Litigation, Business, International Trade, and Transportation Law Newsletter

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BIS warns exporters about avoiding Commodity Jurisdiction Requests

The Bureau of Industry and Security (BIS) issued on August 2nd an interim final rule about Commodity Jurisdiction (CJ) determination requests. This interim final rule is a bit of a misnomer. While it adds a couple sections to the Export Administration Regulations, it does not really create any new rule, but instead clarifies how CJ determination requests work. It is mostly a warning to exporters to stop filing classification requests and requesting advisory opinions with the BIS to circumvent the filing of a CJ determination request with the Department of State's Directorate of Defense Trade Controls (DDTC).

The BIS is visibly irked that exporters file and obtain from the BIS classifications and advisory opinions without first making sure that a State Department license is needed. Why would exporters do this? Time is one consideration. The DDTC takes several months at a minimum to respond to a CJ determination request. In contrast, the BIS has a much shorter turnaround time, often less than a month. Exporters may also fear the additional legal exposure from having to obtain a State Department license and from registering as an arms exporter. Apparently, exporters obtain BIS classifications or an advisory opinion from the BIS as a shield against any enforcement proceedings from the State Department or just to avoid getting a State Department license. The BIS has announced through this interim rule that this ploy will no longer shield an exporter against criminal penalties from the State Department.

However, the interim rule leaves unanswered questions. First, why is the BIS handing out classifications and advisory opinions for items it does not even have jurisdiction over? Why is the agency cutting itself slack when exporters get none? The BIS's website warns, "If you are not completely sure of the export licensing jurisdiction of an item, you should request a CJ determination." Shouldn't the BIS shoulder an equal or greater burden of consulting with the State Department if it is unsure whether it has jurisdiction over an item? If some exporters are using the BIS to get around the State Department (is there even any proof of this?), why isn't the BIS revamping the way it handles classification requests and requests for advisory opinions? Second, who authorized the BIS to speak for the State Department, much less the whole federal government? The interim rule says "Advisory opinions may not be relied upon or cited as evidence that the US Government has determined that items described in the advisory opinion are not subject to the export control jurisdiction of another agency of the US Government." An exporter gets into trouble with the State Department, not with the BIS, for failing to obtain a requisite ITAR license. Let's hear it from the State Department if it does not like when exporters use the excuse "but the BIS let me do this."

Perhaps President Obama's much anticipated overhaul of our nation's export

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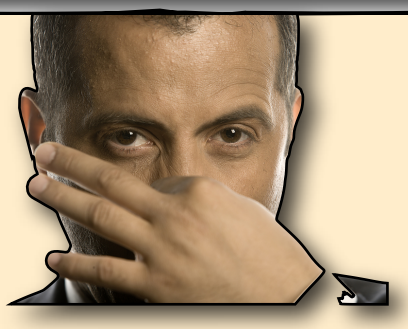
Does Your Customs Broker Exam Course Stink?



Switch and get 50% off!

We hear this story often. You want to pass the October 2010 customs broker exam, so you signed up for a review course. Your course may have come recommended, or you found the course through Google. You may be planning to use a customs broker license as a steppingstone to greater professional opportunities, but you may not be used to studying. You were expecting a great deal from the course for the hefty registration price you paid. You were expecting to be taught the skills and information you need to pass, but the exam is less than two months away, and your course is not delivering. Your instructor may be a customs broker or even an attorney who prefers lecturing from notes rather than tailoring lessons to your needs, strengths, and weaknesses. Your course and instructor have left you to drift, and now, disappointed and frustrated, you feel that you are on your own.

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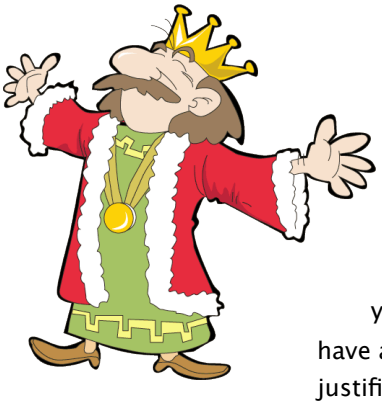
Switch to the Best Customs Broker Exam Study Course and get 50% off the registration price. We host boot camps in different cities (one is schedule for Dallas in September) to get you primed for the October 2010 exam. Our course offers exactly what you need to pass. We guarantee you will pass, we offer weekly conference calls and the highest passing rate in the nation. We've been around for two decades and, unlike your course, our students love us. Go to www.bestcustomsbrokercourse.com. You will have to provide us with proof that you are currently registered in a customs broker review course. Questions: (800) 256-2013, ext 1 or info@bestcustomsbrokercourse.com. Other discounts may be available.



Can you sue the Federal Government for detaining your shipment?

The Government has its tentacles in all imports. This statement is not a criticism (there are many valid and historical justifications for exercising this jurisdiction), but merely recognizes the concrete, cold reality that importers must live with. The other reality is that government agencies are staffed by (horrors) humans who, for the most part, do a good job, but who sometimes act in a boneheaded manner that costs importers lots of money. If someone who was not operating under government authority messed with your shipments, you could sue them. Winning and collecting on the lawsuit are whole different matters, but you have a right to sue them. But what if CBP or FDA seizes your shipment when there with little justification. Can you sue?

Cue the anachronistic legal relic. The controlling doctrine has its roots in medieval English common law and is called sovereign immunity, or "the king can do no wrong." Why our federal courts decided a long time ago to import this precept to our democracy is a tale beyond the scope of this article, but the crux is that you cannot sue the federal government without its permission. The federal government does not surrender this kind of permission easily, but it did so in 1948 when it enacted the Federal Torts Claims Act. Now you have permission to sue the US Government, but there are a slew of exceptions. For importers, the most important exception is 28 USC § 2680(c) "(a)ny claim arising in respect of . . . the detention of any goods or merchandise by any officer of customs . . . or any other law-enforcement officer." There are, of course, other things that federal agencies do to importers that go beyond detaining goods, and it may be wise to consult with the extensive case law history under the Federal Torts Claims Act and other laws, but it is safe to say that importers have not faired well when they tried to sue the federal government for improper detention of shipments.

The Ultimate Bull: Country of Origin Marking

by
Oscar Gonzalez, Attorney

Everybody imports, especially our federal government. Or so that is the lesson that I decided to take away from a tiny black stress bull handed to me by another lawyer in my firm. Funny, "stress" and "bull" seem to naturally go well together, don't they? The USDA is using these diminutive, plasticine bovine to promote its Plant Protection and Quarantine (PPQ) program. It's pretty cool when a federal government agency hands out promotional products, but I don't get why it's doing it. Why promote? Why the carrot? It's not as if importers and exporters have a choice to participate in PPQ. Everyone's shipments are screened under PPQ. It's as if the TSA handed out t-shirts to promote its x-ray screening at the airport or your local police department gave out tote bags to promote its use of laser speed guns.

Maybe the USDA is using tiny black stress bulls to liven up the drab sameness of just another bureaucratic hurdle. Maybe it is just having fun. You have to agree, the tiny black stress bull is cute, in a sort of menacing way. Or maybe the agency sensed that a terrible dread is building up within the trade community in anticipation of the PPQ program, and the only answer is to hand out these babies in the hope of breaking up the anxiety. The USDA, like many others, wrongly and tragically thought that stress balls or stress toys reduce stress, when they, in fact, induce stress in otherwise tranquil humans. Take me for example; I freaked when I squeezed my tiny black stress bull and its leg almost fell off. I don't need that kind of aggravation to compound my already pressurized day.

Other than my being bothered by the unseemly fragility of such a macho animal, I have additional issues with my tiny black stress bull (I apologize that I keep repeating myself, but I fear I may never again after this article get the opportunity to say tiny black stress bull). PPQ is about, in part, import and export enforcement, is it not? USDA imposes strict requirements on importers and exporters, does it not? You should expect the agency, therefore, to be sensitive to and comply with those very regulations, would you not? [Here I will assume that you answered all three questions in the affirmative; if not, please secure your own tiny black stress bull from the USDA and ignore the rest of my commentary].

Ladies and gentlemen of the jury, I show you Plaintiff's exhibit 1, a picture of the country of origin marking for the tiny black stress bull.

We will not deal for the moment with the ethical implications of a federal enforcement agency's failure to purchase domestic products and thereby piling on the nation's trade deficit. Instead, I focus your attention on the label with China on it. Are you having a hard time seeing it? Exactly! The manufacturer or perhaps the importer placed the label in, ahem, that region that is the most sensitive and pronounced for any bull (other than its horns, a clue in itself), just south of its belly button, if bulls had belly buttons. If you have not yet found it, look to the upper right hand side of the photo. In most bulls, you would be able to see the label easily, but not our tiny black stress bulls. More alarming still, the label is the flimsiest of stickers, just waiting for the slightest moisture or pressure to peel it away from the product it limply identifies.

Section 134.11 of the US Code of Federal Regulations requires that imported items be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article will permit. Does our tiny black stress bull meet all, or any, of these elements? Is the China label conspicuous and legible? Yes, but only if you discount the intense squinting and the magnifying glass that are required to find it. Is the label indelible and permanent? This one is harder to judge since I've had the tiny black stress bull only for about seven hours, but I would be surprised if the label was still there in the morning, especially not if the cat finds my tiny black stress bull. Perhaps the "as the nature of the article will permit" language of the regulation will save this label from violating the law, but what is the nature of a polymer stress ball? How can an artificial construct, an offspring of the BP oil spill, if you will, even have a nature? Suddenly we find ourselves in the arena of philosophy, a discipline well beyond my expertise or taste, and an activity that makes my head hurt and my heart palpitate.

Quick, where's my tiny black stress bull!

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laws would answer some or all of these questions. In the meantime, you have until October 1, 2010 to submit a comment to the BIS regarding the interim final rule.

For now, exporters must take this interim rule to heart and should accommodate the warning in the rule. If you will be filing Commodity Jurisdiction determination requests, your exports may take many months to go through all the export compliance steps.

There is one other development in regards to CJ determination requests. On August 4, a final rule was issued that requires the electronic filing of CJ determination requests. There is one difference between this and the earlier notice, namely, this rule was issued by the State Department, the agency with actual jurisdiction over CJ determination requests.

Do-Gooder Corner
Heartbeat International Foundation
www.heartbeatsaveslives.com

This month we are honored to feature an organization started by the father of Michael Maniscalco, an attorney in our Washington, DC offices. His father, Dr. Benedict Maniscalco, is a cardiologist who runs this organization that provides pacemakers to those in need around the world. Heartbeat has saved more than 10,000 lives and depends on the pacemaker industry to generously donate the pacemakers, doctors who volunteer their professional services, hospitals that volunteer their facilities, and ordinary people to donate money to pay for it all. The cost of each pacemaker implant for an international patient is about $500, and Heartbeat covers the cost so there is no charge to the patient. To find out more about Heartbeat, go to www.heartbeatsaveslives.com.

Calendar

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Aviation Industry: Import and Logistics Compliance
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