

303 East Wacker Drive
Suite 1020
Chicago, IL 60601

Tel: 312 565-2000
Fax: 312 565-1782
www.barnesrichardson.com

475 Park Avenue South
New York, NY 10016
Tel: 212 725-0200
Fax: 212 889-4135

11 Dupont Circle, NW
Suite 500
Washington, DC 20036
Tel: 202 483-0070
Fax: 202 483-0092

THE LATEST LURKING INTERNATIONAL TRADE LIABILITY

Customs is about to get new responsibilities in the antidumping and countervailing duty (“AD/CVD”) areas that will require the agency to undertake evasion investigations that could lead to substantial additional liabilities for importers. However, companies that recognize the threat to their bottom line and act to remove it will be at a competitive advantage when Customs gains this responsibility. Barnes, Richardson & Colburn is uniquely suited to assist companies in reviewing their operations to ensure compliance, and in defending their operations during an investigation. The firm has broad international experience in AD/CVD matters and over 90 years of Customs experience, as well as extensive contacts in key exporting countries. Coupled with the firm’s practical, solutions-oriented advice, the firm’s experience and contacts are an unmatched combination.

Executive Summary

- A bill is pending in Congress that will require Customs to investigate allegations that AD/CVD cases have been evaded.
- This bill has broad support and is expected to become law in the near future.
- AD/CVD duties for individual importers could rise to extraordinarily high levels if Customs finds that there was evasion (200% and 300% rates are not uncommon in these case).

- The bill does not require that the importer knowingly evade the AD/CVD order to impose these extraordinarily high AD/CVD duties on imports.
- It is necessary to obtain the cooperation of the foreign suppliers of the merchandise in order for the importer to obtain a successful result, requiring that the importer's counsel be able to work smoothly and quickly with the foreign supplier as well as the U.S. importer.
- The proposed deadlines for investigations are very short and importers will need to have prepared beforehand to effectively meet the deadlines.
- If there is a preliminary affirmative finding of evasion importers will likely be required to deposit cash to cover AD/CVD duties. This could negatively impact cash flow for many companies.
- Some companies will be bankrupted by the higher duties imposed in affirmative evasion cases, while other companies will find their supply chains disrupted.
- In addition to high AD/CVD duties, the law also allows for Customs penalties for false declarations and other enforcement actions by other agencies.
- Barnes, Richardson & Colburn has a unique range of experience and overseas contacts to be able to prepare companies for evasion investigations, and defend them in evasion investigations.

Background

AD/CVD duties are collected by United States Customs and Border Protection on certain imports. These imports have generally been found to be harming a United States industry, and represent either unfairly low prices in the United States (antidumping duties) or unfair subsidies by foreign governments (countervailing duties). Antidumping duties are calculated based on a comparison of sale prices in the United States and sales prices in the "home market," which is usually the country of export. Countervailing duties are calculated to offset the benefit derived by the exporter or producer from an

unfair government subsidy. These duties can be very substantial, with rates of 200% or 300% of the value of the imported merchandise not uncommon.

Because of the very high duties in many cases, some manufacturers or importers resort to deceptive means to avoid paying the duties. In these situations the manufacturers or importers obscure the true identity of the producer, the country of origin of the merchandise, and/or the nature of the goods. In some cases this means the goods are shipped through a third country, with that country declared as the origin of the goods. In other cases the goods are classified as articles other than what they are, often as parts of goods. These actions are against United States law, and cost the United States millions of dollars. These actions also perpetuate injury to the United States industry that is harmed by the imports and put honest foreign manufacturers, as well as honest importers, at a competitive disadvantage. On the other hand, there also are circumstances where products are legitimately exported from a country subject to an AD/CVD order and are transformed into a product of a third country that is not subject to the order, or the product is otherwise exempt from the order. Knowing how to distinguish these two types of situations is the key to a strong defense of evasion allegations made against importers.

In light of the consequences of AD/CVD evasion, Customs has long had the authority to investigate allegations that goods had their origins falsified, or were improperly described. In fact, these means of evasion are already violations of 19 U.S.C. 1592. However, for a variety of reasons Customs has not pursued allegations of evasion as aggressively as domestic parties would like. In recent years a variety of industries have alleged that there has been AD/CVD evasion. These industries include such diverse products as steel wire hangers, wooden bedroom furniture, uncovered inner springs, steel nails, steel plate, diamond saw blades, tissue paper, honey, laminated woven sacks, crawfish, and ferrovanadium. In some of these cases there have been criminal prosecutions; in others there has been no apparent action by Customs. Therefore, Congress has drafted legislation that will mandate that Customs

formally investigate allegations of evasion and sets strict time limits for those investigations. The law will also require periodic reports to Congress regarding the evasion investigations undertaken by Customs. There is broad support for this legislation and we fully expect it to become law.

The Legislation

The current form of the legislation is Senate Bill 1133, entitled the Enforcing Orders and Reducing Customs Evasion Act of 2011, or the ENFORCE Act. The first important element of the legislation is the definition of “evasion.” Under the bill, “evasion”

refer[s] to entering covered merchandise into the customs territory of the United States by means of any document or electronically transmitted data or information, written or oral statement, or act that is material and false, or any omission that is material, and 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.

This definition does not require any knowledge on the part of the importer. In fact, the bill makes clear that it does not matter if the importer intends to evade an AD/CVD order. It is not a defense to say that the importer relied on the manufacturer, or that the importer was unaware of the evasion for the product to be covered by the AD/CVD duty, if the product is improperly classified.

An allegation of evasion can be made by a petition filed with Customs by an interested party or a referral by any other Federal agency. The petition need only contain “information reasonably available to the petitioner.” Once Customs initiates an investigation, the importers will be under very tight statutory deadlines. A preliminary determination as to whether “there is a reasonable basis to believe or suspect that the covered merchandise was entered into the customs territory of the United States through evasion” is to be made within 90 days. This can be extended by 45 additional days. However, in that time Customs will collect information from interested parties, give parties the opportunity to comment on whether there has been evasion, and hold a hearing with the parties. Any party found to have failed to cooperate faces “adverse inferences” by Customs. Thus, the pressure to effectively participate in this

compressed proceeding will be tremendous. The failure of a foreign manufacturer to participate in the proceeding could lead to adverse inferences being taken that will result in high AD/CVD duties for importers, even if such importers themselves cooperated fully.

If Customs makes an affirmative preliminary decision, liquidation of any entries of subject merchandise entered on or after initiation of the investigation will be suspended. In addition, Customs will reassess the bond amounts required of the importer. Finally, Customs will require cash deposits on future entries of subject merchandise. The bill also allows Customs to take “other measures as the Commissioner determines appropriate.” For some importers, a substantially higher bond could be effectively impossible to procure. Even where Customs makes a negative preliminary judgment, the investigation will still continue to a final conclusion.

In the event that Customs reaches an affirmative final determination, liquidation will be suspended and Customs will ask the Department of Commerce to calculate an appropriate AD/CVD assessment rate. But this is not the end of the potential liability. The importer will then be required to post a cash deposit to cover AD/CVD duties at this assessment rate. In addition, the bill makes clear that an importer can still face enforcement actions from Customs, up to and including criminal investigations led by the Immigration and Customs Enforcement. These additional penalties require some degree of negligence or intent, however, unlike the imposition of the AD/CVD duties.

Once this bill becomes law, Customs will need to issue regulations that clarify the processes and deadlines. However, it is clear that the regime contemplated in the ENFORCE Act will require quick responses from manufacturers and importers with serious consequences if there is a finding of evasion. Furthermore, even if there are changes to the eventual law, it is clear that there will be aggressive investigation of allegations of evasion for the foreseeable future.

Preparing for ENFORCE

1. Risk Assessment

As discussed above, ENFORCE has a very broad definition of evasion, and does not require that Customs show an intent to evade an AD/CVD case. Unfortunately, the consequences of evasion fall on the importer, regardless of whether the importer acted in good faith. Moreover, even the best efforts of the importer can be undermined if there is insufficient cooperation from the foreign supplier. Thus, a proactive approach, even before an investigation, should become part of a comprehensive compliance program. Below we describe some of the steps that can be taken.

First, companies that utilize imported products that are subject to United States AD/CVD cases need to evaluate their risk. It is not necessary for the company to be the importer of record to be in jeopardy. This is true because if your supplier is the importer and is driven out of business, your supply chain will be disrupted. It is also not necessary that the product you use be from a country subject to an AD/CVD order. One of the most common types of evasion is to declare an allegedly false country of origin from a third country not subject to the order (e.g., declaring Vietnamese origin on goods that may be found to originate in China, which is subject to an order) . Therefore, the declared origin of your goods may not protect your company from an evasion case. An assessment of your import sources, possible problem areas, and a review of your suppliers' methods of doing business, is a good first step in determining if deeper analysis is needed.

2. Documenting and Reviewing Transactions

Second, because a finding of evasion does not require a showing of intent to evade, it will not insulate a company from the risk of higher AD/CVD duties if the company relies on another entity to manage its international sourcing, even if the reliance is in good faith. Companies will need to be able to leverage international resources to document that their products are, in fact, of the origin declared at

entry. One of the strengths of Barnes, Richardson & Colburn is our depth of experience in working numerous foreign countries to obtain similar information for clients.

3. Develop and Implement Compliance Systems

Third, companies will need to recognize that importing goods that are subject to United States AD/CVD orders can be, in some instances, a bet-the-company proposition, or at least a very expensive proposition. This is true even if the declared origin is not the country with the AD/CVD order. With AD/CVD rates potentially at two or three times the value of the imported merchandise, a finding of evasion can lead to liabilities that are two and three times higher than the most severe penalties available to Customs for breaking the Customs laws. Strong systems and procedures will need to be in place to manage this risk. Thus, in addition to reviewing the current vulnerability, companies should incorporate new suppliers into an internal compliance system that checks on the potential for vulnerability to evasion allegations.

4. Due Diligence in Mergers & Acquisitions

In addition to the compliance issues above, special care should be taken when acquiring another company that is involved in international trade. Substantial liability could be acquired along with the purchase of such a company if there are evasion issues. Often the review of such issues are not part of the standard due diligence review, but with increased enforcement and risk in international trade, such issues now need to be part of such review for many deals.

Barnes, Richardson & Colburn approaches legal issues with a business-oriented, practical perspective. We understand the importance of supply chains, business relationships, and being able to function as a business while still maintaining compliance with the laws. Barnes, Richardson & Colburn also has broad and deep experience with AD/CVD matters from countries across the world. In addition, the firm has decades of experience with Customs and managing import risk. Finally, the firm has

extensive contacts in all key trading countries familiar with the realities of the local business environment, as well as the realities of international trade. We stand ready and able to assist companies in managing this new risk.