

§ 151.13 Approval of commercial gaugers.

This section sets forth the requirements for commercial gaugers to obtain approval by Customs for the measuring of certain merchandise, and explains the operation of such approved gaugers. This section also provides for the imposition of approval and re-approval fees, sets forth grounds for the suspension or revocation of approval, and provides for the imposition of a monetary penalty for an approved commercial gauger that fails to adhere to the provisions of this section.

(a) *What is a "Customs-approved gauger"?* "Commercial gaugers" are individuals and commercial organizations that measure, gauge, or sample merchandise (usually merchandise in bulk form) and who deal mainly with animal and vegetable oils, petroleum, petroleum products, and bulk chemicals. A "Customs-approved gauger" is a commercial concern, within the United States, that has demonstrated, to the satisfaction of the Executive Director (defined at § 151.12(a)), pursuant to this section, the capability to perform certain gauging and measurement procedures for certain commodities. Customs approval extends only to the performance of such functions as are vested in, or delegated to, Customs.

(b) *What are the obligations of a Customs-approved gauger?* A commercial gauger approved by Customs agrees to the following conditions and requirements:

(1) To comply with the requirements of part 151, Customs Regulations (19 CFR part 151), and to conduct professional services in conformance with approved standards and procedures, including procedures which may be required by the Commissioner of Customs or the Executive Director;

(2) To have no interest in or other connection with any business or other activity which might affect the unbiased performance of duties as a Customs-approved gauger. It is understood that this does not prohibit acceptance of the usual fees for professional services;

(3) To maintain the ability, *i.e.*, the instrumentation, equipment, qualified staff, facilities, etc., to perform the services for which the gauger is ap-

proved, and allow the Executive Director to evaluate that ability on a periodic basis by such means as on-site inspections, demonstrations of gauging procedures, and reviews of submitted records;

(4) To retain those gauger records beyond the five-year record-retention period specified by Customs as necessary to address matters concerned in pending litigation, and, if gauger operations or approval cease, to contact Customs immediately regarding the disposition of records retained;

(5) To promptly investigate any circumstance which might affect the accuracy of work performed as an approved gauger, to correct the situation immediately, and to notify both the port director and the Executive Director of such matters, their consequences, and any corrective action taken or that needs to be taken; and

(6) To immediately notify both the port director and the Executive Director of any attempt to impede, influence, or coerce gauger personnel in the performance of their duties, or of any decision to terminate gauger operations or approval status. Further, within 5 days of any changes involving legal name, address, ownership, parent-subsidiary relationships, bond, other offices or sites, or approved signatories to notify the Executive Director by certified mail.

(c) *What are the approved measurement procedures?* Customs-approved gaugers must comply with appropriate procedures published by such professional organizations as the American Society for Testing and Materials (ASTM) and the American Petroleum Institute (API), unless the Executive Director gives written permission to use an alternate method. Alternative methods will be considered and approved on a case-by-case basis.

(d) *How would a commercial gauger become a Customs-approved gauger? (1) What should an application contain?* An application for Customs approval must contain the following information:

(i) The applicant's legal name and the address of its principal place of business and any other facility out of which it will work;

(ii) Detailed statements of ownership and any partnerships, parent-sub-sidiary relationships, or affiliations with any other domestic or foreign organizations, including, but not limited to, importers, producers, refiners, Customs brokers, or carriers;

(iii) A statement of financial condition;

(iv) If a corporation, a copy of the articles of incorporation and the names of all officers and directors;

(v) The names, titles, and qualifications of each person who will be authorized to sign or approve gauging reports on behalf of the commercial gauger;

(vi) A complete description of the applicant's facilities, instruments, and equipment;

(vii) An express agreement that if notified by Customs of pending approval to execute a bond in accordance with part 113, Customs Regulations (19 CFR part 113), and submit it to the Customs port nearest to the applicant's main office. (The limits of liability on the bond will be established by the Customs port in consultation with the Executive Director. In order to retain Customs approval, the gauger must maintain an adequate bond, as determined by the port director);

(viii) An express agreement to be bound by the obligations contained in paragraph (b) of this section; and,

(ix) A nonrefundable pre-payment equal to 50 percent of the fixed approval fee, as published in the FEDERAL REGISTER and Customs Bulletin, to cover preliminary processing costs. Further, the applicant agrees to pay Customs within 30 days of notification of preliminary approval the associated charges assessed for approval, *i.e.*, those charges for actual travel and background investigation costs, and the balance of the fixed approval fee.

(2) *Where should an application be sent?* A commercial gauger seeking approval or an extension of an existing approval must send a letter of application to the U.S. Customs Service, Attention: Executive Director, Laboratories & Scientific Services, 1300 Pennsylvania Ave., NW, Washington, D.C. 20229.

(3) *How will an application be reviewed?*

(i) *Determination of competence.* The Executive Director will determine the applicant's overall competence, independence, and character by conducting on-site inspections, which may include demonstrations by the applicant of gauging procedures and a review of records submitted, and background investigations. The Executive Director may also conduct proficiency testing through check samples.

(ii) *Evaluation of technical and operational requirements.* Customs will determine whether the following technical and operational requirements are met:

(A) *Equipment.* The facility must be equipped with all of the instruments and equipment needed to conduct approved services. The gauger must ensure that all instruments and equipment are properly calibrated, checked, and maintained.

(B) *Facilities.* The facility must have, at a minimum, adequate space, lighting, and environmental controls to ensure compliance with the conditions prescribed for appropriate measurements.

(C) *Personnel.* The facility must be staffed with persons having the necessary education, training, knowledge, and experience for their assigned functions (*e.g.*, maintaining equipment, calibrating instruments, performing gauging services, evaluating gauging results, and signing gauging reports on behalf of the commercial gauger). In general, each technical staff member should have, at a minimum, six months training and experience in gauging.

(e) *How will an applicant be notified concerning approval?*

(1) *Notice of approval or nonselection.* When Customs evaluation of a gauger's credentials is completed, the Executive Director will notify the gauger in writing of its preliminary approval or nonselection. (Final approval determinations will not be made until the applicant has satisfied all bond requirements and made payment on all assessed charges and the balance of the applicable approval fee). All final notices of approval, reapproval, or extension of existing Customs approval will be published in the FEDERAL REGISTER and Customs Bulletin.

(2) *Grounds for nonselection.* The Executive Director may deny a gauger's application for any of the following reasons:

(i) The application contains false or misleading information concerning a material fact;

(ii) The gauger, a principal of the gauging facility, or a person the Executive Director determines is exercising substantial ownership or control over the gauger operation is indicted for, convicted of, or has committed acts which would:

(A) Under United States federal or state law, constitute a felony or misdemeanor involving misstatements, fraud, or a theft-related offense; or

(B) Reflect adversely on the business integrity of the applicant;

(iii) A determination is made that the gauger-applicant does not possess the technical capability, have adequate facilities, or management to perform the approved methods of measurement for Customs purposes;

(iv) A determination is made that the gauger has submitted false reports or statements concerning the measurement of merchandise, or that the applicant was subject to sanctions by state, local, or professional administrative bodies for such conduct;

(v) Nonpayment of assessed charges and the balance of the fixed approval fee; or

(vi) Failure to execute a bond in accordance with part 113 of this chapter.

(3) *Adverse approval decisions; appeal procedures.* (i) *Preliminary notice.* A gauger which is not selected for approval will be sent a preliminary notice of nonselection. The preliminary notice of nonselection will state the specific grounds for the proposed nonselection decision and advise the gauger that it may file a response addressing the grounds for the action proposed with the Executive Director within 30 calendar days of the date the preliminary notice of nonselection was received by the gauger.

(ii) *Final notice.* (A) *Based on non-response.* If the gauger does not respond to the preliminary notice, the Executive Director will issue a final notice of nonselection within 60 calendar days of the date the preliminary notice of nonselection was received by the gauger

applicant. The final notice of nonselection will state the specific grounds for the nonselection and advise the gauger that it may choose to pursue one of the following two options:

(1) Submit a new application for approval, in accordance with the provisions of paragraph (d)(1) of this section, 180 days after the date of the final notice of nonselection; or

(2) Administratively appeal the final notice of nonselection to the Assistant Commissioner within 30 calendar days of the date of the final notice of nonselection.

(B) *Based on response.* If the gauger files a timely response, the Executive Director will issue a final determination regarding the gauger's approval within 30 calendar days of the date the applicant's response is received by the Executive Director. If this final determination is adverse to the gauger, then the final notice of nonselection will state the specific grounds for nonselection and advise the gauger that it may choose to pursue one of the two options provided at paragraphs (e)(3)(ii)(A)(1) and (2) of this section.

(iii) *Appeal decision.* The Assistant Commissioner will issue a decision on the appeal within 30 calendar days of the date the appeal is received. If the appeal decision is adverse to the gauger, then the decision notice will advise the gauger that it may choose to pursue one of the following two options:

(A) Submit a new application for approval, in accordance with the provisions of paragraph (d)(1) of this section, 120 days after the date of the appeal decision; or

(B) File an action with the Court of International Trade, pursuant to chapter 169 of title 28, United States Code, within 60 days of the date of the appeal decision.

(f) *What are the approval/reapproval fee requirements?*

(1) *In general.* A fixed fee, representing Customs administrative overhead expense, will be assessed for each application for approval or reapproval. In addition, associated assessments, representing the actual costs associated with travel and per diem of Customs employees related to verification of application criteria and background investigations will be

charged. The combination of the fixed fee and associated assessments represent reimbursement to Customs for costs related to approval and re-approval. The fixed fee will be published in the Customs Bulletin and the FEDERAL REGISTER. Based on a review of the actual costs associated with the program, the fixed fee may be adjusted periodically; any changes will be published in the Customs Bulletin and the FEDERAL REGISTER.

(i) *Approval fees.* A nonrefundable prepayment equal to 50 percent of the fixed approval fee to cover preliminary processing costs must accompany each application for approval. Before a gauger will be approved, it must submit to Customs, at the address specified in the billing, within the 30 day billing period the associated charges assessed for the approval and the balance of the fixed approval fee.

(ii) *Reapproval fees.* Before a gauger will be reapproved, it must submit to Customs, at the billing address specified, within the 30 day billing period, the fixed reapproval fee.

(2) *Disputes.* In the event a gauger disputes the charges assessed for travel and per diem costs associated with scheduled inspection visits, it may file an appeal within 30 calendar days of the date of the assessment with the Executive Director. The appeal letter must specify which charges are in dispute and provide such supporting documentation as may be available for each allegation. The Executive Director will make findings of fact concerning the merits of an appeal and communicate the agency decision to the gauger in writing within 30 calendar days of the date of the appeal.

(g) *Can existing Customs-approved gaugers continue to operate?* Commercial gaugers approved by the Executive Director prior to December 8, 1993, will retain approval under these regulations provided that they conduct their business in a manner consistent with the administrative portions of this section. This paragraph does not pertain to any gauger which has had its approval suspended or revoked. Gaugers which have had their approvals continued under this section will have their status re-evaluated on their next triennial inspection date which is no earlier than three years after the effective date of this regulation. At the time of re-approval, these gaugers must meet the requirements of this section and remit to Customs, at the address specified in the billing, within the 30 day billing period the fixed reapproval fee. Failure to meet these requirements will result in revocation or suspension of the approval.

(h) *How will Customs-approved gaugers operate?*

(1) *Reports.* (i) *Contents of reports.* The measurement results from a Customs-approved gauger that are submitted by an importer of record with respect to merchandise in an entry, in the absence of measurements conducted by Customs, will be accepted by Customs, provided that the importer of record certifies that the measurement was of the merchandise in the entry. All reports must measure net landed quantity, except in the case of crude petroleum of Heading 2709, Harmonized Tariff Schedule of the United States (HTSUS), which may be measured by gross quantity. Reports must use the appropriate HTSUS units of quantity, e.g., liters, barrels, or kilograms.

HTSUS	Product	Unit of quantity
Headings 1501-1515	Animal and vegetable oils	Kilogram.
Subheadings 2707.10-2707.30 and 2902.20-2902.44.	Benzene, toluene and xylene	Liter.
Heading 2709	Crude Petroleum	Barrel.
Heading 2710 (various subheadings)	Fuel oils, motor oils, kerosene, naphtha, lubricating oils .	Barrel.
Chapter 29 (various subheadings)	Organic compounds in bulk and liquid form .	Kilogram, liter, etc.

(ii) *Status of commercial reports where Customs also gauges merchandise.* Nothing in these regulations will preclude

Customs from gauging a shipment which has been gauged by a Customs-approved gauger at the request of an

importer. In cases where a shipment has been gauged by both Customs and a Customs-approved gauger, all Customs actions will be based upon the gauging reports issued by Customs, unless the Executive Director advises other actions. If Customs gauges merchandise, it will release the report of its measurements to the importer of record or its agent upon request unless the gauging information is proprietary to the holder of a copyright or patent, or developed by Customs for enforcement purposes.

(2) *Recordkeeping requirements.* Customs-approved gaugers must maintain records of the type normally kept in the ordinary course of business in accordance with the provisions of this chapter and any other applicable provisions of law, and make them available during normal business hours for Customs inspection. In addition, these gaugers must maintain all records necessary to permit the evaluation and verification of all Customs-related work, including, as appropriate, those described below. All records must be maintained for five years, unless the gauger is notified in writing by Customs that a longer retention time is necessary for particular records. Electronic data storage and transmission may be approved by Customs.

(i) *Transaction records.* Records for each Customs-related transaction must be readily accessible and have the following:

- (A) A unique identifying number;
- (B) The date and location where the transaction occurred;
- (C) The identity of the product (*e.g.* crude oil);
- (D) The name of the client;
- (E) The source of the product (*e.g.*, name of vessel, flight number of airline); and
- (F) If available, the Customs entry date, entry number, and port of entry and the names of the importer, exporter, manufacturer, and country-of-origin.

(ii) *Major equipment records.* Records for each major piece of equipment used in Customs-related work must identify the name and type of instrument, the manufacturer's name, the instrument's model and any serial numbers, and the occurrence of all servicing performed

on the equipment or instrument, to include recalibration and any repair work, identifying who performed the service and when.

(iii) *Records of gauging procedures.* The Customs-approved gauger must maintain complete and up-to-date copies of all approved gauging procedures, calibration methods, etc., and must document the procedures that each staff member is authorized to perform. These procedures must be readily available to appropriate staff.

(iv) *Gauging records.* The Customs-approved gauger must identify each transaction by transaction record number (see paragraph (h)(2)(i) of this section) and must maintain all information or data (such as temperatures, etc.) associated with each Customs-related gauging transaction. Each gauging record (*i.e.*, the complete file of all data for each separate transaction) must be dated and initialed or signed by the staff member(s) who did the work.

(v) *Gauging reports.* Each gauging report submitted to Customs must include:

- (A) The name and address of the Customs-approved gauger;
- (B) A description and identification of the transaction, including its unique identifying number;
- (C) The designations of each gauging procedure used;
- (D) The gauging report itself (*i.e.*, the quantity of the merchandise);
- (E) The date of the report; and
- (F) The typed name and signature of the person accepting technical responsibility for the gauging report (*i.e.*, an approved signatory).

(3) *Representation of Customs-approved status.* Commercial gaugers approved by Customs must limit statements or wording regarding their approval to an accurate description of the commodities for which approval has been obtained. Use of terms other than those appearing in the notice of approval (see paragraph (e) of this section) is prohibited.

(4) *Subcontracting prohibited.* Customs-approved gaugers must not subcontract Customs-related work to non Customs-approved gaugers or non Customs-accredited laboratories, but may subcontract to other facilities that are

Customs-approved/accredited and in good standing.

(i) *How can a gauger have its approval suspended or revoked or be required to pay a monetary penalty?*

(1) *Grounds for suspension, revocation, or assessment of a monetary penalty.* (i) *In general.* The Executive Director may immediately suspend or revoke a gauger's approval only in cases where the gauger's actions are intentional violations of any Customs law or when required by public health or safety. In other situations where the Executive Director has cause, the Executive Director will propose the suspension or revocation of a gauger's approval or propose a monetary penalty and provide the gauger with the opportunity to respond to the notice of proposed action.

(ii) *Specific grounds.* A gauger's approval may be suspended or revoked, or a monetary penalty may be assessed because:

(A) The selection was obtained through fraud or the misstatement of a material fact by the gauger;

(B) The gauger, a principal of the gauging facility, or a person the port director determines is exercising substantial ownership or control over the gauger operation is indicted for, convicted of, or has committed acts which would: under United States federal or state law, constitute a felony or misdemeanor involving misstatements, fraud, or a theft-related offense; or reflect adversely on the business integrity of the applicant. In the absence of an indictment, conviction, or other legal process, the port director must have probable cause to believe the proscribed acts occurred;

(C) Staff gauger personnel refuse or otherwise fail to follow any proper order of a Customs officer or any Customs order, rule, or regulation;

(D) The gauger fails to operate in accordance with the obligations of paragraph (b) of this section;

(E) A determination is made that the gauger is no longer technically or operationally proficient at performing the approved methods of measurement for Customs purposes;

(F) The gauger fails to remit to Customs, at the billing address specified, within the 30 day billing period the as-

sociated charges assessed for the approval and the balance of the fixed approval fee;

(G) The gauger fails to maintain its bond;

(H) The gauger fails to remit to Customs, at the billing address specified, within the 30 day billing period the fixed reapproval fee; or

(I) The gauger fails to remit any monetary penalty assessed under this section.

(iii) *Assessment of monetary penalties.* The assessment of a monetary penalty under this section, may be in lieu of, or in addition to, a suspension or revocation of approval under this section. The monetary penalty may not exceed \$100,000 per violation and will be assessed and administered pursuant to published guidelines. Any monetary penalty under this section can be in addition to the recovery of:

(A) Any loss of revenue, in cases where the gauger intentionally falsified the gauging report in collusion with the importer, pursuant to 19 U.S.C. 1499(b)(1)(B)(i); or

(B) Liquidated damages assessed under the gauger's Customs bond.

(2) *Notice of adverse action.* When a decision to suspend or revoke approval, and/or assess a monetary penalty is made, the Executive Director will immediately notify the gauger in writing, indicating whether the action is effective immediately or is proposed.

(i) *Immediate suspension or revocation.* Where the suspension or revocation of approval is immediate, the Executive Director will issue a final notice of adverse determination. The final notice of adverse determination will state the specific grounds for the immediate suspension or revocation, direct the gauger to cease performing any Customs-approved functions, and advise the gauger that it may choose to pursue one of the following two options:

(A) Submit a new application for approval, in accordance with the provisions of paragraph (d)(1) of this section, 180 days after the date of the final notice of nonselection; or

(B) Administratively appeal the final notice of adverse determination to the Assistant Commissioner within 30 calendar days of the date of the final notice of adverse determination.

(ii) *Proposed suspension, revocation, or assessment of monetary penalty.*

(A) *Preliminary notice.* Where the suspension or revocation of approval, and/or the assessment of a monetary penalty is proposed, the Executive Director will issue a preliminary notice of proposed action. The preliminary notice of proposed action will state the specific grounds for the proposed action, inform the gauger that it may continue to perform those functions requiring Customs-approval until the Executive Director's final notice is issued, and advise the gauger that it may file a response addressing the grounds for the action proposed with the Executive Director within 30 calendar days of the date the preliminary notice of proposed action was received by the gauger. The gauger may respond by accepting responsibility, explaining extenuating circumstances, and/or providing rebuttal evidence. The gauger also may ask for a meeting with the Executive Director or his designee to discuss the proposed action.

(B) *Final notice.*

(1) *Based on nonresponse.* If the gauger does not respond to the preliminary notice of proposed action, the Executive Director will issue a final notice of adverse determination within 60 calendar days of the date the preliminary notice of proposed action was received by the gauger. The final notice of adverse determination will state the specific grounds for the adverse determination, direct the gauger to cease performing any Customs-approved functions, and advise the gauger that it may choose to pursue one of the two options provided at paragraphs (i)(2)(i)(A) and (B) of this section.

(2) *Based on response.* If the gauger files a timely response, the Executive Director will issue a final determination regarding the status of the gauger's approval within 30 calendar days of the date the gauger's response is received by the Executive Director. If this final determination is adverse to the gauger, then the final notice of adverse determination will state the specific grounds for the adverse action, advise the gauger to cease performing any functions requiring Customs approval, and advise the gauger that it

may choose to pursue one of the two options provided at paragraphs (i)(2)(i)(A) and (B) of this section.

(3) *Publication of final notices of adverse determination.*

Any final notices of adverse determination issued by the Executive Director resulting in a gauger being directed to cease performing Customs-approved functions will be published in the FEDERAL REGISTER and Customs Bulletin and the notice published will include the effective date, duration, and scope of the determination.

(4) *Appeal decision.* The Assistant Commissioner will issue a decision on the appeal within 30 calendar days of the date the appeal is received. If the appeal decision is adverse to the gauger, then the decision notice will advise the gauger that it may choose to pursue one of the following two options:

(i) Submit a new application for approval, in accordance with the provisions of paragraph (d)(1) of this section, 120 days after the date of the appeal decision; or

(ii) File an action with the Court of International Trade, pursuant to chapter 169 of title 28, United States Code, within 60 calendar days of the date of the appeal decision.

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§ 151.14 Use of commercial laboratory tests in liquidation.

The analysis method for crude petroleum contained in ASTM D96 or other approved analysis method and as determined by a Customs-accredited commercial laboratory shall be used for Customs purposes if the difference between the value found by the commercial laboratory and the value found by the Customs laboratory does not exceed 0.11 percent. If the difference exceeds this limit and the Customs-accredited commercial laboratory cannot establish that Customs is in error, then the Customs results shall be used.

[T.D. 90-78, 55 FR 40167, Oct. 2, 1990, as amended by T.D. 99-67, 64 FR 48543, Sept. 7, 1999]