

# CBP Publishes Interim Procedures for Investigations of Claims of Evasion of Antidumping and Countervailing Duties

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On August 22, U.S. Customs and Border Protection ("CBP") published interim regulations setting forth procedures for CBP to investigate alleged evasion of antidumping ("AD") or countervailing ("CV") duty orders. The interim regulations, which take immediate effect, implement provisions of the newly-enacted Trade Facilitation and Trade Enforcement Act of 2015, which we summarized in an earlier **client alert**.

Below, we address the following aspects of the interim regulations:

- **Scope and purpose of the interim regulations:** the interim regulations set deadlines and procedures for CBP to investigate the alleged "evasion" by an importer of product subject to AD or CV duties.
- **Process for triggering an investigation:** the interim regulations allow private parties that fall within the definition of "interested parties" and federal agencies to formally request CBP to initiate an investigation into alleged evasion.
- **Initiation and notification of investigations – and possible use of "interim measures":** CBP will open an investigation where it finds that information in a formal request "reasonably suggests" that an importer has entered merchandise into the United States through evasion. The interim regulations allow CBP to take interim measures where it has a "reasonable suspicion" that the importer concerned is evading an AD or CV order.
- **Creation of administrative record and possible use of adverse facts:** CBP is required to maintain an administrative record containing all information it relied upon during its investigation. CBP will obtain necessary information through questionnaires and written correspondence with parties to the investigation. Failure by a party to provide CBP information in a timely manner may result in CBP's use of facts adverse to that party's interests.
- **Treatment of confidential information:** the interim regulations do not provide for an administrative protective order ("APO") mechanism. However, interested parties may request that CBP treat submitted information as business confidential information ("BCI"). The interim regulations designate certain categories of information as ineligible for BCI treatment.
- **Alternatives to filing allegation:** the risk that CBP may deny BCI treatment to an interested party's information might prompt a party to consider lobbying a separate federal agency to submit a "referral" to CBP instead of doing so itself.
- **Determinations:** CBP has up to a maximum of 360 days to issue a determination as to evasion. If it makes a positive determination, CBP will take certain measures against entries of the merchandise at issue in conjunction with the U.S. Department of Commerce ("DOC").
- **Administrative and Judicial Reviews:** any party to the investigation may seek a *de novo*

administrative review of CBP's determination as to evasion. This review concludes with issuance of a final administrative determination to the parties, which may be appealed to the U.S. Court of International Trade ("CIT").

### **Scope and purpose of the interim regulations**

CBP may initiate an investigation into alleged "evasion" on the basis of "allegations" submitted to it by "interested parties," or by "referrals" from other federal agencies. The interim regulations define evasion as "the entry of covered merchandise into the customs territory of the United States for consumption 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 other security or any amount of applicable antidumping or countervailing duties being reduced or not being applied with respect to the covered merchandise."

"Interested parties" are defined in the interim regulations to include foreign manufacturers, producers, exporters, or importers of the merchandise at issue; U.S. manufacturers, producers, processors, growers, or wholesalers of a domestic like product; trade 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. "Allegations" are formal requests lodged by interested parties for CBP to investigate alleged evasion. Analogous requests to CBP from other federal agencies are termed "referrals" in the interim regulations.

Import entries that may be subject of an allegation or agency referral are those made within one year before receipt of the allegation or referral. The interim regulations specify further that CBP may not initiate an investigation where the alleged evasion is the result of a clerical error or the allegation or referral has been withdrawn by the interested party or agency. The interim regulations clarify that while clerical errors do not constitute evasion, CBP may take "appropriate actions" against erroneously recorded import entries to ensure that all AD or CV duties owed to the Government are correctly assessed and collected.

CBP was already authorized, prior to issuance of the interim regulations, to take a broad range of enforcement actions against companies or individuals seeking to evade AD or CV orders. The interim regulations do not limit CBP's authority to act under other provisions of law with respect to any information obtained during an investigation conducted under its terms. For instance, CBP may continue to assess customs penalties for fraud or negligence under 19 U.S.C. § 1592 in appropriate circumstances.

Private parties that submitted allegations of evasion to CBP under earlier provisions of law did not have the benefit of formal investigative procedures. The interim regulations introduce deadlines and require CBP to notify interested parties of the outcome of its investigations. The interim regulations also streamline inter-agency cooperation, in specifying the form and content of agency requests for CBP to investigate alleged evasion, and formalizing a separate referral process by which CBP may request the DOC to determine whether the merchandise at issue is properly within the scope of an existing AD or CV order. Referrals to the DOC pursuant to this separate process stop the clock from running during the pendency of the DOC's determination.

### **Process for triggering an investigation**

Allegations can be submitted through CBP's e-Allegations system. They must specify the name and contact details of the interested party making the allegation; the basis upon which the alleging party is "interested"; the name and address of the importer against whom the allegation is brought; a description of the merchandise at issue; applicable AD and/or CV orders; and information that is "reasonably available" to the interested party to support its allegation. The interim regulations authorize CBP to assist interested parties with the preparation of an allegation. Such assistance neither forms part of administrative record, nor triggers any of the deadlines specified in the interim regulations.

Referrals, like allegations, must specify the name of the importer against whom the referral is brought; a description of the merchandise at issue; applicable AD and/or CV orders; and information that "reasonably suggests" that the importer has entered covered merchandise into U.S. commerce through evasion. Additionally, referrals should specify a point of contact within the referring agency; and indicate any knowledge or belief that the merchandise at issue poses health or safety risk to consumers.

### **Initiation and notification of investigations — and possible use of "interim measures"**

The interim regulations require CBP to initiate an investigation where it determines that the merchandise at issue is properly within the scope of an AD or CV order, and the information provided in the allegation or referral "reasonably suggests" that merchandise covered by an AD or CV order has entered U.S. commerce through evasion. CBP has 15 business days from receipt of an allegation to determine whether to initiate an investigation. If CBP declines to open an investigation, it must inform the alleging party within 5 business days of this determination. Such determination is not subject to judicial review. If CBP decides to proceed with an investigation, CBP's newly created Trade Remedy Enforcement Directorate is tasked with conducting the investigation.

The interim regulations require CBP to notify all affected parties of its decision to initiate an investigation up to 95 calendar days after this decision has been made. CBP has up to 90 calendar days to issue "interim measures," if it determines that there is a "reasonable suspicion" that the importer entered covered merchandise into the U.S. through evasion. Such measures can include the suspension of liquidation of an importer's entries and the requirement that such importer secure a single transaction bond or post a cash deposit. CBP has up to 5 business days to inform these parties of any interim measures taken — meaning that interim measures may be imposed for up to five days without any notice from CBP.

### **Creation of administrative record and possible use of adverse facts**

The interim regulations require CBP to maintain an administrative record containing all information and material that it obtained and considered in the course of its investigation, in addition to any written arguments submitted to it by interested parties, referring agencies and/or the importer against whom the allegation is brought, and summaries of oral discussions held with interested parties. CBP, in issuing a determination as to evasion, may not consider any information that is not properly filed with it. Thus, interested parties should anticipate that all probative information and material they submit to CBP in support of their allegation may form part of the administrative record.

The interim regulations state that CBP will generally obtain necessary information from other agencies, or through questionnaires and written correspondence with private parties. CBP may also conduct verifications of information it collects, whether in the United States or in foreign countries.

If a party fails to cooperate with an information request from CBP, CBP may apply adverse inferences to that party's interests by resorting to facts otherwise available when issuing a determination under the interim regulations. In applying any adverse inferences, CBP may rely on any information it has on file pertaining to the non-cooperative party.

### **Treatment of confidential information**

The interim regulations do not provide for an APO mechanism allowing counsel to view other parties' confidential information. However, interested parties are permitted under the interim rule to request that CBP treat relevant parts of their submissions as BCI. The interim guidelines generally contemplate that BCI treatment will be granted for information consisting of trade secrets and privileged or confidential commercial or financial information.

Interested parties seeking BCI treatment must identify all BCI in their submissions for which BCI treatment is sought by enclosing them in single brackets, and provide an item-specific explanation of

why this information qualifies as BCI. Such parties must also file a public version of their submissions on the same day as their confidential versions. Public versions must contain item-specific summaries of the redacted information that are sufficiently detailed to allow for a reasonable understanding of the substance of the BCI.

The interim regulations specifically designate the following information as ineligible for BCI treatment: identification of the party providing the information and the agent filing on its behalf; specification of the basis upon which the alleging party is "interested"; the name and address of the importer against whom the allegation is brought; the description of the merchandise at issue; and applicable AD and/or CV orders.

### **Alternatives to filing allegation**

The fact that CBP may deny BCI treatment to information bearing upon the identity of interested parties might deter such parties from lodging an allegation or providing information to CBP. Such parties might consider lobbying a separate federal agency to submit a referral to CBP instead. For example, an importer of certain agricultural products may learn from a customer that foreign foodstuffs that are subject to an AD or CV order are being introduced into U.S. commerce without payment of AD or CV duties. If the company were to lodge an allegation with CBP under the interim rule, the importer's identity would be revealed. Instead of raising the matter directly with CBP, the importer might prefer to alert the U.S. Department of Agriculture, which may be willing to undertake to refer the case to CBP pursuant to the interim rule.

### **Determinations**

CBP generally has 300 calendar days within which to issue a determination as to evasion. This period can be extended by an additional 60 calendar days for investigations presenting complex or novel issues. If it makes an affirmative determination, CBP is required to suspend or continue suspension of liquidation of entries of the merchandise at issue 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 the same merchandise entered before the date of initiation. In addition, CBP will request the applicable assessment rate or cash deposit rate for the merchandise at issue from DOC. CBP will then require the appropriate cash deposits and assess the appropriate duties in accordance with instructions from the DOC. CBP is also authorized to take any additional enforcement measures as it deems appropriate.

### **Administrative and Judicial Review**

Any party to the investigation may seek a *de novo* administrative review of CBP's determination as to evasion, within 30 days of its issuance, to CBP Office of Trade's Executive Director for Regulations and Ruling by serving all parties to the investigation with a public version of its administrative review request. Parties to the investigation are then afforded an opportunity to respond to the review request. CBP may, at its discretion, request additional written information from the parties pursuant to the same rules applicable to its investigations. Should the requesting party later withdraw its review request, the interim guidelines state that both review requests and responses to review requests remain part of the administrative record.

At the close of administrative proceedings, CBP issues a final administrative determination to the parties. A party may seek judicial review of the final administrative determination by filing a timely request with the CIT.

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