

# Global Trade Report

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## Regulations, Legislation Highlight Busy Month in International Trade

### Foreign Trade Zones Board Proposes Comprehensive Regulations Overhaul

The Foreign Trade Zones Board has proposed a comprehensive overhaul of its regulations governing the establishment, operation and regulation of Foreign Trade Zones and subzones in the United States.

The agency is seeking public comment on the proposed regulations by April 8, 2011.

The overhaul seeks to modernize the Board's regulations which have been in place since 1991 without major changes, and to address problems which the Board perceives in the administration of the FTZ program. The new rules address the obligations of General Purpose FTZs and operations, propose FTZ Board regulation of the fees charged by operators, require broader publication of grantee tariffs and charges, and also require FTZ grantees to treat all participants in FTZ projects on a non-discriminatory basis, or provide reasons for the disparate treatment.

The proposed regulations would replace the current FTZ regulatory concepts of "manufacturing" and "processing" with a single concept, "production". It would make it easier for zone users to secure interim authority to engage in production operations pending full FTZ Board review, particularly for export-oriented operations, and would delegate some of the Board's regulatory authority to the Assistant Secretary of Commerce for Import Administration.

The proposed regulations would also implement statutory provisions, not previously embodied in regulations, which authorize the Board to impose civil penalties for violations of the FTZ Act or a zone user's authorizations. Thus, production of articles without proper Board authorization would be punishable by fines of \$1000 per incident (which, if defined as each product allegedly produced without authority, could be substantial), for failing to submit required annual reports on a timely basis, or for a zone user or subzone operator's failure to timely provide the zone grantee with information needed for the grantee to prepare and timely file its annual report. Existing "public interest" restrictions against the use of FTZs would be retained, and the Board would apparently require stronger showings of public interest and community need as a condition of securing a general purpose zone, subzone, or activated zone project.

The proposed regulations are likely to be controversial and to attract a wide number of comments.

### Congress Recesses Without Acting on GSP, Duty Suspensions

The 111<sup>th</sup> Congress recently recessed, without taking action to extend the Generalized System of Preferences (GSP). As a result, the program, which provides duty-free treatment to a wide range of goods from beneficiary developing countries, expired effective January 1, 2011. Importers of goods that would

otherwise qualify for GSP treatment will be required to deposit estimated duties at Column 1 rates.

Congress has allowed the GSP to expire in the past, but has generally reinstated it, on a retroactive basis. Anticipating such a renewal, Customs has issued instructions to ports of entry, instructing them to allow importers to continue the use of the Special Program Indicators for the GSP (“A” or “A\*”) pending renewal of the GSP sometime in 2011.

Before recessing, Congress did approve a 6-week extension of the Andean Trade Preferences Act/Andean Trade Promotion and Drug Eradication Act (ATPA/ATPDEA), which provides duty-free treatment to qualifying imports from certain Andean countries. Congress also approved a 6-week extension for Trade Adjustment Assistance (TAA).

However, hundreds of duty suspension bills, originally included in H.R. 6317, the House-approved version of the Omnibus Trade Act of 2010, failed to secure approval.

As approved by the House, the Omnibus Trade Act of 2010 would have included an 18-month extension of GSP and ATPDEA, and hundreds of new duty suspension measures. But Senator Jeff Sessions (R-AL) put a “hold” on many of the measures because he opposed continued GSP treatment for sleeping bags, a product of interest to his constituents. Other Senators opposed extending the TAA without approving the United States-Colombia Free Trade Agreement (FTA).

The new Congress, which goes into session on January 5, 2011, will have a number of trade issues on its early agenda, including the GSP and ATPA/ATPDEA extensions. In addition, most remaining duty suspensions are scheduled to expire at the end the new Congress, in 2012. Trade and Customs will continue to be a focus of legislative activity in the next few years.

## USTR Announces Acceptance of GSP Waiver Petitions, Establishes “Special 301” Schedule, and Seeks Anti-Counterfeiting Comments

The United States Trade Representative (USTR) has announced that it has accepted for consideration four (4) petitions seeking waivers of the “Competitive Need Limitation” for the Generalized System of Preferences (GSP). Unless the waivers are granted, the affected products will lose duty-free GSP status, effective July 1, 2011.

The products for which petitions to waive the CNL limits will be considered cover the following products:

- > Lysine and lysine esters from Brazil (HTS subheading 2922.41.00);
- > Pneumatic tires from Sri Lanka (HTS subheading 4011.93.80);
- > Rubber gloves from Thailand (HTS subheading 4015.19.10);
- > Calcium silicon ferrous alloys from Argentina (HTS subheading 7202.99.20).

All other petitions to waive the CNL for articles from beneficiary countries were rejected.

The United States International Trade Commission (USITC) has initiated a factfinding investigation to determine the probable economic effect of granting the requested CNL waivers. The Commission will shortly solicit public comment on the petitions accepted for review.

USTR also announced the schedule for its 2011 “Special 301 Review” to identify countries that deny adequate and effective protection of intellectual property rights or deny fair and equitable market access to U.S. persons who rely on intellectual property protection. Countries thus identified may be subject to trade sanctions. Written comments from private parties are due by February 15, 2011, and comments from foreign

governments are due by February 22, 2011. Requests to appear at the hearing and hearing statements also are due by these dates. The hearing will be held on March 2, 2011.

In addition, USTR has solicited public comments on the proposed Anti-Counterfeiting Trade Agreement (“ACTA”), designed to address international counterfeiting and product piracy. ACTA, which was negotiated among Australia, Canada, the European Union, Japan, Korea, Mexico, Morocco, New Zealand, Singapore, Switzerland and the United States., would establish a common framework for identifying prohibited practices and enforcing agreed-upon standards. Comments are due by February 15, 2011.

## Copyright Law Allows Exclusion of Genuine Goods, Court Holds

United States copyright owners can use the copyright laws to exclude from entry copyrighted works legitimately produced abroad, as a result of the United States Supreme Court’s inability to resolve the question of international copyright exhaustion.

On December 13, 2010, the Supreme Court announced that it was deadlocked, 4 votes to 4, in the case of *Omega S.A. v. Costco Wholesale Corporation*, which had raised the question of whether the authorized sale of a copyrighted work produced abroad “exhausted” the U.S. copyright holder’s right to use the copyright law to block the importation of such works. As a result, the Court left standing the decision of the U.S. Court of Appeals for the Ninth Circuit, which had ruled that Omega could use its copyright to block Costco’s importation of genuine Omega watches.

Swiss watch maker Omega sold a particular model of watch in the United States at a price of \$1,999.00. Discount retailer Costco was able to purchase the same genuine watches abroad more cheaply, and sold them in its discount stores for

about \$1399. When high-end sellers of the Omega watches complained about Costco’s discounting, Omega placed a copyrighted design on the back of the watch cases, and then sued Costco, charging that the watches, having been made abroad, were not “lawfully made under” the U.S. copyright law and could not be imported.

In 2000, the Supreme Court had ruled, in *Quality King Distributors v. L’Anza Research*, that copyrighted works which had been *made in the United States* and exported could be reimported without violating the copyright law. *Costco v. Omega* posed the question of whether legitimate goods which the copyright owner made abroad could also be imported. For now, it appears that the prevailing answer is no – but no doubt the issue will be presented to the Supreme Court again in the near future.

In the interim, it can be expected that more companies will start placing copyrighted artwork on functional goods, recording the copyrights with Customs and Border Protection for import protection, and seeking to have legitimate gray market goods excluded from the U.S. Indeed, the use of copyrights may be one way for companies to get around the limited protection against gray market goods afforded under the trademark laws.

Additional information concerning the decision, as well as procedures for seeking Customs enforcement of copyrights, are available from our offices.

## Supreme Court Also Lets “Territorial” Patent Exhaustion Rule Stand

The same day it failed to reach decision in the *Omega v. Costco* case, the Supreme Court also declined to review the Court

of Appeals for the Federal Circuit's decision in *Fujifilm v. Benun*, in which the Circuit Court ruled that a patent owner's rights were only exhausted by the authorized sale of a patented article which occurs in the United States.

Historically, the rule in United States law had been that the authorized "first sale" of a patented good by a patent owner or its licensee "exhausted" the patent owner's rights in the article, and prevented it from using the patent laws to control the subsequent disposition or sale of the goods. This changed with the Federal Circuit's much-criticized 2001 decision in *Jazz Photo Corp. v. United States International Trade Commission*, which held that patent exhaustion in the United States is "territorial" – and that only the authorized sale of a product in the United States exhausts the patentee's ability to control imports of the good.

For the next several years, territorial patent exhaustion was the rule. But in its 2008 decision in *Quanta Computer LP v. LG Electronics, Inc.*, the U.S. Supreme Court had ruled that the authorized sale of an article which substantially embodies a patented invention exhausts the patent owner's right to use the patent laws to control the subsequent sale of the goods. The Supreme Court gave no indication that exhaustion was territorial (and indeed, many of the goods involved in the *Quanta Computer* case had been sold abroad.

But the Federal Circuit disagreed. In *Fujifilm v. Benun*, it ruled that a company which imported refurbished cameras – all of which admittedly had been the subject of a first sale by *Fujifilm* or its licensees – was guilty of infringement, unless it could prove that the cameras were first sold in the United States.

The Supreme Court's second inaction on December 13 creates additional confusion regarding the scope of U.S. intellectual property rights, and creates more peril for importers of patented goods – whether new or refurbished.

## OFAC Adds Shipping Companies to Iran Sanctions List and Adopts North Korea Sanctions

The Treasury Department's Office of Foreign Assets Control (OFAC) recently announced that it has added eight (8) shipping companies, two (2) energy companies and five (5) individuals to the list of entities subject to trade sanctions under the Comprehensive Iran Sanctions Act of 2010.

The shipping companies, all located on the Isle of Man, were determined to be acting as fronts for the Iranian flag carrier IRISL, which was subjected to strong sanctions in 2010. The "Comprehensive Act" authorizes the imposition of penalties on persons who aid Iranian shipping, or in the development of certain Iranian petroleum refining capacities.

In addition to the shipping companies, two energy companies, based in Malaysia and Switzerland, were added to the list of sanctioned entities.

The surprisingly strong Comprehensive Act sanctions, designed to deter Iran's nuclear weapons development program and being carried out multilaterally, have been having a significant impact on Iranian shipping.

In another development, on November 4, 2010, OFAC issued its North Korea Sanctions Regulations to implement Executive Orders 13446 (June 27, 2008) and 13551 (September 1, 2010). The regulation prohibit "United States persons" from engaging in financial transactions with the North Korean government and specified North Korean persons. OFAC indicated that more detailed regulations would be issued in the near future.

## Commerce Proposes to Use “Non-Zeroing” Methodology in AD Reviews

Attempting to come into compliance with various World Trade Organization (WTO) decisions, the United States Department of Commerce, International Trade Administration (ITA), has issued a proposed regulation under which the agency would “normally” use a “non-zeroing” methodology in calculating antidumping duty margins in annual reviews, new shipper review, and expedited reviews of antidumping orders.

Public comments on the proposed regulation are due by January 27, 2011.

Commerce’s “zeroing” methodology has long been controversial in setting antidumping duty rates. Under the practice, if some sales are found to be at “less than fair value” (dumped) prices, and other sales are found to be at fair value or higher, Commerce treats the fair value sale as having a “zero” margin, and does not grant an offset in determining ad valorem antidumping duty rates. For instance, if the “normal value” of a product is 100, and sales for export to the United States are made at adjusted prices of 90 and 85, Commerce would calculate dumping margins of 10 and 15, respectively, an average of 12.5% ad valorem. If other sales were made above fair value, say at a price of 110, Commerce would treat the sale as having a “zero” margin. The antidumping duty rate would be based solely on the below-fair value sales.

If “zeroing” did not occur, then the net dumping margin for the three sales above would be an aggregate of 15 which, divided among the three sales (assuming the sales to be of equal quantities of goods), would yield an ad valorem dumping rate of just 5%.

In a series of decisions, the WTO has held that the United States practice of “zeroing” violates the WTO’s Antidumping Code.

Commerce has previously adopted “zeroing” in initial antidumping investigations, but not in annual reviews, new shipper reviews and

other proceedings in which antidumping duty assessments are actually fixed. The new proposal could conceivably result in lower dumping margins in a variety of duty assessment situations.

## Alcatel-Lucent Hit With FCPA Penalties

Alcatel-Lucent, Inc. and several of its subsidiaries have agreed to pay more than \$92 million to the Justice Department to settle charges that the companies’ subsidiaries bribed foreign officials to win contracts, in violation of the Foreign Corrupt Practices Act (FCPA). Alcatel-Lucent, and its subsidiaries in France, Costa Rica and elsewhere, were charged with using agents and intermediaries to route payments to foreign government officials and to executives of private customers in order to gain or retain business in Taiwan, Costa Rica, Honduras and Malaysia.

The companies had previously paid more than \$45 million to settle Securities and Exchange Commission (SEC) charges arising out of the FCPA violations, and numerous former officials of the companies have been charged with criminal violations. That settlement resulted in entry of a permanent injunction against future FCPA settlement, requiring the company to retain compliance agents and satisfy FCPA recordkeeping and internal compliance requirements.

Alcatel-Lucent also paid \$10 million to settle Costa Rican charges arising from the bribing of that government’s officials.

A number of high-profile FCPA investigations and prosecutions have reminded companies of the importance of adopting and monitoring compliance, anti-bribery and recordkeeping policies under the act, and many companies have increased their internal scrutiny of compliance programs.

## Export Control Revision Process Underway

As part of the Obama Administration's export control reform initiative, the State and Commerce Departments have issued a number of proposed rules designed to clarify and simplify the United States Munitions List ("USML") and Commerce Control List ("CCL") that they respectively administer.

First, State has proposed revising the USML as a "positive" list of covered products and related software and technology. The revised USML would define products in terms of objective criteria, replacing the often-vague and subjective approach that now characterizes the list. The goal is to permit easier identification of controlled items and eliminate overlap in USML and CCL coverage. The revised USML would also establish differing levels of control depending on the nature of the product, its use, proposed end-users, and other criteria. Certain less-sensitive items would be transferred to CCL coverage. To illustrate the new methodology, State has issued a proposed revision to USML Category VII covering tanks and military vehicles.

Public comments on the proposed USML revision methodology and revised Category VII are due by February 8, 2011.

Second, the Commerce Department has requested public comments on revising the CCL, including how to provide greater clarity in product descriptions and adoption of new criteria to determine whether and to what extent products should be controlled. Commerce also published a proposal to establish a Strategic Trade Authorization License Exception. The "SRA" exception would allow exports, reexports and in-country transfers of eligible items to destinations with little risk of unauthorized use, and establish procedures and safeguards to avoid unauthorized diversion of those items.

Public comments on both Commerce proposals are due by February 7, 2011.

## CPSC Considers Extending Stay on Lead Testing for Children's Products

The Consumer Product Safety Commission is giving some consideration to extending the stay on enforcement of third-party testing and certification requirements for children's products, according to information recently placed on the agency's official blog.

The Consumer Product Safety Improvement Act of 2008 mandated reductions in the maximum levels of lead and heavy metals content in children's products. Maximum lead limits in such products have been reduced from 1000 parts per million (ppm) to 600 ppm, and currently stand at 300 ppm. A further reduction to 100 ppm is scheduled for goods made on and after August 14, 2011, assuming such a reduction proves technologically feasible.

The statute also mandates third party testing and independent certification of lead levels in children's products. While the lead level reductions have entered into force, the CPSC has stayed enforcement of the testing and certification requirements for nearly two years, while the agency develops policies for "component testing" and a regulatory definition of "children's products".

With the end of the stay looming in February, a number of industry groups are suggesting that a further extension may be in order. As of this writing, CPSC sources indicate that the stay is scheduled to lift on February 10, 2011, but Commissioner Nancy Nord has indicated that she has requested a staff briefing on the status of industry readiness with a view to possible extension of the stay.

## Food Safety Bill Signed into Law

President Obama will shortly sign into law the FDA Food Safety Modernization

Act, which contains appropriations for several food safety agencies and establishes a number of new safety requirements for food importers.

Within two years after the bill's enactment, food importers will be required to establish "foreign supplier verification programs", and perform risk-based verification activities. Verification activities will be established by regulation, and could include such activities as monitoring foreign producers' records, performing on-site verifications of foreign producers' hazard-control procedures, conduct lot-by-lot certifications, and/or periodic testing and sampling of food shipments.

The importation of any food product for which a foreign supplier verification program has not been established would be prohibited. In addition, foods would be refused entry into the United States if not prepared in accordance with the verification program.

Importers would be required to keep records of foreign verification programs and make them available to FDA for examination for two (2) years.

The program would not apply to (1) articles of food imported for testing or evaluation, (2) plants which are already subject to the Seafood Hazard Analysis Critical Control Points (HAACP) Program, the Juice HAACP, or standards for Thermally-Processed Low Acid Foods Packaged in Hermetically Sealed Containers (but only for microbiological standards).

Within 18 months after importation, the FDA and the Department of Homeland Security would be required to establish a voluntary "Qualified Importer Program". To qualify for the program, importers would need to import foods from foreign suppliers who have undergone inspection and verification by third party auditors.

Additional regulatory requirements could be imposed on "high risk" food imports. The FDA could require third-party testing and certification of high-risk food imports as a condition of allowing importation. Additional recordkeeping requirements will also be established for "high risk" foods designated by FDA.

The bill would require DHS and FDA to earmark additional resources for conducting import inspections of food products. Pending adoption of inspection protocols, the new law requires the FDA to notify United States Customs and Border Protection (CBP) of all instances where goods are refused admission into the United States, so that the agencies can combat "port shopping".

The new Act also establishes laboratory certification and accreditation procedures for produce testing, and creates authority the adoption of safety standards for various types of imported fresh produce. In addition, it provides FDA with mandatory recall authority and establishes procedures to ensure that warehouse-based third party logistics (3PL) providers are given sufficient notice of recalls to enable them to identify goods being recalled.

The new Act also provides for studies on a number of subjects, including: (1) establishment of registration numbers for foreign food producers and Customs brokers handling such shipments, (2) prevention of food smuggling into the United States and (3) creation of a National Food Defense Strategy.

Additional information concerning the new law is available from our offices.

## EU Mandatory Cargo Data Requirements Became Effective January 1

After an extended testing period, European Union electronic advance security notification requirements for inbound and outbound cargo became effective January 1, 2011.

The new requirements require that all goods imported into the European Union be the subject of an Entry Summary Declaration (ENS) which must be lodged at the Customhouse at the first port of entry in the EU where goods arrive. The ENS must cover all cargo on board the inbound vessel, including freight remaining on board (FROB). The importing carrier is the party responsible for

filing the ENS. In the case of shared vessels, the carrier who issued each bill of lading is obligated to file the ENS for the cargo covered by the bill of lading.

Freight forwarders can file the ENS with the consent of the carrier. Non-vessel owning common carriers (NVOCCs) can also file the ENS, with the carrier's consent.

The ENS does not eliminate the requirement of filing a vessel or aircraft manifest, even though there is a substantial overlap in information covered by the manifest and the ENS.

Failure to file the ENS in timely fashion can trigger penalties under the law of the EU Member State concerned.

Exit summary declarations are also required for cargoes leaving the EU.

Additional information concerning these requirements is available from our offices.

## Government Stepping Up Antidumping Enforcement

Driven by industry complaints that importers and foreign producers are evading antidumping duties, particularly in respect of goods from China, the Federal government has increased enforcement activities targeted at stopping antidumping evasion. The steps being taken include criminal prosecutions, civil investigations and merchandise seizures.

A Seattle-based honey importer was recently sentenced to prison for allegedly transshipping honey from China through the Philippines and Thailand, and relabeling it in an effort to evade antidumping duties. In addition to the criminal sentence, the importer was forced to disgorge more than \$400,000 in revenues gained on the sale of the honey, and to forfeit four (4) shipments of honey currently in storage. The Seattle case is the latest in a series of criminal investigations involving honey, garlic and other Chinese commodities subject to antidumping orders.

Customs recently seized a shipment containing more than 21 million plastic retail bags, on suspicion that the bags were mislabeled with country of origin in order to avoid the payment of antidumping duties. The bags, valued at more than \$440,000, were seized by CBP officials at the Port of Los Angeles/Long Beach.

Some United States Attorney's offices are also engaged in civil investigations regarding possible evasion of antidumping duties in respect of products such as lined paper, tow-behind lawn groomers, pencils, and others. Investigation record demands suggest that the government is conducting its investigations under the Federal False Claims Act (FCA), although the United States Court of International Trade, in its 2006 decision in *United States v. Universal Fruits and Vegetables, Inc.*, held that the False Claims Act did not apply to Customs duties.

In response to the increased enforcement, more importers are securing Commerce Department scope determinations, to ensure that their products are outside the scope of antidumping orders, and avoid scrutiny later.

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