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§ 272:50. Business Counselor's Guide to Customs Compliance

**BUSINESS COUNSELOR'S GUIDE TO CUSTOMS COMPLIANCE**

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**§ 1. Introduction**

United States companies increasingly look to foreign vendors as sources for new products that can be sold in the U.S. and for parts and supplies that can be consumed in domestic manufacturing and other business activities. As such, import and customs compliance has now become an important issue that requires attention from management and investment of resources to ensure that U.S. customs laws and regulations are satisfied and imported goods are received on a timely basis. The primary regulatory authority in the U.S. with respect to imports is the United States Customs and Border Protection ("CBP" or "Customs"), which is part of the U.S. Department of Homeland Security. The major responsibility of Customs is administration of the Tariff Act of 1930, as amended.<sup>1</sup> In addition, however, Customs enforces some 400 laws and regulations on international traffic and trade for 40 other government agencies.

The overall mission of Customs includes protecting the nation's revenue by assessing and collecting duties, taxes, and fees incident to international traffic and trade; controlling, regulating, and facilitating the movement of carriers, people, and commodities between the U.S. and other nations; protecting U.S. consumers and the environment against the introduction of hazardous or noxious products into the U.S.; protecting U.S. industry and labor against unfair foreign competition; and detecting, interdicting, and investigating smuggling and other illegal practices aimed at illegally entering narcotics, drugs, contraband or other prohibited articles into the U.S. In addition, Customs is involved with detecting, interdicting, and investigating fraudulent activities intended to avoid the payment of duties, taxes, and fees, or activities meant to evade the legal requirements of international traffic and trade; and for detecting, interdicting, and investigating illegal international trafficking in arms, munitions, currency, and acts of terrorism at U.S. ports of entry.<sup>2</sup>

**§ 2. Customs laws and regulations**

Customs law is actually a complex set of statutes, rules, procedures and regulations that are located in a variety of sources. In addition to the statutes and regulations pertaining to determination and collection of customs duties, there are numerous laws and regulations pertaining to import transactions, particularly those that deal with various aspects of international traffic and trade. Moreover, given that imports present serious and substantial homeland security issues for the U.S., a plethora of restrictions and procedures have been adopted to reduce the risk that terrorists will use U.S. ports to import dangerous and illegal items into the U.S.

The principal source of customs law is Title 19 (Customs Duties) of the U.S. Code and the specific rules and regulations pertaining to customs are set out in Title 19 (Customs Duties) of the Code of Federal Regulations; although, as previously noted, the CBP also administers and enforces some 400 laws and regulations dealing with international traffic and trade for numerous other government agencies. Title 19 sets out the organizational structure of Customs, and provides a statutory basis for the authority of its officers.<sup>3</sup> From time to time, Congress considers and approves supplemental legislation that impacts custom law compliance. For example, in 1993, Congress passed the Customs Modernization and Informed Compliance Act, commonly referred to by import specialists as the “Mod Act,” as part of the North American Free Trade Agreement Implementation Act. The Mod Act laid the foundations for the concepts of “informed compliance” and “shared responsibility” that are now the foundation of best practices for importers and discussed elsewhere in this chapter.

All of the laws and regulations currently enforced by Customs can be accessed at the Customs website. In addition, the Government Printing Office (“GPO”) publishes Customs Regulations of the United States in loose-leaf format and makes it available by subscription. For current information on proposed rules issued by Customs and other agencies relating to customs and other aspects of importing, reference should be made to the Federal Register, which is the official daily publication of rules, proposed rules, and notices of federal agencies and organizations; Executive Orders; and other presidential documents. The Federal Register is available online through GPO Access, which is the main gateway to providing links to government information products on the Web.

### § 3. —Harmonized Tariff Schedule of the United States

The Harmonized Tariff Schedule of the United States (“HTS”),<sup>4</sup> which was adopted in 1989 and is maintained and published by the U.S. International Trade Commission (“ITC”), prescribes the rates of duty and classification of goods by broad product type (e.g., textile products, vegetable products, etc.), information that is then used to determine the dutiable status of goods that are being entered into the U.S. via Customs clearance. The structure of the HTS is based on the International Convention on the Harmonized Commodity Description and Coding System, referred to as the Harmonized System (“HS”) which is administered by the World Customs Organization (“WCO”) in Brussels and establishes a uniform classification system for imports and exports used by over 200 countries and customs unions around the world, including the U.S. The HS serves as a uniform framework for collection of customs duties and trade statistics.

The HS Committee of the WCO, which includes 131 Contracting Parties reviews and revises the legal text of the HS every four to six years to make sure that it remains relevant to changing technology. When these revisions are made and recommended by the WCO they are investigated by the ITC and reviewed by the Office of the United States Trade Representative before being integrated into the HTSUS. The next round of amendments to the HS will enter into force on January 1, 2017, and will include 233 sets of amendments, divided as follows: agricultural sector 85; chemical sector 45; wood sector 13; textile sector 15; base metal sector 6; machinery sector 25; transport sector 18; other sectors 26. Environmental and social issues of global concern are the major feature of the HS 2017 amendments and the majority of these changes were broached by the Food and Agriculture Organization of the United Nations.

The most recent wholesale changes to the HTSUS took effect as of February 3, 2012, and further changes will be made to take into account the HS 2017 amendments. Whenever changes are made they are generally quite extensive and importers must confirm all new HTSUS numbers; update all related product databases, transmission and trade documentation; and review all import transactions to verify that the correct HTSUS is being used. In addition, importers should review any changes to determine how they may affect an item’s eligibility for preferential treatment under the various U.S. Free Trade

Agreements and whether it will be necessary to re-certify Free Trade Eligibility.<sup>5</sup>

The proper scope and meaning of a tariff classification term under the HTS is a question of law, while whether the subject merchandise falls within a particular tariff term as properly construed is a question of fact.<sup>6</sup> Given the inherent difficulty presented by the classification of some types of merchandise—such as difficulty in locating the proper category or in finding more than one category applicable to the merchandise—certain rules, and, of course, a certain amount of litigation, have developed that provides the importer with some guidance in selecting the proper classification. For instance, when the importer is faced with two or more provisions that appear to apply to the same merchandise, the outcome is determined according to the legal notes and the General Rules of Interpretation for the tariff schedule. Additionally, tariff classification principles, found either in administrative precedents or represented by case law (U.S. Court of International Trade or the U.S. Court of Appeals for the Federal Circuit), are important guides to determining the proper tariff classification.

#### **§ 4. —Security requirements**

Importers must pay special attention to the requirements imposed on import activities to protect domestic security. Customs regulations are now part of the broader efforts of the U.S. Government with respect to “Homeland Security,” and the parties to an import transaction must be mindful of a number of new rules, such as the 24-hour rule of the Automated Manifest System (“AMS”) that now requires presentation of the cargo declaration 24 hours before lading of the vessel.<sup>7</sup>

#### **§ 5. —Enforcement and penalties**

The failure to follow customs laws and regulations can result in significant adverse consequences. Customs laws are enforced by special agents within the Office of Enforcement that operate throughout the U.S. and in major trading centers in foreign countries. Customs has a wide variety of sanctions available for use against persons that violate import laws and regulations, including criminal and civil penalties, seizure, and forfeiture and imposition of restrictions on future shipments. For example, when merchandise is released to an importer, it is generally conditionally released under a bond posted by the importer. If these bond conditions are breached, liquidated damages in an amount up to the value of the bond or the value of the merchandise can be assessed. In addition, customs can seize merchandise under various circumstances, including any merchandise that is introduced or attempted to be introduced in the U.S. contrary to law. Customs also has the authority to assess civil penalties in an amount up to the domestic value of the imported merchandise for any material misstatements or omissions or actions in connection with the importation of merchandise into the U.S. Finally, criminal actions may be brought for customs law violations. Customs can, and often does, launch formal investigations against importers. While importers often delegate activities necessary for customs law compliance to third parties, such as customs brokers and other agents, the importer remains ultimately liable for compliance and can be penalized even if the broker or other agent was responsible for the shipment.

#### **§ 6. Import controls**

The U.S. has adopted various controls on the type and volume of imports into the U.S. to address concerns relating to the domestic economy, the preservation of domestic plant and animal life, consumer health and consumer well-being. Specifically, various goods and products, such as textiles, clothing, automobiles, boats, radios, television sets, and medical devices, are subject to special standards, declarations, certification, marking or labeling requirements. In addition, other merchandise may be subject to import quotas or trade restraints or fall under examination requirements to determine fitness of use or potential for contamination. Finally, some products, often broad categories of products, are covered by import restrictions or prohibitions.

Given the policy considerations underlying the definition and use of import controls, and the continuous changes in technology, it can be expected that the controls will change over time and should be continuously monitored by importers as part of their overall import compliance and planning activities. Import controls can present challenging compliance problems

for importers given that many of the restrictions and prohibitions are administered by, and thus require reference to applicable laws and regulations of, federal agencies other than Customs; however, Customs does cooperate with other agencies in the enforcement of these laws and regulations and thus may prohibit entry; limit entry to certain ports; restrict routing, storage or use; or require treatment, labeling or processing as a condition of release.

While the list of items subject to additional important requirements is quite extensive, generally, a license or permit from the responsible agency is necessary to import items falling within any of the following broad classes of articles: alcoholic beverages; animals and animal products; certain drugs; firearms and ammunition; fruits and nuts; meat and meat products; milk, dairy, and cheese products; plants and plant products; poultry and poultry products; petroleum and petroleum products; trademarked articles; or vegetables. Of course, certain items in these categories may also be prohibited altogether from importation. Foreign exporters and U.S. importers should, of course, consult the responsible federal agency for detailed information and guidance, and, moreover, to determine if any changes to these restrictions have occurred. Additional information regarding import requirements can also be found in *Importing into the United States* or by visiting the Customs Web site.

Import prohibitions essentially block the entry of certain goods into the U.S. and may be based on the country of origin, product type, and/or the manufacturing practices associated with the products. For example, the U.S. may prohibit entry of all products from a specific country, illegal narcotics and goods that have been manufactured using convict or child labor. In most cases, prohibited goods will be refused entry at the U.S. border and are subject to seizure by Customs officials.

As the name implies, an import quota controls the quantity of certain types of merchandise that can be imported into the U.S. during a specified period of time. While the majority of import quotas are administered by Customs, the quotas themselves are established and determined by legislation and by directives and proclamations issued from time to time under the authority of specific legislation. In the U.S., quotas can be classified as either "absolute" or "tariff-rate." An absolute tariff imposes quantitative limits on the amount of the product that will be allowed to enter the U.S. during the specified quota period. While some absolute quotas are global, others apply only to specified countries. In either case, imports in excess of the quota must either be re-exported or placed in a bonded warehouse to await entry in a subsequent period. A tariff-rate quota permits importers to enter up to a specified quantity of a product at a reduced rate during the quota period. There is no quantitative limit on the total amount of product that may be entered during the period; however, products in excess of the tariff-rate quota that are entered will be subject to higher duty rates. NAFTA has trade-preference levels which are administered in essentially the same way as tariff-rate quotas.

Finally, certain products may be subject to specific import requirements imposed by different U.S. government agencies, including special requirements with respect to product specifications, testing, certification, labeling, packaging, and documentation. For example, the importation of Cuban cigars or Iranian carpets is subject to certain restrictions. Also, diamonds may not be imported from Angola without a certificate of origin or other documentation that demonstrates to Customs authorities that they were legally imported with the approval of the Angola Government of Unity and National Reconciliation. Imports that fail to satisfy applicable requirements may be refused entry at the border, seized, assessed a monetary penalty or even subjected to a program of forced compliance.

## § 7. Country-of-origin requirements

The "country of origin" is a technical term that extends beyond where an imported product came from; and, in fact, there are approximately 20 different definitions of origin for imported products. Country-of-origin determination is important for many reasons, including access to preferential duty programs under U.S. Customs law or under a trade agreement; import control management vis-a-vis embargoed countries and countries subject to product quotas; notifications to consumers and other end users; statistical reporting; certificate-of-origin issuance; and product marking requirements. Imported products on which there has been an incorrect origin determination or a misrepresentation of origin may be refused entry, seized at the border, assessed a monetary penalty, or subjected to a program of forced compliance.

The default position with respect to country of origin deals primarily with “substantial transformation,” which occurs if the manufacturing process results in a new or different good that has a name, character, and use different from those of its constituent materials. In addition to the default position, however, there are various other origin rules that are applied in the U.S., including rules applicable to certain product categories (e.g., apparel); imports from certain geographical regions (e.g., North American Free Trade Agreement (“NAFTA”) origin rules, Caribbean Basin origin rules) or imports from certain countries (e.g., Israel U.S. Free Trade Agreement and countries designated as beneficiary countries under the Generalized System of Preferences described below).

Importers must be mindful that country-of-origin marking requirements extend beyond the limited set of imported products subject to import prohibitions and quotas. Specifically, the customs laws of the U.S. require that every product produced abroad and then imported into the U.S. be conspicuously (as the nature of the article allows) marked with the English name of the country of origin. Such a marking, which must be legibly, indelibly, and permanently marked, is required so as to provide the “ultimate purchaser” in the U.S. with the name of the country where it originated.

### § 8. Import requirements and procedures

In general, all goods coming into the U.S. must “clear customs” and will be subject to import duties unless a specific exemption applies. Clearance involves a number of steps, including entry of the goods; examination of goods and entry documents; classification and appraisal; and liquidation. Customs clearance can be a challenging process and importers are advised to work closely with their suppliers to take the necessary steps to be sure that all required information is available for delivery to Customs; invoices are carefully and properly prepared; goods are packaged, marked, and labeled in a manner that facilitates easy review by Customs; goods are stored securely; and provisions of any other special laws applicable to the particular goods are satisfied.

### § 9. —Entry of goods

When goods arrive in the U.S. from outside of the country, they must undergo and complete a process of “entry.” The entry process may be analogized to the preparation and filing of a tax return. Its purpose is to provide CBP with the information it needs to assess the “duty” or “tax” required to be paid on a particular item. When importing goods for consumption, the importer or its representative will file an entry package containing required documentation with the appropriate CBP officer to secure the release of imported merchandise from CBP custody and an *ad valorem* user fee is assessed on entries for consumption. Also, required is the filing of an entry summary that includes any other documentation necessary to enable CBP to collect statistical information on imported merchandise, assess duties, and determine whether other requirements of law or regulation are met. The invoice, which often establishes transaction value for purposes of assessment of duties, must be included in the entry package. Filing usually takes place within fifteen working days after the arrival of the goods at the port.

Legal entry of imported goods into the U.S. is not complete until the goods have arrived within the port of entry, the CBP has authorized delivery of the goods, and estimated duties on the goods have been paid. Entry requires the filing of documents needed to determine whether the goods can be released from CBP custody and the filing of documents that provide information needed by the CBP for duty assessment and statistical purposes. To expedite the process, document filings can be completed electronically via the Automated Broker Interface program of the Automated Commercial System. The CBP does not notify importers of the arrival of goods, and notification usually is made by the carrier of the goods. In any event, it is essential that arrangements be made to ensure the importer or its agent is immediately informed of arrival to avoid delays in obtaining the goods.

There are different types of entry, including entry for consumption, which is the most common reason; for warehouse at the

point of arrival; at a port of entry other than the port of arrival after having been transferred in-bond from the port of arrival; quota entry; control entry; informal entry; drawback entry; and foreign trade zone entry. Entry for consumption is used for getting goods into the U.S. and immediately placing them in commerce. The other entries (except quota and informal entries) place specific limitations on the disposition of the goods. Most involve reduced, suspended, or deferred duty treatment where the goods will again be exported from the U.S.

#### **§ 10.—Examination of goods and entry documents**

The next step in the clearance process is an examination of the goods and documents. In general, examination is required to determine the value of the goods for customs purposes and their dutiable status; whether the goods must be marked with their country of origin or require special marking or labeling and, if so, whether the goods are marked in the manner required; whether the shipment contains prohibited articles; whether the goods are correctly invoiced; whether the goods are in excess of the invoiced quantities or a shortage exists; and whether the shipment contains illegal narcotics.

Examination of small shipments or certain classes of goods such as bulk shipments may be made on the docks, at container stations, cargo terminals, or the importer's premises and the goods will then be immediately released to the importer. With respect to other shipments, the port director will designate representative quantities of any shipment for examination by Customs officers under conditions that will safeguard the goods and release the remainder of the shipment. If necessary, the samples may be brought to a Customs laboratory for analysis to determine proper classification and appraisal and whether the goods meet applicable safety requirements and are not otherwise in violation of U.S. laws. The retained samples will eventually be released to the importer following completion of the examination. In order to expedite the inspection and clearance process, importers should ensure that the goods are invoiced in a systematic manner; the exact quantity of each item of goods is shown in each box, bale, case, or other package; marks and numbers are placed on each package; and the marks and numbers are shown on the invoice opposite the itemization of goods contained in the package that bears those marks and numbers.

The Customs officers will determine the quantity of the goods imported, make allowances for shortages under specified conditions and assess duties on any excess goods. In the event that the Customs officers identify a package that contains an article not specified on the invoice, and there is reason to believe the article was omitted from the invoice by fraud, gross negligence, negligence on the part of the seller, shipper, owner, or agent, a monetary penalty may be imposed; or, in some cases, the merchandise may be seized or forfeited. Any goods that are found by Customs officers to be entirely without commercial value at the time of arrival in the U.S. due to damage or deterioration will be treated as a "non-importation" and no duties will be assessed on these goods.

#### **§ 11.—Classification and appraisal**

Classification and, when ad valorem rates of duty are applicable, appraisal (i.e., valuation) are the two most important factors affecting dutiable status. All goods imported into the U.S. are subject to duty or duty-free entry in accordance with their classification under the applicable items in the HTS, which was discussed above. The amount of duty will depend on whether the goods are assessed using ad valorem, specific, or compound rates and will also vary depending on the country of origin. The importer must declare the dutiable value of the goods at the time of entry; however, the final value ("appraisal") will be determined by Customs. Classification and valuation, whether or not they are pertinent because an ad valorem rate of duty applies, must be provided by commercial importers when an entry is filed. In addition, classifications under the statistical suffixes of the tariff schedules must be furnished even though this information is not pertinent to dutiable status. Accordingly, classification is initially the responsibility of an importer, customs broker or other person preparing the entry papers. Importers are required to exercise reasonable care when classifying and appraising merchandise.

#### **§ 12.—Liquidation**

Customs officers at the port of entry or other officials acting on behalf of the port director review selected classifications and valuations, as well as other required import information, for correctness or as a proper basis for appraisement, as well as for agreement of the submitted data with the merchandise actually imported. If necessary, Customs officers will obtain a report of the Customs import specialist as to appraisement of the goods, and the laboratory report, if required. Once all of this review is completed, a final determination of duty is made and the entry is liquidated. Liquidation is the point at which the ascertainment of the rate and amount of duty by Customs becomes final for most purposes. Liquidation is accomplished by posting a notice on a public bulletin board at the customs house. However, an importer may receive an advance notice on Customs Form 4333A "Courtesy Notice" stating when and in what amount duty will be liquidated. This form is not the liquidation, and protest rights do not accrue until the notice is posted. Time limits for protesting do not start until the date of posting, and a protest cannot be filed before liquidation is posted. Effective September 30, 2011, CBP will discontinue mailing paper courtesy notices of liquidations to importers who file entries through the Automated Broker Interface (ABI) system; however, they will receive electronic courtesy notices.

The entry summary and documentation may be accepted as submitted without any changes. In this situation, the entry is liquidated as entered. However, Customs may determine that an entry cannot be liquidated as entered for one reason or another. For example, the tariff classification may not be correct or may not be acceptable because it is not consistent with established and uniform classification practice. If the change required by this determination results in a rate of duty more favorable to an importer, the entry is liquidated accordingly and a refund is authorized for the applicable amount of the deposited estimated duties. On the other hand, a change may be necessary which imposes a higher rate of duty. For example, a claim for an exemption from duty under a free-rate provision or under a conditional exemption may be found to be insufficient for lack of the required supporting documentation. In this situation, the importer will be given an advance notice of the proposed duty rate increase and an opportunity to validate the claim for a free rate or more favorable rate of duty. If the importer does not respond to the notice, or if the response is found to be without merit, entry is liquidated in accordance with the entry as corrected, and the importer is billed for the additional duty.

An importer or consignee may, within 90 days after the date of liquidation or other decision, protest the decision and apply for an administrative review on Customs Form 19. The initial protest must be filed with the port director whose decision is being protested, and the importer or consignee must also make a request for further review at that time if one is desired. Review of the port director's decision by the Customs Service Center or Headquarters is then automatic, and notice of the denial of all or part of the protest will be mailed to the person filing the protest or to his or her agent. Any person whose protest has been denied may contest the denial by filing a civil action in the U.S. Court of International Trade within 180 days after denial of the protest. The rules of the court and other applicable statutes and precedents determine the course of customs litigation. While the ascertainment of dutiable status by Customs is final for most purposes at the time of liquidation, liquidation is not final until any protest which has been filed against it has been decided. Similarly, the administrative decision issued on a protest is not final until any litigation filed against it has become final.

The obligation for payment of duty is upon the person or firm in whose name the entry is filed. When goods have been entered for warehouse, liability for paying duties may be transferred to any person who purchases the goods and desires to withdraw them in his or her own name. There is no provision under which duties may be prepaid in a foreign country before the goods are exported to the U.S. When using a customs broker, importers should give the broker a separate check, made payable to "U.S. Customs Service" for those customs charges, which the broker will then deliver to Customs. However, paying a customs broker will not relieve the importer of liability for customs charges (duties, taxes, and other debts owed Customs) should those charges not be paid by the broker. If the entry is made in the name of a customs broker, the broker may obtain relief from statutory liability for the payment of increased or additional duties found due if: (1) the actual owner of goods is named, and (2) the owner's declaration whereby the owner agrees to pay the additional duty and the owner's bond are both filed by the broker with the port director within 90 days of the date of entry.

### § 13. Records and record keeping requirements

Every importer, consignee, entry filer or other person who imports merchandise into the customs territory of the U.S. or files

a drawback claim must be mindful of the importance of maintaining full and adequate records of import transactions. In fact, importers are under a duty to exercise “reasonable care” to ensure that they are in compliance with Customs’s recordkeeping rules and regulations and able to present all requested records to Customs officials upon demand. Amendments made to the Tariff Act at the time that NAFTA became effective established a comprehensive set of recordkeeping regulations for importers, including expansion of the class of parties subject to the requirements and broadening of the definition of “records” to include electronically generated or machine-readable data.

The recordkeeping requirements, which can be found in [19 C.F.R. §§ 163.0 to 163.13](#), are considered to be a fair tradeoff for amendments made to the customs laws that permit Customs agents to reduce the document filing burden on importers at the time of entry by permitting merchandise to be entered with presentation of certain documentation or information at that time. While this allows merchandise to move quickly and smoothly into the stream of commerce, Customs needs to retain the ability to obtain and examine entry records at a later date. Importers and other parties subject to the recordkeeping requirements may be subject to severe monetary penalties for infractions, including failure to comply with a demand by Customs for just one required entry document.

As a general rule, records will need to be maintained for five years from the date of entry. Records relating to activities other than entry need to be maintained for a period of five years from the date of the activity that led to the creation of the record.

#### **§ 14. Principle of “informed compliance”**

Customs has developed the principle of “informed compliance,” which it defines as a shared responsibility between Customs and the import community wherein Customs effectively communicates its requirements to the trade, and the people and businesses subject to those requirements voluntarily conduct their regulated activities in accordance with U.S. laws and regulations. One of the key components of informed compliance is that importers are expected to exercise “reasonable care” in their importing operations. What constitutes reasonable care with respect to a particular import transaction cannot be determined with certainty since the facts and circumstances are never identical; however, Customs has developed a set of questions that importers are encouraged to use to avoid compliance problems and to meet their responsibilities with respect to reasonable care.

The documentation for each import transaction must be carefully reviewed to ensure that it is full, complete, and accurate. If the review is done in-house, the party completing the review must be responsible and knowledgeable about all applicable requirements and the details of the specific transaction. If the documentation is being prepared by an outside expert, the company must be sure it has provided the expert with complete and accurate information regarding the transaction and that a responsible person within the company will have an opportunity to review the documents before they are submitted to Customs. In addition, if the documentation is submitted to Customs by an outside expert, the company must have a reliable method for obtaining and reviewing copies of the submitted information and making sure that any mistakes or omissions are corrected in a timely fashion.

Companies involved in substantial volumes of import activities are advised to develop and use an import compliance manual that sets out internal import compliance procedures and the day-to-day responsibilities of parties within the organization. In addition, the compliance manual should address import controls, entry procedures and recordkeeping requirements. While there is a great deal of published information available with respect to compliance with Customs requirements relating to imports, smaller companies just getting involved with importing activities should seriously consider retaining an expert to assist with compliance until the company has sufficient experience and resources to create its own in-house import department or unit. Customs brokers and consultants can provide invaluable guidance on almost every issue that might arise, and additional assistance may be available from attorneys and accountants with specific experience in the area. If the company is not able or willing to retain outside experts, it must nonetheless be sure it has access to all of the information necessary to establish reliable procedures and facilitate compliance with Customs laws and regulations. For example, the company should have a copy of the Customs Regulations, the HTS, and the Customs Bulletin and Decisions and should also

have access to all of the information available at the Customs website.

### § 15. Compliance assessments

Amendments to the Customs laws in the 1990s shifted responsibility for maintaining compliance with import laws and regulations from Customs to importers. While this enabled Customs to speed entry of imported goods into the U.S., it also required a mechanism that would allow Customs to monitor the status of import compliance and to gather data that could be used to prepare and publish its annual import compliance report. To allow Customs to fulfill its obligations, it was vested with the authority to conduct compliance assessments, which are a systematic evaluation of an importer's systems supporting its Customs-related operations. In general, the assessment will include tests of import and financial transactions, reviews of the adequacy of the importer's internal controls, and a determination of the importer's compliance levels in key areas such as record keeping; merchandise classification/trade statistics; merchandise quantities; antidumping/countervailing duty operations; quota conformity; merchandise value; warehouse or foreign trade zone operations; merchandise transshipment; and the special trade programs discussed above.

Customs has performed compliance assessment reviews of selected importers for a number of years as part of its "informed compliance" strategy. For example, under the Focused Assessment ("FA") program Customs has the ability to conduct assessments on a random basis; however, Customs tends to focus its efforts on high volume importers. By law, Customs is required to provide importers with advance notice of an intended assessment and an estimate of its duration. A focused assessment is conducted by Customs' Regulatory Audit Division ("RAD"). Each assessment is conducted by an interdisciplinary team composed of a Customs auditor, import specialist, account manager, industry expert (highly knowledgeable of the electronics or auto parts or surgical equipment industries, for example), and possibly other Customs specialists (attorney, inspector, scientist).

Prior to an assessment, importers are entitled to an entry conference, at which time the purpose of the assessment will be discussed and the assessment team will distribute questionnaires regarding the specific information that is needed regarding the importer's internal procedures. When performing the assessment, the compliance team is required to use professionally accepted statistical sampling and auditing techniques to review selected import transactions from the company's previous fiscal year. The first part of any assessment is an evaluation of the risk of non-compliance by the importer with importer requirements. In contrast to previous compliance assessment review programs, this phase does not generate a compliance pass/fail rate; however, if the audit team finds that the importer presents an "unacceptable risk," the importer will then be subject to a much more comprehensive Assessment Compliance Testing ("ACT") phase. During any ACT review, the audit team will be focusing on trying to determine the amount of revenues lost by Customs as a result of the importer's failure to comply with applicable laws and requirements.

Once the assessment is completed, a closing conference will be schedule to present and explain the preliminary findings of the compliance team. Companies found in compliance with Customs laws and regulations will get a report stating that fact. If serious enforcement issues have been uncovered, a report will be provided to the company, and the company will be asked to formulate, in cooperation with Customs advisors, a compliance improvement plan specifying corrective actions the company will take to increase compliance levels. Serious violations of law or regulation may result in Customs referring the company for a formal investigation or other enforcement actions. Companies subject to an assessment can generally avoid costly penalties for non-compliance by demonstrating that they have acted with reasonable care, which requires proof of good faith efforts to achieve and maintain compliance with import laws and regulations. The Importer Audit/Compliance Assessment Team Kit (also called the CAT Kit), which provides extensive details of the assessment procedure, can be found at the Customs website, or by calling a local Customs Regulatory Audit Division office.

### § 16. Customs-Trade Partnership Against Terrorism ("C-TPAT")

The Customs-Trade Partnership Against Terrorism ("C-TPAT") is a joint government-business initiative to build cooperative

relationships that strengthen overall supply chain and border security. The premise of the program is that Customs can provide the highest level of security only through close cooperation with all parties in the supply chain, including importers, carriers, brokers, warehouse operators and manufacturers. C-TPAT is currently open to all importers and carriers (air, rail, sea), and it is anticipated that enrollment will eventually be available to a broader spectrum of the trade community, including all sectors of the supply chain. The latest information on eligibility and application is available on the Customs website. Participation in C-TPAT is based on an application process, and applicants must submit signed agreements to Customs evidencing their commitment to conduct a comprehensive self-assessment of supply chain security using the C-TPAT security guidelines jointly developed by Customs and the trade community; submit a supply chain security profile questionnaire to Customs; develop and implement a program to enhance security throughout the supply chain in accordance with C-TPAT guidelines; and communicate C-TPAT guidelines to other companies in the supply chain and work toward building the guidelines into relationships with those companies.

The security guidelines are available for review on the Customs website and cover the following areas: Procedural Security, Physical Security, Personnel Security, Education and Training, Access Controls, Manifest Procedures, and Conveyance Security. Participants must complete and submit the supply chain security profile questionnaire at the same time they submit their signed agreements or within a specified time thereafter. Among other things, the questionnaire should outline the process elements of the security procedures that the participant currently has in place, including facilities security, shipping and receiving controls, information security controls, personnel security, and service provider requirements. Participants are also asked to include an assessment of their security processes and information on what changes are envisioned to correct identified weaknesses. Finally, participants must indicate that specific detailed procedures relating to security are available to Customs in a verifiable format at an identified location. Complete instructions for completion of the application process are available on the Customs website. Customs aims to complete the evaluation of new applications within 30 to 60 days after the supply chain security questionnaire has been submitted.

While participation in C-TPAT is voluntary, Customs has made it clear that there will be several tangible benefits to C-TPAT members, including a reduced number of inspections (i.e., reduced border times), an assigned account manager, access to the C-TPAT membership list, and eligibility for account-based processes (e.g., bimonthly/monthly payments). Once admitted to the program, participants will be contacted by account managers to begin joint work on establishing or updating account action plans to reflect C-TPAT commitments. These action plans will track participants' progress in making security improvements, communicating C-TPAT guidelines to business partners, and establishing improved security relationships with other companies. If a participant fails to meet its C-TPAT commitments, the benefits of C-TPAT will be suspended; however, those benefits will be reinstated upon correction of identified deficiencies in compliance and/or security.

### **§ 17. Importer Self-Assessment**

Importer Self-Assessment ("ISA") is a relatively new, and voluntary, program that provides qualified importers with the opportunity to assume responsibilities for self-assessment of their Customs compliance activities in exchange for less formal oversight by Customs. Participation in the program allows importers to avoid Customs audits, reduce the danger of costly delays for government inspections and realize competitive advantages through stronger internal controls and the ability to access the other benefits of ISA. In turn, importers electing not to participate in ISA may actually experience more inspections by Customs, port-clearance delays of their imports, reprioritization of imports, and low-priority processing of their imports during port closures.

To be eligible for ISA, an importer must be a member of the C-TPAT described above, must be a resident importer in the U.S., and must have two years of importing experience prior to the date the importer applies to the program. In addition, the importer must complete an ISA Memorandum of Understanding ("MOU") and Questionnaire, both of which are available on the Custom website with instructions. The MOU is an agreement between Customs and the importer that establishes their respective roles and responsibilities and the Questionnaire covers the importer's current and anticipated efforts with respect to implementation of the key internal controls considered necessary for Customs compliance. In addition, the importer must be prepared to implement a control framework based on Statement of Accounting Standards 78 ("Consideration of Internal

Control in a Financial Statement Audit: An Amendment to Statement of Auditing Standards No. 55”) (“SAS 78”) and maintain a sustainable audit trail from accounting records to import entries. This commitment should be evidenced by the development and submission of an ISA work plan that details the importer’s plans with respect to monitoring and periodic testing of the its internal controls system.

Other specific requirements of the ISA include the following:

- Agree to comply with all applicable Customs laws and regulations;
- Maintain an internal control system that demonstrates the accuracy of Customs transactions;
- Establish, document, and implement internal controls;
- Perform periodic testing of transactions based on risk;
- Maintain results of testing for three years and make test information available to Customs on request;
- Make appropriate adjustments to internal controls;
- Maintain an audit trail from financial records to Customs declarations; or, an alternate system that ensures accurate values are reported to Customs;
- Submit appropriate disclosures to Customs upon completion of company reviews;
- Submit an annual written notification to Customs to confirm the identity of the company ISA contact and confirm that the importer continues to meet the requirements of the ISA program as listed in the MOU; and
- Notify Customs of major organizational changes as soon as possible.

The importer may meet the requirements of the ISA program by using internal resources or using an objective third party exercising due diligence and reasonable care. Importers considering participation in ISA must demonstrate both upper-management support for the program and corresponding internal controls and commitment to an appropriate organizational infrastructure, including a dedicated department responsible for customs compliance. The support and involvement of upper management is necessary because compliance will require communication and cooperation among a diverse range of business units and functional groups, including legal, accounting, finance, shipping/receiving, transportation/logistics, procurement, and security. In addition, most companies find that it is necessary to supplement internal resources with outside auditors and accountants and other independent specialists that can assist the importer in creating and effectively using the policies and controls associated with ISA. All of the groups referred to above should begin working together from the outset and most candidates for ISA find that it is best to involve personnel from accounting, finance, purchasing and other departments in preparation of the ISA application.

Customs developed the Importer Self-Assessment Handbook, which is available on Customs’ website at <http://www.cbp.gov/document/forms/importer-self-assessment-handbook>, to provide information about the benefits and requirements of the ISA program and the steps that importers need to take in order to apply for the ISA program. The

appendices to the Handbook include a template for the Memorandum of Understanding (“MOU”) that applicants for the ISA Program must file with Customs along with an ISA Questionnaire that is required to determine if the importer has documented and implemented controls over its customs-related processes. The MOU outlines importer and Customs responsibilities and identifies the company entities that will be covered by the MOU. The Handbook also includes an extensive guide to assist large or complex companies in developing adequate internal controls. Smaller importers that do not have complex organizational structures or complex Customs operations should consider consulting the “Guidance for Developing Internal Controls” (also an appendix in the Handbook), which is a briefer explanation of components that should be part of an internal control program that may be more appropriate for a small importer.

### **§ 18. Customs’ protection of intellectual property rights**

Customs maintains an intellectual property rights enforcement program that targets, intercepts, detains, seizes, and obtains the forfeiture of shipments of goods that violate intellectual property rights. To take full advantage of this program, registered trademark and copyright holders should first “record” their trademarks and copyrights with Customs. “Recording” is the process whereby Customs takes the information that it receives from trademark and copyright owners concerning their specific trademarks and copyrights and enters that information into an electronic database. This database is accessed by Customs officers to check shipments of goods coming into and going out of the country, so as to prevent infringing goods from entering or leaving the country. Recording with Customs can be done either on paper or electronically and requires payments of a recordation fee specified by statute. A separate application is required for each item to be recorded. In order to assist applicants in understanding Customs protection for trademarks, trade names, and copyrights, Customs has issued directives on Customs policies and procedures dealing with trademark and trade name protection and copyright protection. In addition, reference should be made to another useful Customs publication dealing with enforcement of intellectual property rights, *What Every Member of the Trade Community Should Know About CBP Enforcement of Intellectual Property Rights*, which is available at the Customs website (see <http://www.cbp.gov/trade/rulings/directives-handbooks>).

### **§ 19. Import and customs law compliance policies and procedures**

The starting point for any import and customs law compliance program is the creation, adoption, and enforcement of compliance policies and procedures. A variety of drafting approaches can be taken and many companies begin with a basic policy relating to compliance with laws and regulations governing the entry of goods in to the U.S., with special emphasis on steps that need to be taken to comply with U.S. customs laws by preparing and filing appropriate documents, making sure that all applicable tariffs and duties are paid, and keeping all required records pertaining to importing activities. A more comprehensive policy might begin with an overall statement of the company’s policy intent, namely its broad commitment to complying with all applicable import laws, including customs and product/country of origin marking laws, in all countries in which the company does business, and then go on to discuss specific elements of the company’s compliance program and provide guidance to employees and other covered parties (e.g., outside business partners) about how to obtain information on compliance from the company’s trade and legal departments. General policies are typically supported by additional policies and tools that address common situations that the company faces in complying with import and customs laws such as cargo security procedures and country of origin marking and labeling requirements.

Managers responsible for administering the compliance policies should be familiar with the directives and other publications distributed by Customs and the Harmonized Tariff Schedule that will determine how imported goods are classified so that tariffs on those goods can be established. Policies and procedures should address all of the important issues surrounding any entry of goods into the U.S., including inspection and clearance of carriers, persons, and merchandise; classification and valuation of imported goods; assessment and collection of duties on imported goods; and compliance with country of origin marking requirements. Training programs should also be established to ensure that responsible employees are able to prepare all of the documents required for entry.

### **§ 20. Trade programs and agreements**

The U.S. has established a number of programs, as well as bilateral and regional trade agreements, that create opportunities to import goods from certain countries on a duty-free basis or at reduced rates. For example, the U.S. offers duty preferences to certain developing countries under the Generalized System of Preferences (“GSP”). Similarly, many products of Caribbean and Andean countries are exempt from duty under the Caribbean Basin Initiative, Caribbean Basin Trade Partnership Act, Andean Trade Preference Act, and the Andean Trade Promotion and Drug Eradication Act; the African Growth and Opportunity Act provides similar exemptions for many products of certain sub-Saharan African countries. In addition, the U.S. has been pursuing a constantly expanding network of bilateral free trade agreements with various countries that would provide for duty preferences for many products imported from those trading partners. Finally, the North American Free Trade Agreement, which went into effect in 1994, is the most well-known example of regional trade initiatives, which have become an important part of U.S. trade strategy. In the past, regional trade agreements have included those mentioned above as well as the African Growth and Opportunity Act and the Compact of Free Association and promise to be expanded to cover much larger regions such as the entire Western Hemisphere (i.e., the “Free Trade Area of the Americas”), the Middle East and large parts of Asia.

The Office of the United States Trade Representative (“USTR”) is primarily responsible for negotiation and consummation of bilateral and regional trade agreements involving the U.S. and also speaks for the U.S. in global trade discussions within the boundaries of the World Trade Organization. The Congress has provided the president with the authority to negotiate, through the USTR, trade-related treaties and agreements; however, once any such treaty or agreement is signed by the president, it must then be considered and approved by the Congress in order to take effect. The treaties and agreements mentioned in the text above are just a sampling of the activities in this area, and international traders should regularly review the information on current and proposed trade initiatives that is available through the website of the USTR (<https://ustr.gov/>). The website also includes a useful side-by-side comparison of Free Trade Agreements and selected preferential trade legislation programs that is updated annually.

### § 21. Duty saving options

The customs laws include a number of programs that can be used by importers to avoid or delay the payment of duties or reduce the amount of the duties that would otherwise be payable with respect to a particular shipment. For example, materials can be imported into special warehouses where they can be legally processed in a manner that reduces the duties payable when the goods are finally ready for entry into the U.S. In addition, duties can be avoided by importing goods in foreign trade zones. Importers can also use duty drawbacks to obtain a refund of duties previously paid on goods that are entered and then subsequently re-exported or destroyed. However, each of these duty-saving options requires careful advance planning and recordkeeping, as well as strict adherence to customs regulations to avoid imposition of substantial penalties.

### § 22. Customs’ resources for importers

The Customs website includes general explanations of basic import requirements. In addition, Customs regularly updates and revises a publication called *Importing into the United States: A Guide for Commercial Importers (Importing Guide)*. The *Importing Guide*, which is written with the new importer in mind, is an extremely useful Customs resource and provides the importer with a “nuts-and-bolts” guidebook to the importing process. It contains a great deal of general and specific information concerning basic import requirements, including lists of quotas and other restrictions on a variety of generic merchandise. A more succinct, but still very helpful, pamphlet on importing is also published by Customs is *United States Import Requirements*. This Customs resource offers only very general explanations of basic import requirements. It does, nevertheless, contain a number of references to other relevant Customs publications or sources for obtaining additional information.

The Customs website includes a comprehensive library of directives and handbooks on a wide array of topics of interest to importers including the Electronic Invoice Program, intellectual property protection, quotas, broker management, entry compliance procedures and bonds. In addition, *Customs Bulletin and Decisions*, published weekly by Customs, is a weekly compilation of decisions, rulings, regulations, notices, and abstracts concerning Customs and related matters of Customs,

U.S. Court of Appeals for the Federal Circuit, and U.S. Court of International Trade. Customs' website also includes an extensive collection of ruling requests and responses and instructions that importers can follow in order to transmit a ruling request to Customs. Finally, Customs is dedicated to providing the public with relevant information concerning the trade community's responsibilities and rights under customs and related laws and to that end has prepared a substantial number of informed compliance publications in the *What Every Member of the Trade Community Should Know About* series on topics such as value, classification, entry procedures, determination of country of origin, marking requirements, intellectual property rights, record keeping, drawback, penalties, and liquidated damages.

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#### Footnotes

- \* Alan S. Gutterman is the founder and director of the Business Counselor Institute ([www.businesscounselorinstitute.org](http://www.businesscounselorinstitute.org)) and the Growth-Oriented Entrepreneurship Project ([www.growthentrepreneurship.org](http://www.growthentrepreneurship.org)). He received his A.B., M.B.A., and J.D. from the University of California at Berkeley, a D.B.A. from Golden Gate University and a Ph.D. in Law from the University of Cambridge in the United Kingdom. For more information about Alan, see <https://www.linkedin.com/in/alangutterman> and/or contact him at [agutterman@alangutterman.com](mailto:agutterman@alangutterman.com).
- <sup>1</sup> See 19 U.S.C.A. §§ 1304 et seq.
- <sup>2</sup> While the CBP has responsibility for overall enforcement of entry laws, specific questions regarding particular types of commodities may need to be addressed to other federal regulatory agencies. For example, importers should contact the Food and Drug Administration ("FDA") regarding issues relating to imports of products regulated by the FDA. Other federal agencies may be involved with imports of alcohol, tobacco, firearms, wildlife products (e.g., furs, skins and shells), motor vehicles, and other regulated products and merchandise.
- <sup>3</sup> Further information concerning the organizational structure of Customs can be found at the Customs Web site <http://www.cbp.gov/>, which also provides for download a helpful Customs Organizational Chart (<http://www.cbp.gov/document/publications/cbp-organization-chart>).
- <sup>4</sup> 19 U.S.C.A. § 1202.
- <sup>5</sup> The most recent online version of the HTS may be viewed and downloaded from the ITC web site at <https://www.usitc.gov/tata/hts/bychapter/index.htm> and the HTS may also be purchased in print form from the GPO. The ITC has also released *A Guide to the Harmonized Tariff Schedule of the United States*, a web-based, interactive e-learning module to help users become familiar with and learn how to read the HTS.
- <sup>6</sup> *Estee Lauder, Inc. v. U.S.*, 815 F. Supp. 2d 1287 (Ct. Int'l Trade 2012), dismissed, 470 Fed. Appx. 899 (Fed. Cir. 2012).
- <sup>7</sup> For further information on security issues and requirements, see the website of the Customs Small Business Program at [www.cbp.gov](http://www.cbp.gov).

The **Business Counselor Institute** creates, maintains and distributes a comprehensive portfolio of practical and timely legal and business information for legal professionals and their clients in a variety of formats including books; online infobases, such as the Business Counselor page on Westlaw Next; in-person and online programs and seminars; and newsletters, guides and working papers. In addition, training services are available to businesses of all sizes around the world through relationships with affiliated parties such as West LegalEd Center and news and updated practical information of interest to business counselors and their clients is regularly distributed through the Business Counselor Blog, blogs and e-magazines published by Thomson Reuters Legal Solutions and various social media outlets.

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