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EAPA Investigations: Top 5 Considerations When Customs Comes Knocking

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The Enforce and Protect Act of 2015 (EAPA) and subsequent regulations promulgated by U.S. Customs and Border Protection (CBP) allow the agency to conduct intensive investigations of alleged customs evasion, including avoidance of antidumping and countervailing duty orders. The EAPA is an administrative proceeding that permits and encourages participation by domestic industry, the alleged evading party, and CBP. This article explores the top five considerations for those alleged evading parties against whom EAPA investigations are lodged.

CBP has 15 business days from receipt of an allegation to determine whether an investigation under the EAPA is appropriate. CBP will initiate such an investigation if the merchandise described in the allegation has been entered for consumption into the customs territory of the U.S. through evasion. [19 CFR § 165.15(b))] At the end of the EAPA process, CBP will conclude its investigation by issuing a determination as to whether evasion occurred. The determination, and what it means for the parties alleged to be in violation, are then subject to optional administrative and judicial reviews.

The period between initiation of an investigation and the ultimate determination can be a complex and labor-intensive process. In our experience, the top five considerations when embarking on defense of an EAPA investigation are: (1) the precise sequence of events and timing; (2) the burden of proof and information requirements; (3) the breadth for negative adverse inferences and their impact on other supplier relationships; (4) the public nature of proceedings and mechanisms to protect confidentiality; and (5) the potential for review of an initial adverse determination.

Consideration 1 - EAPA Sequence of Events and Timing

Recipients of EAPA investigation notices must bear in mind that the process proceeds on a strict timeline with a potentially wide range of participants. During its investigation, CBP may choose to request information from: (1) the party making the allegation; (2) the party alleged to have evaded AD/CV duties; (3) the foreign producer or exporter of the merchandise; or (4) the foreign government of the country from which the merchandise was exported. [19 CFR. § 165.23] The deadline for responses are provided in CBP's written request. [*Id.*] CBP will not consider information that is submitted outside of the required periods.

The cadence of filings generally involves long periods for initial submissions due to the volume of information involved, with much shorter periods to rebut or otherwise respond to another parties' submission. For example, all parties to the investigation may voluntarily submit factual information within 200 calendar days of initiation. [19 CFR. § 165.23] Rebuttal information may be submitted

within 10 days of service of the factual information. Likewise, parties may also submit written arguments to CBP within 230 calendar days of initiation. [19 CFR. § 165.26] Other parties may respond to those written arguments and must submit responses no later than 15 calendar days after the written arguments were filed. [*Id.*]

Fortunately, good faith extensions are available. For good cause, any party may request an extension of any time limit, but must do so in a separate, stand-alone submission. [19 C.F.R. § 165.5] The request must be submitted no less than 3 business days before the time limit expires unless there are extraordinary circumstances. CBP has broad discretion to grant or deny the request for an extension.

CBP's timeline for its own analysis and determination also involves a relatively long but certain period. CBP must determine whether evasion occurred within 300 days of initiating the investigation unless that period must be adjusted due to extension of deadlines. [19 CFR § 165.22] Still, if the investigation is extraordinarily complicated, CBP may extend the determination deadline, but may not extend beyond 60 calendar days. Within 5 business days of the determination as to evasion, CBP will issue a summary of the determination to all parties to the investigation.

If any party is unsatisfied with a determination then it may request an administrative review.[1] Requests for review must be filed no later than 30 business days after the issuance of the initial determination. Written responses to third-party requests for review are available and must be submitted no later than 10 business days from the commencement of the administrative review. [19 CFR § 165.42] The administrative review will be completed within 60 business days of its commencement. [19 CFR § 165.45] The final administrative determination is subject to judicial review and must be filed with the Court of International Trade (CIT) within 30 days of the administrative review decision.

Consideration 2 - Burden of Proof and Informational Requirements

The objective of CBP's investigation is to determine whether "substantial evidence" exists to show that merchandise was entered through evasion. [19 CFR § 165.45] Evasion means "the entry of covered merchandise into the customs territory of the United States for consumption by means of any document or electronically transmitted data or information, written or oral statement, or act that is material and false, or any omission that is material, and that results in any cash deposit or other security or any amount of applicable antidumping or countervailing duties being reduced or not being applied with respect to the covered merchandise." [19 CFR § 165.1]

Critically, the alleged violator's level of culpability is not a determining factor into CBP's decision. In practical terms this means that defense of EAPA investigations requires a showing through documentary evidence that the underlying violation amounting to evasion did not in fact occur. In fact, the entirety of CBP's review is based upon information in the administrative record developed during investigation. This information includes, for example, materials obtained by CBP through the course of an investigation, factual information submitted by the parties and results of any verification conducted pursuant to § 165.25, materials from other agencies provided to CBP pursuant to the investigation, written arguments and rebuttals, and summaries of oral discussions with interested parties relevant to the investigation. [19 C.F.R. § 165.21]

Consideration 3 - Potential Adverse Inferences

Another critical point is contending with the fact that CBP is permitted to make negative adverse inferences where its questions go unanswered to its satisfaction. Essentially, CBP is free to "fill in the blanks" in ways against the interest of the alleged evader. This can necessitate fulsome disclosure as well as prompting any third parties, such as foreign manufacturers, who may also receive information requests to likewise comply. If any party fails to cooperate and comply "to the best of its ability" with CBP's requests for information, then CBP is free to apply an adverse inference to the interests of that party when making an evasion determination. [19 CFR § 165.6] CBP may also apply an inference adverse based on a prior CBP determination or "any other available information."

Consideration 4 - Confidentiality of Information Submitted

Generating fulsome responses to CBP queries can mean offering high volumes of competitively sensitive information such as supplier or customer contacts and the cost of goods. CBP will treat a party's information submitted in response to the investigation as business confidential information (BCI) so long as the submitting party properly designates it as such.[2] [19 CFR § 165.4] To designate BCI, the party must submit both a public version and a BCI version. The first page of the BCI version must clearly state that the submission contains BCI. The party must then identify the BCI by enclosing the claimed confidential information within single brackets. The party must also provide an explanation of why each item of bracketed information is entitled to business confidential treatment.

The public version must be filed on the same date as the BCI version and must be clearly marked as a public version on the first page. This version must "contain a summary of the bracketed information in sufficient detail to permit a reasonable understanding of the substance of the information." When applicable, any information that CBP places on the administrative record will include the public summary of the BCI. When providing the public version, the party must certify that the information is either information from its own business records (and not BCI of another entity) or information that was publicly obtained or in the public domain.

CBP will reject a submission that includes a request for business confidential treatment but does not meet the precise documentary requirements. Still, CBP will treat the relevant portion of the submission as BCI until the appropriate corrective action is taken or the submission is rejected.

Consideration 5 - Right of Appeal and CIT Review

Administrative reviews of initial CBP determinations may be requested, but thereafter they cannot bet withdrawn. [19 CFR § 165.43] The standard of review is "de novo," which means that CBP will review the entire administrative record upon which the initial determination was made, the filed request(s) for review and responses, and any additional information that was received. [19 CFR § 165.45] After the administrative review is decided, a party to the administrative review may file suit with the Court of International Trade (CIT) to contest CBP's determination. The CIT will examine: (1) whether the CBP fully complied with all regulatory procedures; and (2) whether any determination, finding, or conclusion is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

How EAPA Investigations End

CBP's determination is not final until the right of appeal is closed and, even then, the immediate consequences of an adverse determination may not be immediately clear. If CBP determines that evasion occurred, CBP will cease applying any interim measures and liquidate the entries in the normal course. It is reasonable to expect that the evading party will be required to pay any lost duties, plus interest, and any penalties or damages CBP seeks to impose. CBP may choose to conduct additional investigations or enforcement actions, including by notifying other government agencies, such as the U.S. Department of Commerce, so that those sister agencies may take action within their jurisdiction as well. [19 CFR §§ 165.47, 165.28(b)]

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[1] The contents of the administrative review are found at 19 CFR § 165.41(f).

[2] Still, certain information will not be treated as "business confidential." *See* 1 9 C.F.R. § 165.4(c).