



The Customs Business Fairness Act (H.R. 2261)

Customs brokers and sureties are seeking a technical change in the bankruptcy laws to provide relief for customs brokers who have paid duties and to Customs and Border Protection (CBP) on behalf of importers who subsequently file for bankruptcy.

Customs Brokers and the Payment of Duties: The customs broker plays an important role in the duty payment process at the border and U.S. ports. Under current trade law, there is generally a 10 business day period between the release of imported merchandise by CBP and submission of the estimated payment of duties and taxes. Licensed customs brokers are often called upon to either advance the payment of these estimated duties/taxes on behalf of the importer or to guarantee payment to the government through its ACH (automated clearing house) account. In effect, customs brokers serve as a pass-through entity, or conduit, for the collecting and payment of duties/taxes. This payment method has become a standard business practice.

Collectively, customs brokers are responsible for remitting an estimated \$10 billion a year in duty and fee payments due from importers. From the government's perspective, it is far easier to collect the initial duties from a finite number of licensed customs brokers than a hundred thousand individual importers. The government is significantly advantaged by this system, where the prompt payment of billions of dollars in duties is facilitated. This expedites the payment of revenues to the government and allows the flow of trade to continue unimpeded.

Importers and Bankruptcy: When an importer-client files bankruptcy, the most immediate and troublesome threat is an action by the bankruptcy trustee or debtor to recover payments made to/through the customs broker to CBP by the importer in the 90-day period prior to the filing of the bankruptcy petition. This can amount to substantial amounts of money -- often well into the six-figure range. This so-called "claw back" period is allowed under Section 547 of the Bankruptcy Code to avoid preferential treatment to any one creditor. In these circumstances, the customs broker is required to pay to the trustee any monies received from the debtor (or advanced to CBP by the broker on the debtor/importer's behalf) during the 90-day period prior to the bankruptcy filing.

Subrogation in Bankruptcy: Generally, when a creditor pays a debtor's debt owed to another creditor (for example, the US government), the paying creditor is *subrogated* to the rights of the creditor receiving payment. In effect, the paying creditor can "stand in the shoes" of the receiving creditor. Since CBP is granted a "priority" under the Bankruptcy Code for claims against a bankrupt importer, any payment directly to the agency from the importer during the

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90-day claw-back period would not be considered a preferential payment. If a customs broker could be subrogated to the priority rights of CBP, any payments from the importer to CBP *via the customs broker* during the 90-day period would likewise no longer be subject to a preference payment recovery action. Recognizing the value of customs brokers' role in advancing duty payments, Customs itself attempted several years ago to assign its priority status under the Bankruptcy Code to customs brokers through regulation -- an effort that was deemed by the courts to exceed the agency's authority, ruling that it was up to Congress to make changes in the Bankruptcy Code.

Proposed Technical Bill: Subrogation rights are derived from common law and ordinarily would come into play, except for the fact that Section 507(d) of the Bankruptcy Code specifically disallows subrogation with respect to many of the enumerated priorities. In the House, H.R. 2261, introduced by Rep. Peter King (R-NY), provides a technical amendment to Section 507(d) that, in effect, would allow subrogation for customs brokers or sureties who have paid duties to the government on behalf of a bankrupt importer.



NCBFAA Key Legislative Issues 2019

CBP-Agriculture Inspectors are on the front lines, responsible for screening the 81,000 truck, rail and sea containers arriving in the U.S. each day to protect against prohibited plant materials/animal products and agricultural pests that could harm U.S. agriculture or the health and safety of U.S. consumers. Out of the large volumes of fruits, vegetables, flowers, animals and other agricultural products that arrive in the U.S. each day, the CBP-Ag inspectors seize an average of 4,370 plant materials/animal products and 319 agricultural pests. Yet, a staff shortage threatens the ability of CBP to carry out this critical mission. According to CBP's resource allocation staffing models, the agency is currently 695 inspectors short of the 3,148 inspectors needed at the ports. NCBFAA supports legislation to close this gap.

The Protecting America's Food and Agriculture Safe Act of 2019 (S. 2107), sponsored by Senators Gary Peters (D-MI) and Pat Roberts (R-KS), authorizes the annual hiring of 240 Agriculture Specialists each year for three years until the workforce shortage is filled. The bill also adds 200 Agricultural Technicians to carry out administrative and support functions and 20 new canine teams each year. A House bill has not yet been introduced. We urge Congress to enact this important legislation to ensure that agricultural goods move efficiently across our borders while safeguarding against invasive pests, harmful diseases and even bioterrorist attacks.

The Craft Beverage Modernization and Tax Reform Act of 2017 recalibrated federal excise taxes on alcoholic beverages, setting quantitative limits for producers to receive a lower excise tax rate. For example, for distilled spirits, the excise tax rate is lowered from \$13.50 to \$2.70 on the first 100,000 proof gallons produced annually by each producer. Similar excise tax reductions apply to wine and beer. While the CBMA focused on simplifying the Alcohol and Tobacco Tax and Trade Bureau (TTB) process that applies to domestic producers, the new law failed to recognize the unique features of the trade process that apply to imports – a process that is regulated by Customs and Border Protection (CBP) with the tax collected electronically by CBP at the time of entry (as opposed to the domestic producers who pay quarterly through a TTB process).

Consequently, the CBMA requirements for determining and collecting the excise tax for imported alcohol products have created a needlessly cumbersome process requiring a complex matrix of information which cannot be processed in CBP's automated system, ACE. Instead, the entire process must be handled off-line – an antiquated, resource intensive exercise for both the trade and CBP. Moreover, the required information is often not known or readily available to the importer. The fact that 77% of the claims submitted to CBP have missing or erroneous

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data speaks to the unworkability of this process. With the CBMA tax reductions expiring at the end of 2019, legislation has been introduced to make the benefits permanent. NCBFAA urges Congress to work with the trade to modify the CBMA to provide a more straightforward, administrable process that can be managed in ACE.

CTPAT Reauthorization – It has been nearly 13 years since CTPAT was authorized by an Act of Congress. Congress' and CBP's vision for the program has evolved over time, as have the trade's import and export practices. More recently, we have experienced the revolution occasioned by e-commerce. It's time for Congress to update its vision for international supply chain security and to improve features of the program where experience dictates.

Recently, Representative Clay Higgins (R-LA) introduced H.R. 3719 to reauthorize CTPAT. Chairman Bennie Thompson (D-MS) has not yet divulged his plans for a CTPAT bill. And, there is not yet a corresponding effort in the Senate. It is unclear what a bill will look like when it is ready for passage; however, H.R. 3719 articulates several principles that NCBFAA supports:

- New requirements will need to address current and evolving security threats. This must be done in consultation with the trade to reflect current industry practices.
- Establishing an appeals process after CBP has made a determination to remove a participant from the program based on alleged breaches in security or false and misleading statements.
- Offer tangible and specific benefits to all participants depending on their tier designation and/or supply chain role.

Diversion of TSA's September 11 Security Fee – Established in 2001, this air security fee has paid for TSA measures related to their security mission. For the air cargo industry, this fee is paid by air passengers (\$11.20 per round trip) but has value directly and indirectly for enhancing TSA's processing of goods transported by air. The agency is in immediate need of funds for necessary staffing and for advanced technology that can facilitate the efficiency of screening what moves onboard an aircraft.

But it's a story that has been otherwise repeated several times and is being applied to these safety funds – Congress passed a Budget Act in 2014 that took \$13 billion generated over 10 years and used them to offset receipts for the federal budget deficit.

Legislation was introduced in 2019 to require that the funds would henceforth be directed to a separate account for expenditure only for "the costs of activities and services for which the fee is imposed." H.R. 1171 (DeFazio) and S.472 (Markey) are waiting in their respective committees for further action. NCBFAA urges passage of this legislation.