

Spotlight on Import Regulation: Choosing Between Post-Entry Amendments, Prior Disclosures and Protests

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U.S. Customs & Border Protection (CBP) is authorized to penalize importers that fail to exercise reasonable care to provide complete and accurate data regarding the goods they bring into the United States. However, despite an importer's best efforts, it may sometimes be necessary to amend or supplement the information provided to CBP after goods have entered the country. Additionally, CBP itself sometimes makes errors in the process of assessing duties on an importer's merchandise. Accordingly, CBP's regulations provide for a variety of corrective measures.

The most common methods for correcting or supplementing data provided to CBP are Post-Entry Amendments (PEAs), prior disclosures and protests.

Post-Entry Amendments. PEAs may be filed at any time after goods are entered into the country, up to 20 days prior to the scheduled date of liquidation (usually 314 days after entry). PEAs may be used to correct or amend any information that was provided to CBP when the goods were entered. For example, if an item was inadvertently misclassified, the classification may be corrected. PEAs can be used to correct errors that resulted in the overpayment of duties to CBP, as well as those that may have resulted in underpayment.

Prior Disclosures. If an importer fails to exercise reasonable care standard in reporting information to CBP, resulting in errors on entry documentation, the company can voluntarily disclose the errors. In return, CBP will not assess penalties against the importer, other than interest on any unpaid duties, even if the error occurred because of

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the importer's negligence in ascertaining the facts regarding the entry. Where the error was the result of actual fraud on the importer's part, a valid prior disclosure will not entirely prevent penalties from being assessed, but it can result in a significant reduction of the penalty amount.

Protests. Where an importer disagrees with certain CBP decisions, such as those determining the value or classification of merchandise, the importer may challenge the agency's decision through a procedure called a protest. Most typically, protests arise in conjunction with CBP's assessment of duties. For example, CBP may determine that the importer's goods were inadvertently misclassified, incorrectly valued, or that they should otherwise be subject to a different duty rate than claimed by the importer at the time of entry, and apply a different duty rate than the importer believes is applicable.

When an importer discovers mistakes—either its own or what it believes to be CBP's—it may question which method provides the simplest and most appropriate method of resolving the issue. The answer depends on the nature and extent of the mistakes, and whether they were the importer's fault or CBP's.

If the error affects a single entry that has not been liquidated, a PEA is likely the simplest way of handling the situation. PEAs are particularly appropriate where the error was clerical in nature or where an importer provided data that it reasonably believed to be correct at the time of entry, but subsequently learned was incorrect. For example, an importer may have a longstanding relationship with a supplier to provide merchandise from the supplier's factory in Country X. After importation, but before duties are assessed, the importer discovers that its supplier, due to an unforeseen breakdown of its machinery, substituted merchandise from its other factory in Country Y. A PEA would be a reasonable method of amending the country of origin information submitted to CBP to reflect that Country Y is the origin of the good.

Where an error affects multiple entries, or otherwise reflects an importer's failure to exercise reasonable care, a prior disclosure is the better option. For example, perhaps a clerical error is perpetuated over multiple entries due to the importer's failure to timely review its submissions. Or perhaps an importer has been classifying its merchandise under Tariff Provision A, despite the existence of CBP ruling letters holding that substantially similar merchandise is classified under Provision B. Where an error of this type is discovered—one that could lead CBP to penalize the importer if the agency were to discover it independently—a PEA may not be appropriate. First, a PEA does not permit an importer to avoid penalties. Further, if the entry or entries at issue have already been liquidated, a PEA would not be available even if the error was not the result of a failure to exercise reasonable care. Importers should be aware that, in order to take advantage of the penalty protections of a prior disclosure, a disclosure must be filed before CBP launches an investigation into the matter.

Where an error is not the result of the importer's failure to exercise reasonable care, but the entry has liquidated, a protest is the importer's best option for correcting the entry. A protest may be filed where the importer believes that CBP has made an error in liquidating the merchandise. For example, an importer might enter its goods under Tariff Provision A, only to have CBP independently reclassify the goods under a different provision. If the importer believes that it was correct in its classification, a protest—potentially followed by

litigation at the U.S. Court of International Trade—is likely the appropriate method for pursuing correction.

Importers should also be aware that CBP provides for the amendment or “reconciliation” of information that is simply not available when the goods are brought into the United States. Most typically, the value of imported merchandise may depend on accounting adjustments that are not finalized until after importation. Importers that routinely face such issues can apply to participate in CBP’s reconciliation program, which will allow the importer to provide the agency with finalized information after entry.

CBP provides multiple methods by which an importer may seek to correct or amend information supplied to the agency, or to correct or amend determinations made by the agency itself. The most appropriate method will depend on the particular circumstances of each case. The discussion above provides broad guidelines that importers may take into account when considering how best to correct or amend information. However, importers seeking to correct or amend information related to specific entries should discuss their options with their brokers, outside counsel and other expert advisors.