

COMMERCIAL FRAUD – 19 U.S.C. 1592

NEGLIGENCE, GROSS NEGLIGENCE AND FRAUD

Appendix B to Part 171—Customs Regulations, Revised Penalty Guidelines, 19 U.S.C. 1592

Appendix B to Part 171--Customs Regulations, Guidelines for the Imposition and Mitigation of Penalties for Violations of 19 U.S.C. 1592.

Introduction

A monetary penalty incurred under section 592 of the Tariff Act of 1930, as amended (19 U.S.C. 1592; hereinafter referred to as section 592) may be remitted or mitigated under section 618 of the Tariff Act of 1930, as amended (19 U.S.C. 1618), if it is determined that there are mitigating circumstances to justify remission or mitigation. The guidelines below will be used by the Customs Service in arriving at a just and reasonable assessment and disposition of liabilities arising under section 592 within the stated limitations. It is intended that these guidelines shall be applied by Customs officers in prepenalty proceedings and in determining the monetary penalty assessed in any penalty notice. The assessed penalty or penalty amount set forth in Customs administrative disposition determined in accordance with these guidelines does not limit the penalty amount which the Government may seek in bringing a civil enforcement action pursuant to section 592(e). It should be understood that any mitigated penalty is conditioned upon payment of any actual loss of duty as well as a release by the party that indicates that the mitigation decision constitutes full accord and satisfaction. Further, mitigation decisions are not rulings within the meaning of part 177 of the Customs Regulations (19 C.F.R. part 177). Lastly, these guidelines may supplement, and are not intended to preclude application of, any other special guidelines promulgated by Customs.

I. Violations of Section 592

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, a violation of section 592 occurs when a person, through fraud, gross negligence, or negligence, enters, introduces, or attempts to enter or introduce any merchandise into the commerce of the United States by means of any document, electronic transmission of data or information, written or oral statement, or act that is material and false, or any omission that is material; or when a person aids or abets any other person in the entry, introduction, or attempted entry or introduction of merchandise by such means. It should be noted that the language "entry, introduction, or attempted entry or introduction" encompasses placing merchandise in-bond (e.g., filing an immediate transportation application). There is no violation if the falsity or omission is due solely to clerical error or mistake of fact, unless the error or mistake is part of a pattern of negligent

conduct. Also, the unintentional repetition by an electronic system of an initial clerical error generally will not constitute a pattern of negligent conduct. Nevertheless, if Customs has drawn the party's attention to the unintentional repetition by an electronic system of an initial clerical error, subsequent failure to correct the error could constitute a violation of section 592. Also, the unintentional repetition of a clerical mistake over a significant period of time or involving many entries could indicate a pattern of negligent conduct and a failure to exercise reasonable care.

II. Definition of Materiality Under Section 592

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; (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. The "but for" test of materiality is inapplicable under section 592.

III. Degrees of Culpability Under Section 592

The three degrees of culpability under section 592 for the purposes of administrative proceedings are:

A. Negligence

A violation is determined to be negligent if it results from an act or acts (of commission or omission) done through either the failure to exercise the degree of reasonable care and competence expected from a person in the same circumstances either: (a) in ascertaining the facts or in drawing inferences therefrom, in ascertaining the offender's obligations under the statute; or (b) in communicating information in a manner so that it may be understood by the recipient. As a general rule, a violation is negligent if it results from failure to exercise reasonable care and competence: (a) to ensure that statements made and information provided in connection with the importation of merchandise are complete and accurate; or (b) to perform any material act required by statute or regulation.

B. Gross Negligence

A violation is deemed to be grossly negligent if it results from an act or acts (of commission or omission) done with actual knowledge of or wanton disregard for the relevant facts and with indifference to or disregard for the offender's obligations under the statute.

C. Fraud

A violation is determined to be fraudulent if a material false statement, omission, or act in connection with the transaction was committed (or omitted) knowingly, i.e., was done voluntarily and intentionally, as established by clear and convincing evidence.

IV. Discussion of Additional Terms

1. Duty Loss Violations

A section 592 duty loss violation involves those cases where there has been a loss of duty including any marking, anti-dumping, or countervailing duties, or any tax and fee (e.g., merchandise processing and/or harbor maintenance fees) attributable to an alleged violation.

2. Non-duty Loss Violations

A section 592 non-duty loss violation involves cases where the record indicates that an alleged violation is principally attributable to, for example, evasion of a prohibition, restriction, or other non-duty related consideration involving the importation of the merchandise.

3. Actual Loss of Duties

An actual loss of duty occurs where there is a loss of duty including any marking, anti-dumping, or countervailing duties, or any tax and fee (e.g., merchandise processing and/or harbor maintenance fees) attributable to a liquidated Customs entry, and the merchandise covered by the entry has been entered or introduced (or attempted to be entered or introduced) in violation of section 592.

4. Potential Loss of Duties

A potential loss of duty occurs where an entry remains unliquidated and there is a loss of duty, including any marking, anti-dumping or countervailing duties or any tax and fee (e.g., merchandise processing and/or harbor maintenance fees) attributable to a violation of section 592, but the violation was discovered prior to liquidation. In addition, a potential loss of duty exists where Customs discovers the violation and corrects the entry to reflect liquidation at the proper

classification and value. In other words, the potential loss in such cases equals the amount of duty, tax and fee that would have occurred had Customs not discovered the violation prior to liquidation and taken steps to correct the entry.

5. Total Loss of Duty

The total loss of duty is the sum of any actual and potential loss of duty attributable to alleged violations of section 592 in a particular case. Payment of any actual and/or potential loss of duty shall not affect or reduce the total loss of duty used for assessing penalties as set forth in these guidelines. The "multiples" set forth below in paragraph (F)(2) involving assessment and disposition of cases shall utilize the "total loss of duty" amount in arriving at the appropriate assessment or disposition.

6. Reasonable Care

General Standard: All parties, including importers of record or their agents, are required to exercise reasonable care in fulfilling their responsibilities involving entry of merchandise. These responsibilities include, but are not limited to: providing a classification and value for the merchandise; furnishing information sufficient to permit Customs to determine the final classification and valuation of merchandise; taking measures that will lead to and assure the preparation of accurate documentation, and determining whether any applicable requirements of law with respect to these issues are met. In addition, all parties, including the importer, must use reasonable care to provide accurate information or documentation to enable Customs to determine if the merchandise may be released. Customs may consider an importer's failure to follow a binding Customs ruling a lack of reasonable care. In addition, unreasonable classification will be considered a lack of reasonable care (e.g., imported snow skis are classified as water skis). Failure to exercise reasonable care in connection with the importation of merchandise may result in imposition of a section 592 penalty for fraud, gross negligence or negligence.

7. Clerical Error

A clerical error is an error in the preparation, assembly or submission of import documentation or information provided to Customs that results from a mistake in arithmetic or transcription that is not part of a pattern of negligence. The mere non-intentional repetition by an electronic system of an initial clerical error does not constitute a pattern of negligence. Nevertheless, as stated earlier, if Customs has drawn a party's attention to the non-intentional repetition by an electronic system of an initial clerical error, subsequent failure to correct the error could constitute a violation of section 592. Also, the unintentional repetition of a clerical mistake over a significant period of time or involving many entries could indicate a pattern of negligent conduct and a failure to exercise reasonable care.

8. Mistake of Fact

A mistake of fact is a false statement or omission that is based on a bona fide erroneous belief as to the facts, so long as the belief itself did not result from negligence in ascertaining the accuracy of the facts.

V. Penalty Assessment

(1) Case Initiation--Prepenalty Notice.

(a) Generally.

As provided in Sec. 162.77, Customs Regulations (19 C.F.R. 162.77), if the appropriate Customs field officer has reasonable cause to believe that a violation of section 592 has occurred and determines that further proceedings are warranted, the Customs field officer will issue to each person concerned a notice of intent to issue a claim for a monetary penalty (*i.e.*, the "prepenalty notice"). In issuing such a prepenalty notice, the Customs field officer will make a tentative determination of the degree of culpability and the amount of the proposed claim. Payment of any actual and/or potential loss of duty will not affect or reduce the total loss of duty used for assessing penalties as set forth in these guidelines. The "multiples" set forth in paragraphs (F)(2)(a)(i), (b)(i) and (c)(i) involving assessment and disposition of duty loss violation cases will use the amount of total loss of duty in arriving at the appropriate assessment or disposition. Further, where separate duty loss and non-duty loss violations occur on the same entry, it is within the Customs field officer's discretion to assess both duty loss and non-duty loss penalties, or only one of them. Where only one of the penalties is assessed, the Customs field officer has the discretion to select which penalty (duty loss or non-duty loss) shall be assessed. Also, where there is a violation accompanied by an incidental or nominal loss of duties, the Customs field officer may assess a non-duty loss penalty where the incidental or nominal duty loss resulted from a separate non-duty loss violation. The Customs field officer will propose a level of culpability in the prepenalty notice that conforms to the level of culpability suggested by the evidence at the time of issuance. Moreover, the prepenalty notice will include a statement that it is Customs practice to base its actions on the earliest point in time that the statute of limitations may be asserted (*i.e.*, the date of occurrence of the alleged violation) inasmuch as the final resolution of a case in court may be less than a finding of fraud. A prepenalty notice that is issued to a party in a case where Customs determines a claimed prior disclosure is not valid--owing to the disclosing party's knowledge of the commencement of a formal investigation of a disclosed violation--will include a copy of a written document that evidences the commencement of a formal investigation. In addition, a prepenalty notice is not required if a violation involves a non-

commercial importation or if the proposed claim does not exceed \$1,000. Special guidelines relating to penalty assessment and dispositions involving "Arriving Travelers" are set forth in section (L) below.

(b) Prepenalty Notice--Proposed Claim Amount

(i) Fraud. In general, if a violation is determined to be the result of fraud, the proposed claim ordinarily will be assessed in an amount equal to the domestic value of the merchandise. Exceptions to assessing the penalty at the domestic value may be warranted in unusual circumstances such as a case where the domestic value of the merchandise is disproportionately high in comparison to the loss of duty attributable to an alleged violation (e.g., a total loss of duty of \$10,000 involving 10 entries with a total domestic value of \$2,000,000). Also, it is incumbent upon the appropriate Customs field officer to consider whether mitigating factors are present warranting a reduction in the customary domestic value assessment. In all section 592 cases of this nature regardless of the dollar amount of the proposed claim, the Customs field officer will obtain the approval of the Penalties Branch at Headquarters prior to issuance of a prepenalty notice at an amount less than domestic value.

(ii) Gross Negligence and Negligence. In determining the amount of the proposed claim in cases involving gross negligence and negligence, the appropriate Customs field officer will take into account the gravity of the offense, the amount of loss of duty, the extent of wrongdoing, mitigating or aggravating factors, and other factors bearing upon the seriousness of a violation, but in no case will the assessed penalty exceed the statutory ceilings prescribed in section 592. In cases involving gross negligence and negligence, penalties equivalent to the ceilings stated in paragraphs (F)(2)(b) and (c) regarding disposition of cases may be appropriate in cases involving serious violations, e.g., violations involving a high loss of duty or significant evasion of import prohibitions or restrictions. A "serious" violation need not result in a loss of duty. The violation may be serious because it affects the admissibility of merchandise or the enforcement of other laws, as in the case of quota evasions, false statements made to conceal the dumping of merchandise, or violations of exclusionary orders of the International Trade Commission.

(c) Technical Violations.

Violations where the loss of duty is nonexistent or minimal and/or that have an insignificant impact on enforcement of the laws of the United States may justify a proposed penalty in a fixed amount not related to the value of merchandise, but an amount believed sufficient to have a deterrent effect: e.g., violations involving the subsequent sale of merchandise or vehicles entered for personal use; violations involving

failure to comply with declaration or entry requirements that do not change the admissibility or entry status of merchandise or its appraised value or classification; violations involving the illegal diversion to domestic use of instruments of international traffic; and local point-to-point traffic violations. Generally, a penalty in a fixed amount ranging from \$1,000 to \$2,000 is appropriate in cases where there are no prior violations of the same kind. However, fixed sums ranging from \$2,000 to \$10,000 may be appropriate in the case of multiple or repeated violations. Fixed sum penalty amounts are not subject to further mitigation and may not exceed the maximum amounts stated in section 592 and in these guidelines.

(d) Statute of Limitations Considerations--Waivers.

Prior to issuance of any section 592 prepenalty notice, the appropriate Customs field officer will calculate the statute of limitations attributable to an alleged violation. Inasmuch as section 592 cases are reviewed de novo by the Court of International Trade, the statute of limitations calculation in cases alleging fraud should assume a level of culpability of gross negligence or negligence, *i.e.*, ordinarily applying a shorter period of time for statute of limitations purposes. In accordance with section 162.78 of the Customs Regulations (19 C.F.R. 162.78), if less than 1 year remains before the statute of limitations may be raised as a defense, a shortened response time may be specified in the notice--but in no case, less than 7 business days from the date of mailing. In cases of shortened response times, the Customs field officer should notify alleged violators by telephone and use all reasonable means (*e.g.*, facsimile transmission of a copy of the notice) to expedite receipt of the notice by the alleged violators. Also in such cases, the appropriate Customs field officer should advise the alleged violator that additional time to respond to the prepenalty notice will be granted only if an acceptable waiver of the statute of limitations is submitted to Customs. With regard to waivers of the statute of limitations, it is Customs practice to request waivers concurrently both from all potential alleged violators and their sureties.

(2) Closure of Case or Issuance of Penalty Notice.

(a) Case Closure.

The appropriate Customs field officer may find, after consideration of the record in the case, including any prepenalty response/oral presentation, that issuance of a penalty notice is not warranted. In such cases, the Customs field officer will provide written notification to the alleged violator who received the subject prepenalty notice that the case is closed.

(b) Issuance of Penalty Notice.

In the event that circumstances warrant issuance of a notice of penalty pursuant to Sec. 162.79 of the Customs Regulations (19 C.F.R. 162.79), the appropriate Customs field officer will give consideration to 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. In cases involving fraud, the penalty notice will be in the amount of the domestic value of the merchandise unless a lesser amount is warranted as described in paragraph (E)(1)(b)(i). In general, the degree of culpability or proposed penalty amount stated in a prepenalty notice will not be increased in the penalty notice. If, subsequent to the issuance of a prepenalty notice and upon further review of the record, the appropriate Customs field officer determines that a higher degree of culpability exists, the original prepenalty notice should be rescinded and a new prepenalty notice issued that indicates the higher degree of culpability and increased proposed penalty amount. However, if less than 9 months remain before expiration of the statute of limitations or any waiver thereof by the party named in the prepenalty notice, the higher degree of culpability and higher penalty amount may be indicated in the notice of penalty without rescinding the earlier prepenalty notice. In such cases, the Customs field officer will consider whether a lower degree of culpability is appropriate or whether to change the information contained in the prepenalty notice.

(c) Statute of Limitations Considerations.

Prior to issuance of any section 592 penalty notice, the appropriate Customs field officer again shall calculate the statute of limitations attributable to the alleged violation and request a waiver(s) of the statute, if necessary. In accordance with part 171 of the Customs Regulations (19 C.F.R. part 171), if less than 180 days remain before the statute of limitations may be raised as a defense, a shortened response time may be specified in the notice--but in no case less than 7 business days from the date of mailing. In such cases, the Customs field officer should notify an alleged violator by telephone and use all reasonable means (e.g., facsimile transmission of a copy) to expedite receipt of the penalty notice by the alleged violator. Also, in such cases, the Customs field officer should advise an alleged violator that, if an acceptable waiver of the statute of limitations is provided, additional time to respond to the penalty notice may be granted.

VI. Administrative Penalty Disposition

(1) Generally.

It is the policy of the Department of the Treasury and the Customs Service to grant mitigation in appropriate circumstances. In certain cases, based upon criteria to be developed by Customs, mitigation may take an alternative form, whereby a violator may eliminate or reduce his or her section 592 penalty liability by taking action(s) to correct problems that caused the violation. In any case, in determining the administrative section 592 penalty disposition, the appropriate Customs field officer will consider the entire case record--taking into account the presence of any mitigating or aggravating factors. All such factors should be set forth in the written administrative section 592 penalty decision. Once again, Customs emphasizes that any penalty liability which is mitigated is conditioned upon payment of any actual loss of duty in addition to that penalty as well as a release by the party that indicates that the mitigation decision constitutes full accord and satisfaction. Finally, section 592 penalty dispositions in duty-loss and non-duty-loss cases will proceed in the manner set forth below.

(2) Dispositions.

(a) Fraudulent Violation.

Penalty dispositions for a fraudulent violation will be calculated as follows:

(i) Duty Loss Violation. An amount ranging from a minimum of 5 times the total loss of duty to a maximum of 8 times the total loss of duty--but in any such case the amount may not exceed the domestic value of the merchandise. A penalty disposition 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, but again, the amount may not exceed the domestic value of the merchandise.

(ii) Non-Duty Loss Violation. An amount ranging from a minimum of 50 percent of the dutiable value to a maximum of 80 percent of the dutiable value of the merchandise. A penalty disposition greater than 80 percent of the dutiable value 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, but the amount may not exceed the domestic value of the merchandise.

(b) Grossly Negligent Violation.

Penalty dispositions for a grossly negligent violation shall be calculated as follows:

(i) Duty Loss Violation. An amount ranging from a minimum of 2.5 times the total loss of duty to a maximum of 4 times the total loss of duty--but in any such case, the amount may not exceed the domestic value of the merchandise.

(ii) Non-Duty Loss Violation. An amount ranging from a minimum of 25 percent of the dutiable value to a maximum of 40 percent of the dutiable value of the merchandise--but in any such case, the amount may not exceed the domestic value of the merchandise.

(c) Negligent Violation.

Penalty dispositions for a negligent violation shall be calculated as follows:

(i) Duty Loss Violation. An amount ranging from a minimum of 0.5 times the total loss of duty to a maximum of 2 times the total loss of duty but, in any such case, the amount may not exceed the domestic value of the merchandise.

(ii) Non-Duty Loss Violation. An amount ranging from a minimum of 5 percent of the dutiable value to a maximum of 20 percent of the dutiable value of the merchandise, but, in any such case, the amount may not exceed the domestic value of the merchandise.

(d) Authority to Cancel Claim.

Upon issuance of a penalty notice, Customs has set forth its formal monetary penalty claim. Except as provided in 19 C.F.R. part 171, in those section 592 cases within the administrative jurisdiction of the concerned Customs field office, the appropriate Customs field officer will cancel any such formal claim whenever it is determined that an essential element of the alleged violation is not established by the agency record, including prepenalty and penalty responses

provided by the alleged violator. Except as provided in 19 C.F.R. part 171, in those section 592 cases within Customs Headquarters jurisdiction, the appropriate Customs field officer will cancel any such formal claim whenever it is determined that an essential element of the alleged violation is not established by the agency record, and such cancellation action precedes the date of the Customs field officer's receipt of the alleged violator's petition responding to the penalty notice. On and after the date of Customs receipt of the petition responding to the penalty notice, jurisdiction over the action rests with Customs Headquarters including the authority to cancel the claim.

(e) Remission of Claim.

If the Customs field officer believes that a claim for monetary penalty should be remitted for a reason not set forth in these guidelines, the Customs field officer should first seek approval from the Chief, Penalties Branch, Customs Service Headquarters.

(f) Prior Disclosure Dispositions.

It is the policy of the Department of the Treasury and the Customs Service to encourage the submission of valid prior disclosures that comport with the laws, regulations, and policies governing this provision of section 592. Customs will determine the validity of the prior disclosure including whether or not the prior disclosure sets forth all the required elements of a violation of section 592. A valid prior disclosure warrants the imposition of the reduced Customs civil penalties set forth below:

(1) Fraudulent Violation.

(a) Duty Loss Violation. The claim for monetary penalty shall be equal to 100 percent of the total loss of duty (i.e., actual + potential) resulting from the violation. No mitigation will be afforded.

(b) Non-Duty Loss Violation. The claim for monetary penalty shall be equal to 10 percent of the dutiable value of the merchandise in question. No mitigation will be afforded.

(2) Gross Negligence and Negligence Violation.

(a) Duty Loss Violation. The claim for monetary penalty shall be equal to the interest on the actual loss of duty computed from the date of liquidation to the date of the party's tender of

the actual loss of duty resulting from the violation. Customs notes that there is no monetary penalty in these cases if the duty loss is potential in nature. Absent extraordinary circumstances, no mitigation will be afforded.

(b) Non-Duty Loss Violation. There is no monetary penalty in such cases and any claim for monetary penalty which had been issued prior to the decision granting prior disclosure will be remitted in full.

VII. Mitigating Factors

The following factors will be considered in mitigation of the proposed or assessed penalty claim or the amount of the administrative penalty decision, provided that the case record sufficiently establishes their existence. The list is not all-inclusive.

(1) Contributory Customs Error.

This factor includes misleading or erroneous advice given by a Customs official in writing to the alleged violator, or established by a contemporaneously created written Customs record, only if it appears that the alleged violator reasonably relied upon the information and the alleged violator fully and accurately informed Customs of all relevant facts. The concept of comparative negligence may be utilized in determining the weight to be assigned to this factor. If it is determined that the Customs error was the sole cause of the violation, the proposed or assessed penalty claim shall be canceled. If the Customs error contributed to the violation, but the violator also is culpable, the Customs error will be considered as a mitigating factor.

(2) Cooperation with the Investigation.

To obtain the benefits of this factor, the violator must exhibit extraordinary cooperation beyond that expected from a person under investigation for a Customs violation. Some examples of the cooperation contemplated include assisting Customs officers to an unusual degree in auditing the books and records of the violator (e.g., incurring extraordinary expenses in providing computer runs solely for submission to Customs to assist the agency in cases involving an unusually large number of entries and/or complex issues). Another example consists of assisting Customs in obtaining additional information relating to the subject violation or other violations. Merely providing the books and records of the violator should not be considered cooperation justifying mitigation inasmuch as Customs has the right to examine an importer's books and records pursuant to 19 U.S.C. 1508-1509.

(3) Immediate Remedial Action.

This factor includes the payment of the actual loss of duty prior to the issuance of a penalty notice and within 30 days after Customs notifies the alleged violator of the actual loss of duties attributable to the alleged violation. In appropriate cases, where the violator provides evidence that immediately after learning of the violation, substantial remedial action was taken to correct organizational or procedural defects, immediate remedial action may be granted as a mitigating factor. Customs encourages immediate remedial action to ensure against future incidents of non-compliance.

(4) Inexperience in Importing.

Inexperience is a factor only if it contributes to the violation and the violation is not due to fraud or gross negligence.

(5) Prior Good Record.

Prior good record is a factor only if the alleged violator is able to demonstrate a consistent pattern of importations without violation of section 592, or any other statute prohibiting false or fraudulent importation practices. This factor will not be considered in alleged fraudulent violations of section 592.

(6) Inability to Pay the Customs Penalty.

The party claiming the existence of this factor must present documentary evidence in support thereof, including copies of income tax returns for the previous 3 years, and an audited financial statement for the most recent fiscal quarter. In certain cases, Customs may waive the production of an audited financial statement or may request alternative or additional financial data in order to facilitate an analysis of a claim of inability to pay (e.g., examination of the financial records of a foreign entity related to the U.S. company claiming inability to pay).

(7) Customs Knowledge.

Additional relief in non-fraud cases (which also are not the subject of a criminal investigation) will be granted if it is determined that Customs had actual knowledge of a violation and, without justification, failed to inform the violator so that it could have taken earlier corrective action. In such

cases, if a penalty is to be assessed involving repeated violations of the same kind, the maximum penalty amount for violations occurring after the date on which actual knowledge was obtained by Customs will be limited to two times the loss of duty in duty-loss cases or twenty percent of the dutiable value in non-duty-loss cases if the continuing violations were the result of gross negligence, or the lesser of one time the loss of duty in duty-loss cases or ten percent of dutiable value in non-duty-loss cases if the violations were the result of negligence. This factor will not be applicable when a substantial delay in the investigation is attributable to the alleged violator.

VIII. Aggravating Factors

Certain factors may be determined to be aggravating factors in calculating the amount of the proposed or assessed penalty claim or the amount of the administrative penalty decision. The presence of one or more aggravating factors may not be used to raise the level of culpability attributable to the alleged violations, but may be utilized to offset the presence of mitigating factors. The following factors will be considered "aggravating factors," provided that the case record sufficiently establishes their existence. The list is not exclusive.

- (1) Obstructing an investigation or audit,
- (2) Withholding evidence,
- (3) Providing misleading information concerning the violation,
- (4) Prior substantive violations of section 592 for which a final administrative finding of culpability has been made,
- (5) Textile imports that have been the subject of illegal transshipment (i.e., false country of origin declaration), whether or not the merchandise bears false country of origin markings,
- (6) Evidence of a motive to evade a prohibition or restriction on the admissibility of the merchandise (e.g., evading a quota restriction),
- (7) Failure to comply with a lawful demand for records or a Customs summons.

IX. Offers in Compromise ("Settlement Offers")

Parties who wish to submit a civil offer in compromise pursuant to 19 U.S.C. 1617 (also known as a "settlement offer") in connection with any section 592 claim or potential section 592 claim should follow the procedures outlined in Sec. 161.5 of the Customs Regulations (19 C.F.R. 161.5). Settlement offers do not

involve "mitigation" of a claim or potential claim, but rather "compromise" an action or potential action where Customs evaluation of potential litigation risks, or the alleged violator's financial position, justifies such a disposition. In any case where a portion of the offered amount represents a tender of unpaid duties, taxes and fees, Customs letter of acceptance may identify the portion representing any such duty, tax and fee. The offered amount should be deposited at the Customs field office responsible for handling the section 592 claim or potential section 592 claim. The offered amount will be held in a suspense account pending acceptance or rejection of the offer in compromise. In the event the offer is rejected, the concerned Customs field office will promptly initiate a refund of the money deposited in the suspense account to the offeror.

X. Section 592(d) Demands

Section 592(d) demands for actual losses of duty ordinarily are issued in connection with a penalty action, or as a separate demand without an associated penalty action. In either case, information must be present establishing a violation of section 592(a). In those cases where the appropriate Customs field officer determines that issuance of a penalty under section 592 is not warranted (notwithstanding the presence of information establishing a violation of section 592(a)), but that circumstances do warrant issuance of a demand for payment of an actual loss of duty pursuant to section 592(d), the Customs field officer shall follow the procedures set forth in section 162.79b of the Customs Regulations (19 C.F.R. 162.79b). Except in cases where less than one year remains before the statute of limitations may be raised as a defense, information copies of all section 592(d) demands should be sent to all concerned sureties and the importer of record if such party is not an alleged violator. Also, except in cases where less than one year remains before the statute of limitations may be raised as a defense, Customs will endeavor to issue all section 592(d) demands to concerned sureties and non-violator importers of record only after default by principals.

XI. Customs Brokers

If a customs broker commits a section 592 violation and the violation involves fraud, or the broker commits a grossly negligent or negligent violation and shares in the benefits of the violation to an extent over and above customary brokerage fees, the customs broker will be subject to these guidelines. However, if the customs broker commits either a grossly negligent or negligent violation of section 592 (without sharing in the benefits of the violation as described above), the concerned Customs field officer may proceed against the customs broker pursuant to the remedies provided under 19 U.S.C. 1641.

XII. Arriving Travelers

(1) Liability. Except as set forth below, proposed and assessed penalties for violations by an arriving traveler must be determined in accordance with these guidelines.

(2) Limitations on Liability on Non-commercial Violations. In the absence of a referral for criminal prosecution, monetary penalties assessed in the case of an alleged first-offense, non-commercial, fraudulent violation by an arriving traveler will generally be limited as follows:

(a) Fraud--Duty Loss Violation. An amount ranging from a minimum of three times the loss of duty to a maximum of five times the loss of duty, provided the loss of duty is also paid;

(b) Fraud--Non-duty Loss Violation. An amount ranging from a minimum of 30 percent of the dutiable value of the merchandise to a maximum of 50 percent of its dutiable value;

(c) Gross Negligence--Duty Loss Violation. An amount ranging from a minimum of 1.5 times the loss of duty to a maximum of 2.5 times the loss of duty provided the loss of duty is also paid;

(d) Gross Negligence--Non-duty Loss Violation. An amount ranging from a minimum of 15 percent of the dutiable value of the merchandise to a maximum of 25 percent of its dutiable value;

(e) Negligence--Duty Loss Violation. An amount ranging from a minimum of .25 times the loss of duty to a maximum of 1.25 times the loss of duty provided that the loss of duty is also paid;

(f) Negligence--Non-duty Loss Violation. An amount ranging from a minimum of 2.5 percent of the dutiable value of the merchandise to a maximum of 12.5 percent of its dutiable value;

(g) Special Assessments/Dispositions. No penalty action under section 592 will be initiated against an arriving traveler if the violation is not fraudulent or commercial, the loss of duty is \$100.00 or less, and there are no other concurrent or prior violations of section 592 or other statutes prohibiting false or fraudulent importation practices. However, all lawful duties, taxes and fees will be collected. Also, no penalty under section 592 will be initiated against an arriving traveler if the violation is not fraudulent or commercial, there are no other concurrent or prior violations of section 592, and a penalty is not believed necessary to deter future violations or to serve a law enforcement purpose.

XIII. Violations of Laws Administered by Other Federal Agencies.

Violations of laws administered by other federal agencies (such as the Food and Drug Administration, Consumer Product Safety Commission, Office of Foreign Assets Control, Department of Agriculture, Fish and Wildlife Service) should be referred to the appropriate agency for its recommendation. If promptly tendered, such recommendation will be granted due consideration and may be followed, provided such recommendation does not result in a disposition inconsistent with these guidelines.

XIV. Section 592 Violations by Small Entities

In compliance with the mandate of the Small Business Regulatory Enforcement Fairness Act of 1996, under appropriate circumstances, the issuance of a penalty under section 592 may be waived for businesses qualifying as small business entities.