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July 29, 2008 CLIENT ALERT

CBP UPDATE:

- 1. Country of Origin Proposed Rule**
- 2. Update on “First Sale”**
- 3. New Softwood Lumber Requirements**
- 4. Lacey Act Amendments**

1. Country of Origin Proposed Rule: On July 25, 2008, CBP proposed amendments to its regulations in the Federal Register that would establish “uniform” rules governing CBP determinations of the country of origin of imported merchandise. [Click here for the full text of the proposed rule.](#)

Currently, the country of origin of imported goods (other than those of a NAFTA country) that are processed in, or contain materials from, more than one country is generally based upon the “substantial transformation” test. Under this test, CBP utilizes case-by-case determinations to decide the last country in which an imported article has been substantially transformed into a new and different article of commerce with a name, character, or use distinct from that of the article (or articles) from which it was transformed. Often characterized as somewhat subjective, the “substantial transformation” test is used in a number of different trade-related situations, including compliance with the country of origin marking statute, allowance of drawback, and qualification for preferential tariff treatment under statutory programs such as the Generalized System of Preferences. As a result, there are numerous court decisions and Customs administrative rulings that apply the test in a wide variety of factual situations.

The country of origin of goods imported from a NAFTA country, by contrast, is currently determined by application of the country of origin rules codified in 19 CFR Part 102. Predominantly comprising “tariff shift” rules, these standards determine country of origin in a somewhat more objective way, setting forth the change in tariff classification or other requirements that the components of an imported good must undergo in a given country in order for the finished article to be considered a “product of” that country.

In the notice published on July 25, 2008, CBP has proposed to extend application of the Part 102 rules of origin to all country of origin

determinations made under the customs laws of the United States (with limited exceptions as required under certain free trade agreements), thereby ending the use of the “substantial transformation” standard.

Importers who have relied on the “substantial transformation” test in determining the origin of their products will want to apply the “tariff shift” rules in order to determine the impact of the proposed rule on their import transactions. Comments to this proposed change must be received by Customs on or before September 23, 2008. If you have any questions concerning the proposed rule, or would like our help in preparing and submitting comments to Customs, contact Michael Roll at (310) 826-4410 or send an email to info@worldtradelawyers.com .

2. Update on “First Sale:” As has been frequently reported over the past few months, the Food, Conservation and Energy Act of 2008 (“Farm Bill”) passed by Congress on May 22, 2008 included a provision expressing the “sense of Congress” that CBP should not implement a change to the interpretation of the term “sold for exportation to the United States” for purposes of applying the transaction value of the imported merchandise in a series of sales before January 1, 2011. CBP has therefore indicated that they will not proceed with its prior proposal to eliminate “first sale” valuation, at least until that date. In the interim, the statute requires importers to declare, for a one-year period, whether the transaction value of its imported merchandise is determined on the basis of the price paid by the buyer in the first or earlier sale occurring prior to introduction of the merchandise into the United States. We have learned from sources within CBP that this information will likely be collected by CBP on a line-item level through the ABI system using an electronic flag. A Federal Register notice regarding compliance with this new declaration requirement is anticipated from CBP very shortly.

3. New Softwood Lumber Requirements: The Farm Bill passed by Congress also included a title called the “Softwood Lumber Act of 2008” that is primarily intended to prevent circumvention of the U.S.-Canada Softwood Lumber Agreement of October 2006. Under this new statute, importers of all softwood lumber and softwood lumber products, regardless of origin, classified under HTSUS subheadings 4407.10.00, 4409.10.10, 4409.10.20 or 4409.10.90, as well as importers of certain softwood lumber, flooring, siding and other products, are subject to a new “SOFTWOOD LUMBER IMPORTER DECLARATION PROGRAM.” Any importer of such products must now declare both the “export price” of the imported softwood lumber or softwood lumber product, as well as any “export charges” collected

by the country of export from the exporter in order to ensure compliance with any international agreement entered into by that country and the United States. In addition, the statute requires the importer to certify that it has made “appropriate inquiry” of the exporter to ensure that the information regarding export price and export charges is correct; importantly, the term “appropriate inquiry” is not defined in the statute. Knowing violations of these new declaration requirements are subject to a civil penalty of up to \$10,000 for each instance. We have learned from our contacts at CBP Headquarters that a Federal Register notice setting forth an interim rule implementing this new declaration requirement will likely be published either this week or next.

4. Lacey Act Amendments: The Lacey Act, the country’s oldest national wildlife protection statute, prohibits a range of activities related to the transportation, possession and marking of wildlife in interstate commerce. The recently enacted Farm Bill amended the Lacey Act to strengthen its prohibition against plants and plant products taken, possessed, transported or sold in violation of foreign law. In addition, the amendment implements a new declaration requirement. Under the new law, importers of plants and plant products (including most wood products used in furniture) must now file a declaration including the scientific name (genus and species) of the plant contained in the importation, as well as the quantity and value of the shipment and the name of the country from which the plant was taken. Importantly, until regulations implementing this declaration requirement are adopted, a declaration relating to plant *products* must also include the following information:

- If the plant species used to produce the imported plant product varies and that species is unknown, the declaration must contain the name of each plant species that may have been used to produce the plant product.
- If the plant species used to produce the imported plant product is commonly taken from more than one country and the country from which the plant was taken and used to produce the plant product is unknown, the declaration must contain the name of each country from which the plant may have been taken.
- If a paper or paperboard plant product includes recycled plant product, the declaration must contain the average percent recycled content without regard for the species or country of origin of the recycled plant product, in addition to the information for the non-recycled plant content otherwise required.

Declarations need not be filed for plants and plant products used exclusively as packaging material to support, protect or carry another item, unless the packaging material itself is the item being imported.

Although the Lacey Act amendments and the new import declaration requirement were primarily intended to address illegal logging, it is clear that the express application of the new declaration requirement to “plant products” will affect many importers of furniture and other wood-based finished products. CBP has advised that the U.S. Department of Agriculture (USDA) is the “lead” federal agency charged with implementing regulations under this statute – i.e., USDA will be responsible for publishing the relevant proposed rules in the Federal Register. Presently, the timeframe for publication of the proposed rules has not been announced.

If you have any questions concerning the above CBP Update, or the potential impact these issues may have on your business, please contact Robert Pisani at (202) 466-0960 or Michael Roll at (310) 826-4410 or send an email to info@worldtradelawyers.com .

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