

# **The Federal Register**

## **The Daily Journal of the United States Government**

Rule

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

A Rule by DEPARTMENT OF THE TREASURY, DEPARTMENT OF HOMELAND SECURITY, and U.S. Customs and Border Protection on [09/18/2015](#)

## **Action**

Final Rule.

## **Summary**

This document adopts as a final rule, with changes, interim amendments to the U.S. Customs and Border Protection (CBP) regulations pertaining to importations of merchandise bearing suspected counterfeit trademarks or trade names that are recorded with CBP. Specifically, the amendments allow CBP, for the purpose of obtaining assistance in determining whether merchandise bears a counterfeit mark, to disclose to a trademark or other mark owner information appearing on merchandise or its retail packaging that may otherwise be protected by the Trade Secrets Act. This final rule also amends the CBP regulations to further enhance information-sharing procedures by requiring CBP to release to the importer an unredacted sample or image of the suspect merchandise or its retail packaging any time after presentation of the suspect goods for examination. This change is to reflect that an importer may not have complete information about the marks appearing on imported goods, and release of such unredacted information will assist the importer in providing CBP with a meaningful response to a detention notice. The amendments in this final rule also require CBP to release limited importation information to the mark owner no later than the time of issuance of the detention notice to the importer, rather than within 30 business days from the date of detention. Finally, these amendments require CBP to notify the mark owner that use of any information otherwise protected by the Trade Secrets Act that is disclosed by CBP to the mark owner is for the limited purpose of assisting CBP.

## **Unified Agenda**

## [Disclosure of Information for Certain Intellectual Property Rights Enforced at the Border](#)

3 actions from April 24th, 2012 to February 2015

- April 24th, 2012
  - Interim Final Rule
  - [77 FR 24375](#)
- June 25th, 2012
  - Interim Final Rule Comment Period End
- February 2015
  - Final Action

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# DATES:

Effective on October 19, 2015.

# FOR FURTHER INFORMATION CONTACT:

Goli Gharib, Intellectual Property Rights Branch, Regulations and Rulings, Office of International Trade, (202) 325-0216.

# SUPPLEMENTARY INFORMATION:

## Background

On April 24, 2012, CBP published CBP Dec. 12-10 in the Federal Register ([77 FR 24375](#)), setting forth interim amendments to the CBP regulations that pertain to importations of merchandise bearing suspected counterfeit trademarks or trade names that are recorded with CBP. The interim regulation, which went into effect upon publication, made several changes to subpart C of part 133 of title 19 of the Code of Federal Regulations ([19 CFR part 133](#)) regarding the detention of suspect merchandise and the disclosure of information to mark owners during detention of goods bearing potentially counterfeit marks and after seizure of goods bearing counterfeit marks. These changes included a clarifying revision of the definition of “counterfeit trademark” and the addition of a 30-day detention period relative to goods suspected of bearing counterfeit marks.

CBP Dec. 12-10 sets forth a detailed discussion of the statutory scheme pertaining to enforcement of the intellectual property laws and CBP's derived authority to promulgate the interim amendments whereby CBP officers may disclose certain information that might comprise otherwise confidential commercial or financial information in order to assist CBP in identifying merchandise bearing counterfeit marks at the time of detention. *See* National Defense Authorization Act for Fiscal Year 2012 (NDAA) ([Public Law 112-81](#), [10 U.S.C. 2302](#)); Trade Secrets Act ([18 U.S.C. 1905](#)); Administrative Procedures Act ([5 U.S.C. 551 et seq.](#)); Lanham Act ([15 U.S.C. 1124](#), 1125, 1127); Tariff Act of 1930, as amended ([19 U.S.C. 1526](#)(e) and 1595a(c)). Interested parties may refer to CBP Dec. 12-10 for that background information.

Although the interim regulatory amendments were promulgated without prior public notice and comment procedures and took effect on April 24, 2012, CBP Dec. 12-10 provided for the submission of public comments which would be considered before adoption of the interim regulations as a final rule.

## Discussion of Comments

Twenty commenters responded to the interim rule's solicitation of public comment. Each submission consisted of multiple comments and several were submitted by or on behalf of associations. A majority of commenters expressed support for the interim rule's primary purpose of providing a procedure for the disclosure of information by CBP to mark owners for the purpose of determining whether imported goods bear counterfeit marks. Many of these commenters expressed the view that the interim rule does not go far enough to support CBP's enforcement efforts and made recommendations for improving the regulation.

A minority of commenters opposed the rule. Some of these commenters expressed concern that the interim regulation may have unintended consequences on the flow of legitimate trade, such as by enabling mark owners to prevent competing legitimate goods from entering commerce, and may create administrative burdens for the agency. The comments, and CBP's analyses thereof, are set forth below.

## **A. Terminology**

For purposes of the comment discussion, the following terms are defined as set forth below:

- “Section (b)(1) information” refers to the specified information CBP is authorized to release under § 133.21(b)(1) of the interim regulation: Information appearing on suspect goods or their retail packaging (including labels) and unredacted samples or images (photographs, etc.) of the suspect goods or their retail packaging. “Section (b)(1) information,” in whatever form disclosed, may include manufacturer, shipper, exporter, or importer name and address when it appears on merchandise or its retail packaging, or serial numbers, dates of manufacture, lot codes, batch numbers, universal product codes, or other identifying marks, appearing on merchandise or its retail packaging in alphanumeric or other formats.
- The term “unredacted sample” refers to a sample (including its packaging) in its original condition as presented to CBP for examination.
- The term “limited importation information” refers to the basic information CBP releases under § 133.21(b)(2) of the interim regulation (redesignated as § 133.21(b)(4) in this final rule). Limited importation information consists of: Date of importation, port of entry, and description, quantity, and country of origin of the goods.
- The term “redacted sample” is used to describe samples of goods displaying information all of which or some of which has been removed, obscured, or obliterated. Such information may include the names and addresses of manufacturers, shippers, exporters, or importers that appear on merchandise or its retail packaging, or serial numbers, dates of manufacture, lot codes, batch numbers, universal product codes, or other identifying marks that appear on merchandise or its retail packaging in alphanumeric or other formats. Redacted samples may be photographed or otherwise reproduced for release to mark owners.
- “Comprehensive importation information,” released by CBP under § 133.21(d) of the interim regulation (redesignated as § 133.21(e) in this final rule), includes limited importation information plus the following additional information: Name and address of the manufacturer, exporter, and importer.
- The terms “goods” and “merchandise” are used interchangeably.

## **B. Comments Concerning Legal Issues**

### **1. Comments Concerning Applicability of the Trade Secrets Act ([18 U.S.C. 1905](#))**

*Comment:* One commenter contended that the Trade Secrets Act only prohibits unauthorized disclosures of personally identifiable information by a government official or employee who received the information in the course of his employment.

*CBP Response:* CBP disagrees. The Trade Secrets Act applies to any information that “. . . 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; . . .” ([18 U.S.C. 1905](#)).

*Comment:* Several commenters questioned CBP's interpretation of the Trade Secrets Act as set forth in the interim rule, which is that information appearing on imported articles and their retail packaging is information potentially covered by the Trade Secrets Act's protection against disclosure.

*CBP Response:* CBP's view is that while the Trade Secrets Act protects from disclosure information that identifies persons, or which may lead to the identification of persons, the Act is not limited to such information. The Act also covers a comprehensive array of business, commercial, and financial information.

*Comment:* Several commenters were of the view that CBP had changed its practice in 2008 to reflect that information appearing on imported articles and their retail packaging is information potentially covered by the Trade Secrets Act's protection against disclosure, and that subsequently CBP required that samples provided to mark owners be redacted.

*CBP Response:* The agency has consistently interpreted the Trade Secrets Act as prohibiting its employees from the unauthorized disclosure of protected information received in the course of their employment. From calendar year 2000 to publication of the interim rule on April 24, 2012, CBP's written policy was to provide, prior to seizure of goods bearing counterfeit marks, only limited importation information and/or redacted samples to mark owners (Customs Directive 2310-008A, April 7, 2000).

*Comment:* Several commenters stated that tracking information and other product coding are generally visible to the public and that any proprietary interest in this information belongs to the shipper and/or mark owner, not to the importer. These commenters contended that the Trade Secrets Act does not prohibit disclosure of this information to the mark owner.

*CBP Response:* As explained in the interim rule, markings, alphanumeric symbols, and other coding appearing on products or their retail packaging may reveal information regarding an importer's supply chain. This information is of the kind normally subject to Trade Secrets Act protection regardless of who may have applied the markings/symbols/coding to the products or packaging. The Trade Secrets Act permits those covered by the Act to disclose protected

information when the disclosure is otherwise “authorized by law,” which includes properly promulgated substantive agency regulations authorizing disclosure based on a valid statutory interpretation. *See Chrysler v. Brown*, 441 U.S. 281, 294-316 (1979). Therefore, the “authorized by law” exception of the Trade Secrets Act allows CBP to disclose this protected information to the mark owner for the limited purpose of obtaining the mark owner's assistance in determining whether goods bear a counterfeit mark.

*Comment:* Some commenters stated that the interim regulation fails to safeguard the commercial and supply chain information that it purports to protect, as that information will inevitably become available to the public when the imported goods reach the market.

*CBP Response:* The Trade Secrets Act prohibits government officials from disclosing protected information received during the course of their employment or official duties, unless disclosure is exempted from the prohibition, regardless of whether the owner of that information may eventually disclose it to the public. Importers of merchandise detained under the provisions of the interim regulation may ultimately choose not to put the goods on the market or may otherwise dispose of the goods in a manner in which the aforementioned information appearing on the goods and/or packaging would never be disclosed to the public. Importers who choose to disclose such information are not subject to the Trade Secrets Act as they are not government employees who have received information pursuant to their employment. CBP's release of this information under the interim regulation's procedure is allowed under the “authorized by law” exception to the Trade Secrets Act, discussed above.

## **2. Comments Concerning the NDAA**

*Comment:* One commenter stated that the NDAA is the sole authority for promulgating the interim regulation and requested that CBP clarify the legal basis for the regulation.

*CBP Response:* CBP disagrees with the commenter's premise. As explained in the interim rule, the NDAA is not the sole source of authority for the interim regulation's information disclosure procedure. In fact, several statutes, including [15 U.S.C. 1124](#), 1125, and 1127 and [19 U.S.C. 1526\(e\)](#) authorize CBP to disclose to mark owners, for purposes of obtaining the mark owners' assistance in making infringement determinations, information that CBP may disclose under the interim regulation.

*Comment:* Several commenters contended that the NDAA only applies to products procured by the military and/or matters involving national defense concerns.

*CBP Response:* Several statutes authorize CBP to disclose to the mark owner the information set forth in the interim regulation, none of which, including the NDAA, is limited to military procurements and/or importations raising national defense concerns. The NDAA language is unambiguous and applies to any product CBP suspects of “being imported in violation of section 42 of the Lanham Act.” Therefore, CBP declines to limit the interim regulation's applicability as suggested by the commenters.

## **3. Comments Raising Other Legal Concerns**

*Comment:* One commenter recommended that CBP amend the interim regulation to clarify that goods that are properly trademarked and that only use an additional protected trademark in a description of the product are not covered within the scope of this regulation.

*CBP Response:* In many cases, using a trademark in the way described by the commenter is permissible as a “fair use” of the trademark. “Fair use” is a well-established doctrine in trademark law that is recognized and honored by the courts. *See* section 33(b)(4) of the Lanham Act, [15 U.S.C. 1115](#)(b)(4), which provides for a “fair use” defense when “the use of the name, term, or device charged to be an infringement is a use, otherwise than as a mark, . . . or [use of] a term or device which is descriptive of and used fairly and in good faith only to describe the goods or services of such party.” CBP honors the “fair use” doctrine, but does not believe it is necessary to include it in this CBP regulation.

*Comment:* Several commenters recommended that CBP amend the interim regulation to modify its definition of “counterfeit” based on their concerns that CBP officers could detain goods that are genuine, albeit repaired or refurbished goods, or goods bearing genuine marks that are unrestricted parallel imports.

*CBP Response:* The interim regulation employs the definition of “counterfeit” provided by the Lanham Act at [15 U.S.C. 1127](#).

*Comment:* Several commenters stated that the interim regulation should apply to other forms of intellectual property, such as suspected piratical or copyright infringing goods, and merchandise suspected of violating the Digital Millennium Copyright Act (DMCA), [17 U.S.C. 1201](#).

*CBP Response:* As the above comment concerns amendments to regulations concerning forms of intellectual property other than counterfeit marks, it falls outside the scope of this final rulemaking. CBP recognizes the concern that there be similar disclosure provisions relating to suspected piratical or copyright infringing goods and merchandise suspected of violating the Digital Millennium Copyright Act (DMCA), [17 U.S.C. 1201](#), and plans to address the issue through a separate proposed rulemaking.

### **C. Comments Concerning Action by Mark Owners**

*Comment:* Several commenters noted that the interim regulation provides an opportunity for mark owners to potentially abuse the section (b)(1) information provided to them by CBP, and to disrupt or eliminate lawful parallel market competition. Several commenters recommended that CBP restrict mark owners' use of section (b)(1) information by placing conditions on the manner by which they may receive and use the information.

*CBP Response:* The interim regulation allows CBP to release section (b)(1) information to a mark owner after an importer has been notified and has had the opportunity to establish that the suspect goods bear genuine marks. This regulation is not intended to impede the legal importation of parallel (gray market) goods. However, to address the concern of these commenters, and the concern of those suggesting that conditions and limitations be placed on mark owners receiving section (b)(1) information, CBP is amending the interim regulation at [19 CFR 133.21](#)(c) to

include in the disclosure to the mark owner a statement that some or all of the information being disclosed may be information protected from disclosure by the Trade Secrets Act. The regulation provides that CBP is only disclosing the information to the owner of the mark for the purpose of assisting CBP in determining whether the merchandise bears a counterfeit mark. CBP will take into account, in deciding whether to make future disclosures to a mark owner, instances in which the mark owner has used the disclosed information for another purpose (*i.e.*, other than for assisting CBP in making the infringement determination).

*Comment:* Several commenters recommended that CBP amend the interim regulation to require mark owners receiving section (b)(1) information from CBP to provide certifications, under penalty of perjury, when reporting to CBP that goods are counterfeit and contain spurious versions of the specific marks recorded with CBP. One commenter contended that a certification would provide an assurance of veracity in a mark owner's response to CBP that the goods bear counterfeit marks.

*CBP Response:* A certification step would add administrative complexity and impede CBP's ability to determine a suspect good's admissibility as quickly as possible. The responsibility for determining whether the goods bear counterfeit marks rests with CBP which routinely determines the admissibility of goods under numerous provisions of customs and other laws. In doing so, CBP considers and determines the veracity of information and the authenticity of documents presented by importers, mark owners, and others who participate in various procedures administered under the customs laws and regulations. CBP will not seize merchandise based solely on information provided by the mark owner when CBP deems such information to be insufficient or inconsistent with the facts of the case.

*Comment:* One commenter expressed concern that mark owners will delay and/or fail to be responsive to CBP's inquiries regarding authenticity of marks appearing on suspect goods, thereby prejudicing the right of importers to an orderly and reasonably expeditious process.

*CBP Response:* CBP believes the commenter's concern will be the exception, not the rule. The interim regulation's detention period extends for 30 days from the date goods are presented for examination, which CBP deems a reasonable time frame considering the potential urgency of the matter. Most cases will be resolved within the 30-day period. If detained articles are not released within the detention period, the articles are deemed excluded in accordance with [19 U.S.C. 1499\(c\)\(5\)](#) for purposes of [19 U.S.C. 1514\(a\)\(4\)](#), which pertains to an importer's right to protest CBP's decisions. Therefore, delay by the mark owner, whatever the reason, will not deprive the importer of recourse to gain release of its merchandise where the facts warrant such release.

## **D. Comments Pertaining to the Interim Regulation's Procedure**

### **1. Comments Concerning the Procedure Generally**

*Comment:* Some commenters noted that there could be a potential disruption to the flow of legitimate trade by the interim regulation's required procedures.

*CBP Response:* CBP acknowledges that some goods initially suspected of bearing counterfeit marks will ultimately be determined to be genuine or otherwise non-violative and that the release of these genuine goods will be delayed to some extent. However, the interim regulation's procedure is structured to resolve these issues in a reasonably expedited manner, while giving appropriate notices to impacted parties. Suspect goods found to be genuine will be released expeditiously.

*Comment:* One commenter, an importer, stated that the interim regulation's procedure prevents CBP from seeking assistance in determining whether the suspect goods bear counterfeit marks until CBP issues a notice of detention to the importer. The commenter contended that this procedure impedes CBP's enforcement effort.

*CBP Response:* CBP disagrees with the commenter's characterization of the process. In order to seek assistance from a mark owner CBP may, at its discretion at any time after merchandise is presented for examination, disclose limited importation information and redacted samples (or photographs/images) to a mark owner.

*Comment:* The same commenter stated that the interim regulation's procedure prevents CBP from seeking assistance from the mark owner within the seven business day period after issuance of the detention notice.

*CBP Response:* Again, CBP disagrees with the commenter's characterization of the process. As stated above, CBP may, at its discretion at any time after merchandise is presented for examination, disclose limited importation information and redacted samples (or photographs/images) to a mark owner.

*Comment:* One commenter recommended that CBP amend the regulation to require that a mark owner post a bond in order to receive a sample only when the value of the sample released to the mark owner is \$500 or more.

*CBP Response:* CBP believes that the bonding requirements set forth in this final rule are appropriate to indemnify the importer against any loss or damage resulting from the furnishing of a sample to the mark owner for purposes of assisting the government in making an infringement determination.

*Comment:* Several commenters recommended that CBP provide in the regulation an opportunity for the importer to have a sample of the suspect goods tested by a qualified laboratory rather than providing a sample to the mark owner.

*CBP Response:* CBP recognizes that laboratory analysis may, in certain instances, be a valuable tool in determining whether goods bear genuine marks. CBP will consider any information, including laboratory reports, provided by an importer to support the admissibility of goods detained under the interim regulation. While information from a laboratory may lead CBP to decide it is not necessary to provide a sample to a mark owner, that is not necessarily the case.

*Comment:* One commenter, an association representing mark owners, stated that its members strongly oppose giving importers the principal role in authenticating detained products and requests that CBP provide right holders with unredacted samples and a direct voice in determining authenticity.

*CBP Response:* This final rule does not give importers the principal role in authenticating suspected counterfeit marks. Pursuant to [19 U.S.C. 1499](#), CBP has the ultimate responsibility for determining whether a suspected mark is counterfeit. Moreover, this final rule provides the right holders with unredacted samples and photographs and an opportunity to provide CBP with input regarding whether the goods bear a counterfeit mark whenever CBP has an unresolved suspicion.

*Comment:* Some commenters stated that allowing the importer an opportunity to establish that its imported goods are genuine invites fraud and questioned whether CBP would be able to determine the authenticity of documents and information provided by an importer.

*CBP Response:* There is always a risk that CBP receives incorrect information, whether from an importer or another interested party. CBP, however, has extensive experience in determining the admissibility of goods under the numerous provisions of the customs laws and other laws it enforces and is well aware of the potential for fraud. CBP has developed expertise in determining the admissibility of goods presented for entry and routinely considers the veracity and authenticity of information and documents that importers (and others) present to CBP.

*Comment:* One commenter recommended that CBP include a mechanism under the interim regulation's procedure by which mark owners may object to a determination by CBP that a suspected counterfeit mark is not counterfeit, after the mark owner receives either limited importation information or section (b)(1) information from CBP.

*CBP Response:* As stated in CBP Dec. 12-10 and noted above, the objective of this rulemaking is to facilitate CBP's solicitation of information from both mark owners and importers to better enable CBP to determine a good's admissibility while safeguarding, to the greatest extent possible, information that is protected by the Trade Secrets Act. The mark owner receives more than limited importation information in that the right holder is provided with an unredacted sample or digital images containing information appearing on the suspect article. The disclosure of this information allows the right holder to provide CBP with the information necessary for making a determination relative to the suspect mark and for determining whether the article bears a counterfeit mark.

*Comment:* One commenter noted with disapproval that the interim regulation provides for a 30-day window from the date of importation for CBP to make a determination of "reasonable suspicion" and requires CBP to issue a notice of detention to the importer within five business days of that determination.

*CBP Response:* CBP disagrees with the commenter's reading of the regulation. Under [19 U.S.C. 1499](#), CBP must decide whether to release or detain merchandise within five business days following the date on which merchandise is presented for examination. Therefore, a five business day window exists within which CBP must make a reasonable suspicion determination, not a 30-day window. CBP is also required to issue a notice of detention to the importer no later than five

business days after a decision to detain the merchandise is made. Therefore, the importer will learn of the detention within ten business days of the merchandise being presented for examination.

*Comment:* Several commenters stated that CBP should be required to issue uniform notices of detention that specify the reason(s) for detention.

*CBP Response:* CBP agrees as this requirement is mandated by [19 U.S.C. 1499\(c\)\(2\)\(B\)](#).

*Comment:* One commenter, citing language from the interim rule's preamble, recommended that CBP amend the interim regulation to explicitly state that goods will be detained only when CBP “reasonably suspects” that they bear counterfeit marks.

*CBP Response:* CBP believes that it is unnecessary to codify in the regulations factors, elements, and/or circumstances it must consider, on a case-by-case basis, in determining whether goods are subject to detention for a determination of violation of the intellectual property laws.

*Comment:* A commenter recommended that CBP define the “good cause” an importer must show under the interim regulation to justify an importer's request for a 30-day extension of the detention period.

*CBP Response:* CBP no longer believes that such a 30-day extension is warranted and has eliminated it in this final rule. In the past, extensions were granted to provide time to determine admissibility. CBP is confident that with the assistance and input of the right holder, admissibility determinations can be made within the 30-day period.

*Comment:* One commenter stated that the interim regulation simply codifies in the regulations what, prior to the promulgation of the interim rule, had been the regulatory *status quo* inasmuch as mark owners may obtain unredacted samples only after CBP determines that the subject goods bear counterfeit marks and seizes them or formulates the intention to seize them.

*CBP Response:* CBP disagrees with the commenter's reading of the interim regulation. CBP may, when necessary to determine whether suspect goods bear counterfeit marks, disclose unredacted samples to the owner of the mark in accordance with the interim regulation's notice (to the importer) provisions. This disclosure takes place after detention but before either seizure or the formulation of an intent to seize.

*Comment:* One commenter objected to the interim regulation as not providing protection to importers against disclosure to mark owners of information protected by the Trade Secrets Act with respect to marks that are not recorded with CBP.

*CBP Response:* The interim regulation does, in fact, require that a mark be registered with the U.S. Patent and Trademark Office and recorded with CBP as a prerequisite to the agency detaining goods it suspects bear a counterfeit version of the mark and disclosing information (or samples or photographs/images) to the mark owner under § 133.21(b) of the interim regulation. CBP believes that this long-standing requirement is warranted and will continue to impose it.

Without it, CBP would lack information needed to enforce the prohibition against counterfeit marks, and the process would become more complex and significantly less workable.

*Comment:* Several commenters stated that the interim regulation does not provide an objective standard for establishing the genuine nature of marks appearing on imported goods. These commenters recommended that CBP amend the interim regulation to include examples of the kind of information it will accept as tending to prove that marks are genuine.

*CBP Response:* CBP believes that it is unnecessary to amend the regulation, as CBP will consider any document or information that is relevant to the question of the authenticity of the mark. Inevitably, some documents or information submitted to CBP by an importer or a mark owner will be less persuasive or probative. These decisions are case-specific and depend on the circumstances involved. In this context, CBP finds little benefit to limiting the kinds of information it will consider.

## **2. Comments Concerning the Release of Information**

*Comment:* One commenter recommended that prior to CBP's disclosure of section (b)(1) information to the mark owner, the agency should provide the information to the importer for its consideration of the accuracy and veracity of that information. Several commenters recommended that CBP allow importers to obtain samples of suspect goods to assist them in responding to CBP's request for information regarding the goods. Some of these latter commenters also recommended that importers be permitted to receive samples of seized goods to enable them to respond to seizure and/or penalty notices.

*CBP Response:* Inasmuch as an importer may not have complete information about the marks appearing on imported goods and/or their retail packaging, CBP finds merit in releasing this information to importers and is amending the interim regulation (*see* new § 133.21(d)) to provide release of an unredacted sample/packaging/image to the importer any time after presentation of the goods for examination. CBP believes that releasing this information to importers will assist them in providing CBP with a meaningful response before or within the seven business day response period. Under this amended provision, if an importer does not identify a need for a sample until after CBP seizes goods as bearing counterfeit marks the importer may request a sample at that time.

*Comment:* Several commenters recommended that the interim regulation's procedure for issuing a notice of detention to the importer be expanded to provide, simultaneously rather than within 30 business days of detention, the notice of the detention and limited importation information to the mark owner. This would eliminate unnecessary delay.

*CBP Response:* CBP finds merit in this recommendation and is amending § 133.21(b) of the interim regulation accordingly. The amended provision will no longer provide that CBP has 30 business days from the date of detention to release limited importation information to the mark owner; if available, such information will be released upon issuance of the detention notice to the importer (or as soon as possible thereafter if not immediately available). This simultaneous notice and release of limited importation information provision will apply in those instances where CBP

has not already released limited importation information to the mark owner in accordance with its discretionary release authority under the same section of the interim regulation.

*Comment:* Several commenters recommended that CBP amend the interim regulation to allow disclosure to another person in place of the mark owner, where there is an arrangement between the other person and the mark owner, such as an assignment, a license, or other agreement. Such other persons may be in a better position to assist CBP in identifying goods bearing counterfeit marks.

*CBP Response:* CBP discloses such information to the person designated by the mark owner during the recordation process as the contact for enforcement of the mark (*see* §§ 133.1 through 133.7 of this part). However, due to the administrative difficulty in determining which additional persons may be entitled to receive such information, CBP is not amending the regulations in this regard.

*Comment:* Several commenters recommended that CBP limit the circumstances in which unredacted samples are released to mark owners by first releasing a redacted sample to the mark owner. An unredacted sample can then be released when the redacted sample proves insufficient for the mark owner to assist CBP in determining whether the goods bear a counterfeit mark.

*CBP Response:* CBP believes that the interim regulation adequately safeguards importers' interests and that it would be counter-productive and unduly burdensome administratively to impose additional procedural steps before releasing an unredacted sample to the mark owner. The result would be more instances where resolution of the matter would require all or nearly all of the 30-day detention period, which is contrary to CBP's goal to quickly resolve issues of admissibility so as to either enable lawful trade or to prevent violative goods from entering the commerce of the United States.

*Comment:* Several commenters recommended that CBP make the interim regulation's disclosure provision mandatory rather than permissive, requiring CBP, in every case, to disclose section (b)(1) information, including unredacted samples.

*CBP Response:* The interim regulation permits CBP to disclose to mark owners, prior to seizure, section (b)(1) information (including an unredacted sample) when CBP finds that obtaining a mark owner's assistance regarding the authenticity of a mark is warranted, subject to the notice and seven business day response period set forth in § 133.21(b)(2)(i). *See* § 133.21(c). CBP will weigh the facts and circumstances before releasing section (b)(1) information (prior to seizure). CBP therefore does not agree with the commenters' recommendation to require the pre-seizure release of section (b)(1) information to the mark owner in every case. CBP believes that the interim regulation's procedure protects importers' interests in the confidentiality of their commercial and supply chain information while, at the same time, facilitating CBP's trademark enforcement at the border.

*Comment:* One commenter recommended that CBP clarify that release of information is only authorized after detention, rather than at any time after importation.

*CBP Response:* Although this comment is accurate regarding release of section (b)(1) information to the mark owner under the interim regulation, this final rule amends § 133.21(b)(4), as explained above, to reflect that CBP may release limited importation information to the mark owner prior to issuance of a notice of detention to the importer and will release such information to the mark owner upon issuance of the notice of detention or as soon as possible after its issuance. This latter change removes the 30-business day window specified in the interim regulation and mandates that CBP will release this information, when available, contemporaneously with issuance of the detention notice to the importer.

*Comment:* Some commenters recommended that the interim regulation be amended to permit CBP to disclose unredacted samples to the owner of the mark at any time after goods are presented for entry, without the seven business day response period. Some commenters recommended that this response period be eliminated, observing that applicable law does not require a role for the importer in the authentication process.

*CBP Response:* CBP believes that the regulation strikes the appropriate balance between protecting importers' commercial information and allowing mark owners to assist CBP in enforcing prohibitions against counterfeit goods. Section 1499(a)(5) within 19 U.S.C. specifies the manner in which an importer may provide information to CBP when information is required for the release of goods. Accordingly, importers have a statutorily prescribed role in establishing the admissibility of their goods. At any time after goods are presented for examination, CBP may solicit and receive information from the importer that may enable CBP to expeditiously release the goods. In cases where information is not provided within five days or the information received is insufficient to enable CBP to release the goods, pursuant to [19 U.S.C. 1499](#), CBP may detain the goods to enable CBP to determine their admissibility. Should CBP require assistance from a mark owner to determine admissibility of the goods, it may seek assistance at various stages of the detention and may disclose section (b)(1) information, if necessary, after the seven business day response period. Under [19 U.S.C. 1499](#), if CBP does not make a final determination regarding the admissibility of the goods within 30 days of presentation of the merchandise for examination, its failure to make such a determination is treated as a decision to exclude the merchandise for purposes of [19 U.S.C. 1514](#)(a)(4). CBP believes that the above process allows the mark owner adequate time to provide information to CBP when CBP requests such information while protecting importers' commercial information.

*Comment:* One commenter suggested that CBP amend the interim regulation to require the importer to provide to the mark owner any information it submits to CBP within the seven business day response period. Another commenter suggested that CBP provide to the mark owner a non-proprietary version of the information the importer provided to CBP.

*CBP Response:* It is CBP's role to determine whether, in light of the relevant laws and regulations, goods that are presented for examination are admissible. The interim regulation simply facilitates CBP's solicitation of information from both mark owners and importers to better enable CBP to determine a good's admissibility while safeguarding as much as possible information that is protected by the Trade Secrets Act.

### **3. Other Comments Concerning the Seven Business Day Response Period**

*Comment:* Several commenters recommended that CBP exempt certain industries from the interim regulation's seven business day response period, contending that some industries have special needs requiring information sharing with the mark owner, without delay, in every case.

*CBP Response:* CBP believes that the interim regulation's procedure will operate effectively across all industries and sectors. Should CBP recognize a need to address a specific industry's circumstances in the future, CBP will consider amending the regulation at that time.

*Comment:* One commenter expressed concern that the interim regulation's seven business day response period will impair a mark owner's ability to assist CBP in its efforts to curtail importation of restricted parallel imports or to assist CBP in identifying counterfeit goods that are commingled with unrestricted gray market goods.

*CBP Response:* The interim regulation did not change the way CBP enforces restrictions on gray market goods. The seven business day response period neither impairs the mark owner's ability to make information available to CBP nor increases the risk of counterfeit goods being admitted. Unless CBP determined the goods are admissible, they are deemed excluded by operation of law. CBP is aware of the potential for these types of shipments and has developed expertise in identifying such activity.

*Comment:* Some commenters stated that the interim regulation's seven business day response period makes the process for authenticating marks unduly burdensome and that officers charged with enforcing the intellectual property laws may therefore be deterred from taking action.

*CBP Response:* CBP believes that the interim regulation's procedure will assist CBP officers in making determinations regarding counterfeit marks and is similar to various other provisions in the CBP regulations that require CBP to issue notice to an importer or other party of actions it is undertaking and/or receive information from an importer or other party before taking action. CBP is also confident that its officers will discharge their sworn duties efficiently, responsibly, and professionally at all times.

*Comment:* Some commenters stated that the interim regulation's seven business day response period will result in the delayed release of legitimate goods. Several other commenters specified that the seven business day response period is too long and may result in the mark owner receiving information to determine authenticity of the mark(s) with as little as 11 days left in the 30-day detention period. These commenters contended that this is not enough time for mark owners to provide meaningful information and is prejudicial to mark owners' interests.

*CBP Response:* CBP believes that, in the interest of due process, the seven business day response period is appropriate and that the regulation provides adequate time for both importers and mark owners to respond and does not prejudice their interests. CBP further notes that if CBP fails to make a determination within the 30-day detention period the merchandise is excluded by operation of law.

*Comment:* Several commenters stated that the interim regulation's seven business day response period is too short, inasmuch as it may not provide enough time for an importer to provide information sufficient to establish to CBP's satisfaction that detained goods bear genuine marks.

*CBP Response:* CBP disagrees. Although CBP may release section (b)(1) information to the mark owner after the seven business day response period, the importer has the option of submitting information to CBP up to the end of the detention period or until CBP determines that the goods bear counterfeit marks. CBP believes that this time frame is adequate to protect importers' interests.

## **E. Comments Concerning Information Released**

*Comment:* Several commenters objected to the disclosure of information provided in § 133.21(b)(2) of the interim regulation whereby CBP may disclose to the mark owner, prior to CBP's seizure of the goods as bearing counterfeit marks, the quantity and description of merchandise involved in a suspect shipment.

*CBP Response:* CBP can disclose the quantity and description of merchandise at any time after merchandise is presented for examination as CBP does not consider this information to be protected by the Trade Secrets Act. CBP articulated this position in T.D. 98-21, published in the Federal Register ([63 FR 11996](#)) on March 12, 1998. Nothing in the comments has persuaded CBP to change its view.

*Comment:* Several commenters contended that the interim regulation is unclear as to the meaning of “quantity” and the manner by which CBP will provide the mark owner with a description of merchandise “from the entry.”

*CBP Response:* CBP agrees that these provisions require more clarity. Accordingly, CBP is amending the regulation to provide that the quantity of merchandise involved in the detention and the description of detained merchandise will be drawn from CBP arrival or entry documents or their electronic equivalents, which could include, but will not be limited to, the CBP Form 3461, the CBP Form 7533, the CBP Form 7512 (if the detention is for merchandise moving in-bond), the cargo manifest (if no entry has yet been filed), or any other document or information, as applicable.

*Comment:* One commenter requested that CBP reconsider the scope of information that it redacts when providing samples or photographs/ images to a mark owner under § 133.21(b)(3) of the interim regulation. The commenter observed that determining whether suspect goods bear counterfeit marks may require a mark owner to review information such as product codes, packaging, and SKUs and that disclosing these marks and numbers does not violate the Trade Secrets Act as they may not necessarily identify the importer.

*CBP Response:* CBP believes that in order to protect importers' interests, any identifying information such as 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, should be redacted when CBP provides samples, photographs, or images prior to the running of the seven business day response period.

*Comment:* One commenter stated that the interim regulation is deficient in that it provides for disclosure of only certain limited information appearing on the packaging of suspect merchandise. The commenter contended that the mark owner may need more information to provide meaningful assistance.

*CBP Response:* CBP disagrees with the commenter's reading of the interim regulation. CBP is not limited to disclosing information appearing only on the packaging of suspect merchandise. Once the seven business day response period has expired without resolution of authenticity, CBP is authorized to disclose to the mark owner all information appearing on the goods as well as all information appearing on their retail packaging. The NDAA specifically authorizes CBP to disclose certain information to a mark owner, including unredacted samples and photographs/images of suspect merchandise (and its retail packaging). The interim rule is consistent with that grant of authority.

## **F. Comments Concerning Post-Seizure**

*Comment:* Several commenters recommend that CBP make the interim rule's post-seizure disclosure provision mandatory rather than discretionary, requiring CBP, in every case, to provide unredacted photographs/images or samples of the goods seized to the mark owner.

*CBP Response:* CBP does not believe that post-seizure disclosure to mark owners needs to be made mandatory through regulations.

*Comment:* One commenter recommended that CBP amend the interim regulation to require the retention of seized counterfeit goods for at least 60 days after CBP has provided the mark owner with formal notice of the seizure. The commenter stated that CBP often disposes of the goods before notice is given, depriving mark owners of the opportunity to request and obtain samples.

*CBP Response:* The comment inaccurately reflects CBP's procedure regarding seizure, forfeiture, and destruction of goods bearing counterfeit marks. Generally, CBP retains seized merchandise for at least 90 days from the date of seizure, through completion of the forfeiture process, prior to destruction of the goods. Section 133.21(d) of the interim regulation (redesignated in this final rule as § 133.21(e)) requires CBP to disclose to the mark owner comprehensive importation information, if available, within 30 business days of the notice of seizure to the importer.

*Comment:* Several commenters recommended that CBP commit to rendering determinations on [19 U.S.C. 1618](#) petitions (challenging the seizure or forfeiture or both) no later than 30 days after such petitions are filed.

*CBP Response:* Part 171 of the CBP regulations governs the agency's handling of petitions for remission or mitigation of fines, penalties, and forfeitures filed pursuant to [19 U.S.C. 1618](#). CBP believes that the administrative procedure set forth in its existing regulations is adequate to protect importers' interests in matters involving seized merchandise and that an amendment to these regulations is unnecessary.

## **Conclusion and List of Changes**

Based on the foregoing analysis of the comments and CBP's further consideration of the matter, CBP is adopting the interim amendments to the CBP regulations published in the Federal Register ([77 FR 24375](#)) on April 24, 2012 as final with the exception of the amendments to §§ 133.21 and 151.16 which are being adopted as final with the following modifications:

CBP is amending § 133.21 to enhance its readability and to reflect the clarifications, amendments and organizational changes discussed above. Specifically:

1. CBP is amending § 133.21(b) by eliminating the optional 30-day extension of the detention period as CBP now believes that such an extension is unnecessary.

2. CBP is reorganizing the text of § 133.21(b) by redesignating the existing introductory text and paragraphs (b)(1), (b)(2), and (b)(3) as newly redesignated paragraphs (b)(1) through (b)(5). Within § 133.21(b):

- Paragraph (b)(1) restates the 30-day detention period provided for in 1499(c).
- Paragraph (b)(2)(i) specifies that a notice of detention is issued to the importer pursuant to [19 CFR 151.16\(c\)](#) and [19 U.S.C. 1499\(c\)](#), and that CBP will also inform the importer that certain information may already have been disclosed to the owner of the mark, or may be disclosed concurrent with the issuance of the notice of detention, and that the importer has seven business days from the date of the notice of detention to present information that establishes, to CBP's satisfaction, that the detained merchandise does not bear a counterfeit mark.
- New paragraph (b)(2)(ii) provides that where the importer does not provide information within the seven business day response period, 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.
- Paragraph (b)(3) sets forth the information CBP may disclose to the mark owner (information appearing on goods and their retail packaging and unredacted samples, photographs/images, etc.).
- Redesignated paragraph (b)(4) (paragraph (b)(2) of the interim regulation) is amended to clarify that the “description of the merchandise” and the “quantity involved” that CBP releases to the mark owner (along with other data) prior to issuance of a detention notice is taken from the paper or electronic equivalent of CBP Forms 3461, 7533, 7512, cargo manifest, advance electronic information, or other entry document as appropriate. After issuance of a detention notice, this information is taken from the notice of detention. CBP will release the information at the same time it issues the detention notice to the importer, or as soon afterward as possible.
- Paragraph (b)(5) provides for release of redacted photographs/images and samples to the mark owner.

3. In § 133.21(c), pertaining to release of unredacted *photographs, images and samples* to the mark owner under paragraph (b), CBP is:

- Clarifying the heading text to state that the provision pertains to conditions associated with the disclosure.

- Adding language to provide that, with the release of the information or the photographs, images or samples, CBP will notify the mark owner that some or all of the information it is receiving may be subject to the protections of the Trade Secrets Act, and is only being provided to the mark owner to assist CBP in determining whether the merchandise described in the notice of detention bears counterfeit marks.
- Reorganizing the provision into two sub-paragraphs to enhance readability.

4. Sections 133.21(b)(5), (c)(2), and (f), relating to the terms of the IPR sample bond, are amended to clarify that the IPR sample bond is posted to indemnify the importer or owner of the sample against any loss or damage resulting from the furnishing of the sample by CBP to the owner of the mark.

5. CBP is adding a new paragraph (d) to § 133.21 to provide for release of unredacted samples to the importer any time after presentation of the suspect goods to CBP for examination.

6. Existing § 133.21(d), pertaining to the seizure of goods and disclosure of comprehensive importation information to the mark owner, is re-designated as paragraph (e) in this final rule and clarified to reflect that the “description” and the “quantity” of the merchandise provided to the mark owner by CBP is taken from the notice of seizure (and intent to forfeit).

7. Existing § 133.21(e), pertaining to photographs/images and samples being made available to the mark owner after seizure, is re-designated as paragraph (f) in this final rule.

8. Existing § 133.21(f), pertaining to consent of the mark owner, is re-designated as paragraph (g) in this final rule.

This document amends the specific authority citation for §§ 133.21 through 133.25 to reflect [10 U.S.C. 2302](#).

Lastly, this final rule amends § 151.16(a) by removing the reference to “imports of articles bearing counterfeit marks or suspected counterfeit marks.”

CBP is adopting as final, with the clarifications and amendments discussed above, the interim amendments set forth in CBP Dec. 12-10 that went into effect on April 24, 2012. The additional changes made to the interim regulation in this final rule include non-substantive editorial changes that improve readability, as well as logical-outgrowth changes to the interim regulation's provisions, as described above. In an effort to provide the trade, if necessary, with the opportunity to make adjustments to their business practices, CBP has determined to delay the effective date of this final rule for a period of 30 days from the date of publication of this document in the Federal Register.

## **Executive Orders 13563 and 12866**

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

The Regulatory Flexibility Act ([5 U.S.C. 601](#) *et seq.*), as amended by the Small Business Regulatory Enforcement and Fairness Act of 1996, requires agencies to assess the impact of regulations on small entities. 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).

One of CBP's primary roles is to safeguard the U.S. economy from the importation of counterfeit goods. Prior to the publication of the interim final rule, if CBP needed assistance in determining whether an import bears counterfeit marks, the agency was restricted to only sharing redacted samples of the import in question with a right holder. However, due to the highly technical nature of some imports and the continuously increasing sophistication of counterfeiters, sharing redacted samples with right holders is no longer sufficient in certain circumstances. To broaden CBP's ability to identify counterfeit goods, Congress included a provision to the National Defense Authorization Act for Fiscal Year 2012 (NDAA) ([Public Law 112-81](#), [10 U.S.C. 2303](#)) that allows CBP to share unredacted samples of imports suspected of bearing counterfeit marks with the right holders of the trademarks in question in order to aid CBP in determining whether the suspect goods are violative.<sup>111</sup>

By sharing unredacted samples of imports with mark owners, however, mark owners may gain access to some sensitive information about the importer, such as its supply chain and purchase price. To mitigate the potential unnecessary release of an importer's trade secrets to a mark owner, the interim final rule established a procedure to allow an importer seven business days to demonstrate to CBP that suspect marks are not violative. If the importer is unable to do so, CBP may seek assistance from the mark owner by releasing unredacted samples of the import(s) in question. As discussed earlier, during the comment period for the interim final rule CBP received comments regarding the possible misuse of trade secret information by mark owners when viewing unredacted samples. In order to address such misuses, and thus any potential business impacts to the importation of legitimate trade, CBP is amending the interim regulation to provide that the disclosure to the mark owner must include a statement informing the mark owner that some or all of the information being disclosed may be information protected from disclosure by the Trade Secrets Act ([18 U.S.C. 1905](#)).

As described in the “Paperwork Reduction Act” section of this document, CBP estimates that it takes an importer two hours to provide proof to CBP that establishes that suspect goods do not bear counterfeit marks. CBP estimates the average wage of an importer to be \$28.50 per hour. Thus, CBP estimates it will cost a small entity \$57.00 to demonstrate that its import does not bear counterfeit marks. CBP does not believe \$57.00 constitutes a significant economic impact. CBP

does recognize, however, that such repeated inquiries could eventually rise to the level of a significant economic impact. CBP lacks data on how often a particular importer would be affected by this regulation. CBP subject matter experts, however, are unaware of any instances where a particular importer was repeatedly requested to provide information to CBP for the purpose of establishing that an import does not bear counterfeit marks. Additionally, based on CBP's experience over the years (including in implementing the interim rule), CBP anticipates that law-abiding importers will not be subject to the provisions in this rule on a repeated basis. Further, we note that providing this information to CBP is optional on the part of the importer. CBP did not receive any comments on the interim final rule regarding the cost to importers of providing proof to CBP that establishes that suspect goods do not bear counterfeit marks. Due to the harm that counterfeit goods pose to public health and safety, this rule went into effect as an interim final rule on the date of its publication on April 24, 2012. As discussed earlier, CBP lacks data on how many importers have been affected by the interim rule, and on how often any particular importer has been affected. As a general matter, any importer may be affected by this rule, and that is because the rule will be applied when CBP cannot make a determination—without the use of these regulatory provisions—as to whether an import(s) bears a counterfeit mark. Because this rule could be applied to any importer, CBP believes that this rule will potentially have an effect on a substantial number of small entities.

While this rule will potentially have an effect on a substantial number of small entities, CBP does not believe that an estimated cost to an importer of \$57.00 per affected import constitutes a significant economic impact (also, as discussed above, providing this information to CBP is optional on the part of the importer). Thus, CBP certifies this regulation will not have a significant economic impact on a substantial number of small entities.

## **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 Notice 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.

## 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.

## 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

Accordingly, the interim rule amending parts 133 and 151 of title 19 of the Code of Federal Regulations ([19 CFR parts 133](#) and 151), which was published at [77 FR 24375](#) on April 24, 2012, is adopted as final with the following changes:

begin regulatory text

## **PART 133—TRADEMARKS, TRADE NAMES, AND COPYRIGHTS**

1. The general authority citation for part 133 continues, and the specific authority citation for §§ 133.21 through 133.25 is added, 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](#) ([10 U.S.C. 2302](#));

2. In § 133.21:

- a. Paragraphs (b) and (c) are revised;
- b. Paragraphs (d), (e), and (f) are redesignated as paragraphs (e), (f), and (g);
- c. A new paragraph (d) is added; and
- d. Redesignated paragraphs (e) and (f) are revised.

The revisions and addition read as follows:

**§ 133.21 Articles suspected of bearing counterfeit marks.**

\* \* \* \* \*

(b) *Detention, notice, and disclosure of information*—(1) *Detention period*. CBP may detain any article of domestic or foreign manufacture imported into the United States that bears a mark suspected by CBP 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 30 days from the date on which the merchandise is presented for examination. In accordance with [19 U.S.C. 1499](#)(c), if, after the detention period, the article is not released, the article will be deemed excluded for the purposes of [19 U.S.C. 1514](#)(a)(4).

(2) *Notice of detention to importer and disclosure to owner of the mark*—(i) *Notice and seven business day response period*. Within five business days from the date of a decision to detain suspect merchandise, CBP will notify the importer in writing of the detention as set forth in § 151.16(c) of this chapter and [19 U.S.C. 1499](#). CBP will also inform the importer that for purposes of assisting CBP in determining whether the detained merchandise bears counterfeit marks:

(A) CBP may have previously disclosed to the owner of the mark, prior to issuance of the notice of detention, limited importation information concerning the detained merchandise, as described in paragraph (b)(4) of this section, and, in any event, such information will be released to the owner of the mark, if available, no later than the date of issuance of the notice of detention; and

(B) CBP may disclose to the owner of the mark information that appears on the detained merchandise and/or its retail packaging, including unredacted photographs, images, or samples, as described in paragraph (b)(3) of this section, unless the importer presents information within seven business days of the notification establishing that the detained merchandise does not bear a counterfeit mark.

(ii) *Failure of importer to respond or insufficient response to notice.* Where the importer does not provide information within the seven business day response period, 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 of information described in paragraph (b)(3) of this section to the owner of the mark and will so notify the importer.

(3) *Disclosure to owner of the mark of information appearing on detained merchandise and/or its retail packaging, including unredacted photographs, images or samples.* When making a disclosure to the owner of the mark under paragraph (b)(2)(ii) of this section, CBP may disclose information appearing on the merchandise and/or its retail packaging (including labels), images (including photographs) of the merchandise and/or its retail packaging in its condition as presented for examination (*i.e.*, an unredacted condition), or a sample of the merchandise and/or its retail packaging in its condition as presented for examination. The release of a sample will be in accordance with, and subject to, the bond and return requirements of paragraph (c) of this section. The disclosure 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 (including labels), in alphanumeric or other formats.

(4) *Disclosure to owner of the mark of limited importation information.* From the time merchandise is presented for examination, CBP may disclose to the owner of the mark limited importation information in order to obtain assistance in determining whether an imported article bears a counterfeit mark. Where CBP does not disclose this information to the owner of the mark prior to issuance of the notice of detention, it will do so concurrently with the issuance of the notice of detention, unless the information is unavailable, in which case CBP will release the information as soon as possible after issuance of the notice of detention. The limited importation information CBP will disclose to the owner of the mark consists of:

(i) The date of importation;

(ii) The port of entry;

(iii) The description of the merchandise, for merchandise not yet detained, from the paper or electronic equivalent of the entry (as defined in § 142.3(a)(1) or (b) of this chapter), the CBP Form 7512, cargo manifest, advance electronic information or other entry document as appropriate, or, for detained merchandise, from the notice of detention;

(iv) The quantity, for merchandise not yet detained, as declared on the paper or electronic equivalent of the entry (as defined in § 142.3(a)(1) or (b) of this chapter), the CBP Form 7512, cargo manifest, advance electronic information, or other entry document as appropriate, or, for detained merchandise, from the notice of detention; and

(v) The country of origin of the merchandise.

(5) *Disclosure to owner of the mark of redacted photographs, images and samples.*

Notwithstanding the notice and seven business day response procedure of paragraph (b)(2) of this section, CBP may, in order to obtain assistance in determining whether an imported article bears a counterfeit mark and at any time after presentation of the merchandise for examination, provide

to the owner of the mark photographs, images, or a sample of the suspect merchandise or its retail packaging (including labels), 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 may release to the owner of the mark a sample under this paragraph when the owner furnishes to CBP a bond in the form and amount specified by CBP, conditioned to indemnify the importer or owner of the imported article against any loss or damage resulting from the furnishing of the 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\(b\)\(5\)](#) was (damaged/destroyed/lost) during examination, testing, or other use.”

*(c) Conditions of disclosure to owner of the mark of information appearing on detained merchandise and/or its retail packaging, including unredacted photographs, images and samples—(1) Disclosure for limited purpose of assisting CBP in counterfeit mark determinations.* In order to obtain assistance in determining whether an imported article bears a counterfeit mark, CBP may disclose to the owner of the mark, prior to seizure, information appearing on the merchandise and/or its retail packaging (including labels), unredacted photographs or images of the merchandise and/or its retail packaging in its condition as presented for examination, or an unredacted sample of the imported merchandise and/or its retail packaging in its condition as presented for examination, in accordance with paragraphs (b)(2)(ii) and (3) of this section. Upon release of such information, photographs, images, or samples, CBP will notify the owner of the mark that some or all of the information being released may be subject to the protections of the Trade Secrets Act, and that CBP is only disclosing the information to the owner of the mark for the purpose of assisting CBP in determining whether the merchandise bears a counterfeit mark.

*(2) Bond.* CBP may release to the owner of the mark a sample under paragraphs (b)(2)(ii) and (3) of this section when the owner furnishes to CBP a bond in the form and amount specified by CBP, conditioned to indemnify the importer or owner of the imported article against any loss or damage resulting from the furnishing of the 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) Disclosure to importer of unredacted photographs, images, and samples.* CBP will disclose to the importer unredacted photographs, images, or an unredacted sample of imported merchandise suspected of bearing a counterfeit mark at any time after the merchandise is presented to CBP for examination. CBP may demand the return of the sample at any time. The importer 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 importer, the importer 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](#)(d) was (damaged/destroyed/lost) during examination, testing, or other use.”

(e) *Seizure and disclosure to owner of the mark of comprehensive importation information.* 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 comprehensive importation information, if available, within 30 business days from the date of the notice of the seizure:

- (1) The date of importation;
- (2) The port of entry;
- (3) The description of the merchandise from the notice of seizure;
- (4) The quantity as set forth in the notice of seizure;
- (5) The country of origin of the merchandise;
- (6) The name and address of the manufacturer;
- (7) The name and address of the exporter; and
- (8) The name and address of the importer.

(f) *Disclosure to owner of the mark, following seizure, of unredacted photographs, images, and samples.* At any time following a seizure of merchandise bearing a counterfeit mark under this section, and upon receipt of a proper request from the owner of the mark, CBP may provide, if available, photographs, images, or a sample of the seized merchandise and its retail packaging, in its condition as presented for examination, to the owner of the mark. To obtain a sample under this paragraph, the owner of the mark must furnish to CBP a bond in the form and amount specified by CBP, conditioned to indemnify the importer or owner of the imported article against any loss or damage resulting from the furnishing of the 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](#)(f) was (damaged/destroyed/lost) during examination, testing, or other use.”

\* \* \* \* \*

## **PART 151—EXAMINATION, SAMPLING, AND TESTING OF MERCHANDISE**

3.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;

\* \* \* \* \*

### **§ 151.16 [Amended]**

4.Section 151.16(a) is amended by removing the words, “imports of articles bearing counterfeit marks or suspected counterfeit marks,”.

end regulatory text

R. Gil Kerlikowske,

Commissioner, U.S. Customs and Border Protection.

Approved: September 15, 2015.

Timothy E. Skud,

Deputy Assistant Secretary of the Treasury.

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## **Footnotes**

1. Note that this rule does not alter CBP's ability to provide redacted photographs/images, samples, or retail packaging (including labels) of suspect merchandise to the right holder of the trademark without prior notification to the importer.

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