Congress Passes Customs Bill Containing New Trade Enforcement and Facilitation Measures

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On February 11, the Senate passed the Trade Facilitation and Trade Enforcement Act of 2015 (also referred to as the "Customs Bill") by a 75-20 vote, sending the bill to President Obama's desk for signature. The House of Representatives had passed the bill in December by a vote of 256-148. The White House has already stated that President Obama will sign the bill into law. The new law seeks to enhance the enforcement of U.S. international trade laws, facilitate trade, and modernize U.S. Customs and Border Protection ("CBP"), among other goals.

New Anti-Evasion Procedures

Among the most important provisions in the Customs Bill is the creation of new procedures within CBP to prevent the evasion of antidumping and countervailing duty orders. "Evasion" under the bill refers to entering covered merchandise "by means of any document or electronically submitted 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 other security or any amount of applicable antidumping or countervailing duties being reduced or not being applied with respect to the merchandise." Clerical errors generally will not constitute evasion unless they are part of a "pattern of negligent conduct."

The bill requires the establishment of a Trade Remedy Law Enforcement Division within CBP's Office of Trade. The Division will be tasked with the trade enforcement and compliance assessment activities of CBP that concern evasion, including receiving and investigating allegations of evasion. The Division also will be authorized to issue "trade alerts" to ports directing further inspection, physical examination, or testing of merchandise and to require additional bonds, cash deposits, or other security.

In determining whether antidumping or countervailing duty orders are being evaded, CBP is directed to use all existing authority to collect information necessary to make such a determination. CBP is also authorized to collect information via questionnaires to persons who file allegations of evasion, persons alleged to have entered the merchandise, foreign exporters or producers of the merchandise, and foreign governments. If the person who filed the allegation, person alleged to have entered the merchandise, or the foreign producer or manufacturer does not cooperate to the best of its ability in providing requested information, CBP may apply an adverse inference against that person in making the evasion determination. CBP is authorized to conduct verification of relevant information, including on-site verification. The bill also authorizes information sharing between CBP, the Department of Commerce, and the International Trade Commission. If CBP is unable to determine whether the merchandise being investigated is covered by an antidumping or countervailing duty order, CBP can refer the matter to the Department of Commerce to determine if the merchandise is within the scope of an order.

Investigations into possible evasion can be initiated on the basis of allegations submitted to CBP by certain "interested parties" or by referral from another federal agency. The following "interested parties" may submit an allegation of evasion to CBP: foreign manufacturers, producers, or exporters of the covered merchandise; U.S. importers of the covered merchandise; U.S. manufacturers, producers or wholesalers of a domestic like product; trade or business associations composed of the parties mentioned above; and unions representing U.S. industries engaged in the manufacture, production, or wholesale of a domestic like product.

The bill itself does not describe what must be included in an allegation, beyond explaining that the allegation is to be "accompanied by information reasonably available to the party that filed the allegation." It will be the duty of the Director of the Trade Remedy Law Enforcement Division to develop "guidelines on the types and nature of information that may be provided in such an allegation of evasion." We assume that CBP will issue regulations or some other form of guidance regarding the necessary content of an evasion allegation before these new provisions take effect.

Upon the receipt of such allegations, CBP has 15 business days to initiate the investigation if CBP determines that the information submitted "reasonably suggests that covered merchandise has been entered into . . . through evasion." CBP then has 90 days to determine whether there is a "reasonable suspicion" that covered merchandise was entered through evasion. If so, then CBP is required to suspend liquidation for merchandise entered on or after the date of initiation, extend the period for liquidating unliquidated entries of merchandise entered before the date of initiation, and to take such additional measures as necessary to protect the revenue of the United States. CBP must make a final determination regarding evasion within 300 days from the date of initiation, but this deadline can be extended by 60 days if the investigation is "extraordinarily complicated." If the matter is referred to the Department of Commerce for a scope determination, these deadlines are stayed while Commerce makes its determination.

If CBP finds that evasion has occurred in its final determination, CBP is required to suspend (or continue to suspend) liquidation of entries of merchandise entered on or after the date of initiation and on or before the date of the determination, extend (or continue to extend) the period for liquidating unliquidated entries of merchandise entered before the date of initiation, and to request from Commerce the applicable assessment rate or cash deposit rate for the merchandise. If the producer or exporter is unknown, Commerce is to identify the highest cash deposit or assessment rate (as the case may be) applicable to any producer or exporter. In addition to requiring the appropriate cash deposits and assessing the appropriate duties in accord with the instructions from Commerce, CBP is also authorized to take such additional enforcement measures as CBP deems appropriate.

The party who filed an allegation or a person determined to have entered merchandise via evasion may request de novo review by the CBP Commissioner within 30 business days of the final determination. The Commissioner has 60 business days to complete the review. If a party is still aggrieved, it may seek judicial review at the Court of International Trade within 30 business days of the Commissioner's determination. The Court of International Trade will examine whether the Commissioner fully complied with all relevant procedures under the law and whether "any determination, finding, or conclusion is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." The bill clarifies that nothing in the new law is meant to affect the availability of judicial review to an interested party under any other provision of law, and explains that scope decisions by Commerce following referral by CBP can be reviewed pursuant to existing provisions for challenging scope determinations.

The new anti-evasion provisions will take effect 180 days after enactment, and CBP is instructed to issue regulations implementing these provisions within that same 180-day period.

Increased Intellectual Property Rights Enforcement

If CBP suspects that intellectual property rights are being infringed, it may share information appearing on the merchandise and its packaging and labels, and in some cases samples of the merchandise, with the trademark or copyright owner in order to determine whether the articles are being imported contrary to law. The bill also instructs the Secretary of Homeland Security to authorize a process pursuant to which CBP shall enforce a copyright for which the owner has submitted an application for registration.

Outside of CBP, the bill establishes a National Intellectual Property Rights Coordination Center within Immigration and Customs Enforcement to protect intellectual property rights and to investigate producers, smugglers, and distributors of infringing merchandise.

Other Trade Facilitation and Enforcement Provisions

The Customs Bill requires CBP to work with other agencies to facilitate trade, and the Commissioner of CBP is required to establish priorities and performance standards related to the following:

- The Automated Commercial Environment ("ACE")
- Trade issues described in the bill as "priority trade issues"
- Centers of Excellence and Expertise

- Drawback for exported merchandise
- Transactions relating to imported merchandise in bond
- Collection of antidumping and countervailing duties
- The expedited clearance of cargo
- The issuance of regulations and rulings
- The issuance of Regulatory Audit Reports

The bill defines the following as "priority trade issues":

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

To enhance its enforcement efforts, CBP will be required to establish targeted risk assessment methodologies and standards for evaluating the risk that cargo destined for the United States may violate U.S. customs and trade laws. The bill also authorizes the Executive Director of the National Targeting Center to issue "trade alerts" directing further inspection, or physical examination or testing, of merchandise to ensure compliance with the customs and trade laws.

The Customs Bill also has a number of provisions related to identifying the importer of record. Within 180 days of enactment, the Secretary of Homeland Security is required to establish an importer of record program that will assign and maintain importer of record numbers. This program will include the development of criteria that importers must meet in order to obtain an importer of record number. The bill also requires the establishment of an importer risk assessment program within 180 days of enactment, which will include the adjustment of bond amounts and increased screening based on CBP's risk assessment.

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The Customs Bill will affect many areas of international trade and customs law. The provisions discussed in this update are not meant to be exhaustive, but instead highlight some of the important provisions in the bill. For more information about the Customs Bill, please contact a Hughes Hubbard attorney.

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