

Thanks for Nothing!

By John D. Goodrich
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I've been working recently with a great little company. They are the classic American success story. In a way they have invented a better mousetrap. Through loads of hard work, gumption and a little luck they have made a name for themselves in their industry in the U.S.

To paraphrase the Spiderman comics, with great success, comes great responsibility. Because of their success, my client's customers are now holding them responsible for issuing NAFTA certificates. I have to give my customer some credit. Before issuing a NAFTA certificate of origin, they first came to one of my NAFTA classes. Thankfully they did. It turns out that their products fall to a category of goods that requires that certain of their primary materials also originate in North America, no questions, no exceptions and no de minimis are allowed.

This complexity holds them to a high standard of proof before originating their finished good under the NAFTA. Being unfamiliar with the ins and outs of the NAFTA they engaged my consulting services to walk them through their first year of implementing their NAFTA program.

Because the client's good requires certain materials to originate we needed to confirm this with the producers of these materials. We drafted a letter to their primary suppliers asking them for a NAFTA producer's statement certifying that the material originates under the agreement. The letter reminded the supplier that a simple "made in America" statement was not what we were looking for. The letter asked the supplier to make a clear unambiguous NAFTA statement, and if the supplier could not do that, to advise that it was unable to do so.

As it is with most solicitation attempts we got a variety of responses. Some of the suppliers responded with the NAFTA statement we requested while others sent their regrets and informed us the goods did not originate or they were from a different country. And then we received the following from the director of trade compliance from a larger supplier.

"This letter is in response to your request for qualification of the following products for NAFTA. Arrow Gent Incorporated is not the exporter for these products. Therefore we are unable to complete a formal NAFTA certificate of origin. I do however confirm that the products listed below have been produced by Arrow Gent, Inc. and they are of U.S. origin under NAFTA marking rules of origin."

Being new to the NAFTA game, my client perceived this statement as implying that the goods qualified under the NAFTA rules of origination. Upon closer inspection we see that it does not. The message says that the goods qualify as U.S. origin under NAFTA marking rules.

This is a nuanced distinction. Those of you familiar with the NAFTA know that a good is considered to originate if it meets both the NAFTA marking rules and one of the preference criteria detailed within the agreement. The response from this producer only certified one but not the more important and higher standard of originating under one of the preference criteria.

"Well thanks for nothing!" was my client's indignant response.

My first thought was that the issuer of the statement might not have understood how the statement was misleading so we followed up with her.

“Thank you so much for your response. If you would be so kind, could you please clarify what you mean by “they are of U.S. origin under NAFTA marking rules of origin.” Did you mean to imply that the goods also originate?”

We felt our follow-up inquiry was professional and to the point but our supplier seemed to take issue with it. The subsequent email exchange devolved into something that resembled a political debate on Facebook. It involved her pulling rank as a licensed customhouse broker and what did we know and finally after some back and forth she formed the words:

“I cannot originate these goods for you under the NAFTA.”

Well why didn't you say so in the first place? That is not the answer we hoped to receive, but it is, nevertheless, the truth. Thank you very much!

I did not want to ascribe intent to this individual at first but after multiple interactions it became quite clear that her intent was to deceive my client thinking that, by placating them, they would go away. As a licensed customhouse broker she knew the regulatory issues at stake for her company but did not share the same level of regard for our mutual client. While she did not violate a law or regulation, her lack of transparency in the interaction bumped up against an ethical line. She clearly crossed over a line of professional behavior in subsequent communication.

This was not, however, the worst response we have received so far. That honor goes to the producers that have not responded at all.

Remember I described my client as having a lot of gumption? Yeah, that's right, they are making plans to convert their sourcing over to those suppliers that are cooperating with their trade agreement requests, even those that have non-originating goods.

Why do I take the time to write about this issue? It is my experience that the example I cite here is part of a growing trend. NAFTA participants ask for origination information and the resulting producer response sounds like the answer they were seeking but in reality it is not. It seems we are increasingly having the following type of conversation.

NAFTA solicitation request: *“Producer, please confirm that your product is blue.”*

Producer response: *“Yes, customer, the sky is blue over our U.S. factory.”*

It seems kind of silly when you put it that way, but this is effectively what is going on.

As we stand at the precipice of the 2017 NAFTA solicitation season can we all agree to make the effort to be more professional and transparent with one another?

NAFTA solicitors, please be more appreciative of the amount of work you are expecting your supplier to undertake to respond to your request. If the response you receive within a producer's

affidavit is accurate and truthful, then go with it. Don't beat up your poor supplier for minor formatting issues. And while you're at it, please do not threaten your suppliers with cutting them off. We all know most of you are not in a position of authority to make that decision.

Producers, would you do all of us a favor and please respond? If your good does not originate, then don't be afraid to say so. You don't have to apologize or explain why. The same applies if you are choosing not to participate in the NAFTA. Just tell your customer the good does not originate. Oh, and please don't fake it. You're embarrassing yourselves. Finally producers, if you are going to make a non-standard NAFTA statement, don't be Arrow Gent and respond with some craftily worded deceptive statement. Just be clear, concise and matter-of-fact.

Happy NAFTA season everyone!

