

**American Apparel & Footwear Association (AAFA)**  
**American Association of Exporters and Importers (AAEI) ▪ American Trucking Association (ATA)**  
**Emergency Committee for American Trade (ECAT) ▪ Express Delivery & Logistics Association (XLA)**  
**Footwear Distributors and Retailers of America (FDRA)**  
**International Wood Products Association (IWPA)**  
**National Customs Brokers and Forwarders Association of America (NCBFAA)**  
**National Retail Federation (NRF) ▪ Retail Industry Leaders Association (RILA)**  
**The National Industrial Transportation League (NITL)**  
**United States Fashion Industry Association (USFIA)**

July 24, 2015

Dear House and Senate Conferees,

The undersigned represent the interests of companies and millions of their employees that depend on a system of interconnected, predictable, and efficient supply chains to compete effectively in the global economy. We support strong enforcement of U.S. trade laws, and our members spend millions of dollars to ensure compliance with those laws. We urge conferees to strengthen enforcement by including the PROTECT Act in the conference report to H.R. 644, the Trade Facilitation and Trade Enforcement Act of 2015. We also urge conferees against including the ENFORCE Act, which will hinder trade enforcement, jeopardize millions of U.S. jobs, and create confusion, unpredictability, and inefficiency at our borders.

The PROTECT Act will improve the enforcement of U.S. trade remedy laws and ensure an effective and modern trade enforcement policy to combat the evasion of antidumping and countervailing duties (AD/CVD). The bill focuses government efforts to prevent, investigate, and remedy efforts by companies intentionally seeking to break the rules and strengthens the government's ability to investigate and prosecute those instances where circumvention occurred. The bill also builds on existing government strengths and expertise by enhancing the Department of Commerce's authority to investigate these illegal actions. Finally, PROTECT promotes effective enforcement without creating unnecessary or confusing bureaucratic processes or decreasing incentives for public-private partnerships on trade.

Conversely, the ENFORCE Act creates confusing new procedures and denies law-abiding importers the transparency and due process that are hallmarks of U.S. trade remedy laws. In particular, the ENFORCE Act's definition of "evasion" encompasses situations where no fraud is involved and creates within CBP an administrative process that treats all importers as "evaders" of the law. Supporters of the ENFORCE Act may suggest that their definition is more limited. While that may be the proponent's intention, a plain reading of the legislation reveals a very broad and problematic definition ultimately harmful to supporters of trade enforcement.

**Key problems with the ENFORCE Act include:**

- **No Due Process Rights for Innocent Importers.** Even when an importer has a strong compliance system in place, evasion can occur without the U.S. importer having any knowledge or reason to know that it is happening. Also, as acknowledged in the U.S. Evasion Paper, importers can be "lured" into evasion schemes, particularly smaller importers. The ENFORCE Act seeks to hold innocent U.S. importers accountable for what could be substantial unanticipated duty liability, but fails to guarantee those innocent U.S. importers *any* due process rights – not the right to notice, an explanation of CBP's decision, nor the right to administrative or judicial review. Imposing liability on innocent importers without due process is unprecedented under U.S. trade remedy laws and runs counter to our basic legal principles and sense of fairness, and potentially bankrupting innocent importers does not serve the remedial purpose of the trade remedy laws.
- **Failure to Recognize CBP's Trusted Traders.** Our companies have a long history of working closely with CBP to provide transparency regarding our supply chains. We do it because we view our relationship with CBP as a mutually beneficial partnership. Our members are often the first to volunteer for new supply chain security and trade enforcement programs, taking on the new costs for compliance. We do it because it can improve our own

recordkeeping and also because it builds trust within CBP that we are accountable for every claim. Given CBP's limited resources, our companies work to provide timely to CBP, information in order for it to focus on the goods that pose the greatest risk to our economic as well as our national security interests. The ENFORCE Act does not recognize our companies as trusted traders in the supply chain and failure to do so wastes government resources and hinders overall trade enforcement efforts.

- Lack of Meaningful Judicial Review. Supporters of the ENFORCE Act note that it provides for judicial review of CBP's "evasion" determinations. However, they fail to point out that the ENFORCE Act only provides for judicial review under the "arbitrary and capricious standard," which is far less rigorous than the "substantial evidence" standard of review that applies to all other AD/CVD proceedings. For example, the Department of Commerce's interpretations of the scope of an order are subject to the substantial evidence standard of review. However, if the question whether products fell within the scope of an order were central to an "evasion" allegation, CBP's decision, unlike a scope ruling by the Department of Commerce (Commerce), would only be subject to the arbitrary and capricious standard of review.
- Creates Opportunities for "Forum Shopping". Under the ENFORCE Act, any statement, omission, or document that a domestic producer believes is false and resulted in merchandise entering the United States with no payment, or a reduced payment, of AD/CVD duties constitutes the basis for an allegation of "evasion", regardless of whether there is any evidence of fraud. Thus, for example, under a plain reading of the legislation, a domestic producer may file a petition with CBP based on an allegation that an importer is evading an order by failing to declare merchandise as subject to AD/CVD duties. Under the ENFORCE Act, it does not matter whether the importer did not declare the merchandise as subject to AD/CVD duties based on a reasonable belief that the products did not fall within the scope of an order. This gives broad authority to CBP to make determinations as to whether merchandise is subject to AD/CVD duties. There is longstanding jurisprudence that Commerce, not CBP, has the authority to interpret the scope of an order. However, unlike the PROTECT Act, the ENFORCE Act does not require CBP to refer administrative issues, such as whether products fall within the scope of an order, to Commerce. Under the ENFORCE Act, therefore, simply by invoking the evasion process at CBP, questions such as whether an importer properly interpreted the scope of an order can be transformed into questions of "evasion" that CBP must decide.

In sum, strong enforcement of U.S. trade laws is the right policy, but the ENFORCE Act is the wrong mechanism to implement that policy. The ENFORCE Act will divert scarce CBP resources from investigation and prevention of fraudulent schemes to addressing essentially administrative issues that are more properly handled by Commerce. As a result, the ENFORCE Act can be used as a mechanism to evade the transparency and due process rights normally guaranteed under U.S. trade remedy laws. We strongly urge Congress to ensure that legislation to enforce U.S. trade remedy laws is properly focused on fraudulent schemes, does not blur the jurisdictional lines between Commerce and CBP in a way that would encourage forum shopping, and guarantees innocent importers due process.

Sincerely,

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