

Trade Alert

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CUSTOMS BORDER PROTECTION INCREASES SEIZURE OF COUNTERFEIT AND PIRATED GOODS IN 2008

Recently the United States Customs and Border Protection announced that seizures of counterfeit goods and products posing a danger to U.S. citizens increased significantly. U.S. Customs and Border Protection (CBP) released statistics which show that products seized for intellectual property rights violations, increased 50% in 2008. CBP's recently published report on seizures in 2008 included the following information:

- The number of products seized by CBP for intellectual property violations, increased by 50%.
- Products originating from countries in Asia accounted for 81% of the total value of all products seized.
- Pharmaceutical seizures increased by more than 100% in domestic value from 2007 through 2008.
- Finally, counterfeit designer consumer products accounted for 8% of the entire value of seized products, a substantial growth over 2007.

CBP acts as the enforcement arm along the U.S. border and other ports of entry for over 40 agencies in the United States Government, including the Food and Drug Administration, the Environmental Protection Agency, the Consumer Product Safety Commission, the Drug Enforcement Administration, the Bureau of Alcohol, Tobacco and Firearms and others. CBP's enforcement duties include the statutory right to seize goods from travelers and importers preventing contraband or noncompliant merchandise from entering the United States in violation of Federal law.



Seizures

CBP has the authority to seize imported or exported products which are either prohibited (hazardous materials or narcotics, products to be shipped to a country subject to a trade embargo, for example, items imported or exported to Iran) or in violation of import requirements (improper value or label). Despite CBP's seemingly unlimited authority over goods in the import/export process, companies whose products are subject to seizure and forfeiture retain their constitutional rights to due process throughout the seizure procedure. CBP must follow particular requirements in all seizure cases regardless of the products seized or the nationality of the owner or destination of the products. CBP must serve a Notice of Seizure, on both the importer and other entities listed on the Shipper's Export Declaration Documents, that have an interest in the seized product. CBP's notice must contain specific information about the items seized, the alleged violation, facts tending to support the seizure and specific options detailing the ability to petition for relief, including the alternatives of either an administrative hearing with the CBP or judicial relief in a United States Federal Court, allowing the owner to claim a right of recovery for the seized product.

Contesting a Seizure

If your products are seized by CBP, you must decide whether to forfeit the products to CBP, or request a hearing to challenge the seizure of the products. Deciding whether to forfeit the products or request a hearing to challenge the seizure, requires deciding whether you will seek relief in an administrative hearing at CBP or file a lawsuit in U.S. Federal Court seeking the return of the products seized by CBP. Whether you chose administrative relief with CBP or file a Federal lawsuit contesting CBP's action, your petition should include mitigating facts and circumstances legally sufficient to establish your right to the return of the seized goods.

While your petition for relief generally states that CBP has improperly seized your property and you are seeking its return, there are only five possible remedies.

1. The petitioner must forfeit all or part of the property;
2. Customs must remit all or part of the property to the owner without penalty;
3. Customs must remit the property to the owner with a penalty;
4. Customs must remit the property to the owner who must reexport the product out of the U.S.; or
5. Customs must return all or part of the property if the petitioner provides cash in the amount of the property's value with the money then being forfeited to the U.S. Government.



A seizure by CBP must be viewed as a potential loss of property without compensation from the U.S. government along with the possibility of penalties which may be substantial. The seizure conducted by CBP is an integral aspect of the enforcement arm of the government at the border or ports and therefore is considered to be a quasi-criminal enforcement act. The matter must be viewed not only in light of the circumstances regarding the seized product or the violation of Federal law but, also ensuring that CBP and the U.S. Government have followed proper procedures and constitutional protections to ensure that owners of products seized by CBP may seek relief in a proper forum. When a decision is made to contest the seizure and potential forfeiture of the goods of the products, the considerations must not only be limited to the value of the products but also potential penalties which may include substantial monetary fines, the loss of import or export privileges and possible incarceration.

However, in certain circumstances contesting the CBP's seizure via an administrative claim with CBP may not be the best course of action. CBP is not required to provide all of the facts supporting its decision to seize the products and in fact the notice of seizure is at best vague and devoid of facts. Most importantly the Notice of Seizure does not disclose that decisions of CBP arising out of the administrative claim for relief, are not reviewable by a Federal Court. Filing a lawsuit in Federal Court, claiming that CBP has wrongfully seized your product may present a forum that will allow the owner of the seized product to reclaim the product. However not all cases can be litigated in Federal Court. The type and value of the shipment may prevent you from seeking relief in Court.

Questions or Assistance?

Shipman & Goodwin LLP can assist parties whose products have been seized by CBP in determining the steps to take to contest the violation and seizure by CBP and provide counsel on the most effective judicial forum in which to request the return of the seized products along with mitigating the potential associated fines. If you have questions, please feel free to contact John Fusco at (203) 869-5600 or jfusco@goodwin.com

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