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CBP Adopts Tougher New Investigatory Regulations to Combat Evasion of Anti-Dumping & Countervailing Duties

U.S. Customs and Border Protection, CBP, has implemented regulations for the investigation of claims of evasion of Antidumping (AD) and Countervailing Duties (CVDs). The timely release of these new interim regulations was, in part, the result of the Government Accountability Office's (GAO) report that was published in July of 2016. In this report, the GAO estimated around \$2.3 billion in AD and CVDs owed to the U.S. government were uncollected as of May 2015, based on its' analysis of AD/CVD bills for goods entering the U.S. in fiscal years 2001 – 2014.¹ The purpose of the regulations is to modernize, streamline, and strengthen CBP's ability to collect duties by formalizing the procedure by which allegations of evasion can be initiated. Initially, the interim regulations were open for public comment until October 21, 2016. However, CBP published a notice in the Federal Register and extended the deadline to December 20, 2016. Now, after the expiration of notice and comment period, regulations have been implemented and are currently effective.

The new investigatory regulations come in the wake of the *Trade Facilitation and Trade Enforcement Act* (TFTEA) of 2015, which was signed into law by former President Obama in February of 2016. Title IV of TFTEA, entitled *Prevention of Evasion of Antidumping and Countervailing Duty Orders*, also known as *Enforce and Protect Act* of 2015 (EAPA), is of particular importance. The purpose of EAPA was to create and recommend a formalized procedure for CBP to investigate allegations of evasion of AD/CVD directives. Additionally, EAPA also created the Trade Remedy Law Enforcement Directorate (from hereon referred as "Directorate") within

¹ U.S. Government Accountability Office: *Antidumping and Countervailing Duties - CBP Action Needed to Reduce Duty Processing Errors and Mitigate Nonpayment Risk* (<http://www.gao.gov/products/GAO-16-542>)

CBP's Office of Trade. The Directorate was charged with introducing new policies and procedures to ensure that duties owed as a result of AD and CVD orders are paid and collected in an efficient manner.

New Customs Regulations

Section 421 of TFTEA requires that CBP promptly develop regulations and amend Title 19 of the Code of Federal Regulations (C.F.R.) to create new Part 165. As a result, it provides new procedures for investigating into four particular segments: (1) General Provisions; (2) Initiation of Investigations; (3) Investigation Procedures; and (4) Administrative review of Determinations.

Provided below are some of the key points and highlights of the newly passed Part 165:²

1. General Provisions:

□□§165.1 Definitions:

This section lists definitional terms that are used throughout the new regulations. Most notable is the term “interested parties,” which is defined as:

- (i) alleged importers of the merchandise;
- (ii) importers who wish to bring allegations against competing importers; and
- (iii) doesn't include other Federal agencies

□□§165.2 Entries subject to investigations:

Only entries that are one year old before the receipt of an allegation are subject to investigations pursuant to this statute.

□□§165.6(b) Adverse Inferences:

CBP may draw adverse inferences if the importer or the foreign producer/exporter fails to cooperate and comply to the best of its' ability with a request for information made by CBP.

□□§165.11(b) Contents of allegations by interested parties:

This section lists requirements for interested party allegations:

- (i) name of the interested party making the allegation;
- (ii) explanation as to how the interested party qualifies as an interested party;

² *Federal Register: Investigation of Claims of Evasion of Antidumping and Countervailing Duties.*

<https://www.federalregister.gov/documents/2016/08/22/2016-20007/investigation-of-claims-of-evasion-of-antidumping-and-countervailing-duties>

- (iii) name and address of importer against whom the allegation is brought;
- (iv) description of the covered merchandise; and
- (v) information reasonably available to the interested party to support its allegation

2. Initiation of Investigations:

§165.11(a) *Filing of allegation:*

Any interested party may file an allegation that an importer covered merchandise has evaded AD/CVD orders. Allegation must be filed *electronically*.

§165.14(a) *Requests for investigations:*

Any other Federal agency, including the Department of Commerce or the ITC, may request an investigation as well.

§165.15(a) *Time for Determination:*

Once a proper allegation has been received by CBP, it will make a determination on or before fifteenth (15th) business day whether to initiate an investigation.

§165.15(d)(1) *Notification of the investigation:*

If CBP determines that it will not initiate an investigation, it will notify interested parties within five (5) business days. In addition, CBP will issue notification of its' decision to initiate investigation to all parties no later than ninety-five (95) calendar days after the decision has been made.

3. Investigation Procedures:

§165.22 *Time for determination:*

CBP will make a determination no later than three hundred (300) calendar days from the date of initiation of the investigation, unless for an extraordinarily complicated case, CBP – at its discretion – extends the deadline by an additional sixty (60) calendar days.

§165.27(b) *Notification of evasion:*

Upon conclusion of the investigation, CBP will issue notices to interested parties within five (5) business days regarding whether evasion of an AD/CVD has occurred.

4. Administrative Review of Determination/Appellate Process:

□ □ §165.41(d) When filed:

Requests for review must be filed no later than thirty (30) business days after the issuance of the initial determination for evasion. Untimely or incomplete requests for review will not be accepted.

□ □ §165.45 Standard for administrative review:

The initial determination will be reviewed de novo – the judge will review the entire administrative record upon which the initial determination was made. This review will be completed within sixty (60) business days of the commencement of the review.

□ □ §165.46(a) Final administrative determination:

Final administrative determinations will be electronically issued to all parties involved. Note, this final administrative determination is subject to judicial review.

Subsequent Investigatory Claims Using the New Regulations:

To date, there have been two actions initiated under the new EAPA provisions, although there will certainly be more. Soon after the new regulations went into effect, *Wheatland Tube* (“Wheatland”) filed the first complaint using the new regulations. *Wheatland*, based out of Chicago, is a producer of steel tubular products, as well as steel pipes.³ In their complaint, they alleged that *NEXTracker*, a producer of circular welded carbon-quality steel pipe from China, was evading an AD/CVD order by not paying the additional duty owed.⁴ In support of their allegation, *Wheatland* submitted public import data demonstrating that 56,774 metric tons of welded pipes had been imported from this Chinese company, which were supposed to be subject to AD/CVD orders of approximately \$81.5 million in duties.⁵

Pursuant to *Wheatland’s* complaint, CBP examined the allegations but declined to pursue any further investigation. According to CBP, “*Wheatland’s* allegation reasonably suggested that *NEXTracker* imported merchandise from China that may be subject to AD/CVD orders, but the allegation didn’t reasonably suggest that

³ *Wheatland Tube: U.S. Customs and Border Protection decides not to investigate duty evasion on steel pipe from China:* <http://www.prnewswire.com/news-releases/wheatland-tube-us-customs-and-border-protection-decides-not-to-investigate-duty-evasion-on-steel-pipe-from-china-300347867.html#continue-jump>

⁴ *Id.*

⁵ *EAPA Case Number: 15134*, <https://www.cbp.gov/sites/default/files/assets/documents/2016-Dec/EAPA%2015134%20Wheatland%20Tube.pdf>

merchandise was entered through evasion.”⁶ In other words, CBP was suggesting that *Wheatland* did not adequately support their evasion claim. Hence, evidence of importation by itself is not sufficient to raise a reasonable suspicion of evasion, claimed the CBP.

Wheatland has expressed disappointment in CBP’s conclusion noting that “CBP appears to have set an impossible standard for initiating AD/CVD investigations by requiring that domestic producers prove, not just allege the evasion of duty.”⁷ They further claim that this is an extraordinary result, since only CBP maintains the confidential data that would be necessary to precisely prove the allegations of evasion.

A more recent decision on a complaint filed by another domestic producer provides further insight into the evidentiary requirements of bringing an investigatory complaint under the new regulations. In that complaint, *M&B Metal Products Company, Inc.* (“M&B”) filed an allegation against *Eastern Trading NY Inc.* (“Eastern Trading”).⁸ Specifically, *M&B* alleged that *Eastern Trading* was importing steel wire garment hangers of Chinese origins from Thailand.⁹ CBP, in their response to *M&B*’s complaint, outlined that it would initiate an investigation if it determines that the “information provided in the allegation reasonably suggested not only that the merchandise subject to an AD/CVD order was entered into the U.S., but that such entry was made by a material false statement or act, or material omission, that resulted in the reduction or avoidance of applicable AD/CVDs.”¹⁰ In applying this standard to the facts supplied by *M&B*, CBP concluded *M&B* reasonably suggested that *Eastern Trading* imported merchandise which was subject to AD orders on steel wire garment hangers from China.

It is important to note and distinguish the supporting documents provided by *M&B* from *Wheatland Tube*. For instance, *M&B*’s complaint was accompanied by a Foreign Market Researcher’s Report on the manufacturer in Thailand.¹¹ Accordingly, the report contained pictures of the supposed manufacturing factory (visibly small capacity perhaps insufficient to produce the numbers of hangers they were exporting to U.S.), interviews with the accounting firm representing the manufacturer, the financial statements of the manufacturer, and ties between the manufacturer in Thailand and China.¹² *Wheatland*’s complaint on the other hand, as noted by CBP, included their “own calculation of what it believed would have been the AD/CVD owed by the alleged perpetrator, and no other

⁶ *Id.* at pg. 2

⁷ *Wheatland Tube*: U.S. Customs and Border Protection decides not to investigate duty evasion on steel pipe from China

⁸ *EAPA Case Number*: 15135, <https://www.cbp.gov/sites/default/files/assets/documents/2016-Dec/EAPA%2015135%20Eastern%20Trading%20.pdf>

⁹ *Id.* at pg. 2

¹⁰ *Id.* at pg. 3

¹¹ *Id.* at pg. 2

¹² *Id.* at pg. 2-3

evidence beyond this mere supposition through the public import data.”¹³

In the wake of these two decisions, it is important to dissect the standard CBP has suggested. First and foremost, petitioners need to be aware that a mere allegation of a wrongdoing is not enough to commence an investigation against a competitor. Rather, the commencement of any investigation will depend on the strength of the evidence accompanying the complaint. Secondly, petitioners must put forth information to CBP that: (1) reasonably suggests that the covered merchandise has been entered for consumption into the territory of the U.S; and (2) the entry was made by a material false statement or act, or material omission, that resulted in the reduction or avoidance of applicable AD/CVD cash deposits or other securities. Overall, it appears that CBP will be maintaining a critical view in their evaluation of allegations to limit the floodgates of frivolous complaints.

Recommendations & Concluding Remarks:

In order to meet the threshold for initiating an evasion investigation, petitioners must develop and present proof supporting their claims. A complaint or allegation alone will not suffice, and CBP would be correct in rejecting the request for the initiation of an evasion investigation. Moreover, it must also be shown that entry was made with a material false statement or act or material omission. While CBP can be expected to zealously pursue legitimate claims of duty evasion, they should be equally vigilant in protecting legitimate importers from the use of these new procedures to achieve an otherwise unjustified competitive advantage.

Despite this needed and expected balance, all indications are pointing towards heavy enforcement by CBP of AD & CVD evasion. With the recent release of the GAO report, it is more likely that CBP will utilize its new enforcement tools to increase recovery of unpaid AD/CVD and better manage and mitigate the risk of non-payments. Moreover, the recent election of President Trump has left a tremendous amount of protectionist sentiment for domestic companies against foreign producers and trade in general. There is no doubt that foreign producers will face even more scrutiny by CBP to ensure they aren't engaging in allegedly anti-competitive trade practices. In the event that they are, CBP is empowered and required to respond.

As recently as on March 31st of this year, President Trump issued two executive orders (EO) pertaining to Antidumping and Countervailing Duties, and the U.S. trade deficit. The first EO – *Presidential Executive Order on Establishing Enhanced Collection and Enforcement of Antidumping and Countervailing Duties and Violations of Trade and Customs Laws* – requires implementation of a plan within 90 days to ensure that stricter bond requirements are placed on covered importers. More importantly, the EO has instructed the Attorney General to develop a plan to prioritize prosecution of trade related violations by Federal prosecutors.¹⁴ This may be

¹³ *EAPA Case Number: 15134*, pg. 2

¹⁴ *Presidential Executive Order on Establishing Enhanced Collection & Enforcement of Antidumping & Countervailing Duties & Violations of Trade and Customs Laws*, <https://www.whitehouse.gov/the-press-office/2017/03/31/presidential-executive-order-establishing-enhanced-collection-and>

welcoming news for petitioners seeking to bring AD & CVD initiation proceedings. Similarly, the second EO – *Presidential Executive Order Regarding the Omnibus Report on Significant Trade Deficits* – requires a report from Secretary of Commerce and the USTR to submit a report pertaining to U.S. trade deficits, assessing underlying causes of it and identifying unfair burdens imposed by trading partners.¹⁵ The Trump Administration, and the President himself certainly has not been shy about projecting his views on trade related matters, so the domestic industries should breathe a sigh of relief with these new developments considering the *Wheatland* case.

In the end, it is recommended that importers revisit the implemented compliance laws to ensure that all the pertinent materials are up to date. Moreover, it is also urged that the assigned personnel dealing with compliance related matters reasonably acquaint themselves with the latest CBP regulations – 19 C.F.R. Part 165. Should you have any questions, please don't hesitate to contact our law firm directly.

¹⁵ *Presidential Executive Order Regarding the Omnibus Report on Significant Trade Deficits*, <https://www.whitehouse.gov/the-press-office/2017/03/31/presidential-executive-order-regarding-omnibus-report-significant-trade>

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The Center for Global Trade Education and Compliance was created to educate international trade participants about U.S. import requirements, U.S. export control regulations and other statutes, regulations, practices and procedures relating to international trade. The Center was founded on a simple premise that importers, exporters, customhouse brokers, freight forwarders and others involved in the movement of goods across international borders would benefit from international trade educational programming tailored to their individual needs. Such programs include:

- Basic overviews to U.S. import regulations or U.S. export Controls
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- Updates on current legal issues and developments

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