New Customs Bill Becomes Law

MSK Client Alert by Susan Kohn Ross

On February 24, 2016, H.R. 644 was signed into law by the President. While yet another trade-related bill was signed without any public ceremony, this new law contains a number of timely provisions. The first section deals with trade facilitation side-by-side with trade enforcement. The CBP Commissioner is directed to coordinate with the Director of U.S. Immigration and Customs Enforcement ("ICE") and develop a joint strategic plan. CBP is further directed to continue to solicit and consult with the private sector, plus coordinate with customs authorities in other countries and other U.S. federal agencies to facilitate legitimate trade and commerce, while, at the same time, enforcing U.S. trade laws.

What makes for more interesting reading is the Senate debate which led up to that body's approval. The transcript tells us what the legislators saw as the priorities. Senator Hatch highlighted the goals of the bill as to: 1) facilitate and streamline the flow of legitimate trade; 2) improve enforcement of U.S. trade laws; and 3) strengthen trade promotion authority. Senator Wyden talked in terms of the bill "coming down hard on the trade cheats…" There was also repeated reference to "merchandise laundering," meaning where goods made in one country are transshipped through a second country, relabeled as if made in that second country, and shipped into the U.S. to evade antidumping or countervailing duty. Whether it was honey, crawfish, garlic or mushrooms (the commodities cited), U.S. domestic producers are up against strong and sometimes unfair competition. For that reason, the U.S. Trade Representative is designated to lead the newly created Center on Trade Implementation, Monitoring and Enforcement. USTR is also, along with other tasks, to lead the effort to identify acts, policies and practices of foreign governments the elimination of which will lead to a significant potential increase in the growth of the U.S. economy.

CBP's current list of priority issues consists of antidumping and countervailing duty, import safety, intellectual property rights, textiles/wearing apparel, trade agreements and "comprehensive" trade enforcement. This new law mandates that list must, at the very least, consist of: agriculture programs, antidumping and countervailing duty, import safety, intellectual property rights, revenue, textiles and wearing apparel, and trade agreements and preference programs. The Commissioner is free to name other trade priorities and otherwise consolidate, modify or eliminate priorities, but only upon advance notice to Congress.

To the satisfaction of industry, the new bill frequently mentions partnership programs, those between CBP and the private sector, and makes clear these programs should be consolidated where possible and provide tangible benefits. Trusted traders are to be given "immediate clearance," absent evidence of national security or compliance threats. The bill also underscores the importance of the new computer system by mentioning ACE, ITDS and AES in the context of on-going accountability. With the full support of the trade community, there is a provision calling for regular reports by CBP regarding implementation of ACE by all the affected agencies, including CBP. GAO is also to report on ACE's progress. To that end, by June 30, 2016, CBP is to receive the criteria and data elements from each agency by which release of goods is to be authorized. The December 31, 2016 deadline for full implementation of ACE was also reiterated.

When it comes to trade enforcement, the focus is, not surprising: undervaluation; transshipment; legitimacy of entities making entry; protection of revenue; fraud detection and prevention; and penalties, including intentional misclassification, inadequate bonding and other misrepresentations. Also a focus of trade enforcement, but equally of trade facilitation are: ACE; the priority trade issues identified earlier; the Centers of Excellence and Expertise ("CEEs"); drawback; in-bond merchandise; collection of countervailing and antidumping duty; expedited release of cargo; issuance of regulations and rulings; and issuance of audit reports.

It has long been felt by many in the trade community, one reason for sloppiness, if not rampant cheating, is the staffs at both CBP and ICE who really understand trade fraud have retired. The institutional knowledge is gone, and so there has been a remarkable absence of significant trade fraud cases. Equally baffling is why so few audits are being conducted. Certainly the loss of institutional knowledge was cited by CBP as a major reason for creation of the CEEs. ICE acknowledged that same fact in creating the National Intellectual Property Rights Center (its primary trade fraud enforcement program). Congress endorsed the Center in the new law and then went further. It specifically recommended more and better training for CBP, going so far as to call for private sector assistance in such areas of physical inspection of goods, reviewing manifest and other documentation, valuation and supply chain programs, along with collection of countervailing and antidumping duties, evasion of duty on imported textiles, protection of intellectual property and enforcement of child labor laws.

Protection of the revenue is defined to include collection of antidumping and countervailing duties; commercial fines and penalties; use of bonds; in-bond tracking; the number and outcome of investigations; and the effectiveness of training when it comes to accountability, performance and collection of revenue.

Regarding importers of record, CBP is given 180 days from enactment to assign and maintain an importer of record program. Given the emphasis on collection of antidumping and countervailing duty, this new law requires CBP to collect sufficient information to verify the existence of the importer; identify linkages and affiliations to and between that importer and others; changes in address and corporate structure; and to maintain a centralized database in which CBP is able to evaluate the accuracy of the data and minimize the issuance of duplicate numbers to the same importer. As part of this process, CBP is also mandated to establish an importer risk assessment process, especially for new and nonresident importers, that includes increased screening of their imports. However, if the importer is C-TPAT Tier 2 or Tier 3, it is exempt. Minimum standards will be established for customs brokers and importers to be used to identify importers. What weighs in favor of the seriousness with which this information is to be gathered is the fine for failing to follow these information gathering requirements is not the maximum fine of $10,000, but rather, that failure to do so could lead to suspension or revocation of the broker's license.

The Interagency Safety Working Group is formalized but expanded to include engagement with foreign governments, identification of best practices for the safety of merchandise, inspection of manufacturing facilities, inspection of merchandise, protection of the international supply chain, and best practices so government at all levels and ports are able to more easily communicate and ensure the safety of merchandise. Also mandated is a Joint Import Safety Rapid Response Plan to deal with any health or safety threat by merchandise.

When it comes to intellectual property rights, there are some points of interest to rights holders. First, greater support for making unredacted samples available to rights holder so they may inspect the allegedly infringing goods. This option is limited to trademarks and copyrights recorded with CBP. However, the bill goes further and now provides that any copyright submitted to the Copyright Office may also be enforced. One interesting omission is, when discussing the ICE IPR Center and the scope of agencies with which it is to consult, the Copyright Office is notably absent from the list. There is a catchall provision and undoubtedly, the IPR Center will consult with the Copyright Office, but its omission is glaring. IPR is also impacted by the training recommendation for CBP. CBP is to consult with the private sector to identify opportunities for training collaboration. The law goes so far as to require CBP to come up with ways to receive donations of "hardware, software, equipment and similar technologies" and also to receive "training and other support services" so as to be able to better enforce IPR. Finally, the bill mandates CBP is to provide an educational program to arriving and departing travelers about the dangers of buying infringing goods, even mandating a declaration from travelers whether they are importing any infringing goods! More details about the new IPR provisions will be addressed in a separate Alert.

The new law also includes creation of the Trade Remedy Law Enforcement Division which is to reside within CBP in the Office of Trade and oversee and coordinate CBP's efforts to deal with evasion. Not surprisingly, it will be supported by the National Targeting and Analysis Group. This Division is to receive and act on evasion complaints (on a specific timeline), but also to provide assistance to small businesses which are harmed by evasion activities. One interesting provision calls for the Division to share information publicly, but without specific guidance. Rather, the criteria is to be developed with private sector input. Given the broad mandate of this Division, and the ability for CBP to determine an importer was uncooperative when asked to provide documentation about an evasion claim, how well these provisions will serve to protect an importer is another question. Nonetheless, importers would be wise to make sure they have properly vetted their suppliers (including retaining the supporting documentation of that process). Their commercial agreements should also include cooperation clauses and penalties for failure to cooperate. Importers would be prudent to also keep records of any research done by them or on their behalf to determine if specific goods are subject to any antidumping or countervailing duty assessment.

Small business interests are also to be supported through the efforts of the Chief Counsel for Advocacy at the Small Business Administration and the Interagency Working Group he is to head. This new process was established in order to facilitate input from the private sector regarding manufacturing, services and agriculture about the potential economic impact of trade agreements.

The next topic worth mentioning is honey. CBP is now tasked with compiling a database of the characteristics of honey as produced in individual countries. Fortunately, the directive includes cooperation with the FDA Commissioner and foreign customs services in doing so. Given past history and the abysmal shellacking the CBP Lab keeps taking in court and other fora, one is wont to ask – is CBP really the best lab to rely on to accomplish this goal? The question is especially relevant since the law calls on the FDA Commissioner to establish "a national standard of identity" for honey so it may be classified correctly and denied entry if any presents a health risk.

Next, we see the creation of a Trade Enforcement Trust Fund to be administered by Treasury. Its purpose is to fund any of the following:

(A) To seek to enforce the provisions of and commitments and obligations under the WTO Agreements and free trade agreements to which the United States is a party and resolve any actions by foreign countries that are inconsistent with those provisions, commitments, and obligations.

(B) To monitor and ensure the full implementation by foreign countries of the provisions of and commitments and obligations under free trade agreements to which the United States is a party for purposes of systematically assessing, identifying, investigating, or initiating steps to address inconsistencies with those provisions, commitments, and obligations.

(C) To thoroughly investigate and respond to petitions under section 302 of the Trade Act of 1974 (19 U.S.C. 2412) requesting that action be taken under section 301 of such Act (19 U.S.C. 2411).

(D) To support capacity-building efforts undertaken by the United States pursuant to any free trade agreement to which the United States is a party and to prioritize and give special attention to the timely, consistent, and robust implementation of the commitments and obligations of a party to that free trade agreement, including commitments and obligations related to trade in goods, trade in services, trade in agriculture, foreign investment, intellectual property, digital trade in goods and services and cross-border data flows, regulatory practices, state-owned and state-controlled enterprises, localization barriers to trade, labor and the environment, currency, foreign currency manipulation, anticorruption, trade remedy laws, textiles, and commercial partnerships.

(E) To support capacity-building efforts undertaken by the United States pursuant to any such free trade agreement and to include performance indicators against which the progress and obstacles for the implementation of commitments and obligations can be identified and assessed within a meaningful time frame.

The law also makes clear, none of these Trust Funds may be used to offset the costs of conducting any trade negotiations, only to support implementation and capacity building prior to any free trade agreement entering into force.

There is another new provision having to do with currency exchange rates. It calls for one of the many reports required under the law. Here, the currency practices of all the U.S. major trading partners are to be reviewed and analyzed. If the Treasury Secretary determines a given country has not adopted "appropriate" policies to correct undervaluation or surpluses, the President is to prohibit the Overseas Private Investment Corp. from providing any new financing, the federal government is generally barred from contracting for goods or services from those countries, the U.S. Executive Director at the International Monetary Fund is to seek additional "rigorous" surveillance of macroeconomic and exchange rate policies and formal consultations, and the U.S. Trade Representative (USTR) is to take this finding into account when negotiating any bilateral or regional trade agreement. The President may waive the requirements in the face of adverse impact on the U.S. economy or where there would be serious harm to national security. An Advisory Committee on International Exchange Rate Policy is to be established to counsel the Treasury Secretary regarding exchange rates and financial policy.

The bill also includes a revised de minimis value for postal and courier shipments. It encourages USTR to establish "commercially meaningful" de minimis values when negotiating trade agreements. Section 321's di minimis value is increased from $200 to $800. Penalties for customs brokers are expanded to include committing or conspiring to commit acts of terrorism.

Fungible 9801 articles may now be commingled and their origin, value and classification determined by inventory management methods. Interestingly, 9801.00.10 has been expanded from including only those products which are of American origin to include any product exported and returned within three (3) years which is not advanced in value or improved in condition.

Additionally, seeking to settle the long-standing debate about how much residue left in a bulk carrier is too much to be considered an empty, the new law sets the empty level at not to exceed 7% by weight or volume with no de minimis value.

In future Alerts, we will provide details about specific sections of this new law. Many of the provisions take effect immediately, some only set periods of time after enactment, and there is a lot to digest and implement for all international traders. While this Alert highlighted primarily import issues, exporters are impacted too, especially when it comes to ACE, ITDS, grants and other forms of export financing. Stay tuned for more details in the near future.