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NAFTA Update

NAFTA Certificates of Origin: Supporting Document Requirement

Ford Risks Penalty For Failure To Provide “Supporting Documents” For NAFTA Claims

Summary of the Case

On September 27, 2007, the U.S. District Court for the Western District of Texas, El Paso Division (“the Court”) denied a Motion to Dismiss filed by defendant, Ford Motor Company. Ford challenged a decision by the U.S. Customs and Border Protection (“Customs”) to issue an administrative summons demanding that Ford produce supporting documents relating to products imported under NAFTA claims, and to assess a penalty for Ford’s failure to produce the documents. The case can be found [here](#).

Ford advanced several arguments in support of its Motion to Dismiss, all of which were refuted by the Court. Ford first argued that the underlying documents that support the NAFTA claim and completed certificate of origin should not be considered “entry documents” requiring retention and production as defined by 19 U.S.C. §1509(a)(1)(A), the (“(a)(1)(A) list”). Ford advanced a second argument claiming that production documents that support a NAFTA CO should be considered “foreign producer records,” and therefore not subject to the recordkeeping and retention requirements of the (a)(1)(A) list for importers, but rather are documents required for retention by exporters only.

Regarding the first argument, the Court found that the requirements of the (a)(1)(A) list for 19 C.F.R. §181.22 NAFTA claims include “NAFTA certificate of origin and supporting records.” The Court went on to specify that “supporting records”

are those that “serve as the foundation by which the exporter executes a NAFTA Certificate of Origin.” Thus, records providing information relating to the origin of the goods for which NAFTA benefits were claimed would be considered “supporting records” for the NAFTA claim and thus part of the required (a)(1)(A) list.

Regarding the “foreign producer records” argument, Ford claimed that 19 C.F.R. 181.12(a) requires only exporters and producers to maintain NAFTA COs and “all other records relating to the origin of a good for which preferential tariff treatment may be claimed in Canada or Mexico.” The Court countered this argument by stating that “all other records” and the “supporting records” cited in the (a)(1)(A) list describe the same substantive information and constitute entry records that both the exporter and Ford have a duty to maintain as part of their recordkeeping requirements.

The Court equally rejected Ford’s argument that “entry” records are different from “origin” records, and that importers are required to keep entry records while exporters are required to keep origin records. Because NAFTA regulations create a cause and effect relation between origin and entry with respect to NAFTA claims and the NAFTA CO is listed on the (a)(1)(A) list as a document required by law for the entry of goods, the Court found that Customs was justified in seeking supporting records relating to the importation of goods subject to NAFTA claims. This is particularly true given that Ford acted as the agent of the exporter when it aided in the preparation of the NAFTA COs used to import the merchandise into the United States.

Although Ford then argued that the business record standard in 19 U.S.C. § 1508 should apply to entry records in 19 U.S.C. § 1509, the court found that, while both § 1508 and §1509 records are subject to summons by Customs, §1509 entry records are limited to those of the (a)(1)(A) list, and the provision allows the imposition of an administrative fine for failure to produce these documents. The Court found that § 1508 is not at issue in this case.

Finally, the Court rejected Ford's argument that the entry records and their retention as defined by 19 U.S.C. § 1509 should yield to conflicting definitions and guidelines in other Customs materials, such as the NAFTA Focused Assessment Program Guidelines and the NAFTA Audit Verification Manual. Specifically, the Manual only discusses the exporter's, rather than the importer's, duty to keep NAFTA supporting records, and that the Guidelines state the importer is not responsible for maintaining supporting NAFTA documents. The Court found that, while there is a discrepancy between the statute and regulations and the Manual and Guidelines in this specific area, "internal agency manuals are not federal statutes and regulations, conflicting definitions do not exist, and the (a)(1)(A) list is the authoritative definition of entry records.

In dismissing Ford's Motion, the Court determined that Ford's refusal to produce records authorized the imposition of a monetary penalty by Customs.

Advice to Importers

This case takes another step in defining Customs' view, as increasingly supported by the courts, of an importer's expanding duties to undertake an

independent review of supplier generated information including NAFTA Certificates of Origin. In the Ford case, the district court has identified an importer's duty to retain and be able to produce records generated by the exporter in support of the exporter's CO. Implicitly, Customs appears to believe that an importer would then be in the position to independently verify the qualification for NAFTA treatment claimed in the NAFTA CO. This analysis seems to follow another significant case, the decision of the U.S. Court of International Trade in U.S. v. Golden Ship Trading. Here, the court held that reasonable care requires an importer to review and verify a supplier's assertion that merchandise is entitled to duty free entry under the GSP. According to the Court, importers must "at least undertake an effort to verify the information on entry documents" and cannot "blindly" rely on assertions by the exporter regarding the country of origin of the imported good.

It is important to keep in mind that the Ford decision relates to a preliminary procedural matter. Further, Ford is a recordkeeping case and does not directly involve the question of whether Ford acted reasonably in relying on the certificates from its supplier. Nevertheless, we recommend that all importers review their current compliance procedures regarding recordkeeping and duty preference claims. If the Ford decision becomes final as it currently stands, importers may face a new reality in which they are required to gather, review, and validate the NAFTA exporter's certification analysis.

Should you have any further questions, please do not hesitate to contact us.

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