THOMPSON &
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Customs Section 592 Penalties: Who, What, When, Why and How

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Section 592

- **Section 592 of the Tariff Act of 1930 (19 U.S.C. § 1592) authorizes U.S. Customs and Border Protection to impose penalties for material false statements or omissions in entry documents.**
- **The statute is one of the primary enforcement tools used by CBP to prevent and correct violations of the trade laws and loss of revenue from duties, fees and taxes.**

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Section 592

- **(1) General rule. Without regard to whether the United States is or may be deprived of all or a portion of any lawful duty, tax, or fee thereby, no person, by fraud, gross negligence, or negligence—**
  - **(A) may enter, introduce, or attempt to enter or introduce any merchandise into the commerce of the United States by means of—**
  - **(i) any document or electronically transmitted data or information, written or oral statement, or act which is material and false, or**
  - **(ii) any omission which is material, or**
  - **(B) may aid or abet any other person to violate subparagraph (A).**

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Section 592

- **Clerical errors or mistakes of fact are not violations of paragraph (1) unless they are part of a pattern of negligent conduct. The mere nonintentional repetition by an electronic system of an initial clerical error does not constitute a pattern of negligent conduct.**
- **Three elements of a violation.**
  - **Activity (entry or attempted entry of merchandise)**
  - **Method (by means of a false and material statement or omission)**
  - **Level of culpability (fraud, gross negligence, negligence)**

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Section 592--What

- **". . . enter, introduce, or attempt to enter or introduce any merchandise into the commerce of the United States . . ."**
- **In most cases, the alleged violation stems from the filing of entry documents by or on behalf of the importer.**
- **The entry documents themselves qualify as evidence that the act occurred.**

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Section 592--What

- **The term "introduce" encompasses actions besides filing of entry documents.**
  - **"[I]ntroduce" in section 1592(a)(1)(A) means that the statute is broad enough to reach acts beyond the act of filing with customs officials papers that 'enter' goods into United States commerce." *U.S. v. Trek Leather* (Fed. Cir. 2014), citing U.S. v. *25 Packages of Panama Hats* (S. Ct. 1913).**

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Section 592--What

- **"It is broad enough to cover, among other things, actions completed before any formal entry filings made to effectuate release of imported goods. . . . Under the rationale of *Panama Hats*, the term covers actions that bring goods to the threshold of the process of entry by moving goods into CBP custody in the United States and providing critical documents (such as invoices indicating value) for use in the filing of papers.**
- **Recent decisions have given an expanded meaning to the term.**

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Section 592--What

- **Actions that may fall within the scope of "introduce" include preparation of invoices by foreign consignor and "ordering goods to be shipped to a U.S. port for the purpose of entering those goods into U.S. commerce, because by so doing, the goods are ultimately moved into CBP's custody."**
- **Also covered is foreign party's misclassification "in a document prepared for the purpose of entering goods which that person causes to be shipped to, and unloaded at, a U.S. port." *U.S. v. Sterling Footwear* (CIT 2017).**

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Section 592--What

- **". . . by means of . . . any document or electronically transmitted data or information, written or oral statement, or act which is material and false or . . . any omission which is material . . ."**
- **The term "material" covers any "document, statement, act, or omission" that "has 'the tendency to influence Customs' decision in assessing duties.' " *U.S. v. Matthews* (CIT 2007).**

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Section 592--What

- **19 C.F.R. Part 171, Appendix B provides that "A document, statement, act, or omission is material if it has the natural tendency to influence or is capable of influencing agency action including, but not limited to a Customs action regarding: (1) Determination of the classification, appraisement, or admissibility of merchandise (e.g., whether merchandise is prohibited or restricted); (2) determination of an importer's liability for duty (including marking, antidumping, and/or countervailing duty); (3) collection and reporting of accurate trade statistics; (4) determination as to the source, origin, or quality of merchandise;**

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Section 592--What

- **(5) determination of whether an unfair trade practice has been committed under the anti-dumping or countervailing duty laws or a similar statute; (6) determination of whether an unfair act has been committed involving patent, trademark, or copyright infringement; or (7) the determination of whether any other unfair trade practice has been committed in violation of federal law.**

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Section 592--What

- **Such statements include, for example, "the description of the imported merchandise provided within the commercial invoice, the asserted classification of the imported merchandise, and the declaration as to whether the imported merchandise is subject to antidumping or countervailing duties. All of this information is used by Customs to determine an importer's duty liability." *U.S. v. Deladiep, Inc.* (CIT 2017).**

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Section 592--What

- **A false statement is *per se* material if its consequence is to deprive the United States of duties that should otherwise have been tendered. *U.S. v. Chavez* (CIT 2017).**
- **The term "false" is not statutorily defined, so cases have looked to the ordinary meaning of the word, as found (for example) in dictionaries: "a statement is 'false' when it is 'untrue' or '[n]ot genuine; inauthentic.' " *U.S. v. Sterling Footwear*.**
- **". . . the invoice for each shipment of produce was grossly undervalued, and hence false." *U.S. v. Inn Foods* (Fed. Cir. 2009).**

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Section 592--Why

- **Negligence**
  - **"An act or omission constitutes a negligent violation of 19 U.S.C. §1592(a) if the alleged violator failed to exercise the degree of reasonable care and competence expected from a person in the same circumstances to ensure that the statements made and information provided in connection with the importation of merchandise were complete and accurate." *U.S. v. Deladiep.***
  - **CBP may demonstrate negligence occurred by merely by showing there was a false and material act or omission.**

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Section 592--Why

- **Gross Negligence**
  - **"An importer is guilty of gross negligence if it behaved willfully, wantonly, or with reckless disregard in its failure to ascertain both the relevant facts and the statutory obligation, or acted with an utter lack of care." *U.S. v. Ford Motor Co.* (Fed. Cir. 2006).**
- **Fraud**
  - **Knowingly entering goods by means of a material false statement. *U.S. v. Hitachi America, Ltd.* (Fed. Cir. 1999)**
  - **Fraud requires a showing of intent, which may be inferred from behavior such as double-invoicing.**

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Section 592--Who

- **CBP and reviewing courts have given broad application to the meaning of "person".**
  - **Includes, but is not limited to, the corporate importer of record for the entries.**
  - **Also applies to individuals responsible for preparation and presentation of the false statements.**
  - **"*Trek Leather* stands for the proposition that an individual may be held liable for violating § 1592(a)(1)(A) when that individual engages in conduct proscribed by the statutory provision. . . . ("person" for purposes of § 1592(a)(1) includes individuals and is not limited to the importer of record)."**

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Section 592--Who

- **Customs broker and nominal importer of record for entries presenting false tariff classification and NAFTA claims based on information provided by the foreign vendor (its customer), as well as that vendor. *U.S. v. UPS Supply Chain Solutions, Inc.* (CIT 2017).**
- **"Aiding and abetting" provision is an alternative means to impose liability on parties other than the importer.**
  - **Creates a form of liability for those who play certain roles in an underlying violation short of committing the violation.**
  - **Applied to corporate alter ego of importer in *U.S. v. Inn Foods* (Fed. Cir. 2009).**

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Section 592—When & How

- **If CBP has " reasonable cause to believe that a violation of section 592 has occurred and determines that further proceedings are warranted," it will issue a pre-penalty notice stating an intent to issue a claim for a monetary penalty.**
- **The pre-penalty notice "will make a tentative determination of the degree of culpability and the amount of the proposed claim."**

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Section 592—When & How

- **A notice of penalty will take into account "all available evidence with respect to the existence of material false statements or omissions (including evidence presented by an alleged violator), the degree of culpability, the existence of a prior disclosure, the seriousness of the violation, and the existence of mitigating or aggravating factors."**

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Penalties & Remedies

- **The statute provides for maximum penalty amounts, but these are subject to mitigation by CBP.**
- **Negligence**
  - **Statute: Two times the loss of lawful duties, taxes, and fees deprived the government or 20% of the dutiable value in non-duty loss violations.**
  - **Mitigation Guidelines: A minimum of 0.5 times the total loss of duty to a maximum of 2 times the total loss of duty or, in non-duty loss violations, a minimum of 5 percent of the dutiable value to a maximum of 20 percent of the dutiable value of the merchandise.**

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Penalties & Remedies

- **Gross Negligence**
  - **Statute: Four times the loss of lawful duties, taxes, and fees or the domestic value or, if the violation did not affect the assessment of duties 40% of the dutiable value in non-duty loss violations.**
  - **Mitigation Guidelines: A minimum of 2.5 times the total loss of duty to a maximum of 4 times the total loss of duty or, in non-duty loss violations, a minimum of 25 percent of the dutiable value to a maximum of 40 percent of the dutiable value of the merchandise.**

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Penalties & Remedies

- **Fraud**
  - **Statute: Domestic value of the merchandise.**
  - **Mitigation Guidelines: A minimum of 5 times the total loss of duty to a maximum of 8 times the total loss of duty, although a penalty of greater than 8 times the total loss of duty may be imposed in a case involving an egregious violation, or a public health and safety violation, or due to the presence of aggravating factors; in non-duty loss violations, a minimum of 50 percent of the dutiable value to a maximum of 80 percent of the dutiable value of the merchandise.**

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Penalties & Remedies

- **". . . if the United States has been deprived of lawful duties, taxes, or fees as a result of a violation of subsection (a), the Customs Service shall require that such lawful duties, taxes, and fees be restored, whether or not a monetary penalty is assessed.**
- **Regardless of whether a civil penalty is assessed, CBP requires payment of any duties, taxes, and fees that were avoided due to the violation.**
- **This obligation is not limited to the importer of record but applies to any person subject to penalty under the statute.**

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Penalties & Remedies

- **The statute of limitations is five years.**
- **CBP cannot collect penalties that it has administratively assessed. Instead, it must proceed through an action in the Court of International Trade.**
- **19 U.S.C. § 1621 imposes a five year period for commencing an action, measured as five years after the date of the alleged violation or five years after the date of discovery of fraud.**
- **CBP cannot seek a higher level of culpability than was alleged in the administrative process.**

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Penalties & Remedies

- **Prior disclosures provide a "safe harbor" against penalties.**
- **A prior disclosure informs CBP of the circumstances of a section 592 before, or without knowledge of, the commencement of a formal investigation of that violation by CBP, and includes a tender of any actual loss of duties associated with the violation.**
- **A disclosure "immunizes" the disclosing party against assessment of a penalty and avoids the possibility of CBP seizing merchandise.**

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Penalties & Remedies

- **The disclosure may be presented in two stages, at the importer's option.**
- **It must identify the "class or kind" of merchandise and entries involved, the false statements and why they were made, the true and accurate information that should have been provided and the estimated revenue loss.**

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Penalties & Remedies

- **CBP has substantial discretion to mitigate penalties.**
  - **Mitigation factors include: (1) the defendant's good faith effort to comply with the statute; (2) the defendant's degree of culpability; (3) the defendant's history of previous violations; (4) the nature of the public interest in ensuring compliance with the regulations involved; (5) the nature and circumstances of the violation at issue; (6) the gravity of the violation; (7) the defendant's ability to pay; (8) the appropriateness of the size of the penalty to the defendant's business and the effect of a penalty on the defendant's ability to continue doing business;**

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Penalties & Remedies

- **CBP has substantial discretion to mitigate penalties.**
  - **Mitigation factors include (9) that the penalty not otherwise be shocking to the conscience of the court; (10) the economic benefit gained by the defendant through the violation; (11) the degree of harm to the public; (12) the value of vindicating the agency authority; (13) whether the party sought to be protected by the statute had been adequately compensated for the harm; and (14) such other matters as justice may require.**

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Penalties & Remedies

- **An importer that exercises "reasonable care" may receive substantial mitigation or a complete discharge of a penalty, even if CBP establishes that there was a false and material act or omission.**
- **Reasonable care is a flexible concept and the actions required of an importer may vary, depending on the circumstances.**
- **CBP and the CIT have identified the following activities as reflecting reasonable care:**
  - **Participation in a CBP preclassification of the imported merchandise,**

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Penalties & Remedies

- **Consulting the tariff schedules, informed compliance publications, court cases, and/or CBP rulings, a lawyer, accountant, or customs consultant.**
- **Seeking a binding ruling for the subject merchandise prior to importation of merchandise.**
- **When presented with more than one interpretation of legal requirements, undertaking some further investigation to resolve the conflict by (for example) proper classification, whether it meant consulting the CROSS database of customs rulings, obtaining a second opinion, or consulting a customs attorney or other customs expert.**

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Penalties & Remedies

- **There is a likelihood that CBP will expand its use of Section 592.**
- ***Trek Leather* makes multiple parties potentially liable for violations.**
- **CBP uses the threat of a penalty proceeding as "persuasion" for importers to make duty payments for entries that are beyond the period for reliquidation.**
- **Executive Order 13785 requires enhanced AD/CVD and trade law enforcement.**

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