

Customs and International Trade Bar Association Quarterly Newsletter

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CITBA in Action

On August 16, 2006, CITBA filed comments on the proposed rule the Department of Commerce, Bureau of Industry and Security (BIS) had published in the Federal Register (71 Fed. Reg. 37517) on June 30, 2006. The proposed rule set forth BIS policy concerning voluntary self disclosures of violations of part 760 (Restrictive Trade Practices or Boycotts) of the Export Administration Regulations (EAR) and violations of part 762 (Recordkeeping) of the EAR that relate to part 760. The proposed rule also set forth the factors that BIS would consider when deciding whether to pursue administrative charges or settle allegations of such violations as well as the factors that BIS considers when deciding what level of penalty to seek in administrative cases. [A copy the comments CITBA filed is included at page 14.](#) BIS received only 1 other set of comments on the proposed rule.

Upcoming Events

CITBA Semi-Annual Meeting and Dinner

CITBA's Semi-Annual Meeting and Dinner will be held Monday, November 6, 2006 at the Penn Club, 30 West 44th Street, New York, NY. Mr. Lawrence Rosenzweig, Director of Industry Partnerships, U.S. Customs and Border Protection, will be the dinner speaker. Further information about the event and how to register is provided below.

DATE: Monday, November 6, 2006

PLACE: The Penn Club
30 West 44th Street
New York, New York

TIME: 6:30-8:30 p.m.

SPEAKER: Lawrence Rosenzweig
Director of Industry Partnerships, U.S.
Customs and Border Protection

COST: CITBA Members \$75.00
Government attorneys \$65.00
Non-members \$95.00
Honorary members (Judiciary) are invited as guests of CITBA.

Mail reservations and checks by
October 27, 2006 to:
Beth C. Ring, Esq.
Sandler, Travis & Rosenberg, P.A.
551 Fifth Avenue, Suite 1100
New York, N.Y. 10176

Special dietary requirements should be notified by October 27, 2006 to Nelly Koosau, 212-883-1300, fax: 212-883-0068, e-mail: nkoosau@strtrade.com

CIT Judicial Conference

The 14th Judicial Conference of the United States Court of International Trade will be held Monday, November 6, 2006 at the New York Marriott Marquis Times Square. The theme of the conference is "Something Old, Something New: Emerging Issues Before the Court." Registration forms and additional information are available on the Court's website at <http://www.cit.uscourts.gov/>.

Feature Article

Decision Time at Customs HQ: Harmonization of Customs Valuation and Transfer Pricing Rules

By Damon V. Pike¹

I. Introduction

The scenario for importers of merchandise from related sellers is all too familiar: a shipment arrives in the United States, the appropriate paperwork is filed, and then the inquiries begin. The local U.S. Customs and Border Protection (CBP or Customs) Import Specialist calls the importer to inquire about the basis for the declared value, followed by a formal Request For Information (Customs Form 28) pertaining to the valuation methodology. The importer responds that the use of "transaction value" is appropriate because the product's price is determined by the transfer price, and is thus "arm's length." It forwards a copy of the company's transfer pricing study to Customs, thinking the matter is closed. Not satisfied with a mere transfer pricing study, Customs elevates the matter to the Office of Regulatory Audit, resulting in a full-blown audit that will consume countless hours and resources, or to the Office of Investigations, which has even more dire consequences.

Because of this scenario, members of the trade community have attempted for years to persuade CBP (formerly the U.S. Customs Service) that the agency's reluctance to consider transfer pricing rules as a means of validating the transaction value hinders the development of international trade and wastes valuable resources. Until recently, Customs had been receptive to these arguments, and had displayed some forward thinking in acceding to transfer pricing rules in certain circumstances, such as in the context of an Advance Pricing Agreement (APA) when Customs was allowed to participate in the negotiations and review pricing information prior to approval in a bilateral negotiation.

However, during a recent conference on this topic at the World Customs Organization in Brussels,² it became clear this issue is far from settled. A ruling issued by Customs HQ in 2004,³ as well as an anticipated forthcoming request for comments by CBP's Office of Regulations and Rulings, indicates that Customs may be rethinking its approach to this

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Pro Bono Opportunities

The U.S. Court of International Trade has an ongoing need for attorneys who are able to serve as *pro bono* counsel for *pro se* plaintiffs in Trade Adjustment Assistance cases before the Court. There are two types of Trade Adjustment Assistance cases that call for *pro bono* representation. The first type arises when workers seek judicial review either after the U.S. Department of Labor's negative determination on the original petition or after the U.S. Department of Labor's negative determination on its reconsideration. The second type of case occurs when the U.S. Department of Agriculture denies a petitioner's claim seeking compensation for a decline in net farm income from one year to the next as a result of imports. The majority of these cases are filed by participants in the Alaska salmon industry and the Gulf Coast shrimp industry.

If you would like to volunteer to serve as *pro bono* counsel or if you would like more information about the *pro bono* program, please contact:

Donald C. Kaliebe
Case Management Supervisor
(212) 264-2031
donald_kaliebe@cit.uscourts.gov

You can also learn more about TAA by visiting the CITBA website (<http://www.citba.org/announce.htm>) and reading the Executive Summary of a course first presented at "What You Need to Know About Trade Adjustment Assistance Cases – From All Sides" sponsored by the U.S. Court of International Trade, the American Bar Association, and the Customs and International Trade Bar Association, in April, 2005. Additional and more detailed information can be obtained at the TAA Coalition web site (<http://www.taacoalition.com/>), which includes a "Primer on TAA petition process," among other informative materials.

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difficult issue, but that ultimate resolution need not require a complete redrafting of the Trade Agreement Act (TAA) of 1979, which enacted the current customs valuation laws in the United States. This article will review the 1979 Act, summarize the previous rulings that expanded the use of transfer pricing rules in the customs context, review Customs' current position in detail, and suggest an outcome that would obviate the need for a complete redrafting of the 1979 TAA.⁴

II. Customs Valuation Methodologies Established By Trade Agreement Act Of 1979

In 1979, the United States amended section 402 of the Tariff Act of 1930⁵ pursuant to its obligations under the multilateral General Agreement on Tariffs and Trade (GATT) Treaty. The Trade Agreements Act of 1979 implemented the Tokyo Round of agreements, which among other things made U.S. valuation laws consistent with the GATT standards of appraisement. The 1979 TAA offers prioritized methods for valuing imported merchandise, starting with transaction value.

For Customs purposes, transaction value is the preferred and most common method of valuing imported merchandise, and is used as the appraisement method for approximately 90 percent of all merchandise imported into the United States.⁶ The statute provides that the transaction value of imported merchandise is the "price actually paid or payable for the merchandise when sold for exportation to the U.S. . . ." plus certain statutory additions that are added only if they are not already included in the selling price.⁷ The "price actually paid or payable" is defined as the "total payment (whether direct or indirect, and exclusive of any costs, charges, or expenses incurred for transportation, insurance, and related services incident to the international shipment of the merchandise . . .) made or to be made for the imported merchandise by the buyer to, or for the benefit of, the seller."⁸ Basically, the invoice price from the seller to the buyer/importer serves as the value to be declared to CBP, in addition to certain other payments that must be declared if not already included in the invoice price.

Transaction value -- using the invoice price -- must be applied when it is the valid method of appraisement for sales between both related and unrelated parties.⁹ Oddly enough, the regulations nonetheless state that Customs will not disregard

use of transaction value solely because the buyer and seller are related.^{10 11} Given that the overwhelming majority of import transactions occur between related parties using transaction value, this statutory language seems to imply that importers that are related to their seller are on "shaky ground" when they choose to base appraisement on transaction value, when in practice the opposite is true -- all major importers that purchase goods from related parties routinely use transaction value as the primary method of appraising their imported merchandise.

To examine whether the use of transaction value is acceptable in the related-party context, the statute goes on to say that transaction value may be acceptable if the circumstances of the sale (COS) of the imported merchandise indicate that the relationship did not influence the price actually paid or payable, or if the price of the imported merchandise approximates enumerated test values.¹² The regulations state that the importer will be given an opportunity to supply further detailed information as may be necessary to enable Customs to examine the COS.¹³ Customs will consider pertinent details of the transaction, such as the manner in which the parties organize their commercial relations and the methodologies utilized to derive the price in question, to determine whether the relationship influenced the price actually paid or payable.¹⁴ In making this determination, Customs will also seek evidence that the price has been settled in a manner consistent with the normal pricing practices of the industry in question, or with the manner in which the seller settles prices for sales to unrelated buyers.¹⁵ Furthermore, if it is shown that the price is adequate to ensure recovery of all costs plus a profit that is equivalent to the seller's total profit realized over a representative period of time, in sales of merchandise of the same class or kind,¹⁶ then Customs will accept that the relationship did not influence the price.¹⁷ All of these COS tests seek to ensure that the transaction value is essentially an arm's length price -- which is also the goal of the income tax regulations when examining transfer pricing under section 482 of the Internal Revenue Code, discussed below.¹⁸

The basic dilemma for importers is clear: can the rules noted above be used to validate application of transaction value when in fact all major intercompany pricing is based on rules set by the IRS for allocating income (and profit) among differing jurisdictions? In other words, the unit price per item that appears on every commercial

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invoice for virtually every shipment of merchandise imported from a related party is derived first and foremost from the intercompany transfer pricing policy of the seller, with nary a thought given to satisfying the customs valuation rules. Only after the fact (post-entry) do most importers address the need to buttress their use of transaction value with appropriate analysis and documentation.¹⁹

III. Customs Rulings That Expanded the Use of IRS Transfer Pricing Rules

A. Brief Background of Transfer Pricing Rules, Particularly Use of APAs

Before turning to a review of the Customs rulings that have relied on transfer pricing studies, APAs, and otherwise looked to income tax rules in support of transaction value, a brief discussion of the relevant U.S. transfer pricing rules is set forth below.

Multinational companies engaging in global import and export of goods must set intercompany prices for sales to and purchases from related parties.

The U.S. transfer pricing rules require that intercompany prices be set in accordance with the arm's length principle. Prices are arm's length if they are the same as would have been agreed to by uncontrolled taxpayers engaged in the same transaction under the same circumstances. Unfortunately, it is not uncommon for the IRS and foreign tax authorities, in trying to protect their respective fiscs, to assert that intercompany prices charged were not arm's length despite the taxpayer's best efforts to set its prices accordingly. In the United States, the substantive transfer pricing rules are contained in section 482 of the Internal Revenue Code and regulations adopted thereunder.

While the tax and customs rules have similar requirements -- that related-party importers set their prices as would unrelated parties -- they use different methodologies to test compliance. Customs assesses duties based on the value of the goods and seeks to obtain the correct value on specific imported goods at the time of their entry into the United States. The U.S. transfer pricing rules seek to properly allocate income between related parties to achieve its clear reflection and to prevent the shifting of income between tax jurisdictions. The time for determination of whether a transfer price was correct is the date of filing the tax return.

The competing national interests in generating tax revenue naturally have created tensions between governments. They also present considerable challenges for importers. Quite often disagreements between taxpayers and tax authorities, if not quickly settled during exam, result in complex and lengthy disputes that must be addressed in litigation or the IRS administrative appeals process. Considering the complex nature of transfer pricing issues, these processes can prove very costly and time-consuming. Fortunately, the IRS has created the APA program to allow taxpayers to obtain transfer pricing certainty on a prospective basis.

An APA is a written agreement that is binding on the taxpayer and the Internal Revenue Service, and in case of a bilateral APA, a foreign tax authority. The APA sets forth a transfer pricing methodology to determine arm's length prices between the parties for a set period of time (normally five years). An APA can be renewed and in some cases can be applied to previous years (rolled back). The benefits of an APA include, among other things, certainty of tax treatment, a nonadversarial negotiation process, and time and cost savings.

B. Development of Customs HQ Rulings

Importers of merchandise into the United States have struggled for many years to reconcile the divergent rules concerning the valuation of merchandise for tax and Customs purposes. Most importers determine transfer prices under section 482, and use the transfer prices to set Customs values without any in-depth consideration given to the various Customs valuation methodologies. This approach has left many importers exposed to Customs audits, investigations, and penalties.

While many importers sought approval through the ruling process to use transaction value as the basis of appraisement, Customs has not taken a consistent position when the ruling requests relied on transfer pricing documentation or other kinds of "transfer pricing" arguments for support.²⁰ The only consistency seems to be that when the ruling requests were granted, Customs made little effort to explicate the economic underpinnings of the referenced transfer prices and/or studies, but rather parroted the language of one of the COS requirements and stated the requirement had been met. In sum, Customs' lack of sophistication in this area has prevented any meaningful analysis from finding its way into published HQ rulings.²¹

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However, in 1998 an importer filed a ruling request with Customs HQ seeking to validate its declared customs values using the transfer prices developed pursuant to a bilateral APA between the Internal Revenue Service and Japan's National Tax Authority (NTA). In HQ 546979 (Aug. 30, 2000), the importer approached Customs at the onset of APA negotiations. After filing its ruling request (and while the ruling request was pending at Customs HQ), a CBP representative participated in the negotiations at the request of the importer and reviewed extensive documentation submitted by the importer to the IRS and NTA in support of its intercompany pricing. Specifically, Customs was able to review:

- Selection of the tested party;
- How the comparable companies were selected;
- The determination of financial results related to the controlled transactions;
- The selection of the years for comparison;
- What accounting adjustments were made to the financial statements of the comparable companies and of the importer;
- The selection of the most reliable profit level indicator; and
- The capital adjustments and the use of the interquartile range.

Customs ruled in favor of the importer that transaction value was the proper method of appraisement for purchases from its related-party supplier -- values that were based on prices established pursuant to a bilateral APA. In its decision, Customs noted that merchandise imported into the United States is generally appraised in accordance with section 402 of the Tariff Act of 1930 (19 U.S.C. § 1401a) and that the preferred method of appraisement is "transaction value." The agency further noted that transaction value ("price actually paid or payable") between related parties is acceptable if the "circumstances of sale" demonstrate that the declared values are arm's length.

In examining the COS test, Customs found that "the information submitted to the IRS and the fact that there is a bilateral APA constitute valuable information in applying the COS test" Customs then cited its traditional tests for

determining that the relationship between the parties did not influence the price, such as "the price is adequate to ensure recovery of all costs, plus a profit that is equivalent to the firm's overall profit realized over a representative period of time in sales of merchandise of the same class or kind . . ." Customs agreed with the importer's position that the information submitted in the APA request provided Customs with the necessary profit information to conclude that the COS test was met, and thus satisfied the traditional Customs valuation rules for related-party transactions.

Customs was careful to note that it normally requires more detailed information pertaining to the valuation of imported merchandise, that is, it requires pricing information on a more detailed product-by-product level. In this ruling, it did not require the importer to provide Customs with a further breakdown of product line profitability for comparability because *all* the importer's imported products were covered by the APA. However, Customs announced that in any future verification it expected the importer to demonstrate that the profit earned by any given product line fell within the agreed-upon range specified in the APA.

Customs then held that:

[o]ur review of the information, including attending the APA prefiling conference and review of information submitted to the IRS . . . allows us to conclude that we have examined the relevant aspects of the transaction, including the way in which the importer and its related suppliers organize their commercial relations, as well as the way in which the price in question was arrived at between the parties. Based on this review, we hold that the [i]mporter has demonstrated that the price has not been influenced by the relationship for purposes of the COS test.²²

The ruling effectively eliminated the taxpayer's exposure to Customs examinations, adjustments, and penalties.

Seeking to build on the momentum established by this ruling and CBP's apparent willingness to look to the transfer pricing arena for support of its rules regarding the validation of transaction value through COS, another importer soon came forward with a similar ruling request. The second ruling (HQ 548233, Nov. 7, 2003) involved facts and circumstances similar to those in the 2000 HQ

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Ruling (HQ546979) and adopted a path of reasoning substantially similar to the 2000 ruling. Both rulings evince a level of sophistication not found in any of the other “transfer pricing” rulings to date.²³

IV. Customs’ Current Position and Suggested Outcome

A. HQ 548482

With the “APA Customs” ruling process thus established as a reliable weapon in the importer’s arsenal to respond to requests for information from import specialists or otherwise support the use of transaction value, a gap still existed for many importers. The disconnect between transfer pricing and customs valuation could not be bridged through the APA/Customs ruling process for a simple reason: very few importers avail themselves of the APA program. The option cemented in the above-mentioned rulings could not apply to the vast majority of importers because the APA process was too expensive and time-consuming, despite the benefits the program offered.

Thus, an importer developed and set forth another approach in HQ 548482 (July 23, 2004). In that case, the importer had previously undergone an audit by Customs and, as a result, was precluded from using transaction value as the basis of appraisal because, among other reasons, it adjusted the transfer price after the date of importation. The importer therefore was forced to use the “deductive value” method of appraisal, a very cumbersome, artificial pricing analysis that both CBP and importers consider an administrative burden. Nonetheless, the importer had no choice after the audit but to implement this valuation methodology.

At the behest of the local CBP import specialist (who was no doubt just as exasperated as the importer with the use of deductive value), the importer filed a ruling request seeking a return to transaction value as the basis of appraisal for its imported merchandise. Its argument, in a nutshell, was very simple: the company maintained a global transfer pricing policy that was well-documented and followed rigorously in all jurisdictions where it conducted business. Using the COS provision discussed above, the importer maintained that its pricing practices as set forth in the transfer pricing study were the normal pricing

practices of the industry, and that its transfer pricing methodology employed allowed CBP to “back into” a determination that the producer(s) recovered all of its costs plus a profit that was equivalent to the firm’s overall profit for a given period for the class or kind of merchandise at issue.²⁴

Most important, the importer argued that the transfer prices used as the basis for determining invoice prices (and thus customs values) had been *audited* by the IRS. Thus, the transfer pricing study provided to CBP as part of the ruling request had also been provided to and examined by the IRS as part of the audit preparation, and the audit revealed these numbers to be arm’s length, with certain adjustments.²⁵ The IRS’s findings were documented in the Revenue Agent’s Report (RAR), the relevant section of which was submitted to CBP for review as part of the ruling request. Because the IRS agent audited all the major companies in the industry at issue and determined in the RAR that the importer’s pricing was arm’s length (based on data for comparable uncontrolled entities submitted in the economic analysis appended to its ruling request), the importer argued that the COS test was satisfied – its pricing reflected the normal pricing practices of the industry and allowed the producers to recover all their costs plus a reasonable profit for the imported merchandise.²⁶

In rejecting these arguments, CBP applied faulty and conclusory analyses. Regarding the “normal pricing practices of the industry,” Customs claimed that the importer “has not presented any information to support its statements,” and went on to address the need for “objective evidence,” such as prices published in a trade journal.²⁷ It noted that the ruling request did not direct CBP to any part of the transfer pricing study to support its assertions. It concluded that “the transfer pricing study is not sufficient to establish that the transfer prices at issue are set in accordance with the normal pricing practices of the industry.”

Unfortunately, CBP misapprehended the nature of a transfer pricing study in general. No particular section of these lengthy documents can be isolated and identified as the “objective evidence” of an industry’s normal pricing practices. Indeed, the transfer pricing study in its entirety (including its economic analysis) is the objective evidence deemed “essential” by Customs, because the interquartile range setting the amount of profit – and thus the arm’s length price – is the result of the *entire* study, not a mere excerpt or portion. In fact,

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the normal pricing practice of every industry is to document its transfer pricing policy in accordance with section 482 and maintain and update transfer pricing studies on a regular basis – and provide them to the IRS upon request, as is the practice at the start of every audit. Indeed, the most objective evidence one could hope to find is the RAR – a report of an IRS Revenue Agent’s findings *after* examining the transfer prices in light of all the evidence.

Moreover, on this point CBP ignored the importer’s position that the voluminous information submitted in support of its ruling request included the RAR, which documented that the importer’s *audited* transfer prices were arm’s length, based on an audit conducted by the IRS’s expert in the industry at issue. As the industry expert, the IRS agent’s findings (as evidenced in the RAR) were proof that the transfer prices of the importer were in accordance with the normal pricing practices of the industry, given that the same IRS agent had also audited all the other major players in the industry and found that the importer’s profitability – with the minuscule adjustments noted earlier – was in line with the other major companies in the industry, as well as with those set forth in the economic appendix to the importer’s transfer pricing study as comparable uncontrolled companies.

Regarding the “all costs plus a profit” part of the COS test, CBP noted at the outset that the IRS regulations reviewed profitability on an aggregate basis, not product by product. It went on to note that while a transfer pricing study could be relevant to the COS test, the weight given to the study varies. It cited as an important factor in determining the study’s importance whether it had been “reviewed and approved” by the IRS. Apparently the agency meant that a transfer pricing methodology “reviewed and approved” in the context of an APA would be acceptable (although technically, no transfer pricing “studies” are submitted during the APA process – the agreement itself documents the methodology approved by the IRS and, in some cases, by another foreign taxing authority when the APA is bilateral). However, a transfer pricing study is also “reviewed and approved” in the context of an IRS audit.²⁸ The transfer pricing study and related documents provided to the IRS agent prior to the audit are thoroughly reviewed in advance of the audit. The “approval” of the prices (and profit levels) takes place at the conclusion of the audit, when the auditor signs off that the prices are meeting the profit levels mandated in the interquartile range, or

whether adjustments are needed to bring those prices back in the ranges that permit the recovery of an adequate profit, i.e., that are arm’s length, as set forth in the transfer pricing study.

CBP cited its two earlier “APA rulings,” wherein it was allowed to review the information submitted by the taxpayer to the IRS during the APA negotiation process.²⁹ Apparently this “timing distinction” was important to the agency, although it requested no changes to any of the information submitted to the IRS in either of the rulings discussed earlier, nor did it submit any comments nor provide formal feedback of any kind to the IRS during either of the APA negotiations in the two rulings. Thus, CBP focused on a “form over substance” approach in ruling on this aspect of the COS test: the process of an up-front review of the information submitted in support of a given transfer pricing methodology appears to be more important to the agency than actually reviewing and analyzing the information in a meaningful way, as the IRS does in approving an APA or in conducting an audit of an importer’s transfer prices.

CBP’s further statement that its “review of the companies deemed to be ‘functionally’ comparable by the [economic] consultant does not lead this agency to the conclusion that they are engaged in the sale of the same class or kind of merchandise” also highlights the agency’s lack of understanding of “functional comparability” in the transfer pricing context. First, while the CBP regulations do indeed focus on the profitability of *products*, no company in the world maintains financial statements on a product-line basis. Any attempt to reconstruct a product-line profitability analysis simply to meet the arcane language of this particular part of the COS regulations is by necessity an *ad hoc* exercise not grounded in sound economics and is, in any event, inherently unreliable, because only financial statements contain audited numbers reflecting a company’s actual, verified profit.

Moreover, companies maintain financial statements in accordance with GAAP, and these statements can easily be used to support the requirements of section 482 that measure the *aggregate* profitability of the enterprise. In meeting the income tax requirements, the standard approach measures the profitability of the tested party against those of comparable uncontrolled entities based on companies that share similar functions and risks – and may or may not sell the same class or kind of merchandise. Nonetheless, whatever products are involved, the profitability of

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each and every product sold can be determined by ensuring first and foremost that the integrity of the importer's overall profit is sound. Once this is established through an APA or through an IRS audit, the soundness of the producer's profit can easily be determined by subtracting the importer's profit on any given product, or on any class or kind of merchandise. The result is a figure that, by definition, also must return a reasonable profit to the producer.

In this case, the importer's economic study listed 10 different comparable uncontrolled entities, many of which sold the same merchandise as the importer. Others did not, but were nonetheless engaged in the *distribution* of imported merchandise and otherwise had profiles that mirrored the functions and risks of the importer. The profitability of the tested party (the importer) was measured against these similar uncontrolled companies, and a profit range (the interquartile range) was established pursuant to this analysis. It was this profitability that was audited by the IRS, and the resulting prices were deemed to be arm's length. As discussed above (especially in the context of a "backward-integrated" industry such as that at issue in this ruling), the arm's length determination must then also apply to the producer's profits as well as the distributor's upon resale of the imported goods. Any other conclusion would render the IRS regulations -- not to mention basic economics -- meaningless.³⁰

B. The Future of Transaction Values Based on Transfer Pricing Rules

At the time HQ 548842 was issued, many in the trade community who closely follow this issue hoped that the ruling would prove to be an anomaly. When the issue surfaced at the World Customs Organization/Organization for Economic Cooperation and Development's (WCO/OECD) May 2005 Conference on Transfer Pricing and Customs Value, the participants expressed many divergent views. CBP's representative from OR&R did not explicitly support a particular reading of the statute and the regulations one way or another, but did note that the entire issue was under review at Customs HQ. A notice in the *Federal Register* requesting comments from the public is expected shortly to assist CBP in formulating a new policy that will hopefully facilitate efficient and accurate reporting of declared transaction values, while not shortchanging the government of duties or otherwise infringing the rules.

What this means for importers of merchandise from related-party sellers is that careful planning and meticulous documentation will be necessary when the price declared for customs purposes is based on an intercompany transfer price. Until revoked, HQ 548482 (no matter how poorly reasoned) suggests that supporting the price declared by means of a transfer pricing study alone is insufficient to pass muster with Customs. Thus, absent a bilateral IRS APA/Customs ruling, a resort to pricing formulas and supporting documentation that specifically addresses the customs rules may be the only hope in the short term for successfully arguing the use of transaction value when related-party transactions occur.

Customs has previously accepted the use of transaction value when it is supported by a pricing formula and accompanying documentation. For example, in HQ 546211, discussed above, a pricing formula based on the standard manufacturing cost plus a gross margin percent, when coupled with supporting information that detailed the allocation of costs between domestic and foreign sales in accordance with the pricing formula (among other things) was deemed sufficient for purposes of supporting the price declared for merchandise imported from a related party seller. Likewise, in HQ 547019 (March 31, 2000), a price list applied against a discount rating system that assigned purchasers a rating based on criteria involving the volume of merchandise purchased, investment by the purchaser in spare parts inventory, the technical ability of the purchaser's field service personnel, and the purchaser's sophistication in the area of electronic data interchange with the seller, satisfied the COS approach. In addition to details regarding the discount system, the importer also provided the foreign seller's invoices to both related and unrelated purchasers, evidencing identical price discounts based on the rating system.³¹

Thus, the existence of a pricing formula, when accompanied by documentation evidencing the formula's consistent application, appears to assuage Customs' concerns that related-party transactions fail the COS test. With proper counsel and guidance, importers should be able to modify their transfer pricing documentation to address the customs valuation requirements in a manner that satisfies Customs HQ. But one overriding question remains: how do transfer pricing adjustments affect declared customs values?

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C. *Availability of Duty Refunds for Retroactive Transfer Pricing Adjustments*

The most contentious issue discussed at the WCO/OECD Convention on Transfer Pricing and Customs Valuation concerned duty refunds for retroactive downward transfer pricing adjustments. Customs has held that retroactive price adjustments for income tax purposes must be “reported to Customs immediately and any additional duties resulting from the adjustments must be tendered to Customs.”³² Such reporting for upward adjustments, that is, increases in COGS (and thus customs values), is ordinarily accomplished by filing of an administrative letter to inform Customs of changes to transaction value due to the transfer pricing adjustment. When an upward adjustment is involved, a tender of additional duties, taxes, and other fees accompanies the administrative letter. However, when a downward adjustment occurs, importers should expect a refund of any overpayment. See HQ 548223 (Nov. 7, 2003). This is accomplished through the use of various administrative mechanisms such as Reconciliation, Protests, and Post Summary Adjustments.

Despite this practice, several participants at the WCO/OECD Convention on Transfer Pricing and Customs Valuation commented that the GATT Valuation Agreement (on which the TAA of 1979 is based) does not permit duty refunds that result from lower values reported as a result of a transfer pricing adjustment. Most commentators found support for this interpretation in the GATT regulation (found in the U.S. regulations at 19 C.F.R. §152.103(a)(4)), which provides that “[a]ny rebate of, or other decrease in, the price actually paid or payable made or otherwise effected between the buyer and seller after the date of importation of the merchandise will be disregarded in determining the transaction value [of the merchandise upon entry].”³³ However, a review of the intent of this regulation and the reasons for transfer pricing adjustments clearly indicate that application of the regulation to retroactive transfer pricing adjustments is an improperly broad interpretation.

Because transfer pricing adjustments are made to bring the transaction value of imported merchandise into compliance with IRS arm’s length pricing regulations, the above regulation does not apply. The importer is simply correcting previously-reported transaction values that are no

longer in compliance with IRS arm’s length standards. Unlike the express scenarios enumerated in the regulation, downward transfer pricing adjustments are not “rebates of, or other decreases in, the price paid or payable ... between the buyer and seller after the date of importation....”³⁴ Instead, the adjustment reflects what should have been reported upon entry, had such information been available at the time.

Under the age-old doctrine of *ejusdem generis*, courts have long held that when a regulation provides specific examples of items or circumstances that the regulation governs, anything not expressly enumerated must be of the same class or kind as that specifically mentioned for the regulation to apply. By way of illustration, an imported envelope with a commemorative stamp cannot be classified under the tariff provisions for photographs and other pictorial matter.³⁵ Why? Because the envelope and accompanying stamp, by their very nature, do not belong to the same class or kind of goods covered by the provisions for photographs and other pictorial matter.³⁶ In the same fashion, amounts returned to importers for retroactive downward transfer pricing adjustments are in no way related to a “rebate.” Instead, such amounts are merely the result of an adjustment to the importer’s accounting books (and possibly its tax return) to properly reflect the customs value that should have been declared at the time of import. Thus, a transfer pricing adjustment bears no relation whatever to the post-importation rebates covered by 19 CFR § 152.103(a)(4).³⁷

In addition, the plain language of the statute and regulation requires importers to report the “price *actually* paid or payable” for merchandise when sold for export to the United States. Most importers that follow a global transfer pricing policy use every amount of “reasonable care” to generate invoice prices when the products are sold and to report the most accurate values for customs appraisal purposes at the time of entry – but know that these prices may be subject to adjustment at some point in the future if the “formula” used to calculate the value does not deliver the expected result (profits that fall within the interquartile range). Thus, to report the price that was *actually* (finally) paid, the customs values must be restated based on the transfer pricing adjustments. Again, these adjustments are in no way akin to *post*-importation rebates.

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Finally, Customs' apparent stance completely ignores fundamental concepts of logic and fairness. If importers are expected to report upward transfer pricing adjustments and tender any underpayment of duties, taxes, and fees (as CBP has expressly indicated),³⁸ why would a downward adjustment fail to result in a refund of any overpayments? Such a stance can have no other motivation that one centered upon generating revenue, as opposed to ensuring that the customs laws and regulations are properly and fairly enforced as intended – and as written.

Finally, importers have long availed themselves of Customs' Reconciliation Prototype program to account for the payments or refunds attributable to retroactive transfer pricing adjustments. Under the Reconciliation Prototype program, importers may flag entries for which certain information is not available at the time of entry. The importer may then review the flagged entries, after importation, to reconcile certain changes to entered information, such as value. Customs' own handbook on the Reconciliation Prototype program contains a section on "Payment/Refunds," which provides instructions surrounding the issuance of refunds due to value adjustments.

Thus, the tendering of refunds to importers for retroactive downward transfer pricing adjustments is anything but an incorrect understanding of U.S. Customs law or the GATT Valuation Agreement of 1979 – rather, it is a long-established practice. If Customs intends to now deny refunds previously available for transfer pricing adjustments, a retooling of 19 CFR § 152.103(a)(4) and the Reconciliation Prototype program would have to precede such a policy change – not to mention the "notice and comment" period anticipated shortly from CBP.³⁹

D. The Solution

The use of transaction values based on income tax transfer pricing is far from settled. Nevertheless, while Customs formulates clear guidelines on this issue, importers with related-party pricing should continue to carefully analyze and document their intercompany pricing. As previously indicated, Customs has generally found that pricing formulas, when properly supported, satisfy the COS test. Thus, a transfer pricing formula set under IRS rules *can* serve as some valid support for the use of transaction value when customs valuation is based on the transfer price. As indicated above, in HQ 546211 Customs has accepted the use of

transaction value when the imported goods' value was based on a transfer pricing formula set prior to importation and in accordance with IRS arm's length principles. Nevertheless, importers must ensure that they provide sufficient additional documentation surrounding calculation of the transfer pricing formula that addresses the COS test and any new clarifying requirements CBP is expected to impose. This will establish that the price paid or payable is applied consistently on a global basis for identical merchandise, regardless of whether that merchandise is sold to related or unrelated customers – in other words, that the transfer price is truly arm's length.⁴⁰

V. Conclusion

While U.S. Customs' current stance should give importers pause as they rethink their approach to integrating transfer pricing and customs valuation, a complete overhaul of the Trade Agreements Act of 1979 may not be needed to satisfy both the government's need to enforce its regulations and collect revenue, and the trade community's need to ease administrative burdens that hinder expansion of global commerce. Although in some cases importers may be able to fit "square pegs" into "round holes," their preference would be to apply a set of customs rules and regulations that reflects today's commercial reality: transfer pricing rules determine customs values. CBP should amend its regulations or issue a policy directive that, like the IRS rules, strongly encourages importers to prepare *contemporaneous* documentation and support of arm's length pricing through which importers can document their compliance with the customs valuation regulations *at the time the prices are set*, i.e., prior to the time of export. Like the IRS rules, such documentation could explicitly serve as a mitigating factor in any CBP penalty case, and, in any event, would make good business sense. Having two sets of harmonious rules allowing importers to document their compliance with CBP rules in tandem with the preparation of their IRS transfer pricing documentation would finally free multinational companies from their current conundrum, increase international trade, and bolster the world's economy – worthwhile goals for *both* CBP and the IRS.

¹ Damon V. Pike was nominated by President Bush as a Judge of the U.S. Court of International Trade in January, 2005, but elected to remain in the private sector. He recently announced his retirement from Deloitte & Touche after a 13-

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- year career, which included a four-year term as National Director of Customs Services. The author would like to express his thanks to Daniel S. ZumBrunnen of Deloitte Tax LLP in Chicago for his assistance in preparing this article.
- ² The WCO/OECD Conference on Transfer Pricing and Customs Valuation was held May 3-4, 2006, in Brussels, Belgium, and was attended by a wide variety of international representatives from private practice, industry, and governments of all the major trading nations.
- ³ HQ 548482 (July 23, 2004).
- ⁴ This article will not review the "1059A" issue, which refers to the section of the Internal Revenue Code that essentially requires importers, with certain exceptions, to report the same values for customs as they use for their inventory basis (cost of goods sold) in determining income tax liability. U.S. Customs has never addressed 1059A or opined on its relationship to the customs valuation rules, for good reason: Customs does not have the legal authority to speak to laws and regulations promulgated by any agency other than CBP.
- ⁵ 19 U.S.C. § 1401a.
- ⁶ Margaret R. Polito, *Customs Law & Administration*, §47.1, page 3 (Lawrence J. Bogard ed., 1998).
- ⁷ The five statutory additions to transaction value are: (1) packing costs incurred by the buyer; (2) selling commissions incurred by the buyer; (3) any "assists;" (4) royalty or license fee the buyer is required to pay, directly or indirectly, as a condition of the sale; and (5) the proceeds of any subsequent resale, disposal, or use of the imported merchandise that accrue, directly or indirectly, to the seller. See 19 U.S.C. § 1401a(b)(1). "Assists" are items the importer provides directly or indirectly, free of charge or at a reduced cost, for use in the production of the imported merchandise, including: (1) materials, components, parts, and similar items incorporated into the imported merchandise; (2) tools, dies, molds, and similar items used in producing the imported merchandise; (3) items that are consumed in producing the imported merchandise; and (4) engineering, development, artwork, design work, and plans and sketches that are undertaken *outside* the United States and are necessary for the production of the imported merchandise. See 19 C.F.R. § 152.102(a).
- ⁸ 19 U.S.C. § 1401a(b)(4)(A).
- ⁹ Unlike the transfer pricing rules, which allow the taxpayer to choose the "best method" among many to determine its arm's length pricing, the customs rules require the importer to apply the valuation methodologies in hierarchical fashion: if transaction value does not apply, the importer must then determine if transaction value of identical merchandise applies; if not, then it moves on to determine if transaction value of similar merchandise applies, and so on. See 19 C.F.R. § 152, Subpart E.
- ¹⁰ 19 C.F.R. § 152.103(l)(1).
- ¹¹ The Customs statute defines related parties to include: (a) members of the same family, including brothers and sisters (whether by whole or half blood), spouse, ancestors, and lineal descendants; (b) any officer or director or an organization and such organization; (c) an officer or director of an organization and an officer or director or another organization, if each individual is also an officer or director in the other organization; (d) partners; (e) employer and employee; (f) any person directly or indirectly owning, controlling, or holding with power to vote, 5 percent or more of the outstanding voting stock or shares of any organization and such organization; and (g) two or more persons directly or indirectly controlling, controlled by, or under common control with, any person. 19 U.S.C. § 1401a(g)(1).
- In contrast, IRS law in this area is much vaguer. The statute provides in pertinent part: "[i]n any case of two or more organizations, trades, or businesses (whether or not incorporated, whether or not organized in the United States, and whether or not affiliated) owned or controlled directly or indirectly by the same interests, the Secretary may distribute, apportion, or allocate gross income, deductions, credits, or allowances between or among such organizations, trades, or businesses, if he determines that such distribution, apportionment, or allocation is necessary in order to prevent evasion of taxes or clearly to reflect the income of any of such organizations, trades, or businesses." Treas. Reg. § 1.482-1.
- ¹² See 19 C.F.R. § 152.103(j)(2)(iii) for more detail on the use of test values, which essentially allow the use of previously declared and accepted transaction values to act as surrogates for determining whether current transaction values are acceptable.
- ¹³ 19 U.S.C. § 1401a(b)(2)(B).
- ¹⁴ Interpretive Note 1 – 19 CFR § 152.103(l)(1).
- ¹⁵ Interpretive Note 2 – 19 CFR § 152.103(l)(1).
- ¹⁶ The regulations define "merchandise of the same class or kind" as including, but not limited to, identical merchandise and similar merchandise within a group or range of merchandise produced by a particular industry or industry sector. 19 C.F.R. § 152.102(h).
- ¹⁷ Interpretive Note 3 – 19 CFR § 152.103(l)(1).
- ¹⁸ If the use of transaction value cannot be supported, importers must then appraise merchandise using other methodologies, in the following order: transaction value of identical merchandise, transaction value of similar merchandise, deductive value, computed value (which may be elected at the importer's option instead of deductive value), and the "adjusted value" method. See 19 C.F.R. Part 152, Subpart E.
- ¹⁹ This kind of "post hoc" rationalization is frowned upon under the IRS regulations, which require *contemporaneous* documentation of how the transfer prices are set to mitigate penalties – but the IRS can still impose penalties if it determines that the taxpayer did not rely on its contemporaneous documentation. See 26 U.S.C. § 482.
- ²⁰ See HQ 544686 (Aug. 31, 1994) (CBP held that a Side Agreement on Transfer Prices between the related parties was insufficient to establish use of transaction value); HQ 546166 (Apr. 5, 1996) (CBP rejected use of transaction value when importer relied only on a transfer pricing negotiation); HQ 546211 (June 10, 1996) (CBP accepted use of transaction value when importer provided details of the transfer pricing formula, copies of its subsidiary's audited financial statements, the internal management accounts from which the financial statements were derived, and a detailed summary of the allocation of costs and expenses as between related party and non-related party sales in accordance with the transfer pricing formula); HQ 545800 (June 28, 1996) (CBP ruled that importer did not demonstrate acceptability of using transaction value based on submitted transfer pricing formula); HQ 546998 (Jan. 19, 2000) (CBP accepted use of transaction value when importer provided a range of adjusted full cost mark-ups in a Comparable Industry Set of six

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- companies); HQ547672 (May 21, 2002) (CBP held that a Transfer Pricing Industry Comparability Report was insufficient to establish that the transfer price was arm's length); HQ 548095 (Sept. 19, 2002) (CBP held that the transfer pricing study did not establish the acceptability of transaction value); HQ 563400 (March 29, 2006) (CBP ruled that the use of transaction value was not supported when the importer allegedly failed to provide sufficient information regarding its pricing formula).
- ²¹ To overcome this perceived deficiency, the author and others have suggested for some time that Customs HQ hire a full-time economist to assist the attorney-advisors at the Office of Regulations and Rulings in analyzing issues like this one.
- ²² CBP was careful to note at the conclusion of the ruling that "if the importer must make compensating adjustments to comply with [the APA], the adjustments must be reported to Customs immediately and any additional duties resulting from the adjustments must be tendered . . ." As discussed below, CBP reaffirmed this finding and clarified that these adjustments must be reported "whether upward or downward." HQ 548233 (Nov. 7, 2003). Thus, if too much income was earned in the United States (and thus too much profit) and the taxpayer is required to increase the cost of goods sold to decrease the profit (and income), then a corresponding upward adjustment must be made to the declared customs values. Similarly, if too much income was earned abroad, the U.S. taxpayer must make a compensating adjustment to decrease its cost of goods sold – and likewise report a downward adjustment to the declared customs values for the same merchandise, even if no duties are due. It is important to note that, while the cited rulings pertained to situations where Advance Pricing Agreements were in effect, their directives have been widely understood to apply to ALL transfer pricing compensating adjustments, not just those applied in the context of an Advance Pricing Agreement. A transfer pricing adjustment is the same regardless of whether it is self-initiated as a result of an internal audit, a recommendation from its outside tax advisors or counsel, because it did not fall within the interquartile range specified in the APA, or whether the IRS initiates the adjustment after its own audit.
- ²³ In the context of a "*Nissho Iwai*" (982 F.2d 505 (1992)) ruling, CBP also demonstrated notable sophistication in analyzing whether the first sale at issue was arm's length. It addressed the COS requirements and agreed with the importer that the first sale qualified as a valid transaction value in a multi-tiered import transaction. Customs relied on a transfer pricing study (including economic analysis) based on I.R.C. §482, financial statements for the related companies, and a listing of profitability for independent contract manufacturers of merchandise like that of the importer to reach its determination. HQ 547382 (Feb. 14, 2002).
- ²⁴ The methodology employed was the comparable profits method (CPM), which essentially tests the profitability of the U.S. distributor on sales to its U.S. customers. For a "backward integrated" industry like that at issue, the producer's profitability could not be determined by examining production records and other cost sheets because in many cases these records did not exist. As a surrogate for that profitability, the distributor's profit was deducted, leaving a figure that represented the cost of goods sold – the declared import values. By definition under the IRS regulations, this surrogate producer profitability meets the arm's length test as long as the profitability of the distributor is within the interquartile range established in the applicable transfer pricing using CPM – as it was in this case.
- ²⁵ While the importer was found to be out of the "interquartile range" set forth in its transfer pricing study, the adjustments recommended by the IRS (and accepted by the importer) to bring the company's profit back into the range were a minuscule percentage of the total profit, and thus would have amounted to no more than hundredths of a penny on a per unit basis for each imported product.
- ²⁶ The importer also argued that the transactions covered by the ruling were *bona fide* sales, which is the first requirement in applying transaction value. CBP agreed.
- ²⁷ The ruling it cited in support of this "trade journal" evidence was almost 24 years old. See HQ 542261 (Mar. 11, 1981). Despite nearly a quarter of a century's worth of rulings since then, CBP could find no other examples of the purported "objective evidence" essential to determine how prices are set in a given industry.
- ²⁸ See LMSB Commissioner Directive, Transfer Pricing Compliance Processes (Jan. 22, 2003) (directing IRS Revenue Agents to issue a written information document request for any transfer pricing documentation at the start of each audit cycle's opening conference).
- ²⁹ See *supra* for a discussion of the information reviewed.
- ³⁰ In addition, any concern that CBP may have about importers shifting profit to low- or zero-duty rated products (thus decreasing or eliminating their duty burden) should be assuaged by the fairly draconian nature of CBP penalties. No responsible multinational company would engage in this kind of profit-shifting either, especially given that most companies do not consider the Customs regulations *at all* when setting transfer prices for imported merchandise.
- ³¹ Most recently, however, Customs rejected the use of transaction value when a related-party importer referenced a pricing formula to determine sales to both related and unrelated parties, but failed to provide documentation evidencing the formula. See HQ563400 (March 29, 2006).
- ³² HQ 546979 (August 30, 2000).
- ³³ 19 USC § 1401a(b)(4)(B); 19 CFR § 152.103(a)(4).
- ³⁴ *Id.*
- ³⁵ See *Unicover Corporation v. United States*, 5 CIT 132, 135 (1983); U.S. Court of International Trade held that an engraved envelope with accompanying stamp could not be classified under the tariff provision for photographs, engravings, etchings, lithographs, wood cuts, and other pictorial matter, as the envelope was clearly not of the same class or kind of items for which the tariff provision was drafted.
- ³⁶ *Id.*
- ³⁷ In addition, the legislative history of the statute from which the regulation is derived (verbatim) indicates that the House Ways and Means Committee expressly limited its intended application to "renegotiated, deferred quantity discounts, and rebates" -- all of which are very different concepts from retroactive transfer pricing adjustments. See H.R. Rep. No. 317, 96 Cong., 1st Sess. 81 (1979); H.R. 4537.
- ³⁸ HQ 546979 (August 30, 2000).
- ³⁹ See, e.g., *Ranchers-Cattlemen Action Legal Foundation v. United States*, 23 CIT 861, 885 (1999); *Heraeus-Amersil, Inc. v. United States*, 9 CIT 412, 416 (1985); 19 CFR § 177.12 (for modification or revocation of rulings).
- ⁴⁰ See HQ 563400, *supra*.

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August 16, 2006

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U.S. Department of Commerce
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Room 2703
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Washington, D.C. 20230

***Re: Proposed Anti-Boycott Regulations, RIN 0694-AD63,
71 Fed. Reg. 37517 (June 30, 2007);
Comments Pursuant to Public Invitation.***

Dear Mr. Deputy Assistant Secretary:

These comments are submitted by the Customs and International Trade Bar Association (CITBA) on the proposed amendments to the anti-boycott regulations recently published by the Department of Commerce, Bureau of Industry and Security (BIS). Founded in 1926, CITBA consists primarily of attorneys who concentrate in the fields of customs law, international trade law, and related matters.

In general, CITBA applauds BIS's intention to amend the Export Regulations to include a "prior disclosure" procedure for anti-boycott violations. We further support BIS's intention to publicize the factors and considerations that the agency considers when evaluating violations and reaching settlements in enforcement proceedings. We believe that both reforms will promote better understanding of the law and encourage exporters to disclose violations in good faith efforts to comply with the law.

We nevertheless have comments that we respectfully offer for consideration. To a significant extent, they are inspired by our experience in customs law administration, where there has long been a successful procedure for disclosing customs law violations, and where U.S. Customs

has long publicized the factors it considers in evaluating violations. We believe that BIS might possibly find this experience of value.

Oral Disclosures. The proposed prior disclosure procedure would not allow for oral disclosures. All disclosures must be in writing. This includes “initial notifications,” which in effect are abbreviated summary disclosures that the submitter must subsequently perfect with more elaborate presentations.

We believe that U.S. Customs has a better procedure on this. Pursuant to 19 C.F.R. 162.74(a), an importer may orally disclose a violation to any Customs enforcement office and then perfect the oral revelation within 10 days by a written submission. This procedure has great advantage. For one thing, it allows an importer to disclose a violation at the earliest possible time and still have a reasonable time to formulate a careful presentation, perhaps with the assistance of counsel. In our experience, this encourages prompt disclosures as well as better-written presentations, and we believe that this, in turn, better serves the interests of Customs. It is often the case that importers are eager to come forth with information, as soon as they learn they have a violation, in order to clear their record with Customs, but they also want to be fully certain that their disclosures are accurate and well-presented. The 10-day rule encourages this.

We of course are mindful that BIS’s proposal specifically provides for “initial notifications,” which are basically summary written disclosures that are something less than full presentations. But reducing anything to writing takes time and careful drafting, and there is always the risk of mis-formulation if this is done too quickly. This latter risk can be magnified if the exporter lacks requisite writing skills and needs to seek out appropriate assistance. A rule that parallels Customs’ procedure would reduce these practical risks and, in our view, more successfully encourage exporters to disclose violations. In our view, this should be the overriding goal.

Accordingly, we suggest that BIS’s regulation adopt an oral disclosure rule. It is unlikely a 10-day delay would affect anti-boycott enforcement.

Concrete Incentives to Disclose Violations. The proposed regulation provides that prior disclosures of violations would constitute a mitigating factor to which BIS would give “great weight.” This is promising on its face because any factor given “great weight” would seem to create an incentive to disclose. However, the proposal indicates that a prior disclosure would still be weighed against other consideration (some of which, too, would be given “great weight”), and this inevitably introduces uncertainty as to the benefit of making a disclosure. Of course this uncertainty necessarily impacts the calculus of deciding whether to disclose. Indeed, our reading of the proposed procedure suggests that the benefits of disclosure are almost speculative in some situations. In the words of the proposed regulation, “[t]he weight given to a voluntary self-disclosure is solely within [the agency’s] discretion, and the mitigating effect of voluntary self-disclosure may be outweighed by aggravating factors.” Proposed section 764.8(b)(4).

This scheme sharply contrasts with the disclosure program in customs law administration. There, definite advantages *always* flow from disclosing violations, and this creates a concrete incentive to come forward with information. We can understand, of course, why BIS would naturally desire to keep all of its options open by not committing to certain guarantees; however, this interest must be weighted against the goal of the program itself, which is to encourage persons to come forward. Customs' program has worked very well. BIS may wish to enjoy the same success.

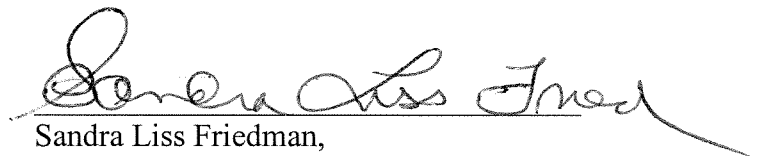
Accordingly, we suggest at least the following: Except when a violation involves serious anti-boycott concerns -- *e.g.*, complying with a boycott request to discriminate on the basis of race, religion, sex, or national origin, or where there are significant aggravating factors -- the agency should resolve the matter by merely issuing a warning letter, not imposing a penalty, when a company makes a voluntary self-disclosure. This should particularly be the case where the disclosing company has taken steps to correct the problem disclosed going forward.

Conclusion. Again, CITBA supports BIS's intention to provide guidance to the exporting community regarding the imposition of penalties. Hopefully the agency will find our comments of value. Thank you for the opportunity to present views.

Respectfully submitted,

CUSTOMS AND INTERNATIONAL TRADE
BAR ASSOCIATION

By:



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