

June 17, 2010

IN THIS ISSUE

[CPSC Issuing Its Own Detention Notices](#)

[CBP Unilaterally Changes the Rules Again?](#)

By Susan Kohn Ross

CPSC Issuing Its Own Detention Notices

Effective June 14, 2010, the U.S. Consumer Product Safety Commission (CPSC) has started using detention notices for possible violations of its laws and regulations rather than leaving that function

in U.S. Customs and Border Protection's (CBP) hands, as in the past. If there are both CPSC and CBP violations asserted, an importer will receive a separate notice from each agency. At this time, CPSC has yet to explain on what authority it will be issuing the detention notices instead of CBP, but this could be a blessing in disguise. First, CPSC staff have made clear their intention to be specific about the reasons(s) for the detention, rather than CBP's more vague explanations, *e.g.*, "admissibility" or "CPSC." Second, given the complexity of consumer product safety issues, it is really only the CPSC staff which is knowledgeable, so why not deal with them directly? Here is how the Commission hopes this process will work.

Once a shipment is presented for examination, *i.e.*, the boxes are out of the container, the five (5) business days for CBP's detention period begins. CPSC has set as a goal for itself the same time limit in which to issue its Notices of Detention. There is no specific regulation or statute which contains CPSC's detention procedures, although CPSC promises to post Questions and Answers on its website shortly. Those whose goods are subject to CPSC jurisdiction should make sure they have provided their customs broker with the email address of the correct person to receive such notices. CPSC has been very clear about wanting to communicate in the most efficient way possible and email is preferred.

The Notice of Detention will be sent to the broker, the importer, and CBP. It is supposed to include the name and contact details for CPSC's Compliance or Field Investigator handling of the specific entry. In response, the importer is expected to provide information and documents. If the CBP thirty (30) day period expires and a CBP violation is found, the goods will be seized. If that happens, CBP will require satisfaction of any CPSC issues prior to releasing the goods at the end of the mitigation process. On the other hand, if the sole violation has to do with CPSC issues, then CPSC and CBP will consult before the petition decision is made, although CPSC's advice is not binding on CBP according to how the law is written. On the other hand, if a shipment is conditionally released to the importer, then ordered redelivered by CBP, but the importer fails to timely comply, the resulting liquidated damages case will be issued for three times the value of the goods. When it comes to making decisions on petitions submitted for these types of violations, CPSC does get the final word; see 16 C.F.R. 1500.271(b).

There are a host of questions which remain to be answered. First, when will we see something in writing from CPSC detailing how the detention process will work? CPSC's right to obtain samples is stated at 15 USC 1273 and 2066, but what is the legal authority for CPSC to issue its own detention notices? In the absence of proper legal authority, will the detention process withstand an Administrative Procedures Act challenge? When will the Questions and Answers be posted on the CPSC website? How will the procedure be affected by the fact that CPSC has Compliance or Field Investigators only at the ten (10) largest ports, but not at all ports of entry? Also, experience tells us that, if a given CBP inspector is out for any reason, his coworkers are loathe to handle his cases in his absence. How will that impact communications between CBP and CPSC? During the detention period, CPSC will be looking for documents and information from the importer. What happens if the importer needs to obtain test results from a foreign entity? How will that slow down the process? What steps is CBP taking to make sure its staff and CPSC are on the same page and communicating efficiently?

The imported shipment will remain under CBP's custody and control during detention, unless CPSC

and CBP agree to conditional release, which means under the importer's bond. Unlike FDA, where conditional release is the accepted norm, CPSC will need experience before allowing conditional release as a matter of routine, if ever. At the same time, conditional release of goods thought to present a significant health hazard is unlikely at any time. It is also worth noting that, under the CPSC laws and regulations, the default with noncompliant goods is destruction, while export comes in second. If export is allowed, it will have to be under government supervision.

There are a couple of additional points which are critical. First, this new detention procedure applies to **all** CPSC regulations, not just those related to the CPSIA. In other words, CPSC will be implementing detention for issues arising out of the CPSIA (children's products) plus Consumer Product Safety Act (e.g., lighters, toys, and children's products), Federal Hazardous Substances Act (e.g., fireworks), Flammable Fabrics Act (e.g., sleepwear and mattresses), Poison Prevention Packaging Act, Refrigerator Safety Act, Virginia Graeme Baker Pool and Spa Safety Act, and the Children's Gasoline Burn Prevention Act.

The other interesting complication which comes out of the CPSIA is that it is now a prohibited act to place an unauthorized safety mark on a good. We are all used to seeing an unauthorized UL or ATSM mark on electric goods offered for import. Going forward, not only can seizure for the trademark violation occur, followed by a civil penalty for importing counterfeit goods, but on top of that, a civil penalty may also be imposed under the CPSIA! Time to beef up your intellectual property rights and consumer product safety standard operating procedures.

CBP Unilaterally Changes the Rules Again?

On June 8, 2010, Asst. Comm. Baldwin again confirmed that it is CBP's long-standing policy to encourage prior disclosures. The reason these comments are notable is that a number of Ports have attempted to use the CBP Form 28 (Request for Information) as a device to claim an importer has been put on notice of an investigation, which then cuts off the right to file a prior disclosure and clear up past errors without being penalized. At this time, Headquarters is working with the Ports to make sure CBP staff understand what documents are needed to begin a formal investigation. If you receive a CBP Form 28 and it states words to the effect that you are under investigation for ____, e.g., undervaluation, misclassification, etc., then you have most likely been properly put on notice that an investigation has been commenced. However, the sort of CBP Forms 28 which we are discussing here say no such thing. They are a routine request for documents or other information from the importer.

On June 10, 2010, Charles Ressin (Chief, Penalties Branch, Office of Regulations and Rulings, CBP Headquarters) spoke at the Customs Lawyers Association meeting. He was asked about Mr. Baldwin's comments and responded by explaining that guidelines are being drafted to make sure the Ports understand that the routine issuance of a CBP Form 28 alone does not preclude the importer from filing a prior disclosure, unless the express "under investigation" language is included in the notice. At the same time, it appears that this proposed guidance may conclude that the issuance of a CBP Form 29 could result in disclosure rights being cut off. Why should the rules be any different just because a different form is used?

As CBP is developing this policy, it begs the question of what will happen to those cases under review where CBP Forms 28 and 29 have already been issued, the Port has taken the position prior disclosure rights are cut off, the importer has objected, and the matter is under review at CBP Headquarters. The significance of a CBP Form 29 in terms of prior disclosure rights also remains under consideration. At a time when CBP keeps saying that trade facilitation is a critical mission, it makes you wonder what these folks are really thinking?

Susan Kohn Ross
International Trade Counsel
(310) 312-3206
skr@msk.com

If you have received this alert from a colleague and would like to subscribe,

please complete the following online [form](#).

Mitchell Silberberg & Knupp LLP

11377 W. Olympic Blvd.
Los Angeles, CA 90064

12 East 49th Street, 30th Fl.
New York, NY 10017

1818 N Street N.W., 8th Fl.
Washington, DC 20036

www.msk.com

This alert is provided as a service to our clients and friends. While the information provided in this publication is believed to be accurate, it is general in nature and should not be construed as legal advice.

MITCHELL SILBERBERG & KNUPP LLP