

New Customs and Trade Bill Focused on Strong Enforcement and Facilitation Likely To Be Enacted

On December 9, following a bicameral conference committee to reconcile the House and Senate versions, Congress released the Trade Facilitation and Trade Enforcement Act of 2015 (ENFORCE Act), a major customs and international trade bill designed to modernize U.S. Customs and Border Protection's (CBP or Customs) procedures, promote trade facilitation, prioritize certain trade issues, and strengthen enforcement of U.S. international trade laws.

Notably, the Act provides the Administration multiple new tools to achieve these goals, including:

- the establishment of formal duty evasion investigation and prevention programs;
- importer risk assessment and importer of record programs;
- new requirements that customs brokers identify importers;
- import-related intellectual property rights enforcement initiatives;
- changes in classification and duty rates for certain textile and apparel imports;
- an interagency Import Safety Working Group;
- trade facilitation provisions related to the *de minimis* value for duty-free entry, returned imports, residue of cargo, and duty drawback;
- increased cooperation and partnerships with the private sector; and
- an expanded State Trade Expansion Program.

The House passed the ENFORCE Act by a vote of 256-158 on December 13, and the Senate is expected to vote on it in early 2016 (without amendment). Thus, U.S. importers, exporters, and manufacturers should become familiar with the below provisions to begin adapting to maximize opportunities and navigate challenges presented by the new U.S. customs and international trade landscape and regime.

Duty Evasion Prevention

The ENFORCE Act establishes within CBP a Trade Law Remedy Enforcement Division charged with:

- Developing and administering policies to prevent and counter **evasion**, defined as bringing merchandise into U.S. customs territory by any means that is material and false or results in the reduction or elimination of applicable antidumping and countervailing duty (AD/CVD) duties. This includes the application of single entry and continuous bonds.
- Directing enforcement and compliance assessment activities concerning evasion; and

- Developing and conducting commercial risk assessment targeting of potentially evading imports.

The Act provides procedures and timelines for CBP to investigate allegations of evasion of AD/CVD duties filed by interested parties—U.S. importers, producers or wholesalers; foreign producers or exporters; or unions and trade associations thereof. If CBP finds duty evasion, the remedy is focused on collecting the duties that importers failed to pay, for example by suspending liquidation pending the Commerce Department’s determination of the applicable AD/CVD duties, requiring cash deposits or single entry bonds, or requesting U.S. Immigration and Customs Enforcement (ICE) section of the U.S. Department of Homeland Security (DHS) to pursue a criminal or civil investigation.

If an interested party disagrees with CBP’s evasion determination, that party may request an internal *de novo* review by CBP’s Commissioner. If that party disagrees with the evasion determination in the *de novo* review, then the party may appeal to the U.S. Court of International Trade which will determine whether CBP followed the proper procedures for the evasion investigation and review, and whether CBP’s determination was arbitrary, capricious, or an abuse of discretion.

Other Trade Enforcement Initiatives

In addition to the duty evasion initiative described above, the ENFORCE Act includes many other completely new trade enforcement initiatives as well as significant changes to several existing programs.

Under the Act, Customs will be required to establish the following as priority trade issues:

- Agriculture programs;
- Antidumping and countervailing duties;
- Import safety;
- Intellectual property rights;
- Revenue;
- Textiles and wearing apparel; and
- Trade agreements and preference programs.

The Act directs Customs to establish an **importer risk assessment program** whereby, among other things, CBP (a) adjusts bond amounts for importers based on risk assessments and (b) increases screening of imports of new importers including nonresident importers. The Act also directs DHS and CBP to establish an **importer of record program**, including the assignment

and maintenance of importer of numbers based on sufficient information to verify the existence and identify changes in address and corporate structure of any importer requesting an importer of record number.

Under the Act, customs brokers are required to affirmatively identify importers using reasonable procedures to verify the authenticity of information collected and maintain records of such information or face up to \$10,000 for each violation and have their broker license revoked.

Import-Related Intellectual Property Rights Enforcement

The ENFORCE Act permits CBP to provide information that appears on imported merchandise that is suspected of infringing a trademark or copyright (e.g., packaging, labels, images of the merchandise) or in certain cases samples of the merchandise for examination and testing to the owner of the trademark or copyright.

The Act directs DHS to establish within ICE a National Intellectual Property Rights Coordination Center to (a) investigate sources that infringe intellectual property rights to identify organizations and individuals that produce, smuggle, or distribute such merchandise, (b) develop and expand the capability of agencies to enforce intellectual property rights, and (c) support the international interdiction of infringing merchandise destined for the United States.

The Act also establishes a Chief Innovation and Intellectual Property Negotiator at the Office of the U.S. Trade Representative.

Changes to Textiles and Apparel Classification and Duty Rates

The ENFORCE Act corrects several drafting errors to the trade preferences legislation passed by Congress in June 2015 that changed the tariff classifications and significantly increased (from 4 to 27.7% and from 20 to 37.5%) the tariff rates for recreational performance outerwear and protective active footwear. Under the Act, these products will still have separate tariff classifications from other apparel, but their general duty rates will return to their original level. Separate tax extender legislation passed in late December extended the effective date of the June tariff increases until March 2016. Importers of these products should closely monitor this situation to avoid significantly higher import duties if Congress' mistake is not permanently fixed.

The Act also allows for certain textile and leather travel goods (such as backpacks and sports bags) to be designated for duty-free treatment under the Generalized System of Preferences (GSP).

Finally, in response to the recent natural disaster in Nepal, the Act makes imports of certain textile and apparel items such as bags, carpets, shawls, and hats from Nepal to be eligible for duty-free treatment if Nepal satisfies the eligibility criteria of the Africa Growth and Opportunity Act (AGOA).

Import Health and Safety

The ENFORCE Act requires DHS and a newly created interagency Import Safety Working Group to develop an import safety rapid response protocol for responding to, recovering from, and mitigating the effects of, imports of merchandise identified as posing a threat to the health or safety of U.S. consumers.

Trade Facilitation: Modernizing/Streamlining Customs

The Act requires CBP to establish priorities and performance standards relating to the following functions and programs:

- The Automated Commercial Environment (ACE) system;
- The Centers of Excellence and Expertise (CEE's);
- Drawback for exported merchandise;
- Transactions relating to imported merchandise in bond;
- Collection of countervailing duties and antidumping duties;
- The expedited clearance of cargo;
- The issuance of regulations and rulings; and
- The issuance of Regulatory Audit Reports.

The Act increases the *de minimis* value of articles that may be entered informally and duty-free from \$200 to \$80.

The Act amends Chapter 98 of the Harmonized Tariff Schedule of the United States (HTSUS) regarding articles exported and returned, advanced or improved abroad and returned property by modernizing existing inventory management rules and reducing certain record-keeping burdens.

The Act exempts from duty the residue of bulk cargo contained in instruments of international traffic (e.g., containers, lift vans, cargo vans, shipping tanks, skids, pallets, caul boards, and cores for textile fabrics) previously exported from the United States.

The Act amends existing duty drawback and refund provisions such that claims must be made within 5 rather than 3 years, removes the existing duty drawback and refunds amounts, and directs the Treasury Department to promulgate regulations for calculating drawback and refunds.

Increased Cooperation and Partnerships with the Private Sector

The ENFORCE Act requires that participants in Customs partnership programs, such as Customs-Trade Partnership Against Terrorism (C-TPAT), actually receive commercially significant and measureable trade benefits. The Act also expands the Commercial Operations Advisory Committee to include twenty appointees from the private sector.

Export Promotion for Small Businesses

With the State Trade Expansion Program (STEP), the Act expands a pilot initiative providing grants to states to carry out export promotion programs for small businesses, including foreign trade missions, foreign market sales trips, design of international marketing media, trade show exhibition, and training workshops. The Act authorizes STEP grants of \$30 million per year to improve coordination between the federal government and the states, to authorize reverse trade missions, and procure consultancy services.

Child Labor, Casting Origin Marking, and Internet Access Tax Ban

The Act includes a potpourri of other random provisions, including the following three:

- **Child and Forced Labor:** The Act eliminates the consumptive demand exception to the existing ban on imports of goods made with convict, forced, or indentured labor (that exception carved out from the ban any goods for which there is insufficient U.S. production so that imports would meet domestic demands).
- **Country of Origin Marking of Certain Castings:** The Act amends the current law requiring visible country of origin marking for manhole covers to also cover inlet frames, tree and trench grates, lampposts, lamppost bases, cast utility poles, bollards, hydrants, and utility boxes and to require that the aforementioned marking remain visible after installation.
- **Internet Access Tax Ban:** The Act permanently prohibits state and local governments from imposing taxes on internet access or placing multiple discriminatory taxes on electronic commerce.

Miscellaneous Tariff Bill and Currency CVD Provisions Dropped from Final Bill

A controversial provision in the pre-conference Senate version that permitted the Commerce Department to treat undervalued currencies as countervailable subsidies was dropped from the ENFORCE Act. Instead, the Act provides for an enhanced biannual report by the Treasury Department to Congress on international exchange rate policies and requires the Administration to engage in bilateral talks with countries that may have engaged in currency manipulation, provides remedial actions the President may take if such talks are unsuccessful, and creates a

federal advisory committee to advise the Treasury secretary on international exchange rate policy.

The Miscellaneous Tariff Bill (MTB) remains unresolved because House Republicans consider MTBs in their current form to be earmarks that are banned under their conference rules. The conference report to the Act contains a non-binding statement that Congress should act as soon as possible to craft a new process for developing legislation to suspend duties on goods not domestically available.

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