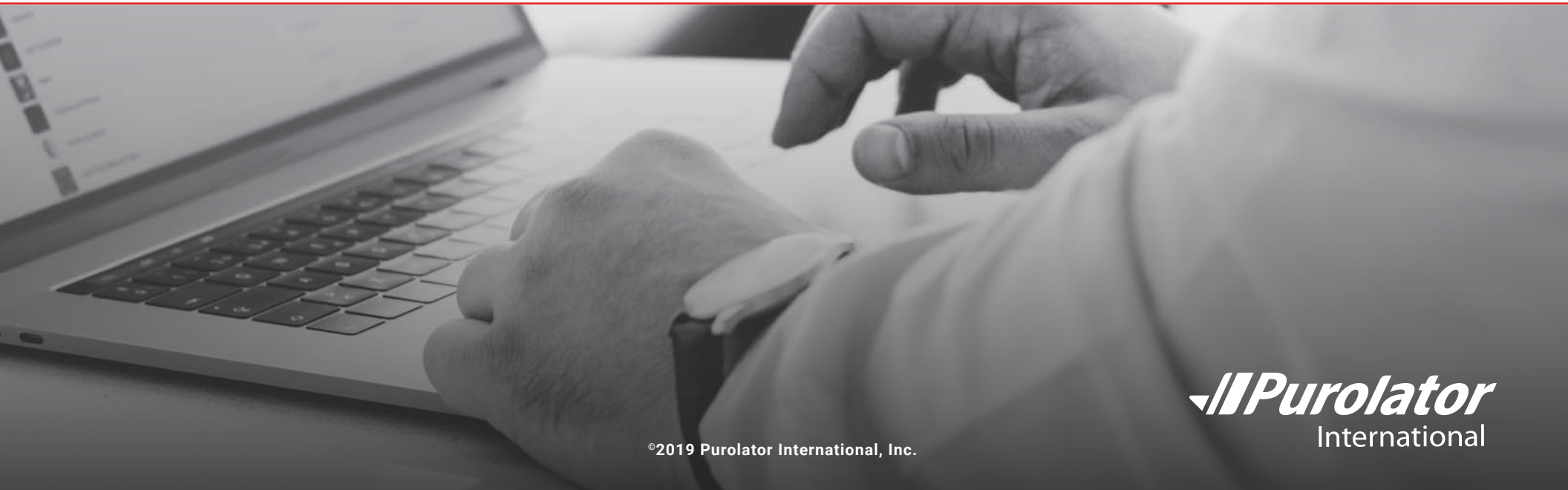
Correcting Errors in U.S. Customs Entry Filings



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Introduction

In late 2017, a California-based shoe importer was fined $1.6 million by the U.S. Court of International Trade for what was deemed to be "grossly negligent product misclassification." In making its decision, the Court left open the possibility that additional penalties could be forthcoming, amounting to more than $20 million.

According to analysis by Fox Rothschild LLP, the importer, Sterling Footwear, Inc., was found to have misclassified footwear as "rubber tennis shoes" and assigned a corresponding product classification code under the Harmonized Tariff Schedule of the United States (HTSUS). To qualify for this classification, 90 percent of the exterior of the shoe would need to be covered in rubber. In fact, though, an examination by U.S. Customs and Border Protection (CBP) determined the shoes did not meet this threshold and were actually subject to a classification code that carried a higher rate of duty.



One shoe importer was found by the U.S. Court of International Trade to have been "grossly negligent" in assigning an erroneous tariff classification code.

When CBP brought this mistake to the attention of company management, not only was no corrective action taken but subsequent shipments of shoes were submitted using the same "rubber tennis shoes" classification. This failure to abide by CBP's instruction, according to the analysis, contributed to the Court's finding of gross negligence and the threat of added penalties.

The Sterling case is instructive for several reasons:

- It demonstrates the specificity of product classification codes.
- It demonstrates the need for businesses to carefully review all documentation submitted to customs on their behalf.
- It demonstrates that CBP will attempt to work with a party found to be in violation of compliance requirements.
- It demonstrates the seriousness of submitting incorrect information to CBP.

While, in this particular case, the importer was found to have knowingly assigned incorrect classification codes, there are plenty of instances in which incorrect information is submitted inadvertently. Consider 2019 audit findings in Canada in which the Canada Border Services Agency (CBSA) found 70 percent noncompliance among products on its list of "commodity targets," which included plastics, footwear, and apparel, among other items. Also included were cell phone cases and countertops, which, according to 3CE Technologies, were found to be misclassified "100 percent of the time."

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Canada Border Services Agency (CBSA) found 70 percent noncompliance among products on its list of "commodity targets."

This underscores the frequency with which misclassifications happen and the need for filers to take corrective action once a mistake is realized. CBP does offer opportunities to correct previously submitted documentation, namely by submitting a "prior disclosure" or "post summary correction." There are also opportunities to challenge CBP rulings with regard to information supplied on customs documentation. Since every customs filing is unique, a business will need — usually in consultation with a qualified customs broker or attorney — to determine its best course. The only sure thing, though, is that ignoring the mistake and hoping the shipment will escape CBP's attention is not an option.

The following discussion will provide an informational overview of CBP's recommended course to follow should a shipper become aware of a customs-related mistake. There are opportunities to rectify errors. But failure to act quickly, or in good faith, often exacerbates a situation and usually results in far worse outcomes.

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"Reasonable Care" Drives CBP Expectations for Accuracy

The Customs Modernization and Informed Compliance Act — known as the "Mod Act" — was enacted by the U.S. Congress in 1993 as a way to update, modernize, and streamline existing border clearance processes. According to Sanders Brokerage, "the Mod Act of 1993 was without a doubt the most sweeping piece of customs legislation written to date."

The Mod Act remains integral to today's compliance framework. Among other things, the law introduced the concepts of "informed compliance" and "shared responsibility" with regard to compliance. According to CBP, "these concepts are premised on the idea that in order to maximize voluntary compliance with customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations."

As such, the law obligates CBP to provide information concerning the trade community's responsibilities and rights under customs-related laws. In addition, both the trade community and CBP share responsibility in carrying out import requirements. For example, the law determines that the importer of record is responsible for using "reasonable care" to enter, classify, and value imported merchandise. The importer of record must also exercise reasonable care to provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics, and determine whether any other applicable legal requirement is met. CBP is then responsible for making a final assessment with regard to classification, value of the merchandise, and other considerations.

An importer of record's failure to exercise "reasonable care" could delay a shipment's release and, in some instances, result in penalties and even referral for criminal enforcement. However, CBP does not define what, specifically, the term entails. "There is a general consensus that a 'black and white' definition of reasonable care is impossible because the concept of acting with reasonable care depends upon individual circumstances," the General Accountability Office wrote in an assessment of Mod Act implementation. "In lieu of a definition, customs has issued a checklist of measures for importers to use as guidance in meeting the reasonable care requirements."

That checklist, which includes different questions to guide each compliance requirement (i.e., tariff classification, valuation, country of origin), can be found in the CBP publication "What Every Member of the Trade Community Should Know: Reasonable Care."



CBP makes available a series of "informed compliance" publications to educate the trade community about customs-related requirements and responsibilities.

This publication is rooted in CBP's legal responsibility to inform members of the trade community about their compliance responsibilities. The agency fulfills this mandate in several ways, including:

- **A comprehensive library of informed compliance publications.** CBP publishes a "What Every Member of the Trade Community Should Know:..." series, which provides extensive clearance-

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related information for dozens of selected categories. Current listings include information about importing "beauty and skin care products," "coffee," "classification of flat-panel displays," and "classification of tires."

- **Webinars.** The agency also makes available a series of pre-recorded webinars in which CBP trade specialists drill down on compliance requirements for specific products. Pre-recorded webinars are available on topics including "Water Sport Equipment and Watercraft," "Women's Knit Skirts and Trousers," and "Cheese."
- **CBP also provides access to a library of prior rulings and legal decisions.** Members of the trade community have the option of seeking an "advance ruling" from CBP as a way to document the precise tariff classification, valuation, or country of origin for a specific product. In soliciting CBP's advance ruling, an importer agrees the determination — favorable or unfavorable — will be binding.

  Alternatively, an importer can choose to review CBP's list of prior decisions to try and determine the correct information for a shipment based on previous decisions made about similar goods. In this instance, relying on a prior ruling does not bind the importer, which leaves the door open to challenge CBP should the agency disagree with the information submitted for a particular shipment.
- **Federal register notices.** CBP regularly posts import-related guidance in the Federal Register, which is the daily digest of all U.S. government agency activity.
- **Centers of excellence and expertise.** CBP maintains a network of 10 "Centers of Excellence and Expertise," each of which is dedicated to trade practices with regard to certain products. Apparel, footwear, and textile products, for example, are processed by the San Francisco Center, while Chicago has responsibility for "base metals," and New York handles "pharmaceuticals, health, and chemicals." Each Center is staffed by trade experts who are available to respond to inquiries and offer compliance-related guidance.



Each CBP "Center of Excellence and Expertise" is responsible for overseeing trade-related issues pertaining to specific products or categories of goods.

According to Sanders Brokerage, CBP fulfills its Mod Act informed compliance responsibilities by making information available through these various methods. "CBP has done their job of informing the importing public, and now it is the importing public's responsibility to take full ownership of entry compliance."

However, despite an importer's best efforts to exercise reasonable care, compliance mistakes happen. And when they do, an importer must be fully aware of all options for swiftly and accurately rectifying that mistake.

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Avoiding Mistakes — Understanding Requirements

On any given day, CBP agents facilitate the release of more than 90,000 shipments into the United States and collect approximately $120 million in duties, taxes, and other fees. While these shipments include a broad range of contents and may arrive via different modes of transportation, each must provide similar categories of information upon arrival at the border. This includes three specific data elements:

- Product Valuation
- Tariff Classification Code
- Country of Origin

As straightforward as these requirements may seem, they are, in fact, behind most customs mistakes. This is because identifying the correct information usually includes many variables, and arriving at the correct answer can sometimes seem like finding a needle in a haystack.

For example, in a CBP webinar focused on tariff classifications, trade specialist Maribeth Dunajski advised: "If you ever thought 'fabric is fabric' and 'wood is wood,' think again." She pointed out that within the "Harmonized Tariff Schedule of the U.S.," which is the official listing of classification codes, there are almost 5,500 codes that pertain to textiles. "So, if you think fabric is fabric, you'll have to think again because it's a lot more complicated than that."



According to CBP, a fabric importer must identify the correct tariff classification code from almost 5,500 codes that pertain specifically to textiles.

Value Determination

Every product arriving at the U.S. border must be assigned a value that is used for a number of purposes, including assessing duties and collecting accurate statistics. However, determining the correct valuation can be complicated since many factors need to be considered. CBP publishes an "informed compliance" publication, "What Every Member of the Trade Community Needs to Know — Customs Value," that offers in-depth information.

Transaction Value

In general, according to CBP, the value listed on a commercial invoice should be the price a buyer in the U.S. has paid for a product (and not the amount the goods will be sold for in the U.S.). This is called the product's transaction value and should also reflect money paid for commissions, assists, royalties, production costs, and packaging, and these items should be included on the commercial invoice. Important to note, though, transaction value should not include transportation or insurance costs, or any taxes paid on the item.

Failure to include the above factors, according to CBP, "is undervaluing the goods and may result in penalties." The agency also advises that all prices in foreign currency must be converted to U.S. dollars on invoices and other entry documents.

Non-Transaction Value

In some situations, it is not possible to assign a transaction value. In those situations, CBP maintains alternate processes for determining value, which are applied in this order:

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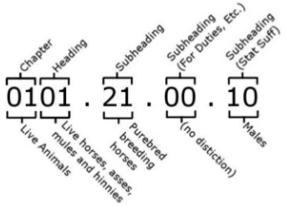
- Transaction Value of Identical Merchandise
- Transaction Value of Similar Merchandise
- Deductive Value — This is essentially the resale price in the United States with deductions for certain items. According to CBP, the deductive value is generally calculated by starting with a unit price and making certain additions to and deductions from that price.
- Computed Value — If none of the above valuation methods can be applied, a computed value may be determined. This consists of the sum of the following items: Materials used in producing the merchandise + Profit and general expenses + Packing costs.

Once a valuation is determined, that information is provided to CBP. Customs agents will review, and if a valuation seems questionable, agents will either delay the shipment, pending additional information, or possibly reject the claim outright and impose a financial penalty on the importer.

Tariff Classification

Every product entering the United States must also bear a 10-digit identifying code as found in the Harmonized Tariff Schedule of the United States (HTSUS) or (HTS), which is maintained by the U.S. International Trade Commission. The HTS includes more than 35,000 different product classifications, which can vary based on slight product variations. But, since each subheading carries a different duty rate, it is very important for the right subheading to be assigned.

Harmonized Tariff Schedule



Example of tariff classification based on U.S. Harmonized Tariff Schedule

For exporters, a 10-digit code must also be assigned, but that code must come from the U.S. Census Bureau's "Schedule B." Schedule B codes are rooted in the HTS but are intended to capture different information and therefore are not identical.

Interesting to note, according to analysis by international legal firm Hughes Hubbard & Reed LLP, prior to the 1993 implementation of the Mod Act, responsibility for assigning a tariff classification code fell to customs. "Now, however," the analysis notes, "the Mod Act requires an importer to use reasonable care to itself classify the goods, i.e., to determine the proper HTS subheading for each imported product and enter that subheading number on documents filed with the entry."

But with thousands of subheadings from which to choose, how can an importer be certain to select the right code? According to CBP, there is only one "right" code for each product, but determining that precise code can be a challenge.

Consider the insight CBP offers with regard to the proper classification of travel mugs:

"A stainless steel travel mug with a plastic handle would be classifiable in heading 7323 as a table, kitchen, or other household article of steel despite the plastic handle. If a travel mug, however, contained relatively equal amounts of stainless steel and plastic (e.g., the outside or outer surface of the mug is made of plastic and the inside or inner surface [lining] of the mug is made of stainless steel), then the travel mug would be potentially classifiable under two heads: Heading 3924 as

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tableware, kitchenware, or other household article of plastic; and heading 7323 as a table, kitchen, or other household article of steel."

Clearly, determining the proper classification can be confusing, and mistakes can be made easily. Great care must be exercised, and CBP will expect an importer to avail itself of a number of tools available to facilitate the process:

- **HTS general notes.** The Harmonized Tariff System includes detailed guidance in the form of "General Rules of Interpretation," which are essentially legal notes that accompany each HTS chapter. These resources should be consulted whenever questions arise about proper classification. In the above "travel mug" example, CBP advises consulting with the applicable GRI to determine the correct classification.
- **Online "tariff lookup tools" are available for both U.S. importers and exporters.** The International Trade Commission offers an online database for importers, and the U.S. Census Bureau maintains a Schedule B lookup tool through which Schedule B export codes can be identified.
- **CBP maintains a database of all prior tariff classification challenges.** That database, the Customs Rulings Online Search System (CROSS) provides an updated list of all prior customs rulings that can serve as guidance when attempting to assign a tariff classification code.

According to CBP, there is only one correct classification code for each product. But the right classification can sometimes be open to interpretation. CBP has final authority to "make classification decisions and may disagree with reasonable classification offered by the importer."

Country of Origin

Importers also have an obligation to provide CBP with specific information about a product's country of origin. This information is necessary for several reasons, including:

- Determining eligibility for free trade agreement benefits
- Determining rate of duty
- Assessing applicability of antidumping or countervailing duties
- Determining eligibility for import into the United States

In many instances in which a product is 100 percent grown or produced in a single country and proof of that origin is easily proven, compliance with CBP requirements is not difficult. Unfortunately, this is not usually the case.

As Hughes Hubbard & Reed legal analysis notes, since many imported goods consist of materials from more than one country or are manufactured in processes performed in multiple countries, complex rules have been established to determine the country of origin. Importers are expected to exercise "reasonable care" in determining country of origin, and CBP has included related questions in its *Reasonable Care* publication. Among the questions related to country of origin:

- Have you consulted with a customs expert regarding the correct country-of-origin/ proper marking of your merchandise?
- Have you assured that the merchandise is properly marked upon entry with the correct country of origin?
- Have you apprised your foreign supplier of CBP country-of-origin marking requirements prior to importation of your merchandise?

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Source: U.S. Trade Representative

In addition, U.S. importers who apply for benefits under the terms of the North American Free Trade Agreement (NAFTA) must be in compliance with the agreement's very specific rules for determining country of origin. Most shippers understand that NAFTA essentially eliminates duties on all "domestically produced" goods moving among the United States, Canada, and Mexico, but determining what constitutes domestic production can be very confusing.

NAFTA includes special rules that determine what percentage of non-NAFTA components can comprise a finished product and still qualify for preferential treatment. These rules are known as the "NAFTA Rules of Origin." For every product, there is a rule of origin, but deciphering the complex language of each rule can be difficult.

When eligibility for NAFTA benefits is in doubt, a shipper may seek an advance ruling whereby CBP will validate — or change — the assigned country of origin and determine eligibility for NAFTA benefits. NAFTA advance rulings are binding and eliminate any uncertainty with regard to duty-free eligibility.

Once eligibility is determined, a NAFTA Certificate of Origin must be completed and filed with all other shipment documentation. However, completing the certificate of origin can be a highly confusing, exacting process. A business must entrust this responsibility to a highly trained employee or to a qualified customs broker or logistics provider. Improper claims for NAFTA eligibility may result in significant penalties assessed on the individual who signed the form or made the claim.

In fact, incorrect origin determination is a leading reason for shipments being held at the border or being subject to fines and penalties. Further, if CBP determines that a shipper has either failed to provide a certificate of origin on at least two occasions or has repeatedly reported incorrect information, that shipper may have future preferential tariff treatment suspended.

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When a Mistake Occurs...

As outlined above, federal law places the burden for compliance accuracy on the importer. The law also dictates that liability remains with the importer of record — often a retailer or other type of shipper — and not with the customs broker or logistics provider acting on the importer's behalf.

This means a business has a vested interest in ensuring the accuracy of all information submitted to CBP. But despite good intentions, mistakes can and do happen. Should a business become aware that incorrect information was submitted, it's important to notify CBP as soon as possible. By self-identifying — and correcting — the mistake, an importer can minimize the amount of penalties assessed and the possibility of the case being flagged for additional scrutiny.

Know Your Options:

Prior Disclosure: Voluntary filing to report inaccuracies when reasonable care has not been exercised.

Post Summary Corrections: Used to correct inaccuracies made in ACE electronic filings. Can only be used with non-liquidated entries.

Protests: An importer can file a protest to contest a CBP determination after an entry has been liquidated.

Voluntary Prior Disclosure

Should an importer realize it has failed to exercise "reasonable care" in reporting information to CBP and that failure has resulted in errors on entry documentation, the importer can voluntarily disclose the information. Such errors are reported to CBP through submission of a "prior disclosure," as outlined by federal statute.

According to the George R. Tuttle international law firm, a properly prepared and timely filed prior disclosure protects the importer and "can significantly reduce the amount of penalties that would have been imposed had customs initiated an administrative penalty action."

CBP advises that a properly filed prior disclosure requires an importer provide a written report with the following information:

- An explanation of the circumstances of the violation, including the nature of the error or incorrect information submitted
- The identity of the entries or period to which the disclosure applies
- The correct information that should have been included in the original documentation
- Payment of all duties owed

Timing is critically important in submitting a prior disclosure. The prior disclosure must be submitted while the entry is still open — before CBP discovers the error and initiates its own investigation. That way, the disclosure is considered "voluntary," which is taken into consideration in assessing penalties.

As CBP explains, a prior disclosure should be filed as soon as possible once an error is identified. "If you delay submission of a prior disclosure, you run the risk that CBP may discover the violation, commence a formal investigation, and notify you of the commencement of a formal investigation, thereby cutting off your right to make a prior disclosure."

Since the purpose of the prior disclosure is to correct errors in previously submitted CBP filings, an importer must ensure that information included on the prior disclosure is correct and reported accurately. According to analysis by Torres Law, this means a party filing a prior disclosure must have confidence in its ability to provide the correct information and documentation. "If an importer has not maintained, or cannot retrieve, sufficient records to provide correct information regarding its violating imports, the importer will have a difficult time preparing its prior disclosure."

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Prior Disclosures Are Voluntary — and Not Always the Best Option

Since prior disclosures are voluntary, an importer that becomes aware of a violation will need to assess its particular circumstances and determine its best path forward. "Certain factors may exist that will influence your decision," notes CBP, which may include the following:

- Whether or not the importer has already been contacted by CBP
- Whether or not the correct information involving the transactions has been gathered

In addition, Torres Law analysis notes, "CBP cannot meet the culpability requirements to support a penalty action if the importer exercised 'reasonable care' in making the entry." While determining reasonable care is handled on a case-by-case basis, "if a party believes it has acted with reasonable care and can support that assertion, a prior disclosure may not be necessary."

Thus, since there is significant "gray area" with regard to rectifying customs errors, it is advisable for an importer to seek advice from experienced legal counsel in determining its best strategy.

Post Summary Corrections (PSCs)

Customs and Border Protection has mandated use of a new "Single Window Initiative" to serve as the centralized access point for submitting all trade-related documentation to CBP and associated "partner government agencies" (PGAs). Going forward, all information and documentation must be electronically submitted through CBP's Automated Commercial Environment (ACE), which is the technology platform that enables the SWI. Thus, the import process has changed from a paper-based system to an electronic system.

And with that change came the need for a mechanism to allow members of the trade community to correct or amend information submitted via ACE. That mechanism is the Post Summary Correction (PSC), and it replaced the Post Entry Amendment (PEA) process, which had been in place to handle hard-copy entry filings.

Through the PSC process, an importer can correct or amend information supplied to CBP after documentation has been filed but before the entry has been liquidated. PSCs can be used for a variety of purposes, including correction of errors that resulted in overpayments or underpayments of duties, or to correct inadvertent misclassifications.

CBP offers several "guidance points" with regard to PSC usage:

- A PSC allows the trade to electronically correct entry summary data presented to and accepted by CBP through ACE.
- The PSC is essentially a new entry summary and will not be processed until it is fully paid. As a new entry summary, the PSC completely replaces the initial entry summary.
- There is no limit to the number of PSC filings that can be transmitted for an entry summary within the allowable time frame.
- CBP will consider the PSC to be the importer's assertion that the entry summary data is correct. CBP will accept the data as the most up-to-date information available and will change the associated collection information to reflect any monetary changes.

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Important to note, not every entry is eligible for PSC. Instead, PSCs may only be filed to correct original entry summaries that meet the following criteria:

- The entry summary must be in ACE "accepted status" and not under CBP review.
- The entry summary must be in CBP control.
- The entry summary must be "paid."
- The entry summary cannot be liquidated. If it is liquidated, the only recourse a filer has to correct a mistake is to file a prior disclosure or a protest.
- Similarly, since "informal" entries (valued at less than $2,500) are liquidated at time of entry, PSCs cannot be used to correct mistakes in informal entry filings.
- PSC filers can submit these changes within 300 days from the date of entry and up to 15 days of the scheduled liquidation date, whichever date is earlier. Any PSC filed outside the specified time frame will be rejected.

Importers are legally required to correct erroneous information submitted to CBP. Filing a PSC provides a fast and relatively simple venue for meeting that obligation.



An importer can object to a CBP ruling by filing an administrative protest.

Whether an importer submits a prior disclosure or post summary correction, or proceeds with entry information as originally submitted, CBP will make the final determination with regard to the appropriate information for a particular shipment.

CBP could reject a tariff classification assigned by an importer, for example, significantly adding to the amount of duties owed. Or CBP could decide that an importer acted with negligence in making that improper tariff classification and refer the case for possible legal action.

Should CBP make a decision with which an importer disagrees and the shipment in question has already been liquidated, the importer can seek recourse through an administrative protest.

According to CBP, within 180 days of liquidation, the importer or its broker or attorney can contest a CBP decision by filing a protest under section 514 of the Tariff Act of 1930. Protests are generally filed on CB Form 19, which includes specific instructions. Protests can also be filed electronically in the ACE Protest Module or by paper submission at any port of entry.

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CBP Forms CF-28 and CF-29

The first sign that something may be amiss with a customs filing is the receipt of a "CF-28" form. This form is a request from CBP for additional information and, according to Tuttle Law, is issued when CBP believes it has insufficient information to determine admissibility or the appraised value, or to make a correct classification determination. An importer has 30 days to respond to a CF-28 inquiry and should use that time to determine what triggered the inquiry, consult with a customs broker or some other party with expertise, and prepare a detailed response.

An importer may also be in receipt of CBP CF-29, which is a “notice of action” and an indication either that issues outlined in the CF-28 were not sufficiently addressed or that CBP is moving ahead based on information included in the original entry documentation.

This form will indicate that CBP is either “proposing” a certain course of action or that action has already been taken. If a certain remedy is proposed, an importer has 20 days in which to respond. But if action has already been taken, the only recourse is to file a formal protest. CBP generally uses CF-29 to alert an importer of actions that include:

- Assessment of additional duties
- Initiation of liquidation process
- Assessment of antidumping duties based on country of origin

Forms 28 and 29 must be taken seriously and all requested action addressed within the specified time frame. Failure to do so can result in civil fines, additional penalties, and forfeiture proceedings.

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Conclusion

CBP's website discussion on "Determining Duty Rates" puts the complexity of the issue in context by noting: "Experts spend years learning how to properly classify an item in order to determine its correct duty rate. For instance, you might want to know the rate of duty of a wool suit. A classification specialist will need to know, does it have darts? Did the wool come from Israel or another country that qualifies for duty-free treatment for certain of its products? Where was the suit assembled, does it have any synthetic fibers in the lining?"

Clearly, identifying the correct tariff classification, product valuation, or country of origin can be an exacting process. This is why most importers enlist the services of an experienced customs broker to manage the process on their behalf. Important to note, though, the importer — and not the customs broker — retains full responsibility for all information submitted to CBP.

Given the complexity of the clearance process, it's reasonable to expect that mistakes will happen. An importer can do its level best to avoid making a mistake, but when one does happen, it's essential to take prompt action that can limit the risk of penalties and maintain its continued good standing with CBP.

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