

Where Three Is Not A Crowd: What Outside Parties Can Do To Enhance Cooperation Between Enforcement and Compliance and Customs and Border Protection

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Introduction

By necessity, the agency within the United States Department of Commerce that is responsible for administering and enforcing the antidumping and countervailing duty laws,² Enforcement and Compliance (hereinafter referred to as “Commerce”), and the United States Customs and Border Protection (“CBP”) work hand-in-hand ensuring the proper enforcement of antidumping and countervailing duty orders and other measures, as well as the accurate collection and assessment of antidumping and countervailing duties. Indeed, in 2006 Commerce created its Customs Liaison Unit, an office that is dedicated to, and tasked specifically with, facilitating these activities through its close working relationship with CBP. Commerce and CBP coordinate and cooperate on a number of activities to enforce the antidumping and countervailing duty laws.³

This paper discusses only one of the many discrete areas in which Commerce and CBP cooperate: coordination through a comprehensive system of instructions issued by Commerce and implemented by CBP during the course of, and after, an antidumping or countervailing duty administrative review.⁴ Private parties, however, are not without a role in this interagency collaboration. While it may seem obvious, given the importance and effect of such instructions, private parties should pay particular attention to the names of producers, exporters, importers,

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² The antidumping and countervailing duty laws can be found at 19 U.S.C. §§ 1671 *et seq.*

³ To take just one important example, Commerce and CBP cooperate to detect and prevent fraud and evasion of the antidumping and countervailing duty laws. However, cooperation concerning potential fraud and evasion is beyond the scope of this paper.

⁴ Commerce issues, and CBP implements, instructions in connection with other administrative proceedings as well, including antidumping and countervailing duty investigations, circumvention inquiries, and scope rulings to name a few. However, such instructions are not the subject of this paper.

and customers they report to Commerce and CBP, respectively. Commerce bases its instructions to CBP on the names reported to it during an administrative proceeding and CBP implements such instructions on the basis of information provided to it in connection with importation. As will be described below, private parties can make an important contribution to assist in effective coordination between Commerce and CBP in this respect.

Commerce's Customs Liaison Unit

With nearly 300 orders in place around the time of publication,⁵ one can imagine that the number of instructions issued by Commerce and implemented by CBP in a given year is extraordinary. In fiscal year 2014, Commerce issued 1,348 instructions to Customs. Of those, 1,020 instructions directed CBP to liquidate merchandise (*i.e.*, liquidation instructions) or collect estimates of antidumping or countervailing duties due (*i.e.*, cash deposit instructions). These numbers increased from fiscal year 2013, in which Commerce issued 1,233 instructions to CBP, of which 898 were liquidation or cash deposit instructions.⁶ As evidenced by the sheer number of instructions issued in the past two fiscal years alone, and notwithstanding the other activities involving Commerce-CBP cooperation, enforcing the antidumping and countervailing duty laws requires extensive cooperation between the two agencies.

Facilitating this extensive cooperation, in 2006, Commerce created its Customs Liaison Unit which, as its name describes, serves as the liaison between Commerce and CBP on issues involving suspension of liquidation and the assessment and collection of antidumping and countervailing duties. In the context of these activities, the Customs Liaison Unit and CBP have an open line of communication that facilitates the efficient, effective, prompt enforcement of the antidumping and countervailing duty trade laws. In this respect, the Customs Liaison Unit and CBP work together to resolve questions that arise in the context of CBP implementing Commerce's antidumping and countervailing duty decisions. Additionally, the Customs Liaison Unit serves as the bridge between Commerce, CBP, and other Department of Homeland Security agencies on matters related to the potential fraud and evasion of antidumping and countervailing

⁵ For a list of antidumping and countervailing duty orders, *see* http://www.usitc.gov/trade_remedy/documents/orders.xls (last viewed on November 10, 2014).

⁶ Statistics as compiled by the Customs Liaison Unit.

duty orders. Not only is the Customs Liaison Unit a resource for CBP, but it is likewise a resource for private parties. The Customs Liaison Unit maintains a call center where the importing public may seek clarification on Commerce's cash deposit and assessment instructions to CBP.⁷

Commerce-CBP Cooperation Through A Robust Series Of Instructions

Instructions in administrative proceedings

One of the most routine forms of cooperation between Commerce and CBP results from Commerce's instructions directing CBP to take certain actions. In the context of its administrative proceedings, for example, upon initiating an antidumping or countervailing duty administrative review of a particular order for a given period pursuant to 19 U.S.C § 1675(a), Commerce instructs CBP to continue to suspend subject merchandise covered by the administrative review and liquidate the subject merchandise that entered the United States during the relevant period that is not subject to the administrative review. These latter instructions are referred to as "automatic liquidation instructions."⁸ Subsequently, after completing an administrative review of an antidumping or countervailing duty order, in general Commerce instructs CBP to collect deposits of estimated duties at the cash deposit rates, and to liquidate relevant entries at the assessment rates, determined in the administrative review.⁹

These administrative reviews serve as the bases for the cash deposit and antidumping duty or countervailing duty rates, as appropriate, as well as the bases for the party names that Commerce inserts into its liquidation and cash deposit instructions to CBP. In other words, Commerce takes the information received in these administrative reviews and instructs CBP based on such information. CBP then is responsible for carrying out those instructions, assessing antidumping or countervailing duties, and collecting cash deposits, as appropriate.¹⁰ Yet, CBP

⁷ Enforcement and Compliance, Customs Liaison Unit Call Center: 202-482-0894.

⁸ See 19 C.F.R. § 351.212(c).

⁹ See *c.f.* 19 U.S.C. § 1675(a)(2)(C) ("The determination under this paragraph shall be the basis for the assessment of countervailing or antidumping duties on entries of merchandise covered by the determination and for deposits of estimated duties."); 19 U.S.C. §1675(a)(3)(B); 19 C.F.R. § 351.212(b)(1)-(2).

¹⁰ CBP's role in carrying out Commerce's instructions is strictly ministerial. See, e.g., *Ugine and ALZ Belgium v. United States*, 551 F.3d 1339, 1343 (Fed. Cir. 2009).

applies the instructions from Commerce based on information CBP receives in connection with the importation of merchandise. Hence the possibility for disconnect: Commerce drafts its instructions on the basis of the information presented to Commerce while CBP implements the instructions on the basis of information presented to CBP, information that is not necessarily identical to the information that was before Commerce.

Instructions in the context of litigation

Another important area of coordination between Commerce and CBP relates to the implementation of temporary restraining orders and preliminary injunctions issued by the Court of International Trade.¹¹ When challenging Commerce determinations such as final results of administrative review before the Court of International Trade, parties frequently seek preliminary injunctions, and to a lesser extent temporary restraining orders, from the Court to enjoin the liquidation of their merchandise during the pendency of litigation so that the party's merchandise may benefit from a favorable court decision should the party prevail.¹² In a litigation context, similar to in the administrative context, Commerce issues certain instructions to CBP, namely instructions directing CBP not to liquidate merchandise covered by a temporary restraining order or preliminary injunction during the pendency of litigation (*i.e.* injunction instructions). Upon dissolution of a preliminary injunction, Commerce issues instructions directing CBP to liquidate the merchandise that was the subject of the preliminary injunction, if appropriate.

Similar to the administrative context, the information reported to Commerce in the challenged proceeding normally should serve as the basis for the information contained in a temporary restraining order or preliminary injunction and, hence, the information in Commerce's instructions to CBP. However, that is not always the case given that outside parties, rather than Commerce, move for injunctive relief. When the information in the draft temporary restraining order or preliminary injunction submitted to the court, and subsequently ordered by the court,

¹¹ See 19 U.S.C. § 1516a(c)(2).

¹² 19 U.S.C. § 1516a(c)(2) provides that the Court of International Trade “may enjoin the liquidation of some or all entries of merchandise covered by a determination of the Secretary, the administering authority, or the Commission” in connection with “a determination described in [19 U.S.C. § 1516a(a)(2)] by the Secretary, the administering authority, or the Commission.” Thus, injunctions are not limited to the context of litigation involving decisions by Commerce. The CIT may also enjoin liquidation in the context of litigation involving challenges to decisions by the International Trade Commission.

differs from the information reported to Commerce, it complicates Commerce's and likewise CBP's ability to easily implement the resulting order. Again, as in the administrative context, issues arise as a result of potential disconnects in information provided to Commerce, CBP, and in the case of temporary restraining orders or preliminary injunctions, to the Court.

Opportunities For Private Parties To Enhance Cooperation and Coordination Between Commerce and CBP

There is a role for private parties to help reduce the potential for complications in Commerce and CBP cooperation on instructions. Anecdotally, there are issues that Commerce and CBP face time and again that can complicate the agencies' abilities to cooperate efficiently. These issues include misspellings, alternative spellings, imprecise or generic forms of parties' names, and "doing business as" (DBA) names, to name a few, as submitted in various documents to Commerce (*e.g.*, requests for administrative review) and, separately and unrelatedly, to CBP in import-related documentation. Commerce incorporates the names of parties as provided to it during its administrative proceedings into its instructions to CBP.

Such misspellings, alternative spellings, imprecise, and generic or DBA forms of parties' names can result in Commerce and CBP receiving different information about the same merchandise, thus complicating efficient Commerce-CBP cooperation. Due to differences in information provided to Commerce and CBP, Commerce's instructions may not always align perfectly with the information CBP receives from the importing community. Some possible results of disconnects in the information provided to Commerce and Customs are described below. When made aware of such discrepancies, Commerce and CBP work together to ascertain whether discrepancies can be resolved on the basis of information provided to each. Yet, issues of this sort are potentially preventable with some help from private parties.

Names in requests for administrative reviews

When it comes to requesting an administrative review pursuant to 19 U.S.C. § 1675(a), private parties should pay particular attention to the spelling and iteration of the name of the party or parties for which they request a review. A discrepancy between the name of the producer or exporter as reported to Commerce in the review request, and the name of the

producer or exporter on the import-related documentation provided to CBP can mean the difference between merchandise remaining suspended for purposes of an administrative review and the merchandise being automatically liquidated as not being subject to the administrative review. This is so because, as described above, Commerce and CBP work from information provided, respectively, to each of them. Here, private parties can play an important role in helping to prevent such issues, and thereby enhance Commerce and CBP cooperation.

If the name of a company for which an administrative review is requested of Commerce does not match the name of that company as it appears in the import documentation provided to CBP, there is a chance that merchandise from the company for which a review request was intended might be liquidated and not suspended for purposes of the administrative review. Specifically, subsequent to initiation, Commerce issues CBP instructions to liquidate merchandise for the relevant period that is not subject to the administrative review. Thus, to the extent a party's name does not appear in the review request, and therefore Commerce does not initiate a review for that particular company, Commerce will issue instructions to CBP to liquidate this merchandise at the cash deposit rate in effect at the time of entry.¹³ Where merchandise is not suspended from liquidation and is automatically liquidated as not subject to a review, that merchandise does not receive the assessment rate determined in the administrative review. Even a small difference in a name can result in certain merchandise being liquidated despite the intention of a party requesting a review.

To identify the iterations of producer and exporter names that Commerce and CBP may have recognized in the past, there are a handful of public resources available for parties. For example, before requesting administrative reviews for one or more producers or exporters, as relevant, parties can review Federal Register notices that announce final results of prior reviews. In past Federal Register notices concerning final results of review, the party intending to request a review can see whether Commerce previously reviewed a particular producer or exporter and can ascertain the spelling and iteration of the name as the producer or exporter may have presented it to Commerce during an administrative review. Thus, in requesting a review of the particular producer or exporter, it would be wise for the requesting party to include the name of the producer or exporter as previously recognized by Commerce in the prior Federal Register

¹³ See 19 C.F.R. § 351.212(c)(2).

notice. Additionally, parties can search public CBP instructions as another resource to ascertain the spelling or iterations of producer or exporter names as previously reported to Commerce. CBP maintains a website where public CBP instructions are compiled in a searchable format.¹⁴

Thus, prior to requesting reviews, as a best practice, practitioners might first check the names of producers or exporters for which they are requesting an administrative review against names that Commerce has included in a final results Federal Register notice and has transmitted to CBP in past instructions. Where possible, practitioners should harmonize the spelling of producer or exporter names in their review request with prior iterations of spelling put before Commerce. In this way, private parties can potentially increase already efficient cooperation between Commerce and CBP such that the merchandise intended as the subject of an administrative review remains suspended from liquidation during the administrative review instead of getting automatically liquidated.

Names in liquidation instructions

Commerce and CBP also cooperate to ensure that duties are assessed on merchandise subject to an administrative review at the appropriate rates. Specifically, following an administrative review, Commerce issues liquidation instructions to CBP, informing CBP of the rates at which to assess duties for reviewed merchandise. For an antidumping duty administrative review, Commerce “normally will calculate an assessment rate for each importer of subject merchandise covered by the review” and “will instruct the Customs Service to assess antidumping duties”¹⁵ Alternatively, where appropriate, Commerce calculates customer-specific rates rather than importer specific rates.¹⁶ A discrepancy between the name of the importer or customer as reported to Commerce in the review request, and the name of the importer or customer as reported on the import-related documentation provided to CBP can

¹⁴ See <http://adcvd.cbp.dhs.gov/adcvdweb/> (last viewed on November 5, 2014).

¹⁵ 19 C.F.R. § 351.212(b)(1).

¹⁶ See generally *Ball Bearings and Parts Thereof From France, Germany, Italy, Japan, and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews and Revocation of an Order in Part*, 74 Fed. Reg. 44,819, 44,821 (August 31, 2009) (“In accordance with 19 CFR 351.212(b)(1), we have calculated, whenever possible, an importer/customer-specific assessment rate or value for subject merchandise.”)

mean the difference between liquidation based on the relevant Commerce liquidation instructions or deemed liquidation.

With respect to liquidation instructions, private parties can confirm that Commerce's instructions to CBP reflect the information provided in the context of an administrative review such that CBP's subsequent assessment of duties reflects the results of such administrative review. In particular, importers may: (a) request an administrative review of the exporter or producer of the merchandise they import;¹⁷ and/or (b) participate in an administrative review requested on the exporter or producer of their merchandise. Through their participation in an administrative review, an importer can take steps such as reviewing the information its producer or exporter is supplying to Commerce, or providing information itself, to ensure that its—or the customer's—name and relevant information are properly reported to Commerce. Importers can also review Commerce's instructions to CBP. These steps may help increase effective coordination between Commerce and CBP such that CBP may properly assess duties at the rates determined in the final results of review for the importer or customer.¹⁸

This is particularly important because the importers, rather than Commerce, know what information they (the importers) provide CBP in connection with entries of merchandise at issue. Thus, importers are in a unique position in that they (or their representatives covered by an APO, where required) have the ability to know what information is being provided to Commerce concerning the importer's merchandise and at the same time what information was or is being provided to CBP concerning the importer's merchandise. Thus, importers can help Commerce and CBP coordinate effectively by participating in Commerce's administrative reviews and seeing whether the information being provided to Commerce is consistent with the information provided to CBP for the same merchandise.

Producers or exporters can likewise help contribute to effective and efficient Commerce-CBP coordination by ensuring that they are reporting their importers' or customers' full names,

¹⁷ 19 C.F.R. § 351.213(b)(3).

¹⁸ To the extent a respondent producer or exporter in an administrative review claims business proprietary treatment for the names of its importers or customers pursuant to 19 C.F.R. § 351.304 such that the importer or customer names are not to be disclosed publicly, an importer itself would not be able to see the names of a respondent's importers or customers. Rather, a representative of an importer that has applied to Commerce for, and received, access to business proprietary information in an administrative review pursuant to an administrative protective order ("APO") would be able to see the names of a respondent's importers or customers.

and reviewing instructions to confirm that the importers' or customers' names appearing in the instructions reflect the information reported to Commerce. In this way, producers and exporters ensure to the extent possible that Commerce instructs CBP to, and CBP can, assess duties on the merchandise in a manner consistent with the information the producers or exporters reported to Commerce.

Draft injunctions

Following an administrative review, Commerce issues liquidation instructions. Yet, parties often challenge Commerce's decisions at the Court of International Trade. It is important that the names in the temporary restraining order or preliminary injunction match the names of producers, exporters, importers and customers, as appropriate, reported to Commerce. Based on the terms of an injunction, Commerce instructs CBP not to liquidate the merchandise described in the injunction. Merchandise not covered by an injunction generally does not remain suspended from liquidation. Therefore, if the producer, exporter, importer and/or customer names on the injunction do not match the information parties provided to Commerce, parties risk the liquidation of merchandise they intend to be covered by an injunction.

Accordingly, the Department of Justice and Commerce have established a system whereby parties seeking a preliminary injunction can provide the Department of Justice and Commerce with a draft preliminary injunction for review before the party files a motion for preliminary injunction with the court. Where private parties permit the Department of Justice and Commerce to review a draft preliminary injunction, Commerce can confirm whether the information in the draft preliminary injunction reflects the information reported to Commerce in the context of the underlying administrative proceeding. If the information in the draft preliminary injunction does not align with the information that was presented to Commerce in the underlying proceeding, Commerce can suggest revisions to harmonize the preliminary injunction with the information presented to Commerce. This ultimately can facilitate Commerce's and CBP's administration of injunctions issued by the Court of International Trade.

Conclusion

As described above, Commerce and CBP cooperate extensively on the issuance and implementation of various instructions. However, disconnects between the information provided to Commerce and to CBP, respectively, can complicate the process. Private parties can help reduce the possibility for complications by ensuring that party names have been properly reported to both agencies and, thereby contribute to effective and efficient Commerce-CBP coordination.

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