

# CUSTOMS-NOTES

Written by George R. Tuttle Law Offices for informational use by the trade and import community on selected topics of general interest concerning Customs and import related matters.

November, 1999

## Customs' Prior Disclosure Regulations

Have you ever wondered what to do if you discover that your company has misclassified or undervalued merchandise it was importing, and what the effect of that might be on the company?

Section 1592 of Title 19 of the United States Code (19 U.S.C. § 1592) provides that no person may enter, or attempt to enter, merchandise into the United States by means of a false document or oral statement, or to aid or abet any other person to commit such a violation.

Penalties for breaching 19 U.S.C. § 1592 include civil fines ranging from two to four times the loss of revenue, and to up to the domestic value of the merchandise for a knowing violation.

How can you, as an importer, avoid these fines? By legally taking advantage of what is known as "prior disclosure."

### What is a "Prior Disclosure"?

Pursuant to the "prior disclosure" provision of 19 U.S.C. § 1592, a person (including companies) that commits a violation of 19 U.S.C. § 1592 but discloses the circumstances of the violation before, or without knowledge of the commencement of, a formal investigation by Customs of such violation, will be afforded certain protections, including a limitation on the amount they can be penalized.

In the case of negligent or grossly negligent violations, the penalty is limited to

interest owing on the amount of the actual lost revenue. In the case of fraudulent violations, the penalty is limited to one times the loss of revenue.

Typical examples of 1592 violations include misclassification of merchandise, omission of payments for imported merchandise in the declared value of the merchandise, and other forms of non-compliance with the Customs laws and regulations.

### Oral Disclosures of Violations

Normally, a prior disclosure should be in writing. However, the regulations clarify that a disclosing party shall be accorded the full benefit of prior disclosure if that person provides information orally to Customs with respect to the circumstances of a violation of 19 U.S.C. § 1592, and the concerned Fines, Penalties and Forfeitures Officer is satisfied the information was provided before, or without knowledge of, the commencement of a formal investigation. The disclosing party must, however, tender, or agree to tender, the lost revenue.

In the case of an oral disclosure, the regulations provide that the disclosing party shall confirm the oral disclosure in writing to Customs within 10 days of the date of the oral disclosure. The concerned Fines, Penalties and Forfeiture Officer may, upon request of the disclosing party, waive the oral disclosure written confirmation requirement. If the disclosing party does not provide written

confirmation of the oral disclosure, Customs can reject the oral prior disclosure.

local Customs authorities, it may appeal the matter to Customs Headquarters.

### **Disclosure of the Circumstances of a Violation**

For a "prior disclosure" to be valid, the disclosing party must disclose the "circumstances of a violation," which is defined as including:

1. A description of the merchandise involved in the violation;
2. Identification of the importations subject to the disclosure by entry number, or by indicating the Customs port of entry and the approximate dates of entry;
3. A description of the false statements, omissions or acts, including an explanation as to how and when they occurred;
4. Statements as to the true and accurate information that should have been provided in the entry, to the best of the disclosing party's knowledge; and
5. An agreement to provide any information or data unknown at the time of disclosure within 30 days of the initial disclosure date.

Extensions of the 30-day period to provide the additional information or data may be requested by the disclosing party.

### **Tender of Actual Loss of Duties**

A person who discloses the circumstances of the violation must tender any actual loss of duties, or agree to tender that amount within 30 days after Customs notifies the party in writing of the actual loss of duties. The 30-day period to make payment may also be extended for good cause.

If the disclosing party disagrees with the amount of lost revenue determined by the

## **"Commencement of a Formal Investigation"**

A significant limitation on the use of prior disclosure is that the disclosure will not be considered valid if the importer made the disclosure with knowledge that a formal investigation has been commenced by Customs. A formal investigation is considered to be commenced on the date the matter is recorded in writing by a Customs officer as the date on which facts and circumstances were discovered or information was received that caused the Customs Service to believe that a possibility of a violation existed. This definition includes matters recorded in writing by any import specialist, regulatory auditor, inspector, or Port Account Manager as being a possible violation.

Once a formal investigation has been commenced, a disclosing party is presumed to have knowledge of its commencement if any of the following occur before the prior disclosure of the violation is made:

- (i) A Customs Officer (including any import specialist, regulatory auditor, inspectors, or Port Account Managers) has informed the person that there is reasonable cause to believe that there has been a violation of 19 U.S.C. § 1592, and has informed that person of the type or circumstances of the violation;
- (ii) A Customs Special Agent, having properly identified himself or herself and the nature of his or her inquiry, has, either orally or in writing, made an inquiry of the person concerning the type of or circumstances of the disclosed violation; or
- (iii) A Customs Special Agent, having properly identified himself or herself and the nature of his or her inquiry, requested specific books and/or records of the person relating to the disclosed violation.

The regulations provide that if the disclosing party is denied prior disclosure treatment on the basis that Customs has commenced a formal investigation of the disclosed violation, and Customs initiates a penalty action, a copy of the "writing" evidencing the commencement of a formal investigation of the disclosed violation is to be attached to any pre-penalty notice.

## **Scope of the Disclosure and Expansion of a Formal Investigation**

A party making a prior disclosure needs to be sure that the information provided to Customs is complete and encompasses all potential violations. Additional or subsequent violations not disclosed or covered within the scope of the party's prior disclosure that are discovered by Customs as a result of an investigation and/or verification of the prior disclosure will not be entitled to treatment under the prior disclosure provisions.

## **Requests For Deferral by the Office of Investigations of the Disclosure Verification Proceedings**

Customs' Fines and Penalty Officers routinely refer prior disclosures to the Office of Investigations for verification of the information contained in the disclosure; however, a disclosing party may request, in the oral or written prior disclosure, that the Office of Investigations withhold the initiation of disclosure verification proceedings until the disclosing party has an opportunity to explain all the circumstances underlying the disclosed violation. It is within the discretion of the concerned Fines, Penalties and Forfeitures Officer to grant or deny such requests.

## **Preparing Your Prior Disclosure**

The new regulations impose the burden on the disclosing party to ensure the adequacy and completeness of the prior

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disclosure. Importers must be certain to ensure that they:

1. Disclosure enough facts regarding the class or kind of merchandise involved in the violation, the ports of entry, and the approximate dates of entry.
2. Identify the specific material false statements, omissions, or acts involved in the disclosure.
3. Determine what actions, if any, were taken to determine that only accurate

information was filed with Customs.

4. Identify whether any issues exist in classification, valuation that should be the subject of a ruling request.

By taking these actions, a company can ensure that it is taking maximum advantage of the protections afforded to importers under the prior disclosure provisions of 19 U.S.C. § 1592.

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