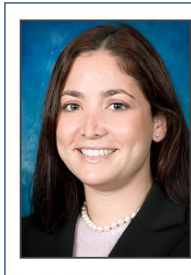


DID YOU KNOW?

WELCOME BACK, JENNIFER!



We are very pleased to announce Jennifer Diaz has rejoined the Customs and International Trade Department as a Senior Attorney at Becker & Poliakoff. Jennifer interned at Becker & Poliakoff while in law school, and began her practice here. After gaining valuable experience at KPMG helping facilitate large scale compliance programs for Fortune 500 companies, she has rejoined Becker & Poliakoff to continue assisting clients with issues relating to the import and export of merchandise to and from the United States, especially U.S. Food and Drug Administration (FDA) and U.S. Customs and Border Protection (CBP) compliance. Jennifer's updated contact information is:

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Mr. Quinter is also the Chair of the International Trade and Customs Specialist Business Group for Consulegis, consisting of 1,600 lawyers in 150 cities. Being a member will assist our many clients doing international business transactions to receive prompt legal advice from lawyers located in most major cities on 6 Continents.



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Tuesday, June 2, 2009

8:30 AM - 1:00 PM

Alhambra Towers, 121 Alhambra Plaza, 10th Floor, Coral Gables, FL 33134

\$99 per person (includes program guide, a copy of the ITAR/ EAR Regulations and case studies - a \$220 value).

For more information, please call Ana Ziade at (954) 985-4101 or register online www.becker-poliakoff.com/events/seminars/

GLOBAL TRENDS & CUSTOMS

JUNE 2009

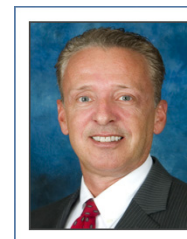
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PETER QUINTER, EDITOR

Recent Developments in Customs & International Trade Law



BUYER BEWARE: THE POTENTIAL CONSEQUENCES OF IMPORTING COUNTERFEIT MERCHANDISE



By: Caleb W. Sullivan

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With increasing vigilance, U.S. Customs and Border Protection ("CBP") is inspecting, detaining, and seizing counterfeit goods often manufactured in China and imported into the United States. The domestic value of goods seized for intellectual property rights ("IPR") violations increased by almost 40% between 2007 and 2008, from \$196.7 to \$272.7 million. In 2008, China was the top trading partner with the United States for IPR seizures, accounting for 81% of the total value, or \$221 million. As a consequence of these developments, U.S. trademark holders are becoming more aggressive in protecting their brands and their businesses against the flood of counterfeit merchandise entering the U.S. market.

Caught in the middle are U.S. importers, often deceived by foreign manufacturers into believing the goods they bought and paid for are genuine. When CBP seizes and forfeits their merchandise, importers are left without the products that were destined for their customers, and with no reliable recourse for recovering the money paid to the foreign manufacturer. To avoid this result and protect their businesses, importers must take affirmative steps to ensure that their merchandise is genuine, and react quickly and decisively to obtain the release of their goods, in the event they are seized by CBP and alleged to be counterfeit.

In a globalized trading system, where the Internet serves as the predominant source for identifying and communicating with potential foreign suppliers, it is more important than ever for importers to ensure that the merchandise they are buying does not infringe upon trademarks or copyrights owned by U.S. companies. This may be accomplished in a number of ways. *(Continued)*



Peter A. Quinter, a Board Certified International Attorney, is the editor of *Global Trends & Customs*, which is published for the clients and friends of Becker & Poliakoff, P.A. The information provided herein is for informational purposes only and should not be construed as legal advice.

If you have any questions regarding a legal topic presented, please contact Peter A. Quinter, Chair of the Customs & International Trade Dept, at 954-985-4101 or pquinter@becker-poliakoff.com.

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BUYER BEWARE: THE POTENTIAL CONSEQUENCES OF IMPORTING COUNTERFEIT MERCHANDISE *(continued)*

1. Importers should request samples or digital photographs of the merchandise in advance of the transaction, which must be carefully examined for potential trademarks and copyrights.

2. Importers should require that foreign manufacturers provide clear and reliable proof that the foreign company has the permission and legitimate authority of the U.S. trademark holder or copyright owner to use the trademark or copyrighted information. This is often accomplished through a Licensed Status Confirmation Document (LSCD).

3. Importers should verify any such information with the U.S. trademark holder or copyright owner directly.

Hiring legal counsel with substantial experience in foreign trade law, customs law, and intellectual property rights is often a critical and necessary component of the importer's due diligence.

In the event CBP has reason to believe that goods arriving at U.S. ports are counterfeit, CBP will place the merchandise on hold for intensive examination. CBP may formally detain the merchandise for up to thirty days. Experts with the Import Specialist Branch of CBP who specialize in different types of merchandise (e.g., electronics, pharmaceuticals, food products) make a determination whether there is an adequate basis for issuing a Seizure Notice. During the period between detention and seizure, it is strongly recommended that importers retain legal counsel to assist in establishing to CBP's satisfaction that the merchandise is genuine. If successful, CBP will release the merchandise to the importer immediately, thereby avoiding lengthy administrative delays associated with formal seizure proceedings.

In many cases, however, CBP will conclude that the merchandise is counterfeit and issue a Seizure Notice to the importer. In the Seizure Notice, CBP must identify the specific trademarks or copyrights alleged to have been

infringed. The Seizure Notice invariably requires that the importer obtain written authorization from the trademark or copyright holder, in order to obtain the release of the merchandise. Failure to obtain such authorization significantly reduces the likelihood that CBP will agree to release the goods to the importer.

Once an importer has merchandise seized by CBP, he or she should immediately retain legal counsel in order to conduct negotiations with the trademark or copyright holder, and submit a written Petition to CBP seeking the immediate release of the merchandise. There are number of ways in

which the written consent of the trademark or copyright holder may be secured. First, it may be proven through factual and legal arguments that the merchandise is genuine and not counterfeit. Second, the trademark holder may be persuaded by circumstances surrounding the transaction that release of the merchandise to the importer is warranted. Success in obtaining written authorization of the trademark or copyright holder ultimately will depend upon the facts of a specific case, and the relationship that the importer or importer's attorney has developed with the trademark or copyright holder in prior cases.

The rapid increase in counterfeit merchandise originating from China and other countries has enormous implications for the trade community as a whole, and for importers that are conducting transactions with foreign manufacturers. The consequences of this problem are clear: CBP is more actively inspecting suspicious merchandise at U.S. ports, U.S. trademark and copyright holders are more aggressively defending their intellectual property rights, and importers are more likely to have their goods seized and forfeited to the Government. As a result, it is more important than ever that importers perform a thorough due diligence of their foreign business partners, and take appropriate and decisive measures where allegedly counterfeit goods are detained or seized by the Government. ■



WASHINGTON BEAT CUSTOMS BROKER SELF-ASSESSMENT OUTREACH PROGRAM

By Jennifer R. Diaz, jdiaz@becker-poliakoff.com
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The Department of Homeland Security's U.S. Customs and Border Protection ("CBP") announced on April 27, 2009, the commencement of a Broker Self-Assessment ("BSA") voluntary pilot program. BSA is comparable to the Importer Self-Assessment ("ISA") program in purpose and structure. BSA is based upon the premise that eligible customs brokers with strong internal controls achieve the highest level of compliance with applicable CBP laws and regulations. Under the BSA pilot program, a limited number of selected customs brokers will update and improve internal controls, perform periodic testing of these internal controls, and disclose to CBP any deficiencies discovered through testing. CBP believes the program will facilitate legitimate trade, and allow CBP to focus on higher-risk enforcement issues. Applications to participate in this unique and valuable program must be submitted to CBP no later than May 27, 2009.

Criteria for Eligibility in BSA Pilot Program in order to be eligible to participate in the BSA pilot program, a customs broker must meet the following criteria:

- 1) be a licensed customs broker for a minimum of five (5) years;
- 2) be a member of C-TPAT with full benefits;
- 3) agree to comply with all applicable CBP laws and regulations;
- 4) utilize automated environments including ABI and ACE;
- 5) possess a broker national permit;
- 6) possess and maintain a system of business records that demonstrates the accuracy of CBP transactions; and
- 7) complete a BSA pilot questionnaire. In accordance with the participation requirements, the broker must also agree to:
 - a. continue to maintain and update its internal controls;
 - b. perform periodic testing of its internal control system based upon risk;
 - c. make appropriate adjustments to internal control systems as warranted;
 - d. inform CBP of deficiencies identified during periodic testing; and
 - e. maintain an audit trail linking financial records to entries filed with CBP.



BSA PILOT PROGRAM SELECTION PROCESS

After the closing date for submission of applications, CBP intends to select a limited number of customs brokers to participate in the BSA pilot program. Each broker chosen to participate will be provided with a BSA Participation Agreement and BSA Pilot Questionnaire for completion. A CBP multi-disciplinary team comprised of auditors, account managers, and field personnel will visit the applicant to review the broker's internal controls. CBP will then make a determination whether the custom broker has sufficient and adequate controls in place to comply with their statutory and regulatory obligations. Where CBP makes such a finding, CBP will countersign the BSA Participation Agreement with the participating broker.

ADVANTAGES OF PARTICIPATION IN THE BSA PILOT PROGRAM

The potential advantages of participation in the BSA pilot program are significant. Participating customs brokers will obtain accelerated review and disposition of electronic drawback claims, reconciliation applications, and ruling requests. CBP will provide assistance with corrective action plans prior to the assessment of penalties, or removal of the customs broker from CBP programs. Brokers may utilize the BSA voluntary disclosure provision to disclose violations of 19 U.S.C. § 1641 to CBP. In the event that civil penalties are assessed against a broker by CBP, the broker's participation in the BSA pilot program may constitute an extraordinary mitigating factor for penalties imposed against the broker pursuant to 19 U.S.C. § 1641.

CONCLUSION

The BSA pilot program represents an enormous opportunity for qualifying customs brokers in the trade community. Brokers interested in the program should seriously consider participation in the application process, and be mindful that the deadline for doing so is fast approaching. Securing the advice of experienced legal counsel in order to determine eligibility for the program, assist with the BSA application process, and implement effective and reliable internal controls is strongly recommended. ■