

## Is Your Philippine Operation Fully Customs Compliant?

Post clearance audit function in the Philippines is finally back with the Bureau of Customs (BOC). This is where it should have always been, as this function is the primary backstop that allows customs to facilitate the movement of goods across its borders. In 2014, this function was moved from the BOC to the Department of Finance.

In October 2017, President Rodrigo Duterte signed Executive Order No. 46, returning the Post Entry Audit Group's (PEAG) function back to the BOC albeit with a name change to Post Clearance Audit Group (PCAG).

Finally, this month, January 2019, Customs Administrative Order (CAO) 01-2019 was signed by the customs commissioner and the finance secretary. This implements the Post Clearance Audit (PCA) function and the Prior Disclosure Program (PDP), which are prescribed under the Customs

Modernization and Tariff Act (CMTA). It will come into effect on 15 February 2019.

Despite the fact that the government wheels turned slowly in respect to the final issuance of CAO 01-2019, allowing for the PCA's operation under the BOC, we understand that the PCAG has already identified target companies for its 2019 audit program. We also understand that the commissioner of customs may have already issued Audit Notification Letters to some companies.

CAO No. 01-2019 provides for the post clearance audit of all records required to be kept by all importers, beneficial or true owners of imported goods, customs brokers, agents, and locators (economic zone operators). It also implements the PDP - previously known as Voluntary Disclosure Program (VDP) - as part of its compliance and revenue measure.

Note that the time given to respond to any demand letters is very tight.

It is critically important that whoever is the receiver of inward correspondence is given clear instructions to accurately record all movements related to the Customs Audit Notification Letter (ANL). This includes recording the date and time of receipt of the ANL, the date noted on the actual letter, who it was passed to, the date and time when it was passed, and having the recipient(s) sign acknowledgement of receipt of the ANL.

### Record Retention

An essential part of any importers' compliance program is the maintaining of business records. For PCA, there is a requirement that importers must maintain, at the importers' principal place of business, for a period of three years from the date of final payment of duties and taxes or customs clearance, whichever is later, all records as detailed within the CAO No. 01-2019. (Note that the list of documents to be maintained is substantive.) This requirement is not limited to just the importer, it includes all parties engaged in customs clearance

and processing as well as locators or persons authorised to bring imported goods into the Free Zones.

While the PCAG will initially target importers, it has the mandate to extend the audit to the customs brokers, other duly authorised agents and other parties engaged in the customs clearance process. The requirement to maintain all documents relating to imports and movements of goods, including instructions received, must be maintained by the importers and related parties at their premises.

## Issue of the Audit Notification Letter

A company selected for a PCA will receive an Audit Notification Letter (ANL) issued by the commissioner of customs. This is the first step in the audit process for the auditee and will provide details of the PCAG team members that will undertake the audit and the scope of the audit. The ANL shall be valid for 30 calendar days subject to revalidation for another 30 days. This is served to the importer personally, by registered mail or through electronic notice.

We highly recommend that companies put in place very clear operational procedures for the receipt and handling of all official mails, including the ANL. These letters have a date on them and your time to respond starts counting down from that date. These will be served by personal service at the principal place of the importers' business, by registered mail, or through electronic notice sent to the registered official email address of the importer. The letter is valid for a period of 30 calendar days from the date of issuance, subject to revalidation by the assistant commissioner for another 30 days prior to its expiry.

It is important for the receiver of the ANL to know who they must notify of its receipt and who they need to pass this to. The letter itself should be stamped with the date and time received by the company and the person receiving it should also record that date and time in a log or ledger.

PCAG should commence their audit within 60 calendar days from the date of service of the ANL and should also be completed within 120 days from the date of service of the ANL. However, an audit may be deferred if the importers have communicated their intention to avail themselves of the PDP.

Note that during the audit, importers are mandated to provide the PCA team with full and free access to their records. This is consistent with the delegated power, under the Customs Modernization and Tariff Act, of the commissioner of customs to obtain information from any person or from any office of the government and to summon the person liable to produce the needed information.

## Non-compliance

Companies who fail to retain records, or fail or refuse to give customs officers full access to such records, can potentially receive the following penalties:

- suspension or cancellation of accreditation as importer or customs broker with BOC;
- surcharge of 20 percent on the dutiable value of the goods which is the subject of the importation for which no records were kept and maintained;
- hold delivery or release of subsequent imported articles to answer for the fine and any revised assessment; and
- criminal prosecution punishable with imprisonment of not less than three years but not more than six years, and/or a fine of one million Philippine pesos (approximately USD 20,000).

Failure to maintain and keep records can also result in the waiver of the company's right to contest the results of the audit based on records kept by BOC. Where an importer fails or refuses to give customs officers full access to required records, they can face charges for contempt and reassessment of the importations that are the subject of audit.

If the importer is found to have been deficient in the duties and taxes paid for imported goods and fails to pay the correct dues resulting from the audit, the importer will be penalised according to two degrees of culpability: negligence or fraud.

The penalty for negligence could be a fine equivalent to 125 percent of the revenue loss, while fraud could see a fine equal to six times the revenue loss, and/or imprisonment of not less than two years but not more than eight years.

## Prior Disclosure Program

The PDP is a facility allowing the commissioner of customs to accept the importers' prior disclosure of errors and omissions in goods declaration resulting in a payment of the deficient duties and taxes. The following are situations where a PDP would not be accepted:

- Those importers who are subject to pending cases with any other customs office;
- Those transactions which are the subject of cases already filed and pending in courts;
- Those involving fraud.

Note that importers who have received an ANL may still avail themselves of the PDP by submitting their application form prescribed by BOC within 90 calendar days from the receipt of the ANL.

By taking advantage of the PDP, importers who have not received an ANL will only need to pay the deficiency in duties and taxes due plus interest. For those importers who have already received an ANL, they will have to pay the deficiency in duties and taxes due plus a penalty of 10 percent of the basic deficiency and interest.

Where a PDP applicant is disclosing the non-inclusion in the value of royalties and other proceeds, they will be required to pay the deficiency in duties and taxes without penalty and interest provided that the applicant files for PDP within 30 calendar days from the payment or accrual of subsequent proceeds to the seller, directly or indirectly, or from the date adjustment to the price paid or payable is made.

### Potential penalties

Section 108 of the CMTA provides for minor penalties for errors in goods declarations and Section 1400 Chapter 1, Title XIV of the CMTA covers the more substantive crimes and other offences. It is worth considering that there are some strong penalty provisions within these sections of the CMTA and that there is currently a CAO under consideration for the implementation of these provisions.

For example, under Section 1400 in cases of misdeclaration, misclassification and under-invoicing or under declaration of value, the BOC can, in addition to the assessed duties, taxes, fees and other charges, impose a surcharge equivalent to 250 percent of the amount of duties and taxes due. That misdeclaration could relate to quantity, quality, description, weight or measurement of the goods. The supporting commercial documents attached to or submitted in support of the goods declaration are considered part of the declaration when determining whether or not there was any misdeclaration or misclassification.

When the misdeclaration, misclassification or undervaluation is intentional or fraudulent, a surcharge will be imposed equal to 500 percent of the duty and tax due and the goods will be subject to seizure regardless of the amount of the discrepancy.

### Comments

- As can be seen from the above information, the need for companies to ensure their operations are in full compliance with their customs and trade requirements is important. Non-compliance has financial as well as other possible future disadvantages.
- We therefore recommend that all companies with a presence in the Philippines who are importing and exporting goods, undertake a review of their customs and trade compliance, including their record retention and the compliance of your third-party service providers.
- If you identify any issues, you can consider a PDP application which you can do independently, or with the assistance of a suitable qualified service provider.
- If you currently do not have customs compliance procedures in place, we strongly suggest that you implement these as quickly as possible. The role of a customs and trade compliance professional is a key role in any company whose products cross borders. In today's compliance environment, it is critically important that there is active communication across the organization as one has to consider not only customs matters but data security, corruption, export controls, cargo security, etc.
- We also recommend proper filing of documents, i.e. ensuring that you have on file:
  - » all contracts and agreements, including any royalty and other agreements;
  - » copies of all standard operating/compliance procedures that are being practiced by the company.

For enquiries related to this Trade Alert, please contact the following or your usual contact at our firm.

## Author

### **Anthony Kerr**

Senior Director

Mayer Brown Consulting

+65 6327 0638

[anthony.kerr@mayerbrown.com](mailto:anthony.kerr@mayerbrown.com)

## Regional Contacts

### **Duane W. Layton**

Partner, Washington DC

T: +1 202 263 3811

E: [dlayton@mayerbrown.com](mailto:dlayton@mayerbrown.com)

### **Sydney H. Mintzer**

Partner, Washington DC

+1 202 263 3866

[smintzer@mayerbrown.com](mailto:smintzer@mayerbrown.com)

### **Eduardo Molan Gaban**

Partner, São Paulo

+55 11 2504 4639

[egaban@mayerbrown.com](mailto:egaban@mayerbrown.com)

### **Paulette Vander Schueren**

Partner, Brussels

+32 2 551 5950

[pvanderschueren@mayerbrown.com](mailto:pvanderschueren@mayerbrown.com)

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