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DEPARTMENT OF COMMERCE

[Docket Number: 190703544-9544-01]

**Comment Request; Report on the State of Counterfeit and Pirated Goods
Trafficking and Recommendations**

ACTION: Notice; request for comments.

SUMMARY: The Department of Commerce is seeking comments from intellectual property rights holders, online third-party marketplaces and other third-party intermediaries, and other private-sector stakeholders on the state of counterfeit and pirated goods trafficking through online third-party marketplaces and recommendations for curbing the trafficking in such counterfeit and pirated goods. All responses to this notice will be shared with interagency teams, and specifically the Department of Homeland Security (DHS), for use in preparing a report for the President as directed by the April 3, 2019 Presidential Memorandum on “Combating Trafficking in Counterfeit and Pirated Goods” (Presidential Memorandum).

DATES: Comments must be received by 5:00 PM Eastern time on Monday, July 29, 2019.

ADDRESSES: You may submit comments and responses to the questions below by one of the following methods. All comments must be submitted through the Federal eRulemaking Portal at <http://www.regulations.gov>, Docket No. DOC-2019-0003, unless the commenter does not have access to the internet. Commenters who do not have access to the internet may submit the original and one copy of each set of comments by mail or hand delivery/courier as noted in option (b) below.

a) **Electronic Submission:** Submit all electronic comments via the Federal e-Rulemaking Portal at <http://www.regulations.gov> (at the home page, enter [DOCKET NUMBER] in the “Search” box, click the “Comment Now!” icon, complete the required fields, and enter or attach your comments). The materials in the docket will not be edited to remove identifying or contact information, and the Department cautions against including any information in an electronic submission that the submitter does not want publicly disclosed. Attachments to electronic comments will be accepted in Microsoft Word, Excel, or Adobe PDF formats only. Comments containing references to studies, research, and other empirical data that are not widely published should include copies of the referenced materials. If you want to submit a comment with business confidential information that you do not wish to be made public, submit the comment in the manner detailed below.

Submissions of “**Business Confidential Information**”: For any comments submitted electronically containing business confidential information, the file name of the business confidential version should begin with the characters “BC”. Any page containing business confidential information must be clearly marked “BUSINESS CONFIDENTIAL” on the top of that page and the submission should clearly indicate, via brackets, highlighting, or other means, the specific information that is business confidential. If you request business confidential treatment, you must certify that the information is business confidential and would not customarily be released to the public. Filers of submissions containing business confidential information also must submit a public version of their comments. The file name of the public version should begin with the character “P”. The “BC” and “P” should be

followed by the name of the person or entity submitting the comments or rebuttal comments. Failure to follow these procedures may result in the public posting of the submissions in their entirety. If these procedures are not sufficient to protect business confidential information or otherwise protect business interests, please contact Raquel Cohen at Raquel.Cohen@trade.gov to assess whether alternative arrangements are possible.

- b) **Written/Paper Submissions:** Commenters who do not have access to the internet may send written/paper submissions to: The Office of Intellectual Property Rights (OIPR), International Trade Administration, U.S. Department of Commerce, 1401 Constitution Ave., N.W., Room 21028, Washington, D.C. 20230. Submissions of **“Business Confidential Information”**: Please review the “Business Confidential Information” instructions noted in a), above.

FOR FURTHER INFORMATION CONTACT: For questions about this notice, contact Raquel Cohen at the U.S. Department of Commerce, International Trade Administration, Office of Intellectual Property Rights, by email to Raquel.Cohen@trade.gov, telephone number (202) 482-4146.

SUPPLEMENTARY INFORMATION: Section 2 of the Presidential Memorandum of April 3, 2019, “Combatting Trafficking in Counterfeit and Pirated Goods,” directs the Secretary of Homeland Security, in coordination with the Secretary of Commerce and in consultation with other agencies and offices to prepare and submit a report to the President on the “State of Counterfeit and Pirated Goods Trafficking and Recommendations,” with particular emphasis on the role of online third-party

marketplaces and other third-party intermediaries, and, consistent with applicable law, to consult with intellectual property rights holders, online third-party marketplaces and other third-party intermediaries, and other private-sector stakeholders in preparing the report. Specifically, the report shall:

(i) Analyze available data and other information to develop a deeper understanding of the extent to which online third-party marketplaces and other third party intermediaries are used to facilitate the importation and sale of counterfeit and pirated goods; identify the factors that contribute to trafficking in counterfeit and pirated goods; and describe any market incentives and distortions that may contribute to third-party intermediaries facilitating trafficking in counterfeit and pirated goods. This review should include data regarding the origins of counterfeit and pirated goods and the types of counterfeit and pirated goods that are trafficked, along with any other relevant data, and shall provide a foundation for any recommended administrative, regulatory, legislative, or policy changes.

(ii) Evaluate the existing policies and procedures of third-party intermediaries relating to trafficking in counterfeit and pirated goods, and identify the practices of those entities that have been most effective in curbing the importation and sale of counterfeit and pirated goods, including those conveyed through online third-party marketplaces. The report should also evaluate the effectiveness of Federal efforts, including the requirement for certain Federal contractors to establish and maintain a system to detect and avoid counterfeit electronic parts under the Defense Federal Acquisition Regulation Supplement (DFARS) 252.246-7007, as well as steps taken by foreign governments, such as France and Canada, to combat trafficking in counterfeit and pirated goods.

- (iii) To the extent that certain types of data are not currently available to the Federal Government, or accessible in a readily usable form, recommend changes to the data collection practices of agencies, including specification of categories of data that should be collected and appropriate standardization practices for data.
- (iv) Identify appropriate administrative, statutory, regulatory, or other changes, including enhanced enforcement actions, that could substantially reduce trafficking in counterfeit and pirated goods or promote more effective law enforcement regarding trafficking in such goods. The report should address the practices of counterfeiters and pirates, including their shipping, fulfillment, and payment logistics, and assess means of mitigating the factors that facilitate trafficking in counterfeit and pirated goods.
- (v) Identify appropriate guidance that agencies may provide to third-party intermediaries to help them prevent the importation and sale of counterfeit and pirated goods.
- (vi) Identify appropriate administrative, regulatory, legislative, or policy changes that would enable agencies, as appropriate, to more effectively share information regarding counterfeit and pirated goods, including suspected counterfeit and pirated goods, with intellectual property rights holders, consumers, and third-party intermediaries.
- (vii) Evaluate the current and future resource needs of agencies and make appropriate recommendations for more effective detection, interdiction, investigation, and prosecution regarding trafficking in counterfeit and pirated goods, including trafficking through online third-party marketplaces and other third-party intermediaries. These recommendations should include suggestions for increasing the use of effective

technologies and expanding collaboration with third party intermediaries, intellectual property rights holders, and other stakeholders.

(viii) Identify areas for collaboration between the Department of Justice and Department of Homeland Security on efforts to combat trafficking in counterfeit and pirated goods.

The Presidential Memorandum defines:

- “Online third-party marketplace” to mean “any web-based platform that includes features primarily designed for arranging the sale, purchase, payment, or shipping of goods, or that enables sellers not directly affiliated with an operator of such platforms to sell physical goods to consumers located in the United States;” and
- “Third-party intermediaries” to mean “online third-party marketplaces, carriers, customs brokers, payment providers, vendors, and other parties involved in international transactions.”

The Secretary of Homeland Security, in coordination with the Secretary of Commerce, and in consultation with relevant agencies (“interagency”), is required to deliver this report to the President by October 30, 2019. A public version of the report will be published in the Federal Register within 30 days thereafter.

In response to this directive, as part of its coordination in preparation of the report, the Department of Commerce is facilitating stakeholder outreach to better understand, *inter alia*:

- The extent to which online third-party marketplaces and other third-party intermediaries are used to facilitate importation and sale of counterfeit and pirated goods;
- The existing practices of online third-party marketplaces and/or other third-party intermediaries that are most effective in curbing importation and sale of counterfeit and pirated goods; and
- Recommendations for potential policy, administrative, regulatory, and/or legislative changes by the Federal Government that could be effective in curbing the importation and sale of counterfeit and pirated goods through online third-party marketplaces and/or enabling more effective law enforcement regarding the importation and sale of such goods.

In preparing the report, the interagency already is considering information and recommendations submitted by stakeholders in response to other U.S. Government solicitations for public submissions, including those received in connection with USTR's annual Special 301 Report on intellectual property protection and Review of Notorious Markets for piracy and counterfeiting. For this notice, the Department particularly is seeking input beyond that provided through those other process.

In addition, the interagency currently is considering potential "best practices" guidance for online third-party marketplaces designed to prevent counterfeit and pirated goods from being offered for sale, such as:

- i. conducting an advance vetting of the potential sellers/vendors, including to ensure that the goods are not being produced by forced labor (19 U.S.C. 1307; 18 U.S.C. 1589);

- ii. establishing and enforcing a “prohibited items” list of those goods that may not be sold through the marketplace (due to, e.g., the risks to public health and safety that would be posed by counterfeit or pirated versions of such goods and/or the high likelihood that such goods would be counterfeit or pirated in light of the nature of the authorized distribution channels for the legitimate versions of those goods);
- iii. taking down listings for counterfeit and pirated goods;
- iv. notifying customers that the marketplace has determined that the customer has, or may have, purchased counterfeit or pirated goods, and providing appropriate remedies to such customers; and
- v. notifying other third-party intermediaries, intellectual property rights holders, other stakeholders, and law enforcement that the online third-party marketplace has determined that a particular seller/vendor has been supplying counterfeit or pirated goods.

Request for Information and Recommendations:

Given the nature and import of the Presidential Memorandum, the Secretary requests information and recommendations from interested stakeholders, including but not limited to: intellectual property rights holders affected by the importation and sale of counterfeit and pirated goods through online third-party marketplaces or other third-party intermediaries; online third-party marketplaces and other third-party intermediaries; and other affected persons or entities.

Respondents may address any, all or none of the following questions, and may address additional related topics that have implications for combating the trafficking in

counterfeit and pirated goods. Please identify, where possible, the questions your comments are intended to address.

Respondents may organize their submissions in any manner, and all responses that comply with the requirements listed in the **DATES** and **ADDRESSES** sections of this notice will be considered. Reminder: Respondents have the burden to request that any information contained in a submission be treated as “**Business Confidential Information**” and must certify that such information is business confidential and would not customarily be released to the public by the submitter.

While the Department welcomes all input considered relevant to the development of a report on the state of counterfeit and pirated goods trafficking through online third-party marketplaces and recommendations to combat such trafficking, the Department specifically seeks the following types of information and recommendations:

1. How are your interests affected by counterfeit or pirated goods imported through online third-party marketplaces and other third-party intermediaries as those terms are defined in the Presidential Memorandum? (Specific examples and/or data would be helpful, including on the origins of counterfeit and pirated goods and the types of counterfeit and pirated goods that are trafficked. Information that is not publicly available can be submitted as “business confidential” in accordance with the instructions in the **ADDRESSES** section).

2. What factors contribute to trafficking in counterfeit and pirated goods through online third-party marketplaces or other third-party intermediaries, and what market incentives and distortions may contribute to the use of online third-party marketplaces and other third-party intermediaries to traffic in counterfeit and pirated goods?
3. Are there effective technologies, the use of which – by the private sector and/or law enforcement agencies – could substantially reduce the sale and importation of counterfeit and pirated goods through online third-party marketplaces and/or enable more effective law enforcement regarding the trafficking in such goods? Please reference and provide copies of any available studies that demonstrate the efficacy of such technologies, or any available data that may be used to do so.
4. To what degree can expanded collaboration and information sharing among online third-party marketplaces, other third-party intermediaries, intellectual property rights holders, other private-sector stakeholders and/or U.S. law enforcement organizations substantially reduce trafficking in counterfeit and pirated goods and/or enable more effective law enforcement regarding the trafficking in such goods?
5. Are there Federal agency data collection or standardization practices, or practices involving provision of data to parties, that could promote more effective detection, interdiction, investigation or prosecution of underlying violations of U.S. customs laws and of intellectual property rights?

6. What existing policies, procedures or best practices of online third-party marketplaces, other third-party intermediaries, intellectual property rights holders, and/or other private-sector stakeholders have been effective in curbing the importation and sale of counterfeit and pirated goods, including those conveyed through online third-party marketplaces?
7. What additional policies, procedures or best practices of online third-party marketplaces, other third-party intermediaries, intellectual property rights holders, and/or other private-sector stakeholders can be effective in curbing the importation and sale of counterfeit and pirated goods, including those conveyed through online third-party marketplaces? What would it cost for industry to adopt such practices?
8. What policy remedies, including administrative, regulatory, or legislative changes by the Federal Government (including enhanced enforcement actions) could substantially reduce the trafficking in counterfeit and pirated goods and/or promote more effective law enforcement regarding the trafficking in such goods? Please reference any available analyses that shed light on the efficacy and potential impacts of such proposed remedies.

Dated: July 5, 2019.

Earl Comstock,

Director of the Office of Policy and Strategic Planning,

Department of Commerce.

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