

Customs Compliance Strategies for the Corporate Environment\*  
Steven W. Baker\*\*

U.S. Customs is stepping up its efforts to ensure that all imported goods enter the United States in compliance with all U.S. rules and regulations. The recently released (February 1997) document entitled "Trade Compliance Implementation" states that trade compliance is a "core business process" for Customs, with primary goals "to maximize compliance with U.S. trade laws while facilitating the importation of legitimate cargo."

The trade-compliance process involves several compliance systems, including Compliance Assessments and Compliance Measurement. These were previously discussed in articles titled "Compliance assessments and Customs Audits," *Corporate Counsel's International Adviser*, Issue No. 140, January 1, 1997; and "U.S. Customs Commercial Compliance Measurement Program and Its Effect on Cargo Inspections," Issue No. 144, May 1, 1997.

The Compliance Implementation plan extends the emphasis on "big players," and carries the national focus a step further to include Local Port Initiatives. "Big players" are companies that, because of their size and value of importations, are capable of having a significant effect on compliance levels within an industry. These include the "top 1000" overall importers (by Customs value), which account for over 61 percent of the value of all imports. In addition, the top 250 importers in each of the primary focus industries, even if not in the top 1000 overall, are included. (The primary focus industries are Advanced Displays, Automobiles/Automobile Parts, Critical Components, Production Equipment, Steel, Telecommunications, and Textiles/Footwear.)

These "big players" are being approached by Customs on an "account" basis, with emphasis on the overall interaction between the company and the Customs Service, rather than on the transaction-by-transaction basis used in the past. After completing a Compliance Assessment, a company may be assigned an "account manager." This manager is a Customs employee assigned as a primary contact between the importer and the Customs Service on a national basis. The account manager is not a decision maker (still the responsibility of Import Specialists, Inspectors, etc.), but a coordinator and partner in efforts to increase and maintain compliance.

A company that successfully completes a Compliance Assessment and has good Compliance Measurement results will benefit from reduced Customs inspections, lower documentation burdens, increased uniformity through the account-based approach, and possible future benefits such as reduced bond amounts. The highest level of compliance finding will only be made for companies which have adequate internal controls - a corporate Customs compliance program - sufficient to assure Customs of continued future high compliance levels.

Customs has also identified a "second tier" of importer, with annual imports of \$10 million or more but less than the "big player" which exceeds \$75 million. A prototype program to assign account managers from local port offices to companies at this level has begun. Once fully implemented, these local account managers (Import Specialists or other officials taking on an

additional responsibility) will be assigned based on areas of competence and geographic location of importers (or their primary ports of entry). A new analytical tool, the Customs Automated Port Profile System (CAPPs) has been developed to provide individual ports with detailed analysis of import volumes and compliance rates, at the port and national level, both by industry (HTS number) and by account.

Account processing, at both national and port levels, will intensify the emphasis on internal compliance programs maintained by each importer account. Customs has identified a number of criteria that are reviewed to determine the adequacy of individual programs. These include the location of responsibility (e.g., legal or finance department as opposed to traffic), the reporting level (corporate officer or equivalent), the comprehensiveness of the program (only at the import level, or extending to procurement, finance, engineering, product development, etc.), continuity (how much does the program depend upon the continued health/employment of one or two key individuals), and the existence of internal review procedures (updating, training, discovery, and disclosure of noncompliant activities). A compliance program must have provisions to deal with all major Customs issues, including classification, value, currency exchange, assists, country of origin, product marking, quota, IPR issues, record keeping, other agency compliance, and special trade issues such as antidumping and countervailing duties.

Customs looks for a set of detailed written procedures, describing both the overall compliance strategy and the specific day-to-day responsibilities and activities which must be performed. The use of Customs "experts" including internal Customs compliance specialists, and/or outside attorneys, brokers, accountants, or Customs consulting firms will be reviewed by Customs and can provide indications of the company's commitment to use "reasonable care."

Many organizations, including the Customs Committee of the ABA's International Law and Practice Section, the American Association of Exporters and Importers, and individual industry associations such as the American Institute for International Steel, Inc. are actively engaged in developing and promoting Customs compliance programs. Law firms, accountants, consultants, and Customs brokers are also involved in devising and establishing procedures, both generic and individualized.

Recent programs have developed an "Industry Best Practices" approach. There is recognition that the Customs function within a company is ordinarily not a profit center. It may reduce costs by securing faster cargo release and reduced cargo examination; it may save some duties through the use of special preference programs, duty deferral, drawback and the like. Generally, however, time and effort spent on compliance is a cost, not a direct profit.

It is necessary to involve and secure support and leadership from senior management levels, which recognize the risks of noncompliance and the cost saving and related benefits that come from compliance. Proper performance of Customs functions requires company-wide planning, consulting, and interaction to ensure relevant information from many sectors is centralized, organized, and properly utilized. R&D, product development, procurement, finance, traffic, marketing, and tax

departments, as well as actual manufacturing or product purchasing, must all be integrated to bring the necessary information together for the Customs process.

The Customs Service itself has sought to involve senior management in compliance issues. Part of this activity is the development of a videotape entitled "Customs Compliance: Why You Should Care." Customs describes the tape as "designed to provide senior executives and others in importing and exporting companies with an overview of some significant features of the Customs 'Modernization Act' and some major reasons for adopting new strategies for minimizing legal exposure under this Act." In addition to customs Commissioner George Weise and Assistant Commissioner Stuart Seidel, the tape features Motorola's Vice President and Director of Corporate Compliance, Mr. Jack Bradshaw. Customs has previewed this tape at industry meetings and made it available for purchase by the public.

As the video indicates, the Customs Modernization Act (effective December 8, 1993) has placed significant new legal responsibilities on importers, including an obligation to use "reasonable care" in conducting its Customs operations and includes strong enforcement provisions now being used by the Customs Service. Corporations should view the development and implementation of a Customs compliance program as an important component of the overall obligation for compliance with government requirements. Success will aide the company not only by avoiding the Customs enforcement activities that attach to noncompliance, but also by making the company eligible for the benefits accorded to highly compliant companies.

#### Reasonable Care Checklist

Customs is continuing to develop descriptions, materials, and explanations of the reasonable care obligation. In May 1997, Customs issued a second Discussion draft proposal for a checklist, which stated: "Asking and answering the following questions may be helpful in assisting importers in the exercise of reasonable care." The checklist (arranged by topic) follows.

#### Preamble

One of the most significant effects of the Customs Modernization Act is the establishment of the clear requirement that parties exercise "reasonable care" in importing into the United States. Section 484 of the Tariff Act, as amended, requires an importer of record "using reasonable care" to make entry by filing such information as is necessary to enable the Customs Service to determine whether the merchandise may be released from customs custody, and using reasonable care - "complete the entry by filing with the Customs Service the declared value, classification, and rate of duty" and "such other documentation...or information as is necessary to enable the Customs Service to properly assess duties...collect accurate statistics...determine whether any other applicable requirement of law...is met." Despite the seemingly simple connotation of the term "reasonable care," this explicit responsibility defies easy explanation. The facts and circumstances surrounding every import transaction differ - from the experience of the importer to the nature of the imported articles. Consequently, neither the Customs Service nor the importing community can develop a foolproof

reasonable care "checklist" that would cover every import transaction. On the other hand, in keeping with the Modernization Act's theme of "informed compliance," the Customs Service would like to take this opportunity to recommend that the importing community examine the list of questions below. In Customs's view, the list of questions may prompt or suggest a program, framework, or methodology which importers may find useful in avoiding compliance problems and meeting "reasonable care" responsibilities.

Obviously, the questions below cannot be exhaustive or encyclopedic - ordinarily, every import transaction is different. For the same reason, it cannot be overemphasized that although the following information is provided to promote enhanced compliance with the Customs laws and regulations, it has no legal denial effect on Customs or the importing community. Nevertheless, Customs believes that the following information may be helpful to the importing community and hopes that this document will facilitate and encourage importers to develop their own unique compliance measurement plans and "reasonable care" programs.

As a final reminder, it should be noted that to further assist the importing community, Customs issues rulings and informed compliance publications on a variety of technical subjects and processes. It is strongly recommended that importers always make sure that they are using the latest versions of these publications.

#### Asking and Answering the Following Questions May Be Helpful in Assisting Importers in the Exercise of Reasonable Care

##### General Questions for All Transactions

1. If you use an expert to assist you in complying with Customs requirements, have you discussed your importations in advance with that person and have you provided that person with full, complete, and accurate information about the import transactions?
2. Has a responsible and knowledgeable individual within your organization reviewed the Customs documentation prepared by you or your expert to insure that it is full, complete, and accurate? If that documentation was prepared outside your own organization, do you have a system in place to ensure that you receive copies of the information as submitted to Customs; that it is reviewed for accuracy; and that Customs is timely apprised of any needed corrections?
3. Are identical transactions or merchandise handled differently at different ports or Customs offices within the same port? If so, have you brought this to the attention of the appropriate Customs officials?

##### Questions Arranged by Topic

###### Merchandise Description and Tariff Classification

Basic Question: Do you know what you ordered, where it was made and what it is made of?

1. Did you provide a complete and accurate description of your merchandise to Customs in accordance with 19 U.S.C. 1481?
2. Did you provide a correct tariff classification of your merchandise to Customs in accordance with 19 U.S.C. 1484?
3. Have you obtained a Customs "ruling" regarding the description of the merchandise or its tariff classification (see 19 C.F.R. Part 177), and if so, have you followed the ruling and brought it to Customs attention?
4. Have you participated in a Customs "preimportation review or preclassification" of your merchandise relating to proper merchandise description and classification?
5. Have you consulted the tariff schedules, Customs informed compliance publications, court cases, and/or Customs rulings to assist you in describing and classifying the merchandise?
6. Have you consulted with a Customs "expert" (e.g., lawyer, broker, accountant, or Customs consultant) to assist in the description and/or classification of the merchandise?
7. If you are claiming a conditionally free or special tariff classification/provision for your merchandise (e.g., GSP, HTS Item 9802, NAFTA, etc.), how have you verified that the merchandise qualifies for such status? Have you obtained any required or necessary documentation to support the claim? If making a NAFTA preference claim, do you already have a NAFTA certificate of origin in your possession?
8. Is the nature of your merchandise such that a laboratory analysis is suggested to assist in proper description and classification?
9. Have you maintained and can you produce any required entry documentation and supporting information?

#### Valuation

Basic Questions: Do you know the "price actually paid or payable" for your merchandise? Do you know the terms of sale; whether there will be rebates, tie-ins, indirect costs, additional payments; whether "assists" were provided, commissions, or royalties paid? Are amounts actual or estimated? Are you and the supplier "related parties"?

10. Did you provide declared value for your merchandise in accordance with 19 U.S.C.

1484 and 19 U.S.C. 1401a?

11. Have you obtained a Customs "ruling" regarding the valuation of the merchandise (see 19 C.F.R. Part 177), and if so, have you followed the ruling and brought it to Customs attention?
12. Have you consulted the Customs valuation laws and regulations, Customs Valuation Encyclopedia, Customs informed compliance publications, court cases and Customs rulings to assist you in valuing merchandise?
13. Have you consulted with a Customs "expert" (e.g., lawyer, accountant, broker, Customs consultant) to assist in the valuation of the merchandise?
14. If you purchased the merchandise from a "related" seller, have you reported that fact upon entry and taken measures to ensure that value reported to Customs meets one of the "related party" tests?
15. Have you taken measures to ensure that all of the legally required costs or payments associated with the imported merchandise have been reported to Customs (e.g., assists, commissions, indirect payments or rebates, royalties, etc.)?
16. If you are declaring a value based on a transaction in which you were/are not the buyer, have you substantiated that the transaction is a bona fide sale at arm's length and that the merchandise was clearly destined to the United States at the time of sale?
17. If you are claiming a conditionally free or special tariff classification/provision for your merchandise (e.g., GSP, HTS Item 9802, NAFTA, etc.), have you reported the required value information and obtained any required or necessary documentation to support the claim?
18. Have you maintained and can you produce any required entry documentation and supporting information?

#### Country of Origin/Marking/Quota

Basic Question: Have you taken steps to ascertain the correct country of origin for the imported merchandise?

19. Have you taken measures to ensure that you report the correct country of origin on Customs entry documents?
20. Have you taken measures to verify or ensure that the merchandise is properly marked upon entry with the correct country of origin (if required) in accordance with 19

U.S.C. 1304 and any other applicable special marking requirement (watches, gold, textile labeling, etc)?

21. Have you obtained a Customs "ruling" regarding the proper marking and country or origin of the merchandise (see 19 C.F.R. Part 177), and if so, have you followed the ruling and brought it to Custom attention?
22. Have you consulted with a Customs "expert" (e.g., lawyer, accountant, broker, Customs consultant) regarding the correct country of origin/proper marking of your merchandise?
23. Have you taken adequate measures to communicate Customs country of origin marking requirements to your foreign supplier prior to importation of your merchandise?
24. If you are claiming a change in the origin of the merchandise or claiming that the goods are of U.S. origin, have you taken required measures to substantiate your claim? (E.g., do you have U.S. milling certificates or manufacturer's affidavits attesting to the production in the U.S.?)
25. If you are importing textiles or apparel, have you ascertained the correct country of origin in accordance with 19 U.S.C. 3592 (§ 334, Pub. Law 103-465) and assured yourself that no illegal transshipment or false or fraudulent practices were involved?
26. Do you know how your goods are made from raw materials to finished goods, by whom and where?
27. Have you checked with Customs to ensure that the quota category is correct?
28. Have you checked the Status Report on Current Import Quotas (Restraint Levels) issued by Customs to determine if your goods are subject to a quota category which has "part" categories?
29. Have you obtained the correct visas for your goods if they are subject to visa categories?
30. In the case of textile articles, have you prepared the proper country declaration for each entry, i.e., a single country declaration (if wholly obtained/produced) or a multi country declaration (if raw materials fed into goods in a second)?
31. Have you maintained, and can you produce any required entry documentation and supporting information, including any required certificates of origin?

## Intellectual Property Rights

Basic Question: Have you determined whether your merchandise or its packaging bear or use any trademarks or copyrighted matter or are patented and if so, that you have a legal right to import and/or use those items into the United States?

32. If you are importing goods or packaging bearing a trademark registered in the United States, have you checked to ensure that it is genuine and not restricted from importation under the "gray-market" or parallel import requirements of U.S. law (see 19 C.F.R. 133.21), or that you have permission from the trademark holder to import such merchandise?
33. If you are importing goods or packaging which consist of, or contain registered copyrighted material, have you checked to ensure that it is authorized and genuine? If you are importing sound recordings of live performances, were the recordings authorized?
34. Have you checked to see if your merchandise is subject to an International Trade Commission or court ordered exclusion order?
35. Have you maintained and can you produce any required entry documentation and supporting information?

## Some Miscellaneous Questions

36. Have you taken measures to ensure that the merchandise complies with other agency requirements (e.g., FDA, EPA/DOT, CPSC, FTC, agriculture, etc.) prior to or upon entry, including the procurement of any necessary licenses or permits?
37. Is your merchandise subject to an antidumping or countervailing duty order, and if so, have you complied with Customs reporting requirements upon entry (e.g., 19 C.F.R. 141.61)?
38. Is your merchandise subject to quota/visa requirements, and if so, have you provided a correct visa for the goods upon entry?
39. Have you verified that you are filing the correct type of Customs entry (e.g., TIB, T&E, consumption entry, mail entry, etc), and that you have the right to make entry under the Customs Regulations?
40. Are your goods subject to a Commerce Department dumping or countervailing duty investigation or determination?

\* Originally published in Business Laws, Inc.'s Corporate Counsel's International Adviser, Issue Number 149, October 1, 1997. Copyright 1997, retained by Steven W. Baker. Reprinted with permission. All rights reserved.

\*\* Mr. Baker is the principal of the San Francisco law firm of Steven W. Baker and Associates, specializing in Customs and International Trade Law.