U.S. Customs and Border Protection

8 CFR PART 100

CBP Dec. 15–17

TECHNICAL AMENDMENT TO LIST OF FIELD OFFICES: EXPANSION OF SAN YSIDRO, CALIFORNIA PORT OF ENTRY TO INCLUDE THE CROSS BORDER XPRESS USER FEE FACILITY

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

ACTION: Final rule; technical amendment.

SUMMARY: This document amends the Department of Homeland Security (DHS) regulations by revising the list of field offices to expand the limits of the San Ysidro, California Class A port of entry to include the Cross Border Xpress (CBX) user fee facility. Class A ports of entry are designated ports that process all aliens applying for admission into the United States. The CBX facility includes a pedestrian walkway connecting the Tijuana A.L. Rodriguez International Airport (Tijuana Airport) in Mexico to San Diego, California and a passenger terminal located in San Diego that will be used exclusively to process Tijuana Airport passengers traveling to and from the United States via the pedestrian walkway.

DATES: This rule is effective on December 9, 2015, the date the CBX facility will open.

FOR FURTHER INFORMATION CONTACT: Tara Ross, Office of Field Operations, *tara.ross@cbp.dhs.gov,* 202–344–1031.

SUPPLEMENTARY INFORMATION:

I. Background

Ports of entry are places (seaports, airports, or land border ports) designated by the Secretary of the Department of Homeland Security where CBP officers or employees are assigned to accept entries of merchandise, clear passengers, collect duties, and enforce the various provisions of the customs and immigration laws, as well as other laws

applicable at the border. The term "port of entry" is used in the Code of Federal Regulations (CFR) in title 19 for customs purposes and in title 8 for immigration purposes. Subject to certain exceptions, all individuals entering the United States must present themselves to an immigration officer for inspection at a U.S. port of entry when the port is open for inspection. *See* 8 CFR 235.1. Customs and immigration services may also be provided by CBP officers at facilities that are designated as user fee facilities pursuant to 19 U.S.C. 58b. User fee facilities are approved by the Commissioner of CBP to receive, for a fee, the services of CBP officers, including the processing of travelers entering the United States.

The ports of entry for immigration purposes for aliens arriving by vessel and land transportation are listed in 8 CFR 100.4(a). These ports are listed according to location by districts and are designated as Class A, B, or C, which designates which aliens may use the port. Class A ports are those designated for all aliens. Class B and C ports are restricted to certain aliens. If the facility processes aliens for immigration purposes, the facility may be considered a port of entry for purposes of title 8 CFR. In such case, an amendment to 8 CFR 100.4(a) is necessary.[1]

The Cross Border Express (CBX) User Fee Facility

On March 21, 2014, the Commissioner of CBP approved a request from Otay-Tijuana Venture, LLC for CBP to provide reimbursable inspection services, pursuant to 19 U.S.C. 58b, at a new cross-border user fee facility named "Cross Border Xpress" or CBX.[2] At this facility, CBP will provide a variety of inspection services, including immigration services.

The CBX facility was designed in accordance with U.S. and international security standards. It includes an enclosed pedestrian walkway connecting the Tijuana Airport in Mexico to San Diego, California and a passenger terminal located in San Diego that will be used exclusively to process ticketed Tijuana Airport passengers traveling to and from the United States via the walkway. The pedestrian walkway will be accessible only for ticketed Tijuana Airport passengers.

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[1] For customs purposes, CBP regulations list designated CBP ports of entry and the limits of each port in section 101.3(b)(1) of title 19 (19 CFR 101.3(b)(1)). User fee facilities are not considered ports of entry for purposes of 19 CFR 101.3(b)(1). Therefore, the designation of a user fee facility does not require an amendment to this provision.

[2] On July 22, 2015, CBP issued a press release announcing the establishment of CBX as a user fee facility pursuant to 19 U.S.C. 58b. It also indicated that CBX would operate as a Class A port of entry. *See: http://www.cbp.gov/newsroom/national-media-release/2015–07–22–000000/cbp-partners-new-cross-border-terminal-cross.*

Travelers with departing flights from the Tijuana Airport will use the CBX facility's north entrance in the United States to cross the international border into Mexico. To use the facility, these travelers must present a valid airline ticket for a flight departing from the Tijuana Airport in the next twenty-four hours and purchase a CBX bridge pass. Airline tickets and CBX passes may be purchased the same day at ticket windows at the north entrance. CBX passes may also be purchased online in advance. After being subject to inspection by CBP officers, travelers will use the pedestrian walkway to cross the international border. At the Tijuana Airport, travelers will be processed by Mexican immigration and customs authorities. After processing, the travelers will enter the Tijuana Airport for their departing flight.

Travelers landing at the Tijuana Airport may use the CBX facility to apply for admission or entry to the United States. These travelers must purchase a CBX pass and use the CBX facility within four hours of their flight's arrival at the airport to apply for admission or entry to the United States. Passes may be purchased online in advance or at ticket counters at the Tijuana Airport. Travelers will be processed by Mexican immigration and customs authorities at the Tijuana Airport before entering the CBX facility. Travelers will use the CBX pedestrian walkway to cross the international border into the United States and then apply for admission or entry into the United States at the processing terminal where they will be subject to immigration, customs and agriculture inspection by CBP officers. CBP will process only pedestrians at the CBX facility. CBP will not process cargo, commercial entries, or vehicles.

Expansion of San Ysidro, California Class A Port of Entry To Include the CBX User Fee Facility

The port of San Ysidro, California is included within the San Diego district and is listed in 8 CFR 100.4(a) as a Class A port of entry. This rule amends 8 CFR. 100.4(a) to expand the San Ysidro Class A port of entry to include the CBX facility.

II. Statutory and Regulatory Requirements

A. Inapplicability of Public Notice and Delayed Effective Date Requirements

Under section 553 of the Administrative Procedure Act (APA) (5 U.S.C. 553), rulemaking generally requires prior notice and comment, and a 30-day delayed effective date, subject to specified excep-

tions. Pursuant to 5 U.S.C. 553(a)(2), matters relating to agency management or personnel are excepted from the requirements of section 553.

This rule expands the San Ysidro Class A port of entry to include the CBX facility. CBP has already designated the CBX facility as a user fee facility pursuant to 19 U.S.C. 58b and has approved the request for CBP officers to provide reimbursable inspection services at the CBX facility to Tijuana airport travelers entering and departing the United States at the CBX facility. Otay-Tijuana Venture, LLC, the operator of the facility, will reimburse CBP for the expenses CBP incurs, including the salary and expenses of CBP officers that will provide the CBP services, in accordance with the approved request. The approved request to provide such services, and the update to the list of the Class A ports of entry to reflect this approved request directly relates to CBP's operations and agency management and personnel. As such, CBP finds that this rule pertains to a matter relating to agency management or personnel within 5 U.S.C 553(a)(2) which is excepted from the prior notice and comment and delayed effective date requirements of section 553.

Additionally, as provided in 5 U.S.C. 553(b)(3)(A), the prior notice and comment requirements do not apply when agencies promulgate rules concerning agency organization, procedure, or practice. This rule falls within that category.

As discussed above, on March 21, 2014, the CBP Commissioner approved the request from Otay-Tijuana Venture, LLC for CBP to provide inspection services at the new CBX facility pursuant to 19 U.S.C. 58b. The designation of the CBX as a user fee facility means that CBP will be providing agency personnel at the facility, pursuant to the approved request, to process travelers for application for admission or entry into and departure from the United States. This rule, which updates the list of Class A ports of entry in 8 CFR 100.4(a) to include the CBX facility within the San Ysidro port of entry, simply makes the necessary amendments to section 100.4(a) to implement the CBP Commissioner's decision to designate the CBX facility as a user fee facility. It is a procedural or organizational rule that does not have a substantial impact on the user fee facility or on the public. For this reason, CBP finds that this is a rule of agency organization, procedure, or practice, which is not subject to notice and comment rulemaking pursuant to § 553(b)(3)(A).

B. The Regulatory Flexibility Act and Executive Orders 12866 and 13563

Because no notice of proposed rulemaking is required, the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) do not apply. This amendment does not meet the criteria for a "significant regulatory action" as specified in Executive Order 12866, as supplemented by Executive Order 13563.

C. The National Environmental Policy Act of 1969

In 2009, the Otay-Tijuana Venture, LLC applied to the Department of State (DOS) for a Presidential Permit pursuant to Executive Order 11423, as amended, which authorizes the Secretary of State to issue Presidential permits for the construction, connection, operation, and maintenance of facilities at the borders of the United States if he or she finds them to be in the national interest. In support of its application for a Presidential permit, Otay-Tijuana Venture, LLC submitted a draft environmental assessment (EA) prepared under the guidance and supervision of DOS, consistent with the National Environmental Policy Act (NEPA). This EA examined the effects on the natural and human environment associated with the construction and establishment of the facility. On December 29, 2009, DOS provided public notice of the draft EA in the **Federal Register** (74 FR 68906) and invited public comment for 45 days.

On July 23, 2010, DOS published a notice in the **Federal Register** (75 FR 43225) announcing that it adopted the EA and issued a "Finding of No Significant Impact" concluding that the CBX facility would not result in a significant impact on the human and natural environment. On August 10, 2010, DOS published a notice in the **Federal Register** (75 FR 48408) announcing the issuance of a Presidential permit, effective August 3, 2010, to Otay-Tijuana Venture, LLC for the construction, operation, and maintenance of the CBX facility.

D. Signing Authority

The signing authority for this document falls under 19 CFR 0.2(a) because the establishment of this title 8 Class A Port of Entry is not within the bounds of those regulations for which the Secretary of the Treasury has retained sole authority. Accordingly, this rule may be signed by the Secretary of Homeland Security (or his delegate).

List Of Subjects in 8 CFR Part 100

Organization and functions (Government agencies).

Amendments to Regulations

For the reasons set forth above, part 100 of title 8 of the Code of Federal Regulations (8 CFR part 100) is amended as set forth below.

PART 100—STATEMENT OF ORGANIZATION

■ 1. The authority citation for part 100 continues to read as follows:

Authority: 8 U.S.C. 1103; 8 U.S.C. 1185 note (section 7209 of Pub. L. 108–458); 8 CFR part 2.

§ 100.4 [Amended]

■ 2. Amend § 100.4 in paragraph (a), under the heading "District No. 39-San Diego, California", subheading, "Class A", add "(including the Cross Border Xpress (CBX) facility)" after "San Ysidro, CA".

Dated: November 30, 2015.

JEH CHARLES JOHNSON,
Secretary.

[Published in the Federal Register, December 3, 2015 (80 FR 75631)]

AGENCY INFORMATION COLLECTION ACTIVITIES:

User Fees

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

ACTION: 60-Day Notice and request for comments; extension of an existing collection of information.

SUMMARY: U.S. Customs and Border Protection (CBP) of the Department of Homeland Security will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act: User Fees. CBP is proposing that this information collection be extended with no change to the burden hours or to the information collected. This document is published to obtain comments from the public and affected agencies.

DATES: Written comments should be received on or before February 1, 2016 to be assured of consideration.

ADDRESSES: Written comments may be mailed to U.S. Customs and Border Protection, Attn: Tracey Denning, Regulations and Rulings, Office of International Trade, 90 K Street NE., 10th Floor, Washington, DC 20229–1177.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to Tracey Denning, U.S. Customs and Border Protection, Regulations and Rulings, Office of International Trade, 90 K Street NE., 10th Floor, Washington, DC 20229–1177, at 202–325–0265.

SUPPLEMENTARY INFORMATION:

CBP invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104–13). The comments should address: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimates of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden including the use of automated collection techniques or the use of other forms of information technology; and (e) the annual cost burden to respondents or record keepers from the collection of information (total capital/startup costs and operations and maintenance costs). The comments that are submitted will be summarized and included in the CBP request for OMB approval. All comments will become a matter of public record. In this document, CBP is soliciting comments concerning the following information collection:

Title: User Fees.

OMB Number: 1651–0052.

Form Number: CBP Forms 339A, 339C and 339V.

Abstract: The Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA—Pub. L. 99–272; 19 U.S.C. 58c) authorizes the collection of user fees by Customs and Border Protection (CBP). The collection of these fees requires submission of information from the party remitting the fees to CBP. This information is submitted on three forms including the CBP Form 339A for aircraft at: *http://www.cbp.gov/sites/default/files/documents/CBP%20Form%20339A.pdf*, CBP Form 339C for commercial vehicles at: *http://www.cbp.gov/sites/default/files/documents/CBP%20Form%20339C.pdf*, and CBP Form 339V for vessels at: *http://www.cbp.gov/sites/default/files/documents/CBP%20Form%20339V.pdf*. The information on these forms may

also be filed electronically at: *https://dtops.cbp.dhs.gov/*. This collection of information is provided for by 19 CFR 24.22.

In addition, CBP requires express consignment courier facilities (ECCFs) to file lists of couriers using the facility in accordance with 19 CFR 128.11. In cases of overpayments, carriers using the courier facilities may send a request to CBP for a refund in accordance with 19 CFR 24.23(b). This request must specify the grounds for the refund. ECCFs are also required to file a quarterly report in accordance with 19 CFR 24.23(b)(4).

Current Actions: This submission is being made to extend the expiration date with no change to the burden hours or to the information collected.

Type of Review: Extension (without change).

Affected Public: Businesses.

CBP Form 339A—Aircraft

Estimated Number of Respondents: 15,000.
Estimated Number of Annual Responses: 15,000
Estimated Time per Response: 16 minutes.
Estimated Total Annual Burden Hours: 4,005.

CBP Form 339C—Vehicles

Estimated Number of Respondents: 50,000.
Estimated Number of Annual Responses: 50,000.
Estimated Time per Response: 20 minutes.
Estimated Total Annual Burden Hours: 16,500.

CBP Form 339V—Vessels

Estimated Number of Respondents: 10,000.
Estimated Number of Annual Responses: 10,000.
Estimated Time per Response: 16 minutes.
Estimated Total Annual Burden Hours: 2,670.

ECCF Quarterly Report

Estimated Number of Respondents: 18.
Estimated Number of Annual Responses: 72.
Estimated Time per Response: 2 hours.
Estimated Total Annual Burden Hours: 144.

ECCF Application and List of Couriers

Estimated Number of Respondents: 3.

Estimated Number of Annual Responses: 12.

Estimated Time per Response: 30 minutes.

Estimated Total Annual Burden Hours: 6.

Dated: November 30, 2015.

TRACEY DENNING,
Agency Clearance Officer,
U.S. Customs and Border Protection.

[Published in the Federal Register, December 3, 2015 (80 FR 75684)]

AGENCY INFORMATION COLLECTION ACTIVITIES:

Protest

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

ACTION: 60-Day Notice and request for comments; extension of an existing collection of information.

SUMMARY: U.S. Customs and Border Protection (CBP) of the Department of Homeland Security will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act: Protest. CBP is proposing that this information collection be extended with no change to the burden hours or to the information collected. This document is published to obtain comments from the public and affected agencies.

DATES: Written comments should be received on or before February 1, 2016 to be assured of consideration.

ADDRESSES: Written comments may be mailed to U.S. Customs and Border Protection, Attn: Tracey Denning, Regulations and Rulings, Office of International Trade, 90 K Street NE., 10th Floor, Washington, DC 20229–1177.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to Tracey Denning, U.S. Customs and Border Protection, Regulations and Rulings, Office of International Trade, 90 K Street NE., 10th Floor, Washington, DC 20229–1177, at 202–325–0265.

SUPPLEMENTARY INFORMATION:

CBP invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant

to the Paperwork Reduction Act of 1995 (Pub. L. 104–13). The comments should address: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimates of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden including the use of automated collection techniques or the use of other forms of information technology; and (e) the annual cost burden to respondents or record keepers from the collection of information (total capital/startup costs and operations and maintenance costs). The comments that are submitted will be summarized and included in the CBP request for OMB approval. All comments will become a matter of public record. In this document, CBP is soliciting comments concerning the following information collection:

Title: Protest.

OMB Number: 1651–0017.

Form Number: Form 19.

Abstract: CBP Form 19, *Protest,* is filed to seek the review of a CBP officer. This review may be conducted by a CBP officer who participated directly in the underlying decision. This form is also used to request "Further Review" which means a request for review of the protest to be performed by a CBP officer who did not participate directly in the protested decision, or by the Commissioner, or his designee as provided in the CBP Regulations.

The matters that may be protested include: The appraised value of merchandise; the classification and rate and amount of duties chargeable; all charges within the jurisdiction of the U.S. Department of Homeland Security; exclusion of merchandise from entry or delivery, or demand for redelivery; the liquidation or reliquidation of an entry; and the refusal to pay a claim for drawback.

The parties who may file a protest or application for further review include: the importer or consignee shown on the entry papers, or their sureties; any person paying any charge or exaction; any person seeking entry or delivery, or upon whom a demand for redelivery has been made; any person filing a claim for drawback; or any authorized agent of any of the persons described above.

CBP Form 19 collects information such as the name and address of the protesting party, information about the entry being protested, detailed reasons for the protest, justification for applying for further review.

The information collected on CBP Form 19 is authorized by Sections 514 and 514(a) of the Tariff Act of 1930 and provided for by 19 CFR part 174. This form is accessible at *http://www.cbp.gov/sites/default/files/documents/CBP_Form_19.pdf*.

Current Actions: CBP proposes to extend the expiration date of this information collection with no change to the burden hours or to the information collected.

Type of Review: Extension (with no change).

Affected Public: Businesses.

Estimated Number of Respondents: 3,750.

Estimated Number of Total Annual Responses: 45,000.

Estimated Time per Response: 1 hour.

Estimated Total Annual Burden Hours: 45,000.

Dated: November 30, 2015.

TRACEY DENNING,
Agency Clearance Officer,
U.S. Customs and Border Protection.

[Published in the Federal Register, December 3, 2015 (80 FR 75683)]

U.S. Court of Appeals for the Federal Circuit

UNITED STATES, Plaintiff-Appellant v. NITEK ELECTRONICS, INC., Defendant-Appellee

Appeal No. 2015–1166

Appeal from the United States Court of International Trade in No. 1:11-cv-00078-JMB, Senior Judge Judith M. Barzilay.

Dated: December 1, 2015

Stephen Carl Tosini, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for appellant. Also represented by Jeanne E. Davidson, Patricia M. McCarthy, Benjamin C. Mizer; Eric Paul Delmar, Office of the Assistant Chief Counsel, United States Customs and Border Protection, El Paso, TX.

Robert Clifton Burns, Bryan Cave LLP, Washington, DC, argued for appellee. Also represented by Michael Zara, Santa Monica, CA.

Before Newman, Clevenger, and O'Malley, Circuit Judges.

Clevenger, Circuit Judge.

The United States appeals from a decision of the United States Court of International Trade dismissing the Government's penalty claim based on negligence for failure to exhaust the administrative remedies under 19 U.S.C. § 1592. *United States v. Nitek Elecs., Inc.*, 844 F. Supp. 2d 1298 (Ct. Int'l Trade 2012), *recons. denied*, 2012 WL 3195084 (Ct. Int'l Trade Aug. 7, 2012). Specifically, the Government argues that it should not be barred from seeking a penalty claim in court at a culpability level that is lower than that administratively asserted by U.S. Customs and Border Protection ("Customs"). Because the statutory framework of § 1592 does not allow the Government to change the culpability level that Customs alleged in the penalty claim, we affirm

BACKGROUND

Between June 14, 2001 and March 22, 2004, Nitek Electronics, Inc. ("Nitek") entered thirty-six shipments of pipe fitting components used for gas meters, which included gas meter swivels and gas meter nuts, into the United States from China. Customs issued a letter to Nitek on April 1, 2004, claiming that the merchandise was misclassified under the U.S. Harmonized Tariff Schedule ("HTSUS"). Accordingly, Customs demanded payment for lost duties under 19 U.S.C. § 1592(d) that resulted from the alleged misclassification. Customs further

alleged that the misclassification was also subject to antidumping duties. On March 21, 2005, Customs issued a pre-penalty notice to Nitek alleging that Nitek "entered or attempted to enter pipe fittings into the commerce of the United States by means of material false statements and documents, and/or omissions." The notice stated that the tentative culpability was gross negligence.

Concurrently, other importers of gas meter swivels and gas meter nuts challenged the antidumping duty order in the Court of International Trade. *See Sango Int'l L.P. v. United States*, 429 F. Supp. 2d 1356 (Ct. Int'l Trade 2006). Customs agreed to stay the penalty proceedings pending resolution of Sango International's challenge in exchange for Nitek subsequently waiving the statute of limitations. This Court later issued a final decision in *Sango International* on June 4, 2009, which sustained the anti-dumping duty order. *Sango Int'l L.P. v. United States*, 567 F.3d 1356 (Fed. Cir. 2009).

On February 24, 2011, Customs issued Nitek a final penalty claim and again stated that the tentative culpability was gross negligence. Nitek responded by letter opposing the penalty claim for gross negligence stating that it had not acted with wanton disregard for the law when dealing with the classification issues. Nitek also offered to pay all duties owed. Customs then referred the matter to the United States Department of Justice ("United States" or "Government") to bring a claim against Nitek in the Court of International Trade to enforce the penalty under its jurisdiction in 28 U.S.C.§ 1582. The United States then brought suit against Nitek to recover lost duties, antidumping duties, and a penalty based on negligence under 19 U.S.C. § 1592 in connection with the Nitek's misclassification of gas meter parts.

Nitek filed a motion to dismiss the case under two theories. First, Nitek moved to dismiss for lack of subject matter jurisdiction under USCIT Rule 12(b)(1) because the Government failed to exhaust all administrative remedies before filing suit in the Court of International Trade. The court denied dismissal on this ground because it found that exhaustion was not a jurisdictional matter and can be waived. Alternatively, Nitek moved to dismiss for failure to state a claim for which relief may be granted under USCIT Rule 12(b)(5) (now 12(b)(6)). The court denied dismissal of the claims to recover lost duties and antidumping duties. However, the court did dismiss the Government's claim for a penalty based on negligence. The court reasoned that since Customs had only issued a penalty based on gross negligence, the Government could not bring a penalty claim in court based on negligence. The negligence claim was "an entirely new claim" that had not been pursued by Customs at the administrative

level. Thus, the court found that the penalty claim was not properly before the court because the Government had failed to exhaust all administrative remedies by not having Customs demand a penalty based on negligence, instead of gross negligence.

The Government then moved for reconsideration, but the court reaffirmed its reading of the statute and denied reconsideration. The court explained that "for the Court to have any role, there must exist a claim for a specified violation of § 1592(a)—namely, a material false statement or omission amounting to 'fraud, gross negligence, or negligence'—for which the government is seeking recovery, thereby limiting the scope of the government's § 1592 action to the administrative claim Customs imposed below."

On September 23, 2014, the parties stipulated that the United States is entitled to recover $47,884.27 from Nitek for the lost duties and antidumping duties. The parties also stipulated that they could not appeal their agreement on these counts. Accordingly, the court ordered a final judgment on October 1, 2014, for the United States for the above amount.

The United States then timely appealed the dismissal of the penalty claim based on negligence to this Court. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(5).

DISCUSSION

We review the Court of International Trade's legal determinations de novo, including the court's dismissal for failure to state a claim for which relief can be granted. *Bell/Heery v. United States*, 739 F.3d 1324, 1330 (Fed.Cir. 2014). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The trade court's finding on exhaustion of administrative remedies is reviewed for abuse of discretion. *Itochu Bldg. Prods. v. United States*, 733 F.3d 1140, 1145 (Fed. Cir.2013) (reviewing the district court's dismissal for failure to exhaust for abuse of discretion); *Corus Staal BV v. United States*, 502 F.3d 1370, 1381 (Fed. Cir. 2007) (reviewing the trade court's finding of no exhaustion of administrative remedies for abuse of discretion).

The issue in this case is whether the court properly dismissed the Government's penalty claim for failure to state a claim because the underlying administrative penalty was based on gross negligence, not negligence. This requires a close examination of the statutory scheme in 19 U.S.C. § 1592, which governs this penalty claim.

First, § 1592(a) states that no one may enter merchandise into the United States by presenting material and false information by means of fraud, gross negligence, or negligence. 19 U.S.C. § 1592(a)(1). If Customs believes that there has been a violation of subsection (a), § 1592(b)provides that Customs must first issue a pre-penalty notice to the importer. The pre-penalty notice must "specify all laws and regulations allegedly violated" and "state whether the alleged violation occurred as a result of fraud, gross negligence, or negligence." § 1592(b)(1)(A)(iii),(v). Customs must also inform the accused importer "that he shall have a reasonable opportunity to make representations, both oral and written, as to why a claim for a monetary penalty should not be issued in the amount stated." § 1592(b)(1)(A)(vii). Next, if Customs determines that there was a violation after considering any representations made by the accused importer, Customs must issue a written penalty claim under § 1592(b)(2). The penalty claim must specify any changes in the information provided in the pre-penalty notice, including the level of culpability that was initially stated. The importer may then follow the procedures under 19 U.S.C. § 1618 to seek remission or mitigation of the penalty. At the conclusion of any such proceedings, Customs "shall provide to the person concerned a written statement which sets forth the final determination and the findings of fact and conclusions of law on which such determination is based." § 1592(b)(2).

Under § 1592(e), the United States can bring a claim in the Court of International Trade "for the recovery of any monetary penalty claimed under this section." The statute also states that "all issues, including the amount of the penalty, shall be tried de novo," § 1592(e)(1), and sets out the burden of proof for each culpability level. For fraud, the United States has to prove the violation by clear and convincing evidence. § 1592(e)(2). For gross negligence, the United States has the burden to prove the elements of the violation. § 1592(e)(3). For negligence, the United States has the burden to prove the act or omission that caused the violation and the alleged violator has the burden to prove that their actions were not negligent.§ 1592(e)(4).

From the statutory framework, it is clear that § 1592(e) creates a cause of action for the United States to recover penalty claims. Subsection 1592(b) states the procedures that Customs must follow when making penalty claims, including specifying the level of culpability (fraud, gross negligence, or negligence). In contrast, § 1592(e) merely gives the United States the authority to recover the penalty if the importer does not pay.

The Government argues that the three levels of culpability are "varying degrees of the falsity of the statement or omission underlying a violation," not separate claims. Appellant's Br. 12. The Government contends that the purpose of § 1592 is for Customs to identify the maximum penalty amount that can be collected for a violation. Under this theory, the Government believes that § 1592(e) allows the court to review the penalty determination de novo, meaning that the Department of Justice can independently assess the penalty claim issued by Customs and assert a penalty claim at a different culpability level. We do not agree.

The language of the statute and the legislative history support a reading that penalty claims based on fraud, gross negligence, or negligence are separate claims and the Department of Justice cannot independently enforce a penalty claim in court for a culpability level that was not pursued administratively by Customs. The structure of § 1592 indicates that the proceedings in Customs are separate from the proceedings in the Court of International Trade and the rules of one do not apply to the rules of the other. Subsection 1592(b) details the procedures for Customs whereas § 1592(e) addresses the court proceedings. Subsection (b) enables Customs to determine the level of culpability and requires Customs to inform the importer if the culpability level changes throughout the administrative process. This indicates that notice of a penalty claim based on a specific culpability level does not put the importer on notice of claims based on the other culpability levels because Customs must inform the importer if the culpability changes. This means that each culpability level is a separate claim and Customs chooses which culpability level or levels to assert against the importer. Subsection 1592(e) states that the Government can initiate an action in court "for the recovery of any monetary penalty claimed under this section" and that all issues will be tried de novo. This language specifies that the court proceeding is an enforcement mechanism to be used if the importer does not pay the penalty. Read together, the recovery language and the de novo review mean that that the court can consider all issues de novo that are alleged in Customs' final penalty claim. Specifically, this means that if Customs determines that the importer violated the statute based on negligence, the court does not need to give any deference to Customs' finding that the importer was negligent. However, the de novo review does not give the Government power to independently bring a claim that Customs did not allege. There is no indication in the plain meaning of subsection (e) that the Government may bring a claim based on a different culpability level.

The legislative history of § 1592 states that one objective of the de novo standard was to relate the amount of penalty to the culpability level and ensure due process for the importer. S. REP. NO. 95–778, at *1 (1978). To ensure fairness to the importer, Congress added the procedures for Customs under § 1592(b). The changes also enabled the court to review the amount of the asserted penalty, which the prior version of § 1592 did not allow. The main focus in the legislative history is that it is appropriate for the court to review the amount of penalty. S. REP. NO. 95778, at *20 ("If an importer refuses to pay a [§ 1592] monetary penalty and is sued by the United States in a district court, all issues, including the appropriateness of the penalty amount, would be considered by the court."); *id.* at *21 ("[T]he Committee emphasizes that the appropriateness of the amount of the penalty is a proper subject for judicial review.") However, the legislative history nowhere suggests that the Department of Justice should determine the level of culpability. It leaves this determination in the hands of Customs.

As we stated in *United States v. Ford Motor Co.*, 463 F.3d 1286 (Fed. Cir. 2006), the Court of International Trade has correctly defined the proper scope of the de novo review provided for in § 1592(e). In *Ford*, we reviewed that court's analysis in *United States v. Optrex*, 29 C.I.T. 1494 (Ct. Int'l Trade 2005), which concluded that "the de novo standard [in § 1592(e)] refers to the issues in the context of a specific claim based on one of three types of section 1592 violations and does not allow the court to review entirely new penalty claims." *Ford*, 463 F.3d at 1298 (quoting *Optrex*, 29 C.I.T. at 1500). In *Optrex*, the Government moved to amend its complaint for the penalty claim to allege higher levels of culpability than Customs originally alleged in the administrative proceedings. *Optrex*, 29 C.I.T. at 1495–96. The Government argued that "as long as the United States commences a section 1592 action," the de novo review of § 1592(e) puts "no limitation upon the 'issues' addressed or the 'amount of the penalty.'" *Id.* at 1499. The court denied the motion to amend, finding that the de novo review was limited to reviewing penalty claims for culpability levels that Customs had asserted. *Id.* at 1500. The court reasoned that the basic purpose of the statute is "to give an importer an opportunity to resolve a penalty proceeding before Customs, before any action in [the Court of International Trade]." *Id.* (citing S. REP. NO. 95–778, at *19–20 (1978)).

We are now faced with a similar issue and *see* no reason to interpret § 1592 differently in this case. The Government tries to distinguish this case from *Optrex* by noting that the Government in *Optrex* wanted to add claims at higher culpability levels than what Customs

had asserted whereas in this case, the Government is bringing a penalty claim for a lesser culpability level than what Customs asserted. The Government argues that "negligence is merely a lesser included offense within the universe of gross negligence." Appellant's Br. 18. The Government contends that Customs' penalty based on gross negligence gave Nitek notice that all lesser included culpability levels (i.e., negligence) were included in the gross negligence penalty notice. The Government cites to criminal law cases for this proposition. *Id.* at 18–19 (citing *United States v. Stolarz*, 550 F.2d 488 (9th Cir. 1977), and *Mildwoff v. Cunningham*, 432 F. Supp. 814 (S.D.N.Y. 1977)). However, there is nothing in the language of the statute, legislative history, or treatment in the prior cases to support importing that idea into this statutory framework. In fact, the procedures under § 1592(b) strongly suggest that the importer is not put on notice of lesser included offenses because Customs must notify the importer of any changes to the level of culpability throughout the administrative proceeding.

The doctrine of exhaustion requires that all administrative remedies be exhausted before seeking enforcement of administrative action. *United States v. Priority Prods., Inc.*, 793 F.2d 296, 300 (Fed. Cir. 1986). 28 U.S.C. § 2637(d) provides that "the Court of International Trade shall, where appropriate, require the exhaustion of administrative remedies." We have held that exhaustion is not strictly a jurisdictional requirement and therefore the court may waive the requirement at the court's discretion. *See Priority Prods., Inc.*, 793 F.2d at 300. However, § 2637(d) "indicates a congressional intent that, absent a strong contrary reason, the court should insist that parties exhaust their remedies before the pertinent administrative agencies." *Corus Staal BV v. United States*, 502 F.3d 1370, 1379 (Fed. Cir. 2007). Here, the Court of International Trade found that § 1592 precludes a waiver of exhaustion in this case. The court specifically points to the requirements under § 1592(b)(1) and (2) that direct Customs to articulate a level of culpability in the pre-penalty notice and notify the importer of any changes to that culpability level in the final penalty claim. Customs must inform the accused importer before enforcing a penalty claim for a different culpability level in court. Since Nitek was not notified of changing the culpability level from gross negligence to negligence, the court correctly found that the procedures under § 1592 were not properly followed. Accordingly, the court found that the Government did not exhaust its administrative remedies because Customs could have changed the culpability level in the administrative proceedings. If waiver of exhaustion was allowed under these circumstances it would be contrary to the purpose of the statute,

which is to provide fair administrative opportunities for resolution of penalties. Also, it would leave the importer guessing at what level of culpability he was accused of in court and thus would not properly put him on notice of the penalty claim.

We review a court's dismissal for failure to exhaust administrative remedies for an abuse of discretion. *Itochu Bldg. Prods.*, 733 F.3d at 1145. The court did not make any error of law or clearly erroneous fact finding that would warrant a finding of abuse of discretion in this case. As discussed above, the court found that requiring exhaustion in penalty recovery cases is consistent with the statutory scheme set up in § 1592. The court properly interpreted the statute and applied it to this case consistent with our observation in *United States v. Ford Motor Co.* Therefore, the court did not abuse its discretion in finding that waiver of exhaustion was not appropriate in this case.

CONCLUSION

The language of subsection (e) of § 1592—which vests the United States with authority to pursue recovery of penalty claims in the Court of International Trade— clearly defines that authority. The United States, under subsection (e), is charged with "the recovery of any monetary penalty claimed under this section." As noted above, the structure of the statute identifies the monetary penalty "claimed" under § 1592 as the claim made by Customs, the agency which has first-hand knowledge of the facts of the case and which is responsible for policing the statute. Under subsection (e), the Department of Justice acts as the litigating attorney for Customs, seeking to recover the claim made by Customs. We reject the Government's preference that we read subsection (e) as authorization for it to recover a monetary penalty claimed by the Department of Justice in its discretion "under this subsection."

We thus affirm the Court of International Trade's interpretation of § 1592. The court correctly found that the Government did not exhaust its remedies by bypassing Customs and independently asserting a penalty claim based on a different level of culpability. The Government cannot bring a penalty claim based on negligence in court because such a claim did not exist at the administrative level.

AFFIRMED