DEPARTMENT OF THE TREASURY

Monetary Offices

31 CFR Part 92

RIN 1506–AA58

Assessment of Civil Penalties for Misuse of Words, Letters, Symbols, and Emblems of the United States Mint

AGENCY: United States Mint, Treasury.

ACTION: Final rule.

SUMMARY: The United States Mint is adopting a new rule establishing procedures under which the United States Mint will implement and execute the provisions of 31 U.S.C. 333(c), which authorizes the Secretary of the Treasury to assess a civil penalty against any person who has misused the words, titles, abbreviations, initials, symbols, emblems, seals, or badges of the United States Mint.

DATES: *Effective Date:* This final rule is effective November 26, 2007.

FOR FURTHER INFORMATION CONTACT: James Adler, Senior Attorney, United States Mint, at (202) 354–7286.

SUPPLEMENTARY INFORMATION: The United States Mint is adopting today the new regulation set forth below under 31 CFR part 92.

I. Background

Section 333(c) of title 31, United States Code, authorizes the Secretary of the Treasury to assess a civil penalty against any person who has misused the words, titles, abbreviations, initials, symbols, emblems, seals, or badges of the Department of the Treasury, including those of the United States Mint. The Secretary of the Treasury has delegated to the Director of the United States Mint the authority to enforce the civil penalty provisions of 31 U.S.C. 333(c) with respect to the misuse of United States Mint words, titles, abbreviations, initials, symbols, seals, trademarks, and badges, and with respect to the misuse of Department of the Treasury words, titles, abbreviations, initials, symbols, seals, trademarks, and badges when in connection with activities related to United States Mint operations and programs. This rule establishes procedures that the United States Mint will follow to carry out that authority and to ensure that those assessed a civil penalty under 31 U.S.C. 333(c) are accorded due process. These procedures are based on the procedures of the Department of the Treasury at 31 CFR part 27.

II. Notice of Proposed Rulemaking

This final rule is based on the notice of proposed rulemaking published Wednesday, January 12, 2005 (the ''NPRM'') (70 FR 2081). The NPRM sought public comment on the proposed rule.

The comment period for the NPRM ended on February 18, 2005. The United States Mint received 17 comments from members of the public, businesses and trade associations. The Federal Trade Commission also submitted a staff comment.

III. Summary of Comments

Eight of the comments were from members of the public. Seven of the eight expressed support for the United States Mint's proposed regulation. One of these comments objected to the use of names by companies that ''attempt to confuse the public into the belief that the product is being sold and promoted by the U.S. Mint.'' Another expressed the opinion, ''You should come down as hard as possible on these companies.'' A third stated, ''I strongly recommend the proposal maintained be adopted that would prevent firms from cashing in on U.S. Mint.'' A fourth asserted that it is ''about time the U.S. Mint played hardball and protected its products. Use of Mint products to make money by misleading new collectors gives a black eye to collecting.'' The eighth submission enclosed a newspaper article on the proposed regulation without comment.

A. Discussion of Substantive Comments From the Public

Substantive comments from the public included a request that the United States Mint not ''limit penalties to audience size'' and a suggestion that ''civil penalties must include a clause for full restitution for those customers who purchased the items that were marketed in violation of the statute.''

As to the comment on restitution, we note that the proposed regulation would have permitted the imposition of a ''civil monetary penalty and/or civil or equitable remedy.'' Upon further examination of 31 U.S.C. 333(c) and the statute's legislative history, however, we have determined that the term ''civil penalty'' in this regulation should refer only to a monetary penalty payable to the Treasury. Accordingly, the final regulation will permit an assessing official to impose a civil monetary penalty on a person ''who violates the provisions of paragraph (a) of this section.'' The phrase ''civil penalty'' is defined in the regulation to mean ''(1) A civil monetary penalty.'' Consistent with our view of the underlying statutory authority, therefore, the final regulation will not permit the United States Mint to order restitution as a remedy. This, of course, is in no way intended to limit any relief to which a person who is injured by the misleading use of United States Mint names or symbols may be entitled in private litigation or through an enforcement action by another Federal or state agency.

With regard to the comment that the United States Mint not ''limit penalties to audience size,'' the proposed regulation's operative clause with regard to the amount of penalty imposed for a violation reads as follows:

> (c) *Civil penalty.* The assessing official may impose a civil penalty on any person who violates the provisions of paragraph (a) of this section. The amount of a civil penalty shall not exceed $5,000 for each and every use of any material in violation of paragraph (a) of this section, except that such penalty shall not exceed $25,000 for each and every use if such use is in a broadcast or telecast.

These provisions do not limit penalties to ''audience size,'' but are based on each misuse of material and may be as high as $25,000 for each and every misuse if the misuse is in a broadcast or telecast.

In reviewing the public comments on civil penalties, and the role of the examining official in recommending civil penalties to the assessing official, we concluded that the proposed rule did not make it clear that the Initial Notice of Assessment would include a proposed civil monetary penalty. We have clarified the provisions of § 92.15 to provide that the Initial Notice of Assessment will include a statement of the proposed penalty.

B. Discussion of Substantive Comments From Businesses, Trade Associations and Others Generally

Six of the comments that the United States Mint received were from small businesses involved in the coin business. Each of these commenters expressed concern over the proposed regulation, with several expressing direct opposition. Two expressed general support for the regulation.

1. Fairness Comments

The United States Mint acknowledges the perception of several commenters that the proposed regulation may not be fairly enforced because the United States Mint sells United States coinage and, under the regulation, would have the power to take action against private businesses whose advertisements and solicitations misuse the names, symbols

and indicia of the United States Mint or the United States Treasury Department.

Several commenters expressed concern about the role of the United States Mint's Director as the decision maker under the regulation. One commenter raised the issue of whether the United States Mint's Director can be considered an impartial decision maker. Another commenter alleged that the regulations were unfair in that they gave the United States Mint, a competitor in the marketing of legal tender coinage, discretion to assess civil penalties against its own competitors. This, it stated, ''creat[ed] a situation that is intrinsically unfair and open to abuse.''

We note, however, that there is no inherent conflict of interest in having the United States Mint policing the improper use of the United States Mint's and the Treasury Department's names and symbols. The owner of intellectual property has the responsibility of protecting that property from improper use; this doctrine is codified and well recognized in the body of Federal intellectual property law. Additionally, no United States Mint or Treasury Department official who could have a role in the execution of the regulation has any official duty that inherently conflicts with the interests that the regulation is designed to protect. The authority of a Government agency to assess fines, in accordance with the authority and procedures established under law, naturally requires officials of that agency to act fairly, impartially, and judiciously. Every United States Mint and Treasury Department official—like all Government officials—has a duty to avoid conflicts of interest, act impartially, not give preferential treatment, protect and conserve public property, and adhere to the law. 5 CFR 2635.101. These duties are not inconsistent with these officials' fiduciary responsibility to protect public funds. Although it is true that the United States Mint generates revenues through the sale of numismatic items, the United States Mint is a Federal agency—not a commercial enterprise. By law, any amount in the United States Mint Public Enterprise Fund that is determined to be in excess of the amount required by the Fund, including the proceeds of fines assessed under the regulation, shall be transferred to the Treasury for deposit as miscellaneous receipts. See 31 U.S.C. 5136. Accordingly, fines paid under the regulation are not analogous to profit generated by a private company; they do not accrue to the benefit of either the United States Mint or its officials but, rather, to the General Treasury.

2. Economic Interest Comments

One commenter stated, ''These regulations will be enforced by government officials who have an economic interest in the results of the enforcement proceedings.'' Contrary to the comment, neither the examining official nor the assessing official will have any economic interest in the results of enforcement proceedings under this subpart. Employee compensation for all United States Mint employees is not based upon the United States Mint's coin sales or revenue. The United States Mint has performance awards and incentives that do affect compensation; however, these are based on criteria relating to the United States Mint's efficiency of operations and reductions in overhead and other costs. Civil penalties assessed under this regulation affect none of these criteria.

3. Competition Comments

Several commenters expressed the concern that the United States Mint would use its enforcement ability under the regulation in an unfair manner. One stated, ''The regulation gives the Mint too much power to unfairly pick and choose the competitors it wishes to punish.'' Another stated, ''We are concerned about the Mint's path on trying to eliminate competition with regulations and unfair enforcement actions.'' The United States Mint, in proposing and enacting these regulations, does not seek to ''eliminate competition'' but, rather, seeks to reduce consumer confusion and deceptive practices. Under Federal law, the United States Mint is the only entity permitted to produce United States coinage. As a Government monopoly, the United States Mint does not have competition in producing legal tender coinage for the United States. The purpose of the proposed rule, therefore, is not to eliminate competition but, instead, to protect consumers, collectors and the public from the improper use of Treasury and United States Mint names and symbols.

This protection is necessary because third parties increasingly have engaged in marketing practices that have the potential to mislead consumers by using the United States Mint's and Treasury Department's name and symbols with products not produced by either the United States Mint or the Treasury Department. More specifically, the United States Mint is aware of advertisements that have used the United States Mint's name and symbols in marketing tokens and medals not produced by the United States Mint. These tokens and medals are designed to resemble the designs of United States legal tender coinage despite the fact that tokens and medals have no status as legal tender in the United States. The United States Mint is also aware that other parties have acquired coinage and numismatic items produced by the United States Mint, have altered them (usually by plating and coloring them), and then have advertised the resulting items for sale as products of the United States Mint. We view these practices as being deceptive because, in both instances, the use of the United States Mint's and the Treasury Department's names and symbols in these contexts conveys the false impression that the advertisement, product or activity is endorsed, sponsored or affiliated with the United States Mint or the Treasury Department. The goal of the United States Mint in enacting these regulations is simply to prevent the deceptive misuse of the Treasury Department's and the United States Mint's names and symbols by third parties.

4. Comments on the Use of Disclaimers

Two commenters also expressed concern over the provision in the proposed regulations that disclaimers will not be considered when determining whether an advertisement is misusing a United States Mint or Treasury Department name or symbol. One commented, ''If a company has an advertisement for the sale of U.S. Mint coins, but clearly states that it is not affiliated, endorsed or authorized by the U.S. Mint, the regulation states that the disclaimers will be ignored. This makes no sense.''

Similarly, the Federal Trade Commission's staff comment, in part, addressed the proposed rule's treatment of disclaimers of affiliation and indicated, ''The proposed rule's treatment of disclaimers of affiliation in this process may raise some potential legal and policy issues.'' The comment then set forth the FTC's approach to reviewing advertising claims.

We note, however, that the statute upon which the regulation is based specifically addresses disclaimers. It states the following:

(b) Treatment of Disclaimers.

Any determination of whether a person has violated the provisions of subsection (a) shall be made without regard to any use of a disclaimer of affiliation with the United States Government or any particular agency or instrumentality thereof.

31 U.S.C. 333(b).

Given the clear requirement in 31 U.S.C. 333(b) that a determination of a violation be made without regard to any use of a disclaimer of affiliation, this

requirement cannot be removed from the regulation.

We believe, however, that it is appropriate to consider the use of a disclaimer as a factor in determining the amount of any civil penalty that the Assessing Official imposes under the regulation. If the disclaimer is clear and prominent and is likely to be noticed by a consumer and is not contradicted or confused by any claims made in the materials found to be in violation of 31 U.S.C. 333, then the Examining Official may propose, and the Assessing Official may assess, a civil penalty in an amount lower than that which would otherwise be appropriate, including, where warranted, a penalty in a nominal amount.

C. Discussion of Substantive Comments From Trade Associations in Particular

The remaining comments were submitted by two trade associations. The Magazine Publishers of America, while supporting the proposed rule, indicated its concern ''that the proposed rule may inadvertently impose liability on publishers and other media that, through no fault of their own, disseminate false advertisements.'' The Magazine Publishers of America requested that an exception be included in the final rule ''to exempt the media from fines * * * associated with false advertising.'' The Magazine Publishers of America also cited several Federal statutes, court decisions and state statutes in which media publishers were not held responsible for the content of advertisements from parties who purchased advertising space in their publications.

After considering these comments, we concur that publishers of newspapers, magazines, and other broadcasters of media, who merely sell advertising space to third parties should not be held responsible for ensuring compliance with the rule proposed by the United States Mint. The rule focuses on the person who ''uses'' the operable words, letters, symbols, or emblems in connection with, or as part of, an advertisement, solicitation, business activity, or product; the rule does not focus on a party who makes space available to the using person. Accordingly, we believe that the rule could not be applied to assess a penalty against a publisher or broadcaster that merely sells space and has no responsibility for the substantive content of an advertisement. However, we do not believe that amending the rule to excuse publishers or broadcasters from liability under all possible circumstances is appropriate. Rather, in each case, the examining and assessing officials will look to the extent of the publisher's or broadcaster's participation in the preparation of the challenged advertisement, solicitation, or business activity, and whether the publisher or broadcaster knew or should have known during that preparation process that the advertisement, solicitation, or business activity included improper uses of names, emblems, or symbols covered by 31 U.S.C. 333 and the rule. Finally, we note that the same definition of ''person'' has appeared at 31 CFR 27.2(f) (the Treasury Department regulation implementing 31 U.S.C. 333) since 1997 with no reported action against any publisher or broadcaster.

The other trade association submitting comments was the Industry Council for Tangible Assets (ICTA), a trade association for rare coin and precious metals dealers. In summary, the ICTA believes the proposed regulations: (1) ''exceed the mandate of 31 U.S.C. 333 by adding 'trademark' to the scope of the regulation''; (2) ''[are] overly broad and will deny due process to those who directly compete with the Mint''; (3) ''raise serious concerns about violations of commercial free speech protected by the first amendment''; and (4) ''are flawed in their failure to allow for a reasonable period to cure alleged violations.'' The ICTA comments also indicate that ''existing law provides the Mint with adequate remedies for perceived problems and there are more appropriate regulations that could be proposed to accomplish the goals of the Mint.'' The Professional Numismatics Guild sent a letter expressing its support for the comments made by the ICTA.

1. Use of the Word ''Trademark'' in the Definition of ''Symbol''

The ICTA asserts that the United States Mint has ''exceeded the mandate of 31 U.S.C. 333 by adding 'trademark' to the scope of the regulation.'' It also asserts that United States Mint's definition of the phrase ''symbol'' under the regulation ''facially appears to go beyond the scope of 31 U.S.C. 333(c)'' as it includes ''a trademark, designation of origin, or mark of identification.'' ITCA Comment at 13.

An examination of the statute, 31 U.S.C. 333, shows that the word ''symbol'' occurs in two places in subsection (a) although the statute does not define the term. The statute uses the term ''symbol'' in section (a) stating the following:

> No person may use, in connection with, or as a part of, any advertisement, solicitation, business activity or product, whether alone or with other words, letters, *symbols* or emblems. * * *

The United States Mint's proposed regulation closely tracked the language of the statute in subsection (a). The United States Mint's proposed regulation, however, defined the term ''symbol'' as ''any letter, word, number, picture, design, graphic or any combination thereof used by the United States Mint or the Treasury Department as a trademark, designation of origin, or mark of identification.'' See Proposed Regulation, section 92.12(i).

It is well-established that words in a statute are to be given their common, ordinary meaning. *See Federal Deposit Ins. Corp.* v. *Meyer*, 114 S. Ct. 996, 1000 (1994); *Director, Office of Workers' Compensation Programs* v. *Greenwich Collieries*, 114 S. Ct. 2251, 2255 (1994). The word ''symbol'' has been commonly defined as ''[s]omething that represents something else by association, resemblance, or convention, especially a material object used to represent something invisible.'' American Heritage Dictionary of the English Language (4th ed. 2006). Similarly, under the Lanham Trademark Act, trademarks ''includ[e] any word, name, symbol, or device, or any combination thereof adopted and used by a manufacturer or merchant to identify his goods and distinguish them from those manufactured or sold by others.'' 15 U.S.C. 1127. Because of the close association between the word ''symbol'' and the definition of trademark, we believe including trademarks as part of the definition of symbol in the final rule is a reasonable construction of the statute. *See Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984) (noting that ''considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer'').

The United States Mint, however, has decided to modify slightly the definition of the word ''symbol'' in the final rule for clarity. Hence, ''symbol'' is now defined as ''any design or graphic used by the United States Mint or the Treasury Department to represent themselves or their products.'' It further clarifies that a ''design or graphic may include (1) a trademark, designation of origin, or mark of identification, or (2) a stylized depiction comprising letters, words, or numbers.''

2. Assertion That the Proposed Rule Is ''Overly Broad'' and ''Violates Due Process''

The ICTA, secondly, asserts that the proposed rule ''[is] overly broad and will deny due process to those who directly compete with the Mint.'' After

reviewing the proposed regulation and the enabling statute, we believe the regulation is narrowly drawn and is not overly broad. The proposed regulation closely tracks each of the elements of the enabling statute. The only new material sets forth the procedures being adopted for imposing a civil penalty. These procedures include written notice of any potential violations, an opportunity to respond, consideration of any response, a written decision with an evaluation of each penalty factor, and a right of appeal to any person found to have violated the regulation. These procedures, in our view, fully comply with applicable due process requirements.

3. Concern That the Rule Violates the First Amendment

The ITCA commented that the proposed regulation ''threaten[s] the freedom of commercial speech under the First Amendment.'' In particular, the ITCA indicated that ''the regulations fail the Supreme Court's *Central Hudson* test because they are over broad.'' In *Central Hudson Gas* v. *Public Service Comm. of New York*, 447 U.S. 557, 563–64 (1980), however, the United States Supreme Court noted that ''there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity.'' The Court also made it clear that ''[t]he government may ban forms of communication more likely to deceive the public than to inform it'' Id. (citing *Friedman* v. *Rogers*, 440 U.S. 1, 13, 15–16 (1979); *Ohralik* v. *Ohio State Bar Assn.*, 436 U.S. 447, 464–65 (1978)). In light of this passage from *Central Hudson*, we do not believe the regulation violates any commercial free speech right under the First Amendment. To the contrary, the regulation implements a law that functions precisely in the manner to which the *Central Hudson* Court stated that ''there could be no constitutional objection.'' Specifically, 31 U.S.C. 333 effectively ''ban[s] forms of communication more likely to deceive the public than to inform it'': the misuse of Department of the Treasury or United States Mint names, titles, abbreviations, initials, symbols, or emblems in a manner that conveys a false impression.

4. Concern About Providing a Reasonable Period To Cure Alleged Violations

The ICTA asserted that the proposed regulations ''are flawed in their failure to allow for a reasonable period to cure alleged violations.'' However, the statute does not provide for, nor does it require the agency to afford to an offending party, a cure period. Indeed, we note that another part of the statute (31 U.S.C. 333(d)) provides for criminal penalties for precisely the same offenses over which the agency would exercise civil penalty authority. Although a notice of assessment naturally would put an alleged offending party on notice that it immediately should consider steps to cure the alleged misuse, the inherent purpose for the statute is to allow the agency to penalize the offending party for the misuse. In light of this concern, however, the United States Mint has modified the final regulation slightly so that it expressly requires the examining and assessing officials to consider the repeated nature of the misuse in determining whether, and to what extent, a penalty should be imposed against an offending party.

D. Comments on Impartiality

Some of the commenters pointed out that if the Government seeks to infringe upon a citizen's liberty, it ''always has the obligation of providing a neutral decision-maker—one who is not inherently biased against the individual or who has personal interest in the outcome.'' *Tumey* v. *Ohio*, 273 U.S. 510, 532 (1927). We acknowledge the commenters' concern about impartiality, but conclude that the proposed regulations fully comply with the agency's obligations in this respect.

In general, ''[t]he mere fact that an administrative or adjudicative body derives a financial benefit from fines or penalties that it imposes is not in general a violation of due process * * *.'' *Van Harkin* v. *City of Chicago*, 103 F.3d 1346 at 1348 (7th Cir. 1997) (citing *Dugan* v. *Ohio*, 277 U.S. 61 (1928)); *see Commonwealth of the Northern Mariana Islands* v. *Kaipat*, 94 F.3d 574, 580–81 (9th Cir. 1996); *Doolin Security Savings Bank* v. *Federal Deposit Ins. Corp.*, 53 F.3d 1395, 1405–07 (4th Cir. 1995). Moreover, in Doolin, the Fourth Circuit recognized that, although most Federal agencies have some form of institutional bias, this does not make them incapable of disinterested adjudication of disputes. 53 F.3d at 1407.

We do not believe the regulation raises issues of impartiality. First, the Director of the United States Mint has no personal or official economic interest in the results of any enforcement action under this regulation. Pursuant to the United States Mint Public Enterprise Fund (PEF) statute, 31 U.S.C. 5136, all receipts from fines assessed under the regulation would be deposited in the PEF and the Secretary of the Treasury would transfer these amounts, along with regular United States Mint seigniorage and profits, to the General Fund as miscellaneous receipts. As miscellaneous receipts in the Treasury—the drawing of funds from which are subject to appropriation by Congress—neither the Secretary of the Treasury, nor the Director of the Mint could be subject to ''possible temptation * * * when [their] executive responsibilities * * * may make [them] partisan to maintain the high level of contribution'' from the assessment process provided for under the regulation. *Cf. Ward* v. *Village of Monroeville*, 409 U.S. 57, 60 (1972). Moreover, the amounts involved would nonetheless render any ostensible temptation inconsequential because the relatively small amounts that the United States Mint could be expected to receive in fines payable under 31 U.S.C. 333 would be *de minimis* when compared to the recent amounts ($600–800 million) that the United States Mint annually has transferred to the General Fund. *See* 2006 United States Mint Annual Report, at 17. Accordingly, for the reasons described above, as well as in paragraphs III(b)(1) and (2), the United States Mint has no intrinsic bias that may affect its ability to adjudicate matters under this regulation in a fair and objective manner.

IV. Additional Amendments

Upon additional review and consideration of the provisions outlined in the interim rule, the agency has removed from the regulation sections 92.16(d)(3) & (4), which provide for agency counsel review. We also made conforming changes to section 92.17(a). The agency determined that these steps in the examination and assessment process are best addressed through internal procedures.

We also have made minor clarifying changes throughout the final rule.

V. Procedural Requirements

This final rule is not a significant regulatory action for the purposes of Executive Order 12866. While a proposed rule was published for public comment, the rule establishes agency practice and procedure, and prior notice and the opportunity for public comment were not required pursuant to 5 U.S.C. 553(b)(A) (or any other law). For this reason, a Regulatory Flexibility Act analysis is not required. *See* 5 U.S.C. 604. Nonetheless, it is hereby certified that this rule will not have a significant economic impact on a substantial number of small entities. Any imposition of a civil penalty on a small business entity flows directly from the authorizing statute, 31 U.S.C. 333.

Paperwork Reduction Act

The final rule does not require new ''collection of information'' requirements within the meaning of the Paperwork Reduction Act of 1995. The only information collected would be that provided voluntarily by persons sent Initial Notices of Assessment under the regulation.

VI. Format

The format of the final rule is generally consistent with the format of the rule proposed in the NPRM.

List of Subjects in 31 CFR Part 92

Administrative practice and procedure, Advertising, Consumer protection, Currency, Penalties, Seals and insignia, Signs and symbols, Trademarks.

Text of Rule

■ For the reasons set forth in the preamble, the United States Mint amends 31 CFR part 92 as follows:

PART 92—UNITED STATES MINT OPERATIONS AND PROCEDURES

■ 1. The authority citation for part 92 is revised to read as follows:

Authority: 5 U.S.C. 301, 31 U.S.C. 321 and 333.

■ 2. The heading for part 92 is revised to read as set forth above.

■ 3. Add a subpart heading before § 92.1 to read as follows:

Subpart A—Numismatic Operations

■ 4. Add a subpart heading before § 92.5 to read as follows:

Subpart B—Availability of Records

■ 5. Add a new Subpart C (§§ 92.11 through 92.18) to read as follows:

Subpart C—Assessment of Civil Penalties for Misuse of Words, Letters, Symbols, or Emblems of the United States Mint

Sec.
92.11 Purpose.
92.12 Definitions.
92.13 Assessment of civil penalties.
92.14 Initiation of action.
92.15 Initial notice of assessment.
92.16 Written response.
92.17 Final action.
92.18 Judicial review.

Subpart C—Assessment of Civil Penalties for Misuse of Words, Letters, Symbols, or Emblems of the United States Mint

§ 92.11 Purpose.

(a) The procedures in this subpart implement the provisions of 31 U.S.C. 333(c), which authorize the Secretary of the Treasury to assess a civil penalty against any person who has misused the words, titles, abbreviations, initials, symbols, emblems, seals, or badges of the United States Mint in violation of 31 U.S.C. 333(a).

(b) The procedures in this subpart do not apply to the extent that the Secretary of the Treasury, the Director of the United States Mint, or their authorized designees have specifically granted to the person express permission, in writing, to manufacture, produce, sell, possess, or use the words, titles, abbreviations, initials, symbols, emblems, seals, or badges in a contract, agreement, license, letter, memorandum, or similar document.

(c) The procedures in this subpart are limited to actions initiated by the United States Mint to enforce the provisions of 31 U.S.C. 333. The procedures herein do not affect the provisions of 31 CFR Part 27. Therefore, this subpart shall not be construed as the exclusive means for the Secretary of the Treasury to enforce 31 U.S.C. 333 insofar as a covered misuse affects the United States Mint.

§ 92.12 Definitions.

(a) *Assessing official* means the Director of the United States Mint or his designee.

(b) *Examining official* means an employee of the United States Mint appointed by the Director of the United States Mint (or an employee of the Treasury Department appointed by the Director of the United States Mint with the concurrence of the head of that employee's organization), to administer the procedures in this subpart in a particular case and to propose findings and recommendations in that case to the assessing official. The examining official must be:

(1) An employee of the Treasury Department in the grade of GS–15 or higher; and

(2) Capable of examining the matter without actual or apparent conflict of interest.

(c) *Broadcast* or *telecast* means widespread dissemination by electronic transmission or method, whether audio and/or visual.

(d) *Civil penalty* means a civil monetary penalty

(e) *Date of offense* means the later of:

(1) The date that the misuse occurred;

(2) The date that the misuse had the effect of conveying the false impression that the activity was associated with or approved, endorsed, sponsored or authorized by the United States Mint or its officers or employees; or

(3) If the violation is a continuing one, the date on which the misuse of the words, titles, abbreviations, initials, symbols, emblems, seals, or badges protected by 31 U.S.C. 333 or the procedures in this subpart last occurred.

(f) *Days* means calendar days, unless otherwise stated.

(g) *Person* means an individual, partnership, association, corporation, company, business, firm, manufacturer, or any other organization, entity, or institution.

(h) *Respondent* means a person named in an Initial Notice of Assessment.

(i) *Symbol* means any design or graphic used by the United States Mint or the Treasury Department to represent themselves or their products. A design or graphic may include

(1) A trademark, designation of origin, or mark of identification, or

(2) A stylized depiction comprising letters, words, or numbers.

§ 92.13 Assessment of civil penalties.

(a) *General rule*. The assessing official may impose a civil penalty on any person when the following two conditions are met:

(1) That person uses in connection with, or as a part of, any advertisement, solicitation, business activity, or product, whether alone or with other words, letters, symbols, or emblems—

(i) The words ''Department of the Treasury,'' ''United States Mint,'' or ''U.S. Mint'';

(ii) The titles ''Secretary of the Treasury,'' ''Treasurer of the United States,'' ''Director of the United States Mint,'' or ''Director of the U.S. Mint'';

(iii) The abbreviations or initials of any entity or title referred to in paragraph (a)(1)(i) or (a)(1)(ii) of this section;

(iv) Any symbol, emblem, seal, or badge of an entity referred to in paragraph (a)(1)(i) of this section (including the design of any envelope, stationery, or identification card used by such an entity); or

(v) Any colorable imitation of any such words, titles, abbreviations, initials, symbols, emblems, seals, or badges; and

(2) That person's use is in a manner that could reasonably be interpreted or construed as conveying the false impression that such advertisement, solicitation, business activity, or product is in any manner approved, endorsed, sponsored, authorized by, or associated with the United States Mint, or any officer, or employee thereof.

(b) *Disclaimers*. Any determination of whether a person has violated the provisions of paragraph (a) of this section shall be made without regard to any use of a disclaimer of affiliation

with the United States Government or any particular agency or instrumentality thereof.

(c) *Civil penalty*. The assessing official may impose a civil penalty on any person who violates the provisions of paragraph (a) of this section. The amount of a civil penalty shall not exceed $5,000 for each and every use of any material in violation of paragraph (a) of this section, except that such penalty shall not exceed $25,000 for each and every use if such use is in a broadcast or telecast.

(d) *Time limitations*. (1) Civil penalties imposed under the procedures in this subpart must be assessed before the end of the three-year period beginning on the date of offense.

(2) The assessing official may commence a civil action to recover or enforce any civil penalty imposed in a Final Notice of Assessment issued pursuant to § 92.17 at any time before the end of the two-year period beginning on the date of the Final Notice of Assessment. If judicial review of the Final Notice of Assessment is sought, the two-year period begins to run from the date that a final and unappealable court order is issued.

(e) *Criminal Proceeding*. No civil penalty may be imposed under the procedures in this subpart with respect to any violation of paragraph (a) of this section after a criminal proceeding on the same violation has been commenced by indictment or information under 31 U.S.C. 333(d).

§ 92.14 Initiation of action.

(a) When an employee of the United States Mint learns of or discovers a potential violation of 31 U.S.C. 333 or this subpart, he or she will refer the matter, with all available evidence, to the assessing official.

(b) The assessing official will consider relevant factors when determining whether to initiate an action to impose a civil penalty under the procedures in this subpart. Those factors may include, but are not limited to, the following:

(1) The scope of the misuse;

(2) The purpose and/or nature of the misuse;

(3) The extent of the harm caused by the misuse;

(4) The circumstances of the misuse;

(5) The commercial benefit intended to be derived from the misuse; and

(6) The repeated nature of the misuse.

(c) If the assessing official decides to initiate an action to impose a civil penalty under the procedures in this subpart, he or she will, in writing:

(1) Appoint an examining official; and

(2) Delegate to the examining official the authority to prepare, sign, and serve an Initial Notice of Assessment on behalf of the assessing official.

§ 92.15 Initial notice of assessment.

The examining official shall review all immediately available evidence on the matter; determine a proposed civil penalty based on the factors listed under § 92.16(d)(2)(iii); and prepare and serve an Initial Notice of Assessment by United States mail or other means upon the person believed to be in violation of § 92.13 and otherwise subject to a civil penalty. The notice shall provide the name and telephone number of the examining official, who can provide information concerning the notice and the procedures in this subpart. The notice shall include the following:

(a) A specific reference to the provisions of § 92.13 violated;

(b) A concise statement of the facts that support the conclusion that such a violation occurred;

(c) The amount of the civil penalty proposed and the maximum amount of the potential civil penalty that the assessing official could impose;

(d) A notice informing the person alleged to be in violation of § 92.13 that he or she:

(1) May, within 30 days of the date of the notice, pay the proposed civil penalty, thereby waiving the right to make a written response under § 92.16 and to seek judicial review under § 92.18:

(i) By electronic funds transfer (EFT) in accordance with instructions provided by the examining official in the Initial Notice of Assessment; or

(ii) By means other than EFT only with the written approval of the assessing official;

(2) May make a written response in accordance with § 92.16 within 30 days of the date of the notice addressing, as appropriate:

(i) Why a civil penalty should not be imposed; and

(ii) Why a civil penalty should be in a lesser amount than proposed.

(3) May be represented by an attorney or other representative, provided that a designation of representative signed by the person alleged to be in violation is received by the examining official; and

(4) May request, within 20 days of the date of the notice, a copy of or opportunity to review any documents and/or other evidence that the United States Mint compiled and relied on in determining to issue the notice (the assessing official reserves the right to assert privileges available under law and may decline to disclose certain documents and/or other evidence protected by such privileges; however, any documents or other evidence withheld from disclosure shall be expunged from the record and shall not be considered by the examining and assessing officials in arriving at their respective recommendations and decisions); and

(e) An advisement of the following:

(1) If no written response is received within the time allowed in § 92.16(b), a Final Notice of Assessment may be issued without a presentation by the person;

(2) If a written response has been made and the examining official deems it necessary, the examining official may request, orally or in writing, additional information from the respondent;

(3) A Final Notice of Assessment may be issued in accordance with § 92.17 requiring that the proposed civil penalty be paid;

(4) A Final Notice of Assessment is subject to judicial review in accordance with 5 U.S.C. 701 *et seq.*; and

(5) All submissions sent in response to the Initial Notice of Assessment must be transmitted to the address specified in the notice and include the name, address, and telephone number of the respondent.

§ 92.16 Written response.

(a) *Form and contents*. (1) The written response submitted by a person pursuant to § 92.15(d)(2) must provide the following:

(i) A reference to and specific identification of the Initial Notice of Assessment involved;

(ii) The full name of the person against whom the Initial Notice of Assessment has been made;

(iii) If the respondent is not a natural person, the name and title of the officer authorized to act on behalf of the respondent; and

(iv) If a representative of the person named in the Initial Notice of Assessment is filing the written response, a copy of the duly executed designation as representative.

(2) The written response must admit or deny each violation of § 92.13 set forth in the Initial Notice of Assessment. Any violation not specifically denied will be presumed to be admitted. Where a violation is denied, the respondent shall specifically set forth the legal or factual basis upon which the allegation is denied. If the basis of the written response is that the respondent is not the person responsible for the alleged violation, the written response must set forth sufficient information to allow the examining and assessing officials to determine the truth of such an assertion. The written response should include any and all documents and other information that the respondent believes

should be a part of the administrative record on the matter.

(b) *Time*. (1) Except as provided in paragraph (b)(2) of this section, any written response made under this section must be submitted not later than 30 days after the date of the Initial Notice of Assessment.

(2) If a request for documents or other evidence is made pursuant to § 92.15(d)(4), the written response must be submitted not later than 20 days after the date of the United States Mint's response to the request.

(3)(i) In computing the number of days allowed for filing a written response under this paragraph, the first day counted is the day after the date of the Initial Notice of Assessment is issued. If the last date on which the response is required to be filed by this paragraph is a Saturday, Sunday or Federal holiday, the response will be due on the next business day after that date.

(ii) If a response is transmitted by United States mail, it will be deemed timely filed if postmarked on or before the due date.

(4) The examining official may extend the period for making a written response under paragraphs (b)(1) and (b)(2) of this section for up to ten days for good cause shown. Requests for extensions beyond ten days must be approved by the assessing official and must be based on good cause shown. Generally, failure to obtain representation in a timely manner will not be considered good cause.

(c) *Filing*. The response may be sent by personal delivery, United States mail or commercial delivery. A written response transmitted by means other than United States mail will be considered filed on the date received at the address specified in the Initial Notice of Assessment.

(d) *Review and Recommendation*. The examining official will fully consider the facts and arguments submitted by the respondent in the written response, any other documents filed by the respondent pursuant to this subpart, and the evidence in the United States Mint's record on the matter. If the respondent waives the right to submit a written response in accordance with § 92.15(d)(1), or declines to submit a written response by the end of the 30-day response period, the examining official will fully consider the evidence in the United States Mint's record on the matter.

(1) In fully considering the matter, the examining official will not consider any evidence introduced into the record by the United States Mint after the date of the Initial Notice of Assessment unless and until the respondent has been notified that such additional evidence will be considered, and has had an opportunity to request, review and comment on such evidence.

(2) The examining official will prepare a concise report, addressed to the assessing official, which will contain the following:

(i) The entire administrative record on the matter, including all information provided in or with a written response timely filed by the respondent and any additional information provided pursuant to § 92.15(e)(2), as well as all evidence upon which the Initial Notice of Assessment was based, and any additional evidence as provided for in § 92.16(d)(1).

(ii) A finding, based on the preponderance of the evidence, as to each alleged violation specified in the Initial Notice of Assessment;

(iii) For each violation that the examining official determines to have occurred, a recommendation as to the appropriate amount of a civil penalty to be imposed which, upon additional consideration of the evidence, may be the same as, more than, or less than the amount initially proposed by the examining official pursuant to § 92.15. In making this recommendation, the examining official will consider all relevant factors including, but not limited to, the following:

(A) The scope of the misuse;

(B) The purpose and/or nature of the misuse;

(C) The extent of the harm caused by the misuse;

(D) The circumstances of the misuse;

(E) The commercial benefit intended to be derived from the misuse; and

(F) The repeated nature of the misuse.

(iv) If the examining official determines that a violation has occurred, a proposed Final Notice of Assessment that incorporates his or her findings and recommendations.

(v) Any additional information or considerations that the assessing officer should consider in a decision whether to issue a Final Notice of Assessment under § 92.17.

§ 92.17 Final action.

(a) In making a final determination whether to impose a penalty, the assessing official shall take into consideration the entire report prepared by the examining official. Although the assessing official should accord appropriate weight to the findings and recommendations of the examining official, the assessing official is not bound by them. The assessing official may approve, disapprove, modify, or substitute any or all of the examining official's findings and recommendations if, in his or her judgment, the evidence in the record supports such a decision. The assessing official will determine whether:

(1) The facts warrant a conclusion that no violation has occurred; or

(2)(i) The facts warrant a conclusion that one or more violations have occurred; and

(ii) The facts and violations found justify the conclusion that a civil penalty should be imposed.

(b) If the assessing official determines that no violation has occurred, the official shall promptly send a letter indicating that determination to the person served with an Initial Notice of Assessment and to any designated representative of such person.

(c) If the assessing official determines that a violation has occurred:

(1) The assessing official shall issue a Final Notice of Assessment to the person served with an Initial Notice of Assessment and to any designated representative of such person.

(2) The assessing official may, in his or her discretion:

(i) Impose a civil penalty;

(ii) Not impose a civil penalty; or

(iii) Impose a civil penalty and suspend the payment of all or some of the civil penalty, conditioned on the violator's future compliance with 31 U.S.C. 333.

(3) If a civil penalty is imposed under § 92.17(c)(2)(i) or (iii), the assessing official shall determine the appropriate amount of the penalty in accordance with 31 U.S.C. 333(c)(2). In determining the amount of a civil penalty, the assessing official will consider relevant factors including, but not limited to, the following:

(i) The scope of the misuse;

(ii) The purpose and/or nature of the misuse;

(iii) The extent of the harm caused by the misuse;

(iv) The circumstances of the misuse;

(v) The commercial benefit intended to be derived from the misuse; and

(vi) The repeated nature of the misuse.

(4) The Final Notice of Assessment shall:

(i) Include the following:

(A) A specific reference to each provision of § 92.13 found to have been violated;

(B) A concise statement of the facts supporting a conclusion that each violation has occurred;

(C) An analysis of how the facts and each violation justifies the conclusion that a civil penalty should be imposed; and

(D) The amount of each civil penalty imposed and a statement as to how the

amount of each penalty was determined; and

(ii) Inform the person of the following:

(A) Payment of a civil penalty imposed by the Final Notice of Assessment must be made within 30 days of the date of the notice;

(B) Payment of a civil penalty imposed by the Final Notice of Assessment shall be paid by EFT in accordance with instructions provided in the notice, unless the assessing official has given written approval to have payment made by other means;

(C) If payment of a civil penalty imposed by the Final Notice of Assessment has been suspended on the condition that the person comply in the future with 31 U.S.C. 333 and this subpart, the failure by the person to so comply will make the civil penalty payable on demand;

(D) If a civil penalty is not paid within 30 days of the date of the Final Notice of Assessment (or on demand under paragraph (c)(3)(ii)(D) of this section), a civil action to collect the penalty or enforce compliance may be commenced at any time within two years of the date of the Final Notice of Assessment; and

(E) Any civil penalty imposed by the Final Notice of Assessment may be subject to judicial review in accordance with 5 U.S.C. 701 *et seq.*

§ 92.18 Judicial review.

A Final Notice of Assessment issued under the procedures in this subpart may be subject to judicial review pursuant to 5 U.S.C. 701 *et seq.*

Dated: October 22, 2007.

Edmund C. Moy,

Director, United States Mint.

[FR Doc. E7–21132 Filed 10–25–07; 8:45 am]

BILLING CODE 4810–02–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. COTP Morgan City—07–018]

RIN 1625—AA00

Safety Zone; Morgan City-Port Allen Alternate Route, Mile Marker 0.5 to Mile Marker 1.0, Bank to Bank

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary Safety Zone on the Morgan City-Port Allen Alternate Route, from Mile Marker 0.5 to Mile Marker 1.0, bank to bank. This Safety Zone is needed to protect divers, vessels, and tows from destruction, loss, or injury from salvage operations to remove a crane from beneath the Long-Allen Fixed Bridge, and to facilitate compliance with a court approved Consent Judgment whereby the crane must be removed prior to December 1, 2007.

DATES: This rule is effective from 6 a.m. on October 29, 2007 until 6 p.m. on November 11, 2007.

ADDRESSES: Documents indicated in this preamble as being available in the docket are part of COTP Morgan City-07–018 and are available for inspection or copying at Marine Safety Unit Morgan City, 800 David Drive, Morgan City, Louisiana, 70380 between 8 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Lieutenant Commander (LCDR) Rick Paciorka, Marine Safety Unit Morgan City, at (985) 380–5320.

SUPPLEMENTARY INFORMATION:

Regulatory Information

We did not publish a notice of proposed rulemaking (NPRM) for this regulation. Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing an NPRM, and under 5 U.S.C. 553(d)(3), good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. Establishment of this safety zone is required to comply with a Consent Judgment approved by the Honorable Kurt D. Engelhardt, U.S. District Judge, in his order dated May 17, 2007. Pursuant to his Order, the Consent Judgment between Jefferson Marine Towing Inc., *et al* and the United States requires the crane to be removed by Jefferson Marine not later than 1 December 2007. In order to effect the Consent Judgment's court approved deadline, the U.S. Army Corps of Engineers (ACOE), the U.S. Coast Guard, and Jefferson Marine met to discuss the parameters of a salvage plan. This plan was preliminarily approved on 29 August 2007. The preliminary plan projected salvage operations beginning on 17 September 2007. Given the potential impact on the public and industry of this near term major waterway closure, the Coast Guard and the ACOE negotiated a later date beginning 29 October 2007. This later date allowed for transit planning that accommodates the vast majority of fall harvest barge movement while still allowing for completion of the salvage work by the court ordered deadline. The 29 October date was tentatively agreed upon on 13 September 2007. Publishing an NPRM and delaying its effective date would be contrary to public interest since immediate action is needed to protect divers, vessels, and mariners from the hazards associated with salvage operations in the area, and to facilitate compliance with the court approved Consent Judgment whereby the salvage operation must be concluded by 1 December 2007.

Background and Purpose

Due to an allision with the Long-Allen fixed bridge, a crane was lost from a barge into the Morgan City-Port Allen Alternate Route. Salvage operations will be conducted in the vicinity of the Long-Allen Fixed bridge to recover the crane. The Morgan City-Port Allen Alternate Route will be closed to marine traffic during salvage operations. This Safety Zone is needed to protect divers, vessels, and tows from destruction, loss or injury from the dangers associated with the salvage operations, and to facilitate compliance with a court approved Consent Judgment whereby the salvage operation must be concluded by 1 December 2007.

Discussion of Rule

The Coast Guard is establishing a temporary Safety Zone on the Morgan City-Port Allen Alternate Route, from Mile Marker 0.5 to Mile Marker 1.0, bank to bank. The temporary Safety Zone will continue in effect until the salvage operations are complete. Vessels and tows may not enter this zone while salvage operations are taking place. This rule is effective from 6 a.m. on October 29, 2007 until 6 p.m. on November 11, 2007.

Regulatory Evaluation

This rule is not a ''significant regulatory action'' under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order.

This rule will only be in effect for a 14 day period of time and notifications to the marine community will be made through broadcast notice to mariners. The impacts on routine navigation are expected to be moderate to great. Vessels may continue to transit through alternate routes to their destinations.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601—612), we have considered whether this rule would have a significant economic impact on a substantial number of small entities.