

United States v. UPS: *The Status of Remedies under the Customs Broker Penalty Statute**

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I. INTRODUCTION

When the U.S. Court of Appeals for the Federal Circuit¹ rendered its decision in *United States v. UPS Customhouse Brokerage, Inc.*,² the community³ was left with an unanswered question: What is the maximum penalty Customs can assess against a Customs broker for failing to exercise responsible supervision and control as required by the Customs Brokers' Statute.⁴

¹ Hereinafter "CAFC" or "Federal Circuit"

² 575 F.3d 1376 (Fed. Cir. 2008) (hereinafter UPS V). Before reaching CAFC, this litigation had produced four decisions by the United States Court of International Trade: *United States v. UPS Customhouse Brokerage, Inc.*, 30 CIT 808, 442 F.Supp 2d 1290 (2006) (denying UPS's motion for partial summary judgment and Customs' motion to strike) (hereinafter UPS I); *United States v. UPS Customhouse Brokerage, Inc.*, 30 CIT 1612, 464 F. Supp. 2d 1364 (2006) (granting UPS's motion to certify question), *appeal den.*, 213 Fed. Appx. 985, 986 (hereinafter UPS II); *United States v. UPS Customhouse Brokerage, Inc.*, 31 CIT 1023 (Ct. Int'l Trade 2007) (denying Customs' motion for summary judgment) (hereinafter UPS III); *United States v. UPS Customhouse Brokerage, Inc.*, 558 F. Supp. 2d 1331 (2008) (The decision that UPS appealed.) (hereinafter UPS IV).

³ This article uses the word "community" to denote affected parties at large, *e.g.*, importers, customs brokers, Customs, as well as international trade lawyers and judges.

⁴ See 19 U.S.C. § 1641(d)(2) (2010) (hereinafter Broker Penalty Statute).

At the trial level,⁵ the three main questions were (1) whether UPS misclassified certain computer parts; (2) whether its repeated misclassifications of the computer parts constituted a single violation or multiple violations of the Customs Brokers' Statute ; as well as (3) whether a multiplicity of violations breached UPS's statutory duty to exercise responsible supervision and control.⁶

These three issues, in turn, subsumed additional questions: Can Customs impose penalties aggregating more than \$30,000?⁷ Does the Broker Penalty Statute limit the number of penalties CBP may assess?⁸ Should repeated misclassification be treated as a pattern of conduct and, thus, be penalized as one instance,⁹ or may Customs construe each misclassified entry as a separate and distinct violation of the Broker Penalty Statute¹⁰? Does the doctrine of multiplicity serve as a good theory in civil and administrative cases?¹¹

With the foregoing in mind, the goal of this paper is two-fold: (1) to outline the root of this controversy, and (2) to discuss whether the CIT correctly held that the are no

⁵ United States Court of International Trade.

⁶ UPS V, *supra* note 2, at 1377.

⁷ 19 C.F.R. § 111.91 (2010) (“Customs may assess a monetary penalty or penalties as follows: (a) In the case of a broker in an amount not to exceed an aggregate of \$30,000. . . .”).

⁸ UPS IV, *supra* note 2, at 1354–56.

⁹ *Id.*

¹⁰ Customs argued that each shipment of merchandise is a discreet event comprised of different merchandise from unique importers. *Id.* at 1354–55.

¹¹ The CIT deferred to Congress to decide. *Id.* at 1354, n.26.

limitations on the number of penalties Customs can issue under the Broker Penalty Statute. The root of the litigation was the failure of Congress and Customs to define the phrase “violation or violations” in the Broker Penalty Statute¹² and the regulations¹³, respectively.

Part II of this article provides a detailed factual, procedural and substantive background of the UPS case(s). Part III analyzes the litigants’ contentions on the issue of violation of the Broker Penalty Statute, the issue that was raised and left unresolved in the controversy. Part IV summarizes the state of the law following the litigation.

II. FACTUAL, PROCEDURAL AND SUBSTANTIVE HISTORY OF THE *UPS* CASE(S)

A. *Administrative Proceedings*

This controversy commenced more than ten years ago.¹⁴ On May 15, 2000,¹⁵ Customs issued three pre-penalty notices to UPS for violations of The Broker Penalty

¹² 19 U.S.C. 1641(d)(2)(A) (2010) [hereinafter Section 1641].

¹³ 19 CFR § 111.1 (2010) [hereinafter Section 111.1].

¹⁴ See UPS I, *supra* note 2, at 809, n.1 (relating that the parties were confused about the year when Customs issued the first pre-penalty notice).

¹⁵ “Based upon the record before it, the Court presumes that Customs concurrently issued three separate pre-penalty notices on May 15, 2000.” *Id.*

Statute.¹⁶ Subsequently, Customs issued three penalty notices, and UPS paid Customs a total of \$15,000 in penalties.¹⁷

These payments did not conclude the matter. Pre-penalty and penalty notices kept coming. Between July and August 2000, Customs issued five pre-penalty notices followed by penalty claims in a total amount of \$75,000.¹⁸ UPS did not pay the penalties thereby prompting the Government to file suit to collect the penalties.¹⁹

All the penalty claims alleged the same violation: UPS failed to exercise “responsible supervision and control” over the classification of merchandise entered between January 10 and May 10, 2000.

B. *Factual, Procedural and Substantive History at the CIT: UPS IV*

Because UPS refused to pay \$75,000, the Government filed a complaint against it seeking to enforce the monetary penalties.²⁰ In turn, UPS attempted to put the fight to

¹⁶ The Brokers’ Statute requires that Customs notify a customs broker prior to enforcing a penalty against the broker for a violation of the statute. Section 1641, *supra* note 12.

¹⁷ UPS I, *supra* note 2, at 810–11. UPS remitted the payment on October 1, 2001. *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 1294. Government filed a complaint against UPS on December 17, 2004. On February 14, 2006, Government filed its first amended complaint seeking to recover \$75,000, in total, for the five unpaid penalties assessed against UPS. *Id.* at 1294. On April 21, 2005, UPS filed its answer to Government’s complaint. The answer included nine affirmative defenses and no counterclaims. *Id.*

²⁰ UPS I, *supra* note 2, at 811.

rest in a summary judgment motion.²¹ UPS argued that the Broker Penalty Statute bars Customs from collecting more than a single monetary penalty for all violations of Section 1641 preceding the issuance of a pre-penalty notice.²² In accord with this reasoning, UPS also asserted that it was owed a refund of \$10,000 (from the \$15,000 UPS had paid to Customs in 2001).²³ The CIT denied the motion.²⁴

A bench trial took place in December of 2007.²⁵ In its briefs and at trial, Customs alleged that UPS failed to “exercise responsible supervision and control” over its “customs business”²⁶ when it repeatedly misclassified entries of merchandise under subheading 8473.30.9000,²⁷ the subheading that provides for electronic merchandise containing a cathode-ray tube (CRT). Customs sought enforcement of its \$75,000 penalty claim.

²¹ The CIT noted that despite the title “Summary Judgment,” UPS did not seek to dispose of all of the issues. *Id.* With that, the Court treated the motion as partial motion for summary judgment. *Id.* n.8.

²² *Id.* It is also worth mentioning that the National Customs Brokers and Freight Forwarders Association of America (“NCBFFAA”) appeared as amicus curiae arguing the same on behalf of UPS, albeit to no avail. *Id.* at 812.

²³ *Id.*

²⁴ *Id.* at 825–26.

²⁵ UPS IV, *supra* note 2, at 1335.

²⁶ 19 U.S.C. 1641(b)(4).

²⁷ UPS IV, *supra* note 2, at 1335. 8473.30.9000, Harmonized Tariff Schedule of the United States (“HTSUS”) [hereinafter 8473.30.90].

The ultimate issue before the court was whether UPS had failed to “exercise responsible supervision and control.”²⁸ And the CIT found that UPS had failed to do so. The Government argued that even after Customs had warned UPS about the incorrect classification and had provided remedial training, UPS continued to classify merchandise not containing CRTs under 8473.30.90.²⁹ These persistent misclassifications prompted Customs to declare that UPS had failed to exercise responsible supervision and control over its customs business thereby violating the Broker Penalty Statute.

1. *The CIT's Preliminary Findings*

Before resolving the ultimate issue, the CIT had to dispense with the preliminary factual and substantive findings. To that end, Customs had to prove that the imported electrical merchandise did not contain CRTs.

Customs met its burden. The parties stipulated that 37 out of 45 entries did not contain a CRT. Because Customs withdrew three entries from consideration, it only had

²⁸ In order to prevail, Customs needed to satisfy the statutory requirement of 19 U.S.C. § 1641(b)(4) allowing Customs to impose a monetary penalty when a broker “has violates any provision of any law enforced by the Customs or the rules or regulations issued under any such provision.” 19. U.S.C. § 1641(d)(1)(C) (2010). The statute requires that Customs prove by preponderance of the evidence that (1) entity charged is a “customs broker”; that (2) entity charged was engaged in “customs business,” and that (3) the entity failed to “exercise responsible supervision and control” over its “customs business.” *Id.* at (b)(4). Here, the parties stipulated to the first and second issues.

²⁹ UPS IV, *supra* note 2, at 1335. Subheading 8473.30.9000 provides for “parts and accessories of automated data processing machines.” *Id.*

to prove the absence of a CRT in the remaining five entries.³⁰ The CIT was satisfied with the evidence Customs provided and found that the electrical merchandise did not contain CRTs.³¹

Next, the CIT determined that the goods were not classified in 8473.30.90. To arrive at that finding, the CIT used a two-step analysis: (1) it construed the relevant tariff headings and then (2) determined under which of those headings the merchandise at issue is properly classified. At the conclusion of the analysis, the Court determined that, as a matter of law, for merchandise to be classified under 39.90 subheading, the imported article must contain a CRT and that the merchandise at issue thus was improperly classified.³² Finished with the preliminaries, the CIT took on the ultimate task.

2. *The Ultimate Findings*

As has been mentioned earlier, the ultimate question was that of responsible supervision and control pursuant to the Broker Penalty Statute.³³ First, the court examined the meaning of “responsible supervision and control” in the context of the Customs Brokerage business.³⁴ Because the Broker Penalty Statute does not define the

³⁰ *Id.* at 1337, n.8.

³¹ *Id.* at 1349.

³² *Id.*

³³ *Id.*

³⁴ UPS IV, *supra* note 2, at 1349–50.

phrase “responsible supervision and control,” but Customs defined it in the implementing regulations. Specifically, Section 111.1,³⁵ in relevant part, states:

‘Responsible supervision and control’ means that degree of supervision and control necessary to ensure the proper transaction of the customs business of a broker, including actions necessary to ensure that an employee of a broker provides substantially the same quality of service in handling customs transactions that the broker is required to provide.

The regulations explain that “the determination of what is necessary to perform and maintain responsible supervision and control will vary depending upon the circumstances in each instance”; however, it provides a list of ten non-exclusive factors.³⁶

³⁵ Section 111.1, *supra* note 13.

³⁶ *Id.* These factors are:

The training required of employees of the broker; the issuance of written instructions and guidelines to employees of the broker; the volume and type of business of the broker; the reject rate for the various customs transactions; the maintenance of current editions of the Customs Regulations, the Harmonized Tariff Schedule of the United States, and Customs issuances; the availability of an individually licensed broker for necessary consultation with employees of the broker; the frequency of supervisory visits of an individually licensed broker to another office of the broker that does not have a resident individually licensed broker; the frequency of audits and reviews by an individually licensed broker of the customs transactions handled by employees of the broker; the extent to which the individually licensed broker who qualifies the district permit is involved in the operation of the brokerage; and any circumstance which indicates that an individually licensed broker has a real interest in the operations of a broker.

Id.

The court observed that the parties actually argued about application of the Broker Penalty Statute and its regulations to the facts of the matter rather than the substance of the regulations—the definition of “responsible supervision and control.”³⁷

While Customs argued that the factors listed in Section 111.1 were discretionary and non-exclusive, UPS insisted that Customs failed to show its deficiency in any of the factors.³⁸ Customs argued that this regulation was discretionary. The list of factors provided guidance only and did not require that Customs consider each of the ten factors to determine whether a customs broker failed to exercise responsible supervision and control.

Conversely, UPS asserted that the regulations required Customs to consider all factors listed in the regulations.³⁹ According to UPS, the regulation required Customs to review all of the factors when determining compliance with the Broker Penalty Statute because the regulations’ language—“factors which [Customs] will consider”— was mandatory not discretionary.⁴⁰ The CAFC upheld this position several months later.

The CIT deferred to the agency’s interpretation thereby disagreeing with UPS. Although the court agreed that the text “will consider” is ambiguous, it stated that as long as the author of the regulations—Customs—interprets the provision as

³⁷ UPS IV, *supra* note 2, 1350.

³⁸ *Id.* at 1350–51.

³⁹ *Id.*

⁴⁰ *Id.* (emphasis added).

discretionary, the court should defer to that interpretation when the interpretation is reasonable.⁴¹ The court found that the interpretation was reasonable.

In conclusion, the CIT upheld Customs' administrative finding concerning UPS. Because the court found that the factors were mere guidance, it examined the factors that Customs actually had considered.⁴² When summarizing Customs' evidence, the CIT stated that it "presented a holistic totality-of-circumstances application of Section 111.1 to UPS's persistent misclassification violations where no single listed factor dominated."⁴³

In particular, Customs won the CIT over with evidence of a long-term campaign aiming to increase brokers' awareness with respect to the proper use of the subheading 8473.30.90, as well as with a showing that Customs provided training to UPS on the use

⁴¹ UPS IV, *supra* note 2, at 1350. The Court noted that first of all "Customs' definition of "responsible supervision and control" . . . is reasonable." *Id.* The court disagreed with UPS, stating that "where a rule states that an agency 'will consider' certain factors, this textual directive 'implies wide areas of judgment and therefore discretion.'" *Id.* at 1352. (citing *Carolina Tobacco Co., v. Bureau of Customs & Border Protection*, 402 F.3d 1345, 1350 (Fed. Cir. 2005)). Such discretion allowed Customs to weigh only some of the factors when considering whether UPS failed to exercise reasonable supervision and control of its brokerage business. *Id.* at 1353. The court further noted that it is charged with "defer[ing] to Customs' reasonable interpretation of its own regulations." Here, Customs established that the Section 111.1 factors were not exclusive, but served as guidance to the agency and the brokerage community. *Id.*

⁴² UPS IV, *supra* note 2, at 1352.

⁴³ *Id.*

of 8473.30.90.⁴⁴ During one of the training sessions attended by UPS officials, Customs informed attendees that goods classified under heading 8473.30.90 “must contain a cathode ray tube” and that “8473.30.90 should almost never be used.”⁴⁵ Apparently, the fact that UPS officials attended this training, received this information, and seemingly ignored it by classifying merchandise under heading 8473.30.90, significantly hurt UPS’s defense.⁴⁶ And the CIT was not sympathetic.

After considering the factors’ issue and finding that UPS failed to exercise responsible supervision and control, the Court also upheld the penalty amounts. The CIT dismissed the UPS’s argument that repeated misclassifications of computer parts constituted a single violation of 19 U.S.C. 1641.⁴⁷ The court merely deferred to the agency’s interpretation—and Customs asserted that each misclassified entry “constituted a ‘separate and distinct violation’” of the Brokers’ Statute warranting separate penalties.⁴⁸ The CIT held for Customs on all three issues.⁴⁹ UPS appealed.

⁴⁴ *Id.* at 1352.

⁴⁵ *Id.* Customs officials further cautioned attendees that using 8473.30.9000 sends up the red flag to Customs to look at that entry—it is usually never correct. *Id.*

⁴⁶ *Id.* at 1352. Other evidence added to the blow: Customs sent UPS multiple warning letters and Notices of Action when UPS failed to “achiev[e] a 95% compliance rate in the use of heading 8473,” despite receiving training sessions. Additionally, the work processes at UPS did not work long-term prompting the court to note that “UPS failed to successfully stem the cascade of errors that resulted from supervisory neglect.” UPS IV, *supra* note 2, at 1352.

⁴⁷ *Id.* at 1353.

⁴⁸ *Id.*

C. *The Appeal: UPS V*

Although presented with essentially the same issues as the trial court, the CAFC did not reach the issue of single versus multiple violations, the focus of this discussion. The court affirmed the CIT's determination that UPS misclassified merchandise under the subheading 8473.30.90.⁵⁰ But rather unexpectedly, perhaps, the court agreed with UPS's argument that the "will consider" language in Section 111.1 was mandatory rather than discretionary.

The CAFC found that Customs is required to consider all of the factors when considering broker's exercise of supervision and control. Having found inconsistency in Customs' interpretation of Section 111.1, the CAFC had its hand untied so to speak to interpret the regulations.⁵¹ Honing the meaning of "will consider," the CAFC found not only that the term was mandatory, but also that the term plainly meant that Customs must consider "*at the least* the ten listed factors."⁵² The court held that because Customs had not considered all ten factors listed in 19 C.F.R. § 111.1, it improperly determined that UPS had violated of the Broker Penalty Statute. With that, the CAFC remanded the case to the CIT.

⁴⁹ The court concluded that "[t]o hold that Customs is limited to issuing only one penalty in instances . . . where [UPS] continually engages in the same conduct would hamper [Customs'] enforcement authority and read a restriction into 19 U.S.C. [Section] 1641 that does not exist." *Id.* at 1356.

⁵⁰ UPS V, *supra* note 2, at 1381, 1383.

⁵¹ *Id.* at 1382.

⁵² *Id.* (emphasis in original).

Despite clarifying the “factors’ issue,” the CAFC declined to reach the other two: (1) whether there were in fact multiple violations of The Broker Penalty Statute and (2) whether Customs can impose penalties aggregating more than \$30,000.⁵³ Although the CAFC acknowledged the importance of these issues to the parties and the community, it noted that “deciding them would be premature.”⁵⁴ The next section of this discussion summarizes the arguments the parties advanced before the CIT and on appeal regarding these issues.

III. PARTIES’ ARGUMENTS ON THE ISSUE OF “VIOLATION”

UPS advanced two arguments in support of its “single violation” position. In UPS I, UPS relied on statutory interpretation for support. Because the CIT rejected its statutory interpretation in UPS I, UPS advanced a pattern of conduct argument in UPS IV.

A. *UPS Textual Interpretation of The Broker Penalty Statute and Regulation*

Relying on principles of statutory interpretation, UPS contended that Customs was statutorily⁵⁵ barred from pursuing a penalty case against UPS because Customs was limited to either:

⁵³ 19 C.F.R. § 111.91.

⁵⁴ UPS V, *supra* note 2, at 1383. The CAFC vacated the CIT’s judgment addressing these issues. *Id.* at 1377.

⁵⁵ The statute, in relevant part, provides:

Unless action has been taken under subparagraph (B), the appropriate customs officer shall serve notice in writing upon any customs broker to show cause why the broker should not be subject to a **monetary penalty not to exceed \$30,000 in total for a violation or violations of this section.**

Section 1641, *supra* note 12 (emphasis added).

- (1) a single monetary penalty against a broker for any violation or violations of the broker statute that precede the pre-penalty notice, which penalty [UPS] has satisfied; or
- (2) a maximum penalty of \$30,000 for all alleged violations that occurred prior to the first pre-penalty notice Customs issues, of which amount Customs has already collected \$15,000.⁵⁶

UPS asserted that the phrase “for a violation of violations” makes clear that Customs is “limited to the issuance of a single penalty . . . , subject to the \$30,000 maximum, even where the broker has committed multiple violations” of the statute.⁵⁷ UPS also argued that the statement imposed a cap on the penalty Customs may impose.⁵⁸

Section 111.91 of the Customs regulations, in relevant part, provides:

Customs may assess a monetary **penalty or penalties** as follows:

- (a) In case of a broker, in an amount **not to exceed an aggregate of \$30,000** for any of the reasons set forth in § 111.53 (a) through (f) other than those listed in § 111.53(b)(3) and provided that no license or permit suspension or revocation proceeding has been instituted against the broker under subpart D of this part any of the same reasons.
- (b) In the case of a person who is not a broker, in an amount not to exceed \$10,000 for each transaction or violation referred to in §111.4 and in an amount not to exceed an aggregate of \$30,000 for all those transactions or violations.

19 C.F.R. § 111.91.

Note that 19 C.F.R. § 111.53(c) embraces the violation of the “responsible supervision and control” requirement.

⁵⁶ UPS I, *supra* note 2, at 814. (emphasis in original).

⁵⁷ *Id.*

⁵⁸ *Id.*

To drive its argument home, UPS turned to the legislative history. Specifically, UPS quoted the President⁵⁹ of the NCBFFA before the House Ways and Means Subcommittee saying that the first sentence of The Broker Penalty Statute specifies a 30,000 maximum monetary penalty and that this maximum amount was intended to apply to all violations committed prior to the date of issue of notice under the Brokers' Statute.⁶⁰ UPS added that the language in question was the result of negotiations between the customs brokerage industry and Customs⁶¹ and that to uphold Customs' varied interpretation would be to "undo the delicate balance struck by Congress, the industry and the agency at the time of enactment,"⁶² a common understanding among the three groups "that the agency is authorized to issue a single penalty, not to exceed \$30,000, . . . applicable to all violations committed prior to the date of the [p]re-penalty notice under the [Broker Penalty Statute]."⁶³

B. *UPS's "Pattern of Conduct" Argument*

While the previous section described the UPS's arguments in its motion for summary judgment, at the trial UPS argued that the overall *pattern of conduct* should be deemed a "violation." UPS invoked the principles of criminal law—prohibition of the

⁵⁹ In its brief, UPS provided a quote from William St. John's testimony. *Memorandum of Law in Support of Defendant's Motion for Summary Judgment*, filed August 2, 2005, at 8 n.8. [hereinafter UPS's Brief].

⁶⁰ UPS's Brief, *supra* note 60, at 8, n.10.

⁶¹ UPS I, *supra* note 2, at 816.

⁶² UPS's Brief, *supra* note 60, at 17.

⁶³ *Id.*

multiplicitous indictment—analagizing to it and arguing against multiple penalties for the same violation or violations.⁶⁴

Because Customs had already charged a violation of The Broker Penalty Statute based on the same pattern of conduct and UPS paid the \$15,000 penalty, Customs created a classic multiplicity problem.⁶⁵ UPS argued that it had already satisfied its penalty obligation.⁶⁶ In response, Customs maintained that each misclassified entry constitutes a “separate and distinct violation” for the purposes of The Broker Penalty Statute.⁶⁷

C. *Customs’ Argument with Respect to “Violation”*

In UPS I, the Government argued that (1) the Broker Penalty Statute is clear and unambiguous; (2) the legislative history does not support UPS’s position; (3) Customs’ interpretation of the statute is reasonable and is entitled to deference; (4) “the statute, existing regulations, administrative procedures, mitigation guidelines and *de novo*

⁶⁴ An indictment is multiplicitous if it charges multiple counts for a single offense. UPS IV, *supra* note 2, at 1354, n.25. The CIT dismissed this argument calling this principle inapposite in administrative and civil law. *Id.* n.26.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ In response, UPS leaned on rationale of the Brokers’ Statute: The statute, UPS argued, addresses broader concept and “does not speak in terms of individual entries being a violation” of Section 1641. Def.’s Post Trial Br. 25.

review by the [CIT] act ... to prevent Customs from abusing its discretion"; and (5) UPS's interpretation would prevent Customs from enforcing the laws.⁶⁸

Customs interpretation of the Broker Penalty Statute was that it has only two requirements: (1) each penalty must be preceded by written prior notice, *i.e.*, a pre-penalty notice, and (2) no single penalty may exceed \$30,000.⁶⁹

IV. CONCLUSIONS ON THE STATE OF THE LAW

A. *Can Customs Issue Multiple Penalties under the Broker Penalty Statute?*

In UPS I, the CIT answered this question in the affirmative. While the court found the statute to be ambiguous, it disagreed with UPS's interpretation.⁷⁰ Instead, the CIT found that Customs interpretation of the statute was reasonable and thus was entitled to Chevron deference.⁷¹ The court stated:

Separate and apart from its brief, Customs articulated its interpretation of [the Broker Penalty Statute] in its regulations ... and the mitigation guidelines. As stated previously, the regulations state that Customs may assess a penalty or penalties . . . in an amount not to exceed an aggregate of \$ 30,000 for one or more" violations of the broker statute. 19 C.F.R. § 111.91. In promulgating the broker penalty regulations, which were subject to notice and comment, 50 Fed. Reg. 31,871 (Aug. 7, 1985), Customs clearly adopted the position that it was entitled to impose more than one monetary penalty for violations of the broker statute. Although the regulation might be read to limit any penalties imposed to an aggregate of \$ 30,000, Customs clarified its position in the mitigation guidelines, which state that Customs may penalize a broker "a maximum of \$ 30,000 for any violation or violations of the statute in any one penalty notice." 19 C.F.R. Pt. 171, App. C., XII(A) (emphasis added). While the mitigation guidelines were not subject to notice and comment, they are "still entitled

⁶⁸ UPS I, *supra* note 2, at 1298.

⁶⁹ UPS I, *supra* note 2, at 1299.

⁷⁰ UPS I, *supra* note 2, at 1308.

⁷¹ UPS I, *supra* note 2, at 1309.

to some deference, since [they are] a 'permissible construction of the statute.'" *Reno v. Koray*, 515 U.S. 50, 61, 115 S. Ct. 2021, 132 L. Ed. 2d 46 (1995) (quotation and citations omitted).

Neither the broker penalty statute nor Customs regulations place any temporal restriction on a penalty issued by Customs, and this Court sees no reason to read one into the statute.²¹ This Court also does not read the statute as prescribing a limit on the number of pre-penalty notices Customs may issue. This Court finds that the regulations and mitigation guidelines express a reasonable interpretation of the broker penalty statute. Accordingly, Customs' reading of the broker penalty statute is owed deference by this Court. If the statute is not written in a manner consistent with the understanding of Defendant and the NCBFFAA, this Court is not the proper venue in which to attempt to effect a change.

The CIT certified its decision in UPS for interlocutory appeal, but the Federal Circuit denied the petition for permission to appeal.⁷²

The Federal Circuit did not reach this issue in UPS V. "Although these issues are important to the parties and the industry, deciding them would be premature."⁷³ Thus, the CIT's decision is the state of the law at this time. Customs may issue multiple penalties under the Broker Penalty Statute so long as it issues a pre-penalty notice and no single penalty exceeds \$30,000. The Customs brokerage community must rely on the CIT's *de novo* review of penalty cases to ensure that Customs does not abuse its discretion.

B. *What is Customs' burden of proof under the Broker Penalty Statute?*

The Federal Circuit clearly answered this question. Customs must consider all ten factors listed in 19 C.F.R. § 111.11 in order to show that a broker has violated 19 U.S.C. § 1641.

⁷² UPS V, *supra*, note 2 at 1378.

⁷³ *Id.* at 1383.

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