The Trade Facilitation and Enforcement Act (H.R. 644) Conference: Key Provisions

Customs Broker Requirements for Identifying Importers: The House bill (Section 116)[1] requires customs brokers to screen their customers by collecting *and verifying* information on the identity of importers. This places a law enforcement responsibility on the importers' private sector representatives, not on CBP, and shifts responsibility for trade law compliance away from the importers themselves. It is like holding a tax return preparer responsible for his taxpayer client. Instead, the law should hold importers primarily responsible for documenting their own identity, with the customs broker responsible for collecting specified information. And, most certainly, the customs broker should not be required to substantiate the information collected, as the House bill provides.

The theory is that, since importers usually utilize a U.S. customs broker, it is far easier to place and enforce accountability on the broker. But, is it fair to place the enforcement burden on an intermediary when he has no real ability to screen his client, especially when there is no penalty for the importer's failure to comply? Nor does the customs broker have the power to prevent or hold accountable entities presenting false (but seemingly accurate) identity information. And, finally, the cost of this burden to the broker is added liability for customs penalties ($10,000 for each violation) and potential revocation of his license (and therefore loss of his livelihood).

CBP and the customs broker community have been seeking an alternative solution through extensive dialogue on the broker's role in identifying importers. This resulted in the recently launched **Broker Known Importer Program (BKIP),** which tells CBP what importers are known to their broker and with whom brokers have engaged in order to outline the importer's obligations to accurately report their import transactions. There is more that can be done on a collaborative basis. But, to start, the requirement must be placed on <u>importers</u>, not customs brokers, to bear primary responsibility for documenting their identity.

The Senate bill contains <u>no</u> such provision, which we support.

Antidumping and Countervailing Duties (AD/CVD): NCBFAA supports strong enforcement of U.S. trade laws and we work closely with members' customers, who are U.S. importers, to ensure compliance with these laws. We note that many of the issues surrounding the AD/CVD laws could be averted if the U.S. moved to a prospective system of collecting AD/CVD duties and we strongly favor that solution.

The House and Senate bills take very different approaches to strengthen enforcement of the antidumping and countervailing duty laws. In our view, the House bill, known as the PROTECT Act, provides a more effective mechanism to deter companies intentionally seeking to evade these trade laws. It builds on the Commerce Department's expertise, expanding its authority to investigate such illegal actions.

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[1] The House-passed version of H.R. 644 can be found at this link: https://www.congress.gov/bill/114th-congress/house-bill/644/text

By contrast, the Senate version contains the ENFORCE Act, which establishes confusing new administrative procedures at CBP, blurring the jurisdictional lines between Commerce and CBP in a way that would invite forum shopping. More troubling, it would expand the definition of "evasion" to include situations where no intentional wrongdoing is present. At the same time, it would deny fundamental due process rights to such innocent importers, who would receive no notice, no explanation of CBP's decision and no right to administrative or judicial review. This is an unprecedented departure from established principles of trade remedy law.

NCBFAA urges conferees to focus the final legislation on fraudulent evasion schemes, on providing due process protection for innocent importers, and on respecting the distinct roles of Commerce and CBP by referring administrative issues and decisions to Commerce, thereby allowing CBP to devote its diminished resources to investigation and prevention of fraudulent schemes.

Streamlining Drawback: "Duty drawback" is the customs process of crediting U.S. exporters of products with the import duties that they have paid for those products or their components. Drawback was introduced over two hundred years ago in the U.S. Its purpose is to promote exports by reducing U.S. producers' costs, thereby strengthening the competitiveness of U.S. companies in overseas markets.

The process for obtaining drawback is currently very complex, time-consuming and resource-intensive for both drawback brokers and CBP. For nearly 10 years, NCBFAA and others in the trade community have worked with CBP and Congress to modernize and simplify the drawback program. We are very pleased that both the House and Senate-passed versions of H.R. 644 include drawback modernization by allowing use of eight-digit Harmonized Tariff System (HTS) classifications for determining eligibility for drawback claims. This is designed to make administration of drawback easier and more efficient, allowing drawback claims to be processed in the CBP's Automated Commercial Environment (ACE). NCBFAA strongly supports these provisions and urges conferees to address the few remaining technical issues before the bill is finalized.

Port Congestion: An Economic Threat

Port congestion is still very much with us. Of the nation's 10 busiest ports by volume, it is estimated that at least seven face congestion regularly. The causes are varied and complex -- labor disruptions, cargo surges from big ships, infrastructure needs, marine terminal productivity, and equipment shortages, among other causes.

The result is chronic gridlock at many ports. Earlier this year at Los Angeles/Long Beach, ships were stranded offshore for days, even weeks, waiting to unload. Frequently, containers are buried in enormous stacks in clogged terminal yards. Trucks wait in line for hours to pick up a single container. And customers throughout the country experience shipment delays lasting weeks. The congestion and bottlenecks reverberate throughout the supply chain, becoming a significant trade barrier for both exports and imports with a corresponding negative impact on the economy.

In addition to this broader impact, port congestion adds other more direct costs to the supply chain, such as exorbitant demurrage costs (discussed below) and higher inventory costs. Faced with chronic delays and uncertain deliveries, many U.S. companies are forced to increase their inventory levels. For example, one company, Nike, has reported it spends $200 million annually to carry an extra 7 to 14 days of inventory because of the unreliable transportation caused by port congestion.

Specific Problems for Congress To Address

There are no quick-fix solutions. Several ports are working with terminal operators and shippers to develop innovative solutions to ease the congestion. Some of these ideas, such as an Uber-style technology platform in Los Angeles to facilitate truck transactions, offer promising new tools. But, while helpful, these improvements cannot solve the overall, multifaceted challenges facing maritime trade. Congress can and must play a role. When it comes to jobs and the economy, there is perhaps no more pressing issue than this.

Port Metrics: We all know when ports are gridlocked. We can all point to anecdotal evidence about trucks backed up for miles at the terminals and ships anchored at sea unable to unload. Yet there is a shocking lack of hard data on port congestion and efficiency. The "Port Transparency Act" (S. 1298) attempts to remedy this. Based on the premise that "you can't manage what you can't measure," S. 1298 for the first time provides the tools needed to track performance measures uniformly over time at the various ports. This port performance data will allow the kind of rigorous analysis so essential for ensuring the smooth flow of commerce. An amended version of S. 1298 was added to the Senate-passed Highway bill in July. We urge Congress to pass this legislation.

Labor Disruptions: Our experience on the West Coast over the past year is a stern reminder that labor disputes at a major port can bring commerce to a halt, threatening the economic health of the entire nation. Recently introduced legislation seeks to provide better tools to prevent this from happening in the future. S. 1519 and H.R 3343, introduced by Senator Cory Gardner (R-CO) and Rep. Dave Reichert (R-WA), are designed to discourage labor disruptions and to incentivize quick resolution if a dispute does occur. The legislation specifically allows use of Taft-Hartley to end work slowdowns at ports and would empower state governors to seek a federal injunction against slowdowns, strikes and lockouts. S. 1630, introduced by Senator James Risch (R-ID), makes intentional work slowdowns by maritime unions an unfair labor practice under federal labor law. Labor organizations that engage in slowdowns could be subject to claims for monetary damages both from employers and injured parties, such as importers or exporters.

Infrastructure: NCBFAA supports congressional passage of long-term funding for transportation infrastructure. In particular, we strongly support the TIGER competitive grant program, which is an important funding source for freight projects, including port access and expansion and intermodal projects. A June 8, 2015, coalition letter to Senators Susan Collins (R-ME) and Jack Reed (D-RI), states our position: "The annual TIGER process and its coordinated and collaborative planning requirements...has served as a catalyst in bringing freight stakeholders to the table -- along with additional funding....For example, since its inception in 2009, TIGER maritime projects have received over $500 million in federal funding while leveraging $700 million in additional funding" [from non-federal sources]. Therefore, we urge Congress to provide the $1.25 billion in FY 2016 funding proposed by the Administration for the TIGER program.

Demurrage: Demurrage is a charge for the use of space, with fees applied after a specified period of "free time" at the terminal. Demurrage was originally intended to encourage faster cargo movement so that terminals are not used for storage by shippers. But this concept has been turned on its head. Typically, in a congested port, the situation arises where a shipper is ready and willing to pick up his cargo. Yet, the trucker is turned away from the terminal because the container is buried in a stack too deep to be retrieved or because of a chassis shortage at the terminal. Nevertheless, the terminal operator still

charges a per diem penalty for demurrage for each day the container remains at the terminal -- even though the shipper is prevented from removing it. Once demurrage is assessed, the shipper has no choice but to pay, since the charges are due upfront on the day of pick-up. Demurrage fees are having an extraordinarily negative impact on the movement of ocean cargo. One importer reports having paid over $100,000 in demurrage charges last year compared to $10,000 in the previous year. Another importer paid $2.0 to $2.5 million in three events in the New York port (Hurricane Sandy, the Maher system meltdown and the winter vortex of 2014), while having virtually no demurrage at any other time. Perversely, instead of an incentive to keep cargo moving, demurrage has become a convenient revenue stream for gridlocked terminals. Congress should press the Federal Maritime Commission to take prompt action in light of their recently concluded port congestion study.