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Customs Alert: Customs Proposes New Interpretation of Statute Defining "Transaction Value" – By Carl R. Soller, C.J. Erickson of Cowan, Liebowitz & Latman

February 5, 2008

Import Duties Likely to Increase under New Definition – Wearing Apparel Imports Highly Impacted

Customs and Border Protection ("Customs") has recently proposed a new interpretation of the statutory definition of "transaction value," the primary method of appraising imported merchandise. The objective of the proposed change is to eliminate the "first sale" rule which has been utilized by importers of multiple sale import transactions for almost twenty years as a means of determining transaction value. Simply put, the first sale rule allows importers of multiple sale import transactions to use the price paid by the buyer in the first sale as the dutiable value for U.S. Customs purposes. For instance, where an importer contracts to purchase goods from a middleman, who purchases the goods from the manufacturer, under the first sale rule, the transaction value is based on the price paid by the middleman to the manufacturer.

The recent proposed interpretation, however, seeks to reverse this rule by advancing a "last sale" rule in which the transaction value of multiple sale imports would be determined on the basis of the price paid in the last sale occurring prior to the introduction of the goods into the U.S. In essence, the transaction value under this rule would be the price paid by the U.S. buyer. Consequently, under the proposed interpretation, transaction values would increase, resulting in substantial duty increases for importers.

If you wish to discuss the additional requirements under the current rule, have any questions regarding the proposed change, or wish to submit comments in response to the proposed interpretation, please contact [Carl Soller](#) or [C.J. Erickson](#).

Comments must be received by Customs by April 23, 2008.



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CBP Grants Only 30 Extra Days to Comment on Proposal to Eliminate First Sale Rule *Prepared by Sandler Travis & Rosenberg P.A.*

U.S. Customs and Border Protection has extended from March 24 to April 23 the comment period on its proposal to eliminate the favorable import valuation methodology available under the First Sale Rule. The implementation of this change will result in a tariff increase of between 8 percent and 15 percent for those importers using the First Sale Rule. An industry coalition organized by Sandler, Travis & Rosenberg, P.A., had requested an additional 180 days to respond to CBP's proposal.

The First Sale Rule has been available for almost 20 years as a result of a 1988 decision by the U.S. Court of Appeals for the Federal Circuit in *E.C. McAfee v. U.S.*, which was successfully argued by ST&R's Len Rosenberg. CBP's proposed action, which is based on an April 2007 finding by the World Trade Organization's Technical Committee on Customs Valuation, would revoke this rule and thus eliminate the ability of importers to use the price paid in the first sale in a multi-sale transaction as the value for duty purposes.

Under U.S. customs law, transaction value is the primary method of appraising imported merchandise and is defined as "the price actually paid or payable for merchandise when sold for exportation to the United States." CBP is proposing to revise its interpretation of the phrase "sold for exportation to the U.S." so that in a transaction involving a series of sales the price actually paid or payable is the price paid in the last sale occurring prior to the introduction of the goods into the U.S. instead of the first (or earlier) sale. As a result, transaction value will normally be determined on the basis of the higher price paid by the U.S. buyer.

The First Sale Coalition is pursuing a number of legislative, regulatory and other initiatives to oppose the elimination of the First Sale Rule, which would increase costs for U.S. businesses and consumers. For more information, please contact [Larry Ordet](#) at (305) 267-9200 or [David Cohen](#) at (202) 216-9307.

Trade Community Asks DHS to Withdraw Proposal to Raise Import Taxes *– Prepared by Sandler Travis & Rosenberg P.A.*

Nearly 100 U.S. importers, retailers, industry groups and others sent a letter to Homeland Security Secretary Michael Chertoff Feb. 11 requesting the immediate withdrawal of U.S. Customs and Border Protection's Jan. 24 proposal to eliminate the favorable import valuation methodology available under the First Sale Rule. The letter said this proposal "ignores significant judicial precedent, suddenly seeks to overturn almost two decades of agency practice, and, if allowed to be implemented, would amount to a hidden tax on U.S. consumers."



Under U.S. customs law, transaction value is the primary method of appraising imported merchandise and is defined as “the price actually paid or payable for merchandise when sold for exportation to the United States.” The First Sale Rule provides that in a transaction involving a series of sales the price actually paid or payable is the price paid in the first sale. This methodology was approved in a 1988 Court of Appeals for the Federal Circuit ruling, and the letter notes that since then it has been “consistently reaffirmed by U.S. courts and by CBP itself.”

CBP is proposing to revoke the First Sale Rule based on what the letter calls “a non-binding commentary” issued in April 2007 by the World Trade Organization’s Technical Committee on Customs Valuation. Specifically, CBP is seeking to revise its interpretation of the phrase “sold for exportation to the United States” so that in a multi-tiered transaction the price actually paid or payable would be the price paid in the last sale occurring prior to the introduction of the goods into the U.S. As a result, transaction value would normally be determined on the basis of the higher price paid by the U.S. buyer.

The letter states that this proposal “is particularly disturbing with regard to the timing, process and manner that CBP employed to publish its position.” For example, eliminating the First Sale Rule would result in “the assessment of significantly higher duties on U.S. imports, leading to higher prices for U.S. consumers” that would undercut the essential goals of the economic stimulus package recently worked out by Congress and the Bush administration. “Moreover,” the letter adds, “while government and business have collaborated as partners to protect our ports and boost our economy, the decision to put forward such a significant change in practice without consultation with the U.S. trade community presents a disturbing message with respect to that essential partnership.” The letter also expresses concern that this change has been proposed and would take effect without any congressional approval or oversight.

Sandler, Travis & Rosenberg, P.A., has moved quickly and aggressively to challenge CBP’s proposal. The firm has helped to secure a 30-day extension of the comment period, which is now slated to expire April 23. We have also assembled a coalition of businesses that are or may be affected by a revocation of the First Sale Rule. This coalition is pursuing a number of legislative, regulatory and other measures to prevent CBP’s proposal from being implemented. For more information, please contact [Larry Ordet](#) at (305) 267-9200 or [David Cohen](#) at (202) 216-9307.

MERCOSUR Countries to Implement New Labeling Requirements for Textile and Apparel Products – *provided by Broker Power Inc.*



The Southern Cone Common Market (MERCOSUR), which includes Brazil, Argentina, Paraguay, and Uruguay, has issued technical regulations establishing new labeling requirements for textile and apparel products produced in or imported for consumption into a MERCOSUR member country.

Textile Products to Be Affected by the Technical Regulation on Labeling

According to an unofficial translation of the proposed technical regulation in Portuguese, the textile products that will be affected by the regulation include textile products which are composed exclusively of fibers and/or textile filaments in raw form, treated or semi-treated, manufactured or semi-manufactured, made-up or semi-made-up.

(See the technical regulations for the complete definition of “textile products.” Note that the Office of Textiles and Apparel (OTEXA) states that in general, “most” textile and apparel products will be affected by this technical regulation.)

Labels Will be Required to Include Name of Importer, Country of Origin, Etc.

The subject textile and apparel products will be required to include the following information on a label, stamp, decal, etc. that is permanent, indelible, legible and clearly visible in the language of the country of consumption¹:

- name or registered brand and tax identification of the domestic producer or importer;
- country of origin;
- fiber content;
- care instructions; and
- size or dimensions, as applicable.

Products to be Excluded from the Labeling Requirement

Among other listed exempted products, the following will not be subject to the new labeling requirement (*partial list*):

- tampons and sanitary napkins, disposable diapers, hair accessories, textile appliqués, textile articles used on animals or toys, seatbelts, camping tents, footwear, felt hats, book covers, belts, rope, flags, badges, toys, umbrellas, artificial flowers, bags and suitcases, cleaning rags, parachutes, textile products for rent, used clothing (the term "used clothing" must be indicated), scuba-diving clothing, certain tablecloths, bath articles (except towels, curtains and carpets which will be subject to the labeling requirement), watch bands, furniture, etc.

Textile and Apparel Products Sold in Packages

Certain textile and apparel products sold in packages will be allowed to bear the required information on or inside their packaging instead of on the article itself, as long as that information can be seen from the outside. Such articles include handkerchiefs, fabric diapers, napkins, bibs, hosiery and socks, gloves, garments made in raschel-type machines, crocheted bedspreads, mosquito nets, and seamless products.

Multiple units in a package. If the package contains more than one item, the number of units and the fact that those items cannot be sold separately will have to be clearly stated.

Airtight packages. Textile and apparel products sold in airtight packages such that the labeling information is not visible from the outside must, at a minimum, include on their packaging: the fiber composition, the country of origin and the size or dimension.

(See the technical regulations for complete requirements, exceptions, scope, etc.)

¹The labels may also be in other languages.

MERCOSUR labeling requirements *in Spanish or Portuguese*, are available via email by sending a request to documents@brokerpower.com

OTEXA notice, “MERCOSUR Countries Adopt New Labeling Regulations for Textiles and Apparel” (dated 01/25/08) available at

<http://web.ita.doc.gov/otexa/hotiss.nsf/f73552c8fded111d85256e5b00498a51/91bb757b13d79dcc852573db007776c3?OpenDocument>

New Regulations Will Make Trade Compliance Program Essential for Companies Doing Business in China - *Published by Sandler, Travis & Rosenberg, P.A.*



New Regulations Will Make Trade Compliance Program Essential for Companies Doing Business in China

China's General Administration of Customs will implement April 1 new regulations that will make it easier and less costly to import goods into and export goods from China for companies that have good trade compliance programs and records. These regulations are intended to encourage informed trade compliance, improve the customs-trade partnership, continue China Customs' modernization efforts and bring its policies and practices concerning trade compliance and facilitation and supply chain security more into line with those embodied by the World Customs Organization's Framework of Standards to Secure and Facilitate Global Trade and the authorized economic operator programs being developed around the world based on that framework. China Customs is now working on the rules, standards, systems and processes that will be used to implement the new regulations, including an importer compliance assessment system and internal control standards that incorporate best practices from the Importer Self-Assessment program used by the U.S. and the AEO programs of other countries.

The major feature of the new regulations is the provision of specific trade facilitation benefits for importers/exporters (referred to herein as importers of record, or IORs) that meet certain criteria. Based on their compliance records, internal controls, business performance and other information, IORs will be classified by China Customs into one of the following categories: AA, A, B, C and D. IORs in class B will continue to experience routine inspections and audits and slow customs release of

their goods, while those in classes C and D will be subject to increased inspections and audits. IORs classified in classes A or AA, however, will receive the following benefits.

Class A. Class A IORs will be eligible for (a) inter-district remote filing and goods release at the port of entry, (b) Customs inspection at the IOR facility if necessary, (c) privileged rapid inspection and release, (d) advance customs entry and release before the goods arrive at the port of entry, (e) 24/7 urgent customs clearance and (f) waiver of customs bond or cash deposit requirement for processing trade operations. Eligibility requirements include an annual import and export volume greater than \$500,000, a customs entry error rate lower than 3 percent, operating as a Class B IOR for at least a year, and a clean record over the past 12 months concerning customs, trade and other relevant laws and regulations.

Class AA. Class AA IORs will receive all of the Class A benefits, plus (a) rapid customs release for trusted clients, (b) a Customs account manager to answer customs and trade questions, (c) direct customs release after the entry passes electronic review, and (d) no cargo inspections under normal circumstances. Qualifications for Class AA include an annual import and export volume greater than \$30 million, passing a customs audit and verification, meeting internal control, trade compliance and trade security requirements, submitting biannual import/export business reports and operating as a Class A IOR for at least a year.

Customs brokers will also be classified according to the new system. Importers are advised to be very careful in selecting a broker and to avoid hiring one classified under category C or D.

Benefits Available for Active IORs with Good Trade Compliance Programs

The new regulations are expected to reduce the costs and burdens associated with importing into and exporting from China for IORs with good trade compliance programs. As a result, multinational companies doing business in China are advised to act as IORs and to centralize their trade activities in that country if possible in order to more effectively and efficiently deal with China Customs and other trade-related Chinese government agencies. Although foreign-invested companies have been allowed to conduct international trade activities in China since it joined the WTO in 2001, many still hire local trading companies to act as IORs to avoid technical issues and compliance problems, which can increase the cost of doing business. In addition, by acting only as consignees for import shipments, these companies increase their potential customs and trade compliance risk and lose out on the benefits of government trade compliance and facilitation programs, which only IORs can legally participate in.

Sandler, Travis & Rosenberg, P.A., which has a longstanding partnership with China Customs under the three-phase United Nations Development Program project for China Customs modernization, has worked with industry interests to promote and pursue these regulations and is well-positioned to help you take advantage of them. For additional information, please contact [Zhaokang Jiang](#) at +86 (10) 6505-9900 in Beijing or (202) 216-9307 in Washington, D.C., [Larry T. Ordet](#) at (305) 267-9200 or [Jeremy Ross Page](#) at (312) 641-0000.



USTR Seeks Comments for Preparing New Anti-Counterfeiting Agreement *Sandler, Travis & Rosenberg, P.A.*

USTR Seeks Comments for Preparing New Anti-Counterfeiting Agreement

The Office of the U.S. Trade Representative is seeking comments by March 21 regarding its negotiation of a new Anti-Counterfeiting Trade Agreement. According to the USTR, the U.S. and other trading partners intend to seek an agreement with provisions in three main areas: international cooperation, enforcement practices and the legal framework for intellectual property rights enforcement. A principal goal of the ACTA would be to establish with other governments a common standard for IPR enforcement to combat global infringements of IPR, particularly in the context of counterfeiting and piracy.

When the ACTA was first announced in October 2007, Canada, the European Union, Japan, Korea, Mexico, New Zealand and Switzerland had already signed on to participate in the negotiations. The USTR has stated that the pact will not involve any changes to the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights but instead is designed to “set a new, higher benchmark for enforcement that countries can join on a voluntary basis.” CBP states that the information provided in this publication is for general information purposes only. CBP cautions that because many complicated factors can be involved in customs issues, an importer may wish to obtain a ruling under CBP Regulations, 19 CFR Part 177, or obtain advice from an expert (such as a licensed Customs Broker, attorney or consultant) who specializes in customs matters. Reliance solely on the general information in this ICP may not be considered reasonable care.

¹CBP notes that the terms and explanations that are covered within this ICP are applicable to fasteners made of other base metals classified within other chapters, as well as fasteners made to metric or inch standards. However, this ICP focuses on fasteners of iron or steel and references inch fastener standards for illustration purposes.

ICP on fasteners of HTS heading 7318 (dated January 2008)

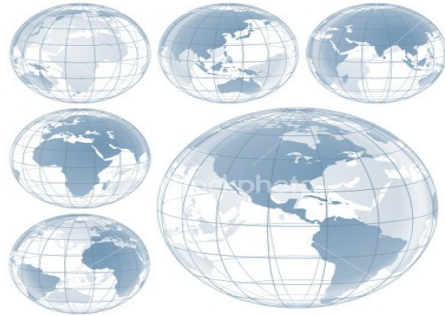
http://www.cbp.gov/linkhandler/cgov/toolbox/legal/informed_compliance_pubs/fasteners_head_7318.ctt/fasteners_head_7318.pdf

House Committee Approves Ten-Month Extension of Andean Trade Preferences - *Sandler, Travis & Rosenberg, P.A.*



The House Ways and Means Committee approved Feb. 14 by voice vote legislation that would extend the Andean Trade Preference Act through Dec. 31. A committee press release noted that the full House is expected to consider the measure during the week of Feb. 25. It is unclear whether both the House and Senate will be able to act on the bill before ATPA preferences for Bolivia, Colombia, Ecuador and Peru expire Feb. 29.

The bill approved by the committee (H.R. 5264) is a stripped-down version of the measure introduced Feb. 7 by Chairman Charles Rangel, D-N.Y. Rangel had proposed to extend all three of the trade preference programs scheduled to expire this year – the ATPA, the U.S.-Caribbean Basin Trade Partnership Act and the Generalized System of Preferences – through Sept. 30, 2010. The original bill would also have made certain amendments to the African Growth and Opportunity Act.



CBP Officials Discuss 10+2 Proposed Rule at February 2008 COAC Meeting (COAC Submits its Comments) – by Broker Power Inc.

During the February 13, 2008 meeting of the Departmental Advisory Committee on Commercial Operations of U.S. Customs and Border Protection and Related Homeland Security Functions (COAC)¹, CBP officials discussed, among things, the proposed rule to amend 19 CFR to require Security Filing (SF) information from importers and additional information from carriers (10+2) for vessel (maritime) cargo before it is brought into the U.S.

CBP Recognizes Need to Phase-In 10+2

At the meeting, CBP Commissioner Basham stated that CBP recognizes that it needs to make sure that 10+2 is implemented in the correct way and is phased-in over a period of time. According to the Commissioner, CBP will work with COAC to get advice on how to implement 10+2.

Comments on Systems Issues, Etc. Are Being Reviewed by CBP Team

CBP has assembled a team to review comments on the 10+2 proposed rule, noting that the primary focus of the comments has been on systems issues. CBP's team is also talking about how to train field personnel and provide outreach to the trade.

CBP is Reaching Out to ATDI Partners for Advice

CBP officials stated that as part of their examination of the approach they will take from a programming perspective, they have reached out to some of the partners in the Advance Trade Data Initiative (ATDI)². CBP has asked them to participate in a roundtable to discuss how they provide data to CBP under ATDI in order to give the trade community some idea about what CBP is looking at system-wise, what the ATDI partners have experienced, etc.

(As part of ATDI, CBP has been working with a variety of volunteers from the world trade community to test the trade's ability to provide data, including some elements of the importer SF, to CBP. CBP officials have previously stated that they are using ATDI as a "laboratory" to try out certain aspects of 10+2.)

COAC Recommends Phased Implementation/Enforcement, Confirmation Message, Etc.

At the meeting, COAC adopted a list of eight main comments/recommendations which will be submitted as comments to CBP in response to its 10+2 proposed rule.

Highlights of the COAC recommendations contained in its letter include:

1. CBP should use a phased approach to the operational implementation and enforcement of the importer SF requirements sufficient to allow the trade and CBP adequate time to take the steps necessary for effective implementation without an undue disruption to commerce or to CBP's information systems.

COAC recommends that the effective date for all filers be projected to be 12 months from the time of the effective date of the final rule, subject to implementation progress.

2. The proposed imposition of liquidated damages in connection with the importer SF is unnecessary and should be deleted.
3. There must be no "linking" of the data elements in the importer SF. Instead filers should transmit all required information in an established format, allowing CBP to manipulate the data to best achieve effective security screening.
4. There must be a timely confirmation message (with a unique identification number issued) indicating that the SF has been completed, filed, and accepted. (This would provide required assurance to the filer, forwarder/consolidator and the importer of record, and contribute to the success of the importer SF.)
5. The type, length, and definition of each required data element must be clearly described in the regulations and any accompanying instructions, so that filers may properly program their information technology (IT) systems to accommodate the importer SF.
6. The importer SF and World Customs Organization's Framework of Standards to Secure and Facilitate Global Trade (SAFE Framework) should be harmonized.
7. The carrier messaging requirements must clearly defined so that the carriers may carry out an effective implementation of their portion of the SF requirement .
8. A more realistic and collaborative cost, benefit, and feasibility study is strongly recommended (as COAC believes that the costs used are understated in the proposed rule).

According to trade sources, COAC also wants publication of the data requirements followed by a phase-in of 10+2 by a volunteer group from the trade using the data and authorized filing systems

(Automated Manifest System (AMS) and Automated Broker Interface (ABI). This would allow the trade to properly prepare for the IT portion of the filing and would allow CBP to get “the bugs out.”

See future issues of ITT for additional details from this COAC meeting.

Comments on 10+2 Proposed Rule are Due by March 18, 2008

According to CBP, all comments received will be posted without change to <http://www.regulations.gov>, including any personal information provided. As of the morning of February 20, 2008, 17 comments (from 15 separate commenters) had been posted on CBP's proposed rule (COAC's comments had not yet been posted). The submitted comments may be viewed on the Federal eRulemaking portal at

<http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=USCBP-2007-0077>.

¹Formerly known as the "Commercial Operations Advisory Committee."

²CBP has stated that the goal of ATDI is to gather and analyze specific information already available from commercial supply chain participants in advance of, and in addition to, the 24-Hour Rule and entry data currently collected. Started in 2004 as a maritime security prototype, it was elevated to be part of C-TPAT Best Practices in 2005. CBP has also stated that ATDI provides information further back in the supply chain than the 24-Hour Rule.-

(See ITT's Online Archives or 01/17/08 news, (Ref: [08011710](#)), for the final part of BP's summary of the 10+2 proposed rule, with links to previous parts.

See ITT's Online Archives or 02/04/08 news, (Ref: [08020405](#)), for BP summary of CBP's 10+2 comment period extension notice.)

COAC's comments (dated 02/13/08) available by emailing documents@brokerpower.com.



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