

**Export/Import
Recordkeeping**
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Agenda

- Export recordkeeping
 - Bureau of Census
 - Department of Commerce - EAR
 - Department State – ITAR
- Import recordkeeping
 - Recordkeeping requirements
 - Recordkeeping issues
 - Record retention
 - Alternate recordkeeping
 - Production and non-production of records
- Other agency considerations



Export Recordkeeping Requirements

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Bureau of Census

- **Source: 15 CFR 30.66(c)**
- **Basic requirements:**
 - Applies to the exporter (USPPI), forwarder and carrier
 - 5 year retention period
 - Format is elective
 - Records must be produced on request from the government

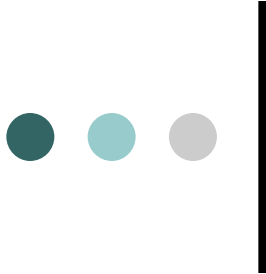
● ● ● | Export Administration Regulations (EAR)

- Applies to:
 - Exports and re-exports
 - Restrictive trade practices and boycotts
 - All transactions subject to the EAR
- Parties to maintain records:
 - Any principal or agent participating in any of the above transactions
 - Any person required to maintain records under any section of the EAR

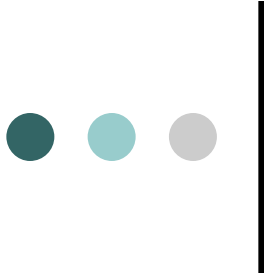


Record Retention Under EAR

- (1) Export control documents, as defined in part 772 of the EAR;
- (2) Memoranda, notes and correspondence
- (3) Contracts;
- (4) Invitations to bid;
- (5) Books of account and financial records
- (6) Restrictive trade practice or boycott documents and reports



Export control document. A license; application for license; any and all documents submitted in accordance with the requirements of the EAR in support of, or in relation to, a license application; application for International Import Certificate; Delivery Verification Certificate or similar evidence of delivery; Shipper's Export Declaration (SED) or Automated Export System (AES) record presented in connection with shipments to any country; a Dock Receipt or bill of lading issued by any carrier in connection with any export subject to the EAR and any and all documents prepared and submitted by exporters and agents pursuant to the export clearance requirements of part 758 of the EAR; a U.S. exporter's report of request received for information, certification, or other action indicating a restrictive trade practice or boycott imposed by a foreign country against a country friendly to the United States, submitted to the U.S. Department of Commerce in accordance with the provisions of part 760 of the EAR; Customs Form 7512, Transportation Entry and Manifest of Goods, Subject to Customs Inspection and Permit, when used for Transportation and Exportation (T.& E.) or Immediate Exportation (I.E.); and any other document issued by a U.S. Government agency as evidence of the existence of a license for the purpose of loading onto an exporting carrier or otherwise facilitating or effecting an export from the United States or any reexport of any item requiring a license.



EAR 762.2(b) List

- There are 45 other parts of the EAR requiring recordkeeping, including:
 - Use of exemptions
 - License determinations
 - Dual use determinations
 - Screening reports
 - License applications and support documents
 - Revoked or suspended licenses
 - Internal control plans
 - SED or AES records
 - Self-disclosures
 - Supplier audits/corrective action
 - New BIS checklist
 - Wassenaar reports



Recordkeeping Exemptions

- Records exempt from the recordkeeping requirements include:
 - Inspection and warranty certificates
 - Certain financial worksheets, logs, corrections and receipts
- When in doubt, keep the record!



EAR Format of Records

- Retained in the form in which received or created – unless an alternate format is pre-approved
- May retain records in an alternate format, providing it meets EAR requirements

● ● ● | Digital Imaging Under the EAR

- **Must provide indexing**
- **Must be able to locate records based on one or more of the following:**
 - The names of the parties to the transaction
 - Any countries involved in the transaction
 - A document reference number

● ● ● | EAR Record Retention Period

- Records are retained for five years from:
 - Date of export or re-export
 - Date of termination of the transaction
 - Receipt of request involving a restrictive trade practice or boycott
- Must provide if BIS or another government agency makes a request for the records - may not be destroyed or disposed of without approval from the requesting agency

● ● ● | **Records Production and Inspection**

- **Parties in the U.S. required to maintain records must:**
 - Make them available for inspection by the government
 - BIS, OEE and Anti-boycott Compliance may request a subpoena for records
- **Persons located outside U.S. may also have to retain records**
- **BIS may initiate an enforcement proceeding for failure to comply**

International Traffic in Arms Regulations (ITAR)

- Any party registered as an exporter of defense articles under the ITAR must maintain records:
 - Acquisition, manufacture and disposition of defense articles and technical data
 - Provision of defense services
 - Brokering activities
 - Related political fees & commissions
- Must be available to the government agency on request



ITAR Electronic Recordkeeping

- **If stored electronically:**
 - Must be legible and readable
 - Capable of producing hard copy
 - Must be indexed
 - Changes and alterations must be recorded

Other ITAR Recordkeeping Requirements

- Company registration documents and appointment of empowered officials
- Transfers of technical data under License Agreements
- Use of exemptions for technical data
- Records of any administrative enforcement proceeding
- Political fees and commissions paid by suppliers - or absence thereof

Other ITAR Recordkeeping Requirements (cont.)

- Recordkeeping period is five years from expiration of a license or agreement
- Record requirements may arise from:
 - Provisos in a license or agreement
 - Technology control plans
 - Consent agreement with Dept of State
 - Classifications of articles on the USML or CCL
- In addition, the SED/AES requirements of Bureau of Census apply



Types of Requests

- Informal
- Written
- Subpoena/Summons
- Search Warrant
- What happens if you fail to produce the requested records?



Import Recordkeeping Requirements

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Customs Mod Act Requirements

- The importer of record is held responsible for:
 - Classification
 - Value
 - Accuracyof its transactions
- These responsibilities by themselves create a huge recordkeeping requirement

● ● ● Basic CBP Recordkeeping

Importers must keep records of their import transactions and all associated documents:

- Entries
- Transportation and receiving documents
- Other government agency compliance documents
- Bonds
- Customs correspondence
- Purchasing and payment records

Part 163 Appendix contains a 4 page list (in fine print) of required records



Other Recordkeeping Requirements

- Other government agencies have separate recordkeeping rules
- Free Trade Agreements (e.g. NAFTA) may impose requirements
- Use of Drawback, Bonded Warehouses and Foreign Trade Zones mean additional recordkeeping requirements



Recordkeeping Example

- Acme Corporation (Acme) is an average size importer of products from Canada and Japan
- How many and what type of records would Acme be required to maintain?

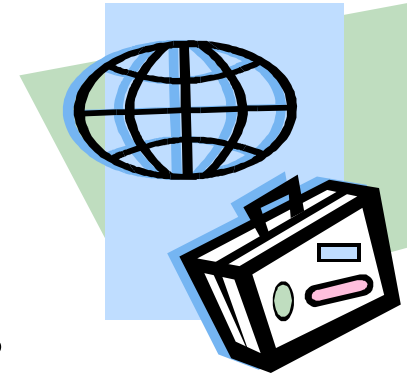


Acme's Recordkeeping Obligations

- The purchase contract, including all changes and amendments
- Correspondence with supplier impacting the entry
- All payments to the supplier
- Transportation related documents, including payments to carriers, forwarders, and sureties if deduction has been claimed
- Notice of arrival, authority to make entry, delivery order
- The entry itself, including all associated documents (3461, 7501, certificates of origin, commercial invoice)
- Documents required by other US government agencies – FDA, EPA, CPSC, FCC, etc.
- Instructions and correspondence with customs broker regarding entry
- Correspondence with Customs regarding entry
- Copy of the customs broker invoice and related correspondence
- Associated payments to Customs and/or broker
- Storage and delivery documents, including receiving records, e.g., shortage/overage reports
- Post entry claims and correspondence with CBP (CBP Form 28/29 etc.)
- Associated reconciliation and drawback entries
- Liquidation records

Impact of “10+2” Importer Security Filing

- Nothing specific in the Notice of Proposed Rulemaking except:
 - Evidence that the filing was completed and what was contained in the ISF
 - Any corrections and amendments to the ISF
 - Copies of the filing and associated documents
 - Power of attorney
- Be prepared to demonstrate the ISF was completed and what it contained



1. Manufacturer name and address
2. Seller name and address
3. Container stuffing location
4. Consolidator name and address
5. Buyer name and address
6. Ship to name and address
7. Importer of record number
8. Consignee number
9. Country of origin of the goods
10. Harmonized Tariff Schedule number (6 digit)

● ● ● | Recordkeeping Time Frames

- 5 years from date of entry
- Exceptions:
 - FTZ and warehouse entries
 - Drawback
 - Reconciliation
 - Other agency requirements
 - Packing lists – 60 days from release (however – what if the packing list is part of a post-entry claim?)
- This applies to all records required by (a)(1)(A) list – not just the entries



Record Retention

- Retained in the same format as received or generated
- May be kept in one or more places – providing you can timely produce copies on reasonable request
- May request to keep records in alternate format

● ● ● | Alternate Recordkeeping

- Must provide notification to CBP minimum of thirty (30) days in advance
- And spell out how the requirements will be satisfied, including internal controls, security, testing and ability to produce hard copies
- CBP does not approve the notification but may specify that records cannot be maintained in the proposed manner and decline the request

● ● ● | Other Recordkeeping Issues

- **Customs brokers**

- Requirements are governed by both Part 111 and Part 163 of the regulations

- **Third party recordkeepers:**

- Defined
- Designation

- **Note: Recent *Ford* decision. Look for changes to NAFTA recordkeeping**

● ● ● | CBP Request for Records

- **CBP may request copies of records in several ways, including:**
 - Form 28
 - Focused assessment or audit
 - Summons
- **Document production period is usually thirty (30) days**
 - Less for records relating to admissibility
 - Form 29 – 20 days
 - Can request a longer period but must justify the additional time and get it pre-approved

● ● ● | Failure to Produce Records

- **If an importer fails to produce the requested entry records:**
 - Willful: \$100,000 for each release or 75% of the value
 - Negligent: \$10,000 or 40% of value
 - If record is for reduced duty or duty-free status, claim is considered abandoned
- **Excuse for non-production: Act of God or natural disaster**
 - Be prepared to prove this (with documentation)

Failure to Produce During an Audit

- Focused Assessment or ISA may require other records – training, documented procedures, testing, etc.
- If you cannot produce the requested record(s) – you fail the audit!
 - Will require corrective action
 - If applying for ISA, you may not qualify



CBP Recordkeeping Compliance Program

- **Application**
 - Made to CBP Regulatory Audit
 - Describes detailed recordkeeping process and controls
 - Must be reviewed and approved by CBP
- **Benefit: “One free bite” – Waiver of first time penalty for negligent actions**
- **Does anyone participate in this?**

● ● ● | Paperless Recordkeeping

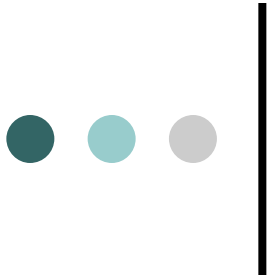
- **Issues in going paperless:**
 - Indexing and storage
 - Retrieving records
 - Captures everything?
 - Readable?
 - Plan to capture missing info
 - Annual testing plan
 - Internal controls to ensure plan meets requirements
- **Reminder: Once alternate recordkeeping plan is accepted, you will be audited to that plan.**



A Best Practice – Recordkeeping Map

○ Process:

- Identify all the records required
 - Identify the physical or virtual location of those records
 - Go to that place to verify the existence and state of the records and the format in which they are stored (and their retention period)
 - Record results of process
- **The result is a recordkeeping map – now you know where things are!**



Other Government Agency Records

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Importing FDA Products

- Most critical issues relate to safety
- 2nd: efficacy (medical products and dietary supplements);
- 3rd: labeling (second easiest FDA detention); and
- 4th: Pre-shipment filings (easiest detention) - Facility Registrations; Drug and Device Listings; Notifications and Approvals, Licenses, Reports.



“Label” & “Labeling”

- FDCA defines the term label to include printed, graphic, written matter on the product or its container
- FDCA defines the term labeling to include printed, graphic, written matter **“accompanying”** the article (including the label)
- POS Websites, Fliers and Marketing Sheets



Other FDA Records

- Test results
- GAP, GMP, GRAS
- HACCP plans
- Site visits



- Biologics - Public Health Act
 - Blood, plasma, tissue, organs
- Are they a drug?
 - Large molecule proteins
- In-vitro diagnostics may be biologics *and* medical devices



Other FDA Issues

- Pesticides
- Colors/dyes
- Food additives
- Drugs
- Medical devices
- Animal feed and drugs
- Food contact surfaces
- Prior Notice and the Bioterrorism Act



Goodness!

- 840 bags of sesame seeds - salmonella
- 80 bags prematurely released
- Could not be recovered
- Led to
 - Remarking of the remaining bags - twice
 - 6 more bags released by the warehouse
 - Commingled into 336 lot
 - Repurchased by importer for shipment integrity purposes.



And Then

- Two separate what are you doing about this problem demand letters issued by FDA; and
- OCI referred case to L.A. City Attorney for prosecution
 - Company and president were subjected to criminal liability
 - Misdemeanor plea for selling and distributing unsafe foods



In The News

- Toothpaste – tainted with chemical and bacteria – Dr. Cool, Superdent and Everfresh Smiles
- Farmed fish – banned drugs and pesticides
- Tires – adhesive changed, may lead to blow-outs – Foreign Tire Sales, Inc.
- Pet food – melamine



ChemNutra -Melamine Case

- ChemNutra is owned by Sally and Stephen Miller
- It sourced the wheat gluten from Suzhou Textiles, Silk Light Industrial Products, Arts and Crafts Import/Export Co., Ltd. (SSC)
- SSC sourced from Xuzhou Anying Biologic Technology Development Co., Ltd. (XAC)
- XAC was the exporter and ChemNutra was the importer



More Facts

- Wheat gluten is used as a binding agent in the manufacture of certain types of pet food
- It was to have a 75% minimum protein content.
- Wheat gluten is subject to mandatory inspection by AQSIQ upon export from China
- The export shipment was misclassified under 3504.0090 – peptones, other derivatives and other protein substances - and so not inspected by AQSIQ



And Still More Facts

- Sally Miller is a Chinese national
- She has a food chemistry engineering degree from a Chinese university
- She claimed to be an ISO-9000 certified chief auditor.
- She, her husband and the company were indicted in Kansas City by the U.S. Attorney



Allegations

- Due to Sally Miller's training –
 - She should have known that classification under 3504.00, HTS, would evade inspection in China
 - She should have known that classification under 1109.00, HTS, would subject the gluten to inspection
- When was the last time you saw the export documents filed by your supplier with its home government?



It Gets More Bizarre

- The Millers concealed the misclassification from their customers
- The melamine “fraudulently” created the appearance of a higher protein level
- The wheat gluten was deliberately labeled and coded so it would not be subject to compulsory inspection at time of export.



The Indictment

- 13 counts
 - Introduction, delivery for introduction and causing the introduction and delivery for introduction into interstate commerce of misbranded food.
- 13 counts
 - Focused on the same claims re adulterated foods



Felony Count

- Conspiracy to commit wire fraud
- Interstate and international wire transfers
- Overt acts –
 - E-mail communications focused on 1109.00.10
 - Wheat protein description, and not wheat gluten
 - Sally Miller questioned the supplier about the correct classification – 3504 v 1109
- Failure to disclose the supplier was not the manufacturer
- Certificates of analysis were issued by the supplier and by the importer separately - which HTS was stated?
- Failure to truthfully respond to a quality complaint



Lacey Act

FDA shares jurisdiction to enforce the Lacey Act, 16 U.S.C. § 3372, et seq., which prohibits the importation, exportation, transportation, sale, receipt, acquisition, or purchase of any fish, wildlife or plant taken, possessed, transported or sold in violation of any law, treaty, or regulation of the U.S. or any state (includes violations of foreign laws).



Lacey Act Requirements

- Genus
- Species
- How do you document?
- Will CBP be ready on April 1st for mandatory filing?



Phase-In - April 1 and September 30, 2009

- Phase I – PPQ declaration for available on the website and accepted after December 15, 2008.
- Phase II involves products in Chapter 44 of the HTS under headings 4401, 4403, 4404, 4406 - 4409, 4417 and 4418. Effective October 1, 2009, to March 31, 2010.
- Phase III adds products also in Chapter 44 – 4402, 4405, 4410 - 4416, 4419 and 4420, and in Chapter 47 – 4701 - 4705.
- Phase IV takes effect between April 1, 2010, and September 30, 2010, and adds products classified under Chapters 44 (4421), 448 (4801 through 4811) and 94 (9401.69, 9403.30, 9403.40, 9403.50, 9403.6 – 9403.70).



CPSIA

- Certifications
- Lead testing
- Phthalate testing
- What documents are you receiving?
accepting? retaining?



Trademarks

- Need to be registered in the US, but doing so does not provide any rights in foreign countries.
 - Is the mark registered with Customs?
- No use is required in most foreign countries to support a registration.
- Without a trademark registration, in most foreign countries, one has no trademark rights.
- Internationally, it is basically a race to the Trademark Office to get the rights.
- In some regions of the world (South America, Asia), it is common for people to monitor trademark filings in the US and file for the same trademark in their country in order to hold the trademark for ransom, in effect, when the rightful owner comes into the country with its goods.



Trademark Licensee

- Are authorized licensees listed on the trademark holder's website?
- How is your right to use the mark documented?
 - Licensee letter
 - Underlying documents
 - Any limitations?



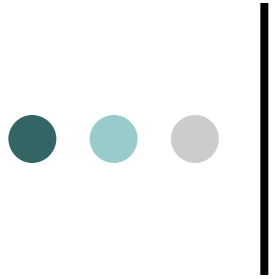
Immigration Issues

- I-9 completion and retention of forms
- Employers who file labor certifications as the first step in the green card process on behalf of foreign nationals must pay the legal fees involved
- E-verify - even if the federal contractor rules are not currently in effect, various states have mandatory e-verify for different classes of employers
- Failure to comply may lead to debarment and an employer's inability to file applications in the future



H1b Issues

- H1b visas are under great scrutiny and employers who have H1b visa employees must prepare the labor condition application file for each occupation and maintain all of the required supporting documents in the public access file
- In case of termination, the employer must notify USCIS and provide a return ticket home to the foreign national
- Failure to do so may impose penalties and liability on the employer, including back pay
- H1b visa holders may not be laid off without certain payments and notification



Conclusion and Takeaways

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Record keeping period

- The trade related agencies generally require five (5) years
- The IRS requires seven (7) years
- How long should you keep which records?

Additional Takeaways

- “Recordkeeping” is more than entries or SED/AES declarations
- Import and export transactions are subject to the requirements of several government agencies and not always the obvious ones
- “Paperless” records are possible, but require planning and indexing
- Not having the required records is a bad idea
- Destroying or altering existing records is an even worse idea



The Bottom Line Consequences

- Additional Costs
- Shipment Delays
- Monetary Penalties
- Rejection/return of shipments
- Civil Fines
- Criminal Prosecution
- Loss of importing or exporting privileges



How Are the Records Requested?

- Informal request, e.g. call v letter
- Summons
- Subpoena
- Search warrant



So long as price drives the deal, you
have to be concerned about
standards, compliance and quality



That's all folks!

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