NCBFAA Position Paper

The Customs Business Fairness Act

Customs brokers are seeking a technical change in the bankruptcy laws to provide relief for customs brokers who have paid duties and taxes to Customs and Border Protection (CBP) on behalf of importer-clients who 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. NCBFAA, therefore, proposes a technical amendment to Section 507(d) to permit subrogation rights for customs brokers who have received from the debtor or paid duties and taxes to the government on behalf of a bankrupt importer.

NCBFAA Position Paper

Key Issues in NAFTA Renegotiation

The De Minimis Dilemma: Raising the Section 321 de minimis value threshold in the Trade Facilitation and Trade Enforcement Act of 2015 (TFTEA) was proposed as a means of facilitating trade, primarily among the NAFTA countries. This was however a unilateral gesture, a step taken only by the U.S., without negotiation or without a corresponding concession by others. In fact, we are advised that Canada and Mexico have determined that their interests call for retention of substantially lower levels for de minimis shipments. This has created incentives to ship goods to the U.S., both via e-commerce and in traditional trade, in quantities qualifying for de minimis treatment. We understand that this has led to an increase in distribution centers being located outside the U.S. in order to reduce delivery times and costs, and provide a location for re-packaging volumes of higher value merchandise into small de minimis quantities.

<u>The de minimis levels among the NAFTA countries must be harmonized</u>. Differing levels provide significant advantage to exportations from Canada and Mexico with their lower thresholds and their proximity to the United States. Yet the consequences are even greater than this. Goods entering the U.S. under the de minimis threshold not only enter free of duty and tax, but with reduced data requirements, minimal scrutiny and accelerated speed in crossing our borders. The multiple dimensions of the expanded de minimis threshold are yet to be fully understood. We do know, however, of its impact on such areas as:

- **The Trade Deficit:** To address the trade deficit, all trade must be counted. The expanded Section 321 creates a growing volume of "invisible" trade that cannot be ignored.
- **Enforcement:** Whether it's enforcing the rules of origin to ensure that the benefits of NAFTA accrue only to North American products, preventing counterfeit goods from entering the U.S. or stopping unsafe or illicit products from crossing the border, CBP must have some visibility into the trade entering under Section 321 in order to implement risk management techniques and targeting. Without that, the expanded Section 321 threatens to become a back-door portal for anyone out to skirt U.S. trade laws.

NCBFAA urges U.S. negotiators to pursue a common NAFTA de minimis level and a simplified 321 entry type (to include the 10-digit HTS, name of shipper and consignee, country of origin and quantity - both manifest and HTS level quantities) for de minimis shipments. Section 321 declarations made using the manifest should also require the 10-digit HTS to allow CBP to properly target for AD/CVD and all Partner Government Agency data requirements. With the simplified 321 entry filed electronically in ACE, CBP will have sufficient data to screen de minimis shipments for anomalies, thereby providing the basis for further scrutiny.

Drawback: Duty drawback is a valuable export promotion program where a refund is granted by the U.S. Government for duties, taxes and other fees that have been paid for imported products which then serve as inputs in the production of U.S. manufactured goods that are later exported. This is also granted where the imported good is substituted for the same or similar US-made product that is later exported. Article 303 of the existing agreement contains restrictions on the use of substitution drawback and duty deferral for goods exchanged between the U.S., Canada and Mexico. [Only the U.S.-Chile FTA contains comparable restrictions.] Goods exported to Mexico and Canada from other countries with which Mexico and Canada have FTAs receive better treatment for their exports than do U.S. exporters, creating an unfair playing field for U.S. manufacturers, exporters and workers. Subsequent to NAFTA going into effect, Canada and Mexico implemented programs that circumvented these restrictions for those manufacturers needing targeted duty rate reductions for inputs used in specific export industries. This puts U.S. exporters at a disadvantage when competing for sales of U.S. products in Mexico and Canada. NCBFAA recommends that our negotiators adopt a strong position for removal of these restrictions in the upcoming negotiations.

Trade Facilitation and Customs Procedures: A top priority for negotiators is to modernize and harmonize customs procedures among the three countries. For example, both Canada and the U.S. allow importers to make corrections to entries after the data has been filed initially (so-called "post-entry" corrections). Mexico does not allow such corrections. The procedure can be employed when data needs to be corrected or updated, enhancing entry accuracy. Trade facilitation improvements should also include:

- Coordinated inspection and release at the border;
- Harmonizing and simplifying data sharing and reducing red tape. When NAFTA took effect, most Customs forms were paper-based. NAFTA countries should undertake a strong commitment to a fully automated, paperless entry processing system. With full automation, we would have the opportunity to align the format and content of data elements required at the border, eliminating redundancies, creating greater regulatory coherence and simplifying the cross border trade process.
- Whatever substantive changes in the Rules of Origin may be considered, negotiators should seek to simplify the rules of origin procedurally. The rules of origin have proven to be painfully complex and difficult to administer for customs brokers, particularly for our small and medium clients who are importing products subject to these complex determinations. This makes it especially daunting for these companies to conduct their business, to the point that they may forego claiming NAFTA benefits because of the complexity of the rule of origin requirements.

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We urge you to contact the members and staff of the House Ways and Means Committee or the Senate Finance Committee to let them know of your interest in having the U.S. negotiating team address these concerns about NAFTA, with particular emphasis on the Section 321 de minimis issue and duty drawback.