the statement number and statement amount to the importer of record at least one business day prior to the due date so that the importer of record can originate the payment.

(f) *Date of collection.* The date that the ACH credit payment transaction is received by Customs shall be the collection date which equates to the settlement date. The appropriate daily statement or entry or warehouse withdrawal or bill shall be identified as paid as of that collection date.

(g) *Removal from the ACH credit program.* If a payer repeatedly provides improperly formatted or erroneous information when originating ACH credit payments, the Financial Management Services Center may advise the payer in writing to refrain from using ACH credit and to submit its payments by bank draft or check pursuant to § 24.1 or, in the case of daily statement payments, to use the ACH debit payment method under § 24.25.

Samuel H. Banks,

Acting Commissioner of Customs.

Approved: May 5, 1998.

John P. Simpson,

Deputy Assistant Secretary of the Treasury.

[FR Doc. 98–14166 Filed 5–27–98; 8:45 am]

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DEPARTMENT OF THE TREASURY

Customs Service

19 CFR Parts 162 and 178

[T.D. 98–49]

RIN 1515–AB98

Prior Disclosure

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

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations governing ''prior disclosure'', including implementation of the Customs modernization provisions of the North American Free Trade Implementation Act (Mod Act) concerning prior disclosure by a person of a violation of law committed by that person involving the filing or attempted filing of a drawback claim, or an entry or introduction, or attempted entry or introduction of merchandise into the United States by fraud, gross negligence, or negligence. Pursuant to the ''prior disclosure'' provision of 19 U.S.C. 1592(c)(4) as amended by the Mod Act, and 19 U.S.C. 1593a(c)(3), if a person commits a violation of 19 U.S.C. 1592 or 19 U.S.C. 1593a and discloses the circumstances of the violation before, or without knowledge of, the commencement of a formal investigation of such violation, merchandise shall not be seized and any monetary penalty to be assessed shall be limited. ''Commencement of a formal investigation'' for purposes of 19 U.S.C. 1592 and 1593a is defined in these regulations. The document also amends the regulations to give Fines, Penalties and Forfeitures Officers discretion to defer Customs disclosure verification proceedings until the disclosing party has an opportunity to explain all the circumstances underlying the disclosed violation.

EFFECTIVE DATE: June 29, 1998.

FOR FURTHER INFORMATION CONTACT: Robert Pisani, Penalties Branch (202) 927–2344.

SUPPLEMENTARY INFORMATION:

Background

On December 8, 1993, the President signed the North American Free Trade Agreement Implementation Act (Pub. L. 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. Section 621 of Title VI amended section 592 of the Tariff Act of 1930 (19 U.S.C. 1592) (hereinafter referred to as section 592), and section 622 of Title VI added new section 593a. On September 26, 1996, Customs published in the **Federal Register** (61 FR 50459) a notice of proposed rulemaking to amend the Customs Regulations governing prior disclosure as it relates to sections 592 and 593a. Pursuant to the ''prior disclosure'' provision of 19 U.S.C. 1592(c)(4) as amended by the Mod Act, and 19 U.S.C. 1593a(c)(3), if a person commits a violation of 19 U.S.C. 1592 or 19 U.S.C. 1593a and discloses the circumstances of the violation before, or without knowledge of, the commencement of a formal investigation of such violation, merchandise shall not be seized and any monetary penalty to be assessed shall be limited.

It is noted that it is the policy of the Customs Service to encourage the submission of prior disclosures.

The notice of proposed rulemaking invited public comments on the proposals, which would be considered before adoption of a final rule. The public comment period closed on November 25, 1996.

Analysis of Comments

A total of thirty-seven commenters responded to the solicitation of comments during the public comment period. Many commenters applauded Customs efforts to re-organize and simplify the regulations involving prior disclosure. Ten of the commenters set forth specific recommendations to change the proposed amendments on a ''section by section'' basis. Five of these ten commenters made general comments which were not directly related to a specific section of the proposal. The remaining twenty-seven commenters set forth the single recommendation to amend the proposal to include a regulatory prohibition that would specify that a valid prior disclosure precludes the assessment of a liquidated damage claim for the disclosed violation.

The specific ''section by section'' recommendations and/or suggestions, general recommendations and/or suggestions, and the Customs responses thereto, are set forth below.

Proposed § 162.74(a)

Comment: One commenter suggests that § 162.74(a)(2) be amended to preclude ''oral'' prior disclosures. If adopted, the commenter recommends deleting all other references to oral prior disclosures in the proposal. No reason is articulated for suggesting this change.

Customs Response: We can find no valid reason for precluding a party from making an oral prior disclosure. Of course, as with a party making a written prior disclosure, a party who elects to make an oral disclosure must meet the regulatory criteria governing ''disclosure of the circumstances of the violation'' before, or without knowledge of the commencement of a formal investigation of such violation, in order to obtain prior disclosure benefits.

Comment: One commenter suggests that Customs change proposed § 162.74(a)(2) to reflect that the ''appropriate Customs officer,'' rather than the Fines, Penalties and Forfeitures Officer, be the deciding official regarding whether the party had included substantially the information set forth in paragraph (b) of proposed § 162.74. The commenter is of the opinion that the decision-making authority should be vested in a Customs officer not connected to a potential penalty action. For similar reasons, another commenter suggests that the port director should be the deciding official instead of the Fines, Penalties and Forfeitures Officer.

Customs Response: We disagree. Inasmuch as the evaluation of information regarding the potential assessment of penalties under 19 U.S.C. 1592 or 19 U.S.C. 1593a is within the province of the Fines, Penalties and Forfeitures Officer, we are of the opinion that the Fines, Penalties and

Forfeitures Officer is the appropriate Customs official to determine whether the criteria set forth in proposed § 162.74(b) is met.

Comment: One commenter suggests that proposed § 162.74(a)(2) be amended to include language that indicates that a disclosing party is presumed to have no knowledge of the commencement of a formal investigation of the disclosed violation, unless Customs can rebut such presumption by virtue of one or more of the events set forth in proposed § 162.74(i).

Customs Response: Proposed § 162.74(i) sets forth events which give rise to presumptions of knowledge of the commencement of a formal investigation of the disclosed violation(s). Inasmuch as circumstances may exist that demonstrate ''knowledge,'' but that are not included in the list of events set forth in proposed § 162.74(i), we do not believe that adoption of this suggestion is warranted. Moreover, we believe creating such a presumption would conflict with 19 U.S.C. 1592 and 1593a, which places the burden to demonstrate lack of knowledge on the disclosing party.

Comment: One commenter recommends that the Fines, Penalties and Forfeitures Officer should not be listed in proposed § 162.74(a)(2) as the sole officer to decide whether the disclosing party made a ''disclosure of the circumstances of a violation'' (*i.e.*, the criteria set forth in proposed § 162.74(b)), and that any such decisions should be subject to review or appeal. Further, for the sake of grammatical continuity, the commenter recommends deletion of the word ''that'' after the word ''satisfied'' in proposed § 162.74(a)(2).

Customs Response: For reasons discussed above, we are of the opinion that the Fines, Penalties and Forfeitures Officer is the appropriate Customs official to determine whether or not the party has met the criteria set forth in proposed § 162.74(b). With respect to a right of review or appeal of such determinations, Customs notes that such rights already are ensured by virtue of the disclosing party's right to petition if Customs issues a prepenalty or penalty notice initiating or assessing regular penalties. Lastly, we note that we have adopted the commenter's grammatical recommendation.

Proposed § 162.74(b)

Comment: One commenter recommends that the word ''violator'' in proposed § 162.74(b)(4) be changed to ''disclosing party.''

Customs Response: The recommendation is adopted.

Comment: One commenter suggests that proposed § 162.74(b)(4) should be clarified to indicate that requests for extensions apply to all information specified in proposed § 162.74(b).

Customs Response: We disagree. The adoption of the suggestion is contrary to the principle of ''shared responsibility'' and would eliminate the obligation to initially provide any information regarding a claimed prior disclosure.

Comment: One commenter suggests that Customs change proposed § 162.74(b)(4) to reflect that extension requests should normally be granted by Customs except in certain specified circumstances.

Customs Response: Customs believes that this change is not necessary. We note that the commenter did not specify circumstances that would warrant a denial of a request for an extension, and we believe that the creation of such circumstances would not be in the interests of either the disclosing party or the Customs Service.

Comment: One commenter recommends that proposed § 162.74(b)(4) be changed to specify that information provided to Customs pursuant to this provision may not be used to initiate or develop a criminal investigation or proceeding. The commenter suggests that use of such information to develop criminal cases impinges on the disclosing party's Constitutional 5th Amendment rights.

Customs Response: Customs disagrees. In addition to the fact that a party *elects* to make a claimed prior disclosure, it should be noted that current law requires referral of suspected criminal violations to the concerned U.S. Attorney's office. Consequently, the decision to prosecute a suspected violation of criminal statutes rests with the concerned U.S. Attorney's office rather than the Customs Service.

Proposed § 162.74(c)

Comment: One commenter suggests a change in the language in this section to make it clearer that the disclosing party may decide to wait to tender the actual loss of duties until Customs advises the party of its calculation of the actual loss of duties. The commenter is of the opinion that the current language is ambiguous, and that some ports have insisted that lost duties be tendered at the time of disclosure. Further, the commenter recommends that the period for tendering an actual loss of duties after having been notified by Customs of such loss be extended from 30 days to 60 days, and that the party may request an extension of time to tender.

Customs Response: We agree that the language suggested by the commenter regarding the timing of a tender is less ambiguous than the proposed language and have revised this section in accordance with the commenter's recommendation. On the other hand, we see no reason to change the 30 day period to tender an actual loss calculated by Customs to 60 days. We note that the proposed regulations do provide the Fines, Penalties and Forfeitures Officer with the authority to extend the 30 day period if it is determined that there is good cause to do so.

Comment: One commenter recommends adding a subsection to proposed § 162.74(c) to provide for refund in the event that Customs determines that the amount tendered is not, in fact, an actual loss of duties. Three other commenters recommend that proposed § 162.74(c) be revised to provide the disclosing party with a mechanism to challenge or protest Customs calculation of the actual loss of duties. Two of these three commenters suggest that the inability to challenge Customs actual loss calculation discourages prior disclosures.

Customs Response: We agree that where legitimate disputes exist between a Customs field office and a disclosing party regarding the amount of the actual loss of duties due the government, there should be some mechanism for review at Customs Headquarters—provided that the Customs claimed loss of duty is substantial (*i.e.*, exceeds $100,000); the disclosing party deposits the Customs claimed actual duty loss amount; greater than one year remains under the statute of limitations; and that the Headquarters review is limited solely to the basis for Customs determination of the actual duty loss. In addition, we note that granting such review is within the discretion of Customs Headquarters, and that such review is conditioned upon the disclosing party's compliance with all other provisions of the prior disclosure regulations. We also note that where Headquarters review is afforded, such review is not limited to the revenue loss claims raised by the Customs field office or disclosing party, but could involve an independent Headquarters determination. Lastly, although the Headquarters decision on such review may result in a partial or total refund of the deposited duty loss amount, the regulations indicate that, in any case where such review is afforded, the Headquarters decision is final and not subject to administrative or judicial appeal. In effect, the disclosing party who elects to request such Headquarters review should be aware that, if granted,

the party is waiving any right to contest Headquarters actual loss of duties determination—either administratively or judicially.

Proposed § 162.74(d)

Comment: One commenter recommends that proposed § 162.74(d)(2) be revised to require that Customs furnish a receipt that indicates the time and date of Customs receipt of claimed prior disclosure documents delivered in person. The commenter suggests that it is somewhat anomalous to require a person delivering documents to Customs to request a receipt, and that as part of ''shared responsibility'' it seems more appropriate to provide that the person delivering the documents would be furnished a receipt.

Customs Response: Customs agrees that the proposed regulation should be amended to reflect that a receipt will be furnished to the person delivering documents, but in keeping with the spirit of ''shared responsibility,'' we remain of the opinion that the receipt will be furnished upon request.

Comment: One commenter claims that proposed § 162.74(d)(3) is silent as to the specific time and date when a claimed oral prior disclosure becomes effective. The commenter provides revised language which indicates that orally provided information is ''deemed to have occurred at the time the oral communication is made.''

Customs Response: We disagree with the premise of this recommendation. The proposed regulation does, in fact, provide that claimed oral prior disclosures are ''deemed to have occurred at the time Customs was provided with the information which substantially complies with the requirements set forth in paragraph (b) of this section.''

Proposed § 162.74(e)

Comment: Two commenters point out an apparent inconsistency between proposed § 162.74(e)(2) and proposed § 162.74(a)(1), in that the latter proposed section provides for making a claimed prior disclosure to a ''Customs officer,'' whereas the former proposed section provides for making a ''multi-port'' claimed prior disclosure to ''all concerned Fines, Penalties and Forfeitures Officers.'' One of the commenters suggests that Port Director be substituted for Fines, Penalties and Forfeitures Officer.

Customs Response: We agree that there is an apparent inconsistency between the two proposed sections. Customs is revising proposed § 162.74(e)(2) to reflect that although a ''multi-port'' claimed prior disclosure may be made to a Customs officer, unless the claimed prior disclosure is made directly to the concerned Fines, Penalties and Forfeitures Officer, it is incumbent upon the Customs officer to refer the claimed prior disclosure to the concerned Fines, Penalties and Forfeitures Officer so that consolidation of the matter can be arranged in accordance with internal procedures. We believe that a disclosing party should not be limited to providing the claimed prior disclosure to the concerned port director.

Proposed § 162.74(f)

Comment: One commenter recommends that the word ''violator'' in proposed § 162.74(f) be changed to ''disclosing party.''

Customs Response: The recommendation is adopted.

Comment: One commenter recommends that the Fines, Penalties and Forfeitures Officer be eliminated in proposed § 162.74(f) as the Customs official responsible for requests for the withholding of initiation of disclosure verification proceedings. No specific reason is suggested for this change.

Customs Response: Inasmuch as the concerned Fines, Penalties and Forfeitures Officer is the Customs officer who is responsible for ascertaining the validity of the claimed prior disclosure, we see no reason to adopt the recommended change.

Comment: One commenter suggests that proposed § 162.74(f) be revised to include language indicating that requests to withhold initiation of disclosure verification proceedings of the claimed prior disclosure should be granted ''except for good cause.''

Customs Response: The suggestion is not adopted. In the event that Customs learns of a serious abuse of discretion regarding such requests, Customs can take measures to eliminate the problem through either internal guidelines, regulatory revisions or whatever other action is deemed appropriate.

Comment: One commenter suggests that proposed § 162.74(f) be revised to provide the Fines, Penalties and Forfeitures Officer with the discretion to defer notification to the Office of Investigations of a claimed prior disclosure. The commenter is of the opinion that the deferral of notification should be predicated on a number of factors, such as the gravity of the disclosed violation, any pattern of non-compliance, etc.

Customs Response: The notification to the Office of Investigations of the claimed disclosure serves to prevent delay in the administrative disposition of the disclosure, in that the Office of Investigations can take immediate action to initiate or coordinate disclosure verification proceedings as well as ascertain whether or not Customs already had commenced a formal investigation of the claimed prior disclosure. Consequently, Customs is of the opinion that the proposed regulation remain unchanged.

Comment: One commenter recommends that proposed § 162.74(f) be changed to reflect that a disclosing party may also request that Customs audits be included in a request to withhold initiation of disclosure verification proceedings.

Customs Response: Inasmuch as audits initiated solely to verify disclosures would often be considered part of the disclosure verification proceedings, Customs is of the opinion that the suggested change is unnecessary.

Comment: One commenter suggests that Customs add to the end of the first sentence in proposed § 162.74(f) ''and the Office of Investigations is requested to determine whether or not investigation is pending or contemplated.'' The commenter does not provide a reason for the suggested change.

Customs Response: In view of the fact that internal procedures already exist regarding the handling of claimed prior disclosures by the Office of Investigations, Customs is of the opinion that the suggested change is unnecessary.

Proposed § 162.74(g)

Comment: Two commenters indicate that, based upon Congressional discussions involving the Customs Modernization Act, proposed § 162.74(g) should include language to require that records of a ''commencement of a formal investigation'' be maintained in the Office of Investigations, Customs Headquarters or some other central unit. One of these two commenters also suggests that the regulation specify the official who is charged with recording the ''commencement'' information. Also, this commenter suggests that the words ''with regard to the disclosing party'' be added after the word ''commenced'' in the first sentence of the proposed section. A third commenter recommends that this section be revised to indicate that only Customs agents from the Office of Investigations can commence formal investigations for prior disclosure purposes. Three other commenters recommend that the proposed section be revised to require that a formal

investigations control number be assigned to the written commencement document or otherwise require the Office of Investigations to open an investigation. Lastly, one other commenter suggests revisions to the proposed section which specify the form and nature of the ''commencement'' document.

Customs Response: Customs is of the opinion that proposed § 162.74(g) fully comports with the Customs Modernization Act's statutory language and intent regarding the definition of the term ''commencement of a formal investigation.'' The proposed language requires that the Customs Service evidence the commencement by a writing, as well as specifies that the disclosing party will receive written evidence of such a ''commencement'' in any required notice issued to the party pursuant to 19 U.S.C. 1592 or 1593a, in the event the claimed prior disclosure is denied. We do not agree that the law mandates that agents of the Office of Investigations are the only Customs officials capable of commencing a formal investigation for the purposes of prior disclosure. Further, in Customs view, additional requirements involving custody of such records, or record forms/formats, record maintenance or case control numbers are not properly the province of regulation, but rather, concern internal procedures developed by the agency. We do agree with the suggestion to include the phrase ''with regard to the disclosing party'' after the word ''commenced'' in the first sentence, and have revised the proposed section to reflect adoption of this recommendation.

Comment: One commenter states that proposed § 162.74(g) should indicate that a Customs Form 28 (Request for Information) and Customs Form 29 (Notice of Action) cannot be considered written evidence of a ''commencement of a formal investigation.'' The commenter is of the opinion that these documents will have a ''chilling'' effect on the prior disclosure provisions if they are permitted to be construed as ''formal commencement'' documents, in that they, for the most part, merely request information or propose rate or value advances.

Customs Response: As indicated above, Customs is of the opinion that dictating the form of the ''commencement'' writing is not properly the province of regulation. We do agree that Customs Forms 28 and 29 which merely request information or propose rate or value advances could not be considered ''commencement'' documents for prior disclosure purposes unless they articulate that a possibility of a violation existed.

Comment: One commenter recommends deleting the phrase ''denied prior disclosure treatment on the basis of the commencement of a formal investigation of the disclosed violation'' in the second sentence of proposed § 162.74(g). The commenter points out that ''commencement of a formal investigation is merely one fact bearing on the ultimate resolution of the matter.''

Customs Response: Customs agrees with the commenter that ''commencement of a formal investigation of the disclosed violation'' is one of several issues concerning the disposition of the claimed prior disclosure (*e.g.*, a disclosing party may be unable to obtain prior disclosure benefits if the party fails to ''disclose the circumstances of the violation'' in accordance with § 162.74(b)—and this may occur in cases where Customs had not commenced a formal investigation). Nevertheless, this provision of proposed § 162.74(g) addresses those instances where the denial of the prior disclosure *is* predicated on the commencement of the formal investigation of the disclosed violation. In such cases, the regulation requires a copy of a writing evidencing the commencement of a formal investigation of the disclosed violation. Accordingly, the recommendation is not adopted.

Comment: One commenter recommends that proposed § 162.74(g) be revised to indicate that any required notice issued pursuant to 19 U.S.C. 1592 or 1593a should specify the event listed in proposed § 162.74(i) that provided the disclosing party with knowledge of the commencement of a formal investigation of the disclosed violation. The commenter believes that inclusion of such a provision would eliminate disputes regarding the issue of knowledge of the commencement.

Customs Response: We disagree. Customs notes that the purpose underlying proposed § 162.74(g) is to provide a definition of the ''commencement of a formal investigation'' for prior disclosure purposes. We note that notices issued to the disclosing party pursuant to 19 U.S.C. 1592 or 1593a may commence a formal investigation of the disclosed violation and may be issued prior to the claimed disclosure. It should also be noted that the law establishes the burden to demonstrate lack of knowledge of the commencement of the formal investigation upon the disclosing party.

Comment: One commenter suggests that proposed § 162.74(g) be revised to require that the disclosing party be notified of the acceptance or denial of the claimed prior disclosure as soon as Customs makes that decision, and that documentary evidence of the ''commencement of a formal investigation'' should be furnished to the disclosing party well in advance of the initiation of penalty proceedings.

Customs Response: Customs believes that the statutory and regulatory procedures already in place are sufficient to advise parties of the validity of a claimed prior disclosure. Also, it is well established that an invalid prior disclosure may subject the disclosing party to penalties.

Proposed § 162.74(h)

Comment: One commenter recommends that proposed § 162.74(h) be revised to clarify that once an investigation begins with respect to a disclosed violation, the disclosing party still may obtain prior disclosure treatment for other violations not covered by the commenced formal investigation.

Customs Response: Customs does not believe that clarification is necessary. The proposed section makes clear that additional disclosed violations not covered in the disclosing party's original prior disclosure may receive prior disclosure benefits, provided that such additional disclosures were made before ''the date recorded in writing by the Customs Service as the date on which facts and circumstances were discovered or information was received which caused the Customs Service to believe that a possibility of such additional violations existed.''

Proposed § 162.74(i)

Comment: Five commenters recommend that proposed § 162.74(i) be revised to require that for the ''presumption of knowledge'' to be effective any Customs notification of the disclosed violation to the disclosing party that precedes the claimed prior disclosure must be evidenced by a ''writing.'' Four of the five commenters maintain that such a requirement will avoid unnecessary conflict or misunderstandings concerning the content or circumstances of an oral notification by Customs. Two of the five commenters are of the opinion that a written notification requirement also should require a return receipt. In addition, two of the five commenters recommend that proposed § 162.74(i) be revised to ensure that ''general inquiries'' (*e.g.*, Customs Forms 28 and 29) are not used as evidence of prior knowledge of the commencement of a formal investigation of the disclosed

violation. One of these two commenters suggests inclusion of the phrase ''so informed the person of that reasonable belief,'' immediately following the statutory citations in proposed § 162.74(i)(1)(i) in order to clarify that ''general inquiries'' would not constitute a presumption of knowledge.

Customs Response: Customs notes that although the Customs Modernization Act prior disclosure changes added the requirement that a ''commencement of a formal investigation'' must be evidenced by a writing, the Modernization Act changes did not impose such a writing requirement regarding ''knowledge of the commencement of a formal investigation'' involving Customs notification to the disclosing party. Customs believes that the language of the proposed regulatory section makes clear that ''general inquiries'' or mere ''contact'' with a Customs officer prior to the submission of the claimed prior disclosure is insufficient to create a ''presumption of knowledge'' of the commencement of a formal investigation of the disclosed violation. In those instances where oral notification pursuant to proposed § 162.74(i) renders the presumption operative, the concerned Customs official must meet other criteria—such as informing the person of the type of or circumstances of the disclosed violation.

Customs is of the opinion that its position regarding ''presumption of knowledge'' is consistent with the underlying Modernization Act theme of ''shared responsibility''—if a party receives oral notification from a Customs officer of the type of or circumstances of the violation(s) at issue *before* making the claimed prior disclosure, Customs believes that prior disclosure benefits should not accrue—unless, of course, the party is able to rebut the presumption of knowledge as provided for under the proposed regulatory provision. Also, it should be noted that even if one or more of the events have taken place as set forth in the proposed § 162.74(i), a party still may wish to submit a claimed disclosure—either because the party believes it can rebut the presumption of knowledge, or because the party seeks to obtain substantial mitigation in an ensuing penalty proceeding (despite the fact that the information provided to Customs does not qualify for disclosure benefits).

Comment: One commenter suggests changing proposed § 162.74(i) so that it cannot be read to permit denial of prior disclosure benefits in those instances where one of the events or notifications under the proposed regulatory section takes place, but no formal investigation has been commenced. Another commenter recommends that Customs should eliminate the language in the proposed section which places the burden of proving ''lack of knowledge'' on the disclosing party.

Customs Response: Customs believes the proposed section is clear. The second sentence of proposed § 162.74(i) sets forth the requirement that the commencement of a formal investigation must occur before there can be a presumption of knowledge. Consequently, Customs sees no need to adopt the first commenter's suggestion. With respect to the burden of proving lack of knowledge, we reject the commenter's suggestion to eliminate this burden inasmuch as both concerned statutory provisions (*i.e.,* 19 U.S.C. 1592(c)(4) and 19 U.S.C. 1593a(c)(3)(c)) establish the burden of proving lack of knowledge.

General Comments

Comment: One commenter recommends that prior disclosure benefits should extend to violations of the customs laws other than violations of 19 U.S.C. 1592 or 1593a.

Customs Response: Customs notes that the proposed regulations are being promulgated based upon the statutory authority establishing ''prior disclosure'' for violations of 19 U.S.C. 1592 and 1593a. Currently, such statutory authority for permitting ''prior disclosure'' of other violations of the customs laws does not exist. Nevertheless, it should be noted that in some instances, a party who discloses a violation of the customs laws (other than 19 U.S.C. 1592 or 1593a) may be entitled to substantial mitigation in the administrative disposition of the offense under existing Customs guidelines for such violations.

Comment: Twenty-six commenters recommend that the proposed amendments be revised to prohibit an assessment of liquidated damages for a violation revealed in a 19 U.S.C. 1592 or 1593a prior disclosure. The vast majority of these commenters are of the opinion that it is unfair for the Customs Service to assess liquidated damages against a Foreign-Trade Zone (FTZ) operator for breach of the FTZ operator's bond based on information obtained from a prior disclosure submitted by an operator. These commenters believe that inasmuch as most valid prior disclosures by FTZ operators involve a tender of all lost revenue, Customs is made whole and that the subsequent assessment of liquidated damages should not be allowed. The FTZ commenters are of the opinion that the proposed regulations unfairly discriminate against FTZ operators, and serve to deter such parties from submitting prior disclosures.

Customs Response: Customs notes that unlike the assessment of civil penalties, the assessment of liquidated damages for a breach of bond terms is based upon the contractual agreement with the bondholder. Accordingly, although Customs may, under existing guidelines, reduce liquidated damage amounts in administrative proceedings—particularly in those cases where a valid prior disclosure is submitted, the agency does not believe the suggestion should be adopted.

Comment: One commenter suggests that the proposed regulations include a statement that indicates that the submission of valid prior disclosures is encouraged.

Customs Response: Customs notes that the commenter's suggested statement is not provided for by statute, but rather is a recommended statement of agency policy. Inasmuch as it is the policy of the Customs Service to encourage the submission of prior disclosures in accordance with the proposed regulatory requirements, we have added such a sentence to the preamble of this document.

Comment: One commenter is of the opinion that the annual reporting burden set forth in the section under Paperwork Reduction Act heading is understated. The commenter believes that it also would be helpful for the estimated number of respondents shown to be based on the actual number of prior disclosures filed annually in the last several years.

Customs Response: Customs notes that the figures set forth in the notice of proposed rulemaking are Customs best estimates of both the annual reporting burden, estimated annual number of respondents and estimated average annual burden per respondent. Inasmuch as a prior disclosure may involve one Customs entry with one line item, or several thousand Customs entries involving hundreds of line items, it is virtually impossible to predict either the frequency at which disclosures will be made, or the amount of time necessary to complete a disclosure. It should also be noted that the simplicity or complexity of the ''disclosed violation,'' as well as the number of line items at issue may involve a completion time that is either substantially more or less than the ''one hour for each Customs entry'' set forth in the notice of proposed rulemaking. In view of these considerations and the voluntary nature of the prior disclosure

provisions, Customs is of the opinion that its estimates comport with the regulatory requirements of the Paperwork Reduction Act.

Comment: One commenter believes that it would be helpful to acknowledge in this document that there may be instances where the disclosing party requires several months—or even longer—to submit all of the required information to complete its disclosure of the circumstances of the violation.

Customs Response: Customs acknowledges that in certain cases a claimed prior disclosure may involve numerous transactions, multiple ports, and/or complex issues and information—all of which require adequate research and compilation time. The agency is of the opinion that the proposed regulations accommodate such prior disclosures by virtue of the ability of the party to request extensions of time to research and compile such information.

Comment: One commenter recommends that the proposed regulations include a provision that either establishes a procedure for appealing a denial of a claimed prior disclosure, or references such a procedure found elsewhere in the Customs Regulations. The commenter is of the opinion that such a provision or statement would serve to avoid unnecessary litigation.

Customs Response: Customs notes that, ordinarily, the denial of a prior disclosure is manifested by Customs initiation of administrative penalty proceedings at ordinary penalty amounts under either 19 U.S.C. 1592 or 1593a. Inasmuch as the disclosing party may avail itself of administrative petitioning rights in such cases (including the right to petition Customs denial of prior disclosure treatment), Customs believes it is unnecessary to enact a separate or additional appeal procedure.

Comment: Four commenters are of the opinion that Customs should reinstate the ''minor violations'' section of the regulations governing prior disclosure (former § 162.74(j)). The commenters believe that the proposed regulations should state that minor, non-fraudulent violations should not be subject to penalty, and one commenter believes that such infractions should not be referred to the Office of Investigations. Another commenter believes that the deletion of former § 162.74(j) will discourage prior disclosure of minor violations.

Customs Response: Customs notes that despite the deletion of former § 162.74(j), the agency does not anticipate any change of practice with respect to minor violations. It should be noted that inasmuch as ''minor violations'' already are addressed in Customs revised penalty guidelines (19 CFR Part 171, Appendix B), former § 162.74(j) is unnecessary.

Conclusion

Accordingly, based on the comments received and the analysis of those comments as set forth above, and after further review of this matter, Customs believes that the proposed regulatory amendments should be adopted as a final rule with certain changes thereto as discussed above and as set forth below. This document also includes an appropriate update of the list of information collection approvals contained in § 178.2 of the Customs Regulations (19 CFR § 178.2).

Regulatory Flexibility Act

Insofar as this amendment closely follows legislative direction, pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601, *et seq.*), it is certified that the amendment will not have a significant economic impact on a substantial number of small entities. Accordingly, it is not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

Executive Order 12866

This amendment does not meet the criteria for a ''significant regulatory action'' as specified in E.O. 12866.

Paperwork Reduction Act

The collection of information contained in this final regulation was submitted to the Office of Management and Budget (OMB) in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) and approved under OMB control number 1515–0212. An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless the collection of information displays a valid control number assigned by OMB.

The collection of information in this final rule is in § 162.74. This information is required in connection with prior disclosure by a person of a violation of law committed by that person involving the filing or attempted filing of a drawback claim, or an entry or introduction, or attempted entry or introduction of merchandise into the United States by fraud, gross negligence or negligence. This information will be used by Customs to determine if the party discloses the circumstances of a violation before, or without knowledge of, the commencement of a formal investigation of such violation, so that merchandise would not be seized and any monetary penalty to be assessed would be limited. The collection of information is required to obtain a benefit. The likely respondents are business organizations including importers, exporters, and manufacturers.

The estimated average burden associated with the collection of information in this final rule is 1 hour per respondent or recordkeeper for each Customs entry involved in prior disclosure. Comments concerning the accuracy of this burden estimate and suggestions for reducing this burden should be directed to the U.S. Customs Service, Paperwork Management Branch, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229, and to the OMB, Attention: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, D.C. 20503.

Drafting Information: The principal author of this document was Keith B. Rudich, Regulations Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other offices participated in its development.

List of Subjects

19 CFR Part 162

Customs duties and inspection, Law enforcement, Seizures and forfeitures.

19 CFR Part 178

Administrative practice and procedure, Exports, Imports, Reporting and recordkeeping requirements.

Amendment to the Regulations

In accordance with the preamble, Parts 162 and 178 of the Customs Regulations (19 CFR Parts 162 and 178) are amended as set forth below:

PART 162—RECORDKEEPING, INSPECTION, SEARCH AND SEIZURE

1. The general authority citation for Part 162 continues to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1624.

* * * * *

2. Section 162.71 is amended by removing paragraph (e).

3. Section 162.74 is revised to read as follows:

§ 162.74 Prior disclosure.

(a) *In general.*—(1) A prior disclosure is made if the person concerned discloses the circumstances of a violation (as defined in paragraph (b) of this section) of 19 U.S.C. 1592 or 19 U.S.C. 1593a, either orally or in writing to a Customs officer before, or without knowledge of, the commencement of a

formal investigation of that violation, and makes a tender of any actual loss of duties in accordance with paragraph (c) of this section. A Customs officer who receives such a tender in connection with a prior disclosure shall ensure that the tender is deposited with the concerned local Customs entry officer.

(2) A person shall be accorded the full benefits of prior disclosure treatment if that person provides information orally or in writing to Customs with respect to a violation of 19 U.S.C. 1592 or 19 U.S.C. 1593a if the concerned Fines, Penalties and Forfeitures Officer is satisfied the information was provided before, or without knowledge of, the commencement of a formal investigation, and the information provided includes substantially the information specified in paragraph (b) of this section. In the case of an oral disclosure, the disclosing party shall confirm the oral disclosure by providing a written record of the information conveyed to Customs in the oral disclosure to the concerned Fines, Penalties and Forfeitures Officer within 10 days of the date of the oral disclosure. The concerned Fines, Penalties and Forfeiture Officer may, upon request of the disclosing party which establishes a showing of good cause, waive the oral disclosure written confirmation requirement. Failure to provide the written confirmation of the oral disclosure or obtain a waiver of the requirement may result in denial of the oral prior disclosure.

(b) *Disclosure of the circumstances of a violation.* The term ''discloses the circumstances of a violation'' means the act of providing to Customs a statement orally or in writing that:

(1) Identifies the class or kind of merchandise involved in the violation;

(2) Identifies the importation or drawback claim included in the disclosure by entry number, drawback claim number, or by indicating each concerned Customs port of entry and the approximate dates of entry or dates of drawback claims;

(3) Specifies the material false statements, omissions or acts including an explanation as to how and when they occurred; and

(4) Sets forth, to the best of the disclosing party's knowledge, the true and accurate information or data that should have been provided in the entry or drawback claim documents, and states that the disclosing party will provide any information or data unknown at the time of disclosure within 30 days of the initial disclosure date. Extensions of the 30-day period may be requested by the disclosing party from the concerned Fines, Penalties and Forfeitures Officer to enable the party to obtain the information or data.

(c) *Tender of actual loss of duties.* A person who discloses the circumstances of the violation shall tender any actual loss of duties. The disclosing party may choose to make the tender either at the time of the claimed prior disclosure, or within 30 days after Customs notifies the person in writing of his or her calculation of the actual loss of duties. The Fines, Penalties and Forfeitures Officer may extend the 30-day period if there is good cause to do so. The disclosing party may request that the basis for determining Customs asserted actual duty loss be reviewed by Headquarters, provided that the actual duty loss demanded by Customs exceeds $100,000 and is deposited with Customs, more than one year remains under the statute of limitations involving the shipments covered by the claimed disclosure, and the disclosing party has complied with all other prior disclosure regulatory provisions. A grant of review is within the discretion of Customs Headquarters in consultation with the appropriate field office, and such Headquarters review shall be limited to determining issues of correct tariff classification, correct rate of duty, elements of dutiable value, and correct application of any special rules (GSP, CBI, HTS 9802, etc.). The concerned Fines, Penalties and Forfeitures Officer shall forward appropriate review requests to the Chief, Penalties Branch, Customs Headquarters, Office of Regulations and Rulings. After Headquarters renders its decision, the concerned Fines, Penalties and Forfeitures Officer will be notified and the concerned Customs port will recalculate the loss, if necessary, and notify the disclosing party of any actual duty loss increases. Any increases must be deposited within 30 days, unless the local Customs office authorizes a longer period. Any reductions of the Customs calculated actual loss of duty shall be refunded to the disclosing party. Such Headquarters review decisions are final and not subject to appeal. Further, disclosing parties requesting and obtaining such a review waive their right to contest either administratively or judicially the actual loss of duties finally calculated by Customs under this procedure. Failure to tender the actual loss of duties finally calculated by Customs shall result in denial of the prior disclosure.

(d) *Effective time and date of prior disclosure.*—(1) If the documents that provide the disclosing information are sent by registered or certified mail, return-receipt requested, and are received by Customs, the disclosure shall be deemed to have been made at the time of mailing.

(2) If the documents are sent by other methods, including in-person delivery, the disclosure shall be deemed to have been made at the time of receipt by Customs. If the documents are delivered in person, the person delivering the documents will, upon request, be furnished a receipt from Customs stating the time and date of receipt.

(3) The provision of information that is not in writing but that qualifies for prior disclosure treatment pursuant to paragraph (a)(2) of this section shall be deemed to have occurred at the time that Customs was provided with information that substantially complies with the requirements set forth in paragraph (b) of this section.

(e) *Addressing and filing prior disclosure.*—(1) A written prior disclosure should be addressed to the Commissioner of Customs, have conspicuously printed on the face of the envelope the words ''prior disclosure,'' and be presented to a Customs officer at the Customs port of entry of the disclosed violation.

(2) In the case of a prior disclosure involving violations at multiple ports of entry, the disclosing party may orally disclose or provide copies of the disclosure to all concerned Fines, Penalties and Forfeitures Officers. In accordance with internal Customs procedures, the officers will then seek consolidation of the disposition and handling of the disclosure. In the event that the claimed ''multi-port'' disclosure is made to a Customs officer other than the concerned Fines, Penalties and Forfeitures Officer, the disclosing party must identify all ports involved to enable the concerned Customs officer to refer the disclosure to the concerned Fines, Penalties and Forfeitures Officer for consolidation of the proceedings.

(f) *Verification of disclosure.* Upon receipt of a prior disclosure, the Customs officer shall notify Customs Office of Investigations of the disclosure. In the event the claimed prior disclosure is made to a Customs officer other than the concerned Fines, Penalties and Forfeitures Officer, it is incumbent upon the Customs officer to provide a copy of the disclosure to the concerned Fines Penalties and Forfeitures Officer. The disclosing party may request, in the oral or written prior disclosure, that the concerned Fines, Penalties and Forfeitures Officer request that the Office of Investigations withhold the initiation of disclosure verification proceedings until after the party has provided the information or data within the time limits specified in

paragraph (b)(4) of this section. It is within the discretion of the concerned Fines, Penalties and Forfeitures Officer to grant or deny such requests.

(g) *Commencement of a formal investigation.* A formal investigation of a violation is considered to be commenced with regard to the disclosing party on the date recorded in writing by the Customs Service as the date on which facts and circumstances were discovered or information was received that caused the Customs Service to believe that a possibility of a violation existed. In the event that a party affirmatively asserts a prior disclosure (i.e., identified or labeled as a prior disclosure) and is denied prior disclosure treatment on the basis that Customs had commenced a formal investigation of the disclosed violation, and Customs initiates a penalty action against the disclosing party involving the disclosed violation, a copy of a ''writing'' evidencing the commencement of a formal investigation of the disclosed violation shall be attached to any required prepenalty notice issued to the disclosing party pursuant to 19 U.S.C. 1592 or 19 U.S.C. 1593a.

(h) *Scope of the disclosure and expansion of a formal investigation.* A formal investigation is deemed to have commenced as to additional violations not included or specified by the disclosing party in the party's original prior disclosure on the date recorded in writing by the Customs Service as the date on which facts and circumstances were discovered or information was received that caused the Customs Service to believe that a possibility of such additional violations existed. Additional violations not disclosed or covered within the scope of the party's prior disclosure that are discovered by Customs as a result of an investigation and/or verification of the prior disclosure shall not be entitled to treatment under the prior disclosure provisions.

(i) *Knowledge of the commencement of a formal investigation.*—(1) A disclosing party who claims lack of knowledge of the commencement of a formal investigation has the burden to prove that lack of knowledge. A person shall be presumed to have had knowledge of the commencement of a formal investigation of a violation if before the claimed prior disclosure of the violation a formal investigation has been commenced and:

(i) Customs, having reasonable cause to believe that there has been a violation of 19 U.S.C. 1592 or 19 U.S.C. 1593a, so informed the person of the type of or circumstances of the disclosed violation; or

(ii) A Customs Special Agent, having properly identified himself or herself and the nature of his or her inquiry, had, either orally or in writing, made an inquiry of the person concerning the type of or circumstances of the disclosed violation; or

(iii) A Customs Special Agent, having properly identified himself or herself and the nature of his or her inquiry, requested specific books and/or records of the person relating to the disclosed violation; or

(iv) Customs issues a prepenalty or penalty notice to the disclosing party pursuant to 19 U.S.C. 1592 or 19 U.S.C. 1593a relating to the type of or circumstances of the disclosed violation; or

(v) The merchandise that is the subject of the disclosure was seized; or

(vi) In the case of violations involving merchandise accompanying persons entering the United States or commercial merchandise inspected in connection with entry, the person has received oral or written notification of Customs finding of a violation.

(2) The presumption of knowledge may be rebutted by evidence that, notwithstanding the foregoing notice, inquiry or request, the person did not have knowledge that an investigation had commenced with respect to the disclosed information.

PART 178—APPROVAL OF INFORMATION COLLECTION REQUIREMENTS

1. The authority citation for part 178 continues to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 1624; 44 U.S.C. 3501 *et seq.*

2. Section 178.2 is amended by adding a new listing to the table in numerical order to read as follows:

§ 178.2 Listing of OMB control numbers.

19 CFR section	Description	OMB control No.
* * * * *		
§ 162.74	Prior disclosure	1515–0212
* * * * *		

Samuel H. Banks,

Acting Commissioner of Customs.

Approved: May 12, 1998.

John P. Simpson,

Deputy Assistant Secretary of the Treasury.

[FR Doc. 98–14154 Filed 5–27–98; 8:45 am]

BILLING CODE 4820–02–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 173

[Docket No. 97F–0283]

Secondary Direct Food Additives Permitted in Food for Human Consumption; Monester of alpha-Hydro-omega-Hydroxy-Poly(Oxyethylene) Poly(Oxypropylene) Poly(Oxyethylene) (15 Mole Minimum) Blocked Copolymer

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the food additive regulations for safe use of monoester of alpha-hydro-omega-hydroxy-poly(oxyethylene) poly(oxypropylene) poly(oxyethylene) (15 mole minimum) blocked copolymer derived from low erucic acid rapeseed oil as a component of defoaming agents used in the washing of sugar beets for processing into sugar. This action responds to a petition filed by Akzo Nobel Chemical, Inc.

DATES: The regulation is effective May 28, 1998; written objections and requests for a hearing by June 29, 1998.