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USMCA: Ready or not, here it comes

Legal Ease

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The negotiations are complete, the text is agreed upon, the participating countries have ratified, the implementing legislation has passed, and the implementation date has now come and gone. The U.S.-Mexico–Canada Trade Agreement (USMCA) is in effect as of July 1, 2020.

Customs published two important operational documents that will likely be of some help to the trade. On June 30, 2020 Customs issued "implementation instructions," available at https://www.cbp.gov/document/guidance/usmca-implementation-instructions, which direct the importer and Customs alike on some of the fundamental instructions to be followed as the Agreement takes effect.

On July 1, 2020, Customs published its interim final rule on USMCA. Though this contemplates eleven categories that ultimately will be addressed in the regulations, the interim final rule addresses only the rules of origin. So, much of the regulatory framework remains incomplete.

The interim rule is available at https://www.federalregister.gov/documents/2020/07/01/2020-13865/implementation-of-the-agreement-between-the-united-states-of-america-the-united-mexican-states-and. Because these are interim regulations, Customs invites comment from the import community. Comments are due by August 31, 2020.

Also on July 1, the Department of Labor published interim final regulations related to the calculation of labor content for purposes of USMCA eligibility for motor vehicles, and those comments, too, are due on August 31*(85 Fed. Reg. 39782)*.

From a practical standpoint, the implementation instructions are the more relevant to the trade, and they address some of the operational questions that arise almost immediately.

For example:

- Will there be any breathing room between the operational date (July 1, 2020) and the enforcement date? Customs says it will devote the second half of 2020 to outreach on the basics of the Agreement. As experienced importers know, the Customs Modernization Act created the notion of shared responsibilities between importer and government. The law imposed on Customs the obligation to properly inform the community of its obligations under the law, and it required the importer to use "reasonable care" carrying out those obligations. In balancing those two notions, Customs has stated that "in appropriate cases," it will withhold enforcement action during the outreach period, but the "in-appropriate-cases" limitation is clearly intended to communicate that the import community's good-faith compliance must begin immediately.

Specifically, the instructions state that, in deciding whether to institute enforcement proceedings during this six-month period, Customs will look to "satisfactory progress towards compliance." One would expect that, during this period, for example, Customs will seek data verifying the origin of goods, but it may be too permissive a reading of the instructions to imply that, for example, an importer would be excused if he does not have his certificate of origin during this period. Such "breathing room" periods have their limitation.

- If a corporation produces goods in the U.S. (for export to Mexico and Canada) and in Mexico (for export to the U.S. and Canada) must the corporation complete one Certificate of Origin or two? Customs says two.
- What is the Special Program Indicator that the importer is to use to designate a claim for USMCA treatment on the entry? S or S+.
- Do the drawback limitations applicable under NAFTA for goods manufactured in the U.S. and exported to another NAFTA Signatory State continue in the USMCA? Yes.
- Where in the Harmonized Tariff Schedule of the United States are the USMCA Rules of Origin located? General Note 11.
- Are there any benefits to claiming USMCA treatment if the goods being imported are already unconditionally duty free? Yes. In addition to an elimination in duties, USMCA relieves the importer of the obligation to pay Merchandise Processing Fees. Goods unconditionally duty free, without USMCA, are still encumbered by the MPF.
- USMCA eligibility and country of origin marking. Customs will continue to make a distinction between an "originating" good for USMCA purposes and the origin of a good for customs marking purposes. However, under NAFTA, for an article from one of the NAFTA countries to be marked as a product of that country, it also had to meet the NAFTA eligibility rules. This was known as the "NAFTA override provision." This rule is not continued under USMCA, to the relief of many.

These are but a few of the principles emerging under USMCA, but the management of these issues will be greater clarified as USMCA rules are published and adopted.

Stay tuned.