

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).