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November 16, 2016

Trade and Commercial Regulations Branch,
Regulations and Rulings,
Office of Trade
U.S. Customs and Border Protection,
90 K Street, N.E., 10th Floor,
Washington, DC 20229-1177

Re: Investigation of Claims of Evasion of Antidumping and Countervailing Duties; USCBP-2016-0053

On behalf of the Committee to Support U.S. Trade Laws ("CSUSTL"), an organization of U.S. companies, trade associations, and workers, we are providing comments on the interim regulations issued by U.S. Customs and Border Protection ("CBP") to implement section 421 of the Trade Facilitation and Trade Enforcement Act of 2015, also known as Title IV-Prevention of Evasion of Antidumping and Countervailing Duty Orders (short title "Enforce and Protect Act of 2015" or "EAPA").[1] These comments are submitted in response to CBP's solicitation regarding the published interim regulations.[2]

EAPA's enactment into law underscores the substantial adverse impact of evasion of antidumping and countervailing duty orders on the efficacy of our trade remedy laws. CSUSTL encourages CBP to robustly implement and administer administrative proceedings under EAPA to address duty evasion. The comments provided herein are submitted with the objective of improving and augmenting the interim regulations such that the final regulations administered by CBP may effectively counteract evasion of antidumping and countervailing duties. These comments are organized by regulatory provision and follow the order of the interim regulations.

I. Definitions – 19 C.F.R. § 165.1

A. *Allegation*

CBP's *Interim Regulations* define an "allegation" as referring to "a filing with CBP under § 165.11 by an interested party that alleges an act of evasion by an importer of AD/CVD orders." Section 165.11, in turn, requires that an allegation

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1 *See* Pub. L. 114-125, 130 Stat. 122, 155, Feb. 24, 2016 (19 U.S.C. § 4301 note).

2 *See Investigation of Claims of Evasion of Antidumping and Countervailing Duties*, 81 Fed. Reg. 56,477 (Dep't Homeland Security and Dep't of the Treasury Aug. 22, 2016) ("*Interim Regulations*").

include the "{n}ame and address of {the} importer against whom the allegation is brought . . . ." and "{i}nformation reasonably available to the interested party to support its allegation that the importer with respect to whom the allegation is filed is engaged in evasion." As such, the definition appears to require allegations to not only identify "an act of evasion . . . of AD/CVD orders" but, further, the specific importer involved in the alleged activity.

The recent report issued by the United States Government Accountability Office ("GAO") on antidumping and countervailing duties accurately observed that importers with substantial unpaid debts owed to CBP subsequently incorporate under different names and are able to resume importing as a new entity.[3] Further, the recent GAO report recognized that an importer with substantial unpaid debts owed to CBP may also switch roles to formally act as a consignee, with another company acting as the importer of record, in order to continue to participate in the importation of merchandise subject to antidumping and/or countervailing duties.[4]

Experience teaches that evasion of antidumping and countervailing duties is often achieved through a shell-game of related paper companies and/or non-resident entities acting as the formal importer of record on various shipments. For example, in the criminal prosecution of Katy Lin regarding evasion of antidumping duties on imports of Chinese honey, the U.S. Attorney described a scheme involving at least a dozen different companies acting as importers of record, with a single U.S. agent in common to all of them:

> KBB Express Inc. was a freight forwarding company located in South El Monte, California that provided nationwide transportation, delivery, and other logistical services for imported and entered merchandise, including Chinese-origin honey. LIN owned and operated KBB Express Inc., and also served as the U.S. agent for at least twelve importers of record that were controlled by Chinese honey producers and manufacturers. These importers of record included Bright Step (United States) Limited; Sweet Campo Co., Ltd.; Migrow Trading Inc.; Chix Trading Inc.; Rouka International Inc.; Oliv Amber Trading Co., Ltd.; Titto International Inc.; Stariver Trading Inc.; Tobest Trading Co., Ltd.; Russa International Inc.; Sunny (USA) Trading Inc.; and Silver Spoon International Inc. As the U.S. agent for these companies, LIN handled the process of importing, and coordinated with customhouse brokers to enter and bring in, Chinese-origin honey into the United States without paying antidumping duties and honey assessment fees.

See U.S. Attorney's Office, Pre-Sentencing Report (Sept. 25, 2013), United States v. Lin, Case No. 1:13-cr-00125 (N.D. Ill.). In the criminal prosecution of Hung Ta Fan, also involving the evasion of antidumping duties on imports of Chinese-origin honey, an investigator from U.S. Immigration and Customs Enforcement reported that the participants in the scheme recommended the use of multiple companies to import the illegal merchandise:

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[3] *See* United States Government Accountability Office, *Antidumping and Countervailing Duties: CBP Action Needed to Reduce Duty Processing Errors and Mitigate Nonpayment Risk*, GAO 16-542 (July 2016) at 20-21.

[4] *See id.* at 21.

> FAN also told ICE agents that he created Honey World on the advice of ALW United States Executive 2, who told FAN that a high volume of imports by a single company would be noticed by CBP. FAN also stated that he acted upon additional advice provided to him by an employee of the FAN Companies, who advised FAN that he should import into the United States using multiple companies to avoid added scrutiny and attention by CBP and that this advice was seconded by ALW Executives in at least one-in-person meeting with FAN.

See Declaration of Immigration and Customs Enforcement (March 12, 2010), United States v. Fan, Case No. 1:10-cr-00198 (N.D. Ill.).

Because of these common evasion strategies, parties interested in submitting an allegation may be able to compile substantial information regarding the act of evasion, but, in many cases, still be left to guess as to the specific identity adopted to act as the formal importer of record for any particular import entry. Making the initiation of investigations contingent upon guessing the right name would significantly reduce the effectiveness of the EAPA procedure in a way that Congress does not appear to have intended. It would also further encourage the proliferation of paper company importers to shield certain evasion schemes from the reach of the EAPA administrative proceedings.

CSUSTL appreciates that the agency must administer the EAPA proceedings in a manner consistent with the Trade Secrets Act, 18 U.S.C. § 1905. That statutory provision mandates:

> Whoever, being an officer or employee of the United States or of any department or agency thereof . . . publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be fined under this title, or imprisoned not more than one year, or both; and shall be removed from office or employment.

It is possible that disclosure of the identity of the importer to an interested party that did not already know that identity could violate section 1905. But CBP can protect against such disclosure without having to narrow the class of investigations it will undertake in a manner inconsistent with Congress' instructions. In the Trade Facilitation and Trade Enforcement Act of 2015, Congress instructed CBP to investigate any allegation that "reasonably suggests that covered merchandise has been entered into the customs territory of the United States through evasion."[5] Congress did not indicate that such investigations should only be undertaken to the extent that a specific importer of record was identified, nor is there any support in the legislative

[5] *See* Pub. Law. at Sec 421 (new 19 U.S.C. § 1517(b)(1)).

history for CBP to exercise discretion to decline to initiate an investigation where an allegation reasonably suggests that covered merchandise has been entered into the United States through evasion.[6] Thus, CBP should not require such specific identification as a condition of investigation.

Rather, to the extent that CBP believes that, where not identified publicly by the alleger, the identity of an evading importer should remain confidential, CBP must undertake other means by which to protect this information. For example, the agency could identify importers in public documents by pseudonyms, at least until such time as identity of the importer is disclosed by a party other than CBP (*i.e.*, a party not subject to 18 U.S.C. § 1905). This would be more consistent with Congressional intent than foregoing the investigation of plausible claims of evasion simply because the alleger cannot identify the relevant importer or importers with precision.

Additionally, to the extent that CBP is concerned that public disclosure of the name of an importer is integral to its enforcement efforts under the EAPA, such public identification may be provided by the alleged importer itself. For instance, pursuant to § 165.5(a) of the *Interim Regulations,* CBP is authorized to "employ any means authorized by law" to obtain information, including through questionnaires and correspondence. Section 165.21(a)(1) of the *Interim Regulations* makes "{m}aterials obtained and considered by CBP during the course of an investigation" part of the administrative record. Section 165.4(c) indicates that no interested party providing information in an EAPA investigation may claim that the "name and address" of the importer constitutes business confidential information. As such, in response to the receipt of an allegation or request that "reasonably suggests that the covered merchandise has been entered for consumption into the Customs territory of the United States through evasion," regardless of whether the importer of record has been identified, CBP may issue an initial questionnaire to relevant importers seeking information regarding the entity's identity and the entry at issue. Any response by that entity provides a basis for identification of the importer of record separate and apart from documents submitted regarding the entry of imported merchandise, and the entity cannot claim that its identity constitutes business confidential information. Moreover, should the entity refuse to respond, CBP is authorized under § 165.6 of the *Interim Regulations* to apply an inference adverse to the importer that would guide the agency in selecting from among the facts otherwise available in order to make a determination as to evasion. Accordingly, the refusal to respond to a request for information would also provide a basis for identification of the importer of record separate and apart from documents submitted regarding the entry of imported merchandise.

In the final regulations, CBP should amend the definition of "allegation" at 19 C.F.R. § 165.1 to read as follows: "The term 'allegation' refers to a filing with CBP under § 165.11 by an interested party that alleges an act of evasion of AD/CVD orders." In order to make 19 C.F.R. § 165.4(c)(3) consistent with this change, CBP should additionally amend that provision to read as follows: "Name and address of the importer;" Further, 19 C.F.R. § 165.11(a) should be amended to omit the following sentence: "Each allegation must be limited to one importer, but an interested party may file multiple allegations."

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6 *See id.*

19 C.F.R. § 165.11(b)(3) should be deleted from the final regulations, and (b)(4), (b)(5), and (b)(6) should be re-numbered (b)(3), (b)(4), and (b)(5).

B. *Investigation*

CBP's *Interim Regulations* define an "investigation" as "a formal investigation within the meaning of section 592(c)(4), Tariff Act of 1930, as amended (19 U.S.C. § 1592(c)(4))." The statutory provision cited, in turn, regards prior disclosure and provides for a limitation on the repercussions of any finding of a violation of law in the event of prior disclosure. CSUSTL understands that, pursuant to 19 U.S.C. § 1592(c)(4), an importer may not make a prior disclosure once it is aware that an investigation is underway. Accordingly, an importer would presumably not be able to make a prior disclosure after the notification provided for by interim § 165.15(d)(1).

Nevertheless, the *Interim Regulations* do not appear to contemplate how the disclosure of circumstances of a violation would impact an EAPA proceeding. Nothing within the *Interim Regulations* indicates whether an EAPA investigation will proceed if a prior disclosure is made. Further, the *Interim Regulations* do not indicate whether an interested party filing an allegation or another federal agency requesting an investigation will be informed if a prior disclosure has been made.

In the final regulations, CBP should address how prior disclosures pursuant to 19 U.S.C. § 1592(c)(4) will impact EAPA proceedings.

C. *Parties to the Investigation*

CBP's *Interim Regulations* implement a narrow definition of "parties to the investigation" such that the term is limited only to the interested party filing an allegation and the importer allegedly engaged in evasion in investigations initiated through an allegation and only the importer (or importers) alleged to have engaged in evasion in investigations initiated following a request by another Federal agency. Interim § 165.14(e), in turn, provides that "{o}nly the parties to the investigation will be entitled to notice and service, as well as the related rights to administrative review and judicial review." Moreover, § 165.26(a) and § 165.26(b)-(c) limit the ability to submit written arguments and responses to "parties to the investigation." Further, § 165.44 authorizes the agency to request additional written information from "parties to the investigation" at any time during the review process. Accordingly, the only way that an "interested party" not responsible for the alleged activities can participate in an investigation is by filing its own allegation pursuant to § 165.11.

The narrow definition of "parties to the investigation" contained within the *Interim Regulations* means that the agency is precluding the participation of a "manufacturer, producer, or wholesaler in the United States of a domestic like product" in investigations self-initiated by CBP or initiated at the request of another Federal agency. This regulatory construction runs contrary to CBP's commitments to transparency and unreasonably limits the number of parties that can participate in a category of investigations. Further, as discussed in more detail below, CBP should consider implementing regulations that would authorize the agency to self-initiate investigations where the criteria of 19 C.F.R. § 165.15(b) are met. If CBP were to adopt this

suggestion, the narrow definition of "parties to the investigation" would preclude the participation of a "manufacturer, producer, or wholesaler in the United States of a domestic like product" in these investigations as well.

Pursuant to 19 C.F.R. § 165.15(d)(1) of the *Interim Regulations*, notification of the decision to initiate an investigation is to be provided no later than 95 calendar days after that decision is made. Pursuant to 19 C.F.R. § 165.23(c)(2), parties to the investigation may voluntarily submit factual information to the agency no later than 200 calendar days after initiation and, pursuant to 19 C.F.R. § 165.26(a), written arguments may be submitted to CBP by parties to the investigation no later than 230 calendar days after initiation. Accordingly, there is a window of significant time between notification of initiation of an investigation (no later than 95 days after initiation) and the deadlines for the submission of factual information (no later than 200 days after initiation) and written argument (no later than 230 days after initiation) wherein a "manufacturer, producer, or wholesaler in the United States of a domestic like product" could meaningfully participate in an investigation that has been self-initiated by CBP or was initiated in response to a request by another Federal agency.

For these reasons, CBP should promulgate regulations that provide for the publication of notices to initiate EAPA investigations (discussed below) and the agency should amend the definition of "parties to the investigation" to read as follows:

> *Parties to the investigation.* The phrase "parties to the investigation" means the interested party (or interested parties, in the case of consolidation pursuant to § 165.13) who filed the allegation of evasion, the importer (or importers, in the case of consolidation pursuant to § 165.13) who allegedly engaged in evasion, and any other party meeting the definition of an "interested party" that submits an entry of appearance to CBP in a timely fashion. In the case of investigations initiated based upon a request from a Federal Agency, parties to the investigation only refers to the importer or importers who allegedly engaged in evasion and any party meeting the definition of an "interested party" that submits an entry of appearance to CBP in a timely fashion, and not the Federal agency.

II. Entries Subject to this Part – 19 C.F.R. § 165.2

CBP's *Interim Regulations* provide that an allegation (§ 165.11) or request for investigation (§ 165.14) may only be premised upon import entries made within one year before the allegation or request for investigation has been filed. At the same time, Section 165.2 affords CBP with the authority to investigate other entries at the agency's own discretion.

Discussing the one-year limitation, CBP explains:

> CBP is specifying the one-year period for an EAPA investigation in order that the information required for conducting the investigation and rendering a timely determination will be current and readily available.[7]

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[7] *Interim Regulations* at 56,479.

However, the *Federal Register* notice does not indicate the basis for the conclusion that information "will be current and readily available" only for entries made within one year prior to an allegation being filed. Rather, it appears that the one-year period limitation is premised on the deemed liquidation standard established by 19 U.S.C. § 1504(a)(1).

The retrospective nature of antidumping and countervailing duty assessment under U.S. law means that the one year limitation on allegations potentially eliminates entries of merchandise from the scope of CBP's EAPA proceedings for which relief is possible under the statutory structure. This is because there is a wide range of tactics used to illegally circumvent the payment of antidumping and countervailing duties. CBP's *Interim Regulations* explain that "{e}xamples of evasion could include, but are not limited to":

- "the misrepresentation of the merchandise's true country of origin (e.g., through fraudulent country of origin markings on the product itself or false sales)" otherwise known as transshipment;
- "false or incorrect shipping and entry documentation"; or
- "misreporting of the merchandise's physical characteristics."[8]

In describing these broad categories of types of evasion, CBP appropriately acknowledges the diversity of evasion schemes. However, the breadth of the categories discussed is so massive that schemes involving Type 1 entries are conflated with schemes involving Type 3 entries.

A more complete description of duty evasion strategies recognizes that:

- Foreign manufacturers and unscrupulous U.S. importers may seek to completely avoid the payment of antidumping and countervailing duties by routing merchandise through a third-country and falsely claiming a country-of-origin not subject to a trade remedy (transshipment);
- Foreign exporters and unscrupulous U.S. importers may seek to unlawfully reduce their *ad valorem* antidumping and countervailing duty liability by falsely undervaluing imported merchandise;
- Foreign exporters and unscrupulous U.S. importers may seek to unlawfully reduce their per unit antidumping and countervailing duty liability by declaring a false weight for the imported merchandise;
- Foreign exporters may illegally reduce or eliminate antidumping and countervailing duty liability by misidentification of the manufacturer of the subject merchandise;
- Unscrupulous U.S. importers may illegally reduce or eliminate antidumping and countervailing duty liability by misidentifying the manufacturer or exporter of the

[8] *Interim Regulations* at 56,478.

imported goods in order to take advantage of a comparatively lower duty rate attached to that foreign company;

- Unscrupulous U.S. importers may seek to completely avoid payment of antidumping and countervailing duties by falsely characterizing entries of imported merchandise that should be subject to such duties as something other than a "Type 03" entry; and

- Unscrupulous U.S. importers may seek to illegally circumvent antidumping and countervailing duty orders by misclassifying merchandise in import entry documentation as falling under an inapplicable code of the Harmonized Tariff Schedule of the United States ("HTSUS").

The schemes described in the second, third, fourth, and fifth bullets above may involve merchandise imported into the United States as a Type 3 entry. In that circumstance, liquidation of the entry may be suspended for a period greater than a single year and the relief, both interim and final, contemplated by 19 C.F.R. §§ 165.24 and 165.28, respectively, remains available. Where this is true, the temporal limitation established by 19 C.F.R. § 165.2 would inappropriately inhibit CBP from providing a remedial response to unliquidated entries as contemplated by both the statute and the *Interim Regulations*.

Moreover, regardless of whether a particular entry made through evasion was designated as Type 1 or Type 3, a one year limitation does not appear to have been contemplated by Congress, which imposed no such limitation on CBP's investigations in the Trade Facilitation and Trade Enforcement Act. Indeed, such a limitation appears to undermine Congress' expressed intent of ensuring that importers that are evading duties pay all antidumping and countervailing duties for which they are liable.[9] To the extent that CBP would prefer to not investigate entries that have already liquidated, we note that CBP already has established authority under 19 U.S.C. §§ 1621 and 1641 to take action with respect to up to five years of entries, inclusive of liquidated entries.

Interim section 165.15(b)(2) authorizes CBP to consider whether information provided along with an allegation or a request for an investigation "reasonably suggests that the covered merchandise has been entered for consumption . . . through evasion." This provision appears to give the agency substantial latitude to determine that overly stale or dated information is an insufficient basis upon which to find a "reasonable suggestion" of evasion.

Accordingly, CBP should omit interim § 165.2 from the final regulations. If the agency believes that a cutoff date is important for the purposes of administrative efficiency, the interim regulation should be amended to encompass entries made within five years before the receipt of an allegation or a request for an investigation.

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[9] Congress did not limit CBP's authority, in the Trade Facilitation and Trade Enforcement Act, to the investigation only of evasion encompassed by imports no more than a year old. Further, CBP currently administers similar investigative procedures that do not incorporate any such time limitation. For example, CBP's regulations permit private parties to submit allegations regarding imports that may have been produced through forced and/or indentured labor, and require CBP to investigate such claims. *See* 19 C.F.R. § 12.42. The regulation provides no specific limitation on the time period for entries that form the basis of the allegation.

III. Power of Attorney – 19 C.F.R. § 165.3

CBP's *Interim Regulations* require, under certain circumstances, the existence of a power of attorney where materials are filed with the agency "by a person acting as agent or attorney in fact for the principal . . . ."[10] Further, the *Interim Regulations* instruct that "CBP will require proof of execution of a power of attorney . . . ."[11] However, the *Interim Regulations* do not specify what action CBP may take if no proof of the execution of a power of attorney is provided.

Accordingly, for the final regulations, a new subsection (f) should be added to the interim regulation stating as follows:

> (f) *Return of submission.* If a party has not provided proof to CBP pursuant to paragraph (e) of this section, CBP will return any submissions made pursuant to paragraph (a) of this section and will not consider any such submissions or retain any such submissions in the record of the proceeding.

IV. Release of Information Provided By Interested Parties – 19 C.F.R. § 165.4

The *Interim Regulations* allow interested parties to claim confidential treatment for certain information submitted to CBP in the course of an evasion allegation/investigation, and also requires parties to supply public versions of submissions that contain confidential information.[12] However, the *Interim Regulations* do not provide for an administrative protective order (APO), or a similar process by which counsel to interested parties may obtain and review confidential information submitted by other parties. CSUSTL strongly believes that the lack of an APO process or APO analogue complicates parties' ability to make and respond to EAPA allegations, implicates the due process rights of parties, and is to the detriment of CBP's own ability to administer the EAPA process.

For example, in the absence of an APO process, persons alleging evasion will not have full or fair access to information that importers provide in their defense. Likewise, importers allegedly involved in evasion may not be able to review the evidence presented against them. This will complicate all parties' ability to provide the agency with relevant and responsive information and to make useful arguments in support of their positions. In fact, the lack of an APO process raises the distinct possibility that the parties that most stand to be affected by the agency's decision-making will not have full access to the record unless and until a judicial appeal is launched, and a judicial protective order is issued.

Lack of an APO process also stands to complicate the agency's administration of evasion investigations by requiring the agency to devote time and resources to refereeing disputes among interested parties regarding the adequacy of public summaries. The agency may also find itself confronted with irrelevant arguments and evidence submitted by parties who, without full access to the record, are unable to properly assess the nature of that record and of other parties' claims.

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10 *Interim Regulations* at 56,483.

11 *Id.*

12 *Id.* at 56,483-84.

CSUSTL understands that the agency may not have included provisions for an APO process in the *Interim Regulations* out of concerns that Congress did not explicitly authorize the agency to set up such a process. CBP may have been particularly concerned that in the absence of such express authorization, the Trade Secrets Act, discussed above, would operate to prevent the agency from developing an APO process on its own.

However, CSUSTL notes that specific statutory authorization for an APO process is not necessary, given that Congress broadly authorized CBP to "prescribe such regulations as may be necessary to implement" the provisions of the Trade Facilitation and Trade Enforcement Act regarding investigation of evasion allegations.[13] Likewise, Congress has broadly authorized the agency to issue rules and regulations necessary to carrying out the purposes of the Tariff Act of 1930, to which the evasion provisions of the Trade Facilitation and Trade Enforcement Act are an amendment.[14] CSUSTL respectfully submits that these grants of authority permit CBP to adopt APO processes, which are necessary to the full and fair administration of the process. In so doing, these statutory grants of authority provide the agency with an exception to the Trade Secrets Act, which operates to prevent disclosure of certain information "except as provided by law."

Support for this approach can be found within the rules adopted by similarly situated federal agencies. For example, the Federal Communications Commission has adopted a protective order process despite a lack of specific statutory provisions prescribing such a process.[15] Rather, because limited disclosure of confidential information through a protective order is necessary to the full and fair performance of the agency's duties under the Communications Act, the agency has relied on that Act's general delegation of regulatory authority to develop an APO process.

CSUSTL urges CBP to undertake a similar approach here and develop an APO process for purposes of the finalized regulations. This will protect the due process rights of parties and will ultimately result in more efficient and easily-administered proceedings.

V. Obtaining and Submitting Information – 19 C.F.R. § 165.5

CBP's *Interim Regulations* provide, at 19 C.F.R. § 165.5(c)(2), that if a submission is untimely filed, "then CBP will not consider or retain it in the administrative record and adverse inferences may be applied, if applicable." In addition, 19 C.F.R. § 165.5(b) sets forth a series of requirements for submissions made to CBP and instructs that all submissions must be (1) written in the English language or be accompanied by an adequate English translation; (2) made electronically to CBP's designated e-mail address "or through any other method approved or designated by CBP"; and (3) accompanied by certain enumerated certifications.

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13 *See* Pub. Law. at Sec 421(d).

14 19 U.S.C. § 1624.

15 *See* Order, *In the Matter of Applications of Charter Communications, Inc., Time Warner Cable Inc. and Advance/Newhouse Partnership For Consent to Assign or Transfer Control of Licenses and Authorizations*, MB Docket No. 15-149 at para. 13 (Sept. 11, 2015), *available* at https://apps.fcc.gov/edocs_public/ attachmatch/FCC-15-110A1.pdf.

Although the *Interim Regulations* discuss potential consequences of the submission of a false statement, they do not specify what action CBP may take if a submission fails to meet the requirements of 19 C.F.R. § 165.5(b) on its face. Accordingly, for the final regulations, a new subsection (b)(4) should be added to the interim regulation stating as follows:

> (4) *Return of submission.* If a submission to CBP from a party fails to meet the requirements of paragraph (b) of this section, CBP will return the submission and will not consider the submission or retain the submission in the record of the proceeding.

VI. Allegations by Interested Parties – 19 C.F.R. § 165.11

As discussed in more detail above, the requirement that allegations specify the importer alleged to have engaged in evasion will have the perverse effect of encouraging the further proliferation of shell company importers. CBP's *Interim Regulations* currently require that "{e}ach allegation must be limited to one importer, but an interested party may file multiple allegations" (19 C.F.R. § 165.11(a)), that each allegation include the "{n}ame and address of importer against whom the allegation is brought" (19 C.F.R. § 165.11(b)(3)), and that each allegation include "{i}nformation reasonably available to the interested party to support its allegation that the importer with respect to whom the allegation is filed is engaged in evasion (19 C.F.R. § 165.11(b)(6)). In circumstances where a distributor or foreign exporter uses multiple entities to act as the formal importer of record, these requirements obligate any interested party wishing to submit an evasion allegation to file multiple allegations with the hope that, in at least one of them, they have correctly identified the relevant importer.

As also discussed in more detail above, CBP can structure the conduct of its EAPA proceedings so as not to run afoul of the Trade Secrets Act (18 U.S.C. § 1905), without requiring allegers to precisely identify the importer or importers at issue. For the final regulations, 19 C.F.R. § 165.11(a) should be amended to omit this following sentence: "Each allegation must be limited to one importer, but an interested party may file multiple allegations." 19 C.F.R. § 165.11(b)(3) should be deleted from the final regulations, and (b)(4), (b)(5), and (b)(6) should be re-numbered (b)(3), (b)(4), and (b)(5). The *Interim Regulations'* 19 C.F.R. § 165.11(b)(6) (to be re-numbered (b)(5)), should be amended to be consistent with the statute such that the revised provision would read: "Information reasonably available to the interested party to support its allegation that merchandise has entered the customs territory of the United States through evasion."

VII. Receipt of Allegations – 19 C.F.R. § 165.12

The *Interim Regulations* authorize a party to withdraw an allegation if the party "submits a request to withdraw the allegation to the designated email address specified by CBP." Other provisions within the *Interim Regulations* contemplate submissions to the agency by e-mail or "through any other method approved or designated by CBP." See 19 C.F.R. § 165.5(b)(1); 19 C.F.R. § 165.11(a); 19 C.F.R. § 165.14(c); and 19 C.F.R. § 165.26. For the final version of the regulations, CBP should make the withdrawal provision consistent with other provisions and amend 19 C.F.R. § 165.12(b) to read: "*Withdrawal.* An allegation may be withdrawn by the

party that filed it if that party submits a request to withdraw the allegation to the designated email address specified by CBP or through any other method approved or designated by CBP."

VIII. Consolidation of Allegations – 19 C.F.R. § 165.13

The *Interim Regulations* authorize CBP, at the agency's discretion, to consolidate allegations against one or more importers into a single investigation. CBP's determination as to whether to consolidate multiple allegations into a single investigation will be premised on the consideration of multiple factors, which may include: (1) the relationship between the importers; (2) the similarity of covered merchandise; (3) the similarity of the antidumping and countervailing duty orders; and (4) the overlap in time periods of the entries of covered merchandise at issue. Notably, none of these factors are part of the regulations governing allegations submitted by interested parties (19 C.F.R. § 165.11) or federal agency requests for investigations (19 C.F.R. § 165.14). As such, the decision as to whether to consolidate allegations into a single investigation is made based on CBP's fact-finding after an allegation or request for investigation has been submitted.

CBP's approach to the consolidation of allegations supports the agency withdrawing its requirement that allegations and requests identify a specific importer tied to the entry or entries of merchandise made through evasion. Specifically, pursuant to the *Interim Regulations*, CBP will make a determination as to whether to consolidate allegations regarding different importers based on information obtained regarding relationships between those importers. Because the *Interim Regulations* only permit an allegation to be filed against one importer (19 C.F.R. § 165.11(a)), information regarding any relationships between importers will only be obtained by CBP after the submission of an allegation. Similarly, as discussed above, fact-finding made by CBP after the submission of an allegation or a request for investigation but made prior to notification of initiation permits the agency to identify the importer of record through information obtained within an EAPA investigation.

IX. Other Federal Agency Requests for Investigations – 19 C.F.R. § 165.14

Consistent with the *Interim Regulations*' requirement that interested parties making evasion allegations specifically name the importer that is the subject of the allegation, 19 C.F.R. § 165.14 also places the same requirement on federal agencies filing allegations. In particular, 19 C.F.R. § 165.14(b) states that an agency request for investigation must include the "{n}ame of {the} importer against whom the allegation is brought" (19 C.F.R. § 165.14(b)(1)) and "{i}nformation that reasonably suggests that an importer has entered covered merchandise into the customs territory of the United States through evasion . . ." (19 C.F.R. § 165.14(b)(4)). Requiring other federal agencies to specifically identify the name of the formal importer of record involved in the evasion improperly shields entities that use multiple shell or paper company entities to act as importers on entries of covered merchandise.

As discussed in more detail above, CBP can structure the conduct of its EAPA proceedings so as not to run afoul of the Trade Secrets Act (18 U.S.C. § 1905). For the final regulations, 19 C.F.R. § 165.14(b)(1) should be deleted and (b)(2), (b)(3), (b)(4), (b)(5) and (b)(6) should be re-numbered (b)(1), (b)(2), (b)(3), (b)(4) and (b)(5), respectively. The *Interim Regulations'* 19 C.F.R. § 165.14(b)(4) (to be re-numbered (b)(3)), should be amended to be

consistent with the statute such that the revised provision would read: "Information that reasonably suggests that covered merchandise has entered the customs territory of the United States through evasion."

Further, as with 19 C.F.R. § 165.12(b), the *Interim Regulations* authorize a federal agency to withdraw a request for an investigation if "the agency submits a request to withdraw to the designated email address specified by CBP." In the final regulations, this provision should be made consistent with 19 C.F.R. §§ 165.5(b)(1), § 165.11(a), § 165.14(c), and § 165.26 and the relevant clause of the second sentence of 19 C.F.R. § 165.14(a) should be amended to read: "unless the agency submits a request to withdraw to the designated email address specified by CBP or through any other method approved or designated by CBP."

X. Initiation of Investigations – 19 C.F.R. § 165.15

If CBP continues to hold that investigations can only be initiated where an allegation or request for investigation accurately identifies the specific importer of record responsible for the entry made through evasion, the agency should amend the *Interim Regulations* to authorize self-initiation of EAPA investigations. Importantly, the standard for initiation established by 19 C.F.R. § 165.15(b) makes no reference to an importer. Instead, 19 C.F.R. § 165.15(b) requires that covered merchandise described in the allegation or request for investigation be "properly within the scope of an AD/CVD order" (19 C.F.R. § 165.15(b)(1)) and that "{t}he information provided in the allegation or Federal agency request for an investigation reasonably suggests that the covered merchandise has been entered for consumption into the Customs territory of the United States through evasion as it is defined in § 165.1" (19 C.F.R. § 165.15(b)(2)). Accordingly, the structure of the *Interim Regulations* means that inevitably, there will be allegations or requests for investigations submitted to the agency that, while failing to correctly identify the importer of record, meet the criteria requirements of 19 C.F.R. § 165.15(b). In such circumstances, failing to initiate an investigation would be an unreasonable exercise of discretion by the agency because the criteria for initiation have been met.

If CBP amends the *Interim Regulations* to permit self-initiation of investigations but declines to amend the narrow definition of "parties to the investigation" contained within 19 C.F.R. § 165.1 so as to facilitate greater participation in EAPA investigations initiated based on an allegation, the agency should amend its regulations to implement a different definition of "parties to the investigation" where an investigation has been self-initiated or initiated based on a request for investigation. In these circumstances, CBP should publish, through its web-site or otherwise, its determination to initiate an investigation consistent with the timeframe established by 19 C.F.R. § 165.15(d) and invite interested parties to submit entries of appearance for the investigation within a reasonable period of time after publication of the notice of initiation.

XI. Determination as to Evasion – 19 C.F.R. § 165.27

As explained above, CBP is likely to confront a broad range of illegal evasion schemes in its administration of the EAPA proceedings. CBP's findings arising out of these proceedings, in turn, will assist the trade community in identifying and addressing similar evasion schemes.

Nevertheless, the *Interim Regulations* do not appear to contemplate publication of determinations. The interim 19 C.F.R. § 165.27(a) provides that CBP "will make a determination based on substantial evidence as to whether covered merchandise was entered" into the United States through evasion. The interim 19 C.F.R. § 165.27(b) requires that, no later than five days after making the determination provided for in (a), "CBP will send via an email message or through any other method approved or designated by CBP a summary of the determination limited to publicly available information under paragraph (a) to the parties to the investigation."

Thus, under the interim regulation, a "summary" of CBP's determination need only be distributed to the "parties to the investigation." Any limitations on the distribution and publication of CBP determinations in EAPA proceedings are inconsistent with the agency's commitment to transparency. On the agency's website, CBP explains its approach to rulings and legal decisions as follows:

> U.S. Customs and Border Protection (CBP) issues binding advance rulings and other legal decisions in connection with the importation of merchandise into the United States. Advance rulings provide the international trade community with a transparent and efficient means of understanding how CBP will treat a prospective import or carrier transaction.
>
> For example, a ruling letter may address the tariff classification or appraised value of merchandise, the liquidation of an entry, or the exclusion of merchandise from entry. As such, ruling letters facilitate trade by enabling companies to make business decisions that are dependent on how their goods will be treated on importation.
>
> CBP also issues other binding decisions such as internal advice decisions letters (covering current import and carrier transactions), and protest review decisions (appeals of CBP decisions on completed transactions).
>
> With a view to promoting transparency, CBP also makes available to the public various other guidance including the following: the Customs Rulings On-Line Search System (CROSS – a database of published rulings), the Customs Bulletin and Decisions, pertinent Federal Register Notices, CBP Directives and Handbooks, Informed Compliance Publications, and a summary of laws enforced by CBP.[16]

Similarly, a view towards promoting transparency and increasing understanding within the trade community regarding how CBP will treat a transaction argues in favor of the wide distribution and publication of CBP determinations.

Moreover, limitations on the distribution and publication of agency evasion determinations are inconsistent with CBP's overarching goal of effectively addressing evasion of antidumping and countervailing duty orders, while, at the same time, ensuring that importers are

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[16] See https://www.cbp.gov/trade/rulings (last visited September 26, 2016).

adequately educated so as to be able to properly and accurately declare their imports of goods subject to trade remedy orders. In other words, declining to make the agency's determinations widely available improperly handicaps the trade community from being able to evaluate whether the EAPA proceedings are achieving their objective of countering illegal evasion and robs importers of information that could assist them in avoiding others' mistakes.

The statute provides no restrictions on CBP's ability to distribute or publicize agency determinations in EAPA proceedings. Further, CBP practice, developed pursuant to other statutory obligations, affords an existing framework for distribution and publication of these determinations. Specifically, 19 U.S.C. § 1625 mandates that "{w}ithin 90 days after the issuance of any interpretive ruling (including any ruling letter, or internal advice memorandum) or protest review decision under this chapter with respect to any customs transaction" CBP "shall have such ruling or decision published in the Customs Bulletin or shall otherwise make such ruling or decision available for public inspection." Similarly, CBP should amend interim regulation 19 C.F.R. § 165.27 to re-number subsection (c) as (d) and include the following new subsection (c):

> (c) *Publication.* No later than ninety days after making a determination under paragraph (a) of this section, CBP shall have a summary of the determination limited to publicly available information published in the Customs Bulletin or shall otherwise make such a summary available for public inspection.

XII. Final Administrative Determination – 19 C.F.R. § 165.46

As with the initial determinations issued by CBP, the *Interim Regulations* require that the final administrative determination that "will be in writing" by the Office of Regulations and Rulings made in response to an administrative review "will be transmitted electronically to all parties to the investigation" (19 C.F.R. § 165.46(a)). The *Interim Regulations* do not appear to contemplate the publication of these determinations.

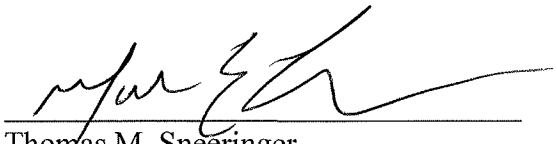
For the same reasons as those discussed above with regard to initial determinations, CBP should provide for the publication of the administrative determinations of the Office of Regulations and Rulings in EAPA proceedings. Accordingly, CBP should amend interim regulation 19 C.F.R. § 165.46 to include a new subsection (c) as follows:

> (c) *Publication.* No later than ninety days after issuing an administrative determination in writing under paragraph (a) of this section, CBP shall have the written determination, limited to publicly available information, published in the Customs Bulletin or shall otherwise make such a written determination available for public inspection.

* * *

We appreciate CBP's consideration of these comments. Please do not hesitate to contact the undersigned with any questions regarding this submission.

Respectfully submitted,



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