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DEPARTMENT OF THE TREASURY

Customs Service

19 CFR Part 133

RIN 1515-AC98

Civil Fines for Importation of Merchandise Bearing a Counterfeit Mark

AGENCY: Customs Service, Department of the Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document proposes to amend the Customs Regulations pertaining to the importation of merchandise bearing a counterfeit mark to clarify the limit on the amount of a civil fine which may be assessed by Customs when merchandise bearing a counterfeit mark is imported. The regulations currently use, as a measurement for determining the limit, the domestic value of merchandise as if it had been genuine, based on the manufacturer's suggested retail price of the merchandise at the time of seizure. The language set forth in the proposed rule adheres more closely to the statutory language, basing the limit of the civil fine on the value of the genuine goods according to the manufacturer's suggested retail price (MSRP), without any reference to domestic value. Because the MSRP excludes retail sales and markdowns, it is usually greater than the good's domestic value. Removing the distinction between the statutory and regulatory language will clear up confusion and result in Customs more uniformly determining the amount of a civil fine when merchandise bearing a counterfeit mark is imported.

DATES: Comments must be received on or before August 6, 2002.

ADDRESSES: Written comments, regarding both the substantive aspects of the proposed rule and how it may be made easier to understand, may be submitted to and inspected at the Regulations Branch, Office of Regulations and Rulings, U.S. Customs Service, 1300 Pennsylvania Avenue, NW., 3rd Floor, Washington, DC 20229.

FOR FURTHER INFORMATION CONTACT: Lynne O. Robinson, Office of Regulations and Rulings: (202) 927-2346.

SUPPLEMENTARY INFORMATION:

Background

The Anticounterfeiting Consumer Protection Act of 1996 (the ACPA; Pub. L. 104-153, 110 Stat. 1386) was signed into law on July 2, 1996, to ensure that Federal law adequately addresses the scope and sophistication of modern counterfeiting which costs American businesses an estimated \$200 billion a year worldwide. Toward that end, the ACPA amended section 526 of the Tariff Act of 1930, as amended (19 U.S.C. 1526), to provide two new tools to fight the importation of counterfeit goods: (1) The seizure, forfeiture, and destruction of merchandise bearing a counterfeit mark under 19 U.S.C. 1526(e) (section 1526(e)), as amended by section 9 of the ACPA, and (2) the imposition of a civil fine under 19 U.S.C. 1526(f) (section 1526(f)), a new section of law created under section 10 of the ACPA.

Under section 1526(e), merchandise bearing a counterfeit mark that is seized and forfeited must be destroyed except where the merchandise is not unsafe or a hazard to health and the trademark owner has consented to its disposal by one of several alternative methods (see sections 1526(e)(1), (2) and (3)). This provision ensures that a violator cannot regain possession of the forfeited goods and distribute them in some other manner (including making another attempt to import them at another U.S. port or into another country). Under section 1526(f)(1), a civil fine is assessed against any person who directs, assists financially or otherwise, or aids and abets the importation of merchandise for sale or public distribution that is seized under section 1526(e). Section 1526(f)(2) provides for a fine for the first seizure in an amount up to the value the imported merchandise would have had if it were genuine, according to the manufacturer's suggested retail price (MSRP). Section 1526(f)(3) provides for a fine for subsequent seizures in the amount of up to twice the value the imported merchandise would have had if it were genuine, according to the MSRP.

On November 17, 1997, Customs published interim regulations in the **Federal Register** (62 FR 61231) to amend § 133.25 of the Customs Regulations (19 CFR 133.25) to reflect the ACPA's amendment of 19 U.S.C. 1526. The interim amendments were adopted as a final rule published in the **Federal Register** (63 FR 51296) on September 25, 1998. A final rule document published in the **Federal Register** (64 FR 9058) on February 24, 1999, redesignated § 133.25 as § 133.27.

Under § 133.27 of the Customs Regulations (19 CFR 133.27), Customs

may impose a civil fine, in addition to any other penalty or remedy authorized by law, against any person who directs, assists financially or otherwise, or aids and abets the importation of merchandise bearing a counterfeit mark that is seized under § 133.21 (and 19 U.S.C. 1526(e)). Under § 133.27(a), the fine imposed for the first violation (seizure) will not be more than the domestic value of the merchandise (as set forth in § 162.43(a)) as if it had been genuine, based on the MSRP of the genuine merchandise at the time of seizure. Under § 133.27(b), the fine imposed for subsequent violations will not be more than twice the domestic value of the merchandise as if it had been genuine, based on the MSRP of the genuine merchandise at the time of seizure.

Upon review of § 133.27, Customs has determined that the language of the regulation is inconsistent with the language of section 1526(f). The regulation employs the term "domestic value" (of the merchandise) while the statute does not use that term. Moreover, because the MSRP is exclusive of any sale or markdown of a good at retail, it is usually greater than the good's domestic value. Therefore, setting the maximum amount of a civil fine by means of a formula that includes both the domestic value of the merchandise and the value of genuine merchandise according to the MSRP is confusing and contributes to misunderstanding by both Customs personnel and the public.

A review of the regulatory history indicates that Customs, in using the term "domestic value" in § 133.27 (§ 133.25 when published as a final rule on September 25, 1998), relied on 19 U.S.C. 1606 (section 1606) and § 162.43(a) of the Customs Regulations (19 CFR 162.43(a)). Section 1606 provides that Customs will determine the domestic value of merchandise seized under the Customs laws at the time and place of appraisement. Section 162.43(a) provides that "domestic value" as used in section 1606 means the price for which seized or similar property is freely offered for sale at the time and place of appraisement and in the ordinary course of trade.

While this "domestic value appraisement rule" of section 1606 and § 162.43(a) is applicable in various circumstances involving merchandise seized under the Customs laws, its application is qualified. Under 19 U.S.C. 1600, the procedures set forth in 19 U.S.C. 1602 through 1619, including the use of domestic value as laid out in section 1606, apply to seizures of property under any law enforced or

administered by Customs unless such law specifies different procedures. Section 1526(f), however, specifies a different procedure for imposing civil fines for the importation of merchandise bearing a counterfeit mark. Therefore, the formula for civil fines set forth in section 1526(f) is controlling, and the domestic value appraisal rule of section 1606 and § 162.43(a) does not apply for that purpose.

Based on the foregoing, Customs believes that the term “domestic value” should be removed from § 133.27, leaving “manufacturer’s suggested retail price” as the applicable measure of the penalty. The result would be that the formula for setting the maximum civil fine under the regulation would more closely follow the language of the statute. This would clarify for Customs personnel and the importing public the limit of a civil fine and would enhance uniformity in Customs assessment of fines when merchandise bearing a counterfeit mark is imported and seized. In addition, as the MSRP of a given article (in this case the genuine article that corresponds to imported merchandise bearing a counterfeit mark) is normally greater than its domestic value, because MSRP excludes retail sales and markdowns, civil fines based on the MSRP will normally be greater. Thus, uniform application of the regulation will ensure that the Congressional intent in enacting section 1526(f), i.e., to enhance deterrence of trade in counterfeit goods, is uniformly served.

Customs notes that guidelines for the mitigation of penalties assessed under section 1526(f) and § 133.27 were published in T.D. 99–76 (33 Cust. Bull. No. 43, October 27, 1999). However, as the guidelines also use the term “domestic value” in the same manner as § 133.27, if the proposed rule is adopted as final, Customs will modify the guidelines to more closely adhere to the language of section 1526(f).

Executive Order 12866

This document does not meet the criteria for a “significant regulatory action” as specified in E.O. 12866.

Regulatory Flexibility Act

The proposed amendment, if adopted as final, will result in the language of the regulation more closely adhering to the language of the statute, thus clarifying the maximum amount Customs can assess for a civil fine when merchandise bearing a counterfeit mark is imported and seized. Pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601, *et seq.*), it is certified that the proposed amendment, if

adopted, will not have a significant economic impact on a substantial number of small entities. Accordingly, the proposed amendment is not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

Drafting Information

The principal author of this document was Bill Conrad, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other offices contributed in its development.

List of Subjects in 19 CFR Part 133

Counterfeit goods, Penalties, Seizures and forfeitures, Trademarks.

Proposed Amendment to the Regulations

For the reasons stated in the preamble, it is proposed to amend part 133 of the Customs Regulations (19 CFR part 133) as follows:

PART 133—TRADEMARKS, TRADE NAMES, AND COPYRIGHTS

1. The authority citation for part 133 continues to read, in part, as follows:

Authority: 17 U.S.C. 101, 601, 602, 603; 19 U.S.C. 66, 1624; 31 U.S.C. 9701.

* * * * *

2. Section 133.27 is revised to read as follows:

§ 133.27 Civil fines for those involved in the importation of merchandise bearing a counterfeit mark.

In addition to any other penalty or remedy authorized by law, Customs may impose a civil fine under 19 U.S.C. 1526(f) on any person who directs, assists financially or otherwise, or aids and abets the importation of merchandise for sale or public distribution that bears a counterfeit mark resulting in a seizure of the merchandise under 19 U.S.C. 1526(e) (see § 133.21 of this subpart), as follows:

(a) *First violation.* For the first seizure of merchandise under this section, the fine imposed will not be more than the value the merchandise would have had if it were genuine, according to the manufacturer’s suggested retail price at the time of seizure.

(b) *Subsequent violations.* For the second and each subsequent seizure under this section, the fine imposed will not be more than twice the value the merchandise would have had if it were genuine, according to the

manufacturer’s suggested retail price at the time of seizure.

Robert C. Bonner,
Commissioner of Customs.

Approved: June 3, 2002.

Timothy E. Skud,
Deputy Assistant Secretary of the Treasury.
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DEPARTMENT OF THE TREASURY

Customs Service

19 CFR Parts 141 and 151

RIN 1515–AD05

Conditional Release Period and Customs Bond Obligations for Food, Drugs, Devices, and Cosmetics

AGENCY: Customs Service, Department of the Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document proposes to amend the Customs Regulations to clarify the responsibilities of importers of food, drugs, devices, and cosmetics under Customs entry bond and to provide a reasonable period of time to allow the Food and Drug Administration to perform its enforcement functions with respect to these articles. The proposed amendments provide for a specific conditional release period for any food, drug, device, or cosmetic which has been released under bond and for which admissibility is to be determined under the provisions of the Food, Drug and Cosmetic Act. The proposed amendment also clarifies the amount of liquidated damages that may be assessed when there is a breach of the terms and conditions of the Customs bond. The document also proposes to amend the Customs Regulations to authorize any representative of the Food and Drug Administration (FDA) to obtain a sample of any food, drug, device, or cosmetic, the importation of which is governed by section 801 of the Food, Drug and Cosmetic Act, as amended (21 U.S.C. 381).

DATES: Comments must be received on or before August 6, 2002.

ADDRESSES: Written comments (preferably in triplicate) may be addressed to the Regulations Branch, Office of Regulations and Rulings, U.S. Customs Service, 1300 Pennsylvania Avenue, NW, Washington, DC 20229. Comments submitted may be inspected at the Regulations Branch, Office of Regulations and Rulings, U.S. Customs