

Trade & Customs - USA

Stalemate on temporary import duty suspensions continues

Contributed by [Sidley Austin LLP](#)

May 28 2010

Introduction

[Miscellaneous tariff bills](#)

[Earmarks, limited tax benefits and limited tariff benefits](#)

[The need for a new approach](#)

Introduction

A partisan congressional battle over the use of earmarks means that many US companies are currently paying duties on products that had been duty free before this year – and many others are missing out on temporary relief from duties on additional products they had hoped to benefit from starting this year. Earmarks are provisions in legislation that direct that funds be used for a particular project (usually in the home district or state of the member of Congress who proposes them). A recent decision by Republicans in the House of Representatives to adopt "a unilateral moratorium on all earmarks, including tax and tariff related earmarks" has now ensnared bills that direct that import duties not be collected. The dispute is costing US importers and their customers dearly and the prospects for resolution are far from clear. The stalemate may be the impetus for a significant reconsideration of the 'miscellaneous tariff bill' process.

Miscellaneous tariff bills

Over the last 30 years, a practice has evolved in Washington under which US manufacturers, industry associations and even wholesalers and retailers have asked Congress to introduce legislation to reduce or temporarily suspend duties (usually just for two years) on certain imports, or to make technical corrections related to particular importations. All of those bills are then packaged together to create a single miscellaneous tariff bill. Most of these tariff bills cover chemicals, raw materials or other components that are used as inputs for goods manufactured in the United States, making those downstream products less expensive, but some suspend duties on finished products.

The number of duty suspension requests has gradually increased over time and so has scrutiny of the practice, with sceptics labelling it as corporate welfare. As a result, Congress – which has exclusive authority under the Constitution to set import tariff levels – has adopted rules designed to make the process more transparent, so that the beneficiaries of the duty suspensions and their congressional sponsors are readily apparent.

Although the rules vary slightly between the House of Representatives and the Senate, both bodies have special disclosure rules for legislation which provides a 'limited tariff benefit' – defined as "a provision modifying the Harmonized Tariff Schedule of the United States in a manner that benefits 10 or fewer entities". The sponsors must be identified, along with the name and location of the intended beneficiaries and the purpose of the benefit. Under Senate rules, there are additional disclosure rules for lobbying activities associated with miscellaneous tariff bills.

In practice, Congress's two trade committees (the House Committee on Ways and Means and the Senate Committee on Finance) manage the process of assembling miscellaneous tariff bills, which usually come up for consideration every two years. The committee chairmen set a deadline for members to introduce standalone bills, with instructions that only those bills that are non-controversial and revenue neutral will be considered for inclusion in the miscellaneous tariff bill package. A bill is considered controversial if any domestic producer objects and revenue neutral only if the annual duty loss to the United States is no more than \$500,000. Besides being subject to

Author

[Brenda A Jacobs](#)



public comment, the bills under consideration for inclusion in the miscellaneous tariff bill are reviewed by the administration including:

- the US Department of Commerce, which considers whether there are US producers of the product;
- US Customs & Border Protection (CBP);
- the US International Trade Commission, which identifies the value and volume of trade in the product, the estimated revenue loss if the tariff is suspended, the name of the proponent and identification of the views of others; and
- the Office of the US Trade Representative, which may address how the legislation would impact on US trade policy, including reciprocal bilateral and multilateral negotiations and unilateral preference programmes.

The most recent miscellaneous tariff bill expired at the end of 2009, with Congress failing to approve a new bill that would have maintained the existing duty suspensions and created new ones. As a result, CBP is currently collecting duty on many products that had been duty free. While there have previously been instances where Congress did not act in time to prevent the duty suspensions from expiring, when it did finally enact a new miscellaneous tariff bill, the duty suspensions were retroactively reinstated back to the date of the prior expiration. This time, however, it is not so clear that will happen.

Earmarks, limited tax benefits and limited tariff benefits

Initially, many assumed that once Congress finished its work on healthcare, it would be in a position to take up legislation to extend the miscellaneous tariff bill, especially since the new individual bills that would comprise the miscellaneous tariff bill for the 111th Congress had already been introduced and vetted. However, on March 11 2010 the House of Representatives Republican leadership announced its policy decision against earmarks, declaring that "the earmark process in Congress has become a symbol of a broken Washington". Specifically, the Republicans agreed that they should not offer any earmarks in legislation and should not support any earmarks in House of Representatives votes. That decision would appear to require all Republicans to vote against the miscellaneous tariff bill if it were to come up for a vote, because the parliamentary rules of the House of Representatives for earmarks include within their scope limited tariff benefits.

Many Republican staffers and members of Congress have said that they generally support the goals of the miscellaneous tariff bill, which would help to lower costs for manufacturers and consumers. Some have said that they are working with leaders to find a way around the decision and get Republicans to vote for the miscellaneous tariff bill. But for now, the policy position appears to be a serious impediment. House Republican staffers have said they would expect almost all Republicans to follow it.

It is possible, but unlikely, that Democrats could approve a miscellaneous tariff bill without any (or only a few) Republican votes. The past criticism of miscellaneous tariff bills as a boon to corporate interests has meant a strong preference for moving only bills with broad bipartisan support. It is far from clear whether Democrats would be comfortable moving away from this recent tradition.

The need for a new approach

Industry groups have taken up this issue in recent weeks by meeting with the staff for Republican members, to see whether support for the miscellaneous tariff bill can be found in a way that does not violate the Republican pledge on earmarks. Many companies are beginning to feel the effects of higher import costs, since the miscellaneous tariff bill has now been expired for more than four months (which also reportedly makes CBP less enthusiastic about the prospect of having to deal with refunds for many entries if a new miscellaneous tariff bill were to reinstate retroactively the expired provisions).

Longer term, there is now discussion of turning the miscellaneous tariff bill process into one that begins administratively, to reduce the risk of future bills getting caught up in the politics of the day. However, because Congress has authority over tariffs, it either must delegate that authority to the administration – as it has done under programmes such as the Generalized System of Preferences, to permit the administration to decide, pursuant to criteria set by Congress, which products qualify for duty-free treatment – or ultimately approve an administration decision or process. That, too, could prove challenging, especially when – as is now the case – the legislative calendar is already crowded and congressional elections, which could change the majorities in at least the House of Representatives, scheduled in November.

Enlisting administration support may be key. To the extent that the miscellaneous tariff bill can be identified as a means for creating US jobs and meeting the administration's top trade priority, the National Export Initiative (which aims to double exports over the next five years), there may be an opportunity. It also may be possible to cast a new

process as a reform effort to restore the certainty that US companies need in order to stay competitive globally.

For further information on this topic please contact [Brenda A Jacobs](#) at Sidley Austin LLP by telephone (+1 202 736 8000), fax (+1 202 736 8711) or email (bjacobs@sidley.com).

The materials contained on this website are for general information purposes only and are subject to the [disclaimer](#).

ILO is a premium online legal update service for major companies and law firms worldwide. In-house corporate counsel and other users of legal services, as well as law firm partners, qualify for a free subscription. Register at www.iloinfo.com.



Official Online Media Partner to the International Bar Association
An International Online Media Partner to the Association of Corporate Counsel
European Online Media Partner to the European Company Lawyers Association

© Copyright 1997-2010 Globe Business Publishing Ltd