

Client Alert

International Trade & Litigation Practice Group

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U.S. Customs And Border Protection Releases Interim Regulations To Implement Enforce Act, Solicits Comments

The Trade Facilitation and Trade Enforcement Act of 2015 (H.R. 644) was signed into law on February 24, 2016. This comprehensive legislation includes the Enforce and Protect Act of 2015 (the “Enforce Act”), 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. The Enforce 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.”

The Enforce Act directed CBP to promulgate regulations to implement its new responsibilities within 180 days of enactment. CBP met this deadline on August 22, 2016, when it published its [Interim Regulations](#) and solicited comments from interested parties. Comments on the Interim Regulations are due October 21, 2016. Domestic producers and other interested parties, importantly, still may file allegations of evasion during the comment period.

The Enforce Act Became Effective On August 22, 2016

Pursuant to the Statute, the Enforce Act became effective on August 22, 2016. Domestic producers and other interested parties, therefore, have a new tool for alleging that an importer is evading the payment of AD or CVD duties. The Interim Regulations released by CBP will be used to govern the submissions of such allegations until final regulations are promulgated.

The Interim Regulations provide that an allegation only is required to include “[i]nformation reasonably available to the interested party to support its allegation that the importer with respect to whom the allegation is filed is engaged in evasion” and certain information regarding the importer, covered merchandise, and the applicable AD/CVD orders. Once filed, CBP has 15 business days to determine whether to initiate an evasion investigation. If CBP initiates, it will then determine whether there is a reasonable suspicion of evasion within 90 days. If CBP finds a reasonable suspicion of evasion, it will take Interim Measures, which can include

For more information, contact:

P. Lee Smith

+1 202 626 2940
lsmith@kslaw.com

Bonnie B. Byers

+1 202 626 5507
bbyers@kslaw.com

J. Michael Taylor

+1 202 626 2385
jmtaylor@kslaw.com

Jeffrey M. Telep

+1 202 626 2390
jtelep@kslaw.com

King & Spalding
Washington, D.C.

1700 Pennsylvania Avenue, NW
Washington, D.C. 20006-4707
Tel: +1 202 737 0500
Fax: +1 202 626 3737

www.kslaw.com

suspending the liquidation of entries by the importer. CBP also may take any additional measures necessary to protect the revenue of the United States. 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 (and this post-preliminary period may be extended by 60 calendar days). Final determinations by CBP will be subject to judicial review by the U.S. Court of International Trade.

CBP's Interim Regulations, However, Only Allow For Limited Participation

The Interim Regulations provide for the submission of business confidential information to CBP. In addition to the initial allegation of evasion, CBP may issue questionnaires to interested parties, obtain information from documents filed by importers at the time of entry, accept other factual information submissions, and conduct on-site verifications. The Interim Regulations require CBP to maintain an administrative record that includes the information submitted to and collected by CBP during the course of its investigation and that is used as the basis of its determination. Importantly, the Interim Regulations provide CBP the authority to make adverse inferences against an importer, exporter, or foreign producer that fails to cooperate and comply to the best of its ability with CBP's requests for information.

The Interim Regulations, however, do not provide for an administrative protective order. Accordingly, during the course of the administrative investigation, interested parties' lawyers who otherwise would be bound by a protective order are not allowed to review and comment on other interested parties' proprietary or confidential information. Such non-public information would include entry documents submitted by the importer to enter the covered merchandise, confidential information submitted in a questionnaire response, and information collected at an on-site verification. Thus, interested parties will have the opportunity to review, comment on, and/or rebut confidential factual information placed on the record by CBP or other interested parties only to the extent that such information is publicly available or is their own data/information. Although interested parties may submit written arguments to CBP after the release of the Interim Measure, these arguments will be limited to public summaries of the information developed during the course of the investigation.

Next Steps

CBP has solicited comments on its Interim Regulations. Companies and workers that rely on the disciplines of the AD/CVD laws should consider participating in the rulemaking process by submitting comments. Domestic producers also should consider taking advantage of CBP's new procedures, if they have information showing that an importer is evading the payment of AD/CVD duties.

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