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ARTICLE

USMCA: Customs Administration in the 21st Century

This is the latest installment in BLG's series of detailed analyses of key provisions in the United States-Mexico-Canada Agreement (USMCA).

The USMCA text compels all parties to apply their customs procedures in transparent, predictable and consistent manners to facilitate trade. Key changes in the USMCA from the NAFTA include eliminating the prescribed format for certificates of origin, providing a potentially broader window for origin claims under the *Customs Act* and an increase in *de minimis* thresholds for the collection of duties and taxes at the time of import.

The USMCA text mirrors many provisions of the World Trade Organization's Trade Facilitation Agreement (TFA), which entered into force in February 2017. Currently, there are 113 WTO member signatories, including all 3 USMCA parties. The TFA was negotiated by WTO members to reduce trade costs and increase efficiencies in customs procedures to expedite the release of goods. In the simplest terms, the USMCA customs procedures follow commitments made broadly under the TFA designed to reduce compliance costs and speed up trade in goods, and implemented territorially for the United States, Canada and Mexico.

Changes from NAFTA

Customs administration and origin procedures are divided between Chapters 5 and 7 of the USMCA. Chapter 5, *Origin Procedures*, modernizes NAFTA's origin procedures, while Chapter 7, *Customs Administration and Trade Facilitation*, updates customs administration, and codifies a number of longstanding customs practices. These changes modernize the USMCA and bring it into line with 21st century procedures.

There are numerous important changes to customs procedures from the NAFTA for certifying origin, post importation adjustments to origin, and express shipments that will benefit large and smaller importers.

Certification of Origin

The USMCA streamlines the origin certification process employed under NAFTA, which will speed up the release of goods by reducing anachronistic and rigid requirements such as original signatures and prescribed formats for certificates, and will provide greater flexibility for importers and exporters. The changes made bring modern business practices into the fold of the USMCA and reflect the desire to reduce the administrative cost of complying with requirements that generally do not involve high rates of non-compliance.

There are three important changes to the filing process for certificates of origin: (1) no prescribed format is required, unlike the NAFTA which requires the use of definitive information and formatting in a required Certificate of Origin; (2) electronic signatures and electronic submissions are permitted; and (3) importers may certify origin, unlike the NAFTA where only producers and/or exporters can complete a certificate of origin.

Under the NAFTA, parties were required to use a prescribed Certificate of Origin form, which was to be completed by the exporter. Under the USMCA, parties "need not follow a prescribed format". A certificate may be provided on an invoice or "any other document", but must, amongst other requirements, specify that the goods are originating (meeting the prescribed requirements under Chapter 5) and describe the goods in sufficient enough detail to allow for identification. USMCA certification of origin may be signed by an exporter, producer or importer and may be completed and submitted electronically with a digital signature. This brings the USMCA certification of origin into line with other FTA's like the Comprehensive and Progressive Trans-Pacific Partnership. Mexico has up to three and a half years after the USMCA enters into force to allow importers to complete a certificate of origin.

Post Importation Adjustments to Origin

The USMCA may expand the claim period for Canadian importers making post importation origin claims from 1 year (under NAFTA) to 4 years. Article 502 (Obligations Regarding Importations) of Chapter 5 of the NAFTA, provides a short window to qualify originating goods. If a claim for preferential tariff treatment is not made on the date of importation, an importer only has one year to make the tariff preference claim for a refund of excess duties. This "one year rule" did not operate in tandem with other customs provisions relating to changes to origin value, or tariff classification, and often barred recovery of duties.

Under the USMCA, Article 5.12, Chapter 5 (Origin Procedures) provides that an importing party *may* require that the importer make a claim no later than one year after the date of importation or a longer period *if specified in the importing party's law*. Given the change from the mandatory to permissive language, Canadian importers may have up to four years to make or correct origin claims under the USMCA. Currently section 32.2(4) of the *Customs Act*, allows an importer up to four years to make corrections to origin declarations, which are then eligible for refunds under section 74(1)(c.1). It is unclear if these provisions will remain the same, or tighten the window for filing origin claims.

De Minimis (Article 7.8)

Under the USMCA, the parties are obligated to implement or maintain expedited customs procedures for express shipments. The parties have agreed to the following amounts for *de minimis* thresholds for the collection of duties and taxes at the time or point of importation by express shipment:

- Canada: $150 CAD (duties) and $40 CAD (taxes);
- United States: $800 USD; and
- Mexico: $117 USD (duties) and $50 USD (taxes).

Canada already maintains expedited customs procedures for express shipments under the Canada Border Services Agency's ("CBSA") Courier Low Value Shipment Program. This program is designed to clear express shipments and streamlines the reporting, release and accounting procedures for having a value for duty not exceeding $2,500 CAD and goods that are not controlled, prohibited or regulated.

Under the USMCA, no customs duties or taxes will be assessed on goods imported into Canada with a value for duty under $150 CAD. This provision does not apply to a series of shipments (in an attempt to evade duties or taxes). The thresholds do not restrict subsequent assessment and collection of duties or taxes, which may mitigate the effect on Canadian retailers. This reflects the growth of e-commerce and a practical need to align customs procedures to the growth of cross-border commerce and the shift to on-line purchasing from bricks and mortar stores.

Codification of Canada customs procedures

The USMCA provides informal guidance on a number of customs procedures that are currently in administrative practice, but are absent from the NAFTA text, including the following:

- Communication with Traders (Article 7.3)
- Enquiry Points (Article 7.4)
- Advice Regarding Duty Drawback or Duty Deferral Programs (Article 7.6)
- Release of Goods (Article 7.7)
- Express Shipments (Article 7.8)
- Use of Information Technology (Article 7.9)
- Single Window (Article 7.10)
- Post-Clearance Audits (Article 7.13)
- Authorized Economic Operation (Article 7.14)
- Review and Appeal of Customs Determinations (Article 7.15)
- Transit (Article 7.17)
- Penalties (Article 7.18)
- Customs Brokers (Article 7.21)

Although the CBSA has adopted or is in the process of updating many of these customs procedures, partly resulting from the WTO TFA commitments, the USMCA will ensure there is consistency among the parties. We have highlighted some of the parties' obligations under the USMCA and outlined recent initiatives by the CBSA to update Canadian customs procedure below.

Use of Information Technology (Article 7.9)

All parties are obligated to adopt or maintain procedures allowing for the electronic payment of duties, taxes and fees charged by customs officials in connection with importation and exportation of goods. The CBSA is in the process of modernizing its payment processes through the CBSA Assessment and Revenue Management project. Importers and brokers now use the Accounts Receivable Ledger which reconciles transactions in a single account and facilitates online banking.

Single Window (Article 7.10)

A "single window" allows a party to submit one copy of all customs and regulatory documentation related to an importation of goods into one interface. These documents are then distributed by the single window to various government agencies to obtain the required approvals to release the goods. A single window facilitates the timely release of goods by increasing the speed of approvals for import permits and other regulatory approvals and reducing red tape for importers and exporters.

Under the USMCA, all parties are obligated to establish and/or maintain a single window system by December 31, 2018 and to minimize the extent to which paper documents are required if electronic copies are provided. Mexico opened a single window, the Ventanilla Unica, in September 2011 when it began registering users and initiated is first customs clearances in 2012. In August 2017, the United States launched a single window on its Automated Commercial Environment (ACE) platform.

In March 2017, the CBSA launched a single window initiative (SWI), which allows importers to report information to the CBSA (via an Integrated Import Declaration) in advance of import and to obtain the necessary import approvals from various regulatory agencies, like the Canadian Food Inspection Agency.

At this point in time, the SWI is limited to imports, but Canada is obligated under the USMCA to review the SWI with a view to expanding its functionality to cover all export and transit transactions.

Authorized Economic Operator (Article 7.14)

Authorized Economic Operator (AEO) programs allow companies to enjoy more efficient and faster border crossings after an assessment of a company's security profile. In Canada, the CBSA administers the Partners in Protection program, which allows program members noted as "low risk" to face less border delays. The United States and Mexico have comparative programs, respectively, the United States' Customs Trade Partnership Against Terrorism and Operadores Económicos Autorizados.

Under the USMCA, all parties are encouraged to cooperate and share information regarding their AEO programs, to establish best practices, exchange information regarding authorized operators and to implement benefits for operators authorized by other parties.

Review and Appeal (Article 7.15)

The NAFTA text was limited to providing rights of review and appeal for origin determinations and advance rulings, only. The USMCA confers broader rights and includes a commitment to providing "effective, impartial and easily accessible procedures for review and appeal of administrative determinations on customs matters". In Canada, the statutory appeal mechanism for customs matters is already quite broad. Customs appeals are heard by the President of the CBSA pursuant to section 59 of the *Customs Act*, which provides for appeals of origin, tariff classification, value for duty and marking determinations of any imported goods at any time within four years after a date of determination.

Penalties (Article 7.18)

Under the USMCA, all parties are required to administer penalties in a uniform manner across the country. Penalties must only be imposed on persons legally responsible for a breach, must be based on the facts and circumstances of the case and must be commensurate with the degree and severity of the breach (clerical errors are not subject to assessments of penalties). The CBSA currently maintains a Master Penalty Document that outlines its administrative monetary penalty system including the fees associated with offences and guidelines with examples of non-compliance that are applicable across Canada. The United States Customs and Border Protection Agency operates a Penalties Program and has full authority to assess penalties and seize merchandize for violations of customs laws, which are assessed by Fines, Penalties and Forfeiture Officers.

Working towards a cooperative future

The USMCA entrenches the WTO TFA customs commitments in a regional context. The TFA is a broad agreement that aims to expedite the movement, release and clearance of goods. The customs provisions of the TFA are largely mirrored in the text of the USMCA, such as: requiring members to establish inquiry points; posting customs procedures on the internet; providing parties with an opportunity to comment on laws and regulations; issuing advance rulings in a timely manner; providing pre-arrival processing for goods to expedite their release upon arrival; maintaining a low rate of physical inspections and examinations and rapid release times for authorized operators; expedited shipping procedures; and border agency cooperation.

The USMCA text also contemplates the future administration of customs and trade facilitation by establishing a "Trade Facilitation Committee" (Article 7.22) and a commitment to regional and bilateral cooperation on enforcement (Article 7.26). The Trade Facilitation Committee will make parties accountable to improving their customs procedures, help to facilitate the exchange of information regarding important cases on tariff classification and valuation or emerging trends and issues, will provide a forum to discuss emerging trends and will allow parties to take joint action to reconcile inconsistencies in policy or procedure.

Cooperating on enforcement will ensure the efficacy of the USMCA, for example, ensuring that claims for preferential tariff treatment under the agreement are accurate and uniform among the territories. Parties are also obligated to provide advance notice of administrative changes, modifications of laws or regulations.

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