

Better Read than Shred: Customs Recordkeeping Requirements for Importers**

Record retention is a pressing concern for most businesses, particularly those engaged in importing. The U.S. Customs Service has enacted comprehensive regulations governing the records that an importer must retain. However, Customs has always placed its principal reliance on the documents that comprise an entry.¹ An importer's Customs broker is also required to retain copies of the documents submitted to Customs.² Generally, these are the only documents needed to determine the nature of the imported merchandise, its value, and its classification for duty assessment purposes.

Over the past five years Customs has developed the "Automated Commercial System" (ACS). Its goal is to automate the entry process and, in so doing, to initiate the age of the "paperless" entry.³ Customs has proposed "Special Entry Procedures" to implement this goal.

The development of these new procedures and the proposals for paperless entries will undoubtedly have a significant impact on recordkeeping procedures. In the past most significant commercial documents were reviewed by Customs import specialists when presented to Customs. Although such presentation will be unnecessary with paperless entries, the Customs Service will undoubtedly expect importers to retain the records that have proved commercially significant in the past.⁴

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1. An "entry" is the name given to the documentation that must be submitted by an importer to obtain the release of imported merchandise from Customs custody. 19 C.F.R. 141.0a(a) (1990).

2. A Customs broker is a person licensed to transact Customs business on behalf of importers. *Id.* § 111.1(b).

3. See 55 Fed. Reg. 2528 (1990).

4. In 55 Fed. Reg. 2528 (1990), the U.S. Customs Service states: "Filers . . . would be obligated to retain all records which they received, . . . generally for a period of five years from the date of the consumption entry or the date the merchandise was entered for consumption."

As discussed below, the advent of the paperless entry through implementation of the ACS will place far more weight on individual importer's recordkeeping procedures. Commercial documents will not be submitted regularly to Customs import specialists.⁵ Instead, if an import specialist determines that an inquiry regarding a particular importation is appropriate, the importer will have to respond to a request for detailed documentary records. In addition, Customs auditors are likely to play a larger part in Customs regulation of importers as entry-by-entry review is supplanted by ACS. If import specialists or auditors are dissatisfied by an importer's record retention program, the importer is likely to have additional duties assessed on its imports and may be subject to civil or criminal penalties as well.⁶

This article reviews the statutory and regulatory recordkeeping requirements presently imposed by U.S. Customs laws. It examines the nature of the documents that must be retained, those persons subject to recordkeeping requirements, and Customs' authority to obtain documents. The article then examines the potential impact of the ACS as applied to import transactions. It also reviews judicial enforcement of Customs administrative orders for production of documents and the sanctions against importers for noncompliance. Finally, it examines Customs' authority to seize records pursuant to a search warrant.

I. The Statutory Recordkeeping Requirements

The principal statute that governs recordkeeping is 19 U.S.C. section 1508. The statute provides:

§ 1508. Recordkeeping

(a) Requirements. Any owner, importer, consignee, or agent thereof who imports, or who knowingly causes to be imported, any merchandise into the customs territory of the United States shall make, keep, and render for examination and inspection such records (including statements, declarations, and other documents) which—

- (1) pertain to any such importation, or to the information contained in the documents required by this Act in connection with the entry of merchandise; and
- (2) are normally kept in the ordinary course of business.

The regulations broadly define the term "records" as including all statements, electronic data, books of account, or documents that pertain to an entry or that bear on the right to enter merchandise.⁷ This statute raises two pertinent inqui-

5. Each port of entry has Customs officers designated as import specialists whose duties include determining the classification and valuation of imported merchandise.

6. Destroying invoices may subject an importer to criminal prosecution pursuant to 18 U.S.C. § 551 (1988). Civil penalties may be assessed pursuant to 19 U.S.C. § 1592 (1988). Liquidated damages may also be assessed for breach of the importer's custom bond. *See* 19 C.F.R. 113.62(j) (1990).

7. Specifically, 19 C.F.R. 162.1a(a) (1990) provides:

(a) Records. "Records" means:

- (1) Statements, declarations, books, papers, correspondence, accounts, technical data, automated record storage devices (e.g., magnetic discs and

ries: (1) what documents must be retained; and (2) who is subject to the record-keeping requirements?

A. RECORDS THAT MUST BE RETAINED

As noted above, 19 U.S.C. section 1508 creates a two-part test requiring importers to retain those records which: “(1) pertain to any such importation, or to the information contained in the documents required by this Act in connection with the entry of merchandise; and (2) are normally kept in the ordinary course of business.” The first part is extremely broad and encompasses all documents relevant to a given importation; the second part is one of limitation—only those documents kept in the “ordinary course of business” must be retained.

As a threshold matter, importers must retain the documents filed with an entry pursuant to 19 U.S.C. section 1484. That statute requires importers to provide Customs with the following documents: (1) a commercial invoice;⁸ (2) a bill of lading (freight bill);⁹ (3) a signed entry (Customs Form 7501) setting forth such facts as are required for the purpose of assessing duties and for securing proper examination, inspection, and appraisement; (4) any certificates required by law or government regulations (for example, visas for merchandise subject to quota, FCC forms, etc.); (5) a verified statement showing the cost of production, when necessary for the appraisement of merchandise. In addition, 19 U.S.C. section 1485 requires the importer to execute a signed declaration stating that the prices set forth on the invoice are true and correct.¹⁰ This statement appears on the back of Customs Form 7501.

tapes), computer programs necessary to retrieve information in a usable form, and other documents which:

- (i) Pertain to any importation, or to the information contained in the documents required by law or regulation under the Tariff Act of 1930, as amended, in connection with the entry of merchandise;
- (ii) Are of the type normally kept in the ordinary course of business; and
- (iii) Are sufficiently detailed:
 - (A) To establish the right to make entry,
 - (B) To establish the correctness of any entry,
 - (C) To determine the liability of any person for duties and taxes due, or which may be due, the United States,
 - (D) To determine the liability of any person for fines, penalties, and forfeitures, and
 - (E) To determine whether the person has complied with the laws and regulations administered by the Customs Service;
- (2) Any other documents required under laws or regulations administered by the Customs Service.

8. The commercial invoice must describe the merchandise imported and state its quantity and value. *Id.* § 142.6. The commercial invoice is often tendered as a payment document that enables the foreign seller to draw against the importer’s letter of credit.

9. The bill of lading is generally tendered by the owner to obtain possession of the merchandise. Bills of lading may or may not be negotiable and often must be tendered to draw against a letter of credit. *See R. AXTEL, THE DO’S AND TABOOS OF INTERNATIONAL TRADE* 180 (1989).

10. *See* 19 C.F.R. 142.3 (1990).

A wide variety of other documents, not specifically mentioned by statute, may be pertinent for Customs purposes. These include: (1) purchase orders and order confirmations (which identify the parties involved in the transactions); (2) copies of payment documents (for example, letters of credit, debit advices, wire transfers, cancelled checks); (3) underlying contracts, including output and requirements contracts, buying agency agreements, and inspection agreements; (4) documents evidencing payments for assists,¹¹ inland freight, packing costs, and other costs associated with the importation of merchandise; (5) miscellaneous correspondence, including telexes and facsimiles related to the imported merchandise; (6) bookkeeping records, including books of accounts, such as purchase and disbursement journals; (7) internal memoranda; (8) advertising materials; (9) instruction materials; and (10) contracts for resale of the merchandise. All of these records pertain to importation and meet the first part of the document retention statute.¹² An importer need only retain those records, however, that "are normally kept in the ordinary course of business."¹³

The statutory phrase "normally kept in the ordinary course of business" has not been widely interpreted. In *United States v. Weinberg*,¹⁴ the Customs Service sought to enforce an administrative summons for all documents referred pursuant to 19 U.S.C. section 1508. Judge McGarr construed the summons as only requiring documents kept in the "normal course of business." Expanding on that phrase, the court explained:

This court . . . reads the summons as requesting only those business records normally kept by respondents in the ordinary course of their business. Respondents need not produce any purely private paper or any other document which is not of the type normally kept in the ordinary course of business.¹⁵

The *Weinberg* court's interpretation is in keeping with Customs' explanation of these statutes as expressed in the course of implementing regulations on record-keeping. In Treasury Decision 79-159 the Customs Service explained:

The records to be kept are designated by the act as records of the type which "are normally kept in the ordinary course of business." Thus, if records described above presently are not of a type kept in the ordinary course of business, there is no intention on the part of Customs to require the creation of a new class of records to burden the importers.¹⁶

11. An "assist" is defined at 19 U.S.C. § 1401a(h)(1) (1988). Briefly, an assist includes articles supplied free or at reduced cost to foreign manufacturers, such as materials or components incorporated in merchandise, dies and molds used to manufacture merchandise, or engineering and design services.

12. As noted above, the term "records" is broadly defined to include written documents, electronic data, etc. This definition should be compared with FED. R. CIV. P. 34(a), which has an equally broad definition. Thus, the form in which "records" are stored is largely irrelevant.

13. 19 U.S.C. § 1508(a)(2) (1988); 19 C.F.R. 162.1a(a) (1990).

14. No. 84 C 5390, slip op. (N.D. Ill. Jan. 9, 1985).

15. *Id.*, slip op. at 2.

16. 13 Cust. B. & Dec. 370, 377 (1979).

Documents kept in the “ordinary course of business” are likely to include purchase orders, proof of payment documents, bookkeeping materials, and resale contracts. These are generally needed if there is a dispute regarding the performance of the underlying contract, the consideration paid for performance, or the ascertainment of taxes. However, documents such as correspondence, internal memoranda, advertising materials, market surveys, packing materials, warranties, and internal memoranda need not be kept in the “ordinary course of business.” Thus they can be destroyed when a transaction is closed, if this procedure is consistent with normal business practice.¹⁷

Some documents may fall within several classes of documents. For example, correspondence may be used to change a material term of a contract (such as quantity or price) and should be retained. However, types of changes and the manner in which these changes are documented are unique to particular businesses. An established, written record retention program tailored to a specific business is the best evidence of those documents that are “normally kept in the ordinary course of business.”

B. PERSONS SUBJECT TO RECORDKEEPING REQUIREMENTS

Customs regulations provide that “[a]ny owner, importer, consignee, or their agent” shall retain the required records.¹⁸ This includes the importer of record of a given entry or the importer’s agent. The regulations define “third-party recordkeeper” as “any Customs broker, attorney, or accountant.”¹⁹ Any of these persons may be the importer’s agent for the purpose of retaining the required documents.

The primary obligation to retain records is fixed on the importer of record. “Importer of record” is a term of art referring to the consignee of the merchandise, who is generally identified on the entry (Customs Form 7501) as the “importer of record.”²⁰ The importer of record must either “import [], or knowingly cause [] to be imported” specific merchandise in a particular entry.²¹ The person identified as the importer of record is required to declare that the information set forth in the commercial invoices and records is true and cor-

17. This definition is worth comparing with FED. R. EVID. 803(6), the hearsay exception for records of regularly conducted activity. Those documents needed as evidence to establish the terms of a contract or its breach should normally be retained in the ordinary course of business.

18. 19 C.F.R. 162.1b(a) (1990).

19. Customs brokers are subject to regulatory recordkeeping requirements found at *id.* §§ 111.21–.23.

20. The importer of record is defined as “the owner or purchaser of the goods, or when designated by the owner, purchaser or consignee, a licensed customhouse broker.” See Customs Directive 3530–02 (Nov. 6, 1984); see also National Customs Brokers & Forwarders Ass’n of Am. v. United States, 24 Cust. B. & Dec. No. 12 at 37, 731 F. Supp. 1076 (Ct. Int’l Trade 1990) (definition of “consignee”).

21. 19 C.F.R. 162.1b(a) (1990).

rect.²² The importer of record must retain the documents required by law to substantiate the truthful nature of its declarations in the entry.

If merchandise is imported in the name of a nominal consignee, or if the Customs broker is identified as the importer of record, the importer or consignee has primary responsibility for retaining records and establishing the accuracy of the information submitted with the entry. The regulations provide that “[a] nominal consignee who makes entry in his own name is not considered an agent. . . .”²³ The documents that must be filed with the entry (Custom Form 7501, commercial invoice, air waybill, etc.) should be retained by the importer of record and by the Customs broker. Other relevant documents (buying agency agreements, documentation regarding assists, etc.) should only be retained by a single entity—preferably the importer of record.

Records need only be retained by a single entity: either the importer of record or its agent.²⁴ It is not necessary that duplicate records be kept by all interested parties. Records may also be retained by third parties such as accountants or attorneys. Indeed, the regulations specifically contemplate that records may be retained by a “third-party recordkeeper” rather than by the importer of record.²⁵ However, the records must be retained in the United States.²⁶

II. Authority to Inspect Records

Customs is authorized to inspect all of the importer’s relevant records. Customs’ general authority to inspect importers’ records is found at 19 U.S.C. section 1509.²⁷ It can obtain these records by means of three procedures: (1) it

22. 19 U.S.C. § 1485 (1988); 19 C.F.R. 141.19 (1990). When deceased or insolvent persons, partnerships, or corporations are importers, their obligations are defined by 19 U.S.C. § 1485(f) (1988).

23. 19 C.F.R. 141.19(b)(3) (1990). The broker designated as the importer of record may, however, be subject to a duty assessment even though it has no interest in the entry of the merchandise other than by way of its ministerial duties. *See United States v. Blum*, 858 F.2d 1566 (Fed. Cir. 1988).

24. Customs brokers have an independent obligation to retain these records. 19 C.F.R. 111.23 (1990).

25. *See id.* § 162.1g (1990).

26. Customs Ruling No. 710625 M (July 26, 1979).

27. That statute provides:

(a) Authority. In any investigation or inquiry conducted for the purpose of ascertaining the correctness of any entry, for determining the liability of any person for duty . . . for determining liability for fines and penalties, or for insuring compliance with the laws of the United States . . . the Secretary (. . . or special agent in charge) may—

- (1) examine, or cause to be examined, upon reasonable notice, any record, statement, declaration or other document, described in the notice with reasonable specificity, which may be relevant to such investigation or inquiry;
- (2) summon, upon reasonable notice—
 - (A) the person who imported, or knowingly caused to be imported, merchandise into the customs territory of the United States,

can inspect records with the consent of the importer upon reasonable notice; (2) it can issue an administrative summons and, if necessary, have the summons enforced by court order; and (3) it can seize records pursuant to a judicially issued search warrant. 19 U.S.C. section 1509 provides Customs with the authority to inspect records informally, with the consent of the importer, or to issue an administrative summons. It also authorizes personal interviews with importers or related parties.

Customs regulations confirm the breadth of the statutory authority to conduct an inquiry and to review documents. The regulations set forth:

[P]rocedures governing the examination of records and persons in connection with any audit or other inquiry or investigation conducted for the purpose of ascertaining the correctness of any entry, for determining the liability of any person for duties and taxes due or which may be due, for determining liability for fines, penalties, and forfeitures, or for insuring compliance with the laws and regulations administered by Customs.²⁸

Customs may seek these records through an individual import specialist's informal oral request, through the issuance of a Customs Request for Information Form,²⁹ as part of a formal audit, or in the context of an investigation by Special Customs Agents.³⁰

A summons may be used to compel a person to testify before a Customs officer (by deposition) or may require the production of the records described above. If the Customs officer requires the person to testify under oath, then the testimony must be transcribed.³¹ A summons may be served on any person or business that is related to the importation of merchandise or that has custody of records relating to the importation. This includes the importer of record, the consignee, the ultimate purchaser of the merchandise, the Customs broker, or the importer's accountant.³² It may also include buying agents, selling agents, and other persons related to the import transaction.

Significantly, the statute requires Customs to provide importers with "reasonable notice." This may require little more than an oral request to conduct an audit, or it may be provided by a formal administrative summons. The regulations elaborate upon the "reasonable notice" requirement by stating:

[A]ny Customs officer, during normal business hours and, to the extent possible, *at a time mutually convenient to the parties*, may examine, or cause to be examined, any

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- (B) any officer, employee, or agent of such person,
 - (C) any person having possession, custody, or care of records relating to any such importation, or
 - (D) any other person he may deem proper, to appear before the appropriate customs officer. . . .

19 U.S.C. § 1509 (1988).

28. 19 C.F.R. 162.0 (1990).

29. Customs Form 28. Customs may also send a Notice of Proposed Action (Customs Form 29).

30. Customs, in implementing Treas. Dec. 79-159, specifically notes that "because the audit may or may not be of a routine nature, the word 'routine' has been deleted." 13 Cust. B. & Dec. 372.

31. 19 C.F.R. 162.1d(c) (1990).

32. *Id.* at 162.1(g).

relevant records, statements, declarations, or other documents by providing the person with reasonable notice, either orally or in writing, which describes the records with reasonable specificity.³³

This requirement grants an importer some latitude in arranging an audit or in responding to a request for information. Thus, negotiation is possible regarding the time and place in which an audit will be conducted. The summons must state the name of the Customs officer before whom records must be produced and must describe the records sought with "reasonable specificity."³⁴

As noted above, Customs is likely to be more aggressive in the future in seeking documents related to import transactions. Unlike the past, in which most commercially significant documents were submitted to Customs, paperless entries provide little specific information about individual import transactions. Paperless computerized entries contain standardized data that is in large measure non-descriptive. Such data will not prove helpful in determining the correct classification of imported merchandise, or in determining complex valuation questions.

To ascertain specific information, import specialists will increasingly rely on requests for information, customs audits, and referrals to Special Agents for investigation. If records are not produced, or only limited records are retained and produced, Customs officials are likely to advance duties, as well as assess penalties on imported merchandise. In many instances importers may only have the ability to provide a limited response to Customs' document requests. Thus, the process of record production is likely to become more adversarial. In this light, the enforcement procedures available to Customs by application to the federal courts are discussed below.

III. Judicial Enforcement of Summons

Summonses are not self-executing, but require court enforcement if an importer refuses to comply with a Customs' request to review documents.³⁵ If the person served with a summons does not comply with its demands or objects to its issuance the Customs Service must apply to a U.S. district court to have the summons enforced. To do so, Customs must file an action seeking enforcement of the summons, and the person against whom enforcement is sought is given an opportunity to respond.

A district court can order a person to subject to the summons to comply with its terms pursuant to 19 U.S.C. section 1510.³⁶ Failure to comply with the

33. *Id.* at 162.1d(2) (emphasis added).

34. *Id.* at 162.1e.

35. *United States v. Molt*, 589 F.2d 1247 (3d Cir. 1978).

36. 19 U.S.C. § 1510(a) (1988) provides:

(a) Order of court.

If any person summoned under section 1509 of this title does not comply with the summons, the district court of the United States for any district in which such person

court's order will subject the person to contempt sanctions. The normal sanctions available for contempt include fines, jail sentences, and any additional sanctions that are deemed appropriate.³⁷ In addition, the court is authorized to impose two special sanctions against an importer guilty of contempt: (1) the importer may be barred from importing merchandise into the United States; and (2) delivery of imported merchandise may be withheld by Customs.³⁸

Enforcement of a summons is readily granted. The leading judicial decisions involving enforcement of Customs administrative summonses are *United States v. Wilson*³⁹ and *United States v. Frowein*.⁴⁰ Both cases adopted a lenient test for granting enforcement. The government need only show four elements for the court to grant the government's application for enforcement: (1) a legitimate purpose for the investigation; (2) that the inquiry is relevant to that purpose; (3) that the information is not already in the government's possession; and (4) that all administrative procedures have been followed. If the purpose is legitimate (in other words, not intended to harass or punish) then all "relevant" documents are within the scope of investigation.⁴¹

If the government makes the requisite showing, then judicial enforcement of the summons will be granted unless it can be shown that the government has abused the summons process.⁴² The type of abuse of process necessary to deny enforcement must rise to the level of fraud or deceit.⁴³ Moreover, to deny enforcement, the importer must establish that the government acted intentionally, that the importer was actually misled, and that the summons was issued as the result of an impropriety.⁴⁴

Both the *Wilson* and *Frowein* courts held that the government made the requisite showing to enforce the summons in issue. This indicates the courts' in-

is found or resides or is doing business, upon application and after notice to any such person and hearing, shall have jurisdiction to issue an order requiring such person to comply with the summons. Failure to obey such order of the court may be punished by such court as a contempt thereof.

37. The destruction of documents subject to a summons may result in an adverse inference being drawn against the party that destroyed the documents. *See, e.g.,* *Telectron Inc. v. Overhead Door Corp.*, 116 F.R.D. 107 (S.D. Fla. 1987); *Carlucci v. Piper Aircraft Corp.*, 102 F.R.D. 472 (S.D. Fla. 1984). In contrast, if the destruction can be explained for good cause or as part of a retention program the inference will not be drawn. *Mast Indus. v. United States*, 9 Ct. Int'l Trade 549, 551 n.6 (1985), *aff'd*, 786 F.2d 1144 (Fed. Cir. 1986); *see also* *Coates v. Johnson & Johnson*, 756 F.2d 524 (7th Cir. 1985).

38. 19 U.S.C. § 1510(b) (1988).

39. 864 F.2d 1219 (5th Cir. 1989).

40. 727 F.2d 227 (2d Cir. 1984).

41. *Id.* at 230-31. The term "relevant" is defined in FED. R. EVID. 401: "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence . . . more probable or less probable than it would be without the evidence."

42. *SEC v. ESM Gov't Sec., Inc.*, 645 F.2d 310, 318 (5th Cir. 1983); *see also* *Lee v. Von Raab*, 576 F. Supp. 1267 (S.D. Ohio 1983).

43. *See* *SEC v. ESM Gov't Sec., Inc.*, 645 F.2d 310, 317 (5th Cir. 1983).

44. *Id.* at 317-18.

clination to grant enforcement of a summons without imposing a substantial burden. Equally important, judges have a traditional reluctance to intrude upon government investigations (civil or criminal) at any stage prior to trial. They view the supervision of an investigation as being within the responsibility of the executive branch of government, absent a patent abuse of authority.

IV. Documents Located Abroad

Customs may apply to the Court of International Trade for a subpoena directed to a U.S. citizen or domiciliary in a foreign country, requiring that person's appearance or the production of specific documents.⁴⁵ If that person does not respond, the court can hold that person in contempt and may seize his or her property in the United States.⁴⁶ After a hearing, if the person is found in contempt, he or she may be fined \$100,000, which amount may be satisfied by the sale of the seized property.⁴⁷ Moreover, a U.S. citizen with control over a foreign corporation may be compelled to order that corporation to comply with an administrative summons.⁴⁸

Customs agents located abroad may also interview persons, although the agents are not specifically authorized to serve a summons on those persons. For example, Customs Commercial Attachés posted in U.S. embassies located abroad may call on foreign sellers of merchandise in an attempt to ascertain facts regarding specific importations. These facts may include information related to the cost of production, the selling price, the bona fide nature of agency commissions, or any other relevant information. Customs need not provide the importer notice of such an interview or investigation. Moreover, reports of Customs officials based abroad may be admitted into evidence without the presence of the declarant at the trial.⁴⁹

V. Court Issuance of Search Warrants

In serious cases involving fraud Customs may bypass the summons procedure and instead obtain a search warrant authorizing the seizure of documents. This enables agents to avoid giving notice to an importer of the records it seeks to review. Customs officers are authorized to obtain search warrants in civil investigations or pursuant to 19 U.S.C. section 1592 and section 1595. Those statutes

45. 28 U.S.C. § 1783(a) (1988). *But see In re Arawak Trust Co.*, 489 F. Supp. 162, 165 (E.D.N.Y. 1980) (foreign corporation not "in" the United States not subject to grand jury subpoena).

46. 28 U.S.C. § 1784 (1988).

47. *Id.* § 1784(d).

48. *See, e.g., United States v. Quigg*, 48 A.F.T.R. 2d (P-H) 5953 (D. Va. 1981) (opinion withdrawn); *see also United States v. First Nat'l City Bank*, 396 F.2d 897 (2d Cir. 1968). *But see In re Sealed Case*, 825 F.2d 494 (D.C. Cir. 1987).

49. 28 U.S.C. § 1639(c)(1) (1988). This is a statutory exception to the hearsay rule.

authorize Customs officers with *probable cause* to suspect a violation of the Customs laws to obtain authorization for a court to enter a business and seize documents. This authority extends to documents retained by third party record-keepers, such as Customs brokers and accountants.⁵⁰

The threshold to establish probable cause to obtain a search warrant is generally low. "Probable cause" requires more than "mere suspicion" of illegal activity, but less evidence than is necessary for a conviction. Generally a showing of "probable" illegal activity, as distinguished from a *prima facie* case of guilt, is sufficient.⁵¹ In *United States v. Gregg*,⁵² Customs agents obtained sufficient evidence from documents placed in trash to authorize the interception of telexes and, ultimately, the search of defendant's business premises and home. During those searches, Customs agents seized all of the business documents found in the course of the search.

Rule 41 of the Federal Rules of Criminal Procedure governs the issuance of warrants. It specifically provides that the "property" subject to search and seizure "include[s] documents, books, papers, and any other tangible evidence."⁵³ Moreover, any "property" that is evidence of commission of a criminal offense is subject to search and seizure.⁵⁴ By statute, the authority in Customs matters extends to civil as well as criminal investigations.⁵⁵

Customs agents generally can obtain a search warrant by submitting an affidavit to a judge or magistrate alleging that probable cause exists to justify a search for evidence. So long as the affidavit does not contain a false or reckless

50. 19 U.S.C. § 1595 (1988):

Searches and seizures

(a) Warrant

- (1) If any officer or person authorized to make searches and seizures has probable cause to believe that—
- (A) any merchandise upon which the duties have not been paid, or which has been otherwise brought into the United States unlawfully;
 - (B) any property which is subject to forfeiture under any provision of law enforced or administered by the United States Customs Service; or
 - (C) any document, container, wrapping, or other article which is evidence of a violation of section 1592 of this title involving fraud or of any other law enforced or administered by the United States Customs Service, is in any dwelling house, store, or other building or place, he may make application, under oath, to any justice of the peace, to any municipal, county, State, or Federal judge, or to any Federal magistrate, and shall thereupon be entitled to a warrant to enter such dwelling house in the daytime only, or such store or other place at night or by day, and to search for and seize such merchandise or other article described in the warrant.

51. *United States v. Bush*, 582 F.2d 1016 (5th Cir. 1978).

52. 629 F. Supp. 958 (W.D. Mo. 1986).

53. FED. R. CRIM. P. 41(h).

54. *Id.* 41(b).

55. 19 U.S.C. § 1595 (1988); *id.* § 1595(c)(5).

misstatement, the warrant will be upheld.⁵⁶ Typical warrants authorize seizure of the following types of documents:

(1) export [or import] records including purchase orders, invoices, pro forma invoices, commodity brochures, requests for price quotation, correspondence, export license applications, export licenses, export regulations, notes, air waybills, shipper's letters of instruction, shipper's export declarations, parcel-post receipts, and telexes relating to [specific time sanctions]; (2) financial records including letters of credit, or other payment records such as cancelled checks, delivery receipts; (3) telephone and communications records and correspondence, including telephone message records and bills, and; (4) any and all other documents, books and records relating to exports from the United States which are the fruits, instrumentalities and evidence of violation of Title 50, United States Code, Appendix, Section 2410(a), et seq., to include equipment destined for exportation in violation of U.S. law.⁵⁷

These are the same types of documents subject to a Customs administrative summons. As can be seen, the scope of inquiry sweeps very broadly, so that virtually any document that is relevant or that may be relevant is subject to seizure and discovery.

VI. Conclusion

In conclusion, Customs recordkeeping requirements are likely to become far more important with the advent of the Automated Commercial System. Importers will increasingly be required to respond to Customs import specialists' requests for documents such as commercial invoices, purchase orders, order confirmations, and proof of payment documents. Customs audits are also likely to be more frequent occurrences in the future. Accordingly, all importers should implement a recordkeeping program requiring the retention of all relevant documents and the destruction of those documents that need not be kept in the ordinary course of business.

Unfortunately, the particular documents individual businesses need to retain varies from industry to industry and from importer to importer. No single recordkeeping program can be adapted to all importers. However, implementation of such a program is necessary and should be undertaken by all importers as soon as practicable.

56. *United States v. Gregg*, 629 F. Supp. 958, 964 (W.D. Mo. 1986).

57. *See United States v. Luk*, 859 F.2d 667, 670 n.4 (9th Cir. 1988).