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**DEPARTMENT OF HOMELAND SECURITY
U.S. Customs and Border Protection**

DEPARTMENT OF THE TREASURY

19 CFR PARTS 133 and 151

USCBP-2012-0011

CBP Dec. 12-10

RIN 1515-AD87

Disclosure of Information for Certain Intellectual Property Rights Enforced at the Border

AGENCIES: U.S. Customs and Border Protection, Department of Homeland Security; Department of the Treasury.

ACTION: Interim rule; solicitation of comments.

SUMMARY: This document amends, on an interim basis, the U.S. Customs and Border Protection (CBP) regulations pertaining to importations of merchandise bearing recorded trademarks or recorded trade names. The interim amendments, effective upon publication in the **Federal Register**, allow CBP, subject to limitations, to disclose to an intellectual property right holder information appearing on merchandise or its retail packaging that may comprise information otherwise protected by the Trade Secrets Act, for the purpose of assisting CBP in determining whether the merchandise bears a counterfeit mark. Such information will be provided to the right holder in the form of photographs or a sample of the goods and/or their retail packaging in their condition as presented to CBP for examination and alphanumeric codes appearing on the goods. The information will include, but not be limited to, serial numbers, universal product codes,

and stock keeping unit (SKU) numbers appearing on the imported merchandise and its retail packaging, whether in alphanumeric or other formats. These changes provide a pre-seizure procedure for disclosing information about imported merchandise suspected of bearing a counterfeit mark for the limited purpose of obtaining the right holder's assistance in determining whether the mark is counterfeit or not.

DATES: Effective [INSERT DATE OF PUBLICATION]; comments must be received on or before [INSERT DATE 60 DAYS FROM DATE OF PUBLICATION].

ADDRESSES: You may submit comments, identified by docket number, by one of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments via docket number USCBP 2012-0011.
- Mail: Trade and Commercial Regulations Branch, Office of International Trade, Regulations and Rulings, U.S. Customs and Border Protection, 799 9th Street, N.W. (Mint Annex), Washington, D.C. 20229-1179.

Instructions: All submissions received must include the agency name and docket number for this interim rulemaking. All comments received will be posted without change to <http://www.regulations.gov>, including any personal information provided. For detailed instructions on submitting comments and additional information on the rulemaking process, see the "Public Participation" heading of the SUPPLEMENTARY INFORMATION section of this document.

Docket: For access to the docket to read background documents or comments received, go to <http://www.regulations.gov>. Submitted comments may also be inspected during regular business days between the hours of 9 a.m. and 4:30 p.m. at the Trade and

Commercial Regulations Branch, Office of International Trade, Regulations and Rulings, U.S. Customs and Border Protection, 799 9th Street, N.W., 5th Floor, Washington, D.C. Arrangements to inspect submitted comments should be made in advance by calling Joseph Clark at (202) 325-0118.

FOR FURTHER INFORMATION CONTACT: Paul Pizzeck, Intellectual Property Rights Branch, Regulations and Rulings, Office of International Trade, (202) 325-0020.

SUPPLEMENTARY INFORMATION:

PUBLIC PARTICIPATION

Interested persons are invited to participate in this rulemaking by submitting written data, views, or arguments on all aspects of the interim rule. CBP also invites comments that relate to the economic, environmental, or federalism effects that might result from this rule. If appropriate to a specific comment, the commenter should reference the specific portion of the rule, explain the reason for any recommended change, and include data, information, or authority that support such recommended change.

BACKGROUND

Purpose of the Interim Amendments

CBP is responsible for border enforcement of intellectual property rights laws and regulations. One of the primary purposes of CBP's efforts to interdict counterfeit imported goods is to protect the public from unsafe and substandard products, which, in some cases, can be a threat to public health and safety, and also a threat to the national security. In particular, counterfeit integrated circuits and electronic components can find their way into critical manufacturing, military, infrastructure, and consumer product

applications. In fact, inquiries conducted by Congress and the Department of Defense (DoD) have revealed that counterfeit electronic components, including counterfeit integrated circuits, have entered military and government supply chains, posing a serious threat to our military and government personnel and infrastructure.

Due to the development of sophisticated techniques of some counterfeiters and the highly technical nature of some imported goods, it has become increasingly difficult for CBP to determine whether some goods suspected of bearing counterfeit marks in fact bear counterfeit marks. The current regulation pertaining to goods bearing counterfeit marks does not provide a procedure for disclosing information to right holders to assist CBP in its efforts to identify goods bearing infringing marks, prior to CBP's making a determination to seize.

In this document, CBP is making several changes to subpart C of part 133 of the CBP regulations (19 CFR part 133) regarding the detention of suspect merchandise and the disclosure of information to right holders during detention of goods bearing potentially counterfeit marks and after seizure of goods bearing counterfeit marks. These changes, made on an interim basis and effective on the date of their publication in the **Federal Register**, include a clarifying revision of the current regulation's definition of "counterfeit trademark" and an addition of a 30-day detention period relative to goods suspected of bearing counterfeit marks. These changes will enhance CBP's enforcement capability against increasingly sophisticated counterfeit products that threaten the public health and safety and national security.

The Trade Secrets Act and Disclosure under the Current Regulation

The Trade Secrets Act (18 U.S.C. 1905) bars the unauthorized disclosure by government officials of any information received in the course of their employment or official duties when such information (also referred to collectively as “protected information”) “concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association.” Case law interpreting the statute states that the Act “appears to cover practically any commercial or financial data collected by any Federal employee from any source” and that the “comprehensive catalogue of items” listed in the Act “accomplishes essentially the same thing as if it had simply referred to ‘all officially collected commercial information’ or ‘all business and financial data received.’” See CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1140 (D.C. Cir. 1987).

Specifically, the Trade Secrets Act protects those required to furnish commercial or financial information to the government by shielding them from the competitive disadvantage that could result from disclosure of that information by the government. In turn, this protection encourages those providing information to the government to furnish accurate and reliable information that is useful to the government.

The protection afforded by the Trade Secrets Act, however, must be balanced against the important and legitimate interests of government. The Trade Secrets Act permits those covered by the Act to disclose confidential information when the disclosure is otherwise “authorized by law,” which includes both statutes expressly authorizing disclosure and properly promulgated substantive agency regulations authorizing

disclosure based on a valid statutory interpretation. See Chrysler v. Brown, 441 U.S. 281, 294-316 (1979).

The National Defense Authorization Act for Fiscal Year 2012

Section 818(g) of the National Defense Authorization Act for Fiscal Year 2012 (NDAA) (P.L. 112-81) provides:

“If United States Customs and Border Protection suspects a product of being imported in violation of section 42 of the Lanham Act, and subject to any applicable bonding requirements, the Secretary of the Treasury may share information appearing on, and unredacted samples of, products and their packaging and labels, or photographs of such products, packaging, and labels, with the rightholders of the trademarks suspected of being copied or simulated for purposes of determining whether the products are prohibited from importation pursuant to such section.”

The NDAA enhances CBP’s capability to enforce laws protecting marks by authorizing the agency to disclose certain information to right holders to assist CBP officers in determining whether suspect merchandise bears counterfeit marks.

Further Statutory Analysis Concerning Disclosure of Commercial Information

Under the NDAA, CBP is authorized by law to make certain disclosures. One reading of the language of the NDAA, however, is that disclosure is limited to trademarks and does not include other marks noted under the Lanham Act (certification, collective, and service marks). Moreover, some have suggested that the legislative history of the Act indicates that certain legislators intended that the exception to the Trade Secrets Act created by the NDAA is to apply only to military sales.

Consequently, CBP, in publishing this interim rule, is exercising regulatory authority to remove any ambiguity about CBP’s authority to disclose information with regard to certification, collective, and service marks, as well as trademarks, and to further

clarify that the disclosure authority extends to all imports and not just those associated with military sales.

As noted above, the Secretary of the Treasury (the Secretary) has authority to disclose information otherwise protected under the Trade Secrets Act when such disclosures are authorized by law. Disclosures meeting the “authorized by law” standard of the Trade Secrets Act include those made under regulations that are (1) in compliance with the provisions of the Administrative Procedure Act (5 U.S.C. 551 et seq.) and (2) based on a valid statute. Regarding CBP’s statutory authority to disclose certain importation information to right holders, various provisions in titles 15 and 19 of the United States Code (U.S.C.) authorize CBP to promulgate regulations to enforce prohibitions against the importation of merchandise that infringes intellectual property rights.

Section 42 of the Lanham Act (15 U.S.C. 1124) prohibits the importation of merchandise bearing a mark which copies or simulates a registered mark. In order to aid CBP in enforcing this prohibition, section 42 provides for the recordation of registered marks under such regulations as the Secretary of the Treasury shall prescribe. Sections 526(e) and 595a(c) of the Tariff Act of 1930, as amended (19 U.S.C. 1526(e), and 19 U.S.C. 1595a(c)), prohibit the importation of merchandise bearing a counterfeit mark and the introduction or attempted introduction into the United States of merchandise or packaging in which, inter alia, trademark or trade name protection violations are involved, including but not limited to violations of sections 1124, 1125 and 1127 of Title 15 (sections 42, 32 and 45 of the Lanham Act). Moreover, section 526(e) of the Tariff Act of 1930, as amended, (19 U.S.C 1526(e)) requires CBP to notify the owner of the

trademark when merchandise, bearing a counterfeit mark, within the meaning of section 1127 of Title 15 and imported in violation of section 1124 of Title 15, is seized. Section 624 of the Tariff Act of 1930, as amended (19 U.S.C. 1624), authorizes the Secretary of the Treasury to promulgate regulations to carry out the provisions of the Tariff Act of 1930, as amended. Collectively, these statutes authorize the Secretary of the Treasury, in instances where identification of suspected violative merchandise requires the assistance of right holders for the specific and limited purpose of determining whether imported merchandise bears a counterfeit mark, to provide for the disclosure of certain information to right holders upon importation.

The interim rule is intended to support the statutory enforcement scheme discussed above and to allow CBP officers, without violating the Trade Secrets Act, to disclose information that might reveal otherwise confidential commercial or financial information in order to assist CBP in identifying merchandise bearing counterfeit marks at the time of detention.

Notice Provision to Prevent Economic Harm to Legitimate Importers.

In addition, CBP is putting in place a procedure that provides the importer the opportunity to demonstrate to CBP, within seven (7) days (exclusive of weekends and holidays) of a notice of detention, that the article in question does not bear a counterfeit mark, before releasing information to the right holder. Only absent such a demonstration by the importer will information, images, or samples be shared with the right holder. This procedural safeguard is intended to achieve the policy goals of the NDAA in a manner consistent with maintaining the flow of information to the government, fostering competition, keeping prices low, and maintaining consumer choice.

Information that is covered by the Trade Secrets Act and obtained from an importer, including the importer's name and place of business, manufacturer's identity, supply chain, and other confidential commercial or financial information, if disclosed, could provide insights into the importer's business operations, processes, style of work, and income, all inuring to the importer's competitive disadvantage. For example, product coding, such as serial numbers, and SKUs often incorporates information about where and when a product was manufactured, as well as other information that could allow one to identify information about the manufacture of the product. It is likewise possible that such information could directly or indirectly reveal the identity of wholesalers, exporters, or other parties in the importer's supply chain and the timing and pricing of the transactions involving those entities. Such confidential commercial or financial information, if not properly protected, could be used by competitors to an importer's economic disadvantage, potentially resulting in reduced competition and consumer choice with attendant increases in prices.

Interim Amendments Concerning Pre-seizure Disclosure of Information

This document is amending the CBP regulations to allow CBP to provide right holders, for the limited purpose of assisting CBP in making infringement determinations, with any information appearing on merchandise and/or its retail packaging, or a sample of the merchandise including its retail packaging, when CBP reasonably suspects that such merchandise and/or packaging may bear a counterfeit mark (see § 133.21(b)(1) of this rule). This disclosure of information, which includes images (photographs) or samples, as appropriate, could potentially disclose confidential commercial or financial information otherwise protected under the Trade Secrets Act. The interim regulation also

includes a procedure that allows an importer, prior to release of the information, the opportunity to establish, within seven (7) days (excluding weekends and holidays) of a notice of detention, that the marks are not counterfeit. Only absent such a demonstration by the importer will the disclosure be made to the right holder.

In conjunction with the interim rule's procedure outlined above, CBP is adding to the regulation a 30-day period (and an extension, if requested by the importer for good cause) to commence upon presentation of the goods for examination, within which a determination with respect to admissibility will be made (see § 133.21(b) of this rule). Under the interim regulation, CBP will issue the notice of detention within five days of its detention decision, starting the seven-day period within which the importer may demonstrate that the goods do not bear a counterfeit mark. Only if such demonstration is untimely or insufficient will CBP release information to the right holder.

In brief summation, this change to the regulations concerning counterfeit marks, in principal part, allows CBP, prior to seizure, to release to right holders information appearing on goods (and/or their retail packaging), and on images and samples, that are not redacted, i.e., images showing the merchandise (and/or its retail packaging) in its condition as presented for examination and samples (and/or its retail packaging) in their condition as so presented. This allows the right holder to assist CBP in its enforcement effort to prevent the entry of goods bearing counterfeit marks. However, in certain circumstances, DHS criminal investigators may provide right holders such information or samples without notifying the importer, for example to obtain from the right holder evidence that will assist the investigators in demonstrating probable cause when they seek a judicial order in the course of a criminal or national security investigation.

Other Interim Amendments to Clarify and Maintain Consistency with the Current Regulations

As mentioned previously, CBP is also making a clarifying amendment to the definition of “counterfeit trademark.” The amended definition of “counterfeit mark” uses the term “mark” instead of “trademark” (see § 133.21(a) of this rule).

In addition, CBP is amending the regulations pertaining to goods bearing copying or simulating marks and restricted gray market goods to correct an inconsistency in the regulatory scheme for such goods (19 CFR 133.22(f) and 133.23(f), respectively). The 30-day detention period for these goods is set forth in § 133.25 of the CBP regulations, and this procedure provides for extension of the detention period applicable to these goods upon good cause shown. Therefore, CBP is removing from §§ 133.22(f) and 133.23(f) inconsistent language that appears to restrict the respective detention periods to only 30 days.

Lastly, CBP is amending the provisions of 19 CFR 151.16(a) regarding detention of merchandise to make them consistent with the interim regulations in this rulemaking. The regulations pertaining to detention of merchandise exclude from their applicability imported articles suspected of being infringing copies or phonorecords, imported goods bearing marks which are confusingly similar to recorded trademarks, and imported restricted gray market merchandise. The interim amendment to section 151.16(a) excludes imports of goods suspected of bearing counterfeit marks from the applicability of the regulations pertaining to detention of merchandise.

INAPPLICABILITY OF NOTICE AND DELAYED EFFECTIVE DATE REQUIREMENTS

As explained previously in this document (see “Purpose of the Interim Amendments” subsection in the BACKGROUND section), CBP is responsible for enforcement of intellectual property rights laws and regulations at the border. An important goal of CBP efforts to interdict counterfeit imported goods is to protect the public from unsafe and substandard counterfeit products. In addition, counterfeit goods present a threat to national security and our critical infrastructure. Counterfeit integrated circuits and electronic components can be used in critical manufacturing, military, infrastructure, and consumer product applications. Inquiries conducted by Congress and the DoD have revealed that counterfeit electronic components, including counterfeit integrated circuits, have entered military and government supply chains, posing a serious threat to our military and government personnel and infrastructure. Moreover, interdiction of counterfeit goods has been made increasingly difficult due to the development of sophisticated techniques used by some counterfeiters and the highly technical nature of some imported goods.

Because this rule addresses an immediate need to address without delay vulnerabilities in our military and government procurement processes, as well as an immediate need to interdict goods bearing counterfeit marks that pose health and safety risks to the American public, CBP has determined that it would be contrary to the public interest to delay the effective date of this rule. Therefore, CBP has determined that in accordance with the sections 553(b)(B) and 553(c) of the Administrative Procedure Act (5 U.S.C 553), good cause exists to dispense with the prior comment requirement and delayed effective date requirement. Subsection 818(g) of the NDAA was effective upon

enactment, but the authority it provides the Secretary is discretionary and not mandatory. Accordingly, although some may interpret the statute to allow the Secretary to exercise his discretionary authority without amending CBP's existing regulations, CBP believes that amending the existing, more restrictive regulations is consistent with the requirements of the Administrative Procedure Act and will eliminate any legal ambiguity. The interim regulations also promote transparency and provide an important opportunity to gather feedback and input from stakeholders regarding implementation of § 818(g) of the NDAA.

EXECUTIVE ORDERS 12866 and 13563

Executive Orders 13563 and 12866 direct agencies to assess costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has been designated a “significant regulatory action” although not economically significant, under section 3(f) of Executive Order 12866. Accordingly, the rule has been reviewed by the Office of Management and Budget.

REGULATORY FLEXIBILITY ACT

Because a notice of proposed rulemaking is not required under section 553(b)(3)(B) of the APA for the reasons described in the INAPPLICABILITY OF NOTICE AND DELAYED EFFECTIVE DATE REQUIREMENTS section of this

document, the provisions of the Regulatory Flexibility Act, as amended (5 U.S.C. 601 et seq.), do not apply to this rulemaking. Accordingly, this interim rule is not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

SIGNING AUTHORITY

This rulemaking is being issued in accordance with 19 CFR 0.1(a)(1), pertaining to the authority of the Secretary of the Treasury (or that of his or her delegate) to approve regulations concerning trademark enforcement.

PAPERWORK REDUCTION ACT

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507), the collections of information for this document are included in an existing collection for Notices of Detention (OMB control number 1651-0073). An agency may not conduct, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number assigned by OMB.

The burden hours related to the Notices of Detention for OMB control number 1651-0073 are as follows:

Number of Respondents: 1,350

Number of Responses: 1,350

Time per Response: 2 hours

Total Annual Burden Hours: 2,700

There is no change in burden hours under this collection with this rule.

LIST OF SUBJECTS

19 CFR Part 133

Copying or simulating trademarks, Copyrights, Counterfeit trademarks, Customs duties and inspection, Detentions, Reporting and recordkeeping requirements, Restricted merchandise, Seizures and forfeitures, Trademarks, Trade names.

19 CFR Part 151

Customs duties and inspection, Examination, Imports, Penalties, Reporting and recordkeeping requirements, Sampling and testing.

AMENDMENTS TO THE CBP REGULATIONS

For the reasons stated above in the preamble, CBP is amending parts 133 and 151 of title 19 of the Code of Federal Regulations (19 CFR parts 133 and 151) to read as follows:

PART 133 - TRADEMARKS, TRADE NAMES, AND COPYRIGHTS

1. The general authority citation for part 133 and the specific authority citation for § 133.21 through 133.25 are revised, to read as follows:

AUTHORITY: 15 U.S.C. 1124, 1125, 1127; 17 U.S.C. 101, 601, 602, 603; 19 U.S.C. 66, 1202, 1499, 1526, 1624; 31 U.S.C. 9701;

* * * * *

Sections 133.21 through 133.25 also issued under 18 U.S.C. 1905; Sec. 818(g), Pub. L. 112-81

* * * * *

2. The heading for subpart C is revised to read as follows:

Subpart C—Importations Bearing Recorded Marks or Trade Names

3. Section 133.21 is revised to read as follows:

§ 133.21 Articles suspected of bearing counterfeit marks.

(a) Counterfeit mark defined. A “counterfeit mark” is a spurious mark that is identical with, or substantially indistinguishable from, a mark registered on the Principal Register of the U.S. Patent and Trademark Office.

(b) Detention. CBP may detain any article of domestic or foreign manufacture imported into the United States that bears a mark suspected of being a counterfeit version of a mark that is registered with the U.S. Patent and Trademark Office and is recorded with CBP pursuant to subpart A of this part. The detention will be for a period of up to thirty days from the date on which the merchandise is presented for examination. The 30-day time period may be extended for up to an additional thirty days for good cause shown by the importer. In accordance with 19 U.S.C. 1499, if after the detention period and any authorized extensions the article is not released the article will be deemed excluded for the purposes of 19 U.S.C. 1514(a)(4).

(1) Notice to importer of detention and possible disclosure. Within five days (excluding weekends and holidays) from the date of a decision to detain, CBP will notify the importer in writing of the detention. The notice will inform the importer that a disclosure of information concerning the detained merchandise may be made to the owner of the mark to assist CBP in determining whether any marks are counterfeit, unless the importer presents information within seven days of the notification (excluding weekends and holidays) establishing to CBP’s satisfaction that the detained merchandise does not bear a counterfeit mark. CBP may disclose information appearing on the

merchandise and/or its retail packaging, images (including photographs) of the merchandise and/or its retail packaging in its condition as presented for examination, or a sample of the merchandise and/or its retail packaging in its condition as presented for examination. The release (disclosure) of a sample is subject to the bond and return requirements of paragraph (c) of this section. Where the importer does not timely provide information or the information provided is insufficient for CBP to determine that the merchandise does not bear a counterfeit mark, CBP may proceed with the disclosure to the owner of the mark, and will so notify the importer. Disclosure under this section may include any serial numbers, dates of manufacture, lot codes, batch numbers, universal product codes, or other identifying marks appearing on the merchandise or its retail packaging, in alphanumeric or other formats.

(2) Notice to owner of the mark and disclosure of information. From the time merchandise is presented for examination until the time a notice of detention is issued, CBP may disclose to the owner of the mark any of the following information in order to obtain assistance in determining whether an imported article bears a counterfeit mark. Once a notice of detention is issued, CBP will disclose to the owner of the mark the following information, if available, within thirty days (excluding weekends and holidays) from the date of detention:

- (i) The date of importation;
- (ii) The port of entry;
- (iii) The description of the merchandise from the entry;
- (iv) The quantity involved; and
- (v) The country of origin of the merchandise.

(3) Redacted images and samples made available to the owner of the mark.

Notwithstanding the notice and seven-day response procedure of paragraph (b)(1) of this section, CBP may, at any time after presentation of the merchandise for examination, provide to the owner of the mark images or a sample of the detained merchandise or its retail packaging, provided that identifying information has been removed, obliterated, or otherwise obscured. Identifying information includes, but is not limited to, serial numbers, dates of manufacture, lot codes, batch numbers, universal product codes, the name or address of the manufacturer, exporter, or importer of the merchandise, or any mark that could reveal the name or address of the manufacturer, exporter, or importer of the merchandise, in alphanumeric or other formats. CBP will release to the owner of the mark a sample under this paragraph when the owner furnishes CBP a bond in the form and amount specified by the port director, conditioned to hold the United States, its officers and employees, and the importer or owner of the imported article harmless from any loss or damage to the sample resulting from the furnishing of a sample by CBP to the owner of the mark. CBP may demand the return of the sample at any time. The owner of the mark must return the sample to CBP upon demand or at the conclusion of any examination, testing, or similar procedure performed on the sample. In the event that the sample is damaged, destroyed, or lost while in the possession of the owner of the mark, the owner must, in lieu of return of the sample, certify to CBP that: "The sample described as [insert description] and provided pursuant to 19 CFR 133.21(b)(3) was (damaged/destroyed/lost) during examination, testing, or other use."

(c) Unredacted samples made available to the owner of the mark prior to seizure.

A sample of the imported merchandise may be released prior to seizure to the owner of

the mark in accordance with paragraph (b)(1) of this section. CBP will release to the owner of the mark a sample under this paragraph when the owner furnishes CBP a bond in the form and amount specified by the port director, conditioned to hold the United States, its officers and employees, and the importer or owner of the imported article harmless from any loss or damage to the sample resulting from the furnishing of a sample by CBP to the owner of the mark. CBP may demand the return of the sample at any time. The owner of the mark must return the sample to CBP upon demand or at the conclusion of any examination, testing, or similar procedure performed on the sample. In the event that the sample is damaged, destroyed, or lost while in the possession of the owner of the mark, the owner must, in lieu of return of the sample, certify to CBP that: "The sample described as [insert description] and provided pursuant to 19 CFR 133.21(c) was (damaged/destroyed/lost) during examination, testing, or other use."

(d) Seizure. Upon a determination by CBP, made any time after the merchandise has been presented for examination, that an article of domestic or foreign manufacture imported into the United States bears a counterfeit mark, CBP will seize such merchandise and, in the absence of the written consent of the owner of the mark, forfeit the seized merchandise in accordance with the customs laws. When merchandise is seized under this section, CBP will disclose to the owner of the mark the following information, if available, within thirty days (excluding weekends and holidays) from the date of the notice of seizure:

- (1) The date of importation;
- (2) The port of entry;
- (3) The description of the merchandise from the entry;

- (4) The quantity involved;
- (5) The name and address of the manufacturer;
- (6) The country of origin of the merchandise;
- (7) The name and address of the exporter; and
- (8) The name and address of the importer.

(e) Samples made available to the owner of the mark after seizure. At any time following a seizure of merchandise bearing a counterfeit mark under this section, CBP may provide a sample and its retail packaging, in its condition as presented for examination, to the owner of the mark for examination, testing, or other use in pursuit of a related private civil remedy for trademark infringement. To obtain a sample under this paragraph, the owner of the mark must furnish CBP a bond in the form and amount specified by the port director, conditioned to hold the United States, its officers and employees, and the importer or owner of the imported article harmless from any loss or damage to the sample resulting from the furnishing of a sample by CBP to the owner of the mark. CBP may demand the return of the sample at any time. The owner of the mark must return the sample to CBP upon demand or at the conclusion of the examination, testing, or other use in pursuit of a related private civil remedy for infringement. In the event that the sample is damaged, destroyed, or lost while in the possession of the owner of the mark, the owner must, in lieu of return of the sample, certify to CBP that: "The sample described as [insert description] and provided pursuant to 19 CFR 133.21(e) was (damaged/destroyed/lost) during examination, testing, or other use."

(f) Consent of the mark owner; failure to make appropriate disposition. The owner of the mark, within thirty days from notification of seizure, may provide written

consent to the importer allowing the importation of the seized merchandise in its condition as imported or its exportation, entry after obliteration of the mark, or other appropriate disposition. Otherwise, the merchandise will be disposed of in accordance with § 133.52 of this part, subject to the importer's right to petition for relief from forfeiture under the provisions of part 171 of this chapter.

§ 133.22 [Amended]

4. Section 133.22(f), first sentence, is amended by removing the words “within the 30-day period of detention” and adding in their place the words “within the period of detention as provided in § 133.25 of this subpart”.

§ 133.23 [Amended]

5. Section 133.23(f), first sentence, is amended by removing the words “within the 30-day period of detention” and adding in their place the words “within the period of detention as provided in § 133.25 of this subpart”.

§ 133.26 [Amended]

6. Section 133.26 is amended by removing from the first sentence the words “subject to the restrictions of § 133.22 or § 133.23 of this subpart” and adding in their place the words “subject to the restrictions of § 133.21, § 133.22 or § 133.23 of this subpart”.

PART 151 – EXAMINATION, SAMPLING AND TESTING OF MERCHANDISE

7. The general authority citation for part 151 continues to read as follows:

Authority: 19 U.S.C. 66, 1202 (General Note 3(i) and (j), Harmonized Tariff Schedule of the United States (HTSUS), 1624;

* * * * *

8. Section 151.16(a) is revised to read as follows:

§ 151.16 Detention of merchandise.

(a) Exemptions from applicability. The provisions of this section are not applicable to detentions effected by CBP on behalf of other agencies of the U.S. Government in whom the determination of admissibility is vested and to detentions arising from possibly piratical copies (see part 133, subpart E, of this Chapter), imports of articles bearing counterfeit marks or suspected counterfeit marks, goods bearing marks which are confusingly similar to recorded trademarks, or restricted gray market merchandise (see part 133, subpart C, of this chapter.)

David V. Aguilar
Acting Commissioner
U.S. Customs and Border Protection

Approved: April 18, 2012

Timothy E. Skud
Deputy Assistant Secretary of the Treasury

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