

## Chapter 25C. Customs and the Court Indicate What Is Reasonable in Meeting Reasonable Care Obligations

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### 25C:1. Introduction

The legal obligation requiring importers to use reasonable care in connection with the entry of merchandise into the United States was imposed in 1993 as part of the Customs Modernization Act.

[Pub. L. No. 103-182, Dec. 8, 1993.](#)

The legislative history and agency materials developed at that time indicated that the level of care required would be that expected from similarly situated businesspersons. The materials also indicated that importers could demonstrate reasonable care by consulting experts such as brokers and attorneys, provided that the consultation involved supply of all relevant information and resulted in a written opinion or similar document. Policy decisions and judicial interpretations since that time have expanded upon the level of care that will be considered “reasonable.”

Judicial and agency notices, rulings, cases, and decisions have made clear that U.S. Customs and Border Protection and the courts expect a high degree of responsibility from importers in meeting their reasonable care obligations with regard to importing merchandise into the United States. Importers are required to have some basis to believe the truth of the information provided to Customs and cannot simply rely on the representations of the exporter. While importers may--and often are expected to--use the services of experts and consultants such as brokers and attorneys, the importer must use them appropriately, and bears the ultimate responsibility for actions taken in its name.

### 25C:2. Affirmative duty

The U.S. Court of International Trade ruled in 2001 in *Golden Ship Trading Company*

[U. S. v. Golden Ship Trading Company, 25 Ct. Int'l Trade 40, 23 Int'l Trade Rep \(BNA\) 1025, 2001.](#)

that reasonable care required more than a passive acceptance by the importer of information provided by the exporter. The importer has an affirmative duty to secure at least some level of confirmation of relevant data. The importer in *Golden Ship* argued both that it was a small company with limited resources and had, therefore, acted reasonably under the circumstances in accepting the exporter's claims at face value, and that determining the true information was a

complex issue that had proven troublesome for Customs itself. The court found that the failure to take any affirmative action to confirm the data--in this case the country of origin--negated any claim of reasonable care.

Commentators on the case have used phrases such as “the days of looking the other way are gone” to describe the impact of the decision. The court's opinion made clear that reasonable care does not mandate that the importer always reach the legally correct conclusion, but does require sufficient investigation to support reasonable cause to believe in it.

U.S. Customs has carried this position somewhat further, at least with regard to sensitive products such as textiles and to information directly applicable to the admissibility or status of goods. In TBT (Textile Book Telegram) 04-030, Customs announced that it would apply gross negligence penalties to false country of origin statements on textile entries, even if the importer was unaware of an error by its broker, where the documents surrounding the entry clearly demonstrated China was the origin of country, rather than the country shown on the entry document. Both the broker and the importer could be held liable. Customs has also issued gross negligence penalty claims for the failure to properly enter steel products under the Global Steel 201 remedy in effect from March 21, 2002, to December 4, 2003. The actions appear to be based on a position that importers of these types of sensitive products have a special obligation to ensure correct filing of the relevant information.

### 25C:3. Compliance with written policies and record-keeping procedures

The CIT further discussed the activities required for reasonable care in a 2005 case involving the Ford Motor Company.

. Note: On appeal, the Court of Appeals for the Federal Circuit remanded the case to recalculate the penalty because it found a violation of the Fifth Amendment's due process clause that precluded penalizing Ford for violating the requirement that it disclose the existence of variable pricing agreements relating to entries. The court upheld the finding that Ford failed to rebut a prima facie case of negligent violations of the Customs reporting statute, however. .

Ford is a large-scale importer, with a large number of people devoted to Customs activities. It has developed a set of written policies and procedures for handling its Customs responsibilities to ensure compliance. In this case, Customs claimed that Ford had failed to declare certain assists costs properly. Ford argued in part that assuming the costs were in fact reportable, it had provided notice through a Reconciliation Agreement with Customs. The court found that it was unreasonable to expect this agreement to provide adequate notice on entries that made no reference to it, and ruled that Ford had failed to follow its own written policies regarding declaration of these costs to Customs. Such failure indicated a lack of reasonable care.

A case decided by the CIT in 2002, Yuchius Morality Co.,

. reveals an additional aspect of what the court considers reasonable for an importer in supporting the claims made at the time of entry. Although this case involves actions taken and entries filed prior to both the reasonable care and the record-keeping requirements of the Customs Modernization Act, the court found that because the importer lacked any significant record-

keeping procedure and showed no effort to fully and accurately account for relevant transactions, such failure constituted at least negligence on the part of the importer. It should be understood that although the Customs Modernization Act establishes certain specific requirements for records to be kept regarding import transactions, the obligation of the importer to be able to support the claims made on entry may in some circumstances require that additional records be maintained beyond those mandated by the statute.

#### 25C:4. Consultation

In addition to requiring importers to take affirmative action to confirm information, to maintain adequate records, and to comply with their own written policies and procedures, the CIT has commented on the role that consultation with experts such as brokers and attorneys plays in meeting reasonable care requirements. In *Optrex America*,

a 2006 decision, the court dealt with the importer's claims that it had taken reasonable care by consulting with a licensed Customhouse broker and with legal counsel. The evidence as to whether the importer had actually consulted with, as opposed to merely advising, its Customhouse broker was unclear. While there was clear evidence that the importer had consulted counsel, there was also evidence that the importer had acted in at least some instances contrary to the legal advice provided. Counsel had also developed a written decision tree for classification purposes, but the court found conflicting evidence as to whether it was actually used. In these circumstances the court denied summary judgment on the reasonable care claim, indicating that consultation alone does not necessarily result in compliance. After mediation failed to result in an agreement by the parties, a trial was held resulting in a 2008 decision.

[U. S. v. Optrex Am., Inc., Slip Op. 08-63 \(2008\).](#)

The decision confirmed that consulting a Customs professional is not always a safe harbor for importers; while it may be some evidence of compliance, that evidence may be contradicted by other actions, such as failing to follow the advice received.

The *Golden Ship* case discussed above also included as a claimed defense the importer's reliance on a licensed Customhouse broker for preparation of the entries. The court found that the importer's failure to make any inquiry of the broker regarding the country of origin, or otherwise verify or ascertain the correctness of the information prepared by the broker, was a lack of reasonable care.

#### 25C:5. Verification

Customs has made clear, with support from the courts, that it expects importers, regardless of their size, to take affirmative steps to verify the information reported to Customs in connection with the importation of merchandise. Customs also expects importers to have documented procedures in place, which are actually followed, to ensure that reasonable care is used in that verification process.

Much of the information importers must submit is relatively easily verifiable. The importer is clearly in a position to know (assuming an adequate level of corporate communication exists) whether the amount shown on the invoice represents the actual payment for the goods; whether

additional payments of any kind were made, or assists provided; and whether the suppliers were actually paid the amounts reported to Customs. Similarly, receiving records and inspections for goods could verify the quantities declared and verify the presence of required markings. Classification of merchandise, while it may require some input from the supplier regarding component materials, can likewise be determined by the importer based on the product itself and the importer's knowledge of its end use or uses.

Some information, like the country of origin concerns discussed in Golden Ship above, or the presence of alloy elements in steel products, may necessitate further inquiry. This can be as simple as having an overseas agent who regularly visits facilities to confirm that the products in question are manufactured in the designated location, or sufficient experience with a supplying mill to know that the mill test certificates are accurate. In some circumstances, however, more extensive inquiry and documentation may be required. For example, textiles produced in multiple countries may necessitate not only multi-country declarations but also the verification of costs involved for the raw materials, the existence and operation of production facilities, the availability and costs of production labor, and additional information regarding the movement of unfinished goods.

Importers must know enough about their products, suppliers, and accounting systems to be able to identify possible areas where verification of information would be required. They must also understand the Customs laws and regulations well enough to identify the concerns that Customs could have and the areas where special care is indicated.

#### 25C:6. Written procedures and compliance reviews

Customs has strongly indicated its position that importers should have formal, written policies and procedures which are based on an analysis of the issues involved for the particular importer. These policies and procedures should set forth specific methodologies to ensure that those issues are addressed. Similarly, Customs has expressed its concern that importers not only develop these formal policies, but also undertake efforts to ensure that the policies and procedures are followed in connection with actual importations.

Written policies and procedures can consist of several hundreds of pages of documents designed to be used for educational purposes within the company and to document that company's recognition of the wide range of issues in which it can be involved. Alternatively, the policies and procedures can be limited to a few pages of specific, step-by-step actions to be taken to ensure compliance in the import process. Both extremes have been approved by Customs, where appropriate, for particular importers with a specific range of issues. Simply put, Customs' emphasis is on the development of an appropriate set of procedures for the individual importers and the follow-through to ensure their use.

There are many resources available for companies to use in developing written policies and procedures. Law firms, Customs brokers, and other Customs consultants market their services to aid in the process, or actually write a customized import manual. Several trade-related publishers make available standard documents in word-processor formats, allowing those documents to be

customized for individual companies. A number of importers have posted their import manuals on the Internet, providing examples of different approaches. Whether a company develops its own policies and procedures in house or hires outside assistance, it is important for the importer to ensure that its particular issues are covered. It is also important to have internal controls and processes that document the implementation of those policies and procedures by the company. As noted above, Customs will hold an importer to its supposedly established procedures.

A second major concern for importers is to secure some outside confirmation that the policies and procedures developed by or for the company are proper, appropriate, and sufficiently complete for its purposes and are in fact actually used in company operations. Large companies or corporate groups with independent import departments may well be able to perform these services, and perform a review or audit, for the various import departments located at divisions or subsidiaries. (The corporate Customs Department, however, may itself require some outside validation.) Other companies may use Customs attorneys, Customs brokers, or other Customs consultants for this review process.

Importers should consult their in-house or outside counsel to evaluate the importance of these protections in selecting outside reviewers. Outside reviews can be used to validate the written policies and procedures developed by an importer, evaluating them with regard to the specific issues encountered by the company; and to confirm the extent to which the written policies and procedures are actually used in the company's import process. Periodic reviews, which could occur annually, biannually, or at greater intervals based on the specific needs of the company and developments in the Customs infrastructure, can confirm that the policies and procedures are regularly reviewed and updated as necessary, while reinforcing the necessity of applying those policies and procedures to ongoing activities. Such reviews, at least to the extent that they find adequate compliance or lead to recommended improvements, are considered by Customs to be another indication of reasonable care.