From: Storm, Evan
Sent: Thursday, August 04, 2016 12:23 PM
To: [redacted]
Subject: RE: Determining sales in or into the US under 802.50 and 802.51

[redacted]

As long as the products aren't designed specifically for the US, to the exclusion of other markets, these would not be US sales.

Regards
Evan

From: [redacted]
Sent: Thursday, August 04, 2016 11:54 AM
To: Whitehead, Nora
Cc: Walsh, Kathryn E.; Gillis, Diana L.; Storm, Evan; Shaffer, Kristin
Subject: RE: Determining sales in or into the US under 802.50 and 802.51

Nora,

I have a clarification from my client and would like to assess if it impacts the advice below. My client is a target in a foreign to foreign acquisition ("Target"). In summarizing facts relating to Target's sales in or into the US for purposes of applying 802.51, I stated below that Target's "inputs are not designed specifically to be incorporated into end products for sale only in the US." I now understand it is the case that customers routinely provide production specs relating to Target's inputs. In the case of US-based customers it is likely that some of these specs relate to US standards such as environmental standards that the customer's end product must meet if sold into the US, but Target generally does not track this information in the ordinary course and does not have control over where the end products are sold. While the Target sometimes knows that certain specs relate to US standards, Target does not know whether the customer sells the end products incorporating Target's inputs meeting US standards only in the US or instead sells them in a broader geographic area (e.g., globally). Likely Target would have significant difficulty determining which specs relate solely to US standards and further whether end products incorporating inputs meeting those specs were ultimately sold in the US versus elsewhere. Does this change the conclusion below?

Many thanks,

[redacted]

From: Whitehead, Nora [mailto:nwhitehead@ftc.gov]
Sent: Wednesday, July 27, 2016 9:32 AM
To: [redacted]
Cc: Walsh, Kathryn E.; Gillis, Diana L.; Storm, Evan; Shaffer, Kristin
Subject: RE: Determining sales in or into the US under 802.50 and 802.51

Agree – these are not US sales.

Nora Whitehead

(202) 326-3262

From: [redacted]
Sent: Tuesday, July 26, 2016 5:40 PM
To: Whitehead, Nora; Storm, Evan; Shaffer, Kristin; Gillis, Diana L.; Walsh, Kathryn E.
Subject: Determining sales in or into the US under 802.50 and 802.51

Hi all,

I would like to confirm my understanding on determining sales in or into the US under 802.50 or 802.51. Assume Target to an acquisition has direct sales in or into the US well under $50 million (as adjusted). Target sells an input used in manufacturing. Some of its products are sold to manufacturing plants outside the US owned by US customers or by foreign subsidiaries of US customers. Title and risk of loss to the products sold to these US customers passes outside the US at the foreign manufacturing plants. Target has no control of where the final products incorporating its input are sold by its US customers, and these inputs are not designed specifically to be incorporated into end products for sale only in the US. My understanding is that this is the end of the assessment and these are not sales into the US. See, e.g., PNO Manual 5th ed. Opinion 153. This is also consistent with the below informal opinion (1006012, dated June 30, 2010).

https://www.ftc.gov/enforcement/premerger-notification-program/informal-interpretations/1006012 (Bananas sold to a US army base in Iraq where title and risk of loss pass in Iraq are not US sales even though the US government pays for the banana in the US)

Specifically, in my situation I understand it is not relevant for this assessment whether the sales contract is governed by US law, the sales are negotiated with a US office or customer rep located in the US, or the sales are invoiced to or paid from a US office of the customer. Note, I have no information on these additional factors, but suspect that to run them down would require marching through invoiced sales over the course of the past year, so I am hopeful that I am correct that such an exercise will not be necessary.

Do you agree?

Many thanks,

[redacted]