

Importing Goods into the U.S.

Access US

New policies, aggressive enforcement by U.S. Customs and Border Protection (CBP), along with ongoing NAFTA negotiations, mean it is more important than ever for Canadian companies to be familiar with the legal standard for complying with U.S. customs laws and regulations governing the importation of merchandise into the U.S. Executive Order 13785 (“Establishing Enhanced Collection and Enforcement of Antidumping and Countervailing Duties and Violations of Trade and Customs Laws”), signed by President Trump on March 31, 2017, has only increased the stakes in the event of non-compliance.

Canadian companies with U.S. subsidiary or branch operations may be importing into the U.S. directly from overseas suppliers, as well as from Canadian parent and affiliated companies. Many Canadian companies that have not established a presence in the U.S. are non-resident importers in the U.S., a strategy that allows them to better serve U.S. customers. For any Canadian companies with U.S. importing activities, U.S. customs laws and regulations, as well as CBP’s investigation and enforcement activities can pose significant challenges and risks.

U.S. customs laws and CBP regulations require all businesses and individuals to exercise “reasonable care” when importing merchandise into the U.S. However, “reasonable care” is not defined in these laws and regulations. In general, a lack of reasonable care can (and often does) lead to CBP imposing civil penalties on importers and others that CBP alleges failed to meet this legal standard.

For CBP to assess a civil penalty, the underlying violation must involve the introduction or entry of merchandise into U.S. commerce by means of a material and false act or statement (oral, written, or electronic) or a material omission. “False” does not require intent; essentially it means in error or incorrect. “Material” means information that tends to affect the decision by CBP to admit and release goods from its custody (“clear customs”) or assess accurate duties, taxes, and fees. Penalties can also be imposed against those who aid and abet a violation of the customs laws and regulations.

Unlike the Canada Border Services Agency’s (CBSA) Administrative Monetary Penalty System (AMPS), CBP’s civil penalties are not set according to a schedule that provides importers with some certainty as to the risk and potential exposure in the event of a violation or series of violations. Instead, CBP penalties can range from a maximum of 2x the unpaid duties (for simple negligence) to 4x (for gross negligence, generally meaning recklessness) to the U.S. domestic value of the imported merchandise (for fraud, where intent is shown by direct or circumstantial evidence).

Meeting the reasonable care standard can be shown by evidence that the importer consulted with a U.S. customs broker, legal counsel familiar with customs laws and CBP regulations, or by other means. Generally, documentary evidence and sworn statements will be required to demonstrate that an importer or other party involved with the importation exercised reasonable care to defend against CBP’s allegations of a violation. The statute of limitations for negligence and gross negligence penalties is five (5) years from the time of entry, while the limitations period for a fraud penalty is five (5) years from the date of discovery of the fraudulent activity, so complete and accessible documents will be necessary to defend a CBP civil penalty proceeding.

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Canadian companies, business owners, and individuals who are involved with U.S. importing activities are not immune to CBP's civil penalties if they fail to meet the reasonable care standard. The case might involve a Canadian non-resident importer facing CBP penalties for not declaring pencils imported into the U.S. from China as subject to U.S. antidumping/countervailing duties or a Canadian company facing potential penalties for importing figure skating dresses into the U.S. and, in good faith but wrongly, declaring the dresses qualified as duty-free under NAFTA. In both instances and many others, CBP will pursue penalties against the Canadian importing parties.

Even if CBP does not seek to impose a penalty resulting from a violation (a rarity these days), a new collection policy significantly shortens the time to pay a supplemental duty bill (often issued by CBP if it reclassifies goods or denies a NAFTA claim). These bills are due within thirty (30) days. Effective September 5, 2017, supplemental duty bills that remain unpaid after sixty (60) days will result in CBP placing the importer on sanctions which will delay the release of goods and require the filing of "live entries" at individual ports. This new policy has been implemented without regard to the 180-day time limit to protest CBP's adverse decision, effectively forcing importers to pay supplemental duty bills before exercising their right to protest against a CBP decision. The payment requirement or threat of sanctions exists even where a protest is pending.

For more information on this topic and importing goods into the U.S., please contact Jon Yormick, Special Counsel at Phillips Lytle LLP. He can be reached at jyormick@phillipslytle.com or 716-847-7006.