

port or into another country). Under section 1526(f)(1), a civil fine is assessed against any person who directs, assists financially or otherwise, or aids and abets the importation of merchandise for sale or public distribution that is seized under section 1526(e). Section 1526(f)(2) provides for a fine for the first seizure in an amount up to the value the imported merchandise would have had if it were genuine, according to the manufacturer's suggested retail price (MSRP). Section 1526(f)(3) provides for a fine for subsequent seizures in the amount of up to twice the value the imported merchandise would have had if it were genuine, according to the MSRP.

On November 17, 1997, Customs published interim regulations in the **Federal Register** (62 FR 61231) to amend § 133.25 of the Customs Regulations (19 CFR 133.25) to reflect the ACPA's amendment of 19 U.S.C. 1526. The interim amendments were adopted as a final rule published in the **Federal Register** (63 FR 51296) on September 25, 1998. A final rule document published in the **Federal Register** (64 FR 9058) on February 24, 1999, redesignated § 133.25 as § 133.27.

Under § 133.27 of the Customs Regulations (19 CFR 133.27), CBP may impose a civil fine, in addition to any other penalty or remedy authorized by law, against any person who directs, assists financially or otherwise, or aids and abets the importation of merchandise bearing a counterfeit mark that is seized under section 1526(e) and § 133.21 of the Customs Regulations (19 CFR 133.21). Under § 133.27(a), the fine imposed for the first violation (seizure) will not be more than the domestic value of the merchandise (as set forth in § 162.43(a)) as if it had been genuine, based on the MSRP of the genuine merchandise at the time of seizure. Under § 133.27(b), the fine imposed for subsequent violations will not be more than twice the domestic value of the merchandise as if it had been genuine, based on the MSRP of the genuine merchandise at the time of seizure.

Upon review of § 133.27, CBP determined that the language of the regulation is inconsistent with the language of section 1526(f). The regulation employs the term "domestic value" (of the merchandise) while the statute does not use that term. Moreover, because the MSRP is exclusive of any sale or markdown of a good at retail, it is usually greater than the good's domestic value. Therefore, setting the maximum amount of a civil fine by means of a formula that includes both the domestic value of the merchandise and the value of genuine

merchandise according to the MSRP is confusing and contributes to misunderstanding by both CBP personnel and the public.

A review of the regulatory history indicates that CBP, in using the term "domestic value" in § 133.27 (§ 133.25 when published as a final rule on September 25, 1998), relied on 19 U.S.C. 1606 (section 1606) and § 162.43(a) of the Customs Regulations (19 CFR 162.43(a)). Section 1606 provides that CBP will determine the domestic value of merchandise seized under the Customs laws at the time and place of appraisal. Section 162.43(a) provides that "domestic value" as used in section 1606 means the price for which seized or similar property is freely offered for sale at the time and place of appraisal and in the ordinary course of trade.

While this "domestic value appraisal rule" of section 1606 and § 162.43(a) is applicable in various circumstances involving merchandise seized under the Customs laws, its application is qualified. Under 19 U.S.C. 1600, the procedures set forth in 19 U.S.C. 1602 through 1619, including the use of domestic value as laid out in section 1606, apply to seizures of property under any law enforced or administered by CBP unless such law specifies different procedures. Because section 1526(f) specifies the formula for imposing civil fines for the importation of merchandise bearing a counterfeit mark, the domestic value appraisal rule of section 1606 and § 162.43(a) does not apply.

This conclusion led CBP to publish a Notice of Proposed Rulemaking (NPRM) in the **Federal Register** (67 FR 39321) on June 7, 2002, which proposed to remove the term "domestic value" from § 133.27, leaving "manufacturer's suggested retail price" as the applicable measure of the penalty. The notice stated that using the MSRP as the measure for a penalty will: (1) Result in a formula for setting the maximum civil fine under the regulation that more closely follows the language of the statute; (2) clarify for CBP personnel and the importing public the limit of a civil fine; (3) enhance uniformity in CBP's assessment of fines when merchandise bearing a counterfeit mark is imported and seized; and (4) ensure that the Congressional intent in enacting section 1526(f), *i.e.*, to enhance deterrence of trade in counterfeit goods, will be uniformly served. Deterrence is furthered by the fact that the MSRP of a given article (in this case the genuine article that corresponds to imported merchandise bearing a counterfeit mark) is normally greater than its domestic

value (because MSRP excludes discounted sales and markdowns) and a civil fine based on the MSRP will normally be greater.

Discussion of Comments

The NPRM invited public comment, and CBP received 15 responses by the close of the comment period. Of the 11 specific comments gleaned from the 15 responses, several agreed with CBP's proposal to amend the regulation and with CBP's reasons for doing so. However, some commenters suggested changes to the proposed amendment which are discussed below:

Comment: A commenter proposed that all previously issued fines under 19 U.S.C. 1526(f) should be canceled as they were not issued pursuant to a valid regulation.

Customs response: CBP disagrees. All penalties were issued in a manner consistent with the provisions of the statute, *i.e.*, fine amounts were finally set based on the MSRP. Thus, CBP will not cancel fines issued prior to the effective date of this amendment.

Comment: A commenter proposed that CBP should not issue a penalty notice assessing a fine under 19 U.S.C. 1526(f) where the manufacturer has not determined a MSRP for its genuine product. Another commenter suggested the use of "domestic resale value" when the MSRP of a genuine good is not available.

Customs response: CBP disagrees. CBP believes that in most cases, there will be a readily available MSRP to use in determining a fine under the statute. Occasional problematic situations will be handled on a case-by-case basis, and reasonable alternatives to using a manufacturer's MSRP, such as using the MSRP of a comparable good, will be employed with the assistance of CBP officers experienced in appraising merchandise.

Comment: A commenter proposed that the regulation incorporate sentencing guidelines used for criminal offenses.

Customs response: CBP disagrees. The sentencing guidelines are used by courts to determine sentences in criminal cases. Section 1526(f) provides for a civil fine which Congress sought to be imposed in addition to any other civil or criminal penalty (see section 1526(f)(4)). There is no indication that Congress wanted CBP to employ criminal sentencing guidelines in assessing penalties under section 1526(f).

Comment: A commenter proposed that because a fine under section 1526(f) is issued at the discretion of CBP, CBP officers should be instructed to impose