

PLACE ON Company LETTERHEAD

[INSERT DATE], 2019

Via E-Mail

The Honorable [INSERT REPRESENTATIVE]
[INSERT ADDRESS]

Re: Customs Business Fairness Act of 2019

Dear Congressman [INSERT]

On behalf of the [INSERT], we seek your support for H.R. 2261, the Customs Business Fairness Act of 2019, which was just introduced by Representatives Peter King (R-NY) and Gregory Meeks (D-NY). As discussed below, this legislation will address an issue of continuing concern to customs brokers in the [INSERT] area.

Our company is comprised as Customs Broker and International Customs Broker. Customs brokers are licensed by U.S. Customs and Border Protection (“CBP”) to transact customs business on behalf of third parties. One of our chief responsibilities is to collect import duties from importers and timely remit those funds to CBP. This service greatly facilitates the prompt payment of enormous sums of duties to the federal government every day.

As the bankruptcy law is currently written, however, customs brokers have no protection in the event that an importer-client declares bankruptcy. Brokers are often the target of bankruptcy trustees seeking to recover duty payments made from the importer to CBP through the customs broker during the 90-day “claw back” period. This practice punishes the broker for performing an important service that CBP, as well as the larger federal apparatus, relies upon.

The Customs Business Fairness Act of 2019 is meant to address this very issue and allow customs brokers to be "subrogated" to the priority rights of CBP for duties paid by the customs broker on behalf of an importer that subsequently files bankruptcy. This would allow the customs broker to "stand in the shoes" of CBP as a creditor who collected duties from the importer.

We would greatly appreciate your help in passing this legislation and, if possible, joining Representatives King and Meeks as a co-sponsor of the bill. We have attached a copy of a recent letter Representative King prepared regarding this legislation and can be available to discuss further at your convenience.

Sincerely,

[INSERT NAME]
[INSERT POSITION]
[INSERT Company]

The Customs Business Fairness Act (H.R. 2261)

Customs brokers and sureties are seeking a technical change in the bankruptcy laws to provide relief for customs brokers who have paid duties to Customs and Border Protection (CBP) on behalf of importers who subsequently file for bankruptcy.

Customs Brokers and the Payment of Duties: The customs broker plays an important role in the duty payment process at the border and U.S. ports. Under current trade law, there is generally a 10 to 45 business day period between the release of imported merchandise by CBP and submission of the estimated payment of duties and taxes. Licensed customs brokers are often called upon to either advance the payment of these estimated duties/taxes on behalf of the importer or to guarantee payment to the government through its ACH (automated clearing house) account. In effect, customs brokers serve as a pass-through entity, or conduit, for the collecting and payment of duties/taxes. This payment method has become a standard business practice.

Collectively, customs brokers are responsible for remitting an estimated \$10 billion a year to the government in duty and fee payments due from importers. From the government's perspective, it is far easier to collect the initial duties from a finite number of licensed customs brokers than a hundred thousand individual importers. The government is significantly advantaged by this system, where the prompt payment of billions of dollars in duties is facilitated. This expedites the payment of revenues to the government and allows the flow of trade to continue unimpeded.

Importers and Bankruptcy: When an importer-client files bankruptcy, the most immediate and troublesome threat is an action by the bankruptcy trustee or debtor to recover payments made to/through the customs broker to CBP by the importer in the 90-day period prior to the filing of the bankruptcy petition. This can amount to substantial amounts of money -- often well into the six-figure range. This so-called "claw back" period is allowed under Section 547 of the Bankruptcy Code to avoid preferential treatment to any one creditor. In these circumstances, the customs broker is required to pay to the trustee any monies received from the debtor (or advanced to CBP by the broker on the debtor/importer's behalf) during the 90-day period prior to the bankruptcy filing.

Subrogation in Bankruptcy: Generally, when a creditor pays a debtor's debt owed to another creditor (for example, the US government), the paying creditor is *subrogated* to the rights of the creditor receiving payment. In effect, the paying creditor can "stand in the shoes" of the receiving creditor. Since CBP is granted a "priority" under the Bankruptcy Code for claims against a bankrupt importer, any payment directly to the agency from the importer during the 90-day claw-back period would not be considered a preferential payment. If a customs broker could be subrogated to the priority rights of CBP, any payments from the importer to CBP *via the customs broker* during the 90-day period would likewise no longer be subject to a preference payment

recovery action. Recognizing the value of customs brokers' role in advancing duty payments, Customs itself attempted several years ago to assign its priority status under the Bankruptcy Code to customs brokers through regulation -- an effort that was deemed by the courts to exceed the agency's authority, ruling that it was up to Congress to make changes in the Bankruptcy Code.

Proposed Technical Bill: Subrogation rights are derived from common law and ordinarily would come into play, except for the fact that Section 507(d) of the Bankruptcy Code specifically disallows subrogation with respect to many of the enumerated priorities. In the House, H.R. 2261, introduced by Reps. Peter King (R-NY), Greg Meeks (D-NY) and other colleagues from around the country, provides a technical amendment to Section 507(d) that, in effect, would allow subrogation for customs brokers or sureties who have paid duties to the government on behalf of a bankrupt importer.