

Client Alert

International Trade & Litigation Practice Group

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Senate Passes Enforce And Protect Act Of 2015 Creating A New Avenue To Combat Evasion Of AD/CVD Duties

On February 11, 2016, the Senate passed the Trade Facilitation and Trade Enforcement Act of 2015 (H.R. 644) by a 75-20 vote, which previously passed the House on December 11, 2015 by a 256-148 vote. President Obama has indicated that he intends to sign the final bill into law. This comprehensive legislation includes the Enforce and Protect Act of 2015, which creates a new division and procedures in U.S. Customs & Border Protection (CBP) to combat the evasion of antidumping (AD) and countervailing duty (CVD) orders. King & Spalding actively sought the passage of, and provided significant input into, the Enforce and Protect Act during the years from introduction to final enactment.

The Enforce and Protect Act targets and addresses evasion of AD and CVD orders when covered merchandise is entered into the United States by reason of any “material and false” statement or omission 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.”

This provision constitutes a significant victory for domestic industries and workers who successfully have petitioned for relief from unfairly traded imports. Companies and unions now have a new avenue for addressing duty evasion. The new administrative procedures, which include additional oversight of CBP and the opportunity to seek remedial action, supplement the existing statutory provisions that already allow CBP to impose civil penalties for an importer that makes false statements when entering merchandise into the United States.

The Act Establishes A Trade Law Remedy Enforcement Division In CBP And Provides Deadlines For Public Determinations That Are Subject To Judicial Review

The Enforce and Protect Act of 2015 creates the Trade Remedy Law Enforcement Division (Enforcement Division) within CBP’s Office of International Trade. The Enforcement Division will be dedicated to preventing and remedying AD and CVD evasion and will develop regulatory procedures and policies to carry out its mandate. It also will develop commercial risk assessment targeting for potentially evading cargo, develop policies for the application of single entry and continuous

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bonds to sufficiently ensure the collection AD/CVD duties, and issue Trade Alerts regarding evading imports.

The new law also provides procedures that CBP must follow during the conduct of its investigations. After receiving an evasion allegation from an interested party (or a referral from another agency), CBP has 15 business days to determine whether to initiate an investigation. If CBP is unable to determine whether the merchandise at issue is subject to AD or CVD duties, it shall refer the matter to the Commerce Department. After initiating an evasion investigation, CBP has 90 days to determine whether to suspend the liquidation of merchandise that entered on or after the date of initiation. CBP then has 300 calendar days after the initiation date to make a final determination as to whether the covered merchandise was entered by means of evasion. This deadline may be extended by 60 calendar days where CBP concludes that the investigation is extraordinarily complicated and additional time is necessary. Final determinations by CBP and the Commerce Department under these new provisions will be subject to judicial review by the Court of International Trade.

The new law directs CBP to exercise all existing information collection authority to identify evasion. Moreover, it authorizes CBP to issue questionnaires to collect information from persons who may have relevant information. Importantly, the new law also makes clear that CBP may make adverse inferences against a person, exporter, or foreign producer alleged to have entered merchandise through evasion, regardless of whether requested information has been provided.

Other Tools Provided To CBP

The new law strengthens CBP's ability to combat evasion in other ways. It allows the Commerce Department and the International Trade Commission to share business proprietary information submitted to those agencies with CBP to assist in investigating evasion. Moreover, the law requires the United States to negotiate bilateral agreements with Customs authorities in other countries. These agreements would allow the foreign Customs authorities to cooperate with the United States on preventing evasion. In the past, CBP's efforts to combat evasion have been frustrated by lack of information on exporters or producers in foreign countries.

In addition, the new law provides CBP with additional bonding authority. CBP is required to establish a program that directs it to adjust bond amounts for importers, specifically new importers and non-resident importers, based on the level of risk assessed by CBP for revenue protection. Although CBP has bonding directives, those directives have not been updated in over a decade and did not permit CBP to increase bonding on an importer that did not have prior entries.

Reporting Requirements For CBP And Oversight

The new law requires CBP to submit a report on the effectiveness of its trade enforcement activities to the relevant Senate Finance and House Ways and Means Committees, no later than one year after the date of enactment. The report must include 1) a description of the use of resources, results of audits and verifications, targeting, organization, and training of CBP personnel and 2) a description of trade enforcement activities to address undervaluation, transshipment, legitimacy of entities making entry, protection of revenue, fraud prevention and detection, and penalties.

The new law also provides domestic companies and workers with greater oversight of CBP's efforts to address duty evasion. In the past, CBP has been hesitant to discuss the status of its efforts to curtail evasion of AD/CVD duties. By contrast, the new law requires CBP to issue a final determination regarding the domestic industry's allegations of evasion and to do so within specific deadlines. Moreover, to the extent that the interested party that filed the allegation of evasion disagrees with CBP's determination, the interested party may appeal that determination to the

U.S. Court of International Trade. Thus, the domestic industry will be able to monitor CBP's activities through CBP's reports to Congress and the publication of its final determinations.

Next Steps

CBP is required to promulgate regulations to implement its new duties within 180 days of enactment of the Act. Companies and workers that count on the disciplines of the AD/CVD laws should consider participating in the rulemaking process to help ensure that the regulations to be implemented will be effective. CBP is expected to issue a notice of proposed rulemaking well in advance of the 180-day deadline for issuing final regulations. Domestic industries should be prepared to comment on the proposed regulations to ensure CBP's regulations sufficiently address any issues or evasion schemes that domestic industries may have encountered in the past.

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