

# Fines, Penalties and Forfeitures: Working with Customs

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TUESDAY, JUNE 12, 2012

### New CBP Regulation for Suspected Counterfeit Merchandise



**Peter Quinter**

Finally, after years of debate, on April 24, 2012, CBP amended its regulations regarding the detention and seizure of suspected imported counterfeit merchandise. In my opinion, it provides a good balance between the rights of legitimate importers, and the need for CBP to examine, detain, and seize merchandise that violates the trademark rights of companies that have registered their trademarks with the U.S. Patent and Trademark Office and then recorded those trademarks with CBP. The interim rule is entitled "Disclosure of Information for Certain Intellectual Property Rights Enforced at the Border," and amends 19 CFR Parts 133 and 151.

In summary, here are the important changes:

1. Merchandise may be detained by CBP for up to 30 days from the date the merchandise is presented for examination to CBP.
2. The U.S. importer will receive written notification from CBP within 5 days of the detention of the merchandise by CBP.
3. The U.S. importer then has 7 days to establish to CBP's satisfaction that the detained merchandise is not counterfeit.
4. CBP may provide to the trademark owner, at any time, written notice of the date

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# How a Typical Seizure Case Commences with U.S. Customs and Border Protection:

- U.S. Customs finds a violation, and places the merchandise on hold for “intensive examination”.



# CBP Detention Notice

- 19 C.F.R. 151.16
  - (e) “A final determination with respect to admissibility of detained merchandise will be made within 30 days from the date the merchandise is presented for Customs examination”
  - (f) “*Effect of failure to make a determination.* The failure by Customs to make a final determination with respect to the admissibility of detained merchandise within 30 days after the merchandise has been presented for Customs examination, or such longer period if specifically authorized by law, **shall be treated as a decision by Customs to exclude the merchandise** for purposes of section 514(a)(4)”

# What Should Be Done Upon Receipt of a Detention Notice?

- During the detention process, establishing proof of compliance with U.S. law avoids seizure of the merchandise, administrative delays, and related costs.
- Interaction with Import Specialist Branch
  - **TEAM 472:** Footwear, Headgear, Handbags, Plastics
  - **TEAM 473:** Stone, Cement, Ceramics, Metals, Glass, Furniture
  - **TEAM 474:** Machinery, Electrical Equipment, Electronics, Chemicals, Pharmaceuticals, Perfumes
  - **TEAM 483:** Cut Flowers, Live Animals, Food Products

# Seizure Authority

- **U.S. Customs statutory authority for seizure & forfeiture:**
  - Title 19 U.S.C. § 1595a(c)
    - Merchandise introduced contrary to U.S. law.





# What Type of Merchandise is Subject to Seizure?

- Prohibited Merchandise (counterfeit, controlled substances)
- Restricted Merchandise (CPSC, FDA, Quota)
- Undeclared, unreported or smuggled merchandise (non-reporting of currency over \$10,000)
- Goods which aid or facilitate the illegal importation of merchandise

# How a Typical Seizure Case Commences with CBP:

- U.S. Customs (Fines, Penalties & Forfeitures Office) issues a Seizure Notice
- When, where, why, what
- How, where, and when to respond

# U.S v. Complex Machine Works (CIT 1999)

## 14 Factors to be considered by CBP

1. The defendant's good faith effort to comply with the status
2. The defendant's degree of culpability
3. The defendant's history of previous violations
4. The nature of the public interest in ensuring compliance with the regulations involved
5. The nature and circumstances of the violation at issue
6. The gravity of the violation
7. The defendant's ability to pay
8. The appropriateness of the size of the penalty to the defendant's business and the effect of a penalty on the defendant's ability to continue doing business
9. That the penalty not otherwise be shocking to the conscience of the Court
10. The economic benefit gained by the defendant through the violation
11. The degree of harm to the public
12. The value of vindicating the agency authority
13. Whether the party sought to be protected by the statute had been adequately compensated for the harm, and
14. Such other matters as justice may require.

# Untimely Filed Petitions

Effective January 9, 2013

Only allowed when petitioner demonstrates the existence of extraordinary circumstances that prevented the petitioners from filing a timely petition or timely seeking a lawful extension of time in which to file a petition.

A party responsible for a liquidated damages claim may submit an offer in compromise to CBP pursuant to 19 USC 1617 and 19 CFR 161.5

# What should be done upon receipt of a Seizure Notice

- Establishing proof of compliance with U.S. law and obtain assistance to:
  - Draft a Petition to U.S. Customs

# FP&F Seizure Process

- If merchandise is seized, case is transferred to the Fines, Penalties & Forfeitures (FP&F) Office
- Case assigned to Paralegal Specialist at FP&F
- Paralegal Specialist issues Seizure Notice
- FP&F Officer is empowered to remit or mitigate on such terms and conditions as, under the law and factual circumstances, he or she deems appropriate.

## FP&F Seizure Process

- Petition must be filed within 30 days (of date of Seizure Notice), establishing merchandise entered or exported consistent with U.S. law (factual & legal arguments)
- Oral argument often requested and granted by FP&F
- Supplemental Petition may be filed within 60 days of adverse decision based upon presentation of new facts or law

# FP&F Refers certain cases to CBP's Headquarters

- Cases are sent to Chief, Penalties Branch, Regulations & Rulings, Office of International Trade
- Value of the merchandise is over \$100,000.
- Novel or complex issues concerning a Ruling, policy or procedure.
- HQ Recommendation sent to FP&F and Final Decision issued by FP&F.





# Currency Seizures

CERTIFIED - RETURN RECEIPT REQUESTED



U.S. Customs and  
Border Protection

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NOV 21 2012

Re: Case Number 2013- [REDACTED]

Dear Sir/Madam:

This is to officially notify you that U.S. Customs and Border Protection (CBP) seized the property described below from your client, [REDACTED], at JFK Airport on November 11, 2012. The particular instruments seized are described as follows: \$55,837.00 in U.S. currency. At the time of seizure, \$1,837.00 was returned to your client for humanitarian reasons. The property was seized and is subject to forfeiture under the provisions of Title 31, United States Code, Section 5317 because it was not properly reported as required by Title 31, United States Code, Section 5316 and/or pursuant to the provisions of Title 31, United States Code, Section 5332 because it was knowingly concealed with the intent to evade the reporting requirement set forth in Title 31, United States Code, Section 5316.

The facts available to CBP indicate that your client might have an interest in the seized property. The purpose of this letter is to advise you of the options available to your client concerning this seizure. Important documents are attached to this letter. Please do not ignore them. Those documents are an "Election of Proceedings" form and a "Seized Asset Claim Form." You should choose one of the options outlined below, indicate your choice on the Election of Proceedings form, and return it, and any other necessary documents, to CBP within the allotted time frame (see each option below). If you check Box 3 on the Election of Proceedings form, you will need to complete the Seized Asset Claim Form or otherwise file a complete claim for judicial forfeiture. Even if you are abandoning the property, you should complete the Election of Proceedings Form and return it to CBP.

# Typical Mitigating Factors:

- ✓ First offense,
- ✓ Inexperience in importing, and/or
- ✓ Cooperation with Customs' investigation.



# CBP FP&F Guidelines with Mitigating Factors:

- **1. First Offense**
  - No aggravating factors – remission upon payment of:
    - 10-30% of the dutiable value of the seized goods
- **2. Second Offense**
  - No aggravating factors – remission upon payment of:
    - 30 –50% of the dutiable value of the seized goods
- **3. Third or Subsequent Offense**
  - Remission upon payment of 50 - 80% of the dutiable value of the seized goods

# Typical Aggravating Factors:

- Criminal conviction relating to transaction;
- Repetitive violation of the same import restriction; and/or
- Evidence of intentional importation contrary to U.S. law.



# CBP FP&F Guidelines with Aggravating Factors:

- **1. First Offense**
  - Aggravating factors – remission upon payment of:
    - 30 – 50% of the dutiable value of the goods
- **2. Second Offense (and subsequent offenses)**
  - Aggravating factors – remission upon payment of:
    - 50 – 80% of the dutiable value of the seized goods



# Petition for Relief is Granted:

- Decision providing for remittance is valid for **30 days**.
- Execution and submission of **Hold Harmless Agreement** by Petitioner.
- Payment of assessed **penalty**, if any.
- Provide contact name and information of designated authorized agent to retrieve goods.
- Payment of **storage fees**.



# CBP Notice of Penalty Language

- Demand is hereby made for payment of \$10,000 representing penalties assessed against you for violation of law or regulation, or breach of bond, as set forth below:
  - On [date], [MAWB#, HAWB# or B/L#] generated by [filer], noted the AES indicator as "NO EEI 30.37(A)". Commercial invoice obtained by CBP declared the value of the shipment at [\$ amount]. Penalty assessed for no electronic export information filed prior to documents being presented for export.
  - Failure to file electronic export information in the AES.
  - LAW OR REGULATION VIOLATED
    - 15 CFR 30.2, 19 U.S.C. 1595a(d), and 22 U.S.C. 401

# Penalty Authority

- **U.S. Customs Statutory authority to issue penalties is from Title 19 U.S.C. § 1592 for:**
  - Fraud
  - Gross Negligence
  - Negligence
- 19 CFR Part 171
  - Appendix B
  - Offer in Compromise





# 19 USC § 1592 - PENALTIES FOR FRAUD, GROSS NEGLIGENCE, AND NEGLIGENCE

## (a) Prohibition

### (1) General rule

Without regard to whether the United States is or may be deprived of all or a portion of any lawful duty, tax, or fee thereby, no person, by fraud, gross negligence, or negligence—

(A) may enter, introduce, or attempt to enter or introduce any merchandise into the commerce of the United States by means of—

(i) any document or electronically transmitted data or information, written or oral statement, or act which is material and false, or

(ii) any omission which is material, or

(B) may aid or abet any other person to violate subparagraph (A).

### (2) Exception

Clerical errors or mistakes of fact are not violations of paragraph (1) unless they are part of a pattern of negligent conduct. The mere non-intentional repetition by an electronic system of an initial clerical error does not constitute a pattern of negligent conduct.

# 19 USC 1592

(c) Maximum penalties

## **(1) Fraud**

A fraudulent violation of subsection (a) of this section is punishable by a civil penalty in an amount not to exceed the domestic value of the merchandise.

## **(2) Gross negligence**

A grossly negligent violation of subsection (a) of this section is punishable by a civil penalty in an amount not to exceed—

(A) the lesser of—

(i) the domestic value of the merchandise, or

(ii) four times the lawful duties, taxes, and fees of which the United States is or may be deprived, or

(B) if the violation did not affect the assessment of duties, 40 percent of the dutiable value of the merchandise.

# 19 USC 1592

## **(3) Negligence**

A negligent violation of subsection (a) of this section is punishable by a civil penalty in an amount not to exceed—

(A) the lesser of—

(i) the domestic value of the merchandise, or

(ii) two times the lawful duties, taxes, and fees of which the United States is or may be deprived, or

(B) if the violation did not affect the assessment of duties, 20 percent of the dutiable value of the merchandise.

# 19 USC 1592(c)

## **(4) Prior disclosure**

If the person concerned discloses the circumstances of a violation of subsection (a) of this section before, or without knowledge of, the commencement of a formal investigation of such violation, with respect to such violation, merchandise shall not be seized and any monetary penalty to be assessed under subsection (c) of this section shall not exceed—

(A) if the violation resulted from fraud—

(i) an amount equal to 100 percent of the lawful duties, taxes, and fees of which the United States is or may be deprived, so long as such person tenders the unpaid amount of the lawful duties, taxes, and fees at the time of disclosure, or within 30 days after notice by CBP of its calculation of such unpaid amount, or

(ii) if such violation did not affect the assessment of duties, 10 percent of the dutiable value; or

(B) if such violation resulted from negligence or gross negligence, the interest on the amount of lawful duties, taxes, and fees of which the United States is or may be deprived so long as such person tenders the unpaid amount of the lawful duties, taxes, and fees at the time of disclosure, or within 30 days after notice by the CBP of its calculation of such unpaid amount

# Broker Penalties

<u>Type of Penalty</u>	Broker
<u>19 U.S.C. 1641</u> <u>Maximum</u> <u>Penalties</u>	Not to exceed \$30,000

# Liquidated Damages

- Customs Bonds
- Entry Violations
- Warehouse Violations
- Manifest and Cargo Delivery Violations
  - 10+2

# Liquidated Damages Claim



- In accordance with 19 C.F.R. 141.113
- Redelivery Notice (date)
- Redelivery Required (date)
- “Described merchandise not redelivered into Customs custody after refused admission by the FDA”
- “Failure to comply with a demand for redelivery  
... will result in the assessment of liquidated  
damages equal to three times the value of the  
merchandise...”

## Typical Liquidated Damages Claim: Failure to Redeliver

- Failure to Redeliver Merchandise for Export or Destruction is a very common Liquidated Damages claim issued by CBP.





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