

CUSTOMS-NOTES

Written by George R. Tuttle Law Offices for informational use by the trade and import community on selected topics of general interest concerning Customs and import related matters.

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CUSTOMS PUBLISHES PROPOSED RECORDKEEPING REGULATIONS WITH LIST OF MANDATORY RECORDS TO BE KEPT BY IMPORTERS

By: George R. Tuttle, III, Esq.

The Customs Service took another step forward in implementing the provisions of the Customs Modernization Act when it published proposed revisions to the recordkeeping regulations. These revisions incorporate the list of entry records and information required by law to be kept by importers. (See *Federal Register* notice dated April 23.)

While there has always been a requirement for importers to maintain and produce import and related financial documents under Part 162, now the failure to produce certain records within the required time limitations can result in the imposition of substantial monetary fines.

The Customs Service proposes to add Part 163 to the Regulations to cover all recordkeeping requirements, and includes procedures for the maintenance, production and examination of records. The notice also proposes to amend Part 111 to reflect the impact of these recordkeeping changes on customs brokers.

Summary Of Part 163

Section 163.1 of Part 163 contains a list of definitions of important terms, such as

certified recordkeeper and *entry records*.

Section 163.2 describes the parties required to maintain records and section 163.4 sets forth the record retention period. Section 163.3 describes the requirements for maintaining entry records, and section 163.6 explains the procedures for producing records, including entry records and penalties for non-production. Section 163.14 describes Customs' new voluntary recordkeeping compliance program and an Appendix identifies the entry records and other information subject to penalties for non-compliance.

Expanded List Of Parties Required To Keep & Produce Records

Before its amendment by the Mod Act, 19 U.S.C. §1508 limited recordkeeping obligations to the owner, importer, consignee, or agent of the party whom imported merchandise into the United States. The Mod Act amended these requirements and expanded the list of parties subject to recordkeeping requirements to include,

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among others,¹ **exporters to Canada or Mexico** and **drawback claimants**.

General Record Keeping Requirements

The new regulations reflect the requirement that importers and other parties associated with an import or other customs transaction (for instance, a NAFTA export or drawback claim) keep and produce upon written demand technical, business, and financial records maintained in the normal course of business that pertain to a customs activity. This includes documents and information which demonstrate that information on customs declarations regarding classification, valuation, and rate of duty are accurate.

These records must be kept for a period of **five years** from the date of entry, exportation, or other customs activity.

Exceptions For Drawback And Packing Lists

Two exceptions to the five-year rule apply. Section 163.4 provides that records relating to drawback claims need be retained only for a period of **three years** from the date of payment of the drawback claim. Customs has clarified, however, that the total retention requirement could extend to eight years for some of those documents, since entry records relating to the merchandise for

¹ Parties responsible to maintain records under 19 U.S.C. §1508 now include: the owner, importer, consignee, importer of record, entry filer, or other party who imports merchandise, files a drawback claim, exports to a NAFTA country or transports or stores bonded merchandise; carriers, cartmen, bonded warehouse proprietors, foreign trade zone operators, and other parties required to file an entry declaration.

which the drawback claim was paid must be kept for five years.

Another exception from the normal five-year retention period is made for packing lists. The regulations propose that packing lists need only be retained for 60 days following the release or end of the conditional release period of the goods because for the limited period in which information contained on those lists would be useful to Customs or the importer.

Methods For Storage Of Records

Generally, records and documents must be maintained by the recordkeeper in their **original form**. Procedures for the establishment of alternative record retention systems are provided for in Section 163.5 of the proposed regulations. Section 163.5 explains the procedures and requirements to obtain approval of an alternative record retention system, such as microfiche and CD ROM.

The "(a)(1)(A) List"

For purposes of assessment of penalties for non-production of records, Customs differentiates between general records and those that are described as **entry records**, which are required for the entry of merchandise.

The Mod Act grants Customs authority to waive the presentation of most documents otherwise required at the time of entry, thereby facilitating Customs' efforts to automate the entry process by reducing and eventually eliminating the submission of paper documentation at time of entry.²

² Customs' notice contains proposals to amend § 143.35 and 143.36 to reflect Customs present practice relating to the submission of paper documents when entries are transmitted electronically through the

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In exchange for not requiring presentation of these documents at the time of entry, Customs has the authority to request those documents at any time within five years of the date of entry. Failure to maintain or produce requested entry documents can result in the imposition of substantial administrative penalties.

The Mod Act requires Customs to identify for the importing community the list of records, statements, declarations and other documents required for the entry of merchandise. This list of entry records is commonly referred to as the "(a)(1)(A) list," after the section of law containing the requirement.

The list is included as **Appendix** to proposed Part 163.³ These are the records which Customs has identified as being necessary for the entry of merchandise.

Generally, the records and information to be retained include airway bills/ bills of lading, packing lists, customs bond information, entry and entry summary records (or its electronic data), the commercial invoice or its electronic

ACS system. A new proposed § 143.37 (a) will require all brokers and importers to maintain records in accordance with the new part 163. The proposed language means that hard copy or electronic documentation supporting electronic immediate delivery, entry, and entry summary must be retained in the condition as received by the filer or importer, unless the filer has received permission to store such documentation in accordance with § 163.5.

³ The list is the same as that which was published in the Customs Bulletin on January 3, 1996 (T.D. 96-1) on an interim basis, and the Federal Register on July 15, 1996 (61 FR 36956).

equivalent, and declarations and certifications associated with special tariff rate classifications.

Time Frames For Production Of (a)(1)(A) List Documents

Customs has proposed guidelines for the production of (a)(1)(A) list documents in § 163.6. For instance, it is expected that a record, such as an air waybill, which is less than a month old, be produced within five days of the request, and a record which is one to three years old would be produced within 20 days. Documents which are 3 to 5 years old would be produced within 30 days. The regulations provide that while these time frames are guidelines, they are to be complied with to the greatest extent possible. Alternative schedules can be established for extenuating circumstances, such as when Customs requests a large number of documents or when the requested documents are scattered throughout geographically diverse locations. In such situations, Customs expects that the recordkeeper will notify Customs of its inability to meet the deadline and provide an explanation.

Penalties for Non-Production Of "(a)(1)(A) List" Documents

Proposed § 163.6(b), contains the provisions for penalties for the failure to produce a record or information identified on the (a)(1)(A) list. Under the statute, a penalty action may result in a fine and loss of any special duty privilege. Under subparagraph (b), the fine may not exceed \$10,000.00 (or 40% of the value of the merchandise, whichever is less) when there is a finding of negligence associated with the inability to produce the demanded document or information, and \$100,000.00 (or 75% of the value of the merchandise, whichever is less) if it is determined that the failure to produce

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the demanded document or information was intentional.

Parties assessed administrative penalties for failure to produce demanded "(a)(1)(A) list" records will be able to petition for mitigation of the penalties under the provisions of part 171 of the Customs Regulations.

Penalties for the failure to produce (a)(1)(A) list documents may be avoided provided the recordkeeper can establish that its inability to produce the demanded record was the result of an act of God or natural disaster; that the demand has been substantially complied with by production of other documents or information; that the document was previously presented to and retained by Customs; or, if the recordkeeper participates in a recordkeeping compliance program.

Recordkeeping Compliance Programs

The proposed regulations contain provisions that describe a voluntary recordkeeping compliance program for parties who are required to maintain and produce "(a)(1)(A) list" records.

Participants in the program are eligible for alternatives to penalties and may be entitled to greater mitigation of any recordkeeping penalty that might be assessed should the party be unable to produce a requested record. The recordkeeping compliance program will also permit participants to receive approval of recordkeeping formats that are tailored to the needs of their operations or involve conversion of records from one format to another.

Section 163.14 describes the procedures to obtain certification and the requirements of the program. Applicants to the program may have Customs review their

recordkeeping procedures and methods. If Customs determines that the party meets the program requirements, it will certify that fact and permit the party to participate in the program.⁴

Who Can Be Certified RecordKeepers?

Generally, only importers and consignees of imported merchandise can have their recordkeeping program certified.⁵ A customs broker may also apply for certified recordkeeping status for transactions in which it acts as the importer of record. Otherwise, a customs broker may seek certified recordkeeping status in its own name (not that of its customer) and for its own records.

This does not prevent an importer from seeking status as a certified recordkeeper and contracting with a third party under an agency agreement for the actual retention of documents. In such instances, the importer will remain liable as the principal party for the non-production of any record by the third party recordkeeping agent.

Regulatory Audit Procedures

Proposed §163.13 details the role and responsibility of Customs regulatory auditors and formally sets forth regulatory audit

⁴ To assist the public in meeting Customs recordkeeping requirements, Customs has prepared a Recordkeeping Compliance Handbook which can be obtained from the Customs Electronic Bulletin Board or by faxing or writing the Regulatory Audit Division, Miami Field Office.

⁵ This would also include an entry filer or "other party" who imports merchandise in the United States, files a drawback claim, or transports or stores merchandise carried or held under bond.

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procedures for conducting a regulatory audit that have been in place by directive for several years. The regulations provide for time lines for conducting an audit as well as issuance of audit reports.

Changes Affecting Customs Brokers And Entry Filers

Customs also proposes to make several changes to Part 111 (Customs Broker Regulations) and Part 143 (Entry filing).

Section 111.21(b) will require brokers to comply with the provisions of § 163 when maintaining records that reflect on their transactions as a broker. Section 111.21(c) will require brokers to designate a recordkeeping officer and a back-up recordkeeping officer.

A change is proposed to § 111.22 (b), (c), (d), and (e) that will permit requests for exemptions for recordkeeping formats to be granted by the Field Director, Regulatory Audit, responsible for the geographical area in which the designated broker's recordkeeping officer is located rather than requiring that the request be referred to port directors.

A change is being proposed to §111.23(a)(1) that will permit brokers to consolidate all records they are required to maintain. The current regulations permit brokers to centralize only accounting records and requires they maintain entry records within the district to which they relate. Brokers will also be permitted to store powers of attorney in alternative format. These proposed changes will give brokers more flexibility in their record maintenance options.

Customs also proposed that § 143.37(c) be amended to permit filers to consolidate and store records and electronic data in alternative formats if their proposed plan is

approved by the Field Director, Regulatory Audit, who has responsibility for the geographical area in which the designated broker's recordkeeping officer is situated.

Finally, Customs proposes to amend § 143.39 to state that the failure to produce records in a timely manner could subject importers to penalties pursuant to part 163 and brokers to penalties pursuant to parts 111 and 163.

Recommendations

Importers and filers have been obligated to maintain and produce (a)(1)(A) list records since publication of the interim list in January 1996. Once these proposed regulations become final, Customs will be in a position to assess administrative penalties against importers who can not produce records pursuant to an (a)(1)(A) list demand.

Importers who have not already done so should do the following:

- 1) Identify the records on the (a)(1)(A) list which they are required to maintain in connection with the import transactions, and
- 2) Implement an adequate system to maintain these records for a period of five years.
- 3) Determine if they can produce the (a)(1)(A) list document within the time period required by Customs.
- 4) Verify that all other records required to be maintained for five years under Section 162.1(a).

Importers must keep in mind that while their customs brokers may retain some of the (a)(1)(A) list records, they will not necessarily have all of the records necessary to comply with a document request in their files. In addition, importers need to keep in mind that legal responsibility to maintain

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(a)(1)(A) list records lies with the importer and not the broker.

A copy of the Interim (a)(1)(A) list and proposed recordkeeping regulations can be obtained by contacting our office at (415) 986-8780.

For additional information on this subject or for additional copies of this publication contact:

George R. Tuttle Law Offices
Three Embarcadero Center, Suite 1160
San Francisco, CA 94111
Phone (415)986-8780 Fax (415) 986-0908
E-mail address: info@tuttlelaw.com