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Report to the Congress; by Elmer B. Staats, Comptroller General.

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In recent years, U.S. importers have alleged that penalties for violating import laws and regulations are inequitable and do not provide for adequate judicial review. An examination of penalty assessment and mitigation procedures in five U.S. Customs Service districts showed that the laws, regulations, and procedures for handling import violations have not been in the best interest of the Government or the importers. Findings/Conclusions: The Customs Service's penalty assessment and mitigation procedures contain four major problem areas: the intial penalty required by law is often unfair, judicial review of violations has been limited to considering whether a violation occurred, Customs does not uniformly apply the mitigation process, and Customs takes considerable time to process penalty cases which slows receipt of revenue by the Government. In fiscal year 1975, the Government collected penalties of about $15.6 million. With timely processing of penalty cases, it could have received the revenues more promptly. Recommendations: Where possible, the Secretary of the Treasury should revise Customs regulations to allow Customs to consider the circumstances of the violation when assessing a penalty. The Commissioner of Customs should: give explicit Service-wide guidelines for all types of violations, require the districts to submit exceptions to the guidelines to headquarters, and place greater emphasis on expediting penalty cases. The Commissioner should emphasize quicker processing of penalty cases by: identifying why delays in investigations occur; implementing procedures, including priorities and time frames, to speed up investigations whenever possible; implementing a reporting system to identify exceptional investigations which take longer than the time frames; clarifying Custom's policy of granting extensions for filing

petitions; and requiring that cases be promptly referred to the U.S. attorney. (IRS)

5652

BY THE COMPTROLLER GENERAL

Report To The Congress

OF THE UNITED STATES

Customs' Penalty Assessment And Mitigation Procedures -- Changes Would Help Both The Government And Importers

The U.S. Customs Service's penalty assessment and mitigation procedures contain four major problem areas:

--The initial penalty required by law is often unfair.

--Judicial review of violations has been limited to considering whether a violation occurred.

--Customs does not uniformly apply the mitigation process.

--Customs takes considerable time to process penalty cases, slowing receipt of revenue by the Government.

This report shows why these problems should be remedied and makes recommendations to do so.

GGD-78-5
MARCH 13, 1978

COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

B-114898

To the President of the Senate and the
Speaker of the House of Representatives

This report discusses the problems in the handling of violations of Customs laws and regulations and contains our recommendations for improvements.

While reviewing Customs' penalty assessment and mitigation procedures, we found that 90 percent of the fraud violations are due to negligence rather than an intentional act or omission designed to defraud the Government. Nevertheless, whether the violation is due to fraud or negligence, the penalty is the same.

We made our review pursuant to the Budget and Accounting Act, 1921 (31 U.S.C. 53), and the Accounting and Auditing Act of 1950 (31 U.S.C. 67).

We are sending copies of this report to the Acting Director, Office of Management and Budget; the Secretary of the Treasury; and the Commissioner, U.S. Customs Service.

Comptroller General
of the United States

COMPTROLLER GENERAL'S REPORT TO THE CONGRESS

CUSTOMS' PENALTY ASSESSMENT AND MITIGATION PROCEDURES--CHANGES WOULD HELP BOTH THE GOVERNMENT AND IMPORTERS

D I G E S T

In recent years, importers have alleged that penalties for violations of U.S. import laws and regulations are inequitable and do not provide for adequate judicial review.

GAO's examination of penalty assessment and mitigation procedures in five U.S. Customs Service districts showed that the laws, regulations, and procedures for handling import violations have not been in the best interest of the Government or the importers. Importers state they feel pressured to accept rather than challenge final settlements of penalties which were not uniformly applied by Customs. The Government also suffered because of delays in receipt of revenues.

Until recently, Customs had been reluctant to seek change in the laws and regulations it administers. The House of Representatives passed a bill October 17, 1977, which, if enacted, should alleviate some of the problems with the penalty for civil fraud violations.

There are four major problems: First, the initial penalty is unfair. Under existing law, many penalties for import violations are equal to the total value of the merchandise. Factors not considered are the amount of duties lost to the Government and the severity of the violation--that is, whether or not it was willfully committed.

Because these factors are not considered, importers who have committed similar violations are assessed much differently. For example, two importers committed similar violations, each causing a loss of duty of $18,600. But based on the value of the merchandise, one importer was initially penalized $19,500,000 and the other $62,600. (See p. 9.)

Sometimes, less negligent importers can receive the larger penalty. For example, two importers committed violations resulting in a nearly equal underpayment of duties. Based on the value of the merchandise, the importer who was guilty of the lesser negligence received a penalty of $149,973, but the importer who committed a more severe intentional violation received a $4,564 penalty. (See p. 10.)

To alleviate these inequities, Customs has a mitigation process which considers violation facts such as degree of negligence and duties lost in adjusting the initial penalty. Mitigation usually results in a reduced penalty. For example, of 175 cases in one district, 136 were mitigated and 95 percent of these had the penalty reduced. (See p. 11.)

The second problem is that judicial review of the violation has been limited to considering whether a violation occurred. Penalized parties are pressured to accept Customs' mitigated penalty amounts. If a penalized party disagrees with the penalty, Customs takes the party to court. Should the party lose, the original penalty applies, and although Customs can still mitigate the penalty, a Customs official said there is less likelihood of mitigation after a court action. (See pp. 11 and 12.)

The bill passed by the House in October 1977, would require that the initial penalty and subsequent settlement for false or fraudulent declarations be based on the violator's degree of culpability, rather than the total value of the merchandise. This proposal should remove the pressure from the penalized parties to accept without challenge penalties they consider unfair; however, the bill changes only the current fraud statute. Laws concerning other types of violations also should be changed. (See pp. 13 and 14.)

The third problem is that the mitigation process is not uniformly applied. After the penalized party requests mitigation, Customs considers whether the case facts

warrant adjusting the initial penalty. Depending on the amount of the penalty, the mitigation request is either decided by district offices or headquarters.

Similar mitigation cases in different district offices did not receive uniform treatment. This was because (1) headquarters had not given mitigation instructions for some types of penalties, (2) the district directors were not required to follow the Service-wide instructions, and (3) some instructions were not explicit and, therefore, not interpreted uniformly.

Customs needs to give explicit Service-wide instructions for mitigating penalties and monitor their application.

The fourth problem is that the process takes time, slowing the Government's receipt of revenue. The average case processing time in one district ranged from 59 days for timely entry violation cases to 503 days for fraud violation cases. The penalized party has 60 days to appeal the initial penalty and Customs has been lenient in granting extensions. In addition, investigations have not been expedited by the districts. For example, the initial investigations in one district were open an average of 440 days, although an average of only 8 days was needed to investigate the violation. (See p. 25.)

In fiscal year 1975, the Government collected penalties of about $15.6 million. With timely processing of penalty cases it could have received the revenues more promptly. Customs should tighten up on granting extensions and shorten the investigation process.

RECOMMENDATIONS

Where possible, the Secretary of the Treasury should revise Customs regulations to allow Customs to consider the circumstances of the violation when assessing a penalty. Also, the Secretary should direct the Commissioner of Customs to

--give explicit Service-wide mitigation guidelines for all types of violations,

--require the districts to submit exceptions to the guidelines to headquarters, and

--place greater emphasis on expediting penalty cases.

The Commissioner of Customs should emphasize quicker processing of penalty cases by

--identifying why delays in investigations occur;

--implementing procedures, including priorities and time frames, to speed up investigations wherever possible;

--implementing a reporting system to identify exceptional investigations which take longer than the time frames;

--clarifying Customs' policy of granting extensions for filing petitions; and

--requiring that cases be promptly referred to the U.S. attorney.

RECOMMENDATION TO THE CONGRESS

Although legislation to amend the penalty for civil fraud violations (19 U.S.C. 1592) has been passed by the House of Representatives and is pending in the Senate, the Congress should request the Secretary of the Treasury to provide a compilation of other applicable laws; and the Congress should amend these laws to allow the Secretary, when assessing a penalty, to consider violation facts such as the amount of duty underpayment and the penalized party's degree of negligence.

AGENCY COMMENTS

The Department of the Treasury generally agreed with GAO's findings and recommendations.

The Department has turned its attention to most of the problems covered by the report. Detailed comments are discussed on pages 14, 21, 26, and 27.

Contents

CHAPTER 1

INTRODUCTION

The U.S. Customs Service's major responsibility is to administer portions of the Tariff Act of 1930, as amended. Customs assesses and collects duties, taxes, and fees on imported merchandise and enforces Customs and related laws. During fiscal year 1975, Customs processed merchandise valued at over $100 billion and collected over $4.5 billion in duties, taxes, and fees. To do this it handled 18.9 million merchandise entries, 74.9 million ground vehicles, 368,700 aircraft, 152,800 vessels, and 255.1 million persons.

CUSTOMS' ORGANIZATION

Customs, an agency of the Department of the Treasury, is headquartered in Washington, D.C. The Commissioner of Customs, by authority of the Secretary of the Treasury, establishes policy and supervises all Customs activities. He is advised on legal matters by a Chief Counsel, who is a member of Treasury's Office of the General Counsel, and is assisted by a Deputy Commissioner and six Assistant Commissioners of Administration, Operations, Regulations and Rulings, Internal Affairs, Investigations, and Enforcement Support.

Customs has nine regional offices located in Boston, New York, Baltimore, Miami, New Orleans, Houston, Los Angeles, San Francisco, and Chicago. Each region has four principal officers--regional commissioner, regional counsel, regional director of internal affairs, and regional director of investigations.

Within the 9 regions are 45 district/area offices. A typical district has two principal officers--a district director and a special agent in charge. The district director reports directly to the regional commissioner and supervises all Customs activities except investigations within the district. The special agent in charge reports directly to the regional director of investigations and supervises all Customs investigations within the district.

LAWS GOVERNING THE IMPORTATION OF MERCHANDISE

In recent years, U.S. importers have alleged that penalties for violating import laws and regulations are inequitable and do not provide for adequate judicial review. These laws and regulations prescribe penalties against the

carrier, traveler, importer, or importer's agent (customhouse broker) who violates them. The penalties range from a nominal fine to forfeiture of the vessel and merchandise plus a fine equal to the merchandise's value.

Customs literature states that it enforces over 400 provisions of law. We identified 123 laws or regulations under which Customs could assess a penalty. However, regardless of the total number, violation of the following three laws and five regulations accounted for 98 percent of the penalties assessed in four districts:

Type of violation	Citation
The vessel or vehicle was loaded or unloaded without a Customs permit (loading violation).	Title 19, U.S. Code, section 1453
The vessel's or vehicle's manifest was not submitted or was false when submitted to Customs (manifest violations).	Title 19, U.S. Code, section 1584
The merchandise was entered using fraudulent or false invoices or declarations (fraud violations). 1/	Title 19, U.S. Code, section 1592
The merchandise was temporarily imported and not exported or destroyed within the required time (temporary importation violations).	Title 19, Code of Federal Regulations, section 10.39
The carrier was not authorized to deliver or, when authorized, did not deliver any or all the merchandise to the consignee (carrier violations).	Title 19, Code of Federal Regulations, section 18.8
The importer did not produce a required document within a specified time period (document violations).	Title 19, Code of Federal Regulations, section 113.45
The importer did not return merchandise recalled by Customs (recall violations).	Title 19, Code of Federal Regulations, section 141.113
The importer did not file entry documentation within the required time period after Customs released the merchandise (timely entry violations).	Title 19, Code of Federal Regulations, section 142.15

1/The term fraud in this report denotes a civil violation, not a criminal violation; also, it is used consistently with Customs' interpretation that 19 U.S.C. 1592 fraud violations include negligent as well as intentional false statements.

Violations are usually discovered by import specialists during the review of entry documentation or by Customs inspectors during cargo or passenger processing. They refer major potential violations to the district Fines, Penalties, and Forfeiture Office for issuance of a penalty notice or other action. Penalties for minor violations can be processed when discovered.

If more evidence is needed to determine that a violation did occur, the matter is referred to the Office of Investigations. Investigations range from a review of the case file to a full scale effort--interviewing the Customs employee who discovered the violation, the importer, and the broker and examining current and prior entries and importer records.

When an investigation is completed the Office of Investigations has three options: if no violation has occurred, the case is closed; if a criminal violation has occurred, the case is referred to the U.S. attorney for criminal prosecution; and if a civil violation has occurred, the case is returned to the district.

PENALTY ASSESSMENT

When a civil violation is involved, the district director, after reviewing the investigation report and any other information concerning the violation, decides whether to assess a penalty. If a penalty notice is sent, the penalized party has 60 days to pay or submit a petition for further review. The district director is authorized to grant extensions to the 60-day period upon request.

Customs modified its penalty assessment procedures for fraud violations on January 24, 1975. Now a prepenalty notice is issued if the contemplated penalties exceed $25,000. The notice describes the violation and allows the penalized party 30 days to file a written statement of facts on the matter.

If a written statement is provided and contains additional facts requiring verification, the district takes no further action until the Office of Investigations verifies the additional facts. If warranted, a penalty notice is sent to the penalized party, who has 60 days to pay the penalty or submit a petition for relief. The district director is authorized to grant extensions upon request.

The types of penalties are:

--Fine (monetary penalty for violations other than a breach of Customs bonds).

--Forfeiture (loss of the merchandise).

--Liquidated damages (monetary penalty for breach of Customs bonds used to guarantee compliance with the laws and regulations).

The penalty amount is prescribed by the law or regulation violated. Penalties for the eight violations listed on page 2 are:

Type of violation	Penalty
Loading	Value of merchandise that is loaded or unloaded without a permit. Merchandise subject to forfeiture, and if merchandise value over $500, vessel also subject to forfeiture.
Manifest	(1) No manifest--$500 penalty; (2) Merchandise on board but not included on manifest--value of of the merchandise (merchandise subject to forfeiture); (3) Merchandise included on manifest but not on board--$500 penalty; and (4) Special penalties for controlled substances and alcohol.
Fraud	Value of merchandise that is entered by false or fraudulent invoice or declarations. Merchandise subject to forfeiture.
Temporary importation	(1) For merchandise entered temporarily, free of duty, under bond and not exported or destroyed within the bond period: (a) entire bond amount 1/ when the transaction is covered by a single entry bond; (b) double the estimated duties when the transaction is covered by a term bond; 2/ and (c) 110 percent of the estimated duties when the transaction is covered by a carnet. 3/ (2) Double the estimated duties on merchandise entered temporarily, free of duty, under bond not returned to Customs upon demand except for samples, motion-picture advertising film, professional equipment, tools of the trade, and repair parts for the above equipment and tools. 110 percent of estimated duties for the excepted items.
Carrier	(1) Amount, not to exceed $25, equal to the value of duty-free merchandise missing from the shipment, not delivered, or delivered direct to the consignee or other person. (2) Amount equal to the estimated duties on dutiable merchandise missing from the shipment or not delivered. If duties cannot be promptly estimated, 70 percent of the manifested value of the missing merchandise. (3) 125 percent of the estimated duties on dutiable merchandise in the case of an unauthorized delivery direct to the consignee. If duties cannot be promptly estimated, 70 percent of the manifested value of the merchandise.
Document	Charge for the failure to provide a required document is the amount of the single entry bond that would have been required if the entry were covered by a single entry bond.
Recall	Amount equal to the value of the merchandise plus estimated duties and taxes on merchandise not returned to Customs upon demand except merchandise entered temporarily. Penalty for the latter merchandise is set by 19 C.F.R. 10.39.
Timely entry	Entire amount of single entry bond if transaction is covered by a single entry bond or an equivalent amount if the transaction is covered by a term bond for failure to make a timely entry.

1/Set within limits at an amount either the Commissioner of Customs or the District Director deems necessary to protect the Government's interest.

2/Issued for a set period and may cover more than one entry.

3/An international Customs document which serves simultaneously as a Customs entry document and as a Customs bond.

PENALTY MITIGATION

After receiving a penalty notice, the penalized party may submit a petition for cancellation or mitigation (reduction) of the penalty. The petition should contain the facts and circumstances the penalized party relied on to justify this action.

The Secretary of the Treasury is authorized by law (19 U.S.C. 1618 and 19 U.S.C. 1623(c)) to cancel or mitigate any penalty. 1/ The Secretary has delegated his authority to the Commissioner of Customs for penalties of $100,000 or under and certain specified penalties over $100,000, including loading violations, manifest violations, and fraud violations.

The Commissioner has redelegated his authority to (1) the district directors for cases in which the total amount of fines and/or forfeitures does not exceed $25,000 or the claim for liquidated damages does not exceed $50,000, (2) the Director, Headquarters Entry Procedures and Penalties Division for cases in which the penalties do not exceed $50,000, and (3) the Assistant Commissioner (Regulations and Rulings) for cases exceeding the amounts above.

A petition for mitigation of a penalty is first processed by the District Fines, Penalties, and Forfeiture Office. If an investigation is deemed necessary then the case is sent to the Office of Investigations. After receiving the investigation report, the Fines, Penalties, and Forfeiture Office determines the degree of negligence of the violation and recommends a mitigated penalty amount to the district director. The criteria used to determine this amount are contained in various Customs circulars and regulations; however, there are no written criteria for certain violations. For those violations the amount is left to the district director's discretion.

If the case is within the district director's authority, he mitigates the penalty and a mitigation notice is issued to the penalized party; if it is not within his authority, he forwards the case with his recommendation to Customs headquarters.

At headquarters, the case is received by the Office of Regulations and Rulings. First, the case is assigned to a

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1/For simplicity, "mitigate" will be used in the generic sense to refer to the reduction of penalties and the reduction or cancellation of liquidated damages.

Penalties Branch attorney. The attorney prepares a case summary which includes any mitigating or aggravating factors and a headquarters recommendation for the mitigated penalty amount. If a reviewing official in the Penalties Branch does not agree with the headquarters recommendation, he writes a memo explaining why not.

The case and any memos are forwarded to the headquarters official with the authority to mitigate the penalty. Once a mitigation is determined, the decision is sent to the district. It then issues a mitigation notice to the penalized party.

The penalized party has 60 days to pay the penalty or submit a supplemental petition. For cases within the district director's authority, this supplemental petition is reviewed at the district office, except that regional office officials review it if the district believes further mitigation is not warranted. For cases in which the original petition must be forwarded to headquarters, any supplemental petitions are referred directly to headquarters.

Upon completion of the review, the district issues a final mitigation notice, and the penalized party has 60 days, or another period authorized by the district director, to pay the mitigated amount. If the penalized party does not pay the mitigated amount within the allotted time, the case is submitted to the regional office, which issues a bill for the mitigated amount.

If the penalized party does not agree with the assessed penalty or mitigated amount, judicial review of the violation may be obtained by refusing to pay either the initial or mitigated penalty. In such a situation, however, the Government brings an enforcement action for the full penalty in district court against the penalized party.

CHAPTER 2

INEQUITIES IN ASSESSING AND CHALLENGING PENALTIES

Customs laws and regulations for penalty assessment prevent consideration of such factors as the amount of duty underpayment and/or the penalized party's degree of negligence. As a result, inequities occur. These inequities are somewhat alleviated by Customs' mitigation process; however, the penalized party is pressured to accept rather than challenge the mitigated penalty. Changes in the statutes and regulations could correct this situation.

NEED TO CONSIDER UNDERPAYMENT OF DUTIES AND/OR DEGREE OF NEGLIGENCE BEFORE ASSESSING PENALTIES

Customs laws and regulations specify either the penalty amount or the basis for determining the penalty. Our review of 493 violation cases showed that Customs generally assessed the proper penalty. None of the laws or regulations allowed Customs to consider such factors as the amount of duty underpayment and/or the penalized party's degree of negligence.

Because Customs is prevented from considering the actual or potential duty underpayment, violations with nearly equal losses of duties result in irregular penalties. For example, while the penalty for fraud violations 1/ is forfeiture or payment of the value of the merchandise, the application of this law resulted in the following penalty inequities for nearly equal losses of duties:

1/Fraud violations accounted for about 70 percent of the penalties for cases closed during fiscal year 1975 in four Districts. We were unable to determine the total penalties assessed in the other district.

Case	Loss of duties	Penalty assessed
A	$18,586	$19,487,236
B	18,590	62,589
A	875	290,000
B	880	24,866
A	42	31,000
B	42	638
A	22	3,378
B	20	400
A	9	445
B	9	35

Also, the penalty can be extremely large in relation to the duties lost. The following is a comparison of penalties assessed and duties lost.

Case	Penalty assessed	Loss of duties	Penalty assessed for each dollar of duties lost
1	$33,005,127	$ 96,709	$ 341
2	19,487,236	18,586	1,048
3	8,890,106	56,876	156
4	4,394,112	156,935	28
5	179,985	7,148	25
6	62,589	18,590	3
7	43,200	250	172
8	4,547	312	15
9	660	27	24
10	310	50	6

An integral function of the penalty laws and regulations is to discourage violations; therefore, the penalized party who intentionally commits a violation should be penalized more than one who is grossly negligent, and one who is grossly negligent should be penalized more than one who is ordinarily negligent. Customs has read the civil fraud provision as applying to negligent as well as intentional false statements. Thus, any error, including a clerical error, is subject to the civil fraud penalty. Also, since the Customs laws and regulations require a set penalty (value of the merchandise in the case of fraud) the degree of negligence is not considered when assessing a penalty.

Treasury defines degrees of negligence for fraud violations from least to most negligent--ordinary, gross, and intentional. However, the degree is not determined until after receipt of a petition for cancellation or mitigation of

the penalty. As a result, the less negligent penalized party can receive the larger penalty. Some examples are:

Case	Degree of negligence	Loss of duties	Penalty assessed
A	Intentional	$21,040	$ 357,517
B	Ordinary	20,964	523,565
A	Intentional	12,691	49,896
B	Ordinary	11,349	972,657
A	Intentional	542	4,564
B	Ordinary	549	[illegible],973
A	Gross	5,790	,088
B	Ordinary	5,928	454,725
A	Gross	2,007	386,582
B	Ordinary	2,669	2,070,188
A	Gross	490	49,000
B	Ordinary	466	592,425

In commenting on discrimination resulting from the law that applies to this situation, the Assistant Secretary of the Treasury (Enforcement, Operations, and Tariff Affairs) stated in 1976:

> "Any 'discrimination' that may occur appears to result from the imposition of the same penalty on the negligent violator that must be imposed on the fraudulent party. Under the present law, the negligent party must seek relief through a petition for mitigation, in order for the degree of culpability to be considered."

Although the Assistant Secretary has said that the law requiring penalties for fraud violations "discriminates" against penalized parties, there are other laws such as those concerning loading and manifest violations, requiring a specified penalty without consideration of the violation facts, which discriminate in a like manner.

JUDICIAL REVIEW HAS BEEN LIMITED

Mitigation gives some relief from the penalty inequities. However, the penalized parties are pressured into accepting Customs' decisions on the mitigated penalty amount because judicial review has been limited to considering whether a violation occurred.

Mitigation alleviates some penalty inequities

To alleviate penalty inequities, Customs' mitigation process considers the violation facts, including the degree of negligence and the amount of duty underpayment, and reduces the penalty if the facts justify such an action. However, a petition for mitigation from the penalized party is needed to start this process.

In most cases the penalized party does petition. In one district, 136 of 175 cases were petitioned and 95 percent of them had the penalty reduced. The reduction can be large as shown in the following fraud violations cases.

Case	Penalty assessed	Mitigated amount	Percent of penalty assessed
1	$33,005,127	$ 5,000	.01
2	8,890,106	113,750	1.28
3	4,394,112	156,935	3.57
4	4,176,709	29,250	.70
5	523,565	41,925	8.01
6	126,290	12,300	9.74
7	45,494	12,937	28.44
8	15,715	-	-
9	4,547	624	13.72
10	660	133	20.02

Pressure to accept the mitigated penalty

Judicial review of statutory violations has been limited to determining whether a violation occurred. As a result, the penalized party has no means to appeal the amount of the mitigation decisions and yet concede that a violation did occur. This pressures the party to accept Customs' final action.

A penalized party who believes the penalty is unjustified and wants to contest it in court can do so by refusing to pay. In such a situation, Customs refers the case to the U.S. attorney for filing, in a district court, an action to recover the full original penalty, not the mitigated penalty.

The courts have refused to review the amounts of the statutory Customs penalties in mitigation decisions and have determined only whether the law has been violated. Courts

have stated that actions with respect to Customs penalty mitigation are discretionary and not reviewable by the court. 1/ Also, although Customs can still mitigate the penalty after court action, a Customs official said that as a general rule Customs does not mitigate the penalty once it has had the expense and trouble of a court action. Thus, in order to obtain judicial review, the penalized party must forego the mitigated penalty and take the risk of losing the case and incurring the full penalty.

Generally the penalized party will not take such a risk considering the large difference between the original and mitigated penalties. For example, in the fourth case on page 11 the original penalty was $4,176,709 and the mitigated amount was $29,250--a difference of $4,147,459. The penalized party in that case would not likely have risked over $4 million in a court action, unless certain of winning.

In addition, once the Government shows probable cause that a violation occurred, the burden of proof for forfeiture penalties is on the penalized party. The courts have found that "probable cause" means reasonable grounds for presumption that the charge is or may be well founded. 2/ These reasonable grounds are more than mere suspicion but less than self-evident facts. 3/ The penalized party could never be very certain of winning since the burden of proof is placed on him.

The Assistant Secretary of the Treasury (Enforcement, Operations, and Tariff Affairs), in commenting on judicial review of fraud violation penalties, recommended:

> "The concerns over 'due process' in the administrative process with respect to section 592 would most effectively be resolved by permitting the Department to assess an original penalty in an amount 'up to' the forfeiture value of the merchandise, commensurate with the degree of culpability involved. * * * to the extent that the original penalty for negligence would be a multiple of the revenue loss that would be a

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1/Jary Leasing Corp. v. U.S., 254 F. Supp. 157 (E.D. N.Y. 1966); U.S. v. One 1973 Dodge Maxivan Truck, 365 F. Supp. 833 (N.D. Fla. 1973).

2/Wood v. U.S., 41 U.S. 342 (1842).

3/See Lee v. Thornton, 398 F. Supp. 970 (D. Vt. 1975).

relatively small fraction of currently required penalties in most cases, it would remove the economic impediment to judicial review of the assessed penalty that is now claimed to exist. As a further consequence, the court would of necessity be required to consider the degree of culpability that forms the basis of the penalty assessment, as the culpability factor would have played a part in determining the assessed penalty."

PROPOSED LEGISLATION

Until recently Customs had been reluctant to seek a change to the penalty laws. In May 1975, the Assistant Commissioner of Customs (Regulations and Rulings), commenting on a proposed amendment which would have changed the penalty for fraud violations, said that the amendment's only effect would be to reduce the deterrent for violating Customs laws. In August 1976, the Assistant Secretary of the Treasury (Enforcement, Operations, and Tariff Affairs) said that historically the fraud violation law, which is an "extremely blunt kind of weapon," has been Customs' almost sole enforcement weapon. He also [illegible], however, that assuming Customs received the power to [illegible] it importers' records, changes to the fraud violation law would be acceptable.

A bill (H.R. 8149, 95th Congress) pertaining to Customs procedural reform was introduced by several Members of Congress on June 30, 1977. The proposed legislation would amend the fraud violation law, providing penalties based on degree of culpability, with a penalty of not more than the merchandise's value for fraud. This bill was passed by the House of Representatives on October 17, 1977.

CONCLUSIONS

Penalties are assessed in accordance with the applicable Customs law or regulation under which factors such as the degree of negligence and/or loss of duties are not considered. This results in inequitable treatment of importers. Although a Treasury official believes the ability to assess the full penalty is Customs' "almost sole enforcement weapon," we believe the almost routine mitigation of penalties has weakened the credibility of this weapon.

Although the inequities are largely alleviated by the mitigation process, penalized parties have no means of appealing the amounts of the penalties in Customs' mitigation decisions. These inequities could be resolved by changing

Customs laws and regulations. Proposed legislation, if enacted, would make the needed changes to the fraud violation law; however, other laws and regulations require similar changes.

RECOMMENDATION TO THE SECRETARY OF THE TREASURY

Recognizing that the Secretary can revise the liquidated damages penalty regulations without legislative action, we recommend that he revise those regulations, where possible, to allow Customs to consider the violation facts when assessing a penalty.

RECOMMENDATION TO THE CONGRESS

Although legislation to amend the penalty for civil fraud violations (19 U.S.C. 1592) has been passed by the House of Representatives and is pending in the Senate, the Congress should request the Secretary of the Treasury to provide a compilation of other applicable laws; and the Congress should amend these laws to allow the Secretary, when assessing a penalty, to consider violation facts such as the amount of duty underpayment and the penalized party's degree of negligence.

AGENCY COMMENTS AND OUR EVALUATION

In commenting on a draft of this report, the Department of the Treasury advised us that Customs has recognized the unfair impact of its most stringent penalty provision (section 592 of the Tariff Act of 1930, as amended). The Department supports the proposed changes in H.R. 8149 and believes that the bill, if enacted, will resolve the problem of inequities in penalty assessment. On the judicial review topic, the Department advised us that the changes to be made by H.R. 8149 would remove the alleged unreasonable economic risks under the existing fraud statute. We agree; however, other laws and regulations require similar changes.

CHAPTER 3

PENALTY MITIGATION PROCEDURES SHOULD BE UNIFORM

Customs has not issued Service-wide mitigation guidelines for some violations, and the guidelines it has issued either are not applied equally by district directors or lack specific procedures. As a result, the mitigation of penalties for the same offense can vary by districts.

TO AID IN EQUALIZING MITIGATION TREATMENT, SERVICE-WIDE GUIDELINES ARE NEEDED FOR ALL VIOLATIONS

Customs has not issued Service-wide mitigation guidelines for three types of violations--temporary importation, carrier, and recall--which were included in the top eight violations in numbers of assessed penalties. As a result, the mitigation of penalties for these violations varies among the Customs districts involved.

A Customs official said Service-wide mitigation guidelines for a violation are not issued unless a large number of cases are referred to headquarters. Referral seldom happens in temporary importation, carrier, or recall violation cases because the penalty is usually not over the delegated limit. In fiscal year 1975, headquarters closed only one carrier violation case and no temporary importation or recall violation cases. If there are no Service-wide guidelines, the mitigated penalty amount is determined by the district director.

For example, the penalty for a temporary importation violation is either the bond amount, double the estimated duties, or 110 percent of the estimated duties, depending upon the merchandise and type of bond. The mitigation procedures for this violation varied among several districts. Although there were no specific written guidelines, the following mitigation procedures were applied.

Circumstances	Mitigated penalty amount District A	District B	District C
If the importer shows the merchandise would have been duty free	None	None	None
If the importer supplies proof of export or destruction:			
Documentary proof	Amount deemed	None	$25
Other evidence	appropriate	None	$50
If the reason for not exporting or destroying the merchandise was beyond the importer's control	Not in district guidelines	100 percent of duties	Not in district guidelines
If importer supplies no reason	Full penalty	Full penalty	Full penalty

Because these procedures were not uniform, the penalized party could receive different mitigated penalties in each district. This difference is shown by comparing the actual mitigated penalties received in cases in district A with what they would have been in the other districts. In the following cases, evidence of the merchandise's exportation was noted.

Case	Penalty assessed	District A mitigation	District B mitigation	District C mitigation (note a)
1	$36,249	$ 50	None	$25/50
2	280	28	None	25/50
3	388	50	None	25/50
4	557	56	None	25/50
5	464	194	None	25/50

a/The case files did not indicate whether or not the evidence supplied was documentary.

SERVICE-WIDE MITIGATION GUIDELINES NOT ALWAYS FOLLOWED

Customs has issued Service-wide mitigation guidelines for loading, manifest, timely entry, fraud, and document violations. However, the penalized parties received different penalty mitigation decisions in the various districts because the guidelines were not always followed.

District officials said they were not required to follow the Service-wide mitigation guidelines and that the person handling the petition was the best judge of the proper mitigation action. A headquarters official agreed. Thus, the application of the guidelines for the same offense varied among districts.

The districts usually applied the Service-wide guidelines for mitigating fraud and document violations. Instead of the Service-wide mitigation guidelines for timely entry penalties, however, one district was applying its own guidelines.

Timely entry penalties occur when Customs' immediate delivery procedures are not met. Under these procedures, the importer secures release of the merchandise before filing an entry or paying the estimated duties. The entry must be filed within 10 working days after release of the merchandise to avoid a penalty.

The Service-wide mitigation guidelines are composed of two parts. A Customs regulation authorizes the district director to (1) mitigate liquidated damages based on a timely entry violation to an appropriate amount of not more than 10 percent of the duty, but not less than $25 if the delay was not deliberate; and (2) cancel the penalty if the delay was caused solely by a delay in Customs return of documents to the importer. A Customs circular clarifies the meaning of "an appropriate amount" as follows:

--When the entry or duty deposit is 5 working days late or less, the mitigated penalty amount should approximate a percentage of the duty assessed equal to the working days late, but not less than $25.

--When the entry or duty deposit is more than 5 working days late, the mitigated penalty amount should approximate 10 percent of the duty assessed, but not less than $25.

In one district, the director issued local guidelines for mitigating timely entry penalty damages. These guidelines consisted of a schedule of mitigated penalty amounts ranging from $25 to $500 and based on the amount of duty, days late, and importer's record. The guidelines incorporated the regulation's minimum and maximum mitigated amounts--$25 and 10 percent of duties assessed, respectively. As a result, a timely entry penalty could be mitigated to more or less than required by the Service-wide guidelines. The following compares the actual mitigated penalty amount to the Service-wide guidelines that should have been used.

Penalty	Duty	Days late	Actual mitigated penalty	Service-wide mitigated penalty	Difference
$267,685	$12,747	1	$25	$127	-$102
489,623	30,135	1	50	301	- 251
8,931	978	3	25	29	- 4
4,491	78	8	43	25	18

The Service-wide guidelines for mitigating loading or manifest penalties were not uniformly or consistently applied by the districts. As a result, some mitigated penalties were more or less than required by the guidelines. The inconsistent application of these guidelines is shown in the following manifest violation cases. (See app. II for manifest penalty mitigation guidelines.)

During a search of a ship, Customs seized unmanifested merchandise with a domestic value of $896 and a foreign value of $130. The district released the merchandise upon payment of a $261 mitigated penalty. This amount was two times the foreign value; however, the guidelines state that the mitigated penalty should be based on a percentage of the merchandise's domestic value. For example, if ordinary negligence was involved, then the mitigated penalty should have been either 1 percent of the merchandise's domestic value but not less than $100 for the first violation, or 2 percent of the merchandise's domestic value but not less than $200 for subsequent violations. A district official agreed that mitigation based on foreign value was not in accordance with the Service-wide guidelines.

In another case, Customs seized unmanifested merchandise with a domestic value of $390. The district released the merchandise upon payment of a $50 mitigated penalty. The

guidelines set the lower limit on the mitigated penalty at $100, which should have been the penalty.

SERVICE-WIDE MITIGATION GUIDELINES FOR FRAUD VIOLATIONS ARE NOT SPECIFIC ENOUGH TO BE EQUALLY APPLIED

Parties penalized for similar fraud violations are not treated equally in all districts because the Service-wide mitigation guidelines for fraud violations are not specific enough.

As indicated in chapter 2, the fraud penalty mitigation guidelines, issued by the Assistant Secretary of the Treasury (Enforcement, Operations, and Tariff Affairs), define three violation levels--intentional violation, gross negligence, and ordinary negligence--and set a specific multiple of duty lost as the normal mitigated penalty amount. However, the guidelines allow the district director to adjust this penalty amount up or down after considering certain mitigating and aggravating factors. (See app. I for list of factors.) In applying these factors the guidelines state:

> "In number and degree, they may be only sufficient to justify mitigation to normal disposition, or they may be sufficient (aggravating versus mitigating) to justify an increase or decrease from the normal disposition. The judicious application of these factors and others, where appropriate, provides the flexibility to dispense equity to the individual offender while preserving that degree of standardization which insures impartiality to all offenders."

Since the guidelines do not define what is meant by "judicious application of these factors," officials must judge the proper weight each factor is to be given in the mitigation decision. As a result, the factors can be applied differently in each district and at Customs headquarters, hardly resulting in "a degree of standardization which insures impartiality to all offenders." This difference is shown by using a case mitigated by Customs headquarters and comparing the factors used by the district directors in arriving at their recommendations to those used by headquarters officials in arriving at the final mitigated penalties. It should be noted that because the cases were mitigated at headquarters, each penalty was given equal consideration; however, if the penalities

had not been over $25,000, the district directors would have mitigated them.

Four cases resulted from one importer submitting false invoices in which fictitious prices of the merchandise at the seller's factory were set forth by deducting false inland freight and other charges. In addition, buying commissions were deducted when in fact they were dutiable. In one case the importer also did not report dutiable mold and design costs.

The penalties assessed in the cases were $1,163,023 in district A, $149,973 in district B, $149,242 in district C, and $60,271 in district D. Customs headquarters combined the four cases for mitigation because, with the exception of the mold and design costs, the same type of violations were involved and the importer made identical or similar claims in each mitigation petition.

The district B and C directors recommended settlement of their cases on the basis of the normal mitigated penalty amount for ordinary negligence ($1,098 and $1,626, respectively). They did not list any mitigating or aggravating factors. The district A director agreed that the violation constituted ordinary negligence; however, his recommended mitigated penalty amount ($6,889) was less than normal because (1) the importer had voluntarily disclosed some mold and design costs and (2) the case contained meager evidence regarding the importer's method of purchase and knowledge of the selling agent's actual status. The district D director, on the other hand, recommended the normal mitigated penalty amount for an intentional violation ($3,700) because the importer was experienced and should have been fully aware of the seller's commercial practices.

Customs headquarters found the importer to be ordinarily negligent since the evidence in the files did not show the importer had actual knowledge of all the relevant facts. However, the mitigated penalties were half the normal amount for ordinary negligence because the case file lacked evidence of the importer's purchase method and knowledge of the selling agent's actual status, and because the importer cooperated with Customs, voluntarily disclosed some mold and design costs, and had taken appropriate steps to correct the problem. The final mitigated amounts were $549 in district B (50 percent less than the director's recommendation), $813 in district C (50 percent less than the director's recommendation), $10,635 in district A (54 percent more than the director's

recommendation), and $465 in district D (87 percent less than the director's recommendation).

The example raises questions about the guidelines' ability to provide the "degree of standardization which insures impartiality to all offenders," especially in cases mitigated at the district level. Although Customs headquarters said the violations were similar, the district directors had varying views on the importer's degree of negligence and the mitigating or aggravating factors to be applied, which resulted in different recommended mitigated penalties.

CONCLUSIONS

The existing mitigation procedures frequently result in unequal treatment of penalized parties. This happens because Service-wide mitigation guidelines either do not exist for certain violations or, where they exist, are not uniformly or consistently applied or are not specific enough to be applied equally.

We believe explicit Service-wide mitigation guidelines are needed for all types of violations. The guidelines should be mandatory for the districts in most cases. The districts may need to make justifiable exceptions to the guidelines. If so, such cases should be submitted to headquarters for revisions of the guidelines.

RECOMMENDATIONS

We recommend that the Secretary of the Treasury direct the Commissioner of Customs to:

--Issue explicit Service-wide mitigation guidelines for all types of violations.

--Require the districts to submit exceptions to the guidelines to headquarters.

AGENCY COMMENTS

The Department advised us that, with respect to penalty mitigation, it has been aware of the lack of uniformity in the process. The Department advised that existing guidelines will be reviewed and made more explicit and that guidelines will be issued for penalties which presently have none. Headquarters and regional officials have been assigned responsibilities to assure that mitigation guidelines are followed uniformly.

CHAPTER 4

EXPEDITED PENALTY SETTLEMENT SHOULD SPEED THE GOVERNMENT'S RECEIPT OF REVENUE

Customs takes considerable time to process penalty cases. Part of that time is unavoidable. Slow processing, however, is partly caused by granting unauthorized time extensions for filing mitigation petitions as well as delays in the investigation process. The processing time would have been shortened if only authorized time extensions for filing mitigation petitions had been granted and time goals had been established for completing investigations. With timely processing of penalty cases, the Government could have received revenues more promptly.

PENALTY CASE SETTLEMENT DELAYS ARE A PROBLEM

In fiscal year 1975, Customs collected about $15.6 million in penalties. Since Customs does not document the reasons for the delays, we could not determine why they occurred or the interest cost lost by the Government. However, one district's processing time for the most common violations--from the date the violation was discovered to the date of payment or referral of the case for collection--was as follows:

Violation (note a)	Number of cases reviewed	Case processing time in days	
		Average	Range
Loading	10	113	7 to 309
Manifest	10	149	9 to 485
Fraud	24	503	45 to 1,652
Temporary importation	20	85	4 to 340
Carrier	40	314	131 to 642
Document	30	117	55 to 397
Timely entry	30	59	13 to 224

a/The district did not have recall violations as one of its most common violations.

Filing mitigation petitions not timely

Because the regulations were usually ignored, unauthorized time extensions for filing mitigation petitions were granted in 62 out of 214 fraud violation cases.

Customs regulations require the penalized party to file a petition for mitigation within 60 days from the date the penalty notice was mailed unless the district director authorizes additional time. If this does not occur and the penalty is not paid, the district director is to immediately refer the case to the U.S. attorney for appropriate action unless the penalized party is absent from the United States or was absent for 30 days of the 60-day period. If the penalized party is or was absent, the district director may withhold referral for a reasonable time. The regulations do not provide any other reason for granting extensions to the 60-day period.

The penalized party did not file on time in 62 of 214 fraud violation cases we sampled. The districts delayed followup action on the penalty notices an average of 127 days. Extensions were granted in 33 of these cases; however, Customs did not always follow its regulations in granting the extensions. In the remaining 29 cases, the violator did not request an extension, but the districts usually automatically authorized additional time to pay or petition.

The regulations for granting extensions were usually ignored. District officials said either they were unaware of the restrictions for granting extensions or the regulations did not apply. Thus, extensions were often granted for reasons other than the one permitted in the regulations--the penalized party being out of the country.

The reasons for granting extensions varied. In one case two 30-day extensions were granted; the first because the importer had recently retained an attorney who needed more preparation time, and the second because the attorney was in an accident. In another case, six extentions totaling 279 days were autnorized, four for 60 days each, one for 32 days, and one for 7 days. The reasons were:

Extension	Reason
First	Attorney had other matters to handle.
Second	Attorney needed more time.
Third	Attorney needed more time.
Fourth	Attorney needed more time.
Fifth	Attorney out of town; attorney had other matters to handle.
Sixth	Attorney out of town; attorney had other matters to handle; client unable to assist in petition.

Although the regulations required immediate referral to the U.S. attorney if the penalized party did not respond to the penalty notice within 60 days, the district directors usually automatically authorized an additional 30 days to pay or petition. Then if no response was received, the director sometimes requested the Office of Investigations to locate the penalized party and attempt to collect or determine his ability to pay.

Thus, few cases at this stage in processing were ever referred to the U.S. attorney. Only 2 of the 493 cases reviewed were referred because the penalized party did not either pay the penalty or submit a petition. Both cases were settled without court action. In the 29 cases in which the penalized party did not respond to the penalty notice within 60 days, the average delay was 195 days.

Investigation time should be shortened

In most districts, no priorities and goals for timely completion of investigations have been established. Considerable delays occur and they affect the Government's cash flow.

The district director may request an investigation of the violation at two times during case processing. The first investigation, to determine if the violation occurred, is usually conducted before the penalty is assessed. The second, to determine if the penalized party's petition claims are valid, is conducted after the petition is received. None of the districts had established priorities or goals for completing investigations into whether the violation occurred.

An investigation is not required if the case facts are self-evident. For example, in one district, the director did not request investigations for any cases involving temporary importation, carrier, document, or timely entry

violations. Investigations were requested, however, for some cases involving loading, manifest, and fraud violations.

The time required for investigating whether fraud violations occurred is show below:

District	Number of cases	Average (days)	Range (days)
A	36	156	10 to 663
B	99	285	8 to 1,042
C	32	440	29 to 1,339
D	20	206	22 to 610
E	10	211	6 to 742

The actual days required to investigate the violation were considerably less than the days the case was open. While the investigation cases were open an average of 156 days in district A, an average of only 5 days was needed to investigate. In district C, the average was 440 days compared to an average of 8 days needed to investigate.

Investigation after the receipt of a petition is usually given a higher priority. In district A, such investigations are to be completed within 30 days. In district D, each Office of Investigations location had its own informal investigation time criterion--30 days at one location and 60 days at another. The remaining districts did not set a time goal for completion.

We could not determine if any of the cases were unnecessarily delayed during the petition investigation, because the reasons for delays are not documented. However, in district A, the review of 36 cases showed that investigations were requested in 18 cases. The investigations required an average of 58 days from receipt of the petition to completion. In 10 cases the investigation required over 30 days. District D requested investigations in 11 out of 20 cases--6 in the location with the 60-day criterion and 5 in the location with the 30-day criterion. The investigations required an average of 103 days.

Customs officials suggested various reasons for the delay of fraud cases. Office of Investigations personnel in district A attributed delays in most instances to workload and waiting for data from other sources. A regional director of investigations said that the reason fraud cases remain inactive for long periods is a matter of priorities. He added that the information needed to complete a fraud investigation will still be available even if several months go by;

whereas, the information needed to complete other types of investigations, such as smuggling, requires immediate attention.

CONCLUSIONS

While we were unable to determine how much penalty case processing time would be shortened, we believe Customs could expedite its processing by discontinuing unauthorized extensions for filing mitigation petitions and by conducting timelier investigations. Customs should clarify its criteria for granting such extensions and establish Customs-wide priorities and time frames for completing investigations.

RECOMMENDATIONS

We recommend that the Secretary of the Treasury direct the Commissioner of Customs to place greater emphasis on expediting penalty cases by:

--Identifying areas where delays in investigations occur.

--Implementing procedures, including priorities and time frames, to expedite investigations where possible.

--Implementing a reporting system to identify exceptional investigations which take longer than the time frames.

--Clarifying Customs policy for granting extensions for filing petitions.

--Requiring that cases be promptly referred to the U.S. attorney.

AGENCY COMMENTS AND OUR EVALUATION

The Department advised us that it is concerned over the delay in the entire penalty assessment/collection process. We were advised that the Fines, Penalties and Forfeitures Handbook (Jan. 1978), the first comprehensive manual issued by the Customs Service in this area, establishes time constraints to expedite processing penalty settlements and provides a tool for monitoring the penalty process.

The handbook assigns responsibility to Customs officials to review the effectiveness of the fines, penalties, and forfeitures program and to see that the time frames are met. The handbook restates the existing time frames for filing mitigation petitions and referring cases to the U.S. attorney, bu-

it does not establish priorities or time frames for investigations.

The Department advised us that Customs' Office of Investigations has been seriously understaffed for many years. Given this constraint, we believe it is critical for Customs to evaluate its investigative process for penalty cases. A better understanding of investigative delays and establishing priorities should not only expedite penalty cases, but also assist in determining the actual staffing resources needed to do the job.

CHAPTER 5

SCOPE OF REVIEW

We reviewed the laws and regulations which prescribe Customs penalties. Also, we reviewed Customs' policies and procedures for assessing and mitigating penalties for violations of Customs laws or regulations. We performed our review at Customs headquarters, Washington, D.C., three Customs regional offices--Region III headquarters, Baltimore, Region IV headquarters, Miami, and Region VII headquarters, Los Angeles--and five district offices--Los Angeles District, San Pedro, California; Miami District; Philadelphia District; San Diego District; and Tampa District.

At all the district offices, we reviewed the penalty assessment and mitigation procedures by selecting two samples--one of fraud cases (19 U.S.C. 1592) and one of the 10 most common violations excluding fraud--from the penalty cases closed during fiscal year 1975. Also, we reviewed the district investigative procedures by selecting a third sample of investigative cases closed during fiscal year 1975.

APPENDIX I

FRAUD VIOLATION

MITIGATING FACTORS

1. The loss of duty is comparatively small in relation to the forfeiture value.
2. A Customs error contributed to the violation.
3. The violator cooperated in the investigation.
4. The violator immediately took remedial action.
5. The violator was inexperienced in importing.
6. The violator had a prior good record.
7. The violator is outside U.S. jurisdiction, which will probably cause difficulty in collecting.
8. The violator is unable to pay.

FRAUD VIOLATION

AGGRAVATING FACTORS

1. The violator impeded the investigation.
2. The violator has a previous record of violations.
3. The violator was experienced in importing.

MANIFEST VIOLATION

SERVICE-WIDE MITIGATION GUIDELINES

1. No penalty for errors without intent to defraud.

2. One percent, but not less than $100 or more than $2,000, of the unmanifested merchandise's domestic value for first violations involving ordinary negligence.

3. Two percent, but not less than $200 or more than $4,000, of the unmanifested merchandise's domestic value for subsequent violations involving ordinary negligence.

4. Ten percent, but not less than $500 or more than $8,000, of the unmanifested merchandise's domestic value for violations involving gross negligence. 1/

5. Not less than 50 percent of the unmanifested merchandise's domestic value for deliberate violations.

1/The guidelines state that repeated violations or refusal to cooperate with Customs personnel may constitute gross negligence.

APPENDIX III

THE UNDER SECRETARY OF THE TREASURY
WASHINGTON, D.C. 20220

DEC 19 1977

Dear Mr. Lowe:

In response to your letter of October 27, 1977, I am enclosing a memorandum of comments on the major problem areas identified in the draft proposed report on Assessment of Penalties and Customs' Mitigation Procedures (26357).

We appreciate the opportunity to express our views on the proposed report, which has identified many areas which are of current concern to the Department of the Treasury. As the attached memorandum indicates, we have already turned our attention to most of the problems covered by the report, and we intend to deal with the remaining areas, to the extent that they may be solved administratively, as expeditiously as possible.

Sincerely,

Bette B. Anderson

The Honorable
Victor L. Lowe
Director, General Government Division
U.S. General Accounting Office
Washington, D. C. 20548

Enclosure

GAO notes:

1. The deleted comments do not apply.

2. The policy statement of June 17, 1977 (mentioned on page 2 of the memorandum), was attached to the original comments but is not included in this report.

MEMORANDUM

COMMENTS ON GAO REPORT - ASSESSMENT OF PENALTIES AND CUSTOMS' MITIGATION PROCEDURES

1. Unfair Impact Of Penalties Assessed Under 19 U.S.C. 1592

The Customs Service has recognized the unfair impact of the mandatory requirement in its most stringent penalty provision (section 592 of the Tariff Act of 1930, as amended) that the initial penalty "assessment" must consist of either the seizure, with a view to forfeiture, of all merchandise included in a shipment that is involved in a violation, or the notice of a monetary penalty equal to the full domestic value of the entire shipment, regardless of the amount of revenue loss that is actually attributable to the violation. This penalty dates back to the 19th Century, when values were low and rates of duty were extremely high, so that a penalty associated with the value of the merchandise was not nearly so extreme in its effects.

Pending legislation, H.R. 8149, which has been approved in the House of Representatives and is pending in the Senate, would establish tiers of monetary penalties in cases involving a revenue loss (virtually all of the cases that arise under section 592), in which the amount of the assessed penalty would be commensurate with the degree of culpability involved. Physical seizure would be limited to circumstances where it is necessary in order to protect the revenue. The Treasury Department is on record as supporting this modification in the original penalty assessment under section 592. We believe that the proposed statutory change, if enacted, will resolve the first major problem area identified in the draft GAO report. Additional resources will be required to meet the hearing and other procedural requirements that would be created by H.R. 8149.

2. Limited Availability Of Judicial Review

H.R. 8149 will also eliminate the second major problem area identified in the GAO report, namely, the inability of the courts to consider factors other than whether the violation in fact occurred. Under the proposed legislation, the court will be able to consider the amount of the penalty, and its appropriateness in view of the degree of culpability involved. These changes, together with the lower initial penalty that would be the subject of judicial review if H.R. 8149 is enacted, will remove the unreasonable economic risks which have allegedly acted as an impediment to seeking court review under existing law.

(See GAO Note 1.)

3. Lack Of Uniformity In The Mitigation Process

We have been acutely aware of the absence of uniformity in the process of mitigating initial penalties, the third problem identified in the GAO report. Major steps have been taken in the past year to create systems and procedures to deal with this lack of uniformity. A formal policy statement dated June 17, 1977, and issued by the Acting Commissioner of Customs throughout the Customs Service, copy attached, sets forth clearly identifiable program responsibilities for organizational entities within the Customs Service. They state as primary objectives of the Fines, Penalties and Forfeitures Program the following: (A) timeliness of Customs action; (B) equity and effectiveness in Customs action; (C) encouragement of voluntary disclosures; and (D) the design, development and implementation of a national case control and information retrieval system for penalty, seizure and liquidated damages cases. The Assistant Commissioner (Operations) has been charged with responsibility for overseeing the "efficient" processing of all penalty cases in Customs field offices. Efficiency is defined to require both technical accuracy and uniformity, which in turn is recognized as demanding periodic reviews and oversight. The Assistant Commissioner (Enforcement Support) is charged with providing technical assistance to the Office of Operations in designing, testing and implementing a national case control and information retrieval system, as a monitoring tool. The Regional Commissioners are charged with primary responsibility for maintaining programs which will assure that all mitigation guidelines proposed by the Treasury Department and Customs Headquarters are followed uniformly. The Assistant Commissioner (OR&R) is responsible for developing the guidelines and precedential decisions that afford the basis for uniform field implementation.

The GAO draft report properly points out that there is no specific requirement for District Directors to follow servicewide instructions that apply to specific penalty situations, and that some instructions are not sufficiently explicit to assure uniform implementation. Steps will be taken to assure that all existing guidelines with respect to penalties mitigation are reviewed and made more explicit, and to assure that those penalties arising in which mitigation guidelines have not yet been issued will be the subject of specific guidelines issuances in the near future. It must be noted, however, that if the equitable objectives

behind the statutory mitigation procedures are to be realized, some degree of flexibility and leeway must be provided to permit decision-making officers, either at field or Headquarters levels, to depart from what are clearly intended as only general guidelines rather than rigid rules where extraordinary mitigating (or aggravating) circumstances in a given case require such modification in the name of equity. This is the essence of the mitigation process. Existing guidelines also provide the criteria for such departures from the general rule.

4. Delay In The Entire Penalty Assessment/Collection Process

We recognize and are strongly concerned with the fourth problem area identified in the GAO report, namely, that the entire process, from recognition of a violation to the ultimate disposition of the penalty and the collection of the penalty amount is unduly prolonged. In this process, the Government is deprived of revenue, the violator is unduly punished by the process itself, and the objective of the penalty, either as an individual punishment or as a deterrent to other violations, is seriously undermined, as the connection between the offense and the punishment is lost in the administrative delay.

The Fines, Penalties and Forfeitures Handbook, the first comprehensive manual ever issued by the Customs Service in this area, has just been completed and is in the process of distribution to all field offices. We believe that the detailed provisions of this handbook will not only establish firm time constraints which will expedite the processing of penalty settlements, but will also provide an effective tool for monitoring the penalties process which will promote uniformity of treatment of parties involved in similar violations.

Unfortunately, there can be no assurance that the investigative time can in fact be shortened. Compared to the scope and complexity of its investigative workload, the Office of Investigations in the Customs Service has been seriously understaffed for many years. In the event that substantial additional staffing cannot be obtained, a fundamental change in the method of investigative operations would have to be accepted in order to reduce the time used to investigate commercial violations. We would have to limit the devotion of investigative time to the most serious violations of Customs and other Customs enforced laws. This would mean the condoning of a great volume of clear violations which, although of a lesser degree then the more serious fraud cases, may be quite wide-spread and may result in serious cumulative revenue losses to the United States. Such selectivity in the investigative process might well eliminate a major deterrent to ordinary or even grossly negligent activity among those who import merchandise into the U.S. It would also undermine the effectiveness

APPENDIX III

of the entire Customs statistical verification program, insofar as it relies on substantial deterrents to achieve mass voluntary compliance with extremely burdensome but essential paperwork requirements in the Customs process.

While we recognize that there is undoubtedly room for improving investigative techniques and a need to reexamine priorities within the investigative process, we would expect that the variety and complexity of Customs actions is such that there will always be situations in many districts in which some investigations can be completed within a matter of days while others must require years for their completion.

(See GAO Note 1.)

Attachment

(See GAO Note 2.)

PRINCIPAL DEPARTMENT OF THE TREASURY

OFFICIALS RESPONSIBLE FOR ADMINISTERING

ACTIVITIES DISCUSSED IN THIS REPORT

	Tenure of office	
	From	To
SECRETARY OF THE TREASURY:		
W. Michael Blumenthal	Jan. 1977	Present
William E. Simon	Apr. 1974	Jan. 1977
UNDER SECRETARY OF THE TREASURY (note a):		
Bette B. Anderson	Apr. 1977	Present
ASSISTANT SECRETARY OF THE TREASURY (ENFORCEMENT, OPERATIONS, AND TARIFF AFFAIRS) (note b):		
John H. Harper (acting)	Jan. 1977	May 1977
Jerry Thomas (acting)	Sept. 1976	Jan. 1977
David R. Macdonald	May 1974	Sept. 1976
COMMISSIONER, UNITED STATES CUSTOMS SERVICE:		
Robert E. Chasen	July 1977	Present
G. R. Dickerson (acting)	May 1977	July 1977
Vernon D. Acree	May 1972	Apr. 1977

a/Functions and responsibilities of the Assistant Secretary were transferred to the Under Secretary on May 3, 1977.

b/This position was abolished on May 3, 1977.

(26357)