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4 Customs Bill Sticking Points To Watch

By **Alex Lawson**

Law360, New York (August 19, 2015, 9:25 PM ET) -- As the U.S. Congress remains in recess for the month of August, feverish work continues in both chambers on a final version of a bill to beef up customs enforcement, with rules on currency manipulation, environmental enforcement and duty evasion emerging as crucial sticking points.

The House and Senate have each passed their own versions of the Trade Facilitation and Trade Enforcement Act, H.R. 644, but were unable to arrange a bicameral conference to reconcile the differences between the two bills before they departed the Capitol at the end of July.

Looming as the biggest obstacle to movement on the bill is the fact that some of its most pressing provisions, such as rules to enhance the use of trade remedy laws, were shuffled off to other trade bills that have since been passed, Mayer Brown LLP partner Timothy Keeler said, adding that this development increases the bill's chances of languishing.

“You don't necessarily have that serious pressure to force people to work through some of these things and that's hard,” Keeler told Law360. “It seems as though trade staffers are still talking about it like it's going to get done but that's the hurdle it's going to have to overcome.”

Presuming lawmakers are able to get to the conference table, here are some of the outstanding diversions between the two bills that will command their attention.

Dueling Paths On Duty Evasion

Crafting rules to deal with foreign companies and importers that conspire to evade tariffs when bringing in merchandise has been at the center of every effort to craft a new customs bill over the years, and this latest legislative squabble has been no exception.

Embedded in the Senate and House bills are duty evasion proposals known, respectively, as the ENFORCE Act and the PROTECT Act. While they are both generally aimed at empowering interested parties to make evasion allegations, they contain certain critical differences that have bedeviled policymakers for years.

The Senate's bill leaves duty evasion procedures strictly within U.S. Customs and Border Protection, while the House version creates a role for the U.S. Department of Commerce in the process. Any involvement with Commerce is likely to roil the respondents' bar, which has viewed the agency as already being too favorable to petitioners in trade remedy proceedings.

Asked to speculate on which proposal might have the upper hand in the debate, Hogan Lovells LLP partner Jonathan Stoel told Law360 that conventional wisdom would seem to favor keeping the status quo in place.

“I always tend to think that in Washington it’s hard to take away an agency’s jurisdiction over something than it is to keep things the way they are,” he said. “So I wouldn't necessarily be surprised if Congress decided to limit CBP in a traditional area of its jurisdiction and instead expand Commerce's role, but it would be more of a challenge.”

The two bills are also at odds over the deadlines for a given agency to respond to evasion claims and the degree to which their decisions are subject to judicial review.

Currency Clash

A customs bill conference also provides yet another forum for lawmakers to swap blows on whether to use trade remedy laws as a tool for combating currency manipulation from foreign partners, a discussion that is likely to get even more contentious given the high-profile devaluation of China's yuan last week.

The Senate version of the legislation contains language backed by Sen. Charles Schumer, D-N.Y., and other Democrats that would make it easier for Commerce to treat an undervalued foreign currency as an illegal subsidy that may be offset with countervailing duties.

Top administration officials have long pushed against this measure for fear that it could open the U.S. to similar enforcement actions stemming from its own monetary policies. This opposition is so strong that President Barack Obama may be willing to scuttle the entire customs bill if it contains aggressive currency rules.

“It's hard to see how that would end up surviving the conference, once you look at how hard they fought over currency as a negotiating objective [in the Trade Promotion Authority bill],” Keeler said. "I think the administration would rather see that bill die than come through with that provision on it.”

Schumer and other currency hawks want to point to the recent downward movement of the Chinese yuan as a tactic for drumming up more support, but the specifics of the event don't lend themselves to more momentum on currency legislation, according to Peterson Institute for International Economics senior fellow Joseph E. Gagnon.

Gagnon said that in years past, China was “manipulating” the value of the yuan by buying or selling shares of foreign currencies to skirt the upward or downward pressure on its own currency. But last week, China merely opted not to take that path and instead allowed the yuan to drop amid the downward pressure.

“I think it slightly increases the chance of this becoming law, though I think the overall chances are less than 50 percent,” he told Law360. “It reminds people that this is still a live issue But this was a pretty small devaluation and is not what we would technically call currency manipulation because the Chinese are not buying dollars.”

The Notorious MTB

Another prong of the Senate's legislation would reform the long-stalled Miscellaneous Tariff Bill process, which slashes import duties on hundreds of products coming into the U.S., a point on which the lower chamber's legislation is silent.

Under the previous MTB system, companies looking to secure tariff cuts on products they import had to convince members of Congress to introduce individual pieces of legislation for each item. Those bills, often numbering in the thousands, then went to the U.S. International Trade Commission for an economic impact assessment. The bills approved by the ITC were then packaged into a final bill.

But under the reform proposal, championed by numerous importers and manufacturers**,** companies would submit tariff-cutting proposals directly to the ITC for review, a move aimed at cutting down backroom Capitol Hill deals and level the playing field for smaller businesses that cannot afford to hire lobbyists to get the attention of lawmakers.

The MTB system has been stymied in the wake of the House's ban on earmarks, something that the reform proposal is aimed at quelling. Still, Keeler warned that shifting the process to the ITC would present new challenges.

“There's a different set of concerns with the process, which centers around whether you are handing over the constitutional responsibility to legislate to the ITC,” he said. 'It's certainly possible they may be able to find something that threads that needle, but that's something they'll have to work through.”

Trade Going Green?

One area where the two bills are most sharply at odds is the intersection of trade policy and the environment, with the upper chamber's bill arming the administration to crack down on partners flouting environmental rules and the House angling to divorce the two policy goals.

The two bills are not squarely addressing the same area of law. The Senate's measure would give the U.S. trade representative authority to use Section 301 of the 1974 Trade Act to bring an enforcement action against countries that fail to enforce their environmental laws or impede their own domestic remedies for such violations.

On the other side, the House bill ignores the so-called Green 301 proposal and instead aims to add a formal negotiating objective to those contained in the already-passed Trade Promotion Authority bill that would bar the administration from entering into trade accords that require changes to U.S. law regarding climate change.

Democratic lawmakers have implored the conferees to reject the language, which it said will send the wrong message to U.S. trading partners on environmental policy, setting the stage for a bitter fight at the conference table.

--Editing by Christopher DeZinno and Kelly Duncan.
