Circumvention of Antidumping Duty Orders on Chinese Activated Carbon Creates Risk for Importers

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In April 2006, the United States Government imposed "antidumping" duties on Chinese activated carbon, to offset unfair pricing or "dumping" in the U.S. market. The requirement for the deposit of estimated antidumping duties has been in place since that time, and such estimated duties can be as high as 228.11 percent of an import's entered value. The level of these duties may provide significant motivation for some exporters and some importers to try to find ways to import Chinese carbon without paying required duties.

Recently, questions have arisen concerning Chinese activated carbon being imported from third countries without paying legally required antidumping duties. As a service to the activated carbon trade, we are providing this summary of the legal requirements related to the country of origin of Chinese activated carbon imported through third countries.

Steam-activated and CO_2-activated Chinese activated carbon remains the product of China and subject to applicable antidumping duties, unless it is substantially transformed in a third country. Importers who fail to properly declare the country of origin of such imports may be subject to significant penalties.

The antidumping duty order covers all forms of activated carbon that are activated by steam or CO_2, regardless of the raw material, grade, mixture, additives, further washing or post-activation chemical treatment (chemical or water washing, chemical impregnation or other treatment), or product form. Unless specifically excluded, the antidumping duty ("AD") order covers all physical forms of certain activated carbon, including powdered activated carbon ("PAC"), granular activated carbon ("GAC"), and pelletized activated carbon. Chemically activated carbon is not covered by the order.

Importers need to be aware that Chinese activated carbon may be entering the United States through third countries, with improper country of origin markings. Unless it has been substantially transformed, this activated carbon remains Chinese and subject to the required duties. Following are several potential scenarios that should be kept in mind.

First, Chinese thermally-activated carbon that is sent to third countries to be repacked into different containers (*i.e.*, from 1000 kg supersacks into 500 kg supersacks, or from supersacks into drums), or merely relabeled with a new country of origin, remains a product of China.

Second, if Chinese subject activated carbon is mixed or blended with steam/CO_2 activated carbon from another country or with inert materials (such as raw coal) from any country, the resulting

mixture must be declared as a product of both countries, and AD duties are owed on the amount of the activated carbon that is from China. Merely blending the activated carbon with other activated carbon or other materials does not remove it from the scope of the order on Chinese activated carbon.

Third, Chinese activated carbon that is sent to a third country for processing that changes the physical form – *i.e.*, crushing, sieving, screening, sizing, or agglomeration into pellets – does not undergo a substantial transformation and does not change the country of origin. All forms of carbon that are activated in China using heat and steam or CO_2 are covered by the scope of the order, and merely processing one form of in-scope carbon into another form of in-scope carbon in a third country does not confer a new country of origin.

Fourth, impregnation in a third country also does not change the country of origin for purposes of the AD order, for exactly the same reason. Because all forms of carbon that is activated using heat and steam or CO_2 are covered by the scope of the order, merely processing one form of in-scope carbon into another form of in-scope carbon will not confer a new country of origin.

By law, importers of activated carbon, like all importers, are responsible for using "reasonable care" to enter, classify and determine the value of imported merchandise, and to provide any other information necessary to enable U.S. Customs and Border Protection to properly assess duties, including antidumping duties. This includes correctly identifying entries of Chinese activated carbon – regardless from where they are shipped – as "Type 3" entries, and with China as their country of origin.

Failure to exercise "reasonable care" and properly identify an entry's country of origin and entry type will subject an importer to a variety of penalties, both civil and potentially criminal.

Penalties that could be imposed for failure to properly identify imports as merchandise subject to the AD order fall into two general categories. First, penalties can be imposed for making false statements, such as falsely identifying the country of origin on paperwork presented upon importation, or for omitting material information from materials and statements that are presented. Second, penalties can be imposed for falsely marking goods, *i.e.*, for falsely identifying the country of origin on the goods themselves or (as would be the case with activated carbon) their containers. These are briefly addressed in turn below.

When an importer makes false or fraudulent statements or omissions, several provisions of law provide for civil and criminal penalties that can be very significant in scope and amount. Depending on the facts before it, Customs can impose penalties for such things as fraud, gross negligence, and ordinary negligence (19 U.S.C. § 1592).

If an importer makes false statements in order to avoid dumping duties, and thus fails to pay amounts that are legitimately owed, Customs can impose penalties that equal the commercial value of the merchandise itself, in addition to collecting the underpaid or unpaid duties.

Separately, importers can be liable for civil and/or criminal penalties for "conspiracy to commit offense or to defraud the United States" (18 U.S.C. § 371), and for making false statement or entries generally (18 U.S.C. § 1001). These penalties are the most significant that Customs can apply and can easily add up to amounts that far exceed the value of the entered goods.

Penalties in the form of a 10% additional duty may be imposed where an importer falsely marks goods or their containers with an incorrect or improper country of origin. The law is very specific that

this amount "shall be deemed to have accrued at the time of importation, shall not be construed to be penal, and shall not be remitted wholly or in part nor shall payment thereof be avoidable for any cause." (19 U.S.C. § 1304(h).) In addition, false marking of the country of origin on goods or their containers may give rise to additional penalties under the fraud, gross negligence, and ordinary negligence provisions of (19 U.S.C. § 1592), discussed above, and may give rise to a claim by Customs for liquidated damages for breach by the importer of the terms of its bond that Customs requires.

The penalties described above can easily add up to more than the commercial value of the goods at issue. Combined with dumping duties at the levels currently applicable to Chinese activated carbon imports, U.S. importers who participate in circumvention of the dumping order could face duties and penalties in an amount that can be more than 300 percent of the value of the merchandise.

An importer's customs broker also is at risk, and can be fined and/or have their license or permit suspended or revoked if they are found to have been involved in such activities. (19 U.S.C. § 1641(b)(4).) Lastly, depending on the circumstances, Customs also may refer the matter to the U.S. Attorney's Office for criminal prosecution. For example, attached to this Client Advisory is a press release from the United States Attorney for the Western District of Washington announcing the arrest and impending prosecution of an exporter and an importer of another product covered by an AD order for circumventing that order by transshipping products through a third country and declaring an improper country of origin.

The obligation to exercise reasonable care means that an importer should know where imported activated carbon was made. Importers should conduct careful and thorough due diligence before importing activated carbon that may include activated carbon from China, or risk being subject to significant penalties.

To the extent that importers have questions related to these matters, we recommend that they seek the advice of qualified legal counsel.

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