Overview

Submitting a Prior Disclosure to Customs & Border Protection

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All parties involved in the importation of merchandise into the US, such as importers, customs brokers, exporters, shippers, and foreign suppliers and manufacturers, can file a Prior Disclosure (PD) with Customs and Border Protection (CBP) to proactively disclose certain false statements, acts, or omissions in violation of 19 U.S.C. § 1592. By doing so, these parties may benefit from reduced penalties as a result of the PD filing. However, if CBP, Immigration and Customs Enforcement (ICE), or Homeland Security Investigations (HSI) first discovers the violation and notifies the party, the party no longer has a right to file a PD.

This article provides the background of CBP PDs, explains CBP's new extension requirements, and identifies best practices to optimize your PD filing process.

Enforcement Background

CBP is an agency of the Department of Homeland Security that is responsible for protecting the American people, safeguarding US borders, and enhancing economic prosperity. Among many objectives, CBP's mission priorities are to facilitate lawful trade, safeguard US interests by preventing unlawful trade, and protect revenue.

CBP is chiefly responsible for enforcing 19 U.S.C. § 1592, a statute under which CBP can assess monetary penalties against persons who make material false statements, acts, or omissions in connection with their importations. These material false statements, acts, or omissions must result from the parties' negligence, gross negligence, or fraudulent conduct.

"Person" includes importers, exporters, agents, manufacturers, and consignors. Aiding or abetting any person committing such act or making such an omission is a violation of the CBP statute. The statute 19 U.S.C. § 1592 gives CBP the ability to assess penalties upon persons that do not provide accurate information pertaining to their imports.

Common examples of false statements, acts, or omissions pertaining to imports include:

- Under or over valuation
- Misdescription of merchandise
- Misclassification under the Harmonized Tariff Schedule of the United States (HTSUS)
- Evasion of an antidumping or countervailing (AD/CVD) duty order
- Improper country of origin markings
- Improper claims for preferential treatment under a free trade agreement or other duty preference program

Duty to Exercise Reasonable Care

Congress implemented the Customs Modernization Act (Mod Act) which became effective on Dec. 8, 1993, and created a fundamental shift in appraisement and enforcement of CBP laws. The Mod Act unilaterally altered the relationship between importers and CBP. Its provisions shifted the legal responsibility for declaring the value, classification, and rate of duty applicable to entered merchandise to the importer. The Mod Act provided two new concepts: "shared responsibility" and "informed compliance" between importers and CBP.

Under the Mod Act, importers are required to exercise "reasonable care." This standard of care requires importers to conduct themselves as a reasonable importer would under the circumstance with respect to importing prior to entering goods into the US.

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Importers have a duty to exercise reasonable care when making entry, including when:

- Classifying and determining the value of imported goods
- Providing other information necessary to aid CBP in properly assessing duties, collecting accurate statistics; and determining whether other applicable legal requirements have been met.

Practice Tip: Reasonable care can sound like a subjective standard, but the best way for importers to ensure they meet this standard, is to proactively:

- **Keep records to show your use of reasonable care**. Review CBP's reasonable care checklist and create written processes and procedures describing your internal implementation.
- **Confirm use of the correct HTSUS classification**. The HTSUS is the legally recognized mechanism for determining tariff classifications for goods being imported into the US. If you are unsure how your product is classified, review Tariff Classification Basics.
- **Confirm use of the correct value for your product**. When importing, accurately valuing your product and ensuring the payment of the correct corresponding duties is an important aspect of exercising reasonable care. Protecting revenue is a priority trade initiative for CBP. CBP's Informed Compliance publication on Customs Value is a terrific primer on valuation, and in contrast the premier substantive guidance including all relevant binding rulings on valuation is CBP's Valuation Encyclopedia.
- **Confirm use of the correct country of origin (COO)**. If you are unsure of CBP's COO requirements, CBP's Guidance Marking of Country of Origin on U.S. Imports is a terrific start. When you source products from multiple countries and are unsure about whether your product is substantially transformed in the last country of production, or unsure of which COO to mark your goods with, it is best to consult with counsel and jointly determine if a binding ruling from CBP is good idea.

Prior Disclosure Process

CBP encourages proactive import compliance, including the submission of PDs by parties who believe they may have violated 19 U.S.C. § 1592. According to CBP, "Both CBP and the importing/exporting community have a shared responsibility to maximize compliance with laws and regulations." Details on CBP's PD program are available in CBP's Informed Compliance Publication on Prior Disclosures.

If a company or individual suspects it has violated 19 U.S.C. § 1592, the party must proactively inform CBP to benefit from mitigated penalties offered by a PD. Delaying submission of a PD could result in CBP notifying you that it is commencing a formal investigation, thereby preventing you from filing a PD.

Practice Tip: Although oral disclosures are permissible, CBP's regulations at 19 C.F.R. 162.74 requires that oral disclosures must be followed-up with a written submission within 10 days. If you do decide to inform CBP orally first, it is recommended to keep a great paper trail of who you spoke with, what you advised CBP, and thereafter, ensure you summarize this in writing within 10 days of your discussion.

Practice Tip: The PD must be filed with both the Fines, Penalties and Forfeiture (FP&F office) in the ports where the disclosed violation occurred, as well as the appropriate Center of Excellence and Expertise (CEE). If your PD involves multiple ports of entry, copy the relevant FP&F Officer at the primary port of entry—the port with the most entries implicated in the PD). The FP&F Officer is generally responsible to:

- Determine whether a PD is valid
- Process the PD in coordination with the assigned CEE
- Determine what penalty amount, if any, should be issued
- Close out the PD

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Centers of Excellence & Expertise

CEEs are facilities established via CBP's 21st-century modernization framework. CEEs were established to increase uniformity across ports of entry, facilitate timely resolution of trade compliance issues, and strengthen critical agency knowledge on industry practices. Currently, there are 10 CEEs, each representing a distinct industry category.

The 10 CEEs organized by industry category are:

- Electronics (Los Angeles, CA)
- Apparel, footwear, and textiles (San Francisco, California)
- Machinery (Laredo, Texas)
- Petroleum, natural gas, and minerals (Houston, Texas)
- Agriculture and prepared products (Miami, Florida)
- Consumer products and mass merchandising (Atlanta, Georgia)
- Pharmaceuticals, health, and chemicals (New York, New York)
- Automotive and aerospace (Detroit, Michigan)
- Base metals (Chicago, Illinois)
- Industrial and manufacturing materials (Buffalo, New York)

Practice Tip: Prior to filing a PD, confirm the CEE that the importer is assigned to. For more information on CEEs and a description on each of the CEEs along with a directory, click here.

Practice Tip: The most critical part of the PD process is ensuring all required components are included. If a PD is deficient, it can be rejected and thereafter used against you. A detailed checklist from CBP's Informed Compliance Publication on Prior Disclosures (Appendix A) is summarized below:

- Is your PD addressed to the Commissioner of CBP and does your submission indicate your name, address and telephone number?
- Have you identified the class or kind of merchandise involved in the disclosed violation?
- Have you identified the importations by customs entry number, or by indicating each concerned CBP port of entry and the approximate dates of entry?
- Have you provided the specific material false statements, omissions or acts involved in the disclosed violation and how and when they occurred?
- Have you provided the true and accurate information or data which should have been provided in the entry?
- If you used a statistical sampling methodology to calculate the loss of duty, have you described that methodology, including the elements of the sampling plan?
- Have you calculated any loss of duty involving liquidated entries covered by the PD? If so, have you prepared a check in the amount of the duty loss made payable to CBP and submitted it along with your PD?
- Have you specifically identified overpayments of duties, taxes, or fees for which you are seeking to offset against any underpayment and did you ensure that all affected entries are "finally liquidated?"
- Have you identified all the CBP ports where the disclosed violations occurred?

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- If you are mailing the prior disclosure, have you considered sending it registered or return receipt requested so that the time of disclosure is the date of mailing?

- If you are sending the PD electronically to CBP, have you requested a delivery receipt?

Initial Submission

A PD is often submitted in two parts: a "blanket" initial PD submission, and a "perfected" PD. Pursuant to 19 C.F.R.§ 162.74(b), the initial submission should do all the following:

- Identify the class or kind of merchandise involved in the violation

- Identify the importation or drawback claim included in the disclosure by entry number, drawback claim number, or by indicating each concerned customs port of entry and the approximate dates of entry or dates of drawback claims

- Specify the material false statements, omissions or acts including an explanation as to how and when they occurred

- Set forth, to the best of your knowledge, the true and accurate information or data that should have been provided in the entry or drawback claim documents

Practice Tip: If you have identified a potential violation that CBP is unaware of and you wish to benefit from the PD process, you should file an initial submission even you do not have all the facts and details gathered. This initial submission is often referred to as a "blanket" submission, as you want to think of it as a blanket protecting all potentially non-compliant entries.

Practice Tip: In all cases involving liquidated entries and duty loss violations, the party must tender the duty loss to CBP in order for the PD to be considered valid. You may request CBP to perform this duty loss calculation, and pursuant to 19 C.F.R.162.74(c), if requested, CBP must notify the disclosing party of its calculation of the actual loss of duties, taxes, and fees or actual loss of revenue. The disclosing party may choose to make the tender either when perfecting the disclosure or within 30 days after CBP notifies the party in writing of CBP's calculation. If the loss of revenue exceeds $100,000, and is deposited with CBP with more than one year remaining on the five-year statute of limitations (SOL) or an SOL waiver is provided, then the disclosing party may also request that CBP headquarters review the PD. The disclosure would be sent to the CBP Chief, Penalties Branch, Office of International Trade. The CBP HQ review is final and is not appealable.

Perfecting a Prior Disclosure

A perfected PD must include all the following:

- The class or kind of merchandise involved in the violation

- The importation or drawback claim included in the disclosure by entry number, drawback claim number, or by indicating each concerned customs port of entry and the approximate dates of entry or dates of drawback claims, if applicable

- The material false statements, omissions, or acts including an explanation as to how and when they occurred

- To the best of your knowledge, the true and accurate information or data that should have been provided in the entry or drawback claim documents

Practice Tip: Often, comprehensively auditing your import transactions to provide a complete evaluation of the violations and correct information that should have been submitted takes significant time to complete. It is essential to keep CBP up to date with your progress and be upfront when additional time is needed.

Practice Tip: If you require additional time to perfect the disclosure, you should state so in your initial PD. According 19 C.F.R.§ 162.74(b)(4), you have 30 days to gather this information after your initial submission.

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Furthermore, although the regulation states "extensions of the 30-day period may be requested by the disclosing party from the concerned Fines, Penalties, and Forfeitures Officer to enable the party to obtain the information or data," according to the new CBP directive described below, parties can receive one additional 60-day extension from FP&F and now all additional extension requests must be approved by the CBP Director of Field Operations (DFO).

Updated CBP Prior Disclosure Policies

On Nov. 17, 2021, CBP issued Directive No. 5350-020A, titled "Processing Prior Disclosure Submissions." Although not publicly available, our firm received a redacted copy of the national policy directive after filing a Freedom of Information Act request. This CBP directive provided new PD extension request timelines. The new directive shortens the amount of time available for PD filers to perfect their disclosure. Previously, from our firm's personal experience, CBP routinely granted requests for 180 days to perfect a prior disclosure. However, CBP has now significantly shortened extension period to an initial 30-day extension with only one additional 60-day extension granted by FP&F.

According to CBP's directive:

- Importers may verbally inform CBP of their intention to submit a PD and then have 10 days to submit an initial prior disclosure in writing
- Upon the filing of an initial prior disclosure, PDs must be perfected within 30 days
- The deadline to submit a perfected PD may generally be extended only once for a period of 60 days
- Any additional time—allegedly only for extraordinary circumstances—may only be granted by the express consent of the DFO.

Due to the potentially large amount of work needed to perfect a PD, this shortened time to perfect makes the PD process more onerous for importers seeking to proactively disclose their suspected violations. Even worse, the limitation of time to perfect a disclosure opens up the possibility that an importer may disclose a violation to CBP, not have the opportunity to perfect the disclosure, and lose the benefits of the PD protection, allowing CBP the ability to penalize the importer. This recent guidance is believed to have a chilling effect as importers and brokers may be faced with the choice of submitting a weak disclosure or no disclosure at all given the short time-limit.

New CBP PD Timelines

Notifications / Extensions	Previously	Currently
Verbal	10 days	10 days
First Extension	30 days – up to 180 days*	30 days
Second Extension	Granted as Needed	60 days
Third Extension	Granted as Needed	Requires consent of Director of Field Operations
Additional Extensions	Granted as Needed	None

* Based upon authors' personal experience

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Scope of a Prior Disclosure

> ***Practice Tip:*** The submitting party, not CBP, determines the scope of the PD. Only the entries described within the scope of the PD will receive beneficial PD treatment. When you are coming up with your disclosure dates, be sure to think of your "blanket" and cover the SOL period—all implicated entries in the preceding five years. In other words, you should review your import history over the past five years to identify any instances of potential violations.

Often this level of review cannot be performed when you are initially advising CBP of your PD, therefore it is a best practice to cover all your entries within the SOL in your "blanket" submission, and thereafter narrow down your dates in the perfection.

> ***Practice Tips:*** The best way to audit your import history in preparation for a PD is to pull your import history data on the Automated Commercial Environment (ACE). In the past, an Importer Trade Activity Report (ITRAC) request would have to be sent to CBP, with a letter stating you would pay up to $250 for the report, and you would have to wait 6-8 weeks for a password protected CD to come in the mail.

ACE is certainly a huge upgrade, as ACE is a free online system that allows the user to pull all import and export data for the entire SOL period. An importer must first request an ACE account, and we recommend attorneys be set up as a consultant to assist in pulling relevant import data. Once the data is pulled, it should be used to identify and include any possible violative entries.

CBP Response & Penalty Mitigation

If a PD is determined to be valid under 19 C.F.R.§ 162.74(a)(2), CBP will process the disclosure, and ultimately decide whether or not a penalty should be assessed depending on the violation, duty loss, and revenue tendered to CBP. Sometimes, no penalty is assessed and the PD is ultimately closed out by CBP. If a PD is determined to not be valid under 19 C.F.R.§ 162.74(a)(2), CBP may proceed with issuing a penalty under 19 U.S.C. § 1592 at the prescribed statutory penalty amounts.

PDs determined to be valid will result in substantially reduced penalties compared to the statutory maximum amount if a PD was not filed. For example, for negligent and grossly negligent violation, where there is a valid PD filed, the total maximum penalty potential is only the interest on any loss of revenue for all unliquidated entries. Whereas for fraudulent violations, when there is a valid PD filed, the total maximum penalty potential is 100% of the lawful duties, taxes, and fees owed and if there is no loss of revenue, 10% of the dutiable value.

The following is a breakdown of the maximum penalties owed for fraudulent, grossly negligent, and negligent violations with or without a valid prior disclosure:

- **Fraud.** Fraudulent violations—no matter whether they result in a loss of revenue to CBP—can result in a maximum penalty equivalent to the domestic value of the merchandise per 19 U.S.C. 1592. However, should a party file a valid prior disclosure, the maximum penalty under 19 U.S.C. 1592(c)(4) would be 100% of the lawful duties, taxes & fees owed or if the violation did not affect the assessment of duties, 10% of the dutiable value.

- **Grossly Negligent.** Grossly negligent violations which result in no loss of revenue to CBP are ordinarily subject to a maximum penalty under 19 U.S.C. 1592 of 40% of the dutiable value of the merchandise. However, if the party has filed a valid prior disclosure, entries are subject to no penalty, regardless of liquidation status. Meanwhile, if grossly negligent violations do result in a loss of revenue, the maximum penalty amount under 19 U.S.C. 1592 is ordinarily the lesser of the domestic value or four times the loss of revenue. However, if the party has filed a valid prior disclosure, entries are subject to no penalty if unliquidated, and only a penalty comprising of interest on the loss of revenue if liquidated.

- **Negligent.** Negligent violations which result in no loss of revenue to CBP are ordinarily subject to a maximum penalty under 19 U.S.C. 1592 of 20% of the dutiable value of the merchandise. However, if the party has filed a valid prior disclosure, entries are subject to no penalty if unliquidated and only a penalty comprising of interest on the loss of revenue if liquidated.

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Meanwhile, if negligence violations do result in a loss of revenue, the maximum penalty amount under 19 U.S.C. is ordinarily the lesser of the domestic value or two times the loss of revenue. However, if the party has filed a valid prior disclosure, entries are subject to no penalty if unliquidated, and only a penalty comprising of interest on the loss of revenue if liquidated.

Practice Tip: After submitting a valid PD, when trying to assess the potential penalty amount, note that they can differ greatly depending on the level of culpability of the suspected violation and the liquidation status:

- CBP must not issue a penalty if the importations at issue involve unliquidated (i.e. open) entries and no fraud is involved.
- However, when entries are liquidated, that is, closed or finalized, and no fraud is involved, then the penalty is equal to the interest of the actual loss of duties computed from the date of liquidation to the date of the party's tender of the loss of duty resulting from the violation.
- If a fraudulent violation is disclosed, the penalty amount should be reduced from the normal assessment of the domestic value of the merchandise to 100 percent of the duty loss. If there was no duty loss, the penalty should be reduced to 10 percent of the dutiable value of the merchandise.

Practice Tip: Even if CBP finds that the PD was invalid and ultimately issues a penalty, you can and should file a petition to request mitigation of the penalty amount and note the filing of the PD as a mitigating factor. For information on factors that CBP often considers in order to mitigate penalties, review CBP's mitigation guidelines.

Limitations of a Prior Disclosure

Notification of a Formal Investigation

Like most disclosure programs across the federal government, the submission of a PD is not valid if CBP, ICE, or HSI does all the following:

- Discovers the violation
- Commences a formal investigation
- Notifies you of the commencement of the formal investigation

Practice Tip: CBP often verifies that an importer is declaring merchandise entered into the US properly by sending an importer a request for information, also known as Customs Form 28 (CF 28). Upon receipt of a request for information, if an importer determines an inadvertent error took place, and an investigation by CBP, ICE, or HSI has not yet commenced, filing a perfected PD may assist in drastically reducing potential penalties from CBP.

Practice Tip: In CBP's May 24, 2011, notice, GUIDANCE: CBP Forms 28 and 29 Language, CBP states that it "…has advised the field to limit the use of the CBP Form 28 for the purposes stated above and not extend its use as notification that a formal investigation has commenced as a matter of enforcement policy, not a matter of law. The preferred mechanism to inform the importer of the commencement of an investigation is by correspondence on CBP letterhead or the CBP Form 29."

Practice Tip: CBP defines "knowledge of the commencement of a formal investigation" in 19 C.F.R. 162.74(i) and a person is presumed to have knowledge in any of the following instances:

- When CBP informs the person of the type of or circumstances of the disclosed violation
- When a Customs Special Agent (from ICE or HSI), having properly identified themselves and the nature of their inquiry, had, either orally or in writing, made an inquiry of the person concerning the type of or circumstances of the disclosed violation; or requested specific books and/or records of the person relating to the disclosed violation
- When CBP issues a pre-penalty or penalty notice to the disclosing party
- When the merchandise that is the subject of the disclosure was seized

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Practice Tip: The presumption of knowledge may be rebutted by evidence that, notwithstanding the foregoing notice, inquiry, or request, the person did not truly have knowledge that an investigation had commenced with respect to the disclosed information. This would be a difficult burden to satisfy when a party has received a penalty notice from CBP for example.

A Valid PD Doesn't Preclude Criminal Liability

If you submit a PD containing information which gives CBP reason to believe that a criminal violation has occurred, CBP, ICE, or HSI may refer that information to the Department of Justice (DOJ). Specifically, the matter will likely be referred to the appropriate U.S. Attorney's office responsible for making a decision as to whether to prosecute the alleged criminal violation.

Practice Tip: Because PDs can carry potential criminal implications, you should proactively consult customs and/or criminal counsel prior to submitting a PD in which you disclose potentially criminal violations. Please note, however, that criminal prosecutions as a result of PDs are rare. According to CBP's guidance, "a valid prior disclosure of a non-fraudulent violation is rarely prosecuted by the U.S. Attorney's office."

Conclusion

A PD is an invaluable tool for importers seeking to proactively comply with CBP import requirements. Filing a legally compliant and ultimately accepted PD will substantially reduce any civil penalties and will additionally reduce the likelihood of criminal enforcement.

Nevertheless, the PD process can be involved and detail oriented. The November 2021 CBP directive shortens the time to perfect a PD and makes the process more constricted. Therefore, it is now more important than ever for importers to seek appropriate legal counsel and meticulously work through the PD process to obtain the best results.

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