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21 January 2024

Renewal of Responsible Supervision and Control

The technological advancements we have seen throughout the last few decades have impacted the day-to-day lives of all humans on earth. Everything from the way we communicate, navigate, and find information has changed dramatically. This paradigm shift has impacted every industry across the globe. Customs brokers are no strangers to the changes that technology has brought. Customs and Border Protection transformed from being heavily paper-centric to accepting electronic submissions of data for the facilitation of legitimate trade. While advantageous, this shift has also presented a need to update many longstanding regulations. Significant revamps in the way Customs and Border Protection operates internally have paved the way for these updates. Amongst one of the most important changes was the modernization of the customs broker regulations which went into effect on December 19, 2022. This day marked a significant shift that impacted every customs brokerage firm in America.

Adjustments to the regulations include items such as: updated language, fee changes, introduction of cybersecurity measures, and clarity on customs broker responsibilities just to name a few. US Customs and Border Protection also made it abundantly clear that a broker is “tasked with the responsibility to exercise the highest level of accuracy and knowledge when filing entries, navigate the complex nature of international trade, ensure that the clients’ needs are met timely and accurately, and facilitate the movement of legitimate cargo”. One of the most significant changes in the regulations was the addition of three factors that CBP utilizes to

determine whether a Customs Broker is exercising adequate responsible supervision and control over the customs business of the firm. Responsible supervision and control is defined in 19 CFR 111.1 as “that degree of supervision and control necessary to ensure the proper transaction of the customs business of a broker, including actions necessary to ensure that an employee of a broker provides substantially the same quality of service in handling customs transactions that the broker is required to provide”. In addition to the added factors, the updated regulations reassigned the listed factors from the responsible supervision and control definition found in 19 CFR 111.1 to the section outlining responsible supervision and control in 19 CFR 111.28. The modernization also updated language indicating Customs and Border Protection “may” consider in its discretion what factors are relevant for the analysis of proper exercising of responsible supervision and control. The update to the word “may” is significant because Customs and Border Protection is now exonerated from considering all the listed factors in its analysis. The agency’s position is that the assessment of a brokerage exercising responsible supervision and control is fact-specific, and not all factors would apply in every instance (United States, Customs and Border Protection). Prior to the modernization of the regulations this clause utilized the word “will”. In fact, this issue was brought before the United States Court of Appeals for the Federal Circuit in the matter of *United States v. UPS Customhouse Brokerage, Inc.*. At that time, the Court ruled that CBP had the obligation under the regulation to consider all the listed factors due to the word “will” being a mandatory term and not a discretionary citing a previous ruling in *New England Tank Indus, of N.H., Inc v. United States*. As it stands, there are a total of thirteen enumerated factors that CBP considers in its evaluation of adequate responsible supervision and control. Since the size and internal workings of one brokerage may differ from another, CBP will

at its discretion elect which factors it will consider in assessing whether a customs broker is exercising adequate responsible supervision and control.

Prior to the modernization of the customs broker regulations, the factor on training read “the training required of employees of the broker”. This factor now reads, “the training provided to broker employees”. With this change in language, it is not enough for a broker to have a training requirement or plan – they must show what training was actually done (Braumiller and Leeds). A customs broker must now demonstrate that training was in fact given to its employees. Although not explicitly stated in the regulations, it is necessary to document what they were trained in, how many hours of training they received, and keep records of this information in the event of a broker management audit. An example Customs and Border Protection lists in its website also mentions whether a broker provides access to CBP webinars specific to the employee’s job. Training will vary depending on the duties and responsibilities of the broker employee, but they should grasp training on the customs regulations that affect their function. In the case of entry filers, they should be able to identify what documentation is needed before filing an entry, discern in what instance they can or cannot file entry, and understand that with every transmission to Customs and Border Protection they are acknowledging and signing a document that certifies its contents are true and correct. Going through a few hours of customs regulations training ensures that the employee knows what the brokerage does, why the brokerage does it, and why it is important to do it right. Following training on regulation, the employee may then proceed to the practical aspects of their job function with an assigned trainer for some hours prior to transitioning to production. All training should be documented with the topics that were covered, the amount of time spent on the topic, and a signature of the broker employee acknowledging they understood what they learned. These records should be kept in the

employee's file. Training should also be continuous and provided on an as needed basis depending on the performance of the employees and the needs of the brokerage. Documenting and reporting the training will ensure that a customs brokerage can supply broker management with evidence of their conformity with the training factor of 19 CFR 111.28(a).

Statute and regulation afford customs brokers a bit of latitude in human error, but it's important to note that the line between clerical error and negligence is thin. The eighth factor of responsible supervision and control reads, "the frequency of audits and reviews by an individually licensed broker of the customs transactions handled by employees of the broker". Customs and Border Protection's intent here is to assess a customs broker's audit program if the broker has one at all. It is highly likely they will want to know who conducts entry audits, the training non-broker auditors have undergone, the percentage of customs files audited, if an individually licensed broker has oversight of the audits, and if audits are being recorded and documented. Although it would be best to solely have individually licensed brokers audit all customs transactions, this may not be practical for larger firms. To offset this, an individually licensed broker should have oversight of any non-broker auditors in its organization. Auditors should be well versed in the contents of the customs filings it is auditing. In the instance of an entry, the auditor should be trained to easily detect any anomalies in the entry summary header, classification, valuation, and supporting documents connected with PGA data, quota, licenses, permits, trade remedy cases, chapter 98, section 301 or any other that may apply. Critical to the audit would be ensuring that the appropriate entry type was used, the correct importer of record was named, and the bond is sufficient to make entry. The value of the entry should be reported correctly with any appropriate deductions, assists, royalties, discounts, and relationship with the buyer and seller fully disclosed. In the event any free trade agreements apply, appropriate

documentation should be attached to the filing to authenticate the claim. Auditors should review ABI messages to ensure that there are no existing census warnings, and no entry is in reject status. Auditors should also ensure that all documents pertaining to the entry are legible, correct, filled out and signed in all the appropriate places, and attached in the file to comply with the recordkeeping requirements of 19 CFR 111.23. Audits should be documented in the form of a checklist attached to every file to ensure that no item goes overlooked. In addition to day-to-day entry documentation, auditors should periodically review power of attorneys to ensure that the information is validated and current. In the event certain importers don't get billed directly for brokerage services, auditors should also ensure that the appropriate billing waivers are on the importer of records file in accordance with 119 CFR 111.36(a). Finally, an individually licensed broker should be available to audit more complex filings, as well as provide guidance to any inquiries an auditor may have.

Lastly, individually licensed brokers themselves have the responsibility of staying abreast of all changes in legislation. The nature of our industry is a dynamic one that changes daily. Responsible supervision and control factors six and seven are there to ensure brokerage employees have access to a knowledgeable individually licensed customs broker to keep them informed of any advances and updates in the industry as well as critical changes in procedures and regulations. Factor six specifically reads, "The availability of a sufficient number of individually licensed brokers for necessary consultation with employees of the broker". CBP has not provided guidance in how it would determine what exactly enough individually licensed brokers for a customs brokerage would be, but it is safe to assume that this will vary considerably since brokerages can range from local family-owned shops with no more than five employees to colossal publicly traded firms with hundreds of employees. Customs brokerage

firms should self-assess their ratio of employees to individually licensed brokers. It is also important for the employees of the firm have an individually licensed broker readily accessible for any inquires both in office and afterhours. Records of communication such as phone call logs, emails, direct messages or any other should suffice as evidence of a broker engaging with it's employees.

The benefit of some of the ambiguity in the responsible supervision and control factors is that customs brokerage firms have flexibility to demonstrate to CBP why their approach satisfies regulation. It boils down to demonstrating the logic behind your process or procedures. As technology progresses, and the world becomes more globalized, we can expect many more changes in customs regulations to come to fruition. This is the beginning of many changes that are yet to come. We the customs brokers of the United States are the professionals that are entrusted by our government to facilitate legitimate trade. We are the frontline that sustains America in motion, and we are prepared to face the challenges of an evolving landscape in international trade.

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