ACE: THE FUTURE IS HERE

The mainframe system used by U.S. Customs & Border Protection (CBP) since 1986 to process imports and exports is about to end. The Automated Commercial System ("ACS") has almost fully transitioned to the new Automated Commercial Environment ("ACE"). CBP will require all importers to begin using ACE on November 1, 2015 for all cargo release and entry summary filing. After this deadline, October 1, 2016 is the date set for mandatory ACE reporting of all remaining electronic information. Finally, by Executive Order, December 31, 2016 is the deadline for the "single window" -- all federal agencies must begin using ACE for any import/export-related data gathering and transmission for the release of merchandise.

Why should international traders care? Because ACE presents importers and exporters with the ability to have "real-time" access to every minute detail of their cross-border transactions via a "Portal Account." For those who have not signed up for this free account, NOW is the time. Sign up here: http://www.cbp.gov/trade/automated/getting-started

Given the impact that trade-related data has on planning, sourcing, compliance, tax liabilities, and a host of other corporate priorities, import and export personnel can now play a much more visible and important role in setting their companies' global agenda when armed with up-to-date, complete, and reliable trade data.

In addition, the increased "data mining" capabilities presented by the ACE system may lead to an increase in enforcement actions by a variety of government agencies. The potential for such increased scrutiny is another key reason why every company should sign up now for an ACE Portal Account. ACE is the future, and the future is almost here!

"BIG 9" PASS ON REVIEWING TREK LEATHER

The U.S. Supreme Court recently declined to hear the appeal in United States v. Trek Leather Inc. and Harish Shadadpuri, which involved a corporate officer of a U.S. importer who was found **personally liable** for gross negligence under the applicable statute by the U.S. Court of Appeals for the Federal Circuit ("CAFC").

In its widely-discussed decision, the CAFC ruled that Mr. Shadadpuri, the owner of Trek Leather, personally violated the Section 592 penalty provisions by "introducing" goods into the United States when he gave his customs broker commercial invoices which omitted the value of mandatory additions to the declared price of the imported merchandise. The CAFC considered his act of omission to be egregious enough to constitute gross negligence under Section 592 and further held that Section 592 permits CBP to seek penalties for such violations against individuals and not just the business entity designated as the importer of record.

Because the Supreme Court has declined to hear Mr. Shadadpuri's appeal, the Trek Leather decision is now the law of the land. Corporate officers and compliance professionals involved in importing goods into the United States should understand that CBP is now explicitly empowered to seek penalties against individual actors. Although it remains to be seen how broadly CBP will apply this authority, the Trek

Leather decision should provide additional motivation for all management levels of a company to make compliance a top priority.

CBP HQ ISSUES RARE DEDUCTIVE VALUE RULING

In an unusual HQ ruling (HQ H260036), CBP recently ruled that an importer of natural and biodegradable additives (such as citric acid and xanthum gum, mainly used in the food industry) must use deductive value as the basis of appraisement for its imported merchandise – instead of transaction value. Despite the fact that the importer had an Advance Pricing Agreement in place with the IRS (mandating that the importer earn a certain operating margin), CBP found that its various tests for arm's length pricing were not met. It continued to hold to its long-standing position that unless the companies used as comparables in establishing the targeting operating profit margin in the APA/transfer pricing study produce *the same merchandise* as the importer, the APA/transfer pricing study cannot support a finding of arm's length pricing to validate the use of transaction value. Given that such comparables almost never exist (and are thus rarely used in preparing an APA or transfer pricing study), it is curious that CBP continues to adhere to this position.

The real significance of this ruling remains to be seen, but it appears that a shift in thinking at CBP HQ may be underway concerning the valuation of "commodity-type" products. Because commodities typically sell for "whatever the market will bear," the ultimate price is dictated entirely by market conditions. Any profit is "backwards-driven" so that each party in the distribution chain takes their share of profit, with whatever profit remains going back to the seller. This scenario more closely reflects the deductive value methodology than it does transaction value, and CBP may be aligning its position accordingly. Nonetheless, for most of recent history, CBP has almost always applied deductive value only to imports of fresh produce. Given the burdensome nature of deductive value (use of *pro forma* invoices; calculating product-by-product prices based on surrogate end customer selling prices), CBP should proceed cautiously with any further expansion of the deductive value methodology.