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INTERNATIONAL TRADE ALERT

FARM BILL IMPOSES A NEW CUSTOMS VALUE REPORTING REQUIREMENT AND SEEKS A MINIMUM DELAY UNTIL AT LEAST 2011 FOR CBP TO RENEW ITS PROPOSAL TO REVOKE THE FIRST-SALE RULE

The farm bill conference report, which the House of Representatives and Senate passed by veto-proof margins on May 14th and 15th, contains a section entitled "Requirements Relating to Determination of Transaction Value of Imported Merchandise." This section includes, among others, two important provisions concerning U.S. Customs and Border Protection's (CBP) controversial January proposal to revoke the "first-sale rule," i.e., the first or earlier sale in a series of sales that qualify as the transaction value under the customs valuation statute. Given overwhelming congressional support, these provisions will in all likelihood become law even if President Bush, as expected, vetoes the legislation.

First, the proposal mandates an additional step for importers by setting forth a new declaration requirement. Effective 90 days after enactment and for a one-year period thereafter, all importers would be required to provide a declaration to CBP at the time of entry stating whether or not the transaction value of the imported merchandise is determined on the basis of the first-sale rule. CBP would then report the frequency of the use of the first-sale rule and other associated data to the International Trade Commission (ITC) on a monthly basis. After the one-year period, the ITC would then issue a report to Congress on importers' use of the first-sale rule. The legislation does not state what action, if any, Congress will take based on the ITC's report.

The second is a non-binding "sense of Congress" provision, which states that CBP should not "implement a change to [CBP's] interpretation (as such interpretation is in effect on the date of the enactment of this Act) of the term 'sold for exportation to the United States', as described in section 402(b) of the Tariff Act of 1930 (19 U.S.C. 1401a(b)), for purposes of applying the transaction value of imported merchandise in a series of sales, before January 1, 2011." In addition, the provision indicates that "it is the sense of Congress that beginning on January 1, 2011, [CBP] may propose to change or change [its] interpretation of the term 'sold for exportation to the United States'" only after consulting with Congress and the Commercial Operations Advisory Committee (COAC) — and only after receiving express approval from the secretary of the Treasury prior to publishing a change.

While on its face it may seem that the "sense of Congress" provision has blocked CBP's controversial proposal to revoke the first-sale rule, the moratorium may only be temporary even if CBP complies with the provision. Under the legislation, CBP is free to renew its proposal in 2011. In the meantime, the legislation does not provide any business or legal certainty for U.S. importers that need to clearly understand whether CBP will endorse the use of the first-sale rule beyond the next two-and-a-half years. Furthermore, it is unclear whether CBP headquarters will issue ruling letters involving the proper application of the first-sale rule during this interim period.

Finally, because the "sense of Congress" provision does not question CBP's legal authority to revoke the first-sale rule, it has the unfortunate effect of suggesting that CBP actually has this authority, which it clearly does not. The first-sale rule is a judicial interpretation of the customs valuation statute enacted by Congress in 1979. As an executive branch agency, CBP simply does not have the authority to interpret a statute in a manner that is inconsistent with well-settled federal court precedent. Senators and House representatives have previously acknowledged as much in letters to Secretary Chertoff opposing CBP's proposed revocation. If the farm bill becomes law, which appears to be a near certainty, CBP will hopefully heed Congress's sense and mothball its proposal for good, but that, of course, remains to be seen. Stay tuned.

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