

U.S. Customs and Border Protection

19 CFR Part 122

CBP Dec. 21-15

TECHNICAL AMENDMENT TO LIST OF USER FEE AIRPORTS: REMOVAL OF ONE AIRPORT

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

ACTION: Final rule; technical amendment.

SUMMARY: This document amends U.S. Customs and Border Protection (CBP) regulations by removing one airport from the list of user fee airports. User fee airports are airports that have been approved by the Commissioner of CBP to receive, for a fee, the customs services of CBP officers for processing aircraft, passengers, and cargo entering the United States, but do not qualify for designation as international or landing rights airports. Specifically, this technical amendment reflects the removal of the designation of user fee airport status for the Charlotte-Monroe Executive Airport in Monroe, North Carolina.

DATES: *Effective date:* October 20, 2021.

FOR FURTHER INFORMATION CONTACT: Ryan Flanagan, Director, Alternative Funding Program, Office of Field Operations, U.S. Customs and Border Protection at *Ryan.H.Flanagan@cbp.dhs.gov* or 202-550-9566.

SUPPLEMENTARY INFORMATION:

Background

Title 19, part 122 of the Code of Federal Regulations (19 CFR part 122) sets forth regulations relating to the entry and clearance of aircraft engaged in international commerce and the transportation of persons and cargo by aircraft in international commerce.¹ Generally, a civil aircraft arriving from outside the United States must land at an airport designated as an international airport. Alternatively, civil

¹ For purposes of this technical rule, an “aircraft” is defined as any device used or designed for navigation or flight in air and does not include hovercraft. 19 CFR 122.1(a).

aircraft may request permission to land at a specific airport and, if landing rights are granted, the civil aircraft may land at that landing rights airport.²

Section 236 of the Trade and Tariff Act of 1984 (Pub. L. 98–573, 98 stat. 2948, 2994 (1984)), codified at 19 U.S.C. 58b, created an alternative option for civil aircraft seeking to land at an airport that is neither an international airport nor a landing rights airport. This alternative option allows the Commissioner of U.S. Customs and Border Protection (CBP) to designate an airport, upon request by the airport authority or other sponsoring entity, as a user fee airport.³ Pursuant to 19 U.S.C. 58b, a requesting airport may be designated as a user fee airport only if CBP determines that the volume or value of business at the airport is insufficient to justify the unreimbursed availability of customs services at the airport and the governor of the state in which the airport is located approves the designation. As the volume or value of business cleared through this type of airport is insufficient to justify the availability of customs services at no cost, customs services provided by CBP at the airport are not funded by appropriations from the general treasury of the United States. Instead, the user fee airport pays for the customs services provided by CBP. The user fee airport must pay the fees charged, which must be in an amount equal to the expenses incurred by CBP in providing customs and related services at the user fee airport, including the salary and expenses of CBP employees to provide such services. *See* 19 U.S.C. 58b; *also* 19 CFR 24.17(a)–(b).

CBP designates airports as user fee airports in accordance with 19 U.S.C. 58b and 19 CFR 122.15 and on a case-by-case basis. If CBP decides that the conditions for designation as a user fee airport are satisfied, a Memorandum of Agreement (MOA) is executed between the Commissioner of CBP and the sponsor of the user fee airport. Pursuant to 19 CFR 122.15(c), the designation of an airport as a user fee airport must be withdrawn if either CBP or the airport authority gives 120 days written notice of termination to the other party, or if any amounts due to CBP are not paid on a timely basis.

² A landing rights airport is “any airport, other than an international airport or user fee airport, at which flights from a foreign area are given permission by Customs to land.” 19 CFR 122.1(f).

³ Sections 403(1) and 411 of the Homeland Security Act of 2002 (Pub. L. 107–296, 116 stat. 2135, 2178–79 (2002)), codified at 6 U.S.C. 203(1) and 211, transferred certain functions, including the authority to designate user fee facilities, from the U.S. Customs Service of the Department of the Treasury to the newly established U.S. Department of Homeland Security. The Secretary of Homeland Security delegated the authority to designate user fee facilities to the Commissioner of CBP through Department of Homeland Security Delegation, Sec. II.A., No. 7010.3 (May 11, 2006). The Commissioner subsequently delegated this authority to the Executive Assistant Commissioner of the Office of Field Operations on January 28, 2020.

The list of designated user fee airports is set forth in 19 CFR 122.15(b). Periodically, CBP updates the list to include newly designated airports that were not previously on the list, to reflect any changes in the names of the designated user fee airports, and to remove airports that are no longer designated as user fee airports.

Recent Change Requiring Update to the List of User Fee Airports

This document updates the list of user fee airports in 19 CFR 122.15(b) by removing the Charlotte-Monroe Executive Airport in Monroe, North Carolina. On February 3, 2021, the Monroe City Manager requested termination of the user fee status for the Charlotte-Monroe Executive Airport, and the Monroe City Manager and CBP mutually agreed to terminate the user fee status of Charlotte-Monroe Executive Airport effective on June 30, 2021.

Inapplicability of Public Notice and Delayed Effective Date Requirements

Under the Administrative Procedure Act (5 U.S.C. 553(b)), an agency is exempted from the prior public notice and comment procedures if it finds, for good cause, that such procedures are impracticable, unnecessary, or contrary to the public interest. This final rule makes a conforming change by updating the list of user fee airports by removing one airport in light of the CBP Commissioner's withdrawal of its designation as a user fee airport, in accordance with 19 U.S.C. 58b. Because this conforming rule has no substantive impact, is technical in nature, and does not impose additional burdens on or take away any existing rights or privileges from the public, CBP finds for good cause that the prior public notice and comment procedures are impracticable, unnecessary, and contrary to the public interest. For the same reasons, pursuant to 5 U.S.C. 553(d)(3), a delayed effective date is not required.

Regulatory Flexibility Act and Executive Order 12866

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

Paperwork Reduction Act

There is no new collection of information required in this document; therefore, the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3507) are inapplicable.

Signing Authority

This document is limited to a technical correction of CBP regulations. Accordingly, it is being signed under the authority of 19 CFR 0.1(b). Acting Commissioner Troy A. Miller, having reviewed and approved this document, is delegating the authority to electronically sign this document to Robert F. Altneu, who is the Director of the Regulations and Disclosure Law Division for CBP, for purposes of publication in the **Federal Register**.

List of Subjects in 19 CFR Part 122

Air carriers, Aircraft, Airports, Customs duties and inspection, Freight.

Amendments to Regulations

Part 122, of title 19 of the Code of Federal Regulations (19 CFR part 122) is amended as set forth below:

PART 122—AIR COMMERCE REGULATIONS

■ 1. The general authority citation for part 122 continues to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 58b, 66, 1415, 1431, 1433, 1436, 1448, 1459, 1590, 1594, 1623, 1624, 1644, 1644a, 2071 note.

* * * * *

§ 122.15 [Amended]

■ 2. In § 122.15, amend the table in paragraph (b) by removing the entry for “Monroe, North Carolina”.

Dated: October 15, 2021.

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

[Published in the Federal Register, October 20, 2021 (85 FR 57991)]

**PROPOSED REVOCATION OF ONE RULING LETTER,
PROPOSED MODIFICATION OF ONE RULING LETTER,
AND PROPOSED REVOCATION OF TREATMENT
RELATING TO THE TARIFF CLASSIFICATION OF
MECHANICALLY ADJUSTABLE BED BASE**

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

ACTION: Notice of proposed revocation of one ruling letter, proposed modification of one ruling letter and proposed revocation of treatment relating to the tariff classification of a mechanically adjustable bed base.

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 tariff classification of a mechanically adjustable bed base 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 December 3, 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: Ms. Arim J. Kim, Chemicals, Petroleum, Metals and Miscellaneous Articles 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), this notice advises interested parties that CBP is proposing to modify one ruling letter pertaining to the tariff classification of a mechanically adjustable bed base. Although in this notice, CBP is specifically referring to New York Ruling Letters (NY) N244209, dated August 16, 2013 (Attachment A), and NY N284490, dated April 4, 2017 (Attachment B), 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 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 N244209, CBP classified a mechanically adjustable bed base in heading 9403, HTSUS, specifically in subheading 9403.90.80, HTSUS, which provides for “[o]ther furniture and parts thereof: [p]arts: [o]ther: [o]ther”. Similarly, in NY N284490, CBP classified a mechanically adjustable bed base in heading 9403, HTSUS, specifically in

subheading 9403.50.90, HTSUS, which provides for “[w]ooden furniture of a kind used in the bedroom: [o]ther: [b]eds: [o]ther”. CBP has reviewed NY N244209 and NY N284490, and has determined the ruling letters to be in error. It is now CBP’s position that the mechanically adjustable bed base is properly classified, in heading 9403, HTSUS, specifically in subheading 9403.20.00, HTSUS, which provides for “[o]ther furniture and parts thereof: [o]ther metal furniture: [h]ousehold: [m]echanically adjustable bed or mattress base, not foldable, having the characteristics of a bed or bed frame, of a width exceeding 91.44 cm, of a length exceeding 184.15 cm, and of a depth exceeding 8.89 cm”.

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is proposing to revoke NY N244209, to modify NY N284490, and to revoke or modify any other ruling not specifically identified to reflect the analysis contained in the proposed HQ H294085, set forth as Attachment C 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: September 27, 2021

ALLYSON MATTANAH
for

CRAIG T. CLARK,
Director

Commercial and Trade Facilitation Division

Attachments

N244209

August 16, 2013

CLA-2-94:OT:RR:NC:N4:433

CATEGORY: Classification

TARIFF NO.: 9403.90.8041

STEVEN A. COHEN, DIRECTOR
AMERICAN SIGNATURE INC.
4300 E 5TH AVENUE
COLUMBUS, OH 43219

RE: The tariff classification of adjustable bed bases from China.

DEAR MR. COHEN:

In your letter dated July 19, 2013, you requested a tariff classification ruling. Illustrative literature was submitted. All of the depicted photos indicate a mattress over a metal frame. No material breakdown was provided for the mattresses. As such, this ruling will only address the classification of the metal frames for the beds, without their mattresses.

Illustrative literature describes the merchandise as the “rize Adjustable Bed Series.” This series consist of: (1) the {classic} adjustable motion power base, (2) the {relaxer} adjustable motion power base, and (3) the {contemporary} adjustable motion power base.

Additional product information provided by means of the internet for the “rize Adjustable Bed Series” indicates: the classic features a steel leg balance support frame, and has a hard-wire remote control allowing for upper and lower body positioning; the relaxer features a steel leg balance support frame with locking rolling casters, and has a wireless hand remote control allowing for the elevating of one’s head and feet, three pre-set memory positioning, one touch auto-flat positioning and two-zone body massage with variable styles; and the contemporary features a steel leg balance support frame with locking rolling casters, modern modular (cushion/comfort) deck support, and has a wireless hand remote control allowing for multiple support preferences, four pre-set memory positioning, one touch auto-flat positioning and two-zone body massage with variable styles.

The applicable subheading for the metal frames used for the “rize Adjustable Bed Series,” will be 9403.90.8041, Harmonized Tariff Schedule of the United States (HTSUS), which provides for “Other furniture and parts thereof: Parts: Other: Other: Other: Of metal: Other.” 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 Neil H. Levy at (646) 733-3036.

Sincerely,

DEBORAH C. MARINUCCI

Acting Director

National Commodity Specialist Division

N284490

April 4, 2017

CLA-2-94:OT:RR:NC:N4:433

CATEGORY: Classification

TARIFF NO.: 9403.20.0021; 9403.20.0019;

9403.50.9045; 9401.90.5081

DENISE N. YAPP
CUSTOMS CLASSIFICATION SPECIALIST
ASHLEY FURNITURE INDUSTRIES, INC.
ONE ASHLEY WAY
ARCADIA, WI 54612

RE: The tariff classification of bed bases and a sleeper mechanism with mattress from China.

DEAR Ms. YAPP:

In your letter dated March 14, 2017, you requested a tariff classification ruling. Illustrative literature and a description were provided. Additional company information was provided by means of material breakdown tables.

Item 77948M is identified as the “67 Sleeper Frame W / Spring Matt.” The item is a metal framed sleeper mechanism and mattress that will be incorporated into a sofa sleeper (bed) unit. The metal framed sleeper mechanism and mattress are folded together as a single unit, palletized and wrapped, and then shipped to the United States. The metal framed sleeper mechanism with mattress pulls out from the sofa bed for purposes of one to sleep upon and then reverts back to a sofa when not used as a bed for purposes of sitting or lounging upon. This item measures 67 inches wide (from side to side) by 83 inches long (from foot to head) by 19 inches high.

Item 81212 is identified as the “Twin Foundation.” The item is a bed base made of a steel frame and six floor standing metal legs, having wood cross slats, onto which a mattress is placed. This item measures 37.50 inches wide (from side to side) by 74.38 inches long (from foot to head) by 16.73 inches high.

Item M86X12 is identified as the “Twin Foundation.” The item is a metal bed base having a nonskid fabric cover which is supported on multiple floor standing risers, onto which a mattress is placed. This item measures 37.99 inches wide (from side to side) by 74.02 inches long (from foot to head) by 13.98 inches high.

Item M9X632 is identified as the “Queen Adjustable Base.” The item is a powered adjustable bed base, which consists of a foam frame that is covered over in non-woven grey mesh and is supported on metal legs. This item measures 59.06 inches wide (from side to side) by 78.74 inches long (from foot to head) by 14.96 inches high.

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

A reading of the Legal Note 2, and 2 (a) and 2 (b) to Chapter 94 of the HTSUS, provides: at 2, that the articles (other than parts) referred to in the

headings of 9401 to 9403 are to be classified in those headings only if they are designed for placing on the floor or ground; at 2 (a) and 2 (b), the following are, however, to be classified in the above headings even if they are designed to be hung, to be fixed to the wall or to stand one on the other --- 2 (a) Cupboards, bookcases, other shelved furniture (including single shelves presented with supports for fixing them to the wall) and unit furniture, and 2 (b) Seats and beds.

When interpreting and implementing the HTSUS, the Explanatory Notes (ENs) of the Harmonized Commodity Description and Coding System may be utilized. The ENs, while neither legally binding nor dispositive, provide a guiding commentary on the scope of each heading, and are generally indicative of the proper interpretation of the HTSUS. CBP believes the ENs should always be consulted. See T.D. 89-80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

The General Explanatory Notes (ENs) to Chapter 94 of the HTSUS further elaborate on Legal Note 2, and 2 (a) and 2 (b) to Chapter 94 of the HTSUS, and state with regard to the meaning of furniture at:

(A): For the purposes of this Chapter, the term “furniture” means: Any “movable” articles (not included under other more specific headings of the Nomenclature), which have the essential characteristic that they are constructed for placing on the floor or ground, and which are used, mainly with a utilitarian purpose, to equip private dwellings, hotels, theatres, cinemas, offices, churches, schools, cafés, restaurants, laboratories, hospitals, dentists, surgeries, etc., or ships, aircraft, railway coaches, motor vehicles, caravan-trailers or similar means of transport. (It should be noted that, for purposes of this Chapter, articles are considered to be “movable” furniture even if they are designed for bolting, etc., to the floor, e.g., chairs for use on ships). Similar articles (seats, chairs, etc.) for use in gardens, squares, promenades, etc., are included in this category.

(B) The following: (i) Cupboards, bookcases, other shelved furniture and unit furniture designed to be hung, to be fixed to the wall or to stand one on the other or side by side, for holding various objects or articles (books, crockery, kitchen utensils, glassware, linen, medicaments, toilet articles, radio or television receivers, ornaments, etc.) and separately presented elements of unit furniture; and (ii) Seats or beds designed to be hung or to be fixed to the wall.

Even though Legal Note 2, and 2 (a) and 2 (b) to Chapter 94, HTSUS, do not pertain to parts of goods classified in the headings 9401 to 9403, the ENs to Chapter 94, Parts, clarify and elaborate CBP’s position in regards to furniture parts of headings 9401 to 9403, HTSUS.

The ENs to Chapter 94 of the HTSUS, Parts, provide:

“This Chapter covers parts, whether or not in the rough, of goods of heading 9401 to 9403 and 9405, when identifiable by their shape or other specific features as parts designed solely or principally for an article of those headings. They are classified in this Chapter when not more specifically covered elsewhere.”

Consistent with the meaning of “furniture” as provided by the General Explanatory Notes (ENs) to Chapter 94 of the HTSUS, the M81212 and M86X12, both described as a mattress foundation, are considered household pieces of furniture, because they are recognized as “beds” in that they sit directly on the floor of one’s bedroom, and are the underlying structure with frame and legs for sleeping upon. Also consistent with the meaning of “fur-

niture” as provided by the General Explanatory Notes (ENs) to Chapter 94 of the HTSUS, the M9X632 is an adjustable base, a special type of mattress foundation that sits directly on the floor of one’s bedroom and is the underlying structure with frame and legs for sleeping upon. The M9X632, is a queen size, powered adjustable foundation and is considered a household piece of furniture too, insofar as it is recognized as a “bed,” albeit with the enhanced characteristics of allowing users to raise and lower their head and/or feet in a supine or alpine position. With case in point, the M81212, M86X12 and M9X632, all being mattress foundations that are recognized as “beds” are classified in heading 9403, HTSUS. See Headquarters ruling HQ H254127 dated May 15, 2015.

GRI 6 is implicated at the [sub]heading level, because the contents of the M81212 and M86X12, beds, are composed of different components (i.e., metal and fabric or metal and wood) and are considered composite goods. Under GRI 6 the classification of goods at the subheading level shall be determined according to the terms of those subheadings and any related subheading notes and, mutatis mutandis, to the above rules [GRIs 1 - 5], on the understanding that only subheadings at the same level are comparable. For the M81212, consisting of a metal base frame with wooden cross slats, the competing subheadings are 9403.20 (other metal furniture) and 9403.50 (wooden furniture of a kind used in bedrooms). For the M86X12, consisting of a metal base frame covered over in fabric the competing subheadings are 9403.20 (other metal furniture) and 9403.89 (furniture of other materials)

The ENs to the HTSUS, at GRI, Rule 3 (b) (VIII), state that “The factor which determines essential character will vary between different kinds of goods. It may for example, be determined by the nature of the materials or components, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods.” When the essential character of a composite good can be determined, the whole product is classified as if it consisted only of the material or component that imparts the essential character to the composite good.

In the United States Court of International Trade, *The Home Depot, U.S.A., Inc., v. the United States*, Slip Op. 06–49, Court No. 00–00061, dated April 7, 2006, the Court considered all factors in evidence to determine essential character and that these factors were to be reviewed as a whole. See Slip Op. 06–49, for a listing of factors reviewed. Consistent with *The Home Depot* case, we will consider all facts as presented, assign weight to those facts, and if possible decide which of the constituent materials or components impart the essential character to the items referenced above.

Upon review of the illustrative literature and additional company provided information, the following are the essential character determinations for the beds:

For the M81212, bed, the essential character is imparted by the base metal frame, because the frame provides for the weight and volume of the bed, and the support onto which a mattress is placed.

For the M86X12, bed, the essential character is imparted by the base metal frame over that of its fabric covering, because the frame provides for the volume of the bed, the weight and cost of the fabric is marginal as compared against the weight and cost of the frame and the frame provides the support onto which a mattress is placed. See HQ 088432 dated August 15, 1991.

For the M9X632, adjustable bed, the essential character is imparted by the wood slats over that of the base metal frame, fabric covering and foam,

because the wood slats provided for the volume of the bed onto which a mattress is placed allowing for the raising and lower of the bed's positioning. The increased weight and higher cost of the metal frame as compared against the wood slats is marginalized when compared against the functionality of the wood slats to hold a mattress and adjust that mattress accordingly. See HQ 088432 dated August 15, 1991.

The applicable subheading for the M81212, bed, will be 9403.20.0021, Harmonized Tariff Schedule of the United States (HTSUS), which provides for "Other furniture and parts thereof: Other metal furniture: Household: Other: Other." The rate of duty will be free.

The applicable subheading for the M86X12, bed, will be 9403.20.0019, Harmonized Tariff Schedule of the United States (HTSUS), which provides for "Other furniture and parts thereof: Other metal furniture: Household: Other: Mechanically adjustable bed or mattress base, having the characteristics of a bed or bed frame, of a width exceeding 91.44 cm, of a length exceeding 184.15 cm, and of a depth exceeding 8.89 cm, whether or not motorized." The rate of duty will be free.

The applicable subheading for the M9X632, adjustable bed, will be 9403.50.9045, Harmonized Tariff Schedule of the United States (HTSUS), which provides for "Other furniture and parts thereof: Wooden furniture of a kind used in the bedroom: Other: Other: Beds: Other." The rate of duty will be free.

Wooden bedroom furniture from [China] is subject to Antidumping Duties (AD) under the Department of Commerce case number A-570-890. Written decisions regarding the scope of AD and Countervailing Duty (CVD) orders are issued by the Enforcement and Compliance office in the International Trade Administration of the Department of Commerce and are separate from tariff classification and origin rulings issued by Customs and Border Protection (CBP). It would be prudent for your company to obtain a scope ruling from the Department of Commerce, as the written description of the AD order is dispositive over that of the classification number assigned to the good.

You can contact the International Trade Administration at <http://trade.gov/enforcement/> (click on "Contact Us"). For your information, you can view a list of current AD/CVD cases at the United States International Trade Commission website at <http://www.usitc.gov> (click on "Antidumping and Countervailing Duty" under "Popular Topics" at the top of the screen), and you can search AD/CVD deposit and liquidation messages using CBP's AD/CVD Search tool at <http://addecvd.cbp.gov/>.

It is our opinion that item 77948M, the "67 Sleeper Frame W / Spring Matt" is not a "bed" classifiable in heading 9403, HTSUS. The metal framed sleeper mechanism with mattress is not part of any article of furniture covered by the heading of 9403, HTSUS. The pull out mechanism with mattress is provided for in the heading of 9401, HTSUS, as parts for seats convertible into beds. GRI 6 is implicated at the [sub]heading level, because the 77948M, is a mixed/composite good composed of different components (i.e., metal framed sleeper mechanism and mattress) and is considered a composite good.

We find that the metal framed sleeper mechanism imparts the essential character to the good, because the weight and cost of the metal framed sleep mechanism exceeds that of the mattress, the metal framed sleeper mechanism allows for the conversion from a sofa to a bed, and the metal framed sleeper mechanism allows for the placement of the mattress within the sofa sleeper (bed) unit.

The applicable subheading for item 77948M, the “67 Sleeper Frame W / Spring Matt,” will be 9401.90.5081, Harmonized Tariff Schedule of the United States (HTSUS), which provides for “Seats (other than those of heading 9402) whether or not convertible into beds, and parts thereof: Parts: Other: Other; Other.” 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 <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 Neil H. Levy at neil.h.levy@cbp.dhs.gov.

Sincerely,

STEVEN A. MACK

Director

National Commodity Specialist Division

HQ H294085
OT:RR:CTF:CPMMA H294085 AJK
CATEGORY: Classification
TARIFF NO: 9403.20.0035

MR. STEVEN A. COHEN
DIRECTOR
AMERICAN SIGNATURE INC.
4300 E 5TH AVENUE
COLUMBUS, OH 43219

RE: Revocation of NY N244209; Modification of NY N284490; Classification of Mechanically Adjustable Bed Base

DEAR MR. COHEN:

This letter is in reference to your New York Ruling Letter (NY) N244209, dated August 16, 2013, concerning the tariff classification of mechanically adjustable bed bases. In NY N244209, U.S. Customs and Broder Protection (CBP) classified the merchandise in subheading 9403.90.8041, Harmonized Tariff Schedule of the United States (HTSUS), which is the provision for metal parts of furniture. We have reviewed the aforementioned ruling and have determined that the classification of mechanically adjustable bed bases in subheading 9403.90.8041, HTSUS, was incorrect.

We have also reviewed NY N284490, dated April 4, 2017, concerning the tariff classification of a mechanically adjustable bed base in subheading 9403.50.9045, HTSUS, which provides for wooden bedroom furniture, and have determined that the ruling was incorrect. For the reasons set forth below, we revoke one ruling letter and modify one ruling letter.

FACTS:

The subject merchandise was described in NY N244209 as follows:

Illustrative literature describes the merchandise as the “rize Adjustable Bed Series.” This series consist of: (1) the {classic} adjustable motion power base, (2) the {relaxer} adjustable motion power base, and (3) the {contemporary} adjustable motion power base.

Additional product information provided by means of the internet for the “rize Adjustable Bed Series” indicates: the classic features a steel leg balance support frame, and has a hard-wire remote control allowing for upper and lower body positioning; the relaxer features a steel leg balance support frame with locking rolling casters, and has a wireless hand remote control allowing for the elevating of one’s head and feet, three pre-set memory positioning, one touch auto-flat positioning and two-zone body massage with variable styles; and the contemporary features a steel leg balance support frame with locking rolling casters, modern modular (cushion/comfort) deck support, and has a wireless hand remote control allowing for multiple support preferences, four pre-set memory positioning, one touch auto-flat positioning and two-zone body massage with variable styles.

The subject merchandise was described in NY N284490 as follows:

Item M9X632 is identified as the “Queen Adjustable Base.” The item is a powered adjustable bed base, which consists of a foam frame that is covered over in non-woven grey mesh and is supported on metal legs. This

item measures 59.06 inches wide (from side to side) by 78.74 inches long (from foot to head) by 14.96 inches high.

Moreover, we found additional information regarding the merchandise in NY N284490 by the means of the internet. The merchandise is composed of fabric, foam, electrical components, packaging, plastic, steel, and wood. In terms of value, the electrical components compose 45 percent, and the steel part comprises 32 percent of the merchandise. In terms of weight, however, the steel part predominates by 53 percent and the wood composes 23 percent of the product.

ISSUES:

1. Whether the mechanically adjustable bed bases are classified in subheading 9403.90.8041, HTSUS, as parts of furniture.
2. If not parts of furniture, whether the essential character of the merchandise is imparted by the steel component in subheading 9403.20.0035, HTSUS, as metal furniture, or by the wooden slats in subheading 9403.50.9045, HTSUS, as wooden bedroom furniture.

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.

GRI 3(b) states, in pertinent part:

Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

* * * * *

The HTSUS provisions at issue are as follows:

9403:	Other furniture and parts thereof:
9403.20.00:	Other metal furniture
	Household:
	Other:
9403.20.0035:	Mechanically adjustable bed or mattress base, not foldable, having the characteristics of a bed or bed frame, of a width exceeding 91.44 cm, of a length exceeding 184.15 cm, and of a depth exceeding 8.89 cm
9403.50:	Wooden furniture of a kind used in the bedroom:
	Other:
9403.50.90:	Other

9403.90: Parts:
 Other:
 9403.90.80: Other

Note 2 to Chapter 94, HTSUS, provides, in pertinent part:

2. The articles (other than parts) referred to in headings 9401 to 9403 are to be classified in those headings only if they are designed for placing on the floor or ground.

* * * * *

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 (Aug. 23, 1989).

EN RULE 3(b) provides as follows:

- (VIII) The factor which determines essential character will vary as between different kinds of goods. It may, for example, 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 goods.

The General EN to Chapter 94 provides, in pertinent part:

For the purposes of this Chapter, the term “furniture” means:

- (A) Any “movable” articles (not included under other more specific headings of the Nomenclature), which have the essential characteristic that they are constructed for placing on the floor or ground, and which are used, mainly with a utilitarian purpose, to equip private dwellings, hotels, theatres, cinemas, offices, churches, schools, cafés, restaurants, laboratories, hospitals, dentists’ surgeries, etc., or ships, aircraft, railway coaches, motor vehicles, caravan-trailers or similar means of transport. (It should be noted that, for the purposes of this Chapter, articles are considered to be “movable” furniture even if they are designed for bolting, etc., to the floor, e.g., chairs for use on ships). Similar articles (seats, chairs, etc.) for use in gardens, squares, promenades, etc., are also included in this category.

The Parts EN to Chapter 94 provides, in pertinent part:

This Chapter only covers parts, whether or not in the rough, of the goods of headings 94.01 to 94.03 and 94.05, when identifiable by their shape or other specific features as parts designed solely or principally for an article of those headings.

EN 94.03 provides, in pertinent part, as follows:

The heading includes furnitures for:

- (1) Private dwellings, hotels, etc., such as: ... beds (including wardrobe beds, camp-beds, folding beds, cots, etc.)

* * * * *

1. Whether the mechanically adjustable bed bases are classified in subheading 9403.90.8041, HTSUS, as parts of furniture.

There is no dispute that the mechanically adjustable bed bases are furniture or parts thereof classified in heading 9403, HTSUS, which includes beds. See EN 94.03. The General EN to Chapter 94 explains that “furniture” means any movable articles that are designed to be placed on the floor or ground and are used, mainly with a utilitarian purpose, to equip private dwellings. Note 2 of Chapter 94 states that heading 9403, HTSUS, includes articles and parts that are designed to be placed directly on the floor or ground only. In the instant case, the mechanically adjustable bed bases are utilized to place mattresses on top of the bed bases and are placed directly on the floor to furnish bedrooms. Accordingly, the subject merchandise constitutes furniture, not parts thereof, within the scope of HTSUS.

In NY N244209, CBP classified the mechanically adjustable bed bases under subheading 9403.90.80, HTSUS, as parts of furniture. This classification, however, was incorrect. The Parts EN to Chapter 94 provides that “[chapter 94] only covers parts ... of the goods of heading[] ... 94.03 ..., when identifiable by their shape or other specific features as parts designed solely or principally for an article of those headings.” The mechanically adjustable bed bases, however, are imported as complete articles and thus, are not identifiable as parts. Therefore, the mechanically adjustable bed bases are, *prima facie*, classified in heading 9403, HTSUS, as beds.

2. If not parts of furniture, whether the essential character of the merchandise is imparted by the metal component in subheading 9403.20.0035, HTSUS, as metal furniture, or by the wooden slats in subheading 9403.50.9045, HTSUS, as wooden bedroom furniture.

The mechanically adjustable bed bases are composite goods that are composed of various components, including fabric, steel, wood, plastic, and electrical components. Accordingly, the classification of the merchandise is determined by the application of GRI 3(b), which applies to composite goods. To classify under GRI 3(b), CBP must identify the component of the subject merchandise that imparts the essential character of the merchandise. “The ‘essential character’ of an article is ‘that which is indispensable to the structure, core or condition of the article, i.e., what it is.’” *Structural Industries v. United States*, 360 F. Supp. 2d 1330, 1336 (Ct. Int’l Trade 2005). Generally, the physical measures of bulk, quantity, weight or value are considered to determine the constituent material that imparts the essential character of the merchandise. See EN to GRI 3(b). Accordingly, the classification of the merchandise is determined by the heading in which the component that imparts the essential character is classified.

In the instant case, the steel part of the mechanically adjustable bed bases unequivocally predominates by role, weight, and value. First, the steel component forms the legs and frames of the bed bases, which provide support and structure of the merchandise. Absent the steel part, the merchandise would be rendered useless as it would not be able to perform the functions of a bed base—to support a mattress and equip bedrooms. Because the steel legs and frames are the parts that establish the structure and functionality of the bed bases, they are essential to the role of the merchandise. Second, the steel component predominates by weight. In regard to the merchandise in NY N284490, the steel component outweighs all other materials as the weight of

the steel comprises 53 percent of the total weight. In addition, the value of the steel is the highest among the primary components. In NY N284490, the electrical components compose 45 percent of the total value whereas the steel part comprises 32 percent only. As such, the electrical components have the *de facto* highest value. In relation to the merchandise as furniture, however, the electrical components are mere ancillary parts because the mechanical adjustment and other mechanical features of the merchandise do not effectively contribute to the furniture's utilitarian purpose to equip private dwellings. Thus, when deducing the value of the electrical components, the steel part predominates by value in addition to the weight of the merchandise. Although a comprehensive list of components was not provided in NY N244209, the description of the merchandise therein demonstrates that the components of the bed bases are substantially similar to those described in NY N284490. Hence, the essential character of the mechanically adjustable bed bases is imparted by the steel component.

According to the steel part, which imparts the essential character of the merchandise, the mechanically adjustable bed bases are classified in subheading 9403.20.00, HTSUS, as metal furniture—specifically, in subheading 9403.20.0035, HTSUS, which provides for “[m]echanically adjustable bed or mattress base” and wholly describes the entire subject merchandise as mechanically adjustable bed base. In NY N312925, dated July 29, 2020, CBP classified a substantially similar item, which consisted of metal, plastic and textile, in subheading 9403.20.0035, HTSUS, as mechanically adjustable bed base. Analogous to the instant case, we found that the metal component imparted the essential character of the merchandise because it predominated by value and provided the structure, shape, and functionality of the merchandise. Accordingly, the instant mechanically adjustable bed bases are classified in subheading 9403.20.0035, HTSUS.

Pursuant to GRI 3(b), the mechanically adjustable bed base is classified in heading 9403, HTSUS, as “[o]ther furniture and parts”.

HOLDING:

By application of GRI 3(b), the mechanically adjustable bed base is classified in heading 9403, HTSUS, specifically subheading 9403.20.0035, HTSUS, which provides for “[o]ther furniture and parts thereof: [o]ther metal furniture: [h]ousehold: [m]echanically adjustable bed or mattress base, not foldable, having the characteristics of a bed or bed frame, of a width exceeding 91.44 cm, of a length exceeding 184.15 cm, and of a depth exceeding 8.89 cm”. 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 N244209, dated August 16, 2013, is hereby revoked. In addition, NY N284490, dated April 4, 2017, is modified.

Sincerely,

CRAIG T. CLARK,

Director

Commercial and Trade Facilitation Division

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6 CFR Part 27**8 CFR Parts 270, 274a, and 280****U.S. Customs and Border Protection****19 CFR Part 4****Coast Guard****33 CFR Part 27****Transportation Security Administration****49 CFR Part 1503****RIN 1601-AA99****CIVIL MONETARY PENALTY ADJUSTMENTS FOR
INFLATION**

AGENCY: Department of Homeland Security.

ACTION: Final rule.

SUMMARY: In this final rule, the Department of Homeland Security (DHS) makes the 2021 annual inflation adjustment to its civil monetary penalties. On November 2, 2015, the President signed into law The Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (The 2015 Act). Pursuant to the 2015 Act, all agencies must adjust their civil monetary penalties annually and publish the adjustment in the **Federal Register**. Accordingly, this final rule adjusts the Department's civil monetary penalties for 2021 pursuant to the 2015 Act and Executive Office of the President (EOP) Office of Management and Budget (OMB) guidance. The new penalties will be effective for penalties assessed after October 18, 2021 whose associated violations occurred after November 2, 2015.

DATES: This rule is effective on October 18, 2021.

FOR FURTHER INFORMATION CONTACT: Hillary Hunnings, 202-282-9043, hillary.hunnings@hq.dhs.gov.

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I. Statutory and Regulatory Background

On November 2, 2015, the President signed into law the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Pub. L. 114–74 section 701 (Nov. 2, 2015)) (2015 Act).¹ The 2015 Act amended the Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. 2461 note) to improve the effectiveness of civil monetary penalties and to maintain their deterrent effect. The 2015 Act required agencies to: (1) Adjust the level of civil monetary penalties with an initial “catch-up” adjustment through issuance of an interim final rule (IFR) and (2) make subsequent annual adjustments for inflation. Through the “catch-up” adjustment, agencies were required to adjust the maximum amounts of civil monetary penalties to more accurately reflect inflation rates.

For the subsequent annual adjustments, the 2015 Act requires agencies to increase the penalty amounts by a cost-of-living adjustment. The 2015 Act directs OMB to provide guidance to agencies each year to assist agencies in making the annual adjustments. The 2015 Act requires agencies to make the annual adjustments no later than January 15 of each year and to publish the adjustments in the **Federal Register**.

Pursuant to the 2015 Act, DHS undertook a review of the civil penalties that DHS and its components administer.² On July 1, 2016, DHS published an IFR adjusting the maximum civil monetary pen-

¹ The 2015 Act was part of the Bipartisan Budget Act of 2015, Public Law 114–74 (Nov. 2, 2015).

² The 2015 Act applies to all agency civil penalties except for any penalty (including any addition to tax and additional amount) under the Internal Revenue Code of 1986 (26 U.S.C. 1 *et seq.*) and the Tariff Act of 1930 (19 U.S.C. 1202 *et seq.*). See sec. 4(a)(1) of the 2015 Act. In the case of DHS, several civil penalties that are assessed by U.S. Customs and Border Protection (CBP) and the U.S. Coast Guard (USCG) fall under the Tariff Act of 1930, and therefore DHS did not adjust those civil penalties in this rulemaking.

alties with an initial “catch-up” adjustment, as required by the 2015 Act.³ DHS calculated the adjusted penalties based upon nondiscretionary provisions in the 2015 Act and upon guidance that OMB issued to agencies on February 24, 2016.⁴ The adjusted penalties were effective for civil penalties assessed after August 1, 2016 (the effective date of the IFR), whose associated violations occurred after November 2, 2015 (the date of enactment of the 2015 Act). On January 27, 2017, DHS published a final rule making the annual adjustment for 2017.⁵ On April 2, 2018, DHS made the 2018 annual inflation adjustment.⁶ On April 5, 2019, DHS made the 2019 annual inflation adjustment.⁷ On June 17, 2020, DHS made the 2020 annual inflation adjustment.⁸

II. Overview of the Final Rule

This final rule makes the 2021 annual inflation adjustments to civil monetary penalties pursuant to the 2015 Act and pursuant to guidance OMB issued to agencies on December 23, 2020.⁹ The penalty amounts in this final rule will be effective for penalties assessed after October 18, 2021 where the associated violation occurred after November 2, 2015. Consistent with OMB guidance, the 2015 Act does not change previously assessed penalties that the agency is actively collecting or has collected.

The adjusted penalty amounts will apply to penalties assessed after the effective date of this final rule. We discuss civil penalties by DHS component in Section III below. For each component identified in Section III, below, we briefly describe the relevant civil penalty (or penalties), and we provide a table showing the increase in the penalties for 2021. In the table for each component, we show (1) the penalty name, (2) the penalty statutory and or regulatory citation, (3) the penalty amount as adjusted in the 2020 final rule, (4) the cost-of-living adjustment multiplier for 2021 that OMB provided in its

³ See 81 FR 42987.

⁴ Office of Mgmt. & Budget, Exec. Office of The President, M-16-06, Implementation of the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, Table A: 2016 Civil Monetary Penalty Catch-Up Adjustment Multiplier by Calendar Year, (Feb. 24, 2016) (<https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2016/m-16-06.pdf>).

⁵ See 82 FR 8571.

⁶ See 83 FR 13826.

⁷ See 84 FR 13499.

⁸ See 85 FR 36469.

⁹ Office of Mgmt. and Budget, Exec. Office of the President, M-21-10, Implementation of Penalty Inflation Adjustments for 2021, Pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Dec. 23, 2020) (<https://www.whitehouse.gov/wp-content/uploads/2020/12/M-21-10.pdf>).

December 23, 2020, guidance, and (5) the new 2021 adjusted penalty. The 2015 Act instructs agencies to round penalties to the nearest \$1. For a more complete discussion of the method used for calculating the initial “catch-up” inflation adjustments and a component-by-component breakdown to the nature of the civil penalties and relevant legal authorities, please see the IFR preamble at 81 FR 42987–43000.

III. Adjustments by Component

In the following sections, we briefly describe the civil penalties that DHS and its components, the Cybersecurity and Infrastructure Security Agency (CISA), the U.S. Customs and Border Protection (CBP), the U.S. Immigration and Customs Enforcement (ICE), the U.S. Coast Guard (USCG), and the Transportation Security Administration (TSA), assess. Other components not mentioned do not impose any civil monetary penalties. We include tables at the end of each section, which list the individual adjustments for each penalty.

A. Cybersecurity and Infrastructure Security Agency

The Cybersecurity and Infrastructure Security Agency (CISA) administers only one civil penalty that the 2015 Act affects. That penalty assesses fines for violations of the Chemical Facility Anti-Terrorism Standards (CFATS). CFATS is a program that regulates the security of chemical facilities that, in the discretion of the Secretary, present high levels of security risk. DHS established the CFATS program in 2007 pursuant to section 550 of the Department of Homeland Security Appropriations Act of 2007 (Pub. L. 109–295).¹⁰ The CFATS regulation is located in part 27 of title 6 of the Code of Federal Regulations (CFR). Below is a table showing the 2021 adjustment for the CFATS penalty that CISA administers.

¹⁰ Section 550 has since been superseded by the Protecting and Securing Chemical Facilities from Terrorist Attacks Act of 2014 (Pub. L. 113–254). The new legislation codified the statutory authority for the CFATS program within Title XXI of the Homeland Security Act of 2002, as amended. See 6 U.S.C. 621 *et seq.* Public Law 113–254 authorized the CFATS program from January 18, 2015 to January 17, 2019. Public Law 116–150 extends the CFATS program authorization to July 27, 2023.

TABLE 1—CFATS CIVIL PENALTY ADJUSTMENT

Penalty name	Citation	Penalty amount as adjusted in the 2020 FR (per day)	Multiplier*	New penalty as adjusted by this final rule (per day)
Penalty for non-compliance with CFATS regulations ..	6 U.S.C. 624(b)(1); 6 CFR 27.300(b)(3).	\$35,486	1.01182	\$35,905

* Office of Mgmt. and Budget, Exec. Office of the President, M-21-10, Implementation of Penalty Inflation Adjustments for 2021, Pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Dec. 23, 2020) (<https://www.whitehouse.gov/wp-content/uploads/2020/12/M-21-10.pdf>).

B. U.S. Customs and Border Protection

The U.S. Customs and Border Protection (CBP) assesses civil monetary penalties under various titles of the United States Code (U.S.C.) and the CFR. These include penalties for certain violations of title 8 of the CFR regarding the Immigration and Nationality Act of 1952 (Pub. L. 82-414, as amended) (INA). The INA contains provisions that impose penalties on persons, including carriers and aliens, who violate specified provisions of the INA. The relevant penalty provisions appear in numerous sections of the INA; however, CBP has enumerated these penalties in regulation in one location—8 CFR 280.53. For a complete list of the INA sections for which penalties are assessed, in addition to a brief description of each violation, see the 2016 IFR preamble at 81 FR 42989– 42990. For a complete list and brief description of the non-INA civil monetary penalties assessed by CBP subject to adjustment and a discussion of the history of the DHS and CBP adjustments to the non-INA penalties, see the 2019 annual inflation adjustment final rule preamble at 84 FR 13499, 13500 (April 5, 2019).

Below is a table showing the 2021 adjustment for the penalties that CBP administers.

TABLE 2—U.S. CUSTOMS AND BORDER PROTECTION CIVIL PENALTIES ADJUSTMENTS

Penalty name	Citation	Penalty amount as adjusted in the 2020 FR	Multiplier*	New penalty as adjusted by this final rule
Penalties for non-compliance with arrival and departure manifest requirements for passengers, crewmembers, or occupants transported on commercial vessels or aircraft arriving to or departing from the United States.	8 U.S.C. 1221(g); 8 CFR 280.53(b)(1) (INA section 231(g)).	\$1,419	1.01182	\$1,436
Penalties for non-compliance with landing requirements at designated ports of entry for aircraft transporting aliens.	8 U.S.C. 1224; 8 CFR 280.53(b)(2) (INA section 234).	3,855	1.01182	3,901
Penalties for failure to depart voluntarily	8 U.S.C. 1229(c)(d); 8 CFR 280.53(b)(3) (INA section 240B(d)).	1,625–8,128	1.01182	1,644–8,224
Penalties for violations of removal orders relating to aliens transported on vessels or aircraft under section 241(d) of the INA, or for costs associated with removal under section 241(e) of the INA.	8 U.S.C. 1253(c)(1)(A); 8 CFR 280.53(b)(4) (INA section 243(c)(1)(A)).	3,251	1.01182	3,289
Penalties for failure to remove alien stowaways under section 241(d)(2) of the INA.	8 U.S.C. 1253(c)(1)(B); 8 CFR 280.53(b)(5) (INA section 243(c)(1)(B)).	8,128	1.01182	8,224
Penalties for failure to report an illegal landing or desertion of alien crewmen, and for each alien not reported on arrival or departure manifest or lists required in accordance with section 251 of the INA.	8 U.S.C. 1281(d); 8 CFR 280.53(b)(6) (INA section 251(d)).	^a 385	1.01182	^a 390
Penalties for use of alien crewmen for longshore work in violation of section 251(d) of the INA.	8 U.S.C. 1281(d); 8 CFR 280.53(b)(6) (INA section 251(d)).	9,639	1.01182	9,753
Penalties for failure to control, detain, or remove alien crewmen	8 U.S.C. 1284(a); 8 CFR 280.53(b)(7) (INA section 254(a)).	964–5,783	1.01182	975–5,851

Penalty name	Citation	Penalty amount as adjusted in the 2020 FR	Multiplier*	New penalty as adjusted by this final rule
Penalties for employment on passenger vessels of aliens afflicted with certain disabilities.	8 U.S.C. 1285; 8 CFR 280.53(b)(8) (INA section 255).	1,928	1.01182	1,951
Penalties for discharge of alien crewmen	8 U.S.C. 1286; 8 CFR 280.53(b)(9) (INA section 256).	2,891–5,783	1.01182	2,925–5,851
Penalties for bringing into the United States alien crewmen with intent to evade immigration laws.	8 U.S.C. 1287; 8 CFR 280.53(b)(10) (INA section 257).	19,277	1.01182	19,505
Penalties for failure to prevent the unauthorized landing of aliens	8 U.S.C. 1321(a); 8 CFR 280.53(b)(11) (INA section 271(a)).	5,783	1.01182	5,851
Penalties for bringing to the United States alien subject to denial of admission on a health-related ground.	8 U.S.C. 1322(a); 8 CFR 280.53(b)(12) (INA section 272(a)).	5,783	1.01182	5,851
Penalties for bringing to the United States alien without required documentation.	8 U.S.C. 1323(b); 8 CFR 280.53(b)(13) (INA section 273(b)).	5,783	1.01182	5,851
Penalties for failure to depart	8 U.S.C. 1324d; 8 CFR 280.53(b)(14) (INA section 274D).	813	1.01182	823
Penalties for improper entry	8 U.S.C. 1325(b); 8 CFR 280.53(b)(15) (INA section 275(b)).	81–407	1.01182	82–412
Penalty for dealing in or using empty stamped imported liquor containers.	19 U.S.C. 469 ..	540	1.01182	** 546
Penalty for employing a vessel in a trade without a required Certificate of Documentation.	19 U.S.C. 1706a; 19 CFR 4.80(i)	1,352	1.01182	1,368
Penalty for transporting passengers coastwise for hire by certain vessels (known as Bowaters vessels) that do not meet specified conditions.	46 U.S.C. 12118(f)(3)	540	1.01182	** 546

Penalty name	Citation	Penalty amount as adjusted in the 2020 FR	Multiplier*	New penalty as adjusted by this final rule
Penalty for transporting passengers between coastwise points in the United States by a non-coastwise qualified vessel.	46 U.S.C. 55103(b); 19 CFR 4.80(b)(2).	812	1.01182	822
Penalty for towing a vessel between coastwise points in the United States by a non-coastwise qualified vessel.	46 U.S.C. 55111(c); 19 CFR 4.92	^b 946–2,976	1.01182	^c 957–3,011

* Office of Mgmt. and Budget, Exec. Office of the President, M–21–10, Implementation of Penalty Inflation Adjustments for 2021, Pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Dec. 23, 2020) (<https://www.whitehouse.gov/wp-content/uploads/2020/12/M-21-10.pdf>).

** No applicable conforming edit to regulatory text.

^a for each alien.

^b plus \$162 per ton.

^c \$164 per ton.

C. U.S. Immigration and Customs Enforcement

U.S. Immigration and Customs Enforcement (ICE) assesses civil monetary penalties for certain employment-related violations arising from the INA. ICE’s civil penalties are located in title 8 of the CFR.

There are three different sections in the INA that impose civil monetary penalties for violations of the laws that relate to employment actions: sections 274A, 274B, and 274C. ICE has primary enforcement responsibilities for two of these civil penalty provisions (sections 274A and 274C), and the Department of Justice (DOJ) has enforcement responsibilities for one of these civil penalty provisions (section 274B). The INA, in sections 274A and 274C, provides for imposition of civil penalties for various specified unlawful acts pertaining to the employment eligibility verification process (Form I–9, Employment Eligibility Verification), the employment of unauthorized aliens, and document fraud.

Because both DHS and DOJ implement the three employment related penalty sections in the INA, both Departments’ implementing regulations reflect the civil penalty amounts. For a complete description of the civil money penalties assessed and a discussion of DHS’s and DOJ’s efforts to update the penalties in years past, see the IFR preamble at 81 FR 42991. Below is a table showing the 2021 adjustment for the penalties that ICE administers.¹¹

¹¹ Table 3 also includes two civil penalties that are also listed as penalties administered by CBP. These are penalties for failure to depart voluntarily, INA section 240B(d), and failure to depart after a final order of removal, INA section 274D. Both CBP and ICE may administer these penalties, but as ICE is the DHS component primarily responsible for assessing and collecting them, they are also listed among the penalties ICE administers.

TABLE 3—U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT CIVIL PENALTIES ADJUSTMENTS

Penalty name	Citation	Penalty amount as adjusted in the 2020 FR	Multiplier*	New penalty as adjusted by this final rule
Civil penalties for failure to depart voluntarily, INA section 240B(d)	8 U.S.C. 1229c(d); 8 CFR 280.53(b)(3).	\$1,625–\$8,128	1.01182	\$1,644–\$8,224
Civil penalties for violation of INA sections 274C(a)(1)–(a)(4), penalty for first offense.	8 CFR 270.3(b)(1)(ii)(A)	481–3,855	1.01182	487–3,901
Civil penalties for violation of INA sections 274C(a)(5)–(a)(6), penalty for first offense.	8 CFR 270.3(b)(1)(ii)(B)	407–3,251	1.01182	412–3,289
Civil penalties for violation of INA sections 274C(a)(1)–(a)(4), penalty for subsequent offenses.	8 CFR 270.3(b)(1)(ii)(C)	3,855–9,639	1.01182	3,901–9,753
Civil penalties for violation of INA sections 274C(a)(5)–(a)(6), penalty for subsequent offenses.	8 CFR 270.3(b)(1)(ii)(D)	** 3,251–8,128	1.01182	3,289–8,224
Violation/prohibition of indemnity bonds	8 CFR 274a.8(b)	2,332	1.01182	2,360
Civil penalties for knowingly hiring, recruiting, referral, or retention of unauthorized aliens—Penalty for first offense (per unauthorized alien).	8 CFR 274a.10(b)(1)(ii)(A)	583–4,667	1.01182	590–4,722
Penalty for second offense (per unauthorized alien)	8 CFR 274a.10(b)(1)(ii)(B)	4,667–11,665	1.01182	4,722–11,803
Penalty for third or subsequent offense (per unauthorized alien)	8 CFR 274a.10(b)(1)(ii)(C)	6,999–23,331	1.01182	7,082–23,607
Civil penalties for I–9 paperwork violations	8 CFR 274a.10(b)(2)	234–2,332	1.01182	237–2,360
Civil penalties for failure to depart, INA section 274D	8 U.S.C. 1324d; 8 CFR 280.53(b)(14).	813	1.01182	823

* Office of Mgmt. and Budget, Exec. Office of the President, M–21–10, Implementation of Penalty Inflation Adjustments for 2021, Pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Dec. 23, 2020) (<https://www.whitehouse.gov/wp-content/uploads/2020/12/M-21-10.pdf>).

** The \$3,251 penalty minimum amount was erroneously listed as \$3,351 in the regulatory text of the 2020 final rule. It was correctly listed as \$3,251 in the preamble of the 2020 final rule. DHS calculated the new penalty minimum amount as adjusted by this final rule based on \$3,251.

D. U.S. Coast Guard

The Coast Guard is authorized to assess close to 150 penalties involving maritime safety and security and environmental stewardship that are critical to the continued success of Coast Guard mis-

sions. Various statutes in titles 14, 16, 19, 33, 42, 46, and 49 of the U.S.C. authorize these penalties. Titles 33 and 46 authorize the vast majority of these penalties as these statutes deal with navigation, navigable waters, and shipping. For a complete discussion of the civil monetary penalties assessed by the Coast Guard, see the 2016 IFR preamble at 81 FR 42992.

The Coast Guard has identified the penalties it administers, adjusted those penalties for inflation, and is listing those new penalties in a table located in the CFR—specifically, Table 1 in 33 CFR 27.3. Table 1 in 33 CFR 27.3 identifies the statutes that provide the Coast Guard with civil monetary penalty authority and sets out the inflation adjusted maximum penalty that the Coast Guard may impose pursuant to each statutory provision. Table 1 in 33 CFR 27.3 provides the current maximum penalty for violations that occurred after November 2, 2015.¹²

The applicable civil penalty amounts for violations occurring on or before November 2, 2015, are set forth in previously published regulations amending 33 CFR part 27. To find the applicable penalty amount for a violation that occurred on or before November 2, 2015, look to the prior versions of the CFR that pertain to the date on which the violation occurred.

Table 4 below shows the 2021 adjustment for the penalties that the Coast Guard administers.

TABLE 4—U.S. COAST GUARD CIVIL PENALTIES ADJUSTMENTS

Penalty name	Citation	Penalty amount as adjusted in the 2020 FR	Multiplier*	New penalty as adjusted by this final rule
Saving Life and Property .	14 U.S.C. 521(c)	\$10,839	1.01182	\$10,967
Saving Life and Property; Intentional Interference with Broadcast	14 U.S.C. 521(e)	1,112	1.01182	1,125
Confidentiality of Medical Quality Assurance Records (first offense)	14 U.S.C. 936(i); 33 CFR 27.3	5,444	1.01182	5,508
Confidentiality of Medical Quality Assurance Records (subsequent offenses).	14 U.S.C. 936(i); 33 CFR 27.3	36,297	1.01182	36,726
Obstruction of Revenue Officers by Masters of Vessels	19 U.S.C. 70; 33 CFR 27.3	8,116	1.01182	8,212

¹² The Frank LoBiondo Coast Guard Authorization Act of 2018 re-designated certain existing sections of the U.S.C., including 14 U.S.C. 88 (now 14 U.S.C. 521) and 33 U.S.C. 1232 and 1236 (now 46 U.S.C. 70036 and 70041). The table reflects those changes to the statutory citations.

Penalty name	Citation	Penalty amount as adjusted in the 2020 FR	Multiplier*	New penalty as adjusted by this final rule
Obstruction of Revenue Officers by Masters of Vessels—Minimum Penalty.	19 U.S.C. 70; 33 CFR 27.3	1,894	1.01182	1,916
Failure to Stop Vessel When Directed; Master, Owner, Operator or Person in Charge.	19 U.S.C. 1581(d)	** 5,000	N/A	** 5,000
Failure to Stop Vessel When Directed; Master, Owner, Operator or Person in Charge—Minimum Penalty.	19 U.S.C. 1581(d)	** 1,000	N/A	** 1,000
Anchorage Ground/Harbor Regulations General	33 U.S.C. 471; 33 CFR 27.3	11,767	1.01182	11,906
Anchorage Ground/Harbor Regulations St. Mary's river	33 U.S.C. 474; 33 CFR 27.3	812	1.01182	822
Bridges/Failure to Comply with Regulations	33 U.S.C. 495(b); 33 CFR 27.3	29,707	1.01182	30,058
Bridges/Drawbridges	33 U.S.C. 499(c); 33 CFR 27.3	29,707	1.01182	30,058
Bridges/Failure to Alter Bridge Obstructing Navigation	33 U.S.C. 502(c); 33 CFR 27.3	29,707	1.01182	30,058
Bridges/Maintenance and Operation	33 U.S.C. 533(b); 33 CFR 27.3	29,707	1.01182	30,058
Bridge to Bridge Communication; Master, Person in Charge or Pilot	33 U.S.C. 1208(a); 33 CFR 27.3	2,164	1.01182	2,190
Bridge to Bridge Communication; Vessel	33 U.S.C. 1208(b); 33 CFR 27.3	2,164	1.01182	2,190
Oil/Hazardous Substances: Discharges (Class I per violation)	33 U.S.C. 1321(b)(6)(B)(i); 33 CFR 27.3.	19,277	1.01182	19,505
Oil/Hazardous Substances: Discharges (Class I total under paragraph).	33 U.S.C. 1321(b)(6)(B)(i); 33 CFR 27.3.	48,192	1.01182	48,762
Oil/Hazardous Substances: Discharges (Class II per day of violation).	33 U.S.C. 1321(b)(6)(B)(ii); 33 CFR 27.3.	19,277	1.01182	19,505
Oil/Hazardous Substances: Discharges (Class II total under paragraph).	33 U.S.C. 1321(b)(6)(B)(ii); 33 CFR 27.3.	240,960	1.01182	243,808
Oil/Hazardous Substances: Discharges (per day of violation) Judicial Assessment.	33 U.S.C. 1321(b)(7)(A); 33 CFR 27.3.	48,192	1.01182	48,762

Penalty name	Citation	Penalty amount as adjusted in the 2020 FR	Multiplier*	New penalty as adjusted by this final rule
Oil/Hazardous Substances: Discharges (per barrel of oil or unit discharged) Judicial Assessment.	33 U.S.C. 1321(b)(7)(A); 33 CFR 27.3.	1,928	1.01182	1,951
Oil/Hazardous Substances: Failure to Carry Out Removal/Comply With Order (Judicial Assessment).	33 U.S.C. 1321(b)(7)(B); 33 CFR 27.3.	48,192	1.01182	48,762
Oil/Hazardous Substances: Failure to Comply with Regulation Issued Under 1321(j) (Judicial Assessment).	33 U.S.C. 1321(b)(7)(C); 33 CFR 27.3.	48,192	1.01182	48,762
Oil/Hazardous Substances: Discharges, Gross Negligence (per barrel of oil or unit discharged) Judicial Assessment.	33 U.S.C. 1321(b)(7)(D); 33 CFR 27.3.	5,783	1.01182	5,851
Oil/Hazardous Substances: Discharges, Gross Negligence—Minimum Penalty (Judicial Assessment).	33 U.S.C. 1321(b)(7)(D); 33 CFR 27.3.	192,768	1.01182	195,047
Marine Sanitation Devices; Operating	33 U.S.C. 1322(j); 33 CFR 27.3	8,116	1.01182	8,212
Marine Sanitation Devices; Sale or Manufacture	33 U.S.C. 1322(j); 33 CFR 27.3	21,640	1.01182	21,896
International Navigation Rules; Operator	33 U.S.C. 1608(a); 33 CFR 27.3	15,173	1.01182	15,352
International Navigation Rules; Vessel	33 U.S.C. 1608(b); 33 CFR 27.3	15,173	1.01182	15,352
Pollution from Ships; General	33 U.S.C. 1908(b)(1); 33 CFR 27.3.	75,867	1.01182	76,764
Pollution from Ships; False Statement	33 U.S.C. 1908(b)(2); 33 CFR 27.3.	15,173	1.01182	15,352
Inland Navigation Rules; Operator	33 U.S.C. 2072(a); 33 CFR 27.3	15,173	1.01182	15,352
Inland Navigation Rules; Vessel	33 U.S.C. 2072(b); 33 CFR 27.3	15,173	1.01182	15,352
Shore Protection; General	33 U.S.C. 2609(a); 33 CFR 27.3	53,524	1.01182	54,157

Penalty name	Citation	Penalty amount as adjusted in the 2020 FR	Multiplier*	New penalty as adjusted by this final rule
Shore Protection; Operating Without Permit	33 U.S.C. 2609(b); 33 CFR 27.3	21,410	1.01182	21,663
Oil Pollution Liability and Compensation	33 U.S.C. 2716(a); 33 CFR 27.3	48,192	1.01182	48,762
Clean Hulls	33 U.S.C. 3852(a)(1)(A); 33 CFR 27.3.	44,124	1.01182	44,646
Clean Hulls—related to false statements	33 U.S.C. 3852(a)(1)(A); 33 CFR 27.3.	58,833	1.01182	59,528
Clean Hulls—Recreational Vessel	33 U.S.C. 3852(c); 33 CFR 27.3	5,883	1.01182	5,953
Hazardous Substances, Releases, Liability, Compensation (Class I)	42 U.S.C. 9609(a); 33 CFR 27.3	58,328	1.01182	59,017
Hazardous Substances, Releases, Liability, Compensation (Class II).	42 U.S.C. 9609(b); 33 CFR 27.3	58,328	1.01182	59,017
Hazardous Substances, Releases, Liability, Compensation (Class II subsequent offense).	42 U.S.C. 9609(b); 33 CFR 27.3	174,985	1.01182	177,053
Hazardous Substances, Releases, Liability, Compensation (Judicial Assessment).	42 U.S.C. 9609(c); 33 CFR 27.3	58,328	1.01182	59,017
Hazardous Substances, Releases, Liability, Compensation (Judicial Assessment subsequent offense).	42 U.S.C. 9609(c); 33 CFR 27.3	174,985	1.01182	177,053
Safe Containers for International Cargo	46 U.S.C. 80509; 33 CFR 27.3	6,376	1.01182	6,451
Suspension of Passenger Service	46 U.S.C. 70305; 33 CFR 27.3	63,761	1.01182	64,515
Vessel Inspection or Examination Fees	46 U.S.C. 2110(e); 33 CFR 27.3	9,639	1.01182	9,753
Alcohol and Dangerous Drug Testing	46 U.S.C. 2115; 33 CFR 27.3	7,846	1.01182	7,939
Negligent Operations: Recreational Vessels	46 U.S.C. 2302(a); 33 CFR 27.3	7,097	1.01182	7,181
Negligent Operations: Other Vessels	46 U.S.C. 2302(a); 33 CFR 27.3	35,486	1.01182	35,905
Operating a Vessel While Under the Influence of Alcohol or a Dangerous Drug.	46 U.S.C. 2302(c)(1); 33 CFR 27.3.	7,846	1.01182	7,939

Penalty name	Citation	Penalty amount as adjusted in the 2020 FR	Multiplier*	New penalty as adjusted by this final rule
Vessel Reporting Requirements: Owner, Charterer, Managing Operator, or Agent.	46 U.S.C. 2306(a)(4); 33 CFR 27.3.	12,219	1.01182	12,363
Vessel Reporting Requirements: Master	46 U.S.C. 2306(b)(2); 33 CFR 27.3.	2,444	1.01182	2,473
Immersion Suits	46 U.S.C. 3102(c)(1); 33 CFR 27.3.	12,219	1.01182	12,363
Inspection Permit	46 U.S.C. 3302(i)(5); 33 CFR 27.3.	2,549	1.01182	2,579
Vessel Inspection; General	46 U.S.C. 3318(a); 33 CFR 27.3	12,219	1.01182	12,363
Vessel Inspection; Nautical School Vessel	46 U.S.C. 3318(g); 33 CFR 27.3	12,219	1.01182	12,363
Vessel Inspection; Failure to Give Notice IAW 3304(b)	46 U.S.C. 3318(h); 33 CFR 27.3	2,444	1.01182	2,473
Vessel Inspection; Failure to Give Notice IAW 3309(c)	46 U.S.C. 3318(i); 33 CFR 27.3	2,444	1.01182	2,473
Vessel Inspection; Vessel ≥ 1,600 Gross Tons	46 U.S.C. 3318(j)(1); 33 CFR 27.3.	24,441	1.01182	24,730
Vessel Inspection; Vessel < 1,600 Gross Tons	46 U.S.C. 3318(j)(1); 33 CFR 27.3.	4,888	1.01182	4,946
Vessel Inspection; Failure to Comply with 3311(b)	46 U.S.C. 3318(k); 33 CFR 27.3	24,441	1.01182	24,730
Vessel Inspection; Violation of 3318(b)–3318(f)	46 U.S.C. 3318(l); 33 CFR 27.3	12,219	1.01182	12,363
List/count of Passengers ..	46 U.S.C. 3502(e); 33 CFR 27.3	254	1.01182	257
Notification to Passengers	46 U.S.C. 3504(c); 33 CFR 27.3	25,479	1.01182	25,780
Notification to Passengers; Sale of Tickets	46 U.S.C. 3504(c); 33 CFR 27.3	1,273	1.01182	1,288
Copies of Laws on Passenger Vessels; Master	46 U.S.C. 3506; 33 CFR 27.3	510	1.01182	516
Liquid Bulk/Dangerous Cargo	46 U.S.C. 3718(a)(1); 33 CFR 27.3.	63,699	1.01182	64,452
Uninspected Vessels	46 U.S.C. 4106; 33 CFR 27.3	10,705	1.01182	10,832

Penalty name	Citation	Penalty amount as adjusted in the 2020 FR	Multiplier*	New penalty as adjusted by this final rule
Recreational Vessels (maximum for related series of violations)	46 U.S.C. 4311(b)(1); 33 CFR 27.3.	337,016	1.01182	341,000
Recreational Vessels; Violation of 4307(a)	46 U.S.C. 4311(b)(1); 33 CFR 27.3.	6,740	1.01182	6,820
Recreational vessels	46 U.S.C. 4311(c); 33 CFR 27.3	2,549	1.01182	2,579
Uninspected Commercial Fishing Industry Vessels	46 U.S.C. 4507; 33 CFR 27.3	10,705	1.01182	10,832
Abandonment of Barges ..	46 U.S.C. 4703; 33 CFR 27.3	1,814	1.01182	1,835
Load Lines	46 U.S.C. 5116(a); 33 CFR 27.3	11,665	1.01182	11,803
Load Lines; Violation of 5112(a)	46 U.S.C. 5116(b); 33 CFR 27.3	23,331	1.01182	23,607
Load Lines; Violation of 5112(b)	46 U.S.C. 5116(c); 33 CFR 27.3	11,665	1.01182	11,803
Reporting Marine Casualties	46 U.S.C. 6103(a); 33 CFR 27.3	40,640	1.01182	41,120
Reporting Marine Casualties; Violation of 6104	46 U.S.C. 6103(b); 33 CFR 27.3	10,705	1.01182	10,832
Manning of Inspected Vessels; Failure to Report Deficiency in Vessel Complement.	46 U.S.C. 8101(e); 33 CFR 27.3	1,928	1.01182	1,951
Manning of Inspected Vessels	46 U.S.C. 8101(f); 33 CFR 27.3	19,277	1.01182	19,505
Manning of Inspected Vessels; Employing or Serving in Capacity not Licensed by USCG.	46 U.S.C. 8101(g); 33 CFR 27.3	19,277	1.01182	19,505
Manning of Inspected Vessels; Freight Vessel < 100 GT, Small Passenger Vessel, or Sailing School Vessel.	46 U.S.C. 8101(h); 33 CFR 27.3	2,549	1.01182	2,579
Watchmen on Passenger Vessels	46 U.S.C. 8102(a)	2,549	1.01182	2,579
Citizenship Requirements	46 U.S.C. 8103(f)	1,273	1.01182	1,288
Watches on Vessels; Violation of 8104(a) or (b)	46 U.S.C. 8104(i)	19,277	1.01182	19,505
Watches on Vessels; Violation of 8104(c), (d), (e), or (h)	46 U.S.C. 8104(j)	19,277	1.01182	19,505

Penalty name	Citation	Penalty amount as adjusted in the 2020 FR	Multiplier*	New penalty as adjusted by this final rule
Staff Department on Vessels	46 U.S.C. 8302(e)	254	1.01182	257
Officer's Competency Certificates	46 U.S.C. 8304(d)	254	1.01182	257
Coastwise Pilotage; Owner, Charterer, Managing Operator, Agent, Master or Individual in Charge.	46 U.S.C. 8502(e)	19,277	1.01182	19,505
Coastwise Pilotage; Individual	46 U.S.C. 8502(f)	19,277	1.01182	19,505
Federal Pilots	46 U.S.C. 8503 ...	61,098	1.01182	61,820
Merchant Mariners Documents	46 U.S.C. 8701(d)	1,273	1.01182	1,288
Crew Requirements	46 U.S.C. 8702(e)	19,277	1.01182	19,505
Small Vessel Manning	46 U.S.C. 8906	40,640	1.01182	41,120
Pilotage: Great Lakes; Owner, Charterer, Managing Operator, Agent, Master or Individual in Charge.	46 U.S.C. 9308(a)	19,277	1.01182	19,505
Pilotage: Great Lakes; Individual	46 U.S.C. 9308(b)	19,277	1.01182	19,505
Pilotage: Great Lakes; Violation of 9303	46 U.S.C. 9308(c)	19,277	1.01182	19,505
Failure to Report Sexual Offense	46 U.S.C. 10104(b)	10,245	1.01182	10,366
Pay Advances to Seamen	46 U.S.C. 10314(a)(2)	1,273	1.01182	1,288
Pay Advances to Seamen; Remuneration for Employment	46 U.S.C. 10314(b)	1,273	1.01182	1,288
Allotment to Seamen	46 U.S.C. 10315(c)	1,273	1.01182	1,288
Seamen Protection; General	46 U.S.C. 10321 .	8,831	1.01182	8,935
Coastwise Voyages: Advances	46 U.S.C. 10505(a)(2)	8,831	1.01182	8,935
Coastwise Voyages: Advances; Remuneration for Employment	46 U.S.C. 10505(b)	8,831	1.01182	8,935
Coastwise Voyages: Seamen Protection; General	46 U.S.C. 10508(b)	8,831	1.01182	8,935
Effects of Deceased Seamen	46 U.S.C. 10711	510	1.01182	516
Complaints of Unfitness ..	46 U.S.C. 10902(a)(2)	1,273	1.01182	1,288
Proceedings on Examination of Vessel	46 U.S.C. 10903(d)	254	1.01182	257
Permission to Make Complaint	46 U.S.C. 10907(b)	1,273	1.01182	1,288

Penalty name	Citation	Penalty amount as adjusted in the 2020 FR	Multiplier*	New penalty as adjusted by this final rule
Accommodations for Seamen	46 U.S.C. 11101(f)	1,273	1.01182	1,288
Medicine Chests on Vessels	46 U.S.C. 11102(b)	1,273	1.01182	1,288
Destitute Seamen	46 U.S.C. 11104(b)	254	1.01182	257
Wages on Discharge	46 U.S.C. 11105(c)	1,273	1.01182	1,288
Log Books; Master Failing to Maintain	46 U.S.C. 11303(a)	510	1.01182	516
Log Books; Master Failing to Make Entry	46 U.S.C. 11303(b)	510	1.01182	516
Log Books; Late Entry	46 U.S.C. 11303(c)	382	1.01182	387
Carrying of Sheath Knives	46 U.S.C. 11506	127	1.01182	129
Vessel Documentation	46 U.S.C. 12151(a)(1)	16,687	1.01182	16,884
Documentation of Vessels—Related to Activities involving mobile offshore drilling units.	46 U.S.C. 12151(a)(2)	27,813	1.01182	28,142
Vessel Documentation; Fishery Endorsement	46 U.S.C. 12151(c)	127,525	1.01182	129,032
Numbering of Undocumented Vessels—Willful violation	46 U.S.C. 12309(a)	12,740	1.01182	12,891
Numbering of Undocumented Vessels	46 U.S.C. 12309(b)	2,549	1.01182	2,579
Vessel Identification System	46 U.S.C. 12507(b)	21,410	1.01182	21,663
Measurement of Vessels ..	46 U.S.C. 14701	46,664	1.01182	47,216
Measurement; False Statements	46 U.S.C. 14702	46,664	1.01182	47,216
Commercial Instruments and Maritime Liens	46 U.S.C. 31309	21,410	1.01182	21,663
Commercial Instruments and Maritime Liens; Mortgagor	46 U.S.C. 31330(a)(2)	21,410	1.01182	21,663
Commercial Instruments and Maritime Liens; Violation of 31329	46 U.S.C. 31330(b)(2)	53,524	1.01182	54,157
Ports and Waterway Safety Regulations	46 U.S.C. 70036(a); 33 CFR 27.3	95,881	1.01182	97,014
Vessel Navigation: Regattas or Marine Parades; Unlicensed Person in Charge.	46 U.S.C. 70041(d)(1)(B); 33 CFR 27.3.	9,639	1.01182	9,753
Vessel Navigation: Regattas or Marine Parades; Owner Onboard Vessel.	46 U.S.C. 70041(d)(1)(C); 33CFR 27.3.	9,639	1.01182	9,753

Penalty name	Citation	Penalty amount as adjusted in the 2020 FR	Multiplier*	New penalty as adjusted by this final rule
Vessel Navigation: Regattas or Marine Parades; Other Persons .	46 U.S.C. 70041(d)(1)(D); 33 CFR 27.3.	4,819	1.01182	4,876
Port Security	46 U.S.C. 70119(a)	35,486	1.01182	35,905
Port Security—Continuing Violations	46 U.S.C. 70119(b)	63,761	1.01182	64,515
Maritime Drug Law Enforcement	46 U.S.C. 70506(c)	5,883	1.01182	5,953
Hazardous Materials: Related to Vessels	49 U.S.C. 5123(a)(1)	83,439	1.01182	84,425
Hazardous Materials: Related to Vessels—Penalty from Fatalities, Serious Injuries/Illness or substantial Damage to Property.	49 U.S.C. 5123(a)(2)	194,691	1.01182	196,992
Hazardous Materials: Related to Vessels; Training	49 U.S.C. 5123(a)(3)	502	1.01182	508

* Office of Mgmt. and Budget, Exec. Office of the President, M-21-10, Implementation of Penalty Inflation Adjustments for 2021, Pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Dec. 23, 2020) (<https://www.whitehouse.gov/wp-content/uploads/2020/12/M-21-10.pdf>).

** Enacted under the Tariff Act; exempt from inflation adjustments.

E. Transportation Security Administration

The Transportation Security Administration (TSA) is updating its civil penalties regulation in accordance with the 2015 Act. Pursuant to its statutory authority in 49 U.S.C. 46301(a)(1), (4), (5), (6), 49 U.S.C. 46301(d)(2), (8), and 49 U.S.C. 114(u), TSA may impose penalties for violations of statutes that TSA administers, including penalties for violations of implementing regulations or orders. Note that pursuant to division K, title I, sec. 1904(b)(1)(I), of Public Law 115-254, 132 Stat. 3186, 3545 (Oct. 5, 2018), the TSA Modernization Act—part of the FAA Reauthorization Act of 2018—the former 49 U.S.C. 114(v), which relates to penalties, was redesignated as 49 U.S.C. 114(u).

TSA assesses these penalties for a wide variety of aviation and surface security requirements, including violations of TSA's requirements applicable to Transportation Worker Identification Credentials (TWIC),¹³ as well as violations of requirements described in chapter 449 of title 49 of the U.S.C. These penalties can apply to a wide variety of situations, as described in the statutory and regulatory provisions, as well as in guidance that TSA publishes. Below is a table showing the 2021 adjustment for the penalties that TSA administers.

¹³ See, e.g., 46 U.S.C. 70105, 49 U.S.C. 46302 and 46303, and 49 U.S.C. chapter 449.

TABLE 5—TRANSPORTATION SECURITY ADMINISTRATION CIVIL PENALTIES ADJUSTMENTS

Penalty name	Citation	Penalty amount as adjusted in the 2020 FR	Multiplier*	New penalty as adjusted by this final rule
Violation of 49 U.S.C. ch. 449 (except secs. 44902, 44903(d), 44907(a)–(d)(1)(A), 44907(d)(1)(C)–(f), 44908, and 44909), or 49 U.S.C. 46302 or 46303, a regulation prescribed, or order issued thereunder by a person operating an aircraft for the transportation of passengers or property for compensation.	49 U.S.C. 46301(a)(1), (4), (5), (6); 49 U.S.C. 46301(d)(2), (8); 49 CFR 1503.401(c)(3).	\$34,777 (up to a total of \$556,419 per civil penalty action).	1.01182	\$35,188 (up to a total of \$562,996 per civil penalty action).
Violation of 49 U.S.C. ch. 449 (except secs. 44902, 44903(d), 44907(a)–(d)(1)(A), 44907(d)(1)(C)–(f), 44908, and 44909), or 49 U.S.C. 46302 or 46303, a regulation prescribed, or order issued thereunder by an individual (except an airman serving as an airman), any person not operating an aircraft for the transportation of passengers or property for compensation, or a small business concern.	49 U.S.C. 46301(a)(1), (4), (5); 49 U.S.C. 46301(d)(8); 49 CFR 1503.401(c)(1) and (2).	\$13,910 (up to a total of \$69,553 total for small businesses, \$556,419 for others).	1.01182	\$14,074 (up to a total of \$70,375 for small businesses, \$562,996 for others).
Violation of any other provision of title 49 U.S.C. or of 46 U.S.C. ch. 701, a regulation prescribed, or order issued thereunder.	49 U.S.C. 114(u); 49 CFR 1503.401(b).	\$11,904 (up to a total of \$59,522 total for small businesses, \$476,174 for others)**.	1.01182	\$12,045 (up to a total of \$60,226 total for small businesses, \$481,802 for others).

* Office of Mgmt. and Budget, Exec. Office of the President, M–21–10, Implementation of Penalty Inflation Adjustments for 2021, Pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Dec. 23, 2020) (<https://www.whitehouse.gov/wp-content/uploads/2020/12/M-21-10.pdf>).

** The \$476,174 penalty amount was erroneously listed as \$76,174 in the preamble of the 2020 final rule. It was correctly listed as \$476,174 in the regulatory text of the 2020 final rule. DHS calculated the new penalty amount as adjusted by this final rule based on \$476,174.

IV. Administrative Procedure Act

DHS is promulgating this final rule to ensure that the amount of civil penalties that DHS assesses or enforces reflects the statutorily mandated ranges as adjusted for inflation. The 2015 Act provides a clear formula for adjustment of the civil penalties, leaving DHS and its components with little room for discretion. DHS and its components have been charged only with performing ministerial computations to determine the amounts of adjustments for inflation to civil monetary penalties. In these annual adjustments DHS is merely updating the penalty amounts by applying the cost-of-living adjustment multiplier that OMB has provided to agencies. Furthermore, the 2015 Act specifically instructed that agencies make the required annual adjustments notwithstanding section 553 of title 5 of the U.S.C. Thus, as specified in the 2015 Act, the prior public notice-and-comment procedures and delayed effective date requirements of the Administrative Procedure Act (APA) do not apply to this rule. Fur-

ther, as described above, this rule makes minor amendments to the regulations to reflect changes required by clear statutory authority, and DHS finds that prior notice and comment procedures and a delayed effective date for these amendments are unnecessary.

V. Regulatory Analyses

A. *Executive Orders 12866 and 13563*

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

OMB has not designated this final rule a “significant regulatory action” under section 3(f) of Executive Order 12866. Accordingly, OMB has not reviewed this rule.

This final rule makes nondiscretionary adjustments to existing civil monetary penalties in accordance with the 2015 Act and OMB guidance.¹⁴ DHS therefore did not consider alternatives and does not have the flexibility to alter the adjustments of the civil monetary penalty amounts as provided in this rule. To the extent this final rule increases civil monetary penalties, it would result in an increase in transfers from persons or entities assessed a civil monetary penalty to the government.

B. *Regulatory Flexibility Act*

The Regulatory Flexibility Act applies only to rules for which an agency publishes a notice of proposed rulemaking pursuant to 5 U.S.C. 553(b). See 5 U.S.C. 601–612. The Regulatory Flexibility Act does not apply to this final rule because a notice of proposed rulemaking was not required for the reasons stated above.

C. *Unfunded Mandates Reform Act*

The Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1531–1538, requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may

¹⁴ Office of Mgmt. and Budget, Exec. Office of the President, M–21–10, Implementation of Penalty Inflation Adjustments for 2021, Pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Dec. 23, 2020) (<https://www.whitehouse.gov/wp-content/uploads/2020/12/M-21-10.pdf>).

result in the expenditure by a State, local, or Tribal government, in the aggregate, or by the private sector of \$100,000,000 (adjusted for inflation) or more in any one year. This final rule will not result in such an expenditure.

D. Paperwork Reduction Act

The provisions of the Paperwork Reduction Act of 1995, 44 U.S.C. chapter 35, and its implementing regulations, 5 CFR part 1320, do not apply to this final rule, because this final rule does not trigger any new or revised recordkeeping or reporting.

VI. Signing Authorities

The amendments to 19 CFR part 4 in this document are issued in accordance with 19 CFR 0.2(a), which provides that the authority of the Secretary of the Treasury with respect to CBP regulations that are not related to customs revenue functions was transferred to the Secretary of Homeland Security pursuant to Section 403(l) of the Homeland Security Act of 2002. Accordingly, this final rule to amend such regulations may be signed by the Secretary of Homeland Security (or his or her delegate).

List of Subjects

6 CFR Part 27

Reporting and recordkeeping requirements, Security measures.

8 CFR Part 270

Administrative practice and procedure, Aliens, Employment, Fraud, Penalties.

8 CFR Part 274a

Administrative practice and procedure, Aliens, Employment, Penalties, Reporting and recordkeeping requirements.

8 CFR Part 280

Administrative practice and procedure, Immigration, Penalties.

19 CFR Part 4

Exports, Freight, Harbors, Maritime carriers, Oil pollution, Reporting and recordkeeping requirements, Vessels.

33 CFR Part 27

Administrative practice and procedure, Penalties.

49 CFR Part 1503

Administrative practice and procedure, Investigations, Law enforcement, Penalties.

Amendments to the Regulations

Accordingly, for the reasons stated in the preamble, DHS is amending 6 CFR part 27, 8 CFR parts 270, 274a, and 280, 19 CFR part 4, 33 CFR part 27, and 49 CFR part 1503 as follows:

Title 6—Domestic Security

PART 27—CHEMICAL FACILITY ANTI-TERRORISM STANDARDS

- 1. The authority citation for part 27 continues to read as follows:

Authority: 6 U.S.C. 624; Pub. L. 101–410, 104 Stat. 890, as amended by Pub. L. 114–74, 129 Stat. 599; Pub. L. 113–254, 128 Stat. 2898, as amended by Pub. L. 116–150, 134 Stat. 679.

- 2. In § 27.300, revise paragraph (b)(3) to read as follows:

§ 27.300 Orders.

* * * * *

(b) * * *

(3) Where the Assistant Secretary determines that a facility is in violation of an Order issued pursuant to paragraph (a) of this section and issues an Order Assessing Civil Penalty pursuant to paragraph (b)(1) of this section, a chemical facility is liable to the United States for a civil penalty of not more than \$25,000 for each day during which the violation continues, if the violation of the Order occurred on or before November 2, 2015, or \$35,905 for each day during which the violation of the Order continues, if the violation occurred after November 2, 2015.

* * * * *

Title 8—Aliens and Nationality

PART 270—PENALTIES FOR DOCUMENT FRAUD

- 3. The authority citation for part 270 continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, and 1324c; Pub. L. 101–410, 104 Stat. 890, as amended by Pub. L. 104–134, 110 Stat. 1321 and Pub. L. 114–74, 129 Stat. 599.

- 4. In § 270.3, revise paragraphs (b)(1)(ii)(A) through (D) to read as follows:

§ 270.3 Penalties.

* * * * *

(b) * * *

(1) * * *

(ii) * * *

(A) *First offense under section 274C(a)(1) through (a)(4).* Not less than \$275 and not exceeding \$2,200 for each fraudulent document or each proscribed activity described in section 274C(a)(1) through (a)(4) of the Act before March 27, 2008; not less than \$375 and not exceeding \$3,200 for each fraudulent document or each proscribed activity described in section 274C(a)(1) through (a)(4) of the Act on or after March 27, 2008, and on or before November 2, 2015; and not less than \$487 and not exceeding \$3,901 for each fraudulent document or each proscribed activity described in section 274C(a)(1) through (a)(4) of the Act after November 2, 2015.

(B) *First offense under section 274C(a)(5) or (a)(6).* Not less than \$250 and not exceeding \$2,000 for each fraudulent document or each proscribed activity described in section 274C(a)(5) or (a)(6) of the Act before March 27, 2008; not less than \$275 and not exceeding \$2,200 for each fraudulent document or each proscribed activity described in section 274C(a)(5) or (a)(6) of the Act on or after March 27, 2008, and on or before November 2, 2015; and not less than \$412 and not exceeding \$3,289 for each fraudulent document or each proscribed activity described in section 274C(a)(5) or (a)(6) of the Act after November 2, 2015.

(C) *Subsequent offenses under section 274C(a)(1) through (a)(4).* Not less than \$2,200 and not more than \$5,500 for each fraudulent document or each proscribed activity described in section 274C(a)(1) through (a)(4) of the Act before March 27, 2008; not less than \$3,200 and not exceeding \$6,500 for each fraudulent document or each proscribed activity described in section 274C(a)(1) through (a)(4) of the Act occurring on or after March 27, 2008 and on or before November 2, 2015; and not less than \$3,901 and not more than \$9,753 for each fraudulent document or each proscribed activity described in section 274C(a)(1) through (a)(4) of the Act after November 2, 2015.

(D) *Subsequent offenses under section 274C(a)(5) or (a)(6).* Not less than \$2,000 and not more than \$5,000 for each fraudulent document or each proscribed activity described in section 274C(a)(5) or (a)(6) of the Act before March 27, 2008; not less than \$2,200 and not exceeding \$5,500 for each fraudulent document or each proscribed activity described in section 274C(a)(5) or (a)(6) of the Act occurring on or after March 27, 2008 and on or before November 2, 2015; and not less than

\$3,289 and not more than \$8,224 for each fraudulent document or each proscribed activity described in section 274C(a)(5) or (a)(6) of the Act after November 2, 2015.

* * * * *

PART 274a—CONTROL OF EMPLOYMENT OF ALIENS

■ 5. The authority citation for part 274a continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1105a, 1324a; 48 U.S.C. 1806; 8 CFR part 2; Pub. L. 101–410, 104 Stat. 890, as amended by Pub. L. 114–74, 129 Stat. 599.

■ 6. In § 274a.8, revise paragraph (b) to read as follows:

§ 274a.8 Prohibition of indemnity bonds.

* * * * *

(b) *Penalty.* Any person or other entity who requires any individual to post a bond or security as stated in this section shall, after notice and opportunity for an administrative hearing in accordance with section 274A(e)(3)(B) of the Act, be subject to a civil monetary penalty of \$1,000 for each violation before September 29, 1999, of \$1,100 for each violation occurring on or after September 29, 1999, but on or before November 2, 2015, and of \$2,360 for each violation occurring after November 2, 2015, and to an administrative order requiring the return to the individual of any amounts received in violation of this section or, if the individual cannot be located, to the general fund of the Treasury.

■ 7. In § 274a.10, revise paragraphs (b)(1)(ii)(A) through (C) and the first sentence of paragraph (b)(2) introductory text to read as follows:

§ 274a.10 Penalties.

* * * * *

(b) * * *

(1) * * *

(ii) * * *

(A) First offense—not less than \$275 and not more than \$2,200 for each unauthorized alien with respect to whom the offense occurred before March 27, 2008; not less than \$375 and not exceeding \$3,200, for each unauthorized alien with respect to whom the offense occurred occurring on or after March 27, 2008, and on or before November 2, 2015; and not less than \$590 and not more than \$4,722 for each unauthorized alien with respect to whom the offense occurred occurring after November 2, 2015;

(B) Second offense—not less than \$2,200 and not more than \$5,500 for each unauthorized alien with respect to whom the second offense

occurred before March 27, 2008; not less than \$3,200 and not more than \$6,500, for each unauthorized alien with respect to whom the second offense occurred on or after March 27, 2008, and on or before November 2, 2015; and not less than \$4,722 and not more than \$11,803 for each unauthorized alien with respect to whom the second offense occurred after November 2, 2015; or

(C) More than two offenses—not less than \$3,300 and not more than \$11,000 for each unauthorized alien with respect to whom the third or subsequent offense occurred before March 27, 2008; not less than \$4,300 and not exceeding \$16,000, for each unauthorized alien with respect to whom the third or subsequent offense occurred on or after March 27, 2008, and on or before November 2, 2015; and not less than \$7,082 and not more than \$23,607 for each unauthorized alien with respect to whom the third or subsequent offense occurred after November 2, 2015; and * * * * *

(2) A respondent determined by the Service (if a respondent fails to request a hearing) or by an administrative law judge, to have failed to comply with the employment verification requirements as set forth in § 274a.2(b), shall be subject to a civil penalty in an amount of not less than \$100 and not more than \$1,000 for each individual with respect to whom such violation occurred before September 29, 1999; not less than \$110 and not more than \$1,100 for each individual with respect to whom such violation occurred on or after September 29, 1999, and on or before November 2, 2015; and not less than \$237 and not more than \$2,360 for each individual with respect to whom such violation occurred after November 2, 2015. * * *

* * * * *

PART 280—IMPOSITION AND COLLECTION OF FINES

■ 8. The authority citation for part 280 continues to read as follows:

Authority: 8 U.S.C. 1103, 1221, 1223, 1227, 1229, 1253, 1281, 1283, 1284, 1285, 1286, 1322, 1323, 1330; 66 Stat. 173, 195, 197, 201, 203, 212, 219, 221–223, 226, 227, 230; Pub. L. 101–410, 104 Stat. 890, as amended by Pub. L. 114–74, 129 Stat. 599.

■ 9. In § 280.53, revise paragraphs (b)(1) through (15) to read as follows:

§ 280.53 Civil monetary penalties inflation adjustment.

* * * * *

(b) * * *

(1) Section 231(g) of the Act, penalties for non-compliance with arrival and departure manifest requirements for passengers, crew-

members, or occupants transported on commercial vessels or aircraft arriving to or departing from the United States: From \$1,419 to \$1,436.

(2) Section 234 of the Act, penalties for non-compliance with landing requirements at designated ports of entry for aircraft transporting aliens: From \$3,855 to \$3,901.

(3) Section 240B(d) of the Act, penalties for failure to depart voluntarily: From \$1,625 minimum/ \$8,128 maximum to \$1,644 minimum/ \$8,224 maximum.

(4) Section 243(c)(1)(A) of the Act, penalties for violations of removal orders relating to aliens transported on vessels or aircraft, under section 241(d) of the Act, or for costs associated with removal under section 241(e) of the Act: From \$3,251 to \$3,289.

(5) Penalties for failure to remove alien stowaways under section 241(d)(2) of the Act: From \$8,128 to \$8,224.

(6) Section 251(d) of the Act, penalties for failure to report an illegal landing or desertion of alien crewmen, and for each alien not reported on arrival or departure manifest or lists required in accordance with section 251 of the Act: From \$385 to \$390; and penalties for use of alien crewmen for longshore work in violation of section 251(d) of the Act: From \$9,639 to \$9,753.

(7) Section 254(a) of the Act, penalties for failure to control, detain, or remove alien crewmen: From \$964 minimum/ \$5,783 maximum to \$975 minimum/ \$5,851 maximum.

(8) Section 255 of the Act, penalties for employment on passenger vessels of aliens afflicted with certain disabilities: From \$1,928 to \$1,951.

(9) Section 256 of the Act, penalties for discharge of alien crewmen: From \$2,891 minimum/\$5,783 maximum to \$2,925 minimum/\$5,851 maximum.

(10) Section 257 of the Act, penalties for bringing into the United States alien crewmen with intent to evade immigration laws: From \$19,277 maximum to \$19,505 maximum.

(11) Section 271(a) of the Act, penalties for failure to prevent the unauthorized landing of aliens: From \$5,783 to \$5,851.

(12) Section 272(a) of the Act, penalties for bringing to the United States aliens subject to denial of admission on a health-related ground: From \$5,783 to \$5,851.

(13) Section 273(b) of the Act, penalties for bringing to the United States aliens without required documentation: From \$5,783 to \$5,851.

(14) Section 274D of the Act, penalties for failure to depart: From \$813 maximum to \$823 maximum, for each day the alien is in violation.

(15) Section 275(b) of the Act, penalties for improper entry: From \$81 minimum/\$407 maximum to \$82 minimum/\$412 maximum, for each entry or attempted entry.

Title 19—Customs Duties

PART 4—VESSELS IN FOREIGN AND DOMESTIC TRADES

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

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1415, 1431, 1433, 1434, 1624, 2071 note; 46 U.S.C. 501, 60105.

* * * * *

Sections 4.80, 4.80a, and 4.80b also issued under 19 U.S.C. 1706a; 28 U.S.C. 2461 note; 46 U.S.C. 12112, 12117, 12118, 50501–55106, 55107, 55108, 55110, 55114, 55115, 55116, 55117, 55119, 56101, 55121, 56101, 57109; Pub. L. 108–7, Division B, Title II, § 211;

* * * * *

Section 4.92 also issued under 28 U.S.C. 2461 note; 46 U.S.C. 55111;

* * * * *

■ 11. In § 4.80, revise paragraphs (b)(2) and (i) to read as follows:

4.80 Vessels entitled to engage in coastwise trade.

* * * * *

(b) * * *

(2) The penalty imposed for the unlawful transportation of passengers between coastwise points is \$300 for each passenger so transported and landed on or before November 2, 2015, and \$822 for each passenger so transported and landed after November 2, 2015 (46 U.S.C. 55103, as adjusted by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015). * * * * *

(i) Any vessel, entitled to be documented and not so documented, employed in a trade for which a Certificate of Documentation is issued under the vessel documentation laws (see § 4.0(c)), other than a trade covered by a registry, is liable to a civil penalty of \$500 for each port at which it arrives without the proper Certificate of Documentation on or before November 2, 2015, and \$1,368 for each port at which it arrives without the proper Certificate of Documentation after November 2, 2015 (19 U.S.C. 1706a, as adjusted by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015). If such a vessel has on board any foreign merchandise (sea stores

excepted), or any domestic taxable alcoholic beverages, on which the duty and taxes have not been paid or secured to be paid, the vessel and its cargo are subject to seizure and forfeiture.

■ 12. In § 4.92, revise the third sentence to read as follows:

§ 4.92 Towing.

* * * The penalties for violation of this section occurring after November 2, 2015, are a fine of from \$957 to \$3,011 against the owner or master of the towing vessel and a further penalty against the towing vessel of \$164 per ton of the towed vessel (46 U.S.C. 55111, as adjusted by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015).

Title 33—Navigation and Navigable Waters

PART 27—ADJUSTMENT OF CIVIL MONETARY PENALTIES FOR INFLATION

■ 13. The authority citation for part 27 continues to read as follows:

Authority: Secs. 1–6, Pub. L. 101–410, 104 Stat. 890, as amended by Sec. 31001(s)(1), Pub. L. 104–134, 110 Stat. 1321 (28 U.S.C. 2461 note); Department of Homeland Security Delegation No. 0170.1, sec. 2 (106).

■ 14. In § 27.3, revise the third sentence of the introductory text and table 1 to read as follows:

§ 27.3 Penalty adjustment table.

* * * The adjusted civil penalty amounts listed in Table 1 to this section are applicable for penalty assessments issued after October 18, 2021, with respect to violations occurring after November 2, 2015.
* * *

TABLE 1 TO § 27.3—CIVIL MONETARY PENALTY INFLATION ADJUSTMENTS

U.S. Code citation	Civil monetary penalty description	2021 Adjusted maximum penalty amount (\$)
14 U.S.C. 521(c)	Saving Life and Property	\$10,967
14 U.S.C. 521(e)	Saving Life and Property; Intentional Interference with Broadcast	1,125
14 U.S.C. 936(i)	Confidentiality of Medical Quality Assurance Records (first offense)	5,508
14 U.S.C. 936(i)	Confidentiality of Medical Quality Assurance Records (subsequent offenses)	36,726
19 U.S.C. 70	Obstruction of Revenue Officers by Masters of Vessels	8,212
19 U.S.C. 70	Obstruction of Revenue Officers by Masters of Vessels—Minimum Penalty	1,916

U.S. Code citation	Civil monetary penalty description	2021 Adjusted maximum penalty amount (\$)
19 U.S.C. 1581(d)	Failure to Stop Vessel When Directed; Master, Owner, Operator or Person in Charge ¹	5,000
19 U.S.C. 1581(d)	Failure to Stop Vessel When Directed; Master, Owner, Operator or Person in Charge—Minimum Penalty ¹ .	1,000
33 U.S.C. 471	Anchorage Ground/Harbor Regulations General	11,906
33 U.S.C. 474	Anchorage Ground/Harbor Regulations St. Mary's River	822
33 U.S.C. 495(b)	Bridges/Failure to Comply with Regulations	30,058
33 U.S.C. 499(c)	Bridges/Drawbridges	30,058
33 U.S.C. 502(c)	Bridges/Failure to Alter Bridge Obstructing Navigation	30,058
33 U.S.C. 533(b)	Bridges/Maintenance and Operation	30,058
33 U.S.C. 1208(a)	Bridge to Bridge Communication; Master, Person in Charge or Pilot	2,190
33 U.S.C. 1208(b)	Bridge to Bridge Communication; Vessel	2,190
33 U.S.C. 1321(b)(6)(B)(i)	Oil/Hazardous Substances: Discharges (Class I per violation)	19,505
33 U.S.C. 1321(b)(6)(B)(i)	Oil/Hazardous Substances: Discharges (Class I total under paragraph)	48,762
33 U.S.C. 1321(b)(6)(B)(ii)	Oil/Hazardous Substances: Discharges (Class II per day of violation)	19,505
33 U.S.C. 1321(b)(6)(B)(ii)	Oil/Hazardous Substances: Discharges (Class II total under paragraph)	243,808
33 U.S.C. 1321(b)(7)(A)	Oil/Hazardous Substances: Discharges (per day of violation) Judicial Assessment	48,762
33 U.S.C. 1321(b)(7)(A)	Oil/Hazardous Substances: Discharges (per barrel of oil or unit discharged) Judicial Assessment.	1,951
33 U.S.C. 1321(b)(7)(B)	Oil/Hazardous Substances: Failure to Carry Out Removal/Comply With Order (Judicial Assessment).	48,762
33 U.S.C. 1321(b)(7)(C)	Oil/Hazardous Substances: Failure to Comply with Regulation Issued Under 1321(j) (Judicial Assessment).	48,762
33 U.S.C. 1321(b)(7)(D)	Oil/Hazardous Substances: Discharges, Gross Negligence (per barrel of oil or unit discharged) Judicial Assessment.	5,851
33 U.S.C. 1321(b)(7)(D)	Oil/Hazardous Substances: Discharges, Gross Negligence—Minimum Penalty (Judicial Assessment).	195,047
33 U.S.C. 1322(j)	Marine Sanitation Devices; Operating	8,212
33 U.S.C. 1322(j)	Marine Sanitation Devices; Sale or Manufacture	21,896
33 U.S.C. 1608(a)	International Navigation Rules; Operator	15,352
33 U.S.C. 1608(b)	International Navigation Rules; Vessel	15,352
33 U.S.C. 1908(b)(1)	Pollution from Ships; General	76,764

U.S. Code citation	Civil monetary penalty description	2021 Adjusted maximum penalty amount (\$)
33 U.S.C. 1908(b)(2) .	Pollution from Ships; False Statement	15,352
33 U.S.C. 2072(a)	Inland Navigation Rules; Operator	15,352
33 U.S.C. 2072(b)	Inland Navigation Rules; Vessel	15,352
33 U.S.C. 2609(a)	Shore Protection; General	54,157
33 U.S.C. 2609(b)	Shore Protection; Operating Without Permit	21,663
33 U.S.C. 2716a(a) ...	Oil Pollution Liability and Compensation .	48,762
33 U.S.C. 3852(a)(1)(A)	Clean Hulls; Civil Enforcement	44,646
33 U.S.C. 3852(a)(1)(A)	Clean Hulls; related to false statements ...	59,528
33 U.S.C. 3852(c)	Clean Hulls; Recreational Vessels	5,953
42 U.S.C. 9609(a)	Hazardous Substances, Releases, Liability, Compensation (Class I)	59,017
42 U.S.C. 9609(b)	Hazardous Substances, Releases, Liability, Compensation (Class II)	59,017
42 U.S.C. 9609(b)	Hazardous Substances, Releases, Liability, Compensation (Class II subsequent offense).	177,053
42 U.S.C. 9609(c)	Hazardous Substances, Releases, Liability, Compensation (Judicial Assessment)	59,017
42 U.S.C. 9609(c)	Hazardous Substances, Releases, Liability, Compensation (Judicial Assessment subsequent offense).	177,053
46 U.S.C. 80509(a) ...	Safe Containers for International Cargo ...	6,451
46 U.S.C. 70305(c) ...	Suspension of Passenger Service	64,515
46 U.S.C. 2110(e)	Vessel Inspection or Examination Fees	9,753
46 U.S.C. 2115	Alcohol and Dangerous Drug Testing	7,939
46 U.S.C. 2302(a)	Negligent Operations: Recreational Vessels	7,181
46 U.S.C. 2302(a)	Negligent Operations: Other Vessels	35,905
46 U.S.C. 2302(c)(1) .	Operating a Vessel While Under the Influence of Alcohol or a Dangerous Drug	7,939
46 U.S.C. 2306(a)(4) .	Vessel Reporting Requirements: Owner, Charterer, Managing Operator, or Agent .	12,363
46 U.S.C. 2306(b)(2) .	Vessel Reporting Requirements: Master	2,473
46 U.S.C. 3102(c)(1) .	Immersion Suits	12,363
46 U.S.C. 3302(i)(5) .	Inspection Permit	2,579
46 U.S.C. 3318(a)	Vessel Inspection; General	12,363
46 U.S.C. 3318(g)	Vessel Inspection; Nautical School Vessel .	12,363
46 U.S.C. 3318(h) ...	Vessel Inspection; Failure to Give Notice IAW 3304(b)	2,473
46 U.S.C. 3318(i)	Vessel Inspection; Failure to Give Notice IAW 3309(c)	2,473
46 U.S.C. 3318(j)(1) .	Vessel Inspection; Vessel ≥1600 Gross Tons	24,730
46 U.S.C. 3318(j)(1) .	Vessel Inspection; Vessel <1600 Gross Tons	4,946

U.S. Code citation	Civil monetary penalty description	2021 Adjusted maximum penalty amount (\$)
46 U.S.C. 3318(k)	Vessel Inspection; Failure to Comply with 3311(b)	24,730
46 U.S.C. 3318(l)	Vessel Inspection; Violation of 3318(b)–3318(f)	12,363
46 U.S.C. 3502(e)	List/count of Passengers	257
46 U.S.C. 3504(c)	Notification to Passengers	25,780
46 U.S.C. 3504(c)	Notification to Passengers; Sale of Tickets	1,288
46 U.S.C. 3506	Copies of Laws on Passenger Vessels; Master	516
46 U.S.C. 3718(a)(1) .	Liquid Bulk/Dangerous Cargo	64,452
46 U.S.C. 4106	Uninspected Vessels	10,832
46 U.S.C. 4311(b)(1) .	Recreational Vessels (maximum for related series of violations)	341,000
46 U.S.C. 4311(b)(1) .	Recreational Vessels; Violation of 4307(a) .	6,820
46 U.S.C. 4311(c)	Recreational Vessels	2,579
46 U.S.C. 4507	Uninspected Commercial Fishing Industry Vessels	10,832
46 U.S.C. 4703	Abandonment of Barges	1,835
46 U.S.C. 5116(a)	Load Lines	11,803
46 U.S.C. 5116(b)	Load Lines; Violation of 5112(a)	23,607
46 U.S.C. 5116(c)	Load Lines; Violation of 5112(b)	11,803
46 U.S.C. 6103(a)	Reporting Marine Casualties	41,120
46 U.S.C. 6103(b)	Reporting Marine Casualties; Violation of 6104	10,832
46 U.S.C. 8101(e)	Manning of Inspected Vessels; Failure to Report Deficiency in Vessel Complement	1,951
46 U.S.C. 8101(f)	Manning of Inspected Vessels	19,505
46 U.S.C. 8101(g)	Manning of Inspected Vessels; Employing or Serving in Capacity not Licensed by USCG.	19,505
46 U.S.C. 8101(h) ...	Manning of Inspected Vessels; Freight Vessel <100 GT, Small Passenger Vessel, or Sailing School Vessel.	2,579
46 U.S.C. 8102(a)	Watchmen on Passenger Vessels	2,579
46 U.S.C. 8103(f)	Citizenship Requirements	1,288
46 U.S.C. 8104(i)	Watches on Vessels; Violation of 8104(a) or (b)	19,505
46 U.S.C. 8104(j)	Watches on Vessels; Violation of 8104(c), (d), (e), or (h)	19,505
46 U.S.C. 8302(e)	Staff Department on Vessels	257
46 U.S.C. 8304(d)	Officer's Competency Certificates	257
46 U.S.C. 8502(e)	Coastwise Pilotage; Owner, Charterer, Managing Operator, Agent, Master or Individual in Charge.	19,505
46 U.S.C. 8502(f)	Coastwise Pilotage; Individual	19,505
46 U.S.C. 8503	Federal Pilots	61,820
46 U.S.C. 8701(d)	Merchant Mariners Documents	1,288

U.S. Code citation	Civil monetary penalty description	2021 Adjusted maximum penalty amount (\$)
46 U.S.C. 8702(e)	Crew Requirements	19,505
46 U.S.C. 8906	Small Vessel Manning	41,120
46 U.S.C. 9308(a)	Pilotage: Great Lakes; Owner, Charterer, Managing Operator, Agent, Master or Individual in Charge.	19,505
46 U.S.C. 9308(b)	Pilotage: Great Lakes; Individual	19,505
46 U.S.C. 9308(c)	Pilotage: Great Lakes; Violation of 9303 ...	19,505
46 U.S.C. 10104(b) ...	Failure to Report Sexual Offense	10,366
46 U.S.C. 10314(a)(2)	Pay Advances to Seamen	1,288
46 U.S.C. 10314(b) ...	Pay Advances to Seamen; Remuneration for Employment	1,288
46 U.S.C. 10315(c) ...	Allotment to Seamen	1,288
46 U.S.C. 10321	Seamen Protection; General	8,935
46 U.S.C. 10505(a)(2)	Coastwise Voyages: Advances	8,935
46 U.S.C. 10505(b) ...	Coastwise Voyages: Advances; Remuneration for Employment	8,935
46 U.S.C. 10508(b) ...	Coastwise Voyages: Seamen Protection; General	8,935
46 U.S.C. 10711	Effects of Deceased Seamen	516
46 U.S.C. 10902(a)(2)	Complaints of Unfitness	1,288
46 U.S.C. 10903(d) ...	Proceedings on Examination of Vessel	257
46 U.S.C. 10907(b) ...	Permission to Make Complaint	1,288
46 U.S.C. 11101(f) ...	Accommodations for Seamen	1,288
46 U.S.C. 11102(b) ...	Medicine Chests on Vessels	1,288
46 U.S.C. 11104(b) ...	Destitute Seamen	257
46 U.S.C. 11105(c) ...	Wages on Discharge	1,288
46 U.S.C. 11303(a) ...	Log Books; Master Failing to Maintain	516
46 U.S.C. 11303(b) ...	Log Books; Master Failing to Make Entry .	516
46 U.S.C. 11303(c) ...	Log Books; Late Entry	387
46 U.S.C. 11506	Carrying of Sheath Knives	129
46 U.S.C. 12151(a)(1)	Vessel Documentation	16,884
46 U.S.C. 12151(a)(2)	Documentation of Vessels—Related to activities involving mobile offshore drilling units	28,142
46 U.S.C. 12151(c) ...	Vessel Documentation; Fishery Endorsement	129,032
46 U.S.C. 12309(a) ...	Numbering of Undocumented Vessels—Willful violation	12,891
46 U.S.C. 12309(b) ...	Numbering of Undocumented Vessels	2,579
46 U.S.C. 12507(b) ...	Vessel Identification System	21,663
46 U.S.C. 14701	Measurement of Vessels	47,216
46 U.S.C. 14702	Measurement; False Statements	47,216

U.S. Code citation	Civil monetary penalty description	2021 Adjusted maximum penalty amount (\$)
46 U.S.C. 31309	Commercial Instruments and Maritime Liens	21,663
46 U.S.C. 31330(a)(2)	Commercial Instruments and Maritime Liens; Mortgagor	21,663
46 U.S.C. 31330(b)(2)	Commercial Instruments and Maritime Liens; Violation of 31329	54,157
46 U.S.C. 70036(a) ...	Ports and Waterways Safety Regulations	97,014
46 U.S.C. 70041(d)(1)(B)	Vessel Navigation: Regattas or Marine Parades; Unlicensed Person in Charge	9,753
46 U.S.C. 70041(d)(1)(C)	Vessel Navigation: Regattas or Marine Parades; Owner Onboard Vessel	9,753
46 U.S.C. 70041(d)(1)(D)	Vessel Navigation: Regattas or Marine Parades; Other Persons	4,876
46 U.S.C. 70119(a) ...	Port Security	35,905
46 U.S.C. 70119(b) ...	Port Security—Continuing Violations	64,515
46 U.S.C. 70506	Maritime Drug Law Enforcement; Penalties	5,953
49 U.S.C. 5123(a)(1)	Hazardous Materials: Related to Vessels—Maximum Penalty	84,425
49 U.S.C. 5123(a)(2)	Hazardous Materials: Related to Vessels—Penalty from Fatalities, Serious Injuries/Illness or Substantial Damage to Property.	196,992
49 U.S.C. 5123(a)(3)	Hazardous Materials: Related to Vessels—Training	508

¹ Enacted under the Tariff Act of 1930 exempt from inflation adjustments.

Title 49—Transportation

PART 1503—INVESTIGATIVE AND ENFORCEMENT PROCEDURES

■ 15. The authority citation for part 1503 continues to read as follows:

Authority: 6 U.S.C. 1142; 18 U.S.C. 6002; 28 U.S.C. 2461 (note); 49 U.S.C. 114, 20109, 31105, 40113–40114, 40119, 44901–44907, 46101–46107, 46109–46110, 46301, 46305, 46311, 46313–46314; Pub. L. 104–134, as amended by Pub. L. 114–74.

■ 16. In § 1503.401, revise paragraphs (b)(1) and (2) and (c)(1), (2), and (3) to read as follows:

§ 1503.401 Maximum penalty amounts.

* * * * *

(b) * * *

(1) For violations that occurred on or before November 2, 2015, \$10,000 per violation, up to a total of \$50,000 per civil penalty action, in the case of an individual or small business concern, as defined in

section 3 of the Small Business Act (15 U.S.C. 632). For violations that occurred after November 2, 2015, \$12,045 per violation, up to a total of \$60,226 per civil penalty action, in the case of an individual or small business concern; and

(2) For violations that occurred on or before November 2, 2015, \$10,000 per violation, up to a total of \$400,000 per civil penalty action, in the case of any other person. For violations that occurred after November 2, 2015, \$12,045 per violation, up to a total of \$481,802 per civil penalty action, in the case of any other person.

(c) ** *

(1) For violations that occurred on or before November 2, 2015, \$10,000 per violation, up to a total of \$50,000 per civil penalty action, in the case of an individual or small business concern, as defined in section 3 of the Small Business Act (15 U.S.C. 632). For violations that occurred after November 2, 2015, \$14,074 per violation, up to a total of \$70,375 per civil penalty action, in the case of an individual (except an airman serving as an airman), or a small business concern.

(2) For violations that occurred on or before November 2, 2015, \$10,000 per violation, up to a total of \$400,000 per civil penalty action, in the case of any other person (except an airman serving as an airman) not operating an aircraft for the transportation of passengers or property for compensation. For violations that occurred after November 2, 2015, \$14,074 per violation, up to a total of \$562,996 per civil penalty action, in the case of any other person (except an airman serving as an airman) not operating an aircraft for the transportation of passengers or property for compensation.

(3) For violations that occurred on or before November 2, 2015, \$25,000 per violation, up to a total of \$400,000 per civil penalty action, in the case of a person operating an aircraft for the transportation of passengers or property for compensation (except an individual serving as an airman). For violations that occurred after November 2, 2015, \$35,188 per violation, up to a total of \$562,996 per civil penalty action, in the case of a person (except an individual serving as an airman) operating an aircraft for the transportation of passengers or property for compensation.

JONATHAN E. MEYER,
General Counsel,
U.S. Department of Homeland Security.

19 CFR Chapter I

NOTIFICATION OF TEMPORARY TRAVEL RESTRICTIONS APPLICABLE TO LAND PORTS OF ENTRY AND FERRIES SERVICE BETWEEN THE UNITED STATES AND MEXICO

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

ACTION: Notification of continuation of temporary travel restrictions.

SUMMARY: This Notification announces the decision of the Secretary of Homeland Security (Secretary) to continue to temporarily limit the non-essential travel of individuals from Mexico into the United States at land ports of entry along the United States-Mexico border. This Notification further announces that the Secretary intends to lift these limitations for individuals who are fully vaccinated for COVID-19 (as defined by the Centers for Disease Control and Prevention) to align with anticipated changes to international travel by air.

DATES: This Notification goes into effect at 12 a.m. Eastern Daylight Time (EDT) on October 22, 2021 and will remain in effect until 11:59 p.m. Eastern Standard Time (EST) on January 21, 2022, unless amended or rescinded prior to that time.

FOR FURTHER INFORMATION CONTACT: Stephanie Watson, Office of Field Operations Coronavirus Coordination Cell, U.S. Customs and Border Protection (CBP) at 202-325-0840.

SUPPLEMENTARY INFORMATION:

Background

On March 24, 2020, DHS published notice of its decision to temporarily limit the travel of individuals from Mexico into the United States at land ports of entry along the United States-Mexico border to “essential travel,” as further defined in that document.¹ The document described the developing circumstances regarding the COVID-19 pandemic and stated that, given the outbreak and continued transmission and spread of the virus associated with COVID-19 within the United States and globally, DHS had deter-

¹ 85 FR 16547 (Mar. 24, 2020). That same day, DHS also published notice of its decision to temporarily limit the travel of individuals from Canada into the United States at land ports of entry along the United States-Canada border to “essential travel,” as further defined in that document. 85 FR 16548 (Mar. 24, 2020).

mined that the risk of continued transmission and spread of the virus associated with COVID–19 between the United States and Mexico posed a “specific threat to human life or national interests.” DHS later published a series of notifications continuing such limitations on travel until 11:59 p.m. EDT on October 21, 2021.²

DHS continues to monitor and respond to the COVID–19 pandemic. As of the week of October 13, 2021, there have been over 237 million confirmed cases globally, with over 4.8 million confirmed deaths.³ There have been over 44.4 million confirmed and probable cases within the United States,⁴ over 1.6 million confirmed cases in Canada,⁵ and over 3.7 million confirmed cases in Mexico.⁶ DHS also notes that the Delta variant has driven an increase in cases, hospitalizations, and deaths in the United States, Canada, and Mexico in recent months.⁷

Notwithstanding these realities, vaccines are effective against Delta and other known variants, protecting people from getting infected and severely ill, as well as significantly reducing the likelihood

² See 86 FR 52609 (Sept. 22, 2021); 86 FR 46964 (Aug. 23, 2021); 86 FR 38556 (July 22, 2021); 86 FR 32764 (June 23, 2021); 86 FR 27802 (May 24, 2021); 86 FR 21188 (Apr. 22, 2021); 86 FR 14812 (Mar. 19, 2021); 86 FR 10815 (Feb. 23, 2021); 86 FR 4969 (Jan. 19, 2021); 85 FR 83432 (Dec. 22, 2020); 85 FR 74603 (Nov. 23, 2020); 85 FR 67276 (Oct. 22, 2020); 85 FR 59670 (Sept. 23, 2020); 85 FR 51634 (Aug. 21, 2020); 85 FR 44185 (July 22, 2020); 85 FR 37744 (June 24, 2020); 85 FR 31050 (May 22, 2020); 85 FR 22352 (Apr. 22, 2020). DHS also published parallel notifications of its decisions to continue temporarily limiting the travel of individuals from Mexico into the United States at land ports of entry along the United States-Mexico border to “essential travel.” See 86 FR 52611 (Sept. 22, 2021); 86 FR 46963 (Aug. 23, 2021); 86 FR 38554 (July 22, 2021); 86 FR 32766 (June 23, 2021); 86 FR 27800 (May 24, 2021); 86 FR 21189 (Apr. 22, 2021); 86 FR 14813 (Mar. 19, 2021); 86 FR 10816 (Feb. 23, 2021); 86 FR 4969 (Jan. 19, 2021); 85 FR 83433 (Dec. 22, 2020); 85 FR 74604 (Nov. 23, 2020); 85 FR 67275 (Oct. 22, 2020); 85 FR 59669 (Sept. 23, 2020); 85 FR 51633 (Aug. 21, 2020); 85 FR 44183 (July 22, 2020); 85 FR 37745 (June 24, 2020); 85 FR 31057 (May 22, 2020); 85 FR 22353 (Apr. 22, 2020).

³ WHO, Coronavirus disease 2019 (COVID–19) Weekly Epidemiological Update (Oct. 12, 2021), available at [Weekly operational update on COVID–19—12 October 2021 \(who.int\)](https://www.who.int/news-room/operational-updates/20211012-covid-19-weekly-epidemiological-update) (accessed Oct. 13, 2021).

⁴ CDC, COVID Data Tracker: United States COVID–19 Cases, Deaths, and Laboratory Testing (NAATs) by State, Territory, and Jurisdiction, CDC COVID Data Tracker. (accessed Oct. 13, 2021).

⁵ WHO, Situation by Region, Country, Territory & Area, available at <https://covid19.who.int/table> (accessed Oct. 13, 2021).

⁶ *Id.*

⁷ See CDC, Delta Variant: What We Know About the Science, <https://www.cdc.gov/coronavirus/2019-ncov/variants/delta-variant.html> (accessed Sept. 9, 2021). See Government of Canada, Coronavirus Disease (COVID–19) For Health Professionals, <https://health-infobase.canada.ca/covid-19/epidemiological-summary-covid-19-cases.html#VOC> (accessed Sept. 9, 2021). See Government of Mexico, Ministry of Health, COVID–19 National General Information, <https://datos.covid-19.conacyt.mx/#DOView> (accessed Aug. 16, 2021); Mexican Consortium of Genomic Surveillance (CoViGen-Mex), Reportes, <http://mexcov2.ibt.unam.mx:8080/COVID-TRACKER/> (accessed Sept. 9, 2021).

of hospitalization and death, according to the CDC.⁸ As such, the risks posed by and to fully vaccinated travelers differ materially from those posed by unvaccinated travelers. As a result, in late September, the White House COVID–19 Response Coordinator indicated the United States plans to revise standards and procedures for incoming international air travel, so as to enable the air travel of fully vaccinated travelers beginning in early November. On October 12, 2021, DHS announced that it intends to do the same with respect to travelers crossing the land border from Mexico and Canada, so as to align the treatment of the land and air ports of entry and allow those who are fully vaccinated for COVID–19 to travel to the United States for non-essential purposes.⁹

Therefore, this Notification extends the limits on non-essential travel and also announces the Secretary’s intent to lift these restrictions for certain such individuals who are fully vaccinated.

Notice of Action

Given the outbreak and continued transmission and spread of COVID–19 within the United States and globally, I have determined that the risk of continued transmission and spread of the virus associated with COVID–19 between the United States and Mexico poses an ongoing “specific threat to human life or national interests.”

In March 2020, U.S. and Mexican officials mutually determined that non-essential travel between the United States and Mexico posed additional risk of transmission and spread of the virus associated with COVID–19 and placed the populace of both nations at increased risk of contracting the virus associated with COVID–19. Given the sustained human-to-human transmission of the virus, coupled with risks posed by new variants, non-essential travel to the United States places the personnel staffing land ports of entry between the United States and Mexico, as well as the individuals traveling through these ports of entry, at increased risk of exposure to the virus associated with COVID–19. Accordingly, and consistent

⁸ What You Need to Know about Variants √ CDC (accessed Oct. 13, 2021).

⁹ DHS Press Release, Secretary Mayorkas to Allow Fully Vaccinated Travelers from Canada and Mexico to Enter U.S. at Land Borders and Ferry Crossings, www.dhs.gov/news/2021/10/12/secretary-mayorkas-allow-fully-vaccinated-travelers-canada-and-mexico-enter-us-land (last accessed Oct. 14, 2021).

with the authority granted in 19 U.S.C. 1318(b)(1)(C) and (b)(2),¹⁰ I have determined that land ports of entry along the U.S.-Mexico border will continue to suspend normal operations and will only allow processing for entry into the United States of those travelers engaged in “essential travel,” as defined below. Given the definition of “essential travel” below, this temporary alteration in land ports of entry operations should not interrupt legitimate trade between the two nations or disrupt critical supply chains that ensure food, fuel, medicine, and other critical materials reach individuals on both sides of the border.

For purposes of the temporary alteration in certain designated ports of entry operations authorized under 19 U.S.C. 1318(b)(1)(C) and (b)(2), travel through the land ports of entry and ferry terminals along the United States-Mexico border shall be limited to “essential travel,” which includes, but is not limited to—

- U.S. citizens and lawful permanent residents returning to the United States;
- Individuals traveling for medical purposes (*e.g.*, to receive medical treatment in the United States);
- Individuals traveling to attend educational institutions;
- Individuals traveling to work in the United States (*e.g.*, individuals working in the farming or agriculture industry who must travel between the United States and Mexico in furtherance of such work);
- Individuals traveling for emergency response and public health purposes (*e.g.*, government officials or emergency responders entering the United States to support federal, state, local, tribal, or territorial government efforts to respond to COVID–19 or other emergencies);
- Individuals engaged in lawful cross-border trade (*e.g.*, truck drivers supporting the movement of cargo between the United States and Mexico);

¹⁰ 19 U.S.C. 1318(b)(1)(C) provides that “[n]otwithstanding any other provision of law, the Secretary of the Treasury, when necessary to respond to a national emergency declared under the National Emergencies Act (50 U.S.C. 1601 *et seq.*) or to a specific threat to human life or national interests,” is authorized to “[t]ake any . . . action that may be necessary to respond directly to the national emergency or specific threat.” On March 1, 2003, certain functions of the Secretary of the Treasury were transferred to the Secretary of Homeland Security. *See* 6 U.S.C. 202(2), 203(1). Under 6 U.S.C. 212(a)(1), authorities “related to Customs revenue functions” were reserved to the Secretary of the Treasury. To the extent that any authority under section 1318(b)(1) was reserved to the Secretary of the Treasury, it has been delegated to the Secretary of Homeland Security. *See* Treas. Dep’t Order No. 100–16 (May 15, 2003), 68 FR 28322 (May 23, 2003). Additionally, 19 U.S.C. 1318(b)(2) provides that “[n]otwithstanding any other provision of law, the Commissioner of U.S. Customs and Border Protection, when necessary to respond to a specific threat to human life or national interests, is authorized to close temporarily any Customs office or port of entry or take any other lesser action that may be necessary to respond to the specific threat.” Congress has vested in the Secretary of Homeland Security the “functions of all officers, employees, and organizational units of the Department,” including the Commissioner of CBP. 6 U.S.C. 112(a)(3).

- Individuals engaged in official government travel or diplomatic travel;
- Members of the U.S. Armed Forces, and the spouses and children of members of the U.S. Armed Forces, returning to the United States; and
- Individuals engaged in military-related travel or operations.

The following travel does not fall within the definition of “essential travel” for purposes of this Notification—

- Individuals traveling for tourism purposes (*e.g.*, sightseeing, recreation, gambling, or attending cultural events).

At this time, this Notification does not apply to air, freight rail, or sea travel between the United States and Mexico, but does apply to passenger rail, passenger ferry travel, and pleasure boat travel between the United States and Mexico. These restrictions are temporary in nature and shall remain in effect until 11:59 p.m. EST on January 21, 2022. These restrictions also can be modified by the Secretary at any point prior to January 21, 2022 to allow non-essential travel through land ports of entry and ferry terminals for individuals who are fully vaccinated and have appropriate proof of vaccination. Any such modifications to the restrictions will be accomplished via a posting to the DHS website (<https://www.dhs.gov>) and followed by a publication in the **Federal Register**. Moreover, this Notification may be amended or rescinded prior to that time, based on circumstances associated with the specific threat.

The CBP Commissioner is hereby directed to prepare and distribute appropriate guidance to CBP personnel on the continued implementation of the temporary measures set forth in this Notification including any appropriate procedures regarding the lifting of restrictions for fully vaccinated travelers. The CBP Commissioner may determine that other forms of travel, such as travel in furtherance of economic stability or social order, constitute “essential travel” under this Notification. Further, the CBP Commissioner may, on an individualized basis and for humanitarian reasons or for other purposes in the national interest, permit the processing of travelers to the United States not engaged in “essential travel.”

ALEJANDRO N. MAYORKAS,
Secretary,
U.S. Department of Homeland Security.

19 CFR Chapter I

NOTIFICATION OF TEMPORARY TRAVEL RESTRICTIONS APPLICABLE TO LAND PORTS OF ENTRY AND FERRIES SERVICE BETWEEN THE UNITED STATES AND CANADA

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

ACTION: Notification of continuation of temporary travel restrictions.

SUMMARY: This Notification announces the decision of the Secretary of Homeland Security (Secretary) to continue to temporarily limit the non-essential travel of individuals from Canada into the United States at land ports of entry along the United States-Canada border. This Notification further announces that the Secretary intends to lift these limitations for individuals who are fully vaccinated for COVID-19 (as defined by the Centers for Disease Control and Prevention) to align with anticipated changes to international travel by air.

DATES: This notification goes into effect at 12 a.m. Eastern Daylight Time (EDT) on October 22, 2021 and will remain in effect until 11:59 p.m. Eastern Standard Time (EST) on January 21, 2022, unless amended or rescinded prior to that time.

FOR FURTHER INFORMATION CONTACT: Stephanie Watson, Office of Field Operations Coronavirus Coordination Cell, U.S. Customs and Border Protection (CBP) at 202-325-0840.

SUPPLEMENTARY INFORMATION:

Background

On March 24, 2020, DHS published notice of its decision to temporarily limit the travel of individuals from Canada into the United States at land ports of entry along the United States-Canada border to “essential travel,” as further defined in that document.¹ The document described the developing circumstances regarding the COVID-19 pandemic and stated that, given the outbreak and continued transmission and spread of the virus associated with COVID-19 within the United States and globally, DHS had deter-

¹ 85 FR 16548 (Mar. 24, 2020). That same day, DHS also published notice of its decision to temporarily limit the travel of individuals from Mexico into the United States at land ports of entry along the United States-Mexico border to “essential travel,” as further defined in that document. 85 FR 16547 (Mar. 24, 2020).

mined that the risk of continued transmission and spread of the virus associated with COVID–19 between the United States and Canada posed a “specific threat to human life or national interests.” DHS later published a series of notifications continuing such limitations on travel until 11:59 p.m. EDT on October 21, 2021.²

DHS continues to monitor and respond to the COVID–19 pandemic. As of the week of October 13, 2021, there have been over 237 million confirmed cases globally, with over 4.8 million confirmed deaths.³ There have been over 44.4 million confirmed and probable cases within the United States,⁴ over 1.6 million confirmed cases in Canada,⁵ and over 3.7 million confirmed cases in Mexico.⁶ DHS also notes that the Delta variant has driven an increase in cases, hospitalizations, and deaths in the United States, Canada, and Mexico in recent months.⁷

Notwithstanding these realities, vaccines are effective against Delta and other known variants, protecting people from getting infected and severely ill, as well as significantly reducing the likelihood

² See 86 FR 52609 (Sept. 22, 2021); 86 FR 46964 (Aug. 23, 2021); 86 FR 38556 (July 22, 2021); 86 FR 32764 (June 23, 2021); 86 FR 27802 (May 24, 2021); 86 FR 21188 (Apr. 22, 2021); 86 FR 14812 (Mar. 19, 2021); 86 FR 10815 (Feb. 23, 2021); 86 FR 4969 (Jan. 19, 2021); 85 FR 83432 (Dec. 22, 2020); 85 FR 74603 (Nov. 23, 2020); 85 FR 67276 (Oct. 22, 2020); 85 FR 59670 (Sept. 23, 2020); 85 FR 51634 (Aug. 21, 2020); 85 FR 44185 (July 22, 2020); 85 FR 37744 (June 24, 2020); 85 FR 31050 (May 22, 2020); 85 FR 22352 (Apr. 22, 2020). DHS also published parallel notifications of its decisions to continue temporarily limiting the travel of individuals from Mexico into the United States at land ports of entry along the United States-Mexico border to “essential travel.” See 86 FR 52611 (Sept. 22, 2021); 86 FR 46963 (Aug. 23, 2021); 86 FR 38554 (July 22, 2021); 86 FR 32766 (June 23, 2021); 86 FR 27800 (May 24, 2021); 86 FR 21189 (Apr. 22, 2021); 86 FR 14813 (Mar. 19, 2021); 86 FR 10816 (Feb. 23, 2021); 86 FR 4969 (Jan. 19, 2021); 85 FR 83433 (Dec. 22, 2020); 85 FR 74604 (Nov. 23, 2020); 85 FR 67275 (Oct. 22, 2020); 85 FR 59669 (Sept. 23, 2020); 85 FR 51633 (Aug. 21, 2020); 85 FR 44183 (July 22, 2020); 85 FR 37745 (June 24, 2020); 85 FR 31057 (May 22, 2020); 85 FR 22353 (Apr. 22, 2020).

³ WHO, Coronavirus disease 2019 (COVID–19) Weekly Epidemiological Update (Oct. 12, 2021), available at [Weekly operational update on COVID–19—12 October 2021 \(who.int\)](https://www.who.int/news-room/operational-updates/20211012-covid-19-weekly-epidemiological-update) (accessed Oct. 13, 2021).

⁴ CDC, COVID Data Tracker: United States COVID–19 Cases, Deaths, and Laboratory Testing (NAATs) by State, Territory, and Jurisdiction, CDC COVID Data Tracker. (accessed Oct. 13, 2021).

⁵ WHO, Situation by Region, Country, Territory & Area, available at <https://covid19.who.int/table> (accessed Oct. 13, 2021).

⁶ *Id.*

⁷ See CDC, Delta Variant: What We Know About the Science, <https://www.cdc.gov/coronavirus/2019-ncov/variants/delta-variant.html> (accessed Sept. 9, 2021). See Government of Canada, Coronavirus Disease (COVID–19) For Health Professionals, <https://health-infobase.canada.ca/covid-19/epidemiological-summary-covid-19-cases.html#VOC> (accessed Sept. 9, 2021). See Government of Mexico, Ministry of Health, COVID–19 National General Information, <https://datos.covid-19.conacyt.mx/#DOView> (accessed Aug. 16, 2021); Mexican Consortium of Genomic Surveillance (CoViGen-Mex), Reportes, <http://mexcov2.ibt.unam.mx:8080/COVID-TRACKER/> (accessed Sept. 9, 2021).

of hospitalization and death, according to the CDC.⁸ As such, the risks posed by and to fully vaccinated travelers differ materially from those posed by unvaccinated travelers. As a result, in late September, the White House COVID–19 Response Coordinator indicated the United States plans to revise standards and procedures for incoming international air travel, so as to enable the air travel of fully vaccinated travelers beginning in early November. On October 12, 2021, DHS announced that it intends to do the same with respect to travelers crossing the land border from Mexico and Canada, so as to align the treatment of the land and air ports of entry and allow those who are fully vaccinated for COVID–19 to travel to the United States for non-essential purposes.⁹

Therefore, this Notification extends the limits on non-essential travel and also announces the Secretary’s intent to lift these restrictions for certain such individuals who are fully vaccinated.

Notice of Action

Given the outbreak and continued transmission and spread of COVID–19 within the United States and globally, I have determined that the risk of continued transmission and spread of the virus associated with COVID–19 between the United States and Canada poses an ongoing “specific threat to human life or national interests.”

In March 2020, U.S. and Canadian officials mutually determined that non-essential travel between the United States and Canada posed additional risk of transmission and spread of the virus associated with COVID–19 and placed the populace of both nations at increased risk of contracting the virus associated with COVID–19. Given the sustained human-to-human transmission of the virus, coupled with risks posed by new variants, non-essential travel to the United States places the personnel staffing land ports of entry between the United States and Canada, as well as the individuals traveling through these ports of entry, at increased risk of exposure to the virus associated with COVID–19. Accordingly, and consistent

⁸ What You Need to Know about Variants | CDC (accessed Oct. 13, 2021).

⁹ DHS Press Release, Secretary Mayorkas to Allow Fully Vaccinated Travelers from Canada and Mexico to Enter U.S. at Land Borders and Ferry Crossings, www.dhs.gov/news/2021/10/12/secretary-mayorkas-allow-fully-vaccinated-travelers-canada-and-mexico-enter-us-land (last accessed Oct. 14, 2021).

with the authority granted in 19 U.S.C. 1318(b)(1)(C) and (b)(2),¹⁰ I have determined that land ports of entry along the U.S.-Canada border will continue to suspend normal operations and will only allow processing for entry into the United States of those travelers engaged in “essential travel,” as defined below. Given the definition of “essential travel” below, this temporary alteration in land ports of entry operations should not interrupt legitimate trade between the two nations or disrupt critical supply chains that ensure food, fuel, medicine, and other critical materials reach individuals on both sides of the border.

For purposes of the temporary alteration in certain designated ports of entry operations authorized under 19 U.S.C. 1318(b)(1)(C) and (b)(2), travel through the land ports of entry and ferry terminals along the United States-Canada border shall be limited to “essential travel,” which includes, but is not limited to—

- U.S. citizens and lawful permanent residents returning to the United States;
- Individuals traveling for medical purposes (*e.g.*, to receive medical treatment in the United States);
- Individuals traveling to attend educational institutions;
- Individuals traveling to work in the United States (*e.g.*, individuals working in the farming or agriculture industry who must travel between the United States and Canada in furtherance of such work);
- Individuals traveling for emergency response and public health purposes (*e.g.*, government officials or emergency responders entering the United States to support federal, state, local, tribal, or territorial government efforts to respond to COVID-19 or other emergencies);
- Individuals engaged in lawful cross-border trade (*e.g.*, truck drivers supporting the movement of cargo between the United States and Canada);

¹⁰ 19 U.S.C. 1318(b)(1)(C) provides that “[n]otwithstanding any other provision of law, the Secretary of the Treasury, when necessary to respond to a national emergency declared under the National Emergencies Act (50 U.S.C. 1601 *et seq.*) or to a specific threat to human life or national interests,” is authorized to “[t]ake any . . . action that may be necessary to respond directly to the national emergency or specific threat.” On March 1, 2003, certain functions of the Secretary of the Treasury were transferred to the Secretary of Homeland Security. *See* 6 U.S.C. 202(2), 203(1). Under 6 U.S.C. 212(a)(1), authorities “related to Customs revenue functions” were reserved to the Secretary of the Treasury. To the extent that any authority under section 1318(b)(1) was reserved to the Secretary of the Treasury, it has been delegated to the Secretary of Homeland Security. *See* Treas. Dep’t Order No. 100-16 (May 15, 2003), 68 FR 28322 (May 23, 2003). Additionally, 19 U.S.C. 1318(b)(2) provides that “[n]otwithstanding any other provision of law, the Commissioner of U.S. Customs and Border Protection, when necessary to respond to a specific threat to human life or national interests, is authorized to close temporarily any Customs office or port of entry or take any other lesser action that may be necessary to respond to the specific threat.” Congress has vested in the Secretary of Homeland Security the “functions of all officers, employees, and organizational units of the Department,” including the Commissioner of CBP. 6 U.S.C. 112(a)(3).

- Individuals engaged in official government travel or diplomatic travel;
- Members of the U.S. Armed Forces, and the spouses and children of members of the U.S. Armed Forces, returning to the United States; and
- Individuals engaged in military-related travel or operations.

The following travel does not fall within the definition of “essential travel” for purposes of this Notification—

- Individuals traveling for tourism purposes (*e.g.*, sightseeing, recreation, gambling, or attending cultural events).

At this time, this Notification does not apply to air, freight rail, or sea travel between the United States and Canada, but does apply to passenger rail, passenger ferry travel, and pleasure boat travel between the United States and Canada. These restrictions are temporary in nature and shall remain in effect until 11:59 p.m. EST on January 21, 2022. These restrictions also can be modified by the Secretary at any point prior to January 21, 2022 to allow non-essential travel through land ports of entry and ferry terminals for individuals who are fully vaccinated and have appropriate proof of vaccination. Any such modifications to the restrictions will be accomplished via a posting to the DHS website (<https://www.dhs.gov>) and followed by a publication in the **Federal Register**. Moreover, this Notification may be amended or rescinded prior to that time, based on circumstances associated with the specific threat.

The CBP Commissioner is hereby directed to prepare and distribute appropriate guidance to CBP personnel on the continued implementation of the temporary measures set forth in this Notification including any appropriate procedures regarding the lifting of restrictions for fully vaccinated travelers. The CBP Commissioner may determine that other forms of travel, such as travel in furtherance of economic stability or social order, constitute “essential travel” under this Notification. Further, the CBP Commissioner may, on an individualized basis and for humanitarian reasons or for other purposes in the national interest, permit the processing of travelers to the United States not engaged in “essential travel.”

ALEJANDRO N. MAYORKAS,
Secretary,
U.S. Department of Homeland Security.

RECEIPT OF APPLICATION FOR “LEVER-RULE” PROTECTION

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

ACTION: Notice of receipt of application for “Lever-Rule” protection.

SUMMARY: Pursuant to 19 CFR 133.2(f), this notice advises interested parties that CBP has received an application from the Procter & Gamble company (hereinafter “P&G”) seeking “Lever-Rule” protection for the federally registered and recorded “ORAL-B” trademark.

FOR FURTHER INFORMATION CONTACT: Ann Segura, Intellectual Property Enforcement Branch, Regulations & Rulings, (202) 325-0031.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to 19 CFR 133.2(f), this notice advises interested parties that CBP has received an application from P&G seeking “Lever-Rule” protection. Protection is sought against importations of P&G’s “ORAL-B” branded products which are manufactured in Germany and intended for sale in countries outside of the United States that bear the “ORAL-B” (U.S. Trademark Registration No. 2,910,847 / CBP Recordation No. TMK 08-01198) trademark. In the event that CBP determines that the “ORAL-B” branded products under consideration are physically and materially different from the products intended for sale in the United States, CBP will publish a notice in the Customs Bulletin, pursuant to 19 CFR 133.2 (f), indicating that the above-referenced trademarks are entitled to “Lever-Rule” protection with respect to those physically and materially different products.

Dated: October 18, 2021

ALAINA VAN HORN
Chief,
Intellectual Property Enforcement Branch
Regulations and Rulings, Office of
International Trade

U.S. Court of International Trade

Slip Op. 21–125

FULL MEMBER SUBGROUP OF THE AMERICAN INSTITUTE OF STEEL CONSTRUCTION, LLC, Plaintiff, v. UNITED STATES, Defendant, and CORNERSTONE BUILDING BRANDS, INC. et al., Defendant-Intervenors.

Before: Claire R. Kelly, Judge
Court No. 20–00090
PUBLIC VERSION

[Sustaining the U.S. International Trade Commission’s final negative injury determination in its antidumping and countervailing duty investigations of fabricated structural steel from Canada, the People’s Republic of China, and Mexico.]

Dated: September 22, 2021

Adam M. Teslik and *Christopher B. Weld*, Wiley Rein LLP, of Washington, DC, argued for plaintiff Full Member Subgroup of the American Institute of Steel Construction, LLC. Also on the briefs were *Alan H. Price*, *Stephanie M. Bell*, and *Enbar Toledano*.

John D. Henderson, Attorney-Advisor, Office of the General Counsel, and *Andrea C. Casson*, Assistant General Counsel for Litigation, U.S. International Trade Commission, of Washington, DC, argued for defendant United States. Also on the brief were *Dominic L. Bianchi*, General Counsel, and *Karl S. von Schriltz*, Attorney.

Ned H. Marshak, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt, LLP, of New York, NY, argued for defendant-intervenors Jinhuan Construction Group Co., Ltd., Wison (Nantong) Heavy Industry Co., Ltd., Shanghai Matsuo Steel Structure Co., Ltd., Yanda (Haimen) Heavy Equipment Manufacturing Co., Ltd., Shanghai Cosco Kawasaki Heavy Industries Steel Structure Co., Ltd., Modern Heavy Industries (Taicang) Co., Ltd., Dickerson Enterprises, Inc., and Steel Construction Group, LLC. Also on the brief were *Max F. Schutzman*, *Jordan C. Kahn*, and *Eve Q. Wang*.

Matthew R. Nicely and *Daniel M. Witkowski*, Akin, Gump, Strauss, Hauer & Feld-LLP, of Washington, DC, argued for defendant-intervenor Cornerstone Building Brands, Inc.

Christopher A. Dunn and *Daniel L. Porter*, Curtis, Mallet-Prevost, Colt & Mosle LLP, of Washington, DC, argued for defendant-intervenor Blue Scope Buildings North America Inc.

Richard L.A. Weiner and *Rajib Pal*, Sidley Austin, LLP, of Washington, DC, for defendant-intervenors Exxon Mobil Chemical Company, a Division of Exxon Mobil Corporation, and Gulf Coast Growth Ventures, LLC.

OPINION

Kelly, Judge:

Before the court is Plaintiff Full Member Subgroup of the American Institute of Steel Construction, LLC’s (“AISC”, “Petitioner”, or “Plaintiff”) Rule 56.2 motion for judgment on the agency record challenging various aspects of the U.S. International Trade Commission’s (the “Commission”) final negative injury determination in its antidump-

ing and countervailing duty (“ADD” and “CVD”) investigations of fabricated structural steel (“FSS”) from Canada, the People’s Republic of China (“China”) and Mexico.¹ See [AISC’s] Rule 56.2 Mot. J. Agency R., Sept. 21, 2020, ECF No. 52 (“Pl.’s Mot.”); *[FSS] From Canada, China, and Mexico*, 85 Fed. Reg. 16,129 (Int’l Trade Comm’n Mar. 20, 2020) (deters.); *[FSS] from Canada, China, and Mexico*, Investigation Nos. 701-TA-616–617 and 731-TA-1432–1434, USITC Pub. 5031 (Mar. 2020) (Final), ECF No. 39–1 (“USITC Pub. 5031”); see also Views of Comm’n and Separate and Dissenting Views of Schmidlein and Karpel (Confidential Version), Mar. 17, 2020, ECF No. 40–1 (“Final Views”); Final Staff Report (Confidential Version), Feb. 12, 2020, ECF No. 40–2, revised by, Revisions Final Staff Report (Confidential Version), Feb. 18, 2020, ECF No. 40–3, and Revisions Final Staff Report (Confidential Version), Feb. 24, 2020, ECF No. 40–4 (collectively, “Final Staff Report”). For the following reasons, the Commission’s final negative injury determination is sustained.

BACKGROUND

On February 4, 2019, AISC filed petitions with the Commission and the U.S. Department of Commerce (“Commerce”) requesting ADD and CVD relief from imports of FSS from Canada, China, and Mexico.² Compl. ¶ 5, May 13, 2020, ECF No. 9; Petitions Imposition of Antidumping and Countervailing Duties, PD 1, CD 1, Doc. Nos. 665761, 665760 (Feb. 4, 2019) (“Petitions”).³ AISC is a “trade association[,] a majority of whose members manufacture, produce, or wholesale the domestic like product in the United States.” Compl. ¶ 3. The petitions alleged that unfairly traded imports of certain FSS caused or threatened to cause material injury to the domestic industry. Compl. ¶ 5; Petitions at 1. On February 4, 2019, the Commission initiated the preliminary phase of its investigation into the effects of imports of FSS from Canada, China and Mexico into the United States on the domestic industry. See *[FSS] From Canada, China, and Mexico*, 84 Fed. Reg. 3245 (Int’l Trade Comm’n Feb. 11, 2019) (insti-

¹ The countervailing duty investigation concerning fabricated structural steel from Canada was terminated after the U.S. Department of Commerce determined that countervailable subsidies were not being provided by Canada. *Certain [FSS] from Canada*, 85 Fed. Reg. 5387 (Dep’t. Comm. Jan. 30, 2020) (final negative [CVD] deter.).

² Both Commerce and the Commission must come to affirmative conclusions in their respective investigations into imports of the subject merchandise before an ADD or CVD order can be issued. See 19 U.S.C. §§ 1673d(c)(2), 1671d(c)(2) (2018).

³ On June 22, 2020, Defendant submitted indices to the public and confidential administrative records underlying the Commission’s final determination. These indices are located on the docket at ECF Nos. 39 and 40, respectively. All references in this opinion to documents from the administrative record underlying the Commission’s final determination are identified by the numbers assigned by the Commission in those indices and preceded by “PD” and “CD” to denote public or confidential documents.

tution of [ADD] and [CVD] investigation and scheduling of prelim. phase investigation). The period of investigation (“POI”) covered January 2015 through September 2018. [*FSS*] from *Canada, China, and Mexico*, Investigation Nos. 701-TA-615–617 and 731-TA-1432–1434 (Prelim.) at 12, USITC Pub. 4878, (Mar. 2019) (“USITC Pub. 4878”). The Commission assessed the effect of subject imports from Canada, China, and Mexico on the domestic industry on a cumulated basis after determining that imports from these countries compete with each other and with the domestic like product. USITC Pub. 4878 at 19–21; *see also* Final Views at 35–38;⁴ 19 U.S.C. § 1677(7)(G)(i).

The Commission defined “a single domestic like product consisting of all in-scope FSS.” Final Views at 15. Commerce defined the scope in its ADD investigations as follows:

The merchandise covered by the investigation is carbon and alloy fabricated structural steel. Fabricated structural steel is made from steel in which: (1) iron predominates, by weight, over each of the other contained elements; and (2) the carbon content is two percent or less by weight. Fabricated structural steel products are steel products that have been fabricated for erection or assembly into structures, including, but not limited to, buildings (commercial, office, institutional, and multifamily residential); industrial and utility projects; parking decks; arenas and convention centers; medical facilities; and ports, transportation and infrastructure facilities. Fabricated structural steel is manufactured from carbon and alloy (including stainless) steel products such as angles, columns, beams, girders, plates, flange shapes (including manufactured structural shapes utilizing welded plates as a substitute for rolled wide flange sections), channels, hollow structural section (HSS) shapes, base plates, and plate-work components. Fabrication includes, but is not limited to cutting, drilling, welding, joining, bolting, bending, punching, pressure fitting, molding, grooving, adhesion, beveling, and riveting and may include items such as fasteners, nuts, bolts, rivets, screws, hinges, or joints.

The inclusion, attachment, joining, or assembly of non-steel components with fabricated structural steel does not remove the fabricated structural steel from the scope.

⁴ Citations to the public version of the Final Views can be found at the corresponding page of USITC Pub. 5031 (e.g., USITC Pub. 5031 at 35–38 is the corresponding citation in the public version of the Commission’s Final Views for this citation).

Fabricated structural steel is covered by the scope of the investigation regardless of whether it is painted, varnished, or coated with plastics or other metallic or non-metallic substances and regardless of whether it is assembled or partially assembled, such as into modules, modularized construction units, or sub-assemblies of fabricated structural steel.

Subject merchandise includes fabricated structural steel that has been assembled or further processed in the subject country or a third country, including but not limited to painting, varnishing, trimming, cutting, drilling, welding, joining, bolting, punching, bending, beveling, riveting, galvanizing, coating, and/or slitting or any other processing that would not otherwise remove the merchandise from the scope of the investigation if performed in the country of manufacture of the fabricated structural steel.

All products that meet the written physical description of the merchandise covered by the investigation are within the scope of the investigation unless specifically excluded or covered by the scope of an existing antidumping duty order.

Certain [FSS] from Canada, 85 Fed. Reg. 5373, 5375 (Dep't Com. Jan. 30, 2020) (final deter. of sales at less than fair value); *Certain [FSS] from [China]*, 85 Fed. Reg. 5376, 5379 (Dep't Com. Jan. 30, 2020) (final affirmative deter. of sales at less than fair value); *Certain [FSS] from Mexico*, 85 Fed. Reg. 5390, 5392–93 (Dep't Com. Jan. 30, 2020) (final deter. of sales at less than fair value).

Commerce defined certain enumerated exclusions from the scope of its investigation. *See, e.g., Certain [FSS] from Mexico*, 85 Fed. Reg. at 5393–94. *Relevant to this dispute is the third exclusion:*

Pre-engineered metal building systems, which are defined as complete metal buildings that integrate steel framing, roofing and walls to form one, pre-engineered building system, that meet Metal Building Manufacturers Association guide specifications. Pre-engineered metal building systems are typically limited in height to no more than 60 feet or two stories.

Id. at 5393.

On February 12, 2020, the Commission issued its final staff report. *See generally* Final Staff Report.⁵ On February 25, 2020, in a split vote, the Commission determined that the domestic industry was not materially injured by imports of subject FSS. *See* Commission Meet-

⁵ Citations to the public version of the Final Staff Report can be found at the corresponding page of USITC Pub. 5031, beginning at page I-1.

ing Transcript, *[FSS] from Canada, China, and Mexico*, Investigation Nos. 701-TA-615–617 and 731-TA-1432–1434 (Final), PD 407, Doc. No. 703488 (Feb. 25, 2020). Three Commissioners voted in the negative (“the Majority”), while two Commissioners voted in the affirmative. *Id.* at 4. Notice of the negative determination was published on March 20, 2020. *[FSS] From Canada, China, and Mexico*, 85 Fed. Reg. 16,129 (Int’l Trade Comm’n Mar. 20, 2020).

This appeal ensued. *See* Summons, Apr. 17, 2020, ECF No. 1; Compl. Plaintiff brought the instant motion for judgment on the agency record, the parties briefed the issues, and the court conducted oral argument on the matter. *See* [AISC’s] Memo. in Supp. of [Pl.’s Mot.], Sept. 21, 2020, ECF No. 55 (“Pl.’s Br.”); Def. United States’ Memo. in Opp’n to [Pl.’s Mot.], Dec. 4, 2020, ECF No. 58 (“Def.’s Br.”); Resp. in Opp’n to [Pl.’s Mot.] of Def.-Intervenors Jinhuan Construction Group Co., Ltd., Wison (Nantong) Heavy Industry Co., Ltd., Shanghai Matsuo Steel Structure Co., Ltd., Yanda (Haimen) Heavy Equipment Manufacturing Co., Ltd., Shanghai Cosco Kawasaki Heavy Industries Steel Structure Co., Ltd., Modern Heavy Industries (Taicang) Co., Ltd., Dickerson Enterprises, Inc., and Steel Construction Group, LLC (collectively, “GDLSK Respondents”), Dec. 30, 2020, ECF No. 60 (“GDLSK’s Br.”); Def.-Intervenors Cornerstone Building Brands, Inc. & BlueScope Buildings North America, Inc.’s Memo. in Opp’n to [Pl.’s Mot.], Dec. 30, 2020, ECF No. 62 (“CBB-BlueScope’s Br.”); Reply Br. of [AISC], Jan. 28, 2021, ECF No. 63 (“Pl.’s Reply Br.”); Oral Arg., May 6, 2021, ECF No. 73.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to section 516A(a)(2)(B)(i) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(i) (2018),⁶ and 28 U.S.C. § 1581(c) (2018), which grant the court authority to review actions contesting a final affirmative injury determination. “The court shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law.” 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

I. The Commission’s Inclusion of NCI and BlueScope’s Data

Plaintiff asserts that the Commission should have excluded data from NCI Group, Inc. (“NCI”) and BlueScope Buildings North

⁶ 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.

America, Inc. (“BlueScope”) as out-of-scope. *See* Pl.’s Br. at 41–46. Plaintiff contends that NCI and BlueScope included data for out-of-scope complete PEMBS and non-FSS components of PEMBS. *See id.* Defendant counters that the Commission’s reliance on NCI and BlueScope’s reported data was reasonable, noting that the Commission confirmed that NCI and BlueScope only reported data relating to shipments of in-scope domestic like product. *See* Def.’s Br. at 39–45. Defendant-Intervenors Cornerstone Building Brands, Inc. (“CBB”)⁷ and BlueScope argue that NCI and BlueScope did not report data relating to excluded PEMBS or non-FSS components. *See* CBB-BlueScope’s Br. at 4–15. For the following reasons the Commission’s inclusion of data from NCI and BlueScope is reasonable.

The Commission shall determine whether a domestic industry is materially injured by reason of subject imports. *See* 19 U.S.C. § 1671d(1). The domestic industry consists of “producers as a whole of a domestic like product.” 19 U.S.C. § 1677(4)(A). The “domestic like product” is “a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation.” *Id.* § 1677(10). The Commission conducts a like product analysis in light of the scope as determined by Commerce using a variety of factors. *See, e.g., Nippon Steel Corp. v. U.S.*, 19 CIT 450, 454–55 (1995); *see Torrington Co. v. United States*, 14 CIT 648, 650–52, 651 n.3 (1990), *aff’d*, 938 F.2d 1278, 1280 (Fed. Cir. 1991); *USEC v. United States*, 34 F. App’x 725, 730 (Fed. Cir. 2002). In analyzing the domestic industry and the domestic like product, the Commission may not act arbitrarily. *See Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41 (1983). The Commission’s determinations must be supported by substantial evidence. *See* 19 U.S.C. § 1516a(b)(1)(B)(i). Substantial evidence means “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951). The possibility of drawing two inconsistent conclusions from the evidence does not prevent the court from holding that the Commission’s findings are supported by substantial evidence. *See Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1352 (Fed. Cir. 2006). However, the Commission must provide an explanation for those conclusions it draws from the record that reasonably addresses relevant arguments made by interested parties. 19 U.S.C. § 1677f(i)(3)(B); *State Farm*, 463 U.S. at 48–49.

⁷ Defendant-Intervenor CBB states that it is “a U.S. producer of fabricated structural steel and was known as NCI Building Systems, Inc. prior to changing its name in 2019, during the pendency of the Commission’s investigation.” CBB-BlueScope’s Br. at 1 n.1. According to CBB, it “maintains an operating subsidiary called [NCI], which completed U.S. producer and U.S. importer questionnaires during the Commission’s investigation.” *Id.*

Here, the Commission defined the domestic like product as coextensive with Commerce's scope determination, and included NCI and BlueScope's data, explaining that its staff ensured NCI and BlueScope did not report any data that were excluded from the scope. *See* Final Views at 63 n.304. That scope included "steel products that have been fabricated for erection or assembly into structures" regardless of whether that FSS was necessary to support design loads. Final Scope Decision Memo. Re: [FSS] from Canada, Mexico, and [China] at 2, 27, PD 353, Doc. No. 702277 (Jan. 23, 2020) ("Final Scope Decision Memo").

It is reasonably discernible that the Commission concluded that non-loadbearing FSS components were in-scope, and that data relating to such components were properly included. Therefore, the Commission's determination that NCI and BlueScope did not include data for out-of-scope merchandise was in accordance with law and supported by the record. The Commission's decision to include data relating to non-load-bearing steel components of PEMBS is in accordance with Commerce's scope ruling. *See* Final Scope Decision Memo. at 26–27. Commerce explained that any FSS that is incorporated into a structure, regardless of whether such FSS "is essential to support the design loads of the structure" is in-scope. *Id.* Given Commerce's explanation, the Commission reasonably included data from NCI and BlueScope for such FSS components of PEMBS. Plaintiff's contention that steel components that are not "structural" in the sense that they are not load bearing should have been excluded contravenes Commerce's explanation of what FSS encompasses. Thus, Plaintiff's claim that the Commission's failure to define "out-of-scope PEMB[S] components" allowed NCI and BlueScope "to define for themselves what they considered 'out-of-scope,'" which resulted in a flawed data set, does not withstand scrutiny. *See* Pl.'s Br. at 43; *see also* Pl.'s Reply Br. at 21.

The Commission instructed NCI and BlueScope to exclude out-of-scope merchandise and followed up to "determine what specific components each producer had included . . . as in[-]scope merchandise." Final Views at 63 n.304. The Commission "reviewed the questionnaire responses . . . closely and examined the data they submitted in light of what Commerce indicated in its final scope definition was within or outside the scope." *Id.* After the hearing, the Commission specifically directed counsel for NCI and BlueScope that "[i]f you produce or import out-of-scope PEMB[S] components, *do not* include such products in either production or imports – even if assembled into

[PEMBS] that you sell.” *Id.* (emphasis in original). The Commission further obtained shipment data from NCI and BlueScope to determine which specific PEMBS components were included as in-scope merchandise and which components were excluded as out-of-scope merchandise. *Id.* at 64 n.304. The Commission also verified the financial data submitted by NCI.⁸ *Id.* The Commission’s decision to use all the data submitted by NCI and BlueScope was thus made after a proper review of the record. Given the Commission’s documented efforts to ensure that the NCI and BlueScope data was in-scope, Plaintiff’s assertion that the Commission acted arbitrarily is baseless. The Commission assured itself that only in-scope data was included, and its determination is reasonable on this record.

Finally, contrary to Plaintiff’s interpretation of who constructs PEMBS, the record indicated that the “producers of FSS components of PEMBS” did not construct the completed PEMBS, rather builders constructed the completed PEMBS. Final Views at 43; *see also* Pl.’s Br. at 46–47. The Commission concluded that the producers of FSS did not captively consume the FSS components of PEMBS but merely aggregated them. *Id.* As discussed further below, the record supports the Commission’s determination. *See* Revised and Corrected Commission Hearing Transcript at 204 (Pasley), PD 409, Doc. No. 704509 (Mar. 10, 2020) (“Hearing Transcript”); *see also* Post-Hearing Br. BlueScope Buildings North America and Butler de Mexico at 13, PD 341, CD 1005, Doc. Nos. 701534, 701430 (Feb. 4, 2020) (“BlueScope’s Post-Hearing Br.”); Final Staff Report at III-22 n.12, Table E-9; Post-Hearing Br. [CBB] and Building Systems de Mexico, S.A. de C.V., App. A at 16–17, PD 342, CD 1004, Doc. No. 701540 (Feb. 4, 2020) (“CBB & BSM’s Post-Hearing Br.”). Thus, the Commission reasonably determined that BlueScope and NCI did not improperly report data in connection with completed PEMBS.

II. Failure to Collect Certain Data

Plaintiff argues that the Commission’s failure to seek out “pricing product data”⁹ or bid data relating to initial offers for projects involving the sale of FSS from both purchasers and producers (or fabricators) for the final phase of its investigation was unlawful and led to an

⁸ Plaintiff argues that this verification is irrelevant, as it relates to sales figures that should not have been included in the first place. Pl.’s Br. at 45. However, the Commission staff had also verified that only in-scope merchandise that been reported. *See* Verification Report of NCI Group, Inc., [FSS] from Canada, China, and Mexico Investigation Nos. 701-TA-615–617 and 731-TA-1432–1434 (Final) (Confidential Version) CR 1028 (Feb. 5, 2020).

⁹ The parties use the phrase “pricing product data” to describe “quarterly data for the total quantity and f.o.b. value of . . . fabricated structural steel products shipped to unrelated U.S. customers”. *See* USITC Pub. 4878 at V-8.

inadequate record. See Pl.’s Br. at 21–26, 39 (citing, inter alia, *Allegheny Ludlum Corp. v. United States*, 287 F.3d 1365, 1373 (Fed. Cir. 2002)). Defendant contends that Plaintiff’s challenge is essentially an objection to the reasonableness of the Majority’s analysis, and that the Commission’s collection of data in this case was appropriate and reasonable. Def.’s Br. at 25–30. For the following reasons the Commission’s methodological choices were reasonable and in accordance with law.

The Commission shall determine whether a domestic industry is materially injured (or threatened with material injury) by reason of subject imports. See 19 U.S.C. § 1671d(b)(1). “Material injury” means “harm which is not inconsequential, immaterial, or unimportant.” 19 U.S.C. § 1677(7)(A). In each case, the Commission shall consider:

- (I) the volume of imports of the subject merchandise,
- (II) the effect of imports of that merchandise on prices in the United States for domestic like products, and
- (III) the impact of imports of such merchandise on domestic producers of domestic like products, but only in the context of production operations within the United States[.]

Id. § 1677(7)(B)(i)(I)–(III). The Commission may also “consider such other economic factors as are relevant to the determination regarding whether there is material injury by reason of imports.” *Id.* § 1677(7)(B)(ii). As long as the Commission considers all three mandatory factors, its “methodology and procedures are reasonable means of effectuating the statutory purpose, and there is substantial evidence in the record supporting the agency’s conclusions, the court will not impose its own views as to the sufficiency of the agency’s investigation or question the agency’s methodology.” *Ceramica Regiomontana, S.A. v. United States*, 10 CIT 399, 404–05 (1986) (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843 (1984)); see also *Angus Chem. Co. v. United States*, 140 F.3d 1478, 1485 (Fed. Cir. 1998).

The Commission reasonably declined Petitioner’s request to solicit additional pricing product data or bid data for the final phase of its investigation. Although FSS is primarily sold through a bidding process, the Commission initially requested pricing product data from U.S. producers and importers regarding the effects of subject imports from Canada, China, and Mexico on FSS sales in the United States.

See USITC Pub. 4878 at V-8.¹⁰ The Commission also requested that U.S. producers report instances of lost sales or revenue resulting from FSS imports from Canada, China, and Mexico (“lost sales and revenue survey”), see *id.* at V-13, which it considered alongside other sources such as official import statistics from Commerce and publicly available index data on FSS prices. See *id.* at 4–5, V-7. However, the Commission encountered difficulties with the pricing product data it collected for the preliminary phase, and “request[ed] that the parties in their comments on the draft questionnaires suggest the best way for the Commission to collect comparable pricing data for the domestic like product and the subject imports.” *Id.* at 31. On August 5, 2019, the Commission circulated to the parties a draft of its final phase questionnaires, and Petitioner made several suggestions.¹¹ See Draft Questionnaires and accompanying Letter, PDs 97–98, Doc. Nos. 684283, 684284 (Aug. 5, 2019). The Commission implemented some, but not all, of the suggestions offered during the preliminary phase as to how to conduct its investigation. See, e.g., Def.’s Br. at 26–27 (citing Pet’r’s Cmts. on Draft Questionnaires, PD 116, CD 314, Doc. Nos.

¹⁰ The Commission requested pricing product data based on six categories proposed by AISC in its petitions:

Product 1.—Fabricated light structural, Grade 50, 0–19 lbs. per linear foot, sold for industrial projects.

Product 2.—Fabricated medium structural, Grade 50, 20–119 lbs. per linear foot, sold for industrial projects.

Product 3.—Fabricated extra heavy structural, Grade 50, 120 lbs. or greater per linear foot, sold for industrial projects.

Product 4.—Fabricated structural steel sold for schools, libraries, labs, and hospitals, 2–4 stories.

Product 5.—Fabricated structural steel sold for office buildings, multi-family residential buildings, and mixed-use buildings, 5–19 stories.

Product 6.—Fabricated structural steel sold for office buildings, multifamily residential buildings, and mixed-use buildings, 20 stories and greater.

Id.

¹¹ First, Petitioner maintained that the Commission should continue collecting pricing product data and proposed an additional product category calling for “quarterly price data for all [FSS] sold by [the respondent’s] firm.” See Pet’r’s Draft Questionnaire Cmts. at 8–9, PD 116, CD 314, Doc. Nos. 687192, 687029 (Sept. 3, 2019). Additional time to conduct the final phase, Petitioner argued, would mitigate many of the difficulties experienced by the Commission in collecting usable pricing product data during the preliminary phase. *Id.* at 6–7. According to Petitioner, even if the collected pricing product data suffered limitations, it would still be useful to complement or corroborate the bid data. *Id.* at 8. Second, in addition to requesting data from U.S. purchasers of FSS, Petitioner urged the Commission to expand its questionnaire to include bid data from U.S. and foreign producers of FSS. *Id.* at 10–11. Petitioner explained that fabricators/producers of FSS would be better positioned to itemize total bid prices in such a way as to enable the Commission to isolate the FSS component of final bids. *Id.* Third, Petitioner requested that the Commission seek data on initial bid amounts for sales of FSS. *Id.* at 11. Petitioner submitted that implementing its request would allow the Commission to conduct a representative comparison of FSS prices that reflects any price changes that occurred between rounds of bidding in response to subject imports. See *id.* at 10–11.

687192, 687029 (Sept. 3, 2019) (“Pet’r’s Draft Questionnaire Cmts.”), Final Questionnaires, PD 154 (Oct. 4, 2019)).

Although the Plaintiff argues that the Commission ignored its suggestions, Pl.’s Br. at 21–22, the Commission reasonably determined that requesting additional pricing product data would not lead to probative evidence. *See* Final Views at 52–53. The Commission noted irregularities with the data and difficulties it encountered when soliciting responses from U.S. producers during the preliminary phase. *See id.* at 52–53, 53 n.256. The Commission explained that Petitioner’s suggestion to collect pricing product data for the same six categories, plus an additional seventh category consisting of all FSS, did little to address the problems the Commission encountered in the preliminary phase of the investigations. *See id.* at 52–53, 53 nn.254, 256. The Commission’s preliminary request for pricing product data produced responses that all parties that address this issue acknowledge were flawed and of limited probative value. *See* Pl.’s Br. at 21–23; Def.’s Br. at 30–31; GDLSK’s Br. at 14–15. The Commission’s determination that further requests for the same data would be unhelpful is reasonable. It may be, as Petitioner speculated in its comments, that the inclusion of one additional product pricing category in the Commission’s final phase questionnaire and more time to conduct the final phase of the investigation would have mitigated difficulties the Commission encountered during the preliminary phase. Pet’r’s Draft Questionnaire Cmts. at 8–9. However, an alternative reasonable approach does not render the Commission’s determination unreasonable. *See Nippon Steel Corp.*, 458 F.3d at 1352.

The Commission also requested bid data from purchasers, but not from producers or fabricators, and limited its request to bid data relating to final offers. *See* Final Questionnaire at 28–30. The Commission observed that Petitioner “acknowledged in the petitions that the customized nature of FSS and the bid process imposed limitations on the usefulness of both pricing product data and bid data for FSS,” and that “[t]he petitions specifically cited a previous investigation in which the Commission had explained that its ‘conventional {pricing product} approach to pricing’ was ‘not useful’ in that investigation given the custom nature of the products and the bidding process through which they were sold.” Final Views at 53 n.256 (citing Petitions at 27); *see also* Large Power Transformers from Korea Investigation No. 731-TA-1189 (Prelim.) at 16, USITC Pub. 4256 (Sept. 2011) (“USITC Pub. 4256”). It is reasonably discernible, based on the Commission’s reference to Large Power Transformers from Korea, that past investigations dealing with subject merchandise that are

custom-made for specific projects and sold through a bidding process informed the Commission's decision to limit its request to final bid data from U.S. purchasers.¹² See Final Views at 53 n.256.

Plaintiff's assertions that the Commission should have requested initial bid data and that the Commission should have broadened its requests to include bid data from fabricators, fail for similar reasons. See Pl.'s Br. at 21–22, 38–39. As discussed, it is reasonably discernible that the Commission preferred to request bid data from purchasers because requests for bid data from fabricators or producers would result in comparability issues. See Final Views at 53 n.256; see also, e.g., Engineered Process Gas Turbo-Compressor Systems from Japan, Investigation No. 731-TA-748 (Final) at V-4 n.16, USITC Pub. 3042 (Jun. 1997) (“Since bid prices presented by individual suppliers may differ in their scope, information from contractors/end users is more reliable in terms of comparing bids from different suppliers, since it is more likely that all bids presented will cover an equivalent scope.”).¹³

III. The Commission's Refusal to Apply Captive Production Provisions

The Commission's determination not to apply the captive production provision of the statute, see 19 U.S.C. § 1677(7)(C)(iv), is reasonable and supported by substantial evidence. The Commission determined that aggregation of FSS components with non-FSS components into PEMBS “kits” does not constitute “production of a downstream article” within the meaning of the statute. See Final Views at 43; see also 19 U.S.C. § 1677(7)(C)(iv). Plaintiff argues that the relevant downstream article is a complete PEMBS, which Plaintiff asserts is indistinguishable from a PEMBS kit. See Pl.'s Br. at 46. Plaintiff further argues that the PEMBS kits themselves are down-

¹² For example, in *Large Power Transformers from Korea*, the Commission requested bid data from producers and fabricators, but found that the information submitted was not sufficient to permit identification of instances where U.S. produced subject merchandise compete with subject imports for the same sales. USITC Pub. 4256 at 16. Indeed, Defendant points out, and Plaintiff does not dispute, that in the three most recent investigations cited by Plaintiff, the Commission limited its examination to final bid data from purchasers. See Def.'s Br. at 29 (citing *Utility Scale Wind Towers from China and Vietnam*, Investigation Nos. 701-TA-486 and 731-TA-11951196 (Final) at 22, USITC Pub. 4372 (Feb. 2013); *100- to 150- Seat Large Civil Aircraft from Canada*, Investigation Nos. 701-TA-578 and 731-TA-1368 (Final) at V10, USITC Pub. 4759 (Feb. 2018); *Large Diameter Welded Pipe from China and India*, Investigation Nos. 701-TA-593–594 and 731-TA-1402 and 1404 (Final) at 43, USITC Pub. 4859 (Jan. 2019)).

¹³ Plaintiff invokes *Allegheny* for the proposition that the Commission has an obligation to seek out more information than it did in this case. Pl.'s Reply Br. at 4–5. In *Allegheny*, the U.S. Court of Appeals for the Federal Circuit held that the Commission must seek out all relevant information before resorting to the “product line provision” of the statute, see *Allegheny* 287 F.3d at 1372, but the parties do not argue that the product line provision is applicable in this instance. See 19 U.S.C. § 1677(4)(D). Therefore, *Allegheny* is not applicable.

stream articles. *Id.* at 48–49. Defendant asserts the Commission’s determination not to apply the captive production provision was reasonable because builders, not FSS producers, produce PEMBS, so FSS is not internally transferred for the production of a downstream article. Def.’s Br. at 46–47. Defendant further argues that it was reasonable for the Commission to determine that aggregation of PEMBS components without any assembly was “not tantamount to a downstream article ‘produced’ from an in-scope article.” *Id.* at 46 (quoting Final Views at 43 n.188). NCI and BlueScope contend that the Commission’s determination not to apply the captive production provision was reasonable and that the Commission’s interpretation of the statute is entitled to deference. CBB-BlueScope’s Br. at 17–19. For the following reasons, the Commission’s decision not to apply the captive production provision is reasonable and supported by substantial evidence.

For the captive production provision to apply, the threshold condition that domestic producers internally transfer domestic like product for the production of a downstream article and sell a significant production of the domestic like product in the merchant market must be met.¹⁴ If the threshold condition is met, the Commission will consider whether the downstream article enters the merchant market and whether the domestic like product is the predominant material input in production of the downstream article. 19 U.S.C. § 1677(7)(C)(iv). The term “internally transfer[red] . . . for the production of a downstream article” is further defined by Congress to mean “processed into a higher-valued downstream article by the same producer.” *See Uruguay Round Agreements Act: Statement of Administrative Action*, H. Doc. 103–316, at 852 (1994), *reprinted in* 1994

¹⁴ Captive production is defined by the statute as follows,

If domestic producers internally transfer significant production of the domestic like product for the production of a downstream article and sell significant production of the domestic like product in the merchant market, and the commission finds that—

(I) the domestic like product produced that is internally transferred for processing into that downstream article does not enter the merchant market for the domestic like product, and

(II) the domestic like product is the predominant material input in the production of that downstream article,

then the Commission, in determining market share and the factors affecting financial performance set forth in clause (iii), shall focus primarily on the merchant market for the domestic like product.

19 U.S.C. § 1677(7)(C)(iv). Sales in the “merchant market” refers to sales to unrelated customers. *See Uruguay Round Agreements Act, Statement of Administrative Action*, H.R. Doc. No. 103–316, vol. 1, at 852 (1994), *reprinted in* 1994 U.S.C.A.N. 4040, 4185 (“SAA”).

U.S.C.C.A.N. 4040, 4185 (“SAA”); *see also* 19 U.S.C. § 1677(7)(C)(iv).¹⁵

Neither the statute nor the SAA further define “production of a downstream article,” or “processing into a distinct downstream article.”¹⁶ If the statute is ambiguous, the court defers to the Commission’s interpretation as long as that interpretation is permissible under the statute.¹⁷ *See Chevron*, 467 U.S. at 843. The common meanings of these words do not compel any specific interpretation of the terms “production of a downstream article,” or “processing into a distinct downstream article”; therefore, the Commission’s construction will be upheld as long as it is permissible. *See id.*

Here, the Commission found that the threshold condition of the statute was not met because aggregation of FSS and non-FSS components of PEMBS did not constitute production of a downstream article and that unrelated builders, not FSS producers, produced the downstream article PEMBS. Final Views at 43. The Commission further found that PEMBS themselves, not the aggregated components, were the downstream articles produced from the in-scope FSS. *See id.* at 43 n.188 (“Aggregation of components, without any assembly by the domestic producer, is not tantamount to a downstream product ‘produced’ from in-scope articles”). The Commission’s determination that PEMBS kits are not downstream articles that are produced using domestic like product was a reasonable interpretation of the statute. No party contends that FSS used in the construction of PEMBS is changed via large-scale assembly with machines or subjected to “a series of mechanical or chemical operations . . . to change it” after it is initially manufactured, but before it is used by builders

¹⁵ The SAA “shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application.” 19 U.S.C. § 3512(d).

¹⁶ Plaintiff argues that the Commission did not discuss processing in its Final Views, *see* Pl.’s Reply Br. at 23, but it is reasonably discernible from the Commission’s reliance on the SAA’s explanation of the threshold condition that the term “for the production of a downstream article” necessarily encompassed the SAA’s elucidation of that term to mean “processing into a downstream article.” *See* Final Views at 42–43; SAA at 852.

¹⁷ “Production” is defined by the Oxford English Dictionary as, “The action of making or manufacturing from components or raw materials, or the process of being so manufactured.” <https://www.lexico.com/en/definition/production> (last visited Sept. 16, 2021). Likewise, the Oxford English Dictionary defines “produce” as, “Make or manufacture from components or raw materials.” <https://www.lexico.com/definition/produce> (last visited Sept. 16, 2021). “Make” is defined as “Form (something) by putting parts together or combining substances; create,” and “manufacture” is defined as “Make (something) on a large scale using machinery.” *See* <https://www.lexico.com/definition/make> (last visited Sept. 16, 2021); <https://www.lexico.com/definition/manufacture> (last visited Sept. 16, 2021). Finally, the Oxford English Dictionary defines “process” as, “Perform a series of mechanical or chemical operations on (something) in order to change or preserve it.” *See* <https://www.lexico.com/definition/process> (last visited Sept. 16, 2021).

in the construction of PEMBS. See <https://www.lexico.com/definition/manufacture> (last visited Sept. 16, 2021); <https://www.lexico.com/definition/process> (last visited Sept. 16, 2021). The parties agree that after FSS for use in PEMBS is manufactured, it is either aggregated with other PEMBS components and shipped to job sites or else shipped directly to job sites without being aggregated.¹⁸ See Pl.’s Br. at 46; Def.’s Br. at 47; CBB-BlueScope’s Br. at 21–22.

Plaintiff does not contend that the threshold condition is unambiguous or that the Commission’s construction of the threshold condition is contrary to the clear intent of Congress. See Pl.’s Reply Br. at 23–24. Rather, Plaintiff asserts that the Commission’s brief sets forth a post-hoc rationalization of the Commission’s determination that was not set forth in the Final Views. *Id.* at 23. Specifically, Plaintiff argues that the Commission’s determination focuses only on whether PEMBS kits are a downstream article, not that FSS is further processed to produce a downstream article. *Id.* at 23. Plaintiff misinterprets the Commission’s analysis of the threshold condition. The Commission interpreted the statute as requiring that a “downstream article” be “further processed” in order to be produced. See Final Views at 42–43, 43 n.188. Because PEMBS kits were aggregated and not processed, PEMBS kits did not constitute a downstream article that was produced from in-scope FSS under the statute. *Id.* at 43. Plaintiff’s argument that the Commission acted contrary to law because the legislative history does not support the Commission’s position fails to persuade. See Pl.’s Br. at 46–48. Indeed, the legislative history quoted by the Plaintiff refers to whether a distinct article is “produced from that product.” *Id.* at 47–48 (quoting Final Views at 43 n.188 and SAA at 852). It is reasonably discernable that the Commission concluded that producing one product from another requires more than aggregation. The Commission’s interpretation is reasonable.

Moreover, the Commission’s determination is supported by substantial evidence. Plaintiff argues that the distinction between a PEMBS kit and a complete PEMBS is “arbitrary [and] unsupported by the record.” Pl.’s Br. at 46. However, the distinction is made not by the Commission but by Commerce in the Final Scope Determination, in which Commerce states, “[p]re-engineered metal building systems, which are defined as complete metal buildings that integrate steel framing, roofing and walls to form one, pre-engineered building sys-

¹⁸ Plaintiff asserts that FSS is [[

]]; however, it is reasonably discernable that the Commission determined that [[
]] is not equivalent to “production” or “processing.” See Reply Br. of [AISC] (Revised Confidential Version), at 24, Feb. 1, 2021, ECF No. 65; Final Views at 43.

tem, that meet Metal Building Manufacturers Association guide specifications” are “excluded from the scope of these investigations.” Final Scope Decision Memo at 3. BlueScope asserts that it does not consume the FSS in the manufacture of a downstream product. Hearing Transcript at 204 (Pasley); *see also* U.S. Producers’ Questionnaire [Revised] Resp. of [BlueScope] at IV-7, CD 547, Doc. No. 694313 (Nov. 8, 2019). BlueScope explains that it “produces FSS, which it ships, usually in stages, to the building site. There, the FSS is ultimately assembled by the builder into a completed building.” *Id.*; *see also* BlueScope’s Post-Hearing Br. at 13 (“BlueScope does not captively consume its production of PEMBS components”). BlueScope further testified that it ships FSS to the site, where the builder assembles the FSS and other materials into a complete building. *Id.*; *see also* Final Staff Report at III-22 n.12, Table E-9. Likewise, record evidence from CBB and Building Systems de Mexico S.A. de C.V. (“BSM”) supports the Commission’s findings that NCI and BlueScope did not internally transfer FSS for further processing into a downstream article. *See* CBB & BSM’s Post-Hearing Br., Appx. A at 16–17. Thus, there is substantial evidence to support the Commission’s determination that U.S. producers do not captively consume FSS for the production of downstream articles, but rather that they produce FSS which is then used by unrelated parties to produce the downstream PEMBS. *See* Final Views at 43.

Contrary to Plaintiff’s suggestion, the Commission’s interpretation of what constitutes a complete PEMBS is not “absurd.” *See* Pl.’s Reply Br. at 25. The Commission determined that, “in nearly all instances, it is not the producers of FSS components of PEMBS that produce a finished PEMBS; rather it is the builders that construct a complete PEMB[S] from the various components in the kit, or by combining the in-scope components it purchases from the producer with other materials that it purchases separately.”¹⁹ Final Views at 43. Plaintiff argues that there is no difference between a completed building and the parts used in its construction, *see* Pl.’s Br. at 46, however, it was not unreasonable for the Commission to find that completed PEMBS (i.e. buildings) are distinguishable from their component parts, regardless of whether those components are aggregated and sold together as a kit. Indeed, Plaintiff appears to have understood this distinction in its briefing at the agency level. *See* Petr’s Prehearing Br. at 22, PD 309, CD 953, 960, Doc. No. 699961, (Jan. 21, 2020) (“While complete PEMBS have their own standards that apply to the

¹⁹ Despite Plaintiff’s contention, *see* Pl.’s Br. at 47, the fact that “beginner-level workshops” are offered, does not mean that “anyone” can construct a PEMBS. Teams of professional builders construct PEMBS, which are one- and two-story buildings, shopping centers, warehouses, arenas, motels, and office complexes. *See* Final Views at 16, 18.

finished building, the structural components are required to comply with AISC standards, similar to all in-scope FSS.”).

Finally, after determining that the captive production provision was inapplicable, the Commission was not obligated to consider captive production a pertinent condition of competition. The Commission explained, “given the nature of the ‘internal transfer’ involved, we do not find that captive consumption, as we normally consider that term, is a pertinent condition of competition.” Final Views at 43 n.189. It is reasonably discernible from the Final Views that the “nature of the internal transfer” referred to in note 189 means that the only actions FSS producers take following production of the FSS is to (sometimes) aggregate the FSS with non-FSS components and then ship the FSS to a job site. *See id.* at 42–43. Thus, the “internal transfer” is unlike the vertical integration that Congress describes in the SAA. *See SAA* at 852. Here, there is no vertical integration and the U.S. producers do not internally transfer the FSS “for further internal processing.” SAA at 852; *see* Final Views at 43. In these circumstances, it was not unreasonable for the Commission to find that captive consumption was not a pertinent condition of competition. The Commission’s determinations with respect to captive production and consumption are sustained.

IV. Commission’s Material Injury Determination

A. Underselling

In evaluating the price effects of subject imports under 19 U.S.C. § 1677(7)(B)(i)(II), the Commission shall consider whether—

- (I) there has been significant price underselling by the imported merchandise as compared with the price of domestic like products of the United States . . .

19 U.S.C. § 1677(7)(C)(ii)(I). In so doing, the Commission “may consider such other economic factors as are relevant to the determination regarding whether there is material injury by reason of imports,” *id.* § 1677(7)(B)(ii), and shall examine any such “relevant economic factors described [in *id.* § 1677(7)(C)] within the context of the business cycle and conditions of competition that are distinctive to the affected industry.” *Id.* § 1677(7)(C).

The Commission’s determination that it lacked substantial evidence that cumulated subject imports undersold the domestic like product is reasonable in light of the record as a whole. The Commission considered total bid data from U.S. purchasers, Final Views at 53–55, itemized bid data, *id.* at 58, average unit value (“AUV”) data

with detailed breakouts, *see id.* at 58, and data derived from responses to its lost sales and revenue survey. *Id.* at 58–59. The Commission also considered pricing data examined in the preliminary phase, but determined that because of the inaccuracies in that data, the data did not “provide a sufficient basis to make findings about the relative price levels.” *Id.* at 53.

First, the Commission relies on total bid data from U.S. purchasers, which it reasonably concludes does not demonstrate the existence of significant underselling during the POI. *Id.* at 53–55. Most of the bid data was not itemized in such a way as to enable the Commission to specifically identify a separate cost-component attributable to FSS. *See id.* at 49, 55–57. In light of conflicting evidence presented by the parties as to what cost-share of a typical project is attributable to the value of FSS,²⁰ it is not unreasonable for the Commission to conclude that the data does not reliably permit a factual finding that cumulative subject imports had adverse price effects on domestic producers. *See id.* at 55–57. It is reasonably discernible that the Commission reasonably decided not to rely on non-itemized bid data because it could not determine what portion of the bid data were for FSS and what portion were for services such as erection services. *See id.* at 55–58. It is reasonably discernible that the Commission reasonably concluded that bids where the main component of cost was something other than FSS would be less probative of whether imports of FSS were having an adverse price effect on domestic producers. *See id.* at 55–58. Thus, it stands to reason that the Commission assigns less weight to the data not itemized and the record does not establish a typical range for FSS cost-share.

Moreover, the Commission examined the bid data to determine to what extent the lowest bid prevailed. *Id.* at 54–55. Comparing bid data for which there was a bid involving at least one domestic supplier and one supplier from Canada, China, or Mexico, the Commission collected usable bid data from 14 purchasers for 40 different projects. *Id.* at 53. Although 18 of 19 bids won by subject imports were

²⁰ Plaintiff contends that the Commission incorrectly stated that AISC publications put the cost share of FSS was “between 25% and 75%, depending on the scope of the project.” Pl.’s Br. at 8–9 (citing Final Staff Report at II-11–II-12). Instead, Petitioner argued the correct cost share was 75%. Pl.’s Br. at 9. The Commission however considered the record evidence cited by the Plaintiff supporting Plaintiff’s view of the cost share of FSS, but nonetheless after weighing the evidence decided that the cost share of FSS could vary greatly and did “not necessarily constitute a majority or fixed proportion of the total bid.” *See* Final Views at 56–58.

lower total bids, in a number of cases the higher bid won the project.²¹ *Id.* at 54. Plaintiff asserts that the Commission’s methodology and analysis improperly imposes a universal lowest price requirement to find underselling.²² Pl.’s Br. at 18–19. However, the Commission reasonably explains that the fact that the lowest priced bid did not always win was “one limitation to use of the total bid data.” Final Views at 55. Record evidence supports the Commission’s determination that factors other than price informed purchasing decisions. *Id.* at 48 n.217. The Commission observes that the lowest bid does not prevail in many instances, and it is reasonable for the Commission to infer, particularly in light of corroborating responses to its questionnaire, that such conditions of competition further limit the probative value of the bid data. *See id.* at 54–55 nn.261–66.

Further, the Commission reasonably found that lost sales data did not support a finding of significant underselling. The Commission concluded that the lost sales accounted for a small volume during the POI and did not correlate to the loss of market share. *See id.* at 59. The Commission noted that domestic producers’ shipments increased by more than the total lost sales volume during the POI. *Id.* Although Plaintiff queries why the Commission’s comparison of lost sales volume to the increase in domestic shipments is relevant to the Commission’s analysis, Pl.’s Br. at 27, it is reasonably discernible that the Commission made its comparison to provide context. *See* Final Views at 59. The Commission must determine whether there is significant underselling, an inquiry that is necessarily done on a case-by-case basis. *See* 19 U.S.C. § 1677(7)(C)(ii)(I). The degree of lost sales as compared to the market is therefore not irrelevant and is part of the evidence that the Commission weighs. It is not the court’s role to reweigh that evidence. The Commission further explained that the

²¹ The Commission found that a higher total bid was successful over a lower bid in 16 instances. *See* Final Views 54–55 nn.264–66. Plaintiff complains that the analysis of these 16 projects “inexplicably veered away from comparing domestic and subject prices, and into comparing domestic prices with other domestic prices, and subject prices with other subject prices.” Pl.’s Br. at 19. Plaintiff challenges the lack of explanation as to why the Commission did not limit itself to comparing domestic to subject bids. *Id.* at 19–20. However, the Commission states “we find that the domestic like product and cumulated subject imports have a moderate-to-high degree of substitutability, and that price is one of several important factors in purchasing decisions for FSS.” Final Views at 52. It is reasonably discernible from this statement that the Commission sought to assess the importance of price in the industry as a whole. Further, Plaintiff argues that the lowest bid did win in most instances when bids awarded to a single fabricator competing with at least one other bid. Pl.’s Br. at 20. Nonetheless, by proposing another way to look at the evidence the Plaintiff is asking the court to reweigh the evidence.

²² The Commission did not impose a universal lowest price requirement, rather it took account of the factors including price which influenced purchasers in order to assess the probative value of the bid data. *See* Final Views at 55.

lost sales did not correspond to a loss in market share to importers, and in fact the domestic industry's market share increased during the POI. *Id.* Further, the Commission found that the data contained substantial ambiguities with respect to lost sales. *Id.* at 59 n.289. The Commission drew that inference from the fact that the bid data did not itemize FSS cost. *Id.* at 55, 59. So even where lost sales and revenue responses indicate that price is the primary reason for purchasing a product, the Commission could not attribute that to the price of FSS. *Id.* at 59. Thus, the Commission's determination that the lost sales data does not support a finding of underselling is supported by substantial evidence.

The Commission also reasonably found that the detailed AUV data were not probative of underselling. Although the Petitioner argued that lower AUVs for U.S. shipments of subject imports evidence that the subject imports undersold the domestic like product, Posthearing Brief of Pet., Fabricated Structural Steel from Canada, China, and Mexico, Investigation Nos. 701-TA-614–617 and 731-TA-14321434 (Final) at 9, PD 344 CD 1001, 1012 (Feb. 4, 2020), the Commission concluded that the nature of FSS production was project specific and therefore differences in AUVs would not necessarily “reflect differences in FSS prices between subject imports and the domestic like product.” Final Views at 58. The court cannot say that the Commission's determination, given the evidence, is unreasonable. The project specific uses of FSS may result in significantly different costs for different projects.²³ Averaging values masks significant differences in costs. Thus, it is not unreasonable for the Commission to find AUVs not probative of underselling.

Finally, the Commission reasonably believed the problems with the pricing product data would not be adequately addressed by the inclusion of an additional pricing product category or additional time to conduct the investigation. *See id.* at 53. Most of the firms the Commission requested pricing product data from did not provide usable responses. USITC Publ. 4878 at V-8–9 n.40. The Commission observed that many of the firms experienced difficulty completing the questionnaire responses, and further noted irregularities and apparent inaccuracies in the data the firms did report. *See Confidential Views of the Commission (Prelim.)* at 49 CD 312, Doc. No. 671868 (Apr. 1, 2019) (“Prelim. Views”). Therefore, the Commission's decision not to assign weight to this data is reasonable.

²³ The Commission found that over 99 percent of the commercial shipments by U.S. producers and importers were produced-to-order. Final Views at 72. Plaintiff's arguments concerning the breadth of the AUV data, Pl.s' Br. at 30, ask this court to reweigh the evidence already considered by the Commission. *See Final Views* at 58 n.280.

B. Price Suppression & Depression

In evaluating the price effects of subject imports, the Commission shall also consider whether “the effect of imports of such merchandise otherwise depresses prices to a significant degree or prevents price increases, which otherwise would have occurred, to a significant degree.” 19 U.S.C. § 1677(7)(C)(ii)(II). In so doing, the Commission “may consider such other economic factors as are relevant to the determination regarding whether there is material injury by reason of imports,” *id.* § 1677(7)(B)(ii), and shall examine any such “relevant economic factors described [in 19 U.S.C. § 1677(7)(C)] within the context of the business cycle and conditions of competition that are distinctive to the affected industry.” *Id.* § 1677(7)(C).

The Commission reasonably explains that the record does not support a finding that cumulated subject imports depressed prices. Final Views at 60–62. Although it assigns limited probative value to the AUV data for the purposes of establishing underselling, the Commission explains that the AUV data showed trends “of increasing domestic prices during the POI.” *Id.* at 60 (citing Final Staff Report at Table C-4). The Commission corroborates its finding by pointing out that only three of 33 responding purchasers indicated that they reduced prices to compete with subject imports. *Id.* at 60 n.292. Plaintiff challenges the Commission’s representation of the record, *see* Pl.’s Br. at 37–38, because 22 of those responding purchasers indicated that they do not know whether they reduced prices. *See* Final Staff Report at V-23. However, Plaintiff’s challenge only serves to further support the Commission’s view that the record lacks evidence to demonstrate injury. Plaintiff does not direct the court to any evidence that would contradict or impugn the Commission’s reasoning.²⁴ *Id.*

Likewise, the Commission’s finding that prices were not suppressed to a significant degree is reasonable. The Commission acknowledges record evidence showing an increase in industry-wide cost of goods sold (“COGS”) to net sales ratio between 2016 and 2018,²⁵ but reasonably concludes that the increase is not significant in view of an extremely fragmented industry comprised of “over a thousand fabricators that have considerable variation in their operations.” Final Views at 60 n.294 (citing, *inter alia*, USITC Pub. 4878 at 25). The Commission supports its conclusion with company-specific financial data from ten of the largest U.S. producers in 2018 showing “tremen-

²⁴ Plaintiff argues the inadequate record creates the evidentiary deficiency. Pl.’s Br. at 38–40. However, as explained above, the suggestions for additional data collection offered by Petitioner did little to address data problems. *See* Final Views at 52–53 nn.254, 256.

²⁵ The increase was [[]] percentage points. Final Views at 60 n.294.

dous variability across firms in their COGS to net sales ratios, the trends in those ratios, unit raw material costs, and the trends in those costs.” *Id.* (citing Final Staff Report at Table G-1); *see also* Final Staff Report at G-5. The Commission also finds “that revenues increased by more than its COGS on both an overall and per-unit basis”, Final Views at 61 (citing Final Staff Report at Table C-4), and that the industry was able to “substantially increase its prices during this period by more than the increase in raw material costs” between 2016–2018. *Id.* (citing Final Staff Report at Table VI-3, Table C-4). Contrary to Plaintiff’s attempt to qualify variations among the top producers as being inconsequential, *see* Pl.’s Br. at 36, which really is a request for the court to reweigh the evidence, the financial data, taken together with its other factual findings, support the Commission’s conclusion that the increase in industry-wide COGS to net sales ratio between 2016 and 2018 does not reasonably demonstrate the existence of price suppression during the POI.

C. Impact

With respect to its examination of the impact of subject imports under 19 U.S.C. § 1677(7)(B)(i)(III), the Commission shall

evaluate all relevant economic factors which have a bearing on the state of the industry in the United States, including, but not limited to—

(I) actual and potential decline in output, sales, market share, gross profits, operating profits, net profits, ability to service debt, productivity, return on investments, return on assets, and utilization of capacity,

(II) factors affecting domestic prices,

(III) actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investment,

(IV) actual and potential negative effects on the existing development and production efforts of the domestic industry, including efforts to develop a derivative or more advanced version of the domestic like product, and

(V) in a proceeding under subtitle B [19 USCS §§ 1673–1673h], the magnitude of the margin of dumping.

Id. § 1677(7)(C)(iii). No particular factor is dispositive, and all relevant factors “within the context of the business cycle and conditions of competition that are distinctive to the affected industry” must be considered. *Id.*

The Commission's determination that subject imports did not have a significant impact on the domestic industry is reasonable and supported by substantial evidence. The Commission found "substantial increases between 2016 and 2018 in capacity, production, capacity utilization, net sales quantity, U.S. shipments, market share, productivity, revenues, gross profit, operating income, and net income, and capital expenditures." Final Views at 63. The Commission further explained that the domestic industry's capacity supported its determination.²⁶ Final Views at 63–64. Given these and other positive changes to domestic industry during the POI, *see generally id.* at 63–66,²⁷ the Commission's determination that the domestic industry was not significantly impacted by subject imports was supported by substantial evidence.²⁸ *See id.* at 67.

Plaintiff contends that the Commission did not sufficiently analyze the broader market conditions, specifically in the context of what Plaintiff calls the "natural experiment" of the different markets for domestic producers of FSS for PEMBS and domestic producers of FSS not for PEMBS. Pl.'s Br. at 51. However, contrary to Plaintiff's contention, the Commission did discuss the broader market conditions. *See* Final Views at 66. The Commission analyzed the above performance indicators in the context of an increase in apparent U.S. consumption,²⁹ and found that many of those indicators significantly outpaced the increased consumption. *Id.* at 66. The Commission also found no evidence to support Plaintiff's argument that the domestic industry should have performed even better than it did but for the subject imports. *Id.* at 66–67, 67 n.323. Instead, the Commission cited record evidence demonstrating that after the volume of subject imports fell in response to Section 301 tariffs imposed on imports from China, the domestic industry was unable to improve its performance

²⁶ The Commission found that the domestic industry's capacity increased by [[]] percent between 2016 and 2018." Final Views. at 64. Likewise, capacity rose from [[]] percent in 2016 to [[]] percent in 2018. *Id.* "Net sales increased by [[]] percent from 2016 to 2018 . . . [and] U.S. shipments increased by [[]] percent from 2016 to 2018." *Id.* Moreover, "The domestic industry's share of apparent U.S. consumption increased from [[]] percent in 2016 to [[]] percent in 2017 and [[]] percent in 2018; it was [[]] percent in interim 2018 and lower, at [[]] percent in interim 2019." *Id.* at 65. The Commission also noted that the domestic industry's "[r]evenues rose by [[]] percent from 2016 to 2018 . . . [and] [g]ross profit rose by [[]] percent from 2016 to 2018." *Id.* Operating income also rose by [[]] percent from 2016 to 2018, and net income rose by [[]] percent over the same period. *Id.* at 65–66.

²⁷ Other positive changes include increased ending inventories, increased share of U.S. consumption, and increased wages paid to domestic workers. *Id.*

²⁸ Plaintiff also claims that the Commission failed to adequately address post-petition effects. Pl.'s Br. at 52–53. The Commission addressed the post-petition effects. *See* Final Views at 51. Plaintiff's disagreement with the Commission's determination does not make the Commission's consideration of post-petition effects inadequate.

²⁹ The increase was an 5.9 percent increase. *Id.* at 66.

and its market share decreased in interim 2019. *Id.* at 51 n.248.³⁰

Moreover, the Commission was under no obligation to analyze different parts of the domestic industry in isolation. *See e.g., CP Kelco US, Inc. v. United States*, 38 CIT __, 24 F. Supp. 3d 1337, 1346–47 (2014) (holding that the Commission’s statutory authority gave it discretion on how to analyze industry data). The Commission adopted Petitioner’s argument that the domestic industry was singular; therefore, the Commission was not required to analyze the impact of subject imports on different segments of the domestic industry. *Id.* ; Final Views at 13, 15. Plaintiff fails to explain how the performance of one segment of the domestic industry undermines the Commission’s finding that the industry as a whole was not materially injured. Contrary to Plaintiff’s argument, having reasonably determined that underselling was not present, the Commission was not obligated to find that the larger percentage of imported merchandise in the non-PEMBS segment of the market caused the relatively worse performance of that segment during the POI. *See Pl.’s Reply Br.* at 27–28.

Furthermore, the Commission explains that when subject imports decreased in interim 2019, the domestic industry was unable to increase its market share, undermining Plaintiff’s argument that the domestic industry should have performed better than it did as a result of the larger percentage of imported merchandise in the non-PEMBS segment of the market. Final Views at 66–67. Even taking Plaintiff’s arguments at face value, that domestic producers of FSS not for use in PEMBS demonstrated weaker performance than other segments of the industry during the POI does not take away from the substantial evidence supporting the Commission’s conclusion that the industry as a whole improved its performance and was not significantly impacted by subject imports, as discussed above.

Plaintiff’s concerns regarding certain economic indicators that fell during the POI asks the court to reweigh the evidence that the

³⁰ The Commission reasonably concluded that the decrease in subject imports from China during the POI was caused solely by the imposition of Section 301 tariffs. *See id.* at 51 n.248. Petitioner contends that although the petitions were not filed until February 2019, [[

]] and Respondents knew of the petitions by December 2018, and that knowledge was at least a partial cause of the decreased volume of subject imports. [AISC’s] Memo. in Supp. of [Pl.’s Mot.] (Revised Confidential Version), Sept. 21, 2020, ECF No. 54 at 52–53; *see also* Final Views at 51, 51 n.248. However, the Commission found subject imports increased from April 2018 through August 2018, and then dropped by over 50% from August 2018 to September 2018 following the announcement of the imposition of Section 301 tariffs. *Final Views.* at 51 n.248; Final Staff Report at IV20, Table IV-7. Subject import volumes decreased further in late 2018 and then remained consistently below August 2018 levels through interim 2019. *Id.* Moreover, it was only imports from China that decreased; imports from Canada and Mexico, which were not subject to Section 301 tariffs but were the subject of the petitions, of which Plaintiff contends [[

]] did not similarly decrease. *Id.* These facts support the Commission’s conclusion that the Section 301 tariffs, not the petitions, were the cause of the decrease in volume.

Commission already considered.³¹ See Pl.'s Br. at 50–51; Final Views at 63–67. The court recognizes that reasonable minds might come to different conclusions regarding the impact of the subject imports on domestic industry given the conflicting evidence, but that is not enough to remand the Commission's determination. The Commission's impact determination is sustained.

CONCLUSION

For the reasons stated the Commission's determination that an industry in the United States is not materially injured by reason of subject imports of FSS from Canada, China, and Mexico that are sold in the U.S. at less than fair value and subsidized by the governments of China and Mexico is sustained. Judgment shall enter accordingly.

Dated: September 22, 2021
New York, New York

/s/ Claire R. Kelly
CLAIRE R. KELLY, JUDGE

³¹ Plaintiff asserts that the domestic industry “was unable to maintain its profitability,” and “should have been able to increase prices significantly” due to prevailing economic conditions. Pl.'s Br. at 50 (quoting Final Views at 79). Plaintiff also asserts that unit operating income fell, operating margins decreased, and the number of domestic producers operating at a loss increased during the POI in the non-PEMBS segment of the industry. *Id.* at 51.

Slip Op. 21–143

SHAMROCK BUILDING MATERIALS, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Timothy C. Stanceu, Judge
Court No. 20–00074

[Granting in part, and denying in part, defendant’s motion to resolve a discovery dispute between the parties by means of a modification of the schedule governing this litigation.]

Dated: October 14, 2021

Peter A. Mancuso, Trial Attorney, Department of Justice, Civil Division, U.S. Department of Justice, of New York, New York, for defendant. With him on the submission were *Brian M Boynton*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, Commercial Litigation Branch, of Washington, D.C., and *Justin R. Miller*, Attorney-In-Charge, International Trade Field Office, of New York, New York, for defendant.

R. Will Planert, Morris Manning & Martin, LLP, of Washington, D.C. for plaintiff. With him on the submission were *Donald B. Cameron*, *Julie C. Mendoza*, *Brady W. Mills*, *Mary S. Hodgins*, *Eugene Degnan*, *Edward J. Thomas III*, *Jordan L. Fleischer*, and *Nicholas C. Duffey*.

Michael S. O’Rourke, Sandler Travis & Rosenberg, P.A., of New York, New York, for plaintiff. With him on the submission was *Patrick D. Gill*.

OPINION AND ORDER**Stanceu, Judge.**

In this litigation involving a dispute as to the tariff classification of plaintiff’s imported merchandise, defendant moves for an amendment of the scheduling order to extend the time to complete factual discovery from the current deadline of October 15, 2021 to November 30, 2021. Mot. to Amend Scheduling Order (Oct. 4, 2021), ECF No. 24 (“Def.’s Mot.”). Defendant’s motion is intended to resolve a discovery-related dispute between the parties arising out of defendant’s desire to take the deposition of a witness plaintiff intends to call to testify on an issue material to the classification of the merchandise at issue.

Plaintiff Shamrock Building Materials, Inc. (“Shamrock”) opposes defendant’s motion, alleging that the motion lacks good cause and would be prejudicial to its interests. Pl.’s Opp’n to Def.’s Mot. to Amend Scheduling Order (Oct. 6, 2021), ECF No. 27 (“Pl.’s Opp’n”). The court declines to modify the schedule in the manner that defendant’s motion contemplates but orders further proceedings to resolve the underlying dispute concerning discovery.

I. BACKGROUND

Shamrock brought this action to contest the denial by U.S. Customs and Border Protection (“Customs”) of its protests directed to the tariff

classification by Customs of its imported merchandise, which Shamrock describes as “certain electrical conduit.” Compl. ¶ 1 (May 20, 2020), ECF No. 10.

After the court adopted a schedule developed jointly by the parties, Shamrock, with defendant’s consent, moved to extend, by seven to eight months, the time limits for completing discovery and to adjust the remaining schedule accordingly. Consent Mot. to Extend the Time for Factual Disc. and Amend Scheduling Order (Mar. 1, 2021), ECF No. 22. The court granted plaintiff’s consent motion. Order (Mar. 2, 2021), ECF No. 23. Under the current schedule, factual discovery is to be completed by October 15, 2021, expert discovery is to be completed by November 30, 2021, remaining motions addressed to preliminary matters are to be submitted by December 21, 2021, dispositive motions are to be submitted by February 15, 2022 and, in the absence of a dispositive motion, requests for trial are to be submitted by March 1, 2022. *Id.* at 1–2.

While moving to extend the factual discovery period to November 30, 2021, defendant’s motion would leave unchanged the remaining dates in the existing schedule. Def.’s Mot. 1. Defendant states that it is seeking the additional time to conduct factual discovery “due to the Government’s desire to take the deposition of one additional witness disclosed by plaintiff, Dr. Joshua Jackson . . . a metallurgist that plaintiff hired to conduct tests on the imported merchandise at issue in this matter.” *Id.* at 2.

II. DISCUSSION

Motions to modify a schedule are governed by USCIT Rule 16(b)(4), which provides that “[a] schedule may be modified only for good cause and with the judge’s consent.” “When assessing whether good cause has been shown, ‘the primary consideration is whether the moving party can demonstrate diligence.’” *High Point Design LLC v. Buyers Direct, Inc.*, 730 F.3d 1301, 1319 (Fed. Cir. 2013) (quoting *Kassner v. 2nd Ave. Delicatessen Inc.*, 496 F.3d 229, 244 (2d Cir. 2007) (in turn citing *Parker v. Columbia Pictures Indus.*, 204 F.3d 326, 339–40 (2d Cir. 2000))). Rule 16(b), in allowing modifications of scheduling orders only for good cause, provides a trial court discretion to prevent prejudice or hardship to either side. *See Kassner*, 496 F.3d at 243–44. The court, therefore, considers two issues: first, should defendant’s motion be denied on the ground of a lack of diligence in defendant’s endeavoring to meet the October 15 deadline, and, second, would granting defendant’s motion cause prejudice or hardship?

For the reasons discussed below, the court concludes that the circumstances do not justify denial of defendant’s motion for lack of

diligence. The court, concludes, further, that granting defendant's motion to amend the schedule in the way defendant proposes would cause prejudice to plaintiff. Therefore, the court is issuing an order designed to resolve, in a way that is fair to both plaintiff and defendant, not only the scheduling dispute between the parties but also the underlying dispute over defendant's desire to take the deposition of Dr. Jackson.

Defendant argues that both parties have been diligent in their efforts to complete factual discovery by the October 15 deadline. The government states that it "has responded to two requests for the production of documents from plaintiff and is in the process of responding to a third." Def.'s Mot. 2. It adds that "[w]e have responded to two sets of interrogatories issued by plaintiff and a set of requests for admissions" and "has produced two witnesses for deposition" and "is taking the deposition of plaintiff, pursuant to USCIT Rule 30(b)(6), on October 13, 2021." *Id.*

Plaintiff opposes defendant's motion on two grounds. It argues, first, that defendant, having had ample opportunity to plan for and to take the deposition of Dr. Jackson during the period for factual discovery ending on October 15, failed to exercise diligence and therefore cannot show good cause for a modification of the existing schedule. Pl.'s Opp'n 1-2. Plaintiff informs the court that defendant has been aware since last February that plaintiff intends to call Dr. Jackson as a fact witness, not as an expert witness. *Id.* at 1-2, 3. According to plaintiff, "Defendant neglected to request to depose Dr. Jackson until September 27, 2021, less than three-weeks before the close of factual discovery," by which point "Defendant had already scheduled another deposition in this matter in Washington, D.C. for October 13, thereby, rendering it not practicable to conduct a deposition of Dr. Jackson, who is located in Houston, before the close of factual discovery on October 15." *Id.* at 3. Plaintiff argues, further, that "Defendant offers no explanation whatsoever as to why it could not have requested a deposition of Dr. Jackson while the parties were already in Houston" during late July of 2021 and "now wants plaintiff to again incur the time and expense of returning to Houston for a second time to conduct this most untimely deposition." *Id.* at 4.

Defendant emphasizes the importance of its having the opportunity to take the deposition of Dr. Jackson. Def.'s Mot. 2. "Specifically, Dr. Jackson conducted tests to determine whether the interior coating of the imported merchandise insulates against electricity, which is a disputed question in this litigation." *Id.* Defendant explains that "[g]iven the scientific, technical, and specialized nature of Dr. Jackson's knowledge, the Government had intended on conducting the

deposition of Dr. Jackson during the expert discovery portion of the current scheduling order,” that “plaintiff has refused to produce Dr. Jackson for a deposition during the expert discovery period,” and that “[p]laintiff contends that Dr. Jackson is a fact witness and therefore his deposition should be conducted prior to the expiration of factual discovery, which is October 15, 2021.” *Id.* at 2–3. Defendant does not agree with plaintiff’s position, arguing that the nature of the subject matter to which Dr. Jackson would testify made it reasonable for the government to assume that the deposition could occur during the expert discovery period. *Id.* at 3 (citing Fed. R. Evid. 702). Plaintiff argues to the contrary, contending that defendant was on notice as of February 8, 2021 that Shamrock did not intend to call Dr. Jackson as an expert witness. Pl.’s Opp’n 3. Shamrock states that it has disclosed to defendant two laboratory reports concerning testing Dr. Jackson “performed on samples of Plaintiff’s conduit and the results obtained” and that “Dr. Jackson is not being asked to render an opinion, but merely to explain what he did, and what the result was.” *Id.*

The court considers it unnecessary to resolve the parties’ disagreement as to whether Dr. Jackson properly could be deposed during the expert discovery period. The court does not reach that issue because it rejects plaintiff’s position that the court should deny defendant’s motion for a lack of diligence. Defendant participated in, and completed, a number of other discovery-related matters with plaintiff during the factual discovery period. It may or may not have been feasible for the parties to arrange for defendant’s taking a deposition of Dr. Jackson in late July of this year, when counsel for both parties were in Houston, but the court does not, in hindsight, view the circumstances then existing to have required defendant to make the necessary arrangements for taking the deposition at that time or else forfeit any opportunity to do so. Under all the circumstances, including plaintiff’s intention to call Dr. Jackson as a witness on an issue that is material to this litigation, the court concludes that defendant should not be denied that opportunity. The parties could arrange for the deposition to be conducted at a time convenient to both parties and in a manner designed to avoid unnecessary expense.

In addition to arguing that defendant’s proposed modification of the schedule would prejudice Shamrock by imposing the costs and burdens attendant to a deposition of Dr. Jackson, plaintiff submits that defendant’s proposed modification of the schedule also will prejudice Shamrock by limiting its opportunity to conduct expert discovery due to the concurrent running of the periods for expert discovery and factual discovery. According to plaintiff, “the expert discovery period

is likely to be fraught with expert discovery,” *id.* at 5, and therefore should continue beyond the allowed period for factual discovery, as it does in the existing schedule, to which the parties agreed. Accusing defendant of a “gross abuse of the discovery process,” *id.*, and pointing out that defendant intends to call an as-yet undisclosed expert witness, plaintiff maintains that “[s]imultaneously conducting both factual and expert discovery will detract from the limited time and resources that Shamrock will have to engage substantively with Defendant’s expert report and its own expert, if any.” *Id.* at 6. Plaintiff adds that “factual discovery should be completed before expert discovery in this case so that the experts have time to consider and opine on the facts that have been discovered.” *Id.* (citing Fed. R. Evid. 703). On that last point, the court agrees.

In resolving the current disputes as to scheduling and also as to the deposition of Dr. Jackson, the court sees no reason why the schedule could not be modified to allow: (1) defendant the opportunity to take Dr. Jackson’s deposition at a time convenient to, and in a manner agreeable to, both parties; and (2) extension of the period for expert discovery beyond November 30, 2021, and beyond the end of the period for factual discovery, for a length of time sufficient to satisfy plaintiff’s concerns as well as any concerns defendant may have.

Achieving the court’s objectives for resolving the current dispute is likely to require some revision of the remaining dates in the schedule (i.e., motions on preliminary matters by December 21, 2021, dispositive motions by February 15, 2022, and requests for trial by March 1, 2022), but doing so would not appear to the court to cause unfairness or prejudice to either party. The court notes, in that regard, that discovery has proven to be more lengthy and complex than either party initially contemplated, as shown by plaintiff’s previous consent motion to modify the schedule. *See* Consent Mot. to Extend the Time for Factual Disc. and Amend Scheduling Order 1–2 (Mar. 1, 2021), ECF No. 22; Order (Mar. 2, 2021), ECF No. 23. The discovery phase of this case is approaching completion, and the court trusts that reaching agreement on a modest change in the schedule that will allow the remaining discovery-related matters to be accomplished cooperatively will not prove to be an insurmountable obstacle.

III. CONCLUSION AND ORDER

Therefore, in consideration of defendant’s Motion to Amend the Scheduling Order and plaintiff’s opposition thereto, and upon due deliberation, it is hereby

ORDERED that defendant’s motion be, and hereby is, granted in part and denied in part; it is further

ORDERED that the parties shall consult with the objective of entering into an agreement that: (1) would modify the schedule so as to allow defendant the opportunity to take the deposition of Dr. Joshua Jackson at a time convenient to, and in a manner agreeable to, both parties; and (2) would provide for extension of the period for expert discovery beyond the end of the period for factual discovery, and incorporating that agreement into a joint or consent motion to modify the schedule; and it is further

ORDERED that, in the unlikely event that the parties fail to reach an agreement on a modified schedule that is consistent with the directives in this Opinion and Order, the parties shall submit, by no later than November 30, 2021, a joint status report informing the court of the points on which they disagree.

Dated: October 14, 2021

New York, New York

/s/ Timothy C. Stanceu
TIMOTHY C. STANCEU, JUDGE



Slip Op. 21–144

OMAN FASTENERS, LLC, ET AL., Plaintiffs, v. UNITED STATES, ET AL.,
DEFENDANTS.

Before: Jennifer Choe-Groves, Judge
M. Miller Baker, Judge
Timothy C. Stanceu, Judge
Consolidated Court No. 20–00037

[Ordering a stay pending appeal and related measures.]

Dated: October 15, 2021

Michael P. House, Perkins Coie, LLP, of Washington, D.C., for plaintiffs Oman Fasteners LLC, Huttig Building Products, Inc., and Huttig Inc. With him on the submissions were *Andrew Caridas*, *Shuaiqi Yuan*, *Jon B. Jacobs*, and *Brenna D. Duncan*.

Tara K. Hogan, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for defendants. With her on the submissions were *Brian M. Boynton*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, *Aimee Lee*, Assistant Director, *Meen Geu Oh*, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C.

OPINION AND ORDER

Stanceu, Judge.

Defendants move for a partial stay pending their appeal of the judgment this Court entered in *Oman Fasteners, LLC v. United States*, Judgment (June 10, 2021), ECF No. 108 (“Judgment”), and for

certain other measures related to protection of potential government revenue. In the Judgment, the court awarded remedies for plaintiff Oman Fasteners, LLC (“Oman”) and plaintiffs Huttig Building Products, Inc. and Huttig, Inc. (collectively, “Huttig”), importers of steel nails, in a challenge to a Presidential action taken under Section 232 of the Trade Expansion Act of 1962, 19 U.S.C. § 1862 (“Section 232”), imposing additional duties of 25% *ad valorem* on certain imported products made of steel, including steel nails.¹ See Proclamation 9980, *Adjusting Imports of Derivative Aluminum Articles and Derivative Steel Articles Into the United States*, 85 Fed. Reg. 5,281 (Exec. Office of the President Jan. 29, 2020) (“Proclamation 9980”). Plaintiffs oppose defendants’ motion.

The court orders a stay of the Judgment, orders suspension of liquidation of the entries affected by this litigation, and requires defendants to confer with Oman and with Huttig to obtain agreements on bonding of entries made on and after June 10, 2021, for protection of the revenue potentially owing due to Proclamation 9980.

I. BACKGROUND

The background of this action is set forth in our previous opinion and supplemented herein. See *Oman Fasteners, LLC v. United States*, 45 CIT __, 520 F. Supp. 3d 1332 (2021) (“*Oman*”). Other pertinent background is presented in decisions of this Court adjudicating a claim substantially the same as the one adjudicated in this litigation. See *PrimeSource Bldg. Prods., Inc. v. United States*, 45 CIT __, 497 F. Supp. 3d 1333 (2021) (“*PrimeSource I*”), *PrimeSource Bldg. Prods., Inc. v. United States*, 45 CIT __, 505 F. Supp. 3d 1352 (2021) (“*PrimeSource II*”).

Oman and Huttig brought actions, now consolidated, challenging the lawfulness of Proclamation 9980 on February 7, 2020, [Oman’s] Compl. (Ct. No. 20–00037), ECF No. 2; and February 18, 2020, [Huttig’s] Compl. (Ct. No. 20–00045), ECF No. 5. Shortly thereafter, upon the consent of all parties, this Court entered preliminary injunctions prohibiting defendants from collecting 25% cash deposits on Oman and Huttig’s entries of merchandise within the scope of Proclamation 9980 and also prohibiting the liquidation of the affected entries. Order (Ct. No. 20–00037) (Feb. 21, 2020), ECF Nos. 34 (conf.), 35 (public) (“Oman Prelim. Inj. Order”); Order (Ct. No. 20–00045) (Mar. 4, 2020), ECF Nos. 29 (conf.), 30 (public) (“Huttig Prelim. Inj. Order”). The preliminary injunctions also required plaintiffs to terminate their existing continuous bonds and replace them with continuous

¹ Citations to the United States Code herein are to the 2012 edition. Citations to the Code of Federal Regulations are to the 2020 edition.

bonds having a higher limit of liability to reflect the additional duties Oman and Huttig otherwise would have been required to deposit. Oman Prelim. Inj. Order 2; Huttig Prelim. Inj. Order 2.

On March 9, 2020, in response to Oman's and defendants' Joint Notice of Proposed Scheduling Order and Amended Injunction Order, the court ordered a stay of Counts II and III of Oman's complaint "pending the Court's decision on the parties' motions on Count I of the complaint." Order 1 (Ct. No. 20-00037), ECF No. 46. The court amended the preliminary injunctive order to provide that the order would continue in effect until the court entered judgment on Count I of Oman's complaint. *Id.* at 2. On March 16, 2020, the court consolidated Ct. No. 20-00045 with Ct. No. 20-00037 *sub nom.* *Oman Fasteners, LLC v. United States*, stayed Counts II and III of Huttig's complaint pending the resolution of Count I, and modified the preliminary injunction entered in Ct. No. 20-00045 to provide for the order to continue in effect until judgment was entered on Count I. Order, ECF No. 54.

On September 11, 2020, and January 20, 2021, with the consent of the parties, the court amended Oman and Huttig's preliminary injunctions, respectively, to require plaintiffs to "monitor [their] subject imports and foregone duty deposits" instead of conferring with defendants prior to the expiry of their continuous bonds, and to terminate and replace each continuous bond once the amount of foregone duty deposits reached the amount of the bond, minus the baseline bond amount as calculated pursuant to the general continuous bonding formula of U.S. Customs and Border Protection ("Customs" or "CBP"). [Oman Prelim. Inj.] Order 2 (Sept. 11, 2020), ECF Nos. 94 (conf.), 95 (public); [Huttig Prelim. Inj.] Order 2 (Jan. 20, 2021), ECF Nos. 100 (public), 101 (conf.).

In the *PrimeSource* litigation, this Court awarded summary judgment to plaintiff PrimeSource Building Products, Inc., holding that Proclamation 9980 was issued beyond the statutory time limits set forth in Section 232. *PrimeSource II*, 45 CIT at __, 505 F. Supp. 3d at 1357. Thereafter, the parties in the instant litigation filed a Joint Status Report, in which the defendants agreed that the decisions in *PrimeSource* were "decisive as to Count I of Plaintiffs' Complaints" and that as a result there was "no reason for this Court not to grant Plaintiffs' Motion for Summary Judgment on Count I of the Complaints . . . and deny Defendant[s]' Motion to Dismiss Count I of Plaintiffs' Complaints." Joint Status Report 1-2 (Apr. 30, 2021), ECF No. 105. Further, plaintiffs agreed to move the court to lift the stay and dismiss Counts II and III of their complaints. *Id.* Accordingly, in

Oman, the court granted summary judgment in favor of plaintiffs on Count I of their complaints and dismissed without prejudice Counts II and III. 45 CIT at ___, 520 F. Supp. 3d at 1339.

The amended preliminary injunctions dissolved upon the entry of judgment on June 10, 2021. *See* Judgment 1–2. In the Judgment, this Court ordered, *inter alia*, that defendants liquidate the duties affected by this litigation without the assessment of the 25% additional duties provided for in Proclamation 9980. *Id.*

Defendants filed a notice of appeal of the Judgment, Notice of Appeal (Aug. 7, 2021), ECF No. 110, and shortly thereafter their motion for a stay pending appeal and other measures, Defs.’ Mot. for Stay of J. to Maintain the *Status Quo Ante* Pending Appeal (Aug. 9, 2021), ECF No. 111 (conf.), (Oct. 14, 2021), ECF No. 119 (public) (“Defs.’ Mot. for Stay”). Defendants requested that, for the pendency of the appeal, the court: (1) stay the requirement to liquidate Oman’s and Huttig’s entries without the assessment of the 25% additional duties and reinstate the order to suspend liquidation; (2) stay the requirement to refund with interest any deposits of estimated duties under Proclamation 9980 made by Oman and Huttig; and (3) reinstate the requirements that plaintiffs monitor their imports of merchandise covered by Proclamation 9980 and maintain a sufficient continuous bond for the duty liability on these imports. Defs.’ Mot. for Stay 1–2. Plaintiffs filed their opposition to defendants’ stay motion on August 30, 2021. Pls.’ Opp’n to Defs.’ Mot. for Stay of J. Pending Appeal, ECF Nos. 116 (conf.), 117 (public) (“Pls.’ Opp’n”).

II. DISCUSSION

In exercising its traditional powers to further the administration of justice, a federal court may stay enforcement of a judgment pending the outcome of an appeal. *Nken v. Holder*, 556 U.S. 418, 421 (2009). “While an appeal is pending from . . . [a] final judgment that grants, continues, modifies, refuses, dissolves, or refuses to dissolve or modify an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party’s rights.” USCIT R. 62(d). When that judgment was rendered by a three-judge panel, “the order must be made . . . by the assent of all its judges, as evidenced by their signatures.” *Id.*

The party seeking a stay pending appeal has the burden of demonstrating that the stay is justified by the circumstances. *Nken*, 556 U.S. at 433–34. We consider four factors in deciding whether defendants have met that burden: (1) whether defendants have made a strong showing that they will succeed on the merits; (2) whether they

will be irreparably harmed absent the stay; (3) whether issuance of the stay will substantially injure plaintiffs; and (4) where the public interest lies. See *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). “There is substantial overlap between these and the factors governing preliminary injunctions.” *Nken*, 556 U.S. at 434 (citing *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008)). The “likelihood of success” and “irreparable harm” factors, working together, are the most critical, and where the United States is a party, the balance of equities and the public interest factors “merge.” *Id.* at 434–35. We conclude that all four factors support our granting defendants’ motion.

A. Success on the Merits

The decision of the Court of Appeals for the Federal Circuit (“Court of Appeals”) in *Transpacific Steel LLC v. United States*, 4 F.4th 1306 (Fed. Cir. 2021) (“*Transpacific II*”), causes us to conclude that defendants have made a sufficiently strong showing that they will succeed on the merits on appeal. In *Transpacific II*, the Court of Appeals vacated a judgment of this Court in *Transpacific Steel LLC v. United States*, 44 CIT ___, 466 F. Supp. 3d 1246 (2020) (“*Transpacific I*”), rejecting a claim similar in some respects to a claim this Court found meritorious in *Oman, PrimeSource I*, and *PrimeSource II*.

The subject of the *Transpacific* litigation is a Presidential proclamation that increased to 50% the then-existing 25% Section 232 duties on imports of steel products from Turkey. See Proclamation 9772, *Adjusting Imports of Steel Into the United States*, 83 Fed. Reg. 40,429 (Exec. Office of the President Aug. 15, 2018) (“Proclamation 9772”). In *Transpacific I*, this Court held the proclamation invalid as untimely and as a violation of equal protection. Regarding the former, *Transpacific I* held that Proclamation 9772 was issued after the close of the combined 105-day time period Congress established in the 1988 amendments to Section 232 (the time period codified as Section 232(c)(1), 19 U.S.C. § 1862(c)(1)), that commenced upon President Trump’s receipt, on January 11, 2018, of a report by the Secretary of Commerce issued under the authority of 19 U.S.C. § 1862(b)(3)(A) (the “2018 Steel Report”). The President’s receipt of the 2018 Steel Report was the procedural predicate for the issuance of a previously issued proclamation, Proclamation 9705, *Adjusting Imports of Steel Into the United States*, 83 Fed. Reg. 11,625 (Exec. Office of the President Mar. 15, 2018) (“Proclamation 9705”).

In *Transpacific II*, the Court of Appeals reversed the decision of this Court in *Transpacific I*. On the issue of the time limits added by the 1988 amendments to Section 232, the Court of Appeals reasoned that

“[n]one of the new language in the statute, on its own or by comparison to what came before, implies a withdrawal of previously existing presidential power to take a continuing series of affirmative steps deemed necessary by the President to counteract the very threat found by the Secretary.” *Transpacific II*, 4 F.4th at 1329. The Court of Appeals stated that “[i]n this context, the directive to the President to act by a specified time is not fairly understood as implicitly meaning ‘by then or not at all’ as to each discrete imposition that might be needed, as judged over time.” *Id.* at 1329–30.

The instant litigation arose from somewhat different facts than did the *Transpacific* litigation. Instead of an upward adjustment to the tariffs imposed by a previous Section 232 proclamation, the action contested here imposed, for the first time, tariffs of 25% on a previously unaffected group of products. These products, identified in Proclamation 9980 as “Derivative Steel Articles,” Proclamation 9980, 85 Fed. Reg. at 5,281, were different than the steel articles affected by the earlier Presidential proclamation, Proclamation 9705. As in *PrimeSource*, defendants here relied upon the President’s receipt of the 2018 Steel Report as the procedural basis upon which the President issued Proclamation 9980, arguing that the President retained “modification” authority over the previous Section 232 action. *See* Defs.’ Mot. to Dismiss Count I for Failure to State a Claim 29–31 (Mar. 20, 2020), ECF No. 57; Joint Status Report 2 (“As was true in the *PrimeSource* litigation . . . [d]efendants’ position remains that the procedural preconditions for the issuance of Proclamation 9980 were met by the Secretary’s 2018 Steel Report and the timely issuance of Proclamation 9705”). Proclamation 9980 was signed by the President on January 24, 2020 (and published in the Federal Register on January 29, 2020), long after the President’s receipt, on January 11, 2018, of the 2018 Steel Report. In *PrimeSource I*, this Court held that, due to the combined 105-day time limitation set forth in 19 U.S.C. § 1862(c)(1), the President’s authority to adjust tariffs on the “derivative” articles of steel had expired by the time Proclamation 9980 was issued, if that time period were presumed to commence upon the receipt of the 2018 Steel Report. 45 CIT at ___, 497 F. Supp. 3d at 1356. We concluded, later, that defendants had waived any defense that the procedural requirements of Section 232 were met based on any procedure other than one reliant upon the 2018 Steel Report. *Oman*, 45 CIT at ___, 520 F. Supp. 3d at 1338.

Our decision in *Oman* is also distinguishable from *Transpacific II* with respect to the time period that elapsed between the receipt of a Section 232(b)(3)(A) report from the Secretary of Commerce and the

President's taking implementing action. In issuing Proclamation 9980, the President acted more than two years after receiving the 2018 Steel Report. In the *Transpacific* litigation, the analogous time period was approximately seven months. In *Transpacific II*, the Court of Appeals rejected the appellee's argument that Congress sought, through the time limits, to ensure that the President will have timely information on which to act. 4 F.4th at 1332 ("Concerns about staleness of findings are better treated in individual applications of the statute, where they can be given their due after a focused analysis of the proper role of those concerns and the particular finding of threat at issue."). That all said, we express no view on whether the factual distinction between this case and *Transpacific II* is material.

Even though *Transpacific II* and this case arose from somewhat different facts, we nevertheless conclude that the opinion of the Court of Appeals potentially affects the outcome of this litigation. In reaching this conclusion, we do not opine on whether *Transpacific II* necessarily controls that outcome, i.e., whether the President's adjusting of tariffs on derivatives of steel products falls within what the Court of Appeals termed, in a different factual setting, "a continuing series of affirmative steps deemed necessary by the President to counteract the very threat found by the Secretary," *id.* at 1329. But for purposes of ruling on the instant stay motion, it suffices that the discussion in *Transpacific II* of the "continuing" nature of Presidential Section 232 authority is expressed in broad terms.

Citing their petition in *Transpacific II* for panel rehearing and rehearing *en banc*, plaintiffs argued that *Transpacific II* does not demonstrate defendants' likelihood of success on the merits because it "is not final." Pls.' Opp'n 5 (citing Combined Pet. for Panel Reh'g and Reh'g *En Banc* of Pls.-Appellees (Ct. No. 2020-2157) (Aug. 23, 2021), ECF No. 68). Oman and Huttig rely on the "strong dissenting opinion" in *Transpacific II* and "the fact that two panels of this Court . . . previously held presidential action outside the statutory deadlines unlawful." *Id.* More recently, on September 24, 2021, the Court of Appeals denied the petition for panel rehearing and the petition for rehearing *en banc*, and the mandate has now been issued. Order (Ct. No. 2020-2157), ECF No. 76; *see* Mandate (Ct. No. 2020-2157) (Oct. 1, 2021), ECF No. 78. We conclude that defendants have made a showing that they will succeed on the merits on appeal that is sufficient to satisfy the first factor in our analysis.

B. Irreparable Harm in the Absence of the Requested Stay

In their motion for a stay, defendants request that, for the pendency of the appeal, the court: (1) stay the requirement to liquidate Oman

and Huttig's entries without the assessment of the 25% additional duties and reinstate the order to suspend liquidation; (2) stay the requirement to refund with interest any deposits of estimated duties under Proclamation 9980 made by Oman and Huttig; and (3) reinstate the requirement that plaintiffs monitor their imports of merchandise covered by Proclamation 9980 and maintain a sufficient continuous bond for the duty liability on these imports. Defs.' Mot. for Stay 1–2. The court concludes that all three of these requested measures are necessary to prevent a form of irreparable harm to the United States. As we discuss below, that harm is the loss of the authority, provided for by statute and routinely exercised by Customs in every import transaction, to require and maintain such bonding as it determines is reasonably necessary to protect the revenue of the United States. Without the requested stay, the judgment entered in *Oman* would interfere with the exercise of that authority.

In Section 623(a) of the Tariff Act of 1930, Congress explicitly recognized the importance of security, such as bonding, to protect the revenue. In pertinent part, the relevant provision reads as follows:

In any case in which bond or other security is not specifically required by law, the Secretary of the Treasury may by regulation or specific instruction require, or authorize customs officers to require, such bonds or other security as he, or they, may deem necessary for the protection of the revenue

19 U.S.C. § 1623(a). This authority is effectuated in the Customs Regulations and applies generally to all import transactions. *See* 19 C.F.R. § 113. Due to the decision of the Court of Appeals in *Transpacific II*, the government has established a likelihood that ultimately it will assess Section 232 duties of 25% *ad valorem* on all entries at issue in this litigation. In any ordinary import transaction, i.e., one not affected by litigation such as this, Customs would exercise its statutory and regulatory authority to ensure that the basic importer's bond (be it a continuous or single transaction bond) has a sufficient limit of liability to secure the liability for all potential duties, such as the Section 232 duties that potentially will be owed by Oman and Huttig.

Importers' bonds are the ordinary means by which the government ensures that the joint and several liability of the importer of record, and of its surety (up to the limit of liability on the bond), will attach for the payment of all duties and other charges eventually determined to be owed. Notably, in the situation posed by this litigation, Oman and Huttig, due to the preliminary injunction that dissolved upon the entry of judgment in this litigation, have made no cash

deposits of estimated duties to cover potential duty liability from Proclamation 9980. The continuous bond required by the consent preliminary injunction was a substitute for these estimated duty deposits.

If an importer's bond has a limit of liability that is too low to cover the ordinary duties plus the 25% duties, there is an inherent risk to the revenue, codified by statute and effectuated by regulation, because one of the two parties that contractually could have been bound to pay the duties—the surety—has liability limited by the face amount of the bond. In short, Congress contemplated in 19 U.S.C. § 1623 that the government should have resort to two parties for assessed duty liability, the importer of record and the surety.

We do not base our decision to grant defendants' motion on a factual determination that plaintiffs will be unable to satisfy their potential duty obligation. Rather, we base it on the loss of the ability of the United States to exercise, as it would in the ordinary course of administering import transactions, the statutory authority of 19 U.S.C. § 1623(a) to secure this potential duty liability. That loss, absent the requested stay, itself will constitute an irreparable harm to the United States.² But for the Judgment entered in *Oman*, the government would maintain, and continue into the future, the requirement of bonding adequate to secure the revenue potentially owing on the entries affected by this case. In summary, were we to deny the government's motion to stay the effect of the Judgment as to these entries, we would be interfering with the exercise of the government's statutory authority under 19 U.S.C. § 1623(a). Based on the intent Congress expressed in enacting that provision, we conclude that any such interference is best avoided.

In addition to enhanced bonding, the government's motion seeks a stay of our order to liquidate without Section 232 liability the entries subject to this litigation and a suspension of the liquidation of those entries pending the appeal. We agree that these steps are warranted. The court notes the possibility that finality of liquidation, should it attach to all entries associated with a particular continuous bond,

² Because we find irreparable harm for the reasons noted, we need not, and do not, consider whether finality of liquidation itself constitutes potential irreparable harm to the United States. Defendants claim they may be unable to collect duties on entries for which liquidation has become final under 19 U.S.C. § 1514(a). See Defs.' Mot. for Stay of J. to Maintain the *Status Quo Ante* Pending Appeal 14–15 (Aug. 9, 2021), ECF No. 111 (conf.), (Oct. 14, 2021), ECF No. 119 (public). Their argument is brought into question by precedent recognizing the authority of this Court, in a case brought according to 28 U.S.C. § 1581(i), to enforce its own judgments by ordering the reliquidation of the entries. See *Shinyei Corp. of Am. v. United States*, 355 F.3d 1297, 1311–12 (Fed. Cir. 2004). The opinion in *Shinyei* reasoned that finality of liquidation under 19 U.S.C. § 1514 does not “preclude judicial enforcement of court orders after liquidation,” as “the Court of International Trade has been granted broad remedial powers.” *Id.* at 1312.

could result in the cancellation of such a bond and the resultant extinguishing of the liability of the surety. Such a prospect would pose irreparable harm to the United States for the reasons the court has discussed. Because avoiding irreparable harm requires that the government have the authority not only to require, but to maintain, sufficient bonding for potential duty liability on all entries at issue in this case, we conclude that avoiding such harm requires that the affected entries remain in an unliquidated state during the pendency of the appeal.

C. Balance of the Hardships

The government also prevails on the third factor. As the court has pointed out, bonding that is inadequate to secure potential duties is deleterious to the interest of the United States in the protection of the revenue, an interest protected by statute. Defendants do not seek an order requiring cash deposits. Instead, under the government's motion, plaintiffs will incur the costs of maintaining enhanced bonding for the potential Section 232 duty liability, i.e., the cost of the bond premiums.

As a result of the previous agreements, Oman and Huttig have bonding that secures the estimated duty liability for all entries between February 8, 2020, until June 10, 2021, the date judgment was entered in favor of these plaintiffs. To address bonding for entries after that time period, defendants request that the court directly order reinstatement of the previous requirements for monitoring and "sufficient bonding." Defs.' Mot. for Stay 1–2. Defendants' proposed order would impose specific bonding requirements for each plaintiff. [Proposed] Order 1–3 (Aug. 9, 2021), ECF No. 111–1.

Oman argues that, in its particular circumstance, it will incur a substantial harm if it must incur the cost of maintaining bonding for entries after June 10, 2021. Pls.' Opp'n 7. Rather than impose the bonding and monitoring requirements directly, the court considers it preferable that the plaintiffs be involved in negotiations of the arrangements for the continuation of bonding on their respective entries. Accordingly, the court will direct defendants to consult with Oman and with Huttig with the objective of reaching, and implementing, agreements under which the entries occurring on and after June 10, 2021, and going forward throughout the appeal, will be covered by bonding, but only such bonding as is reasonably necessary to secure the potential revenue, including the Section 232 duties. The court will direct, further, that should defendants be unable to reach, and enter into, an agreement with a plaintiff or plaintiffs, the involved parties shall file with the court a joint status report on the negotiations.

Oman argues, further, that the harm is magnified due to the same entries subject to the stay being subject to “the as-yet uninitiated seventh administrative review (covering entries between July 1, 2021 and June 30, 2022) and very likely eighth administrative review (covering entries between July 1, 2022 and June 30, 2023)” in *Certain Steel Nails From the Republic of Korea, Malaysia, the Sultanate of Oman, Taiwan, and the Socialist Republic of Vietnam: Antidumping Duty Orders*, 80 Fed. Reg. 39,994 (Int’l Trade Admin. July 13, 2015) (“*Oman Nails*”). *Id.* at 7–8. Further, Oman states that if Commerce follows its “normal regulatory schedule for conducting administrative reviews, the final results of the seventh and eighth *Oman Nails* reviews would not be published until the end of 2023 and 2024, respectively” with suspension of liquidation “lifted thereafter, with actual liquidation of the entries occurring well into the following year[s].” *Id.* at 8.

That Oman’s merchandise at issue is subject to separate administrative proceedings, and any potential duties, separate from Section 232, stemming from those proceedings, does not create a present burden sufficient to alter our analysis of the balance of the hardships related to this litigation.

Characterizing its agreement to continued bonding at the time of the initial preliminary injunction order as the “lesser of two extreme burdens,” Oman submits that “to ask Plaintiffs to accept the same bonding—for an even longer period—when this Court has already held that Proclamation 9980 is unlawful and void . . . is an entirely different matter.” *Id.* at 9. Plaintiffs also oppose the court’s entering a stay that applies retroactively to entries prior to the imposition of the stay because doing so would “grant Defendants a bonding windfall for merchandise that entered the United States at a time when the Court had declared Proclamation 9980 unlawful and void.” *Id.* at 10. Oman’s argument is unconvincing. As we have explained, our conclusion that the government potentially will have a claim to Section 232 revenue is based on certain language in *Transpacific II*, to which we give due consideration. The government’s proposed motion essentially would continue the balance struck by the parties in their agreements for a consent injunction that maintained enhanced bonding while the outcome of this case was not yet determined by this Court. In comparison, denying the government the authority to require such bonding on current and future entries poses a hardship on the United States that, under the statutory scheme designed to ensure adequate protection of the revenue, is unwarranted now that such potential duty liability exists.

D. The Public Interest

The public interest favors allowing the government to exercise its lawful authority to protect the revenue, and potential revenue, of the United States, which in this case involves a significant amount of potential duty liability. *See* Defs.' Mot. for Stay 20.

III. CONCLUSION AND ORDER

All four factors necessitate granting the government's motion to stay. Upon the court's consideration of the parties' motions, including defendants' motion to stay and plaintiffs' response, and all other filings herein, and upon due deliberation, it is hereby

ORDERED that Defs.' Mot. for Stay of J. to Maintain the *Status Quo Ante* Pending Appeal (Aug. 9, 2021), ECF No. 111 (conf.), (Oct. 14, 2021), ECF No. 119 (public), be, and hereby is, granted in part and denied in part; it is further

ORDERED that the order of this Court to liquidate the entries subject to this litigation and to refund with interest any deposits of estimated duties under Proclamation 9980 made by Oman and Huttig, as stated in the Judgment entered on June 10, 2021, be, and hereby is, stayed pending the appeal of that Judgment before the United States Court of Appeals for the Federal Circuit; it is further

ORDERED that defendants be, and hereby are, enjoined, through the pendency of the appeal, from liquidating the entries affected by this litigation; it is further

ORDERED that defendants shall confer with Oman and Huttig with the objective of reaching, and entering into, an agreement with Oman and an agreement with Huttig on monitoring and such bonding for entries of merchandise within the scope of Proclamation 9980 that have occurred, and will occur, on or after June 10, 2021, as is reasonably necessary to secure potential liability for duties and fees, including potential liability for duties under Proclamation 9980; in the event of failure to reach agreement, the involved parties shall file a joint status report with the court no later than November 1, 2021; and it is further

ORDERED that this Order shall remain in effect until issuance of a mandate of the United States Court of Appeals for the Federal Circuit in the pending appeal of the Judgment entered by the court in this litigation.

Dated: October 15, 2021

New York, New York

/s/ Jennifer Choe-Groves

JENNIFER CHOE-GROVES, JUDGE

/s/ M. Miller Baker

M. MILLER BAKER, JUDGE

/s/ Timothy C. Stanceu

TIMOTHY C. STANCEU, JUDGE

Slip Op. 21–145

UNITED STATES, Plaintiff, v. GREENLIGHT ORGANIC, INC. AND PARAMBIR SINGH AULAKH, Defendants.

Before: Jennifer Choe-Groves, Judge
Court No. 17–00031

[Granting in part and denying in part Defendants’ motion to compel Plaintiff to answer requests for admission.]

Dated: October 18, 2021

William Kanellis, Attorney, and *Ashley Akers*, Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for Plaintiff United States. With them on the brief were *Brian M. Boynton*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director.

Robert B. Silverman and *Joseph M. Spraragen*, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, of New York, N.Y., for Defendants Greenlight Organic, Inc. and Parambir Singh Aulakh.

OPINION AND ORDER**Choe-Groves, Judge:**

This matter involves a discovery dispute in a claim brought under 19 U.S.C. § 1592. Plaintiff United States (“Plaintiff”) brings this 19 U.S.C. § 1592 civil enforcement action seeking to recover unpaid duties and to affix penalties, alleging that Defendants Greenlight Organic, Inc. (“Greenlight”) and Parambir Singh Aulakh (“Aulakh”) (collectively, “Defendants”) imported wearing apparel into the United States fraudulently. Second Am. Compl. ¶ 1, ECF No. 124. The statute, 19 U.S.C. § 1592, prohibits companies from making false statements or omitting material information in the course of importing merchandise into the United States through fraud, gross negligence, or negligence. *See* 19 U.S.C. § 1592(a)(1). Plaintiff alleges that Greenlight misclassified and undervalued its subject merchandise fraudulently in violation of the statute. Second Am. Compl. ¶¶ 21–22.

Before the court is the Motion to Compel Plaintiff to Provide Proper Answers to Defendants’ Requests for Admission (“Motion to Compel” or “Mot. Compel”), ECF No. 155, filed by Defendants under USCIT Rule 36(a)(6) to determine the sufficiency of Plaintiff’s answers and objections to Defendants’ requests for admission. *See also* Mem. Supp. Defs.’ Mot. Compel (“Defs.’ Mem.”) at 4, ECF No. 155–1. Defendants assert that in responding to Defendants’ requests for admission, Plaintiff failed to comply with USCIT Rule 36 by objecting and making qualified denials to requests for admission numbers 1–43, 47–57, 59, 61–75, 77–104, and 107–116. Mot. Compel at 1. Defendants ask

the Court to direct Plaintiff to provide sufficient answers or order that the matters are admitted, and award legal fees incurred in preparing the Motion to Compel. *Id.* at 2–3. Plaintiff contends that it complied with USCIT Rule 36 in its answers and objections due to misleading or ambiguous wording, use of excerpts from documents taken out of context, and Plaintiff’s inability to confirm the veracity of information due to destruction of corroborating records by Aulakh. United States’ Opp’n Defs.’ Mot. Compel (“Pl.’s Opp’n”) at 1, ECF No. 161. For the following reasons, the Court grants in part and denies in part the Motion to Compel.

BAGKGROUND

The Court presumes familiarity with the facts and procedural history and recounts briefly the procedural history for context. Plaintiff commenced this action against Greenlight on February 8, 2017. Summons, ECF No. 1; Compl., ECF No. 2. The Court denied Greenlight’s motion for summary judgment because the record did not provide enough information to assess when Plaintiff first discovered Greenlight’s fraud—whether in 2011, as Greenlight asserted, or in February 2012, as Plaintiff asserted—from which time the five-year statute of limitations began to run. *See United States v. Greenlight Organic, Inc.*, 42 CIT __, __, 352 F. Supp. 3d 1312, 1313–14, 1315–16 (2018) (citing 19 U.S.C. § 1621).

Plaintiff filed the First Amended Complaint, adding Aulakh as a defendant and pleading additional facts with leave of the Court on April 2, 2019. *See* First Am. Compl., ECF No. 111. The Court granted Aulakh’s motion to dismiss the First Amended Complaint for failure to state a claim upon which relief may be granted, with judgment to be entered after forty-five days if Plaintiff did not file a second amended complaint.¹ *United States v. Greenlight Organic, Inc.*, 43 CIT __, __, 419 F. Supp. 3d 1298, 1306 (2019).

Plaintiff filed the Second Amended Complaint on January 8, 2020. Second Am. Compl. The Court denied Aulakh’s motion to dismiss on the theories that U.S. Customs and Border Protection (“Customs”) failed to exhaust administrative remedies, the five-year statute of limitations had expired, and Plaintiff failed to plead fraud with particularity based on additional facts pleaded in the Second Amended

¹ The Court granted the motion of Greenlight’s counsel to withdraw its appearance in this matter. Order (Feb. 27, 2018), ECF No. 108. Greenlight had not retained counsel at the time of the Court’s decision on Aulakh’s motion to dismiss and did not join Aulakh’s motion to dismiss. *United States v. Greenlight Organic, Inc.*, 43 CIT __, __, 419 F. Supp. 3d 1298, 1301 n.1, 1306 (2019).

Complaint.² *United States v. Greenlight Organic, Inc.*, 44 CIT __, __, 466 F. Supp. 3d 1260, 1263–66 (2020). Aulakh argued that the five-year statute of limitations had run and Plaintiff asserted again that the Government discovered Defendants’ fraudulent scheme in February 2012, when Aulakh first produced to Customs records from Greenlight showing evidence of a double-invoicing scheme. *Id.* at __, 466 F. Supp. 3d at 1264. The Court held that the Second Amended Complaint contained sufficient facts accepted as true to establish on its face that the Government discovered the fraudulent activity in February 2012, and the Complaint was filed within five years in February 2017. *Id.* at __, 466 F. Supp. 3d at 1265.

JURISDICTION

The Court has jurisdiction over the underlying action pursuant to 28 U.S.C. § 1582.

DISCUSSION

I. Legal Standards

USCIT Rule 36 permits a party to serve a request for admission on another party. USCIT R. 36(a)(1). When answering a request for admission:

If a matter is not admitted, the answer must specifically deny it or state in detail why the answering party cannot truthfully admit or deny it. A denial must fairly respond to the substance of the matter; and when good faith requires that a party qualify an answer or deny only a part of a matter, the answer must specify the part admitted and qualify or deny the rest. The answering party may assert lack of knowledge or information as a reason for failing to admit or deny only if the party states that it has made reasonable inquiry and that the information it knows or can readily obtain is insufficient to enable it to admit or deny.

USCIT R. 36(a)(4). When objecting to a request for admission, “[t]he grounds for objecting to a request must be stated.” USCIT R. 36(a)(5). To challenge responses:

The requesting party may move to determine the sufficiency of an answer or objections. Unless the court finds an objection justified, it must order that an answer be served. On finding that an answer does not comply with this rule, the court may order either that the matter is admitted or that an amended answer be served.

² Greenlight was not represented by counsel. *United States v. Greenlight Organic, Inc.*, 44 CIT __, __, 466 F. Supp. 3d 1260, 1261 n.1 (2020).

USCIT R. 36(a)(6).

“The purpose of requests for admission[] is not necessarily to obtain information but to narrow the issue for trial.” *Beker Indus. Corp. v. United States*, 7 CIT 361, 361 (1984) (citation omitted). The purpose of USCIT Rule 36, as with the corresponding Federal Rule of Civil Procedure Rule 36, “is to expedite trial by eliminating the necessity of proving essentially undisputed and peripheral issues.” *See id.* at 362. “Rule 36 admissions are ‘not to be used . . . in the hope that a party’s adversary will simply concede essential elements.’” *Kahrs Int’l, Inc. v. United States*, 33 CIT 117, 121, 602 F. Supp. 2d 1352, 1357 (2009) (quoting *Conlon v. United States*, 474 F.3d 616, 622 (9th Cir. 2007)).

II. Requests for Admission Regarding Certain Entries and Vendors

Defendants assert that Plaintiff’s responses to requests 1–33 are unacceptable because Plaintiff is able to admit the matters based on entry records in the possession of Customs, and Exhibits 1 and 2 filed by Plaintiff with the Second Amended Complaint. Defs.’ Mem. at 8. Defendants explain that when a foreign vendor ships an entry package to Greenlight, Greenlight’s broker prepares a customs entry form based on the commercial invoice and bill of lading. *Id.* at 8–9. Defendants explain further that “[t]he data received in all entry filings is maintained by [Customs] in a data base that is available to [Customs] personnel.” *Id.* at 9. In Defendants’ view, Plaintiff is able to corroborate requests 1–33 with entry information available to Plaintiff in Customs’ database. *Id.* at 8. Plaintiff responds that it does not have the ability to admit the matters in requests 1–33 because there is evidence that Defendants and their “co-conspirators submitted false documentation to the Government” and Defendants did not provide email communications with Greenlight’s brokers or other internal records that may have allowed Plaintiff to verify the information in requests 1–33. Pl.’s Opp’n at 9–10.

Requests 1–3, 8–9, 14–15, 19–20, 24–25, and 29–30 ask Plaintiff to admit facts related to certain entries. *See* Defs.’ Objs. Pl.’s Resps. Defs.’ [Reqs. Admis.] (“Ex. B”), ECF No. 155–3. As an example of Plaintiff’s responses to requests 1–3, 8–9, 14–15, 19–20, 24–25, and 29–30, request 1 states and Plaintiff responds, in relevant part:

1. Admit that entry numbers 408–1163899–5 . . . covered goods purchased by Greenlight from Rajlakshmi Cotton Mills PVT. Ltd. (“Rajlakshmi”) in India.

Response. Plaintiff objects because . . . defendants GREENLIGHT, AULAKH, and/or their co-conspirators destroyed, spoliated, or otherwise failed to disclose the GREENLIGHT records

which would allow for a meaningful response as to the contents of the entries. Otherwise, denied.

Id. at 1–2.

Plaintiff brings this case based on allegations that Defendants conspired with one of Greenlight’s foreign vendors, One Step Ahead, to make false statements to Customs, and that Defendants created a second falsified set of invoices for purchases from One Step Ahead. *See* Second Am. Compl. ¶¶ 9, 12–14, 17, 21. Plaintiff also explains that Defendants blame Greenlight’s brokers. *See* Pl.’s Opp’n at 9. Thus, there are allegations of falsified invoices and false statements by Defendants, one of Greenlight’s foreign vendors, and possibly Greenlight’s brokers. As Defendants explain, the information in Customs’ database, from which the information in Exhibits 1 and 2 is derived, reflects information provided in commercial invoices and prepared by Greenlight’s brokers. It seems to be Plaintiff’s position that due to the allegations of false statements, Plaintiff does not assume the veracity of any information provided by Defendants, Greenlight’s foreign vendors, or Greenlight’s brokers without corroborating documentation, which Defendants have not provided to Plaintiff. *See id.* at 9–10. Because Plaintiff asserts an inability to answer due to lack of corroborating documentation, Plaintiff’s objections are akin to “assert[ions] [of] lack of knowledge or information as a reason for failing to admit or deny . . . and that the information it knows or can readily obtain is insufficient to enable it to admit or deny” under USCIT Rule 36(a)(4). The Court concludes that Plaintiff’s objections to requests 1–3, 8–9, 14–15, 19–20, 24–25, and 29–30 are justified or are sufficient answers based on lack of knowledge or information.

Requests 4, 10, 16, 21, 26, and 31 ask Plaintiff to admit that Customs’ claims in this case exclude goods from respective vendors or manufacturers. *See* Ex. B. As an example of Plaintiff’s responses to requests 4, 10, 16, 21, 26, and 31, request 4 states and Plaintiff responds, in relevant part:

4. Admit that [Customs] has no fraud claim against Greenlight that the Rajlakshmi goods should have been entered as knit goods.

Response. Plaintiff objects because (1) defendants’ statement, “[Customs] has no fraud claim against Greenlight that the Rajlakshmi goods should have been entered as knit goods[,]” *sic erat scriptum*, is incoherent and prevents a meaningful response, and (2) defendant’s use of the term “fraud claim” is ambiguous, as it involves a legal question that is capable of multiple definitions, and otherwise misstates the basis of the

fraud alleged against GREENLIGHT and AULAKH in the second amended complaint. Otherwise, because GREENLIGHT, AULAKH, and/or their co-conspirators destroyed, spoliated, or otherwise failed to disclose the GREENLIGHT records which would allow for a meaningful examination . . . , denied.

Id. at 4.

“The purpose of requests for admission[] is . . . to narrow the issue for trial.” *Beker Indus. Corp.*, 7 CIT at 361 (citations omitted). The Second Amended Complaint refers to “a manufacturer in Vietnam” and names only one manufacturer, “One Step Ahead, the Vietnamese manufacturer of wearing apparel.” *See* Second Am. Compl. ¶¶ 6, 9, 13–15. Defendants assert that “a number of entries which are purported to be included in this case [] are not covered by the allegations of misclassification and/or undervaluation in the complaint” or Exhibits 1 and 2. *See* Defs.’ Mem. at 8. Plaintiff initiated this action and is able to answer, including by admitting, qualifying, or denying with specificity and in good faith, whether the issues can be narrowed to exclude vendors or manufacturers other than One Step Ahead. The Court concludes that Plaintiff’s objections to requests 4, 10, 16, 21, 26, and 31 are not justified. Plaintiff shall answer pursuant to USCIT Rule 36. *See* USCIT R. 36(a)(4) (“[W]hen good faith requires that a party qualify an answer or deny only a part of the request, the answering party must specify the part admitted and qualify or deny the rest.”); *see also* USCIT R. 37(a)(3) (“[A]n evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer, or respond.”).

Requests 5–7, 11–13, 17–18, 22–23, 27–28, and 32–33 ask Plaintiff to admit that Exhibits 1 and 2 list or provide or do not list or provide information related to entries of goods from respective vendors or manufacturers. *See* Ex. B. As an example of Plaintiff’s responses to requests 5–7, 11–13, 17–18, 22–23, 27–28, and 32–33, request 5 states and Plaintiff responds, in relevant part:

5. Admit [that] Exhibit 1 to the second amended complaint (Court Doc 124) does not list any of the Rajlakshmi goods as having been fraudulently entered as woven goods.

Response. Plaintiff objects because of defendants’ use of “Rajlakshmi goods,” for reasons stated in responses to requests for admission 1 and 2, and because defendant[s] mischaracterize[] the purpose of Exhibit 1 to the second amended complaint, which was not to identify goods which were “fraudulently entered,” but rather, to identify entries and the classification for those entries, which were based upon the incomplete records

supplied by GREENLIGHT and AULAKH. Plaintiff also objects because GREENLIGHT, AULAKH, and/or their co-conspirators destroyed, spoliated, or otherwise failed to disclose the GREENLIGHT records which would allow for a meaningful examination

• • • •

Id. at 5.

Exhibits 1 and 2 were filed by Plaintiff with the Second Amended Complaint. Exhibit 1 is a spreadsheet that Plaintiff described as identifying “[t]he specific date of entry, price, and factual circumstances” of the 148 entries from a manufacturer in Vietnam about which Plaintiff alleges that Defendants made material false statements. Second Am. Compl. ¶¶ 6–7. Exhibit 2 is a spreadsheet that Plaintiff described as identifying “[e]ntries for which AULAKH and GREENLIGHT created two sets of invoices, including the date of entry and the factual circumstances relating to each entry.” *Id.* ¶¶ 12, 15. Plaintiff filed Exhibits 1 and 2 and Plaintiff is able to answer concerning information as listed or provided or not listed or provided in Exhibits 1 and 2. The Court concludes that Plaintiff’s objections to requests 5–7, 11–13, 17–18, 22–23, 27–28, and 32–33 are not justified. Plaintiff shall answer pursuant to USCIT Rule 36. *See* USCIT R. 36(a)(4); *see also* USCIT R. 37(a)(3).

III. Terms and Phrases in Certain Requests for Admission

Defendants assert that Plaintiff’s answers and denials to requests 1, 4, 7–8, 10, 14, 16–19, 21, 23–24, 26, 28–29, 31, 33, 36–38, 40–42, 48–51, 53–54, and 71–72 based on ambiguity of terms or phrases are insufficient. Defs.’ Mem. at 11–13.

Plaintiff objected to the use of the terms “covered” or “covered by” as ambiguous in requests 1, 8, 14, 19, 24, and 29. Ex. B at 2, 8, 12, 16, 20, 24. The Court concluded above that Plaintiff’s objections to requests 1, 8, 14, 19, 24, and 29 were justified and does not consider Plaintiff’s objections to the terms “covered” or “covered by.”

Plaintiff objected to the use of the terms “freight charges,” “international freight charges,” “vendors,” and “international freight deductions” in requests 37–38 and 40–42; the term “CIF USA port terms” in requests 40 and 41; and the term “FOB foreign port terms” in request 42. Ex. B at 30–33. Defendants argue that the terms are “commonly used industry terms” that both parties have used “throughout this litigation without issue.” Defs.’ Mem. at 12.

As an example of Plaintiff’s responses to requests 37–38 and 40–42, request 37 states and Plaintiff responds:

37. Admit that Greenlight's payments for customs duties and freight charges were not separately identified on Greenlight's tax returns.

Response. Plaintiff objects because defendants' request for admission uses terms that are ambiguous, such as "freight charges," because defendants' question is overbroad, and because the Government does not possess the GREENLIGHT tax returns to allow it to answer this request for admission. Otherwise, denied.

Ex. B at 30. Plaintiff's objection to request 37 because it does not possess Greenlight's tax returns is akin to an "assert[ion] [of] lack of knowledge or information as a reason for failing to admit or deny . . . and that the information it knows or can readily obtain is insufficient to enable it to admit or deny" under USCIT Rule 36(a)(4). The Court concludes that Plaintiff's objection to request 37 is justified or is a sufficient answer based on lack of knowledge or information.

For responses 38 and 40–42, Plaintiff also objected "because GREENLIGHT, AULAKH, and/or their co-conspirators destroyed, spoliated, or otherwise failed to disclose the GREENLIGHT records which would allow for a response to this request for admission." Ex. B at 31–33. For the reasons discussed above, Plaintiff's objections to requests 38 and 40–42 are justified or are sufficient answers based on lack of knowledge or information.

Plaintiff objected to the following terms related to fraud—"fraud claim," "fraudulent undervaluation," "undervaluation details," "details of undervaluation," "fraudulent misclassification and undervaluation," "fraudulent customs undervaluation and fraudulent consumer product misstatements," "fraudulent customs undervaluation," "fraudulently entered as woven goods," and "details for any double payments"—in requests 4, 7, 10, 16–18, 21, 23, 26, 28, 31, 33, 48–51, 53–54, and 71–72. Defs.' Mem. at 13. Defendants argued that "[t]he Government's ambiguity claim regarding these phrases is without merit as they are the basis for [its] entire case before this Court." *Id.* The Court concluded above that Plaintiff is able to and shall answer requests 4, 7, 10, 16–18, 21, 23, 26, 28, 31, and 33 because they relate to Plaintiff's allegations and exhibits.

Requests 48–51 and 53–54 ask Plaintiff to respond concerning information as identified or not identified in Exhibit 2 filed with Plaintiff's Second Amended Complaint. *See* Ex. B. Requests 48–51 and 53–54 state:

48. Admit that Exhibit 2 to Plaintiff's Second Amended Complaint does not identify details for any double payments or for any undervaluation for Greenlight entries filed in 2008 or 2009.

49. Admit that Exhibit 2 to Plaintiff's Second Amended Complaint identifies double invoicing and/or undervaluation details for only some of Greenlight's entries of goods purchased from One Step Ahead which were filed in 2010.

50. Admit that Exhibit 2 to Plaintiff's Second Complaint does not identify double invoicing and/or undervaluation details for Greenlight entries of goods purchased from vendors other than One Step Ahead which were filed in 2010.

51. Admit that the 2010 entries in Exhibit 2 for which details of undervaluation have been provided account for 18.98% of entered value for Greenlight's entries filed in 2010.

53. Admit that Exhibit 2 to Plaintiff's Second Complaint identifies undervaluation details for only some of Greenlight's entries of goods purchased from One Step Ahead which were filed in 2011, and Greenlight entry WLQ 1101356-2 of goods purchased from Rajlakshmi, and Greenlight entry WLQ 1101344-8 of goods purchased from Chau Thy.

54. Admit that the 2011 entries in Exhibit 2 for which details of undervaluation have been provided account for 39.41% of entered value for Greenlight's entries filed in 2011.

Id. at 34-38.

Exhibit 2 is a spreadsheet that Plaintiff filed, and Plaintiff described as identifying "[e]ntries for which AULAKH and GREENLIGHT created two sets of invoices, including the date of entry and the factual circumstances relating to each entry." Second Am. Compl. ¶ 12. Exhibit 2 has five columns grouped together under the title "Payment (Double) Invoice." *Id.* Ex. 2. Exhibit 2 also has a "Legend" for color-coded cells of the spreadsheet for "Qty differences between 1st and 2nd invoices," "Unit price in 2nd invoice was lower than the 1st invoice," and "Total payment does not match 2nd invoice." *Id.* The "Legend" includes "NOTE: This worksheet only shows details for those entries where the 2nd invoices and/or payment records were provided." *Id.* Plaintiff filed Exhibit 2 and Plaintiff is able to answer requests 48-51 and 53-54 concerning information as identified or not identified in Exhibit 2. The Court concludes that Plaintiff's objections to requests 48-51 and 53-54 are not justified. Plaintiff shall answer

pursuant to USCIT Rule 36. *See* USCIT R. 36(a)(4); *see also* USCIT R. 37(a)(3).

The Court's discussion of Plaintiff's objections to requests 71–72 is included below.

IV. Requests for Admission Regarding the Government's Investigation

Requests 69–116 relate to the investigation into Greenlight's activities as presented in documents that were produced in discovery by Plaintiff. *See* Defs.' Mem. at 13, 15; Ex. B at 45–71. Defendants challenge the sufficiency of Plaintiff's responses to requests 69–75, 77–104, and 107–116. Mot. Compel at 1. As an example of Plaintiff's objections to requests 69–75, 77–90, 92–104, 107–109, and 111–116, request 69 states and Plaintiff responds:

69. Admit that on or about May 31, 2011, U.S. Immigration and Customs Enforcement ("ICE") received a complaint that alleged fraudulent customs undervaluation and fraudulent consumer product misstatements by Greenlight. (DOC# US0000001-US0000012).

Response. The Government objects because this request for admission misstates or mischaracterizes the contents of the document cited, and does not properly reflect the context of the document in relation to other contemporaneous documents. Otherwise, denied.

Ex. B at 45. Request 91 states and Plaintiff answers:

91. Admit that on or about September 26, 2011[,] ICE sought investigative assistance from the ICE Attaché in Vietnam relating to the investigation of Greenlight undervaluation and misclassification. (DOC# US0012011-US0012012).

Response. The Government admits that in September 2011, HSI sought assistance from an HSI attache in Vietnam relating to GREENLIGHT. Otherwise, denied.

Id. at 57. Request 110 states and Plaintiff answers:

110. Admit that on December 14, 2012, [Customs] Field Director, Office of Regulatory Audit, San Francisco[,] CA transmitted the results of audit report number 811–12-ATIAU-23550 to ICE Supervisory Special Agent Kevin Glazner, Oakland[,] CA. (DOC# US0002253US0002304).

Response. Plaintiff admits that on or about December 14, 2012, [Customs] Regulatory Audit communicated with HSI Supervisory Special Agent Kevin Glazner relating to an audit of GREE-LIGHT. Otherwise, denied.

Id. at 66–67.

Defendants assert that Plaintiff's objections and answers to requests 69–75, 77–104, and 107–116 based on ambiguity, mischaracterization, misstatement, and/or lack of context are insufficient. Defs.' Mem. at 15. In Defendants' view, "an item-by-item review of each request for admission and government response thereto demonstrates the lengths to which plaintiff went to deny the obvious - that the statute of limitations ran before plaintiff filed its complaint in this case." *Id.* Plaintiff counters that the parties disagree regarding the date that fraud was discovered, from which the statute of limitations would begin to run, and requests 69–116 are Defendants' attempt to settle this dispute through the inappropriate medium of requests for admission. Pl.'s Opp'n at 14–16.

The purpose of requests for admission is to identify undisputed facts or issues, *see Beker Indus. Corp.*, 7 CIT at 362, not to confront an opposing party into conceding an essential fact or issue, *see Kahrs Int'l*, 33 CIT at 121, 602 F. Supp. 2d at 1357 (quoting *Conlon*, 474 F.3d at 622). The date of discovery of fraud is a disputed and potentially dispositive issue. Even if Defendants interpret documents related to communications and investigations to readily establish the date of discovery of fraud, Plaintiff is not required to admit to Defendants' interpretation of the facts. The Court concludes that Plaintiff's objections and answers to requests 69–75, 77–104, and 107–116 are justified and sufficient due to the disputed contents and context of the referenced documents.

V. Request for Attorney's Fees

Because Plaintiff's objections were substantially justified, the Court does not order payment of attorney's fees. *See* USCIT R. 37(a)(4)(A)(ii).

CONCLUSION

Upon consideration of the Motion to Compel, and all other papers and proceedings in this action, it is hereby

ORDERED that the Motion to Compel, ECF No. 155, is granted in part and denied in part; and it is further

ORDERED that Plaintiff shall serve amended answers to requests 4–7, 10–13, 16–18, 21–23, 26–28, 31–33, 48–51, and 53–54 on opposing counsel on or before November 5, 2021.

Dated: October 18, 2021
New York, New York

/s/ Jennifer Choe-Groves
JENNIFER CHOE-GROVES, JUDGE

Slip Op. 21–146

SEAH STEEL CORPORATION, Plaintiff, v. UNITED STATES, Defendant, and UNITED STATES STEEL CORPORATION, MAVERICK TUBE CORPORATION, IPSCO TUBULARS INC., TENARIS BAY CITY, INC., AND VALLOUREC STAR L.P., Defendant-Intervenors.

Before: Jennifer Choe-Groves, Judge
Court No. 20–00150

[Sustaining in part and remanding in part the U.S. Department of Commerce’s final results in the 2017–2018 administrative review of the antidumping duty order on oil country tubular goods from the Republic of Korea.]

Dated: October 19, 2021

Jeffrey M. Winton, Michael J. Chapman, Amrietha Nellan, and Vi N. Mai, Winton & Chapman PLLC, of Washington, D.C., for Plaintiff SeAH Steel Corporation.

Hardeep K. Josan, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, N.Y., for Defendant United States. With her on the brief were *Brian M. Boynton*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Claudia Burke*, Assistant Director. Of counsel on the brief was *Mykhaylo Gryzlov*, Senior Counsel, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

Thomas M. Beline, Myles S. Getlan, James E. Ransdell, and Nicole Brunda, Cassidy Levy Kent (USA) LLP, of Washington, D.C., for Defendant-Intervenor United States Steel Corporation.

Gregory J. Spak, Frank J. Schweitzer, Kristina Zissis, and Matthew W. Solomon, White & Case LLP, of Washington, D.C., for Defendant-Intervenors Maverick Tube Corporation, IPSCO Tubulars Inc., and Tenaris Bay City, Inc.

OPINION AND ORDER

Choe-Groves, Judge:

Plaintiff SeAH Steel Corporation (“SeAH” or “Plaintiff”) filed this action challenging the final results published by the U.S. Department of Commerce (“Commerce”) in the 2017–2018 administrative review of the antidumping duty order on oil country tubular goods (“OCTG”) from the Republic of Korea (“Korea”). *See Certain Oil Country Tubular Goods from the Republic of Korea (“Final Results”)*, 85 Fed. Reg. 41,949 (Dep’t of Commerce July 13, 2020) (final results of antidumping duty administrative review; 2017–2018); *see also* Issues and Decision Mem. for the Final Results of the 2017–2018 Admin. Review of the Antidumping Duty Order on Certain Oil Country Tubular Goods from the Republic of Korea (July 6, 2020) (“Final IDM”), ECF No. 20–5. Before the Court is the Motion of Plaintiff SeAH Steel Corporation for Judgment on the Agency Record, ECF Nos. 43, 44. *See also* Br. SeAH Steel Corp. Supp. Its Rule 56.2 Mot. J. Agency R. (“SeAH’s Br.”), ECF Nos. 43–1, 44–1. For the following reasons, the Court sustains in part and remands in part the *Final Results*.

ISSUES PRESENTED

The Court reviews the following issues:

1. Whether Commerce's application of a differential pricing analysis in calculating SeAH's dumping margin is in accordance with the law;
2. Whether Commerce's determination that a particular market situation existed during the period of review in Korea is supported by substantial evidence;
3. Whether Commerce's regression-based particular market situation adjustment is supported by substantial evidence;
4. Whether Commerce's calculation of constructed value profit and selling expenses is supported by substantial evidence;
5. Whether Commerce's calculation of constructed export price profit is in accordance with the law; and
6. Whether Commerce's exclusion of freight revenue in calculating SeAH's constructed export price is in accordance with the law.

BACKGROUND

Commerce initiated this fourth administrative review ("OCTG IV") of the antidumping duty order on OCTG from Korea for the period covering September 1, 2017 through August 31, 2018. *Initiation of Antidumping and Countervailing Duty Admin. Reviews*, 83 Fed. Reg. 57,411, 57,413–14 (Dep't of Commerce Nov. 15, 2018) (initiation notice). Commerce selected Hyundai Steel Company ("Hyundai Steel") and SeAH as mandatory respondents for individual examination. *Certain Oil Country Tubular Goods from the Republic of Korea*, 84 Fed. Reg. 63,615, 63,615 (Dep't of Commerce Nov. 18, 2019) (prelim. results of antidumping duty admin. review; 2017–2018); *see also* Decision Mem. for the Prelim. Results of the 2017–2018 Admin. Review of the Antidumping Duty Order on Certain Oil Country Tubular Goods from the Republic of Korea (Nov. 8, 2019) ("Prelim. DM"), PR 285.¹

In the *Final Results*, Commerce assigned weighted-average dumping margins of 0% for Hyundai Steel, 3.96% for SeAH, and 3.96% for non-examined companies. *Final Results*, 85 Fed. Reg. at 41,950. Commerce based normal value on constructed value for Hyundai Steel

¹ Citations to the administrative record reflect the public record ("PR") document numbers.

and SeAH because neither mandatory respondent had a viable home market or third-country market during the period of review. Final IDM at 68.

Commerce applied a differential pricing analysis and calculated SeAH's weighted-average duty margin by the alternative average-to-transaction method. *Id.* at 79–91. Commerce determined that a particular market situation existed in Korea based on a totality-of-the-circumstances assessment of five factors, namely: (1) subsidies from the Government of Korea to producers of hot-rolled coil, (2) the deluge of Chinese hot-rolled products exerting downward pressure on Korean domestic hot-rolled coil prices, (3) strategic alliances between Korean hot-rolled coil suppliers and Korean OCTG producers, (4) the Government of Korea's influence over the cost of electricity, and (5) steel industry restructuring efforts by the Government of Korea. *See id.* at 5–6. Commerce used a regression-based analysis to quantify the impact of the particular market situation in Korea and adjusted for the particular market situation determination by increasing the reported hot-rolled coil costs by a rate of 17.13%. *See id.* at 49, 61; Final Calculations Mem. – SeAH Steel Corp. (July 6, 2020) (“SeAH Final Calculations Mem.”) at 2, PR 350. Commerce utilized the 2018 financial statements of Tenaris S.A. (“Tenaris”) and PAO TMK (“TMK”) to calculate SeAH's constructed value profit and selling expenses. *See* Final IDM at 67. Commerce deducted SeAH's reported freight revenue up to actual freight cost and calculated SeAH's constructed export price profit rate using the Tenaris and TMK 2018 financial statements. *See id.* at 106, 109–11; *see also* Analysis of Data Submitted by SeAH Steel Corp. for Prelim. Results (Nov. 8, 2019) (“SeAH Prelim. Calculations Mem.”) at 3, PR 290.

JURISDICTION AND STANDARD OF REVIEW

The Court has jurisdiction under 19 U.S.C. § 1516a(a)(2)(B)(iii) and 28 U.S.C. § 1581(c), which grant the Court authority to review actions contesting the final results of an administrative review of an anti-dumping duty order. The Court shall hold unlawful any determination found to be unsupported by substantial evidence on the record or otherwise not in accordance with the law. 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

I. Statutory Framework

Commerce determines antidumping duties by calculating the amount by which the normal value of subject merchandise exceeds

the export price or the constructed export price for the merchandise. *Id.* § 1673. When reviewing antidumping duties in an administrative review, Commerce must determine: (1) the normal value and export price or constructed export price of each entry of the subject merchandise, and (2) the dumping margin for each such entry. *Id.* § 1675(a)(1)(B), (a)(2)(A). The statute dictates the steps by which Commerce may calculate normal value “to achieve a fair comparison” with export price or constructed export price. *Id.* § 1677b(a).

Commerce normally determines dumping margins “by comparing the weighted average of the normal values to the weighted average of the export prices (and constructed export prices) for comparable merchandise” or “by comparing the normal values of individual transactions to the export prices (or constructed export prices) of individual transactions for comparable merchandise.” *See id.* § 1677f1(d)(1)(A)(i)–(ii); *JBF RAK LLC v. United States*, 790 F.3d 1358, 1364–65 (Fed. Cir. 2015). Commerce may “compar[e] the weighted average of the normal values to the export prices (or constructed export prices) of individual transactions for comparable merchandise,” if two statutory conditions are met: “there is a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or periods of time,” and “[Commerce] explains why such differences cannot be taken into account using a method described in paragraph (1)(A)(i) or (ii).” 19 U.S.C. § 1677f-1(d)(1)(B).

If Commerce cannot determine the normal value of the subject merchandise based on home market sales, then Commerce may use qualifying third-country sales or constructed value as a basis for normal value. *Id.* § 1677b(a)(4), (a)(1)(B)(ii), (b)(1). Constructed value represents: (1) the cost of materials and fabrication or other processing of any kind used in producing the merchandise; (2) the actual amounts incurred and realized for selling, general, and administrative expenses, and for profits, in connection with the production and sales of a foreign like product, in the ordinary course of trade, for consumption in the foreign country; and (3) the cost of packing the subject merchandise. *Id.* § 1677b(e). When calculating constructed value, if Commerce determines that a particular market situation exists “such that the cost of materials and fabrication or other processing of any kind does not accurately reflect the cost of production in the ordinary course of trade, [then] [Commerce] may use . . . any other calculation methodology.” *Id.* The statute directs Commerce to calculate cost of production and constructed value “based on the records of the exporter or producer of the merchandise, if such records are kept in accordance with the generally accepted accounting prin-

ciples of the exporting country (or the producing country, where appropriate) and reasonably reflect the costs associated with the production and sale of the merchandise.” *Id.* § 1677b(f)(1)(A).

When Commerce is required to calculate constructed value for a respondent, Commerce must utilize the respondent’s actual selling, general, and administrative expenses and profits from the home market or a third-country market. *Id.* § 1677b(e)(2)(A). If those data are unavailable, the statute provides Commerce with three alternatives:

(i) the actual amounts incurred and realized by the specific exporter or producer being examined in the investigation or review for selling, general, and administrative expenses, and for profits, in connection with the production and sale, for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise,

(ii) the weighted average of the actual amounts incurred and realized by exporters or producers that are subject to the investigation or review (other than the exporter or producer described in clause (i)) for selling, general, and administrative expenses, and for profits, in connection with the production and sale of a foreign like product, in the ordinary course of trade, for consumption in the foreign country, or

(iii) the amounts incurred and realized for selling, general, and administrative expenses, and for profits, based on any other reasonable method, except that the amount allowed for profit may not exceed the amount normally realized by exporters or producers (other than the exporter or producer described in clause (i)) in connection with the sale, for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise.

Id. § 1677b(e)(2)(B).

The statute also dictates the steps by which Commerce is to calculate export price or constructed export price (collectively, “U.S. price”). Export price is:

the price at which the subject merchandise is first sold (or agreed to be sold) before the date of importation by the producer or exporter of the subject merchandise outside of the United States to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States,

subject to certain adjustments. *Id.* § 1677a(a). Constructed export price is:

the price at which the subject merchandise is first sold (or agreed to be sold) in the United States before or after the date of importation by or for the account of the producer or exporter of such merchandise or by a seller affiliated with the producer or exporter, to a purchaser not affiliated with the producer or exporter,

subject to certain adjustments. *Id.* § 1677a(b). The price used to calculate export price and constructed export price is reduced by selling expenses, further manufacturing expenses, and the profit allocated to these expenses. *Id.* § 1677a(d).

II. Differential Pricing Analysis

Commerce determined that the results of the differential pricing analysis justified using the alternative average-to-transaction methodology to calculate SeAH's dumping margin. *See* Final IDM at 79. SeAH argues that Commerce was required to support with substantial evidence its determination to apply the differential pricing analysis and the relevant numerical thresholds, but Commerce failed to do so. SeAH's Br. at 36–38. SeAH contends that Commerce's application of the Cohen's *d* test to the non-normal distribution of SeAH's U.S. sales was unreasonable. *Id.* at 38–43.

Commerce ordinarily uses an average-to-average (“A-to-A”) comparison of “the weighted average of the normal values [of subject merchandise] to the weighted average of the export prices (and constructed export prices) for comparable merchandise” when calculating a dumping margin. *See* 19 U.S.C. § 1677f-1(d)(1)(A)(i); 19 C.F.R. § 351.414(c)(1). The statute allows Commerce to depart from using the A-to-A methodology and instead use an average-to-transaction (“A-to-T”) comparison of the weighted average of normal values to the export prices and constructed export prices of individual transactions for comparable merchandise when: (1) Commerce observes “a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or periods of time;” and (2) “[Commerce] explains why such differences cannot be taken into account using [the A-to-A methodology].” 19 U.S.C. § 1677f-1(d)(1)(B)(i)–(ii). In contrast to the A-to-A method, which may mask dumped sales at low prices by averaging them with sales at higher prices, the A-to-T method allows Commerce “to identify a merchant who dumps the product intermittently—sometimes selling below the foreign market value and sometimes selling above it.” *Apex Frozen Foods Priv. Ltd. v. United States*, 862 F.3d 1337, 1341 (Fed.

Cir. 2017) (citation and internal quotation marks omitted). Commerce may apply the alternative A-to-T methodology on the same basis in administrative reviews as in antidumping investigations. *See JBF RAK LLC*, 790 F.3d at 1364–65.

The statute does not set forth the analysis for how Commerce is to identify a pattern of price differences. *See* 19 U.S.C. §§ 1677, 1677f-1; *see also Apex Frozen Foods*, 862 F.3d at 1346; *Dillinger France S.A. v. United States*, 981 F.3d 1318, 1325 (Fed. Cir. 2020). The Court affords Commerce deference in determinations “involv[ing] complex economic and accounting decisions of a technical nature.” *See Fujitsu Gen. Ltd. v. United States*, 88 F.3d 1034, 1039 (Fed. Cir. 1996) (citation omitted). However, Commerce still “must [] explain [cogently] why it has exercised its discretion in a given manner.” *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48 (1983) (citation omitted).

Commerce applied its two-step differential pricing methodology in this case, the first step of which was the Cohen’s *d* test. *See* Final IDM at 79. The standard of review for considering Commerce’s differential pricing analysis is reasonableness. *Stupp Corp. v. United States*, 5 F.4th 1341, 1353 (Fed. Cir. 2021). The U.S. Court of Appeals for the Federal Circuit and this Court have held the steps underlying the differential pricing analysis as applied by Commerce to be reasonable. *See e.g., Mid Continent Steel & Wire, Inc. v. United States*, 940 F.3d 662, 670–74 (Fed. Cir. 2019) (discussing zeroing and the 0.8 threshold for the Cohen’s *d* test); *Apex Frozen Foods Priv. Ltd. v. United States*, 40 CIT __, __, 144 F. Supp. 3d 1308, 1314–35 (2016) (discussing application of the A-to-T method, the Cohen’s *d* test, the meaningful difference analysis, zeroing, and the “mixed comparison methodology” of applying the A-to-A method and the A-to-T method when 33–66% of a respondent’s sales pass the Cohen’s *d* test), *aff’d*, 862 F.3d 1337; *Apex Frozen Foods Priv. Ltd. v. United States*, 862 F.3d 1322 (Fed. Cir. 2017) (affirming zeroing and the 0.5% *de minimis* threshold in the meaningful difference test). However, the U.S. Court of Appeals for the Federal Circuit has stated that “there are significant concerns relating to Commerce’s application of the Cohen’s *d* test . . . in adjudications in which the data groups being compared are small, are not normally distributed, and have disparate variances.” *Stupp*, 5 F.4th at 1357.

The Cohen’s *d* test is “a generally recognized statistical measure of the extent of the difference between the mean of a test group and the mean of a comparison group.” *Apex Frozen Foods*, 862 F.3d at 1342 n.2. The Cohen’s *d* test relies on assumptions that the data groups being compared are normal, have equal variability, and are equally

numerous. *See Stupp*, 5 F.4th at 1357. Applying the Cohen’s *d* test to data that do not meet these assumptions can result in “serious flaws in interpreting the resulting parameter.” *See id.* at 1358.

In *Stupp Corp. v. United States*, 5 F.4th 1341 (Fed. Cir. 2021), the U.S. Court of Appeals for the Federal Circuit remanded Commerce’s use of the Cohen’s *d* test for further explanation because the data Commerce used may have violated the assumptions of normality, sufficient observation size, and roughly equal variances. *Id.* at 1357–60. The Court addressed Commerce’s argument that it does not need to worry about normality because it is using a population instead of a sample, stating that Commerce’s argument “does not address the fact that Professor Cohen derived his interpretive cutoffs under the assumption of normality.” *Id.*

SeAH contends that Commerce’s use of the Cohen’s *d* test was contrary to well-recognized statistical principles. SeAH’s Br. at 38–40. Specifically, SeAH argues that the Cohen’s *d* test can only be used when comparing “random samples drawn from Normal (*i.e.*, bell-curve shaped) distributions with roughly equal variance containing a sufficient number of data points.” *Id.* at 38. SeAH asserts that Commerce applied the Cohen’s *d* test to data that lacked normality, a sufficient number of data points, and equal variances. *Id.* at 40 (citing SeAH Final Calculations Mem. Attach. 2). Commerce contends that it chose the Cohen’s *d* test “to evaluate the extent to which the prices to a particular purchaser, region, or time period differ significantly from the prices of all other sales of comparable merchandise.” Final IDM at 82 (quoting Prelim. DM at 10) (internal quotation marks omitted). Commerce explained that application of the Cohen’s *d* test was appropriate because “the U.S. sales data . . . reported to Commerce constitutes a population. As such, sample size, sample distribution, and the statistical significance of the sample are not relevant to Commerce’s analysis.” *Id.* at 86.

In accordance with the U.S. Court of Appeals for the Federal Circuit’s decision in *Stupp*, this Court concludes that use of a population, instead of a sample, does not negate the assumptions inherent to the Cohen’s *d* test. The Court observes that Commerce did not explain whether the data used in its differential pricing analysis met the assumptions associated with the Cohen’s *d* test. *See* Final IDM at 86; *see also* Def.’s Resp. Opp’n Mots. J. Upon Admin. R. (“Def.’s Resp.”) at 39, ECF No. 52 (“[T]he Court has stated that ‘Commerce has made no finding that United States prices tend to exhibit a normal distribution’”) (citation omitted). The Court notes that the data cited by Commerce appear to contain a limited number of data points and do

not indicate whether they exhibit a normal distribution. *See* SeAH Final Calculations Mem. Attach. 2. The evidence and arguments before the Court call into question whether the data Commerce used in its differential pricing analysis violated the assumptions of normality, sufficient observation size, and roughly equal variances associated with the Cohen's *d* test. The Court remands for Commerce to further explain whether the limits on the use of the Cohen's *d* test were satisfied or whether those limits need not be observed when Commerce uses the Cohen's *d* test.

III. Particular Market Situation Determination

Commerce based normal value for SeAH on constructed value because SeAH did not have a viable home market or third-country market during the period of review. Final IDM at 68. In calculating constructed value, Commerce determined that a particular market situation distorted the cost of production of OCTG. *See id.* at 5–6, 26.

SeAH asserts that the record does not support Commerce's particular market situation determination. SeAH's Br. at 5–7. Defendant United States ("Defendant") responds that record evidence considered in OCTG IV is timely and supports Commerce's determination of a particular market situation based on the cumulative effect of five factors related to the production of OCTG in Korea. Def.'s Resp. at 4–14.

The Trade Preferences Extension Act amended certain subsections of the Tariff Act of 1930. *See* Trade Preferences Extension Act of 2015, Pub. L. No. 114–27, 129 Stat. 362 (2015). When calculating constructed value under the revised statute, if Commerce determines that a particular market situation exists "such that the cost of materials and fabrication or other processing of any kind does not accurately reflect the cost of production in the ordinary course of trade, [Commerce] may use another calculation methodology under this subtitle or any other calculation methodology." 19 U.S.C. § 1677b(e).

In OCTG IV, covering the period from September 1, 2017 through August 31, 2018, Commerce determined that a particular market situation distorted the cost of production of OCTG based on the cumulative effect of five factors: (1) subsidization of Korean hot-rolled coil products by the Korean Government; (2) distortive pricing of unfairly-traded Chinese hot-rolled coil; (3) "strategic alliances" between Korean hot-rolled coil suppliers and Korean OCTG producers; (4) distortive government control over electricity prices in Korea; and (5) steel industry restructuring efforts by the Korean Government. *See* Final IDM at 5–6. Defendant-Intervenors U.S. Steel, Maverick Tube Corporation, Tenaris Bay City, Inc., IPSCO Tubulars Inc. (for-

merly TMK IPSCO), Vallourec Star, L.P., and Welded Tube USA Inc. collectively submitted a particular market situation allegation letter with 226 attached exhibits. *See* Domestic Interested Parties' August 5 Particular Market Situation Submission (Aug. 5, 2019) ("OCTG IV Allegation"), PR 177–208. The Court observes that Commerce's examination of the OCTG IV record overall, with related explanations, does not support Commerce's determination that a particular market situation affected the cost of production of OCTG.

As to the first factor, Commerce determined that subsidies of hot-rolled coil production by the Government of Korea contributed to a particular market situation. Final IDM at 31. Commerce supported its determination by citing record evidence, including: an article in Korea Joongang Daily, dated December 27, 2018, titled "Restructuring to be Continued" ("Korea Joongang Daily Article"); an article in the Korea Times, dated August 11, 2016, titled "One-Shot Act to Take Effect" ("Korea Times Article"); an article in Business Korea, dated June 10, 2016, titled "Korean Government to Assist Steel Industry in Restructuring from August;" an article in Kallanish Commodities, dated June 13, 2016, titled "Korea's 'One Shot' Act Supports Steel Restructuring;" an article in Aju Business Daily, dated November 22, 2016, titled "S. Korea Designates Two More Steel Firms for Fast Track Corporate Restructuring" ("Aju Business Daily Article"); an article in The Investor, dated November 22, 2016, titled "Gov't Picks 3 Firms for Fast-Track Restructuring;" an article in Pulse, dated November 23, 2016, titled "Hyundai Steel, Dongkuk Steel Become Latest Beneficiaries of Fast-Track Restructuring Program;" an article in Kallanish Commodities, dated November 23, 2016, titled "Hyundai, Dongkuk Win 'One Shot' Government Approval;" an article in Pulse, dated September 6, 2016, titled "Korean Gov't Selects 3 Firms to Benefit from One-Shot Act;" an article by Yonhap News in the Korean Herald, dated February 28, 2017, titled "5 More Firms Picked for Fast-Track Restructuring Program;" an article in Kallanish Commodities, dated January 23, 2017, titled "POSCO to Get Government Aid for BF No. 1;" an article in Market Screener, dated June 12, 2017, titled "POSCO Pohang Blast Furnace No. 3 Is Transformed into a Super-Large Black Furnace Equipped with Smart Infrastructure;" a press release by the Ministry of Economy and Finance, dated March 3, 2017, titled "Tenth Ministerial Meeting on Industrial Restructuring: Government to Pursue Restructuring Beyond Shipping and Shipbuilding;" a press release by the Ministry of Economy and Finance, dated January 23, 2019, titled "Sixth Ministerial Meeting on Boosting the Economy" ("Ministry of Economy and Finance Press Release I"); an article by Yonhap News, dated September 30, 2016, titled "S.

Korea to Induce Steel, Petrochemical Firms to Cut Output;” a press release by the Ministry of Economy and Finance, dated January 25, 2017, titled “9th Ministerial Meeting on Industrial Restructuring: 2017 Action Plan for Industrial Restructuring” (“Ministry of Economy and Finance Press Release II”); an article in Business Korea, dated January 26, 2017, titled “New Plans Released for Revival of Four Industries;” an article in Business Korea, dated October 25, 2018, titled “South Korean Gov’t Plans to Inject 300 Bill. Won for Steel Innovation;” a press release by the Ministry of Economy and Finance, dated December 28, 2018, titled “First Ministerial Meeting on Boosting the Economy: First Meeting Discussing General Policies of New Economic Team, as well as 2019 Economic Policies;” a press release by the Ministry of Economy and Finance, dated March 13, 2019, titled “Tenth Ministerial Meeting on Boosting the Economy: Government to Promote Private Investment in Infrastructure;” a press release by the Ministry of Economy and Finance, dated March 4, 2019, titled “Ninth Ministerial Meeting on Boosting the Economy: Government to Focus on Boosting Exports;” a press release by the Ministry of Economy and Finance, dated April 23, 2019, titled “Twentieth Ministerial Meeting on Industrial Restructuring: Government to Persist with Its Restructuring Policies;” the Other Factual Information Submission for Valuing Particular Market Situation in Korea and Respondents’ Constructed Value Profit in Case No. A-580–870; Hyundai Steel’s Response to Commerce’s New Subsidies Questionnaire in Case No. C-580–884, dated June 13, 2018 (“Hyundai Steel’s Questionnaire Response”); and the final countervailing duty determination in *Countervailing Duty Investigation of Certain Hot-Rolled Steel Flat Products from the Republic of Korea*, 81 Fed. Reg. 53,439 (Dep’t of Commerce Aug. 12, 2016) (final affirmative determination; 2014), amended by *Certain Hot-Rolled Steel Flat Products from Brazil and the Republic of Korea*, 81 Fed. Reg. 67,960 (Dep’t of Commerce Oct. 3, 2016) (amended final affirmative countervailing duty determinations and countervailing duty orders; 2014), amended by *Certain Hot-Rolled Steel Flat Products From the Republic of Korea*, 84 Fed. Reg. 23,019 (Dep’t of Commerce May 21, 2019) (notice of court decision not in harmony with amended final determination of the countervailing duty investigation). *See id.* at 31–33 (citing OCTG IV Allegation Exs. 15, 77–100).

The record evidence cited by Commerce does not support Commerce’s determination that programs and subsidies offered by the Government of Korea contributed to a particular market situation during the period of review. Commerce cited the OCTG IV Allegation,

which referred to the subsidy rates of 0.55–0.58% in *Certain Hot-Rolled Steel Flat Products from the Republic of Korea*, 84 Fed. Reg. 28,461 (final results of countervailing duty admin. review, 2016). See Final IDM at 32 n.144 (citing OCTG IV Allegation at 27 n.106). The Court notes that record documents cited by Commerce suffer from a temporal problem because the documents discuss programs and subsidy rates from 2016 and early 2017, prior to the OCTG IV period of review between September 1, 2017 and August 31, 2018, or programs and subsidy rates from 2019, after the period of review. See *id.* ; OCTG IV Allegation Exs. 77–95, 96–100.

The Court observes that record documents reviewed by Commerce discuss the restructuring programs and subsidies offered to non-steel industries and anticipated restructuring efforts of the steel industry, but do not show that OCTG producers actually received subsidies by taking advantage of the Government of Korea’s approved restructuring programs during the period of review. See OCTG IV Allegation Exs. 81, 84–86; see also Case Br. of Hyundai Steel Co. (Jan. 6, 2019) at 54, PR 311 (stating that Hyundai Steel disputes whether it took advantage of the restructuring program, despite having received approval to participate in the program). While some record documents cited by Commerce illustrate that OCTG producers took advantage of programs and subsidies, the Court notes that these documents suffer from a temporal problem as they discuss actions taken in 2016, prior to the OCTG IV period of review. See OCTG IV Allegation Exs. 85, 87, 88.

None of the record documents cited by Commerce show that Korean OCTG producers received subsidies or participated in subsidy programs during the period of review. The Court holds that the record evidence cited by Commerce does not support Commerce’s determination that OCTG producers received subsidies from the Government of Korea that contributed to a particular market situation in Korea because the record evidence cited by Commerce suffers from a temporal problem and does not show that OCTG producers actually received subsidies during the period of review. In summary, the Court concludes with respect to the first factor that Commerce’s determination that subsidized hot-rolled coil contributed to a particular market situation that distorted the cost of OCTG production is not supported by substantial evidence.

As to the second factor, Commerce determined that “significant overcapacity in steel production” from the People’s Republic of China (“China”) has “flooded [the Korean steel market] with imports of cheap steel products,” exerting downward effects on Korean steel prices. Final IDM at 28–29. Commerce cited record documents in

support of its determination, including: an article in the Korea Times, dated September 29, 2016, titled “Gov’t Seeks Restructuring of Steel-making, Petrochemical Industries;” an article by Bloomberg, dated July 31, 2018, titled “China’s Steelmakers Are Smashing Production Records;” an article by S&P Global Platts, dated May 13, 2019, titled “Chinese Steel Output Rises Relentlessly Despite Plant Closures;” an article in the Business Recorder, dated December 28, 2017, titled “Global Steel’s ‘China’ Problem” (“Business Recorder Article”); an article in Kallanish Commodities, dated March 20, 2017, titled “China Loosens Credit for Coal and Steel Companies;” an article by Reuters, dated December 15, 2017, titled “China Will Cut, Remove Export Tariffs on Some Steel, Fertilizer;” an article by Reuters, dated January 10, 2018, titled “China’s Shanxi Province Sets Up Steel Fun Worth \$770 Mln;” an article by S&P Global Platts, dated May 28, 2019, titled “Chinese Steel Output Reaches New Heights;” an article by the Southeast Asian Iron and Steel Institute, dated January 28, 2019, titled “Global Crude Steel Output Increases by 4.6 Percent in 2018;” an article by the Southeast Asian Iron and Steel Institute, dated November 7, 2018, titled “Baowu Says China Steel Output to Hit Record Level in 2018;” an article in Kallanish Commodities, dated May 19, 2017, titled “China Explains why Capacity Curbs Mean More Steel;” an article by Reuters, dated December 3, 2017, titled “China’s 2018 Steel Output Seen Rising Even After Mill Closures;” an article by Xinhua, dated May 11, 2019, titled “Iron and Steel Industry Posts Rising Revenue, but Plummeting Profit;” an article by the American Metal Market, dated June 1, 2018, titled “China’s Steel Export Prices Set Global Tone;” an article in the South China Morning Post, dated June 6, 2019, titled “In China’s Industrial Hinterlands, State Subsidies Run Deep and Appetite for Reform Is Low Despite US Demands;” and a presentation to the OECD Steel Committee, titled “Korean Iron and Steel Market in 2017.” See Final IDM at 28–31 & nn.115–40 (citing OCTG IV Allegation Exs. 6, 15–32, 37–39, 42, 52–54, 224, 225).²

² Commerce also cited the following exhibits: an article by the American Metal Market, dated February 22, 2017, titled “China Remains Steel Behemoth;” an article by the American Metal Market, dated February 13, 2017, titled “China’s Steel Capacity Up Despite Cut Attempts;” a 2016 article in Asian Steel Watch, titled “China’s Steel Exports, Reaching 100 Mt: What It Means to Asia and Beyond;” a report in the Global Steel Trade Monitor, dated February 2017, titled “Steel Imports Report: Japan;” a report by the International Monetary Fund, dated August 8, 2017, titled “People’s Republic of China: Staff Report for the 2017 Article IV Consultation;” five exhibits submitted in Case No. A-580–880 over heavy walled rectangular welded carbon steel pipes and tubes from Korea; the particular market situation allegation from Case No. A-489–501 over circular welded carbon steel standard pipe and tube products from Turkey; and the particular market situation allegation from

The record evidence cited by Commerce does not support a determination that the influx of Chinese hot-rolled coil is particular to Korea because the record documents describe a global influx that affected many other countries in addition to Korea, rather than an effect that is unique or particular to Korea. *See* OCTG IV Allegation Exs. 6, 17–18, 21, 23–31, 42, 224, 225. Commerce noted that Korea was China’s second largest export market for hot-rolled products in 2017 and 2018. Final IDM at 30. The Court observes that the record evidence cited by Commerce does not indicate that the experience in Korea due to Chinese hot-rolled coil imports is distinct from the experience in other countries around the world, which were also inundated with the global oversupply of low-priced Chinese products. *See* OCTG IV Allegation Exs. 6, 17–18, 21, 23–31, 42, 224, 225. Although it is clear that the oversupply of low-priced Chinese products affected many countries in the global market, the Court notes that Commerce cited nothing on the record to support its determination that the oversupply of low-priced Chinese products is *particular* to the Korean market. *See id.* Commerce acknowledged that the “global steel overcapacity crisis . . . [has] far-reaching effects worldwide,” undermining its determination that Chinese hot-rolled coil imports contributed to a particular market situation in Korea. Final IDM at 28; *see Husteel Co. v. United States*, 44 CIT __, __, 426 F. Supp. 3d 1349, 1391 (2020) (“Although 19 U.S.C. § 1677b may not demand that a [particular market situation] be such that it only affects the subject market, there is no evidence on the record that Chinese overcapacity affects the Korean market in some way that is specific to the Korean market at all.”).

The Court observes that the record evidence cited by Commerce does not support a conclusion that the global glut of Chinese hot-rolled coil imports caused price distortions specific to the Korean steel market. The Court holds that Commerce’s determination that excess capacity of Chinese hot-rolled coil imports contributed to a particular market situation in Korea is not supported by substantial evidence.

As to the third factor, Commerce determined that strategic alliances between certain Korean hot-rolled coil producers and Korean OCTG producers affected the cost of hot-rolled coil and contributed to a particular market situation. Final IDM at 33–34. Commerce cited the following record documents in support of its determination: a report by the Korean Free Trade Commission, dated September 7, 2018, titled “KFTC Sanctions Six Steel Manufacturing Companies for Case No. A-533–502 over circular welded carbon steel standard pipe and tube products from India.” *See* Final IDM at 28–31 & nn.117, 118, 121, 125, 126, 128, 137–40 (citing OCTG IV Allegation Exs. 15, 16, 19, 20, 22, 32, 37–39, 52–54). These exhibits were not included in the Joint Appendix, so the Court was unable to review them. *See* J.A., ECF Nos. 58, 59.

Price Fixing;” an article by S&P Global Platts, dated September 10, 2018, titled “South Korea’s FTC Fines Six Steelmakers for Rebar Price Rigging;” an article in the Korean Herald, dated September 9, 2018, titled “Six-Largest Steel Firms Fined W100b Over Price Fixing;” an article in the Korea Times, dated December 20, 2017, titled “Steelmakers Fined W.92 Bil. For Bid Rigging;” an article in Pulse, dated September 10, 2018, titled “FTC Slaps Biggest Fine on Korean Rebar Suppliers for Price Fixing;” an article in Kallanish Commodities, dated September 10, 2018, titled “South Korea Fines Rebar Mills for Price Fixing;” an article by Yonhap News, dated September 9, 2018, titled “Steelmakers Fined Over Price Collusion;” a report by the Korean Free Trade Commission, dated December 21, 2017, titled “KFTC Punishes Six Steel Pipe Manufacturers for Rigging Bids Offered by Korea Gas Corporation;” an article by Yonhap News, dated May 7, 2017, titled “Hyundai Steel fined 312 Mln Won for Obstructing FTC’s Probe;” an article by Yonhap News, dated July 7, 2016, titled “Eight Business Groups Engage in Cross-Shareholding FTC;” an article by the Council on Foreign Relations, dated May 4, 2018, titled “South Korea’s Chaebol Challenge;” an article by CNBC News, dated October 9, 2018, titled “Seoul Relies on Chaebols for North Korea Investment So Reform Doubtful;” an article by the Sage Business Researcher, dated August 21, 2017, titled “South Korea’s Conglomerates;” an article by CNN, dated January 17, 2107, titled “South Korea’s Long History of Light Sentences for Business Leaders;” and an article by The Globe and Mail, dated May 12, 2018, titled “South Korea’s Chaebol Problem.” See Final IDM at 33–34 & nn.148–51 (citing OCTG IV Allegation Exs. 101–20).³

Commerce conceded that the record shows that SeAH is being fined for bid-rigging schemes that occurred before the OCTG IV period of review. *Id.* at 34. But Commerce asserted that unfair corporate practices are “a long-term, chronic occurrence” and that the record does not indicate that unfair corporate practices did not continue to occur during the OCTG IV period of review. *Id.* The record documents cited by Commerce relate to findings of unfair corporate action that occurred prior to 2017. See OCTG IV Allegation Exs. 101–08, 110, 119–20. The Court observes that no record evidence cited by Commerce relates to unfair corporate action or other strategic alliances during the OCTG IV period of review from 2017–2018 in this case. See

³ Commerce also cited the following exhibits: an article by Foley & Lardner LLP, dated April 16, 2013, titled “Another Steelmaker Subsidiary Raided in International Antitrust Investigation;” a 2005 article in The Korean Journal of International Relations, titled “The Origins of Korean Chaebols and Their Roots in the Korean War;” and three exhibits submitted in Case No. A-580–876 over welded line pipe from Korea. See Final IDM at 33 & n.148 (citing OCTG IV Allegation Exs. 109, 111–13, 118). These exhibits were not included in the Joint Appendix, so the Court was unable to review them. See J.A.

id. Exs. 101–08, 110, 114–17, 119–20. Because none of the record evidence pertains to actions within the OCTG IV period of review, Commerce’s purely speculative conclusions that strategic alliances “may have created distortions” and “may continue to impact [hot-rolled coil] pricing in a distortive manner during the [OCTG IV] [period of review] and in the future” are not supported by substantial evidence on the record. *See* Final IDM at 34. The Court holds that Commerce’s determination that strategic alliances between Korean hot-rolled coil producers and Korean OCTG producers affected prices in the Korean steel market and contributed to a particular market situation during the OCTG IV period of review is not supported by substantial evidence.

As to the fourth factor, Commerce determined that the Korean Government’s regulation of the Korean electricity market contributed to a particular market situation. *Id.* Commerce cited the following record documents in support of its determination: the Form 20-F annual report filed by Korea Electric Power Corporation (“KEPCO”) with the U.S. Securities and Exchange Commission for the fiscal year ending December 31, 2018; an article in Business Korea, dated February 14, 2019, titled “KEPCO Expected to Post 2.4 Tril. Won in Operating Loss This Year;” an article in Korea Joongang Daily, dated May 15, 2019, titled “Records Big Loss in First Quarter of 2019;” and an article in Korea Joongang Daily, dated February 23, 2019, titled “KEPCO Reports an Operating Loss; the First in Six Years.” *See* Final IDM at 34–35 & nn.152–58 (citing OCTG IV Allegation Exs. 121, 217–19).

The record evidence cited by Commerce does not support a determination that the Korean Government’s regulation of the electricity market contributed to a particular market situation. Commerce determined that Korean electricity prices “cannot be considered to be competitively set” because the Korean Government exercises control over KEPCO, which reported an operating loss in 2018. *Id.* at 34 (citing OCTG IV Allegation Exs. 217–19). The record evidence cited by Commerce indicates that KEPCO reported an operating loss due to increased environmental and renewable energy costs, decreased electricity demand due to warmer winter weather, and higher natural gas prices. *See* OCTG IV Allegation Exs. 121, 217–19. The Court observes that the record evidence reviewed by Commerce does not appear to indicate that operating losses were a result of government regulation or that electricity prices were not competitively set. *See id.* The Court also notes that the record evidence cited by Commerce does not indicate that Korean steel manufacturers received countervailable

subsidies as to electricity. *See id.* Because the record evidence cited by Commerce does not show that the Korean Government's regulation of the electricity market resulted in subsidies being granted to Korean steel manufacturers or prices not being competitively set, the Court holds that Commerce's determination that Korean Government regulation distorted electricity prices and affected prices in the Korean steel market, contributing to a particular market situation during the OCTG IV period of review, is not supported by substantial evidence.

As to the fifth factor, Commerce determined that the Korean Government's steel industry restructuring efforts to provide subsidies to participating companies contributed to a particular market situation. Final IDM at 35–36. Commerce cited the following record documents in support of its determination: Hyundai Steel's Questionnaire Response; an article in Kallanish Commodities, dated September 19, 2017, titled "Korea Should Close 4–5M t-y Plate Capacity BCG;" the Korea Joongang Daily Article; the Korea Times Article; the Aju Business Daily Article; the Ministry of Economy and Finance Press Release I; the Ministry of Economy and Finance Press Release II; and the Business Korea Article. *See* Final IDM at 35–36 & nn.159–68 (citing OCTG IV Allegation Exs. 7, 77, 78, 81, 93, 94, 124).

The Court observes that the record does not support Commerce's determination that Korean OCTG producers took advantage of or received benefits from restructuring programs during the period of review. *See* OCTG IV Allegation Exs. 7, 77, 81, 93, 94, 124. For example, Commerce cited the Aju Business Daily Article stating that Hyundai Steel had received approval to proceed with corporate restructuring as evidence that OCTG producers took advantage of restructuring programs, but the record does not indicate that Hyundai Steel actually took advantage of restructuring efforts during the period of review, and Hyundai Steel asserts that it did not take advantage of restructuring efforts. *See* OCTG IV Allegation Ex. 81; Case Br. of Hyundai Steel Co. at 54. The Court notes that one article cited by Commerce states that the Korean Government was "ask[ing] the steel industry to execute a voluntary restructuring," but the article does not state that any Korean steel manufacturers had taken advantage of voluntary restructuring programs. *See* OCTG IV Allegation Ex. 124. Record evidence cited by Commerce discusses restructuring programs backed by the Korean Government and laws passed to facilitate these programs, but does not show that Korean steel manufacturers took advantage of these programs during the period of review. *See* OCTG IV Allegation Exs. 78, 93, 94.

The Court observes that record evidence cited by Commerce also has a temporal problem, as it covers restructuring efforts outside of

the period of review. *See* OCTG IV Allegation Exs. 77, 78, 81, 94. For example, Commerce cited several articles discussing restructuring that are dated from 2016, prior to the OCTG IV period of review covering 2017–2018. *See* OCTG IV Allegation Ex. 77, 78, 81. Further, a press release cited by Commerce indicates that ten trillion Korean won were allocated for business restructuring in 2019, outside of the OCTG IV period of review between 2017 and 2018. *See* OCTG IV Allegation Ex. 90.

The Court concludes that the mere existence of restructuring efforts, absent evidence of actual restructuring and government interference during the period of review, is insufficient to contribute to the existence of a particular market situation. The Court holds that Commerce’s determination that the Korean Government’s steel industry restructuring contributed to a particular market situation in Korea is not supported by substantial evidence.

In summary, the Court concludes that substantial record evidence does not support Commerce’s cumulative particular market situation determination in Korea for the 2017–2018 period of review because the record evidence does not demonstrate the existence during the period of review of the five factors allegedly underlying the particular market situation determination. The Court remands Commerce’s particular market situation determination for further explanation or reconsideration consistent with this opinion.

IV. Calculation of Particular Market Situation Adjustment with Regression Analysis

Commerce calculated a particular market situation adjustment for SeAH based on a regression analysis. *See* Final IDM at 49–50. Commerce used the regression analysis to quantify the particular market situation that it determined existed in Korea. *See id.* at 52–61. At this time, the Court need not assess whether Commerce’s determination to use a regression-based adjustment is supported by substantial evidence because the Court holds that Commerce’s determination that a particular market situation existed is not supported by substantial evidence.

V. Constructed Value Profit Calculation

Commerce calculated constructed value profit and selling expenses by “any other reasonable method,” based on the Tenaris and TMK 2018 financial statements, citing them as the best information available on the record. *Id.* at 67. SeAH argues that Commerce should have used SeAH’s third-country sales to calculate constructed value profit and selling expenses; that, in the alternative, Commerce’s selection of financial statements is not supported by substantial evi-

dence; and that Commerce failed to apply a “profit cap” in accordance with the relevant statute. SeAH’s Br. at 22–33.

If Commerce determines that a respondent’s actual selling, general, and administrative expenses and profits from the home market or a third-country market are unavailable when calculating constructed value for the respondent, the statute provides Commerce with three alternative calculation methods. *See* 19 U.S.C. § 1677b(e)(2). When calculating constructed value by the third alternative method, Commerce may use “any other reasonable method” to calculate profits and selling, general, and administrative expenses. *Id.* § 1677b(e)(2)(B). “The objective is to find a good proxy (or surrogate) for the profits that the respondent can fairly be expected to build into a fair sales price of the particular merchandise.” *Mid Continent Steel & Wire v. United States*, 941 F.3d 530, 542 (Fed. Cir. 2019) (citations omitted).

In calculating constructed value, Commerce determined that SeAH did not have a viable home market or third-country market during the period of review for purposes of calculating constructed value profit and selling expenses under 19 U.S.C. § 1677b(e)(2)(A). Final IDM at 67–68. When considering the statutory alternatives under 19 U.S.C. § 1677b(e)(2)(B)(i)–(iii), Commerce eliminated subsection (i) because SeAH’s other steel products were in different categories than OCTG, and subsection (ii) because SeAH had no sales of OCTG in the home market of Korea in the ordinary course of trade. *Id.* at 69. Commerce calculated constructed value under subsection (iii), using “any other reasonable method.” *Id.*

A. Commerce’s Selection of Surrogate Financial Statements

SeAH argues that Commerce should have selected SeAH’s home-market or third-country sales as surrogate financial statements instead of the Tenaris and TMK 2018 financial statements. SeAH’s Br. at 22–25.

The eleven sources of information on the record identified by Commerce included: SeAH’s Canadian-market data from the first administrative review of the antidumping duty order on OCTG from Korea; SeAH’s third-country sales of OCTG; Hyundai Steel’s home-market sales of non-prime OCTG; Hyundai Steel’s home-market sales of line pipe; and the financial statements of seven non-Korean producers, Tenaris, TMK, Borusan Mannesmann Boru Sanayi ve Ticaret A.S. (“Borusan”), Chung Hung Steel Corporation (“Chung Hung”), Nippon Steel and Sumitomo Metal Corporation (“NSSMC”), Welspun Corp. Limited (“Welspun”), and Maharashtra Seamless Limited (“Maharashtra”). Final IDM at 70. Commerce noted that many of these sources were not viable, as they included primarily sales of non-

OCTG products; lacked sufficient detail to determine the amount of sales revenue from OCTG products; failed to show a profit on sales; reflected sales data from non-viable markets; reflected profit data for line pipe; or were not contemporaneous with the period of review. *Id.* Commerce chose to calculate constructed value profit by utilizing the Tenaris and TMK 2018 financial statements. *Id.* at 67, 70. Commerce favored the Tenaris and TMK 2018 financial statements as the best information available on the record that reflected the profit of a Korean OCTG producer on sales of OCTG in the ordinary course of trade. *Id.* at 71.

Using subsection (iii) to calculate constructed value, Commerce may use “any reasonable method” to determine constructed value. *See* 19 U.S.C. § 1677b(e)(2)(B)(iii). Commerce determined that the home-market data were for non-OCTG products and sales “not made in the ordinary course of business, *i.e.*, transacted in a non-viable market at a net loss,” and that the third-country market data failed the viability test. Final IDM at 71. Because the home-market and third-country market data were from non-viable markets, Commerce reasoned that it would be inconsistent and unreasonable to use this data to calculate constructed value profit and selling expenses. *Id.* at 71–72. Commerce noted that the Tenaris and TMK 2018 financial statements did not suffer from viability concerns and selected them as the best available information. *Id.* at 72.

SeAH does not challenge Commerce’s determination that SeAH’s home-market sales and third country market sales were non-viable, and does not dispute that Commerce’s standard practice is to disregard sales from non-viable markets when calculating constructed value profit under 19 U.S.C. § 1677b(e)(2)(A). *See* SeAH’s Br. at 23–24. The Court observes that record evidence reviewed by Commerce indicates that data from Tenaris and TMK did not suffer from viability concerns, as the data showed sufficient sales populations compared to U.S. sales— five percent or more of the aggregate quantity (or value) of the subject merchandise sold in the United States. *See* 19 U.S.C. § 1677b(a)(1)(B)(ii)(II); Constructed Value Profit and Selling Expense Comments and Information (July 26, 2019) (“Tenaris 2018 Annual Report”) Ex. 14, PR 135–37; Resp. to Req. [Constructed Value] Profit and Selling Expense Information (“TMK 2018 Annual Report”) Attach. 1, PR 125–27, 132. The Court notes that the statute instructs Commerce to exclude sales from non-viable markets when determining normal value based on home market sales or third-country sales. *See* 19 U.S.C. § 1677b(a)(1)(B), (C). The Court regards as reasonable Commerce’s explanation that use of data from sales in

non-viable markets to calculate constructed value could result in the constructed value being equal to a normal value that is based on non-viable market sales, which the statute does not permit. *See id.* ; Final IDM at 71. The Court concludes that Commerce's use of the Tenaris and TMK 2018 financial statements is reasonable and supported by substantial evidence.

SeAH argues that, if Commerce relies on surrogate financial statements, Commerce should exclude Tenaris' financial statements in the calculation of constructed value profit because Tenaris' sales to North America constitute 48% of its total sales and because a \$6 million grant received by one of Tenaris' subsidiaries in 2013 constitutes a subsidy that distorts the 2018 data. SeAH's Br. at 25–27. Because Commerce determined that there was no information on the record regarding profit on sales of OCTG, or products in the same category, in Korea, Commerce reasoned that the Tenaris and TMK financial statements represented the best available information. *See* Final IDM at 71 (stating that “their business operations and products are most similar to those of . . . SeAH”). Commerce determined that Tenaris and TMK are significant producers of OCTG and their financial statements represent sales of mainly OCTG in a broad range of geographic markets. *See id.* ; *see also* Prelim. DM at 18. Commerce determined that both Tenaris and TMK have “significant non-U.S. sales” and are suitable to be used to calculate constructed value profit. Final IDM at 71, 73.

The Court observes that record evidence cited by Commerce shows that over 50% of Tenaris' net sales and over 75% of TMK's net sales were to end users in non-U.S. markets in 2018. *See* Tenaris 2018 Annual Report; TMK 2018 Annual Report. Because record evidence cited by Commerce shows that over 50% of Tenaris' 2018 net sales were to end users in non-U.S. markets, the Court finds that Commerce's determination that Tenaris has significant non-U.S. sales, sufficient to use Tenaris' financial statements in the calculation of constructed value profit, is reasonable and supported by substantial evidence.

Further, Commerce reviewed Tenaris' 2018 financial statements and determined that the grant received by Tenaris in 2013 did not distort the 2018 data. Final IDM at 73. Defendant asserts that the \$6 million grant that Tenaris received in 2013 is not a countervailable subsidy and that, even if the grant constitutes a subsidy, it would have been fully allocated to 2013 as a non-recurring subsidy. Def.'s Resp. at 26. Under 19 C.F.R. § 351.524, non-recurring benefits are allocated over a number of years corresponding to the average useful life of renewable physical assets, except when the benefit is less than

0.5% of relevant sales—in which case the benefit is allocated to the year in which it is received. 19 C.F.R. § 351.524(b). Defendant asserts that, because the \$6 million grant accounted for less than 0.5% of Tenaris’ net sales, the benefit would have been allocated in its entirety to 2013 and would not impact the 2018 financial statements. Def.’s Resp. at 26. Commerce determined, therefore, that Tenaris’ 2018 financial statements did not need to be excluded due to subsidies. Final IDM at 73.

The Court observes that Tenaris’ financial statements, cited by Commerce, do not show subsidies and indicate that the grant accounted for less than 0.5% of Tenaris’ net sales. *See* Tenaris 2018 Annual Report. Based on the record evidence cited by Commerce, indicating that the grant accounted for less than 0.5% of Tenaris’ net sales, and the relevant regulation instructing non-recurring benefits to be allocated to the year in which they are received, the Court concludes that Commerce’s determination that the 2013 grant did not distort Tenaris’ 2018 financial statements is reasonable and supported by substantial evidence.

SeAH argues also that Commerce should include Chung Hung’s financial statements in the calculation of constructed value profit. SeAH’s Br. at 28–29. Commerce determined that Chung Hung’s sales were not specific to the OCTG industry and that Chung Hung’s customer base did not correspond to that of a global OCTG producer. Final IDM at 72. Commerce explained that Chung Hung’s OCTG sales account for less than 6.8% of total sales, while other data on the record, the Tenaris and TMK financial statements, included significant OCTG sales. *Id.* Commerce reasoned that, because it is “particularly important to use financial statements from a producer of identical merchandise,” it is “unnecessary” for Commerce to rely on Chung Hung’s data when there are more closely analogous data available on the record. *See id.*

The Court observes that the Chung Hung 2018 Annual Report cited by Commerce supports Commerce’s determination that Chung Hung’s OCTG sales account for less than 6.8% of total sales. *See* Resp. to Req. [Constructed Value] Profit and Selling Expense Information Attach. 2, PR 125–27, 132. The Court notes that Commerce reviewed record evidence that supports its determination that Tenaris and TMK’s data were more closely analogous than Chung Hung’s data to Korean OCTG producers. *See id.*; Tenaris 2018 Annual Report; TMK 2018 Annual Report. The Court concludes, therefore, that Commerce’s determination not to include Chung Hung’s financial statements in the calculation of constructed value profit is reasonable and supported by substantial evidence.

B. Commerce’s Determination Not to Apply A Profit Cap

SeAH argues that Commerce’s calculation of constructed value profit is inconsistent with the statute because Commerce did not apply a “profit cap.” SeAH’s Br. at 31–33. SeAH argues that Commerce’s “use of the same rate for [constructed value] profit and the profit cap is essentially a failure to calculate a profit cap” and that Commerce erred by not applying a profit cap based on the profit earned on Hyundai Steel’s home-market sales of OCTG or SeAH’s third-country sales of OCTG produced in Korea. *Id.*

In utilizing a “reasonable method” under subsection (iii), Commerce normally must apply an upward limit for profit, commonly termed the “profit cap.” *Atar S.r.l. v. United States*, 730 F.3d 1320, 1322 (Fed. Cir. 2013) (citation omitted). “This ‘profit cap’ prevents the ‘various possible calculation methods from yielding anomalous results that stray beyond the amount normally realized from sales of merchandise in the same general category.’” *Mid Continent Steel & Wire*, 941 F.3d at 545 (quoting *Atar S.r.l.*, 730 F.3d at 1327). Congress contemplated situations, however, in which a profit cap would not be calculable:

[W]here, due to the absence of data, Commerce cannot determine amounts for profit under alternatives (1) and (2) or a “profit cap” under alternative (3), it might have to apply alternative (3) on the basis of “the facts available.” This ensures that Commerce can use alternative (3) when it cannot calculate the profit normally realized by other companies on sales of the same general category of products.

Id. (quoting Uruguay Round Agreements Act, Statement of Administrative Action (“SAA”), H.R. Doc. No. 103–316, vol. 1 at 841 (1994), reprinted in 1994 U.S.C.C.A.N. 4040, 4177). When Commerce explains reasonably that information is not available for Commerce to calculate a profit cap, Commerce may calculate constructed profit under subsection (iii) without calculating a profit cap. *Id.* at 545–46.

Commerce explained here that “[it] [wa]s unable to calculate a profit cap based on the actual amounts reported in accordance with the statutory intent under section [1677b(e)(2)(B)(iii)]” because “[t]here is no profit information for sales in Korea of OCTG and products in the same general category on the record.” Final IDM at 74; see also *Mid Continent Steel & Wire*, 941 F.3d at 545 (“[T]he statutorily specified information was not available to calculate a profit cap” when “there [wa]s no viable domestic market in the exporting country for merchandise that is in the same general category

of products as the subject merchandise.”). Commerce noted that the record did not contain any information regarding the profit for sales in Korea of OCTG and products in the same general category. *See* Final IDM at 74. Because Commerce articulated a reasonable justification for its decision, tied to the record in the proceeding, the Court concludes that Commerce’s decision not to calculate a profit cap when the statutorily specified information was not available is reasonable.

C. Commerce’s Application of Unadjusted Costs to Adjusted Costs

SeAH argues that Commerce incorrectly applied the unadjusted Tenaris and TMK 2018 financial statements to SeAH’s adjusted costs. SeAH’s Br. at 29–30. Commerce reasoned that the particular market situation adjustment allowed SeAH’s costs to “more accurately reflect ‘the [cost of production] in the ordinary course of trade.’” Final IDM at 61. Commerce asserted that, because there is no evidence that a particular market situation affects Tenaris or TMK, it would be inaccurate to adjust their costs. *Id.* Commerce asserted that the unadjusted Tenaris and TMK data and the adjusted SeAH data each most accurately reflect costs in the ordinary course of trade. *Id.* Commerce determined that it was reasonable to apply the unadjusted Tenaris and TMK 2018 financial statements to SeAH’s adjusted costs when calculating the constructed value profit and selling expenses. *Id.*

As discussed in detail above, the Court holds that Commerce’s determination that a particular market situation affected the cost of production of OCTG in Korea is not supported by substantial evidence. *See supra* Part III. The Court notes that Commerce’s determination to apply unadjusted costs to SeAH’s adjusted costs was based on its finding that a particular market situation affected SeAH’s costs. *See* Final IDM at 61. Because the Court remands Commerce’s particular market situation determination and does not consider Commerce’s regression-based particular market situation adjustment, the Court likewise does not consider at this time whether Commerce’s application of unadjusted costs to adjusted costs is reasonable and supported by substantial evidence.

VI. Constructed Export Price Profit Calculation

Commerce calculated SeAH’s constructed export price profit rate using the same data that Commerce used to calculate the constructed value profit, the Tenaris and TMK 2018 financial statements. *See* Final IDM at 5, 106; Prelim. DM at 13–14. SeAH argues that Commerce should have used SeAH’s financial statements to calculate SeAH’s constructed export price profit rate and that Commerce is not

permitted by statute to use other information. See SeAH's Br. at 33–35.

When a foreign producer or exporter sells a product to a U.S. selling affiliate, the law permits using “constructed export price” in calculating the dumping margin. 19 U.S.C. § 1677a(d). Constructed export price is “the price at which the subject merchandise is first sold (or agreed to be sold) in the United States before or after the date of importation by or for the account of the producer or exporter of such merchandise or by a seller affiliated with the producer or exporter, to a purchaser not affiliated with the producer or exporter,” subject to certain adjustments. *Id.* § 1677a(b). To calculate constructed export price, this price is reduced by selling expenses, further manufacturing expenses, and the profit allocated to these expenses. *Id.* § 1677a(d). To determine profit, Commerce “may rely on any appropriate financial reports, including public, audited financial statements, or equivalent financial reports, and internal financial reports prepared in the ordinary course of business.” 19 C.F.R. § 351.402(d)(2). Section 1677a(f)(1) of the statute states that “profit shall be an amount determined by multiplying the total actual profit by the applicable percentage.” 19 U.S.C. § 1677a(f)(1). Total actual profit is “the total profit earned by the foreign producer, exporter, and affiliated parties described in subparagraph (C) with respect to the sale of the same merchandise for which total expenses are determined under such subparagraph.” *Id.* § 1677a(f)(2)(D). The statute defines the total expenses as:

(C) Total expenses

The term “total expenses” means all expenses in the first of the following categories which applies and which are incurred by or on behalf of the foreign producer and foreign exporter of the subject merchandise and by or on behalf of the United States seller affiliated with the producer or exporter with respect to the production and sale of such merchandise:

- (i) The expenses incurred with respect to the subject merchandise sold in the United States and the foreign like product sold in the exporting country if such expenses were requested by the administering authority for the purpose of establishing normal value and constructed export price.
- (ii) The expenses incurred with respect to the narrowest category of merchandise sold in the United States and the exporting country which includes the subject merchandise.

(iii) The expenses incurred with respect to the narrowest category of merchandise sold in all countries which includes the subject merchandise.

Id. § 1677a(f)(2)(C).

In calculating constructed export price, Commerce utilized the same data that it used to calculate the constructed value profit, the Tenaris and TMK 2018 financial statements. *See* Final IDM at 106; SeAH Prelim. Calculations Mem. at 3. Commerce determined that SeAH did not have a viable home market and, therefore, did not have a viable comparison market. *See* Final IDM at 106; SeAH Prelim. Calculations Mem. at 3. As a result, Commerce determined that relying on SeAH's financial statements was "unsuitable" and relied on the Tenaris and TMK 2018 financial statements. *See* Final IDM at 106; SeAH Prelim. Calculations Mem. at 3.

SeAH argues that Commerce is required by statute to use SeAH's own information. *See* SeAH's Br. at 33–35. Commerce asserted that the statute "does not require Commerce to rely upon a company's own financial data when using constructed value for the home market." Final IDM at 106. Defendant reiterates this assertion and argues that Commerce may rely on financial statements on the record when the comparison market is not viable. Def.'s Resp. at 31.

Under 19 U.S.C. § 1677b(e)(2)(B)(i)–(iii), Commerce may, when appropriate, use "any other reasonable method" to determine profits for constructed value. The Court observes that no such "any other reasonable method" provision exists under section 1677a for constructed export price. Section 1677a, covering export price and constructed export price, refers to data from "the foreign producer, exporter, and affiliated parties." 19 U.S.C. § 1677a(d). Unlike the constructed value provision in section 1677b, section 1677a contains no language concerning the use of data from producers of comparable merchandise. Despite the absence of such a provision, the U.S. Court of Appeals for the Federal Circuit has upheld the use of surrogate values to adjust constructed export price under section 1677a. *See SeAH Steel VINA Corp. v. United States*, 950 F.3d 833, 838 (Fed. Cir. 2020) (citing 19 U.S.C. § 1677a(c)(2)(A)) (stating that Commerce may adjust constructed export price using surrogate values when the exporting country is a non-market economy).

Section 1677a(f)(2)(C) provides that the first applicable category of three listed categories is to be used to determine total expenses. 19 U.S.C. § 1677a(f)(2)(C). The first category provides for the use of expenses "requested by [Commerce] for the purpose of establishing

normal value and constructed export price.” *Id.* The Court notes that Commerce calculated a constructed value and did not use SeAH’s expenses to establish normal value, because Commerce determined that SeAH’s home-market and third-country sales were non-viable. *See* Final IDM at 71. Commerce determined, therefore, that use of the second category was appropriate. *Id.* at 106. Under the second category, the Statement of Administrative Action instructs that the information is obtained through financial reports. *See* SAA at 825, *reprinted in* 1994 U.S.C.C.A.N. at 4164. The Court notes that neither the SAA nor section 1677a contain language requiring the use of a company’s own financial data or prohibiting the use of data from producers of comparable merchandise. *See id.* ; 19 U.S.C. § 1677a(d). Accordingly, the Court holds that Commerce is permitted under the statute to use surrogate data to calculate constructed export price and, inherently, constructed export price profit rates.

The Court holds that Commerce’s determination to use the Tenaris and TMK 2018 financial statements to calculate SeAH’s constructed export price profit rate, instead of SeAH’s own information, is in accordance with the law. The Court sustains Commerce’s constructed export price profit rate determination.

VII. Exclusion of Freight Revenue Profit

Commerce capped the deduction for freight expenses at the amount actually incurred. Final IDM at 109–11. SeAH asserts that Commerce’s determinations that separately-invoiced freight revenue are included in the price of the merchandise and that the portion of freight revenue up to actual freight expenses, but not exceeding actual freight expenses, is included in the price of the merchandise, are contrary to the law. SeAH’s Br. at 20–21. SeAH argues that Commerce must treat freight profits and losses uniformly, either ignoring both or including both. *Id.* at 21.

Export price or constructed export price is the price at which the subject merchandise is first sold in the United States. *See* 19 U.S.C. § 1677a(a), (b). Under 19 U.S.C. § 1677a(c)(2)(A),

[t]he price used to establish export price and constructed export price shall be reduced by . . . the amount, if any, included in such price, attributable to any additional costs, charges, or expenses, and United States import duties, which are incident to bringing the subject merchandise from the original place of shipment in the exporting country to the place of delivery in the United States

Id. § 1677a(c)(2)(A). Commerce uses adjustments when calculating export price or constructed export price “to achieve ‘a fair, apples-to-apples comparison’ between U.S. price and foreign market value.” *Fla. Citrus Mut. v. United States*, 550 F.3d 1105, 1110 (Fed. Cir. 2008) (quoting *Torrington Co. v. United States*, 68 F.3d 1347, 1352 (Fed. Cir. 1995)). Such adjustments prevent exporters from improperly inflating the export price of a good by charging a customer for freight more than the exporter’s actual freight expenses. *See Dongguan Sunrise Furniture Co. v. United States*, 36 CIT 860, 894 (2012). Commerce adjusts its price calculation using net freight revenue, and it is reasonable for Commerce not to consider freight revenue profit as part of the price of the subject merchandise in accordance with the statutory language. *See id.* at 894–95.

Here, Commerce determined that increasing the merchandise gross unit selling price with profit SeAH earned on the sale of freight would artificially inflate the constructed export price. *See* Final IDM at 110–11. Commerce isolated the price of SeAH’s merchandise alone without any additional charges by capping SeAH’s freight expenses at the actual cost incurred in order to exclude freight revenue profit. *Id.*

SeAH contends that Commerce’s treatment of freight revenue below the cap as part of the U.S. price in its calculations, and freight revenue above the cap as not part of the U.S. price in its calculations, is inconsistent with the statute. *See* SeAH’s Br. at 20–21. SeAH argues that, under the language of 19 U.S.C. § 1677a(c)(2)(A), Commerce “may deduct freight costs only if freight is included in the price that Commerce uses as the starting point of its calculations.” *Id.* at 21 (emphasis omitted). SeAH also argues that the statute allows Commerce to include all freight revenue and costs in the price or none of the freight revenue and costs in the price, but does not allow Commerce to include only a part of the freight revenue in the price. *Id.* This is an incorrect reading of the statute. Section 1677a requires Commerce to make adjustments when calculating export price or constructed export price “to achieve a fair, apples-to-apples comparison between U.S. price and foreign market value.” *Fla. Citrus Mut.*, 550 F.3d at 1110 (citation and internal quotation marks omitted); *see* 19 U.S.C. § 1677a(c)(2)(A). A proper “apples-to-apples” comparison between the U.S. price and foreign market value would not include profit earned from freight rather than from the sale of subject merchandise. Because a proper comparison would not include profit earned from freight rather than from the sale of subject merchandise, the Court concludes that Commerce’s exclusion of freight revenue profit reflects the statutory method and is in accordance with the law.

CONCLUSION

For the foregoing reasons, the Court sustains in part and remands in part Commerce's *Final Results*.

The Court sustains the following determinations of Commerce:

1. The Court sustains Commerce's constructed export price profit rate as in accordance with the law; and
2. The Court sustains Commerce's exclusion of freight revenue profit as in accordance with the law.

The Court remands the following determinations of Commerce:

1. The Court remands for Commerce to further explain or reconsider its use of the Cohen's *d* test in its differential pricing analysis; and
2. The Court remands for Commerce to further explain or reconsider its particular market situation determination.

Accordingly, it is hereby

ORDERED that the *Final Results* are remanded to Commerce for further proceedings consistent with this opinion; and it is further

ORDERED that this case will proceed according to the following schedule:

1. Commerce shall file the remand results on or before December 17, 2021;
2. Commerce shall file the remand administrative record on or before January 14, 2022;
3. Comments in opposition to the remand results shall be filed on or before February 11, 2022;
4. Comments in support of the remand results shall be filed on or before March 4, 2022; and
5. The joint appendix shall be filed on or before March 25, 2022.

Dated: October 19, 2021
New York, New York

/s/ Jennifer Choe-Groves
JENNIFER CHOE-GROVES, JUDGE

Slip Op. 21–147

HUSTEEL CO., LTD., Plaintiff, and SEAH STEEL CORPORATION, HYUNDAI STEEL COMPANY, AND NEXTEEL CO., LTD., Consolidated Plaintiffs, v. UNITED STATES, Defendant, and WHEATLAND TUBE COMPANY, Defendant-Intervenor.

Before: Jennifer Choe-Groves, Judge
Consol. Court No. 19–00107

[Sustaining the U.S. Department of Commerce’s second remand results in the 2016–2017 administrative review of the antidumping duty order on circular welded non-alloy steel pipe from the Republic of Korea.]

Dated: October 19, 2021

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Robert G. Gosselink and Jarrod M. Goldfeder, Trade Pacific PLLC, of Washington, D.C., for Consolidated Plaintiff Hyundai Steel Company.

J. David Park, Henry D. Almond, Daniel R. Wilson, Leslie C. Bailey, and Kang Woo Lee, Arnold & Porter Kaye Scholer LLP, of Washington, D.C., for Consolidated Plaintiff NEXTEEL Co., Ltd.

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

Roger B. Schagrin, Elizabeth J. Drake, and Christopher T. Cloutier, Schagrin Associates, of Washington, D.C., for Defendant-Intervenor Wheatland Tube Company.

OPINION**Choe-Groves, Judge:**

Plaintiff Husteel Co., Ltd. (“Husteel”) and Consolidated Plaintiffs SeAH Steel Corporation (“SeAH”), Hyundai Steel Company (“Hyundai Steel”), and NEXTEEL Co., Ltd. (“NEXTEEL”), (collectively, “Plaintiffs”), filed this consolidated action challenging the final results published by the U.S. Department of Commerce (“Commerce”) in the 2016–2017 administrative review of the antidumping duty order on circular welded non-alloy steel pipe from the Republic of Korea (“Korea”). See *Circular Welded Non-Alloy Steel Pipe from the Republic of Korea (“Final Results”)*, 84 Fed. Reg. 26,401 (Dep’t of Commerce June 6, 2019) (final results of admin. review; 2016–2017); see also Issues and Decision Mem. for the Final Results of the 2016–2017 Admin. Review of the Antidumping Duty Order on Circu-

lar Welded Non-Alloy Steel Pipe from the Republic of Korea (May 30, 2019) (“Final IDM”), PR 173. Before the Court are the Final Results of Redetermination Pursuant to Court Remand (“*Second Remand Results*”), ECF No. 62–1, which the Court ordered in *Husteel Co. v. United States* (“*Husteel I*”), 45 CIT __, 517 F. Supp. 3d 1342 (2021). For the reasons discussed below, the Court sustains the *Second Remand Results*.

BACKGROUND

The Court presumes familiarity with the facts and procedural history set forth in its prior opinions and recounts the facts relevant to the Court’s review of the *Second Remand Results*. See *Husteel Co. v. United States*, 44 CIT __, __, 476 F. Supp. 3d 1363, 1367–68 (2020); *Husteel II*, 45 CIT at __, 517 F. Supp. 3d at 1345–46.

In *Husteel Co. v. United States* (“*Husteel I*”), 44 CIT __, 476 F. Supp. 3d 1363 (2020), the Court concluded that Commerce’s adjustment to the cost of production for the purpose of the sales-below-cost test pursuant to 19 U.S.C. § 1677b(b)(1) and Commerce’s determination that a particular market situation distorted costs under 19 U.S.C. § 1677b(e) in the *Final Results* were not in accordance with the law because 19 U.S.C. § 1677b(e) applies only when Commerce bases normal value on constructed value. *Husteel I*, 44 CIT at __, 476 F. Supp. 3d at 1373–74, 1377.

Commerce maintained on remand its determination that a particular market situation distorted the cost of production. Final Results of Redetermination Pursuant to Court Order (“*Remand Results*”) at 7–8, ECF Nos. 47–1, 48–1. Commerce did not conduct the sales-below-cost test because, it explained, the sales-below-cost test would not be “meaningful” without an adjustment to the cost of production to account for the particular market situation. *Id.* at 7. Instead, Commerce made a particular market situation determination under 19 U.S.C. § 1677(15)(C), stating that the distorted cost of production prevented a proper comparison between home market sales and export prices. *Id.* “[A]bsent the ability to determine whether the comparison market sales were made within the ordinary course of trade,” under respectful protest, Commerce based normal value on constructed value under 19 U.S.C. § 1677b(a)(4) for each respondent. *Id.* at 1, 7, 9. In calculating constructed value, Commerce made a cost-based particular market situation determination under 19 U.S.C. § 1677b(e) and adjusted the cost of production as an alternative calculation methodology. *Id.* at 8–9.

The Court granted in *Husteel II* the motion for a partial remand filed by Defendant United States (“Defendant”) to reconsider its de-

cisions to base normal value on constructed value and make certain particular market situation adjustments to the cost of production when calculating constructed value in light of the subsequent issuance of this Court's decision in *Saha Thai Steel Pipe Public Co. v. United States*, 44 CIT __, 487 F. Supp. 3d 1323 (2020). *Husteel II*, 45 CIT at __, 517 F. Supp. 3d at 1346–47, 1348.

On second remand, Commerce “continue[d] to find that a particular market situation existed in Korea during the period of review that distorted the price of hot-rolled coil.” *Second Remand Results* at 2. Under respectful protest, however, Commerce recalculated the dumping margins without a particular market situation adjustment. *Id.* at 2, 5–6.

JURISDICTION AND STANDARD OF REVIEW

The Court has jurisdiction under 19 U.S.C. § 1516a(a)(2)(B)(iii) and 28 U.S.C. § 1581(c), which grant the Court authority to review actions contesting the final results of an administrative review of an anti-dumping duty order. The Court shall hold unlawful any determination found to be unsupported by substantial evidence on the record or otherwise not in accordance with the law. 19 U.S.C. § 1516a(b)(1)(B)(i). The Court also reviews determinations made on remand for compliance with the Court's remand order. *Ad Hoc Shrimp Trade Action Comm. v. United States*, 38 CIT __, __, 992 F. Supp. 2d 1285, 1290 (2014), *aff'd*, 802 F.3d 1339 (Fed. Cir. 2015).

DISCUSSION

Hyundai Steel, Husteel, and Defendant ask the Court to sustain the *Second Remand Results*. Comments Consol. Pl., Hyundai Steel Company, Commerce's Second Remand Redetermination (“Hyundai Steel's Cmts.”) at 1–2, ECF No. 65 (joined by Husteel); Def.'s Comments Supp. Remand Redetermination at 2, ECF No. 67. Hyundai Steel represents that SeAH and NEXTEEL agree that the *Second Remand Results* should be sustained. Hyundai Steel's Cmts. at 2. No party filed comments opposing the *Second Remand Results*.

The U.S. Court of Appeals for the Federal Circuit has held that when Commerce advocates a position zealously and must abandon that position in order to comply with a ruling of the U.S. Court of International Trade, Commerce preserves its right to appeal it if adopts a complying position under protest. *See Viraj Grp., Ltd. v. United States*, 343 F.3d 1371, 1376 (Fed. Cir. 2003). In this case, under protest, Commerce recalculated the weighted-average dumping margins for Husteel, Hyundai Steel, and non-examined companies (including SeAH and NEXTEEL) without a particular market

situation adjustment. *Second Remand Results* at 5–6. The weighted-average dumping margins changed from 10.91% to 6.44% for Husteel, 8.14% to 4.82% for Hyundai Steel, and 9.53% to 5.63% for non-examined companies. *Id.* at 6. Commerce’s recalculation of the weighted-average dumping margins without a particular market situation adjustment, under protest, is consistent with the Court’s prior opinions and orders in *Husteel I* and *Husteel II*.

Commerce maintained its determination that a particular market situation distorted the cost of production. *Id.* at 2–4. The reiterated determination has no effect on the dumping margins because Commerce recalculated the dumping margins without a particular market situation adjustment. No party challenges the determination.

Because the Court sustains Commerce’s removal of the particular market situation adjustment, consideration of Commerce’s reiterated particular market situation determination in the *Second Remand Results* “‘would have no practical significance’ and is mooted.” See *Saha Thai Steel Pipe Pub. Co. v. United States*, 45 CIT __, __, Slip Op. 21–118 at 7 (Sept. 17, 2021) (quoting *Morton Int’l, Inc. v. Cardinal Chem. Co.*, 967 F.2d 1571, 1574 (Fed. Cir. 1992) (Nies, C.J., dissenting from the order declining suggestions for rehearing en banc) (citations omitted) (“An issue is also said to be ‘mooted’ when a court, having decided one dispositive issue, chooses not to address another equally dispositive issue.”); citing *Daewoo Elecs. Co. v. Int’l Union of Elec., Elec., Tech., Salaried & Mach. Workers*, 6 F.3d 1511, 1513 (Fed. Cir. 1993) (“[O]ur disposition of the tax incidence issue moots two other issues”)).

The Court sustains the *Second Remand Results* without considering Commerce’s reiterated particular market situation determination in the *Second Remand Results*.

CONCLUSION

The Court sustains the *Second Remand Results*. Judgment will be entered accordingly.

Dated: October 19, 2021

New York, New York

/s/ Jennifer Choe-Groves

JENNIFER CHOE-GROVES, JUDGE

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