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## Overview of Import Practice

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Import practice, or customs and international trade law, refers to the area of law and administrative procedure that governs the importation of goods into the United States. The Constitution grants to Congress the power to regulate importing, and Congress has done so by enacting the customs statutes, which are contained in the United States Code, and by delegating to the administering agency, U.S. Customs and Border Protection, the authority to promulgate the customs regulations, which are contained in the Code of Federal Regulations. Customs matters are under the exclusive jurisdiction of one national trial court—the U.S. Court of International Trade—and appeals therefrom are heard by one national appellate court—the U.S. Court of Appeals for the Federal Circuit. Import practice is a highly specialized area, and its technical rules can be a trap for the unwary. An overview of the practice will lay the groundwork for understanding its rules and how to apply them.

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## “Import Practice” Defined

### Q 1.1 What is import practice and customs and international trade law?

Import practice, or customs and international trade law, refers to the area of law and administrative procedure that governs the importation of goods into the United States. It covers the tariff classification and valuation of imported goods; importing restrictions and requirements; the entry process for imported goods; reduction and elimination of duty on imported goods; administration, regulation, and enforcement by U.S. Customs and Border Protection; and judicial review of customs matters.

## Governing Laws

### Q 1.2 What laws govern importing into the United States?

Importing is governed by federal law. The Constitution expressly grants to Congress two specific powers to regulate importing: “the power to lay and collect taxes, duties, imposts and excises” and “the power to regulate commerce with foreign nations.”<sup>1</sup> Congress has exercised these constitutional powers by enacting the customs statutes, which are contained, for the most part, in **Title 19 of the U.S. Code**. Interestingly, the U.S. tariff law itself, formally called the “**Harmonized Tariff Schedule of the United States**” (HTSUS), is not in Title 19, but published separately by the U.S. International Trade Commission.<sup>2</sup>

Congress has also delegated to U.S. Customs and Border Protection the power to administer the customs laws:

The Secretary . . . shall establish and promulgate such rules and regulations not inconsistent with the law . . . as may be necessary to secure a just, impartial, and uniform appraisement of imported merchandise and the classification and assessment of duties thereon at the various ports of entry.<sup>3</sup> In addition to the specific powers conferred by this chapter the Secretary . . . is authorized to make such rules and regulations as may be necessary to carry out the provisions of this chapter.<sup>4</sup>

The **Customs Regulations** are contained in Title 19 of the Code of Federal Regulations. In addition to the Customs Regulations, U.S. Customs also issues **formal administrative rulings**, which represent the official position of U.S. Customs with respect to the particular transaction or issue described therein and is binding on all U.S. Customs personnel and may be cited as authority in the disposition of transactions involving the same circumstances.<sup>5</sup> Although there are other sources of law governing importing, Title 19 of the U.S. Code, the HTSUS, the Customs Regulations, and the formal U.S. Customs rulings are the chief sources.

## Definitions

### Q 1.3 What is an “import”?

For tariff purposes, an “import” is a “good” brought into the “customs territory of the United States” from a foreign territory.<sup>6</sup>

#### Q 1.3.1 What is a “good”?

The term “good” is not defined in the tariff; rather, the tariff considers anything that can be imported to be a “good,” unless that thing falls within one of six specific tariff exemptions therefrom—namely, telecommunications transmissions, business data in any media form, corpses (with their coffins and accompanying flowers), articles returned from space, certain exported articles, and certain aircraft parts and equipment.<sup>7</sup> But for the latter four exemptions, a “good” for tariff purposes is essentially the same thing as a “good” for Uniform Commercial Code purposes—that is, anything “movable,” except information.<sup>8</sup> That is no surprise, for if a thing is “movable” it can be imported into the United States. Interestingly, unlike the tariff, the customs valuation statute uses the term “merchandise,” not “good,” when referring to an import,<sup>9</sup> but that distinction makes no difference, for the statutory definition of “merchandise” begins with the term “goods.”<sup>10</sup> The customs laws also use the terms “product” and “article” in addition to “good” and “merchandise”; all of those terms are synonymous.

#### Q 1.3.2 What is the “customs territory of the United States”?

The “customs territory of the United States” includes only the fifty states, the District of Columbia, and Puerto Rico.<sup>11</sup> The significance of the foregoing is twofold: (1) a good introduced into any one of the aforementioned places from another is not an “import,” and, therefore, is not subject to U.S. customs laws, because all of those places are within the customs territory of the United States; and (2) a good introduced into one of the fifty states, the District of Columbia, or Puerto Rico from any other place in the United States—*e.g.*, a U.S. insular possession—is an “import” subject to U.S. customs laws, including the assessment of duty, unless specifically exempted therefrom.<sup>12</sup> In other words, even if a good comes from a place in the United States that is not the “customs territory,” it may still be an “import.”

## Importable Goods

### Q 1.4 What goods can be imported?

Although the provisions of the tariff cover all goods—that is, anything that can be imported<sup>13</sup>—not all goods can be imported. Scattered throughout the customs statutes and regulations are a multitude of provisions prohibiting or restricting the importation of particular goods. A few examples of specifically prohibited goods are: written materials and films advocating treason against the United States,<sup>14</sup> white phosphorous matches,<sup>15</sup> switchblade knives (unless the blade is no more than three inches long and is carried on the person of an individual who has only one arm),<sup>16</sup> merchandise bearing a counterfeit trademark,<sup>17</sup> and wild mammals and birds protected by foreign law.<sup>18</sup> Restricted articles—*i.e.*, those requiring special permission or conditions to import them—include milk,<sup>19</sup> seeds,<sup>20</sup> and narcotics.<sup>21</sup> The lesson to be learned from the foregoing is this: Before attempting to import any particular merchandise, the importer must ascertain whether any prohibition or restriction applies to it. Prohibited merchandise cannot be imported; restricted merchandise must satisfy the conditions necessary for importation.

## Import Regulation

### *Agencies*

### Q 1.5 Which governmental agencies administer U.S. customs laws?

U.S. Customs and Border Protection—also known as “U.S. Customs,” “CBP,” or simply “Customs”—an agency within the U.S. Department of Homeland Security, is vested with the authority to administer and enforce U.S. customs and international trade laws.<sup>22</sup> Thus, import practice is essentially dealing with U.S. Customs and its regulations, procedures, and actions. Other agencies involved in regulating importing include the U.S. International Trade Commission, the International Trade Administration of the U.S. Department of Commerce, and the Food and Drug Administration.

**Q 1.5.1 How is U.S. Customs organized?**

Customs is organized on two levels—**national** and **local**. At the national level, at Customs **Headquarters** in Washington, D.C., the agency is headed by a **Commissioner**, who is appointed by the President.<sup>23</sup> At Headquarters, there are also a Deputy Commissioner, who reports to the Commissioner, and fourteen Assistant Commissioners who report to the Commissioner and the Deputy Commissioner. Each Assistant Commissioner presides over a CBP “Office.” Of particular importance to importers is the **Office of International Trade**.<sup>24</sup> The **Regulations and Rulings Unit** thereof has direct effect on the importer, for it is responsible for Customs’ rulings and other formal decisions on the tariff classification and valuation of merchandise already imported or contemplated to be imported. Within that Unit, the **National Import Specialists (NIS)** of the National Commodity Specialist Division (located in New York City, rather than in Washington, D.C.) have decision-making authority and are important sources of tariff classification information. At the local level, Customs operates through a field-office structure consisting of twenty Field Operations Offices, organized geographically throughout the United States. The Field Offices supervise the 300+ U.S. ports of entry.<sup>25</sup> The ports of entry conduct the daily operations involved in administering and enforcing the Customs laws, such as allowing entry and release of imported merchandise,<sup>26</sup> collecting duties,<sup>27</sup> liquidating entries,<sup>28</sup> deciding protests,<sup>29</sup> and issuing penalties.<sup>30</sup> Some ports are “service ports,”<sup>31</sup> which means that they provide a full range of cargo processing services; other ports provide minimal processing services. Personnel of particular importance to import practice at the service ports are the **Port Director**, the **Import Specialist Teams**, and the **Fines, Penalties & Forfeitures Officers**, whose actions have direct effect on merchandise already imported or contemplated to be imported. Depending on the particular import transaction at issue, the importer and his experts may be dealing with Customs at the national level, the local level, or both.

**Courts****Q 1.6 Which courts interpret the customs laws?**

The **U.S. Court of International Trade (CIT)** in New York City is the national federal trial-level court that has exclusive jurisdiction over civil actions relating to the customs laws,<sup>32</sup> except actions involving

certain seizures and forfeitures that are within the exclusive jurisdiction of the federal district courts;<sup>33</sup> criminal violations of the customs laws are also within the exclusive jurisdiction of the district courts.<sup>34</sup>

**Appeals** from the U.S. Court of International Trade are heard by the specialized, national federal circuit court—the U.S. **Court of Appeals for the Federal Circuit** (CAFC) in Washington, D.C.<sup>35</sup>

## Involved Parties

### Q 1.7 What private parties and experts are involved in a commercial importation?

A commercial importation will include some or all of the following private parties and experts: an **importer**, a **surety**, a **carrier**, a **customs broker**, a **freight forwarder**, a **customs attorney**, and a **customs consultant**. The customs statutes and regulations establish the roles, and the accompanying responsibilities, of each of those parties.

#### *Importer*

### Q 1.8 Who is the “importer” for customs purposes?

The term “importer” comes from the Latin, *importare*, and literally means “to carry in.” However, carrying merchandise into the United States is not the specific meaning of “importer” in customs parlance. The Customs Regulations define the “importer” by his or her obligations—“the person primarily liable for the payment of any duties on the merchandise, or an authorized agent acting on his behalf.”<sup>36</sup> Although “the liability for duties is a personal debt due from the importer to the United States,”<sup>37</sup> that obligation burdens the importer, but does not identify him or her. To identify the importer, the Customs Regulations provide options—he or she “may be” the “consignee,” the “importer of record” of the merchandise, or, in certain cases, the actual owner or transferee of the merchandise.<sup>38</sup> The “consignee” is the person named in a bill of lading as the person to whom the goods are to be delivered.<sup>39</sup> The “importer of record” is the owner or purchaser of the merchandise or a licensed customs broker.<sup>40</sup> In most commercial transactions, the consignee of the merchandise and the purchaser of the merchandise are one and the same, and accordingly, that person is both the “the importer” and the “importer of record” of that merchandise.

**Q 1.8.1 Can a non-resident of the United States be an importer?**

Yes, subject to certain requirements. A non-resident consignee or purchaser may be an importer, but the bond securing the entry of the imported merchandise must have a *resident* corporate surety.<sup>41</sup> If the non-resident consignee or purchaser is a foreign corporation (meaning one that is not incorporated in the customs territory of the United States or the U.S. Virgin Islands), there are two additional requirements: (1) the corporation must have a *resident* agent for service of process in the state where the port of entry of the merchandise is located; and (2) the bond securing the entry must have a *resident* corporate surety.<sup>42</sup>

**Q 1.8.2 What degree of care must an importer use to comply with U.S. customs laws?**

An importer has a statutory duty to use “**reasonable care**” in connection with the entry of merchandise into the United States.<sup>43</sup> In that regard, the Customs Regulations define “negligence” as an importer’s “failure to exercise the degree of *reasonable care* and competence: (a) to ensure that statements made and information provided in connection with the importation of merchandise are complete and accurate; or (b) to perform any material act required by statute or regulation.”<sup>44</sup>

**Q 1.8.3 How can an importer exercise “reasonable care”?**

On the compliance checklist promulgated by Customs, the question asked of the importer about every customs requirement is, “Have you consulted with a Customs “expert” (e.g., lawyer, customs broker, accountant or consultant) to assist in . . . ?”<sup>45</sup> In other words, if an importer is not aware of his obligations under the customs laws, “reasonable care” requires him to consult with an expert who can advise him of those obligations.

**Surety****Q 1.9 What is the role of a surety in a commercial import transaction?**

Imported merchandise cannot be released from Customs custody unless the importer files a customs bond issued by an authorized surety.<sup>46</sup>



The most common type of customs bond is the basic importation and entry bond.<sup>47</sup> If the bond conditions are breached, both the surety and the importer (the principal) are liable to Customs (the beneficiary) for any additional duties, taxes, charges, liquidated damages, and penalties secured by the bond.<sup>48</sup>

### ***Customs Broker***

#### **Q 1.10 What is the role of a customs broker?**

A customs broker is a person—an individual, partnership, association, or corporation—licensed by U.S. Customs to transact “customs business” on behalf of others.<sup>49</sup> “Customs business” refers to activities involving the admissibility, entry, and release of merchandise, its classification and valuation, and the payment, refund, and drawback of duties.<sup>50</sup> It includes the preparation and filing of entry documents and the deposit of duties with Customs electronically,<sup>51</sup> which are the primary services that most importers retain brokers to perform for them. Brokers also advise importers on the requirements and duty-savings opportunities contained in the customs laws, regulations, and procedures.

### ***Ocean Freight Forwarder***

#### **Q 1.11 What is the role of an ocean freight forwarder?**

An ocean freight forwarder, a type of Ocean Transportation Intermediary, is a person licensed by the Federal Maritime Commission<sup>52</sup> to dispatch shipments from the United States via ocean common carriers and book space on those carriers on behalf of shippers and to perform services related thereto.<sup>53</sup> For various reasons, such as the inadmissibility of imported merchandise<sup>54</sup> or to obtain duty drawback thereon,<sup>55</sup> the merchandise must later be exported; a freight forwarder can arrange that exportation. Freight forwarders can also forward shipments by air or ground transportation, because no license is required to perform those services. Licensed customs brokers are often also licensed freight forwarders.

## ***Customs Attorney***

### **Q 1.12 What is the role of a customs attorney?**

The U.S. Court of International Trade recognizes customs law as a specialized practice area, distinct from general and administrative law.<sup>56</sup> A customs attorney, in addition to providing legal advice to importers on issues involving customs and international trade law, can represent the importer at both the administrative and judicial levels. The Administrative Procedure Act provides that an attorney licensed to practice in any state may represent a person before a federal agency, such as Customs, and that the agency must honor that representation.<sup>57</sup> In order to represent a client before the U.S. Court of International Trade, and the U.S. Court of Appeals for the Federal Circuit, a customs attorney must be admitted to practice pursuant to those courts' rules.<sup>58</sup>

## ***Other Customs Consultants***

### **Q 1.13 What is the role of a customs consultant?**

Professionals other than customs attorneys and brokers also possess expertise in particular areas of import practice. For example, CPAs have the expertise to opine on whether a particular cost is computed in accordance with Generally Accepted Accounting Principles (GAAP), and therefore, whether that cost must be accepted for determining the customs value of imported merchandise.<sup>59</sup> Former U.S. Customs personnel have expertise in the areas of import practice in which they worked, such as classification of imported merchandise, regulatory audits of importers, and duty drawback. The aforementioned professionals may work independently or for customs attorneys or brokers.

## **Representation Before U.S. Customs**

### **Q 1.14 Who can represent an importer before U.S. Customs?**

An attorney licensed to practice law in any state may represent an importer before any federal agency, including U.S. Customs.<sup>60</sup> A licensed customs broker who represents an importer in connection

with the importation or exportation of merchandise may represent the importer before U.S. Customs in connection with any matter concerning that merchandise.<sup>61</sup> In certain other customs matters, the importer may designate an agent or attorney-in-fact, who is not an attorney or customs broker, to act on its behalf.<sup>62</sup>

## Requirements for a Commercial Importation

### Q 1.15 What are the basic requirements for a commercial importation?

Assuming that no prohibitions or restrictions apply, the following documentation must be submitted to “enter”—that is, to secure the release from Customs custody<sup>63</sup>—merchandise imported into the United States:

- **CBP Form 3461**, known as the “**entry**,”<sup>64</sup> with an assigned eleven-digit entry number endorsed thereon<sup>65</sup>
- **Evidence of the right to make entry**, *i.e.*, a bill of lading or carrier’s certificate<sup>66</sup>
- A **commercial invoice** endorsed with the applicable HTSUS tariff classification heading or subheading numbers and the rates of duty associated therewith<sup>67</sup>
- A **packing list** detailing the specific contents of each package or case in the shipment<sup>68</sup>
- A **basic importation and entry bond** on CBP Form 301 satisfying the conditions and minimum amount required by Customs<sup>69</sup>

Within ten working days of submitting the aforementioned entry documents, the importer must:

- file **CBP Form 7501**, known as the “**entry summary**,”<sup>70</sup> and
- attach thereto the **estimated duties** due on the entry.<sup>71</sup>

Most importers engage the services of a customs broker to make entry and to pay duties on their behalf electronically.

## Determination of Duty on Imported Merchandise

### *How Determined*

#### **Q 1.16 How is the amount of duty, if any, applicable to imported merchandise determined?**

The amount of duty, if any, on imported merchandise is determined by its tariff classification and customs valuation.<sup>72</sup> The HTSUS lists the rates of duty applicable to each tariff classification heading and subheading number. Most rates of duty are *ad valorem*, that is, a *percentage* of the customs value of the merchandise; some rates are *specific*, that is, they apply to the *quantity* (rather than value) of merchandise imported. Different rates apply depending on the country of origin of the merchandise. In short, once the classification and valuation of the merchandise is determined, the duty rate specified in the tariff is applied thereto to calculate the duty due thereon.<sup>73</sup>

### *Payment*

#### **Q 1.17 When and how must duties be paid?**

Duties accrue at the time the ship carrying the merchandise arrives at a U.S. port with intent to unlade or otherwise when the merchandise enters the Customs territory of the United States.<sup>74</sup> Estimated duties must be deposited at the time the entry summary is filed, which generally must be done within ten working days of filing the entry.<sup>75</sup> Payment may be made in U.S. currency or coin, by check drawn on a U.S. bank, by a U.S. money order, or, as is most common in commercial transactions and preferred by Customs, electronically by qualified brokers and importers.<sup>76</sup>

### *Liability*

#### **Q 1.18 Who is liable for duties?**

The liability for duties constitutes a **personal debt of the importer**.<sup>77</sup> If the importation is covered by a bond, the **surety** is also liable for duties.<sup>78</sup> The liability for duties also constitutes a **lien upon the imported merchandise**.<sup>79</sup>

## ***Refunds***

### **Q 1.19 Can a refund of duties be obtained?**

Yes, but only if the importer: (1) timely files a formal duty refund claim, known as a “**protest**,” within 180 days after Customs “liquidates,” or finalizes, the entry of imported merchandise to which the claim applies;<sup>80</sup> and (2) proves the claim to the satisfaction of Customs,<sup>81</sup> or, if Customs denies the claim, by a preponderance of the evidence in a **refund suit** filed in the U.S. Court of International Trade.<sup>82</sup>

## ***Penalties***

### **Q 1.20 What may happen if an importer violates U.S. customs laws?**

The customs statutes and regulations provide for a broad range of penalties for customs violations, for example, interest assessed on underpayments or late payments of duty,<sup>83</sup> additional duties,<sup>84</sup> liquidated damages,<sup>85</sup> detention of merchandise,<sup>86</sup> seizure of merchandise,<sup>87</sup> forfeiture of merchandise,<sup>88</sup> monetary penalties,<sup>89</sup> suspension of importing privileges,<sup>90</sup> and criminal prosecution, including fines and imprisonment.<sup>91</sup>

## Notes

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1. U.S. CONST. art. I, § 8.
2. 19 U.S.C. § 3007.
3. 19 U.S.C. § 1502(a).
4. 28 U.S.C. § 1624.
5. 19 C.F.R. § 177.9.
6. Harmonized Tariff Schedule of the United States (HTSUS), General Note (GN) 1.
7. HTSUS, GN 3(e); 19 U.S.C. § 1484a.
8. U.C.C. § 2-103(1)(k).
9. 19 U.S.C. § 1401a.
10. 19 U.S.C. § 1401(c).
11. HTSUS, GN 2.
12. HTSUS, GNs 2, 3(a)(iv).
13. *See* notes 1 and 2, *supra*.
14. 19 C.F.R. §§ 12.40, 12.41, and 145.51.
15. 19 C.F.R. § 12.34.
16. 19 C.F.R. § 12.98.
17. 19 U.S.C. § 1526(e).
18. 19 U.S.C. § 1527.
19. 19 C.F.R. § 12.7.
20. 19 C.F.R. § 12.16.
21. 19 C.F.R. pt. 132.
22. 19 U.S.C. §§ 2071, 2083.
23. 19 U.S.C. § 2701.
24. 19 U.S.C. § 2072(d).
25. 19 C.F.R. § 101.3.
26. 19 C.F.R. pts. 141 and 142.
27. 19 C.F.R. pt. 141, subpt. G.
28. 19 C.F.R. § 159.9(b).
29. 19 C.F.R. pt. 174.
30. 19 C.F.R. pt. 171.
31. 19 C.F.R. § 101.3.
32. 28 U.S.C. §§ 1581 and 1582.
33. 28 U.S.C. §§ 1581(j), 1340, and 1356.
34. 18 U.S.C. § 3231.
35. 28 U.S.C. § 1295(a)(5).
36. 19 C.F.R. § 101.1.
37. 19 C.F.R. § 141.1(b).

38. 19 C.F.R. § 101.1.
39. *See, e.g.*, 49 U.S.C. § 80101(1).
40. 19 U.S.C. § 1484(a)(2)(B).
41. 19 C.F.R. § 141.17.
42. 19 C.F.R. § 141.18.
43. 19 U.S.C. § 1484(a).
44. 19 C.F.R. pt. 171, app. B.
45. U.S. Customs and Border Protection, *What Every Member of the Trade Community Should Know About: Reasonable Care (A Checklist for Compliance)* (2004).
46. 19 C.F.R. § 142.4.
47. 19 C.F.R. § 113.62.
48. 19 C.F.R. §§ 113.2(a) and 113.3.
49. 19 C.F.R. § 111.1.
50. *Id.*
51. *Id.*
52. 46 U.S.C. § 1718.
53. 46 U.S.C. § 1702(17)(A).
54. *See, e.g.*, 19 C.F.R. § 12.44.
55. *See, e.g.*, 19 C.F.R. § 191.42.
56. *See, e.g.*, *Jazz Photo Corp. v. United States*, 597 F. Supp. 2d 1364, 1369 (Ct. Int'l Trade 2008).
57. 5 U.S.C. § 500.
58. CIT Rule 74; CAFC Rule 46.
59. 19 U.S.C. § 1401a(g)(3).
60. 5 U.S.C. § 500.
61. 19 C.F.R. § 111.5(a).
62. *See, e.g.*, 19 C.F.R. § 174.3.
63. 19 C.F.R. § 141.0a.
64. 19 C.F.R. § 142.3(a)(1).
65. 19 C.F.R. § 142.3a.
66. 19 C.F.R. §§ 142.3(a)(2), 141.11.
67. 19 C.F.R. §§ 142.3(a)(3), 142.6.
68. 19 C.F.R. § 142.3(a)(4).
69. 19 C.F.R. §§ 142.4, 113.62.
70. 19 C.F.R. §§ 142.11, 142.12(b).
71. 19 C.F.R. § 142.12 paras. (b) and (c).
72. HTSUS, GN 1.
73. *See generally* HTSUS.
74. 19 C.F.R. § 141.1(a).
75. 19 C.F.R. §§ 141.101, 142.12.
76. 19 C.F.R. § 24.1.
77. 19 C.F.R. § 141.1(b).
78. 19 C.F.R. § 113.62(a).
79. 19 C.F.R. § 141.1(d).

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80. 19 U.S.C. § 1514.
81. 19 U.S.C. § 1515.
82. Fabil Mfg. Co. v. United States, 237 F.3d 1335, 1339 (Fed. Cir. 2001).
83. 19 C.F.R. § 24.3a.
84. 19 C.F.R. § 134.2.
85. 19 C.F.R. § 172.1.
86. 19 U.S.C. § 1499(c).
87. 19 U.S.C. § 1595a.
88. 19 U.S.C. § 1607.
89. 19 U.S.C. § 1592.
90. 19 C.F.R. § 163.10.
91. 18 U.S.C. § 545.