

Congressional backlash against Customs



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Congress recently overrode a presidential veto of the Farm Bill, which focuses primarily on U.S. agricultural and food policy. This law also includes an unequivocal, bipartisan message from Congress to Customs and Border Protection. Ultimately, this message, which expresses congressional displeasure with Customs' unprecedented assault on 20 years of U.S. court precedent, may prevent increases in prices for footwear, apparel and other consumer goods. So, what exactly did Customs do to raise Congress's ire?

The battle began in January, when Customs proposed revocation of the first-sale rule, which permits shippers to value imports on the price of the first arm's-length transaction in certain transactions involving more than one sale. This rule, which applies only where specific, court-derived conditions are met, necessarily lowers the duty that businesses must pay. Since 1988, this rule has been specifically and repeatedly approved by federal courts with exclusive jurisdiction over Customs laws, and followed in countless Customs administrative rulings and directives.

Customs' proposal sparked uproar in the import community. If the first-sale rule is revoked, companies relying upon it face unpredictable and unanticipated cost increases. In addition, companies structuring their import programs upon other rules established by court decisions and Customs rulings will face similar uncertainty: When, how and why will Customs reverse those rulings and decisions? As the community digs through the "why," the methods used by Customs to launch this proposal raise additional concerns — concerns that have reached Capitol Hill.

The basis for Customs' unprecedented attack on precedent is shockingly thin. First, Customs relies on arguments previously and consistently dismissed by U.S. courts. Customs raises a number of issues, including the courts' review of decisions issued under prior law and the alleged failure of these courts to consider certain aspects of the new law's legislative history. These unpersuasive claims are simply rehashed arguments that Customs submitted to the courts nearly two decades ago — and which have been consistently rejected.

However, the linchpin in Customs' efforts to nullify this consistent federal court precedent is a non-binding international commentary, which Customs quietly helped create. This commentary, produced by a World Customs Organization committee, was issued after years of review, and suggested that valuation based on the first sale was inappropriate.

Throughout this process, a number of countries — including the 27 European Union members, New Zealand and the United States — stated that their administrations supported the first-sale rule. The EU vigorously supported first-sale throughout much of this review. Despite two decades of judicial and administrative precedent, the U.S. — surprisingly — did not.

Then, 10 months prior to publishing its proposal to reverse first-sale, Customs effectively began the revocation of U.S. law in Brussels by submitting comments to the WCO Technical Committee on Customs Valuation. In these comments, Customs announced to the world its belief that current U.S. law was incorrect — declaring its support for the commentary described as "contrary to current U.S. practice." Once the commentary was finalized,

Customs brought it to the U.S. and has used it in its effort to overturn consistent, dispositive federal court decisions.

The import community and Congress were virtually unanimous in opposition to Customs' proposal. Eighteen senators and 51 representatives called the plan an affront to efforts by Congress and the administration "to implement an economic stimulus package to promote economic spending," and asked that it be withdrawn.

In an effort to forestall further Customs action, Congress moved swiftly to amend the Farm Bill to prevent Customs from finalizing its first-sale proposal and to prohibit such action in the future. The legislation includes a "sense of Congress" provision advising Customs to drop the issue until at least Jan. 1, 2011. If Customs still wants to proceed after that date, it will have to clear a number of hurdles, as the provision urges the agency to consult with Congress and the trade community and receive the explicit approval of the treasury secretary. Commissioner Ralph Basham has pledged that Customs will comply with the Farm Bill and will not act before 2011.

The Farm Bill provisions represent a significant victory for consumers and businesses. Given the overwhelming opposition expressed in public comments, as well as the congressional direction in the Farm Bill, it is hoped that Customs will withdraw this ill-timed, ill-advised proposal and properly defer to the unambiguous decisions of the courts.

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