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FCPA

Navigating Anticorruption in Latin America

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In Latin America, navigating the customs clearance process presents significant business and compliance risks for exporters. Customs issues can entangle exporters in any industry, can lead to business disruption and, in some cases, can present heightened anticorruption enforcement risk. Although customs and port officials are viewed to be prone to corruption world-wide, exporters should pay particular attention to the risks presented by their Latin American operations. Each of the 20 countries in Latin America has its own customs and duties laws. Overlaying this framework is a complex set of international treaties and conventions, non-compliance with which can produce repercussions beyond customs-related sanctions. While there is no substitute for local expertise, this article discusses some basic steps that companies may consider to mitigate their customs-related corruption exposure in Latin America (and elsewhere).

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I. CUSTOMS-RELATED CORRUPTION RISKS

Bribes paid to Latin American customs officials have led to a number of Foreign Corrupt Practices Act (FCPA) settlements. Prior Securities and Exchange Commission and Department of Justice enforcement actions have targeted medical device companies, oil services companies, a vitamin supplement manufacturer, an agricultural products importer and manufacturing companies in connection with alleged payments to Argentine, Brazilian, Columbian and Mexican customs officials. For example, in 2009, Helmerich & Payne Inc. agreed to pay $1 million to the DOJ and disgorge over $375,000 to the SEC to resolve allegations that employees and third-party agents made improper payments to customs officials in Argentina and Venezuela, in violation of the FCPA. Similarly, in 2013, Ralph Lauren paid over $1.6 million to resolve allegations that its subsidiaries made improper payments to Argentine customs officials to facilitate importation of the company's products. International regulators also are ramping up their scrutiny of the customs process. In 2015, Guatemalan prosecutors brought criminal charges against multiple public officials, including the country's former president and vice president, for their participation in a wide-ranging customs kickback scheme.

Customs-related corruption risk in Latin America is the product of many factors. At the most fundamental level, customs clearance involves (1) payments (*i.e.*, duties and fees) to government entities, (2) typically transmitted through third-party agents, (3) who have frequent, informal interactions with government officials

(*i.e.*, customs agents), (4) potentially across many ports of entry in the air, ground, and ocean environments.

Commercial considerations can—and frequently do—contribute to environments in which employees or third-party agents (*e.g.*, distributors, sales agents) value expediency over strict compliance with company policies and customs regulations. In many cases, there is a legitimate commercial need for the products at issue to be imported and delivered in a timely fashion. Indeed, depending on the industry or products being imported, Latin America-based subsidiaries and distributors facing customs delays may not have access to local suppliers to meet pressing customer needs. In addition, in some markets, there are statutes regulating the time that products may remain in the customs area prior to clearance. Where potential penalties include additional fees or forfeiture of goods, seemingly routine issues such as volume backlogs, missing or incomplete documentation, or simple incompetence (including on the part of customs agents) can create incentives for improper payments.

Further complicating matters, port-specific standards can create uncertainty as to applicable entry requirements, including those related to tariff classifications of specific categories of products, the product-specific information that must be provided to customs agents at the time of entry, and the documentation required to support preferential duty claims. Frequently, port-specific standards are communicated verbally or inferred from a longstanding course of dealing at a particular port of entry. The risks inherent to non-documented, port-specific standards include that (1) the standards may be revised from time to time at the whim of customs agents (*e.g.*, if customs agents are rotated through different ports); and (2) importers may lack documentation to justify imports made pursuant to then-existing standards, which were subsequently revised. In extreme cases, port-specific standards could conceivably vary within the same port, depending on the attitude, prejudices, or motivation of the specific customs agent or agents on duty.

II. LIABILITY FOR CUSTOMS FINES AND SURCHARGES

Improper payments to customs officials are not the only source of potential liability for exporters. Companies that export products to Latin America may incur substantial liability in unpaid or underpaid duties due to incorrect tariff classifications. As a general matter, the importer of a product—as opposed to the importer's customs broker—is legally responsible for ensuring that imported articles are classified properly. Thus, in practical terms, the risk of misclassification may rest with a manufacturer that exports its products to a Latin American subsidiary for resale. In addition, tariff classifications can be ambiguous, and as a result, different customs brokers may reasonably disagree regarding the appropriate classification of an article. Finally, it is important that exporters to Latin America do not mistake customs officials' failure to assess fines or penalties for incorrect tariff classifications—even over an extended period of time—as evidence of the absence of a systemic classification problem. Due to volume and other considerations, customs agents do not inspect every article that is presented to them for clearance.

III. RISK MITIGATION STEPS

A. Customs Broker Selection

The careful selection of customs brokers is a critical step in mitigating customs-related corruption risk. While conducting robust anticorruption due diligence of prospective customs brokers is important, such diligence may not be sufficient depending upon the market and the availability of public source information. Moreover, some Latin American countries, including Mexico, have enacted laws requiring non-local customs services providers to partner with—or subcontract their operations to—local licensed customs brokers. As a result, it may not be possible to work directly with a global, trusted customs broker in certain markets.

Even where public information about prospective customs brokers is limited, exporters are not without options. For example, membership in a local customs broker association can be an indicator of a prospective broker's reputability, and the association may be a useful source of information during the broker screening process.

B. Written Contract With Fee Schedule

Customs broker relationships should be governed by a written contract. Ideally, the contract should be limited to a term of years, with any extension premised upon the customs broker's successful completion of renewal due diligence. The contract also should include anticorruption and compliance with all laws provisions, as well as a right to audit the customs broker's relevant accounts. In addition, the contract should specify in writing a fee schedule covering all potential fees and costs that the customs broker may charge for its own services or pass through on behalf of third-party vendors (*e.g.*, inspection fees, bonded warehouse costs).

C. Entry Point Control

Each customs entry point within a country presents its own unique combination of compliance and operational risks. Import volumes, staffing levels, and enforcement priorities differ from entry point to entry point, and may lead to significant variations in both customs clearance time and the level of scrutiny that imported articles receive from customs officials. Uncertainty related to the customs process may create incentives for in-country employees or agents to ''shop'' entry points in search of inattentive (or unscrupulous) customs agents. In some cases, in-country employees or agents may attempt to circumvent the customs process altogether by hand-carrying small products from one country to another, in violation of local laws. Although a certain degree of unpredictability is inherent in the customs process, exporters can seek to minimize uncertainty by (1) restricting customs clearance activities to a limited number of pre-approved entry points; (2) negotiating provisions in distributor and sales agents contracts prohibiting the hand-carry of products between countries for resale; and (3) providing training to relevant in-country personnel.

D. Proactive Monitoring

To ensure effectiveness, internal policies and due diligence of prospective customs brokers should ideally be supplemented by proactive compliance monitoring. Monitoring of the customs process can take many dif-

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ferent forms, and the scope of monitoring activities should be tailored to each exporter's individual risk profile.

It is a best practice for exporters to periodically review and test completed import documentation and customs payments. The extent of customs payment testing can be determined based on traditional corruption risk factors, including transaction volume and inherent corruption risk in the market. In some cases, it may be sufficient to conduct remote payment testing, which may be as straightforward as comparing a sample of customs broker invoices against (1) the importing subsidiary's or distributor's payments extract; or (2) the fee schedule in the customs broker's contract, in order to identify potential excess charges or unapproved costs and fees. In other cases, customs payment monitoring may take the form of in-country transaction testing.

Companies that export large volumes of products to Latin America may consider the employment of dedicated trade compliance personnel who are familiar with relevant customs regulations and are capable of drafting and updating policies, developing and delivering training for employees, and conducting proactive monitoring activities. Further, while Spanish and/or Portuguese language ability is undeniably a benefit within Latin America, language skills cannot compensate for lack of experience or subject matter knowledge, or for the inability or unwillingness to self-identify and mitigate potential red flags.

IV. CONCLUSION

Navigating the customs process can present significant compliance challenges for companies exporting products to Latin America. Moreover, regulators around the globe have intensified their scrutiny of customs transactions involving companies within their jurisdictional reach in response to political pressure and, increasingly, in search of revenue for depleted government coffers. In the current enforcement environment, exporters of goods to Latin America have renewed reason to take stock of their trade compliance policies and controls, to avoid being the subject of the next customs-related compliance headline.