

Global Trade & National Security Tax

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Proposed Legislation Aims to Outlaw the First Sale Rule

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In 1992 the Court of Appeals for the Federal Circuit in *Nissho Iwai American Corp. v. United States* established the First Sale Rule by stating that “sale for export” in the valuation statute need not be considered a sale to the importer. Instead, under certain circumstances, it could be a sale between parties further up the supply chain.

Sens. Bill Cassidy, R-La., and Sheldon Whitehouse, D-R.I., have introduced bipartisan legislation called the Last Sale Valuation Act, which, if passed by Congress and signed by President Donald Trump, would make the First Sale program illegal. The two senators have introduced other customs legislation to remove tariff mitigation measures and have succeeded in the past –for example, with the *de minimis* rule.

The Last Sale Valuation Act would specifically define “sale for export” as a sale to the U.S. importer. This change to the statute would effectively overturn *Nissho Iwai* and end the First Sale program.

In 2008, Customs and Border Protection proposed to eliminate the “first sale for exportation” method of valuation. However, importing companies spoke up and were able to defeat the bill. The current America First agenda from the White House will make defeat harder in 2026.

Significantly, this proposed legislation has no scheduled hearings and will need to be voted on in the Senate Finance Committee before being considered by both the House and the Senate before going to the White House. Meanwhile, to mitigate risk, companies should proactively undertake these three steps:

- Check with all the trade associations with which you work, ask for their position on the legislation, and share with them your position.
- Review supply chain and tariff mitigation factors in case the proposed legislation becomes law.
- Even if the proposed legislation does not become law, renewed focus on the First Sale Rule may cause Customs and Border Protection to focus on the audit of First Sale Rule pricing; consider revisiting your historic transfer pricing analysis, particularly the determination of dutiable versus nondutiable costs.

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