Global Corporate Compliance

US-Mexico Compliance Quarterly: Winter 2014

Baker & McKenzie's US-Mexico Compliance Quarterly is a newsletter providing an in-depth exploration of compliance issues facing companies active in the markets of US and Mexico. The newsletter integrates unique insights of Mexican and US experts who represent diverse interests across the legal spectrum -- trade compliance, antitrust, anti-corruption and more. We seek to impart guidance on doing business across our borders that is both pragmatic and constructive to our clients in the US and Mexico.

If you would like to provide comments or obtain further information about the initiative or matters discussed in this issue,, please contact Sue Boggs of Baker & McKenzie at sue.boggs@bakermckenzie.com or +1 214 965 7281. We look forward to hearing from you and to continue serving your cross-border corporate compliance needs.

The US-Mexico Cross-Border Initiative

Baker & McKenzie's US-Mexico Cross-Border Initiative was established last year in response to the growing opportunities and challenges for companies doing business in Mexico and Mexican companies doing business in the US. The Initiative's principal goal is to highlight emerging issues and best practices for companies seeking to navigate in this promising economic space. Baker & McKenzie is well-positioned to provide seasoned and practical advice in connection with cross-border issues. Baker fields a well-coordinated cross-border compliance team led by Joan Meyer, a partner in Washington DC, and Reynaldo Vizcarra-Mendez, a partner in Mexico City. Baker's ties to Mexico are long-standing. We first established a presence in Mexico in 1961 and have since expanded to offices in five cities – Mexico City, Guadalajara, Monterrey, Tijuana, and Juarez. The US-Mexico Cross-Border Initiative leverages and builds upon the firm's deep historic ties to Mexico and the strong internal network between our offices in both countries.

Compliance in International Trade Transactions

By Adriana Ibarra-Fernandez, Mexico City

As a result of the increasing proliferation of free trade agreements between different countries, import and export transactions become more agile each day. The need for just-in-time deliveries requested by manufacturing companies, and the ease of closing deals electronically, further heighten the importance of timely customs clearance processing to avoid breaching contractual obligations. For these and similar reasons, importers and exporters may be enticed to do whatever is necessary in order to speed up customs procedures. Hence, customs processes are often viewed as a major compliance concern for companies participating in international trade transactions.

In Mexico, as in many countries, an in-house or an independent customs broker is responsible for processing of customs paperwork. The Mexican Customs Law has just been amended, however, and using customs brokers will no longer be mandatory and the position of in-house customs broker (*apoderado aduanal*) has been eliminated. Now, importers and exporters are permitted to have an in-house employee – a customs representative – process their import entry documents directly. While companies will now be able to process customs clearance directly, most companies will avoid direct customs clearance processing due

to liability concerns, and will likely continue using independent customs brokers to process their imports and exports.

Under the Customs Law, when a customs broker processes customs clearance on behalf of an importer or exporter, the customs broker is the legal representative of that importer/exporter during customs clearance and is jointly liable for omissions in payment of duties and taxes or lack of compliance with non-tariff regulations. Despite the joint liability set forth in the Customs Law, in practice the tax authorities single out the importer/exporter of record for collection when they identify omissions in payment of duties and taxes or lack of compliance with non-tariff regulations. In any case, joint liability *should* encourage customs brokers to be extremely diligent and cautious to ensure that the applicable duties and taxes and non-tariff regulations are duly met in every single transaction they process. Unfortunately, this is not always the case. Due to the volume of transactions that are processed on a daily basis by customs brokers, they are not able to participate directly in the customs clearance process for all of the transactions processed with their customs broker license. Indeed, the typical customs broker in Mexico will have several agents and other staff that assist with filling out customs entry forms (*pedimentos*) and processing customs clearance.

Another matter that may cause compliance issues is the fact that many companies do not have in-house personnel in charge of customs issues, and fully entrust the customs broker with these functions. While it is not a good practice, it is common that customs brokers not only handle customs clearance on behalf of importers/exporters, but are also advisors in foreign trade matters. Frequently, companies simply send instructions to the customs broker along with the relevant documentation covering the goods to be imported, so that the broker may determine the applicable tariff classification, taxes and non-tariff restrictions, and takes care of all the necessary paperwork and customs clearance process. But what happens when it is an urgent shipment and the customs broker has not yet received all the documentation necessary for processing an importation? In many cases, customs brokers draft these documents before they receive the originals from the exporter located abroad. When the documents arrive, *if they arrive*, customs brokers *may* rectify the import *pedimento* to declare the accurate information.

When claiming a preferential duty treatment under free trade agreements (FTAs), the certificate of origin demonstrating the goods are originating under many of these FTAs, including the North American Free Trade Agreement (NAFTA), is filled out directly by the exporter or producer, without the need for any validation or certification by the authorities of the export country. The certificate must be filled out by the exporter or producer because the issuer of the certificate must know whether the goods covered therein actually originate in terms applicable to the FTA in question. However, we have seen cases where the shipment is received without a certificate of origin and the importer or the customs broker fills it out. Because the certificate of origin confers preferential duties on imported goods, the customs authorities of the importing country are entitled to request information from the exporter or producer shown on the certificate of origin, to evidence the originating character of the goods. When the certificate is incorrectly issued by the importer or the customs broker, the goods may not have in fact originated under the FTA and thus were not entitled to preferential duties. Claiming such false duties, even when a product of mistake, may lead to stiff penalties on both the exporter and importer.

If the importer or customs broker is willing to falsify documents to claim unwarranted preferential duties, it is reasonable to assume that they are also willing to issue other documents with inaccurate or false information. Tariff classification is a good example, as it determines all the tariff and non-tariff regulations applicable to the goods upon importation and exportation. A customs broker can significantly expedite the import process if it declares an incorrect, ‘easier’ tariff classification – *e.g.*, one subject to a lower duty rate, or not subject to an import permit required under the correct classification.

The sale and distribution of goods manufactured in different countries always begins with an export and import transaction. Thus, companies engaged in international trade into or out of Mexico continuously face the prospect that their customs broker will turn out to be the weakest link in the supply chain as relates to regulatory and compliance risks.

To proactively monitor, detect and prevent such lapses, companies involved in trade should consider adopting the following best practices:

1) Frequently communicate with your customs broker to ensure that it is following your specific instructions and not making assumptions on how to proceed.
2) Execute a formal customs brokerage services agreement. Many brokers only require the execution of

a simple letter of instructions, which is mandatory under the Customs Law. Even if not mandatory, signing a contract that clearly sets out the obligations of the broker – and contains robust compliance provisions – clarifies the company's expectations and minimizes the likelihood that the broker will avoid liability.

3) Execute contracts with carriers and logistics companies as well, which include compliance provisions.
4) Evaluate several service providers and do not centralize all your operations with a single customs broker, carrier or logistics company.
5) Review your import documentation on a periodic basis to ensure accuracy in tariff classifications, application of duty preferences and compliance with non-tariff regulations.
6) Even if you have personnel in charge of logistics and customs matters, carry out annual internal reviews that randomly select operations and check the accuracy of their transactions.
7) Establish internal compliance policies which include guidelines on hiring external service providers.
8) Periodically review invoices and expenses to ensure descriptions are clear enough to identify the service that was actually rendered or the good purchased.

While none of these recommendations constitute a 'silver bullet' that will absolutely preclude the compliance risks discussed above, they are nonetheless practical, uncomplicated steps in-house counsel can take to shield their companies and employees.

Reform Watch: An Update on Pacto por Mexico

By Jesse Heath, Washington, D.C.

Anticorruption Reform

On December 13, the Mexican Senate passed the anticorruption reform required by the *Pacto*. The reform consists of several additions to the *Constitucion Politica de Los Estados Unidos Mexicanos*. The most important addition is a new Article 113(III), which establishes a National Anticorruption Commission. The main points of Art. 113(III) include:

- The creation of a new anticorruption commission, which will be responsible for the prevention, investigation and punishment of corruption offenses.
- The commission will have the power to mete out administrative sanctions – suspension, dismissal, disqualification and monetary fines – but not criminal sanctions; the fines may not exceed more than three times the benefits received from, or damages caused by, the corruption offense.
- In cases involving criminal violations, the commission will pass the case along to the Procurator General of Mexico.
- The commission will be an autonomous public agency with its own legal identity and assets.
- The head of the commission will be appointed by the Senate based on a proposal from the parliamentary factions; the head will hold office for seven years and may not pursue other employment during the term.
- The commission must develop programs and activities to promote ethics and honesty in the public service and a culture of respect for the law.
- The commission will have an Advisory Council, presided over by three citizens appointed by the Senate, a representative of the executive branch, a representative of the Supreme Auditor of the Federation, and a representative from the Federal Institute for Access to Public Information (IFAI).
- The commission may issue general or specific recommendations to the three branches of government, aimed at preventing corruption.

The anticorruption reform is currently pending approval by the House of Deputies, which is debating the issue in its current session.

Energy and Financial Reforms Signed into Law

- On December 20, 2013, Pres. Peña signed the Energy Reform into law
- On January 9, 2014, Pres. Peña signed the Financial Reform into law