through 3063 inclusive; certificated in any category.

Note 1: This AD applies to each airplane identified in the preceding applicability provision, regardless of whether it has been modified, altered, or repaired in the area subject to the requirements of this AD. For airplanes that have been modified, altered, or repaired so that the performance of the requirements of this AD is affected, the owner/operator must request approval for an alternative method of compliance in accordance with paragraph (c) of this AD. The request should include an assessment of the effect of the modification, alteration, or repair on the unsafe condition addressed by this AD; and, if the unsafe condition has not been eliminated, the request should include specific proposed actions to address it.

Compliance: Required as indicated, unless accomplished previously.

To prevent fatigue cracking of the rod ends on the leading edge slat actuators, which could result in uncommanded deployment of the wing leading edge slat and consequent reduced controllability of the airplane, accomplish the following:

Replacement

(a) Within 24 months after the effective date of this AD: Replace the leading edge slat actuator with an actuator that has a new rod end, or replace the rod end on the existing slat actuator with a new rod end, at slat positions 1, 2, 5, and 6; in accordance with the Accomplishment Instructions in Boeing Alert Service Bulletin 737–27A1211, dated November 19, 1998, or Revision 1, dated December 9, 1999.

Spares

(b) As of the effective date of this AD, no person shall install any part having a part number identified in the ''Existing Part Number'' column of Section 2.E. of Boeing Alert Service Bulletin 737–27A1211, dated November 19, 1998, on any airplane.

Alternative Methods of Compliance

(c) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager, Seattle Aircraft Certification Office (ACO), FAA, Transport Airplane Directorate. Operators shall submit their requests through an appropriate FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, Seattle ACO.

Note 2: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the Seattle ACO.

Special Flight Permits

(d) Special flight permits may be issued in accordance with sections 21.197 and 21.199 of the Federal Aviation Regulations (14 CFR 21.197 and 21.199) to operate the airplane to a location where the requirements of this AD can be accomplished.

Incorporation by Reference

(e) The actions shall be done in accordance with Boeing Alert Service Bulletin 737–27A1211, dated November 19, 1998; or Boeing Alert Service Bulletin 737–27A1211, Revision 1, dated December 9, 1999. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from Boeing Commercial Airplane Group, P.O. Box 3707, Seattle, Washington 98124–2207. Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

(f) This amendment becomes effective on February 29, 2000.

Issued in Renton, Washington, on January 18, 2000.

Donald L. Riggin,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 00–1596 Filed 1–24–00; 8:45 am]

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DEPARTMENT OF THE TREASURY

Customs Service

19 CFR Parts 162, 171 and 191

[T.D. 00–5]

RIN 1515–AC21

Penalties for False Drawback Claims

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

ACTION: Final rule.

SUMMARY: This document adopts as a final rule, with some changes, proposed amendments to the Customs Regulations that implement section 622 of the Customs Modernization provisions of the North American Free Trade Agreement Implementation Act concerning penalties for false drawback claims. The document sets forth: procedures that apply when false drawback claims are filed and penalties are thereby incurred; mitigation guidelines that Customs would follow in arriving at a just and reasonable assessment and disposition of liabilities when false drawback claims are filed and penalties are incurred; and more specific grounds and procedures for removing a participant from the drawback compliance program.

EFFECTIVE DATE: February 24, 2000.

FOR FURTHER INFORMATION CONTACT: Wende Schuster, Penalties Branch, Office of Regulations and Rulings, 202–927–1537.

SUPPLEMENTARY INFORMATION:

Background

On December 8, 1993, the President signed into law the North American Free Trade Agreement Implementation Act (Public Law 103–182, 107 Stat. 2057). Title VI of that Act contained provisions pertaining to Customs Modernization and thus is commonly referred to as the Customs Modernization Act or ''Mod Act.'' Paragraph (a) of section 622 of the Mod Act amended the Tariff Act of 1930, as amended, by adding section 593A, which prohibits the filing of false (fraudulent or negligent) drawback claims and prescribes the actions that Customs may take, including the assessment of monetary penalties, if such claims are filed. New section 593A was codified as section 1593a of Title 19 of the United States Code (19 U.S.C. 1593a, hereinafter ''the statute'').

As in the case of penalties under section 592 of the Tariff Act of 1930, as amended (19 U.S.C. 1592), specific procedures and other requirements are set forth in the statute for prepenalty notices and penalty claims, the former not being required by the statute if the penalty is $1,000 or less, and provision is made for limited penalty assessment if there is a prior disclosure. The statute further provides for the applicability of section 618 of the Tariff Act of 1930, as amended (19 U.S.C. 1618), which authorizes the administrative remission or mitigation of penalties. Written decisions, setting forth a final determination and findings of fact and conclusions of law upon which that determination was based, are also mandated by the statute.

The statute provides 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 the Customs drawback compliance program. (The statute provides for the establishment of a drawback compliance program; 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.) The statute also provides for the issuance of a notice of a violation (warning letter) in lieu of a monetary penalty in the case of a drawback compliance program participant who commits a first (that is, nonrepetitive) negligent violation.

On September 29, 1998, Customs published a Notice of Proposed Rulemaking in the **Federal Register** (63 FR 51868) setting forth proposed

amendments to the Customs Regulations to implement the statutory changes made by section 622(a) of the Mod Act. The proposed amendments involved changes to the penalty procedure provisions within Parts 162 and 171 of the Customs Regulations (19 CFR Parts 162 and 171), the addition of a new Appendix D to Part 171 setting forth guidelines for the imposition and mitigation of monetary penalties incurred under the statute, and changes regarding the grounds and procedures for revoking a certification for participation in the drawback compliance program contained in § 191.194 of the Customs Regulations (19 CFR 191.194) which was originally adopted in T.D. 98–16 mentioned above. The Notice of Proposed Rulemaking also stated that, in accordance with paragraph (b) of section 622 of the Mod Act (which provides that the provisions of the statute apply only to drawback claims filed on and after nationwide implementation by Customs of an automated drawback selectivity program and which mandates the publication in the *Customs Bulletin* of the effective date of that selectivity program), the proposed regulatory amendments, if adopted as a final rule, will not be effective until Customs implements an automated drawback selectivity program. Finally, the Notice of Proposed Rulemaking made provision for the submission of public comments on the proposed regulatory changes for consideration before adoption of those changes as a final rule. The prescribed public comment period closed on November 30, 1998.

Discussion of Comments

Seven commenters responded to the solicitation of comments contained in the Notice of Proposed Rulemaking. The comments submitted are summarized and responded to below.

A. Part 162

Section 162.71—Definitions

Comment: Three commenters expressed concern that the meaning of ''revenue,'' as used in the proposed texts, was not sufficiently clear, and they suggested that it should have the meaning of ''drawback'' as defined in § 191.2(i) of the Customs Regulations (19 CFR 191.2(i)). Two of these commenters specifically suggested as a solution the inclusion of a reference to § 191.2(i) in the definition of ''loss of revenue'' in the introductory text of proposed § 162.71(b), in the definition of ''actual loss of revenue'' in proposed § 162.71(b)(1) and in the definition of ''potential loss of revenue'' in proposed § 162.71(b)(2), each of which defines the term at issue with reference to ''the amount of drawback that is claimed * * *.''

Customs response: Customs agrees that the meaning of ''revenue'' should be clarified in the regulatory texts with reference to the meaning of ''drawback'' contained in § 191.2(i) within the drawback regulations. Customs also agrees that the best approach would be to insert a cross-reference to § 191.2(i) after the word ''drawback'' in the definitions of ''loss of revenue'' and ''actual loss of revenue'' and ''potential loss of revenue'' within proposed § 162.71(b) which, as set forth below, has been modified accordingly.

On a related matter, Customs notes that the current § 162.74 prior disclosure provisions adopted in T.D. 98–49 (which was published in the **Federal Register** at 63 FR 29126 on May 28, 1998, and corrected at 63 FR 35798 on July 1, 1998) included appropriate references to 19 U.S.C. 1593a but inadvertently did not include corresponding references to the tender of actual loss of ''revenue'' in paragraphs (a) and (c). Section 162.74 is amended below in order to correct this oversight.

Section 162.73a(b)(2) and Subsection (G)(2) of Appendix D to Part 171—Notice of Violation and Response Thereto

Comment: Four comments were received on proposed § 162.73a(b)(2) and subsection (G)(2) of Appendix D to Part 171, which concern alternatives to penalties for participants in the drawback compliance program. Under these provisions, when a participant commits a violation of section 593A, in the absence of fraud or a repeat violation and in lieu of a monetary penalty, Customs will issue a written notice of the violation (a warning letter). These commenters noted that there is no provision in either case for a person who receives such a warning letter to contest, challenge, or appeal it. The commenters proposed the inclusion of language in § 162.73a(b)(2) and in subsection (G)(2) of Appendix D to Part 171 to allow a person who receives a warning letter to have the opportunity to formally appeal that action within 30 days from issuance. Furthermore, these commenters suggested that the program participant should be entitled to challenge any denial of an appeal with Customs Headquarters within 30 days after the issuance of the applicable drawback office's appeal decision.

Customs response: Pursuant to § 162.73a(b)(2)(ii), within 30 days from the date of mailing of the warning letter under § 162.73a(b)(1)(ii)(A), the person concerned must notify Customs in writing of the steps that have been taken to prevent a recurrence of the violation. In consideration of the fact that the issuance of a warning letter has legal consequences in that it has an effect on the liability for a penalty for a subsequent repetitive violation, Customs agrees with the suggestion of these commenters that during the prescribed 30-day period the alleged violator should have the opportunity to refute the allegations made in the warning letter if he believes that no violation took place (in which case the need to take steps to prevent a recurrence would not exist). Accordingly, § 162.73a(b)(2)(ii) has been modified as set forth below to include a procedure for challenging a warning letter and to provide that if, after considering any arguments made in response to the warning letter, Customs determines that no violation occurred, Customs will in writing notify the person of that determination and rescind the warning letter; however, if Customs affirms the warning letter, the requirement to provide notice of the steps taken to prevent a recurrence would remain applicable and the person would have a minimum of 15 days in which to comply with that requirement. A conforming change has been included in corresponding subsection (G)(2) of Appendix D to Part 171 as set forth below.

While the alleged violator is specifically required under the statute to respond to the warning letter (see 19 U.S.C. 1593a(f)(3)), there is no statutory provision for an additional appeal mechanism at this stage in the penalty process. Customs believes that it would create an unacceptable administrative burden to provide for a further appeal procedure to Headquarters as suggested by these commenters.

Section 162.77a(c)—Exceptions to Prepenalty Notice

Comment: One comment was received on proposed § 162.77a(c) which provides that a prepenalty notice will not be issued for a violation of 19 U.S.C. 1593a if the amount of the proposed monetary penalty is $1,000 or less. The commenter questioned whether a person will have the right to make an oral and written presentation if the amount of the proposed monetary penalty is $1,000 or less and, if so, whether the petitioner will have a 30-day deadline in which to file a petition for remission or mitigation.

Customs response: Even though Customs under the statute may only proceed directly with the issuance of a

penalty claim to the alleged violator (rather than first issue a prepenalty notice) when the penalty claim is $1,000 or less, the alleged violator will be afforded a reasonable opportunity under the provisions of 19 U.S.C. 1618 to make representations, both oral and written, seeking remission or mitigation of the monetary penalty. Unless additional time has been authorized by Customs, under Part 171 the alleged violator will have 60 days from the date of mailing of the notice of penalty incurred in which to file a petition. In addition, under Part 171 the person named in the penalty notice may also request an opportunity to make an oral presentation seeking relief.

B. Appendix D to Part 171

Section (A)—Violations of Section 593A

Comment: Two commenters requested definitions of the terms ''clerical error'' and ''mistake of fact'' as used in proposed Appendix D to Part 171.

Customs response: The terms in question are already defined for purposes of new Appendix D to Part 171. It is noted in this regard that the definitions contained in § 162.71 apply for purposes of Subpart G of Part 162 and include a definition of ''clerical error'' in paragraph (c) (redesignated in this document as paragraph (e)) and a definition of ''mistake of fact'' in paragraph (d) (redesignated in this document as paragraph (f)). Therefore, since new Appendix D to Part 171 relates specifically to the imposition and mitigation of the penalties provided for in new § 162.73a (which, as adopted in this document, will fall within Subpart G of Part 162), those definitions also will apply for purposes of those Appendix D provisions.

Section (D), Paragraph (3)(e)—Exclusivity

Comment: One comment was received concerning proposed paragraph (3)(e) of section D which states that penalty claims under section D shall be the exclusive civil remedy for any drawback-related violation of section 593A. The commenter was of the opinion that Part 162 or Part 171 of the regulations should be revised to include the language of this provision.

Customs response: The language in question reflects the terms of the statute (19 U.S.C. 1593a(c)(5)) and was included in the Appendix for information purposes. Customs does not believe that it is necessary to repeat this statutory language in the Part 162 or Part 171 regulations.

Section (F), Paragraph (4)(a)—Contributory Customs Error

Comment: Two comments were received on proposed paragraph(4)(a) of section F which sets forth ''contributory Customs error'' as a mitigating factor. This provision states, in pertinent part, that if it is determined that the Customs error was the sole cause of the violation, the proposed or assessed penalty is to be canceled. One commenter stated that the text should include examples of Customs errors as the sole cause, the other commenter requested clarification on whether Customs will make the determination, and both commenters were of the opinion that the alleged violator should have an opportunity to appeal a determination that a Customs error was not the sole cause of the violation.

Customs response: One of the factors which may be considered by Customs in mitigation of a proposed or assessed penalty claim or final penalty amount is contributory Customs error. This factor includes misleading or erroneous advice given by a Customs official in writing to the alleged violator, but this factor may be applied in such a case only if it appears that the alleged violator reasonably relied upon the written information and the alleged violator fully and accurately informed Customs of all relevant facts. It is the responsibility of the particular Customs official to determine whether an error made by Customs was the sole cause of the violation. If a party is not satisfied with a decision made by Customs with regard to this factor, a supplemental petition may be filed with the Fines, Penalties, and Forfeitures Officer under Part 171. Finally, Customs does not believe that examples of Customs errors that are the sole cause of a violation should be included in the Appendix text because each case is unique and must be decided on its particular facts.

Section (F), Paragraph (4)(f)—Customs Knowledge

Comment: Two comments were received on proposed paragraph (4)(f) of section (F) which sets forth, as a mitigating factor in non-fraud cases, the fact that Customs had actual knowledge of a violation and failed, without justification, to inform the violator so that it could have taken earlier remedial action. One commenter requested clarification on whether the alleged violator will be expected to demonstrate that Customs did not act and, if so, how the violator can prove that fact. The other commenter stated that specific guidelines should be provided regarding the type of evidence that must be produced to establish that Customs knew of the violation but never informed the violator.

Customs response: An alleged violator is responsible for proving by a preponderance of the evidence that Customs had actual knowledge of a violation and failed, without justification, to inform the violator so that it could have taken earlier remedial action. However, if Customs can show that it was justified in withholding the information, then this factor will not be considered in mitigation of a proposed or assessed penalty. Because each case must be decided on its own unique facts, Customs does not believe that specific examples of types of evidence should be included here.

Section (G), Paragraph (1)—Drawback Compliance Program Participants In General

Comment: One comment was received concerning the separate treatment afforded drawback compliance program participants under section (G). This commenter argued that participants in the drawback compliance program should be subject to the same penalties (if not even more severe penalties) than persons who are not participants in the drawback compliance program. The commenter argued that exporters that are approved for participation in the drawback compliance program should be held to a higher standard of compliance with the drawback regulations than the infrequent exporter.

Customs response: The distinction between participants in the drawback compliance program and nonparticipants for purposes of assessing penalties for false drawback claims must remain in the guidelines because it reflects the terms of the statute (19 U.S.C. 1593a(f)) which specifically provides both for alternatives to penalties and for a lower penalty level when a party has been certified as a participant in the drawback compliance program.

Comment: Four commenters expressed concern that the subject of remission or mitigation of a monetary penalty incurred under 19 U.S.C. 1593a is not found in the proposed regulations themselves but rather appears only in proposed Appendix D to Part 171. The commenters were of the opinion that the status of the Appendix is more closely analogous to ''guidelines'' and does not rise to the level of a regulation. Three of these commenters specifically suggested that the first sentence of Appendix D to Part 171, or a slight variation thereof, should be added to the regulatory text.

Customs response: The commenters are correct that a distinction can be made between the guidelines in Appendix D to Part 171 and the regulatory texts in Parts 162 and 171, because the guidelines serve primarily to inform the general public regarding how Customs officers will carry out their statutory functions rather than to directly control the actions of the general public. However, Customs does not agree that the general language concerning remission or mitigation of a penalty under 19 U.S.C. 1593a at the beginning of Appendix D should be added to the regulatory text. Customs has included similar language involving remission or mitigation of a penalty in Appendix A to Part 171 (guidelines for disposition of violations of 19 U.S.C. 1497) and in Appendix B to Part 171 (revised penalty guidelines under 19 U.S.C. 1592). Customs believes that it is unnecessary to repeat in the regulatory text that which is already clearly and adequately stated in the guidelines and in the applicable statute.

C. Part 191

Section 191.194(e)(1)(ii)—Certification Removal for Noncompliance

Comment: One comment was received on proposed § 191.194(e)(1)(ii) which sets forth, as a ground for removal of a participant from the drawback compliance program, the failure to remain in compliance with the Customs laws and regulations. The commenter requested clarification regarding who within Customs is empowered to remove a program participant from the drawback compliance program. In addition, the commenter asked whether a party will be removed from the drawback compliance program if the party notifies Customs of a violation through a prior disclosure.

Customs response: The initial decision to remove a program participant from the drawback compliance program will be made by the appropriate Customs drawback office, and that decision may be appealed to the Office of Trade Programs at Headquarters. The eight drawback offices are located in Boston, MA; New York, N.Y.; Miami, FL; New Orleans, LA; Houston, TX; Long Beach, CA; Chicago, IL; and San Francisco, CA. It is the position of Customs that a party will not automatically be removed from the drawback compliance program for disclosing the circumstances of a violation by means of a prior disclosure. However, it always remains within the discretion of Customs to determine whether the circumstances of a particular violation warrant removal of a party from the drawback compliance program.

Section 191.194(e)(1)(iv)—Certification Removal for Felony or Misdemeanor

Comment: One comment was received on proposed § 191.194(e)(1)(iv) concerning removal of a participant from the drawback compliance program due to conviction of any felony or where the program participant has committed acts which would constitute a misdemeanor or felony involving theft, smuggling, or any theft-connected crime. The commenter requested that the regulation state which Customs official is empowered to make a determination that a program participant should be removed under this provision. It was the opinion of the commenter that the language of this provision is vague and does not afford the participant any due process. The commenter suggested either deleting the language or changing the language of this provision to read as follows: ''The program participant is convicted of any felony or convicted of any misdemeanor involving theft, smuggling, or any theft-connected crime.''

Customs response: As indicated in the previous comment response, the appropriate drawback office is initially responsible for determining whether a participant should be removed from the drawback compliance program, but Customs does not believe that it is necessary to specify this in the regulatory text. Customs does not believe that the language of this provision should be changed as specifically proposed by this commenter. To require that a participant be convicted of a felony or any misdemeanor involving theft, smuggling, or any theft-connected crime before removal from the drawback compliance program would be inconsistent with sound administrative practice, particularly in cases where there is an impact on the revenue.

Section 191.194(e)(3)—Effect of Removal

Comment: With regard to proposed § 191.194(e)(3) which concerns the effect of removal of certification for participation in the drawback compliance program, one commenter asked whether removal from the drawback compliance program automatically revokes the participant's other drawback privileges (that is, accelerated payment and waiver of prior notice).

Customs response: Pursuant to § 191.195 of the Customs Regulations (19 CFR 191.195), a party may make a combined application for certification in the drawback compliance program and for waiver of prior notice of intent to export and/or approval of accelerated payment of drawback. The basic purpose behind applying for certification for participation in the drawback compliance program is fundamentally different from the purpose served by applying for waiver of prior notice of intent to export and/or approval of accelerated payment of drawback. Accordingly, a party who is removed from the drawback compliance program will not automatically also lose a waiver of prior notice or accelerated payment of drawback privilege. However, the factual basis for removal from the drawback compliance program could also form the basis for a separate action to revoke the waiver of prior notice or accelerated payment privilege.

Comment: One comment was received on that portion of proposed § 191.194(e)(3) that provides that the removal of certification shall be effective immediately in cases of willfulness on the part of the program participant or when required by public health, interest, or safety. The commenter pointed out that there is no definition of ''willfulness'' in Part 191 nor any indication of what party will make that determination. The commenter also suggested removing the language in this provision which refers to the ''public health, interest, or safety.''

Customs response: Customs believes that the language in question should remain unchanged. As stated in the background portion of the Notice of Proposed Rulemaking, the language in question was taken from the provisions of the Administrative Procedure Act (see 5 U.S.C. 558(c)). Customs believes that it would be inappropriate to attempt to define in these regulations terms that are of such general application and not limited to drawback penalty concepts. Customs is responsible for determining whether the particular behavior of a program participant rises to the level of willfulness and whether this behavior warrants removal from the program.

D. Miscellaneous Comments

Comment: One commenter noted that there is no reference to a time limitation for the issuance of penalties or the recovery of the loss of revenue in the proposed regulations. The commenter also suggested that the proposed regulations be amended to include the context of 19 U.S.C. 1621 which covers the time period in which Customs may commence a suit or action in the case of an alleged violation under 19 U.S.C. 1592 or 1593a.

Customs response: Under 19 U.S.C. 1621, Customs is forever barred from recovering a penalty under 19 U.S.C. 1593a unless Customs commences an appropriate suit or action within five years from the date of discovery of the alleged violation if the violation resulted from fraud or within five years from the date the alleged violation was committed if the violation resulted from negligence. Customs does not believe that the regulations should be amended to include the provisions of 19 U.S.C. 1621 because that statute references 19 U.S.C. 1593a and is clear and unambiguous. There is no reason to repeat those statute of limitations provisions in the regulations.

Comment: Three commenters noted that in the Background section of the Notice of Proposed Rulemaking there was a reference to an ''automated drawback selectivity program.'' The commenters stated that there are differences of opinion between the trade and Customs concerning exactly what selectivity is and how it is to be determined and implemented. For purposes of uniformity and certainty of application, the commenters requested that the term ''Drawback Selectivity Program'' be addressed in the regulations.

Customs response: The issue of drawback selectivity as it relates to penalties for false drawback claims was addressed in T.D. 98–88 which was published in the *Customs Bulletin* on November 25, 1998 (32 Cust. Bull. 47), pursuant to section 622(b) of the Mod Act as discussed above. In T.D. 98–88, Customs gave notice to the public that on August 29, 1998, Customs implemented, on a nationwide operational basis, an automated drawback selectivity program. This criteria-based selectivity program automates the previously manual, labor-intensive processing of drawback claims. The automated drawback selectivity program is significant because it will result in more efficient processing of drawback data and will move Customs one step closer to paperless processing of drawback claims. As a consequence of implementation of the drawback selectivity program and publication of T.D. 98–88, any person who files a false drawback claim on and after November 25, 1998, will become potentially liable for a monetary penalty under 19 U.S.C. 1593a. However, T.D. 98–88 further stated that, until such time as final regulations implementing the provisions of 19 U.S.C. 1593a are in effect, Customs does not intend to issue a penalty notice or take any other action authorized by 19 U.S.C. 1593a. With regard to the question of how selectivity will be implemented by Customs, the criteria used in the cargo selectivity process is based upon internal Customs enforcement policy and therefore is not an appropriate subject for this document.

Comment: One commenter requested advice regarding the effective date of the final rule.

Customs response: The regulatory changes adopted in this final rule are effective on the date set forth under the Effective Date caption in the preamble of this document, and that date is the date on which Customs will commence actions authorized by 19 U.S.C. 1593a (see the discussion of T.D. 98–88 in the preceding comment response).

Comment: One commenter requested examples of what would be considered a negligent violation and a fraudulent violation for purposes of assessing a penalty under 19 U.S.C. 1593a.

Customs response: In general, fraudulent and negligent violations are determined on a case-by-case basis depending upon the facts of the particular case. An example of a negligent violation for purposes of 19 U.S.C. 1593a is as follows: An importer makes a claim for drawback under 19 U.S.C. 1313(j)(2) (substitution unused merchandise drawback) for concentrated orange juice. The importer makes no effort to determine if the concentrated orange juice which is exported is commercially interchangeable with the concentrated orange juice that was imported as required by law and, in fact, the exported and imported juices are not commercially interchangeable.

An example of a fraudulent violation for purposes of 19 U.S.C. 1593a is as follows: A person makes a false drawback claim asserting that certain drawback eligible merchandise was exported from the United States. In connection with this claim, the claimant submits fabricated bills of lading or other documents of exportation. In actuality, the claimant knows that the merchandise was never exported from the United States.

Comment: With reference to the use of the term ''a person'' in the proposed drawback penalty regulations, one commenter requested clarification on when that term refers to a drawback claimant, a drawback broker or a drawback consultant, and when the term refers to a combination of these three persons.

Customs response: For purposes of drawback, a ''person'' or ''party'' is considered to include any person or company who is involved in providing data on which a drawback claim may be based or who is the drawback claimant. This would include importers, intermediary parties, drawback claimants, and agents such as drawback brokers and drawback consultants. Therefore, any party that provides information or documentation to one who intends to file a drawback claim may be subject to the drawback penalty provisions.

Comment: One commenter believed that a minimum penalty amount of $100 should be established for all willful and negligent violations under 19 U.S.C. 1593a in order for the amount of the penalty to have any real deterrent effect and in order to be more cost-effective.

Customs response: Rather than setting forth specific penalty amounts, the drawback statute provides 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 the drawback compliance program. The guidelines for mitigation of a drawback penalty are general in nature and are intended to give Customs discretion in granting relief from a penalty below the statutory maximum amount in those cases where Customs deems that it is appropriate. Those guidelines were modeled on the 19 U.S.C. 1592 mitigation guidelines, and since the 19 U.S.C. 1592 mitigation guidelines do not provide for a minimum penalty amount for fraud, gross negligence or negligence cases, a minimum penalty amount was not included in the mitigation guidelines for 19 U.S.C. 1593a purposes. Customs would prefer to be able to automate non-serious penalties (penalties less than $1,000) by simply issuing a bill to the violator, so that the imposition and collection of a small penalty amount would be more cost-effective, but Customs does not have authority to take such action under the current statutory framework.

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. In addition, a number of minor changes have been made in the regulatory texts to conform to statutory language and to reflect plain language principles.

Regulatory Flexibility Act and Executive Order 12866

For the reasons set forth above and because the amendments closely follow legislative direction, pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601, *et seq.*), it is certified that the amendments will not have a significant economic impact on a substantial number of small entities. Accordingly, the amendments are not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604. Further, this document does not meet the criteria for a ''significant regulatory action'' as specified in E.O. 12866.

List of Subjects

19 CFR Part 162

Customs duties and inspection; Law enforcement; Penalties; Seizures and forfeitures.

19 CFR Part 171

Administrative practice and procedure; Customs duties and inspection; Law enforcement; Penalties; Seizures and forfeitures.

19 CFR Part 191

Administrative practice and procedure; Customs duties and inspection; Drawback.

Amendments to the Regulations

For the reasons stated in the preamble, parts 162, 171 and 191 of the Customs Regulations (19 CFR parts 162, 171 and 191) are amended as set forth below:

PART 162—INSPECTION, SEARCH, AND SEIZURE

1. The general authority citation for part 162 is revised to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1592, 1593a, 1624.

* * * * *

2. In § 162.71, paragraphs (b) through (d) are redesignated as paragraphs (d) through (f), the heading for paragraph (a) is revised, and new paragraphs (b) and (c) are added, to read as follows:

§ 162.71 Definitions.

* * * * *

(a) *Loss of duties under section 592.* * * *

(b) *Loss of revenue under section 593A.* When used in § 162.73a, the term ''loss of revenue'' means the amount of drawback (see § 191.2(i) of this chapter) that is claimed and to which the claimant is not entitled and includes both actual and potential loss of revenue.

(1) *Actual loss of revenue.* When used in §§ 162.73a, 162.74, 162.77a and 162.79b, the term ''actual loss of revenue'' means the amount of drawback (see § 191.2(i) of this chapter) that is claimed and has been paid to the claimant and to which the claimant is not entitled.

(2) *Potential loss of revenue.* When used in § 162.77a, the term ''potential loss of revenue'' means the amount of drawback (see § 191.2(i) of this chapter) that is claimed and has not been paid to the claimant and to which the claimant is not entitled.

(c) *Repetitive violation.* When used in § 162.73a to describe a violation, ''repetitive'' has reference to a violation by a person that involves the same issue as a prior violation by that person.

* * * * *

3. A new § 162.73a is added to read as follows:

§ 162.73a Penalties under section 593A, Tariff Act of 1930, as amended.

(a) *Maximum penalty without prior disclosure for a drawback compliance program nonparticipant.* If the person concerned has not made a prior disclosure as provided in § 162.74 and has not been certified as a participant in the drawback compliance program under part 191 of this chapter, the monetary penalty under section 593A, Tariff Act of 1930, as amended (19 U.S.C. 1593a), cannot exceed:

(1) For fraudulent violations, three times the loss of revenue; and

(2) For negligent violations,

(i) 20 percent of the loss of revenue for the first violation,

(ii) 50 percent of the loss of revenue for the first repetitive violation, or

(iii) One times the loss of revenue for the second and each subsequent repetitive violation.

(b) *Maximum penalty without prior disclosure for a drawback compliance program participant*—(1) *General.* If the person concerned has not made a prior disclosure as provided in § 162.74 and has been certified as a participant in, and is generally in compliance with the procedures and requirements of, the drawback compliance program provided for in part 191 of this chapter, the monetary penalty or other sanction under section 593A, Tariff Act of 1930, as amended (19 U.S.C. 1593a), cannot exceed:

(i) For fraudulent violations, three times the loss of revenue; and

(ii) For negligent violations,

(A) Issuance of a written notice of a violation (warning letter) for the first violation and for any other violation that is not repetitive or that is repetitive but does not occur within three years from the date of the violation of which it is repetitive,

(B) 20 percent of the loss of revenue for the first repetitive violation that occurs within three years from the date of the violation of which it is repetitive,

(C) 50 percent of the loss of revenue for the second repetitive violation that occurs within three years from the date of the first of two violations of which it is repetitive, or

(D) One times the loss of revenue for the third and each subsequent repetitive violation that occurs within three years from the date of the first of three or more violations of which it is repetitive.

(2) *Notice of violation and required response to notice*—(i) The notice issued by Customs under paragraph (b)(1)(ii)(A) of this section will:

(A) State that the person concerned has violated section 593A;

(B) Explain the nature of the violation; and

(C) Warn the person concerned that future violations of section 593A may result in the imposition of monetary penalties. The notice will also warn the person concerned that repetitive violations may result in removal of certification under the drawback compliance program provided for in part 191 of this chapter until the person takes corrective action that is satisfactory to Customs.

(ii) Within 30 days from the date of mailing of the notice issued under paragraph (b)(1)(ii)(A) of this section:

(A) The person concerned must notify Customs in writing of the steps that have been taken to prevent a recurrence of the violation; or

(B) If the person concerned believes that no violation took place, he may advise Customs in writing of the basis for that position. If Customs agrees on further review that no violation in fact took place, Customs will in writing advise the person concerned and rescind the notice of violation. If on further review Customs remains of the opinion that the violation took place as alleged in the notice of violation, Customs will issue a written affirmation of the notice of violation advising the person concerned that the notice requirement of paragraph (b)(2)(ii)(A) of this section remains applicable and must be complied with either within the remainder of the prescribed 30-day period or within 15 days after issuance of the written affirmation, whichever period is longer.

(c) *Maximum penalty with prior disclosure.* If the person concerned has made a prior disclosure as provided in § 162.74, whether or not such person has been certified as a participant in the drawback compliance program under

part 191 of this chapter, the monetary penalty under section 593A, Tariff Act of 1930, as amended (19 U.S.C. 1593a), cannot exceed:

(1) For fraudulent violations, one times the loss of revenue; and

(2) For negligent violations, an amount equal to the interest accruing on the actual loss of revenue during the period from the date of overpayment of the claim to the date on which the person concerned tenders the amount of the overpayment based on the prevailing rate of interest under 26 U.S.C. 6621.

4. In § 162.74:

a. In paragraph (a)(1), the first sentence is amended by adding after ''fees'' the words ''or actual loss of revenue'';

b. In paragraph (c), the heading and the first, second, eleventh, and twenlfth sentences are amended by adding after ''and fees'' the words ''or actual loss of revenue''; and

c. Also in paragraph (c), the fourth, seventh, and ninth sentences are amended by removing the words ''or fees'' wherever they appear and adding, in their place, the words ''and fees or actual loss of revenue''.

5. A new § 162.77a is added to read as follows:

§ 162.77a Prepenalty notice for violation of section 593A, Tariff Act of 1930, as amended.

(a) *When required.* If the appropriate Customs field officer has reasonable cause to believe that a violation of section 593A, Tariff Act of 1930, as amended (19 U.S.C. 1593a) has occurred, and determines that further proceedings are warranted, the officer will issue to the person concerned a notice of intent to issue a claim for a monetary penalty.

(b) *Contents*—(1) *Facts of violation.* The prepenalty notice will:

(i) Identify the drawback claim;

(ii) Set forth the details relating to the seeking, inducing, or affecting, or the attempted seeking, inducing, or affecting, or the aiding or procuring of, the drawback claim;

(iii) Specify all laws and regulations allegedly violated;

(iv) Disclose all the material facts which establish the alleged violation;

(v) State whether the alleged violation occurred as a result of fraud or negligence; and

(vi) State the estimated actual or potential loss of revenue due to the drawback claim and, taking into account all circumstances, the amount of the proposed monetary penalty.

(2) *Right to make presentations.* The prepenalty notice also will inform the person of his right to make an oral and a written presentation within 30 days of mailing of the notice (or such shorter period as may be prescribed under § 162.78) as to why a claim for a monetary penalty should not be issued or, if issued, why it should be in a lesser amount than proposed.

(c) *Exceptions.* A prepenalty notice will not be issued for a violation of 19 U.S.C. 1593a if the amount of the proposed monetary penalty is $1,000 or less.

(d) *Prior approval.* If an alleged violation of 19 U.S.C. 1593a occurred as a result of fraud, a prepenalty notice will not be issued without prior approval by Customs Headquarters.

6. Section 162.79a is amended by removing the references ''§ 162.76(b)(1) or § 162.77(b)(1)'' and adding, in their place, ''§ 162.76(b)(1), § 162.77(b)(1) or § 162.77a(b)(1) and (b)(2)''.

7. Section 162.79b is revised to read as follows:

§ 162.79b Recovery of actual loss of duties, taxes and fees or actual loss of revenue.

Whether or not a monetary penalty is assessed under this subpart, the appropriate Customs field officer will require the deposit of any actual loss of duties, taxes and fees resulting from a violation of section 592, Tariff Act of 1930, as amended (19 U.S.C. 1592) or any actual loss of revenue resulting from a violation of section 593A, Tariff Act of 1930, as amended (19 U.S.C. 1593a), notwithstanding that the liquidation of the entry to which the loss is attributable has become final. If a person is liable for the payment of actual loss of duties, taxes and fees or actual loss of revenue in any case in which a monetary penalty is not assessed or a written notification of claim of monetary penalty is not issued, the port director will issue a written notice to the person of the liability for the actual loss of duties, taxes and fees or actual loss of revenue. The notice will identify the merchandise and entries involved, state the loss of duties, taxes and fees or loss of revenue and how it was calculated, and require the person to deposit or arrange for payment of the duties, taxes and fees or revenue within 30 days from the date of the notice. Any determination of actual loss of duties, taxes and fees or actual loss of revenue under this section is subject to review upon written application to the Commissioner of Customs.

PART 171—FINES, PENALTIES, AND FORFEITURES

1. The authority citation for part 171 is revised to read in part as follows:

Authority: 19 U.S.C. 66, 1592, 1593a, 1618, 1624. * * *

2. Section 171.31a is revised to read as follows:

§ 171.31a Written decisions.

If a petition for relief relates to a violation of section 592, 593A or 641, Tariff Act of 1930, as amended (19 U.S.C. 1592, 19 U.S.C. 1593a or 19 U.S.C. 1641), the petitioner will be provided with a written statement setting forth the decision on the matter and the findings of fact and conclusions of law upon which the decision is based.

3. Part 171 is amended by adding a new Appendix D to read as follows:

Appendix D to Part 171—Guidelines for the Imposition and Mitigation of Penalties for Violations of 19 U.S.C. 1593A

A monetary penalty incurred under section 593A, Tariff Act of 1930, as amended (19 U.S.C. 1593a; hereinafter referred to as section 593A), may be remitted or mitigated under section 618, Tariff Act of 1930, as amended (19 U.S.C. 1618; hereinafter referred to as section 618), if it is determined that there exist such mitigating circumstances as to justify remission or mitigation. The guidelines below will be used by Customs in arriving at a just and reasonable assessment and disposition of liabilities arising under section 593A within the stated limitations. It is intended that these guidelines will be applied by Customs officers in prepenalty proceedings, in determining the monetary penalty assessed in the penalty notice, and in arriving at a final penalty disposition. The assessed or mitigated penalty amount set forth in Customs administrative disposition determined in accordance with these guidelines does not limit the penalty amount which the Government may seek in bringing a civil enforcement action pursuant to 19 U.S.C. 1593a(i).

(A) Violations of Section 593A

A violation of section 593A occurs when a person, through fraud or negligence, seeks, induces, or affects, or attempts to seek, induce, or affect, the payment or credit to that person or others of any drawback claim by means of any document, written or oral statement, or electronically transmitted data or information, or act which is material and false, or any omission which is material, or aids or abets any other person in the foregoing violation. There is no violation if the falsity is due solely to clerical error or mistake of fact unless the error or mistake is part of a pattern of negligent conduct. Also, the mere nonintentional repetition by an electronic system of an initial clerical error will not constitute a pattern of negligent

conduct. Nevertheless, if Customs has drawn the person's attention to the nonintentional repetition by an electronic system of an initial clerical error, subsequent failure to correct the error could constitute a violation of section 593A.

(B) Degrees of Culpability

There are two degrees of culpability under section 593A: negligence and fraud.

(1) *Negligence.* A violation is determined to be negligent if it results from an act or acts (of commission or omission) 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 or done through the failure to exercise the degree of reasonable care and competence expected from a person in the same circumstances in ascertaining the facts or in drawing inferences from those facts, in ascertaining the offender's obligations under the statute, or in communicating information so that it may be understood by the recipient. As a general rule, a violation is determined to be negligent if it results from the offender's failure to exercise reasonable care and competence to ensure that a statement made is correct.

(2) *Fraud.* A violation is determined to be fraudulent if the material false statement, omission or act in connection with the transaction was committed (or omitted) knowingly, i.e., was done voluntarily and intentionally, as established by clear and convincing evidence.

(C) Assessment of Penalties

(1) *Issuance of Prepenalty Notice.* As provided in § 162.77a of the Customs Regulations (19 CFR 162.77a), if Customs has reasonable cause to believe that a violation of section 593A has occurred and determines that further proceedings are warranted, a notice of intent to issue a claim for a monetary penalty will be issued to the person concerned. In issuing such prepenalty notice, the appropriate Customs field officer will make a tentative determination of the degree of culpability and the amount of the proposed claim. A prepenalty notice will not be issued if the claim does not exceed $1,000.

(2) *Issuance of Penalty Notice.* After considering representations, if any, made by the person concerned pursuant to the notice issued under paragraph (C)(1), the appropriate Customs field officer will determine whether any violation described in section (A) has occurred. If a notice was issued under paragraph (C)(1) and the appropriate Customs field officer determines that there was no violation, Customs will promptly issue a written statement of the determination to the person to whom the notice was sent. If the appropriate Customs field officer determines that there was a violation, Customs will issue a written penalty claim to the person concerned. The written penalty claim will specify all changes in the information provided in the prepenalty notice issued under paragraph (C)(1). The person to whom the penalty notice is issued will have a reasonable opportunity under section 618 to make representations, both oral and written, seeking remission or mitigation of the monetary penalty. At the conclusion of any proceeding under section 618, Customs will provide to the person concerned a written statement which sets forth the final determination and the findings of fact and conclusions of law on which such determination is based.

(D) Maximum Penalties

(1) *Fraud.* In the case of a fraudulent violation of section 593A, the monetary penalty will be in an amount not to exceed 3 times the actual or potential loss of revenue.

(2) *Negligence.*

(a) *In General.* In the case of a negligent violation of section 593A, the monetary penalty will be in an amount not to exceed 20 percent of the actual or potential loss of revenue for the first violation.

(b) *Repetitive Violations.* For the first negligent violation that is repetitive (i.e., involves the same issue and the same violator), the penalty will be in an amount not to exceed 50 percent of the actual or potential loss of revenue. The penalty for a second and each subsequent repetitive negligent violation will be in an amount not to exceed the actual or potential loss of revenue.

(3) *Prior Disclosure.*

(a) *In General.* Subject to paragraph (D)(3)(b), if the person concerned discloses the circumstances of a violation of section 593A before, or without knowledge of the commencement of, a formal investigation of such violation, the monetary penalty assessed under this Appendix will not exceed:

(i) In the case of fraud, an amount equal to the actual or potential revenue of which the United States is or may be deprived as a result of overpayment of the claim; or

(ii) If the violation resulted from negligence, 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 that begins on the date of overpayment of the claim and ends on the date on which the person concerned tenders the amount of the overpayment.

(b) *Condition Affecting Penalty Limitations.* The limitations in paragraph (D)(3)(a) on the amount of the monetary penalty to be assessed apply only if the person concerned tenders the amount of the overpayment made on the claim either at the time of the disclosure or within 30 days (or such longer period as Customs may provide) from the date of notice by Customs of its calculation of the amount of overpayment.

(c) *Burden of Proof.* The person asserting lack of knowledge of the commencement of a formal investigation has the burden of proof in establishing such lack of knowledge.

(d) *Commencement of Investigation.* For purposes of this Appendix, a formal investigation of a violation is considered to be commenced with regard to the disclosing party, and with regard to the disclosed information, on the date recorded in writing by Customs as the date on which facts and circumstances were discovered which caused Customs to believe that a possibility of a violation of section 593A existed.

(e) *Exclusivity.* Penalty claims under section D will be the exclusive civil remedy for any drawback-related violation of section 593A.

(E) Deprivation of Lawful Revenue

Notwithstanding section 514, Tariff Act of 1930, as amended (19 U.S.C. 1514), if the United States has been deprived of lawful duties and taxes resulting from a violation of section 593A, Customs will require that such duties and taxes be restored whether or not a monetary penalty is assessed.

(F) Final Disposition of Penalty Cases When the Drawback Claimant Is Not a Certified Participant in the Drawback Compliance Program

(1) *In General.* Customs will consider all information in the petition and all available evidence, taking into account any mitigating, aggravating, and extraordinary factors, in determining the final assessed penalty. All factors considered should be stated in the decision.

(2) *Penalty Disposition When There Has Been No Prior Disclosure.*

(a) *Nonrepetitive Negligent Violation.* The final penalty disposition will be in an amount ranging from a minimum of 10 percent of the actual or potential loss of revenue to a maximum of 20 percent of the actual or potential loss of revenue.

(b) *Repetitive Negligent Violation.*

(i) *First Repetitive Negligent Violation.* The final penalty disposition will be in an amount ranging from a minimum of 25 percent of the actual or potential loss of revenue to a maximum of 50 percent of the actual or potential loss of revenue.

(ii) *Second and Each Subsequent Repetitive Negligent Violation.* The final penalty disposition will be in an amount ranging from a minimum of 50 percent of the actual or potential loss of revenue to a maximum of 100 percent of the actual or potential loss of revenue.

(c) *Fraudulent Violation.* The final penalty disposition will be in an amount ranging from a minimum of 1.5 times the actual or potential loss of revenue to a maximum of 3 times the actual or potential loss of revenue.

(3) *Penalty Disposition When There Has Been a Prior Disclosure.*

(a) *Negligent Violation.* The final penalty disposition will be in an amount equal to the interest determined in accordance with paragraph (D)(3)(a)(ii).

(b) *Fraudulent Violation.* The final penalty disposition will be in an amount equal to 100 percent of the actual or potential loss of revenue.

(4) *Mitigating Factors.* The following factors will be considered in mitigation of the proposed or assessed penalty claim or final penalty amount, provided that the case record sufficiently establishes their existence. The list is not exclusive.

(a) *Contributory Customs Error.* This factor includes misleading or erroneous advice given by a Customs official in writing to the alleged violator, but this factor may be applied in such a case only if it appears that the alleged violator reasonably relied upon the written information and the alleged violator fully and accurately informed

Customs of all relevant facts. The concept of comparative negligence may be utilized in determining the weight to be assigned to this factor. If the Customs error contributed to the violation, but the alleged violator is also culpable, the Customs error is to be considered as a mitigating factor. If it is determined that the Customs error was the sole cause of the violation, the proposed or assessed penalty is to be cancelled.

(b) *Cooperation With the Investigation.* To obtain the benefits of this factor, the alleged violator must exhibit cooperation beyond that expected from a person under investigation for a Customs violation. An example of the cooperation contemplated includes assisting Customs officers to an unusual degree in auditing the books and records of the alleged violator (e.g., incurring extraordinary expenses in providing computer runs solely for submission to Customs to assist the agency in cases involving an unusually large number of entries and/or complex issues). Another example consists of assisting Customs in obtaining additional information relating to the subject violation or other violations. Merely providing the books and records of the alleged violator may not be considered cooperation justifying mitigation inasmuch as Customs has the right to examine an importer's books and records pursuant to 19 U.S.C. 1508–1509.

(c) *Immediate Remedial Action.* This factor includes the payment of the actual loss of revenue prior to the issuance of a penalty notice and within 30 days after Customs notifies the alleged violator of the actual loss of revenue attributable to the violation. In appropriate cases, where the alleged violator provides evidence that, immediately after learning of the violation, substantial remedial action was taken to correct organizational or procedural defects, immediate remedial action may be granted as a mitigating factor. Customs encourages immediate remedial action to ensure against future incidents of non-compliance.

(d) *Prior Good Record.* Prior good record is a factor only if the alleged violator is able to demonstrate a consistent pattern of filing drawback claims without violation of section 593A, or any other statute prohibiting the making or filing of a false statement or document in connection with a drawback claim. This factor will not be considered in alleged fraudulent violations of section 593A.

(e) *Inability to Pay the Customs Penalty.* The party claiming the existence of this factor must present documentary evidence in support thereof, including copies of income tax returns for the previous 3 years and an audited financial statement for the most recent fiscal quarter. In certain cases, Customs may waive the production of an audited financial statement or may request alternative or additional financial data in order to facilitate an analysis of a claim of inability to pay (e.g., examination of the financial records of a foreign entity related to the U.S. company claiming inability to pay). In addition, the alleged violator must present information reflecting ownership and related domestic and foreign parties and must provide information reflecting its current financial condition, including books and records of account, bank statements, other tax records (for example, sales tax returns) and a list of assets with current values; if the alleged violator is a closely held corporation, similar current financial information must be provided on the shareholders, wherever they are located.

(f) *Customs Knowledge.* This factor may be used in non-fraud cases (which also are not the subject of a criminal investigation) if it is determined that Customs had actual knowledge of a violation and failed, without justification, to inform the violator so that it could have taken earlier remedial action. This factor is not applicable when a substantial delay in the investigation is attributable to the alleged violator.

(5) *Aggravating Factors.* Certain factors may be determined to be aggravating factors in calculating the amount of the proposed or assessed penalty claim or the amount of the final administrative penalty. The presence of one or more aggravating factors may not be used to raise the level of culpability attributable to the alleged violations, but may be used to offset the presence of mitigating factors. The following factors will be considered ''aggravating factors'', provided that the case record sufficiently establishes their existence. The list is not exclusive.

(a) Obstructing an investigation or audit.

(b) Withholding evidence.

(c) Providing misleading information concerning the violation.

(d) Prior substantive violations of section 593A for which a final administrative finding of culpability has been made.

(e) Failure to comply with a Customs summons or lawful demand for records.

(G) Drawback Compliance Program Participants

(1) *In General.* Special alternative procedures and penalty assessment standards apply in the case of negligent violations of section 593A committed by persons who are certified as participants in the Customs drawback compliance program and who are generally in compliance with the procedures and requirements of that program. Provisions regarding the operation of the drawback compliance program are set forth in part 191 of the Customs Regulations (19 CFR part 191).

(2) *Alternatives to Penalties.* When a participant described in paragraph (G)(1) commits a violation of section 593A, in the absence of fraud or repeated violations and in lieu of a monetary penalty, Customs will issue a written notice of the violation (warning letter).

(a) *Contents of Notice.* The notice will:

(i) State that the person has violated section 593A;

(ii) Explain the nature of the violation; and

(iii) Warn the person that future violations of section 593A may result in the imposition of monetary penalties and that repetitive violations may result in removal of certification under the drawback compliance program until the person takes corrective action that is satisfactory to Customs.

(b) *Response to Notice.* Within 30 days from the date of mailing of the written notice, the person must notify Customs in writing of the steps that have been taken to prevent a recurrence of the violation unless the person establishes to the satisfaction of Customs that no violation took place (see § 162.73a(b)(2)(ii) of the Customs Regulations, 19 CFR 162.73a(b)(2)(ii)). If the person fails to provide the required notification in a timely manner, any penalty assessed for a repetitive violation under paragraph (G)(3) will not be subject to mitigation under this Appendix.

(3) *Repetitive Violations.*

(a) *In General.* A person who has been issued a written notice under paragraph (G)(2) and who subsequently commits a negligent violation that is repetitive (i.e., involves the same issue), and any other person who is a participant described in paragraph (G)(1) and who commits a repetitive negligent violation, is subject to one of the following monetary penalties:

(i) An amount not to exceed 20 percent of the loss of revenue for the first repetitive violation that occurs within three years from the date of the violation of which it is repetitive;

(ii) An amount not to exceed 50 percent of the loss of revenue for the second repetitive violation that occurs within three years from the date of the first of two violations of which it is repetitive ; and

(iii) An amount not to exceed 100 percent of the loss of revenue for the third and each subsequent repetitive violation that occurs within three years from the date of the first of three or more violations of which it is repetitive.

(b) *Repetitive Violations Outside 3-Year Period.* If a participant described in paragraph (G)(1) commits a negligent violation that is repetitive but that did not occur within 3 years of the violation of which it is repetitive, the new violation will be treated as a first violation for which a written notice will be issued in accordance with paragraph (G)(2), and each repetitive violation subsequent to that violation that occurs within any 3-year period described in paragraph (G)(3)(a) will result in the assessment of the applicable monetary penalty prescribed in that paragraph.

(4) *Final Penalty Disposition When There Has Been No Prior Disclosure.*

(a) *In General.* Customs will consider all information in the petition and all available evidence, taking into account any mitigating factors (see paragraph (F)(4)), aggravating factors (see paragraph (F)(5)), and extraordinary factors in determining the final assessed penalty. All factors considered should be stated in the decision.

(b) *First Repetitive Negligent Violation Within 3 Years of Violation Handled Under Paragraph (G)(2).* The final penalty disposition will be in an amount ranging from a minimum of 10 percent of the loss of revenue to a maximum of 20 percent of the loss of revenue.

(c) *Second Repetitive Negligent Violation Within 3 Years of Violation Handled Under Paragraph (G)(2) or (G)(3).* The final penalty disposition will be in an amount ranging from a minimum of 25 percent of the loss of revenue to a maximum of 50 percent of the loss of revenue.

(d) *Third and Each Subsequent Repetitive Negligent Violation Within 3 Years of Violation Handled Under Paragraph (G)(2) or*

(G)(3). The final penalty disposition will be in an amount ranging from a minimum of 50 percent of the loss of revenue to a maximum of 100 percent of the loss of revenue.

(e) *Fraudulent Violations.* The final penalty disposition will be determined in the same manner as in the case of fraudulent violations committed by persons who are not participants in the drawback compliance program (see paragraph (F)(2)(c)).

(5) *Final Penalty Disposition When There Has Been A Prior Disclosure.* The final penalty disposition will be determined in the same manner as in the case of persons who are not participants in the drawback compliance program (see paragraph (F)(3)).

(H) Violations by Small Entities

In compliance with the mandate of the Small Business Regulatory Enforcement Fairness Act of 1996, under appropriate circumstances, the issuance of a penalty under section 593A may be waived for businesses qualifying as small business entities. Procedures that were established for small business entities regarding violations of 19 U.S.C. 1592 in Treasury Decision 97–46 published in the **Federal Register** (62 FR 30378) are also applicable for small entities regarding violations of section 593A.

PART 191—DRAWBACK

1. The authority citation for part 191 continues to read in part as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1202 (General Note 20, Harmonized Tariff Schedule of the United States), 1313, 1624.

* * * * *

§§ 191.191–191.195 also issued under 19 U.S.C. 1593a.

2. In § 191.194, paragraphs (e) and (f) are revised to read as follows:

§ 191.194 Action on application to participate in compliance program.

* * * * *

(e) *Certification removal*—(1) *Grounds for removal.* The certification for participation in the drawback compliance program by a party may be removed when any of the following conditions are discovered:

(i) The certification privilege was obtained through fraud or mistake of fact;

(ii) The program participant is no longer in compliance with the Customs laws and regulations, including the requirements set forth in § 191.192;

(iii) The program participant repeatedly files false drawback claims or false or misleading documentation or other information relating to such claims; or

(iv) The program participant is convicted of any felony or has committed acts which would constitute a misdemeanor or felony involving theft, smuggling, or any theft-connected crime.

(2) *Removal procedure.* If Customs determines that the certification of a program participant should be removed, the applicable drawback office will serve the program participant with written notice of the removal. Such notice will inform the program participant of the grounds for the removal and will advise the program participant of its right to file an appeal of the removal in accordance with paragraph (f) of this section.

(3) *Effect of removal.* The removal of certification will be effective immediately in cases of willfulness on the part of the program participant or when required by public health, interest, or safety. In all other cases, the removal of certification will be effective when the program participant has received notice under paragraph (e)(2) of this section and either no appeal has been filed within the time limit prescribed in paragraph (f)(2) of this section or all appeal procedures have been concluded by a decision that upholds the removal action. Removal of certification may subject the affected person to penalties.

(f) *Appeal of certification denial or removal*—(1) *Appeal of certification denial.* A party may challenge a denial of an application for certification as a participant in the drawback compliance program by filing a written appeal, within 30 days of issuance of the notice of denial, with the applicable drawback office. A denial of an appeal may itself be appealed to Customs Headquarters, Office of Field Operations, Office of Trade Programs, within 30 days after issuance of the applicable drawback office's appeal decision. Customs Headquarters will review the appeal and will respond with a written decision within 30 days after receipt of the appeal unless circumstances require a delay in issuance of the decision. If the decision cannot be issued within the 30-day period, Customs Headquarters will advise the appellant of the reasons for the delay and of any further actions which will be carried out to complete the appeal review and of the anticipated date for issuance of the appeal decision.

(2) *Appeal of certification removal.* A party who has received a Customs notice of removal of certification for participation in the drawback compliance program may challenge the removal by filing a written appeal, within 30 days after issuance of the notice of removal, with the applicable drawback office. A denial of an appeal may itself be appealed to Customs Headquarters, Office of Field Operations, Office of Trade Programs, within 30 days after issuance of the applicable drawback office's appeal decision. Customs Headquarters will consider the allegations upon which the removal was based and the responses made to those allegations by the appellant and will render a written decision on the appeal within 30 days after receipt of the appeal.

Approved: January 19, 2000.

Raymond W. Kelly,

Commissioner of Customs.

John P. Simpson,

Deputy Assistant Secretary of the Treasury.

[FR Doc. 00–1681 Filed 1–24–00; 8:45 am]

BILLING CODE 4820–02–P

DEPARTMENT OF TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 8866]

RIN 1545–AV48

Equity Options With Flexible Terms; Special Rules and Definitions

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations providing guidance on the application of the rules governing qualified covered calls. The new rules address concerns that were created by the introduction of new financial instruments after the enactment of the qualified covered call rules. The final regulations will provide guidance to taxpayers writing qualified covered calls.

EFFECTIVE DATE: These regulations are effective January 25, 2000.

FOR FURTHER INFORMATION CONTACT: Pamela Lew of the Office of Assistant Chief Counsel (Financial Institutions and Products), (202) 622–3950 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

On June 25, 1998, the IRS published in the **Federal Register** proposed regulations (REG–104641–97, 63 FR 34616) addressing whether strike prices available for equity options with flexible terms affect the definition of a qualified covered call (QCC) under section 1092(c)(4) for equity options with standardized terms. No requests to speak at a public hearing were received, and no public hearing was held.

Two written comments were received. These comments focused on whether equity options with flexible terms should be eligible for QCC treatment. After considering these comments, the IRS and Treasury have decided to