



# Professional Association of Exporters and Importers

*“Leaders and Partners in Worldwide Regulatory Compliance”*

September 2008

Volume 22, Number 4

## PAEI Board of Directors: Call for Nominations and Letters of Intent

By Jo-Anne Daniels, PAEI President & Director

### It is time to elect new Directors for the Board of PAEI.

This year we have three PAEI Board of Director positions open for the term which begins 2009 and ends 2011. We want to welcome new members to sit on the Board for the next three years.

PAEI was formed over 20 years ago in response to the changes in export controls with the mission to offer quality educational programs, and networking opportunities to those professionals involved in import and export activities. The board is looking for new ideas and opportunities to make an investment in the education of our members.

Holding a PAEI board position is your door to opportunity. Many members have shared with us that they learned about their current position through PAEI and others related that they found opportunities through networking that led to career advancement.

I would like to thank each and every member who would consider running for a Director position. The door is open at PAEI and we value new talent and energy. Please give me a call on 650 438-1411 or e-mail me at [jo@trade-resources.com](mailto:jo@trade-resources.com) and I will answer your questions about the Director position and responsibilities. I look forward to hearing from you

and hope to receive your nomination and completed [letter of intent](#).

Sincerely,

Jo-Anne Daniels

PAEI President & Board Member

Trade Resources & Associates, President

650 438-1411 [jo@trade-resources.com](mailto:jo@trade-resources.com)

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## A quick overview of USA and European Union Trade Compliance Programs

By Anne van de Heetkamp,  
PAEI VP of Administration

Slowly, yet undeniably, US and European compliance systems are converging. From the main importing and exporting programs to supply chain security measures, programs with similar if not identical features are being set up. In addition, new initiatives that are being deployed by the EU are also being adopted by the US, and vice versa.

### Import Compliance/Filing

In the European Union, self filing and simplified procedures to decrease border wait times have been in place for over a decade. With ACE, the US is moving towards a system resembling the European Union's model. In all likelihood, the result will be that more brokerage type activities will be performed in-house by the large multinationals, rather than outsourcing these activities to traditional customs brokers.

### Export Compliance/Filing

What once was very much a US only program, many export controls programs initiated in the US are now followed and implemented globally. The EU has had a Export Commodity Control Number (ECCN) compliance system in place (in Europe ECN for Export Control Number) for years, and it is being fine-tuned and more broadly applied. Also, more countries in the EU are maintaining local restricted party lists on top of the EU centralized denied party list, and one can expect renewed focus on ITAR/USML type of programs down the stretch.

### Supply Chain Security

The security initiatives deployed throughout the Supply Chain, have affected compliance personnel in several ways. Typically, they have included confirmation that parties to the supply chain are verified as

'good guys', or that administrative requirements are going to be put in place to allow officials further insight into shipments. C-TPAT ('good guys' verification) and 10+2 (shipment insight) are security initiatives initiated in the US. The European Union has its own version of C-TPAT: Authorized Economic Operator (AEO). The EU has been working with advanced notices and clearance based on the importer's administration as opposed to just the physical movement of goods for a long time.

### Duty Relief Programs

There is currently less development in the duty relief program area. Arguably, this is related to the lower overall duty rates. The EU and US programs have been comparable for years already. The bonded warehousing and FTZ programs are fairly similar both in pursued results and setup.

In 'exchange' for the US' drawback and US goods returned, the EU supports Inward Processing Relief (IPR) and Outward Processing Relief (OPR). The main difference in these programs are:

- In the EU, a license to apply the duty relief needs to be obtained prior to first shipment;
- In some cases the duty relief qualifications are different (OPR v. drawback);
- The US program is more restrictive as to what processes can be performed outside the US before the goods are returned (for example: textiles can only be sewn together abroad, not cut and trimmed whereas in the EU additional processes on exported fabric is allowed).

In conclusion, it is highly likely that when you are looking for a EU program that provides you with benefits similar to your US programs, there is a program available. It is just a matter of complying with the different requirements in order to benefit from them.

## Recap: WCO “Getting to Grips with Origin” Seminar

By Anne van de Heetkamp, PAEI VP of Admin.

On June 16 and 17, the WCO held its first ‘Origin’ seminar since 2004. A broad range of speakers from government, institutions like the WCO, WTO, the European Union, and industry (companies, service providers, lawyers) gave insight into developments, issues and current status of both non-preferential and preferential origin programs.

According to research, amongst others from professor Oliver Cadot (University of Lausanne), the costs of complying with the Free Trade Agreement (FTA) requirements (Rules of Origin), are 2 to 15%. This high number has affected the ‘usage rate’ of the FTAs and is the reason why still a large number of imports on FTA tradelanes are not taking full benefit from the FTA in place. The movement in both the EU and US to make importers more responsible for FTA compliance (versus relying on the exporter’s statement), may increase the costs of compliance even further and could result in even lower usage of FTAs, especially in cases where the difference between MFN and FTA rates is low or decreasing. An interesting solution to this problem was offered by industry. Mr. Petzold from Delphi suggested that Incoterms could be shifted to DDP, which implies the exporter would become the importer of record and would have the burden to fulfill all the relevant requirements to import while applying the preferential rates.

Two other developments were broadly discussed. Firstly, Mr. Eki Kim of the WTO shared his proposal on the Uniform Rules of Origin for non-preferential origin. Since 1995 Mr. Kim has worked at the WTO in this sub-committee, and in February of 2008, the 2<sup>nd</sup> version of the text passed. If adopted by WTO/WCO members, the non-preferential Rules of Origin would be standardized and the non-preferential origin determination process would become similar if not identical

for over 100 countries. The proposal can be found on the WTO website, and the reference is CG/RO/W/111/Rev.2. Related to this development, the US also has issued proposal for new legislation for non-preferential origin determination (look at <http://frwebgate2.access.gpo.gov/cgi-bin/PDFgate.cgi?WAISdocID=993231503622+0+1+0&WAISaction=retrieve>)

Secondly, the WCO itself presented various developments on training and trade facilitation. Most importantly from an Origin perspective, they presented in the week of June 25 (internally for now) a database that allows users to search for Rules of Origin on preferential tradelanes. The tool is likely to be deployed on the WCO website later this year.

## Customs Issues with Vendor Managed Inventory Programs\*

By Steven W. Baker\*\*, PAEI Member

### I. Introduction

Vendor Managed Inventory (VMI) programs have become an important tool in supply chain operations. When the vendor is located in another country, however, and the goods must cross an international border, significant Customs and tax issues can arise. Delaying the shift in ownership (passage of title) can affect the right to make entry, have an impact on determining the appropriate Customs value, may incur certain tax responsibilities and can subject a foreign vendor to the legal jurisdiction of the delivery location.

VMI programs may be established by vendors to better serve distributors or end users, or be required by purchasers to reduce costs and improve timely supply. In operation, the manufacturer or vendor is responsible for maintaining the inventory of the customer, based

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on access to the customer's inventory and usage data. The process requires a significant level of information sharing and cooperation among the parties.

In the "traditional" type of international business transaction, the buyer makes a purchase from a foreign manufacturer or vendor, and either arranges for the transportation of the goods and entry into the buyer's country, or pays the seller to perform some or all of the transportation and entry responsibilities. When the goods reach the importing country, a sale has already occurred, and in most circumstances there are no issues regarding the right to enter the goods or a method to satisfy Customs valuation requirements. After entry into the destination country, the purchaser owns the goods, and is responsible for any tax implications. The seller can usually arrange the transaction so that it does not become subject to the jurisdiction of the importing country.

VMI programs, on the other hand, usually require that the goods be held in inventory near the purchaser's location or locations, whether for supply as parts for manufacturing operations or inventory for a retail operation. Title to the goods, and responsibility to make payment, generally does not pass from the seller to the buyer until the goods are withdrawn from warehouse, or, perhaps, delivered to the customer's location. The price for the goods may not be determined until the withdrawal from warehouse or delivery to the customer's facility. The foreign manufacturer or vendor must use or establish a branch office, subsidiary or appropriate agents to hold and manage the inventory and process its release. Integrated logistics companies are often engaged to transport, warehouse, repackage, and ship the goods to the purchaser.

For the purposes of this article, the specific laws and policies discussed and procedures reviewed will relate

to an import transaction into the United States. Similar issues will exist, with possible small differences due to the requirements of different importing countries, where another destination country is involved.

## **II. Right To Make Entry**

The United States restricts the right to make entry of merchandise into the country to the owner or purchaser of the goods, or a formally authorized party with a financial interest in the goods, such as a commission agent; or to a licensed customs broker.<sup>1</sup> Due primarily to the responsibilities and liabilities imposed on the Importer of Record (IOR), few customs brokers, other than those performing courier services, are willing to act as an IOR.

In the "traditional" transaction described above, even if the seller is arranging for the transportation of goods to the United States, the buyer has already made a purchase, so that it can act as the IOR as a purchaser. In VMI operations, however, no sale to the final buyer takes place until after the goods have arrived and been warehoused at some location in the United States. In certain situations, US Customs and Border Protection (Customs) has found an "agreement to sell" that allowed the prospective purchaser to act as the IOR, although value was based on actual sale prices of identical merchandise.<sup>2</sup> In other situations, however, Customs has found that there was no sale at the time of importation.<sup>3</sup> Therefore, the vendor, as the owner of the merchandise, is normally responsible for entry of the goods. Also, in many situations the purchaser will require the vendor to take on the importing obligations as part of its contract.

A foreign company or individual can legally act as importer of record into the United States. However, any such transaction by a corporation must involve an agent resident in the United States (often fulfilled by a

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licensed customs broker) to whom that foreign party has granted authorization to serve as the agent for service of process in connection with any legal proceedings which may relate to that importation. A non-resident importer must also have the bond required for entry issued by an authorized resident surety company.<sup>4</sup> In some instances, a foreign vendor may have an established or newly formed subsidiary in the US act as the importer of record, either as an agent for the foreign seller or as a “middleman” technically purchasing and then managing the inventory before re-sale to the ultimate purchaser. Unless the agent or subsidiary has an established financial record sufficient for underwriting by a surety company, however, the foreign seller may be required to provide sufficient collateral (such as a standby letter of credit) for the bond amount.

### III. Customs Value

Under the Customs laws, both in the United States and in all countries that are members of the World Trade Organization (WTO), the preferred basis for determining value for Customs purposes is “transaction value”.<sup>5</sup> Transaction Value is defined as “the price paid or payable for the merchandise when sold for exportation to the United States”.<sup>6</sup> There are certain specified adjustments which may or must be made in appropriate circumstances. Use of this basis of valuation does, however, require an actual sale transaction.

Merchandise imported by vendors in VMI operations ordinarily has not yet been sold at the time it enters into the United States, and the transfer occurs of goods owned by the same party both before and after entry. In some instances the end purchaser may act as importer of record based on an “agreement to sell” although an actual sale has not yet occurred. Alterna-

tively, there may be a “sale” to a subsidiary, but the actual price at which the goods are sold (both by the vendor to the subsidiary, and by the subsidiary to the purchaser) may not be determined until the ultimate sale by that middleman subsidiary to the end purchaser. In all of these situations, creative solutions may be required to determine a value which will be acceptable to the Customs authorities for entry purposes.

In certain situations, Customs has found that the agreement between the vendor and the purchaser, although not constituting a sale at the time of importation, is still sufficiently binding that transaction value can be directly applied. In a 2007 ruling, Customs found that the purchaser was obligated to buy the imported inventory and also obligated to make payment for that inventory within 63-days even if it had not yet been removed from inventory. This was sufficient to allow a finding that a sale for exportation did exist, and the invoice price for the international shipment was an acceptable Customs value.<sup>7</sup>

More commonly, however, where the purchaser may not have an absolute obligation to buy merchandise from the imported inventory, and where the actual price paid or payable by the purchaser is not determined at the time of import, but rather at the time of withdrawal, Customs has determined that no transaction value exists. Whether the shipment is considered a transfer of inventory from one location to another, or a consignment to an agent of goods for future sale, no bona fide sale exists at the time of entry.

In the absence of a transaction value, the valuation statute provides a hierarchy of alternatives. These include the transaction value of identical or similar merchandise, deductive value (based on the price at which merchandise is sold in the US in its condition as imported), and computed value (based on the material

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and processing costs incurred in producing the merchandise.) If the vendor is selling the same product, or it or a competitor is selling a similar product, into the United States, it is possible that a transaction value for identical or similar merchandise can be found. Generally, however, either the information regarding competitor's sales activities are not available, or the product is being sold by the vendor only to a single customer (including customer branded items) so that it will not be possible to determine a transaction value for identical or similar merchandise.

Deductive value is commonly unavailable, because it must be based on sales of the actual merchandise imported into the United States in the greatest aggregate quantity at or about the time of importation or before the close of the 90<sup>th</sup> day after the date of importation. Where goods are held in inventory in excess of 90-days, or where procedures do not allow for the identification of specific products withdrawn from inventory to specific Customs entries, it may not be possible to make the necessary calculations. Computed value can only be used when the vendor is willing to provide the specific detailed information required by US Customs.

The final method of valuation available, often known as "the fallback method", is to determine the value for the goods derived from the statutory provisions, but "reasonably adjusted" as necessary to arrive at a value. In a number of situations, Customs has used this fallback method to determine the appropriate value for consigned inventory.

In one ruling, Customs found that, although the commercial invoice which accompanied the shipment to the United States was not the agreed upon price for the merchandise when withdrawn from inventory for delivery to the purchaser, most products remained in inventory for only a short period of time, and the price

paid at release was normally the same as that on the international invoice. In another ruling, Customs found that the price at the time of export (which was reflected on the invoice accompanying the shipment) would match the price for goods withdrawn from inventory on that same date. Again, based on the "just in time" process meaning goods remained in inventory for only a limited period of time, use of the invoice reflecting the price in effect for inventory withdrawals on the date of export was allowed as a reasonable adjustment to transaction value. A third ruling involves international commercial invoices that reflected the most recent purchase order paid on withdrawal of the goods from inventory, treating this as a reasonable adjustment to transaction value.<sup>8</sup>

Many value issues (and right to make entry and taxation issues) can be resolved by the use of a US based sales subsidiary. If the subsidiary makes an arms length bona fide purchase of the goods there can be a valid transaction value. However, if the final price between the vendor/parent and sales subsidiary remains dependent on the price of the final sale to the end customer, the sales subsidiary acting as importer may have to use the reconciliation procedure established by Customs (if applicable) or consider the use of alternative valuation procedures. Prior notice to, and perhaps formal approval by, Customs may be necessary as well.

The importer, whether it is the foreign vendor, a US subsidiary, or the purchaser of consignment goods, has the obligation to value the goods, using reasonable care based on the applicable Customs laws. A recent court case, although not involving VMI merchandise, did review a situation where a "provisional" invoice was issued and used as the basis of value at the time of filing the entry. Customs was not advised that the invoice was "provisional" nor was Customs ever advised

*(Continued from page 7)*

of additional payments made to the seller when the transaction was “settled” and a final invoice issued at a later date. The Court agreed with Customs that the importer had intentionally provided an invoice which it knew did not reflect the final transaction price, without advising Customs of that fact. This was found to be a fraudulent act, and the importer was subject to a multi-million dollar penalty in addition to payment of lost revenues and the interest thereon<sup>9</sup>.

Small differences in the details of the transaction, or the availability of alternative values, may have significant effects on the application of the value statute. Importers of VMI merchandise must take special care to understand the true nature of the transaction, apply the valuation requirements, and establish an ongoing program to ensure compliance with Customs requirements.

#### **IV. Responsibilities of Importer of Record**

An Importer of Record (IOR) incurs legal responsibilities by the act of filing a Customs entry. Whether this is done directly by the foreign vendor, or by its agent or subsidiary, the IOR is responsible for supplying true and correct information to US Customs regarding the nature of the goods and their value, including using reasonable care to classify and value the goods for entry purposes; and for ensuring the goods meet all country of origin marking requirements, not only of US Customs, but of other government agencies such as the Food and Drug Administration, the Federal Trade Commission, and the Environmental Protection Agency. In addition to marking requirements, many other federal agencies impose further requirements on specific types of products such as drugs, cosmetics, radiation emitting devices (including consumer devices such as televisions and CD players) and so forth. The IOR is responsible for the payment of Customs duties together with any

liquidated damages or penalties that may be imposed in connection with the import process. The importer of record may also, in certain circumstances be responsible for certain product liability obligations.<sup>10</sup>

The importer of record will also be subject to a new requirement for a Security Filing based on a Notice of Proposed Rule Making published by Customs.<sup>11</sup> A Security Filing must be made, for containerized and breakbulk maritime cargo, prior to the loading of the goods for shipment to the United States. It must indicate detailed information regarding the cargo, the importer, the purchaser, and the stuffing of the container or packaging of the goods. This new requirement is expected to go into effect by the end of 2008.

Many government agencies place requirements on manufacturers or producers of various products. These include, in addition to those listed above, agencies such as the Consumer Product Safety Commission (product safety), the Department of Transportation (vehicle safety), the Department of Agriculture (meat and fish, agricultural pests), and the Department of Energy (energy efficiency). When the goods are produced outside the United States, the regulations often treat the importer of record as the manufacturer and impose all of the relevant responsibilities on the IOR.

#### **V. Taxation Issues**

In the “traditional” international sale transaction described above, the foreign vendor sells the goods for shipment to the United States. The sale may be direct to an end customer, or made to a US sales subsidiary. In either event the vendor will ordinarily not have sufficient business connection to the United States to subject it to federal or state taxing authorities, although a subsidiary operation established in the United States would be. In the VMI procedure, however, a foreign vendor arranges for goods owned by it to be imported

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into and held in the United States for subsequent sale in a domestic transaction; that sale could now subject the foreign company to US tax consequences. Tax treaties may define some of these obligations.

In addition to income taxes, goods held for sale in the United States may be subject to state and/or local inventory taxes. Even where a US subsidiary or agent is utilized to take title to and hold the goods, there are potential tax implications due to the delayed nature of many sales transactions (see above), in addition to the tax liabilities applicable to the US agent or subsidiary itself.

In some situations, some of these taxes, such as local inventory taxes, can be avoided by the use of Foreign Trade Zones (FTZs). Duty liability can also be deferred by using FTZs or Customs Bonded warehouses. Because those options are generally more costly than privately owned or public warehouse space, the relative cost and savings must be carefully examined.<sup>12</sup>

## VI. Conclusion

Establishing a vendor managed inventory program where the inventory merchandise is imported from another country adds substantial levels of complexity to the process. Vendors must be aware of possible legal restrictions on the ability to file an entry, complexities in the Customs valuation process, the responsibilities that are taken on by an Importer or Record, and possible exposure to the taxing authorities in the importing country. Purchasing companies having vendors manage inventory on their behalf should be aware of how their product supply process may be affected by these issues.

VMI programs are now an integral part of supply chains, and have been proven to provide savings and other benefits when properly planned and imple-

mented. Care should be taken to understand the Customs issues that may be involved whenever establishing such a process, and to conduct appropriate reviews to ensure ongoing compliance.

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## ENDNOTES

<sup>1</sup> 19 USC 1484

<sup>2</sup> HQ ruling 548574.

<sup>3</sup> HQ 548273; HQ 548236; HQ 548574.

<sup>4</sup> 19 CFR 141.17, 141.18.

<sup>5</sup> Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994.

<sup>6</sup> 19 USC 1401a(b).

<sup>7</sup> HQ H012659.

<sup>8</sup> See rulings listed in Endnote 3.

<sup>9</sup> United States v. Inn Foods, Inc., U.S. Court of International Trade Slip Op. 07-142, September 25, 2007.

<sup>10</sup> 19 USC 1592; 19 USC 1304; 19 CFR 12; 19 CFR 141.1.

<sup>11</sup> Federal Register January 2, 2008 (Volume 73, Number 1, pages 90-113).

<sup>12</sup> See HQ H017624 for a discussion of Foreign Trade Zone VMI issues.

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**\*\*Steven W. Baker** has specialized in the practice of Customs and International Trade law for more than thirty years. He is a past Chair of the Customs Law Committee of the American Bar Association. After 32 years in San Francisco, his offices are now located in Marin County, California.

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## **Trade Compliance Professionals: A Day in the Life**

**By Tansie Iwafuch, PAEI Director and  
Jo-Anne Daniels, PAEI President & Director**

The PAEI July 16, 2008 event, "Trade Compliance Professionals: A Day in the Life," was given at National Semiconductor Corporation. There were approximately thirty attendees.

Tansie Iwafuchi of National Semiconductor talked about making decisions for choosing a prospective employer, specifically making sure that they share the same level of commitment for compliance that you have. Ms. Iwafuchi spoke about her daily tasks, which she said can include:

- Classifying products for export commodity control numbers
- Releasing customer orders
- Managing Export License Conditions
- Auditing, Testing, Monitoring
  - Systems
  - Transactions
- Monitoring changes in Regulations
- Insuring compliance to US Government Trade Programs: VEU, AES

Fatima Guadamuz-Cabral, Manager of Import Operations at Varian gave a powerful and insightful presentation. She spoke to the audience about being in the right place at the right time, and taking the opportunities that are presented to you. She spoke of her lifelong dream of teaching, and how she translated this dream into an instructor position at Skyline College teaching Customs Broker Services & Regulations. Ms. Guadamuz-Cabral also spoke about the importance of auditing your brokers, and stated if

your brokers are out of control, your compliance program may well be out of control as well.

Jo-Anne Daniels, President, Trade Resources & Associates. Ms Daniels spoke about Trade Consultants who are experts in global trade. She advised that consultants are experienced export/import practitioners who may be attorneys or customs brokers. The Trade Consultant will provide services and guidance to exporters and importers who might have violated trade laws or instruct companies how to build and sustain a sound trade compliance program. Trade Consultants can assist the client avoid or mitigate enforcement action or penalties by assessing corporate trade deficiencies and recommending corrective action.

## **"C-TPAT Updates"**

**By Jo-Anne Daniels, PAEI Director & President**

June 26, PAEI proudly presented the third annual C-TPAT seminar, The C-TPAT Update, with Bernice Conley, Supervisory Supply Chain Specialist, Los Angeles/Long Beach Field Office and Dave Perez, Xilinx Corporation.

PAEI welcomed back Bernice Conley. Her presentation was entitled "Program Updates" and Strengthening the Customs Trade Cooperative Partnership" Some of the topics of interest were the review of minimum-security criteria, mutual recognition agreements, and supply chain security performance measurements. She also talked about continued efforts with China Customs, 3rd Party logistics providers, portal enhancements, and the Safe Port Act. As of June 2008 there are 8,363 Certified Partners. She told the attendees that there about 533 C-TPAT suspensions/removals. One of the highlights of the

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presentation was the information about security breaches discovered by CBP. There were some amazing photos of vehicles containing illegal narcotics and illegal that were smuggled in vehicles attempting to cross borders into the U.S.

Supervisory Supply Chain Security Specialist  
L.A./L.B C-TPAT Field Office Supervisory Supply Chain Security Specialist  
L.A./L.B C-TPAT Field Office

PAEI was very fortunate to have Dave Perez, Xilinx Global Trade Compliance present "C-TPAT Importer's Perspective," Dave's discussed the C-TPAT application process, security profile, self validation, testing process and the actual validation day.

Dave shared lessons learned which were "you don't know anything until you test." He interviewed the people who were doing the actual work and physically inspected Xilinx facilities to insure his company was prepared for its Validation.

He also generously shared his assessment findings including a C-TPAT Security Questionnaire Score Card.

As a result of Xilinx preparedness and hard work, Xilinx was commended for "rare results." CBP stated Xilinx clearly demonstrated best practices in almost every criteria category.

PAEI appreciates the knowledgeable speakers for this event, who provided valuable information at their own time and expense.

## **PAEI's Quarterly Luncheon with Mr. Larry Sullivan, BIS West**

**By Loree Stevens, PAEI Director**

On September 3, 2008, the Professional Association of Exporters and Importers (PAEI) hosted their Quarterly Luncheon at the Biltmore Hotel in Santa Clara, CA. We were very fortunate to have Mr. Larry Sullivan as our guest speaker. Mr. Sullivan had replaced Ms. Jo Allyn Scott from the San Jose Department of Commerce, Bureau of Industry and Security in late 2007.

At the beginning of the luncheon, PAEI's President and Director, Jo-Anne Daniels gave a brief comprehensive summary on PAEI's last quarter of events and future events that will take place this year and early next year. Then Jo-Anne Daniels introduced Mr. Larry Sullivan to the audience.

This was Mr. Sullivan's first speaking engagement for PAEI who gave an overview of the Export Control System under the Commerce Department. There were forty (40) attendees, who thoroughly enjoyed Mr. Sullivan's presentation. Mr. Sullivan gave us an historical background of the Commerce Department, examples of multilateral cooperation, the U.S. Government Agencies that the Bureau of Industry and Security (BIS) works with, what is subject to the Export Administration Regulations (EAR) and reasons for controls to name a few of the items presented.

The luncheon attendees had many questions afterwards, which Mr. Sullivan was happy to answer.

PAEI would like to thank Mr. Sullivan for taking time out of his very busy schedule to be PAEI's guest speaker; his presentation was extremely informative and educational for all attending.

## "Export Controls in One Page" (Source: Author)

\* Author: Kevin Wolf, Esq., Bryan Cave LLP, 202-508-6113, [kwolf@bryancave.com](mailto:kwolf@bryancave.com)

Reprinted from the August, 2008 NGC Ex/Im Daily Update

I was asked by a client to reduce all of export control decision-making down to one page. This is what I wrote.

### REQUIRED QUESTIONS TO ANSWER BEFORE ENGAGING IN AN EXPORT TRANSACTION:

- (1) What is at issue, i.e., hardware, software, or information ("item"), or a service?
- (2) What is the jurisdictional status of the item or service, i.e., is it controlled by the Export Administration Regulations ("EAR") or International Traffic in Arms Regulations ("ITAR")?
- (3) What is the classification status of the item or service, i.e., if EAR-controlled, what is its Export Control Classification Number ("ECCN"), or, if ITAR-controlled, what is its U.S. Munitions List ("USML") subcategory number?
- (4) Does the applicable ECCN or USML subcategory require a license or other authorization for exports to the country or the foreign persons (even if in the U.S.) at issue? (If EAR, check "Reasons for Control." If ITAR, worldwide.)
- (5) If so, are there any exceptions or exemptions in the EAR or ITAR, as applicable, that would allow the item or service to nonetheless be exported without a license?
- (6) Regardless of the answers to the foregoing questions, is a General Prohibition applicable to the transaction, i.e., is there a prohibited end-use (e.g., one related to weapons of mass destruction), prohibited end-user (e.g., a Specially Designated National ("SDN")), prohibited destination (e.g., an embargoed country), or knowledge that a violation or other red flag exists in connection with the item or service?
- (7) Regardless of the answers to the foregoing questions, are there any applicable licenses, license conditions, or provisos that affect or limit the proposed activity?
- (8) Regardless of the answers to the foregoing questions, are there any known U.S. Government concerns or issues, from a policy or other perspective, with respect to the proposed transaction?
- (9) Regardless of the answers to the foregoing questions, will all registration, recordkeeping, and document creation requirements be satisfied with respect to the proposed export activity?
- (10) Are there related limitations or issues, such as those imposed by contract terms, payment issues (e.g., with letters of credit); intellectual property rights, internal business policies, conflict of interest rules, foreign export and import laws, or hazardous materials or other safety-related regulations?

*The Northrop Grumman Corporation Law Department sends the NGC Export/Import Daily Update ("The Daily Bugle") every business day to nearly 2,000 subscribers to help NGC employees, customers, and others comply with U.S. defense and high-tech trade restrictions and Federal business ethics regulations.*

## **CBP Clarifies Declaration Requirements For Imports Under “First Sale Rule” And Delays Implementation Until September 20, 2008**

**By George R. Tuttle, III PAEI Member**

In a notice published August 20, 2008, CBP issued guidance to the importing community on satisfying the requirement that importers using the “first sale” value when declaring the value of goods provide a declaration by entering an "F" next to the declared value at the line level on CBP Form 7501 or the electronic filing equivalent.

This notice may be accessed at: [http://customs.gov/xp/cgov/trade/trade\\_programs/cargo\\_summary/first\\_sale/grace\\_period2.xml](http://customs.gov/xp/cgov/trade/trade_programs/cargo_summary/first_sale/grace_period2.xml).

CBP has also said that in order to permit the trade sufficient time to comply with the requirements in the First Sale Declaration, and thereby ensure the integrity of the data collected on importations, it will delay the enforcement of the First Sale Declaration Requirement for 30 days. **Thus, CBP will commence the enforcement of the data collection requirements contained in the First Sale Declaration on September 20, 2008.** Entries subject to the First Sale Declaration Requirement made between August 20 and September 19th will require a post entry amendment.

### **Background: Proposed Elimination Of The First Sale Rule**

In January 2008, CBP proposed to eliminate the use of the First Sale rule for purposes of determining the imported value for certain types of import transactions ([Proposed Interpretation of the Expression “Sold for Exportation to the United States” for Purposes of Applying the Transaction Value Method of](#)

[Valuation in a Series of Sales](#)) (73 Federal Register page 4254, January 24, 2008).

In a traditional single-tier import transaction, the purchaser of the goods is located in the U.S. and is also acting as the importer of record. The exporter is a foreign party and the seller of the goods. If the parties are unrelated and there are no other circumstances that affect the purchase, the Customs value of the goods will be the price paid by the U.S. purchaser to the foreign seller for the imported merchandise.

Sometimes, however, the foreign seller of the goods purchases the goods from another party and then resells the goods to the U.S. purchaser. This is often referred to as a multi-tiered transaction, with the reseller acting as a middleman between the actual manufacturer and the U.S. purchaser.

Based on a number of court decisions and resulting administrative practice, if, in a multi-tiered import transaction, the sale between the foreign manufacturer and the foreign middleman “caused the imported goods to be exported to the United States,” then that “first sale” can be used as the reported value for customs purposes, rather than the selling price between the foreign middleman and the U.S. purchaser/ importer. This results in a lower declared import value.

In its proposed rule, CBP proposed a new interpretation of the phrase “when sold for exportation to the United States” when the goods were the subject of a series of sales prior to importation. CBP wanted it to be the “price paid in the last sale occurring prior to the introduction of the goods into the United States”, explaining that the transaction value will normally be determined on the basis of the price paid by the buyer in the United States.

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### **Legislative Response: The Farm Bill And The First Sale Declaration**

Because of the significant opposition by the importing and legal community, Congress got involved; and as a part of the Food, Conservation, and Energy Act of 2008 (the Farm Bill), included Section 15422, which barred CBP from making any changes to the interpretation of the phrase “when sold for exportation to the United States” before January 1, 2011.

In so doing, however, Congress included a section that requires importers that base their imported value on the “first sale” of a multi-transaction sale, to disclose this to CBP at the time of entry. Subparagraph

(a) of Section 15422, provides:

(a) Requirement on Importers-

(1) IN GENERAL- Pursuant to sections 484 and 485 of the Tariff Act of 1930 (19 U.S.C. 1484 and 1485) . . . U.S. Customs and Border Protection shall require each importer of merchandise to provide to U.S. Customs and Border Protection at the time of entry of the merchandise the information described in paragraph (2).

(2) INFORMATION REQUIRED- [A] declaration as to whether the transaction value of the imported merchandise is determined on the basis of the price paid by the buyer in the first or earlier sale occurring prior to introduction of the merchandise into the United States.

Using this information, CBP is to submit monthly reports to the United States International Trade Commission on the number of importers using “first

sale”, the HTS of the goods, and the value.

The effective date of the declaration requirements in the Farm Bill was 90 days from the date of enactment. The Farm Bill was enacted on May 22, 2008 (becoming Public Law No: 110-234). Therefore, the requirement for importers to provide a first sale declaration was August 20th.

Due to a number of factors CBP was not prepared to implement its declaration requirements in sufficient time to allow importers to meet the August 20th deadline. As a result, CBP is postponing the first sale declaration requirement for 30 days until September 20, 2008.

### **Impact of New Declaration Requirements**

The impact of the new declaration requirements may be significant for importers that make use of the First Sale rule. Prior to this requirement CBP did not have visibility as to which importers were making use of the rule. Now, CBP will be able to identify and target these companies for follow-up and quick review audits to ensure that importers are properly complying with the requirements for using the first sale rule.

T.D. 96-87 sets forth the documentation and information needed to support a determination that transaction value should be based on a sale not involving the U.S. importer in a multi-tiered transaction. It requires an importer to provide (1) a detailed description of the roles of each of the parties involved in the multi-tiered transaction and (2) a complete paper trail relating to the imported merchandise that shows the structure of the entire multi-tiered transaction. Specifically, T.D. 96-87 requires an importer to have documentary evidence that establishes (1) that the alleged sale of the imported merchandise was a bona fide sale; (2) that the merchandise was clearly destined for exportation to the United States; and (3)

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that the alleged sale between the middleman and foreign manufacturer was at arm's length.

In order to establish that merchandise is clearly destined for exportation to the United States in a multi-tiered transaction, there must be a complete paper trail relating to the imported merchandise that shows the structure of the entire multi-tiered transaction. This would include invoices, sales contracts, purchase orders, proof of payment, shipping contracts or other documentation for each individual transaction involved in the multi-tiered transaction with consistent prices, dates, parties and merchandise.

Importers that do not have the appropriate documentation and other evidence available to support use of the first sale rule may have their goods re-appraised at a higher value, face additional duties, and possible 1592 penalties for negligence, or a Quick Response Audit.

More information on the first sale rule can be found in Customs Informed Compliance Publication on Bona Fide Sales & Sales For Exportation To the United States at: [http://www.cbp.gov/linkhandler/cgov/trade/legal//informed\\_compliance\\_pubs/icp010r2.ctt/icp010r2.pdf](http://www.cbp.gov/linkhandler/cgov/trade/legal//informed_compliance_pubs/icp010r2.ctt/icp010r2.pdf).

We would be pleased to assist in explaining how this rule may affect your company.

*For more information regarding these issues, contact George Tuttle, III at (415) 986-8780 or [geo@tuttlelaw.com](mailto:geo@tuttlelaw.com).*

*George R. Tuttle, III is an attorney with the Law Offices of George R. Tuttle in San Francisco.*

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## Upcoming Events

### Mark Your Calendars!

- **September 24 - 25, 2008**  
BIS "Complying with U.S. Export Controls"
- **January 13 - 14, 2009**  
BIS "Complying with U.S. Export Controls"
- **January 20, 2009**  
"ITAR Compliance Regulations"
- **May 19 - 20, 2009**  
BIS "Complying with U.S. Export Controls"
- **May 21, 2009**  
BIS "Technology Controls"
- **September 23 - 24, 2009**  
BIS "Complying with U.S. Export Controls"

**Watch the PAEI Web site for these  
and other events,**

**<http://www.paei.org>**

### PAEI Members Share Your Insights!

The P.A.E.I. Newsletter is a publication that is written by its many members. If you have an article you have written, or have any web site that you would like to share with your fellow PAEI members in the next newsletter, please contact:

Karen Hebert at [khebertdms@aol.com](mailto:khebertdms@aol.com)



**The Bureau of Industry and Security**  
**Cosponsored by: The Professional Association of**  
**Exporters and Importers**



**Presents**

**"Complying with U.S. Export Controls"**

**September 24 – 25, 2008**  
**San Jose, California**

This two-day program is led by BIS's professional counseling staff and provides an in-depth examination of the Export Administration Regulations (EAR). The program will cover the information exporters need to know to comply with U.S. export control requirements on commercial goods. We will focus on what items and activities are subject to the EAR; steps to take to determine the export licensing requirements for your item; how to determine your export control classification number (ECCN); when you can export or reexport without applying for a license; export clearance procedures and record keeping requirements; Export Management Compliance Program (EMCP) concepts; and real life examples in applying this information. Presenters will conduct a number of "hands-on" exercises that will prepare you to apply the regulations to your own company's export activities. This program is well suited for those who need a comprehensive understanding of their obligations under the EAR. **This program will also include an overview of the unique provisions related to encryption under the EAR.**

**About the Instructors:**

The instructors are experienced export specialists, and enforcement personnel from BIS's field offices and other agencies. The instructors will be available throughout the seminar to answer your questions.

**Location/time:**

San Jose Holiday Inn, 1740 North First Street, San Jose, California 95112. Registration will begin at 7:30 am on September 24, 2008. The program will begin at 8:30 am on September 24, 2008, and end on September 25, 2008 at 4:30 pm.

**Accommodations:**

Please make your reservations directly with the San Jose Holiday Inn by calling (408) 793-3300, or (800) 315-2621. Please mention "PAEI" to obtain a discounted rate of \$135. Reduced rate rooms available until September 15, 2008.

**Registration:**

The cost of this seminar is \$325. Breakfast, lunch, breaks and training materials will be provided both days. Please no telephone, or fax registrations will be accepted. All registrations must be processed using our on-line processing system using a credit card. No checks will be accepted. No registrations will be accepted after September 19, 2008. NO REFUND FOR CANCELLATIONS MADE AFTER September 12, 2008 12:00 noon.

You may register for this seminar and pay by credit card direct at:

<http://www.acteva.com/booking.cfm?bevaid=161517> You may also visit the PAEI Website at <http://www.paei.org> (We accept VISA, AMX, or MasterCard)

PAEI Tax ID# is 680117035. For registration questions, please contact Karen Hebert, PAEI Admin. Services at: (408) 532-7234. A confirmation email will be sent to all attendees.

**Other Questions?**

For more information or questions on the topics to be covered, please call BIS's Western Regional Office at (949) 660-0144 or (408) 998-8806 or [Email us.](mailto:)



## WATCH US GROW!

Travis Huckaby

Verigy US Inc.

### June 2008

#### New

Alan Davis Strategic Solutions Partners, LLC

#### Renew

Sophia Chan Zoran Corporation  
 Lee Delos Reyes Zoran Corporation  
 Susan Leavitt Geometrics Inc  
 Archibong J. Ituh

#### Renew

Alden Neilson Wyse Technology  
 Yvonne Angelo JSI Shipping  
 Bobby Solis JSI Shipping  
 Joannie Montagne

### September 2008

#### New

Mark Casper Maim Integrated Products, Inc  
 John Manalo LSI Corporation  
 Maria Legaspi LSI Corporation  
 Jeanne M. Burns Thornley & Pitt, Inc.  
 Michael Baekboel Thornley & Pitt, Inc.  
 Greg Malter Expeditors International  
 Justin Hill Expeditors International

### July 2008

#### New

David Ricci PLH  
 Uday Solanki  
 Pedro J. Martin Epson Electronics America  
 Patricia Monahan Lansmont Corporation

#### Renew

Richard Tomkins Brocade Communications  
 Bill Butler Teknovus, Inc  
 Daniel Hernandez Applied Materials, Inc.  
 Craig L. Dimick FedEx Express Intl.  
 Evelyn Morales XILINX, Inc.  
 Daved Perez XILINX, Inc.  
 Khaled Hamade CAL MICRO, INC.  
 Jennifer Holden Morgan Advanced Ceramics  
 Colleen Allgeyer Vishay Americas  
 Darlene Shaffer Vishay Siliconix  
 Dan Minutillo DCM APLC

### August 2008

#### New

Doug Treadwell Genesis Engineering  
 Vanessa Rosas Genesis Engineering  
 Lori J. Soares Network Equipment Tech.



## P.A.E.I. Membership Information

*The Professional Association of Exporters and Importers is an organization of professionals involved in import/export activities. Objectives of the association include promoting and fostering the role of the import/export professional, providing on-going education relative to regulatory issues, exchanging information and enhancing industry's participation in import/export control issues and policies.*

*P.A.E. I. sponsors quarterly luncheon meetings with featured guest speakers, a bimonthly newsletter, networking and job placement opportunities.*

*P.A.E.I. membership represents both large and small companies in the high-technology community. Membership is open to all persons interested in personal and professional growth in the international arena. Two types of memberships are available and are valid for one year from date of payment. For more information call the PAEI Message Center at telephone (800) 930-PAEI.*

*Complete this application and return it along with your check. Make checks payable to: Professional Association of Exporters & Importers, P.O. Box 612743, San Jose, CA 95161-2743. PAEI's TAX ID NO: 680117035. You may also pay online for your membership at the PAEI web site <http://www.paei.org/>.*

### Check Membership Choice:

\$25 Student (must be full time student)     \$50.00 Individual     \$150.00 Corporate\*\*

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