

# Legislative & Regulatory Update

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The Legislative & Regulatory Update is produced several times per year and reports on current issues of interest to the transatlantic business community

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## SOPA Taken Off the Menu. Domestic Manufacturing Featured as the Special of the Day

The recent spectacular flameout of a package of antipiracy laws in the House and Senate made for considerable news in Washington in recent days. Perhaps more than anything, the imminent demise of the *Stop Online Piracy Act* and a Senate companion bill suggest that the power of well-funded lobbying bodies (in this case, primarily the Motion Picture Association of

America) may not be what it once was in the nation's capital. Moreover, the sequence of events leading to the shelving of SOPA demonstrated the strength of "grass roots" campaigns, which are increasingly coming into favor as effective tools for shaping policy.

Not to be easily "one-upped" by coalitions opposed to SOPA, President Obama used his recent State of the Union address to lay the foundations

for a revival of the manufacturing sector in the United States, interspersing his oration with populist appeals to the "99 percent" to work on a grass-roots level towards reinvigorating the economy and building up the manufacturing base. What will come of this lofty goal in the near term remains to be seen. In the interim, some domestic manufacturers complain, foreigners continue to "eat our lunch." Their proof: a recent court ruling holding that the U.S. Department of Commerce cannot impose countervailing duties against non-market economies like China.



## Lacey Act Enforcement Trends Lead to Industry Comments

Recently proposed legislation would amend the *Lacey Act*, a federal law intended to curtail trafficking in endangered wildlife and plant products. The bill, H.R. 3210 (*Retailers and Entertainers Lacey Implementation and Enforcement Fairness Act*, or RELIEF), is sponsored by Reps. Jim Cooper (Democrat – Tennessee), Marsha Blackburn (Republican – Tennessee), and Mary Bono Mack (Republican – California) and intended in part to address concerns of importers of wood furniture and related products.

The legislation would limit the scope of new provisions of the Lacey Act signed into law in 2008, currently requiring import declarations pertaining to the species and country of origin of plant or plant products, including wood. As to imported furniture, the declaration requirement would be limited to solid wood, thus eliminating the need to file declarations for particleboard and similar non-solid wood components. Additional relief would be available in the form of greatly reduced penalties for first offenses.

## Intellectual Property Bill Sponsors Yield to Community Backlash

Intended to permit the federal government to more effectively quell online intellectual property violations, the recently introduced Stop Online Piracy Act - SOPA (H.R. 3261) and Senate counterpart Protect IP Act (S. 968) appeared to be on the way to becoming law. Support on the part of important industry groups was based on the supposition that the pair of bills would at a minimum limit the proliferation of pirated, copyrighted material online. The means towards this end would be the implementation of mechanisms for interrupting the web-based presence of entities determined by the Justice Department to be benefiting from engaging in copyright infringement. SOPA would enable the U.S. Department of Justice as well as permit copyright owners to initiate legal action against sites linked to IP violations, and would concurrently allow the government to cause operators of search engines and social networking sites to block access to such sites.

A consumer backlash, spurred in part by online campaigns dedicated to making the general public aware of the scope of the bills appears to have helped quash the bills. Also instrumental in putting the legislation on what appears to be an indefinite hold was very active lobbying on the part of various anti-SOPA coalitions, including those representing internet service providers and new media businesses claiming possible restrictions on civil liberties and unduly burdensome requirements that would make doing everyday business in good faith an undue burden. As a result of the negative attention and large-scale grass-roots protests, House Judiciary Committee Chairman - and chief sponsor of SOPA - Lamar Smith (Republican - Texas) on January 20, 2012 postponed further treatment of the legislation to some point in the indefinable future – a future that will probably be beyond the scope of the current legislative session.

*Detailed legislative background information on the bills can be found at:*

<http://thomas.loc.gov/cgi-bin/thomas>

*Chairman Smith's latest statement on the matter may be reviewed here:*

<http://judiciary.house.gov/news/01202012.html>

## **Expedited Patent Examination Instituted**

The United States Patent and Trademark Office (PTO) in a Federal Register notice dated December 19, 2011 announced that the implementation of provisions for prioritized examination of new patent applications will now also apply to in connection with requests for continued examination.

The Leahy-Smith *America Invents Act* prioritized examination provision following the prioritized examination track (Track I) of the proposed 3-Track examination process in a previous final rule, which was applicable only to newly filed patent applications. In order to provide patent applicants with the flexibility to accelerate processing of their applications in which a request for continued examination has been filed, the PTO is now permitting applicants to request prioritized examination for applications after the filing of a request for continued examination.

The changes in the final rule are applicable to any patent application in which a proper request for continued examination has been filed before, on, or after December 19, 2011. Under the procedure set forth

## **New Ethics Standards for Employees of the Executive Branch Proposed**

In a Federal Register notice dated September 13, 2011, the Office of Government Ethics proposed amendments to the regulations governing standards of ethical conduct for executive branch employee of the Federal Government. The amendment would impose limits on the use of gift exceptions by all employees to accept gifts from registered lobbyists and lobbying organizations, and would implement the lobbyist gift ban for appointees required to sign the Ethics Pledge prescribed by Executive Order 13490. An example of the practical effects of the lobbying ban is that government employees would not be able to avail themselves of the "widely attended gathering" exception to attend various programs and events held by lobbying organizations. Importantly, the proposed rules place no restrictions on the ability of employees to accept offers of free attendance at events, if such employees are speaking or presenting information on behalf of the government. The explanation underlying this is that a speaking engagement is not deemed a gift, and an employee's participation in such an event may be viewed as a customary and necessary part of his or her duties.

*The direct link to the Federal Register notice is:*

<http://www.gpo.gov/fdsys/pkg/FR-2011-09-13/pdf/2011-23311.pdf>

## **Department of Commerce Issues Notice of Manufacturing Council Vacancies**

The Department of Commerce is currently seeking applications to fill six vacant positions on the Manufacturing Council (Council) for the current two-year charter term that began April 8, 2010. The purpose of the Council is to advise the Secretary of Commerce on matters relating to the competitiveness of the U.S. manufacturing sector and to provide a forum for regular communication between Government and the manufacturing sector. All applications must be received by the Office of Advisory Committees by close of business on February 9, 2012.

(continued) in the final rule, once the application is accorded special status after the filing of a request for continued examination it will be placed on the examiner's special docket throughout its entire course of continued prosecution before the examiner until a final disposition is reached in the application. The goal for handling applications under prioritized examination for request for continued examination is to, on average, provide a final disposition within twelve months of prioritized status being granted. It should be noted that filing an amendment to the application which results in more than four independent claims, more than thirty total claims, or a multiple dependent claim will terminate the prioritized examination. Upon termination of prioritized examination, the application will be removed from the examiner's special docket and placed on the examiner's regular docket in accordance with its stage of prosecution.

*The Federal Register notice can be found at:*

<http://www.gpo.gov/fdsys/pkg/FR-2011-12-19/pdf/2011-32434.pdf>

### **Department of Commerce Issues Notice of Manufacturing Council Vacancies (continued)**

The member will be selected, in accordance with applicable Department of Commerce guidelines, based on his or her ability to advise the Secretary of Commerce on matters relating to the U.S. manufacturing sector, to act as a liaison among the stakeholders represented by the membership and to provide a forum for those stakeholders on current and emerging issues in the manufacturing sector. Given the duties and objectives of the Council, the Department particularly seeks applicants who are active manufacturing executives (Chief Executive Officer, President, or a comparable level of responsibility) and who are leaders within their local manufacturing communities and industries. Each Council member serves as the representative of a U.S. entity in the manufacturing sector. For the purposes of eligibility, a U.S. entity is defined as a firm incorporated in the United States (or an unincorporated firm with its principal place of business in the United States) that is controlled by U.S. citizens or by another U.S. entity. An entity is not a U.S. entity if 50 percent plus one share of its stock (if a corporation, or a similar ownership interest of an unincorporated entity) is controlled, directly or indirectly, by non-U.S. citizens or non-U.S. entities. Appointments to the Council will be made by the Secretary of Commerce. Council members shall serve in a representative capacity, representing the views and interests of their particular subsector within the manufacturing sector.

*Additional information is available at:*

<http://www.gpo.gov/fdsys/pkg/FR-2012-01-17/pdf/2012-731.pdf>

### **Office of the United States Trade Representative Issues Request For Comments Regarding the U.S.-EU High Level Working Group on Jobs and Growth**

At the November 28, 2011, European Union (EU)-United States Summit meeting, President Obama, European Commission President Barroso, and European Council President Von Rompuy directed the Transatlantic Economic Council to establish a High Level Working Group on Jobs and Growth, led

### FDA Issues Draft Guidance for Industry and Staff on Medical Device Classification Product Codes

In a Federal Register Notice dated January 3, 2012, the Food and Drug Administration (FDA) is announced the availability of the draft guidance entitled “*Medical Device Classification Product Codes*.” The purpose of the guidance document is to educate regulated industry and FDA Staff on how, when, and why to use classification product codes for medical devices regulated by the Center for Devices and Radiological Health (CDRH) and the Center for Biologics Evaluation and Research (CBER). This document describes how classification product codes are used in a variety of FDA program areas to regulate and track medical devices. This draft guidance is not final nor is it in effect at this time.

*The notice is available for review at:*

<http://www.gpo.gov/fdsys/pkg/FR-2012-01-03/html/2011-33686.htm>

### USTR Issues Request For Comments Regarding the U.S.–EU High Level Working Group (continued)

by U.S. Trade Representative Kirk and EU Trade Commissioner De Gucht. The Working Group identified policies and measures to increase U.S.–EU trade and investment to support mutually beneficial job creation, economic growth, and international competitiveness. The Working Group was requested to work closely with public and private sector stakeholder groups including business, nongovernmental organizations, and academia, among other stakeholders, and to draw on existing dialogues and mechanisms, as appropriate. As part of this process, and consistent with the Leaders’ mandate, the U.S. Government hopes for written input from members of the public on options for increasing trade and investment in areas including, but not limited to, the following:

- Conventional barriers to trade in goods, such as tariffs and tariff-rate quotas;
- Reduction, elimination, or prevention of barriers to trade in goods, services, and investment;
- Opportunities for enhancing the compatibility of regulations and standards;
- Reduction, elimination, or prevention of unnecessary “behind the border” non-tariff barriers to trade in all categories;
- Enhanced cooperation for the development of rules and principles on global issues of common concern and also for the achievement of shared economic goals relating to third countries.

For each option or proposal that is suggested, submissions should seek to assess the short- and medium-term impact on economic growth, job creation, and competitiveness, as well as the feasibility of and implications for, and consistency with, bilateral and multilateral trade obligations.

Written comments should be submitted no later than February 3, 2012.

*Additional information is available at:*

<http://www.gpo.gov/fdsys/pkg/FR-2012-01-11/pdf/2012-329.pdf>

## President Obama announces establishment of "Trade Enforcement Unit"

In the course of the January 24, 2012 State of the Union address, President Obama announced the creation of a Trade Enforcement Unit that will be charged with investigating unfair trading practices in countries like China.

Obama stated that there will be an increased number of inspections to prevent counterfeit or unsafe goods from crossing U.S. borders, and urged Congress to ensure that no foreign company has an advantage over American manufacturing in terms of accessing financing or new markets. Details have not yet been made available.

*The text of the State of the Union address may be viewed at:*

<http://nationaljournal.com/whitehouse/obama-announces-new-unit-to-investigate-unfair-trade-practices-20120124>

## White House Releases Fact Sheet on a National Strategy for Global Supply Chain Security; Homeland Security releases full strategy document

On January 25, 2012, the Obama administrations unveiled the *National Strategy for Global Supply Chain Security*. A fact sheet, consisting largely of an executive summary of the Strategy, was posted to the White House website. The full strategy document was released by the U.S. Department of Homeland Security (DHS) and presented by DHS Secretary Janet Napolitano during the World Economic Forum in Davos, Switzerland. The stated goal of the strategy is to facilitate legitimate trade and travel, while preventing terrorists from exploiting supply chains, protecting transportation systems from attacks and disruptions, and increasing the resilience of global supply chains. The administration emphasizes working closely with international partners in the public and private sector to build a more resilient global supply chain. In terms of content, the *National Strategy for Global Supply Chain Security* outlines goals to promote the efficient and secure movement of goods and foster a resilient supply chain system, and provides general guidance for the U.S. government and domestic, international, public and private stakeholders who share a common interest in the security and resiliency of the global supply chain.

Following the release of the strategy document, DHS and the U.S. Department of State are to lead a six month engagement period with the international community and industry stakeholders to solicit feedback and specific recommendations on how to implement the Strategy in a cost effective and collaborative manner. Within 12 months of the release of the Strategy, a consolidated report on the status of implementation efforts is to be developed.

*The fact sheet may be retrieved at:*

<http://www.whitehouse.gov/the-press-office/2012/01/25/fact-sheet-national-strategy-global-supply-chain-security>

*The complete National Strategy for Global Supply Chain Security released by the Department of Homeland Security is available at:*

<http://www.dhs.gov/xlibrary/assets/wh/national-strategy-for-global-supply-chain-security.pdf>

## Electronic Delivery of Patent Search Results by United States Patent and Trademark Offices to European Patent Office

The United States Patent and Trademark Office (USPTO) has recently begun electronic delivery of search results from U.S. patent applications to the European Patent Office (EPO) to assist U.S. applicants who later file in the EPO to comply with amended Rule 141(1) of the EPO's implementing regulations to the European Patent Convention (EPC). As a result, U.S. applicants subject to amended Rule 141(1) EPC will not need to separately file their U.S. search results with the EPO, thereby providing time and cost savings to these applicants.

*Further information is available at:*

<http://www.federalregister.gov/articles/2011/12/30/2011-33539/electronic-delivery-of-search-results-from-the-united-states-patent-and-trademark-office-to-the#p-3>

## Highest Court Agrees to Consider Question of Whether Corporations Are Subject to Liability Under Alien Tort Statute.

The U.S. Supreme Court on October 17, 2011 granted the petition for a writ of certiorari in *Kiobel, et al. v. Royal Dutch Petroleum, et al.*, a matter in which the Second Circuit issued a decision holding that corporations are not subject to suit under the Alien Tort Statute, 28 U.S.C. § 1350 ("ATS"). At issue now is whether the issue of corporate civil tort liability under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, is a merits question, as it has been treated by all courts prior to the decision below, or an issue of subject matter jurisdiction, as the court of appeals held for the first time. Also at issue is whether corporations are immune from tort liability for violations of the law of nations such as torture, extrajudicial executions or genocide, as the court of appeals decisions provides, or if corporations may be sued in the same manner as any other private party defendant under the ATS for such egregious violations, as the Eleventh Circuit has explicitly held. The case will be argued on February 28, 2012.

*Background information and documents relating to the matter may be found at:*

<http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/10-1491.htm>

## Energy Department: Marcellus Shale Reserve Estimates Appear to be Inflated

According to initial information released on January 23, 2012 by the U.S. Energy Information Administration, in the *Early Release Report* which presents a preview of the findings that will be presented later this spring in the complete *Annual Energy Outlook* (AEO), one rich new source of natural gas, the Marcellus Shale, a formation extending northeastward from West Virginia to New York, does not contain the initially estimated 410 trillion cubic feet of shale gas, but more likely holds 141 trillion cubic feet. The marketplace has already responded to the decline in natural gas prices, with a leading producer of natural gas this week announcing production cuts.

*The AEO Early Release Report may be viewed at:*

<http://www.eia.gov/forecasts/aeo/er/>