

Where do we Stand With CBP's "New Verification Policy" for Duty Preference Claims?

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Marc C. Hebert, Esq.
Jones Walker
New Orleans, LA/Washington, D.C.

WHERE DO WE STAND?

- Where do we stand with CBP's new duty preference verification procedures?
 - Is there an end in sight?
 - Is there a final resolution?
 - What should industry do at this point?

What is it that CBP Wants or Needs?

- Your money? Enforcement of duty preferences? Consistency in verification?
- OR&R - Reaffirmation that nothing short of 100% of origin
- Trade Policy – A “reasonable degree of certainty” that the good is of origin

What are the issues?

- CBP maintains that the only way it can verify origin is to have actual foreign refiner production records
- The certificate of origin is only your “ticket to admission”, giving you a reasonable basis upon which to make a claim
- CBP’s current standard is that unless an importer has the production records for a shipment, then the claim will be denied
- What are we working towards – documentation and evidence that provides a reasonable degree of certainty

Chronology of events

- Began in 2005 with a focused assessment
- In 2008 CBP began targeting the industry as a whole
- Various attempts at resolution from 2008 to 2009
- 2010 the Ad Hoc Coalition (Shell, Tesoro, Valero, Vitol) in Support of Duty Preference Programs was developed, and works jointly with API
- Meetings and proposals exchanged with CBP
 - October 13, 2010
 - October 26, 2010
 - December 2, 2010
 - December 15, 2010
 - January 10-11, 2011 (Valero Houston Meeting)
 - February 7, 2011 when CBP presented its first draft dated February 7, 2011
 - March 8, 2011, and Industry's reply/counter-proposal dated March 2011 and submitted jointly by API and the Ad Hoc Coalition
 - CBP "Final Draft Guidance" finalized May 15, 2011, proposed to industry June 22, 2011, and was to be issued to the field as of July 20, 2011
 - July 19, 2011
 - Next?

Proposals by CBP

- Products were broken out into three groups:
 - Crude oil
 - Distillates (i.e., fuel oils)
 - Other Petroleum Products (i.e., finished product, jet fuel and gasoline)
- CBP starts with the premise that production documents from foreign refiners are required to verify a claim for origin
- Crude, CBP proposes testing for API gravity, sulfur, nickel (ppm) and vanadium (ppm), but it only applies to a single named crude stream
- Distillate, CBP proposes the same as crude – fingerprinting, but it only applies to straight run distillates from a single originating named crude stream
- Other products, CBP requires production records from the foreign refiner showing movement of product from a “qualifying” processing unit to a shore tank
 - CBP also wants a description of the foreign refinery processing capabilities and the qualifying process performed at the refinery

Counter proposal by Industry

- Industry will agree to testing for crude, even though it sets a 100% proof standard, as long as
 - A range is developed for the applicable criteria in order to account for mixed streams from a single country, and
 - Verification take place within 90 days if CBP will require samples to be kept
- For distillates and other petroleum product, industry cannot agree to a production records requirement, but can agree to documents kept in the ordinary course of business plus market research on the refinery and market from where the product is exported
- The same standards apply to ISA and Non ISA members

Applicable standard

- The standard is not beyond a reasonable doubt
- *Jazz Photo* – circumstantial evidence in the absence of conflicting evidence is sufficient to establish the fact at issue
- Restoration Hardware – in a GSP claim CBP relied on general manufacturer profiles
- HQ AGOA Ruling H114575 – CBP accepted oral evidence in lieu of tickets that the product was of origin
- So what is the problem?

Duty preference programs affected

- All programs are affected save for NAFTA
 - GSP
 - AGOA
 - CBI
 - ATDPEA
 - US Chile
 - CAFTA
 - US Israel
 - US Peru
 - US Oman
 - US Jordan
 - US Bahrain
 - US Morocco
 - US Singapore
 - US Australia

What do the DPPs require regarding verification vs CBP

- No DPP requires that CBP verify
- No DPP requires production records of the foreign producer in order to verify origin
- Verification procedures and requirements are left to the discretion of the party conducting the verification

Potential Losses to the Industry for Non-NAFTA Claims

- CBP says we are “fighting” over only \$2.4 mm in duties for other petroleum products, e.g., jet fuel and gasoline, finished product.
- Based on CBP’s import numbers for 2009-2010, the reality is that the industry stands to lose in duty preference benefits during a two year period:
 - **\$90,310,000 for finished product**
 - **\$21,630,000 for distillates**
 - **\$11,955,300 for crude**

Congressional Support and USTR Involvement

- House side: Ways and Means Committee and Members (Kevin Brady, Charles Boustany, Gene Green and Charles Gonzales)
- Senate side: Finance Committee and Senators (Mary Landrieu, John Cornyn, David Vitter and Ron Wyden)
- USTR: concern over consistency among preference programs and whether or not the programs are providing the intended benefits to both

Sequence of events

- Customs was to provide comments to industry on its counterproposal submitted earlier this year (April, 2011) by Friday, July 22, 2011, but instead provided an October 4, 2011 letter to API in late October.
- Guidance provided industry dated June 22, 2011 will not be issued to the field
- Customs, USTR and industry met thereafter to discuss any final guidance before any final guidance is issued to the field.
- Industry reassessed what documentation it can realistically obtain and provide to Customs to support verification claims
- USTR and CBP did away with the idea of “jump teams”

CBP and Industry 11/29/11 Meeting

- **AGENDA:**
- Welcome and Introductions
- Trade Engagement Overview
- CBP's Response to Industry on Duty Preference Issues (Acting Deputy Assistant Commissioner Richard DiNucci)
- Industry Dialogue and Questions

- **Attendees:**
 - API, AAEI, Duty Preference Coalition, Jones Walker, CBP (AC DiNucci and Gina)

- *What was the outcome?*

CBP's November 7, 2011 Guidance to the Field

- Received by industry on November 29, 2011 after request at the meeting earlier that morning.
- The guidance was established without giving consideration to industry's prior and continuing input.
- **Addressed crude oil (non-NAFTA)**
 - Test for API gravity, percent sulphur, ppm nickel and ppm vanadium
 - Limited to a single field, not crude from different field yet the same country that is commingled prior to loading and export
 - Test per CBP accredited lab only
- **Addressed straight run distillates from a single originating named crude oil**
 - High resolution gas chromatographic profile,
 - Test for API gravity, percent sulphur, ppm nickel and ppm vanadium
 - Test per CBP accredited lab only
- **Did NOT address the big picture high value processed petroleum product**

Ad Hoc Coalition's Confirmation of the New Verification Process

- The new process as outlined by AC's Gina and DiNucci – very practical, very logical and we are very appreciative and supportive of their involvement and efforts in the process
 - Discretion of validating during verification duty preference claims for the industry lies with the Port Director
 - Reg audit is to only audit and provide advice, NOT make the determination for the Port Director
 - Port Director shall consider knowledge of the applicant, the industry, and the totality of the circumstances
 - If there is reason to doubt the claimant, then CBP moves to testing for crude and distillates and business records for processed product

Next steps

- Center of Excellence for joint CBP and industry training
- Finalizing test methodology
- Ensuring consistency in application of any final guidance among Port Directors
- Are Port Directors using their discretion in handling and approving duty preference claims as they did prior to this becoming an issue

Treatment of Outstanding Claims and Record Requests

- All CF 28s and record requests issued on the subject to be withdrawn by CBP per the March 2011 meeting with AC Baldwin
- It is expected that all outstanding claims will be liquidated with the preference allowed
- If preference were not taken on entries not yet liquidated, the importer can take post entry action to request a refund of duties (Ports will be provided guidance for same)
- If preference were not taken on claims that were liquidated, recovery must be through Congress implementing re-liquidation bills

CBP and Industry Cooperation on Education and Lab Testing

- CBP, API, NPRA and AAEI to resolve outstanding issues with testing methods as previously raised by API and the Ad Hoc Coalition
- CBP to partner with industry in training Port Directors, auditors and lab personnel on production and import issues so that CBP can properly analyze the “totality of the circumstances” in verifying claims
- CBP to meet with industry every 6 months at the AC level to discuss progress on the new guidance

And then...

WHAT IS NEXT?

Marc C. Hebert, Esq.

mhebert@joneswalker.com

201 St. Charles Ave
New Orleans, LA 70170-5100
504.582.8506

499 S Capitol St SW
Suite 600
Washington, D.C. 20003
202.203.1000

