WEDNESDAY, OCTOBER 14, 2020

USTR Launching Two Section 301 Investigations on Vietnam

The Office of the U.S. Trade Representative is considering sanctions against Vietnam for importing illegal lumber to use in wood furniture and for currency manipulation that it suspects is hurting U.S. industry. The Section 301 investigations, announced the evening of Oct. 2, invite public comment on the extent of the violations, the scope of its impact on U.S. commerce, and suggestions for how to respond. Comments are due by Nov. 12.

The notices say that in 2019, Vietnam exported $3.7 billion worth of wooden furniture, and that there's evidence that Vietnamese customs officials don't record the origin of timber coming in from Cambodia. "Available evidence suggests that a significant portion of that imported timber was illegally harvested or traded," USTR said. The office said reports say much of the Cambodian timber was harvested outside of legal timber concessions, including in wildlife sanctuaries. The USTR also suggests Vietnam is importing wood from Cameroon and the Congo, which also may be illegally harvested.

The Section 301 investigation on currency undervaluation says that the U.S. analysis indicates that the dong was undervalued by 7% in 2017 and 8.4% in 2018, and that undervaluation continued in 2019. It asks that comments on how undervaluation affects U.S. commerce should be submitted at docket number USTR-2020-0037.

The American Apparel and Footwear Association expressed alarm that there could be duties on Vietnamese imports as a result of these investigations. "Vietnam is an important trading partner for the U.S. apparel, footwear, and travel goods industry, and has become even more important as U.S. companies have implemented diversification strategies away from China," AAFA CEO Steve Lamar said in a statement issued Oct. 5. "Imposing new punitive tariffs on imports from Vietnam would cause extreme disruption, directly threatening those investments and increasing prices for hard-working American families at the register or costs on the supply chains that directly support millions of U.S. jobs."

Lamar said companies are still recovering from the impacts of the COVID-19 pandemic, so this is a particularly poor time to raise taxes on Vietnamese imports. Vietnam is the second-largest supplier of apparel and shoes, AAFA said. — ***Mara Lee***

DOJ Suggests 'Test Case' in Section 301 Litigation; HMTX Signals Agreement, Requests 3-Judge Panel

The Court of International Trade should use a case management approach for the numerous Section 301 tariff lawsuits similar to the one used for litigation over the harbor maintenance tax (HMT), the Department of Justice said in a Sept. 23 filing. That should include the selection of a "test case" and a stay of all other cases involved, DOJ said. The filing marks DOJ's first since HMTX Industries filed suit to force refunds of Section 301 tariffs paid on lists 3 and 4 goods from China.

Like the Section 301 tariffs suit, the HMT litigation involved thousands of parties and is seen as a likely model for CIT to follow. "As of September 22, 2020, approximately 3,400 summonses and complaints have been filed" and it anticipates "that the volume will continue to increase, as the lists cover a substantial quantity of merchandise imported from China and continue to be in effect," the government said. "Given that the cases appear to be identical or substantially similar, the Court could select a test case (or cases if there are variations) for adjudication," DOJ said. All the cases should also be assigned to the same judge, it said. "This procedure was used in the HMT cases and, in our view, would be more efficient in dealing with issues of procedure."

Without a stay for all the related cases, "the Government will file motions for a stay in each case, and the Court will be required to rule on thousands of motions." Even just having to file "notices of appearances in all cases will impose a significant burden on the Government," DOJ said. Lawyers not part of the test case would be able to file short briefs after the main briefs are submitted by the test case lawyers, it said. The short briefs should focus on arguments not made by the test case briefs, it said. There are 3,429 cases filed as of Sept. 23, according to a list maintained by the Harris & Roll law firm.

DOJ also suggested establishing a "steering committee" made up of plaintiffs' lawyers. That setup was also used in the HMT cases "to enhance coordination and reduce duplication." Without expressly saying who should be involved in such a committee, the DOJ highlighted "that the first three complaints were filed by members of the private bar who are well-experienced and known to the Court." Those three are

Matthew Nicely of Akin Gump, Lawrence Friedman of Barnes Richardson and Joseph Spraragen of Grunfeld Desiderio.

DOJ asked that CIT schedule a conference as soon as it can to discuss the procedures. "We recognize that the plaintiffs and the Court, including the Clerk of the Court, likely will wish to raise other case management issues, including interim relief," it said. "By highlighting those that, in our experience, are likely to be most significant, at least at the outset, we are not suggesting that other issues do not warrant attention."

Plaintiffs HMTX and Jasco Products had until Oct. 14 to respond to DOJ's motion, but waited only a day to file a reply in which they said "in the main" they conditionally "embrace" DOJ's proposals. "It is important to confirm at the outset that the government will stipulate, as it has in other cases, that a refund remedy is available should plaintiffs prevail," they said Sept. 24. The court should also consider convening a three-judge panel, rather than assigning the case to a single judge, they said: "This action implicates significant issues of congressional and presidential authority, as well as principles of constitutional avoidance. Notably, the principal merits issues in the HMT cases were decided by a three-judge panel."

Email ITTNews@warren-news.com for a copy of the DOJ and HMTX filings. — ***Tim Warren***

Forwarder Agrees to Shipper and Importer Verification Requirements in Trademark Settlement With Nike

A New Jersey freight forwarder has agreed to shipper and importer verification requirements, as well as conditions on acting as a go-between for customs brokers and importers, as part of a settlement of a trademark suit filed by Nike in the Southern New York U.S. District Court.

Hana Freight, which does business as Hana International Logistics, had acted as a foreign forwarder's U.S. receiving agent on a shipment later discovered to be of Nike counterfeit shoes. The customs broker involved in the shipment, B&H Customs Brokers, settled in May after agreeing to power of attorney verification requirements. The foreign forwarder that arranged transportation, China-based Shine Shipping, remains party to the lawsuit.

In a complaint filed in February, Nike had said Shine, Hana and B&H ignored red flags on shipping and entry documentation when they brought in counterfeit shoes described as lamps on shipping documentation. For example, the importer named on the documentation had been out of business for two years by the time of the shipment.

Like B&H, Hana does not admit guilt as part of the settlement, which was approved by the district court judge on Sept. 24.

Under the settlement, Hana must take steps to communicate directly with the shipper and the importer or ultimate consignee to verify the authenticity of shipping documentation it receives "for any cargo for which it provides transportation services to or from the United States." Hana is required to either call, fax or email the shipper and importer, using either a number or e-mail address publicly available in a gov-

ernment database, on a website where at least the second level of the website's domain name incorporates the shipper's corporate name, or in a publicly listed and generally recognized as reliable internet database.

Hana must also verify with any foreign forwarder or non-vessel operating common carrier that refers it a shipment for transportation that the foreign forwarder or NVOCC has had direct contact with the shipper or importer, and has verified that the container was actually delivered and picked up from the location associated with the shipper. Hana also has to verify the referring forwarder or NVOCC via government or publicly available database, and the referring party has to agree in writing to indemnify any third parties harmed by Hana's transportation of cargo that contains infringing goods.

The settlement says Hana must confirm that any foreign forwarder that refers a shipment, if the forwarder is performing the services of an NVOCC or holding out to the public that it does, is licensed and bonded with the Federal Maritime Commission.

Finally, the settlement provides that Hana cannot act as the intermediary between the importer of record and the customs broker on a shipment, including for the purposes of passing on the power of attorney, without receiving written confirmation that the broker has had direct contact with the importer of record, and has validated the power of attorney.

Email ITTNews@warren-news.com for a copy of the settlement agreement. — ***Brian Feito***

Importers, Brokers Concerned Over Proposed Import Certificate Requirements for Organic Products

Organic growers, suppliers and importers, as well as customs brokers, called on the Agricultural Marketing Service to streamline aspects of its proposed new strategy for strengthening organic enforcement, in comments to AMS filed in recent days. As proposed in August, the new enforcement approach imposes unrealistic timelines for per-shipment organic certifications, and could cause confusion over who is responsible for ensuring organic imports are compliant.

The Produce Marketing Association, the Western Growers Association and the United Fresh Produce Association said they appreciated AMS's "intention to strengthen oversight and enforcement of the production, handling, and sale of organic agricultural products," in comments dated Oct. 5. "We believe the rule will yield greater integrity and reliability in the organic supply chain and will continue to build consumer and industry confidence in the USDA organic label," said the trade groups, which represent members at "every level" of the organic supply chain.

But a requirement that organic products be accompanied by a National Organic Program (NOP) import certificates on a shipment-by-shipment basis is unrealistic in light of the 30 days the agency has to review and issue them, the trade groups said. "We believe the 30-day timeframe for issuance of an import certificate is unworkable as proposed and would have limited impact on fraud control," they said.

"Produce is picked, packed, and shipped to the border all in the same day," the PMA, WGA and UFPA said. "The invoices for each load are generated as the load is leaving a packing facility in Mexico for instance. Waiting for an inspection certificate would only delay a supply chain that relies on the efficient movement of fruits and vegetables from the fields to consumers across North America. Shelf life is very short for perishables, and any delay is a detriment," the trade group said.

The trade groups' joint comments recommended "a certificate turnaround period for perishable products of no longer than the end of the next calendar day," and a five-day turnaround for semi-perishable products. Alternatively, AMS could approve certificates so that goods can cross the border, then actually issue them within 10 days.

The American Association of Exporters and Importers called on AMS to do away with the shipment-specific import certificates altogether, arguing they are redundant in light of the data already collected in ACE. "USDA would be able to obtain all of the information that would be required on a certificate through CBP's ACE portal," AAEI said in its comments, also dated Oct. 5. Any data not already collected in ACE, such as National Organic Program operation ID numbers, could be added to the data collected in ACE, AAEI said. That data could be cross-referenced with AMS's existing INTEGRITY database.

"AAEI believes that the combination of ACE and INTEGRITY is an existing data [system] to strengthen enforcement and to collect data on organic imports which is much more powerful and provides real-time information on the compliance of each load than a certificate," the trade group said. "A load-specific certificate would be redundant, would add cost to organic companies throughout the supply chain, and would not provide adequate benefits in enforcement over and above the information collected in ACE and INTEGRITY."

Another common refrain in comments on the proposed enforcement strategy is the need to more precisely define the "Organic Importer of Record." The AMS proposed it as the "operation responsible for accepting imported organic products within the United States." The Fresh Produce Association of America, among other groups, said in its comments that the proposed definition is too ambiguous and could include service providers with little knowledge of the underlying product.

The International Warehouse Logistics Association, which represents some of those service providers that could potentially be subject to new requirements under AMS's proposed importer definition, highlighted that as problematic, in its comments to AMS.

"A 3rd party warehouse does not generally have a relationship with the foreign supply chain and, as such, is not in a position to provide meaningful verifications," the IWLA said. "Nor is the 3rd party warehouse in any way involved in the import processing documentation. We are not the customs Importer of Record. We do not hold title to the product. We simply receive the shipment into our warehouse because our customer – typically a U.S. manufacturer or distributor – directs the trucking company to deliver it to us for storage and further distribution," it said.

The FPAA suggested that AMS look to the example of the Food and Drug Administration's definition of importer of record in FDA's Foreign Supplier Verification Program regulations. In developing its

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importer definition, FDA looked to capture the person with a direct financial interest in the imported food, as the person likely to have the most knowledge and control over a product's supply chain. "This approach might be illustrative for AMS-NOP in clarifying any ambiguity with the current definition in the proposed organic enforcement rule," the FPAA said.

The National Customs Brokers & Forwarders Association of America shared the same concerns over provisions on import certificates and the importer of record definition, in comments dated Oct. 3. But it also raised issues more specific to customs brokers, including the potential that the proposed enforcement strategy could result in more onerous filing requirements in ACE.

"Since customs brokers will in most circumstances be the filers, we urge AMS to streamline this process as much as possible and avoid requiring the submission of the same information in duplicate formats—such as entry of the data elements AND uploading the NOP Import Certificate into the Digital Imaging System (DIS)," the NCBFAA said. "We also caution against requiring redundant entry of data elements that are already submitted as part of the customs entry. In fact, the most efficient process would be to only require entry of the NOP Import Certificate number in ACE, which could be automatically matched up to a database containing the NOP Import Certificates generated by the foreign certifying agents."

The NCBFAA similarly urged AMS to delay implementation of the new enforcement strategy until 10-digit tariff subheadings can be implemented throughout the tariff schedule for organic products. "Most of the organic products that are subject to the proposed rule do not contain an HTS suffix to differentiate organic from non-organic product. This means AMS will be 'flagging' thousands of HTS subheadings that could contain organic products, but mostly consist of products that are not organic, in turn requiring importers/filers to file thousands of disclaims for non-organic products that fall under a flagged HTS code," it said. Not only is this inefficient, but it leads to confusion and inaccuracies in the filing process.

The NCBFAA suggested AMS create a trusted trader program for organic importers to streamline some of the proposed reporting requirements in the enforcement strategy, including by way of an exemption from shipment-by-shipment certificate requirements or a blanket certificate option. "A well-designed Trusted Trader Program, with meaningful benefits for participants, would provide a valuable incentive for U.S. importers to develop the internal controls necessary to strengthen the integrity of their organics supply chain," the NCBFAA said.

CBP Issues Formal Notice on Changes to e214 FTZ Admission Process

CBP is updating its "test program for submitting electronic Foreign-Trade Zone (FTZ) admission applications," the agency said in a notice released Sept. 24. "Specifically, this notice announces that the zone identification number is being expanded from seven to nine digits and that test participants will now have the ability to submit 'replace requests to modify parts of an admission while retaining the original filing date, submit post-admission correction requests, and cancel permit to transfer transactions," it said. As previously mentioned in a notice outlining the changes, the zone number expansion will not be implemented until 120 days after *Federal Register* publication of this notice, on Sept. 25, or on or about March 24, 2021.