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

**DEPARTMENT OF THE TREASURY**

**19 CFR Parts 142 and 143**

**USCBP-2013-0009**

**RIN 1515-AD96**

**Establishment of Due Process Procedures on License-Like Processes**

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

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** This document proposes to amend the U.S. Customs and Border Protection (CBP) regulations to set forth due process procedures for CBP to follow before suspending or revoking assigned entry filer codes, immediate delivery privileges or remote location filing privileges. These proposed changes will codify in the regulations due process procedures consistent with the Administrative Procedure Act before CBP takes actions on these programs depriving an importer of these privileges.

**DATES:** Comments must be received on or before [INSERT DATE 60 DAYS FROM DATE OF PUBLICATION IN THE **FEDERAL REGISTER**].

**ADDRESSES:** You may submit comments, identified by USCBP 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-2013-0009.

- Mail: Trade and Commercial Regulations Branch, Regulations and Rulings, Office of International Trade, U.S. Customs and Border Protection, 90 K Street, NE (10<sup>th</sup> Floor), Washington, D.C. 20229-1177.

Instructions: All submissions received must include the agency name and USCBP docket number for this 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, Regulations and Rulings, Office of International Trade, Customs and Border Protection, 90 K St., NE, 10<sup>th</sup> 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:** For operational questions, Laurie Dempsey, Trade Policy and Programs, Office of International Trade, Tel. (202) 863-6509. For legal questions, Blake Harden, Trade and Finance, Office of Chief Counsel, Tel. (202) 344-2972.

## **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 proposed rule. U.S. Customs and Border Protection (CBP) also invites comments that relate to the economic, environmental, or federalism effects that might result from this proposed rule. If appropriate to a specific comment, the commenter should reference the specific portion of the proposed rule, explain the reason for any recommended change, and include data, information, or authority that support such recommended change.

### **Background**

When an agency acts to deprive a person of a property interest, the Constitution of the United States requires procedures that appropriately balance three factors: the private interest affected by government action; the risk of erroneous deprivation of such interest; and, the government's interest, including the function involved and the burdens the government would face in providing greater process. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). An individual's expectation of continued eligibility in a federal program is a "property interest" under the Due Process Clause. *Mathews v. Eldridge*, at 332. *See also Goldberg v. Kelly*, 397 U.S. 254 (1970). In the matter of *Lizarraga Customs Broker v. Bureau of Customs and Border Protection*, No. 08-00400, slip op. 10-113 (Ct. Int'l Trade Oct. 4, 2010) ("Lizarraga"), CBP suspended a broker's assigned entry-filer code without providing notice of the proposed action. *Lizarraga*, at 5. CBP acknowledged that brokers are entitled to the procedural protections of the Administrative Procedure Act (APA) if their entry filer code is deactivated. *Lizarraga*, at 16. As such, CBP has reviewed its current regulations in title 19 of the Code of Federal Regulations (19 CFR) which affords license-like programs and has determined that its regulations should be

amended to provide due process procedures required by the APA if an importer's or broker's assigned entry filer code is proposed to be suspended or revoked.

The APA (Section 558 of title 5 of the United States Code) provides, in relevant part, that except in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings, the licensee has been given— (1) notice by the agency in writing of the facts or conduct which may warrant the action; and (2) opportunity to demonstrate or achieve compliance with all lawful requirements. 5 U.S.C. 558(c).

Since participation in CBP programs involving entry filer codes, immediate delivery, and remote location filing all require the satisfaction of certain eligibility requirements, they are akin to licenses for the purpose of the APA. To comply with the due process requirements, CBP proposes to amend 19 CFR parts 142 and 143 by adding notice requirements and appeal procedures for the suspension or revocation of an assigned entry filer code and for the discontinuance of immediate delivery and remote location filing procedures before CBP takes action on these programs depriving an importer or broker of these privileges.

### Entry Filer Code

An entry filer code is a unique three character (alphabetic, numeric, or alpha numeric) number assigned by CBP to all licensed brokers filing CBP consumption entries and all importers filing CBP entries through the Automated Broker Interface (ABI) system. See 19 CFR 142.3a(b)(1) and 143.2(f). This assigned three digit code comprises

the beginning three characters of the entry number that a broker or importer files for all of its CBP entries into the CBP database.

In order to file electronically, an importer or broker must have an active entry filer code and be approved to use the ABI system. The ABI is a module of CBP's automated systems that permits qualified participants to electronically file required import data with CBP. See 19 CFR 143.1.

Current CBP regulations provide that the Assistant Commissioner, Office of International Trade, or his designee may refuse to allow use of an assigned entry filer code if it is misused by the importer or broker. See 19 CFR 142.3a(d).

In this document, CBP is proposing to amend the CBP regulations by limiting its ability to invalidate an entry filer code in order to provide due process protections to approved ABI entry filers with regard to the suspension or revocation of entry filer codes. More specifically, this document proposes to revise § 142.3a(d) of title 19 of the CFR to provide notice requirements and appeal procedures for suspending or revoking an entry filer code.

CBP proposes to add new subsection (1) to paragraph (d) in § 142.3a to provide that, in the event a port director finds that an assigned entry filer code has been misused by the importer or broker, CBP will provide the importer or broker with written notice proposing the suspension or revocation of the entry filer code, including a description of the facts or conduct warranting the action. The importer or broker will have the opportunity to appeal the port director's decision in writing within 10 calendar days of receiving the written notice. Within 30 working days after receiving a timely filed appeal, the Assistant Commissioner, Office of International Trade, or his designee, will

issue a decision in writing on the proposed action. If the importer or broker does not timely appeal the written notice, the notice proposing the suspension or revocation of the entry filer code becomes CBP's final decision as of the date that the appeal period expires. This section provides that the importer or broker may continue to use the entry filer code during the appeal period and that the entry filer code will not be suspended or revoked unless the appeal process has been concluded with a decision adverse to the importer or broker.

CBP also proposes to add §142.3a(d)(2) to title 19 of the CFR to allow the port director to immediately suspend an entry filer code upon written notice to the importer or broker in the case of willfulness or in those cases in which public health, interest, or safety so requires. The written notice provided to the importer or broker will contain a description of the facts or conduct warranting the immediate action. The importer or broker will be offered the opportunity to appeal the port director's decision within 10 calendar days of receiving the written notice providing for immediate discontinuance. Within 15 working days after receiving a timely filed appeal from the importer or broker, the Assistant Commissioner, Office of International Trade, or his designee, will issue a decision in writing on the discontinuance. If no timely appeal is received, the notice becomes the final decision of CBP as of the date that the appeal period expires. This section provides that the entry filer code remains suspended or revoked unless the appeal is resolved in favor of the importer or broker.

CBP also proposes to amend the procedures for discontinuing immediate delivery and remote location filing privileges.

### Immediate Delivery

Section 448(b) of the Tariff Act of 1930, as amended, authorizes the Secretary of the Treasury to promulgate regulations allowing the issuance of special permits for delivery, prior to formal entry, of perishable articles and other articles for which immediate delivery is necessary. 19 U.S.C. 1448(b).

Accordingly, under certain circumstances merchandise may be released under a special permit for immediate delivery. See 19 CFR 142.21. In most respects, the procedures for immediate delivery are similar to filing an entry. The same CBP Form 3461 is used as the release document; however, the filer will designate the CBP Form 3461 as a special permit instead of as an entry. A CBP Form 7501 entry/entry summary with estimated duties attached must generally be filed within 10 working days of release. Immediate delivery is allowed, at the discretion of the port director, in the following circumstances: land shipments from Canada and Mexico; shipments of fresh fruits and vegetables from Canada and Mexico, which are transported to the importer's warehouse at the port of arrival for examination, resulting in entry being made only on those portions with commercial value; shipments of certain quota class merchandise; shipments of articles for a trade fair; U.S. government shipments; split shipments for which an election for incremental release has been made; and other shipments when authorized by CBP Headquarters.

Currently, the port director has the authority to discontinue immediate delivery privileges under certain circumstances. See 19 CFR 142.25. In this document, CBP proposes to amend 19 CFR 142.25 to provide due process protections to the importing public with regard to the discontinuance of immediate delivery privileges.

Specifically, CBP proposes to add § 142.25(c)(1) to title 19 of the CFR to require CBP to provide the importer with written notice proposing the discontinuation of the

immediate delivery privileges, including a description of the facts or conduct warranting the action. The importer will have the opportunity to appeal the port director's decision in writing within 10 calendar days of receiving the written notice. Within 30 working days after receiving a timely filed appeal from the importer, the Assistant Commissioner, Office of International Trade, or his designee, will issue a decision in writing on the proposed action. If the importer does not timely appeal the written notice, the notice proposing the discontinuation of the immediate delivery privilege becomes the final decision of CBP as of the date that the appeal period expires. This section provides that in the case of a proposed discontinuance, the importer may continue to use immediate delivery during the appeal period and immediate delivery privileges will not be discontinued unless the appeal process has been concluded with a decision adverse to the importer or broker.

CBP also proposes to add § 142.25(c)(2) to title 19 of the CFR to allow the port director to immediately discontinue immediate delivery privileges upon written notice to the importer in the case of willfulness or those in which public health, interest, or safety so requires. The written notice provided to the importer will contain a description of the facts or conduct warranting the immediate action. The importer will be offered the opportunity to appeal the port director's decision within 10 calendar days of receiving the written notice providing for immediate discontinuance. Within 15 working days after receiving a timely filed appeal from the importer, the Assistant Commissioner, Office of International Trade, or his designee, will issue a decision in writing on the discontinuance. If no timely appeal is received, the notice becomes the final decision of CBP as of the date that the appeal period expires. This section provides that in the case



of an immediate discontinuance, immediate delivery privileges remain discontinued unless the appeal is resolved in favor of the importer or broker.

### Remote Location Filing

Remote location filing is an elective method of making entry by which a customs broker with a national permit electronically transmits all data associated with an entry that CBP can process in a completely electronic data interchange, filed from a location other than where the goods are being entered. See 19 CFR 143.42(a). Importers filing on their own behalf may file electronically in any port, subject to ABI filing requirements. See 19 CFR 143.42(a). A remote filing is accepted at CBP locations within the customs territory of the United States that are staffed with CBP personnel who have been trained in remote location filing procedures and who have operational experience with the Electronic Invoice Program (EIP). See 19 CFR 143.42(b).

Section 1414(a)(2) of title 19 of the U.S. Code sets forth the requirements for a program participant to file from a remote location. Program participant is defined as any party entitled to enter merchandise under 19 U.S.C. 1484(a)(2)(B). See 19 U.S.C. 1414(d)(2). The eligibility criteria for remote location filing are further described at 19 CFR 143.43. To be eligible for remote location filing, an importer of record or licensed customs broker must be: (1) operational on the ABI; (2) operational on the EIP prior to applying for remote location filing; and (3) operational on the Automated Clearinghouse (ACH) (or any other CBP-approved method of electronic payment), for purposes of directing the electronic payment of duties, taxes and fees, 30 days before transmitting a remote location filing entry. See 19 CFR 143.43(a). In addition, a licensed customs

broker must hold a valid national permit. See 19 CFR 143.43(b); see also 19 CFR 111.19(f). Finally, a remote location filing entry must be secured with a continuous bond. See 19 CFR 143.43(c).

Currently, so long as a remote location filer meets all of the compliance requirements and operational standards for remote location filing and adheres to all applicable laws and regulations, it qualifies for filing from a remote location. See 19 U.S.C. 1414(a)(3). In this document, CBP proposes to amend 19 CFR Part 143 to provide the criteria under which a port director will discontinue remote location filing privileges. CBP also proposes to amend the regulations to provide due process protections to the importing public with regard to the discontinuation of remote location filing privileges.

Specifically, this document proposes to amend subpart E of Part 143 of 19 CFR by adding a new § 143.46, entitled Discontinuance of RLF privileges. CBP proposes to add § 143.46(a) to 19 CFR to allow CBP to discontinue remote location filing privileges if the filer no longer meets the eligibility criteria set forth in 19 CFR 143.43, or fails to file all additional information required by CBP pursuant to 19 CFR 143.45. Two additional proposed paragraphs will provide procedures for the discontinuance of remote location filing privileges.

CBP proposes to add § 143.46(b)(1) to 19 CFR to require CBP to provide the remote location filer with written notice proposing the discontinuance of the remote location filing privileges, including a description of the facts or conduct warranting the action. The remote location filer will have the opportunity to appeal the port director's decision in writing within 10 calendar days of receiving the written notice. Within 30

working days after receiving a timely filed appeal from the remote location filer, the Assistant Commissioner, Office of International Trade, or his designee, will issue a decision in writing on the proposed action. If an appeal is not timely received, the notice proposing the discontinuance of the remote location filing privilege becomes the final decision of CBP as of the date that the appeal period expires. This section provides that in the case of a proposed discontinuance, the remote location filer may continue to file remotely during the appeal period and remote location filing privileges will not be discontinued unless the appeal process has been concluded with a decision adverse to the filer.

CBP also proposes to add § 143.46(b)(2) to 19 CFR to allow the port director to immediately discontinue remote location filing privileges upon written notice to the remote location filer in the case of willfulness or those in which public health, interest, or safety so requires. The written notice provided to the remote location filer will contain a description of the facts or conduct warranting the immediate action. The remote location filer will be offered the opportunity to appeal the port director's decision within 10 calendar days of receiving the written notice providing for immediate discontinuance. Within 15 working days after receiving a timely filed appeal from the remote location filer, the Assistant Commissioner, Office of International Trade, or his designee, will issue a decision in writing on the discontinuance. If no timely appeal is received, the notice becomes the final decision of CBP as of the date that the appeal period expires. This section provides that in the case of an immediate discontinuance, remote location filing privileges remain discontinued unless the appeal is resolved in favor of the remote location filer.

### **EXECUTIVE ORDER 12866**

This rule is not a significant regulatory action under Executive Order 12866, as supplemented by Executive Order 13563, and has not been reviewed by the Office of Management and Budget (OMB) under that order.

### **REGULATORY FLEXIBILITY ACT**

This section examines the impact of the rule on small entities as required by the Regulatory Flexibility Act (5 U.S.C. 603), as amended by the Small Business Regulatory Enforcement and Fairness Act of 1996. A small entity may be a small business (defined as any independently owned and operated business not dominant in its field that qualifies as a small business per the Small Business Act); a small not-for-profit organization; or a small governmental jurisdiction (locality with fewer than 50,000 people).

As stated above, CBP exercises its authority to suspend or revoke entry filer codes, immediate delivery privileges, or remote location filing privileges fewer than ten times a year for each type of authority. It is unknown how many of the affected parties, primarily customs brokers, are small businesses, but the number will be very small. In addition, the impact to these parties is expected to be low (cost to prepare and submit the appeal to CBP) and beneficial (establishment of due process). CBP will certify, therefore, that this rule will not have a significant impact on a substantial number of small entities if it does not receive any comments to the contrary.

### **PAPERWORK REDUCTION ACT**

As the collection of information proposed in this document applies to fewer than ten respondents annually, the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3507) do not apply.

### **SIGNING AUTHORITY**

This proposed regulation is being issued in accordance with 19 CFR 0.1(a)(1) pertaining to the Secretary of the Treasury's authority (or that of his delegate) to approve regulations related to certain customs revenue functions.

### **LIST OF SUBJECTS**

#### 19 CFR Part 142

Canada, Customs duties and inspection, Mexico, Reporting and recordkeeping requirements.

#### 19 CFR Part 143

Customs duties and inspection, Reporting and recordkeeping requirements.

### **PROPOSED AMENDMENTS TO THE CBP REGULATIONS**

For the reasons set forth in the preamble, parts 142 and 143 of title 19 of the CFR (19 CFR parts 142 and 143) are proposed to be amended as set forth below.

### **PART 142 – ENTRY PROCESS**

1. The authority citation for part 142 continues to read as follows:

**Authority:** 19 U.S.C. 66, 1448, 1484, 1624.

2. Section 142.3a is amended by revising paragraph (d) to read as follows:

**§ 142.3a. Entry numbers.**

\* \* \* \* \*

(d) Suspension or revocation of the entry filer code.

(1) Proposed suspension or revocation. If the port director finds that an assigned entry filer code has been misused by the importer or broker, the importer or broker will be provided with written notice proposing the suspension or revocation of the entry filer code along with a description of the facts or conduct warranting the action. Any notice to suspend or revoke a filer code will also specify that participation in Remote Location Filing would also be suspended or revoked pursuant to § 143.46. The importer or broker will be offered the opportunity to appeal the port director's decision in writing within 10 calendar days of receipt of the written notice. The Assistant Commissioner, Office of International Trade, or his designee, will issue a decision in writing on the proposed action within 30 working days after receiving a timely filed appeal. If no timely appeal is received, the proposed notice becomes the final decision of the Agency as of the date that the appeal period expires. A proposed suspension or revocation of an importer's or broker's entry filer code will not take effect unless the appeal process under this paragraph has been concluded with a decision adverse to the importer or broker.

(2) Immediate suspension or revocation. In the case of willfulness or those in which public health, interest, or safety so requires, the port director may immediately suspend or revoke an entry filer code upon written notice to the importer or broker. The notice will contain a description of the facts or conduct warranting the immediate action. The importer or broker will be offered the opportunity to appeal the port director's

decision within 10 calendar days of receipt of the written notice providing for immediate suspension or revocation. The immediate suspension or revocation will remain in effect during the appeal period. The Assistant Commissioner, Office of International Trade, or his designee, will issue a decision in writing on the suspension or revocation within 15 working days after receiving a timely filed appeal from the importer or broker. If no timely appeal is received, the notice becomes the final decision of the Agency as of the date that the appeal period expires.

\* \* \* \* \*

3. Section 142.25 is amended by adding a new paragraph (c) to read as follows:

**§ 142.25. Discontinuance of immediate delivery privileges.**

\* \* \* \* \*

(c) Procedures for discontinuance of immediate delivery privileges.

(1) Proposed discontinuance. If the port director finds that there is a basis for the discontinuance of immediate delivery privileges, the importer will be provided with written notice proposing the discontinuance with a description of the facts or conduct warranting the action. The importer will be offered the opportunity to appeal the port director's decision in writing within 10 calendar days of receipt of the written notice. The Assistant Commissioner, Office of International Trade, or his designee, will issue a decision in writing on the proposed action within 30 working days after receiving a timely filed appeal from the importer. If no timely appeal is received, the proposed notice becomes the final decision of the Agency as of the date that the appeal period expires. A proposed discontinuance of an importer's immediate delivery privileges will

not take effect unless the appeal process under this paragraph has been concluded with a decision adverse to the importer.

(2) Immediate discontinuance. In the case of willfulness or those in which public health, interest, or safety so requires, the port director may immediately discontinue immediate delivery privileges upon written notice to the importer. The notice will contain a description of the facts or conduct warranting the immediate action. The importer will be offered the opportunity to appeal the port director's decision within 10 calendar days of receipt of the written notice providing for immediate discontinuance. The immediate discontinuance will remain in effect during the appeal period. The Assistant Commissioner, Office of International Trade, or his designee, will issue a decision in writing on the discontinuance within 15 working days after receiving a timely filed appeal from the importer. If no timely appeal is received, the notice becomes the final decision of the Agency as of the date that the appeal period expires.

#### **PART 143 – SPECIAL ENTRY PROCEDURES**

4. The authority citation for part 143 continues to read as follows:

**Authority:** 19 U.S.C. 66, 1414, 1481, 1484, 1498, 1624, 1641.

5. Add new § 143.46 to read as follows:

#### **§ 143.46. Discontinuance of RLF privileges.**

(a) Authority of the port director. The port director will discontinue RLF privileges if the RLF filer:

- (1) No longer meets the eligibility criteria set forth in § 143.43,
- (2) Fails to file all additional information required by CBP pursuant to



§ 143.45; or

(3) Fails to adhere to all applicable laws and regulations.

(b) Procedures for discontinuance of RLF privileges.

(1) Proposed discontinuance. If the port director finds that there is a basis for the discontinuance of RLF privileges, the RLF filer will be provided with written notice proposing the discontinuance with a description of the facts or conduct warranting the action. The notice will also specify whether the RLF filer's participation in the Automated Broker Interface (ABI) is being suspended or revoked pursuant to § 143.6 or § 143.7. The RLF filer will be offered the opportunity to appeal the port director's decision in writing within 10 calendar days of receipt of the written notice. The Assistant Commissioner, Office of International Trade, or his designee, will issue a decision in writing on the proposed action within 30 working days after receiving a timely filed appeal from the RLF filer. If no timely appeal is received, the proposed notice becomes the final decision of the Agency as of the date that the appeal period expires. A proposed discontinuance of a filer's RLF privileges will not take effect unless the appeal process under this paragraph has been concluded with a decision adverse to the RLF filer.

(2) Immediate discontinuance. In the case of willfulness or those in which public health, interest, or safety so requires, the port director may immediately discontinue RLF privileges upon written notice to the RLF filer. The notice will contain a description of the facts or conduct warranting the immediate action. The RLF filer will be offered the opportunity to appeal the port director's decision within 10 calendar days of receipt of the written notice providing for immediate discontinuance. The immediate discontinuance will remain in effect during the appeal period. The Assistant Commissioner, Office of

International Trade, or his designee, will issue a decision in writing on the discontinuance within 15 working days after receiving a timely filed appeal from the RLF filer. If no

timely appeal is received, the notice becomes the final decision of the Agency as of the date that the appeal period expires.

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

Approved: February 20, 2013

Timothy E. Skud  
Deputy Assistant Secretary of the Treasury

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