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Decided: November 26, 1997.

By the Board, David M. Konschnik, Director, Office of Proceedings.

**Vernon A. Williams,**

Secretary.

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## DEPARTMENT OF THE TREASURY

### Customs Service

[TD 97-96]

#### Reasonable Care Checklist

**AGENCY:** U.S. Customs Service, Department of the Treasury.

**ACTION:** General notice.

**SUMMARY:** This document sets forth, for guidance, a checklist of measures which importers and their agents may find helpful in meeting the "reasonable care" requirements of the Customs laws.

**DATES:** Effective December 4, 1997.

**FOR FURTHER INFORMATION CONTACT:** Robert Pisani, Penalties Branch, International Trade Compliance Division, Office of Regulations and Rulings, (202) 927-1203.

#### SUPPLEMENTARY INFORMATION:

##### Background

On May 16, 1997, the Customs Service published a Second Discussion Draft in the Customs Bulletin (as well as the Customs Electronic Bulletin Board and Customs Internet Website) concerning the importer's obligation to use reasonable care. Based on comments received in response to the initial discussion draft on reasonable care, Customs decided to adopt a "checklist" approach—as a means to provide guidance regarding an importer's obligation to use reasonable care. The second discussion draft set forth an expanded and revised checklist, and requested public comment on the document by June 30, 1997.

Customs has finalized its review of all second discussion draft comments received from interested parties. The "final" checklist follows the discussion of the public comments, and Customs notes that the document contains relatively minor revisions to the checklist published on May 16, 1997. Customs also notes that the majority of the comments received from the public favored the adoption of the checklist. It should also be pointed out that although Customs is publishing the "final" checklist, the agency's adoption of this

format for providing guidance may readily be expanded in the future to suit the changing nature of international trade—without resort to statutory or regulatory amendment. Also it should be reiterated that, as new Customs regulations are proposed, it is anticipated that regulatory references to the reasonable care standard will be included.

#### Discussion

The majority of comments received by Customs applauded the agency's decision to adopt the checklist approach to the issue of reasonable care. There is a general consensus that a "black and white" definition of reasonable care is impossible, inasmuch as the concept of acting with reasonable care depends upon individual circumstances.

The most prevalent concern about the checklist raised by commenters involved Customs use of the term "expert" in those checklist questions pertaining to relying on the advice of an "expert." Some commenters are concerned that unlicensed and unregulated individuals are regularly advising importers in Customs matters—i.e., holding themselves out as "Customs experts" or Customs consultants, in violation of section 641 of the Tariff Act of 1930. In addition, one commenter is of the opinion that the public should not be misled into believing that it constitutes reasonable care to consult with anyone who chooses to call himself or herself a Customs expert.

With respect to the above concerns, Customs notes that publication of the checklist is not intended to condone the unlawful conduct of Customs business by unlicensed individuals or entities. Rather, the agency's use of the term "expert" is in conformity with the Customs Modernization Act's legislative history as reflected in the language of the House of Representatives and Senate Reports (H.Rep. 103-361, pg. 120; S. Rep. 103-189, pg. 73) discussion of the reasonable care standard. A party's selection of an expert, and the expert's qualifications are part and parcel of the review of all of the facts and circumstances in the agency's determination whether the party has exercised reasonable care. In Customs view, the importer who retains the services of an "expert" bears some responsibility in ensuring that the party is qualified to render advice on the Customs matter at issue. In Customs view, it is not unreasonable to expect that a party selecting an expert will inquire about the Customs experience and credentials of an expert. Customs believes this responsibility to be

particularly important in cases involving selection of unlicensed experts such as consultants. The existence of experienced Customs lawyers and licensed brokers makes fulfillment of this responsibility an easier task—but in Customs view, to limit the selection of an expert to these individuals runs contrary to the language of the congressional reports. In sum, the importer or party selecting an expert must use judgment and reason in making his or her selection.

One commenter expressed a reservation about the checklist in that "assiduous compliance with the list for every entry would require an impossible expenditure of time and resources." The commenter believes that the checklist fails to keep sight of "commercial realities and business realities."

Customs believes it is important to underscore that the checklist is not a law or Customs regulation, and that it merely serves to provide guidance and information to the importing community to assist the members of the community in meeting reasonable care obligations. In publishing the checklist, Customs is not mandating that each and every question be asked by each and every importer for all transactions. Rather, the checklist serves as a flexible tool to help importers find and/or understand statutory and regulatory obligations involved in the importation process. Customs notes that the agency rejected the regulatory and policy statement approaches set forth in the first discussion draft for the very reasons set forth by the commenter. In this regard, Customs believes the following excerpts from the second discussion draft warrant reiteration:

\* \* \* [I]t is important to remember that not every incident of non-compliance involves a failure to exercise reasonable care. The circumstances surrounding an incident of non-compliance determine whether or not the incident involves culpable conduct.

\* \* \* For example, if Customs were to enact a regulation, or issue a policy statement setting forth "reasonable care" parameters and standards, such regulation or policy statement could be considered helpful, cost-effective and instructive to a large multi-national importer, yet harmful, impractical, intrusive and cost-defective to a smaller organization.

Rather than attempting to dictate specific methods of compliance with regard to a standard that demands flexibility and is dependent upon circumstance, Customs believes that by providing guidance and education the agency is working toward fulfilling the principle of informed compliance which underscores the Customs Modernization Act.

One of the commenters suggested that the agency abandon General Question

No. 3 pertaining to alerting Customs of different treatment at different ports for the same merchandise or transactions. The commenter believes that it is the responsibility of the Customs Service to coordinate and ensure uniformity. In addition, the commenter believes it is unnecessary to require that the importer attach a ruling it receives to every entry, provided that the importer follows the ruling.

Customs does not agree that it is reasonable for an importer to remain silent when it becomes aware that the same merchandise or transaction is receiving different treatment at different ports. Further, it is important to remember that the checklist is not a vehicle to amend existing law or regulation or law—rather, the checklist questions pertaining to the Customs rulings program simply point out the importer's obligations under existing law and regulation.

Several commenters recommended that Customs revise some of the questions in the checklist to emphasize that the exercise of reasonable care also applies to the process employed by the importer in preparing its Customs entries. The commenters suggest that some questions be added and/or revised to reflect that the exercise of reasonable care also encompasses an importer's development and maintenance of reasonable steps or reasonable procedures to ensure compliance with the Customs laws and regulations.

Customs agrees and has added new questions and/or revised some of the existing questions to reflect the recommendations set forth above.

As a convenience to the public, the checklist published below also includes the checklist previously published in the **Federal Register** for use in certain textile and apparel importations. The full document was published in 62 FR 48340 (September 15, 1997).

### Reasonable Care Checklist

#### Preamble

One of the most significant effects of the Customs Modernization Act is the establishment of the clear requirement that parties exercise "reasonable care" in importing into the United States. Section 484 of the Tariff Act, as amended, requires an importer of record "using reasonable care" to make entry by filing such information as is necessary to enable the Customs Service to determine whether the merchandise may be released from customs custody," and using reasonable care—"complete the entry by filing with the Customs Service the declared value, classification and rate of duty" and

"such other documentation \* \* \* or information as is necessary to enable the Customs Service to \* \* \* properly assess duties \* \* \* collect accurate statistics \* \* \* determine whether any other applicable requirement of law \* \* \* is met." Despite the seemingly simple connotation of the term "reasonable care," this explicit responsibility defies easy explanation. The facts and circumstances surrounding every import transaction differ—from the experience of the importer to the nature of the imported articles. Consequently, neither the Customs Service nor the importing community can develop a foolproof reasonable care "checklist" which would cover every import transaction. On the other hand, in keeping with the Modernization Act's theme of "informed compliance," the Customs Service would like to take this opportunity to recommend that the importing community examine the list of questions below. In Customs view, the list of questions may prompt or suggest a program, framework or methodology which importers may find useful in avoiding compliance problems and meeting "reasonable care" responsibilities.

Obviously, the questions below cannot be exhaustive or encyclopedic—ordinarily, every import transaction is different. For the same reason, it cannot be overemphasized that although the following information is provided to promote enhanced compliance with the Customs laws and regulations, it has no legal, binding or precedential effect on Customs or the importing community. In this regard, Customs notes that the checklist is not an attempt to create a presumption of negligence, but rather, an attempt to educate, inform and provide guidance to the importing community. Consequently, Customs believes that the following information may be helpful to the importing community and hopes that this document will facilitate and encourage importers to develop their own unique compliance measurement plans, reliable procedures and "reasonable care" programs.

As a convenience to the public, the checklist also includes the text of a checklist previously published in the **Federal Register** for use in certain textile and apparel importations. The full document was published in 62 FR 48340 (September 15, 1997).

As a final reminder, it should be noted that to further assist the importing community, Customs issues rulings and informed compliance publications on a variety of technical subjects and processes. It is strongly recommended

that importers always make sure that they are using the latest versions of these publications.

### Asking and answering the following questions may be helpful in assisting importers in the exercise of reasonable care

#### General Questions for all Transactions

1. If you have not retained an expert to assist you in complying with Customs requirements, do you have access to the Customs Regulations (Title 19 of the Code of Federal Regulations), the Harmonized Tariff Schedule of the United States, and the GPO publication "Customs Bulletin and Decisions?" Do you have access to the Customs Internet Website, Customs Electronic Bulletin Board or other research service to permit you to establish reliable procedures and facilitate compliance with Customs laws and regulations?

2. Has a responsible and knowledgeable individual within your organization reviewed the Customs documentation prepared by you or your expert to ensure that it is full, complete and accurate? If that documentation was prepared outside your own organization, do you have a reliable system in place to insure that you receive copies of the information as submitted to Customs; that it is reviewed for accuracy; and that Customs is timely apprised of any needed corrections?

3. If you use an expert to assist you in complying with Customs requirements, have you discussed your importations in advance with that person and have you provided that person with full, complete and accurate information about the import transactions?

4. Are identical transactions or merchandise handled differently at different ports or Customs offices within the same port? If so, have you brought this to the attention of the appropriate Customs officials?

#### Questions Arranged by Topic

##### Merchandise Description & Tariff Classification

*Basic Question:* Do you know or have you established a reliable procedure or program to ensure that you know what you ordered, where it was made and what it is made of?

1. Have you provided or established reliable procedures to ensure you provide a complete and accurate description of your merchandise to Customs in accordance with 19 U.S.C. 1481? (Also, see 19 CFR 141.87 and 19 CFR 141.89 for special merchandise description requirements.)

2. Have you provided or established reliable procedures to ensure you provide a correct tariff classification of your merchandise to Customs in accordance with 19 U.S.C. 1484?

3. Have you obtained a Customs "ruling" regarding the description of the merchandise or its tariff classification (See 19 CFR part 177), and if so, have you established reliable procedures to ensure that you have followed the ruling and brought it to Customs attention?

4. Where merchandise description or tariff classification information is not immediately available, have you established a reliable procedure for providing that information, and is the procedure being followed?

5. Have you participated in a Customs pre-classification of your merchandise relating to proper merchandise description and classification?

6. Have you consulted the tariff schedules, Customs informed compliance publications, court cases and/or Customs rulings to assist you in describing and classifying the merchandise?

7. Have you consulted with a Customs "expert" (e.g., lawyer, broker, accountant, or Customs consultant) to assist in the description and/or classification of the merchandise?

8. If you are claiming a conditionally free or special tariff classification/provision for your merchandise (e.g., GSP, HTS Item 9802, NAFTA, etc.), How have you verified that the merchandise qualifies for such status? Have you obtained or developed reliable procedures to obtain any required or necessary documentation to support the claim? If making a NAFTA preference claim, do you already have a NAFTA certificate of origin in your possession?

9. Is the nature of your merchandise such that a laboratory analysis or other specialized procedure is suggested to assist in proper description and classification?

10. Have you developed a reliable program or procedure to maintain and produce any required Customs entry documentation and supporting information?

#### Valuation

*Basic Questions:* Do you know or have you established reliable procedures to know the "price actually paid or payable" for your merchandise? Do you know the terms of sale; whether there will be rebates, tie-ins, indirect costs, additional payments; whether "assistants" were provided, commissions or royalties paid? Are amounts actual or estimated? Are you and the supplier "related parties"?

1. Have you provided or established reliable procedures to provide Customs with a proper declared value for your merchandise in accordance with 19 U.S.C. 1484 and 19 U.S.C. 1401a?

2. Have you obtained a Customs "ruling" regarding the valuation of the merchandise (See 19 CFR Part 177), and if so, have you established reliable procedures to ensure that you have followed the ruling and brought it to Customs attention?

3. Have you consulted the Customs valuation laws and regulations, Customs Valuation Encyclopedia, Customs informed compliance publications, court cases and Customs rulings to assist you in valuing merchandise?

4. Have you consulted with a Customs "expert" (e.g., lawyer, accountant, broker, Customs consultant) to assist in the valuation of the merchandise?

5. If you purchased the merchandise from a "related" seller, have you established procedures to ensure that you have reported that fact upon entry and taken measures or established reliable procedures to ensure that value reported to Customs meets one of the "related party" tests?

6. Have you taken measures or established reliable procedures to ensure that all of the legally required costs or payments associated with the imported merchandise have been reported to Customs (e.g., assists, all commissions, indirect payments or rebates, royalties, etc.)?

7. If you are declaring a value based on a transaction in which you were/are not the buyer, have you substantiated that the transaction is a bona fide sale at arm's length and that the merchandise was clearly destined to the United States at the time of sale?

8. If you are claiming a conditionally free or special tariff classification/provision for your merchandise (e.g., GSP, HTS Item 9802, NAFTA, etc.), have you established a reliable system or program to ensure that you reported the required value information and obtained any required or necessary documentation to support the claim?

9. Have you established a reliable program or procedure to produce any required entry documentation and supporting information?

#### Country of Origin/Marking/Quota

*Basic Question:* Have you taken reliable measures to ascertain the correct country of origin for the imported merchandise?

1. Have you established reliable procedures to ensure that you report the correct country of origin on Customs entry documents?

2. Have you established reliable procedures to verify or ensure that the merchandise is properly marked upon entry with the correct country of origin (if required) in accordance with 19 U.S.C. 1304 and any other applicable special marking requirement (watches, gold, textile labeling, etc)?

3. Have you obtained a Customs "ruling" regarding the proper marking and country of origin of the merchandise (See 19 CFR Part 177), and if so, have you established reliable procedures to ensure that you followed the ruling and brought it to Customs attention?

4. Have you consulted with a Customs "expert" (e.g., lawyer, accountant, broker, Customs consultant) regarding the correct country of origin/proper marking of your merchandise?

5. Have you taken reliable and adequate measures to communicate Customs country of origin marking requirements to your foreign supplier prior to importation of your merchandise?

6. If you are claiming a change in the origin of the merchandise or claiming that the goods are of U.S. origin, have you taken required measures to substantiate your claim (e.g., Do you have U.S. milling certificates or manufacturer's affidavits attesting to the production in the U.S.)?

7. If you are importing textiles or apparel, have you developed reliable procedures to ensure that you have ascertained the correct country of origin in accordance with 19 U.S.C. 3592 (Section 334, Pub. L. 103-465) and assured yourself that no illegal transshipment or false or fraudulent practices were involved?

8. Do you know how your goods are made from raw materials to finished goods, by whom and where?

9. Have you checked with Customs and developed a reliable procedure or system to ensure that the quota category is correct?

10. Have you checked or developed reliable procedures to check the Status Report on Current Import Quotas (Restraint Levels) issued by Customs to determine if your goods are subject to a quota category which has "part" categories?

11. Have you taken reliable measures to ensure that you have obtained the correct visas for your goods if they are subject to visa categories?

12. In the case of textile articles, have you prepared or developed a reliable program to prepare the proper country declaration for each entry, i.e., a single country declaration (if wholly obtained/produced) or a multi-country declaration (if raw materials from one

country were produced into goods in a second)?

13. Have you established a reliable maintenance program or procedure to ensure you can produce any required entry documentation and supporting information, including any required certificates of origin?

#### *Intellectual Property Rights*

**Basic Question:** Have you determined or established a reliable procedure to permit you to determine whether your merchandise or its packaging bear or use any trademarks or copyrighted matter or are patented and, if so, that you have a legal right to import those items into, and/or use those items in, the U.S.?

1. If you are importing goods or packaging bearing a trademark registered in the U.S., have you checked or established a reliable procedure to ensure that it is genuine and not restricted from importation under the "gray-market" or parallel import requirements of U.S. law (see 19 CFR 133.21), or that you have permission from the trademark holder to import such merchandise?

2. If you are importing goods or packaging which consist of, or contain registered copyrighted material, have you checked or established a reliable procedure to ensure that it is authorized and genuine? If you are importing sound recordings of live performances, were the recordings authorized?

3. Have you checked or developed a reliable procedure to see if your merchandise is subject to an International Trade Commission or court ordered exclusion order?

4. Have you established a reliable procedure to ensure that you maintain and can produce any required entry documentation and supporting information?

#### Miscellaneous Questions

1. Have you taken measures or developed reliable procedures to ensure that your merchandise complies with other agency requirements (e.g., FDA, EPA/DOT, CPSC, FTC, Agriculture, etc.) prior to or upon entry, including the procurement of any necessary licenses or permits?

2. Have you taken measures or developed reliable procedures to check to see if your goods are subject to a Commerce Department dumping or countervailing duty investigation or determination, and if so, have you complied or developed reliable procedures to ensure compliance with Customs reporting requirements upon entry (e.g., 19 CFR 141.61)?

3. Is your merchandise subject to quota/visa requirements, and if so, have

you provided or developed a reliable procedure to provide a correct visa for the goods upon entry?

4. Have you taken reliable measures to ensure and verify that you are filing the correct type of Customs entry (e.g., TIB, T&E, consumption entry, mail entry, etc.), as well as ensure that you have the right to make entry under the Customs Regulations?

#### *Additional Questions for Textile and Apparel Importers*

**Note:** Section 333 of the Uruguay Round Implementation Act (19 U.S.C. 1592a) authorizes the Secretary of the Treasury to publish a list of foreign producers, manufacturers, suppliers, sellers, exporters, or other foreign persons who have been found to have violated 19 U.S.C. 1592 by using certain false, fraudulent or counterfeit documentation, labeling, or prohibited transshipment practices in connection with textiles and apparel products. Section 1592a also requires any importer of record entering, introducing, or attempting to introduce into the commerce of the United States textile or apparel products that were either directly or indirectly produced, manufactured, supplied, sold, exported, or transported by such named person to show, to the satisfaction of the Secretary, that such importer has exercised reasonable care to ensure that the textile or apparel products are accompanied by documentation, packaging, and labeling that are accurate as to its origin. Under section 1592a, reliance solely upon information regarding the imported product from a person named on the list does not constitute the exercise of reasonable care. Textile and apparel importers who have some commercial relationship with one or more of the listed parties must exercise a degree of reasonable care in ensuring that the documentation covering the imported merchandise, as well as its packaging and labeling, is accurate as to the country of origin of the merchandise. This degree of reasonable care must rely on more than information supplied by the named party.

In meeting the reasonable care standard when importing textile or apparel products and when dealing with a party named on the list published pursuant to section 592A an importer should consider the following questions in attempting to ensure that the documentation, packaging, and labeling is accurate as to the country of origin of the imported merchandise. The list of questions is not exhaustive but is illustrative.

1. Has the importer had a prior relationship with the named party?

2. Has the importer had any detentions and/or seizures of textile or apparel products that were directly or indirectly produced, supplied, or transported by the named party?

3. Has the importer visited the company's premises and ascertained

that the company has the capacity to produce the merchandise?

4. Where a claim of an origin conferring process is made in accordance with 19 CFR 102.21, has the importer ascertained that the named party actually performed the required process?

5. Is the named party operating from the same country as is represented by that party on the documentation, packaging or labeling?

6. Have quotas for the imported merchandise closed or are they nearing closing from the main producer countries for this commodity?

7. What is the history of this country regarding this commodity?

8. Have you asked questions of your supplier regarding the origin of the product?

9. Where the importation is accompanied by a visa, permit, or license, has the importer verified with the supplier or manufacturer that the visa, permit, and/or license is both valid and accurate as to its origin? Has the importer scrutinized the visa, permit or license as to any irregularities that would call its authenticity into question?

Dated: December 1, 1997.

**Stuart P. Seidel,**

*Assistant Commissioner, Office of Regulations and Rulings.*

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## DEPARTMENT OF THE TREASURY

### Fiscal Service

#### **Surety Companies Acceptable on Federal Bonds; Termination of Authority: Munich American Reinsurance Company, Munich Reinsurance Company, U.S. Branch**

**SUMMARY:** (Dept. Circ. 570, 1997—Rev., Supp. No. 3).

**FOR FURTHER INFORMATION CONTACT:** Surety Bond Branch (202) 874-7102.

**SUPPLEMENTARY INFORMATION:** Notice is hereby given that the Certificates of Authority issued by the Treasury to Munich American Reinsurance Company and Munich Reinsurance Company, U.S. Branch, under the United States Code, Title 31, Sections 9304-9308, to qualify as an acceptable surety and as an acceptable reinsuring company on Federal bonds are hereby terminated.

Munich American Reinsurance Company was last listed as an acceptable surety on Federal bonds at 62 FR 35567, July 1, 1997 and Munich