

Department of Homeland Security



U.S. Immigration  
and Customs  
Enforcement

Office of Investigations

# Commercial Trade Fraud Investigations Handbook

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## Foreword

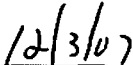
The Commercial Trade Fraud Investigations Handbook provides a single source of national policies, procedures, responsibilities, guidelines, and controls to be followed by U.S. Immigration and Customs Enforcement (ICE) Office of Investigations (OI) Special Agents when conducting commercial trade fraud investigations. This Handbook contains instructions and guidance that will help ensure uniformity and operational consistency at all OI field offices. Oversight over the national Commercial Trade Fraud Investigations Program resides with the Unit Chief, Commercial Fraud and Intellectual Property Rights Investigations Unit. The Commercial Trade Fraud Investigations Handbook is available on the OI Proprietary Web site.

Chapter 8, entitled "Fraud Investigations," of the U.S. Customs Service (USCS) OI Special Agent Handbook no longer applies to ICE OI and is hereby superseded. All other previous issuances by USCS or by ICE OI on commercial trade fraud investigations are also superseded.

The Commercial Trade Fraud Investigations Handbook is an internal policy of OI and is not intended to confer any right or benefit on any private person or party. If disclosure of this Handbook or any portion of it is demanded in any judicial or administrative proceeding, the Information Disclosure Unit, Mission Support Division, as well as the appropriate ICE Counsel and/or U.S. Attorney, should be consulted so that appropriate measures can be taken to invoke privileges against disclosure. This Handbook contains information which may be exempt from disclosure to the public. Any further request for disclosure of this Handbook or information contained herein should be referred to the OI Information Disclosure Unit.

The OI Policy Unit is responsible for coordinating the development and issuance of OI policy. All suggested changes or updates to this Handbook should be submitted in writing to the Policy Unit which will coordinate all needed revisions with the Commercial Fraud and Intellectual Property Rights Investigations Unit.

  
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Marcy M. Forman  
Director, Office of Investigations

  
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Date

# COMMERCIAL TRADE FRAUD INVESTIGATIONS HANDBOOK

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# COMMERCIAL TRADE FRAUD INVESTIGATIONS HANDBOOK

## Chapter 1. INTRODUCTION

### 1.1 Purpose and Scope

The Commercial Trade Fraud Investigations Handbook provides policies and procedures to United States (U.S.) Immigration and Customs Enforcement (ICE) Office of Investigations (OI) Special Agents when conducting commercial trade fraud investigations. It includes a discussion of the effect of the Customs Modernization Act of 1993 (Mod Act) on commercial trade fraud investigations, the role of such investigations in achieving U.S. Customs and Border Protection (CBP) and ICE trade enforcement goals, and direction and guidance to be followed when conducting such investigations.

The commercial trade fraud priority programs are aimed at stopping predatory and unfair trade practices that threaten the economic stability of the United States, restrict the competitiveness of U.S. industry in world markets, and place the public health and safety of the American people at risk. Combating commercial trade fraud is the basis for important links to the international trade community and, more importantly, to the war on terrorism. Commercial trade fraud investigations have identified import system vulnerabilities which could facilitate the illegal importation of weapons of mass destruction and chemical/biological agents. Such investigations have also shown how fraudulent importations may generate illegal revenue for organizations engaged in international organized crime and terrorism.

### 1.2 Background

The principal agencies responsible for enforcing U.S. international trade laws and regulations are ICE and CBP. The common mission of ICE and CBP is to ensure that all goods entering the United States do so in compliance with these laws and regulations. ICE commercial trade fraud investigations are a powerful enforcement tool for ensuring that these goals are met. Commercial trade fraud investigations encompass all criminal and civil violations and are the sole responsibility of ICE OI.

Commercial trade fraud investigations are unique in the sense that, to successfully investigate alleged violations, ICE and CBP must work together. This working relationship can best be described as being “conjoined twins” sharing the same heart and the same mission. The mission of ICE is to protect the U.S. public health and safety and economic infrastructure, and the U.S. Government’s revenue from predatory trade practices. To complete this mission, ICE will investigate and refer for prosecutions and civil penalties willfully noncompliant importers, exporters, and brokers, in order to provide a highly visible deterrent factor.

Commercial trade fraud investigations focus on commercial importations involving false statements and deceptive business practices. Commercial trade fraud investigations are

important components of an overall trade strategy to enforce revenue protection and, increasingly, non-revenue protection laws and regulations. Successful investigations and enforcement actions cases produce significant seizures, civil penalties, and/or criminal prosecutions.

### **1.3 Commercial Trade Fraud Investigations Priority Program Areas**

#### **A. General Commercial Trade Fraud**

Identification and investigation of illegal activities associated with the importation or exportation of goods and contraband contrary to law, undervaluation, markings, misclassification, broker compliance, etc.

#### **B. In-Bond Diversion of Merchandise into the Commerce of the United States**

Identification and investigation of illegal activities associated with diversion and in-bond manipulation schemes.

#### **C. Textile Transshipments**

Identification and investigation of illegal activities associated with transshipment and false declaration of textiles and wearing apparel diversion schemes to avoid quotas, duties, or other legal requirements.

#### **D. Trade Agreement Enforcement**

Enforcement and prevention of the circumvention of trade agreements.

#### **E. Public Health and Safety/Environmental Crimes**

Identification and investigation of illegal activities associated with the importation, transportation, and distribution of imported items that pose a threat to U.S. consumers and/or the environment.

#### **F. Forced, Child, Convict, or Indentured Labor**

Identification of foreign manufacturers, as well as those U.S. importers whose goods were produced with forced, child, convict, or indentured labor, and prevention of the importation of those goods.

#### **G. Tobacco Smuggling**

Identification and investigation of illegal activities associated with tobacco smuggling.



## **H. Intellectual Property Rights**

Identification and investigation of illegal activities associated with the importation and trafficking of counterfeit goods subject to registered trademarks and copyrights.

As part of Operation Cornerstone, commercial trade fraud investigations target all areas of vulnerability. Operation Cornerstone targets the alternative financing mechanisms that criminal organizations use to earn, move, and store funds. OI's goal is to disrupt and dismantle alternative funding mechanisms *before* these organizations can exploit them for their own purposes.

To achieve the Operation Cornerstone goal and add another deterrent factor, commercial trade fraud investigations should aim to remove the "profit motive" from the crime. Every commercial trade fraud investigation should include a money laundering component, as the object of commercial trade fraud violations is to increase profits. Entry of Goods by Means of False Statements and Smuggling, 18 U.S.C. §§ 542 and 545, are both Specified Unlawful Activities (SUAs) for Money Laundering, 18 U.S.C. §§ 1956 and 1957. All viable commercial trade fraud cases should engage the Asset Identification and Removal Groups to assist in removing the violators' monetary gains.

Another important factor in commercial trade fraud investigations is OI's outreach program. Special Agents should cultivate close working relations with their CBP partners, as these are the first line of defense against commercial trade fraud and illegal imports. Special Agents should also establish contacts with other federal agencies because ICE enforces their statutes relating to imports and also because those other agencies are the subject matter experts. In addition, Special Agents should develop contacts within the importing, broker, transportation, and warehousing communities. Strong relationships with these communities will lead to information concerning trends in commercial trade fraud, methods used to commit commercial trade fraud, and predatory trade practices.

### **1.4 Responsibilities**

#### **A. Director, Office of Investigations**

The Director of OI has the overall responsibility for the oversight and implementation of the policies and procedures set forth in this Handbook.

#### **B. Special Agents in Charge**

OI Special Agents in Charge (SACs) are responsible for implementing the policies and procedures set forth in this Handbook within their areas of responsibility.

## **C. Special Agents**

OI Special Agents are responsible for complying with the provisions of this Handbook.

## **Chapter 2. ICE/CBP STRATEGIC FOCUS AND TRADE ENFORCEMENT PLAN**

To accomplish its trade enforcement mission and meet its trade enforcement goals, ICE has developed a **strategic trade focus** for its enforcement and compliance efforts. It centers on key industries, commodities, and trade issues that have a significant impact on the U.S. public health and safety, economy, and revenue. To meet the “shared responsibility” and “informed compliance” mandates of the Mod Act, CBP has developed a related Trade Enforcement Plan to maximize trade compliance through a balanced program of targeted enforcement and informed compliance actions, also centered principally on the same key industries, commodities, and issues. ICE’s commercial trade fraud investigations are an important and integral part of both the ICE strategic trade focus and the CBP Trade Enforcement Plan.

### **2.1 Commercial Importation Trade Focus**

CBP and ICE concentrate their enforcement and compliance efforts on violations of U.S. law, including those defined in Titles 18 and 19 of the United States Code (U.S.C.) and Title 19 of the Code of Federal Regulations (C.F.R.). The first priority of the ICE Commercial Trade Fraud Investigations Program is to conduct investigations that result in criminal prosecutions. The second priority is to conduct investigations that result in civil fines and penalties.

### **2.2 Trade Enforcement Plan**

The CBP Trade Enforcement Plan focuses on the primary goal of achieving maximum compliance with U.S. trade laws. This Plan targets informed and enforced compliance actions to address noncompliance issues and problems in five areas of emphasis:

#### **A. Compliance Measurement**

Statistically valid sampling of import transactions involving intensive cargo examinations and document reviews to establish and monitor base compliance levels for selected Harmonized Tariff Schedule of the United States (HTSUS) commodity classifications. Compliance measurement allows CBP to identify noncompliance issues, problems, and trends, such as strategic or high-priority commodities that have low compliance rates, for informed and enforced compliance actions.

**B. Sustained Customer Involvement (Informed Compliance)**

Outreach to importers, other members of the international trade community and trade associations and industries, and other federal agencies responsible for imported merchandise to inform, educate, and facilitate voluntary compliance.

**C. Audit**

Intensive compliance overviews and audits of key importers to determine the quality of their statistical and financial trade information, identify noncompliance issues and problems, and develop strategies for corrective action, including referral to ICE.

**D. Special Operations**

Focused problem-solving used to address and resolve industry-wide or commodity-wide trade compliance problems and issues.

**E. Investigations**

OI investigations to gather facts and evidence to support criminal prosecution of, and civil penalty actions against, trade law violators.

This combination of informed and enforced compliance actions, principally targeted on the primary focus industries and trade enforcement priorities, is intended to form an integrated approach to achieve the goal of maximum compliance with U.S. trade laws.

### **Chapter 3. OVERVIEW OF COMMERCIAL TRADE FRAUD INVESTIGATIONS**

Commercial trade fraud investigations encompass all criminal and civil violations of commercial import laws and regulations. Commercial trade violations fall into three broad categories:

**A. Revenue Loss Violations**

The underpayment or nonpayment of duties and fees owed on imported merchandise.

**B. Trade Fraud Violations**

The importation of restricted or prohibited merchandise or other violations that do not result in a loss of duties or fees, with an emphasis on violations that adversely impact the public health and safety of the American public or domestic industry.

**C. Other Violations**

Any other violation of the customs laws of the U.S. that involve deception when the violator or evidence has crossed the U.S. international border.

**3.1 Goal and Strategy of Every Commercial Trade Fraud Investigation**

**A. Goal**

**To conduct objective and thorough investigations that uncover the evidence needed to prove criminal and civil violations, if such evidence exists.**

Investigations are only as good as the evidence gathered. Only objective and thorough investigations can uncover the evidence needed to secure convictions, make seizures, support forfeitures, collect civil penalties, and recover duties.

**B. Strategy**

**Approach each commercial trade fraud investigation as a criminal case.**

Special Agents should conduct commercial trade fraud investigations in a manner designed to objectively identify and obtain all available evidence related to the possible violation of criminal statutes. This includes investigating and identifying:

1. All the parties responsible for the alleged criminal acts;
2. The statutory and regulatory requirements which the alleged violator failed to meet, or the prohibited acts the alleged violator committed;
3. The criminal statutes allegedly violated and the essential elements of those statutes which must be proven to obtain a criminal conviction for the alleged criminal acts;
4. The violator's role and the overt act(s) involved in the violation of U.S. law; and
5. The types and sources of evidence needed to prove the elements of the offense.

Special Agents should use all appropriate criminal investigative methods and resources, including witness and suspect interviews, search warrants, confidential informants, undercover investigations, and information from state, local, and other federal law enforcement agencies, in order to obtain all available evidence needed to prove criminal violations.

If sufficient evidence is developed to prove that a criminal violation occurred, that evidence may serve as the basis for both criminal prosecution and civil fraud proceedings. Because of the civil penalty component of all commercial trade fraud investigations, Special Agents must be aware of the secrecy problems inherent in the use of grand jury proceedings. Premature or inappropriate use of the grand jury as an investigative tool can severely limit the ability of CBP's Fines, Penalties and Forfeitures office (FP&F) to pursue civil penalties due to grand jury secrecy rules that make it extremely difficult and sometimes impossible to use evidence obtained by a grand jury for the civil case. Accordingly, commercial trade fraud investigations are to be conducted using investigative methods in such a manner as to ensure that the evidence obtained may be used in both criminal and civil actions.

## **Chapter 4. ELEMENTS OF COMMERCIAL TRADE FRAUD VIOLATIONS**

All criminal and civil violations are made up of essential elements enumerated in various statutes and case law. To prove criminal violations at trial, the U.S. Government must present evidence sufficient to prove, beyond a reasonable doubt, each element of the offense charged. Failure to prove even one element of a violation will result in the acquittal of a criminal defendant. In civil fraud cases under 19 U.S.C. § 1592, the burden of proof is "clear and convincing" evidence that the violator had knowledge of the fraud. In cases of Gross Negligence and Negligence, the U.S. Government has to prove its case by a preponderance of the evidence. Generally, criminal and civil commercial trade fraud violations have four basic elements: the fact of the violation, materiality, responsibility, and culpability. Commercial trade fraud investigations should be planned and conducted in a manner designed to prove each of these elements for the particular violation to be charged. Special Agents are encouraged to consult the "Law Course for Customs and Border Protection Officers" for more specific information and to contact the local ICE Office of the Chief Counsel (OCC) with any legal questions.

### **4.1 The Fact of the Violation**

The "fact" of the violation is the conduct of the violator that relates to the alleged violation. If the violator failed to do something required by statute or regulation, the failure is the fact of the violation. If the violator did something restricted or prohibited by law or regulation, that act is the fact of the violation. Proving the fact of the violation involves establishing that a statutory or regulatory requirement or prohibition in fact existed and either the requirement was not met or a prohibited act was committed. The fact of the violation will vary depending on the statute's particular elements, for example whether the violation involves a false statement, act, omission, or importation contrary to law.

#### **A. False Statement, Act, or Omission**

The traditional criminal and civil commercial trade fraud violations, 18 U.S.C. § 542 and 19 U.S.C. § 1592, involve a false statement, act, or omission in connection with an import transaction. Investigations must demonstrate that such a false statement, act or omission occurred. False statements, acts, or omissions

are often found in documents filed with CBP in connection with an import transaction and may be proven false through a comparison of those documents with the importer's own records of the transaction. Additionally, documents obtained from other parties to the transaction, such as the export shipper and the importer's customs broker and statements made by the employees of the importers, shippers, and customs brokers, may provide further evidence of the false statement. Although ICE investigates numerous criminal fraud statutes, these provisions of law share one common theme: a lie. Along with motive, establishing "the lie" is critical in proving a commercial trade fraud case. Special Agents should find the lie and make that the centerpiece of the fraud investigation and prosecution.

## **B. Importation Contrary to Law**

Importations contrary to law involve the importation of merchandise in violation of some provision of federal law or regulation. Some statutes criminalize specific types of illegal importations. For example, the federal statute prohibiting trafficking in counterfeit trademark merchandise, 18 U.S.C. § 2320, makes the importation of such merchandise a criminal act if the intentional element of the statute is present. In such instances, criminal charges may be brought for violation of the specific statute. Other statutes restrict or prohibit importations but do not criminalize violations of those provisions. For example, the provisions of 15 U.S.C. § 1125 prohibit the importation of merchandise bearing marks or labels, which give a false designation of origin or description of the merchandise. The statute, however, does not make such importation a criminal act. In such instances, criminal charges may be brought for violation of the "contrary to law" provision of 18 U.S.C. § 545, Smuggling goods into the United States. Civil penalties also are available under 19 U.S.C. § 1595a, Forfeitures and other penalties.

## **4.2 Materiality**

In many criminal fraud statutes, the fact of the violation alone does not constitute a criminal or a civil violation. Investigations must establish the materiality of the fact of the violation. When the fact of the violation involves false statements, acts, or omissions, materiality is defined in terms of the actual or potential effect on the actions or interests of the U.S. Government. For the purposes of civil penalties under 19 U.S.C. § 1592, regulations state that a document, statement, act, or omission is material if it has the potential to alter the classification, appraisal, or admissibility of merchandise, or the liability for duty. Under 19 C.F.R. Part 171 App. B, a document, statement, act, or omission is material if, for example, it tends to conceal an unfair trade practice under the antidumping, countervailing duty, or a similar statute, or an unfair act involving patent or copyright infringement. A false statement, act, or omission is material if it has the potential to induce CBP to rely on it or to affect or influence CBP actions. Materiality may be shown if the document, information, or act involved in the violation is one specifically required by statute or regulation. For example, CBP laws and regulations require certain

information to appear on an invoice, including the description of the imported merchandise, its purchase price, and its country of origin. The fact that this information is required by statute and regulation tends to show that it is material. It is required because CBP has a demonstrated need for that information in determining the classification, appraisement, and admissibility of imported merchandise. The fact that CBP did not accept or rely on a false statement, act, or omission does not mean that it was not material. The test for materiality is whether the false statement, act, or omission would have had an adverse effect on the U.S. Government's interest if it had been accepted. It is sufficient that the false statement, act, or omission had the potential to affect CBP's actions. CBP need not actually be deceived.

*Note: Not all primary fraud statutes require proof of materiality (e.g., Smuggling goods into the United States, 18 U.S.C. § 545, and the false statement in any declaration provision of Entry of goods by means of false statements, 18 U.S.C. § 542).*

### 4.3 Responsibility

An investigation should identify all the parties involved in, and responsible for, the violation. All alleged violators are the parties who are potentially liable for criminal prosecution and civil penalties. This includes not only whoever formally filed the transaction (the importer of record) in which the violation occurred, but also any parties who may have conspired (18 U.S.C. § 371) in the commission of the offense or who may have aided or abetted its occurrence. Special Agents should determine if other related offenses may have been committed in furtherance of the commercial trade fraud violation, such as mail and wire fraud, conspiracy, aiding and abetting, and money laundering, in order to identify additional potential violators.

### 4.4 Culpability

Once it is determined that a violation has occurred and the responsible parties have been identified, culpability must be established. **Culpability is the very essence of any commercial trade fraud case** because it establishes the degree of "fault" on the part of the violator. This "fault" is the basis for both criminal prosecution and civil penalty action. Principal commercial trade fraud laws require importers and other parties involved in import transactions to act **reasonably** in light of their knowledge of the facts. The degree of culpability determines whether a violator's conduct constitutes merely a civil violation, or both civil and criminal offenses. An individual who acted reasonably may not be culpable. On the other hand, acting unreasonably is *prima facie* negligence. An individual who acted recklessly or with disregard for the facts or a legal obligation, as he or she knew it may be found to be grossly negligent. Negligent or grossly negligent acts may make a violator liable for civil penalties. A violator who acted knowingly or willfully is culpable of fraud. Fraudulent acts may subject a violator to civil penalties and/or criminal prosecution.

The Mod Act created a statutory requirement that importers exercise **reasonable care** (i.e., act reasonably) in meeting their obligations in their import transactions. **The alleged violator may be deemed to have exercised reasonable care, even though a violation resulted. In such instances, the alleged violator may not be culpable of criminal or civil violations arising**

**from their “reasonable” conduct.** An investigation must determine if an alleged violator reasonably relied on guidance for acting the way he or she did. This should include obtaining full documentation of any guidance a violator sought and received from CBP, ICE, or any other competent authority, such as a customs broker or other consultant. Special Agents should attempt to obtain evidence demonstrating what information was actually provided to the broker, consultant, or other competent authority by the violator that led to the advice given. Special Agents must also determine if the violator possessed any knowledge or other basis to believe that any erroneous guidance was in fact incorrect. A thorough examination of these issues in the early stages of an investigation may be crucial to overcoming a violator’s claim of non-culpability based on an alleged exercise of reasonable care, since merely seeking guidance does not, in and of itself, mean that the violator is not liable for criminal and/or civil sanctions. (It should be noted that, regardless of the culpability, unpaid duties are owed to the U.S. Government and must be paid to CBP.)

Culpability is the most difficult element of an offense to prove, in large part because evidence demonstrating culpability will not necessarily be found in documentary evidence. Culpability is more frequently established through interviews of witnesses and alleged violators as well as through circumstantial evidence, such as conduct on the part of the violators that shows evidence of knowledge and intent, e.g., lying to a Special Agent or destroying pertinent records after learning of an investigation, or having previously filed correct entries.



## **Chapter 5. CRIMINAL VIOLATIONS**

### **5.1 Criminal Intent**

Criminal commercial trade fraud statutes require proof that a violator’s illegal conduct was knowing and willing. The courts have generally held that the basic customs criminal commercial trade fraud statutes require only general criminal intent, as opposed to crimes involving specific intent, in which a violator must purposely intend to violate a specific law or do a specific thing. Some criminal statutes enforced by ICE require proof of specific intent. For example, 19 U.S.C. § 1304(l) requires that a violator who removes required country of origin markings has done so with the specific intent of concealing the country of origin of the article.

### **5.2 Motive**

Proof of motive is not a necessary element of a criminal offense. However, evidence of motive may circumstantially demonstrate that a violator’s conduct was knowing and willing. In other words, showing that a violator profited from the alleged illegal conduct strongly implies that the conduct was deliberate and intentional. Proof of motive may also have strong jury appeal and, moreover, the U.S. Attorney’s office may well look to a showing of motive in making a decision to prosecute a criminal commercial trade fraud case. Special Agents should make every effort to establish the violator’s motive for committing a criminal offense.



### **5.3 Referral of Cases for Criminal Prosecution**

The provisions of 19 U.S.C. § 1603, “Seizure; warrants and reports,” require that, whenever a violation of customs law is discovered and legal proceedings by the U.S. Attorney in connection with such a discovery are required, it will be the duty of the appropriate customs officer to promptly report the violation to the U.S. Attorney for the district(s) where such violation has occurred. The report must include a statement of all the facts and circumstances of the investigation in the Customs Officer’s knowledge, with the names of the witnesses and a citation of the statute or statutes believed to have been violated which may be relied upon for conviction and/or forfeiture.

### **5.4 Primary Criminal Commercial Trade Fraud Statutes**

This section provides only an overview of the primary criminal commercial trade fraud statutes (18 U.S.C. §§ 541-542, § 545) and of issues that Special Agents should be aware of in conducting investigations of these violations. Special Agents should also consult with the local ICE OCC for a discussion of additional legal aspects of these statutes.

#### **18 U.S.C. § 541 Entry of Goods Falsely Classified**

This statute covers entry of goods at less than the true weight or measure, or upon false classification as to quality or value, or by payment of less than the amount of duty legally due.

#### **18 U.S.C. § 542 Entry of Goods by Means of False Statements**

This statute covers several separate violations which need not involve an actual or potential loss of revenue:

- A. By means of false statements, oral or written, to enter or introduce or attempt to enter or introduce merchandise.
- B. By means of any false or fraudulent practice or appliance to enter or introduce or attempt to enter or introduce merchandise. This includes situations in which no actual falsity occurs in the entry documentation, but where the entry process itself is knowingly used to commit other violations. For example, someone may legally import merchandise that bears the required country of origin markings with the intention of removing those markings after release of the merchandise from CBP custody. CBP has held that entry under such circumstances was completed by means of a false practice, in violation of this statute.
- C. By making any false statement in any declaration without reasonable cause to believe the truth of that statement. This differs from the two violations listed in Subsections A and B above, in that the mere making of a knowingly false statement becomes a violation without requiring the U.S. Government to show that the entry of goods was “by means of” the false statement, a restrictive

interpretation in the Fifth and Ninth Circuits. If the importer submits information in the entry summary or in any other entry documents knowing that the information is false, that act constitutes a violation of this section of 18 U.S.C. § 542.

- D. Procuring the making of any material false statement.
- E. Any willful act or omission whereby the United States may be deprived of any lawful duties. As opposed to the provisions discussed in Subsections A, B, and C above, use of this provision of the statute requires that the act or omission had an impact on duty liability.

### 18 U.S.C. § 545 Smuggling Goods into the United States

Two violations within this statute are applicable to commercial trade fraud investigations:

- A. Cases in which a violator knowingly and willfully, with intent to defraud the United States, “makes out or passes, or attempts to pass, through the customhouse any false, forged, or fraudulent invoice, or other document or paper.” This could include the use of fraudulent or forged documents to enter merchandise subject to quota restrictions, or of invoices that contain false prices or other information.
- B. Cases in which a violator “fraudulently or knowingly imports or brings into the United States, any merchandise contrary to law.” Use of this section requires proof that some other provision of law or regulation was violated in the import transaction. This section covers violations such as the importation of merchandise bearing counterfeit trademarks and other intellectual property rights violations (the underlying violations include 15 U.S.C. § 1124) and the importation of merchandise falsely marked as to origin or quality (the underlying violation is 15 U.S.C. § 1125).

### **5.5 Other Criminal Commercial Trade Fraud Statutes**

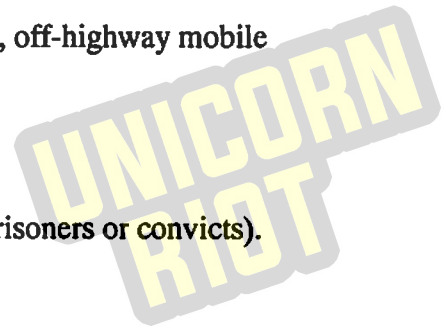
The following is a list of additional criminal commercial trade fraud statutes:

- A. 18 U.S.C. § 496  

Customs matters (involves the forgery or alteration of any writing made in connection with the entry of merchandise).
- B. 18 U.S.C. § 544  

Relanding of goods (involves the smuggling into the U.S. of goods previously exported free of duty, such as from a Foreign Trade Zone or bonded warehouse, or with an intent to obtain drawback).

- C. 18 U.S.C. § 548  
Removing or repacking goods in warehouses.
- D. 18 U.S.C. § 549  
Removing goods from customs custody; breaking seals.
- E. 18 U.S.C. § 550  
False claim for refund of duties (duty refunds and drawback fraud).
- F. 18 U.S.C. § 551  
Concealing or destroying invoices or other papers.
- G. 18 U.S.C. § 553  
Importation or exportation of stolen motor vehicles, off-highway mobile equipment, vessels, or aircraft.
- H. 18 U.S.C. § 1761  
Transportation or importation (of goods made by prisoners or convicts).
- I. 18 U.S.C. § 1762  
Marking packages (containing goods made by prisoners or convicts).
- J. 18 U.S.C. § 2312  
Transportation of stolen vehicles.
- K. 18 U.S.C. § 2314  
Transportation of stolen goods, securities, moneys, fraudulent state tax stamps, or articles used in counterfeiting.
- L. 18 U.S.C. § 2318  
Trafficking in counterfeit labels, illicit labels, or counterfeit documentation or packaging.



- M. 18 U.S.C. § 2319  
Criminal infringement of a copyright.
- N. 18 U.S.C. § 2320  
Trafficking in counterfeit goods and services.
- O. 18 U.S.C. § 2321  
Trafficking in certain motor vehicles or motor vehicle parts (involving altered or removed Vehicle Identification Numbers).
- P. 17 U.S.C. § 506  
Criminal offenses (criminal infringement of a copyright).
- Q. 19 U.S.C. § 1304(l)  
Removal of required country of origin markings.
- R. 19 U.S.C. § 1436  
Penalties for violations of the arrival, reporting, entry, and clearance requirements (failure to file manifests).
- S. 19 U.S.C. § 1459  
Reporting requirements for individuals.
- T. 26 U.S.C. § 7207  
Fraudulent returns, statements, or other documents.
- Note: This is an Internal Revenue Service (IRS) misdemeanor provision involving the submission of false documents to the Secretary of the Treasury. While this provision may be construed to apply to false entry documents, its use is governed by local U.S. Attorney policy. Some Assistant U.S. Attorneys (AUSAs) will not use this provision in connection with ICE violations and some require IRS concurrence for its use.*
- U. 31 U.S.C. § 3729 et seq.  
False Claims (False Claims Act).

V 49 U.S.C. § 80101, et seq.

Bills of Lading.

W. 50 App. U.S.C. § 16

Offenses; punishment; forfeitures of property (Trading with the Enemy Act involving international sanctions and embargoes).

X 50 U.S.C. § 1701, et seq.

Unusual and extraordinary threat; declaration of national emergency; exercise of Presidential authorities (International Emergency Economic Powers Act (IEEPA) involving international sanctions and embargoes).

The following statutes do not contain specific criminal provisions related to importations, but may serve as a basis for charging the “importation contrary to law” provision of 18 U.S.C. § 545:

A. 15 U.S.C. § 1124

Importation of goods bearing infringing marks or names forbidden.

B. 15 U.S.C. § 1125

False designations of origin and false descriptions forbidden (the Lanham Act).

C. 18 U.S.C. § 1301

Importing or transporting lottery tickets.

D. 18 U.S.C. § 1302

Mailing lottery tickets or related matter.

E. 22 U.S.C. § 2778

Control of arms exports and imports.

## 5.6 Related Criminal Statutes

The following criminal statutes do not relate specifically to import transactions, but may be violated concurrently with commercial trade fraud violations enforced by ICE:

- A. 18 U.S.C. § 371  
Conspiracy to commit offense or defraud the United States.
- B. 18 U.S.C. § 546  
Smuggling goods into foreign countries.
- C. 18 U.S.C. § 554  
Smuggling goods from the United States.
- D. 18 U.S.C. § 554  
Border tunnels and passages.
- E. 18 U.S.C. §§ 1956, 1957  
Laundering of monetary instruments.

Section 1956(c)(7) lists the SUAs for money laundering violations. Commercial trade fraud violations that are listed as money laundering SUAs are:

- 1. 18 U.S.C. § 542  
Entry of goods by means of false statements.
- 2. 18 U.S.C. § 545  
Smuggling goods into the United States.
- 3. 18 U.S.C. § 549  
Removing goods from customs custody; breaking seals.
- 4. 18 U.S.C. § 2319  
Criminal infringement of a copyright.
- 5. 18 U.S.C. § 2320  
Trafficking in counterfeit goods or services.

6. 50 App. U.S.C. § 16

Offenses; punishment; forfeitures of property (Trading with the Enemy Act).

7. 50 U.S.C. § 1701, et seq.

Unusual and extraordinary threat; declaration of national emergency; exercise of Presidential authorities (IEEPA).

If funds that are the proceeds of violations of these statutes or were used to promote violations of these statutes are involved in financial transactions or are transported internationally, that activity may constitute a violation of the money laundering statutes. Special Agents conducting commercial trade fraud investigations should make every effort to obtain evidence to prove money laundering violations based on the commercial trade fraud-related SUAs. This should include identifying suspected laundered funds, establishing that the funds are in fact the proceeds of an SUA and are involved in a transaction or intended transfer either to conceal the fact that they are proceeds of an SUA or in furtherance of an SUA.

F. 18 U.S.C. § 1001, False Statements

This statute generally prohibits the making of any material false statement in a matter within the jurisdiction of any agency of the United States. The elements of a violation of section 1001 are included in the elements of a violation of 18 U.S.C. § 542. However, section 1001 does not require that there be an “importation by means of” the false statement, as does section 542. Thus, section 1001 may be considered as an alternative to the use of section 542 in those circuits where the courts have narrowly defined the materiality requirement of section 542 or in instances in which a false statement made to CBP is not clearly tied to an import transaction, such as in some drawback fraud and North American Free Trade Agreement (NAFTA) cases. It should also be noted that section 1001 carries higher penalties (a maximum of 5 years imprisonment) than section 542 (2 years imprisonment).

A material oral or written false statement provided to an ICE Special Agent during an interview of involved parties can result in this statute being added to an indictment as a stand-alone charge. It can also be used as an admonition by an ICE Special Agent before starting an interview in order to obtain true and accurate information from subjects.

**G. 18 U.S.C. §§ 1341, 1343, Mail and Wire Fraud**

The mail fraud statute (18 U.S.C. § 1341) provides criminal penalties for any use of the U.S. Postal Service or of private or commercial interstate carriers, such as the United Parcel Service or Federal Express, in furtherance of any scheme to defraud or obtain money under false or fraudulent pretenses. The wire fraud statute (18 U.S.C. § 1343) provides similar criminal penalties for any use of wire, radio, or telephone communications in interstate or foreign commerce. Special Agents should always consider the use of mail and wire fraud charges in commercial trade fraud cases. Individuals and companies involved in legitimate international trade and importing make extensive use of the U.S. Postal Service and express delivery services and, increasingly, of wire communications such as telephones, facsimiles, and email. In like manner, commercial trade fraud violators may use any of these communication media in furtherance of their criminal activity. They may use them to communicate instructions to a foreign supplier for the preparation or submission of false invoices, or to provide copies of documents to foreign suppliers, customs brokers, and CBP. Proof of a mail or wire fraud violation requires the U.S. Government to establish the scheme to defraud, as well as use, the mails or wire communications in furtherance of that scheme.

**H. 18 U.S.C. §§ 1961-1968, Racketeer Influenced and Corrupt Organizations**

The Racketeer Influenced and Corrupt Organizations statutes, found in 18 U.S.C. §§ 1961-1968, target the use of “racketeering activity” or the use of funds obtained through “racketeering activity” to engage in interstate or foreign commerce or in acquiring or controlling any business or other “enterprise” engaged in, or affecting, interstate or foreign commerce.

## **Chapter 6. CIVIL VIOLATIONS**

Civil violations involve material false statements, acts, or omissions or importations made contrary to law for which a violator has some degree of culpability. While criminal violations cover only statements, acts, or omissions knowingly and willfully (i.e., intentionally) made by the violator, civil violations penalize a violator not only for acts or omissions knowingly and willfully made but also for negligently-made acts or omissions. Negligence is defined as a failure to exercise reasonable care (i.e., unreasonable acts). A measure of reasonable care is the “reasonable person” test - would a reasonable person with the same knowledge as the alleged violator have acted in the same way? If so, then the alleged violator exercised reasonable care; if not, the alleged violator was negligent. (The Mod Act further defined the concept of “reasonable care” by citing specific examples of reasonable conduct in connection with an import transaction.) There are three primary statutes related to civil commercial trade fraud violations: 19 U.S.C. § 1592, Penalties for Fraud, Gross Negligence, and Negligence, which covers false



statements, acts, or omissions; 19 U.S.C. § 1593a, Penalties for False Drawback Claims; and 19 U.S.C. § 1595a, Forfeitures and Other Penalties, which covers importations contrary to law.

### **6.1 19 U.S.C. § 1592, Penalties for Fraud, Gross Negligence, and Negligence**

A violation of 19 U.S.C. § 1592 consists of:

- A. Entering or introducing or attempting to enter or introduce merchandise by means of a statement, act, or omission which is material and false due to negligence, gross negligence, or fraud; or
- B. Falsely certifying, due to negligence, gross negligence, or fraud, in a NAFTA Certificate of Origin that goods to be exported to a NAFTA country qualify for preferential treatment under the NAFTA rules of origin.

The statute penalizes the individual responsible for the false statement, act, or omission, as well as anyone who aids or abets the violation. The violation need not involve a loss of revenue. However, the statute includes a provision for the recovery of any duties lost as a result of the violation.

### **6.2 19 U.S.C. § 1593a, Penalties for False Drawback Claims**

Section 1593a is a provision added as a part of the Mod Act to provide penalties for false drawback claims. Section 1593a provides that no person, by fraud or negligence, may seek, induce, or affect, or attempt 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, electronically transmitted data or information, any act which is material and false, or any omission which is material, or aid or abet any other person in any such violation. Special Agents involved in drawback investigations should refer to any such regulations and guidance as may be issued in the future, and should contact the local ICE OCC for guidance in the application of this statute.

### **6.3 19 U.S.C. § 1595a, Forfeiture and Other Penalties**

19 U.S.C. § 1595a(b) provides that any person who directs or is in any way concerned in any actual or attempted importation of merchandise contrary to law is liable for a civil penalty equal to the value of the merchandise. Merchandise imported contrary to law is also subject to seizure and forfeiture under the provisions of 19 U.S.C. § 1595a(c), while conveyances used to import merchandise contrary to law are subject to seizure and forfeiture under the provisions of 19 U.S.C. § 1595a(a).

## **Chapter 7. RELATIONSHIP BETWEEN CRIMINAL AND CIVIL VIOLATIONS**

The basic elements of criminal and civil violations may, in some cases, be the same: false statements, acts, or omissions for which the violator is both responsible and culpable. Criminal

and civil frauds chiefly differ in the higher degree of culpability and the higher overall burden of proof at trial required in criminal cases. Thus, a criminal commercial trade fraud violation may encompass all the elements of a related civil fraud violation. The same evidence used to establish the criminal violation may therefore also establish the civil violation. Commercial trade fraud investigations must therefore be conducted in a manner which, while chiefly focusing on proving criminal violations, preserves CBP's ability to pursue civil remedies. Various traditional investigative methods, including witness and suspect interviews, search warrants, and use of confidential informants and undercover operations, can be used to collect evidence that may be used in both criminal and civil actions. It should be noted that the use of grand jury subpoenas to obtain evidence can limit ICE's and CBP's ability to pursue civil penalties. The Federal Rules of Criminal Procedure require that grand jury information remain secret unless a court order is obtained allowing its release. Such an order is required to use grand jury information for civil purposes. It should also be noted that the use of Customs Summonses to obtain evidence of criminal violations may be inappropriate and an abuse of process when a case has already been referred to a U.S. Attorney for criminal prosecution, or if a grand jury investigation has already begun. Care must be taken to use, to the maximum extent possible, investigative methods that allow evidence obtained to be used without restriction in both criminal and civil proceedings.

## 7.1 Grand Jury Subpoenas

Rule 6(e) of the Federal Rules of Criminal Procedure generally restricts the use of evidence obtained pursuant to grand jury proceedings for the purpose of criminal prosecutorial actions. Unlawful disclosure, use, or attempted use of grand jury material for any purpose other than assisting the U.S. Attorney in the enforcement of federal criminal laws is prohibited. Grand jury materials become available for use by ICE and CBP in civil proceedings only after those materials become a matter of public record, either by embodiment in a criminal indictment, information, plea agreement, or at trial, or when otherwise ordered disclosed by the court. **The inappropriate release or use of grand jury materials can subject a Special Agent to criminal contempt proceedings.**

Because it is important for ICE to preserve its ability to use evidence for civil penalty actions, it is the policy of ICE that all other means of gathering evidence be exhausted prior to the use of the grand jury subpoena. When use of the grand jury becomes necessary, Special Agents will refer the case simultaneously to the U.S. Attorney and to CBP's FP&F Officer. Evidence obtained through subsequent use of the grand jury must be segregated from the civil case. In cases where use of the grand jury is necessary prior to the development of sufficient evidence to serve as the basis for referral of an investigation to CBP for civil penalty action, evidence of the civil aspects of the case must be preserved and kept separate from grand jury material while the grand jury action proceeds. In addition, grand jury material must be catalogued and accounted for to avoid the commingling of records becoming an evidentiary issue at trial. A list should be made of all Department of Homeland Security (DHS) personnel having access to grand jury information. One option is referral of the case to a CBP FP&F Officer prior to the initiation of grand jury proceedings, with a request that civil action be held in abeyance pending resolution of the criminal case. Special Agents need to monitor the Statute of Limitations (SOL) for the

applicable CBP entries under investigation and, if needed, obtain necessary SOL waivers (see Section 16.2, “Waivers of the Statute of Limitations”).

Where circumstances dictate use of the grand jury at the initial stages of an investigation, different Special Agents or even separate ICE offices can be assigned responsibility for pursuing independent investigations - one criminal, using the grand jury as an investigative tool, and one civil, using only non-grand jury investigative methods. No evidence obtained in the criminal investigation through use of the grand jury can be provided to the civil investigator. Because of the substantial duplication of effort and resources required, parallel investigations should be used only in the most significant investigations and only when early use of the grand jury is essential to obtain evidence of criminal violations. Special Agents considering the use of parallel investigations should contact the Commercial Fraud and Intellectual Property Rights Investigations Unit at ICE OI Headquarters for guidance.

## **7.2 Customs Summonses**

Title 19 of the U.S. Code, *Customs Duties*, gives ICE officers the authority to summon persons to give testimony and produce documents related to customs transactions. While Customs Summons authority is civil, not criminal, evidence obtained pursuant to a Customs Summons may also be used in criminal prosecution. However, the courts have held that civil processes similar to Customs Summonses cannot be used in cases once they have been formally presented to the U.S. Attorney for criminal prosecution or a grand jury investigation has begun. At that point, criminal procedures should be followed. In other words, once ICE has asked the U.S. Attorney to accept a case for prosecution and a formal referral has been made, Customs Summonses can no longer be used as an investigative tool.

# **Chapter 8. SOURCES OF INFORMATION**

## **8.1 Sources of Information Within ICE**

### **A. Criminal Research Specialists**

ICE Criminal Research Specialists can be assigned to assist with the collection, evaluation, and analysis of data for the purpose of identifying violations related to commercial trade fraud, domestic and international narcotics smuggling, international terrorism, illegal exportation of controlled technology, and money laundering. Criminal Research Specialists have access to databases which can assist in obtaining corporation records and identifying corporate officers.

### **B. Office of the Principal Legal Advisor**

The Office of the Principal Legal Advisor (OPLA) is composed of Headquarters attorneys as well as 26 ICE OCCs in the field. OPLA attorneys are available to provide legal advice and guidance to Special Agents throughout any commercial

trade fraud investigation and can act as a conduit between ICE and any outside agency. When a significant investigation involving entry by false documents, statements, or practices is opened, the case agent is strongly encouraged to consult with the local ICE OCC to obtain legal advice on relevant legal issues such as the SOL, materiality, and the potential level of culpability of violations. At major stages during commercial trade fraud investigations (e.g., execution of warrants, interviewing of significant witnesses, sample indictment drafting, and referral of a case to the U.S. Attorney), the case agent should consult with the local ICE OCC in order to ensure legal compliance. The case agent may also request that a local ICE OCC attorney accompany the case agent when a significant case is presented to the U.S. Attorney for criminal prosecution. This will allow the local ICE OCC attorney to support the case agent's presentation and to answer any questions that may arise concerning the application of specific customs laws to the case.

### **C. Cyber Crimes Center**

The OI Cyber Crimes Center (C3) is responsible for delivering cyber technical and investigative services to field offices and Headquarters programs in support of all transborder and infrastructure protection investigations within ICE's immigration and customs authorities. C3's responsibilities are as follows:

#### **1. C3's Cyber Technical Services**

Digital Forensics – The forensic acquisition, examination, and analysis of digital storage devices and media (computers, cellular telephones, personal digital assistants, cameras, hard disk drives, CD/DVD, flash drives, and media, etc.).

Digital Data Exploitation – The creation and management of large digital data sets that are derived from the digital forensics process and analyzed through the use of specialized data modeling and extraction software.

Internet Protocol (IP) Interception – Those services that support the court-ordered, lawful intercept and analysis of Internet communications (e.g., email, website usage, chat, etc.). This cyber technical service also supports non-content, digital trap and traces of email and website traffic, and wireless network identification and triangulation.

#### **2. C3's Investigative Services**

Management – C3 is responsible for managing the cyber component of all OI investigative categories.

**Training** – C3 is responsible for training Special Agents on-line, developing and referring investigative leads, including deconflicting the cyber components of field investigations.

**Investigative Efforts** – C3 provides investigative support to field offices regarding the Internet component of any investigation. The following are examples of C3's investigative services:

- undercover communications via email, chat, etc.;
- website tracing and analysis; and
- IP identification and tracing.

#### **D. Trade Transparency Unit**

The OI Trade Transparency Unit (TTU) identifies anomalies related to cross-border trade that present indications of international trade-based money laundering. TTU generates, initiates, and supports investigations and prosecutions related to trade-based money laundering, the illegal movement of criminal proceeds across international borders, alternative money remittance systems, and other financial crimes. By sharing trade data with foreign governments, ICE and participating governments are able to see both sides, import and export, of commodities entering or leaving their countries. This makes trade transparent and assists in the identification and investigation of international money launderers and money laundering organizations. Other benefits of trade transparency include assisting developing nations in the potential identification of smuggling routes or public corruption, and in the reduction of smuggling that feeds the Black Market Peso Exchange money laundering system.

The Data Analysis and Research for Trade Transparency System (DARTTS) is an ICE proprietary system that helps Special Agents analyze foreign and domestic trade data and Bank Secrecy Act information. Special Agents employ DARTTS to identify discrepancies in trade and financial data that may indicate money laundering, commercial trade fraud, and other transnational crimes. TTU develops investigative leads from analysis through DARTTS and facilitates the dissemination of investigative referrals to field entities.

#### **E. National Intellectual Property Rights Coordination Center**

The National Intellectual Property Rights (IPR) Coordination Center is a multiagency center responsible for coordinating a unified U.S. Government response to IPR enforcement issues. Core staffing is provided by investigative personnel from ICE, CBP, and the Federal Bureau of Investigation. Particular emphasis is given to investigating major criminal organizations and businesses and individuals using the Internet to facilitate IPR violations.

The IPR Coordination Center's responsibilities include:

- Coordinating the U.S. Government's domestic and international law enforcement activities involving IPR issues;
- Serving as a collection point for intelligence provided by private industry, as well as a channel for law enforcement to obtain cooperation from private industry (in specific law enforcement situations);
- Integrating domestic and international law enforcement intelligence with private industry information relating to IPR crime;
- Disseminating IPR intelligence for use in appropriate investigative and tactical activities;
- Developing enhanced investigative, intelligence, and interdiction capabilities;
- Serving as a point of contact for all U.S. Government agencies, the Administration, Congress, and media outlets regarding IPR-related issues.

#### **F. Office of International Affairs**

The Office of International Affairs (OIA) provides operational and programmatic management of ICE Attachés at foreign embassies and consulates worldwide.

OIA also coordinates and supports all foreign investigative activities of ICE. OIA works with foreign counterparts in combating transnational crimes involving national security, financial, smuggling, illegal arms exports, forced child labor, child pornography, human trafficking, IPR violations, and commercial trade and immigration fraud violations.

OIA assists host-country counterparts in the development and implementation of legislation and regulations; provides training to foreign officials; responds to government and public requests for trade, travel, and business information; and supports the implementation of treaties, agreements, and international cooperative programs.

In addition, OIA acquires and develops intelligence related to cross-border criminal activity.

## **8.2 Sources of Information Within CBP**

### **A. Import Specialists**

Import specialists at the port level are responsible for reviewing entry summary documentation submitted by importers to ensure the appropriate classification and appraisal of merchandise, verifying compliance with all statutory and regulatory requirements, and assessing and collecting duties and fees owed on imported commodities. Because of the sheer volume of import transactions, import specialists cannot review the entry summary documentation for all import transactions. They use various criteria to select import transactions for review.

Import specialists typically specialize in one or more commodities covered by a given section of the HTSUS. They have extensive contacts with importers, customs brokers, foreign shippers, and other parties involved in international trade. Import specialists provide advice to importers and customs brokers on the classification and appraisal of merchandise and often meet with importers to discuss and resolve routine instances of noncompliance that occur in import transactions. Import specialists can help Special Agents understand the statutory and regulatory obligations involved in import transactions under investigation and thus help establish both the “fact” of the violation and its materiality. Import specialists keep various records of their contacts with the importing community, including formal “Requests for Information” (CBP Form 28), “Reports of Visits to Importers’ Premises” (CBP Form 213), and literature regarding importers and imported commodities. These records can provide background information on the parties and commodities involved in a commercial trade fraud investigation and details of the alleged violator’s prior contacts with CBP, thereby helping to establish both responsibility and culpability.

Additionally, as the CBP officers responsible for the classification and appraisal of imported merchandise, import specialists complete Appraisal Worksheets in commercial trade fraud investigations to determine the loss of revenue and the value of the merchandise involved in the violation. Because of their day-to-day involvement with import transactions, import specialists may discover potential violations to refer to ICE OI for investigation, such as potential false statements or omissions in entry documentation.

### **B. National Import Specialists**

National Import Specialists (NISs) work for CBP’s Office of Regulations and Rulings (OR&R) in New York City. NISs specialize in one or more commodities in a given section of the HTSUS. They are responsible for issuing binding guidance to CBP officers and importers on the proper classification and appraisal of merchandise. They also disseminate commodity information to import specialists to promote uniformity in the treatment of import transactions.

Formal rulings issued by NISs are released to the trade through the Rulings Module of the Automated Commercial System (ACS) and through the Customs Information Exchange (CIE) in New York.

Like local import specialists, NISs can assist Special Agents in understanding the statutory and regulatory obligations and prohibitions involved in import transactions under investigation, and thus help establish both the fact of the violation and its materiality. Additionally, NISs maintain files of correspondence with importers related to ruling requests and issuances that can help to establish both responsibility and culpability. This documentation may be obtained via a formal request to the CIE.

Field National Import Specialists (FNISs), who also specialize in commodities and sections of the HTSUS, are located at various ports. FNISs assist the NISs in preparing and issuing binding rulings to importers.

### **C. Entry Specialists**

Entry specialists at ports of entry review and process entry summary documentation that is not selected for import specialist review. Unlike import specialists who specialize in given commodities, entry specialists generally service various “filers” of entry summary documentation who are usually customs brokers. For this reason, entry specialists are in a good position to discover potential violations of the customs brokers’ statutes and regulations.

### **D. CBP Officers**

CBP Officers are responsible for examining merchandise upon its entry into the United States. In many instances, CBP Officers will be the only enforcement officers who actually see merchandise in its imported condition. CBP Officers are in an excellent position to discover potential commercial violations, particularly those related to imported merchandise. This can include importations of restricted or prohibited merchandise, such as merchandise bearing counterfeit trademarks and copyrights; marking violations, such as false country of origin markings; and transshipped merchandise, such as articles claimed as a product of one country but actually produced in another country. They also frequently discover discrepancies between the actual merchandise and the accompanying entry documentation that may be indicative of fraudulent practices.

### **E. Field Analysis Staff**

The CBP Field Analysis Staff (FAS) is responsible for developing, inputting, and managing ACS merchandise and document examination criteria, otherwise known as “selectivity criteria.” CBP Officers and import specialists use selectivity criteria to identify individual import transactions for intensive review. The FAS is



also responsible for placing all enforcement lookouts in ACS, including those lookouts requested by Special Agents. Special Agents who request that an import shipment be examined by CBP Officers or that an entry summary documentation be reviewed by import specialists should contact the FAS at the port where the transaction occurred. Special Agents should provide sufficient information to the FAS to identify the transaction(s) to be examined or reviewed and provide specific instructions to the inspector and/or import specialist conducting the examination/review. If more than one port is involved in the targeted transactions, the FAS will contact the National FAS in New York for input of national selectivity criteria. FAS analysts can also conduct customized queries of the ACS database, known as data queries, for use in commercial trade fraud investigations. Data queries are useful for obtaining a list of all entry summaries filed by a given importer for a specific commodity or from a given country or foreign manufacturer.

#### **F. Document Analysis Units and Manifest Review Units**

CBP port-level Document Analysis Units and Manifest Review Units are responsible for reviewing cargo manifests and entry documentation to identify shipments that will be subjected to intensive examination. This includes checking entry transactions against ACS selectivity criteria, as well as assessing documentation to identify high-risk importations, such as those originating from known source countries, for counterfeit merchandise and narcotics.

#### **G. Office of Strategic Trade**

The Office of Strategic Trade (OST) coordinates enforcement and compliance efforts involving primary focus industries and trade enforcement priorities. OST monitors developing trends and issues in the primary focus industries involving trade enforcement priorities, identifies potential areas of noncompliance, and designs and implements interventions targeting identified problems for compliance and enforcement efforts.

OST has International Trade Managers (ITMs) and International Trade Specialists (ITSs) located both at Headquarters and at Strategic Trade Centers (STCs), which specialize on the primary focus industries. Special Agents are assigned to each STC; they act as OI liaisons to the STCs and coordinate matters of mutual interest between ICE OI and CBP OST. ITMs and ITSs maintain contacts within their designated industries, conduct informed compliance outreach to industries on selected issues, and have access to an extensive range of data on companies involved in international trade. ITMs and ITSs can be a source of information for Special Agents regarding the importers, exporters, industries, and commodities involved in an investigation, and may work with Special Agents to assist in integrating commercial trade fraud investigations into OST-designed industry interventions.

## **H. Regulatory Auditors**

The Regulatory Audit Division is part of OST, with offices at various field locations. Regulatory auditors conduct audits of various entities involved in import transactions, including importers, customs brokers, bonded warehouses, and foreign trade zone operators, to determine the accuracy and completeness of import transactions and to verify compliance with trade laws. Regulatory auditors also conduct compliance assessments of importers engaged in strategic focus industries and special audits related to trade enforcement priorities in order to identify potential noncompliance. They also work with importers to improve compliance levels. Audits that uncover potential criminal or civil violations of customs laws are referred to ICE for investigation. Regulatory auditors are also available to assist Special Agents in commercial trade fraud investigations. Auditors have a broad knowledge of business record-keeping practices and can assist Special Agents in identifying business records to be sought via search warrants or summonses. The Regulatory Audit Division also maintains a cadre of trained computer audit specialists who can assist Special Agents in analyzing computer systems and data obtained in the course of an investigation. Auditors can also conduct reviews and analyses of financial and other records that may serve as evidence in commercial trade fraud investigations. This can include calculation of losses, calculation of revenue and domestic value for penalty purposes, analysis of cost and production data to support preferential claims such as those made under NAFTA, and reconstruction of cost and accounting records in money laundering cases.

A party being audited has a right to an initial entry conference with the auditor to discuss the scope and purpose of the audit and its estimated completion date. This right applies only to on-site audits at the audited party's premises. At the conclusion of an audit, the auditor is required to hold a closing conference with the audited party to discuss the audit findings. The audit is required to provide a copy of the completed audit report to the audited party. These requirements do not apply, however, in instances in which ICE has commenced a formal investigation of the issue(s) involved in the audit. *See* 19 U.S.C. § 1509(b)(5).

## **I. CBP Laboratories**

CBP laboratories are located in various field locations. They specialize in conducting physical, chemical, and other laboratory analyses of imported merchandise to assist with the appropriate classification of that merchandise under the HTSUS. Laboratory analysis can be useful in determining the true physical and chemical composition of imported products, such as the metallurgical content of substandard products, the chemical composition of hazardous waste, or the fiber content of textile wearing apparel. In some instances, laboratory analysis can establish the true country of origin of imported merchandise.

## 8.3 Computer Systems

### A. Treasury Enforcement Communications System II

The Treasury Enforcement Communication System (TECS) II is an automated enforcement system that supports DHS, the Department of the Treasury, and other federal agency users. Its database and operational features have been designed to allow the linking and manipulation of information for investigative and analytical purposes. TECS-II also provides access to enforcement records of other DHS agencies, the National Crime Information Center, state law enforcement records via the National Law Enforcement Telecommunications System, and Department of Treasury financial databases. These records can provide a wide range of information on suspects and other parties.

### B. Automated Commercial System

ACS is CBP's automated commercial and business tracking system. The vast majority of import-related transactions, including the filing of advance cargo manifest information, entries, entry summaries, and liquidation transactions, as well as the processing of penalty cases, are recorded in ACS. Customs brokers, international carriers, and major importers are able to electronically submit import transaction data directly to ACS via the Automated Broker Interface (ABI). In many instances, ABI-transmitted data is the only information required to complete entry and entry summary transactions. These electronic-only transactions are known as "paperless" entries and entry summaries. In other instances, the initial ABI-transmitted data is subsequently reconciled with hard-copy entry and entry summary documents filed by the importer or customs broker.

ACS contains a significant amount of information regarding import transactions. Importers, consignees, and foreign manufacturers are assigned unique identifying numbers that may be located through queries based on name, address, or other data. Those numbers may, in turn, be queried to identify import transactions, examination histories, and penalty files linked to the queried number. In addition to standard queries, Special Agents can request customized searches of the ACS database known as "data queries," either through their local FAS or the Commercial Fraud and IPR Investigations Unit at OI Headquarters. Additionally, Special Agents may ask the FAS to enter enforcement lookouts ("selectivity criteria") into ACS, at the port or at the national level, to designate cargo shipments for intensive examination and/or entry summary transactions for document reviews by import specialists. Selectivity criteria can be useful in targeting shipments suspected of containing prohibited or restricted merchandise for inspection.

ACS processes will be replaced incrementally by the Automated Commercial Environment (ACE). ACE will offer a single, consolidated window for

processing trade transactions, trade enforcement and compliance, and multiagency mission information.

**C. Data Analysis and Research for Trade Transparency System**

DARTTS is a proprietary ICE system that helps the TTU analyze foreign and domestic trade data and information disclosed pursuant to the Bank Secrecy Act. Access to this database is restricted to current licensing requirements. Commercial Fraud Program Managers at ICE OI Headquarters have access to DARTTS and can complete queries to support commercial trade-related investigations. Special Agents requesting DARTTS queries for their investigations should complete a written request and route it to the attention of the Commercial Fraud and IPR Investigations Unit through appropriate channels.

**D. CBP Analytical Tracking Systems**

CBP has an Intranet-based series of databases accessible through the Automated Targeting System (ATS), which includes data for inbound cargo. Two useful databases are ATS/Narcotics and the Trend Analysis and Analytical Selectivity Program (TAPS) 2000. ATS/Narcotics maintains manifest data and TAPS2000 is a more user-friendly application for accessing and reviewing ACS/ACE commercial importation information.

**E. Customs Rulings Online Search System**

The Customs Rulings Online Search System (CROSS) is a searchable Internet database of CBP rulings that can be retrieved based on simple or complex search characteristics using keywords and Boolean operators. CROSS has the added functionality of referencing rulings from the initial search results with their modified, revoked, or referenced counterparts.

Rulings are very useful for showing importer knowledge of the customs regulations, especially when dealing with classification and country of origin issues. CROSS data is separated into Headquarters- and New York-issued rulings issued from 1989 to the present.

**8.4 Sources of Information Outside ICE and CBP**

**A. Confidential Informants**

The development of knowledgeable and reliable confidential informants is as important in commercial trade fraud investigations as in any other criminal investigation. Special Agents should cultivate confidential informants involved in international trade investigations in order to assist with the identification of

potential commercial violations. Informants can include licensed customs brokers and their employees, employees of major importers and cargo consignees, freight forwarders, shipping agents, and representatives of trade associations and unions. Special Agents should also develop confidential informants to assist in pursuing and resolving open investigations. Informants may also include current and former employees of suspect customs brokers or importers. Special Agents should consult with the local ICE OCC or an AUSA prior to interviewing former or current employees.

#### **B. Other Law Enforcement and Regulatory Agencies**

Many other federal, state, and local law enforcement and regulatory agencies have responsibilities involving imported merchandise. The Environmental Protection Agency and the Department of Transportation both have the responsibility of regulating the transportation of hazardous materials and hazardous waste, while the Food and Drug Administration has the responsibility of regulating the labeling of foods, drugs, and cosmetics. Many agencies have both regulatory and enforcement branches; some have their own criminal investigators. The statutory and regulatory obligations and prohibitions enforced by these agencies can form the basis for importation-contrary-to-law charges when violations occur during import transactions. Liaison should be established and maintained with all such offices at the field level in order to educate other agency personnel to recognize potential DHS violations and to ensure that such violations are referred to ICE for action.

#### **C. Incorporation Documents**

Incorporation documents are public records documenting the creation and/or current status of corporations. These records are usually maintained by state governments. They contain such information as the dates of incorporation; the identities of corporate owners, incorporating agents, and corporate officers; and relationships to other corporations. They also usually identify a corporation's agent for service of process.

#### **D. Securities and Exchange Commission Reports**

The Securities and Exchange Commission routinely grants access to its investigative and other files to law enforcement officers. These files contain the names, addresses, and Social Security numbers of all owners of public corporations on file and listings of property and assets owned by corporations and/or their shareholders.

## **E. Dun and Bradstreet Reports**

Dun & Bradstreet (D&B) is a commercial credit reporting service with extensive files on both domestic and foreign businesses. D&B reports contain information identifying corporate officers, corporate relationships, history, financial standing, etc. It should be noted, however, that most of this information is obtained directly from the company reported on, with little verification.

## **F. Business Information Sources**

Commercial directories and data banks can be useful for gathering background data on industries, companies, and individuals involved in commercial trade fraud investigations. Extensive information is available on-line via the Internet; however, the use of a government computer to access the Internet may alert a website holder that an inquiry was made. Extensive information is also maintained in the CBP library at CBP Headquarters and in the reference sections of local public libraries.

Business information sources include:

1. Directory of Corporate Affiliations (Who Owns Whom): Identifies the management of many corporations and indicates relationships between firms.
2. Encyclopedia of Business Information Sources: An index describing publications, periodicals, statistical sources, special interest groups, directories, and bibliographies by specific industry or topic.
3. Dialogue: Links officers of numerous corporations, partnerships, and companies with other business entities.
4. National Trade and Professional Associations and Labor Unions of the United States and Canada: Identifies and describes approximately 14,000 special interest groups in the United States and Canada.
5. Million Dollar Directory: Lists U.S. companies owned by foreign interests.
6. New York Times Information Bank: Contains abstracts of articles from more than 90 leading periodicals and newspapers, which may be queried by subject, topic, or name.
7. Lexis: On-line legal subscription service including published decisions from federal and state courts, including the Court of International Trade (CIT), as well as administrative rulings and bulletins.

8. Nexis: On-line subscription service including general business news text taken from newspapers, journals, wire services, and newsletters.

### **G. Trade Associations**

Many trade associations actively cooperate with federal law enforcement agencies in pursuing violations of trade laws that have an impact on their members. They can serve as sources of information for the identification of potential violations and also provide expert assistance in matters related to the industries they represent. Associations also publish materials that can familiarize Special Agents with industry issues and help identify potential fraudulent activities.

### **H. Newspapers and Other Publications**

National and local newspapers and other publications frequently provide leads for use in developing commercial trade fraud cases, as well as extensive historical information on companies and individuals involved in international trade. Many newspaper and periodical archives are available via the Internet and may be searched via keywords, such as a name or topic.

## **Chapter 9. INVESTIGATIVE METHODS**

### **9.1 Interviews**

#### **A. General**

Interviews are generally the single most important part of any commercial trade fraud investigation. While documentary evidence may demonstrate the fact of the violation and its materiality, interviews of witnesses, confidential informants, and suspects are often the principal means through which evidence of the violator's responsibility, motives, and culpability is obtained. All individuals involved in suspect transactions or who may have knowledge of the facts and circumstances of alleged violations should be identified and interviewed. Current and former employees of the importer, customs broker, or foreign supplier, as well as competitors and domestic purchasers of the imported product, may all have knowledge bearing on the fact of the violation, as well as on the suspect's responsibility and culpability. Witness interviews should focus on obtaining the testimonial evidence and all relevant supporting documents needed to prove the elements of the violation and the level of culpability involved.

## **B. Compelling Testimony**

Special Agents should always attempt to obtain voluntary statements from suspects and witnesses. However, if suspects or witnesses will not voluntarily submit to an interview, their testimony may be compelled either through the use of a Customs Summons or, in appropriate circumstances, through the use of a grand jury subpoena. Special Agents are reminded that, because of grand jury secrecy, evidence obtained pursuant to grand jury subpoenas may be unavailable for use in civil penalty actions. Accordingly, it is ICE OI policy that, prior to requesting a grand jury subpoena to obtain evidence in commercial trade fraud investigations, one of the following two conditions must be met:

1. All other legal means of obtaining the evidence must be exhausted;  
or
2. A determination has been made that all other legal means of obtaining the evidence are not reasonably likely to succeed in obtaining the evidence.

## **C. Records of Interviews**

At a minimum, Special Agents should make contemporaneous notes of all interviews and permanently retain those notes in the investigative file. Sworn statements from witnesses and suspects which provide direct evidence of the elements of the violation are of particular value in commercial trade fraud investigations where criminal and civil court proceeding may not occur until years after the interviews were conducted. Since lying in a sworn statement is a felony, placing a witness under oath may help elicit truthful answers. Special Agents may tape interviews with the consent of all parties present. Original interview tapes should be retained as evidence. Taped interviews of evidentiary value should be transcribed in their entirety. Detailed Reports of Investigation (ROIs) should be completed to document interview results. Interview reports may be invaluable in refreshing witnesses' recollections in preparation for testimony at trial.

## **9.2 Examination of Records and Documents**

Upon reasonable notice, a Customs Officer may examine any record, statement, declaration, or other document which may be described with reasonable specificity and which is relevant to a commercial trade fraud investigation. *See* 19 U.S.C. § 1509(a). This examination authority, in most instances, will be the basis for an ICE OI Special Agent's request for an importer, customs broker, or other party to voluntarily allow the Special Agent to review and copy documents. "Reasonable notice" is determined by the facts and circumstances that exist at the time a request to examine documents is made. "Records" also include automated storage devices (e.g., servers, removable hard drives, CD-ROMs) and computer programs necessary to retrieve information in a



usable form. *See* 19 C.F.R. § 163.1(a). Examinations under this section are not limited or restricted only to “import” records under 19 U.S.C. § 1508 and 19 C.F.R. § 163.1(a). The statute allows for the examination of any record or document that is relevant to an investigation for compliance with the customs laws of the United States. Requests to examine documents may be made by any Customs Officer, orally, electronically, or in writing. There is no requirement that a specified period of time must be given for the production of the requested records. The examination should be conducted in a mutually convenient place during normal business hours. Failure to give reasonable notice or to describe documents with reasonable specificity may be a valid reason for refusal to permit examination at the requested time. The validity of a refusal is determined by the totality of the circumstances involved. A Special Agent can take the following actions if a party refuses to honor a valid request to examine records:

1. Certain records and information are required by law or regulation for the entry of merchandise. *See* 19 U.S.C. § 1509(a)(1)(A). CBP has published an extensive list of these records and information, known as the “(a)(1)(A) List.” Records and information on the list include the information contained in the Customs Entry Summary (CBP Form 7501), invoices, entry declarations, and powers of attorney. If a party who is required to maintain (a)(1)(A) records willfully fails to maintain, store, or retrieve those records, that party may be liable to penalties not to exceed \$100,000. If a party who is required to maintain (a)(1)(A) records negligently fails to maintain, store, or retrieve those records, that party may be liable to penalties not to exceed \$10,000. *See* 19 U.S.C. § 1509(g). It should be noted that these penalty provisions apply only to records identified on the (a)(1)(A) List.
2. There are no penalties provided for refusal to honor a request to produce records not identified on the (a)(1)(A) List. In such circumstances, Special Agents must use a search warrant, a Customs Summons, a court order, or, as a last resort, a grand jury subpoena to obtain such records.

### **9.3 Search Warrants**

The use of search warrants to obtain documentary evidence minimizes the opportunity for violators to purge records and/or destroy documents. Customs Summonses and grand jury subpoenas do not generally demand the immediate production of records and may give violators time to decide which documents they will or will not produce and may also give them time to conceal or destroy evidence. The use of search warrants, by contrast, allows Special Agents to seize and examine all records and documents that constitute evidence of the violation. Special Agents must remember not to seize any type of documents not identified in the search warrant (i.e., if the warrant calls for seizure of all import documents relating to importations of cotton shirts from 2003 to 2006, Special Agents should not seize documents related to importations outside this time period.)

In addition to seizing paper documentation, Special Agents should review and seize computer records and other electronic documentation. Most courts today will require that such data be downloaded on site, rather than authorize seizure of the equipment used to store such data.

While preparing search warrants, Special Agents should consult with C3 for additional information to be included in the search warrant to authorize the seizure of computer evidence.

Search warrant affidavits must include sufficient probable cause to justify the issuance of the warrant. The case agent must be prepared to respond to all court actions to challenge the search warrant and to suppress evidence seized pursuant to the warrant.

**Special Agents should also anticipate the possibility of locating privileged (i.e., attorney-client) documentation while executing warrants. Procedures for identifying and securing likely privileged documents should be discussed with, and approved by, the AUSA. A potential solution would be to designate an ICE Special Agent not associated with the investigation to secure any documents containing attorney letterhead to be reviewed by the designated AUSA to determine if the document can become evidence. Failure to protect privileged information can negatively affect criminal and civil proceedings.**

Two types of search warrants are available for use in commercial trade fraud investigations:

**A. Criminal Search Warrants (Rule 41)**

Criminal search warrants are issued under the provisions of Rule 41 of the Federal Rules of Criminal Procedure. Criminal search warrants authorize the search for and seizure of evidence and fruits of criminal violations. In order to obtain a Rule 41 criminal search warrant, the U.S. Government must establish probable cause that a crime has been committed and that evidence and/or fruits of that crime are located at the place to be searched at the time the search is to be conducted.

**B. Customs Search Warrants (19 U.S.C. § 1595)**

Customs search warrants are issued under the provisions of 19 U.S.C. § 1595 and authorize the search for and seizure of:

1. Any merchandise on which duties have not been paid or which was otherwise unlawfully imported;
2. Any property which is subject to forfeiture under any provision of law enforced or administered by Customs Officers; and
3. Any document, container, wrapping, or article that is evidence of a fraudulent violation of 19 U.S.C. § 1592 or any other law enforced or administered by Customs Officers.

In order to obtain a section 1595 warrant, the U.S. Government must establish probable cause that one or more of the points above exist and that the property or evidence to be seized is located at the place to be searched. In the case of a search warrant for evidence of a violation of 19 U.S.C. § 1592, there must be probable cause that the alleged violation is a result of fraud (i.e., a

knowing and willful act or omission) as opposed to negligence or gross negligence. **It is the policy of OI that, when probable cause can be developed, either a Rule 41 or a section 1595 search warrant must be used to gather evidence.** Rule 41 warrants should be used in all instances in which probable cause of a criminal violation is established. Section 1595 warrants should be used in situations where the Special Agent cannot obtain a Rule 41 search warrant, but there is probable cause of a civil fraud violation of section 1592 or of any other law enforced or administered by Customs Officers. Evidence obtained via a Rule 41 or a section 1595 search warrant may be used in both criminal and civil proceedings.

#### **9.4 Customs Summonses**

The provisions of 19 U.S.C. § 1508 require certain persons to maintain certain records of their import transactions. Customs Summonses are administrative processes by which Special Agents can compel persons to produce documents and give testimony in connection with investigations. Customs Summonses are authorized by 19 U.S.C. § 1509.

##### **A. Persons Required to Keep Records**

Any owner, importer, consignee, importer of record, entry filer, or other party

1. who imports merchandise into the United States, files a drawback claim, or transports or stores merchandise carried or held under bond; or
2. who knowingly causes the importation, transportation, or storage of merchandise carried or held under bond into or from the United States; or
3. who is an agent of any party described above, including a customs broker;  
or
4. whose activities require the filing of a declaration or entry

must make, keep, and render for examination any records which pertain to any such activity and are kept in the ordinary course of business. *See* 19 U.S.C. § 1508.

Also, any person who completes and signs a NAFTA Certificate of Origin for preferential treatment must make, keep, and render for examination all records related to the origin of the goods, including the Certificate of Origin and associated records. *See* 19 U.S.C. § 1508.

##### **B. Records That Must be Kept**

Records that must be kept include documents normally kept in the ordinary course of business and that pertain to the activities listed in 19 C.F.R. § 163.1. Such

records include statements, declarations, books, papers, correspondence, accounts, technical data, automated record storage devices (e.g., removable hard drives, tapes, CD-ROMs), computer programs necessary to retrieve information in a usable form, and other documents.

Additionally, NAFTA “records” include other documents related to the origin of goods for which NAFTA preference is claimed, including the NAFTA Certificate of Origin and records associated with:

1. the purchase of, cost of, value of, and payment for the goods;
2. the purchase of, cost of, value of, and payment for all material, including indirect materials, used in the production of the goods; and,
3. the production of the goods.

Records required by 19 U.S.C. § 1508 must be retained for 5 years from the date of entry. Records related to drawback claims must be retained for 3 years from the date of the claim. This provision does not preclude Customs Officers from seeking older records that are known to exist.

### **C. Persons Who May Be Summoned**

Special Agents may summon, upon reasonable notice:

1. the person who imported, or knowingly caused to be imported, merchandise into the United States; or who exported, or knowingly caused to be exported, merchandise to a NAFTA country; or who transported or stored such merchandise, or knowingly caused such transportation or storage; or who filed a declaration, entry, or drawback claim with CBP;
2. any officer, employee, or agent of any such person described above;
3. any person having possession, custody, or care of records relating to the transaction; or,
4. any other person deemed proper.

19 U.S.C. § 1509(a)(2). A person who “knowingly caused” merchandise to be imported includes a person ordering merchandise from an importer if that person controlled the terms and conditions of the importation or furnished technical data, molds, equipment, other production assistance, material, components, or parts with the knowledge that they would be used in the manufacture or production of the imported merchandise. Customs Summonses may be used to compel any person to give testimony under oath. A person summoned to give testimony is

entitled to be represented by counsel. Testimony taken under oath will be transcribed. The person giving testimony may review the transcript to correct clerical and transcription errors; however, the person will not be permitted to strike portions of the transcript or make material changes in its content unless all parties agree to those changes. Customs Officers shall provide a copy of the transcript to the person giving testimony; however, Customs Officers may withhold release of the transcript to the person if there is good cause to do so. *See* 5 U.S.C. § 555(c) and 19 C.F.R. § 163.7(d).

#### **D. Records Which May Be Summoned**

Summonses may require the production of any record required to be kept under the provisions of 19 U.S.C. § 1508, or where there is probable cause to believe that they pertain to the importation of prohibited merchandise. The summons must describe the records to be produced with reasonable specificity.

In commercial trade fraud investigations which do not involve the importation of prohibited merchandise, Customs Summonses may be used to compel the production of records required to be kept under 19 U.S.C. § 1508. Customs Officers may use a summons to compel any person who has possession of those records to produce them.

In commercial trade fraud investigations which involve the importation of prohibited merchandise, Customs Summonses compel the production of records required to be kept under 19 U.S.C. § 1508 and any other records for which there is probable cause to believe that they pertain to prohibited merchandise.

#### **E. Third-Party Recordkeepers and Summonses**

Special procedures are required for the issuance of a Customs Summons to a “third-party recordkeeper.” A third-party recordkeeper is defined as any customs broker, attorney, or accountant. *See* 19 U.S.C. § 1509(d)(1)(c). A customs broker is not considered to be a third-party recordkeeper if the broker was the importer of record for the transactions under investigation. If a summons is issued to a third-party recordkeeper for the production of records or the giving of testimony related to any portion of records made or kept of transactions described in 19 U.S.C. § 1508, the office issuing the summons must give notice of the issuance of the summons to that person otherwise identified in the summons but who is not the recordkeeper. The notice must be made either in person or via certified or registered mail, and must be given at least 10 business days before the day fixed in the summons for the production of records or the giving of testimony. The party receiving the notice has the right to stay the compliance by providing the third-party recordkeeper written direction not to comply. The notice informs the person that, to stay compliance, he or she must send a copy of the summons and the direction not to comply by registered or certified mail to both the person

summoned and to the issuing Customs Officer not later than the day before the day set for compliance. Customs Officers may not examine the summoned records or take the summoned testimony prior to the expiration of the period of time allowed for the third party to raise objections to the summons. If the third party raises such an objection, Customs Officers must move for judicial enforcement of the summons in federal district court. In instances in which an ICE Special Agent receives notice of such an objection, referral should be made to the local ICE OCC for the filing of judicial enforcement proceedings.

The third-party recordkeeper provisions do not apply if the customs broker, attorney, or accountant is liable for duties, fees, or taxes in the transactions in question (i.e., if the customs broker, attorney, or accountant is the importer of record) or if the summons is issued to determine if records required under 19 U.S.C. § 1508 have been made or kept. The third-party recordkeeper provisions also do not apply if, upon a petition by the Customs Officer issuing the summons, a U.S. district court determines that reasonable cause exists to believe that giving notice to the third party may lead to an attempt to conceal, destroy, or alter relevant documents; prevent the communication of information from other persons through intimidation, bribery, or collusion; or flee to avoid prosecution, testifying, or the production of records. Special Agents who have reasonable cause to believe that these circumstances exist should contact the local ICE OCC.

#### **F. Who May Issue Summonses**

SACs have been delegated the authority to issue the Customs Summons. This authority may not be redelegated. *See* OI Delegation Order 07-005 entitled, “Authority to Use the 19 U.S.C. § 1509 Summons Authority Within the Office of Investigations,” dated July 16, 2007. Summonses may require the appearance of the summoned person and production of the summoned records before any Customs Officer. Normally, appearance and production will be before the case agent.

#### **G. Service of Summonses**

Any Customs Officer may serve a Customs Summons. If the summons is directed to an individual, service must be made by personal delivery of the original summons (Customs Form (CF) 3115 or as updated) to that person. If the summons is directed to a corporation, partnership, or association, service must be made by personal delivery of the original summons to an officer, managing or general agent, or any other agent authorized by the corporation, partnership, or association to receive the service of process; or by certified or registered mail. State incorporation documents usually give the name and address of the corporation’s registered agent for this purpose.

Foreign corporations which serve as importers of record for customs purposes, such as Canadian companies who are the importers of record for goods they ship to the United States, must have a resident agent in the state where the port of entry is located who is authorized to accept service of process. *See* 19 C.F.R. § 141.18. The foreign corporation's power of attorney for its U.S. customs broker will frequently contain a clause making the broker the registered agent for this purpose. In such circumstances, service of a summons directed to the foreign corporation may be made on the customs broker. The third-party recordkeeper provisions do not apply in this instance since the summons is for the production of the importer of record's files, not files maintained by the broker as a third-party recordkeeper.

A summons may not require the summoned person to appear at a place more than 100 miles from where that person was served with the summons. For example, Customs Officers cannot serve a summons on a person in New York that requires that person to appear in Los Angeles. *See* 19 U.S.C. § 1509(a)(2), 19 C.F.R. § 163.7(b)(ii).

Proof of service will be recorded by the serving Customs Officer by completion of block A, "Certificate of Service of Summons," on the reverse of the file copy of the summons (CF 3115A or as updated). The party accepting service of the summons should complete block C, "Acknowledgment of Receipt," of the CF 3115A or as updated. If third-party recordkeeper procedures apply to the summons, notice must be given by providing a copy of the summons and the notice (CF 3115-B or as updated) to the third party. The serving Customs Officer must record the giving of this notice by completing block B, "Certificate of Service of Notice," of the reverse of the file copy of the summons (CF 3115A or as updated).

#### **H. Failure to Comply with a Summons**

**Whenever a person does not comply with a summons, Special Agents may ask the appropriate U.S. Attorney's office, assisted by the local ICE OCC, to seek an order requiring compliance from the federal district court for the district in which the person resides or does business. If the third-party recordkeeper provisions applied to the summons, the third party may intervene in any proceeding before the court to judicially enforce the summons. If a summoned party fails to comply with a court order enforcing the summons, the court may find that party in contempt. In such instances, so long as the party remains in contempt, CBP, with the approval of the Secretary of Homeland Security, may prohibit the importation or withhold delivery of merchandise by that party, directly or indirectly, or for that party's account. If the party remains in contempt for more than 1 year, CBP may sell any such property at auction. *See* 19 U.S.C. § 1510. Special Agents**

**should refer any failure to comply with a summons to the local ICE OCC for action.**

A person who willfully fails to maintain, store, or retrieve (a)(1)(A) List records may be subject to a penalty not to exceed \$100,000 or an amount equal to 75% of the appraised value of the imported merchandise, whichever is less. *See* 19 U.S.C. § 1509(g)(2)(A). A person who negligently fails to maintain, store, or retrieve (a)(1)(A) List records may be subject to a penalty not to exceed \$10,000 or an amount equal to 40% of the appraised value of the imported merchandise, whichever is less. *See* 19 U.S.C. § 1509(g)(2)(B). If a summons requires the production of (a)(1)(A) List records, failure to comply with the summons may subject the summoned party to these penalties. Special Agents should coordinate with CBP FP&F if the issuance of penalties for failure to comply with a summons is contemplated. Such penalties would be issued through the CBP FP&F and are in addition to any proceedings to judicially enforce compliance with the summons. These penalties may not be assessed if penalties are also imposed under the provisions of 19 U.S.C. § 1592 for a material omission of the demanded information, or if disciplinary action is taken against a customs broker under the provisions of 19 U.S.C. § 1641.

## **9.5 Grand Jury Subpoenas and Investigative Grand Juries**

Grand jury subpoenas and investigative grand juries (those actively calling witnesses and issuing subpoenas to investigate criminal conduct) can be powerful tools for use in commercial trade fraud investigations. However, because of grand jury secrecy rules, testimonial, documentary, and physical evidence and other materials obtained by grand juries may, as a general rule, be used only in criminal prosecutions. Use of the grand jury as a principal method of conducting a commercial trade fraud investigation may therefore severely limit the ability of ICE and CBP to pursue civil violations. It is the policy of ICE that other investigative methods, such as interviews, search warrants, and Customs Summonses, be exhausted, or a determination be made that such other means are not reasonably likely to succeed, prior to use of the grand jury.

## **9.6 Undercover Investigations and Participating Informants**

Undercover operations, both short and long term, and the use of participating/cooperating informants and defendants can be productive techniques for investigating ongoing violations, such as the importation and sale of restricted or prohibited merchandise. Special Agents should also consider the use of these techniques in cases which involve widespread criminal activity, including cases involving multiple violators in a given location or industry.

The use of certified Undercover Operations is the only appropriate method of entering contraband, i.e., counterfeit cigarettes or IPR material, into the commerce of the United States. If an OI investigation needs to allow the release of a shipment of contraband merchandise, the OI Commercial Fraud Investigations and IPR Center Unit at Headquarters should be contacted for guidance.



## **9.7 Controlled Deliveries**

Controlled deliveries of imported merchandise can be used in commercial trade fraud investigations, particularly in cases involving the discovery of restricted or prohibited merchandise by CBP inspectors during cargo examinations. Controlled delivery of merchandise, supported by additional investigation, may provide sufficient probable cause for the issuance of a search warrant. Execution of that warrant may result not only in the recovery of the restricted/prohibited merchandise, but also in apprehending violators in the act of handling that merchandise. This may provide compelling evidence of the violators' knowledge and intent.

## **9.8 Trash "Runs"**

Trash "runs" or "covers" (i.e., searching the violator's discarded trash for evidence) can be a good way of obtaining probable cause for a search warrant and evidence for use at trial. Violators frequently discard evidence related to their import transactions, including financial records and correspondence with foreign sellers and domestic purchasers of imported goods. Violators have also been known to discard legitimate country of origin labels removed from imported merchandise in violation of the customs statutes. Those labels, recovered from the trash, have served not only as the basis for a search warrant but also contributed to the criminal conviction of the violator. Case law on trash runs is evolving. Special Agents should consult the local ICE OCC for updates.

## **9.9 Surveillance**

Surveillance can be useful as a means of gaining general background and intelligence information on the business habits and relationships of suspects. Surveillance should be used whenever it is likely to result in obtaining evidence to prove the elements of the offense being investigated. While surveillance may be especially useful in the investigations of the importation and sale of counterfeit trademark merchandise, its utility may be limited in cases involving only material false statements or omissions in customs entry documents.

## **9.10 Electronic Surveillance**

Electronic surveillance techniques, such as electronic intercepts of wire and oral communications and the use of tracking devices, can be very useful in commercial trade fraud cases. Consensual monitoring and the recording of telephone conversations and personal meetings between confidential informants or undercover Special Agents and alleged violators can result in obtaining direct evidence, in the violator's own words, of the violator's knowledge and intent in committing offenses. While ICE criminal commercial trade fraud violations are not predicate offenses for nonconsensual intercepts (i.e., wire taps), other criminal fraud statutes, including the counterfeit trademark statute (18 U.S.C. § 2320), can serve as the basis for such court-ordered intercepts. Additionally, the money laundering statutes (18 U.S.C. §§ 1956-1957) are also predicate offenses for nonconsensual intercepts; thus, money laundering violations based on customs commercial trade fraud SUAs, including 18 U.S.C. §§ 542, 545, can serve as the basis for court orders for such intercepts.

## **9.11 Forensic Analysis**

Forensic analysis techniques are applicable to both criminal and civil cases. Forensic analysis of questioned document and handwriting analysis may establish who prepared false or forged documents. Laboratory analysis of suspect imported articles can determine their true nature, content, or country of origin.

# **Chapter 10. COORDINATING COMMERCIAL TRADE FRAUD INVESTIGATIONS**

## **10.1 Referrals for Investigation**

Referrals of potential commercial violations may be received from many sources including ICE employees, CBP officers, import specialists, or regulatory auditors. Special Agents should develop and maintain contacts with CBP officers involved in the processing of imported merchandise and entry documentation to encourage the early identification and prompt reporting of suspected commercial violations to ICE. The manner and routing of referrals for investigation will vary based on circumstances and local procedures. Referrals may be received via telephone, email, or in personal meetings with referring officers.

In many ports, a referral will be routed to OI through the multidisciplinary Commercial Enforcement Analysis and Response (CEAR) meeting. The basic role of the CEAR is to make an early determination as to the nature, extent, and impact of instances of noncompliance, select the response best suited to remedy the problem, and follow up on that action to ensure that the noncompliance problem is solved. The CEAR process ensures that significant discrepancies and possible violations are treated uniformly on a national and account-wide basis. CEARs are multidisciplinary groups selected from respective Ports of Entry and OI personnel who meet not less often than on a monthly basis to determine courses of action on Impact Level 1 and 2 discrepancies and possible violations. The decision-making members of CEAR are the CBP Assistant Port Director, Trade Operations, and the ICE OI Commercial Fraud Group Supervisor. Advisory members of the CEAR include: CBP Account Managers/Teams; Regulatory Auditors; CBP Assistant Chief Counsels; FP&F Officers; and International Trade Managers. Discovering/referring officers and other ICE or CBP personnel may attend the meetings as needed. The CBP Assistant Port Director, Trade Operations, is the lead officer responsible for oversight of the CEAR. The ICE OI Commercial Fraud Group Supervisor has sole authority for determining acceptance/declination of issues for investigation. (For additional information, Special Agents should read the "Commercial Enforcement Analysis and Response Process Handbook," issued by CBP and ICE, dated February 3, 2004).

If a referral is accepted, the ICE OI case agent should keep the CBP referring officer advised of major developments in the case and of the results of the investigation. If a referral is not accepted for investigation, the reason for the declination should be fully explained to the referring officer.

Referrals should be evaluated upon receipt to determine if they meet OI criteria for the opening of either a preliminary or formal investigation. The answers to the following questions will assist Special Agents and supervisors in determining whether to initiate a preliminary or formal investigation based on the referral:

- Does the referral establish the fact of a violation and its materiality?
- Are the potentially responsible parties identified and are there indications of those parties' culpability?
- Is a criminal violation evident?
- What is the scope of the alleged violation?
- How many entries are involved?
- What is the loss of revenue?
- Does it involve one of the primary focus industries or trade enforcement priorities?
- Does the violation meet the CEAR class criteria for commercial trade fraud investigations?

Interviews of the CBP referring officer and other CBP Officers, such as the import specialist responsible for the involved commodities, may be required to fully evaluate the referral and determine the appropriate action. Referrals should also be evaluated upon receipt to determine if any immediate action by ICE OI is required. For example, a cargo examination may uncover violations that lend themselves to a controlled delivery of the imported merchandise to the importer's premises. Prompt review and action on such referrals may result in obtaining significant evidence to support criminal and civil action.

## **10.2 CBP Action on Declined Referrals**

In instances where ICE OI declines to open an investigation based on a referral generated by a CBP inspector, import specialist, or other CBP employee, the CBP Port Director may assign an import specialist to make further inquiries and develop additional information to serve as the basis for a referral to FP&F for the issuance of a civil penalty. The development and administrative processing of the case includes preparing and opening a Commercial Operations Memorandum of Information Received (COMOIR) and preparing and/or reviewing and/or compiling all relevant documents, including the involved entry summaries, reports of importer premises and customs brokers visits, the Appraisal Worksheet, and the referral to FP&F.

If the responsible import specialist uncovers any evidence indicating that the violation was knowingly and willfully committed, or if the nature and scope of the violation, including the loss of revenue, are found to be significantly different from those detailed in the original referral, the case will be referred to the CEAR to reevaluate the referral's potential for official ICE investigation.

## **10.3 Processing of Entries**

When any potential commercial violation is uncovered, CBP should determine how it will treat both past and future entry transactions involved in the violation. Special Agents conducting

commercial trade fraud investigations must coordinate with CBP at the port level to provide all information necessary to the CBP Office of Field Operations to allow for appropriate treatment of the involved entry transactions and to ensure that appropriate action on such transactions are taken. In situations when delay in coordination with CBP occurs, CBP action may inadvertently compromise the investigation. Special Agents should coordinate with CBP at the earliest opportunity. Failure by either CBP or ICE to take appropriate action once a violation has been discovered may arguably be construed as an acceptance of the conduct and may be held to have been a contributing factor to the violation in later criminal and civil proceedings. This can have a significant, negative impact on the U.S. Attorney's decisions to prosecute commercial trade fraud cases, as well as lead to significant reductions in the amount of civil penalties assessed against the violator. *However, immediate and remedial action may alert violators prematurely and/or preclude the use of valuable covert investigative techniques.*

Creation of ACS cargo selectivity criteria should immediately be requested by contacting the FAS to ensure the detention and seizure of future shipments of restricted or prohibited merchandise. This action is particularly important in cases involving articles that pose a threat to public health and safety. Under certain conditions, CBP may also administratively order the redelivery of imported merchandise to CBP custody within 30 days of its original release.

All original entry documents involved in the violation should be retrieved and maintained as evidence. Requests for the retrieval of entry documents are made to the CBP Port Director via ACS. In some instances, the original entry documents will be retrieved from CBP archives. In instances in which the entry/entry summaries were "paperless," the Port Director will request the original entry documents from the customs broker who handled the transactions. ACS entry summary selectivity criteria should be requested by contacting the FAS to ensure that future entry summaries are not automatically processed and liquidated, but are routed to the appropriate import specialist for review. The responsible import specialist should also be asked to designate involved entry summaries for commodity team review. Liquidation extensions may be appropriate in cases in which the investigation has not yet resulted in CBP obtaining the information necessary to liquidate the entry at the proper classification, value, and duty rate, or for other investigative reasons. Liquidation may be withheld for up to 3 years after the original scheduled liquidation date. In other instances where CBP has the information necessary to liquidate the entry summaries at the proper classification, value, and duty rate, the ICE Special Agent may ask the import specialist to liquidate the entry summaries. However, the importer of record will then have the right to file a protest of the liquidated classification, value, and duty assessment, and to litigate any denial of that protest in the CIT. Coordination of civil litigation with investigative, prosecutive, and civil penalty actions is necessary in such cases.

Entry summaries may be reliquidated within 90 days of the original liquidation date to correct errors and mistakes that are not adverse to the importer. *See* 19 U.S.C. § 1501.

In cases accepted by the U.S. Attorney's office for criminal prosecution, all contemplated actions affecting the involved entries should be closely coordinated with the AUSA and CBP to ensure that liquidation and other action will not adversely impact the criminal prosecution of the case. However, Special Agents must balance prosecutorial requests that such CBP administrative

actions be held in abeyance with their responsibility as Customs Officers to ensure that merchandise is imported in full compliance with all applicable laws and that all applicable duties and fees are collected. Special Agents are encouraged to enlist the assistance of the local ICE OCC in instances in which AUSAs are reluctant to allow administrative processing of the involved entry summaries to proceed.

## **Chapter 11. SEIZURE AND DETENTION OF MERCHANDISE**

### **11.1 Seizures for Violation of 19 U.S.C. § 1595a**

The provisions of 19 U.S.C. § 1595a provide for the seizure and forfeiture of merchandise imported or attempted to be imported contrary to law. *See also* 18 U.S.C. § 545 (a criminal statute with a civil forfeiture provision not dependent on a criminal conviction.) If merchandise is subject to quotas requiring a visa or permit and the permit is not presented at the time of entry, the merchandise will be detained. If a counterfeit permit is presented, the merchandise may be seized and forfeited. If merchandise is imported contrary to a law which governs the classification or value of merchandise or contrary to laws involving false statements and material omissions and there are no issues as to the admissibility of that merchandise, it will not be seized under 1595a. Such merchandise may, in limited circumstances, be subject to seizure under the provisions of 19 U.S.C. § 1592. When merchandise intentionally bears a false country of origin marking, seizure can be made under 19 U.S.C. § 1595a (c)(2)(E). Any conveyance or other item used to aid in the importation of merchandise contrary to law may also be seized.

### **11.2 Seizures for Violation of 19 U.S.C. § 1592**

The primary Customs civil commercial trade fraud statute, 19 U.S.C. § 1592, provides that merchandise imported as a result of a violation of the statute (i.e., merchandise imported as a result of a material false statement, omission, or act, or through negligence, gross negligence, or fraud) may be seized in limited circumstances (e.g., the violator is insolvent or beyond the jurisdiction of the U.S. or to prevent the introduction of prohibited or restricted goods). However, as a general rule, seizures for violation of section 1592 will not be made since the goods are subject to forfeiture only after the violator fails to satisfy a judgment under 19 U.S.C. § 1592. In circumstances in which a seizure is contemplated, particularly of prohibited or restricted merchandise, consideration should be given to seizing the merchandise under section 1595a, not under section 1592. In such circumstances, the mere restriction or prohibition will make the merchandise subject to seizure under section 1595a, while use of section 1592 would require establishing that the importation resulted from a culpable act or omission in violation of section 1592.

### **11.3 Seizures Pursuant to Search Warrants; Single- and Dual-Status Evidence**

Criminal and civil search warrants may be used in commercial trade fraud investigations to search for and seize documentary and physical evidence of violations, as well as merchandise,

including currency, which may be subject to forfeiture by the U.S. Government, including under the provisions of 19 U.S.C. § 1595 and 18 U.S.C. § 981.

Documentary, physical, and other evidence seized, purchased, or otherwise acquired by Special Agents that is not subject to forfeiture is known as “single-status evidence,” i.e., such articles have only evidentiary status. Upon completion of all investigative, prosecutorial, and penalty action, those articles will be returned to their rightful owner.

Documentary, physical, and other evidence seized, purchased, or otherwise acquired by Special Agents that is subject to forfeiture is known as “dual-status evidence,” i.e., such articles have dual status as both evidence and as property in which the U.S. Government has forfeiture interest. Either during or at the conclusion of all investigative, prosecutive, and penalty action, the U.S. Government will institute proceedings to forfeit those articles.

The retention and disposition of both single- and dual-status evidence is governed by Customs Directive 3290-018, “Non-Drug Evidence Processing,” dated January 15, 1998, or as updated. Special Agents will ensure that all single- and dual-status evidence obtained in the course of commercial trade fraud investigations is processed, retained, and disposed of in accordance with this directive.

The Civil Asset Forfeiture Reform Act (CAFRA) of 2000, Pub. L. 106-185 contains comprehensive amendments to federal forfeiture law. CAFRA has provisions that exempt Title 19 U.S.C.-based seizures from the application of most of these reforms. CAFRA applies to all civil forfeitures *except* those under Title 19, the Neutrality Act; Title 26, Trading with the Enemy Act; and the Federal Food, Drug, and Cosmetic Act.

#### **11.4 Detention of Imported Merchandise**

In many instances, CBP cannot make an immediate determination as to whether the merchandise is admissible at the time merchandise is presented for examination and release. This is particularly true in instances where there is a question as to the true nature of the imported articles (such as chemicals which may be hazardous wastes), or where the merchandise may be subject to quotas but lacks the necessary visa documents. In some instances, an ICE Special Agent may ask the examining CBP inspector to place an “investigative hold” on merchandise to allow the Special Agent to examine imported goods or to prepare for a controlled delivery. Under the provisions of 19 U.S.C. § 1499, within 5 working days following the date on which merchandise is presented for examination and release, CBP must decide if it will release or detain the merchandise. Merchandise not released within this 5-day period will be considered detained.

When merchandise is detained, unless it is held as evidence of a criminal violation, CBP must, within 5 working days of the detention, issue a notice to the importer or other interested party, such as the customs broker, that the merchandise has been detained. The notice must state the specific reason for the detention, the anticipated length of the detention, the nature of tests or

inquiries to be conducted, and the nature of any information which, if supplied to CBP, may accelerate the disposition of the detention.

If CBP fails to make a final determination with respect to admissibility within 30 days of the date on which the merchandise was presented for examination and release, that failure will be treated as a decision to exclude the merchandise from entry into the United States. The importer may file a protest of that decision. If CBP denies that protest, the importer may file suit in the CIT.

These procedures do not apply where the determination as to admissibility rests with another federal agency or to trademark/copyright detentions covered by 19 C.F.R. § 133.

## **Chapter 12. REPORTING THE INVESTIGATION**

### **12.1 Criminal Referrals: Criminal Syllabus Report**

The TECS-generated criminal syllabus report is highly recommended for referring commercial trade fraud investigations to local U.S. Attorneys for the initiation of criminal prosecution. Criminal syllabus reports for commercial trade fraud investigations should provide an overview of the alleged violation, the full identity of the alleged violators, citation of the criminal statutes believed to have been violated, a discussion of the statutory and/or regulatory obligation or prohibition involved, an explanation of the ICE and CBP procedures involved, details of the testimonial and documentary evidence available to prove the elements of the violation, and the identity of the witnesses available for grand jury and trial testimony.

Each ICE OI SAC and Resident Agent in Charge office should, in consultation with its local U.S. Attorney's office, determine the style, format, and procedures to be used for its criminal syllabus reports. Special Agents are encouraged to supplement the criminal syllabus with any other materials which may assist the U.S. Attorney in understanding and evaluating the case, such as time lines, link analysis diagrams, charts, graphs, etc. Additionally, the Special Agent should make a formal oral presentation of the case to the AUSA to fully explain the ICE violations involved and the evidence that establishes that criminal violations have occurred. Copies of any criminal syllabus reports forwarded to the U.S. Attorney should also be provided to the local ICE OCC.

### **12.2 Civil Referrals: Penalty Report of Investigation**

Referral of fraud investigations to the CBP FP&F Officer for the initiation of civil penalty proceedings will be made via a TECS II Penalty ROI. The Penalty ROI is designed to provide, in a standardized format, the information needed by FP&F to process a civil penalty case. It must be an objective, impartial report of the facts and evidence developed in the investigation. It should include all pertinent information sufficient to allow FP&F to establish the facts of the violation, its materiality, and the alleged violator's responsibility and degree of culpability. The Penalty ROI should contain no opinions or speculation and should draw no conclusion as to the

responsibility or culpability of the alleged violator. Specific headings to be used in the Penalty ROI are:

**A. Synopsis**

The face page of the Penalty ROI should include a one-to-two paragraph synopsis of the case. This synopsis should not exceed 15 lines in length so as to fit on the first page of the TECS-generated ROI. The synopsis should include such details as the identity of the alleged violators, a description of the alleged violations, and the period of time in which the alleged violations occurred. The synopsis should also state any matters of critical importance requiring immediate attention by CBP FP&F, such as any statute of limitations concerns.

**B. Details of Investigation**

This general heading should appear at the top of page two of the Penalty ROI. Subheadings to this heading are:

**1. Statute of Limitations**

**a. Date of Occurrence**

State the first day on which the alleged violation occurred. This usually will be the date of the first entry in which the violation occurred. If multiple entries are involved, state the dates of the first and last involved entries.

**b. Date of Discovery**

State the date on which ICE or CBP discovered the alleged violation and details of that discovery. This may include the date and circumstances on which a Customs Officer received information alleging that the violation had occurred, such as the receipt of an allegation from a confidential informant. Pertinent documents, such as a COMOIR prepared by an import specialist to document the discovery of a violation, should be referenced and appended as exhibits to the ROI.

**c. Waiver of the Statute of Limitations**

If a waiver of the statute of limitations has been requested and/or obtained, details must be provided and copies of all relevant documents must be amended as exhibits to the ROI. If there are any statute of limitations problems, such as the statute running within a brief period, and the alleged violators have not provided a waiver, details of those problems should be



provided. If no waiver has been obtained and no SOL problems exist, it should be stated in the ROI.

## **2. Customs Entries Involved**

List the involved entry number(s) and entry dates(s) chronologically. If entries from several ports are involved, group them according to port. If the case involves a large number of entries, give a general statement to identify the involved entries (for example, "A total of 126 entry summaries filed in the ports of Los Angeles, Miami, and New York between March 1, 2003, and May 1, 2003, which are fully identified in Exhibit 1"), create a separate list of the involved entries, and append that list as an exhibit to the ROI. Also state where the original CBP entries are located (for example, "The original entries are being retained in the office of the SAC New York for use as evidence in this case.").

The original entry documentation should be provided as a collective exhibit to the CBP FP&F Office with the referral. If the case is to be presented to the CIT, all original entry documentation is required.

## **3. Description and Value of Seized Merchandise**

If any merchandise seized in connection with the violation is subject to forfeiture, provide details of the seizure (including the date and location of the seizure and the seizure number), a description of the merchandise, its appraised value, and its status (for example, retained by FP&F, forfeited, etc.). Append copies of all pertinent documents, including the TECS-generated Incident Report, as exhibits to the ROI. State if no seizures were made (for example, "No merchandise was seized in connection with this investigation.").

## **4. Actual Loss of Revenue**

State the actual Loss of Revenue (LOR) occurring on entries for which liquidation is final and LOR not collected on liquidation. Separately identify the LOR attributable to duties, processing fees, and any other losses and show a cumulative total. These figures should be displayed in a tabular format.

## **5. Potential Loss of Revenue**

State the potential LOR occurring on entries for which liquidation is not final or entries liquidated with an increase to collect the LOR. Separately identify the LOR attributable to duties, fees (such as merchandise

processing fees), and any other losses. Show a cumulative total. These figures should be displayed in a tabular format.

**6. Total Loss of Revenue**

Show the total of the actual and potential LOR. Append a copy of the Appraisal Worksheet as an exhibit to the ROI.

**7. Revenue Recovery**

Provide details of any of the LOR that has been recovered by ICE and/or CBP. If the alleged violator tendered any of the LOR to CBP and/or ICE during the course of the investigation, provide details of that tender and attach copies of all relevant documents as exhibits to the ROI. If CBP recovered any of the potential LOR via the liquidation process, provide details of that recovery. State the amount of any of the LOR that has not been recovered, as FP&F may demand payment of that amount as a part of the penalty case.

**8. Domestic Value**

State the domestic value of the involved merchandise as shown on the Appraisal Worksheet, and refer to the appropriate exhibit number.

**9. Facts Developed by the Investigation**

This section of the report sets out the facts and evidence that establish the elements of the violation. This may be in chronological order or any other format that clearly presents the findings of the investigation. If the case involves complex issues of classification, appraisement, or other investigative procedures, those issues and the applicable statutory/regulatory provisions involved should be discussed in separate paragraphs.

Results of interviews conducted in the investigation, including interviews of import specialists, customs brokers, importers, exporters, violators, witnesses, and any other involved parties should also be set out in separate paragraphs. These paragraphs should contain the name and title of the person interviewed, details of the statements, and a description of any documents and records examined. Copies of any sworn statements obtained should be appended as exhibits to the ROI.

Pertinent documents and records should be described with particular emphasis on the portion(s) of those documents and records that have an important bearing on the case. Copies of documents should be appended

as exhibits to the ROI. Other pertinent ICE and/or CBP reports, such as Incident Reports, should be identified by the name and date of the document, the issuing office, and the report number, with copies appended as exhibits to the ROI. All exhibits should be explained in sufficient detail in the ROI so that anyone not receiving a copy of the exhibits, such as an officer who reads the ROI directly from TECS, will adequately understand the case.

If a criminal syllabus was previously prepared, reference the criminal syllabus and append it as an exhibit to the ROI (for example, “The facts and evidence developed in this investigation are set out in the Criminal Syllabus Report, dated June 1, 1995, appended to this report as Exhibit X.”). *Note: If the criminal syllabus contains any grand jury information, the syllabus may not be given to FP&F. In such cases, all non-grand jury information must be extracted from the criminal syllabus and inserted into the body of the Penalty ROI.*

This section of the report should state only facts; the reporting Special Agent’s opinions or speculations should not be included. If explanatory remarks are required to highlight the importance of a piece of testimony or documentary evidence, those notes should be clearly identified as “Special Agent’s Comment” or with another similar identifier.

#### **10. Documentary Evidence**

Provide a list, by exhibit number, of the documents appended as exhibits to the ROI. For example: “Exhibit 1: Copy of Commercial Memorandum of Information Received #: 05M999900001, dated March 1, 2005, prepared by Import Specialist Joan Smith.”

#### **11. Identity of Alleged Violator(s)**

Give the full name and address of the alleged violator, as well as all other pertinent identifying data. For individuals, include the date of birth and other pertinent data. Provide the violator’s importer identification number. For companies, include information on corporate structure, officers, registered agent, etc.

#### **12. Evidence of the Alleged Violation**

Give a brief description of the fact of the violation and its materiality, including the statutory/regulatory obligation or prohibition involved and the alleged acts or omissions that constitute a failure to meet that obligation or which are prohibited.

### **13. Evidence of the Alleged Violator's Culpability**

Summarize the facts and evidence that establish the alleged violator's responsibility for the violation and the degree of culpability involved. Do not characterize the violator's actions as "negligence," "gross negligence," or "fraud"; those determinations are CBP FP&F's responsibility. Instead, objectively and impartially summarize the facts and evidence which tend to establish that the violator's acts or omissions constitute a lack of reasonable care, recklessness, or knowing and willful action, to form the basis of FP&F's culpability determination. Most ICE criminal fraud statutes are specific intent crimes; it is therefore especially important to report all information and evidence concerning a person's motive in committing the illegal acts at issue (e.g., avoiding duty, quotas, etc.).

### **14. Remarks**

Include any additional information that may be necessary to clarify the case, highlight issues or problems, or otherwise assist FP&F. Include any information regarding the violator's prior record of violations. State if the case is also under review by the U.S. Attorney for criminal prosecution and include any information necessary to facilitate the coordination of FP&F's action with the criminal aspects of the case. Again, keep all remarks objective and impartial. Do not include opinion or speculation.

## **Chapter 13. CRIMINAL PROSECUTIVE PROCEDURES**

### **13.1 General**

The U.S. Attorney's office will determine if sufficient facts and evidence exist to establish whether a criminal violation has occurred and, if so, whether criminal prosecution will be pursued. The first question, whether a violation has occurred, will be answered largely based on the facts and evidence developed by the ICE Special Agent in the investigation and set out in the referral. For this reason, it is essential that the referral clearly and completely set out the evidence that establishes each and every element of the criminal violations committed. The Special Agent's oral presentation of the case may greatly enhance the prosecutor's understanding of the case. The second question, whether prosecution will be pursued, will be answered based on the AUSA's evaluation of the case's "prosecutorial merit" and will reflect Department of Justice (DOJ) priorities, local office workload, the impact of the violation, the presence of any mitigating and/or aggravating factors, and potential evidentiary problems. The Special Agent should therefore include information in the criminal syllabus and oral presentation bearing on the significance of the violation and any aggravating factors present.

### **13.2 Action by the United States Attorney's Office**

Once an AUSA has accepted the investigative case for criminal prosecution, he or she may:

- A. Present the case to a grand jury for indictment. Typically, the case agent will be called to testify as the chief government witness before the grand jury. Violators may either plead guilty to charges specified in the indictment or plead not guilty and proceed to trial.
- B. Prepare an information charging the violator. Typically, informations are issued in instances in which the AUSA and the counsel for the violator have discussed the case and entered into a pre-indictment plea agreement in which the violator agrees to plead guilty to one or more charges. Many fraud cases are resolved in this manner. Plea negotiations often lend themselves to a "global settlement" of both the criminal and civil aspects of a case (see Section 18.2, "Global Settlements").
- C. Authorize the Special Agent to swear out a complaint and obtain an arrest warrant for the violator. Complaints must be followed up with an indictment or an information.
- D. Enter into a pre-trial diversion agreement. Pre-trial diversion agreements are similar to plea negotiations; however, as a part of the plea agreement, the violator agrees to meet one or more conditions, similar to probation, during a specified period, usually 1 year. At the end of that period, if the violator has met the conditions, the charges will be dismissed.

### **13.3 Criminal Statute of Limitations**

The criminal SOL that applies to commercial trade fraud investigations is the general SOL contained in 18 U.S.C. § 3282. The statute requires that any indictment or information charging a criminal offense be issued within 5 years of the commission of the violation.

### **13.4 Plea Agreements and Sentencing**

Plea agreements, criminal sentencing, and pre-trial diversion agreements afford excellent opportunities for the government to impose conditions on the violator to ensure that repeat offenses do not occur. In particular, violators may be required to participate in educational and other outreach contacts with ICE/CBP, implement internal controls and compliance programs under CBP supervision, and/or take other corrective action to ensure that their future import transactions are in full compliance with applicable laws and regulations. Plea agreements and probation terms are also excellent vehicles for compelling violators to cooperate with ICE in the identification of other violators. Global settlements of criminal and civil cases should always be considered during plea negotiations (see Section 18.2). Special Agents should consult the local ICE OCC as to possible global settlements and ensure the inclusion of the "best" counts in any

resulting plea. ICE is not authorized, nor is the U.S. Attorney's office, to negotiate a global settlement without CBP consultation and concurrence. CBP coordination on global settlements is mandatory. Special Agents should coordinate with the AUSA and the probation office to include such conditional requirements in the sentence that is to be recommended to the court.

### **13.5 Asset Forfeiture**

Investigations of criminal violations also provide the basis for civil and criminal actions to forfeit assets used to facilitate the violation or that are proceeds of the violation. Guidelines for asset forfeiture are established in the statutes that subject the property to forfeiture. Thus, the circumstances leading to forfeiture will depend on the specific provisions of the statutes involved, the evidence that supports the allegations of wrongdoing, and any defenses that may exist. If the government meets the required burden of proof and the violator fails to assert a legal claim through a meritorious defense, the asset will be forfeited to the government.

## **Chapter 14. CBP CIVIL 19 U.S.C. § 1592 PENALTY PROCEDURES**

### **14.1 General**

Statutes and regulations provide a comprehensive administrative process whereby CBP assesses, mitigates, and collects civil penalties. In some instances, the administrative process will end with the collection of a penalty amount from the violator. In other instances, the administrative process will end in a referral to DOJ for civil litigation to collect the penalty. The civil penalty process can be long and complex. In many cases, years may pass between the initiation of a civil penalty claim and the collection of a penalty amount. Special Agents may be called on to provide significant support to various ICE and/or CBP offices and DOJ in the processing and litigation of civil penalty cases. Prompt and thorough attention to requests for such support can be instrumental in the successful resolution of penalty cases. Special Agents should always remember that the facts developed in their commercial trade fraud investigations might be used years later in litigation to sustain penalty claims. Investigations should always be conducted in a manner that will develop the best possible evidence to prove the violation and preserve that evidence for its use at trial.

### **14.2 Responsibility for Penalty Actions**

ICE OI provides the results of its commercial trade fraud investigations to the appropriate FP&F Officers in the form of Penalty ROIs. The CBP FP&F Officer is responsible for reviewing the results of investigations to determine if a violation (i.e., a material false statement, act, or omission, or an importation contrary to law) occurred, the identity of the responsible parties, and the degree of the alleged violator's culpability (negligence, gross negligence, or fraud). Based on these determinations, the FP&F Officer may initiate penalty and duty claims against the culpable parties.

Because a penalty investigation must be an objective process, a Penalty ROI should report only facts and evidence and not contain any conclusion regarding the degree of the violators' culpability, nor should it contain any recommendations regarding what action FP&F should take. For the same reason, Special Agents will not prepare pre-penalty or penalty notices. Responsibility for culpability determinations and penalty case preparation rests solely with FP&F. In most instances, a Penalty ROI will be referred to the FP&F office responsible for the port(s) where the importations occurred. In cases in which importations occurred in more than one port, each responsible FP&F office may issue a separate penalty covering only the importations in their port, or one FP&F office may issue a consolidated penalty covering all involved ports and importations. Consolidation requires the concurrence of all involved FP&F Officers and the approval of the CBP OR&R, International Trade Compliance Division, Penalties Branch. Requests to OR&R for consolidation of penalty actions will be made by FP&F.

### **14.3 19 U.S.C. § 1592, Pre-Penalty Notice**

If the responsible FP&F Officer has reasonable cause, based on the results of an investigation, to believe that a violation of 19 U.S.C. § 1592 has occurred and determines that a penalty should be assessed, a written **pre-penalty notice** will be prepared. This notice informs the potentially liable parties of CBP's intent to issue a claim for a monetary penalty. Special Agents may assist FP&F in identifying facts to be articulated in the pre-penalty notice, but should not prepare the notice themselves. Depending on the circumstances, FP&F may seek guidance from CBP's Associate Chief Counsel and/or CBP's OR&R prior to issuing a pre-penalty notice.

The amount of a proposed penalty under 19 U.S.C. § 1592 is based on the degree of culpability involved in the violation. If FP&F determines the culpability as:

#### **A. Simple Negligence**

The maximum penalty is an amount equal to two times the loss of revenue, which occurred as a result of the violation or, if there was no loss of revenue, an amount equal to 20% of the dutiable value of the merchandise imported in connection with the alleged violation.

#### **B. Gross Negligence**

The maximum penalty is an amount equal to four times the loss of revenue or, if there was no loss of revenue, an amount equal to 40% of the dutiable value of the merchandise imported in connection with the alleged violation.

#### **C. Fraud**

The maximum penalty is an amount equal to the "domestic value" of the merchandise imported in connection with the violation. Domestic value, which will be determined by the appropriate import specialist, will generally equal the sum of the appraised value of the imported merchandise for CBP's purposes plus

duty, charges (costs, insurance, and freight), and profit, although in some cases another basis of appraisement may apply.

Typically, the proposed penalty will be issued at the statutory maximum for the level of culpability charged. However, this is not required, and FP&F Officers may choose to issue a proposed penalty in an amount less than the statutory maximum.

If the alleged violator does not voluntarily tender lost duties, and CBP cannot administratively recover those duties through liquidation, CBP may make a “duty demand” for the payment of lost duties under the provisions of 19 U.S.C. § 1592(d). Duty demands under 19 U.S.C. § 1592(d) may be issued not only to violators, but also to anyone liable for payment of the lost duties. This includes the surety company that underwrote the importer of record’s importation bond.

#### **14.4 Response to Pre-Penalty Notice**

The alleged violator is generally given 30 days during which to respond to the pre-penalty notice by filing a written response and/or by making an oral presentation to the FP&F Officer. In some instances, particularly in cases where the SOL may run out soon, the alleged violator may be given as little as 7 days during which to submit a response to the pre-penalty notice. Alleged violators will often make factual assertions and/or challenge the facts developed in the investigation in their pre-penalty responses and oral presentations. For example, the pre-penalty response is often the first place where the alleged violator claims not to be culpable for the alleged violation because he or she exercised reasonable care by relying on guidance obtained from CBP, a customs broker, or other consultant. FP&F will routinely ask the case agent to review and comment on violator responses. At times, additional investigation may be necessary prior to FP&F responding to the alleged violator’s assertions. Special Agents should carefully and promptly respond to such requests from FP&F, preferably in writing, since investigative findings may be incorporated into CBP answers to violator claims and, as such, may form a part of the record that is ultimately reviewed for mitigation.

After reviewing the pre-penalty response and the Special Agent’s comments, FP&F may elect to proceed with the contemplated penalty, pursue a penalty in a lesser amount or at a different degree of culpability, or cancel the penalty action in total. Written notice of FP&F’s decision will be given to the alleged violator.

#### **14.5 Penalty Notice**

If FP&F elects to further pursue the claim, a written Penalty Notice (CF 5955A, or as updated) will be issued to the violator(s). The Penalty Notice must set out the same details of the offense, as did the pre-penalty notice. If the Penalty Notice involves no substantive changes from the pre-penalty notice, it may be incorporated by reference. If a demand for duties is made under the provisions of 19 U.S.C. § 1592(d), the Penalty Notice will formally set out that demand. The violator is normally afforded 30 days to make representations, both orally and in a written petition, as to why the penalty should be reduced or cancelled. A shorter period may be afforded to the violator if the SOL will run out in less than 1 year.



## **14.6 Mitigation**

After consideration of the violator's petition and the Special Agent's comments, CBP may consider mitigation of the penalty. For penalties less than \$50,000, the FP&F Officer may mitigate the penalty. For penalties greater than \$50,000, the case must be forwarded to CBP's OR&R for mitigation. Guidelines for the mitigation of penalties under 19 U.S.C. § 1592 are set out in Appendix B to § 171 of the Customs Regulations (19 C.F.R. § 171, app. B). Violators may make an oral presentation to OR&R during the mitigation process. OR&R may ask the ICE OI case agent or the Commercial Fraud and Intellectual Property Rights Investigations Unit to attend such presentation and provide comments for consideration in the mitigation decision. Written notice of the mitigation decision and a demand for payment of the penalty and any duty demand made pursuant to 19 U.S.C. § 1592(d) will be provided to the violator.

## **14.7 Supplemental Petition**

A violator may submit a supplemental petition seeking further relief of the mitigated penalty. For penalties less than \$25,000, a decision on supplemental petitions will be made by National FP&F Officers located at various field offices. For penalties exceeding \$25,000, the decision on supplemental petitions will be made by OR&R. A supplemental petition may not be entertained if a waiver is requested and not provided.

## **14.8 Review of Penalties at the Department of Homeland Security**

At any time in the administrative processing of a penalty claim, a violator may ask for review of the case by the Secretary of Homeland Security. The Secretary of Homeland Security has delegated the penalty review to the CBP Commissioner. If the CBP Commissioner decides to review a case, the Commissioner may uphold the CBP mitigation decisions, direct CBP to modify its penalty and/or mitigation determinations, or independently negotiate a settlement of the claim with the violator.

## **14.9 Bankruptcy of Violator**

If, during the course of an investigation, a violator files bankruptcy, an immediate review of the case should be completed to determine the administrative processing of a penalty. FP&F and the CBP Associate Chief Counsel will refer the case to the National Finance Center to attempt recovery of the claimed penalty through the bankruptcy court.

## **14.10 Offers in Compromise**

At any time, a violator may seek a negotiated settlement of the case with CBP. 19 U.S.C. § 1617 provides for such settlements, known as offers in compromise. Offers in compromise must be referred to the CBP OR&R and Office of the Chief Counsel and ICE OPLA for review and acceptance or rejection. The local ICE OCC and the CBP Chief Counsel and OR&R will evaluate the settlement offer, make counteroffers, and negotiate any final settlement. The ICE OI case agent may be asked to comment on assertions made by the violator or to conduct additional

investigation to assist in the evaluation of the offer. Generally, action in any administrative penalty case will be held in abeyance while an offer in compromise is under CBP review.

#### **14.11 Referral to the Department of Justice for Litigation**

If the violator refuses to pay the penalty after the administrative processing of a penalty claim has been completed, FP&F will refer the case to the CBP Office of the Associate or Assistant Chief Counsel. The CBP Office of the Associate or Assistant Chief Counsel will in turn refer the case to the Civil Division of DOJ in Washington, D.C., which may file a civil suit to recover the penalty amount. All litigation of penalty claims under 19 U.S.C. § 1592 is conducted by DOJ with the assistance of the CBP Associate or Assistant Chief Counsel. The suit will be filed in the original penalty amount (not the amount of any mitigated penalty) in the CIT in New York. If the violator fails to satisfy a judgment issued in favor of the U.S. Government by the CIT, the CBP Associate or Assistant Chief Counsel will request that DOJ file an action in Federal Court in the appropriate judicial district to seek enforcement of the judgment. The District Court may issue orders authorizing seizure of the violator's real or personal property to satisfy the judgment.

### **Chapter 15. CIVIL PENALTY PROCESSING**

#### **15.1 19 U.S.C. § 1593a, Penalties for False Drawback Claims**

Administrative procedures under 19 U.S.C. § 1593a for the issuance of monetary penalties for false drawback claims are similar to those for the issuance of penalties under 19 U.S.C. § 1592. In cases involving negligence, Section 1593a provides for a monetary penalty not to exceed 20% of the actual or potential loss of revenue for the first violation, and in an amount not to exceed 50% of the actual or potential loss of revenue for the second violation. The penalty for each succeeding negligent violation will be an amount not to exceed the actual or potential loss of revenue. In cases involving fraud, the penalty will be an amount not to exceed three times the actual or potential loss of revenue. Pursuant to 19 U.S.C. § 1593a(d), CBP may also demand the repayment of any drawback refund paid as a result of the violation.

#### **15.2 19 U.S.C. § 1595a, Forfeiture and Other Penalties**

Administrative penalty procedures for the issuance of monetary penalties pursuant to 19 U.S.C. § 1595a(b) are similar to those for the issuance of penalties under 19 U.S.C. § 1592. The chief differences are:

- A. No pre-penalty notice is required. An FP&F Officer who chooses to initiate a penalty under 19 U.S.C. § 1595a proceeds directly to the issuance of a penalty notice.
- B. The amount of penalty is the value of the merchandise imported contrary to law.

- C. Any referral of the penalty for litigation will be made to the U.S. Attorney in the judicial district in which the violation occurred, not to DOJ. Any litigation of the claim will occur in the U.S. District Court, not the CIT.

## **Chapter 16. CIVIL STATUTE OF LIMITATIONS**

The civil statute of limitations found in 19 U.S.C. § 1621 requires that suits or actions to recover duty under 19 U.S.C. § 1592(d), 19 U.S.C. § 1593a(d), or any penalty or forfeiture commence within 5 years of the date of discovery, except for violations involving 19 U.S.C. §§ 1592/1593a. Any suit or action for a violation involving 19 U.S.C. § 1592 or 1593a must be commenced within 5 years of the date of the violation, unless the violation involves fraud, in which case the suit or actions must be commenced within 5 years of the date of discovery of the fraud.

### **16.1 Tolling of the Statute**

In the case of a 19 U.S.C. § 1592 or 1593a claim, the SOL is not tolled until DOJ files a civil suit before the CIT. Under any other Customs-related civil statute, the SOL is not tolled until DOJ files a civil suit in the U.S. District Court. This only occurs after all CBP administrative processing of the claim is complete, the violator has failed to pay the mitigated penalty, and the CBP Associate Chief Counsel has referred the case to DOJ. Commercial trade fraud investigations, therefore, must be completed in a timely fashion so as to allow sufficient time to administratively process the penalty and refer the case to DOJ before the statute expires. DOJ policy requires that all such referrals be received by DOJ at least 6 months prior to the expiration of the statute. The SOL is suspended for any period in which a violator is absent from the U.S.

### **16.2 Waivers of the Statute of Limitations**

A violator may voluntarily waive the right to raise the SOL as an affirmative defense in any litigation. Violators often find it in their interest to waive the statute during the administrative processing of a penalty case, because their failure to do so when the statute is close to expiring may result in CBP's use of accelerated administrative proceedings to process a penalty claim and refer it to DOJ for the initiation of civil litigation. By waiving the statute, violators give themselves added time to respond to CBP's penalty actions.

ICE policy requires that a waiver of the SOL be requested **if 3 or more years have elapsed since the date the alleged violation was committed** (see Customs Directive 4410-014, "Referral of Section 1592 Penalty Cases to the Department of Justice," dated June 14, 1990, or as updated). This requirement is the same regardless of the statute violated or the degree of culpability allegedly involved.

## Chapter 17. PRIOR DISCLOSURES PURSUANT TO 19 U.S.C. § 1592

The provisions of 19 U.S.C. § 1592 allow for significantly reduced penalties for violators who voluntarily disclose the circumstances of a violation and tender any duties owed prior to, or without knowledge of, the commencement of a formal investigation by ICE or CBP. Such voluntary disclosures are known as “prior disclosures.” Generally, a prior disclosure claim must be made in writing to a Customs Officer, although verbal disclosures may be accepted. In either event, the disclosure claim must identify:

- A. the class or kind of merchandise involved;
- B. the involved entries by entry number, or by port(s) of entry and approximate entry date(s); and,
- C. the material false statement or omission made.

The disclosure must contain the true and accurate information that should have been provided in the entry documents, or state that the violator will submit any information that is unknown at the time of the disclosure to CBP within 30 days. The disclosure must be accompanied by a check in the amount of the violator’s estimate of the duties and fees owed, or state that the violator will pay CBP’s calculation of all duties and fees owed within 30 days of receipt of notice from CBP of that amount.

In the case of a non-fraudulent violation involving the false certification in a NAFTA Certificate of Origin, the violator must voluntarily and promptly provide all persons to whom the Certificate was provided written notice of the falsity of the Certificate (19 C.F.R. § 181.82). If the prior disclosure does not qualify under the NAFTA prior disclosure rule, it may nonetheless still qualify under 19 U.S.C. § 1592 (c).

### 17.1 Investigation of Prior Disclosure Claims

ICE OI is responsible for investigating prior disclosure claims referred by CBP for investigation. The investigation should determine if ICE and/or CBP have already commenced a formal investigation of the disclosed violation, if the disclosing party had knowledge of that investigation, and if the disclosure is accurate, full, and complete. *Note: False information may invalidate a prior disclosure.* In instances in which ICE OI has not commenced a formal investigation of a disclosed violation as defined in 19 C.F.R. § 162.74(g), the ICE OI Special Agent should review the disclosure for indications that the disclosed violation may constitute a criminal violation. The fact that a violator submits a prior disclosure claim in no way affects the U.S. Government’s ability to criminally prosecute the violator. In fact, a prior disclosure claim may constitute an admission or confession of criminal culpability. If the disclosed violation potentially constitutes a criminal offense, or if other reasons exist which warrant further action by OI, then OI should initiate a formal investigation and ask the CBP Port Director who referred the prior disclosure claim and CBP FP&F to withhold action pending completion of the investigation. In instances in which OI has not commenced a formal investigation of the

disclosed violation and no other circumstances are evident which warrant the commencement of a formal investigation, the Special Agent should report those facts to the referring Port Director and FP&F via an open and closed ROI.

## **17.2 Prior Disclosures Pursuant to 19 U.S.C. § 1593a**

The provisions of 19 U.S.C. § 1593a provide for significantly reduced penalties for violators who voluntarily disclose the circumstances of a violation prior to, or without knowledge of, the commencement of a formal investigation. The requirements for a valid prior disclosure are similar to those provided for prior disclosures of violations under 19 U.S.C. § 1592.

## **Chapter 18. COORDINATING CRIMINAL PROSECUTION AND CIVIL PENALTY ACTIONS**

### **18.1 Coordination Between AUSAs and FP&F**

Once a case has been accepted for criminal prosecution, the ICE OI case agent serves as the point of contact between the AUSA, CBP, and ICE. The case agent should ensure that actions taken by the AUSA and CBP do not conflict and that actions taken in the criminal case support and enhance CBP's ability to pursue civil penalties arising from the violations. This includes:

- A. Asking the AUSA to obtain Rule 6(e) disclosure orders from the court when needed.
- B. Familiarizing the AUSA with CBP's civil penalty processes, encouraging and coordinating concurrent criminal and civil actions, and advising the AUSA of the SOL and other issues that may arise in the civil case.
- C. Asking that criminal indictments, informations, and plea agreements contain sufficient detail to encompass the full scope of all civil violations, and allow the Government to collaterally stop the violator's civil defenses. This typically involves ensuring that indictments, informations, and plea agreements cover all relevant customs entries, etc., involved in the civil violation.
- D. Seeking to make evidence obtained pursuant to grand jury proceedings available to CBP for use in civil penalty actions.
- E. Asking the AUSA to make grand jury evidence a matter of public record in indictments, informations, and at trial.
- F. Encouraging and facilitating global settlements.

## **18.2 Global Settlements**

Criminal cases are often resolved through pre- or post-indictment plea negotiations. In such cases, the violator, through counsel, agrees to plead guilty to one or more charges specified in an indictment or information, with remaining charges to be dismissed. Violators often wish to resolve potential civil penalties at the same time that they enter into criminal plea agreements. CBP can consider such “global settlements” under procedures established for processing offers in compromise.

The CBP Office of the Chief Counsel and the local ICE OCC will work with the AUSA to coordinate global settlements. This will include discussions among the CBP Associate Chief Counsel, OR&R, local ICE OCC, and the AUSA, with input from ICE OI, regarding what criminal sentences and civil penalty amounts will be mutually acceptable, for the purpose of negotiating the global settlements with the defense counsel.

The criminal prosecution process cannot be used to “leverage” a related civil penalty case. Moreover, the AUSA can make no promises, representations, or conditions in the plea agreement that bind CBP and/or ICE action in accepting or rejecting a civil offer. Similarly, CBP or ICE can make no promises, representations, or conditions in its civil negotiations that bind DOJ in a criminal plea. Plea agreements and civil negotiations, although linked to each other, must be conducted as concurrent, not contingent, actions.

Global settlements should be pursued in all cases in which the violator has entered into criminal plea negotiations. Special Agents involved in cases where global settlements may be employed will seek guidance from the local ICE OCC, which will in turn consult with CBP’s Office of the Chief Counsel.

## **Chapter 19. PUBLICITY IN COMMERCIAL TRADE FRAUD CASES**

The deterrent effect of commercial trade fraud cases can be greatly enhanced by publicizing the results of criminal prosecutions and civil penalty actions. OI case agents and Group Supervisors are encouraged to seek publicity, through the appropriate chain of command, from the Office of Public Affairs and the U.S. Attorney’s office. They may draft sample articles for review and approval. Certain information related to criminal commercial trade fraud cases, such as indictments, informations, arrests, and convictions, are matters of public record. Although local policies may differ, the U.S. Attorney’s office generally handles press releases and press conferences related to such actions. ICE may assist the U.S. Attorney in preparing press releases by providing background information on ICE and CBP operations and requirements related to the violation in question. ICE should follow local U.S. Attorney guidelines regarding direct contacts with representatives of the press or other media, and should take special care to ensure that only information that is a matter of public record is discussed.

Information related to CBP civil penalty actions may be made public only after the final collection of a penalty. After the penalty proceedings are complete, ICE may release the identity

of the violator, the section of the law violated, the loss of revenue, the amount of the penalty originally assessed, as well as any mitigated penalty amount, and the amount of money actually paid by the violator. *See* 19 C.F.R. § 103.16. The disclosure of any other information may be a violation of the Trade Secrets Act or the Privacy Act. Contacts with representatives of the press or media regarding civil penalty cases should be closely coordinated with the ICE Office of Public Affairs.

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## ACRONYMS

### A

ABI – Automated Broker Interface  
ACE – Automated Commercial Environment  
ACS – Automated Commercial System  
ATS – Automated Tracking System  
AUSA – Assistant United States Attorney

### B

### C

C3 – Cyber Crimes Center  
CAFRA – Civil Asset Forfeiture Reform Act of 2000  
CBP – U.S. Customs and Border Protection  
CEAR – Commercial Enforcement Analysis Response  
CF – Customs Form  
CFR – Code of Federal Regulations  
CIE – Customs Information Exchange  
CIT – Court of International Trade  
CROSS – Customs Rulings Online Search System  
COMOIR – Commercial Operations Memorandum of Information Received

### D

D&B – Dun and Bradstreet  
DARTTS – Data Analysis and Research for Trade Transparency System  
DHS – Department of Homeland Security  
DOJ – Department of Justice

### E

### F

FAS – Field Analysis Staff  
FNIS – Field National Import Specialist  
FP&F – Fines, Penalties, and Forfeitures





## **G**

## **H**

HTS – Harmonized Tariff Schedule

HTSUS – Harmonized Tariff Schedule of the United States

## **I**

ICE – U.S. Immigration and Customs Enforcement

IEEPA – International Emergency Economic Powers Act

IP – Internet Protocol

IPR – Intellectual Property Rights

IRS – Internal Revenue Service

ITM – International Trade Manager

ITS – International Trade Specialist

## **J – K**

## **L**

LOR – Loss of Revenue

## **M**

## **N**

NAFTA – North American Free Trade Agreement

NIS – National Import Specialist

## **O**

OAS – Operational Analysis Staff

OCC – Office of the Chief Counsel

OI – Office of Investigations

OIA – Office of International Affairs

OPLA – Office of the Principal Legal Advisor

OR&R – Office of Regulations and Rulings

OST – Office of Strategic Trade

## **P – Q**

## **R**

ROI – Report of Investigation



## **S**

SAC – Special Agent in Charge  
SOL – Statute of Limitation  
STC – Strategic Trade Center  
SUA – Specified Unlawful Activity

## **T**

TAPS – Trend Analysis and Analytical Selectivity Program  
TECS – Treasury Enforcement Communications System  
TTU – Trade Transparency Unit

## **U**

U.S. – United States  
U.S.C. – United States Code

## **V - Z**

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