

**Testimony of Edward T. Hayes,
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**Before the United States Senate Committee on Appropriations,
Subcommittee on Homeland Security**

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Madam Chairman, Ranking Member Coats, members of the committee, good morning. My name is Eddy Hayes, and I am a partner at the law firm of Leake & Andersson LLP in New Orleans, Louisiana. I lead the firm's international trade practice, and I am an adjunct professor of Law at Tulane University Law School and Loyola University Law School, where I teach a seminar on international trade law and practice. I also represent the city of New Orleans on the U.S. Trade Representative's Intergovernmental Policy Advisory Committee, and I serve on the roster of panelists eligible to adjudicate trade disputes under Chapter 19 of the North American Free Trade Agreement.

I am also counsel to the American Shrimp Processors Association, the largest national organization of shrimp processors. As Mr. Baumer just testified, this industry has seen the damaging effects of duty evasion, transshipment, and circumvention first-hand. Duty non-payment in the shrimp industry alone has deprived the U.S. government of more than \$75 million in tariff revenue – and over one-and-a-half billion in tariff revenue overall – since 2001. These problems have seriously compromised the integrity of the trade relief the industry has fought to obtain and maintain over the years.

We are deeply appreciative of all of the support the industry has received from this Committee, including the powerful testimony that both Chairman Landrieu and Senator Cochran provided to the U.S. International Trade Commission in its recent sunset review of the antidumping orders on shrimp. The Commission rightly decided that revocation of the orders would likely lead to a continuation or recurrence of material injury to the domestic shrimp industry, and voted to keep these orders in place. Now is the perfect opportunity to ensure that these orders are in fact providing the full measure of relief intended under the law.

Chairman Landrieu, as the Commission voted to maintain these orders, you rightly noted that the next step was to ensure that all duties owed under the orders were in fact being paid. We could not agree more. As Mr. Baumer testified, importers have failed to pay more than \$75 million in antidumping duties owed. As I noted, across all orders, such non-payment has deprived the U.S. government of more than one-and-a-half billion dollars in revenue. If the IRS only collected two out every three tax dollars owed, it would be on the front page of every newspaper, and rightly so. This duty collection problem deserves a similar level of urgent attention.

Importers of goods under an antidumping or countervailing duty order generally must post cash deposits equal to the estimated dumping or subsidy margin for those goods.

The actual margin of dumping or subsidization for the merchandise will often not be finalized until an administrative review is conducted by Commerce, and, sometimes, until judicial review of Commerce's determination is complete. Because the final duty liability may be higher than the estimated margin covered by cash deposits, importers are also required to post a bond in addition to their cash deposits. In addition, a new exporter or producer may post a bond instead of cash deposits while it seeks a determination of its correct margin in a new shipper review.

Unfortunately, the bonds that are currently required in these situations are simply not sufficient to allow Customs to collect the full amount of duties it is owed. In too many cases when the ultimate duty liability increases over the preliminary estimate, or when a new shipper fails to achieve a lower rate in its requested review, the importer of record is unable or unwilling to meet its duty obligation. In some cases, the "importer" is little more than a U.S. post office box address for the foreign producer or exporter, and there is no way to collect at all. Customs is then forced to try to collect against the surety that provided the bond. But if importers are only required to obtain a continuous entry bond, which is capped at ten percent of the duties owed in the previous year, what Customs is able to collect from a surety may be far less than the full amount actually owed.

The problem is particularly acute for agriculture and aquaculture products, where fragmentation in the foreign industries allows players to appear and disappear without a trace. Indeed, seafood alone accounts for a full 43 percent of the duties that have not been collected since 2001, and most of that amount is due to duties that have not been paid by importers of crawfish and shrimp.

To its credit, Customs has tried to address the problem in these industries with enhanced bonding requirements. Unfortunately, those requirements were struck down because they singled out agriculture and aquaculture. But there is a way to make such requirements fully consistent with both U.S. law and our WTO obligations by ensuring they are based on an objective risk assessment rather than industry categories. For example, whenever the amount of uncollected duties under an order exceeds a certain fixed amount, say a million dollars, Customs could require that importers post a more robust single entry bond, rather than the insufficient continuous entry bond, for imports under that order. Such a requirement would be industry- and country-neutral, easy to administer, and highly effective.

Furthermore, we should not allow an importer to continue posting the same security after Commerce has preliminarily found that a higher margin is likely to apply or while a final Commerce determination that such a higher margin will apply is under appeal. Instead, importers should have to start posting a sufficiently high security to meet increased margins shortly after any preliminary Commerce determination that the duty liability is likely to be higher than the cash deposit rates. The same obligation should apply if any final determination by Commerce that finds a margin that is higher than the cash deposit rates is subsequently appealed. To facilitate this, Commerce should be required to publish the amount by which the margins that apply to exporters in a preliminary or final determination exceed each exporter's cash deposit rates for the period reviewed.

Finally, Congress could change the law to eliminate the privilege new shippers currently enjoy to post bonds rather than cash deposits as they await the results of new shipper reviews. Importers of merchandise from new shippers should face the same cash deposit requirements as importers from other companies that have not received individual rates.

These three changes would go a very long way towards plugging the holes through which far too many importers currently escape their duty liability. While they can't make our industries whole for the harm they have already suffered, these changes will ensure this inexcusable behavior is not allowed to continue. In addition, we believe it is entirely appropriate for these changes to originate from this Committee because they go directly to Customs' revenue-raising authority.

As to the problems of transshipment, misclassification, circumvention, and other schemes, we believe it is time to supplement Customs' toolkit so it can act with the speed, flexibility, and transparency that modern commerce demands. As Mr. Baumer testified, too often enforcement efforts such as civil fraud cases, penalty collections, and criminal prosecutions take far too long to have a meaningful impact on the market. In addition, the legal threshold for initiating such investigations is a high one, and such cases are resource-intensive.

While these enforcement actions play an important role, more is needed. Numerous helpful proposals have been put forward that would give Customs needed new enforcement tools, including by Senator Wyden and some of his colleagues. We are supportive of Senator Wyden's proposals and believe them consistent with the ideas proposed below.

First, Customs should suspend liquidation of entries as soon as there is a reasonable indication that goods which may be subject to an order are not being properly entered under that order. The burden should be on the importer, not on Customs, to substantiate claims regarding the origin, physical properties, and value of the merchandise. While these claims are being verified, entries would be held in suspension. If an importer cannot substantiate its claims, Customs should be able to apply an adverse inference that the goods are in fact subject to the order, and assess duty liability accordingly. Similar procedures at Commerce create a strong incentive for foreign producers to cooperate and provide requested information, and the same would hopefully be true at Customs. These actions would be separate from, and in addition to, any civil or criminal proceedings against the importer.

Second, the ability of Customs to share useful information with those who have the most vested interest in enforcing our trade laws – the domestic industry – is currently hampered by legal restrictions such as the Trade Secrets Act. At Commerce, the ability of domestic parties to access foreign producers' confidential business information under administrative protective orders has proven invaluable; it permits the domestic industry to provide targeted, specific information to Commerce, eases the Department's own investigative burden, and helps to keep respondents honest, all while protecting

confidential information. Similar procedures should be available at Customs. In addition, Customs should be able to update the domestic industry on the status of investigative matters without violating its confidentiality obligations. This would keep the domestic industry involved and invested and permit Customs to share its successes.

Third, there should be more robust information sharing between Customs and Commerce. When Customs conducts the type of verification outlined above, it should forward the resulting information to Commerce so it can be part of its own record, and so that parties to the Commerce proceeding can access that information under protective order. Similarly, parties should be allowed to share confidential information learned in a Commerce proceeding with Customs. If, for example, Customs suddenly sees a large increase in imports claiming to originate from a foreign producer that recently received a relatively low margin, information learned in the Commerce proceeding may demonstrate that the foreign producer has nowhere near the capacity to produce such a high volume of imports, and that they are in fact being fraudulently shipped from foreign producers subject to much higher margins. Interested parties should be able to alert Customs to such information without violating their confidentiality obligations.

Fourth, Customs must be allowed to use the full range of information it currently collects from importers for trade enforcement purposes. In 2009, Customs began requiring importers to submit additional information regarding cargo shipments on their way to our ports, the so-called "10 + 2" requirements. The information is collected for smuggling and security purposes, and it includes the identity of the seller, the buyer, the manufacturer, the party being shipped to, the country of origin, the applicable tariff line, where the container was loaded, and the identity of the consolidator. This information is already being collected on all cargo shipments to the U.S., yet Customs is prohibited from using this information for trade enforcement purposes. By eliminating this needless wall between security and trade enforcement, we could give Customs access to a huge amount of extremely useful information at no extra cost to the tax payer and with no additional burden on importers.

Finally, in this time of acute fiscal pressures, we understand that any request for increased funding is a hard sell. But at Customs, the funds invested bring a concrete revenue return back to the government, and they are thus money well spent. At a minimum, we should ensure that Customs is not being deprived of the appropriations it needs to protect the tariff revenue and to ensure the integrity of our trade remedy laws. The losses due to unpaid duties alone exceed one-and-a-half billion dollars over the past ten years; it is impossible to quantify the additional amounts lost to transshipment, circumvention, misclassification, and other schemes.

I thank the Committee for the opportunity to testify today, and I look forward to working with you on these important issues. I would be happy to take any questions you may have.