

U.S. Customs and Border Protection

CBP Decisions

8 CFR Part 217

[USCBP-2008-0003; CBP Dec. No. 08-18]

RIN 1651-AA72

Changes to the Visa Waiver Program To Implement the Electronic System for Travel Authorization (ESTA) Program

AGENCY: Customs and Border Protection, DHS.

ACTION: Interim final rule; solicitation of comments.

SUMMARY: This rule amends Department of Homeland Security (DHS) regulations to implement the Electronic System for Travel Authorization (ESTA) requirements under section 711 of the Implementing Recommendations of the 9/11 Commission Act of 2007, for aliens who wish to enter the United States under the Visa Waiver Program (VWP) at air or sea ports of entry. This rule establishes ESTA and delineates the data fields DHS has determined will be collected by the system.

As required under section 711 of the Implementing Recommendations of the 9/11 Commission Act of 2007, the Secretary of Homeland Security will announce implementation of a mandatory ESTA system by publication of a notice in the **Federal Register** no less than 60 days before the date on which ESTA becomes mandatory for all VWP travelers. Once ESTA is mandatory, all VWP travelers must either obtain travel authorization in advance of travel under ESTA or obtain a visa prior to traveling to the United States.

Currently, aliens from VWP countries must provide certain biographical information to U.S. Customs and Border Protection (CBP) Officers at air and sea ports of entry on a paper form Nonimmigrant Alien Arrival/Departure (Form I-94W). Under this interim final rule, VWP travelers will provide the same information to CBP electronically before departing for the United States. Once ESTA is mandatory and all carriers are capable of receiving and validating messages pertaining to the traveler's ESTA status as part of the traveler's boarding status, DHS will eliminate the I-94W require-

ment. By automating the I-94W process and establishing a system to provide VWP traveler data in advance of travel, CBP will be able to determine the eligibility of citizens and eligible nationals from VWP countries to travel to the United States and whether such travel poses a law enforcement or security risk, before such individuals begin travel to the United States. ESTA will provide for greater efficiencies in the screening of international travelers by allowing CBP to identify subjects of potential interest before they depart for the United States, thereby increasing security and reducing traveler delays upon arrival at U.S. ports of entry.

DATES: This interim final rule is effective on August 8, 2008. Comments must be received on or before August 8, 2008. ESTA will be implemented as a mandatory program 60 days after publication of a notice in the **Federal Register**. DHS anticipates that the Secretary of Homeland Security will issue that notice in November 2008, for implementation of the mandatory ESTA requirements on or before January 12, 2009.

ADDRESSES: Please submit comments, identified by docket number, by one of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments via docket number USCBP-2008-0003.

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

- *Instructions:* All submissions received must include the agency name and docket number for this rulemaking. All comments received will be posted without change to <http://www.regulations.gov>, including any personal information provided.

- *Docket:* For access to the docket to read background documents or comments received, go to <http://www.regulations.gov>. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552) and 19 CFR 103.11(b) on normal business days between the hours of 9 a.m. and 4:30 p.m. at the Border Security Regulations Branch, Office of International Trade, United States Customs and Border Protection, 799 9th Street, NW., 5th Floor, Washington, DC. Arrangements to inspect submitted comments should be made in advance by calling Mr. Joseph Clark at (202) 572-8768.

FOR FURTHER INFORMATION CONTACT:

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I. Public Comments

Interested persons are invited to submit written comments on all aspects of this interim final rule. U.S. Customs and Border Protection (CBP) also invites comments on the economic, environmental, or federalism effects of this rule. We urge commenters to reference a specific portion of the rule, explain the reason for any recommended change, and include data, information, or authorities that support such recommended change.

II. Background

A. *The Visa Waiver Program*

Pursuant to section 217 of the Immigration and Nationality Act (INA), 8 U.S.C. 1187, the Secretary of Homeland Security (the Secretary), in consultation with the Secretary of State, may designate certain countries as Visa Waiver Program (VWP) countries if certain requirements are met. Those requirements include, without limitation, (i) meeting the statutory rate of nonimmigrant visa refusal for citizens and nationals of the country, (ii) a government certification that it has a program to issue machine readable, tamper-resistant passports that comply with International Civil Aviation Organization (ICAO) standards, (iii) a U.S. government determination that the country's designation would not negatively affect U.S. law enforcement and security interests, and (iv) government agreement to report, or make available to the U.S. government information about the theft or loss of passports. The INA also sets forth requirements for continued eligibility and, where appropriate, emergency termination of program countries.

Citizens and eligible nationals of VWP countries may apply for admission to the United States at a U.S. port of entry as nonimmigrant aliens for a period of ninety (90) days or less for business or pleasure without first obtaining a nonimmigrant visa, provided that they are otherwise eligible for admission under applicable statutory and regulatory requirements. The list of countries which currently are eligible to participate in VWP is set forth in section 217.2(a) of Title 8 of the Code of Federal Regulations (CFR).

To travel to the United States under VWP, an alien currently must (1) present an electronic passport or a machine readable passport issued by a designated VWP participant country to the air or vessel carrier before departure;¹ (2) possess a round trip ticket; and (3) upon arrival at a U.S. port of entry, submit to a CBP Officer a signed and completed I-94W Nonimmigrant Alien Arrival/Departure Form (I-94W). Additionally, the alien must comply with the inspection process at the U.S. port of entry and must not have violated the requirements of a prior VWP admission to the United States. *See* Section 217(a) of the Immigration and Nationality Act (INA), 8 U.S.C. 1187(a). *See also* 8 CFR part 217.

Under VWP, nonimmigrant alien visitors currently are required to complete and sign an I-94W form prior to arriving at a U.S. port of entry and present it to the CBP Officer at the U.S. port of entry where they undergo admissibility screening. In signing the I-94W

¹ For current VWP member countries only, passports issued before October 26, 2006, need not contain the electronic chip that includes the biographic and biometric information of the passport holder provided the passports comply with International Civil Aviation Organization machine readable standards.

form, the traveler waives any right to review or appeal of a CBP Officer's determination as to his admissibility, or to contest, except on the basis of an application for asylum, any action in removal. The form instructs the alien to apply for a visa at the appropriate U.S. embassy or consulate if he or she responds in the affirmative to questions on the reverse side of the I-94W. For example, a traveler may be refused admission to the United States under VWP based upon an affirmative response on the I-94W regarding prior criminal activity, deportation, or visa revocation. Upon arrival at the U.S. port of entry, if the CBP Officer determines that the traveler seeking admission under VWP is ineligible to enter the United States, or is inadmissible based on the information submitted via the I-94W form, or information ascertained during an admissibility interview, then the person must then be returned to the country from which they departed at the carrier's expense. Pursuant to section 217 of the Immigration and Nationality Act (INA, 8 U.S.C. 1187), a VWP alien traveling to the United States by air or sea must arrive in the United States on a carrier that has signed an agreement with DHS guaranteeing to transport inadmissible or deportable VWP travelers out of the United States at no expense to the United States. This may create significant delays for the VWP traveler who may not have been on notice that he or she is not admissible to the United States until he or she has arrived at a U.S. port of entry.

B. Enhancing VWP Screening

While VWP encourages travel with participating countries, aspects of the program may be exploited by individuals seeking to circumvent immigration or other laws of the United States. Currently, VWP travelers are not subject to the same degree of screening as those travelers who must first obtain a visa before arriving in the United States. Since September 11, 2001, the visa issuance process has taken on greater significance as an antiterrorism tool.² Non-VWP travelers must obtain a visa from a U.S. embassy or consulate and undergo an interview by consular officials overseas who conduct a rigorous screening process in deciding whether to approve or deny a visa. At the U.S. consulate, the application is reviewed, fingerprints are collected, and the applicant's name is checked against various government watchlists. The consular officer reviews name check results and determines if additional security checks are required. The consular officer then interviews the visa applicant and

² The Government Accountability Office (GAO) has issued a series of reports on how the visa issuance process serves as an antiterrorism tool, including: GAO, *Border Security: Strengthened Visa Process Would Benefit from Improvements in Staffing and Information Sharing*, GAO-05-859 (Washington, DC: Sept. 13, 2005); *Border Security: Actions Needed to Strengthen Management of Department of Homeland Security's Visa Security Program*, GAO-05-801 (Washington, DC: July 29, 2005); and, *Border Security: Visa Process Should be Strengthened as an Antiterrorism Tool*, GAO-03-132NI (Washington, DC: Oct. 21, 2002).

reviews his or her supporting documents. During the visa application process, consular officers have ample time to interview applicants and examine the authenticity of their passports, and may also speak the visa applicant's native language. Every visa applicant undergoes extensive security checks before a visa can be issued, including name-based checks against the Department of State's (State Department's) Consular Lookout and Support System (CLASS). When a consular officer determines that an applicant is a positive match to a CLASS record, or if the applicant meets other established criteria, the case is referred for an interagency security review. If denied a visa, the individual cannot lawfully board a plane or vessel destined for the United States.

In contrast to travelers who require a visa and are screened by State Department consular officers through the visa issuance process, VWP travelers are not screened in person until they arrive at a U.S. port of entry.³ Only after arrival at a U.S. port of entry are VWP travelers subject to an admissibility interview in which CBP Officers observe the applicant, examine his or her passport, collect the applicant's fingerprints as part of the U.S. Visitor and Immigrant Status Indicator Technology (US-VISIT) program,⁴ and check his or her name against automated databases and watchlists (which contain information regarding the admissibility of aliens, including known terrorists, criminals, and immigration law violators). Thus, only after a VWP traveler has arrived at a U.S. port of entry is a CBP Officer able to determine whether the traveler is admissible to the United States, or ineligible for admission, based on the information submitted via the form I-94W and information ascertained during an admissibility interview. Annually, several thousand VWP travelers arrive in the United States and are deemed inadmissible for VWP entry at the port of entry, causing significant expense, delay, and inconvenience for those aliens, other travelers, the airlines, and the U.S. government.

³ Under the Advance Passenger Information System (APIS) regulations, commercial aircraft carriers bound for the United States from a foreign port must transmit passenger and crew manifest information to CBP no later than 30 minutes prior to departure to allow CBP to vet such information against government databases, including the terrorist watchlist, prior to departure of the aircraft. Vessel carriers departing for the United States from a foreign port must transmit a passenger and crew manifest no later than 60 minutes prior to departure. *See* 19 CFR 122.49a.

⁴ The US-VISIT program is a government-wide program to collect, maintain, and share information on foreign nationals and better control and monitor the entry, visa status, and exit of visitors. Under the program, foreign visitors are required to submit to fingerprint scans of their right and left index finger and have a digital photograph taken upon arrival at U.S. ports of entry. (DHS recently has initiated a transition to collect scans of all ten fingers from travelers enrolling in the US-VISIT program.) Foreign nationals entering the United States through VWP are required to enroll in the US-VISIT program upon arrival at U.S. ports of entry.

DHS has taken a number of steps to mitigate VWP security vulnerabilities in recent years, including instituting a biometric collection requirement for VWP travelers at U.S. ports of entry through US-VISIT. *See* 8 CFR part 235. The procedural and timing changes implemented under this interim final rule, as described below, represent crucial additional improvements to VWP security.

C. Implementing the Recommendations of the 9/11 Commission Act of 2007

On August 3, 2007, the President signed into law the Implementing the Recommendations of the 9/11 Commission Act of 2007 (9/11 Act), Public Law 110–53. Section 711 of the 9/11 Act requires that the Secretary of Homeland Security, in consultation with the Secretary of State, develop and implement a fully automated electronic travel authorization system which will collect such biographical and other information as the Secretary determines necessary to evaluate, in advance of travel, the eligibility of the alien to travel to the United States, and whether such travel poses a law enforcement or security risk. ESTA is intended to fulfill the statutory requirements as described in Section 711 of the 9/11 Act. Section 711 of the 9/11 Act also provides the Secretary with discretion to expand VWP to additional countries by waiving the nonimmigrant visa refusal rate requirements in section 217 of the INA for countries that do not satisfy the required threshold. *See* Public Law 110–53, Section 711(c). To waive those requirements, the Secretary must certify to Congress that ESTA is “fully operational,” and that an air exit system (a separate requirement from ESTA) is in place that can verify the departure of not less than 97 percent of foreign nationals who exit through U.S. airports.⁵ Additionally, according to the statute, the Secretary’s waiver authority may be temporarily suspended if the Secretary does not notify Congress that a biometric air exit system is in place by June 30, 2009.

D. Electronic System for Travel Authorization

To satisfy the requirements of section 711 of the 9/11 Act, this interim final rule establishes ESTA to allow VWP travelers to obtain authorization to travel to the United States by air or sea prior to embarking on such travel. Under ESTA, CBP also will be able to screen travelers seeking to enter the United States under VWP prior to their arrival in the United States. Aliens intending to travel under the VWP will be able to obtain travel authorization in advance of travel to the United States. DHS notes that an authorization to travel to the United States under ESTA is not a determination that

⁵ The Secretary will provide separate certification to Congress and neither this interim final rule nor its effective and compliance dates serve as that certification.

the alien ultimately is admissible to the United States. That determination is made by a CBP Officer only after an applicant for admission is inspected by the CBP officer at a U.S. port of entry. In addition, ESTA is not a visa or a process that acts in lieu of any visa issuance determination made by the Department of State. Travel authorization under ESTA allows a VWP participant to travel to the United States, and does not confer admissibility to the United States. ESTA, therefore, allows DHS to identify potential grounds of ineligibility for admission before the VWP traveler embarks on a carrier destined for the United States.

ESTA will reduce the number of travelers who are determined to be inadmissible to the United States during inspection at a port of entry, thereby saving, among other things, the cost of return travel to the carrier, inspection time, and delays and inconvenience for the traveler. ESTA also will enable the U.S. government to better allocate existing resources towards screening passengers at U.S. ports of entry, thereby facilitating legitimate travel. ESTA increases the amount of information available to DHS regarding VWP travelers before such travelers arrive at U.S. ports of entry; and, by recommending that travelers submit such information a minimum of 72 hours in advance of departure, provides DHS with additional time to screen VWP travelers destined for the United States, thus enhancing security.

1. Obtaining Travel Authorization

This interim final rule establishes data fields by which VWP travelers may electronically submit to CBP, in advance of travel to the United States, biographic and other information specified by the Secretary. The information specified by the Secretary is necessary to determine the eligibility of the alien to travel to the United States under the VWP, and whether such travel poses a law enforcement or security risk. This is the same information currently required on the form I-94W, which VWP travelers must present to a CBP officer at a port of entry. This interim final rule does not impose any new data collection requirements on air or vessel carriers. For example, this rule does not require air carriers to transmit any ESTA data elements on behalf of travelers to CBP, nor does it require carriers to submit any additional data.

In determining a traveler's eligibility for ESTA authorization, CBP will assess each application to determine whether the alien is eligible to travel to the United States and whether there exists any law enforcement or security risk in permitting such travel under VWP. The information submitted by the alien in his/her travel authorization application will be checked by CBP against all appropriate databases, including, but not limited to, lost and stolen passport databases and appropriate watchlists. Additionally, if an alien does not provide the information required or provides false information in his

travel authorization application or if any evidence exists indicating that an alien is ineligible to travel to the United States under VWP or that permitting such travel poses a law enforcement or security risk, CBP may deny the alien's application for a travel authorization. Consistent with section 711 of the 9/11 Act, the Secretary, acting through CBP, retains discretion to revoke a travel authorization determination at any time and for any reason. 8 U.S.C. 1187(h)(3)(C)(i). If an alien's travel authorization application is denied, the alien may still seek to obtain a visa to travel to the United States from the appropriate U.S. embassy or consulate.

2. Implementation Notice

Under section 711 of the 9/11 Act, the Secretary also must publish a notice in the **Federal Register**, no less than 60 days before ESTA requirements are implemented. The Secretary will publish a notice in the **Federal Register** 60 days before ESTA is implemented as a mandatory requirement. DHS anticipates that the Secretary of Homeland Security will issue that notice in November 2008, for implementation of the mandatory ESTA requirements on or before January 12, 2009.

3. Timeline for Submitting Travel Authorization Data

Once ESTA is implemented as a mandatory program, 60 days following publication of a notice in the **Federal Register**, each nonimmigrant alien wishing to travel to the United States under the VWP must have a travel authorization prior to embarking on a carrier. DHS, however, recommends that VWP travelers obtain travel authorizations at the time of reservation or purchase of the ticket, or at least 72 hours before departure to the United States, in order to facilitate timely departures. This timeline will allow accommodation of last minute and emergency travelers.

4. Required Travel Authorization Data Elements

ESTA will collect the same information currently required on the Form I-94W that is presented to a CBP officer at a port of entry. *See* 8 U.S.C. 1187(h)(3). This is the information that the Secretary has deemed necessary to evaluate whether an alien is eligible to travel to the United States under VWP and whether such travel poses a law enforcement or security risk. This information is already collected through the I-94W form, which is presented to CBP when the alien arrives in the United States. On the I-94W form, aliens must provide biographical data such as name, birth date, and passport information, as well as travel information such as flight information and the address of the traveler in the United States. Travelers must also answer eligibility questions regarding, for example: communicable diseases, arrests and convictions for certain crimes, and past history of visa revocation or deportation. The information provided in the

I-94W form is sufficient for CBP to initially determine if the applicant is eligible to travel under VWP before the alien commences travel to the United States. Therefore, DHS has decided to utilize the I-94W data elements by requiring them to be submitted in advance of travel under ESTA.

In conjunction with CBP's final rule "Advance Electronic Transmission of Passenger and Crew Member Manifests for Commercial Aircraft and Vessels," which was published in the **Federal Register** on August 23, 2007 (and became effective on February 19, 2008), DHS has been coordinating with commercial aircraft and commercial vessel carriers on the development and implementation of messaging capabilities for passenger data transmissions that will enable DHS to provide the carriers with messages pertaining to a passenger's boarding status. A prospective VWP traveler's ESTA status is a component of a passenger's boarding status that has been introduced into the plans for implementing messaging capabilities between DHS and the carriers.

The development and implementation of the ESTA program will eventually allow DHS to eliminate the requirement that VWP travelers complete an I-94W prior to being admitted to the United States. As DHS moves towards elimination of the I-94W requirement, a VWP traveler with valid ESTA authorization will not be required to complete the paper Form I-94W when arriving on a carrier that is capable of receiving and validating messages pertaining to the traveler's ESTA status as part of the traveler's boarding status. Once all carriers are capable of receiving and validating messages pertaining to the traveler's ESTA status as part of the traveler's boarding status, DHS will eliminate the I-94W requirement.

5. Scope of ESTA

Consistent with the 9-11 Act, an approved travel authorization only allows an alien to board a conveyance for travel to a U.S. port of entry and does not restrict, limit, or otherwise affect the authority of CBP to determine an alien's admissibility to the United States during inspection at a port of entry.

6. Duration

a. General Rule

Each travel authorization will be valid for a period of no more than two years. An alien may travel to the United States repeatedly within the validity period of the travel authorization using the same travel authorization. Travelers whose ESTA applications are approved, but whose passports will expire in less than two years, will receive travel authorization that is valid only until the expiration date on the passport.

b. Exception

Pursuant to 8 U.S.C. 1182(a)(7)(B)(i)(I) and implementing regulations at 8 CFR 214.1(a)(3)(i), the passport of an alien applying for admission must be valid for a minimum of six months from the expiration date of the contemplated period of stay. Certain foreign governments have entered into agreements with the United States whereby their passports are recognized as valid for the return of the bearer to the country of the foreign-issuing authority for a period of six months beyond the expiration date specified in the passport. These agreements have the effect of extending the validity period of the foreign passport an additional six months notwithstanding the expiration date indicated in the passport. The general rule applies to aliens who are citizens of countries that have entered into such an agreement.

For aliens from countries that have not entered into such an agreement,⁶ travel authorizations will be valid for a period of two years under ESTA. However, travel authorizations for aliens from countries that have not entered into such an agreement will not be approved beyond the six months prior to the expiration date of the alien's passport. Travelers from these countries whose passports will expire in six months or less will not receive an approved ESTA.

The Secretary, in his discretion, may issue a travel authorization for a different period of validity, not to exceed a period of three years.

7. Events Requiring New Travel Authorizations

A VWP traveler must obtain a new travel authorization under ESTA in advance of travel to the United States if any of the following occur:

- (1) The alien is issued a new passport;
- (2) The alien changes his or her name;
- (3) The alien changes his or her gender;
- (4) The alien changes his or her country of citizenship; or
- (5) The circumstances underlying the alien's previous responses to any of the ESTA application questions requiring a "yes" or "no" response (eligibility questions) have changed.

8. Fee

As provided under section 711(h)(3)(B) of the 9/11 Act, the Secretary may charge aliens a fee to use ESTA. The fee is intended to cover the full costs of developing and administering the system. At this time, payment of a fee will not be required to obtain a travel au-

⁶At this time, Brunei is the only VWP country that has not entered into such an agreement with the United States. The list of countries which have entered into such an agreement is available on the Department of State Web site at <http://foia.state.gov/masterdocs/09fam/0941104X1.pdf>.

thorization. If DHS determines at a later time, however, that collection of a fee is necessary for the efficient administration of ESTA, DHS will implement a fee through a separate rulemaking action or such other manner as is consistent with the Administrative Procedure Act and applicable statutory authorities.

9. Judicial Review

Section 711 of the 9/11 Act expressly provides that “no court shall have jurisdiction to review an eligibility determination under the System.” Accordingly, a determination by DHS to not provide a traveler a travel authorization under ESTA will be final and, notwithstanding any other provision of the law, is not subject to judicial review. *See* 8 U.S.C. 217(h)(3)(C)(iv).

10. Privacy

DHS will ensure that all Privacy Act requirements and policies are adhered to in the implementation of this rule and will be issuing a Privacy Act Impact Assessment that will fully outline processes that will ensure compliance with Privacy Act protections.

III. Statutory and Regulatory Requirements

A. Administrative Procedure Act

1. Procedural Rule Exception

This interim final rule addresses requirements that are procedural in nature and does not alter the substantive rights of aliens from VWP countries seeking admission to the United States. This interim final rule, therefore, is exempt from notice and comment requirements under 5 U.S.C. 553(b)(A). This rule is procedural because it merely automates an existing reporting requirement for nonimmigrant aliens, as captured in the “I-94W Nonimmigrant Alien Arrival/Departure Form” pursuant to existing statutes and regulations. *See* 8 U.S.C. 1103, 1184 and 1187. *See also* 8 CFR 212.1, 299.1, 299.5 and Parts 2 and 217. By procedurally shifting the paper I-94W form to an electronic form and changing the timing of submission of such information to require travelers to submit the data to CBP in advance of travel, CBP will be able to determine, before the alien departs for the United States, the eligibility of citizens and eligible nationals from VWP countries to travel to the United States under VWP and whether such travel poses a law enforcement or security risk. This procedural change also benefits travelers as it allows CBP to identify potential grounds of ineligibility for admission before the traveler embarks on a carrier destined for the United States.

2. Good Cause Exception

This interim final rule is also exempt from APA rulemaking requirements under the “good cause” exception set forth at 5 U.S.C.

553(b)(3)(B). By requiring VWP travelers, who currently are not screened in person until they arrive at a U.S. port of entry, to submit I-94W screening information in advance of their departure for the United States, DHS is better positioned to screen VWP aliens before they board carriers or vessels en route to the United States. This rule, therefore, improves the security of the VWP by addressing vulnerabilities in the program identified by GAO and implementing security enhancements included in section 711 of the 9/11 Act.

Specifically, certain inadmissible travelers who need visas to enter the United States may attempt to acquire a passport from a VWP country to avoid the normal visa issuance procedures. Potential terrorists also may use VWP exemption from the visa screening process as a means to gain access to the United States or an aircraft en route to the United States to cause serious damage, injury, or death in the United States. Thus, implementation of this rule prior to notice and comment is necessary to protect the national security of the United States and to prevent potential terrorists from exploiting VWP.

Prolonging the implementation of these regulations could hamper the ability of DHS to address the security vulnerabilities in the VWP and to take effective action to keep persons found by DHS to pose a security threat from entering the country under the VWP. Accordingly, DHS has determined that delaying implementing of this interim final rule to consider public comment rule would be impracticable, unnecessary and contrary to the public interest.

3. Foreign Affairs Function Exception

This interim final rule is also excluded from the rulemaking provisions of 5 U.S.C. 553 as a foreign affairs function of the United States because it advances the President's foreign policy goals, involves bilateral agreements that the United States has entered into with participating VWP countries, and directly involves relationships between the United States and its alien visitors. Accordingly, DHS is not required to provide public notice and an opportunity to comment before implementing the requirements under this final rule. The Department, however, is interested in public comments on this interim final rule and ESTA and, therefore, is providing the public with the opportunity to comment without delaying implementation of this rule.

Additionally, the public will continue to be provided opportunity to comment on changes to the Arrival and Departure Record, Forms I-94 and I-94W. These forms are in the process of being updated under the Paperwork Reduction Act. A **Federal Register** notice entitled "Proposed Collection; Comment Request; Arrival and Departure Record (Forms I-94 and I-94W)," was published in the **Federal Register** on November 9, 2007 (72 FR 63622). The 60-day comment period expired on January 8, 2008, and CBP has analyzed and responded to those comments received. Pursuant to the requirements

of the Paperwork Reduction Act of 1995, CBP advised the public in this notice of its intention to revise its existing collection of information by adding an e-mail address and phone number to the I-94 and the I-94W forms under OMB Control Number 1651-0111. CBP published this 30-day notice document on February 4, 2008, in the **Federal Register** (73 FR 6522) and the comment period expired on March 5, 2008. We note that, upon publication for OMB approval, interested persons had an additional opportunity to provide comments to OMB on CBP's request for the addition of e-mail address and phone number and other data elements to update the I-94W form. All comments received will become a matter of the public record.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) (5 U.S.C. 603(b)), as amended by the Small Business Regulatory Enforcement and Fairness Act of 1996 (SBREFA), requires an agency to prepare and make available to the public a regulatory flexibility analysis that describes the effect of a proposed rule on small entities (*i.e.*, small businesses, small organizations, and small governmental jurisdictions) when the agency is required "to publish a general notice of proposed rulemaking for any proposed rule." Because this rule is being issued as an interim rule, on the grounds set forth above, a regulatory flexibility analysis is not required under the RFA.

Nonetheless, DHS has considered the impact of this rule on small entities and had determined that this rule will not have a significant economic impact on a substantial number of small entities. The individual aliens to whom this rule applies are not small entities as that term is defined in 5 U.S.C. 601(6). Accordingly, there is no change expected in any process as a result of this rule that would have a direct effect, either positive or negative, on a small entity.

C. Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

D. Executive Order 12866

This interim final rule is considered to be a "significant regulatory action" under Executive Order 12866, section 3(f), Regulatory Planning and Review. Accordingly, OMB has reviewed this regulation under that Executive Order.

The purpose of ESTA is to allow DHS and CBP to establish the eligibility of certain foreign travelers to travel to the United States under the VWP, and whether the alien's proposed travel to the United

States poses a law enforcement or security risk. Upon review of such information, DHS will determine whether the alien is eligible to travel to the United States under the VWP. Once ESTA is implemented as a mandatory program, 60 days following publication of a notice in the **Federal Register**, citizens and eligible nationals of the 27 countries in the current VWP must comply with this rule. The primary parameters for this analysis are as follows—

- The period of analysis is 2008 to 2018.
- Because the order in which countries will potentially be brought into VWP, and thus into ESTA, is unknown, we make the simplifying assumption for this analysis only that all affected travelers will comply with this rule beginning in 2009.
- Air and sea carriers that transport these VWP travelers are not directly regulated under this rule; therefore, they are not responsible for completing ESTA applications on behalf of their passengers. However, carriers may choose to either modify their existing systems or potentially develop new systems to submit ESTA applications for their customers. For this analysis, we assume that carriers will incur system development costs in 2008 and will incur operation and maintenance costs every year thereafter. We note that CBP will transmit travelers' authorization status through CBP's existing Advance Passenger Information System (APIS), and therefore carriers may not have to make significant changes to their existing systems in response to this rule. Additionally, to minimize the potential impacts to air and sea carriers, CBP is developing a system that carriers will be able to use to submit applications on behalf of their passengers.
- Under this rule, an initial travel authorization is valid for two years. We anticipate that travelers and carriers will update information via CBP's APIS requirements rather than requiring updated ESTA information on each entry during the two-year period. However, for purposes of this analysis, we assume that a travel authorization update would be required for each trip to the United States so as not to underestimate the potential economic impacts of this rule.

Impacts to Air & Sea Carriers

We estimate that eight U.S.-based air carriers and eleven sea carriers will be affected by the rule. An additional 35 foreign-based air carriers and five sea carriers will be affected.

CBP intends to transmit each passenger's travel authorization status to the air carriers using CBP's Advance Passenger Information System (APIS).⁷ When a passenger checks in for his/her flight, the passport is swiped and the APIS process begins. CBP will pro-

⁷ See U.S. Customs and Border Protection final Passenger and Crew Member Manifests for Commercial Aircraft and Vessels," 72 FR 48320 rule. "Advance Electronic Transmission of (Aug. 23, 2007).

vide the passenger's travel authorization status to the carrier in the return APIS message. If a passenger has not applied for and received a travel authorization prior to check-in, the carrier will be able to submit the required information and obtain a travel authorization on behalf of the passenger. It is unknown how many passengers annually may request that their carrier apply for a travel authorization on their behalf or how much it will cost carriers to modify their existing systems to accommodate such requests. During the first years of implementation when passengers are not quite as familiar with the new process, the carriers could face a notable burden if most of their non-U.S. passengers require travel authorization applications to be carrier-transmitted.

Given these unknowns, we have developed a range of costs. For the low end of the range, we assume that carriers will modify their existing systems, interface with CBP's system, and will help few passengers apply for travel authorizations annually. For the high end of the range, we assume that carriers will develop a new system (similar to APIS Quick Query, AQQ) and will assist many passengers annually. We assume that for an air carrier modifying its existing systems the cost would be \$500,000 in the first year and \$125,000 (25 percent of start-up costs) in subsequent years (low cost). The subsequent-year estimate is intended to account not only for annual operation and maintenance of the system but also for the burden incurred by the carriers to assist passengers. For an air carrier developing a new system, the cost would be \$2 million in the first year and \$2 million (100 percent of start-up costs) in subsequent years (high cost). Sea carriers have not previously developed an AQQ-like system, as they have been able to submit advance passenger data through the U.S. Coast Guard's Notice of Arrival/Departure system (called "eNOA/D"). For the low cost estimate, we assume that modifying systems would cost \$1 million in the first year and \$250,000 in subsequent years. For a sea carrier developing a new system, the cost would be \$2 million in the first year and \$2 million (100 percent of start-up costs) in subsequent years, as with air carriers.

Given this range, should carriers undertake this effort, costs for U.S.-based carriers at the low end of the range would be about \$9 million in the first year and \$2 million in subsequent years (undiscounted). Costs for U.S.-based carriers at the high end of the range will be about \$36 million in the first year and subsequent years (undiscounted). See Exhibit 1.

**EXHIBIT 1.—FIRST YEAR AND ANNUAL COSTS FOR CARRIERS TO
ADDRESS ESTA REQUIREMENTS**
[\$Millions, 2008–2018, undiscounted]

	Low cost scenario					High cost scenario				
	U.S.		Foreign		Total	U.S.		Foreign		Total
	Air	Sea	Air	Sea		Air	Sea	Air	Sea	
Carriers . . .	8	11	35	5	59	8	11	35	5	59
2008	\$4.0	\$5.5	\$35.0	\$5.0	\$49.5	\$16.0	\$22.0	\$70.0	\$10.0	\$118.0
2009	1.0	1.4	8.8	1.3	12.5	16.0	22.0	70.0	10.0	118.0
2010	1.0	1.4	8.8	1.3	12.5	16.0	22.0	70.0	10.0	118.0
2011	1.0	1.4	8.8	1.3	12.5	16.0	22.0	70.0	10.0	118.0
2012	1.0	1.4	8.8	1.3	12.5	16.0	22.0	70.0	10.0	118.0
2013	1.0	1.4	8.8	1.3	12.5	16.0	22.0	70.0	10.0	118.0
2014	1.0	1.4	8.8	1.3	12.5	16.0	22.0	70.0	10.0	118.0
2015	1.0	1.4	8.8	1.3	12.5	16.0	22.0	70.0	10.0	118.0
2016	1.0	1.4	8.8	1.3	12.5	16.0	22.0	70.0	10.0	118.0
2017	1.0	1.4	8.8	1.3	12.5	16.0	22.0	70.0	10.0	118.0
2018	1.0	1.4	8.8	1.3	12.5	16.0	22.0	70.0	10.0	118.0

As estimated, ESTA could cost the carriers about \$137 million to \$1.1 billion (present value) over the next 10 years depending on how the carriers decide to assist passengers, how many passengers the carriers need to assist, and the discount rate applied (3 or 7 percent). See Exhibit 2.

**EXHIBIT 2.—PRESENT VALUE COSTS FOR CARRIERS TO ADDRESS
ESTA REQUIREMENTS**
[Millions, 2008–2018]

	Low cost scenario				High cost scenario			
	U.S.		Foreign		U.S.		Foreign	
	Air	Sea	Air	Sea	Air	Sea	Air	Sea
3 percent discount rate								
10-year subtotal	\$12.5	\$17.2	\$109.6	\$15.7	\$152.5	\$209.7	\$667.1	\$95.3
10-year total	\$29.7		\$125.3		\$362.2		\$762.4	
10-year grand total	\$155.0				\$1,124.6			
Annualized subtotal	\$1.3	\$1.8	\$11.5	\$1.6	\$16.0	\$22.0	\$70.0	\$10.0
Annualized total	\$3.1		\$13.1		\$38.0		\$80.0	
Annualized grand total	\$16.2				\$118.0			
7 percent discount rate								
10-year subtotal	\$11.0	\$15.2	\$96.5	\$13.8	\$128.4	\$176.5	\$561.7	\$80.2
10-year total	\$26.2		\$110.3		\$304.9		\$641.9	
10-year grand total	\$136.5				\$946.8			
Annualized subtotal	\$1.4	\$1.9	\$12.0	\$1.7	\$16.0	\$22.0	\$70.0	\$10.0
Annualized total	\$3.3		\$13.7		\$38.0		\$80.0	
Annualized grand total	\$17.0				\$118.0			

Travel agents and other service providers may incur costs to assist their clients in obtaining travel authorizations. We do not know how many such service providers would be affected, but they would likely need to obtain a software module that allowed them to apply for travel authorizations during the booking process. Affected travel agents are most likely foreign businesses located in the affected countries.

Impacts to Travelers

ESTA will present new costs and burdens to travelers in VWP countries who were not previously required to submit any information to the U.S. Government in advance of travel to the United States. Travelers from Roadmap countries who become VWP will also incur costs and burdens, though these are much less than obtaining a nonimmigrant visa (category B1/B2), which is currently required for short-term pleasure or business to travel to the United States.

For the primary analysis, we explore the following categories of costs.

- Burden to obtain a travel authorization—the time that will be required to obtain a travel authorization and the value of that time (opportunity cost) to the traveler.

- Cost and burden to obtain a visa if a travel authorization is denied—based on the existing process for obtaining a visa, the cost to obtain that document in the event that a travel authorization is denied and the traveler is referred to a U.S. Embassy.

For this analysis, we have developed four methods to predict ESTA-affected travelers to the United States over the next 10 years using information available from the Department of Commerce, Office of Travel and Tourism Industries (OTTI), documenting historic travel levels and future projections. Method 1 employs the travel-projection percentages provided by OTTI and extrapolates them to the end of our period of analysis (OTTI projects travel only through 2010; we calculate a simple, straight-line extrapolation to 2018). Method 2 (modified OTTI projections) presents a more pessimistic outlook on travel: all projected percentages from Method 1 are reduced by 2 percent throughout the period of analysis. Methods 3 and 4 present more optimistic projections than Methods 1 and 2, but incorporated periodic downturns, which are prevalent (though not necessarily predictable) in international travel. See Exhibit 3.

EXHIBIT 3.—TOTAL VISITORS TO THE UNITED STATES USING FOUR
METHODOLOGIES, 2008–2018
[Millions]

	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018
Method 1:											
VWP.....	17.4	18.0	18.7	19.4	20.0	20.7	21.3	21.9	22.4	23.0	23.5
Roadmap.....	1.2	1.2	1.3	1.3	1.4	1.4	1.5	1.5	1.5	1.6	1.6
Total.....	18.6	19.2	20.0	20.7	21.4	22.1	22.8	23.4	23.9	24.6	25.1
Method 2:											
VWP.....	17.0	17.4	17.7	17.9	18.2	18.4	18.6	18.7	18.8	18.9	18.9
Roadmap.....	1.1	1.2	1.2	1.2	1.2	1.3	1.3	1.3	1.3	1.3	1.3
Total.....	18.1	18.6	18.9	19.1	19.4	19.7	19.9	20.0	20.1	20.2	20.2
Method 3:											
VWP.....	17.4	18.0	18.7	19.4	17.7	20.7	24.1	27.4	26.0	30.1	34.1
Roadmap.....	1.2	1.2	1.3	1.3	1.2	1.4	1.7	2.0	2.3	2.9	2.7
Total.....	18.6	19.2	20.0	20.7	18.9	22.1	25.8	29.4	28.3	33.0	36.8
Method 4:											
VWP.....	17.4	15.9	18.5	21.6	24.5	23.3	26.9	30.5	35.6	33.9	38.6
Roadmap.....	1.2	1.0	1.3	1.5	1.8	2.1	2.0	2.3	2.9	3.3	4.0
Total.....	18.6	16.9	19.8	23.1	26.3	25.4	28.9	32.8	38.5	37.2	42.6

Burden To Obtain Travel Authorization Through ESTA

To estimate the value of a non-U.S. citizen's time (opportunity cost), we have conducted a brief analysis that takes into account differing wage rates for countries that will be affected by the ESTA requirements. Based on this analysis, we found that countries in Western Europe, Oceania, and Japan generally have a higher value of time than the less developed countries of Eastern Europe and Asia. We also found that air travelers have a higher value of time than the general population. As we did previously for carriers, we develop a range of cost estimates for the value of an individual's time. For the low cost estimate, the hourly value of time ranges from \$1.42 to \$30.78 depending on the country. For the high cost estimate, the hourly value of time ranges from \$3.00 to \$65.19.

We estimate that it will take 15 minutes of time (0.25 hours) to apply for a travel authorization. Note that this is approximately 5 minutes more than the time currently estimated to complete the I-94W (10 minutes). We estimate additional burden for a travel authorization application because even though the data elements and admissibility questions are identical, the traveler must now register with ESTA, familiarize himself/herself with the system, gather and enter the data, and access an e-mail account to check the status of his/her travel authorization application. For those applicants who are computer savvy and have little difficulty navigating an electronic system, this may be a high estimate. For those applicants who are not as comfortable using computers and interfacing with Web sites, this may be a low estimate. We believe the burden estimate of 15 minutes is a reasonable average.

Furthermore, if airlines, cruise lines, travel agents, and other service providers are entering the information on behalf of the passenger, it would almost certainly not take 15 minutes of time because these entities will have most of the information electronically as gathered during the booking process, and travel and ticket agents are certainly comfortable using computer applications. Because we do not know how many travelers will apply independently through the ESTA Web site versus through a third party, we assign a 15-minute burden to all travelers.

Based on these values and assumptions, we estimate that total opportunity costs in 2009 (the first year that all travelers comply with the ESTA requirements in this analysis) will range from \$86 million (low) to \$207 million (high) depending on the number of travelers projected and the value of time used. By the end of the period of analysis, costs range from \$102 million to \$444 million. These estimates are all undiscounted. The range between the estimates broadens as differences in the projection methods are more discernable at the end of the period of analysis. See Exhibit 4.

EXHIBIT 4.—TOTAL OPPORTUNITY COSTS FOR VISITORS TO THE UNITED STATES USING FOUR METHODOLOGIES, 2009 AND 2018
[In \$millions]

	2009		2018	
	Low estimate	High estimate	Low estimate	High estimate
Method 1.....	\$98	\$207	\$127	\$269
Method 2.....	94	199	102	217
Method 3.....	98	207	184	389
Method 4.....	86	182	210	444

As estimated, ESTA could cost travelers \$700 million to over \$2.6 billion (present value) over the next 10 years depending on the projection method, the value of opportunity cost, and the discount rate applied (3 or 7 percent). Annualized costs are an estimated \$86 million to \$270 million. See Exhibit 5.

EXHIBIT 5.—TOTAL PRESENT VALUE AND ANNUALIZED OPPORTUNITY COSTS TO TRAVELERS, 2008–2018

	Total present value benefits (\$billions)				Annualized benefits (\$millions)			
	Low estimate		High estimate		Low estimate		High estimate	
	3%	7%	3%	7%	3%	7%	3%	7%
Method 1.....	\$0.957	\$0.781	\$2.026	\$1.653	\$100	\$97	\$213	\$206
Method 2.....	0.844	0.693	1.788	1.468	89	86	188	183
Method 3.....	1.071	0.862	2.268	1.825	112	107	238	227
Method 4.....	1.216	0.972	2.574	2.058	128	121	270	257

Cost and Burden To Obtain a Visa if a Travel Authorization Is Denied

Using the value of time estimates calculated above, we estimate the costs if a travel authorization is denied and the traveler is referred to the nearest U.S. Consulate to apply for a nonimmigrant visa (B1/B2). Absent country-specific information, we assume that it will require 5 hours of time to obtain a visa including time to complete the application, travel time, waiting at the Embassy for the interview, and the interview itself. There are also other incidental costs to consider, such as bank and courier fees, photographs, trans-

portation, and other miscellaneous expenses. We estimate that these out-of-pocket costs will be \$187.

The number of travel authorizations that will be denied is unknown. For a country to have become part of the VWP originally, the visa refusal rate must have been no higher than 3 percent. Currently, the number of VWP travelers found inadmissible upon application for admission is low, only about 1 percent. ESTA, however, will likely affect a relatively small number of the current inadmissible individuals (see next section on benefits) because many individuals are denied entry for reasons that ESTA will not affect. For this analysis, we assume that 1 percent of ESTA applicants from current VWP travelers will subsequently need to apply for a visa. We do not account for visas that must be obtained in the event of an ESTA refusal for new VWP travelers because obtaining a visa is the baseline condition under which those travelers must currently operate in order to travel to the United States. We do, however, subtract out ESTA refusals in our benefits calculations (see next section) because these travelers do not accrue any benefit from ESTA.

We multiply 1 percent of the annual travelers for each country by the burden (5 hours), the out-of-pocket expenses, and the value of time, either high or low. Total present value visa costs over the period of analysis could total \$374 million to \$916 million over the period of analysis. Annualized costs are an estimated \$47 million to \$96 million. See Exhibit 6.

EXHIBIT 6.—TOTAL PRESENT VALUE AND ANNUALIZED VISA COSTS TO TRAVELERS, 2008–2018

	Total present value benefits (\$billions)				Annualized benefits (\$millions)			
	Low estimate		High estimate		Low estimate		High estimate	
	3%	7%	3%	7%	3%	7%	3%	7%
Method 1	\$0.517	\$0.421	\$0.724	\$0.590	\$54	\$53	\$76	\$74
Method 2	0.456	0.374	0.639	0.525	48	47	67	65
Method 3	0.577	0.465	0.809	0.651	61	58	85	81
Method 4	0.654	0.523	0.916	0.733	69	65	96	91

Total Costs to Travelers

Based on the above calculations, we estimate that the total quantified costs to travelers will range from \$1.1 billion to \$3.5 billion depending on the number of travelers, the value of time, and the discount rate. Annualized costs are estimated to range from \$133 million to \$366 million. See Exhibit 7.

EXHIBIT 7.—TOTAL PRESENT VALUE AND ANNUALIZED COSTS TO
TRAVELERS, 2008–2018

	Total present value benefits (\$billions)				Annualized benefits (\$millions)			
	Low estimate		High estimate		Low estimate		High estimate	
	3%	7%	3%	7%	3%	7%	3%	7%
Method 1	\$1.474	\$1.202	\$2.750	\$2.244	\$154	\$150	\$289	\$280
Method 2	1.300	1.067	2.427	1.993	137	133	255	248
Method 3	1.648	1.327	3.077	2.476	173	165	323	308
Method 4	1.870	1.495	3.490	2.791	197	186	366	348

Conclusions

We have shown that costs to air and sea carriers to support the requirements of the ESTA program could cost \$137 million to \$1.1 billion over the next 10 years depending on the level of effort required to integrate their systems with ESTA, how many passengers they need to assist in applying for travel authorizations, and the discount rate applied to annual costs. Costs to foreign travelers could total \$1.1 billion to \$3.5 billion depending on traveler volume, their value of time, and the discount rate applied.

Benefits

Inadmissibility

By requiring passenger data in advance of travel, CBP may be able to determine, before the alien departs for the United States, the eligibility of citizens and eligible nationals from VWP countries to travel to the United States under the VWP, and whether such travel poses a law enforcement or security risk. In addition to fulfilling a statutory mandate, the rule serves the twin goals of promoting border security and legitimate travel to the United States. By modernizing the VWP, ESTA is intended to both increase national security and provide for greater efficiencies in the screening of international travelers by allowing for the screening of subjects of potential interest well before boarding, thereby reducing traveler delays based on potentially lengthy processes at U.S. ports of entry.

ESTA will allow for advance screening of VWP travelers against all appropriate databases, including, but not limited to, lost and stolen passport databases and appropriate watchlists. Based on data from CBP, we estimate that 0.04 percent of affected individuals will be prevented from traveling to the United States as a result of the ESTA requirements.

Currently, when ineligible travelers are brought to the United States, they are referred to secondary inspection where a CBP or other law enforcement officer questions them and processes them for return to their country of origin. CBP estimates that it requires 2 hours of time for questioning and processing at a cost of approximately \$1,560 per individual. We estimate that removing an ineligible traveler costs carriers \$1,500 per individual, which includes the air fare and any lodging and meal expenses incurred while the individual is awaiting transportation out of the United States.

Based on these estimates, we calculate that benefits to CBP would total \$85 million to \$151 million over the period of analysis depending on the traveler projection method and the discount rate applied. Benefits to carriers could total \$82 million to \$146 million. Annualized benefits range from \$17 million to \$29 million. See Exhibit 8.

EXHIBIT 8.—BENEFITS OF ANNUAL ADMISSIONS DENIED
ATTRIBUTABLE TO ESTA, 2008–2018
[In \$millions]

	Total admissions denied	3% discount rate				7% discount rate			
		Benefits to CBP	Benefits to carriers	Total benefits	Annualized benefits	Benefits to CBP	Benefits to carriers	Total benefits	Annualized benefits
Method 1 . . .	89,000	\$118	\$113	\$231	\$23	\$96	\$92	\$188	\$19
Method 2 . . .	78,000	104	100	204	21	85	82	167	17
Method 3 . . .	102,000	133	128	261	26	107	103	210	21
Method 4 . . .	117,000	151	146	297	29	121	116	237	23

Additionally, asking questions regarding eligibility for admission prior to travel to the United States may keep some VWP travelers from arriving at a United States port of entry only to then be deemed inadmissible. This rule would provide benefits to CBP and the carriers for those travelers who answer “yes” to any of the eligibility questions who are then deemed inadmissible and must be transported back to their country of origin. It is not known how many entries like this occur on an annual basis, and we are thus unable to quantify the benefits to CBP or the carriers of forgoing such occurrences.

Benefits of Not Having To Obtain Visas

The benefits of not having to obtain a B1/B2 visa, but rather obtaining a travel authorization are also quantifiable. These benefits will be realized only by travelers who are citizens of countries that enter the Visa Waiver Program in the future. We must first determine how many travelers are repeat versus first-time travelers in order not to double count benefits from not having to obtain a visa. We

estimate the number of first-time visitors under each of the four methods of projecting travelers. Then we estimate a percentage of repeat travelers who would also need to have visas because their old visa will expire during the next 10 years. All of the Roadmap visitors are eligible for 10-year B1/B2 visas, and we thus assume that 10 percent of repeat visitors would have to reapply for visas were it not for the rule. Finally, we subtract out those who are denied a travel authorization and must apply for a visa instead (see previous section on costs).

Benefits of forgoing visa are expected to range from about \$619 million to \$1.6 billion (present value) over 10 years depending on the travel level, the value of time used, and the discount rate applied. Annualized benefits range from \$77 million to \$167 million. See Exhibit 9.

EXHIBIT 9.—TOTAL PRESENT VALUE AND ANNUALIZED BENEFITS OF FORGOING VISAS, 2008–2018

	Total present value benefits (\$billions)				Annualized benefits (\$millions)			
	Low estimate		High estimate		Low estimate		High estimate	
	3%	7%	3%	7%	3%	7%	3%	7%
Method 1.....	\$0.856	\$0.697	\$1.042	\$0.850	\$90	\$87	\$109	\$106
Method 2.....	0.755	0.619	0.920	0.754	79	77	96	84
Method 3.....	1.053	0.838	1.290	1.026	111	105	135	128
Method 4.....	1.293	1.019	1.588	1.251	136	127	167	156

Benefits of Not Having To Complete the I-94W and I-94 Forms

We can also quantify the benefits of not having to complete the I-94W paper form. These benefits will accrue to all travelers eventually covered by ESTA as the requirement to present a paper I-94W is eliminated. The estimated time to complete either the I-94W or I-94 is 10 minutes (0.17 hours). We then subtract out those travelers who are not able to obtain a travel authorization through ESTA (see previous section on costs) and then apply a low and high value of time to the burden to estimated total savings that are expected to be accrued as a result of this rule.

Benefits of not having to complete the paper forms are expected to range from \$457 million to \$1.7 billion over 10 years depending on the value of time used and the discount rate applied. Annualized benefits range from \$57 million to \$178 million. See Exhibit 10.

**EXHIBIT 10.—TOTAL PRESENT VALUE AND ANNUALIZED BENEFITS
OF FORGOING THE I-94W, 2008–2018**

	Total present value benefits (\$billions)				Annualized benefits (\$millions)			
	Low estimate		High estimate		Low estimate		High estimate	
	3%	7%	3%	7%	3%	7%	3%	7%
Method 1	\$0.636	\$0.519	\$1.336	\$1.090	\$67	\$65	\$140	\$136
Method 2	0.557	0.457	1.179	0.968	58	57	124	121
Method 3	0.706	0.568	1.495	1.203	74	71	157	150
Method 4	0.801	0.641	1.697	1.357	84	80	178	169

In addition to these benefits to travelers, CBP and the carriers should also experience the benefit of not having to administer the I-94W. While CBP has not conducted an analysis of the potential savings, it should accrue benefits from not having to produce, ship, and store blank forms. CBP should also be able to accrue savings related to data entry and archiving. Carriers should realize some savings as well, though carriers will still have to administer the I-94 for those passengers not traveling under the VWP and the Customs Declaration forms for all passengers aboard the aircraft and vessel.

Total Benefits to Travelers

Total benefits to travelers could total \$1.1 billion to \$3.3 billion over the period of analysis. Annualized benefits could range from \$134 million to \$345 million. See Exhibit 11.

**EXHIBIT 11.—TOTAL PRESENT VALUE AND ANNUALIZED BENEFITS TO
TRAVELERS, 2008–2018**

[10-year costs in \$billions; annualized costs in \$millions]

	Total present value benefits (\$billions)				Annualized benefits (\$millions)			
	Low estimate		High estimate		Low estimate		High estimate	
	3%	7%	3%	7%	3%	7%	3%	7%
Method 1	\$1.492	\$1.216	\$2.378	\$1.940	\$157	\$152	\$249	\$242
Method 2	1.312	1.076	2.099	1.722	137	134	220	215
Method 3	1.759	1.406	2.785	2.229	185	176	292	278
Method 4	2.094	1.660	3.285	2.608	220	207	345	325

Benefits of Enhanced Security

As set forth in section 711 of the 9/11 Act, it was the intent of Congress to modernize and strengthen the security of the VWP under section 217 of the Immigration and Nationality Act (INA, 8 U.S.C. 1187) by simultaneously enhancing program security requirements and extending visa-free travel privileges to citizens and eligible nationals of eligible foreign countries that are partners in the war on terrorism.

In previous DHS analyses, a “breakeven” analysis has been conducted in the absence of information regarding baseline risks of terrorist attacks and risk reduced as the result of a regulatory action. Such an analysis was conducted for CBP’s final rule implementing enhancements to APIS (this rule is familiarly referred to as APIS 30/AQQ).⁸ The APIS 30/AQQ and the ESTA rules essentially have the same objective: Prevent a traveler who has been matched to an individual on a government watchlist from boarding an aircraft or passenger vessel bound for the United States. This layered approach is a key component of the DHS and CBP goal of safe and secure travel. However, if we were to conduct a breakeven analysis for ESTA without taking into account the breakeven analysis for APIS 30/AQQ, we would be double-counting security benefits, though the extent is unknown. The APIS 30/AQQ analysis accounted for identifying a traveler of concern prior to the issuance of a boarding pass. Thus, we must not take credit for preventing a traveler from boarding an aircraft as a result of ESTA because that benefit has already been counted. We have not conducted a breakeven analysis for this rule because CBP has already accounted for preventing a traveler on a watchlist from boarding an aircraft and coming to the United States. This does not mean, however, that there are no security benefits of this rule—we simply have not quantitatively accounted for them here.

Annualized costs and benefits are presented in the following accounting statement, as required by OMB Circular A–4.

⁸ See 72 FR 48320, 48339.

ACCOUNTING STATEMENT: CLASSIFICATION OF EXPENDITURES,
2008–2018
[\$2008]

	3% discount rate	7% discount rate
Costs:	\$16 million to \$118 million	\$17 million to \$118 million.
Annualized monetized costs	None quantified	None quantified.
Annualized quantified, but un-monetized costs	Indirect costs to the travel and tourism industry.	Indirect costs to the travel and tourism industry.
Qualitative (un-quantified) costs		
Benefits:	\$21 million to \$29 million	\$17 million to \$23 million.
Annualized monetized benefits	None quantified	None quantified.
Annualized quantified, but un-monetized benefits.		
Qualitative (un-quantified) benefits	Enhanced security and efficiency	Enhanced security and efficiency.

We estimate that the annualized costs of this rule will be \$16 million to \$118 million. These costs are for U.S. and foreign-based air and sea carriers. Quantified benefits of \$17 million to \$29 million to carriers and CBP are for annual travel authorizations denied by ESTA that prevent inadmissible persons from applying for admission under the VWP at a United States port of entry. Firms participating in the U.S. economy may also face unquantified or indirect burdens if, for example, U.S. travel agents invest in resources to assist their foreign clients in obtaining a travel authorization, if the requirements lead to trips forgone, or if the requirements lead to increased queues in airports or seaports. Under the simplifying assumption for this analysis only that all affected travelers, including those from roadmap countries, will comply with this rule beginning in 2009, there are quantified benefits to those travelers from Roadmap countries who no longer need to obtain a visa to visit the United States. In addition, there are quantified benefits for all ESTA participants who no longer need to complete I-94W forms. Because these benefits accrue to foreign entities, however, we do not include them in the accounting statement. Non-quantified benefits are enhanced security and efficiency.

Regulatory Alternatives

We consider three alternatives to this rule—

- The ESTA requirements in the rule, but with a \$1.50 fee per each travel authorization (more costly)
- The ESTA requirements in the rule, but with only the name of the passenger and the admissibility questions on the I-94W form (less burdensome)
- The ESTA requirements in the rule, but only for the countries

entering the VWP after 2009 (no new requirements for VWP, reduced burden for newly entering countries)

Because this rule only directly affects travelers, these alternatives only directly affect travelers, not air and sea carriers. The first alternative would create additional burden for carriers, who would potentially need to collect credit card information and the fee to cover the costs of the ESTA application. The second alternative would create less burden for the carriers because the biographic information would not be included. The third alternative would be less costly and burdensome for the carriers who would now not need to handle as many ESTA participants. Because the range of high and low cost estimates for carriers presented is so broad in the primary analysis (see previous section), we do not estimate carrier costs for these alternatives. The comparison of alternatives, therefore, is just for affected travelers.

For the sake of brevity, we present the 10-year present value cost of the rule and these alternatives for the high value estimates, Method 1 traveler projection, at the 7 percent discount rate only. Benefits are expressed as negative values in this presentation See Exhibit 12.

EXHIBIT 12.—COMPARISON OF 10-YEAR IMPACTS OF THE RULE AND REGULATORY ALTERNATIVES, 2008–2018, IN \$BILLIONS, METHOD 1, HIGH ESTIMATE, 7 PERCENT DISCOUNT RATE

	Rule	Alternative 1	Alternative 2	Alternative 3
ESTA burden	\$1.653	\$1.653	\$1.102	\$0.045.
Visa costs	0.591	0.591	0.591	0.
ESTA fee	0	0.231	0	0.
Benefit of no visa	(0.850)	(0.850)	(0.850)	(0.850).
Benefit of no I-94W...	(1.090)	(1.090)	(1.090)	(0.030).
Net impact	\$0.304	\$0.535	(\$0.247)	(\$0.835).
Comment		Fee will not be charged at this time.	All data elements are required for proper screening.	Does not meet statutory requirements.

DHS has determined that the rule provides the greatest level of enhanced security and efficiency at an acceptable cost to the traveling public and potentially affected air carriers.

E. Executive Order 13132

The rule will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, DHS has determined that this interim final

rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

F. Executive Order 12988 Civil Justice Reform

This rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

G. Paperwork Reduction Act

These regulations are being issued without prior notice and public procedure pursuant to the Administrative Procedure Act (5 U.S.C. 553). For this reason, the collection of information contained in these regulations has been reviewed and, pending receipt and evaluation of public comments, approved by the Office of Management and Budget (OMB) in accordance with the Paperwork Reduction Act of 1995, Public Law 104–13, under Control Number 1651–0111.

The information collection provisions of this regulation are in §§ 212.1 and 217.5 of the CFR. CBP will use the information collected under this rule to determine the eligibility of nonimmigrant aliens to travel to the United States under the VWP so as to enhance border security and streamline entry processes at U.S. ports of entry. The respondents to this collection are non-U.S. citizen travelers to the United States. When the Secretary publishes notice in the **Federal Register** that each alien wishing to travel to the United States by air or sea must apply for and obtain ESTA authorization prior to such travel, under 8 CFR 217.5, any nonimmigrant alien wishing to travel to the United States by air or sea under VWP would be required in advance to have a travel authorization before embarking on a carrier for travel to the United States. To obtain a travel authorization, travelers must provide to CBP via a CBP Web site an application consisting of biographic and other information specified by the Secretary of Homeland Security as necessary to determine the eligibility of the alien to travel to the United States under the VWP, and whether such travel poses a law enforcement or security risk.

The collection of information regarding the I–94W Form procedures was previously reviewed and approved by OMB in accordance with the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3507) under OMB Control Number 1651–0111, and its renewal is currently being vetted through **Federal Register** notice as discussed in the document. An agency may not conduct, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number assigned by OMB.

The additional respondents and burden estimates for this collection are as follows:

Estimated annual reporting and / or recordkeeping burden: 4,225,000 hours.

Estimated average annual burden per respondent / recordkeeper: 15 minutes (0.25 hours).

Estimated number of respondents and / or recordkeepers: 17,000,000.

Estimated annual frequency of responses: Once per year.

The estimated annual public cost for ESTA is \$63.8 million. This is based on the number of responses (17,000,000) × a response time of 15 minutes × an average hourly rate of \$15 = \$63.8 million.

Comments concerning the accuracy of this burden estimate and suggestions for reducing this burden should be directed to the Office of Management and Budget, Attention: Desk Officer for the Department of Homeland Security, Office of Information and Regulatory Affairs, Washington, DC 20503. A copy should also be sent to the Border Security Regulations Branch, Bureau of Customs and Border Protection, 1300 Pennsylvania Avenue, NW. (Mint Annex), Washington, DC 20229.

H. Privacy Interests

DHS will be publishing a Privacy Impact Assessment (PIA) on its Web site. DHS also is preparing a separate SORN for publication in conjunction with this interim final rule.

List of Subjects in 8 CFR Part 217

Air carriers, Aliens, Maritime carriers, Passports and visas.

Amendments to the Regulations

■ For the reasons stated in the preamble, DHS amends part 217 of title 8 of the Code of Federal Regulations (8 CFR part 217), as set forth below.

PART 217—VISA WAIVER PROGRAM

■ 1. The general authority citation for part 217 continues to read as follows:

Authority: 8 U.S.C. 1103, 1187; 8 CFR part 2.

* * * * *

■ 2. A new § 217.5 is being added to read as follows:

§ 217.5 Electronic System for Travel Authorization.

(a) *Travel authorization required.* Each nonimmigrant alien intending to travel by air or sea to the United States under the Visa Waiver Program (VWP) must, within the time specified in paragraph (b) of this section, receive a travel authorization, which is a positive determination of eligibility to travel to the United States under the VWP via the Electronic System for Travel Authorization (ESTA), from CBP. In order to receive a travel authorization, each nonimmigrant alien intending to travel to the United States by air or sea

under the VWP must provide the data elements set forth in paragraph (c) of this section to CBP, in English, in the manner specified herein.

(b) *Time.* Each alien falling within the provisions of paragraph (a) of this section must receive a travel authorization prior to embarking on a carrier for travel to the United States.

(c) *Required elements.* ESTA will collect such information as the Secretary deems necessary to issue a travel authorization, as reflected by the I-94W Nonimmigrant Alien Arrival/ Departure Form (I-94W).

(d) *Duration.* (1) *General Rule.* A travel authorization issued under ESTA will be valid for a period of two years from the date of issuance, unless the passport of the authorized alien will expire in less than two years, in which case the authorization will be valid until the date of expiration of the passport.

(2) *Exception.* For travelers from countries which have not entered into agreements with the United States whereby their passports are recognized as valid for the return of the bearer to the country of the foreign-issuing authority for a period of six months beyond the expiration date specified in the passport, a travel authorization issued under ESTA is not valid beyond the six months prior to the expiration date of the passport. Travelers from these countries whose passports will expire in six months or less will not receive a travel authorization.

(e) *New travel authorization required.* A new travel authorization is required if any of the following occur:

- (1) The alien is issued a new passport;
- (2) The alien changes his or her name;
- (3) The alien changes his or her gender;
- (4) The alien's country of citizenship changes; or
- (5) The circumstances underlying the alien's previous responses to any of the ESTA application questions requiring a "yes" or "no" response (eligibility questions) have changed.

(f) *Limitations.* (1) *Current authorization period.* An authorization under ESTA is a positive determination that an alien is eligible, and grants the alien permission, to travel to the United States under the VWP and to apply for admission under the VWP during the period of time the travel authorization is valid. An authorization under ESTA is not a determination that the alien is admissible to the United States. A determination of admissibility is made only after an applicant for admission is inspected by a CBP Officer at a U.S. port of entry.

(2) *Not a determination of visa eligibility.* A determination under ESTA that an alien is not eligible to travel to the United States under the VWP is not a determination that the alien is ineligible for a visa to travel to the United States and does not preclude the alien from applying for a visa before a United States consular officer.

(3) *Judicial review.* Notwithstanding any other provision of law, a determination under ESTA is not subject to judicial review pursuant to 8 U.S.C. 217(h)(3)(C)(iv).

(4) *Revocation.* A determination under ESTA that an alien is eligible to travel to the United States to apply for admission under the VWP may be revoked at the discretion of the Secretary.

(g) *Compliance date.* Once ESTA is implemented as a mandatory program, 60 days following publication by the Secretary of a notice in the **Federal Register**, citizens and eligible nationals of countries that participate in the VWP planning to travel to the United States under the VWP must comply with the requirements of this section. As new countries are added to the VWP, citizens and eligible nationals of those countries will be required to obtain a travel authorization via ESTA prior to traveling to the United States under the VWP.

Dated: June 2, 2008.

MICHAEL CHERTOFF,
Secretary.

[Published in the Federal Register, June 9, 2008 (73 FR 32440)]

19 CFR Part 192

[CBP Dec. No. 08–20]

Mandatory Pre-Departure Filing of Export Cargo Information Through the Automated Export System

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

ACTION: General notice of compliance.

SUMMARY: This notice informs the public of the date when U.S. Customs and Border Protection (CBP) will require compliance with its regulations pertaining to the mandatory, pre-departure electronic filing of export information through the Automated Export System (AES). CBP regulations at 19 CFR 192.14 setting forth requirements for the advance electronic filing of export information by vessel, air, truck, and rail carriers provide a compliance date contingent upon the redesign of CBP's AES commodity module and the effective date of Department of Commerce (DOC) regulations pertaining to mandatory electronic filing of export information. Since the redesign of the AES commodity module is complete, and the DOC regulations were published as a final rule on June 2, 2008, with an effective date of July 2, 2008, and an implementation date of September 30, 2008, the CBP regulations must be complied with starting September 30, 2008.

DATES: The compliance date for the CBP regulations pertaining to the mandatory, pre-departure electronic filing of export cargo information through the AES (19 CFR 192.14) is September 30, 2008.

FOR FURTHER INFORMATION CONTACT: Gregory Olsavsky, Director, Cargo Control Division, Office of Field Operations, 202–344–1049.

SUPPLEMENTARY INFORMATION: On December 5, 2003, CBP published a final rule in the **Federal Register** (68 FR 68140) amending the CBP regulations pertaining to the filing of export cargo information through the AES (19 CFR, Part 192, Subpart B). Specifically, the final rule added new § 192.14 to require (with a provision for exceptions) that vessel, air, truck, and rail carriers electronically file export cargo information through a CBP-approved electronic data interchange system (then and still the AES) and that such filing occur prior to departure from the United States for vessel and air carriers (24 hours for vessel carriers, two hours prior to scheduled departure time for air carriers) and prior to arrival at the border for truck and rail carriers (one hour for truck carriers, two hours for rail carriers). (The actual filing responsibility is imposed on the U.S. principal party in interest (USPPI), or its agent, representing the carrier.) These regulations were published pursuant to section 343(a) of the Trade Act of 2002, as amended by the Maritime Security Act (19 U.S.C. 2071 note). (See the published rule for a further discussion of these provisions and their underlying authorities.)

Under the 2003 CBP final rule (specifically, § 192.14(e)), the requirements of these regulations were set to be implemented upon the completion of the redesign of CBP's AES commodity module and the effective date of DOC regulations pertaining to mandatory electronic filing of export cargo information. The redesign of the AES is complete, and the DOC has recently published its regulations.

On June 2, 2008, the Bureau of the Census (U.S. Census Bureau or Census Bureau), DOC, published a final rule in the **Federal Register** (73 FR 31548) amending its Foreign Trade regulations to implement provisions of the Foreign Relations Authorization Act (FRA Act). Under the FRA Act, the Secretary of Commerce, with the concurrence of the Secretary of State and the Secretary of Homeland Security, is authorized to publish regulations mandating that all persons required to file export information via a Shippers Export Declaration (SED) under chapter 9 of title 13, United States Code (13 U.S.C.) do so through the AES. Thus, under the final rule, the Census Bureau is requiring mandatory filing of export cargo information through CBP's AES (or through AESDirect, the Census Bureau's free Internet-based system) for all shipments: Vessel, aircraft, truck, and rail. (See the published rule for a further discussion of these provisions and their underlying authorities.) The publication of these

DOC regulations and the effective date set forth in those DOC regulations trigger the effectiveness of the CBP regulations.

The effective date of the Census Bureau final rule is July 2, 2008, but the Census Bureau will not commence implementation of the final rule's provisions until September 30, 2008. Accordingly, the compliance date for the CBP regulations pertaining to pre-departure electronic filing (through AES) of export cargo information, pursuant to 19 CFR 192.14(e), is the implementation date of the DOC final rule, September 30, 2008. After September 30, 2008, CBP will publish a technical amendment to the CFR amending § 192.14 to reflect the compliance date.

Dated: June 2, 2008.

JAYSON P. AHERN,
*Acting Commissioner,
Customs and Border Protection.*

[Published in the Federal Register, June 9, 2008 (73 FR 32466)]

DEPARTMENT OF THE TREASURY

19 CFR Part 12

CBP Dec. 08-40

Docket No. USCBP-2008-0076

RIN 1505-AB99

**EXTENSION OF IMPORT RESTRICTIONS IMPOSED ON
ARCHAEOLOGICAL MATERIAL FROM CAMBODIA**

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

ACTION: Final rule.

SUMMARY: This document amends Customs and Border Protection (CBP) regulations to reflect both continuing and new import restrictions on certain archaeological material from Cambodia. Import restrictions that were previously imposed by CBP Decision 03-28 on certain stone, metal, and ceramic archaeological materials that are due to expire on September 19, 2008, are extended. The Assistant Secretary for Educational and Cultural Affairs, United States Department of State, has made the requisite determination for the extension of import restrictions that previously existed and for amending the agreement so that it applies also to archaeological material of the Bronze and Iron Ages. Accordingly, these import restrictions

will remain in effect until September 19, 2013, and title 19 of the CBP regulations is being amended to reflect this amended bilateral agreement. These restrictions are being extended pursuant to determinations of the United States Department of State made under the terms of the 1970 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. This document also contains the amended Designated List of Archaeological Material that describes the articles to which the restrictions apply, including the new categories of objects (glass and bone) and the additional subcategories of stone and metal objects from the Bronze and Iron Age.

EFFECTIVE DATE: This final rule is effective on September 19, 2008.

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) 863-6558.

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 Cambodia on September 19, 2003, concerning the imposition of import restrictions on Khmer archaeological material from the 6th century through the 16th century A.D. in Cambodia. On September 22, 2003, CBP published CBP Decision 03-28 in the **Federal Register** (68 FR 55000), which amended 19 CFR 12.104g(a) to reflect the imposition of these restrictions, which subsumed the emergency import restrictions of 1999, and included a list designating the types of archaeological material 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)).

AMENDED BILATERAL AGREEMENT

Consistent with expressed interest in an extension of the agreement from the Royal Government of Cambodia and with the findings and recommendations of the Cultural Property Advisory Committee, the Assistant Secretary for Educational and Cultural Affairs, United States Department of State, made the requisite determinations on June 13, 2008, that the cultural heritage of Cambodia continues to be in jeopardy from the pillage of the archaeological materials described further below in the list of designated materials, and that, therefore, the import restrictions on certain stone archaeological materials from Cambodia that were previously imposed by emergency import restrictions under Treasury Decision (T.D.) 99–88 (64 FR 67479, December 2, 1999) and then extended by CBP Decision 03–28 (68 FR 55000, September 22, 2003) to include certain stone, metal, and ceramic archaeological materials, are extended for an additional five year period until September 19, 2013, and include additional subcategories of objects and new categories of Glass and Bone objects from the Bronze and Iron Age. Accordingly, the title of the bilateral agreement was amended to read: “Memorandum of Understanding between the Government of the United States of America and the Government of the Kingdom of Cambodia Concerning the Imposition of Import Restrictions on Archaeological Material from Cambodia from the Bronze Age through the Khmer Era.”

By exchange of diplomatic notes the agreement was extended and amended on August 26, 2008. Accordingly, CBP is amending 19 CFR 12.104g(a) to reflect the extension of the import restrictions on the currently protected cultural property as well as the new categories and subcategories from the Bronze Age (c. 1500 B.C.–500 B.C.) and the Iron Age (c. 500 B.C.–550 A.D.) in the amended bilateral agreement.

AMENDED DESIGNATED LIST

The Designated List of articles that are protected pursuant to the bilateral agreement, as amended, on Archaeological Material from Cambodia from the Bronze Age (c. 1500 B.C.) through the sixteenth century (16th c. A.D.) has been revised. We note that subcategories of objects from the Bronze and Iron Ages have been added, as well as new categories, such as glass and bone, pursuant to 19 U.S.C. 2606.

List of Archaeological Material from Cambodia from the Bronze Age (c. 1500 B.C.) through the 16th century A.D.

Restricted archaeological material from Cambodia includes the categories listed below. The following list is representative only.

I. Stone

This category consists largely of materials made of sandstone, including many color shades (grey to greenish to black, pink to red and violet, and some yellowish tones) and varying granularity. Due to

oxidation and iron content, the stone surface can become hard and take on a different color than the stone core. These surface colors range from yellowish to brownish to different shades of grey. This dense surface can be polished. Some statues and reliefs are coated with a kind of clear shellac or lacquer of different colors (black, red, gold, yellow, brown). The surface of sandstone pieces can also however be quite rough. Chipped surfaces can be white in color. In the absence of any systematic technical analysis of ancient Khmer stonework, no exact description of other stone types can be provided. It is clear however that other types of stone were also used (some volcanic rock, rhyolite, and schist, etc.), but these are nonetheless exceptional. Some quartz objects are also known. Precious and semi-precious stones were also used as applied decor or in jewelry settings.

Different types of stone degradation can be noted. Eroded surfaces result from sanding (loss of surface grains), contour scaling (detachment of surface plaques along contour lines), flaking, and exfoliation. The stone can also split along sedimentation layers. Chipping or fragmentation of sculpted stone is also common.

Stone objects included here come under several periods: Bronze Age (c. 1500 B.C.–500 B.C.), Iron Age (c. 500 B.C.–550 A.D.), pre-Angkorian (6th–9th c.), Angkorian (9th–14th c.), and post-Angkorian (14th–16th c.). Many stone objects can be firmly assigned to one of these periods; some, notably architectural elements and statues, can be further assigned a specific style and a more precise date within the given period.

A. Sculpture.

1. Architectural Elements

Stone was used for religious architecture in the pre-Angkorian and Angkorian periods. The majority of ancient Khmer temples were built almost entirely in stone. Even for those temples built primarily in brick, numerous decorative elements in stone were also employed. Only small portions of early post-Angkorian edifices were built in stone. The architectural elements that follow are therefore characteristic of pre-Angkorian and Angkorian times. The state of the material varies greatly, some objects being well preserved, others severely eroded or fragmented. The sculpture of some pieces remains unfinished.

a. Pediments. Pediments are large decorative stone fixtures placed above temple doorways. They are triangular in shape and composed of two or more separate blocks that are fitted together and sculpted with decorative motifs. The ensemble can range from approximately 1–3 meters in width and 1–3 meters in height. Motifs include floral scrolls, medallions, human figures, and animals. A whole scene from a well-known story can also be represented.

b. Lintels. Lintels are rectangular monoliths placed directly above temple entrance gates or doorways, below the pediments described

above. They are decorated with motifs similar to those of pediments. They can reach up to nearly one meter in height and one and one half meters in width.

c. False doors. Three of the four doorways of a temple sanctuary are frequently “false doors”; that is, though they are sculpted to look like doors, they do not open. They bear graphic and floral motifs, sometimes integrating human and animal figures. These doors can reach up to more than two meters in height and more than one meter in width. They can be monolithic or composed of separate blocks fitted together.

d. Columnnettes. Columnnettes are decorative columns placed on either side of a temple door entrance. They can be sculpted in deep relief out of a temple doorway and therefore remain attached to the doorway on their back side. The earliest columnnettes are round and sculpted with bands which themselves are sculpted with decorative motifs. Later in the Angkorian period, the columnnettes are octagonal in shape and bear more complex and abundant sculpted decor on the concentric bands. This decor includes graphic designs (pearls, diamond shapes, flowers, etc.) repeated at regular intervals along the length of the column. The base of the column is square and is also sculpted with diverse motifs and figures. The columnnettes can reach around 25 cm. in diameter and more than two meters in height.

e. Pilasters. Pilasters are decorative rectangular supports projecting partially from the wall on either side of a temple doorway. They are treated architecturally as columns with base, shaft, and capital. Motifs include floral scrolls and graphic designs of pearls, diamond shapes, etc., as well as human or animal figures. They range in width from approximately 20–30 cm. and can reach a height of more than two meters.

f. Antefixes. Antefixes are decorative elements placed around the exterior of each level of temple tower. They are small free-standing sculptures and can take multiple forms, including but not limited to graphic designs, animal figures, human figures in niches, and miniature models of temples.

g. Balustrade finials. Long balustrades in the form of mythical serpents are found in many Angkorian temples. Often, these line either side of the entrance causeways to temples. The ends of the balustrade take the form of the serpent’s multiple cobra-like heads.

h. Wall reliefs. Much of the surface area of most temples is sculpted with decorative reliefs. This decor includes graphic designs and floral motifs as well as human or animal figures. The figures can range in size from just a few centimeters to more than one meter in height. They can be integrated into the decor or set off in niches. Narrative scenes can also be represented.

i. Other decorative items. Other decorative items include wall spikes, roof tile finials, sculpted steps, and other architectural decorations.

2. Free-Standing Sculpture

The pre-Angkorian and Angkorian periods are characterized by extensive production of statuary in stone. Some stone statuary was also produced during the post-Angkorian period. This statuary is relatively diverse, including human figures ranging from less than one half meter to nearly three meters in height, as well as animal figures. Some figures, representations of Indian gods, have multiple arms and heads. Figures can be represented alone or in groups of two or three. When male and female figures are presented together as an ensemble, the female figures are disproportionately smaller than their male counterparts. Some are part-human, part-animal. Figures can be standing, sitting, or riding animal mounts. Many figures are represented wearing crowns or special headdresses and holding attributes such as a baton or a conch shell. Clothing and sometimes jewelry are sculpted into the body. Though statues are generally monolithic, later post-Angkorian statues of Buddha can have separate arms sculpted in wood and attached to the stone body. Many statues were once lacquered in black, dark brown, red, or gold colors and retain lacquer traces. Some yellow lacquer is also found.

a. Human and hybrid (part-human, part-animal) figures. Examples include statues of the eight-armed god and the four-armed god, representations of Buddha in various attitudes or stances, and female and male figures or deities, including parts (heads, hands, crowns, or decorative elements) of statuary and groups of figures.

b. Animal figures. Examples include bulls, elephants, lions, and small mammals such as squirrels.

c. Votive objects. A number of more abstract sculptures were also the object of religious representation from pre-Angkorian to post-Angkorian times. Examples include ritual phallic symbols and sculpted footprints of Buddha.

d. Pedestals. Pedestals for statues can be square, rectangular, or round. They vary greatly in size and can be decorated with graphic and floral decor, as well as animal or human figures. They are usually made of numerous components fitted together, including a base and a top section into which the statue is set.

e. Foundation deposit stones. Sacred deposits were placed under statues, as well as under temple foundations and in temple roof vaults, from pre-Angkorian to post-Angkorian times. Marks on these stones indicate sacred configurations, which could contain deposits such as gold or precious stones.

3. Stelae

a. Sculpted stelae. Free-standing stelae, sculpted with shallow or deep reliefs, served as objects of worship and sometimes as boundary stones from pre-Angkorian to post-Angkorian times. Examples include stelae with relief images of gods and goddesses, Buddhas, figures in niches, and other symbols.

b. Inscriptions. Texts recording temple foundations or other information were inscribed on stone stelae from pre-Angkorian to post-Angkorian times. Such texts can also be found on temple doorjambs, pillars, and walls. The stelae are found in a number of different shapes and sizes and can also bear decorative reliefs, for example a bull seated on a lotus flower.

4. Sculpture in Brick

Brick was used mainly in pre-Angkorian and some relatively early Angkorian religious architecture. Yet, typically, while the bodies of buildings were in brick, some of the decorative elements listed above—pediments, lintels, etc.—were in stone. The brick, of light orange color, was usually sculpted with a preliminary relief, which was then covered over with white stucco, itself sculpted along brick contours. Some brick reliefs seem however to have been fully sculpted and not meant to be covered in stucco. Brick temple reliefs include graphic design, as well as floral or animal decor. Human and animal figures can also be represented.

B. Jewelry

In the Bronze and Iron Ages, beads were made from semi-precious stones such as agate and carnelian. Agate beads are banded stone, black to light brown to white in their bands. These are usually carved into tubular shapes. Carnelian beads are reddish orange and glassy. These are usually ball-shaped. Bronze and Iron Age stone bracelets have triangular or rectangular cross-sections.

C. Chipped and Ground Tools

During the Bronze and Iron Ages, chipped and ground tools such as adzes, whetstones, and arrowheads were made of metamorphic rock.

II. Metal

This category consists mainly of bronze objects. No singular alloy is characteristic of Cambodian bronzes, which contain varying degrees of copper, zinc, lead, and iron. Surface colors can range from dark to light brown to goldish; a green patina is found on many objects. Some bronzes are also gilt. Some artwork in silver and gold also survives but is much less common.

Most objects were cast with the “lost wax” technique, by which a mold of the object is built around a full or hollow wax model; the wax is then melted out with hot metal, which then hardens in the mold. Because the mold must be destroyed to obtain the metal object, each casting is unique. Decor can be chiseled into the finished metal surface. As early as the Bronze and Iron Ages, objects demonstrate a very high degree of technical skill. The “repousse” technique, by which metal is beaten into shape in a concave mold, was also used.

Most of the objects presented here can be assigned to one of the periods defined for stone objects above: Bronze Age (c. 1500 B.C.–500 B.C.), Iron Age (c. 500 B.C.–550 A.D.), pre-Angkorian (6th–9th c.), Angkorian (9th–14th c.), and post-Angkorian (14th–16th c.). Some

pieces, in particular statuary and ritual or domestic accessories with motifs akin to architectural decor in stone, can also be assigned to specific styles and corresponding time periods within the larger historical periods.

A. Statues and Statuettes

Khmer metal statuary is comparable to Khmer stone statuary in both thematic and stylistic treatment. (See general description of free-standing sculpture above.) Statues can be represented alone or in groups ranging from human figures on animal mounts to triads, to more complex ensembles including architectural structures and decor. Though some colossal statues are known in both pre-Angkorian and Angkorian times, metal statues are, generally, relatively smaller in scale than their stone counterparts. Colossal statues can reach more than two meters in height; fragments demonstrate that one reclining figure measured some six meters in length. Such colossal pieces are nonetheless rare.

Statuettes as small around as 15 cm. are common; larger statues more typically reach around one meter in height. Small-scale statues are generally composed of a single cast; separate pieces however can be placed together, for example on a single pedestal, to form an ensemble. Larger works can be composed of multiple pieces fitted together with joints which can be concealed by chiseled decor. Only some small statuettes are solid. Others are composed of two plaques, one for the front of the piece and the other for the back; the plaques are filled with a resin-or tar-based substance and soldered together. Larger pieces are hollow. It should be noted that the Bayon period (late 12th-early 13th c.) has left more bronze statuary than any other period.

Post-Angkorian bronze statues and statuettes, like their stone counterparts, take on certain characteristics of Siamese sculpture but can nonetheless usually be identified as Khmer due to certain types of decor and bodily form which maintain or develop on a specific Angkorian tradition.

1. Human and Hybrid (Part-human, Part-animal) Figures. Examples include standing male figures, Buddhas, four-armed male figures, female figures, gods, and goddesses, all in various attitudes and dress, including fragments of sculpture such as hands, arms, and heads.

2. Animal Figures. Animal representations in bronze resemble those in stone in both thematic and stylistic treatment. Statues and statuettes include primarily bulls, lions, and elephants with one or three trunks. Other animals, such as horses, are also represented but are less common. The only colossal animal images known date to the late 12th-early 13th c. Other animal figures, such as the mythical multiheaded serpent and mythical birds and monkeys, are also frequently found as decor of ritual or domestic objects.

3. Pedestals. Pedestals in bronze often appear to be simplified and reduced versions of their stone counterparts. One innovation of sculpting the base in openwork is to be noted.

B. Other Ritual and Domestic Objects

1. Special Objects Used in Ritual. Special ritual objects include bells, conch shells, and musical instruments such as tambourines, etc.

2. Containers. Ritual and domestic containers include such items as perfume holders, oil lamps or bowls, and boxes with decorative or sculptural features.

3. Decorative Elements from Ritual or Domestic Objects. In addition to the decorative accessory items noted below, there exist insignia finials for banner poles which often take the form of small human or animal figures.

4. Jewelry. Jewelry, including but not limited to rings, bracelets, arm bands, necklaces, and belts, could have been worn not only by people but also by statues. Bronze and Iron Age bracelets may be decorated with scrolls, spirals, and the heads of buffalo/cows. Different types of rings can be noted: Ring-stamps, rings with ornamental settings, rings with settings in the form of a bull or other animal, and rings with settings for stones.

5. Musical Instruments. Diverse percussion instruments, including varying sizes of bells, drums, gongs, and cymbals, were made in bronze. These may carry geometric designs and/or images of humans and animals.

6. Animal Fittings. In addition to bells to be suspended around the necks of animals, common to both the Angkorian and the post-Angkorian periods, various kinds of decorative animal harness accessories are known in post-Angkorian times.

C. Architectural Elements

Metal architectural elements include ceiling or wall plaques sculpted with flowers or other motifs, floral plaques, and panels.

D. Weapons and Tools

Metal weapons and tools include arrow heads, daggers, spear tips, swords, helmets, axes, adzes, chisels, spoons, and sickles.

III. Ceramics

Bronze and Iron Age ceramics are primarily earthenwares with varying colors and surface treatments. Later ceramics include both glazed and unglazed stonewares. Stonewares, and particularly glazed wares, are characteristic of the Angkorian period (9th–14th c.). Khmer ceramics production primarily concerned functional vessels (vases, pots, etc.) but also included sculpture of figurines and architectural or other decorative elements. Angkorian period vessels were generally turned on a wheel and fired in kilns. Vessels range in size from around five to at least 70 cm. in height. Glaze colors are fairly limited and include creamy white, pale green (color of Chinese tea), straw-yellow, reddish-brown, brown, olive, and black. Light col-

ors are generally glossy, while darker colors can be glossy or matte. Some two-colored wares, primarily combining pale green and brown, are also known. Decoration is relatively subtle, limited to incisions of graphic designs (criss-crosses, striations, waves, etc.), some sculpted decor such as lotus petal shapes, and molding (ridges, grooves, etc.); some applied work is also seen. Most decoration is found on shoulders and necks, as on lids; footed vessels are typically beveled at the base. Many wasters (imperfect pieces) are found and are also subject to illicit trade.

A. Sculpture

Ceramic sculpture known to have been produced in Cambodia proper largely concerns architectural elements. Though some figurines are known and are of notable refinement, statuary and reliefs in ceramics seem to be more characteristic of provincial production.

1. Architectural Elements. Some pre-Angkorian, Angkorian, and post-Angkorian period buildings, primarily but not exclusively royal or upper-class habitation, were roofed with ceramic tiles. The tiles include undecorated flat tiles and convex and concave pieces fitted together; a sculpted tile was placed as a decor at the end of each row of tiles. These pieces were produced in molds and can be unglazed or glazed. The unglazed pieces are orange in color; the glazed pieces are creamy white to pale green. Spikes placed at the crest of roof vaults can also be made in ceramics. These spikes were fit into a cylinder, also made of ceramics, which was itself fitted into the roof vault. Architectural ceramics sometimes have human heads and anthropomorphic or zoomorphic features.

2. Figurines and Ritual Objects. Figurines, statuettes, or plaques can include human, hybrid (part-human, part-animal), and animal figures. These are typically small in size (around 10 cm.). Ritual objects found in Cambodia proper are limited primarily to pieces in the shape of a conch shell, used for pouring sacral water or as blowing horns.

B. Vessels

1. Lidded Containers. Examples include round lidded boxes with incised or sculpted decoration, bulbous vases with lids, and jars with conical multi-tiered lids. Lids themselves include conical shapes and convex lids with knobs.

2. Lenticular Pots. Pots of depressed globular form are commonly referred to as lenticular pots. The mouth of the vessel is closed with a stopper.

3. Animal-shaped Pots. The depressed globular form can take animal shapes, with applied animal head, tail, or other body parts that can serve as handles. The animal-shaped pot is also found in other forms. Animal-shaped pots often contain remains of white lime, a substance used in betel nut chewing. Shapes include bulls, elephants, birds, horses, and other four-legged creatures.

4. Human-shaped Pots. Anthropomorphic vessels often have some applied and incised decoration representing human appendages, features, or clothing. The vessels are usually gourd-shaped bottles.

5. Bottles. This category includes a number of different kinds of vessels with raised mouths.

6. Vases. A number of different types of vases are grouped together under this general heading. Some are flat based and bulbous or conical. Others have pedestal feet. Some are characterized by their elongated necks. The “baluster vases,” for which Khmer ceramics are particularly known, have pedestal feet, conical bodies, relatively long necks, and flared mouths.

7. Spouted Pots. These are vessels, usually in the “baluster vase” form, that have short pouring spouts attached to the shoulder. Some spouted pots also have ring handles on the opposite shoulder.

8. Large Jars. Large barrel-shaped jars or vats have flat bases, wide mouths, short necks, and flattened everted rims. They are always iron glazed.

9. Bowls. Bowls with broad, flat bases and flaring walls that are either straight or slightly concave, ending in plain everted or incurving rims, usually have green or yellowish glaze, although some brown-glazed bowls are known. Some are decorated with incised lines just below the rim. Most have deep flanges above the base; some are plain. Small hemispherical cups on button bases bear brown glaze. Another form is the bowl on a pedestal foot.

IV. Glass

Bronze and Iron Age glass beads are usually very small (1–2 mm across) and come in a range of colors from blue, green, red and white. Other artifacts made of glass include spiral earrings and triangular bangle bracelets. The bracelets are light to dark green or blue-green and translucent.

V. Bone

Bone (and sometimes ivory or horn) beads, bangles, pendants, and combs are found at Bronze and Iron Age sites.

More information on import restrictions can be obtained from the International Cultural Property Protection Web site (<http://exchanges.state.gov/culprop>). The restrictions on the importation of these archaeological materials from Cambodia are to continue in effect for an additional 5 years. Importation of such materials 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 proce-

dures (5 U.S.C. 553(a)(1)). For the same reason, a delayed effective date is not required under 5 U.S.C. 553(d)(3).

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:

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:

a. In the entry for Cambodia, in the column headed “Decision No.” by adding “extended by CBP Dec. 08–40” after “CBP Dec. 03–28”, and

b. In the entry for Cambodia, in the column headed “Cultural Property” by removing the reference to “Khmer Archaeological Material from the 6th century through the 16th century A.D.” and adding in its place “Archaeological Material from Cambodia from the Bronze Age through the Khmer Era.”

JASON P. AHERN,
Acting Commissioner,
U.S. Customs and Border Protection.

Approved: September 16, 2008

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

[Published in the Federal Register, September 19, 2008 (73 FR 54309)]

General Notices

NOTICE OF ISSUANCE OF FINAL DETERMINATION CONCERNING GROUND FAULT CIRCUIT INTERRUPTER

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

ACTION: Notice of final determination.

SUMMARY: This document provides notice that U.S. Customs and Border Protection (“CBP”) has issued a final determination concerning the country of origin of a ground fault circuit interrupter (“GFCI”). Based upon the facts presented, CBP has concluded in the final determination that China is the country of origin of the GFCI for purposes of U.S. Government procurement.

DATE: The final determination was issued on September 15, 2008. A copy of the final determination is attached. Any party-at-interest, as defined in 19 CFR § 177.22(d), may seek judicial review of this final determination within October 20, 2008.

FOR FURTHER INFORMATION CONTACT: Gerry O’Brien, Valuation and Special Programs Branch, Regulations and Rulings, Office of International Trade (202–572–8792).

SUPPLEMENTARY INFORMATION: Notice is hereby given that on September 15, 2008, pursuant to subpart B of part 177, Customs Regulations (19 CFR part 177, subpart B), CBP issued a final determination concerning the country of origin of GFCI’s which may be offered to the United States Government under an undesignated government procurement contract. This final determination, in HQ H030645, was issued at the request of Pass & Seymour, Inc. under procedures set forth at 19 CFR part 177, subpart B, which implements Title III of the Trade Agreements Act of 1979, as amended (19 U.S.C. § 2511–18). In the final determination, CBP has concluded that, based upon the facts presented, certain GFCI’s, assembled in Mexico from parts made in China, are not substantially transformed

in Mexico, such that the China is the country of origin of the finished article for purposes of U.S. Government procurement.

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

Dated: September 15, 2008

MYLES B. HARMON,
Acting Executive Director,
Office of Regulations and Rulings,
Office of International Trade.

DEPARTMENT OF HOMELAND SECURITY.
U.S. CUSTOMS AND BORDER PROTECTION,
HQ H030645
September 15, 2008
MAR-2-05 OT:RR:CTF:VS H030645 GOB
CATEGORY: Marking

DANIEL B. BERMAN, ESQ.
HANCOCK & ESTABROOK, LLP
1500 AXA Tower I
100 Madison Street
Syracuse, NY 13202

RE: U.S. Government Procurement; Title III, Trade Agreements Act of 1979 (19 U.S.C. § 2511); Subpart B, Part 177, CBP Regulations; Country of Origin Marking; Ground Fault Circuit Interrupter (GFCI)

DEAR MR. BERMAN:

This is in response to your correspondence of May 1, 2008, requesting a final determination on behalf of Pass & Seymour, Inc. (“P&S”), pursuant to subpart B of Part 177, Customs and Border Protection (“CBP”) Regulations (19 CFR § 177.21 *et seq.*). Your letter was forwarded to CBP’s National Commodity Specialist Division in New York and was returned to this office by memorandum of June 3, 2008. Under the pertinent regulations, which implement Title III of the Trade Agreements Act of 1979, as amended (19 U.S.C. § 2511 *et seq.*), CBP issues country of origin advisory rulings and final determinations as to whether an article is or would be a product of a designated country or instrumentality for the purpose of granting waivers of certain “Buy American” restrictions in U.S. law or practice for products offered for sale to the U.S. Government.

This final determination concerns the country of origin of a ground fault circuit interrupter (“GFCI”). We note that P&S is a party-at-interest within the meaning of 19 CFR § 177.22(d)(1) and is entitled to request this final determination.

You also request a country of origin marking determination.

FACTS:

You describe the pertinent facts as follows. The business of P&S includes the design, manufacture, and distribution of GFCI's in the U.S. for residential and commercial use in electrical circuits of less than 1,000 volts. The GFCI's are electrical components, designed for installation in electrical circuits, which are able to detect small imbalances in the circuit's current caused by leakages of current to ground. When leakage is detected, the GFCI opens the electrical circuit, stopping the flow of current. Legrand, the parent company of P&S, produces the subcomponents of the GFCI in China through another subsidiary, Rocom Electric Co. Ltd. ("Rocom"). The subcomponents include the following: cover, reset button, test button, spring, light pipe, strap assembly, assembly terminals, contact, separator, springs, latch block top, spark gap blades, assembly screw terminals, armature, spring assembly, term assemblies, PCB subassembly, assembly screw terminals, back body, screws and labels. Rocom plans to ship the subcomponents to a facility in Mexico where they will be assembled into the GFCI's. The GFCI's will be tested and packaged at the same facility. Upon completion of assembly, testing, and packaging, the GFCI's will be imported into the U.S. by P&S for sale and distribution.

You state that the process in Mexico to assemble the GFCI is comprised of forty-three discrete steps and takes approximately ten minutes. You state that each GFCI is comprised of thirty component parts which, until inclusion in the final GFCI, have little or no functionality.

An exhibit to your correspondence, which includes photographs, describes the assembly process as follows:

1. Place back body into date code fixture/stamping press and press button to apply date code on side of back body.
2. Remove back body from date code fixture. Place hot terminal screw pressure plate assembly into back body cradle on line end.
3. Place neutral terminal screw pressure plate assembly into back body cradle on line end.
4. Place printed circuit board subassembly into back body, capturing terminal screw pressure plate subassemblies under line terminals.
5. Place hot terminal screw pressure plate subassembly into back body cradle on load end.
6. Place neutral terminal screw pressure plate subassembly into back body cradle on load end.
7. Place hot load terminal assembly into back body, over load screw pressure plate subassembly.
8. Place neutral load terminal subassembly into back body, over load screw pressure plate assembly.
9. Place two break springs into latch block.
10. Place latch block with springs onto line contacts, aligning leg of latch block over auxiliary switch on printed circuit board subassembly.
11. Drop separator over device, aligning test resistor lead through role in separator. Snap separator onto back body.
12. Place strap subassembly into center channel of separator.
13. Place hot side load contact into slot in separator.
14. Bend test resistor lead over with finger to test blade slot.
15. Press test blade leg into slot in separator, capturing test resistor lead in slot on bottom leg of test blade.

16. Place neutral side load contact into slot in separator.
17. Place light pipe into slot in separator.
18. Place reset button spring subassembly into hole through separator.
19. Set two shutter subassemblies into pockets in test button subassembly.
20. Place test button subassembly on top of device, fitting over reset button subassembly and light pipe.
21. Turn device over. Place four assembly screws in holes at corners of back body.
22. Run assembly screws in and torque down with driver.
23. Place device in automated final tester fixture.
24. Short circuit test.
25. False trip test.
26. Trip level test in forward polarity.
27. Trip level test in reverse polarity.
28. Grounded-neutral test.
29. Test-button test.
30. Dielectric test.
31. Response time test with 500 ohm fault resistor.
32. If device passes all tests, hand solder link across solder bridge on bottom of printed circuit board to activate miswire circuit.
33. Depress reset button on device and place device in automatic miswire-function tester. Push button to initiate test to verify device trips.
34. If device passes, snap plastic cap into back body, covering miswire solder bridge.
35. Remove miswire label from roll and apply across back body and load terminal screws.
36. Remove UL label from roll and apply to neutral side of device, overlapping back body, separator and cover.
37. Place cardboard protector over face of device.
38. Place wallplate subassembly with captive screws over cardboard protector and face of device.
39. Take stack of three pre-folded instruction sheets and fuse box label and place under device.
40. Remove product box label from roll and place on flap of individual box.
41. Assemble individual box, closing flap on one end.
42. Slide device, protector, wallplate and instruction sheets into individual box and close flap.
43. Place individual box in carton for shipping.

ISSUES:

1. What is the country of origin of the GFCE's for the purpose of U.S. government procurement?
2. What is the country of origin of the GFCE's for the purpose of marking?

LAW AND ANALYSIS:

Government Procurement

Pursuant to Subpart B of Part 177, 19 CFR § 177.21 *et seq.*, which implements Title III of the Trade Agreements Act of 1979, as amended (19 U.S.C. § 2511 *et seq.*), CBP issues country of origin advisory rulings and final determinations as to whether an article is or would be a product of a desig-

nated country or instrumentality for the purposes of granting waivers of certain “Buy American” restrictions in U.S. law or practice for products offered for sale to the U.S. Government.

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

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

See also, 19 CFR § 177.22(a).

In rendering advisory rulings and final determinations for purposes of U.S. government procurement, CBP applies the provisions of subpart B of Part 177 consistent with the Federal Acquisition Regulations. *See* 19 CFR § 177.21. In this regard, CBP recognizes that the Federal Acquisition Regulations restrict the U.S. Government’s purchase of products to U.S.-made or designated country end products for acquisitions subject to the TAA. *See* 48 CFR § 25.403(c)(1). The Federal Acquisition Regulations define “U.S.-made end product” as:

... an article that is mined, produced, or manufactured in the United States or that is substantially transformed in the United States into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed.

48 CFR § 25.003.

In determining whether the combining of parts or materials constitutes a substantial transformation, the determinative issue is the extent of operations performed and whether the parts lose their identity and become an integral part of the new article. *Belcrest Linens v. United States*, 573 F. Supp. 1149 (Ct. Int’l Trade 1983), *aff’d*, 741 F.2d 1368 (Fed. Cir. 1984). Assembly operations that are minimal or simple, as opposed to complex or meaningful, will generally not result in a substantial transformation. Factors which may be relevant in this evaluation may include the nature of the operation (including the number of components assembled), the number of different operations involved, and whether a significant period of time, skill, detail, and quality control are necessary for the assembly operation. *See* C.S.D. 80–111, C.S.D. 85–25, C.S.D. 89–110, C.S.D. 89–118, C.S.D. 90–51, and C.S.D. 90–97. If the manufacturing or combining process is a minor one which leaves the identity of the article intact, a substantial transformation has not occurred. *Uniroyal, Inc. v. United States*, 3 CIT 220, 542 F. Supp. 1026 (1982), *aff’d* 702 F. 2d 1022 (Fed. Cir. 1983). In *Uniroyal*, the court determined that a substantial transformation did not occur when an imported upper, the essence of the finished article, was combined with a domestically produced outsole to form a shoe.

In order to determine whether a substantial transformation occurs when components of various origins are assembled into completed products, CBP considers the totality of the circumstances and makes such determinations on a case-by-case basis. The country of origin of the item’s components, ex-

tent of the processing that occurs within a country, and whether such processing renders a product with a new name, character, and use are primary considerations in such cases. Additionally, factors such as the resources expended on product design and development, extent and nature of post-assembly inspection and testing procedures, and the degree of skill required during the actual manufacturing process may be relevant when determining whether a substantial transformation has occurred. No one factor is determinative.

In a number of rulings (*e.g.*, HQ 735608, dated April 27, 1995 and HQ 559089 dated August 24, 1995), CBP has stated: "In our experience these inquiries are highly fact and product specific; generalizations are troublesome and potentially misleading. The determination is in this instance 'a mixed question of technology and customs law, mostly the latter.' *Texas Instruments, Inc. v. United States*, 681 F.2d 778, 783 (CCPA 1982)."

In HQ 734050 dated June 17, 1991, CBP held that the assembly of five subassemblies by a screwdriver operation that took 45 minutes was not a substantial transformation. In HQ 561392 dated June 21, 1999, CBP considered the country of origin marking requirements of an insulated electric conductor which involved an electrical cable with pin connectors at each end used to connect computers to printers or other peripheral devices. The cable and connectors were made in Taiwan. In China, the cable was cut to length and connectors were attached to the cable. CBP held that cutting the cable to length and assembling the cable to the connectors in China did not result in a substantial transformation. In HQ 560214 dated September 3, 1997, CBP held that where wire rope cable was cut to length, sliding hooks were put on the rope, and end ferrules were swaged on in the U.S., the wire rope cable was not substantially transformed. CBP concluded that the wire rope maintained its character and did not lose its identity and did not become an integral part of a new article when attached with the hardware. In HQ 555774 dated December 10, 1990, CBP held that Japanese wire cut to length and electrical connectors crimped onto the ends of the wire was not a substantial transformation. In HQ 562754 dated August 11, 2003, CBP found that cutting of cable to length and assembling the cable to the Chinese-origin connectors in China did not result in a substantial transformation of the cable.

This case involves 30 components manufactured in China which are proposed to be assembled in Mexico in a process involving 43 steps which will take ten minutes. After a careful consideration of the pertinent facts and authorities, we find that the assembly operations to be performed in Mexico are not sufficiently complex for the process to result in a substantial transformation of the components. We note that the printed circuit board subassembly from China is placed into the back body of the GFCI. It is a major functional part of the finished GFCI and provides the essential character to the GFCI. Further, we note that: only a short amount of time is required for assembly (ten minutes); the assembly process itself is not at all complex; many of the steps involve testing, which we do not find in this case to be significant with respect to a substantial transformation claim; and all of the components are manufactured in China.

Therefore, based upon our finding that there is no substantial transformation of the components in Mexico, we determine that the country of origin of the GFCI for government procurement purposes is China.

Country of Origin Marking

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

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

Section 134.1(j), CBP Regulations provides that the “NAFTA Marking Rules” are the rules promulgated for purposes of determining whether a good is a good of a NAFTA country. Section 134.1(g), CBP Regulations defines a “good of a NAFTA country” as an article for which the country of origin is Canada, Mexico or the United States as determined under the NAFTA Marking Rules.

Part 102, CBP Regulations (19 CFR Part 102), sets forth the “NAFTA Marking Rules” for purposes of determining whether a good is a good of a NAFTA country. Section 102.11, CBP Regulations (19 CFR § 102.11) sets forth the required hierarchy for determining country of origin for marking purposes. Section 102.11(a), CBP Regulations provides that the country of origin of a good is the country in which:

- (1) The good is wholly obtained or produced;
- (2) The good is produced exclusively from domestic materials; or
- (3) Each foreign material incorporated in that good undergoes an applicable change in tariff classification set out in section 102.20 and satisfies any other applicable requirements of that section, and all other requirements of these rules are satisfied.

“Foreign Material” is defined in section 102.1(e), CBP Regulations as “a material whose country of origin as determined under these rules is not the same country as the country in which the good is produced.

We find that we are unable to determine the country of origin of the GFCI by section 102.11(a), CBP Regulations. Section 102.11(a)(1) and (2) are not applicable, *i.e.*, the GFCI is not wholly obtained or produced and the GFCI is not produced exclusively from domestic materials. Further, pursuant to section 102.11(a)(3), CBP Regulations, there is no applicable change in tariff classification for each foreign material as set out in section 102.20, CBP Regulations, as the GFCI and the PCB subassembly are both classified in subheading 8536.30.80, Harmonized Tariff Schedule of the United States (“HTSUS”).

Section 102.11(b), CBP Regulations provides in pertinent part that, except for a good that is specifically described in the HTSUS as a set, or is classified as a set pursuant to General Rule of Interpretation 3 (neither of these conditions are satisfied), where the country of origin cannot be determined under paragraph (a) of section 102.11:

- (1) The country of origin of the good is the country or countries of origin of the single material that imparts the essential character of the good[.]

Section 102.18(b)(1), CBP Regulations provides in pertinent part as follows:

- (b) (1) For purposes of identifying the material that imparts the essential character to a good under § 102.11, the only materials that shall be taken into consideration are those domestic or foreign materials that are classified in a tariff provision from which a change in tariff classification is not allowed under the § 102.20 specific rule or other requirements applicable to the good.

A change in tariff classification is not allowed with respect to the PCB subassembly. As stated above, both the PCB subassembly and the GFCI are classified in subheading 8536.30.80, HTSUS. The PCB subassembly is manufactured in China (as are all of the components of the GFCI). Therefore, under section 102.11(b)(1), CBP Regulations, the country of origin of the GFCI is China.

Pursuant to 19 U.S.C. § 1304, the country of origin of the GFCI for country of origin marking purposes is China.

HOLDINGS:

The assembly operations to be performed in Mexico are not sufficiently complex for the process to result in a substantial transformation of the components. Therefore, the country of origin of the GFCI for government procurement purposes is China.

Pursuant to 19 U.S.C. § 1304, the country of origin of the GFCI for country of origin marking purposes is China.

Notice of this final determination will be given in the *Federal Register*, as required by 19 CFR § 177.29. Any party-at-interest other than the party which requested this final determination may request, pursuant to 19 CFR § 177.31, that CBP reexamine the matter anew and issue a new final determination. Pursuant to 19 CFR § 177.30, any party-at-interest may, within 30 days after publication of the *Federal Register* notice referenced above, seek judicial review of this final determination before the Court of International Trade.

MYLES B. HARMON,
Acting Executive Director,
Office of Regulations and Rulings,
Office of International Trade.