18th JUDICIAL CONFERENCE OF THE
UNITED STATES COURT OF INTERNATIONAL TRADE
WHO'S ON THE HOOK?
(AND WHO CAN AFFORD THE HOOK ANYWAY?)

RESPONDING TO CUSTOMS AND BORDER PROTECTION'S REQUESTS FOR FACTUAL INFORMATION: RESPONSIBILITIES, BURDENS & CONSEQUENCES *

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I. Introduction

This article outlines some of the current administrative requests from Customs and Border Protection ("CBP") and related issues as CBP seeks to redefine itself using the Centers of Excellence and Expertise ("CEE")[2], electronic filing (i.e., Automated Commercial Environment ("ACE")) , and seeks to transform its approach to trade operations and the international trade community. According to CBP, the agency hopes that by having these CEE virtual centers they will be able to focus on industry-specific issues, and provide tailored support. While CBP had hoped to have the CEEs increase uniformity of practices across ports of entry, there are currently some growing pains both for the agency - and consequently for businesses. This paper outlines some of the information currently being requested by CBP, some of the forms used by the agency and notes some potential logistical problems in gathering the data. It also discusses potential ethical concerns for attorneys as CBP transitions.

II. Form - Factual Requests from CBP

A. The Usual Suspects[3]

When goods are presented for entry into the United States, the importer declares the value and classification of the goods and provides other related information electronically. Issues arise when Customs targets an entry for review and wants additional information – especially when that information is not required to be transmitted at the time of entry – and is not necessarily in the immediate possession (or control) of the importer.

i. Requests for Information (28's)[4]

Customs may seek information through a CBP Form 28 - Request for Information. See e.g., 19 C.F.R. §§ 151.11, 181.72. CBP Form 28 is typically used when the electronic information and entry summary package has insufficient information that makes it difficult to determine admissibility, application of antidumping/countervailing duty determinations, appraised value, or classification of imported merchandise. These requests can range for simple requests for samples and invoice clarifications to extensive documentation supporting a trade agreement qualification. In many cases, the importer should readily have the information requested by CBP

and the burden of responding may be minimal. However, where CBP is seeking information beyond the transaction (for example, FTA compliance), collection and presentation of the information can be arduous. This usually requires the importer to collect detailed production documentation including detailed cost information the supplier may not want to share with the importer. Even if the information is gathered, the presentation of the information to CBP usually requires significant organization, translation, in many cases, and analysis. Absent this, CBP is awash in documentation, which it has neither real ability to decipher nor direction to understand its meaning or significance. As a result, absent significant work prior to submission, CBP cannot in many cases determine if the submission provides the answers CBP's need to make a determination.

If a Request for Information is not responded to or the response is deemed insufficient, CBP will often presume the least favorable interpretation of the facts and will then issue a Notice of Action – discussed below. Additionally, the Form 28 may be requesting "entry records (or "(a)(1)(A) records)[5]. These records, required by statute and regulation to be maintained by the importer, must be produced in a timely fashion. The mere failure or refusal to produce these records could result in penalties and other actions.[6]

Some of the below are questions that importers are asking regarding CBP's requests:

- "Why is Customs asking me this question – on every entry?"
- "Didn't we just do this?"
- Why can't the agency just do a statistical sampling like they did in our audit, which we passed?"
- "We are C-TPAT[7] certified, aren't we so supposed to have less scrutiny?"

The last question – regarding C-TPAT is a particularly interesting. C-TPAT members are allegedly considered low-risk by CBP and are therefore supposed to be less likely to be examined. Ideally, C-TPAT establishes supply chain security criteria for members to meet and, "supposedly" provides incentives and benefits such as expedited processing. This designation by CBP is based on a company's past compliance history, security profile, and the validation of a sample international supply chain. However, are importers actually receiving the provided benefits? These are good questions for the agency's administration and something to which we don't yet have an answer. C-TPAT is focused on physical security. Thus, the importer may

enjoy fewer physical exams. The program is simply not targeted at trade compliance. Therefore, simple C-TPAT membership should likely have little no effect on CBP information inquires in common trade areas.

ii. Notice of Action (29s)[8]

When CBP determines that the entered rate/classification is incorrect, the entered value of imported merchandise is too low, or other errors were made in the entry (e.g., quantity, ADD/CVD applicability, etc.), the importer receives notice via CBP Form 29 – Notice of Action. 19 C.F.R. § 152.2. The Form 29 is to provide the importer a foreshadowing of the liquidation of the entry.

Significantly, the majority of CBP Form 28 and 29 responses are done by importers or customs brokers- not lawyers. The customs broker might be the person with the technical knowledge, but they generally only have limited documents – the minimum necessary to file the entry, and limited knowledge beyond those documents. A majority of the information is not in the broker's possession. For example, the custom broker might now know if there are assists. What the broker will have is a commercial invoice. Accordingly, when these Notices (or Requests for Information) go out the hunt for documents, typically in the possession of non-related third parties overseas…begins.

The Prior Disclosure Conundrum

A Form 28 or 29 may be routine or indicate a significant issue of compliance. CBP has selected the entry and/or taken action because it believes the importer has erred. Viewed in isolation, the change effected by CBP may not be significant. However, viewed in context, the change could have significant ramifications. Thus, even before the importer files a response, the importer should understand the potential implications of CBP's inquiry and action. Under 19 U.S.C. § 1592, if a violation has occurred, CBP has authority to recover duties up to five years from the date of entry or date of discovery (in cases of fraud) in addition to potential penalties. Thus, the importer must understand the ramifications of their response and potential CBP action. The importer must weigh the potential benefits of a "prior disclosure" in addition to its response to the specific entry.

Pursuant to 19 U.S.C. § 1592(c), a valid prior disclosure can significantly limit penalties (i.e., to an amount equal to interest in case of gross negligence or negligence) if the importer is willing to fully disclose the error and tender all applicable duties. As a matter of law, either Form 28 or 29 may be considered a "commencement document" which can terminate the ability to make a prior disclosure. However, the official policy of CBP has been to encourage the submission of valid prior disclosures.[9]

- Accordingly, the CBF Form 28 alone should not be routinely considered a "commencement" document.

- The Form 29 often is used by CBP as a document commencing a formal investigation and providing notification to the importer.

When responding, the specific language of the request must be reviewed to determine if CBP has given the importer notice that it has commenced a formal investigation.

B. And Some Unusual Suspects

i. CBP Summons

An administrative summons is a document through which CBP requests for examination any records an importer is required to maintain regarding a specific importation (i.e., (a)(1)(A) records) and/or that are normally kept in the ordinary course of business (i.e., accounting records). A summons may also request oral testimony regarding the above. It is typically issued in order to determine the liability of an importer or to otherwise insure compliance with the customs laws. See 19 U.S.C. §§ 1508, 1509. The summons can be served on any person who imports, export, transport under customs bond, filed any declaration, has possession of any records related to these transactions, or any person Customs may deem "proper." 19 C.F.R. 163.8(a).

A third-party summons is served on anyone who is not the person or entity under investigation. Tiffany Fine Arts, Inc. v. United States, 469 U.S. 310, 315-16 (1985). A third-party recordkeeper may be a:

(i) customhouse broker

(ii) an attorney; or

(iii) an accountant. [10]

The Supreme Court's has provided guidance regarding the necessary preconditions to the judicial enforcement of an agency's summons. The Court in Powell stated that the agency:

1. Must show that the investigation will be conducted pursuant to a legitimate purpose;
2. That the inquiry may be relevant to the purpose,
3. That the information sought is not already within the agency's possession, and
4. That the required administrative steps have been followed.

United States v. Powell, 379 U.S. 48 (1964). The agency's power to summon is not limited to records solely within the importer's direct control, but extends to any information that may be relevant to its investigation. However, a summons may cover a five-year period (reflecting the statute of limitations) and may be overly broad. Thus, the practitioner should again scrutinize the request and seek, where appropriate, proper narrowing of the request to relevant information.

ii. Summons Enforcement

Unlike requests for "entry records" discussed above, CBP cannot enforce the summons directly (i.e., through recordkeeping penalties where non-"entry records" are sought).[11] CBP must seek judicial enforcement. If after non-compliance with an order of the court requiring compliance with the summons, the Court may impose penalties for non-compliance.

> Any person, after being adjudged guilty of contempt for neglecting or refusing to obey a lawful summons issued under section 1509 of this title and for refusing to obey the order of the court, remains in contempt, the Secretary may:
>
> (A) prohibit that person from importing merchandise into the customs territory of the United States directly or indirectly or for his account, and
>
> (B) instruct the appropriate customs officers to withhold delivery of merchandise imported directly or indirectly by that person or for his account.

19 U.S.C. § 1510 (b), 19 C.F.R. § 163.10. CBP may also seek for the court to impose monetary penalties. 19 C.F.R § 163.10(a), 19 U.S.C. § 1510 (b)(3).

- **Practical Considerations**

An agency uses an administrative summons when, among other reasons, it does not have probable cause for a search warrant. When CBP or ICE agents deliver a Summons to a company,

they are on the property at the discretion of the company (i.e., guests). If you ask them to leave – they must do so or you may have them removed for trespassing.

Conversely, when a Search Warrant is delivered to a company, CBP or ICE has the right to search the company's property in the area and manner described on the warrant and take away documents without the company's consent or the lawyer being present.

III. Ethical Production

Administrative Agencies and the Rules of Professional Conduct

In 1946, before civil discovery was common, the Administrative Procedure Act (APA) was enacted. Consequently, it contains only a few provisions related to discovery (e.g., Section 6(c) authorized the issuance of subpoenas and section 7(b) authorized depositions).[12] In 1963, the Administrative Conference of the United States officially endorsed discovery and the Federal Trade Commission was one of the earliest innovators. Other agencies followed suit and in 1981, the National Conference of Commissioners on Uniform State Laws issued a "Model State Administrative Procedure Act," which provided for liberal discovery.[13]

When initially written, the Rules of Professional Conduct (RPC) were drafted with the practice before courts in mind. However, the rules have since expanded the notion of what constitutes a "tribunal", and now includes practice before an administrative agency. This portion of the article will typically be referring to the New York State Rules of Professional Conduct ("NY RPC") throughout; however many other states have adopted similar if not identical definitions, which embrace the ABA Model Rules of Professional Conduct.[14] For example, the New York State RPC provides:

> (w) "**Tribunal"** denotes a court, an arbitrator in an arbitration proceeding or a legislative body, **administrative agency or other body acting in an adjudicative capacity**. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a legal judgment directly affecting a party's interests in a particular matter.

Similarly, the Washington State Rules of Professional Conduct[15] provides:

> 1.0(m). "**Tribunal"** denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body

> acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.

Finally, the ABA Model Rules of Professional Conduct[16] Provide:

> (m) "Tribunal" denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.

Under any definition, if the administrative agency is acting in an adjudicatory manner, the RPCs typically indicate that an attorney has the same ethical duties as if appearing before the courts.

i. Confidentiality of Information

NY RPC 1.6

(a) A lawyer shall not knowingly reveal confidential information, as defined in this Rule, or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person, unless:

(1) the client gives informed consent, as defined in Rule 1.0(j);
(2) the disclosure is impliedly authorized to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community; or
(3) the disclosure is permitted by paragraph (b).

"Confidential information" **consists of** information gained during or relating to the representation of a client, whatever its source, that is:

(a) protected by the attorney-client privilege,
(b) likely to be embarrassing or detrimental to the client if disclosed, or
(c) information that the client has requested be kept confidential.

"Confidential information" **does not** ordinarily include:

(i) a lawyer's legal knowledge or legal research or
(ii) Information that is generally known in the local community or in the trade, field or profession to which the information relates.

As an interesting note, modern electronic communications often list counsel on the email as one of many recipients. The question then becomes whether the communication is privileged? Some recent Federal decisions have begun to question the viability of the privilege, particularly

when there is widespread circulation. See SmithKlineBeecham Corp. v. Apotex Corp., 232 FRD 467, 478 (E.D. Pa. 2005). For example, in the Vioxx litigation, Merck forfeited its claim to attorney client privilege by having too many persons on the email, more than were just necessary to receive legal advice. In re Vioxx Prods. Liability Litig., 510 S. Supp. 2d 789 (E.D. La. 2007).

Similarly, government agencies have a habit of widespread dissemination of information on emails. Counsel should be mindful of this emerging trend and start educating clients about only dispensing legal advice to those who actually need to receive it.

ii. Conduct before a Tribunal

NY RPC 3.3 (a)

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

***

(b) In appearing as a lawyer before a tribunal, a lawyer shall not:

(1) fail to comply with known **local customs of courtesy or practice of the bar** or a particular tribunal without giving to opposing counsel timely notice of the intent not to comply;
(2) engage in undignified or discourteous conduct;
(3) intentionally or habitually violate any established rule of procedure or of evidence; or
(4) engage in conduct intended to disrupt the tribunal.

iii. Advocate in Non-Adjudicative Matter

NY RPC 3.9

A lawyer communicating in a representative capacity with a legislative body or administrative agency in connection with a pending non-adjudicative matter or proceeding shall disclose that the appearance is in a representative capacity, except when the lawyer seeks information from an agency that is available to the public.

iv. Communication with a Person Represented by Counsel (i.e. Communicating with Government Officials)

NY RPC 4.2

(a) In representing a client, a lawyer shall not communicate or cause another to communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the other lawyer or is authorized to do so by law.

One of the more problematic areas in regard to dealing with administrative agencies relates to communication when litigation is pending. The "authorized by law" exception allows a lawyer representing an adverse party to directly contact a government official about the case, even if that person, the agency, or the governmental entity is represented by counsel. The reasoning behind the exception was that there is a First Amendment right to petition the government. While the weight of national authority seems to be that constitutional rights allow communications directly with a government official whether or not that person or agency is represented by counsel.

The American Bar Association (the "ABA"); however, has issued mixed guidance. It originally provided that the authorized by law provision of RPC 4.2 is satisfied by "a constitutional provision, statute or court rule, having the force and effect of law, that expressly allows a particular communication to occur in the absence of counsel." Camden v. Maryland, 910 F. Supp. 1115 (D. Md. 1996) (stating "Insofar as a party's right to speak with government officials about a controversy is concerned, Rule 4.2 has been uniformly interpreted to be inapplicable."); but see, Alaska Bar Association Opinion 94-1 (1994) stating that a citizen may petition government on a represented matter, but may not do so through a lawyer. The ABA recognized this constitutional right to petition government in Formal Ethics Opinion 95-396. Two years later; however, it attempted to narrow the scope of this right in Formal Opinion 97-408 (1997). The committee opined there were two conditions on allowing direct contact:

(1) requiring the communication be only about a policy issue, which may include settlement of the dispute; and
(2) and requiring notice to the government lawyer before the communication takes place.

The ABA opinion concluded that if these two conditions were not met, there would be a violation of RPC 4.2.

IV. Recent Factual Information Requested by CBP or "Show Me the Money"

A. The CEE's and Free Trade Agreement Compliance[17]

Free trade agreements ("FTA") are intended to stimulate trade between countries by reducing or eliminating procedural restrictions and barriers. One of the purposes of free trade agreements that is espoused by the US Trade Representative's Office is that FTAs are intended to improve the transparency and consistency of the regulatory environment in order to make it easier for small- and medium-sized businesses to operate across a region.[18] In this manner, they purport to facilitate transactions (and thus promote business) between countries or areas.

Some of the Purported Goals of Free Trade Agreements

- Market access for goods and services,
- Strong and enforceable labor standards and environmental commitments,
- Rules on state-owned enterprises,
- Intellectual property rights framework, and
- A thriving digital economy.

By reducing such things as duties on imports, an FTA is supposed to reduce the costs for businesses in each country to sell their goods and services in the partner country.

Whether goods qualify for duty free treatment under a free trade agreement is a hot issue for CBP from a revenue generating perspective. CBP's overarching concern regarding FTAs is whether the goods actually qualify for *duty free* treatment – not whether the agency is effectuating the goal of transparency and increased trade between partner nations. Accordingly, many importers are seeing increased (and often burdensome – although perfectly legal) requests for supporting documents from the CEEs.

What are some of the possible causes, issues, and questions:

- The experience levels at the different CEEs varies.
- Inconsistent requests for documents for the same importer.
- CBP had indicated that it had hoped to have the CEEs established uniformity of practice. However, it remains to be seen as to whether businesses and importers will experience that hoped for consistency
- From a business perspective - at a certain point it becomes cost inefficient for a company to produce supporting records – on every entry. It easier to just import

from China than put together the requested records on every entry. This is not effectuating the goal of free trade.

- The questions should also be asked - just because the agency has the authority to request supporting records…should they? Would a sampling method, something that is used in the audit context, be a better method?

- Are there actual guidelines for new CEE personnel regarding that hoped for consistency within the CEE?

- Will CBP be publishing a list on its website of the CEE core and matrix members so we can work with the same person on a continuing issue?

The bottom line is that at this point we are currently dealing with inconsistent requests and odd issues on a client–by-client basis regarding imports pursuant to FTAs. Hopefully, we will have a more transparent and regular practice, but that time isn't yet. CBP's stated goal has been to incrementally transition the operational trade functions that traditionally reside with the ports of entry until they reside entirely with the CEEs. So far it is looking like a somewhat rocky transition.

B. Intellectual Property and Gray Market Goods - Who Has the License?

Importers are also frequently asked to furnish their license to import trade name or trademarked goods. While counterfeiting remains a problem, one of the problem areas that importers are frequently running into is when they purchase legitimate goods not intended for the U.S. market. The term "Gray market" is typically used to describe the sale of new, used, or refurbished products through what the U.S. intellectual property holder believes to be an "unauthorized" reseller or overseas channels. Gray market importers believe that parallel importing is a legitimate business and the price differential is fair because they are not offering the same products or services offered by authorized distributors (i.e., the consumer is informed that the product is not covered by the factory warranty).

These imported goods, which are sometimes referred to as "parallel imports" are manufactured abroad and bear a genuine trade name or mark that is either identical to, or substantially indistinguishable from, that owned and recorded by a United States citizen or corporation.[19] To U.S. distributors, there is a significant price differential between the gray goods

and the U.S. intended goods that they claim causes unfair competition and infringement. These U.S. distributors argue that the unauthorized flow of gray market goods into the United States jeopardizes product quality standards, diminishes customer satisfaction and dilutes the integrity of a brand.

At bottom, these articles are often considered infringing by CBP and are subject to detention and seizure.[20] While gray market goods bear a legitimate trade name or mark, they are often imported without the consent of the intellectual property owner in the United States. Whatever side of the argument you are on, CBP protects domestic intellectual property holders against imports of gray market goods under two conditions:

(1) The U.S. owner must register its mark with CBP through the Intellectual Property Rights e-Recordation system; and

(2) The U.S. intellectual property owner and the foreign intellectual property owner must be two different people or companies.

When a suspected gray market good is detained, **the importer** bears the burden of establishing that its mark fits an exceptions (i.e. the foreign intellectual property owner is the same as the U.S. owner or, the foreign and domestic goods are physically and materially identical). In practice, CBP almost invariably detains restricted gray market goods for up to 30 days. 19 C.F.R. §§ 133.23, 133.25. Furthermore, while the penalties for attempting to import a good bearing a counterfeit trade name or mark are more severe than those for attempting to import an infringing gray market product; the procedures for determining whether a mark should be released or seized do not differ – notwithstanding the legitimacy of the imported good. 19 C.F.R. § 133.21.

- Example: Apparel importers run into this problem when they import goods that use a YKK zipper that was purchased legitimately abroad and used in the apparel, but the importer does not own a YKK license.

C. Advantageous Duty Provisions – The Importer's Lab versus CBP's Lab

Customs lab testing is often a critical factor in a number of areas including tariff classification, eligibility for Free Trade Agreement benefits and whether an imported article falls within the scope of an antidumping case. For example, some imported apparel items must conform to certain laboratory tests in order to qualify for advantageous duty provisions. One of the continuing problem areas for apparel importers are water resistant garments and the rain

test method. The HTSUS provides for beneficial duty treatment of outerwear garments, which are "water resistant" (e.g., spray coated) or visibly coated. The tariff permits classification under various favorable provisions applicable to "water resistant" garments, carrying relatively low duty rates (e.g., **7.1**% ad valorem for man-made fiber water resistant jackets vs. **27.7**% ad valorem, if not water resistant). These provisions only apply to woven garments, which are water resistant.[21]

In order to take advantage of these provision, the prudent importer may send samples to a laboratory prior to exportation, and make certain the samples pass the appropriate tests. However, when the goods arrive, CBP sometimes sends a notice that they sampled the garments, and their test report indicates the garments failed.

Question: So what happened?

Answer: The test report game.

It is unfortunate that sometimes CBP's laboratory just makes an error. CBP will test the wrong sample or misread the test results (e.g., CBP's report indicates that when using the rain test method the garment passed the water resistant test, but was rate advanced as not being water resistant). One of the more recent notices indicated that both samples provided to the testing center passed AATCC test methods 35-1985 as required by Additional U.S. Note 2 to Chapter 62 with regard to the coated fabric - and the goods were still rate advanced. Testing errors happen.

Recently, our firm had an issue that involved a denial of a garment importer's claim for duty-free treatment under the DR-CAFTA's "short supply" provision. The garment's duty-free eligibility turned on whether the underlying fabric had been subjected to certain specific finishing processes (which CBP's lab concluded were not performed). We ended up receiving a ruling on behalf of the importer where Customs agreed that the supposed lab testing actually involved subjective visual observations as opposed to scientifically-grounded testing. The rejection of the lab's testing methodology, combined with the submission of evidence supporting the importer's claim, resulted in an approval of the protest. HQ H250948 (Apr. 1, 2014).[22]

Ruling HQ H250948 is only the most recent decision by Customs and the courts questioning the validity of Customs lab testing. Importers facing adverse actions resulting

from negative Customs lab determinations may wish to explore the ability to challenge such determinations.

The advice to importers who are consistently taking advantage of advantageous duty provisions is test early, and test often. There sometimes is just no way of knowing what facts CBP is going to garner on its own – and whether they will read the results correctly or even take proper action.

V. Are Requests from CBP Predictable?

To summarize the above, are requests from CBP predictable, well yes…and no. If an importer utilizing a lower duty rate provision or something that involves an intellectual property issue – expect scrutiny. Can the same importer or different importers of the same product expect consistency in the requests. Not now, but maybe in the future? With the new CEEs, there is a lot of shuffling of personnel. Sometimes the agency is not sending out relevant requests, and sometimes the agency doesn't understand the results of the information it has.

VI. The Burden of Producing the Information versus the Interests at Stake?

Short Answer: The importer always has the burden of producing the information to the agency.

As a practical matter, the importer has the obligation to turn over information. If a conflict with the agency develops into a penalty action and goes to court, the government then has the burden of proof.

VII. Last, but not least – The Role of Sureties

Issue: When (and for what) is the surety on the hook?

Short Answer - The surety is always on the hook for customs duties and liquidated damages. A surety is not on the hook for penalties.

CBP has the authority to require bonds under 19 U.S.C. § 1623, 19 C.F.R. 113.1 and a bond is required for every importer. 19 C.F.R. 141.4.[23] The bond is not in lieu of duty payment but there to ensure the federal government is paid.

There are three parties to a CBP bond: the principal, the surety and the beneficiary. The principal on a bond can be an importer, a carrier, a bonded warehouse proprietor, a foreign trade zone ("FTZ") operator or other parties that seek to do business with CBP. The CBP bond is a contract to insure payment to CBP if a required act is not performed by the principal. The principal gives the bond to CBP to insure performance. This three party contract or obligation does not come into existence until the importer fails to do something legally required under the terms of the bond.

The surety's responsibility is limited to the bond amount and the surety is responsible for liquidated damages because those are contemplated by the contract. The principal and surety are the bond obligors. The surety has no direct, upfront responsibility to CBP because the surety is a stranger to the transaction. The surety typically knows little about its potential liability under its bonds until after a claim has been made by CBP. The surety is normally an insurance company authorized by the Department of the Treasury to write CBP bonds.[24] The surety agrees to pay liabilities that arise from the principal's failure to perform its legal and required obligations and pay its obligation including liquidated damages. CBP is the beneficiary. CBP typically takes from one to four years to "liquidate" an entry; but liquidation can be suspended almost indefinitely for merchandise subject to antidumping and countervailing duties.

There are two types of bonds: Single Transactions or Continuous. For example, single entry bonds where importers obtain a single entry bond for a single shipment. It covers only the entry or transaction for which it was written. The second type is continuous transaction bonds. A continuous bond is normally obtained by importers who have a large number of entries and/or imports through several ports of entry during a given year. They are also obtained by international carriers who frequently arrive and depart the CBP territory and who do business with the agency on a regular basis. A continuous bond has a term of one year and is renewed each year. A continuous bond is valid until it is terminated by the surety or the principal.

Effective January 3, 2015, many sureties, or their authorized broker/managers, will be filing surety bonds in an electronic environment (i.e., raw data transmittal). The e-bond program will not be mandatory initially. However, the primary benefit will be same day turnaround for CBP authorization. Continuous bonds currently in effect that were filed in a paper/email

document image environment remain effective and will not require an electronic refresher as of bond period renewal date.

If a principal fails to perform these obligations under the bond, CBP assesses a claim against the principal and surety under the terms and conditions of that bond. An importer's bond obligations require:

1. payment of duties;
2. to submit entry summary documentation at the times required by law; and
3. to redeliver merchandise upon a lawful demand.

CBP's claim may be for breach of an obligation to pay duties, in which case CBP makes a claim against the surety for those unpaid duties under the bond. If the principal breaches a different condition of the bond, CBP may issue as claim for liquidated damages. The amount of liquidated damages is established by the conditions of the bond. However, a claim for liquidated damages cannot exceed the amount of the bond.

Ultimately, if the bond principal cannot (will not) perform its obligations, CBP can demand payment from both the principal and the surety because they are "jointly and severally" liable for any claims made under the bond - including claims for liquidated damages. That means CBP will accept payment from either party in satisfaction of the claim.

Conversely, sureties may assert traditional rights and defenses arising out of the bond contract and may also "step into the shoes" of an importer and assert any such rights that the importer has under the law. The surety may be relieved of its payment obligations when such actions or inactions on the part of CBP, either at the time of contract formation, during the administrative protest period, or anytime thereafter, cause a material increase in the surety's bond risk. The surety's right to be discharged of its bond obligation when CBP takes *or fails to take* certain actions that invalidate the suretyship contract, or otherwise discharges the bond under a theory of bond voidance. [25]

For example, if CBP exposes the surety to undue risk, the surety may wait to be sued by the government in an action upon the bond under 28 U.S.C. § 1582. The surety may then raise the defense of voidance as a counterclaim or as an affirmative defense. See St. Paul Fire and Marine Ins. Co. v. United States, 959 F.2d 960 (Fed. Cir. 1992) ("If St. Paul had not filed a protest, and had refused to comply with the government's demand for payment, and the

government had proceeded to sue St. Paul, no protest would have been required to assert contractual defenses….") The question of voidability also arises when extraordinary risk is placed upon an unknowing surety by Customs. A bond is not an insurance policy that insures against governmental error. See United States v. Utex Int'l, 857 F.2d 1408, 1412 (Fed. Cir. 1988) CBP may not know immediately that merchandise is being misdeclared or described and the surety companies accept such risk.

The question of risk arises when CBP has reason to believe that the importer may be evading the payment of proper duties and taxes at the time of entry, concealing its actual source (i.e., to avoid ADD/CVD), or undervaluing its worth; or all of the foregoing. Similarly, if the surety does not know about CBP activity (and that the agency may have unduly burdened its bond) until after the protest period expires, the surety may file an action in the CIT for relief under 28 U.S.C. § 1581(i) within two years after first learning of the cause of action and raise the previously concealed basis for the contract challenge.

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[2] Map of current CEEs available at http://www.cbp.gov/sites/default/files/documents/cee_map_1.pdf (last viewed Nov. 5, 2014).

[3] CBP's website indicates that the Automated Commercial Environment ("ACE") Secure Data Portal will allow authorized users to receive and respond to Requests for Information and Notices of Action forms. Available at http://www.cbp.gov/sites/default/files/documents/rr_cbpforms_3.pdf (last viewed Nov. 10, 2014).

[4] Form available at http://forms.cbp.gov/pdf/CBP_Form_28.pdf (last viewed Nov. 1, 2014).

[5] See 19 C.F.R. §§ 163.1(e), 163.6.

[6] 19 C.F.R. § 163.6(b).

[7] Customs-Trade Partnership Against Terrorism ("C-TPAT"). This program was developed in 2001 with seven importers as members. Today, CBP has indicated that there are more than 10,000 certified partners. These include U.S. importers, U.S./Canada highway carriers; U.S./Mexico highway carriers; rail and sea carriers; licensed U.S. Customs brokers; U.S. marine port authority/terminal operators; U.S. freight consolidators; ocean transportation intermediaries and non-operating common carriers; Mexican and

Canadian manufacturers; and Mexican long-haul carriers. According to CBP's website, these 10,000-plus companies account for over 50 percent (by value) of what is imported into the United States.
CBP has also has numerous Mutual Recognition Arrangements with other countries. The goal of aligning partnership programs is to create a system whereby all participants in an international trade transaction are approved by the customs function as observing specified standards in the secure handling of goods and relevant information. C-TPAT signed its first Mutual Recognition Arrangement with New Zealand in June 2007, and since that time has signed similar arrangements with South Korea, Japan, Jordan, Canada, the EU, Taiwan, Israel, and Mexico.

[8] Available at http://www.cbp.gov/sites/default/files/documents/CBP%20Form%2029.pdf (last viewed Nov. 1, 2014).

[9] See CBP GUIDANCE: CBP Forms 28 and 29 Language (May 24, 2011)

[10] 19 C.F.R. §§ 163.1(k), 163.8.

[11] As noted above CBP maintains it has the ability to seek recordkeeping penalties for "entry records" sought under a summons. See United States v. Ford Motor Company, Case No. 06-cv-00013-DB (WDTX) (case dismissed).

[12] See Montgomery, Discovery in Federal Administrative Proceedings, 16 STAN. L. REV. 1035, 1041-44 (1964)

[13] Model State Administrative Procedure Act § 4-210(a) (1981). The Model Act was revised in 2010 to provide for mandatory disclosure of party statements and certain other documents. Model State Administrative Procedure Act § 411(b) (2010).

[14] Title 22 [Judiciary]; Subtitle B Courts; Chapter IV Supreme Court; Subchapter E All Departments; Part 1200 Rules of Professional Conduct; § 1200.0 Rules of Professional Conduct *available at* https://www.nycourts.gov/rules/jointappellate/NY-Rules-Prof-Conduct-1200.pdf (last viewed Nov. 14, 2014).

[15] For an analysis of Washington State Rules of Professional Conduct as they relate to Administrative agencies see http://www.tal-fitzlaw.com/Papers/Ethical_Considerations-Administrative_Agencies.pdf (last viewed Nov. 14, 2014).

[16] The ABA has also issued opinions on the Model Rules of Professional Conduct.

[17] According to the International Trade Administration website, as of January 1, 2014, the United States has fourteen (14) Free Trade Agreements in force with the following countries:

1. Australia Free Trade Agreement (AUFTA)
2. Bahrain Free Trade Agreement (BFTA)
3. Chile Free Trade Agreement (CFTA)
4. Colombia Trade Promotion Agreement (CTPA)
5. Central America-Dominican Republic Free Trade Agreement (CAFTA-DR):
   - Costa Rica,
   - Dominican Republic,
   - El Salvador,
   - Guatemala,
   - Honduras, and
   - Nicaragua
6. Israel Free Trade Agreement (ILFTA)
7. Jordan Free Trade Agreement (JFTA)
8. Korea Free Trade Agreement (UKFTA)
9. Morocco Free Trade Agreement (MFTA)
10. North American Free Trade Agreement (NAFTA):
    - Canada

- Mexico

11. Oman Free Trade Agreement (OFTA)
12. Panama Trade Promotion Agreement (PATPA)
13. Peru Trade Promotion Agreement (PETPA)
14. Singapore Free Trade Agreement (SFTA)

Additionally, there are additional unilateral and multilateral special trade programs such as the Generalized System of Preferences (GSP), Caribbean (CBTPA), Andean (ATPDEA), Sub-Saharan Africa (AGOA), Civil Aircraft, Pharmaceuticals, Chemicals for Dyes, and others that provide preferential duty treatment upon compliance with specific origin and/or content rules.

[18] Available at http://www.ustr.gov/tpp.(last viewed Nov. 1, 2014).

[19] 19 C.F.R. § 133.23(a)

[20] The importation of trademarked goods is protected under the Lanham Act and under the Tariff Act. However, 19 U.S.C. § 1526 prohibits their importation without the explicit written consent of the owner. This provision is used by domestic companies to prevent parallel imports.

Interestingly, travelers arriving in the United States may be permitted an exemption and allowed to import one article of each type - bearing a counterfeit, confusingly similar or restricted gray market trademark, provided that the article is for personal use and is not for sale. http://www.cbp.gov/travel/international-visitors/kbyg/prohibited-restricted

[21] Knitted or crocheted garments under Chapter 61 of the HTS are not eligible for favorable tariff treatment even if they are water resistant, as there are no water resistant provisions in Chapter 61.

[22] http://www.gdlsk.com/knowledge/322-recent-ruling-calls-into-question-customs-lab-testing.html

[23] The CBP Form 301 is the bond form that is signed by the bond principal and surety. It does not carry any terms and conditions in the text. 19 C.F.R. § 113.62 sets out the terms and conditions of the Basic Importation and Entry Bond. The form is available at http://forms.cbp.gov/pdf/CBP_Form_301.pdf (last viewed Nov. 1, 2014).

[24] The list of Approved Sureties is maintained by the U.S. Department of Treasury. See Department Circular 570, http://www.fms.treas.gov/c570/c570.html.

[25] For an excellent discussion of bond voidance and voidability see Ferguson, "Why Voidance is a Fair remedy for Customs' failure to Inform Surety of Events that Materially Enhance Bond Obligations." Available at http://www.cit.uscourts.gov/Judicial_Conferences/17th_Judicial_Conference/17th_Judicial_Conference_Papers/FergusonPaper.pdf (last viewed Nov. 5, 2014).

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