Meeting the challenges of Customs compliance: 11 questions to ask yourself, 6 action steps

International Trade Alert

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In the global environment in which we operate, exchanging goods internationally always entails basic customs issues. Among these are the import/entry process, tariff classification, valuation, country of origin labeling, and duty assessment. Such basic import issues, arising from distinct customs law disciplines, have long presented compliance challenges for the average US importer.

Adding to these pre-existing import challenges are some of the provisions recently enacted under the Trade Enforcement and Trade Facilitation Act of 2015 (TFTEA) that are specifically designed to enhance Customs and Border Protection's (CBP) trade enforcement capabilities. US importers, who already are integrating their supply chains more internationally than ever, now face ever multiplying compliance challenges.

In the world of sports or the military, the old adage that "the best defense is a good offense" is often true. But the opposite is the case for the importer of goods into the US: often, "the best offense makes the best defense."

The offense, in this context, is the importer's assessment and updating of its customs and trade compliance status, which, when done right, can become the best defense against a trade compliance enforcement action initiated by the government. Execution of a comprehensive due diligence check list, before it is needed, is one way that an importer can take the offensive in fighting against non-compliance, which later becomes the importer's
In this alert, we take a quick look at international trade compliance risk assessment as a tool for meeting the challenges of being customs compliant in today's trade enforcement environment. [1]

**Making due diligence second nature**

In order for customs compliance to be organic within a company, the tenets of "reasonable care" must be embedded in all import-related functions. Under customs law, the use of reasonable care goes hand in hand with the affirmative obligation to present legally and factually correct documentation to CBP for any imported good or material. Specifically, 19 U.S.C. 1484(a) (1), requires importers, using "reasonable care," to:

- file an entry for the imported good, declare its value and tariff classification, plus the rate of duty and
- provide any such other information necessary to enable CBP to properly assess duties, determine the admissibility of the imported merchandise and determine compliance with any law enforced by CBP.

Making customs compliance organic also means providing "arms and legs" to the concept of compliance through the company's management infrastructure: that is, putting in place, and empowering, a component devoted to ensuring compliance with laws, rules and procedures affecting the company's imports.

At the end of the day, the buck stops at the US importer.

**Assess risks beyond physical US borders**

For importers, the reasonable care obligation today must be exercised beyond the borders of the US. US borders have been pushed out for cargo security risk assessment purposes through CBP initiatives such as the Container Security Initiative (CSI), C-TPAT, and, later, the Importer Security Filing (ISF) [2] for determining cargo security risks in the post-9/11 environment. In the same way, the US borders also are effectively being pushed out for importers to assess their own risks in trade compliance. In other words, risk should be assessed prior to departure from the foreign port. This new protocol is necessary for importers who wish to avoid having their international trade transactions halted at the CBP port of entry.

To help minimize such risk there a few questions for which the US importer or consignee should have answers well before the goods depart for the US.

1. Do you know the origins of your components?
   - For example, do you know where the minerals used to make your imported cell phones were mined?

2. Do you have a "supplier code of conduct" that specifically prohibits such factors as the use of forced labor? If so, are these standards audited?

3. Can you produce records of such audits?

4. Do you know the exact name of the country of origin of goods being imported into the US?

5. Will special marking and labeling be required at the time of importation due to the type or class of merchandise being imported into the US (e.g., watches, gold, pipe fittings, textile fiber)?

6. Will the imported merchandise infringe any registered (and recorded with CBP) trademarks or copyright or will it be covered by an ITC exclusion order?

CBP also enforces other agencies' requirements. Many times, it is in connection with addressing another agency's requirement that a company realizes it also has a customs compliance issue. And, as a result of the implementation of the Single Window, these requirements will be more readily enforced by the other agencies and CBP at the time of importation. [3] Thus, a final question under the "Import Restrictions" risk category is:

7. Are there other US agency requirements applicable to the merchandise when imported into the US?

So your goods are admissible. What next?

Assuming the goods are admissible into the US, there remains the basic requirement under 19 U.S.C. 1484(a)(1)
for importers to use reasonable care to enter, classify, appraise, and provide any additional information to enable CBP to properly assess duties and determine compliance with any laws it enforces. Each one of these areas involves a distinct customs law discipline.

For example, tariff classification is the basis for all international trading of goods and, as a result, the foundation for determining regular duty rates. Therefore, the first due diligence questions affecting post release financial risk will be the following:

8. Do you have **in-house employees who have expertise on applicable tariff classifications** for your product lines?

9. Will a **duty-free or special program be claimed at entry** in connection with the import’s tariff classification?

Businesses are expected to seek the most advantageous duty rate that is legally possible, which sometimes can be a free or substantially reduced rate for which the import may qualify under a special program. If the duty preference or duty-free claim is rejected by CBP, there is also the possibility of additional liability for penalties resulting from the incorrect (false) claim of duty-free or duty preference eligibility on the customs entry. So, if the answer to number 9 above is yes, then the importer should be able to verify the product’s eligibility under the rules for the program. [4]

10. Is the imported merchandise **classified in a tariff provision or described within the scope of an order subject to antidumping and/or countervailing duties**?

If CBP believes the goods are evading AD/CVD, it has the ability to take interim measures that can include "(i) [s]uspen[si]on [of] the liquidation of each unliquidated entry of such covered merchandise that entered on or after the date of the initiation of the investigation under § 165.15." This provision becomes a hammer against an alleged AD/CVD evader because when "suspending of liquidation" takes place, CBP creates a temporary financial liability in its records against the importer for the AD/CVD entry in question, and the importer of record must remit payment of estimated duties to CBP. The cash deposit serves as a financial guarantee that the duty obligation will be fulfilled. [5]

Another basic "reasonable care" obligation under 19 U.S.C. 1484 is the requirement for the importer to declare the correct customs value. So the next due diligence question is:

11. Do you know the "method" or "basis" of appraisement used to determine the customs value of the imported merchandise? Do you know whether the sale was between related parties?

The most common method of appraisement is the "Transaction Value" method. "Transaction value" is defined as "the price actually paid or payable for the merchandise when sold for exportation to the United States," plus amounts for certain statutorily enumerated additions. Generally, the transaction value between a "related buyer and seller" may be acceptable under certain prescribed circumstances.

**When due diligence does not prevent a non-compliance – approaches to mitigation**

It is an unpleasant reality that despite one's best efforts to comply with laws and regulations, there will sometimes be failure. Fortunately, for importers of goods and materials into the US, a number of ways exist to mitigate the circumstances so that the full brunt of enforcement or penalty action is not brought to bear upon the company. For example, there are the voluntary pre-importation partnership programs in which importers can participate that would allow them to receive the benefit of the doubt or mitigation for small infractions. There is also the statutory right to receive minimum or no penalty if the importer discloses its violation before or without knowledge that CBP has begun a formal investigation.

1. **CBP Partnership Programs**

With regard to its continuing practice to partner with the trade community to promote cargo security and trade compliance, on its website CBP says the following about the new Trusted Trader Program that is still being piloted by CBP:

> U.S. Customs and Border Protection (CBP) has formulated the design for a holistic Trusted...
Trader program that unifies the current Customs-Trade Partnership Against Terrorism (C-TPAT) and the Importer Self-Assessment (ISA) processes in order to integrate supply chain security and trade compliance. The development of Trusted Trader is a coordinated effort with members of the trade community, CBP and Partner Government Agencies (PGAs), such as the Food and Drug Administration, Consumer Product Safety Commission, and the Transportation Security Administration.

While the Trusted Trader Program is still in testing, the components of that program remain permanent partnership programs that are available for use today.

**C-TPAT**

The C-TPAT program is a voluntary government-business initiative to build cooperative relationships that strengthen and improve overall international supply chain and US border security. CBP encourages participation by providing incentives to participants meeting or exceeding the program requirements. C-TPAT importers enjoy certain incentives based on their tier status within a three-tier structure. It is not unusual for entry-level data for goods arriving to the US for entry to not be known 24 hours prior to lading, with the level of certainty needed for filing documentation with CBP. But being a known entity to CBP via the C-TPAT partnership program helps the importer to avoid the brunt of enforcement for failing to provide such details 100 percent of the time.

**Importer Self-Assessment (ISA)**

The most significant benefit for a participant in the ISA program was provided at the program’s creation in 2002, and that is, the ability to disclose and receive "prior disclosure" treatment under 19 U.S.C. 1592 for violations uncovered and reported in writing to the importer during a CBP audit. [6]

2. Prior disclosures

Aside from the special treatment provided to ISA members when a violation of a customs law is committed by a US importer, a prior disclosure has the potential to become an importer’s "get out of jail free” card. In general, a prior disclosure is made if the person discloses the "circumstances of a violation" of 19 U.S.C. 1592, either orally or in writing to a Customs officer before, or without knowledge of, the commencement of a formal investigation of that violation, and makes a tender of any actual loss of duties, taxes and fees in accordance with 19 CFR 162.74. If a prior disclosure under 19 U.S.C. 1592 (c)(4) is accepted, the maximum penalties for violations of that statute are: (1) for negligence and gross negligence violations, the interest on the loss of revenue owed from the date of the violation until the date of the tender of the loss of revenue; and (2) for fraud violations, one times the loss of revenue amount or, if no loss of revenue, 10 percent of the dutiable value of the merchandise involved in the violation. See 19 U.S.C. 1592(c)(4).

Thus, the advantages of making a prior disclosure are clear. But the ability to take advantage of prior disclosure is not always the same. The same degree of care and diligence required to avoid a violation and trade compliance issue in the first place will be needed to take advantage of prior disclosure provisions. In other words, regularized self-assessment checks and organic due diligence will likely lead to finding out and being able to report the violation before CBP begins to formally investigate the matter.

**Action steps**

The discussion above presents some ideas for developing a toolkit for meeting the challenges of US import compliance in today's global environment with stepped up customs enforcement in several arenas. Key recommendations to US importers for meeting these challenges can be summarized as follows:

- **Know** your commodities being traded
- **Learn** the basic customs requirements related to your traded commodities
- **Avoid** the show stoppers at the border
- **Prepare** for post entry financial obligations affecting your bottom line
- **Partner** with CBP if possible and
- **Monitor and quickly report** non-compliance so that you have that "get out of jail free" card, when needed.
There is no specific order of priority in the above recommendations. They are all equally important, and, with an organized approach or infrastructure, they all can be implemented at the same time. But the time for action is now.

Find out more by contacting the author.

[1] This Alert is an excerpt from “Meeting the Challenges of Customs Compliance in a Post TFTEA and Reinvigorated Trade Enforcement Environment,” forthcoming in Global Trade & Customs Journal.

[2] See Importer Security Filing Regulations at 19 CFR Part 149. The other two cargo security initiatives (C-TPAT and CSI) are not codified in the CPB Regulations.

[3] CBP has developed the Automated Commercial Environment (ACE) which is the platform for International Trade Data System (ITDS) “single window” requirement established by the SAFE Port Act of 2006 for automated transmission of import documentations covering CBP as well as agencies’ import requirements (i.e., those affecting admissibility of the goods into the U.S.).


[6] In the Federal Register Notice creating the ISA program, Customs expressly provided as follows:

"With respect to an importer's right to make a prior disclosure pursuant to 19 U.S.C. 1592(c) or 1593a(c) and 19 CFR 162.74 when the importer becomes aware of facts that may represent a violation of 19 U.S.C. 1592 or 1593a, an ISA participant may utilize the following process: Unless, during Customs assistance, consultation or training with an ISA participant, Customs becomes aware of errors in which there is an indication of a fraudulent violation of 19 U.S.C. 1592 or 1593a, Customs will provide a written notice to the participant of such errors and allow 30 days from the date of the notification for the participant to assess and, if determined necessary, to file a prior disclosure pursuant to 19 CFR 162.74. This benefit does not apply if the matter is already the subject of an on-going Customs investigation*. 67 FR 41298 at 41299.

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