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October 17, 2001

Regulations Branch  
Office of Regulations and Rulings  
United States Customs Service  
1300 Pennsylvania Avenue, N.W.  
Washington, D.C. 20229

Re: Notice of Proposed Rulemaking Concerning the Issuance of  
Administrative Rulings: Federal Register Notice of July 17, 2001

Dear Sir:

The Joint Industry Group (JIG) welcomes the opportunity to comment on the Notice of Proposed Rulemaking (NPRM) concerning the issuance of Administrative Rulings which the Customs Service published in the Federal Register on July 17, 2001.

Because JIG has extensive experience in working with the Customs Service, and was one of the trade groups primarily responsible for negotiating the Customs Modernization Act (“Mod Act”) with Customs, it has a unique understanding of the responsibilities which both the trade community and the Customs Service agreed to assume under the Mod Act. Our members understand and appreciate the pressures which have caused the Customs Service to propose the extensive changes in the rulings process which are contained in the NPRM. Notwithstanding these pressures, for the reasons stated below, JIG strongly objects to the general philosophy manifested in the NPRM. JIG believes that the current level of “informed compliance” assumed by Customs under the Mod Act can be maintained, or even improved, if Customs adopts the proposals advocated herein, and implements the suggestions contained in the list of specific comments appended as an exhibit to this letter.

## **GENERAL COMMENTS:**

The Customs Service and the trade community negotiated for over four years to bring about the extensive changes that culminated in the passage of the Mod Act. During these negotiations, the trade community agreed to assume responsibility for using “reasonable care” in the classification, valuation and proper entry of merchandise as a quid pro quo for the Customs Service providing: 1) increased automation to speed the entry and clearance of goods, and

2) information to assist the trade in complying with customs laws (*e.g.*, the issuance of timely and well-reasoned rulings, publication of Informed Compliance Publications.)

JIG is aware that not every aspect of the above quid pro quo is specifically set forth in law. However, there was a clear recognition that imposition of a reasonable care standard would likely result in huge increases in the number of ruling requests. Customs officials publicly expressed confidence that they would be able to handle whatever volume of ruling requests resulted from the adoption of the Mod Act. In fact, subsequent to the enactment of the Mod Act, Customs officials conducted numerous briefings and seminars for both Customs personnel and the trade community explaining, among other things, that under the Mod Act, importers had the right to request two “flavors” of rulings:

- 1) Rulings issued by the National Commodity Specialist Division in New York, which would be issued within 30 days and would advise “What time it is” (*i.e.*, the ruling would briefly describe the merchandise and state a conclusion, such as the HTSUS subheading under which goods were to be classified), or
- 2) Rulings issued by Customs Headquarters, which would usually take no longer than 120 days, and would advise “How the clock was made” (*i.e.*, the ruling would describe in detail the merchandise or other aspects of the transaction involved, thoroughly discuss and explain the legal principles involved, and state a conclusion advising how the goods were to be classified, valued, etc.).

Customs has worked hard to fully implement its informed compliance responsibilities from the minute the Mod Act went into effect. The issuance by Customs of over 60 Informed Compliance Publications and the numerous seminars conducted by Customs have been extremely useful. However, Customs recognizes that publications and seminars are not a substitute for the trade community to be “clearly and completely informed of its legal obligations” through the issuance of rulings to individual members of the trade community.<sup>1</sup> We believe that a cooperative approach between Customs and the trade can and will result in Customs’ ability to increase the level of informed compliance it provides. However, the strain on the resources of the Office of Regulations and Rulings (OR&R) cannot be resolved by assigning the responsibility for issuing most initial rulings to OR&R’s New York office and having Headquarters attorneys act as a type of appellate body. This approach will result in less uniformity in the Customs Service’s determinations; less understanding of determinations by both members of the trade community and Customs Service personnel; greater delay in the final ascertainment of the correct classification, valuation, etc. for imported merchandise; increased

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<sup>1</sup> The Preface to every Informed Compliance Publication issued by Customs contains, among other things, the following two statements:

“Two new concepts that emerge from the Mod Act are “*informed compliance*” and “*shared responsibility*,” which are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations.”

“Because many complicated factors can be involved in customs issues, an importer may wish to obtain a ruling under Customs Regulations . . . Reliance solely on the information in this pamphlet may not be considered reasonable care.”

litigation; and an overall greater expenditure of valuable government resources resulting therefrom. Rather, to maintain or increase the current level of informed compliance, top management at Customs must fully recognize the importance of OR&R and cooperate with the trade community to see that the following actions are accomplished:

- 3) The timely issuance of well-reasoned rulings, through the use of procedures designed to develop a sound administrative record and insure that interested parties are heard, will result in:
  - Fewer requests for reconsideration of rulings which do not completely discuss all facts and arguments presented,
  - Fewer proposals by Customs to modify or revoke previously issued rulings,
  - The resolution of issues at the administrative level, rather than through litigation which places an increased burden on the Customs Service, the Justice Department and importers,
  - The receipt of fewer letters questioning the procedures used, which also places an additional burden on OR&R resources,
  - Increased overall compliance by members of the import community, which will reduce the number of enforcement actions taken by Customs, *e.g.*, investigations, audits, penalties.
- 4) The use of valuable resources can be minimized by reducing the overall number of formal rulings sought, by expanding and not reducing the scope of programs such as the Preimportation Review Program (PIRP). The number of duplicative ruling requests submitted to OR&R at Headquarters might also be reduced by periodically publishing the list of Internal Advice Requests, Applications for Further Review (AFRs) and other ruling requests pending at Headquarters.
- 5) Customs must work with the trade community to obtain sufficient resources to permit OR&R to fulfill its functions, in accordance with a report recently issued by the Government Accounting Office, which concluded that while OR&R's responsibilities have substantially increased, its Headquarters staff has been seriously reduced.
- 6) Customs must insure that OR&R's responsibilities are clearly spelled out and that other offices within Customs and/or other government agencies do not interfere with or delay the issuance of rulings by OR&R.
- 7) Insure that OR&R's staff is properly trained. Measures to achieve that end might include the following:
  - All professional staff at OR&R's Headquarters office should be members in good standing of the Bar,
  - All professional staff within OR&R should be required to take and pass a rigorous training course to insure they have a requisite degree of knowledge consistent with their position,

- Insure that professional staff has a well-rounded knowledge of the customs and related laws, by making a renewed effort to insure adequate rotation among branches.

While perhaps these “General” comments are outside the scope of the NPRM, JIG believes that the changes proposed therein will not alleviate the problems which currently exist in OR&R. Accordingly, we respectfully urge Customs Service management to carefully consider all of the above suggestions and to work with the trade community in implementing solutions which will permit Customs to properly perform the responsibilities it assumed under the Mod Act. As previously stated, our specific comments on the NPRM are contained as an exhibit to this letter.

Very truly yours,

A handwritten signature in black ink that reads "Ronald Schoof". The signature is written in a cursive style with a large, sweeping initial 'R'.

Ronald Schoof

Enclosures

1. Comments on NPRM
2. List of JIG members

Cc: Mr. Robert Bonner  
Mr. Charles Winwood

## **SPECIFIC COMMENTS ON NPRM**

### **Subpart B – Advice on Prospective Transactions :**

#### **1. Customs Should Eliminate the Distinction Between Prospective and Current Transactions**

The proposed regulations perpetuate the artificial distinction between rulings on “prospective” and “current” transactions. In fact, many of the sections of the proposed regulations that deal with prospective rulings are merely copied - verbatim - in the sections dealing with requests for internal advice. Such redundancy is unnecessary and does not reflect the longstanding, common practice of Customs and the importing community. Importers often seek rulings on classification, appraisement, country of origin marking, and applicability of preference programs, with respect to “current” transactions, especially in the case of repetitive shipments. Importers who lack sufficient expertise will seek such rulings on current transactions in an effort to exercise reasonable care. Under the proposal, an importer would not be permitted to request a “prospective” ruling on a “current” transaction. Customs appears to want importers to wait until there is a dispute before requesting internal advice. Such technicalities are commonly ignored in practice and, as such, should be eliminated from the regulations.

#### **2. Customs Should Retain Current Procedures for Submission of Ruling Requests and Treatment of Samples**

Parties should not be required to submit certain requests for rulings first to the National Commodity Specialist Division in New York. The current jurisdictional framework/choice of venue should be maintained.

Proposed § 177.11 does not explain why Customs is changing its practice regarding samples and introduces undefined concepts such as samples being converted for official government use. Customs should retain the current regulation regarding samples and continue its current practice of returning samples upon request - without cost to the requesting party.

#### **3. No Certification Statement Regarding Prior or Current Transactions Should Be Required**

There should be no certification statement required regarding prior or current transactions, as the proposed requirement places an additional unnecessary reporting and tracking burden on the requesting party, as well as requires a party to speculate as to the meaning of previously issued “similar” ruling requests.

#### **4. A Procedure to Correct an Inadvertent Failure to Claim Confidentiality Should be Provided**

Deeming the failure to request confidentiality at the time of submission to be a waiver of confidentiality is draconian. A party should be permitted, within a reasonable period of time, to cure the inadvertent failure to designate information as confidential. *See e.g.*, 59 C.F.R. § 1102.306 (regulations of the Federal Financial Institutions Examination Council permitting designation within 10 business days of submission); 13 C.F.R. § 500.107(g) (regulations of the Emergency Oil and Gas Guaranteed Loan Board permitting designation within a reasonable time after submission). A request for confidentiality should not be precluded simply because it was not initially requested—as currently provided under various provisions of the proposed Part 177—if confidentiality can be justified. Of course, Customs cannot be held accountable for information disclosed before confidentiality is requested.

#### **5. The Rules on Conferences Should Be Modified**

One conference, at a mutually agreed upon time, should be afforded parties as a matter of right by both the New York and Headquarters offices in relation to all rulings on prospective transactions. Customs should not be precluded from granting more than one meeting if it believes that additional meetings would be useful to making its determination. Customs has the discretion to deny requests for additional meetings. In addition, National Commodity Specialist Division personnel should have the right to grant a request for an additional conference without seeking the approval of Headquarters.

At the conclusion of a conference, if both Customs and the requesting party agree, there simply is no reason why Customs cannot conclude with issuance of the ruling on the prospective transaction.

#### **6. Nonconforming Requests Should Be Treated the Same by Both Headquarters and the National Commodity Specialist Division**

The same 30 calendar day notification period associated with nonconforming ruling requests submitted to Headquarters should be applied to such requests submitted to the National Commodity Specialist Division.

In the event that a ruling request is submitted to the wrong Customs office, the regulations should specify that the receiving office is required to forward the request to the appropriate office within 15 calendar days.

**7. Customs Should Only Decline to Issue Rulings on Prospective Transactions if a Complaint Has Been Filed; Persons Requesting Rulings Should Only Be Required to Notify Customs of Complaints that the Requestor Has Filed in the U.S. Court of International Trade Regarding the Same Issue**

Proposed 177.16(k) and 177.14 should be modified to indicate that Customs will not issue a prospective ruling when the ruling requestor has filed a complaint in the U.S. Court of International Trade regarding the same issue. The limitation in proposed 177.16(k) should be triggered by the filing of a complaint and not a summons since summonses are often filed for protective reasons and may not be followed by a complaint. By continuing to issue rulings until a complaint is filed, Customs may resolve the matter at the administrative level, thereby preventing the unnecessary expenditure of limited judicial and Department of Justice resources. Moreover, the notification requirement in proposed 177.14 should be limited to instances in which the ruling requestor and the complainant are the same person. Without this limitation, 177.14 places an unnecessary burden on the trade to monitor filings in the U.S. Court of International Trade and to determine whether a particular case involves the “same issue as that involved in the ruling request.”

**8. Withdrawn Files Should Be Returned to the Requester**

If a party withdraws a ruling request, the regulations should provide that the matter is considered closed and the file should be returned to the requesting party.

**9. Customs Should Limit the Circumstances in Which No Prospective Ruling Will Be Issued**

The discretionary authority to determine that issuance of an information letter is “more appropriate” is ill-defined and should be deleted. Similarly, the definition of “similar” in proposed § 177.16(f) is vague and subjective and therefore Customs should not decline to issue a ruling simply because Customs believes the requesting party received a ruling involving a “similar” transaction.

**10. The Regulations Should Impose Time-frames on Customs and Customs Should Not Be Permitted to Initiate Rulings**

The proposed regulations should impose an obligation on Customs Headquarters to issue rulings within 90 calendar days. Extensions of time to act upon ruling requests by Headquarters should only be permitted where the agency is able to demonstrate extraordinary circumstances warranting a delay in issuance, or in cases where both the requesting party and Customs agree to an additional time period. Accordingly, the last sentence of proposed section 177.17(a) involving laboratory analyses and other agency information, should be deleted.

The proposed new provision permitting Customs-initiated rulings is extremely objectionable and should be eliminated in its entirety. It is antithetical to the fact that the Customs ruling program was designed as an elective procedure available to concerned importers. Aside from the logistical difficulties associated with the Customs official notifying the ill-defined “importer or other interested party,” of the Customs-initiated request, the notion that an importer may be bound by a ruling that he or she did not initiate (and subject to penalties in the event of failing to follow and notify Customs of such a ruling) ignores the fact that an existing procedure (i.e., internal advice) is the appropriate vehicle for use by Customs officials.

In addition, the field personnel that are most likely to initiate ruling requests on prospective transactions would often have limited facts on which to base the ruling request. Issuing a ruling under such circumstances wastes Customs resources. It is far better to allow an importer to request a ruling based on a full disclosure of the facts, or to wait until the transaction is completed and use internal advice procedures.

In addition, the current proposal unjustifiably fails to require Customs officials to notify an importer or interested party within 30 calendar days in cases involving a question of admissibility. Clearly, the importer or interested party may have information that has a direct bearing on the admissibility of the item.

A new paragraph should be added to this section that requires Customs to notify the requesting party and/or the requesting party’s representative (within 7 calendar days of the date of the ruling request) of the name, telephone number and email address of the Customs official to whom the ruling request has been assigned, and again notified in the event of re-assignment of the ruling request (notification within 7 calendar days of the re-assignment).

#### **11. The Requirement to Bring Rulings to the Attention of Field Offices Should Be Modified**

The term “successor in interest” should be deleted from the first sentence of proposed § 177.18. This new proposed extension of liability is unfair in that the undefined term provides too much discretion to Customs officers to determine those parties that might be bound by the subject ruling.

The person to whom a ruling has been issued should only be required to follow the ruling with respect to affected current transactions, and should only be required to bring the ruling to the attention of concerned port(s) of entry (i.e., the location(s) of the current transaction(s)) once. Consequently, the proposed language of § 177.18(a) regarding attachment of the ruling should be changed from “appropriate Customs office” to “concerned port(s) of entry.” The term “appropriate Customs office” lacks sufficient specificity to assist importers with meeting this reporting obligation.

Delete as vague and ill-defined the phrase “completing any documentation in connection with...” in proposed § 177.18(b).

## **12. Customs Should Not Modify or Revoke Rules Established by the Courts**

Modification or revocation of rulings or decisions found “not in accord with the current views of Customs” should be limited to purely administrative positions, and should not include derogation of a court ruling or other higher authority. JIG disagrees that Customs may take a “current view” contrary to a higher authority. This point should be clarified in the final regulations.

## **13. Modifications and Revocations of Rulings in Effect Less than 60 Days Should Not Apply to Goods Already Ordered and/or en Route to the United States**

The JIG supports the concept of distinguishing between rulings that have been in effect for less than 60 calendar days and those in effect for 60 or more calendar days. However, a person who obtains a prospective ruling and orders goods in reliance thereon, should not have the ground rules changed with respect to goods the person has already ordered and/or which are already en route to the United States on the date of issuance of the modification/revocation, notwithstanding these goods are actually imported on and after the date of issuance of the modification/revocation. Proposed § 177.21(e)(1) should be amended to address such situations.

## **14. Customs Should Provide a 60-day Comment Period for Modifications and Revocations**

With respect to those rulings that have been in effect for 60 or more calendar days, the publication of the proposed action in the *Customs Bulletin* is appropriate. However, in today’s environment, 30 calendar days from the date of publication of the notice is an insufficient comment period. The JIG favors a period of at least 60 days to ensure that everyone with an interest has an adequate opportunity to learn of the proposed change. Given recent events, there may be a delay in mail delivery. In addition, the *Customs Bulletin* is generally circulated among various readers at law firms and private companies. In view of these factors, a longer comment period is warranted.

## **15. “Treatment” Previously Accorded to Substantially Identical Transactions Should Not Be Limited to Classification Treatment**

The definition of “treatment” as relating to the “classification of imported merchandise” and to no other issues is unwarranted and is not a reasonable interpretation of 19 U.S.C. § 1315(d). For example, the Customs Service’s decision to characterize certain royalties payments as dutiable under 19 U.S.C. § 1401a(b)(1)(E) was in derogation of a position maintained administratively for many years. Accordingly, we believe that “treatment” should mean “a consistent pattern involving imported merchandise...”

## **16. The Relationship of Proposed § 177.21(c)(2) to 19 U.S.C. § 1315(d) Is Unclear**

The notice provisions under proposed §177.21(c)(2) appear inconsistent with the provisions of 19 U.S.C. §1315(d). The statute speaks of “an established and uniformed practice” and requires publication in the Federal Register. Although proposed §177.21(d)(1)(viii) suggest that the provisions of proposed §177.21 are inapplicable, there is an element reminiscent of a “simultaneous equation” associated with the two sets or provisions. For example, is the Customs Service attempting to state that a two-year period immediately prior to publication is insufficient to establish a uniform practice? Customs’ purposes under proposed §177.21(c) are unclear.

We do not believe that proposed § 177.21(c) is warranted. Further, we must note that the proposed timetables, both as to comment and decision making, are too short given the fact that the *Customs Bulletin* is the vehicle of choice for all forms of notice and comment.

Proposed §177.21(d) appears to be inclusive. We believe, however, that proposed § 177.21(d)(1)(iv) should be amended by adding the words “overturns or” after “which.”

We have already noted concerns over what happens to importers who seek rulings—an admitted exercise in reasonable care—only to find that the Customs Service has changed its mind within 60 days of issuing a ruling. Some form of effective date relief should be provided to insure that the modification or revocation of a ruling in effect for more than 60 days does not work substantial hardship on importers who have ordered merchandise that is being delivered via ship or under bona-fide long-term contracts.

## **17. Proposed §177.22(a)(1) Is Not a Reasonable Interpretation of 19 U.S.C. § 1315(d)**

Proposed §177.22(a)(1) unreasonably limits 19 U.S.C. § 1315(d) to classification practices. The statute provides that administrative rulings “resulting in the imposition of a higher rate of duty *or* charge than the Secretary of the Treasury shall have found to have been applicable to imported merchandise under an established uniform practice” shall have a delayed effective date. Imposition of such a charge can result from matters other than a change in the tariff classification. Accordingly, the final version of 177.22(a)(1) should be amended to track more closely the language of the statute and to eliminate the notion that established and uniform practices are limited to classification matters.

## **18. Uniform Treatment Does Not Require 100 Percent Uniform Treatment**

We question the requirement set forth in proposed §177.22(a)(2) that there be “100 percent uniform treatment.” This implies that one entry out of a thousand would be sufficient to deny the existence of such a practice. Accordingly, we believe that “100 percent” should be deleted and “virtually” be inserted in its place. We also believe the concept of “an actual review of entries” is impractical given current Customs practices. In actuality, entries at the beginning of any given period or practice will be made with the direct and active involvement of the

Customs Service. After a period of time, these become eligible for bypass or automatic liquidation. The Customs Service controls the degree of its involvement in the liquidation process. We believe, therefore, that the second sentence of proposed §177.229(a)(2) should be deleted in its entirety.

**19. Customs Decisions to Limit Court Decisions Should Be Issued Within 90 Days of the Court Decision, Should Allow More Time for Public Comment and Should Have Delayed Effective Dates**

In general, we believe that the Customs Service has the authority to advise the public of limitations it proposes on court decisions. The major deficiency in the proposal is the lack of any limit on when the Customs Service must issue such a decision. Seemingly, this could occur a year after the rendering of a decision, or even longer. Therefore, the words “within 90 days after such decision becomes final” should be added at the end of proposed §177.23(a). Alternatively, the regulations should adopt the 180-day period for issuing a limiting decision that was established in T.D. 78-481, 12 Cust. B.& Dec. 1086 (Nov. 29, 1978).

Under proposed §177.23(b), we again believe additional time should be given for public comment. With similar import, proposed §177.23(c) should have a delayed effective date.

**Subpart C (Internal Advice Procedure):**

**20. Requests for Internal Advice, Whether Initiated by Customs or the Importer, Should be Limited to the Criteria in Proposed §177.32(c) and Should Be Automatically Granted Whenever These Criteria Are Met**

Internal advice requests should be evaluated under the objective criteria in §177.32(c). Where such criteria are met, internal advice review should be granted and the matter referred to Customs Headquarters for a ruling. The criteria for further review should apply equally whether the internal advice is initiated by a Customs field office or the importer. Thus, Customs field offices should not be able to request an internal advice ruling unless the criteria are met. Customs-initiated requests for internal advice should not provide a mechanism for field offices to self-initiate rulings. We believe that Customs-initiated rulings would not be in the interest of the sound administration of the Customs laws.

The decision to refer a request for internal advice made by the importer or other concerned party should not be at the sole discretion of the Customs field office. In many cases, the reason that the importer is seeking internal advice is because the importer disagrees with local Customs’ decision. See proposed 177.32(a)(2) and 177.32(b). As with requests for further review, the port should only be permitted to make the decision of whether the request for internal advice meets the stated criteria for referral to Customs Headquarters.

**21. The Failure to Issue a Written Decision Denying or Allowing an Importer's Request for Internal Advice within 30 Days Should Be Treated as an Allowance of the Request**

Since we believe that importers should have the right to request internal advice, the procedure setting forth a 30-day period during which the Customs field office may consider whether to forward the request for internal advice to the appropriate office is rendered unnecessary. To the extent this provision remains a part of the regulations, language should be inserted providing that the request for internal advice will be deemed to have been granted if Customs fails to act within the prescribed period. Alternatively, importers should be permitted to appeal a field office determination not to seek internal advice. Allowing no administrative review of the local field office's decision not to submit the importer's request for internal advice will unnecessarily preclude administrative review.

**22. Importers Do Not Have an Affirmative Obligation to Advise Customs How Its Field Offices Treat Imports**

Proposed section 177.32(b)(2) requires an importer who is aware "that two or more Customs offices are allowing different tariff results for the same merchandise imported by that importer" to bring that fact to the attention of the Customs Service. Customs should delete this proposal from the regulations. Lack of uniformity as to tariff application should serve as criteria for granting a request for internal advice. It should not, however, impose an affirmative obligation to report disparity as set forth in § 177.32(b)(2). What constitutes "reasonable care" can only be determined on a case-by-case basis and therefore is inappropriate for a regulation.

**23. No Separate Certification Should Be Required under § 177.32(d)**

There is no reason to require a certification as provided for under proposed § 177.32(d). Customs has recourse if the statements made in any submission to the Government are false.

**24. Liquidation Should Be Suspended Pending Appeal of Requests for Internal Advice**

The liquidation of entries that are the subject of internal advice should be suspended pending any appeal of the request for internal advice. If current transactions are liquidated, the importer will be forced to file administrative protests that will also require resolution. It would be more efficient for Customs to expeditiously decide the appeal and suspend liquidation of current entries.

**25. Confidentiality Should Not Be Precluded Simply Because It Was Not Initially Requested**

As explained above, requests for confidential treatment should not be precluded simply because the request was not initially made.

**26. One Meeting Should Be Granted as a Matter of Right**

It is in the best interest of sound administration to allow one meeting as a matter of right even with appeals.

**27. Customs Should Include “Administrative Record” in the Definitions Under § 177.2**

In general, the “administrative record” should be defined for all Part 177 administrative rulings. Customs should base its decision on the defined record and not “any other information that Customs determines to be relevant” as set forth in § 177.33(g)(3).

**28. Importers Should Have the Unqualified Right to Request Internal Advice**

Objective review in determining whether an issue should be forwarded to Headquarters for internal advice may be difficult to obtain by Customs field offices. Importers should have the right to request internal advice and not be forced to overcome the procedural hurdle of convincing a Customs field employee of its merit.

**29. Importers Should Have 45 Days to Appeal Internal Advice Decisions**

As proposed, § 177.33 grants importers 30 calendar days from the effective date of an adverse internal advice decision to appeal. This time frame is too short in light of delays that may occur in relation to the mail (both external and internal) and the time needed to research and prepare an effective written appeal. It would be in the interest of Customs and the import community to extend this time period to at least 45 days. This will avoid the administrative burden associated with requests for additional time to make additional submissions.

**30. Section 177.41(c) Should Clarify Whether a Complete Appeal Must Be Filed within the Timeframe, or Only a Notice of Appeal**

It is unclear from the proposed regulations whether the recipient of the internal advice decision who wishes to appeal simply needs to put Customs on notice of the intent to appeal within the prescribed time period, and then may supplement the appeal later. If the latter is intended, there appears to be no time limit placed on the importer during which it may supplement its appeal. If the intent is to limit the duration of the appeal process, we propose that

60 days be granted to allow the importer sufficient time to prepare its appeal. Obviously, if the importer requires expedited treatment of the particular issue, one would expect an appeal to be filed more quickly.

### **Subpart D – Disclosure of Confidential Information:**

**31. The proposal should be amended to reflect changes in the state of disclosure law and incorporate all of the pertinent standards for nondisclosure.**

The proper protection of confidential business and financial information and trade secrets is vitally important to the importing community. In this regard, Customs' proposal improves upon the current regulatory regime for designation of confidential treatment. But, in our view, further improvements are necessary for the procedures to conform to the current law.

The standards for the protection or disclosure of confidential business and financial information and trade secrets established under the Freedom of Information Act (5 U.S.C. § 552) and the Trade Secrets Act (18 U.S.C. §1905) have more “prongs” than are reflected in the proposed regulations. To avoid disputes that would needlessly consume scarce administrative and business resources, we request that Customs revise this portion of the proposed regulation to reflect the current state of the law and republish it for advance comment.

Under Customs' current existing ruling request regulations (19 C.F.R. §177.2(b)(7)), Customs grants confidential treatment to information submitted in connection with a ruling request when disclosure of the information would cause “substantial harm to the competitive position” of the submitter. This standard is commonly known as the “competitive injury” standard. Following the landmark decision of the U.S. Court of Appeals for the District of Columbia Circuit (“DC Circuit”) in Critical Mass Energy Project v. NRC, 975 F.2d 871 (D.C. Cir. 1992) (“Critical Mass”), this standard is now but one of two standards for determining whether confidential information is subject to disclosure under Exemption 4 of the Freedom of Information Act or it must be kept confidential.

**- Two Prongs: “Competitive Injury” Prong for “Required” Information and “Customarily Disclosed” Prong for “Voluntary” Information**

The Department of Justice Freedom of Information Act Guide, May 2000 edition (“DOJ FOIA Guide, May 2000”), recognizes the distinctions made by the DC Circuit in Critical Mass. Under Critical Mass, the decision to grant confidentiality depends on whether the information is confidential business or financial information that is (a) submitted voluntarily or (b) required by the agency. The “competitive injury” standard was limited by the court to apply only to information “required” to be submitted to the agency. Information submitted “voluntarily” is subject to disclosure under the “customarily disclosed” standard. That is, voluntarily submitted confidential business or financial information is to be protected from disclosure if the information is not “customarily disclosed to the public by the submitter.”

Confidential information contained in ruling requests may be required or voluntary or both. The Justice Department interprets the “required” information to include information that is required by the Government from those who choose to participate in a Government program.

Because Customs will fail to issue a ruling on ruling requests that do not confirm to its requirements, it appears that the information contained in a ruling request that conforms to the information identified by Customs for the type of ruling request involved may be regarded as “required.” Specifically, proposed Section 177.11(b)(1) directs a ruling requestor to provide “a complete statement of all facts and other information relating to the transaction.” For guidance, Customs identifies information that should be submitted in a ruling request to avoid Customs inaction on the request as “nonconforming” (Section 177.12(a)) or a later Customs determination that material facts were omitted from the request and any ruling issued in response to the request is inapplicable (section 177.11(b)(1)). For example, Section 177.11(b)(3)(ii) lists what a classification request “should include,” such as a description of the manufacturing processes used to produce the article, its principal use, and the relative quantity, by weight and volume, of the materials used in its production; and Section 177.11(b)(3) (iv) lists “required information” that a valuation ruling request “should contain,” such as the terms of sale, purchase price, method of payment, a description of payments in addition to the purchase price, if any.

Any business or financial information submitted beyond what Customs has stated a particular type of ruling request “should contain” is within the discretion of the submitter and must necessarily be regarded as voluntarily submitted and subject to the Critical Mass “customarily disclosed” standard for confidential treatment.

In the situation of a Customs’ self-initiated ruling, an importer’s submission of information to Customs would be done commonly, and perhaps nearly always, on a voluntary basis, taking advantage of an opportunity to comment in response to a proposed action by the agency (e.g., a CF 29 “Notice of Action”). Thus, the information submission in that procedural context would be done voluntarily, and notwithstanding the proposed consequence for failure to respond, without a penalty for the failure to respond. Under a recent decision of the District Court for the District of Columbia, information that is submitted in response to a request that is not enforceable by a penalty for failure to respond is “voluntary.” *See, Center for Auto Safety v. National Highway Traffic Safety Admin.*, 93 F. Supp. 2d 1 (D.D.C. 2000) (holding that information collected without OMB approval in accordance with the Paperwork Reduction Act is not pursuant to a request enforceable by a penalty and is therefore “voluntary”).

#### **- Trade Secrets Act Prohibition Takes Away Any Discretion to Disclose**

There is an additional consideration that must be taken into account in determining the grant of confidential treatment, namely, whether the information constitutes trade secrets within the meaning of the Trade Secrets Act. If the information constitutes trade secrets, then according to the guidance provided by the Department of Justice, Customs would abuse its discretion if it disclosed such information. (“The practical effect of the Trade Secrets Act is to limit an agency’s ability to make a discretionary release of otherwise-exempt material, because to do so in violation of the Trade Secrets Act would not only be a criminal offense, it would also constitute a “serious abuse of agency discretion” redressable through a reverse FOIA suit.” See

DOJ FOIA Guide, May 2000. The regulations should recognize the obligation of Customs to maintain strict confidentiality of trade secret information covered by the Trade Secrets Act.

**- No Distinction in Confidentiality Tests for Self-Initiated Rulings**

Customs is to be commended for its intent in proposed Section 177.41(c) to resolve disputes arising with (a) ruling requestors and (b) parties who would be the subject to a ruling self-initiated by Customs. However, the law does not permit Customs, to do what it proposes to do in Section 177.41(c), which is to treat these two categories of parties differently if the dispute is not resolved. In the former situation Customs would return the ruling request to the requestor. In contrast, in the latter situation, Customs would proceed to issue the self-initiated ruling, albeit with an attempt to avoid use of the disputed information.

The law does not support such a distinction. Whether a ruling request is initiated by a ruling requestor or self-initiated by Customs is not relevant to the application of these standards. The nature of the information as “trade secrets,” or not, and its “voluntary” or “required” submission are the determining factors.

**32. The Three-Year Renewable Period for Confidentiality is Unnecessary and Burdensome**

We strongly object to Customs proposed three-year renewable period for confidential treatment in Section 177.43. This sunset period is unnecessary and would be unduly burdensome for Customs and ruling requestors to administer. Stale confidentiality claims can be adequately addressed through the proposed “objection to disclosure” procedure provided in the new Section 177.44 of the proposed regulations.

The issue of stale confidentiality claims would appear to be a minor one based on the limited number of rulings in which confidentiality is granted. A review of publicly-available rulings involving claims for confidential treatment reveals that such claims were made in fewer than 300 rulings out of more than 120,000 rulings, a relatively small number. Presumably, the number of these rulings that are the subject of disclosure requests is even smaller. The agency’s scarce resources would be better spent stepping aside and allowing a ruling requestor to defend the continuing confidentiality of its business or financial information. In this way, Customs avoids reviewing claims for renewal of confidential treatment, issuing extension decisions or adjudicating the inevitable disputes between the agency and the ruling requestor as to the continuing vitality of its confidentiality claims.

In addition, we would note that a three-year confidentiality period is too short for the kinds of information that Customs has treated as confidential. Proprietary product formulas and information on products with long development lead times are examples of the kind of information for which a longer confidentiality period would be appropriate.

The administrative burden on ruling requestors to track the sunset dates on grants of confidential treatment is substantial and unjustified under the circumstances.

We believe that the confidentiality period should be unlimited. However, if Customs implements a sunset period, we would support a period no shorter than ten years. In that event, the renewal of confidential treatment should be made automatic, upon certification from the ruling requestor that the information remains confidential. A ten-year period would be consistent with the Treasury Regulations that limiting the number of years during which Treasury gives notice of a FOIA request for confidential information. *See* 31 C.F.R. §1.6 (Treasury regulations limiting notice for request of business information to ten years after date of submission) (published at 65 Fed. Reg. 40503, 40510).

### **33. The Certification Requirement is Unnecessary**

The JIG recommends elimination of the certification requirement under § 177.41(b)(4) that a signed statement by an officer or authorized employee of an interested party company accompany any request for confidentiality. Because Customs is reviewing each initial request for sufficiency, it should be adequate that each request, submission or appeal contain a statement that the information in question is confidential commercial or financial information and is not already in the public domain.

Moreover, it is unnecessary that the certification be separately presented or signed by someone other than the party authorized to file the request, submission or appeal on behalf of the interested party. Companies often use the services of an attorney or customs broker to prepare ruling requests, submissions and appeals and such agents should be permitted to provide the necessary certification. *See* 55 C.F.R. §212.38(c)(4) (AID regulations requiring confidential designation to be accompanied by a certification by the submitter, its agent or designee that to the best of submitter's knowledge, information has not been disclosed to the public).

### **34. Specific Methods of Identifying Confidential Information Should be Approved**

We also recommend that section 177.41(b)(2) include bracketing as a specific example of an acceptable method of identifying the information for which confidentiality is requested.

### **35. Withdrawal of a Ruling Request Should Always be an Option**

In addition, if the parties fail to agree on the confidentiality of a supplemental submission, the applicant should be given the opportunity to withdraw the original ruling request, submission or appeal. Customs should not, as proposed under section 177.41(c)(2)(B), proceed to issue the ruling without considering the supplemental information. Proceeding without the further submission may result in an erroneous decision. Therefore, the submitter should be given the option of withdrawing the request if he believes there is a likelihood of an erroneous ruling absent the information.

**36. Customs Should Confirm That It Will Retain No Copies of Withdrawn Ruling Requests**

Section 177.41(c)(2)(i)(A) and (B) should be amended to clarify that when a case file is closed without action, Customs will not retain a copy of the submission and will destroy any copies it has made.

**37. The Time Period to Object to Disclosure Should be Lengthened**

Section 177.44(c) should grant 30 days to file an objection to disclosure. Allowing 10 days for the filing of such an objection is insufficient in light of the fact that five days are normally allotted for mail delivery. In addition, the specific date for disclosure under section 177.44(d) should be at least 15 days after the date appearing on the notice. Again, given the delay in mail delivery, the proposed ten days is unlikely to be sufficient for an interested party to obtain an injunction preventing the disclosure.

**38. Third Parties Should Have the Right to Defend Against Disclosure**

Finally, we urge Customs to modify the proposed regulations to grant rights to third-party owners of business confidential information. *See, e.g.*, 47 C.F.R. 0.459(i) (FCC regulations granting rights to third-party owners). Ruling requests may contain engineering, manufacturing or other proprietary information that relates to processes and designs developed by a company other than the party requesting the ruling. When the identity of such third-parties is evident from the submission, Customs should attempt to notify the third-party and provide the third-party with an opportunity to participate in the confidentiality determination, whether it is an initial confidentiality determination, a renewal, or a response to a request for disclosure under FOIA.