

Dated: May 1, 2009.

J. G. Lantz,

Director of Commercial Regulations and Standards.

[FR Doc. E9-10750 Filed 5-7-09; 8:45 am]

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DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

Notice of Issuance of Final Determination Concerning USB Flash Devices

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of final determination.

SUMMARY: This document provides notice that U.S. Customs and Border Protection ("CBP") has issued a final determination concerning the country of origin of certain USB flash devices ("UFDs") which may be offered to the United States Government under an undesignated government procurement contract. Based upon the facts presented, in the final determination CBP concluded that either Israel or the United States is the country of origin of the UFDs for purposes of U.S. Government procurement.

DATES: The final determination was issued on May 5, 2009. A copy of the final determination is attached. Any party-at-interest, as defined in 19 CFR 177.22(d), may seek judicial review of this final determination within June 8, 2009.

FOR FURTHER INFORMATION CONTACT: Gerry O'Brien, Valuation and Special Programs Branch, Regulations and Rulings, Office of International Trade (202-325-0044).

SUPPLEMENTARY INFORMATION: Notice is hereby given that on May 5, 2009, pursuant to Subpart B of Part 177, Customs Regulations (19 CFR Part 177, Subpart B), CBP issued a final determination concerning the country of origin of certain UFDs which may be offered to the United States Government under an undesignated government procurement contract. This final determination, in HQ H034843, was issued at the request of SanDisk Corporation under procedures set forth at 19 CFR Part 177, Subpart B, which implements Title III of the Trade Agreements Act of 1979, as amended (19 U.S.C. 2511-18). In the final determination, CBP concluded that, based upon the facts presented, certain goods are substantially transformed in either Israel or the United States, such

that either Israel or the United States is the country of origin of the finished article for purposes of U.S. Government procurement.

Section 177.29, Customs Regulations (19 CFR 177.29), provides that notice of final determinations shall be published in the **Federal Register** within 60 days of the date the final determination is issued. Section 177.30, CBP Regulations (19 CFR 177.30), provides that any party-at-interest, as defined in 19 CFR 177.22(d), may seek judicial review of a final determination within 30 days of publication of such determination in the **Federal Register**.

Dated: May 5, 2009.

Sandra L. Bell,

Executive Director, Office of Regulations and Rulings, Office of International Trade.

Attachment

HQ H034843

May 5, 2009

MAR-2-05 OT:RR:CTF:VS H034843

GOB

CATEGORY: Marking

Kevin P. Connelly, Esq., Seyfarth Shaw LLP, 975 F Street, N.W., Washington, D.C. 20004

RE: U.S. Government Procurement; Title III, Trade Agreements Act of 1979 (19 U.S.C. § 2511); Subpart B, Part 177, CBP Regulations; Country of Origin of USB Flash Drive

Dear Mr. Connelly: This is in response to your letter of July 17, 2008 requesting a final determination on behalf of the SanDisk Corporation ("SanDisk"), pursuant to subpart B of Part 177, Customs and Border Protection ("CBP") Regulations (19 CFR 177.21 *et seq.*). Pursuant to our request, you provided additional information on March 10, 2009.

Under the pertinent regulations, which implement Title III of the Trade Agreements Act of 1979 ("TAA"), as amended (19 U.S.C. 2511 *et seq.*), CBP issues country of origin advisory rulings and final determinations as to whether an article is or would be a product of a designated country or instrumentality for the purpose of granting waivers of certain "Buy American" restrictions in U.S. law or practice for products offered for sale to the U.S. Government. You state that SanDisk "either manufactures or imports the merchandise which is the subject of this request."

This final determination concerns the country of origin of certain encrypted USB flash devices. We note that SanDisk is a party-at-interest within the meaning of 19 CFR § 177.22(d)(1) and is entitled to request this final determination.

You also request a determination concerning the country-of-origin marking of the subject goods.

FACTS:

You describe the pertinent facts as follows. A USB flash device ("UFD") is a portable device that stores data in a non-volatile memory. The data is accessed from a host PC when the UFD is connected to its USB port. Flash memory is a form of block-oriented computer memory that can be electronically erased and reprogrammed. Flash memory is based on one of two current principles of operation: NOR flash and NAND flash. NAND-based flash, which is more suitable for mass-data storage devices, has faster erase and write times, but its interface allows only sequential access to data.

Four different items are involved here: Cruzer Professional (Stock Keeping Unit ("SKU") SDCZ21); Cruzer Enterprise (SKU SDCZ22 and SDCZ35); Cruzer Enterprise FIPS Edition (SKU SDCZ32); and Cruzer Identity (SKU SDCZ31). The subject SanDisk UFDs are intended for organizations which require protection of their data when a UFD is lost or stolen. Cruzer Identity can also be used for managing a user digital identity to authenticate the user to different software systems.

You state that the key hardware component of the UFD is the flash memory chip, which stores the data. A flash chip is created in a generic manufacturing process for semiconductor device fabrication used to create chips and integrated circuits present in electronic devices. The process is a sequence of photographic and chemical processing steps during which electronic circuits are stacked on a wafer made of semiconducting material. Silicon is the most commonly used semiconductor material. The entire manufacturing process, which is performed in highly specialized facilities, takes six to eight weeks. The flash memory chips are manufactured in Japan and are the most expensive hardware component of the UFD.

You state that the UFDs consist of the following components: (1) NAND-based flash memory chips for mass data storage; (2) an application specific integrated circuit ("ASIC"), which acts as the mass storage controller and provides a linear interface to the block-oriented flash memory; (3) a USB connector, which provides the interface with the host computer; (4) a crystal oscillator, which produces the device's clock signal and controls the data output; (5) LEDs, which indicate data transfer in progress; (6) capacitors and

resistors; (7) electrically erasable programmable read-only memory ("EEPROM") to store secret encryption keys in some of the UFD models; (8) a printed circuit board, which provides the mounting frame and circuitry for the electronic components listed above; and (9) a robust plastic or metal case. Cruiser Identity also contains a USB hub and smartcard.

You further state that the subject UFDs consist of firmware and application software. The firmware is a piece of binary machine code embedded or downloaded to the device using SanDisk's proprietary mass production machines ("MPUs") after the hardware is manufactured. The firmware is essential to the use of the UFD. The firmware is responsible for the following: transferring data into and out of the flash memory chips; determining the storage algorithm; transferring data to and from the host PC through the USB port by implementing the USB different protocols; controlling the hardware encryption core in decisions such as determining which encryption key to use; and establishing secure encrypted communication sessions with a related software agent running on the host PC. During the manufacturing step of embedding the firmware, the production system is responsible for provisioning randomly generated encryption keys that are stored in the controller internal memory cache. The encryption keys are also crucial for the operation of the UFD.

The application software is responsible for functions such as login and user interface. Without it, the UFD does not exhibit its security features and behaves like any standard off the shelf USB flash drive for storing files in a non-protected manner. Without the application software, one cannot access information already stored in the protected encrypted form. The application software code is stored in the UFD during the manufacturing process in a read only storage area.

The current versions of the firmware and the application software were developed at SanDisk's site in Israel. SanDisk estimates that at least 70 man year hours were invested in the development of the firmware and the application software and that at least 20 more man years are invested each year in its continuing development. The process of software development (firmware and application software) is composed of requirements analysis, design, code writing, quality assurance testing, bug fixing and maintenance and support. The entire development process of the firmware and application software is performed in Israel.

The UFDs are intended for organizations that require protection of their data when a UFD is lost or stolen. They add security by encrypting the data secured on them via a cryptographic hardware core. The UFD user must provide a login password to access the data. Cruiser Identity may be used for managing a user digital identity to authenticate the user to different software systems.

The UFDs are manufactured in a manufacturing process, which requires approximately five minutes for each device. You state that SanDisk will perform the first three manufacturing operations in China and that it will perform the final three manufacturing operations in either Israel or the United States:

1. Initial Quality Control. SanDisk personnel assemble and visually inspect the components.

2. Component Mounting. SanDisk prints a bare circuit board with circuits and populates it with various electronic components through a solder paste surface mounting and reflow process (Surface Mounted Technology or "SMT") to form a printed circuit board assembly ("PCBA"). Assembly of the PCBA is performed in a standard SMT process. The PCBA is visually inspected and tested to verify that all components have been properly mounted and the connections and power circuitry are functioning.

3. Device Housing. The PCBA is joined with a metal USB connector and sealed in a plastic case to form the device through an ultrasonic housing process. The device then undergoes quality control to verify that it has not been harmed in the ultrasonic housing process.

4. Software Installation and Customization. The proprietary software (firmware and application software) is downloaded and the device is tested for functionality. Additional software, such as security software, can be added at this time or later. During this operation, device enumeration and identification to the operating system, device configuration, and content loading occur. Depending on the customer's unique requirements, some or all of the following configurable parameters are accomplished during this step: device enumeration and identification to the operating system; device configuration; and content. The process is slightly different for Cruiser Identity, as it contains the controllers, one for storage and one for the smartcode reader. Cruiser Identity provides capability (two-factor authentication (password and certificate)) which the Cruiser Professional, Cruiser Enterprise, and

Cruzer Enterprise FIPS Edition do not have.

5. System Diagnostics and Test. The device undergoes a systems test consisting of many tests that are performed with "Read Only" diagnostics software and test vectors to verify product definition and functionality.

6. Packaging. After the firmware and application software are downloaded and the system is tested, the completed products are packaged and prepared for shipment.

The components used by SanDisk to manufacture Cruiser Professional and Cruiser Enterprise are a printed circuit board, USB connector, LED, crystal oscillator, flash memory chip, ASIC controller chip, capacitors and resistors, and plastic parts for the case. Cruiser Enterprise FIPS Edition consists of the same components with the addition of an EEPROM and epoxy glue, coating part of the PCBA. The components used to manufacture Cruiser Identity consist of a printed circuit board, USB connector, two LEDs, crystal oscillator, flash memory chips, two ASIC controller chips, USB hub, EEPROM, smartcard, capacitors and resistors, and plastic parts used to make the case.

As stated above, the flash memory chip is manufactured in Japan. The other hardware components are manufactured in Korea, Taiwan, or China.

You state that the addition of the security capabilities of the UFDs, through the firmware and application software installation and customization process, add significant capability and value to the UFDs. The software installation and customization currently drive the price of the UFDs, as the price of a UFD with security is currently somewhere between seven to nine times the price of a UFD without security.

ISSUES:

What is the country of origin of the UFDs for the purpose of U.S. Government procurement?

What is the country of origin of the UFDs for the purpose of marking?

LAW AND ANALYSIS:

Pursuant to Subpart B of Part 177, 19 CFR 177.21 et seq., which implements Title III of the Trade Agreements Act of 1979, as amended (19 U.S.C. 2511 et seq.), CBP issues country of origin advisory rulings and final determinations as to whether an article is or would be a product of a designated country or instrumentality for the purposes of granting waivers of certain "Buy American" restrictions in U.S. law

or practice for products offered for sale to the U.S. Government.

Under the rule of origin set forth under 19 U.S.C. 2518(4)(B):

An article is a product of a country or instrumentality only if (i) it is wholly the growth, product, or manufacture of that country or instrumentality, or (ii) in the case of an article which consists in whole or in part of materials from another country or instrumentality, it has been substantially transformed into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was so transformed.

See also, 19 CFR § 177.22(a).

In determining whether the combining of parts or materials constitutes a substantial transformation, the determinative issue is the extent of operations performed and whether the parts lose their identity and become an integral part of the new article. *Belcrest Linens v. United States*, 573 F. Supp. 1149 (Ct. Int'l Trade 1983), *aff'd*, 741 F.2d 1368 (Fed. Cir. 1984). Assembly operations that are minimal or simple, as opposed to complex or meaningful, will generally not result in a substantial transformation. See, C.S.D. 80-111, C.S.D. 85-25, C.S.D. 89-110, C.S.D. 89-118, C.S.D. 90-51, and C.S.D. 90-97. In C.S.D. 85-25, 19 Cust. Bull. 844 (1985), CBP held that for purposes of the Generalized System of Preferences ("GSP"), the assembly of a large number of fabricated components onto a printed circuit board in a process involving a considerable amount of time and skill resulted in a substantial transformation. In that case, in excess of 50 discrete fabricated components (such as resistors, capacitors, diodes, integrated circuits, sockets, and connectors) were assembled. Whether an operation is complex and meaningful depends on the nature of the operation, including the number of components assembled, number of different operations, time, skill level required, attention to detail, quality control, the value added to the article, and the overall employment generated by the manufacturing process.

The courts and CBP have also considered the essential character of the imported article in making these determinations. See, for example, *Uniroyal, Inc. v. United States*, 542 F. Supp. 1026, 3 CIT 220, 224-225 (1982) (where it was determined that imported uppers were the essence of a completed shoe) and *National Juice Products Association, et al v. United States*, 628 F. Supp. 978, 10 CIT 48, 61 (1986) (where the court addressed each of the factors (name, character, and use) in finding that no substantial transformation occurred in the

production of retail juice products from manufacturing concentrate).

In order to determine whether a substantial transformation occurs when components of various origins are assembled into completed products, CBP considers the totality of the circumstances and makes such determinations on a case-by-case basis. The country of origin of the item's components, extent of the processing that occurs within a country, and whether such processing renders a product with a new name, character, and use are primary considerations in such cases. Additionally, factors such as the resources expended on product design and development, extent and nature of post-assembly inspection and testing procedures, and worker skill required during the actual manufacturing process may be considered when determining whether a substantial transformation has occurred. No one factor is determinative.

In *Data General v. United States*, 4 CIT 182 (1982), the court determined that for purposes of determining eligibility under item 807.00, Tariff Schedules of the United States, the programming of a foreign PROM (Programmable Read-Only Memory chip) substantially transformed the PROM into a U.S. article. The court noted that it is undisputed that programming alters the character of a PROM. Programming changes the pattern of interconnections within the PROM. A distinct physical change is effected in the PROM by the opening or closing of the fuses, depending on the method of programming. This physical alteration, not visible to the naked eye, may be discerned by electronic testing of the PROM. The essence of the article, its interconnections or stored memory, is established by programming. The court concluded that altering the non-functioning circuitry comprising a PROM through technological expertise in order to produce a functioning read only memory device possessing a desired distinctive circuit pattern is no less a "substantial transformation" than the manual interconnection of transistors, resistors and diodes upon a circuit board creating a similar pattern.

In C.S.D. 84-86, CBP stated:

We are of the opinion that the rationale of the court in the *Data General* case may be applied in the present case to support the principle that the essence of an integrated circuit memory storage device is established by programming * * * [W]e are of the opinion that the programming (or reprogramming) of an EPROM results in a new and different article of commerce which would be considered to be a product of the country where the programming or reprogramming takes place.

In HQ 563012, dated May 4, 2004, CBP considered whether components of various origins were substantially transformed when assembled to form a fabric switch which involved a combination of computer hardware and software. Most of the assembly of computer hardware was performed in China. Then, in either Hong Kong or the U.S., the hardware was completed and the U.S.-origin software was downloaded onto the hardware. CBP noted that the U.S.-developed software provided the finished product with its "distinctive functional characteristics." In making the determination that the product was substantially transformed in the U.S., where the fabric switch was assembled to completion, CBP considered both the assembly process that occurred in the U.S. and the configuration operations that required U.S.-origin software. In the scenario where the fabric switch was assembled to completion in Hong Kong, CBP determined the origin for marking purposes was Hong Kong.

In HQ 559255, dated August 21, 1995, a device referred to as a "CardDock" was under consideration for country of origin marking purposes. The CardDock was a device which was installed in IBM PC compatible computers. After installation, the units were able to accept PCMCIA cards for the purpose of interfacing such PCMCIA cards with the computer in which the CardDock unit was installed. The CardDock units were partially assembled abroad but completed in the United States. The overseas processing included manufacturing the product's injection molded plastic frame and installing integrated circuits onto a circuit board along with various diodes, resistors and capacitors. After such operations, these items were shipped to the United States for further processing that included mating a U.S.-origin circuit board to the foreign-origin frame and board. The assembled units were thereafter subjected to various testing procedures. In consideration of the foregoing, CBP held that the foreign-origin components, i.e., the ISA boards, frame assemblies and connector cables, were substantially transformed when assembled to completion in the United States. In finding that the name, character, and use of the foreign-origin components had changed during processing in the United States, CBP noted that the components had lost their separate identity during assembly and had become an integral part of a new and distinct item which was visibly different from any of the individual foreign-origin components.

In HQ 735027, dated September 7, 1993, a device that software companies used to protect their software from piracy was under consideration for country of origin marking purposes. The device, referred to as the "MemoPlug," was assembled in Israel from parts that were obtained from Taiwan (such as various connectors and an Electronically Erasable Programmable Read Only Memory, or "EEPROM") and Israel (such as an internal circuit board). After assembly, these components were shipped to a processing facility in the United States where the EEPROM was programmed with special software. Such processing in the United States accounted for approximately 50 percent of the final selling price of the MemoPlugs. In finding that the foreign-origin components were substantially transformed in the United States, CBP noted that the U.S. processing transformed a blank media, the EEPROM, into a device that performed functions necessary to the prevention of software piracy.

We make our determination herein based on the totality of the circumstances. In doing so, we take particular note of the fact that the installation of the firmware and the application software makes the UFDs functional and executes the security features. In addition, the installation and customization of the firmware and application software greatly increase the value of a UFD without security.

Based upon the above precedents and the totality of the circumstances, we determine that there is a substantial transformation of the component parts in either Israel or the United States, the location where the final three manufacturing operations, including installation and customization of the firmware and application software, occur, i.e., if the final three manufacturing operations occur in Israel, there is a substantial transformation in Israel and if the final three manufacturing operations occur in the United States, there is a substantial transformation in the United States. Therefore, the country of origin for government procurement purposes is such location, either Israel or the United States.

Country of Origin Marking

Section 304 of the Tariff Act of 1930, as amended (19 U.S.C. 1304), provides that, unless excepted, every article of foreign origin imported into the United States shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article (or container) will permit, in such manner as to indicate to the ultimate

purchaser in the U.S. the English name of the country of origin of the article.

Part 134, CBP Regulations (19 CFR Part 134), implements the country of origin marking requirements and exceptions of 19 U.S.C. 1304. Section 134.1(b), CBP Regulations (19 CFR 134.1(b)), defines the country of origin of an article as the country of manufacture, production, or growth of any article of foreign origin entering the United States. Further work or material added to an article in another country must effect a substantial transformation in order to render such other country the country of origin for country of origin marking purposes.

Based upon our determination, above, with respect to substantial transformation of the UFDs, the country of origin for marking of these goods is Israel or the United States if the final three manufacturing steps, described above, are performed in either of these countries. If the final three manufacturing steps are performed in Israel, the UFDs should be marked "Made in Israel." For a determination as to whether SanDisk may mark the UFDs "Made in the United States" when the final three manufacturing operations are performed in the U.S., please contact the Federal Trade Commission, Division of Enforcement, 6th Street and Pennsylvania Ave., NW., Washington, DC 20580.

Holdings

There is a substantial transformation of the component parts in either Israel or the United States, the location where the final three operations, including the installation and customization of the firmware and application software, occur. Therefore, the country of origin for government procurement purposes is such location, either Israel or the United States.

The country of origin of the UFDs is Israel or the United States if the final three manufacturing steps, described above, are performed in these countries. If the final three manufacturing steps are performed in Israel, the UFDs should be marked "Made in Israel." For a determination as to whether SanDisk may mark the UFDs "Made in the United States" when the final three manufacturing operations are performed in the United States, please contact the Federal Trade Commission.

Notice of this final determination will be given in the **Federal Register**, as required by 19 CFR 177.29. Any party-at-interest other than the party which requested the final determination may request, pursuant to 19 CFR § 177.31, that CBP reexamine the matter anew and issue a new final determination.

Any party-at-interest may, within 30 days after publication of the **Federal Register** notice referenced above, seek judicial review of this final determination before the Court of International Trade.

Sincerely,
Sandra L. Bell,
Executive Director, Office of Regulations and Rulings, Office of International Trade

[FR Doc. E9-10813 Filed 5-7-09; 8:45 am]

BILLING CODE 9111-14-P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR-5281-N-34]

Notice of Submission of Proposed Information Collection to OMB; Emergency Comment Request Homelessness Prevention and Rapid Re-Housing Program (HPRP)

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice of proposed information collection.

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

DATES: *Comments Due Date: May 15, 2009.*

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments must be received within seven (7) days from the date of this Notice. Comments should refer to the proposal by name and/or OMB approval number and should be sent to: Ms. Kimberly P. Nelson, HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20502; *e-mail: Kimberly.P.Nelson@omb.eop.gov; fax: (202) 395-6974.*

FOR FURTHER INFORMATION CONTACT: Lillian Deitzer, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; *e-mail: Lillian.L.Deitzer@hud.gov; telephone (202) 402-8048.* This is not a toll-free number. Copies of available documents should be submitted to OMB and may be obtained from Ms. Deitzer.

SUPPLEMENTARY INFORMATION: This Notice informs the public that the U.S. Department of Housing and Urban Development (HUD) has submitted to