

# HIGH STAKES: CUSTOMS PENALTIES AND SURVIVING THE PROCESS

BY MARIAN LADNER

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It is immensely important to understand exactly what is at stake in the world of importing and exporting, especially regarding the penalties one can expect for knowingly or accidentally violating the law. These penalties can be very steep if one is not careful, and poor record-keeping or poor organization can unwittingly compound an already serious problem.

Naturally, it is not a good idea to criminally transport goods into or out of the country. But simple negligence can potentially be just as crippling to a business not intimately familiar with the rules, regulations and penalties that can be incurred as a result of the shipping process.

To import commercial goods into the U.S., a company must post a bond, which forms a three-way contract between U.S. Customs and Border Protection, the importer and the surety. Customs may impose a penalty against the bond if the importer files an incorrect declaration of the value, nature or classification of the goods. This is known as a claim for liquidated damages.

As a general rule, fraudulent or false information regarding the entry of merchandise, excluding clerical errors, is grounds for investigation. If such fraudulent or false documentation is found to exist, a written notice will be issued by Customs regarding the decision to impose monetary penalties. These penalties are pursuant to 19 U.S.C. 1592. Penalties of this type apply to any commercial damages over \$1,000. The written notice will deliver important information regarding the claim, including the amount of damages that are being sought and the violations and facts relied upon by the government. A person or company will then have an opportunity to reasonably debate these accusations if they wish to try and lower or dismiss them.

The range of penalties for violations of this kind is as follows:

- A finding of outright fraud is punishable by a claim up to the full domestic resale value of the merchandise.
- Gross negligence is whatever is lower: the full price of the merchandise, or four times the amount of lost taxes-duties to the United States. If the negligence does not affect taxation, the damage is up to 40 percent of the value of the merchandise.

- Simple negligence is punished with the lesser of the price of the merchandise, or twice the lost duties. If such negligence does not affect taxation, the penalty is up to 20 percent of the value of the merchandise.
- If a person confesses any wrongdoing before the government discovers the error or prior to an investigation, absent fraud, the penalty is only the duties-taxes due, plus interest. This confession, however, must take the form of a valid prior disclosure filed with Customs.
- If a person is unable to pay, the merchandise can be seized until they are able to find the money. Merchandise will be seized if it is found to be stolen, smuggled, or bought into the country secretly. Explosives, contraband, or drugs will also be seized in the event they are discovered. Any other merchandise which might require a special license or permit and if it doesn't have it — or is a health or safety concern — is also subject to seizure and forfeiture.

In addition to obeying myriad of import laws, good record-keeping is also of paramount importance when it comes to bringing goods into the country. Compulsive record-keeping can save you vast amounts of trouble and money.

By law, any importer must make, keep and render for inspection any records, documents and electronic media pertaining to general business and relating to the importations. These records must be kept for five full years, and must be submitted when requested within a reasonable time frame, generally 30 days. Further, under certain circumstances, records might be required to be kept as long as 12 years after the importation of the merchandise. Therefore, it is critical to understand how your company's record-retention policy works and when, and if, records are automatically destroyed, or rendered unretrievable. In the event of a failure to produce all records associated with a single transaction, the penalty can be extremely severe:

- Willful failure to maintain, store or retrieve documentation can result in a civil penalty of up to \$100,000, or 75 percent of the value of the merchandise, whichever is less.
- Negligent failure to maintain, store or retrieve documentation can bring a civil penalty of \$10,000, or 40 percent of the value of the merchandise, whichever is less.
- An employer without a history of willful failure to retrieve documents or repeated violations, who is also involved in a record-keeping compliance program, will generally only receive a written warning. However, future failures will receive appropriate monetary penalties.
- No penalty will be assessed if the failure can be attributed to an act of God or other natural disaster, such as Hurricane Katrina, or if the information was submitted to Customs at an earlier time.

Keeping goods records and remaining vigilant with legal documentation will keep a compliant company from having to worry about legal penalties, seizures or forfeitures of goods. However, errors happen, and it is prudent to know what to expect. In 30 days, could find a specific e-mail relating to an import from November of 2000? Consider performing a limited review of your internal controls, processes and documents to determine your likely compliance. The demonstrable exercise of reasonable care will be considered a mitigating factor in errors discovered and disclosed. Staying on good terms with Customs and avoiding repeat violations can be a simple matter of understanding the ways in which things can go wrong, and how best to mitigate disaster.

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