

Retail & Consumer Products Alert: Are You Prepared for Increased Import Compliance Scrutiny?

Importers in the retail and consumer products sectors should be carefully reviewing their trade compliance policies and procedures as Canada Border Services Agency (“CBSA”) is scrutinizing customs compliance in a number of areas – including declarations of origin, tariff classification and customs valuation.

Failure to meet these requirements under the *Customs Act* (the “Act”) can result in the imposition of Administrative Monetary Penalties, seizures and ascertained forfeitures, the assessment of duties, taxes and penalizing interest, and the denial of duty-free access to the Canadian market. Of particular concern for retailers with just-in-time business models, non-compliance significantly disrupts cross-border product flow and can cause lengthy and costly delays in getting your product into the hands of Canadian consumers.

Getting the Price Right: Customs Valuation Vulnerabilities

In particular, we are observing increased CBSA audit and enforcement activity regarding customs valuation. i.e., the value of goods declared for purposes of calculating customs duties and taxes owing on importation.

Common areas of compliance vulnerability include:

- (i) related party transactions – in order to use the price paid to a related vendor importers must be able to demonstrate that the price was not influence by the relationship; in certain circumstances, and provided they have properly documented and supported their methodology, importers may be able to use as a “base” the price established in accordance with income tax transfer pricing principles, subject to a number of adjustments;
- (ii) transfer pricing adjustments – adjustments or “true-ups” to related party transaction pricing may also trigger specific customs obligations to correct past entries and remit additional customs duties, taxes and interest;
- (iii) post-importation payments (subsequent proceeds) – CBSA is aggressively reviewing payments made by importers that at first instance may appear unrelated to the price of the goods; as highlighted in further detail in *Importer Alert: New CBSA Guidelines on Post-Importation Payments and Management and Administration Fees* (at http://mccarthy.ca/article_detail.aspx?id=4655), unless certain conditions are satisfied, CBSA will determine that management and administrative fees paid by the importer should be included in the customs valuation of imported goods;
- (iv) other adjustments to the price paid – in addition to subsequent proceeds, the Act requires the addition of a number of other amounts to the price paid or payable by the importer to the extent that they are not already included in the price when determining value for duty; these include commissions and brokerage paid by the purchaser of the goods (excluding buying commissions), packing costs, assists such as tools and dies and engineering and art and design work, certain royalties and license fees and transportation and insurance costs relating to the transportation of the goods to place from which they are shipped directly to Canada; and

- (v) proper use of other valuation methods – in some circumstances, the price paid or payable by the importer cannot be used and other methods under the Act must be considered in sequence for purposes of customs valuation; these include the transaction value of identical or similar goods, the computed value (cost-plus), the deductive value (resale value-minus), and, if those cannot be applied, the residual method; using these other valuation methods can be complex and time-consuming and often it is recommended that importers seek CBSA rulings to confirm their approach.

CBSA detects compliance failures in these areas through a number of monitoring mechanisms, including desk audits and the more comprehensive compliance verifications. These are carried out by CBSA on a random basis as well as by targeting priority areas – further detail can be found in CBSA’s “Trade Compliance Post-Release Verifications – January 2012” at http://new.cscb.ca/sites/default/files/repository/CBSA_Verification_Priority_List-Jan_2012.pdf. A number of retail and consumer products are currently on CBSA’s priority target list.

Mitigating Risk Exposure

There are a number of actions that retail and consumer product importers can take to address the significant risks in this area, including:

- (i) conducting an assessment of your current trade compliance status, include past contraventions, current procedures, testing and sampling of transactions;
- (ii) developing and implementing clearly articulated and readily accessible trade compliance manual and procedures that are regularly reviewed and updated;
- (iii) appointing senior officer(s) responsible for the implementation and enforcement of trade compliance policies and procedures;
- (iv) educating and training appropriate officials on trade and customs requirements;
- (v) internal procedures for reporting potential trade compliance violations;
- (vi) using, as appropriate, CBSA’s voluntary disclosure process for relief from monetary penalties, penalizing interest and other enforcement action;
- (vii) using, as appropriate, CBSA’s ruling process to obtain additional comfort
- (viii) regular reviewing, testing and enhancement of processes and procedures to ensure continued full compliance.

In light of CBSA’s increased enforcement in this area and the highly competitive and just-in-time nature of the Canadian retail and consumer products sector, a robust trade and customs compliance program is now viewed as a competitive advantage in the Canadian marketplace - it ensures the smooth and timely flow of product across the border and protects against costly penalties and other CBSA enforcement action.

About Us

McCarthy Tétrault's International Trade & Investment Law Group has significant experience and expertise in dealing with trade and customs issues in the retail sector and is available to advise on any related enforcement, compliance and strategic planning issues.