II

Calendar No. 500

112TH CONGRESS
2D SESSION

S. 3524

[Report No. 112–209]

To deter the evasion of antidumping and countervailing duty orders, and for other purposes.

IN THE SENATE OF THE UNITED STATES

SEPTEMBER 10, 2012

Mr. BAUCUS, from the Committee on Finance, reported the following original bill; which was read twice and placed on the calendar

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A BILL

To deter the evasion of antidumping and countervailing duty orders, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Enforcing Orders and Reducing Customs Evasion Act of 2012".

SEC. 2. PROCEDURES FOR INVESTIGATING CLAIMS OF EVASION OF ANTIDUMPING AND COUNTERVAILING DUTY ORDERS.

(a) IN GENERAL.—The Tariff Act of 1930 is amended by inserting after section 516A (19 U.S.C. 1516a) the following:

"SEC. 517. PROCEDURES FOR INVESTIGATING CLAIMS OF EVASION OF ANTIDUMPING AND COUNTERVAILING DUTY ORDERS.

"(a) DEFINITIONS.—In this section:

"(1) ADMINISTERING AUTHORITY.—The term 'administering authority' has the meaning given that term in section 771(1).

"(2) COMMISSIONER.—The term 'Commissioner' means the Commissioner responsible for U.S. Customs and Border Protection, acting pursuant to the delegation by the Secretary of the Treasury of the authority of the Secretary with respect to customs revenue functions (as defined in section 415 of the Homeland Security Act of 2002 (6 U.S.C. 215)).

"(3) COVERED MERCHANDISE.—The term 'covered merchandise' means merchandise that is subject to—

"(A) an antidumping duty order issued under section 736;

"(B) a finding issued under the Antidumping Act, 1921; or

"(C) a countervailing duty order issued under section 706.

"(4) ENTER; ENTRY.—The terms 'enter' and 'entry' refer to the entry, or withdrawal from warehouse for consumption, of merchandise in the customs territory of the United States.

"(5) EVASION.—

"(A) IN GENERAL.—Except as provided in subparagraph (B), the term 'evasion' refers to entering covered merchandise into the customs territory of the United States by means of any document or electronically transmitted data or information, written or oral statement, or act that is material and false, or any omission that is material, and that results in any cash deposit or other security or any amount of applicable antidumping or countervailing duties being reduced or not being applied with respect to the merchandise.

"(B) EXCEPTION FOR CLERICAL ERROR.—

"(i) IN GENERAL.—Except as provided in clause (ii), the term 'evasion' does not include entering covered merchandise into the customs territory of the United States by means of—

"(I) a document or electronically transmitted data or information, written or oral statement, or act that is false as a result of a clerical error; or

"(II) an omission that results from a clerical error.

"(ii) PATTERNS OF NEGLIGENT CONDUCT.—If the Commissioner determines that a person has entered covered merchandise into the customs territory of the United States by means of a clerical error referred to in subclause (I) or (II) of clause (i) and that the clerical error is part of a pattern of negligent conduct on the part of that person, the Commissioner may determine, notwithstanding clause (i), that the person has entered such covered merchandise into the customs territory of the United States through evasion.

"(iii) ELECTRONIC REPETITION OF ERRORS.—For purposes of clause (ii), the mere nonintentional repetition by an electronic system of an initial clerical error does not constitute a pattern of negligent conduct.

"(iv) RULE OF CONSTRUCTION.—A determination by the Commissioner that a person has entered covered merchandise into the customs territory of the United States by means of a clerical error referred to in subclause (I) or (II) of clause (i) rather than through evasion shall not be construed to excuse that person from the payment of any duties applicable to the merchandise.

"(b) INVESTIGATIONS.—

"(1) IN GENERAL.—Not later than 10 business days after receiving an allegation described in paragraph (2) or a referral described in paragraph (3), the Commissioner shall initiate an investigation if the Commissioner determines that the information provided in the allegation or the referral, as the case may be, reasonably suggests that covered merchandise has been entered into the customs territory of the United States through evasion.

"(2) ALLEGATION DESCRIBED.—An allegation described in this paragraph is an allegation that a person has entered covered merchandise into the customs territory of the United States through evasion that is—

"(A) filed with the Commissioner by a person that is a producer in the United States of merchandise—

"(i) that is like, or in the absence of like, most similar in characteristics and uses with, such covered merchandise; or

"(ii) into which merchandise described in clause (i) is incorporated; and

"(B) accompanied by information reasonably available to the person that filed the allegation.

"(3) REFERRAL DESCRIBED.—A referral described in this paragraph is information submitted to the Commissioner by any other Federal agency, including the Department of Commerce or the United States International Trade Commission, that reasonably suggests that a person has entered covered merchandise into the customs territory of the United States through evasion.

"(4) CONSOLIDATION OF ALLEGATIONS AND REFERRALS.—

"(A) IN GENERAL.—The Commissioner may consolidate multiple allegations described in paragraph (2) and referrals described in paragraph (3) into a single investigation if the Commissioner determines it is appropriate to do so.

"(B) EFFECT ON TIMING REQUIREMENTS.—If the Commissioner consolidates multiple allegations or referrals into a single investigation under subparagraph (A), the date on which the Commissioner receives the first such allegation or referral shall be used for purposes of the requirement under paragraph (1) with respect to the timing of the initiation of the investigation.

"(5) INFORMATION-SHARING TO PROTECT HEALTH AND SAFETY.—If, during the course of conducting an investigation under paragraph (1) with respect to covered merchandise, the Commissioner has reason to suspect that such covered merchandise may pose a health or safety risk to consumers, the Commissioner shall provide, as appropriate, information to the appropriate Federal agencies for purposes of mitigating the risk.

"(c) DETERMINATIONS.—

"(1) IN GENERAL.—Not later than 270 calendar days after the date on which the Commissioner initiates an investigation under subsection (b) with respect to covered merchandise, the Commissioner shall make a determination, based on substantial evidence, with respect to whether such covered merchandise was entered into the customs territory of the United States through evasion.

"(2) AUTHORITY TO COLLECT AND VERIFY ADDITIONAL INFORMATION.—In making a determination under paragraph (1) with respect to covered merchandise, the Commissioner may collect such additional information as is necessary to make the determination through such methods as the Commissioner considers appropriate, including by—

"(A) issuing a questionnaire with respect to such covered merchandise to—

"(i) a person that filed an allegation under paragraph (2) of subsection (b) that resulted in the initiation of an investigation under paragraph (1) of that subsection with respect to such covered merchandise;

"(ii) a person alleged to have entered such covered merchandise into the customs territory of the United States through evasion;

"(iii) a person that is a foreign producer or exporter of such covered merchandise; or

"(iv) the government of a country from which such covered merchandise was exported; and

"(B) conducting verifications, including on-site verifications, of any relevant information.

"(3) ADVERSE INFERENCE.—If the Commissioner finds that a person described in clause (i), (ii), or (iii) of paragraph (2)(A) has failed to cooperate by not acting to the best of the person's ability to comply with a request for information, the Commissioner may, in making a determination under paragraph (1), use an inference that is adverse to the interests of that person in selecting from among the facts otherwise available to make the determination.

"(4) NOTIFICATION.—Not later than 5 business days after making a determination under paragraph (1) with respect to covered merchandise, the Commissioner—

"(A) shall provide to each person that filed an allegation under paragraph (2) of subsection (b) that resulted in the initiation of an investigation under paragraph (1) of that subsection with respect to such covered merchandise a notification of the determination and may, in addition, include an explanation of the basis for the determination; and

"(B) may provide to importers, in such manner as the Commissioner determines appropriate, information discovered in the investigation that the Commissioner determines will help educate importers with respect to importing merchandise into the customs territory of the United States in accordance with all applicable laws and regulations.

"(d) EFFECT OF DETERMINATIONS.—

"(1) IN GENERAL.—If the Commissioner makes a determination under subsection (c) that covered merchandise was entered into the customs territory of the United States through evasion, the Commissioner shall—

"(A)(i) suspend the liquidation of unliquidated entries of such covered merchandise that are subject to the determination and that enter on or after the date of the initiation of the investigation under subsection (b) with respect to such covered merchandise and on or before the date of the determination; or

"(ii) if the Commissioner has already suspended the liquidation of such entries pursuant to subsection (e)(1), continue to suspend the liquidation of such entries;

"(B) pursuant to the Commissioner's authority under section 504(b)—

"(i) extend the period for liquidating unliquidated entries of such covered merchandise that are subject to the determination and that entered before the date of the initiation of the investigation; or

"(ii) if the Commissioner has already extended the period for liquidating such entries pursuant to subsection (e)(1), continue to extend the period for liquidating such entries;

"(C) notify the administering authority of the determination and request that the administering authority—

"(i) identify the applicable antidumping or countervailing duty assessment rates for entries described in subparagraphs (A) and (B); or "(ii) if no such assessment rate for such an entry is available at the time, identify the applicable cash deposit rate to be applied to the entry, with the applicable antidumping or countervailing duty assessment rate to be provided as soon as that rate becomes available;

"(D) require the posting of cash deposits and assess duties on entries described in subparagraphs (A) and (B) in accordance with the instructions received from the administering authority under paragraph (2); and

"(E) take such additional enforcement measures as the Commissioner determines appropriate, such as—

"(i) initiating proceedings under section 592 or 596;

"(ii) implementing, in consultation with the relevant Federal agencies, rule sets or modifications to rules sets for identifying, particularly through the Automated Targeting System and the Automated Commercial Environment, importers, other parties, and merchandise that may be associated with evasion;

"(iii) requiring, with respect to merchandise for which the importer has repeatedly provided incomplete or erroneous entry summary information in connection with determinations of evasion, the importer to deposit estimated duties at the time of entry; and

"(iv) referring the record in whole or in part to U.S. Immigration and Customs Enforcement for civil or criminal investigation.

"(2) COOPERATION OF ADMINISTERING AUTHORITY.—

"(A) IN GENERAL.—Upon receiving a notification from the Commissioner under paragraph (1)(C), the administering authority shall promptly provide to the Commissioner the applicable cash deposit rates and antidumping or countervailing duty assessment rates and any necessary liquidation instructions.

"(B) SPECIAL RULE FOR CASES IN WHICH THE PRODUCER OR EXPORTER IS UNKNOWN.— If the Commissioner and the administering authority are unable to determine the producer or exporter of the merchandise with respect to which a notification is made under paragraph (1)(C), the administering authority shall identify, as the applicable cash deposit rate or antidumping or countervailing duty assessment rate, the cash deposit or duty (as the case may be) in the highest amount applicable to any producer or exporter, including the 'all-others' rate of the merchandise subject to an antidumping order or countervailing duty order under section 736 or 706, respectively, or a finding issued under the Antidumping Act, 1921, or any administrative review conducted under section 751.

"(e) INTERIM MEASURES.—Not later than 90 calendar days after initiating an investigation under subsection (b) with respect to covered merchandise, the Commissioner shall decide based on the investigation if there is a reasonable suspicion that such covered merchandise was entered into the customs territory of the United States through evasion and, if the Commissioner decides there is such a reasonable suspicion, the Commissioner shall—

"(1) suspend the liquidation of each unliquidated entry of such covered merchandise that entered on or after the date of the initiation of the investigation;

"(2) pursuant to the Commissioner's authority under section 504(b), extend the period for liquidating each unliquidated entry of such covered merchandise that entered before the date of the initiation of the investigation; and

"(3) pursuant to the Commissioner's authority under section 623, take such additional measures as the Commissioner determines necessary to protect the revenue of the United States, including requiring a single transaction bond or additional security or the posting of a cash deposit with respect to such covered merchandise.

"(f) ADMINISTRATIVE REVIEW.—

"(1) IN GENERAL.—Not later than 30 business days after the Commissioner makes a determination under subsection (c) with respect to whether covered merchandise was entered into the customs territory of the United States through evasion, a person determined to have entered such covered merchandise through evasion or a person that filed an allegation under paragraph (2) of subsection (b) that resulted in the initiation of an investigation under paragraph (1) of that subsection with respect to such covered merchandise may file an appeal with the Commissioner for de novo review of the determination.

"(2) TIMELINE FOR REVIEW.—Not later than 60 business days after an appeal of a determination is filed under paragraph (1), the Commissioner shall complete the review of the determination.

"(g) JUDICIAL REVIEW.—

"(1) IN GENERAL.—Not later than 30 business days after the Commissioner completes a review under subsection (f) of a determination under subsection (c) with respect to whether covered merchandise was entered into the customs territory of the United States through evasion, a person determined to have entered such covered merchandise through evasion or a person that filed an allegation under paragraph (2) of subsection (b) that resulted in the initiation of an investigation under paragraph (1) of that subsection with respect to such covered merchandise may commence a civil action in the United States Court of International Trade by filing concurrently a summons and complaint contesting any factual findings or legal conclusions upon which the determination is based.

"(2) STANDARD OF REVIEW.—In a civil action under this subsection, the court shall hold unlawful any determination, finding, or conclusion found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

"(h) RULE OF CONSTRUCTION WITH RESPECT TO OTHER CIVIL AND CRIMINAL PROCEEDINGS AND INVESTIGATIONS.—No determination under subsection (c) or action taken by the Commissioner pursuant to this section shall be construed to limit the authority to carry out, or the scope of, any other proceeding or investigation pursuant to any other provision of Federal or State law, including sections 592 and 596.".

(b) CONFORMING AMENDMENT.—Section 1581(c) of title 28, United States Code, is amended by inserting "or 517" after "516A".

(c) EFFECTIVE DATE.—The amendments made by this section shall take effect on the date that is 180 days after the date of the enactment of this Act.

(d) REGULATIONS.—Not later than the date that is 180 days after the date of the enactment of this Act, the Secretary of the Treasury shall prescribe such regulations as may be necessary to implement the amendments made by this section.

(e) APPLICATION TO CANADA AND MEXICO.—Pursuant to article 1902 of the North American Free Trade Agreement and section 408 of the North American Free

Trade Agreement Implementation Act (19 U.S.C. 3438), the amendments made by this section shall apply with respect to goods from Canada and Mexico.

SEC. 3. ANNUAL REPORT ON PREVENTION AND INVESTIGATION OF EVASION OF ANTIDUMPING AND COUNTERVAILING DUTY ORDERS.

(a) IN GENERAL.—Not later than January 15 of each calendar year that begins on or after the date that is 270 days after the date of the enactment of this Act, the Commissioner, in consultation with the Secretary of Commerce and the Assistant Secretary for U.S. Immigration and Customs Enforcement, shall submit to the Committee on Finance of the Senate and the Committee on Ways and Means of the House of Representatives a report on the efforts being taken to prevent and investigate the entry of covered merchandise into the customs territory of the United States through evasion.

(b) CONTENTS.—Each report required under subsection (a) shall include—

(1) for the calendar year preceding the submission of the report—

(A) a summary of the efforts of U.S. Customs and Border Protection to prevent and investigate the entry of covered merchandise into the customs territory of the United States through evasion;

(B) the number of allegations of evasion received under subsection (b) of section 517 of the Tariff Act of 1930 (as added by section 2 of this Act) and the number of such allegations resulting in investigations by U.S. Customs and Border Protection or any other agency;

(C) a summary of investigations initiated under subsection (b) of such section 517, including—

(i) the number and nature of the investigations initiated, conducted, and completed; and

(ii) the resolution of each completed investigation;

(D) the number of investigations initiated under that subsection not completed during the time provided for making determinations under subsection (c) of such section 517 and an explanation for why the investigations could not be completed on time;

(E) the amount of additional duties that were determined to be owed as a result of such investigations, the amount of such duties that were collected, and, for any such duties not collected, a description of the reasons those duties were not collected;

(F) with respect to each such investigation that led to the imposition of a penalty, the amount of the penalty;

(G) an identification of the countries of origin of covered merchandise determined under subsection (c) of such section 517 to be entered into the customs territory of the United States through evasion;

(H) the amount of antidumping and countervailing duties collected as a result of any investigations or other actions by U.S. Customs and Border Protection or any other agency;

(I) a description of the allocation of personnel and other resources of U.S. Customs and Border Protection and U.S. Immigration and Customs Enforcement to prevent and investigate evasion, including any assessments conducted regarding the allocation of such personnel and resources; and

(J) a description of training conducted to increase expertise and effectiveness in the prevention and investigation of evasion; and

(2) a description of U.S. Customs and Border Protection processes and procedures to prevent and investigate evasion, including—

(A) the specific guidelines, policies, and practices used by U.S. Customs and Border Protection to ensure that allegations of evasion are promptly evaluated and acted upon in a timely manner;

(B) an evaluation of the efficacy of those guidelines, policies, and practices;

(C) an identification of any changes since the last report required by this section, if any, that have materially improved or reduced the effectiveness of U.S. Customs and Border Protection in preventing and investigating evasion;

(D) a description of the development and implementation of policies for the application of single entry and continuous bonds for entries of covered merchandise to sufficiently protect the collection of antidumping and countervailing duties commensurate with the level of risk of not collecting those duties;

(E) a description of the processes and procedures for increased cooperation and information sharing with the Department of Commerce, U.S. Immigration and Customs Enforcement, and any other relevant Federal agencies to prevent and investigate evasion; and

(F) an identification of any recommended policy changes for other Federal agencies or legislative changes to improve the effectiveness of U.S. Customs and Border Protection in preventing and investigating evasion.

(c) PUBLIC SUMMARY.—The Commissioner shall make available to the public a summary of the report required by subsection (a) that includes, at a minimum—

(1) a description of the type of merchandise with respect to which investigations were initiated under subsection (b) of section 517 of the Tariff Act of 1930 (as added by section 2 of this Act);

(2) the amount of additional duties determined to be owed as a result of such investigations and the amount of such duties that were collected;

(3) an identification of the countries of origin of covered merchandise determined under subsection (c) of such section 517 to be entered into the customs territory of the United States through evasion; and

(4) a description of the types of measures used by U.S. Customs and Border Protection to prevent and investigate evasion.

(d) DEFINITIONS.—In this section, the terms ‘‘Commissioner’’, ‘‘covered merchandise’’, and ‘‘evasion’’ have the meanings given those terms in section 517(a) of the Tariff Act of 1930 (as added by section 2 of this Act).

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[Report No. 112–209]

A BILL

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