

U.S. Customs and Border Protection



APPLICATION FOR ALLOWANCE IN DUTIES

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

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

SUMMARY: The Department of Homeland Security, U.S. Customs and Border Protection will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). The information collection is published in the **Federal Register** to obtain comments from the public and affected agencies.

DATES: Comments are encouraged and must be submitted (no later than August 6, 2021) to be assured of consideration.

ADDRESSES: Written comments and/or suggestions regarding the item(s) contained in this notice must include the OMB Control Number 1651-0007 in the subject line and the agency name. Please use the following method to submit comments:

Email. Submit comments to: *CBP_PRA@cbp.dhs.gov*.

Due to COVID-19-related restrictions, CBP has temporarily suspended its ability to receive public comments by mail.

FOR FURTHER INFORMATION CONTACT: Requests for additional PRA information should be directed to Seth Renkema, Chief, Economic Impact Analysis Branch, U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, 90 K Street NE, 10th Floor, Washington, DC 20229-1177, Telephone number 202-325-0056 or via email *CBP_PRA@cbp.dhs.gov*. Please note that the contact information provided here is solely for questions regarding this notice. Individuals seeking information about other CBP programs should contact the CBP National Customer Service Center at 877-227-5511, (TTY) 1-800-877-8339, or CBP website at *https://www.cbp.gov/*.

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on the proposed and/or continuing information collections pursuant to the Paperwork Reduc-

tion Act of 1995 (44 U.S.C. 3501 *et seq.*). This process is conducted in accordance with 5 CFR 1320.8. Written comments and suggestions from the public and affected agencies should address one or more of the following four points: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) suggestions to enhance the quality, utility, and clarity of the information to be collected; and (4) suggestions to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses. The comments that are submitted will be summarized and included in the request for approval. All comments will become a matter of public record.

Overview of This Information Collection

Title: Application for Allowance in Duties.

OMB Number: 1651-0007.

Form Number: CBP Form 4315.

Current Actions: Extension.

Type of Review: Extension (without change).

Affected Public: Businesses.

Abstract: CBP Form 4315, "*Application for Allowance in Duties*," is submitted to CBP in instances of claims of damaged or defective imported merchandise on which an allowance in duty is made in the liquidation of the entry. The information on this form is used to substantiate an importer's claim for such duty allowances. CBP Form 4315 is authorized by 19 U.S.C. 1506 and provided for by 19 CFR 158.11, 158.13, and 158.23. This form is accessible at: <https://www.cbp.gov/sites/default/files/assets/documents/2020-Mar/CBP%20Form%204315.pdf>.

This collection of information applies to the importing and trade community who are familiar with import procedures and with the CBP regulations.

19 CFR 158.11—Merchandise completely worthless at time of importation. The allowance in duties may be made to nonperishable merchandise if found without commercial value at the time the importation by reason of damage or deterioration. For perishable merchandise an allowance in duties may be made if an application, on Customs Form 4315, or its electronic equivalent, is filed within 96

hours after the unloading of the merchandise and before any of the shipment involved has been removed from the pier, and only on such of the merchandise as is found by the port director to be entirely without commercial value by reason of damage or deterioration. If an application is withdrawn, the merchandise involved shall thereafter be released upon presentation of an appropriate permit.

19 CFR 158.13—Allowance for moisture and impurities. An application for an allowance in duties is made by the importer on Customs Form 4315, or its electronic equivalent, for all detectable moisture and impurities present in or upon imported petroleum or petroleum products. For products, other than petroleum or petroleum products, with excessive moisture or other impurities not usually found in or upon such or similar merchandise an application for an allowance in duties shall be made by the importer on Customs Form 4315, or its electronic equivalent. If the port director is satisfied after any necessary investigation that the merchandise contains moisture or impurities, the Center director will make allowance for the amount thereof in the liquidation of the entry.

19 CFR 158.23—Filing of application and evidence by importer. Within 30 days from the date of his discovery of the loss, theft, injury, or destruction, the importer shall file an application on Customs Form 4315, or its electronic equivalent and within 90 days from the date of discovery shall file any evidence required by § 158.26 or § 158.27.

Type of Information Collection: CBP Form 4315.

Estimated Number of Respondents: 12,000.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 12,000.

Estimated Time per Response: 0.1333 hours.

Estimated Total Annual Burden Hours: 1,600.

Dated: June 1, 2021.

SETH D. RENKEMA,
Branch Chief,
Economic Impact Analysis Branch,
U.S. Customs and Border Protection.

COMMERCIAL CUSTOMS OPERATIONS ADVISORY COMMITTEE (COAC)

AGENCY: U.S. Customs and Border Protection (CBP), Department of Homeland Security (DHS).

ACTION: Committee management; notice of Federal advisory committee meeting.

SUMMARY: The Commercial Customs Operations Advisory Committee (COAC) will hold its quarterly meeting on Wednesday, June 23, 2021. The meeting will be open to the public via webinar only. There is no on-site, in-person option for this quarterly meeting.

DATES: The COAC will meet on Wednesday, June 23, 2021, from 1:00 p.m. to 5:00 p.m. EDT. Please note that the meeting may close early if the committee has completed its business. Comments must be submitted in writing no later than June 22, 2021.

ADDRESSES: The meeting will be held via webinar. The webinar link and conference number will be provided to all registrants by 5:00 p.m. EDT on June 22, 2021. For information on facilities or services for individuals with disabilities or to request special assistance at the meeting, contact Ms. Florence Constant-Gibson, Office of Trade Relations, U.S. Customs and Border Protection, at (202) 344-1440 as soon as possible.

FOR FURTHER INFORMATION CONTACT: Ms. Florence Constant-Gibson, Office of Trade Relations, U.S. Customs and Border Protection, 1300 Pennsylvania Avenue NW, Room 3.5A, Washington, DC 20229; or Ms. Valarie M. Neuhart, Designated Federal Officer, at (202) 344-1440.

SUPPLEMENTARY INFORMATION: Notice of this meeting is given under the authority of the Federal Advisory Committee Act, 5 U.S.C. Appendix. The Commercial Customs Operations Advisory Committee (COAC) provides advice to the Secretary of Homeland Security, the Secretary of the Treasury, and the Commissioner of U.S. Customs and Border Protection (CBP) on matters pertaining to the commercial operations of CBP and related functions within the Department of Homeland Security and the Department of the Treasury.

Pre-registration: For members of the public who plan to participate via webinar, please register online at <https://teregistration.cbp.gov/index.asp?w=228> by 2:00 p.m. EDT on June 22, 2021. For members of the public who are pre-registered to attend the webinar and later need to cancel, please do so by 2:00 p.m. EDT on June 21, 2021,

utilizing the following link: <https://teregistration.cbp.gov/cancel.asp?w=228>.

Please feel free to share this information with other interested members of your organization or association.

To facilitate public participation, we are inviting public comment on the issues the committee will consider prior to the formulation of recommendations as listed in the Agenda section below.

Comments must be submitted in writing no later than June 22, 2021, and must be identified by Docket No. USCBP–2021–0020, and may be submitted by one (1) of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.
- *Email:* tradeevents@cbp.dhs.gov. Include the docket number in the subject line of the message.
- *Mail:* Ms. Florence Constant-Gibson, Office of Trade Relations, U.S. Customs and Border Protection, 1300 Pennsylvania Avenue NW, Room 3.5A, Washington, DC 20229.

Instructions: All submissions received must include the words “Department of Homeland Security” and the docket number (USCBP–2021–0020) for this action. Comments received will be posted without alteration at <http://www.regulations.gov>. Please do not submit personal information to this docket.

Docket: For access to the docket or to read background documents or comments, go to <http://www.regulations.gov> and search for Docket Number USCBP–2021–0020. To submit a comment, click the “Comment Now!” button located on the top-right hand side of the docket page.

There will be multiple public comment periods held during the meeting on June 23, 2021. Speakers are requested to limit their comments to two (2) minutes or less to facilitate greater participation. Please note that the public comment period for speakers may end before the time indicated on the schedule that is posted on the CBP web page, <http://www.cbp.gov/trade/stakeholder-engagement/coac>.

Agenda

The COAC will hear from the current subcommittees on the topics listed below and then will review, deliberate, provide observations, and formulate recommendations on how to proceed:

1. The Secure Trade Lanes Subcommittee will present the following updates: The Trusted Trader Working Group will provide an update on the progress of the White Paper on the Implementation of CTPAT Trade Compliance Requirements for Forced Labor; the In-Bond Working Group will provide an update on the progress with the

technical enhancements being addressed through the Trade Support Network and the review of regulatory recommendations incorporated within the COAC In-Bond Modernization White Paper to create future efficiency and process development; the Export Modernization Working Group will present their White Paper on Export Operations for the 21st Century along with proposed recommendations; and, the Remote and Autonomous Cargo Processing Working Group will provide an update on the development of a draft White Paper identifying the potential impact of Remote and Autonomous Vehicles to CBP Cargo Processing Operations.

2. The Next Generation Facilitation Subcommittee will provide an update on the following working groups and task force activities: First, the Re-Imagined Entry Processes (RIEP) Working Group has begun a series of deep-dive sessions to review the entire entry process and examine when entry data becomes available. The intent of these sessions is to determine the points along the supply-chain where the data is first available in order to enhance the facilitation and security of the entry process and may provide some strategic recommendations in this area. Next, the One U.S. Government Working Group will provide an update on the following key project: The automation of electronic documents that are currently required at time of entry and the Partner Government Agency Disclaim Handbook. Finally, CBP will provide an update on the progress of the E-Commerce and 21st Century Customs Framework Task Forces.

3. The Intelligent Enforcement Subcommittee will provide a status update on the following: The Bond Working Group will report on the continued work with CBP on the Monetary Guidelines of Setting Bond Amounts, the status of the risk-based bonding initiative, and recommendations on the eBond Pilot; the Antidumping/Countervailing Duty (AD/CVD) Working Group will discuss the ongoing challenges associated with the growing number of AD/CVD cases; the Intellectual Property Rights (IPR) Process Modernization Working Group will provide updates on past recommendations to further the modernization of IPR processes; and, the Forced Labor Working Group will provide an update related to the progress of the three subgroups outlined in the Statement of Work: Informed Compliance Fact Sheet Subgroup, Emerging Traceability Subgroup, and Forced Labor Report and Metrics Subgroup.

4. The Rapid Response Subcommittee will provide an update on the progress of its two working groups. First, the USMCA Working Group has identified specific topics for review with the USMCA Center as the anticipated publication of the new regulations approaches. The topics for discussion include export guidance, e-signatures, and the

marking rules in part 102 of title 19 of the Code of Federal Regulations (19 CFR part 102). Second, the Broker Exam Modernization Working Group will provide an update on recent exam modernization activities.

Meeting materials will be available by June 21, 2021, at: <http://www.cbp.gov/trade/stakeholder-engagement/coac/coac-public-meetings>.

Dated: June 3, 2021.

VALARIE M. NEUHART,
Deputy Executive Director,
Office of Trade Relations.

[Published in the Federal Register, June 8, 2021 (85 FR 30467)]



**PROPOSED MODIFICATION OF ONE RULING LETTER
AND PROPOSED REVOCATION OF TREATMENT
RELATING TO THE TARIFF CLASSIFICATION OF WI-FI
INFRARED MOTION SENSORS**

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

ACTION: Notice of proposed modification of one ruling letter and proposed revocation of treatment relating to the tariff classification of Wi-Fi infrared motion sensors.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) intends to modify one ruling letter concerning the tariff classification of Wi-Fi infrared motion sensors under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP intends to revoke any treatment previously accorded by CBP to substantially identical transactions. Comments on the correctness of the proposed actions are invited.

DATE: Comments must be received on or before July 23, 2021.

ADDRESS: Written comments are to be addressed to U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, Attention: Erin Frey, Commercial and Trade Facilitation Division, 90 K St., NE, 10th Floor, Washington, DC 20229–1177. Due to the COVID-19 pandemic, CBP is also allowing commenters

to submit electronic comments to the following email address: 1625Comments@cbp.dhs.gov. All comments should reference the title of the proposed notice at issue and the *Customs Bulletin* volume, number and date of publication. Due to the relevant COVID-19-related restrictions, CBP has limited its on-site public inspection of public comments to 1625 notices. Arrangements to inspect submitted comments should be made in advance by calling Ms. Erin Frey at (202) 325-1757.

FOR FURTHER INFORMATION CONTACT: Suzanne Kingsbury, Electronics, Machinery, Automotive and International Nomenclature Branch, Regulations and Rulings, Office of Trade, via email at suzanne.kingsbury@cbp.dhs.gov.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Current customs law includes two key concepts: informed compliance and shared responsibility. Accordingly, the law imposes an obligation on CBP to provide the public with information concerning the trade community's responsibilities and rights under the customs and related laws. In addition, both the public and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. § 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and to provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics, and determine whether any other applicable legal requirement is met.

Pursuant to 19 U.S.C. § 1625(c)(1), this notice advises interested parties that CBP is proposing to modify one ruling letter pertaining to the tariff classification of Wi-Fi infrared motion sensors. Although in this notice CBP is specifically referring to New York Ruling Letter ("NY") N255515, dated August 21, 2014 (Attachment "A"), this notice also covers any rulings on this merchandise that may exist but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the one identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should advise CBP during the comment period.

Similarly, pursuant to 19 U.S.C. § 1625(c)(2), CBP is proposing to revoke any treatment previously accorded by CBP to substantially identical transactions. Any person involved in substantially identical

transactions should advise CBP during this comment period. An importer's failure to advise CBP of substantially identical transactions or of a specific ruling not identified in this notice may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of the final decision on this notice.

In NY N255515, CBP classified Wi-Fi enabled smart plugs and infrared motion sensors. This reconsideration is limited to the Wi-Fi infrared motion sensors. In NY N255515, CBP classified the Wi-Fi infrared motion sensors under heading 8543, HTSUS, specifically subheading 8543.70.40, HTSUS (2014), which provides for "[E]lectrical machines and apparatus, having individual functions, not specified or included elsewhere in this chapter; parts thereof: Other machines and apparatus: Electric synchros and transducers; flight data recorders; defrosters and demisters with electric resistors for aircraft. This provision is now designated subheading 8543.70.45 under the HTSUS. CBP has reviewed NY N255515 and has determined the ruling letter to be in error as regards the classification of the Wi-Fi infrared motion sensors. It is now CBP's position that the Wi-Fi infrared motion sensors are properly classified in heading 8531, HTSUS, specifically in subheading 8531.80.90, HTSUS, which provides for "[E]lectric sound or visual signaling apparatus...: Other apparatus: Other."

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is proposing to modify NY N255515 and to revoke or modify any other ruling not specifically identified to reflect the analysis contained in the proposed HQ H276956, set forth as Attachment "B" to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is proposing to revoke any treatment previously accorded by CBP to substantially identical transactions.

Before taking this action, consideration will be given to any written comments timely received.

Dated:

GREGORY CONNOR
For

CRAIG T. CLARK,
Director

Commercial and Trade Facilitation Division

Attachments

ATTACHMENT A

N255515

August 21, 2014

CLA-2-85:OT:RR:NC:1:120

CATEGORY: Classification

TARIFF NO.: 8537.10.9070; 8543.70.4000

MR. DAVID GOMEZ
WORLD EXCHANGE, INC.
11205 S. LA CIENEGA BLVD.
LOS ANGELES, CA 90045

RE: The tariff classification of three Wi-Fi-based home networking products from Taiwan and China

DEAR MR. GOMEZ:

In your letter dated July 17, 2014 you requested a tariff classification ruling on behalf of your client, D-Link Systems, Inc. The samples are being returned as requested.

The merchandise under consideration is the D-Link W-Fi Smart Plug Lite, model number DSP-W110; the D-Link Wi-Fi Smart Plug, model number DSP-W215; and the D-Link Wi-Fi Pyroelectric infrared (PIR) Motion Sensor, model number DCH-S150, all imported separately from each other.

The D-Link Wi-Fi Smart Plug Lite, model number DSP-W110, is a three-prong plug-in module with a three-plug outlet used for the insertion and control of various electric devices inside the home, such as a lamp and fan. It is controlled by a mobile app which sends a signal (or command) to the module, thereby causing its circuit to close or open and turn a device on or off. The module is encased in a plastic housing, measuring approximately 3 ½ inches in length by 2 inches in width and 1 ½ inches in depth, with three control buttons: a power button, a WPS (Wireless Protected Setup) button to connect to the home network; and a reset button. It is rated for up to 120 Volts (V) AC and 15 Amps (A). From the information provided by you, the Smart Plug incorporates switches, relays, fuses, contacts, plugs and sockets. It does not have built-in surge protection nor does it contain components that divert a voltage spike to ground.

The D-Link Wi-Fi Smart Plug, model number DSP-W215, is similar to model number DSP-W110 in styling, construction and function in noting the following differentiating features: it is slightly larger in size; it has two control buttons (a power button and a WPS button); and it has a built-in temperature sensor.

The D-Link Wi-Fi PIR Motion Sensor, model number DCH-S150, is a two-prong plug-in module, with a WPS button, which operates with the Smart Plug model numbers DSP-W110 and DSP-W215. The sensor uses infrared waves to detect the motion of an object within a range of 26 feet and sends a signal to the user's phone when motion is detected. This signal is also transmitted to the Smart Plug(s), thereby directing the desired action. It is encased in a plastic housing measuring approximately 2 inches in length by 2 inches in width by 1 ½ inches in depth. It is rated for up to 120 Volts (V) and 0.1 Amps (A).

The applicable subheading for the D-Link W-Fi Smart Plug Lite, model number DSP-W110, and the D-Link Wi-Fi Smart Plug, model number DSP-W215, will be 8537.10.9070, Harmonized Tariff Schedule of the United States

(HTSUS), which provides for “Boards, panels, consoles, desks, cabinets and other bases, equipped with two or more apparatus of heading 8535 or 8536, for electric control or the distribution of electricity...: For a voltage not exceeding 1,000 V: Other: Other: Other.” The rate of duty will be 2.7 percent ad valorem.

The applicable subheading for the D-Link DCH-S150 PIR Motion Sensor will be 8543.70.4000, HTSUS, which provides for “Electrical machines and apparatus, having individual functions, not specified or included elsewhere in this chapter; parts thereof: Other machines and apparatus: Electric synchros and transducers; flight data recorders; defrosters and demisters with electric resistors for aircraft. The rate of duty is 2.6 ad valorem.

Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on World Wide Web at <http://www.usitc.gov/tata/hts/>.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Denise M. Faingar at denise.m.faingar@cbp.dhs.gov.

Sincerely,

GWENN KLEIN KIRSCHNER

Director

National Commodity Specialist Division

ATTACHMENT B

HQ H276956

CLA-2 OT:RR:CTF:EMAIN H276956 SKK

CATEGORY: Classification

TARIFF NO.: 8531.80.90

MS. AMY HESS
WORLD EXCHANGE INC.
11205 S. LA CIENEGA BLVD.
LOS ANGELES, CA 90045

RE: Modification of NY N255515; Classification of D-Link WiFi motion sensors.

DEAR MS. HESS:

This is in response to your correspondence of February 24, 2016, in which you request reconsideration of New York Ruling Letter (NY) N255515, issued to your client, D-Link Systems, Inc., on August 21, 2014. In NY N255515, U.S. Customs and Border Protection (CBP) classified WiFi-enabled D-Link smart plugs and motion sensors. This reconsideration is limited to the WiFi-enabled D-Link motion sensors (model number DCH-S150). No sample was submitted with your reconsideration request.

In NY N255515, CBP classified the subject motion sensors under heading 8543, Harmonized Tariff Schedule of the United States (HTSUS), specifically subheading 8543.70.40, HTSUS (2014), which provided for “[E]lectrical machines and apparatus, having individual functions, not specified or included elsewhere in this chapter; parts thereof: Other machines and apparatus: Electric synchros and transducers; flight data recorders; defrosters and demisters with electric resistors for aircraft.”

We have reviewed NY N255515 and have determined that the ruling is incorrect as regards the classification of the subject WiFi-enabled D-Link motion sensor. For the reasons set forth below, we are modifying that portion of NY N255515 pertaining to motion sensors.

FACTS:

The motion sensor at issue in NY N255515 is described as the D-Link WiFi PIR Motion Sensor (model number DCH-S150). The subject sensor is designed as a two-prong plug-in module. It features a Wireless Protected Setup (WPS) button (to connect to the home network) and operates with D-Link Smart Plug model numbers DSP-W110 and DSP-W215. The sensor uses Passive Infrared Sensor (PIR) technology to detect motion within a range of 26 feet by sensing a change in infrared heat. When motion is detected, the unit sends a signal to the user’s phone or device. The sensor does not have an internal alarm. It contains a built-in LED light that indicates when the unit is connected to a network and rapidly flashes to signal when motion is detected. The subject sensor has two printed circuit boards (PCB): a motion detector board with the motion sensor and LED light and a QCA9531 chip for transmitting and receiving wireless signals when motion is detected. When the motion detector board detects motion, it activates the LED light on the motion detector board and transmits a digital message to the QCA9531 chip, which relays the message as a wireless data packet to the user’s mobile

* This provision is now designated subheading 8543.70.45 under the 2021 HTSUS.

device. The article is encased in a plastic housing measuring approximately 2 inches in length by 2 inches in width by 1-½ inches in depth. It is rated for up to 120 Volts (V) and 0.1 Amps (A).

ISSUE:

Whether the instant Wi-Fi enabled motion sensor is properly classified as an electric sound or visual signaling apparatus of heading 8531, HTSUS.

LAW AND ANALYSIS:

Classification of goods under the HTSUS is governed by the General Rules of Interpretation (GRI). GRI 1 provides that classification is determined according to the terms of the headings of the tariff schedule and any relative section or chapter notes. If the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI may then be applied.

The HTSUS provisions under consideration are as follows:

8531 Electric sound or visual signaling apparatus (for example, bells, sirens, indicator panels, burglar or fire alarms), other than those of heading 8512 or 8530; parts thereof.

* * *

8543 Electrical machines and apparatus, having individual functions, not specified or included elsewhere in this chapter.

The Explanatory Notes (EN) to the Harmonized Commodity Description and Coding System represent the official interpretation of the tariff at the international level. While neither legally binding nor dispositive, the ENs provide a commentary on the scope of each heading of the HTSUS and are generally indicative of the proper interpretation of these headings. *See* T.D. 89–80, 54 Fed. Reg. 35127, 35128 (August 23, 1989). EN 85.31 states:

With the **exception** of signalling apparatus used on cycles or motor vehicles (**heading 85.12**) and that for traffic control on roads, railways, etc. (**heading 85.30**), this heading covers all electrical apparatus used for signalling purposes, whether using sound for the transmission of the signal (bells, buzzers, hooters, etc.) or using visual indication (lamps, flaps, illuminated numbers, etc.), and whether operated by hand (e.g., door bells) or automatically (e.g., burglar alarms).

Static signs, even if lit electrically (e.g., lamps, lanterns, illuminated panels, etc.) are not regarded as signalling apparatus. They are therefore not covered by this heading but are classified in their own appropriate headings (**headings 83.10, 94.05**, etc.).

As heading 8543, HTSUS, excludes electrical apparatus that are specified or included elsewhere in chapter 85, the threshold determination is whether the subject sensors are covered by heading 8531, HTSUS.

The subject sensors are electrical apparatus that feature an integrated LED light that flashes rapidly to visually signal when motion is detected. As such, the subject sensors are *prima facie* classified in heading 8531, HTSUS, as electric visual signaling apparatus. Subheading 8531.10, HTSUS, provides for “burglar or fire alarms and similar apparatus.” The subject sensors are not classified in this provision as they do not perform the function of an alarm apparatus. The subject sensors identify motion via a change in temperature and do not possess an internal alarm. When motion is detected, the LED on

the sensor's motion detection board blinks and a digital message communicating the change in status is transmitted to the sensor's second PCB (QCA9531 chip), which relays the message as a wireless transmission to the user's mobile device. The subject sensor's ability to wirelessly transmit signals to another device may enable it to activate a burglar or fire alarm or similar apparatus, but this capability does not constitute the function of an alarm apparatus of subheading 8531.10, HTSUS, on its own. The subject motion sensors are therefore properly classified in subheading 8531.80.90, HTSUS, which provides for "[E]lectric sound or visual signaling apparatus...: Other apparatus: Other." See NY N264715, dated June 5, 2015 and NY N271651, dated January 12, 2016 (classifying door/window and motion sensors that trigger LED illumination under heading 8531, HTSUS).

On the basis of the foregoing, NY N255515 is modified as regards the classification of the D-Link Wi-Fi PIR Motion Sensor (model number DCH-S150).

HOLDING:

By application of GRIs 1 and 6, the subject D-Link Wi-Fi PIR Motion Sensor (model number DCH-S150) at issue in NY N255515 is classified under heading 8531, HTSUS, specifically under subheading 8531.80.90, HTSUS, which provides for "[E]lectric sound or visual signaling apparatus...: Other apparatus: Other." The applicable rate of duty is free. Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on the internet at www.usitc.gov.

EFFECT ON OTHER RULINGS:

NY N255515, dated August 21, 2014, is hereby MODIFIED.

Sincerely,

CRAIG T. CLARK,

Director

Commercial and Trade Facilitation Division



19 CFR PART 177

**REVOCATION OF FOUR RULING LETTERS AND
REVOCATION OF TREATMENT RELATING TO THE
TARIFF CLASSIFICATION OF CERTAIN MINERAL STONES**

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

ACTION: Notice of revocation of four ruling letters and revocation of treatment relating to the tariff classification of certain mineral stones—specifically, amber, selenite, calcite and aragonite.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of title VI (Customs

Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) is revoking four ruling letters concerning tariff classification of certain mineral stones, including amber, selenite, calcite and aragonite under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Notice of the proposed action was published in the *Customs Bulletin*, Vol. 55, No. 15, on April 21, 2021. One comment was received in response to that notice.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after August 22, 2021.

FOR FURTHER INFORMATION CONTACT: Ms. Arim J. Kim, Chemicals, Petroleum, Metals and Miscellaneous Classification Branch, Regulations and Rulings, Office of Trade, at (202) 325–0266.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Current customs law includes two key concepts: informed compliance and shared responsibility. Accordingly, the law imposes an obligation on CBP to provide the public with information concerning the trade community's responsibilities and rights under the customs and related laws. In addition, both the public and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. § 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and to provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics, and determine whether any other applicable legal requirement is met.

Pursuant to 19 U.S.C. § 1625(c)(1), a notice was published in the *Customs Bulletin*, Vol. 55, No. 15, on April 21, 2021, proposing to revoke four ruling letters pertaining to the tariff classification of certain mineral stones, including amber, selenite, calcite and aragonite. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should have advised CBP during the comment period.

Similarly, pursuant to 19 U.S.C. § 1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical

transactions. Any person involved in substantially identical transactions should have advised CBP during the comment period. An importer's failure to advise CBP of substantially identical transactions or of a specific ruling not identified in this notice may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of this notice.

In NY F86134, CBP classified amber in heading 9705, HTSUS, specifically in subheading 9705.00.00, HTSUS, which provides for "Collections and collectors' pieces of zoological, botanical, mineralogical, anatomical, historical, archeological, paleontological, ethnographic or numismatic interest". CBP has reviewed NY F86134 and has determined the ruling letter to be in error. It is now CBP's position that amber in natural state is properly classified in heading 2530, HTSUS, specifically in subheading 2530.90.80, HTSUS, which provides for "Mineral substances not elsewhere specified or included: Other: Other". The sanded and buffed amber stones, however, are classified in heading 9602, HTSUS, specifically in subheading 9602.00.50, HTSUS, which provides for "Worked vegetable or mineral carving material and articles of these materials; molded or carved articles of wax, of stearin, of natural gums or natural resins, of modeling pastes, and other molded or carved articles, not elsewhere specified or included; worked, unhardened gelatin (except gelatin of heading 3503) and articles of unhardened gelatin: Other".

In NY N004112 and NY N004200, CBP classified selenite stones in heading 9705, HTSUS, specifically in subheading 9705.00.00, HTSUS, which provides for "Collections and collectors' pieces of zoological, botanical, mineralogical, anatomical, historical, archeological, paleontological, ethnographic or numismatic interest". CBP has reviewed NY N004112 and NY N004200, and has determined the ruling letters to be in error. It is now CBP's position that selenite stones are properly classified, in heading 2520, HTSUS, specifically in subheading 2520.10.00, HTSUS, which provides for "Gypsum; anhydrite; plasters (consisting of calcined gypsum or calcium sulfate) whether or not colored, with or without small quantities of accelerators or retarders: Gypsum; anhydrite".

In NY N015557, CBP classified calcite and aragonite in heading 9705, HTSUS, specifically in subheading 9705.00.00, HTSUS, which provides for "Collections and collectors' pieces of zoological, botanical, mineralogical, anatomical, historical, archeological, paleontological, ethnographic or numismatic interest". CBP has reviewed NY N015557 and has determined the ruling letter to be in error. It is now CBP's position that calcite and aragonite are properly classified, in heading 7103, HTSUS, specifically in subheading 7103.10.20,

HTSUS, which provides for “Precious stones (other than diamonds) and semiprecious stones, whether or not worked or graded but not strung, mounted or set; ungraded precious stones (other than diamonds) and semiprecious stones, temporarily strung for convenience of transport: Unworked or simply sawn or roughly shaped: Unworked”.

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is revoking NY F86134, NY N004112, NY N004200 and NY N015557, and revoking or modifying any other ruling not specifically identified to reflect the analysis contained in Headquarters Ruling Letter (HQ) H311301, set forth as an attachment to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions.

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

Dated: June 4, 2021

ALLYSON MATTANAH
for

CRAIG T. CLARK,
Director

Commercial and Trade Facilitation Division

Attachment

HQ H311301

June 4, 2021

OT:RR:CTF:CPMMA H311301 AJK

CATEGORY: Classification

TARIFF NO: 2520.10.00; 2530.90.80;
7103.10.20; 9602.00.50

Ms. TARA TOMPKINS

EIGHTEEN KARAT INTERNATIONAL PRODUCT SOURCING INC.

5292 272ND STREET

LANGLEY, BRITISH COLUMBIA

CANADA V4W 1S3

RE: Revocation of NY F86134, NY N004112, NY N004200, and
NY N015557; Classification of Certain Mineral Stones

DEAR Ms. TOMPKINS:

This letter is in reference to your New York Ruling Letters (NY) N004112, dated December 28, 2006, NY N004200, dated December 28, 2006, and NY N015557, dated August 21, 2007, issued to you by U.S. Customs and Border Protection (CBP), concerning the tariff classification of certain mineral stones—specifically, concerning selenite, calcite and aragonite—under the Harmonized Tariff Schedule of the United States (HTSUS). We have reviewed the aforementioned rulings and have determined that the classification of the merchandise was incorrect.

We have also reviewed NY F86134, dated April 18, 2000, concerning the tariff classification of amber, and have determined that the ruling was incorrect. For the reasons set forth below, we revoke the four ruling letters.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. § 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), a notice of the proposed action was published in the Customs Bulletin, Volume 55, No. 15, on April 21, 2021. One comment was received in response to this notice.

FACTS:

The amber was described in NY F86134 as follows:

The merchandise to be imported consists of amber, in its natural state or sanded down and buffed. The amber will not be made into a finished article.

The selenite stones were described in NY N004112 as follows:

The Selenite Stones, white (46539, 46540 and 46541) and Selenite Stones, orange (46542 and 46543) are natural mineral stones mined in Morocco. They were formed 140 - 200 million years ago. Selenite is a hydrous calcium sulfate. It is a glassy, well-crystallized form of gypsum. They are naturally occurring stones, not cultured. Other than being cut to size there is no further processing done on the stones following the manual extraction of the rock from the earth. The stones are not polished; they are imported in their natural state. These mineral stones are marketed as decorations or collectibles for the home.

The selenite desert roses stones in NY N004200 are substantially similar to the product described in NY N004112.

The calcite geodes and aragonite specimens were described in NY N015557 as follows:

The Calcite Geodes (items 47548, 47549 and 47550) and Argonite specimens are natural mineral stones mined in Morocco. The Calcite Geodes are naturally occurring rock formations that appear in sedimentary or volcanic rock. The Argonite Stones are also naturally occurring formations that have not been cultured or altered.

ISSUE:

Whether certain mineral stones—specifically, amber, selenite, calcite, and aragonite—are classified in heading 2520, HTSUS, as gypsum, heading 2530, HTSUS, as mineral substances, heading 7103, HTSUS, as precious or semiprecious stones, heading 9602, HTSUS, as worked mineral carving material, or heading 9705, HTSUS, as collectors’ pieces of minerals.

LAW AND ANALYSIS:

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

* * * * *

The HTSUS provisions at issue are as follows:

- 2520: Gypsum; anhydrite; plasters (consisting of calcined gypsum or calcium sulfate) whether or not colored, with or without small quantities of accelerators or retarders:
- 2520.10.00: Gypsum; anhydrite
- 2530: Mineral substances not elsewhere specified or included:
- 2530.90: Other:
- 2530.90.80: Other
- 7103: Precious stones (other than diamonds) and semiprecious stones, whether or not worked or graded but not strung, mounted or set; ungraded precious stones (other than diamonds) and semiprecious stones, temporarily strung for convenience of transport:
- 7103.10: Unworked or simply sawn or roughly shaped:
- 7103.10.20: Unworked
- 9602.00: Worked vegetable or mineral carving material and articles of these materials; molded or carved articles of wax, of stearin, of natural gums or natural resins, of modeling pastes, and other molded or carved articles, not elsewhere specified or included; worked, unhardened gelatin (except gelatin of heading 3503) and articles of unhardened gelatin:
- 9602.00.50: Other

9705.00.00: Collections and collectors' pieces of zoological, botanical, mineralogical, anatomical, historical, archeological, paleon-tological, ethnographic or numismatic interest

The Legal Note to Chapter 25, HTSUS, provides, in pertinent part:

1. Except where their context or note 4 to this chapter otherwise requires, the headings of this chapter cover only products which are in the crude state or which have been washed (even with chemical substances eliminating the impurities without changing the structure of the product), crushed, ground, powdered, levigated, sifted, screened, concentrated by flotation, magnetic separation or other mechanical or physical processes (except crystallization), but not products which have been roasted, calcined, obtained by mixing or subjected to processing beyond that mentioned in each heading.

...

4. Heading 2530 applies, *inter alia*, to: ... amber

The Legal Note to Chapter 71, HTSUS, provides, in pertinent part:

3. This chapter does not cover:

...

(p) [C]ollectors' pieces (heading 9705) ..., other than natural or cultured pearls or precious or semiprecious stones.

The Legal Note to Chapter 96, HTSUS, provides, as follows:

2. In heading 9602 the expression "vegetable or mineral carving material" means:

...

(b) Amber, meerschaum, agglomerated amber and agglomerated meerschaum, jet and mineral substitutes for jet.

The Legal Note to Chapter 97, HTSUS, provides, as follows:

1. This chapter does not cover:

...

(c) Pearls, natural or cultured, or precious or semiprecious stones (headings 7101 to 7103).

* * * * *

The Harmonized Commodity Description and Coding System (HS) Explanatory Notes (ENs) constitute the official interpretation of the HS. While not legally binding or dispositive, the ENs provide a commentary on the scope of each heading of the HS at the international level, and are generally indicative of the proper interpretation of these headings. *See* T.D. 89-80, 54 Fed. Reg. 35127 (August 23, 1989).

The General EN to Chapter 25, provides, in pertinent part:

As provided in Note 1, this Chapter covers, except where the context otherwise requires, mineral products only in the crude state or washed (including washing with chemical substances to eliminate impurities provided that the structure of the product itself is not changed), crushed, ground, powdered, levigated, sifted, screened or concentrated by flotation, magnetic separation or other mechanical or physical processes (not including crystallisation)....

The General EN to Chapter 71, provides, in pertinent part:

This Chapter includes:

- (1) In headings 71.01 to 71.04, natural or cultured pearls, diamonds, other precious or semi-precious stones (natural, synthetic or reconstructed), unworked or worked, but not mounted, set or strung; also, in heading 71.05, certain waste resulting from the working of these stones.

The General EN to Chapter 97, provides, in pertinent part:

This Chapter covers:

...

- (C) Collections and collectors' pieces of zoological, botanical, mineralogical, anatomical, historical, archaeological, palaeontological, ethnographic or numismatic interest (heading 97.05)....

It should, however, be noted that such articles are classified in other Chapters of the Nomenclature if they do not comply with the conditions arising from the terms of the Notes or headings of this Chapter.

EN 25.20, provides, as follows:

Gypsum is a natural hydrated calcium sulphate generally white and friable....

EN 25.30(B) provides, in pertinent part:

- (2) Amber is a fossilised resin (also known as "succinite" or "*Karabé*"). It generally ranges in colour from yellow to deep orange....

EN 71.03 provides, in pertinent part:

The heading includes the precious or semi-precious stones listed in the Annex to this Chapter, the name of the mineralogical species being given with the commercial names; the heading is, of course, restricted to those stones and varieties of a quality suitable for use in jewellery, etc.

EN 96.02(B), which provides for worked mineral carving materials, states as follows:

This group covers mineral carving materials of the kind mentioned in Note 2 (b) to this Chapter.

The heading does not cover the following products which fall in heading 25.30:

- (i) Rough blocks or lumps of meerschaum or amber;

EN 97.05 provides, in pertinent part, as follows:

These articles are very often of little intrinsic value but derive their interest from their rarity, their grouping or their presentation. The heading includes:

- (A) Collections and collectors' pieces of zoological, botanical, mineralogical or anatomical interest, such as:

...

- (4) Specimens of minerals (not being precious or semi-precious stones falling in Chapter 71);

* * * * *

I. Amber

Heading 9705, HTSUS, which provides for collectors' pieces of zoological, botanical, mineralogical, anatomical, historical, archaeological, palaeonto-

logical, ethnographic or numismatic interest, covers articles that “derive their interest from rarity, their grouping or their presentation.” EN 97.05. Amber, however, is generally common with the exception of very large pieces of amber or amber with rare insects.¹ In regard to the instant amber stones, the description of the merchandise does not highlight their rarity or other unique characteristics that may qualify them as being rare. Thus, the instant amber stones are not classifiable in heading 9705, HTSUS, as collectors’ pieces, due to their lack of rarity or unique interest for collectors.

Heading 2530, HTSUS, is a provision for mineral substances, including amber. EN 25.30; *see also* Note 4 to Chapter 25. To classify amber stones in heading 2530, HTSUS, Note 1 to Chapter 25 provides that they must be in crude state. Accordingly, the amber stones in natural state in NY F86134 are classified in heading 2530, HTSUS, as mineral substances. The sanded and buffed amber stones, however, are excluded from heading 2530, HTSUS, because they are no longer in crude state after undergoing the worked process of sanding down and buffing. The Legal Note 2(b) to Chapter 96, which encompasses minerals, provides that “vegetable or mineral carving material” in heading 9602, HTSUS, means “amber”. Moreover, EN 96.02(B) states that heading 9602, HTSUS, “does not cover ... products which fall in heading 25.30 [including] (i) [r]ough blocks or lumps of ... amber”. Accordingly, as the sanded and buffed amber stones are excluded from heading 2530, HTSUS, as mineral substance, heading 9602, HTSUS, is the only heading that wholly encompasses the instant amber stones that are further worked and are not in their crude state. Therefore, the sanded and buffed amber stones are classified in heading 9602, HTSUS, as worked mineral carving material.

II. Selenite Stones

Heading 2520, HTSUS, is an *eo nomine* provision that provides for gypsums, which are natural hydrated calcium sulphates, such as the instant selenite stones in NY N004112 and NY N004200. *See* EN 25.20. Gypsums—of which selenite is a variety—are one of the most abundant minerals and are not considered rare unless they are in the form of gem-quality crystals with transparency.² The instant selenite stones, however, are not colorless or transparent and thus, they lack unique interests for collectors due to their abundance. Accordingly, they are not considered rare within the context of heading 9705, HTSUS, which provides for collectors’ pieces. By application of GRI 1, therefore, the selenite stones are excluded from heading 9705, HTSUS, which provides for collectors’ pieces, and instead classified in heading 2520, HTSUS, as gypsums.

III. Aragonite and Calcite

The EN’s Annex to Chapter 71, HTSUS, lists various minerals that constitute precious or semiprecious stones under HTSUS. The Annex does not include organic materials, such as amber; however, the Annex specifically

¹ *Amber Value, Price, and Jewelry Information*, International Gem Society, <https://www.gemsociety.org/article/gypsum-jewelry-and-gemstone-information/> (last visited Feb. 24, 2021).

² *Gypsum Value, Price, and Jewelry Information*, International Gem Society, <https://www.gemsociety.org/article/gypsum-jewelry-and-gemstone-information/> (last visited Feb. 24, 2021).

identifies aragonite and calcite. Under HTSUS, therefore, aragonites and calcites are classified as precious or semiprecious stones in heading 7103, HTSUS. Accordingly, heading 7103, HTSUS, is the only heading that wholly characterizes the instant aragonites and calcites, and is not classifiable in heading 9705, HTSUS. Although EN 97.05 provides that the heading includes “specimens of minerals”, Note 1 to Chapter 97 states that Chapter 97 does not cover precious or semiprecious stones in heading 7103, HTSUS. Accordingly, even if the instant aragonite and calcite are rare, they are excluded from heading 9705, HTSUS, because they are wholly classified in heading 7103, HTSUS. Under GRI 1, therefore, aragonite and calcite are, *prima facie*, classified in heading 7103, HTSUS, which provides for precious or semiprecious stones.

As noted above, we received one comment in response to the notice of the proposed revocation. With regard to amber and selenite stones, the commenter contends that the proposed revocation incorrectly considered the stones’ mineral composition only and that the sale of mineral stones as collectibles are attributed to the rarity of mineral and/or aesthetic beauty. To support its claim for the consideration of rare beauty, the commenter provides examples of reported sales or auctions of similar specimens or collections. Indeed, EN 97.05 provides that the articles of heading 9705, HTSUS, “derive their interest from their rarity, their grouping or their presentation” and we accordingly recognize that such presentation may encompass the stone’s rare beauty. In the present case, however, our research indicates that the subject selenite stones in NY N004112 and N004200 do not possess rare presentation or beauty, in addition to lacking rarity of minerals, to warrant them as collector’s items.³ Whereas collector’s items are generally priced at a high value, the subject selenite stones and similar specimens are generally marked and sold at low prices (less than one hundred dollars). Although we did not find additional information concerning the amber stone in NY F86134, the description of the merchandise does not indicate or suggest its rarity of mineral or beauty. As stated above, therefore, the amber and selenite stones do not constitute collector’s pieces of heading 9705, HTSUS.

In addition, the commenter argues that the aragonite and calcite stones in NY N01557 are precluded from heading 7103, HTSUS, because EN 71.03 provides that “[t]he stones of this heading are therefore mainly stones intended for mounting or setting in jewellery or goldsmiths’ or silversmiths’ wares” while the subject stones are for open display on shelves. Although it is true that EN 71.03 states that this heading “mainly” covers stones for jewelry, this fact does not preclude other precious or semiprecious stones from heading 7103, HTSUS. Moreover, EN 71.03 restricts the heading “to those stones and varieties of a quality suitable for use in jewellery, etc.” only. Accordingly, the subject aragonite and calcite stones are not excluded from heading 7103, HTSUS, because they are stones that are identified as precious or semiprecious stones in the EN’s Annex to Chapter 71 and they are of quality suitable for use in jewelry. Even if the subject stones constitute collectibles, they are not excluded from Chapter 71, because Note 3 to Chapter 71 provides that the chapter excludes collectors’ pieces of heading 9705, HTSUS, other than those of precious and semiprecious stones. Thus, the mineral stones herein are excluded from heading 9705, HTSUS.

³ *Selenite & Gypsum Crystals for Sale*, Fossilera Minerals, https://www.fossilera.com/minerals-for-sale/selenite-gypsum?sort=published_at+desc (last visited May 24, 2021).

HOLDING:

By application of GRI 1, the amber stones in natural status are classified in heading 2530, HTSUS, specifically subheading 2530.90.80, HTSUS, which provides for “[m]ineral substances not elsewhere specified or included: [o]ther: [o]ther”. The 2021 column one, general rate of duty is free. However, the sanded down and buffed amber stones are classified in heading 9602, HTSUS, specifically subheading 9602.00.50, HTSUS, which provides for “[w]orked vegetable or mineral carving material and articles of these materials; molded or carved articles of wax, of stearin, of natural gums or natural resins, of modeling pastes, and other molded or carved articles, not elsewhere specified or included; worked, unhardened gelatin (except gelatin of heading 3503) and articles of unhardened gelatin: [o]ther”. The 2021 column one, general rate of duty is 2.7 percent *ad valorem*.

In addition, the selenite stones are classified in heading 2520, HTSUS, specifically subheading 2520.10.00, HTSUS, which provides for “[g]ypsum; anhydrite; plasters (consisting of calcined gypsum or calcium sulfate) whether or not colored, with or without small quantities of accelerators or retarders: [g]ypsum; anhydrite”. The 2021 column one, general rate of duty is free.

Lastly, the calcite and aragonite are classified in heading 7103, HTSUS, specifically subheading 7103.10.20, HTSUS, which provides for “[p]recious stones (other than diamonds) and semiprecious stones, whether or not worked or graded but not strung, mounted or set; ungraded precious stones (other than diamonds) and semiprecious stones, temporarily strung for convenience of transport: [u]nworked or simply sawn or roughly shaped: [u]nworked”. The 2021 column one, general rate of duty is free.

Duty rates are provided for your convenience and subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided at www.usitc.gov.

EFFECT ON OTHER RULINGS:

NY F86134, dated April 18, 2000, NY N004112, dated December 28, 2006, NY N004200, dated December 28, 2006, and NY N015557, dated August 21, 2007, are hereby revoked.

This ruling will become effective 60 days from the date of publication in the Customs Bulletin.

Sincerely,

ALLYSON MATTANAH
for

CRAIG T. CLARK,
Director

Commercial and Trade Facilitation Division

CC: Mr. Zane L. Goehman
6321 Winona Ave.
St. Louis, MO 63109

**PROPOSED REVOCATION OF FOUR RULING LETTERS
AND PROPOSED REVOCATION OF TREATMENT
RELATING TO THE TARIFF CLASSIFICATION OF
CERTAIN HEARING AMPLIFICATION DEVICES**

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

ACTION: Notice of proposed revocation of four ruling letters, and proposed revocation of treatment relating to the tariff classification of certain hearing amplification devices.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) intends to revoke four ruling letters concerning tariff classification of certain hearing amplification devices under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP intends to revoke any treatment previously accorded by CBP to substantially identical transactions. Comments on the correctness of the proposed actions are invited.

DATE: Comments must be received on or before July 23, 2021.

ADDRESS: Written comments are to be addressed to U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, Attention: Erin Frey, Commercial and Trade Facilitation Division, 90 K St., NE, 10th Floor, Washington, DC 20229–1177. Due to the COVID-19 pandemic, CBP is also allowing commenters to submit electronic comments to the following email address: 1625Comments@cbp.dhs.gov. All comments should reference the title of the proposed notice at issue and the *Customs Bulletin* volume, number and date of publication. Due to the relevant COVID-19-related restrictions, CBP has limited its on-site public inspection of public comments to 1625 notices. Arrangements to inspect submitted comments should be made in advance by calling Ms. Erin Frey at (202) 325–1757.

FOR FURTHER INFORMATION CONTACT: Tom P. Beris, Electronics, Machinery, Automotive and International Nomenclature Branch, Regulations and Rulings, Office of Trade, at (202) 325–0292.

SUPPLEMENTARY INFORMATION:**BACKGROUND**

Current customs law includes two key concepts: informed compliance and shared responsibility. Accordingly, the law imposes an obligation on CBP to provide the public with information concerning the trade community's responsibilities and rights under the customs and related laws. In addition, both the public and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. § 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and to provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics, and determine whether any other applicable legal requirement is met.

Pursuant to 19 U.S.C. § 1625(c)(1), this notice advises interested parties that CBP is proposing to revoke four ruling letters pertaining to the tariff classification of certain hearing amplification devices. Although in this notice, CBP is specifically referring to New York Ruling Letters ("NY") N283085, N166443, N025447, and D80822, dated February 28, 2017, May 31, 2011, April 18, 2008, and August 11, 1998, respectively, (Attachments A, B, C, and D), this notice also covers any rulings on this merchandise which may exist, but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the four identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should advise CBP during the comment period.

Similarly, pursuant to 19 U.S.C. § 1625(c)(2), CBP is proposing to revoke any treatment previously accorded by CBP to substantially identical transactions. Any person involved in substantially identical transactions should advise CBP during this comment period. An importer's failure to advise CBP of substantially identical transactions or of a specific ruling not identified in this notice may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of the final decision on this notice.

In NY N283085, NY N166443, NY N025447, and NY D80822, CBP classified certain hearing amplification devices in heading 9021, HTSUS, specifically in subheading 9021.40.00, HTSUS, which provides for "Orthopedic appliances, including crutches, surgical belts

and trusses; splints and other fracture appliances; artificial parts of the body; hearing aids and other appliances which are worn or carried, or implanted in the body, to compensate for a defect or disability; parts and accessories thereof: Hearing Aids, excluding parts and accessories thereof.” CBP has reviewed NY N283085, NY N166443, NY N025447, and NY D80822 and has determined the ruling letters to be in error. It is now CBP’s position that these hearing amplification devices are properly classified, in heading 8518, HTSUS, specifically in subheading 8518.40.20, HTSUS, which provides for “Audio-frequency electric amplifiers: Other.”

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is proposing to revoke NY N283085, NY N166443, NY N025447, and NY D80822 and to revoke or modify any other ruling not specifically identified to reflect the analysis contained in the proposed Headquarters Ruling Letter (“HQ”) H313006, set forth as Attachment E to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is proposing to revoke any treatment previously accorded by CBP to substantially identical transactions.

Before taking this action, consideration will be given to any written comments timely received.

Dated:

GREGORY CONNOR
For

CRAIG T. CLARK,
Director

Commercial and Trade Facilitation Division

Attachments

ATTACHMENT A

N283085

February 28, 2017

CLA-2-90:OT:RR:NC:2:235

CATEGORY: Classification

TARIFF NO.: 9021.40.0000

MR. DAVID PRATA
GEODIS USA FREIGHT FORWARDING
1 CVS DRIVE
WOONSOCKET, RI 02895

RE: The tariff classification of a “Hearing Amplifier Kit” from China

DEAR MR. PRATA:

In your letter dated January 19, 2017, on behalf of your client, CVS Health, you requested a classification ruling on a “Hearing Amplifier Kit,” which you also refer to as “Item number 207741.” The provided sample has been reviewed and will be returned as requested. In your letter, you have described the product at issue as a retail-ready kit, comprised of a sound amplifier, three plastic earplugs in different sizes, a spare battery, and a plastic storage case. This product is intended to be worn as an in-ear sound amplification device.

The Explanatory Notes to the Harmonized Tariff System, although not legally binding, provide guidance in the interpretation of the Harmonized Commodity Description and Coding System at the international level. Explanatory Note X to GRI 3 (b) provides that the term “goods put up in sets for retail sale” means goods that; (a) consist of at least two different articles which are, prima facie, classifiable in different headings; (b) consist of articles put up together to meet a particular need or carry out a specific activity; and (c) are put up in a manner suitable for sale directly to users without re-packing. Goods classifiable under GRI 3 (b) are classified as if they consisted of the material or component which gives them their essential character, which may be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the article. GRI 3 (c) provides that when goods cannot be classified by reference to GRI 3 (a) or 3 (b), they are to be classified in the heading that occurs last in numerical order among those which equally merit consideration.

The product at issue will be classified as a set for tariff classification purposes in accordance with GRI 3(b), with the essential character imparted by the sound amplifier.

The applicable subheading for the “Hearing Amplifier Kit” will be 9021.40.0000, Harmonized Tariff Schedule of the United States (HTSUS), which provides for Orthopedic appliances, including crutches, surgical belts and trusses; splints and other fracture appliances; artificial parts of the body; hearing aids and other appliances which are worn or carried, or implanted in the body, to compensate for a defect or disability; parts and accessories thereof: Hearing Aids, excluding parts and accessories thereof. The general rate of duty will be free.

Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on World Wide Web at <https://hts.usitc.gov/current>.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Nuccio Fera at nuccio.fera@cbp.dhs.gov.

Sincerely,

STEVEN A. MACK

Director

National Commodity Specialist Division

ATTACHMENT B

N166443

May 31, 2011

CLA-2-90:OT:RR:NC:N4:405

CATEGORY: Classification

TARIFF NO.: 9021.40.0000

JOHN BESSICH

FOLLICK & BESSICH

33 WALT WHITMAN ROAD, SUITE 310

HUNTINGTON STATION, NY 11746

RE: The tariff classification of the RCA Symphonix Personal Sound Amplifier from China

DEAR MR. BESSICH:

In your letter dated May 10, 2011, on behalf of Audiovox Electronics Co., you requested a tariff classification ruling. A sample was provided.

In your submission you state:

“The RCA Personal Sound Amplifier, further identified as the RPSA10, is made in China and imported by Audiovox. The RPSA10 includes a high-quality, non-resonant plastic earpiece, gray plastic charging case with transparent blue plastic top, a plug-in AC power adapter with cable, plastic left and right ear tubes, and plastic medium and large ear domes. The RPSA10 is packaged for retail sale in a clear plastic container with a printed paper user guide, use and care pamphlet, accessories pamphlet, and warranty registration card. The main component of the RPSA10, the earpiece, incorporates a 15-hour rechargeable NiMH battery. The user recharges the earpiece battery by placing it in the charging case, inserting the AC adapter cable into the case, and plugging the adapter plug wire into a standard electrical outlet. The charging case and top also serve together as a storage compartment for the earpiece.

“The earpiece includes an on/off switch, volume button to switch between three sound settings, a microphone to pick up sounds in the user’s immediate surroundings, a tube to carry the audio from the earpiece directly into the ear, a tube connector which attaches the tube to the earpiece, and the dome, which fits securely in the ear, similar to an earbud. Because the earpiece fits over the ear, with the thin sound tube inserted into either ear with the dome, the user may continue to use a cellphone or Smartphone. Moreover, the earpiece is thin and lightweight and has been designed not to interfere with eyeglasses that may be worn by the user.

“Using high-definition digital sound processing, the RPSA10 enables the user to hear better in certain situations. It provides speech frequency amplification and active layered noise reduction.”

You also state:

“The RPSA10 does not require a prescription or a hearing test for purchase and is not sold or intended for use as a hearing aid for FDA (Food & Drug Administration) purposes.”

Harmonized System Explanatory Note (IV) to Heading 9021, entitled HEARING AIDS, states:

“These are generally electrical appliances with a circuit containing one or more microphones (with or without amplifier), a receiver and a battery. The receiver may be worn internally or behind the ear, or it may be designed to be held in the hand against the ear.

This group is restricted to appliances for overcoming deafness; it therefore excludes articles such as headphones, amplifiers and the like used in conference rooms or by telephonists to improve the audibility of speech.”

Although these imports are not optimized for the individual after extensive (and expensive) hearing tests by an audiologist, which is the most effective method of improving an individual’s hearing, they should significantly improve the user’s hearing especially when the hearing loss is not severe. The HS EN specifically includes a device held against the ear, which is also not the most effective method.

The Proper Use and Care pamphlet in the package indicates that the tube that goes inside the ear canal that is designed for the right ear can be replaced by one for the left ear and that “with proper care, you RCA Symphonix earpiece should provide years of use.” This is not indicative of an item to improve hearing for those with normal hearing in both ears, but dealing with conferences, traffic noise, etc.

Whether or not it is regulated by the FDA as a Hearing Aid for their purposes, that is not controlling regarding its classification. As stated in Headquarters Ruling Letter 946267, dated February 2, 2001: “However, ‘It is well established that statutes, regulations and administrative interpretations relating to “other than tariff purposes” are not determinative of Customs classification disputes.’ Amersham Corp. v. United States, 5 CIT 49, 56 (1983). Articles are classified by the FDA to protect public safety, not as guidance to Customs classification. HQ 085064 dated August 24, 1990. See also, HQ 962181 dated January 13, 1999.”

We agree that the applicable subheading for the RCA Symphonix Personal Sound Amplifier will be 9021.40.0000, Harmonized Tariff Schedule of the United States (HTSUS), which provides for Hearing Aids, excluding parts and accessories thereof. The rate of duty will be free.

Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on World Wide Web at <http://www.usitc.gov/tata/hts/>.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist J. Sheridan at (646) 733-3012.

Sincerely,

ROBERT B. SWIERUPSKI

Director

National Commodity Specialist Division

ATTACHMENT C

N025447

April 18, 2008

CLA-2-90:RR:NC:N1:105

CATEGORY: Classification

TARIFF NO.: 9021.40.0000

MS. ROXANNE PEIFFER
NORMAN G. JENSEN INC.
3050 METRO DRIVE, STE 300
MINNEAPOLIS, MN 55425

RE: The tariff classification of PockeTalkers from China

DEAR MS. PEIFFER:

In your letter dated March 24, 2008, on behalf of Williams Sound Corporation, you requested a tariff classification ruling. Three samples were provided.

You describe the samples as follows:

A) Pocketalker Ultra Duo pack: PKT D1 EH - this is a kit that is packaged for retail sale upon import in the same condition the enclosed sample is. It contains the Pocketalker amplifier, 2 AAA batteries, microphone, TV Listening extension cord, Lanyard, instruction manual, Mini ear bud, and a folding headphone.

B) Pocketalker: PKT D1 Nur and PKT C1 Nur - these are not packaged for retail sale upon import. After import, Williams Sound will package them with various accessories; typically they will include an earphone or headphone, a microphone, batteries, and a cable.

The packaging for the Pocketalker Ultra kit states, in large print, "Improve Your Hearing, Improve Your Life."

From the booklet in the retail box, the personal amplifier would typically be clipped on the person (using the built-in clip) or left on a restaurant table, etc, to receive sound waves and to convert them to amplified electrical signals which are sent by wire to headphones. Its output can also power a telecoil to send that sound information to an in-the-ear hearing aid with a built in telephone coil via magnetic induction.

While it differs from item you cite in NY Ruling letter D80822-105, 8-11-98, since it is not an in-the-ear device, it appears from your sample and your advertising literature that this device will also be used principally as a low cost way to compensate for hearing loss in people with moderate deafness and not to enhance the hearing of others to hear faint sounds.

The PKT D1 NUR is the Pocketalker person amplifier, i.e., the main element in the kit, which receives sounds from a small microphone which plugs into its top surface and emits corresponding amplified electrical outputs.

The PKT C1 NUR is labeled as the Pocketalker Pro. You did not provide any description of it. However, www.marilynelectronics.com/Pocketalker-Pro-w-EAR013-Earphone-p/ws-pktpro1-e13.htm describes a kit that uses it as its main element as:

Pocketalker Pro w/EAR013 Earphone by Williams Sound.

The Pocketalker Pro is an easy to use, portable amplifier that can improve your ability to communicate in difficult listening situations. It helps you listen and function more effectively.

Quality Components - the Pocketalker Pro includes a sensitive microphone that can be placed close to the sound source to minimize background noise, a compact amplifier with volume control, and a choice of three earphone/headphone options to deliver full range, high quality sound. Two AA batteries provide up to 100 hours of use, while rechargeable batteries and an AC adapter/charger are also available. A microphone extension cord for TV listening, a belt clip case, and handy carry cases are standard components as well. The optional Telelink attaches to the handset of most telephones and amplifies calls to a clear and comfortable listening level. For hearing aid wearers, neck loop and silhouette telecoil couplers are available for use with telecoil equipped hearing aids.

The Pocketalker Pro can be used for one on one conversations, indoor and outdoor activities, listening in a car, TV or radio listening, and restaurants or small groups.

The PockeTalker Pro is thus quite similar to the PockeTalker Ultra.

We agree that the applicable subheading for the three items will be 9021.40.0000, Harmonized Tariff Schedule of the United States (HTSUS), which provides for Hearing aids, excluding parts and accessories thereof. The rate of duty will be Free.

Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on World Wide Web at <http://www.usitc.gov/tata/hts/>.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist J. Sheridan at 646-733-3012.

Sincerely,

ROBERT B. SWIERUPSKI

Director

National Commodity Specialist Division

ATTACHMENT D

NY D80822

August 11, 1998

CLA-2-90:RR:NC:1:105 D80822

CATEGORY: Classification

TARIFF NO.: 9021.40.0000

MR. JAMES SHAW
PANASONIC LOGISTICS COMPANY OF AMERICA
2 PANASONIC WAY
SECAUCUS, NJ 07094

RE: The tariff classification of an Assistive Listening Device from Japan

DEAR MR. SHAW:

In your letter dated August 3, 1998, you requested a tariff classification ruling.

Model# WH-770 is an assistive listening device which consists of a small microphone and amplifier with a volume control that rests in the ear. The unit is designed to enhance listening and hearing in conversation or in group activities. You stated in your letter that "the unit is not uniquely fitted to the ear as most hearing aids are. It does not require a special prescription from an audiologist or hearing aid specialist. It is sold at retail in pharmacies or via direct advertising."

From the fact that it is worn in the ear canal and from your advertising literature, it appears that these devices will be used principally as a low cost way to compensate for hearing loss in people with moderate deafness and not to enhance the hearing of others to hear faint sounds.

The applicable subheading for the assistive listening device will be 9021.40.0000, Harmonized Tariff Schedule of the United States (HTS), which provides for hearing aids, excluding parts and accessories thereof. The rate of duty will be 0.8 percent ad valorem.

The assistive listening device is eligible for free entry under the provision for articles specially designed or adapted for the use or benefit of physically or mentally handicapped persons, other than the blind, in subheading 9817.00.96, HTS. All applicable entry requirements must be met including the filing of form ITA-362P.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of this ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding this ruling, contact National Import Specialist James Sheridan at (212) 466-5669.

Sincerely,

ROBERT B. SWIERUPSKI
Director,
National Commodity
Specialist Division

ATTACHMENT E

HQ H313006
CLA-2 OT:RR:CTF:EMAIN HQ H313006 TPB
CATEGORY: Classification
TARIFF NO.: 8518.40.20

MR. DAVID PRATA
GEODIS USA FREIGHT FORWARDING
1 CVS DRIVE
WOONSOCKET, RI 02895

Re: Revocation of New York Ruling Letter (NY) N283085, NY N166443, NY N025447, and NY D80822.

DEAR MR. PRATA:

This is to inform you that U.S. Customs and Border Protection (“CBP”) has reconsidered New York Ruling Letter (NY) N283085, dated February 28, 2017, regarding the classification of a “Hearing Amplifier Kit”. Additionally, we have also reconsidered the classification of NY N166443¹, N025447², and D80822³, all of which deal with the classification of certain hearing amplification devices.

FACTS:

In N283085 your product is briefly described:

... a retail-ready kit, comprised of a sound amplifier, three plastic earplugs in different sizes, a spare battery, and a plastic storage case. This product is intended to be worn as an in-ear sound amplification device.

The product in N166443, the Personal Sound Amplifier, is described as an earpiece with an on/off switch, volume button to switch between three sound settings, a microphone to pick up sounds in the user’s immediate surroundings, a tube to carry the audio from the earpiece directly into the ear, a tube connector which attaches the tube to the earpiece, and the dome, which fits securely in the ear, similar to an earbud. It is noted that the Personal Sound Amplifier does not require a prescription or a hearing test for purchase and is not sold or intended for use as a hearing aid for FDA (Food & Drug Administration) purposes. The PockeTalkers classified in N025447 include a variety of models. In essence, they are described as personal amplifiers and consist of an amplifier, batteries, microphone, ear bud, folding headphones. Finally, Assistive Listening Device in NY D80822 is described as a device that consists of a small microphone and amplifier with a volume control that rests in the ear. The unit is designed to enhance listening and hearing in conversation or in group activities. It does not require a special prescription from an audiologist or hearing aid specialist. It is sold at retail in pharmacies or via direct advertising.

¹ N166443, dated May 31, 2011, classified a Personal Sound Amplifier under subheading 9021.40.00.

² N025447, dated April 18, 2008, classified products referred to as “PockeTalkers” under subheading 9021.40.00.

³ D80822, dated August 11, 1998, classified an Assistive Listening Device under subheading 9021.40.00.

ISSUE:

Whether the hearing amplification devices are classified as other audio-frequency electric amplifiers of heading 8518 or hearing aids of heading 90.21.

LAW AND ANALYSIS:

Merchandise imported into the United States is classified under the HTSUS. Tariff classification is governed by the principles set forth in the General Rules of Interpretation (GRIs) and, in the absence of special language or context which requires otherwise, by the Additional U.S. Rules of Interpretation. The GRIs and the Additional U.S. Rules of Interpretation are part of the HTSUS and are to be considered statutory provisions of law for all purposes.

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

The Harmonized Commodity Description and Coding System Explanatory Notes (“ENs”) constitute the official interpretation of the Harmonized System at the international level. While neither legally binding nor dispositive, the ENs provide a commentary on the scope of each heading of the HTSUS and are generally indicative of the proper interpretation of these headings. See T.D. 89–80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

The HTSUS provisions under consideration are:

8518	Microphones and stands therefor; loudspeakers, whether or not mounted in their enclosures; headphones and earphones, whether or not combined with a microphone, and sets consisting of a microphone and one or more loudspeakers; audio-frequency electric amplifiers; electric sound amplifier sets; parts thereof:
8518.40	Audio-frequency electric amplifiers:
8518.40.20	Other * * *
9021	Orthopedic appliances, including crutches, surgical belts and trusses; splints and other fracture appliances; artificial parts of the body; hearing aids and other appliances which are worn or carried, or implanted in the body, to compensate for a defect or disability; parts and accessories thereof:
9021.40	Hearing aids, excluding parts and accessories thereof

Note 1(m) to Section XVI states that the Section does not cover articles of Chapter 90. As such, we must first determine whether the hearing amplifiers at issue are goods of Chapter 90. Additionally, the EN to Chapter 85 states that the heading excludes hearing aids of heading 90.21.

Heading 9021 provides for, *inter alia*, hearing aids and other appliances which are worn or carried, or implanted in the body, to compensate for a defect or disability. The term “hearing aids” is not defined in the legal texts of the HTSUS. A tariff term that is not defined in the HTSUS is construed in

accordance with its common and commercial meaning. *Nippon Kogasku (USA), Inc. v. United States*, 69 CCPA 89, 673 F.2d 380 (1982). Common and commercial meaning may be determined by consulting dictionaries, lexicons, scientific authorities and other reliable sources. *C.J. Tower & Sons v. United States*, 69 CCPA 128, 673 F.2d 1268 (1982). Further, the EN to heading 9021 provides guidance. Part IV of the EN, titled “Hearing Aids” gives a brief technical description of the products, i.e., that they are generally electrical appliances with a circuit containing one or more microphones (with or without amplifier), a receiver and a battery. The receiver may be worn internally or behind the ear, or it may be designed to be held in the hand against the ear. Additionally, the EN states that hearing aids of heading 9021 are *restricted* to appliances for *overcoming deafness* (emphasis added). It goes on to explain that certain devices, such as headphones, amplifiers and the like used in conference rooms or by telephonists to improve the audibility of speech are excluded from heading 9021. This is not an exhaustive list of excluded devices.

Online Webster Dictionary defines a “defect” as an imperfection or abnormality that impairs quality, function, or utility.⁴ It defines a “disability” as a physical, mental, cognitive, or developmental condition that impairs, interferes with, or limits a person’s ability to engage in certain tasks or actions or participate in typical daily activities and interactions.⁵ Finally, it defines “deaf” as “lacking or deficient in the sense of hearing.”⁶ “Deaf” people mostly have profound hearing loss, which implies very little or no hearing.⁷ “Deaf” usually refers to a hearing loss so severe that there is very little or no functional hearing.⁸ The Cambridge Dictionary defines “deafness” as “the quality of being unable to hear, either completely or partly.”⁹

The degree of hearing loss can range from mild to profound¹⁰:

(1) Mild Hearing Loss

A person with a mild hearing loss may hear some speech sounds but soft sounds are hard to hear.

(2) Moderate Hearing Loss

A person with a moderate hearing loss may hear almost no speech when another person is talking at a normal level.

(3) Severe Hearing Loss

A person with severe hearing loss will hear no speech when a person is talking at a normal level and only some loud sounds.

⁴ <https://www.merriam-webster.com/dictionary/defect> (last visited May 19, 2021).

⁵ <https://www.merriam-webster.com/dictionary/disability> (last visited May 19, 2021).

⁶ <https://www.merriam-webster.com/dictionary/deafness> (last visited May 19, 2021).

⁷ <https://www.who.int/news-room/fact-sheets/detail/deafness-and-hearing-loss> (last visited May 19, 2021). Also see a table showing a common way to classify hearing loss at <https://www.asha.org/public/hearing/Degree-of-Hearing-Loss/> (last visited May 19, 2021).

⁸ <https://www.washington.edu/doi/how-are-terms-deaf-deafened-hard-hearing-and-hearing-impaired-typically-used> (last visited May 19, 2021).

⁹ <https://dictionary.cambridge.org/us/dictionary/english/deafness> (last visited May 19, 2021).

¹⁰ <https://www.cdc.gov/ncbddd/hearingloss/types.html> (last visited May 19, 2021).

(4) Profound Hearing Loss

A person with a profound hearing loss will not hear any speech and only very loud sounds.

An online article explains what a hearing aid is and how hearing aids help with hearing loss.¹¹ It states:

Hearing aids are small electronic devices that can be highly customized to address different types of hearing loss. All digital hearing aids contain at least one microphone to pick up sound, a computer chip that amplifies and processes sound, a speaker that sends the signal to your ear and a battery for power. More sophisticated models provide additional features, such as direct connection to a smartphone or neural networks.

* * *

A hearing aid amplifies the sounds going into the ear. They are most often prescribed for people who have a type of hearing loss known as “sensorineural,” meaning that some of the tiny hair cells of the inner ear are damaged. The surviving healthy hair cells pick up the sound delivered by the hearing aid and send them as neural signals to the brain via the auditory nerve.

For people with mild-to-moderate hearing loss, standard hearing aids work best. “Power” models are often used for people who have severe-to-profound hearing loss as the batteries require more power.

Based on online research, a hearing aid is a doctor-prescribed device based on the patient’s hearing test result and usually custom-programmed by a hearing care professional to suit the patient’s specific hearing loss and listening needs.

Hearing aids are a kind of assistive listening devices,¹² but not all assistive listening devices are hearing aids. “Hearing aids are the best all-around solution for people with hearing loss, but other assistive listening devices (ALDs) can help you navigate specific communication demands.”¹³ “Some of these devices [ALDs] are made to work specifically with certain hearing aids while others are stand-alone and can be helpful—even if you don’t yet wear hearing aids ... Assistive listening devices include amplified telephones, hearing aid compatible phones and smartphones, television compatible devices, FM systems for public settings, and alerting devices.”¹⁴ Accordingly, heading 9021, as it relates to the provision for “hearing aids”, does not cover all assistive listening devices.

Based on the Hearing Aid Museum website, the personal sound amplifier products (PSAPs) are also considered assistive listening devices.¹⁵ However,

¹¹ <https://www.healthyhearing.com/help/hearing-aids> (last visited May 19, 2021).

¹² <https://www.healthyhearing.com/report/47717-Digital-hearing-aid-history> (last visited May 19, 2021). https://www.hearingaidmuseum.com/gallery/General_Info/GenInfoMisc/info/generalinfo-assistivedevices.htm (last visited May 19, 2021).

¹³ <https://www.healthyhearing.com/help/assistive-listening-devices/fm-systems> (last visited May 19, 2021).

¹⁴ <https://www.healthyhearing.com/help/assistive-listening-devices> (last visited May 19, 2021). See also <https://www.hearingaidmuseum.com/gallery/Miscellaneous/Assistive%20Devices/index-asstdev.htm> (last visited May 19, 2021).

¹⁵ <https://www.hearingaidmuseum.com/gallery/Miscellaneous/Assistive%20Devices/Sonic%20Technology/index-sonictechnology.htm> (last visited May 19, 2021).

the personal sound amplifier products and hearing aids are two different product categories. We understood three principal differences between PSAPs and hearing aids in the following:¹⁶

Difference #1: Class of product

PSAPs are basic sound amplifiers for those who do not have hearing loss. The FDA does not regulate them and says they are designed to “increase environmental sounds for non-hearing impaired consumers.” On the other hand, hearing aids are FDA-regulated medical devices that are intended to compensate for hearing loss and be customized to your needs.

Difference #2: Amplification style

Most PSAPs amplify all sounds within a given radius, even those you don’t want to hear. This can actually damage (instead of help) your hearing. Modern hearing aids, on the other hand, use broadband technology and filters to selectively amplify the sounds you need to hear, while reducing background noise and feedback. This can make a huge difference – for example, in a noisy restaurant where amplifying all sounds equally (a companion’s speech plus background noise) would make it virtually impossible to hear a conversation.

Difference #3: Fit and features

Most PSAPs only consist of a microphone, amplifier and receiver (mini-loudspeaker). In addition, they are only available in standard settings and are typically one size fits all. Hearing aids, however, are custom-programmed by a hearing care professional to suit your specific hearing loss and listening needs. Hearing aids are available with advanced features such as directional microphones, tinnitus control and streaming capabilities. They can also be custom-molded for a secure and ultra-comfortable fit.

This is supported by additional internet research that differentiates hearing aids from other sound amplification devices.¹⁷ In sum, our research has indicated that unlike sound amplification devices such as PSAPs, hearing aids are sophisticated, highly customized devices tailored to a user’s specific hearing deficits. While PSAPs amplify all sounds, hearing aids are programmed to amplify only the sounds a user cannot hear well. Because PSAPs amplify all sounds, they can potentially cause more harm than good to the users and are not recommended as a replacement for hearing aids.

While these personal sound amplifiers may help people hear things that are at low volume or at a distance, the Food and Drug Administration (FDA) wants to ensure that consumers don’t mistake them—or use them as substitutes—for approved hearing aids.

¹⁶ <https://www.miracle-ear.com/hearing-aid-technology/psap-hearing-aids-differences> (last visited May 19, 2021).

¹⁷ See, for example, <https://www.connecthearing.com/blog/hearing-loss/what-the-new-otc-hearing-aid-law-means-for-you/>; <https://www.fda.gov/consumers/consumer-updates/hearing-aids-and-personal-sound-amplifiers-know-difference>; <https://www.fda.gov/regulatory-information/search-fda-guidance-documents/regulatory-requirements-hearing-aid-devices-and-personal-sound-amplification-products-draft-guidance>; <https://www.fda.gov/regulatory-information/search-fda-guidance-documents/regulatory-requirements-hearing-aid-devices-and-personal-sound-amplification-products-draft-guidance>; and <https://www.signia-hearing.com/blog/the-difference-between-hearing-amplifiers-hearing-aids/> (all last visited May 19, 2021).

Hearing aids and PSAPS can both improve one's ability to hear sound; they are both wearable, and some of their technology and function is similar. However, the products are different in that only hearing aids are intended to make up for impaired hearing. PSAPs are not intended to make up for impaired hearing. Instead, they are intended for non-hearing-impaired consumers to amplify sounds in the environment for any number of reasons.

Frequency-specific hearing loss is not something that can be mitigated through the amplification of all sound and using an amplifier where a hearing aid should be used can be dangerous. Personal sound amplifying products are designed to boost environmental hearing for people without hearing loss. Some people might use PSAPs as over-the-counter hearing aids as a way to cut costs and avoid spending money on a certified hearing aid, but audiologists and doctors warn against the practice. Hearing aids perform a complex purpose that depends on the wearer, whereas amplifiers boost all sound.

Hearing aids are usually professionally fitted and fine-tuned to the wearer and help mitigate hearing loss by boosting certain frequencies. Amplifiers simply make things louder, regardless of the frequency or volume. While hearing aids are tailored to hard of hearing people, PSAPs are meant to be used by people with a full range of hearing.

We note that the Food and Drug Administration regulates hearing aids in the United States.¹⁸ Under the FDA Reauthorization Act of 2017, Section 709, Congress outlined certain requirements and set forth a process to establish a separate category of over-the-counter (OTC) hearing aids and the requirements that apply to them. While the FDA may impose certain requirements on hearing aids as medical or OTC devices, these requirements are not controlling regarding classification under the HTSUS. "It is well established that statutes, regulations and administrative interpretations relating to 'other than tariff purposes' are not determinative of Customs classification disputes." *Amersham Corp. v. United States*, 5 CIT 49, 56 (1983). "Articles are classified by the FDA to protect public safety, not as guidance to Customs classification." HQ 085064 dated August 24, 1990. *See also*, HQ 962181 dated January 13, 1999.

In this case, based on guidance from the EN to heading 9021, the commonly understood definitions of "defect", "disability", "deafness" and "hearing aids", and our own research on the topic, we conclude that the instant devices are not hearing aids of heading 9021. As such, they are not excluded from classification under Section XVI by operation of Note 1(m) to Section XVI.

Heading 8518 provides for audio-frequency electric amplifiers. These goods are discussed in Part D of the EN to heading 8518:

Audio frequency amplifiers are used for the amplification of electrical signals of frequencies falling within the range of the human ear. The great majority are based on transistors or integrated circuits, but some are still based on thermionic valves. They are generally powered by a built in power pack which may be fed from the mains or, particularly in the case of portable amplifiers, from electric accumulators or batteries.

The input signals to audio frequency amplifiers may be derived from a microphone, a laser optical disc reader, a pick up cartridge, a magnetic tape head, a radio feeder unit, a film sound track head or some other source of audio frequency electric signals. Generally speaking, the output

¹⁸ See 21 CFR 801.420–21.

is fed into a loudspeaker, but this is not always the case (pre amplifiers can feed into a succeeding amplifier or be incorporated in an amplifier).

Audio frequency amplifiers may contain a volume control for varying the gain of the amplifier, and also commonly incorporate controls (bass boost, treble lift, etc.) for varying their frequency response.

The product at issue in NY N283085 is a retail-ready kit, comprised of a sound amplifier, three plastic earplugs in different sizes, a spare battery, and a plastic storage case. In this case, the sound amplifier provides the essential character of the kit. As such, the correct classification for the hearing amplifier kit is heading 8518, and more specifically, subheading 8518.40.20, by application of GRIs 1, 3 (b) and 6. The products at issue in NY N166443, NY N025447, and NY D80822 are not components of retail sets and are therefore classified under the same provision by application of GRIs 1 and 6.

HOLDING:

By application of GRIs 1, 3 (b) and 6, the hearing amplification kit described in NY N283085 is classified under heading 8518, subheading 8518.40.20, which provides for “Microphones and stands therefor; loudspeakers, whether or not mounted in their enclosures; headphones and earphones, whether or not combined with a microphone, and sets consisting of a microphone and one or more loudspeakers; audio-frequency electric amplifiers; electric sound amplifier sets; parts thereof: Audio-frequency electric amplifiers: Other”. The devices described in NY N166443, NY N025447, and NY D80822 are classified under the same provision by application of GRIs 1 and 6. The column one, general rate of duty for merchandise of this subheading is free.

Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on the internet at <https://hts.usitc.gov/current>.

EFFECT ON OTHER RULINGS:

NY N283085, N166443, N025447, and D80822, dated February 28, 2017, May 31, 2011, April 18, 2008, and August 11, 1998, respectively, are hereby REVOKED.

Sincerely,

CRAIG T. CLARK,

Director

Commercial and Trade Facilitation Division

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U.S. Court of International Trade

Slip Op. 21–71

XI'AN METALS & MINERALS IMPORT & EXPORT CO., LTD., Plaintiff, and SHANXI PIONEER HARDWARE INDUSTRIAL CO., LTD., Consolidated Plaintiff, and BUILDING MATERIAL DISTRIBUTORS, INC., Consolidated Plaintiff, v. UNITED STATES, Defendant, and MID CONTINENT STEEL & WIRE, INC., Defendant-Intervenor.

Before: Leo M. Gordon, Judge
Consol. Court No. 20–00103

[Commerce's *Final Results* sustained.]

Dated: June 9, 2021

Gregory S. Menegaz, J. Kevin Horgan, and Alexandra H. Salzman, deKieffer & Horgan, PLLC of Washington, DC for Plaintiff Xi'an Metals & Minerals Import & Export Co., Ltd.

Jeffrey S. Neeley and Stephen W. Brody, Husch Blackwell, LLP of Washington, DC for Consolidated Plaintiff Shanxi Pioneer Hardware Industrial Co., Ltd.

Lizbeth R. Levinson, Ronald M. Wisla, and Brittney R. Powell, Fox Rothschild LLP of Washington, DC for Consolidated Plaintiff Building Material Distributors, Inc.

Sosun Bae, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice of Washington, DC, for Defendant United States. With her on the brief were *Brian M. Boynton*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director. Of counsel was *Ayat Mujais*, Attorney, U.S. Department of Commerce, Office of Chief Counsel for Trade Enforcement and Compliance of Washington, DC.

Adam Gordon, Lauren Fraid, Jennifer Smith, and Ping Gong, The Bristol Group PLLC of Washington, DC for Defendant-Intervenor Mid Continent Steel & Wire, Inc.

OPINION

Gordon, Judge:

This action involves the U.S. Department of Commerce's ("Commerce") final results of the antidumping ("AD") administrative review issued as *Certain Steel Nails from the People's Republic of China*, 85 Fed. Reg. 22,399 (Dep't of Commerce Apr. 22, 2020) (final results of AD admin. review and final determ. of no shipments) ("*Final Results*"), and the accompanying Issues and Decision Memorandum (Dep't of Commerce Apr. 15, 2020), <https://enforcement.trade.gov/frn/summary/prc/2020-08526-1.pdf> (last visited this date) ("*Decision Memorandum*").

Before the court are the motions for judgment on the agency record under USCIT Rule 56.2 filed by Plaintiff Xi'an Metals & Minerals

Import & Export Co., Ltd. (“Xi’an Metals”), Consolidated Plaintiff Shanxi Pioneer Hardware Industrial Co., Ltd. (“Pioneer”), and Consolidated Plaintiff Building Material Distributors, Inc. (“BMD”). See Mem. in Supp. of Xi’an Metals’ Rule 56.2 Mot. for J. on the Agency R., ECF No. 31¹ (“Xi’an Metals Br.”); Mem. in Supp. of Pioneer’s Rule 56.2 Mot. for J. on the Agency R., ECF No. 29 (“Pioneer Br.”); Mem. in Supp. of BMD’s Rule 56.2 Mot. for J. on the Agency R., ECF No. 32 (“BMD Br.”); see also Def.’s Resp. to Pl.’s Rule 56.2 Mot. for J. on the Agency R., ECF No. 33 (“Def.’s Resp.”); Def.-Intervenor Mid-Continent Steel & Wire Inc.’s Resp. to Pls.’ Rule 56.2 Mots. for J. on the Agency R., ECF No. 36 (“Def.-Intervenor’s Resp.”); Pl.’s Reply Br., ECF No. 41 (“Xi’an Metals Reply”); Reply Br. of Pioneer, ECF No. 39 (“Pioneer Reply”); Reply Br. of BMD, ECF No. 42 (“BMD Reply”). The court has jurisdiction pursuant to Section 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2018),² and 28 U.S.C. § 1581(c) (2018). For the reasons set forth below, the court sustains Commerce’s *Final Results*.

I. Standard of Review

For administrative reviews of antidumping duty orders, the court sustains Commerce’s “determinations, findings, or conclusions” unless they are “unsupported by substantial evidence on the record, or otherwise not in accordance with law.” 19 U.S.C. § 1516a(b)(1)(B)(i). More specifically, when reviewing agency determinations, findings, or conclusions for substantial evidence, the court assesses whether the agency action is reasonable given the record as a whole. *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1350–51 (Fed. Cir. 2006); see also *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951) (“The substantiality of evidence must take into account whatever in the record fairly detracts from its weight.”). Substantial evidence has been described as “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *DuPont Teijin Films USA v. United States*, 407 F.3d 1211, 1215 (Fed. Cir. 2005) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Substantial evidence has also been described as “something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency’s finding from being supported by substantial evi-

¹ All citations to parties’ briefs and the agency record are to their confidential versions unless otherwise noted.

² Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2018 edition.

dence.” *Consolo v. Fed. Mar. Comm’n*, 383 U.S. 607, 620 (1966). Fundamentally, though, “substantial evidence” is best understood as a word formula connoting reasonableness review. 3 Charles H. Koch, Jr., *Administrative Law and Practice* § 9.24[1] (3d ed. 2021). Therefore, when addressing a substantial evidence issue raised by a party, the court analyzes whether the challenged agency action “was reasonable given the circumstances presented by the whole record.” 8A *West’s Fed. Forms*, National Courts § 3.6 (5th ed. 2021).

Separately, the two-step framework provided in *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984), governs judicial review of Commerce’s interpretation of the Tariff Act. See *United States v. Eurodif S.A.*, 555 U.S. 305, 316 (2009) (An agency’s “interpretation governs in the absence of unambiguous statutory language to the contrary or unreasonable resolution of language that is ambiguous.”).

II. Discussion

In the underlying administrative review, Commerce selected three mandatory respondents for examination pursuant to the sampling methodology of 19 U.S.C. § 1677f-1(c)(2)(A) after finding conditions that raised enforcement concerns. *Decision Memorandum* at 9–10; see generally *Sample Methodology Notice*, 78 Fed. Reg. 65,963, 65,964–65 (“[T]he Department will normally rely on sampling for respondent selection purposes in AD administrative reviews when the following conditions are met: (1) There is a request by an interested party for the use of sampling to select respondents; (2) the Department has the resources to examine individually at least three companies for the segment; (3) the largest three companies (or more if the Department intends to select more than three respondents) by import volume of the subject merchandise under review account for normally no more than 50 percent of total volume; and (4) information obtained by or provided to the Department provides a reasonable basis to believe or suspect that the average export prices and/or dumping margins for the largest exporters differ from such information that would be associated with the remaining exporters.”). Specifically, Commerce found that:

in each of the nine prior administrative reviews under this order, Stanley has consistently been one of the largest exporters, and for this reason has been selected as a mandatory respondent in those prior reviews. Stanley consistently has been a cooperative respondent, its average calculated weighted average dumping margin over the previous nine administrative reviews is 6.76 percent. In contrast, in each of the nine prior administrative

reviews, the other mandatory respondents either obtained a much higher calculated margin, did not qualify for a separate rate, or were otherwise non-cooperative and received a margin based on total {AFA}. We further note that, in the one new shipper review conducted under this order, the respondent received a calculated margin of 34.14 percent (significantly higher than Stanley's 15.43 percent margin for the partially overlapping period of review). Thus, the average margin for respondents other than Stanley, including non-calculated margins, is 74.96 percent. Even when we do not include those non-calculated margins, the average margin for respondents other than Stanley is 57.00 percent through the preliminary results of the 2016–2017 administrative review. Moreover, throughout the history of the proceeding, the China-wide rate, assigned to those respondents who have failed to demonstrate their independence from the China-wide entity, has consistently been 118.04 percent.

Decision Memorandum at 9–10. The mandatory respondents selected for examination were Stanley Works (Langfang) Fastening Systems Co., Ltd. and Stanley Black & Decker, Inc. (collectively “Stanley”), Shanxi Pioneer Hardware Industrial Co., Ltd., and Tianjin Universal Machinery Imp. & Exp. Corporation (“Tianjin Universal”). *See id.* at 10.

In the *Final Results*, Commerce calculated a 2.15% margin for Stanley, a 118.04% margin for Pioneer, and a 118.04% margin for Tianjin Universal. *See Final Results*, 85 Fed. Reg at 22,400. Commerce determined that both Pioneer and Tianjin Universal failed to cooperate in the subject administrative review to the best of their ability, and accordingly, applied total adverse facts available (“total AFA”). *See Decision Memorandum* at 4–5. Commerce averaged the margins of the three mandatory respondents, including the margins based on total AFA, weighted by the import share of their strata, to derive a “sample” margin of 41.75%. *See Calculation of the Sample Margin for Respondents Not Selected for Individual Examination*, PD³ 264. Commerce applied this 41.75% rate to non-selected respondents who had established that they operated free from Chinese Government control.

³ “PD” refers to a document in the public administrative record, which is found in ECF No. 25–4, unless otherwise noted. “CD” refers to a document in the confidential administrative record, which is found in ECF No. 25–5, unless otherwise noted.

Pioneer challenges Commerce’s decision to apply total AFA and assign a 118.04% rate to Pioneer due to its failure to report its factors of production (“FOPs”) on a CONNUM specific⁴ basis as unlawful and unreasonable. *See generally* Pioneer Br. Xi’an Metals and BMD are importers assigned the separate rate margin of 41.75% and challenge Commerce’s determination to include the total AFA rates of Pioneer and Tianjin Universal in the calculation of the separate rate as unlawful and unreasonable. *See generally* Xi’an Metals Br. & BMD Br.

A. Pioneer’s Challenge to AFA

Commerce may rely on “facts otherwise available,” if an interested party:

withholds information that has been requested by [Commerce] ... fails to provide such information by the deadlines for submission of the information or in the form and manner requested ... significantly impedes a proceeding under this subtitle, or provides such information but the information cannot be verified-[Commerce] shall ... use facts otherwise available in reaching the applicable determination under this title.

19 U.S.C. § 1677e(a)(2). Additionally, Commerce may apply facts available with an adverse inference:

[i]f [Commerce] ... finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information ..., [Commerce] ... may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available.

19 U.S.C. § 1677e(b)(1).

In the preliminary results, Commerce calculated a margin for Pioneer based on the sales and FOP data submitted by Pioneer. *See Certain Steel Nails from the People’s Republic of China*, 84 Fed. Reg. 55,906, PD 241 (Dep’t of Commerce Oct. 18, 2019) (prelim. results of AD admin. review and prelim. determ. of no shipments), and accompanying Preliminary Decision Memorandum, PD 224. In the *Final Results*, Commerce determined that Pioneer failed to comply with requests for information and did not act to the best of its ability. *See*

⁴ A “CONNUM” is a contraction of the term “control number,” and is Commerce jargon for a unique product (defined in terms of a hierarchy of specified physical characteristics determined in each antidumping proceeding). All products whose product hierarchy characteristics are identical are deemed to be part of the same CONNUM and are regarded as “identical” merchandise for purposes of the price comparison. The hierarchy of product characteristics defining a unique CONNUM varies from case to case depending on the nature of the merchandise under investigation.

Decision Memorandum at 32. Consequently, Commerce applied total AFA to Pioneer and assigned it a rate of 118.04%. See *Final Results*.

In the *Final Results*, Commerce determined that Pioneer had “repeatedly withheld requested information, significantly impeded the proceeding, failed to cooperate by not acting to the best of its ability” based on Pioneer’s failure to comply with Commerce’s instructions to report CONNUM-specific FOPs or “to maintain appropriate data such that it could properly report FOPs.” See *Decision Memorandum* at 32–33, 35 (“By not reporting CONNUM-specific FOPs as requested, Pioneer has withheld information that has been requested of it, failed to provide data in the form and manner requested, and has significantly impeded this proceeding. Therefore, the application of facts available is appropriate pursuant to section 776(a) of the Act.”). Commerce found that “Pioneer’s refusal to make any attempt to develop more accurate and specific FOPs demonstrates a clear failure to report necessary information in the form and manner requested.” *Id.* at 33. Commerce explained that it would apply an adverse inference in selecting facts available because of Pioneer’s failure to develop an alternate reporting methodology “that would capture product-specific consumption,” despite Commerce explicitly asking Pioneer to develop such a methodology in a supplemental questionnaire. See *id.* at 34. Accordingly, Commerce determined:

because Pioneer failed to cooperate by not maintaining adequate records and by not developing a methodology to report product-specific costs (information which is essential to the accurate calculation of Pioneer’s dumping margin), Pioneer failed to act to the best of its ability to comply with a request for information. Therefore, we use an inference adverse in selecting the facts otherwise available pursuant to section 776(b) of the Act.

Id.

At the conclusion of the third administrative review (“AR3”), Commerce advised respondents that the agency intended “to require ... that respondents ... report all FOPs data on a CONNUM-specific basis using all product characteristics in subsequent reviews.” *Id.* at 32 (internal quotation and citation omitted). Here, Commerce noted that by the time of this review (the 10th AR) “documentation and data collection requirements should now be fully understood,” and expected respondents to submit data on a CONNUM-specific basis. *Id.* (internal quotation and citation omitted). Despite that expectation, Pioneer failed to explain why it was unable to provide the information in the form and manner requested by Commerce, nor did Pioneer

suggest any alternative methods by which it could submit similar information, despite having been on notice of Commerce's reporting requirement since AR3.

Pioneer contends that Commerce's requirement that respondents report CONNUM-specific costs amounts to a "rule" that Commerce "promulgated ... without proper notice and comment rule making." See Pioneer Br. at 5–8 (citing Administrative Procedure Act ("APA")). Pioneer also argues that "Commerce's rule regarding CONNUM-specific reporting for nails is arbitrary and capricious because Commerce never explains why its requirements are necessary in this case but not for other products." *Id.* at 8–15. Pioneer further maintains that Commerce provided insufficient notice as to its CONNUM-specific reporting requirement; that this reporting requirement violated the agency's own regulations; that Commerce did not explain why total adverse facts available was necessary or warranted when Pioneer cooperated by supplying the requested information in its normal books and records; and that Commerce's application of AFA to Pioneer is unreasonable. See *id.* at 15–30.

The court now turns to Pioneer's argument that the CONNUM-specific reporting requirement is tantamount to a "rule" promulgated without the requisite notice-and-comment rulemaking required under the APA. Defendant disagrees, contending that the APA's notice and comment requirement "applies to legislative rules and does not apply to 'interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice.'" Def.'s Resp. at 12–13 (quoting *Apex Frozen Foods Private Ltd. v. United States*, 40 CIT ___, ___, 144 F. Supp. 3d 1308, 1319–20 (2016), *aff'd*, 862 F.3d 1337 (Fed. Cir. 2017)). In *Apex Frozen Foods*, the court adopted the U.S. Court of Appeals for the District of Columbia Circuit's framework for determining whether an agency rule is a legislative rule that must undergo notice-and-comment rulemaking:

- (1) whether in the absence of the rule there would not be an adequate legislative basis for enforcement action or other agency action to confer benefits or ensure the performance of duties, (2) whether the agency has published the rule in the Code of Federal Regulations, (3) whether the agency has explicitly invoked its general legislative authority, or (4) whether the rule effectively amends a prior legislative rule.

See *Apex Frozen Foods*, 40 CIT at ___, 144 F. Supp. 3d at 1320 (citing *Am. Mining Cong. v. Mine Safety Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993)). The facts of this case only implicate the third factor as to whether the CONNUM-specific reporting requirement constitutes a legislative rule. The short answer is "no."

Despite Pioneer's contention to the contrary, Commerce's adoption of a CONNUM-specific reporting requirement does not amount to the implementation of a legislative rule that would require notice-and-comment rulemaking. While arguing that 19 U.S.C. § 1677b "expresses a preference for Commerce to rely on the company's normal books and records if kept in accordance with generally accepted accounting principles," *see* Pioneer Br. at 13, Pioneer ignores the further requirement of the statute that such records must also "reasonably reflect the costs associated with the production and sale of the merchandise." 19 U.S.C. § 1677b(f)(1)(A). Here, Commerce found that Pioneer's failure to submit its cost information on a CONNUM-specific basis meant that Pioneer's cost information did not reasonably reflect the costs of production of the merchandise. *See Decision Memorandum* at 32–35 (emphasizing that CONNUM-specific cost information Commerce requested was "information which is essential to the accurate calculation of Pioneer's dumping margin"). As Commerce explained:

[a]fter initially not requiring product-specific reporting in early segments of this proceeding, in the third administrative review, in 2013, we stated that Commerce 'intends to require ... [that] respondents for this case report all FOPs data on a CONNUM-specific basis using all product characteristics in subsequent reviews, as documentation and data collection requirements should now be fully understood.' Pioneer, by its own account, did not heed our instructions to maintain appropriate data such that it could properly report FOPs.

Id. at 32 (quoting *Certain Steel Nails from the People's Republic of China*, 78 Fed. Reg. 16,651 (Dep't of Commerce Mar. 18, 2013) (Final Results of AR3), and accompanying Issues and Decision Memorandum at cmt. 5).

In announcing in AR3 that it would require respondents to report CONNUM-specific data, Commerce determined that it needed data that more accurately reflected the costs associated with the production and sale of the subject merchandise. *See id.* Commerce's pronouncement reflects a statement of policy rather than the agency's explicit invocation of general legislative authority, which triggers the notice and comment requirement of the APA. *See Apex Frozen Foods*, 40 CIT at ___, 144 F. Supp. 3d at 1320 n. 12 (citing Attorney General's Manual on the Administrative Procedure Act (1947)). Pioneer fails to point to anything in the record that reflects the explicit invocation of Commerce's general legislative authority. It is not sufficient for a plaintiff, such as Pioneer, to make a general allegation; it must do something more to demonstrate a violation of the notice and comment

provision. Accordingly, the court is not persuaded by Pioneer's argument that Commerce's reporting requirements violated the APA.

Pioneer argues that Commerce's CONNUM-specific reporting requirements are more rigorous for nails as compared to other products, and therefore Commerce's requirements are arbitrary and capricious. *See Pioneer Br.* at 8–12. In response, Defendant maintains that "Pioneer ... mischaracterizes Commerce's alleged lack of explanation as to why CONNUM-specific factors of production reporting is necessary for reviews involving nails from China, but not most other products." *Def.'s Resp.* at 11. Defendant emphasizes that CONNUM-specific reporting is not unique to nails, noting that "the default non-market economy questionnaire, which was issued to Pioneer in the underlying proceeding, is issued in all other antidumping administrative reviews involving non-market economy countries." *Id.* (internal citations omitted). Pioneer's argument is misplaced, as the default questionnaire for non-market economy AD administrative reviews makes clear. In particular, the default questionnaire states:

If you are not reporting factors of production using actual quantities consumed to produce the merchandise under review on a CONNUM-specific basis, please provide a detailed explanation of all efforts undertaken to report the actual quantity of each {factor of production} consumed to produce the merchandise under review on a CONNUM-specific basis.

See id. (quoting the AD Questionnaire at D-2, PD 98).

In this review, Commerce determined that CONNUM-specific FOP data was essential in order to calculate costs in an accurate manner, and that Pioneer's failure to report such data prevented Commerce from accurately calculating Pioneer's costs. *See Decision Memorandum* at 34. The court sees no merit in Pioneer's argument that Commerce acted arbitrarily and capriciously. Pioneer is unable to show how Commerce's CONNUM-specific reporting requirements in this review exceed the reporting expectations that Commerce maintains in other AD administrative reviews involving non-market economy countries, nor has Pioneer demonstrated that this CONNUM-specific reporting requirement is unreasonable.

Relatedly, Pioneer also challenges Commerce's refusal to accept their normal books and records despite the fact that those records did not comply with Commerce's CONNUM-specific reporting requirement. Specifically, Pioneer argues that "Commerce never provided any analysis of why CONNUM-specific reporting and recordkeeping was needed with respect to the nails industry." *See Pioneer Br.* at 22–25. Pioneer relies on the decision by the U.S. Court of Appeals for

the Federal Circuit (“Federal Circuit”) in *Hynix Semiconductor, Inc. v. United States*, 424 F.3d 1363 (Fed. Cir. 2005), contending that the Federal Circuit held that Commerce must explain why a respondent’s records that were kept according to generally accepted accounting practices (“GAAP”) are not reasonably reflective of its costs before finding that those records are unsuitable for FOP calculations. *Id.* at 23.

In *Hynix*, over the course of the proceeding the respondent switched from expensing its research and development (“R&D”) costs to amortizing them, and it was uncontested that both accounting methodologies were in accordance with the respondent’s home nation GAAP. 424 F.3d at 1369–70. Commerce refused to accept the respondent’s amortized R&D expenses, and instead calculated respondent’s costs by expensing respondent’s R&D costs. *Id.* Commerce explained that it did not need to accept respondent’s amortized R&D expenses, noting that although the amortized R&D expenses were in accordance with GAAP, the respondent’s amortized expense calculations would result in underreporting of the respondent’s expenses in the current year. *Id.* at 1370. The Federal Circuit reversed the trial court’s decision to require Commerce to accept respondent’s amortized expenses, and instead remanded the matter to allow Commerce to expense the respondent’s R&D costs and reject respondent’s GAAP-compliant records of amortized R&D expenses. *Id.* The appellate court emphasized that 19 U.S.C. § 1677b(f)(1)(A) permits Commerce to disregard a respondent’s GAAP-compliant records upon finding “that the costs do not reasonably reflect the costs of production and should not, therefore, be used.” *See id.*

Here, Commerce explained that CONNUM-specific reporting yields data more specific to the costs of the subject merchandise than standard GAAP records. *See Decision Memorandum* at 32–33. Pioneer acknowledges that using GAAP reporting *may not reflect* the actual cost of the subject merchandise. *See Pioneer Br.* at 23–24 (“Products in all cases investigated by Commerce have variations in the physical characteristics of different models. If there is a difference in physical characteristics or yield loss, how great are those differences such that only CONNUM-specific reporting will prevent any distortions? Are these concerns even applicable to the nails produced and sold by Pioneer?”). Critically though, Commerce accepts GAAP records only if they “reasonably reflect the costs associated with the production and sale of the merchandise,” and the possibility of distortion can preclude Commerce from accepting such records. *See* 19 U.S.C. § 1677b(f)(1)(A). In this review, Commerce considered CONNUM-

specific data to be essential for the accurate calculation of costs. See *Decision Memorandum* at 34. Pioneer contends that “[t]o suggest that failure to report FOPs on a size and weight specific basis significantly distorts the margin defies common sense given the minor physical variations of this product.” See Pioneer Br. at 23–25. However, Pioneer does not explain how the data it cited precluded the possibility of the margin being significantly distorted. Similarly, although Pioneer argues that whatever distortion may have resulted from Pioneer’s GAAP reporting would not have been “even remotely close to [the] 118.04 percent” rate, see *id.*, Pioneer fails to demonstrate that the AFA rate applied to it was unreasonable. Given the record, the court cannot agree that Commerce unreasonably determined that Pioneer’s reported FOP data may not reflect the costs associated with the production of subject merchandise.

Pioneer next contends that it lacked sufficient notice of Commerce’s CONNUM-specific reporting requirement that the agency expressly adopted in AR3. See Pioneer Br. at 17–19. However, Pioneer acknowledges that the court has, in prior decisions, upheld Commerce’s announcement of its intent to require CONNUM-specific reporting as providing sufficient notice for respondents to reasonably be aware of and comply with the change in subsequent reviews. See Pioneer Br. at 5 (citing *An Giang Fisheries v. United States*, 42 CIT ___, 287 F. Supp. 3d 1361 (2018) and *Thuan An Prod. Trading & Serv. Co. v. United States*, 42 CIT ___, 348 F. Supp. 3d 1340 (2018)); see also *Decision Memorandum* at 35 (relying on *An Giang* and *Thuan An* as support for concluding respondents were on notice of CONNUM-specific reporting requirement in underlying review). Given that Commerce expressly announced its CONNUM-specific reporting requirement in AR3, and maintains CONNUM-specific reporting requirements as part of its general AD questionnaire, the court does not agree that Commerce failed to provide reasonable notice of its reporting requirements in this review.

Pioneer also argues that Commerce’s insistence that Pioneer report FOP information on a CONNUM-specific basis violates the agency’s own regulations; however, Pioneer only cites generally to provisions in 19 C.F.R. § 351.401(g), none of which prohibit Commerce’s CONNUM-specific FOP reporting requirement. See Pioneer Br. at 15–19. Rather, those regulatory provisions provide that the agency “may consider allocated expenses and price adjustments when transaction-specific reporting is not feasible, provided ... that the allocation method used does not cause inaccuracies or distortions.” 19 C.F.R. § 351.401(g)(1); see also 19 C.F.R. § 351.401(g)(2) & (g)(3).

Here, Commerce provided Pioneer with multiple opportunities to report its factors of production on a CONNUM-specific basis, and noted that even if Pioneer's normal books and records did not reflect this information, Pioneer could have provided an alternative methodology to "reasonably capture product-specific consumption." See *Decision Memorandum* at 32–34. Commerce's refusal to accept Pioneer's normal books and records as sufficient, and to excuse Pioneer's failure "to make any attempt to develop more accurate and specific FOPs," did not violate 19 C.F.R. § 351.401(g). Pioneer's contention that Commerce "has denied respondent the opportunity to use another allocation methodology by requiring a more specific method of reporting and recordkeeping," see Pioneer Br. at 16, is not supported by the record. Indeed, as the record demonstrates, Pioneer failed to even provide more than short, conclusory statements as to why it could not comply with Commerce's requests, much less actually attempt to develop a methodology. See *Decision Memorandum* at 32 ("Pioneer simply responded that it could not provide FOPs on such a basis, because it does not record CONNUM/product-specific FOP consumption in its accounting system. In [response to] a supplemental questionnaire, ... Pioneer again summarily responded that it had 'no cost records that would support any other allocation methodology.'"). Accordingly, the court is not persuaded by Pioneer's argument that Commerce violated its own regulations in applying AFA to Pioneer.

Given Commerce's longstanding reporting requirements, of which Pioneer was or should have been aware, as well as Commerce's multiple requests for CONNUM-specific FOP information and Pioneer's refusal to develop an alternative reporting methodology, the court sustains Commerce's finding that Pioneer failed to cooperate and to act to the best of its ability, thereby justifying the use of AFA.

B. Calculation of the "Sample" Rate

Xi'an Metals and BMD ("Separate Rate Plaintiffs") challenge as unlawful Commerce's inclusion of the AFA rates assigned to two of the three mandatory respondents in the agency's calculation of the "sample rate" assigned to respondents who were not individually reviewed. Separate Rate Plaintiffs' legal arguments parallel those raised in challenges to the previous administrative review and addressed in *Shanxi Hairui Trade Co. v. United States*, 45 CIT ___, 2021 WL 1291671 (Apr. 7, 2021), *appeal filed*, (Fed. Cir. Jun. 4, 2021). See Xi'an Metals Br. at 5–12; BMD Br. at 4–7.

The Separate Rate Plaintiffs argue that although 19 U.S.C. § 1673d was "written to address investigations, [Commerce], as upheld by this Court, has consistently relied upon this section of the statute when

determining separate rates in reviews.” Xi’an Metals Br. at 5. Separate Rate Plaintiffs contend that, “following the plain and unambiguous meaning” of § 1673d(c)(5)(A) and the attendant legislative history indicating the prohibition on the inclusion of AFA rates, Commerce’s inclusion of AFA rates in the sample rate calculation was unlawful.⁵ *Id.* at 5 & 9; BMD Br. at 4–6. Xi’an Metals specifically argues that Commerce’s decision to rely on § 1673d in the context of administrative reviews conducted pursuant to § 1677f-1(c)(2)(B) but not administrative reviews conducted pursuant to § 1677f-1(c)(2)(A) interprets § 1673d “to apply to one situation and not another, when the statute itself makes no distinction.” Xi’an Metals Br. at 5–6; Xi’an Metals Reply at 2–4. The Separate Rate Plaintiffs cite various decisions by this Court and the Federal Circuit in support of their position. *See* Xi’an Metals Br. at 9–11; BMD Br. at 8–10 (citing, *e.g.*, *Albemarle Corp. v. United States*, 821 F.3d 1345 (Fed. Cir. 2016); *Changzhou Haud Flooring Co. v. United States*, 848 F.3d 1006 (Fed. Cir. 2017); *Yangzhou Bestpak Gifts & Crafts Co. v. United States*, 716 F.3d 1370 (Fed. Cir. 2013); *Changzhou Wujin Fine Chem. Factory Co. v. United States*, 701 F.3d 1367 (Fed. Cir. 2012); *Bosun Tools Co. v. United States*, 44 CIT ___, 463 F. Supp. 3d 1309 (2020)). The problem for Separate Rate Plaintiffs, however, is that none of the cited cases address Commerce’s calculation of a sample rate under § 1677f-1(c)(2)(A).

As the court explained in *Shanxi Hairui*, Separate Rate Plaintiffs’ arguments about Commerce’s reliance on § 1673d in prior administrative reviews ignores the fact that under step two of *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), an agency is free to change its mind and adopt another interpretation of a silence in the statutory regime. Although Separate Rate Plaintiffs have demonstrated that Commerce has previously relied upon § 1673 in calculating the separate rate in some administrative reviews, it is undisputed that Commerce formally adopted a new policy in 2013, namely, the agency will not rely on § 1673 in administrative reviews under certain circumstances. *See Sample Methodology Notice*, 78 Fed. Reg. at 65,964–65 & 65,968–69 (explaining that Commerce would use sampling methodology under 19 U.S.C. § 1677f-1(c)(2)(A) for AD administrative reviews when certain conditions were met, and Commerce would include “all rates in the sample,” including AFA rates).

⁵ While the Separate Rate Plaintiffs’ arguments reference the “plain meaning” of the relevant statutory provisions, they acknowledge that the statute is silent as to the precise question at issue. *See* BMD Reply at 2 (“It is undisputed that the sampling statute (19 U.S.C. § 1677f-1(c)(2)(A)) is silent with regard to how Commerce is to calculate the rate for non-selected companies where sampling under Subparagraph A is the method of respondent selection.”).

While Commerce's prior interpretations are relevant (including its acknowledgment that it has routinely relied upon § 1673 in administrative reviews conducted under § 1677f-1(c)(2)(B)), and do curb its discretion by requiring a reasonable explanation that accounts for its prior approach, Commerce has provided that reasonable explanation for its decision to not rely on § 1673 in its rate calculation for the underlying review. See *Decision Memorandum* at 8–14. Accordingly, the Separate Rate Plaintiffs' arguments contesting the legality of Commerce's inclusion of AFA rates in the calculation of the sample rate fail for the same reasons set forth in *Shanxi Hairui*.

While the analysis set forth in *Shanxi Hairui* explains why Commerce's sample rate calculation methodology is permissible, it does not completely resolve the Separate Rate Plaintiffs' challenge to the sample rate calculated in this action. In addition to challenging the legality of Commerce's rate calculation methodology, the Separate Rate Plaintiffs here contend that Commerce acted unreasonably in *applying* its sampling methodology (including the sample rate calculation) in the underlying review. See *Xi'an Metals Br.* at 7; *BMD Br.* at 7–11 (“Even If Permitted By Statute, Commerce's Approach Is Not Reasonable and Thus Should be Reversed Under General Principles of Fairness in the Administration of the Antidumping Law”).

Xi'an Metals highlights that in the subject review Commerce “sampled only three respondents, two of whom received a total AFA margin.” See *Xi'an Metals Br.* at 7 (distinguishing court's deference to Commerce's sampling methodology in *Asociacion Colombiana de Exportadores de Flores v. United States*, 13 CIT 13, 704 F. Supp. 1114 (1989), where Commerce selected 28 sample respondents). Beyond this lone critique of Commerce's selected sample size, however, Separate Rate Plaintiffs fail to develop any argument challenging the reasonableness of Commerce's selected sample size. Commerce explained that the sample here was selected by “a stratified random PPS [probability proportion to size] sampling procedure.” *Decision Memorandum* at 10. Commerce found that while this review covers 212 individually-named companies, it would not be feasible to individually examine all known producers/exporters and instead would conduct a review of a statistically valid sample of respondents. See *Respondent Selection Sampling Memo* at 3–4, PD 84.

Commerce determined that it had the resources to individually examine three respondents, from a pool of approximately 20 companies that qualified for separate rate status. *Id.* at 6, 14. Commerce explained that its selection of respondents by sampling was in accord with the factors set forth in its *Sampling Methodology Notice*. *Id.* at 8. Commerce highlighted its enforcement concern that “as exporters

accounting for smaller volumes of subject merchandise become aware that they are effectively excluded from individual examination by Commerce's respondent selection methodology, they may decide to lower their prices as they recognize that their pricing behavior will not affect the AD rates assigned to them." *Decision Memorandum* at 9 (citing the *Sampling Methodology Notice*). Commerce also noted that its decision to use sampling was bolstered by the ninth administrative review, where "the pattern of non-participation continued with one respondent failing to participate after being selected using the sampling method." *Id.* at 10. While the Separate Rate Plaintiffs may decry the number of companies that Commerce determined to individually examine, they failed to demonstrate that Commerce's decision to select only three individual respondents was unreasonable.

In fact, Commerce's decision to use sampling was prompted by Defendant-Intervenor Mid Continent Steel & Wire, Inc.'s ("Mid Continent") request, as Mid Continent detailed "the history of separate rate companies' exploitation of Commerce's reliance upon 19 U.S.C. § 1677f-1(c)(2)(B) by requesting their own reviews and obtaining separate rate status with the goal of free-riding on the historically low margin associated with the largest exporter reviewed (Stanley) and with no real intention of being examined, and when they are selected for individual examination, they refuse to participate, initially participate but cease participating at a point when it is simply too late for Commerce to select a replacement respondent, or, if they complete the review, are found not to be eligible for a separate rate, or receive a very high calculated margin or AFA margin." Def.-Intervenor's Resp. at 16 (citing Mid Continent's Request for Sampling at 6-18, PD 58). Defendant-Intervenor further notes that "this pattern of non-participation continued even in the administrative review on appeal. When Universal was selected as one of the mandatory respondents, despite submitting a separate rate certification (just as Xi'an and the separate rate respondents from whom BMD imported subject nails did), and 'cooperating' as far as submitting materials to establish their separate rate status (as Xi'an and BMD claimed in their opening briefs), it failed to respond to the antidumping questionnaire issued by Commerce and was assigned an AFA rate." Def.-Intervenor's Resp. at 17 (citing *Decision Memorandum* at 13). Given the record and Commerce's reasonable explanation for its sampling methodology applied in this review, the court cannot conclude that Commerce acted unreasonably in deciding to sample only three companies as the basis for calculating the sample rate.

In the context of their overall challenge, the Separate Rate Plaintiffs portray themselves as “cooperative.” *See, e.g., Xi’an Metals Br.* at 7–8; *BMD Br.* at 10–11. Commerce, however, expressed concerns regarding potential rate manipulation by “cooperative” separate rate respondents that have no intention of complying if selected for individual investigation, and thus determined that inclusion of AFA rates in the sample rate calculation was appropriate. Notably, the court previously sustained Commerce’s inclusion of individually calculated AFA rates in the sample rate, concluding that Commerce’s reliance on a random sampling methodology eliminates the threat of improper application of AFA to “cooperative” respondents. *See Laizhou Auto Brake Equip. Co. v. United States*, 32 CIT 711, 724 (2008) (“It is important to note that Commerce is not cherry picking here, nor is there anything arbitrary about the way it is constructing this sample This Court therefore need not address Plaintiffs’ contention that Commerce’s approach ‘punishes fully cooperative parties by assigning them a rate unfairly inflated by the non-cooperation of [another] party,’ as this is more a moral argument than a legal one.”). As Commerce explained here, “[b]ecause Commerce is constructing a sample that is intended to be representative of the population as a whole, it has included all the observations in the sample rate, including the AFA rates. Disregarding these actual observations would be contrary to the very principle of random sampling and would invalidate the sample since the sample is supposed to be indicative of the population as a whole.” *Decision Memorandum* at 13. While the Separate Rate Plaintiffs seek to discredit the rationale in *Laizhou* as effectively overruled by subsequent precedent, the court is not persuaded. Separate Rate Plaintiffs’ reliance on those cases is misplaced, as they arose outside of the sampling context.

The Separate Rate Plaintiffs also argue that the sample rate assigned by Commerce is not reasonably reflective of respondents’ potential dumping margins. *See BMD Br.* at 7–10; *Xi’an Metals Br.* at 12–15. In their view, although the inclusion of AFA rates may be necessary to preserve the validity of the sample, Commerce’s rate calculation must still be supported by substantial evidence confirming that the resultant sample rate is reflective of the economic reality. *See Albemarle*, 821 F.3d at 1354 (citing *Bestpak* for the proposition that “accuracy and fairness must be Commerce’s primary objectives in calculating a separate rate for cooperating exporters”); *Bestpak*, 716 F.3d at 1379–80 (“rate determinations for nonmandatory, cooperating separate rate respondents must also bear some relationship

to their actual dumping margins”); *Bosun Tools*, 44 CIT at ____, 463 F. Supp. 3d at 1318 (“It does not stand to reason that the statutory directive not to consider ‘commercial reality’ in the AFA context obviated the fairness and accuracy concerns identified by *Bestpak* when applying a separate statutory provision to cooperative respondents.”). Specifically, Xi’an Metals argues that “[i]n sum, a margin used to deter non-cooperating mandatory respondents that is demonstratively higher than the history of dumping in the Order generally, is *not* reasonably reflective of the dumping margin of cooperating separate rate companies.” Xi’an Metals Reply at 9. Xi’an Metals further notes that as it previously fully cooperated with Commerce’s individual investigation during the fifth administrative review, Commerce’s application of AFA in this administrative review is particularly unrepresentative. See Xi’an Metals Br. at 13–14.

Unfortunately, Separate Rate Plaintiffs have not identified anything in the record showing that the sample rate calculated using Stanley’s calculated margin and Universal’s and Pioneer’s AFA rates is not accurate or does not bear a reasonable relationship to their actual dumping margins. Instead, Separate Rate Plaintiffs rely primarily on the precedent previously addressed and distinguished in this opinion. See *supra* at 19–20 (distinguishing cases listed in BMD Br. at 7–10 & Xi’an Metals Br. at 12–14).

Here, BMD argues that “Commerce’s application of an all others rate based on total AFA is especially unreasonable given that the only calculated rate (for Stanley) in this review is an extremely low 2.11%” compared to the all-others rate assigned to non-investigated respondents of 41.75%. See BMD Br. at 10–11. Separate Rate Plaintiffs note that although Commerce justifies “the high all others rate in this review by claiming that the average calculated rates for companies other than Stanley over the course of the last nine reviews is 57%,” the only respondent “that has fully cooperated in all segments of these past nine reviews and its rate has decreased over time” from 11.95% in the sixth review to 2.11% in the tenth review. Xi’an Metals Br. at 14; BMD Br. at 11.

Separate Rate Plaintiffs’ arguments that their rates should be similar to that of Stanley ignore Commerce’s findings in the previous administrative reviews that the separate rate respondents’ dumping behavior was different than that of Stanley. In fact, Commerce’s finding in this review that separate rate respondents engaged in distinctly different dumping than Stanley was a key basis for Commerce’s decision to select respondents by sampling in the first place. See Respondent Selection Sampling Memo at 2 (“Given the large disparity between Stanley’s calculated margins and the margins as-

signed to the other respondents in the past nine administrative reviews, we find that [there is a reasonable basis to believe or suspect that the average export prices and/or dumping margins for Stanley differ from such information that would be associated with the remaining exporters.]”). Accordingly, the court is not persuaded by Separate Rate Plaintiffs that Commerce acted unreasonably in calculating a sample rate that exceeded the individual rate assigned to Stanley.

Separate Rate Plaintiffs’ reliance on *Bosun Tools* is misplaced for the same reason. See BMD Br. at 9. In *Bosun Tools*, the court held that Commerce’s separate rate calculation under the “expected method” of § 1673d(c)(5)(B) was unreasonable because Commerce failed “to address evidence which detracts from its determination.” 44 CIT at ___, 463 F. Supp. 3d at 1318. Specifically, the court observed that the separate rate respondents in that matter had “put forth evidence that the expected method would result in an unreasonable rate.” *Id.* (citing Separate Rate Plaintiffs’ brief explaining that “‘there is a history of low calculated dumping margins,’ including margins assigned to Bosun following individual examination”). Here, however, Separate Rate Plaintiffs have not demonstrated that Commerce failed to consider anything that challenges the reasonableness of the 41.75% sample rate. In response to Commerce’s finding that the sample rate calculated was reasonable as the “average calculated rates for companies’ other than Stanley over the course of the last nine reviews is 57%,” Separate Rate Plaintiffs continue to focus on Stanley’s low rate, which declined over the course of prior administrative reviews, and insist that Stanley’s rate and cooperation should detract from the reasonableness of a high sample rate calculation. See Xi’an Metals Br. at 14 (citing *Decision Memorandum* at 10); BMD Br. at 11. Again, Separate Rate Plaintiffs ignore Commerce’s findings here that the separate rate respondents’ dumping behavior was different than that of Stanley. For the reasons provided, Separate Rate Plaintiffs have not persuaded the court that Commerce’s sample rate calculation was unreasonably high and not reflective of separate rate respondents’ dumping margins.

III. Conclusion

For the foregoing reasons, the court sustains the *Final Results*. Judgment will be entered accordingly.

Dated: June 9, 2021

New York, New York

/s/ Leo M. Gordon
JUDGE LEO M. GORDON

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