

## President Signs Customs Reauthorization Act

### Client Alert

By [James Sawyer](#), [Mollie D. Sitkowski](#) and [Richard P. Ferrin](#)

On February 24, 2016, President Obama signed the [Trade Facilitation and Trade Enforcement Act of 2015](#) (“the Act”) into law. The president hailed the Act as a way to strengthen U.S. trade enforcement, combat evasion of enforcement actions, and improve transparency, accountability, and coordination in enforcement efforts.

Despite the continued acrimony in Congress, lawmakers in both houses spent the last half of 2015 working on a compromise version of the Act to combine elements of separate House and Senate bills. Among other things, the Act provides United States Customs & Border Protection (CBP) with increased enforcement tools to strengthen the agency’s ability to facilitate trade and ensure compliance. The law formalizes CBP’s new Centers of Excellence and Expertise structure, while modernizing regulatory provisions on duty drawback and the importation of container residue.

The Act also provides significant increased enforcement tools to CBP for intellectual property protections and heightened due process procedures for the enforcement of trade remedy orders, including timelines for CBP to act on evasion of antidumping and countervailing duty orders and the potential for judicial review.

We have summarized below some of the specific areas that will have a more immediate impact on importers.

- **Change in Section 321 De Minimis Value.** Perhaps the most immediate, practical impact from the Act is the increase of the de minimis value for Section 321 imports from \$200 to \$800. Titled after 19 U.S.C. § 1321(a)(2)(C), Section 321 now allows for the duty-free import of articles valued at \$800 or less which are imported by a single individual on a single day. Section 321 allows the importation of such items without the need for a formal entry. The intent of the statute is to minimize expense and inconvenience to the government that is disproportionate to the revenue collected, and it can be a useful tool for importers as well to clear low value shipments on an expedited basis, presuming there are no other requirements prohibiting use of Section 321 (e.g., other government agency requirements).
- **Strict Reliquidation Deadline.** The Act now holds CBP to a strict 90-day reliquidation deadline by clarifying that CBP may only reliquidate an entry within 90 days of the actual date of liquidation. CBP previously interpreted the statute broadly and took advantage of certain ambiguity in the law, allowing it to reliquidate an entry within 90 days of the date the notice of liquidation is provided to the importer.
- **Residue Imports.** The Act also addresses a long-standing trade compliance issue related to the importation of certain residues, i.e., chemical or bulk product that necessarily remains in a bulk container after off-loading at the foreign location, clarifying when a container can be considered empty notwithstanding the existence of residual product.

As brief background, in many cases a tanker or other bulk container cannot be fully emptied at the foreign location by virtue of the container size or product at issue. CBP had recently taken a more aggressive position regarding the declaration of any residual product upon the container’s return to the U.S. for security and other purposes. The Act now provides affirmative exclusions from entry and duty declarations for certain de minimis residue.

Specifically, the Act amends General Note 3(e) of the Harmonized Tariff Schedule of the United States (HTSUS), which now exempts from import reporting and duty payment “residue of bulk cargo contained in instruments of international traffic previously exported from the United States.” The Act provides the following additional guidance and definitions to also be incorporated within HTSUS General Note 3(e):

For purposes of subparagraph (vii) of this paragraph: The term “residue” means material of bulk cargo that

remains in an instrument of international traffic after the bulk cargo is removed, with a quantity, by weight or volume, not exceeding 7 percent of the bulk cargo, and with no or de minimis value. The term “bulk cargo” means cargo that is unpackaged and is in either solid, liquid, or gaseous form. The term “instruments of international traffic” means containers or holders, capable of and suitable for repeated use, such as lift vans, cargo vans, shipping tanks, skids, pallets, caul boards, and cores for textile fabrics, arriving (whether loaded or empty) in use or to be used in the shipment of merchandise in international traffic, and any additional articles or classes of articles that the Commissioner of U.S. Customs and Border Protection designates as instruments of international traffic.

- **Enhancements to HTSUS Chapter 98.** The Act amends the language of HTSUS subheading 9801.00.10, which provides for duty-free entry for U.S. goods returned after being exported, without having been advanced in value. The Act amends HTSUS subheading 9801.00.10 to formally include “any other products when returned within 3 years after having been exported,” a category of goods that had been receiving duty-free treatment, but outside the confines of HTSUS subheading 9801.00.10. Additionally, the Act amends Subchapter Note 3 to HTSUS Heading 9802 to allow U.S. articles exported for repairs or alterations to be commingled and tracked using an inventory management method.
- **Commercial Targeting and Priority Trade Issues.** The Act reemphasizes CBP’s focus on key targeted trade compliance issues and reiterates the priority trade issues (PTIs) to include: agriculture programs, antidumping and countervailing duties, import safety, intellectual property rights, revenue, textiles and wearing apparel, and trade agreements and preference programs. These are largely consistent with previously established PTIs.

The Act also authorizes CBP to establish new PTIs and to eliminate, consolidate, or otherwise modify the current list. It requires CBP and the Government Accountability Office (GAO) to provide reports on trade enforcement activities. Finally, CBP’s National Targeting Center is now required to issue “Trade Alerts” directing further inspection by port personnel of merchandise where certain risk-assessment thresholds are met.

- **Intellectual Property Protection and Enforcement.** The new law enhances and supports CBP’s intellectual property rights (IPR) protection efforts, providing CBP with the authority to share information, including packaging and samples, with copyright and trademark holders when imported goods are suspected to be in violation of intellectual property rights. The Act also allows CBP to seize circumvention devices prohibited for importation and notify the copyright holder potentially injured by the seized device within 30 days (provided the copyright holder is a list maintained by CBP). Enforcement of copyrights that are pending will be granted the same protection as if the copyright were already registered. Finally, a National Intellectual Property Rights Coordination Center is to be established, creating a chief innovation and intellectual property negotiator tasked with conducting trade negotiations and enforcing trade agreements.
- **Antidumping/Countervailing Duties.** The Act establishes significant new enforcement action surrounding the collection of antidumping (AD) and countervailing (CVD) duties. AD/CVD enforcement continues to be a high priority for CBP. Domestic producers who were successful in bringing AD/CVD cases have long fought to enhance enforcement of importers evading payment of AD/CVD duties. The Act establishes new procedures for CBP to investigate evasion claims.
- **Investigations of evasion can now be initiated by:** (1) the filing of an allegation with CBP by an interested person that a person has entered covered merchandise into the customs territory of the United States through evasion; or (2) referral by any other Federal Agency, with information that reasonably suggests that a person has entered covered merchandise into the customs territory of the United States through evasion.
- **Where CBP makes an affirmative determination of evasion,** it shall suspend liquidation of unliquidated entries of such merchandise and require cash deposits, effective with entries entered on or after the date of initiation. Further, CBP will extend the period for liquidating unliquidated entries of such merchandise that are entered before the date of initiation to allow for the calculation and collection of appropriate AD/CVD.
- **The Act also instructs CBP to take additional enforcement measures, as appropriate, including fraud,**

gross negligence, and/or negligence penalties under Section 592 of the Tariff Act (19 U.S.C. § 1592), seizures under Section 596 of the Tariff Act (19 U.S.C. § 1596), or civil or criminal investigation by U.S. Immigration and Customs Enforcement.

- The Act requires CBP to initiate an investigation within 15 business days after receiving an allegation or a referral, and also requires CBP to make a determination within 300 calendar days after initiating the investigation.
- Duty Drawback. The Act attempts to simplify various drawback provisions and update and modernize the process from paper-based filings to a more automated system. It provides clarification for support of unused merchandise drawback based, in most cases, at the 8-digit HTSUS. The amendments extend the deadline for filing certain duty drawback claims, and provide that supporting drawback records may include those kept in the normal course of business or through the Automated Export Systems (AES).
- Importer of Record Tracking and Enhanced Trade Security Measures. The Act requires enhanced tracking of importers of record, and charges CBP to be more vigilant in tracking importer identification numbers and work to “identify linkages or other affiliations between importers that are requesting or have been assigned importer of record numbers.” The Act also requires customs brokers to collect and verify information on the identity of their importer clients, subject to potential civil penalties up to \$10,000 per violation. CBP will likely initially focus on new importers and non-resident importers, but all importers should anticipate the need to provide additional details supporting their import activities.
- Increased Bond Amounts. The Act now allows CBP to set bond amounts based on identified importer risks, and not tied solely to past revenue formulas.

Beyond the highlights noted above, the Act addresses many miscellaneous items, some of which may affect importers, but many which simply reflect a rising trend toward CBP partnerships with the trade community, increasing automation of trade information, and specialization of CBP officers. We have summarized some, but not all, of these miscellaneous provisions below.

- Support for CEEs and Commercial Customs Operations Advisory Committee (COAC). The Act formally establishes the Centers of Excellence and Expertise (CEE) program, requiring a report at the end of 2016 that details the status and effectiveness of the program. It also formally establishes COAC, allowing 20 members to serve for a maximum of two consecutive three-year terms.
- Trade Partnerships. The Act encourages CBP to strengthen its partnership programs, including consolidating the ones already in effect and working with other federal agencies and/or foreign customs agencies to enhance and facilitate trade and trade security.
- Automated Commercial Environment (ACE). The Act requires that CBP submit a report to Congress on its incorporation of core trade processing capabilities within ACE. It also requires that CBP work with each agency involved in the International Trade Data System (ITDS) to ensure that other federal agencies submit to CBP all their admissibility criteria and data element to allow for final development and deployment of ACE.
- Educational Seminars. The Act requires CBP to provide educational seminars to its officers on topic including classification and appraisement of imports and enforcement of intellectual property rights, duties on textiles, and AD/CV duties. The private sector will be allowed to give seminars to CBP officers, with priority given to petitioners in AD/CVD orders. The Act also requires CBP ensure their officers have sufficient training in IPR enforcement.
- Currency Manipulation. The Act seeks to provide tools to address foreign government’s foreign exchange policies that may be designed to undervalue their currency in order to gain an unfair trade advantage over the U.S. In this regard, it addresses the practice and seeks to enhance the United States’ ability to prevent foreign countries from manipulating their currencies to achieve an unfair trade advantage.

To be sure, there are some important changes and new requirements that have been implemented under the Act. Nevertheless, Congress remained at an impasse as to further action on a Miscellaneous Tariff Bill (MTB) that would potentially provide duty-free relief for hundreds of products following requests by domestic parties unfairly impacted by duties. The last MTB expired in 2012, and Congress has been reluctant to pass another as the myriad of MTB requests can

be seen as earmarks targeted to individual beneficiaries. However, the Act reaffirms Congress' commitment to advance MTB legislation so it is possible that MTB may be considered in the future.