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EAPA – An Importer's View

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Top Things to Know as EAPA Importer

- If you're "Home Depot" or "Lowe's" you're not likely to be "EAPA'd"
- If you're "Mom and Pop, Inc." you're a candidate for being "EAPA'd"
- CBP may try to "EAPA" the importer without even "EAPA'ing" the importer
- In many (but not all) cases, the purported evasion has nothing to anything the importer did, but instead relates to something the manufacturer/shipper is alleged to have done/be doing
 - DESPITE THIS, THE EAPA MAKES THE IMPORTER THE POTENTIAL EVADER AND THE IMPORTER MUST PAY THE DUTIES TO CBP

Top Things to Know as EAPA Importer

- EAPA will destroy the importer financially – whether importer is evading or not

EXAMPLE

- Importer goes from importing, say, \$20 million per year of imports and paying no duties (or very little duties, e.g., \$500k in duties) because you're not evading any ADD/CVD to needing many times your annual revenue in available cash just to be able to have the ability to defend yourself
 - CBP is going to reach backward in time – huge retroactive financial hit
 - CBP is going to treat importer as if you're guilty of evasion for about 1 year so importer will need to pay duties until case is finished
 - Bond company is going to increase your bond to an amount equal to annual estimated ADD/CV amounts (again, as if you're evading) and you'll need 2x to 3x that amount in collateral for the bond company – again, you're effectively guilty until you prove yourself innocent
 - Even if importer wins its case, importer won't see its collateral returned to it for years
- Importer will need MILLIONS in cash/assets/collateral – just for its bond + MILLIONS for CBP

Top Things to Know as EAPA Importer

- Importer's proverbial "day in court" does not happen until the administrative process is over. Thus, there is no "day in court" until the case concludes with CBP about 1 year after it starts. And the "day in court" when you actually get to "court" is more like "years in court".
- The administrative process is nearly 1 year long
- The administrative process will be very expensive and stressful –
- While EAPA is a civil, not criminal tool, importer is effectively "guilty until proven innocent"
- The legal standard in court is not "de novo" review but instead is whether CBP's determination is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"

Top Things to Know as EAPA Importer

- Importer will live or die by amount of cooperation from manufacturer and shipper (if shipper is different from manufacturer)
 - Manufacturer may not want to share information with importer
 - Manufacturer should have its counsel who is experienced in EAPA
 - If importer and manufacturer counsel are same – need to think of conflict of interest waivers – but having same counsel is ideal if parties agree to waive potential conflicts

Top Things to Know as EAPA Importer

- CBP will ask importer (and manufacturer) for tons of information
 - Document requests from CBP need to be fully answered – no matter what you think of the request
 - Line up your CPA or accounting/financial team and your procurement and sales teams
 - Ideally you did origin due diligence waaaaay before EAPA case – i.e., at start of your relationship with manufacturer

Top Things to Know as EAPA Importer

- Time is not on your side – deadlines are short – 3 weeks or so for initial questionnaire is effectively no time at all
 - Whatever time you think you have (or foreign manufacturer thinks it has) – you (they) have even less because you (they) need to make 2 sets (confidential version and public version) of most of the important documents
 - Leave time for redactions and public summaries – they take longer than you think - or use 3rd party service, (example: Hill Redaction Services (<https://hillredact.com/>))
- EAPA is a hammer for CBP, the domestic industry and your importer competitors – and everything looks like a nail
 - Deck is stacked against the importer
 - “reasonably suggests” and “reasonable suspicion” are insanely low bars for CBP to act and, to date, no one has challenged “CBP” on whether the evidence meets the “reasonably suggests” or “reasonable suspicion” standards
 - Don’t count on CBP to “get it” at the outset, or to know your industry like you do, or to be able to read between the lines of an allegation – you’re a nail; CBP is the hammer
 - You need to educate CBP through good and thorough responses to any/all questions
- Other side will always want to assert “adverse inferences”; it looms over every submission

Conclusion

