

## MONTHLY RATES OF RETURN (JANUARY 1994–APRIL 1999)

[In percent]

	1999	1998	1997	1996	1995	1994
January .....	-15	-5	-3	-7	10	-24
February .....	-2	3	5	8	18	9
March .....	4	17	-3	7	-3	4
April .....	7	-16	12	-3	-3	3
May .....		-5	9	-15	27	18
June .....		-11	29	2	13	-17
July .....		2	-13	39	-9	-6
August .....		15	2	14	-2	25
September .....		-8	15	-8	-1	1
October .....		10	-1	-2	12	-20
November .....		-3	-8	17	8	13
December .....		18	12	8	33	-7
Annual/YTD .....	-7	10	62	63	149	-13

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**DEPARTMENT OF THE TREASURY****Customs Service****19 CFR Parts 12, 113 and 141**

RIN 1515-AC45

**Assessment of Liquidated Damages Regarding Imported Merchandise That is Not Admissible Under the Food, Drug and Cosmetic Act**

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed rulemaking.

**SUMMARY:** This document proposes to amend the Customs Regulations to provide for the assessment of liquidated damages equal to the domestic value of the merchandise in the case of merchandise that is not admissible under the provisions of the Food, Drug and Cosmetic Act and that is not treated or otherwise disposed of in accordance with that Act. The document also proposes to amend various provisions of the Customs Regulations pertaining to customs bonds to provide for liquidated damages of three times the appraised value of the merchandise in the case of merchandise that is restricted or prohibited from entry. Finally, the document sets forth a proposed editorial correction within one of the sections of the Customs Regulations pertaining to Customs bonds. The substantive changes reflected in the proposed amendments are intended to enhance the effectiveness of the affected regulatory provisions by increasing and clarifying the potential liability for the payment of liquidated damages by principals and sureties on customs bonds.

**DATES:** Comments must be received on or before October 1, 1999.

**ADDRESSES:** Written comments (preferably in triplicate) may be addressed to the Regulations Branch, Office of Regulations and Rulings, U.S. Customs Service, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229. Comments submitted may be inspected at the Regulations Branch, Office of Regulations and Rulings, U.S. Customs Service, 1300 Pennsylvania Avenue, N.W., 3rd Floor, Washington, D.C.

**FOR FURTHER INFORMATION CONTACT:** Jeremy Baskin, Penalties Branch (202-927-2344).

**SUPPLEMENTARY INFORMATION:****Background**

Section 801 of the Food, Drug and Cosmetic Act, as amended (21 U.S.C. 381), and the regulations promulgated thereunder, provide the basic legal framework governing the importation of foodstuffs into the United States. Under 21 U.S.C. 381(a), the Secretary of Health and Human Services is authorized to refuse admission of, among other things, any article that is adulterated, misbranded or has been manufactured, processed or packed under insanitary conditions. The Secretary of the Treasury is required by section 381(a) to cause the destruction of any article refused admission unless the article is exported, under regulations prescribed by the Secretary of the Treasury, within 90 days of the date of notice of the refusal or within such additional time as may be permitted pursuant to those regulations.

Under 21 U.S.C. 381(b), pending decision as to the admission of an article being imported or offered for import, the Secretary of the Treasury may authorize delivery of such article to the owner or consignee upon the execution of a good and sufficient bond providing for the payment of liquidated

damages in the event of default as may be required pursuant to regulations of the Secretary of the Treasury. In addition, section 381(b) allows the owner or consignee in certain circumstances to take action to bring an imported article into compliance for admission purposes, under such bonding and other requirements as the Secretary of the Treasury may prescribe by regulation.

Based upon the above statutory authority, imported foodstuffs are conditionally released under bond while determinations as to admissibility are made; see § 12.3 of the Customs Regulations (19 CFR 12.3). Under § 141.113(c) of the Customs Regulations (19 CFR 141.113(c)), Customs may demand the return to Customs custody of most types of merchandise that fail to comply with the laws or regulations governing their admission into the United States (also referred to as the redelivery procedure). The condition of the basic importation and entry bond contained in § 113.62(d) of the Customs Regulations (19 CFR 113.62(d)) sets forth the obligation of the importer of record to timely redeliver released merchandise to Customs on demand and provides that a demand for redelivery will be made no later than 30 days after the date of release of the merchandise or 30 days after the end of the conditional release period, whichever is later. Failure to meet the obligation to redeliver contained in § 113.62(d) will create a potential liability for the payment of liquidated damages under the terms of the bond.

**Use of the Domestic Value Standard for Liquidated Damages**

In an April 1998 report to the Chairman of the Permanent Subcommittee on Investigations, Committee on Governmental Affairs, U.S. Senate, on the subject of food

safety, the United States General Accounting Office (GAO) determined that federal efforts to ensure the safety of imported foods were inconsistent and unreliable. Among its specific conclusions, the GAO report indicated that a weakness existed in the Customs bond structure in that liquidated damages arising from breach of obligations to redeliver merchandise for which admission was refused did not represent a deterrent to the importation of unsafe products.

In response to this study, Customs is proposing in this document to amend § 12.3 of the Customs Regulations (19 CFR 12.3) by designating the present text as paragraph (a) and adding a new paragraph (b) that would refer specifically to the assessment of liquidated damages with regard to any food, drug, device or cosmetic that is not redelivered into Customs custody or otherwise treated or disposed of within the time period prescribed by law after such merchandise has been found to be inadmissible pursuant to the provisions of the Food, Drug and Cosmetic Act. The proposed new paragraph (b) specifically provides for the assessment of liquidated damages in an amount equal to the domestic value of the merchandise at the time of entry as if it had not been refused admission or otherwise found to be noncompliant. The meaning of domestic value as set forth in § 162.43(a) of the Customs Regulations (19 CFR 162.43(a)) for purposes of seized merchandise (that is, "the price at which such or similar property is freely offered for sale at the time and place of appraisal, in the same quantity or quantities as seized, and in the ordinary course of trade") would be used as the basis for calculating the liquidated damages.

#### *Use of the "Three Times" Value Standard for Prohibited Merchandise*

The conditions of the basic importation and entry bond set forth in § 113.62 of the Customs Regulations (19 CFR 113.62), the conditions of the basic custodial bond set forth in § 113.63 of the Customs Regulations (19 CFR 113.63), the conditions of the international carrier bond set forth in § 113.64 of the Customs Regulations (19 CFR 113.64), the conditions of the commercial gauger and commercial laboratory bond set forth in § 113.67 of the Customs Regulations (19 CFR 113.67), and the conditions of the foreign trade zone operator bond set forth in § 113.73 of the Customs Regulations (19 CFR 113.73) prescribe, as a consequence of default, the assessment of liquidated damages equal to three times the appraised value of the

merchandise involved in the default if that merchandise is "restricted merchandise or alcoholic beverages." Similar language is also used in § 141.113(h) of the Customs Regulations (19 CFR 141.113(h)), which recites the liquidated damages that may be assessed for failure to comply with a demand for return of merchandise to Customs custody.

A question has arisen whether the higher "three times" standard for liquidated damages would be appropriate when the merchandise involved is prohibited from entry. While it remains Customs position that the regulatory provisions referred to above permit the assessment of three times the appraised value of the merchandise when the merchandise involved is prohibited, this document proposes to amend those regulatory provisions to explicitly provide for the assessment of three times the appraised value of the merchandise involved when that merchandise is restricted "or prohibited."

#### *Editorial Correction*

Finally, this document proposes to make an editorial correction to the first sentence of § 113.62(l)(1) of the Customs Regulations (19 CFR 113.62(l)(1)), which sets forth consequences of default. This sentence refers to "conditions (a), (g), or (i)" as exceptions to the general rules regarding the amount of liquidated damages that may be assessed (that is, the value of, or three times the value of, the merchandise involved in the default). However, the sentence in question also should exclude condition (k) of § 113.62, for which a different level of liquidated damages (that is, \$100 per thousand board feet of the imported lumber) is prescribed in paragraph (l)(5) of that section.

#### **Comments**

Before adopting these proposed regulatory amendments as a final rule, consideration will be given to any written comments timely submitted to Customs, including comments on the clarity of this proposed 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), § 1.4, Treasury Department Regulations (31 CFR 1.4), and § 103.11(b), Customs Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9:00 a.m. and 4:30 p.m. at the Regulations Branch, Office of Regulations and Rulings, U.S. Customs Service, 1300 Pennsylvania Avenue, N.W., 3rd Floor, Washington, D.C.

#### **Regulatory Flexibility Act And Executive Order 12866**

Pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), it is certified that the proposed amendments, if adopted, will not have a significant economic impact on a substantial number of small entities. The proposed regulatory amendments will not require any additional action on the part of the public but rather are intended to facilitate Customs enforcement efforts involving existing import requirements. Accordingly, the proposed amendments are not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604. Furthermore, this document does not meet the criteria for a "significant regulatory action" as specified in E.O. 12866.

#### **List of Subjects**

##### *19 CFR Part 12*

Bonds, Customs duties and inspection, Labeling, Marking, Prohibited merchandise, Reporting and recordkeeping requirements, Restricted merchandise, Seizure and forfeiture, Trade agreements.

##### *19 CFR Part 113*

Bonds, Customs duties and inspection, Imports, Reporting and recordkeeping requirements, Surety bonds.

##### *19 CFR Part 141*

Bonds, Customs duties and inspection, Entry procedures, Imports, Prohibited merchandise, Release of merchandise.

#### **Proposed Amendments to The Regulations**

For the reasons stated above, it is proposed to amend parts 12, 113 and 141 of the Customs Regulations (19 CFR parts 12, 113 and 141) as set forth below.

#### **PART 12—SPECIAL CLASSES OF MERCHANDISE**

1. The general authority citation for part 12 continues to read, and the specific authority citation for § 12.3 is revised to read, as follows:

**Authority:** 5 U.S.C. 301; 19 U.S.C. 66, 1202 (General Note 20, Harmonized Tariff Schedule of the United States (HTSUS), 1624.

\* \* \* \* \*

Section 12.3 also issued under 7 U.S.C. 135h, 21 U.S.C. 381;

\* \* \* \* \*

2. Section 12.3 is revised to read as follows:

**§ 12.3 Release under bond; liquidated damages.**

(a) *Release.* No food, drug, device, cosmetic, pesticide, hazardous substance or dangerous caustic or corrosive substance that is the subject of § 12.1 will be released except in accordance with the laws and regulations applicable to the merchandise. Where any merchandise that is the subject of § 12.1 is to be released under bond pursuant to regulations applicable to that merchandise, a bond on Customs Form 301, containing the bond conditions set forth in § 113.62 of this chapter, shall be required.

(b) *Liquidated damages.* Whenever liquidated damages arise with regard to any food, drug, device or cosmetic subject to § 12.1(a) for failure to redeliver merchandise into Customs custody or for failure to rectify any non-compliance with the applicable provisions of admission, including the failure to export or destroy the merchandise within the time period prescribed by law after the merchandise has been refused admission pursuant to the provisions of the Food, Drug, and Cosmetic Act, those liquidated damages will be assessed in an amount equal to the domestic value (see § 162.43(a) of this chapter) of the merchandise at the time of entry as if the merchandise were admissible and otherwise in compliance.

**PART 113—CUSTOMS BONDS**

1. The authority citation for Part 113 continues to read in part as follows:

**Authority:** 19 U.S.C. 66, 1623, 1624.

\* \* \* \* \*

**§ 113.62 [Amended]**

2. In § 113.62, paragraph (l)(1) is amended by removing the words “conditions (a), (g), or (i)” and adding, in their place, the words “conditions (a), (g), (i), or (k)” and by adding the words “or prohibited” after the word “restricted”.

**§ 113.63 [Amended]**

3. In § 113.63, paragraph (h)(1) is amended by adding the words “or prohibited” after the word “restricted”.

**§ 113.64 [Amended]**

4. In § 113.64, the second sentence of paragraph (b) is amended by adding the words “or prohibited” after the word “restricted”.

**§ 113.67 [Amended]**

5. In § 113.67, paragraphs (a)(2)(i) and (b)(2)(i) are amended by adding the words “or prohibited” after the word “restricted”.

**§ 113.73 [Amended]**

6. In § 113.73, the second sentence of paragraph (a)(2) is amended by adding the words “or prohibited” after the word “restricted”.

**PART 141—ENTRY OF MERCHANDISE**

1. The authority citation for part 141 continues to read in part as follows:

**Authority:** 19 U.S.C. 66, 1448, 1484, 1624.

\* \* \* \* \*

Section 141.113 also issued under 19 U.S.C. 1499, 1623.

**§ 141.113 [Amended]**

2. In § 141.113, the first sentence of paragraph (h) is amended by adding the words “or prohibited” after the word “restricted”.

**Raymond W. Kelly,**

*Commissioner of Customs.*

Approved: June 17, 1999.

**John P. Simpson,**

*Deputy Assistant Secretary of the Treasury.*

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**DEPARTMENT OF TRANSPORTATION****Coast Guard****33 CFR Part 100**

[CGD07 99-056]

RIN 2115-AE46

**Special Local Regulations: “Winston Offshore Cup, San Juan, Puerto Rico**

**AGENCY:** Coast Guard, DOT.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** Temporary special local regulations are being proposed for the Winston Offshore Cup, San Juan, Puerto Rico. The event will be held from 1 p.m. to 2:30 p.m. Atlantic Standard Time (AST) on October 10, 1999, in and north of San Juan Harbor, Puerto Rico. These regulations are needed to provide for the safety of life on navigable waters during the event.

**DATES:** Comments must be received on or before September 16, 1999.

**ADDRESSES:** Comments may be mailed to Commander, U.S. Coast Guard Greater Antilles Section (aton), P.O. Box S-3666, San Juan, Puerto Rico, 00902, or may be delivered to the Aids to Navigation Office at the Coast Guard Base in Old San Juan between 7:30 a.m. and 3:30 p.m. Monday through Friday, except federal holidays. The telephone number is (787) 729-5381.

**FOR FURTHER INFORMATION CONTACT:** Mr. John Reyes at (787) 729-5381.

**SUPPLEMENTARY INFORMATION:****Request for Comments**

The Coast Guard encourages interested persons to participate in this rulemaking by submitting written data, views, or arguments. Persons submitting comments should include their name and address, identify this rulemaking (CGD07-99-056) and the specific section of this proposal to which each comment applies, and give a reason for each comment.

The Coast Guard will consider all comments received during the comment period. It may change this proposal in the view of the comments. The Coast Guard plans no public hearing. Persons may request a public hearing by writing to the address under **ADDRESSES**. The request should include the reasons why a hearing would be beneficial. If the Coast Guard determines that the opportunity for oral presentations will aid this rulemaking, it will hold a public hearing at the time and place announced by a notice in the **Federal Register**.

**Background and Purpose**

These proposed regulations would create a regulated area in an north of San Juan Harbor that would prohibit entry to non-participating vessels. The participating race boats will be competing at high speeds with numerous spectator craft in the area, creating an extra or unusual hazard on the navigable waterways. These regulations are required to provide for the safety of life on navigable waters during the Winston Offshore Cup, San Juan, Puerto Rico.

**Regulatory Evaluation**

This proposed regulation is not a significant regulatory action under section 3(f) of Executive Order 12866 and does not require an assessment of potential costs and benefits under section 6(a)(f) of that order. The Office of Management and Budget has excepted it from review under that order. It is not significant under the regulatory policies and procedures of the Department of Transportation (DOT) (44FR 11040; February 26, 1979). The Coast Guard expects the economic impact of this proposal to be so minimal that a full regulatory evaluation under paragraph 10e of the regulated policies and procedures of DOT is unnecessary. The regulated area will only be in effect for three and one half hours in the vicinity of San Juan Harbor, Puerto Rico.

**Small Entities**

Under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.) the Coast Guard