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The Trade Facilitation and Enforcement Act of 2015 Is on its Way to the President's Desk

Last Thursday, the U.S. Senate voted 75-20 to agree to the conference report on H.R. 644, the Trade Facilitation and Enforcement Act of 2015 (the "Act") sending the legislation to President Obama's desk for enactment. The Act is the first major bill impacting U.S. customs law and U.S. Customs and Border Protection (CBP) in over a decade. The Act includes provisions covering intellectual property, trade remedy order enforcement, and health and safety. In addition, the Act increases the *de minimis* threshold for low-value shipments and amends Chapter 98 of the Harmonized Tariff Schedule of the United States (HTSUS), simplifies CBP's duty drawback program, introduces new responsibilities for customs brokers and limits CBP's ability to voluntarily reliquidate entries. A summary of each title of the Act follows

Title I – Trade Facilitation and Trade Enforcement

Title I focuses on various ways that the U.S. government, particularly CBP, shall encourage trade facilitation and trade enforcement.

Trade Facilitation

For instance, it requires CBP to improve its partnership programs by ensuring that each program provides some type of trade benefit to its participants. Title I also codifies the Centers of Excellence and Expertise, which are CBP's attempt at processing entries more efficiently. This title also requires the publication of various reports or plans that relate to measuring or improving trade enforcement or trade facilitation.

Importer of Record Program

Title I requires CBP to (1) develop minimum criteria for an importer to obtain an importer of record number and (2) maintain a centralized database of importer of record numbers. Congress indicated that this program is intended to address concerns that CBP does not collect enough information from prospective importers in order to adequately identify them. The Act also requires CBP to establish a new importer program, under which CBP shall develop risk-based criteria for assessing new importers and their imported products. The Act also requires that CBP implement, through regulations, new minimum requirements for the type of information that customs brokers must obtain from their customers in order to verify the importer's identity. Customs brokers that do not obtain the required information may face monetary penalties or the revocation or suspension of their customs broker licenses.

Title II – Import Health and Safety

Title II of the Act establishes an interagency Import Safety Working Group, which will work to ensure the safety of U.S. imports and identify best practices for improving a coordinated government response at all levels to U.S. import health and safety threats. Such a group was previously created by Executive Order (EO 13439), but the Act will codify its establishment into law. Under this title, CBP is required to create a joint import safety rapid response plan to respond to incoming cargo that poses a health and safety threat. The Import Safety Working Group will include representatives from the departments of Health and Human Services, Treasury, Commerce and Agriculture; the Office of the U.S. Trade Representative (USTR); the Office of Management and Budget; the Food and Drug Administration; CBP; and the Consumer Product Safety Commission.

Title III – Import-Related Protection of Intellectual Property Rights

Title III includes several provisions that are intended to strengthen intellectual property rights enforcement at the border. Notably, while CBP finalized regulation changes last year that allow it to share information with trademark owners prior to seizure, the current legislation requires CBP to share information about suspected merchandise prior to seizure, where examination or testing of the merchandise by the rights holder will assist in determining whether there is a violation. CBP can, however, refuse to share this information where the information would compromise an ongoing law enforcement investigation or national security. Significantly, the Act expands CBP's authority to share information beyond counterfeit trademarks to piratical copyrights and circumvention devices that are suspected of infringing the Digital Millennium Copyright Act (DMCA).

Specifically, the Act:

- adds a provision to 19 U.S.C. § 1595a(c) that authorizes CBP to seize circumvention devices that violate the DMCA and provide information about the seized merchandise to the copyright owner.
- requires CBP to develop a process for enforcing copyrights for which registration is pending to the same extent and manner as registered copyrights
- establishes a National Intellectual Property Rights Coordination Center ("IPR Center") and requires the assistant director of the IPR Center to conduct outreach and share information with the private sector in order to coordinate public- and private-sector efforts to combat intellectual property rights and to collaborate on training CBP officers in enforcing IP rights
- requires CBP to draft regulations authorizing CBP to receive donations of hardware, software, equipment and similar technologies, and to accept training and other support services from private sector entities for the purpose of enforcing IP rights.

Title IV – Prevention of Evasion of Antidumping and Countervailing Duty Orders

Title IV of the Act addresses the evasion of trade remedy orders (i.e., antidumping and countervailing duties), which has come under congressional scrutiny over the past few years. Specifically, Congress attempts to expand the tools that CBP and the Department of Commerce have available to address evasions of trade remedy order duties. The Act also makes CBP's civil and criminal investigations more transparent to the domestic industry.

Specifically, the Act:

- establishes a Trade Remedy Law Enforcement Division within CBP's Office of International Trade. The Division will house a National Targeting and Analysis Group that will be dedicated to targeting potential trade remedy duty evasion. The Division will be responsible for developing policies to prevent evasion, including policies on customs bonds, and to issue Trade Alerts. Trade Alerts are notifications that will direct U.S. ports of entry to conduct further analysis of high-risk entries to ensure that importers are complying with U.S. trade remedy laws.
- establishes a procedure for investigating trade remedy duty evasion. CBP will be required to initiate an investigation within 15 business days of receiving an allegation of evasion from an interested party or a U.S. government agency. CBP will have 300 calendar days from the time it initiates an investigation to make a determination of whether merchandise was entered through evasion. In the event that CBP finds that an importer has evaded trade remedy customs duties, avoided cash deposits, or failed to file the proper customs bonds for entries subject to trade remedy orders, CBP may suspend or extend the liquidation of unliquidated entries that are covered by the applicable trade remedy order. Interested parties that may file an allegation include:
- domestic industry (i.e., domestic manufacturers of like products or unions representing workers who manufacture like products in the United States)
- foreign manufacturers and exporters
- U.S. importers of covered merchandise
- trade associations representing either foreign or domestic industry that produce or import covered or domestic like merchandise.
    - During the course of an investigation, CBP may issue questionnaires and consult with the Department of Commerce regarding the scope of the trade remedy order. CBP may take an adverse inference (i.e., assume the facts that are adverse to the party) in the event that CBP finds that the party from which it is seeking information has not acted to the best of its ability to provide information to the agency. Finally, CBP's evasion decision will be subject to judicial review at the U.S. Court of International Trade.
- authorizes the Secretary of the Treasury to enter into international agreements with foreign countries to cooperate on enforcing both U.S. and the foreign country's trade remedy laws.

Title V – Small Business Trade Issues and State Trade Coordination

Title V ensures that small businesses have a voice when the U.S. government considers negotiating new free trade agreements (FTAs). For example, it establishes a number of working groups that are tasked with reporting on the impact of an FTA on small businesses and coordinating on export promotion and financing.

Title VI – Additional Enforcement Provisions

Title VI authorizes USTR to reinstate trade retaliatory measures that have terminated because the affected industry did not request an extension. USTR can reinstate the retaliatory measures when the domestic industry submits a written request to USTR and USTR consults with Congress and performs a detailed analysis of the request. The title also creates the chief innovation and intellectual property negotiator position at USTR. Finally, the title requires USTR to develop action plans for countries listed on the Priority Watch List for at least a year in USTR's Special 301 Report. The action plans are intended to assist the identified countries in developing adequate intellectual property rights protections. The president is permitted to "take appropriate action" if an identified country does not meet established benchmarks.

Title VII – Currency Manipulation

Title VII requires the Secretary of the Treasury to submit a report to Congress on the macroeconomic and currency exchange rate policies for major trading partner countries. The report will identify major trading partners that are suspected of manipulating their currency and conduct an enhanced macroeconomic analysis. The Secretary of the Treasury is required to take action to address currency issues with major trading partners that are subject to enhanced macroeconomic analysis. In the event that the Secretary of the Treasury is unable to address currency manipulation issues with the major trading partner, the president may take a variety of steps to remedy the situation, such as prohibiting the Overseas Private Investment Corporation from approving new financing products associated with the major trading partner. The president can waive the remedial actions only if he finds that the action would have an adverse impact on the U.S. economy or would cause serious harm to U.S. national security.

Title VIII – Establishment of CBP

This title reauthorizes CBP and formalizes the process for establishing CBP preclearance facilities at airports in foreign countries. Specifically, this title authorizes CBP to establish, or renew, preclearance facilities in foreign countries so long as the secretary of Homeland Security certifies to Congress that the country regularly provides lost and stolen passport information to INTERPOL or to the United States. The purpose of the preclearance facilities is to (1) prevent terrorist attacks in the United States; (2) prevent inadmissible foreigners from entering the United States; (3) ensure that imported merchandise complies with U.S. law; (4) promptly process people entering the United States; and (5) accomplish any other objectives necessary to protect the United States. The title also outlines the procedures that CBP must follow to notify Congress before it establishes a preclearance facility. It includes various reports on the impact of the facility on U.S. trade and travel, CBP staffing and potential security vulnerabilities. Finally, CBP is authorized to enter into cost-sharing agreements with airport authorities and allows airport authorities to make advance payments when establishing new facilities.

Title IX – Miscellaneous Provisions

Finally, Title IX includes a number of miscellaneous provisions, including drawback simplification, increases to the *de minimis* threshold for low-value shipments, amendments to Chapter 98 to address certain returned goods and CBP's ability to voluntarily reliquidate entries.

Sec. 901: De Minimis Value

- Currently, 19 U.S.C. § 1321(a)(2)(C) allows importers to import up to $200 of merchandise informally (i.e., exempt from certain entry documentation requirements) and duty-free. Section 901 amends 19 U.S.C. § 1321(a)(2)(C) to raise the *de minimis* threshold from $200 to $800. Section 901 specifies that this amendment shall apply to merchandise imported or withdrawn from the warehouse for consumption on or after the 15th day after the date of enactment of the Act.
- Notably, Section 901 also contains a sense of Congress that USTR should encourage foreign countries to establish commercially meaningful *de minimis* thresholds for express and postal shipments. This is based on Congress' finding that higher *de minimis* thresholds provide "significant economic benefits" to U.S. businesses, consumers and economy through "costs savings and reductions in trade transaction costs."

Section 903: Penalties for Customs Brokers

- 19 U.S.C. § 1641(d)(1) authorizes CBP to impose a monetary penalty or revoke or suspend a license or permit of any customs broker who has acted contrary to law or regulations. Section 903 amends § 1641(d)(1) by adding "committing or conspiring to commit an act of terrorism" to the list of offenses that are grounds for an enforcement action.

Section 904: Amendments to Chapter 98 of the HTSUS

- Section 904(a) modernizes the rules for goods imported under subheadings 9802.00.40 and 9802.00.50, HTSUS by allowing merchandise to be commingled and by providing that the origin, value and classification of such articles may be accounted for using an inventory management method.
- Section 904(b) amends the article description for subheading 9801.00.10, HTSUS so that it includes any other products when returned within three years after having been exported.
- Section 904(c) creates a new heading 9801.00.11, which provides duty-free treatment for certain U.S. government property returned to the United States either by the U.S. government or a U.S. government contractor.

Section 905: Exemption from Duty of Residue of Bulk Cargo Contained in Instruments of International Traffic Previously Exported from the United States

- Section 905 amends General Note 3(e) of the HTSUS to remove from formal entry requirements residue of bulk cargo contained in instruments of international traffic (e.g., lift and cargo vans, shipping tanks, skids, pallets, caul boards, cores for textile fabrics and containers) previously exported from the United States. The Act defines residue as not exceeding 7 percent (by weight or volume) of the bulk cargo, with no or de minimis.

Section 906: Drawback and Refunds

- **Eight-Digit HTSUS Substitution Standard:** Most importantly, the Act implements an eight-digit HTSUS standard for substitution for both unused and manufacturing drawback, which allows for the substitution of exported goods for imports that are classified within the same eight-digit HTSUS subheading. For unused drawback, the Act specifies that the claimant can use the Schedule B number for merchandise in order to determine whether the merchandise is classifiable under the same eight-digit HTSUS subheading as the imported merchandise.

- **Five-Year Claim Deadline:** The Act extends the deadline for filing drawback claims from three years to five years from the date on which the merchandise was imported.
- **Calculation of Drawback Refunds**: The Act instructs CBP to promulgate regulations for calculating the amount of drawback refunds and specifies that:
  - duties, taxes and fees are eligible for all drawback refunds, instead of just duties in some scenarios
  - drawback refunds equal 99 percent of duties, taxes and fees paid on imported merchandise, instead of refunds up to that amount
  - refunds may be based on the average per-unit duties, taxes and fees as reported on the entry line-item level
  - where there is substitution, claimants may claim the lesser of (1) duties, taxes and fees that are paid on the imported merchandise on the entry-line item level; or (2) the duties, taxes and fees that would have been paid on the export if it had been imported.
- **Supporting Documentation**
  - **Business Records in Lieu of Certificates:** The Act provides that drawback claims can be evidenced by "business records kept in the ordinary course of business," to be used to demonstrate the transfer of merchandise, and eliminates the current statute's certificate requirements.
  - **Bill of Materials:** The Act requires that drawback claims be supported by a bill of materials or "formula" that identifies the merchandise and quantity to show that the merchandise was incorporated into an exported article.
- **Liability:** The Act specifies that (1) any person making a drawback claim is liable for the full amount of the claim and (2) any person claiming drawback and the importer are jointly and severally liable for the lesser of the amount of drawback claimed or the amount that the importer authorized the other person to claim.
- **Recordkeeping:** The Act amends CBP's recordkeeping statute (19 U.S.C. § 1508) to require that records for drawback claims be maintained for three years from liquidation, as opposed to the current date of payment of the claim.
- **Electronic Filing:** The Act requires that all drawback claims filed two years after the date of enactment of the Act shall be filed electronically.

Section 909: United States-Israel Trade and Commercial Enhancement

- Section 909 establishes U.S. objectives for trade with Israel. Section 909 includes an antiboycott provision regarding Israel, which establishes as a principal U.S. trade negotiating objective for proposed trade agreements with foreign countries the discouragement of actions to boycott, divest from or sanction Israel (known as "BDS" policies).

Sec. 911: Voluntary Reliquidations

- 19 U.S.C. § 1501 provides that CBP may reliquidate an entry within 90 days from the date that notice of the original liquidation is transmitted to the importer, the importer's consignee or the importer's agent. CBP has relied on this provision to reliquidate entries long after the original deemed liquidation. Section 911 amends 19 U.S.C. § 1501 to restore the deemed liquidation statute so that CBP may reliquidate an entry only within 90 days of the date of the original liquidation. This amendment ensures that liquidations (including deemed liquidations) and importers' duty obligations will be final (notwithstanding the filing of a protest) after 90 days if CBP does not reliquidate them within that period.

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