

# CUSTOMS-NOTES

Written by George R. Tuttle Law Offices for informational use by the trade and import community on selected topics of general interest concerning Customs and import related matters.

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## **CUSTOMS PROPOSES REVISIONS TO GUIDELINES FOR THE IMPOSITION AND MITIGATION OF PENALTIES FOR VIOLATIONS OF 19 U.S.C. 1592 19 CFR PART 171**

**SUMMARY:** On October 28, 1998, the Custom Service published a proposal to revise Appendix B to Part 171 of the Customs Regulations, which sets forth the guidelines for remitting and mitigating penalties relating to violations of section 592 of the Tariff Act of 1930, as amended. A violation of section 592 involves the entry or introduction or attempted entry or introduction of merchandise into the United States by fraud, gross negligence, or negligence. Many of the proposed changes to Appendix B reflect the Customs Modernization Act and its themes of "informed compliance" and "shared responsibility."

### BACKGROUND

On December 8, 1993, the President signed the [North American Free Trade Agreement Implementation Act](#) (Public Law 103-182). The Customs Modernization portion of this Act (Title VI), popularly known as the Customs Modernization Act or "the Mod Act", became effective when it was signed. The Mod Act emphasizes the themes of shared responsibility and informed compliance for Customs and the public. According to Customs, a more informed public promotes an overall greater level of compliance than the threat of an occasional and often ineffective penalty. According to Customs, a significant aspect of this "shared responsibility" and "informed compliance" approach is reflected in the proposed revision of the guidelines for remitting and mitigating penalties relating to violations of [Section 592](#) of the Tariff Act of 1930, as amended ([19 U.S.C. 1592](#))(hereinafter referred to as [Section 592](#)).

### Summary of Proposed Guidelines

A violation of [Section 592](#) involves the entry or introduction or attempted entry or introduction of merchandise into the United States by fraud, gross negligence, or negligence. The guidelines for remitting and mitigating penalties relating to violations of [Section 592](#) appear as Appendix B to [Part 171](#) of the Customs Regulations.

Much of the proposed revision of the penalty guidelines consists of a reorganization of the content of the current guidelines into a new format that is intended to more clearly identify important provisions which are contained in the present text. The proposal does contain some important substitutive items that are discussed below:

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Proposed paragraph (A) now discusses what constitutes [Section 592](#) violations and proposed paragraph (B) discusses what is meant by materiality.

In the proposed new paragraph (B), defining materiality under [Section 592](#), that definition is expanded by providing that a document, statement, act, or omission is **material if it significantly impairs Customs ability to collect and report accurate trade statistics**, deceives the public as to the source, origin or quality of the merchandise, or constitutes an unfair trade practice in violation of federal law. **Under this proposal, an importer could be liable for a penalty of 20 to 40% of the dutiable value of the merchandise for failure to accurately classify goods at the statistical level.**

Proposed paragraph (C) now discusses the degrees of culpability under [Section 592](#).

Under these definitions, a violation shall be determined to be negligent if it 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. A violation shall be deemed to be grossly negligent if is 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.

A new paragraph (D) is proposed to be added to include terms used throughout the guidelines. Included in this paragraph are discussions of the terms: duty loss violations; non-duty loss violations; actual loss of duty; potential loss of duty; reasonable care; clerical error; and mistake of fact. In its discussion of reasonable care, Customs states:

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; and taking measures that will lead to and assure the preparation of accurate documentation. Customs will 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

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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

Paragraph (F)(2)(f) provides a discussion of prior disclosure and the reduced penalties based upon the different levels of culpability for a valid prior disclosure. Prior disclosure is discussed in paragraph (E) of the existing guidelines.

Paragraph (G) of the proposed guidelines discusses the factors that are considered by Customs in proposing a penalty or mitigating an assessed penalty claim. Among these factors are:

- an error by Customs that contributed to the violation;
- the extent of cooperation by the violator with the investigation by Customs into the alleged violation;
- whether or not the violator takes immediate steps to remedy the situation that caused the violation; and
- the prior record of the violator in its dealings with Customs.

Paragraph (H) contains the factors that Customs believes are to be treated as aggravating factors when considering mitigation of proposed or assessed penalties. Most of these factors are currently contained in paragraph (G) of the existing guidelines. While the list of factors is not intended to be all-inclusive, two new factors have been added. They are: the discovery of evidence of a motive to evade a prohibition or restriction on the admissibility of merchandise, and failure to comply with a lawful demand for records or a Customs summons.

Paragraph (I) of the proposed guidelines addresses offers in compromise (settlement offers). This is a new element not contained in the existing guidelines. The paragraph instructs parties who wish to submit a civil offer in compromise pursuant to [19 U.S.C. 1617](#) to follow procedures outlined in Section 161.5 of the Customs Regulations ([19 CFR 161.5](#)). The paragraph summarizes what steps will be taken by both parties once such an offer has been made.

Paragraph (J) of the proposed guidelines contains instructions to be followed in instances where Customs makes a demand for payment of actual loss of duties pursuant to [Section 592\(d\)](#). This is a subject that is not currently addressed in the existing guidelines. The paragraph provides that Customs will follow the procedures set forth in Section 162.79b of the Customs Regulations ([19 CFR 162.79b](#)) and states that no such

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demand will be issued unless the record establishes the presence of a violation of [Section 592\(a\)](#).

Paragraph (K) of the proposed guidelines addresses violations of [Section 592](#) by brokers. The existing guidelines discuss brokers in paragraph (I). The paragraph continues the present practice of applying the overall mitigation guidelines in instances of fraud or where the broker shares in the financial benefits of a violation. However, where there has been no fraud or sharing of the financial benefits, the proposal removes the dollar limitations contained in the present guidelines and instructs Customs to proceed against the broker under [19 U.S.C. 1641](#).

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