

Enactment of New Law Means Increased Duty Evasion Investigations by Customs

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On February 24, 2016, **President Obama** signed the ***Trade Facilitation and Trade Enforcement Act of 2015 (TFTEA)***. One of the provisions of the TFTEA significantly enhances the U.S. government's ability to combat duty evasion for *antidumping (AD)* and *countervailing (CVD)* duties. As a result of these new provisions, ***U.S. Customs and Border Protection (CBP)*** will now take on a more active role investigating possible AD and CVD evasions, and imposing penalties on non-compliant importers.

I. Background.

Under U.S. law, U.S. companies that believe they are being injured by imports that are dumped at low prices in the United States can petition the U.S. government to impose AD duties to offset the dumped imports. In addition, U.S. companies that believe that they are being injured by imports that are subsidized by foreign governments can petition the U.S. government to offset those subsidies by imposing CVD duties. Over the past 10 years, most of the AD and CVD petitions have been filed by domestic producers against imports from China.

However, even if U.S. companies have successfully petitioned the U.S. government to impose AD and CVD duties, they have loudly complained that some foreign producers and U.S. importers are evading the payment of AD/CVD duties. According to a coalition of U.S. producers, some foreign producers are transshipping to the U.S. products subject to AD/CVD via third countries and then falsely designating the product as originating in the third country to evade the duties. In other cases, foreign producers are making inconsequential modifications to the product in third countries to avoid the payment of AD/CVD duties. The coalition of domestic producers also complains that foreign producers are falsely labeling their products to avoid the payment of AD/CVD duties.

Domestic producers — companies that spent considerable money to have the U.S. government impose the AD and CVD duties in the first place — complained loudly to Congress about duty evasion. One of the main themes of their complaints was that CBP was failing to adequately investigate duty evasion and any investigations pursued by CBP often took years to complete.

Largely as a result of the domestic producer's persistent complaints, Congress took action in the TFTEA to insist that CBP treat evasion of AD/CVD orders as a trade priority. The TFTEA established within CBP a new "Trade Remedy Law Enforcement Division," which is charged with the development and administration of policies to prevent and counter evasion. The centerpiece of the TFTEA is the establishment of an entirely new administrative procedure for investigating claims of evasion of AD/CVD orders, which the Trade Remedy Law Enforcement Division will administer.

II. Summary of TFTEA Provisions Concerning AD/CVD Duty Evasion

The following is a summary of the relevant provisions of the TFTEA:

Definition of "Evasion:" The TFTEA defines "evasion" as entering covered merchandise into U.S. customs territory by means of "any document or electronically transmitted data or information, written or oral statement, or act that is material and false, or any omission that is material" and that results in any cash deposit or AD/CVD duties being reduced or not being applied with respect to that merchandise. The TFTEA specifically exempts from the evasion enforcement provisions any transmission, statement, act, or omission that results from a "clerical error." However, if CBP determines that the clerical error is part of a "pattern of negligent conduct," then the evasion enforcement provisions would apply.

Initiation of Investigation: Investigations of evasion are initiated either by: (1) the filing of an allegation with CBP by an "interested party" (including a U.S. producer, foreign producer/exporter, U.S. importer, union, or trade association); or (2) referral by any other federal agency. Referrals to the CBP can be from any federal agency, including the U.S. Department of Commerce (DOC) or the U.S. International Trade Commission. The allegation or referral need only contain information that "reasonably suggests" that a person has entered covered merchandise into U.S. customs territory through evasion.

Information Sharing: The TFTEA contains provisions that direct various federal agencies to share information during the course of an evasion investigation. If CBP receives an allegation of evasion and is unable to determine whether the merchandise in question is subject to the AD/CVD order, the TFTEA directs CBP to solicit a scope ruling by the DOC. In addition, if, during the course of an evasion investigation CBP has reason to suspect the merchandise in question may pose a health or safety risk to consumers, the TFTEA directs CBP to provide the information to the appropriate federal agencies for purposes of mitigating the risk.

Deadline: The TFTEA stipulates that if the information in the allegation or referral is sufficient, CBP must initiate an investigation within 15 business days after receiving the allegation or referral. The TFTEA generally requires CBP to make a determination on the allegation of evasion within 300 days after the date on which CBP initiates the investigation. CBP may extend the deadline by up to 60 days if CBP determines that the investigation is "extraordinarily complicated."

Authority to Issue Questionnaires: The TFTEA authorizes CBP to issue questionnaires, either to the interested party that filed the allegation, the person alleged to have entered the merchandise through evasion, a foreign producer or exporter of covered merchandise, and/or the government of the country from which the merchandise was exported. These questionnaires are separate from CBP's current audit procedures. The TFTEA also authorizes CBP to take an "adverse inference" if a party fails to cooperate by "not acting to the best of the party or person's ability to comply with a request for information." The adverse inference can be applied by relying on the allegation of evasion, CBP's determination in another investigation, or any other available information.

Notification: The TFTEA states that when CBP makes a determination, CBP must, within 15 days after the determination, notify the interested party that filed the allegation the results of CBP's determination. CBP also may at that time provide to importers the information that was discovered in the investigation, if CBP determines that such disclosure will "help educate" importers.

Consequences of an Affirmative Determination of Evasion: If CBP makes an affirmative determination of evasion, CBP shall suspend liquidation of unliquidated entries of the merchandise in question, and require cash deposits against potential AD/CVD duties, effective with entries entered on or after the date of initiation. In addition, CBP will extend the period for liquidating any unliquidated entries that were entered before the date of initiation. The TFTEA also directs CBP to take additional civil and criminal enforcement action as appropriate, including fraud, gross negligence, and/or negligence penalties under Section 592 of the Tariff Act (19 U.S.C. § 1592), seizures under Section 596 of the Tariff Act (19 U.S.C. § 1595a), or civil or criminal investigation by U.S. Immigration and Customs Enforcement.

Provisional Measures: Within 90 days of initiating an investigation, CBP shall decide whether there is a "reasonable suspicion" that the merchandise in question was entered through evasion. If CBP determines that there is a reasonable suspicion, CBP shall suspend liquidation of unliquidated entries of covered entries that entered on or after the date of initiation of the investigation, and extend the period for liquidation of unliquidated entries entered before the initiation. CBP is also authorized to take "additional measures" as "necessary," including requiring a single transaction bond or additional security, or the posting of a cash deposit with respect to the covered merchandise.

Administrative and Judicial Review: The TFTEA allows any person determined to have entered covered merchandise through evasion to appeal a determination to the CBP Commissioner. The appeal must be completed within 60 days after it is filed. The Commissioner's administrative review can then be appealed to the U.S. Court of International Trade (CIT). The CIT will review to determine whether CBP fully complied with the evasion review and/or administrative appeal procedures, and whether CBP's determination, finding, or conclusion is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. This standard of review provides a somewhat higher legal hurdle than the "substantial evidence" standard in CIT reviews of AD/CVD investigations and administrative reviews.

III. Potential Impact on Importers.

As a consequence of the TFTEA, importers can expect that duty evasion investigations by CBP officials will increase dramatically. In addition, we expect CBP to be more aggressive in issuing penalties in situations where the importer imports merchandise clearly within scope of an AD/CVD order, but has not posted cash deposits of estimated duties. Finally, even without the filing of a duty evasion allegation by a U.S. producer, it is likely that CBP will increasingly focus on AD/CVD duty collection. For example, we are seeing increased activity by CBP in investigating—through "requests for information" and single-issue AD/CVD audits—whether goods are covered by the scope of AD/CVD orders.

What remains to be seen is how CBP's duty evasion investigations will operate within the existing framework of the DOC, the agency responsible for the enforcement of AD and CVD duties. For example, we have seen many instances in which CBP believes goods are in the scope of an AD/CVD order, but the importer disagrees. In these cases, we advise the importer to seek a scope ruling with DOC to confirm that the goods are not included within the scope of the AD/CVD orders. In many instances, DOC agrees with the importer. The question is whether CBP is going to treat this type of

situation as a potential duty evasion or whether CBP will limit its investigations to transshipments, false declarations of origin, or the mismarking of products. Stay tuned.

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