



December 1, 2008

BY ELECTRONIC MAIL

The Honorable W. Ralph Basham
Commissioner, U.S. Customs and Border Protection
1300 Pennsylvania Avenue, N.W.
Washington, DC 20229

The Honorable Timothy E. Skud
Deputy Assistant Secretary of the Treasury
U.S. Department of the Treasury
1500 Pennsylvania Avenue, N.W.
Washington, DC 20220

Re: Comments on Proposed Uniform Rules of Origin for Imported Merchandise

Dear Commissioner Basham and Deputy Assistant Secretary Skud:

The U.S. Small Business Administration's (SBA's) Office of Advocacy (Advocacy) submits the following comment on Customs and Border Protection (CBP) and the Department of the Treasury's (Treasury's) *Proposed Uniform Rules of Origin for Importer Merchandise Rule*.¹ The proposed rule would amend CBP's regulations by establishing uniform rules governing determinations of the country of origin (COO) of imported merchandise and amend the COO rules for certain products to reflect various international agreements.² The proposed rule would essentially change the rules for COO determinations from the current "substantial transformation" system to a "tariff shift" process. Accordingly, numerous small businesses would have to change their current business practices to incorporate these changes.

Office of Advocacy

Advocacy was established pursuant to Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within SBA, so the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The Regulatory Flexibility Act (RFA),³ as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),⁴ gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant

¹ 73 Fed. Reg. 43385 (July 25, 2008).

² *Id.*

³ 5 U.S.C. § 601 et seq.

⁴ Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. § 601 et seq.).

economic impact on a substantial number of small entities, federal agencies are required by the RFA to assess the impact of the proposed rule on small business and to consider less burdensome alternatives. Moreover, on August 13, 2002, President Bush signed Executive Order 13272,⁵ which requires federal agencies to notify Advocacy of any proposed rules that are expected to have a significant economic impact on a substantial number of small entities and to give every appropriate consideration to any comments on a proposed or final rule submitted by Advocacy. Further, the agency must include, in any explanation or discussion accompanying publication in the *Federal Register* of a final rule, the agency's response to any written comments submitted by Advocacy on the proposed rule.

Regulatory Flexibility Act Certification

In their RFA certification, CBP and Treasury certify that, if adopted, the proposed amendments will not have a significant economic impact on a substantial number of small entities.⁶ To justify this RFA certification, the agencies state that the amendments reflect recent judicial guidance and standardized country of origin marking requirements for NAFTA and non-NAFTA trade.⁷ CPB and Treasury then state that the proposed amendments are not subject to the analytical requirements of the RFA.⁸ Advocacy does not believe this certification is proper because it lacks a factual basis.

RFA Analysis

The RFA requires that an agency prepare an Initial Regulatory Flexibility Analysis (IRFA) whenever the agency proposes a rule subject to the notice and comment provisions of the Administration Procedure Act (APA) (5 U.S.C. § 553) or any other law.⁹ An IRFA is required unless the head of the agency can certify that the proposed rule, if adopted, “will not have a significant economic impact on a substantial number of small entities.”¹⁰ However, in order to certify, the agency must provide a factual basis for its certification.¹¹ Since the proposed rule appears to be subject to the notice and comment provisions of the APA, Advocacy believes that the RFA also applies. Accordingly, CBP and Treasury should have either prepared an IRFA or provided a factual basis for certifying the proposed rule under the RFA.

Conclusion

Advocacy believes that the proposed rule is subject to the RFA and that CBP and Treasury's certification under the RFA, as currently stated, is improper because it lacks a factual basis. Because the rule would change the rules for COO determinations,

⁵ Executive Order 13272, *Proper Consideration of Small Entities in Agency Rulemaking* (67 Fed. Reg. 53461) (August 16, 2002).

⁶ 73 Fed. Reg. 43390.

⁷ *Id.*

⁸ *Id.*

⁹ 5 U.S.C. § 603(a).

¹⁰ 5 U.S.C. § 605(b).

¹¹ See, *North Carolina Fisheries Association v. Daley*, 27 F. Supp. 2d 650 (E.D. Va. 1988).

numerous small businesses would have to change their current business practices and would incur some as yet unknown costs. The RFA requires the agency to analyze these costs in order to determine whether an IRFA is required or if an RFA certification is proper. Advocacy's recommends that the agencies prepare and publish in the *Federal Register* either an IRFA or a valid RFA certification before proceeding with this rule.

Thank you for the opportunity to comment on this proposed rule. Please feel free to contact me or Bruce Lundegren at (202) 205-6144 (or bruce.lundegren@sba.gov) if you have any questions or require additional information.

Sincerely,

/s/

Shawne C. McGibbon
Acting Chief Counsel for Advocacy

/s/

Bruce E. Lundegren
Assistant Chief Counsel for Advocacy

cc: Susan E. Dudley, Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget