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CUSTOMS ENFORCEMENT AND THE NAFTA

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I. INTRODUCTION

Today, the international trade scene is abuzz with talk of plans for this or that "free trade pact," "economic coalition," or "economic community of nations." Lawyers, together with businesspersons, bankers, accountants, and other professionals of every discipline, flock to international trade-related conferences hoping better to understand the coming changes and prepare for and profit from these changes. In the United States, Canada, and Mexico, and particularly in Texas and other Mexican border states, the North American Free Trade Agreement (NAFTA) and the changes it heralds predominate at these conference discussions. The massive, recently executed,[1] but not yet ratified treaty promises to sweep aside forthwith the bulk of tariffs among the United States, Canada, and Mexico and to eliminate the rest over various phase-out periods ranging up to fifteen years. Most quotas and other non-tariff barriers will receive similar treatment over various periods. Expected results vary across the spectrum: from extreme optimism to equally extreme dread, and from mutual political and economic good health to havoc.

As of this writing, no reliable forecast is possible respecting when or whether the pending NAFTA will be ratified, or, if changes[2] are made to the pending NAFTA prior to final agreement and ratification, the exact nature of those changes. However, it seems almost certain that the NAFTA, or some form of it, will eventually become law. It also seems certain that whatever variant of a NAFTA does become law, the resulting legal and regulatory climate as to the United States customs laws governing the movement of goods and

1. North American Free Trade Agreement [NAFTA], U.S.-Mex.-Can. (text revised Sept. 6, 1992). On August 12, 1992, the three countries reached in principle a NAFTA agreement of some 2,000 pages. *See generally id.*

2. Recent compromise proposals have been advanced, such as making modifications to the strict "all or nothing," "fast track" requirement, or to the "supplemental agreements" in certain areas.

commercial intercourse between the countries will likely resemble "business as usual." To those in the trenches of international commerce this "business as usual" is something considerably less than "free trade."

Business as usual in the realm of customs enforcement is likely to be even a little more involved because political considerations will require a different approach to customs regulations from the approach now in place. Consequently, any movement toward relaxing restraints on cross-border trade, in the name of "free trade," will likely be accompanied by much harsher United States customs enforcement and punishment of those who do not comply with such customs regulations, albeit in the name of "fair trade."

To demonstrate this interplay between political change and customs enforcement, this article focuses upon two central issues: (1) current application of United States customs-enforcement provisions to several common business activities; and (2) several non-enforcement provisions of the United States customs laws likely to pose problems for trans-border business during implementation of a NAFTA.

II. CUSTOMS ENFORCEMENT

A. *In General*

The customs laws of the United States are the primary laws regulating imports and are codified in Title 19 of the United States Code. Many non-customs laws, such as those enforced by United States agencies that regulate the environment, safety, agriculture, fish, wildlife, food, and drugs, also regulate imports. The United States Customs Service enforces these non-customs laws in tandem with the customs laws because the customs laws ordinarily contain more enforcement authority and a wider variety of sanctions. Also, the United States Customs Service has more enforcement resources. Perhaps most significantly, the customs laws offer the broadest presumptions in favor of the government.

Customs enforcement takes many forms and includes detention, seizure, exclusion of merchandise from importation, claims for liquidated damages, importer and exporter sanctions, civil penalties, and criminal penalties. The Customs Service applies these means of enforcement to a wide range of cases involving error or fraud, and these

examples represent only a few of the most onerous means of enforcement available to the Service.

The Customs Service's application of the many Title 19 enforcement provisions against importers has steadily increased over the past decade. This increased enforcement has been in response to the pressure exerted by protectionists in Washington who have been concerned by the increasing number of imports and complaints from domestic producers. The protectionist reaction has manifested itself in many ways, including complex quantitative restrictions on imports in the form of quotas, "voluntary" restraint agreements, antidumping and countervailing duty actions and orders, and calls for heavy-handed legal action against unfair competition from abroad. Thus, beneath a veneer of apparent cooperation and a self-styled spirit of working together with international business at several levels, the relationship between Customs and the international business community at the enforcement level has deteriorated into something akin to unrestricted warfare.

B. *Customs Investigations*

The Customs Office of Enforcement conducts investigations of suspected civil and criminal violations of customs laws, often in concert with the Customs Office of Regulatory Audit, various specially constituted "fraud teams," and other interested agencies when non-customs laws are involved. Increasingly, a United States Customs Service investigation often proceeds in cooperation with a foreign country's trade and law-enforcement authorities. Consequently, a United States Customs Service inquiry respecting imports from Mexico is apt to induce assistance from Mexican federal customs and tax officials pursuant to bilateral cooperation agreements.

A real threat exists that refusal to cooperate with the United States Customs Service in such an investigation will result in formal or informal reprisals against the exporter by the Mexican customs and tax authorities. Thus, counsel must carefully assess a United States Customs Service inquiry to anticipate not only the legal consequences of a refusal to respond to the inquiry in this country, but also the consequences in the foreign country of such a refusal.

The Customs Service identifies its Office of Enforcement investigators both as Special Agents and as Criminal Investigators. There appears to be a very nebulous separation in the mind of a typical Customs Service investigator between civil and criminal culpability,

and there is a strong bias in favor of the latter. Thus, Customs Service investigators often do not perform such procedural niceties as Miranda warnings, leaving the individual under investigation unaware that criminal charges are even being contemplated.

C. *Civil Penalties*

1. In General

Title 19 of the United States Code contains numerous civil-penalty provisions proscribing specific conduct or omissions and prescribing penalties for such prohibited conduct or omissions. These provisions penalize both persons and property, the latter penalties being in the form of seizure and forfeiture. A few of the commonly employed penalty provisions are described below.

2. Penalties for Fraud, Gross Negligence, and Negligence

Section 1592 of Title 19 is the primary customs-enforcement provision to penalize importers. It is a civil, in personam penalty which "prohibits false written or oral statements, documents, or practices or attempts thereof respecting the entry or introduction of merchandise into the United States if part of a pattern of negligence, or worse."[3] The section also prohibits material omissions and aiding or abetting any of the foregoing. The statute specifies maximum penalties according to culpability rather than the amount of lost revenue.[4]

a. Recovery of Duties

Notwithstanding the assessment of a monetary penalty under Section 1592, if a party underpaid duties as a result of a violation of this section, the Customs Service assesses the penalty against the importer.[5] This provision creates a remedy separate and apart from the penalty provisions of Section 1592 and effectively nullifies the finality of liquidations under Section 1514[6] wherever any violation of Section

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3. 19 U.S.C. § 1592(a) (1988).

4. *See* Robert T. Givens & Rayburn Berry, *United States Customs Law Affecting the Movement of Goods Into and Out of Mexico*, 23 ST. MARY'S L.J. 773, 792-93 (1992) (describing application of civil penalties).

5. 19 U.S.C. § 1591(d) (1988).

6. "Liquidation" (subject to several exceptions) is the final administrative decision regarding the appraised value, tariff classification, duty rate, duty amount, etc., for a given importation. *See* 19 U.S.C. § 1514 (1988) (defining liquidation).

1592 has occurred. Further, the Customs Service has recently advanced the theory in the Court of International Trade that there is no statute of limitations on an action under this statute.[7] The court, however, did not rule upon the issue; thus the international community still awaits a judicial determination. In the interim, an air of uncertainty remains as to whether time limitations exist respecting Section 1592(d) duty claims. If such limitations do exist, then there is uncertainty as to what exactly are those time limitations.

b. Prior Disclosure

Prior disclosure of facts constituting a violation of this statute, if made without knowledge of the commencement of a formal investigation, drastically reduces the maximum penalties.[8] However, the Customs Service tends to interpret the disclosure law narrowly. If a disclosure is not in strict compliance with the regulations and statute, the Service may deny the benefits of a prior disclosure, yielding a result very different from the one contemplated.[9]

Therefore, attorneys face a delicate task of balancing the potential benefit and harm when assisting clients who have violated this statute. The attorney assisting such a client must make two decisions: (1) whether to make a prior disclosure in the first instance; and (2) how much to disclose if the disclosure is indeed made. If a disclosure is too favorable in its treatment of the disclosing party's actions, it may not qualify as a valid disclosure. However, there is no guarantee that any disclosed information will not be used against the disclosing party in a criminal action. Thus, knowledge that any disclosed facts may become grist for the Customs Service's criminal mill strongly suggests that the attorney craft the disclosure with extreme care and discretion.

c. Administrative Mitigation Procedure

The Customs Service's authority to compromise penalties or to mitigate is found in Sections 1617 and 1618 of Title 19, respectively. This

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7. *See* United States v. Menard, Inc., 14 INT'L TRADE REP. DECISIONS (BNA) 1396, 1400 (Ct. Int'l Trade, May 21, 1992) (discussing possibility of statute-of-limitations argument).

8. *See* 19 U.S.C. § 1592(b)(4) (describing limitations on penalty assessed where prior disclosure made); 19 C.F.R. § 162.74 (1992) (describing requirements for valid prior disclosure).

9. Robert T. Givens & Rayburn Berry, *United States Customs Law Affecting the Movement of Goods Into and Out of Mexico*, 23 ST. MARY'S L.J. 773, 793 (1992).

administrative process is informal, and because any judicial enforcement is de novo, the process is not subject to formal, on-the-record procedures.[10] The provision setting out this informal process generally requires that the appropriate Customs Service officer issue a notice of pre-penalty when he or she has reasonable cause to believe a party has violated Section 1592(a). The Court of International Trade has held, however, that the Customs Service's failure to issue a notice of pre-penalty, or even a notice of penalty, will not bar a subsequent action in the Court of International Trade to enforce the penalty.[11]

d. Judicial Enforcement

Any final mitigation decision resulting from the Customs Service administrative process is not subject to judicial review. Instead, if the mitigated penalty goes unpaid, the Government's remedy is an action in the Court of International Trade for recovery of monetary penalties.[12]

3. Penalties for Aiding Unlawful Importation

Section 1595a(b) of Title 19 provides these penalties and states:

> Every person who directs, assists financially or otherwise, or is in any way concerned in any unlawful activity mentioned in the preceding subsection [aiding an unlawful importation] shall be liable to a penalty equal to the value of the article or articles introduced or attempted to be introduced.[13]

Until recently, the Customs Service rarely used this statute to penalize unlawful importations. The more typical practice was for the Service to rely almost exclusively on Section 1592 whenever civil penalties were imposed respecting importations of merchandise. However, enactment of the Anti-Drug Abuse Act of 1986[14] facilitated seizure of merchandise illegally imported by using the more recent

10. *See* 5 U.S.C. § 556 (1988) (setting out procedure for on-the-record proceedings).

11. *See* United States v. Priority Products, Inc., 793 F.2d 296, 297 (Fed. Cir. 1986) (holding that failure to name individual corporate officers in penalty notices does not preclude suit against them in Court of International Trade).

12. *See* 28 U.S.C. § 1582(b) (1988) (stating jurisdiction of Court of International Trade); Robert T. Givens & Rayburn Berry, *United States Customs Law Affecting the Movement of Goods Into and Out of Mexico*, 23 ST. MARY'S L.J. 773, 794 (1992) (discussing details of judicial enforcement).

13. 19 U.S.C. § 1595a(b) (1988).

14. 19 U.S.C.A. § 1595a(c) (West Supp. 1992).

provision of Section 1595a(c), provided that there was no Section 1592 violation. Because the related seizure under Section 1595a(c) precludes per se the use of Section 1592, the Customs Service thereafter began to use Section 1595a(b) to penalize for committing prohibited acts relating to the seized merchandise when the Service deemed that aggravating circumstances existed.

There is a very real, but not so obvious, incentive for the Customs Service to employ the penalty provision of Section 1595a(b) in lieu of the penalty provision of Section 1592. This incentive likely accounts for the recent upsurge in penalty actions under Section 1595a(b). The incentive is that both administrative procedures and court jurisdiction are more local: any administrative review of a petition seeking mitigation of a Section 1592 penalty that exceeds $50,000 is accomplished by an attorney at Customs Service Headquarters in Washington; but Section 1595a(b) does not require review in Washington until the penalty exceeds $100,000.[15] Also, exclusive jurisdiction over a court action brought by the Customs Service to collect a penalty under Section 1592 resides in the Court of International Trade.[16] Thus, the Chief Counsel's office in Washington closely coordinates Customs Service referrals with the Department of Justice. On the other hand, Section 1595a(b) penalty actions filed in the local federal district court[17] are handled by the regional counsel. Customs Service investigators, thus, correctly view Section 1595a(b) penalty actions as susceptible to less interference by Customs Service Headquarters than Section 1592 penalty actions.

4. Penalties for Failure to Declare—Travelers' Declarations

Most attorneys representing international business clients frequently encounter violations of this statute made when arriving travelers fail to declare or declare correctly the nature, source, or value of accompanying articles.[18] The penalty is a compound one, including both forfeiture of the article and a monetary penalty in the amount of the value of the article.[19]

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15. *See* 19 C.F.R. § 171.21 (1992) (describing administrative overview process).

16. 28 U.S.C. § 1582(b) (1988).

17. *See* 28 U.S.C. § 1355 (1988) (describing jurisdiction for all matters not within jurisdiction of Court of International Trade).

18. *See* 19 U.S.C. § 1497 (1988) (setting out penalties for failure to declare).

19. *Id.*; Robert T. Givens & Rayburn Berry, *United States Customs Law Affecting the Movement of Goods Into and Out of Mexico*, 23 ST. MARY'S L.J. 773, 795 (1992).

a. Administrative Mitigation Procedure

An individual may file a petition for mitigation. These petitions generally result in the Customs Service's mitigating the penalty according to levels of culpability. The sequence of events and the individual's prior offenses also are considerations in mitigation.[20]

b. Judicial Enforcement

Any final Customs Service mitigation decision resulting from the administrative process is not subject to judicial review. Instead, if the mitigated penalty goes unpaid, the government's remedy is an action in federal district court.[21]

D. *Seizures and Forfeitures of Merchandise*

The Customs Service has the authority to seize and forfeit merchandise under a number of provisions. Seizure is the penalty for a Section 1592(a) violation in three particular circumstances: (1) The violator is insolvent or beyond the jurisdiction of the United States; (2) Seizure is the only means of preventing the introduction of restricted or prohibited merchandise into the United States; or (3) Seizure is essential to protect the revenue.[22]

Merchandise, except for restricted and prohibited merchandise, may be released prior to a Customs Service final decision if the party deposits monies or a letter of credit to secure the probable monetary penalty. This procedure is termed "early release." However, such deposits are extremely risky because the early-release agreement precludes the party from seeking judicial review of any aspect of the case except the amount of the final mitigated penalty.

Alternatively, merchandise may be released through a substitution of collateral. Although this substitution ordinarily involves a lesser amount than the early release amount, the substitution effectively preserves all judicial review.

Enacted as part of the Anti-Drug Abuse Act of 1986, Section 1595a(c) of Title 19 allows seizure of merchandise "introduced or attempted to be introduced into the United States contrary to law"

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20. *See generally* 19 C.F.R. app. § 171 (1992) (describing mitigation proceedings).

21. *See* 28 U.S.C. § 1355 (1988) (stating jurisdiction for recovery of fines).

22. Robert T. Givens & Rayburn Berry, *United States Customs Law Affecting the Movement of Goods Into and Out of Mexico*, 23 ST. MARY'S L.J. 773, 796 (1992).

(other than in violation of Section 1592).[23] Research, as of this writing, has not revealed any case law regarding seizures under this provision. The lack of case law is surprising because there have been numerous seizures during the past six years.

Other related statutes have specific provisions regarding searches and forfeitures of monetary instruments[24] and seizures owing to aircraft registration violations,[25] both of which are discussed in greater detail below.

E. *Claims for Liquidated Damages*

1. In General

Claims for liquidated damages arise out of a contractual agreement and, therefore, are not penalties. Liquidated damages generally result from violations of an entry requirement covered by the entry bond and are assessable against the bond in the event the importer does not pay the damages.

2. Examples of Liquidated Damages Claims

The most common claims encountered in this area result from failure to redeliver from Customs Service custody merchandise that has been misdelivered, including prohibited merchandise or restricted merchandise.[26]

3. Administrative Mitigation

The importer or the importer's surety may file a petition for mitigation. If the importer adheres strictly to the required procedure for filing, the Customs Service generally mitigates the penalty in terms of the importer or surety's culpability.[27]

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23. 19 U.S.C.A. § 1595a(c) (West Supp. 1992).

24. 31 U.S.C. § 5317 (1988).

25. 49 U.S.C. app. § 1472 (1988).

26. Robert T. Givens & Rayburn Berry, *United States Customs Law Affecting the Movement of Goods Into and Out of Mexico*, 23 ST. MARY'S L.J. 773, 794-95 (1992) (stating examples of restricted merchandise).

27. *See* 19 U.S.C. § 1618 (1988) (describing circumstances contributing to mitigated penalty); *see also* Robert T. Givens & Rayburn Berry, *United States Customs Law Affecting the Movement of Goods Into and Out of Mexico*, 23 ST. MARY'S L.J. 773, 795 (1992) (discussing administrative review of mitigation).

F. *Customs Penalties—Criminal*

1. In General

In recent years, the United States Customs Service has more aggressively resorted to criminal statutes to enforce customs laws. Once reserved almost exclusively for dope smugglers, criminal statutes have often become the statutes of preference for two primary reasons. The first reason for this preference is that Customs Service investigators correctly view criminal actions as higher profile than civil actions. Thus, the Service believes that criminal actions can more efficiently communicate the message that violations of customs laws will be dealt with harshly. The second reason for the Customs Service's increasing reliance on criminal statutes is Congress and the Justice Department's general interest in prosecuting white collar crimes. Because information-gathering procedures under the 1978 revisions to Sections 1508, 1509, and 1510 of Title 19 regarding Customs Service investigations of civil violations have become more complicated, the Service has accelerated its use of criminal prosecutions. Unfortunately for the business community, the result has been to complicate unnecessarily this information-gathering process.[28]

2. Criminal Statutes Employed

The most often-used criminal statute is Section 542 of Title 18. This statute prohibits entry of merchandise at the Customshouse through the use of a false or fraudulent statement or practice.[29] A close second is Section 545 of Title 18, the "smuggling" statute, which covers almost any fraudulent practice connected to importation, or following importation, that is not covered by Section 542. Section 545 also broadly prohibits any act of importing goods that is "contrary to law." Generally, the customs criminal statutes found in Sections 541, 542, and 543 of Title 18 are used in conjunction with numerous other criminal statutes.[30]

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28. *See* Robert T. Givens & Rayburn Berry, *United States Customs Law Affecting the Movement of Goods Into and Out of Mexico*, 23 ST. MARY'S L.J. 773, 792 (1992) (discussing further the increase in criminal cases).

29. Section 542 is the "criminal reciprocal" of 19 U.S.C. § 1592 prior to its 1978 revisions.

30. *See* 18 U.S.C. § 371 (1988) (describing criminal offense of conspiracy); 18 U.S.C. § 1001 (1988) (describing offense of making fraudulent statements); 18 U.S.C. §§ 1341-46 (describing fraudulent offenses regarding mail, bank, wire, radio, or television); 18 U.S.C. § 1956 (1988) (describing elements of crime of money laundering).

G. *The "Drug War" Complication*

The ongoing large-scale drug war has directly affected the language and application of many enforcement statutes employed by the Customs Service. In particular, the government's seizure and forfeiture authority has been greatly broadened in an effort to deny drug smugglers and dealers the profits of their illegal enterprises. Regrettably, a shotgun approach has often been chosen, and innocent bystanders in the business community have often been hit by the anti-drug salvos.

An excellent example is Section 1472 of Title 49, which accords aircraft registration errors a presumption of *intentional* error. The Customs Service uses this presumption to warrant seizure and forfeiture, remedies which otherwise would be unavailable for such errors. Congress enacted this new enforcement provision after the Customs Service represented to Congress that the provision was needed solely for drug enforcement purposes. However, no drug enforcement language appears in the statute. While the provision may be a resourceful and convenient tool to snare airplanes from absent or hard-to-catch drug smugglers, the provision has proven disastrous to some legitimate owners of foreign aircraft who have made clerical or other innocent errors in their registration of United States aircraft. No credible evidence of drug-related activity is required to trigger the newly expanded seizure authority, and the Customs Service has shown little discretion in employing this new authority.

III. EXAMPLES OF CUSTOMS ENFORCEMENT

A. *Aircraft Importation and Registration*

The passage of the NAFTA should encourage and increase Mexican importation of aircraft made in the United States. The NAFTA would replace the 42% importation levy, which Mexico has imposed on foreign aircraft,[31] with a much more liberal tariff schedule that provides for: (1) duty-free treatment of aircraft weighing over 33,000 pounds and (2) a 10% duty respecting single-engine aircraft.[32] While United States duty rates on imported aircraft will remain at 5%,[33]

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31. The Mexican Government will waive this levy if the Mexican importer is a duly-licensed "aerotaxi" company (i.e., a common carrier).

32. *See* North American Free Trade Agreement [NAFTA], Aug. 12, 1992, U.S.-Mex.-Can., Revised Tariff Schedule at 0802.20-0802.40 (text revised Sept. 6, 1992) (providing tariff rates for aircraft).

33. *Id.*

impediments to importing Mexican aircraft into the United States will persist. The United States Customs Service and the Drug Enforcement Administration (DEA) have broadly interpreted and applied United States seizure and forfeiture laws enacted to prevent drug trafficking. Consequently, virtually any private aircraft traveling from Mexico to the United States invokes the suspicion and scrutiny of those agencies; and this suspicion may culminate in seizure of the aircraft. Often, the basis for seizure is a technical violation of aircraft registration laws rather than a drug-related offense.

The enactment of the Federal Aviation Administration Drug Enforcement Assistance Act of 1988[34] has vastly enhanced the potential for administrative seizure of aircraft entering the United States.[35] In particular, registering imported and previously Mexican-registered aircraft with the Federal Aviation Administration (FAA) has become fraught with pitfalls and traps for the unwary importer.

This 1988 legislation engrafted onto the already existing criminal statute[36] a civil forfeiture provision enforceable by both the United States Customs Service and the DEA.[37] These entities may use this civil penalty provision against a res, the aircraft, that offends the false-registration and related proscriptions of Section 1472 of Title 49.[38] Section 1472 proscribes various kinds of knowing and willful misconduct, including, inter alia, falsifying representations made in an application for a certificate of aircraft registration, forging such a certificate, operating or attempting to operate an unregistered aircraft, and displaying on an aircraft false or misleading markings as to nationality or registration.[39]

Importantly, the 1988 legislation permits seizure and forfeiture whether or not an individual is charged with a violation of any of the criminal proscriptions described in Section 1472.[40] Furthermore, the 1988 legislation creates a presumption that various mistakes in the registration process, such as a material erroneous statement in a regis-

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34. Pub. L. No. 100-690, §§ 7201-7214, 102 Stat. 4424 (codified as amended in scattered sections of 49 U.S.C. app.).

35. The potential for seizure of domestic aircraft was similarly enhanced.

36. *See* 49 U.S.C. § 1472 (1988) (prescribing criminal penalties for various "knowing and willful" misrepresentations relating to registration of aircraft).

37. 49 U.S.C. app. § 1472(b)(3)(A) (1988).

38. *See id.* (allowing for seizure of aircraft by DEA or Department of Justice).

39. *Id.* § 1472(b)(1).

40. *Id.* § 1472(b)(3)(A).

tration application or an erroneously applied tail number, are, for seizure and forfeiture purposes, knowing and willful misconduct within the meaning of Section 1472, absent proof to the contrary.[41]

The express intent of Congress when enacting this legislation was to root out criminal elements operating surreptitiously within society, such as drug smugglers who register an aircraft under a false name.[42] The Customs Service and the DEA, however, have not been reluctant to apply the 1988 seizure and forfeiture provisions against legitimate businesses as well.[43] These provisions are enforced "in accordance with the customs laws."[44] Thus, like other such seizure and forfeiture provisions, the courts require the government only to carry the burden of showing probable cause in order to make a prima facie case.

The ease with which the importer may violate the seizure and forfeiture provisions of Section 1472 is illustrated in the case of an importer attempting to register with the FAA an aircraft previously registered in Mexico. The lag between the lapse of foreign registration and the FAA's registration of the aircraft creates multiple opportunities for the importer to run afoul of Section 1472 when attempting to comply with FAA registration requirements.[45] The relevant FAA regulation provides that, unlike previously unregistered aircraft or domestic aircraft, aircraft last registered in a foreign country is not

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41. *See* 49 U.S.C. app. § 1472(b)(3)(B) (1988) (describing presumptions of violations of § 1472(b)(1)).

42. *See* H.R. REP. NO. 891, 100th Cong., 2d Sess. 4-6 (1988) (describing lax registration procedures enabling aircraft registration by drug smugglers). It is noteworthy that state and federal law enforcement officials urging passage of this legislation before Congress testified that the subject seizure provisions would not be utilized against legitimate businesses endeavoring in good faith to register their aircraft. For example, one such official testified:

> Most of the situations that we'll be talking with you about here today are not legitimate aircraft owners. The legitimate people want to do right. They want to register their aircraft properly and they're not trying to circumvent the system. The people that we're addressing or the people that we're talking about is [sic] the narcotic smuggler who runs around with pretty much anonymity and does what he darn well pleases without any regard for the rules and the regulations.

Aviation Drug Enforcement, 1988: Hearings on the FAA's Role in Aviation Drug Enforcement, Before the House Committee on Public Works and Transportation, 100th Cong., 2d Sess. 52 (1988) (statement of Robert B. Nestoroff, Investigator, Narcotics Service, Texas Department of Public Safety).

43. *See* United States v. One Helicopter, 770 F. Supp. 436, 439 (N.D. Ill. 1991) (using criminal penalty of forfeiture against owner of helicopter with no mention of drug-related activity or suspicions thereof).

44. 49 U.S.C. app. § 1472(b)(3)(A) (1988).

45. *See* 14 C.F.R. § 47.39 (1992) (describing effective date of FAA registration).

deemed to be registered with the FAA upon the filing of an application for registration and bill of sale. Instead, there is a waiting period for foreign-registered aircraft, pending the FAA's issuance of a certificate of registration (Form 8050-3). During the waiting period, the FAA confirms foreign deregistration of the aircraft. This waiting period may extend for several weeks or months.

The unwary importer may well be tempted to operate his or her aircraft during this waiting period. The boilerplate legend "Operations Outside of the United States Prohibited by Law" appears prominently on the FAA's application for registration, as well as on the pink copy retained by the applicant. This legend may create the erroneous impression for the importer of being allowed to operate the previously foreign-registered aircraft within the United States during the pendency of the registration process. Section 1472, however, explicitly proscribes the operation or attempted operation of an unregistered aircraft which is eligible for United States registration.[46] Thus, a violation of this provision is presumed to have occurred if an unregistered aircraft eligible for FAA registration is operated during the waiting period.

The interval between Mexican deregistration and the FAA's receipt and review of the Mexican notice of deregistration creates a quandary for the owner of an expensive Mexican-registered aircraft. The owner who has had good legal advice and is aware of the potential traps may find the aircraft effectively "frozen" for up to several months.

FAA aircraft identification number requirements further highlight this interval problem and the ease with which an importer may violate the seizure and forfeiture provisions of Section 1472. For example, FAA Regulation 47.15(3) provides that an applicant seeking registration of an aircraft that was last registered in a foreign country must obtain a United States identification or tail number even before foreign deregistration has occurred.[47] The regulation further indicates that tail numbers must be affixed to the aircraft following foreign deregistration, even though FAA registration may not yet be effectuated. At this point, the aircraft may neither lawfully operate in Mexico, where its Mexican tail number has been revoked via deregistration, nor legally operate in the United States, where it has not yet been registered by the FAA.

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46. 49 U.S.C. app. § 1472(b)(1)(C)-(D) (1988).

47. The United States identification number appears on the FAA application form.

The befuddled importer-applicant may well have utilized the appropriate authorization[48] to affix his or her assigned United States tail number to the aircraft following the lapse of foreign registration and the revocation of the Mexican tail number. In doing so, however, the importer risks violating Section 1472 (b)(1)(H), which renders it "unlawful for any person . . . to knowingly and willfully display or cause to be displayed on any aircraft any marks which are false or misleading as to the nationality or registration of the aircraft." For purposes of seizure and forfeiture, displaying such false and misleading marks creates the presumption that the display was done knowingly and willfully.[49]

Clearly, the seizure and forfeiture provisions of Section 1472 can pose substantial risks when applied in conjunction with the provisions regarding importation of foreign-registered aircraft into the United States. The latter provisions also present special risks to a non-citizen United States corporation importing aircraft into the United States. The statutory provision addressing eligibility requirements for aircraft registration provides that a duly-organized United States corporation owned predominantly by non-residents may register an aircraft with the FAA "so long as such aircraft is based and primarily used in the United States. . . ."[50]

As implemented by FAA Regulation 47.9,[51] this requirement for non-citizen corporations means that 60% of the plane's total flight hours must be accumulated within the United States[52] during the remainder of the month in which registration occurred and during each succeeding 6-month period following registration. Also, with respect to domestic or previously unregistered aircraft, FAA registration occurs immediately upon the filing of the registration application and the bill of sale with the FAA. The non-citizen corporation registering the aircraft must maintain records available for FAA inspection. These records must reflect the number of hours logged in flights

48. *See* 14 C.F.R. § 47.15(3) (1992) (describing requirement of United States identification number).

49. *See* 49 U.S.C. app. § 1472(b)(3)(B)(v) (1988) (stating applicable presumption).

50. 49 U.S.C. § 1401(b)(1)(A)(ii) (1988). The statute additionally requires that the aircraft neither be registered in a foreign country nor that it be an aircraft of a political subdivision of the federal or a state government. *Id.* § 1401 (b)(1)(A)-(B).

51. 14 C.F.R. § 47.9 (1992).

52. This requirement of hours flown in the United States includes non-stop flights between two points in the United States, irrespective of whether the aircraft is outside the United States during some part of the flight. 14 C.F.R. § 47.9(c) (1992).

within the United States.[53]

Accordingly, the regulation requires a registering non-citizen corporation to certify, on the FAA application for aircraft registration known as Form 8050-1, that: (1) it is a non-citizen corporation organized and doing business under United States laws; (2) the "aircraft is based and primarily used in the United States"; and (3) records of flight hours reflecting the same are available for inspection at a specified location.[54] If, however, the non-citizen corporation does not operate in strict accordance with the 60% requirement, or if the corporation does not maintain records of flight hours, the potential for seizure and forfeiture emerges.[55]

B. *Currency Reporting*

The United States Customs Service's often rigid enforcement of currency-reporting laws is another impediment to commerce between the United States and Mexico which will persist after the passage of the NAFTA. These currency laws[56] provide for the reporting of "monetary instruments" on Customs Form 4790. This requirement also prescribes the reporting of currency exceeding $10,000 when transported into or out of the United States at one time by any individual, agent, or bailee.[57] In the event of a reporting violation, seizure and forfeiture of such instruments are the authorized penalties.[58] The United States Customs Service also "bootstraps" currency-reporting violations under Section 1595 of Title 19 in order to effect seizure of aircraft and other conveyances.[59]

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53. 14 C.F.R. § 47.9(e) (1992).

54. *See* 49 C.F.R. § 47.9 (1992) (describing aircraft-registration requirements for non-citizen corporations).

55. *See* 49 U.S.C. app. § 1472(b)(1)(B) (1988) (describing criminal penalties). Specifically, there is a proscription against "knowingly and willfully falsifying, concealing, or covering up a material fact, or making a false, fictitious, or fraudulent statement or entry" with respect to an application for aircraft registration. *Id.* Furthermore, the appearance of a "material, false statement" on an application form for aircraft registration creates the presumption that a violation has occurred. *Id.* § 1472(b)(3)(B)(ii).

56. *See generally* 31 U.S.C. § 5316-5317 (1988) (describing reporting requirements and conditions for search and forfeiture).

57. A report must be filed by an individual receiving in the United States from a place outside the United States monetary instruments of more than $10,000 at one time. 31 U.S.C. § 5316 (1988).

58. *See* 19 U.S.C. § 5317 (1988) (describing procedures for obtaining search and forfeiture).

59. *See* 19 U.S.C. § 1595a(a) (1988) (outlining types of property subject to forfeiture).

The term "monetary instruments" for purposes of the reporting requirement includes cash and checks in "bearer" form or other negotiable form whereby title passes upon delivery.[60] This category does not, however, include a check payable to a named party that is not properly endorsed.[61] The Customs Service treats travelers checks as reportable and requires that money orders be reported unless the money order is restrictively endorsed or payable to a person.[62] Stock and bond certificates are reportable if they are in negotiable form whereby title passes upon delivery through being either in bearer form or assigned in blank on the back of the certificate.[63]

The Fifth Circuit has held that an individual must have knowledge of the reporting requirement before his or her monetary instruments are subject to seizure and forfeiture,[64] but there is a division among the circuits on this issue.[65] Circuits which have not applied the knowledge prerequisite at least have required that an individual have actual knowledge that the monetary instruments are being transported.[66] The Customs Service administrative manual follows the position that actual knowledge of the reporting requirement is unnecessary, but knowledge that the monetary instruments are being transported is a prerequisite to seizure.[67] The manual, however, also states that in a "sealed envelope situation [t]he reportable contents are subject to seizure and forfeiture, regardless of the courier's lack of knowledge, because responsibility also lies with the individual who had the instruments transported and who, presumably, counted them

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Section 1595a(a) provides "every vessel, vehicle . . . aircraft, or other thing" used in the importation or bringing into the United States of any article introduced into the United States contrary to law is subject to seizure and forfeiture. *Id.*

60. These types of checks refer to checks payable to bearer or cash.

61. *See* 31 U.S.C. § 5312(a)(3) (1988) (defining monetary instruments).

62. *See* 31 C.F.R. § 103.11(m)(iii)-(iv) (1992) (including money order in definition of monetary instrument).

63. *See id.* § 103.11(m) (defining monetary instruments).

64. *See* United States v. $173,081.04 in United States Currency, 835 F.2d 1141, 1143 (5th Cir. 1988) (citing cases affirming requirement of having knowledge of reporting requirement).

65. *See* United States v. $359,500 in United States Currency, 828 F.2d 930 (2d. Cir. 1987); United States v. $47,980 in Canadian Currency, 804 F.2d 1085, 1090-91 (9th Cir. 1986) (citing cases in which knowledge of reporting requirements not precondition of forfeiture).

66. *See* United States v. $122,043.00 in United States Currency, 792 F.2d 1470, 1474 (9th Cir. 1986) (stating as only knowledge requirement: knowing that more than $5,000 is being transported).

67. U.S. CUSTOMS SERV., U.S. DEP'T OF THE TREASURY, FINES, PENALTIES AND FORFEITURE HANDBOOK MON-3 (rev. ed. 1989).

before placing them in the sealed envelope."[68]

The Customs Service treats funds or negotiable checks, or both, in excess of $10,000 as reportable when they are carried on behalf of others by a family member, tour guide, or other group member during vacation and travel outings. However, when two or more family members are each carrying $10,000 or less, the Customs Service does not require a currency report.[69] On the other hand, the Service takes the position that a group that is composed of family members cannot redistribute funds belonging to one member of the group in order to evade the reporting requirement.[70] Thus, it is the Customs Service's position that when one member of a family or a group is the owner and possessor of a sum in excess of $10,000, he or she cannot avoid reporting requirements by doling out portions to other group or family members just prior to entry.[71]

The Customs Service adheres to a policy which permits amendment of the currency (monetary instruments) report at any time before the Service begins its examination. The Service also allows amendment after the examination begins if the amendment occurs at any time prior to the discovery of an unreported monetary instrument.[72] The Fifth Circuit has held, however, that the Customs Service is under no obligation to permit correction of an inadvertent error in a monetary instruments report after the examination begins.[73]

The Customs Service views any material misstatement or omission in a monetary instruments report as grounds for seizure and forfeiture, regardless of whether the misstatement or omission is intentional or inadvertent.[74] Further, the Service treats a reporting error involving *any* of the monetary instruments being transported as grounds for seizure and forfeiture of *all* the reporting party's monetary instru-

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68. *Id.*

69. *Id.* at MON-4.

70. *Id.*

71. *See* U.S. CUSTOMS SERV., U.S. DEP'T OF THE TREASURY, FINES, PENALTIES AND FORFEITURES HANDBOOK MON-4 (rev. ed. 1989) (prohibiting distribution of funds to evade reporting requirement).

72. *Id.*

73. *See $173,081.04 in United States Currency*, 835 F.2d at 1143 (rejecting argument that declaration of error before examination relieves individual of violation of reporting requirements).

74. *See* U.S. CUSTOMS SERV., U.S. DEP'T OF THE TREASURY, FINES, PENALTIES AND FORFEITURES HANDBOOK MON-4 (rev. ed. 1989) (determining violation only in terms of materiality).

ments, including those which *were* properly reported.[75] In the 1988 case discussed below, which has been labeled "the border exchange dealer's nightmare," the Fifth Circuit upheld both these positions.

In *United States v. $173,081.04 in United States Currency*,[76] an agent for a monetary exchange business in Juarez, Mexico, was transporting currency and checks for deposit in the Texas Commerce Bank in El Paso. Just prior to the agent's departure, one of the exchange business's principals told the agent to separate $19,685.04 from the total currency being transported and to deliver the lesser amount to Don Peso's Money Exchange House, rather than to Texas Commerce Bank.[77] The monetary instruments report, Form 4790, however, was not revised to reflect that the funds were being taken to two different destinations.[78]

The agent presented the Form 4790 to the Customs Service in El Paso and, upon being asked whether the form was completed correctly, answered in the affirmative.[79] Later, in response to a question about the two separate bags of currency he was carrying, the agent indicated that the bag containing the smaller amount was being taken to Don Peso's Money Exchange House.[80] The Customs Service subsequently seized all of the currency being carried by the agent ($172,081.04),[81] basing the seizure essentially upon the destination discrepancy.[82]

The Fifth Circuit held that "under the clear and unambiguous language of Section 5317(c), the claimant's money became subject to forfeiture when [agent] Arzo-Morales tendered the materially incorrect Form 4790 to [Customs Agent] Payan, regardless of whether the reporting error was intentional or inadvertent."[83] Further, the court

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75. *Id.* at MON-5.

76. 835 F.2d 1141 (5th Cir. 1988).

77. *Id.* at 1142.

78. *Id.*

79. *Id.*

80. *$173,081.04 in United States Currency*, 835 F.2d at 1142.

81. *See id.* at n.3 (noting that most of the seized checks were returned because they were non-negotiable and thus not subject to reporting requirements).

82. *See id.* at 1142 (describing failure to change destination on Form 4790 and resulting forfeiture). There was also a minor discrepancy which arose in the counting of the currency, but this issue was subsequently dropped at the appellate level as a basis for justifying seizure. *See id.* (stating as issues on appeal misstatement as to destination and determining correct amount of forfeiture).

83. *Id.* at 1143.

held that pursuant to the clear intent expressed in the relevant United States Department of the Treasury Regulation,[84] all money associated with the materially incorrect report is subject to forfeiture; only the Secretary of the Treasury has discretion to remit any or all of the forfeited funds.[85] By negative implication, the court held that the regulation did not confer on the federal courts any power to ameliorate an individual forfeiture.[86]

Although the Customs Service reviews on a case-by-case basis the materiality of omissions or misstatements on a Form 4790, the Service almost always deems material any reporting errors regarding the amount of monetary instruments transported.[87] For example, the Customs Service deems material the failure of an agent to report the name of the principal on the Form 4790. The Service also deems material a misstatement as to the identity of the principal.[88]

The Customs Service is quick to pursue criminal sanctions when it believes that there has been an intentional violation of the reporting requirements. Section 1001 of Title 18 of the United States Code, which proscribes making false statements to a federal officer, is commonly invoked by the Customs Service in currency reporting cases. This statute provides for a fine of up to $10,000, imprisonment for up to 5 years, or both. Willful violation of reporting requirements may result in a fine of up to $250,000,[89] imprisonment for up to 5 years, or both.[90] Another statute also provides that violation of reporting requirements, "while violating another law of the United States or as part of a pattern of any illegal activity involving more than $100,000 in a 12 month period," is punishable by a fine of up to $500,000, imprisonment for up to 10 years, or both.[91]

Customs Service enforcement of currency reporting laws, however,

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84. 31 C.F.R. § 103.48 (1992).

85. *$173,081.04 in United States Currency*, 835 F.2d at 1143-44; *see* 31 U.S.C. § 5317(c) (1988) (setting out forfeiture penalty in case of error in filing report); 31 U.S.C. § 5321(c) (1988) (stating authority of Secretary of Treasury to "remit any part of a forfeiture").

86. *See $173,081.04 in United States Currency*, 835 F.2d at 1144 (failing to note availability of any relief from federal courts).

87. *See* U.S. CUSTOMS SERV., U.S. DEP'T OF THE TREASURY, FINES, PENALTIES AND FORFEITURES HANDBOOK MON-4 (rev. ed. 1989) (describing materiality as determinative of reporting violation).

88. *Id.* at MON-5.

89. 31 U.S.C. § 5322(a) (1988).

90. *Id.*

91. 18 U.S.C. § 5322(b) (1988).

is not entirely unremitting. For a non-intentional violation for which the alleged violator can "demonstrate a legitimate source and use for the funds," the Customs Service will commonly remit forfeiture and assess a lesser monetary penalty.[92] The Customs Service has established mitigation guidelines which are followed in assessing such penalties. These guidelines provide, for example, that for an initial, non-intentional violation where a legitimate source and use of the funds is demonstrated, the Customs Service may assess a mitigated penalty equal to 5 to 10% of the seized amount, depending on the presence or absence of various mitigating factors.[93] Mitigating factors include language barriers, inexperience in travel, cooperation with Customs Service officers after discovery of the violation, contributory Customs Service error such as incorrect advice, and humanitarian purposes associated with use of the seized funds, for example, funds intended for medical expenses.[94]

The stakes, however, escalate sharply upon the commission of a second offense.[95] Even in cases in which a legitimate source and use is demonstrated for the seized funds, the mitigated penalty assessed is equal to 45 to 55% of the total amount seized, depending upon the presence or absence of mitigating factors.[96] For a third offense, no mitigation of the penalty is available.

C. *The NAFTA Rules of Origin*

The NAFTA eliminates duties on goods originating in a NAFTA country (Canada, Mexico, and the United States) over a "transition period," which could mean anywhere from immediately to fifteen years. The words "originating in" and the best method of determining a product's origin have constituted one of the thorniest issues in the NAFTA negotiations. It is probable that the resulting rules will prove to be extremely complex and will portend great penalty exposure to both United States manufacturers seeking to export and United States businesses seeking to import under the agreement.

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92. U.S. CUSTOMS SERV., U.S. DEP'T OF THE TREASURY, FINES, PENALTIES AND FORFEITURES HANDBOOK MON-1 (rev. ed. 1989).

93. *See id.* at MON-7 (describing possible range of mitigation).

94. *Id.*

95. *See id.* at MON-9 (stating increased penalty upon second offense).

96. U.S. CUSTOMS SERV., U.S. DEP'T OF THE TREASURY, FINES, PENALTIES AND FORFEITURES HANDBOOK MON-9 (rev. ed. 1989).

The Rules of Origin (Rules),[97] as they are currently stated in the NAFTA, are intended to ensure that the NAFTA benefits are accorded only to goods produced in the North American region and *not* to goods made wholly or in large part in non-NAFTA countries. The Rules were adopted with the intent that they: (1) be clear; (2) yield predictable results; and (3) minimize the administrative burdens for such individuals as exporters, importers, and producers trading under the NAFTA.[98]

The NAFTA Rules of Origin closely track those of the Canadian Free Trade Agreement. They have GATT origins and are widely lauded by various bureaucrats, negotiators, and enforcement officials as the best language yet found to achieve the goals of the Rules.

The language does seems to simplify and render slightly more objective the country of origin determination. This slight simplification is accomplished primarily by tying country-of-origin to tariff classification, rather than to substantial transformation, which, for the past hundred years or more, has been the prevalent standard for determining country-of-origin under United States tariff laws. Engrafted onto the tariff classification change requirement is a regional-content rule.[99] To "simplify" qualification under the latter calculation, there are alternative, optional valuation bases, including: (1) the transaction-value method, which is based on the price paid or payable for the goods and purportedly avoids any complex cost accounting systems;[100] and (2) the "net-cost" method, which is based on the total cost of the goods, less the costs of royalties, sales promotion, and packing and shipping, with an interest limitation.[101]

The transaction-value option is limited, however, and exceptions are piled on qualifications. For example, the transaction-value method is barred where not acceptable under the GATT Customs Valuation Code. This limitation means, inter alia, that any related-party transaction will be carefully scrutinized to determine whether the relationship has influenced the price. Also, the net-cost method must be used in cases in which the transaction value is required for

97. *See generally* North American Free Trade Agreement [NAFTA], Aug. 12, 1992, U.S.-Mex.-Can., Rules of Origin (text revised Sept. 6, 1992) (describing Rules of Origin).

98. NAFTA, Rules of Origin.

99. *See generally* NAFTA, ch. 4, art. 402 (discussing regional content value rule).

100. *See id.* ch. 4, art. 415 (defining transaction value).

101. *See id.* art. 402, § 8 (describing three ways of using net-cost method).

certain products, such as automotive goods.[102]

Other exceptions to the value-content requirement reflect the intense lobbying efforts to obtain an advantage or maintain the status quo. For example, there are specific value-contents for specific products: 62% for autos and 62.5% for auto parts.[103] For textiles, there is the "yarn forward" rule which further restricts textile products to those of NAFTA-produced yarns.[104] Also, a "safe harbor" 7% de-minimis non-NAFTA content rule prevents goods from losing preference eligibility solely because they contain minimal amounts of "non-originating" material.[105]

D. *Customs Enforcement of the NAFTA Rules of Origin*

The NAFTA Rules of Origin, while well-intentioned and the *sine qua non* of a successful agreement, impose on United States manufacturers and exporters, as well as on United States importers, greatly enhanced civil and criminal liability. The Rules compel the parties to certify country of origin, value, and content, and to comply with the Rules of Origin upon export or import of their products. Correct certification requires a degree of sophistication, including a full understanding of the United States and GATT valuation law, knowledge not possessed by most small to medium-sized businesses.

Similarly, Mexican manufacturers and exporters face the same sort of actions by the Mexican government, but their errors or misdeeds are transferred to the United States importer, who is obligated, upon severe penalty of law, to declare correctly at the time of importation those facts relevant to classification, valuation, and admissibility of the merchandise.

IV. LIKELY CUSTOMS ENFORCEMENT UNDER THE NAFTA

The NAFTA is certain to spur the Customs Service to increased levels and varieties of enforcement. The price of "free trade" will surely be demonstrable action to ensure that it is also "fair trade." Some 2,000 pages of the NAFTA agreement await interpretation by international businesspersons and, thereafter, by customs authorities of the respective countries. This gradual process of interpreting the

102. *See id.* art. 403 (describing tariff classification for automotive goods).
103. NAFTA, pmbl., Automotive Goods.
104. *Id.* Textiles and Apparel, Rules of Origin.
105. *See* NAFTA, ch.4, art. 405, § 1 (describing de minimis rule).

NAFTA promises to be an error-filled chore rife with interpretational disagreements respecting tariff classification, phase-out periods for duties and quotas, and similar matters relatively common to customs transactions.

The Customs Service will surely level penalty actions against businesses for "fraud" and "gross negligence" when the business community's interpretation has yielded tariff results more favorable to its interests than the Customs Service's interpretation will permit. Apart from penalty actions resulting from such interpretational error, there will be whole new areas of law which offer fertile ground for the Customs Service to apply its enforcement powers.

The NAFTA, although a trilateral agreement, will mainly affect trade with Mexico rather than Canada because of the drastic difference in wage rates between Mexico and the rest of North America. Upon final ratification of the NAFTA, the primary responsibility for United States enforcement will fall upon the United States Customs Service. This duty will herald unprecedented changes, not only in the way the United States does business with Mexico, but also in the way the United States Customs Service enforces trade with Mexico. Across-the-board reductions in or eliminations of duties on NAFTA-origin products will require substantial, continuing verification and enforcement efforts; otherwise, pervasive cheating could undermine the entire process.

Importantly, the expanded role of the Customs Service under the NAFTA will take the Service into business affairs and businesses themselves, which until now have not had the slightest concern with or knowledge of the customs laws of the United States. It is expected that many companies and individuals will be heavily penalized, both civilly and criminally, during the learning process.

The party-countries are expected to cooperate in enforcing verification and compliance with the Rules of Origin. Such cooperation has heretofore been largely confined to drug enforcement. It is difficult to forecast where this cooperation will lead from a procedural standpoint. Joint defenses could develop, namely, the United States importer and the Mexican exporter, or, vice versa, against combined United States and Mexican enforcement efforts. As surely as death and taxes, the United States Customs Service will continue to broaden its enforcement efforts, and it is to be expected that the Customs Service will liberally apply the entire range of civil and criminal penalties to ensure that trade under the NAFTA is in fact "fair trade."