

Customs resolves detention issues

AFTER REVIEWING THE NEW regulations on detentions issued just a few weeks ago, the first question that stands out is, "What took so long?"

While it is laudable that the current Customs administration managed to resolve this issue (which was lingering from the prior commissioner's reign) as swiftly as it did, the amount of time between the Notice of Proposed Rulemaking (NPRM) and the issuance of the regulations is striking.

By way of historical

perspective, the current statutory procedures for detaining merchandise were passed as part of the Customs Modernization Act in late 1993. Two-and-a-half years later, on June 5, 1996, Customs finally issued a NPRM soliciting comments on its draft detention regulations.

And now, remarkably, more than five and-a-half years after the passage of the statute on detentions, Customs has issued the subject regulations.

The battle against textile transshipments

During this five-and-a-half year hiatus, Customs has been waging a vigorous campaign against textile transshipment which has been gaining momentum in the past two years (highlighted by the recent creation of the Textiles and Transshipments Branch at Customs headquarters).

Although obviously used in other areas, Customs has been utilizing the detentions statute in earnest to impede country-of-origin violations in this product sector.

Thus, after so many years of deliberation, one would expect more than simply the "pro forma" set of guidelines parroting the statute upon which they are based.

Even if the single comment that Customs received in response to its NPRM addressed every single provision in the new regulations, however remote the case may be, a three-and-a-half year hiatus from the date of publication of the NPRM is still an excessive period until the government finally issues regulations on such an important issue.

Nevertheless, the new regulations do substantively address some outstanding

importer concerns regarding detentions.

Multiyear delay finally overcome, with results

Under the current detentions statute, Customs can detain merchandise when, upon initial examination, it is unable to make a determination as to whether the goods may be released into commerce because of some defect regarding their admissibility (frequently country-of-origin verification when textile transshipment is suspected).

Customs then has five working days after merchandise is "presented for examination" (a phrase which has been begging for regulatory clarification for years) to determine whether it should be detained or released.

If goods are detained, or if the merchandise is not released within the specified 5-day period, Customs, according to the new regulations, must provide the importer with a written notice of detention identifying, among other items, the specific reason for, and the anticipated length of, the detention.

If Customs has not made a determination to release or seize the goods after 30 days, or such longer period authorized by law, they are deemed to be excluded. The importer may then file a protest and, ultimately, seek judicial review in the U.S. Court of International Trade.

The importer also has the options of exporting or destroying the goods at any point during the detention or exclusion period.

An effort to clarify recurrent problem areas

Pursuant to the basic framework outlined above, Customs' promulgation of these new regulations attempts to clarify various "sticking points" for importers and the agency itself.

For example, Customs has explicitly stated that merchandise is considered "presented for examination" only when it is in a condition to be viewed and examined by a Customs officer. One speculates whether, after more than three years, this is the best definition Customs could muster?

The meaning was presumably formulated in

good faith, but importers need a precise directive designed to specifically outline their options when they have limited time to act and protect their interests, especially when perishable merchandise is at issue.

In addition, presentation to the examining officer of a cargo van, container or instrument of international traffic in which the merchandise to be examined is contained is not considered to be presentation of the merchandise for Customs examination purposes.

To assist importers in properly adhering to statutory deadlines, the date the merchandise was presented for examination is required to appear on the notice of detention.

In another important clarification, Customs highlighted that if an action concerning a protest which has been deemed "denied" with respect to a detention has not been commenced in the CIT, it retains the authority to act favorably on the protest and release the merchandise.

Alternatively, it may deny the protest, leaving the importer with the options of commencing an action in the CIT, exporting the goods or destroying them.

Once an action is commenced in the CIT, however, Customs has noted that it is proscribed from acting.

Similarly, Customs is precluded from applying these regulations to detentions that it makes on behalf of another agency that retains the authority to make its own admissibility determinations (e.g., the FDA regarding adulterated food products).

The new provisions are also inapplicable to certain copyright violations which are covered elsewhere in the regulations.

Lots of words, no advice, when Customs can't act

Interestingly, in its notice issuing the new regulations, Customs expends a great deal of verbiage identifying those instances in which it cannot act, but it does not explain what importers must do when action is taken.

It would not be surprising to see another notice on detentions proposing to amend the current regulations in the not-so-distant future.

Perhaps this would be a sound approach, since the last three years has provided a wealth of experience to importers vis-a-vis detentions, especially of textile products. More numerous comments would surely be filed by the public.

In the interim, while

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importers should not expect any significant changes to Customs' detentions program prompted by the new guidelines, they should continue exercising reasonable care.

In the case of textile products, importers should have in place an internal country-of-origin verification and evidentiary program.

Customs Update is a weekly column

examining critical aspects of the relationship between customs agencies and importers. This column was prepared by Steven S. Weiser and Ari L. Kaplan, partner and associate, respectively, in the international law firm of Graham & James LLP, N.Y., and reflects the opinion of the writers. Please address any questions to Customs Update, Trade Desk, The Journal of Commerce, Two World Trade Center, Suite 2750, New York, N.Y. 10048.