Customs Recordkeeping Requirements for Non-Importers*

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Many commercial purchasers of imported merchandise, whether buying goods for resale in their imported condition or purchasing parts, components, or materials for manufacturing operations, deliberately choose not to be an importer of record for U.S. Customs purposes. By making this choice, the purchaser avoids incurring the obligations of an importer of record, including the necessity of posting a surety bond and having potential liability for increased duties and/or other costs until each entry is finally liquidated. In some situations, the purchasers buy imported products only after they have been brought to the United States and placed in the importer's inventory for resale. In many others, however, the actual commercial user of the products is involved in the transactions which cause the merchandise to be exported to the United States, negotiating directly or through a U.S. based agent with the foreign supplier. These procedures are sometimes known as "delivered duty paid" (DDP) or "landed cost" transactions.

The choice not to assume importer of record obligations will generally have some price implications, but many companies are willing to pay those costs in order to avoid handling the actual import transaction. This procedure does not, however, insulate the companies using imported products from all obligations to the U.S. Customs Service. For example, marking rules requiring that proper country of origin marking reach the "ultimate purchaser" often pass through to intermediate distributors and processors as well as retailers.

Recent changes in the law and regulations, together with Customs Headquarters interpretations, have made clear that commercial users of imported merchandise may also be subject to significant recordkeeping requirements, and potentially liable for penalties for failure to maintain required records. Although certain obligations may have existed earlier, the recordkeeping provisions of the Customs Modernization Act (effective December 8, 1993, set forth in 19USC1508 et.seq.) have established specific responsibilities. Regulations implementing the requirements and establishing compliance procedures were published in June, 1998 (63FR32915), and proposed guidelines for mitigation of Recordkeeping penalties were issued in June, 1999.1

The Legal Requirements

§19USC1508(a) provides:

1508. Recordkeeping

(a) Requirements
Any-
(1) owner, importer, consignee, importer of record, entry filer, or other party who -

> (A) imports merchandise into the customs territory of the United States, files a drawback claim, or transports or stores merchandise carried or held under bond, or

(B) knowlingly causes the importation or transportation or storage of merchandise carried or held under bond into or from the Customs territory of the United States;

(2) agent of any party described in paragragph (1); or

(3) person whose activities require the filing of a declaration or entry, both; shall make keep, and render for examination and inspection records (which for purposes of this section include, but are not limited to, statements, declarations, documents and electronically generated or machine readable data) which -

(A) pertain to any such activity, or to the information contained in the records required by this chapter in connection with any such activity; and

(B) are normally kept in the ordinary course of business.

The Entry Procedures and Carriers Branch at U.S. Customs Service Headquarters, in an information letter to this author2, has stated: "The scope of 19USC1508(a) is broad. Numerous persons who are not importers of record, including consignees and persons who knowingly cause the importation of merchandise, have recordkeeping responsibilities under 19USC1508(a)."

The implementing regulations (19CFR163) make clear that truly domestic transactions are excluded. The example given states that "whereas a consumer who purchases an imported automobile from a domestic dealer would not be required to maintain records, a transit authority that prepared detailed specifications from which imported subway cars or buses were manufactured would be required to maintain records." Just where the line should be drawn in deciding when a party "knowingly causes" importation will be left to case by case determinations; what is clear, however, is that purchasers who arrange with foreign suppliers, directly or through their agents, for importation and delivery of merchandise on a "landed cost" or "delivered duty paid" basis will be considered to have "knowingly caused" the importation. Similarly, the supply of "technical data, molds, equipment, other production assistance, material, components or parts...with knowledge that they will be used in the manufacture or production of the imported merchandise" would cause the parties arranging for such supply to be considered "covered persons" under the recordkeeping requirements.

The Customs Modernization Act required the Customs Service to develop a list of records that would be considered subject to the specific recordkeeping requirements (and the related penalty provisions). This list, known as the (a)(1)(A) list based on the statutory provision requiring it, is included as an appendix to the Regulations, and sets forth the information and documents which "covered persons" must maintain. Customs Headquarters has interpreted the statutory language limiting the requirement to records which "are normally kept in the ordinary course of business" to mean that non-importers of record who are "covered persons" under the recordkeeping requirements are not obligated to retain the actual entry documents filed with Customs (which must be maintained by the importer of record), so long as that non-importer of record does not normally keep such

documents in its ordinary course of business. The non-importer of record must, however, maintain for Customs those listed documents created or received in the course of the subject commercial transaction which it does normally retain, such as purchase orders, invoices, packing lists, and so forth. If actual entry documents are received by the non-importer of record (for example, some courier transactions in which the broker is the importer of record), they are within the scope of the recordkeeping requirement and subject to 19USC1508(a).

Follow-up correspondence from the Penalties Branch at Customs Headquarters regarding this issue3 confirmed that a non-importer of record who has provided specifications, components, materials or other assists to a foreign producer has an obligation to disclose to the producer sufficient information regarding the assists to allow them to be accounted for in calculating the entered value of the merchandise. While the non-importer would not be liable for a violation of the Customs laws if the importer failed to disclose or inaccurately valued the assists of its own accord, the non-importer could be subject to a penalty claim if it provided information regarding the value of the assists to the foreign producer which resulted in inaccurate information being given to U.S. Customs.

Further clarification on certain recordkeeping obligations was provided by the Regulatory Audit Branch at Customs Headquarters4. Confirming the obligation of a non-importer of record (covered party) to maintain certain regulations, Regulatory Audit indicated that it could not reasonably expect such parties to be able to identify and provide documentation based solely on Customs entry numbers or other Customs identification, which would be known only to the importer of record. Nevertheless, such "covered parties" could be required to provide information based on other identification, including information generated by securing documents from the importer of record, such as the identity of sellers, purchase order or invoice numbers, delivery dates, or other forms of identification.

Maintenance of Records

Once a company has determined that it is or may be subject to the recordkeeping requirements, and determined what documents it maintains in the ordinary course of business which include the information required by or are specifically provided for in the (a)(1)(A) list, proper procedures must be established for record maintenance. The basic requirement is that information and documents must be maintained in the original form received, whether paper or electronic. The regulations do allow for alternative methods of storage, including but not limited to machine readable data, CD-Rom, and Microfiche. Before using an alternative storage method, however, notification must be provided to the Customs Service, and a number of specified standards must be met. These include operational and written procedures, a proper retrieval process, effective labeling and indexing, internal testing, and the ability to make and provide hardcopy records for U.S. Customs. A backup copy of the alternative format is required.

Even if the alternate storage format is used, the original records must be maintained for a period of 120 calendar days from the end of the release or conditional release period by the Customs

Service.

If Customs makes a request for records, the documents must be produced within 30 calendar days of receipt of the demand. Additional time can be granted on request if there are specific reasons why a particular record cannot be retrieved within that time period.

Customs is authorized to request copies of records under specified circumstances pursuant to its general examination authority. Customs also has authority to issue an administrative summons requiring both provision of records and appearance by a person knowledgeable concerning the records. There is specific statutory authority allowing the government to seek judicial enforcement of a summons, and apply contempt of court and monetary penalties in addition to any other sanctions a court may order.

Penalty Provisions

The Customs Modernization Act established for the first time monetary penalties for failure to maintain and provide to the Customs Service on request the required information or documents specified on the (a)(1)(A) list. The record retention period is five years from the date of the entry of the merchandise. For non-importers of record, a safe procedure would be to maintain required records for five years after the receipt of the goods, which would necessarily be after their importation.

Customs has indicated, in the proposed Guidelines for Penalty Mitigation, that penalties under the statute can be applied for the failure to comply with any lawful demand for the production of documents for violations occurring on or after July 15, 1996, which is the date that the (a)(1)(A) list was published in the Federal Register. Penalties for negligence (failure to maintain the records, or inability to supply them to the Customs Service with a reasonable time) can be assessed at $10,000.00 for each violation. (Each requested record not produced may be a separate violation.) The proposed Mitigation Guidelines allow for reduction to a minimum of $5,000.00 or 20% of the appraised value of the merchandise, whichever is less. The Guidelines list numerous mitigating and aggravating factors which will be utilized to determine where in the range of penalties individual mitigation will be allowed.

For a willful violation, the statute provides for a maximum penalty of $100,000.00 per violation. The Guidelines allow mitigation to a minimum of $50,000.00 or 45% of the appraised value, whichever amount is less, based on the same list of mitigating and aggravating factors.

The Regulations do provide for a Recordkeeping Compliance Program. This is a voluntary program, under which a recordkeeper agrees to establish certain procedures, designate responsible personnel, and meet various Customs requirements. A participant in this program can receive a warning letter instead of a penalty for a first time negligent violation, but will be subject to monetary penalties for any additional violations of the same nature. Willful violations are not covered, and can be a basis for removal from the Compliance Program.

Recordkeeping is one of the areas reviewed in a Compliance Assessment (see "Compliance Assessments and Customs Audits", Corporate Counsel's International Adviser, Issue Number 140, January 1, 1997). Compliance Assessments will ordinarily be conducted only of major importers. Companies which both act as importer of record for some shipments and are also involved in transactions where, while not the importer of record, they "knowingly cause" goods to be imported into the U.S., could well have their records for non-importer of record import transactions reviewed as part of the Compliance Assessment process.

Informed Compliance Publication

In addition to the statute, regulations, and proposed mitigation guidelines referenced above, the United States Customs Service has prepared and made available an Informed Compliance Publication entitled "What Every Member of The Trade Community Should Know About Records and Recordkeeping Requirements." This document includes a copy of the (a)(1)(A) list. A copy can be secured at the U.S. Customs website, www.customs.ustreas.gov, by clicking on "Importing and Exporting" and then "Informed Compliance".

Conclusion

Customs requirements and obligations can apply to, and be enforced against, parties who are not importers of record. One important new area of obligation and liability for significant users of imported products is the area of recordkeeping. Five year record retention requirements, recordkeeping formats, and the availability of significant penalties for enforcement purposes necessitate the establishment of appropriate compliance procedures by affected firms.

ENDNOTES

1. Customs recordkeeping requirements also apply to exporters selling goods to Free Trade Agreement countries (e.g., NAFTA, Israel).

2. Entry Procedures and Carriers Branch letter 114667 GOV, dated May 11, 1999.

3. Penalties Branch letter 634613 WAS, June 18, 1999.

4. Regulatory Audit Branch letter MAN-1-ST:RA:P SJH of August 20, 1999.

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