



DEPARTMENT OF THE TREASURY  
WASHINGTON

March 5, 2018

INSPECTOR GENERAL

The Honorable Orrin Hatch  
Chair  
Committee on Finance  
United States Senate  
Washington, DC 20510

The Honorable Ron Wyden  
Ranking Member  
Committee on Finance  
United States Senate  
Washington, DC 20510

The Honorable Kevin Brady  
Chairman  
Committee on Ways and Means  
House of Representatives  
Washington, DC 20515

The Honorable Richard Neal  
Ranking Member  
Committee on Ways and Means  
House of Representatives  
Washington, DC 20515

Re: Customs Revenue Function under the Trade Facilitation and Trade Enforcement Act of 2015 – Section 112 and Section 115 (OIG-CA-18-015)

Dear Messrs. Chairmen and Ranking Members:

Section 112 of Public Law 114-125, the Trade Facilitation and Trade Enforcement Act of 2015 (Trade Act), requires the Department of the Treasury (Treasury) Office of Inspector General (OIG) to report on (1) the effectiveness of measures taken by U.S. Customs and Border Protection (CBP) with respect to protection of revenue, including (A) the collection of countervailing and antidumping duties; (B) the assessment, collection, and mitigation of commercial fines and penalties; (C) the use of bonds to secure that revenue; and (D) the adequacy of CBP policies with respect to the monitoring and tracking of merchandise transported in bond and collecting duties, as appropriate; (2) the effectiveness of actions taken by CBP to measure accountability and performance with respect to protection of revenue; (3) the number and outcome of investigations instituted by CBP with respect to the underpayment of duties; and (4) the effectiveness of training with respect to the collection of duties for personnel of the CBP. The statute required Treasury OIG to produce the first report no later than June 30, 2016 and to produce reports

collection of duties for personnel of the CBP. The statute required Treasury OIG to produce the first report no later than June 30, 2016 and to produce reports biennially, starting in March 2018. We provided you a letter in June 2016 to satisfy the first reporting deadline.

Section 115 of the Trade Act requires Treasury OIG to report on a program established by CBP to adjust bond amounts for importers, including new importers and nonresident importers, based on risk assessments conducted by CBP, in order to protect the revenue of the Federal Government. Treasury OIG is required to report on the (1) risk assessment guidelines developed by CBP for importers to determine if and to what extent CBP (A) adjusted bond amounts of imported products of such importers and (B) increased screening of imported products of such importers; (2) procedures to ensure increased oversight of imported products of new importers relating to the enforcement of priority trade issues; (3) procedures to ensure increased oversight of imported products of new importers by Centers of Excellence and Expertise; and (4) number of bonds adjusted based on the risk assessment guidelines. The statute requires provision of the report no later than February 24, 2018.

## **Background**

The Homeland Security Act of 2002 (HSA) established the Department of Homeland Security (DHS). The HSA dissolved the legacy United States Customs Service in Treasury and transferred all of its functions from Treasury to DHS, except the Customs revenue functions, which were to be retained by Treasury.<sup>1</sup> HSA Section 412 stated that Treasury, at its discretion, could delegate – but not transfer – its Customs revenue functions to DHS and retain any duties that were not delegated. Additionally, Treasury was authorized to appoint up to 20 new personnel to work with DHS personnel in performing Customs revenue functions.

Through Treasury Order (TO) 100-16, “Delegation from the Secretary of the Treasury to the Secretary of Homeland Security of general authority over Customs revenue functions vested in the Secretary of the Treasury as set forth in the Homeland Security Act of 2002” (May 15, 2003), the Secretary of the Treasury delegated the authority over the Customs revenue functions to DHS, with certain exceptions.<sup>2</sup> Specifically, Treasury would have sole authority to approve regulations concerning a wide range of functions involving revenue or regulating trade for economic purposes including import quotas, trade bans, user fees, origin, copyright and trademark enforcement, duty assessment, classification, valuation, preferential trade programs, and recordkeeping requirements. Per the TO, Treasury also retained the authority to review proposed Customs revenue rulings and modify or revoke any determination or ruling involving the previously mentioned Customs

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<sup>1</sup> Pub. L. 107-296, Sections 403, 412, codified at 6 U.S.C. Sections 203 and 212.

<sup>2</sup> Codified in 19 CFR Part 0, “Transferred or Delegated Authority.”

revenue-related topics. In addition, Treasury would share the chair of the Commercial Operations Advisory Committee (COAC) with DHS.<sup>3</sup> All authorities, powers, duties, and responsibilities retained by Treasury relating to Customs revenue functions were delegated through Treasury Directive (TD) 18-03, "Delegation to the Deputy Assistant Secretary (Tax, Trade, and Tariff Policy)" (March 30, 2015), to the Deputy Assistant Secretary (DAS) for Tax, Trade and Tariff Policy.

Had the HSA transferred Customs revenue functions along with the other functions, personnel, assets, and liabilities of the legacy U.S. Customs Service, authority and responsibility for those functions would have been fully conferred to DHS, like the non-revenue functions enumerated in Section 403(1). However, because the authority for Customs revenue was only delegated, responsibility for this function is still vested in the Secretary of the Treasury, who may rescind or modify the delegation at any time. The regulations at 19 CFR Part 0 set out in Footnote 2 illuminate this distinction. The principle is broadly established in 3 U.S. Code 301, the general authorization to delegate functions, which allows delegation of authority but requires retention of responsibility for acts taken pursuant to such delegations.

### **Treasury's Role Regarding Customs Revenue**

We reported in June 2016 that Treasury Office of General Counsel (OGC) attorneys concurred with our conclusion that the delegation of revenue functions does not relieve Treasury of the ultimate responsibility for those functions; the responsibility is retained with the delegator.<sup>4</sup> As the statute is written, Treasury is accountable for ensuring the collection of Customs revenue.

We also reported in our June 2016 report that Treasury only performs policy oversight and does not oversee the operational side of the Customs revenue function. Treasury retained sole authority to approve regulations concerning revenue or regulating trade for economic purposes per TO 100-16. The DAS for Tax, Trade, and Tariff Policy carries out Treasury's Customs revenue policy oversight role. Information made available for our review and our interviews with OGC attorneys and the DAS for Tax, Trade, and Tariff Policy revealed that Treasury is not involved in Customs revenue operations and does not perform data analytics or produce reports on CBP operational functions.

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<sup>3</sup> The Omnibus Budget Reconciliation Act of 1987, Pub. L. 100-203, Title IX, Subtitle F, 9503(c), (codified at 19 U.S.C. 2071 note) established the COAC. TO 100-16, specifies that the COAC will be administered jointly by the Departments of the Treasury and Homeland Security.

<sup>4</sup> OIG, *Customs Revenue Function Report—Section 112* (OIG-CA-12-028; issued June 30, 2016).

In July 2016, Counsel to the Treasury Inspector General informed the Committee on Finance of the Senate and the Committee on Ways and Means of the House of Representatives that Treasury OIG would review the level of detail in which Treasury oversees Customs revenue. Because DHS OIG has oversight jurisdiction of the CBP's operations, we informed the Congressional Committees that we would focus our review on Treasury's Customs revenue policy oversight.

Post July 2016, we reviewed Treasury's Customs revenue policy oversight and confirmed that Treasury complies with the requirements of TO 100-16. However, we note that compliance with the TO does not negate Treasury's lack of responsibility or accountability over Customs revenue collection. We reviewed a selection of Customs revenue regulations and rulings transmitted to Treasury by CBP between 2008 and 2016. We reviewed documentation maintained by Treasury to support its Customs revenue policy reviews and approvals. We coordinated with the DAS for Tax, Trade, and Tariff Policy and OGC attorneys, who provided us detail on Treasury practices regarding Customs revenue.

To determine whether Treasury reviewed and approved Customs revenue-related regulations transmitted to Treasury by CBP, we selected and reviewed 18 of the 115 Customs revenue regulations published between January 16, 2008 and October 14, 2016 – one final rule and one "other" type of rule, such as proposed rule, interim rule, or notice for each year. Per TO 100-16, Treasury retains the sole authority to approve Customs revenue-related regulations. Our review of the regulations found support of Treasury's review and approval prior to publication in the Federal Register.

To determine whether Treasury reviewed Customs revenue rulings on tariff classifications transmitted to Treasury by CBP, we selected and reviewed 27 of the 379 rulings on tariff classifications proposed between February 20, 2008 and May 31, 2016 – three rulings for each year. Per TO 100-16, Treasury shall retain the authority to review, modify, or revoke Customs revenue-related determinations and rulings. Our review of the rulings found that CBP provided Treasury with the rulings prior to publication; however, we found no evidence of Treasury's review of the rulings. The DAS for Tax, Trade, and Tariff told us that Treasury reviews all draft rulings provided by CBP pursuant to TO 100-16. He said that Treasury has not needed to modify or revoke any rulings; when Treasury raises issue with a ruling, it will either be modified by CBP or not finalized. Nevertheless, all Treasury bureaus and offices are required to establish adequate and proper documentation of their functions, policy decisions, procedures, and essential transactions in a manner that promotes accountability and establishes a historical record.<sup>5</sup> Additionally, the Government Accountability Office's (GAO) *Standards for Internal Control in the Federal Government* require managers to document internal controls, all

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<sup>5</sup> TD 80-05, *Records and Information Management Program* (June 2002). The directive was revised in January 2018; however, the sections and requirements referred to in this document did not change.

transactions, and other significant events in a manner that allows for ready examination. Documentation and records should be properly managed and maintained.<sup>6</sup> In this regard, we believe Treasury's review of the draft rulings is a key part of the deliberative process before a ruling is finalized, and as such, documentation of the review is required.

We verified the DAS for Tax, Trade, and Tariff Policy's contribution to COAC as co-chair and the coordination with his counterparts, such as OGC and the Under Secretary of International Affairs on matters of trade policy, as required by TO 100-16 and TD 18-03. We reviewed COAC meeting minutes and Treasury's Customs revenue policy oversight documentation supporting that the DAS for Tax, Trade, and Tariff Policy coordinates with his colleagues regarding Custom revenue-related matters.

### **Accountability for Customs Revenue Collection**

We reported in June 2016 that Treasury's limited Customs revenue policy oversight role is not in alignment with the requirements outlined in the HSA. Treasury's OGC officials concurred with our conclusion that the delegation of revenue functions does not relieve Treasury of the ultimate responsibility for those functions. However, they noted that the current process was functioning well and that Treasury's high-level approach regarding Customs revenue policy oversight was sufficient. When we asked OGC officials if Treasury was fulfilling its statutory responsibilities regarding revenue functions, they did not specifically opine, and stated that the extent of Treasury's involvement with Customs revenue ultimately depends on resources and priorities and whoever manages the delegations makes the determination.

Regardless, because operational functions were delegated and not transferred, Treasury is ultimately responsible for Customs revenue collection (or non-collection). We confirmed that Treasury has no procedures for, or personnel dedicated to, oversight of Customs revenue operations that are housed entirely within DHS. In the HSA, Treasury was authorized to appoint up to 20 new personnel but only has one employee, occasionally assisted by colleagues, carrying out its Customs revenue policy oversight role. It would behoove Treasury to reevaluate its Customs revenue oversight responsibilities, and at minimum, document its rationale for not devoting resources to the operational oversight of Customs revenue functions. This documentation would include detailing its decision not to hire the authorized personnel and, to a greater degree, its decision not to fulfill its Customs revenue mandate.

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<sup>6</sup> GAO, *Standards for Internal Control in the Federal Government* (GAO/AIMD-00-21.3.1; issued Nov. 1999). GAO's September 2014 revision, GAO-14-704G, which became effective beginning with fiscal year 2016, also includes these requirements.

Our ability to review Customs revenue operations is contingent on Treasury's delegee, CBP, providing Treasury with information regarding the collection of Customs revenue; however, a structure is not in place for Treasury to perform necessary Customs revenue oversight functions. Because Customs revenue operations fall under CBP and Treasury is not maintaining an active oversight role, our evaluation and conclusions on these topics would be under the auspices of an agency outside our jurisdiction.

If you wish to discuss further, please contact me at 202-622-1090, or your staffs can contact my Counsel, Rich Delmar, at 202-927-3973 or [delmarr@oig.treas.gov](mailto:delmarr@oig.treas.gov).

Sincerely,

A handwritten signature in black ink, appearing to be "EMT", with a long horizontal line extending to the right.

Eric M. Thorson  
Inspector General

Enclosure

cc: General Counsel  
Deputy Under Secretary for Legislative Affairs  
Assistant Secretary for Tax Policy