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MEMORANDUM

To: **Clients and Friends of the Firm**

From: **NEVILLE PETERSON LLP**

Re: **Customs Issues New "Interim Final Rule" Regarding Nonresident Importers of Record**

I. INTRODUCTION

United States Customs and Border Protection has issued an "Interim Final Rule" regarding "nonresident importers of record" which is scheduled to take effect **January 5, 2027.** A copy of the rulemaking notice is attached. The rulemaking is allegedly issued in furtherance of President Trump's Executive Order 14411 on "Strengthening Customs Enforcement."

The rule, if adopted, would be extremely disruptive to the importing community and especially to certain sectors, including the fresh produce industry. As discussed below, it is contrary to the provisions of Section 484 of the Tariff Act of 1930 [19 U.S.C. §1484] defining who may act as "Importer of Record". This Memorandum describes the proposed rule, its impact on importers generally and possible avenues for challenging it.

Major Points/Problems With the New Rule

- The definition of "nonresident importers of record" includes a large number of American corporations which are "beneficially owned" by foreign citizens;

- "Nonresident importers of record" may only act as IOR if they are certified in the Customs-Trade Partnership Against Terrorism (C-TPAT) or use one of the 600 licensed Customs brokers (out of 1400) who are C-TPAT certified;

- The rule imposes new obligations on Customhouse brokers to determine and report the ownership structures of their clients, and provides penalties for failure to do so or for

reporting incorrect information about IORs, including imposition of live entry requirements, the discontinuation of immediate delivery privileges, or further penalties.

- The rule effects a "partial revocation" of the licenses of non-C-TPAT Customs brokers, who are now barred from representing so-called nonresident IORs.

II. SUMMARY OF THE NEW RULE

Background of the Proposed Rule

On June 3, 2026, Executive Order 14411, "Strengthening Customs Enforcement" directed the Secretary of the Department of Homeland Security, through the issuance or modification of relevant regulations, policy or guidance, to prohibit nonresident IORs from making informal entry pursuant to 19 U.S.C. 1498 and to require nonresident IORs who want to make formal entry to either be a Customs Trade Partnership Against Terrorism (CTPAT) validated participant or use a licensed customs broker who is a CTPAT validated participant. This new rule seeks to address the claimed challenges relating to Foreign Importers of Record.

The new rule is primarily targeted at foreign individuals or entities that have no physical presence and no assets beyond a mailing address in the United States and are considered "shell companies". Shell companies obscure the real identity and corporate structure of their owner, as well as ownership of the entity's assets, enabling tax evasion, financial fraud and other financial crimes. Due to the anonymity of a shell company's identity and the identity of its owner(s), it is difficult to track and verify the company's financial transactions, including customs entries, and to prevent the importation of potentially unsafe merchandise into the United States. These companies may engage in misclassification, undervaluation, or other duty evasion schemes knowing CBP's options are limited when assets and individuals are not within the United States. These foreign entities may shut down one shell company and start another to evade payments.

Accordingly, Customs' view is that it is more difficult for the government to compel compliance, pursue legal action, or collect duties from these entities because they are not subject to the "revenue rule". The revenue rule is a common law doctrine that permits the courts of one country to refuse to entertain lawsuits that are initiated by a foreign country to enforce the foreign country's revenue laws all in the name of promoting comity and protecting state sovereignty.

According to Customs, studies show that 78% of active brokers are not CTPAT validated, yet two-thirds of all brokers have submitted an entry summary for a foreign IOR. For United States IORs collection rate after identifying loss of revenue sits at 15.2% in comparison to the 3.1% collection rate for Foreign IORs. Additionally, the average open bill amount per entry summary is much larger for non-CPTAT foreign IORs. Thus, Customs believes, foreign IORs who are CTPAT validated are much more likely to pay, notwithstanding the fact that C-TPAT is a cargo security program, which does not interact with Customs' revenue functions.

Who is a "Nonresident Importer" Under the Proposed Rule?

CBP is implementing additional requirements for foreign IORs to make entry, that Foreign IORs must be CTPAT validated, or must use a CTPAT validated and licensed customs broker to make entry. The interim rule becomes effective on January 5, 2027.

First, new Part 110 of Title 19 lays forth the qualifications to be considered a "US importer of record" or "foreign importer of record".

A US importer of record is defined as an individual who is either a United States citizen or a lawful permanent resident. It also includes entities organized under the laws of the United States, located in the United States, which maintains at all times:

> at least 51% of beneficial owner(s) who are United States citizens or lawful permanent residents and have control of the entity; **or**
>
> direct ownership of a significant amount of unencumbered real property in the United States.

A "beneficial owner", with respect to the "US importer of record", means an individual who is a natural person, and directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise, either (1) exercises substantial control over the entity, or (2) owns or controls not less than 25 percent of ownership interests of the entity. A foreign importer of record is defined as an IOR who does not meet the criteria to be a United States importer of record.

Thus, under this definition, a large number of corporations, organized and existing under the laws of the United States, and physically located in the United States, will no longer be considered "resident importers of record". **They will be disqualified from importing unless they are C-TPAT certified, or use a C-TPAT certified Customhouse broker to make entry on their behalf.**

In verifying whether an individual or entity is a United States IOR or not, Customs will take into account the size and scale of the overall operations of the entity and whether it is an instrumentality of a foreign manufacturer without a substantial presence in the United States. Some factors include:

> (1) the entity's principal place of business is in the United States;
>
> (2) the entity has a physical presence in the United States where substantial business transactions are conducted, such as paying employees, generating revenue, or operating retail locations;

(3) the entity maintains sufficient unencumbered physical domestic assets, as defined in § 110.1;

(4) the entity directly owns a sufficient amount of unencumbered real property in the United States;

(5) the entity's gross sales generally exceed its cost of goods sold and the entity is structured in a manner that it is anticipated to generate its own profit; and

(6) the entity is sufficiently capitalized.

Unfortunately, Customs provides no guidance concerning who will be responsible for making these determinations or how they will be made. For instance what does "sufficiently capitalized" or "sufficient unencumbered physical domestic assets" mean? Who decides sufficiency or insufficiency

"Physical domestic assets", as it appears in the third factor, is defined as cash deposited in a U.S. bank account, U.S. Treasury bonds, and real property, inventory, machinery, and/or equipment that is physically located in the United States. The purpose of physical domestic assets is for Customs to retain more visibility into the individuals controlling importers and the assets available to them.

The amendments to Part 141 of Title 19 **bar a foreign IOR from entering merchandise for consumption** unless specific requirements are met. If the foreign IOR is CTPAT validated and has the right to make informal or formal entry, it may enter merchandise for consumption or designate a customs broker to make entry whether with or without CTPAT validation so long as the foreign IOR is.

On the other hand, if the foreign IOR is not CTPAT validated it must designate a licensed customs broker who is validated through CTPAT to either make entry or to act as importer of record on the entry. Being a licensed customs broker alone is not sufficient to file entry on behalf of a foreign IOR or a foreign principal on a broker's power of attorney, unless that foreign IOR is itself a CTPAT validated IOR.

Any party who has a right to make entry and meets requirements to be a United States IOR may continue to enter merchandise without need for CTPAT validation and may also designate a customs broker who is not CTPAT validated, however, a United States IOR must be declared prior to making entry.

It appears that C-TPAT validation spares the entity from having to pass the financial tests discussed above, but this is not clear.

Potential Penalty Liabilities

Parts 142, 111, and 171 have all been amended by the interim rule as well.

Under Part 142, Customs has added another condition for when live entry may be required and when immediate delivery privileges discontinued: if an IOR, including a broker acting as IOR on behalf of the principal on the power of attorney, inaccurately declares it qualifies as a United States IOR, these measures may be taken.

Under Part 111, Customs has added the new responsibility of a customs broker to verify that a client meets the qualification to be considered a US IOR **and must cease filing entries if broker itself is not CTPAT validated**.

The amendment to Part 171 updates language to clarify when a customs broker violates 19 U.S.C. 1592 which bars entry of merchandise by fraud, gross negligence, or negligence, and allowing Customs to pursue penalties against the broker under either 19 U.S.C. §1592 or 19 U.S.C. §1641.

Effective Date

As noted above, the new rules are effective **January 5, 2027**. Customs brokers may request an extension of time to come into compliance with the rule until **May 6, 2027.** Presumably this relates to the analysis of their clients' ownership. It is highly unlikely that any broker or importer, even if they applied to join the C-TPAT program, could achieve an initial validation by that date.

Other Important Notes

The interim regulation gives notice of the severability of the provisions, that if a court holds any provision invalid or unenforceable the others remain in effect.

Normally, the Administrative Procedure Act (APA) requires agencies to provide notice of a proposed rulemaking, and an opportunity for comments, **before** adopting a regulation. In this case, Customs is claiming that these APA requirements do not apply, because the final rulemaking involves a foreign affairs function of the United States pursuant to 5 U.S.C. 553 (a)(1). Thus, CBP has decided to proceed without notice-and-comment to timely address national security matters and foreign affairs. Customs claim the rule falls under the notice-and-comment exception for good cause under the justification that their decision is one made under an emergency situation where delay could result in serious harm.

Customs will receive comments on the rule until **January 5, 2027.**

III. COMMENTARY ON THE RULE

1. The Rule is Blatantly Unlawful

It is well-established that a regulation may be held unlawful and set aside if it is "contrary to law". In Section 484(a)(2)(B) of the Tariff Act of 1930 [19 U.S.C. §1484(a)(2)(B)], Congress has prescribed which persons may act as "Importer of Record":

> (B) When an entry of merchandise is made under this section, the required documentation or information shall be filed or electronically transmitted either by the owner or purchaser of the merchandise or, when appropriately designated by the owner, purchaser, or consignee of the merchandise, a person holding a valid license under section 1641 of this title. When a consignee declares on entry that he is the owner or purchaser of merchandise the Customs Service may, without liability, accept the declaration. For the purposes of this chapter, the importer of record must be one of the parties who is eligible to file the documentation or information required by this section.

Thus, "owners" and "purchasers" may act as importer of record, as well as "consignees", provided the entry is filed in the name of a Customs broker.

Customs Directive 3550-002a sets out a fairly expansive definition of who is considered an "owner or purchaser", essentially allowing anyone with a financial interest in the goods to act as Importer of Record. This Directive has not been revoked, and indeed has been noted on recent Customs communications challenging the right of particular persons to act as "Importer of Record".

Nowhere does Section 484 of the Tariff Act distinguish between "resident" and "nonresident" importers of record, or place nationality or other restrictions on "owners" and "purchasers" of merchandise. In this regard, the proposed Interim Rule is contrary to law, as it would prohibit various owners or purchaser of merchandise from making entry.

It should be noted that nothing requires an "owner" or "purchaser" of merchandise to use a Customs broker to make entry. Many companies are "self-filers", and some could presumably be barred from making entry under the proposed regulations. In the case of "self-filers" who do not use a broker, the proposed regulation is silent on who is to perform the analysis of ownership that is contemplated.

Disqualifying certain companies from acting as Importers of Record could also be termed a breach of the surety bonds which Customs has required importers to post to secure payment of duty on their entries. A surety bond is essentially a three party contract, in which a surety agrees to pay Customs if the importer/principal defaults on paying a Customs duty obligation. The United States is a "third party beneficiary" to such contracts. Customs has accepted these bonds, and its National Finance Center monitors their adequacy. Accepting a surety's guarantee of payment and barring the bond principal from acting as Importer of Record arguably breaches all of these contracts.

There is also no basis for tying the right to import to a corporation's unencumbered real-estate holdings, bank deposits, or profitability ratios – the "sufficiency" of which is vaguely defined at best. Customs' supposed rationale for this is to have assets available to seize or otherwise proceed against delinquent importers. However, unlike other taxing agencies like the IRS or State tax authorities, Customs does not have a "statutory lien" against all of a taxpayer/importer's property. It has instead a system of requiring financial commitments in the form of surety bonds. It does not have the power, as the IRS does, for example, to impose liens or

make "deficiency assessments". Customs must first obtain a judgment against an importer before it can seek an order enforcing the judgment against an importer's property.

There is little doubt that if the proposed regulation were challenged in the United States Court of International Trade as being in violation of the Administrative Procedure Act, the regulation would largely or wholly be struck down as unlawful.

2. The Rule Improperly "Pierces the Corporate Veil"

For centuries, investors and entrepreneurs have formed corporations in order to limit their personal liability. States and nations have recognized these corporations as "artificial persons". A large body of contract law says that parties (including governments) may only "pierce the corporate veil" and go behind the corporate entity in rare cases – for example, in cases of fraud, or where the corporate entity commingles funds with other entities, or the corporation is set up as the "alter ego" of a natural person for improper purposes. Unless these conditions are met, the existence of the corporate "person" must be respected.

Customs' interim final rule obviously looks beyond the existence of corporate persons, and disqualifies many corporations from engaging in the lawful activity of importing. This could result in multiple violations of State law.

The formation of corporations is strictly a State law function. The Federal government regulates the activity and behavior of corporations in certain circumstances, for instance in the Securities Act of 1933 and the Securities Exchange Act of 1934. The interim rule could violate State law in several ways, and works the unusual result of refusing to recognize contracts for the sale and purchase of goods. It enacts Federal disabilities, i.e., prohibiting certain entities from engaging in importation against Congress' expressed will.

3. The Rule "Partially Revokes" Non-CTPAT Customs Brokers' Licenses

The Interim Final Rule works a partial revocation of the licenses of Customs brokers who are not C-TPAT certified, by holding that they may not transact "Customs business" on behalf of "nonresident importers" (a definition which included a good number of domestically-formed and based corporations and business associations. This is effectively a partial revocation of a broker's license for reasons not specified in the governing statute, Section 641 of the Tariff Act of 1930, 19 U.S.C. §1641.

This is a separate violation of the Administrative Procedure Act, which at 5 U.S.C. §558(c) provides that a Federally granted license cannot be revoked or suspended, nor may revocation or suspension proceedings be initiated, unless the license holder is notified of a violation of law or regulation and given an opportunity to demonstrate or achieve compliance. The Interim Final Rule does not even pay lip service to this requirement, much less the notion that a license-holder must receive due process (notice of violation, hearing before an impartial decision-maker, etc.) before a license may be revoked, suspended or otherwise impaired.

The proposed rule also imposes substantial additional obligations on Customs brokers. It goes far beyond the "know your client" requirements of the recently-amended Customs broker regulations, and imposes on brokers the obligation of performing a veil-piercing analysis of the customer's "beneficial ownership. This is not a function brokers typically do. It is more typical of the role a financial underwriter would play. Are brokers required to perform title searches to see if their clients own real property, and to determine whether the property is "unencumbered"? Customs' proposed rulemaking says "With respect to real property ownership, the property can be subject to some encumberment, but the net unencumbered value of the real property must be of a significant amount". But it does not define what a "significant amount" is?

Similarly, if a non-resident importer holds a bank line of credit secured by its property, would its assets be considered "unencumbered? The rulemaking does not stay. Brokers may require substantial additional staffing to be able to discharge this new investigative responsibility, for which they are subject to penalty if not done properly. It could require brokers to make extensive financial commitments to perform a function which, at best, would allow a broker to continue serving a client, or at worst, require the broker to drop the client under pain of penalty.

Next Steps

As noted above, Customs is accepting public comments on its Interim Final Rule through January 5, 2027.

The proposed rule is not well thought-out. It does not establish rational connections between the instruments used (C-TPAT, a cargo security program) and the rule's objectives (securing the revenue). It transforms C-TPAT from a program which is "voluntary" to one which businesses must join in order to continue doing business. Its provisions are clearly contrary to law in many respects.

Importers and Customs brokers who will find their operations seriously impaired by the rule may consider filing suit to enjoin the implementation of these rules, which appear to be seriously subject to invalidation as not in accordance with law.

For additional information or assistance, please contact a Neville Peterson professional.