

Overview

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Jennifer Diaz, Diaz Trade Law

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Contributed by *Jennifer Diaz, Diaz Trade Law*

Legislative Background

In response to the increased enforcement burden on U.S. Customs and Border Protection (CBP) caused by a rapid increase in trade volumes and difficulties associated with inaccurate entry documentation, the [Customs Modernization Act \(the Mod Act\)](#) became effective law on Dec. 8, 1993. The Mod Act, which comprised of Title VI of the North American Free Trade Agreement (NAFTA) Implementation Act, amended portions of the [Tariff Act of 1930](#), a foundational statute in U.S. trade law.

The Mod Act requires importers to use reasonable care to enter, classify, and determine the value of imported merchandise and to provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics, and determine whether other applicable legal requirements, if any, have been met. Specifically, the Mod Act requires complete and accurate information regarding tariff classification, product valuation, country of origin markings, duty preferences, claims, quantities, proof of payment, and shipment details.

Informed Compliance

Informed compliance and shared responsibility are two concepts which emerged from this law. The Mod Act fundamentally changed the landscape in the enforcement of CBP laws and regulations, especially in terms of shifting the legal responsibility to the importer in declaring proper value, classification, and rates of duty applicable to imported merchandise. Not only did the Mod Act impose a greater obligation on importers to ensure they are performing due diligence (reasonable care) when importing, but also placed an onus on CBP to provide the public with improved information and guidance—e.g. via ["Informed Compliance" publications](#)—on CBP laws and regulations as well as importers' responsibilities. Both the trade community and CBP are equally responsible for carrying out these requirements, and this cooperation is intended to foster greater transparency and compliance.

Importers are at risk of being subject to enforcement actions by CBP if they do not comply with the reasonable care standard when importing goods into the U.S. This article provides an overview of CBP's expectations of an importer and practitioner's tips to avoid CBP enforcement actions.

Duty to Exercise Reasonable Care

Under the Mod Act, importers are required to exercise "reasonable care," which requires importers to conduct themselves as a reasonable importer would under the circumstance with respect to importing prior to entering goods into the United States. Reasonable care requires importers to:

- Meet the standard to enter, classify and determine the value of imported goods
- Provide other information necessary to aid CBP in properly assessing duties and collecting accurate statistics
- Determining whether other applicable legal standards and requirements have been met

In order for the trade community to effectively comply with this standard of care, the Mod Act imposed a new obligation of transparency on CBP to provide the public with guidance on their legal obligations regarding customs and trade regulations. From a practitioner's perspective, CBP is a labyrinth of an Agency with various departments, offices, divisions, and units that play critical roles in facilitating legitimate trade and border security. CBP's laws and regulations are ever-evolving.

As a practitioner, it is imperative to learn the inner workings of the agency's system in order to effectively represent a client's interest. Customs issues are frequently technical, and their resolution often requires knowledge of and expertise in a variety of interrelated customs principles. The risk of noncompliance can lead to significant CBP enforcement actions. It is highly recommended to advise importers to engage an experienced professional to provide "pre-compliance" assistance prior to importing. If an enforcement action by CBP has commenced, it is similarly imperative to engage experienced counsel to assist in mitigating CBP enforcement.

CBP's [Informed Compliance Publication, What Every Member of the Trade Community Should Know: Reasonable Care](#), provides valuable insight and an invaluable checklist for importers to utilize in ascertaining whether their current processes follow CBP's reasonable care standard. The Informed Compliance Publication topics are arranged as listed below. Accordingly, this article is organized in the same order:

- Merchandise Description and Tariff Classification
- Valuation
- Country of Origin/Marking/Quota
- Intellectual Property Rights
- Forced Labor
- Miscellaneous

Practice Tip: It is highly recommended for importers to use the reasonable care checklist when drafting policies and procedures, and/or an import compliance program.

Merchandise Descriptions & Classifications

All merchandise imported to the U.S. is either subject to, or free of, duties in accordance with the Harmonized Tariff Schedule of the U.S. (HTSUS). The HTSUS is used to determine an imported article's duty rate and whether the article is eligible to use a free trade agreement or any other trade preference program. The HTSUS also differentiates between [general and special rates of duty](#). General rates are intended for countries that have normal trade relations status with the U.S. while special rates are for countries with which the United States has one or more special tariff treatment programs.

Practice Tip: Quite often, importers will rely upon customs brokers to determine the most accurate [HTSUS](#) prior to filing an entry summary with CBP. The liability is upon the importer of record to ensure the correct HTSUS is used. Therefore, it is highly recommended for importers to review the HTSUS carefully and proactively provide the most appropriate HTSUS to the customs broker (instead of having the broker choose the HTSUS). If an importer does rely on a broker for their expertise, the importer is highly recommended to review the HTSUS and ensure the broker is in fact classifying their product correctly.

Under [§1484](#) and [§1481](#) of the Tariff Act, it is a requirement for importers to provide a correct and accurate description to CBP and tender the appropriate amount of duties to CBP. Importers are also encouraged to review CBP's informed compliance publications and [prior CBP rulings](#) on the [Customs Rulings Online Search System \(CROSS\)](#). Additionally, importers are encouraged to consult a customs expert, often a customs attorney to make sure they are compliant.

Practice Tip: Importers are encouraged to seek a binding ruling from CBP. Binding rulings are issued by CBP at no cost to importers. It is important to note that these rulings are binding, and importers must do their research and due diligence prior to requesting a ruling in order to have the best chances of obtaining a favorable ruling. We highly encourage importers to advocate for the result they want CBP to consider. Additionally, if an importer cites to [19 C.F.R. Part 177](#), and requests a call with CBP should CBP disagree with an importers request, CBP must have the call with the importer and provide the importer the right to withdraw the ruling request.

Practice Tip: Importers should ensure that they can answer the following questions accurately pertaining to merchandise descriptions and tariff classifications prior to importing:

1. Have you established reliable procedures to ensure you provide a correct and complete description of your merchandise on your commercial invoice in accordance with [19 U.S.C. §1481](#)?
2. Have you included a correct tariff classification to CBP on your Customs Entry Form 7501, in accordance with [19 U.S.C. §1484](#)? Consult CBP's informed compliance publication, [What Every Member of the Trade Community Should Know About: Tariff Classification](#).
3. Have you obtained a CBP binding ruling, and if so, have you followed the ruling and brought it to CBP's attention by having your broker include the ruling number in ACE when filing your entry? Rulings may be submitted electronically through [the eRulings template](#).

4. Where merchandise description or tariff classification information is not immediately available, have you established a reliable procedure for obtaining and providing that information?
5. Have you consulted the [HTS](#), [CBP's informed compliance publications](#), court cases and/or [CBP's rulings on CROSS](#) to assist you in describing and classifying the merchandise?
6. Have you consulted with a customs attorney or another expert in customs law?
7. If you are claiming eligibility for a conditionally free or special tariff classification/provision, how have you verified that the imported merchandise qualifies for such status? What documentation to support that claim? Does your documentation go back five years covering the statute of limitations period?
8. Is the nature of your merchandise such that a lab analysis or other specialized procedure is suggested to assist in proper description and classification (i.e., a chemical)?
9. Have you developed a reliable written import compliance program covering your process to assess and document the correct HTSUS for your imported merchandise?

Product Valuation

Customs valuation is a procedure to determine the customs value of imported goods. The customs value is essential to calculate the total duty to be paid on an imported good. The vast majority of goods are evaluated based on the “transaction value” of imported merchandise. “Transaction value” refers to “the price actually paid or payable for imported merchandise when sold for exportation to the United States” plus certain statutory or dutiable additions. The “price actually paid or payable” refers to the “total payment made or to be made, for imported merchandise by the buyer to, or for the benefit of, the seller.” Transaction value excludes charges like international freight and insurance.

Statutory additions to the price actually paid or payable include:

- Packing costs incurred
- Selling commissions incurred by the buyer
- The value of an assist
- Royalties and licensing fees paid as a condition of the sale
- Proceeds of any subsequent resale that accrue to the seller

Practice Tip: The [customs valuation encyclopedia](#) is the best valuation resource from CBP and was last updated in 2016.

Practice Tip: When purchasing from a related party, as defined in [19 U.S.C. §1401a\(g\)](#), importers must review CBP's tests for determining the acceptability of related party pricing. CBP's Informed Compliance publication “[Determining the Acceptability of Transaction Value for Related Party Transactions](#)” discusses the circumstances of the sale and test values tests which must be considered prior to importation.

Practice Tip: Importers should ensure that they can answer the following questions accurately pertaining to product valuation prior to importing:

1. Do you know the terms of sale (i.e., the [incoterm](#) used), whether there will be rebates, tie-ins, indirect costs, additional payments, whether assists will be provided, commissions or royalties paid? Are amounts actual or estimated? Are you and the seller related parties?
2. Have you provided a proper declared value to CBP via the CBP Entry Summary Form 7501 for your merchandise in accordance with [§1484](#) and [§1401\(a\)](#)?
3. Have you obtained a CBP binding ruling?
4. Have you consulted the CBP valuation laws and regulations, [Customs Valuation Encyclopedia](#), [CBP's informed compliance publications](#), court cases, and [CBP's rulings on CROSS](#)?
5. Have you consulted with a customs expert?

6. Do you have a complete set of documents from the import transaction ready for CBP review (including your purchase order, commercial invoice, bill of lading or air waybill, packing list, Customs Form 7501, proof of payment)?
7. If the merchandise was purchased from a related seller, have you ensured that you have reported that fact upon entry on box 32 of the CBP Form 7501, and made sure the value reported to CBP meets one of the related party tests? Consult [19 C.F.R. §152.103](#) and [19 U.S.C. §1401a\(b\)\(2\)\(B\)](#).
8. If there is no bona fide sale for exportation to the U.S. between the buyer and seller, have you considered the other valuation methods in [19 U.S.C. §1401a\(a\)](#)?
9. If computed value is used, do you have information concerning the various elements of this method under [19 U.S.C. §1401a\(e\)](#)?
10. Have you ensured any assist, commission, indirect payments or rebates, or royalties are accurately reported to CBP?
11. If you are declaring a value based on a transaction in which you were/are not the buyer, have you substantiated that transaction is a bona fide sale at arm's length and that the merchandise was clearly destined to the U.S. at the time of sale?
12. If you are claiming a conditionally free or special tariff classification/provision, have you reported the required value information and obtained any required or necessary documentation to support the claim.
13. Are you prepared to produce any required entry documentation and supporting information?

Country of Origin

The CBP definition of country of origin is found in [19 C.F.R. §134.1\(b\)](#) and means:

...the country of manufacture, production, or growth of any article of foreign origin entering the United States. Further work or material added to an article in another country must effect a substantial transformation in order to render such other country the "country of origin" within the meaning of this part; however, for a good of a NAFTA or USMCA country, the marking rules set forth in [part 102 of this chapter](#) (hereinafter referred to as the part 102 Rules) will determine the country of origin.

Practice Tip: If operations take place in multiple countries, importers must conduct the substantial transformation analysis. This analysis is based on the premise that minimal or simple assembly operations will generally not result in a substantial transformation. Factors to consider include the nature of the operation, the number of different operations involved, and whether a significant period of time, skill, detail, and quality control are necessary for the assembly operation. If the identity of the article is left intact after a manufacturing or combining process, substantial transformation has likely not occurred. See *Uniroyal, Inc. v. United States*, 3 CIT 220, 542 F. Supp. 1026 (1982), *aff'd*, 702 F.2d 1022 (Fed. Cir. 1983).

Every imported item must be marked conspicuously, legibly, indelibly, and permanently as the nature of the article permits, with the full English name of the country of origin of the article. The ultimate purchaser, or last person or company who will receive the article in the U.S., must be able to view the marking. To accomplish this, the marking must withstand distribution, storage, and handling. The consumer must also be able to read this marking easily without having to strain their eyes.

If a product is not properly marked at the time of importation, a special marking duty equal to 10% of the customs value of the merchandise may be assessed unless the product is exported, destroyed or properly marked under CBP supervision. In addition, CBP may detain improperly marked goods for an indefinite period of review.

Practice Tip: The Federal Trade Commission provides guidance on the requirements to use the "Made in the USA" country of origin marking.

Practice Tip: Importers should ensure that they can answer the following questions pertaining to country of origin prior to importing:

1. Have you reported the correct country of origin on Customs Form 7501? Consult [19 C.F.R. Part 134](#).
2. Is the merchandise properly marked upon entry with the correct country of origin in accordance with 19 U.S.C. §1304 or are you able to take advantage of a marking exception?
3. Have you obtained a CBP binding ruling?
4. Have you consulted a customs expert?
5. Have you taken measures to communicate customs country of origin marking requirements to your foreign supplier to ensure your goods are marked properly prior to importation of your merchandise?
6. If you are claiming a change in the origin of the merchandise or claiming that the goods are of U.S. origin, have you taken measures to substantiate your claim?
7. If you are importing textiles or apparel, have you ensured that you have ascertained the correct country of origin in accordance with [19 U.S.C. §3592](#) and assured that no illegal transshipment or false or fraudulent practices were involved?
8. Do you know how your goods were made from raw materials to finished goods, by whom and where?
9. Have you checked the [CBP Quota Enforcement and Administration website](#), as well as its link to the CBP publication: [Are my goods subject to Quota?](#)
10. Have you checked [Commodity Status Reports and Tariff Preference Levels](#) and/or the [quota bulletins](#) issued by CBP to determine if your goods are subject to a quantitative restriction and whether the limit has been filled?
11. Have you confirmed whether or not your goods are subject to visa(s) and/or licenses, permits or certificates (LPCs)? If so, have you obtained the appropriate visa(s) and/or LPCs?
12. In the case of textiles, have you prepared to accurately construct the [Manufacturer's Identification \(MID\) codes](#) for all shipments under [19 C.F.R. §102.21\(b\)\(5\)](#)?
13. Have you established a reliable recordkeeping program or procedure to ensure you can produce any required entry documentation and supporting information, including any required certificates of origin or certifications?

Intellectual Property Rights (IPR)

Registering a trademark with the U.S. Patent and Trademark Office (USPTO) or copyright with the U.S. Copyright Office provides the public notice of your ownership, which is distinct from recording that IPR with U.S. Customs. When recording IPR with CBP, you are partnering with CBP to prevent the unauthorized importation of merchandise which bears a recorded trademark or copyright. Once a trademark or copyright is recorded with U.S. Customs, the information is entered into the [Intellectual Property Rights Search \(IPRS\)](#) database which is used to target suspect shipments for the purpose of physically examining suspect merchandise. The core benefits of recording IPR with CBP are:

1. CBP monitors and seizes infringing merchandise at all 328 ports of entry.
2. The IPR holder does not have to spend the resources needed to locate and prosecute every unauthorized importer, distributor, retailer illegally using its IPR.
3. CBP may request the U.S. Attorney's Office criminally prosecute those involved in under the Trademark Counterfeiting Act of 1984.
4. U.S. Customs has the authority to issue monetary fines (valued at the MSRP if the goods were legitimate) against anyone who facilitates the attempted introduction into the U.S. of seized and forfeited counterfeit merchandise.

Practice Tip: To consider the differences of IPR protection in China, consult [Protecting Intellectual Property Rights in China](#).

Practice Tip: Importers can review CBP's Annual IPR Seizure Statistics [here](#), and an active dashboard with the most up to date IPR seizure statistics by commodity and country [here](#). In 2021, counterfeit goods from China accounted for 39.83% of seizures (with another 26.5% of the seizures for goods coming from Hong Kong); in 2020, counterfeit goods from China accounted for 44% of seizures (with another 35% of the seizures for goods coming from Hong Kong).

Practice Tip: Importers should ensure that they can answer the following questions accurately pertaining to IPR prior to importing:

1. If you are importing goods or packaging with a trademark registered in the U.S., have you checked to ensure that it is genuine and not restricted from importation under the gray-market or parallel import requirements of U.S. law, or that you have permission from the trademark holder to import such merchandise?
2. If you are importing goods or packaging which consist of registered copyrighted material, have you checked to ensure that it is authorized and genuine? If you are importing sound recordings of live performances, were the recordings authorized?
3. If you are importing goods that have been refurbished or remanufactured, do you have documentation detailing the remanufacturing process?
4. Have you checked to see if your merchandise is subject to a U.S. International Trade Commission or court ordered [exclusion order](#)?
5. Have you ensured that you maintain and can produce any required entry documentation and supporting information upon request?

Forced Labor

Forced labor is currently the third most lucrative category of illicit trade, and over 40 million people around the world were victims of some type of forced labor in 2020. [Section 307 of the Tariff Act of 1930](#) included a "consumptive demand" clause, which permitted importation of goods made with indentured, child, or other forced labor to meet heightened U.S. demand. The [Trade Facilitation and Trade Enforcement Act of 2015](#) eliminated this exemption.

Section 307 prohibits the importation of all goods and merchandise mined, produced, or manufactured wholly or in part in any foreign country by forced labor, convict labor, and/or indentured labor under penal sanctions, including forced child labor. CBP also established the Forced Labor Division in 2017 which leads enforcement of the prohibition against importing goods made with forced labor. This division actively works to prevent this illicit practice by investigating allegations around the world.

CBP does not target whole product lines or industries, but rather focuses on specific actors and their merchandise by investigating allegations received from industry and other sources, including through CBP's [E-allegation Portal](#).

Practice Tip: For a primer on forced labor standards and compliance, review [U.S. Customs Targets Use of Forced Labor](#) and [Importers: If you Can't Answer These 12 Questions on Forced Labor You're in Trouble!](#)

Practice Tip: The Department of Labor's app [Sweat and Toil](#) is a free and essential tool where an importer can search by both country and product to find data and research regarding goods produced with child labor, forced labor, and forced child labor.

Practice Tip: Importers should ensure that they can answer the following questions accurately pertaining to forced labor prior to importing:

1. Have you ensured that you are not importing goods in violation of [19 U.S.C. §1307](#) and [19 C.F.R. §§12.42-12.44](#)?
2. Do you know how your goods are made, from raw materials to finished goods, by whom, where, and under what labor conditions?

3. Have you reviewed [CBP's Forced Labor webpage](#)?
4. Have you received the [Department of Labor's List of Goods Produced by Child Labor or Forced Labor](#) to familiarize yourself with high-risk country and commodity combinations?
5. Have you obtained a CBP binding ruling?
6. Have you established a procedure of conducting periodic internal audits to check for forced labor in your supply chain?
7. Have you established a reliable procedure of having a third-party auditor familiar with evaluating forced labor risks conduct periodic, unannounced audits of your supply chain for forced labor?
8. Have you received the International Labour Organization's *Indicators of Forced Labour* booklet?
9. Do you vet new suppliers for forced labor risks?
10. Do your contracts with supplies include terms that prohibit the use of forced labor, a time frame by which to take corrective action if it is identified, and the consequences if corrective action is not taken?
11. Do you have a comprehensive and transparent social compliance system in place? Have you reviewed the Department of Labor's [Comply Chain](#) webpage?
12. Have you developed a reliable program or procedure to maintain and produce any required customs entry documentation and supporting information?

Practice Tip: CBP's most recent publication, "[Preparing for an Audit Partnership in Responsible Trade](#)" released on March 11, 2022, explores a best practice framework which provides the importing community with guidance regarding where to focus their due diligence in four core areas: compliance, social responsibility, traceability, and remediation.

Penalties

Importers can avoid incurring penalties imposed by CBP under [19 U.S.C. 1592](#) by complying with the reasonable care standard and conducting due diligence on their import procedures. Penalties are imposed by CBP under the following three levels of culpability CBP believes you had at the time of your non-compliance:

Negligence: Negligence arises if it results from an act or acts done through either the failure to exercise the degree of reasonable care and competence expected from a person in the same circumstances, usually when statements or information are provided in connection with importation are not accurate or complete, or when a material act required by law is not performed. Maximum penalties under negligence can be up to 20% of the dutiable value of the merchandise.

Gross Negligence: Gross negligence occurs when an act is done with actual knowledge of or reckless disregard for the obligations required under law. An act can either be an omission or an affirmative act. Maximum penalties under gross negligence can be up to 40% of the dutiable value of the merchandise.

Fraud: Fraud arises when a materially false statement, omission, or act in connection with the transaction is committed or omitted intentionally. The maximum penalty for a fraudulent violation may be up to the domestic value of the merchandise.

Practice Tip: Civil penalties can be imposed even if there is no loss of revenue to the government.

Practice Tip: It is imperative for importers to consider filing a prior disclosure with CBP. A prior disclosure must be filed before, or without knowledge of, the commencement of a formal investigation of that violation, and the importer must make a tender of any actual loss of duties, taxes and fees or actual loss of revenue. When a prior disclosure is accepted, penalties would be mitigated as follows:

- For negligent and gross negligent violations, the mitigated penalty would solely be the interest on the loss of revenue
- For fraudulent violations, the penalty 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

Additional Reasonable Care Considerations

Practice Tip: Importers are strongly encouraged to check CBP's [Partner Government Agencies Import Guide](#) in order to ensure compliance with the import standards of other agencies under the following Departments:

- Department of Agriculture (USDA)
- Department of Health and Human Services (HHS)
- Department of Commerce (DOC)
- Department of Transportation (DOT)
- Department of Justice (DOJ)
- Department of Interior (DOI)
- Department of the Treasury (USDT)

Practice Tip: It is essential to verify whether or not imported goods are subject to anti-dumping or countervailing duties (AD/CVD) prior to importing as the rates can range from [0% through 1731.75%](#). The following are key sources an importer should check (in addition to verifying with counsel):

- [CBP AD/CVD Search](#)
- International Trade Administration (ITA) [Scope Descriptions and Determinations by Country](#)
- [U.S. International Trade Commission \(ITC\) Investigations](#)
- [ACE AD/CVD Case Search Results](#) (this requires an ACE login)
- [Federal Register Notices](#)

Practice Tip: If an importer is unsure of whether its imported goods would be subject to anti-dumping or countervailing duties (AD/CVD), the importer can request a [scope ruling](#) from the Department of Commerce.

Practice Tip: Prior to importing, it is similarly essential to confirm the importer has the [right to make entry?](#)

While exercising reasonable care can be complex, the right team, and documented processes are essential to ensure that your business is being proactive about its import compliance obligations.