

## **DRAWBACK PENALTIES - 19 U.S.C. 1593A APPENDIX D TO PART 171, CUSTOMS REGULATIONS (T.D. 00-5)**

### **Overview**

On December 8, 1993, the President signed into law the North American Free Trade Agreement Implementation Act (Public Law 103-182, 107 Stat. 2057). Title VI of that Act contained provisions pertaining to Customs Modernization and thus is commonly referred to as the Customs Modernization Act or "Mod Act." Paragraph (a) of section 622 of the Mod Act amended the Tariff Act of 1930, as amended, by adding section 593A, which prohibits the filing of false (fraudulent or negligent) drawback claims and prescribes the actions that Customs may take, including the assessment of monetary penalties, if such claims are filed. New section 593A was codified as section 1593a of Title 19 of the United States Code (19 U.S.C. 1593a, hereinafter "the statute").

As in the case of penalties under section 592 of the Tariff Act of 1930, as amended (19 U.S.C. 1592), specific procedures and other requirements are set forth in the statute for prepenalty notices and penalty claims, the former not being required by the statute if the penalty is \$1,000 or less, and provision is made for limited penalty assessment if there is a prior disclosure. The statute further provides for the applicability of section 618 of the Tariff Act of 1930, as amended (19 U.S.C. 1618), which authorizes the administrative remission or mitigation of penalties. Written decisions, setting forth a final determination and findings of fact and conclusions of law upon which that determination was based, are also mandated by the statute.

The statute provides for the assessment of monetary penalties in amounts not to exceed a specific percentage of the actual or potential loss of revenue, with the applicable percentage depending on the level of culpability, whether there have been prior violations involving the same issue, and whether the violator is a participant in the Customs drawback compliance program. (The statute provides for the establishment of a drawback compliance program; regulatory provisions relating to the operation of that program were adopted as part of the amendments to the Customs Regulations regarding drawback published in the **Federal Register** as T.D. 98-16 on March 5, 1998, 63 FR 10970.) The statute also provides for the issuance of a notice of a violation (warning letter) in lieu of a monetary penalty in the case of a drawback compliance program participant who commits a first (that is, nonrepetitive) negligent violation.

### **Guidelines For The Imposition And Mitigation Of Penalties For Violations Of 19 U.S.C. 1593a**

A monetary penalty incurred under section 593A, Tariff Act of 1930, as amended (19 U.S.C. 1593a; hereinafter referred to as section 593A), may be remitted or mitigated under section 618, Tariff Act of 1930, as amended (19 U.S.C. 1618;

hereinafter referred to as section 618), if it is determined that there exist such mitigating circumstances as to justify remission or mitigation. The guidelines below will be used by Customs in arriving at a just and reasonable assessment and disposition of liabilities arising under section 593A within the stated limitations. It is intended that these guidelines will be applied by Customs officers in prepenalty proceedings, in determining the monetary penalty assessed in the penalty notice, and in arriving at a final penalty disposition. The assessed or mitigated 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 19 U.S.C. 1593a(i).

#### I. Violations Of Section 593a

A violation of section 593A occurs when a person, through fraud or negligence, seeks, induces, or affects, or attempts to seek, induce, or affect, the payment or credit to that person or others of any drawback claim by means of any document, written or oral statement, or electronically transmitted data or information, or act which is material and false, or any omission which is material, or aids or abets any other person in the foregoing violation. There is no violation if the falsity 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 mere unintentional repetition by an electronic system of an initial clerical error will not constitute a pattern of negligent conduct. Nevertheless, if Customs has drawn the person's attention to the intentional repetition by an electronic system of an initial clerical error, subsequent failure to correct the error could constitute a violation of section 593A.

#### II. Degrees Of Culpability

A. Negligence. A violation is determined to be 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 or done through the failure to exercise the degree of reasonable care and competence expected from a person in the same circumstances in ascertaining the facts or in drawing inferences from those facts, in ascertaining the offender's obligations under the statute, or in communicating information so that it may be understood by the recipient. As a general rule, a violation is determined to be negligent if it results from the offender's failure to exercise reasonable care and competence to ensure that a statement made is correct.

B. Fraud. A violation is determined to be fraudulent if the 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.

### III. Assessment Of Penalties

A. Issuance of Prepenalty Notice. As provided in § 162.77a of the Customs Regulations (19 C.F.R. 162.77a), if Customs has reasonable cause to believe that a violation of section 593A has occurred and determines that further proceedings are warranted, a notice of intent to issue a claim for a monetary penalty will be issued to the person concerned. In issuing such prepenalty notice, the appropriate Customs field officer will make a tentative determination of the degree of culpability and the amount of the proposed claim. A prepenalty notice will not be issued if the claim does not exceed \$1,000.

B. Issuance of Penalty Notice. After considering representations, if any, made by the person concerned pursuant to the notice issued under paragraph (III)(A), the appropriate Customs field officer will determine whether any violation described in section (I) has occurred. If a notice was issued under paragraph (III)(A) and the appropriate Customs field officer determines that there was no violation, Customs will promptly issue a written statement of the determination to the person to whom the notice was sent. If the appropriate Customs field officer determines that there was a violation, Customs will issue a written penalty claim to the person concerned. The written penalty claim will specify all changes in the information provided in the prepenalty notice issued under paragraph (III)(A). The person to whom the penalty notice is issued will have a reasonable opportunity under section 618 to make representations, both oral and written, seeking remission or mitigation of the monetary penalty. At the conclusion of any proceeding under section 618, Customs will provide to the person concerned a written statement which sets forth the final determination and the findings of fact and conclusions of law on which such determination is based.

### IV. Maximum Penalties

(1) Fraud. In the case of a fraudulent violation of section 593A, the monetary penalty will be in an amount not to exceed 3 times the actual or potential loss of revenue.

(2) Negligence.

(a) In General. In the case of a negligent violation of section 593A, the monetary penalty will be in an amount not to exceed 20 percent of the actual or potential loss of revenue for the first violation.

(b) Repetitive Violations. For the first negligent violation that is repetitive (i.e., involves the same issue and the same violator), the penalty will be in an amount not to exceed 50 percent of the actual or potential loss of revenue. The penalty for a second and each subsequent repetitive negligent violation will be in an amount not to exceed the actual or potential loss of revenue.

(3) Prior Disclosure

(a) In General. Subject to paragraph (D)(3)(b), if the person concerned discloses the circumstances of a violation of section 593A before, or without knowledge of the commencement of, a formal investigation of such violation, the monetary penalty assessed under this Appendix will not exceed:

(i) In the case of fraud, an amount equal to the actual or potential revenue of which the United States is or may be deprived as a result of overpayment of the claim; or

(ii) If the violation resulted from negligence, an amount equal to the interest computed on the basis of the prevailing rate of interest applied under 26 U.S.C. 6621 on the amount of actual revenue of which the United States is or may be deprived during the period that begins on the date of overpayment of the claim and ends on the date on which the person concerned tenders the amount of the overpayment.

(b) Condition Affecting Penalty Limitations. The limitations in paragraph (D)(3)(a) on the amount of the monetary penalty to be assessed apply only if the person concerned tenders the amount of the overpayment made on the claim either at the time of the disclosure or within 30 days (or such longer period as Customs may provide) from the date of notice by Customs of its calculation of the amount of overpayment.

(c) Burden of Proof. The person asserting lack of knowledge of the commencement of a formal investigation has the burden of proof in establishing such lack of knowledge.

(d) Commencement of Investigation. For purposes of this Appendix, a formal investigation of a violation is considered to be commenced with regard to the disclosing party, and with regard to the disclosed information, on the date recorded in writing by Customs as the date on which facts and circumstances were discovered which caused Customs to believe that a possibility of a violation of section 593A existed.

(e) Exclusivity. Penalty claims under section D will be the exclusive civil remedy for any drawback-related violation of section 593A.

V. Deprivation Of Lawful Revenue

Notwithstanding section 514, Tariff Act of 1930, as amended (19 U.S.C. 1514), if the United States has been deprived of lawful duties and taxes resulting from a violation of section 593A, Customs will require that such duties and taxes be restored whether or not a monetary penalty is assessed.

VI. Final Disposition Of Penalty Cases When The Drawback Claimant Is Not A Certified Participant In The Drawback Compliance Program

(1) In General. Customs will consider all information in the petition and all available evidence, taking into account any mitigating, aggravating, and extraordinary factors, in determining the final assessed penalty. All factors considered should be stated in the decision.

(2) Penalty Disposition When There Has Been No Prior Disclosure.

(a) Nonrepetitive Negligent Violation. The final penalty disposition will be in an amount ranging from a minimum of 10 percent of the actual or potential loss of revenue to a maximum of 20 percent of the actual or potential loss of revenue.

(b) Repetitive Negligent Violation.

(i) First Repetitive Negligent Violation. The final penalty disposition will be in an amount ranging from a minimum of 25 percent of the actual or potential loss of revenue to a maximum of 50 percent of the actual or potential loss of revenue.

(ii) Second and Each Subsequent Repetitive Negligent Violation. The final penalty disposition will be in an amount ranging from a minimum of 50 percent of the actual or potential loss of revenue to a maximum of 100 percent of the actual or potential loss of revenue.

(c) Fraudulent Violation. The final penalty disposition will be in an amount ranging from a minimum of 1.5 times the actual or potential loss of revenue to a maximum of 3 times the actual or potential loss of revenue.

(3) Penalty Disposition When There Has Been a Prior Disclosure.

(a) Negligent Violation. The final penalty disposition will be in an amount equal to the interest determined in accordance with paragraph (D)(3)(a)(ii).

(b) Fraudulent Violation. The final penalty disposition will be in an amount equal to 100 percent of the actual or potential loss of revenue.

(4) Mitigating Factors. The following factors will be considered in mitigation of the proposed or assessed penalty claim or final penalty amount, provided that the case record sufficiently establishes their existence. The list is not exclusive.

(a) Contributory Customs Error. This factor includes misleading or erroneous advice given by a Customs official in writing to the alleged violator, but this factor may be applied in such a case only if it appears that the alleged violator reasonably relied upon the written 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 the Customs error contributed to the violation, but the alleged violator is also culpable, the Customs error is to be considered as a mitigating factor. If it is determined that the Customs error was the sole cause of the violation, the proposed or assessed penalty is to be canceled.

(b) Cooperation with the Investigation. To obtain the benefits of this factor, the alleged violator must exhibit cooperation beyond that expected from a person under investigation for a Customs violation. An example of the cooperation contemplated includes assisting Customs officers to an unusual degree in auditing the books and records of the alleged 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 alleged violator may 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.

(c) Immediate Remedial Action. This factor includes the payment of the actual loss of revenue prior to the issuance of a penalty notice and within 30 days after Customs notifies the alleged violator of the actual loss of revenue attributable to the violation. In appropriate cases, where the alleged 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.

(d) Prior Good Record. Prior good record is a factor only if the alleged violator is able to demonstrate a consistent pattern of filing drawback claims without violation of section 593A, or any other statute prohibiting the making or filing of a false statement or document in connection with a

drawback claim. This factor will not be considered in alleged fraudulent violations of section 593A.

(e) 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). In addition, the alleged violator must present information reflecting ownership and related domestic and foreign parties and must provide information reflecting its current financial condition, including books and records of account, bank statements, other tax records (for example, sales tax returns) and a list of assets with current values; if the alleged violator is a closely held corporation, similar current financial information must be provided on the shareholders, wherever they are located.

(f) Customs Knowledge. This factor may be used in non-fraud cases if it is determined that Customs had actual knowledge of a violation and failed, without justification, to inform the violator so that it could have taken earlier remedial action. This factor is not applicable when a substantial delay in the investigation is attributable to the alleged violator.

(5) 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 final administrative penalty. 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 used 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.

- (a) Obstructing an investigation or audit.
- (b) Withholding evidence.
- (c) Providing misleading information concerning the violation.
- (d) Prior substantive violations of section 593A for which a final administrative finding of culpability has been made.
- (e) Failure to comply with a Customs summons or lawful demand for records.

## VII. Drawback Compliance Program Participants

(1) In General. Special alternative procedures and penalty assessment standards apply in the case of negligent violations of section 593A committed by persons who are certified as participants in the Customs drawback compliance program and who are generally in compliance with the procedures and requirements of that program. Provisions regarding the operation of the drawback compliance program are set forth in part 191 of the Customs Regulations (19 C.F.R. part 191).

(2) Alternatives to Penalties. When a participant described in paragraph (G)(1) commits a violation of section 593A, in the absence of fraud or repeated violations and in lieu of a monetary penalty, Customs will issue a written notice of the violation (warning letter).

(a) Contents of Notice. The notice will:

(i) State that the person has violated section 593A;

(ii) Explain the nature of the violation; and

(iii) Warn the person that future violations of section 593A may result in the imposition of monetary penalties and that repetitive violations may result in removal of certification under the drawback compliance program until the person takes corrective action that is satisfactory to Customs.

(b) Response to Notice. Within 30 days from the date of mailing of the written notice, the person must notify Customs in writing of the steps that have been taken to prevent a recurrence of the violation unless the person establishes to the satisfaction of Customs that no violation took place (See, § 162.73a(b)(2)(ii) of the Customs Regulations, 19 C.F.R. 162.73a(b)(2)(ii)). If the person fails to provide the required notification in a timely manner, any penalty assessed for a repetitive violation under paragraph (G)(3) will not be subject to mitigation under this Appendix.

(3) Repetitive Violations.

(a) In General. A person who has been issued a written notice under paragraph (G)(2) and who subsequently commits a negligent violation that is repetitive (i.e., involves the same issue), and any other person who is a participant described in paragraph (G)(1) and who commits a repetitive negligent violation, is subject to one of the following monetary penalties:

(i) An amount not to exceed 20 percent of the loss of revenue for the first repetitive violation that occurs within three years from the date of the violation of which it is repetitive;

(ii) An amount not to exceed 50 percent of the loss of revenue for the second repetitive violation that occurs within three years from the date of the first of two violations of which it is repetitive ; and

(iii) An amount not to exceed 100 percent of the loss of revenue for the third and each subsequent repetitive violation that occurs within three years from the date of the first of three or more violations of which it is repetitive.

(b) Repetitive Violations Outside 3-year Period. If a participant described in paragraph (G)(1) commits a negligent violation that is repetitive but that did not occur within 3 years of the violation of which it is repetitive, the new violation will be treated as a first violation for which a written notice will be issued in accordance with paragraph (G)(2), and each repetitive violation subsequent to that violation that occurs within any 3-year period described in paragraph (G)(3)(a) will result in the assessment of the applicable monetary penalty prescribed in that paragraph.

(4) Final Penalty Disposition When There Has Been No Prior Disclosure.

(a) In General. Customs will consider all information in the petition and all available evidence, taking into account any mitigating factors (See, paragraph (F)(4)), aggravating factors (See, paragraph (F)(5)), and extraordinary factors in determining the final assessed penalty. All factors considered should be stated in the decision.

(b) First Repetitive Negligent Violation Within 3 Years of Violation Handled Under Paragraph (G)(2). The final penalty disposition will be in an amount ranging from a minimum of 10 percent of the loss of revenue to a maximum of 20 percent of the loss of revenue.

(c) Second Repetitive Negligent Violation Within 3 Years of Violation Handled Under Paragraph (G)(2) or (G)(3). The final penalty disposition will be in an amount ranging from a minimum of 25 percent of the loss of revenue to a maximum of 50 percent of the loss of revenue.

(d) Third and Each Subsequent Repetitive Negligent Violation Within 3 Years of Violation Handled Under Paragraph (G)(2) or (G)(3). The final penalty disposition will be in an amount ranging from a minimum of 50 percent of the loss of revenue to a maximum of 100 percent of the loss of revenue.

(e) Fraudulent Violations. The final penalty disposition will be determined in the same manner as in the case of fraudulent violations committed by persons who are not participants in the drawback compliance program (See, paragraph (F)(2)(c)).

(5) Final Penalty Disposition When There Has Been A Prior Disclosure. The final penalty disposition will be determined in the same manner as in the case of persons who are not participants in the drawback compliance program (See, paragraph (F)(3)).

#### VIII. 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 593A may be waived for businesses qualifying as small business entities. Procedures that were established for small business entities regarding violations of 19 U.S.C. 1592 in Treasury Decision 97-48 published in the Federal Register (62 FR 30378) are also applicable for small entities regarding violations of section 593A.