

CLIENT ALERT

New Rules Combating Trafficking in Counterfeit and Pirated Goods Impact E-Commerce

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On January 31, 2020, the Trump administration issued an executive order cracking down on U.S. businesses that import directly or facilitate the import of counterfeit or pirated goods, illegal narcotics and other contraband. The order, entitled “[Ensuring Safe & Lawful E-Commerce for US Consumers, Business, Government Supply Chains and Intellectual Property Rights](#),” directs various government departments and agencies to undertake a series of measures to carry out the president’s effort to combat illegal imports. The initiative has far-reaching implications not only for importers and brand owners but also for e-commerce platforms, government contractors, and service providers in the global supply chain that provide warehouse, customs brokerage and transportation services. Parties that fail to comply with the new measures may be barred from participation in certain transactions involving the federal government and/or banned from importing goods into the United States. Additionally, the Department of Justice will be notified of custom violations that are actionable under the False Claims Act, thus another implication is the potential for increased civil and criminal enforcement actions.

Background & Content

This executive order is a culmination of the president’s “call to action” to combat infringing goods set forth in his April 2019 “[Memorandum on Combating Trafficking Counterfeit and Pirated Goods](#).” The Memorandum outlined the impact that illicit goods are having on U.S. businesses and consumers and set in motion the administration’s effort to study and establish a plan to address the issue. The Department of Commerce subsequently issued a *Federal Register* notice on July 10, 2019 (84 FR 3281), soliciting public comment from IP rights holders, online third-party marketplaces, and other interested parties. The Department of Homeland Security followed up with its recent report, “[Combating Trafficking in Counterfeit and Pirated Goods](#)” on January 24, 2020.

The DHS report provides a roadmap on how the administration will accomplish the goals set forth in the president’s January 31st order. The report analyzes how e-commerce platforms, online third-party marketplaces and other parties in the global supply chain facilitate the import and sale of infringing goods. DHS states that it has devised a plan to “fundamentally realign incentive structures and thereby encourage the private sector to increase self-policing efforts” to fight the import of counterfeit and pirated goods. DHS will implement regulations to include:

- Ensuring that “all appropriate parties to import transactions are held responsible for exercising a duty of reasonable care.” This effort will include extending liability to parties well beyond the traditional importer of record, including warehouses, fulfillment centers, and e-commerce platforms that handle infringing goods. DHS explicitly stated that CBP would be charged with advising the Department of Justice on the types of customs violations that are actionable under the False Claims Act and publishing information on successful FCA claims.
- Increasing scrutiny on so-called “Section 321” import entries (entries with a value of \$800 or less). E-Commerce platforms and other online vendors are responsible for the vast majority of these low-valued imports that generally have avoided government inspection when imported by express couriers and the U.S. Postal Service (USPS).

- Prohibiting non-compliant companies and individuals from participating in CBP's Importer of Record Program. This prohibition could have a lasting impact, as the government "shall consider all appropriate action" to ensure that persons or entities debarred or suspended by CBP are excluded from the Importer of Record Program. This effort will require express consignment operations, carriers, and hub facilities to verify and refuse to engage in activities requiring an importer of record number with persons or entities that have been suspended, debarred, or ineligible for the Program under the criteria to be established. There will be increased scrutiny of international mail posts and efforts to reduce the international shipment of illicit goods.
- Pursuing civil and criminal fines, penalties, and injunctive actions against third party intermediaries dealing in infringing goods. This pursuit not only addresses enforcement actions under existing laws and regulations, but also indicates that DHS will seek statutory changes to enhance its enforcement power.
- Analyzing whether the fees collected by CBP are sufficient to cover the costs associated with processing, inspecting, and collecting duties, taxes and fees for courier packages.

In the executive order, the president adopts the DHS measures and directs the appropriate government departments and agencies to begin implementation. The president states that the government will impose significant penalties on parties that fail to comply with the new measures. Any parties or person "who knowingly, or with gross negligence, imports, or facilitates the importation of, merchandise into the United States in material violation of Federal law evidences conduct of so serious and compelling a nature" will be referred to CBP to determine whether the parties should be allowed to participate in procurement and non-procurement transactions with the federal government. The order further states that CBP will be enforcing its discretionary authority to suspend and debar parties that run afoul the customs laws and ban them from importing goods into the United States.

Specific actions outlined in the order include:

- Instructing DHS to initiate a notice of proposed rulemaking establishing criteria for importers to obtain an importer of record number, and impose requirements for express couriers, hub facilities, and customs brokers to report parties that attempt to circumvent the new importer of record program.
- Directing the USPS, in conjunction with the Department of State, to extend the importer of record requirements to international postal shipments and monitor non-compliance by international posts.
- Requiring CBP and ICE to publish information about seizures of goods involving intellectual property violations, illegal drugs and other contraband, incorrect country of origin, undervaluation, and other violations of law.

Ramifications

The effect of the president's executive order will be wide ranging on e-commerce platforms, service providers, and government contractors. Up until now, the importer of record has been the primary party liable for penalties and enforcement actions associated with infringing imported goods. CBP usually would pursue parties such as customs brokers, warehouse operators, or e-commerce platforms only if they knowingly aided or abetted an importer in the importation of illegal goods. The initiative seeks to extend liability beyond the importer of record for gross negligent actions by a service provider that "facilitated" the import of such goods, an effort that likely would require additional statutory authority. The executive order makes clear that the government will consider criminal enforcement actions where appropriate.

International Trade Supply Chain – E-Commerce Platforms and Service Providers

The administration’s executive order will impact e-commerce and other online third-party platform businesses. The platform business often requires sellers to serve as the importer of record of goods sold on their platforms, thereby avoiding duty and penalty liability for illegally imported goods. The new initiative likely will impose requirements that may limit the ability of non-resident importers to serve as the importer of record, such as increased bonding requirements and more extensive information reporting requirements. More importantly, the crackdown on Section 321 shipments will slow down their entry due to increased inspections and enforcement measures by CBP, thereby delaying the fulfillment of online orders to customers.

The liability of platforms and service providers could also increase. A company other than the importer of record could face enforcement liability for infringing imports even if it is not the importer of record if it “facilitates” the imports by grossly negligent actions. It isn’t a stretch to predict that CBP would find that most companies in the global supply chain – customs brokers, carriers, warehouse operators, and e-commerce platforms – facilitate the entry of goods imported by their customers. The lower level of culpability sought by the administration will increase the liability of companies and require new procedures and business structures to mitigate risk.

Government Contractors and Present Responsibility

The administration’s executive order will particularly impact government contractors that are also importers of record. Those entities that have a dual role must ensure that they do not “flout the customs law,” or engage in any other activity whereby they could be found not presently responsible, as such acts could lead to debarment or suspension by CBP. Such a finding is required to be published in the System for Awards Management (SAM), the electronic roster of suspended and debarred individuals or companies excluded from Federal procurement and non-procurement programs throughout the U.S. Government. Conversely a government contractor that is suspended or debarred will likely not be able to be an importer of record. This additional layer will likely require additional review to one’s supply chain to ensure that the presently responsible entities can be deemed importers of record and/or be limited by the CBP as the agency considers various criteria consistent with applicable law.

Additionally, the CBP is required to develop new standards to measure efforts by foreign postal services providers to reduce counterfeit shipments. Foreign postal services that fail these standards may be subject to greater inspection of their shipments or be blocked from importing into the U.S. This could affect government contractors that ship goods through non-compliant international posts as their goods may be swept into the inspection or they may need to redirect shipments through compliant posts.

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