

CUSTOMS COMMERCIAL COMPLIANCE IN THE SECURITY AGE*

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During the decade following enactment of the Customs Modernization Act in 1993, the United States Customs Service-now operating as the Bureau of Customs and Border Protection (CBP) in the Department of Homeland Security-made significant efforts to address commercial compliance issues. The change in legal responsibility under the Act which requires importers to use “reasonable care” became the basis for Customs “Informed Compliance” programs. The use of risk management procedures and targeting analysis substantially changed prior Customs practice. Compliance Assessments, Compliance Measurement, Account Management, new recordkeeping and drawback compliance programs, and numerous other initiatives brought home to the trade community the attention placed by Customs on compliance with all relevant laws and regulations. Many large companies developed or expanded existing Customs compliance departments, and the attention paid to these issues at higher corporate levels was greatly increased.¹

Security Becomes Primary Mission

Immediately following the events of September 11th, Custom's mission was significantly changed. Newly appointed Commissioner Robert C. Bonner made clear that cargo and border security was now the primary mission of the Customs Service.² Customs began applying its risk management knowledge to cargo issues, and quickly implemented programs such as the Container Security Initiative (CSI) and the Customs Trade Partnership Against Terrorism (C-TPAT). Many Customs personnel were shifted, or at least cross trained, from traditional commercial compliance roles to inspectional and security roles.³

On March 1, 2003, after 213 years as part of the Treasury Department, the Customs Service was transferred to the new Department of Homeland Security. Customs was also reorganized and combined with several other agencies. The Customs Agency Service (fraud and criminal enforcement), Air and Marine Interdiction Service, and the investigative and enforcement branches of the Immigration and Naturalization Service became part of the new Bureau of Customs and Immigration Enforcement. The primary commercial functions of the Customs Service, including entry, inspection, and duty assessment, as well as the new security activities, were transferred, along with the border inspection portion of the Immigration and Naturalization Service, the Border Patrol

and the Animal and Plant Health Inspection Service (APHIS) of the Agriculture Department, into the Bureau of Customs and Border Protection (CBP). This integrated operation intends to provide “one face at the border” for all entry and clearance issues for both people and cargo. During the first months of its existence, large amounts of the agency’s efforts were of necessity directed toward integration and reorganization, further depleting the number of personnel available for commercial enforcement. The move to Homeland Security also brought an increased budget for the security inspectional level, with a significant number of new employees.

Through all of this change and reorganization, however, “legacy” Customs has not lost its focus on the importance of international trade to the US economy and its economic well being. Recent statements regarding the primary security emphasis by Customs have included language affirming the agency’s intent to facilitate the movement of legitimate trade.^{iv} There has also been a commitment to maintain the number of Import Specialists, who are essential to the agency’s commercial compliance operations.

Commercial Compliance Efforts Continue

Despite the current and continuing emphasis on security, Customs has expended a great deal of effort and developed substantial expertise in the areas of commercial compliance and trade facilitation. CBP continues to push forward the development of the Automated Commercial Environment (ACE) which will increase the flexibility of Customs filings for importers and allow companies to deal with Customs on a basis more consistent with their routine commercial operations. It will also provide substantial information resources both for importers and the government to allow for timely analysis, and to make required corrections and modifications.

Customs has significantly expanded the Account Management program, largely by assigning Account Managers to major C-TPAT participants. While the C-TPAT program itself is a security program, the Account Managers functions go well beyond security, and cover many areas of commercial compliance and facilitation. Customs is also continuing the Focused Assessment program, in which audit teams conduct evaluations of importers with regard to the level of

compliance with all import requirements, making recommendations for improvements where required, and quantifying areas in which violations are involved. A recently revised and relaunched Importer Self Assessment (ISA) Program permits importers to conduct their own audit reviews, on a formalized basis, with certain benefits available to participants in return for their efforts in self policing.^v It seems clear that Customs, in its new incarnation in Customs and Border Protection, will not be able to devote the amount of resources and high personnel level involvement to commercial compliance and enforcement issues that were common through the 1990s. Nonetheless, Customs retains significant knowledge and expertise gained during that period, has numerous programs and procedures in operation, is committed to continuation of the corps of Import Specialists, and continues to understand the importance of compliance at all levels-commercial as well as security-in import operations. Changes in emphasis and new procedures and programs are certain; Customs attention to commercial compliance issues, however, is also inevitable.

Every company which is dependent upon imports or exports for its operation, whether for

parts and components or for finished goods or commodities, must recognize the necessity of meeting at least minimal levels of Customs requirements for both security and commercial compliance. Customs issues extend far beyond the basic calculation and payment of duties and fees. Origin and documentation issues, other government agency controls enforced by Customs, and, increasingly, supply chain security matters can lead to action by CBP. Stopping a single shipment required in a timed inventory supply chain can halt an entire manufacturing operation. Delay of promised deliveries to customers can cause significant losses, including cancellation of orders. Customs investigations and reviews can eat up large amounts of time and effort on the part of the company being reviewed, and Customs continues to have significant penalty authority in connection with violations.

Expected Levels of Staffing and Knowledge

CBP will give priority and, in many ways, special treatment to those companies which participate in security and commercial compliance programs, and demonstrate a commitment to “do

things right.” A good starting place for information is on Customs website, www.cbp.gov, under the Importer Self Assessment page. A list of “best practices” for compliant companies, and the five components of effective internal control programs, are set forth. The website also contains a great deal of information about the many programs and activities developed by Customs.

Customs experience over the last decade has found that most large companies (large, by Customs standards, means about \$75 million or more of imports (Customs value) annually), and mid-sized companies (\$10 million to \$75 million in annual imports) in sensitive or import document intensive industries such as apparel and footwear, automobile parts, electronics, and steel, have Customs managers knowledgeable about the import issues for their industry. At some companies, this may involve a full Department, with one or more licensed Customs house brokers on staff, dedicated to entry and compliance issues. At smaller companies, this may be a part time function of traffic or logistics departments. There are no set or established requirements, but Customs, through observation of importers and its various evaluation programs, has come to expect certain

sizes and types of companies to have fairly defined levels of personnel and expertise in this area.

It is possible for firms to outsource some or most of the needed services and expertise, through the use of Customs brokers, Customs attorneys, consultants and similar suppliers. Because Customs nevertheless holds the importer primarily responsible for compliance matters, it expects the companies to have sufficient levels of knowledge, expertise and oversight to insure that outside suppliers are properly performing their functions. During the next decade, it is important for every importing company to evaluate its Customs exposure, the potential costs of delays or other problems, and its obligation in national security areas. Companies which fail to provide adequate security and commercial compliance mechanisms will continue to be at risk for delays, investigations, penalties, and the related costs of Customs enforcement activity.

Endnotes

1. These and related concepts are discussed in previous articles in this series in Corporate Counsel's International Advisor: "Compliance Assessments and Customs Audits", Issue No. 140, January 1997; "US Customs Commercial Compliance Measurement Program and its Effect on Cargo Inspections", Issue No. 144, May 1997; "Customs Compliance Strategies for the Corporate Environment", Issue No. 149, October 1997; "Expansion of the Account Manager Program Emphasizes Customs Account Processing Approach", Issue Number 161, October, 1998; and "Customs Recordkeeping Requirements for Non-Importers", Issue Number 179, April 2000. All articles can be accessed on www.swbakerlaw.com.
2. Remarks at the 2001 Customs Trade Symposium, just weeks after the destruction of the New York Customhouse on 9/11.
3. See "Customs Risk Management Program Responds to Security Needs", Issue No. 204, May 2002.
4. "This includes making sure that as we increase security, we do not stifle the flow of legitimate trade and travel that is so important to our nation's economy." Commissioner Robert C. Bonner, remarks at the 2003 Liner CEO Forum, April 1, 2003.
5. CBP has advised that some 300-400 companies have been selected for Focused Assessments during the upcoming fiscal year. In order to avoid such audits, a company can join the Importer Self-Assessment Program-but only if the company is already a member of the C-TPAT security program.

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