

Client Alert

International Trade & Litigation Practice Group

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Senate Passes Trade Facilitation And Trade Enforcement Act *Comprehensive Customs bill addresses several key topics*

Earlier today, the Senate passed the Trade Facilitation and Trade Enforcement Act of 2015 (H.R. 644) by a 75-20 vote. Today's action constitutes acceptance by the Senate of a conference agreement reached by House and Senate negotiators late last year. The conference agreement already passed the House by a 256-148 vote on December 11, 2015. Final action by the Senate had been delayed due to disagreement over the inclusion of an extension of the Internet Tax Freedom Act in the conference report. President Obama has previously indicated that he will sign the final bill into law.

Known generally as the "Customs bill," this comprehensive legislation addresses several key topics, including prevention of evasion of antidumping (AD) and countervailing duty (CVD) orders, import-related protection of intellectual property (IP) rights, import health and safety, and enhanced engagement and review of potential currency manipulation. Also included are several measures affecting U.S. Customs and Border Protection (CBP) modernization and importation into the United States generally, among many other issues. While several of these topics will be the subject of forthcoming in-depth Client Alerts, we provide a summary of some of the most important provisions here.

Prevention Of Evasion Of AD And CVD Orders

Known as the Enforce and Protect Act of 2015, this title creates the Trade Remedy Law Enforcement Division within the Department of Homeland Security (DHS), which will be dedicated to preventing and countering AD and CVD evasion. The goal is to target 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."

Under the legislation, CBP may investigate allegations that covered merchandise entered into the United States through evasion and must announce its determination, which will be subject to judicial review. In cases where the agency makes an affirmative determination of duty evasion, this process may lead to the imposition of AD and CVD duties and

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application of additional enforcement measures, including civil penalties and referral to U.S. Immigration and Customs Enforcement (ICE) for civil or criminal investigation.

This provision constitutes a significant victory for domestic producers who successfully have petitioned for relief from unfairly traded imports. These domestic producers will have a new avenue for addressing suspected illegal circumvention and duty evasion that provides for additional oversight and communication with CBP. CBP has 180 days from the date of enactment to issue regulations implementing this new enforcement tool.

Import-Related Protection Of Intellectual Property Rights

Another key provision is designed to provide enhanced protections for copyrights, trademarks, and other IP rights that are enforced by CBP or ICE. Among other things, the legislation empowers CBP to investigate merchandise suspected of infringing trademarks or copyrights by permitting rights holders to conduct examination and testing of the merchandise. Importantly, this new level of coordination between CBP and rights holders is only available to trademarks and copyrights that are recorded with CBP. Please contact us for additional details on how to record your trademarks and copyrights.

Other IP measures include a requirement that CBP and ICE assign sufficient personnel with “responsibility for preventing the importation into the United States of merchandise that infringes intellectual property rights.” ICE is also instructed to create a National Intellectual Property Rights Coordination Center, which must coordinate its efforts with several additional federal agencies and conduct outreach with the private sector.

Import Health And Safety

Another provision that exemplifies the far-reaching scope of the Trade Facilitation and Trade Enforcement Act mandates the establishment of an Interagency Import Safety Working Group. The working group will be comprised of leaders at several federal agencies, including DHS, the Department of Health and Human Services, the Department of the Treasury (Treasury), the Department of Commerce (Commerce), the Department of Agriculture, the United States Trade Representative, the Office of Management and Budget, the Food and Drug Administration, CBP, the Consumer Product Safety Commission, ICE, and other agencies that may be identified by the President.

The working group must participate in the creation of a Joint Import Safety Rapid Response Plan to be followed by CBP when faced with imports that pose threats to the health or safety of consumers in the United States. Additional duties for the working group include consultation with the private sector to ensure better import safety, including through inspection of foreign manufacturing facilities and improvements to the international supply chain.

Engagement On Currency Manipulation

Currency manipulation constituted one of the more contentious aspects of the debate on the Trade Facilitation and Trade Enforcement Act. Efforts by some members of Congress to mandate the treatment of currency manipulation as a countervailable subsidy were not successful. This would have constituted a significant change to the application of the U.S. trade remedy laws, because Commerce has to date declined to exercise its authority to investigate currency manipulation in prior CVD proceedings concerning China.

As it stands, the currency exchange rate provisions in this bill call for “enhancement of engagement on currency exchange rate and economic policies with certain major trading partners.” The bill requires Treasury to prepare detailed analytical reports to Congress on major trading partners. The reports may lead to “enhanced bilateral engagement” where the country is found to engage “in persistent one-sided intervention in the foreign exchange

market,” among other things. The bill empowers the President to take certain remedial actions if the country fails to take corrective action associated with currency manipulation, including cessation of federal government procurement activity from that country and prohibition of Overseas Private Investment Corporation financing for projects located there. The President may waive any remedial measures if such actions would cause more harm than good to the economy or would cause serious harm to national security. The legislation also creates a nine-member Advisory Committee on International Exchange Rate Policy, whose members must be comprised of individuals from the private sector who are selected by both chambers of Congress and the President (three members each).

Customs Modernization And Miscellaneous Provisions

The Trade Facilitation and Trade Enforcement Act also contains several measures affecting imports into the United States, including customs modernization, trade facilitation and trade enforcement, and other provisions. For example, the legislation instructs CBP to create additional Centers of Excellence and Expertise (CEE) to continue the development of expertise in key industries, supply chains, and compliance areas. CBP also is instructed to centralize all trade enforcement and trade facilitation operations within the CEE program, including “Priority Trade Issues,” which are identified as agriculture, AD and CVD, import safety, IP rights, revenue, textiles and wearing apparel, and trade agreements and preference programs.

The legislation contains significant changes to duty drawback, including a new requirement that manufacturing drawback claims be accompanied by a detailed bill of materials or formula identifying the relevant inputs by 8-digit Harmonized Tariff Schedule subheading number and quantity. There also are changes to the unused merchandise drawback program, including an extension of the deadline for exportation or destruction of imported merchandise from 3 to 5 years from the date of importation. An additional provision states that drawback claimants and importers may be jointly and severally liable for the full amount of the drawback claimed. Moreover, the legislation prescribes the creation of new regulations for the calculation of duty drawback within two years of enactment. These and other changes to the drawback program affect what is already among the most challenging areas of customs compliance and require careful review by the importing community.

Additional provisions of note include (1) the elimination of the consumptive demand exception to the prohibition on importation of goods made with convict labor, forced labor, or indentured labor; (2) additional tools to combat unlawful imports of honey into the United States; (3) enhanced CBP training to address unlawful imports, exports, or trafficking in cultural property, archaeological or ethnological materials, fish, wildlife, and plants; (4) a mandate for CBP to prepare reports on the agency’s revenue protection measures (including AD and CVD duties and commercial fines and penalties); and (5) new priorities and performance standards to assess the levels of achievement of customs modernization.

In sum, the Trade Facilitation and Trade Enforcement Act is a comprehensive package of customs and trade measures that will affect virtually every segment of the U.S. economy for years to come.

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