U.S. Customs and Border Protection

DEPARTMENT OF THE TREASURY

19 CFR PARTS 24 AND 111

CBP DEC. 22–22

RIN 1515–AE43

ELIMINATION OF CUSTOMS BROKER DISTRICT PERMIT FEE

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

ACTION: Final rule.

SUMMARY: This document amends the U.S. Customs and Border Protection (CBP) regulations to eliminate customs broker district permit fees. Concurrently with this final rule, CBP is publishing a final rule to, among other things, eliminate customs broker districts (*see* "Modernization of the Customs Broker Regulations" RIN 1651–AB16). Specifically, CBP is transitioning all brokers to national permits and expanding the scope of the national permit authority to allow national permit holders to conduct any type of customs business throughout the customs territory of the United States. As a result of the elimination of customs broker districts, CBP is amending in this document the regulations to eliminate customs broker district permit fees.

DATES: Effective December 19, 2022.

FOR FURTHER INFORMATION CONTACT: Melba Hubbard, Chief, Broker Management Branch, (202) 863–6986, *melba.hubbard@cbp.dhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

Section 641 of the Tariff Act of 1930, as amended (19 U.S.C. 1641), provides that individuals and business entities must hold a valid customs broker's license and permit to transact customs business on

behalf of others. The statute also sets forth standards for the issuance of broker licenses and permits; provides for disciplinary action against brokers in the form of suspension or revocation of such licenses and permits or assessment of monetary penalties; and, provides for the assessment of monetary penalties against other persons for conducting customs business without the required broker's license. Section 641 authorizes the Secretary of the Treasury to prescribe rules and regulations relating to the customs business of brokers as may be necessary to protect the public and the revenue of the United States and to carry out the provisions of section 641.

The regulations issued under the authority of section 641 are set forth in part 111 of title 19 of the Code of Federal Regulations (CFR) (19 CFR part 111) and provide for, among other things, fee payment requirements applicable to brokers under section 641 and 19 U.S.C. 58c(a)(7). The existing customs broker regulations are based on a district system in which ports within a district handle entry, entry summary, and post-summary activity, and for which a broker district permit is required.

On June 5, 2020, U.S. Customs and Border Protection (CBP) published a notice of proposed rulemaking (NPRM) in the **Federal Register** (85 FR 34549), proposing the elimination of customs broker district permit fees in parts 24 and 111. The NPRM solicited public comments on the proposed rulemaking, with a 60-day comment period, which closed on August 4, 2020. No comments were received in response to this NPRM.

In a concurrent NPRM, published elsewhere in the same issue of the **Federal Register** (*see* "Modernization of the Customs Broker Regulations" RIN 1651–AB16)(85 FR 34836)), CBP proposed to amend its regulations by modernizing the customs broker regulations to coincide with the development of CBP trade initiatives, including the Automated Commercial Environment (ACE) and the Centers of Excellence and Expertise (Centers). Specifically, CBP proposed to transition all brokers to national permits and expand the scope of the national permit authority to allow national permit holders to conduct any type of customs business throughout the customs territory of the United States. To accomplish this, CBP proposed to eliminate broker districts and district permits, which would also eliminate the need for district permit waivers and the requirement for brokers to maintain district offices. CBP received 55 public comments during the 60-day solicitation period and addressed those comments in a concurrent final rule document, published elsewhere in this issue of the **Federal Register** (*see* "Modernization of the Customs Broker Regulations" RIN 1651–AB16)(hereinafter, referred to as the "concurrent final rule document").

II. Discussion of Regulatory Changes to Parts 24 and 111

Part 24

Part 24 of title 19 of the CFR (19 CFR part 24) sets forth regulations concerning customs financial and accounting procedures. Section 24.22 describes the customs Consolidated Omnibus Budget Reconciliation Act (COBRA) user fees and corresponding limitations for certain services. Specifically, paragraph (h) of § 24.22 deals with the annual customs broker permit user fee. In this final rule, CBP has eliminated in §§ 24.22(h) and (i)(9), references to the customs broker district permit user fee, conforming with amendments in the concurrent final rule document, which eliminates broker districts and district permits.

In the concurrent NPRM, CBP had proposed to add a new definition in § 111.1 for a "Designated Center", which was defined as the Center through which an individual, partnership, association, or corporation submits an application for a broker's license, or as otherwise designated by CBP for already-licensed brokers. After further consideration of how CBP will be processing broker matters and taking into account the public comments received with regard to the proposed definition, CBP has determined in the concurrent final rule document to modify the proposed definition to better align with current and future processes regarding brokers.

CBP has concluded that a definition of "Processing Center" much better reflects how CBP will manage broker applications and broker submissions.[1] As described in the concurrent final rule document, the term "Processing Center" means the broker management operations of a Center that processes applications for licenses under § 111.12(a) and permits under § 111.19(b), as well as submissions by already-licensed brokers required in part 111. The applications and submissions will be managed by Center personnel, who are broker management officers (BMOs) in 41 port locations throughout the U.S. customs territory.[2] Current brokers will continue to submit any submissions to a location where the broker license was issued, and any new applicants for a license or permit should choose a location where the applicant intends to reside and or conduct customs business. Thus, CBP changed the proposed language in § 24.22(h) from "desig-

[1] In this document, CBP uses "Processing Center" in quotes to denote a replacement of the proposed term "Designated Center"; when the words "processing Center" without quotation marks are used, CBP is referring to the Center of Excellence and Expertise that is actually performing a processing function.

[2] A chart of all 41 BMO locations can be found online on CBP's website at *https://www.cbp.gov/trade/programs-administration/customs-brokers,* by clicking on the tab titled "Broker Management Officer (BMO) Contact Information."

nated Center" to "processing Center (see § 111.1)", adding a reference as to where the definition for processing Center may be found.

Part 111

Elimination of District Permits

Section 111.19 provides the procedures for obtaining broker permits, responsible supervision and control requirements for permits, and review procedures for the denial of a permit. Specifically, paragraph (c) describes permit fees. As CBP is eliminating district permits in the concurrent final rule document, this document makes conforming amendments to § 111.19 by eliminating fees for district permits. In addition, CBP has removed the specific permit application and permit user fee amounts and replaced the numerical figures with a reference to the relevant fee provision in § 111.96(b) and (c). CBP changed the proposed term "designated Center" to "processing Center", as explained above, in § 111.19(c), and revised the second half of the second sentence of paragraph (c) to replace the reference to "online" submission of the fee payment with a reference to the use of a CBP-authorized EDI system. This last change was made to conform references to electronic submissions throughout part 111. In addition, CBP re-phrased the last part of the sentence in paragraph (c), without changing the meaning, to state that the fee needs to be submitted at the time the permit application is submitted. The changes to § 111.96(b) can be found in the concurrent final rule document.

Elimination of District Permit Fees

Section 111.96 describes fees required throughout part 111. Paragraph (c) of § 111.96 describes the permit user fee. To reflect the elimination of broker districts and district permits, CBP has eliminated the customs broker district permit user fee, and specified that the user fee is applicable for national permits only, issued under § 111.19(a).

As discussed in the concurrent final rule document, CBP published an interim final rule that transferred certain trade functions from the port director to the Center director (*see* 81 FR 92978, December 20, 2016). Similarly, certain broker management functions previously performed by the port directors are transferred to the processing Centers as part of this final rule. CBP has revised the last sentence of § 111.96(c) by splitting it into two sentences, with the second sentence providing that the processing Center will notify the broker in writing of the failure to pay and the revocation of the permit. For the reasons explained above, CBP replaced the proposed term "designated Cen-

ter" in § 111.96(c) with the term "processing Center". CBP also removed the reference to "director" to clarify that submissions must be made to the broker management operations of a Center, meaning to one of the BMO locations throughout the U.S. customs territory. As not only Center directors will be handling broker matters, but any BMO, depending on where the broker license was issued, CBP determined that the removal of the reference to "director" was more appropriate.

III. Other Conforming Amendments

The authority for part 111 currently provides a specific authority citation for § 111.3. When the text of § 111.3 was transferred to § 111.2 in a final rule published in the **Federal Register** (65 FR 13880) on March 15, 2000, CBP inadvertently did not revise the specific authority citation for either section. CBP has corrected this oversight in this final rule document by adding a specific authority citation for § 111.2, and by removing the specific authority citation for § 111.3. An identical amendment is made in the concurrent final rule document.

IV. Conclusion

Upon further consideration, CBP has decided to adopt, with changes as described above, as final the proposed regulations published in the **Federal Register** (85 FR 34549) on June 5, 2020.

V. Executive Orders 13563 and 12866

Executive Orders 13563 and 12866 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility.

As mentioned above, on June 5, 2020, CBP published in the **Federal Register** an NPRM titled, "Elimination of Customs Broker District Permit Fee," and received no comments from the public. Therefore, CBP adopts the regulatory amendments specified in the NPRM, with the addition of a change to the proposed term "Designated Center." "Designated Center" will be replaced with "Processing Center," in accordance with the same change made in the concurrent final rule document, as explained above, as well as additional minor changes for consistency purposes. With the adoption of the proposed regulatory amendments, CBP applies the 2020 proposed rule's economic analysis approach to this final rule, updating the data as necessary.

This final rule is not a "significant regulatory action," under section 3(f) of Executive Order 12866. Accordingly, the Office of Management and Budget (OMB) has not reviewed this regulation. CBP has prepared the following analysis to help inform stakeholders of the impacts of this final rule.

1. Need and Purpose of the Final Rule

Current customs broker regulations are based on the district system in which entry, entry summary, and post-summary activity are all handled by the ports within a permit district. In the concurrent final rule document, CBP is modernizing the regulations governing customs brokers to better reflect the current work environment and streamline the customs broker permitting process to save money. Under the terms of the concurrent final rule document, CBP is transitioning all brokers to national permits and expanding the scope of the national permit authority to allow national permit holders to conduct any type of customs business throughout the customs territory of the United States. By transitioning to a national permit, CBP is eliminating the requirement for brokers to maintain district permits and pay the annual user fee. Therefore, this final rule eliminates customs broker district permit annual user fees. CBP has prepared the following analysis to help inform stakeholders of the impacts of this final rule.

2. Background

The customs territory of the United States is divided into seven customs regions. Within each region, the customs territory of the United States is further divided into districts; there are currently 40 customs districts.[3] Under the baseline, or the world as it was without this final rule, a district permit was required for each district in which a customs broker intended to conduct customs business. Brokers could apply for district permits either concurrently with their licenses or later on in their careers. Brokers who hold at least one district permit also had the option to hold a national permit, which allows a

[3] In addition to the 40 geographically defined customs districts, there are three special districts that are responsible for specific types of imported merchandise. These special districts include districts 60, 70 and 80. District 60 refers to entries made by vessels under their own power. District 70 refers to shipments with a value under $800. District 80 refers to mail shipments. These three special districts do not require the use of a licensed broker with a specific district permit and as a result are not affected by this final rule.

broker to operate throughout the customs territory of the United States.[4]

The concurrent final rule document eliminates the district permitting process and automatically grants a national permit to each district permit holder who does not already hold a national permit. Going forward, licensed brokers have the option to apply for a single national permit either concurrently with their licenses or later in their careers. With this final rule in place, district permit user fees are eliminated, and brokers continue to pay permit fees only for national permits. Each district or national permit requires a one-time permit fee of $100 and an annual user fee.[5] The annual user fee is $153.19 for calendar year 2022, but is adjusted for inflation each year.[6] Given the uncertainty of future inflation, for the purposes of this analysis, we use this fee amount for the full period of analysis.

The number of new permits issued each year depends, in part, on the number of new licenses issued. CBP issues both individual broker licenses as well as corporate licenses, which may be held by partnerships, associations, or corporations.[7] The number of licenses issued has been declining for the last several years at a rate of one percent for corporate licenses and four percent for individual licenses (*see* Table 1). Additionally, not all licensed brokers choose to apply for a permit. Although virtually all corporate license holders do hold a permit, many individual brokers work under the auspices of a corporate permit and never hold their own permit. Based on data from

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[4] When first introduced in 2000, the national permit was restricted to certain activities, allowing a broker to place an employee in the facility of a client for whom the broker is conducting customs business; file electronic drawback claims; participate in remote location filing; and make representations after the entry summary has been accepted. Since the national permit was introduced, and with the full implementation of ACE, restrictions have been gradually eliminated such that only some activities requiring physical presence at the port require a district permit in lieu of a national permit. Those restrictions will be lifted with the concurrent final rule document in place.

[5] If a broker chooses to receive a permit with the license, then the $100 permit fee is waived. Under the new national permitting system, brokers receiving a national permit will pay the $100 permit fee regardless of when they do so.

[6] The annual user fee payable for calendar year 2022 is $153.19 (86 FR 66573). It will be adjusted for inflation each year. Sections 24.22 and 24.23 of title 19 CFR provide for and describe the procedures that implement the requirements of the Fixing America's Surface Transportation Act (FAST Act) (Pub. L. 114–94, December 4, 2015), which amended section 13031 of the Consolidated Omnibus Budget Reconciliation Act (COBRA), requiring the Secretary of the Treasury to adjust certain customs COBRA user fees and corresponding limitations to reflect certain increases in inflation. Specifically, section 24.22(k) sets forth the methodology to determine the change in inflation as well as the factor by which the fees and limitations will be adjusted, if necessary.

[7] 19 U.S.C. 1641(b)(3). For any corporate license, at least one member of the organization must hold an individual license.

CBP's Broker Management Branch (BMB), approximately 13.5 percent of individual brokers hold a district permit.[8]

Table 1—LICENSING HISTORY

Year	Total licenses issued	Corporate licenses issued	Individual licenses issued
2016	653	21	632
2017	580	16	564
2018	558	27	531
2019	464	15	449
2020	187	7	180
2021	496	31	465

3. Benefits

Brokers must pay an annual permit user fee for each permit held. The permit user fee is payable for each district permit and national permit a customs broker holds, including when a district permit is issued concurrently with the broker's license. As a result of the concurrent final rule document, district permits are eliminated and customs brokers only need to pay an annual user fee for a single national permit.[9] Therefore, the savings accrued to brokers and CBP as a result of many fewer user fees paid qualifies as a benefit and not as a transfer payment because CBP is eliminating the district permits themselves, as well as the work that goes along with processing and issuing them.[10]

Under the baseline, both brokers holding existing permits and brokers issued new permits must pay the annual user fee for each permit held. As of January 2022, there were 15,226 active, licensed customs brokers.[11] 2,365 brokers hold at least one district permit.[12] Of those, 1,914 brokers hold a national permit in addition to their district permit(s). The 2,365 brokers who hold at least one district permit hold a total of 3,345 district permits, for an average of 1.4 district permits per permitted broker.

[8] Data pulled from ACE on May 10, 2021 and March 31, 2022.

[9] The reduction of the fee revenue will result in fewer funds available for CBP operations, but this is offset by the reduction in costs to process the permits. Thus, there is no net effect to CBP in reducing this revenue.

[10] As described in OMB Circular A–4, transfer payments occur when ". . . monetary payments from one group [are made] to another [group] that do not affect total resources available to society."

[11] Data supplied by BMB on May 10, 2021 and March 31, 2022. Data is pulled from ACE. The 12,861 brokers who do not hold any permits are unaffected by this final rule.

[12] This figure represents all current licensed brokers that are permit holders, regardless of what year they received their license.

Based on recent licensing history, CBP projects that over the period of analysis from 2022–2026, 2,072 new individual licenses and 75 new corporate licenses will be issued.[13] As stated above, 13.5 percent of individual brokers and 100 percent of corporate brokers hold at least one district permit. Under the baseline, an average of 1.4 district permits held by each broker results in 396 new individual permits and 105 new corporate permits, for a total of 501 permits. *See* Table 2 for a summary of licensing and permitting over the period of analysis under baseline conditions.

TABLE 2—PROJECTION OF LICENSING AND PERMITTING UNDER BASELINE CONDITIONS

Year	New individual licenses	New individual ermits	New corporate licenses issued	New corporate permits	Total permits
2022	447	86	15	21	107
2023	430	82	15	21	103
2024	414	79	15	21	100
2025	398	76	15	21	97
2026	383	73	15	21	94
Total	2,072	396	75	105	501

* Totals may not sum due to rounding.

With the concurrent final rule document in place, newly licensed brokers choosing to hold a permit require only a single national permit. Therefore, CBP will issue 355 new permits over the period of analysis (*see* Table 3). Because CBP is eliminating the district permit system, these 355 permits will be issued as national permits even though, under baseline conditions, they would have been district permits.

TABLE 3—PROJECTION OF PERMITS UNDER THE FINAL RULE

Year	New individual licenses	New individual permits	New corporate permits	Total new national permits
2022	447	60	15	75
2023	430	58	15	73
2024	414	56	15	71
2025	398	54	15	69
2026	383	54	15	69

[13] The COVID–19 pandemic and the resulting delays and closures resulted in anomalous data for 2020 for corporate licenses. Therefore, CBP removed 2020 from the projection, and used data from 2015–2019 instead to project over the period of analysis from 2022–2026.

Year	New individual licenses	New individual permits	New corporate permits	Total new national permits
Total	2,072	280	75	355

* Totals may not sum due to rounding.

With the final rule in place, brokers currently holding only district permits or holding a national permit in addition to their district permit(s) continue to pay the annual user fee for a single national permit.[14] As of January 2021, 9 brokers each hold more than one district permit and do not hold a national permit.[15] Altogether, those brokers hold 18 district permits, for an average of 2 permits each. With the final rule in place, those brokers each pay for a single national permit instead of paying for the 18 district permits they currently collectively hold. Furthermore, there are 1,914 brokers holding at least one district permit and one national permit. Those brokers hold a total of 2,880 district permits. With the final rule in place, these brokers only need to pay the user fee for their national permits and will no longer pay fees for their 2,880 district permits. Overall, brokers holding permits at the start of the period of analysis will no longer need to pay for 2,889 permits.[16]

Combining both existing and projected permits, over the period of analysis brokers who hold permits will pay the user fee for 364 permits under the terms of the final rule. This includes 355 new national permits issued during the period of analysis in place of 396 new district permits (see Tables 2 and 3 above). An additional 9 existing district permits held by brokers only holding district permits under the baseline will be transitioned to national *permits.* Those 9 brokers will no longer pay for the 9 additional district permits currently held, which will be eliminated. Finally, 1,914 brokers who hold a national permit and at least one district permit under the baseline will only continue paying for their national permits and will no longer pay for 2,880 district permits. Overall, brokers will no longer pay for 3,035 district permits over the period of analysis. With a 2022 user fee of $153.19 per permit, brokers will save $2,281,330 from 2022–2026. *See* Table 4 for a summary of these savings.

[14] As stated above, those brokers only holding district permits will be automatically granted a national permit under the terms of the concurrent final rule document.

[15] Brokers who hold a single district permit will have that district permit transitioned to a national permit and will continue to pay the same amount in user fees. Therefore, they are financially unaffected by the final rule.

[16] This includes the 9 permits forgone by brokers holding only more than one district permit and the 2,880 district permits held by brokers holding both district and national permits.

TABLE 4—TOTAL SAVINGS [2022 U.S. DOLLARS]

Year	Total district permits under the baseline	Total permits under the final rule[17]	District permits no longer paid for	Savings
2022	3,005	84	2,921	$447,393
2023	3,108	158	2,950	$451,959
2024	3,208	229	2,979	$456,398
2025	3,305	298	3,007	$460,709
2026	3,399	364	3,035	$464,871
Total[18]	3,399	364	3,035	$2,281,330

4. Cost

The elimination of the annual user fee for district permits does not result in any costs to brokers, but as noted above, this final rule yields the aforementioned savings.

5. Net Benefits

The total annual monetized savings for customs brokers results from switching from a district permitting system to a national permitting system. Specifically, brokers will only pay annual permit user fee for a single national permit instead of for each of the potentially several district permits held. As shown in Table 5 below, total savings over the period of analysis are the approximately $2.3 million dollars.

TABLE 5—TOTAL ANNUAL UNDISCOUNTED SAVINGS FOR BROKERS FROM 2022–2026 [2022 U.S. DOLLARS]

Year	Total savings
2022	$447,393
2023	451,959
2024	456,398
2025	460,709
2026	464,871
Total	2,281,330

Note: Values may not sum to total due to rounding..

[17] Under the baseline, these permits would be issued as district permits. Under the final rule, they will be issued as national permits.

[18] For the first three columns, the total number of permits is additive throughout the period of analysis instead of at the end of the period (that is, all permits issued in 2021 must also be paid for in 2022, 2023, 2024, and 2025 in addition to new permits issued in those years) so the total is equal to the number of permits existing in the final year. The total savings are calculated by summing the savings in each year.

Table 6 summarizes the monetized costs and benefits of this final rule to individual and corporate customs brokers. As shown, the total monetized present value net benefit of this final rule over a five-year period of analysis from 2022–2026 ranges from approximately $1.9 to $2 million and the annualized net benefit is approximately $456,000. In 2022, we estimate that 462 brokers will receive their broker licenses (447 individual licenses plus 15 corporate licenses). The adoption of this final rule will result in an average annual net benefit per broker in 2022 of $987 ($456,000 annualized net benefit/462 total new brokers for 2022).

TABLE 6—PRESENT VALUE AND ANNUALIZED NET BENEFIT OF FINAL RULE

	3% Discount rate		7% Discount rate	
	Present value	Annualized	Present value	Annualized
Total Cost	$0	$0	$0	$0
Total Benefit	2,027,555	456,008	1,868,359	455,675
Total Net Benefit	2,027,555	456,008	1,868,359	455,675

VI. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement and Fairness Act of 1996, requires agencies to assess the impact of regulations on small entities. A small entity may be a small business (defined as any independently owned and operated business not dominant in its field that qualifies as a small business per the Small Business Act); a small not-for-profit organization; or a small governmental jurisdiction (locality with fewer than 50,000 people).

The final rule will apply to all customs brokers, regardless of size. Accordingly, the final rule will affect a substantial number of small entities. However, as stated above in section V.5 "Net Benefits," the final rule will result in an average annualized savings per customs broker of $987. Since brokers, on average, will benefit as a result of this final rule, and the savings are relatively small on a per broker basis, it will not have a significant impact on customs brokers. Accordingly, CBP certifies that this final rule does not have a significant impact on a substantial number of small entities.

VII. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. 3507), an agency may not conduct, and a person is not required to respond to, a collection of information unless the

collection of information displays a valid control number assigned by OMB. The collections of information contained in these regulations are provided for by OMB control number 1651–0034 (CBP Regulations Pertaining to Customs Brokers) and by OMB control number 1651–0076 (Recordkeeping Requirements). This final rule does not change the burden under these information collections.

Signing Authority

This regulation is being issued in accordance with 19 CFR 0.1(a)(1) pertaining to the Secretary of the Treasury's authority (or that of her or his delegate) to approve regulations related to certain customs revenue functions.

Chris Magnus, the Commissioner of CBP, having reviewed and approved this document, is delegating the authority to electronically sign this document to Robert F. Altneu, who is the Director of the Regulations and Disclosure Law Division for CBP, for purposes of publication in the **Federal Register**.

List of Subjects

19 CFR Part 24

Accounting, Claims, Exports, Freight, Harbors, Reporting and recordkeeping requirements, Taxes.

19 CFR Part 111

Administrative practice and procedure, Brokers, Penalties, Reporting and recordkeeping requirements.

Amendments to the CBP Regulations

For the reasons set forth in the preamble, parts 24 and 111 of title 19 of the Code of Federal Regulations (19 CFR parts 24 and 111) are amended as set forth below.

PART 24—CUSTOMS FINANCIAL AND ACCOUNTING PROCEDURE

■ 1. The general and specific authority citations for part 24 continue to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 58a– 58c, 66, 1202 (General Note 3(i), Harmonized Tariff Schedule of the United States), 1505, 1520, 1624; 26 U.S.C. 4461, 4462; 31 U.S.C. 3717, 9701; Pub. L. 107–296, 116 Stat. 2135 (6 U.S.C. 1 *et seq.*).

* * * * *

Section 24.22 also issued under Sec. 892, Pub. L. 108–357, 118 Stat. 1418 (19 U.S.C. 58c); Sec. 32201, Pub. L. 114–94, 129 Stat. 1312 (19 U.S.C. 58c); Pub. L. 115–271, 132 Stat. 3895 (19 U.S.C. 58c).

§ 24.22 [Amended]

■ 2. In § 24.22:

■ a. Paragraph (h) is amended by:

■ i. Removing the phrase "each district permit and for" in the first sentence;

■ ii. Removing the second sentence; and

■ iii. Removing the word "port" from the third sentence and adding in its place the words "processing Center (see § 111.1)"; and

■ b. Paragraph (i)(9) is amended by removing the phrase "for district permits, class code 497;" from the first sentence.

PART 111—CUSTOMS BROKERS

■ 3. The general and specific authority citations for part 111 are revised to read as follows:

Authority: 19 U.S.C. 66, 1202 (General Note 3(i), Harmonized Tariff Schedule of the United States), 1624; 1641.

Section 111.2 also issued under 19 U.S.C. 1484, 1498;

Section 111.96 also issued under 19 U.S.C. 58c, 31 U.S.C. 9701.

■ 4. In § 111.19, revise the section heading and paragraph (c) to read as follows:

§ 111.19 National permit.

* * * * *

(c) *Fees.* A national permit issued under paragraph (a) of this section is subject to the permit application fee specified in § 111.96(b) and to the customs user permit fee specified in § 111.96(c). The fees must be paid at the processing Center (*see* § 111.1) or through a CBP-authorized EDI system at the time the permit application is submitted.

* * * * *

■ 5. In § 111.96, revise paragraph (c) to read as follows:

§ 111.96 Fees.

* * * * *

(c) *Permit user fee.* Payment of an annual permit user fee defined in § 24.22(h) of this chapter is required for a national permit granted to an individual, partnership, association, or corporate broker. The permit user fee is payable with the filing of an application for a national permit under § 111.19(b), and for each subsequent calendar year at the processing Center referred to in § 111.19(b). The permit user fee must be paid by the due date as published annually in the **Federal Register**, and must be remitted in accordance with the procedures set forth in § 24.22(i) of this chapter. When a broker submits an application for a national permit under § 111.19(b), the full permit user fee must be remitted with the application, regardless of the point during the calendar year at which the application is submitted. If a broker fails to pay the annual permit user fee by the published due date, the permit is revoked by operation of law. The processing Center will notify the broker in writing of the failure to pay and the revocation of the permit.

* * * * *

ROBERT F. ALTNEU,
Director,
Regulations & Disclosure Law Division,
Regulations & Rulings, Office of Trade,
U.S. Customs and Border Protection.

Approved:

THOMAS C. WEST, JR.,
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Treasury for Tax Policy.

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DEPARTMENT OF THE TREASURY

19 CFR PARTS 24 AND 111

CBP DEC. 22–21

RIN 1651–AB16

MODERNIZATION OF THE CUSTOMS BROKER REGULATIONS

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

ACTION: Final rule.

SUMMARY: This document adopts as final, with changes, proposed amendments to the U.S. Customs and Border Protection (CBP) regulations modernizing the customs broker regulations. CBP is transitioning all customs brokers to a single national permit and expanding the scope of the national permit authority to allow national permit holders to conduct any type of customs business throughout the customs territory of the United States. To accomplish this, CBP is eliminating broker districts and district permits, which in turn removes the need for the maintenance of district offices, and district permit waivers. CBP is also updating, among other changes, the responsible supervision and control oversight framework, ensuring that customs business is conducted within the United States, and requiring that a customs broker have direct communication with an importer. These changes are designed to enable customs brokers to meet the challenges of the modern operating environment while maintaining a high level of service in customs business. Further, CBP is increasing fees for the broker license application to recover some of the costs associated with the review of customs broker license applications and the necessary vetting of individuals and business entities (*i.e.,* partnerships, associations, and corporations). Additionally, CBP is announcing the deployment of a new online system, the eCBP Portal, for processing broker submissions and electronic payments. Lastly, CBP is publishing a concurrent final rule document to eliminate all references to customs broker district permit user fees (*see* "Elimination of Customs Broker District Permit Fee" RIN 1515–AE43) to align with the changes made in this final rule document.

DATES: This final rule is effective December 19, 2022.

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SUPPLEMENTARY INFORMATION:

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I. Background

The Role of Licensed Customs Brokers in Conducting Customs Business

Section 641 of the Tariff Act of 1930, as amended (19 U.S.C. 1641), provides that individuals and business entities must hold a valid customs broker's license and permit to transact customs business on behalf of others. The statute also sets forth standards for the issuance of broker licenses and permits; provides for disciplinary action against brokers in the form of suspension or revocation of such licenses and permits, or assessment of monetary penalties; and, provides for the assessment of monetary penalties against other persons for conducting customs business without the required broker's li-

cense. Section 641 authorizes the Secretary of the Treasury to prescribe rules and regulations relating to the customs business of brokers as may be necessary to protect importers and the revenue of the United States and to carry out the provisions of section 641.[1]

The regulations issued under the authority of section 641 are set forth in part 111 of title 19 of the Code of Federal Regulations (19 CFR part 111) and provide for, among other things, the rules for license and permit requirements; recordkeeping and other duties and responsibilities of brokers; the grounds and procedures for the cancellation, suspension or revocation of broker licenses and permits, and monetary penalties in lieu of suspension or revocation; and, rules pertaining to the imposition of a monetary penalty, and fee payment requirements applicable to brokers under section 641 and 19 U.S.C. 58c(a)(7).

Customs brokers are private individuals and/or business entities (partnerships, associations, or corporations) that are licensed and regulated by U.S. Customs and Border Protection (CBP) to assist importers in conducting customs business. Customs brokers have an enormous responsibility to their clients and to CBP, which requires them to properly prepare importation documents, file these documents timely and accurately, classify and value goods properly, pay duties, taxes, and fees, safeguard their clients' information, and protect their licenses from misuse.

The existing customs broker regulations are based on the district system. A district is the geographic area covered by a customs broker permit other than a national permit. Customs brokers are currently required to maintain a physical presence within a district so that the broker is physically close to the ports of entry within the district in order to file any paperwork associated with an entry, entry summary, or post-summary activity. Entry, entry summary, and certain post-summary activities are customs business activities for which a district permit is required. *See* 19 CFR 111.1; 111.2(b)(1). As a rule, all merchandise imported into the United States is required to be en-

[1] The Homeland Security Act of 2002 generally transferred the functions of the U.S. Customs Service from the Department of the Treasury to the Secretary of the Department of Homeland Security (DHS). *See* Public Law 107–296, 116 Stat. 2142. The Act provides that the Secretary of the Treasury retains the customs revenue functions unless delegated to the Secretary of DHS. The regulation of customs brokers is encompassed within the customs revenue functions set forth in section 412 of the Homeland Security Act. On May 15, 2003, the Secretary of the Treasury delegated authority related to the customs revenue functions to the Secretary of DHS subject to certain exceptions. *See* Treasury Order No. 100–16 (Appendix to 19 CFR part 0). Because the authority to prescribe the rules and regulations related to customs brokers is not listed as one of the exceptions, this authority now resides with the Secretary of DHS. However, the regulation of user fees is encompassed within the customs revenue functions set forth in section 412 of the Act. *See* Appendix to 19 CFR part 0.

tered, unless specifically excepted. The act of entering merchandise consists of the filing of paper or electronic data with CBP containing sufficient information to enable CBP to determine whether imported merchandise may be released from CBP custody. *See* 19 CFR 141.0a(a). Additionally, entry summary refers to documentation that enables CBP to assess duties, collect statistics on imported merchandise, and determine whether other requirements of law or regulation are met. *See* 19 CFR 141.0a(b). Pursuant to the existing regulations, customs business includes certain post-summary activities such as the refund, rebate, or drawback of duties, taxes, or other charges.

The Impact of the Centers of Excellence and Expertise and the Automated Commercial Environment on Licensed Customs Brokers

Two major developments, the establishment of the Centers of Excellence and Expertise (Centers) and the creation of the Automated Commercial Environment (ACE), have fundamentally changed the traditional ways that customs brokers and CBP interact. After a four-year transition of operational trade functions from ports of entry and port directors to Centers and Center directors, CBP published an interim final rule in the **Federal Register** (81 FR 92978), which codified the role of the Centers as strategic locations around the country to focus CBP's trade expertise on industry-specific issues and provide tailored support for importers. This permanent shift to Centers was made in order to facilitate trade, reduce transaction costs, increase compliance with applicable import laws, and achieve uniformity of treatment at the ports of entry for the identified industries. The interim final rule transferred to the Centers and Center directors a variety of post-release trade functions that were handled by port directors, including decisions and processing related to entry summaries; decisions and processing related to all types of protests; suspension and extension of liquidations; decisions and processing concerning free trade agreements and duty preference programs; decisions concerning warehouse withdrawals wherein the goods are entered into the commerce of the United States; all functions and decisions concerning country of origin marking issues; functions concerning informal entries; and, classification and appraisement of merchandise. With the transfer of trade functions to the Centers, a significant portion of these activities, including entry summary and post-summary, are now handled directly by the Centers. The Center structure is based on subject matter expertise, as opposed to geographic location, placing the Centers outside of the district system. Consequently, the existing broker regulations based on the district system do not fully reflect how trade functions are currently being processed by CBP.

The other relevant major development was the creation of ACE. In an effort to modernize the business processes essential to securing U.S. borders, facilitating the flow of legitimate shipments, and targeting illicit goods pursuant to the Customs Modernization Act (Mod Act) (passed as part of the North American Free Trade Agreement Implementation Act (NAFTA), Pub. L. 103–182 § 623 (1993)), and the Security and Accountability for Every (SAFE) Port Act of 2006 (Pub. L. 109–347, 120 Stat. 1884), CBP developed ACE to ultimately replace the Automated Commercial System (ACS) as the CBP-authorized electronic data interchange (EDI) system.[2]

On October 13, 2015, CBP published an interim final rule in the **Federal Register** (80 FR 61278) that designated ACE as a CBP-authorized EDI system, effective November 1, 2015. ACE now offers the operational capabilities necessary to enable users to transmit a harmonized set of import data elements, via a "single window," to obtain the release and clearance of goods. As a result, the International Trade Data System (ITDS) eliminates redundant reporting requirements and facilitates the transition from paper-based reporting and other procedures to faster and more cost-effective electronic submissions to, and communication among, government agencies. These electronic capabilities that allow brokers to file entry information in ACE reduce the need for brokers to be physically close to the ports of entry, as required under the district permit regulations.

The Availability of a Remote Option for the Customs Broker License Examination

On April 21, 2021, the bi-annual customs broker license exam was administered at over 120 testing locations, and for the first time, via

[2] Pursuant to 19 CFR 143.32(b), an authorized EDI is defined as any established mechanism approved by the Commissioner of CBP through which information can be transferred electronically. In addition to ACE, which is the system through which the trade community reports imports and exports, and the government determines admissibility, the ACE Secure Data Portal (ACE Portal), the electronic Customs and Border Protection (eCBP) portal and the Automated Broker Interface (ABI) are examples of such authorized EDIs. The ACE Portal is a web-based entry point for ACE to connect CBP, trade representatives and government agencies who are involved in importing goods into the United States. The eCBP portal, developed as part of CBP's Revenue Modernization (Rev Mod) program, is currently the access point for a new system for electronic payments of licensed customs broker fees. When fully implemented, the eCBP portal will allow for easy collection of many types of duties, taxes, and fees. Lastly, ABI is a functionality that allows entry filers to transmit immediate delivery, entry and entry summary data electronically to, and receive electronic messaging from, CBP and receive transmissions from ACE or any other CBP-authorized EDI system. *See* 19 CFR 143.32(a). It is a voluntary program available to brokers, importers, carriers, port authorities and independent service centers. For additional information regarding the transmission of entry summary and cargo release data via an EDI, *see* the CBP and Trade Automated Interface Requirements (CATAIR), specifically the chapter entitled Entry Summary Create/Update, which is available online at *https://www.cbp.gov/document/technical-documentation/entry-summary-createupdate-catair* and the chapter entitled Cargo Release, which is available online at *https://www.cbp.gov/document/guidance/ace-catair-cargo-release-chapter.*

remote proctor delivery. CBP provided information regarding system requirements for the remote testing option, testing room requirements, and other general exam information on its website for prospective exam applicants.[3] CBP continues to offer a remotely proctored exam if the exam provider is equipped to administer such type of testing. CBP does want to emphasize, however, that the availability of a remote examination is at CBP's sole discretion. If a remote exam is available, applicants who prefer to take the exam in a remote setting for convenience or to avoid travel may select the remote option at the time of registration for the exam. However, a remote examination cannot be requested, a spot might not be assured due to limited capacity, and the lack of availability of a remote exam cannot be appealed. CBP will notify prospective applicants of whether the remote option is available at the time the exam is announced on CBP's website.

Proposed Rulemaking To Modernize the Customs Broker Regulations

On June 5, 2020, CBP published a notice of proposed rulemaking (NPRM) in the **Federal Register** (85 FR 34836) proposing to modernize the customs broker regulations in part 111 of the CFR to align with the development of CBP trade initiatives, including ACE and the Centers, and reflect the changes to a more automated commercial environment for both customs brokers and importers. Specifically, CBP proposed to eliminate broker districts and district permits, and transition all brokers who hold only a district permit to a national permit. Further, CBP proposed to expand the scope of the national permit authority to allow all national permit holders to conduct business throughout the customs territory of the United States. In addition, CBP proposed to increase the license application fee in order to recover some of CBP's costs for reviewing license applications and vetting applicants. The NPRM provided for a 60-day comment period, which ended on August 4, 2020. Concurrently, CBP published an NPRM in the **Federal Register** (85 FR 34549) proposing the elimination of customs broker district permit user fees to conform with the proposed elimination of broker districts and district permits. CBP received no comments to the latter NPRM.

II. Discussion of Comments

CBP received 55 documents in response to the publication of the part 111 NPRM, two of which were duplicate submissions, and one of which was a two-part submission by one commenter discussing the same issue. In effect, 52 different documents were received. Com-

[3] Information regarding the customs broker license exam, especially the remotely-proctored exam, may be found online at *https://www.cbp.gov/trade/programs-administration/customs-brokers/license-examination-notice-examination.*

menters raised some concerns about the proposed changes and recommended changes for improvement, but overall expressed support of CBP's effort to modernize customs broker regulations, and welcomed the changes being made to reflect the reality of a rapidly changing world of international trade for both brokers and CBP. Commenters expressed appreciation for CBP's recognizing the broker community's needs to have clarity as to their duties and minimal regulatory burdens to target the essential needs to protect the revenue and enforce the relevant laws. The commenters further acknowledged CBP's efforts in providing the least bureaucratic framework over the years and collaborating with the broker community, including the latest effort in modernizing some of the outdated reporting requirements. For instance, one commenter welcomed the addition of specific language to cover convictions of committing or conspiring to commit an act of terrorism in § 111.53 as a ground for suspension or revocation of a license or permit. Commenters also supported the proposed removal of the requirement to submit an answer in duplicate to the charges against the broker in § 111.62(e) as this change aligns with the current electronic business environment.

CBP recognizes a licensed broker's vital role in the international trade environment and in interactions with clients and CBP. A broker is tasked with the responsibility to exercise the highest level of accuracy and knowledge when filing entries, navigate the complex nature of international trade, ensure that the clients' needs are met timely and accurately, and facilitate the movement of legitimate cargo. Brokers need to be knowledgeable about the governing rules and regulations as well as any changes, maintain a good relationship with clients, and provide a high-quality service to their clients. CBP determined that it was important to modernize customs broker regulations and clarify existing regulations since the creation of Centers and the increasingly automated environment have changed the way customs business is conducted. Due to those changes, a broker may need to make contact with CBP personnel in parts of the customs territory that are not within the broker's district. The elimination of district permits and expansion of the scope of activities allowed under a national permit will provide brokers with the flexibility to easily conduct customs business anywhere within the customs territory of the United States. In addition, the elimination of district permits also eliminates the burden on brokers of maintaining permits for multiple districts or appointing subagents in districts in which they do not have permits. This change also provides cost savings for CBP when it comes to the processing of license and permit applications.

The changes made to the broker regulations will increase efficiency and flexibility as submission requirements are updated, additional electronic submission options are provided, and electronic communication options for certain submissions are added. This update of the regulations will further increase a broker's professionalism due to the addition of grounds to justify the denial of license in § 111.16, the addition of required information or arguments in support of an application during review of the denial of the application in § 111.19, and a new reporting requirement in § 111.30 for inactive brokers.

The submissions received in response to the NPRM contained comments on multiple topics regarding the proposed regulations. The public comments, together with CBP's analysis, were grouped by topic within a subpart of part 111, and are set forth below:

Subpart A. General Provisions.

Comment: CBP proposed adding a new term "Designated Center" for the submission of applications for a broker's license by an individual, partnership, association, or corporation. Several commenters expressed concern with the use of this term as the structure of Centers is not necessarily conducive to broker management, nor were the Centers designed to include brokers filing entries on a broad range of commodities. The commenters requested that CBP maintain a dedicated Broker Management Division or unit with offices reporting to CBP Headquarters, including full-time, dedicated personnel on a national level, with each broker assigned to one team or office for management purposes (as suggested by Commercial Customs Operations Advisory Committee (COAC) recommendation No. 10048 (April 27, 2016)). The commenters reasoned that this approach would ensure a uniform and efficient process for both CBP and brokers, and thus proposed to change the term "Designated Center" to "Designated Broker Management Office" to better reflect the structure that is more suitable for broker matters. Ideally, according to some commenters, CBP would create a new Center for broker licensing and management issues only or expand the broker management division in CBP's Office of Trade.

Response: CBP appreciates the opportunity to clarify that brokers will not be assigned to a specific Center, and CBP will not create a Center solely for broker licensing and management issues. Brokers operate within a unique business model as their clientele have different Center interests, thus, an assignment to one specific Center would not be beneficial to brokers' business filings concerning different commodities. In addition, to prevent any disruption of dealings with brokers in case of personnel changes or workload distributions

within Centers, CBP does not see a benefit to assigning a broker to a particular Center. Broker management officers (BMOs), who are Center personnel at 41 port locations throughout the U.S. customs territory, will handle the administration of all activities conducted under a broker's license and permit. Prior to the creation of Centers, these BMOs were assigned to a port and managed broker applications and other submissions. With the transition of certain trade functions from ports to Centers, the assignment of BMOs transitioned as well. Thus, Center personnel will process new applications for licenses and permits and will also manage submissions provided by already-licensed brokers. A current broker will continue to contact the BMO at a location where the broker's license was issued. After the effective date of this final rule, a BMO will also process any matters relating to a national permit of a broker at that same location. A district permit holder whose permit is transitioned to a national permit will continue to contact the BMO at the location where the broker's license was issued. Any new applicant for a permit or license should contact a BMO in the geographic area where the applicant is located and/or intends to do customs business. CBP has published a chart with all of the locations and contact information for BMOs on its website.[4]

In order to better describe CBP's responsibilities for broker licensing and management issues, CBP changed the proposed term "Designated Center" to "Processing Center" in this final rule. A "Processing Center" means the broker management operations of a Center that processes applications for a license under § 111.12(a) and applications for a national permit under § 111.19(b) for an individual, partnership, association, or corporation, as well as submissions required in part 111 by already-licensed brokers.[5] The revision of the proposed language clarifies that brokers are not assigned to a specific Center, and that Center personnel at any of the 41 port locations may process applications and submissions, depending on the broker's filings and location. All references to "Designated Center" in the proposed regulations are updated in this final rule to reference "Processing Center." In addition, CBP removed any references to "director of" a Center throughout part 111 to simply state "Processing Center", keeping the regulatory language more general. This change aligns with the statutory language in 19 U.S.C. 1641 that references "em-

[4] The BMO contact information for the 41 port locations may be found online at *https://www.cbp.gov/trade/programs-administration/customs-brokers* by clicking on the tab titled "Broker Management Officer (BMO) Contact Information".

[5] In this document, CBP uses "Processing Center" in quotes to denote a replacement of the proposed term "Designated Center"; when the words "processing Center" without quotation marks are used, CBP is referring to the Center of Excellence and Expertise that is actually performing a processing function.

ployees of U.S. Customs and Border Protection" or "duly accredited officers" without pointing out a specific title or position within CBP. This change also provides the agency more flexibility in processing brokers' applications and submissions, without any changes for the brokers.

Comment: Two commenters asked for clarification as to how brokers would be assigned to a Center, including contact information for the designated Center. Another commenter sought further clarification on the process that CBP will use to assign brokers with existing national permits to a specific Center. One commenter suggested that a primary point of contact be assigned for each of the ten (10) Centers.

Commenters also asked that CBP have a reporting structure in place to allow for an escalation process so brokers could properly address a designated broker management office. Some commenters argued that a broker should also have the opportunity to request a specific Center to align with the broker's business model familiar with the commodities, transactions and types of entry processes by the broker. Additionally, some commenters suggested that there should be an avenue for a broker to request re-assignment to a specific Center.

Response: As there will be no designated Centers, there will be no assignment to a Center by CBP, and brokers will not have to request an assignment to a specific Center or a re-assignment to another Center. As mentioned above, BMOs who are currently managing broker submissions and questions will continue to do so. If a broker is unsatisfied with the handling of a matter by a BMO, a broker may escalate an issue to the supervisor of the BMO. The names of the Assistant Center Directors, who may be contacted for purposes of escalation, are listed on the contact information chart mentioned above.

Comment: One commenter suggested that "certain functions," as mentioned in the NPRM, that were previously performed by the port director and transitioned to the Center director, should be clarified in the "Broker Management Handbook" and the "Centers of Excellence and Expertise Trade Process Document" to provide clear policy direction to CBP and the trade community in order to assist with a smooth transition to a Center. The commenter further stated that CBP must consider a full transition of all brokers to a designated Center versus a staged approach. The commenter recommended further that the Centers prepare for the transition and implement their oversight at the same time, ensuring a fair and consistent treatment of brokers. The commenter also strongly recommended that CBP consider a broker working group which would provide feedback to the Centers

on operational trade and post-summary functions, mirroring the current working group in place today.

Response: The "Centers of Excellence and Expertise Trade Process Document" already includes most of the information regarding the transition from ports to Centers. Any updates made with this final rule will be communicated to the broker community on CBP's website. Additionally, CBP has created a guidance document containing operational information regarding the regulatory changes, as well as general information on various broker matters. This document will be published concurrently with the publication of this final rule. In time for the publication of this final rule, CBP will issue additional specific operational guidance regarding certain regulatory changes on CBP's website.

As mentioned above, current license and permit holders will continue to contact the BMO who has been processing brokers' licensing and permitting matters. Center personnel are ready and able to continue to do so. To ensure uniformity among Center personnel and efficiency in handling broker matters, BMOs at the various locations will continue to receive guidance from CBP Headquarters regarding the implementation of any updates or changes to current processes. CBP will continue to exercise oversight over the BMO locations to ensure that BMOs apply the same standards, and process broker submissions and respond to questions from brokers consistently and uniformly.

Regarding the request for CBP to consider a working group, CBP will continue general broker outreach and keep the broker community informed of any changes through various channels, such as Cargo System Messaging Service (CSMS) messages, webinars, and postings on CBP's website. Accordingly, a specific working group is not needed at this time.

Comment: Another commenter acknowledged the importance of building a strong connection between the Centers and brokers but stressed that it is crucial that CBP avoid severing the relationship between brokers and port directors entirely. The commenter stated that a strong relationship is key in the efficient facilitation of cargo and merchandise. As there is no proposed regulatory language regarding any administrative actions that include port directors, the commenter asked that CBP clarify this point in the final rule.

Response: CBP recognizes the importance of the relationship between the brokers and port directors and assures the trade community that port directors will continue to be involved. Port directors or their designees will present the brokers' licenses in locations where there is no Center director, or Assistant Center director, and CBP will

ensure that the port and Center management maintain open communications regarding local broker issues. However, ultimately, Center directors maintain the final authority over any decisions pertaining to broker issues. CBP does not believe that the regulation needs to be amended.

Comment: One commenter agreed that reliable channels of communication between CBP and the brokers are essential but disagreed with the requirement to designate a primary location pursuant to the proposed definition of "broker's office of record" in § 111.1 for overseeing the administration of the part 111 provisions. The commenter proposed to revise the definition to include language which clarifies that the office of record is the primary location that *acts as the point of contact* (emphasis added) for the administration of the provisions of part 111 because businesses may not always have one location that oversees all the activities conducted under a national permit.

Another commenter suggested that CBP utilize electronic reporting systems as the method of communication rather than designating a specific location. The commenter argued that flexibility of administration and effective communication are not dependent on location.

Response: CBP disagrees with the first commenter's request to modify the definition of the broker's office of record. CBP determined that the proposed definition should be adopted because the primary office that oversees the administration of all activities conducted under a national permit may be different from the primary office that acts as the point of contact. The addition of the words suggested by the commenter would change CBP's intended meaning of this definition. As district offices will no longer exist, CBP needs to not only know the point of contact for the administration of the part 111 regulations, but also the location that has been identified as the office overseeing the transactions occurring under the national permit. This may not be the only location through which broker activities occur, but it would be the primary location to which CBP would send correspondence and where CBP would conduct a physical inspection pursuant to § 111.27. Moreover, the primary location is also the address that is provided in the application for a national permit and must be kept up to date for so long as a broker holds a license and permit.

In response to the second commenter, CBP is already utilizing electronic reporting tools, such as ACE and the eCBP portal, and is using email when corresponding with a broker. The eCBP portal is CBP's new payment and submission system, streamlining the payment and submission process for broker examination applications and triennial status reports. Additional reporting capabilities for

brokers will follow, as discussed in more detail below in Section IV. Despite the availability of the above-mentioned electronic reporting tools, a broker has the responsibility to establish an actual location for purposes of visits and audits but is free to determine where to establish his or her office(s) within the U.S. customs territory. CBP understands that flexibility is needed when it comes to establishing a primary office, especially during the COVID–19 pandemic, which caused many brokers to work from home. Thus, CBP appreciates the opportunity to clarify that the primary location does not have to be an office location but can be the broker's home as long as there is a physical location at which the broker can be reached.

Comment: One commenter suggested that CBP make a small change in the definition of "permit" in § 111.1 by replacing the word "any" with "a" to clarify that CBP requires only one permit per business, even if a business operates a drawback business and a consulting business, or an entry business.

Response: CBP agrees with the commenter. In the NPRM, CBP already proposed this change, and now finalized this change to clarify that there is only one national permit that a broker needs to hold in order to conduct customs business within the U.S. customs territory.

Comment: Several commenters expressed support for the elimination of the district permits as it reflects a shift toward modern practice of working with the Centers and filing entries in ACE. However, one commenter requested clarification of CBP's statements in the preamble of the NPRM that the granting of a national permit to current district permit holders would be automatic, but that CBP would, at the same time, provide guidance regarding the permit transition upon the adoption of the final regulations. The commenter stated that the need to provide further instructions as to the transition did not seem to make the transition "automatic". In addition, the commenter asked whether there would be a grace period to ensure an uninterrupted and smooth transition. Lastly, the commenter also stated that the grandfathering rules should be included in the regulation, and not merely in the preamble, as they are critical to a smooth transition.

Response: CBP appreciates the opportunity to clarify that the transition for a district permit holder to a national permit will be automatic, without any actions to be taken by the brokers. CBP will use the ACE data that is on file for each district permit holder who or which does not already have a national permit and automatically create a national permit for each current district permit holder. In addition, to ensure an uninterrupted transition, active district permits will not be cancelled until all national permits have been issued.

District permit holders will be able to continue to conduct customs business without any interruptions or delays. CBP will notify current district permit holders by email (if an email address is on file with CBP) that a new national permit will be issued; otherwise, CBP will notify by mail at the permit holder's business location on file. The transition of permits will occur between the date of publication of this final rule and the date of effectiveness of the final regulations, which will be 60 days after publication. In addition to the notification of the permit holders by email or mail, CBP will issue a CSMS message informing district permit holders of the transition to national permits.

With regard to the transition of the district permits to national permits, it is a one-time event and, thus, there is no need for including the transition to national permits in the regulations. Any new applicants for a national permit will apply pursuant to the final regulations.

Comment: Three commenters expressed disagreement with CBP's proposal to eliminate the district permits. One commenter argued that eliminating the district permits would drastically affect the broker's ability to provide optimum responsible supervision and control over brokerage operations. Brokers should at least have one permit holder per district. The commenter explained that in some cases, a face-to face meeting with a national permit holder might be impossible, so the district permit holder would be able to have such a meeting. It would also be more convenient and more time efficient to resolve questions quickly with a district permit holder who is located closer to a CBP office. In addition, a local expert is more familiar with the port nuances, staff, and different hours of operations, to name a few. With the proposed elimination, a district permit holder might consider not renewing the individual license, which could lead to the elimination of hundreds, if not thousands, of licenses, which in a time when import volumes are increasing seems unreasonable.

Response: CBP understands that the transition from a district permit system requiring multiple local permits to a single national permit may raise new or unique concerns for customs brokers in ensuring proper exercise of responsible supervision and control over the customs business they conduct. However, CBP disagrees with the commenter that responsible supervision and control will be more difficult to maintain because customs brokers will no longer need to expend time and resources monitoring several district offices. Brokers may consolidate operations and focus on a single nationally permitted office to ensure that optimal responsible supervision and control is maintained. Under the national permit system, customs brokers may

also choose to continue to operate locally by liaising with the port where entries are filed and imports are released from customs custody, while conducting customs business and engaging with clients at a national level. Regardless of whether a broker decides to eliminate offices or personnel in a particular location or continues to conduct customs business in its current locations, brokers remain responsible for the customs business they perform and over which they have supervision no matter where that is occurring under the purview of their license. Existing responsibilities of a broker do not disappear simply because district permits are eliminated. In addition, prior to the publication of the NPRM, CBP had conducted outreach to the broker community through webinars, port meetings, and broker association meetings to solicit feedback on brokerage needs in the modern business environment. COAC had recommended that CBP enable brokers to operate through a single, national permit, in light of the changes to CBP's operational structure and growing technological capabilities. CBP incorporated the broker community's feedback and COAC's recommendation in the final regulations, reflecting the modern technological and business environment of customs brokers, and highlighting the importance of electronic process advancements to communicate with local ports, and to submit broker information and entry filings.

It is CBP's goal to ensure that the communication between brokers and CBP (ports and Centers) is easy and efficient. CBP always strives to improve the dialogue with brokers, as exemplified by CBP's ongoing effort to utilize electronic tools for reporting and communicating. If in-person meetings are not possible due to timing or distance, meetings can be held via video conferencing to quickly and efficiently resolve any questions or concerns. A current district permit holder who does not hold a national permit prior to the transition to national permits will possibly have to familiarize himself or herself with the nuances of a particular port, hours of operation and particular staff. However, the benefits gained from the elimination of district permits and the transition to one national permit will outweigh the initial inconveniences that some brokers may experience.

Comment: One commenter argued that because customs business is generally conducted in connection with logistics and handling of cargo, both customs business and logistics would become more consolidated outside the ports without any consideration for the local ports' interests, including revenue in connection with those services. In addition, responsible supervision and control of customs business would change and prove much more difficult in a remote setting. The commenter is of the opinion that if a broker wishes to perform cus-

toms business in a certain physical location, he or she should be required to have a permit issued by that local port.

Response: CBP does not agree with the commenter's concern. When it comes to logistics and cargo handling, local ports will still be involved. Revenue collection will continue to be carried out at the ports. Supervision over employees who are not local will continue to be exercised, especially in light of the updated responsible supervision and control standards, adding, among other factors, the requirement that brokerage firms employ a sufficient number of licensed brokers to satisfy the supervision standard, and the requirement for new permit holders to have a supervision plan in place to ensure that reasonable supervision and control is exercised over the customs business conducted under a national permit. In response to this comment, CBP further wishes to emphasize the importance of the accuracy and completeness of broker submissions to ensure that CBP has sufficient information available to exercise its oversight over broker operations.

National permits cover local ports across the U.S. customs territory; thus, a broker may still perform customs business in a specific location if the broker so chooses. The national permit allows customs business within the entire U.S. customs territory and for brokers to perform any activities allowed under the permit, thus providing a broker with the choice of where to perform customs business and lessening the burden on a broker to work within the scope of a district permit for a geographic area. These regulatory changes will benefit the customs broker community without CBP's losing oversight over broker entities responsible for supervising their employees.

Comment: Several commenters recommended that CBP define "customs business" in § 111.3 and explain when a license is required and when it is not. One commenter stated that the term "customs business" should be redefined to reflect the commercial activities and the roles the individual parties play in a transaction. The commenter explained that customs business can mean something different for different brokers, depending on what role the broker plays in a transaction, from the mere gathering of data for submission to assisting an importer with the entire importation process.

Response: CBP disagrees with the commenters that a revised definition of customs business is needed, as the applicable statute and regulations already provide extensive definitions. Section 1641(a)(2) of title 19 of the United States Code defines "customs business" as those activities involving transactions with CBP concerning the entry and admissibility of merchandise, its classification and valuation, the payment of duties, taxes, or other charges assessed or collection by

CBP upon merchandise by reason of its importation, or the refund, rebate, or drawback thereof. "Customs business" also includes the preparation, and activities relating to the preparation, of documents or forms, the electronic transmission of such documents, invoices, bills, or parts thereof, which are intended to be filed with CBP in furtherance of such activities. The regulatory definition in § 111.1 mirrors the statutory definition in section 1641(a)(2), except for the additional explanation that "corporate compliance activity" is not considered customs business. In addition, CBP issued a Headquarters Ruling Letter (Headquarters ruling) H272798 (January 26, 2017), which provided an in-depth analysis of what customs business entails in several different scenarios provided by the ruling requester.[6] The ruling serves as guidance to other brokers who encounter the same scenarios. CBP does not believe that further explanations or clarifications are needed.

The commenter correctly pointed out that the role of a broker in a specific transaction depends on the broker's involvement and knowledge of the facts, thus, decisions as to what constitutes customs business are made in a case-by-case analysis to take into account the specific facts and circumstances. If a broker is unsure whether a certain transaction is considered customs business, he or she can request a ruling pursuant to 19 CFR 177.1.

Comment: Several commenters raised concerns with respect to the interaction of § 111.3, concerning customs business, and § 111.2(a)(2) concerning transactions for which a customs broker's license is not required. The commenters stated that the proposed § 111.3 only mentions the customs broker's location and point of contact, along with a reference to § 111.1 for the definition of customs business. Meanwhile, § 111.2(a)(2) lists transactions for which a license is not required, and thus, which fall outside of the customs business definition. The commenters suggested that, in order to avoid any confusion, CBP either state in § 111.2(a)(2) that the listed transactions are not considered customs business or list the specific transactions in § 111.3 and clarify that because they do not constitute customs business, they do not require a license. One commenter asserted that CBP should make it clear in § 111.3 that customs business must be conducted within the U.S. customs territory, as opposed to the transactions listed in § 111.2(a)(2), which may be conducted outside of the U.S. customs territory.

[6] The cited Headquarters ruling, and other Headquarters rulings mentioned in this final rule, may be viewed in CBP's searchable database, the Customs Rulings Online Search System (CROSS), which may be found on CBP's website at *https://rulings.cbp.gov/home.*

Response: CBP disagrees with the commenters' suggestion to cross-reference the two mentioned regulations. CBP believes that the regulations, as written, make clear that a customs broker's license is required to conduct customs business, and that customs business must be conducted within the U.S. customs territory. Whether a transaction that is not specifically mentioned in the statutory definition of section 1641(a)(2) or in the regulatory definition in § 111.1 is considered customs business can be determined by requesting a ruling, as mentioned above. CBP cannot exhaustively list all transactions that are (or are not) covered by the customs business definition. A determination as to whether a specific activity is considered customs business is based on a fact-specific analysis, which is better addressed in a CBP ruling letter than a regulation.

Comment: Two commenters expressed disagreement with the requirement in § 111.3(b) for a broker's designation of a knowledgeable point of contact to be available to CBP "outside of normal operating hours". One commenter argued that this requirement goes beyond the requirements set forth in 19 U.S.C. 1641. Another commenter argued that this requirement should only pertain to cargo security matters, such as Customs Trade Partnership Against Terrorism (CTPAT) matters, and CBP should clarify that in the regulation.

Response: CBP disagrees with the commenters. Due to the shift from multiple district permits (and multiple points of contact) to one national permit (and one point of contact), the one individual who is a knowledgeable point of contact for a broker needs to be available to cover all the ports of entry where the brokerage enters goods, which could mean coverage beyond normal operating hours of any one port of entry. Although CBP does not require 24-hour availability, CBP does need one point of contact to cover the operating hours across all time zones to address situations where a port may need to contact an importer regarding the release of goods. While questions relating to the CTPAT program may certainly occur outside of normal operating hours, those are not the only situations that are covered.

Comment: One commenter stated that § 111.3(a) does not address the use of offshore resources to assist importers and/or licensed brokers with the classification process under the Harmonized Tariff Schedule of the United States (HTSUS). The commenter requested clarification on three scenarios: (1) whether § 111.3(a) prohibits the classification of goods either at the four- or six-digit HTSUS levels by unlicensed offshore resources located outside of the customs territory, if the HTSUS codes will be used for the purpose of making customs entry globally, including in the United States (and whether the answer would be different if the offshore resources were employees of a

U.S. importer or U.S. licensed broker); (2) whether § 111.3(a) prohibits the classification of goods either at the eight- or ten-digit HTSUS levels by unlicensed offshore resources/ persons located outside of the customs territory if a U.S. importer or U.S. licensed broker only uses this classification as a resource to determine the classification of goods consistent with Headquarters ruling H272798;[7] and, (3) whether a U.S. licensed broker is permitted to use acceptable sampling methods to review the classification determinations undertaken by its employees (or unlicensed offshore resources if scenarios (1) or (2) above are permissible) to assist with satisfying the "responsible supervision and control" and "due diligence" standards in §§ 111.28(a) and 111.39(b).

With regard to the third scenario, the commenter noted that the use of statistical sampling methods is explicitly codified in the customs regulations, for instance, in 19 CFR 162.74(j), with respect to prior disclosures, and 19 CFR 163.11(c) with respect to customs audits. Thus, the regulations in part 111 would benefit from the inclusion of specific guidance regarding the acceptability of statistical sampling methods for the purposes of satisfying the responsible supervision and control standard of § 111.28(a) and the "due diligence" standard of § 111.39(b). The commenter further suggested to add the adequacy of a satisfying technique as a 16th factor for responsible supervision and control in § 111.28(a) that CBP may consider, and the final rule should also include specific guidance addressing the sampling methods that would be acceptable to CBP.

Response: CBP has clarified in Headquarters ruling H045695 (October 15, 2010) that classification at the six-digit HTSUS level does not constitute customs business. In addition, classification at a level lower than six digits, such as the four-digit HTSUS level, is not considered customs business either. Even though CBP neither regulates non-customs business, nor whether a domestic importing company uses foreign staff to conduct non-customs business, U.S. licensed brokers are required to exercise special caution to ensure that any unlicensed contractor or employee operating on behalf of the brokerage abroad does not perform any tasks that may cross the line

[7] Headquarters ruling H272798 held that a company would not be unlawfully engaged in the conduct of "customs business" by creating a tariff classification database to be used by a licensed broker in preparing to file an entry so long as the company issues a disclaimer cautioning clients that the specific tariff classification to be filed for an entry of merchandise must be determined by a licensed customs broker. The disclaimer must also caution that the opinion of the broker takes priority over the proposed classification in the database. Creation of a classification database is permissible only if the database is used as a resource and will not direct a client or a licensed customs broker in the preparation or filing of a specific entry.

into conducting customs business. *See* Headquarters ruling H302355 (January 29, 2019).

Regarding scenario (2), generally, classification determinations at the eight- and ten-digit HTSUS levels are considered customs business, and customs business must be conducted by a licensed broker. The term "resources" used by the commenter is vague and CBP is not able to fully respond to this comment as to whether such advice would constitute impermissible engagement in customs business. The commenter should seek a ruling to determine whether the specific proposal is permissible. However, in Headquarters ruling H272798 (January 27, 2018), CBP cautioned a requester, citing Headquarters ruling H115248 (August 28, 2011), that "even when there is a 'possibility' that classification information will end up on an entry, a broker's license is required 'to gather classification data which will be reflected on the entry.' "

To respond to the commenter's third scenario, in general, the use of sampling methods is an adequate technique, but it depends on the circumstances of a particular situation whether a specific sampling technique is sufficient to ensure responsible supervision and control pursuant to § 111.28(a). The due diligence standard in revised paragraph (b) of § 111.39 requires that a broker ascertain the correctness of any information which the broker imparts to a client, thus, certain sampling techniques may or may not be appropriate to exercise due diligence, depending on the facts of the specific situation.

The commenter points to 19 CFR 162.74(j), which states that a private party may use statistical sampling to "disclose the circumstances of a violation" and for calculation of lost duties, taxes, and fees or lost revenue for purposes of prior disclosure, provided that the statistical sampling satisfies the criteria in 19 CFR 163.11(c)(3). Section 163.11 generally sets forth the "audit procedures" for CBP auditors pursuant to 19 U.S.C. 1509(b). CBP believes that those cited regulations are not geared towards broker audits; the notable difference being that the sampling results are submitted to CBP in a prior disclosure, whereas the results of a broker's own compliance activities (*e.g.,* review of classification determinations) are not submitted to CBP. CBP does not have any obligation to instruct brokers on how to conduct their own audits, and, thus, CBP does not agree that the use of adequate sampling methods be added as a 16th factor in paragraph § 111.28(a), or that CBP provide additional guidance as to adequate sampling methods.

Comment: One commenter stated that CBP should confirm that § 111.3(a) does not require that any activity falling within the definition

of "corporate compliance activity" in § 111.1, including potential classification support by a related business entity, be conducted within the U.S. customs territory.

Response: The last sentence of the "customs business" definition in § 111.1 specifically states that "corporate compliance activity" is not considered customs business. Section 111.3(a) states that customs business must be conducted within the U.S. customs territory, meaning non-customs business need not be conducted within the U.S. customs territory. CBP believes that the regulations are clear and additional clarification is not needed.

Subpart B—Procedure To Obtain License or Permit

Comment: Several commenters expressed support for the proposed changes in § 111.12 as they eliminate certain outdated requirements for broker license applicants. However, one commenter recommended changing the requirement under § 111.12(a) to provide documentation regarding the applicant's authority to use a trade or fictitious name in one or more states in which the applicant plans to operate. The commenter argued that under a port-based system, where ports lacked access to a centralized database and asked for documentation regarding the applicant's authority to use a trade or fictitious name in a state other than the applicant's home state, that was a reasonable request; however, in an automated world with a single license and national permit and where the broker's filer code is linked to the broker's information in ACE, this is no longer practical or necessary. Other than with respect to the license and the broker's office of record state, documentation showing that a broker is operating in additional states purportedly has no impact on CBP's statutory or regulatory authority over brokers. Therefore, the commenter proposed to delete the advance notice requirement with respect to trade names both with respect to licenses and permits.

Response: CBP disagrees with the commenter. If an applicant proposes to operate under a trade or fictitious name in one or more states, evidence of the applicant's authority to use the name in each of those states must accompany the application. CBP needs to know in which states the applicant is doing customs business, along with the name associated with the applicant's business. If the address provided by the broker for the national permit office is in a different state from the address provided for the national license office, then CBP requires documentation for both the license and permit. If they are one and the same and the broker only operates in one state, then only documentation for that state is required.

Comment: One commenter raised the concern that the CBP examination results letters do not always notify examinees of their right to appeal the examination results or mention the 60-day deadline to file an appeal, pursuant to paragraphs (e) and (f) of § 111.13. The commenter pointed out that the preamble of the NPRM states that examinees who wish to appeal the examination results should submit those requests in accordance with the instructions provided in the results letter. The commenter asked that CBP make sure that the results letters always notify applicants of the reasons for the denial and the right to appeal within 60 days.

The commenter also asked CBP to clarify in the regulations that applicants may be represented in their appeals by an attorney or other agents. The commenter stated that CBP recently eliminated language that appeals must be written in the applicant's own words; however, there is still confusion as to whether an applicant may contract with an attorney or others to assist with the appeal.

Response: Regarding the commenter's first point, CBP will continue to ensure that the examination results letters contain information as to the examinee's right to file an appeal, along with instructions on how to file, and the 60-day deadline to submit an appeal. The results letters contain the examinee's score, as well as the minimum passing score. The results letters for the October 2020 examination also included an electronic filing option for appeals, which was proposed in the NPRM, and has been included in the final regulation. Additionally, examinees may find instructions on how to appeal the exam results on CBP's website.[8]

With respect to the "own words" language that the commenter refers to, results letters still include language that states that the examinee has to submit a compelling argument ("in your own words") explaining why the examinee's answer is better than CBP's official answer, or why the appealed question has no possible correct answer. CBP continues to use this language in the results letters because it is expected that an applicant has the knowledge to draft the appeal document and provide arguments that support the appeal for a particular question. The focus of the appeal is of course on the articulation of why the answer provided by the examinee on the exam should be given credit. The written examination is a test of the applicant's knowledge of the pertinent material, not someone else's knowledge. A third person should not be the one to write the appeal on behalf of the examinee; CBP understands, however, that in some instances a third person may assist with formulating and/ or submitting the appeal.

[8] Instructions on how to appeal may be found online at *https://www.cbp.gov/trade/programs-administration/customs-brokers/how-appeal.*

Comment: One commenter expressed support of the scope expansion for the background investigation in § 111.14 to include the financial responsibility of an applicant, and any association with any individuals or groups that may present a risk to the security or to the revenue collection of the United States, but also noted that the facts to be investigated under § 111.14 should be included in the requirements to apply for a license in § 111.12.

Response: CBP disagrees with the commenter's suggestion to include the non-exhaustive list of factors used in the background investigation pursuant to § 111.14 as requirements for the application for a license. Section 111.12 describes the formalities of the application process, which includes the submission of CBP Form 3124 (Application for Customs Broker License or Permit), along with the application fee, and any additional required documentation pursuant to paragraph (a). In contrast, § 111.14 lists facts and circumstances that CBP will ascertain during the background investigation to determine whether an applicant is qualified to hold a license. The background investigation is a separate step in the application process that follows the submission of the application and fee, and the scope of each investigation depends on the facts and circumstances presented by the applicant and of which CBP becomes aware during its investigation. Including all the considerations that are part of CBP's background investigation as part of the general application process would confuse the requirements for the basic application process with the requirements to qualify for a license after a thorough investigation of more information by CBP.

Comment: One commenter objected to the addition of new grounds to justify the denial of a license in § 111.16(b). The commenter wrote that no due process opportunity is provided to challenge CBP's denial of a license.

Response: CBP disagrees with the commenter. CBP always provides a reason in the denial notice as to why the license was not issued; decisions are not made arbitrarily. Section 111.17 further provides the applicant the opportunity to have the denial of the application reviewed, and upon the affirmation of the denial of the license, the applicant has a second opportunity to request an additional review by the Executive Assistant Commissioner, Office of Trade, and a third opportunity to appeal the decision to the Court of International Trade. Revised § 111.17(a) provides greater flexibility to the applicant and CBP by allowing the applicant to file additional information or arguments in support of the license application, and request to appear in person, by telephone, or other acceptable means of communi-

cation by which an applicant may provide further information to CBP. These avenues provide sufficient notice and due process to an applicant under the regulations.

Comment: Several commenters expressed concern with the proposed term "financial responsibility" in § 111.16(b)(3) and argued that it should not be a factor in the determination whether a license should be denied, especially during the COVID–19 pandemic. One commenter argued that CBP could conceivably deny a license based on a blemish on an applicant's credit history, which would be unfair. One commenter asked CBP to provide a clear definition of "pertinent facts" in § 111.16(b)(5) if CBP wished to penalize an applicant for the omission of pertinent facts in the application or interview. Commenters also expressed confusion as to what constitutes "detrimental" commercial transactions in § 111.16(b)(6), especially to whom the transactions have to be detrimental, and whether the term could include poor business decisions that are unrelated to a brokerage or customs business but are detrimental to the individual making the decision. One commenter expressed great concern with the grounds for denial of a license in paragraph § 111.16(b)(8) that includes "any other relevant information uncovered over the course of the background investigation" as it is over-reaching, which the commenter equated to CBP's being able to deny a license for any reason.

Response: CBP appreciates the opportunity to clarify that the financial responsibility of a license applicant has always been an expectation when determining an applicant's qualification to hold a license, as part of the business integrity requirement in § 111.16(b)(3). A business integrity evaluation includes the provision of financial reports, which reflect upon the financial responsibility of an individual. By expressly including this factor in the final regulation, CBP confirms that the financial responsibility of an applicant is part of the determination whether a license is issued or denied. Nonetheless, CBP has always taken into account the personal circumstances of an applicant when making a decision. It has been CBP's practice to follow up with the applicant with any questions or concerns that arise during the review of the provided information and request additional information and/or request information regarding an applicant's plan to mitigate any debt or other financial difficulties, before making the determination to deny a license.

"Pertinent facts" in § 111.16(b)(5) are those facts that are requested on CBP Form 3124 when applying for a license, the facts gathered during the interview with the applicant, and during the background investigation. These are the same pertinent facts about which an applicant should not make a willful misstatement under the existing

regulations. Those same facts should not be omitted, as the omission of those may be just as significant as a misstatement of those facts. The addition of the word "detrimental" along with the word "unfair" in § 111.16(b)(6) better reflects CBP's intent of including not only unfair transactions but also those that would be detrimental, *e.g.,* those that may cause financial harm, to a client, CBP, or any other individual or entity implicated in a commercial transaction. Whether an applicant's conduct is deemed detrimental is determined on a case-by-case basis, considering the circumstances surrounding the commercial transaction.

Lastly, CBP included a catch-all provision in § 111.16(b)(8) to account for any other relevant information that CBP uncovers over the course of the investigation that may influence CBP's decision to accept or deny a license application, but that is not mentioned in the non-exhaustive list in § 111.16(b)(1) through (7). Each application is reviewed individually, and because factors (1) through (7) do not cover every aspect that could lead to a denial of a license, a provision that covers any other relevant information is necessary to assist with CBP's determination.

Comment: One commenter stated that the requirement to provide a copy of the documentation issued by a State or local government that establishes the legal status and reserves the business name of the entity pursuant to § 111.19(b)(3) is already on file with respect to the license. Given that there is now unity between the scope of the license and permit, this requirement appears redundant. Moreover, another commenter argued that there is no regulatory reason for other offices covered by the national permit to supply such information when the broker's office of record is provided. Therefore, the commenter proposed to delete this requirement.

Response: While it is true that a license applicant who proposes to operate under a trade or fictitious name in one or more states has to provide evidence of the applicant's authority to use the name in each of those states pursuant to § 111.12(a), and that information is already in CBP's records, it is possible that a broker has an office in one state under which the license application was filed, but then later applies for a national permit and provides a different office in a different state with a different trade or fictitious name. In this scenario, CBP would not know about a broker's second office if the broker did not provide this information. Due to the elimination of district permits and a district permit holder's responsibility to provide information for the local office, CBP needs to ensure that all the information regarding the broker's various offices, which could be operating in different states, potentially under different names, is provided to

CBP. Having this information available enables CBP to exercise oversight over a broker's customs business and verify whether the broker is exercising responsible supervision and control in each of the broker's customs business locations. Thus, CBP disagrees with the elimination of the requirement in § 111.19(b)(3).

Comment: More than one commenter maintained that the proposed requirement for a supervision plan in § 111.19(b)(8) is vague and CBP does not describe what such a plan would include. Therefore, CBP should provide at least minimum criteria for brokers to be able to determine what such a plan should look like. Another commenter stated that it is not clear from the proposed regulation whether a current national permit holder is required to submit a supervision plan, and whether a current national permit holder is subject to cancellation of the permit if CBP deems the supervision plan unacceptable, or whether there is a grace period for the broker to adjust the plan. The commenter also noted that the NPRM did not state whether single port or single office brokers are also subject to filing a supervision plan even though effectively they are operating as though they had a single port permit.

Response: What a supervision plan should look like depends, among other things, on the size of a broker entity, the experience of the employees overseen by a licensed broker, the complexity of the customs business, and the types of transactions that a broker entity handles. CBP believes it is prudent for a broker entity to have more supervision, *i.e.,* more licensed brokers and/or more training, and guidance for employees, in place if the broker entity is large and deals with complex business transactions. CBP agrees with the commenters that general guidance on expectations for a supervision plan is helpful, and, thus, CBP will provide such guidance on its website and/or through other electronic forms of communication, such as CSMS messages.

Further, CBP welcomes the opportunity to clarify that current national permit holders are not required to provide a supervision plan pursuant to the new § 111.19(b)(8), however, CBP wishes to emphasize that having a supervision plan in place is highly encouraged and should be a best practice for every permit holder. The same applies to current district permit holders whose district permit will be transitioned to a national permit. As for single port or single office brokers who currently hold a district permit, or a national permit, a supervision plan is not required pursuant to the new regulations, but will be required of new permit applicants, even if they only have a single office or work at a single port.

Comment: Two commenters stated that they disagreed with CBP's proposal to eliminate the requirement that an applicant for a license on behalf of an association or corporation be an officer (and not only a licensed broker). The commenters argued that the broker and CBP are best served when an officer of an association or corporation demonstrates knowledge of customs regulations through its licensed customs broker designation. The commenters believe that the current requirement under § 111.11(c)(2) should remain in place.

Response: CBP agrees with the commenter that it is important to have at least one officer in an association or corporation, and at least one member in a partnership who is a licensed broker. CBP did not propose to eliminate this requirement in § 111.11(c)(2). CBP stated in the preamble of the NPRM that if the application is on behalf of an association, corporation, or partnership, then the applicant is not required to be an officer but is required to be a licensed broker. This relaxation of CBP's prior practice provides the broker entity with flexibility as to who may submit the application for a national permit, but it does not eliminate the requirement under § 111.11(c)(2) to have at least one officer in an association or corporation, or at least one member in a partnership under § 111.11(b), who is a licensed broker. It is further important to note that the individual applying for and obtaining the license on behalf of the entity must be delegated the proper agency authority to obtain the license and serve as the license qualifier, thus, binding the entity with respect to the customs business it later performs.

Comment: One commenter pointed to § 111.16, pursuant to which CBP is required to specify the reasons for denial of a license and stated that there is no comparable requirement to specify a reason for denial of a permit based upon the adequacy of a supervision plan under § 111.19. The commenter recommended that a permit denial include a detailed explanation of the reason(s) for denial, so a broker has clear direction as to what needs to be addressed.

Response: CBP includes a reason as to why a permit application is denied when issuing a denial letter to an applicant. CBP does not agree that there is a need to include language in § 111.19 to state that a reason for the denial will be provided, merely because of comparable language in § 111.16.

Comment: Three commenters suggested that CBP allow brokers to have multiple national permits if they maintain separate, although related, business entities and allow for more than one licensed broker to qualify for the permit. The commenters reasoned that in case of any issues with one national permit, the broker could continue to work under a separate national permit for a related entity.

Response: CBP disagrees with the commenters. CBP moved from the district permit system to a national permit system in order to provide brokers with the flexibility to conduct customs business within the entire U.S. territory with just one license and one permit. Allowing more than one national permit for related business entities defeats the purpose of eliminating multiple district permits in favor of one national permit per broker. The concern that one entity under a parent company is not exercising responsible supervision and control and potentially putting other related entities at risk, needs to be addressed within the entity itself. CBP will not provide more than one national permit to an entity so that a broker may have a backup permit for a related entity in case that entity is not exercising responsible supervision and control or not complying with other laws and requirements.

Additionally, it is CBP's practice to send an informed compliance or warning letter to a broker who is not complying with regulations. Usually, CBP provides the broker an opportunity to address any issues that CBP had raised as a concern before revoking a permit. A broker will usually not lose a permit upon one incident of noncompliance unless the incident was so grave that CBP determines that a broker is no longer qualified to hold a license to exercise customs business.

Subpart C—Duties and Responsibilities of Customs Brokers

Comment: Several commenters stated that the use of the term "breach" in § 111.21(b) is vague and overbroad and should be defined. One commenter asked whether only breaches that involve customer data are included in the regulation. Some commenters stated that the proposed regulation does not clarify the types of breaches that are included, and whether any breaches need to be reported or only material/ serious breaches. Several commenters suggested to hold brokers to the CTPAT cybersecurity standards, and simply indicate in the regulations regarding "record of transactions" (§ 111.21) and "responsible supervision and control" (§ 111.28) that brokers need to have a procedure in place to address data breaches and to report them to CBP as appropriate. Some commenters also noted that the proposed regulation is silent on how a breach should be reported to CBP.

Response: CBP intends for the common meaning of 'breach' to apply and does not believe a regulatory definition is necessary. Some considerations underlying this new regulatory provision, however, are things such as a physical or electronic intrusion into the broker's records whereby any information is compromised, but particularly confidential information of the broker's clients that might have been

viewed, copied, or used without permission. Proposed § 111.21(b) specifically states that records relating to a broker's customs business are at issue. The proposed regulation further states that "any" known breach that affects customer data, physical or electronic, will have to be reported. The regulation does not distinguish between a material/serious and non-material/non-serious breach. Pursuant to § 111.21(a), "records" include documents reflecting financial transactions as a broker. Any breach that affects those records that are maintained in a broker's customs business needs to be reported as part of CBP's overall risk management to prevent identity theft.

CBP disagrees with the use of the CTPAT standard in this context. The CTPAT standard applies mainly to importers and cargo carriers who are partners of the CTPAT program. Very few brokers are CTPAT partners, therefore, this standard would not be applicable to the majority of brokers. Lastly, CBP wishes to take the opportunity to clarify that security incidents, such as a breach discussed here, that have any effect on the security posture of CBP must be reported electronically to the CBP Office of Information Technology (OIT) Security Operations Center (CBP SOC) at *cbpsoc@cbp.dhs.gov,* and not the broker's designated Center, as proposed in the NPRM. Brokers may call CBP SOC at 703–921–6507 with questions as to the reporting of the breach, if any guidance is needed or if brokers are unable to send an electronic notification due to the breach. In addition, CBP added the email address to § 111.21 as the method for reporting a breach, and added the CBP SOC as the appropriate location for reporting a breach.

Comment: Several commenters disagreed with the proposed requirement in § 111.21(b) to provide notification to CBP within 72 hours of discovery of any known breach with a list of all compromised importer identification numbers as it is unreasonable. One commenter argued that if the breach were to happen on a weekend followed by a holiday, the broker would already be outside of the window of time allotted by CBP. Other commenters pointed out that this requirement is especially challenging for brokers who use third-party information technology (IT) providers. Such a short time frame may also lead to incomplete reports. Also, one commenter argued that the risk of a data breach seems to be minimal given CBP's advance targeting system detecting anomalies in shipping patterns.

Different commenters suggested different approaches as an alternative to the 72-hour requirement, such as an agreed upon time frame after the initial reporting of the fact that a breach occurred; reporting "as soon as practicable"; or, allowing for two weeks or ten (10) business days for the investigation and notification of the breach

from the time of discovery. Another suggestion was to allow for a process similar to the one set forth in 19 CFR 162.74(b)(4) in the context of prior disclosures, providing information within 30 days of the initial disclosure date.

Response: As identify theft is a major concern, CBP requires brokers to provide any known breach of importer identification numbers within a short time frame to CBP. Receiving the compromised importer identification numbers soon after the discovery of the breach will allow for a better targeting analysis and, thus, enhance CBP's overall risk management. However, CBP understands that 72 hours may in some instances not be sufficient to provide CBP with the complete information regarding the breach. Therefore, CBP revised the proposed requirement for brokers to provide electronic notification of the fact that a breach occurred and any known compromised importer identification numbers within 72 hours of discovery. In addition, within ten (10) business days of the notification, a broker must electronically provide an updated list of any additional known compromised importer identification numbers. To the extent that additional information is discovered, a broker must electronically provide that information within 72 hours of discovery. The broker is encouraged to work with CBP to gather the remaining information as quickly as possible from the broker's own system or a third-party software vendor to provide a comprehensive report. CBP believes that the revision of the proposed language should provide sufficient time to provide CBP with the breach information, but also satisfy CBP's need to gather and analyze any breach information soon after its discovery.

Comment: One commenter stated that the requirement pursuant to § 111.21(b) to identify affected records in the electronic system is far beyond most brokers' capability and should instead be imposed on the software vendors that CBP certifies. Most brokers use third-party software and most smaller brokers use software hosted by the provider. The software interfacing with CBP is approved by CBP and, therefore, CBP should be requiring these interdiction tools as part of their certification requirements. Unless a broker is using custom software, identification of a breach and the affected records should be the responsibility of the CBP-approved software vendor.

Response: CBP agrees that an agreement between CBP and a CBP-approved software vendor imposes the requirement on the software vendor to report any security incidents that have any effect on the security posture of CBP. However, a broker has an independent responsibility to notify CBP of any breach that compromised importer identification numbers, as discussed above. Also, brokers who do not engage a CBP-approved software vendor have the responsibility to

provide the breach information either from their own server or from a third-party software vendor that the broker employed. Regardless of where the broker's information is stored and maintained, CBP's revision of the time frame for the reporting requirement, as mentioned above, should allow sufficient time for a broker to provide the required information.

Comment: One commenter stated that the notification of the breach to CBP should be treated as confidential information because making the breach public may subject an entity to undue harm.

Response: CBP treats information received from brokers as confidential within the Department of Homeland Security (DHS), however, information may be analyzed and possibly released under the rules pertaining to the Freedom of Information Act (FOIA), as amended (5 U.S.C. 552). Section 103.21 of 19 CFR sets forth the procedures with respect to the production or disclosure of any documents contained in CBP files, or any information relating to material contained in CBP files, in all federal, state, local and foreign proceedings when a subpoena, notice of deposition, order, or demand of a court, administrative agency or other authority is issued for such information. Notifications by brokers of a breach would be covered under these provisions.

Comment: One commenter stated that many companies do not designate one individual as the party responsible for brokerage-wide recordkeeping requirements, as proposed in § 111.21(d). In most cases, multiple individuals are responsible for records management of policy, legal and operational matters. Another commenter stated that CBP should understand that brokers may provide group mailboxes and centralized contact information, monitored by multiple "knowledgeable" persons, which should satisfy the recordkeeping requirement in § 111.21(d).

Response: CBP understands that within a broker entity, different individuals may be responsible for different reporting matters, however, CBP needs the contact information for one knowledgeable employee as the party responsible for brokerage-wide recordkeeping requirements in case CBP has any questions or concerns. The designated individual may contact other individuals within the broker entity who have the knowledge on a particular recordkeeping matter to address CBP's question or concern. Under the new national permit framework, it will be especially important to maintain a current broker point of contact to facilitate efficient processing of entries and entry summaries. As to the second question, a general email address or group mailbox along with an individual's name as the point of contact is sufficient under § 111.21(d).

Comment: Commenters agree that paper or hard copy documents, as well as electronic documents maintained on a broker's privately owned, leased, or controlled server, should be located in the United States. However, where a broker uses a public third party to externally maintain or host the data, CBP should allow such a party to maintain or host the data outside of the United States, so long as that party is an entity operating and incorporated in the United States for jurisdictional purposes. This will provide a broker with the necessary flexibility to maintain data, while assuring CBP that the broker possesses the necessary authority to obtain such documents, when necessary. One commenter argued that so long as the information is kept securely, it should not matter if the information is kept within the U.S. customs territory or not, referring to Headquarters ruling H292868 (March 10, 2020). Another commenter argued that software programs exist that allow a company to file entries and declarations for multiple countries while the broker still works in the United States. The system being used could be securely accessed using a website and housed in another country where the broker entity may have its corporate entities. Such systems allow for enhanced corporate reporting and visibility into their customers' supply chains.

Response: A broker's paper and electronic records must be stored within the customs territory of the United States pursuant to proposed § 111.23(a). CBP has addressed the particular issue of maintaining copies and backups of a U.S. customs broker's digital records outside of the U.S. customs territory in Headquarters ruling H292868 (March 10, 2020). CBP determined in this ruling that a broker's electronic records hosted and maintained by a third-party software vendor must be maintained on a server physically located within the U.S. customs territory. Section 111.23(a) dictates that a licensed customs broker may maintain records relating to its customs transactions "at any location within the customs territory of the United States" in accordance with 19 CFR part 163. It is clear from the governing statutes (19 U.S.C. 1508, 1509(a)(2)) and regulations that a broker's electronic records must be maintained on a server physically located within the U.S. customs territory because this is where CBP has jurisdiction to issue a summons and inspect records. Nonetheless, CBP's Headquarters ruling also emphasized that a broker's duplicate or backup records may be stored outside of U.S. customs territory, so long as the recordkeeping requirements for the original records are satisfied. However, to make this position clearer in § 111.23(a), CBP added the words "originals of" before the word "records" to clarify that the requirement to maintain records in the U.S. customs territory pertains to original records, not backup records.

This clarification does not change any of the substantive regulatory requirements and is consistent with CBP's prior rulings.

Comment: One commenter asked CBP to provide greater clarity as to what constitutes "records". The commenter argued that certain commercial circumstances dictate the disclosure of information that may not be permissible under the current proposed language in § 111.24, such as collections, banking, or financial matters. The commenter claimed that CBP should allow for more business-friendly flexibility, so that a broker should not have to obtain a waiver to perform normal business activities that are incidental to its provision of customs business; limiting disclosable information would possibly place additional liability on the broker in an unforeseen manner. Several commenters suggested that a revision of the regulation to include certain information, *e.g.,* necessary for screening or transportation of a client's cargo, would better reflect how data and information are transmitted and used by brokers in the commercial environment and their business dealings. One of the commenters argued that without such language, brokers would question whether they are complying with their obligation to maintain the confidentiality of their clients' information.

Response: The term "records" is used throughout part 111 to refer to those records that are kept in a customs broker's ordinary course of business and that pertain to certain activities, including information required in connection with any importation, declaration or entry. A more general definition of "records" can be found in 19 CFR 163.1(a)(1) and encompasses a wide range of information that is made or normally kept in the ordinary course of business that pertains to any activity listed in 19 CFR 163.1(a)(2).

CBP does not agree with expanding the scope of disclosure of confidential information to additional scenarios. CBP cannot give advance authorization for the disclosure of importer records, as that authority lies with the client (importer). A broker is merely an agent of the importer, and the broker must obtain a written release from a client allowing for the sharing of client information with third parties for certain purposes, as the scope of client information to be shared is determined by the client. Written authorization for specific disclosures may be granted by the client to the broker as part of a power of attorney, or as a separate release.

Comment: One of the commenters referred to Headquarters ruling H221355 (November 21, 2012) in which CBP determined that a broker is prohibited from disclosing the name and address of a client to a third party for security verification purposes. The commenter asked

CBP to revise § 111.24 to provide that a broker is not precluded from disclosing client information to other third parties.

Response: CBP does not agree with the commenter's request. CBP continues its interpretation that, absent client consent, § 111.24 prevents the sharing of client contact information with a third party for security verification or other purposes, as determined in Headquarters ruling H221355. Any authorization for the broker to use client information must be set forth in the power of attorney that is agreed upon between the broker and the client or obtained in a separate written release. The confidentiality of a client's business information remains a paramount concern for CBP, but a client can always authorize the broker in writing to share information with third parties for certain purposes.

Comment: Several commenters asked CBP to consider revising the exemption that allows brokers to disclose information to representatives of DHS and limit the disclosure to representatives of CBP and U.S. Immigration and Customs Enforcement (ICE). The commenters argued that the agencies most directly involved with the business of the clients serviced by brokers are CBP and ICE, and only those agencies should be specified in the regulation. The commenters suggested to add the phrase "or as requested, in writing, by employees of other government agencies as necessary and appropriate." to include DHS representatives. Alternatively, other DHS agencies could fall under the catch-all phrase "other duly accredited officers or agents of the United States" in § 111.24.

One commenter pointed out that the proposed regulation does not contemplate that a broker may need to consult with an outside party, such as an attorney or consultant, or insurance underwriter/broker. The broker asserted that the broker should be able to discuss, and more importantly, disclose details of an incident, to an outside third party in the context of a damages claim by the client against the broker due to the broker's alleged error or omission.

Response: CBP proposed to replace the list of specific covered government employees to whom the broker records may be disclosed with a general reference to DHS representatives in order to include any government entity within DHS who may be involved in a broker matter. This language maintains CBP's flexibility to involve other entities within DHS, if deemed necessary. It is important to note that within DHS, all agencies are bound by the same information sharing rules to properly protect confidential information. Thus, CBP does not agree with limiting the general rule of disclosure of client information to CBP and ICE.

Additionally, DHS representatives are specifically mentioned in current § 111.26, in the context of interference with the examination of records. By revising §§ 111.24 and 111.25 and adding a reference to DHS, CBP is creating consistency among the regulations that deal with a broker's recordkeeping responsibilities.

Comment: One commenter, who expressed support for the addition of exemptions that permit information sharing, stated that the exemptions do not extend far enough to meet the needs of the modern business community. The commenter argued that many businesses have separate operating entities under one parent company that offers a broad set of services to customers. In a situation where one company acts as a broker, it should be allowed to share customer data within the larger corporate structure, assuming certain ownership and control metrics are met. Another commenter added that, at a minimum, the regulation should permit data sharing with a related corporate entity, such as a transportation provider, where the related entity originally provided the customs information to the broker.

Response: CBP disagrees with the commenter's suggestion to expand the scope of exemptions in § 111.24. Related entities within a larger corporate structure are still separate legal persons (*see* Headquarters ruling 116025 (September 29, 2003)), and no information may be shared among those related entities without a client's consent. As mentioned above, a client may consent to a broker's sharing client information within the larger corporate structure but consent to share information with related entities cannot be assumed, and it cannot be mandated by CBP.

Comment: One commenter, a surety association, asked CBP to amend § 111.24 to add an affirmative obligation to provide information to those entities specifically identified in that section, *i.e.,* when disclosure is allowed, it should be compulsory. The commenter argued that, as the regulation is written, the broker does not have an affirmative requirement to provide information to the client's surety on a particular entry. Even though a surety continues to be named as an exception to a list of parties to whom disclosure may be allowed, brokers do not always read that language as compulsory. The commenter proposed to add language indicating that a broker "must" disclose the contents of the records, or any information connected with the records to those clients to the entities listed in proposed § 111.24, or, in the alternative, add language to state that information may be disclosed if an unexpected or unanticipated matter arises and the broker considers it necessary to consult, inform, or engage with third-party experts.

Response: CBP does not agree with the commenter's suggestion and will not change the regulatory language to reflect that a broker "must" disclose client information to a surety. CBP will not mandate that brokers share confidential client information with the third parties listed in § 111.24. CBP maintains that sureties are third parties, incidental to the relationship between a broker and his or her client. Moreover, the surety is in a contractual relationship with its own client and should be able to establish an exchange of information with that client under the terms of their business relationship. It is therefore not appropriate for CBP to authorize in regulations the transmission of data to sureties pertaining to relations with unlicensed persons.

Comment: One commenter stated that the proposed regulations have not addressed a significant issue surrounding § 111.24, namely the storage of broker client data with cloud-based third-party providers. The commenter stated that CBP had addressed this issue with "service bureaus" in 19 CFR 143.4, but not with software service companies to whom brokers entrust the storage and security of client data and posed the question of whether data storage companies are considered "service bureaus".

Response: Service bureaus are software providers that provide communications facilities and data processing services for brokers and importers, but which do not engage in the conduct of customs business, pursuant to 19 CFR 143.1(a)(3), 143.4. Service bureaus transmit electronic data to CBP as part of a service provided to the broker, and this data is considered confidential and may not be disclosed to any persons other than the filer or CBP. Companies that provide data storage (whether cloud-based or otherwise) contract with the broker. In such a setting, the security requirements are based on an agreement between the company and the broker, and CBP is not involved in this arrangement. Thus, a third-party data storage company is not considered a "service bureau" pursuant to § 143.1, rendering the confidentiality requirement set forth in § 143.4 inapplicable.

Comment: A few commenters stated that the proposed standard of making the records available at a location specified by DHS in § 111.25(b) is vague and CBP should provide a clarification. The commenters suggested that CBP should specify that a broker shall make records available at its designated broker management unit within the appropriate Center, or at an alternative location mutually agreed upon by the broker and CBP. The regulation should further clarify that either paper or electronic copies of documents may be provided to ensure that neither the broker's physical presence nor any travel is necessary.

Response: It is CBP's current practice that the location for the inspection of records is either the broker's office or a CBP office, and CBP will continue to allow those two locations for the inspection of records. In addition, CBP welcomes the opportunity to clarify that CBP accepts both paper and electronic records for inspection purposes. In fact, CBP has been accepting electronic records in cases of audits and otherwise during the COVID–19 pandemic. However, CBP reserves the right to request original versions of documents if deemed necessary.

Comment: Two commenters stated that CBP should consider repealing 19 CFR 163.5, which requires advance written notification of an alternative storage method for records. In today's highly automated and virtual environment, such a notification should not be required and is an administrative burden for both the trade and CBP. Two other commenters argued that the final rule should include the freedom to allow a broker to maintain electronic records of its brokerage tasks, as well as any other related documents, as long as these documents can be readily retrieved and are properly backed up to comply with the time period mandated under § 163.5, without having to request written authorization.

Response: CBP disagrees with the first two commenters' request to repeal § 163.5. Section 111.25(c) refers to part 163, setting forth the provisions for the maintenance, production, inspection, and examination of records. Section 163.5 deals with recordkeeping requirements in general, and applies not only to brokers, but also owners, brokers, consignees, entry filers or agents of those persons mentioned in § 163.2. Brokers mentioned in this section are only one of the groups of persons to which the recordkeeping requirements apply. For these reasons, CBP will not repeal this section.

Part 111 sets forth the specific recordkeeping requirements applicable to brokers, and the records that each customs broker must create and maintain, and make available for CBP examination, in addition to the requirements in part 163. As explained above, CBP will continue its current practice of requiring that original records be maintained within the U.S. customs territory, in a manner that they may be readily inspected. The regulations permit either paper or electronic storage of original records, such that any other method is deemed alternative and requires written authorization. *See*§ 163.5(a). Backup records may be kept outside of the U.S. customs territory because CBP does not regulate these duplicate records.

Comment: Several commenters stated that the proposed standard in paragraph § 111.28(a) that a sole proprietorship, partnership, association, or corporation must employ a sufficient number of li-

censed brokers is vague, and a definition is needed for the term "sufficient". The commenters stated that CBP should not require a "sufficient number" of brokers as a factor, but rather set best practices as guidance for brokers in a revised Broker Management Handbook. Commenters stated that best practices would allow for an administrable and enforceable standard for brokers and CBP, as it is unclear under the proposed language how CBP would evaluate this obligatory standard ("must employ") and how it is meant to complement the enumerated factors. A few commenters raised the same concerns with respect to proposed factor (6) in paragraph (a) requiring the availability of a sufficient number of individually licensed brokers for necessary consultation with employees of the broker. These commenters argued that the language should be revised with simpler language to require only the availability of licensed brokers for necessary consultation with employees of the broker.

One commenter recommended to delete "sufficient" and replace the language with a standard number that can be applied to all brokers. For example, if an office had more than 15 employees conducting customs business, then an additional broker would be required to maintain proper supervision and control. Another commenter suggested to have a certain number of brokers per number of employees conducting customs business.

Response: CBP does not agree that the term "sufficient" needs to be revised or removed. Allowing a broker entity to determine what is a sufficient number of licensed brokers gives the entity flexibility as to how to exercise responsible supervision and control. The sufficiency of licensed brokers employed by a sole proprietorship, partnership, association, or corporation is a fact-specific determination. CBP does not want to mandate a certain number of licensed brokers or a ratio of employees to licensed brokers, as the sufficiency of licensed brokers depends on multiple factors, such as the size of the broker entity, the skills and abilities of the employees and supervising employees, and the complexity and similarity of tasks that need to be completed. Each broker needs to evaluate his or her own business and see what is needed to provide high quality service to the clients. During the broker's internal reviews and audits, the broker entity will assess the sufficient number of licensed brokers required for the proper conduct of customs business. For example, if an entity has a lot of new employees, more licensed brokers may be necessary for oversight; a larger entity with many clients will most likely need more licensed brokers than a smaller entity with fewer clients. All determinations concerning sufficiency are fact-specific, and CBP does not want to specify a certain number of brokers that is required for a certain size

of business. In addition, the Broker Management Branch at CBP Headquarters engages with the brokers to answer questions and resolve any issues as they arise, and thus, brokers may contact CBP if there are any questions. Additionally, with the inclusion of the "sufficient number" language in the proposed regulation, CBP incorporated COAC's recommendation to employ an adequate number of licensed brokers to ensure responsible supervision and control, as part of its recommendation to move to a national permit framework.

Comment: One commenter expressed the concern that the language "sufficient number" could be interpreted differently by different Centers. The commenter also asked what time frame would be provided for broker entities to come into compliance should a Center determine that the current number of brokers is not sufficient. Lastly, the commenter asked whether there would be ways to challenge a Center's decision, or at least challenge the methodology used to determine, for example, the adequacy of licensed brokers to entry writers.

Response: As mentioned above, CBP Headquarters provides guidance to all BMOs to ensure that brokers receive consistent answers to questions. CBP will continue to do so regarding any changes brought about by the final regulations, including the requirement to have a sufficient number of licensed brokers. Regarding the time frame for compliance in case CBP determines that a broker entity does not employ a sufficient number of licensed brokers, CBP will handle this matter in the same fashion as other broker matters where CBP might detect an error in entry filings or other submissions by the broker. CBP will address the issue (in this case, the insufficient number of licensed brokers) with the broker and state that action needs to be taken by the broker to correct the issue, such as additional licensed brokers to exercise responsible supervision and control. Then the broker will have an opportunity to address the issue and CBP will work with the broker on a plan of action to resolve the issue. If the broker does not follow the plan of action, then CBP will issue a warning. A decision by the BMO regarding the sufficiency of licensed brokers may be challenged by escalating the issue to a BMO's supervisor, the Assistant Center Director. Ultimately, however, the broker will need to follow the plan of action determined necessary by CBP. Continued failure to do so will warrant escalated CBP remedial actions including, possibly, a penalty, or suspension or revocation of a license. When the processes for a penalty, suspension, or revocation are invoked, the broker has the due process opportunities already afforded by CBP regulations.

Comment: One commenter stated that CBP should consider the number of employees with a Certified Customs Specialist designation as a means to meet the responsible supervision and control requirement.

Response: CBP disagrees with the commenter's suggestion. The privately offered Certified Customs Specialist (CCS) certification must be distinguished from the profession of a licensed customs broker. To become a CCS, an individual must take the CCS course and an exam at the end of the course, and have at least one year of customs experience, but is not required to be a licensed customs broker. A CCS's position cannot be elevated to that of a licensed customs broker, and therefore, having a certain number of CCSs in a broker entity will not satisfy the responsible supervision and control standard. However, the fact that a broker entity employs numerous CCSs might affect CBP's evaluation of whether the entity employs a sufficient number of licensed customs brokers.

Comment: One commenter stated that CBP must provide guidance as to the responsible supervision and control standard for the broker community since a failure to comply with the standard could lead to penalties and suspension or revocation. Any guidance would encourage brokers to incorporate these standards into their compliance programs. The commenter further recommended that CBP create a procedure where brokers can get clearance on whether the number of licensed brokers is sufficient for a particular broker entity before any change in the number of brokers requirement is imposed, and create a program, which would permit brokers to get clearance on this question after the requirement is imposed.

One commenter stated that the regulation must be clarified, or otherwise removed, and added that even though CBP stated it will be providing guidance, this guidance would not be subject to review and comment, depriving the broker of any input on this issue.

Response: CBP disagrees with the first commenter's request that CBP should provide prior clearance on the issue of sufficient number of licensed brokers, or approval of the number of licensed brokers after employment of a set number of brokers. Prior clearance cannot be given to a broker entity because it is impossible for CBP to evaluate beforehand whether a certain number of licensed brokers will be sufficient to exercise responsible supervision and control. Such a determination depends on specific facts and circumstances of the individual broker's or broker entity's customs business. CBP assesses the sufficiency of licensed brokers in the context of the broker's business dealings; it is not an abstract decision that can be made. Further, CBP does not believe that creating a program to provide prior ap-

proval of a set number of licensed brokers for a broker entity would be beneficial. As with prior clearance, approval after the fact is not feasible because CBP would not know whether the broker entity will function properly and exercise responsible supervision and control until the entity is in fact conducting customs business.

Before CBP issues a suspension or revocation there is usually a history of a broker's failure to meet the supervision standard; in most cases, CBP does not automatically suspend or revoke a broker's license. There will be communication between the broker and CBP regarding the broker's failure to meet the supervision standard, and ways to mitigate that failure.

One of the commenters asked that any regulatory changes based on public comments be subject to review and comment by the public for a second time. CBP disagrees with this request. Pursuant to the Administrative Procedure Act (APA) (5 U.S.C. 551 *et seq.*), CBP solicited comments from the public regarding the proposed changes to part 111 and provided a 60-day comment period. Any change from the proposed regulations is either based on a public comment, a clarification of the proposed or current regulations, or a change that results in a benefit or convenience to the broker community without detriment to existing rights, such as additional automation of certain processes. CBP will not implement any major changes without seeking public input first. Thus, CBP does not see the need to provide a second opportunity for public comments on any guidance that CBP will issue before finalizing the proposed regulations.

Comment: Several commenters expressed a concern with respect to the change from the word "will", which used to be part of the definition of responsible supervision and control in § 111.1, to the word "may" in § 111.28(a). The commenters stated that this change indicates that CBP is no longer required to take into consideration all the listed factors when determining whether a broker exercises responsible supervision and control, and thus removes the protection from a broker by not obligating CBP to consider broker compliance efforts in their totality. One mistake could seemingly result in a broker penalty without regard to the other factors.

Several commenters urged CBP to continue to consider all enumerated factors in assessing responsible supervision and control to avoid any arbitrary and capricious determinations and prevent inconsistent decisions by different CBP officers. The commenters argued that keeping "will" in the regulation provides transparency and uniformity for brokers in executing operations and procedures, as well as for CBP officers in administering and enforcing this standard. A change to "may" would allow CBP to focus on whichever factor it deems

appropriate to the exclusion of additional factors that are clearly relevant as to whether a broker is exercising responsible supervision and control. CBP should be required to review all factors in order to ensure that a broker receives a full and fair evaluation.

Response: CBP disagrees with the commenters. CBP needs flexibility in determining whether a broker is exercising responsible supervision and control over the customs business that it conducts, as this is a fact-specific assessment. It has been CBP's practice to give greater weight to the factors that are implicated in a broker's exercise of responsible supervision and control when making a determination. There may be instances where one or more factors will be more relevant than others in determining whether a broker did or did not exercise responsible supervision and control. While it is possible that CBP's determination that a customs broker has failed to exercise responsible supervision and control may be predicated on fewer factors, but ones that CBP considers relevant, this does not prevent the broker from presenting in its defense any factors it believes to be mitigating.

Comment: A few of the commenters stated that the change from "will" to "may" would be contrary to judicial precedent, citing a court case, *United States v. UPS Customhouse Brokerage, Inc.,* 575 F.3d 1376, 1382 (Fed. Cir. 2009), in which the court decided that CBP's failure to consider all ten factors to determine whether a broker exercised responsible supervision and control was improper.[9] In addition, a commenter argued that the proposed language is in violation of *Chevron U.S.A., Inc. v. NRDC,* 467 U.S. 837 (1984), because agencies cannot implement regulations that are arbitrary and capricious.

Response: CBP disagrees with the commenters. CBP may only be bound by judicial precedent if the same regulatory language is still in place. If CBP decides to change the regulation through a process allowed by the APA, judicial precedent no longer binds CBP in making that change. Further, the proposed language in § 111.28(a) is not arbitrary and capricious. CBP proposed in the NPRM to keep the list of factors to determine responsible supervision and control set forth in § 111.1, and move it to § 111.28(a), along with some additions and modifications to reflect the changes brought about by the transition to a national permit framework. CBP further proposed to consider the relevant factors from among those listed on a case-by-case basis. No decisions will be made without a thorough evaluation of the relevant factors present that apply to an individual broker.

Comment: Several commenters stated that the newly proposed factors in § 111.28(a)(11) through (15) are vague and decrease a broker's

[9] The cited court case may be found online at *https://cite.case.law/f3d/575/1376/*.

certainty in adopting and executing the necessary processes to meet the supervision standard. The commenters suggested that the factors either be removed or at least incorporated into one general factor, for instance into factor (10), as an indication that an individually licensed broker has a real interest in the operations of a broker. In addition, commenters requested that any guidance as to the factors be provided as best practices in the Broker Management Handbook.

A few commenters suggested to remove the new factors because the current ten factors are adequate to determine that a licensed broker has a real interest in the operations. One commenter referred to COAC recommendation No. 010021 (April 27, 2016), which recommends that CBP provide guidance to brokers regarding the ten factors demonstrating responsible supervision and control, such as how to properly train employees, issue appropriate written instructions and internal controls, maintain an adequate ratio of employees to licensed brokers based on certain factors, and engage in supervisory contact, audit and review operations. The commenter is of the opinion that CBP has not done so in the NPRM.

Response: CBP disagrees with the comments to either remove or consolidate the proposed factors (a)(11) through (15) into existing factor (10). First, including all proposed factors in one factor would make the language complex and difficult to follow and enforce. Second, CBP added factors that reflect their importance in the modern brokerage environment and their importance in evidencing the proper transaction of customs business. For instance, filing entries late, paying the government late, or not returning client or CBP communications, are all evidence of a broker's failure to exercise responsible supervision and control. CBP provided an explanation as to each proposed change in the NPRM, and as mentioned above, has worked with the broker community in the past and has taken into account their recommendations. As mentioned above, a new guidance document, that will be published concurrently with the publication of this final rule, will include information as to the listed factors in § 111.28(a). In the meantime, brokers may find additional information and guides on CBP's website at *https://www.cbp.gov/trade/programs-administration/customs-brokers* regarding the broker license exam, triennial status reporting requirements for current brokers, as well as additional information and resources for brokers.

Comment: One commenter raised a concern regarding proposed factor (11), *i.e.,* the broker's timeliness of processing entries and payments of duty, tax, or other debts owed to the government. Two commenters stated that a broker is not obligated to pay on behalf of an importer and asked how the timeliness factor can be judged in

such a situation. Both commenters stated that the term "timeliness" is vague and does not provide a benchmark to which a broker can develop and execute processes, nor can CBP uniformly and transparently evaluate and enforce the standard. The same concern as to vagueness was raised for the term "responsiveness" in proposed factors (13) and (15).

Lastly, commenters stated that the term "communications" in proposed factors (12) (communications between CBP and the broker) and (14) (communications between the broker and its officer(s)) is too broad. One commenter explained that proposed factors (12) and (13) (the broker's responsiveness and action to communications, direction, and notices from CBP) do not explain what type of communication is covered, and proposed factors (14) and (15) (the broker's responsiveness and action to communications and direction from its officer(s)) cover communications between parties to which CBP would have no visibility. One commenter posed the question whether CBP will regularly make available to customs brokers examples of communications relevant for verification and training purposes.

Response: CBP disagrees that these proposed terms need to be further defined in the regulation. The timeliness factor looks at a broker's repeated failures to timely file entries and/or duties, taxes or other debts owed to the government, not just one incident alone. "Timely" generally means doing something by the time it is required to be done in statute or regulation, which is not a vague concept. If a broker frequently fails to timely submit entries and/or payments, CBP will consider the failure to comply with factor (11) in its determination as to whether a broker is exercising responsible supervision and control.

With respect to the term "responsiveness" in factors (13) and (15), a broker's failure to respond to any communications, direction and notices from CBP, and to communication and direction from its officer(s) or member(s) (*i.e.,* not returning phone calls or emails, etc.) will reflect negatively on whether a broker is exercising responsible supervision and control.

The term "communications" in the context of responsible supervision and control is used to assess how well and timely a broker is communicating with its officer(s) or member(s), and with CBP. CBP does not agree that examples of communications need to be provided to brokers for verification and training purposes. Brokers should be able to determine what, if any, communication is needed in a particular situation with CBP and officer(s) or member(s) of the broker entity.

To make the proposed language in § 111.28(a) more concise, CBP combined factors (12) and (13) into one new factor (12), which deals with the broker-CBP relationship, and combined factors (14) and (15) into one new factor (13), relating to the broker-officer/member relationship. In addition, CBP added a reference to "member(s)" in the new factor (13) to account for partnerships, in addition to associations and corporations as a type of broker entity.

Comment: Several commenters stated that it is unclear what the terms "reject rate" and "various" in proposed factor (4) of § 111.28(a) mean under the new supervision standard and argued that, without clarity, this metric is misleading and could be highly prejudicial. One commenter stated that the factor should be eliminated because it appears to be intended to account for a broker's mistakes (versus an importer's or other third party's mistake). Clear guidelines are necessary as to what CBP considers an actionable rejection, and only those instances where the broker is at fault (and not the third-party importer) should be taken into consideration.

Response: CBP does not agree with the commenters that the terms "reject rate" and "various" need to be clarified in the regulation. The reject rate for the various customs transactions historically has been a factor in § 111.1 in the definition of responsible supervision and control. "Various" means not just one rejection, but several, over the course of time. CBP proposed to add language to this factor when moving it to factor (4) in § 111.28(a) to clarify that CBP looks at the reject rate by comparing the number of rejections with the broker's overall volume of entries. This revised language provides a better context to evaluate the quality of responsible supervision and control as CBP looks at the totality of the transactions conducted by the broker to determine whether the broker is properly filing entries. In addition, CBP relied on COAC recommendation No. 010020, which suggested a clarification of existing factor (4) to state that the reject rate resulting from entries or entry summaries be expressed as a percentage of the broker's overall business for the various customs transactions, when making this change to the original factor.

CBP agrees with the commenter who states that this factor is intended to account for a broker's mistakes, however, a broker's responsibility includes a duty to verify any information received from an importer. The broker must exercise due diligence and make sure that the data from the importer is correct, *e.g.,* that the classification of goods is correct. The broker must further verify, depending on the specific facts and circumstances, whether the importer has experience in gathering and providing the necessary information to the broker, whether the importer is a new client, and may need more

assistance, or whether the client is experienced in providing the necessary information. CBP has no way to determine once a filing is made whether a mistake (and reject) was due to a broker's mistake, or due to incorrect information provided by the importer. Moreover, any type of rejection will be communicated to the broker, and the broker has the opportunity to make a clarification.

Comment: Further, several commenters requested that not all system rejects in Automated Broker Interface (ABI) should be considered as rejects as they are often due to contributory factors, such as system outages, delays in HTSUS updates, and programming changes for Partner Government Agencies (PGAs) and in the CBP and Trade Automated Interface Requirements (CATAIR) with short deployment time frames and highly complex filings causing numerous system rejects. One commenter added that ACE is too new and there have been problems with CBP processing, especially drawback filings, thus, this factor (4) in § 111.28(a) is not appropriate.

Response: In case of system outages or delays, where the broker is unable to file in ACE, the broker does not receive a reject. A reject occurs only if the broker successfully submitted a filing in ACE, which is considered filed, and because of the lack of accuracy of the filing, is rejected. As to the comment that ACE is too new, ACE has been the system of record since November 1, 2015, as mentioned above. Both CBP and the trade community have gained extensive experience over the last several years working with and in ACE. As to the commenter's second point, CBP usually announces programming changes, either in a **Federal Register** notice, or via a CSMS message, with guidance for the changes or updates to the process and provides additional time (usually 30 days) after the publication of a notice as to when announced changes or updates become operational. Lastly, drawback claims have been successfully filed in ACE since February 2018. The ACE drawback module has been enhanced significantly to include expanded filing capabilities for claimants, refined validations that reflect current import practices, and updated bonding policies for accelerated payments. In addition, CBP maintains extensive customer service resources for existing and new drawback filers.

Comment: Another commenter requested clarity about census warnings and asked that they not constitute rejects. Another commenter stated that the term "reject rate" lacks specificity and asked whether the term is the same as used in Customs Directive 099–3550–67.[10]

[10] The Customs Directive may be found online at *https://www.cbp.gov/sites/default/files/documents/3550–067_3.pdf.*

Response: Census warnings are informational messages that are part of the entry validation process. The U.S. Census Bureau (Census) provides CBP with specific data ranges at the HTSUS level that ACE uses to validate a variety of data elements (*e.g.,* line value, charge). If a line is transmitted that falls outside of the Census parameters, ACE will return a warning message to the filer. These warnings are described in the Appendix H of the CATAIR.[11] A Census warning is not a reject, as the entry summary is not incorrect, but the information provided is unlikely to be accurate, given Census' parameters. The filer is then required to submit the corrected line data or if the data is found to be correct as entered, submit the reason code for a Census "override."

With respect to the second commenter, the reject rate pursuant to § 111.28(a)(4) covers rejections of entry summaries as discussed in the Customs Directive mentioned above, even though some of the items in this Directive have become obsolete.

Comment: Another commenter suggested that rejects should only be counted after a broker has had the opportunity to agree or provide proof that the originally filed entry was correct. Another commenter asked whether CBP would consider listing rejected entries in ACE to allow the broker to review these entries for verification and training purposes. Lastly, one commenter stated that multiple rejects due to one problem should not be counted as multiple rejects.

Response: CBP does not agree with these comments. A filer receives an error message in ACE if there are any issues when filing. If the submission is rejected, comments are provided as to corrective action that is necessary. Whether a reject is a system reject or a manual reject by a CBP employee, the filer is notified either way as to the reason for the reject. With system rejects, an error code is provided, and the error codes are described in the ACE CATAIR Error Dictionary[12] for the filer to refer to and correct the error. For a manual reject, a CBP employee enters a message in an ACE user interface "Notes" field describing the error, along with instructions as to how to re-transmit the filing in proper form. This message is transmitted to the filer in ACE. For either type of reject, the filer is given sufficient information to re-submit the correct filing, thus, CBP does not believe that it is necessary for the filer to agree or provide proof that the originally filed entry was correct.

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[11] Appendix H provides a detailed resolution on each warning so that the party receiving the warning will know what elements are considered to be "unlikely" to be accurate. The appendix may be found online at *https://www.cbp.gov/document/technical-documentation/ace-catair-appendix-h-census-codes.*

[12] The ACE CATAIR Error Dictionary is available online at *https://www.cbp.gov/document/guidance/ace-catair-error-dictionary.*

Lastly, if a filer makes multiple filings, based on the same incorrect information, the system does count each instance of filing as a reject. CBP notes that if a broker makes the same mistake in several filings and receives the same error code or message, and the filings are rejected, the broker should be aware for future filings as to the error and how to properly submit an entry. Additionally, the broker may always contact CBP to ask for clarification as to a rejected submission, if necessary.

Comment: Some commenters stated that CBP should adjust the proposed language in factor (7) (supervisory visits) and factor (8) (audits and reviews) for § 111.28(a) to include virtual options for supervisory visits by an individually licensed broker of another office that does not have a licensed broker, as well as audits and reviews of the customs transactions that are handled by an employee of the broker in order to better reflect today's often virtual business environment. In addition, one commenter stated that CBP needs to define "frequency", otherwise, a broker cannot ensure compliance.

Response: Virtual options for supervisory visits, and for audits and reviews, are permissible. The factors, as written in the proposed regulation, do not limit supervisory visits, and audits and reviews, to a physical option. CBP understands, especially in the changed environment brought about by the COVID–19 pandemic, and the move from district permits to national permits, that both physical and virtual presence should be allowed for supervisory visits, as well as audits and reviews. However, whether a virtual supervisory visit or audit and review is sufficient in any given case to exercise responsible supervision and control depends on the specific circumstances of a broker's business, such as the size and complexity of a broker entity or the type of transactions that are handled by an employee. In addition, the term "frequency" is a fact-specific determination. As mentioned above, whether a broker exercises responsible supervision and control depends on how a broker conducts its customs business, and it is the broker's responsibility to determine how frequent the supervisory visits, audits and reviews should be. For example, more supervisory visits, and audits and reviews, may be necessary for new employees, or employees tasked with more complex transactions.

Comment: Several commenters did not agree with the proposed requirement in § 111.28(b) that a permit holder submit a list of the names of persons currently employed by the broker as this requirement may be too burdensome, especially on large companies. The commenters argued that CBP should require a list of names only of those employees who are engaged in customs business, given that the regulation specifically relates to supervision and control over the

transaction of the customs business. For the same reasons, two commenters stated that the term "broker employees" used in paragraphs (a) and (b) of § 111.28 should be changed to "employees who conduct customs business" because the term "broker employees" could relate to any employee of the broker, regardless of the employee's responsibility, and those employees should not be included in the reporting requirement.

Response: CBP does not agree with the commenters. First, customs brokers are required to exercise responsible supervision and control over all of their employees, and in particular any of their employees who assist with the customs business and transactions of the brokerage. Requiring the customs broker to identify to CBP all of its employees contributes to both the customs brokers' and CBP's knowledge and awareness of the employees' status. Second, CBP requires the comprehensive information for all persons employed by a broker in order to be aware of all potential risks that any employee might present to the revenue of the United States or the public. Only by obtaining information on all employees can CBP properly engage in a dialogue with the customs broker to determine that none of the employees of the broker occupy a position within the brokerage that presents a risk to the revenue or the public. It is important to note that this final rule is not changing the reporting requirement for brokers. Brokers already have an obligation to submit a list of names of persons employed by a broker, and this obligation continues with this final rule, with the only change being that brokers have to report less information on their employees pursuant to the final regulation.

Comment: Two commenters stated that CBP should enhance ACE to better facilitate the electronic reporting of employee information, improve the reporting of information included in the triennial reporting process and the submission of payment of various broker fees. Specifically, the commenters suggested the addition of a section in the ACE portal where updates can be easily made for new employees, terminated employees, or a change of address. Another commenter stated that the electronic data reporting system within ACE is cumbersome and CBP should not adopt the proposed language in § 111.28(b) regarding the use of a CBP-authorized EDI in the final rule until a more modern system and interface are available, such as blockchain.

Response: Electronic employee reporting for new and terminated employees has been in place within ACE for several years. At this time, brokers have several capabilities in ACE to add, remove or edit certain information related to the license and permit. CBP agrees that the automation of the broker submission could be further en-

hanced, and CBP is continuing to work on technological advancements to streamline and facilitate the processing of broker submissions. However, it is important to note that the system is currently functional to receive employee information from brokers.

In addition, as mentioned above, CBP deployed a new portal for the electronic submission of and payment for the broker examination application, and the submission of the triennial report and payment of the triennial fee. In the case of the triennial reporting, if a broker files the status report and pays the required fee in the eCBP portal, CBP will send by email a receipt to the broker (if an email address is on file) evidencing the completion of the required reporting. A copy of the receipt and the filed report is maintained in the eCBP portal for the broker to access at any time. To provide all brokers the ability to receive an electronic receipt of the completion of the triennial reporting requirement, CBP added a broker's email address as a reporting requirement in § 111.30. Specifically, CBP added "email address" in the first sentence of paragraph (a) and added parentheses after "address information" in the third sentence to clarify that the office of record address, mailing address and email address are all required for purposes of reporting a change of address. CBP also added the email address requirement in paragraphs (d)(2)(i)(A) and (d)(2)(ii) for individual brokers, both actively engaged and not actively engaged. CBP further included the requirement of an email address for each licensed member or licensed officer in case of partnership, corporation, or association reporting in paragraph (d)(3)(i).

During the 2020/2021 triennial reporting period, approximately 90% of the licensed brokers filed the required report and paid the required fee through the new reporting tool. During that triennial reporting period, a broker had to choose to either pay online through the eCBP portal or at the port and had to submit both the report and the payment through one of the chosen options; a broker could not submit the report online and pay the fee at the port, or vice versa. For the next triennial reporting period in 2023/2024, CBP will continue with the same practice.

A broker who chooses to pay the fee at a processing Center, *i.e.,* at one of the 41 BMO locations, may either complete the status report in the eCBP portal and print the draft report or complete a paper copy of the report, and then submit the report to a processing Center, along with the payment of the fee. A BMO at a processing Center will accept the required report and payment and provide a cash receipt. The BMO will manually enter the information on the report in ACE for the triennial reporting to be completed.

Comment: One commenter stated that the 30-calendar day requirement in § 111.28(b)(2) to provide the social security number (SSN) for a new employee from a foreign country is difficult to comply with as it typically takes longer for the new employee to receive an SSN, and ACE does not accept any employee data without also providing the SSN. The commenters asked CBP to allow the submission of employee information in ACE without the SSN if it is not available at the time of the reporting.

Response: Pursuant to the proposed regulation in § 111.28(b)(2), a national permit holder must submit a list of new employees within thirty (30) calendar days of the start of employment to a CBP-authorized EDI system. In the rare instance, where an SSN is not available for a new employee at the time of reporting, the broker must submit the new employee information to the processing Center, indicating that the SSN is still missing and that it will be reported as soon as it is available.

Comment: Two commenters suggested to move paragraphs (b) through (e) of § 111.28, dealing with the reporting of employee information and change in broker ownership, to § 111.30. The commenters argued that while these paragraphs indirectly pertain to supervision and control, their placement in § 111.28 is confusing as they represent regulatory requirements regarding administrative issues more akin to those set forth in § 111.30.

Response: CBP disagrees with the two commenters and believes that paragraphs (b) through (e) fit appropriately in § 111.28. The aspect of employee reporting falls under the responsible supervision and control standard, as CBP will take into consideration a broker's proper employee reporting when looking at whether the broker exercises responsible supervision and control. In contrast, § 111.30 includes instructions for how and when to notify and report to CBP, and what information to include in the notification and report.

Comment: One commenter stated that the responsibilities in proposed § 111.19(f) and proposed § 111.28(a) are not consistent and it is not clear which individual broker has to comply with the responsible supervision and control standard. Proposed § 111.19(f) talks about "the individual broker who qualifies for the national permit", whereas proposed § 111.28(a) talks about "every licensed officer". In § 111.19, the primary responsibility rests with the individual broker designated as qualifying for a national permit, whereas in § 111.28, every licensed officer is included in the definition of responsibility. The commenter suggested to amend § 111.28 to conform with other sections and limit responsibility to the specifically designated person as being responsible.

Response: CBP does not agree with the commenter. A license holder and a national permit holder could be two different individuals conducting customs business, meaning that the license holder is bound by § 111.28(a), whereas a national permit holder is held to the responsibility stated in § 111.19(f). Both requirements are applicable to different designated individuals. If the license holder is the same individual as the national permit holder, then that individual is bound by the standard in § 111.19(f), which also refers to § 111.28(a) and includes the same standard. This cross-reference would not cause such an individual to have two types of responsibilities.

Comment: One commenter asked CBP to define the phrases "physical proximity of subordinates" and "abilities and skills" of employees and managers" set forth in § 111.28(a). The commenter explained that the pandemic has resulted in many licensed brokers working from home, so the physical proximity of subordinates was not always feasible. Another commenter stated that there should be full alignment of the modernization efforts under the national permit framework, meaning that CBP should remove the requirement for a sole proprietorship, partnership, association, or corporation, to employ licensed brokers relative to the physical proximity of subordinates under the responsible supervision and control standard in § 111.28(a).

Response: CBP disagrees with the commenters. Both phrases, "physical proximity of subordinates" and "abilities and skills of employees", help a broker entity determine how many licensed brokers are needed to exercise responsible supervision and control. Physical proximity pertains to the aspect of an employee being physically located in the same or different office close to a broker entity to ensure proper supervision of a subordinate. The level of supervision and the number of supervising employees depends on the ability and skill level of each employee within a broker entity. To comply with the responsible supervision and control standard, a broker entity must take into consideration the experience, training, and skills of an employee to make the determination as to how many licensed brokers are needed. This determination is fact-specific and takes into account the various factors listed in paragraph (a) of § 111.28.

Comment: One commenter noted that § 111.28(e) does not set forth any time frames for CBP to make a decision as to whether CBP wishes to investigate a new principal or render a decision as to the acceptability of the new principal and notification of the transferring broker. Without set time frames, a legal transfer of ownership of a brokerage business could be voided. The commenter added that if the sale is to another broker or to an employee that CBP had previous notice of, there should not be an investigation.

Response: CBP will not add a time frame for completing a background investigation pursuant to § 111.28(e), just as there is no time frame for the background investigation for a license application pursuant to § 111.14(a). CBP reserves the right to conduct a background investigation on a new principal, if deemed necessary. That said, if the new principal is a current employee of the broker and CBP had recently completed a background investigation on that particular individual, then CBP may not complete another investigation, but it is in CBP's discretion to make that decision. It is important to note that the new principal does not have to wait to conduct customs business until CBP completes the background investigation and renders a decision as to whether the new principal is approved. The new principal may start conducting customs business as soon as the change of ownership is completed. If CBP finds a problem during the background investigation, CBP will address it with the new principal.

Comment: Several commenters asked that CBP change the deadline in § 111.30(a) for reporting of a broker's address to ten (10) business days, instead of only ten (10) calendar days, to provide flexibility with weekends and holidays, or simply unavailability of a party that provides such information. One commenter suggested that thirty (30) calendar days would be preferable to align with the requirement in § 111.28(b).

Response: CBP disagrees with the commenters and will keep the time frame for reporting an address change at ten (10) calendar days. CBP believes that a broker would know at least ten (10) calendar days in advance when a business address is changing. Moreover, CBP already added flexibility by changing the requirement from an immediate written notice to ten (10) calendar days to inform CBP. CBP believes that this is a sufficient time frame.

Comment: One commenter stated that when a broker changes his or her name, pursuant to § 111.30(c), the notice of the name change can be provided to CBP after the fact, but a broker must notify CBP in advance when he or she proposes to use a trade name in one or more states. The commenter argued that providing this information in advance was helpful when there were port licenses and manual records maintained at individual ports because the port had no way of knowing that a trade name was the pseudonym for a licensed entity. However, today, the filer code in ACE represents the licensed entity, thus making this requirement unnecessary.

The commenter recommended that to the extent that CBP asserts that this documentation is still required, the regulation should be amended to be more consistent by requiring submission of both the name change and fictitious name authorization after the fact, rather

than prior to use, and the requirement should apply only to the licensee's state of incorporation and office of record.

Response: It is CBP's practice to require proof of a broker's name change or proposed trade name change prior to issuing a new license reflecting the new name. While it is true that in many instances, an individual broker does not provide evidence of a name change (*e.g.,* due to marriage, divorce, etc.) prior to the actual name change, CBP believes that a broker entity who is planning on using a trade or fictitious name for conducting business in one or more states will know in advance what the new trade or fictitious name will be, thus, reporting to CBP in advance, along with documentation to be filed in those states, is not an unreasonable request. That said, in both instances (the broker's name change and the proposed trade name change), the broker will not be able to practice under the new name or trade name until the license reflecting the new name is issued to the broker. As mentioned in response to a comment above, CBP needs to know in what state(s) a broker is conducting customs business to be able to maintain oversight over the broker's business.

Comment: One commenter stated that the failure to file the triennial report and pay the status report fee pursuant to § 111.30(d)(4) should not result in forfeiture of the right to conduct customs business, absent an opportunity to cure the failure. The commenter argued that filing the triennial report is essentially a ministerial activity with limited impact on CBP operations or revenue, yet the failure to timely file the report and/or pay seems to have the same effect of terminating a broker's ability to conduct business, even if only temporarily. In the case of a violation of a more substantive regulatory provision, the broker is given an opportunity to address the violation before the imposition of a penalty, suspension or revocation, however, the same opportunity is not afforded to the broker who failed to complete the triennial reporting requirement.

Response: The suspension of a license by operation of law for failure to timely file the status report in the month of February of the reporting year pursuant to § 111.30(d)(4) is prescribed by statute. Section 1641 of 19 U.S.C. states that if a license holder fails to file the required report by March 1 of the reporting year, the license is suspended, and may be thereafter revoked under certain circumstances. Therefore, CBP cannot modify the regulation to allow brokers an opportunity to address the failure to timely fulfill the status reporting requirements before a suspension is issued.

Comment: Some commenters stated that the proposed requirement in § 111.32 that a broker must not give, or solicit, or procure the giving of, any information or testimony that the broker knew or should have

known was false or misleading in any matter pending before DHS is a very subjective standard and provides CBP with too much discretion. The commenters asked that CBP provide some criteria to determine what the broker should have known, what is considered misleading, and whether a misunderstanding qualifies.

Response: CBP cannot provide a comprehensive list of facts and circumstances that a broker should have known. What a broker should have known is based on a reasonable person standard. Based on a broker's customs business, and the information the broker has before him or her, the broker should be able to make the assessment whether certain information is false or misleading and whether the broker should have known. "Misleading" information is information that could be deceptive, confusing, misrepresentative or just false. Whether a misunderstanding qualifies as the broker's having filed, solicited, or procured the giving of false or misleading information depends on the facts and circumstances of a broker's knowledge, expertise, and actions.

Comment: One commenter asked whether a broker must report to CBP under § 111.32 the mere fact of a separation from or cancellation of representation of a client as a result of the determination that the client is intentionally attempting to defraud or otherwise commit any criminal act against the U.S. Government, or also provide details of the suspected or known wrongdoing by the client. The commenter argued that this proposed language goes against the goal of encouraging confidential communication and effective collaboration with the client, and improved compliance. Secondly, the commenter asked whether this notification would be confidential.

Response: CBP needs to not only know the fact that a separation from or cancellation of representation of the client occurred, but also the client name, date of separation or cancellation, and the reason(s) for the separation or cancellation, so CBP can exercise its due diligence and perform an investigation of the importer's dealings. Accordingly, CBP amended § 111.32 to require this information in the report. CBP proposed the change in § 111.32 to ensure that a broker not only advise a client after discovery that the client has not complied with the law or made errors or omissions in documents, but also document and report to CBP when a broker terminates the representation of the client who directs the broker to continue the noncompliance, error, or omission. In addition, pursuant to paragraph (f) of section 1641, CBP has the ability to fill in gaps in the regulations that CBP considers necessary to protect the revenue of the United States, specifically, regulations relating to documents and correspondence, and the furnishing by customs brokers of any other information

relating to their customs business to CBP. As to the second question, information submitted to CBP is kept confidential within DHS, and all the components within DHS follow the same information-sharing rules. CBP will not put information received from brokers on its website or otherwise publicize it without lawful authority to do so. As mentioned above, the FOIA rules apply when it comes to disclosure of such information under certain circumstances.

Comment: A few commenters asked whether a broker's duty to report under § 111.32 would deprive an importer of the ability to file a prior disclosure pursuant to 19 U.S.C. 1592(d). One commenter stated that a broker already has the responsibility to advise a client as to any errors and how they must be corrected, thus, this new requirement goes beyond 19 U.S.C. 1641.

Response: If an importer discloses the circumstances of a violation under 19 U.S.C. 1592(a) before, or without knowledge of, the commencement of a formal investigation of such violation (which could be triggered by a broker's report), then full benefits of prior disclosure treatment will be afforded. As to the second commenter, a broker has a general duty to disclose any information that he or she has learned while exercising customs business which indicates that a client is attempting to defraud the government. If a broker learns of any noncompliance or errors, then the broker must not keep this information to himself or herself but must report it to CBP, which will assist in combating fraud and other schemes against the government.

Comment: One commenter referred to section 3.5 ('Termination of Client Relationship') of the economic analysis in the NPRM, where CBP stated that it is expected that in many cases the report by the broker under § 111.32 would be drafted by an attorney. The commenter argued that CBP is recognizing that this process is characteristic of an *ad hoc* legal proceeding, evidencing that this reporting responsibility is more of a legal one and should not be enforced by a broker. Another commenter stated that the requirement would add a burden essentially requiring brokers to adjudicate an importer's actions, which is not the responsibility of a broker.

Response: CBP does not agree with the commenter's reasoning. Brokers should be knowledgeable enough to identify when a client is attempting to defraud the government or otherwise commit a criminal act against the government. CBP is not asking brokers to adjudicate a client's actions, but if brokers see any wrongdoing on the part of their clients, and they separate from or cancel representation of their clients as a result of having identified any wrongdoing, then

brokers must alert CBP. As discussed in the economic analysis further below, the reporting requirement will cause a minor increase in the burden on brokers.

Comment: One commenter suggested that the e-Allegations portal on CBP.gov be used for reporting potential violations of law instead of imposing a requirement on the broker.

Response: Submitting an allegation online through the e-Allegations portal is one way of reporting a trade violation, but it is not the best reporting tool in the broker context. Also, the option to submit an allegation online does not relieve a broker of the responsibility to report any information or a client's actions if the broker determines that the client is attempting to violate the customs laws and regulations. Brokers should report any attempted violation of customs laws and regulations to a supervisory point of contact at the importer's/client's assigned Center as the assigned Center handles all processes associated with an assigned importer.

Comment: Another commenter stated that the proposed revisions to § 111.32 appear to exclude civil or non-criminal violations, and if that was CBP's intent, CBP should clarify the regulation. Also, CBP should include "customs laws" in the regulatory text of § 111.32 to make it clear that the documenting requirement does not include all Federal law (such as tax law, security laws etc.), but only those laws with which a broker can be expected to be familiar.

Response: The proposed language of § 111.32 includes civil actions, such as fraud, as well as criminal acts against the U.S. Government. To clarify CBP's intent, CBP modified the third sentence to state that the broker has the duty to document and report if the broker determines that the client intentionally attempted to use the broker "to defraud the U.S. Government or commit any criminal act against the U.S. Government".

CBP disagrees with the commenter's second request to limit a broker's responsibility to customs laws and exclude any other laws. A broker must be knowledgeable as to international trade laws, customs laws and regulations, and general customs practices that concern entry filings, admissibility, classification, valuation of merchandise, as well as duty rates for imported merchandise, and excise tax, among other areas of expertise. In conducting its business, the customs broker might become aware of the attempted importation of illegal merchandise or perhaps import/export schemes violating certain laws, that reach beyond what might traditionally be thought of as 'customs' laws.

Comment: Two commenters stated that the proposed change in § 111.36(c)(3) to require a power of attorney directly from the importer

or drawback claimant, and not via a freight forwarder, is unreasonable. The commenters argued that a lot of brokers use their forwarding divisions to break down language barriers for non-resident importers or delivery duty paid shipments.

Response: CBP does not prohibit a broker from working with the forwarding division of a broker entity. The proposed regulation precludes a broker from obtaining a power of attorney from someone other than an importer or drawback claimant. The intent of this proposed provision is to clarify that a freight forwarder cannot serve as a barrier to communications between the broker and importer or drawback claimant, to address issues of identity theft, supply chain security, fee transparency, and to help ensure that an unlicensed person is not benefitting from the customs business conducted by the broker. However, a freight forwarder may be included as a third party in a power of attorney between the broker and the importer or drawback claimant. CBP does not regulate whether a broker uses foreign agents to perform work that is not customs business, but CBP does strictly ensure that persons not actually employed or supervised by a broker do not get paid a portion of the fee derived from customs business services; such persons may instead be paid by a flat fee.

Comment: One commenter supported the change to require a power of attorney directly from the importer but asked that the language in § 111.36(c)(2)(i) and (ii) align with the proposed language in (c)(3) for power of attorneys by including the drawback filer in (c)(2).

Response: CBP does not agree that the language in paragraph (c)(2) needs to be amended to include drawback claimants. Drawback claimants are included in the phrase "or other party in interest". The term "drawback claimant" was specifically included in the proposed sentence in (c)(3) to emphasize that a broker must execute and obtain a power of attorney directly from either the importer of record or drawback claimant, and not a freight forwarder or other third party that is not part of the broker-importer/drawback claimant relationship.

Comment: Another commenter, a surety association, stated that when an importer fails to file an entry summary or reconciliation entry or fails to re-deliver goods, the surety is held responsible; but, the surety is not authorized to take action to bring the defaulting bond principal into compliance. Thus, the regulation should allow for a surety to complete an action initiated by, but also abandoned by, its bond principal. The commenter recommended to identify sureties, along with importers and exporters, as parties authorized to file on their own account under § 111.2(a)(2)(i), and as one of the parties from whom brokers may obtain powers of attorney (§ 111.36).

Response: CBP does not agree with the commenter's request to include sureties in § 111.2(a)(2)(i) as a party to file on their own account, or in § 111.36 as a party from whom brokers may obtain a power of attorney. It appears from the commenter's reference to § 111.1(a)(2)(i) that the commenter believes that a surety is acting on behalf of a principal (importer), akin to an importer's authorized employee/officer, but that is legally not the case. A surety and importer have rights against each other on a bond. Therefore, sureties may not be included in § 111.2(a)(2)(i) as a party to file on their own account.

Although CBP regulates the general requirements applicable to bonds, which must be met by either the bond principal or the surety, CBP does not regulate the terms of the relationship between the bond principal and the surety, and thus a surety is not included as a party from whom a broker may obtain a power of attorney under § 111.36. The function of the bond regulations is to protect the revenue and ensure compliance with the laws and relevant regulations. The contractual terms agreed upon by a surety and the bond principal, which relate to matters other than bond coverage, bond conditions etc., are beyond the purview of CBP. Information sharing between bond principals and sureties, and their rights against each other over a particular entry, are thus to be decided by contract, and not by the terms of customs regulations pertaining to bonds (part 113) or brokers (part 111).

Comment: One commenter stated that CBP should clarify that in a case where an importer directly provides a broker with a power of attorney, the broker would not be precluded, in turn, to assign that power of attorney to another broker in accordance with the original power of attorney. One of the commenters pointed to the "Broker A-Broker B" process described in the Broker Management Handbook.

Response: A power of attorney must be executed between the importer of record or drawback claimant and the broker. A power of attorney cannot be executed between the importer of record or drawback claimant and the freight forwarder who in turn assigns the power of attorney to a broker. The reason behind CBP's proposed language in § 111.36(c)(3) is the addition of paragraph (i) in section 1641, based on section 116 of the Trade Facilitation and Trade Enforcement Act of 2015 (TFTEA),[13] for CBP to promulgate regulations to require brokers to verify the identity of the client, and the notion that a broker should know his or her client. However, the proposed language does not exclude the assignment of a power of attorney from one broker to another broker. Assignments of powers of attorney are

[13] Public Law 114–125, 130 Stat. 122 (February 24, 2016).

permissible as long as the original power of attorney is executed between the importer of record or drawback claimant and the broker, and Broker A designates Broker B to act on behalf of the client (importer or drawback claimant) in accordance with the terms of the original power of attorney. In other words, a designation by Broker A of Broker B is permitted so long as the client consented to this designation in the original power of attorney. Pursuant to § 141.46, a power of attorney must be in place before a broker acts on behalf of the client. Accordingly, to clarify CBP's intent, paragraph (c)(3) was slightly modified by removing the word "obtain" and replacing it with "execute" in the first sentence.

Comment: One commenter asked CBP to confirm that electronic signatures are permissible on powers of attorney.

Response: CBP recently issued Headquarters ruling H297978 (July 16, 2021), responding to a requester on this same question. CBP determined that whether an electronic signature is permitted for use on a customs broker power of attorney is determined by the applicable state's law governing the execution of powers of attorney. In addition, CBP stated in the Headquarters ruling that neither the applicable customs statute nor regulations prohibit the use of an electronic signature on a power of attorney, provided that it otherwise constitutes a valid power of attorney between the broker and client and may be produced upon CBP's request.

Comment: One commenter supported the changes in § 111.36(c)(3) but asked for additional changes in paragraphs (a), (b), and (c). The commenter asked CBP to add language in paragraph (a) that sets forth that the broker and importer or drawback claimant come to an agreement as to how documents will be transmitted to the importer or drawback claimant, and as to how payments will be made for services and other expenses, and to add a sentence at the end of paragraph (b) stating that nothing in the regulation would prohibit brokers from compensating sales representatives in a manner that is agreeable to both. The commenter further suggested to revise paragraph (c)(2) to state that the broker shall transmit directly to the importer or drawback claimant a copy of the power of attorney and terms and conditions to be signed and returned to the broker, and to revise paragraph (c)(3) to provide that the broker, freight forwarder, and importer or drawback claimant, shall make arrangements as to how documents and payments will be made for services and other expenses.

Response: CBP does not agree with the commenter's suggestion to change paragraph (a). This paragraph sets forth an affirmative obligation for the broker to provide a detailed statement to the importer of the services rendered. This obligation is in place to prevent mis-

feasance and fraud. CBP further does not agree with an additional sentence in paragraph (b) to allow for the compensation of sales representatives who are unlicensed in a manner that is agreeable to both. Such an arrangement would prevent transparency of the billing of services rendered and goes against the overarching principle that brokers must not share fees generated from customs business with unlicensed parties.

In addition, CBP does not agree with the suggested revisions to paragraph (c)(2). Existing paragraphs (c)(2)(i) and (ii) set forth minimum requirements for a broker to communicate certain information to an importer or other party in interest to allow for transparent billing. These requirements may be included in an agreement between the parties involved in a transaction, but also need to be spelled out in the regulation to emphasize that the conditions regarding the compensation of a freight forwarder for referring a brokerage business need to be made known and available to the importer. Lastly, CBP does not agree with the revision in paragraph (c)(3) for the reasons mentioned above. Brokers must fulfill the requirements in the regulations; the conditions as to document submission and payments to the broker may be spelled out in an agreement between the parties, but it is important to have regulatory requirements that bind parties.

Comment: One commenter stated that the fee-splitting requirements are antiquated, unclear and unrealistic. CBP should consider revoking the fee-splitting prohibitions in (b) and the conditions under (c), but at the very least create an additional carveout to (b) for "unlicensed related business entities of the broker whether located in the United States or a foreign country".

Response: CBP does not agree with the commenter. Brokers are prohibited from creating fee arrangements whereby the fees or other benefits resulting from the customs business services rendered by a broker will directly benefit an unlicensed person or entity. Thus, agreements wherein unlicensed persons acting as independent agents receive a commission for marketing or selling customs services on behalf of a brokerage company are generally prohibited. However, in Headquarters ruling H302355 (January 29, 2019), CBP had carved out a distinction between a commission paid to unlicensed independent agents contracted by a broker, and the unlicensed employees of a broker. The function of this distinction is to preserve the regulation's underlying policy concern of preventing unlicensed persons from improperly benefitting from the transaction of customs business. Commission payments to an employee are permitted, but not to independent agents who may or may not be operating outside of the

United States. Instead, a flat fee, not tied to a particular transaction, would be permissible to compensate third-party agents for selling customs services.

Comment: One commenter pointed out that according to language in the preamble of the NPRM, a broker is required to have direct communication with the importer. The commenter hoped that CBP understands that, at times, clients/importers designate third parties, *e.g.,* attorneys and consultants, to engage with the brokers. As such, brokers may communicate directly with third parties that represent the importer and such circumstances, controlled by the importer's preference, should be compliant and sufficient.

Response: CBP wants to clarify that there is no prohibition on the communication between the broker and third parties that the client has designated, but there is a prohibition on brokers executing a power of attorney with a third party acting as an intermediary instead of directly with the client. As mentioned above, CBP clarified the distinction between clients/ brokers and third parties/brokers and replaced the word "obtain" with the word "execute". In addition, to provide more clarity, CBP added a reference to "other third party" after "and not via a freight forwarder".

Comment: One commenter stated that the proposed change in § 111.39(c) to require the broker to advise the client on a proper corrective action and retain a record of the communication with the client, in addition to the existing duty to advise the client if the broker knows that the client has not complied with the law or has made an error, is a shift of responsibility from the importer to the broker who does not possess the same information that the importer does. Another commenter stated that the proposed language in § 111.39(c) greatly increases a broker's responsibilities in an area that should be the domain of the importer and pointed to 19 U.S.C. 1484 and 19 CFR 141.1(b) that place the responsibility for corrective action and liability for duties and other debt on the importer. Accordingly, the commenter is of the opinion that the proposed regulation is in conflict with the cited law and regulation, and, thus, should be removed.

Response: CBP does not agree that the proposed regulation imposes an additional burden on brokers. Brokers have an existing duty pursuant to § 111.39(b) to advise a client promptly of noncompliance, an error or an omission of which the broker has knowledge. If a broker continues to engage in customs business which then repeats such noncompliance, error or omission, then a broker is violating § 111.32 because a broker is now filing documents with CBP that the broker knows contain false information. In addition, brokers should already have a good practice in place for documenting any communication

with a client, and specifically any advice provided to a client on a corrective action. Adding this proposed language in the regulation is merely clarifying and codifying this responsibility.

Comment: Several commenters asked for clarification as to what type of record must be retained as evidence of a corrective action, what should be included in the "communication" with the client, and what constitutes "corrective action." The commenters suggested to add a sentence to paragraph (c) to state that a copy of a corrected entry demonstrating and/or communication explaining specific corrective action(s) shall serve as an adequate record of such communication.

Response: CBP disagrees with the suggested sentence that a copy of a corrected entry or communication could be sufficient to show that the broker has advised its client of a corrective action. CBP does not want to limit the types of records that qualify as evidence that the broker advised the client of a corrective action. The record could be an email or letter sent by the broker, or a written note summarizing a phone call between the broker and client, to name a few. CBP is open to accepting any record that the broker thinks would be sufficient in evidencing the communication that took place between the broker and client. Corrective action is the action that the broker took to remediate the noncompliance or error; an action that the broker in his or her good judgment understands needs to be taken.

Comment: One commenter referenced a statement in the economic analysis in the NPRM (page 34848, 1st row in the table listing § 111.39), which stated that the change in § 111.39(c) is considered neutral as it reflects CBP's current practice. The commenter disagreed with that statement, noting that current part 111 does not explicitly require customs brokers to provide clients with corrective action measures reflective of the client's errors/violations.

Response: CBP believes that the statement in the economic analysis is correct. A broker has an existing responsibility to advise the client of any noncompliance and errors and suggest a corrective action, even though it has not been stated expressly in the regulation. Advising a client and documenting such advice should be a broker's good practice, to protect the client's as well as the broker's interests, in case of any litigation or complaint by the client. Further, a broker has the responsibility pursuant to § 111.21(a) to document any correspondence with the client, which includes the documentation of any corrective action(s) that the broker advised the client to take. CBP wishes to take the opportunity to make clear that this communication from the broker to the client is a record under § 111.21. Thus, CBP

considers this responsibility a current practice, and determined that the proposed language in § 111.39(c) is deemed neutral in the economic analysis.

Comment: Two commenters stated that brokers frequently refer clients to consultants or attorneys for a proper course of action, and CBP should recognize that a referral to a more qualified expert may be the proper corrective action and should reflect that in the regulation.

Response: CBP understands that part of a broker's normal business practice, in some situations where corrective action is needed, could be a referral to a more qualified expert with regard to certain corrective actions. However, that does not mean that a referral is the only proper course of action. It is a reasonable person standard that the broker must employ to determine what type of corrective action is appropriate in a specific situation.

Comment: One commenter stated that the requirement that a broker document the advice to a client under § 111.39(c) serves no purpose to CBP. If CBP has a concern with a broker's performance, then CBP should conduct an audit. The commenter requested that CBP create a standard reporting requirement and advise the importing community of its intention of collecting data and how the benefits of the data collection do not cause the broker or importer to act without conflict in its importing partnership with the importer of record.

Response: CBP disagrees with the commenter. The documentation requirement does serve a purpose, which is evidencing that the broker provided advice to the client, and that documentation is considered a record pursuant to § 111.21. The second sentence of § 111.21(a) states that a broker must keep and maintain on file copies of all of his or her correspondence and other records relating to the customs business. This is a recordkeeping requirement for all brokers; the requirement in proposed paragraph (c) of § 111.39 is merely reiterating that a broker must keep a record of communication with the client regarding the advice on a corrective action. To make this existing requirement clearer, CBP included a reference to § 111.21 in addition to the reference to § 111.23 in paragraph (c) of § 111.39. Since there are recordkeeping requirements in place, CBP believes that there is no need for an additional reporting requirement.

Comment: Several commenters stated that CBP should allow for an extension of time, extenuating circumstances, or an opportunity to mitigate pursuant to § 111.45 if the broker can show a good faith effort to prevent the revocation of the license and permit. The commenters argued that the effect of losing a single national permit is

much more detrimental than losing a district permit. The commenters suggested language to add at the end of the first two sentences of paragraph (a), preventing a suspension or revocation if a broker demonstrates good cause or commits to corrective action, warranting an extension of time.

Response: The statutory requirements in paragraphs (b)(5) and (c)(3) of section 1641 set forth the reasons for a lapse of a broker's license and permit. If a broker entity that is licensed as a corporation, association or partnership fails to have, for any continuous period of 120 days, at least one licensed officer of the corporation or association, or at least one licensed member of the partnership, the entity's license will be revoked by operation of law under paragraph (b)(5). If a broker who was granted a permit fails to employ, for any continuous period of 180 days, at least one individual who is licensed, the permit will be revoked by operation of law under paragraph (c)(3). Neither paragraph in the statute provides for a good cause exception. Thus, the regulation, which mirrors the language in the statute and mandates a revocation by operation of law, cannot be changed to include such an exception. Moreover, CBP already provides for the possibility for reinstatement of a license once the triennial status report and associated fee are filed as required, as well as for reinstatement of a permit. Moreover, there is no prejudice to a broker if a license or permit is suspended or revoked by operation of law; brokers are not barred from reapplying.

Comment: Other commenters suggested that there be an administrative process prior to revoking a license and permit, such as providing prior notice in case of a failure to pay the annual broker permit fee in § 111.45(b). Such process would allow for a less burdensome resolution if the failure to pay was due to an administrative or clerical mistake.

Response: The broker permit user fee is an annual fee that brokers must pay for each permit they hold. CBP issues a **Federal Register** notice to announce the amount of the fee, as well as the deadline to pay the fee, on an annual basis. CBP also posts this information on its website. CBP believes that there is sufficient notice for a broker to timely pay the permit user fee. In addition, with the effectiveness of the final rule, there will be only one permit user fee to pay per year for a broker's national permit. Thus, CBP does not believe that the timely payment of the fee is burdensome.

Subpart D—Cancellation, Suspension, or Revocation of License or Permit, and Monetary Penalty in Lieu of Suspension or Revocation

CBP received supporting comments regarding the proposed changes to subpart D of part 111. Specifically, one commenter supported the proposal in § 111.53 to add a new paragraph (g) to provide an additional ground for the suspension or revocation of a license or permit to cover convictions of committing or conspiring to commit an act of terrorism as described in section 2332b of title 18 of the United States Code (*see* 19 U.S.C. 1641(d)(1)(G)). Another commenter supported the proposal in § 111.62(e) to remove the requirement for the broker to file his or her verified answer in duplicate prior to a suspension or revocation hearing as it better reflects the current electronic business environment. In addition, a commenter supported the proposal in § 111.76 to remove the requirement for a broker to file an application to CBP to reopen a case in writing and in duplicate, if an appeal is not filed, and instead to allow for electronic communication.

Subpart E—Monetary Penalty and Payment of Fees

Comment: One commenter voiced the concern that the increase of the license application fee will deter individuals from applying for a broker's license.

Response: CBP conducted a fee study on the costs associated with the broker license application, and CBP determined that the current fees are no longer sufficient to cover the costs of servicing brokers. The fee study showed that a fee of $463 for individuals and $815 for business entities would be necessary to recover the costs associated with the review of the license application and the necessary vetting for individuals and business entities. However, to minimize the financial burden on prospective brokers and not disincentivize those who are pursuing a career as a broker, while also recovering some of the increasing costs, CBP proposed to not increase the fees to the level of cost needed, but to increase the application fee to $300 for individuals and $500 for business entities. The economic analysis explains the reasons for the increase of the application fee and emphasizes the cost savings as a result of eliminating the district permit requirement and other changes to part 111. Once the final regulations are effective, a national permit applicant has to pay for only one permit application to be able to conduct customs business throughout the U.S. customs territory, in addition to the annual permit user fee for only one national permit.

Comment: One commenter expressed disagreement with the increase of the permit fee, pointing to CBP's ACE system and other

electronic platforms used for receiving payments and submissions of information and argued that the use of those tools should reduce costs. In addition, the commenter noted that the automatic transition from district permits to national permits should not cause any additional cost.

Response: As mentioned above, CBP proposed to increase the license application fee to cover expenses related to the review of license applications and vetting of applicants. CBP did not propose to change the amount of the permit fee, and this final rule is not changing the fee of $100 for a broker to apply for a national permit. In response to the second comment, CBP is transitioning the district permits to national permits at no cost to brokers.

Comment: One commenter stated that CBP should consider automating the fee collection and management functions, and charge a set fee per port, not district. The commenter further noted that "district" is a term used by CBP, which is not as relevant for brokers filing entries, thus, districts should be disregarded when charging fees.

Response: CBP did not propose to change the current fee structure for filing entries, moreover, the commenter's suggestion is not considered a natural outgrowth of the NPRM's proposals. Therefore, CBP is not adopting a new fee structure based on port activity.

Other General Comments

Comment: One commenter stated that CBP did not provide sufficient notice of the proposed amendments as they were not mentioned on CBP's website, but only announced in the **Federal Register**. The commenter further maintained that the NPRM did not mention whether CBP had reached out to the trade for input on specific issues. In addition, the commenter asked that CBP provide a fuller explanation of the proposed changes and provide further opportunities for public comment before finalizing the regulations. Another commenter suggested to issue a revised NPRM, or, at least, hold a public hearing to discuss the proposed changes.

Response: Pursuant to the APA, CBP published the NPRM to propose changes in an effort to modernize the customs broker regulations. The NPRM provided 60 days for public comment, in compliance with the APA. In addition, CBP announced the publication of the NPRM (as well as the concurrent NPRM proposing the elimination of broker district permit user fees) on CBP's website.[14] Moreover, CBP had been socializing the proposed changes to part 111 for numerous

[14] The announcement of the NPRMs, as well as COAC's recommendations regarding the modernization, may be found online on CBP's website at *https://www.cbp.gov/trade/programs-administration/customs-brokers* by clicking on the tab titled "Modernization of the Customs Broker Regulations".

years at many public forums, including COAC meetings and various broker association meetings. As mentioned in the preamble of the NPRM, CBP had conducted outreach to the broker community through webinars, port meetings and broker association meetings to solicit feedback on various broker matters and the modern business environment. The trade community had many opportunities to share their opinions, throughout the outreach as well as during the 60-day public comment period. CBP does not believe that there is a need for a public hearing or a revised NPRM to provide a fuller explanation of the proposed changes, other than the explanations included in this final rule.

Comment: One commenter recommended a minimum percentage of U.S. ownership in a brokerage. The commenter explained that CBP Form 3124 does require the notation of all officers who are licensed, as well as other officers and principals with controlling interest who are not licensed.

Response: CBP thanks the commenter for its contribution but believes that this comment is outside of the scope of this final rule as there is no U.S. ownership requirement in 19 U.S.C. 1641 or the corresponding regulations in 19 CFR part 111.

Comment: One commenter strongly recommended that CBP establish a dedicated, independent ombudsman-type position with the Office of Trade Relations to ensure that customs brokers are treated the same as CBP employees would be treated for similar types of mistakes. The commenter argued that this would be especially important considering the increased level of responsibility continually being transferred from CBP to customs brokers.

Response: CBP does not believe that the creation of an ombudsman-type position is necessary. CBP disagrees that a broker's mistake should be treated in the same fashion as a CBP official's mistake. Brokers are not Federal employees, so different paths are available for brokers and CBP officials to take in case of mistakes. Brokers have the opportunity to appeal certain decisions by CBP if brokers are of the opinion that those decisions are erroneous, such as the rejection of a license or permit, the suspension/ revocation of a license or permit, or the imposition of a penalty. Other applicable avenues are in place for Federal employees.

Comment: Three commenters urged CBP, especially in light of Executive Order 13924 (May 19, 2020), which instructed the government to provide regulatory relief and flexibility on a temporary, as well as, permanent basis, where appropriate, and due to the current challenges businesses are facing during the pandemic, to grant the brokerage industry at least one year, and upon showing of need,

additional time beyond the one-year period to comply with the new regulations. The commenters argued that brokers will need time to adjust, and in some cases, restructure their businesses, to the new national permit framework and the new criteria for responsible supervision and control.

Response: CBP does not believe that one year is necessary to implement the final regulations to allow a broker to adjust, and maybe even restructure, its business. A lot of the changes that are being implemented with this final rule are simplifying processes or updating or clarifying regulations. For instance, the updated supervision framework is simply codifying what brokers should have already been doing, such as the employment of sufficient licensed brokers, broker's responsiveness to CBP's communications and notices, as well as to the partner's or member's communication and direction, and updated recordkeeping requirements. None of these changes is significant in the sense that it would require brokers to re-structure their businesses. A lot of the requirements that are being codified in the regulations should have been best practices already for brokers to provide high quality service to their clients.

However, CBP does agree that a 60-day delayed effective date is beneficial for both the brokers to make any needed changes to the business, and for CBP to transition all district permit holders to a national permit and to ensure that CBP personnel are aware of and ready to work with the new changes imposed by the final rule.

In the NPRM, CBP proposed to revise § 111.2(b) by removing the four exceptions to the district permit requirement in order to transition to a national permit system. As part of the proposed revision, CBP will remove the cross-reference in § 111.2(b)(2)(i)(C) to subpart B of part 143 of the CBP regulations, which sets forth the regulations regarding remote location filing (RLF). No comments were submitted by the public regarding these proposed changes, whereby the use of a national permit would obviate the need for standalone RLF regulations. It should be noted that the RLF requirements that are mandated by 19 U.S.C. 1414 are captured in the proposed transition to national permits for all licensed brokers, as the national permit framework includes the expansion of the scope of a national permit to all customs business within the United States and would allow filings to be made electronically from anywhere in the United States. Once the final rule becomes effective, customs brokers will not be subject to the RLF regulations and, in a future rulemaking, CBP will propose amending the standalone RLF regulations in subpart B of part 143 to remove those provisions which have become moot and make any other changes that may be needed.

III. Technical Changes and Clarifications to the Existing Regulations

In reviewing the proposed changes to the regulations, as well as existing regulations, CBP identified certain technical changes that would provide more flexibility to the brokers, clarify CBP's intent of certain regulatory language, and improve the electronic submission process, which are set forth below.

In § 111.12(a), CBP added the option for electronic submission of license applications. CBP is in the process of developing the capability for the submission of license applications to the eCBP portal and wants the regulatory language to accommodate this future change. In addition, CBP added the option for electronic submission of withdrawals of license applications in redesignated paragraph (b) as an alternative to the current method of submission to the processing Center. As soon as CBP deploys this additional capability, applicants will have two options for the submission of application withdrawals.

To reflect in the regulation the option of a remote exam, as explained above, CBP modified the language in the last sentence of § 111.13(b) to state that CBP will give notice of the exact time and place for the examination, including whether alternatives to on-site testing will be available. In § 111.14(a)(3), CBP corrected a minor error that occurred in the published NPRM in the phrase "(including a member or a partnership or an officer of an association or corporation)". With this final rule, CBP replaced the first instance of "or" in the above phrase with the word "of" to accurately reflect the meaning of the phrase.

In § 111.17(c), CBP slightly modified the language for clarity and replaced "the date of entry of the Executive Assistant Commissioner's decision" with "the decision date by the Executive Assistant Commissioner". This technical change does not change the meaning or substance of the sentence.

CBP slightly modified the language in the fifth sentence of § 111.19(b) to clarify that a broker has two options for submitting the permit application, by submitting a letter either to the processing Center or electronically through a CBP-approved EDI system.

In the first sentence of § 111.19(e)(1), CBP replaced the phrase "in support of the denied application" with the phrase "in support of the application", removing the word "denied." This technical change does not change the meaning or substance of the sentence. Moreover, this change better aligns the regulatory language in § 111.19(e)(1) with (e)(2). The proposed term "denied application" is not used anywhere else in the regulation, thus, it is replaced for clarity purposes.

Further, in § 111.19(e)(2), CBP slightly modified the language for clarity at the end of the sentence and replaced "the date of entry of the decision" by the Executive Assistant Commissioner with "the decision date" by the Executive Assistant Commissioner. This technical change does not change the meaning or substance of the sentence.

In § 111.19(d), CBP added the phrase "the application" after "will review" to further clarify that the processing Center that receives the application will review the application to determine whether the applicant meets the eligibility requirements for a national permit to be issued. This clarification does not change the meaning or substance of the sentence.

In § 111.28 (responsible supervision and control), CBP revised the language in (a)(3) and (5) to provide more clarity. Factor (3) is revised to read as "The volume and type of business conducted by the broker", and factor (5) is revised to read as "The level of access a broker's employees have to current editions of CBP regulations, the Harmonized Tariff Schedule of the United States, and CBP issuances." There is no change to any of the substantive regulatory requirements for customs brokers. In addition, CBP replaced the word "broker" with "brokerage" at the end of the sentences in (a)(9) and (a)(10) to better reflect the meaning of the factors.

In § 111.28(b)(2) and (3), CBP replaced the word "employees" with "employee(s)", where appropriate, for consistency throughout the two paragraphs. This technical change does not change any of the substantive reporting requirements for customs brokers.

Further, in § 111.30(d)(1), CBP removed the proposed language "accompanied by payment or valid proof of payment of the triennial status report fee prescribed in § 111.96(d)." and replaced it with simpler language that reflects the current and future process of submissions of triennial status reports to CBP, *i.e.,* the status report must be filed through a CBP-authorized EDI system. There is no option for a broker to attach valid proof of payment in the eCBP portal, or when submitting the report at one of the 41 BMO locations. Further, CBP added clarifying language that the status report is not considered received by CBP until payment of the triennial status report fee prescribed in § 111.96(d) is received. This is not a new requirement; CBP always required the submission of both the triennial status report and the triennial status fee, as evidenced by the existing regulatory language "the report must be accompanied by the fee." A similar message as the one in the final regulation is displayed in the eCBP portal when submitting the triennial report, alerting the broker that the filing is not completed until payment of the fee has been submitted.

In addition, CBP did not adopt the proposed language of "submits payment or proof of payment of" in the third sentence of § 111.30(d)(4) but kept the existing language of "pays" as it better reflects CBP's practice, as explained above. CBP added "and pay the required fee" in the fourth sentence of § 111.30(d)(4) to align the language with the language in the prior sentence that talks about filing the required report and paying the required fee for the license to be reinstated. The fourth sentence sets forth the consequence of revocation by operation of law if the broker does not file the required report and pay the required fee.

CBP also amended the first sentence of § 111.30(e) and added phone number and email address to the already required information of name and address for the individual who has legal custody of the records after the termination of the brokerage business. Adding the email address and telephone number to the methods for communicating with CBP will expedite communication and facilitate resolution of any questions. Communication in current times is typically conducted by phone or email, thus, adding these two options will benefit both CBP and the recordkeeping individual. Moreover, an email address and telephone number are often already included when brokers provide information to CBP, as those are preferred methods of communication.

In § 111.39(a), covering advice to a client, in the first sentence, CBP added the phrase "it conducts on behalf of" for clarification, but this change will not have an impact on the substantive regulatory requirement for customs brokers to not withhold any information relative to the customs business that the broker is conducting on behalf of a client.

In addition, CBP revised the last sentence of paragraph (a) of § 111.96 and removed references to a CBP fingerprint processing fee since this is not a fee that CBP collects. The only fee that is collected for the processing of fingerprints is one charged by the Federal Bureau of Investigation.

CBP simplified the proposed language in § 111.96(d) regarding the triennial status report fee to state that a fee of $100 is required to defray the costs of administering the status reporting requirement prescribed in § 111.30(d)(1). The method of submission by a CBP-authorized EDI system is already mentioned in § 111.30(d)(1), thus, it is sufficient that paragraph (d) of § 111.96 simply deals with the fee payment.

Finally, while the general topic of this rulemaking covers customs revenue functions delegated to the Secretary of Homeland Security by the Secretary of the Treasury, this document also includes certain

fees over which the Secretary of the Treasury retains authority, as provided for in 19 CFR 0.1(a) and paragraph 1(a)(i) of Treasury Department Order 100–16. Accordingly, this final rule is also being signed by the Secretary of the Treasury (or his or her delegate).

IV. The Benefits of CBP's New Payment and Submission System, the eCBP Portal, for Licensed Customs Brokers

In addition to finalizing the proposed regulations, CBP announces in this final rule the deployment of a new payment and submission system, the eCBP portal. The development of the eCBP portal is part of CBP's Electronic Payment Options (ePO) effort that addresses the revenue collections capability gaps of limited payment options, inefficient manual processes, and disparate revenue systems. This effort's goal is to eliminate manual processes and standardize processes, reduce cash and check collections at ports of entry and provide more online payment options, integrate data with cargo systems, reduce wait times at ports of entry, and provide better and more accessible data, all of which aligns with recommendations by COAC and other trade stakeholders.

This new payment and submission system streamlines and validates data, which in turn reduces errors and provides data to support security-related decision making by CBP personnel. Using the eCBP portal means fewer cash transactions, which means lower risk of cash losses. Additionally, this technological advancement enhances CBP revenue collection capability and permits greater focus on law enforcement and trade facilitation.

The eCBP portal's electronic submission and payment options offer brokers the flexibility and convenience to easily and efficiently manage their reporting responsibilities. Currently, the eCBP portal is being used for the submission and payment of broker examination applications and triennial status reports. Additional enhancements, such as the electronic submission of and payment for broker license applications and permit applications, and the payment of annual user permit fees, will follow, and CBP will announce those additional eCBP functionalities in the **Federal Register**, as needed.

CBP deployed eCBP's functionality to receive broker examination applications on August 19, 2019. CBP announced this new payment system through CSMS messages, on CBP's website, through tweets, and in webinars offered to the broker community. This new payment portal was well received by the broker community, and by the end of fiscal year 2019, CBP had successfully processed more than 1,300 broker examination applications in the eCBP portal, resulting in a significant reduction of personnel hours in CBP Headquarters and at ports processing applications and withdrawals of applications.

After a successful testing phase between December 2017 and May 2018, on December 15, 2020, CBP deployed the capability to file the triennial status report in the eCBP portal by completing the online form and submitting the triennial fee. Approximately 90% of the status reports for the 2020/2021 reporting period were submitted electronically. It is important to note that with this new functionality, customs brokers now have two options to file the triennial report and fee: they may use the new portal or submit the report and fee at a location where their broker license was issued. An additional current functionality of the new eCBP portal is the automatic processing of license suspensions and revocations for unpaid triennial status reports, which was deployed to the portal in February 2021. However, even though this is an automatic process, the list of unpaid reports is manually validated by CBP personnel prior to suspension or revocation. As the eCBP portal is tied to ACE, this new interface also allows ACE to receive the triennial report data and apply any updates regarding the triennial report information and payment information to the broker account in ACE.

Customs brokers who want to use the eCBP portal, found on CBP's website, must create a *Login.gov* account as a first-time user.[15] Instructions and training resources, such as user and quick reference guides, for brokers on how to create a *Login.gov* account and use the eCBP portal can be found on CBP's website.[16]

V. Conclusion

Based on the analysis of the comments received and further consideration, CBP has decided to adopt as final the proposed regulations published in the **Federal Register** (85 FR 34836) on June 5, 2020, as modified by the changes noted in the discussion of the comments section above.

VI. Statutory and Regulatory Requirements

A. Executive Orders 13563 and 12866

Executive Orders 13563 and 12866 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and ben-

[15] The link to the eCBP portal may be found online at *https://e.cbp.dhs.gov/brokers/#/home*.

[16] Resources for brokers on how to use the eCBP portal are available online at *https://www.cbp.gov/trade/ecbp*.

efits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule is not a "significant regulatory action" under section 3(f) of Executive Order 12866. Accordingly, the Office of Management and Budget (OMB) has not reviewed this regulation.

This rule will result in costs to licensed customs brokers in the form of additional fees and reporting requirements. CBP estimates that these costs total $88,850. This rule will also result in benefits to licensed customs brokers in the form of reduced fees and reduced time burdens. CBP will also benefit from time savings. CBP estimates that the monetized savings of the rule total $1,277,116. The five-year total monetized net benefit of the rule ranges from $973,616 discounted at 7 percent to $1,088,308 discounted at 3 percent. In addition, unmonetized benefits include increased professionalism of the broker industry, greater clarity for brokers in understanding the rules and regulations by which they must abide, better data security, and better reporting of potential fraud to CBP.

As mentioned above, CBP published the proposed rule titled, "Modernization of the Customs Brokers Regulations," on June 5, 2020, and received 55 comments from the public.[17] CBP adopts the regulatory amendments specified in the proposed rule with some changes, outlined below. With the adoption of the proposed regulatory amendments, CBP applies the 2020 NPRM's economic analysis approach to this rule, updating the data as necessary and making certain changes in accordance with the public comments. CBP has prepared the following analysis to help inform stakeholders of the impacts of this rule.

TABLE 1—SUMMARY OF CHANGES AS A RESULT OF THE RULE

Provision	Section	Change	Cost/benefit
111.1	Subpart A	Update/eliminate definitions; change primary point of contact to processing Center.	Neutral—changes reflect current practice and statutory changes.
111.2	Subpart A	Eliminate district permits and require national permits.	$122,000 annualized net benefit. See section 3.11.
111.3	Subpart A	Requires customs business to be conducted within the customs territory of the US; brokers must maintain a point of contact.	Neutral—clarifies current regulations and reflects current practice.
111.11	Subpart A	Adds that the processing Center may reject an incomplete application.	Benefit—increases efficiency.

[17] Both the NPRM (85 FR 34836) and the public comments in response to the NPRM may be found online at *https://www.regulations.gov/document/USCBP-2020–0009–0001.*

Provision	Section	Change	Cost/benefit
111.12(a) ...	Subpart B	Update the place of submission for applications and allows for electronic submission or withdrawal; removes requirement that applications are submitted under oath.	Benefit—increases efficiency and reduces the burden on applicants.
111.12(b) ...	Subpart B	Remove requirement to post notice of applications	Benefit—reduces the burden on CBP.
111.13	Subpart B	Revisions to reflect new national permit system; written and electronic notification of examination results; remote exam option.	Neutral—the costs of the new fee system are ad- dressed in section 3.11.
111.14	Subpart B	Clarifies that CBP may use information from the interview in background investigation.	Neutral—reflects current practice.
111.16	Subpart B	Expansion of the grounds to justify the denial of a license.	Benefit—increases professionalism.
111.17	Subpart B	Adds new method to communicate further information to CBP for appeal of an application denial.	Benefit—greater flexibility.
111.18	Subpart B	Requires applicants to provide new or corrected information when re-applying.	Benefit—fewer application appeals will be rejected for lack of new information. Cost—applicants will need to expend time in collecting and submitting information.
111.19	Subpart B	Replacing district permits with national permits	$122,000 annualized net benefit. See section 3.11.
111.19(b) ...	Subpart B	Revision of the procedures to apply for a permit to account for the switch from district to national permits.	Neutral—the process is very similar, but with a national permit.
111.19(c) ...	Subpart B	Revision of permit fees	See “Elimination of Customs Broker District Permit Fee” RIN 1515–AE43.
111.19(d) ...	Subpart B	Elimination of the requirement to maintain a place of business in each port where a district permit is held.	Benefit—allows for greater flexibility and efficiency for brokers and CBP.
111.19(e) ...	Subpart B	Language updates to reflect the change to national permits and processing Centers.	See above.
111.19(g) ...	Subpart B	Clarifies applicants must provide additional information or arguments in support of a denied application; allows information to be provided through various communication methods.	Benefit—increases professionalism and decreases time spent by CBP acquiring information. Cost—requires applicants to expend time in providing additional information.
111.21	Subpart C	Requires brokers to notify CBP of any electronic records breach and to provide CBP a designated point of contact for recordkeeping in addition to the current contact provided for financial queries.	Benefit—enhances CBP’s risk management approach. See section 3.3/section 3.7.2.
111.23	Subpart C	Requires that electronic records be stored within the U.S. customs territory[18].	Benefit—increases security. See section 3.3.
111.24	Subpart C	Clarifies disclosure rules	Benefit reduces confusion. See section 3.7.3.

[18] Duplicate or backup records may be stored outside the U.S. customs territory so long as the recordkeeping requirements for the original records are met. *See* CBP’s Headquarters ruling H292868.

Provision	Section	Change	Cost/benefit
111.25	Subpart C	Revises guidelines for CBP inspection of broker records with the elimination of broker districts.	Neutral—see section 3.4.
111.27	Subpart C	Update of language to reflect the transition of responsibilities from Treasury to DHS following the creation of DHS.	Neutral—reflects the current environment.
111.28	Subpart C	Clarifies requirements in relation to responsible supervision and control and allows for electronic submission of employee lists.	Benefit—increases flexibility. See section 3.7.4.
111.30	Subpart C	Modification to the timing requirement for when a broker notifies CBP of information changes, including a new requirement for inactive brokers to provide CBP with up-to-date contact information.	Benefit—increases professionalism, keeps CBP better informed, and allows greater efficiency for broker's changing status. Cost—inactive brokers will expend time to submit their information.
111.32	Subpart C	Places an affirmative burden on the broker to report to CBP when a broker terminates a client relationship as a result of determining that the client is attempting to defraud the U.S. Government.	Cost—$8,185 annually. Benefit—improves CBP's awareness of potential il- legal activity. See section 3.5.
111.36	Subpart C	Modifies the requirements for brokers when dealing with freight forwarders.	Neutral—time spent does not change. See section 3.6.
111.39	Subpart C	Guidelines for how brokers may behave with clients; requires brokers to advise clients of corrective actions and maintain communication records.	Neutral—reflects current practice. See section 3.7.4.
111.45	Subpart C	Updates to reflect the change to national permits	Neutral—specifies national permit.
111.53	Subpart D	Adds conviction of committing or conspiring to commit an act of terrorism to the grounds for suspension or revocation of a license or permit.	Benefit—increases professionalism.
111.55	Subpart D	Updates to reflect the current practice of not referring all complaints to a special agent.	Neutral—reflects current practice.
111.56	Subpart D	Updates to reflect current practice in the investigation of a complaint.	Neutral—reflects current practice.
111.62	Subpart D	Updates to requirements for notification of charges to reflect new electronic options.	Neutral—reflects improved technology.
111.63	Subpart D	Removes the requirement that a return card be signed solely by the addressee; permits CBP to rely upon the mailing address provided by the broker.	Benefit—increases efficiency.
111.67	Subpart D	Updates to reflect the current practice of Office of Chief Counsel representing the Government.	Neutral—reflects current practice.
111.74	Subpart D	Eliminates the requirement to publish suspension, revocation, or penalty notices in the Customs Bulletin.	Neutral—such announcements are published in the **Federal Register** and automatically included in the Customs Bulletin.
111.76	Subpart D	Allows for electronic communication when filing an appeal.	Benefit—increases efficiency.
111.77	Subpart D	Eliminates the requirement that CBP provide notice of a vacated or modified order in the Customs Bulletin.	Neutral—such announcements are published in the **Federal Register** and automatically included in the Customs Bulletin.

Provision	Section	Change	Cost/benefit
111.81	Subpart D	Updates to the signing requirement for a settlement to reflect delegation of authorities.	Neutral—reflects delegation of existing authority.
111.96	Subpart E	Updates to the user application fee	See above.

As stated above in Section II, *Discussion of Comments,* one commenter disagreed with CBP's assessment that the change to § 111.39(c) has a neutral effect on cost, as it reflects current practice. CBP believes that this assessment is correct. A broker has an existing responsibility to advise the client of any noncompliance and errors and suggest a corrective action, even though it has not been stated expressly in the regulation. Advising a client and documenting such advice should be a broker's good practice, to protect the client's as well as the broker's interests, in case of any litigation or complaint by the client.

1. Need and Purpose of Rule

The primary purpose of this final rule is to formalize recent changes in the permitting of licensed customs brokers. To take advantage of new technologies and reflect a changing trade environment, CBP is switching from a district permit system to a national permit system. Licensed brokers who have traditionally been required to apply for and operate under a permit for each district in which they do business may now work under a single, national permit.

The rule also finalizes changes in the license application fee charged by CBP, which CBP will increase to cover a greater portion of the costs CBP has always faced. Because these costs are being moved from CBP to brokers, they are considered a transfer. The rule contains several provisions meant to professionalize the broker industry, formalize current practices into regulations, and adapt regulations to reflect technological advancements. Finally, in this final rule, CBP announces the deployment of a new payment and submission system, the eCBP portal.[19] Testing initially began in 2017 and continued into 2020. The eCBP portal allows applicants and brokers to electronically submit the broker exam application, the triennial status report and associated fees, with additional enhancements to be announced in the **Federal Register** as needed. The majority of brokers already follow many of the practices described above, like storing records electronically within the customs territory of the United States and reporting clients the broker knows have attempted to commit fraud. Furthermore, 80 percent of applicants and 90 percent of brokers have already

[19] *See The Benefits of CBP's New Payment and Submission System, the eCBP Portal, for Licensed Customs Brokers* above.

adopted the eCBP portal. This rule provides better and more concrete guidance in these matters, at little or no cost to CBP or customs brokers.

In this final rule, CBP is making several changes to address comments received from the public in response to the NPRM, as well as clarifying existing regulatory language. These include:

- Changing the definition of "Designated Center" by changing the name to "Processing Center;" and explaining that processing Center means the broker management operations of a Center;
- Removing references to a "director," to reflect the fact that other Center employees may process broker submissions;
- Updating § 111.12 to allow the electronic submission and withdrawal of the customs broker license application;
- Updating § 111.13 to account for a remote option for the customs broker exam;
- Updating § 111.21 to require brokers to report a breach as well as any known compromised importer identification numbers within 72 hours, in addition to requiring submission of any additional known compromised importer identification numbers within 10 business days;
- Consolidation of proposed responsible supervision and control factors 12 and 13 in § 111.28(a) into a single factor (12), and factors 14 and 15 into a single factor (13);
- Addition of an email address requirement to § 111.30.

Monetized costs for customs brokers will result from no longer receiving a first district permit concurrent with a broker's license, and the requirement for brokers to notify CBP when separating from a client relationship due to attempted fraud or criminal acts. Customs brokers who do not concurrently receive their first district permit with their broker's license will save the cost of district permit fees. Additionally, CBP and customs brokers will save time applying for and reviewing district permit applications and waivers. The five-year total monetized net benefit of the rule ranges from $973,616 discounted at seven percent to $1,088,308 discounted at three percent. The annualized cost is approximately $237,500 using both three and seven percent.

Customs brokers are private individuals and/or business entities (partnerships, associations, or corporations) licensed and regulated by CBP to assist importers in conducting customs business. Customs brokers have an enormous responsibility to their clients and to CBP, requiring them to properly prepare importation documentation, file documents accurately and on-time, correctly classify and value goods, pay duties, taxes, and fees, safeguard their clients' information, and protect their licenses from misuse.

In an effort to perform these duties efficiently, customs brokers have embraced recent technological advances such as making the programming and business process changes necessary to use ACE, thus providing a single, centralized access point to connect CBP and the trade community. Through ACE, manual processes are streamlined and automated, and the international trade community is able to more easily and efficiently comply with U.S. laws and regulations.

CBP has also endeavored to embrace these technological advances to not only more efficiently perform its duties of facilitating legitimate trade while making sure that proper revenue is collected, but also to provide more efficient tools for customs brokers to file and monitor the information submissions necessary for a timely and accurate entry filing. One of the central developments that will allow CBP to perform its operational trade functions more effectively is the transition to the Centers.

Beginning in 2012, CBP developed a test to incrementally transition the operational trade functions that traditionally reside with port directors to the Centers. The Centers were established in strategic locations around the country to focus CBP's trade expertise on industry-specific issues and provide tailored support for importers. CBP established these Centers to facilitate trade, reduce transaction costs, increase compliance with applicable import laws, and achieve uniformity of treatment at the ports of entry for the identified industries. On December 20, 2016, CBP published an interim final rule in the **Federal Register** (81 FR 92978) ending the Centers test and establishing the Centers as a permanent organizational component of CBP.

Current broker regulations are based on a district system in which entry, entry summary, and post-summary activity are all handled by the ports within a permit district. With the transfer of trade functions to the Centers, a significant portion of these activities, including entry summary and post-summary, are now handled directly by the Centers. The Center structure is based on subject matter expertise, as opposed to geographic location, placing them outside of the district system as it currently exists. With this rule, CBP will modernize the regulations governing customs brokers to better reflect the current work environment and streamline the customs broker permitting process.

2. Background

It is the responsibility of CBP to ensure that only qualified individuals and business entities can perform customs business on behalf

of others. CBP accomplishes this task by only issuing broker licenses to individuals and business entities that meet the below criteria:[20]

- Must submit a customs broker license application within three years of taking and passing the customs broker license examination;
- Must be a U.S. citizen and attain the age of 21 prior to submitting the license application;
- Must possess good moral character; and
- Must pay the requisite fee.

Business entity customs broker license eligibility:

Partnerships

- Must have at least one member of the partnership who is a licensed customs broker; and
- Must pay the requisite fee.

Associations and Corporations

- Must have at least one officer who is a licensed customs broker;
- Must be empowered under its articles of association or articles of incorporation to transact customs business as a broker; and
- Must pay the requisite fee.

Currently, CBP requires all prospective brokers, both individuals and business entities, to submit CBP Form 3124: *Application for Customs Broker License* to the port of entry at which they intend to conduct customs business. CBP Form 3124 is used to verify that prospective customs brokers satisfy the requirements for receiving a customs broker's license.

The customs territory of the United States is divided into seven customs regions. Within each region, the customs territory of the United States is further divided into districts; there are currently approximately 40 customs districts.[21] Currently, a district permit is required for each district in which a customs broker intends to conduct customs business. Each district permit requires a one-time per-

[20] *See* 19 CFR part 111.

[21] Customs districts are not evenly divided amongst the seven customs regions (one region may have more or fewer customs districts than another). In addition to the 40 geographically defined customs districts, there are three special districts that are responsible for specific types of imported merchandise. According to the Broker Management Branch, these special districts include districts 60, 70 and 80. District 60 refers to entries made by vessels under their own power. District 70 refers to shipments with a value under $800. District 80 refers to mail shipments. These three special districts do not require the use of a licensed broker with a specific district permit and as a result are not affected by this provision.

mit fee of $100 and an annual user fee.[22] A customs broker has the option of receiving his/her first district permit concurrently with the receipt of the customs broker license, in which case the $100 permit fee is waived. Even if this option is used, the customs broker is still responsible for the annual user fee. However, this option is not exercised often for individual customs broker license holders. Currently, according to a CBP Broker Management Branch estimate, approximately two percent of individual customs broker license holders get their first district permit concurrently issued with the receipt of their broker's license. The majority of individuals do not take advantage of this benefit. Most licensed brokers file exclusively under a corporate permit and do not need to get an individual permit, saving them the annual user fee. On the other hand, according to CBP's Broker Management Branch, 100 percent of current corporate license holders get their first district permit concurrently issued with their customs broker license.

A broker who intends to conduct customs business at a port within a district for which the broker does not have a permit must submit an application for a district permit in a letter to the director of the port at which the broker intends to conduct customs business. Each application for a district permit must set forth or attach the following:

- The applicant's broker license number and date of issuance;
- The address where the applicant's office will be located within the district and the email address and telephone number of that office;
- A copy of a document which reserves the applicant's business name with the State or local government;
- The name, broker license number, office address(es), telephone number, and email address of the individual broker who will exercise responsible supervision and control over the customs business transacted in the district;
- A list of all other districts for which the applicant has a permit to transact customs business;
- The place where the applicant's brokerage records will be retained and the name of the applicant's designated recordkeeping contact; and
- A list of all persons who the applicant knows will be employed in the district with all the required employee information.

[22] The annual user fee payable for calendar year 2022 is $153.19 (86 FR 66573). Information on the fee can be found in 19 CFR 24.22(h). The user fee is subject to adjustment based on inflation. Amendments to the regulatory provisions regarding the district permit user fee are found in the companion Department of the Treasury final rule entitled, "Elimination of Customs Broker District Permit Fee." RIN 1515–AE43.

The applicant for the district permit must have a place of business at the port where the application is filed or must have made firm arrangements satisfactory to the port director to establish a place of business and must exercise responsible supervision and control of that place of business once the permit is granted. Instead of a customs broker getting multiple district permits, he or she could also apply for a national permit for the purpose of transacting customs business in all districts within the customs territory of the United States as defined in 19 CFR 101.1. The national permit application may be submitted concurrently with or after the submission of an application for a broker's license.

CBP first introduced national permits in 2000 to allow a broker to conduct a limited set of activities in districts for which the broker does not have a district permit. When it was first introduced, a national permit allowed licensed brokers to place an employee in the facility of a client for whom the broker is conducting customs business; file electronic drawback claims; participate in remote location filing; and make representations after the entry summary has been accepted. In the years since the national permit was introduced, and with the full implementation of ACE, almost every activity performed under a district permit was added to the national permit. Only those activities, such as the filing of paper entries and certain payment submissions that require physical presence at a port, currently require a district permit instead of a national permit. With the national permit system, these restrictions will no longer apply. This rule will allow a national permit holder to conduct any type of customs business in all districts within the customs territory of the United States. This represents a full expansion of the activities allowed under a national permit. CBP has determined that in the increasingly automated environment brokers may need to make contact with CBP personnel across the customs territory and there is no longer a reason to restrict national permit holders.

Currently, an applicant for a national permit must submit payment of the application fee and user fee to the port where the license was issued, and then submit the national permit application in the form of a letter, including evidence of payment, to the Broker Management Branch.[23] An applicant has to further include the following:

- The applicant's broker license number and date of issuance;
- If the applicant is a partnership, association, or corporation, the name and title of the national permit qualifier;

[23] In the published NPRM, CBP incorrectly stated the current submission process of a national permit application (submission to the director of the designated Center), but this technical error did not have an impact on the outcome of the economic analysis. *See* the published NPRM (85 FR 34836), at page 34850.

• The address, telephone number, and email address of the office designated by the applicant as the broker's office of record; that office will be noted in the national permit when issued;

• A copy of a document which reserves the applicant's business name with the State or local government;

• The name, telephone number, and email address of the licensed broker or knowledgeable employee to be available to CBP to respond to issues related to the transaction of customs business;

• The name, broker license number (if designated), office address, telephone number, and email address of each individual broker who will exercise responsible supervision and control over the customs business of the applicant under the national permit;

• A supervision plan describing how the broker will exercise responsible supervision and control, including compliance with § 111.28 (*see* 19 CFR 111.28);

• The place where the applicant's brokerage records relating to customs business conducted under the national permit will be retained and the name of the applicant's designated recordkeeping contact (*see* 19 CFR 111.22 and 111.23);

• The name, telephone number, and email address of the knowledgeable employee responsible for broker-wide records maintenance and financial recordkeeping requirements;

• A list of all employees of the broker, together with the specific employee information prescribed in § 111.28(b) for each of those employees (19 CFR 111.28(b)); and

• A receipt or other evidence showing that the fees specified in § 111.96(b) and (c) have been paid (19 CFR 111.96(b) and (c)).

In an effort to modernize the permitting process for customs brokers, this rule eliminates the district permitting process and automatically grants each current district permit holder a national permit.[24] Upon adoption of this final rule, the transition for a district permit holder to become a national permit will be a one-time, automatic process, without any actions to be taken by the permit holders. Using data from ACE, CBP will automatically create a national permit for each broker currently holding a district permit and not yet holding a national permit, though CBP will not cancel active district permits until all national permits are issued. Permit holders will be notified via email, or mail, that a new national permit will be issued. These notifications will be part of the day-to-day work of the Broker Management Branch and will not add to the cost of the rule.

Currently, customs brokers who do not have a national permit must maintain an office and have a separate district permit for each district

[24] For more information, *see* the clarification above in *Subpart A. General Provisions.*

in which the broker wants to conduct customs business. For some brokers, this means having many small offices across the country. This rule removes the requirement to have a separate local office in each district in which customs brokers do business. Since, under a national permitting structure, customs brokers are no longer required to have a representative in each district in which they conduct customs business, brokers could organize themselves to better suit their specific business needs. While some brokers may consolidate their office locations and save on overhead costs, which may also involve laying off local staff, others may expand their business operations or staffing needs as they will now be able to serve more ports without needing a local office. CBP cannot predict whether customs brokers as whole would experience net savings as a result of these changes. For the purposes of this analysis, CBP does not believe that brokers will greatly expand or contract their holdings as a result of the rule. In the case that some brokers do ultimately close offices, they will likely experience cost savings and the net benefit estimated in this analysis would increase. Since national permits were first issued, there has not been a noticeable change in the number of brokers hired as a result of national permits, so CBP does not believe there will be a significant change due to this rule.

In response to the NPRM, one commenter predicted that a national permit system would lead to reduced competition and lost revenue at ports. However, because this rule will not reduce the volume of trade, and goods must still physically arrive at various ports, CBP does not believe this to be the case. Another commenter noted that a national permit system would devalue the broker license and force small businesses to close. CBP disagrees with this assertion. In fact, small businesses may benefit more from a national permit, allowing them to work in ports across the country and in which they could not previously afford to maintain a physical presence. Brokers who find they are more competitive with a physical presence at a given port may still maintain a local office.

Projection of Customs Broker Licenses and Permits

CBP's Broker Management Branch provided historical data from 2015– 2021. As of January 2022, there are 15,226 active, licensed customs brokers. CBP also issued new broker licenses each year to both individuals and corporations.[25] From 2015 to 2019, the annual number of licenses issued has declined by one percent for corporate

[25] A partnership or association may also hold a corporate permit. At least one member of the licensed organization must hold an individual broker license.

licenses while from 2017 to 2021, the annual number of licenses declined by four percent for individual licenses (see Table 2).[26]

TABLE 2—HISTORICAL LICENSING

Year	Total licenses issued	Corporate licenses	Individual licenses
2015	770	16	754
2016	653	21	632
2017	580	16	564
2018	558	27	531
2019	464	15	449
2020	187	7	180
2021	496	31	465

As of January 2022, there are 2,365 permitted brokers holding a combined total of 3,345 active district permits. These 2,365 brokers represent about 15.5 percent of all brokers, as the majority of brokers never apply for their own permit and work under the auspices of a corporate permit. Approximately two percent of brokers hold a corporate permit, meaning 13.5 percent of brokers hold individual permits. The brokers who do hold permits average approximately 1.4 district permits per permit holder. Using these figures and historic rates of decline, we can project how many licenses and district permits licensed brokers will be issued over the period of the analysis, under the baseline condition (*i.e.*, if this rule is not promulgated). This is shown in Table 3 below.

TABLE 3—PROJECTION OF NEW INDIVIDUAL AND CORPORATE PERMITS

Year	New corporate licenses issued (1% annual decline)	New corporate permits (100% of new corporate licenses * 1.4)	New individual licenses (4% decline)	Individual permits (13.5% of individual licenses * 1.4)
2022	15	21	447	86
2023	15	21	430	82
2024	15	21	414	79

[26] The closures and delays related to the COVID– 19 pandemic resulted in anomalous data for corporate licenses in 2020 and 2021. The number of licenses issued in 2020 was significantly smaller than previous trends, while 2021 represented a catch-up year and saw an inordinately high number of corporate licenses issued. Therefore, to calculate the corporate license growth rate, CBP used data from 2015–2019, which we believe more accurately reflects future growth. Individual licenses, while also affected by the COVID–19 pandemic, returned to previous trends in 2021, allowing CBP to use a standard 5-year period from 2017–2021.

Year	New corporate licenses issued (1% annual decline)	New corporate permits (100% of new corporate licenses * 1.4)	New individual licenses (4% decline)	Individual permits (13.5% of individual licenses * 1.4)
2025	15	21	398	76
2026	15	21	383	73
Total	75	105	2,072	396

3. Rule Amendments: Costs, Benefits, and Transfer Payments

In this rule, CBP is finalizing regulatory changes that include: increasing fees for the customs broker license application; eliminating district permits so each customs broker only needs one national permit to conduct customs business; mandating that each broker must provide notification to CBP of any known breach of records within 72 hours of discovery;[27] requiring that upon request by CBP to examine records, brokers make all records available to CBP within thirty (30) calendar days at the location specified by CBP; requiring that customs brokers obtain a customs power of attorney directly from the importer of record or drawback claimant—not a freight forwarder or other third party—to transact customs business for that importer or drawback claimant; and requiring that a broker document and report to CBP when the broker separates from or cancels a client as a result of the broker's determination that the client is intentionally attempting to use the services of the broker to defraud or otherwise commit any criminal act against the U.S. Government. Finally, this rule allows CBP to make numerous non-substantive changes and conforming edits in an effort to modernize the regulations governing customs brokers and to clarify existing language in the regulations to better reflect what is already occurring.

3.1 Broker License Fee

CBP currently charges $200 fees per individual or business entity for the broker license application. These fees are used to offset the costs associated with servicing the brokers. Based on a fee study,

[27] Additionally, within ten (10) business days, a broker must provide an updated list of any additional known compromised importer identification numbers. To the extent that additional information is discovered, a broker must provide that information within 72 hours of discovery.

entitled "Customs Broker License Application Fee Study," CBP has determined that these fees are no longer sufficient to cover its costs.[28]

The study found that fees of $463 and $815 are necessary to recover the costs associated with reviewing the customs broker license application for individuals and business entities, respectively. These fees, however, are significantly higher than the current fees of $200 for both individuals and business entities and, if implemented, these fee rates could become an economic disincentive to those pursuing a career as a customs broker. Therefore, in an effort to minimize the financial burden to prospective customs brokers while also recovering a larger portion of the costs associated with reviewing and vetting the license application, CBP has decided to limit the license application fee to $300 for individuals and $500 for business entities; the remainder of the costs would continue to be covered by appropriated funds. In response to the NPRM, one commenter expressed concern that raising application fees would reduce the number of qualified candidates applying for broker licenses. CBP has considered this factor in deciding to limit the amount by which the fee will increase in order to cover more of CBP's costs and account for inflation without adding too much to the cost burden for brokers. CBP considers this increase in the fee to be a reasonable compromise position between not raising the fee at all and raising it to a level necessary to recover the full costs.

In response to the NPRM, one commenter noted that automation and improved technology should obviate the need for a fee increase. The fee increase is necessary, however, because CBP has not been covering costs for many years. Technology improvements and automation also require initial investments and ongoing maintenance costs for computer systems and databases, which were included in CBP's estimation of appropriate fees. Another commenter suggested that fees should be charged on port activity, not district. As discussed above in Section II, *Discussion of Comments,* CBP disagrees with the commenter's suggestion, as the fees as currently outlined are independent of broker size or location. Although these fee increases represent an increased expense for prospective customs brokers, these fee increases do not increase overall costs to society as these costs are already being paid by CBP's appropriated funds.

When assessing costs of final rules, agencies must take care to not include transfer payments in their cost analysis. As described in OMB Circular A–4, transfer payments occur when ". . . monetary payments

[28] The fee study is included in the docket of this rulemaking (docket number USCBP–2020–0009).

from one group [are made] to another [group] that do not affect total resources available to society." Examples of transfer payments include payments for insurance and fees paid to a government agency for services that an agency already provides. CBP's processing of the customs broker license application is an established service that already requires a fee payment. As such, adjustments to the fee associated with providing each service is considered a transfer payment. Currently, any costs not covered by fees are paid via funds appropriated to and expended by CBP. The increased fees paid by brokers would replace appropriated funds. CBP recognizes that the fee changes may have a distributional impact on prospective customs brokers. In order to inform stakeholders of all potential effects of the final rule, CBP has analyzed the distributional effects of the rule in section "3.12 Distributional Impacts."

3.2 Permit Application Fee

Currently, brokers are required to pay a $100 permit application fee in connection with each permit application by either an individual or corporation. The applicant has the option of concurrently receiving its first district permit with its customs broker's license and therefore forgoing the $100 permit application fee for its first district permit. However, some brokers do not request an initial district permit at the time they get their license. When this is the case and the broker later applies for a district permit, or if brokers make a request to obtain a permit for additional districts, then they must submit the following information to CBP as set forth in § 111.19(b):

(1) The applicant's broker license number and date of issuance;

(2) The address where the applicant's office will be located within the district and the telephone number of that office;

(3) A copy of a document which reserves the applicant's business name with the State or local government;

(4) The name of the individual broker who will exercise responsible supervision and control over the customs business transacted in the district;

(5) A list of all other districts for which the applicant has a permit to transact customs business;

(6) The place where the applicant's brokerage records will be retained and the name of the applicant's designated recordkeeping contact; and

(7) A list of all persons who the applicant knows will be employed in the district, together with the specific employee information for each of those prospective employees.

As a result of this rule, the options above pertaining to district permits will no longer exist and all permitted brokers will have to get a single national permit to conduct customs business. That means that brokers will pay the $100 permit application fee and receive a single national permit; brokers who, absent this rule, paid to hold multiple district permits will save the $100 district permit fee for each additional permit. This is considered a cost savings, and not the elimination of a transfer payment, because the $100 district permit fee reflects the economic activity undertaken by CBP to issue those permits. The elimination of the fee represents a savings both to the individual brokers as well as to society as a whole as the underlying work to process the additional district permits is eliminated.

As shown in Table 3 above, absent this rule, there would be 2,147 total new broker licenses (75 corporate + 2,072 individual) issued over the period of analysis from 2022 through 2026. Of these 2,147 licenses, 75 would be issued to corporations which would result in 105 corporate district permits (as mentioned above, each customs broker permit holder currently has 1.4 district permits on average). Additionally, as mentioned above, 100 percent of corporations exercise the option of concurrently receiving their first district permit with their customs broker's license, therefore saving the $100 permit application fee for their first district permit. This means that, absent this rule, corporations would get 75 permits for free and would then have to pay for the remaining 30 permits for a cost of $3,000 ($100 permit application fee * 30 corporate permits). As a result of this rule, these 75 corporate brokers will each have to get a single national permit and pay the $100 permit application fee for each national permit for a total cost of $7,500 (75 national permits * $100 permit application fee). This results in an additional cost to these corporate brokers of $4,500 ($7,500 - $3,000) over the period of the analysis from 2022 through 2026. Please see Table 4 below for a breakdown of these costs.

TABLE 4—COSTS FOR CORPORATE PERMIT HOLDERS
[2022 U.S. dollars]

Year	New corporate licenses	Permits	Costs absent the rule	Costs with the rule	Cost of the rule
2022	15	21	$600	$1,500	$900
2023	15	21	600	1,500	900
2024	15	21	600	1,500	900
2025	15	21	600	1,500	900

Year	New corporate licenses	Permits	Costs absent the rule	Costs with the rule	Cost of the rule
2026	15	21	600	1,500	900
Total	75	105	3,000	7,500	4,500

Note: Values may not sum to total due to rounding.

As shown above in Table 3, if this rule were not in effect there would be 2,072 new individual broker licenses resulting in 396 new individual permits over the period of analysis. According to CBP's Broker Management Branch, individual brokers do not get their first district permit issued concurrently with their customs broker's licenses nearly as often as corporations. Approximately two percent of individual customs broker license holders, or 42 of the estimated 2,072 new brokers, get their first district permit issued concurrently with their broker's license, saving the $100 permit application fee charged for the first district permit. Using the average of 1.4 district permits per customs broker permit holder, we estimate that these 42 individual customs brokers would get 59 district permits over the period of the analysis if this rule did not go into effect. Since, under the baseline, the brokers would get 42 out of the 59 permits for free, brokers would have to pay for the remaining 17 permits for a cost of $1,700 ($100 permit application fee * 17 permits). Under this rule, these 42 individual brokers would each need a single national permit for a total of 42 permits resulting in a total cost of $4,200 ($100 national permit application fee * 42 national permits). As a result of this rule, two percent of individual brokers will bear an additional total cost of $2,500 ($4,200 - $1,700) over the period of analysis. Please see Table 5 below for a breakdown of these costs.

TABLE 5—COSTS FOR TWO PERCENT OF INDIVIDUAL PERMIT HOLDERS
[2022 U.S. dollars]

Year	Individual licenses for 2% of permit holders	Number of permits issued	Costs for 2% without rule	Costs for 2% with rule	Rule's costs for 2%
2022	9	13	$400	$900	$500
2023	9	13	400	900	500
2024	8	11	400	900	500
2025	8	11	400	900	500
2026	8	11	400	900	500
Total	42	59	1,700	4,200	2,500

Note: Values may not sum to total due to rounding.

The remaining 98 percent of individual customs broker license holders do not get their first district permit concurrently with their broker's license, if they get any permits at all. Of the 15,226 active licensed brokers, approximately 15.5 percent hold at least one permit. Because only 15.5 percent of license holders hold a permit, and two percent of those are corporate license holders and only two percent are individuals who get a permit concurrently with their license, the remaining 11.5 percent are individual licensed brokers who apply for and receive a permit after their license is issued. Accordingly, under the current permit system, using an average of 1.4 permits per broker, 238 individual customs broker permit holders pay $33,600 for 336 permits because they pay the $100 fee for every permit.[29] With the national permit system, these brokers would pay $23,800 for 238 national permits, resulting in a savings of $9,800. Please see Table 6 below for an itemization of these costs.

TABLE 6—SAVINGS FOR 11.5 PERCENT OF INDIVIDUAL PERMIT HOLDERS
[2022 U.S. dollars]

Year	Number of licenses for 11.5% of permit holders	Number of permits issued	Costs for 11.5% without rule	Costs for 11.5% with rule	Rule's savings for 11.5%
2022	51	72	$7,200	$5,100	$2,100
2023	49	69	6,900	4,900	2,000
2024	48	68	6,800	4,800	2,000
2025	46	65	6,500	4,600	1,900
2026	44	62	6,200	4,400	1,800
Total	238	336	33,600	23,800	9,800

Note: Values may not sum to total due to rounding.

Any brokers who apply for more than one permit will experience a time savings as a result of this rule because they will only need to apply for a single permit. According to CBP's Broker Management Branch, currently, brokers spend approximately three hours to collect and submit the appropriate documentation to CBP.[30] The rule's elimination of these applications will result in time savings for the brokers as well as for CBP. The estimated number of permits requested separately from individual licenses for the entire period of the analy-

[29] About 15.5 percent of all brokers, corporate and individual, hold a permit. Of those, 2 percent are corporate brokers and 2 percent are individual brokers who get their permit concurrently with their license. Therefore, about 11.5 percent of brokers are individuals who will get a permit at some point in their careers after receiving a license. Based on the projections described above, CBP estimates that 2,072 indiviudal licenses will be issued from 2022–2026. Approximately 11.5 percent of those individuals results in 238.

[30] Source: CBP's Broker Management Branch on May 16, 2019.

sis is taken from Tables 5 and 6. Table 5 implies there are 17 permits for which two percent of individual customs brokers currently pay $100 ($1,700 permit costs without rule/$100 per permit). Table 6 shows that 11.5 percent of individual customs brokers currently pay $100 for 336 permits. Summing these two figures, we find that all individual customs brokers will pay $100 for 353 permits. Table 7 shows the removal of the application for these permits will result in a monetized time savings worth $36,864. This benefit is based on CBP's estimated fully loaded hourly time value for customs brokers of $34.81.[31]

TABLE 7—APPLICATION TIME SAVINGS FOR INDIVIDUAL BROKERS
[2022 U.S. dollars]

Year	Number of permits issued separate from license	Hourly time burden for permit application	Rule's savings for individual brokers
2022	76	3	$7,937
2023	73	3	7,623
2024	71	3	7,415
2025	68	3	7,101
2026	65	3	6,788
Total	353	3	36,864

Note: Values may not sum to total due to rounding.

Corporate brokers would also see time savings resulting from fewer permit applications prepared and submitted. Table 4 shows that corporate brokers currently apply for, receive, and pay $100 for 30 permits after their licenses have been issued. Table 8 shows the removal of the application for these permits will result in a monetized time savings worth $3,133, based on CBP's estimated fully loaded hourly time value for customs brokers of $34.81.

[31] CBP calculated this loaded wage rate by first multiplying the Bureau of Labor Statistics' (BLS) 2021 median hourly wage rate for Cargo and Freight Agents ($22.55), occupation code 43–5011, which CBP assumes best represents the wage for brokers, by the ratio of BLS' average 2021 total compensation to wages and salaries for Office and Administrative Support occupations (1.4819), the assumed occupational group for brokers, to account for non-salary employee benefits. Sources: U.S. Bureau of Labor Statistics. Occupational Employment Statistics, "May 2021 National Occupational Employment and Wage Estimates United States." Updated March 31, 2022. Available at *https://www.bls.gov/oes/2021/may/oes_nat.htm#43–0000.* Accessed May 25, 2022; U.S. Bureau of Labor Statistics. Employer Costs for Employee Compensation. "ECEC Civilian Workers—2004 to Present." March 2022. Available at *https://www.bls.gov/web/ecec.supp.toc.htm.* Accessed May 25, 2022. CBP assumes an annual growth rate of 4.15% based on the prior year's change in the implicit price deflator, published by the Bureau of Economic Analysis.

TABLE 8—APPLICATION TIME SAVINGS FOR CORPORATE BROKERS
[2022 U.S. Dollars]

Year	Number of permits issued separate from license	Hourly time burden for permit application	Rule's savings for corporate brokers
2022	6	3	$627
2023	6	3	627
2024	6	3	627
2025	6	3	627
2026	6	3	627
Total	30	3	3,133

Note: Values may not sum to total due to rounding.

Relatedly, CBP would see benefits due to the elimination of the district permit application review process. CBP estimates that it takes two hours of CBP processing, including time to review and approve an application and create and deliver the permit to the applicant.[32] Given the wage rate, CBP estimates that processing costs approximately $164 per permit. The applicant pays a $100 fee, which compensates CBP for a portion of the economic activity undertaken to process the application. CBP currently funds the remaining portion from appropriated funds. Therefore, with the rule in place, CBP will experience a cost savings of approximately $64 per permit no longer applied for, as the remaining $100 is saved by the broker applicant and accounted for in Tables 5 and 6 above. Going forward, CBP believes that a $100 fee recovers a reasonable portion of its costs for the national permit application. Table 9 shows CBP's total estimated benefits of $24,573 over the period of analysis. This is based on a CBP fully loaded wage rate of $82.08 for CBP staff reviewing applications.[33]

TABLE 9—TIME SAVINGS FOR CBP
[2022 U.S. Dollars]

Year	Number of permits issued separate from license	Hourly time burden for permit application review	Rule's savings for CBP
2022	82	2	$5,261

[32] Source: CBP's Broker Management Branch on May 16, 2019.

[33] CBP bases this wage on the FY 2022 salary and benefits of the national average of CBP Trade and Revenue positions, which is equal to a GS–12, Step 10. Source: Email correspondence with CBP's Office of Finance on June 27, 2022.

Year	Number of permits issued separate from license	Hourly time burden for permit application review	Rule's savings for CBP
2023	79	2	5,069
2024	77	2	4,940
2025	74	2	4,748
2026	71	2	4,555
Total	383	2	24,573

Lastly, the district permit waiver described in current § 111.19(d)(2) would be eliminated with the rule. Currently, requests for a waiver of the requirement for an individual broker in the district must be submitted to the port director and include a description of responsible supervision and control procedures and information on the volume and type of customs business conducted. The port director reviews the request and makes a recommendation to headquarters. Headquarters reviews and issues the decision.[34] According to the CBP Broker Management Branch, this process takes two hours for brokers, including application processing and mailing paper documents to CBP. It takes an hour and a half for CBP to review the waiver analysis, prepare the recommendation memorandum, and for headquarters to make the final decision.[35] As shown in Tables 11 and 12 there is a total benefit of $3,579 ($1,293 + $2,286), as this entire process is eliminated under the national permit framework. Waiver estimates for calendar years 2022 to 2026 are based on compound annual growth rate from calendar years 2017–2021, found in Table 10 below.

TABLE 10—PERMIT WAIVERS 2017–2021

Year	Broker district permit waivers
2017	14
2018	13
2019	7
2020	10
2021	6
Total	50

[34] *See* 19 CFR 111.19(d)(2).

[35] Source: CBP's Broker Management Branch on May 16, 2019.

TABLE 11—TIME SAVINGS FOR BROKERS SEEKING WAIVERS
[2022 U.S. dollars]

Year	Broker district permit waivers	Hourly time burden for waiver application	Rule's savings for brokers seeking waivers
2022	5	2	353
2023	4	2	353
2024	4	2	251
2025	3	2	212
2026	3	2	179
Total	19		1,293

TABLE 12—TIME SAVINGS FOR CBP REVIEWING WAIVERS
[2022 U.S. dollars]

Year	Broker district permit waivers	Hourly time burden for waiver application review	Rule's savings for CBP
2022	5	1.5	$624
2023	4	1.5	526
2024	4	1.5	444
2025	3	1.5	375
2026	3	1.5	317
Total	19	1.5	2,286

Table 13 provides a summary of the costs and savings resulting from the removal of the district permit application and $100 fee over the period of analysis.

TABLE 13—SUMMARY OF COSTS AND SAVINGS TO ALL PARTIES
[2022 U.S. dollars]

	Savings for 11.5%	Costs/savings for individuals		Costs/savings for corporations			Savings for CBP	
		Costs for the 2%	Time savings	Costs for corporation	Waivers applications time savings	Time savings	Review of permits	Review waivers
2022	$2,100	$500	$7,937	$900	$353	$627	$5,261	$624
2023	2,000	500	7,623	900	298	627	5,069	526
2024	2,000	500	7,415	900	251	627	4,940	444
2025	1,900	500	7,101	900	212	627	4,748	375
2026	1,800	500	6,788	900	179	627	4,555	317
Total	9,800	2,500	36,864	4,500	1,293	3,133	24,573	2,286

3.3 Record of Transactions

Each broker must keep current, in a correct and itemized manner, records of accounts reflecting all of his or her financial transactions as a broker. The broker must keep and maintain on file copies of all correspondence and other records relating to customs business. With this rule, each broker must provide notification to the processing Center of any known breach of electronic or physical records relating to customs business. Notification to CBP must be provided within 72 hours of the discovery of the breach with a list of all known compromised importer identification numbers. CBP received several comments on the potential difficulty of reporting a breach and compromised importer numbers within this time frame. As explained above in Section II, *Discussion of Comments,* in response, CBP has revised the requirement such that brokers must report the breach within 72 hours, and, within ten (10) business days, must provide an updated list of any additional known compromised importer identification numbers. To the extent that additional information is discovered, a broker must provide that information within 72 hours of discovery. Brokers already compile this information through their normal course of business, and they can report the information to CBP in any format they choose. CBP assumes data breaches are rare but includes this requirement as a preventive measure. CBP assumes this provision has virtually no cost to the brokers due to the infrequency of data breaches. CBP will use this information in its targeting of imports for inspection, which will help make imports safer.

3.4 Records Availability

Currently, during the period of retention (five years after the date of entry), the broker must maintain its records in such a manner that they can be readily examined by CBP when necessary. Records required to be maintained under this provision must be made available upon reasonable notice for inspection, copying, reproduction or other official use by representatives of the Department of Homeland Security. Additionally, customs brokers currently have the option to store records offsite. Under the rule, upon request by CBP to examine records, the designated recordkeeping contact must make all records available to CBP within thirty (30) calendar days, or any longer timeframe as specified by CBP, at the location specified by CBP. This change in the regulations is necessary to ensure brokers continue to give CBP the requested information and to specifically state for clarity that brokers need to keep records in the customs territory of the

United States. As this is an existing requirement newly stated for the sake of clarity, this will result in no additional burden for customs brokers.

CBP received comments regarding the requirement to maintain records within the customs territory of the United States. As further discussed above in Section II, *Discussion of Comments,* CBP has clarified that while primary records must be stored within the customs territory of the United States, duplicates or backups may be stored outside it.

3.5 Termination of Client Relationship

The rule requires that a broker document and report to CBP when it separates from a client relationship as a result of the broker's determination that the client is intentionally attempting to use the broker's services to defraud or otherwise commit any criminal act against the U.S. Government. This is an entirely new provision, so CBP does not have data on how often clients may use a broker's services to defraud or otherwise commit criminal acts against the U.S. Government. However, based on stakeholder feedback during the development of the NPRM, CBP subject matter experts do not expect this to happen often. CBP's Broker Management Branch estimates this to occur approximately five times per year and each resulting report will take brokers approximately four hours to draft. CBP requested public comment on this assumption and did not receive any comments. CBP did receive some comments regarding this provision and the responsibility of the broker, which are discussed in greater detail in the comment responses above.

CBP expects that, in most cases, the necessary information will be submitted by customs brokers employing in-house or external attorneys to draft the report. CBP received one comment in response to the attorney wage rate used in the NPRM stating that while attorney compensations may be accurately reported by the Bureau of Labor Statistics, actual costs of employing an attorney are significantly higher than estimated by CBP. CBP agrees and has updated the cost estimates to reflect a higher wage. The loaded wage rate for an attorney is $94.15, which accounts for regional differences as well as differences in experience and specialty.[36] CBP assumes this wage reflects the average wage of an in-house attorney. Using data and

[36] CBP calculated this loaded wage rate by first multiplying the Bureau of Labor Statistics' (BLS) 2021 median hourly wage rate for Lawyers, occupation code 23–1011 ($61.54), which CBP assumes best represents the wage for attorneys, by the ratio of BLS' average 2021 total compensation to wages and salaries for Professional and related occupations (1.4689), the assumed occupational group for brokers, to account for non-salary employee benefits. Sources: U.S. Bureau of Labor Statistics. Occupational Employment Statistics, "May 2021 National Occupational Employment and Wage Estimates United States." Updated March

estimates compiled by the American Intellectual Property Law Association (AIPLA), CBP estimates the hourly wage for an external attorney to be $466.38.[37] CBP assumes that, generally, large companies employing licensed customs brokers will also employ in-house attorneys, while small companies employ attorneys outside the business. Approximately 6 percent of brokerages are considered large (see the Regulatory Flexibility Act section, below), while 94 percent are considered small. A weighted average wage, therefore, is $443.85 per hour. Five reports represent an additional burden to the broker and will result in a total annual cost of $8,877 or a total cost of $44,385 over the five-year period of analysis.

3.6 Customs Power of Attorney

A customs broker is required to have a customs power of attorney prior to transacting any customs business on behalf of the importer of record.[38] Currently, an agent of the importer of record, who could be a freight forwarder that is properly designated by the importer of record, may issue a power of attorney on behalf of the importer of record to a customs broker. In such instances, the customs broker may never have any contact with the importer of record, only its agent (the forwarder). With this rule, the broker must secure a customs power of attorney directly from the importer of record or drawback claimant and not via the freight forwarder or any other third-party agent. This gives the broker direct access to the importer of record when entering into the power of attorney, which increases transparency in the verification process. Since brokers are currently required to execute a customs power of attorney, and importers already provide a power of attorney, this provision would not result in any additional burden to brokers. The new provision only requires direct contact between the broker and the importer of record. CBP received several comments on this provision, which are discussed in

31, 2022. Available at *https://www.bls.gov/oes/2021/may/oes_nat.htm#23–0000.* Accessed May 25, 2022; U.S. Bureau of Labor Statistics. Employer Costs for Employee Compensation. "ECEC Civilian Workers—2004 to Present." March 2022. Available at *https://www.bls.gov/web/ecec.supp.toc.htm.* Accessed May 25, 2022. CBP assumes an annual growth rate of 4.15% based on the prior year's change in the implicit price deflator, published by the Bureau of Economic Analysis.

[37] AIPLA's study surveyed intellectual property (IP) lawyers that were used in the 2017 Report of the Economic Survey. The median hourly billing rate for these lawyers was $400 in 2016 dollars, which is the most recent data available, and ($447.78) after adjustment to 2021 dollars. CBP assumes an annual growth rate of 4.15% based on the prior year's change in the implicit price deflator, published by the Bureau of Economic Analysis. Source: American Intellectual Property Law Association. *2017 Report of the Economic Survey.*"Billable Hours, Billing Rate, Dollars Billed (Q29, Q30, Q27)." June 2017.

[38] *See* 19 CFR 141.46

greater detail in the *Discussion of Comments* section above. In reviewing the concerns raised in these comments, CBP has decided to retain its proposed new policy requiring contact directly between the importer of record and the broker.

According to CBP's Broker Management Branch, it takes approximately 1.75 hours, on average, for the broker to obtain a customs power of attorney from the freight forwarder, a time estimate CBP believes will also apply to securing a power of attorney from the importer of record or drawback claimant. CBP received two comments disputing this estimation in response to the NPRM, both noting that it may take substantially longer to acquire a power of attorney under the rule, though neither commenter provided an estimated time burden. However, this estimation is an average across all clients and over time. While it may initially take slightly longer to secure a power of attorney directly from certain clients, for others it will be faster than dealing with the freight forwarder. Additionally, as brokers regularly work directly with importers of record and drawback claimants, the process will likely move faster. Furthermore, CBP based this average on subject matter expertise and information from discussions between the Broker Management Branch and representatives of trade associations and individual brokers. CBP therefore believes the average time to procure a power of attorney will not change once the intermediary is removed and the broker must obtain the customs power of attorney directly from the importer of record or drawback claimant instead of allowing a freight forwarder or other third party to do so on their behalf.

3.7 Professionalism

A number of the changes contained in this rule are meant to increase professionalism and clarify what brokers should already be doing. CBP recognized this need given the volume of routinely fielded questions about these topics. The next several sections describe the current process, and what is changing as a result of this rule, for new requirements related to Customs Business, Records Confidentiality, Responsible Supervision and Control, and Advice to Client.

3.7.1 Customs Business

Currently, customs business must be conducted within the customs territory of the United States as it is defined in 19 CFR 101.1. Furthermore, each brokerage or company employing brokers must designate a licensed broker or knowledgeable employee to be available to CBP to respond to issues related to the transacting of customs business. CBP received several comments regarding this require-

ment. As discussed above in Section II, *Discussion of Comments,* CBP is not requiring 24-hour on-call coverage by brokers. Instead, CBP requires that a broker provide a knowledgeable point of contact covering all ports where the broker does business, which could encompass ports with business hours extending beyond a regular business day. Each broker must maintain accurate and current point of contact information for that employee with CBP and may update that information in a CBP-authorized EDI system, instead of submitting on paper. Under this rule, the requirements related to contact information are not changing; the regulations now recognize that use of the EDI satisfies the requirement and mandates that brokers use an EDI, unless one is unavailable. CBP fields questions on this provision from the public, so adding this additional language to the regulation will clarify the provision for the public. There are no costs to this provision because it does not change the requirement. The public will benefit as the public now has more clarity regarding the requirement without needing to contact CBP.

3.7.2 Records Confidentiality

Currently, records pertaining to the clients of the broker are to be considered confidential and the broker must not disclose their contents, or any information connected with the records to any other persons except the relevant surety, other than specifically described Government representatives with regard to a particular entry or due to a subpoena. This is not changing under the rule. However, this description is clarified to state that these records may not be disclosed to any persons other than the ones mentioned above and to the representatives of the Department of Homeland Security except by court order, subpoena (as mentioned above), or when authorized in writing by the client. This has been the practice but has been the subject of confusion. Finally, the revised language clarifies that the confidentiality provision does not apply to information that is in the public domain, which has been a point of confusion for some brokers. CBP received several comments on this provision, discussed in greater detail in the comment responses above, but is not revising the requirements for this final rule or the analysis of costs and benefits.

3.7.3 Responsible Supervision and Control

Brokers often have employees working for them who are not licensed brokers. These employees help with information collection and submission of entry documentation to CBP. Each broker is responsible for exercising responsible supervision and control over the transaction of the customs business done under his or her broker

license. This requirement currently exists and is not changing as a result of this rule. However, this rule moves the list of factors CBP considers when determining whether a customs broker is exercising responsible supervision and control from the definition of "responsible supervision and control" in § 111.1 to § 111.28. This list is of a substantive nature and is more appropriately located in the section on responsible supervision and control as opposed to the definitions section. CBP has always maintained that the current factors are not exhaustive, and in the rule, CBP is simply clarifying existing requirements that brokers, for the most part, are already complying with in practice.[39] This is not a change of practice as these factors for responsible supervision already exist and are just being moved and formally stated in the regulations to clarify what already should be occurring.

In this final rule, CBP has also made some clarifying changes. In § 111.28(a), CBP combined factors (12) and (13) into one new factor (12), which deals with the broker-CBP relationship, and combined factors (14) and (15) into one new factor (13), relating to the broker-officer/member relationship. In addition, CBP added a reference to "member(s)" in the new factor (13) to account for partnerships, in addition to associations and corporations as a type of broker entity. The factors themselves are not new; only their position in the list has been changed.

CBP received many comments regarding the responsible supervision and control factors and their use in evaluating broker performance. These comments are discussed in greater detail above in Section II, *Discussion of Comments.* CBP did not revise the analysis of costs and benefits based on these comments.

Additionally, CBP is clarifying some of the requirements on the reporting of employee information by brokers, for consistency. This rule removes the requirement for the broker to report each employee's last home address, email address, the name and address of each former employer, and, if the employee had been employed by the broker for less than three years, the dates of employment for the three-year period preceding current employment with the broker. This rule retains the requirement that brokers report other information, including employee names, social security numbers, dates and places of birth, dates of hire, and current home addresses. An updated list must be submitted to the processing Center and updated in ACE

[39] Brokers looking for more information beyond what is stated in CBP regulations can consult the CBP website at *https://www.cbp.gov/trade/ programs-administration/ customs-brokers*. The website is updated more frequently than the regulations themselves. CBP provides guides on how to become a broker, broker exam information, validating the power of attorney, broker compliance, employing convicted felons, fees, national permits, and triennial reports, as well as webinars and informed compliance publications.

if any of the information required changes, including notation of new or terminated employees. This update must be submitted within thirty (30) calendar days of the change. However, brokers already have an up-to-date list of their employees' contact information. This new requirement amounts to a routine submission each month in ACE with data that the brokers already routinely keep. They are likely to do this at the same time as making their other filings or routine reports so submitting one more existing document is not an additional measurable burden on customs brokers.

3.7.4 Advice to Client

Currently, if a broker knows that a client has not complied with the law or has made an error in, or omission from, any document, affidavit, or other record which the law requires the client to execute, the broker must advise the client promptly of that noncompliance, error, or omission. This rule also requires the broker to advise the client on the proper corrective actions and retain a record of the broker's communication with the client for potential review by CBP on a routine visit to the broker. Brokers will not have to report errors, omissions or noncompliance discovered by the broker each time one is discovered, and the client is counseled. However, if CBP identifies the error, omission or noncompliance and brings it to the broker's attention, the broker should provide the documentation of the communication with the client. These additions clarify the level of professionalism that is expected in the broker/importer relationship. Most brokers are already in compliance with this requirement, so this provision will not add a significant burden to customs brokers. CBP received a few comments on this provision, which are further discussed above in Section II, *Discussion of Comments.* However, CBP maintains the requirement that brokers provide and document advice given to clients on corrective actions and has not revised the analysis of costs and benefits as a result. The discussion of comments above clarifies how a broker can achieve proper documentation.

3.8 CBP's New Payment Platform, the eCBP Portal

In this final rule, CBP is also announcing the deployment of the eCBP portal, a new payment and submission system. The eCBP portal is part of an ongoing effort by CBP to eliminate manual processes, reduce cash and check collections at ports of entry, standardize processes, integrate data with cargo systems, reduce wait times at ports of entry, provide more online payment options, and provide better and more accessible data. As described above in *The Benefits of CBP's New Payment and Submission System, the eCBP Portal, for*

Licensed Customs Brokers under Section IV, the eCBP portal streamlines and validates data, which in turn reduces errors and provides data to support security-related decision making by CBP personnel. Additionally, the eCBP portal allows for fewer cash transactions, lowering the risk of cash losses, and allows CBP to shift resources from revenue collection to law enforcement and trade facilitation.

As further discussed above, CBP tested the eCBP portal for use in filing the triennial status report between December of 2017 and May 2018. The new portal was then deployed for the following filing period of the triennial report beginning in December of 2020 and will be used for the next filing in December 2023 into early 2024. The portal was also deployed to accept license exam application fees in August of 2019. As a part of regular announcements, CBP announced the new payment system through CSMS messages, a message on CBP's website, tweets, and in webinars for the broker community. Finally, CBP added the automatic suspension and revocation processing of licenses for unsubmitted triennial status reports as a portal functionality in February 2021, though a CBP employee still reviews all license records with unsubmitted reports prior to suspension or revocation.

CBP saw significant savings resulting from reduced processing and personnel hours, discussed further below, with the deployment of the eCBP portal. The portal also required some initial investment in programming and technical development. However, those costs are part of a long-term project within CBP called Revenue Modernization, which touches on several different areas of CBP's payment processing systems. The Revenue Modernization team is not able to easily identify an exact allocation of its development costs for the eCBP-specific initiatives at this time. The development costs are intertwined with back-end development shared with another Revenue Modification project's solution, as well as development that serves as a front-end platform for numerous other fee collection efforts. The eCBP portal will eventually encompass a variety of different fees, so full development costs are not limited to broker-related projects. The program plans to allocate the costs once it is closer to the solutions being complete. CBP estimates that, as of FY 2021, development costs have amounted to less than $3 million for the broker fees deployed in the eCBP portal to date.

The eCBP portal currently allows brokers and broker exam applicants to submit paperwork and fees for the broker exam and the triennial status report electronically. According to CBP data, between 80 and 90 percent of the brokers required to submit applications and

fees did so via the portal following the introduction of both functionalities, resulting in significant time savings for applicants, brokers, and CBP personnel. To access the portal, users must first create a *login.gov* account, which takes about three-five minutes. However, an account must only be created once.

In 2019, the first year that broker exam applicants were able to use the portal, 1,327 applicants successfully paid their fees for the fall exam via the eCBP portal, saving an average of 43 minutes relative to a paper form.[40] CBP offers the exam twice per year; once in April and again in October. Applicants were again able to use the portal for two exams each in 2020 and 2021.[41] An average of 1,291.4 applicants used the portal for each exam. See Table 14. CBP estimates an average time burden of 60 minutes for a paper form, which includes the time needed to print, fillin, and submit the form and pay either in-person at the port or by mail.[42]

In 2021, brokers were able to use the portal to file their triennial status reports and related fees. Approximately 91 percent of brokers, or 13,772 filers, did so, with 1,406 brokers preferring to file a paper report. The electronic filers saved an average of 19 minutes relative to paper filers.[43]

With information and payments submitted electronically in 2019, CBP subject matter experts estimate that CBP saved approximately

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[40] CBP estimates a time burden of approximately 60 minutes for a paper submission, while an electronic submission takes an average of 17 minutes. Without access to live timings from the public, CBP's Revenue Modernization team relied on a testing team to set up two common scenarios for applicants making their customs broker license examination (CBLE) registration. The basic elements of the registration process include establishing a login.gov ID for first time users, login in, filling in the form and making payment.

[41] The spring exam in 2020 was cancelled due to the COVID–19 pandemic. The exam was offered twice in October to make up for the cancellation.

[42] See *https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=202010–1651–013* for more information on the time burden to submit a paper form. Before electronic submission options were available, filers needed to obtain and fill in a paper form, and mail the form and their payment to the appropriate port. Alternatively, filers could submit in person at the port, sometimes compelling them to wait in line to submit the form and payment and receive their receipt. Beginning in 2015, filers could use a fillable PDF form on *pay.gov* to submit their form along with their payment. Using *pay.gov* required typing in all the information, providing an electronic signature, and submitting the form and payment. The one-hour time burden is an average accounting for both paper submission by mail or in person, or electronic submission.

[43] CBP estimates a 30-minute time burden for the filing of a paper triennial report and fee payment. After testing using the same methodology as described above, the Revenue Modernization team estimates an electronic filing to take an average of 11 minutes. Before the eCBP portal was available, brokers filed their triennial reports in paper form by mailing them along with payment to the port, or by submitting the report and payment in person. For the 2015 and 2018 reporting cycles, brokers could use a fillable PDF on *pay.gov* to submit their triennial reports. In 2015, 15 percent of brokers did so. In 2018, 85 percent used *pay.gov.* The 30-minute time burden is an average accounting for those brokers filing in person or by mail on paper.

280 hours of exam fee processing time, in addition to about 430 hours of time processing withdrawals and mailing out results, for a total savings of 710 hours in 2019, implying a time savings of 32 minutes per applicant.[44] CBP also saved approximately 1,836 hours of processing of triennial status reports and fees in 2021.[45]

TABLE 14—CBP TIME SAVINGS FROM EXAM APPLICANTS USING THE eCBP PORTAL

Year	Applicants	CBP hours saved	CBP minutes saved/applicant
2019	1,327	710	32
2020 (1)	1,372	734	32
2020 (2)	1,421	760	32
2021 (1)	1,312	702	32
2021 (2)	1,025	548	32
Total	6,457	3,455	

Applicants, brokers, and CBP will save time with the eCBP portal over the period of analysis from 2022–2026. CBP will offer the broker exam twice per year, meaning approximately 1,292 applicants will use the portal at each exam, for a total of 2,583 applicants per year.[46] As Table 15 shows, those broker exam applicants will save about $284,728 over the course of five years, accounting for time spent creating a *login.gov* account as well as time saved in using the portal relative to a paper submission.[47] CBP assumes the number of applicants will stay largely the same over the period of analysis, and that the wage rate for brokers most closely approximates the wage earned by applicants.[48] Over the period of analysis, there will only be one

[44] Time savings compiled and provided by CBP's Broker Management Branch and CBP's Revenue Modernization team based on a comparison of the time spent on paper submissions vs electronic submissions. Much of the time savings resulted from reduced administrative burden, like filling envelopes, payment data entry, and cross-checking paper forms with electronic databases.

[45] As discussed below, CBP saved 1,500 hours of processing time over 11,254 brokers in the 2018 reporting cycle, implying a savings on 8 minutes per payment. In 2021, CBP processed 13,772 payments. A savings of 8 minutes over 13,772 payments results in 1,836 hours in 2021.

[46] The eCBP portal is a relatively new tool and is only now becoming required in certain instances. Because we do not have very many years worth of data, an average is a more accurate estimate of the number of future applicants.

[47] For the purposes of calculating a time burden, CBP assumes that all exam applicants will need to create a *login.gov* account. Although some applicants will take the test multiple times, CBP does not have data on the frequency.

[48] Many applicants for the broker exam already work in the brokerage industry. However, because CBP does not have specific wage data for nonlicensed brokerage employees, nor can we estimate the average wage for those working outside the brokerage industry, we have approximated using the broker wage rate.

triennial reporting year (2024). In that year, brokers using the eCBP portal can expect to save approximately $160,909, as shown in Table 16. CBP assumes that about 91 percent of newly licensed applicants will elect to file their triennial status reports via the portal, in line with the 91 percent of already licensed brokers who chose to do so in 2021. Therefore, accounting for the new licenses issued each year, as described above in Table 3, about 14,597 brokers will use the portal to submit their report fees. Those brokers will have already created a *login.gov* account, either to submit the exam application fees, participate in the testing or original deployment of the portal, or in the course of their customs business.

Savings for CBP over the period of analysis amount to $716,066, incorporating savings from the processing of payments, paper forms, exam withdrawals, results, and suspensions. CBP will also require less data entry, resulting in fewer mistakes, reduced time fixing errors, and more time on tasks other than administration. The automation of payments also allows for greater efficiency and speed in payment processing, and reduced cash losses. CBP did incur some unquantified IT and development costs. As stated above, these costs are part of a larger modernization effort by CBP and cannot be separated out by program. Table 17 summarizes these savings.

TABLE 15—TIME SAVINGS FOR EXAM APPLICANTS
[Undiscounted 2022 U.S. dollars]

Year	Applicants	Time savings per submission (minutes)	*Login.gov* account creation (minutes)	Wage rate	Total net savings
2022	2583	43	5	34.81	$56,946
2023	2583	43	5	34.81	$56,946
2024	2583	43	5	34.81	$56,946
2025	2583	43	5	34.81	$56,946
2026	2583	43	5	34.81	$56,946
Total	12,914				284,728

TABLE 16—TIME SAVINGS FOR BROKER
[Undiscounted 2022 U.S. dollars]

Year	Broker filers	Time savings per submission (minutes)	Wage rate	Total savings
2022				0
2023				0

Year	Broker filers	Time savings per submission (minutes)	Wage rate	Total savings
2024	14,597	19	$34.81	$160,909
2025				0
2026				0
Total	14,597			160,909

TABLE 17—COST SAVINGS FOR CBP
[Undiscounted 2022 U.S. dollars]

Year	Applications	Total time savings (hours)	Wage rate	Total savings
2022	2,583	1,378	82.08	$113,073
2023	2,583	1,378	82.08	113,073
2024	17,180	3,214	82.08	263,772
2025	2,583	1,378	82.08	113,073
2026	2,583	1,378	82.08	113,073
Total	27,512	8,724		716,066

In the course of the eCBP portal test, both CBP and brokers/ applicants experienced significant time savings. CBP's time savings throughout the test resulted primarily from greater efficiency in electronic processing of payments, an increase in the number of on-time payments, reduction in time spent on administrative tasks in processing withdrawals and results, and the introduction of automatic suspension. CBP personnel saved 1,500 hours across the 2017/2018 reporting cycle—savings from which are reported in 2018 in Table 18. CBP saved 710 hours across a single exam in 2019, as well as 1,494 hours across two exams in 2020, as shown in Table 14 above. CBP also saved 1,836 hours across the 2020/ 2021 reporting cycle, reported in 2021 in Table 18, and 1,250.4 hours across two exams.[49] CBP also incurred some non-quantified IT and development costs, as described earlier.

Brokers and applicants also saved time if they chose to participate. In the 2017/2018 reporting cycle, 11,254 participating brokers saved 19 minutes per submission. Those savings are reported in 2018 in Table 18 below. In 2019, 1,327 exam applicants saved 43 minutes each, while in 2020, 2,793 exam applicants saved the same. In 2021,

[49] The triennial status report is due on the 28th of February, every three years. To allow adequate time for brokers submitting the reports, CBP begins accepting reports and payments at the end of the year prior to the due date. For ease of presentation, and because the majority of submissions occur in January and February, CBP presents these costs in a single year.

2,337 exam applicants saved 43 minutes each. In the 2020/2021 reporting cycle, 13,772 brokers saved 19 minutes each, the savings from which are reported in 2021 in Table 18.

Brokers did experience a time cost in creating their *Login.gov* account. About 80 percent of brokers filing that year, or 11,254 people, chose to use the portal in the 2017/2018 reporting cycle, and in doing so, spent about three-five minutes creating a *Login.gov* account, the costs of which are reported in 2018 in Table 18 below. For the 2020/2021 reporting cycle, 13,772 brokers, or about 90 percent used the electronic option, costs for which are reported in 2021 in Table 18. This represents 2,518 more brokers than in the previous reporting cycle. Those 2,518 brokers also faced the three-five-minute cost of creating a *Login.gov* account. In 2019, 2020, and 2021, exam applicants also spent three-five minutes creating an account. As stated above, there were 1,327 applicants in 2019, 2,793 applicants across two exams in 2020, and 2,337 test deployment of the eCBP portal are total costs and benefits of the rule. See applicants across two exams in 2021. not recoverable, they are reported here Table 18 for a description of these costs Although the costs and benefits of the for transparency and excluded from the and benefits.

TABLE 18—COSTS AND BENEFITS OF THE eCBP PORTAL TEST
[Undiscounted 2022 U.S. dollars]

Year	Activity	CBP costs	CBP savings	Broker/ applicant savings	*Login.gov* costs	Total savings
2018	Triennial Report ...	IT Costs ...	$123,120	$124,055	$32,646	$214,529
2019	License Exam	IT Costs ...	58,277	33,105	3,849	87,532
2020	2 License Exams ..	IT Costs ...	122,658	69,677	8,102	184,233
2021	Triennial Report; 2 License Exams	IT Costs ...	253,331	$210,113	14,084	449,360
Total	.....	.....	557,386	436,950	58,681	935,654

* Totals may not sum due to rounding.

3.9 Total Costs

The total monetized costs for customs brokers include a $100 fee that two percent of individual customs brokers who receive their first district permit concurrently with their broker's license will need to pay for their permit and the costs resulting from the new requirement that a broker document and report to CBP when it separates from a client relationship as a result of attempted fraud or criminal acts. The costs also include the 5 minute time costs broker license exam applicants will experience in creating their *Login.gov* accounts. Table 18 shows the total annual cost of the rule. Over the five-year period of analysis, this rule will cost brokers about $88,850.

TABLE 19—TOTAL ANNUAL COSTS FOR BROKERS
[2022 U.S. dollars]

Year	Total costs
2022	$17,770
2023	17,770
2024	17,770
2025	17,770
2026	17,770
Total	88,850

Note: Values may not sum to total due to rounding.

Table 20 shows the present value and annualized costs of the rule over the period of analysis at a three and seven percent discount rate. Total costs range from $72,860 to $81,381, depending on the discount rate used. Annualized costs are $17,770.

TABLE 20—TOTAL PRESENT VALUE AND ANNUALIZED COSTS
[2022 U.S. dollars]

Total present value costs		Annualized costs	
3%	7%	3%	7%
$81,381	$72,860	$17,770	$17,770

3.10 Total Benefits

The total annual monetized savings for customs brokers are the result of monetary savings from switching from a district permitting system to a national permitting system. Namely, there is a time savings and fee savings of $100 per permit application for individual customs brokers who do not concurrently receive their first district permit with their broker license. There is also a time savings to CBP due to the removal of the district permit waiver application reviews. Brokers, potential brokers applying to take the broker exam, and CBP also experience time savings resulting from use of the eCBP portal. As shown in Table 21, total undiscounted savings over the period of analysis are $1,277,116.

In addition to these quantified benefits, there are unquantified benefits resulting from this rule's updates. These benefits include increased professionalism of the broker industry, greater clarity for brokers in understanding the rules and regulations by which they must abide, greater data security, and better reporting of potential fraud to CBP. The eCBP portal also increases the efficiency of payment processing, reduces errors, and allows a shift of resources from paperwork and administration to other CBP priorities.

TABLE 21—TOTAL ANNUAL UNDISCOUNTED SAVINGS FOR BROKERS AND CBP
[2022 U.S. dollars]

Year	Total benefits
2022	$194,412
2023	193,655
2024	504,797
2025	192,475
2026	191,777
Total	1,277,116

Note: Values may not sum to total due to rounding.

Table 22 shows the present value and annualized savings of the rule over the period of analysis at a three and seven percent discount rate. Total savings range from $1,046,477 to $1,169,689, depending on the discount rate used. Annualized savings total approximately $255,000.

TABLE 22—TOTAL PRESENT VALUE AND ANNUALIZED BENEFITS
[2022 U.S. dollars]

Total present value costs		Annualized Benefits	
3%	7%	3%	7%
$1,169,689	$1,046,477	$255,407	$255,226

3.11 Net Benefits

Table 23 summarizes the monetized costs and benefits of this rule to individual and business entity customs brokers. As shown, the total monetized present value net benefits of this rule over a five-year period of analysis ranges from $973,616 to 1,088,308 and the annualized net benefit is approximately $237,500.

TABLE 23—PRESENT VALUE AND ANNUALIZED NET BENEFIT OF RULE
[2022 U.S. dollars]

	3% Discount rate		7% discount rate	
	Present value	Annualized	Present value	Annualized
Total Cost	$81,381	$17,770	$72,860	$17,770
Total Benefit	1,169,689	255,407	1,046,477	255,226
Total Net Benefit	1,088,308	237,637	973,616	237,456

3.12 Distributional Impact

Under the rule, the customs broker license application will change from $200 for both individuals and business entities to $300 for individuals and $500 for business entities. Consequently, CBP's fee would increase by $100 for individuals and $300 for business entities. As discussed in section 2, CBP estimates that over the next five years, 2,072 individuals and 75 business entities will be issued a new customs broker license (See Table 3). Using these estimates and the fee increases, CBP estimates that the rule will result in increased transfer payments from brokers to the government of approximately $229,700 over the next five years (2,072 individual applications * $100 fee increase = $207,200; 75 business entity applications * $300 fee increase = $22,500; $207,200 + $22,500 = $229,700).

Although the fee changes will increase costs for individuals and business entities, CBP has determined that these increases are necessary in order to recover some of the costs to provide the services necessary to facilitate the customs broker license application process.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement and Fairness Act of 1996, requires agencies to assess the impact of regulations on small entities. A small entity may be a small business (defined as any independently owned and operated business not dominant in its field that qualifies as a small business concern per the Small Business Act); a small organization (defined as any not-for-profit enterprise which is independently owned and operated and is not dominant in its field); or a small governmental jurisdiction (defined as a locality with fewer than 50,000 people).

In an effort to modernize the regulations governing customs brokers, CBP is finalizing regulatory changes that include: eliminating district permits so each customs broker only needs one national permit, which reduces the time submitting permit applications and the fees owed; mandating that each broker provide notification to CBP of any known breach of its records within 72 hours of discovery;[50] requiring brokers to make all records available to CBP, upon request within thirty (30) calendar days at the location specified by CBP; mandating that customs brokers now obtain a customs power of attorney directly from the importer of record or drawback claimant,

[50] Additionally, within ten (10) business days, a broker must provide an updated list of any additional known compromised importer identification numbers. To the extent that additional information is discovered, a broker must provide that information within 72 hours of discovery.

not a freight forwarder or other third party, to transact customs business for that importer or drawback claimant; and requiring that a broker must document and report to CBP when it separates from or terminates representation of a client as a result of the broker's determination that the client is intentionally attempting to use the services of a broker to defraud or otherwise commit any criminal act against the U.S. Government. Furthermore, CBP is also making various non-substantive changes and conforming edits to clarify the existing language in the regulations to better reflect what is already occurring.

The rule would apply to all customs brokers, regardless of size. Accordingly, the rule would affect a substantial number of small entities, as a small business within the Freight Transportation Arrangement industry (NAICS code 448510), the industry in which brokers are employed, is defined as one whose annual receipts are less than $17.5 million.[51] The rule would result in an average annualized cost per customs broker of $0.08 ($36 annualized costs/429 average brokers per year), excluding savings resulting from the use of the eCBP portal.[52] The time savings resulting from the eCBP portal's introduction accrue to both broker license exam applicants who may or may not be in the Freight Transportation Arrangement industry as well as to all existing, active licensed brokers. Those two groups will only experience the net cost savings provided by the eCBP portal.

Additionally, as discussed above, the customs broker license application fee increase for the 2,147 new customs brokers over the period of analysis would result in a distributional impact of $229,700, with 2,072 individual applicants paying an additional $100 and 75 corporate applicants paying an additional $300 over a 5-year period. Including distributional impacts, the rule costs individual brokers $100 or costs corporate brokers $300 per year, or less than one percent of annual revenue for brokers of any size. Please see Table 23 for a breakdown of brokerages by size. Because the distributional impact and saving are relatively small on a per broker basis, this rule will not have a significant economic impact on customs brokers. Accordingly, CBP certifies that this rule does not have a significant economic impact on a substantial number of small entities.

[51] Small business size standards are defined in 13 CFR 121.

[52] A large part of the savings in this rule accrue to CBP. Therefore, to calculate the impact on small businesses, CBP considered only the costs and savings of the rule for customs brokers. This includes the savings for 11.5% of brokers reported in Table 6, application time savings for individuals reported in Table 7, application time savings reported for coprorations in Table 8, waiver request time savings as reported in Table 11, costs for corporate brokers reported in Table 4, costs for the 2 percent of brokers reported in Table 5, and the costs of an attorney as described above. Over the period of analysis, the net costs total $296, or about $36 annualized at a discount rate of three percent.

Table 24—Annual Revenue by Firm Size[53]

Enterprise size (number of employees)	Number of firms	Receipts ($1,000s)	Receipts per firm (in millions)	Small business?
01: Total	15,104	64,643,370	$243,761	
02: <100	1,856	95,206	51,296	Yes.
03: 100–499	4,655	1,247,577	268,008	Yes.
04: 500–999	2,459	1,769,394	719,558	Yes.
05: 1,000–2,499	2,706	4,244,215	1,568,446	Yes.
06: 2,500–4,999	1,327	4,572,835	3,445,995	Yes.
07: 5,000–7,499	589	3,454,385	5,864,830	Yes.
08: 7,500–9,999	317	2,627,240	8,287,823	Yes.
09: 10,000–14,999	281	3,180,898	11,319,922	Yes.
10: 15,000–19,999	176	2,698,956	15,334,977	Yes.
11: 20,000–24,999	105	2,068,177	19,696,924	No.
12: 25,000–29,999	67	1,582,086	23,613,224	No.
13: 30,000–34,999	49	1,313,422	26,804,531	No.
14: 35,000–39,999	45	1,282,808	28,506,844	No.
15: 40,000–49,999	49	1,536,283	31,352,714	No.
16: 50,000–74,999	85	3,198,608	37,630,682	No.
17: 75,000–99,999	54	2,825,197	52,318,463	No.
18: 100,000+	284	26,946,083	94,880,574	No.

C. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. 3507), an agency may not conduct, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number assigned by OMB. The collections of information contained in these regulations are provided for by OMB control number 1651–0034 (CBP Regulations Pertaining to Customs Brokers) and by OMB control number 1651–0076 (Recordkeeping Requirements).

The final rule formalizes the use of the eCBP portal as an option for applicants and brokers to submit the Application for Broker License Exam and payment and the Triennial Status Report and payment. The eCBP portal reduces the time burden to submit these forms and fees. CBP would submit to OMB for review the following adjustments to the previously approved Information Collection under OMB control number 1651–0034 to account for this rule's changes.

[53] U.S. Census Bureau, 2017 SUSB Annual Data Tables by Establishment Industry, "The Number of Firms and Establishments, Employment, Annual Payroll, and Receipts by Industry and Enterprise Receipts Size: 2017, NAICS 4885 Freight Transportation Arrangement. *https://www.census.gov/data/tables/2017/econ/susb/2017-susb-annual.html.* Accessed June 7, 2021.

CBP Regulations Pertaining to Customs Brokers

Application for Broker License Exam

Estimated Number of Respondents: 2,583.

Estimated Number of Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 2,583.

Estimated Time per Response: 17 minutes (0.283 hours).

Triennial Status Report

Estimated Number of Respondents: 4,866 (14,597 every 3-years).

Estimated Number of Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 4,866.

Estimated Time per Response: 11 minutes (0.183 hours).

Estimated Total Annual Burden Hours: 1,621.47 hours.

VII. Signing Authority

This document is being issued in accordance with 19 CFR 0.1(b)(1), which provides that the Secretary of the Treasury delegated to the Secretary of Homeland Security the authority to prescribe and approve regulations relating to customs revenue functions on behalf of the Secretary of the Treasury for when the subject matter is not listed as provided by Treasury Department Order No. 100–16. Accordingly, this final rule amending such regulations may be signed by the Secretary of Homeland Security (or his or her delegate). Additionally, while the general topic of this rulemaking covers customs revenue functions delegated to the Secretary of Homeland Security by the Secretary of the Treasury, this document also includes certain fees over which the Secretary of the Treasury retains authority, as provided for in 19 CFR 0.1(a)(1) and paragraph 1(a)(i) of Treasury Department Order 100–16. Accordingly, this final rule is also being signed by the Secretary of the Treasury (or his or her delegate).

List of Subjects

19 CFR Part 24

Accounting, Claims, Customs duties and inspection, Harbors, Reporting and recordkeeping requirements, Taxes.

19 CFR Part 111

Administrative practice and procedure, Brokers, Customs duties and inspection, Penalties, Reporting and recordkeeping requirements.

Regulatory Amendments to the CBP Regulations

For the reasons given above, parts 24 and 111 of title 19 of the Code of Federal Regulations (19 CFR parts 24 and 111) are amended as set forth below:

PART 24—CUSTOMS FINANCIAL AND ACCOUNTING PROCEDURE

■ 1. The general authority citation for part 24 continues to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 58a– 58c, 66, 1202 (General Note 3(i), Harmonized Tariff Schedule of the United States), 1505, 1520, 1624; 26 U.S.C. 4461, 4462; 31 U.S.C. 3717, 9701; Pub. L. 107–296, 116 Stat. 2135 (6 U.S.C. 1 *et seq.*).

* * * * *

§ 24.1 [Amended]

■ 2. In § 24.1, paragraph (a)(3)(i) is amended by removing the phrases "who does not have a permit for the district (see the definition of "district" at § 111.1 of this chapter) where the entry is filed," and "which is unconditioned geographically" from the third sentence.

PART 111—CUSTOMS BROKERS

■ 3. The authority citation for part 111 is revised to read as follows:

Authority: 19 U.S.C. 66, 1202 (General Note 3(i), Harmonized Tariff Schedule of the United States), 1624; 1641.

Section 111.2 also issued under 19 U.S.C. 1484, 1498;

Section 111.96 also issued under 19 U.S.C. 58c, 31 U.S.C. 9701.

■ 4. In § 111.1:

■ a. Add a definition for "Appropriate Executive Director, Office of Trade" in alphabetical order;

■ b. Remove the definition of "Assistant Commissioner";

■ c. Add a definition for "Broker's office of record" in alphabetical order;

■ d. Remove the definition of "District";

■ e. Add a definition for "Executive Assistant Commissioner" in alphabetical order;

■ f. Amend the definition of "Permit" by removing the word "any" and adding in its place the word "a";

■ g. Add a definition for "Processing Center" in alphabetical order;

■ h. Remove the definition of "Region"; and

■ i. Revise the definition of "Responsible supervision and control".

The additions and revisions read as follows:

§ 111.1 Definitions.

* * * * *

Appropriate Executive Director, Office of Trade."Appropriate Executive Director, Office of Trade" means the Executive Director responsible for broker management.

* * * * *

Broker's office of record. "Broker's office of record" means the office designated by a customs broker as the broker's primary location that oversees the administration of the provisions of this part regarding all activities conducted under a national permit.

* * * * *

Executive Assistant Commissioner. "Executive Assistant Commissioner" means the Executive Assistant Commissioner of the Office of Trade at the Headquarters of U.S. Customs and Border Protection.

* * * * *

Processing Center. "Processing Center" means the broker management operations of a Center of Excellence and Expertise (Center) that process applications for a broker's license under § 111.12(a), applications for a national permit under § 111.19(b) for an individual, partnership, association, or corporation, as well as submissions required in this part for an already-licensed broker.

* * * * *

Responsible supervision and control. "Responsible supervision and control" means that degree of supervision and control necessary to ensure the proper transaction of the customs business of a broker, including actions necessary to ensure that an employee of a broker provides substantially the same quality of service in handling customs transactions that the broker is required to provide. *See*§ 111.28 for a list of factors which CBP may consider when evaluating responsible supervision and control.

* * * * *

■ 5. In § 111.2:

■ a. Amend the section heading by removing the word "district";

■ b. Amend paragraph (a)(2)(ii)(A)(*1*) by removing "the port director" and "Customs" and adding in their place the term "CBP";

■ c. Amend paragraph (a)(2)(ii)(A)(*2*) by removing the words "port director" and adding the words "processing Center" in their place and by removing the last sentence.

■ d. Amend paragraph (a)(2)(ii)(B) by removing the words "port director" wherever they appear and adding in their place the words "processing Center"; and

■ e. Revise paragraph (b). The revision reads as follows:

§ 111.2 License and permit required.

* * * * *

(b) *National permit.* A national permit issued to a broker under § 111.19 will constitute sufficient permit authority for the broker to conduct customs business within the customs territory of the United States as defined in § 101.1 of this chapter.

■ 6. Add § 111.3 to read as follows:

§ 111.3 Customs business.

(a) *Location.* Customs business must be conducted within the customs territory of the United States as defined in § 101.1 of this chapter.

(b) *Point of contact.* A licensed customs broker, or partnership, association, or corporation, conducting customs business under a national permit must designate a knowledgeable point of contact to be available to CBP during and outside of normal operating hours to respond to customs business issues. The licensed customs broker, or partnership, association, or corporation, must maintain accurate and current point of contact information in a CBP-authorized electronic data interchange (EDI) system. If a CBP-authorized EDI system is not available, then the information must be provided in writing to the processing Center.

■ 7. Revise § 111.12 to read as follows:

§ 111.12 Application for license.

(a) *Submission of application and fee.* An application for a broker's license must be timely submitted to the processing Center after the applicant attains a passing grade on the examination. The application must be executed on CBP Form 3124. The application must be accompanied by the application fee prescribed in § 111.96(a) and one copy of the appropriate attachment required by the application form (Articles of Agreement or an affidavit signed by all partners, Articles of Agreement of the association, or the Articles of Incorporation). If the applicant proposes to operate under a trade or fictitious name in one or more States, evidence of the applicant's authority to use the name in each of those States must accompany the application. The application, application fee and any additional documentation as required above may be submitted to a CBP-authorized electronic data interchange (EDI) system. If a CBP-authorized EDI system is not available, then the information must be submitted in writing to the processing Center. An application for an individual license must be submitted within the 3-year period after the applicant took and passed the examination referred to in §§ 111.11(a)(4) and 111.13. The processing Center may require an individual applicant to provide a copy of the notification that the applicant passed the examination (*see*§ 111.13(e)) and will require the applicant to submit fingerprints at the time of the interview. The processing Center may reject an application as improperly filed if the application is incomplete or, if on its face, the application demonstrates that one or more of the basic requirements set forth in § 111.11 has not been met at the time of filing; in either case the application and fee will be returned to the filer without further action.

(b) *Withdrawal of application.* An applicant for a broker's license may withdraw the application at any time prior to issuance of the license by providing written notice of the withdrawal to the processing Center or through a CBP-authorized EDI system, if available. However, withdrawal of the application does not entitle the applicant to a refund of the application fee set forth in § 111.96(a).

■ 8. In § 111.13:

■ a. Amend paragraph (b) by removing "$390" and revising the last sentence;

■ b. Amend paragraph (c) by:

■ i. Removing the words "an office in another district (*see* § 111.19(d)) and the permit for that additional district would be revoked by op-

eration of law under the provisions of 19 U.S.C. 1641(c)(3) and § 111.45(b)" and adding in their place the words "the transaction of customs business"; and

■ ii. Removing "$390" in the last sentence;

■ c. Amend paragraph (d) by removing "$390";

■ d. Amend paragraph (e) in the first sentence by adding the words "or electronic" after the word "written"; and

■ e. Revise paragraph (f). The revisions read as follows:

§ 111.13 Examination for individual license.

* * * * *

(b) * * * CBP will give notice of the time and place for the examination, including whether alternatives to on-site testing will be available, which is at CBP's sole discretion.

* * * * *

(f) *Appeal of failing grade on examination.* If an examinee fails to attain a passing grade on the examination taken under this section, the examinee may challenge that result by filing a written or electronic appeal with the Office of Trade at the Headquarters of U.S. Customs and Border Protection, Attn: Broker Management Branch, within 60 calendar days after the date of the written or electronic notice provided for in paragraph (e) of this section. CBP will provide to the examinee written or electronic notice of the decision on the appeal. If the CBP decision on the appeal affirms the result of the examination, the examinee may request review of the decision on the appeal by submitting a written or electronic request to the appropriate Executive Director, Office of Trade, U.S. Customs and Border Protection, within 60 calendar days after the date of the notice on that decision.

■ 9. Revise § 111.14 to read as follows:

§ 111.14 Background investigation of the license applicant.

(a) *Scope of background investigation.* A background investigation under this section will ascertain facts relevant to the question of whether the applicant is qualified and will cover, but need not be limited to:

(1) The accuracy of the statements made in the application and interview;

(2) The business integrity and financial responsibility of the applicant; and

(3) When the applicant is an individual (including a member of a partnership or an officer of an association or corporation), the character and reputation of the applicant, including any association with any individuals or groups that may present a risk to the security or to the revenue collection of the United States.

(b) *Referral to Headquarters.* The processing Center will forward the application and supporting documentation to the appropriate Executive Director, Office of Trade. The processing Center will also submit the recommendation for action on the application.

(c) *Additional inquiry.* The appropriate Executive Director, Office of Trade, may require further inquiry if additional facts are deemed necessary to evaluate the application. The appropriate Executive Director, Office of Trade, may also require the applicant (or in the case of a partnership, association, or corporation, one or more of its members or officers) to appear in person or by another approved method before the appropriate Executive Director, Office of Trade, or his or her representatives, for the purpose of undergoing further written or oral inquiry.

■ 10. Revise § 111.15 to read as follows:

§ 111.15 Issuance of license.

If the appropriate Executive Director, Office of Trade, finds that the applicant is qualified and has paid all applicable fees prescribed in § 111.96(a), the Executive Assistant Commissioner will issue a license. A license for an individual who is a member of a partnership, or an officer of an association or corporation will be issued in the name of the individual licensee and not in his or her capacity as a member or officer of the organization with which he or she is connected. The license will be forwarded to the processing Center, which will deliver it to the licensee.

■ 11. Revise § 111.16 to read as follows:

§ 111.16 Denial of a license.

(a) *Notice of denial.* If the appropriate Executive Director, Office of Trade, determines that the application for a license should be denied for any reason, notice of denial will be given by him or her to the applicant and to the processing Center. The notice of denial will state the reasons why the license was not issued.

(b) *Grounds for denial.* The grounds sufficient to justify denial of an application for a license include, but need not be limited to:

(1) Any cause which would justify suspension or revocation of the license of a broker under the provisions of § 111.53;

(2) The failure to meet any requirement set forth in § 111.11;

(3) A failure to establish the business integrity and financial responsibility of the applicant;

(4) A failure to establish the good character and reputation of the applicant;

(5) Any willful misstatement or omission of pertinent facts in the application or interview for the license;

(6) Any conduct which would be deemed unfair or detrimental in commercial transactions by accepted standards;

(7) A reputation imputing to the applicant criminal, dishonest, or unethical conduct, or a record of that conduct; or

(8) Any other relevant information uncovered over the course of the background investigation.

■ 12. Revise § 111.17 to read as follows:

§ 111.17 Review of the denial of a license.

(a) *By the appropriate Executive Director, Office of Trade.* Upon the denial of an application for a license, the applicant may file with the appropriate Executive Director, Office of Trade, in writing, additional information or arguments in support of the application and may request to appear in person, by telephone, or by other acceptable means of communication. This filing and request must be received by the appropriate Executive Director, Office of Trade within sixty (60) calendar days of the denial.

(b) *By the Executive Assistant Commissioner.* Upon the decision of the appropriate Executive Director, Office of Trade, affirming the denial of an application for a license, the applicant may file with the Executive Assistant Commissioner, in writing, a request for any additional review that the Executive Assistant Commissioner, deems appropriate. This request must be received by the Executive Assistant Commissioner within sixty (60) calendar days of the affirmation by the appropriate Executive Director, Office of Trade, of the denial of the application for a license.

(c) *By the Court of International Trade.* Upon a decision of the Executive Assistant Commissioner affirming the denial of an application for a license, the applicant may appeal the decision to the Court of International Trade, provided that the appeal action is commenced within sixty (60) calendar days after the decision date by the Executive Assistant Commissioner.

§ 111.18 [Amended]

■ 13. Amend § 111.18 by adding the phrase "and addressing how deficiencies have been remedied" after the term "§ 111.12".

■ 14. In § 111.19:

■ a. Revise the section heading;

■ b. Revise paragraphs (a) and (b);

■ c. Remove paragraph (d);

■ d. Redesignate paragraph (e) as paragraph (d) and revise it;

■ e. Revise paragraph (f); and

■ f. Redesignate paragraph (g) as paragraph (e) and revise it.

The revisions read as follows:

§ 111.19 National permit.

(a) *General.* A national permit is required for the purpose of transacting customs business throughout the customs territory of the United States as defined in § 101.1 of this chapter.

(b) *Application for a national permit.* An applicant who obtains a passing grade on the examination for an individual broker's license may apply for a national permit. The applicant will exercise responsible supervision and control (as described in § 111.28) over the activities conducted under that national permit. The national permit application may be submitted concurrently with or after the submission of an application for a broker's license. An applicant applying for a national permit on behalf of a partnership, association, or corporation must be a licensed broker employed by the partnership, association, or corporation. An application for a national permit under this paragraph must be submitted in the form of a letter to the processing Center or to a CBP-authorized electronic data interchange (EDI) system. The application must set forth or attach the following:

(1) The applicant's broker license number and date of issuance if available;

(2) If the applicant is applying for a national permit on behalf of a partnership, association, or corporation: the name of the partnership, association, or corporation and the title held by the applicant within the partnership, association, or corporation;

(3) If the applicant is applying for a national permit on behalf of a partnership, association, or corporation: a copy of the documentation

issued by a State, or local government that establishes the legal status and reserves the business name of the partnership, association, or corporation;

(4) The address, telephone number, and email address of the office designated by the applicant as the office of record as defined in § 111.1. The office will be noted in the national permit when issued;

(5) The name, telephone number, and email address of the point of contact described in § 111.3(b) to be available to CBP to respond to issues related to the transaction of customs business;

(6) If the applicant is applying for a national permit on behalf of a partnership, association, or corporation: the name, broker license number, office address, telephone number, and email address of each individual broker employed by the partnership, association, or corporation;

(7) A list of all employees together with the specific employee information prescribed in § 111.28 for each employee;

(8) A supervision plan describing how responsible supervision and control will be exercised over the customs business conducted under the national permit, including compliance with § 111.28;

(9) The location where records will be retained (*see* § 111.23);

(10) The name, telephone number, and email address of the knowledgeable employee responsible for broker-wide records maintenance and financial recordkeeping requirements (*see* § 111.21(d)); and

(11) A receipt or other evidence showing that the fees specified in § 111.96(b) and (c) have been paid in accordance with paragraph (b) of this section.

* * * * *

(d) *Action on application; list of permitted brokers.* The processing Center that receives the application will review the application to determine whether the applicant meets the requirements of paragraphs (a) and (b) of this section. If the processing Center is of the opinion that the national permit should not be issued, the processing Center will submit written reasons for that opinion to the appropriate Executive Director, Office of Trade, CBP Headquarters, for appropriate instructions on whether to grant or deny the national permit. The appropriate Executive Director, Office of Trade, CBP Headquarters, will notify the applicant if his or her application is denied. CBP will issue a national permit to an applicant who meets the requirements of paragraphs (a) and (b) of this section. CBP will maintain and make available to the public an alphabetical list of permitted brokers.

(e) *Review of the denial of a national permit*—(1) *By the Executive Assistant Commissioner.* Upon the denial of an application for a national permit under this section, the applicant may file with the

Executive Assistant Commissioner, in writing, additional information or arguments in support of the application and may request to appear in person, by telephone, or by other acceptable means of communication. This filing and request must be received by the Executive Assistant Commissioner within sixty (60) calendar days of the denial.

(2) *By the Court of International Trade.* Upon a decision of the Executive Assistant Commissioner affirming the denial of an application for a national permit under this section, the applicant may appeal the decision to the Court of International Trade, provided that the appeal action is commenced within sixty (60) calendar days after the decision date by the Executive Assistant Commissioner.

(f) *Responsible supervision and control.* The individual broker who qualifies for the national permit will exercise responsible supervision and control (as described in § 111.28) over the activities conducted under that national permit.

■ 15. In § 111.21:

■ a. Redesignate paragraphs (b) and (c) as paragraphs (c) and (d);

■ b. Add a new paragraph (b); and

■ c. Revise newly redesignated paragraph (d).

The addition and revision read as follows:

§ 111.21 Record of transactions.

* * * * *

(b) Each broker must provide notification to the CBP Office of Information Technology Security Operations Center (CBP SOC) of any known breach of electronic or physical records relating to the broker's customs business. Notification must be electronically provided (*cbpsoc@cbp.dhs.gov*) within 72 hours of the discovery of the breach, including any known compromised importer identification numbers (*see* 19 CFR 24.5). Within ten (10) business days of the notification, a broker must electronically provide an updated list of any additional known compromised importer identification numbers. To the extent that additional information is subsequently discovered, the broker must electronically provide that information within 72 hours of discovery. Brokers may also call CBP SOC at a telephone number posted on CBP.gov with questions as to the reporting of the breach, if any guidance is needed.

* * * * *

(d) Each broker must designate a knowledgeable employee as the party responsible for brokerage-wide recordkeeping requirements. Each broker must maintain accurate and current point of contact information in a CBP-authorized electronic data interchange (EDI) system. If a CBP-authorized EDI system is not available, then the information must be provided in writing to the processing Center.

■ 16. In § 111.23, revise paragraph (a) to read as follows:

§ 111.23 Retention of records.

(a) *Place of retention.* A licensed customs broker must maintain originals of the records referred to in this part, including any records stored in electronic formats, within the customs territory of the United States and in accordance with the provisions of this part and part 163 of this chapter.

* * * * *

■ 17. Revise § 111.24 to read as follows:

§ 111.24 Records confidential.

The records referred to in this part and pertaining to the business of the clients serviced by the broker are to be considered confidential, and the broker must not disclose their contents or any information connected with the records to any persons other than those clients, their surety on a particular entry, and representatives of the Department of Homeland Security (DHS), or other duly accredited officers or agents of the United States, except on subpoena or court order by a court of competent jurisdiction, or when authorized in writing by the client. This confidentiality provision does not apply to information that properly is available from a source open to the public.

■ 18. Revise § 111.25 to read as follows:

§ 111.25 Records must be available.

(a) *General.* During the period of retention, the broker must maintain the records referred to in this part in such a manner that they may readily be examined. Records required to be maintained under the provisions of this part must be made available upon reasonable notice for inspection, copying, reproduction or other official use by representatives of the Department of Homeland Security (DHS) within the prescribed period of retention or within any longer period of time during which they remain in the possession of the broker.

(b) *Examination request.* Upon request by DHS to examine records, the designated recordkeeping contact (*see*§ 111.21(d)), must make all records available to DHS within thirty (30) calendar days, or such longer time as specified by DHS, at the location specified by DHS.

(c) *Recordkeeping requirements.* Records subject to the requirements of part 163 of this chapter must be made available to DHS in accordance with the provisions of that part.

§ 111.27 [Amended]

■ 19. Amend § 111.27 by removing the phrase "the port director and other proper officials of the Treasury Department" and adding in its place the phrase "DHS, or other duly accredited officers or agents of the United States,".

■ 20. In § 111.28:

■ a. Revise the section heading;

■ b. Revise paragraphs (a) and (b);

■ c. Redesignate paragraphs (c) and (d) as paragraphs (d) and (e);

■ d. Add a new paragraph (c);

■ e. Amend newly redesignated paragraph (d) by:

■ i. Removing the words "Assistant Commissioner" and adding in their place the words "appropriate Executive Director, Office of Trade,"; and

■ ii. Removing the phrase "director of each port through which a permit has been granted to the partnership, association, or corporation" and adding in its place the words "processing Center"; and

■ f. Revise newly redesignated paragraph (e).

The addition and revisions read as follows:

§ 111.28 Responsible supervision and control.

(a) *General.* Every individual broker operating as a sole proprietor, every licensed member of a partnership that is a broker, and every licensed officer of an association or corporation that is a broker must exercise responsible supervision and control (see § 111.1) over the transaction of the customs business of the sole proprietorship, partnership, association, or corporation. A sole proprietorship, partnership, association, or corporation must employ a sufficient number of licensed brokers relative to the job complexity, similarity of subordi-

nate tasks, physical proximity of subordinates, abilities and skills of employees, and abilities and skills of the managers. While the determination of what is necessary to perform and maintain responsible supervision and control will vary depending upon the circumstances in each instance, factors which CBP may consider in its discretion and to the extent any are relevant include, but are not limited to, the following:

(1) The training provided to broker employees;

(2) The issuance of instructions and guidelines to broker employees;

(3) The volume and type of business conducted by the broker;

(4) The reject rate for the various customs transactions relative to overall volume;

(5) The level of access broker employees have to current editions of CBP regulations, the Harmonized Tariff Schedule of the United States, and CBP issuances;

(6) The availability of a sufficient number of individually licensed brokers for necessary consultation with employees of the broker;

(7) The frequency of supervisory visits of an individually licensed broker to another office of the broker that does not have an individually licensed broker;

(8) The frequency of audits and reviews by an individually licensed broker of the customs transactions handled by employees of the broker;

(9) The extent to which the individually licensed broker who qualifies the permit is involved in the operation of the brokerage and communications between CBP and the brokerage;

(10) Any circumstances which indicate that an individually licensed broker has a real interest in the operations of a brokerage;

(11) The timeliness of processing entries and payment of duty, tax, or other debt or obligation owing to the Government for which the broker is responsible, or for which the broker has received payment from a client;

(12) Communications between CBP and the broker, and the broker's responsiveness and action to communications, direction, and notices from CBP;

(13) Communications between the broker and its officer(s) or member(s), and the broker's responsiveness and action to communications and direction from its officer(s) or member(s).

(b) *Employee information*—(1) *Current employees.* Each national permit holder must submit to the processing Center a list of the names of persons currently employed by the broker. The list of employees must be submitted prior to issuance of a national permit under § 111.19 and before the broker begins to transact customs

business. For each employee, the broker must provide the name, social security number, date and place of birth, date of hire, and current home address. After the initial submission, an updated list must be submitted to a CBP-authorized electronic data interchange (EDI) system if any of the information required by this paragraph changes. If a CBP-authorized EDI system is not available, then the information must be provided in writing to the processing Center. The update must be submitted within thirty (30) calendar days of the change.

(2) *New employees.* Within thirty (30) calendar days of the start of employment of a new employee(s), the broker must submit a list of new employee(s) with the information required under paragraph (b)(1) of this section to a CBP-authorized EDI system. The broker may submit a list of the new employee(s) or an updated list of all employees, specifically noting the new employee(s). If a CBP-authorized EDI system is not available, then the information must be provided in writing to the processing Center.

(3) *Terminated employees.* Within thirty (30) calendar days after the termination of employment of an employee, the broker must submit a list of terminated employee(s) to a CBP-authorized EDI system. The broker may submit a list of the terminated employee(s) or an updated list of all employees, specifically noting the terminated employee(s). If a CBP-authorized EDI system is not available, then the information must be provided in writing to the processing Center.

(c) *Broker's responsibility.* Notwithstanding a broker's responsibility for providing the information required in paragraph (b) of this section, in the absence of culpability by the broker, CBP will not hold the broker responsible for the accuracy of any information that is provided to the broker by the employee.

* * * * *

(e) *Change in ownership.* If the ownership of a broker changes and ownership shares in the broker are not publicly traded, the broker must immediately provide written notice of that fact to the appropriate Executive Director, Office of Trade, and must send a copy of the written notice to the processing Center. When a change in ownership results in the addition of a new principal to the organization, and whether or not ownership shares in the broker are publicly traded, CBP reserves the right to conduct a background investigation on the new principal. The processing Center will notify the broker if CBP objects to the new principal, and the broker will be given a reasonable period of time to remedy the situation. If the background investigation uncovers information which would have been the basis for a denial of an application for a broker's license and the principal's

interest in the broker is not terminated to the satisfaction of the processing Center, suspension or revocation proceedings may be initiated under subpart D of this part. For purposes of this paragraph, a "principal" means any person having at least a five (5) percent capital, beneficiary or other direct or indirect interest in the business of a broker.

■ 21. In § 111.30:

■ a. Paragraphs (a) and (b) are revised;

■ b. The first sentence of paragraph (c) is revised;

■ c. Paragraph (d) is revised; and

■ d. The first sentence of paragraph (e) introductory text is revised.

The revisions read as follows:

§ 111.30 Notification of change in address, organization, name, or location of business records; status report; termination of brokerage business.

(a) *Change of address.* A broker is responsible for providing CBP with the broker's current addresses, which include the broker's office of record address as defined in § 111.1, an email address, and, if the broker is not actively engaged in transacting business as a broker, the broker's non-business address. If a broker does not receive mail at the broker's office of record or non-business address, the broker must also provide CBP with a valid address at which he or she receives mail. When address information (the broker's office of record address, mailing address, email address) changes, or the broker is no longer actively engaged in transacting business as a broker, he or she must update his or her address information within ten (10) calendar days through a CBP-authorized electronic data interchange (EDI) system. If a CBP-authorized EDI system is not available, then address updates must be provided in writing within ten (10) calendar days to the processing Center.

(b) *Change in organization.* A partnership, association, or corporation broker must update within ten (10) calendar days in writing to the processing Center any of the following:

(1) The date on which a licensed member or officer ceases to be the qualifying member or officer for purposes of § 111.11(b) or (c)(2), and the name of the licensed member or officer who will succeed as the license qualifier;

(2) The date on which a licensed employee ceases to be the national permit qualifier for purposes of § 111.19(a), and the name of the licensed employee who will succeed as the national permit qualifier; and

(3) Any change in the Articles of Agreement, Charter, Articles of Association, or Articles of Incorporation relating to the transaction of customs business, or any other change in the legal nature of the organization (for example, conversion of a general partnership to a limited partnership, merger with another organization, divestiture of a part of the organization, or entry into bankruptcy protection).

(c) * * * A broker who changes his or her name, or who proposes to operate under a trade or fictitious name in one or more States and is authorized by State law to do so, must submit to the appropriate Executive Director, Office of Trade, at the Headquarters of U.S. Customs and Border Protection, evidence of his or her authority to use that name. * * *

(d) *Triennial status report*—(1) *General.* Each broker must file a triennial status report with CBP on February 1 of each third year after 1985. The report must be filed through a CBP-authorized EDI system and will not be considered received by CBP until payment of the triennial status report fee prescribed in § 111.96(d) is received. If a CBP-authorized EDI system is not available, the triennial status report must be filed with the processing Center. A report received during the month of February will be considered filed timely. No form or particular format is required.

(2) *Individual*—(i) Each individual broker must state in the report required under paragraph (d)(1) of this section whether he or she is actively engaged in transacting business as a broker. If he or she is so actively engaged, the broker must also:

(A) State the name under which, and the address at which, the broker's business is conducted if he or she is a sole proprietor, and an email address;

(B) State the name and address of his or her employer if he or she is employed by another broker, unless his or her employer is a partnership, association or corporation broker for which he or she is a qualifying member or officer for purposes of § 111.11(b) or (c)(2); and

(C) State whether or not he or she still meets the applicable requirements of § 111.11 and § 111.19 and has not engaged in any conduct that could constitute grounds for suspension or revocation under § 111.53.

(ii) An individual broker not actively engaged in transacting business as a broker must provide CBP with the broker's current mailing address and email address, and state whether or not he or she still

meets the applicable requirements of §§ 111.11 and 111.19 and has not engaged in any conduct that could constitute grounds for suspension or revocation under § 111.53.

(3) *Partnership, association, or corporation*—(i) Each partnership, association, or corporation broker must state in the report required under paragraph (d)(1) of this section the name under which its business as a broker is being transacted, the broker's office of record (*see* § 111.1), the name, address and email address of each licensed member of the partnership or licensed officer of the association or corporation, including the license qualifier under § 111.11(b) or (c)(2) and the name of the licensed employee who is the national permit qualifier under § 111.19(a), and whether the partnership, association, or corporation is actively engaged in transacting business as a broker. The report must be signed by a licensed member or officer.

(ii) A partnership, association, or corporation broker must state whether or not the partnership, association, or corporation broker still meets the applicable requirements of §§ 111.11 and 111.19 and has not engaged in any conduct that could constitute grounds for suspension or revocation under § 111.53.

(4) *Failure to file timely.* If a broker fails to file the report required under paragraph (d)(1) of this section by March 1 of the reporting year, the broker's license is suspended by operation of law on that date. By March 31 of the reporting year, CBP will transmit written notice of the suspension to the broker by certified mail, return receipt requested, at the address reflected in CBP records. If the broker files the required report and pays the required fee within 60 calendar days of the date of the notice of suspension, the license will be reinstated. If the broker does not file the required report and pay the required fee within that 60-day period, the broker's license is revoked by operation of law without prejudice to the filing of an application for a new license. Notice of the revocation will be published in the **Federal Register**.

(e) * * * Upon permanent termination of brokerage business, written notification of the name, address, email address and telephone number of the party having legal custody of the brokerage business records must be provided to the processing Center. * * *

* * * * *

■ 22. Section 111.32 is revised to read as follows:

§ 111.32 False information.

A broker must not file or procure or assist in the filing of any claim, or of any document, affidavit, or other papers, known by such broker to be false. In addition, a broker must not give, or solicit or procure

the giving of, any information or testimony that the broker knew or should have known was false or misleading in any matter pending before the Department of Homeland Security or to any representative of the Department of Homeland Security. A broker also must document and report to CBP when the broker separates from or cancels representation of a client as a result of determining the client is intentionally attempting to use the broker to defraud the U.S. Government or commit any criminal act against the U.S. Government. The report to CBP must include the client name, date of separation or cancellation, and reason for the separation or cancellation.

■ 23. In § 111.36, revise paragraph (c)(3) to read as follows:

§ 111.36 Relations with unlicensed persons.

* * * * *

(c) ***

(3) The broker must execute a customs power of attorney directly with the importer of record or drawback claimant, and not via a freight forwarder or other third party, to transact customs business for that importer of record or drawback claimant. No part of the agreement of compensation between the broker and the forwarder, nor any action taken pursuant to the agreement, can forbid or prevent direct communication between the importer of record, drawback claimant, or other party in interest and the broker; and

* * * * *

■ 24. In § 111.39:

■ a. Paragraph (a) is revised;

■ b. Paragraphs (b) and (c) are redesignated as paragraphs (c) and (d);

■ c. A new paragraph (b) is added; and

■ d. Newly redesignated paragraph (c) is amended by:

■ i. Removing the word "paper" and adding in its place the word "record"; and

■ ii. Adding a sentence to the end of the paragraph.

The additions and revisions read as follows:

§ 111.39 Advice to client.

(a) *Withheld or false information.* A broker must not withhold information from a client relative to any customs business it conducts

on behalf of a client who is entitled to the information. The broker must not knowingly impart to a client false information relative to any customs business.

(b) *Due diligence.* A broker must exercise due diligence to ascertain the correctness of any information which the broker imparts to a client, including advice to the client on the proper payment of any duty, tax, or other debt or obligation owing to the U.S. Government.

(c) * * * The broker must advise the client on the proper corrective actions required and retain a record of the broker's communication with the client in accordance with §§ 111.21 and 111.23.

* * * * *

§ 111.42 [Amended]

■ 25. In § 111.42:

■ a. Paragraph (a)(1) is amended by removing the word "Customs" and adding in its place the word "customs"; and

■ b. Paragraph (a)(3) is amended by adding the word "Executive" before the word "Assistant" and adding the phrase ", or his or her designee," after the words "Assistant Commissioner".

■ 26. In § 111.45:

■ a. Paragraphs (a), (b), and (c) are revised; and

■ b. In paragraph (d), remove the cross-reference "or (b)" in the second sentence.

The revisions read as follows:

§ 111.45 Revocation by operation of law.

(a) *License and permit.* If a broker that is a partnership, association, or corporation fails to have, during any continuous period of 120 days, at least one member of the partnership or at least one officer of the association or corporation who holds a valid individual broker's license, that failure will, in addition to any other sanction that may be imposed under this part, result in the revocation by operation of law of the license and the national permit issued to the partnership, association, or corporation. If a broker that is a partnership, association, or corporation fails to employ, during any continuous period of 180 days, a licensed customs broker who is the national permit qualifier for the broker, that failure will, in addition to any other sanction that may be imposed under this part, result in the revocation by operation of law of the national permit issued to the partnership,

association, or corporation. CBP will notify the broker in writing of an impending revocation by operation of law under this section thirty (30) calendar days before the revocation is due to occur, if the broker has provided advance notice to CBP of the underlying events that could cause a revocation by operation of law under this section. If the license or permit of a partnership, association, or corporation is revoked by operation of law, CBP will notify the organization of the revocation.

(b) *Annual broker permit fee.* If a broker fails to pay the annual permit user fee pursuant to § 111.96(c), the permit is revoked by operation of law. The processing Center will notify the broker in writing of the failure to pay and the revocation of the permit.

(c) *Publication.* Notice of any revocation under this section will be published in the **Federal Register**.

* * * * *

■ 27. In § 111.51:

■ a. Paragraph (a) is revised;

■ b. Paragraph (b) is amended by:

■ i. Removing the words "Assistant Commissioner" and adding in their place the words "appropriate Executive Director, Office of Trade,"; and

■ ii. Removing the word "Secretary" and adding in its place the words "Executive Assistant Commissioner".

The revision reads as follows:

§ 111.51 Cancellation of license or permit.

(a) *Without prejudice.* The appropriate Executive Director, Office of Trade, may cancel a broker's license or permit "without prejudice" upon written application by the broker if the appropriate Executive Director, Office of Trade, determines that the application for cancellation was not made in order to avoid proceedings for the suspension or revocation of the license or permit. If the appropriate Executive Director, Office of Trade, determines that the application for cancellation was made in order to avoid those proceedings, he or she may cancel the license or permit "without prejudice" only with authorization from the Executive Assistant Commissioner.

* * * * *

§ 111.52 [Amended]

■ 28. Amend § 111.52 by removing the words "Assistant Commissioner" and adding in their place the words "appropriate Executive Director, Office of Trade,".

■ 29. In § 111.53:

■ a. Remove the word "Customs" wherever it appears and add in its place the term "CBP";

■ b. Amend paragraph (e) by removing the words "Assistant Commissioner" and adding in their place the words "appropriate Executive Director, Office of Trade,";

■ c. Amend paragraph (f) by removing the word "or" following the semicolon;

■ d. Redesignate paragraph (g) as paragraph (h); and

■ e. Add a new paragraph (g).

The addition reads as follows:

§ 111.53 Grounds for suspension or revocation of license or permit.

* * * * *

(g) The broker has been convicted of committing or conspiring to commit an act of terrorism as described in section 2332b of title 18, United States Code; or

* * * * *

■ 30. Revise § 111.55 to read as follows:

§ 111.55 Investigation of complaints.

Every complaint or charge against a broker which may be the basis for disciplinary action may be forwarded for investigation to the appropriate investigative authority within the Department of Homeland Security. The investigative authority will submit a final report on the investigation of complaints to the processing Center and send a copy of the report to the appropriate Executive Director, Office of Trade.

■ 31. Revise § 111.56 to read as follows:

§ 111.56 Review of report on the investigation of complaints.

The processing Center will review the report on the investigation of complaints, or if there is no report on the investigation of complaints,

other documentary evidence, to determine if there is sufficient basis to recommend that charges be preferred against the broker. The processing Center will then submit the recommendation with supporting reasons to the appropriate Executive Director, Office of Trade, for final determination together with a proposed statement of charges when recommending that charges be preferred.

■ 32. Revise § 111.57 to read as follows:

§ 111.57 Determination by appropriate Executive Director, Office of Trade.

The appropriate Executive Director, Office of Trade, will make a determination on whether or not charges should be preferred, and will notify the processing Center of the decision.

§ 111.59 [Amended]

■ 33. In § 111.59, paragraph (a) and paragrapb (b) introductory text are amended by removing the words "port director" and adding in their place the words "processing Center".

§ 111.60 [Amended]

■ 34. In § 111.60, remove the words "port director" in the last sentence and add in their place the words "processing Center".

■ 35. Revise § 111.61 to read as follows:

§ 111.61 Decision on preliminary proceedings.

The processing Center will prepare a summary of any oral presentations made by the broker or the broker's attorney and forward it to the appropriate Executive Director, Office of Trade, together with a copy of each paper filed by the broker. The processing Center will also give to the appropriate Executive Director, Office of Trade, a recommendation on action to be taken as a result of the preliminary proceedings. If the appropriate Executive Director, Office of Trade, determines that the broker has satisfactorily responded to the proposed charges and that further proceedings are not warranted, he or she will so inform the processing Center, who will notify the broker. If no response is filed by the broker or if the appropriate Executive Director, Office of Trade, determines that the broker has not satisfactorily responded to all of the proposed charges, he or she will advise the processing Center of that fact and instruct the processing Center to prepare, sign, and serve a notice of charges and the statement of charges. If one or more of the charges in the proposed statement of charges was satisfactorily answered by the broker in the preliminary

proceedings, the appropriate Executive Director, Office of Trade, will instruct the processing Center to omit those charges from the statement of charges.

■ 36. In § 111.62:

■ a. Revise paragraph (d); and

■ b. Amend paragraph (e) by:

■ i. Removing the phrase ", in duplicate"; and

■ ii. Removing the words "port director" and adding in their place the words "processing Center".

The revision reads as follows:

§ 111.62 Contents of notice of charges.

* * * * *

(d) The broker will be notified of the time and place of a hearing on the charges; and

* * * * *

■ 37. In § 111.63:

■ a. Remove the words "port director" wherever they appear and add in their place the words "processing Center"; and

■ b. Revise paragraphs (a)(2) and (c). The revisions read as follows:

§ 111.63 Service of notice and statement of charges.

* * * * *

(a) ***

(2) By certified mail, return receipt requested, addressed to the broker's office of record (or other address as provided pursuant to § 111.30).

* * * * *

(c) *Certified mail; evidence of service.* When service under this section is by certified mail to the broker's office of record (or other address as provided pursuant to § 111.30), the receipt of the return card signed or marked will be satisfactory evidence of service.

§ 111.64 [Amended]

■ 38. In § 111.64, paragraph (a) is amended by removing the words "port director" and adding in their place the words "processing Center".

§ 111.66 [Amended]

■ 39. Section 111.66 is amended by removing the words "Secretary of Homeland Security, or his designee," and adding in their place the words "Executive Assistant Commissioner".

§ 111.67 [Amended]

■ 40. In § 111.67:

■ a. Paragraph (d) is amended by removing the words "port director" wherever they appear and adding in their place the words "processing Center"; and

■ b. Paragraph (e) is removed.

§ 111.69 [Amended]

■ 41. Section 111.69 is amended by removing the words "Secretary of Homeland Security, or his designee" and adding in their place the words "Executive Assistant Commissioner".

§ 111.70 [Amended]

■ 42. Section 111.70 is amended by removing the words "Secretary of Homeland Security, or his designee" and adding in their place the words "Executive Assistant Commissioner".

§ 111.71 [Amended]

■ 43. Section 111.71 is amended by removing the words "Secretary of Homeland Security, or his designee" and adding in their place the words "Executive Assistant Commissioner".

■ 44. Revise § 111.72 to read as follows:

§ 111.72 Dismissal subject to new proceedings.

If the Executive Assistant Commissioner finds that the evidence produced at the hearing indicates that a proper disposition of the case cannot be made on the basis of the charges preferred, he or she may instruct the processing Center to serve appropriate charges as a basis for new proceedings to be conducted in accordance with the procedures set forth in this subpart.

■ 45. Revise § 111.74 to read as follows:

§ 111.74 Decision and notice of suspension or revocation or monetary penalty.

If the Executive Assistant Commissioner finds that one or more of the charges in the statement of charges is not sufficiently proved, the suspension, revocation, or monetary penalty action may be based on any remaining charges if the facts alleged in the charges are established by the evidence. If the Executive Assistant Commissioner in the exercise of discretion and based solely on the record, issues an order suspending a broker's license or permit for a specified period of time or revoking a broker's license or permit or, except in a case described in § 111.53(b)(3), assessing a monetary penalty in lieu of suspension or revocation, the appropriate Executive Director, Office of Trade, will promptly provide written notification of the order to the broker and, unless an appeal from the order of the Executive Assistant Commissioner is filed by the broker (*see*§ 111.75), the appropriate Executive Director, Office of Trade, will publish a notice of the suspension or revocation, or the assessment of a monetary penalty, in the **Federal Register**. If no appeal from the order of the Executive Assistant Commissioner is filed, an order of suspension or revocation or assessment of a monetary penalty will become effective sixty (60) calendar days after issuance of written notification of the order unless the Executive Assistant Commissioner finds that a more immediate effective date is in the national or public interest. If a monetary penalty is assessed and no appeal from the order of the Executive Assistant Commissioner is filed, payment of the penalty must be tendered within sixty (60) calendar days after the effective date of the order, and, if payment is not tendered within that sixty (60)-day period, the license or permit of the broker will immediately be suspended until payment is made.

§ 111.75 [Amended]

■ 46. In § 111.75:

■ a. In the section heading, remove the word "Secretary's" and add in its place the words "Executive Assistant Commissioner's";

■ b. Remove the words "Secretary of Homeland Security, or his designee" and add in their place the words "Executive Assistant Commissioner"; and

■ c. Remove the word "Secretary's" and add in its place the words "Executive Assistant Commissioner's".

■ 47. In § 111.76:

■ a. In paragraph (a), remove the word "written" and the words "in duplicate" in the first sentence and remove the words "Assistant Commissioner" and add in their place the words "appropriate Executive Director, Office of Trade,"; and

■ b. Revise paragraph (b).

The revision reads as follows:

§ 111.76 Reopening the case.

* * * * *

(b) *Procedure.* The appropriate Executive Director, Office of Trade, will forward the application, together with a recommendation for action thereon, to the Executive Assistant Commissioner. The Executive Assistant Commissioner may grant or deny the application to reopen the case and may order the taking of additional testimony before the appropriate Executive Director, Office of Trade. The appropriate Executive Director, Office of Trade, will notify the applicant of the decision by the Executive Assistant Commissioner. If the Executive Assistant Commissioner grants the application and orders a hearing, the appropriate Executive Director, Office of Trade, will set a time and place for the hearing and give due written notice of the hearing to the applicant. The procedures governing the new hearing and recommended decision of the hearing officer will be the same as those governing the original proceeding. The original order of the Executive Assistant Commissioner will remain in effect pending conclusion of the new proceedings and issuance of a new order under § 111.77.

■ 48. Revise § 111.77 to read as follows:

§ 111.77 Notice of vacated or modified order.

If, pursuant to § 111.76 or for any other reason, the Executive Assistant Commissioner issues an order vacating or modifying an earlier order under § 111.74 suspending or revoking a broker's license or permit, or assessing a monetary penalty, the appropriate Executive Director, Office of Trade, will notify the broker in writing and will publish a notice of the new order in the **Federal Register**.

§ 111.78 [Amended]

■ 49. Section 111.78 is amended by removing the words "port director" and adding in their place the words "processing Center".

§ 111.79 [Amended]

■ 50. Section 111.79 is amended by removing the words "Assistant Commissioner" and adding in their place the words "appropriate Executive Director, Office of Trade," wherever they appear.

■ 51. Revise § 111.81 to read as follows:

§ 111.81 Settlement and compromise.

The Executive Assistant Commissioner may settle and compromise any disciplinary proceeding which has been instituted under this subpart according to the terms and conditions agreed to by the parties including, but not limited to, the assessment of a monetary penalty in lieu of any proposed suspension or revocation of a broker's license or permit.

§ 111.91 [Amended]

■ 52. In § 111.91:

■ a. The introductory text is amended by removing the word "Customs" and adding in its place the term "CBP"; and

■ b. Paragraph (a) is amended by removing the phrase "§§ 111.53(a) through (f)" and adding in its place the phrase "§ 111.53(a) through (g)".

§ 111.92 [Amended]

■ 53. In § 111.92, amend paragraph (a) by removing the word "Customs" and adding in its place the term "CBP".

§ 111.94 [Amended]

■ 54. Section 111.94 is amended by removing the word "Customs" wherever it appears and adding in its place the term "CBP".

■ 55. In § 111.96, revise paragraphs (a), (b), and (d) to read as follows:

§ 111.96 Fees.

(a) *License fee; examination fee; fingerprint fee.* Each applicant for a broker's license pursuant to § 111.12 must pay a fee of $300 for an individual license application and $500 for a partnership, association, or corporation license application to defray the costs to CBP in processing the application. Each individual who intends to take the examination provided for in § 111.13 must pay a $390 examination fee before taking the examination. An individual who submits an application for a license must also pay a fingerprint processing fee; the

processing Center will inform the applicant of the current Federal Bureau of Investigation fee for conducting fingerprint checks, which must be paid to CBP before further processing of the application will occur.

(b) *Permit application fee.* An application fee of $100 must be paid in connection with a national permit issued under § 111.19 to defray the processing costs, including costs associated with an application for reinstatement of a permit that was revoked by operation of law or otherwise.

* * * * *

(d) *Triennial status report fee.* A fee of $100 is required to defray the costs of administering the triennial status reporting requirement prescribed in § 111.30(d)(1).

* * * * *

HELEN MARY B. MCGOVERN,
Assistant Secretary for Trade and Economic Security,
Department of Homeland Security.

THOMAS C. WEST, JR.,
Deputy Assistant Secretary of the Treasury for Tax Policy.

[Published in the Federal Register, October 18, 2022 (85 FR 63267)]

U.S. Court of International Trade

Slip Op.22–117

BGH Edelstahl Siegen GmbH, Plaintiff, v. United States, Defendant, and Ellwood City Forge Company, et al., Defendant-Intervenors.

Before: Claire R. Kelly, Judge
Court No. 21–00080
PUBLIC VERSION

[Sustaining in part and remanding in part the U.S. Department of Commerce's final affirmative determination in the countervailing duty investigation of forged steel fluid end blocks from the Federal Republic of Germany.]

Dated: October 12, 2022

James K. Horgan, *Alexandra H. Salzman*, *Gregory S. Menegaz*, *Marc E. Montalbine*, and *Merisa A. Horgan*, deKieffer & Horgan, PLLC, of Washington, D.C., for plaintiff BGH Edelstahl Siegen GmbH.

Sarah E. Kramer, U.S. Department of Justice, Commercial Litigation Branch – Civil Division, and *Ayat Mujais* and *Paul K. Keith*, Of Counsel, U.S. Department of Commerce, Office of Chief Counsel for Trade Enforcement and Compliance, for defendant United States.

Thomas M. Beline, *Chase J. Dunn*, *Jack A. Levy*, *Myles S. Getlan*, and *Nicole Brunda*, Cassidy Levy Kent (USA) LLP, of Washington, D.C., for defendant-intervenors Ellwood City Forge Co., Ellwood National Steel Co., Ellwood Quality Steels Co., and A. Finkl & Sons.

OPINION AND ORDER

Kelly, Judge:

Before the court is BGH Edelstahl Siegen GmbH's ("BGH") Rule 56.2 motion for judgment on the agency record challenging various aspects of the U.S. Department of Commerce's ("Commerce") final determination in its countervailing duty ("CVD") investigation of forged steel fluid end blocks ("Fluid End Blocks") from the Federal Republic of Germany ("FRG"). [BGH] Mot. J. Agency R., Oct. 26, 2021, ECF No. 21; [BGH] Rule 56.2 Memo. Supp. Mot. J. Agency R., Oct. 26, 2021, ECF No. 22 ("Pl. Br."); *see generally [Fluid End Blocks] from the People's Republic of China, [FRG], India, and Italy*, 86 Fed. Reg. 7,535 (Dep't Commerce Jan. 29, 2021) ([CVD] orders, and am. final affirmative [CVD] determination for the People's Republic of China) ("*Final Results*") and accompanying Issues and Decision Memo., C-428–848, PD 293, bar code 4062827–01 (Dec. 7, 2020), ECF No.

15–2 ("Final Decision Memo.");[1] *[Fluid End Blocks] from the People's Republic of China, [FRG], India, and Italy*, 86 Fed. Reg. 10,244 (Dep't Commerce Feb. 19, 2021) (correction to [CVD] orders). BGH challenges Commerce's *Final Results* on three grounds, arguing (1) that Commerce improperly initiated its CVD investigation and impermissibly expanded the CVD investigation to include new subsidy programs, Pl. Br. at 43–45, (2) failed to include *ex-parte* communications in the record, *id.* at 45–46, and (3) incorrectly determined that seven programs used by BGH during the period of investigation were countervailable subsidies.[2] *Id.* at 7–43.

Defendant United States and defendant-intervenors Ellwood City Forge Company, Ellwood National Steel Company, Ellwood Quality Steels Company, and A. Finkl & Sons ("Defendant-Intervenors") argue that Commerce's decisions to initiate and expand its CVD investigations were in accordance with law because the petition to initiate the CVD investigation "included the relevant laws and policies that provided the countervailable subsidies, tied those facts to the legal framework, and established a reasoned basis to conclude that BGH received subsidy benefits[,]" and that Commerce may consider new subsidy programs uncovered during its investigation. Rebuttal Br. of Def.-Intervenors Opp'n to Pl.'s Rule 56.2. Mot. J. Agency R. at 6, Mar. 22, 2022, ECF No. 31 ("Def.-Inter. Br."); *see* Def.'s Resp. to Pl.'s Rule 56.2 Mot. J. Agency R. at 41–45, Mar. 21, 2022, ECF No. 28 ("Def. Br."). Defendant and Defendant-Intervenors further argue that the record for the CVD investigation is complete because the *ex parte* communication that BGH asserts is missing from the record pertained to the antidumping investigation, not the CVD investigation, and therefore need not be included in the record. Def.-Inter. Br. at 38–39; Def. Br. at 45–46. Finally, Defendant and Defendant-Intervenors argue that Commerce correctly determined the Contested Programs are countervailable. Def.-Inter. Br. at 11–35; Def. Br. at 12–41. For the

[1] On May 10, 2021, Defendant filed amended indices to the public and confidential administrative record underlying Commerce's final determination. *See* Reports, May 3, 2021, ECF Nos. 16–6–7. Citations to administrative record documents in this opinion are to the numbers Commerce assigned to such documents in the indices, and all references to such documents are preceded by "PD" or "CD" to denote public or confidential documents.

[2] BGH challenges Commerce's determination that the following programs are countervailable: 1. Stromsteuergesetz ("StromStG" or "the Electricity Tax Act"), 2. Energiesteuergesetz ("EnergieStG" or "the Energy Tax Act"), 3. Erneuerbare Energien-Gesetz's Reduced Surcharge Program (the "Reduced EEG SurchargeProgram" or "EEG Program"), 4. Kraft-Wärme-Kopplungsgesetz Reduced Surcharge Program ("Reduced KWKG Surcharge Program" or "KWKG Program"), 5. The European Union's ("EU") Emissions Trading System ("ETS Program"), 6. The EU ETS Compensation of Indirect CO_2 Costs Program ("CO_2 Compensation Program"),and 7. Konzessionsabgabenverordung (the "KAV Program" or the "Concession Fee Ordinance Program") (collectively "Contested Programs"). Pl. Br. at 7, 21, 30, 39–40.

following reasons, the court sustains in part and remands in part Commerce's *Final Results*.

BACKGROUND

On December 18, 2018, the FEB Fair Trade Coalition and Defendant-Intervenors ("Petitioners") filed a petition with Commerce requesting that Commerce impose countervailing duties on Fluid End Blocks from the FRG. Fluid End Blocks from China, Germany, India, and Italy: Antidumping and [CVD] Pets., C-428–848, PDs 1–7, CDs 1–9, bar codes 3921764–01–07, 3921755–01–09 (Dec. 18, 2019) ("Petition"); *see also [Fluid End Blocks] from the [FRG], India, Italy, and the People's Republic of China*, 85 Fed. Reg. 2,385, 2,385 nn.1–2 (Dep't Commerce Jan. 15, 2020) (initiation of [CVD] investigations) ("*Initiation Notice*"). On December 23, 2019, Commerce issued a supplemental questionnaire to Petitioners requesting clarification for several programs Petitioners alleged constitute countervailable subsidies. Suppl. Questions, C-428–848, PD 11, bar code 3923818–01 (Dec. 23, 2019). On December 29, 2019, Petitioners filed an amended petition. Amend. of Pets. & Resp. to Commerce's Suppl. Questions, C-428–848, PDs 15–19, CDs 10–15, bar codes 3924916–01–05, 3924910–01–06 (Dec. 29, 2019) ("Am. Petition"). In response, Commerce requested further information from Petitioners regarding "issues pertaining to the proposed scope, industry support, and import statistics in the Petitions." Memo. on Phone Call with Counsel to Pet'rs at 1, C-428–848, PD 20, bar code 3926026–01 (Jan. 2, 2020). Petitioners filed two additional amended petitions in January 2020. Second Amend. of Pets., C-428–848, PD 21, bar code 3926213–01 (Jan. 3, 2020); Third Amend. of Pets., C-428–848, PD 22, bar code 3926682–01 (Jan. 6, 2020).

On January 8, 2020, Commerce initiated a CVD investigation into Fluid End Blocks from the FRG covering a period of January 1, 2018, through December 31, 2018. *Initiation Notice*, 85 Fed. Reg. 2,385, 2,385–86 (issued January 8, 2020). On February 4, 2020, Commerce selected Schmiedewerke Gröditz GmbH ("SWG") and BGH as mandatory respondents and sent an initial questionnaire to the Government of the Federal Republic of Germany ("GOG"). Resp't Selection Memo., C-428–848, PD 54, bar code 3938815–01 (Feb. 4, 2020); [CVD] Questionnaire, C-428–848, PD 55, bar code 3938855–01 (Feb. 4, 2020). Between February 4, 2020, and May 8, 2020, Commerce issued questionnaires and supplemental questionnaires to BGH, the GOG,

and the EU;[3] and received responses and pre-preliminary comments from BGH, the GOG, and the European Commission. *See* Decision Memo. Prelim. Affirmative Determination [CVD] Investigation of [Fluid End Blocks] from [FRG] at 2–3 & nn.9– 10, C-428–848, PD 220, bar code 3975458–01 (May 18, 2020) ("Prelim. Decision Memo.") (listing responses and pre-preliminary comments).

On May 18, 2020, Commerce issued its preliminary results, determining that the GOG was providing countervailable subsidies through, *inter alia*, section 9a of the Electricity Tax Act, section 51 of the Energy Tax Act, the Reduced EEG Surcharge Program, and the EU ETS Program. Prelim. Decision Memo. at 20–27. Commerce requested additional information regarding the Reduced KWKG Surcharge Program, the CO_2 Compensation Program, the Concession Fee Ordinance Program, sections 9b and 10 of the Electricity Tax Act, and section 55 of the Energy Tax Act. *Id.* at 29. On October 21, 2020, Commerce issued its post-preliminary decision memorandum, determining that the GOG was providing countervailable subsidies through these additional programs. Post-Prelim. Analysis [CVD] Investigation: [Fluid End Blocks] from [FRG] at 6–14, C-428–848, PD 271, bar code 4043279–01 (Oct. 21, 2020) ("Post-Prelim. Decision Memo.").

On November 2, 2020, the GOG, the EC, the Petitioners, and BGH submitted case briefs to Commerce. Final Decision Memo. at 3 & n.11; *see* [EC] Case Br., C428–848, PD 281, bar code 4047621–01 (Nov. 2, 2020); Case Br. [BGH], C-428–848, PD 283, bar code 4047998–01 (Nov. 2, 2020) ("BGH Agency Br."); Case Br. [FRG] and Federal Ministry Economic Affairs & Energy of [FRG], C-428–848, PD 285, bar code 4048444–01 (Nov. 2, 2020); Pet'rs' Case Br., C-428–848, PD 282, bar code 4047815–01 (Nov. 2, 2020). Petitioners and BGH submitted rebuttal case briefs to Commerce on November 7, 2020. Final Decision Memo. at 3; *see* Rebuttal Br. [BGH], C-428–848, PD 286, bar code 4051243–01 (Nov. 9, 2020); Pet'r's Rebuttal Br., C-428–848, PD 287, bar code 4051590–01 (Nov. 9, 2020). Between November 20–23, 2020, the parties withdrew their requests for a hearing before Commerce.

[3] On behalf of the European Commission ("EC"), the Delegation of the European Union ("EU") to the United States requested a separate CVD questionnaire for the EC pertaining to the EU Emission Trading System and EU Research Fund for Coal and Steel, two programs that are "enforced and managed by the [EC]." Req. for Separate EU Questionnaire, C-428–848, PD 61, bar code 3940491–01 (Feb. 7, 2020). Commerce issued a questionnaire to the EU on March 5, 2020. *See* Letter from [Commerce] to Delegation of the [EU] Pertaining to [EU] Questionnaire, C-428–848,PD 95, bar code 3950675–01 (Mar. 5, 2020). The EC responded to the questionnaire on behalf of the EU. *See* Submission by the [EC] concerning the initiation of the investigations at 1, C-428–848, PD 115, bar code 3958462–03 (Mar. 26, 2020).

Final Decision Memo. at 3; *see* Letter, C-428–848, PD 289, bar code 4055922–01 (Nov. 20, 2020) (withdrawal of BGH's hearing request); Letter, C-428–848, PD 290, bar code 4056121–01 (Nov. 20, 2020) (withdrawal of Petitioners' hearing request); Letter, C-428–848, PD 291, bar code 4056463–01 (Nov. 23, 2020) (withdrawal of GOG's hearing request). Commerce issued the Final Decision Memorandum on December 7, 2020. Final Decision Memo. at 1. On March 29, 2021, BGH filed its complaint under section 516A of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(A)(i)(II) and (B)(i) (2018),[4] contesting Commerce's final determination under section 705 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1671d. Compl. at 1–2, Mar. 29, 2021, ECF No. 7; *see Final Results*. BGH filed this motion on October 26, 2021. [BGH]'s Mot. J. Agency R., Oct. 26, 2021, ECF No. 21.

JURISDICTION AND STANDARD OF REVIEW

The court exercises jurisdiction pursuant to 19 U.S.C. § 1516a(a)(2)(A)(i)(II) (2018) and 28 U.S.C. § 1581(c), which grant the court authority to review actions contesting the final determination of a CVD investigation. The court will uphold Commerce's determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

I. Initiation of the CVD Investigation

BGH alleges Petitioners' CVD petition failed the legal standard for initiation of a CVD investigation. Pl. Br. at 43. Commerce initiates a CVD investigation "after examining, on the basis of sources readily available to the administering authority, the accuracy and adequacy of the evidence provided in the petition" and determining "whether the petition alleges the elements necessary for the imposition of a [CVD] and contains information reasonably available to the petitioner supporting the allegations." 19 U.S.C. § 1671a(c)(1)(A). Commerce includes in its investigation any practice, subsidy, or subsidy program that appears to be a countervailable subsidy. 19 U.S.C. § 1677d(1). Commerce may also include any practice it discovers during the investigation appearing to provide a countervailable subsidy if sufficient time remains. 19 C.F.R. § 351.311(a)–(b).

Here, Commerce fulfilled its obligations under the statute and regulations in initiating and developing its investigation. Commerce

[4] Further citations to the Tariff Act of 1930, as amended, are to relevant provisions of Title 19 of the U.S. Code, 2018 Edition ("the Act").

reported using its initiation checklist to analyze the Petitioners' claims for the necessary elements prior to initiating the investigation. Final Decision Memo. at 9; *see* Enforcement & Compliance Office AD/CVD Operations [CVD] Investigation Initiation Checklist, C428–848, PD 28, bar code 3928814–01 (Jan. 8, 2020). Although Commerce permitted the Petitioners to amend their petition three times, Pl. Br. at 43–44, Commerce has the discretion to permit amendments to the petition at any time. 19 U.S.C. § 1671a(b)(1); *see Citrosuco Paulista, S.A. v. United States*, 704 F. Supp. 1075, 1083 (Ct. Int'l Trade 1988) (stating that a petition "may be amended at such time and upon such conditions as Commerce" may permit). Further, Commerce has an affirmative obligation to seek additional information on any countervailable programs it discovers. *See Changzhou Trina Solar Energy Co. v. United States*, 195 F. Supp. 3d 1334, 1341–42 (Ct. Int'l Trade 2016); *SolarWorld Americas, Inc. v. United States*, 125 F. Supp. 3d 1318, 1326–27 (Ct. Int'l Trade 2015).

II. *Ex parte* Communications

BGH argues the court should remand Commerce's determination to supplement the record because of *ex parte* communications between Commerce and several senior officials relating to this case. Pl. Br. at 45–46. Commerce must maintain a record of any *ex parte* meeting (i) between "persons providing factual information in connection with a proceeding . . . and the person charged with making the determination" and (ii) "information relating to that proceeding [must be] presented or discussed at such [a] meeting." 19 U.S.C. § 1677f(a)(3). Official government acts are entitled to a "presumption of regularity," which presumes that public officers have properly discharged their duties in the absence of clear contrary evidence. *Butler v. Principi*, 244 F.3d 1337, 1340 (Fed. Cir. 2001) ("courts . . . presume that what appears regular is regular [and shifts the burden] to the attacker to show the contrary." (citing *United States v. Chemical Found., Inc.*, 272 U.S. 1, 14–15 (1926))). Parties must do more than speculate that *ex parte* communications occurred; they must establish that a reasonable basis exists to believe that the administrative record is incomplete. *Soc Trang Seafood Joint Stock Co. v. United States*, 321 F. Supp. 3d 1329, 1342–43 (Ct. Int'l Trade 2018); *see Sachs Auto. Prod. Co. v. United States*, 17 C.I.T. 290, 292–93, 1993 WL 135845 (1993) (holding that plaintiff failed to meet burden showing a reasonable basis exists to believe *ex parte* communications had to be included in the record); *Saha Thai Steel Pipe Co. v. United States*, 661 F. Supp. 1198, 1202–03 (Ct. Int'l Trade 1987) (holding that plaintiffs' allegations of *ex parte* communications lacked facts demonstrating the

reasonable basis test had been met); *see also CSC Sugar LLC v. United States*, 317 F. Supp. 3d 1322, 1327 (Ct. Int'l Trade 2018) (taking judicial notice of a newspaper article to find a "reasonable basis to believe [that] the record [wa]s incomplete").

BGH fails to establish a reasonable basis to believe *ex parte* communications occurred in this CVD investigation or that the record is incomplete. Commerce asserts that the record is complete, *see* Final Decision Memo. at 11, and Commerce is entitled to a presumption of regularity. *See Butler*, 244 F.3d at 1340. The burden is on BGH to provide evidence that facts relating to the CVD investigation were presented or discussed. *See* 19 U.S.C. § 1677f(a)(3); *Butler*, 244 F.3d at 1340. BGH alleges U.S. Representative Mike Kelly participated in an *ex parte* communication with Commerce regarding this case. *See* Pl. Br. at 45; BGH Agency Br. at 11. BGH itself asserts, "[t]he administrative record in the related antidumping investigation" contains *ex parte* communication. Pl. Br. at 45. BGH does not provide specific facts demonstrating this teleconference concerned the CVD investigation. In its briefs, BGH refers to a letter from Rep. Kelly to the Secretary of Commerce, which is not on the record, to argue there was also an *ex parte* meeting with Dr. Peter Navarro, then-Director of the Office of Trade and Manufacturing Policy, which might relate to the CVD investigation. Pl. Br. at 45–46. BGH only speculates that "[g]iven the large number of Senior Commerce Officials participating in this *ex parte* telephone conference, including officials responsible for decision-making in this investigation . . . the *ex parte* meeting is relevant to this [CVD] investigation." *See* Pl. Br. at 45. Such speculation is inadequate to establish a reasonable basis to believe that the record before the court is incomplete.

III. The Contested Programs

A. The Electricity and Energy Tax Acts

BGH argues that provisions in the GOG's Electricity Tax Act and Energy Tax Act are not countervailable because the GOG does not provide a financial contribution, BGH is not receiving a benefit, and the provisions are not specific. *See* Pl. Br. at 6–20; *see also* Pl. Reply Br. at 1–13, 16–21. BGH also argues Commerce erroneously calculated the CVD rates under each section of the Electricity Tax Act and the Energy Tax Act. *See* Pl. Br. at 20–21. The Defendant and the Defendant-Intervenors respond that Commerce's determination that the GOG provided BGH countervailable subsidies under the Electricity and Energy Tax Acts is supported by substantial evidence and is in accordance with law. *See* Def. Br. at 9, 12–21; Def.-Inter. Br. at 8, 11–19. Defendant and Defendant-Intervenors further argue Com-

merce appropriately calculated the subsidy rates. *See* Def.'s Br. at 21–22; Def.-Inter. Br. at 19–20. For the following reasons, Commerce's determination that the challenged provisions of the Electricity and Energy Tax Acts constitute countervailable subsidies is supported by substantial evidence and in accordance with law. However, Commerce failed to support with substantial evidence its calculations of the CVD rate for the provisions of the Electricity Tax Act and the Energy Tax Act.

1. Financial Contribution

In order for a subsidy to be countervailable, a foreign government must provide a financial contribution. 19 U.S.C. § 1677(5)(A)–(B). A government makes a financial contribution, *inter alia*, when it forgoes revenue that is otherwise due. 19 U.S.C. § 1677(5)(D)(ii). The statute does not explicate the phrase "otherwise due," however it is reasonably discernible that Commerce interprets the phrase as a type of "but for" requirement. *See* Post-Prelim Decision Memo. at 7–9 (noting that because of the specific provisions the government does not collect the full tax); *see also* Final Decision Memo. at 48–49 (explaining that if the specific provisions relieve a company from having to pay revenue to the government the government forgoes revenue otherwise due). Further, Commerce's interpretation of "otherwise due" makes no distinction between the tax exemption arising from the measure imposing a financial obligation or arising from a separate measure. *See, e.g.*, *Countervailing Duties*, 63 Fed. Reg. 65348, 65,361 (Dep't Commerce Nov. 25, 1998) (explaining for example that a subsidy given to offset the cost of new environmental requirements is nonetheless a countervailable subsidy assuming it is also specific).

Commerce's interpretation is reasonable. The word "otherwise" means "in different circumstances." *Otherwise* at Entry 2 of 3, *Merriam-Webster's Dictionary*, https://www.merriam-webster.com/dictionary/otherwise (last visited Sept. 13, 2022). Thus, the word suggests that if the government carves out circumstances where money is not due, it makes a financial contribution. BGH argues that the reduction in tax liability cannot arise from the same act imposing tax liability. *See* Pl. Br. at 9–11; *see also* Pl. Reply Br. at 12–13. Thus, BGH argues that a digressive tax rate provided in a single integrated statute does not reduce taxes because no tax is due under the digres-

sive rate.[5] Pl. Br. at 10. Even if BGH's interpretation were reasonable, BGH fails to demonstrate that Commerce's interpretation is unreasonable. Thus, Commerce's interpretation must be accepted. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843–44 (1984) (holding the court must accept the agency's reasonable interpretation of ambiguous statutory language).

Given Commerce's interpretation of the phrase "otherwise due," it properly determined that the GOG provided a financial contribution to BGH under the provisions of the Electricity and Energy Tax Acts. The Electricity and Energy Tax Acts impose taxes on electricity and energy as well as specific exemptions from those taxes. *See* Prelim. Decision Memo. at 20–21; Post-Prelim Decision Memo. at 7–9. Sections 9a, 9b, and 10 of the Electricity Tax Act and Sections 51 and 55 of the Energy Tax Act grant tax relief to companies engaged in specific manufacturing processes.[6] *See* Prelim. Decision Memo. at 20–21; Post-Prelim Decision Memo. at 7–9. To receive tax relief, a company must apply for an exemption under the acts. *See* Prelim. Decision Memo. at 20–21; Post-Prelim Decision Memo. at 7–9. To qualify for tax relief under Section 10 of the Electricity Tax Act and Section 55 of the Energy Tax Act a company must prove it operates an energy management system or was a registered organization pursuant to Article 13 of Regulation (EC) No 1221/2009 for the application year and met requirements improving energy efficiency.[7] Post-Prelim. Decision Memo. at 8–9.

BGH applied under sections 9a, 9b, and 10 of the Electricity Tax Act and sections 51 and 55 of the Energy Tax Act for reductions of the

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[5] BGH invokes the WTO Appellate Body Report in United States –Tax Treatment for Foreign Sales Corporations by quoting, "whether revenue foregone is otherwise due must allow a comparison of the fiscal treatment of comparable income, in the handsof taxpayers in similar situations." Pl. Br. at 10 (quoting Appellate Body Report, United States – Tax Treatment for "Foreign Sales Corporations," Recourse to Article 21.5 of the DSU by the European Communities, ¶ 98, WTO Doc. WT/DS108/AB/RW(Jan. 14, 2002)). Appellate Body Reports bind neither the United States nor this court. *Corus Staal BV v. Dep't of Commerce*, 395 F.3d 1343, 1348–49 (Fed. Cir. 2005); *see also Timken Co. v. United States*, 354 F.3d 1334, 1344 (Fed. Cir. 2004).

[6] For example, section 9b provides tax relief of 5.13 Euro per megawatt-hour for electricity used in the manufacturing sector to companies engaged in specific manufacturing processes, Post-Prelim. Decision Memo. at 7, and section 10 of the Electricity Tax Act provides tax relief for companies in the manufacturing sector of up to ninety percent of the electricity tax, where the amount of tax in a calendar year exceeds 1000 Euros. *Id.* at 8.

[7] Section 51 of the Energy Tax Act grants tax relief for energy used as heating fuel to manufacture and process metals. Prelim. Decision Memo. at 21. Section 55 of the Energy Tax Act permits companies in the manufacturing sector to apply for tax relief based on the amount of natural gas, liquefied petroleum gas, and heating oil. Post-Prelim. Decision Memo. at 9.

taxes it would otherwise have to pay. *See* Prelim. Decision Memo. at 21–22; Post-Prelim. Decision Memo. at 7–9.[8] If not for the tax exemption, BGH would owe more money to the GOG. Commerce's determination that these programs provided a financial contribution is in accordance with law and supported by substantial evidence.

2. Benefit

BGH challenges Commerce's determination that the Electricity Tax Act and Energy Tax Act relief provisions constitute a benefit to BGH. Where a provision provides an exemption or remission of a tax, or a reduction in the base used to calculate a tax, a benefit exists to the extent the tax paid as a result of the provision is less than the tax the firm would have paid in the absence of the provision. 19 C.F.R. § 351.509(a)(1). Commerce is not required to consider the effect of a subsidy in determining whether a benefit exists. *See* Statement of Administration Action for the Uruguay Round Agreements Act, H.R. Rep. No. 103–316 (1994), *as reprinted in* 1994 U.S.C.C.A.N. 4040, 4240 ("SAA") (noting the use of the word "normally" in 19 U.S.C. § 1677(5)(E) is not to suggest that Commerce should or must consider the effect of a subsidy in determining whether there is a benefit). BGH argues for a more narrow interpretation of benefit, arguing these taxes are imposed to decrease greenhouse gas emissions and not to raise government revenues. Pl. Br. at 11. This argument is unavailing because neither the statute nor the regulation considers the purpose of the tax. *See* 19 U.S.C. § 1677(5)(E); 19 C.F.R. § 351.509(a)(1).

In this case, the Electricity and Energy Tax Acts provided BGH relief from taxes on its use of electricity and energy, respectively. *See* Prelim. Decision Memo. at 20–23; Post-Prelim. Decision Memo. at 7–9; Final Decision Memo. at 6–7. Commerce determined the benefit to BGH provided by the Electricity and Energy Tax Acts is the difference in the amount of tax BGH would have paid absent the provisions and the amount BGH actually paid during the period of investigation. *See* Prelim. Decision Memo. at 21–22; Post-Prelim. Decision Memo. at 7–9; Final Decision Memo. at 6–7. BGH argues that the absolute amount of tax it paid as a large energy user is far more than smaller energy users. *See* Pl. Reply Br. at 12–13. However, the amount of tax paid in absolute terms has no bearing on whether

[8] The Electricity Tax Act imposed a tax of [[ ]] on BGH in 2018. *See* Data, C-428–848, CD 221, bar code 4062851–02 ("Conf. Data"). The Energy Tax Act imposed a tax of [[ ]] on BGH in 2018. *See id*. Without the tax rebates, BGH would have paid more in taxes—Commerce determined the total reduction in electricity tax to be [[ ]] and the reduction in energy tax to be [[ ]]. *See* Prelim. Decision Memo. at 20–22; Post-Prelim. Decision Memo. at 7–9; Final Decision Memo. at 6; Conf. Data.

the GOG applied a provision to reduce the amount of tax liability to BGH. Given the record, Commerce reasonably concluded that the reduction of tax BGH would otherwise have paid confers a benefit to BGH. *See* Prelim. Decision Memo. at 20–22; Post-Prelim. Decision Memo. at 7–9; Final Decision Memo. at 6–7; 19 U.S.C. § 1677(5)(E); 19 C.F.R. § 351.509(a)(1)–(b)(1).

BGH complains that the United States' withdrawal from the Paris Climate Accords improves U.S. competitiveness while BGH is burdened by the GOG measures to comply with the climate accords. Pl. Br. at 11–12. BGH seems to suggest the relative burdens of U.S. manufacturers and German manufacturers should affect Commerce's benefit analysis. Neither the statute nor the regulations allow for such a comparison. Whether the United States has a tax scheme similar to the Electricity and Energy Tax Acts is not pertinent to the determination of benefit under U.S. law. *See* 19 U.S.C. § 1677(5)(C); 19 U.S.C. § 1677(5)(E) (not requiring evidence of intent to provide a benefit); SAA at 4242 ("it has long been established that intent to target benefits is not a prerequisite for a countervailable subsidy"). Thus, neither Commerce nor the court is at liberty to evaluate the environmental rationale of the GOG's measures or compare them with those of the United States. Requiring consideration or comparison of the measures is a task reserved for Congress. This court must accept the statute as written by Congress. Therefore, Commerce's determination here that the Electricity and Energy Tax Acts provide a benefit is in accordance with law and supported by the record.

3. Specificity

BGH contests Commerce's finding that these provisions are both *de jure* and *de facto* specific. Where an authority or legislation expressly limits access to a subsidy to a sufficiently small number of enterprises, industries, or groups, the subsidy is specific as a matter of law.[9] 19 U.S.C. § 1677(5A)(D)(i); *see* SAA at 4242. The statute provides no precise mathematical formula for determining when the number of enterprises, industries, or groups is so limited as to be *de jure* specific. SAA at 4242. However, the SAA explains that the specificity provision should be applied as an initial screening method to winnow out only those subsidies that truly are broadly available and widely used throughout an economy. SAA at 4242. Moreover, the statute provides a safe harbor for subsidies that are "not specific as a matter of law." 19 U.S.C. § 1677(5A)(D)(ii). Subsidies are not specific as a matter of law where the legislation governing the provision of the

[9] The scope of enterprise or industry includes a group of such enterprises or industries. 19 U.S.C. § 1677(5A).

subsidy provides: (1) "objective criteria or conditions governing the eligibility for, and the amount of," the subsidy; (2) "eligibility is automatic;" (3) "the criteria for eligibility are strictly followed;" and (4) "the criteria are clearly set forth in the relevant statute, regulation, or other official document." 19 U.S.C. § 1677(5A)(D)(ii). Objective criteria are criteria that are neutral and do not favor one enterprise or industry over another. *Id.*; *see* SAA at 4243. Neutral in this context means economic in nature and horizontal in application, such as the number of employees or the size of the enterprise. SAA at 4243.

A domestic subsidy is specific to an enterprise or industry as a matter of fact, if

> one or more of the following factors exists: (I) The actual recipients of the subsidy . . . are limited in number. (II) An enterprise or industry is a predominant user of the subsidy. (III) An enterprise or industry receives a disproportionately large amount of the subsidy. (IV) The manner in which the authority . . . exercised discretion in [granting] the subsidy . . . .

19 U.S.C. § 1677(5A)(D)(iii). The plain language of the statute empowers Commerce to rely upon only one factor. *Id.* ("if one or more of the following factors exists"). Although the SAA states, "the Administration intends that Commerce seek and consider information relevant to all of these factors," SAA at 4243, it acknowledges that each case will be unique, and Commerce will find *de facto* specificity should one or more factors exist. *Id.* ; 19 U.S.C. § 1677(5A)(D)(iii). Moreover, Commerce's regulation explicitly states, "If a single factor warrants a finding of specificity, [Commerce] will not undertake further analysis." 19 C.F.R. § 351.502(a).

Here, Commerce determined that section 9a of the Electricity Tax Act and section 51 of the Energy Tax Act are specific as a matter of law because they are limited to specific products and manufacturing processes. Final Decision Memo. at 41. BGH claims that the rate reductions are open to "all companies in the manufacturing sector," spanning 225 diverse industries. Pl. Br. at 14, Commerce reasonably supported its determination by explaining that only those "industries

identified in the text of each law" were eligible for relief.[10] Final Decision Memo. at 41

Commerce's determination of *de facto* specificity is also in accordance with law and supported by substantial evidence. Commerce found that sections 9b and 10 of the Electricity Tax Act and section 55 of the Energy Tax Act are *de facto* specific because actual use of the provisions was limited to a percentage of the economy as a whole. *See* Final Decision Memo. at 43–45; Post-Prelim. Determination at 7–9.[11] Specifically, Commerce noted that tax relief under section 9b was limited to 33,192 of the 231,063 companies in the manufacturing sector, or fourteen percent of users. Final Decision Memo. at 44–45;

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[10] The tax in the Electricity Tax Act for

> demonstrably taxed electricity which a company in the manufacturing sector has withdrawn shall, upon application, be remitted, reimbursed or refunded
>
> 1. for electrolysis,
>
> 2. to produce glass and glassware, ceramic products, ceramic wall and floor tiles and panels, bricks, tiles and construction products in baked clay, cement, lime and burnt gypsum, products from concrete, cement and plaster, vitrified-bonded abrasives, mineral insulating materials and products from mineral insulating materials, mineral catalyst supports, goods made of asphalt and bituminous products, goods made of graphite or other carbon, and aerated concrete products for drying, firing, melting, heating, keeping warm, expanding, tempering or sintering the above-mentioned products or the semi-finished products used in their production,
>
> 3. to produce and work metals as well as, within the context of the production of metal products, to produce forging, pressing, drawing and stamping parts, roll forms and powder metallurgy products and for the treatment and coating of metals, and for heat treatment for melting, heating, keeping warm, expanding respectively or other forms of heat treatment, or
>
> 4. for chemical reduction purposes.

Electricity Tax Act, § 9a, at 9–10, C-428–848, PD 158, bar code 3962318–06. Upon application under the Energy Tax Act, tax relief shall be granted for taxes on coal, petroleum coke, gas oils, or other solid energy products

> which have been used as heating fuel
>
> 1. by a company in the manufacturing sector within the meaning of section 2 number 3 of the Electricity Tax Act . . .
>
> a) to produce glass and glassware, ceramic products, ceramic wall and floor tiles and panels, bricks, tiles and construction products in baked clay, cement, lime and burnt gypsum, products from concrete, cement and plaster, vitrified-bonded abrasives, mineral insulating materials and products from mineral insulating materials, mineral catalyst supports, goods made of asphalt and bituminous products, goods made of graphite or other carbon, and aerated concrete products for drying, firing, melting, heating, keeping warm, expanding, tempering or sintering the above-mentioned products or the semi-finished products used in their production,
>
> b) to manufacture and process metals as well as within the context of manufacturing metal products to manufacture forging, pressing, drawing and stamping parts, roll forms and powder metallurgy products and for surface refinement and heat treatment,
>
> c) for chemical reduction purposes,
>
> d) simultaneously for heating purposes and for purposes other than for use as heating fuel or motor fuel,
>
> 2. for the thermal treatment of waste or exhaust air.

Energy Tax Act, § 51, at 48, C-428–848, PD 158, bar code 3962318–06.

[11] As BGH notes, Commerce did not determine *de facto* specificity on section 9a. Pl. Br. at 17 n.6; *see* Prelim. Decision Memo. at 20–21; Final Decision Memo. at 41–42.

Post-Prelim. Determination at 7. Under section 10, tax relief was limited to 9,409 of the 231,063 companies in the manufacturing sector, or four percent of users. Final Decision Memo. at 44–45; Post-Prelim. Decision Memo. at 8. Under section 55 of the Energy Tax Act, Commerce found that 5,448 of 231,063 companies received tax relief. Post-Prelim. Decision Memo. at 9. That the actual number of users is greater than in previous cases where Commerce concluded no specificity, *see* Pl. Br. at 19–20 (discussing *Preliminary Affirmative [CVD] Determination and Preliminary Negative Critical Circumstances Determination*, 67 Fed. Reg. 5,991 (Dep't of Commerce Feb. 8, 2002) (carbon and certain alloy steel wire rod from [FRG]) ("*Steel Wire Rod from Germany*"), and accompanying Issues and Decision Memo. (Aug. 23, 2002) (final determination [CVD] investigation of carbon and certain alloy steel wire rod from [FRG]), is of no moment here. It is reasonably discernable from Commerce's consideration of the percentage of use for sections 9b and 10 of the Electricity Tax Act and section 55 of the Energy Tax Act that Commerce concludes whether the number of users is sufficiently small such that a program is *de facto* specific relates not only to the number of users in absolute terms, but also to the portion of the economy that number represents. *See* Final Decision Memo. at 43– 44. Given the purpose of the specificity analysis, Commerce's determination is reasonable. *See* SAA at 4242 (the specificity test functions "as an initial screening mechanism to winnow out only those foreign subsidies which truly are broadly available and widely used throughout an economy").

4. CVD Rate Calculation

BGH argues that Commerce's calculation is contrary to law and unsupported by substantial evidence because Commerce failed to consider the absolute value of the total energy taxes it paid and did not consider expenses it incurred to receive the subsidy. *See* Pl. Br. at 20. Defendant-Intervenors argue that BGH fails to support its claims with evidence as required by 19 U.S.C. § 1677(6). Def.-Inter. Br. at 20.

The benefit of a countervailable subsidy in the form of tax relief is equal to the difference in the tax amount the firm would have paid absent the provision and the amount it actually paid during the period of investigation. 19 C.F.R. § 351.509(a)(1) & (b)(1). Neither the statute nor the regulations require or allow Commerce to assess a taxpayer's total tax paid in comparison to other taxpayers. *See* 19 U.S.C. § 1677(5); 19 C.F.R. §§ 351.503, 351.509. Further, the statute allows Commerce to deduct from the gross countervailable subsidy the amount of any fee, deposit, or similar payment paid to qualify for the benefit of the countervailable subsidy. 19 U.S.C. § 1677(6)(A).

Here, Commerce determined the tax savings for the five provisions of the Electricity and Energy Tax Acts and treated them as a recurring benefit under 19 C.F.R. § 351.524(c)(1). Prelim. Decision Memo. at 21–22; Post-Prelim. Decision Memo. at 7–9; Final Decision Memo. at 6–7. For each provision, Commerce divided the benefit during the period of investigation by the total sales for BGH to arrive at the CVD rate. Prelim. Decision Memo. at 21–22; Post-Prelim. Decision Memo. at 7– 9; Final Decision Memo. at 6–7.[12] BGH argues Commerce, in its CVD rate calculation, should have accounted for the absolute value of the total energy taxes BGH paid in comparison to other customers. *See* Pl. Br. at 20. However, Commerce's regulations require Commerce to calculate the difference in tax BGH would have paid absent the countervailable provisions and do not require it to account for the absolute amount of tax paid in comparison to other customers. *See* 19 C.F.R. § 351.509(a)(1). Therefore, Commerce's determination that it need not consider the absolute value of the total energy taxes is reasonable.

BGH also argues that Commerce did not consider the costs of complying with the provisions of the Electricity and Energy Tax Acts in its subsidy calculations. Pl. Br. at 20–21. In its brief before the agency, BGH raised the cost of compliance, stating, "Commerce also failed to properly account for all the costs related to complying with the various climate change measures," providing as an example "an energy management system" under section 10 of the Electricity Tax Act.[13] BGH Agency Br. at 8–9. Commerce did not address BGH's argument in the Final Decision Memo. *See* Final Decision Memo. at 1–2, 39–45. Defendant-Intervenors argue BGH failed to support its claims with evidence, *see* Def.-Inter. Br. at 20; however, because Commerce did not address these costs, the court will not speculate

[12] For section 9a of the Electricity Tax Act, Commerce determined a rate of 0.81% *ad valorem* for BGH during the period of investigation. Prelim. Determination at 21; Final Decision Memo. at 6. Commerce determined a rate of 0.07% *ad valorem* under section 9b and 0.19% *ad valorem* under section 10. Post-Prelim. Determination at 7– 8; Final Decision Memo. at 6. For section 51 of the Energy Tax Act, Commerce determined a rate of 0.57% *ad valorem*. Prelim. Determination at 22; Final Decision Memo. at 7. For section 55 of the Energy Tax Act, Commerce determined a rate of 0.01% *ad valorem*. Post-Prelim. Determination at 9; Final Decision Memo. at 7.

[13] Also as discussed above, Section 10 of the Electricity Tax Act and Section 55 of the Energy Tax Act require a company to prove it operates an energy management system or was a registered organization pursuant to Article 13 of Regulation (EC) No 1221/2009 for the application year and meet requirements for improving energy efficiency.

what Commerce might have concluded.[14] The court remands this issue to Commerce for it to consider in the first instance. Commerce may consider whether it wishes to reopen the record to permit the parties to submit evidence on BGH's costs of compliance.

B. The EEG and KWKG Reduced Surcharge Programs

BGH argues the reductions of the EEG and the KWKG surcharges under the Special Equalization Scheme ("SES") do not provide a financial contribution by the GOG or a benefit to BGH under the law. Pl. Br. at 22–25. BGH also argues Commerce misapplied the standard in finding *de jure* specificity. *Id.* at 25–29. Finally, BGH challenges Commerce's calculation of the subsidy rate for the SES' reduction of the EEG and KWKG surcharges. *Id.* at 29–30. In response, the Defendant and the Defendant-Intervenors argue the SES constitutes a financial contribution by the GOG and benefit to BGH that is *de jure* specific. Def. Br. at 24–29; Def.-Inter. Br. at 21–24. The Defendant and Defendant-Intervenors also argue that Commerce properly calculated the CVD rate for this program. Def. Br. at 29–30; Def.-Inter. Br. at 24–25. For the following reasons, Commerce's determination of a countervailable subsidy and its calculation of the CVD rate under these provisions are supported by substantial evidence and are in accordance with law.

1. Financial Contribution

As previously discussed, a government makes a financial contribution when it forgoes revenue that is otherwise due. 19 U.S.C § 1677(5)(D)(ii). A government also makes a financial contribution where it entrusts or directs a private entity to make a financial contribution, if providing the contribution would normally be vested in the government and the practice does not differ in substance from practices normally followed by governments. 19 U.S.C. § 1677(5)(B)(iii). The SAA clarifies that a private entity "is not necessarily limited to a single entity, but can include a group of entities or persons," SAA at 4239, and "the 'entrusts or directs' standard shall be interpreted broadly" to avoid "the indirect provision of a subsidy to become a loophole when unfairly traded imports enter the United States and injure a U.S. industry." *Id.*

[14] Commerce notes that the GOG "states that tax relief is only granted if the applying company proves that it operated an energy management system or was a registered organization pursuant to Article 13 of the Regulation (EC) No 1221/2009 for the application year." Post-Prelim. Decision Memo. at 8. However, Commerce did not address operation of an energy management system as a cost of compliance in calculating the CVD rate. *See* Prelim. Decision Memo. at 22; Post-Prelim. Decision Memo. at 8; Final Decision Memo. at 6–7.

Here, Commerce properly determined the GOG made a financial contribution to BGH. The EEG and KWKG surcharges are mechanisms to distribute among electricity consumers the cost of promoting renewable energy sources. Prelim. Decision Memo. at 22; Post-Prelim. Decision Memo. at 10. Under the EEG, network operators of all voltage levels ("NOs") must connect to and prioritize installations producing EEG electricity. Prelim. Decision Memo. at 22. The GOG sets EEG electricity tariffs, which NOs must pay EEG installation operators. *Id.* The NOs sell EEG electricity at prices prevailing on the spot market, which is frequently less than the legally mandated price paid to the installation operators. *Id.* at 22–23. Final customers pay the difference in the form of the EEG surcharge. *Id.* at 23.[15] The scheme for distribution of CHP electricity under the KWKG program is identical to that for EEG electricity. *See id.*

The SES provides that the GOG can certify final customers as electricity-intensive undertakings ("EIUs") in the manufacturing sector, and those EIUs are entitled to a reduction in their EEG surcharge. Prelim. Decision Memo. at 22–23. The EIUs receiving a reduction of the EEG surcharge then also automatically qualify for a reduction of their payments of the KWKG surcharge. Post-Prelim. Decision Memo. at 10–11. The reduction in EEG surcharges for EIUs causes a higher EEG surcharge for other customers. *Prelim. Decision Memo.* at 23. Similar to its reduction and redistribution of the EEG surcharge, the GOG uses the KWKG surcharge to allocate the costs of expanding high efficiency combined heat and power ("CHP") plants among final customers. Post-Prelim. Decision Memo. at 10. Commerce determined, through this scheme, the GOG promotes production of EEG energy while relieving EIUs from the effect of the scheme's higher costs of energy. Prelim. Decision Memo. at 24. Promoting production of EEG energy while allocating costs of that production accomplishes public policy objectives—a function normally vested in the government. *See* 19 U.S.C. § 1677(5)(B)(iii). The SES constitutes a financial contribution in the form of revenue forgone because the GOG directed the private entities not to collect the surcharges for EEG and CHP energy to BGH based on its status as an EIU and permitted those private entities to reallocate the cost of granting reduced surcharges to other final customers.

BGH argues that Commerce fails to explain how the private entities are forgoing any revenue, noting that the entities fully recoup their costs. Pl. Br. at 23; Pl. Reply Br. at 13–14. A subsidy exists when an authority entrusts a private entity to "provide a financial contri-

[15] The NOs are not required to pass along the EEG surcharge to the final customer,but the parties agree that they usually do. Oral Argument at 17:10–19:10, July 28, 2022.

bution . . . to a person," 19 U.S.C. § 1677(5)(B)(iii), and therefore it is irrelevant whether an entity recoups that contribution from another person. *See id.*

BGH argues that Commerce failed to establish that calculating and recouping the additional costs of renewable energy would normally be vested in the government. Pl. Br. at 24; *see* 19 U.S.C. § 1677(5)(B)(iii). On the contrary, Commerce determined that, by implementing the SES, the GOG relieved EIUs from higher electricity costs associated with encouraging the production of renewable energy, which commerce reasonably determined are functions normally performed by the government. *See* Prelim. Decision Memo. at 24.[16] Commerce's determination that the SES provides a financial contribution is in accordance with law and on this record is reasonable.

2. Benefit

Commerce determined the SES provides a benefit to BGH under 19 C.F.R. § 351.503(b)(2). Prelim. Decision Memo. at 25; Post-Prelim. Decision Memo. at 12. When a benefit does not take the form of a reduction of input costs or an enhancement of revenues, Commerce will determine whether a benefit is conferred by examining whether the alleged program or practice has common or similar elements to the following examples: equity infusions, favorable loan terms, favorable loan guarantees, and goods and services provided for less than adequate remuneration. 19 C.F.R. § 351.503(b)(2); 19 U.S.C. § 1677(5)(E)(i)–(iv). Here, the EEG and KWKG surcharges increased the cost of energy BGH needed to buy. As an EIU, BGH qualified for a reduction of the EEG and KWKG surcharges. The reduction of the surcharges lowered BGH's energy costs. Because BGH was able to receive energy for a lesser cost, Commerce's determination that BGH received a benefit was reasonable. BGH argues it received no benefit under the EEG or the KWKG because the very existence of the surcharges significantly increased its electricity costs. Pl. Br. at 25; *see* Pl. Reply. Br. at 16–19. BGH cites no authority for its argument. *See* Pl. Br. at 25; *see also* 19 U.S.C. § 1677(5)(E); 19 C.F.R. § 351.503(b)(2). The program at issue here is the reduction of the surcharges, rather than the imposition of the surcharges in the first instance. Commerce reasonably determined BGH received a benefit in the form of reduced EEG and KWKG surcharges.

[16] As it did with the Electricity and Energy Tax Acts, BGH argues taxes cannot be "otherwise due" if an exemption is included in the same provision imposing the tax burden. *See* Pl. Br. at 23–24 (stating that the EEG "is one integrated law and all of its provisions are integrally linked together and have been since the inception of the Act," which is also true for the KWKG); 19 U.S.C. § 1677(5)(D)(ii). For the reasons discussed above, that argument fails here as well.

3. Specificity

Commerce's determination of *de jure* specificity for the SES' reductions of the EEG and KWKG surcharges is reasonable. Where the authority providing the subsidy expressly limits access to the subsidy to an enterprise or industry or group of enterprises or industries, the subsidy is specific as a matter of law. 19 U.S.C. § 1677(5A)(D)(i). If an authority providing the subsidy establishes objective criteria or conditions governing the eligibility for a subsidy, the subsidy is not specific as a matter of law, if eligibility is automatic and the criteria or conditions are strictly followed and clearly set forth in the relevant statute, regulation, or other official document. 19 U.S.C. § 1677(5A)(D)(ii). Objective criteria or conditions are criteria or conditions that are neutral and that do not favor one enterprise or industry over another. *Id.*

Commerce's determination that the GOG expressly limited access to the subsidy using non-objective criteria is supported by the record. *See* Final Decision Memo. at 29; *see also* Resp. [FRG] and the Fed. Ministry for Economic Affairs and Energy of the [FRG] to Section II of the Initial Questionnaire at Ex. EEG(SCS)-03, at Annex 4, at 161–71 (pdf 403–13), C-428–848, PD 159, bar code 3962318–07 (Apr. 6, 2020) ("IQR 4–6-20"). Commerce determined energy intensive criteria favored enterprises or industries requiring large amounts of electricity and exposed to international competition.[17] Final Decision Memo. at 29.

BGH argues that the SES' reductions are granted to companies based on objective criteria—the amount of each company's energy use. Pl. Br. at 26. In describing subsidies that may fall into the safe harbor of 19 U.S.C. § 1677(5A)(D)(ii), the SAA defines objective criteria as neutral criteria and neutral criteria as "economic in nature and horizontal in application, such as the number of employees or the size of the enterprise." SAA at 4243. Commerce does not address whether energy usage could be economic in nature and horizontal in application. Nonetheless, the SAA cautions that such criteria may not favor some enterprises or industries over others. *See* SAA at 4243. Here, Commerce determined, and the record supports, that the criteria favored enterprises using large amounts of electricity, which are exposed to trade competition. *See* Final Decision Memo. at 29; *see also* IQR 4–6-20 at Ex. EEG(SCS)-03, at Annex 4, at 161–71 (pdf 403–13).

[17] EIUs seeking a reduction in the surcharges are required to submit applications to the Federal Office for Economic Affairs and Export Control ("BAFA"), which reviews the application and either issues a notice declaring the surcharge is capped or rejects the application. Post-Prelim. Decision Memo. at 10–11; Final Decision Memo. at 22. BAFA is part of the GOG, specifically the Federal Ministry for Economic Affairs and Energy. IQR 4–6-20 at Ex. EEG (SCS)-01, at 5 (pdf 9).

Annex 4 lists specific industries eligible for the SES' reductions. *Id.* Therefore, Commerce's determination that the program is specific as a matter of law is reasonable on this record.

4. CVD Rate Calculation

BGH argues Commerce's calculation of the CVD rate for the benefit provided by the SES is contrary to law because Commerce cannot apply the base surcharge rates to BGH's full electricity usage and disregard BGH's high electricity consumption relative to other electricity customers. Pl. Br. at 30. BGH also argues Commerce must consider the cost BGH incurs to qualify for the subsidy. *Id.*

Neither the statute nor the regulations require or allow Commerce to assess a taxpayer's total tax paid in comparison to other taxpayers. *See* 19 U.S.C. § 1677(5); 19 C.F.R. §§ 351.503, 351.509. The statute allows Commerce to deduct from the gross countervailable subsidy the amount of any fee, deposit, or similar payment paid to qualify for the benefit of the countervailable subsidy. 19 U.S.C. § 1677(6)(A).

Here, Commerce determined how much the total EEG surcharge BGH should have paid by applying the cents per kilowatt-hour EEG surcharge to the total kilowatt-hour consumption during the period of investigation. Prelim. Decision Memo. at 25. To determine the benefit during the period of investigation, Commerce subtracted the amount of EEG surcharge BGH actually paid from the total EEG surcharge. *Id.* Commerce divided the benefit by BGH's total sales for that period. *Id.* Commerce determined a rate of 3.82 *ad valorem* for BGH. *Id.*; *see* Final Decision Memo. at 30. Commerce likewise calculated the KWKG benefit by applying the cents per kilowatt-hour surcharge to the total kilowatt-hour consumption. Post-Prelim. Decision Memo. at 12. Commerce subtracted from this total the amount of KWKG surcharge BGH actually paid, and then divided that benefit by the total sales for BGH. *Id.* Commerce determined a rate of 0.17 *ad valorem* for the KWKG surcharge reduction. *Id.* Commerce's determination accords with the law and is reasonable.

C. The EU ETS Additional Free Emissions Allowances

BGH argues that Commerce's determination that the allocation of additional free allowances for carbon emissions to BGH under the EU's Emissions Trading System ("ETS") are a financial contribution and a benefit to BGH is contrary to law. Pl. Br. at 30–34. BGH further argues that Commerce's determination that the program is *de jure* specific is contrary to law and that Commerce's CVD rate calculations are not supported by substantial evidence. *Id.* at 34–38. In response, Defendant and Defendant-Intervenors assert that Commerce's determination that the additional free allowances given to BGH constitute

a countervailable subsidy is in accordance with the law, Def. Br. at 30–34; Def.-Inter. Br. at 25–29, and that Commerce's CVD rate calculation is supported by substantial evidence. Def. Br. at 34–35; Def.-Inter. Br. at 29–31. For the following reasons, Commerce's determination that the additional free emissions allowances given to BGH under the ETS is a countervailable subsidy and its CVD rate calculation are supported by substantial evidence and in accordance with law.

1. Financial Contribution

A government makes a financial contribution when it forgoes revenue which is otherwise due. 19 U.S.C. § 1677(5)(D)(ii). Under this standard, Commerce reasonably determined the distribution of additional free carbon emissions allowances to companies on Germany's carbon leakage list, including BGH, to be a financial contribution.

Under the ETS, the EU requires companies emitting large amounts of greenhouse gas into the atmosphere to reduce their emissions and to surrender emissions allowances for the carbon they emitted in the previous year. Prelim. Decision Memo. at 25. These companies obtain allowances (1) freely from their government, (2) by purchasing allowances through an EU-regulated auction, or (3) by purchasing from private companies on a secondary market. *Id.* at 25–26. All companies other than power stations are given allowances to cover 44.2% of the emissions of the most efficient companies in each sector ("benchmark installations"). *Id.* at 26. States distribute free allowances according to a complex calculation based on the benchmark installations. *Id.* at 25–26. For certain large companies at significant risk of carbon leakage, i.e., being unable to cover the higher environmental costs of compliance under the ETS ("carbon leakage list" companies), the state provides additional free allowances to meet 100% of the allowances needed by the benchmark installations. Id. at 26.[18] If an installation is not able to cover its emissions using only the freely allotted allowances, the installation must purchase additional allowances from the government auction or a private party or invest in technological improvements to reduce its emissions. *Id.* at 27.

Commerce determined BGH was relieved of having to purchase some number of additional allowances because of the additional free allowances. *See* Final Decision Memo. at 49; Prelim. Decision Memo. at 25–27. As a company on the carbon leakage list during the period of investigation, BGH received additional freely allocated emissions

[18] Whether an industry is considered at significant risk of carbon leakage is determined by criteria tied to the increase in production cost induced by implementation of the ETS and to the sector's trade intensity with non-EU countries.Prelim. Decision Memo. at 26.

allowances beyond the standard rate of allocation. *See* Final Decision Memo. at 49; Prelim. Decision Memo. at 25–27. Specifically, BGH received allowances equaling 100% of the emissions of the benchmark installations. If BGH were not on the carbon leakage list, it would have only received 44.2% of the emissions of benchmark installations. *See* Final Decision Memo. at 48–49; Prelim. Decision Memo. at 25–27. The number of additional allowances BGH received as a result of being on the carbon leakage list is the number of the allowances BGH did not have to purchase and therefore revenue the government did not collect. Final Decision Memo. at 49–50 (finding that the companies on the carbon leakage list did not have to purchase additional allowances from the government, and thus the government had given up its right to collect revenue); Prelim. Decision Memo. at 25–27. BGH erects a straw man to argue neither the EU nor any member state may collect revenues on the free allowances generally. *See* Pl. Br. at 33. The issue is not whether the GOG can sell the free allowances to companies, rather the issue is whether the GOG forgoes revenue when it gives additional free allowances to companies on the carbon leakage list like BGH, reducing the number of allowances BGH must purchase at the state-run auction or the secondary market.

2. Benefit

When a benefit does not take the form of a reduction of input costs or an enhancement of revenues, Commerce will determine whether a benefit is conferred by examining whether the alleged program or practice has common or similar elements to the following examples: equity infusions, favorable loan terms, favorable loan guarantees, and goods and services provided for less than adequate remuneration. 19 C.F.R. § 351.503(b)(2); 19 U.S.C. § 1677(5)(E)(i)–(iv). Here, Commerce found that BGH was relieved of the obligation to pay for the additional emissions allowances it was given because it was on the carbon leakage list. Final Decision Memo. at 49. Instead, the GOG provided them to BGH at no cost. BGH argues it is incurring additional costs because it is required to purchase emission allowances at all, which is an obligation significantly increasing its energy costs. Pl. Br. at 33. However, Commerce determines benefit by the reduction or elimination of the obligation, without regard to the source of that obligation. *See, e.g.*, *Countervailing Duties*, 63 Fed. Reg. 65348, 65,361 (Dep't Commerce Nov. 25, 1998) (explaining for example that a subsidy given to offset the cost of new environmental requirements is nonetheless a countervailable subsidy assuming it is also specific). Due to receiving the additional free allowances, BGH received some-

thing for free— allowances BGH otherwise would have been required to pay to acquire at auction or on the private market.

3. Specificity

Commerce reasonably determined the ETS additional free allowances program is *de jure* specific because it is expressly limited to a group of companies. Commerce found eligibility for this subsidy to be limited by law to the companies on the carbon leakage list. Final Decision Memo. at 50; *see* 19 U.S.C. § 1677(5A)(D)(i); *see also* Prelim. Decision Memo. at 26–27. BGH characterizes Commerce's *de jure* specificity determination as an unlawful rule of universal availability. Pl. Br. at 34. However, the standard employed by Commerce is found in the statute. *See* 19 U.S.C. § 1677(5A)(D)(i) ("[T]he subsidy is specific as a matter of law . . . [w]here the authority [or legislation] providing the subsidy . . . expressly limits access to the subsidy to an enterprise or industry . . ." or to a group of enterprises or industries).

BGH also argues that free allowances are granted to companies based on objective criteria—each company's risk of carbon leakage. Pl. Br. at 35. However, not all companies subject to the ETS are eligible to be on the carbon leakage list. *See* Ex. ETS SQ 3 DE at Art. 10a ¶¶ 12–17, C-428–848, CD 134, barcode 3969270–02 (Apr. 28, 2020) (describing selection criteria to determine which sectors or subsectors subject to the ETS are at significant risk of carbon leakage); *see also* ETS Ex. 4 at Annex, C-428–848, PD 118, barcode 3958462–06 (Mar. 26, 2020) ("a list of sectors and subsectors which are deemed to be exposed to a significant risk of carbon leakage for the period of 2015–2019"). The statute requires objective criteria to be neutral—the criteria must not favor certain industries over others. 19 U.S.C. § 1677(5A)(D)(ii); *see* SAA at 4243. It is reasonably discernible that Commerce determined the restrictions of the carbon leakage list to favor certain enterprises or industries or groups of certain industries or enterprises. *See* Final Decision Memo. at 49–50 ("we find this program is *de jure* specific under [the Act] because eligibility for this subsidy is limited by law to companies on the carbon leakage list"); *see also* Resp. from Delegation of [EU] to [Commerce] Pertaining to [EC] at ETS Questionnaire Reply at 9, C-428–848, PD 117, bar code 3958462–05 (Mar 26, 2020) ("Industrial installations covered under the EU ETS free allocation must belong to one of the following two categories: industrial installations . . . at significant risk of carbon leakage (which get 100% free allowances based on the average of the 10% most efficient installations) or industrial installation in other sectors (which get decreasing level of free allowances)").

4. CVD Rate Calculation

Commerce found that the allocation of additional free allowances is a financial contribution in the form of revenue forgone. Final Decision Memo. at 47–48. In contrast, Commerce found that the free allowances provided to all companies is not a countervailable subsidy. *See* Prelim. Decision Memo. at 25–27. When calculating the benefit, Commerce only calculated the additional allowances each company received as a result of being on the carbon leakage list. Final Decision Memo. at 49. Commerce properly calculated the CVD rate based only on the additional free emissions allowances the GOG gave to BGH during the period of review by multiplying the total amount of additional free allowances given to BGH by the price BGH would have paid for those allowances had BGH been required to purchase them and then dividing that total by BGH's total sales value to reach a CVD rate of 0.05% *ad valorem*. *See* Prelim. Decision Memo. at 27.

BGH alleges Commerce miscalculated the free allowances BGH used to cover its emissions.[19] Pl. Br. at 38. BGH argues it purchased ETS allowances and certificates in 2018, and it only needed free allowances to cover a minimal amount of its emissions in 2018. *See id.*[20] That BGH purchased additional allowances during the period of investigation is irrelevant to Commerce's CVD rate calculation. Instead, it is the number of additional free allowances the GOG provided to BGH during the period of investigation that is relevant to

[19] The Defendant contends BGH failed to exhaust its argument that Commerce used the wrong number of allowances because BGH did not raise that argument in its administrative case brief or as a ministerial error after the final determination. Def. Br. at 34–35. The court has discretion whether to require the exhaustion of administrative remedies. *See* 28 U.S.C. § 2637(d) (the court "shall, where appropriate, require the exhaustion of administrative remedies"). *See also Boomerang Tube LLC v United States*, 856 F.3d 908, 912–13 (Fed. Cir. 2017); *Corus Staal BV v. United States*, 502 F.3d 1370, 1379 (Fed. Cir. 2007). Nonetheless, where a party does not have a fair opportunity to raise a claim at the administrative level, the exhaustion doctrine does not preclude the claim. *See Qingdao Taifa Group Co., Ltd. v. United States*, 637 F. Supp. 2d 1231, 1237 (Ct. Int'l Trade 2009) (holding that plaintiff lacked a fair opportunity to challenge issues because Commerce raised those issues after the deadline for case briefs had passed). Here, Commerce issued its Post-Preliminary Decision on October 22, 2020, over four months after its Preliminary Decision on May 19, 2020. Post-Prelim. Decision Memo. at 1; Prelim. Decision Memo. at 1. Commerce then set a one-week period for the parties to provide responsive case briefs to the agency. At the same time, Commerce also issued a questionnaire in the related antidumping duty investigation on October 20, 2020. *See* Extension Req. at 1, C-428–848, PD 279, bar code 4047218–01 (Oct. 30, 2020). BGH requested a four-day extension, and Commerce denied it. *See* Denial of Extension Req. at 1, C-428848, PD 280, bar code 4047409–01 (Oct. [30], 2022); *see also* BGH Agency Br. at 2. Commerce does not dispute BGH's account of the timeline. Under these circumstances, BGH had insufficient time to review changes to the Preliminary Decision prior to filing its brief. Given the timeline of events, which Defendant does not dispute, it would be inappropriate to require exhaustion for this issue.

[20] BGH states it purchased [[ ]] allowances in 2018. Confidential [BGH] Rule 56.2 Memo. Supp. Mot. J. Agency. R. at 38, Oct. 26, 2021 (ECF No. 23). BGH argues it needed [[ ]] allowances to cover its emissions in 2018, leaving a balance of only [[ ]] to be covered by free allowances. *Id.*

Commerce's CVD rate calculation. *See* 19 U.S.C. § 1667(5)(E); 19 C.F.R. § 351.503(b)(2) (noting Commerce "will determine whether a benefit is conferred by examining whether the alleged program or practice has common or similar elements to the four illustrative examples in sections 771(5)(E)(i) through (iv) of the Act"). Because Commerce calculated BGH's benefit using the number of additional free allowances given to BGH by the GOG, *see* Prelim. Decision Memo. at 27; Final Decision Memo. at 49, Commerce's benefit calculation is supported by substantial evidence and is in accordance with law.

D. CO_2 Compensation Program

BGH does not expressly argue the CO2 Compensation Program provides a financial contribution but instead alleges the program does not provide a countervailable benefit and only offsets the burden imposed on BGH by the ETS. Pl. Br. at 39. BGH argues that in any case the program is neither *de jure* nor *de facto* specific. *Id.* BGH also argues Commerce miscalculated any benefit because it fails to account for BGH's significantly increased energy costs. Pl. Reply Br. at 18. In response, the Defendant and Defendant-Intervenors argue the program provides a countervailable benefit and is *de jure* specific. Def. Br. at 35–37; Def.-Inter. Br. at 31–32. For the following reasons, Commerce's determination that the program constitutes a countervailable subsidy and its calculation of the CVD rate are supported by substantial evidence and are in accordance with law.

1. Financial Contribution

Commerce reasonably found the CO_2 Compensation Program provided a direct transfer of funds. *See* Post-Prelim. Decision Memo. at 6. A financial contribution under the Act can be provided by a direct transfer of funds, such as grants, loans, and equity infusions. 19 U.S.C. § 1677(5)(D)(i). Commerce determined that section 10a(6) of the ETS Directive and the 2012 Communications from the EC permit member states to compensate sectors at substantial risk for carbon leakage for their higher electricity costs caused by the burden of the ETS on electricity producers.[21] Post-Prelim. Decision Memo. at 6. The German Emissions Trading Authority ("GETA") administers the CO_2 Compensation Program. *Id.* Under this program, companies on the carbon leakage list, like BGH, apply to GETA for compensation of its higher energy costs from the previous year, which approves compa-

[21] The ETS program prohibits electricity producers from receiving any free allowances, so the electricity producers must purchase allowances for all of their emissions, passing the cost on to final customers like BGH in the form of higher prices. Prelim. Decision Memo. at 26 & n.133; Post-Prelim. Decision Memo. at 6.

nies and pays them directly.[22] *Id.* Here, Commerce determined the GOG directly transferred funds to BGH under this program. *See* Post-Prelim. Decision Memo. at 6. BGH does not dispute it received funds from the GOG. *See id.*; Pl. Br. at 39–40.

2. Benefit

Commerce determined the CO_2 Compensation Program is a grant in the form of a direct transfer of funds and the benefit is the amount of the grant. *See* Post-Prelim. Decision Memo. at 6; 19 U.S.C. § 1677(5)(D)(i); 19 C.F.R. § 351.504(a). Here, BGH received payment in compensation for higher electricity costs it would not have received without the CO_2 Compensation Program. BGH argues that the amount of the grant must be offset by the governmental burden imposed. Pl. Br. at 39. Commerce rejected BGH's argument because it analyzes each program independently without considering what impact one program may have on another, Final Decision Memo. at 50–51, which is reasonable under the statute. *See* 19 U.S.C. § 1677(5)(B).

3. Specificity

Commerce reasonably determined the CO_2 Compensation Program subsidy to be *de jure* specific. *See* Post-Prelim. Decision Memo. at 6; Final Decision Memo. at 51. Similar to the ETS Additional Free Emissions Allowances program, Commerce found the eligibility for this subsidy to be limited by law to the companies on the carbon leakage list. Final Decision Memo. at 51; *see* 19 U.S.C. § 1677(5A)(D)(i). For the reasons discussed above concerning the ETS Additional Free Emissions Allowances program, the court concludes Commerce's determination is supported by substantial evidence here as well.

4. CVD Rate Calculation

BGH alleges Commerce "must consider the absolute amount of taxes/surcharges paid in comparison to other customers." Pl. Reply Br. at 18. BGH's argument is unavailing because companies on the carbon leakage list ultimately paid less for electricity than companies not on the list. *See* Final Decision Memo. at 50– 51. BGH provides no authority for its argument that Commerce must consider the absolute amount of taxes/surcharges paid in comparison to other customers. Commerce determined that, under 19 C.F.R. § 351.504(a), the benefit

[22] After firms like BGH are approved by GETA, "funds are administered directly to the company's bank account." *Id.*

of this program is equal to the amount provided to BGH. Post-Prelim. Decision Memo. at 7. Commerce then divided this amount by BGH's total sales, determining its CVD rate to be 0.12% *ad valorem*. *Id.* Commerce's determination is reasonable.

E. The KAV Program

BGH argues the KAV Program does not provide a financial contribution or benefit to BGH and that the KAV Program is not specific because, *inter alia*, any company can enter into a special contract with a private NO. *See* Pl. Br. at 40–43. In response, Defendant and Defendant-Intervenors argue Commerce lawfully determined the GOG entrusted and directed the NOs through the KAV Program to provide a financial contribution and benefit to BGH, and that the KAV Program is *de jure* specific because the KAV Program limited the benefit to "special contract customers." Def. Br. at 39–40; Def.-Inter. Br. at 33–35. For the reasons that follow, Commerce's determination regarding the existence of a financial contribution and a benefit is supported by substantial evidence and is in accordance with law; however, the court remands Commerce's finding of specificity for further explanation or reconsideration.

1. Financial Contribution

Commerce's determination that the KAV Program constitutes a financial contribution by entrusting a private company to forgo collecting revenue for county and municipal governments is reasonable. As previously discussed, a government makes a financial contribution where it entrusts or directs a private entity to make a financial contribution, if providing the contribution would normally be vested in the government and the practice does not differ in substance from practices normally followed by governments. 19 U.S.C. § 1677(5)(B)(iii).

Under section 46(1) of the Energy Industry Act (Energiewirtschaftsgesetz or "EnWG"), municipalities must make their public transport routes available for the laying and operation of power and gas lines for supply of energy to final consumers. Post-Prelim. Decision Memo. at 12. The concession agreement between a municipality and the NO governs the terms, including a concession fee the NO must pay to the municipality for using the transport routes. *Id.* Section 2 of the KAV Program establishes upper limits for the concession fees the NOs pass on to their final customers. *Id.* Although NOs are not legally obligated to pass along the concession fee, "the NOs, in practice, pass the concession fee on to users of the network." *Id.*; *see* Resp. [FRG] and the Fed. Ministry for Economic Affairs and Energy of the [FRG] to the Suppl. Questions at 7,

C-428–848, PD 270, bar code 4030747–01 (Sept. 22, 2020) ("SQR 9–22–20"). Commerce explains that under section 2(4) of the KAV, concession fees "to special contract customers 'may not be agreed to or paid' if the average price per kilowatt-hour (kWh) in the calendar year is lower than the average revenue per kWh from the supply of electricity to all special contract customers in the penultimate calendar year (Marginal Price)." Post-Prelim. Decision Memo. at 13; *see* Resp. [FRG] and the Fed. Ministry for Economic Affairs and Energy of the [FRG] to Certain Questions from the First Suppl. Questionnaire at Ex. KAV02, at 7, C-428–848, PD 236, bar code 3983126–02 (June 5, 2020) ("SQR 6–5-20"). The GOG defines the term "special contract customer" as all customers whose power consumption exceeds 30 kilowatts in at least two months of the billing year and whose annual consumption is more than 30,000 kilowatt hours. *See* SQR 9–22–20 at 7–8.[23] NOs and municipalities may agree on a higher or lower Marginal Price. *Id.* If the KAV Program applicant is a special contract customer and provides data demonstrating the average price per kWh in the calendar year is lower than the Marginal Price, the NO is not required to pay concession fees for that special contract customer, and no concession fees will be passed to the special contract customer. *Id.*

Commerce determined the KAV Program provides a financial contribution to BGH. Final Decision Memo. at 37. Commerce found that the NOs receive exemptions in the concession fees they pay to the municipality for certain special contract customers like BGH. *See id.* at 38–39; SQR 9–22–20 at 8. The act requires that concession fees for electricity supplied to special contract customers may not be agreed to or paid when those customers meet specific criteria. SQR 6–5-22 at Ex. KAV-02, at 7. Commerce's determination that revenue is forgone is reasonable because, without the KAV Program, BGH would have paid concession fees to the NO and the NO in turn would have paid them to the municipal government, which was the practice. *See* Post-Prelim. Decision Memo. at 12–14; Final Decision Memo. 37–39. Commerce's determination that the GOG entrusted and directed the NOs to forgo collecting or paying revenue which would otherwise be due

[23] In response to Commerce's request to define "special contract customer," the GOG responded—

> Special contract customers are all customers, whose measured power exceeds 30 kilowatts in at least two months of the billing year and whose annual consumption is more than 30,000 kilowatt hours, as defined in section 2(7) of the KAV. Please see Exhibit KAV-03 of the Response of the Government of the Federal Republic of Germany and the Federal Ministry for Economic Affairs and Energy of the Federal Republic of Germany to the First Supplemental Questionnaire (C-428–848) (June 5, 2020) for a copy of the KAV.

SQR 9–22–20 at 7–8.

the municipal governments is reasonable because the KAV Program requires the NO to exempt BGH from paying the concession fee and in turn exempts the NO from paying the municipality. *See* Post-Prelim. Decision Memo. at 13–14; Final Decision Memo. at 38–39.

2. Benefit

BGH argues the KAV Program only imposes a burden, i.e., additional fees for the laying and operation of gas and power lines; thus, BGH receives no benefit. *See* Pl. Br. at 40. However, Commerce reasonably determined the KAV Program provides a benefit to BGH by reducing the amount of the concession fee BGH would have otherwise paid to the NO, which would then have been passed to the municipal government. *See* Post-Prelim. Decision Memo. at 14; 19 U.S.C. § 1677(5)(E)(i)–(iv); 19 C.F.R. § 351.503(b)(2). The amount of the concession fee BGH would have paid absent the KAV Program is a benefit to BGH. *See* 19 U.S.C. § 1677(5)(E)(i)–(iv); 19 C.F.R. § 351.503(b)(2).

3. Specificity

Commerce's specificity determination is unsupported by substantial evidence. Commerce determined that the KAV Program is *de jure* specific because the KAV Program specifically limits relief to special contract customers whose average price per kWh in the calendar year is lower than the average revenue per kWh from the supply of electricity to all special contract customers. Final Decision Memo. at 39. However, limiting the availability of a program may not be *de jure* specific if the criteria are neutral, *i.e.*, do not favor some industries over others. 19 U.S.C. § 1677(5A)(D)(ii). The KAV Program sets forth specific criteria for companies to qualify as special contract customers. Special contract customers are those "whose measured power exceeds 30 kilowatts in at least two months of the billing year and whose annual consumption is more than 30,000 kilowatt hours, as defined in section 2(7) of the KAV." SQR 9–22–20 at 7–8; *see* SQR 6–5-20 at Ex. KAV03, at 2 (containing section 2(7) of the KAV). Here, unlike the case with the Electricity Tax Act, Energy Tax Act, Reduced EEG and KWKG Surcharges, and the ETS Program, Commerce does not explain how this program favors certain industries over others or otherwise explicitly limits usage as to who may apply. Commerce does not address whether criteria based on energy usage is economic in nature and horizontal in application, such that the program may be considered not specific as a matter of law pursuant to 19 U.S.C. § 1677(5A)(D)(ii). *See* 19 U.S.C. § 1677(5A)(D)(ii); SAA at 4243.

CONCLUSION

In accordance with the foregoing, it is

ORDERED that Commerce's *Final Results* are sustained with respect to the initiation of the CVD investigation, the determination that the administrative record is complete, the determination that the provisions of the Electricity Tax Act and the Energy Tax Act, the EEG and KWKG Reduced Surcharge Programs, the ETS Additional Free Emissions Allowances, and the CO_2 Compensation Program are countervailable subsidies, and the determination that Commerce's calculations for the EEG and KWKG Reduced Surcharge Programs, the ETS Additional Free Emissions Allowances, and the CO_2 Compensation Program are supported by substantial evidence; and it is further

ORDERED that Commerce's *Final Results* are remanded for further explanation or reconsideration consistent with this opinion with respect to its determination that the KAV Program is a specific subsidy; and it is further

ORDERED that Commerce's *Final Results* are remanded for further explanation or reconsideration consistent with this opinion with respect to its calculations of the CVD rates for the Electricity Tax Act and the Energy Tax Act; and it is further

ORDERED that Commerce shall file its remand redetermination with the court within 90 days of this date; and it is further

ORDERED that Commerce shall file the administrative record within 14 days of the date of filing of its remand redetermination; and it is further

ORDERED that the parties shall file any comments on the remand redetermination within 30 days of the date of filing of the remand determination; and it is further

ORDERED that the parties shall have 30 days to file their replies to the comments on the remand redetermination; and it is further

ORDERED that the parties shall file the joint appendix within 14 days of the date of filing of responses to the comments on the remand redetermination.

Dated: October 12, 2022
New York, New York

/s/ Claire R. Kelly
CLAIRE R. KELLY, JUDGE

Slip Op. 22–118

KEIRTON USA, INC. Plaintiff, v. UNITED STATES Defendant.

Before: Claire R. Kelly, Judge
Court No. 21–00452

[Granting Keirton USA, Inc's motion for judgment on the pleadings and denying the United States' cross-motion for judgment on the pleadings.]

Dated: October 20, 2022

Bradley Park Thoreson, Buchalter, of Seattle, WA, argued for plaintiff Keirton USA, Inc. Also on the brief was *Ann Y. Gong*.

Guy R. Eddon, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY, argued for defendant United States. Also on the brief were *Luke Mathers*, Trial Attorney, *Aimee Lee*, Assistant Director, *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy,* Director, and *Justin R. Miller*, Attorney-in-Charge, International Trade Field Office. Of counsel on the brief were *Alexandra Khrebtukova* and *Mathias Rabinovitch*, Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection of New York, NY.

Kelly, Judge:

OPINION

Before the court is Keirton USA, Inc.'s ("Keirton") Rule 12(c) motion for judgment on the pleadings, Pl.'s Mot. J. Pleadings and accompanying Memo. Points & Authorities Supp. Pl.'s Mot. J. Pleadings, Jan. 15, 2022, ECF No. 17 ("Pl. Br."); *see* USCIT R. 12(c), challenging the U.S. Customs and Border Protection's ("CBP") denial of Keirton's protest of CBP's exclusion from entry into the United States of "parts and components" (the "subject merchandise") Keirton uses to manufacture its "Twister Trimmer." Keirton sells Twisted Trimmers to companies in the State of Washington that process marijuana plants. Pl. Br. at 2–3; *see* Compl. ¶¶ 4–7, Aug. 19, 2021, ECF No. 2; Protest 3002–21–103719 at 5, 8–10, Nov. 15, 2021, ECF No. 13–1 ("Protest").[1]

Keirton challenges CBP's protest denial arguing possession and importation of the subject merchandise is permissible because Washington State law authorizes the possession and importation of marijuana paraphernalia. Pl. Br. at 2–14. Defendant United States ("Defendant") argues that, although Washington State repealed its laws criminalizing possession of marijuana paraphernalia like the Twisted Trimmer, that repeal does not explicitly authorize Keirton to use the subject merchandise to manufacture, possess, or distribute marijuana paraphernalia under Federal law. Def.'s Cross-Mot. J. Pleadings at 2, 7–8, 10–24, Mar. 28, 2022, ECF No. 21 ("Def. Br.").

[1] Citations to the protest refer to the page number assigned by CM/ECF upon filing.

JURISDICTION AND STANDARD OF REVIEW

The court exercises jurisdiction pursuant to 28 U.S.C. § 1581(a) (2018) in a challenge to contest the denial of a protest of a deemed exclusion made pursuant to Section 514 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1514(a)(4) (2018).[2] The standard of review is *de novo* based upon the record developed before the court. *See* 28 U.S.C. § 2640(a)(1) (2018). Deemed exclusions are governed by 19 U.S.C. § 1499(c)(5)(A), which states CBP's failure "to make a final determination with respect to the admissibility of detained merchandise within 30 days after the merchandise has been presented for customs examination . . . shall be treated as a decision of [CBP] to exclude the merchandise . . . ." 19 U.S.C. § 1499(c)(5)(A); *Blink Design, Inc. v. United States*, 986 F. Supp. 2d 1348, 1353 (Ct. Int'l Trade 2014). An importer may protest CBP's decision to exclude the merchandise. 19 U.S.C. § 1514(a)(4). Pursuant to 19 U.S.C. § 1499(c)(5)(B), if CBP fails to respond to a protest of an exclusion within thirty days, that protest will be deemed denied. *Id.* § 1499(c)(5)(B). An "importer may challenge the deemed denial to its deemed exclusion before the court" under 28 U.S.C. § 1581(a). *See Root Scis., LLC v. United States*, 543 F. Supp. 3d 1358, 1361 (Ct. Int'l Trade 2021), *reconsideration denied*, 560 F. Supp. 3d 1357 (Ct. Int'l Trade 2022).

The court may grant judgment on the pleadings if there are no material facts in dispute and the moving party is entitled to judgment as a matter of law. *N.Z. Lamb Co., Inc. v. United States*, 40 F.3d 377, 380 (Fed. Cir. 1994); USCIT R. 12(c).[3] "A ruling on a motion for judgment on the pleadings is reviewed under the same standard as a motion to dismiss under USCIT R. 12(b) for failure to state a claim." *Forest Lab'ys, Inc. v. United States*, 29 CIT 1401, 1402–03, (2005), *aff'd*, 476 F.3d 877 (Fed. Cir. 2007). In reviewing either a motion to dismiss for failure to state a claim or a motion for judgment on the pleadings, the court accepts all well-pleaded facts as true and views them in the light most favorable to the non-moving party. *Id.* ; *see C.J. Tower & Sons of Buffalo, Inc. v. United States*, 68 Cust. Ct. 377, 379 (1972); *see also* 5C Charles Alan Wright et al., *Federal Practice and Procedure* § 1368 (3d ed. 2022).

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[2] Further Citations to the Tariff Act of 1930, as amended are to the relevant provisions of Title 19 of the U.S. Code, 2018 edition.

[3] United States Court of International Trade Rule 12(c) governs judgments on the pleadings and is identical to Federal Rule of Civil Procedure 12(c). *Forest Lab'ys, Inc. v. United States*, 476 F.3d 877, 880 n.3 (Fed. Cir. 2007); *compare* USCIT R. 12(c) *with* Fed. R. Civ. P. 12(c).

UNDISPUTED FACTS

The following facts are not in dispute. On March 23, 2021, CBP imported the subject merchandise. Compl. ¶ 19; Answer ¶ 19. CBP detained the shipment on March 24, 2021.[4] Compl. ¶ 19; Answer ¶ 19. On April 15, 2021, CBP requested additional clarifying information on the shipment and whether the subject merchandise would be used to manufacture, produce, or process a product identified under the Controlled Substances Act of 1970, 21 U.S.C. § 801 et seq. Compl. ¶ 20; Answer ¶ 20. On April 20, 2021, Keirton responded to CBP's inquiry confirming that its "Twister Trimmer" product could be used in the cannabis industry. Compl. ¶ 21; Answer ¶ 21. CBP refused entry of the subject merchandise following Keirton's response, and the shipment was deemed excluded by operation of law. Compl. ¶ 22; Answer ¶ 22.

Keirton protested CBP's exclusion of the subject merchandise on June 15, 2021. Compl. ¶ 23; Answer ¶ 23. CBP did not allow or deny Protest No. 3002–21–103719, rendering its denial final as a matter of law. Compl. ¶¶ 23, 31; Answer ¶¶ 23, 31. CBP excluded the subject merchandise in Entry No. SQ4–03475065 from entry into the United States. Compl. ¶¶ 27, 30; Answer ¶¶ 27, 30.

Keirton filed its complaint on August 19, 2021.[5] Compl. Defendant filed its answer on November 17, 2021. Keirton filed its motion for judgment on the pleadings on January 5, 2022, stipulating that the subject merchandise meets the Federal definition of "drug paraphernalia" for the purposes of this case. Pl. Br. at 1. Defendant filed its cross-motion for judgment on the pleadings on March 28, 2022. Def. Br. The motions were fully briefed on June 6, 2022. Pl.'s Resp. Opp. [Def. Br.] & Reply Supp. [Pl. Br.], May 2, 2022, ECF No. 22; Def.'s Reply Further Supp. [Def. Br.], June 6, 2022, ECF No. 25.

DISCUSSION

Keirton argues CBP's exclusion of the subject merchandise from entry into the United States is unlawful because Washington State law authorizes Keirton to manufacture, possess, and distribute marijuana paraphernalia, exempting the subject merchandise from the

[4] Keirton's complaint alleges CBP detained the shipment of subject merchandise on March 23, 2021; however, in its motion for judgment on the pleadings, Keirton agrees with Defendant's timeline that it imported the subject merchandise on March 23, 2021, and that CBP detained the subject merchandise on March 24, 2021. *Compare* Compl. ¶ 19 *with* Answer ¶ 19 *and* Pl. Br. at 2–3.

[5] Keirton initially filed a Motion for a Temporary Restraining Order regarding the subject merchandise in the Western District Court of Washington State, and, on March 26, 2021, that court denied Keirton's request for injunctive relief, concluding the court lacked subject matter jurisdiction and holding the United States Court of International Trade was the proper forum for this action. Compl. ¶¶ 16–18; Answer ¶¶ 16–18.

Federal Mail Order Drug Paraphernalia Control Act of 1986, 21 U.S.C. § 863(a),(f)(1). Pl. Br. at 4–14. Defendant argues that Washington State law does not explicitly authorize Keirton to manufacture, possess, or distribute marijuana paraphernalia such that Keirton is exempt pursuant to 21 U.S.C. § 863(f)(1). Def. Br. at 7–24. For the following reasons, Keirton's motion for a judgment on the pleadings is granted.

21 U.S.C. § 863(a) makes it unlawful for a person to, *inter alia*, import or export drug paraphernalia.[6] 21 U.S.C. § 863(a). However, the statute exempts from the proscription of § 863(a) "any person authorized by local, State, or Federal law to manufacture, possess, or distribute such items."[7] *Id.* § 863(f)(1). Thus, CBP may prevent the importation of drug paraphernalia into the United States by virtue of 19 U.S.C. § 1595a(c)(2)(A) because drug paraphernalia is unlawful under 21 U.S.C. § 863(a), unless the importer has been authorized by local, State, or Federal law to manufacture, possess, or distribute such items. *Id.* § 863(f)(1).

The phrase "any person authorized" in § 863(f)(1) extends the exemption from the requirements of § 863 to all persons affected by the repeal of prior State prohibitions. *See Murphy v. NCAA*, 138 S. Ct. 1461, 1474 (2018) (construing New Jersey's repeal of its gambling prohibition to authorize gambling). Section 863 does not define "authorized;" however, dictionary definitions indicate "authorized" means to empower, approve, sanction, or give legal authority.[8] Al-

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[6] The statute defines drug paraphernalia:

> The term "drug paraphernalia" means any equipment, product, or material of any kind which is primarily intended or designed for use in manufacturing, compounding, converting, concealing, producing, processing, preparing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance, possession of which is unlawful under this subchapter.

21 U.S.C. § 863(d).

[7] The plain meaning of § 863(f)(1) makes clear that "'authorization' by a relevant state to possess drug paraphernalia [is] sufficient to implicate the (f)(1) exemption, thereby rendering the entirety of section 863 . . . inapplicable." *Eteros Technologies USA, Inc. v. United States*, Slip Op. 22–111, at 12, 2022 WL 4362917, at *7 (Ct. Int'l Trade Sep. 21, 2022) (internal bracketing and emphasis omitted). In *Eteros*, the court considered § 863's scope and explained that "when the (f)(1) exemption is implicated, none of the provisions under section 863 . . . apply" including the Federal prohibition on importing drug paraphernalia at § 863(a)(3). *Eteros*, Slip Op. 22–111, at 11, 2022 WL 4362917, at *6.

[8] *See Authorize*, *Black's Law Dictionary* (11th ed. 2019) (defining "authorize" as "To give legal authority; to empower;" or "To formally approve; to sanction"); *Authorized, Oxford English Dictionary, available at* https://www.oed.com/view/Entry/13353?result=2&rskey=QHS8ex& (last accessed Oct. 13, 2022) (defining "authorized" as "Of a person: that has been given authority; placed in a position of authority; formally appointed to a particular role or duty"); *Authorized*, *Merriam-Webster's Dictionary*, *available at* https://www.merriamwebster.com/dictionary/authorized (last accessed Oct. 13, 2022) (defining "authorized" as "endowed with authority" or "sanctioned by authority: having or done with legal or official approval").

though the range of meanings supplied by dictionary definitions might, in a vacuum, suggest a concomitant range of possible directives for a State to authorize activity, where the State acts against the backdrop of a prior prohibition, there can be no doubt that a repeal of that prohibition satisfies any definition of authorized. *Murphy*, 138 S. Ct. 1461, 1474. *Murphy* explained this point:

> The concept of state "authorization" makes sense only against a backdrop of prohibition or regulation. A State is not regarded as authorizing everything that it does not prohibit or regulate. No one would use the term in that way. For example, no one would say that a State "authorizes" its residents to brush their teeth or eat apples or sing in the shower. We commonly speak of state authorization only if the activity in question would otherwise be restricted.

Murphy, 138 S. Ct. 1461, 1474.[9]

Here, Washington State law authorizes persons to possess marijuana paraphernalia under the meaning of "authorized" in § 863(f). By referendum, Washington repealed the portions of its law criminalizing the possession of marijuana paraphernalia.[10] *See* Initiative

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[9] Defendant argues that the word "authorize" must be read narrowly here because, unlike in *Murphy* where the federal government prohibited states from authorizing an activity, § 863(f)(1) involves an exemption from a prohibition for an authorized person. Def. Br. at 17–18. However, *Murphy* makes clear that the repeal of a prior prohibition is an authorization to act regardless of the definition of "authorize." *Id.*, 138 S. Ct. 1461, 1474.

[10] The Revised Code of Washington now specifically exempts marijuana from the section criminalizing the possession of drug paraphernalia. Wash. Rev. Code § 69.50.412 (2013) (a person may not possess any equipment to process "a controlled substance other than marijuana"). Initiative Measure 502 amended Washington's prohibitions of drug paraphernalia to read:

> (1) It is unlawful for any person to use drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance other than marijuana. Any person who violates this subsection is guilty of a misdemeanor.
>
> (2) It is unlawful for any person to deliver, possess with intent to deliver, or manufacture with intent to deliver drug paraphernalia, knowing, or under circumstances where one reasonably should know, that it will be used to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance other than marijuana. Any person who violates this subsection is guilty of a misdemeanor.

Wash. Rev. Code § 69.50.412(1)–(2) (2013); *see* Initiative Measure 502, 2013 Wash. Sess. Laws ch. 3.

Measure 502, 2013 Wash. Sess. Laws ch. 3. The Washington Administrative Code provides that "[i]tems for . . . processing cannabis . . . are not considered [drug] 'paraphernalia.'" Wash. Admin. Code § 314–55–010(27). The plain language of the Washington Revised Code excludes marijuana paraphernalia from its prohibition on drug paraphernalia. Wash. Rev. Code §§ 69.50.412(1)–(2), 69.50.4121(1) (2013). Washington State's specific exemption of marijuana paraphernalia from its prohibition on drug paraphernalia reflects the State's intent to authorize persons to possess marijuana paraphernalia. *See* Wash. Rev. Code §§ 69.50.412(1)–(2), 69.50.4121(1) (2013). Washington State's repeal of its prohibitions regarding marijuana paraphernalia possession thus authorizes any person to import paraphernalia for purposes of 21 U.S.C. § 863.

Defendant invokes Washington State's licensing regime for marijuana retailers to argue the repeal of Washington State's marijuana paraphernalia prohibition is not a blanket authorization. *See* Def. Br. at 15–16. *Murphy* provides otherwise. The repeal of a prohibition is an authorization. *Murphy*, 138 S. Ct. 1461, 1474. That Washington State imposes a licensing scheme for retailers does not undo that authorization.

Defendant also argues that the Controlled Substances Act's overarching purpose is to create a uniform Federal prohibition and that allowing the exemption to extend to Washington State's repeal would undermine the uniformity Congress intended. Def. Br. 20–22. However, Congress did not impose complete uniformity. It provided an exemption. Had it wanted to limit that exemption, it could have done so.

Finally, Defendant argues that the absence of a prohibition cannot be considered authorization because there is no Federal prohibition against the possession of drug paraphernalia. *Id.* at 7. Thus, if the absence of a prohibition were sufficient to find authorization, the statute would swallow itself because the exemption extends to authorization by Federal law. *Id.* However, Defendant's argument fails because there is no Federal prohibition. *Murphy* held that "[t]he concept of state 'authorization' makes sense only against a backdrop

(1) Every person who sells or gives, or permits to be sold or given to any person any drug paraphernalia in any form commits a class I civil infraction under chapter 7.80 RCW. For purposes of this subsection, "drug paraphernalia" means all equipment, products, and materials of any kind which are used, intended for use, or designed for use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance other than marijuana.

Wash. Rev. Code § 69.50.4121(1) (2013); *see* Initiative Measure 502, 2013 Wash. Sess. Laws ch. 3.

of prohibition or regulation." *Murphy*, 138 S. Ct. 1461, 1474. Because the Federal Government has not previously prohibited drug paraphernalia possession, there can be no repeal constituting an authorization under § 863(f)(1). *See Murphy*, 138 S. Ct. 1461, 1474; *Eteros*, Slip Op. 22–111, at 25 n.25, 2022 WL 4362917, at *13 n.25 (Washington State's repeal of prior prohibitions on possession of marijuana-related drug paraphernalia conferred "authoriz[ation]" such that 21 U.S.C. § 863 did not justify seizure or forfeiture by Customs and Border Protection of plaintiff's imports at the Port of Blaine).

CONCLUSION

For the foregoing reasons, it is lawful for Keirton to possess and import its merchandise into the State of Washington. Therefore, Keirton's motion for judgment on the pleadings is granted, and Defendant's cross-motion for judgment on the pleadings is denied. Judgment will enter accordingly.

Dated: October 20, 2022
New York, New York

/s/ Claire R. Kelly
CLAIRE R. KELLY, JUDGE

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