

U.S. Customs and Border Protection

CBP Decisions

DEPARTMENT OF THE TREASURY

19 CFR PART 12

CBP Dec. 07-27

RIN 1505-AB79

EXTENSION OF IMPORT RESTRICTIONS IMPOSED ON ARCHAEOLOGICAL AND ETHNOLOGICAL MATERIALS FROM PERU

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

ACTION: Final rule.

SUMMARY: This document amends U.S. Customs and Border Protection (CBP) regulations to reflect the extension of import restrictions on archaeological material and certain ethnological materials originating in Peru which were imposed by Treasury Decision (T.D.) 97-50 and extended by T.D. 02-30. The Assistant Secretary for Educational and Cultural Affairs, United States Department of State, has determined that conditions continue to warrant the imposition of import restrictions. Accordingly, the restrictions will remain in effect for an additional 5 years, and the CBP regulations are being amended to indicate this second extension. These restrictions are being extended pursuant to determinations of the United States Department of State made under the terms of the Convention on Cultural Property Implementation Act in accordance with the United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. T.D. 97-50 contains the Designated List of archaeological and ethnological materials that describes the articles to which the restrictions apply.

EFFECTIVE DATE: June 9, 2007.

FOR FURTHER INFORMATION CONTACT: For legal aspects, George F. McCray, Esq., Chief, Intellectual Property Rights and Restricted Merchandise Branch, (202) 572–8710. For operational aspects, Michael Craig, Chief, Other Government Agencies Branch, (202) 344–1684.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to the provisions of the 1970 United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention, codified into U.S. law as the Convention on Cultural Property Implementation Act (Pub. L. 97–446, 19 U.S.C. 2601 et seq.), the United States entered into a bilateral agreement with the Republic of Peru on June 9, 1997, concerning the imposition of import restrictions on pre-Columbian archaeological materials of Peru dating to the Colonial period and certain Colonial ethnological material from Peru. On June 11, 1997, the former United States Customs Service published T.D. 97–50 in the **Federal Register** (62 FR 31713), which amended 19 CFR 12.104g(a) to reflect the imposition of these restrictions, and included a list designating the types of archaeological and ethnological materials covered by the restrictions.

Import restrictions listed in 19 CFR 12.104g(a) are “effective for no more than five years beginning on the date on which the agreement enters into force with respect to the United States. This period can be extended for additional periods not to exceed five years if it is determined that the factors which justified the initial agreement still pertain and no cause for suspension of the agreement exists” (19 CFR 12.104g(a)).

On June 6, 2002, the former United States Customs Service published T.D. 02-30 in the **Federal Register** (67 FR 38877), which amended 19 CFR 12.104g(a) to reflect the extension of these import restrictions for an additional period of five years until June 9, 2007.

After reviewing the findings and recommendations of the Cultural Property Advisory Committee, the Assistant Secretary for Educational and Cultural Affairs, United States Department of State, concluding that the cultural heritage of Peru continues to be in jeopardy from pillage of archaeological and certain ethnological materials, made the necessary determination to extend the import restrictions for an additional five years on April 26, 2007. Accordingly, CBP is amending 19 CFR 12.104g(a) to reflect the extension of the import restrictions.

The Designated List of Archaeological and Ethnological Material from Peru covered by these import restrictions is set forth in T.D. 97–50. The Designated List and accompanying image database may also be found at the following internet website address: <http://exchanges.state.gov/culprop/pefact.html>, by clicking “III. Categories

of Artifacts Subject to Import Restriction”, and “Federal Register”. A complete list is published in the Federal Register notice of June 11, 1997.

It is noted that the materials identified in T.D. 97–50 as “certain pre-Colombian archaeological materials of Peru dating to the Colonial period and certain Colonial ethnological material from Peru” are referred to in the Determination to Extend as “Archaeological Material from the Prehispanic Cultures and Certain Ethnological Material from the Colonial Period of Peru.” The materials identified in T.D. 97–50 and those identified in the Determination to Extend are the same.

The restrictions on the importation of these archaeological and ethnological materials from Peru are to continue in effect for an additional 5 years. Importation of such material continues to be restricted unless the conditions set forth in 19 U.S.C. 2606 and 19 CFR 12.104c are met.

INAPPLICABILITY OF NOTICE AND DELAYED EFFECTIVE DATE

This amendment involves a foreign affairs function of the United States and is, therefore, being made without notice or public procedure (5 U.S.C. 553(a)(1)). For the same reasons, pursuant to 5 U.S.C. 553(d)(3), a delayed effective date is not required.

REGULATORY FLEXIBILITY ACT

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.

EXECUTIVE ORDER 12866

Because this rule involves a foreign affairs function of the United States, it is not subject to Executive Order 12866.

SIGNING AUTHORITY

This regulation is being issued in accordance with 19 CFR 0.1(a)(1).

LIST OF SUBJECTS IN 19 CFR PART 12

Cultural property, Customs duties and inspection, Imports, Prohibited merchandise.

AMENDMENT TO CBP REGULATIONS

For the reasons set forth above, part 12 of Title 19 of the Code of Federal Regulations (19 CFR part 12), is amended as set forth below:

4 CUSTOMS BULLETIN AND DECISIONS, VOL. 41, NO. 26, JUNE 20, 2007

PART 12 – SPECIAL CLASSES OF MERCHANDISE

1. The general authority citation for part 12 and the specific authority citation for § 12.104g continue to read as follows:

AUTHORITY: 5 U.S.C. 301; 19 U.S.C. 66, 1202 (General Note 3(i), Harmonized Tariff Schedule of the United States (HTSUS)), 1624;

* * * * *

Sections 12.104 through 12.104i also issued under 19 U.S.C. 2612;

* * * * *

2. In § 12.104g(a), the table of the list of agreements imposing import restrictions on described articles of cultural property of State Parties is amended in the entry for Peru by removing the reference to “T.D. 02-30” and adding in its place “CBP Dec. 07-27” in the column headed “Decision No.”.

DEBORAH J. SPERO,
Acting Commissioner,
U.S. Customs and Border Protection.

Approved: June 1, 2007

TIMOTHY E. SKUD,
Deputy Assistant Secretary of the Treasury.

[Published in the Federal Register, June 6, 2007 (72 FR 31176)]

19 CFR PARTS 24, 113, AND 128

[CBP Dec. 07-29]

USCBP-2006-0015

RIN 1505-AB39

FEES FOR CUSTOMS PROCESSING AT EXPRESS CONSIGNMENT CARRIER FACILITIES

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

ACTION: Final rule.

SUMMARY: This document amends title 19 of the Code of Federal Regulations (19 CFR) to reflect changes to the customs user fee statute made by section 337 of the Trade Act of 2002 and section 2004(f) of the Miscellaneous Trade and Technical Corrections Act of 2004. The statutory amendments made by section 337 concern the fees

payable for customs services provided in connection with the informal entry or release of shipments at express consignment carrier facilities and centralized hub facilities, and primarily serve to replace the annual lump sum payment procedure with a quarterly payment procedure based on a specific fee for each individual air waybill or bill of lading. Section 2004(f) amended the user fee statute by authorizing the assessment of both the merchandise processing fee and a reimbursable fee assessed on each air waybill or bill of lading for merchandise that is formally entered at these sites and valued at \$2,000 or less. In addition, pursuant to the authority established in 19 U.S.C. 58c(b)(9)(B)(i), this document raises the existing \$0.66 fee assessed on individual air waybills or bills of lading to \$1.00 to more equitably align it with the actual costs incurred by CBP in processing these items.

EFFECTIVE DATE: July 9, 2007.

FOR FURTHER INFORMATION CONTACT: Michael L. Jackson, Office of Field Operations, Cargo Control, Tel.: (202) 344-1196.

SUPPLEMENTARY INFORMATION:

Background

On July 28, 2006, CBP published in the **Federal Register** (71 FR 42778) a proposal to reflect the changes to the customs user fee statute made by section 337 of the Trade Act of 2002 and section 2004(f) of the Miscellaneous Trade and Technical Corrections Act of 2004, as well as to raise the existing \$0.66 fee assessed on individual air waybills or bills of lading to \$1.00.

Statutory Changes Made by Section 337(a) of the Trade Act of 2002

On August 6, 2002, the President signed into law the Trade Act of 2002, Public Law 107-210, 116 Stat. 933. Section 337(a) of the Trade Act of 2002 amended section 13031(b)(9) of the Consolidated Omnibus Budget Reconciliation Act of 1985 (19 U.S.C. 58c(b)(9)) by adding new requirements for the payment of user fees for customs services provided by CBP to express consignment carrier facilities and centralized hub facilities in connection with imported letters, documents, shipments or other merchandise to which informal entry procedures apply. The statutory amendments made by section 337 replaced the annual lump sum payment procedure with a quarterly payment procedure based on a specific fee for each individual air waybill or bill of lading. In addition, section 337(a) amended 19 U.S.C. 58c(b)(9)(B)(i) to authorize the Secretary of the Treasury to adjust the \$0.66 fee prescribed in 19 U.S.C. 58c(b)(9)(A)(ii) to an

amount that is not less than \$0.35 and not more than \$1.00 per individual air waybill or bill of lading.

Statutory Changes Made by Section 2004(f)
of the Miscellaneous Trade and Technical Corrections
Act of 2004

The Miscellaneous Trade and Technical Corrections Act of 2004 (“Trade Act of 2004”) was signed into law by the President on December 3, 2004 (Public Law 108–429, 18 Stat. 2593). Section 2004(f) of the Trade Act of 2004 made further amendments to section 13031(b)(9) of the Consolidated Omnibus Budget Reconciliation Act of 1985 (19 U.S.C. 58c(b)(9)) and authorized the assessment of merchandise processing fees provided for in 19 U.S.C. 58c(a)(9), as well as the fees that are currently assessed on individual air waybills or bills of lading, for merchandise that is formally entered at express consignment carrier facilities and centralized hub facilities and valued at \$2,000 or less.

Notice of Proposed Rulemaking

In the Notice of Proposed Rulemaking published in the **Federal Register** (71 FR 42778) on July 28, 2006, CBP proposed amendments to its regulations to conform to the statutory changes described above. In addition, pursuant to the authority established in 19 U.S.C. 58c(b)(9)(B)(i), that document set forth a proposed adjustment by the Secretary of the Treasury to increase the \$0.66 reimbursable fee prescribed by 19 U.S.C. 58c(b)(9)(A)(ii) and payable to CBP by express consignment carrier facilities and centralized carrier facilities to \$1.00. The fee increase is necessary to adequately reimburse CBP for the actual costs incurred by the agency in processing individual air waybills and bills of lading at these sites. The only mechanism for reimbursing CBP for these relocation expenses is through the established fee, which does not sufficiently cover CBP’s regular expenses at these sites.

CBP solicited comments on these proposals.

Discussion of Comments

Five commenters responded to the solicitation of public comment in the proposed rule. A description of the comments received, together with CBP’s analyses, is set forth below.

Comment:

Four commenters expressed the view that proposed § 24.23(b)(1)(i)(A), which states, in part, that “merchandise that is formally entered is subject to a \$1.00 per individual air waybill or bill of lading fee . . .” does not accurately reflect section 2004(f) of the Miscellaneous Trade and Technical Corrections Act of 2004. The commenters

uniformly interpret section 2004(f) as authorizing the assessment of both the merchandise processing fee (MPF) and a reimbursable fee for each air waybill or bill of lading only for formal entries valued at \$2,000 or less.

CBP's Response:

CBP agrees. The final rule will clarify that only those formal entries valued at \$2,000 or less are subject to both the merchandise processing fee and the reimbursable fee assessed per individual air waybill or bill of lading.

Comment:

Four commenters stated that the explanation of actual costs incurred by CBP in connection with the processing of an individual air waybill or bill of lading is legally insufficient, unsubstantiated, and fails to justify an increase in the individual airway bill or bill of lading fee.

CBP's Response:

CBP has met the statutory requirement set forth in 19 U.S.C. 58c(b)(9)(B)(i) which requires that, "[T]he Secretary shall provide notice in the Federal Register of a proposed adjustment [of the fee assessed per individual air waybill or bill of lading] . . . and the reasons therefore and shall allow for public comment on the proposed adjustment." CBP published notice in the **Federal Register** of the proposed adjustment and presented both collections received and aggregate costs incurred (see 71 FR 42778). The shortfall in collections versus actual costs justifies the increase in the fee rate assessed for each individual air waybill or bill of lading. CBP is entitled to recover both direct and indirect costs (salaries and benefits, support, overhead, etc.) incurred in connection with the processing of an individual air waybill or bill of lading.

Regarding the commenters' claims that the cost/collection data presented in 71 FR 42778 as the basis for the proposed fee increase are unsubstantiated or otherwise insufficient, it is noted that the data were generated by the Cost Management Information System (CMIS), an agency-wide cost accounting system implemented by CBP in 1998. CMIS uses an Activity Based Costing (ABC) methodology, whereby data are collected from various CBP sources and compiled in CMIS for a cost-of-operations perspective of the organization. Under CMIS, user fee costs are segregated from all other costs and collections are deposited in distinct accounts and can only be used to cover costs authorized by their respective legislation. CMIS uses distinct codes to identify the hours and activities performed by a CBP Officer at an express facility. CBP views the production of CMIS-generated data set forth in the proposed rule as a valid and accurate method of substantiating the agency's claim that actual

costs incurred by CBP in processing individual air waybills and bills of lading at express consignment and carrier hub facilities exceed collections.

The table, set forth below, is updated in this final rule to set forth the finance data associated with CBP's processing of individual air waybills and bills of lading at express consignment facilities and centralized hub facilities for FY's 2004, 2005 and 2006. This table updates and clarifies the table published in 71 FR 42778 to reflect that: (1) the data set forth below for FY 2006 are based on actual data, not estimated projections; (2) the heading text describing "Estimated Package Volume" has been replaced with the more accurate heading, "Individual Air Waybills or Bills of Lading"; and (3) certain CBP cost/deficit amounts for FY 2005 have been corrected to rectify a typographical error in the proposed rule in which CBP Costs were identified as \$21,393,520.

Fiscal Year	Individual Air Waybills or Bills of Lading	*Total Collections (Based on \$.66 Cents Per Bill)	CBP's Retained Portion of Collected Amount (Based on \$.33 Cents Per Bill)	**CBP Costs	CBP Cost Per Bill	CBP Deficit
2004	47,243,205	\$31,180,516	\$15,590,258	\$19,945,704	0.42	(\$4,355,446)
2005	45,364,139	\$29,940,332	\$14,970,166	***\$21,939,520	***0.48	***(\$6,969,354)
2006	48,038,188	\$31,705,204	\$15,852,602	\$26,659,626	0.55	(\$10,807,024)

* Collection information from the Automated Commercial System Monthly Report of Collections (ACSR-CL 134).

** All cost information from the Cost Management Information System.

*** These numbers correct typographical errors in 71 FR 42778 for FY 2005.

Comment:

One commenter questioned CBP's requirement, as described in 71 FR 42778, that the fee be paid on the "lowest level" air waybill or bill of lading contained in a consolidated shipment rather than on the master bill that represents the actual shipping document. It was also suggested that the "lowest level" concept was a means to elevate the bill count to increase fees.

CBP's Response:

CBP disagrees. The implementation of the fee was to replace the direct reimbursement mechanism by which CBP was reimbursed for services provided in the processing of letters, documents, records, shipments, merchandise, or any other item. Section 58c(b)(9)(A) (II)(ii) states that the fee is assessed "per individual air waybill or bill of lading." CBP believes the use of the word "individual" indicates that applying the fee to a bill at the lowest level is appropriate, as opposed to applying the fee to a master bill that covers numerous and separate individual bills.

Comment:

Four commenters view the assessment of 19 U.S.C. 1592 penalties for the underpayment or failure to pay reimbursement fees, as prescribed in § 24.23(b)(4)(iv) of title 19 of the CFR, as inappropriate because 1592 penalties apply to fraud, gross negligence and negligence.

CBP's Response:

Penalties assessed pursuant to 19 U.S.C. 1592 may be applied when a false and material statement or omission occurs by reason of negligence, gross negligence or fraud in connection with the entry or introduction of merchandise into the commerce of the United States. Consequently, CBP believes it may be appropriate to apply these penalties in cases where a false and material statement or omission is made by negligence, gross negligence or fraud regarding the number of air waybills subject to the fee. CBP acknowledges that clerical errors or mistakes of fact are not violations unless they are part of negligent conduct.

Comment:

Two commenters viewed as excessive the provision in § 113.64(a) of title 19 of the CFR that provides that a late payment is subject to liquidated damages equal to two times the fee not paid.

CBP's Response:

The failure to pay the required fee within the prescribed time frame is a breach of the international carrier bond conditions resulting in liquidated damages. The standard for liquidated damages set forth in § 113.64(a) is two times the processing fees not timely paid. The proposed rule did not change that standard; it merely expands it to include the fees for processing letters, documents, records, shipments, merchandise, or other items.

Comment:

Two commenters expressed the opinion that assessment of 19 U.S.C. 1592 penalties and liquidated damages constitutes double penalization.

CBP's Response:

CBP disagrees. As indicated above, 19 U.S.C. 1592 penalties apply to false and material statements or omissions made by fraud, gross negligence and negligence, while liquidated damages result under 19 CFR 113.64(a) for the breach of bond conditions, *i.e.*, for breach of contract. Thus, liquidated damages are the result of a breach of a contract and are not penalties and there is no "double penalization".

Comment:

Three commenters stated that CBP needs to establish a means to protest and appeal decisions regarding the underpayment or overpayment of reimbursable fees.

CBP's Response:

CBP believes there are adequate administrative review processes available to challenge decisions regarding the underpayment or overpayment of the fee. Initially, the Express Consignment operator calculates the number of individual air waybills or bill of lading processed for the required calendar quarter and remits a payment equal to that number multiplied by the set fee. Section 24.23(b)(4)(iii)(A) of title 19 of the CFR contains a mechanism for challenging an overpayment by providing up to one year to request a refund for overpayment. In addition, if CBP assesses a charge or exaction, the assessment is subject to an administrative challenge through the filing of a protest under 19 U.S.C. 1514.

Comment:

One commenter stated that CBP should address whether there were periods when CBP's collections exceeded costs and whether any such surplus had occurred. The commenter also stated that surplus funds should be carried over from one period to another.

CBP's Response:

Since the enactment of the Trade Act of 2002 and the implementation of the provisions of 19 U.S.C. 58c, CBP has not had a surplus of funds (see collection/cost table in CBP's response to second comment, set forth above). However, in the event a surplus should occur, CBP will maintain the surplus funds in the user fee account for providing services to express consignment operations. The funds will remain until expended.

Comment:

One commenter stated that CBP's analysis of costs failed to include the collection of fees under the provisions of 19 U.S.C. 58c(a)(9), i.e., merchandise processing fees (MPF), from many of the same shipments subject to the fees of 19 U.S.C. 58c(b)(9).

CBP's Response:

CBP disagrees. The commenter is correct in that shipments formally entered and valued at \$2,000 or less are subject to both the air waybill or bill of lading fee as well as the MPF. However, CBP did not include the MPF funds as part of its financial analysis as those funds are not available for express consignment operations. MPF is collected under 19 U.S.C. 58c(a)(9). Fees collected under that para-

graph are deposited, by virtue of 19 U.S.C. 58c(f)(1), into the Customs User Fee Account. Express consignment fees are excluded from collection under 19 U.S.C. 58c(a) by section 58c(a)(10) and 58c(b)(9)(B). Instead, express consignment fees are collected under 19 U.S.C. 58c(b)(9).

Comment:

One commenter suggested that if proposed § 128.11(b)(7)(iv) of title 19 of the CFR requires Express Consignment Carrier Facilities operators to report users of the facility on a quarterly basis, then the application procedures should include similar language.

CBP's Response:

CBP agrees. Section 128.11(b) is amended in this final rule to include the requirement to identify prospective users.

Comment:

Two commenters question whether proposed § 24.23(b)(1)(i)(A) is accurate in requiring that the 0.21 percent ad valorem fee be paid by the carrier as the MPF is the responsibility of the importer.

CBP's Response:

CBP concurs. The last sentence in § 24.23(b)(1)(i)(A) will be modified by deleting the phrase, "by the carrier" so as to clarify that the importer of record is the party responsible for paying the 0.21 ad valorem fee. Corresponding changes will be made elsewhere to the final regulatory text as necessary.

Comment:

One commenter suggested that the proposed fee increase of 50% is out of line with federal pay increases for the same period.

CBP's Response:

In August, 2002 the pay grade for journeyman CBP officers was elevated to the General Schedule (GS)-11 level. The difference between the Fiscal Year (FY) 2002 GS-9 Step 1 and FY 2006 GS-11 Step 1 was \$14,544 or a 38.9% increase. (GS-9/1 = \$37,428, GS-11/1 = \$51,972). Based on these figures, CBP does not view the increase as unduly disproportionate.

Comment:

One commenter stated that CBP should detail the cost of hiring the 27 new CBP officers mentioned in the notice of proposed rulemaking.

CBP's Response:

The hiring costs cited in the proposed rule were projected costs for anticipated positions based on resource requests. Additional resources are contingent on funding availability. As such, these costs have been removed from the footnotes in the collection/cost table set forth above.

Comment:

One commenter stated that CBP has, without justification, concluded that express consignment operators will simply pass the increased per item air waybill and bill of lading fee costs along to their customers.

CBP's Response:

CBP noted in the proposed rule that small business entities will "likely pass the costs of the increased fee on to their customers to the extent that they are able." CBP remains of the view that this is the likely option for many of the impacted parties.

Comment:

Two commenters mentioned the CBP employee relocation costs associated with a Midwest hub relocation as a contributing factor for the fee increase, and further noted that these events are infrequent and do not impose regularly recurring costs on CBP.

CBP's Response:

CBP's costs include relocation expenses as authorized by law. As such expenses are episodic in nature and vary from year to year, CBP does not incur relocation expenses at the same rate annually. To the extent that CBP incurs relocation expenses in a given fiscal year, such costs will be accounted for in the agency's subsequent fiscal year cost analysis.

Comment:

One commenter stated that CBP's "estimated average annual burden per respondent/recordkeeper" for complying with fee reporting requirements is low and requests that CBP explain what data it relied upon for these estimates.

CBP's Response:

In the proposed rule, CBP reported the following estimated average annual burden per respondent associated with the proposed fee reporting requirements: § 24.23(b)(4)(ii) – 8 hours; § 24.23(b)(4)(iii) – 1 hour; and § 128.11(b) – 2 hours. Proposed § 24.23(b)(4)(ii) requires a respondent to report to CBP the identity of the calendar quarter to which the payment relates, the identity of the facility to

which the payment is made and the applicable port code (and, if multiple facilities are used, the identity of each facility, its port code and the portion of the payment that pertains to each code). Proposed § 24.23(b)(4)(iii) requires the respondent to provide CBP with an explanation of any overpayment or underpayment accrued in a previous quarter. Proposed § 128.11(b), in pertinent part, requires the respondent to provide CBP with a list of all carriers or operators that intend to use the facility, are currently using the facility, or have ceased to use the facility. CBP is of the view that the normal business records already maintained by affected business entities provide the basis to calculate and transmit the required information and these regulations do not require the creation of any new data elements. For this reason, CBP believes the information collection burden reported in the proposed rule represents a realistic estimate of the recordkeeping burden associated with these regulations.

Comment:

Two commenters stated that CBP did not show fiscal year 2002 and 2003 volumes in its analysis.

CBP's Response:

In the proposed rule, CBP presented the costs and collections for Fiscal Years (FY) 2004 and 2005, and set forth projected costs for FY 2006. The FY 2003 data are not readily available. The figures covering FY 2002 are irrelevant as there was a different reimbursement structure in place at the time.

Comment:

One commenter stated that CBP needs to confirm whether the cost of data transmission lines are included in the reimbursable cost calculation as opposed to separate billings.

CBP's Response:

The data transmission lines are not included in nor covered by the reimbursable fee and these costs are not included in CBP's costs calculation. CBP currently bills for data transmission lines pursuant to authority granted by 19 U.S.C. 58c(b)(9)(B)(ii).

Comment:

One commenter noted that proposed § 24.23(b)(4) should be clarified to state that only import shipments are subject to the reimbursable fee, i.e., those shipments from a foreign shipper to a U.S. consignee.

CBP's Response:

The reimbursable fee applies to the processing of airway bills for shipments arriving in the U.S., and not for shipments leaving the

U.S. The regulatory text set forth in § 24.23(b)(4) will be clarified accordingly.

Comment:

One commenter stated that CBP needs to confirm that none of the costs are associated with the new class of CBP officers referred to as CBP Agriculture Specialists.

CBP's Response:

None of the costs shown in the proposed rule are associated with the CBP Agriculture Specialists. There are distinct codes within CMIS for the CBP officer and the CBP Agriculture Specialist.

Comment:

One commenter noted that the collection/cost table set forth in the proposed rule (71 FR 42778) included a column entitled "Estimated Package Volume" with numbers for FY 2004 and FY 2005, and estimated numbers for FY 2006. As the statutory provisions for the reimbursable fee are based on individual air waybills or bills of lading rather than individual shipping pieces, the commenter suggests that CBP should revise the table to accurately reflect estimated shipment volume, and CBP should also adjust the numbers to reflect the actual number of shipments with individual air waybills or bills of lading subject to the fee. In addition, it is suggested that CBP verify that the subsequent numbers in the "Total Collections" column are accurate, as they are derived from the numbers in the previously published column entitled "Estimated Package Volume".

CBP's Response:

CBP agrees that clarification of the table is necessary. In this regard, it is noted that the number under the erroneous header entitled "Estimated Package Volume" was, in fact, describing air waybills and bills of lading – not packages. The header is correctly named in the table set forth in this document.

Comment:

One commenter notes that, based on the figures provided in the collection/cost table set forth in the proposed rule, CBP claims its costs have increased by 7.3% and 5.4% while its workload has dropped 4% in each of the past two fiscal years. Additionally, a footnote to the cost table set forth in the proposed rule states that CBP anticipated adding 27 new CBP Officer positions in FY 2006. The commenter requests that CBP detail the facilities to which the 27 new CBP officer positions are assigned.

CBP's Response:

The collection/cost table set forth in the proposed rule indicates workload decreases for each of years FY 2004 and 2006. The FY 2006 figures were based on projected estimates. When CBP received the actual numbers, the only workload decrease occurred in FY 2005. The reference to the 27 new employees was based on a hiring projection that did not occur.

An increase in volume will cause an increase in revenue. A decrease in volume may not actually result in a decrease in costs. CBP hub employees continue to work 8 hours a day regardless of volume; however, a decrease in volume could reduce the demand for overtime resulting in reduced costs at hub facilities. In either event, pursuant to 19 U.S.C. 58c(b)(9)(B)(i), the Secretary of the Treasury may once per fiscal year adjust the fee to an amount not less than \$0.35 and not more than \$1.00 per individual air waybill or bill of lading. In the event that collections begin to exceed costs CBP may, pursuant to the authority cited above, analyze and adjust the fee downward.

Comment:

Two commenters stated that CBP should clarify the language used to describe the unit of measure relevant to this reimbursable process and that actual data, rather than estimates, should be provided.

CBP's Response:

As noted above, the titles used in the collection/cost table have been modified to more accurately reflect the nature of the program (i.e., individual air waybills or bills of lading). Actual data volumes are reflected in the table set forth in this document.

CONCLUSION

After analysis of the comments and further review of the matter, CBP has determined to adopt as a final rule, with the changes mentioned in the comment discussion and with additional non-substantive editorial changes, the proposed rule published in the **Federal Register** (71 FR 42778) on July 28, 2006.

THE REGULATORY FLEXIBILITY ACT

CBP examined the impacts of the proposed rule on small entities as required by the Regulatory Flexibility Act (Pub. L. No. 96-354, 94 Stat. 1164, codified at 5 U.S.C. chapter 6) and prepared an Initial Regulatory Flexibility Act Analysis (IRFA) in the NPRM published in the **Federal Register** (71 FR 42778) on July 28, 2006. Based on annual data collected by CBP and set forth in that document, there are 22 businesses that will be affected by this rule. Of these, 10 are large businesses, 11 are small businesses, and 1 is a small, foreign-owned business. The 12 small business entities affected by this rule

are either courier services (NAICS code 492110) or arrange freight transportation (NAICS code 488510). Sixteen of these companies (both large and small) are members of an association that owns and operates a consignment facility. That association acts as a single respondent for its members.

For this Final Regulatory Flexibility Act analysis, CBP analyzed annual revenue data for the 12 small businesses affected. To determine the impact of the proposed rule on annual revenues, CBP calculated the projected difference in costs between the old and proposed fee and compared that (as a percentage) to average annual revenues. Based on these calculations, CBP estimates that the rule will have a 5-percent impact or less on annual revenues for 5 of the small businesses. The rule will have a 5 to 10-percent impact on one of the companies and a greater than 10-percent impact on four companies. CBP could not find data for one small business, and one was foreign-owned. In the course of CBP's examination of the impacts on annual revenues for these small businesses, CBP determined that these entities may pass the cost of the increased fee on to their customers to the extent that they are able.

CBP concluded that the proposed rule set forth in 71 FR 42778 could have a significant impact on a substantial number of small entities. CBP solicited comments on any of the regulatory requirements that could minimize the cost to small businesses.

One comment was received that pertains specifically to the IRFA set forth in the proposed rule. That comment, addressed above in the "comments" section of this document, noted that CBP concluded, without justification, that express consignment operators will pass the increased cost of the fee along to their customers to the extent possible. As set forth above, CBP remains of the view that the impacted business entities are likely to pass along the increased fee to their customers to the extent that they are able. The agency acknowledges, however, that the mechanism by which an individual express consignment operator adjusts to the proposed fee increase is an internal business decision and, therefore, no definitive conclusion regarding the passing along of costs can be made.

Reporting and Recordkeeping

This rule will change current paperwork requirements. No new professional skills will be necessary for the preparations of the reports and records. For more detail, see PAPERWORK REDUCTION ACT below.

Other Federal Rules

This rule does not duplicate, overlap, or conflict with other federal regulations.

Regulatory Alternatives

CBP did not consider any alternatives to the rule.

Conclusions

Based on the above analysis, CBP concludes that the final rule may have a significant economic impact on a substantial number of small entities.

PAPERWORK REDUCTION ACT

The collections of information in this document are contained in §§ 24.23 and 128.11 (19 CFR 24.23 and 128.11). This information is used by CBP to determine whether user fees required by statute have been properly paid. The likely respondents are business organizations including importers and air carriers.

The collections of information for paying fees for customs services provided in connection with the informal entry or release of shipments at express consignment carrier facilities and centralized hub facilities was previously approved by the Office of Management and Budget under control number 1651-0052. In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507), CBP has submitted to OMB for review the following adjustments to the information provided to OMB for the previously approved OMB control number to account for the changes in this rule. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by OMB.

The following is a breakdown of the estimated annual burden per respondent associated with the collection of information in this final rule:

- An express consignment operator (courier) will incur an estimated annual burden of 8 hours to prepare the quarterly payment report as per § 24.23(b)(4)(ii).
- An express consignment courier facility operator, as per § 128.11(b), will incur an estimated annual burden of 2 hours to prepare a quarterly list of all carriers or operators currently using an express consignment courier facility.
- An express consignment operator (courier) will incur an estimated annual burden of 1 hour to prepare a request for a refund of an overpayment as per § 24.23(b)(4)(iii).

Comments concerning the accuracy of this burden estimate and suggestions for reducing this burden should be sent to U.S. Customs and Border Protection, Information Services Group, Office of Finance, 1300 Pennsylvania Avenue, N.W. Washington, D.C. 20229, and to OMB, Attention: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, D.C. 20503. A copy should also be sent to the Trade and Commercial

Regulations Branch, Office of International Trade, U.S. Customs and Border Protection, 1300 Pennsylvania Avenue, N.W. (Mint Annex), Washington, D.C. 20229.

EXECUTIVE ORDER 12866

This amendment does not meet the criteria for a “significant regulatory action” as specified in Executive Order 12866.

SIGNING AUTHORITY

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

LIST OF SUBJECTS

19 CFR Part 24

Accounting, Claims, Customs duties and inspection, Exports, Imports, Interest, Reporting and recordkeeping requirements, Taxes, User fees, Wages.

19 CFR Part 113

Air carriers, Bonds, Customs duties and inspection, Exports, Freight, Imports, Reporting and recordkeeping requirements, Surety bonds.

19 CFR Part 128

Administrative practice and procedure, Carriers, Couriers, Customs duties and inspection, Entry, Express consignments, Freight, Imports, Informal entry procedures, Reporting and recordkeeping requirements.

AMENDMENTS TO THE REGULATIONS

For the reasons set forth in the preamble, parts 24, 113, and 128 of title 19 of the CFR (19 CFR Parts 24, 113, and 128), are amended as set forth below.

PART 24 – CUSTOMS FINANCIAL AND ACCOUNTING PROCEDURE

1. The authority citation for part 24 continues to read in part 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. 9701; Pub. L. 107–296, 116 Stat. 2135 (6 U.S.C. 1 et. seq.).

* * * * *

Section 24.17 also issued under 19 U.S.C. 261, 267, 1450, 1451, 1452, 1456, 1524, 1557, 1562; 46 U.S.C. 2110, 2111, 2112;

Section 24.23 also issued under 19 U.S.C. 3332;

* * * * *

2. In § 24.17:

a. The section heading is revised to read as follows: “Reimbursable services of CBP employees.”;

b. Paragraphs (a) through (d) are amended by removing the words “Customs employee” where they appear and adding in each place the term “CBP employee”; and

c. Paragraphs (a)(12) and (a)(13) are removed and paragraph (a)(14) is redesignated as paragraph (a)(12).

3. In § 24.23:

a. Paragraph (a) is amended by removing the word “Customs” each place that it appears and adding the term “CBP”;

b. Paragraphs (b)(1)(i)(A) and paragraph (b)(2) are revised;

c. New paragraphs (b)(3) and (b)(4) are added;

d. The introductory text of paragraph (c)(1) is amended by removing the reference “(b)(2)(i)” and adding, in its place, the reference “(b)(2)”;

e. Paragraph (c)(2)(i) is amended by removing the reference “(b)(2)(i)” and adding, in its place, the reference “(b)(2)”;

f. The first sentence of paragraph (c)(3) is amended by removing the reference “(b)(2)(i)” and adding, in its place, the reference “(b)(2)”;

g. Paragraph (c)(5) is amended by removing the reference “(b)(2)(i)” and adding, in its place, the reference “(b)(2)”.

The revisions and additions read as follows:

§ 24.23 Fees for processing merchandise.

* * * * *

(b) Fees (1) Formal entry or release (i) Ad valorem fee (A) General. Except as provided in paragraph (c) of this section, merchandise that is formally entered or released is subject to the payment to CBP of an ad valorem fee of 0.21 percent. The 0.21 ad valorem fee is due and payable to CBP by the importer of record of the merchandise at the time of presentation of the entry summary and is based on the value of the merchandise as determined under 19 U.S.C. 1401a. In the case of an express consignment carrier facility or centralized hub facility, each shipment covered by an individual air waybill or bill of lading that is formally entered and valued at \$2,000 or less is subject to a \$1.00 per individual air waybill or bill of lading fee and, if applicable, to the 0.21 percent ad valorem fee in accordance with paragraph (b)(4) of this section.

* * *
* * * * *

(2) Informal entry or release. Except in the case of merchandise covered by paragraph (b)(3) or paragraph (b)(4) of this section, and except as otherwise provided in paragraph (c) of this section, merchandise that is informally entered or released is subject to the payment to CBP of a fee of:

(i) \$2 if the entry or release is automated and not prepared by CBP personnel;

(ii) \$6 if the entry or release is manual and not prepared by CBP personnel; or

(iii) \$9 if the entry or release, whether automated or manual, is prepared by CBP personnel.

(3) Small airport or other facility. With respect to the processing of letters, documents, records, shipments, merchandise, or any other item that is valued at \$2,000 or less, or any higher amount prescribed for purposes of informal entry in § 143.21 of this chapter, a small airport or other facility must pay to CBP an amount equal to the reimbursement (including overtime) which the facility is required to make during the fiscal year under § 24.17.

(4) Express consignment carrier and centralized hub facilities. Each carrier or operator using an express consignment carrier facility or a centralized hub facility must pay to CBP a fee in the amount of \$1.00 per individual air waybill or individual bill of lading for the processing of airway bills for shipments arriving in the U.S. In addition, if merchandise is formally entered and valued at \$2,000 or less, the importer of record must pay to CBP the ad valorem fee specified in paragraph (b)(1) of this section, if applicable. An individual air waybill or individual bill of lading is the individual document issued by the carrier or operator for transporting and/or tracking an individual item, letter, package, envelope, record, document, or shipment. An individual air waybill is the bill at the lowest level, and is not a master bill or other consolidated document. An individual air waybill or bill of lading is a bill representing an individual shipment that has its own unique bill number and tracking number, where the shipment is assigned to a single ultimate consignee, and no lower bill unit exists. Payment must be made to CBP on a quarterly basis and must cover the individual fees for all subject transactions that occurred during a calendar quarter. The following additional requirements and conditions apply to each quarterly payment made under this section:

(i) The quarterly payment must conform to the requirements of § 24.1, must be mailed to Customs and Border Protection, Revenue Division/Attention: Reimbursables, 6650 Telecom Drive, Suite 100, Indianapolis, Indiana 46278, and must be received by

CBP no later than the last day of the month that follows the close of the calendar quarter to which the payment relates.

(ii) The following information must be included with the quarterly payment:

(A) The identity of the calendar quarter to which the payment relates;

(B) The identity of the facility for which the payment is made and the port code that applies to that location and, if the payment covers multiple facilities, the identity of each facility and its port code and the portion of the payment that pertains to each port code; and

(C) The total number of individual air waybills and individual bills of lading covered by the payment, and a breakdown of that total for each facility covered by the payment according to the number covered by formal entry procedures, the number covered by informal entry procedures specified in §§ 128.24(e) and 143.23(j) of this chapter, and the number covered by other informal entry procedures.

(iii) Overpayments or underpayments may be accounted for by an explanation in, and adjustment of, the next due quarterly payment to CBP. In the case of an overpayment or underpayment that is not accounted for by an adjustment of the next due quarterly payment to CBP, the following procedures apply:

(A) In the case of an overpayment, the carrier or operator may request a refund by writing to Customs and Border Protection, Revenue Division/Attention: Reimbursables, 6650 Telecom Drive, Suite 100, Indianapolis, Indiana 46278. The refund request must specify the grounds for the refund and must be received by CBP within one year of the date the fee for which the refund is sought was paid to CBP; and

(B) In the case of an underpayment, interest will accrue on the amount not paid from the date payment was initially due to the date that payment to CBP is made.

(iv) The underpayment or failure of a carrier or operator using an express consignment carrier facility or a centralized hub facility to pay all applicable fees owed to CBP pursuant to paragraph (b)(4) of this section may result in the assessment of penalties under 19 U.S.C. 1592, liquidated damages, and any other action authorized by law.

* * * * *

PART 113 – CUSTOMS BONDS

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

AUTHORITY: 19 U.S.C. 66, 1623, 1624.

* * * * *

5. In § 113.64, paragraph (a) is amended by adding a new sentence at the end to read as follows:

§ 113.64 International carrier bond conditions.

* * * * *

(a) * * * * * If the principal (carrier or operator) fails to pay the fees for processing letters, documents, records, shipments, merchandise, or other items on or before the last day of the month that follows the close of the calendar quarter to which the processing fees relate pursuant to § 24.23(b)(4) of this chapter, the obligors (principal and surety, jointly and severally) agree to pay liquidated damages equal to two times the processing fees not timely paid to CBP as prescribed by regulation.

* * * * *

PART 128 – EXPRESS CONSIGNMENTS

6. The authority citation for part 128 is revised to read as follows:

AUTHORITY: 19 U.S.C. 58c, 66, 1202 (General Note 3(i), Harmonized Tariff Schedule of the United States), 1321, 1484, 1498, 1551, 1555, 1556, 1565, 1624.

7. In § 128.11:

- a. Paragraphs (b)(2) and (b)(7)(ii) – (v) are revised; and
- b. Paragraph (c) is amended, in the first sentence, by removing the word “shall” and adding in its place the word “must” and, in the second sentence, by removing the word “Customs” and adding in its place the term “CBP”.

The revisions read as follows:

§ 128.11 Express consignment carrier application process.

* * * * *

(b) * * *

(2) A statement of the general character of the express consignment operations that includes, in the case of an express consignment carrier facility, a list of all carriers or operators that intend to use the facility.

* * * * *

(7) * * *

(ii) Sign and implement a narcotics enforcement agreement with U.S. Immigration and Customs Enforcement (ICE).

(iii) Provide, without cost to the Government, adequate of-

office space, equipment, furnishings, supplies and security as per CBP's specifications.

(iv) If the entity is an express consignment carrier facility, provide to Customs and Border Protection, Revenue Division/Attention: Reimbursables, 6650 Telecom Drive, Suite 100, Indianapolis, Indiana 46278, at the beginning of each calendar quarter, a list of all carriers or operators currently using the facility and notify that office whenever a new carrier or operator begins to use the facility or whenever a carrier or operator ceases to use the facility.

(v) If the entity is a hub facility or an express consignment carrier, timely pay all applicable processing fees prescribed in § 24.23 of this chapter.

* * * * *

DEBORAH J. SPERO,
Commissioner,
Bureau of Customs and Border Protection.

Approved: June 4, 2007

TIMOTHY E. SKUD,
Deputy Assistant Secretary of the Treasury.

[Published in the Federal Register, June 8, 2007 (72 FR 31719)]

DEPARTMENT OF HOMELAND SECURITY,
OFFICE OF THE COMMISSIONER OF CUSTOMS.

Washington, DC, June 6, 2007,

The following documents of U.S. Customs and Border Protection (“CBP”), Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and CBP field offices to merit publication in the CUSTOMS BULLETIN.

SANDRA L. BELL,
*Executive Director,
Regulations and Rulings Office of Trade.*

19 CFR PART 177

**REVOCAION OF RULING LETTERS AND REVOCAION
OF TREATMENT RELATING TO THE TARIFF
CLASSIFICATION OF KVM CONSOLE SWITCHES AND
KVM EMBEDDED SWITCHES USED WITH COMPUTER
NETWORKS**

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

ACTION: Notice of revocation of tariff classification ruling letters and revocation of treatment relating to the classification of keyboard, video, mouse switches (KVM) that are used with computer networks.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) is revoking two ruling letters relating to the tariff classification, under the Harmonized Tariff Schedule of the United States (HTSUS), of KVM switches that are used with and attached to a computer networks. Similarly, CBP is revoking any treatment previously accorded by it to substantially identical transactions. A notice of proposed actions was published in the *Customs Bulletin*, Vol. 41, No. 18, on April 25, 2007. No comments were received in response to this proposed notice.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after August 19, 2007.

FOR FURTHER INFORMATION CONTACT: Robert Dinerstein, Tariff Classification and Marking Branch, at (202) 572–8721.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter “Title VI”), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are **informed compliance** and **shared responsibility**. These concepts are premised on the idea that in order to maximize voluntary compliance with customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on CBP to provide the public with improved information concerning the trade community’s responsibilities and rights under the customs and related laws. In addition, both the trade and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, this notice advises interested parties that CBP is revoking two ruling letters relating to the tariff classification of KVM switches attached to computer network systems that are used to control those networks. Although in this notice CBP is specifically referring to the revocation of New York Ruling Letter (NY) L81751, dated January 20, 2005, and NY L82985, dated February 16, 2005, this notice covers any rulings on this merchandise which may exist but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the two identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (*i.e.*, ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice should have advised CBP during this notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625 (c)(2)), as amended by section 623 of Title VI, CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Any person involved with substantially identical transactions should have advised CBP during this notice period. An importer’s failure to advise CBP of substantially identical transactions or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importer or its

agents for importations of merchandise subsequent to the effective date of the final decision on this notice.

In NY L81751 and NY L82985, CBP classified devices known as KVM switches which are hardware devices used with computer networks to connect one keyboard, monitor, and mouse, to two or more servers, in subheading 8537.10.90, HTSUS, which provides for: "boards, panels, consoles . . . for the electric control or distribution of electricity." The KVM switches are used to connect to and work in conjunction with networks and provide increase efficiency in networking functions. In NY L81751, the merchandise that was considered was the Dell KVM Console Switch. In NY L82985, CBP considered the classification of the Dell Embedded KVM Switch. NY L82985 described the Dell Embedded KVM Switch as a printed circuit assembly (PCA) in a metal frame that is intended for internal installation in an Original Equipment Manufacturer chassis containing multiple servers. The KVM switches allow the system administrator to view and control several servers through the use of one or two monitors, keyboards and mouse. It utilizes a combination of solid state switching and software to switch the input signals from various servers that connected to the switch.

Based on our examination of the scope of the terms of heading 8471, HTSUS, and we have determined that the KVM switches fit within the scope of Note 5(C) to Chapter 84, of the HTSUS, as a unit of an ADP system. Thus, we have concluded that the KVM switches in question are properly classified in heading 8471, HTSUS, specifically in subheading 8471.80.10, HTSUS, as control or adapter units of ADPs and that NY L81751 and NY L82985 should be revoked.

Pursuant to 19 U.S.C. 1625(c)(1), CBP is revoking NY L81751 and NY L82985 and any other ruling not specifically identified that is contrary to the determination set forth in this notice to reflect the proper classification of the merchandise pursuant to the analysis set forth in Headquarters Ruling Letter (HQ) W967696 (Attachment). Additionally, pursuant to 19 U.S.C. 1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions that is contrary to the determination set forth in this notice. In accordance with 19 U.S.C. 1625(c), this action will become effective 60 days after publication in the Customs Bulletin.

DATED: June 1, 2007

Gail A. Hamill for MYLES B. HARMON,
Director,
Commercial and Trade Facilitation Division.

Attachment

U.S. CUSTOMS AND BORDER PROTECTION

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DEPARTMENT OF HOMELAND SECURITY.
U.S. CUSTOMS AND BORDER PROTECTION,
HQ W967696
June 1, 2007
CLA-2 OT:RR:CTF:TCM W967696 RSD
CATEGORY: Classification
TARIFF NO: 8471.80.1000

Ms. KIM HOSTROM
AVOCENT CORPORATION
9911 Willows Road, N.E.
Redmond, Washington 98052

RE: Reconsideration of NY L81751 and NY L82985; Classification of Certain KVM Switches that are Used with ADP networks

DEAR Ms. HOSTROM:

This is in response to a request for reconsideration of two rulings, NY L81751 dated January 20, 2005 and NY L82985 dated February 16, 2005, submitted by counsel on behalf of Avocent Corporation (Avocent) concerning the classification of certain KVM switches used with automatic data processing (ADP) system. On May 6, 2005, Counsel submitted the request for reconsideration. On September 13, 2006, a meeting was held at our offices with counsel, employees of Avocent, and members of my staff to discuss this matter.

Pursuant to section 625(c), Tariff Act of 1930, (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103-182, 107 Stat. 2057 2186 (1993), a notice of the proposed revocation of the above cited rulings was published in the Customs Bulletin, Volume 41, No. 18, on April 25, 2007. No comments were received in response to this notice.

FACTS:

The merchandise that was under consideration in NY L81751 was the Dell KVM (keyboard, video, and mouse) Console Switch. In NY L82985, Customs and Border Protection (CBP) ruled on the classification of the Dell Embedded KVM Console Switch.

According to the facts stated in NY L81751, the Dell KVM Console Switch is a rack mounted solid-state electronic device that will be utilized by a system administrator. This product consists of a metal housing that measures approximately 17.2 inches wide by 6.5 inches deep and is 1.7 inches high. The KVM console switch will have 1 or 2 local access ports for hooking up to a monitor, keyboard and mouse, and 8 or 16 RJ45 ports for server hookup. There is also an additional RJ45 port for connecting to another KVM unit, and a DB9 interface for delivery of upgrade firmware. The KVM console switch allows the system administrator to view and control several servers through the use of one or two monitors, keyboards and mouse. It utilizes a combination of solid state switching and software to switch the input signals from various servers that are connected to the switch. It switches between ports of the switch.

NY L82985 describes the Dell Embedded KVM Switch as a printed circuit assembly (PCA) in a metal frame. It is intended for internal installation in an Original Equipment Manufacturer (OEM) chassis containing multiple servers. This KVM switch allows a keyboard, monitor and mouse to be connected to and switch between multiple servers. The KVM switch and servers

connect into the OEM chassis backplane. The switch uses solid-state switching to switch between the server video signals. It has a connector for the backplane on the back and two connectors, a RJ45 connector for connecting to another unit and a KVM connector on the front.

KVM switches increase the functionality of a network. For example, in a network using the Windows operating system, a person at a single workstation can access files on any other workstation. That person, however, cannot run programs that appear on other workstations, or see another workstation's desktop monitor. In other words, the KVM switches allow a person at a single control console to perform these tasks, increasing the functionality of the network.

Some common examples of how KVM are switches are used include:

Controlling two computers on different platforms (i.e., a PC and a Mac) with one control console.

Enabling a network administrator to control a large number (up to thousands) of servers from his office and/or the server room; for example, using a KVM switch, the network administrator can boot up all servers from their work station with a single control console.

Allowing a sales person to control a notebook computer using a desktop keyboard, monitor, and mouse.

To achieve the desired functionality, KVM switches must be able to (1) connect (directly or indirectly) to each server or CPU to be accessed and controlled; (2) to accept data from CPUs or servers in coded form; (3) transmit data from the CPUs or servers to the control console in coded form from the control console; (4) accept data in coded form from the control console; and (5) transmit the coded data received from the control console to CPUs or servers in a coded form that is readable by the CPUs or servers. In effect, when the KVM switch is connected to a CPU, the CPU responds just as if the control console was attached directly to the CPU (sending and receiving coded data), and the KVM switch responds in the same fashion as a control console (accepting, encoding, decoding, and transmitting coded data).

There are numerous physical characteristics that KVM switches must possess to achieve the desired functionality, including:

- (1) control console ports, which are capable of connecting directly or indirectly to keyboard, monitor and mouse;
- (2) printed circuit boards (including a CPU) that are capable of accepting and converting data received by the console ports from the control console (keyboard, video, and mouse) and transmitting this data in coded form to the CPUs or servers, and receiving data from the CPUs or servers, converting this data in a coded form that can be read by, and transmitted to, the control console; and
- (3) server ports, which are capable of connecting directly or indirectly to CPUs or servers.

Each of these physical elements is contained in a single KVM switch housing, which may be in the form of a separately housed unit (small box), or in the form of a board that is directly placed into (embedded) the ADP or servers by the OEM.

In NY L81751 and NY L82985, CBP held that the Dell KVM Console Switches and Dell KVM Embedded Switches were classified in heading 8537, HTSUS, as: "boards, panels, consoles . . . for the electric control or distribution of electricity."

ISSUE:

Whether the Dell KVM Console Switches and Dell Embedded KVM Switches are classified as units of automatic data processing machines in heading 8471, HTSUSA, or in heading 8537, HTSUSA, as: “boards, panels, consoles . . . for the electric control or distribution of electricity.”

LAW AND ANALYSIS:

Classification under the HTSUS is made in accordance with the General Rules of Interpretation (GRIs). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs 2 through 6 may then be applied in order.

The HTSUS provisions under consideration are as follows:

- 8471: Automatic data processing machines and units thereof; . . . :
- 8471.80: Other units of automatic data processing machines:
- 8471.80.10: Control or adapter units.
* * *
- 8537: Boards, panels, consoles, desks, cabinets and other bases, equipped with two or more apparatus of heading 8535 or 8536, for electric control or the distribution of electricity, including those incorporating instruments or apparatus of chapter 90, and numerical control apparatus, other than switching apparatus of heading 8517:
- 8537.10: For a voltage not exceeding 1,000 V:
- 8537.10.90: Other.
* * *

Automatic data processing (ADP) machines are defined in Legal Note 5(A) to Chapter 84, HTSUS, which states as follows: For purposes of heading 8471, the expression “automatic data processing machines” means machines capable of: (i) [s]toring the processing program or programs and at least the data immediately necessary for the execution of the program; (ii) [b]eing freely programmed in accordance with the requirements of the user; (iii) [p]erforming arithmetical computations specified by the user; and, (iv) [e]xecuting, without human intervention, a processing program which requires them to modify their execution, by logical decision during the processing run.

To be classified as an ADP unit under heading 8471, HTSUS, an article must meet the terms of Legal Note 5(C) to Chapter 84, HTSUS, which provides that:

Subject to paragraphs (D) and (E) below, a unit is to be regarded as being a part of an automatic data processing system if it meets all the following conditions:

- (i) It is of a kind solely or principally used in an automatic data processing system;

(ii) It is connectable to the central processing unit [CPU] either directly or through one or more other units; and

(iii) It is able to accept or deliver data in a form (codes or signals) which can be used by the system.

The Harmonized Commodity Description and Coding System Explanatory Notes (EN's) constitute the official interpretation of the Harmonized System at the international level. While not legally binding on the contracting parties, and therefore not dispositive, the EN's provide a commentary on the scope of each heading of the Harmonized System and are thus useful in ascertaining the classification of merchandise under the Harmonized System. CBP believes the EN's should always be consulted. See T.D. 89-80, 54 Fed. Reg. 35127, 35128 (Aug. 23, 1989).

EN 84.71 provides:

Data processing is the handling of information of all kinds, in pre-established logical sequences and for a specific purpose or purposes.

Automatic data processing machines are machines which, by logically interrelated operations performed in accordance with pre-established instructions (program), furnish data which can be used as such or, in some cases, serve in turn as data for other data processing operations.

Accordingly, to determine if the KVM switches should be classified in heading 8471, HTSUS, we must apply the requirements for units of ADP systems that are set forth in Note 5(C) of Chapter 84. First, the information available indicates that the KVM switches are used solely with ADP systems. The purpose of the Dell KVM switches is to allow a single user to access multiple ADP machines or servers from a single control console (keyboard, video or mouse). The products are also sold and marketed solely for use in computer systems.

With respect to the second condition specified in Legal Note 5(C) in Chapter 84, the KVM switches are connected to the CPUs or servers, either directly or through one or more other units. The KVM Console Switch is directly connected to the CPUs or servers through a standard cable, and jack arrangement. A separate dongle is used to connect the server to the switch body. The KVM Embedded Switch contains high-density connectors that plug into the midplane, which acts in the same fashion as the cables.

The third requirement of Legal Note 5(C) in Chapter 84 concerns the accepting or the delivery of data in a form (codes or signals) which can be used by the system. The KVM switches contain OSCAR, keyboard and mouse logic and a CPU with embedded software, which convert the coded data received into a proprietary code. OSCAR stands for On Screen Configuration and Activity Reporting. The OSCAR within the KVM unit contains a custom designed ASIC (Application Specific Integrated Circuit), and works in conjunction with CPU software that runs inside of the unit to generate the OSCAR interface. This interface works as a graphical menuing system. For example, the OSCAR in a KVM unit allows the user to configure menu language, color, name attached computers, setup scan lists, and select computers for control.

The synchronizing of data by converting it into a proprietary code is required to ensure the KVM switches achieve their primary purpose to control multiple CPU's from a single console. In addition, KVM switch products receive data in a proprietary code, convert this code back into a code readable by the CPUs or servers and transmit the data to the CPUs or servers. This

means that KVM switches are capable of converting data that are sent and delivered in different types of computer system platforms such as Windows to MAC and vice or versa. Thus, the KVM switches in question deliver and accept data.

Even if a product is able to meet the terms of Legal Note 5(C), classification in heading 8471, HTSUS, may be precluded if Legal Note 5(D) or (E) to chapter 84 is applicable. They provide the following.

D) Heading 8471 does not cover the following when presented separately, even if they meet all of the set forth in note 5(C) above:

- (i) Printers, copying machines, facsimile machines, whether or not combined;
- (ii) Apparatus for the transmission or reception of voice, images or other data, including apparatus for communication in a wired or wireless network (such as a local or wide area network);
- (iii) Loudspeakers and microphones;
- (iv) Television cameras, digital cameras and video camera recorders;
- (v) Monitors and projectors, not incorporating television reception apparatus.

E) Machines incorporating or working in conjunction with an automatic data processing machine and performing a specific function other than data processing are to be classified in the headings appropriate to their respective functions or, failing that, in residual headings.

Heading 8517, HTSUS provides in relevant part for: “. . . other apparatus for the transmission or reception of voice, images or other data, including apparatus for communication in a wired or wireless network (such as a local or wide area network) . . .”. Classification under heading 8517 is precluded because the switches are not transmitting or receiving data but controlling data servers by interconnecting the keyboards, monitor, and mouse to different servers.

Legal Note 5(E) to chapter 84, HTSUS, clearly states that machines performing a specific function other than data processing are to be classified in the heading appropriate to those respective functions. Thus, the issue remains as to whether Legal Note 5(E) to Chapter 84, HTSUS, precludes classification of the KVM switches in heading 8471, HTSUS, because they are performing functions other than data processing.

Based on the information presented, we find that Note 5(E) does not exclude the KVM switches from being classified in heading 8471, HTSUS, because they are not performing a specific function other than data processing. The KVM switches' basic function is to interconnect the keyboard, mouse, and video monitor to different servers in order to control multiple computers and servers from a single control console. This is a data processing function, and thus the KVM switches in question are not precluded from being classified in heading 8471, HTSUS, by Note 5(E). Thus, we find that KVM switches are classified in heading 8471, HTSUS.

Next, we must determine which of the subheadings of heading 8471, HTSUS, that the KVM switches are classified. EN 84.71(I)(B)(3) provides that:

Control and adaptor units such as those to effect interconnection of the central processing unit to input or output units (e.g. USB hubs).

However, control and adaptor units or communication in a wired or wireless network (such as a local or wide area network) are **excluded (heading 85.17)**.

This definition provided by the ENs for control and adaptor units describes the KVM switches under consideration that are used to interconnect CPUs with input and out units, such as keyboards, video, and mouse in this case. Therefore, we find that the KVM switches are classified in subheading 8471.80.10, HTSUS, as control or adapter units of ADPs. Accordingly, we find that NY L81751 and NY L8225 should be revoked.

HOLDING:

In accordance with GRI 1, and by virtue of Legal Note 5(C) to Chapter 84, HTSUS, the two types of KVM switches, the Dell KVM Console Switch and the Dell KVM Embedded Switch, are classified in heading 8471, HTSUS. They are specifically provided for in subheading 8471.80.1000, HTSUS, as: "Automatic data processing machines and units thereof; . . . : Other units of automatic data processing machines: Control or adapter units", at a general, column one rate of duty which is free. Duty rates are provided for requester's convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on the World Wide Web at <http://www.usitc.gov/tata/hts/>.

EFFECT ON OTHER RULINGS:

NY L81751 (issued January 20, 2005) and NY L82985 (issued February 16, 2005) are hereby revoked. This ruling will become effective 60 days after publication in the Customs Bulletin.

Gail A. Hamill for MYLES B. HARMON,
Director,
Commercial and Trade Facilitation Division.

**REVOCATION OF RULING LETTER AND REVOCATION OF
TREATMENT RELATING TO THE CLASSIFICATION OF
TREATED FLAX YARN**

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

ACTION: Notice of revocation of one tariff classification ruling letter and revocation of any treatment relating to the classification of treated flax yarn.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) is revoking one ruling letter relating to the tariff classification under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA), of treated flax yarn. Similarly, CBP is revoking any treatment previously accorded by it to substantially identical mer-

chandise. Notice of the proposed action was published in the *Customs Bulletin*, Vol. 41, No. 18, on April 25, 2007. No comments were received in response to the notice.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption August 19, 2007.

FOR FURTHER INFORMATION CONTACT: Ann Segura Minardi, Tariff Classification and Marking Branch, (202) 572-8822.

SUPPLEMENTARY INFORMATION:

Background

On December 8, 1993, Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended and related laws. Two new concepts which emerge from the law are "**informed compliance**" and "**shared responsibility**." These concepts are premised on the idea that in order to maximize voluntary compliance with customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on CBP to provide the public with improved information concerning the trade community's responsibilities and rights under the customs and related laws. In addition, both the trade and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. section 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, a notice was published in the *Customs Bulletin*, Vol. 41, No. 18, April 25, 2007, proposing to revoke one ruling letter pertaining to the tariff classification of treated flax yarn. As stated in the proposed notice, this revocation will cover any rulings on the subject merchandise which may exist but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the one identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice, should have advised CBP during this notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Any person involved in substantially identical transactions should have advised CBP during this notice period. An importer's failure to advise CBP of substantially identical transactions or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of this final decision.

Pursuant to 19 U.S.C. section 625(c)(1), CBP is revoking NY L82682 to reflect the proper tariff classification of the merchandise in subheading 5306.20.0000, HTSUSA, which provides for "Flax yarn: Multiple (folded) or cabled" pursuant to the analysis set forth in Headquarters Ruling Letter (HQ) W967902 (Attachment). Additionally, pursuant to 19 U.S.C. 1625(c)(2), CBP is revoking any treatment previously accorded by it to substantially identical transactions.

In accordance with 19 U.S.C. section 1625(c), this ruling will become effective 60 days after publication in the *Customs Bulletin*.

DATED: June 1, 2007

Gail A. Hamill for MYLES B. HARMON,
Director,
Commercial and Trade Facilitation Division.

[Attachment]

DEPARTMENT OF HOMELAND SECURITY,
U.S. CUSTOMS AND BORDER PROTECTION,
HQ W967902
June 1, 2007
CLA-2 OT:CTF:TCM W967902 ASM
CATEGORY: Classification
TARIFF NO.: 5306.20.0000

MR. PETER HERMANN
AMERICAN FALCON, INC.
470 Main St., Route 28
Harwich Port, MA 02646-1604

RE: Tariff classification of treated yarn; Revocation of NY L82682

DEAR MR. HERMANN:

This is in response to a request for reconsideration of Customs and Border Protection (CBP) New York Ruling letter (NY) L82682, dated March 9, 2005, which classified a certain treated yarn under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA). Samples have been submitted to CBP for examination.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by Title VI, a notice was published in the April 25, 2007, *Customs Bulletin*, Volume 41, Number 18, proposing revocation of NY L82682, and to revoke any treatment accorded to substantially identical transactions. No comments were received in response to the notice.

FACTS:

The subject merchandise consists of white yarn, identified as “TEX 500 5 cord linen thread”. It is imported on a spool that weighs 484 grams. According to the CBP Laboratory Report, the sample is a 5-ply (multiple) white yarn composed of 100 percent by weight vegetable fibers with the characteristics of flax. The yarn is treated with a substance of the polyethylene type and has an approximate decitex of 6448. There was no rubber material detected on the sample.

In NY L82682, the yarn was classified in subheading 5607.90.9000, HTSUSA, which provides for “Twine, cordage, ropes and cables, whether or not plaited or braided and whether or not impregnated, coated, covered or sheathed with rubber or plastics: Other: Other”.

The merchandise was invoiced under subheading 5306.20.0000, HTSUSA, as “Flax yarn: Multiple (folded) or cabled”. You disagree with CBP’s determination in NY L82682 that the product is classified in subheading 5607.90.9000, HTSUSA. Furthermore, you assert that the yarn is merely “waxed” and not “polished or glazed” within the meaning of the General Explanatory Notes to Section XI(I)(B).

ISSUE:

What is the proper classification for the merchandise?

LAW AND ANALYSIS:

Classification under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) is made in accordance with the General Rules of Interpretation (GRI). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI may then be applied. The Harmonized Commodity Description and Coding System Explanatory Notes (“ENs”) constitute the official interpretation of the Harmonized System at the international level. While neither legally binding nor dispositive, the ENs provide a commentary on the scope of each heading of the HTSUSA and are generally indicative of the proper interpretation of these headings. See T.D. 89–80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

We begin by noting that, in relevant part, the General EN’s to Section XI(I)(B), state as follows:

(B) Yarns

* * *

Polished or glazed yarns are those which have been treated with preparations based on natural substances (wax, paraffin, etc.) or on synthetic substances (acrylic resins in particular). They are then made glossy by means of polishing rollers.

In considering this definition, we recognize that the yarn, while treated with a coating, is not “polished or glazed” within the meaning of the General EN to Section XI cited above. In fact, the yarn has not been made “glossy” by means of polishing rollers.

Section XI, Note 3(A)(c), HTSUSA, specifies that the following descriptions are to be treated as “twine, cordage, ropes and cables”:

(c) Of true hemp or flax:

- (i) Polished or glazed, measuring 1,429 decitex or more; or
- (ii) Not polished or glazed, measuring more than 20,000 decitex;

As we have already noted, the flax yarn is not “polished or glazed” within the meaning of the tariff. Furthermore, it is not more than 20,000 decitex and only has an approximate decitex of 6448. Thus, pursuant to Section XI, Note 3(A)(c)(ii), the subject yarn cannot be classified within a provision for “twine, cordage, ropes and cables”.

The General EN’s to Section XI(I)(B), Table I, provide that flax yarn, neither polished nor glazed, measuring less than 20,000 decitex is to be classified in Chapter 53, HTSUSA. Inasmuch as the subject yarn is not “polished or glazed” within the meaning of the General EN to Section XI, it is not precluded from classification in Chapter 53, HTSUSA. Accordingly, we find that the merchandise, which is only a decitex of 6448, is properly classified as “flax yarn” of heading 5306, HTSUSA. We further find that NY L82682 erroneously classified the yarn in subheading 5607.90.9000, HTSUSA.

HOLDING:

NY L82682, dated March 9, 2005, is hereby revoked.

The subject merchandise is correctly classified in subheading 5306.20.0000, HTSUSA, which provides for “Flax yarn: Multiple (folded) or cabled”. The general column one duty rate is *Free*. The textile category is 800.

Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUSA and the accompanying duty rates are provided on the world wide web at www.usitc.gov. With the exception of certain products of China, quota/visa requirements are no longer applicable for merchandise which is the product of World Trade Organization (WTO) member countries. The textile category number above applies to merchandise produced in non-WTO member-countries. Quota and visa requirements are the result of international agreements that are subject to frequent renegotiations and changes. To obtain the most current information on quota and visa requirements applicable to this merchandise, we suggest you check, close to the time of shipment, the “Textile Status Report for Absolute Quotas” which is available on our web site at www.cbp.gov. For current information regarding possible textile safeguard actions on goods from China and related issues, we refer you to the web site of the Office of Textiles and Apparel of the Department of Commerce at otexa.ita.doc.gov.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, you should contact the local CPB office prior to importation of this merchandise to determine the current status of any import restraints or requirements.

In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after publication in the *Customs Bulletin*.

Gail A. Hamill for MYLES B. HARMON,
Director,
Commercial and Trade Facilitation Division.



