

DEPARTMENT OF THE TREASURY**Customs Service**

[T.D. 97-46]

Policy Statement Regarding Violations of 19 U.S.C. 1592 by Small Entities

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, 202-482-6950.

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 CFR § 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 issued, 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).

The 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.

Samuel H. Banks,

Acting Commissioner of Customs.

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