The Customs Business Fairness Act

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 to 45 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 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, saying 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. 4657, 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. In the Senate, we are seeking similar legislation.

CBP/Treasury Proposed Regulations and Drawback:
Congressional Policy Reversed Through Regulation

Customs and Border Protection (CBP) and the Department of Treasury recently proposed regulations to implement the drawback provisions in the Trade Facilitation and Trade Enforcement Act (TFTEA), recently passed by Congress. Of concern to NCBFAA, the proposed regulations seek to eliminate drawback for certain excise taxes, even though drawback has historically been paid for excise taxes under the customs drawback law. The TFTEA amendments actually make it even clearer that such excise taxes should be paid. Sound policy supports the view that drawback on excise taxes has fueled export expansion and jobs in certain key U.S. industries, such as wine production.

Generally, the drawback program allows for the refund of certain duties, taxes and fees paid on imported products when the product (or a commercially interchangeable substituted product) is exported, or when the product is used as an input to produce another product that is exported. Established in 1789, the purpose of drawback has always been to increase the competitiveness of U.S. manufacturers and encourage U.S. exports.

Despite clear Congressional intent, as well as explicit statutory language, CBP and Treasury are now attempting, through regulation, to limit the use of substitution drawback for excise taxes paid on imported product. By redefining technical terms, the agencies are attempting to unilaterally reverse the longstanding statutory policy, that was reinforced in TFTEA, to allow drawback for excise taxes paid on imported products when a substituted product is exported, regardless of whether the excise tax was paid on the exported product. Moreover, this regulatory overreach is based on the agencies' stated belief that the policy choice made by Congress to allow this form of drawback is "not an effective or efficient export promotion measure."

This is not the agencies' call. The Notice of Proposed Rule Making reaches squarely into the policy-making realm that is reserved under the Constitution for our elected legislators. The proposal ignores Congressional intent and the clear statutory language of TFTEA. We urge Members of Congress to contact the House Ways and Means Committee or Senate Finance Committee about this proposal and to urge the committee leaders to express their concern and disapproval to CBP and Treasury.