

# THE PROTEST FILER'S GUIDE<sup>©</sup>

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### I. INTRODUCTION

The purpose of this Guide is to provide answers to the most perplexing questions, to identify the common pitfalls, and to offer some tips and techniques to greatly improve the likelihood of success relative to the filing of Protests<sup>1</sup> allowed and required under 19 U.S.C. 1514. Visit our website for an electronic copy of Customs' current Protest form, to access an electronic copy of the Guide, for significant Protest law developments, for comments on the Guide, or to suggest items for further coverage in future editions.

Filing Protests<sup>2</sup> is an ongoing concern and responsibility of importers and their customs brokers. When the protestant's argument is fairly reasonable, Customs officers are not offended by a Protest of their decision. Protests are part of the routine for Customs officers, and Protests follow a special non-hostile procedural path at the Customhouse.

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<sup>1</sup> Surety Protests and vessel repair Protests involve special considerations and procedures, and are uncommon other than to those who are specialized in these areas. Therefore, such Protests are not dealt with in this Guide. Should questions arise respecting either of the foregoing, consult with qualified legal counsel.

<sup>2</sup> 19 U.S.C. 1514 (Protest against decision of appropriate Customs officer); 19 C.F.R. Part 174 (Filing of Protests); Customs Form 19 (Protest).

Although widely used, probably no Customs document is so misunderstood, or so frequently ill-prepared, with such **bad** results, as is the Protest. Money is always at stake, and is often lost simply because the Protest preparer didn't understand either the Protest procedure or the requirements of a valid Protest which will withstand the scrutiny of **both Customs and the courts.**

Protests are more complicated than they should be, and while the Customs Service continues its attempts to clarify the process (mainly via the instructions on the back of CBP Form 19), it is still very confusing – and the applicable Regulation (19 C.F.R. 174,) is also confusing, and does not highlight the hidden traps. Moreover, important Protest procedures are absent from the Customs regulations, and only appear in the statute. Customs' website unfairly invites the trusting protest filer into the complex web of "gotcha's" with only the summary instructions from the back of the form and a citation to the regulations for guidance.

Advice from Customs on how to correctly file a Protest is often grudging, non-existent, woefully inadequate, and/or wrong. Customs usually summarily denies poorly drafted or incorrectly filed Protests, often leaving the unwitting protestant in a VERY difficult position.

It's bad enough to lose a Protest because Customs disagrees with the protestant's legal position. However, it's even worse to lose a Protest simply because of a failure to properly fill out the form, file it late, or to file it timely but in the wrong place, or to follow some Customs officer's bad verbal advice, only to later learn it was wrong, and that the officer's bad advice cannot be corrected, or to trip over one of the myriad of other "gotcha's" in the process. The Protest process is littered with traps. Fall into one of them and Customs won't even consider the merits of the protestant's legal position – the

divine procedure trumps justice. Try explaining that result to your boss or client – get ready to write a check.

### **WHEN TO CALL FOR HELP**

At times, Protests will involve multiple, interrelated and/or complex issues of fact and law. At other times, the Protest procedures in some circumstances become unclear in view of Court rulings, and they remain unclear (sometimes for years), until clarified by Congress, the courts, or Customs. Also, a Protest is sometimes just one of several procedural options, and must be prepared in coordination with other parallel or planned legal procedures.

The point is that a Protest can easily present legal issues that are too complex for even the most experienced customs broker or importer to competently address, especially relative to matters likely to be challenged by the Government in court (e.g., Protest sufficiency, effects of mistaken numbers or language, errors in date and place of filing, etc.). A good rule of thumb is that the Protest filer should consult qualified legal counsel before filing a protest 1) any time he or she is uncertain regarding the legal issues, or 2) if there is big money involved. The numerous obscure “traps” in the Protest process call for extreme caution.

## II. DISCLAIMER

The Protest process is exceedingly complex in certain fact situations. The *Guide* cannot and does not purport to cover all of the factual patterns or circumstances. Instead, it is designed to cover and assist the Protest filer in the great majority of cases. Further, there are oftentimes nuances of fact, the legal effect of which can only be properly evaluated by qualified legal counsel. Therefore, the firm will not be responsible for, nor assume any liability for, any adverse effects to the filer from his or her reliance upon or use of this *Guide* in filing Protests, absent the firm's specific, mutually agreed employment as legal counsel respecting those Protests. Further, the law, the Customs regulations, and court interpretations respecting Protests are subject to change. Thus, this Guide represents the firm's interpretation of the law and regulations only as of the date hereof. Please check the firm's website or call to determine whether changes have occurred.

### **III. PURPOSES OF THE PROTEST**

1. To enable and to persuade Customs to reverse its own harmful or adverse decision; otherwise, any protestable decision becomes final 180 days after it is made;<sup>3</sup> and
2. To secure jurisdiction of the Court of International Trade, in case Customs refuses to reverse its decision and denies the Protest.

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<sup>3</sup> The following exceptions to this 180-day finality rule appear in 19 U.S.C. 1514: (a) voluntary reliquidations (19 U.S.C. 1501); (b) petitions by domestic interested parties (19 U.S.C. 1516); and (c) contest of: (i) a protest denial (28 U.S.C. Chap. 169), or (ii) a 19 U.S.C. 1303 determination (19 U.S.C. 1516a(g)(2), or article 1904 of the North American Free Trade Agreement.

#### IV. WHO MAY PROTEST

1. The importer or consignee shown on the entry papers, or their sureties;
2. Any person paying any charge or exaction;
3. Any person seeking entry or delivery;
4. Any person filing a claim for drawback;
5. Any exporter or producer of merchandise subject to a 19 C.F.R. 181 determination of NAFTA origin, who completed and signed a Certificate of Origin [19 C.F.R. 181.11(a)]<sup>4</sup>;
6. Any authorized agent of any of above, subject to 19 C.F.R. 174.3 evidence of authorization.

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<sup>4</sup> Adverse NAFTA marking decisions may, of course, be protested by one of the legal persons in 1, 2, or 3, above, or their authorized agent, whereas an exporter or producer of NAFTA merchandise does not have an independent right to protest an adverse marking decision. However, they do have the right to intervene in the importer's Protest. The form and filing instructions for intervening in the importer's Protest are found in 19 C.F.R. 181.115. Alternatively, in the event the importer does not file a Protest, such exporters and producers may file a petition pursuant to 19 C.F.R. 181.116 for reconsideration of an adverse marking decision after the importer's time to protest the adverse marking decision has expired. This is developing law. If uncertain, consult qualified legal counsel.

## V. WHAT'S PROTESTABLE? WHAT'S NOT?

### 1. Examples of Protestable Decisions

- a. Entry or Reconciliation Liquidations or Reliquidations;
  - 1) Appraised Value;
  - 2) Tariff Classification, Duty Rate, and Duty Amount;
  - 3) Country of Origin Marking Duties;
  - 4) Applicability of Special Provisions (e.g., American Goods Returned, Generalized System of Preferences, C.B.I., Drawback, L.D.D.C., NAFTA and other Free Trade Agreement preferences, NAFTA origin, NAFTA marking, etc.);
  - 5) Any other issues contained therein, or any modification thereof.
- b. All Charges and Exactions<sup>5</sup> within the Treasury Secretary's jurisdiction;
- c. Exclusion of Merchandise From Entry or Delivery or a Demand for Redelivery (except a determination

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<sup>5</sup> "Exactions" is an imprecise term, which includes some, but not all, harmful Customs acts, without a clear standard or reasonable predictability. Court definitions abound (e.g., "*An "exaction" is a "wrongful demand for payment under color of official authority, where no payment is due[.]"* Syva Co. v. United States, 12 CIT 199, 202, 681 F. Supp. 885, 888 (1988) (quoting Webster's Third New Int'l Dictionary 1178 (1981)); *Carlingswitch, Inc. v. United States*, 85 Cust. Ct. 63, 66, 500 F. Supp. 223, 226-27 (1980) (quoting Black's Law Dictionary (4th ed. 1968)), *aff'd*, 651 F.2d 768 (C.C.P.A. 1981), but it's still confusing. If a Customs act is harmful, and it's not listed on the CBP FORM 19 in Section V, Block 2., below, play it safe and file a protest.

appealable under 19 U.S.C. 1337 — Unfair Import Trade Practices);

- d. Refusal to Pay Drawback.

## **2. Examples of Nonprotestable Decisions**

- a. Notices of Liquidated Damages;
- b. Customs Penalty Mitigation Decisions (19 U.S.C. 1618);
- c. Demands for Duty Under 19 U.S.C. 1592(d).

**VI. PROTEST CONTENTS**

In addition to the factual information required on the CBP Form 19 in Section I, Blocks 3 through 6<sup>6</sup> and in Section IV, Blocks 10 through 12 of the CBP Form 19, the following are required:

**1. Describe the Protested Decision (Section II, Block 7)<sup>7</sup>**

The Protest must clearly inform the Port Director of the decision or decisions which the protestant feels was wrong. For example, if it’s the liquidated classification to which you object, state:

“The (protestant) protests the Port Director’s decision in liquidation to classify the merchandise at subheading \_\_\_\_\_ HTSUS at \_\_\_% as \_\_\_\_\_.”

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<sup>6</sup> However, do not discount the importance of accurately supplying all of this factual information, as the law requires all of it. 19 C.F.R. 174.13(a) provides that a protest shall contain “[t]he number and date of the entry, ... [a] specific description of the merchandise affected by the decision as to which protest is made,...[t]he nature of, and justification for the objection set forth distinctly and specifically with respect to each category, payment, claim, decision, or refusal, ... [and] ... with respect to [multiple] entries ... the entry numbers, dates of entry, and dates of liquidation of all such entries should be set forth as an attachment to the protest.”

<sup>7</sup> “With respect to each category of merchandise, set forth, separately, (1) each decision protested, (2) the claim of the protesting party, and (3) the factual material and legal arguments which are believed to support the protest. The factual material and legal arguments should be specific. General statements or conclusions are not sufficient.”

## 2. Describe the Correct Decision (Section II, Block 7)

The Protest should clearly inform the Port Director of the decision which should have been made. For example, when the liquidated classification is claimed to be wrong, also state:

“The correct classification of the merchandise is at subheading \_\_\_\_\_ HTSUS at \_\_, as \_\_\_\_\_.”

While it is necessary to claim the tariff provision the protestant thinks is correct (to make sure that the claimed error is as clear as possible), neither Customs nor a reviewing court is limited to any tariff classification(s) claimed in the protest. Both Customs and the court can consider and find other classifications besides that chosen by the Port Director or that claimed by the protestant.

Note that, to determine whether a protest sufficiently raises a claim (or fails as a protest) the courts have held that in the description of the act or provision objected to in 1, above, and in the description of the claimed correct act or provision, the Port Director must be given sufficient information to reasonably understand the nature of the objection and the nature of the claim. The courts<sup>8</sup> have been more generous than Customs in attempting to construe meaning in “cryptic, inartistic, or poorly drawn” Protest language, but they have rejected many Protests because the protest language failed to adequately advise the Port Director of the nature of the objection or the relief sought.

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<sup>8</sup> See: Mattel, Inc. v. United States, 72 Cust. Ct. 257, C.D. 4547, 377 F. Supp. 955 (1974), an old case still frequently cited.

Don't take a chance. Be clear and specific. Err in favor of too much information, rather than too little information.

### 3. Apply for Further Review

An Application for Further Review is an appeal of the Port Director's decision, should he decide to disallow the Protest, which assures the protestant that someone takes a fresh look at the matter in issue before the Protest is officially disallowed. It must be filed within the initial 180-day Protest period. Thus, file the Application for Further Review at the same time you file the Protest and on the same form (utilizing Section V, Blocks 14 and 15) of the CBP Form 19. This is confusing because appeals are usually filed after an unfavorable decision – not before one, as with a protest. Simply put, applying for further review of a Customs Protest decision is different.

If you wait until after it's denied (and it's over 180 days from the original decision), Customs will say, "Sorry" (or, "Gotcha!").<sup>9</sup>

Thus, since the Protest and the Application for Further Review are on the same form, file them simultaneously, if possible, as follows:

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<sup>9</sup> 19 C.F.R. 174.23 states:

*"Further review of protests. A protesting party may seek further review of a protest in lieu of review by the port director by filing, on the form prescribed in § 174.25, an application for such review within the time allowed and in the manner prescribed by § 174.12 for the filing of a protest. The filing of an application for further review shall not preclude a preliminary examination by the port director whose decision is the subject of the protest for the purpose of determining whether the protest may be allowed in full. If such preliminary examination indicates that the protest would be denied in whole or in part by the port director in the absence of an application for further review, however, he shall forward the protest and application for consideration in accordance with § 174.26."*

**a. Check the Correct “Application for Further Review” Blocks (Section V, Blocks 14a, 14b and 14c)**

Unless blocks 14a, 14b and 14c are checked “No,” the Application for Further Review will not be granted.<sup>10</sup> And, of course, the “NO” answers must be correct. However, before answering “YES” to one of the questions, weigh the facts carefully, because a “Yes” answer to any of the questions will derail the Application for Further Review. Consult with qualified legal counsel, if uncertain.

**b. Applications for Further Review Require the “Magic Language” (Section V, Block 15)**

A Protest will not qualify for Further Review in every case, unless it has in it substantially the following language:

*“Customs’ decision in this matter is inconsistent with rulings of the Commissioner of Customs or his designee, and/or it involves questions of law or fact which have not been ruled upon by the Commissioner of Customs or his designee or the Customs Courts, and/or, if it involves a previous ruling, different facts or legal arguments are presented that were not considered at the time of the original ruling, and/or, the decision involves questions that Customs*

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<sup>10</sup> Note that “granting the Application for Further Review” only means that it will be forwarded to Headquarters (or to the drawback liquidator, if involving drawback) for their review; it does not mean, or even indicate, that the Protest will be approved or denied.

*Headquarters has refused to consider in a request for internal advice pursuant to 19 C.F.R. § 177.11(b)(5)."*

The foregoing "Magic Language" results from the 19 C.F.R. 174.24 requirement that, to be sufficient, an Application for Further Review must:

- i. **allege** that the decision is inconsistent with a ruling of the Commissioner of Customs or his designee, or with a decision made in any port with respect to same or substantially similar merchandise; or it must
- ii. **allege** that the decision involves questions of law or fact which are not the subject of a ruling by the Commissioner of Customs or his designee or by the Customs Court; or it must
- iii. **allege**, if it involves a previous ruling in "ii", above, that different facts or legal arguments are presented that were not considered at the time of the original ruling; or it must
- iv. **allege** that the decision involves questions that Customs Headquarters has refused to consider in a request for internal advice pursuant to 19 C.F.R. 177.11(b)(5).

Applications for Further Review which do not clearly include one of the foregoing allegations are rejected, and no review except by the port occurs. Rather than leave the choice of this critical language to chance on a Protest-by-Protest basis, inviting error with each Protest, always recite the above "Magic Language", which sets forth all of the 19 C.F.R. 174.24 criteria,

alternatively. The regulation must be followed carefully in this respect, and **one** of the “Magic Language” allegations **must** be correct as to the protestant’s situation. This is fertile “Gotcha!” ground. If uncertain in a particular case, consult qualified legal counsel.

#### **4. Allege the Existence of a “Practice” (an Add-on to Section V, Block 15 justification)**

If there has been a finding by Customs that an “established and uniform practice” exists pursuant to 19 U.S.C. 1315(d), Customs cannot change the practice absent a 30-day notice to the public. See also: 19 C.F.R. 177.10(c) (changes of practice). If the Protest doesn’t allege the existence of a “practice” and ask the Commissioner to rule that one exists (thus triggering the Commissioner’s obligation to specifically rule on the issue), then one of the court’s hands seems to be tied behind its back. The court can only determine whether a practice actually existed, rather than find in lieu of the Commissioner that a practice existed pursuant to 1515(d).<sup>11</sup> Thus, where it is thought that a “practice” might exist, the following should be added to the above “Magic Language”:

*“Customs’ established and uniform practice is in accordance with protestant’s claim and we request that the Commissioner so find in accordance with all the reasons and arguments given in this Protest.”*

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<sup>11</sup> See, Heraeus-Amersil, Inc. v. United States, 795 F.2d 1575 (Fed. Cir.1986), cert. denied, 479 U.S. 1064 (1987).

**5. Disposition based on decision on another Protest**

Section III, Blocks 8 and 9, enable the protestant to request for disposition in accordance with the action taken on a previously filed Protest that is the subject of a pending application for further review and is alleged to involve the same merchandise and the same issues, pursuant to See 19 C.F.R. 174.13(a)(7). However, at the present time such a request seems redundant, in view of Customs internal policy of designating a “lead Protest” for purposes of the Application for Further Review.

**6. Continuation Sheets - Clearly Identify and Relate**

Continuation sheets may be necessary to list all of the Customs entries being protested or to fully state the Protest arguments or to provide other necessary information. Don't invite Customs to lose the continuation sheets — you suffer, Customs doesn't note on the CBP Form 19 that continuation sheets are attached, and relate the continuation sheet back to the CBP Form 19 with entry numbers, protestant's name, etc. The same number of copies (original and 4) is required. Also, number the continuation sheets with the “Page \_\_ of \_\_ pages” format.

## VIII. OTHER PROTEST ESSENTIALS

### 1. File the Protest in the RIGHT PLACE

Protests must be filed in the port where the offending decision was made.<sup>12</sup> If an entry is involved, you can also file it at the Port entered, if different. You cannot, however, file a Protest in Houston covering a Miami or Los Angeles consumption entry.

### 2. Get a Receipt

It is receipt by Customs that counts, not the mailing (not even certified mail, or via private express mail). If a Protest is mailed or otherwise sent within the 180-day period, but Customs receives' the Protest after the 180-day period, it is late-filed — period! There is no equitable relief, regardless of how sad or unjust the story may be. Possibly, just possibly, if Customs refused to accept the protest during normal business hours, a court would probably afford relief — Customs Headquarters might or might not.

The CBP Form 19 has five copies<sup>13</sup>, but Customs requires only 4 of them [19 C.F.R. 174.12(b)]. A “fifth” copy may be submitted by the protestant pursuant to 19 C.F.R. 174.12(g). Customs will return this copy after numbering and dating the Protest (which may take days or weeks). For hand delivery,

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<sup>12</sup> Some ports may have special local rules about where to file (e.g., at the Area Service Port). Determine them from the Protest officer, confirm them back to Customs via telefax or other writing for which a receipt is obtained, and use them, if possible — but compliance with the regulations is always sufficient, nonetheless.

<sup>13</sup> That is, the original and 4 copies.

Customs will usually date-stamp for you a sixth copy upon delivery (or you can do it using Customs' stamp).

But, if Customs does not actually receive the Protest for any reason, or if it does receive the Protest and mistakenly stamps a late-filed date on it, the protestant is out of luck without a receipt proving timely filing.

### **3. Protesting via telefax**

The Customs regulations do not state that Protests may be filed by telefax (but they do allow telefaxed signatures thereon). However, Customs Directive 099 3550-065 of August 4, 1993, provides at paragraph 3A(1)(c) for acceptance of facsimile transmitted Protests as of the business day received. In an earlier edition of the Protest Filer's Guide, we recommended that until telefaxed Protests are expressly approved by Regulation, their use should be limited to emergencies only. Today, our advice is different. Customs' acceptance of telefaxed Protests is widespread. Customs is also currently allowing electronic filing of Protests in some areas under controlled conditions, and will to expand electronic filing. A number of software vendors have written Protest modules for use with their ACS software, or with personal computers using popular operating systems.

Different ports have different policies about the use of telefax transmission of Protests. Determine from the Protest Officer his or her local rules or preferences (e.g., number of telefaxed copies, follow-up electronic media or follow-up hard copies), confirm these local rules or preferences in writing so as to obtain a receipt (e.g., via telefax), and adhere to them wherever possible.

Because the use of telefaxed Protests is not expressly provided for in the regulations, there is always a risk that Customs may challenge their validity. We rate this risk as remote, and especially so, if one obtains the above-described written proof that Customs has agreed to accept telefaxed Protests, and that it has received the one in question.

**4. Protests may be amended to correct errors or to submit new legal objections, within the same 180-day Protest period.**

Protests and Applications for Further Review can be amended for any purpose (e.g., to correct errors, or to make new legal objections), but the Amendment must be received by Customs within the same 180-day period applicable to the Protest.

Many deadline errors occur here. The requirement of having to file an appeal prior to first receiving a decision requiring an appeal is very uncommon and counter intuitive. Still, this deadline is hard and fast.

**5. Submissions AFTER the 180-day Protest period.**

If a timely Protest has been filed, additional evidence, legal arguments, or documents submitted after the 180-day Protest period (and before a decision) will be accepted by and considered by Customs in deciding the Protest or the Application for Further Review, provided that they relate legal objections raised by the Protest (e.g., classification, value, etc.). Customs sometimes will negatively receive submissions after the 180-day Protest period has passed. Thus, if any doubt exists as to whether the further argument, evidence or documents amounts to “new grounds” or “new legal argument” in support of an earlier objection or a completely “new objection” (which latter is prohibited) and/or if substantial monies are involved,

consult qualified legal counsel before submitting the additional grounds, evidence, or documents.

**6. “No Change” doesn’t mean “No Protest”**

“No change” liquidations can and must be protested to legally object to an adverse “entered” classification, value, etc. (e.g., an adverse classification that was compelled by Customs as a condition of entry).

A very common error occurs when duties are known or suspected to have been overpaid upon entry. Such entries liquidate “silently”, not accompanied by a red flag (like a bill for additional duties). The 180 days may pass unnoticed, foreclosing the right to protest. Docket such entries for protest upon liquidation.

**7. One Protest for multiple entries**

Generally, there is one Protest per entry. However, one Protest can cover multiple entries, provided they all have the same category of merchandise.

**8. Multiple Protests for one entry**

If an entry contains more than one category of merchandise, separate Protests can be filed by any of the authorized persons for each category of merchandise. Also, exporters and producers of NAFTA merchandise may intervene in importer Protests against adverse NAFTA origin determinations (19 C.F.R. 181.115), thus resulting in multiple Protests for the same entry.

## 9. Protest “Illegal Liquidations” too

The Court of Appeals for the Federal Circuit<sup>14</sup> has so ruled that reliquidations by Customs occurring more than 90 days<sup>15</sup> after a liquidation (where no Protest was filed) are *per se* illegal and need not be protested to assert their illegality in a later court collection action by Customs. However, because both the lower courts and Customs long maintained that such illegal liquidations were merely voidable, not void, and that a Protest was nonetheless required, many Customs officers believe that is still the law today. Avoid the aggravation and expense of educating Customs. If Customs has illegally liquidated, a timely Protest should always be filed — consult with qualified legal counsel concerning the legal argument.

## 10. Protest “Partial Liquidations” with care

Partially favorable liquidations or reliquidations must be protested to legally object to the unfavorable portion.

**CAUTION:** A Protest may open up the entire liquidation or reliquidation to Customs' scrutiny (and possible adverse action). The law is unsettled in this area.<sup>16</sup> Thus, great care must be used when protesting a partially favorable liquidation or reliquidation, and if substantial monies are involved, consult with qualified legal counsel.

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<sup>14</sup> United States v. Cherry Hill Textiles, Inc., 112 F.3d 1550 (CAFC 1997)

<sup>15</sup> Customs will likely soon change this period to 180 days to coincide with the 190 Protest period established by the Miscellaneous Trade Act of 2004.

<sup>16</sup> See, e.g., Computime, Inc. v. United States, 772 F.2d 874 (Fed. Cir. 1985).

**11. Double-Check everything**

Omission or error respecting any of the Protest data may be correctable, or it may be fatal — it often depends on very complex considerations of fact and law. Avoid the headaches and uncertainty. Double check all numbers, addresses, etc. (Be sure to include the 3-digit filer code when listing your entry numbers.) Have someone knowledgeable critically proofread your completed CBP Form 19 before presentation to Customs.

## VI. COMMON PROTEST ERRORS

Based on our experience, as confirmed by continuing consultation with Customs Protest officers nationwide, Protests most frequently are rejected by Customs, or otherwise fail, for the following reasons:

### 1. **The Late-Filed Error**

Protests must be filed (received at the customhouse) no later than 180 calendar days<sup>17</sup> (not six months) following the decision<sup>18</sup> being protested (i.e., 180 days after the occurrence of one of the protestable decisions listed in the previous section). If the Customhouse is officially closed on the 180th day (i.e., it's a Saturday, Sunday, or other federal holiday) the Protest period is extended to the next working day. The 180-day deadline for filing Protests is **etched in stone!** If a Protest is required to contest an adverse Customs action, there are **NO EXCEPTIONS** to the 180-day filing deadline.<sup>19</sup> Always set up a tickler, using a due-date calculator or other application.<sup>20</sup>

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<sup>17</sup> Previously, the deadline for filing a protest was 90 days as provided in 19 C.F.R 174.12. This deadline was extended to 180 days by section 2103 of the Miscellaneous Trade and Technical Corrections Act of 2004 and is reflected in 19 U.S.C. 1514. The 180-day deadline applies to items entered on or after December 18, 2004. Items entered before December 18, 2004 will be are subject to the 90-day deadline. (a shrinking class of entries)

<sup>18</sup> Only liquidations, charges, or exactions are protestable.

<sup>19</sup> There have been court cases holding that the Protest period was equitably tolled (i.e., suspended) by reason of some act on the part of Customs contributing to or causing a late filing. However, one CIT case on point held that there is **no** equitable tolling of the Protest period. See: US JVC Corp. v. United States, Slip Op. 98-97 (July 7, 1998) – “. . . Thus, the presumption that the ninety-day period for filing a protest imposed by 19 U.S.C. 1514(3) contains an equitable tolling exception has been rebutted by the language, structure, and purpose of 19 U.S.C. 1514. The Court is therefore without

## 2. The Early-Filed Error

Protests can't be filed before the decision complained of occurs.

Often Protests are filed after receipt of a Notice of Action contemplated or taken (CF 29) but before the liquidation occurs. If the liquidation occurs after filing the Protest, then the prematurely filed Protest is invalid, as a matter of law, respecting that liquidation. Therefore, WAIT UNTIL AFTER THE LIQUIDATION (or other decision) occurs, before you file a Protest.

## 3. The Incorrect Form Error (a.k.a. Insufficient Information)

The Courts have held and Customs concedes that the Customs Form 19 (CBP Form 19) isn't absolutely required to "PROTEST" and that a letter<sup>21</sup> might qualify as a Protest, and the current applicable Customs Directive 099 3550-065 of August 4, 1993 requires the Protest officer to treat 1520(c)(1) requests (a form of relief since eliminated – see FN 23, below) or **other writings** as Protests, provided that they contain the required information and are filed within the Protest period. However, if any of the critical information is omitted – invalid Protest! Thus, to ensure that inclusion of all of the required information in a Protest, always use the CBP Form 19 Protest form.

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*jurisdiction to review JVC's admittedly untimely protest.*" In any given case, there is little possibility of any equitable tolling. Certainly, Customs will not recognize it. Customs will rigidly enforce the 180-day deadline.

<sup>20</sup> Many computer programs can quickly and accurately make the computation, by adding 180 to the date of the decision (e.g., the date of liquidation).

<sup>21</sup> Every protest must be in writing.

#### 4. The Clerical Error Tragedy

Clerical errors, miscues, bumbles, and almost every other sort of inadvertent human error (e.g. transposing entry numbers, or inadvertently misidentifying the entry or the merchandise, or misdescribing the nature of the objection or claim or failing to justify the Application for Further Review) which results in a failure to comply with any of the Protest requirements are uncorrectable after the passage of the Protest period<sup>22</sup>.

Therefore, examine Protests extremely carefully for error before submitting them.

#### 5. The “No Application for Further Review” Error

Most protest filers do not even ASK for Further Review (*See: Section V, Blocks 14 and 15 on the CBP Form 19*). In our experience, many customs brokers and importers are reticent to file an application for further review, fearing that they might offend the import specialist or other deciding officer. Such sensitivity misconstrues the routine, non-hostile nature of the Protest process and the Customs officers' perception of it. Protests which fail to include Applications for Further Review provoke more disrespect than appreciation at the Customhouse. Good Protests which speak to the law and facts accurately, intelligently, and dispassionately do not generate ill will with Customs – instead, they earn the protestant Customs' respect.

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<sup>22</sup> See: e.g., Lykes Pasco, Inc. v. United States, Slip Op. 98-89 (June 29, 1998), wherein 21 entries were inadvertently omitted from the protest, and the court refused to correct the error.

With one possible exception<sup>23</sup>, EVERY Protest should apply for Further Review. It costs nothing and, otherwise, the adverse decision is likely to only be reviewed by the reviewing official who made it in the first place. That reviewing official is naturally biased in favor of his own prior decision. Currently, unless the Port Director (i.e., the reviewing officer in the port) agrees with and approves them, Applications for Further Review are referred to Headquarters for a decision thus facilitating the possibility of a fresh, unbiased review (well, less biased).

## 6. “Requests for Reliquidation” Wrongly Used as Protests

Requests that Customs reliquidate, pursuant to 19 C.F.R. 173.3 (voluntary reliquidation), even if consented to or agreed to by Customs, are often (but not always) insufficient as Protests because they lack some of the required information; and, if insufficient, they will not stop the running of the 180-day period for protesting.

Of particular danger are “post entry amendments<sup>24</sup>” which may be filed prior to liquidation to request that Customs correct entry errors, either before liquidation or in liquidation. In response to

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<sup>23</sup> 19 C.F.R. 174.26(a) states that the port director, if he agrees with the Protest, shall approve it, notwithstanding the fact that an Application for Further Review was filed. Customs Directive 099 3550-065 of 08-04-93 similarly directs the port director to approve such Protests: however, in practice, a number of ports still refer the Applications for Further Review to Headquarters. Thus, if Customs has expressly agreed to correct the error, and if prompt action is important, file the Application for Further Review together with a letter with it (or after it), withdrawing the Application for Further Review upon condition that Customs grants the Protest. This procedure averts unnecessary delays in approval of the Protest, while eliminating the possibility of a procedural disaster.

<sup>24</sup> On 9/20/2007, the “post entry amendment procedure” replaced the “supplemental information procedure” as the means of obtaining pre-liquidation relief or refunds.

such letters, Customs will sometimes grant pre-liquidation refunds but, in most cases, it will correct the error in liquidation. The danger is that Customs may forget or fail to correct the error, the adverse liquidation will occur anyway, and the “supplemental information letter” will fail to serve as a valid Protest, either because it was prematurely filed (i.e., prior to liquidation) or, perhaps, because it doesn't include all of the required Protest information. Then, 180 days passes following liquidation and relief becomes impossible in most cases. What you get from Customs is something on the order of “tough luck,” if not, “Gotcha!” **As a safety measure, use the CBP Form 19 to protest in all cases where an adverse liquidation or other protestable act has occurred** (but not before such action).

## **IX. NAFTA PROTEST ISSUES**

### **1. Who may protest under NAFTA**

Importers in the United States, and exporters and producers in Canada and Mexico who have completed a CF 434 NAFTA Certificate of Origin, may request administrative review of an origin determination by filing a protest in accordance with 19 C.F.R. 174.12.

### **2. What is protestable under NAFTA**

NAFTA does not grant exporters and producers general protest rights. 19 C.F.R. 174.12(a)(5) limits NAFTA protests to determinations of NAFTA origin. Importers, of course, retain the ability to protest a wide variety of Customs decisions under 19 C.F.R. 174.11. It should be noted that, apart from NAFTA Protests, 19 C.F.R. 181.31 provides for the filing of post importation NAFTA claims for duty refunds respecting NAFTA origin goods within one year of the date of the importation. The denial of such a post importation claim is protestable pursuant to the regular Protest procedures in 19 C.F.R. 174.11.

### **3. Dates of Liquidation**

U.S. Customs will not notify exporters and producers in Canada and Mexico of the dates of liquidation. It is incumbent upon them to obtain this information from the importer, the importer's Customs broker or by checking the bulletin notice of liquidation.

Protests must be filed in English on CBP Form 19 or a letter of the same size clearly labeled "Protest" and setting forth the same content as CBP Form 19.

In addition to the requirements in 19 C.F.R. 174.13, a foreign producer or exporter must provide the importer/exporter number assigned by Revenue Canada in the case of a Canadian exporter or producer, and the federal taxpayer registry number (RFC) in the case of a Mexican exporter or producer.

## **X. WHAT IF CUSTOMS DOESN'T DENY THE PROTEST?**

Occasionally, Customs won't formally grant or deny a Protest as the law requires.<sup>25</sup> Instead, it will simply return it to the protestant as somehow "inapplicable" or "insufficient" or "this isn't protestable." Such action by Customs is not a legal protest denial because it lacks the information required by 19 C.F.R. 174.30(a):

- 1 a statement of the reasons for the denial, and
2. a statement informing the protesting party of the right to file a civil action contesting the denial of the protest under 19 U.S.C. 1514.

Such action by Customs will neither terminate Customs' jurisdiction over the Protest, nor will it invoke the court's jurisdiction. The Protest is still open for consideration by Customs, although Customs often requires persuasion on that point. If the Protest is returned without an express denial in accordance with 19 C.F.R. 174.13, we recommend immediate consultation with qualified legal counsel.

If Customs' rejection is expressly to allow correction of errors on the Protest (which can only be done within the 180-day period of amendment), correct the errors, and return the Protest to Customs forthwith (the 180-day Protest period is running and will continue to run until Customs receives the Protest back).

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<sup>25</sup> Many Protests are not properly denied. 19 C.F.R. 174.30 requires that the notice of denial "include a statement of the reasons for the denial, as well as a statement informing the protesting party of the right to file a civil action contesting the denial of the protest under section 514".

## **XI. WHAT IF CUSTOMS DENIES THE PROTEST?**

Currently, a properly denied Protest invokes the jurisdiction of the Court of International Trade and Customs can't legally reverse its own denial, except in the two circumstances described in 19 U.S.C. 1515, as follows:

**1. If the Protest is denied and it reflects that the Application for Further Review was also denied:**

19 U.S.C. 1515(c) allows the protestant 60 days from the (date on the) notice of the denial in which file a written request with the Commissioner of Customs asking that the denial of the Application for Further Review be set aside, and that the Protest denial be voided. Only information before Customs on the date of the denial of the Application for Further Review (i.e., not on the date of denial of the Protest) will be considered by Customs in ruling on this request. If the Commissioner fails to act as requested within 60 days after the request is filed, the Protest is considered denied as of the date of the original Protest denial for purposes of filing a timely action in the Court of International Trade (28 U.S.C. 2636).

**2. If the Protest is denied contrary to proper instructions:**

19 U.S.C. 1515(d) provides as follows: *“If a protest is timely and properly filed, but is denied contrary to proper instructions, the Customs Service may on its own initiative, or pursuant to a written request by the protesting party filed with the appropriate Port Director within 90 days after the date of the protest denial, void the denial of the protest.”* This provision allows Customs to correct its own errors in Protest denials, rather than allow

improperly denied Protests to reach the Court of International Trade, or to otherwise remain final.

**3. If the Protest is denied in a procedurally correct manner, such that there is no basis for relief under 19 U.S.C. 1515:**

The Court of International Trade gains jurisdiction, provided that an appropriate action is filed in the Court of International Trade within 180 days of the Protest denial, and provided that, if applicable, all duties and interest due (i.e., those which Customs demands) are paid within the same period. The services of qualified legal counsel are always required to properly pursue the court action.

## **XII. WHEN TO CALL FOR HELP**

This is worth repetition. At times, Protests will involve multiple, interrelated and/or complex issues of fact and law. At other times, the Protest procedures in some circumstances become unclear in view of Court rulings, and they remain unclear (sometimes for years), until clarified by Congress, the courts, or Customs. Also, a Protest is sometimes just one of several procedural options, and must be prepared in coordination with other parallel or planned legal procedures.

The point is that a Protest can easily present legal issues that are too complex for even the most experienced customs broker or importer to competently address, especially relative to matters likely to be challenged by the Government in court (e.g., Protest sufficiency, effects of mistaken numbers or language, errors in date and place of filing, etc.). A good rule of thumb is that the Protest filer should consult qualified legal counsel before filing a protest 1) any time he or she is uncertain regarding the legal issues, or 2) if there is big money involved. The numerous obscure “traps” in the Protest process call for extreme caution.