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U.S. Customs "Offers in Compromise" May Limit Exposure

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Enforcement actions by U.S. Customs and Border Protection (CBP) are increasingly more intensive and less lenient than in the past based on our experience. It is not uncommon in today's regulatory enforcement landscape for otherwise diligent industry operators to find themselves on the wrong side of a CBP case. Those enforcement actions often involve actual or potential amounts owed including for liquidated damages and unpaid duties. Offers in Compromise (OICs) are one tool in the toolbox when planning a successful strategy for responding to CBP enforcement actions.

A Primer on CBP Offers in Compromise

The statutory basis for OICs is found in Section 617 of the Tariff Act of 1930 (19 USC § 1617), which permits the Secretary of the Treasury or its designee to compromise on any claim arising under customs laws. Decisions are based on recommendations from the General Counsel for the Department of the Treasury (or its designee, the Office of Chief Counsel of Customs) and require "a report by a customs officer, United States attorney, or any special attorney, having charge of any claim arising under the customs laws, showing the facts upon which such claim is based, the probabilities of a recovery and the terms upon which the same may be compromised."

In practice this means that anyone owing money to CBP can choose to submit an OIC in the interest of settling at a lower amount. CBP is permitted by Section 617 to accept the offer in compromise settlement of a claim, although it has no statutory obligation to do so. CBP considers OICs under a pragmatic rationale weighing: (1) the costs and time associated with collection efforts; (2) the likelihood of recovery, including financial ability to pay the claim amount; and (3) the likely amount of recovery against the offer. This is fundamentally a cost-benefit analysis for maximizing collections and industry compliance as accomplished by CBP.

Attorneys for importers, brokers, forwarders, and other trade participants subject to enforcement may present OIC to CBP generally at any time before a claim is considered administratively final. There are two minimum requirements for OICs: (1) a written offer outlining the rationale for resolving the claim asserted by CBP for the amount offered and (2) a check representing the amount of compromise offer. CBP is not under any strict timeline for consideration and resolution of an OIC. If an OIC is rejected then CBP will typically return the funds presented and a supplemental offer may be available with an increased amount. Communication with CBP attorneys and staff is often helpful to arrive at an acceptable compromise settlement.

Offers in Compromise of Liquidated Damages Claims

The U.S. Congress permits CBP to accept compromise "on any claim arising under customs laws…" and this of course extends to claims for liquidated damages [19 USC § 1617 (emphasis added)]. Receipt of a Notice for Liquidated Damages is often met by seeking a Petition in Relief, or a Supplemental Petition, but sometimes those efforts do not resolve CBP's concerns about the underlying activity, the regulated party, or the risk of reoccurrence. Filing OICs can be a tool for appreciably limiting exposure for liquidated damages.

The reasons advanced for an OIC are those that will be considered persuasive to CBP as it applies the rationale for review. In a less egregious case an argument could be that harm to CBP was minimal and, due to the size and wherewithal of the party, CBP's ability to recovery the full liquidated damages amount would be difficult. The more challenging aspect of OICs can be arriving at a reasonable amount to offer. Unfortunately, there is no explicit method of valuation associated with the OIC process beyond what is provided in 19 USC 1617. The published mitigation guidelines can be used as a metric or very pragmatic rationales on the availability of funds could be advanced.

The perspective of CBP staffers and the Fines, Penalties, and Forfeitures Office will be the key determining factor as the agency determines the best path forward in its sole discretion. Acceptance of the OIC, or a Supplemental OIC, will result in close of the Liquidated Damages case under which the Notice was issued. However, CBP may of course choose to maintain its demand in full.

Offers in Compromise of Duty (and AD/CVD) Claims

The availability of OIC "on any claim" extends on its terms to claims for anti-dumping and countervailing duties (AD/CVD). This is important because demands for payment of AD/CVD can arise late in the import process and, very often, amount to figures that are multiples of the value of product itself. If CBP does not receive payment upon demand then it will often initiate collection by making demand on the surety who issued the customs bond, which places the importer in an uncomfortable position. Failure to take swift action will leave the surety to pay the amount up to the value of the bond and then pursue the importer under the written guaranty supporting the bond.

As with Liquidated Damages, claims for AD/CVD and their resolution are ultimately determined by CBP staffers and the Office of Finance (Financial Risk & Analysis Section). The availability of a bond may lead CBP to call on the surety regardless of an OIC under the rationale that the bond is available to maximize CBP recovery in the first instance. However, calling on a bond does not always settle a claim in its entirety and any deficiency will continue to be owed. It is at that point when an OIC may have greatest value in resolving a claim by mitigating exposure. Since the acceptance of OICs is discretionary it remains possible that an offer may be refused or, in the alternative, that a payment plan under a promissory note is feasible.

Remember to Consider All Available Options

In our experience resolving CBP enforcement cases requires consideration of all available options, the likelihood of success based upon documentary evidence, and appropriate candor before the agency. The process is an art and not a science. At some point it may become clear that an exposure on a claim is likely and, where that is the case, OICs may be worthwhile rather than suffering financial turmoil.

The Benesch team is always available to assist regulated entities in customs compliance and defending against CBP enforcement.

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