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69 Senators and Representatives Write DHS Opposing Change to "First Sale Rule"

— *Bv Broker Power Inc.*



A total of 69 Senators and Representatives have signed on to letters¹ to Homeland Security Secretary Chertoff opposing U.S. Customs and Border Protection's proposal to change the "first sale rule."

(In January 2008, CBP proposed to no longer value merchandise using the "first sale" principle in a series of sales importation scenario. Instead, CBP proposed to value such merchandise based on the "last sale" occurring prior to the introduction of the goods into the U.S. *See ITT's Online Archives or 04/18/08 news, (Ref: [08041825](#)), for most recent BP reminder on the proposed changes.*)

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Increased Import Duties, Fees, and Taxes Would Occur - The letters state that if CBP's proposal were to take effect, many U.S. companies would be forced not only to pay increased import duties, fees, and taxes, but also to restructure and possibly eliminate business units that have been built around long-standing U.S. law.

Long-Standing Interpretation of U.S. Statute Would be Violated - The letters also state that CBP's proposal would violate a long-standing judicial and administrative interpretation of a U.S. statute in favor of a 2007 non-binding World Customs Organization (WCO) commentary.

Potential Negative Impact on Exporters - In addition, the letters state that CBP, in consultation with other federal agencies, should consider the potential negative impact of the proposed change on U.S. exporters. For example, other countries that allow the "first sale rule" could decide to alter their rules if CBP's proposal were adopted. This would likely lead to decreased exports for some U.S. exporters, as they would face increased duties and other taxes based on customs values.

Over 100 Comments Received on CBP's Proposed Change to "First Sale Rule" -

Comments on CBP's proposed change to its "first sale rule" were due by April 23, 2008. As of the afternoon of May 7, 2008, over 100 comments were posted to Federal [eRulemaking portal](#).

¹Representative Meek, along with 50 other Representatives, sent a letter to the DHS Secretary; Senator Schumer sent a letter to the DHS Secretary, as well as Treasury Secretary Paulson; Senators Smith and Wyden, along with 15 other Senators, sent a letter the DHS Secretary.

(*See ITT's Online Archives or 04/29/08 news, (Ref: [08042999](#)) #1, for previous BP summary of the 17 Senators' letter.*)



NOTICE TO THE WILDLIFE IMPORT/EXPORT COMMUNITY



May 7, 2008

Subject: Validation of CITES Documents

Background: On August 23, 2007, the U.S. Fish and Wildlife Service (Service) published a [final rule](#) updating regulations that implement the Convention on International Trade in Endangered Species (CITES) in the United States (50 CFR Part 23). These regulations went into effect on September 24, 2007. In our public bulletin of September 18, 2007, we highlighted some of the changes for the trade.

One of those changes was that the appropriate inspection authority must validate all CITES documents at the time of export or re-export. At that time, we informed the trade that the Service would no longer accept CITES documents for imports of CITES species that have not been validated. As part of the implementation of the new requirements, these changes were also announced in CITES Notification to the Parties No. 2007/027.

Action: We wish to remind the trade that CITES documents for imports of CITES species must be validated with the actual quantity of specimens exported or re-exported using the same units of measure as those on the CITES document. This quantity must be validated or certified by the stamp or seal and signature of the inspecting authority at the time of export or re-export. Importers should communicate with their foreign exporters and ensure that CITES documents are validated prior to export. Any shipments of CITES species imported with unvalidated CITES documents are subject to seizure.

CITA Receives NAFTA Short Supply Request on Rayon Fabrics – *By: Sandler, Travis & Rosenberg, P.A.*

The Committee for the Implementation of Textile Agreements is seeking comments by June 13 on a NAFTA short supply request received May 2. The petitioner alleges that certain woven jacquard acetate rayon fabrics classified under HTSUS 5408.23.2930 cannot be supplied by the domestic industry in commercial quantities in a timely manner. The petitioner is therefore requesting that CITA consider whether the NAFTA rule of origin for certain men's apparel classified under HTSUS 6203 should be modified to allow the use of non-North American woven jacquard acetate rayon fabric.



CBP Revises Textile Detention Policy for Importer Self-Assessment Partners - *By: Sandler, Travis & Rosenberg, P.A.*

U.S. Customs and Border Protection issued a memo to its field offices May 8 relaxing somewhat its textile and apparel detention policy for companies participating in the Importer Self-Assessment program. This policy no longer requires the assessment of liquidated damages for

failure to redeliver inadmissible merchandise and indicates that CBP will generally not seek penalties under 19 USC 1592 if the goods are deemed inadmissible. CBP's revised policy is set forth below.

CBP's usual procedures for shipments detained at time of entry require the presentation of production records to ascertain the country of origin and determine admissibility. Under the revised policy, importers that have been approved under the ISA program will not have their goods detained under specific circumstances. When the detention results from a textile production verification team visit, however, this policy will not apply to ISA partners using manufacturers that (1) falsely declared a country of origin, (2) were closed at the time of the visit and were verified closed at the time of the production of the goods or (3) never existed.

If the importer is an ISA participant and the foreign manufacturer is not barred from this detention exception, CBP will conditionally release the merchandise and immediately issue a request for information (CBP Form 28) to obtain production records to determine the country of origin. Concurrently, the import specialist will notify the importer's port or national account manager. The account manager will notify the importer that the manufacturer or supplier for a given shipment has been designated as a factory of concern and will assist the account, ensuring timely submission of documentation to substantiate compliance with CBP laws and regulations.



The ISA partner may decide to hold the goods until admissibility is determined or to allow the goods to continue to move through the supply chain and enter U.S. commerce. If the documents presented substantiate production in the declared country, the port will notify the ISA partner and national account manager of this positive determination through a CBP Form 29. If the port has any concerns with the documents presented it is encouraged to contact the ISA partner and copy the national account manager to obtain additional information before issuing a negative determination.

If the documents fail to prove production or if the ISA partner does not submit the requested documents, the merchandise, though conditionally released, is deemed inadmissible and a redelivery notice to exclude the merchandise is to be issued within 180 days of release of the goods. If the ISA partner maintained custody of the goods and has returned them to CBP after a redelivery notice is issued, no liquidated damages will be issued. CBP has removed the requirement to initiate a 1592 penalty wherein transshipment is an aggravating factor in the mitigation. Should this type of incident continue to occur, the ISA partner will be scheduled for a quick response audit to determine whether the importer has adequate controls, but it will continue to be a partner in the ISA program.

If the ISA partner did not maintain custody of the goods and the goods are not available for redelivery, (1) CBP will assess liquidated damages for failure to redeliver, (2) the import specialist will notify the account manager and the Textile Operations Branch that the ISA partner has a violation pertaining to origin and (3) the ISA partner will become subject to the standard detention policy. CBP has removed the requirement to initiate a 1592 penalty wherein transshipment is an aggravating factor in the mitigation. It has also eliminated the distinction between first and subsequent violations for purposes of remedial action.

If CBP and the importer differ in their conclusion about whether the declared country of origin can be substantiated, the ISA partner may engage the Textile/Apparel Policy and Program Division within CBP's Office of International Trade, through their account manager, to provide assistance to the import specialist to ensure uniformity of application and review the reasons why the import specialist has determined that the country of origin as declared to CBP is incorrect. The ISA partner may also protest CBP's decision to exclude the goods.

CBP states that this detention policy is a privilege provided to ISA companies that have demonstrated their commitment to improve trade compliance by assuming responsibility for managing their own compliance. This policy does not, however, preclude the issuance of a penalty under 19 USC 1592 if there is evidence warranting punitive actions.



COMMERCE COMPLETES SECOND REVIEW OF VIETNAM IMPORT DATA *Commerce Finds Insufficient Evidence to Self-Initiate*

Washington – Today, U.S. Department of Commerce officials announced that, after reviewing the second six months of data from the monitoring program of apparel imports from Vietnam, there is insufficient evidence to warrant self-initiating an antidumping investigation. This program began upon Vietnam's entry into the World Trade Organization (WTO) in January 2007.

“Commerce will continue our commitment to examine imports from Vietnam to ensure that apparel is not dumped into the U.S. market and threatening American manufacturers’ competitiveness,” said Assistant Secretary for Import Administration David Spooner. “Our investigation reveals that prices of Vietnamese apparel are in line with, and in most cases even exceed, other major suppliers, including Central America.”

Commerce examined import data for five different apparel product groups from Vietnam – trousers, shirts, underwear, swimwear and sweaters – during the second six-month period, August 2007 through January 2008. The review determined that during this period, the United States did not import apparel from 208 of nearly 500 ten-digit Harmonized Tariff Schedule (HTS) lines within the five groups from Vietnam. Many of the remaining ten-digit HTS lines had rising unit values, further indicating that dumping is not taking place.

Commerce then compared trends in unit values and import levels to other suppliers of these products to the United States, including Bangladesh, CAFTA-DR (Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, and Nicaragua), India, Indonesia, Pakistan, Thailand, Cambodia, Macau, Malaysia and the Philippines. Based on this comparison, Commerce concluded that there was insufficient evidence to self-initiate an antidumping investigation. Commerce will continue to monitor trade in these categories during the next six months for the next review that will begin in September 2008. This import monitoring program will conclude at the end of this Administration.

The Commerce Department will continue to post import data for these product groups on the Vietnam Textile and Apparel Import Monitoring Program Web site at: <http://ia.ita.doc.gov/download/vietnam-textile-monitoring/vtm-index.html>.

Background

Dumping occurs when a foreign producer sells a product in the United States at a price that is less than fair value, which is often the producer's sales price in the country of origin or its cost of production.

On Sept. 28, 2006, Secretary of Commerce Carlos M. Gutierrez and United States Trade Representative Susan C. Schwab announced the initiation of an import-monitoring program covering certain textile and apparel products from Vietnam. As part of this program, which commenced upon entry of Vietnam into the WTO and continues for the duration of this Administration, Commerce will complete a review every six months as to whether there is sufficient evidence to self-initiate an antidumping investigation of any textile or apparel goods from Vietnam pursuant to section 732 (a) of the Trade Act of 1930 (19 U.S.C. and 1673a(a)).

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NEW CHINESE CORPORATE TAX LAWS PRESENT OPPORTUNITIES AND RISKS FOR COMPANIES' GLOBAL TRANSFER PRICING POLICIES

With China's implementation of a new corporate tax law and administrative regulations on Jan. 1, 2008, Chinese tax authorities (the State Administration of Taxation) have been developing agency regulations and rules that will increase the scrutiny applied to transfer pricing between related parties in China. This development presents an ideal opportunity for multinational companies operating in China to coordinate their customs valuation and tax transfer pricing policies to reduce their tariff and tax exposure and liability.

China Transfer Pricing Rules

Along with the inter-company pricing rules for tax administration that China issued on Oct. 12, 2004, the new regulations and rules will:

- (1) highlight the criteria for transfer pricing audits;
- (2) effectively demand detailed supporting transfer pricing documentation before submission of a tax return;
- (3) increase the scrutiny of related party transactions for tax purposes; and
- (4) encourage the use of advance pricing agreements.

Coordination with Customs Valuation Rules

With these new tools, the SAT has begun to increase its scrutiny of related party transactions. At the same time, with customs revenue currently representing approximately one-fourth of total government revenue, China Customs is increasingly looking at the valuations relied upon in related party transactions for customs declaration purposes. As the objective of China Customs from a pricing perspective is often contrary to that of the SAT (since lower import values generally lead to higher internal taxes whereas higher import values usually lead to increased tariff revenue), changes in Chinese tax laws only promise to increase the complexity of conducting business in China. Moreover, while the SAT is more focused on the process, methods and comparability analysis relied upon to support the "arm's length" nature of a company's transfer pricing policies, China Customs is more focused on individual transactions and the circumstances surrounding the individual sale into China. The consequences these different approaches can have on a company's exposure to pricing policy challenges are often inadvertently shielded until they come to light during an SAT tax audit and/or China Customs audit or review.

Ironically, one example of the potential impact these policies could have arises out of the expansion of trading rights resulting from China's accession to the WTO in 2001. Since that time, more China-based operations of multinational companies have become "buyers" of commodities into China for consumption or resale and "importers of record" for customs transactions. These related party transactions in and of themselves are now more likely to trigger customs valuation scrutiny, as the values declared for related party transactions are often lower than the ones declared for independent transactions due to factors such as commercial level, quantity, costs and other distinctions. Without advance planning and consultation with China's customs and tax authorities, these differences could be lost on the Chinese government, thereby leading to increased costs and oversight of such transactions.

Similarly, most companies operating in China focus solely on the valuation of tangible goods for customs appraisalment purposes while devoting substantial attention to both tangible and intangible goods (royalties, intellectual property rights, etc.) in determining their tax liability. This dichotomy can have ramifications, particularly as China Customs officials focus on the potential dutiability of intangible property and property rights.

Given these changes, it is critical for multinational companies to act now to review their tax and customs positions to ensure that they are taking full advantage of the opportunities presented by operating in the Chinese market while also protecting their interests against unwanted reviews and challenges of their transfer pricing policies. For additional information concerning these developments and how Sandler, Travis & Rosenberg, P.A., can support companies in this area, please contact:

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