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Meeting the Challenges of Customs Compliance in a Post TFTEA and Reinvigorated Trade Enforcement Environment

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In the international trade environment, basic import issues have always presented challenges for customs compliance because each import issue represents a distinct custom law discipline. For importers into the U.S., compounding the pre-existing challenges are the enhanced enforcement tools enacted in 2016 under various provisions of the Trade Facilitation and Trade Enforcement Act of 2015 (TFTEA), which is now being fully implemented by U.S. Customs and Border Protection. This article examines through self-assessment questions, how trade compliance risk assessment can be used by companies to confront the increased customs compliance challenges in a reinvigorated U.S. trade enforcement paradigm.

1 Background

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 labelling, 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 under the Trade Enforcement and Trade Facilitation Act of 2015 (TFTEA), enacted one year ago, that are specifically designed to enhance Customs and Border Protection's (CBP) trade enforcement capabilities.[1] Meanwhile, US importers' supply chains have become more internationally integrated than ever. In this setting, the compliance challenges for US importers multiply.

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 defense to a customs enforcement proceeding if needed. For example, this means performing the internal customs compliance self-assessment *before there is a lucrative offer* to purchase your company in a merger and acquisition deal, or *before a suit is filed* against your company under the False Claims Act[2] either by the US government or by a private person or entity, such as a competitor.

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1 *See* Pub. L. No. 114-125 *Trade Facilitation and Trade Enforcement Act of 2015* (United States Public Laws (2015–2016 ed.). *See also House Report 114-376, Conference Report To Accompany H.R. 644* 176–204, 224, 228 (9 Dec. 2015). For example, the following provisions under TFTEA relating to – **Intellectual Property Rights (IPR), Antidumping and Countervailing Duty (AD/CVD) Evasion, Forced Labor, and Country of Origin Marking** – provided new tools for increased CBP enforcement in traditional trade compliance risk areas: *TITLE III – Import-Related Protection of Intellectual Property Rights; Title IV – Prevention of Evasion of Antidumping and Countervailing Duty Orders; Section 910 – Elimination of Consumptive Demand Exception to Prohibition on Importation of Goods Made with Convict Labor, Forced Labor, or Indentured Labor; And Section 917– Amendment to Tariff Act of 1930 to Require Country of Origin Marking of Certain Castings.*

2 31 U.S.C. 3729. For example, in Apr. 2016, the Department of Justice in Washington, DC announced that a company agreed to pay USD 15 million to resolve allegations that the company engaged in a scheme to evade evaded antidumping duties on wooden bedroom furniture imported from the PRC from 2007 to 2014 in violation of the False Claims Act. This action was originally brought by a whistleblower, an e-commerce retailer of furniture, under the qui tam provisions of the False Claims Act. *See* Press Release at https://www.justice.gov/opa/pr/california-based-z-gallerie-llc-agrees-pay-15-million-settle-false-claims-act-suit-alleging.

Below, we explore internal trade compliance risk assessment as a tool for meeting the challenges of being customs compliant in today's trade enforcement environment.

2 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.

The Court of International Trade made this obligation clearer in its 2001 decision in *United States v. Golden Ship Trading Company*, et al., Slip Op. 01-7 (24 January 2001), 25 CIT 40 (2001) in which the court held that an importer cannot 'blindly' rely upon information provided or prepared by others (e.g. exporter or broker). In upholding the Customs penalty, the court held that even if the importer uses a licensed customs broker, it will be found liable for 'failure to verify information' contained in documents filed with CBP.

Making customs compliance organic also means providing 'arms and legs' to the concept of compliance through the company's management infrastructure. That is, create and empower a component at the highest level possible within the company's organization that is devoted to ensuring compliance with laws, rules and procedures affecting the company's goods and materials that are imported into, and exported from, the US through updated policies and procedures demonstrating reasonable care. At the end of the day, the buck stops at the US importer.

Finally, an added incentive for making due diligence second nature is *the avoidance of personal liability* for non-compliance. Individual importers, *even if incorporated*, or working as a principal in a corporation, may be *personally* charged and assessed monetary penalties by CBP. On 16 September 2014, the full Court of Appeals for the Federal Circuit (CAFC) issued its decision in *United States v. Trek Leather, Inc. & Shadadpuri* (767 F.3d 1288), in which it unanimously held that employees, officers, and owners of corporate importers of record may *become personally liable* for *negligent* and *grossly negligent* violations of 19 U.S.C. § 1592.

3 Assess Customs risks beyond the physical US borders

The reasonable care obligation today must be exercised beyond the borders of the US because 'Import Restrictions' risks can be the biggest show stoppers in today's international trade and customs transaction. US borders have been pushed out for cargo security risk assessment purposes through CBP initiatives such as the Container Security Initiative (CSI), Customs-Trade Partnership Against Terrorism (C-TPAT), and, later, the Importer Security Filing (ISF)[3] 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, the 'import restriction-risk assessment' cannot await the arrival of the shipment; as with cargo security, this 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 stopped at the CBP port of entry.

That is, to minimize risk that a shipment will be stopped at the border, there are a few questions for which the US importer or consignee should **have answers well before the goods depart for the US.**

(1) **Do you have visibility at the site/location of production?**

– For example, do you know where the minerals used to make your imported cell phones were mined? If from the Democratic Republic of Congo, there may be risks.[4]

(2) **Do you have a 'supplier code of conduct' (or something similar) that specifically prohibits (among other provisions) the use of forced labour** in any part of the manufacture of the imported merchandise? If so: **are these standards audited,** internally or by 3rd party auditors?

(3) **Can you produce records of such audits for a 'Proof of Admissibility' (19 CFR 12.43)** submission in the case of an import ban issued under 19 U.S.C. 1307, the US Forced Labor Statute?

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

– For example, can you readily tell which country of origin rules (e.g. 19 CFR Part 102 tariff shift rules for North America Free Trade Agreement (NAFTA) or Textile products; or case-by-case substantial

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[3] *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.

[4] *See The Cobalt Pipeline*, Wash. Post (2 Oct. 2016).

transformation – new name character or use test) – will apply for determining the correct country of origin for marking?[5]

(5) Will **special marking and labelling** be required at the time of importation due to the type or class of merchandise being imported into the US (e.g. special marking for watches, gold, origin of castings and pipe fittings, or textile fibre content)?

– In February 2016, under section 917 of TFTEA, a new country of origin marking requirement was added to 19 U.S.C. 1304: '(e) Marking of certain castings: **No exception may be made for country of origin marking of –** inlet frames, tree and trench grates, lampposts, lamppost bases, cast utility poles, bollards, hydrants, utility boxes, manhole rings or frames, covers, and assemblies thereof – each of which shall be marked **on the top surface** with the English name of the country of origin by means of **die stamping, cast-in-mold lettering, etching, engraving**, or an equally permanent method of marking in a location such **that it will remain visible after installation.** This amendment was effective on date of enactment (2/24/2016), but became applicable to imports as of 24 August 2016, 180 days from date of enactment.

– In October 2016, in United States ex rel. Customs Fraud Investigations, LLC v. Victaulic Co., 839 F.3d 242 (3rd Cir. 2016), the Third Circuit held that the 2009 amendments to the False Claims Act allowed a relator to pursue a reverse false claims action against an importer who allegedly failed to properly mark its imported pipe fittings with a country-of-origin label as then prescribed under 19 U.S.C. 1304(c).[6]

(6) **Will the imported merchandise infringe any registered (and recorded with CBP) trademarks or copyright or will it be covered by an International Trade Commission (ITC) exclusion order at the time of importation?** For example, if the imported good bears a US registered and recorded trademark, can you provide to CBP – pursuant to CBP Regulations (19 CFR 133.21), within seven business days of notification of a CBP detention of such merchandise – information that can establish that the mark on the imported merchandise is not counterfeit in order to avoid sensitive supplier sourcing information being turned over to the US trademark owner?[7]

CBP also enforces other agencies' requirements that are applicable to goods and materials at the time of its importation into the US. Many times, it is in connection with addressing another agency's requirement that a company realizes it also has a customs compliance issue that needs to be addressed. 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.[8] 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** (e.g. Environmental Protection Agency (EPA), US Department of Transportation, Food and Drug Administration, Consumer Protection Safety Administration, US Fish and Wildlife Service (that enforces US implementation of Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES))? Goods not meeting any one of these requirements can be denied admission into the US.

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[5] 19 U.S.C.1304 requires that, unless excepted by law or regulations, all articles of foreign origin be marked with the country of origin in a conspicuous place, as legibly and permanently as the nature of the article will permit, to indicate to the ultimate purchaser in the US the English name of the country of origin. If the imported article of foreign origin is sold to the ultimate purchaser in the US inside a container, the outermost container in which the article is sold also must be marked with the name of the country of origin. The CBP regulations implementing the general country of origin marking requirements for imported goods of foreign origin (as well as the authorized exceptions to marking) are set forth in 19 CFR Part 134. Under these regulations, unless the good is being imported from a NAFTA country **the 'country of origin' for marking is defined as: 'the country of manufacture, production, or growth of any article of foreign origin entering the United States. Further work or material added to an article in another country must effect a *substantial transformation* in order to render such other country the "country of origin"'** '*Substantial transformation*' determinations are made on *a case-by-case basis.*

[6] 19 U.S.C. 1304**(c): 'Marking of certain pipe and fittings (1)** Except as provided in paragraph (2), no exception may be made under subsection (a)(3) with respect to pipes of iron, steel, or stainless steel, to pipe fittings of steel, stainless steel, chrome-moly steel, or cast and malleable iron each of which shall be marked with the English name of the country of origin by means of die stamping, cast-in-mold lettering, etching, engraving, or continuous paint stenciling. **(2)** If, because of the nature of an article, it is technically or commercially infeasible to mark it by one of the five methods specified in paragraph (1), the article may be marked by an equally permanent method of marking or, in the case of small diameter pipe, tube, and fittings, by tagging the containers or bundles.'

[7] *See* 19 CFR 133.21(b)(2)(B).

[8] 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 US). The ITDS is an electronic data interchange system whose goals include eliminating redundant information requirements, efficiently regulating the flow of commerce, and effectively enforcing laws and regulations relating to international trade by establishing a single portal system, operated by CBP, for the collection and distribution of standard electronic import and export data required by participating federal agencies. All federal agencies requiring documentation for clearance or licensing the importation of cargo must participate in ITDS. As a result, importers will not have to send import related documentations to separate agencies when the shipments arrive into the US. Therefore, if all of the anticipated requirements of affected agencies, such as the flammability and lead content requirements imposed by CPSC, or the registration and listing numbers or foreign manufacturers and exporters of imported medical devices required by FDA, have been addressed or can be addressed with documentation presented to CBP upon arrival, the shipment can be cleared into the US expeditiously through the Single Window upon arrival. *See* e.g. *CPSC Notice of Conclusion of ACE-ITDS Pilot*, 81 FR 84560 23 Nov. 2016 and *FDA Final Rule on Submission of Import Data in ACE*, 81 FR 85854 29 Nov. 2016.

4 Assessment of post release risks affecting the company's bottom line

Moving beyond import restriction risks, and 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 that 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 (if not an organizational unit) who have expertise or knowledge of the applicable tariff classifications for the company's product lines** under the international Harmonized Tariff System (HTS), as well as the extended classification for the product under the Harmonized Tariff Schedule of the United States (HTSUS)?

(9) **Will a duty-free or special program – e.g. Generalized Systems of Preferences (GSP) – be claimed at entry in connection with the tariff classification for the imported merchandise**?

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. But when business plans are based upon the lower or free rate, the denial by CBP of that rate can have a big impact on the company's profit margin. 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 the number 9 above is 'yes', then the importer should be able to verify the product's eligibility under the rules for the program, such as meeting the applicable rule of origin and other eligibility requirements such as 'direct shipment' to the US.[9]

(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 (AD/CVD)?**

Also enacted as part of the TFTEA was Title IV, 'The Enforce and Protect Act of 2015' (EAPA) which required CBP to establish a formal procedure for investigating complaints by domestic petitioners of alleged evasions by importers of AD/CVD orders. CBP Regulations implementing the Enforce and Protect Act were published under 81 Fed. Reg. 56477 (22 August 2016). AD/CVD evasions already were the *most common basis for qui tam actions* which usually are brought by disgruntled former employees. But EAPA has added to the CBP arsenal of tools to tackle AD/CVD evasion, and importers must be careful to avoid this latest weapon.

After initiating an investigation under 19 CFR 165.15, if CBP believes the goods are evading AD/CVD, the most significant Impact of the new regulations upon incoming entries is CBP's ability to take interim measures that can include '(i) [s]uspen[sion] [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 'suspension 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. Cash deposit amounts normally are determined on the basis of the entered value and the weighted-average dumping margins in a given case.[10]

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. 19 U.S.C. §1401a(b)(1). Under US CBP regulations, the phrase 'price actually paid or payable', means **the total payment** (whether direct or indirect, and **exclusive of any charges, costs, or expenses incurred** for transportation, insurance, and related services incident to the international shipment of the merchandise from the country of exportation to the place of importation in the United States) **made, or to be made, for imported merchandise by the buyer to, or for the benefit of,**

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[9] *See* Rules for special programs such as GSP, AGOA, NAFTA and other US Free Trade Agreements at General Notes 3, et seq., *Harmonized Tariff Schedule of the United States* (at the Department of Commerce website).

[10] *See U.S. Department of Commerce 2015 Antidumping Manual*, Ch. 20, 'ENFORCEMENT AND COMPLIANCE (E&C) – CBP COMMUNICATIONS' on this page.

the seller. *See* 19 CFR 152.102(f). Generally, the transaction value between a 'related buyer and seller' may be acceptable under certain prescribed circumstances. *See* 19 CFR 152.103(j).[11]

A recent example of when the compliance effort in declaring the customs value to CBP was not successful can be seen from the Department of Justice 18 April 2016 announcement of a USD 1.5 million settlement of a case under the False Claims Act – qui tam action where the importer of sportswear had undervalued its imports from its related manufacturer of the sportswear in Hong Kong*:* Wind Enterprises, Inc. (US) and Wind Enterprises, Ltd. (HK).

5 When due diligence does not prevent non-compliance: approaches to mitigation

It is an unpleasant reality that despite any company's best efforts to comply with laws and regulations relating to its business, there will be failure on occasion. Fortunately, for importers of goods and materials into the US, there are a number of ways to mitigate the circumstances so that the full brunt of enforcement or penalty action is not brought to bear upon the company for the infraction. For example, there are the voluntary pre-importation partnership programs in which the importer 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 'comes clean' or discloses its violation *before or without knowledge* that CBP has begun a *formal investigation* into the matter. A brief discussion of these two broad classes of options for avoiding the usual harsh result from non-compliance with customs requirements is presented below.

5.1 *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.

5.1.1 *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. Tier I incentives are afforded to those importer partners that have been certified; Tier II level is provided to those that have been certified and validated; and Tier III incentives are provided to those that have exceeded the program's requirements and exhibit best practices. Incentives include benefits such as a reduced examination rate and penalty mitigation for late submission of data required under the ISF regulations. Keep in mind that the entry level data required under the ISF must be submitted to CBP 24 hours prior to lading of the cargo on a vessel departing a foreign port for the US. *See* 'CBP Announcement of Trusted Trader Program Test', 79 FR 34334, 34335 (16 June 2014). 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% of the time.

5.1.2 *Importer Self-Assessment (ISA)*

ISA began as a partnership program between the US importing trade community and the former US Customs Service (now CBP) in 2002. *See* 67 FR 41298 (12 June 2002). Since that time, the program has expanded to allow participation by Canadian importers. *See* 77 FR 61012 (5 October 2012). An additional off spring of the

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[11] Generally, the transaction value between a 'related buyer and seller' *is acceptable* – if an examination of the circumstances of sale indicates – that their relationship did not influence the price actually paid or payable, **or** if the transaction value of the imported merchandise closely approximates (A) The transaction value of identical merchandise; or of similar merchandise, in sales to unrelated buyers in the United States; or (B) The deductive value or computed value of identical merchandise, or of similar merchandise [19 CFR 152.103(j((2)(i)(A)(B)]. These values (also known as test values) *must cover goods exported to the US around the same time that the subject goods* were imported into the US [*19 CFR 152.103(j)(2)(i)(C)*].

ISA program is the ISA Product Safety pilot that is conducted jointly by CBP and Consumer Product Safety Commission (CPSC) and participating importers who strive to prevent the importation of unsafe products. *See* 79 FR 34334, 34335 (16 June 2014). Notwithstanding the expansion of ISA over the years, 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.[12]

5.2 *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. A violation of 19 U.S.C. 1592, generally, is committed whenever any person as a result of negligence, gross negligence, or fraud, enters, introduces, or attempts to enter or introduce into commerce of the United States, merchandise, by means of any false statement, omission or act, which is material. 19 U.S.C. 1592(a). Maximum penalties in amounts commensurate with culpability involved in the violation may be assessed under 19 U.S.C. 1592(c) (1) through (3).

If, however, 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% of the dutiable value of the merchandise involved in the violation. *See* 19 U.S.C. 1592(c)(4).[13]

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. If, as a result of a self-assessment check, violations are uncovered and quickly disclosed to CBP with tenders of lost revenue, there is less likelihood that the circumstances of those violations will already be the subject of a *formal investigation commenced* by CBP at the time of that disclosure.[14] 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.

6 Conclusion

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. Therefore, 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*.

Notes

[12] 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.

[13] Special and more liberal prior disclosure treatment is provided for prior disclosures of violations involving claims for preference under various Free Trade Agreements beginning with NAFTA. These special FTA prior disclosure provisions are set forth under 19 U.S.C. 1592(c)(5) through (13).

[14] *See* 19 CFR 162.74 (g)(h)(i) regarding factors for determining when there has been a 'commencement', 'expansion' and 'knowledge of commencement' of a formal investigation.