



regulatory watch list raises threat level

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It may be easier to talk about the things we know will happen in 2010 than to try to guess what might be coming. After all, no one predicted the product-safety fiasco that became such a major headache.

At the same time, in many ways the past and the future concern themselves with the same issues. For example, we know that on Jan. 26, the Customs and Border Protection agency moves to enforced compliance of the Importer Security Filing program.

We know the deadline, but not what Customs will actually do. Customs said it wants the data and does not want to keep shipments out, but if filers are not providing the data or it is routinely late, incomplete or wrong, will "do not load" messages follow? What about those \$5,000 penalties? Will there really be only one penalty per ISF filing or will there be multiples — one for being late and one for bad data, for example? Customs has said multiple penalties are possible, but under what circumstances?

We also don't know if the current version of the Customs Reauthorization Act will be signed into law. If so, it contains a provision removing the wall between ISF security data and entry data. Perhaps it makes sense to allow Customs to compare data from the two sources, but what should be the consequences if there isn't a complete match? The vetting of security data is different from the vetting performed for entry purposes. How will Customs factor that into its analysis? Lastly, what should Customs do about those carriers (vessel operators and non-vessel-operators) that insist they cannot issue the bill of lading number until post-sailing?

But the two biggest unknowns for Customs revolve around its top two positions. First, will Alan Bersin be confirmed as commissioner and, if so, when? And what sort of stamp will he seek to put on the agency? Also, how will Customs be further transformed when Jay Ahern's replacement is sworn in as deputy commissioner?

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Another twist is whether the structure proposed in the reauthorization bill will be adopted. It proposes splitting the duties of the current deputy commissioner so his enforcement responsibilities remain with the career civil servant and all the trade functions rest with the new post of principal deputy commissioner, whose charge is to further industry's interests. Will the disconnect between law enforcement and trade facilitation get smaller or larger under this new structure?

It may seem a peculiar context, but intellectual property is another high-priority security issue for Customs. Many law enforcement experts have tied funding of terrorists, smugglers and other "bad guys" to their trading in counterfeit goods.

And there are some serious security issues related to counterfeit goods. We know, for instance, the computer networks of the Pentagon, U.S. Air Force, Navy and Marines, Federal Aviation Administration, FBI and General Services Administration were hacked, along with those of a significant number of private companies. Since such a large part of our lives depends on computers, counterfeit network cards or counterfeit integrated circuits could bring critical communication crashing down, never mind the possibility of intruding on the proper functioning of key national infrastructure systems.

Another potential disaster is the possible impact and disruption of military communications and weapons systems. What if the counterfeit chips allowed unauthorized access to or control of the systems on which they are located, military, government or civilian?

We can expect intellectual property rights to continue to be a high priority for Customs, especially given the recent creation of the executive branch position of intellectual property enforcement coordinator and the resulting interagency committee.

Customs should be applauded for its efforts to date, but there are some significant steps the agency should take to work better. For example, there is significant need for more and better training of staff at all levels. Also disruptive is the upheaval at the Office of Regulations and Rulings, especially with routine cases taking interminable time to be decided.

We can only hope the current focus in Congress on facilitation will translate into funding for more staffing at positions other than inspector, border patrol or agriculture specialist. While not nearly as sexy, there are significant entry, operational and legal compliance positions that must be filled or expanded.

On facilitation, we need to see more from Customs than how many drug shipments have been intercepted or the quantities of the cash seized. Trade facilitation means, among other things, acknowledging the smooth flow of goods and rapidly expanding C-TPAT so the program benefits exporters who ship to countries where Authorized Economic Operator is the norm.

When can we expect realistic reports about shipment delays? What about fixing the broken detention system? True, notices of detention are still being issued, but how much an importer learns about the reasons for a shipment is held up is directly related to the customer service attitude of the inspector involved.



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Customs is not the only agency under pressure to do more. The Food and Drug Administration is rolling out PREDICT, its new screening program, so expect it to ratchet up enforcement this year. The FDA is, after all, the agency attracting the most complaints when questions arise about food safety — or lack thereof.

The Consumer Product Safety Commission also is expected to expand its sphere of influence. The commission hired legal staff from Customs and can be expected to better integrate its actions into the entry process, likely leading to more enforcement. CPSC staff members say if you are not a member of the Importer Self-Assessment Product Safety program, the likelihood of inspection is greater.

Changes to the Lacey Act are coming. While more products will likely become subject to the reporting requirement, will we finally get definitions for the exemptions — "common cultivars" and "common food crop?"

Similarly, we can expect the departments of Commerce and State to remain enforcement minded through greater penalty action and more vigorous criminal prosecutions.

There are two other significant events likely this year not generally on the radar of most international traders: criminal prosecutions and the Foreign Corrupt Practices Act.

As bad guys have gotten more creative, there have been changes in the law intended to make it easier to prosecute the violators despite their creativity. One such change was to the Patriot Act with the enactment of a provision, joining existing law allowing confiscation of goods smuggled into the United States and of the conveyances used, to allow confiscation of goods smuggled out of the U.S. and of any property used to facilitate that smuggling.

Trade lawyers are seeing in ever increasing numbers criminal prosecutions of formerly trade related civil penalties. It has long been the norm for criminal prosecutions in the face of serious export license violations. What has been surprising recently is criminal prosecutions for duty underpayments involving numbers significantly less than \$1 million. That alone is remarkable. The logic of the government is, if you have undervalued your goods when you ship them out, you are smuggling them out of the country under the AES mandate to accurately report value.

It also is worth considering the government's reliance on mail and wire fraud statutes when proving actual trade violations are "too complicated" to explain to a jury.

We recently saw an example of just such an effort in the prosecution of Chemnutra, which in 2007 imported the contaminated melamine that went into pet food. The FDA violations are strict liability so there was no question there would be misdemeanor charges involving each of the 13 shipments. Seeking to get a more significant penalty, however, the local U.S. attorney tacked on wire fraud charges.

FCPA fines and prosecutions are also likely to expand, with multimillion-dollar fines the trend on the monetary side. But the new trend is personal liability for individual executives, as well as securities class actions and shareholder derivative lawsuits.



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In its simplest terms, the FCPA, enforced by the Justice Department and Securities Exchange Commission, prohibits corrupt payments to foreign officials in order to obtain or keep business.

It is important to understand that any company listing shares on a U.S. stock exchange is subject to the FCPA. Justice's jurisdiction overlaps with the SEC, but generally focuses on the anti-bribery provision, whereas the SEC focuses on violations by public companies of the anti-bribery, books and records, and internal controls provisions.

There have been significant FCPA settlements this last year:

- Siemens paid a record \$1.6 billion worldwide penalties, \$450 million to Justice, \$569 million to the Munich prosecutor and \$350 million to the SEC for extensive international violations in regions such as Asia, Africa, Europe, the Middle East and the Americas.
- Haliburton/KBR paid a combined \$579 million to Justice and the SEC in a bribery case involving Nigerian government officials to gain construction contracts.
- Nature's Sunshine Products paid a \$600,000 fine, and several executives paid \$25,000 each, when a Brazilian subsidiary paid bribes to Brazilian customs authorities after the country's law changed, classifying many of NSP's vitamins and supplements as medicines requiring registration with the Brazilian authorities. The U.S. company was fined for not having the proper controls to discover much earlier and stop such activities and also for stating false information in its tax returns and other filings.
- Con-way paid a \$300,000 fine arising out of the payments made by its Philippine broker-forwarder affiliate to customs authorities and government-controlled airline officials to induce them to overlook violations of Philippine law.
- Panalpina's activities in Nigeria, Kazakhstan and Saudi Arabia are under investigation. Again, the issue is improper payments, and the investigation has extended to the companies on whose behalf Panalpina was handling shipments. Many of those companies have received letters from Justice asking about their activities in those countries. Evidence of greater fallout comes through the shareholder lawsuit filed against Panalpina by an investment fund-shareholder, even before Justice and the SEC concluded their investigations. Panalpina withdrew from Nigeria. Since that disclosure, its stock price has fallen dramatically.

Viewed together, these cases tell us to be careful with whom we do business, whether for the Foreign Corrupt Practices Act, good governance, regulatory compliance or other reasons.

And whether or not you work for a publicly traded company, even if Justice and/or the SEC cannot come after you under the FCPA, another phenomenon is growing: one competitor suing another alleging unfair business practices.

You can bet paying bribes to get or keep business will be challenged here, too.



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Mistakes will happen; it's part and parcel of operating a global business. The question is how you fix them, and when and how you disclose them.

Finally, make sure congressional representatives know what you need from the agencies regulating international trade.

We're supposed to be in an economic recovery, but it looks like 2010 will be another year of increased regulation administered by agencies individually rather than in concert, meaning a higher cost for compliance and heightened risk.