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**TO CLIENTS AND FRIENDS:**

**RE: CBP Proposal To End First Sale (Middleman) Appraisalment**

In today's Federal Register, U.S. Customs & Border Protection ("CBP") has audaciously proposed a new administrative interpretation of the phrase "sold for exportation to the United States" for purposes of applying the transaction value method of valuation in import transactions involving a series of sales ("the middleman sales scenario"). Currently, CBP will base transaction value on the price paid by the buyer in the first or earlier sale (*e.g.*, the sale from a manufacturer to an intermediary), if the importer establishes by sufficient evidence that this was an arm's length sale and that, at the time of such sale, the merchandise was clearly destined for exportation to the United States. CBP now proposes to negate applicable court and administrative precedent and base transaction value in the middleman sales scenario on the price paid in the last sale occurring prior to import of the goods into the United States, this generally being the price paid by the buyer in the United States, instead of on the first (or earlier) sale.

**The proposal has no immediate impact on current imports. Comments on the proposal are due on or before March 24, 2008. If adopted, the proposal has the potential to affect the competitive positions of importers in many industries and the most serious consideration should be given to filing comments with respect to this proposal, given recent U.S. Supreme Court holdings that indicate a willingness to consider international views, which are ostensibly being relied on by CBP.**

The CBP proposal is based on the April 2007 conclusions of the Technical Committee on Customs Valuation, as set forth in Commentary 22.1, entitled "**Meaning of the Expression 'Sold for Export to the Country of Importation' in a Series of Sales**", to clarify which sale should be used where there are two or more successive contracts for sales of particular goods. The Technical Committee concluded, inasmuch as certain dutiable additions to the purchase price of goods, such as selling commissions, royalties, assists and proceeds, are costs borne by the importer, that application of the "first sale" rule may preclude the addition of those costs to the "transaction value", and that this is contrary to the underlying assumptions and intent of the WTO Valuation Agreement. As a result, the Committee adopted the view that where the transaction involves a series of sales, use of the price paid in the last sale occurring prior to introduction of the goods into the country of importation, instead of any earlier sale, is consistent with the purpose and overall text of the WTO Valuation Agreement. CBP notes that most WTO members already appear to follow this view.

In its proposal, CBP reinterprets legislative history and judicial decisions as actually being supportive of the proposed change, as it simplifies fact-finding issues for importers in their exercise of reasonable care and enables CBP to access records needed for post-importation review. CBP asserts support exists for the proposition that use of "middleman" appraisalment rises to the level of a violation of U.S. international treaty obligations, given such differs from the Technical Committee interpretation, and is also contrary to the Congressional goal of having a transparent standard for determining transaction values.

Please contact Louis Shoichet ([lshoichet@tdllp.com](mailto:lshoichet@tdllp.com)), Robert Stack ([rstack@tdllp.com](mailto:rstack@tdllp.com)), or Barbara Wierbicki ([bywierbicki@tdllp.com](mailto:bywierbicki@tdllp.com)) in the event you have an interest in filing comments on the proposal.

**Note: The above comments are intended for general information only, and not as legal advice. Legal advice can only be offered after a review of a client's specific facts and circumstances, which may affect the applicability of any general comments contained herein.**