

## THE ROLE OF THE CUSTOMS BROKER IN IMPORT TRANSACTIONS

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One of the first items on a businessperson's agenda when he or she becomes involved in importing is to hire a customs broker. Too often this is done with no real understanding of the broker's role in the import transaction and no more care than one gives to choosing a gas station when one's automobile needs refueling. To avoid problems in your import transactions, it is vital to choose your broker with care, to understand the importer's relationship with the broker, and to understand the broker's role in the transaction.

### WHAT IS A CUSTOMS BROKER?

Placed in its simplest terms, a customs broker is an individual licensed by Customs to transact customs business on behalf of others. Customs business is intended to mean those activities involving transactions with Customs relating to the entry and admissibility of merchandise, classification and valuation of merchandise, and the payment of duties and taxes assessed by Customs. To qualify for a broker's license, an individual must take and pass a licensing examination administered by Customs. However, just as in every area of life, the mere fact that an individual has achieved a certain status, in this context a licensed customs broker, does not guarantee the individual's level of competence or the standard of care that will be exercised in fulfilling job responsibilities. Consequently, the mere fact that an individual is a licensed broker does not necessarily mean they are worthy of your company's business.

Another fact of which importers should be aware is that just because your company is dealing with a particular broker does not mean that your import transactions are being handled by an individual who is a licensed broker. The Customs Regulations allow for brokers to hire employees to work under the broker's "responsible supervision." More likely than not, if the importer is dealing with a brokerage operation other than a one-man shop, the importer's transactions are not being handled by an individual licensed by Customs. The transactions are probably being processed by an unlicensed individual employed by and under the supervision of the broker. These individuals are oftentimes clerks, much akin to bank clerks, and their level of competence dramatically varies depending on the individual's intelligence, the amount of training provided by the broker, the individual's level of experience, the amount of supervision exercised by the broker and the broker's level of care and competence. As a consequence of this there are dramatic differences among brokers and the quality of service they deliver. Importers should be aware of these facts when shopping for a broker.

### CHOOSING A BROKER

Hiring a broker is no different than hiring any other employee of your firm. Consequently, extreme care should be taken in the selection process. It is not uncommon for importers to select a broker from the yellow pages of the phone book which is akin to hiring executives for your business by randomly selecting individuals off the street to fill key positions with your organization. Obviously this is not something any organization would do and likewise brokers should not be hired by a random process.

The best advice which can be offered in the selection process of your broker is to treat the process the same as if you were hiring a doctor, lawyer, accountant or any other professional which is what the broker should be. If you apply the same practices in hiring a broker as you would in hiring any other professional the process should hopefully conclude in the selection of the best qualified licensed broker

or brokerage operation available. Before hiring any broker the importer should compile a list of brokers from references available and literally engage in an interview process. Not only should the importer be interested in knowing the level of experience of the broker, but also the types of commodities in which the broker normally deals. The importer should want to know who will be principally responsible for the importer's account, that individual's level of experience and the broker's experience level in handling transactions involving your company's commodities.

The importer should explain to the broker precisely what is expected from the relationship and the importer should inquire of the broker as to the same thing. The broker should be questioned about their own track record with Customs in terms of timeliness of filing entries, penalties and the services the broker offers to clients.

The importer should ask for references from the broker and check with those references. In other words, the importer should go through the same exercise and adhere to the same standard of care that one would in hiring anyone whose work can directly affect the importer's lifeblood, i.e., its very ability to conduct business.

In addition to the foregoing, it is important that price be the very last consideration on the list of criteria for choosing a broker. There is obviously truth in the maxim that "you get what you pay for." While the brokerage business is very price-competitive, the lowest price does not necessarily equate to the best deal. This is one of the reasons that the selection and interview process is so important. You must know what services are being offered and what is included in the price. The cheapest price is not necessarily the best deal if it results in massive penalties, investigations and disruptions to your business.

## THE BROKER'S ROLE AND EXPLODING MYTHS

*Importers must realize that in import transactions with Customs, the customs broker is the importer's agent!* What this means is that as long as the broker is acting on behalf of the importer, the importer is normally going to be held legally responsible for whatever mistakes the broker may make.

It is not uncommon for importers to take the position that mistakes which occurred in their customs transactions (and which were the subject of penalty actions) were not caused by the importer's mistakes but rather were caused by the mistake of the broker. Therefore, the importer believes he or she should not be penalized for an error of the broker. This argument will virtually never prevail and it is a common myth held by most importers that they are not responsible for the mistakes of their brokers. When the importer learns of the fallacy of this belief, it is usually in the form of massive penalties assessed against the importer by Customs and a very strained relationship with the broker.

As previously explained, when the importer hires a customs broker, the importer is hiring someone to act on behalf of the importer's company. There is little difference between hiring a broker and hiring any other employee of your company. The only real difference is that few of your employees are entrusted with the massive responsibility and control over your company's fortunes as is your customs broker. For instance, if the release of merchandise is withheld by Customs for a mistake made in the entry process by the broker, massive penalties may be imposed by Customs. In situations where the mistakes have become engrained in the system, the penalties and the duties due can easily run into the millions upon millions of dollars.

Few employees in an organization have the power to cause as many problems for your organization as does your broker. With this type of responsibility entrusted to a broker, extreme care should be taken in

not only choosing your broker but also in working with your broker.

Normally in an importing operation the broker is the one most knowledgeable about the importer's dealings with Customs. The importer relies upon the broker and oftentimes reveals a great deal of confidential business information to the broker. It is not uncommon that an importer will discuss information with a broker concerning possible violations of customs laws. This frequently takes the form of seeking advice from the broker who the importer sees as more knowledgeable on customs matters. Importers frequently have such discussions with their brokers, again based on a mythical belief that the broker will keep such conversations confidential under all circumstances.

It is true that brokers are bound by both regulation and ethics to maintain their clients' business information in confidence. However, by regulation, the customs broker is also duty bound to make records available to Customs. Likewise, there is no privilege extending to communications between the broker and the importer should Customs be investigating the importer for potential civil or criminal violations of the law. The importer's conversations with the broker are no more privileged than conversations between employees in your firm. The point of this is that your broker is not your lawyer and when you reveal confidential information to your broker, particularly of a type concerning violations of law, you should be aware that such information may eventually be revealed to Customs.

Numerous situations exist where extensive discussions have been held between brokers and their clients regarding violations of customs law including discussions of strategy and tactics of how to deal with the situation. Special Agents of Customs are aware of the degree of reliance importers place in their brokers. Normally, when investigating an importer the first place a Customs Agent goes for information is to the importer's broker. The broker's records relating to the importer are examined which include not only the entry documents themselves but also all written communications between the broker and importer and notes that the broker may have made of conversations with the importer. The broker may also be interviewed by Customs Agents with respect to the broker's knowledge of the importer's transactions. Consequently, when importers are talking with their brokers they should treat the situation as if they were talking on a party line with one of those parties being a Customs Special Agent.

The point of this is not just to alert importers to the fact that they should exercise care in the type of information which is shared with their brokers, but also to alert importers to the fact that they should listen to what their broker has to say and if appropriate to act on the advice rendered by the broker. Brokers are not only bound by the law to avoid engaging in any transaction they view as improper, but they are also directed by regulation to advise importers of circumstances which may be improper and require the attention of the importer. If the broker advises an importer of circumstances that may be a violation of law and the importer takes no action, the importer, in all likelihood, will be assessed a penalty based on fraud should the matter come to the attention of Customs. Basically, Customs will take the position that the importer knew of the violation and took no action to correct it. At the very least when the importer is given counsel by a broker the importer incurs an obligation to check-out what the importer has been told by the broker. By ignoring the advice and suggestions of the broker the importer may well escalate his liability for a violation of law ten-fold.

Oftentimes brokers advise their clients of a potential problem and the client does not even acknowledge the communication from the broker. When such comes out in a civil penalty or criminal action it is inevitably very difficult to counter. The excuses generally offered are that the communication was not seen by appropriate individuals within the importer's company or the importance of the communication was not recognized. Such excuses generally fall on deaf ears when made to a Customs Agent or prosecutor. A portion of the fee the importer is paying to the broker is for the broker's advice, guidance and expertise. The importer should utilize the broker's expertise. Further, the importer must realize that

when advice is received from the broker, whether solicited or not, an obligation is created on the importer to, at a minimum, check-out the advice given and to act on the advice in the appropriate fashion. To ignore the advice or otherwise act as if it was never even received is nothing short of foolhardy.

## COMMUNICATE WITH YOUR BROKER

A common problem between an importer and the broker is a failure to effectively communicate. While the fault for this lies with both importers and brokers the main responsibility must nevertheless fall on the importer. It is not unusual for importers to have very little communication with their brokers other than to alert them to the arrival of a shipment and make payment on the broker's invoice. Documentation from the broker is infrequently reviewed by the importer and the work-product of the broker is almost never checked unless a problem arises. Again, viewing the broker as an employee or agent of the importer's organization, no other employee would be treated in such a haphazard fashion. It is a disservice to both the broker and the importer's organization and more often than not leads to serious problems. As previously mentioned, a mistake by the broker can result in detained merchandise, lost sales and even financial penalties. Against this backdrop, consider how many importers deal with their broker. Communications with the broker are frequently verbal, there is no follow-up in writing, the broker's work-product is not reviewed and oftentimes there is no check to determine if the broker even accurately understood the importer's instructions. Despite the high cost for such inattention, it happens daily.

To effectively utilize the services of a broker the importer must effectively communicate with the broker as would be the case with any other employee of the importer's organization. Mistakes occur every day in customs transactions. When Customs penalizes the importer for these mistakes and the importer attempts to absolve itself of culpability by pointing to broker error there is a series of questions which are invariably asked by Customs. Those questions include:

1. How did the importer communicate instructions to the broker?
2. Were the instructions communicated orally or in writing?
3. Under any circumstances was there follow-up with the broker to assure the instructions were received and more importantly, whether the instructions were accurately understood?
4. How often was the broker's work reviewed?
5. Were entry documents reviewed by anyone in the importer's organization and who reviewed the documents?

Normally, the answers to these questions are that instructions were orally given to the broker with no follow-up and the entries filed by the broker were never reviewed by the importer or anyone in the organization. With these types of answers it is understandable why Customs personnel are unsympathetic to the argument that the importer should not be penalized because the mistake was really the broker's error.

Not only should the importer communicate with the broker to avoid costly penalty situations but the importer should communicate with the broker to enable the broker to do his job. The broker can no more be expected to perform a competent first-class job for the importer without complete and accurate information than can a lawyer be expected to competently defend a client when the client withholds critical information. If information regarding relationships, payment for goods and other critical data is withheld from the broker, the broker cannot adequately advise the importer as to potential problems.

For the importer and the broker to both benefit from their relationship there must be effective communication between the parties. To proceed otherwise is an invitation to disaster.

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