

INTERNATIONAL TRADE ALERT

U.S.-CANADA SOFTWOOD LUMBER AGREEMENT CREATES NEW IMPORT COMPLIANCE CHALLENGES UNDER U.S. LAWS

The Softwood Lumber Agreement between the United States and Canada (SLA 2006), which entered into effect on October 12, 2006, imposes complex new rules governing the importation into the United States of Canadian softwood lumber products – and gives rise to new compliance challenges for U.S. importers and brokers, Canadian exporters and others in the U.S.-Canada trading community.

Under the SLA 2006, the operation of which is explained more fully below, the government of Canada has imposed an export permit requirement and, depending on the Canadian Province of origin and softwood lumber market conditions, quantitative restrictions and export charges. In addition, in order to carry out the enforcement of the SLA 2006, U.S. Customs and Border Protection (CBP) has promulgated interim regulations providing new data reporting requirements for U.S. importers. It is essential that the U.S.-Canada trading community be fully aware of these new requirements so as to minimize the risk of noncompliance and tough enforcement action by the two agencies within the Department of Homeland Security that will have the initial responsibility of enforcing the new import requirements – CBP and U.S. Immigration and Customs Enforcement (ICE).

U.S. SOFTWOOD LUMBER IMPORTERS FACE HEIGHTENED CUSTOMS COMPLIANCE OBLIGATIONS UNDER SLA 2006

U.S. importers of covered softwood lumber products will need to ensure that their internal compliance programs reflect the heightened obligations under the SLA 2006. As always, U.S. importers are required to exercise “reasonable care” under 19 U.S.C. § 1484 in transacting customs business – a duty that now also extends to additional reporting and certification requirements under the SLA 2006 and revised 19 C.F.R. § 12.140. Further, CBP and ICE have, under the SLA 2006, reserved their full rights to investigate U.S. importers for noncompliance and assess penalties. Given the history during prior segments of the softwood lumber dispute of U.S. government allegations of circumvention, CBP and ICE can be expected to take tough enforcement actions on, for example, questions of tariff classification, valuation, date of shipment and province of origin. Importers should also expect heightened U.S. scrutiny of any exclusions permitted by the SLA 2006, i.e., for merchandise produced by excluded companies or produced in the Maritimes.

U.S. importers and Canadian exporters of products not specifically described by the product scope of the SLA 2006 may also wish to take steps to reduce the risk of claims by U.S. or Canadian authorities that their products should be covered. Depending on the circumstances, it may be advisable to file requests for binding tariff classification rulings with CBP and/or Canada Customs. It may also be advantageous to ask the United States and Canada to take up product classification questions in the Technical Working Group process described in the SLA 2006.

U.S. importers should also be aware that the absence of a U.S. duty requirement under the SLA 2006 does not eliminate the risk of investigation for compliance with obligations to properly appraise U.S. entries under applicable valuation rules. Penalties need not be based on a loss of revenue to the U.S. government. For many importers, the preferred “transaction value” methodology will likely continue to be the appropriate basis for entered value. Importers will also need to ensure that they have properly accounted for the statutory adjustments to entered value and for the Canadian export charge. CBP is likely to take the position that, so long as the export charge is included in the price paid or payable by the U.S. customer, there is no statutory basis for deducting it in establishing transaction value.

Importantly, the SLA 2006 in no way alters U.S. statutory import valuation rules. Thus, exporters and importers will need to ensure that each transaction complies both with the rules under the SLA 2006 for establishing the Canadian export value, and with U.S. statutory requirements for establishing the import value.

NEW CBP REGULATIONS IMPOSE ADDITIONAL IMPORT REPORTING REQUIREMENTS

On October 18, 2006, CBP published in the *Federal Register* an interim rule that revises existing section 12.140 of Title 19 of the Code of Federal Regulations. The interim rule provides that importers must, with respect to each entry of covered softwood lumber products, provide the following information in their electronic entry summary documentation (i.e., CBP Form 7501):

- The appropriate letter code for the “Region of Origin” of the softwood lumber. The “Regions” specified in the SLA 2006 are Alberta, British Columbia Coast, British Columbia Interior, Manitoba, Ontario, Saskatchewan and Quebec. The two Regions of British Columbia are defined by reference to British Columbia Regulation 123/2003.
- The 8-digit Export Permit number issued by the government of Canada. The 8-digit number must be preceded by letter codes indicating the month of the date of shipment, or, in the case of shipments originating in the Maritimes, Northwest Territories, Nunavut or Yukon, the region of origin. An additional code must be reported if the softwood lumber was produced by a company excluded from application of the SLA 2006.
- For softwood lumber products originating in the Maritimes Provinces (i.e., New Brunswick, Nova Scotia and Prince Edward Island), an original Certificate of Origin issued by the Maritime Lumber Bureau.

The interim rule also cautions importers that, for all pertinent data – including “any other substantiating documentation issued by the [g]overnment of Canada” – they are subject to the customs recordkeeping requirements, and related penalty provisions, of Title 19 of the Code of Federal Regulations.

Interested persons may comment on the interim rule, as specified in the notice dated October 18, 2006.

OPERATION OF THE SLA 2006

The level of the export charge depends on two basic factors – the prevailing price in the United States of a defined basket of lumber products, and whether the Canadian Region of Origin has elected Option A (export charge only) or Option B (export charge combined with a volume restraint). The lower the prevailing lumber price in the United States, the higher the export charge under Options A and B, and the tighter the volume restraint if under Option B, as follows:

Prevailing Monthly Price	Option A	Option B
Over \$US 355	No export charge	No export charge and no volume restraint
\$US 336-355	5%	2.5% export charge + maximum export volume of 34% of Region's share of U.S. monthly consumption
\$US 316-335	10%	3% export charge + maximum export volume of 32% of Region's share of U.S. monthly consumption
\$US 315 or under	15%	5% export charge + maximum export volume of 30% of Region's share of U.S. monthly consumption

Additionally, for Canadian Regions under Option A, an additional surge tax will apply to exports beyond monthly volumes specified in the SLA 2006.

The export charge is assessed, as a general matter, on the FOB mill price. Certain remanufacturers – i.e., producers of secondary, or remanufactured, lumber products within the scope of the SLA 2006 – may qualify for application of the export charge on the basis of the FOB mill price where primary processing was completed. To do so, they must meet criteria and provide certifications as specified in Annex 7C to the SLA 2006. Remanufacturers that do not satisfy these eligibility criteria are subject to assessment of the export charge on the basis of the FOB value for the remanufactured product.

The SLA 2006 contains elaborate information exchange and reporting provisions. The United States is obligated to provide to Canada, on a monthly basis, specified entry summary information for U.S. softwood lumber imports. Canada is also obligated to provide to the United States specified information relating to the provision of export permits. The countries are further obligated to attempt to reconcile these data and to cooperate to detect false statements. The SLA 2006 provides that CBP may request that Canada's Import and Export Controls Bureau investigate particular exporters, and confirms that CBP and ICE may investigate U.S. importers.

The SLA 2006 establishes several mechanisms for addressing problems that may arise in the administration of the SLA 2006 – including a process for establishing Technical Working Groups to address questions relating, for example, to the product scope of the SLA 2006 or other technical issues. Disputes arising under the SLA 2006 will be referred for settlement to the London Court of International Arbitration.

The SLA 2006 has a seven-year term, and may be extended for two years.

CONTACT INFORMATION

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