

International Trade

US Customs Developments

May 2011

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US Import Policy

CBP Commissioner Announces Focus and Leadership Changes

CBP Commissioner Alan Bersin announced at a 9 March 2011 hearing of the US House of Representatives Appropriations Subcommittee on Homeland Security that CBP intends to re-emphasize trade enforcement and the importance of trade functions. Bersin stated that CBP would be focusing on industries such as textiles and “the defrauding on the basis of [North American Free Trade Agreement] distinctions.” Bersin further stated that both CBP and US Immigration and Customs Enforcement (ICE) would be increasing their attention on intellectual property rights enforcement. Bersin also indicated that a primary objective of CBP is to work with the trade community to enhance benefits to trusted shippers.

On 13 April 2011, Commissioner Bersin announced at CBP’s 2011 trade symposium the need to balance CBP’s security obligations with trade facilitation. Bersin emphasized it is time to recognize that increased economic competitiveness through trade is essential to national security. Through this “paradigm shift,” CBP would develop programs and policies that benefit not just security, but also economic competitiveness. CBP would seek input from the private sector regarding ways to facilitate trade in an efficient manner without disregarding security.

At the National Customs Brokers and Freight Forwarders Association of America, Inc.’s annual meeting on 4 April 2011, Commissioner Bersin further called for the simplification of procedures to expedite the movement of cargo through US ports. Bersin blamed outdated entry procedures for the slow movement of cargo and increased transaction costs, and sought the help of industry in identifying procedures or rules that contribute to slow cargo movement. Bersin also called for increased CBP coordination, as well as increased coordination between the agencies that control imports into the United States.

Commissioner Bersin also announced internal changes in the agency’s leadership designed to restore trade policy experience to the Office of Field Operations and operational experience to the Office of International Trade. These changes entered into effect the week of 15 March. Changes included the appointment of Dan Baldwin—formerly the Assistant Commissioner for International Trade—as the Executive Director for Cargo and Conveyance Security Programs in the Office of Field Operations, Allen Gina as head of the Office of International Trade and Todd Owen as the Director of Field Operations for Los Angeles.

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Finally, Bersin stated that CBP is committed to completing the Automated Commercial Environment (ACE)—part of the agency's initiative to use more paperless procedures for not only agency processes, but also for filings with the trade community. Bersin made additional remarks on 14 April 2011, indicating that CBP is moving towards the pre-arrival release of "trusted" cargo, but will need information earlier, as well as expedited responses to questions. Cargo is often delayed because information already required is missing—if this information is provided earlier, CBP can make a decision earlier. Bersin emphasized the importance of the ACE system in this regard.

USTR Rejects Trade-off for Chinese Apples, US Beef

On 5 April 2011, United States Trade Representative (USTR) Ron Kirk stated that he would not agree to a trade-off with China that would allow the importation of Chinese apples into the United States in exchange for American access to China's beef market. The USTR's declaration followed a hearing before the House Appropriations Subcommittee on Commerce Justice, Science, and Related Agencies in which Representative Frank Wolf (R-VA) cautioned the USTR on concerns over China's compliance with sanitary and phytosanitary (SPS) standards and the risks that may be present in Chinese produce imported into the United States. Kirk emphasized that the United States is not willing to yield with respect to SPS standards and that it expects everyone to comply with such internationally accepted standards.

Tariffs and Import Restrictions

USDA Proposes Softwood Lumber Marketing Fee

On 22 April 2011, the US Department of Agriculture's (USDA) Marketing Service proposed a Softwood Lumber Research, Promotion, Consumer Education and Industry Information Order that would be financed by assessing a fee on softwood lumber shipped within or imported into the United States. The initial assessment rate would be US\$0.35 per thousand board feet of lumber. The stated purpose of the program is "to strengthen the position of softwood lumber in the marketplace, maintain and expand markets for softwood lumber and develop new uses for softwood lumber within the United States."

A referendum among domestic softwood lumber manufacturers or importers will determine whether the program is implemented. The program will be implemented if a majority of those voting back the program. Both the referendum and procedures for voting were published in separate notices in the *Federal Register*.

CBP Proposes Regulatory Amendment on Interest Accrual on Vessel Repair Duties

On 1 April 2011, CBP proposed a regulatory amendment providing that interest will accrue on outstanding duties owed to CBP associated with the purchase of equipment for, or repair to, a vessel while it is outside the United States. CBP indicated that this amendment would ensure CBP regulations reflect that CBP will collect interest in situations where an owner or master of a vessel fails to pay vessel repair duties within 30 days of CBP's issuance of a bill. Comments on this proposal are due before 31 May 2011.

Coin Collectors Fail to Secure Information on Import Limits

The US Court of Appeals for the District of Columbia Circuit (CA-DC) held in *Ancient Coin Collectors Guild et al. v. US Department of State* that the US Department of State (State) could invoke national defense and foreign policy exemptions under the Freedom of Information Act (FOIA) to decline to provide records on import restrictions levied against cultural artifacts from China, Italy and Cyprus to the Plaintiff currency collector groups International Association of Professional Numismatists and the Professional Numismatists Guild, Inc. (ACGG). Plaintiffs sued State in 2007 after the agency refused to provide 19 documents. The currency collectors were specifically seeking reports prepared by the Cultural Advisory Committee (CPAC), which Plaintiffs believed contained recommendations to exempt Italian and Cypriot coins from the restrictions, even though controls were ultimately imposed on the imports. The court ultimately found that the evidence put forth by the collectors was insufficient to overcome the FOIA exemptions.

The ACGG also sued CBP to challenge the seizure of coin imports. This suit remains pending.

Preferential Duty Programs

Federal Circuit Overturns Lower Court Decision on Importer's NAFTA Claims

On 21 March 2011, the US Court of Appeals for the Federal Circuit (CAFC) overturned the US Court of International Trade's (CIT) decision that it did not have jurisdiction to hear a suit by Ford related to NAFTA claims.

In the underlying action, Ford filed post-entry claims with the CBP for preferential treatment under the North American Free Trade Agreement (NAFTA) on imports of automotive parts from Canada within the requisite one-year period from the date of entry. Ford, however, did not file the supporting certificates of origin until more than one year from the date of entry. The US Government argued, and the CIT agreed, that submission of the certificates of origin within the one-year period was a jurisdictional prerequisite.

The Federal Circuit disagreed, finding that the untimely filing of the certificates of origin did not deprive the CIT of jurisdiction. In reaching its decision, the Federal Circuit reasoned that there was no clear jurisdictional requirement with respect to the timely filing of a certificate of origin—only with respect to the timely filing of the claim. The Federal Circuit therefore reversed the lower court's decision and remanded the case for further proceedings on the merits.

Unrestricted Imports of Faux Suede Eligible for Preferential Treatment Under CAFTA-DR

On 25 March 2011, the Committee for the Implementation of Textile Agreements (CITA) published in the *Federal Register* its determination that certain faux suede bonded with faux fur pile fabric is not available in commercial quantities in a timely manner from the US-Dominican Republic-Central American Free Trade Agreement (CAFTA-DR) countries. The product will therefore be added to Annex 3.25 of CAFTA-DR. Unrestricted quantities of fabrics, yarns and fibers listed in Annex 3.25 may be imported into the United States and receive preferential tariff treatment under CAFTA-DR.

Court of Appeals Allows for Recovery of Antidumping Duties Overturned by NAFTA Panel

The CAFC upheld the CIT's decision in *Canadian Wheat Board v. United States* that the US Government could not retain certain antidumping duties under an antidumping duty order invalidated by a NAFTA binational panel and thereafter revoked by the US Department of Commerce (Commerce). The antidumping duties at issue were those deposited prior to the date of the invalidation, but that had not yet liquidated. The CAFC held that the US Government's order to liquidate the entries with antidumping duties was arbitrary and that it had no authority to retain the duties. The importers that deposited those duties may therefore recover the duties.

Country of Origin

CBP Adopts Amendments to Regulations on Country of Origin of Textiles and Apparel

On 17 March 2011, CBP adopted a final rule related to CBP regulations on the country of origin textile and apparel products. The final rule eliminates the textile declaration requirement for all importations of textile and apparel products. Other amendments covered by the final rule reflect changes resulting from, in part, the 1 January 2005 expiration of the Agreement of Textiles and Clothing and the elimination of textile quotas from World Trade Organization (WTO) members. Under the final rule, CBP will require importers of textile and apparel products to identify the manufacturer through a manufacturer identification code (MID). The MID must reflect the entity performing the origin-conferring operations only with respect to commercial importations, meaning personal use shipments will be excepted. Additionally, products such as umbrellas, seat belts, parachutes, watchstraps and doll clothing are exempt from the MID requirement.

CBP Determines Origin of Office Workstations for US Government Contracts

On 11 April 2011, CBP published notice of its final determination in CBP Headquarters (HQ) H134536 (April 11, 2011) concerning the country of origin of certain office workstations which may be offered to the US Government under a government procurement contract. CBP concluded that the assembly of the Vivo and Ethospace office workstations in the United States from parts made in China, Mexico and the United States constituted a substantial transformation and, thus, the origin of the workstations for purposes of US government procurement was the United States. In reaching its conclusion, CBP considered the fact that the two workstations contained 40 and 14 components, respectively, and that the major components of the workstations were of US origin.

Classification

Federal Circuit Overturns CBP's Classification of Wall Panels

On 31 March 2011, the CAFC overturned duties imposed by CBP on StoreWall LLC's imported wall panels and hanging bags. The court ruled that the panels and tabs were parts of furniture classified within Harmonized Tariff Schedule of the United States (HTSUS) subheading 9403.90.50 at a free rate of duty, rather than other articles of plastic classified within HTSUS subheading 3926.90.98 at 5.3 percent ad valorem. Because the products were components used in StoreWall's furniture systems, the CAFC held that CBP erred in classifying the wall panels and hanging bags as "other articles of plastic." The CAFC determined that, as parts of a furniture system, the wall panels and hanging bags were properly classified in the duty-free furniture parts HTSUS provision.

For more information about this case, please see the February 2010 issue of this newsletter.

Procedures

CBP Modifies Testing Method of Pressed and Toughened Glassware

CBP has modified its testing method of pressed and toughened (specially tempered) glassware. The new method will use macroscopic analysis, thermal shock testing and evaluation of temper to determine if a glassware item has been specially tempered. Macroscopic analysis includes visual inspection and dimensional measurement. Thermal shock testing involves the rapid heating and cooling of a sample. Finally, the temper is evaluated using a polariscopic examination for translucent glassware and a cutting test for opaque glassware. Additionally, CBP is re-introducing the center punch test for situations in which the cutting test is inconclusive.

FDA Posts Recommendations for Expediting Imports of Medical Devices

On 24 March 2011, the FDA posted on its website certain recommendations to the medical devices industry for the purpose of expediting the admissibility process of imported medical devices into the United States. Specifically, the FDA warned that a number of imported medical devices do not contain entry information sufficient to allow the FDA to promptly decide upon admissibility at ports of entry in the United States. The FDA explained that when an imported product regulated by the FDA arrives in the United States and the entry information CBP sends to the FDA to evaluate whether the product meets FDA requirements is insufficient, the FDA must manually review each line of the product's entry. To expedite the review and release of entries, the FDA advised the medical devices industry to ensure that all products imported into the United States contain detailed and accurate information about the product, manufacturer, importer and premarket application. The FDA further advised that each entry line should contain an AofC code for: (1) device foreign manufacturer (DEV) or device foreign exporter (DFE); (2) device listing (LST); (3) device initial importer (DII); (4) premarket Application (premarket approval, humanitarian device exemption or product development protocol number); (5) premarket notification number (PMN); and (6) investigational device exemption (IDE).

United States and New Zealand Formally Recognize One Another's Trusted Shippers Programs

On 28 March 2011, CBP announced the formal mutual recognition of New Zealand's export security program and CBP's supply chain security program. New Zealand Secure Export Scheme members will receive "Tier Two" status in CBP's security program, the Customs-Trade Partnership Against Terrorism (C-TPAT). C-TPAT benefits are granted pursuant to three tiers, with "Tier Three" given to certified, validated partners meeting the "gold standard" of best security practices. This is the first time another government's supply chain security program has merited recognition as high as the "Tier Two" level.

Consumer Product Safety

USDA Proposes Testing of Meat Products

On 5 April 2011, the USDA proposed a requirement that meat producers test their products for food-borne illnesses before selling them to consumers. The "test-and-hold" policy is followed on a voluntary basis by meat producers, but the proposal would make it mandatory. It would allow USDA inspectors to hold products from commerce until test results for harmful substances are received.

Currently, the products are not required to be held and must be recalled in the event of a problematic test result. This occurred when 55,000 pounds of frozen, raw turkey burger products were recalled by Jeannie-O Turkey Store due to salmonella concerns.

The USDA will accept comments on the proposed policy for 90 days. There is no specific date for implementation of the new rule.

CPSC Approves New Safety Protections for Toddler Beds

The CPSC has approved new safety standards for toddler beds that regulate guardrail heights and warning labels, among other features, in order to protect children from injury. These mandatory standards will enter into effect six months after publication of the standards in the *Federal Register* with respect to toddler beds manufactured or imported into the United States after that date.

Under the standards, the upper edge of a toddler bed's guardrail must be five inches above the mattress. Strength testing must be consistent with the testing for cribs. Separate warning labels that address entrapment and strangulation must be displayed on the beds. There are additional standards for testing the integrity of the guardrails.

Miscellaneous

USDA Seeks Comments on Guidelines on Curtailing Child Labor in Farm Imports

On 12 April 2011, the USDA sought public comments on guidelines for a voluntary initiative seeking to prevent the importation into the United States of agricultural products produced by forced or child labor. The guidelines, published in the *Federal Register*, stem from the Food, Conservation, and Energy Act of 2008, which directed a consultative group to develop recommendations relating to a standard set of practices for independent, third-party monitoring and verification for the production, processing and distribution of agricultural products to reduce the likelihood that such products are produced with forced or child labor.

A meeting was held on 12 May 2011 to obtain oral comments on the guidelines. Written comments are due no later than 11 July 2011.

