

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 ISSUES RULES ON PENALTIES FOR FALSE DRAWBACK CLAIMS

SUMMARY: On September 29, 1998, Customs published a proposal to amend part 162 of the Customs Regulations to set forth the procedures to be followed when false drawback claims are filed and penalties are thereby incurred. The proposed regulatory changes would implement section 622 of the Customs modernization provisions of the [North American Free Trade Agreement Implementation Act](#). These new provisions track, to the greatest extent possible, the procedures that have been set forth for section 592 of the Tariff Act of 1930, as amended ([19 U.S.C. 1592](#)).

The proposal also sets forth proposed mitigation guidelines that Customs would follow for the assessment of penalties and disposition of cases when false drawback claims are filed and penalties are incurred. Finally, it proposes to amend the Customs Regulations in order to provide more specificity regarding the grounds and procedures for removal of a participant from the drawback compliance program.

BACKGROUND

Customs proposes to amend its Regulations to implement section 622 of Title VI of the [North American Free Trade Agreement Implementation Act](#) (Pub. L. 103-182). Title VI of the [North American Free Trade Agreement Implementation Act](#) is popularly known as the Customs Modernization Act. The proposal would implement Section 593a¹ of the Customs laws, which prohibits the filing of false (fraudulent or negligent) drawback claims. It would also and prescribe the actions that Customs may take, including the assessment of monetary penalties, if such claims are filed.

Penalties for False Claims

The proposed regulations provide 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

¹ New section 593A was codified as section 1593a of Title 19 of the United States Code ([19 U.S.C. 1593a](#), hereinafter "the statute").

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the Customs drawback compliance program (the statute provides for the establishment of a drawback compliance program, and 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). For purposes of applying the monetary penalties prescribed in the statute, Customs proposes to define loss of revenue with reference to the amount of drawback that is claimed and to which the claimant is not entitled.

The statute provides for penalties, or notices of violation in lieu of penalties, as set forth below in cases involving negligent violations (, a repetitive violation is one which involves the same issue as a prior violation):

1. If the violator is not a participant in the drawback compliance program, Customs shall assess monetary penalties in amounts not to exceed the following:
 - a. 20 percent of the loss of revenue for the first violation;
 - b. 50 percent of the loss of revenue for the first repetitive violation; and
 - c. The loss of revenue in the case of a second and each subsequent repetitive violation.
2. If the violator is a participant in the drawback compliance program and is generally in compliance with the provisions thereof, the following actions shall be taken by Customs:
 - a. For a first violation and for any other violation that is not repetitive or that involves the same issue as a prior violation but does not occur within three years from the date of that prior violation, a notice of violation (warning letter) shall be issued;
 - b. For the first violation that is repetitive and that occurs within three years from the date of the violation of which it is repetitive, a monetary penalty of up to 20 percent of the loss of revenue shall be assessed;
 - c. For the second violation that is repetitive and that occurs within three years from the date of the first of two violations of which it is repetitive, a monetary penalty of up to 50 percent of the loss of revenue shall be assessed; and
 - d. For a third and each subsequent violation that is repetitive and that occurs within three years from the date of the first of three or more violations of which it is repetitive, a monetary penalty not to exceed the loss of revenue shall be assessed.

In the case of a fraudulent violation, the statute makes no distinction between drawback compliance program participants and those who do not participate in the program: a fraudulent violation gives rise to a monetary penalty in an amount not exceeding **three times** the loss of revenue.

Penalties in the Case of a Prior Disclosure

The proposal also provides for limited penalty assessment for filing a false drawback claim if there is a prior disclosure of the violation. As in cases brought under section 592, the limited penalty assessment would be applicable only in those instances in which the circumstances of the violation are disclosed before, or without knowledge of the commencement of, a formal investigation. In this context, this document should be read in conjunction with the notice of proposed rulemaking regarding prior disclosure that was published in the **Federal Register** on September 26, 1996 (61 FR 50459).

If there has been a valid prior disclosure regarding a negligent violation, drawback compliance program participants and those who do not participate in that program are also treated the same: the violator is subject to a monetary penalty that may not exceed 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 from the date of overpayment of the claim to the date of tender of the overpaid amount.

If there has been a prior disclosure regarding the fraudulent violation, the penalty is an amount not exceeding the loss of revenue.

In order to obtain the benefits of prior disclosure in both fraud and negligence cases, a tender of the amount of the overpayment is required either at the time of disclosure or within 30 days (or such longer period as Customs may provide) after Customs gives notice of its calculation of the amount of the overpayment.

Delay In Implementation Of Drawback Penalties

The Customs Modernization Act provides that the provisions of the statute shall apply only to drawback claims filed on and after Customs implements a nationwide an automated drawback selectivity program, and mandates the publication in the Customs Bulletin of the effective date of the selectivity program.

Drawback Penalty Mitigation Guidelines

The proposal also includes the addition of a new Appendix D to Part 171, which sets forth guidelines for the imposition and mitigation of monetary penalties incurred under the statute. These guidelines are modeled on the section 592 regulatory provisions

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and thus, among other things, reflect the definitions of "fraud" and "negligence" (which includes gross negligence) that are intended to be applied in cases brought under section 592. As noted above, these proposed regulations, if adopted as a final rule, will not be effective until Customs implements an automated drawback selectivity program.

Drawback Compliance Program

Finally, Customs proposes changes to sections 191.194(e) and (f) regarding the revocation of certification for participation in the program. Noting that there is currently no provision for an immediate revocation when the basis for the revocation involves willfulness on the part of the program participant or when public health, interest, or safety requires immediate revocation, Customs proposes to revise sect; 191.194(e) and (f) to given themselves the authority to immediate revoke, or "removal" (rather than "revocation") a certification.

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