# Small Businesses Can Get A Break From Customs Penalties

by
Oscar Gonzalez, Attorney

Importers often overlook a vital defense to 19 USC § 1592 penalties: the Small Business Regulatory Enforcement Fairness Act of 1996. The defense is not well known because it was created way back during the Clinton Administration and because CBP does not like going out of its way to help importers avoid paying penalties. Even most customs attorneys (outside of our firm) do not know it exists, but that will probably not stop the sudden proliferation of articles similar to this one by copycat lawyers (you know who you are). CBP has not issued
regulations to guide importers who want to invoke the defense and its Mitigation Guidelines dedicate all of one sentence to explore its availability.

Whether a § 592 penalty is remitted or mitigated remains firmly at the discretion of CBP. This can be a problem when dealing with an unaccommodating CBP official, but the defense can be a winner. The defense is separate and independent from other grounds for remission and mitigation found in CBP's Mitigation Guidelines. This defense levels the playing field for small importers who qualify, so it has a nice Davis vs. Goliath character. The qualifications are found in CBP's short memo which I reproduce in its entirety below. You may be surprised how large a company can be to qualify as a small business entity. Most companies are allowed to have up to 500 employees. The defense is definitely not limited to Mom and Pops. While the qualifications seem straightforward, the rules are complex for companies who are affiliated or owned, managed, or operated by large companies or investors.

POLICY STATEMENT REGARDING VIOLATIONS OF
19 U.S.C. § 1592 BY SMALL ENTITIES

4820-02-P

DEPARTMENT OF THE TREASURY
UNITED STATES CUSTOMS SERVICE
(T.D. 97 - 46)

62 F.R. 30378 (June 3, 1997)

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: General Notice.

SUMMARY: On March 29, 1996, the President signed the Small Business Regulatory Enforcement Fairness Act of 1996. Section 223 of that law requires an agency to establish a policy or program which reduces, and under appropriate circumstances, waives civil penalties for violations of a statutory or regulatory requirement by a small entity. As a first step in implementing this law, we are setting forth in this document the circumstances and procedures whereby the assessment of a civil penalty under the provisions of 19 U.S.C. § 1592 will be waived for violations committed by small entities.

FOR FURTHER INFORMATION CONTACT: Alan Cohen, Penalties Branch, Office of Regulations and Rulings, 202-927-2344.

SUPPLEMENTARY INFORMATION:

On March 29, 1996, the President signed the Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. 104-121, 101 Stat. 847. Section 223 of that law requires an agency to establish a policy or program which reduces, and under appropriate circumstances, waives civil penalties for violations of a statutory or regulatory requirement by a small entity.

CUSTOMS POLICY STATEMENT REGARDING VIOLATIONS OF
19 U.S.C. § 1592 BY SMALL ENTITIES

Section 592 of the Tariff Act of 1930 (19 U.S.C. § 1592) prohibits persons, by fraud, gross negligence or negligence, from entering or introducing, attempting to enter or introduce, or aiding and abetting the entry or introduction of merchandise into the commerce of the United States, by means of statements or acts that are material and false, or by means of omissions which are material. Under Customs discretionary authority pursuant to sections 592(b)(2) and 618, Tariff Act of 1930, as amended (19 U.S.C. §§ 1592(b)(2) and 1618), Customs has published national guidelines applicable to its statutory authority to assess civil penalties against persons who violate 19 U.S.C. § 1592. These guidelines provide for a reduction in the initial assessment of civil penalties, and a reduction in the penalties amount found to be ultimately due, because of the presence of specified mitigating factors.

In considering petitions filed pursuant to sections 592(b)(2) and 618, mitigating factors which apply to small entities include: (1) reasonable reliance on misleading or erroneous advice given by a Customs official; (2) cooperation with the investigation beyond that expected for an entity under investigation; (3) immediate remedial action, including the payment of the actual loss of duties prior to the issuance of a penalty notice and within 30 days of the determination of the duties owed; (4) inexperience in importing, provided the violation is not due to fraud or gross negligence; (5) prior good record, provided that the violation is not due to fraud; (6) the inability of the alleged violator to pay the penalty claim; (7) extraordinary expenses incurred by the violator in cooperating with the investigation or in undertaking immediate remedial action; and (8) actual knowledge by Customs of a violation not due to fraud, where Customs failed to inform the entity so that it could have taken earlier corrective action. This list of factors is not exclusive.

In compliance with the mandate of the Small Business Regulatory Enforcement Fairness Act of 1996, the Customs Service is implementing a procedure whereby, under appropriate circumstances, the issuance of a penalty notice under 19 U.S.C. § 1592(b)(2) will be waived for businesses qualifying as small business entities. Specifically, an alleged violator which has been issued a prepenalty notice under 19 U.S.C. § 1592(b)(1) may assert in its response to the prepenalty notice that it is a small business entity, as defined in section 221(1) of the Small Business Regulatory Enforcement Fairness Act of 1996, and in 5 U.S.C. § 601, and that all of the following circumstances are present: (1) the small entity has taken corrective action within a reasonable correction period, including the payment of all duties, fees and taxes owed as a result of the violation within 30 days of the determination of the amount owed; (2) the small entity has not been subject to other enforcement actions by Customs; (3) the violation did not involve criminal or willful conduct, and did not involve fraud or gross negligence; (4) the violation did not pose a serious health, safety or environmental threat, and (5) the violation occurred despite the small entity's good faith effort to comply with the law.

The alleged violator will have the burden of establishing, to the satisfaction of the Customs officer issuing the prepenalty notice, that it qualifies as a small entity as defined in section 221(3) of the Small Business Regulatory Enforcement Fairness Act of 1996, and that all five of the above circumstances are present. In establishing that it qualifies as a small entity, the alleged violator should provide evidence that it is independently owned and operated; that is, there are no related parties (domestic or foreign) as defined in 19 U.S.C. § 1401a(g)(1), that would disqualify the business as a small business entity. Furthermore, the alleged violator must establish that it is not dominant in its field of operation. Finally, the alleged violator must provide evidence, including tax returns for the previous three years and a current financial statement from an independent auditor, of its annual average gross receipts over the past three years, and its average number of employees over the previous twelve months.

Each claim by an alleged violator that it qualifies as a small business entity will be considered on a case by case basis. In considering such claims, the Customs Service will consult the size standards set by the Small Business Administration, 13 C.F.R. § 121.201, for guidance in determining whether the alleged violator qualifies as a small business. If the alleged violator's claims for a waiver of the penalty under the Small Business Regulatory Enforcement Fairness Act of 1996 are not accepted and a penalty notice is issued, or if the alleged violator fails to assert a claim for a waiver of the penalty under this Act when the prepenalty notice is issue, the alleged violator may pursue its claim for a waiver of the penalty in a petition filed pursuant to 19 U.S.C. § 1592(b)(2).

This policies set forth in this notice are issued pursuant to the discretionary authority granted to the Secretary of the Treasury under 19 U.S.C. § 1618 to remit and mitigate penalties, and do not limit the government's right to initiate a civil enforcement action under 19 U.S.C. § 1592(e), nor do they limit the penalty amount which the government may seek in such an enforcement act, nor do they confer upon the alleged violator any substantive rights in such an enforcement action.

DATED: May 21, 1997 Acting Commissioner of Customs Samuel H. Banks

# Consolidated Screening List Helps US Companies Comply With Export Laws

This post originally appeared on Nov. 20, 2014 on the Department of Commerce blog.

Starting today, U.S. companies can use a simple tool to search the federal government's Consolidated Screening List (CSL). The CSL is a streamlined collection of nine different "screening lists" from the U.S. Departments of Commerce, State, and the Treasury that contains names of individuals and companies with whom a U.S. company may not be allowed to do business due to U.S. export regulations, sanctions, or other restrictions. If a co
mpany or individual appears on the list, U.S. firms must do further research into the individual or company in accordance with the administering agency's rules before doing business with them.

It is extremely important for U.S. businesses to consult the CSL before doing business with a foreign entity to ensure it is not flagged on any of the agency lists. The U.S. agencies that maintain these lists have targeted these entities for various national security and foreign policy reasons, including illegally exporting arms, violating U.S. sanctions, and trafficking narcotics. By consolidating these lists into one collection, the CSL helps support Presiden  t Obama's , which is designed to enhance U.S. national security.

In addition to using the simple search tool, the CSL is now available to developers through the International Trade Administration (ITA) Developer Portal (http://developer.trade.gov). The Consolidated Screening List API (Application Programming Interface) enables computers to freely access the CSL in an open, machine-readable format.

By making the CSL available as an API, developers and designers can create new tools, websites or mobile apps to access the CSL and display the results, allowing private sector innovation to help disseminate this critical information in ways most helpful to business users. For example, a freight forwarder could integrate this API into its processes and it could automatically check to see if any recipients are on any of these lists, thereby strengthening national security.

During the process of creating the API, the Commerce Department's International Trade Administration and Bureau of Industry and Security worked with the Departments of the Treasury and State to form an

authoritative, up to date, and easily searchable list with over 8,000 company and individual names and their aliases. These improvements provide options to the downloadable CSL files currently on export.gov/ecr.

In early January, ITA also will release a more comprehensive search tool.

This new API, along with Monday's announcement of a new Deputy Chief Data Officer and Data Advisory Council, is another step in fulfilling Commerce's "Open for Business Agenda" data priority to open up datasets that keep businesses more competitive, inform decisions that help make government smarter, and better inform citizens about their own communities.

NEW C-TPAT PORTAL TO
LAUNCH ON DEC 8

After years of promises, it looks like CBP is finally getting around to replacing its long-in-the-tooth C-TPAT portal. The online portal is how importers and other companies interact with CBP on matters relating to the Customs-Trade Partnership Against Terrorism.

The launch date is December 8, 2014.

C-TPAT Portal 2.0 will not merely update, but will completely replace the current portal. CBP claims that no information will be lost, but companies will have to reset password and learn how to navigate the new portal. CBP already posted a helpful manual.

Click here for further information.

Investigative Organization Highlights
CBP Corruption

The Center for Investigative Reporting (CIR), an award-winning journalistic organization, created a webpage dedicated solely to reporting corruption within the ranks of U.S. Customs and Border Protection. The photos of 153 former CBP officials are shown along
with details of their criminal convictions. Tables break down the convictions by state, port of entry, crime type, gender and years of service. Male employees from US-Mexico border states, Texas in particular, constitute a large chunk of the cases. You can see the page by clicking on the graphic to the left or by going to http://bordercorruption.apps.cironline.org/#all.

# CBP Clarifies Validity Criteria for NAFTA Certificates of Origin

CSMS #14-000598

Title: Valid vs. Invalid vs. Defective NAFTA Certificate of Origin
Date: 11/17/2014 3:29:19 PM

To: Automated Broker Interface, ACE Portal Accounts

This posting seeks to clarify the meaning of the terms "valid NAFTA Certificate of Origin," "invalid NAFTA Certificate of Origin" and "defective NAFTA Certificate of Origin". Additionally, CBP reminds importers that preference will be denied when possession of a valid NAFTA Certificate of Origin at the time of the claim cannot be substantiated.

A NAFTA Certificate of Origin is valid if it:

1. Lists the good in question
2. Covers the period in question
3. Includes the exporter's or his agent's signature in block 11a "Authorized Signature"
4. Was in the importer's possession at the time of the claim, as demonstrated by 1) a block 11e "Authorized Signature" date prior to the date of the preference claim, and 2) submission upon request of a CBP official

A NAFTA Certificate of Origin is invalid if it does not meet the aforementioned requirements.

A NAFTA Certificate of Origin is defective-and thus may be remedied in accordance with 19 CFR 181.22(c)-if, while meeting the conditions of a "Valid NAFTA Certificate of Origin," above, contains other errors or omissions. These include, but are not limited to the following: illegibility, misclassification, incorrect or missing preference criteria, signature by an individual who cannot legally bind the company, typed or stamped signature, 3rd-country goods (in addition to NAFTA goods), Net Cost field error, single entry Certificate without an invoice or other unique reference numbers, or other similar errors or omissions.

In addition to defining the aforementioned terms, this CSMS posting serves as a reminder that NAFTA preference will be denied if the importer does not possess a valid NAFTA Certificate of Origin at the time of the preference claim.

## FOOD FACILITIES ALERT: December 31, 2014 Deadline To Renew FDA Registration

Domestic and foreign facilities that manufacture, process, pack, or hold food or human or animal consumption in the U.S. must register and renew their registration with FDA.

A food facility is required to submit an initial registration to FDA only once, but must renew its registration with FDA every other year during the period beginning on October 1 and ending on December 31 of each even-numbered year. There is no fee for registration or updates to a registration. The owner, operator, or agent in charge of a facility, or an individual authorized by one of them, may register the facility. Foreign facilities must designate a U.S. agent, who lives or maintains a place of business in the U.S. and is physically present in the U.S., for purposes of registration. The U.S. agent may be authorized to register the facility.

The Federal government can bring a civil action against persons who fail to register a facility, update required elements, or cancel registration, or it can bring a criminal action in Federal court to prosecute persons who are responsible for the commission of a prohibited act, or both.

If a foreign facility is required to register but fails to do so, food from that facility that is offered for import into the U.S. is subject to refusal. The food may be held within the port of entry.

## BIS Issues Advisory Opinion On Cloud-Based Storefronts

It's not often that the Bureau of Industry and Security (BIS) issues an advisory opinion interpreting our nation's export laws, so when it does issue one, it would be wise for the exporting community to pay attention. The latest advisory opinion from the BIS addresses cloud-based storefronts. The advisory opinion is short and sweet, so rather than relying on our interpretation, you can read it here.



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