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By direction of the Commission.

**Donald S. Clark,**

*Secretary.*

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## DEPARTMENT OF HOMELAND SECURITY

### Bureau of Customs and Border Protection

#### 19 CFR Part 103

RIN 1515-AD29

[CBP Decision 03-02]

#### Confidentiality of Commercial Information

**AGENCY:** Customs and Border Protection, Department of Homeland Security.

**ACTION:** Interim rule; solicitation of comments.

**SUMMARY:** This document amends Chapter I of Title 19 of the Code of Federal Regulations on an interim basis regarding the disclosure procedures that the Bureau of Customs and Border Protection (CBP) follows when commercial information is provided to CBP by a business submitter. The predecessor of CBP—the U.S. Customs Service—as a component of the Treasury Department, had followed these procedures consistent with a Department of the Treasury regulation that implemented an Executive Order setting forth the procedure for the treatment of commercial information. As CBP is now a component of the Department of Homeland Security, CBP is setting forth this established policy in its own regulations.

**DATES:** This interim rule is effective August 11, 2003. Comments must be received on or before October 10, 2003.

**ADDRESSES:** Written comments may be addressed to the Customs and Border Protection Bureau, Office of Regulations and Rulings, Attention: Regulations Branch, 1300 Pennsylvania Avenue, NW., Washington, DC 20229. Submitted comments may be inspected at Customs and Border Protection Bureau, 799 9th Street, NW., Washington, DC during regular business hours. Arrangements to inspect submitted comments should be made in advance by calling Mr. Joseph Clark at (202) 572-8768.

**FOR FURTHER INFORMATION CONTACT:** Joanne Roman Stump, Chief, Disclosure Law Branch, Office of Regulations and Rulings, (202) 572-8720.

**SUPPLEMENTARY INFORMATION:**

#### Background

The regulations of the Bureau of Customs and Border Protection (CBP), regarding information requested pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. 552, as amended, are set forth in part 103 of Chapter I of Title 19 of the Code of Federal Regulations (19 CFR part 103). These regulations were the regulations of the former U.S. Customs Service (Customs). As a component of the Department of the Treasury, Customs supplemented its regulations with the Department of the Treasury regulations (found at 31 CFR part 1) regarding public access to records. Section 1.6 of the Department of the Treasury regulations (31 CFR 1.6) concerns the treatment of information denominated as “business information”. This section provides that such information provided to the Department of the Treasury by a “business submitter” shall not be disclosed pursuant to a FOIA request except in accordance with the provisions of the section. Part 103 of 19 CFR does not have a similar provision and Customs followed the Department of the Treasury’s disclosure procedure set forth in 31 CFR 1.6 since it was promulgated in 1987.

Section 1.6 was promulgated in accordance with Executive Order 12600 of June 23, 1987, 52 FR 23781, 3 CFR part 1987, 235, 23 Weekly Comp.Pres. Doc. 727. Executive Order 12600 ordered the head of each Executive department to issue a predisclosure notification procedure for FOIA requests concerning confidential commercial information.

On March 1, 2003, Customs was transferred from the Treasury Department to the new Department of Homeland Security (DHS). Pub. L. 107-296, 6 U.S.C. 133, 116 Stat. 2135. DHS published procedures for the public on how to obtain information from DHS in an interim rule published in the **Federal Register** (68 FR 4055) on January 27, 2003. Under this rule, established at 6 CFR, Chapter I, part 5, the DHS FOIA provisions apply to all Department components transferred to the DHS, except to the extent that such component has adopted separate guidance under the FOIA (6 CFR 5.1(a)(2)).

The DHS FOIA regulation at 6 CFR 5.8(c) provides that a submitter of business information will use good-faith efforts to designate, by appropriate markings, either at the time of submission or at a reasonable time thereafter, any portions of its submission that it considers to be protected from disclosure under

exemption 4 of the FOIA. (Exemption 4 of the FOIA protects trade secrets and commercial or financial information that is privileged or confidential.) The regulations go on to say that, before business information will be released, notice will be provided to business submitters whenever (1) a FOIA request is made that seeks the business information that has been designated in good-faith as confidential, or (2) the DHS component agency has reason to believe the information may be protected from disclosure. When notice is provided, the submitter will be required to submit a detailed written statement specifying the grounds for withholding any portion of the information and must show why the information is a trade secret or commercial or financial information that is privileged or confidential.

Customs, in accordance with the Treasury Regulations (31 CFR 1.6), had not required business submitters to designate information as protected from disclosure as privileged or confidential under exemption 4 of the FOIA for the agency to not disclose “commercial information”, defined as trade secret, commercial, or financial information obtained from a person. The Treasury regulations provide that a component of the Treasury Department can determine for itself that information it receives from business submitters will not be disclosed pursuant to a FOIA request. If the agency determines the information is confidential, it can protect the information as confidential without notifying the business submitter that a FOIA request has been received.

For example, Customs routinely considered commercial information appearing on entry documents as confidential and privileged under exemption 4 of the FOIA. Customs did not require business submitters to designate that information as confidential and did not require the business submitters to respond to a notice from Customs with a written detailed statement specifying the reasons for the claim of confidentiality.

Accordingly, CBP is issuing this document to assure the trading community that the transfer of Customs from Treasury to DHS will not affect the treatment of commercial information which business submitters provide to CBP. In this document CBP is amending its regulations on an interim basis to set forth the established policy it had been following pursuant to the Treasury regulations.

### Discussion of Interim Amendments Concerning the Disclosure of Commercial Information

CBP is adding a new § 103.35 to its regulations to set forth its policy under the FOIA for the disclosure of confidential commercial information. The text will provide that "commercial information", defined as "trade secret, commercial, or financial information obtained from a person", that has been provided to CBP by a business submitter will be considered privileged or confidential and will not be disclosed except as provided in the section. This section will explain the various notice requirements CBP must give to the business submitter whose commercial information is the subject of a FOIA request for information, the procedure a business submitter must follow to object to the proposed disclosure, the notice of intent to disclose provisions that CBP must follow when it decides to disclose requested commercial information, and exceptions to the notice requirements. There is no affirmative requirement of business submitters to designate information as privileged or confidential.

It is noted that the new section does allow for a business submitter to designate information as confidential in § 103.35(b)(1)(i). Business submitters may avail themselves of this option when such a designation is feasible, as when submitting a ruling request. However, in situations when there is no method by which to designate information as confidential, such as on entry documentation, it is CBP's position that the commercial information will not be disclosed as a matter of policy. See § 103.35(b)(2)(i).

### Comments

Before adopting these interim regulations as a final rule, consideration will be given to any written comments timely submitted to CBP, including comments on the clarity of this interim rule and how it may be made easier to understand. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552) and § 103.11(b) of the Title 19 of the Code of Federal Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9 a.m. and 4:30 p.m. at the Regulations Branch, Office of Regulations and Rulings, Customs and Border Protection Bureau, 799 9th Street, NW., Washington, DC. Arrangements to inspect submitted comments should be made in advance by calling Mr. Joseph Clark at (202) 572-8768.

### Inapplicability of Prior Notice and Delayed Effective Date Requirements

CBP has determined, pursuant to 5 U.S.C 553(b)(B), that it would be contrary to the public interest to issue this rule with prior notice because the rule sets forth an established treatment of commercial information and seeks to assure the trade community that such submissions will continue to be treated the same by CBP in the Department of Homeland Security as the information was treated when Customs was under the Department of the Treasury. For these reasons, and pursuant to 5 U.S.C. 553(d)(3), good cause exists to make this rule effective immediately without a 30-day delayed effective date. However, as previously stated, CBP invites comments before determining whether to adopt these interim regulations as a final rule.

### The Regulatory Flexibility Act, and Executive Order 12866

Because no notice of proposed rulemaking is required for interim regulations, the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), do not apply. Further, this document does not meet the criteria for a "significant regulatory action" as specified in E.O. 12866.

### List of Subjects in 19 CFR Part 103

Administrative practice and procedure, Confidential commercial information, Freedom of information, Reporting and recordkeeping requirements.

### Amendments to the Regulations

■ For the reasons set forth above, CBP amends part 103 of Title 19 of the Code of Federal Regulations (19 CFR part 103), as set forth below:

### PART 103—AVAILABILITY OF INFORMATION

■ 1. The general authority citation for part 103 continues, and a specific authority citation for § 103.35 is added, to read as follows:

**Authority:** 5 U.S.C. 301, 552, 552a; 19 U.S.C. 66, 1431, 1624, 1628; 31 U.S.C. 9701.  
\* \* \* \* \*

Section 103.35 also issued under E.O. 12600 of June 23, 1987.

■ 2. Section 103.35 is added to subpart C to read as follows:

### § 103.35 Confidential commercial information; exempt.

(a) *In general.* For purposes of this section, "commercial information" is defined as trade secret, commercial, or financial information obtained from a

person. Commercial information provided to CBP by a business submitter will be treated as privileged or confidential and will not be disclosed pursuant to a Freedom of Information Act (FOIA) request or otherwise made known in any manner except as provided in this section.

(b) *Notice to business submitters of FOIA requests for disclosure.* Except as provided in paragraph (b)(2) of this section, CBP will provide business submitters with prompt written notice of receipt of FOIA requests or appeals that encompass their commercial information. The written notice will describe either the exact nature of the commercial information requested, or enclose copies of the records or those portions of the records that contain the commercial information. The written notice also will advise the business submitter of its right to file a disclosure objection statement as provided under paragraph (c)(1) of this section. CBP will provide notice to business submitters of FOIA requests for the business submitter's commercial information for a period of not more than 10 years after the date the business submitter provides CBP with the information, unless the business submitter requests, and provides acceptable justification for, a specific notice period of greater duration.

(1) *When notice is required.* CBP will provide business submitters with notice of receipt of a FOIA request or appeal whenever:

(i) The business submitter has in good faith designated the information as commercially- or financially-sensitive information. The business submitter's claim of confidentiality should be supported by a statement by an authorized representative of the business entity providing specific justification that the information in question is considered confidential commercial or financial information and that the information has not been disclosed to the public; or

(ii) CBP has reason to believe that disclosure of the commercial information could reasonably be expected to cause substantial competitive harm.

(2) *When notice is not required.* The notice requirements of this section will not apply if:

(i) CBP determines that the commercial information will not be disclosed;

(ii) The commercial information has been lawfully published or otherwise made available to the public; or

(iii) Disclosure of the information is required by law (other than 5 U.S.C. 552).

(c) *Procedure when notice given.*—(1) *Opportunity for business submitter to object to disclosure.* A business submitter receiving written notice from CBP of receipt of a FOIA request or appeal encompassing its commercial information may object to any disclosure of the commercial information by providing CBP with a detailed statement of reasons within 10 days of the date of the notice (exclusive of Saturdays, Sundays, and legal public holidays). The statement should specify all the grounds for withholding any of the commercial information under any exemption of the FOIA and, in the case of Exemption 4, should demonstrate why the information is considered to be a trade secret or commercial or financial information that is privileged or confidential. The disclosure objection information provided by a person pursuant to this paragraph may be subject to disclosure under the FOIA.

(2) *Notice to FOIA requester.* When notice is given to a business submitter under paragraph (b)(1) of this section, notice will also be given to the FOIA requester that the business submitter has been given an opportunity to object to any disclosure of the requested commercial information. The requester will be further advised that a delay in responding to the request may be considered a denial of access to records and that the requester may proceed with an administrative appeal or seek judicial review, if appropriate. The notice will also invite the FOIA requester to agree to a voluntary extension(s) of time so that CBP may review the business submitter's disclosure objection statement.

(d) *Notice of intent to disclose.* CBP will consider carefully a business submitter's objections and specific grounds for nondisclosure prior to determining whether to disclose commercial information. Whenever CBP decides to disclose the requested commercial information over the objection of the business submitter, CBP will provide written notice to the business submitter of CBP's intent to disclose, which will include:

(1) A statement of the reasons for which the business submitter's disclosure objections were not sustained;

(2) A description of the commercial information to be disclosed; and,

(3) A specified disclosure date which will not be less than 10 days (exclusive of Saturdays, Sundays, and legal public holidays) after the notice of intent to disclose the requested information has been issued to the business submitter. Except as otherwise prohibited by law, CBP will also provide a copy of the

notice of intent to disclose to the FOIA requester at the same time.

(e) *Notice of FOIA lawsuit.* Whenever a FOIA requester brings suit seeking to compel the disclosure of commercial information covered by paragraph (b)(1) of this section, CBP will promptly notify the business submitter in writing.

Dated: June 20, 2003.

**Robert C. Bonner,**

*Commissioner, Customs and Border Protection.*

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## DEPARTMENT OF HOMELAND SECURITY

### Bureau of Customs and Border Protection

#### 19 CFR Part 111

[CBP Dec. 03-15]

RIN 1515-AD14

#### Performance of Customs Business by Parent and Subsidiary Corporations

**AGENCY:** Customs and Border Protection, Department of Homeland Security.

**ACTION:** Final rule.

**SUMMARY:** This document adopts as a final rule, with some changes, proposed amendments to Customs Regulations to provide that corporate compliance activity engaged in by related business entities for the purpose of exercising "reasonable care" is not customs business and therefore is not subject to the customs broker licensing requirements. The amendments make clear that this corporate compliance activity concept does not extend to document preparation and filing, which is customs business subject to licensing requirements. The amendments will improve the operational efficiency of the affected business entities and, thereby, enhance their ability to ensure compliance with applicable customs laws and regulations.

**EFFECTIVE DATE:** Final rule effective September 10, 2003.

**FOR FURTHER INFORMATION CONTACT:** Gina Grier, Office of Regulations and Rulings (202-572-8730).

#### SUPPLEMENTARY INFORMATION:

##### Background

Section 641 of the Tariff Act of 1930, as amended (19 U.S.C. 1641), provides that a person must hold a valid customs broker's license and permit in order to transact customs business on behalf of others, sets forth standards for the

issuance of broker's licenses and permits, provides for disciplinary action against brokers in the form of suspension or revocation of such licenses and permits or assessment of monetary penalties, and provides for the assessment of monetary penalties against other persons for conducting customs business without the required broker's license. Section 641 also provides for the issuance of rules and regulations relating to the customs business of brokers as may be necessary to protect importers and the revenue of the United States and to carry out the provisions of section 641.

The regulations issued under the authority of section 641 are set forth in part 111 of the Customs Regulations (19 CFR part 111). Part 111 includes detailed rules regarding the licensing of, and granting of permits to, persons desiring to transact customs business as customs brokers, including the qualifications required of applicants and the procedures for applying for licenses and permits. Part 111 also prescribes recordkeeping and other duties and responsibilities of brokers, sets forth in detail the grounds and procedures for the revocation or suspension of broker licenses and permits and for the assessment of monetary penalties, and sets forth fee payment requirements applicable to brokers under section 641 and 19 U.S.C. 58c(a)(7).

Section 111.1 of the Customs Regulations (19 CFR 111.1) sets forth definitions that apply for purposes of part 111 and includes the following definition of "customs business:"

"Customs business" means those activities involving transactions with Customs concerning the entry and admissibility of merchandise, its classification and valuation, the payment of duties, taxes, or other charges assessed or collected by Customs on merchandise by reason of its importation, and the refund, rebate, or drawback of those duties, taxes, or other charges. "Customs business" also includes the preparation, and activities relating to the preparation, of documents in any format and the electronic transmission of documents and parts of documents intended to be filed with Customs in furtherance of any other customs business activity, whether or not signed or filed by the preparer. However, "customs business" does not include the mere electronic transmission of data received for transmission to Customs.

Section 111.2 of the Customs Regulations (19 CFR 111.2) sets forth the basic rules regarding when a person (that is, an individual, partnership, association, or corporation) must obtain a customs broker license and permit. Paragraph (a)(2) of § 111.2 specifies several exceptions to the license requirement including, in subparagraph (i), an exception for an importer or