



SANDLER, TRAVIS & ROSENBERG, P.A.  
International Trade, Customs & Export Law

**Customs Enforcement Under Trump, 2020:  
*Exercising Reasonable Care, Performing Post-Entry Reviews,  
and Filing Prior Disclosures***

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# Our Speaker



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# Why Are We Here?

- Trump
- Increased CBP enforcement
  - Significant penalty actions
  - Enforcement/revenue collection-based audit procedures – Section 232/301
  - New enforcement mechanisms, like the Compliance Letter Campaign
  - New ADD/CVD enforcement mechanism
- Personal liability for customs entry errors
- Aggressive DOJ and False Claims Act cases involving import issues are on the rise

# CBP Trade and Travel Report for FY2019

- CBP processed 35.5m entries valued at over \$2.7 trillion, collecting nearly \$72 billion in duties (almost 73% increase over FY2018, directly linked to Administration’s trade remedy measures under Sections 201 and 301)
- Under the Enforce and Protect Act (EAPA), which relates to allegations of companies circumventing AD/CVD duties, CBP received 38 new allegations and initiated 36 EAPA investigations
- CBP issued six new “withhold release” orders relating to the import of merchandise mined, produced or manufactured by forced labor
- Launched two e-commerce data pilots to assist CBP and its government partners to more accurately identify risk re: what the shipped item is, where it originated, and where it is going

# Trade Enforcement Under Trump

- 2020 Trade Policy Agenda:
  - “The Trump Administration will continue to aggressively enforce U.S. trade laws to protect the interests of American businesses and workers”

# CBP Enforcement Focus – duty underpayments

- Preference Claims
- Free Trade Agreement Claims
- Related Party Valuation
- Section 232/301
  - ✓ Classification
  - ✓ Origin
  - ✓ Value



# CBP Focus – e-commerce

- February 2020 Executive Order aimed at e-commerce - this sector “is being exploited by traffickers to introduce contraband into the United States, and by foreign exporters and United States importers to avoid applicable customs duties, taxes, and fees”
- Among other things, establishes new policy under which any person who knowingly, or with gross negligence, imports (or facilitates imports of) merchandise in material violation of federal law should be referred to CBP for a determination of whether that person should be, among other things, suspended from participating in the import of goods into the U.S.

# CBP Focus – forced labor

- Section 307 of the Tariff Act of 1930 – prohibits imports of all merchandise mined, produced, or manufactured wholly or in part in any foreign country by convict and/or forced labor and/or indentured labor
- Forced labor is defined as “all work or service which is exacted from any person under the menace of any penalty for its nonperformance and for which the worker does not offer himself voluntarily”
  - ✓ Includes forced and indentured child labor
- Significant increase in “withhold release orders”
  - ✓ 2 before 1990
  - ✓ 37 between 1991 – 2000
  - ✓ 13 since 2016

# CBP Focus – forced labor

- In January 2020, Department of Homeland Security released a strategy for combating human trafficking and described steps already taken to prevent the import of goods produced from forced labor
- Steps included streamlining trade policies and procedures, increased inspection and investigation of suspicious trade activity, detention and seizure of goods, and pursuit of criminal prosecutions against individuals and companies

# CBP Focus – forced labor

- The Uyghur Forced Labor Prevention Act (H.R. 6210 and S. 3471) would ensure that goods imported from the Xinjiang Uyghur Autonomous Region of China are not made with forced labor
- Include a determination by the President that “reasonable grounds exist” to conclude that forced labor under section 307 of the Tariff Act of 1930 exists in the region
- If such conclusions are made, corporations would have to prove with “clear and convincing evidence” that any imported products sourced from Xinjiang are not made with forced labor

# Trade Enforcement Under Trump

- Presidential Executive Order on Establishing Enhanced Collection and Enforcement of Antidumping and Countervailing Duties and Violations of Trade and Customs Laws (April 2017)
  - Stated that \$2.3B in AD/CV duties went uncollected in the past 15 years, 95% related to goods from China
  - Increased bonding for importers of goods subject to AD/CV duties
  - Operationalized recent legislative efforts to prevent AD/CV duty evasion

# 2021 Budget

- President Trump’s proposed budget for fiscal year 2021 includes significant funds related to trade enforcement, including:
  - 17.4% increase in the size of the USTR workforce and topline budget increase request of 5.8% over FY 2020 levels
    - Continued move of USTR from trade policy to enforcement and implementation (e.g., 301, trade agreements with Mexico, Canada, South Korea and Japan)
  - Increase to USTR’s Trade Enforcement Trust Fund, which implies greater enforcement of existing agreements and for ongoing negotiations with the UK, EU, Kenya, as well as, phase 2 agreements with China and Japan
  - Increases to Department of Commerce’s International Trade Agency and Bureau of Industry and Security to “level the playing field for American workers, farmers and manufacturers”
    - Continued increase in self-initiated AD/CVD investigations

# Trade Enforcement Under Trump

- Presidential Executive Order on Establishing Enhanced Collection and Enforcement of Antidumping and Countervailing Duties and Violations of Trade and Customs Laws (April 2017)
  - Directed DHS/CBP to develop and implement a plan to combat violations of trade and customs laws
  - Enhanced CBP's authorization to share information relating to IPR infringement with trademark holders
  - Instructed DOJ to work with DHS to develop prosecution practices and to allocate appropriate resources to ensure that federal prosecutors accord a high priority to the prosecution of significant trade offenses

# Increased Enforcement: Significant Penalty Actions

- May 2017 – CIT assessed statutory maximum penalty of \$691,311.54, plus interest, for the negligent misclassification of sugar
  - ✓ In assessing the maximum fee (no mitigation), Court considered the degree of culpability, history of previous violations, public interest, gravity of violation, etc.



# Increased Enforcement: Revised Audit Procedures

- In 2014, CBP modified its audit procedures in an effort to become more enforcement-minded
- Prior to 2014, CBP reviewed processes and written procedures to determine whether an importer was meeting its informed compliance and reasonable care responsibilities
- In 2014, CBP shifted back to comprehensive, statistical testing of an importer's entry transactions with an eye towards finding errors, extrapolating those findings over current/past years and collecting underpaid duties/fees and/or penalties

# Increased Enforcement: Informed Compliance Letters

- Issued by CBP Regulatory Audit to individual importers
- Identify potential cause of concern – high value of goods in a “parts” provision; significant use of a preference program; etc.
- Stated goal: “providing information to assist [the company] in taking steps to ensure future compliance” with Customs Modernization Act requirements
- Provides a DVD that includes the penalty statute and related regulations, including those relating to prior disclosure, and selected CBP informed compliance publications, including classification, value, reasonable care, recordkeeping and prior disclosure

# Increased Enforcement: Informed Compliance Letters

- “We strongly encourage [importer] to proactively monitor its transactional data in the ACE Secure Data Portal and evaluate whether there are any significant errors/discrepancies that should be voluntarily reported to CBP. Additionally, we encourage companies to conduct self-reviews of their systems used to make declarations to CBP, and take appropriate action to correct the issues and submit loss of review (duties, fees, taxes, etc.) in accordance with the appropriate laws and regulations, based on the liquidation status of the entries/transactions at issue.”

# Increased Enforcement: Informed Compliance Letters

- “Because [importer] has been provided this information, violations that may occur in the future could result in seizure and forfeiture of importer merchandise and/or the assessment of monetary penalties.”

# Increased Enforcement: Informed Compliance Letters

- Strongly recommending self-audits
- Seeking prior disclosures
- Placing the company on notice that a full-scale audit may be forthcoming

# Increased Enforcement: TFTEA

- Trade Facilitation and Trade Enforcement Act of 2015 – signed into law in February 2016
  - ✓ Directed enhanced enforcement of AD/CV duty laws – in fiscal year 2016, CBP enforced 364 AD/CV duty orders covering 150 products, collecting 1.5B in AV/CV duty deposits
  - ✓ Provided IPR protections, which, in fiscal year 2016, helped lead to the seizure of more than 31,000 shipments containing counterfeit goods
  - ✓ Formally recognized the Centers of Excellence and Expertise (CEEs)

# Increased Enforcement: AD/CVD Duty Evasion

- Enforce and Protect Act of 2015 (EAPA); Title IV, Section 421 of TFTEA – significantly enhanced CBP’s ability to combat AD/CVD duty evasion
- Preceded recent GAO report to Congress described \$2.3B in AD/CVD duties that were owed but not collected and provided recommendations to CBP for more effective enforcement

# Increased Enforcement: EAPA Regulations

- Define “evasion” as “an act or omission that is material and false, and which results in antidumping or countervailing duties being reduced or not applied to or collected on [entered] merchandise”



# Increased Enforcement: EAPA Regulations

- Claims can be filed by an “interested party” (domestic producer, competitor, OGA, etc.)
  - ✓ Once claim is received, CBP’s Trade Remedy Law Enforcement Directorate (TRLED) has 15 business days to initiate an investigation (information provided “reasonably suggests ... evasion”)
  - ✓ Once initiated, TRLED has 95 calendar days to inform the relevant parties about the investigation (likely cutting off disclosure rights)

# Increased Enforcement: EAPA Regulations

- Process
  - ✓ Any means necessary, including questionnaires requesting additional information (interested parties, foreign government, foreign producer, exporter, etc.)
  - ✓ May refer scope issues to DOC
  - ✓ Interested parties may provide “written arguments”

# Increased Enforcement: EAPA Regulations

- Affirmative Evasion Determination
  - ✓ Suspend or extend liquidation of covered entries;
  - ✓ Request appropriate rates from DOC;
  - ✓ Require importer to post cash deposits;
  - ✓ Assess duties on covered merchandise; and/or
  - ✓ Any other appropriate enforcement action, including penalties

# Personal Liability

- Penalty statute (19 U.S.C. 1592(a)(1)) – no person, by fraud, gross negligence, or negligence...
  - A. May enter, introduce, or attempt to enter or introduce any merchandise into the commerce of the United States..., or
  - B. May aid or abet any other person to violate subparagraph (A)
- Can a corporate officer of a company be penalized as an individual for negligence (or worse) under Section 1592?

# Personal Liability

- *U.S. v. Trek Leather and Harish Shadadpuri* (CIT – June 2011)
  - CBP penalized both the company and owner for consistent failure to declare assists
  - Company denied fraud, but conceded gross negligence
  - Owner claimed he could not be held liable as “aider and abettor” under statute b/c he did not act intentionally
  - CIT found instead that owner was a “person” under the statute and that (citing an earlier case) “a corporate officer who is negligent can be held liable”
  - Joint and several liability

# Personal Liability

- *U.S. v. Trek Leather and Harish Shadadpuri* (CAFC – July 2013)
  - CAFC overturned the CIT decision, finding that the owner could not be personally charged with negligence for the actions he took in his capacity as a corporate officer
  - “Person” means “importer of record”
  - For a corporate officer to “aid or abet” under Section 1592, the government must demonstrate knowing and intentional conduct
  - Strong dissent – Section 1592 does not reference the “importer of record” statute (19 U.S.C. 1484) and broadly sanctions any “person” for fraud, gross negligence or negligence

# Personal Liability

- *U.S. v. Trek Leather and Harish Shadadpuri* (CAFC – March 2014)
  - After an initial reversal was vacated by the court, the CAFC found that Shadadpuri was grossly negligent in introducing goods into the U.S.
  - U.S. Supreme Court declined to review

# False Claims Act

- Federal whistleblower statute that seeks to remedy *fraud* committed against the U.S.
- Originally enacted in 1863 (“Lincoln Law”) to protect the Government from unscrupulous contractors



# False Claims Act

- Claims may be brought by the government or a private person
  - Private person is known as “relator”
  - Civil action is referred to as a *qui tam* action and is filed “in the name of the Government”

# FCA Penalty and Reward

- **Penalty** – treble damages plus \$10,781-\$21,563 per claim
- **Reward** – with success, whistleblower receives a share of the amounts recovered by the Government
  - 15 to 25% if the Government intervenes
  - 25 to 30% if it does not
  - Attorney's fees

# “Reverse” False Claims

- Recently, FCA has been applied to recover duty and/or fee underpayments relating to the filing of customs entries
- **“Reverse” false claims** – where a person “knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government” (31 U.S.C. § 3729(a)(1)(G))

# FCA / Customs Examples

- Importer of computer cable assemblies pays \$1.2M to settle FCA case involving undervaluation of goods by obtaining two sets of invoices (Trade Report, 3/25/2014)
- Two importers of women's apparel pay \$10M to settle FCA case involving undervaluation of goods by paying seller outside of commercial invoice (Trade Report, 4/14/2014)
- Importer of protective cases for smartphones and tablets pays \$4.3M to settle FCA case involving undervaluation of goods by omitting the value of assists from entered value (Trade Report, 4/24/2014)

# “Reasonable Care” – 19 U.S.C. 1484(A)(1)

- The importer of record or its authorized agent must enter merchandise into the U.S. “using reasonable care.”

# What is “Reasonable Care?”

- Upon implementation of the Customs Mod Act, Congress provided two examples of how CBP should apply “reasonable care” in the tariff classification context:
  - Failure to follow a binding ruling is a lack of reasonable care
  - However, “an honest, good faith professional disagreement as to the correct classification of a technical matter shall not be lack of reasonable care unless such disagreement has no reasonable basis (*e.g.*, snow skis are entered as water skis)”

# Operate in an Atmosphere of Reasonable Care

- Create, follow and update specific, written compliance procedures
- Request advice on classification, valuation, preference program qualification, etc., from a customs expert
- Ruling requests, formal or informal
- Subscribe to publications like ST&R Trade Report, periodically review Informed Compliance Publications, etc.
- Check for new rulings on CROSS that may apply to your goods or transactions
- Attend webinars and log attendance
- Consistently perform post entry reviews



# Post Entry Reviews

- Full scale review
- Focused review – similar to CBP audit, but limited to specific issue(s) (*e.g.*, classification; preference program/ FTA qualification)
- “CF 28” type review – similar to CBP review of a single entry



# What should you do when you discover a potential entry error?



# Should the Error Be Reported?

- *Clear errors*
  - ignoring a binding ruling issued to the company
  - classifying identical parts in different provisions
  
- *Less clear*
  - claiming GSP without documentation (can you support GSP claim?)
  - differences of opinion re: classification (though misclassified, was it reasonable? was CBP or a broker involved?)

# Penalty Statute – 19 U.S.C. 1592 (A)(1)

- “Without regard to whether the United States is or may be deprived of all or a portion of any lawful duty, tax, or fee thereby, no person, by fraud, gross negligence, or negligence ... may enter, introduce, or attempt to enter or introduce any merchandise into the commerce of the United States”

# What are the Benefits of a “Valid” Disclosure?

- Maximum Penalties without Disclosure
  - 2x loss of revenue for negligence
  - 4x loss of revenue for gross negligence
  - 20% for negligent non-revenue loss
  - 40% for grossly negligent non-revenue loss

# What are the Benefits of a “Valid” Disclosure?

- Maximum Penalty with Disclosure – interest on duty/fee underpayment

# When is a Prior Disclosure “Valid?”

- Must fully disclose the circumstances of a violation of 19 U.S.C. 1592(c) (full description of merchandise, nature of violation, entries involved)
- Must do so “before, or without knowledge of, the commencement of a formal investigation of such violation”
- Must calculate and tender any loss of revenue
- Must file at the port of entry where the violation occurred

# Commencement and Knowledge

- When is a formal investigation commenced?
- When do you “know” CBP has commenced a formal investigation?

# Commencement and Knowledge

- Under Section 1592(c)(4), “a formal investigation of a violation is considered to be commenced with regard to the disclosing party and the disclosed information on the date recorded in writing by the Customs Service as the date on which facts and circumstances were discovered or information was received which caused the Customs Service to believe that a possibility of a violation of subsection (a) of this section existed.”



# Commencement and Knowledge

- 19 CFR 162.74(i) lists factors that lead to a “presumption” of knowledge of investigation:
  - A CBP Agent requests related records
  - CBP issues a pre-penalty or penalty notice
  - CBP seizes the subject merchandise
  - CBP tells you

# Commencement and Knowledge – CBP Compliance Letter?

- “Because [importer] has been provided this information, violations that may occur in the future could result in seizure and forfeiture of importer merchandise and/or the assessment of monetary penalties.”

# Defining the Scope of the Disclosure

- *Time frame* – 5 year statute of limitations
  - Statute of limitations waivers
- *Issue* – should all be reported to CBP?

# Disclosure Issues/Strategies

- Non-disclosure/disclosure
- Statistical sampling
- Offsetting of duty over- and underpayments
- Disclosure tender
  - 19 U.S.C. 162.74(c) permits “[t]he disclosing party ... to make the tender either at the time of the claimed prior disclosure, or within 30 days after CBP notifies the person in writing of CBP calculation of the actual loss of duties, taxes and fees or actual loss of revenue.”

# General Recommendations

- Create robust compliance program/culture
- Use ACE
- Perform post-entry reviews
- Treat all CBP inquiries seriously and, in particular, CBP Compliance Letters
- Carefully consider responses to CF 28, CF 29 or other CBP inquiries
- Quickly determine whether disclosure protection is warranted/available and take actions necessary to preserve disclosure rights
- Limit communication regarding potential errors until disclosure is filed

# Questions?

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