

U.S. Customs voluntary disclosure is no sham

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On April 1, the company that imports "Sham Wow" cloths filed a complaint against its U.S. Customs law firm alleging malpractice with regard to the advice it received on at least 64 import shipments.

Specifically, the importer claims that despite apparent concern about potential Customs violations, it did not receive any advice on the benefits of filing a voluntary prior disclosure with Customs.

Consequently, it alleges that it was hit with fines and penalties in excess of \$700,000 and had to spend at least another \$100,000 with another Customs law firm to reduce the penalty.

The claim alleges that if the company had been advised to make a voluntary disclosure it would have saved it a long and painful investigation. As of this writing the defendants have not filed their answer responding to the allegations.

No matter the merits of the case itself, the lawsuit provides a valuable object lesson for the entire import community: When in doubt about possible violations of Customs regulations, a voluntary prior disclosure is an extremely valuable tool that every importer and Customs broker should have on the top of its Customs compliance tool-kit. Customs brokers, Customs attorneys and importers should pay heed. Here's why.

Importing goods through Customs can be an exceedingly complex process. Issues with regard to the proper classification, valuation and country of origin of goods entering the United States plague even the most sophisticated large-volume importer.

Even those with full-time compliance personnel and complex compliance manuals make mistakes in navigating the treacherous shoals of Customs regulations. The \$700,000 penalty here is but one example of the exposure a company can face in the event of Customs violations.

A properly crafted voluntary disclosure can dramatically reduce a company's financial exposure to Customs penalties. Customs regulations are very clear. In the event a broker or importer uncovers a mistake or violation, a valid disclosure will reduce dramatically the level of fines that

might flow from an enforcement proceeding initiated by Customs and might even result in no penalty action altogether.

The regulations, found at 19 CFR 162.74, provide clear and concise guidelines for filing voluntary prior disclosures.

The benefits are apparent.

First, a valid disclosure will dramatically reduce a company's exposure to fines and penalties. Customs can seek penalties in an amount up to eight times the claimed duty loss (e.g., a \$100,000 shortfall in duty can result in a fine of \$800,000).

The financial benefits are obvious.

Second, being proactive in dealings with Customs allows the importer to frame the tone of everything that follows.

In the event of an enforcement proceeding, an importer starts out on the defensive trying to establish that it was not negligent. In a disclosure proceeding, the importer is presumed to be acting with reasonable care and due diligence. That's a much better playing field to be on.

It is always better to negotiate up from zero than down from \$800,000. Further, Customs requires that importers exercise reasonable care in dealings with Customs.

Not surprisingly, disclosures are considered evidence of reasonable care.

A disclosure must meet three criteria to be valid.

1. It has to be filed before the commencement of a Customs investigation or before the importer was aware of an investigation.

A "late" disclosure in response to a penalty notice will be disregarded.

2. Before making the disclosure companies should ensure they are disclosing every possible violation.

The disclosure will not provide any benefit for an undisclosed violation that is uncovered subsequent to the initial disclosure.

3. The disclosure should state with specificity what remedial measure the company plans to take subsequent to uncovering the violation.

If for example, a company does not already have a Customs compliance plan in place, a disclosure is a very good time to advise Customs that one will be implemented immediately.

A properly framed voluntary prior disclosure can save a company thousands of dollars.

It also shows Customs that the company takes compliance seriously and should help facilitate the importer's ongoing relationship with Customs.

Getting the benefit of the doubt when dealing with Customs is a goal for every importer.

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