U.S. Customs and Border Protection
Office of Strategic Trade
Regulatory Audit Division

Prior Disclosures During a Focused Assessment

Introduction

In March 2003, the U.S. Customs Service became part of the U.S. Customs and Border Protection, which will continue to be referenced as Customs in this document.

The submission of prior disclosures by importers and other parties and the subsequent handling of these prior disclosures by the Customs Service continue to be areas of concern for both the importing community and Customs. Importers and other parties are increasingly re-evaluating how and when they should reveal their past violations to Customs. While Customs is responsible for enforcing title 19 United States Code (U.S.C.) 1592 and ensuring compliance with the laws and regulations that govern U.S. imports and exports, it seeks to improve compliance and encourage parties to submit prior disclosures. The purpose of this document is to further communicate the importance of submitting a prior disclosure and to explain the benefits received by parties submitting valid prior disclosures.

One of the most valuable tools available to a party when it discovers commercial noncompliance before the agency does, is the "prior disclosure" provision found in 19 U.S.C. 1592. If the disclosure is complete, accurate, and filed before, or without knowledge of, the commencement of a formal Customs investigation of that violation, the Fines, Penalties, and Forfeitures (FP&F) officer will review the disclosure to determine if it constitutes a prior disclosure. For example, prior disclosures must include:

(1) An identification of the class or kind of merchandise involved in the violation;

(2) An identification of the importation or drawback claim included in the disclosure by entry number, by drawback claim number, or by indicating each concerned Customs port of entry and the approximate dates of entry or dates of drawback claims;

(3) Specific material false statements, omissions, or acts, including an explanation of how and when they occurred;

(4) To the best of the disclosing party's knowledge, the true and accurate information or data that should have been provided in the entry or drawback claim documents and a statement that the disclosing party will provide any information or data unknown at the time of disclosure within 30 days of the initial disclosure date. The disclosing party may request extensions of the 30-day period from the concerned FP&F officer to enable the party to obtain the information or data;

(5) A tender of the loss of duties, fees, and taxes to Customs either at the time of the claimed prior disclosure or within 30 days after Customs notifies the party of Customs calculation of the actual loss of duties, taxes, and fees or actual loss of revenue. When disclosures are determined to be prior disclosures by Customs, the disclosing party will be entitled to significantly reduced penalties.

A prior disclosure may be submitted either in writing or orally. A written prior disclosure should be addressed to the Commissioner of Customs, have conspicuously printed on the face of the envelope the words "prior disclosure," and be presented to a Customs officer at the Customs port of entry of the disclosed violation. An oral disclosure must be confirmed in writing, unless waived by the FP&F officer, within 10 days of the date of the oral disclosure. When the claimed prior disclosure is made to a Customs officer other than the concerned FP&F officer, it is incumbent upon the Customs officer to provide the disclosure to the concerned FP&F officer. Additionally, the receiving Customs officer must notify the Office of Investigations of the disclosure. When a tender is made in connection with the prior disclosure, the Customs officer who receives the tender should ensure that the tender is deposited with the concerned local Customs entry officer. The FP&F officer responsible for the port of entry where the admitted violation took place decides whether the prior disclosure is valid in accordance with 19 CFR 162.74.

When a disclosure is determined to be a prior disclosure, Customs notifies the disclosing party and usually sets forth the reduced penalty treatment in its notice. The notification should provide instructions regarding payment of any reduced penalty, and also serves as the Customs record of the disclosed violation. In accordance with 19 CFR 162.74(g), if prior disclosure treatment is denied on the basis that Customs had commenced a formal investigation of the disclosed violation, and if Customs initiates a penalty action against the disclosing party involving the disclosed violation, a copy of the "writing" evidencing the commencement of a formal investigation of the disclosed violation shall be attached to any required pre-penalty notice issued to the disclosing party pursuant to 19 U.S.C. 1592 or 19 U.S.C. 1593a.

What Is Considered a "Formal Investigation" for Prior Disclosure Purposes?

For prior disclosure purposes under 19 CFR 162.74(g), a "formal investigation" is considered commenced on the date recorded in writing by the Customs Service as the date on which facts and circumstances were discovered or information received that caused Customs to believe that the possibility of a violation of 19 U.S.C. 1592 or 19 U.S.C. 1593a existed. During a Focused Assessment (FA) or other audit, a Customs officer may discover information that provides a reason to believe that the possibility of a section 1592 or 1593a violation exists. When this occurs, the officer dates and documents those findings. The prior disclosure regulations require that formal investigations be evidenced by such a "writing."

If the discovering Customs officer has commenced the investigation by such a "writing," the party should be notified of the findings. Although a “writing” may take many forms, during an FA or other audit a common form may be a sufficiently documented result sheet. Without knowledge of the commencement of a formal investigation, the party may still be able to submit a prior disclosure If the party is notified of such findings before the submission of a claimed prior disclosure, the concerned FP&F officer may determine the subsequent disclosure not to constitute a prior disclosure.

It is also important to remember that prior disclosure is "violation specific" and that disclosure benefits ordinarily are available only for those violations fully disclosed by the prior disclosure. Further, it should be noted that the definition of commencement of a formal investigation as it relates to prior disclosure does not require the active involvement of the Office of Investigations. The writing and recording by any Customs officer of the facts and circumstances indicating the belief of a possible violation "commences" the investigation.

Benefits Received from a Prior Disclosure

Benefits to the Disclosing Party

As mentioned above, parties may receive reduced penalties if a prior disclosure is submitted to Customs. The penalty may be reduced to "zero" if the importation involves unliquidated (i.e., "open") Customs entries and no fraud is involved. If the entries are liquidated (i.e., "closed or finalized") and no fraud is involved, the penalty is the interest on the duties owed. Therefore, the penalty for grossly negligent and negligent violations is reduced to only the interest on any loss of duties, taxes, and fees, which is computed from the date of liquidation at the prevailing rate of interest applied under section 6621 of title 26 as long as such person tenders the unpaid amount of the lawful duties, taxes, and fees at the time of the disclosure or within 30 days after notice by the Customs Service. If a fraudulent violation is disclosed, the penalty is reduced from the normal assessment of the domestic value of the goods to 1 times the loss of duties, taxes, and fees as long as such person tenders the unpaid amount of the lawful duties, taxes, and fees at the time of the disclosure or within 30 days after notice by the Customs Service. If the violation involves no loss of duties, taxes, and fees, the penalty is reduced to 10 percent of the dutiable value of the merchandise.

Prior disclosures can and do save the trade community time and money. In some cases, parties have saved millions of dollars in potential penalties by submitting prior disclosures, but other benefits often accrue to the disclosing party. By conducting periodic self-assessment of importing activities and utilizing this provision of law, a party may be able to detect and correct errors as well as ensure future compliance with Customs laws and regulations. Additional time and money savings often materialize in the form of reduced legal expenses and/or the elimination of lengthy Customs civil penalty proceedings. A good example of this is illustrated in the Prior Disclosure Scenario below.

Benefits to Customs

In this era of increased international trade with limited Customs appropriations and personnel (doing more with less), a prior disclosure can significantly eliminate or reduce expenditures of valuable Customs resources. Because the disclosing party does most of the work in uncovering the violation, the need for comprehensive or lengthy labor-intensive investigations can be reduced or eliminated, and protracted civil administrative or judicial proceedings can be avoided. Virtually every Customs discipline involved in commercial compliance (e.g., special agents, regulatory auditors, inspectors, import specialists, penalties personnel, attorneys, entry specialists) benefits from having the disclosing party do the work for Customs. The time- and resource-saving elements of prior disclosures permit the disciplines to devote greater energy to other compelling Customs enforcement or compliance initiatives.

Prior Disclosure Scenario

The following fictional scenario may have a very familiar ring to those involved in importing or exporting:

"JANE'S STORY" - OR - "HOW I SAVED MY COMPANY $1 MILLION"

Jane is the new compliance manager for a large electronics company on the West Coast. She's responsible for all the Customs and freight matters involved with the thousands of products the company imports and exports. The company imports well over $500 million worth of products each year. One Monday morning, she's going through the mail and comes across a letter from Customs advising her that her company has been selected for an FA review. The letter indicates that the FA team will be visiting, and that the team would like to review company books and records relating to the classification and value of certain 1998 electronic parts imports, as well as the records relating to the company's rather extensive 1998 HTS 9802 assembled VCR imports. The letter goes on to state that it is recommended that the company undertake a "self-assessment" and consider availing itself of the prior disclosure provision as described in the Customs Regulations at 19 CFR 162.74, in the event noncompliance with the Customs laws is discovered. The document ends with contact information and the usual Customs pleasantries.

Jane puts down the letter and remembers reading about FAs on the Customs Web site and vaguely recollects something called prior disclosure. She races to her computer, logs on to www.customs.treas.gov, and searches through the link tied into importing and exporting/informed compliance. There it is--the FA Program (FAP) Kit! She downloads the document and while waiting, scans the site for information on prior disclosure. Bingo! She finds an informed compliance publication called "The ABC's of Prior Disclosure," and readies it for downloading. Jane spends the rest of the day going through the information she retrieved from the Web.

One month later, Jane completes a thorough self-assessment of imports covered by the upcoming FA and discovers why the company hired her in the first place. Jane finds that both the 1997 and 1998 imported electronic parts are undervalued and that not all of the required HTS 9802 costs for the 1998 VCR imports were reported to Customs. Based on her calculations, the company failed to pay Customs about $250,000 in duty After meeting with Jane to review her findings, company executives agree to retain a Customs lawyer they have used on one other occasion. Later on, the lawyer calls Jane and informs her that based on his review of the records, Customs could pursue a section 592 penalty against the company, most likely at the gross negligence level (generally 4 times the duty loss). That would mean that the company could face a penalty of $1,000,000 plus the $250,000 in duty. The lawyer advises the company to file a prior disclosure to limit its liability.

Jane immediately meets with management and explains, "Ladies and gentlemen, with regard to the upcoming Focused Assessment, it's either a $1,000,000 penalty plus $250,000 in duty if we do nothing, or $250,000 in duty plus interest, if we make a disclosure. The choice is yours." Fortunately, the company goes forward with a prior disclosure that is accepted by Customs, and Jane gets a nice little bonus in her paycheck.

COMMENTS: The lawyer gave Jane good advice about filing a prior disclosure. The next step and often the most difficult one for compliance managers is "selling" management on the benefits associated with prior disclosure. The following points may make the compliance manager's job a bit easier:

1. If you find the noncompliance during a self-assessment, it's very likely the FA team will discover it during the FA.

2. Let the money do the talking for you. For example, do what Jane did--determine the potential penalty if Customs discovers the violation and then look at the difference in numbers if you elect to submit a valid prior disclosure. In most cases, the disclosure savings are substantial.

3. It's worth noting that a disclosure will also, in most cases, reduce the intrusiveness and duration of an investigation or audit that could ensue if the company fails to make a disclosure and Customs discovers the infractions.