

## New Executive Order Targets Evasion of Customs Laws and International Posts in Light of DHS Action Plan to Combat the Rise of Online Counterfeit and Pirated Goods

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### Key Points

- On January 24, 2020, the DHS released a [report](#) (“DHS Report”) on the global trade in counterfeit goods, outlining a series of recommendations and actions that should be taken by CBP, ICE and the private sector to combat the rise of counterfeit and pirated goods sold online to U.S. consumers.
- On January 31, 2020, as a first action implementing a recommendation in the DHS Report, President Trump issued [E.O. 13904](#), aimed at preventing the sale of counterfeit goods and other contraband into U.S. markets, specifically providing potential new authorities to CBP to (1) suspend and debar trade violators, (2) regulate importers of record, ECOs, carriers, hub facilities and licensed customs brokers, and (3) target international posts that traffic in counterfeit goods.
- The issuance of E.O. 13904, along with the issuance of the DHS Report, represents the Trump administration’s most significant efforts thus far to curtail the online availability of and importation of counterfeits and other contraband, focusing on trafficking via e-commerce platforms, importers of record, ECOs and postal networks. The administration has stated that such trafficking “is threatening both the public health and safety as well as the national security.”

### Background

On April 3, 2019, President Trump issued a “[Memorandum on Combating Trafficking in Counterfeit and Pirated Goods](#)” (“Memorandum”). According to this Memorandum, “[c]ounterfeit trafficking impairs economic competitiveness by harming United States intellectual property rights holders and diminishing the reputations and trustworthiness of online markets; cheats consumers and poses risks to their health and safety; and may threaten national security and public safety through the introduction of counterfeit goods destined for the Department of Defense and other critical infrastructure supply chains.” The Memorandum required that the Secretary of Homeland Security, in coordination with various other agencies, submit a report to the President that, among

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other things, identifies appropriate administrative, statutory or regulatory changes to reduce trafficking in counterfeit goods.

The DHS Report, which is pursuant to the Memorandum as well as a July 2019 comment [request](#), is aimed at helping “develop a deeper understanding of how e-commerce platforms, online third-party marketplaces, and other third-party intermediaries facilitate the importation and sale of massive amounts of counterfeit and pirated goods.” It proposes 11 “immediate actions by DHS and recommendations for the U.S. government” and 10 “best practices for e-commerce platforms and third party marketplaces,” which we will cover in a separate alert.

## **Summary of E.O. 13904**

On January 31, 2020, the President issued Executive Order (E.O.) 13904, which provides U.S. Customs and Border Protection (CBP) with an implementing framework for one of the immediate actions described in the DHS Report—to suspend and debar repeat offenders as well as act against non-compliant international post operators. Below, we summarize several of E.O. 13904’s most notable provisions:

### **Section 1: Policy**

- Consistent with the DHS Report, E.O. 13904 states that “[e]-commerce, including transactions involving smaller express-carrier or international mail packages, is being exploited by traffickers to introduce contraband into the United States, and by foreign exporters and United States importers to avoid applicable customs duties, taxes, and fees.”
- Further, it is the policy of the U.S. government “to protect consumers, intellectual property rights holders, businesses and workers” not only from counterfeit goods, but also contraband, fentanyl/illegal opioids as well as persons who evade customs duties.
- Persons who materially violate such customs law can trigger suspension and debarment, which prevents violators from participating in government contracts, subcontracts, loans, grants and other assistance programs. It is the policy of the U.S. government “that [express consignment operators (ECOs)], hub facilities, international posts, customs brokers, and other entities, including e-commerce platform operators, should not facilitate importation involving persons who are suspended or debarred by CBP.”
- Finally, it is the policy of the U.S. government that “all parties who participate in the introduction or attempted introduction” of parcels containing contraband into the United States “be held accountable under the laws of the United States.”

### **Section 2: Criteria for the Importer of Record Program, Including Exclusion of Trade Violators**

- The Secretary of Homeland Security (via CBP) will issue a Notice of Proposed Rulemaking (NPRM) to establish criteria importers must meet in order to obtain an importer of record number; such criteria must provide that “any person debarred or suspended by CBP for lack of present responsibility for reasons related to importation or trade shall be ineligible to obtain an importer of record number for the duration of such person’s suspension or debarment by CBP.”

- The policy is that violators will be debarred from participating in the importing of goods into the United States, which reinforces that importing is not a right but a privilege.

### **Section 3: Responsibilities of ECOs, Carriers, Hub Facilities and Licensed Customs Brokers**

- The DHS Secretary, through the CBP Commissioner, shall take steps to ensure that—within 60 days of the publication in the System for Award Management by CBP of the name of any debarred or suspended person—ECOs, carriers, hub facilities and licensed customs brokers notify CBP of any attempt by persons who may not obtain an importer of record number based on the criteria established in Section 2 to reestablish business activity requiring an importer of record number through a different name or address associated with the debarred or suspended person.
- In other words, once this section is implemented, ECOs, carriers, hub facilities and customs brokers would have a significant notification and disclosure obligation to CBP if they have any reason to know that a debarred party circumvents the prohibition of the party obtaining an importer of record number.
- In addition, CBP would have, consistent with applicable law, the authority to impose sanctions on ECOs, carriers and customs brokers for facilitating business activity by debarred or suspended importers, including the suspension or revocation of licenses, permits or other operating privileges.

### **Section 4: Items Sent to the United States through the International Postal Network**

- Following the passage of the STOP Act imposing advanced data requirements on the United States Postal Service (USPS) to prevent the introduction of contraband into the United States (e.g., fentanyl), E.O. 13904 seeks to impose additional responsibilities on the USPS and postal networks—responsibilities that ECOs and other carriers must follow under applicable law. For example, the E.O. directs the USPS to make all reasonable efforts to include provisions regarding criteria for debarment or suspension in any new contractual instruments it executes with international posts.
- Within 90 days from the date of E.O. 13904, the DHS Secretary, through the CBP Commissioner and in consultation with USPS, shall submit to the President a report on any appropriate measures the federal government could take, including negotiating with international posts, to prevent the importation or attempted importation into the United States through the international postal network of shipments containing goods, when such importation or attempted importation is known to have been facilitated by any person who may not obtain an importer of record number under criteria established by the Secretary in Section 2.
- E.O. 13904 defines “international post” to mean “any foreign public or private entity providing various types of postal services, including mailing and delivery services.”

### **Section 5: Non-Compliant International Posts**

- The DHS Secretary, through the CBP Commissioner, and in consultation with the United States Trade Representative (USTR), is required to develop an International Mail Non-Compliance metric, based on relevant factors such as rates of trafficking

of counterfeiting goods, narcotics (including synthetic opioids such as fentanyl) and other contraband through a particular international post, as well as effectiveness of the international post in reducing such trafficking, including cooperation with CBP, to formulate an overall compliance score for each international post.

- The DHS Secretary is required to update overall compliance scores on a quarterly basis, and must also determine a minimum threshold compliance score for each quarter and deem “non-compliant” any international post that scores below such threshold in that quarter.
- The DHS Secretary must prioritize targeted inspection of imports into the United States from any international post that for two or more consecutive quarters is deemed a non-compliant international post. The DHS Secretary may require additional information for any shipment from any international post that for six or more consecutive quarters is deemed a non-compliant international post, and must implement all appropriate measures to prevent importation into the United States of any shipments dispatched from any such international post for which the additional information required is not provided.
- Within 90 days from the date of E.O. 13904, the DHS Secretary must publish and regularly update guidance related to CBP’s implementation of this section, including the process by which an international post is deemed a non-compliant international post and the process by which an international post is removed from the list of non-compliant international posts.

#### **Section 6: Publication of Violation Information; Enhanced Enforcement Efforts**

- On a periodic basis, the DHS Secretary, through the CBP Commissioner and the Director of Immigration and Customs Enforcement (ICE), must publish information about seizures arising in the international mail and express consignment environment that involve intellectual property rights violations, illegal drugs and other contraband, incorrect country of origin, under valuation or other violations of law of particular concern.
- Notably, within 60 days of E.O. 13904, the Attorney General must also “assign appropriate resources” to ensure that federal prosecutors “accord a high priority” to prosecuting offenses related to import violations as described in the E.O. The augmentation of prosecutorial resources devoted to customs law offenses, including civil and criminal violations, would impose additional compliance burdens not only for importers but e-commerce platforms and other intermediaries, such as ECOs and customs brokers.

#### **Section 7: Review of User Fee Sufficiency**

- Within 210 days of the date of E.O. 13904, the DHS Secretary must submit a report to the President: (1) analyzing whether the fees (i.e., user fees) collected by CBP are currently set “at a sufficient level” to reimburse the federal government’s costs associated with processing, inspecting and collecting duties, taxes and fees for parcels; and (2) providing recommendations, consistent with applicable law, regarding any fee adjustments that are necessary to reimburse the federal government’s costs associated with processing, inspecting and collecting duties, taxes and fees for parcels.

## **Implications of the E.O.: Enhanced Customs Enforcement**

The issuance of E.O. 13904, in light of the DHS Report, demonstrates that the Trump administration is taking concrete enforcement steps to empower CBP, the USPS, international posts and the Department of Justice with policies and regulatory enhancements to combat the violations of the customs laws, most notably the importation of counterfeit products and other contraband. We recommend that all importers, e-commerce platforms, other online third-party marketplaces and intermediaries, such as customs brokers and ECOs, monitor the upcoming changes that DHS and CBP are likely to implement following this E.O. and the DHS Report. Akin Gump will continue to monitor the administration's implementation of E.O. 13904 and the broader efforts of the administration to enhance CBP enforcement.

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