Sentinel

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ReedSmith

EUROPEAN FINANCIAL INSTITUTIONS PAY HEAVY PRICE FOR VIOLATING U.S. SANCTIONS PROGRAMS

Credit Suisse AG, a Switzerland-based bank, has agreed to a settlement with the U.S. Department of the Treasury's Office of Foreign Assets Control ("OFAC") under which it will pay the largest sanctions penalty of all time—$536 million. The penalty was announced December 16, 2009, by OFAC, the U.S. Attorney General, and the New York County's District Attorney's office, and represents the largest penalty to date in a long-running investigation into financial institutions involved with countries sanctioned by the United States. Earlier this year, London-based Lloyds TSB Bank plc ("Lloyds") settled similar charges with the U.S. Department of Justice and the N.Y. County's District Attorney's office for $350 million. Shortly after the Credit Suisse settlement, OFAC announced a separate $217 million settlement with Lloyds for the same conduct, although the penalty was deemed satisfied by the $350 million settlement. These settlements indicate the significant risk that international entities subject to U.S. jurisdiction take in conducting business prohibited by U.S. law.

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According to the Settlement Agreement, Credit Suisse processed approximately 5,000 electronic funds transfers (EFTs) on behalf of financial institutions or persons located in Iran, Cuba, Sudan, and Myanmar (Burma), among other countries, between 2002 and 2006. The EFTs and a number of securities transactions were allegedly processed through Credit Suisse's U.S. subsidiary after information about the payment had been altered to prevent detection of the prohibited parties. The Settlement Agreement and statements by U.S. government officials describe an elaborate process of code names, procedures, and modifications to internal controls designed to prevent detection of the involvement of Iranian banks (the penalties relate overwhelming to Iranian activities) in financial transactions processed through the United States. The Settlement Agreement also indicates that a number of Credit Suisse executives and employees in Europe, including at least one individual with responsibility for compliance, knew of or participated in the activities.

Beginning as early as 1986, in response to sanctions imposed by the United States against Libya, the Settlement Agreement states that Credit Suisse implemented directives to cover payments for executing payment orders to third-country accounts in the United States or with U.S. banks abroad, without stating the name of the ordering party. This procedure allowed Credit Suisse to process payments through U.S. banks on behalf of Libyan banks and the Libyan government without detection. Over time, the Settlement Agreement describes the cover-payments scheme as developing into policies and procedures that were used to process payments involving persons sanctioned under a number of the sanctions programs, including Iran, Sudan, Myanmar (Burma), and Cuba. Among the procedures, review processes were allegedly modified to ensure that bank employees would manually review cover payments to avoid automatic detection at the bank's payment office. According to the Settlement Agreement, Credit Suisse employees individually reviewed each transaction to ensure that no information would identify the involvement of a prohibited party or country, thereby avoiding detection when the transaction was processed by correspondent banks and others within Credit Suisse.

In 2006, Credit Suisse voluntarily notified OFAC that it was reviewing its processing of securities transactions for violations of U.S. sanctions programs. Credit Suisse did not notify OFAC that it was also investigating its activities as a U.S. dollar clearing bank for payments involving sanctioned countries and persons whose property and interests in property were blocked pursuant to OFAC regulations until later in 2007. By that point, the New York County's District Attorney's office had already launched its own investigation into several wire transfers. Under OFAC's enforcement guidelines, Credit Suisse was therefore only eligible for mitigation credit for voluntarily notifying OFAC of the securities transactions, and not for its activities as a U.S. dollar clearing bank.

Unlike Credit Suisse, which involved its U.S. subsidiary in the prohibited transactions, Lloyds settled with OFAC for activities by its UK and Dubai operations that involved unaffiliated U.S. correspondent banks. Based on the settlement agreements, it appears that the U.S. government determined that both European banks deliberately removed material information to avoid detection of the prohibited transactions by the U.S. financial institutions.

OFAC implements, administers and enforces economic and trade sanctions imposed by Executive Order or specific legislation. The sanctions programs are designed to further U.S. foreign policy and national security goals by targeting particular countries, regimes, and those engaged in certain activities, including terrorism, proliferation of weapons of mass destruction, and narcotics trafficking. OFAC actively enforces sanctions programs against Iran, Sudan, and Cuba, among other countries, and has obtained significant penalties against persons dealing with these countries in the past two years—more than $750 million from Lloyds and Credit Suisse alone.

OFAC sanctions apply to all U.S. citizens, entities, and permanent residents, wherever located, and any person or entity located within the United States, including branches and subsidiaries of foreign entities. Outside the United States, OFAC sanctions apply to:

- U.S. citizens or permanent residents (even when working for non-U.S. entities)
- Foreign branches of U.S. companies
- Foreign subsidiaries of U.S. companies (for Cuban sanctions)
- Foreign persons and entities dealing in certain U.S.-origin goods in Iran

Sanctions against Iranian banks have been separately implemented in the European Union and the UK to varying degrees. These sanctions limit the ability of other international banks to handle payments and other transactions with sanctioned Iranian banks. The following banks are currently under U.S. sanctions: Bank Melli, Bank Sepah, Bank Mellat, Bank Saderat, and the Export Development Bank and Future Bank, Bahrain. The EU has imposed sanctions against Bank Melli and Bank Sepah. The UK has also sanctioned Bank Mellat. As a practical matter, there are issues in dealing with these currencies in Iran, also. No trades

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European Finanical Institutions Pay Heavy Price for Violating U.S. Sanctions Programs—continued from page 2

can be conducted in USD, and most EU banks will not clear EUR with Iranian banks. UK's GDP also cannot be used in transactions with Bank Mellat.

The Credit Suisse and Lloyds settlements illustrate the risks associated with having an ineffective (or unutilized) compliance program for U.S. sanctions and embargoes. The Credit Suisse Settlement Agreement calls mention to the apparent knowledge of the violations by at least one person responsible for compliance and notes that the activities continued following an internal company review of OFAC compliance.

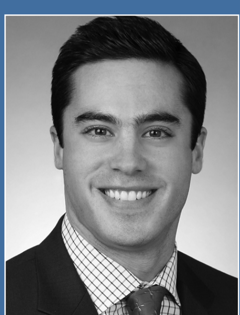
Credit Suisse failed to notify the U.S. government of its internal investigation of EFTs before the district attorney launched its own investigation—thereby resulting in a missed opportunity for voluntary disclosure credit (and a 50 percent reduction in fine under OFAC's economic sanctions enforcement guidelines), and illustrating the importance of making a complete and prompt disclosure of suspected violations. It is clear from the Settlement Agreement that Credit Suisse's subsequent "extensive and substantial cooperation" in the investigation, including "well-organized" and "timely" submissions, mitigated some portion of the potential penalty.

These embargoes and economic sanctions pose substantial risks for international organizations doing business in the United States and Iran. An effective program and policies that anticipate the application of various (or multiple) sanctions regimes to an international transaction is necessary to ensure compliance.

WTO CHINA UPATE

China's Subsidies for Famous Brands

On December 18, 2009, U.S. Trade Representative Ron Kirk announced a bilateral agreement for China to stop providing export subsidies for "famous brands" and other related products. The agreement is designed to resolve U.S. concerns raised in a World Trade Organization's ("WTO") case that the United States and Mexico initiated in December 2008. In that case, the United States and Mexico challenged a Chinese industrial policy that generated a vast number of central, provincial and local government subsidies intended to promise increased worldwide recognition and sales of famous brands of Chinese merchandise, in contravention of WTO rules. China agreed to terminate or modify measures that unfairly benefit "famous brand" Chinese exports, including electronics, textiles and apparel, food and agricultural products, metals, chemicals, medicines, and high-tech products.



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Market Access for Copyrighted Media Products

On December 21, 2009, the WTO Appellate Body rejected China's earlier appeal of the Dispute Settlement Body's ("DSB") August ruling regarding market access for copyrighted media products, including films, DVDs, music, books, and journals (DS 363). The WTO ruled in favor of three U.S. concerns, filed at the WTO in April 2007, finding that:

- Import restrictions on foreign media products such as books, publications, movies, and music are inconsistent with China's WTO accession obligations
- Prohibitions and discriminatory operating requirements forced on foreign-invested distributors are inconsistent with the WTO General Agreement on Trade in Services
- China discriminates against imported reading material in violation of its obligations under the General Agreement on Tariffs and Trade

China must announce whether it intends to implement the WTO's ruling within 30 days of the ruling's adoption. If China agrees to carry out the ruling, the parties will negotiate a "reasonable period of time" for China to do so. If China does not agree to implement the ruling, the WTO can permit the United States to impose limited trade sanctions such as tariffs against Chinese goods.

China's Export Restrictions on Raw Materials

On December 21, 2009, the WTO accepted a second request (DS 394) from the United States, the European Union, and Mexico to form a single panel to decide whether Chinese export restrictions affecting the steel, aluminum, and chemical industries are consistent with China's WTO commitments. The requesting parties are concerned about Chinese export policies that restrict various raw materials important for downstream products in the steel, aluminum, and chemical industries, making global prices higher for non-Chinese producers. Once formed, the panel would have six months to issue a determination to all parties.

Intellectual Property Rights

China has publicly stated that it will adopt the DSB's January 26, 2009 ruling on Intellectual Property Rights (DS 362) by March 20, 2010. In its ruling, the DSB found aspects of China's intellectual property rights enforcement regime to be inconsistent with its obligations under the Trade-Related Aspects of Intellectual Property Rights ("TRIPS") agreement.

CUSTOMS CONSIDERATIONS: DON'T LOSE VALUE IN YOUR SUPPLY CHAIN

In the wake of the global economic downturn, finding ways to cut costs is essential to a company's survival. While global supply chain managers focus their attention on finding the best value in components and end items, a significant cost factor that can affect profit margins is often overlooked. This cost factor is centered in the laws and regulations of the Department of Homeland Security, Customs and Border Protection ("Customs"). Utilizing Customs law and related regulations, companies may be able to significantly reduce Customs outlays and costs associated with shipping delays. Failure to do so may result in a company leaving behind value in its supply chain, which will be readily recouped by the government, service providers, suppliers, and ultimately, competitors. This article addresses a number of ways companies can "find" value in their supply chains through Customs compliance.

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Don't Overpay Because of Misclassification

Under Customs law and regulations, all merchandise imported into the United States must be classified under one of the unique classification numbers in the Harmonized Tariff Schedule of the United States ("HTSUS"). Each HTSUS classification number corresponds to a duty rate that serves as the first basis for determining the amount of duty owed to Customs upon importation. Importers bear primary responsibility for complying with import requirements, and are required to use "reasonable care" in selecting the proper HTSUS classification. However, this level of care does not require an importer faced with two potential HTSUS classifications to select the one with the higher duty rate. In fact, this situation provides an opportunity to find value in the supply chain. Customs laws and regulations permit companies to self-classify their imports, and some companies alternatively rely on their Customs brokers to make classification determinations. Faced with a situation where multiple classifications could apply, companies or their brokers may simply choose the classification with the highest duty rate, in an effort to avoid potential liability for misclassification.

To find value from a classification standpoint, companies should examine their high-value or high-volume imports to evaluate whether an alternative classification could result in a lower tariff rate. In the case of uncertainty, Customs has a procedure whereby companies can seek a binding ruling for prospective transactions that will ensure that the new HTSUS classification is acceptable to Customs. Importers can now electronically submit their binding classification ruling requests directly to the National Commodity Specialist Division of the Office of Regulations and Rulings for review and response.

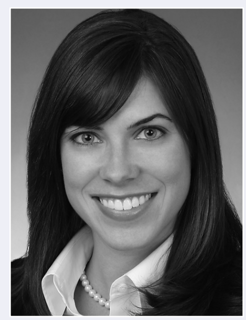
It is also important to realize that all member countries of the World Customs Organization ("WCO") have tariff systems that mirror the HTSUS. Therefore, a binding classification ruling obtained from Customs may be applied in the more than 160 member countries of the WCO. Paying lower duty rates in the United States and around the world can have a dramatic impact on supply chain savings.

Don't Overvalue Imported Products

The second basis for determining the duties owed to Customs is the value of the imported items. Customs calculates the amount of duties to be paid by multiplying the duty rate by the value of the imported items. Under Customs law and regulations, the vast majority of imports can be valued according to their transaction value, or the price actually paid or payable in an arms'-length transaction between unrelated parties. Properly documenting arms'-length transactions is key to establishing an accurate evaluation.

While this concept may seem to be fairly straightforward, assessing transaction value can be complicated. Difficulties in transaction value appraisement may occur when the following factors are present in a transaction: (1) an agent or intermediary is paid a commission for consummating the sale that resulted in the import transaction; (2) the importer pays for certain packing costs or tooling expenses; or (3) the underlying transaction includes a component of debt relief. Under Customs practice, these cost factors must be added to the value of the item. Further complications arise in transactions between related parties, three-tiered transactions, or in other situations where Customs can apply valuation methodologies unrelated to the transaction value.

Because of the complexity of the valuation process, companies may find it tempting to over-estimate the value of imported items in order to avoid being penalized and audited for the underpayment of duties. However, with proper assessment and planning, Customs duties routinely lost to over-valuation can be retained by the company and added to the bottom line. Similar to the proposed solution to the classification issue described above, a review of high-volume and high-value imports is the first step to preventing a loss of value to your supply chain. However, unlike classification, finding value through changes in a company's valuation practices often involves a more holistic review of both internal and external manufacturing, production, and sales documentation. The ensuing improvements in the accuracy of a company's valuation practices can result in significant savings to importing companies.



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Don't Overlook Preferential Treatment

In addition to re-evaluating classification and valuation issues, importers may be able to add value to their supply chain through the participation in preferential import programs. Certain foreign manufactured products qualify for full or partial duty exemptions upon import into the United States through such programs. Programs like the Generalized System of Preferences ("GSP"), which President Barack Obama extended until December 31, 2010, provide specific import advantages to goods from developing countries. Others, like the North American Free Trade Agreement ("NAFTA"), create reciprocal duty advantages for importers from eligible foreign countries. By utilizing the various tariff preference programs, importers have another opportunity to reduce the cost of goods sold and increase profit margins.

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Customs Considerations: Don't Lose Value in Your Supply Chain—continued from page 4

Don't Overlook Temporary Imports

Under Customs law and regulations, there are specialized rules pertaining to the temporary importation of products into the United States. These temporary importation rules generally apply to the further manufacture of products in the United States, coupled with the subsequent re-export of the finished products out of the United States. One such program is the Duty Drawback program, which provides a refund of import duties on components if the finished product (incorporating those components) is later exported out of the United States. Often, duties paid that could be "drawn-back" are left unclaimed, resulting in a significant loss of savings to the importer. The Foreign Trade Zone program is a similar program that allows components to be imported into one of the more than 200 Foreign Trade Zones located in the United States without the payment of import duties. The components imported to Foreign Trade Zones can be used in manufacturing, assembly, or finishing operations using U.S. labor and U.S. resources, and can then either be re-exported to other countries (without ever paying U.S. import duties) or imported into the United States in finished form. Frequently, importers lose money by paying full import duties when they import items that could be imported into a Foreign Trade Zone into U.S. territory. In other cases, importers pay higher duties on the components they import than they would have paid on the final finished product if they had used a Foreign Trade Zone for their final manufacturing processes. In either case, value is lost in the supply chain.

The Duty Drawback and Foreign Trade Zone programs are complex regulatory regimes that may seem daunting to importers. Participation in either program requires an internal control and documentation process, but can result in immediate benefits to companies already conducting operations that are compatible with these programs. Other companies will need to evaluate their manufacturing operations and supply chain management to determine whether participation in these programs would provide enough savings to offset the operational restructuring required to become compatible. To the extent a company's operations are already running parallel to these programs, or are sufficiently portable to be adjusted to meet these programs' requirements, significant cost savings can be achieved.

Don't Forget that Time is Money

Importing goods and materials into the United States in the current high-security environment can often mean increased inspections and occasional seizures of goods. While these inspections and seizures may be necessary to carry out Customs' new Homeland Security mandates, any delay can result in additional transaction costs. To mitigate the effects of these new supply chain realities, Customs currently offers several new "partnership" programs that provide participating companies with increased access to Customs resources, and may result in a lower frequency of inspections, reduced incidences of violations, and mitigation in the event of any inadvertent violations. These programs include the Customs-Trade Partnership Against Terrorism ("C-TPAT"), the Importer Self-Assessment Program ("ISA"), the Free and Secure Trade Program ("FAST"), and the Container Security Initiative ("CSI"). Participation in these programs generally requires that importers demonstrate a commitment to comply with Customs regulations, have business processes in place to ensure Customs compliance, and allow Customs to undertake an initial review of those processes. While participation in these programs may result in some up-front compliance costs, the longer-term savings in the form of faster clearances may be worth the initial investment. In addition, many companies have agreed, as part of their commitment to programs such as C-TPAT, to only work with other C-TPAT participants, which can serve to increase the business demand for companies that participate in these programs.

Don't Neglect Day-to-Day Customs Compliance

The discussion above set forth ways that companies can find value in their supply chains by properly classifying and valuing imported products, participating in specialized programs that allow for reduced duties and duty refunds, and participating in programs that increase national security while allowing for a faster Customs clearance. In each case, these programs can add to a company's bottom line. An additional source of savings is to avoid Customs compliance problems in general. An import compliance program can avoid many liability costs associated with import violations, by providing companies with a tool for advance detection and rectification of Customs violations or procedural errors. Finally, in the event that inadvertent violations occur despite the use of an internal compliance program, Customs considers the presence of a compliance program as a strong mitigating factor in assessing penalties. Just as an ounce of prevention is worth a pound of cure, a Customs compliance program can make a substantive difference to a company's bottom line by preventing liabilities that the company would otherwise face.

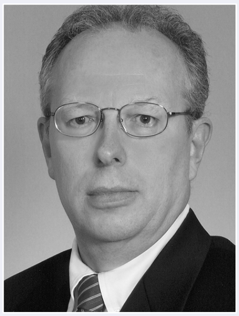
Reed Smith Can Help

Manufacturers, importers, and distributors who are interested in learning more about the cost-saving concepts are encouraged to contact the authors. The attorneys at Reed Smith can help your company find value in its supply chain, and reduce your exposure to Customs compliance shortcomings. Specifically, Reed Smith can help establish overall import compliance programs, provide guidance on reducing tariff outlays, recover tariff duties that may have been paid, and assist companies that wish to participate in the various Customs voluntary programs with navigating the application and certification process.

This article was adapted from a similar article that originally appeared in The Sentinel*, Vol. I, No. 3 (Fall 2004).*

MOVING WASTE TO A DIFFERENT BACKYARD: EPA INCREASES REGULATORY OVERSIGHT OF HAZARDOUS WASTE IMPORTS AND EXPORTS

On January 8, 2010, almost ten years after the United States committed in an international agreement to strengthen its hazardous waste regulations, the U.S. Environmental Protection Agency ("EPA") issued a final rule that governs the shipping of hazardous waste between the United States and other countries.



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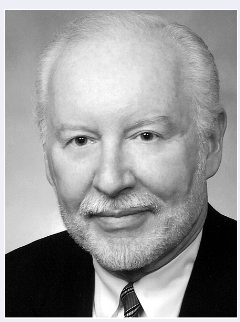
According to EPA, the new measures will increase regulatory oversight of the international shipping of hazardous waste and provide stricter controls. The final rule, which will be effective July 10, 2010, is also designed to make international shipment regulations under the Resource Conservation and Recovery Act ("RCRA") more consistent with those of the Organization for Economic Cooperation and Development ("OECD"), a consortium of 31 member countries that includes the United States.

Some of the revisions in the new rule will apply to all persons who export hazardous waste, universal waste or spent lead-acid batteries (SLABs) to any country, while other changes will apply to exports or imports to certain OECD member countries. Shipping requirements related to Mexico and Canada are governed by separate agreements and are not covered by this new rule.

Key changes to the rules include:



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- Modifying the requirements concerning international shipment of hazardous waste destined for recovery among OECD countries
- Establishing notice and consent requirements for SLABs intended for reclamation in another country
- Changing the hazardous waste import-related requirements for U.S. hazardous waste management facilities to confirm that individual import shipments comply with the terms of EPA's consent
- Revising the EPA address to which exception reports concerning hazardous waste exports are to be sent

Harmonizing RCRA with OECD Rules

The OECD is an international organization concerned with a host of international socio-economic and political issues, including environmental issues. The United States consented to an OECD Amended 2001 Decision on the transboundary movement of waste, thus necessitating these changes to RCRA regulations. The revisions, largely in 40 CFR part 262, subpart H, are aimed at harmonizing RCRA regulations with the Amended 2001 OECD decision, and include:

- Reducing the number of control levels from three (Green, Amber and Red) to two (Green and Amber) and updating references to the revised OECD waste lists
- Exempting qualifying shipments sent for laboratory analyses from certain paperwork requirements
- Requiring recovery facilities to submit a certificate of recovery within 30 days after recovery to all interested parties—the exporter, country of export, and country of import—documenting that recovery of the waste was completed
- Adding requirements to ensure wastes that are subject to the Amber control procedures are returned to the country of export within 90 days from the time the country of import or transit first informs the country of export, unless an alternative timeframe is allowed
- Inserting provisions designed to better track and document hazardous wastes that are managed at transfer and storage/accumulation facilities and recovered by separate recycling facilities

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Notice and Consent Requirements for SLABs

Lead-acid batteries are secondary, wet cell batteries, meaning they can be recharged for many uses and they contain liquid. They are the most widely used rechargeable battery in the world, and are mainly used as starting, lighting, and ignition power batteries found in automobiles and other vehicles. A rechargeable lead-acid battery is considered spent (thus leading to the acronym "SLAB" for spent lead-acid battery) if it no longer performs effectively and cannot be recharged. SLABs are considered wastes under RCRA Subtitle C because they can be classified as spent materials being reclaimed, and they exhibit the toxicity characteristic for lead, and the corrosivity characteristic for the sulfuric acid electrolyte in the battery.

SLABs are one of the most recycled consumer products. When a spent battery is collected, it is sent to a recycler where the lead, plastic and battery acids can be reclaimed and sent to a new battery manufacturer. Although most domestic SLABs are recycled in the United States, some are exported to Canada, Mexico, and other countries. EPA is amending the RCRA regulations for SLABs specified in 40 CFR part 266 subpart G by requiring notification and consent for the export of SLABs. This requirement aims to provide greater assurance that SLABs are sent to countries and reclamation facilities that can manage the SLABs in an environmentally sound manner. In so doing, the requirements mirror RCRA universal waste regulations for the export of SLABs, resulting in a more uniform practice for notification and consent for SLABs.

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Moving Waste to a Different Backyard: EPA increases Regulatory Oversight of Hazardous Waste Imports & Exports—cont'd from page 6

New Documentation Requirements for Facilities Receiving Hazardous Waste and an Address Change

The new rule will require U.S. receiving facilities to submit to EPA, within 30 days of delivery, a matched set of the EPA-provided import consent documentation and the RCRA hazardous waste manifest for each import shipment.

Also, the final rule changes the address for exception reports. Hazardous waste exports submitted to EPA will go to the "International Compliance and Assurance Division in the Office of Enforcement and Compliance Assurance's Office of Federal Activities" in Washington D.C., rather than the "EPA Administrator."

Next Steps

Barring an appeal of this rule, which must be filed March 11, 2010, all of the requirements in this final rule take effect in all states on July 10, 2010. For exporters of SLABs for reclamation, this means that export shipments of SLABs will be prohibited after the effective date unless the exporter has submitted a notification and obtained consent from EPA and the receiving country. SLAB exporters may submit such notifications to EPA before the effective date of the final rule, and EPA encourages the submission of these notifications as soon as possible to avoid potential delays. Keep in mind that the prospective country of import will need time to review the proposed shipments and transmit its decision (i.e., consent, objection) to EPA and the exporter.

Of course, failure to comply with the new requirements after the effective date would be a violation of RCRA. SLAB recyclers and brokers who export SLABs directly or through exporters who have not completed the notification and consent process with EPA may also be in violation of RCRA. In other words, failure to comply with these new requirements could result in an action by the federal government to force a person to comply with the RCRA regulations. In addition, a court can order specific actions by a facility to return to compliance and impose a penalty of up to $32,500 per day per violation for noncompliance.

And Finally

In the final rule, EPA repeatedly notes that U.S. requirements may differ from those of other OECD member countries. For example, some OECD member countries may require, by domestic law, that mixtures of different Green wastes be subject to the Amber control procedures. To ensure compliance, U.S. exporters should check with the appropriate authorities of the relevant OECD country to determine specific export requirements.

Attorneys in Reed Smith's Global Regulatory Enforcement Group are counseling clients on issues related to this new rule. Please contact the authors for more information or advice on this matter.

THERE JUST MIGHT BE A FINE IN THE FINE PRINT: A REVIEW OF THE U.S. ANTI-BOYCOTT REGULATIONS

Is this happening in your company? A customer places a large order, and as the final paperwork is being signed, someone notices that that the letter of credit specifies that "Under no circumstances may a bank listed in the Arab Israeli boycott blacklist be permitted to negotiate documents under this documentary credit." After a tense couple of hours tracking down banking information, you are able to confirm that no banks listed on the blacklist are involved in the transaction. You breathe a sigh of relief, ship the order, and continue to develop your relationship with the customer (or at least not breach this contract!).

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Then someone dusts off the export compliance manual and remembers: requests by customers that seek U.S. compliance with other nations' economic boycotts or embargoes must be reported to federal officials. In not reporting the request, your company has violated U.S. laws enacted to counter these other nations' boycotts. Because of that, you may be subject to criminal, civil, and/or administrative penalties from the U.S. government.

U.S. Anti-Boycott Overview

Since the mid-1970s, two laws have sought to counteract the participation of U.S. citizens in other nation's economic boycotts and embargoes.[1] These are commonly referred to as "anti-boycott" laws and their objective is to encourage—and sometimes require—U.S. companies to refuse participation in unsupported foreign boycotts. The unsupported foreign boycott for which the most requests are received is the Arab League boycott of Israel.

These laws apply to activities of U.S. persons in interstate or foreign commerce. "U.S. persons" includes: all individuals, corporations, and unincorporated associations resident in the United States; all U.S. citizens wherever located, except those residing abroad and employed by non-U.S. persons; and all controlled in-fact affiliates of domestic concerns (*i.e.*, foreign entities for which U.S. affiliates establish general policies or control the day-to-day operations). This means that companies in the United States or controlled by U.S. affiliates are subject to the laws.

But We Chose the Banks Independent of the Request

On first blush, many people believe that because the boycott language in the order documentation did not cause them to make any changes to the transaction

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There Just Might Be a Fine in the Fine Print: A Review of the U.S. Anti-Boycott Regulations—continued from page 7

(*e.g.*, change banks or products), their conduct does not constitute a violation. Unfortunately, that line of reasoning is not relevant to the application of the anti-boycott laws. The sample language used above ("Under no circumstances may a bank listed in the Arab Israeli boycott blacklist be permitted to negotiate documents under this documentary credit") is an actual contract provision alleged to be a refusal to do business in violation of the anti-boycott laws.[2] The anti-boycott laws prohibit and/or penalize the following:

- Agreements to refuse or actual refusal to do business with or in certain countries or blacklisted companies (*i.e.*, Israel)
- Agreements to furnish or actually furnishing information about business relationships with certain or in certain countries or blacklisted countries
- Implementing letters of credit containing prohibited boycott terms or conditions
- Agreements to discriminate or actual discrimination against other persons based on race, religion, sex, national origin, or nationality
- Agreements to furnish or actually furnishing information about the race, religion, sex, or national origin of another person
- Furnishing or knowingly agreeing to furnish information concerning charitable or fraternal organizations that support a boycotted country
- Taking any other action with the intent to evade the anti-boycott regulations

There are some exceptions to these prohibitions. They are based on the recognition that individual countries have the sovereign right to trade (or refuse to trade) with other countries. For example, U.S. persons are permitted to:

- Comply with the import requirements of a boycotting country subject to other anti-boycott information provision restrictions;
- Comply with the shipping requirements dictated by the boycotting country (*e.g.*, agree to perform under a contract where the boycotting-country purchaser dictates that a boycotted-country vessel or port not be used); and
- Comply with import and shipping documentation requirements of the boycotting country.

These exceptions are nuanced and any transaction should be reviewed in detail before proceeding. In particular, the last point allows U.S. persons to positively state the country of origin or country of carrier, but not to indicate that the goods are not from a boycotted country or that the vessel is not from a boycotted country.

Anti-Boycott Enforcement

The Department of Commerce also reviews export transaction documentation (such as the commercial invoices submitted with other paperwork to a freight forwarded) for terms that violate the anti-boycott laws. Its agents can and do issue warning letters and initiate investigations based on what they find in the documentation.

Criminal penalties of a fine of up to $1 million and 20 years imprisonment per violation can be imposed. Civil penalties of up to the greater of $250,000 per violation or twice the value of the transaction can be imposed. Additionally, administrative penalties of a general denial of export privileges and exclusion from practice can be imposed. Recently, York International Company was assessed a civil penalty of $140,850, and M-I Production Chemicals (ME) FZE, United Arab Emirates was assessed a civil penalty of $44,625 for violations.

Anti-Boycott Compliance

The most important steps toward protecting your company are to ensure that there is a reliable reporting chain for potential anti-boycott requests received by your reporting companies, and that a compliance officer or other expert reviews the potential requests carefully. Requests can come from anywhere, but they are most likely to come from Bahrain, Egypt, India, Iran, Iraq, Jordan, Kuwait, Lebanon, Libya, Malaysia, Nigeria, Oman, Pakistan, Qatar, Saudi Arabia, Syria, United Arab Emirates, and the Republic of Yemen.

The receipt of requests for the compliance with, furtherance of, or support of unsanctioned foreign boycotts should be reported quarterly to the U.S. Department of Commerce, Bureau of Industry and Security on form BIS 621-P or BIS-6051P, depending on volume. Customers from which you receive requests should be reviewed to confirm that the value of the relationship outweighs the potential risk for your company.

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1 These two laws are the 1977 amendments to the Export Administration Act and the Ribicoff Amendment to the 1976 Tax Reform Act.

2 *See* the Department of Commerce November 5, 2009 Order assessing a civil penalty of $140,850 against York International Corporation for violations of the anti-boycott regulations, available at http://efoia.bis.doc.gov/antiboycott/violations/tocantiboycott.html. For additional examples of prohibited language, *see also http://www.bis.doc.gov/antiboycottcompliance/oacantiboycottrequestexamples.html*.

ENFORCEMENT HIGHLIGHTS: OCTOBER 2009–DECEMBER 2009

Department of Commerce Actions

On September 18, 2009, Aaron Henderson of Coralville, Iowa, doing business as Valhalla Tactical Supply, pleaded guilty to an indictment charging him with exporting EOTech sighting devices to Taiwan and Afghanistan without obtaining the proper export license from the Bureau of Industry and Security ("BIS"), in violation of the Export Administration Regulations ("EAR"). Henderson agreed to forfeit two firearms that were seized from his residence in January 2008. Henderson faced 20 years imprisonment and a $1 million fine, but the U.S. District Court for the Southern District of Iowa sentenced Henderson to time served, to be followed by two years of supervised release.

Leigh T. Hansson
Partner – Washington, D.C.
Global Regulatory Enforcement

On September 24, 2009, Aviation Services International, B.V. ("ASI"), a Dutch aviation services company, its director and sales manager pleaded guilty in the District of Columbia to federal charges related to a conspiracy to illegally export aircraft components and other items from the United States to entities in Iran via the Netherlands, the United Arab Emirates and Cyprus. The indictment charged each with conspiracy to violate the International Emergency Economic Powers Act ("IEEPA") and the Iranian Transactions Regulations by exporting aircraft components and other goods to Iran without obtaining licenses from the Treasury Department's Office of Foreign Assets Control ("OFAC"). From about October 2005 to about October 2007, the defendants negotiated purchases of materials on behalf of Iranian customers for U.S.-origin goods that were restricted from being transshipped into Iran. The defendants provided false end-user certificates to certain U.S. companies to conceal that customers in Iran would be the true recipients of the goods. The two individual defendants each face a potential sentence of five years in prison and a maximum fine of $250,000, or twice the pecuniary gain or loss. ASI agreed to pay a $100,000 fine and serve corporate probation for five years.

On September 25, 2009, GE Homeland Protection, Inc. ("GE-HP") entered into a settlement agreement with the U.S. government for $22,000 to settle allegations that GE-HP violated the EAR four times in 2004 by exporting spare parts for explosive detection systems from the United States to South Korea, and from its distribution center in France to South Africa, without first obtaining the proper licenses from BIS. These unlicensed exports took place after GE-HP submitted a voluntary self-disclosure to the Department of Commerce that disclosed violations of the EAR involving the same items at issue in the settlement agreement.

On September 25, 2009, Electronic Cable Specialists, Inc. ("ECS") entered into a settlement agreement with the U.S. government for $27,500 to settle allegations that ECS committed six violations of the EAR in 2005 and 2006 involving the unlicensed export of accelerometers classified under ECCN 7A101 to Malaysia and Indonesia. In addition, ECS failed to file the required Shipper's Export Declaration ("SED") with the U.S. government via the Automated Export System.

On September 29, 2009, Griffin & Howe, Inc. entered into a settlement agreement with the U.S. government for $67,000 to settle allegations that Griffin & Howe committed six violations of the EAR in 2005 and 2006 involving the unlicensed export of optical sighting devices classified under ECCN 0A987 to Zambia, and shotguns classified under ECCN 0A984 to Canada and Chile.

On October 1, 2009, Novamet Specialty Products Corporation agreed to pay a $700,000 civil penalty to settle allegations that it exported nickel powders without a license in violation of the EAR. BIS alleged that on 28 occasions between April 2003 and January 2008, Novamet exported nickel powders without the required export licenses to the People's Republic of China, Singapore, Taiwan, Thailand, India, Israel, the Dominican Republic, and Mexico. Under the EAR, nickel powders are controlled for nuclear non-proliferation reasons. Novamet also agreed to complete an internal export compliance audit and submit the results of that audit to BIS.

On October 1, 2009, three Chinese nationals, Alex Wu, Annie Wei, and Eric Lee, and two corporations, Chitron Electronic, Inc. and Shenzhen Chitron Electronics Co. Ltd., were charged in a 38-count indictment in federal court for conspiring over a 10-year period to illegally export defense articles, designated on the United States Munitions List ("USML"), and commerce-controlled electronics components to end-users in China, including several Chinese military entities. The defendants were also charged with illegally exporting electronics components to the Shanghai Academy of Spaceflight Technology, an organization that is designated on the Department of Commerce's Entity List. Each individual defendant faces up to 20 years imprisonment, to be followed by three years of supervised release, and a $1 million fine. The two corporate defendants face up to a $1 million fine for each count in the indictment charging them with illegal export of defense articles, and a $500,000 fine for each remaining count.

Brett D. Gerson
Associate – Washington, D.C.
Global Regulatory Enforcement

On October 15, 2009, Utech Products, Inc. agreed to pay a $125,000 civil penalty to settle allegations that it committed six violations of the EAR from 2004 through 2006 involving the unlicensed export of oscilloscopes controlled under 3A292, from the United States to Pakistan without the proper BIS licenses. The oscilloscopes were controlled for nuclear non-proliferation reasons and were valued at approximately $91,000.

On October 29, 2009, FSI International, Inc. agreed to pay a $450,000 civil penalty to settle allegations that it committed 66 violations of the EAR from 2003 through 2006 involving the unlicensed export of fluoropolymer-coated valves and pumps controlled under 2B350, from the United States to China, Israel, Malaysia, Taiwan, and Singapore without the proper BIS licenses.

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On November 5, 2009, Laura Wang-Woodford, a U.S. citizen who served as a director of Monarch Aviation Pte, Ltd. ("Monarch"), a Singapore-based company that imported and exported military and commercial aircraft components, was sentenced in federal court in Brooklyn, New York, to 46 months' incarceration for conspiring to export controlled aircraft components to Iran. The court ordered Wang-Woodford to forfeit $500,000 to the United States Treasury Department. According to the indictment, between January 1998 and December 2007, Wang-Woodford exported controlled U.S. aircraft parts from the United States to Monarch and Jungda International Pte Ltd. ("Jungda") in Singapore and Malaysia, and then re-exported those items to companies in Iran without obtaining the required U.S. government licenses. As part of the charged conspiracy, the defendants falsely listed Monarch and Jungda as the ultimate recipients of the parts on export documents filed with the U.S. government.

On December 9, 2009, Tara Technologies Corporation agreed to pay a $27,000 civil penalty to settle allegations that it committed three violations of the EAR in March 2006 involving the unlicensed export of edge-welded metal bellows controlled under 3B001.e, from the United States to China.

On December 9, 2009, Keithlay Instruments International Corp. ("KIIC") of India agreed to pay a $125,000 civil penalty to settle allegations that it committed three violations of the EAR in 2003. KIIC worked in concert with another Indian company to enable the Vikram Sarabhai Space Center ("VSSC") to obtain items manufactured by KIIC's U.S. parent company and subject to the EAR, including electronic instruments classified under ECCN 3A992 and designated as EAR99. VSSC is an Indian Space Research Organization designated in the Entity List in Supplement No. 4 of the EAR. In order to evade the requirements of the EAR, KIIC established a transaction structure whereby VSSC ordered the items at issue through Rajaram Engineering, Inc. of Bangalore, India, rather than directly from KIIC, and made it appear as if Rajaram Engineering was the purchaser and end-user of the items.

On December 22, 2009, Thralow, Inc. agreed to pay a $110,000 civil penalty to settle allegations that it committed 445 violations of the EAR between 2003 and 2006 involving the unlicensed export of rifle scopes controlled under 0A987 from the United States to more than 30 countries around the world.

On December 29, 2009, Hailin Lin and Ning Wen each agreed to pay a $1.36 million civil penalty to settle allegations that they each committed 124 violations of the EAR between 1992 and 2004, when they conspired with others to export electronic components controlled under ECCNs 3A001 and 3A002 from the United States to China without the proper licenses. Lin, Wen, and the conspirators conducted the transactions under the auspices of Wen Enterprises, a company that Lin operated out of her own home.

Department of Treasury Actions

In September 2009, Barwil Agencies NA, Inc. ("Barwil"), of Pasadena, Texas, agreed to remit $84,000 to settle allegations of violations of the Iranian Transactions Regulations occurring on or about January 2007. OFAC alleged that Barwil engaged in transactions related to services of Iranian origin and facilitated transactions by non-U.S. persons that involved the payment of port expenses for a vessel's port call in the Iranian port of Bandar Mahshahr, without an OFAC license. Barwil did not voluntarily disclose the alleged violations to OFAC but demonstrated cooperation during OFAC's review of the matter, and as a remedial measure made revisions to its compliance program.

In September 2009, Gold & Silver Reserve, Inc. ("GSR"), of Melbourne, Florida, was assessed $2.95 million for its violations of the Iranian Transactions Regulations occurring between September 2003 and December 2006. GSR exported financial services, without a license, by activating 56,739 "e-currency" accounts through its website for persons located in Iran. GSR did not voluntarily disclose the violations to OFAC.

On December 16, Credit Suisse, Switzerland's second-largest bank, agreed to pay $536 million to settle allegations that it helped its clients in Iran, Libya, and Sudan avoid sanctions by concealing their identities when they did business with entities in the United States. From 2002 to 2006, Credit Suisse processed more than $700 million worth of payments through the United States for banks that are subject to OFAC sanctions. Credit Suisse employed elaborate procedures to ensure that the involvement of sanctioned parties was not apparent to the U.S. banks involved in the transactions, including the use of code names to disguise the identities of certain sanctioned entities.

On December 22, 2009, OFAC announced a $217 million settlement with Lloyds TSB Bank, plc ("Lloyds") concerning Lloyds' intentional manipulation and deletion of information about U.S.-sanctioned parties in wire transfer instructions routed through third-party banks located in the United States. Lloyds had previously entered into deferred prosecution agreements with the Department of Justice ("DOJ") and with the New York County District Attorney's office for similar conduct. From June 2003 through August 2006, Lloyds routed at least 4,281 electronic-funds transfers totaling nearly $37 million through third-party banks located in the United States in apparent violation of the IEEPA and OFAC regulations related to Iran, Sudan, and Libya. As part of its settlement, Lloyds will conduct annual reviews of its polices, procedures, and a sampling of U.S. currency payments to determine whether any of those payments subject to U.S. regulations are being illegally processed.

FCPA Enforcement

On September 11, 2009, Gerald and Patricia Green, Los Angeles-area film executives, were found guilty in U.S. District Court for the Central District of California of conspiracy to violate the FCPA and money-laundering laws of the United States, as well as of substantive violations of the FCPA and money-laundering laws. The Greens were charged with paying kickbacks to the former governor of the Tourism Authority of Thailand ("TAT") in exchange for receiving contracts to manage and operate Thailand's yearly "Bangkok International Film Festival," in addition to contracts to provide an elite tourism "privilege card" marketed to wealthy foreigners. Specifically, according to the superseding indictment, the Greens paid approximately $1.8 million in bribes to the former governor through numerous bank accounts in Singapore, the UK, and the Isle of Jersey in the name of the former governor's daughter and a friend of the former governor. The contracts received by the Greens resulted in more than

(continued)

Enforcement Highlights—continued from page 10

$13.5 million in revenue to businesses they owned. In its December 14, 2009 pre-sentence report, the DOJ requested life in prison for Mr. Green.

On September 30, 2009, AGCO Corporation ("AGCO"), a U.S. agricultural equipment-maker based in Duluth, Georgia, agreed to pay approximately $20 million in combined fines and penalties to resolve charges related to kickbacks its European subsidiaries, including AGCO Ltd. in the UK, paid under the U.N. Oil-for-Food Program. According to the agreement and the information, between 2000 and 2003, AGCO Ltd. paid approximately $553,000 to the former government of Iraq to secure three contracts by inflating the price of the contracts by 13 to 21 percent before submitting the contracts to the U.N. for approval. The company concealed from the U.N. that the price of the contracts had been inflated, and then used the additional funds to pay a kickback to the former Iraqi Ministry of Agriculture.

On November 12, 2009, Paul G. Novak, a former consultant for Willbros International Inc., a subsidiary of Houston-based Willbros Group Inc., pleaded guilty to engaging in a conspiracy to pay more than $6 million in bribes to government officials of the Federal Republic of Nigeria and officials from a Nigerian political party in violation of the FCPA. In his plea, Novak admitted that from approximately late 2003 to March 2005, he conspired with others to pay more than $6 million to various Nigerian government officials and party officials to assist Willbros in obtaining and retaining the Eastern Gas Gathering System Project, which was valued at approximately $387 million. To fund the bribes, Novak and his alleged co-conspirators used a Willbros subsidiary, Willbros West Africa Inc. ("WWA"), to enter into agreements with two consulting companies Novak represented. Without providing any services, the consulting companies invoiced WWA and were paid from a Willbros bank account in Houston, Texas, to accounts in Lebanon. Novak later used money from the Lebanese accounts to pay bribes to various Nigerian officials.

On November 13, 2009, the DOJ announced that Charles Paul Edward Jumet of Virginia pleaded guilty in federal court in Richmond, Virginia, after a two-count criminal indictment charged him with conspiring to make corrupt payments to foreign government officials in Panama for the purpose of securing business for Ports Engineering Consultants Corporation ("PECC"), thereby conspiring to violate the FCPA. PECC, a company incorporated under the laws of Panama, was affiliated with Overman Associates, an engineering firm based in Virginia Beach, Virginia. According to Jumet's plea, PECC was created so Jumet and Overman Associates could obtain a maritime contract from the Panamanian government through corrupt means. Jumet admitted that from at least 1997 through approximately July 2003, he and others conspired to make corrupt payments totaling more than $200,000 to the former administrator and deputy administrator of Panama's National Maritime Ports Authority, and to a former, high-ranking elected executive official of the Republic of Panama.

On December 7, 2009, DOJ announced that it had charged two executives of an unnamed Florida-based telecommunications company and the president of Florida-based Telecom Consulting Services Corp. with violating the FCPA, as well as two former Haitian government officials for conspiracy to commit money laundering for their alleged roles in the foreign bribery, wire fraud and money-laundering scheme. According to the indictment, from November 2001 through March 2005, the telecommunications company paid more than $800,000 to shell companies to be used for bribes to foreign officials of the Republic of Haiti's state-owned national telecommunications company, Telecommunications D'Haiti ("Haiti Teleco"). The alleged corrupt payments, authorized by the telecommunications company's president and vice president, were paid to government officials at Haiti Teleco for the purpose of obtaining business advantages for the company, including receiving preferred telecommunications rates and monetary credits toward amounts owed. The payments were allegedly made through various shell companies, and the defendants created false records claiming the payments were for "consulting services," which were never performed.

On December 11, 2009, the SEC charged Bobby Benton of Houston, Texas, a former vice president of Pride International, Inc. ("Pride"), with violations relating to bribes paid to foreign officials in Mexico and Venezuela. The SEC's complaint alleges that in December 2004, Benton authorized the bribery of a Mexican customs official in return for favorable treatment regarding customs deficiencies identified during an inspection of a supply boat. The complaint also alleged that from approximately 2003 to 2005, a manager of a Pride subsidiary in Venezuela authorized the bribery of an official of Venezuela's state-owned oil company in order to secure extensions of three drilling contracts. Benton, in an effort to conceal these payments, redacted references to bribery in documents responding to an internal audit report. He also signed two false certifications in connection with audits and reviews of Pride's financial statements denying any knowledge of bribery.

On December 31, 2009, UTStarcom Inc. ("UTSI") agreed to pay the DOJ $1.5 million in criminal fines and the SEC an additional $1.5 million in penalties to resolve FCPA violations taking place in China and Thailand. According to the DOJ's press release, UTSI "arranged and paid for employees of Chinese state-owned telecommunications companies to travel to popular tourist destinations in the United States, including Hawaii, Las Vegas and New York City." Although the trips were described as training at UTSI facilities, UTSI had no facilities at the destinations, nor was any training actually conducted.

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