IN THIS ISSUE

Routed Transactions Out,
Foreign Principal Party Controlled Export Transactions In

by

Oscar Gonzalez, Attorney

The law profession (people, mostly lawyers and judges, tell me it's not a business) pretends that lawyers don't, or at least, should't give out business advice. Tut tut, we only do law. You know, we stay above the fray while invoking obscure legal precedent. But other than the pro bono I've done, I can't remember a single case where money was not the crux of the matter. I appreciate why lawyers try to segregate legal advice from business advice (for example, to safeguard the attorney-client privilege), but I initiated a few lawsuits for clients who claimed to be motivated solely by principle and who vowed to spend whatever was needed to attain justice. It's funny how the pursuit of justice wilts under the weight of a couple a months of heavy billing even when success appears certain.

What lawyers do impacts, and sometimes dictates, the bottom line. That is why companies are reluctant to comply with laws, and do so only upon threat of near certain discovery and sanction by enforcement authorities.

Our nation's foreign trade laws are all about money. It does not take a PhD in history or economics to know that nations, and increasingly blocs of nations, seek to control the flow of international trade for their own benefit and someone else's detriment. That there are winners and losers should not surprise any proponents of a market system. Just as

there are no free meals, there is no free trade. When people say "free trade", what they really mean is that they want to rearrange duty rates and investment laws to benefit their preferred industries. Neither goods nor people travel unimpeded over national borders (yes, I know, the EU is somewhat of an exception). There is certainly little freedom to be found at our nation's borders. In fact, as those who travel overseas can attest, under the U.S. Supreme Court schema our constitutional freedoms and rights lose potency as we approach the border, you know, where you need them the most.

Governments prefer constraining the populace, not themselves. They want the license to punish citizens and to those transacting with citizens. The assertion of authority is jurisdictional, which means countries reserve the legal means to extend their reach as much as possible to be able to whack you for perceived violations of their laws.

Our country, the good old USA, has extended its jurisdictional reach far beyond what other countries could ever dream or have the capacity of doing, but evidently not far enough.

Which is why our government officially discourages the use of Foreign Principal Party Controlled Export Transactions (FPPCETs, presumably pronounced feppesets, or maybe not). Never heard of an FPPCET? I can't blame you. That's the new name that export authorities want to give for a routed export transaction. I'm happy for the name change. Routed transaction was always a stupid term. What shipment isn't routed? No one says, "Don't worry. We managed to ship your merchandise without any routing." Maybe when someone finally invents a Star Trek teleporter they'll be able to actually avoid moving merchandise to get it somewhere else, but until then, routing seems to an inevitable component, if not the embodiment, of any shipment.

But maybe you don't know what an export routed transaction is either. In an FPPCET or routed export transaction, a foreign purchaser uses its own freight forwarder to arrange shipment from the domestic seller. What deceivingly looks like a domestic sale turns out to be an export when the party controlling and paying for the shipment is in a foreign country and thus beyond the reach of our enforcement authorities, which explains the antipathy from said authorities. But this type of transaction is too popular to overturn by regulatory edict, so our export authorities devised byzantine means to stay in the game, but fortunately some clarity is on the way.

Under proposed revisions of both the Export Administration Regulations and the Foreign Trade Regulations, FPPCETs will be allowed if the Foreign Principal Party in Interest or FPPI hires a forwarder in the USA and signs over a power of attorney to the forwarder to do the export licensing work and clearance that is needed. The FPPI must deliver the name of its forwarder and a copy of the power of attorney to the US Principal Party in Interest or USPPI. The USPPI assigns in writing primary responsibility for determining licensing requirements and obtaining license authority to the FPPI and the FPPI acknowledges in writing that it is assuming this responsibility. Absence these steps, the

USPPI remains the exporter. Now that the parties are fully apprised as to who is on first base, the USPPI must provide sufficient information to the FPPI or its forwarder to determine export licensing, but does not make that call itself.

The proposed revisions to the regulations should improve awareness and compliance, although foot dragging is to be expected. Some USPPIs may howl that these new requirements are onerous, but all they really do is make sure that the parties communicate to each other and create a written record of who is controlling the shipment and who is on the hook if anything goes wrong. Forwarders may not like that their liability is so plainly agreed to and recorded by the parties thinking, wrongly, that they are merely and solely logistics providers. The uncomfortable truth is that the forwarder becomes the exporter by virtue of its domestic presence and the power of attorney from the FPPI. That clarity of roles should stem silly demands from forwarders asking USPPIs for licensing determinations and should encourage USPPIs to more visibly paper their interactions with foreign customers if they want to avoid being the exporters and all the attendant liability of these transactions.

Will the proposed revisions to the regulations impact the bottom line of all parties to these transactions? Will it discourage the use of this kind of transaction or perhaps even reduce the volume of exports from our country?

Don't ask me. I'm just a lawyer.

You can find the BIS's proposed revisions on its website (*http://www.bis.doc.gov*), by its citation (79 Fed. Reg. 7105 (February 6, 2014) at *https://www.federalregister.gov*), or by requesting a copy from yours truly.

USA Sanctions Russia

On April 28, 2014, the White House issued a press release regarding Ukraine, Crimea, and Russia. Here is the relevant part:

> The United States is imposing targeted sanctions on a number of Russian individuals and entities and restricting licenses for certain U.S. exports to Russia. The Department of the Treasury is imposing sanctions on seven Russian government officials, including two members of President Putin's inner circle, who will be subject to an asset freeze and a U.S. visa ban, and 17 companies linked to Putin's inner circle, which will be subject to an asset freeze. In addition, the Department of Commerce has imposed additional restrictions on 13 of those

companies by imposing a license requirement with a presumption of denial for the export, re-export or other foreign transfer of U.S.-origin items to the companies. Further, today the Departments of Commerce and State have announced a tightened policy to deny export license applications for any high-technology items that could contribute to Russia's military capabilities. Those Departments also will revoke any existing export licenses that meet these conditions.

Read the rest of the press release *here*.

CBP Gets Territorial With Our C-TPAT Logo

by

Oscar Gonzalez, Attorney

Intellectual property protection sees its most fiercest manifestation at our nation's borders. The border is where, for example, Samsung and Apple are duking it out over who gets to numb our brains and maim our social interactions with their gleaming rectangles of addicting apps and unwholesome tactile rituals they force upon us (I am an writing this on my iPad). The border is also where companies and individuals can register their trademarks and copyrights with US Customs and Border Protection (CBP) and, once done, CBP can forego any pretense of the usual due process surrounding IPR protection (IPR holders usually have to initiate court proceedings to protect their interests) and impound any merchandise indefinitely (or so it seems) upon the slightest

suspicion of an infringement. At that point, good luck trying to convince CBP that it made a mistake or that the perceived infringement was trivial and inadvertent and, thus, deserving of dispensation.

I am keen to protecting intellectual property, but it's been overdone to the detriment of both innovation and the common weal, the two reasons that those protections were ostensibly put in place. Case in point, US Customs and Border Protection just announced that it has trademarked its C-TPAT logo. This triggered a double-take from me. C-TPAT has never been known in its two-decades of plodding existence for regulatory refinement or initiative. Except for a few cosmetic changes, it's been the same catatonic C-TPAT from the beginning. It's gotten bigger, but not prettier.

A couple of days ago, C-TPAT sent this announcement to program participants:

> The Customs-Trade Partnership Against Terrorism (C-TPAT) program has applied to the U.S. Patent and Trademark Office for a trademark on its logo to protect the program against the misuse of the logo and deceptive business practices. C-TPAT worked with the Office of Public Affairs within U.S. Customs and Border Protection and the Department of Homeland Security (DHS) Office of the General Counsel, the office responsible for overseeing the DHS Intellectual Property Policy, to complete this task. All licensing agreements will be issued free-of-charge. The C-TPAT Partner Agreement will be updated within the C-TPAT Portal to include clauses describing the proper use of the logo. When each Partner completes their annual profile review and re-signs the Agreement, they will also be agreeing to the proper use clauses. Until such time as a Partner's next annual review, Partners are authorized to continue current uses of the trademark. Partners who are removed or withdrawn from the C-TPAT program must cease using the trademark. Note the display of the trademark does not denote program status; only the Status Verification Interface within the C-TPAT Portal verifies current program status. At this time the C-TPAT trademark is being licensed only to C-TPAT Partners, as a benefit for continued program membership. In addition, a method already exists to record the user agreement and identify the number of licensees. The C-TPAT program is developing a method external to the Portal to allow non-C-TPAT Partners to request and register use of the logo.

There are huge problems with this notice. CBP sent it only to those companies already in C-TPAT (there is no Federal Register notice, for example), which reflects one of the most aggravating and delusional mindsets ever from an entrenched bureaucracy. C-TPAT does not like talking to, communicating with, assisting, or associating with individuals or companies who are not already in the program, and barely to those who are. The C-TPAT phone operators, it would be a stretch to call them counselors, who

answer the well-hidden official C-TPAT phone line deflect queries from the public with "we refer you to the C-TPAT guidelines on our website," a ludicrous suggestion that exposes a level of bureaucratic ineptitude, indolence, and superfluousness that would make Ron Swanson proud. Some of the C-TPAT guidelines are of dubious, well, guidance. C-TPAT imposes on importers that their "buildings must be constructed of materials that resist unlawful entry." One can only infer that CBP is thankfully trying to exclude from C-TPAT the thousands of manufacturers, importers, customs brokers, and others who occupy facilities made out of Legos.

The few helpful C-TPAT guidelines that exist are buried deep in the C-TPAT portal, which you can't enter unless you are C-TPAT certified. I must admit, however, that CBP has taken some valiant steps to upgrade its website in the past few weeks with promising results. However, CBP hosts a huge C-TPAT conference about once a year, but you can attend only if you are C-TPAT certified. Thus, the only companies that benefit are companies that supposedly have already been proven compliant by CBP's thorough vetting. In other words, no one benefits, at least not much, especially not the non-member riffraff trying to crash the party. I hear, however, that the mixers are dynamite.

C-TPAT holds the public at arms-length ostensibly because it views itself as a volunteer program, the "partnership" of C-TPAT, not as a true government program. Funny how C-TPAT officials still carry federal badges and guns. It's a convenient (for CBP) hybrid. C-TPAT is codified in statute but I have no idea why. It's a silly statute that serves no purpose other than to remind the CBP Commissioner to continue with CBP. A good calendaring app, maybe even a string tied around the Commissioner's finger, would have worked just as well.

CBP hasn't issued any regulations on C-TPAT, presumably because it doesn't want to be held accountable. The appeals process for companies who have been rejected or expelled from C-TPAT are ludicrously vague and provide no court review. CBP alone decides whether it acts reasonably in all C-TPAT matters, and we all know what a sterling record the agency has in acting reasonably.

No doubt that CBP is trying to make sure that people and companies do not use its C-TPAT logo for personal gain or without CBP's imprimatur. From CBP actions, you would think that the C-TPAT logo is universally recognized and coveted. Like Nike's swoosh. CBP may even consider registering its trademark with its own IPR department to stop the flood of C-TPAT knockoffs that is surely diluting the worth of its priceless logo and engendering a seedy black market of unwholesome counterfeits. Walter White could make billions.

But here's the problem. CBP is supposed to recruit companies into the C-TPAT program. Greater enrollment is the best way to secure our borders and shipments into our country. This is not a controversial claim. CBP has said so publicly many times

and, if I had to dig through the legislative history, I would bet that Congress echoed the sentiment. CBP claims success in getting most large importers and logistics providers into C-TPAT, but the numbers appear to have stagnated and there is no visible push to increase enrollment. There is no discernible push to educate or help companies not already in C-TPAT. CBP should consider holding conventions and seminars for companies who are interested in joining. Even if CBP is happy with its enrollment numbers, which I guess is ok until suddenly it isn't ok, there remains its parochial, bordering on xenophobic, thinking. It's not only that CBP stands on shaky legal grounds when it tries to register a trademark. Are taxpayers supposed to ask for permission to use a symbol that they paid for? Are the stars and stripes or the US Constitution trademarkable? With this precedent, you may be forced to take a laser to that Abe Lincoln tattoo on your forearm or pay royalties to celebrate the 4th of July, which, granted, may have the unintended benefit of curtailing binge consumption of hot dogs.

It looks like CBP may be jumping the gun. It announced that it applied for a trademark, not that it was granted one, and the tentativeness of this status should probably have given it pause before it laid down all sorts of rules, which the notice does, regarding what is allowed and what is forbidden. All this reveals an unwelcoming philosophy by a government agency for the people who paid for the creation of the logo and who fund every C-TPAT activity and CBP employee. But fortunately for members, the hors d'oeuvres are killers.

U.S. Department of Justice
PRESS RELEASE

United State Settles False Claims Act Allegations Against Otterbox For $4,300,000
FOR IMMEDIATE RELEASE
April 21, 2014

DENVER - The United States Attorney's Office for the District of Colorado and the Department of Homeland Security, U.S. Customs and Border Protection, announce that OtterBox, a Colorado corporation headquartered in Fort Collins, has paid $4,300,000 to the United States to resolve allegations that OtterBox violated the False Claims Act and the Tariff Act of 1930, as amended, by knowingly underpaying customs duties owed to the United States.

OtterBox sells protective cases for smartphones and tablets. Between 2006 and 2011, OtterBox manufactured many of its products overseas, and then imported those products into the United States for distribution and retail sale. OtterBox was responsible for the submission of entry documents to Customs and for the payment of any customs duties owed on those imported products.

The United States alleged that from January 1, 2006 through December 31, 2011, OtterBox knowingly omitted the value of "assists" from the dutiable value OtterBox declared to Customs on entry documents for imported products. The United States further alleged that OtterBox knowingly made or caused to be made false statements in other documents submitted to Customs concerning the value of assists, and the customs duties OtterBox owed on the value of those assists, for products that OtterBox imported between January 1, 2006 through December 31, 2011. According to the United States, as a result of OtterBox's omissions and false statements concerning the value of assists for its imported products, OtterBox knowingly underpaid customs duties it owed to the United States.

The settlement stems from a lawsuit filed by a former OtterBox employee in 2011 under seal pursuant to the qui tam provisions of the False Claims Act. The False Claims Act empowers private citizens with knowledge of fraud against the United States to present those allegations to the government by bringing a lawsuit on behalf of the

United States under seal. If the investigation substantiates those allegations, the private citizen is entitled to share in any recovery. Of the $4,300,000 OtterBox paid to the United States, the United States paid $830,000 to the former employee who filed the qui tam lawsuit.

"America's economic security and prosperity are at the heart of U.S. trade law," said United States Attorney John Walsh. "Customs duties are a significant source of revenue for the United States, and this settlement demonstrates that the Department of Justice will zealously enforce their lawful collection."

"Trade enforcement is a priority for U.S. Customs and Border Protection due to the significant role that it plays in the economic security of the United States," said Richard Di Nucci, Acting Assistant Commissioner for the Office of International Trade. "CBP is responsible for facilitating the legitimate flow of trade, while enforcing the laws against the evasion of duties that protect against unfair trade practices."

The claims settled by this agreement are allegations only. There has been no determination of liability.

The agreement was negotiated by Assistant U.S. Attorney Amanda Rocque.

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