

CANADA BORDER SERVICES AGENCY ("CBSA") REVISES ITS POLICY ON CANADIAN CUSTOMS VOLUNTARY DISCLOSURES

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New Voluntary Disclosure Policy Released Late Last Year

Late last year, Canada Border Services Agency ("**CBSA**") released an updated customs voluntary disclosure policy in Memorandum D11-6-4 – Relief of Interest and/or Penalties including Voluntary Disclosure. This policy goes beyond voluntary disclosures to discuss other circumstances in which CBSA would consider granting relief from interest and/or penalties.

The focus of this Bulletin, however, will be on the voluntary disclosure aspects (the "**Current VDP**"). With respect to voluntary disclosures, D11-6-4 replaces the Customs Voluntary Disclosures Program Information for Clients released on December 21, 2001 (the "**Former VDP**"). The Current VDP clarifies certain aspects of the Voluntary Disclosure Program (the "**VDP**") and provides more details on the VDP.

Purpose of the VDP

The underlying objective of the VDP is to promote voluntary compliance with federal customs import and export legislation "by encouraging clients to come forward voluntarily to:

- a. Disclose previously unreported information; or
- b. Correct inaccurate or incomplete information."

Under a valid voluntary disclosure, CBSA may waive penalties and reduce interest by imposing interest at the prescribed rate rather than the higher specified rate (6% per annum higher than the prescribed rate). Importers are still required to pay any duties and taxes owing.

As in the Former VDP, the Current VDP provides non-compliant importers and exporters with the opportunity to seek no-names opinions from CBSA as to whether CBSA would allow a voluntary disclosure in particular circumstances.

Exports

One welcome development is that the Current VDP provides details relating to exporters disclosing deficient

export reporting (at Section III of Appendix B in D11-6-4).

Where the exported goods are controlled or regulated by federal legislation and a permit, licence or certificate is required to export the goods, then the voluntary disclosure would need to be coordinated with the other government department (the "**OGD**") responsible for administering and issuing the applicable permit, certificate or licence. These OGDs are responsible for enforcement of export control contraventions under their respective mandates, and for granting any relief from any such enforcement. In the case of the Department of Foreign Affairs, Trade and Development Canada ("**DFATD**"), DFATD has published its own procedures for making voluntary disclosures.

Conditions for Making a Valid Voluntary Disclosure

As in the Former VDP, the Current VDP outlines the conditions for making a valid voluntary disclosure, which can be summarized as follows in the Current VDP:

- a. It is voluntary.
- b. It involves the potential imposition of a penalty and/or specified interest or the potential of acting against the goods or person involved in the import/export contravention.
- c. It is complete in all material respects.
- d. With respect to regulated or restricted imports and exports and prohibited goods, the special considerations in paragraphs 19 to 24 of D11-6-4 are taken into account.
- e. With the exception of disclosures relating to section 32.2 of the *Customs Act*, the contraventions are non-repetitive and the applicant can satisfactorily explain how the non-compliance occurred and how it has been corrected or what measures have been put in place to reduce the risk of future non-compliance recurring.

Differences with the Former VDP

The conditions differ in certain respects with those in the Former VDP. Regarding the voluntary condition in (a) above, the Current VDP [\[1\]](#) provides more details than the Former VDP. In the next two paragraphs below, we discuss certain of these details found in the Current VDP.

To nullify the voluntary nature of a disclosure, a prior enforcement activity or action would not necessarily have to be taken by CBSA, but could be taken by an OGD or another person in authority, such as the police.

On the other hand, certain prior enforcement activity would not negate the ability to make a voluntary disclosure. An enforcement activity that would not lead to the discovery of the customs infractions to be disclosed could be eligible for the Current VDP. For example, a trade program verification by CBSA of an importer's customs valuation of certain imported goods would not prevent the importer from making a

voluntary disclosure of tariff classification errors for those same imported goods.

Regarding condition (b) above, the Former VDP required the imposition of at least one applicable monetary penalty. Condition (b) in the Current VDP goes beyond that requirement. To meet this condition, a disclosed infraction could involve the potential imposition of a monetary penalty (notably an Administrative Monetary Penalty or AMP) or specified interest or the potential of an action against the goods (e.g., seizure or ascertained forfeiture) or person (e.g., charges under the *Customs Act*). Where the conditions of a valid voluntary disclosure are satisfied, CBSA would forego taking enforcement action. Acceptance of a valid voluntary disclosure by CBSA would not necessarily preclude criminal prosecution under the *Criminal Code* or penalties or other sanctions imposed by an OGD, as applicable.

Regarding condition (c) above, the Current VDP provides more details than the Former VDP on what is meant by a complete disclosure in various contexts. Under the Current VDP, origin/tariff treatment, valuation and tariff classification disclosures should take into account all incidences within the four year reassessment period. Non-report of, or failure to account for, imported goods should take into account all incidences within six years. There is a six-year period of disclosure for export reporting contraventions.

Unlike the Former VDP, corrections or adjustments under section 32.2 of the *Customs Act* are treated differently than other disclosures^[2]. First, they are explicitly excluded from the criteria in condition (e) above. By their nature, these errors tend to be repetitive or form part of a pattern (e.g., a tariff classification error repeatedly made for one particular type of imported good). Second, the voluntary disclosure application procedures for commercial imports are divided between:

1. disclosures to correct under section 32.2 of the *Customs Act*, and
2. all other types of voluntary disclosures.

Another significant development is that the criteria in condition (e) of the Current VDP are different than the corresponding criteria in the Former VDP. The Current VDP puts the onus on the applicant to demonstrate how and why the non-compliance will be avoided in future. In addition, where an applicant has previously made a voluntary disclosure for the same non-compliance issue as currently disclosed, then the current voluntary disclosure application may be denied.

Considerations for Proceedings with Voluntary Disclosures under the Current VDP

Voluntary disclosures can be a valuable tool to eliminate AMPs and other exposure under the *Customs Act*. Voluntary disclosures are intended to encourage voluntary compliance and be remedial. In considering remedial options, and in implementing the appropriate strategy, a non-compliant importer/exporter may be well advised to consult with a customs expert. To seek comfort from CBSA on an anonymous basis, a non-

compliant importer/exporter could hire a customs advisor to prepare and submit a no-names letter to CBSA to verify in advance whether CBSA would approve the importer's/exporter's voluntary disclosure. When considering a disclosure involving a contravention administered by an OGD, a prospective applicant would need to consider not only the Current VDP, but also the OGD's relevant administrative policies.

by Jamie Wilks

1 At paragraph 16 of D11-6-4.[ps2id id='1' target='']

2 A voluntary disclosure relating to section 32.2 of the Customs Act would be appropriate where an importer seeks to correct origin/tariff treatment, customs valuation or tariff classification errors more than 90 days beyond when the importer acquired "reason to believe" that the errors were committed.[ps2id id='2' target='']

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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