

Transparency Questions Linger As Duty Evasion Regs Loom

By **Alex Lawson**

Law360, New York (July 11, 2016, 6:26 PM ET) -- As U.S. Customs and Border Protection prepares its first round of regulations laying out a new system for challenging the evasion of remedial tariffs, experts are hoping that the agency addresses outstanding transparency and procedural questions about the investigation process.

A key prong of the trade enforcement bill inked by President Barack Obama in February was the establishment of the Trade Law Remedy Enforcement Division, which will be tasked with preventing and countering efforts to avoid payment of anti-dumping and countervailing duties. Regulations articulating the specifics of these proceedings are due next month.

But the legislation was ambiguous on the extent to which the new investigation process will feature an open dialogue between interested parties and CBP, which has historically conducted its probes in other areas of trade law without a great deal of transparency.

"The things ... our clients are looking for are transparency and a partnership between CBP, the trade community and U.S. industries," Wiley Rein LLP partner Timothy C. Brightbill told Law360. "That means having a process that allows us as domestic producers to have real input throughout and to give notice of what's happening as an evasion allegation moves through the process."

CBP currently conducts duty evasion claims through the e-allegations portal on its website. But once allegations are filed, the probe is carried out largely behind closed doors and without concrete timeframes for the agency to complete its work, creating a "black box" effect that has frustrated the trade community for years.

The law is being most closely tracked by domestic industries that will be filing evasion challenges, but the push for a more transparent system also extends to the importer side of the bar, according to White & Case LLP counsel Dean Barclay.

"The one thing that has become clear to me is that this is a very different kind of investigation than Customs is used to doing," Barclay told Law360. "I am very interested in looking at what the regulations are going to do because the law says it's going to have to look more like a Commerce Department investigation."

Barclay was referring to the probes that Commerce conducts in concert with the U.S. International Trade Commission that put anti-dumping and countervailing duties in place. Those proceedings feature notices of initiation, preliminary determinations and arguments made available to all interested parties in the dispute.

At this point, it is somewhat unclear how far CBP will go in mirroring the Commerce approach, and King &

Spalding LLP partner Michael Taylor said that the inclusiveness of the evasion policies is among the items he will be most closely examining when the regulations are made public.

“There’s a new tool available, but with that, it needs to have some real opportunities for the parties involved to see what’s happening and participate. That’s extremely important,” Taylor told Law360.

The regulations CBP releases next month will likely be of the interim variety, leaving the door open for interested parties to comment on further modifications. Given the considerable legislative lift that went into passage of the bill, CBP will likely not be short on stakeholder suggestions.

Late last month, a bipartisan group of five U.S. senators wrote to the heads of CBP and its parent agency the U.S. Department of Homeland Security, articulating a brief wishlist for the regulations. As part of their pleas for transparency, the lawmakers stressed that CBP must notify interested parties of “key milestones” in the case, such as initiation, interim rulings or referrals to Commerce.

The statute gives CBP considerable latitude regarding whether it will offer an accompanying explanation when it makes a final decision on an evasion claim. Under the law, CBP “may” provide the basis for its determinations, and some attorneys are hoping the regulations can provide clarity on how CBP will exercise that discretion.

“Just like with other agency determinations, there is a need, I think, for the findings to be released or at a minimum for there to be some public statements about what the basis for the determinations were,” Taylor said.

The trade community will also be looking to see how CBP strikes a balance between the calls for openness and the need to protect sensitive or confidential business information.

For instance, one portion of the law allows Commerce or the ITC to provide CBP with any salient information that might be useful in an evasion probe, but it won’t be clear how that sharing will be handled until the regulations are finalized.

“Will people that submit proprietary information at the Commerce Department even know whether their proprietary information was given to another government agency to use for evasion investigations?” Crowell & Moring LLP attorney Benjamin Caryl asked. “That will be an interesting area to see if it’s dealt with at all and if so, how.”

As domestic industries look to the regulations for guidance on how they should pursue claims of evasion, importers will have to closely examine the law’s regulatory infrastructure so as to adjust their compliance programs to a new world of CBP enforcement, according to Barnes Richardson & Colburn partner Lawrence M. Friedman.

“An affirmative finding of evasion is very likely to spark an investigation of past entries and a penalty claim covering as much as the previous five years of entries,” Friedman told Law360. “If a small importer negligently failed to pay [duties] for five years, the requirement to pay all of the duties plus interest and a penalty is very possibly a corporate death sentence.”

--Editing by Christine Chun and Kelly Duncan.