

# National Educational Institute of the NCBFAA

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# Prior Disclosure: Anticipate and Prepare for the Consequences



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Do you have questions about importing/exporting?

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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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# Questions??



## 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).

# 19 USC 1592

## **(b) Procedures**

### **(1) Pre-penalty notice**

#### **(A) In general**

If the Customs Service has reasonable cause to believe that there has been a violation of subsection (a) of this section and determines that further proceedings are warranted, it shall issue to the person concerned a written notice of its intention to issue a claim for a monetary penalty. Such notice shall—

- (i)** describe the merchandise;
- (ii)** set forth the details of the entry or introduction, the attempted entry or introduction, or the aiding or procuring of the entry or introduction;
- (iii)** specify all laws and regulations allegedly violated;
- (iv)** disclose all the material facts which establish the alleged violation;
- (v)** state whether the alleged violation occurred as a result of fraud, gross negligence, or negligence;
- (vi)** state the estimated loss of lawful duties, taxes, and fees, if any, and, taking into account all circumstances, the amount of the proposed monetary penalty; and
- (vii)** inform such person that he shall have a reasonable opportunity to make representations, both oral and written, as to why a claim for a monetary penalty should not be issued in the amount stated.

# 19 USC 1592

## **(b) Procedures**

### **(1) Pre-penalty notice**

...

### **(2) Penalty claim**

After considering representations, if any, made by the person concerned pursuant to the notice issued under paragraph (1), the Customs Service shall determine whether any violation of subsection (a) of this section, as alleged in the notice, has occurred. If the Customs Service determines that there was no violation, it shall promptly issue a written statement of the determination to the person to whom the notice was sent. If the Customs Service determines that there was a violation, it shall issue a written penalty claim to such person. The written penalty claim shall specify all changes in the information provided under clauses (i) through (vi) of paragraph (1)(A). Such person shall have a reasonable opportunity under section 1618 of this title to make representations, both oral and written, seeking remission or mitigation of the monetary penalty. At the conclusion of any proceeding under such section 1618, the Customs Service shall provide to the person concerned a written statement which sets forth the final determination and the findings of fact and conclusions of law on which such determination is based.

# 19 USC 1592

## (b) Procedures

### (1) Pre-penalty notice

#### (A) In general

If the Customs Service has reasonable cause to believe that there has been a violation of subsection (a) of this section and determines that further proceedings are warranted, it shall issue to the person concerned a written notice of its intention to issue a claim for a monetary penalty. Such notice shall—

- (i) describe the merchandise;
- (ii) set forth the details of the entry or introduction, the attempted entry or introduction, or the aiding or procuring of the entry or introduction;
- (iii) specify all laws and regulations allegedly violated;
- (iv) disclose all the material facts which establish the alleged violation;
- (v) state whether the alleged violation occurred as a result of fraud, gross negligence, or negligence;
- (vi) state the estimated loss of lawful duties, taxes, and fees, if any, and, taking into account all circumstances, the amount of the proposed monetary penalty; and
- (vii) inform such person that he shall have a reasonable opportunity to make representations, both oral and written, as to why a claim for a monetary penalty should not be issued in the amount stated.



# 19 USC 1592

(c) Maximum penalties

(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 (or such longer period as the Customs Service may provide) after notice by the Customs Service 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 (computed from the date of liquidation at the prevailing rate of interest applied under section 6621 of title 26) 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 (or such longer period as the Customs Service may provide) after notice by the Customs Service of its calculation of such unpaid amount.

The person asserting lack of knowledge of the commencement of a formal investigation has the burden of proof in establishing such lack of knowledge. For purposes of this section, a formal investigation of a violation is considered to be commenced with regard to the disclosing party and the disclosed information on the date recorded in writing by the Customs Service as the date on which facts and circumstances were discovered or information was received which caused the Customs Service to believe that a possibility of a violation of subsection (a) of this section existed

# 19 USC 1592

- 19 USC 1592
- (c) Maximum penalties
- (5) Prior disclosure regarding NAFTA claims
- An importer shall not be subject to penalties under subsection (a) of this section for making an incorrect claim for preferential tariff treatment under section 3332 of this title if the importer—
- (A) has reason to believe that the NAFTA Certificate of Origin (as defined in section 1508 (b)(1) of this title) on which the claim was based contains incorrect information; and
- (B) in accordance with regulations issued by the Secretary, voluntarily and promptly makes a corrected declaration and pays any duties owing.

# 19 CFR § 162.74

- 19 CFR § 162.74 Prior disclosure. (a) In general—(1) A prior disclosure is made if the person concerned discloses the circumstances of a violation (as defined in paragraph (b) of this section) of 19 U.S.C. 1592 or 19 U.S.C. 1593a, either orally or in writing to a Customs officer before, or without knowledge of, the commencement of a formal investigation of that violation, and makes a tender of any actual loss of duties, taxes and fees or actual loss of revenue in accordance with paragraph (c) of this section. A Customs officer who receives such a tender in connection with a prior disclosure shall ensure that the tender is deposited with the concerned local Customs entry officer.(2) A person shall be accorded the full benefits of prior disclosure treatment if that person provides information orally or in writing to Customs with respect to a violation of 19 U.S.C. 1592 or 19 U.S.C. 1593a if the concerned Fines, Penalties, and Forfeitures Officer is satisfied the information was provided before, or without knowledge of, the commencement of a formal investigation, and the information provided includes substantially the information specified in paragraph (b) of this section. In the case of an oral disclosure, the disclosing party shall confirm the oral disclosure by providing a written record of the information conveyed to Customs in the oral disclosure to the concerned Fines, Penalties, and Forfeitures Officer within 10 days of the date of the oral disclosure. The concerned Fines, Penalties and Forfeiture Officer may, upon request of the disclosing party which establishes a showing of good cause, waive the oral disclosure written confirmation requirement. Failure to provide the written confirmation of the oral disclosure or obtain a waiver of the requirement may result in denial of the oral prior disclosure

# 19 CFR 162.74

19 CFR 162.74

....

(b) Disclosure of the circumstances of a violation. The term “discloses the circumstances of a violation” means the act of providing to Customs a statement orally or in writing that:

- (1) Identifies the class or kind of merchandise involved in the violation;
- (2) Identifies the importation or drawback claim included in the disclosure by entry number, drawback claim number, or by indicating each concerned Customs port of entry and the approximate dates of entry or dates of drawback claims;
- (3) Specifies the material false statements, omissions or acts including an explanation as to how and when they occurred; and
- (4) Sets forth, to the best of the disclosing party's knowledge, the true and accurate information or data that should have been provided in the entry or drawback claim documents, and states that the disclosing party will provide any information or data unknown at the time of disclosure within 30 days of the initial disclosure date..

# Extensions

- Extensions of the 30-day period may be requested by the disclosing party from the concerned Fines, Penalties, and Forfeitures Officer to enable the party to obtain the information or data

## 19 CFR 162.74

(c) Tender of actual loss of duties, taxes and fees or actual loss of revenue. A person who discloses the circumstances of the violation shall tender any actual loss of duties, taxes and fees or actual loss of revenue. The disclosing party may choose to make the tender either at the time of the claimed prior disclosure, or within 30 days after CBP notifies the person in writing of CBP calculation of the actual loss of duties, taxes and fees or actual loss of revenue. The Fines, Penalties, and Forfeitures Officer may extend the 30-day period if there is good cause to do so.

## Disclosure of the Circumstances of a Violation

1. Identify the type of merchandise involved
2. Identify the entry number, if applicable, the dates of import or export, and the port(s) of import or export
3. Identify the materially false statements, omissions, or acts, and explain how and when they occurred.
4. State the true information that should have been provided

Practice Point – Request thirty (30) days to conduct thorough investigation of violation.

## USE of CBP Form 28 (Request for Information) and CBP Form 29 (Notice of Action)

- The CBP field offices are directed not to use the CBP Form 28 to advise an importer that a formal investigation has been commenced.
- The commencement of a formal investigation is by correspondence on CBP letterhead or on the CBP Form 29.

DEPARTMENT OF HOMELAND SECURITY  
U.S. Customs and Border Protection  
**REQUEST FOR INFORMATION**  
19 CFR 151.11

OMB No. 1551-0023  
Exp. 03-31-2014

1. Date of Request		2. Date of Entry and Importation	
3. Manufacturer/Seller/Shipper		4. Carrier	
5a. Invoice Description of Merchandise		5b. Invoice No.	6. HTSUS Item No.
7. Country of Origin/Exportation		8. CBP Broker and Reference or File No.	
9. TO:		10. FROM:	
Production of Documents and/or Information Required by Law: If you have provided the information requested on this form to U.S. Customs and Border Protection at other ports, please indicate the port of entry to which it was supplied, and furnish a copy of your reply to this office, if possible.		11a. Port	11b. Date Information Furnished
<b>General Information and Instructions on Reverse</b>			
12. Please Answer Indicated Question(s)		13. Please Furnish Indicated Item(s)	
<input type="checkbox"/> A. Are you related (see reverse) in any way to the seller of this merchandise? If you are related, please describe the relationship, and explain how this relationship affects the price paid or payable for the merchandise.		<input type="checkbox"/> A. Copy of contract (or purchase order and seller's confirmation thereof) covering this transaction, and any revisions thereto.	
<input type="checkbox"/> B. Identify and give details of any additional costs/expenses incurred in this transaction, such as: <input type="checkbox"/> (1) packing <input type="checkbox"/> (2) commissions <input type="checkbox"/> (3) proceeds that accrue to the seller <input type="checkbox"/> (4) assists <input type="checkbox"/> (5) royalties and/or license fees		<input type="checkbox"/> B. Descriptive or illustrative literature or information explaining what the merchandise is, where and how it is used, and exactly how it operates. <input type="checkbox"/> C. Breakdown of components, materials, or ingredients by weight and the actual cost of the components at the time of assembly into the finished article. <input type="checkbox"/> D. Submit samples: Article number and description _____ from container _____ mark(s) and number _____ Samples consumed in analysis, and other samples whose return is not specifically requested, will not normally be returned. <input type="checkbox"/> E. See item 14 below.	
14. CBP Officer Message			
15. Reply Message (Use additional sheets if more space is needed.)			
16. CERTIFICATION It is required that an appropriate corporate/company official execute this certificate and/or endorse all correspondence in response to the information requested. (NOTE: NOT REQUIRED IF FOREIGN FIRM COMPLETES THIS FORM.) I hereby certify that the information furnished hereon or upon this form in response to this inquiry is true and correct, and that any samples provided were taken from the shipment covered by this entry.			
16a. Name and Title/Position of Signer (Owner, Importer, or Corporate/Company Official)		16b. Signature	
17. CBP Officer		18. Team Designation	19. Telephone No.

CBP Form 28 (03/11)

DEPARTMENT OF HOMELAND SECURITY  
CUSTOMS AND BORDER PROTECTION  
**NOTICE OF ACTION**  
*This is NOT a Notice of Liquidation*

1. DATE OF THIS NOTICE

2. CARRIER	3. DATE OF IMPORTATION	4. DATE OF ENTRY	5. ENTRY NO.
6. IAP #/SELLER/SHIPPER	7. COUNTRY	8. CUSTOMS BROKER AND I.E. NO.	
9. DESCRIPTION OF MERCHANDISE			
10. TO		10. FROM	
12. THE FOLLOWING ACTION, WHICH WILL RESULT IN AN INCREASE IN DUTIES, —			
<input type="checkbox"/> IS PROPOSED		IF YOU DISAGREE WITH THIS PROPOSED ACTION, PLEASE FURNISH YOUR REASONS IN WRITING TO THIS OFFICE WITHIN 20 DAYS FROM THE DATE OF THIS NOTICE. AFTER 20 DAYS THE ENTRY WILL BE LIQUIDATED AS PROPOSED.	
<input type="checkbox"/> HAS BEEN TAKEN		THE ENTRY IS IN THE LIQUIDATION PROCESS AND IS NOT AVAILABLE FOR REVIEW IN THIS OFFICE.	
TYPE OF ACTION			
A. <input type="checkbox"/> RATE ADVANCE			
B. <input type="checkbox"/> VALUE ADVANCE			
C. <input type="checkbox"/> EXCESS <input type="checkbox"/> WEIGHT <input type="checkbox"/> QUANTITY			
D. <input type="checkbox"/> OTHER (See below)			
13. EXPLANATION (Refer to Action indicator designations above)			
14. CUSTOMS OFFICER (Print or Type)		15. TEAM DESIGNATION	16. TELEPHONE

CBP FORM 29



# Bureau of Industry and Security (BIS): What is an Export Violation?

- (a) Engaging in prohibited conduct
- (b) Causing, aiding, or abetting a violation
- (c) Solicitation
- (d) Conspiracy
- (e) Acting with knowledge of a violation
- (f) Possession with intent to export illegally
- (g) Misrepresentation and concealment of facts
- (h) Evasion
- (j) License alteration
- (k) Acting contrary to the terms of a denial order



## VSD: The Process

- ALL Voluntary Self-Disclosures should be made to the BIS Office of Export Enforcement
- OEE: Procedures
- VSD: Only a Mitigating Factor
- Other Mitigating and Aggravating Factors



# VSD: Procedural Requirements

## Initial Disclosure:

- Initial notification

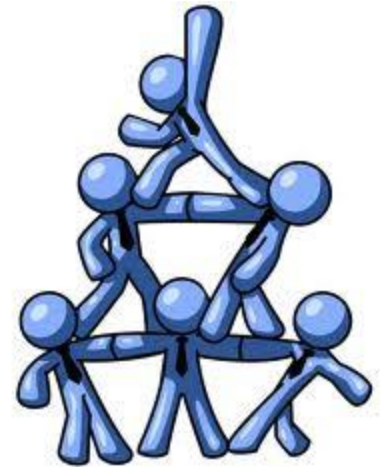
## After the initial notification:

- Narrative account
  - The kind of violation involved
    - Explanation of violation
    - Identities
    - Description of Items involved
    - Supporting documents, shipping documents & mitigating circumstances



## Elements of an Effective Export Management and Compliance Program

1. Management Commitment
2. Continuous Risk Assessment
3. Formal written export management and compliance program
4. Ongoing training and awareness
5. Follow recordkeeping requirements
6. Periodic internal and external audits
7. Reporting procedure to export compliance problems.



# Iranian Transaction Regulations

## 31 CFR Part 560.204

No goods, technology, or services may be exported, re-exported, sold or supplied, directly or indirectly, from the United States or by a U.S. person to Iran or the Government of Iran, unless licensed.




# Enforcement Guidelines OFAC Economic Sanctions

- Final Rule issued November 9, 2009
- Appendix “A” to 31 CFR Part 501



# Base Penalty Matrix Egregious Case

	No	Yes
	(1) One-Half of Transaction Value (Capped at \$125,000 per violation/\$32,500 per TWEA Violation)	(3) One-Half of Applicable Statutory Maximum
Voluntary Self-Disclosure	(2) Applicable Schedule Amount (Capped at \$250,000 per violation/\$65,000 per TWEA violation)	(4) Applicable Statutory Maximum

# OFAC General Mitigating Factors

1. Willful or Reckless Violation of Law.
2. Awareness of Conduct at Issue.
3. Harm of Sanctions Program.
4. Individual Characteristics of Violator.
5. Remedial Response.
6. Cooperation with OFAC.





# OFAC Special Mitigating Factors

1. Voluntary Self-Disclosure
2. Effective export compliance program
3. Violation was isolated occurrence
4. License would have been issued
5. Cooperating with Agency





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