

DEPARTMENT OF HOMELAND SECURITY

Bureau of Customs and Border Protection

[USCBP-2006-0021]

Standards for Tariff Classification of Unisex Footwear

AGENCY: Customs and Border Protection; Department of Homeland Security.

ACTION: Proposed interpretation; solicitation of comments.

SUMMARY: This document proposes new criteria to be used by the Bureau of Customs and Border Protection ("CBP") to determine whether footwear should be considered to be "commonly worn by both sexes" (unisex) for tariff classification purposes under the Harmonized Tariff Schedule of the United States. The rates of duty applicable to footwear "For other persons" (i.e. "unisex") are about 1.5 percent higher than the rates of duty applicable to footwear "For men, youths and boys". CBP is seeking comments from the public on its proposed criteria prior to adoption of a final interpretation.

DATES: Comments must be received on or before September 22, 2006.

FOR FURTHER INFORMATION CONTACT: Brian Barulich, Tariff Classification and Marking Branch, Office of Regulations and Rulings, (202) 572-8883.

ADDRESSES: You may submit comments, identified by *docket number*, by one of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments via docket number USCBP-2006-0021.

- Mail: Trade and Commercial Regulations Branch, Office of Regulations and Rulings, Bureau of Customs and Border Protection, 1300 Pennsylvania Avenue, NW., (Mint Annex), Washington, DC 20229.

Instructions: All submissions received must include the agency name and docket number for this document. All comments received will be posted without change to <http://www.regulations.gov>, including any personal information provided. For detailed instructions on submitting comments and additional information, see the "Public Participation" heading of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: For access to the docket to read background documents or comments received go to <http://www.regulations.gov>. Submitted comments may also be inspected during

regular business days between the hours of 9 a.m. and 4:30 p.m. at the Office of Regulations and Rulings, Bureau of Customs and Border Protection, 799 9th Street, NW., 5th Floor, Washington, DC. Arrangements to inspect submitted comments should be made in advance by calling Mr. Joseph Clark at (202) 572-8768.

SUPPLEMENTARY INFORMATION:

Public Participation

Interested persons are invited to submit written data, views, or arguments on all aspects of the proposed interpretation. CBP also invites comments that relate to the economic, environmental, or federalism effects that might result from this proposed interpretation. Comments that will provide the most assistance to CBP in developing these procedures will reference a specific portion of the proposed interpretation, explain the reason for any recommended change, and include data, information, or authority that support such recommended change.

Background

This document sets forth CBP's proposed standards for classification of certain footwear as "unisex". On April 15, 2002, CBP's predecessor, the U.S. Customs Service (hereinafter "CBP", for clarity and consistency), published in the **Federal Register** (67 FR 18303) a general notice to solicit comments concerning alternatives to CBP's treatment of footwear deemed to be "unisex." Four comments were received in response to that notice. In this document, CBP addresses the concerns and suggestions raised in those comments and proposes standards for determining whether footwear should be classified as unisex footwear. This document solicits further comment on the proposed interpretation before a final interpretation is published.

Current Law and Policy

Chapter 64 of the Harmonized Tariff Schedule of the United States (HTSUS) covers footwear, gaiters and the like, and parts of such articles. Disparities in the duty rates applicable to some provisions under heading 6403 in Chapter 64 are based on the gender of the user. Additional U.S. Note 1(b) and Statistical Note 1(b) to Chapter 64, HTSUS, provide that footwear "for men, youths and boys" covers footwear of certain men's and youths' sizes, but does not cover footwear commonly worn by both sexes (i.e., unisex footwear). Statistical Note 1(c) to Chapter 64, HTSUS, provides that footwear "for women" covers footwear

of certain women's sizes, whether for females or of types commonly worn by both sexes (i.e., unisex). Elsewhere in the HTSUS (in subheadings 6403.99.75 and 6403.99.90, for example), footwear is classified as "for other persons," a definition that also includes unisex footwear. The determination of whether footwear is classifiable as "for men, youths and boys" rather than "for women" or "for other persons," therefore, often rests on whether the footwear is truly for men, youths and boys or is, in fact, unisex. The rates of duty applicable to footwear "For other persons" (i.e. "unisex") are about 1.5 percent higher than the rates applicable to footwear "For men, youths and boys". It is noted that quota/visa requirements remain inapplicable to footwear.

Many types of footwear may be, and in fact are, worn by both sexes. Moreover, many types of shoes in male sizes feature no physical characteristics that distinguish the footwear as being exclusively for males. Current CBP standards for making the determination of whether or not footwear is unisex have been developed and applied by CBP on an ad hoc, case-by-case basis. This approach to the "unisex" footwear issue, while effective in individual cases, has provided only limited guidance to the importing community and to CBP officers with respect to other prospective or current import transactions that present different factual patterns involving that issue.

CBP's current approach to unisex determinations is as follows: CBP considers certain types or categories of footwear to at least be susceptible to unisex treatment (that is, to be classifiable as footwear "for other persons" despite claims that the footwear is designed and intended solely "for men, youths and boys"). These types of footwear include hikers, sandals, work boots, cowboy boots, combat boots, motorcycle boots, "athleisure" shoes, boat shoes, and various types within the class described as athletic footwear (e.g., tennis shoes and training shoes). CBP generally considers that a type of footwear is "commonly worn by both sexes" if the number of styles claimed to be for males in an importer's line, when compared to the number of styles in the line for females, renders it likely that females will purchase and wear at least 5 percent of the styles claimed to be for males. Once it is determined that an imported line of footwear potentially susceptible to unisex treatment is in fact "commonly worn by both sexes," CBP applies unisex treatment to that

footwear line only in sizes up to and including American men's size 8.

However, if a shoe in an imported line claimed to be for males is of a type of footwear commonly worn by both sexes, CBP does not accord unisex treatment to the imported line if a "comparable line" of styles is available to females. To be considered a "comparable line," CBP requires an equal number of styles of a particular type of footwear (*i.e.*, a one-to-one ratio, female-to-male is required). In addition, to be considered a "comparable line," female styles must be substantially similar to the styles for males in general appearance, value, marketing, activity for which designed, and component material (including percentage) breakdowns.

For purposes of establishing the existence of a "comparable line" for females, CBP confines its determination to the imported footwear at issue. CBP may take notice of additional styles made available by the importer that are not included in a particular entry. CBP does not, however, consider the availability of comparable styles for females in the U.S. market as a whole. Finally, CBP does not consider the fact that a certain shoe is not marketed to women to be evidence that the shoe is not "commonly worn by both sexes."

Request From Public to Provide Enhanced Guidance

In a letter dated September 17, 1999, the importing public, represented by the Footwear Distributors and Retailers of America ("FDRA"), requested that CBP take steps to provide enhanced guidance in determinations concerning "unisex" issues. The FDRA requested that CBP (1) set forth criteria for determining whether footwear claimed to be "for men, youths and boys" is "commonly worn by both sexes" and therefore should be classified as footwear "for other persons" and (2) ensure the uniform interpretation and application of those criteria by Customs field offices.

Preliminary Notice

After receiving the FDRA letter, CBP published a document in the **Federal Register** (67 FR 18303) on April 15, 2002. In that document, CBP set forth a more in depth analysis of its current procedures, and also set forth FDRA's proposed criteria. CBP solicited comments on the appropriateness of the specific standards suggested by FDRA and on the extent to which any standards followed by CBP in the past should be retained. Suggestions for alternative appropriate standards were also invited.

Summary of Comments

All four of the commenters who responded to the general notice provided a range of specific comments on various aspects of the "unisex" footwear issue. These comments are discussed below.

Comment: All of the commenters take issue with the fact that CBP confines its "unisex" footwear determinations in every case to the footwear of a particular importer's line. They argue that CBP should consider the availability of comparable styles for females in the U.S. retail market to constitute, or substitute for, any part of the importer's "comparable line" for females. The commenters note that this narrow focus leads to inaccurate findings that an importer's footwear for males is "commonly worn by both sexes" (*i.e.*, unisex). The commenters point out that the precise question raised by Additional U.S. Note 1(b) to chapter 64, is whether footwear is "commonly worn by both sexes." They maintain that CBP improperly applies this statutory standard of "use" through presumptions, essentially basing factual determinations on: (1) The size and type of shoe; and (2) the number of various styles (male and/or female) included in an importer's line of merchandise.

Two of the commenters concede that in most cases, confining the inquiry to the importer's line of footwear provides a reliable estimate as to whether footwear for males is commonly worn by both sexes. This is particularly true when the importer is a "branded distributor" of the footwear it imports, as opposed to a "non-branded importer," who provides footwear to a retailer under the retailer's brand or a generic brand. However, the commenters assert that, in the case of the non-branded importer, confining the "unisex" determination to the importer's line of footwear not only provides an unreliable estimate as to whether footwear for males is commonly worn by both sexes, but also results in the misclassification of footwear.

CBP Response: CBP agrees and, in an effort to bring more consistency to this area, is proposing to consider evidence from an importer of men's footwear demonstrating that it imports the same shoe for women and girls or that the same shoe for women and girls is imported by a separate importer and is available in the U.S. marketplace.

Comment: All of the commenters stress that, in certain cases, importers must be allowed the opportunity to present evidence to establish that their footwear for males is not commonly

worn by both sexes. One commenter cites to Treasury Decision (T.D.) 93-88, dated October 25, 1993, as an example of CBP's use of presumption in applying the above statutory standard. In T.D. 93-88, certain footwear definitions were provided for use as guidelines by the importing community. Under the term "unisex," it stated, in part, that "[u]nless there is evidence to the contrary, assume all athletic shoes for youths (approximately sizes 11.5 to 2) and men, sizes 8 and smaller, are unisex except shoes for football, boxing or wrestling." In addition, T.D. 93-88 indicates that CBP will not assume that certain shoes are unisex if there is "evidence to the contrary." The commenter complains that CBP provides very little guidance to the importing community as to the type or amount of evidence needed to refute unreasonable presumptions.

CBP Response: CBP agrees and is proposing to consider evidence of marketing provided by importers and others, and the marking of gender and size. By considering this evidence, CBP hopes to limit determinations that are based solely on presumption as to how footwear will be used.

Comment: One commenter notes that CBP has previously ascertained the availability of women's styles and sizes in the retail market, to determine whether shoes claimed to be "for men, youths and boys" were classifiable as footwear "for other persons." The commenter asserts that in Headquarters Ruling Letter (HQ) 955960, issued August 19, 1994, CBP determined that certain basketball shoes were classified as unisex because "retailers, as well as administrative staff members of a major college women's basketball team, stated that women will buy men's basketball shoes when a suitable selection is not available in the women's department." The commenter opines that such an approach, based on available evidence, is sensible and correct. The commenter further notes that in HQ 952097 (issued September 15, 1992), CBP concluded that certain soccer shoes were classified as unisex based on informal interviews with retailers.

CBP Response: As indicated above, CBP agrees with the commenter and is proposing to consider evidence of marketing provided by importers and others, as well as the marking of gender and size.

Comment: Another commenter suggests that, regardless of the type of evidence CBP decides to require or accept, the agency should not have to perform its own market research, as it apparently did before issuing HQ 962742, dated February 28, 2001. This

ruling concerned the extent of use by men of certain types of western/cowboy hats. To determine such use, CBP viewed numerous magazines, contacted several equine sports associations that regulate equine sports events for western style riding, and visited eight western stores. The commenter asserts that the judicial decisions and statutory standards pertinent to unisex footwear do not require the amount of extraneous evidence and number of subjective determinations inherent in standards utilized by CBP and in those initially proposed by the FDRA. The commenter maintains that reliance on the general appearance of footwear is extremely subjective, that shoes of identical construction often are not sold at similar prices and that susceptibility to use, likelihood of use, and availability of "comparable" styles in a retail market of ever-changing styles, tastes, etc., rarely shed light on the question of what is "commonly worn by both sexes."

However, the commenter also notes that in *Mast Industries, Inc. v. United States*, 9 C.I.T. 549 (1985), aff'd 786 F.2d 1144 (Fed. Cir. 1986), the court emphasized the primary importance of the characteristics of the imported merchandise, observing that "[t]he former Court of Customs and Patent Appeals held that the merchandise itself may be strong evidence of use."

CBP Response: CBP agrees with the court in *Mast*. Again, as indicated above, CBP is proposing to consider evidence of marketing provided by importers and others, and marking of gender and size in order to limit determinations that are based solely on presumption. CBP proposes to initially rely on evidence provided by the importer and others. However, CBP does not propose to limit its ability to perform market research in those cases where it finds such research necessary.

Comment: One commenter, noting the judicial guidance of *Mast* discussed above, proposes that CBP base its unisex determinations on examination of: (1) The imported merchandise itself; and (2) the documents presented at the time the entry summary, or its equivalent, is filed. The commenter asserts that men's/boys' shoes are usually made on men's/boys' lasts (i.e., a block or form shaped like a human foot and used in making shoes) and are usually described as men's/boys' shoes on purchase orders, invoices and footwear detail sheets. The commenter suggests that, in order to eliminate any gender ambiguity, shoes for males could be labeled or marked to identify the gender for which the shoes have been designed, and to whom they will be marketed. CBP could require that such labeling or marking be visible

in or on the shoe, the shoebox, or both. As an example, the commenter proposes requiring that a sewn-in label or hang tag state "boys size 6" instead of only "size 6," in order to clarify that the shoe is a boy's shoe and that the importer intends that it be sold for use by boys.

The commenter stresses that footwear described as men's/boys' shoes on the import documentation and marked as such, should be presumed to be marketed for sale to men and boys and should not be considered unisex. The commenter also states that shoes designed for males are usually merchandised separately from shoes for females, and even if sold in the same department of the same retail store, the shoes for each gender are usually segregated in separate areas, shelves or racks. The commenter contends that this aspect of marketing is a reflection of shoe design, because shoes for males are intended to be sold to males.

The same commenter recommends the following "bright-line test" to establish what is commonly worn by both sexes. The following criteria should be met in order for CBP to presume that imported footwear is unisex. The footwear should be: (a) American men's sizes 8 or under; (b) a type that is susceptible to use by both sexes; (c) not described in import documents as footwear for men, youths or boys; and (d) not made on lasts designed for American males; or not marked, labeled, or sold as footwear for men, youths or boys by sizing or otherwise. The commenter also maintains, however, that an importer should be allowed to rebut CBP's presumption that the footwear is unisex, by establishing the existence of at least one comparable female shoe style, in either the importer's line or in the U.S. market, for every five male shoe styles, with comparability based solely on design and construction of the footwear. A failure to rebut the unisex presumption would call into effect the criterion identified by the commenter as: "(e) limited availability of comparable female styles."

CBP Response: CBP agrees in part and is proposing to base "unisex" determinations on examination of the imported merchandise and to accept evidence in the form of marketing material, retail advertisements, or other convincing documentation showing that the same shoe is available for "other persons" in the U.S. marketplace. CBP is proposing to generally accept presentation of such evidence as satisfactorily demonstrating that the instant footwear is exclusively for "men, youths and boys."

CBP is proposing to generally consider the marking of gender and size, to indicate men's size, youths' size, or boys' size, as acceptable evidence that a shoe is not "unisex."

CBP does not agree that import documents describing footwear as being for men, youths or boys should constitute sufficient evidence that the footwear is not commonly worn by both sexes.

Lastly, the commenter offered no evidence to support the position that footwear made on male lasts is not commonly worn by both sexes. In the absence of such evidence, CBP declines to adopt that position.

Comment: With respect to factors used to determine that a female style is comparable to a male style, one commenter (as noted immediately above) asserts that comparability should be based only on a shoe's design and construction. Two commenters maintain that comparability should be based primarily on a shoe's retail price, but also on the features and the materials that comprise its upper and outer sole. One of these two commenters also considers the type of shoe to be a factor of comparability.

CBP Response: CBP agrees and is proposing to limit the "unisex" determination to the characteristics of the shoe under consideration, in most cases making comparisons and presumptions unnecessary.

Comment: Concerning the ratio of female-to-male styles that could establish the existence of a "comparable line" for females, three commenters maintain that the existence of at least one comparable female style (in either the importer's line, or in the U.S. market) for every five male styles (a one-to-five ratio) should be deemed sufficient. These same commenters also state that a one-to-three ratio (female-to-male styles), as an alternative standard, could be considered sufficient.

CBP Response: CBP disagrees that either a one-to-five or one-to-three ratio, female-to-male, is sufficient in the absence of the means and opportunity to examine and compare all styles of an importer's line. CBP is proposing, in the absence of marking as to gender, to require evidence that the same style of shoe for females is available in either the importer's line or the U.S. marketplace. CBP is not proposing to accept comparable styles as alternatives for the same style.

Comment: With regard to any set percentage of use by (or sale to) females, of footwear claimed to be for males, indicative of footwear that is commonly worn by both sexes, one commenter suggests that 25 percent is an

appropriate standard. The commenter contends that the 5 percent (one sale in twenty) standard utilized by CBP (subsequent to the court's finding in *De Vahni International, Inc. v. United States*, 66 Cust. Ct. 239, C.D. 4196 (1971), that "[s]uch infrequent usage [characterized by one sale in a hundred] could hardly be considered common") is appropriate only as an indicator of *de minimis* usage.

CBP Response: CBP agrees that the 5 percent standard does not provide an accurate indication that footwear is commonly worn by both sexes and is proposing to adopt a 25 percent standard.

Comment: Concerning whether CBP should attempt to clarify, refine, and/or redefine terms such as "category," "type," "style," "line," etc., as they relate to footwear, one commenter recommends that all such terms be left alone. The commenter notes that these terms have been expressed by CBP in appropriately broad terms, that fashion drives most aspects of the footwear industry, and that the market concepts are so fluid that any narrow definitions would soon be obsolete.

CBP Response: CBP agrees and is not proposing, at this time, to attempt to clarify, refine, or redefine footwear-related terms such as those stated above.

Comment: With regard to whether unisex standards should be limited only to provisions under heading 6403, HTSUS, one commenter opines that the standards should indeed be limited to that heading. The commenter notes that in the other headings covering footwear, gender is addressed only at the statistical level (*i.e.*, the ten digit level), and stated as "For men," "For women," or "Other," in contrast to eight digit subheadings under heading 6403, which reference footwear "For men, youths or boys" and "For other persons." The commenter also notes that in January 2000, many references to gender at the statistical level in heading 6403 (*e.g.*, "misses," "children," and "infants") were eliminated.

CBP Response: CBP agrees and is proposing that unisex standards should be limited only to classifications within heading 6403, HTSUS.

CBP's Proposed Criteria

Based upon the comments received and for the reasons set forth above, CBP is proposing the following criteria for its determination of whether footwear should be deemed to be "unisex" under heading 6403, HTSUS:

(1) Footwear in sizes for men, youths or boys will not be considered to be "commonly worn by both sexes" (*i.e.*, "unisex") if marked "MEN'S SIZE ____",

"YOUTHS' SIZE ____", or "BOYS' SIZE ____".

(2) Even if not marked as described in criterion 1, footwear in sizes for men, youths or boys will not be considered to be "commonly worn by both sexes" (*i.e.*, "unisex") if:

a. The importer imports the same shoe for women and girls, or;

b. Evidence is provided in the form of marketing material, retail advertisements, or other convincing documentation demonstrating that the same shoe for women and girls is available in the U.S. marketplace.

(3) A style of footwear in sizes for males will not be presumed to be "commonly worn by both sexes" (*i.e.*, "unisex") unless evidence of marketing establishes that at least one pair in four (25 percent) of that style is sold to and/or worn by females.

(4) A determination that footwear is "commonly worn by both sexes" will trigger "unisex" classification treatment that is applicable to all sizes.

Dated: June 23, 2006.

Deborah J. Spero,

Acting Commissioner, Customs and Border Protection.

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DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR-5043-N-06]

Notice of Proposed Information Collection for Public Comment: Survey of Manufactured (Mobile) Home Placements

AGENCY: Office of Policy Development and Research, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below will be submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

DATES: *Comments Due Date:* September 22, 2006.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Reports Liaison Officer, Office of Policy Development and Research, Department of Housing and Urban Development, 451 7th Street, SW., Room 8226, Washington, DC 20410.

FOR FURTHER INFORMATION CONTACT:

Robert A. Knight, Department of Housing and Urban Development, 451 7th Street, SW., Washington, DC 20410; telephone (202) 708-1060, Ext. 5893 (this is not a toll-free number), (or via the Internet at Robert_A.Knight@hud.gov) or Michael Davis, U.S. Census Bureau, Manufacturing and Construction Division, Room 2126, FOB 4, Washington, DC 20233-6900, at (301) 763-1605 (or via the Internet at Michael.Davis@census.gov).

SUPPLEMENTARY INFORMATION: The Department will submit the proposed information collection to OMB for review, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as amended).

This Notice is soliciting comments from members of the public and affected agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology that will reduce respondent burden (*e.g.*, permitting electronic submission of responses.) This Notice is requesting a revision of a currently approved collection.

This Notice also lists the following information:

Title of Proposal: Survey of Manufactured (Mobile) Home Placements.

OMB Control Number: 2528-0029.

Description of the need for the information and proposed use: The Survey of Manufactured (Mobile) Home Placements collects data on the characteristics of newly manufactured homes placed for residential use including number, sales price, location, and other selected characteristics. HUD uses the statistics to respond to a Congressional mandate in the Housing and Community Development Act of 1980, 42 U.S.C. 5424 note, which requires HUD to collect and report manufactured home sales and price information for the nation, census regions, states, and selected metropolitan areas and to monitor whether new manufactured homes are