Customs Compliance and Duty Savings Opportunities

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Presented by:
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Import Compliance: What’s At Stake

• Maintaining the flow of core business
• Avoiding delay, detention, exclusion, seizure, additional duties, fines, penalties & forfeitures
• Minimizing transaction costs (i.e., duties)
• Being prepared for CBP info requests / audits
• Maintaining reputation
Consequences of Non-Compliance

- Goods delayed at the border
- CBP may issue
  - CF-28 “request for information”
  - CF-29 “notice of action”
- Delays can become detentions (< 30 days)
- Detained goods may be excluded or seized
- Released goods may be ordered for redelivery
- For serious violations, CBP can pursue forfeiture
- Repetitive errors can trigger CBP audits
- CBP can impose penalties and initiate criminal investigations
Consequences of Non-Compliance

• Every Entry Secured by Customs Bond
• Bond provides for “liquidated damages” for non-compliance (non-payment and other requirements)
• All goods are conditionally released for 30 days or longer (e.g., FDA)
• CBP can “recall” goods within Conditional Release period, for instance, for goods not meeting CBP or other governmental agency requirements (e.g., FDA, EPA, CPSC, FWS, TM, etc.)
• Failure to redeliver goods can result in liquated damages claim of 1 to 3 times the value of the goods
CBP Penalties

• No person may, by fraud, gross negligence or negligence, enters or attempt to enter goods by means of a material false statement or omission.

• Potential Penalties
  – Fraud: full domestic value of goods
  – Gross Negligence: 4 times lost revenue or 40% of dutiable value
  – Negligence: 2 times lost revenue or 20% of dutiable value

• Prior disclosures significantly reduce penalties
Reasonable Care

• Importers are required by law to exercise “reasonable care” in making entry, by:
  – providing CBP all information necessary to decide whether to release merchandise, and
  – ensuring the declared value, classification, rate of duty and other requirements of law are satisfied.

• CBP penalties are imposed for the failure to exercise reasonable care.
Reasonable Care

- Reasonable Care means knowing your *import* business
  - What are you importing?
  - Where is it made?
  - Where is it classified in the HTS?
  - What is the duty rate?
  - Is it subject to any special duties (tariff rate quotas, ADD, CVD)?
  - Is it subject to special licenses, rules, or labeling?
  - Is it subject to any other government agency restrictions?
  - Could it be considered prohibited (foreign corrupt practices, IPR violations, social compliance)?
  - What records are required for entry?
  - Are any disclosures required before or at the time of entry?

- Reliance on the advice of a customs “expert” is strong evidence of the exercise of reasonable care.
Discussion Topics

• Key Elements of Import Compliance
  – HTSUS Classification
  – Valuation
  – Rate of Duty (incl. Trade Preference Programs)
  – Marking
  – Trade Enforcement (Regulatory Compliance)
    • Fish & Wildlife, APHIS, CPSC, FDA, etc.
  – Recordkeeping
Duty Liability

• Duty liability is a function of three elements:
  • HTSUS Classification
  • Country of origin
  • Value of the product (usually)
• Importers must declare each element at the time of entry, but CBP ultimately determines each one
• A duty-paying importer may benefit from strategically altering one or more of these factors.
Tariff Classification

• Upon entry, every imported item must be classified under the Harmonized Tariff Schedule of the United States (“HTSUS”). The HTSUS contains over 17,000 unique provisions.

• The text of the tariff provisions (“headings” and “subheadings”), and their associated duty rate are internationally negotiated (at the WTO).
Tariff Classification

Harmonized Tariff Schedule of the United States (2014)
Annotated for Statistical Reporting Purposes

<table>
<thead>
<tr>
<th>Heading/Subheading</th>
<th>Article Description</th>
<th>Unit of Quantity</th>
<th>Rates of Duty</th>
</tr>
</thead>
<tbody>
<tr>
<td>7109.00.00</td>
<td>Base metals or silver, clad with gold, not further worked than semimanufactured</td>
<td>g</td>
<td>Free (A, AU, BH, CA, CL, CO, E, IL, JO, KR, MA, MX, OM, P, PA, PE, SG)</td>
</tr>
</tbody>
</table>

• Proper classification is determined according to General Rules of Interpretation
• Usefulness of CBP Ruling Search
• The U.S. offers preferential tariff treatment to qualifying goods originating in certain countries
Tariff Classification – Duty Savings

• Duty paying importers should review the tariff classification of their products to ensure that the classifications selected are correct, and the only viable tariff classifications.

• Importers may also be able to design their products to take advantage of favorable tariff anomalies.
Trade Preference Programs

• Duty paying importers might also consider taking advantage of trade preference programs ("TPPs") which provide beneficial tariff treatment for qualifying products.

• The U.S. has entered into a number of bilateral and regional trade agreements, and unilaterally extends trade benefits to developing countries under a number of programs.
Trade Preference Programs

• Bilateral Free Trade Agreements
  – Israel, Jordan, Australia, Chile, Singapore, Bahrain, Morocco, Oman, Peru, Panama, Colombia, South Korea

• Regional Trade Agreements
  – NAFTA (Canada, Mexico, U.S.)
  – CAFTA-DR (Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, Dominican Republic, U.S.)

• Unilateral Preference Programs
  – Generalized System of Preferences (GSP)
  – African Growth & Opportunity Act (AGOA)
  – Caribbean Basin Initiative (CBI)
  – Andean Trade Preference
Trade Preference Programs

• Each TPP has its own rules and eligibility requirements (“preferential rules of origin”)

• Generally speaking, products “wholly obtained or produced entirely” within the designated country, or manufactured from inputs sourced entirely from that country qualify

• Eligibility of other products is driven by the origin of the raw material inputs as well as the nature of the processing performed in the country of origin.
Trade Preference Programs

• Challenges of Utilizing TPPs
  – Preferential rules of origin can be complicated
  – Strict compliance
  – Importers cannot rely on foreign vendors to confirm program eligibility
  – Record retention & production requirements (on demand + 5 years from release by CBP)
  – Periodic lapse of unilateral programs
Country of Origin Marking

• Each article of imported merchandise (or its container) must be marked to convey its country of origin to the ultimate purchaser.

• Failure to properly mark the country of origin can result in a penalty of 10% of the offending article’s customs value.
Valuation

- Importers must declare the correct value of imported goods, regardless of duty liability
- The Customs value statute (19 U.S.C. § 1401a) provides for five different appraisement methods:
  - Transaction Value
  - Transaction Value of Same of Similar Items
  - Computed Value
  - Deductive Value
  - “Surprise Value”
Valuation

• Transaction Value is the primary basis of appraisement and is defined as “the price paid or payable by the buyer to the seller when the merchandise is sold for export to the United States.”

• The purchase price for imported goods is subject to certain additions (if not already reflected in the price), as well as some reductions.
Additions to Transaction Value

• Certain costs must be added to the transaction value if not included in the seller’s price:
  – Selling Commissions
  – Packing Charges
  – Resale Charges That Accrue to Seller
  – Assists
    • e.g., materials, tools, dies, molds provided directly or indirectly, free or at reduced cost by the buyer
    • design work, development or engineering expenses incurred outside the United States
  – Certain Royalties or License Fees
Reductions from Transaction Value

• The following, if included in the purchase price, may be removable from the transaction value:
  – Payments to buying agents (buying commissions or inspection fees)
  – Interest charges
  – Cost of transportation, insurance and related services for international freight
  – Costs of post-importation construction, erection, assembly or maintenance of merchandise
  – Design or logo royalties collected by the seller and paid to a third party
  – Administrative and marketing costs unrelated to production
Advance Purchase Planning

• An importer can lawfully structure transactions to minimize the payment of customs duties.

• Duty paying importers should consider two particularly useful strategies:
  – First Sale Program
  – Agency Program
First Sale Program

• Any duty-paying importer purchasing from a middleman should consider the viability of a first sale program.
• Where there are back-to-back sales from manufacturer to middleman and from middleman to importer, the “first sale doctrine” allows the importer to treat the middleman’s profit and overhead as a non-dutiable expense.
First Sale Program

• Keys to Successful First Sale Program
  – The goods must be clearly destined for the U.S. when sold by the manufacturer to the middleman
  – The sales must be back-to-back
  – A complete paper trail must be maintained. (i.e., separate purchase orders, invoices, payment records, demonstrating cost breakdown and terms of sale)
  – Unrelated factory and middleman preferable but not necessary
Agency Program

• Duty-paying importers engaged in direct trade with producers might consider the viability of establishing an Agency Program.
• An Agency Program is premised on the non-dutiability of buying commissions.
• Fair trade importers may be particularly well suited to establish an Agency Program with their trading partners.
Agency Program

• Elements of a Successful Agency Program
  – Buying Agent is established as separate entity from producers—legally, financially and functionally.
  – BA enters into service agreement with importer
  – Importer pays BA for services separately from payment to producers
  – Importer utilizes BA as primary liaison for orders/issues relating to producers
Trade Enforcement

• In addition to evaluating classification, declared value, country of origin marking and claims for preferential treatment, CBP enforces its own rules and regulations as well as those of other government agencies, including:
  – Fish & Wildlife Service
  – Animal Plant Health Inspection Service (USDA)
  – Consumer Product Safety Commission
  – Food & Drug Administration
  – Federal Trade Commission
Selected Regulatory Compliance

• Fish and Wildlife Service
  – Regulated: any article containing any amount of skin, fur, animal shell, coral, feathers, etc., whether or not endangered (except for certain common domestic and captive bred animals)
  – All regulated wildlife & wildlife products must be imported through a designated FWS Port
    • Anchorage, Atlanta, Baltimore, Boston, Chicago, DFW, Honolulu, Houston, LA, Louisville, Memphis, Miami, New Orleans, NY, Newark, Portland, SF, Seattle
  – Must declare on FWS form: scientific name, common name, country of origin, source (wild caught, farm raised, domestic), etc.
Selected Regulatory Compliance

• Animal Plant Health Inspection Service (APHIS)
  – Regulates animals, plants and derivative products to control spread of exotic pests and parasites
  – Must declare on APHIS form scientific name, country of origin, quantity, value
  – APHIS Import Manual on Miscellaneous and Processed Products (300 pp.)
    • e.g., bags used to hold coffee; brooms (and broomcorn); numerous grasses, wheat, rice, straw; bamboo; natural packing material; goat/lamb/sheepskin, coffee, cotton, seeds
Selected Regulatory Compliance

• Federal Trade Commission
  – “Protecting America’s Consumers”
  – Imposes labeling requirements:
    • Fiber content, country of origin, manufacturer/importer identification,
    • Care labeling for garments
  – Regulates advertising claims, including regarding “green” products (claims of biodegradability, recyclable, recycled content, renewable energy, free-of, non-toxic, etc.)
Selected Regulatory Compliance

• Consumer Product Safety Commission
  – Regulation for product safety
  – Strict enforcement of children’s products
    • Bans on lead paint, phthalates, hazardous substances
    • Third party testing requirements
  – New: (2011) Some testing exceptions available for qualifying registered “small batch” manufacturers
Selected Regulatory Compliance

• Food and Drug Administration
  – Importers of food products and foreign food manufacturing facilities must be registered with FDA
  – Administers Food, Drug & Cosmetic (FD&C) act
    • The claims made about a personal care product can mean the difference between treatment as a “drug” or “cosmetic”
More Information

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