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How to Avoid EAPA-Related Enforcement Actions

AS TRADE RESTRICTIONS AND REGULATIONS MOUNT, PRIVATE BUSINESSES WILL NEED TO DEVELOP GREATER INSIGHTS INTO THEIR SUPPLY CHAINS.

According to U.S. Customs and Border Protection's latest *CBP Trade and Travel Report*, the number of antidumping and countervailing duty (AD/CVD) orders enforced by the agency has doubled in just the last six years. This surge coincides roughly with the 2015 enactment of the Enforce and Protect Act (EAPA), which provided U.S.-based businesses with a powerful tool to uncover and report the existence of allegedly transshipped goods in the U.S. marketplace.

Overall, for fiscal year 2022, a staggering \$37.4 billion of goods imported into the U.S. were subject to AD/CVD orders. When one considers the vast supply chains implicated by such a large volume of commerce, it is easy to imagine that sourcing and supply chain issues will occur from time to time, especially given the rapid increase in regulatory enforcement. That means, far too often, transshipped goods make their way into the U.S. market, but the flip side is also true: sometimes, law-abiding businesses are subjected to CBP investigations and enforcement actions that are without merit.

Supply chains often represent a major component of a company's cost of goods sold, and as such, strategic considerations regarding the supply chain reside not just in the purchasing and/or legal departments, but often land on the desk of chief financial officers and other corporate officers as well. That's why it is important—particularly for nonlegal officers—to have some understanding of the legal frameworks involved in supply chain decisions, and EAPA presents

some unique features to consider for CFOs and others whose companies rely on imported goods and components.

How EAPA Works

EAPA enhances the U.S. government's ability to enforce AD/CVD laws, providing additional tools for Customs and Border Protection (CBP) to investigate importers that may not be paying duties at the time of entry. One key feature of the law is a provision allowing U.S. domestic producers to file allegations against importers suspected of evasion, in effect, turning private businesses into whistleblowers regarding "suspicious" products, many of which may compete with their own products. Like other legal frameworks that employ whistleblowers, EAPA can be highly effective at rooting out evasive behavior, but it can also lead to unfounded allegations. After all, not all whistleblowers have the purest of motives or the most reliable information, and the legal standard in place to launch an EAPA allegation is not particularly high.

Getting wrapped up in an EAPA investigation is an unenviable predicament. As an investigation proceeds, the burden tends to shift to the importer, and evidence will need to be produced demonstrating that the goods in question are not evading AD/CVD orders. Investigations are, however, time-bound—CBP must initiate an investigation within 15 days of receiving a properly filed allegation and must make a determination regarding evasion within 300 days (with a possible 60-day extension). Additionally, there are some important due-process restraints built into the law and that were recently strengthened with the Federal Circuit's reversal in its July 2023 decision in *Royal Brush Manufacturing v. U.S. et al.* Nonetheless, companies have to spend substantial time and money defending themselves when embroiled in EAPA investigations, and as with any administrative action, they can lead to unpredictable results.

A Case Study

One noteworthy example that our law firm handled recently involved an EAPA complaint that led to a CBP investigation of a client, its Malaysian affiliate, and a supplier. After almost a year-long investigation, CBP initially found that the client had evaded duties. This in turn led to the filing of an administrative appeal and, eventually, a reversal of the initial findings, but getting to that successful resolution required a lot of time, effort, and expense.

A contributing factor leading to the initial adverse findings was a supposed delay in making timely disclosures, which prompted the investigator to assume the worst and also illustrates the government's "guilty-until-proven-innocent" evidentiary standard in EAPA cases. The key facts of the case turned on whether our client's supplier manufactured products in Malaysia or evaded an antidumping order by transshipping products from China through Malaysia, which was CBP's contention. During the lengthy investigation, our client provided numerous documents and

supporting explanations for its assertion that the products at issue were made in Malaysia. The supplier also participated in a protracted onsite visit and verification of its submitted information as part of the underlying EAPA investigation, during which it became clear that CBP's initial findings were based on speculation and not supported by record evidence.

Winning Is Great—Avoiding the Fight Is Even Better

Winning EAPA disputes is not easy, and securing a reversal is rare. Well over 80 percent of the administrative reviews put before CBP's Office of Rulings and Regulations are affirmed. It is far better to avoid such disputes with the government and to take all reasonable measures to keep supply chains beyond reproach. When corporate leaders sit down to assess supply chain risk in connection with EAPA, it could be helpful to consider what prompts competitors to avail themselves of EAPA and—when EAPA investigations are likely or actual—what companies can do proactively to minimize risk.

Competitors are most likely to lodge EAPA allegations when they have direct knowledge of duty-evading goods in the marketplace or when they infer such indirectly from certain product characteristics. Price is chief among these. If a company is able to source overseas products and components at a conspicuous discount to its competitors, it is a more likely candidate to become the target of EAPA-related allegations, even when the sourcing is completely legitimate and legal. Companies will then need to develop and implement measures to deal with any potential EAPA investigation quickly and effectively. These include:

Ensuring that all raw material purchases are documented and correctly maintained in inventory records and inventory accounting;

Vetting foreign suppliers and documenting any onsite visits;

Maintaining certificates of origin that are stamped and dated;

Ensuring that full and complete responses are provided in response to CBP's questions. The more precise the answer, the more likelihood of being able to prove that no evasion occurred;

Engaging experienced trade law counsel.

These countermeasures might not ward off EAPA-related investigations entirely, but they will put companies in a much stronger position to address the underlying allegations. Given the cost and uncertainty associated with prolonged EAPA disputes, putting controls in place proactively is the best solution, particularly for companies that successfully source cheaper products and components and/or that import goods from countries routinely targeted by regulators as a frequent locus of transshipment.