

Customs Alert

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CBP's Informed Compliance Letters Notify Importers That an Audit or Enforcement Action May Follow

U.S. Customs and Border Protection (CBP) recently issued letters to major U.S. importers that encourage the recipients to review their recent trade data and CBP's Informed Compliance Publications (ICPs), and remind them of potential CBP enforcement actions in the case of non-compliance with U.S. customs laws. CBP's Informed Compliance letters have caused some alarm in the importing community, and Akin Gump Strauss Hauer & Feld LLP has confirmed with CBP that receiving such a letter is an indication that CBP is considering an audit.

Background

CBP's letters were issued by its Office of Regulatory Audit, often with the subject line, "Distribution of Informed Compliance Publications and Other Informative Documents." In the letters, CBP:

- provides a summary of the importer's top imports from the previous calendar year
- recommends the review of certain listed Informed Compliance Publications (ICPs)
- encourages importers to review their trade data and reminds importers of their ability to submit disclosures
- warns importers that they could be subject to penalties and/or seizures in the event that CBP identifies non-compliance with U.S. customs law
- requests that the importer sign and return a copy of the letter to CBP.

Letters May Indicate That a CBP Audit or Other Enforcement Action Is on Its Way

CBP informed Akin Gump that it is sending the letters to the top 1,000 importer-of-record numbers that CBP has not audited in the past 10 years as CBP works to clear its audit pool of major importers that it has not recently audited. CBP indicated that the letters are meant to remind importers of their legal obligations under U.S. customs law and give them a chance to review their compliance with U.S. customs laws before CBP commences any validation efforts, such as an audit. That said, CBP has indicated that recipients of the letter can expect to be subject to a CBP audit—either a general Focused Assessment (FA) or a Quick Response Audit (QRA)—in the foreseeable future.

CBP also informed Akin Gump that it will determine whether to conduct an FA or a QRA based on its analysis of each importer's risk profiles. If an importer has high-risk profiles across a number of compliance areas, (i.e., tariff classification, value), then CBP will likely conduct an FA. Similarly, CBP will also conduct an FA if an importer has high-risk profiles in Priority Trade Issue areas—such as antidumping and countervailing duties (AD/CVD) or free trade agreement claims—and the underlying compliance issues involve major customs data points (e.g., an importer with high-risk profiles for AD/CVD

risk due to misclassification, value and/or country of origin). On the other hand, if the importer's risk is limited to one particular area, such as classification or value, CBP will likely conduct a QRA.

CBP's Letters Include Language Not Supported by Law and Do Not Change Importers' Legal Obligations

CBP's letters contain strong language that warns the importer that it is on notice regarding its legal obligations and that future violations "could result in seizure and forfeiture of imported merchandise and/or the assessment of monetary penalties." However, these letters do not have any material impact on importers' reasonable care and other legal obligations under the customs laws. As the importing community is aware, CBP and importers share responsibility for complying with U.S. customs law. Importers are always required to enter merchandise exercising reasonable care, and failing to do so may constitute a violation of 19 U.S.C. § 1592. Importers exercise reasonable care by reviewing relevant customs laws, CBP rulings and other CBP publications, such as ICPs (which are publicly available on CBP's website) when entering merchandise into the United States. An importer is always subject to potential customs penalties when failing to comply with customs legal requirements, regardless of whether or not they have received a letter from CBP. The fact that CBP is providing copies of certain ICPs to particular importers does not change the importers' legal obligations because the importers are already on notice of those publications before making entry.

Based on the language in the letters, we expect that CBP may be setting the stage for increased penalties, or penalties in circumstances where the agency has not issued them in analogous cases. It is foreseeable that CBP could argue in penalty proceedings that it went beyond its traditional shared responsibility by notifying an importer in writing that the agency had published various documents on the areas covered by the violation (i.e., tariff classification). For example, the agency could potentially argue that, as a result of the notification, any ongoing violations are the result of gross negligence or some higher culpability, since the importer was made aware of CBP's interpretations in the ICPs.

How the Importing Community May Respond to the Letter

While the letters do not impact an importer's legal obligations, they can serve as an indication that the recipients will likely be subject to a CBP audit. As a result, recipients may wish to start preparing for a CBP audit. Specifically, letter recipients may start reviewing their import data to identify any potential compliance risks and consider filing prior disclosures in the event that it identifies violations of 19 U.S.C. § 1592. Importers could also take this time to review their existing customs compliance policies to ensure that they are up to date and reflect the company's current practice. In addition, importers may also review and be familiar with any CBP ICPs applicable to their business. All of CBP's published ICPs are available to view and download here: <https://www.cbp.gov/trade/rulings/informed-compliance-publications>.

In addition, letter recipients might consider not signing and returning the letter. Importers are basically under no legal obligation to sign and return the letter to CBP, since CBP would arguably have to go through the Agency Information Collection process required by the Paperwork Reduction Act before it can formally require recipients to acknowledge receipt of the ICP letters. Thus, one option—in order to avoid establishing a formal record—might simply be to receive the ICP letter, address the possibility of an audit,

take any additional compliance steps (e.g., prior disclosure review), and not sign and return the letter to CBP.

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