

U.S. Customs and Border Protection

CBP Dec. 21-13

DETERMINATION THAT MAINTENANCE OF FINDING OF MARCH 29, 2021, PERTAINING TO CERTAIN DISPOSABLE GLOVES PRODUCED IN MALAYSIA, IS NO LONGER NECESSARY

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

ACTION: Determination that merchandise is no longer subject to 19 U.S.C. 1307.

SUMMARY: On March 29, 2021, U.S. Customs and Border Protection (CBP), with the approval of the Secretary of Homeland Security, issued a Finding that certain disposable gloves, were mined, produced, or manufactured in Malaysia by Top Glove Corporation Bhd with the use of convict, forced, or indentured labor, and were being, or were likely to be, imported into the United States. CBP has now determined, based upon additional information, that such merchandise is no longer being, or is likely to be, imported into the United States in violation of section 307 of the Tariff Act of 1930, as amended.

DATES: This determination applies to any merchandise described in this notice that is imported on or after September 10, 2021.

FOR FURTHER INFORMATION CONTACT: M. Estrella, Chief, Operations Branch, Forced Labor Division, Trade Remedy Law Enforcement Directorate, Office of Trade, (202) 325-6087 or *forcedlabor@cbp.dhs.gov*.

SUPPLEMENTARY INFORMATION:

I. Background

Pursuant to section 307 of the Tariff Act of 1930, as amended (19 U.S.C. 1307), “[a]ll goods, wares, articles, and merchandise mined, produced, or manufactured wholly or in part in any foreign country by convict labor or/and forced labor or/and indentured labor under penal sanctions shall not be entitled to entry at any of the ports of the United States, and the importation thereof is hereby prohibited.” Under this section, “forced labor” includes “all work or service which

is exacted from any person under the menace of any penalty for its nonperformance and for which the worker does not offer himself voluntarily” and includes forced or indentured child labor.

The CBP regulations promulgated under the authority of 19 U.S.C. 1307 are found at sections 12.42 through 12.45 of title 19, Code of Federal Regulations (CFR) (19 CFR 12.42–12.45). Among other things, these regulations allow any person outside of CBP to communicate his or her belief that a certain “class of merchandise . . . is being, or is likely to be, imported into the United States [in violation of 19 U.S.C. 1307].” 19 CFR 12.42(a), (b). Upon receiving such information, the Commissioner “will cause such investigation to be made as appears to be warranted by the circumstances” 19 CFR 12.42(d). CBP also has the authority to self-initiate an investigation. 19 CFR 12.42(a). If the Commissioner of CBP finds that the information available “reasonably but not conclusively indicates that merchandise within the purview of section 307 is being, or is likely to be, imported,” the Commissioner will order port directors to “withhold release of any such merchandise pending [further] instructions.” 19 CFR 12.42(e). After issuance of such a withhold release order, the covered merchandise will be detained by CBP for an admissibility determination and will be excluded unless the importer demonstrates that the merchandise was not made using labor in violation of 19 U.S.C. 1307. 19 CFR 12.43–12.44. The importer may also export the merchandise. 19 CFR 12.44(a).

These regulations also set forth the procedure for the Commissioner of CBP to issue a Finding when it is determined that the merchandise is subject to the provisions of 19 U.S.C. 1307. Pursuant to 19 CFR 12.42(f), if the Commissioner of CBP determines that merchandise within the purview of 19 U.S.C. 1307 is being, or is likely to be, imported into the United States, the Commissioner of CBP will, with the approval of the Secretary of the Department of Homeland Security (DHS), publish a Finding to that effect in the *Customs Bulletin* and in the **Federal Register**.¹ Under the authority of 19 CFR 12.44(b), CBP may seize and forfeit imported merchandise covered by a Finding.

On July 15, 2020, CBP issued a withhold release order on “disposable gloves” reasonably indicated to be manufactured by forced labor

¹ Although the regulation states that the Secretary of the Treasury must approve the issuance of a Finding, the Secretary of the Treasury delegated this authority to the Secretary of Homeland Security in Treasury Order No. 100–16 (68 FR 28322). In Delegation Order 7010.3, Section II.A.3, the Secretary of Homeland Security delegated the authority to issue a Finding to the Commissioner of CBP, with the approval of the Secretary of Homeland Security. The Commissioner of CBP, in turn, delegated the authority to make a Finding regarding prohibited goods under 19 U.S.C. 1307 to the Executive Assistant Commissioner, Office of Trade.

in Malaysia by Top Glove Corporation Bhd (Top Glove). Through its investigation, CBP determined that there was sufficient information to support a Finding that Top Glove was manufacturing disposable gloves with forced labor and that such merchandise was likely being imported into the United States. Pursuant to 19 CFR 12.42(f), CBP issued a Finding to that effect in the **Federal Register** on March 29, 2021 (86 FR 16380).²

Since that time, Top Glove has provided additional information to CBP, which CBP believes establishes by satisfactory evidence that the subject disposable gloves are no longer mined, produced, or manufactured in any part with forced labor. 19 CFR 12.42(g).

II. Determination

Pursuant to 19 U.S.C. 1307 and 19 CFR 12.42(g), it is hereby determined that the articles described below are no longer being mined, produced, or manufactured wholly or in part with the use of convict, forced, or indentured labor by Top Glove in Malaysia.

The subject articles are disposable gloves classified under Harmonized Tariff Schedule of the United States (HTSUS) subheadings 3926.20.1020, 4015.11.0150, 4015.19.0510, 4015.19.0550, 4015.19.1010, 4015.19.1050, and 4015.19.5000, which are mined, produced, or manufactured by Top Glove in Malaysia.

Dated: September 3, 2021.

ANNMARIE R. HIGHSMITH,
*Executive Assistant Commissioner,
Office of Trade.*

[Published in the Federal Register, September 10, 2021 (85 FR 50725)]

19 CFR Part 111

RIN 1651-AB03

CONTINUING EDUCATION FOR LICENSED CUSTOMS BROKERS

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

ACTION: Notice of proposed rulemaking.

SUMMARY: This document proposes to amend the U.S. Customs and Border Protection (CBP) regulations to require continuing edu-

² The Finding was also published in the *Customs Bulletin and Decisions* (Vol. 55, No. 14, p. 13) on April 14, 2021.

ation for individual customs broker license holders (individual brokers) and to create a framework for administering this requirement. By requiring individual brokers to remain knowledgeable about recent developments in customs and related laws as well as international trade and supply chains, CBP's proposed framework would enhance professionalism and competency within the customs broker community. CBP has determined that the proposed framework would contribute to increased trade compliance and better protection of the revenue of the United States.

DATES: Comments must be received on or before November 9, 2021.

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

- Federal eRulemaking Portal at <https://www.regulations.gov>.

Follow the instructions for submitting comments via Docket No. US-CBP 2021-0030.

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

Instructions: All submissions received must include the agency name and docket number for this rulemaking. All comments received will be posted without change to <https://www.regulations.gov>, including any personal information provided. For detailed instructions on submitting comments and additional information on the rulemaking process, see the Public Participation heading of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: For access to the docket to read background documents or comments received, go to <https://www.regulations.gov>. Due to the relevant COVID-19-related restrictions, CBP has temporarily suspended its on-site public inspections of the public comments.

FOR FURTHER INFORMATION CONTACT: Elena D. Ryan, Special Advisor, Programs and Policy Analysis, Regulations and Rulings, Office of Trade, U.S. Customs and Border Protection, at (202) 325-0001 or Broker.Continuing.Education@cbp.dhs.gov; and, Melba Hubbard, Chief, Broker Management Branch, Trade Policy and Programs, Office of Trade, U.S. Customs and Border Protection, at (202) 325-6986, melba.hubbard@cbp.dhs.gov.

SUPPLEMENTARY INFORMATION:

I. Public Participation

Interested persons are invited to participate in this rulemaking by submitting written data, views, or arguments on all aspects of the proposed rule. CBP also invites comments that relate to the economic,

environmental, or federalism effects that might result from this proposed rulemaking. Comments that will provide the most assistance to CBP will reference a specific portion of the proposed rulemaking, explain the reason for any recommended change, and include data, information, or authority that support such recommended change. See **ADDRESSES** above for information on how to submit comments.

II. Executive Summary

This notice of proposed rulemaking (NPRM) proposes to amend the U.S. Customs and Border Protection (CBP) regulations to require individual customs broker license holders (individual brokers) to participate in continuing education activities (hereinafter, referred to as the “continuing broker education requirement”) and to create a framework for administering this requirement. This section provides a brief summary of the proposed framework. A more detailed description of the proposed framework is contained in section IV of this NPRM.

This NPRM proposes to require individual brokers to complete at least 36 continuing education credits per triennial period, with limited exceptions. Individual brokers reentering the profession following a period of voluntary suspension would be subject to a prorated requirement of one continuing education credit for each complete remaining month until the end of the triennial period. The proposed framework also exempts two groups of individual brokers from the continuing broker education requirement—namely, individual brokers who have voluntarily suspended their license in accordance with § 111.52 of title 19 of the Code of Federal Regulations (19 CFR 111.52), and individual brokers who have not held their license for an entire triennial period at the time of the submission of the status report as required under 19 CFR 111.30(d).

Under the proposed framework, individual brokers could earn continuing education credits for a variety of training or educational activities, whether in-person or online, including the completion of coursework, seminars, workshops, symposia, or conventions, and, subject to certain limitations and requirements, the preparation and presentation of subject matter as an instructor, discussion leader, or speaker. Individual brokers would report and certify their compliance with the continuing broker education requirement upon the submission of the status report required under 19 CFR 111.30(d), which is due on a triennial basis.

In order to ensure compliance with the continuing broker education requirement, this NPRM also proposes regulatory provisions authorizing CBP to take disciplinary actions, if an individual broker sub-

mits a triennial report but fails to report and certify his or her compliance with the continuing broker education requirement on the triennial report. The proposed framework also includes provisions addressing other aspects of the administration of the continuing broker education requirement, such as accreditation and the selection of accreditors.

III. Background

A. Authority for Continuing Broker Education Requirement

Section 641 of the Tariff Act of 1930, as amended (19 U.S.C. 1641), provides that individuals and business entities must hold a valid customs broker's license and permit to transact customs business on behalf of others. The statute also sets forth standards for the issuance of broker licenses and permits, provides for disciplinary action against customs brokers in the form of suspension or revocation of such licenses and permits or assessment of monetary penalties, and provides for the assessment of monetary penalties against other persons for conducting customs business without the required broker's license.

Section 641 authorizes the Secretary of the U.S. Department of the Treasury (Treasury) to prescribe rules and regulations relating to the customs business of brokers as may be necessary to protect importers and the revenue of the United States and to carry out the other provisions of section 641. *See* 19 U.S.C. 1641(f). That authority was transferred to the Secretary of the U.S. Department of Homeland Security (DHS) as a result of the enactment of the Homeland Security Act of 2002 (Pub. L. 107–296, 116 Stat. 2142). The Homeland Security Act of 2002 generally transferred the functions of the former U.S. Customs Service from the Secretary of the Treasury to the Secretary of DHS, and provided that the Secretary of the Treasury retains authority over customs revenue functions, unless specifically delegated to the Secretary of DHS. *See* 6 U.S.C. 212(a)(1). Paragraph 1(a)(i) of Treasury Department Order No. 100–16 contains a list of subject matters over which the Secretary of the Treasury retained authority. *See* appendix to 19 CFR part 0. The other functions of the former U.S. Customs Service not expressly listed in paragraph 1(a)(i) of Treasury Department Order No. 100–16 were transferred from the Secretary of the Treasury to the Secretary of DHS. As paragraph 1(a)(i) of Treasury Department Order No. 100–16 does not list the regulation of customs brokers, the Secretary of the Treasury did not retain authority over this subject matter. Accordingly, the Secretary of DHS is authorized to prescribe rules and regulations relating to the customs business of brokers as may be necessary to protect importers

and the revenue of the United States and to carry out the other provisions of section 641. *See* 19 U.S.C. 1641(f).

19 U.S.C. 1641(b)(4) imposes upon customs brokers the duty to exercise responsible supervision and control over the broker's employees and control over the customs business that is conducted. The statute also permits the Secretary of DHS to test persons for their knowledge of customs and related laws prior to issuing a license. Furthermore, based upon 19 U.S.C. 1641, CBP has promulgated regulations setting forth additional obligations of customs brokers pertinent to the conduct of their customs business. CBP believes that maintaining current knowledge of customs laws and procedures is essential for customs brokers to meet their legal duties. CBP proposes that requiring a customs broker to fulfill a continuing education requirement is the most effective means to ensure that the customs broker keeps up with an ever-changing customs practice after passing the broker exam and subsequent receipt of the license. CBP believes that 19 U.S.C. 1641 provides authority to require, by regulation, continuing education for individual brokers.

To enhance professionalism and competency within the customs broker community, CBP proposes to promulgate regulations to require continuing education for individual brokers and to create a framework for administering this requirement. CBP believes that requiring individual brokers to participate in continuing education activities would enhance the credibility and value of a customs broker's license and improve a broker's skills, performance, and productivity. This in turn would increase client service and compliance with customs laws, which would better protect the revenue of the United States.

B. Overview of Licensing Requirements for Individual Customs Brokers

CBP is responsible for administering the licensing requirements for customs brokers. *See* 19 CFR part 111, subpart B. A prospective customs broker must pass a broker exam administered by CBP, which is designed to determine the individual's knowledge of customs and related laws, regulations and procedures, bookkeeping, accounting, and all other appropriate matters necessary to render valuable service to the broker's clientele.

After an applicant passes the customs broker exam, CBP will investigate whether the applicant is qualified for a broker's license, taking into account information provided by the applicant and other aspects pertaining to the applicant, such as his or her business integrity. If CBP finds that the applicant is qualified and has paid all applicable fees, then CBP will issue a broker's license. Following the

issuance of a license, a customs broker administratively maintains a license primarily through the payment of fees required in 19 CFR 111.96, and the filing of reports and notifications to CBP as set forth in 19 CFR 111.30. Pursuant to 19 U.S.C. 1641(b)(4), a customs broker has the statutory duty to exercise responsible supervision and control over the customs business that he or she conducts. *See also* 19 CFR 111.1 and 111.28(a). A customs broker also has other legal obligations, to CBP and to the broker's clientele, including, but not limited to, the exercising of due diligence in making financial settlements, answering correspondence, and preparing paperwork or filings related to customs business. *See* 19 CFR 111.29(a).

While the broker exam provides a good initial indication of an individual's knowledge of customs and related laws, regulations and procedures, bookkeeping, accounting, and all other appropriate matters (hereinafter, referred to as "customs matters"), the broker exam is, by necessity, limited in scope. The broker exam only assesses a person's knowledge of the state of the customs and related laws at a certain point in time. The broker exam does not test for knowledge of any of the requirements of the more than 40 Partner Government Agencies (PGAs)¹ involved in regulating imports. The complex nature of trade and the ever-changing and expanding requirements to comply with U.S. and international law requires that a customs broker maintain a high level of functional and accessible knowledge to ensure that a broker's clients remain compliant with the applicable laws over time. CBP proposes that requiring a customs broker to fulfill a continuing education requirement is the most effective way to ensure that individual customs brokers keep abreast of changes in customs and related laws, which is especially important because of the constant evolution of international trade and supply chains. CBP is proposing that, once individuals become licensed customs brokers, they must maintain sufficient knowledge of customs and related laws necessary to render valuable service to importers and drawback claimants through the completion of continuing education. CBP believes this will result in more competent licensed customs brokers who are well educated in customs law, regulations, and critical subject matter. A more competent customs broker community will prevent costly errors for their clients, potentially saving importers and drawback claimants from unwanted problems and relieving CBP from expending valuable examination and collection resources. The proposed regulations will create a framework for continuing broker

¹ CBP enforces over 400 laws on behalf of over 40 other U.S. Government agencies, which are commonly referred to as Partner Government Agencies (PGAs).

education that would contribute to increased trade compliance and better protection of the revenue of the United States.

C. Assessment of Compliance Risks Managed by Customs Brokers in the Complex and Evolving Realm of International Trade

Recent developments have demonstrated the need for key parties involved in importing and claiming drawback to keep up-to-date on training and continuously build and maintain their knowledge of current requirements. For example, the Trade Facilitation and Trade Enforcement Act of 2015 (TFTEA) (Pub. L. 114–125, 130 Stat. 122, February 24, 2016) required the issuance of new rules to protect domestic industry from dumping by foreign competitors (19 CFR part 165) and to modernize the processes surrounding duty refunds through the drawback program (19 CFR part 190). Both of these rules are complicated and detailed, requiring entities involved in international trade—particularly, customs brokers serving as the fiduciary agents of the affected importers and drawback claimants—to learn entirely new legal and technical processes. In addition to understanding the implementation of new regulations, a customs broker also needs to know how to research answers to complex questions. For example, determining the country of origin of imported merchandise is much less straightforward than it was in the past, as traders source inputs from various countries and may assemble those inputs in yet another country before a final product is fully manufactured or produced.

The past several years, in particular, have posed challenges for both CBP and entities involved in international trade, requiring quick adaption to new requirements that compelled changes to operational processes. Low-value shipments (19 U.S.C. 1321(a)(2)(C)), the volume of which has exploded with the increase in the *de minimis* limit from \$200 to \$800 as a result of section 901(c) of TFTEA and the online shopping revolution, have created multiple levels of issues for international trade that implicate security, health, safety, information collection, timely clearance, and duty evasion. The 2020 statutory implementation of the Agreement between the United States of America, the United Mexican States and Canada (the USMCA), which replaced the North American Free Trade Agreement (NAFTA), requires a new body of knowledge to successfully implement and maintain compliance. See United States-Mexico-Canada Agreement Implementation Act, Public Law 116–113, 134 Stat. 11 (19 U.S.C. Chapter 29). The ongoing COVID–19 pandemic created an unprecedented impact on supply chains and international trade processes.

The customs broker is at the heart of the aforementioned challenges, as the agent of the importer/drawback claimant who works with CBP to resolve problems and facilitate the safe and secure movement of legitimate cargo. CBP believes that the complex and evolving nature of international trade requires a mandatory continuing education framework for individual brokers involved in these trade processes. Simply relying on self-initiated efforts to maintain current knowledge is insufficient to ensure compliance with the wide array of applicable and evolving laws that is necessary to protect the revenue of the United States. Brokers who were assessed penalties by CBP between 2017 and 2020 have held their individual broker license for, on average, 37 years. In contrast, the average individual customs broker license has been held for just 24 years. This suggests that as more time passes since the passing of the customs broker exam, more errors are made. Additionally, as addressed in greater detail in section V.A. of this NPRM, which pertains to the requirements of Executive Orders 13563 and 12866, CBP has seen a recent increase in penalties while data indicates that companies employing individual brokers who voluntarily pursue continuing education in the form of industry certifications generally commit fewer errors.

Regular continuing education is a professional requirement for many dynamic professions, such as in the accounting, legal, and medical industries. The Internal Revenue Service (IRS), for example, has regulations covering tax professionals that include both an examination and a continuing education requirement. *See* 31 CFR part 10. These regulations were based, in part, on the Return Preparer Review report (January 4, 2010), which recommended continuing education for tax preparers to “better leverage the tax return preparer community with the twin goals of increasing taxpayer compliance and ensuring uniform and high ethical standards of conduct for tax preparers.”² The IRS serves as the primary revenue collector of the U.S. Government and has a responsibility for protecting the revenue of the United States. Similarly, CBP is the second largest collector of revenue in the federal government, in the form of duties, taxes, and fees for imported merchandise, and likewise has a responsibility for protecting the revenue of the United States.

As CBP licenses customs brokers to conduct customs business, it is in the best interests of CBP and the PGAs to have a well-educated customs broker community. A customs broker’s involvement in import and/or drawback transactions eases the burden of the government;

² Internal Revenue Service, U.S. Department of the Treasury, *Return Preparer Review*, IRS Publication No. 4832 (January 4, 2010), available at <https://www.irs.gov/pub/irs-news/fs-10-01.pdf>.

the customs broker takes on a large part of the role of educating importers and drawback claimants on the technical requirements of filing in the Automated Broker Interface (ABI)³ and informing them of regulatory requirements for the customs transactions in which they are involved. While there are some self-filers, the vast majority of entries of imported merchandise are filed by customs brokers on behalf of the importers of record. This dynamic generally allows CBP to target a smaller group of individuals when managing trade compliance for revised or new filing requirements. Thus, a customs broker community that continues to stay abreast of changes in the customs practice helps support CBP's crucial work. As the quality of such brokerage services suffers, this would cause CBP to expend additional resources to assist entities involved in international trade with navigating complex import and drawback requirements, which diverts limited resources away from other critical aspects of CBP's trade mission. To ameliorate that consequence, CBP proposes to require customs brokers to maintain their knowledge and skills through the completion of continuing customs broker education.

Importers and drawback claimants also benefit from well-educated customs brokers who are aware of current requirements in the complex and evolving realm of international trade. When an importer or drawback claimant enlists the services of a customs broker, that customs broker is perceived to be knowledgeable of customs laws, regulations, and operational processes; however, an importer or drawback claimant does not know with certainty that the customs broker is in fact knowledgeable of all newly emerging requirements. The continuing broker education requirement would provide importers and drawback claimants with greater assurance that their agents are knowledgeable of customs laws and regulations, familiar with operational processes, and can properly exercise a broker's fiduciary duties.

In recent years, the need for continuing broker education has also attracted the attention of international intergovernmental organizations, such as the World Customs Organization (WCO). In 2018, the WCO published the *WCO Customs Brokers Guidelines*, which is a guidance document wherein the WCO recognizes the need for mandatory continuing education for customs brokers.⁴ In the guidance

³ The Automated Broker Interface (ABI) is an electronic data interchange that allows brokers and entry filers (self-filers) to transmit immediate delivery, entry, and entry summary data electronically to, and receive electronic messaging from, CBP in the Automated Commercial Environment (ACE). See 19 CFR 143.1 and 143.32(a).

⁴ World Customs Organization, *WCO Customs Brokers Guidelines*, at 28 (June 2018), available at <http://www.ucoomd.org/en/topics/facilitation/instrument-and-tools/tools/wco-customs-brokers-guidelines.aspx>.

document, the WCO notes that the passing of an initial broker exam does not ensure that customs brokers stay abreast of changes in customs and related laws and recommends that, on their own or in partnership with other governmental, private, or non-profit organizations, customs administrations should take on an active role in educating the customs broker community about changes in customs and related laws and reinforcing existing knowledge.⁵ Additionally, in the guidance document, the WCO notes that some countries already require customs brokers to complete continuing education.⁶ Accordingly, in proposing to require individual brokers to complete continuing education, this NPRM is generally in line with the WCO's recommendations on best practices for customs administrations.

D. Development of the Proposed Continuing Broker Education Requirement

In recent years, the importance of continuing broker education has received attention on a domestic level. In 2013, the predecessor to the Commercial Customs Operations Advisory Committee (COAC)⁷ recommended that DHS issue regulations requiring customs brokers to complete a minimum of 40 hours of continuing education during a triennial reporting cycle, pursuant to CBP's authority under 19 U.S.C. 1641(f), on the condition that there be no accreditation requirements for such continuing education.⁸

In September 2019, CBP formed the Requirements for Customs Broker Continuing Education Task Force (Task Force), which was placed within COAC under the Rapid Response Subcommittee. The objective was to develop a proposed framework for continuing education for individual brokers. This Task Force was comprised of representatives throughout CBP and licensed customs brokers from around the country with decades of experience with international trade. Through this Task Force, members provided valuable input, advice, and operational perspectives.

⁵ *Id.*

⁶ *Id.*

⁷ COAC is jointly appointed by the Secretary of the Treasury and the Secretary of DHS and advises the Secretary of the Treasury and the Secretary of Homeland Security on all matters involving the commercial operations of CBP. Meetings of COAC are presided over jointly by the Deputy Assistant Secretary for Tax, Trade, and Tariff Policy of the Department of Treasury and Commissioner of CBP. See section 109 of TFTEA.

⁸ For a list of COAC recommendations that were considered open as of April 27, 2016, see Commercial Customs Operations Advisory Committee, *Term to Date Recommendations: Trade Modernization Subcommittee, Recommendation Nos. 10046–10047* (April 27, 2016), available at https://www.cbp.gov/sites/default/files/assets/documents/2019-Dec/_COAC%20Recommendations%20To%20Date%2010001%20-%2010412.pdf.

In conjunction with the work of the Task Force and a previous COAC recommendation,⁹ CBP published an advance notice of proposed rulemaking (ANPRM) in the **Federal Register** (85 FR 68260) on October 28, 2020. The ANPRM announced that CBP was considering the adoption of a continuing education requirement for licensed customs brokers. The ANPRM solicited comments on the tentative framework developed by the Task Force for purposes of gathering further information and data from the broader customs broker community. This request for information and data assisted CBP in considering whether, and if so what type of, requirements would contribute to increased trade compliance. The ANPRM solicited comments on the following issues:

- The number of hours of continuing education that customs brokers should be required to complete;
- The customs broker license holders who should be required to complete continuing education (including license holders who should be exempt from the requirement or required to complete fewer hours of continuing education);
- The types of training, coursework, or other educational activities that should qualify for continuing education credit;
- The manner in which qualifying continuing broker education should be provided (online or in-person);
- Whether subject-matter-specific education requirements should be imposed;
- How compliance with the continuing broker education requirement should be reported to CBP;
- What recordkeeping obligations should exist for the purpose of the continuing broker education requirement;
- What disciplinary actions should be taken if customs brokers fail to report their compliance with the continuing broker education requirement to CBP, or, in the alternative, fail to satisfy the continuing broker education requirement;
- What disciplinary actions should result from the submission of false or misleading information in association with the continuing broker education requirement;
- Whether disciplinary actions should be taken immediately upon a customs broker's failure to report compliance with the continuing broker education requirement, or whether customs brokers should be provided with an opportunity to take corrective actions, including the length of such period;
- Whether there should be an accreditation process to control the quality of the content of the various educational activities (including how such an accreditation process should be administered, how ac-

⁹ See *id.*

creditors should be selected, and whether educational activities offered through certain content providers should automatically qualify for continuing education credit);

- The types of training, coursework, or educational activities that customs brokers already complete on a regular basis;
- How often customs brokers currently participate in continuing education;
- The costs customs brokers would anticipate to incur as a result of the implementation of a continuing broker education requirement; and
- The benefits customs brokers would anticipate as a result of the implementation of a continuing broker education requirement.

The ANPRM provided for a 60-day public comment period, which closed on December 28, 2020. During the 60-day public comment period, CBP received 29 comments.¹⁰ Of the 29 submissions, 23 submissions were generally supportive of the implementation of a continuing education requirement and 5 submissions were not supportive of the adoption of a continuing education requirement. One submission consisted of a question, and, thus, neither expressed the commenter's support of or opposition to a continuing education requirement.

In developing this NPRM, CBP carefully considered all public comments submitted in response to the ANPRM. Below are summaries of comments on topics that received the most attention and short descriptions of how they affected the formulation of the framework proposed in this NPRM. CBP will provide more detailed descriptions of the comments and responses to the issues raised therein when responding to the comments received for this NPRM.

1. Required Number of Hours of Continuing Education

Seven commenters recommended that CBP require customs brokers to complete, at a maximum, 36 hours of continuing broker education every three years, rather than the 40 hours of continuing broker education per triennial period that was considered in the ANPRM. CBP believes that requiring individual brokers to complete on average one hour of continuing education per month will make it easier for individual brokers to plan their continuing education. Continuing education requirements of one hour of continuing education

¹⁰ The public comments can be viewed in their entirety on the public docket for the ANPRM, Docket No. USCBP 2020-0042, which can be accessed through <https://www.regulations.gov>.

per month have been adopted for many other professions.¹¹ CBP also believes that requiring more than 36 hours of continuing broker education per triennial period could be burdensome for the customs broker community (especially individual brokers operating as or working for small businesses) and a lower requirement would be insufficient to ensure that individual brokers keep abreast of changes in customs and related laws. Accordingly, CBP has adopted the commenters' suggestion in this NPRM and is proposing to require that individual brokers complete 36 hours of continuing broker education per triennial period.

2. Qualifying Continuing Education

Seven commenters suggested that corporate, in-house training should be eligible for continuing education credit. CBP agrees that corporate, in-house training can serve as an appropriate continuing education activity, as it is routinely given to employees to provide them with knowledge specifically tailored to their job functions and experience levels. As such, CBP's proposal would allow customs brokers to satisfy the continuing education requirement through corporate, in-house training if the training receives the approval of an accreditor. CBP believes that requiring corporate, in-house training to be approved by an accreditor will ensure that it meets the objectives of the continuing education framework proposed in this NPRM.

Three commenters also suggested that any training or educational activity provided by CBP, or offered by any other U.S. Government agency that routinely offers training relevant to customs business, should automatically qualify for continuing education credit, without the need for accreditation. CBP agrees and believes that these types of activities should automatically qualify for continuing education credit, thus limiting the administrative burden and overall costs associated with the implementation of the proposed rule. Additionally, CBP's trainings are designed to educate the public about important and timely issues facing entities involved in international trade, and, thus, by virtue of their design, meet the objectives of continuing broker education—that is, to assist individual brokers in maintaining

¹¹ See, e.g., Ala. R. Mand. Cont. Legal Ed. Rule 3, available at <https://www.alabar.org/assets/2019/02/MCLE-RULE-BOOK-2017-updated-01-17-2017.pdf> (accessed on July 16, 2021); Ark. R. Minimum Con't Legal Educ. Rule 4, available at https://rules.arcourts.gov/w/ark/rules-for-minimum-continuing-legal-education/#/fragment/zoupio-_Toc44590166/BQCwhgziBcwMYgK4DsDWszlQewE4BUBTADwBdoAvbRABwEtsBaAfX2zgBYOBWATgAYAjADZHASgA0ybKUIQAIokK4AntADk6iRDi5sAG30BhJGmgBCZNsJhcCRerWbrthAGU8pAEJqASgFEAGX8ANQBADkjlwlSMAAJaFJ2MTEgA (accessed on July 16, 2021); Conn. Practice Book § 2-27A, available at <https://www.jud.ct.gov/Publications/PracticeBook/PB.pdf> (accessed on July 16, 2021); Cal Bus & Prof Code § 1275, available at https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=1275&lawCode=BPC (accessed on July 16, 2021).

a sufficient knowledge of customs matters. Accordingly, CBP adopted the commenters' suggestion in this NPRM.

3. Specific Subject Matter Content Requirements

Five commenters raised concerns pertaining to CBP's proposal to require customs brokers to complete a specific number of hours of continuing education on specific subject matter areas (content requirements). In the ANPRM, CBP solicited public comments on the adoption of a continuing broker education framework that would have required the majority (75 percent) of the required continuing education credits to pertain to laws authorizing CBP operations and processes, as well as CBP regulations and programs. Under the proposal considered in the ANPRM, only the remainder (25 percent) would have been available for education focusing on other areas related to international trade (such as other U.S. Government agency requirements).

All commenters that addressed specific subject matter areas raised concerns about the adoption of the ANPRM's stringent content requirement. These commenters noted that such a content requirement would discourage individual brokers from participating in continuing education specifically tailored to their job functions and their experience levels, and, therefore, would inhibit professionalism and competency within the customs broker community. In light of the commenters' concerns, CBP is not proposing to require individual brokers to complete a specific number of hours of continuing education on laws authorizing CBP operations and processes, and CBP regulations and programs. CBP recognizes that the educational needs of individual brokers differ greatly based on each individual broker's position, experience level, and type of employment, and, thus, render content requirements impractical. Additionally, CBP believes that, as CBP and the PGAs offer a sufficient number of free, online-based trainings for an individual broker to meet the required number of continued education credits, there is little risk that an individual broker would opt to complete the same training or educational activity multiple times solely for the purpose of earning the required minimum number of continuing education credits.

4. Recordkeeping Requirements

Four commenters agreed with CBP's suggestion that although individual brokers should maintain records documenting their compliance with the continuing broker education requirement (including specific information), they should not be required to maintain records

in any specific format (*i.e.*, electronically or in paper). Although the commenters agreed with this suggestion, several of the commenters requested that a form be developed in the Automated Commercial Environment (ACE) where customs brokers could record their credits as they are earned and accrued. In accordance with the commenters' suggestions, this NPRM does not propose requiring customs brokers to maintain records documenting their compliance with the continuing broker education requirement in any specific form, although the proposed regulations require such records to include certain information and documentation, which are discussed in further detail in section IV.C.4. of this NPRM. CBP appreciates the commenters' suggestion and will consider developing such a tool in ACE. If developed, customs brokers would not be required to use the ACE tool, but it would serve as an option for individuals to track their credits earned. However, this ACE tool would not be a substitute for maintaining records documenting compliance with the continuing broker education requirement.

5. Economic Impact

Four commenters raised concerns about the costs of requiring continuing education and the potential impact of a continuing broker education requirement on small businesses. CBP appreciates these comments and has developed the proposed framework for continuing broker education with this concern in mind. In addition to lowering the originally proposed number of required hours of continuing education, CBP is also committed to providing free, online content that will satisfy the continuing broker education requirement. CBP already provides at least 36 hours of training or informational webinars on an *annual* basis, which would allow individual brokers to fully satisfy the continuing broker education requirement through free, CBP-provided content. As described in more detail below, CBP is also proposing that, once accreditation has been obtained for training or educational activities, the vast majority of continuing education currently obtained at a broker's expense for various certificate programs offered by the private sector would qualify for continuing education credit.

6. Effectiveness of Continuing Education

Five commenters were opposed to the introduction of a continuing education requirement for customs brokers, arguing that this would not affect compliance and that customs brokers demonstrate their knowledge of customs business on a transactional basis with their clients. A number of the commenters also requested that customs

brokers who do not actively file entries should be exempt from the requirement. CBP disagrees and is proposing that all individual brokers, regardless of filing status, earn continuing education credit, with the exception of those individual brokers who have voluntarily suspended their licenses in accordance with 19 CFR 111.52. Furthermore, CBP continues to believe that the complex and evolving realm of international trade warrants a continuing education framework for individual brokers.

IV. Discussion of Proposed Framework for Continuing Education for Licensed Customs Brokers

CBP is proposing amendments to 19 CFR part 111 to require continuing education for individual customs broker license holders. CBP's proposal includes the addition of a new subpart F to 19 CFR part 111, consisting of §§ 111.101 through 111.104, which will set forth the continuing broker education requirement and the framework for administering this requirement. Proposed § 111.101 sets forth the scope of proposed subpart F, proposed § 111.102 sets forth the obligations that individual customs brokers would have in conjunction with the continuing broker education requirement, proposed § 111.103 contains the requirements that educational activities would be required to meet in order to satisfy the continuing broker education requirement and sets forth an accreditation process for certain training or educational activities, and proposed § 111.104 sets forth the disciplinary proceedings for the failure to comply with the continuing broker education requirement.

CBP is also proposing to amend several existing provisions in 19 CFR part 111. CBP is proposing to require individual brokers to certify and report their compliance with the continuing broker education requirement as part of the submission of the status report, which is due on a triennial basis (hereinafter, referred to as "status report" or "triennial report") by amending § 111.30(d). Additionally, CBP is proposing to amend § 111.0, which sets forth the scope of part 111, in order to reflect the addition of proposed subpart F, and amend § 111.1, which is a definitional provision, in order to define certain terms as they are used in the context of the continuing broker education requirement. Finally, CBP is proposing to reserve §§ 111.97 through 111.100 for future use. The proposed changes are described in detail below.

A. Modifications to the Scope of 19 CFR Part 111

Section 111.0 sets forth the scope of the provisions contained in 19 CFR part 111, which currently include the licensing of, and granting of permits to, persons desiring to transact customs business as cus-

toms brokers, the duties and responsibilities of customs brokers, and the grounds for disciplining customs brokers. CBP is proposing to revise the second sentence of § 111.0 to reflect the proposed addition of regulatory provisions requiring individual brokers to satisfy a continuing education requirement.

B. Definitions for the Proposed Continuing Broker Education Framework

Section 111.1 provides definitions for terms as they appear in 19 CFR part 111. For purposes of the creation of a continuing education requirement for individual brokers, CBP is proposing the addition of definitions of four terms—“continuing broker education requirement”, “continuing education credit”, “qualifying continuing broker education”, and “triennial period”. Although amended § 111.1 would continue to list definitions in alphabetical order, this section discusses the proposed definitions in logical order, for explanatory purposes.

The term “qualifying continuing broker education” defines any training or educational activity that is eligible or, if required, has been approved for continuing education credit, in accordance with proposed § 111.103. This definition indicates that a wide range of training or educational activities will meet an individual broker’s obligation to complete continuing education, which must satisfy the requirements set forth in proposed § 111.103.

The term “continuing education credit” defines the unit of measurement used for meeting the continuing broker education requirement. The smallest recognized unit is one continuing education credit, which requires 60 minutes of continuous participation in a qualifying continuing broker education program, as defined in proposed § 111.103(a). For qualifying continuing broker education lasting more than 60 minutes, one continuing education credit may be claimed for the first 60 minutes of continuous participation, and half of one continuing education credit may be claimed for every full 30 minutes of continuous participation thereafter. For example, for a qualifying continuing broker education program lasting more than 60 minutes but less than 90 minutes, only one continuing education credit may be claimed. In contrast, for a qualifying continuing broker education program lasting 90 minutes, 1.5 continuing education credits may be claimed.

The term “continuing broker education requirement” defines an individual customs broker license holder’s obligation to complete a certain number of continuing education credits of qualifying continuing broker education, as set forth in proposed subpart F of part 111, in order to maintain sufficient knowledge of customs and related

laws, regulations, and procedures, bookkeeping, accounting, and all other appropriate matters necessary to render valuable service to importers and drawback claimants.

The term “triennial period” defines a period of three years commencing on February 1, 1985, or on February 1 in any third year thereafter.¹² As explained in further detail below, CBP is proposing to require individual brokers to report and certify compliance with the continuing broker education requirement on the triennial report. Thus, for purposes of clarification, CBP is proposing a definition for the 3-year period between the due dates of two consecutive status reports.

C. Continuing Education Requirements for Customs Brokers

In addition to requiring individual brokers to participate in continuing education activities, the proposed framework includes provisions imposing additional related duties upon individual brokers, such as reporting and recordkeeping requirements, that promote compliance and allow for the enforcement of the continuing education requirement. For these reasons, the proposed framework also contains provisions authorizing disciplinary actions upon a broker’s failure to comply with these requirements. These requirements are contained in proposed §§ 111.102 and 111.104, which are discussed in detail below.

1. Customs Broker License Holders Subject to Continuing Broker Education Requirement

Proposed § 111.102(a) sets forth the customs broker license holders who will be subject to the continuing broker education requirement. Specifically, proposed § 111.102(a) provides that only individual customs broker license holders (individual brokers) will be required to complete qualifying continuing broker education. Proposed § 111.102(a) also exempts two groups of individual brokers from this requirement—namely, individual brokers who have voluntarily suspended their license in accordance with § 111.52, and individual customs broker license holders who have not held their license for an entire triennial period at the time of the submission of the status report as required under § 111.30(d). CBP does not believe that it is necessary to require continuing education for individual brokers who have not held their license for an entire triennial period at the time that their first triennial report is due, because these individual bro-

¹² February 1, 1985, was the first due date for the triennial reporting requirement, and, thus, February 1 in any third year thereafter is the date on which the triennial report becomes due. *See* 19 CFR 111.30(d)(1).

kers have recently demonstrated a sufficient baseline knowledge of customs matters by passing the customs broker examination.

CBP is proposing to exempt individual brokers who have voluntarily suspended their license from the continuing broker education requirement because customs brokers may choose to voluntarily suspend their licenses for many reasons, including changes in a broker's personal life or the entry into federal service (which prohibits the customs broker from concurrently serving as a customs broker to transact customs business on behalf of clients in dealings with the federal government). As some of these reasons may prevent a broker from participating in or attending qualifying continuing broker education programs, CBP believes that requiring individual brokers to comply with the continuing broker education requirement during a period of voluntary suspension would be overly burdensome.

At this time, CBP is not proposing to impose a similar obligation onto corporation, partnership, or association brokers (hereinafter, collectively referred to as "corporate brokers"), because knowledge is held at the individual level. The reason is because corporate brokers are comprised of one or more individual brokers and the individual brokers will be subject to the continuing education requirement. Furthermore, the training required of the employees of a customs broker is already taken into consideration when determining whether the license holder exercises responsible supervision and control. Pursuant to 19 CFR 111.28(a), every licensed member or officer of a corporate broker that is an individual broker, as well as every individual broker operating as a sole proprietor, is obligated to exercise responsible supervision and control over the transaction of the customs business of the sole proprietorship, partnership, association, or corporation.¹³ Therefore, individual brokers who serve as members or officials of a corporate broker, as well as individual brokers who operate as sole proprietorships with employees, are already incentivized to ensure that the employees of the sole proprietorship, partnership, association, or corporation complete continuing education. Accordingly, CBP does not believe that it is necessary to impose a similar obligation on corporate brokers at the organizational level.

¹³ Section 111.1 defines the phrase "responsible supervision and control" and provides, in relevant part, that one of the factors that CBP will consider in determining whether the customs broker exercises responsible supervision and control is the training required of the employees of the broker. However, the determination of what is necessary to perform and maintain responsible supervision and control will vary depending upon the circumstances in each instance. See 19 CFR 111.1.

2. Required Minimum Number of Continuing Education Credits

Proposed § 111.102(b) sets forth the number of continuing education credits that individual brokers, who, pursuant to proposed § 111.102(a), are subject to the continuing broker education requirement, must complete. Specifically, proposed § 111.102(b) provides that these individual brokers are required to complete at least 36 continuing education credits per triennial period, except upon the reinstatement of a license following a period of voluntary suspension as described in § 111.52. Upon consideration of the public comments received on the ANPRM, CBP is no longer proposing to require 40 continuing education credits per triennial period, as this will simplify the proration of continuing education credits for the purposes discussed below.

When a broker chooses to reactivate his or her license following a period of voluntary suspension, the broker generally contacts CBP to begin the reinstatement process. This process determines the precise date on which the license will be reinstated, which may occur at any time during the triennial period. Thus, after a period of voluntary suspension, the completion of the full 36 continuing education credits within the remainder of the current triennial period could impose an undue burden upon the individual broker, depending on when during the triennial period the reinstatement occurs. To address this, proposed § 111.102(b) provides that, following the reinstatement of a license after a period of voluntary suspension, the number of continuing education credits required for the triennial period (that is, the triennial period during which the reinstatement of the license occurs) is calculated on a prorated basis, of one continuing education credit for each complete remaining month until the end of the triennial period.

For example, if, following a period of voluntary suspension, an individual broker's license were to be reinstated on March 21, 2028, the individual broker would only be required to complete 22 continuing education credits during the triennial period (February 1, 2027, to February 1, 2030) in which the license was reinstated. Effectively, the amount of continuing education credits required is prorated for the number of full months remaining in the triennial period (April 1, 2028, to February 1, 2030). As another example, if the individual broker's license were to be reinstated on February 1, 2027, the individual broker would be required to complete all 36 continuing education credits during the triennial period. When, following a period of voluntary suspension, the individual broker contacts CBP to request the reinstatement of the license, CBP will assist the broker in deter-

mining the prorated number of continuing education credits that he or she will be required to complete during the current triennial period.

3. Reporting of Compliance With the Continuing Broker Education Requirement

Proposed § 111.102(c) provides that individual brokers, who are required to comply with the continuing broker education requirement, will be subject to an additional reporting obligation. Specifically, CBP is proposing to require individual brokers to report and certify their compliance with the continuing broker education requirement upon the submission of the status report required under existing § 111.30(d).

Current § 111.30(d)(1) requires both individual and corporate brokers to file a status report with CBP. The status report is due on February 1 of each third year after 1985, and will be considered timely filed as long as the report is received during the month of February. As part of the submission of the triennial report, customs brokers are required to pay a fee, which is prescribed in paragraph (d) of § 111.96. Status reports must be addressed to the director of the port through which the license was delivered to the licensee (*see* § 111.15), or, since the February 2021 triennial period, can be filed in the eCBP portal (available at <https://e.cbp.dhs.gov/ecbp/#/main>). The information that must be included in a status report submitted by an individual broker is set forth in current § 111.30(d)(2).

As proposed § 111.102(c) would impose upon individual brokers the obligation to report and certify their compliance with the continuing broker education requirement upon the submission of the status report, CBP is also proposing to amend current § 111.30(d)(2) to reflect this obligation by adding a new paragraph (d)(2)(iv) to reflect that individual customs brokers must report and certify their compliance with the continuing broker education requirement. CBP is also proposing minor grammatical changes to existing paragraphs (d)(2)(ii) and (iii) of § 111.30 in order to allow for the addition of proposed paragraph (d)(2)(iv); however, these changes are not substantive. Individual brokers who file paper-based triennial reports with CBP would report and certify compliance by including a written statement in the triennial report that reports and certifies their compliance with the continuing broker education requirement.

CBP is proposing to require individual brokers to report and certify compliance on the triennial report for two reasons. First, as the status report has been an integral part of maintaining a customs broker license since 1985, this mechanism is familiar to customs brokers and

will minimize any additional burden that the new reporting obligation would place upon individual brokers. As individual brokers are already accustomed to the submission of status reports, individual brokers would not need to familiarize themselves with a new type of information collection. Second, aligning the timeframe for continuing education with the three-year filing timeframe for the status report will give individual brokers a number of years to earn the required number of continuing education credits. This will provide them with flexibility and the opportunity to select qualifying continuing broker education programs that best meet their individual educational needs.

4. Recordkeeping Requirements for Individual Customs Brokers

In conjunction with the continuing education requirement, CBP is proposing to require individual brokers to maintain records documenting their completion of the required number of continuing education credits. This requirement is set forth in proposed § 111.102(d), and is intended to enable CBP to verify an individual broker's compliance with the requirements set forth in paragraphs (a) and (b) of proposed § 111.102.

Proposed § 111.102(d)(1) provides that, for a period of three years following the submission of the status report required under § 111.30(d), an individual broker must retain certain information and documentation pertaining to the qualifying continuing broker education completed during the triennial period. Proposed § 111.102(d)(1) contains a list of the type of information and documentation that must be retained, consisting of: (1) The title of the qualifying continuing broker education attended; (2) the name of the provider or host of the qualifying continuing broker education; (3) the date(s) attended; (4) the number of continuing education credits accrued; (5) the location of the training or educational activity, if the training or educational activity is offered in person; and (6) any documentation received from the provider or host of the qualifying continuing broker education that evidences the individual broker's registration for, attendance at, completion of, or other activity bearing upon the individual broker's participation in and completion of the qualifying continuing broker education. The last item would include receipts or confirmations documenting the individual broker's intention to attend the qualifying continuing broker education program, written or electronic materials provided as part of the attendance of the training or educational activity, or certificates of completion or attendance. An individual broker would only be required to retain such documentation, if such documentation is made available by the provider or host

of the qualifying continuing broker education to attendees of the training or educational activity. Unlike the general broker record retention requirement in current 19 CFR 111.23(b), the recordkeeping requirement in proposed § 111.102(d)(1) only requires the records to be retained for a period of three years following the submission of the triennial report (rather than for a five-year period).

Upon consideration of the comments received in response to the ANPRM, CBP is not proposing to require individual brokers to maintain the records in a specific format (*i.e.*, electronically or in paper). For example, if the individual broker received paper documents in the mail or in person from an education provider, the individual broker could retain the information in that form, or could scan and retain it in electronic form. Based on several public comments to the ANPRM, CBP will explore building a tool in ACE that would serve as a place to record and track continuing education credits, but this would not be a substitute for document retention by the individual broker. Individual brokers would not be required to access or use this tool; rather, it would provide a means to record continuing education credits earned over time if convenient for the individual broker.

Proposed § 111.102(d)(2) provides CBP with authority to request the information and documentation for a period of three years following the submission of the status report required under § 111.30(d)(2). CBP can request the information and documentation be made available for in-person inspection, or be delivered to CBP by either hardcopy or electronic means, or any combination thereof. Proposed § 111.102(d) is intended to enable CBP to verify an individual broker's compliance with the requirements set forth in paragraphs (a) and (b) of this proposed section—that is, the completion of the required number of continuing education credits during the triennial period.

5. Disciplinary Actions

Proposed § 111.104 authorizes CBP to take disciplinary actions, if an individual broker, who is required to complete qualifying continuing broker education, submits a triennial report but fails to report and certify his or her compliance with the continuing broker education requirement on the triennial report. These actions take a path of “progressive discipline” by imposing increasingly serious measures following a reasonable time and opportunity to take corrective actions. This approach is rooted in CBP's goal to ensure that all individual brokers participate in continuing education activities, but not to take disciplinary actions against brokers for mere clerical errors, such as the failure to report compliance with the continuing broker education requirement due to a mere oversight.

Proposed § 111.104(a) provides that, if an individual broker, who is required to complete qualifying continuing broker education, submits a triennial report but fails to report and certify his or her compliance with the continuing broker education requirement on the triennial report, CBP will notify the individual broker of his or her noncompliance. Pursuant to proposed § 111.104(a), CBP would send the notification to the address reflected in CBP's records or transmit it electronically pursuant to any electronic means authorized by CBP for that purpose. This language would authorize CBP to send such notification to the mailing address that the individual broker listed on the status report or via email (if the individual broker's email address is on file with CBP).

Proposed § 111.104(b) requires the noncompliant individual broker to take appropriate corrective actions within 30 calendar days upon the issuance of such notification. During this period, the individual broker would be provided with an opportunity to take corrective actions without being subjected to any disciplinary consequences for his or her noncompliance. As reflected in paragraphs (b)(1) and (2) of proposed § 111.104, the nature of the required corrective actions is determined by the reason for the individual broker's failure to report and certify compliance on the triennial report. If the individual broker completed the required number of continuing education credits, but failed to report and certify his or her compliance with the continuing broker education requirement on the triennial report, the broker would merely be required to submit a corrected triennial report that reflects the broker's compliance. If the individual broker did not report and certify compliance on the triennial report because the broker did not complete the required number of continuing education credits, the broker would be required to complete the required number of continuing education credits and then submit a corrected triennial report.

Proposed § 111.104(c) provides that, if the noncompliant individual broker fails to take the required corrective actions within 30 calendar days upon the issuance of the aforementioned notification, CBP will take actions to suspend the broker's individual license. Upon the suspension of the individual broker's license and the issuance of the order of suspension, the individual broker would be provided with an additional opportunity to take the required corrective actions before CBP would take more serious disciplinary measures. Specifically, in paragraph (d), proposed § 111.104 provides that, if following the suspension of the license the noncompliant individual fails to take the required corrective actions within 120 calendar days upon the issuance of the order of suspension, CBP will take actions to revoke the

individual broker's license without prejudice to the filing of an application for a new license. As proposed § 111.104(d) provides that the individual broker's license would be revoked without prejudice to the filing of an application for a new license, the individual broker would not be prevented from seeking a new individual customs broker license at a later point in time.

Existing § 111.53(c) provides the relevant basis for the suspension and/or revocation of a customs broker's license when an individual broker fails to submit a status report reporting and certifying his or her compliance with the continuing broker education requirement. Section 111.53(c), which authorizes CBP to initiate proceedings for the suspension, for a specific period of time, or revocation of the license or permit of any broker for any violation of a statutory provision enforced by CBP or any rule or regulation issued by CBP, implements 19 U.S.C. 1641(d)(1)(C). Consequently, pursuant to 19 U.S.C. 1641(d)(2)(B), as implemented by subpart D of part 111 (19 CFR part 111, subpart D), CBP would be required to comply with certain formal procedural requirements in suspending or revoking the individual broker's license, which would conclude with the issuance of an order of suspension or revocation. This is reflected in paragraphs (c) and (d) of proposed § 111.104 through the cross-references to subpart D of part 111. As such, CBP is not adopting either of the proposals considered in the ANPRM—that is, to suspend or revoke an individual broker's license by operation of law.

The provisions of proposed § 111.104 would only apply to cases in which an individual broker, who is required to complete qualifying continuing broker education, submits a triennial report but fails to report and certify his or her compliance with the continuing broker education requirement on the triennial report. CBP believes that any other type of misconduct could be sufficiently addressed through existing regulatory provisions. For example, if an individual broker were to fail to timely submit a triennial report, or to submit no triennial report at all, CBP would continue to seek the suspension and/or revocation of the individual broker's license in accordance with the provisions of current § 111.30(d)(4). Additionally, current § 111.53(a), which implements 19 U.S.C. 1641(d)(1)(A), authorizes CBP to initiate proceedings for the suspension, for a specific period of time, or revocation of the license or permit of a customs broker, if the broker has, among others, made in any report filed with CBP any statement which was, at the time and in light of the circumstances under which it was made, false or misleading with respect to any material fact, or has omitted to state in any report any material fact which was required.

In the context of the proposed framework, CBP foresees that violations of § 111.53(a) could arise from the following misconduct. First, a violation of § 111.53(a) would occur, if an individual broker were to falsely report and certify compliance with the continuing broker education requirement on the triennial report when, at the time of the submission of the triennial report, the individual broker had not completed the required number of continuing education credits. This would include cases in which an individual broker, who has not yet completed the required number of continuing education credits, submits a triennial report on which the broker reports and certifies compliance, but later completes the required number of continuing education credits. Second, a violation of § 111.53(a) would occur, if, in accordance with proposed § 111.102(d)(2), CBP were to request additional documentation from an individual broker to verify the broker's compliance with the continuing broker education requirement, and the documentation submitted by the broker were to contain any statement which, at the time and in light of the circumstances under which it was made, is false or misleading with respect to any material fact, or omitted a material fact. This would include the submission of falsified documentation, documentation containing false or misleading statements of material fact, or documentation omitting any material fact (such as the title or provider of a continuing education program, if the training or educational activity did not meet the requirements for qualifying continuing broker education). Third, a violation of § 111.53(a) would occur, if, in accordance with proposed § 111.102(d)(2), CBP were to request additional documentation from an individual broker to verify the broker's compliance with the continuing broker education requirement, and the individual broker were to be unable to submit any documentation in response to CBP's request.

D. Training and Educational Activities That Qualify as Continuing Broker Education

Although amended § 111.1 contains a proposed definition of the term "qualifying continuing broker education", this definition also provides that, in order to constitute qualifying continuing broker education, a training or educational activity must meet certain additional requirements. These requirements are set forth in paragraphs (a) and (b) of proposed § 111.103. Specifically, paragraph (a)(1) sets forth requirements for categories of educational providers (including both government and non-government providers), while paragraph (a)(2) lists the types of training or educational activities that are recognized for purposes of the continuing broker education requirement. Paragraph (b) of proposed § 111.103 contains provisions per-

taining to continuing education credits that are earned as an instructor, discussion leader, and speaker.

1. Categories of Educational Providers

Proposed § 111.103(a)(1) divides training or educational activities into two categories based on the identity of the content provider offering the training or educational activity. Pursuant to proposed paragraph (a)(1)(i), the first category consists of training or educational activities offered by U.S. Government agencies. Specifically, paragraph (a)(1)(i) provides that qualifying continuing broker education constitutes any training or educational activity offered by CBP, whether online or in-person, and any training or educational activity offered by another U.S. Government agency, whether online or in-person, if the content is relevant to customs business. These types of trainings or educational activities would not require the approval of a CBP-selected accreditor and would qualify for continuing education credit automatically.

CBP is proposing that training or educational activities offered by U.S. Government agencies should automatically qualify for continuing education credit, without the approval by a CBP-selected accreditor, because quality control of the content is less of a concern with regard to this type of content provider. Training or educational activities offered by CBP are designed to educate the public about important and timely issues faced by entities involved in international trade. Thus, CBP believes that, by virtue of their design, these training or educational activities meet the objectives of the continuing broker education framework—that is, to assist individual brokers in maintaining a sufficient knowledge of customs matters. Additionally, CBP believes that other U.S. Government agencies carefully select educational content based on timeliness and importance, and accurately present the content to members of the public.

CBP believes that allowing training or educational activities offered by CBP, or other U.S. Government agencies, if they provide educational content that is relevant to customs business, to automatically qualify for continuing education credit will limit the administrative burden and costs associated with the implementation of the proposal. CBP's proposal deliberately provides individual brokers with wide latitude when determining whether a training or educational activity offered by an U.S. Government agency other than CBP is relevant to customs business. This discretion empowers individual brokers with the ability to select training or educational activities based on their individual educational needs. CBP also anticipates making a list of recommended U.S. Government agency provided training or educa-

tional activities publicly available on the CBP website to allow individual brokers to easily identify activities that are free of cost and automatically qualify for continuing education credit.

Pursuant to proposed paragraph (a)(1)(ii), the second category of educational providers consists of training or educational activities offered by a content provider other than a U.S. Government agency. Any training or educational activity not offered by a U.S. Government agency (such as private-sector entities, non-profit organizations, and foreign government agencies), whether online or in-person, will not be considered qualifying continuing broker education, unless the training or educational activity has been approved for continuing education credit by a CBP-selected accreditor before the training or educational activity is provided. CBP is proposing to require accreditation for such training or educational activities to ensure that they offer educational content that is high-quality, current, relevant, and accurate, and that it is directly tied to customs business.

As noted previously, CBP is not proposing the adoption of subject-matter-specific content requirements at this time in order to enable individual brokers to participate in educational opportunities that provide them with knowledge directly relevant to their specific position and experience level. Additionally, to encourage the creation of low-cost educational opportunities that satisfy the continuing broker education requirement, CBP's proposal does not differentiate between educational opportunities that are offered online or in-person. CBP intends for this to minimize the costs to small businesses and customs brokers in remote locations so that individual brokers will not be required to travel to attend qualifying continuing broker education programs. CBP believes that the opportunity for individual brokers to earn the required number of continued education credits through free, online-based trainings would further incentivize individual brokers to select training or educational activities based on their educational needs and, thereby, limit the risk that individual brokers complete the same training or educational activities multiple times solely for the purpose of earning the required minimum number of continuing education credits.

Regardless of who provides the training or educational activities, CBP anticipates that providers will issue certificates to customs brokers upon completion. CBP will make certificates of attendance available for all of its training or educational activities to those participants who want them. For online-based training or educational activities, CBP will make certificates of attendance available for download or printing at the conclusion of the presentation. For in-person activities, such as the Trade Symposium, CBP will make paper

certificates available to licensed customs brokers to pick up prior to the end of the conference. Additionally, because one of the factors to become a CBP-selected accreditor will be to design and develop certificates for approved education providers to use as needed, certificates of attendance will also be available for any qualifying continuing broker education offered by private, non-profit, or foreign government entities.¹⁴

CBP will work with its PGAs to make them aware of the new continuing education requirements, if finalized, so that the PGAs can consider making available certificates of attendance or completion, whether in electronic or paper form. However, CBP is unable to require its PGAs to provide certificates of attendance or completion. Proposed § 111.102(d)(1)(iv) thus only requires an individual broker to retain any documentation that the individual broker received from the provider or host of the qualifying continuing broker education that evidences the individual broker's registration for, attendance at, completion of, or other activity bearing upon the individual broker's participation in and completion of the qualifying continuing broker education. Therefore, the language in proposed § 111.102(d)(1)(iv) accounts for the possibility that certificates of attendance or completion may not be issued for all qualifying training or educational activities provided by its PGAs.

2. Recognized Training or Educational Activities

CBP is proposing that only certain categories of training or educational activities may be considered qualifying continuing broker education. The list of recognized categories of training or educational activities is contained in paragraphs (a)(2)(i) through (iv) of proposed § 111.103. Paragraph (a)(2)(i) provides that the first category consists of coursework, seminars, or workshops, whether online or in-person, that are conducted by an instructor, discussion leader, or speaker. This category would include most webinars, in-house training, university or college courses, or similar educational programs.

Paragraph (a)(2)(ii) provides that the second category includes symposia and conventions, whether online or in-person. This category would include the annual CBP Trade Symposium and similar educational programs. However, meetings that are conducted in accordance with the provisions of the Federal Advisory Committee Act, as amended (5 U.S.C. App.) (FACA), are expressly excluded from this category. As such, individual brokers would not be permitted to claim

¹⁴ As part of the RFP process, applicants will be required to provide CBP with information how they plan to handle the post-course certification process for those course providers who apply for accreditation.

continuing education credit for their participation in committees, subcommittees, workgroups, and any other group organized under the auspices of the Commercial Customs Operations Advisory Committee (COAC), as well as public COAC meetings. CBP is proposing to exclude FACA meetings because these meetings do not serve an educational purpose. FACA meetings are intended, instead, to solicit advice from advisory committee members and to receive input from the public that may later form the basis for government decisions.

The last two categories of recognized training or educational activities are set forth in paragraphs (a)(2)(iii) and (iv) which will permit individual brokers serving as instructors, discussion leaders, or speakers to receive continuing education credit for the time spent preparing a subject matter for presentation and presenting a subject matter (hereinafter, referred to as “special allowance”). Paragraphs (a)(2)(iii) and (iv) provide that the subject matter must be presented as part of a training or educational activity that falls within one of the first two recognized categories of training or educational activities (that is, the categories described in paragraphs (a)(2)(i) and (ii) of proposed § 111.103), and the special allowance for instructors, discussion leaders, or speakers is subject to the conditions and limitations set forth in proposed § 111.103(b).

While CBP is proposing to carve out a special allowance for certain instructors, discussion leaders, or speakers, CBP is not proposing to permit individual brokers to claim continuing education credit for authoring articles, books, or other publications. CBP believes that the learning involved in the authoring of a publication does not necessarily equate to the knowledge derived from a continuing education program that is current and developed by an individual or organization qualified in the relevant subject matter, as the learning does not necessarily include an interactive component. For this reason, CBP is also not including credit hours for independently reading articles, books, or other publications or for paid subscriptions to these types of materials. If these materials are part of an accredited course, then the course hours may be eligible for continuing education credit.

3. Special Allowance for Instructors, Discussion Leaders, and Speakers

Proposed § 111.103(b) sets forth additional requirements and limitations pertaining to the special allowance for instructors, discussion leaders, and speakers. In proposed paragraph (b)(1), CBP sets forth that, contingent upon the approval by a CBP-selected accreditor, an individual broker may claim one continuing education credit for each full 60 minutes spent presenting subject matter, or preparing subject

matter for presentation, as a discussion leader, or speaker at a training or educational activity described in paragraphs (a)(2)(i) and (ii) of this section.

However, the special allowance for instructors, discussion leaders, and speakers is subject to limitations, which are set forth in proposed § 111.103(b)(2) and (3). Specifically, proposed § 111.103(b)(2)(i) provides that, for any session of presentation given at one time, regardless of the duration of that session, an individual broker may claim, at a maximum, one continuing education credit for the time spent preparing subject matter for that presentation pursuant to paragraph (b)(1)(ii). Further, proposed § 111.103(b)(2)(ii) also imposes a limit on the total number of continuing education credits that an individual broker can earn based on his or her activities as an instructor, discussion leader, or speaker. This limit is 12 continuing education credits per triennial period. CBP is proposing these limitations to ensure that individual brokers receive education in a broad variety of subject matters, not just provide instructions, possibly exclusively on the same subject matter.

As specified in proposed § 111.103(b)(3), any instructor, discussion leader, or speaker seeking to claim continuing education credit for the preparation of a subject matter for presentation, or the presentation of a subject matter, at one of a training or educational activity described in paragraph (a)(2)(i) or (ii) of proposed § 111.103, must obtain approval by a CBP-selected accreditor, regardless of whether the training or educational activity is offered by a U.S. Government agency or another provider. CBP is proposing this requirement in order to ensure that the effort and quality of the educational experience derived from the activities as an instructor, discussion leader, or speaker is commensurate with the award of continuing education credit.

Like content providers, the means by which an individual broker claiming continuing education credits under the special allowance would be notified of an accreditor's approval would vary based on the terms of the accreditor's contractual relationship with CBP, which is discussed in further detail in section IV.E. of this NPRM. Depending on the terms of the accreditor's contractual relationship with CBP, the individual broker would be notified of the accreditor's approval either in writing or electronically, or both. CBP anticipates that, as part of the selection process for the accreditors, it will require each accreditor to (1) provide CBP with a running list of activities that the accreditor approved, and/or (2) publish this list on its website. A failure to observe the requirements and limitations set forth in proposed § 111.103(b) would result in a failure to comply with the con-

tinuing broker education requirement for the triennial period. Thus, if an individual broker were to fail to observe the requirements and limitations set forth in proposed § 111.103(b) and to report and certify compliance with the continuing broker education requirement on the triennial report, the individual broker would falsely report and certify compliance on the triennial report. As a result, CBP could impose disciplinary actions pursuant to proposed § 111.104 and existing § 111.53(a).

E. Accreditation of Providers of Continuing Broker Education

CBP believes that it is necessary to implement an accreditation process for training or educational activities not offered by a U.S. Government agency, including the special allowance for instructors, discussion leaders, or speakers, to ensure that such activities meet the objectives of the continuing broker education requirement. Due to resource constraints, CBP is not well positioned to administer the accreditation of training and educational activities. Thus, CBP, through the Office of Trade, is proposing to select accreditors who will review and approve or deny such training or educational activities for continuing education credit. Below is a description of the selection process, which is outlined in proposed § 111.103(c), and the accreditation process, which is outlined in paragraphs (d) and (e) of proposed § 111.103.

1. Selection of Accreditors

As reflected in proposed § 111.103(c), CBP is proposing to select third-party accreditors using common government contracting procedures, which would include the issuance of a Request for Information (RFI) and a Request for Proposal (RFP). CBP would administer this process through the Office of Trade in accordance with the requirements of the Federal Acquisition Regulation (48 CFR chapter 1) (the FAR). While selected accreditors would administer the accreditation of the training or educational activities as part of their contractual relationship with CBP, selected accreditors would not receive a monetary award from CBP as a result of this contractual relationship. However, selected accreditors would be permitted to charge content providers for their services to recoup their expenses in reviewing and approving or denying training or educational activities for continuing education credit, as long as the fees are clearly displayed on the accreditors' website and materials. The remainder of this section lays out the basic framework that CBP is proposing for the review and approval of potential accreditors. The specific obligations that ac-

creditors under contract with CBP would be required to meet would be provided in more detail in the RFI, and then in even more granular detail, in the RFP.

Because this is a new program for both CBP and the customs broker community, CBP plans to initiate the selection process through the issuance of an RFI. The RFI would be posted in the System for Award Management (available at <https://sam.gov/SAM/>) (SAM).¹⁵ The RFI would lay out the basic criteria that CBP believes a future accreditor must meet in order to successfully review activities for continuing education credit. Currently, CBP expects to propose the following criteria:

- At least one key official in the entity must have a customs broker's license;
- A demonstrated knowledge of international trade laws, customs laws and regulations, and general customs practices for imported goods and goods subject to drawback;
- A demonstrated knowledge of other U.S. Government agencies that are involved in transactions of international trade;
- A list of professional references;
- Resumes for the key personnel who would be involved in accrediting course work;
- A description of the process for how someone would submit a training or educational activity proposed for credit to the accreditor, including electronic and online methods for submitting materials for consideration;
- A description of the criteria the accreditor would use to approve or deny trainings or educational activities for continuing education credit;
- A description of how the accreditor would avoid conflicts of interest;
- A description of how the accreditor would track accreditation activity for CBP review;
- A description of how customers can provide feedback to the accreditor and CBP on the approval process;
- An estimate of the "turn around" time for approving/denying activities under consideration for accreditation; and
- An estimate of the charge, if any, for approving/denying an activity under consideration for accreditation.

¹⁵ SAM is a U.S. Government website operated by the General Services Administration (GSA), and there is no cost for any entity to use the system. Through SAM, any entity can register to do business with the U.S. Government, update or renew an entity's registration, check the status of an entity registration, and search for any entity registration and exclusion records.

Based on these criteria, along with other details that would be provided in the RFI, CBP would then hold an “industry day” with interested parties. As CBP-selected accreditors would not receive a monetary award from CBP, CBP anticipates that trade associations and law firms specializing in customs matters will make up the majority of parties interested in becoming CBP-selected accreditors. However, CBP encourages all interested parties to participate in the RFI process as it will provide interested parties with an opportunity to provide input that will shape the accreditation process. As part of this industry day, CBP would present its needs and expectations for the accreditation process and receive input on its initial proposal from parties that are potentially interested in providing accreditation services. This information would then be used to refine the above-listed criteria and prepare an RFP. CBP would then post the RFP in SAM. Following the publication of the RFP, interested parties would then respond with their proposals of how they would administer the accreditation process based on the criteria set forth in the RFP. A party that participated in the RFI process would be under no obligation to put forth a response to the RFP. Conversely, if a party interested in applying to become an accreditor did not respond to the RFI or participate in the industry day process, that party would not be precluded from responding to the RFP. CBP is not proposing an “application fee” for interested parties to submit a response to the RFP (fees to submit responses to RFPs are not permitted under the FAR).

In addition to the publication of the RFI and RFP in SAM, CBP is proposing to announce the availability of the RFI and RFP through the publication of notices in the **Federal Register** by the Executive Assistant Commissioner, Office of Trade. This would ensure that the requests reach as wide an audience as possible, including parties that do not traditionally contract with the U.S. Government. In accordance with the provisions of proposed § 111.103(c), these **Federal Register** notices would contain information pertaining to the criteria that the Office of Trade will use to select an accreditor and the period during which CBP will accept applications by potential accreditors.

Following the issuance and publication of the RFP, CBP would review the proposals received and rate them based on the factors provided in the relevant section of the RFP. Based on these ratings, CBP would then select the accreditors approved for that cycle. Parties not selected for the cycle would have the opportunity to protest CBP’s decision in accordance with the procedures set forth in the FAR. Following the selection of the approved accreditors, the Office of Trade will notify the approved accreditors of their award, and the Executive Assistant Commissioner, Office of Trade, will publish a

notice in the **Federal Register** to inform the public and the customs broker community of the parties approved to provide accreditation services. In accordance with the provisions of proposed § 111.103(c), this **Federal Register** notice would contain information pertaining to the selected accreditors' period of award.

CBP is not proposing to set a target or a limit on the number of accreditors. Rather, the number will be determined by the strength of the proposals received and CBP's needs at the time of the RFP. CBP is proposing to introduce a period of award of three years, subject to renewal. This will provide CBP-selected accreditors with sufficient time to establish their accreditation programs and to begin with the accreditation of educational content while not creating a long period of time during which new interested parties would have to wait for the next selection cycle. In accordance with the provisions of the FAR, either party to the contract—whether the accreditor or CBP—would be permitted to terminate the contract with 30-days' notice. If an accreditor were to leave the program, the Executive Assistant Commissioner, Office of Trade, would publish a notice in the **Federal Register** announcing the departure.

Once awards have been made for the first cycle of accreditors, CBP envisions working closely with them—as a group and as individual parties—to provide directions and instructions, set expectations, develop due dates and milestones, and create a public outreach campaign to inform the affected customs broker community of the new program and opportunities. Once the program has been fully implemented, the Broker Management Branch within the Office of Trade will meet with the accreditors periodically to identify and exchange best practices, address areas of concern, and develop program metrics that can be shared with COAC and other members of the public as needed. Following the first 3-year cycle, CBP will announce the opening of a new application cycle through posts in SAM, and the Executive Assistant Commissioner, Office of Trade, will publish a notice in the **Federal Register** to the same effect.

CBP believes the approach outlined above will meet the following objectives, which CBP believes to be key to the program's success:

1. Multiple approved accreditors, which will allow for competition and keep costs at market level without creating a monopoly;
2. An open and transparent application process; and,
3. An opportunity for small businesses, such as law firms that specialize in customs law, and non-profit organizations, such as trade associations, to become approved accreditors.

2. Accreditation Process

Proposed § 111.103(d) and (e) pertain to the administration of the accreditation process, including the responsibilities of CBP-selected accreditors. Proposed § 111.103(d) reflects that CBP-selected accreditors will administer the accreditation of training or educational activities offered by an entity other than a U.S. Government agency, including the special allowance for instructors, discussion leaders, and speakers, by reviewing and approving or denying training or educational activities for continuing education credit. The accreditation process may vary slightly among CBP-selected accreditors (*e.g.*, fees, timeframe for the review and issuance of an accreditation decision, address to which paper-based accreditation requests must be submitted, and the documents that must be submitted as part of the accreditation request); however, each accreditor will be required to administer the accreditation process within the bounds of a defined set of parameters. These parameters will be defined as part of the RFP. For example, CBP is expecting that, as a result of this process, CBP-selected accreditors will be required to: (1) Provide an electronic means for a content provider to submit the details of an activity under consideration; (2) state the average or typical processing time for an accreditation request; and (3) clearly state any charges for the review and approval or denial of an accreditation request.

Although the accreditation process will be defined in more detail as part of the selection process, paragraphs (d) and (e) of proposed § 111.103 contain two requirements. First, in order to ensure that qualifying continuing broker education programs present educational content that is current and relevant, proposed § 111.103(d) provides that an accreditor's approval of a training or educational activity for continuing education credit is only valid for one year, but can be renewed through any CBP-selected accreditor. As CBP's proposal does not require individual brokers to complete a specific number of hours of continuing education on specific subject matter areas, CBP has chosen to propose to limit the validity of accreditations to one year. CBP believes that this limitation would ensure that content providers regularly update educational content, and, thereby, ensure that qualifying continuing broker education offers educational content that is current and relevant. Second, while a CBP-selected accreditor could approve a training or educational activity offered by one of its officials or members for continuing education credit, proposed § 111.103(e) provides a CBP-selected accreditor may not approve its own trainings or educational activities for continuing education credit. This will require CBP-selected accreditors who are also content providers to seek another CBP-selected accreditor's approval

in order for educational content to be eligible for continuing education credit. CBP is proposing this limitation to curb the risk of conflicts of interest and self-dealings.

In order to promote transparency and the accreditors' compliance with their contractual obligations, CBP also intends to provide content providers and instructors, discussion leaders, and speakers seeking to claim continuing education credits under the special allowance with an opportunity to submit complaints and comments to the Office of Trade at the Headquarters of U.S. Customs and Border Protection, Attn: Broker Management Branch, electronically. CBP intends to publish additional information on how to submit complaints and comments concerning specific CBP-selected accreditors, including the email address to which such electronic correspondences should be submitted, on its website. CBP plans to request that content providers (and instructors, discussion leaders, and speakers seeking to claim continuing education credits under the special allowance) who submit a complaint pertaining to the denial of a specific accreditation adhere to the following procedures. First, the content provider (and instructors, discussion leaders, and speakers seeking to claim continuing education credits under the special allowance) should contact the CBP-selected accreditor to request a detailed explanation as to the denial of the accreditation request. Second, if following the receipt of the detailed explanation, the content provider (and instructors, discussion leaders, and speakers seeking to claim continuing education credits under the special allowance) continues to believe that the denial was in error, the content provider should submit a complaint to CBP, including (1) a copy of all materials that were submitted to the accreditor for consideration, (2) any materials received from the accreditor that explain why the activity was rejected, and (3) a detailed explanation as to why the content provider believes the denial decision to be erroneous.

In order to ensure the successful implementation of the proposed continuing education requirement, CBP will also welcome any other type of feedback, such as feedback on accreditor performance and customer experience, positive interactions, and areas for improvement. CBP plans to compile and share such feedback during the sessions that CBP intends to hold with the accreditors on a periodic basis.

F. Timeframe for the Implementation of the Proposed Changes

This NPRM provides for a public comment period of 60 days. Upon the review of the comments and further consideration, CBP will prepare a final rule. The final rule will adopt the current proposal as

final, with or without changes based on consideration of the public comments, and will provide the date on which the changes will become effective. In addition to the 30-day delayed effective date required under the Administrative Procedure Act (5 U.S.C. 553(c)), CBP anticipates that there will be an additional delay between the publication of the final rule and the effective date to allow for proper implementation of the continuing education framework.

As CBP's proposal requires some training and educational activities to be approved for continuing education credit by a CBP-selected accreditor, a delayed effective date will be needed in order to permit for sufficient time for the selection of qualified accreditors, for CBP-selected accreditors to set up their processes for reviewing accreditation requests, and for content providers to obtain accreditation for their training or educational activities. CBP will ensure that there will be adequate time for compliance by individual brokers if the proposed rule is adopted. For example, in addition to a delayed effective date, CBP may also select an effective date for the final rule that coincides with the beginning of a new triennial period or prorate the number of continuing education credits individual brokers must complete by the end of the triennial period during which the final rule becomes effective.

V. Statutory and Regulatory Requirements

A. Executive Orders 12866 and 13563

Executive Orders 13563 and 12866 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. This proposed rule is not a "significant regulatory action," under section 3(f) of Executive Order 12866. Accordingly, the Office of Management and Budget (OMB) has not reviewed this regulation. CBP has prepared the following analysis to help inform stakeholders of the impacts of this proposed rule.

1. Purpose of Rule

The proposed rule, if implemented, would require active¹⁶ individual customs broker license holders (brokers) to complete 36 hours of continuing education every three years. A continuing education

¹⁶ The term "active" refers to a license that has not been suspended.

requirement would increase the knowledge base from which brokers work, educate them on changing customs requirements, regulations, and laws, and reduce the number of errors in filings and resultant penalties. CBP believes that requiring continuing education would enhance the credibility and value of an individual customs broker license and improve a broker's skills, performance, and productivity. Furthermore, CBP believes that mandating continuing education would increase the quality of service for brokers' clients and importers' compliance with customs laws, which would protect the revenue of the United States and aid in maintaining a high standard of professionalism in the customs broker community.

2. Background

On October 28, 2020, CBP published an ANPRM, entitled "Continuing Education for Licensed Customs Brokers", in the **Federal Register** (85 FR 68260). The ANPRM presented a basic outline for a continuing education requirement for licensed customs brokers and posed questions pertaining to the potential costs and benefits of such a requirement. Some of the public comments that CBP received in response to the ANPRM addressed the questions pertaining to the potential costs and benefits of such a requirement, although very few contained specific information or data. Any information that was provided on these issues was taken into account in formulating this analysis. In this NPRM, CBP is proposing a continuing education requirement for individual brokers.

i. Customs Brokers

A customs broker assists clients with the importation of goods into the United States, and also with the filing of drawback claims. Customs brokers can be individuals, partnerships, associations, or corporations and must be licensed by CBP. Brokers are responsible for helping clients to meet all relevant requirements for importing and submitting drawback claims, submitting information and payments to CBP on their client's behalf, and exercising responsible supervision and control over their employees and customs business.¹⁷ Only licensed customs brokers may perform customs business.¹⁸ Brokers

¹⁷ For more details on responsible supervision and control, see 19 U.S.C. 1641(b)(4), as well as 19 CFR 111.1 and 111.28.

¹⁸ Customs business is defined as: those activities involving transactions with U.S. Customs and Border Protection concerning the entry and admissibility of merchandise, its classification and valuation, the payment of duties, taxes, or other charges assessed or collected by U.S. Customs and Border Protection upon merchandise by reason of its importation, or the refund, rebate, or drawback thereof. It also includes the preparation of documents or forms in any format and the electronic transmission of documents, invoices, bills, or parts thereof, intended to be filed with U.S. Customs and Border Protection in furtherance of such activities, whether or not signed or filed by the preparer, or activities relating to such

may have expertise in any number of trade-related areas, including entry, admissibility, classification, valuation, and duty rates for imported goods. Some brokers specialize in a specific area of customs business, like drawback or valuation, while others are more general practitioners. As of 2021, there are 13,822 active individual brokers in the United States.¹⁹

To become a licensed customs broker, an eligible individual²⁰ must pass the Customs Broker License Examination, submit a broker license application and appropriate fees to CBP, and be approved by CBP.²¹ Once applicants have passed the broker exam, they may apply for an individual, corporate, partnership, or association license. To maintain the license, the individual broker or the licensed entity (for corporations, partnership, or associations) must submit a triennial report and requisite fees. The triennial report and fees are due on February 28, every three years, since 1985.²² Once an individual has been approved as a licensed customs broker, the primary ongoing requirement for maintaining the license under current regulations is the submission of the triennial report and appropriate fee in 3-year cycles. Given the established 3-year cycle of triennial reporting, CBP employs a 6-year period of analysis to calculate costs and benefits that result from this proposed rule, accounting for two triennial cycles.

A broker license may be suspended or revoked, or a monetary penalty assessed, for several violations ranging from falsifying information on the license application to willfully and intentionally deceiving, misleading, or threatening a client.²³ CBP generally assesses monetary penalties for less serious infractions, such as the incorrect filing of entry forms or the misclassification of goods. However, the majority of civil monetary penalties assessed against brokers for violations of 19 U.S.C. 1641 involve egregious violations or the failure

preparation, but does not include the mere electronic transmission of data received for transmission to CBP. See 19 U.S.C. 1641(a)(2).

¹⁹ A customs broker may voluntarily suspend his or her license for a number of reasons and may re-activate the license at a later time. A broker's license may also be suspended as part of a penalty. For more information, see 19 CFR 111.52.

²⁰ To be eligible, an individual must be a United States citizen at least 21 years of age, in possession of good moral character, and not be an employee of the U.S. Government. For more information, see U.S. Customs and Border Protection, *Becoming a Customs Broker* (Dec. 12, 2018), available at <https://www.cbp.gov/trade/programs-administration/customs-brokers/becoming-customs-broker>.

²¹ To be approved, a broker who has passed the broker exam must also pass an investigation of his or her relevant background. See section III.B. of this NPRM.

²² 19 CFR 111.30(d). For more information on the triennial report, see U.S. Customs and Border Protection, *2021 Customs Broker Triennial Status Report FAQs* (Feb. 26, 2021), available at https://help.cbp.gov/s/article/Article-1711?language=en_US.

²³ See, e.g., 19 U.S.C. 1641(d)(1) and (g)(2).

to take satisfactory corrective actions following written notice and a reasonable opportunity to remedy the deficiency as the penalties process provides noncompliant brokers with several opportunities to avoid or mitigate penalty liability.²⁴ Monetary penalties may not exceed \$30,000 per violation and averaged \$22,697 from 2017–2020.²⁵

In the fiscal years from 2017 to 2020, CBP assessed an average of 66 penalties to brokers per year.²⁶ However, in FY 2017 and FY 2018, CBP assessed 20 and 21 penalties, respectively, while in FY 2019 and FY 2020, CBP assessed over 100 penalties each year (see Table 1). The significant increase in penalties from 2018 to 2019 and into 2020 is likely due to rapid changes in the international trade environment in those years. During that time, CBP began enforcing several significant changes in the realm of international trade, including new antidumping and countervailing duties (AD/CVD) and the tariffs imposed by the Trump Administration under section 201 of the Trade Act of 1974 (19 U.S.C. 2251), as amended, section 232 of the Trade Expansion Act of 1962 (19 U.S.C. 1862), as amended, and sections 301 through 310 of the Trade Act of 1974 (19 U.S.C. 2411 *et seq.*), as amended.²⁷ These changes affected a significant number of imported

²⁴ In the case of non-egregious violations, CBP will first attempt to work with the broker through the informed compliance process of communication and education. See U.S. Customs and Border Protection, *Electronic Invoice Program (EIP) and Remote Location Filing (RLF) Handbook* (May 2013), p. 22, available at https://www.cbp.gov/sites/default/files/assets/documents/2016-Dec/Revised_eip_rlf_handbook_12-15_16.pdf. This is an attempt to improve the broker's performance, and precedes the issuance of a pre-penalty notice, which is a written notice that advises the broker of the allegations or complaints against the broker. See *id.*; 19 CFR 111.92(a). If this process fails to remedy the deficiencies, or in case of egregious violations, CBP will issue a pre-penalty notice to the broker, which, *inter alia*, explains that the broker has the right to respond to the allegations or complaints. See 19 CFR 111.92(a). If the broker files a timely response to the pre-penalty notice, CBP will either cancel the case, issue a penalty notice in an amount lower than that provided in the pre-penalty notice, or issue a penalty notice in the same amount as the pre-penalty notice. See 19 CFR 111.92(b). Upon the issuance of the penalty notice, the broker is afforded the opportunity to file a petition for relief in accordance with the provisions of 19 CFR part 171, which may result in the cancellation or mitigation of the penalty, and subsequently a supplemental petition for relief. See 19 CFR 111.93 and 111.95.

²⁵ 19 U.S.C. 1641(d)(2)(B). Penalty information comes from CBP's Seized Currency and Asset Tracking System (SEACATS). Although the average value of assessed penalty is \$22,697, CBP allows brokers to mitigate penalties, such that the amount collected is often significantly less, averaging \$2,664 from 2017–2020.

²⁶ SEACATS.

²⁷ Trade remedies implemented by CBP include Section 201 trade remedies on solar cells and panels, and washing machines and parts; Section 232 trade remedies on aluminum and steel; Section 232 trade remedies on derivatives; Section 301 trade remedies to be assessed on certain goods from China; and Section 301 trade remedies to enforce U.S. rights in the large civil aircraft dispute before the World Trade Organization. See U.S. Customs and Border Protection, *Trade Remedies*, available at <https://www.cbp.gov/trade/programs-administration/trade-remedies> (last visited on May 11, 2021).

goods. CBP provided many opportunities for individual brokers to learn about the changes, including webinars, Question and Answer sessions, public forums, and **Federal Register** notices. External organizations, like regional broker associations, also provided information regarding these changes to the customs laws, which would have led to greater understanding for individual brokers.

Although CBP sought information in the ANPRM on the number of companies employing brokers who already complete continuing education, CBP did not receive enough specific information to estimate the proportion of companies already providing ongoing training. However, based on information gathered via self-reporting by individual brokers, CBP is aware of about 300 companies that employ at least one broker who holds an industry certification that requires annual continuing education.²⁸ In the fiscal years from 2017 to 2019, those companies were responsible for 54 percent of the entries but only 10 percent of the penalties.²⁹ Overall, these 300 companies filed 73,906,967 of 136,466,361 filed entries between 2017 and 2020, but only account for 26 of 267 total penalties assessed in that period.³⁰ For companies outside of this group, CBP does not know how much continuing education is currently taken.

TABLE 1—ANNUAL PENALTIES ASSESSED BY CBP

FY	Number of penalties
2017	20
2018	21
2019	119
2020	106

ii. Continuing Education

Continuing education refers to the training and learning pursued by professionals outside of the formal education system, usually as part of career development. Many licensed professions have some sort of continuing education requirement for license-holders, including accountants, medical professionals, and teachers.³¹ Continuing edu-

²⁸ Information was provided by the National Customs Broker and Forwarders Association of America (NCBFAA). Nine companies employ at least 48 brokers certified by programs provided by the NCBFAA’s Education Institute (NEI), and often employ more. An additional 292 companies employing at least one broker with an NEI certification were identified via a survey of NEI’s students.

²⁹ Significant at the 99 percent confidence level.

³⁰ Entry data was pulled from ACE, and penalty data from SEACATS.

³¹ The number of hours of continuing education required for many professions varies by state as the state is the licensing authority.

ation is particularly important for professions characterized by continuously changing rules, standards, and norms. Customs and international trade is one such profession. Since 2000, the United States has added two new preferential trade programs and several new free trade agreements, the most recent being the USMCA, which replaced the NAFTA.³² Additionally, the logistical aspects of customs have changed significantly over time. For example, CBP introduced the single window, enabling most CBP forms to be submitted electronically through the Automated Commercial Environment (ACE), which was fully implemented in 2016, with added functionalities being deployed on an ongoing basis.

There have been several other significant changes to the customs environment, including the implementation of TFTEA, changes in duty rates and tariffs, and the modernization of the drawback requirements.³³ Customs brokers must maintain awareness of and adapt to these changes to provide quality service to clients. However, aside from the broker exam at the beginning of their careers, brokers do not currently have any requirements ensuring they maintain up-to-date knowledge of customs rules, regulations, and practices. As stated above, CBP believes that the vigorous pace and expanding scope of international trade require a more stringent continuing education framework for individual brokers who provide guidance to importers and drawback claimants.

The effects of continuing education programs are not easily measured and not often the subject of research.³⁴ Some studies show that various licensed professions do see a mild increase in positive perception of their industry, performance, and professionalism after the implementation of continuing education requirements.³⁵ Studies

³² In October 2000, the United States implemented the Caribbean Basin Trade Partnership Act, which will expire in 2030 (<https://www.cbp.gov/trade/priority-issues/trade-agreements/special-trade-legislation/caribbean-basin-initiative/cbtpa>). The African Growth and Opportunity Act was also enacted in 2000 (<https://ustr.gov/issue-areas/trade-development/preference-programs/african-growth-and-opportunity-act-agoa>). See <https://www.state.gov/trade-agreements/outcomes-of-current-u-s-trade-agreements/> for a list of free trade agreements currently in force.

³³ See section III.C. of this NPRM.

³⁴ "Evaluation of Current Customs Broker Continuing Education Practices and Literature Review of Continuing Education in Other Professions." Report for CBP prepared by International Economics, Inc. (IEC) on June 30, 2014. This document is included in the docket for this NPRM, which is posted on [Regulations.gov](https://www.regulations.gov).

³⁵ See Bradley, S., Drapeau, M. and DeStefano, J. (2012), The relationship between continuing education and perceived competence, professional support, and professional value among clinical psychologists. *J. Contin. Educ. Health Prof.*, 32: 31–38; O'Leary, P. F., Quinlan, T. J., & Richards, R. L. (2011). Insurance Professionals' Perceptions of Continuing Education Requirements. *Journal of Insurance Regulation*, 30, 101–117; and Wessels, S. (2007). Accountants' Perceptions of the Effectiveness of Mandatory Continuing Professional Education. *Accounting Education*, 16(4), 365–378.

have also demonstrated a positive link between continuing education for teachers and student outcomes as well as between continuing medical education and patient outcomes.³⁶ Additionally, one study found that continuing professional education was correlated to an improvement in financial outcomes for accounting firms, particularly large firms.³⁷ Finally, a study of IRS-certified tax preparers found that mandatory continuing education was potentially linked to reduced civil penalties, a decrease in non-compliance, and increased accuracy of tax returns.³⁸

Under the terms of the proposed rule, individual brokers would be required to complete 36 hours of accredited continuing education over each 3-year reporting period. Qualifying activities would include attending or presenting at events, such as courses, seminars, symposia, and conventions.³⁹ Brokers would be required to self-attest to the completion of the required continuing education on each triennial report and maintain records consisting of certain documentation received from the provider or host of the qualifying continuing broker education, if such documentation was made available to the broker, and containing information pertaining to the dates, titles, providers, credit hours earned, and location (if applicable) for each training. The records can be in any format (*i.e.*, electronically or on paper), and the proposed regulations provide CBP with authority to conduct a compliance audit and to request such records for a period of three years following the submission of the status report.

iii. Accreditation

To ensure the quality and relevance of continuing education offerings, they are often accredited by a leading body within the field in question. For example, the American Medical Association (AMA) is accredited to provide training by the Accreditation Council for Continuing Medical Education.⁴⁰ An accreditor is responsible for review-

³⁶ Darling-Hammond, L., Hyler, M.E., and Gardner, M. (2017). *Effective Teacher Professional Development*. Learning Policy Institute; Cervero, R. M., & Gaines, J.K. (2014). *Effectiveness of continuing medical education: updated synthesis of systematic reviews*. Accreditation Council for Continuing Medical Education.

³⁷ Chen, Y.-S., Chang, B.-G., & Lee, C.-C. (2008). The association between continuing professional education and financial performance of public accounting firms. *International Journal of Human Resource Management*, 19(9), 1720–1737.

³⁸ Diehl, K. A. (2015). Does Requiring Registration, Testing, and Continuing Professional Education for Paid Tax Preparers Improve the Compliance and Accuracy of Tax Returns?—US Results. *Journal of Business & Accounting*, 8(1), 138–147.

³⁹ See proposed 19 CFR 111.103(a).

⁴⁰ See American Medical Association, *About the AMA's CME Accreditation*, available at <https://edhub.ama-assn.org/pages/ama-cme> (last accessed on May 11, 2021).

ing course content and determining the number of credits or hours to be granted for each course.

Under the proposed rule, after an application process (using the RFP, as described above), CBP would designate entities outside of CBP to act as accreditors for customs broker continuing education. Every three years, CBP would release an RFP soliciting applications to become an accreditor for the customs broker continuing education program. Every three years following the first cycle, existing accreditors would also apply for renewal. To apply, potential and existing accreditors would submit an application to CBP detailing their standards for accreditation, quality control practices, application process, and other information. A panel of CBP experts would convene to review and approve or deny applications. Once approved, accreditors could begin accepting submissions from courses or companies seeking accreditation. Note that training or educational activities offered by U.S. Government agencies, including CBP, automatically qualify for continuing education credit, without the approval by a CBP-selected accreditor.⁴¹

iv. Performance Improvement

Once brokers have passed the broker exam, thereby proving their basic knowledge and competency to perform the duties of a licensed customs broker at the time of the exam, they are free to practice in perpetuity unless the license is suspended or revoked. Statute dictates that while practicing under the auspices of his or her broker license, a customs broker must maintain responsible supervision and control.⁴² CBP's regulations likewise place additional legal obligations upon customs brokers, including, but not limited to, the requirement for exercising due diligence in making financial settlements, answering correspondence, and preparing or assisting in the preparation and filing of information relating to customs business.⁴³ Staying current on developments in customs law is needed for customs brokers to comply with their legal obligations, but presently there are no standards for how much continuing education is needed.

Under baseline conditions, meaning the world as it is now, CBP does not require brokers to complete any additional training or prove their ongoing knowledge. The broker exam only attests knowledge of customs and related laws that are in place at the time of the exam. While the exam ensures that brokers have a solid base level of

⁴¹ Per proposed § 111.103(a)(1)(i), a training or educational activity offered by a U.S. Government agency other than CBP must be relevant to customs business.

⁴² See 19 U.S.C. 1641(b)(4).

⁴³ See 19 CFR 111.29(a), and 19 CFR part 111 generally for additional obligations.

knowledge when they begin practicing, there is no requirement that they keep up the knowledge, and evidence suggests that as more time passes since brokers took their exam, the more errors they make. Brokers who were assessed penalties by CBP between 2017 and 2020 have held their individual broker license for, on average, 37 years. In contrast, the average individual broker license is 24 years old. This suggests that as more time passes since the passing of the customs broker exam, more errors are made. Furthermore, the exam does not test for any of the requirements of the more than 40 PGAs involved in regulating imports. Depending on the brokers' needs, CBP believes that continuing education should also include courses relating to the PGAs' international trade requirements, although there is no minimum requirement for certain subject matters in this proposed rule.

Given the often fast-paced and evolving nature of the international trade environment, CBP believes that a continuing education requirement would help to ensure that brokers remain current with their understanding of international trade laws and continue to expand their knowledge of customs regulations and practices. A more competent and educated customs broker community would also prevent costly errors, potentially saving brokers' clients time and money, as well as relieving CBP from expending valuable audit and penalty assessment and collection resources.

3. Overview of Assessment

The proposed rule would result in costs and benefits for customs brokers, accreditors, providers of continuing education, and CBP. Many of the costs for brokers come in the form of time spent researching, registering for, attending, and reporting trainings. Brokers would also experience some opportunity cost as they forgo time spent on other tasks in favor of fulfilling a continuing education requirement. Accreditors must apply to CBP. Though CBP would not charge a fee, the accreditors would need to spend time in creating their applications. Similarly, providers of continuing education must apply to accreditors to have their coursework certified. Finally, CBP must designate accreditors, and, following the full implementation of the proposed framework, CBP may audit individual brokers for compliance.

The benefits from the proposed rule would be largely qualitative. A continuing education requirement would help to professionalize and improve the reputation of the customs broker community, as well as to improve customer service and outcomes. Quantitatively, continuing education would likely lead to a reduction in errors in documentation and associated penalties assessed by CBP for some infractions

and violations. Not only would individual brokers not need to pay the associated penalties, but CBP would save the time of identifying, assessing, and collecting such penalties. Similarly, CBP would likely see a reduction in regulatory audits of individual brokers.

4. Historical and Projected Populations Affected by the Rule

The proposed rule applies to any individual holding an active customs broker license.⁴⁴ Brokers who have voluntarily suspended their licenses are not required to complete continuing education until they elect to reactivate their license, at which point the requirements are pro-rated depending upon the timing within the triennial reporting cycle. Brokers who have not held their license for an entire triennial period at the time their first triennial report is due are also exempted from completing training and reporting in their first triennial report, though are bound by the terms of the proposed rule in the following years. As of 2021, there are 13,822 active, individual broker licenses.⁴⁵ Because 2021 is a reporting year and triennial reports are due in February, those brokers who receive their licenses in 2021, 2022, and 2023 will only be required to complete continuing education beginning on February 1, 2024, the next reporting year.⁴⁶ Similarly, brokers who receive licenses in 2024, 2025, and 2026 would not need to pursue continuing education until after their first report is due in 2027.

CBP approves approximately 600 new licenses per year, although the number of licenses added annually has been decreasing since 2015. *See* Table 2 for a summary of licensing history for the previous six years.

⁴⁴ Entities holding corporate, association, or partnership licenses must employ at least one individual broker, who would be required to comply with the rule. *See* 19 CFR 111.11(a) and (b).

⁴⁵ 2021 is triennial reporting year. The CBP Broker Management Branch anticipates that the number of active, individual customs brokers could decrease by approximately 600–1,000 in May–July of 2021 as brokers choose not to renew or to voluntarily suspend their licenses. This number would be partially offset by new, individual customs brokers applying for licenses after passing the broker exam, which is held bi-annually.

⁴⁶ Triennial reports are due in February. Therefore, all those brokers who receive licenses in 2021, 2022, and 2023 will submit their first triennial reports in February of 2024 and would then need to complete 36 hours of training before the triennial report is due in February of 2027.

TABLE 2—LICENSING HISTORY FROM 2015–2020

Year	Total licenses ⁴⁷	Corporate licenses	Individual licenses
2015	770	16	754
2016	653	21	632
2017	580	16	564
2018	558	27	531
2019	464	15	449
2020 ⁴⁸	187	7	180
Total	3,212	102	3,110

Based on an average rate of decline of 12 percent in the number of individual licenses issued, CBP would likely issue 1,754 new individual licenses over a 6-year period of analysis from 2021–2026 (see Table 3), though not all of those license holders would be required to complete continuing education during the 6-year period of analysis. Each of these new individual license holders would need to comply with the terms of the proposed rule once it is in effect and they have completed their first triennial report. All 13,822 individual brokers active at the time the rule is implemented would be required to complete continuing education from February 1, 2021–February 1, 2024.⁴⁹ In 2024, the 1,045 individual brokers who CBP projects would receive licenses from 2021–2023 would need to begin complying with the terms of the proposed rule. Brokers who receive licenses in 2024–2026 would not need to comply with the proposed rule until after their first triennial reporting cycle, which would fall outside of the period of analysis. In total, therefore, CBP estimates that 14,867 brokers would be required to abide by the rule in the six years from 2021 to 2026.

⁴⁷ CBP sometimes issues licenses that are later suspended or terminated (either voluntarily or as a penalty). This table includes all licenses issued in these years that remain active as of 2021, as only holders of an active license would need to abide by the terms of the rule.

⁴⁸ The number of licenses applied for and issued in 2020 was significantly lower than in previous years due to the effects of the COVID–19 pandemic and related closures and delays. CBP excluded this year from calculations of growth rates due to its anomalous nature. 2021 may also be affected similarly, but CBP cannot predict to what extent.

⁴⁹ The exact timing of the requirement will vary depending on when the final rule goes into effect, and the requirement will be prorated based on the time left until the triennial report is due. For the purposes of this analysis, we estimate the costs for the hypothetical period from 2021–2027.

TABLE 3—PROJECTED LICENSES ISSUED FROM 2021–2026

Year	Total licenses issued	Corporate licenses	Individual licenses	New licenses affected by the rule
2021	408	13	394	0
2022	358	12	346	0
2023	315	10	304	0
2024	276	9	267	1,045
2025	243	8	235	0
2026	213	7	206	0
Total.....	1,812	59	1,754	1,045

* Totals may not sum due to rounding.

Although the majority of active individual brokers would be required to complete continuing education under the proposed rule, feedback from the broker community indicates that many brokers already complete the amount of continuing education that would satisfy this requirement.⁵⁰ Many companies that employ brokers provide and require in-house training and continuing education. Both independent brokers and brokers employed by brokerages often attend government-sponsored webinars, as well as trade conferences and symposia, which would qualify as continuing education under the terms of the proposed rule. Many brokers also pursue professional certifications like the National Customs Brokers and Freight Forwarders Association of America’s (NCBFAA) Certified Customs Specialist (CCS) and Certified Export Specialist (CES).⁵¹ Under the baseline, or the world as it is now, these brokers likely would be in compliance with the proposed rule and, assuming similar activities if a continuing education requirement is imposed, would not incur new costs under the new requirements, except for new reporting costs.

Overall, CBP estimates that approximately 60 percent of individual brokers already pursue continuing education and would be in com-

⁵⁰ Feedback was provided in the form of public comments on the ANPRM. Additional feedback was provided in various meetings and discussions between CBP personnel and customs brokers, as well as at trade conferences and meetings of the Task Force for Continuing Education for Licensed Customs Brokers, a part of the COAC. See I.I.E. Development of the Proposed Continuing Broker Education Requirement, above.

⁵¹ We included both brokers qualifying as CCS and CES in our analysis as the coursework for both has significant overlap and is relevant to customs business.

pliance with the rule.⁵² CBP bases this estimation on several factors. First, the NCBFAA estimates that approximately 4,456 brokers hold a CCS or CES in 2020, representing 29 percent of total individual brokers.⁵³ In order to maintain these professional certifications, these brokers are required to earn 20 continuing education credits per year.⁵⁴ Additionally, public comments in response to the ANPRM, as well as discussions between CBP and various broker organizations, indicate that most large businesses employing brokers already provide, and often mandate, internal training and continuing education. Based on data from the U.S. Census Bureau, approximately 61 percent of those employed within the Freight Transportation Arrangement Industry (North American Industry Classification System (NAICS) code 448510) are not employed by small businesses. A small business within the Freight Transportation Arrangement Industry is defined as one whose annual receipts are less than \$16.5 million, regardless of the number of employees.⁵⁵ Table 4 shows the receipts per firm, in millions of dollars, for firms employing each number of employees.⁵⁶ The average firm within Categories 7 and 9 has annual receipts of greater than \$16.5 million and is considered a large business. These firms employ 161,463 people, or approximately 61 percent of the total employees in the industry.

⁵² CBP requested information about the proportion of individual brokers already complying with the rule in the ANPRM. Although CBP did not receive specific information in the public comments, several commenters said they would be compliant and believed that significant numbers of other brokers would be as well. Many also noted that their companies require their broker employees to complete continuing education.

⁵³ Discussion with officials at the NCBFAA on April 5, 2021. This includes brokers renewing their certification in 2020, as well as those becoming certified for the first time. The CCS certification program requires enough hours of continuing education to comply with the terms of the proposed rule and the NCBFAA has expressed interest in becoming an accredited provider.

⁵⁴ See National Customs Brokers & Forwarders Association of America, Inc., CES FAQs, available at https://www.ncbfaa.org/Scripts/4Disapi.dll/4DCGI/cms/review.html?Action=CMS_Document&DocID=13806&MenuKey=education (last accessed on July 2, 2021); National Customs Brokers & Forwarders Association of America, Inc., CCS FAQs, available at https://www.ncbfaa.org/Scripts/4Disapi.dll/4DCGI/cms/review.html?Action=CMS_Document&DocID=13803&MenuKey=education (last accessed on July 2, 2021).

⁵⁵ Small business size standards are defined in 13 CFR 121.

⁵⁶ United States Census Bureau, "2017 County Business Patterns and 2017 Economic Census," Released March 6, 2020, <https://www.census.gov/data/tables/2017/econ/susb/2017-susbannual.html>. Accessed March 15, 2021.

TABLE 4—SMALL BUSINESSES IN THE FREIGHT TRANSPORTATION ARRANGEMENT INDUSTRY

Employment size ⁵⁷	Number of employees	Preliminary receipts (all firms, \$1,000s) ⁵⁸	Receipts per firm (\$)	Small business?
01: Total	265,192	67,276,572	4,454,222	
02: <5	15,939	6,315,166	708,614	Yes.
03: 5–9	18,025	5,392,992	1,974,732	Yes.
04: 10–19	20,288	5,870,163	3,851,813	Yes.
05: <20	54,252	17,578,321	1,335,029	Yes.
06: 20–99	49,477	13,973,780	10,397,158	Yes.
07: 100–499	44,715	10,886,028	30,493,076	No.
08: <500	148,444	42,438,129	2,854,327	Yes.
09: 500+	116,748	24,838,443	105,247,640	No.

Given the proportion of brokers working for larger businesses, the feedback on the ANPRM indicating high rates of compliance, the proportion of brokers pursuing certifications, and input from CBP subject matter experts who frequently interact with the broker community, CBP estimates that approximately 60 percent of individual brokers are already in compliance with the requirements of the proposed rule and would not face new costs, assuming a continuing level of similar activity, aside from recordkeeping and reporting, as a result of the rule's implementation. Based on the likely proportion of brokers already in compliance, CBP estimates that 5,947 affected brokers, or approximately 40 percent, would need to come into compliance with the proposed rule over a 6-year period of analysis (see Table 5). We request comment on our assumption that 60 percent of brokers already spend at least 36 hours per 3-year period on continuing education and that the remaining 40 percent of brokers would need to increase their training by the full 36 hours triennially to meet the proposed requirement.

⁵⁷ Note that some of the categories are sums of other categories. For example, Category 8, <500, is a sum of Categories 2, 3, 4, 6, and 7. Thus, Categories 7 and 9 are not consecutive, but represent all firms employing 100 or more people.

⁵⁸ The Survey of U.S. Businesses (SUSB) from which this data is taken is conducted in years ending in 2 and 7. Note that finalized results from the 2017 survey are scheduled for release in May of 2021.

TABLE 5—PROJECTION OF BROKERS AFFECTED BY THE PROPOSED RULE

Year	Total licenses	Proportion in compliance (%)	Total licensed brokers affected
2021	13,822	60	5,529
2022	13,822	60	5,529
2023	13,822	60	5,529
2024	14,867	60	5,947
2025	14,867	60	5,947
2026	14,867	60	5,947
Total	14,867	.....	5,947

Although individual brokers are the primary party affected by the terms of the proposed rule, the rule would also have an impact on CBP, providers of continuing education, and the bodies who accredit continuing education. Each party would see both costs and benefits under the proposed rule.

5. Costs of the Rule

i. To Brokers

The primary cost to individual brokers upon implementation of the rule would be those costs associated with finding and attending 36 hours of continuing education over a 3-year period. These costs include time spent researching reputable and relevant trainings, travel and incidental expenses to attend in-person events like conferences, and the tuition or fees for the courses themselves. Many brokers might satisfy the continuing education requirement with training supplied by their employers. Other brokers, particularly those self-employed or employed by small businesses, would need to seek external training. For external training, brokers may attend free webinars, seminars, and trade events sponsored by CBP, other government agencies, and various related organizations like local freight forwarder and broker associations.⁵⁹ Alternatively, brokers might choose paid trainings, conferences, or symposia, or seek certifications offered by trade organizations or educational institutions.

⁵⁹ For example, the Florida Customs Broker and Forwarders Association offers both paid and free events. Information on CBP-hosted webinars can be found at <https://www.cbp.gov/trade/stakeholder-engagement/webinars>. Many other government agencies also provide webinars on trade-related topics. For example, in 2020, the Food and Drug Administration (FDA) hosted a series of webinars on the importation of medical devices in light of the COVID-19 pandemic. See <https://www.fda.gov/medical-devices/workshops-conferences-medical-devices/webinar-series-respirators-and-other-personal-protective-equipment-ppe-health-care-personnel-use>.

CBP does not know exactly which option each individual broker is likely to choose. Many brokers already hold certifications, attend webinars, and fulfill internal training requirements, though they may need to increase the number of hours completed to comply with the proposed rule. Therefore, CBP has estimated a range of costs. Some brokers would fulfill their proposed continuing education requirements with only free trainings. Others would follow a medium-cost path by opting for a mix of free, lower-cost, and internal trainings. CBP further assumes that brokers electing the medium-cost path would travel to attend one major conference or symposium in-person per year. Finally, some would meet requirements by completing only paid courses representing the highest-cost offerings. CBP assumes that brokers choosing the higher-cost option would travel to attend an average of two conferences per year.

There are several organizations that provide continuing education for customs brokers, ranging from regional broker associations to national entities, such as the American Association of Exporters and Importers (AAEI). Continuing education that qualifies under the terms of the proposed rule includes webinars, seminars, and trade conferences. The hourly cost of such trainings (excluding free events provided by government agencies and other organizations) usually ranges from around \$25 to \$70. Fees are often tiered based on membership of the hosting organization. Members of an organization may pay \$25 while non-members pay \$45. CBP cannot predict which organizations would seek accreditation for their events, although all free webinars and trainings hosted by Federal government agencies would be automatically accredited. Therefore, we assume that the average hourly monetary cost would range from \$0.00 (low) to \$30 (medium) to \$50 (high). This assumption is based on current fees charged for various continuing education certifications, webinars, and trade conferences.⁶⁰

In addition to fees, individual brokers would need to spend some time in researching relevant and accredited trainings. CBP assumes that a broker would spend approximately three hours finding and registering for continuing education during every triennial period. Many individual brokers are members of both local and national organizations that provide continuing education opportunities and would likely be notified of opportunities via newsletters or listservs. Other individual brokers would need to spend some time finding and verifying accreditation for qualifying events. All individual brokers

⁶⁰ CBP does not have information on the cost for an employer to provide training internally, although such information was requested in the ANPRM. CBP believes the cost for internal training would be closer to that of attending external trainings as a member, since member fees are likely much closer to base cost of provision than non-member fees.

would spend some time registering for events. Based on an average fully-loaded wage rate of \$31.27, the process of researching and registering for trainings would cost brokers approximately \$2.61 per credit hour.⁶¹

Many individual brokers also travel to attend trade conferences each year. CBP assumes that those brokers electing the lower-cost options would forgo travel and either attend virtually (paying only the fee) or not attend at all. CBP assumes that brokers in the medium-cost tier would travel to attend one conference each year, while brokers in the high-cost tier would travel to attend two conferences.⁶² Tuition and fees for conferences, broken down into an hourly rate, are already accounted for in the average costs of \$30–\$50 per hour. Traveling to attend a single 3-day conference costs approximately \$245 in airfare, \$288 for lodging, and \$165 for meals and incidentals, for a total of \$698 for one conference or \$1,396 for two conferences (see Table 6).⁶³ Spread across 36 hours of training, travel costs account for an additional \$19.39 per hour (medium) or \$38.78 per hour (high).

⁶¹ Wage rate source: U.S. Bureau of Labor Statistics. Occupational Employment Statistics, “May 2019 National Occupational Employment and Wage Estimates, United States.” Updated March 31, 2020. Available at https://www.bls.gov/oes/2019/may/oes_nat.htm. Accessed June 12, 2020; U.S. Bureau of Labor Statistics. Employer Costs for Employee Compensation. Employer Costs for Employee Compensation Historical Listing March 2004–December 2019, “Table 3. Civilian workers, by occupational group: employer costs per hours worked for employee compensation and costs as a percentage of total compensation, 2004–2019.” March 2020. Available at <https://www.bls.gov/web/ecec/ececqrtn.pdf>. Accessed June 12, 2020. The wages are in 2019 dollars and CBP assumes an annual growth rate of 0 percent.

⁶² Some individual brokers would pay for their travel out of pocket, while other would have their travel expenses covered by their employers.

⁶³ CBP bases these costs off the average price of a domestic flight in 2019 (flight prices in 2020 were not used due to the disruptions caused by COVID–19 cancellations), and the General Services Administration’s per diem cost for lodging and meals and incidentals. Source for flight costs: The Bureau of Transportation Statistics, “Average Domestic Airline Itinerary Fares,” <https://www.transtats.bts.gov/AverageFare/>. Accessed April 13, 2021. Source for per diem costs: U.S. General Services Administration, “Per Diem Rates,” <https://www.gsa.gov/travel/plan-book/per-diem-rates>. Accessed April 13, 2021.

TABLE 6—TRAVEL AND INCIDENTAL COSTS TO ATTEND IN-PERSON EVENTS
[2021 U.S. dollars]

Cost	General cost	Low	Medium	High
Transportation	\$245	0	\$245	\$490
Hotel	288	0	288	576
Meals & Incidentals	165	0	165	330
Total	698	0	698	1,396

Overall, as a result of the rule, a single broker would likely incur monetary costs ranging from \$31.27 (low) to \$624 (medium) to \$1,097 (high) per year to complete 36 hours of continuing education in a 3-year period. Over a 6-year period of analysis, these costs sum to \$188 (low), \$3,744 (medium), or \$6,580 (high). See Table 7 for a summary of these costs.

TABLE 7—ANNUAL COSTS FOR ONE BROKER
[2021 U.S. dollars]

Year	Hours ⁶⁴	Low		Medium		High	
		Costs ⁶⁵	Total	Costs	Total	Costs	Total
2021	12	\$2.61	\$31.27	\$52	\$624	\$91	\$1,097
2022	12	2.61	31.27	52	624	91	1,097
2023	12	2.61	31.27	52	624	91	1,097
2024	12	2.61	31.27	52	624	91	1,097
2025	12	2.61	31.27	52	624	91	1,097
2026	12	2.61	31.27	52	624	91	1,097
Total ...	72	15.64	188	312	3,744	548	6,580

* Totals may not sum due to rounding.

There were 13,822 active individual brokers in 2021. CBP estimates that a total of 5,947 would be required to begin to complete continuing education under the terms of the rule in the 6-year period of analysis, based on a current estimated compliance rate of 60 percent (see Historical and Projected Populations Affected by the Rule, above). Therefore, CBP estimates that brokers would incur costs related to searching for training, fees, travel, and incidentals, ranging from \$1,076,537 (low) to \$21,480,353 (medium) to \$37,752,913 (high) over the 6-year period of analysis. See Table 8.

⁶⁴ Individual brokers may complete whatever number of hours they prefer during each year, so long as it totals 36 hours in 3 years. CBP designates 12 hours per year both for ease of presentation and to account for pro-rating for individual brokers who re-activate their licenses within the triennial period.

⁶⁵ Costs include tuition/fees, travel costs, and research time costs for each level.

TABLE 8—ANNUAL TRAINING COSTS FOR INDIVIDUAL BROKER LICENSE HOLDERS
[2021 U.S. dollars]

Year	Brokers ⁶⁶	Low		Medium		High	
		Costs	Total	Costs	Total	Costs	Total
2021	5,529	\$31.27	\$172,886	\$624	\$3,449,621	\$1,097	\$6,062,901
2022	5,529	31.27	172,886	624	3,449,621	1,097	6,062,901
2023	5,529	31.27	172,886	624	3,449,621	1,097	6,062,901
2024	5,947	31.27	185,960	624	3,710,497	1,097	6,521,404
2025	5,947	31.27	185,960	624	3,710,497	1,097	6,521,404
2026	5,947	31.27	185,960	624	3,710,497	1,097	6,521,404
Total	5,947	188	1,076,537	3,744	21,480,353	6,580	37,752,913

* Totals may not sum due to rounding.

To create a primary estimate, CBP assumes that approximately one third of individual brokers would elect the lowest cost path, one third would elect the medium-cost path, and one third would elect the highest cost path once the rule is in place. Under these conditions, brokers who begin pursuing continuing education as a result of the rule would face \$20,103,267 in costs related to searching for training, fees, travel, and incidentals over the 6-year period of analysis. See Table 9.

TABLE 9—PRIMARY ESTIMATE OF COSTS FOR BROKERS
[2021 U.S. dollars]

Year	Total brokers	Brokers choosing each path	Total cost
2021	5,529	1,843	\$3,228,469
2022	5,529	1,843	3,228,469
2023	5,529	1,843	3,228,469
2024	5,947	1,982	3,472,620
2025	5,947	1,982	3,472,620
2026	5,947	1,982	3,472,620
Total	5,947	1,982	20,103,267

* Totals may not sum due to rounding.

⁶⁶ Only the 40 percent of brokers who do not already complete continuing education would face these costs. The total number of brokers affected in the final year of analysis (2026) is the same as the number of brokers overall because each year represents the same population with a small amount of growth.

All individual brokers, including those who already complete continuing education and would not face new costs for research, tuition, and travel, would also be required to store records of their completed continuing education and report their compliance to CBP.⁶⁷ Record storage would require maintaining either paper or digital copies of any documentation received from the provider or host of the qualifying continuing broker education and a document of some kind listing the date, title, provider, number of credit hours, and location (if applicable) for each training. To report and certify compliance, individual brokers who file paper-based triennial reports with CBP would include a written statement in the triennial report, and individual brokers who file their triennial reports electronically through the eCBP portal would check a box in the eCBP portal while filing their triennial report electronically. Brokers would further be required to produce their records of compliance if requested by CBP, though CBP would only require brokers to maintain their records for the three years following the submission of the triennial report.⁶⁸ CBP estimates that recordkeeping and reporting would take each broker 30 minutes (0.5 hours) per year. After the first triennial reporting period in which brokers self-attest to completing their training, 10 percent of brokers each year would incur the cost of producing records to submit to CBP for a compliance audit, which CBP estimates will take 15 minutes (0.25 hours).⁶⁹ Therefore, brokers would see \$1,380,538 in new reporting and recordkeeping costs over the 6-year period of analysis. *See* Table 10.

⁶⁷ Some brokers would likely face additional time-costs should they fail to complete and/or report their required continuing education and need to take corrective action or reapply for their licenses following revocation (*see* proposed § 111.104(d) for details). However, CBP only reports the costs affected populations would face to maintain compliance with the proposed rule.

⁶⁸ Note that many other records must be maintained for five years. The 3-year standard applies only to records of continuing education.

⁶⁹ CBP would randomly select 10 percent of individual brokers to audit for compliance each year.

TABLE 10—REPORTING COSTS FOR ALL BROKERS
[2021 U.S. dollars]

Year	Brokers	Time (hours) ⁷⁰	Wage	Total
2021	13,822	0.5	\$31.27	\$216,107
2022	13,822	0.5	31.27	216,107
2023	13,822	0.5	31.27	216,107
2024	14,867	0.5–0.75	31.27	244,072
2025	14,867	0.5–0.75	31.27	244,072
2026	14,867	0.5–0.75	31.27	244,072
Total	14,867	3.0–3.75	.....	1,380,538

* Totals may not sum due to rounding.

To comply with the proposed rule, individual brokers who do not already do so would be required to spend 36 hours over three years completing continuing education in whatever form they choose. Additionally, CBP estimates they would spend three hours per 3-year cycle researching and registering for trainings. Finally, brokers would need to spend about 30–45 minutes (0.5–0.75 hours) on recordkeeping during each cycle. Overall, brokers would need to spend about 40.5 hours over a 3-year period, or 81 hours over a 6-year period of analysis, to comply with the rule.

Some brokers would choose to complete their trainings outside of work hours, while others would complete training as part of their assigned duties. Brokers would also spend time in researching, registering for, and maintaining records of their continuing education, for a total of 12 hours per year of training plus 1.5 to 1.75 hours per year in research and recordkeeping. Based on the average wage rate for brokers of \$31.27, the opportunity cost of researching, registering for, attending, and reporting continuing education is approximately \$14,547,191 over the 6-year period of analysis.⁷¹ See Table 11.

⁷⁰ Note that only 10 percent of individual brokers would spend 45 minutes per year, while the remaining 90 percent would spend 30 minutes per year. Furthermore, CBP would only begin audits after the first triennial period during which the rule is in effect.

⁷¹ U.S. Bureau of Labor Statistics. Occupational Employment Statistics, “May 2019 National Occupational Employment and Wage Estimates, United States.” Updated March 31, 2020. Available at https://www.bls.gov/oes/2019/may/oes_nat.htm. Accessed June 12, 2020; U.S. Bureau of Labor Statistics. Employer Costs for Employee Compensation. Employer Costs for Employee Compensation Historical Listing March 2004–December 2019, “Table 3. Civilian workers, by occupational group: Employer costs per hours worked for employee compensation and costs as a percentage of total compensation, 2004–2019.” March 2020. Available at <https://www.bls.gov/web/ceec/ceecqrtn.pdf>. Accessed June 12, 2020. The wages are in 2019 dollars and CBP assumes an annual growth rate of 0 percent.

TABLE 11—SUMMARY OF OPPORTUNITY COST FOR BROKERS
[2021 U.S. dollars]

Year	Brokers	Hours	Wage rate	Cost
2021	5,529	13.5	\$31.27	\$2,333,955
2022	5,529	13.5	31.27	2,333,955
2023	5,529	13.5	31.27	2,333,955
2024	5,947	13.5	31.27	2,515,108
2025	5,947	13.5	31.27	2,515,108
2026	5,947	13.5	31.27	2,515,108
Total	5,947	81	187.62	14,547,191

* Totals may not sum due to rounding.

Total costs for all individual brokers, including tuition and travel expenses for those who must begin continuing education regimens because of the rule as well as opportunity and reporting costs for all brokers, range from \$16,452,050 to \$53,128,426. The primary estimate, which accounts for one third of brokers choosing each cost tier, comes to \$35,478,781 over the 6-year period of analysis. See Table 12.

TABLE 12—TOTAL COSTS FOR ALL BROKERS
[2021 U.S. dollars]

Year	Total cost: low estimate	Total cost: medium estimate	Total cost: high estimate	Total cost: primary estimate
2021	\$2,636,505	\$5,913,241	\$8,526,520	\$5,692,089
2022	2,636,505	5,913,241	8,526,520	5,692,089
2023	2,636,505	5,913,241	8,526,520	5,692,089
2024	2,847,512	6,372,048	9,182,956	6,134,172
2025	2,847,512	6,372,048	9,182,956	6,134,172
2026	2,847,512	6,372,048	9,182,956	6,134,172
Total	16,452,050	36,855,867	53,128,426	35,478,781

* Totals may not sum due to rounding.

ii. To CBP

To implement the requirements of the proposed rule, CBP would need to designate entities or companies as approved accreditors of customs broker continuing education. To do so, CBP would solicit applications from parties interested in becoming accreditors, or (following the first application cycle) accreditors seeking renewal of their status, by publishing a Request for Proposal (RFP).⁷² A panel of CBP

⁷² See proposed 19 CFR 111.103(c).

experts would evaluate the applications and select the entities approved or renewed as accreditors. CBP estimates that the process of developing and submitting the RFP would take two personnel 10 hours. Application evaluation would take a further 40 hours and would require four CBP personnel. The process of designating accreditors would occur before the continuing education requirements went into effect, to allow accreditors to be ready for the rule’s implementation and ensure equal footing for all providers.⁷³ However, because of uncertainty over timing of the rule’s implementation, we assumed that designation of accreditors would occur in the first year of the period of analysis. Regardless of when the rule goes into effect and the designation process occurs, accreditors and CBP would need to complete the process two times in a 6-year period. Overall, designation of accreditors would require six CBP personnel 180 hours total, twice in a 6-year period of analysis, for a cost to CBP of \$26,640 (see Table 13).

TABLE 13—COSTS TO CBP TO DESIGNATE ACCREDITORS
[2021 U.S. dollars]

Year	Personnel for RFP	Personnel for evaluation	Wage rate	Hours	Total
2021	2	4	\$74.00	50	\$13,320
2022	0	0	74.00	0	0
2023	0	0	74.00	0	0
2024	2	4	74.00	50	13,320
2025	0	0	74.00	0	0
2026	0	0	74.00	0	0
Total .....	.....	.....	.....	.....	26,640

* Totals may not sum due to rounding.

CBP’s Broker Management Branch (BMB) would also face the costs of auditing for compliance with the continuing education requirement. Although individual brokers would self-attest to their completion of the continuing education requirement with each triennial report, CBP would occasionally conduct compliance audits by randomly selecting a certain subset of brokers for auditing. To start, CBP would select 10 percent of brokers per year, although the audits would only cover the continuing education reported for the most recently completed triennial cycle. A continuing education compliance audit would involve CBP personnel reviewing the reported coursework of the selected broker and potentially working with brokers to identify

⁷³ See section IV.E.1. of this NPRM.

gaps or higher quality training opportunities. Such an activity would take approximately one hour, on average; therefore, CBP estimates that each compliance audit would cost CBP approximately \$74.00. For the first three years of the period of analysis, no compliance audit would take place because brokers would not yet have reported their training at the end of the first triennial cycle. Over the next three years, CBP would select 10 percent of active individual brokers to audit.⁷⁴ With about 1,500 compliance audits performed per year, costs to CBP would amount to \$330,054 over the 6-year period of analysis. See Table 14.

TABLE 14—COMPLIANCE AUDITING COSTS FOR CBP
[2021 U.S. dollars]

Year	Audits	Cost per audit	Total
2021	0	\$74	\$0
2022	0	74	0
2023	0	74	0
2024	1,487	74	110,018
2025	1,487	74	110,018
2026	1,487	74	110,018
Total	4,460	444	330,054

* Totals may not sum due to rounding.

iii. To Accreditors

Accrediting bodies interested in becoming designated accreditors for customs brokers continuing education under the terms of proposed rule would need to apply to CBP during an open RFP period and then re-apply to confirm their status every three years. Costs to respond to the RFP include only the preparation of the application. Overall, CBP estimates that the preparation of an application to CBP to become an accreditor would take two employees 40 hours, to be completed two times in a 6-year period. Although the application for accreditor status would likely be completed before the proposed rule is officially in effect, because of uncertainty in the timing, we have used the same period of analysis.⁷⁵ Regardless of when the rule goes

⁷⁴ Those individual brokers who have not yet completed a triennial report since taking their broker exam would be exempt from completing continuing education until after their first triennial report and, therefore, would also be exempt from continuing education audits during that time.

⁷⁵ When the proposed rule is first implemented, CBP would allow accreditor-applicants time to apply before the requirement is officially in place so that they are able to accredit courses as soon as the rule is in effect, allowing providers equal footing and giving brokers the largest pool of potential training.

into effect, accreditor-applicants would need to apply twice in a 6-year period. Therefore, CBP estimates that CBP-designated accreditors would incur approximately \$11,339 in costs over a 6-year period of analysis. See Table 15.

TABLE 15—COSTS TO ACCREDITORS
[2021 U.S. dollars]

Year	Personnel	Wage rate	Hours	Total
2021	2	\$70.87	40	\$5,670
2022	0	70.87	0	0
2023	0	70.87	0	0
2024	2	70.87	40	5,670
2025	0	70.87	0	0
2026	0	70.87	0	0
Total .....	.....	.....	.....	11,339

* Totals may not sum due to rounding.

iv. To Providers

Providers of continuing education would also face new costs under the terms of the proposed rule. Specifically, providers would need to submit applications to accreditors to have their coursework or events accredited. Officials at the NCBFAA Education Institute estimate that they currently approve approximately 1,000 courses per year. With the proposed rule in place, CBP believes the number of events submitted for accreditation would increase substantially because companies’ internal trainings and external offerings would need to be accredited. Therefore, CBP estimated that about 2,000 courses would require accreditation each year. Providers would likely pay a fee and would need to renew their accreditation annually to ensure their coursework remains up to date. The fee for accreditation is likely to vary based on accreditor, but would likely average \$25.⁷⁶ Overall, CBP estimates that providers of continuing education for customs brokers would face \$300,000 of new costs over a 6-year period of analysis. See Table 16.

⁷⁶ This fee is based on that charged by the NCBFAA. Although CBP sought information in the ANPRM on how much accreditors might charge, CBP did not receive specific information.

TABLE 16—COSTS TO PROVIDERS
[2021 U.S. dollars]

Year	Courses	Fee	Total
2021	2,000	\$25.00	\$50,000
2022	2,000	25.00	50,000
2023	2,000	25.00	50,000
2024	2,000	25.00	50,000
2025	2,000	25.00	50,000
2026	2,000	25.00	50,000
Total .....	.....	.....	300,000

* Totals may not sum due to rounding.

Based on the primary estimate, costs total \$36,146,814 over the 6-year period of analysis. Using a three percent discount rate, the annualized total costs are \$6,012,425. See Table 17 for an annual breakdown and Table 18 for discounting.

TABLE 17—TOTAL COSTS TO ALL PARTIES
[2021 U.S. dollars]

Year	Costs to brokers—primary estimate	Costs to accreditors	Costs to providers	Costs to CBP—accrediting and auditing	Total costs
2021	\$5,692,089	\$5,670	\$50,000	\$13,320	\$5,761,078
2022	5,692,089	0	50,000	0	5,742,089
2023	5,692,089	0	50,000	0	5,742,089
2024	6,134,172	5,670	50,000	123,338	6,313,179
2025	6,134,172	0	50,000	110,018	6,294,190
2026	6,134,172	0	50,000	110,018	6,294,190
Total	35,478,781	11,339	300,000	356,694	36,146,814

* Totals may not sum due to rounding.

TABLE 18—DISCOUNTED TOTAL COSTS
[2021 U.S. dollars]

	3%		7%	
	PV	AV	PV	AV
Costs	\$32,570,459	\$6,012,425	\$28,584,851	\$5,996,982

6. Costs Not Estimated in This Analysis

The parties affected by the proposed rule would also face several, mostly minor costs that CBP is unable to quantify. To provide indi-

vidual brokers who choose to file their triennial report electronically through the eCBP portal the ability to self-attest to their continuing education completion, CBP would need to include a field within the triennial report, which is submitted via the eCBP portal. The programming to include this field does not add significantly to the application development budget as CBP constantly makes small changes to many aspects of CBP's authorized electronic data interchanges.

Additionally, some potential accreditors may face costs related to protesting CBP's initial decisions regarding their proposals to become accreditors.⁷⁷ Accreditor-applicants would have the right to protest in accordance with procedures set out in the FAR. CBP expects these costs to be minor and protests to be rare. Brokers' clients may see slight price increases for broker services. As broker costs increase, they may pass some of these costs onto their clients in the form of increased prices. However, CBP believes that the per transaction increase in prices would be so small as to be insignificant.

7. Benefits of the Rule

This proposed rule, if finalized, would have many benefits to brokers, CBP, and the general public. We are able to estimate some of the benefits of the proposed rule, but many others are qualitative in nature. Brokers would benefit from improved reputation and a professionalization of the customs broker community while their clients would benefit from better performance and improved compliance. The continuing broker education requirement would provide importers and drawback claimants with greater assurance that their agents are knowledgeable of customs laws and regulations, familiar with operational processes, and can properly exercise a broker's fiduciary duties. The requirements would also help maintain a measure of consistency across all customs brokers. Providers would benefit from increased prestige due to CBP-approved accreditation. Other benefits of the proposed rule are quantitative.

CBP would benefit from a reduction in regulatory audits of broker compliance. Both CBP and brokers would benefit from fewer errors committed by brokers and fewer penalties assessed by CBP. CBP examined data on broker penalties, regulatory audits, and validation activities between a group of companies who employ one or more individual brokers known to voluntarily hold an industry certification that requires meeting the proposed continuing education requirement and the broader population of brokers (which includes those who voluntarily complete continuing education and those who do

⁷⁷ See section IV.E.1. of this NPRM.

not). This group of brokers with continuing education represents about 300 companies, which make up 54 percent of entries filed between 2017 and 2020 and 51 percent of entries filed between 2015 and 2020. CBP found that at the 99 percent confidence level, there is a statistically significant difference between these groups. Those who voluntarily hold this certification and complete continuing education have significantly lower rates of penalties, audits, and validation activities. *See* Table 19.⁷⁸ Brokers who are not known to have continuing education are assessed 11 times as many penalties per entry filing, are audited 8 times as often, and have 5 times as many validation activities performed by CBP to investigate discrepancies when compared to companies that are known to employ brokers who voluntarily take continuing education.

TABLE 19—ENFORCEMENT ACTION RATE FOR DIFFERENT GROUPS

Enforcement action	Total	By all other companies (%)	By 300 companies with continuing education (%)	Ratio
Penalty	267	0.00039	0.000035	11 to 1
Regulatory Audit	87	0.000077	0.000011	8 to 1
Validation Activity	311	0.00026	0.000052	5 to 1

* Rates are defined as the number of enforcement actions divided by the number of entries filed.

Aside from penalties, CBP enforcement often takes the form of a regulatory audit. Regulatory audits usually occur because a CBP Officer or Import Specialist flags unusual or suspicious activity. CBP then performs a regulatory audit of the broker’s activity, investigating the potential infraction, as well as the broker’s overall compliance with regulations, rules, and CBP guidance. These audits may lead to a settlement agreement in which a penalty is assessed, but they more often lead to discussion between the broker and CBP as to how the broker can improve compliance and performance. With continuing education in place, CBP believes that fewer regulatory audits would be necessary. From 2015 to 2020, CBP performed 84 regulatory audits of broker compliance, for an average of 14 per year.⁷⁹ The number of audits holds approximately steady across the 5-year period, so CBP

⁷⁸ Source of data of companies with at least one individual broker with continuing education: Data received from NCBFAA on companies participating in its broker certification program on April 28, 2021. Data on enforcement actions and the number of entries per company was obtained from ACE on April 11, 2021.

⁷⁹ Data provided by CBP’s Regulatory Audit and Agency Advisory Services Directorate on April 11, 2021.

does not believe it likely that the number of audits would grow in the period of analysis. Therefore, CBP projects 84 audits would be performed during the 6-year period of analysis under baseline conditions, or 14 each year. See Table 20.

TABLE 20—PROJECTION OF AUDITS AND BROKER SURVEYS UNDER THE BASELINE

Year	Audits
2021	14
2022	14
2023	14
2024	14
2025	14
2026	14
Total	84

CBP estimates that a regulatory audit of broker compliance takes CBP approximately 559 hours, on average. Based on the average wage rate for a CBP Trade and Revenue employee of \$74.00 per hour, we estimate the average broker audit costs \$41,351. Based on a review of outcomes from the audits completed from 2015–2020, approximately 40 percent would likely have been avoided had a continuing education requirement been in place. CBP believes that, had customs brokers been required to complete continuing education on an individual level, and, therefore, stayed current on the rules and regulations governing customs business, they would have made fewer errors and avoided the audits. Over a 6-year period of analysis under the terms of the rule, CBP would avoid 34 audits, for a cost savings of \$1,389,400. See Table 21.

TABLE 21—CBP COST SAVINGS FROM REDUCED REGULATORY AUDIT ACTIVITIES [2021 U.S. Dollars]

Year	Audits avoided	Cost savings per audit	Total savings
2021	6	\$41,351	\$231,567
2022	6	41,351	231,567
2023	6	41,351	231,567
2024	6	41,351	231,567
2025	6	41,351	231,567
2026	6	41,351	231,567
Total	34	248,107	1,389,400

* Totals may not sum due to rounding.

The number of penalties assessed between 2017 and 2020 grew significantly. In 2017, CBP assessed 20 penalties while in 2020, that number jumped to 119 (see Table 1, above). Between 2017 and 2020, the number of penalties issued increased with a compound annual growth rate (CAGR) of 52 percent. The jump in penalties between 2019 and 2020 is likely attributable to changes in the AD/CVD environment, and CBP does not believe that penalties per year would continue to grow at the same rate. Based on trends before and after the jump, we do not believe that the number of penalties assessed per year would consistently grow at any meaningful rate. Based on a 0 percent growth rate, CBP estimates that over the 6-year period of analysis from 2021 to 2026, CBP would assess 675 penalties. See Table 22 for an annual count.

TABLE 22—PROJECTION OF PENALTIES ASSESSED FROM 2021–2026 UNDER THE BASELINE

Year	Penalties
2021.....	113
2022.....	113
2023.....	113
2024.....	113
2025.....	113
2026.....	113
Total.....	675

When CBP assesses a penalty against a broker for a customs violation, CBP incurs the cost of detecting and investigating the violation, as well as determining the appropriate monetary fine and handling any appeals from the broker. The broker must pay the penalty, which is capped at \$30,000 by statute. CBP also works with brokers against whom a fine has been assessed to mitigate the penalty, resulting in the collection of amounts that are usually significantly lower. From 2017–2020, monetary penalties collected from individual brokers averaged \$2,644. CBP estimates that the entire process of assessing a penalty against a broker, from detection to working through mitigation, costs CBP approximately \$4,440 per penalty.⁸⁰

⁸⁰ CBP bases this estimate on an average of 60 hours worked per penalty at an average wage of \$74.00 per hour for a CBP Trade and Revenue employee. CBP bases this wage on the FY 2020 salary and benefits of the national average of CBP Trade and Revenue positions, which is equal to a GS–13, Step 5. Source: Email correspondence with CBP’s Office of Finance on July 2, 2020.

With the proposed rule implemented, CBP believes that brokers would commit approximately 20 percent fewer penalizable violations.⁸¹ As a result, brokers would save approximately \$359,640 in fines avoided, while CBP would save approximately \$599,400 in processing costs.⁸² See Tables 23 and 24.

TABLE 23—PENALTIES AVOIDED BY BROKERS
[2021 U.S. Dollars]

Year	Penalties avoided	Fines avoided per penalty	Total
2021	23	\$2,664	\$59,940
2022	23	2,664	59,940
2023	23	2,664	59,940
2024	23	2,664	59,940
2025	23	2,664	59,940
2026	23	2,664	59,940
Total	135	15,984	359,640

* Totals may not sum due to rounding.

TABLE 24—COSTS AVOIDED BY CBP
[2021 U.S. Dollars]

Year	Penalties avoided	Cost savings per penalty	Total
2021	23	\$4,440	\$99,900
2022	23	4,440	99,900
2023	23	4,440	99,900
2024	23	4,440	99,900
2025	23	4,440	99,900
2026	23	4,440	99,900
Total	135	26,640	599,400

* Totals may not sum due to rounding.

⁸¹ Approximately 20 percent of the penalties assessed between 2017 and 2020 were for infractions that CBP believes would have been avoided had the broker been required to complete continuing education. The majority of the remaining penalties were for late filing. Penalty data is taken from SEACATS.

⁸² Penalties are a transfer payment from the broker to CBP that do not affect total resources available to society. Accordingly, CBP does not include penalties or penalties avoided in the final accounting of costs and benefits this rule. In addition, penalties are an enforcement tool that are intended to bring a noncompliant party in line with existing requirements. Any costs and benefits that result from compliance with the underlying requirement are included in the analysis, but not the enforcement mechanism. In the same way, if a rule results in the seizure of illegal merchandise, CBP does not include the cost of the lost merchandise to the importers.

8. Net Impact of the Rule

The proposed rule would lead to costs for brokers in the form of tuition, travel expenses, opportunity cost, and time spent researching, registering for, keeping records of, and reporting continuing education. CBP would face the costs of designating accreditors and auditing broker compliance. Accreditors would incur the costs of responding to a CBP-issued RFP, and education providers would incur the costs of drafting applications and fees charged by the accreditors for reviewing their accreditation requests. CBP would also see cost savings (benefits) from avoided penalty assessment and avoided regulatory audits. CBP has found that companies employing one or more brokers who complete continuing education are statistically less likely to face enforcement actions. Over a 6-year period of analysis, the primary estimate of the net costs totals \$34,158,014 (see Table 25). Using a discount rate of three percent, annualized costs total \$5,680,959 (see Table 26).

TABLE 25—PRIMARY ESTIMATE OF NET COSTS
[2021 U.S. Dollars]

Year	Benefits	Costs	Net costs ⁸³
2021	\$331,467	\$5,761,078	\$5,429,611
2022	331,467	5,742,089	5,410,622
2023	331,467	5,742,089	5,410,622
2024	331,467	6,313,179	5,981,713
2025	331,467	6,294,190	5,962,723
2026	331,467	6,294,190	5,962,723
Total	1,988,800	36,146,814	34,158,014

TABLE 26—PRIMARY ESTIMATE OF NET PRESENT AND ANNUALIZED COSTS
[2021 U.S. Dollars]

	3%		7%	
	PV	AV	PV	AV
Savings	\$1,795,619	\$331,467	\$1,579,949	\$331,467
Costs	32,570,459	6,012,425	28,584,851	5,996,982
Net Costs ...	30,774,841	5,680,959	27,004,902	5,665,515

⁸³ Note that we only include costs of remaining compliant with the proposed rule in the net costs. Similarly, we do not include penalties avoided in the final accounting of benefits.

CBP presents four estimates of the net costs depending on the cost of training pursued by each individual broker. The low-cost path assumes the broker would pursue only free trainings and forgo travel. In the medium-cost path, brokers would pursue a mix of free and paid trainings and travel to a single conference or in-person event per year. In the high-cost path, brokers would pursue all paid trainings and travel to two in-person events or conferences per year. The primary estimate assumes that one third of brokers would choose each path. Overall, the quantifiable effects of the proposed rule result in a net, annualized cost ranging from \$2,514,956 to \$8,617,817, using a 3 percent discount rate over the 6-year period of analysis. A summary of net costs under all four estimates presented in the analysis can be found in Table 27.

TABLE 27—SUMMARY OF NET COSTS
[2021 U.S. Dollars]

Estimate	Value	3%	7%
Primary	Net PV	\$30,774,841	\$27,004,902
	Net AV	5,680,959	5,665,515
Low	Net PV	13,624,000	11,945,324
	Net AV	2,514,956	2,506,079
Medium	Net PV	32,016,156	28,094,859
	Net AV	5,910,102	5,894,183
High.....	Net PV	46,684,367	40,974,522
	Net AV	8,617,817	8,596,283

As stated before, many benefits of the proposed rule are qualitative. Brokers would benefit from improved reputation and a professionalization of the customs broker community while their clients would benefit from better performance, less non-compliance, and improved outcomes. Providers would benefit from increased prestige due to CBP-approved accreditation. CBP believes that the combination of quantified benefits and unquantified benefits exceed the costs of this rule. We request comment on this conclusion.

9. Analysis of Alternatives

Alternative 1: 72 hours every three years.

Alternative 1 is the same as the chosen alternative except that the continuing education requirement would be raised to 72 hours each triennial cycle instead of 36 hours. This alternative is modeled on the

Internal Revenue Service's (IRS) Enrolled Agent program, which requires 72 hours of continuing education every three years.⁸⁴ An enrolled agent is an individual who may represent clients in matters before the IRS and, like a licensed customs broker, must pass a rigorous examination to prove his or her knowledge and competence, making it a reasonable analog to the proposed CBP program. Once the agent has passed the exam, he or she has unlimited practice rights, providing he or she completes the requisite continuing education.

CBP has determined that 72 hours every three years would be inappropriate for individual brokers. Were CBP to mandate 72 hours of continuing education every three years, brokers who already voluntarily pursue continuing education would need to increase the amount of training they complete, often by 100 percent. Costs incurred by both brokers who do not already pursue continuing education and those who do would be much greater. Such a requirement would be too onerous, particularly for small businesses, which make up a significant proportion (approximately 39 percent) of the employers of licensed customs brokers. CBP estimates that such a requirement would cost brokers up to \$113,258,739 over a 6-year period of analysis, or about \$7,618 per broker. *See* Table 28.

TABLE 28—BROKER COSTS UNDER A 72-HOUR CONTINUING EDUCATION REQUIREMENT
[2021 U.S. Dollars]

Year	Brokers	Low		Medium		High	
		Cost	Total	Cost	Total	Cost	Total
2021.....	13,822	\$62.54	\$518,657	\$1,248	\$10,348,863	\$2,193	\$18,188,702
2022.....	13,822	62.54	518,657	1,248	10,348,863	2,193	18,188,702
2023.....	13,822	62.54	518,657	1,248	10,348,863	2,193	18,188,702
2024.....	14,867	62.54	557,880	1,248	11,131,490	2,193	19,564,211
2025.....	14,867	62.54	557,880	1,248	11,131,490	2,193	19,564,211
2026.....	14,867	62.54	557,880	1,248	11,131,490	2,193	19,564,211
Total.....	14,867	375	3,229,610	7,487	64,441,059	13,159	113,258,739

* Totals may not sum due to rounding.

⁸⁴ See Internal Revenue Service, Enrolled Agent Information (Apr. 6, 2021), available at <https://www.irs.gov/tax-professionals/enrolled-agents/enrolled-agent-information>.

Alternative 2: 36 hours every three years.

Alternative 2 is the chosen alternative.

Alternative 3: CBP list of brokers voluntarily meeting continuing education standards.

Under Alternative 3, instead of mandating any kind of continuing education program, CBP would release annually a list of brokerages or companies employing brokers who voluntarily provide continuing education to their broker employees. As with Alternative 1, qualifying events would include internal training, government-sponsored webinars, trade conferences and events, and other activities. CBP would draft this list each year by requesting that companies report whether they provide a continuing education program. CBP might request details from the company to ensure the training provided meets a certain threshold for quality and relevance.

Under baseline conditions, CBP estimates that about 60 percent of brokers already complete continuing education on a voluntary basis. CBP does not believe that publishing a list of brokerages that provide continuing education would induce the remaining 40 percent of brokers to pursue continuing education, though some brokers might do so. Under Alternative 3, those individual brokers who already complete ongoing training would continue to do so, while many of those brokers who do not, would not, absent a mandate, be likely to change. CBP estimates that an additional five percent of brokers might begin a continuing education program in order to be included on CBP's list, representing about 186 additional companies.⁸⁵ While fewer brokers would face the costs of tuition, travel, and record-keeping, approximately 743 would face these costs of continuing education over the 6-year period of analysis. Additionally, CBP would incur the costs of composing the list each year and companies employing brokers would face the costs of applying to be included on the list. Assuming two CBP personnel spend about 40 hours each, annually to compose the list, that one person from each company spends about 10 hours compiling and submitting information to CBP annually, and that one third of affected brokers choose each cost path, Alternative 3 results in costs of \$5,636,739 over the 6-year period of analysis. *See* Table 29.

⁸⁵ CBP assumes that large companies employing more than 100 people already have a continuing education program. Therefore, those companies that would need to add continuing education in order to be included on CBP's list would likely be small to medium sized businesses, meaning there would be a significant number of them, employing a few brokers each.

TABLE 29—TOTAL COSTS UNDER ALTERNATIVE 3
[2021 U.S. Dollars]

Year	CBP cost	Brokerage costs	Broker costs	Total
2021	\$11,840	\$267,605	\$293,545	\$572,990
2022	11,840	267,605	695,303	974,748
2023	11,840	267,605	725,822	1,005,267
2024	11,840	267,605	748,466	1,027,911
2025	11,840	267,605	748,466	1,027,911
2026	11,840	267,605	748,466	1,027,911
Total	71,040	1,605,631	3,960,068	5,636,739

* Totals may not sum due to rounding.

If only 5 percent more brokers elect to begin continuing education under the terms of Alternative 3, fewer non-compliance actions would be avoided. CBP estimates that only an eighth as many penalties and audits would be avoided as compared to Alternative 2. Therefore, CBP and brokers would avoid three penalties and one audit annually, for a total cost savings of \$44,955 per year. However, CBP does not typically include avoided penalties in the overall accounting of costs and benefits of a rule. Therefore, over a 6-year period of analysis, Alternative 3 leads to \$248,600 in cost savings.

TABLE 30—TOTAL SAVINGS UNDER ALTERNATIVE 3
[2021 U.S. Dollars]

Year	Savings for brokers	Savings for CBP	Total savings
2021	\$7,493	\$41,433	\$41,433
2022	7,493	41,433	41,433
2023	7,493	41,433	41,433
2024	7,493	41,433	41,433
2025	7,493	41,433	41,433
2026	7,493	41,433	41,433
Total	44,955	248,600	248,600

* Totals may not sum due to rounding.

One of the primary goals of the proposed rule is to reduce compliance issues, penalties, and regulatory audits, and CBP does not believe that a system based on voluntary reporting would do enough to reach that goal. With only an additional 5 percent of brokers

pursuing continuing education, Alternative 3 would not do enough to further professionalize the customs broker community, nor would their clients see an appreciable decline in compliance issues. Additionally, such a system would still result in a net cost of about \$5.4 million over the 6-year period of analysis. Therefore, CBP believes that Alternative 3 is less preferable than the chosen alternative.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement and Fairness Act of 1996, requires agencies to assess the impact of regulations on small entities. A small entity may be a small business (defined as any independently owned and operated business not dominant in its field that qualifies as a small business concern per the Small Business Act); a small organization (defined as any not-for-profit enterprise which is independently owned and operated and is not dominant in its field); or a small governmental jurisdiction (defined as a locality with fewer than 50,000 people). A small business within the Freight Transportation Arrangement Industry, the industry that employs customs brokers, is defined as one whose annual receipts are less than \$16.5 million, regardless of the number of employees.⁸⁶ Data from the U.S. Census Bureau shows that approximately 96 percent of businesses in the Transportation Arrangement Industry (NAICS Code 448510) are small businesses (see Table 31). All businesses employing brokers under this NAICS Code are affected by this rule. Additionally, some small businesses may elect to become accreditors or training providers. Therefore, CBP concludes that this rule will affect a substantial number of small entities.

⁸⁶ Small business size standards are defined in 13 CFR part 121.

TABLE 31—SMALL BUSINESSES IN THE FREIGHT TRANSPORTATION ARRANGEMENT INDUSTRY⁸⁷

Employment size ⁸⁸	Number of employees	Preliminary receipts (all firms, \$1,000s) ⁸⁹	Receipts per firm (\$)	Small business?
01: Total.....	265,192	\$67,276,572	\$4,454,222	
02: <5.....	15,939	6,315,166	708,614	Yes.
03: 5–9.....	18,025	5,392,992	1,974,732	Yes.
04: 10–19.....	20,288	5,870,163	3,851,813	Yes.
05: <20.....	54,252	17,578,321	1,335,029	Yes.
06: 20–99.....	49,477	13,973,780	10,397,158	Yes.
07: 100–499.....	44,715	10,886,028	30,493,076	No.
08: <500.....	148,444	42,438,129	2,854,327	Yes.
09: 500+.....	116,748	24,838,443	105,247,640	No.

Some small businesses may choose to apply to CBP to become accreditors. Those businesses would face the costs of applying to CBP, the potential costs of any protests they choose to file should they disagree with CBP’s decision regarding their proposals, and the costs of being an accreditor. Small businesses may also choose to become training providers and to incur the costs of producing and providing trainings. However, CBP believes that those costs would be recouped by tuition and fees. CBP further expects any costs not directly covered by fees to be minor and included in general business expenses.

Individual brokers employed by these companies would be required to attain 36 hours of continuing education every three years under the terms of the proposed rule. They would also face the opportunity cost of attending trainings as well as the costs of recordkeeping, reporting, and participating in any continuing education compliance audit initiated by CBP. Accordingly, the impacts of the rule to individual brokers and affected businesses will depend on if the broker currently meets the proposed training requirements. Based on public comments in response to the ANPRM and discussions between CBP and various broker organizations, CBP estimates most large busi-

⁸⁷ United States Census Bureau, “2017 County Business Patterns and 2017 Economic Census,” Released March 6, 2020, <https://www.census.gov/data/tables/2017/econ/susb/2017-susb-annual.html>. Accessed March 15, 2021.

⁸⁸ Note that some of the categories are sums of other categories. For example, Category 8, <500, is a sum of Categories 2, 3, 4, 6, and 7. Thus, Categories 7 and 9 are not consecutive, but represent all firms employing 100 or more people.

⁸⁹ The Survey of U.S. Businesses (SUSB) from which this data is taken is conducted in years ending in 2 and 7. Note that finalized results from the 2017 survey are scheduled for release in May of 2021.

nesses employing brokers already provide, and often mandate, internal training and continuing education. CBP estimates that these 60 percent of individual brokers already in compliance would not face new costs aside from recordkeeping and reporting. CBP estimates the remaining 40 percent of brokers, mostly at smaller businesses, would need to come into compliance with the proposed rule. Using the primary estimate under which one third of brokers selects each cost tier, and assuming a discount rate of 3 percent, the annualized cost of the rule to all affected brokers is \$5,903,336. The rule would affect 5,529 customs brokers in the first year, for an average annualized cost of \$1,068 per broker. The average annual receipts for small businesses in the Freight Transportation Arrangement Industry, according to the Census data in Table 28, is \$543,589. The number of brokers employed by each business would vary among the small businesses in question, but assuming an average of four brokers per company,⁹⁰ the cost of continuing education for each firm would be approximately \$4,272 annually, or about 0.79 percent of annual receipts. CBP generally considers effects of less than 1 percent of annual receipts not to be a significant impact. Accordingly, CBP certifies that this proposed rule does not have a significant economic impact on a substantial number of small entities.

C. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. 3507) an agency may not conduct, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number assigned by OMB. The collections of information contained in these regulations are provided for by OMB control number 1651–0034 (CBP Regulations Pertaining to Customs Brokers).

The proposed rule would require individual brokers to maintain records of completed continuing education (including, among others, the date, title, provider, location, and credit hours) and certify the completion of the required number of continuing education credits on the triennial report. Based on these changes, CBP estimates a small increase in the burden hours for information collection related to customs brokers regulations. CBP would submit to OMB for review the following adjustments to the previously approved Information Collection under OMB control number 1651–0034 to account for this

⁹⁰ Many brokerages are sole proprietorships and many employ individual brokers who supervise other employees. The average number of employees per firm is seven. CBP assumes the average firm employs 4 individual brokers and 3 other employees, such as human resource managers.

proposed rule's changes. The addition of the self-attestation and submission of records would add about 30–45 minutes (0.5–0.75 hours) per respondent.

CBP Regulations Pertaining Customs Brokers

Estimated Number of Respondents: 13,822.

Estimated Number of Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 0.333.

Estimated Time per Response: 31.5 minutes (0.525 hours).

Estimated Total Annual Burden Hours: 2,418.85 hours.

D. Signing Authority

This document is being issued in accordance with 19 CFR 0.1(b)(1), which provides that the Secretary of the Treasury delegated to the Secretary of DHS authority to prescribe and approve regulations relating to customs revenue functions on behalf of the Secretary of the Treasury for when the subject matter is not listed as provided by Treasury Department Order No. 100–16. Accordingly, this proposed rule may be signed by the Secretary of DHS (or his or her delegate).

List of Subjects in 19 CFR Part 111

Administrative practice and procedure, Brokers, Penalties, Reporting and recordkeeping requirements.

Amendments to the Regulations

For the reasons set forth in the preamble, CBP proposes to amend 19 CFR part 111 as set forth below:

PART 111—CUSTOMS BROKERS

■ 1. The general authority citation for part 111 continues to read as follows:

Authority: 19 U.S.C. 66, 1202 (General Note 3(i), Harmonized Tariff Schedule of the United States), 1624, 1641.

* * * * *

■ 2. Revise the second sentence of § 111.0 to read as follows:

§ 111.0 Scope.

* * * This part also prescribes the duties and responsibilities of brokers, the grounds and procedures for disciplining brokers, including the assessment of monetary penalties, the revocation or suspension of licenses and permits, and the obligation for individual customs broker license holders to satisfy a continuing education requirement.

■ 3. In § 111.1, add the definitions “Continuing broker education requirement”, “Continuing education credit”, “Qualifying continuing broker education”, and “Triennial period” in alphabetical order to read as follows:

§ 111.1 Definitions.

* * * * *

Continuing broker education requirement. “Continuing broker education requirement” means an individual customs broker license holder’s obligation to complete a certain number of continuing education credits of qualifying continuing broker education, as set forth in subpart F of this part, in order to maintain sufficient knowledge of customs and related laws, regulations, and procedures, bookkeeping, accounting, and all other appropriate matters necessary to render valuable service to importers and drawback claimants.

Continuing education credit. “Continuing education credit” means the unit of measurement used for meeting the continuing broker education requirement. The smallest recognized unit is one continuing education credit, which requires 60 minutes of continuous participation in a qualifying continuing broker education program, as defined in § 111.103(a). For qualifying continuing broker education lasting more than 60 minutes, one continuing education credit may be claimed for the first 60 minutes of continuous participation, and half of one continuing education credit may be claimed for every full 30 minutes of continuous participation thereafter. For example, for qualifying continuing broker education lasting more than 60 minutes but less than 90 minutes, only one continuing education credit may be claimed. In contrast, for qualifying continuing broker education lasting 90 minutes, 1.5 continuing broker education credits may be claimed.

* * * * *

Qualifying continuing broker education. “Qualifying continuing broker education” means any training or educational activity that is eligible or, if required, has been approved for continuing education credit, in accordance with § 111.103.

* * * * *

Triennial period. “Triennial period” means a period of three years commencing on February 1, 1985, or on February 1 in any third year thereafter.

■ 4. In § 111.30, revise paragraphs (d)(2)(ii) and (iii) and add paragraph (d)(2)(iv) to read as follows:

§ 111.30 Notification of change of business address, organization, name, or location of business records; status report; termination of brokerage business.

* * * * *

(d) * * *

(2) * * *

(ii) State the name and address of his or her employer if he or she is employed by another broker, unless his or her employer is a partnership, association, or corporation broker for which he or she is a qualifying member or officer for purposes of § 111.11(b) or (c)(2);

(iii) State whether or not he or she still meets the applicable requirements of §§ 111.11 and 111.19 and has not engaged in any conduct that could constitute grounds for suspension or revocation under § 111.53; and

(iv) Report and certify the broker's compliance with the continuing broker education requirement as set forth in § 111.102.

* * * * *

§§ 111.97 through 111.100 [Added and Reserved]

■ 5. Add reserve §§ 111.97 through 111.100.

■ 6. Add subpart F, consisting of §§ 111.101 through 111.104, to read as follows:

Subpart F—Continuing Education Requirements for Individual Customs Broker License Holders

Sec.

111.101 Scope.

111.102 Obligations of individual customs brokers in conjunction with continuing broker education requirement.

111.103 Accreditation of qualifying continuing broker education.

111.104 Failure to report and certify compliance with continuing broker education requirement.

§ 111.101 Scope.

This subpart sets forth regulations providing for a continuing education requirement for individual customs broker license holders and the framework for administering the requirements of this subpart. The continuing broker education requirement is for individual brokers, in order to maintain sufficient knowledge of customs and related laws, regulations, and procedures, bookkeeping, accounting, and all other appropriate matters necessary to render valuable service to importers and drawback claimants.

§ 111.102 Obligations of individual customs brokers in conjunction with continuing broker education requirement.

(a) *Continuing broker education requirement.* All individual customs broker license holders must complete qualifying continuing broker education as defined in § 111.103(a), except:

(1) During a period of voluntary suspension as described in § 111.52; or

(2) When individual customs broker license holders have not held their license for an entire triennial period at the time of the submission of the status report as required under § 111.30(d).

(b) *Required minimum number of continuing education credits.* All individual brokers who are subject to the continuing broker education requirement must complete at least 36 continuing education credits of qualifying continuing broker education each triennial period, except upon the reinstatement of a license following a period of voluntary suspension as described in § 111.52. Upon the reinstatement of a license following a period of voluntary suspension as described in § 111.52, the number of continuing education credits that an individual broker must complete by the end of the triennial period during which the reinstatement of the license occurred will be calculated on a prorated basis of one continuing education credit for each complete remaining month until the end of the triennial period.

(c) *Reporting requirements.* Individual brokers who are subject to the continuing broker education requirement must report and certify their compliance upon submission of the status report required under § 111.30(d).

(d) *Recordkeeping requirements*—(1) *General.* Individual brokers who are subject to the continuing broker education requirement must retain the following information and documentation pertaining to the qualifying education completed during a triennial period for a period of three years following the submission of the status report required under § 111.30(d):

- (i) The title of the qualifying continuing broker education attended;
- (ii) The name of the provider or host of the qualifying continuing broker education;
- (iii) The date(s) attended;
- (iv) The number of continuing education credits accrued;
- (v) The location of the training or educational activity, if the training or educational activity is offered in person; and
- (vi) Any documentation received from the provider or host of the qualifying continuing broker education that evidences the individual broker's registration for, attendance at, completion of, or other activ-

ity bearing upon the individual broker's participation in and completion of the qualifying continuing broker education.

(2) *Availability of records.* In order to ensure that the individual broker has met the continuing broker education requirement, upon CBP's request, the individual broker must make available to CBP the information and documentation described in paragraph (d)(1) of this section. CBP can request the information and documentation be made available for in-person inspection, or be delivered to CBP by either hard-copy or electronic means, or any combination thereof.

§ 111.103 Accreditation of qualifying continuing broker education.

(a) *Qualifying continuing broker education.* In order for a training or educational activity to be considered qualifying continuing broker education, it must meet the following two requirements:

(1) *Providers of qualifying continuing broker education.* The training or educational activity must be offered by one of the following providers:

(i) *Government agencies.* Qualifying continuing broker education constitutes any training or educational activity offered by CBP, whether online or in-person, and training or educational activity offered by another U.S. Government agency, whether online or in-person, but only if the content is relevant to customs business. Accreditation is not required for trainings or educational activities offered by U.S. Government agencies.

(ii) *Other providers requiring accreditation.* Any other training or educational activity not offered by a U.S. Government agency, whether online or in-person, will not be considered a qualifying continuing broker education, unless the training or educational activity has been approved for continuing education credit by a CBP-selected accreditor before the training or educational activity is provided.

(2) *Recognized trainings or educational activities.* The training or educational activity must constitute one of the following:

(i) Coursework, a seminar, or a workshop, whether online or in-person, that is conducted by an instructor, discussion leader, or speaker;

(ii) A symposium or convention, with the exception of the attendance at a meeting conducted in accordance with the provisions of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), whether online or in-person;

(iii) The preparation of a subject matter for presentation as an instructor, discussion leader, or speaker at a training or educational activity described in paragraphs (a)(2)(i) and (ii) of this section, subject to the requirements set forth in paragraph (b) of this section; and

(iv) The presentation of a subject matter as an instructor, discussion leader, or speaker at a training or educational activity described in paragraph (a)(2)(i) or (ii) of this section, subject to the requirements set forth in paragraph (b) of this section.

(b) *Special allowance for instructors, discussion leaders, and speakers.* (1) Contingent upon the approval by a CBP-selected accreditor, an individual broker may claim one continuing education credit for each full 60 minutes spent:

(i) Presenting subject matter as an instructor, discussion leader, or speaker at a training or educational activity described in paragraph (a)(2)(i) or (ii) of this section; or

(ii) Preparing subject matter for presentation as an instructor, discussion leader, or speaker at a training or educational activity described in paragraph (a)(2)(i) or (ii) of this section.

(2) The special allowance for instructors, discussion leaders, and speakers is subject to the following limitations:

(i) For any session of presentation given at one time, regardless of the duration of that session, an individual broker may claim, at a maximum, one continuing education credit for the time spent preparing subject matter for that presentation pursuant to paragraph (b)(1)(ii) of this section.

(ii) Per triennial period, an individual broker may claim, at a maximum, a combined total of 12 continuing education credits earned in accordance with paragraphs (b)(1)(i) and (ii) of this section.

(3) Regardless of whether the training or educational activity is offered by a U.S. Government agency or another provider, any instructor, discussion leader, or speaker seeking to claim continuing education credit in accordance with paragraph (b)(1) of this section must obtain the approval of a CBP-selected accreditor.

(c) *Selection of accreditors.* The Office of Trade will select accreditors based on a Request for Information (RFI) and a Request for Proposal (RFP) announced through the System for Award Management (SAM) or any other electronic system for award management approved by the U.S. General Services Administration, in accordance with the Federal Acquisition Regulation (48 CFR chapter 1), for a specific period of award, subject to renewal. The Executive Assistant Commissioner, Office of Trade, will periodically publish notices in the **Federal Register** announcing the criteria that CBP will use to select an accreditor, the period during which CBP will accept applications by potential accreditors, and the period of award for a CBP-selected accreditor.

(d) *Responsibilities of CBP-selected accreditors.* CBP-selected accreditors administer the accreditation of trainings or educational activities other than those described in paragraph (a)(1) of this sec-

tion for the purpose of the continuing broker education requirement by reviewing and approving or denying such educational content for continuing education credit. A CBP-selected accreditor's approval of a training or educational activity for continuing education credit is valid for one year, and the accreditation may be renewed through any CBP-selected accreditor.

(e) *Prohibition of self-certification by an accreditor.* CBP-selected accreditors may not approve their own trainings or educational activities for continuing education credit.

§ 111.104 Failure to report and certify compliance with continuing broker education requirement.

(a) *Notification by CBP.* If an individual broker is subject to the continuing broker education requirement pursuant to § 111.102 and submits a status report as required under § 111.30(d)(2), but fails to report and certify compliance with the continuing broker education requirement as part of the submission of the status report, then CBP will notify the individual broker of the broker's failure to report and certify compliance in accordance with § 111.30(d). The notification will be sent to the address reflected in CBP's records, or transmitted electronically pursuant to any electronic means authorized by CBP for that purpose.

(b) *Required response to notice.* Upon the issuance of such notification, the individual broker must within 30 calendar days:

(1) Submit a corrected status report that, in accordance with § 111.30(d), reflects the individual broker's compliance with the continuing broker education requirement, if the individual broker completed the required number of continuing education credits but failed to report and certify compliance with the requirement as part of the submission of the status report; or

(2) Complete the required number of continuing education credits of qualifying continuing broker education and submit a corrected status report that, in accordance with § 111.30(d), reflects the broker's compliance with the continuing broker education requirement, if the individual broker had not completed the required number of continuing education credits at the time the status report was due.

(c) *Suspension of license.* Unless the individual broker takes the corrective actions described in paragraph (b)(1) or (2) of this section within 30 calendar days of the issuance of the notification described in paragraph (a) of this section, CBP will take actions to suspend the individual broker's license in accordance with subpart D of this part.

(d) *Revocation of license.* If the individual broker's license has been suspended pursuant to paragraph (c) of this section and the

individual broker fails to take the corrective actions described in paragraph (b)(1) or (2) of this section within 120 calendar days upon the issuance of the order of suspension, CBP will take actions to revoke the individual broker's license without prejudice to the filing of an application for a new license in accordance with subpart D of this part.

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

[Published in the Federal Register, September 10, 2021 (85 FR 50723)]

**NOTICE OF ISSUANCE OF FINAL DETERMINATION
CONCERNING CERTAIN CALCITRIOL SOFT-SHELL
CAPSULES**

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

ACTION: Notice of final determination.

SUMMARY: This document provides notice that U.S. Customs and Border Protection (CBP) has issued a final determination concerning the country of origin of certain Calcitriol soft-shell capsules. Based upon the facts presented, CBP has concluded in the final determination that the Calcitriol capsules would be products of a foreign country or instrumentality designated pursuant to CBP regulations for purposes of U.S. Government procurement.

DATES: The final determination was issued on August 27, 2021. A copy of the final determination is attached. Any party-at-interest, as defined in 19 CFR 177.22(d), may seek judicial review of this final determination no later than October 12, 2021.

FOR FURTHER INFORMATION CONTACT: Albena Peters, Valuation and Special Programs Branch, Regulations and Rulings, Office of Trade, at (202) 325-0321.

SUPPLEMENTARY INFORMATION: Notice is hereby given that on August 27, 2021, CBP issued a final determination concerning the country of origin of Calcitriol capsules for purposes of Title III of the Trade Agreements Act of 1979. This final determination, HQ H319605, was issued at the request of the party-at-interest, under procedures set forth at 19 CFR part 177, subpart B, which implements Title III of the Trade Agreements Act of 1979, as amended (19 U.S.C. 2511-18). In the final determination, CBP has concluded that, based upon the facts

presented, the Calcitriol soft-shell capsules would be products of a foreign country or instrumentality designated pursuant to 19 U.S.C. 2511(b) for purposes of U.S. Government procurement. Section 177.29, CBP Regulations (19 CFR 177.29), provides that a notice of final determination shall be published in the **Federal Register** within 60 days of the date the final determination is issued. Section 177.30, CBP Regulations (19 CFR 177.30), provides that any party-at-interest, as defined in 19 CFR 177.22(d), may seek judicial review of a final determination within 30 days of publication of such determination in the **Federal Register**.

Dated: September 3, 2021.

ALICE A. KIPEL,
Executive Director,
Regulations and Rulings, Office of Trade.

HQ H319605

August 27, 2021

OT:RR:CTF:VS H319605 AP

CATEGORY: Origin

STEVEN LERNER, SUPPLY CHAIN ANALYST,
SUN PHARMACEUTICAL INDUSTRIES LTD.,
2 INDEPENDENCE WAY,
PRINCETON, NJ 08540

RE: U.S. Government Procurement; Title III, Trade Agreements Act of 1979 (19 U.S.C. 2511); Subpart B, Part 177, CBP Regulations; Country of Origin of Calcitriol Capsules

DEAR MR. LERNER:

This is in response to your July 13, 2021 request, on behalf of Sun Pharmaceutical Industries Ltd. (“Sun Pharma”), for a final determination concerning the country of origin of Calcitriol soft-shell capsules. This request is being sought because the company wants to confirm eligibility of the merchandise for U.S. government procurement purposes under Title III of the Trade Agreements Act of 1979 (“TAA”), as amended (19 U.S.C. 2511 *et seq.*). Sun Pharma is a party-at-interest within the meaning of 19 CFR 177.22(d)(1) and 177.23(a).

FACTS:

Sun Pharma is among the largest specialty generic pharmaceutical companies in the world with more than 40 manufacturing facilities.¹ The company manufactures and imports Calcitriol² in the form of soft-shell capsules (0.25 mcg and 0.5 mcg). The Calcitriol capsules are used for vitamin D3 deficiency.

The raw ingredients originate from Switzerland. The active ingredient is Calcitriol USP. The inactive ingredients, which serve as coloring agents, preservatives, and fillers, consist of medium-chain triglycerides, butylated hydroxyanisole, butylated hydroxytoluene, noncrystallizing liquid sorbitol, glycerin, gelatin, methyl paraben, propylparaben, ferric oxide (red and yellow), titanium dioxide, triethyl citrate, isopropyl alcohol, and opacode black.

All of the Swiss ingredients are shipped to India where capsules are manufactured. During the manufacturing process, the Calcitriol is dissolved in medium chain triglycerides along with other inactive ingredients to form a clear drug solution. Gelatin is mixed along with purified water and other inactive ingredients under specific temperature and vacuumed with help of a gelatin melter. The resulting gelatin mass is fed into an encapsulation machine to form soft gelatin capsules with drug solution inside. The capsules pass into a tumble dryer to remove excess moisture. After the capsules are dried and polished, they are printed with food grade ink. Finally, the capsules are inspected, packed in containers, and labelled.

¹ See Sun Pharma, About Us, <https://sunpharma.com/about-us/> (last visited Aug. 2, 2021).

² The Calcitriol’s National Drug Code Directory numbers are: 62756–967–83, 62756–967–88 and 62756–968–88.

ISSUE:

What is the country of origin of the subject Calcitriol capsules for purposes of U.S. Government procurement?

LAW AND ANALYSIS:

U.S. Customs and Border Protection (“CBP”) issues country of origin advisory rulings and final determinations as to whether an article is or would be a product of a designated country or instrumentality for the purposes of granting waivers of certain “Buy American” restrictions in U.S. law or practice for products offered for sale to the U.S. Government, pursuant to subpart B of Part 177, 19 CFR 177.21–177.31, which implements Title III of the TAA, as amended (19 U.S.C. 2511–2518).

CBP’s authority to issue advisory rulings and final determinations is set forth in 19 U.S.C. 2515(b)(1), which states:

For the purposes of this subchapter, the Secretary of the Treasury shall provide for the prompt issuance of advisory rulings and final determinations on whether, under section 2518(4)(B) of this title, an article is or would be a product of a foreign country or instrumentality designated pursuant to section 2511(b) of this title.

The rule of origin set forth under 19 U.S.C. 2518(4)(B) states:

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

A product of a foreign country or instrumentality designated pursuant to 19 U.S.C. 2511(b)(1), in pertinent part, is a country or instrumentality which is a party to the Agreement on Government Procurement (“GPA”), referred to in 19 U.S.C. 3511(d)(17), and as annexed to the World Trade Organization (“WTO”) Agreement.³ Switzerland is a WTO GPA country.

Title 48, CFR Section 25.003 defines “WTO GPA country end product” as an article that:

(1) Is wholly the growth, product, or manufacture of a WTO GPA country; or

(2) In the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in a WTO GPA country into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed. The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the end product includes services (except transportation services) incidental to the article, provided that the value of those incidental services does not exceed that of the article itself.

³ See World Trade Organization, Agreement on Government Procurement, Parties, Observers and Accessions, https://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm (last visited Aug. 2, 2021).

Sun Pharma asserts that no substantial transformation occurs in India because the identity of the raw materials originating from Switzerland remains intact. We concur. The processing of the Calcitriol into dosage form as soft gel capsules will not result in a substantial transformation. *See* Headquarters Ruling Letter (“HQ”) H284694, dated Aug. 22, 2017 (Dutch-origin bulk calcium acetate produced in the Netherlands and combined with inactive ingredients in India resulted in calcium acetate capsules originating from the Netherlands); HQ H233356, dated Dec. 26, 2012 (The blending of the mefenamic acid of Indian origin with inactive ingredients in the U.S. to form mefenamic acid capsules did not substantially transform the mefenamic acid from India). The Calcitriol is produced in Switzerland and is encapsulated in India. No change in name occurs in India because the product is referred to as “Calcitriol” both before and after encapsulation. The Calcitriol is the only active ingredient. After being mixed with the inactive ingredients serving as coloring agents, preservatives, and fillers, it retains its chemical and physical properties and is merely put into a dosage form in India. Finally, no change in use occurs in India because the Calcitriol retains the same predetermined medicinal use for vitamin D3 deficiency. As a result, no substantial transformation occurs during the encapsulation process in India and the country of origin of the final Calcitriol capsules remains Switzerland, a WTO GPA country, where the Calcitriol is produced.

Accordingly, the instant Calcitriol capsules would be products of a foreign country or instrumentality designated pursuant to 19 U.S.C. 2511(b)(1).

HOLDING:

Based on the facts presented, the country of origin of the Calcitriol capsules is Switzerland, a WTO GPA country, for purposes of U.S. Government procurement. Therefore, the Calcitriol soft-shell capsules would be products of a foreign country or instrumentality designated pursuant to 19 U.S.C. 2511(b)(1).

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

Sincerely,

ALICE A. KIPPEL,

Executive Director,

Regulations and Rulings, Office of Trade.

**PROPOSED REVOCATION OF EIGHT RULING LETTERS,
PROPOSED MODIFICATION OF ONE RULING LETTER,
AND REVOCATION OF TREATMENT RELATING TO THE
TARIFF CLASSIFICATION OF FLEET TELEMATICS
DEVICES**

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

ACTION: Notice of proposed revocation of eight ruling letters, proposed modification of one ruling letter, and proposed revocation of treatment relating to the tariff classification of fleet telematics devices.

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

DATE: Comments must be received on or before October 29, 2021.

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

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

SUPPLEMENTARY INFORMATION:**BACKGROUND**

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

Pursuant to 19 U.S.C. § 1625(c)(1), this notice advises interested parties that CBP is proposing to revoke eight ruling letters, and modify one ruling letter, pertaining to the tariff classification of fleet telematics devices. Although in this notice, CBP is specifically referring to New York Ruling Letter ("NY") N304264, dated May 22, 2019 (Attachment A), NY N213872, dated May 16, 2012 (Attachment B), NY N108329, dated June 28, 2010 (Attachment C), NY N300201, dated September 11, 2018 (Attachment D), NY N301862, dated December 11, 2018 (Attachment E), NY N201495, dated February 14, 2012 (Attachment F), NY N108330, dated June 22, 2010 (Attachment G), NY N148555, dated March 3, 2011 (Attachment H), and NY N168766, dated June 21, 2011 (Attachment I), 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 nine rulings 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 N304264, NY N213872, NY N108329, NY N300201, and NY N301862, CBP classified fleet telematics devices in heading 8517, HTSUS, specifically in subheading 8517.62.00, HTSUS, which provides for “[T]elephone sets, including telephones for cellular networks or for other wireless networks; other apparatus for the transmission or reception of voice, images or other data, including apparatus for communication in a wired or wireless network (such as a local or wide area network), other than transmission or reception apparatus of heading 8443, 8525, 8527 or 8528; parts thereof: Other apparatus for transmission or reception of voice, images or other data, including apparatus for communication in a wired or wireless network (such as a local or wide area network): Machines for the reception, conversion and transmission or regeneration of voice, images or other data, including switching and routing apparatus:.” In NY N201495, NY N108330, NY N148555, and NY N168766, CBP classified fleet telematics devices in heading 8526, HTSUS, specifically in subheading 8526.91.00, HTSUS, which provides for “[R]adar apparatus, radio navigational aid apparatus and radio remote control apparatus: Other: Radio navigational aid apparatus:.” CBP has reviewed NY N304264, NY N213872, NY N108329, NY N300201, NY N301862, NY N201495, NY N108330, NY N148555, and NY N168766 and has determined the ruling letters to be in error. It is now CBP’s position that fleet telematics devices that are composite machines and feature components described by headings that fall under Section XVI, and Chapter 90 if applicable, are classified pursuant to Note 3 to Section XVI, and Note 3 to Chapter 90 if applicable, as if consisting only of that component that performs the telematics device’s principal function. If it is not possible to determine the principal function, and the context does not otherwise require, classification will be determined pursuant to GRI 3(c). In applying this legal analysis, it is now CBP’s position that the subject fleet telematics devices, depending on their configuration, are properly classified, pursuant to GRI 3(c), under either heading 8526, HTSUS, specifically subheading 8526.91.00, HTSUS, which provides for “[R]adar apparatus, radio navigational aid apparatus and radio remote control apparatus: Other: Radio navigational aid apparatus:” or under heading 9031, HTSUS, specifically subheading 9031.80.80, HTSUS, which provides for for “[M]easuring or checking instruments, appliances and machines, not speci-

fied or included elsewhere in this chapter; profile projectors; parts and accessories thereof; other instruments, appliances and machines: other.”

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is proposing to revoke NY N304264, NY N213872, NY N108329, NY N300201, NY N301862, NY N201495, NY N108330, NY N148555, and to modify NY N168766, and to revoke or modify any other ruling not specifically identified to reflect the analysis contained in the proposed Headquarters Ruling Letter (“HQ”) H312223, set forth as Attachment “J” 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.

GREGORY CONNOR
for

CRAIG T. CLARK,
Director

Commercial and Trade Facilitation Division

Attachments

ATTACHEMENT A

N304264

May 22, 2019

CLA-2-85:OT:RR:NC:N2:209

CATEGORY: Classification

TARIFF NO.: 8517.62.0090

ERIC SEGAL
PANASONIC CORPORATION OF NORTH AMERICA
TWO RIVERFRONT PLAZA
NEWARK, NJ 07102

RE: The tariff classification of a telematic control unit from Spain

DEAR MR. SEGAL:

In your letter dated May 6, 2019, you requested a tariff classification ruling.

The items concerned are referred to as “Telematic Control Units” (TCU), model numbers 51986538 and 51986539.

The TCU is a cellular communication device that is installed within a vehicle and connects to the Controller Area Network (CAN) bus, Body Control Module (BCM), and battery line voltage (VBATT). It allows the vehicle to communicate CAN bus data, location data, and vehicle security information to a backend server infrastructure.

The TCU has an internal battery capable of sustaining TCU operations for security purposes, BLE 4.2 connectivity, a LTE/4G/3G/2G cell modem, GPS/GLOANASS functionality, internal cellular and GPS antennas. The GPS functionality provides mobile phone access via the TCU to a vehicle’s position and routes the phone to that vehicle. The vehicle does not use the GPS from the TCU to perform routing or navigation functions.

The applicable subheading for the “Telematic Control Units” (TCU), model numbers 51986538 and 51986539 will be 8517.62.0090, Harmonized Tariff Schedule of the United States (HTSUS), which provides for “Telephone sets, including telephones for cellular networks or for other wireless networks; other apparatus for the transmission or reception of voice, images or other data, including apparatus for communication in a wired or wireless network (such as a local or wide area network), other than transmission or reception apparatus of heading 8443, 8525, 8527 or 8528; parts thereof: Other apparatus for transmission or reception of voice, images or other data, including apparatus for communication in a wired or wireless network (such as a local or wide area network): Machines for the reception, conversion and transmission or regeneration of voice, images or other data, including switching and routing apparatus: Other.” The general rate of duty will be Free.

Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on the 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 Steven Pollichino at steven.pollichino@cbp.dhs.gov.

Sincerely,

STEVEN A. MACK

Director

National Commodity Specialist Division

ATTACHEMENT B

N213872

May 16, 2012

CLA-2-85:OT:RR:NC:N1:109

CATEGORY: Classification

TARIFF NO.: 8517.62.0050

MS. ANGELA M. SANTOS

GRUNFELD, DESIDERIO, LEBOWITZ, SILVERMAN & KLESTADT, LLP

399 PARK AVENUE, 25TH FLOOR

NEW YORK, NY 10022-4877

RE: The tariff classification of a Telemetry Device from an unspecified country

DEAR MS. SANTOS:

In your letter dated April 12, 2012 you requested a tariff classification ruling on behalf of your client, Xirgo Technologies, Incorporated

The merchandise subject to this ruling is a telemetry device (XT6000G). The device is mounted on a refrigerated container on a ship and receives and transmits data between the container's microcontroller ("Reefer") and the external server. The XT6000G obtains relevant data, including alarms and changes in power or environmental conditions from the Reefer. It can be configured to report collected data based on events defined by its configuration; on a periodic basis; upon request by an external server; or upon request by a router connected to the local mesh network formed by the device and other similar devices within its range.

The collected data, combined with location and time data from a global positioning system (GPS) within the XT6000G, is transmitted over a global wireless network using a 3G modem also located within the product to an external server connected to the Internet. In addition, some of the data collected (including the associated location and time stamping) is provided over a local wireless mesh network to a handheld router. Based on commands received from the server in response to the transmitted reported data, the XT6000G can transmit and inform the Reefer to adjust the container's environmental conditions, update the firmware in the Reefer, or report additional information. However, the device cannot automatically adjust the refrigerated container's environmental conditions and does not perform any of the adjustments of updates.

The XT6000G transmits the refrigerated container's environmental and location data derived from the Reefer in the refrigerated container to the external server. This device does not perform the measurement activities, but simply reports the data. Its GPS system only serves to provide the refrigerated container's location data so that the server can determine the necessary adjustments to the refrigerated container's environment. The XT6000G cannot measure the environmental conditions of the refrigerated container or automatically change the refrigerated container's conditions. Its principal function is to receive data commands from the server and in turn transmit commands to the Reefer.

The applicable subheading for a Telemetry Device will be 8517.62.0050, Harmonized Tariff Schedule of the United States (HTSUS), which provides for "Other apparatus for transmission or reception of voice, images or other data, including apparatus for communication in a wired or wireless network

(such as a local or wide area network): Machines for the reception, conversion and transmission or regeneration of voice, images or other data, including switching and routing apparatus: 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 Linda M. Hackett at (646) 733-3015.

Sincerely,

THOMAS J. RUSSO

Director

National Commodity Specialist Division

ATTACHEMENT C

N108329

June 28, 2010

CLA-2-85:OT:RR:NC:N1:109

CATEGORY: Classification

TARIFF NO.: 8517.62.0050

MR. KARL F. KRUEGER
REGULATORY COMPLIANCE CONSULTANT
RADIX GROUP INTERNATIONAL
DBA DHL GLOBAL FORWARDING
2660 20TH STREET
PORT HURON, MI 48060

RE: The tariff classification of a Communicator 500 and a Communicator 1000 from Canada

DEAR MR. KRUEGER:

In your letter dated June 3, 2010 you requested a tariff classification ruling on behalf of your client, Wireless Matrix.

The merchandise subject to this ruling is a Communicator 500 and a Communicator 1000. Both items are used for telemetry communications and are aimed for use with transportation fleets to enable communication between the vehicle and the home station.

The Communicator 500 is a cellular CDMA/EvDO (transmission and reception) communications platform for vehicle fleets. It provides high speed broadband cellular capability integrated with 802.11b WiFi communications for operations outside the vehicle. The Communicator 500 also includes integrated GPS functionality supporting Wireless Matrix's FleetOutlook® vehicle management solution. The unit mounts inside the vehicle and offers multiple input and output ports for monitoring vehicle functions and status.

The Communicator 1000 is a high speed, secure mobile hotspot available with GSM or CDMA cellular (transmission and reception) technology. This device provides router functionality between 802.11b/g, cellular, and a variety of local interfaces, including Satellite Sidecar™ port for seamless connectivity with Wireless Matrix satellite products. The Communicator 1000 reduces fleet operational costs by tracking and improving vehicle-centric metrics, such as driver performance and safety behavior via Wireless Matrix's Fleet-Outlook® web application. The Communicator 1000 also enables high speed Internet/Intranet communications from a laptop or other computing device from the same wireless platform.

The applicable subheading for the Communicator 500 and the Communicator 1000 will be 8517.62.0050, Harmonized Tariff Schedule of the United States (HTSUS), which provides for "Other apparatus for transmission or reception of voice, images or other data, including apparatus for communication in a wired or wireless network (such as a local or wide area network): Machines for the reception, conversion and transmission or regeneration of voice, images or other data, including switching and routing apparatus: Other." The general rate of duty will be free.

Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on World Wide Web at <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 Linda M. Hackett at (646) 733-3015.

Sincerely,

ROBERT B. SWIERUPSKI

Director

National Commodity Specialist Division

ATTACHEMENT D

N300201

September 11, 2018

CLA-2-85:OT:RR:NC:N2:209

CATEGORY: Classification

TARIFF NO.: 8517.62.0050

BRENDA A. JACOBS
SIDLEY AUSTIN LLP
1501 K STREET, N.W.
WASHINGTON, D.C. 20005

RE: The tariff classification of fleet tracking devices from China and/or Mexico

DEAR Ms. JACOBS:

In your letter dated August 14, 2018, you requested a tariff classification ruling on behalf of your client, Flex Ltd.

The items concerned are the Flex OBD-II asset tracker, the TT600 solar powered asset tracker with Cat-M, and the TT603 solar powered asset tracker with Cat-M.

The primary purpose of these devices is to collect, record and transmit/receive data essential to asset management (assets such as vehicles, trailers or containers). The information gathered enables fleet owners to identify key facts essential to analyzing and effectively managing fleets.

The Flex OBD-11 asset tracker has access to a power source from the vehicle it is monitoring while the solar powered asset trackers are intended for trailers, containers, construction equipment, pumps, and other large unpowered assets.

Both the Flex OBD-II and the solar powered devices have global cellular connectivity. These devices receive and transmit data between an asset, such as a truck or a container, and a remote/external server connected to the internet, transmitting that data over a global wireless network. These devices collect and generate information related to data points such as fuel consumption, system health, driver behavior, speed, tire pressure, mileage traveled, and total stop time in non-depot locations. Fleet owners can use the collected data to identify what percentage of vehicles or other assets (such as trailers or containers) are in use in a particular month and thereby make capacity decisions.

The applicable subheading for the Flex OBD-II asset tracker, the TT600 solar powered asset tracker with Cat-M, and the TT603 solar powered asset tracker with Cat-M will be 8517.62.0050, Harmonized Tariff Schedule of the United States (HTSUS), which provides for “Telephone sets...; other apparatus for the transmission or reception of voice, images or other data...: Other apparatus for transmission or reception of voice, images or other data, including apparatus for communication in a wired or wireless network (such as a local or wide area network): Machines for the reception, conversion and transmission or regeneration of voice, images or other data, including switching and routing apparatus: Other.” The general rate of duty will be Free.

Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on the 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 Steven Pollichino at Steven.Pollichino@cbp.dhs.gov.

Sincerely,

STEVEN A. MACK

Director

National Commodity Specialist Division

ATTACHEMENT E

N301862

December 11, 2018

CLA-2-85:OT:RR:NC:N2:209

CATEGORY: Classification

TARIFF NO.:8517.62.0090

MICHAEL J. FEMAL
 MUCH SHELIST P.C.
 191 N. WACKER DR. SUITE 1800
 CHICAGO, IL 60004

RE: The tariff classification of asset tracking devices from China

DEAR MR. FEMAL:

In your letter dated November 19, 2018, you requested a tariff classification ruling on behalf of your client, Telular Corporation.

The first item concerned is referred to as the Falcon GXT5002C. This electronic device is an externally mounted asset management/tracking device. It is used to track/report various data elements from (generally) a tractor trailer. It operates on a long-lasting battery pack which is recharged from an integrated solar panel. It operates on an LTE cellular network. The Falcon GXT5002C provides relevant reporting, including on-road vs. on-rail profiling, and is configurable to each user's needs. Data can be requested from the GXT5002C on-demand. This device can be programmed over-the-air, allowing customers to update reporting frequency and behavior. The Falcon GXT5002C does not incorporate a GPS transceiver.

The second item concerned is referred to as the Falcon GXT5002. This electronic device is an externally mounted asset management/tracking device. It is used to track/report various data elements from (generally) a tractor trailer. It operates on a long-lasting battery pack which is recharged from an integrated solar panel. It is a custom built cellular, remote data collection device that provides accurate pin-point location information of assets and cargo status. The Falcon GXT5002 provides relevant reporting and is configurable to each user's needs. Data can be requested from the GXT5002 on-demand. This device can also be programmed over-the-air, allowing customers to update reporting frequency and behavior. The Falcon GXT5002 does not incorporate a GPS transceiver.

You proposed classification of both products under subheading 8517.12.0050, Harmonized Tariff Schedule of the United States (HTSUS), which provides for "Telephone sets, including telephones for cellular networks or for other wireless networks;...: Telephone sets, including telephones for cellular networks or for other wireless networks: Telephones for cellular networks or for other wireless networks: Other radio telephones designed for the Public Cellular Radiotelecommunication Service." Based on the information supplied the products concerned are not telephones. As such classification within subheading 8517.12.0050, HTSUS is inapplicable.

The applicable subheading for the Falcon GXT5002C and the Falcon GXT5002 will be 8517.62.0090, HTSUS, which provides for "Telephone sets...; other apparatus for the transmission or reception of voice, images or other data...: Other apparatus for transmission or reception of voice, images or other data...: Machines for the reception, conversion and transmission or

regeneration of voice, images or other data, including switching and routing apparatus: Other.” The general rate of duty will be Free.

Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on the 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 Steven Pollichino at steven.pollichino@cbp.dhs.gov.

Sincerely,

STEVEN A. MACK

Director

National Commodity Specialist Division

ATTACHEMENT F

N201495

February 14, 2012

CLA-2-85:OT:RR:NC:N1:108

CATEGORY: Classification

TARIFF NO.: 8526.91.0040

MR. JOHN M. WALTERS
CRIMSON INFORMATICS, INC.
4435 WATERFRONT DRIVE
SUITE 306
GLEN ALLEN, VA 23060

RE: The tariff classification of a navigational aid apparatus from various countries

DEAR MR. WALTERS:

In your letter dated January 24, 2012, you requested a tariff classification ruling.

The merchandise subject to this ruling request is a Micro-Electro-Mechanical device, model CTDOBD1, which contains a global positioning system (GPS), an accelerometer, a gyroscope, a magnetometer, and a modem. This device is installed in a vehicle and is used to track, record, and transmit data that it receives from the GPS, accelerometer, gyroscope, and magnetometer sensors. In addition, this merchandise transmits the data received by the sensors via a cellular modem to company servers. This device can be used to assist in fleet management, driving habits, or transportation research.

This merchandise is considered a composite machine and as such is classified in accordance with Legal Note 3 to Section XVI, Harmonized Tariff Schedule of the United States (HTSUS) and Legal Note 3 to Chapter 90, HTSUS. It is the opinion of this office that the principal function of this merchandise is being performed by the radio navigational aid (GPS) function and that the other sensors and the modem provide subsidiary functions.

The applicable subheading for this merchandise will be 8526.91.0040, Harmonized Tariff Schedule of the United States (HTSUS), which provides for Radar apparatus, radio navigational aid apparatus and radio remote control apparatus: Other: Radio navigational aid apparatus: 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 Lisa Cariello at (646) 733-3014.

Sincerely,

THOMAS J. RUSSO

Director

National Commodity Specialist Division

ATTACHEMENT G

N108330

June 22, 2010

CLA-2-85:OT:RR:NC:N1:108

CATEGORY: Classification

TARIFF NO.: 8526.91.0040

MR. KARL F. KRUEGER
RADIX GROUP INT'L DBA
DHL GLOBAL FORWARDING
2660 20TH STREET
PORT HURON, MI 48060

RE: The tariff classification of tracking devices from Canada

DEAR MR. KRUEGER:

In your letter dated June 3, 2010, on behalf of Wireless Matrix, you requested a tariff classification ruling.

The merchandise under consideration is the Wireless Matrix Reporter 101 and the Wireless Matrix Reporter 112. These small radio navigation aid devices are designed to track mobile assets such as trucks. Both Matrix Reporters are integrated with Wireless Matrix's FleetOutlook® solution for mobile resource management, and are compatible with wireless Matrix's TechConnect® solution for messaging and job dispatch. In addition, these tracking devices, which are equipped with USB device ports for interface with USB-equipped devices, are small enough to be mounted on the windshield inside a vehicle or out-of-sight under the dashboard.

The Reporter 101, which consists of a sensitive GPS receiver and a General Packet Radio Service (GPRS) transceiver, receives real-time global positioning system (GPS) location information and transmits this data over a GPRS cellular network.

The Reporter 112 integrates a 1xRTT transceiver with a sensitive GPS receiver for tracking purposes. This tracking device receives GPS information and transmits this data over a code division multiple access (CDMA) 1xRTT cellular network.

The Reporter 101 and the Reporter 112 are both multifunction machines and as such are classified in accordance with Legal Note 3 to Section XVI, HTSUS. It is the opinion of this office that the principal function of these devices is being performed by the radio navigational aid (GPS) function.

The applicable subheading for these tracking devices will be 8526.91.0040, Harmonized Tariff Schedule of the United States (HTSUS), which provides for Radar apparatus, radio navigational aid apparatus and radio remote control apparatus: Other: Radio navigational aid apparatus: 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 Lisa Cariello at (646) 733-3014.

Sincerely,
ROBERT B. SWIERUPSKI
Director
National Commodity Specialist Division

ATTACHEMENT H

N148555

March 3, 2011

CLA-2-85:OT:RR:NC:N1:108

CATEGORY: Classification

TARIFF NO.: 8526.91.00

MR. MICHAEL THEODORE
LIVINGSTON CONSULTING
1925-18 AVENUE NE
SUITE 320
CALGARY, ALBERTA T2E 7T8
CANADA

RE: The tariff classification of a GPS/GPRS Tracking Unit from Canada

DEAR MR. THEODORE:

In your letter dated February 14, 2011, on behalf of DSG TAG Systems, Inc., you requested a tariff classification ruling.

The merchandise in question is the "TAG-150 GPS/GPRS Tracking Kit." The TAG-150 is a tracking unit consisting of a printed circuit board assembly with integrated GPS module and GPRS modem, SIM card, Li-Polymer battery and firmware, all housed within a waterproof enclosure. This radio navigational aid apparatus is used to monitor golf carts, utility vehicles and turf equipment. This unit, which is part of the overall TAG fleet management system, constantly communicates its position and movements to the TAG server through the cellular network. It is the opinion of this office that the principal function of this composite machine is performed by the radio navigational aid (GPS tracking) function.

The applicable subheading for the TAG-150 will be 8526.91.00, Harmonized Tariff Schedule of the United States (HTSUS), which provides for Radar apparatus, radio navigational aid apparatus and radio remote control apparatus: Other: Radio navigational aid apparatus. 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 Lisa Cariello at (646) 733-3014.

Sincerely,

ROBERT B. SWIERUPSKI

Director

National Commodity Specialist Division

ATTACHEMENT I

N168766

June 21, 2011

CLA-2-85:OT:RR:NC:N1:108

CATEGORY: Classification

TARIFF NO.: 8526.91.0040

MR. KARIM W. FOURNIER
KF LOGISTICS INC.
480 S. AMERICAS AVE.
SUITE B1-B2
EL PASO, TX 79907

RE: The tariff classification of GPS Personal Trackers and GPS Vehicle Trackers from Hong Kong

DEAR MR. FOURNIER:

In your letter dated May 27, 2011, on behalf of El Paso Communications Systems, Inc., you requested a tariff classification ruling.

The merchandise under consideration is GPS Personal Trackers, item numbers CR-GT80MT, CR-GT30GT, CR-GT30XGT, and CR-GT60GT; and GPS Vehicle Trackers, item numbers CR-GT300VT, CR-GT310VT, and CR-GT400MVT. The Personal Trackers are small, lightweight GPS devices that can obtain personal positions and transmit the position data back to a mobile phone or server, through GPS, GSM, and GPRS capabilities. The Vehicle Trackers are small, lightweight GPS tracking devices specially developed and designed for vehicle real-time tracking and fleet management. These Vehicle trackers are GPS devices that obtain accurate position data and send the position data to a specified mobile phone or server base, through GPS, GSM, and GPRS capabilities. FCC form 740 is required for this merchandise.

This merchandise is multifunctional machines that consist of GPS devices of heading 8526, HTSUS, that transmit the position data back to a mobile phone or server, a function of heading 8517, HTSUS. It is the opinion of this office that the principal function of these multifunctional machines is performed by the radio navigational aid function. Therefore, as per Legal Note 3 to section XVI these GPS trackers are not classifiable in subheading 8517.62.0050, HTSUS, because the principal function of these devices is not performed by the communication function.

The applicable subheading for the GPS Personal Trackers and the GPS Vehicle Trackers will be 8526.91.0040, Harmonized Tariff Schedule of the United States (HTSUS), which provides for Radar apparatus, radio navigational aid apparatus and radio remote control apparatus: Other: Radio navigational aid apparatus: 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 Lisa Cariello at (646) 733-3014.

Sincerely,
ROBERT B. SWIERUPSKI
Director
National Commodity Specialist Division

HQ H312223
 OT:RR:CTF:EMAIN H312223 SKK
 CATEGORY: Classification
 TARIFF NO.'s: 8526.91.00; 9013.80.80

ERIC SEGAL
 PANASONIC CORPORATION OF NORTH AMERICA
 TWO RIVERFRONT PLAZA
 NEWARK, NJ 07102

Re: Revocation of NY N304264; NY N213872; NY N108329, NY N300201, NY N301862, NY N201495, NY N108330, and NY N148555; modification of NY N168766; telematics device; telemetry device; fleet management device; fleet tracker; asset tracker; cargo tracker.

This ruling is in reference to New York Ruling Letter (NY) N304264, dated May 22, 2019, in which U.S. Customs and Border Protection (CBP) classified a telematics device under heading 8517, Harmonized Tariff Schedule of the United States (HTSUS), specifically subheading 8517.62.00, HTSUS, which provides for “[T]elephone sets, including telephones for cellular networks or for other wireless networks; other apparatus for the transmission or reception of voice, images or other data, including apparatus for communication in a wired or wireless network (such as a local or wide area network), other than transmission or reception apparatus of heading 8443, 8525, 8527 or 8528; parts thereof: Other apparatus for transmission or reception of voice, images or other data, including apparatus for communication in a wired or wireless network (such as a local or wide area network): Machines for the reception, conversion and transmission or regeneration of voice, images or other data, including switching and routing apparatus.” Upon reconsideration, we have determined that the tariff classification of the merchandise at issue in NY N304264 is incorrect.

CBP has also reviewed NY N213872, dated May 16, 2012, NY N108329, dated June 28, 2010, NY N300201, dated September 11, 2018, and NY N301862, dated December 11, 2018, which also involve the classification of telemetry devices in heading 8517.62.00, HTSUS. CBP has also undertaken the review of telemetry devices classified in NY N201495, dated February 14, 2012, NY N168766, dated June 21, 2011, NY N108330, dated June 22, 2010, and NY N148555, dated March 3, 2011, under heading 8526, HTSUS, specifically subheading 8526.91.00, HTSUS, which provides for “[R]adar apparatus, radio navigational aid apparatus and radio remote control apparatus: Other: Radio navigational aid apparatus.” We have also determined that the tariff classification of the merchandise at issue in these rulings is incorrect.

Pursuant to the analysis set forth below, CBP is revoking NY N304264, NY N213872, NY N108329, NY N300201, NY N301862, NY N201495, NY N108330, and NY N148555 and modifying NY N168766.

FACTS:

CBP rulings classifying telematics devices in heading 8517, HTSUS:

- *NY N304264:* The subject articles are identified as “Telematic Control Units,” referenced item numbers 51986538 and 519865390. The devices are designed for installation in vehicles and connect to a Controller Area

Network (CAN bus)¹. They communicate vehicle data to a backend server. They feature an internal battery, BLE 4.2 connectivity, LTE/4G/3G/2G cell modem, GPS/GLOANASS functionality, and internal cellular and GPS antennas. The GPS functionality provides mobile phone access via the device to a vehicle's position and routes the phone to that vehicle. The GPS functions to provide location data.

- *NY N213872*: The subject article is a telemetry device, identified as the "XT6000G." The device mounts on a refrigerated ship container. It collects GPS location data and transmits/receives data (i.e., alarms, changes in power or environmental conditions) between the container's microcontroller and the external server. The device features an integrated 3G modem and GPS to provide location data.
- *NY N108329*: The subject articles are identified as the "Communicator 500" and "Communicator 1000." Both items are used for fleet management telemetry communications. The "Communicator 500" is a cellular CDMA/EvDO (transmission and reception) communications platform for vehicle fleets and includes an integrated GPS for location tracking. The unit mounts inside a vehicle and offers multiple input and output ports for monitoring vehicle functions and status. The "Communicator 1000" is a high speed, secure mobile hotspot available with GSM or CDMA cellular (transmission and reception) technology. This device integrates a 3G cellular modem, GPS, and wireless LAN technologies in a single vehicle-mounted platform. The "Communicator 1000" reduces fleet operational costs by tracking and improving vehicle-centric metrics, such as driver performance and safety behavior.
- *NY N300201*: The subject articles are identified as the "Flex OBD-II asset tracker," the "TT600 solar powered asset tracker with Cat-M," and the "TT603 solar powered asset tracker with Cat-M." These devices enhance fleet management by collecting, recording and transmitting/receiving location and other data pertaining to vehicles, trailers or containers. All three models feature a cellular modem. The "Flex OBD-II" also features an OBD-II² code reader. Although NY N300201 does not specify whether the subject devices feature a GPS component, internet research on these products indicates that they possess a GPS component that collects location data³. CBP classified the subject articles in sub-heading 8517.62.00, HTSUS.

¹ A Controller Area Network (CAN bus) is a standard serial communication protocol, meaning that its support of distributed real-time control and multiplexing allows for the interchange of information among the different components of a vehicle. See <https://blog.ansi.org/2017/02/controller-area-network-can-standards-iso-11898/> (site last visited July, 2021).

² OBD-II is an acronym for On-Board Diagnostic II, the second generation of on-board self-diagnostic equipment that provides access to data from the engine control unit.

³ <https://flex.com/sketch-to-scale/deliver/tracking-solutions> (site last visited August, 2020)

- *NY N301862*: The articles at issue consist of two externally mounted asset management/tracking devices, identified as the “Falcon GXT5002C” and the “GXT5002.” They are used to track/report various data elements from (generally) a tractor-trailer. They perform remote data collection that provides location information of assets and cargo status. They operate on a battery pack that recharges from an integrated solar panel. The devices feature a LTE network cellular modem. The ruling requester submitted to CBP that the subject devices do not feature a GPS. However, the product installation specifications for the “Falcon GXT5002C” describe the model as follows: “[T]he GXT5002C is a SkyBitz GPS tracking device used to determine the location as well as the loaded status of a trailer. It communicates via cellular technology and has a wireless interface capability for connectivity to other SkyBitz wireless devices.” The product specifications for the “Falcon GXT5002” do not reference a GPS and indicate that it features an accelerometer to collect start/stop data. CBP classified both products under subheading 8517.12.00, HTSUS.

CBP rulings classifying telematics devices in heading 8526, HTSUS:

- *NY N201495*: The article at issue is a Micro-Electro-Mechanical device, identified as item “CTDOBD1.” The device is designed for installation in a vehicle and contains a cellular modem, GPS, accelerometer, gyroscope, and magnetometer. It transmits the data from the GPS and sensors via a cellular modem to company servers. The device is used to assist in fleet management. Pursuant to Note 3 to Section XVI and Note 3 to Chapter 90, HTS, CBP determined that the subject article was classified under subheading 8526.91.00, HTSUS, on the basis that the GPS imparted the article’s principal function.
- *NY N168766*: Two articles were classified in this ruling, “GPS Personal Trackers” (referenced item numbers CR-GT80MT, CR-GT30GT, CR-GT30XGT, and CR-GT60GT), and “GPS Vehicle Trackers,” (referenced item numbers CR-GT300VT, CR-GT310VT, and CR-GT400MVT). Only the “GPS Vehicle Trackers” are subject to this reconsideration. The “GPS Vehicle Trackers” are designed for real-time tracking and fleet management. An integrated GPS collects location data and the data is transmitted to a specified mobile phone or server base through GPS, GSM, and GPRS capabilities. Pursuant to Note 3 to Section XVI, HTS, CBP classified the subject article under subheading 8526.91.00, HTSUS, and determined that the principal function of the composite machine was performed by the GPS.
- *NY N108330*: The articles at issue are identified as the “Wireless Matrix Reporter 101” and the “Wireless Matrix Reporter 112.” These devices track mobile assets such as trucks. The tracking devices mount to a vehicle’s windshield or under the dashboard and are equipped with USB device ports for interface with USB-equipped devices. The “Wireless Matrix Reporter 101” consists of a GPS and cellular modem. The “Wireless Matrix Reporter 112” integrates a transceiver with a GPS receiver.

CBP determined that subject articles were composite machines classified under subheading 8526.91.00, HTSUS, in accordance with Note 3 to Section XVI, HTS.

- *NY N148555*: The subject article is identified as the “TAG-150 GPS/GPRS Tracking Kit.” The device is a tracking unit consisting of a printed circuit board assembly with integrated GPS, GPRS modem, SIM card, Li-Polymer battery and firmware, all housed within a waterproof enclosure. The device is a fleet management tool used to monitor golf carts, utility vehicles and turf equipment by communicating location data to the TAG server through the cellular network. CBP determined that subject article is a composite machines classified under subheading 8526.91.00, HTSUS, in accordance with Note 3 to Section XVI, HTS.

In summary, the articles at issue in the above-referenced rulings are telematics devices, also commonly referred to as telemetry devices or fleet/asset/cargo management devices or trackers. The subject telematics devices measure and/or collect data at remote points and transmit/receive data via integrated cellular modems to the end user. The subject articles are telematics devices specifically used in fleet management applications.

LAW AND ANALYSIS:

Classification under the HTSUS is in accordance with the General Rules of Interpretation (GRIs). GRI 1 provides that the classification of goods will 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 will then be applied in order.

GRI 3(a) provides that “the heading which provides the most specific description shall be preferred to headings providing a more general description.” GRI 3(b) states, in pertinent part, that composite goods that cannot be classified by reference to GRI 3(a), are to be classified as if they consisted of the component that gives them their essential character. GRI 3(c) provides that when goods cannot be classified by reference to GRI 3(a) or 3(b), they are to be classified in the heading that occurs last in numerical order among the competing headings that equally merit consideration.

The articles in the rulings identified above feature cellular modems, described by heading 8517, HTSUS, which provides for, *inter alia*, apparatus for the wireless transmission or reception of data. All of the articles, with the exception of the “GXT5002” model the subject of NY N301862, also feature a GPS component for collecting location data, described by heading 8526, HTSUS. Some of the articles also feature measuring devices such as an OBD-II code reader (the “Flex OBD-II asset tracker” at issue in NY N300201) and accelerometer (NY N201495 and NY N301862), described by heading 9031, HTSUS. Therefore, the following HTSUS headings are under consideration for all the rulings the subject of this reconsideration:

- 8517 Telephone sets, including telephones for cellular networks or for other wireless networks; other apparatus for the transmission or reception of voice, images or other data, including apparatus for communication in a wired or wireless network (such as a local or

wide area network), other than transmission apparatus of heading 8443, 8525, 8527 or 8528; parts thereof:

8526 Radar apparatus, radio navigational aid apparatus and radio remote control apparatus:

In addition, for NY's N300210, N201495 and N301862, the following HTSUS heading is also under consideration:

9031 Measuring or checking instruments, appliances and machines, not specified or included elsewhere in this chapter; profile projectors; parts and accessories thereof:

Note 3 to Section XVI, HTSUS, provides:

Unless the context otherwise requires, composite machines consisting of two or more machines fitted together to form a whole and other machines designed for the purpose of performing two or more complementary or alternative functions are to be classified as if consisting only of that component or as being that machine which performs the principal function.

Note 3 to Chapter 90 states that the provisions of Note 3 to section XVI also apply to this chapter.

The Harmonized Commodity Description and Coding System Explanatory Notes (ENs) constitute the official interpretation of the Harmonized System. While not legally binding nor dispositive, the ENs provide a commentary on the scope of each heading of the Harmonized System and are generally indicative of the proper interpretation of these headings. *See* T.D. 89-80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

The ENs to Note 3 to Section XVI provide:

**(VI) MULTI-FUNCTION MACHINES
AND COMPOSITE MACHINES**

Section Note 3)

In general, multi-function machines are classified according to the principal function of the machine.

Multi-function machines are, for example, machine-tools for working metal using interchangeable tools, which enable them to carry out different machining operations (e.g., milling, boring, lapping).

Where it is not possible to determine the principal function, and where, as provided in Note 3 to the Section, the context does not otherwise require, it is necessary to apply General Interpretative Rule 3 (c); such is the case, for example, in respect of multi-function machines potentially classifiable in several of the headings 84.25 to 84.30, in several of the headings 84.58 to 84.63 or in several of the headings 84.70 to 84.72.

The ENs to heading 85.26 state that this heading includes the following:

(1) Radio navigational aid equipment (e.g., radio beacons and radio buoys, with fixed or rotating aerials; receivers, including radio compasses equipped with multiple aerials or with directional frame aerial). It also includes global positioning system (GPS) receivers.

As explained above, the subject articles are telematics devices used in fleet management applications. Fleet telematics devices function to monitor a

variety of vehicle/cargo information (*i.e.*, location, driver behaviour, vehicle activity, engine diagnostics, environmental conditions) and transmit that data in real time to fleet operators to enable them to manage their resources. Fleet telematics devices are designed in various configurations. Simpler devices may feature only a cellular modem and GPS; other devices may include additional integrated components that function to obtain data that is specific to the needs of the end-user. The articles at issue feature key components such as a cellular modem, GPS, code reader, and accelerometer. Data relating to location (GPS), vehicle diagnostics (code reader) and changes in velocity, orientation and driving habits (accelerometer) all provide essential information in the context of fleet management, and the cellular modem transmits that data to end-users in real-time. Each of these components (modem, GPS, code reader, accelerometer) contributes equally to the device's function, *i.e.*, obtaining and transmitting real-time data for fleet management purposes. In this regard, we note that the importance of components that monitor essential data elements is dependent upon that data being able to reach the end user in real time. Similarly, the importance of the modem is negated if there is no data to transmit. Accordingly, we conclude that no single key component of the subject telematics devices imparts the principal function.

As it is not possible to determine which component imparts the principal function to the subject merchandise, classification is determined pursuant to GRI 3(c), which provides that goods are to be classified in the heading that occurs last in numerical order among the competing headings that equally merit consideration. As noted *supra*, all the subject articles contain a cellular modem described in heading 8517, HTSUS. All of the subject articles, with the exception of the "GXT5002" at issue in NY N301862, also feature a GPS component for collecting location data, described by heading 8526, HTSUS. The "Flex OBD-II asset tracker" at issue in NY N300201 also features an OBD-II code reader, described by heading 9031, HTSUS. The "CTDOBD1" at issue in NY N201495 and the "Falcon GXT5002" at issue in NY N301862 also feature an accelerometer, described by heading 9031, HTSUS. Accordingly, the articles the subject of this reconsideration are classified as follows:

- *NY N304264*: The "Telematic Control Units" (item numbers 51986538 and 51986539) feature a cellular modem (heading 8517, HTSUS) and GPS (heading 8526, HTSUS). Pursuant to GRI 3(c), the subject articles are classified in heading 8526, HTSUS, specifically subheading 8526.91.00, HTSUS, which provides for "[R]adar apparatus, radio navigational aid apparatus and radio remote control apparatus: Other: Radio navigational aid apparatus:."
- *NY N213872*: The subject telemetry device identified as the "XT6000G" features a cellular modem and GPS. Pursuant to GRI 3(c), the subject article is classified in heading 8526, HTSUS, specifically subheading 8526.91.00, HTSUS.
- *NY N108329*: The subject articles identified as the "Communicator 500" and "Communicator 1000" feature a cellular modem and GPS. Pursuant to GRI 3(c), the subject articles are classified in heading 8526, HTSUS, specifically subheading 8526.91.00, HTSUS.

- *NY N300201*: The subject articles are identified as the “Flex OBD-II asset tracker,” the “TT600 solar powered asset tracker with Cat-M,” and the “TT603 solar powered asset tracker with Cat-M.” The “Flex OBD-II asset tracker” features a cellular modem, GPS, and OBD-II code reader. Pursuant to GRI 3(c), the “Flex OBD-II asset tracker” is classified in heading 9031, HTSUS, specifically subheading 9031.80.80, HTSUS, which provides for “[M]easuring or checking instruments, appliances and machines, not specified or included elsewhere in this chapter; profile projectors; parts and accessories thereof: other instruments, appliances and machines: other.” The “TT600 solar powered asset tracker with Cat-M” and the “TT603 solar powered asset tracker with Cat-M” feature a cellular modem and GPS. Pursuant to GRI 3(c), the “TT600 solar powered asset tracker with Cat-M” and the “TT603 solar powered asset tracker with Cat-M” are classified in heading 8526, HTSUS, specifically subheading 8526.91.00, HTSUS.
- *NY N301862*: The subject articles are identified as the “Falcon GXT5002C” and the “GXT5002.” The “Falcon GXT5002C” features a cellular modem and GPS. Pursuant to GRI 3(c), the “Falcon GXT5002C” is classified in heading 8526, HTSUS, specifically subheading 8526.91.00, HTSUS. The “Falcon GXT5002” features a cellular modem and an accelerometer. Pursuant to GRI 3(c), the “Falcon GXT5002” is classified in heading 9031, HTSUS, specifically subheading 9031.80.80, HTSUS.
- *NY N201495*: The “CTDOBD1” features a cellular modem, GPS, accelerometer, gyroscope, and magnetometer. CBP classified the subject article under subheading 8526.91.00, HTSUS, pursuant to Note 3 to Section XVI and Note 3 to Chapter 90, HTS. The subject article is properly classified, pursuant to GRI 3(c), under subheading 9031.80.80, HTSUS.
- *NY N168766*: Two articles are at issue in this ruling, “GPS Personal Trackers” (referenced items CR-GT80MT, CR-GT30GT, CR-GT30XGT, and CR-GT60GT), and “GPS Vehicle Trackers,” (referenced items CR-GT300VT, CR-GT310VT, and CR-GT400MVT). Only the “GPS Vehicle Trackers” are subject to this reconsideration. The “GPS Vehicle Trackers” feature a cellular modem and GPS. Although CBP correctly classified the subject “GPS Vehicle Trackers” under subheading 8526.91.00, HTSUS, the legal basis for such classification pursuant to Note 3 to Section XVI, HTS, is incorrect. The subject “GPS Vehicle Trackers” are properly classified under subheading 8526.91.00, HTSUS, pursuant to GRI 3(c).
- *NY N108330*: The subject articles are identified as the “Wireless Matrix Reporter 101” and the “Wireless Matrix Reporter 112.” The devices consist of a cellular modem and GPS. Although CBP correctly classified these articles under subheading 8526.91.00, HTSUS, the legal basis for such classification pursuant to Note 3 to Section XVI, HTS, is incorrect. The subject articles are properly classified under subheading 8526.91.00, HTSUS, pursuant to GRI 3(c).

- *NY N148555*: The “TAG-150 GPS/GPRS Tracking Kit” features a cellular modem and GPS. Although CBP correctly classified this article under subheading 8526.91.00, HTSUS, we note that the legal basis for such classification pursuant to Note 3 to Section XVI, HTS, is incorrect. The subject article is properly classified under subheading 8526.91.00, HTSUS, pursuant to GRI 3(c).

HOLDING:

By application of GRIs 1, 3(c) and 6, the subject fleet telematics devices at issue in NY N304264, NY N213872, NY N108329, NY N300201 (only the “TT600 solar powered asset tracker with Cat-M” and “TT603 solar powered asset tracker with Cat-M”), N301862 (only the “Falcon GXT5002C”), NY N201495, NY N108330, NY N148555 and NY N168766 (only the “GPS Vehicle Trackers”) are classified under heading 8526, HTSUS, specifically subheading 8526.91.00, HTSUS, which provides for “[R]adar apparatus, radio navigational aid apparatus and radio remote control apparatus: Other: Radio navigational aid apparatus:.” The applicable rate of duty is free.

By application of GRIs 1, 3(c) and 6, the subject fleet telematics devices at issue in NY N201495, NY N300201 (only the “Flex OBD-II asset tracker”), and NY N301862 (only the “Falcon GXT5002”) are classified under heading 9031, HTSUS, specifically subheading 9031.80.80, HTSUS, which provides for “[M]easuring or checking instruments, appliances and machines, not specified or included elsewhere in this chapter; profile projectors; parts and accessories thereof: other instruments, appliances and machines: other.” The applicable rate of duty is free.

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

EFFECT ON OTHER RULINGS:

NY N304264, dated May 22, 2019, NY N213872, dated May 16, 2012, NY N108329, dated June 28, 2010, NY N300201, dated September 11, 2018, NY N301862, dated December 11, 2018, NY N201495, dated February 14, 2012, NY N108330, dated June 22, 2010, and NY N148555, dated March 3, 2011, are hereby REVOKED.

NY N168766, dated June 21, 2011, is hereby MODIFIED.

Sincerely

CRAIG T. CLARK,

Director

Commercial and Trade Facilitation Division

CC: Ms. Angela M. Santos

Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt, LLP

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19 CFR PART 177

**REVOCATION OF ONE RULING LETTER AND
REVOCATION OF TREATMENT RELATING TO THE
TARIFF CLASSIFICATION OF REFRIGERATOR GASKETS**

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

ACTION: Notice of revocation of one ruling letter and of revocation of treatment relating to the tariff classification of refrigerator gaskets.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) is revoking one ruling letter concerning tariff classification of refrigerator gaskets under the Harmonized Tariff Schedule of the United

States (HTSUS). Similarly, CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Notice of the proposed action was published in the *Customs Bulletin*, Vol. 55, No. 30, on August 4, 2021. One comment was received in response to that notice, supporting the proposed revocation.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after November 28, 2021.

FOR FURTHER INFORMATION CONTACT: Nataline Viray-Fung, Tariff Classification and Marking Branch, Regulations and Rulings, Office of Trade, at nataline.viray-fung@cbp.dhs.gov

SUPPLEMENTARY INFORMATION:

BACKGROUND

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

Pursuant to 19 U.S.C. § 1625(c)(1), a notice was published in the *Customs Bulletin*, Vol. 55, No. 30, on August 4, 2021, proposing to revoke one ruling letter pertaining to the tariff classification of refrigerator gaskets. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should have advised CBP during the comment period.

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

In New York Ruling Letter (“NY”) N300351, dated November 16, 2018, CBP classified a refrigerator gasket in heading 8505, HTSUS, specifically in subheading 8505.19.20, HTSUS, which provides for “Electromagnets; permanent magnets and articles intended to become permanent magnets after magnetization; electromagnetic or permanent magnet chucks, clamps and similar holding devices; electromagnetic couplings, clutches and brakes; electromagnetic lifting heads; parts thereof: Permanent magnets and articles intended to become permanent magnets after magnetization: Other: Composite good containing flexible magnets.” CBP has reviewed NY N300351 and has determined the ruling letter to be in error. It is now CBP’s position that the refrigerator gaskets are properly classified, in heading 8418, HTSUS, specifically in subheading 8418.99.80, HTSUS, which provides for “Refrigerators, freezers and other refrigerating or freezing equipment, electric or other; heat pumps, other than the air conditioning machines of heading 8415; parts thereof: Parts: Other: Other.”

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is revoking NY N300351 and revoking or modifying any other ruling not specifically identified to reflect the analysis contained in HQH301861, set forth as an attachment to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions.

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

GREGORY CONNOR
for

CRAIG T. CLARK,
Director

Commercial and Trade Facilitation Division

Attachment

HQ H301861

September 14, 2021

CLA-2 OT:RR:CTF:EMAIN H301861 NVF

CATEGORY: Classification

TARIFF NO.: 8418.99.80

JOHN B. BREW
CROWELL MORING LLC
1001 PENNSYLVANIA AVE NW
WASHINGTON, DC 20004

RE: Revocation of NY N300351; Classification of Refrigerator Gaskets

DEAR MR. BREW:

This letter is in response to your request, dated November 16, 2018, for reconsideration of New York Ruling Letter (“NY”) N300351, which was issued to your client, REHAU Industries LLC (“Rehau”), on September 26, 2018. In NY N300351, U.S. Customs and Border Protection (“CBP”) classified a refrigerator gasket under subheading 8505.19.20 of the Harmonized Tariff Schedule of the United States (“HTSUS”), which provides for “Electromagnets; permanent magnets and articles intended to become permanent magnets after magnetization; electromagnetic or permanent magnet chucks, clamps and similar holding devices; electromagnetic couplings, clutches and brakes; electromagnetic lifting heads; parts thereof: Permanent magnets and articles intended to become permanent magnets after magnetization: Other: Composite good containing flexible magnets.” We have reviewed NY N300351, taken into consideration new factual information, and are revoking NY N300351 in accordance with the reasoning below.

Notice of the proposed action was published in the *Customs Bulletin*, Vol. 55, No. 30, on August 4, 2021. One comment was received in support of that notice. Therefore, CBP is revoking NY N300351 in accordance with the reasoning below.

FACTS:

The subject merchandise is a door gasket consisting of an outer PVC material with a flexible magnetic band insert. The article is used in doors of residential and commercial refrigerators. The polymer material allows the gasket to function as a seal and the magnetic insert acts to hold the door shut.

You also provide additional factual information that Rehau did not provide when submitting its initial ruling request. Specifically, in their condition as imported, the gaskets are cut to size and shaped to fit a specific refrigerator or freezer. The gaskets are attached to a refrigerator door after importation using various processes, including sliding the gasket into a channel in the door that is specifically designed to accept the gasket. After installation, the gasket acts as a seal between the refrigerator door and the cabinet. The magnet within the gasket assists the gasket in maintaining the seal by holding the door in place. In addition to holding the door shut, the magnet also provides some door-closing force for the door (*i.e.* if the door is left slightly open).

ISSUE:

Is a refrigerator gasket made from PVC and a magnetic strip classified under heading 8505, HTSUS as a magnet or under heading 8418, HTSUS as a part of a refrigerator?

LAW AND ANALYSIS:

The HTSUS provisions under consideration are as follows:

- 8505 Electromagnets; permanent magnets and articles intended to become permanent magnets after magnetization; electromagnetic or permanent magnet chucks, clamps and similar holding devices; electromagnetic couplings, clutches and brakes; electromagnetic lifting heads; parts thereof.
- 8418 Refrigerators, freezers and other refrigerating or freezing equipment, electric or other; heat pumps, other than the air conditioning machines of heading 8415; parts thereof.

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.

Note 2 to Section XVI, HTSUS, provides the following, in pertinent part:

Subject to note 1 to this section, note 1 to chapter 84 and to note 1 to chapter 85, parts of machines (not being parts of the articles of heading 8484, 8544, 8545, 8546 or 8547) are to be classified according to the following rules:

- (a) Parts which are goods included in any of the headings of chapter 84 or 85 (other than headings 8409, 8431, 8448, 8466, 8473, 8487, 8503, 8522, 8529, 8538 and 8548) are in all cases to be classified in their respective headings;
- (b) Other parts, if suitable for use solely or principally with a particular kind of machine, or with a number of machines of the same heading (including a machine of heading 8479 or 8543) are to be classified with the machines of that kind or in heading 8409, 8431, 8448, 8466, 8473, 8503, 8522, 8529 or 8538 as appropriate. However, parts which are equally suitable for use principally with the goods of headings 8517 and 8525 to 8528 are to be classified in heading 8517... .

The term “part” is not defined in the HTSUS. In the absence of a statutory definition, the courts have fashioned two distinct but reconcilable tests for determining whether a particular item qualifies as a part for tariff classification purposes. See *Bauerhin Technologies Limited Partnership, & John V. Carr & Son, Inc. v. United States*, 110 F.3d 774 (Fed. Cir. 1997). Under the first test, articulated in *United States v. Willoughby Camera Stores*, 21 C.C.P.A. 322 (1933), an imported item qualifies as a part only if can be described as an “integral, constituent, or component part, without which the article to which it is to be joined, could not function as such article.” *Bauer-*

hin, 110 F.3d at 779. Pursuant to the second test, set forth in *United States v. Pompeo*, 43 C.C.P.A. 9 (1955), a good is a “part” if it is “dedicated solely for use” with a particular article and, “when applied to that use...meets the Willoughby test.” *Bauerhin*, 110 F.3d at 779 (citing *Pompeo*, 43 C.C.P.A. at 14); *Ludvig Svensson, Inc. v. United States*, 63 F. Supp. 2d 1171, 1178 (Ct. Int’l Trade 1999) (holding that a purported part must satisfy both the *Willoughby* and *Pompeo* tests). An item is not a part if it is “a separate and distinct commercial entity.” *Bauerhin*, 110 F.3d at 779.

In this case there is no dispute that that the instant merchandise is a “part” for the purposes of classification under the HTSUS and that the matter is therefore controlled by Note 2 to Section XVI, *supra*. As such, if the subject merchandise is *prima facie* classifiable under heading 8505, HTSUS, as a permanent magnet, then it will be classified under this provision per Note 2(a), thus eliminating the possibility of being classified as a part of the machine for which it is suitable for sole or principal use per Note 2(b). The instant gasket is comprised of a hollow PVC strip and a magnet that could be classified as a part of a refrigerator.

The merchandise at issue is comprised of both a PVC strip and a magnet combined to form an article that is ready for installation on a refrigerator door after importation. While heading 8505, HTSUS, covers part of the overall gasket (*i.e.*, the magnet), it does not cover the entire item at issue. It is therefore not classified under heading 8505, HTSUS, by operation of Note 2(a) to Section XVI.

The gaskets at issue are designed to be attached to a refrigerator door inasmuch as the magnet component and PVC strip are combined, and the combination is cut to specified size and shape and is ready for attachment to a specific model of refrigerator door. The gasket acts as a seal between the refrigerator door and the cabinet. In addition to holding the door shut, the magnet also provides some door-closing force for the door. Each imported gasket is dedicated solely for use with a specific refrigerator door and plays an integral role in containing cooled air inside a refrigerator cabinet. Therefore, we find that the gaskets at issue are suitable for sole or principal use with refrigerators of heading 8414, HTSUS, and are therefore properly classified as parts of refrigerators by operation of Note 2(b) to Section XVI.

HOLDING:

By application of GRIs 1 (Note 2(b) to Section XVI) and 6, the refrigerator gasket is classified under heading 8418, HTSUS specifically subheading 8418.99.80, HTSUS which provides for, “Refrigerators, freezers and other refrigerating or freezing equipment, electric or other; heat pumps, other than the air conditioning machines of heading 8415; parts thereof: Parts: Other.” The general column one rate of duty is free.

Pursuant to U.S. Note 20 to Subchapter III, Chapter 99, HTSUS, products of China classified under subheading 8418.99.80, HTSUS, unless specifically excluded, are subject to an additional 25 percent ad valorem rate of duty. At the time of importation, you must report the Chapter 99 subheading, *i.e.*, 9903.88.03, in addition to subheading 8418.99.80, HTSUS, listed above.

The HTSUS is subject to periodic amendment, so you should exercise reasonable care in monitoring the status of goods covered by the Note cited above and the applicable Chapter 99 subheading. For background information regarding the trade remedy initiated pursuant to Section 301 of the Trade Act of 1974, including information on exclusions and their effective

dates, you may refer to the relevant parts of the USTR and CBP websites, which are available at <https://ustr.gov/issue-areas/enforcement/section-301-investigations/tariff-actions> and <https://www.cbp.gov/trade/remedies/301-certain-products-china> respectively.

EFFECT ON OTHER RULINGS:

NY N300351, dated November 16, 2018, is REVOKED.

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

Sincerely,

GREGORY CONNOR

for

CRAIG T. CLARK,

Director

Commercial and Trade Facilitation Division

19 CFR PART 177

**REVOCATION OF ONE RULING LETTER AND
REVOCATION OF TREATMENT RELATING TO THE
TARIFF CLASSIFICATION OF THREE “POWER RANGER”
COSTUME ACCESSORY SETS**

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

ACTION: Notice of revocation of one ruling letter and of revocation of treatment relating to the tariff classification of three “Power Ranger” Costume Accessory Sets.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) is revoking one ruling letter concerning tariff classification of three “Power Ranger” Costume Accessory Sets under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Notice of the proposed action was published in the *Customs Bulletin*, Vol. 55, No. 30, on August 4, 2021. One comment was received in response to that notice.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after November 28, 2021.

FOR FURTHER INFORMATION CONTACT: Parisa J. Ghazi, Food, Textiles and Marking Branch, Regulations and Rulings, Office of Trade, at (202) 325-0272.

SUPPLEMENTARY INFORMATION:

BACKGROUND

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

Pursuant to 19 U.S.C. § 1625(c)(1), a notice was published in the *Customs Bulletin*, Vol. 55, No. 30, on August 4, 2021, proposing to revoke one ruling letter pertaining to the tariff classification of three "Power Ranger" Costume Accessory Sets. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should have advised CBP during the comment period.

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

In New York Ruling Letter ("NY") M82946, dated May 3, 2006, CBP classified three "Power Ranger" Costume Accessory Sets in heading 9505, HTSUS, specifically in subheading 9505.90.60, HTSUS, which provides for "Festive, carnival or other entertainment articles, including magic tricks and practical joke articles; parts and accessories thereof: Other: Other." CBP has reviewed NY M82946 and has determined the ruling letter to be in error. It is now CBP's position that three "Power Ranger" Costume Accessory Sets are properly classified, in heading 6406, HTSUS, specifically in subheading 6406.90.15, HT-

SUS, which provides for “Parts of footwear (including uppers whether or not attached to soles other than outer soles); removable insoles, heel cushions and similar articles; gaiters, leggings and similar articles, and parts thereof: Other: Of other materials: Of textile materials.”

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is revoking NY M82946 and revoking or modifying any other ruling not specifically identified to reflect the analysis contained in Headquarters Ruling Letter (“HQ”) H239480, set forth as an attachment to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions.

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

For

CRAIG T. CLARK,

Director

Commercial and Trade Facilitation Division

Attachment

HQ H239480

September 13, 2021

OT:RR:CTF:FTM H239480 PJG

CATEGORY: Classification

TARIFF NO.: 6406.90.15

Ms. MARIA JOHNSON
DISGUISE, INC.
12120 KEAR PLACE
POWAY, CA 92064

RE: Revocation of NY M82946; Classification of Three “Power Ranger” Costume Accessory Sets

DEAR Ms. JOHNSON:

This is in reference to New York Ruling Letter (“NY”) M82946, dated May 3, 2006, issued to you concerning the tariff classification of three “Power Ranger” Costume Accessory Sets under the Harmonized Tariff Schedule of the United States (“HTSUS”). Each of the three accessory sets consist of a pair of knit gloves and a pair of leg coverings, referred to as “boot covers” in NY M82946.

In NY M82946, U.S. Customs and Border Protection (“CBP”) classified the leg coverings in subheading 9505.90.60, HTSUS, which provides for “Festive, carnival or other entertainment articles, including magic tricks and practical joke articles; parts and accessories thereof: Other: Other.” We have reviewed NY M82946 and find it to be in error regarding the tariff classification of the leg coverings and the resulting classification of the three “Power Ranger” Costume Accessory Sets. Accordingly, for the reasons set forth below, NY M82946 is revoked.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. § 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. No. 103–182, 107 Stat. 2057, 2186 (1993), notice of the proposed action was published on August 4, 2021, in Volume 55, Number 30, of the Customs Bulletin. We received one comment in support of the notice that additionally suggested adding General Rules of Interpretation (“GRI”) 6 to the Holding section of the document. We agree with this suggestion.

FACTS:

In NY M82946, the merchandise is described as follows:

Style 14747, Pink Ranger Accessory Set, style 14748, Red Ranger Accessory Set, and style 14749, Green Ranger Accessory Set, consists of three sets that contain a pair of polyester knit gloves and a pair of polyester knit boot covers that accessorize “Power Ranger” costumes. Each pair of gloves and [each] pair of boot covers are identical except for color and are designed for a child.

The leg coverings are designed to resemble boots worn by the “Power Ranger” characters when worn over the consumer’s shoes.

In NY M82946, CBP classified the knit gloves in heading 6116, HTSUS, which provides for “Gloves, mittens and mitts, knitted or crocheted” and classified the leg coverings in heading 9505, HTSUS, which provides for “Festive, carnival or other entertainment articles, including magic tricks and

practical joke articles; parts and accessories thereof.” CBP determined under GRI 3(c) that the “Power Ranger” Accessory Sets are classified under heading 9505, HTSUS. The tariff classification of knit gloves is not in dispute. This ruling only addresses the tariff classification of the knit shoe covers and the complete “Power Ranger” Accessory Sets.

ISSUE:

- 1) Whether the leg coverings are classified in heading 6406, HTSUS, as gaiters, leggings and similar articles, or under heading 9505, HTSUS, as festive articles.
- 2) Whether the “Power Ranger” Accessory Sets are classified in heading 6406, HTSUS, or 9505, HTSUS.

LAW AND ANALYSIS:

Classification under the Harmonized Tariff Schedule of the United States (“HTSUS”) is made in accordance with the GRI. GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI may then be applied.

The 2021 HTSUS provisions under consideration are as follows:

6116	Gloves, mittens and mitts, knitted or crocheted: * * *
6406	Parts of footwear (including uppers whether or not attached to soles other than outer soles); removable insoles, heel cushions and similar articles; gaiters, leggings and similar articles, and parts thereof: * * *
6406.90	Other: * * *
	Of other materials:
6406.90.15	Of textile materials * * *
9505	Festive, carnival or other entertainment articles, including magic tricks and practical joke articles; parts and accessories thereof: * * *
9505.90	Other: * * *
9505.90.60	Other

GRI 3 provides as follows:

When, by application of rule 2(b) or for any other reason, goods are, prima facie, classifiable under two or more headings, classification shall be effected as follows:

- (a) The heading which provides the most specific description shall be preferred to headings providing a more general description.

However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.

- (b) 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.
- (c) When goods cannot be classified by reference to 3(a) or 3(b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration.

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

The EN to GRI 3(b) states, in pertinent part:

(VI) This second method relates only to:

- (i) Mixtures.
- (ii) Composite goods consisting of different materials.
- (iii) Composite goods consisting of different components.
- (iv) Goods put up in sets for retail sales.

It applies only if Rule 3 (a) fails.

(VII) In all these cases the goods are to be classified as if they consisted of the material or component **which gives them their essential character**, insofar as this criterion is applicable.

(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.

* * *

(X) For the purposes of this Rule, the term “goods put up in sets for retail sale” shall be taken to mean goods which:

- (a) consist of at least two different articles which are, *prima facie*, classifiable in different headings. Therefore, for example, six fondue forks cannot be regarded as a set within the meaning of this Rule;
- (b) consist of products or articles put up together to meet a particular need or carry out a specific activity; and
- (c) are put up in a manner suitable for sale directly to end users without repacking (e.g., in boxes or cases or on boards).

“Retail sale” does not include sales of products which are intended to be re-sold after further manufacture, preparation, repacking or incorporation with or into other goods.

The term “goods put up in sets for retail sale” therefore only covers sets consisting of goods which are intended to be sold to the end user where the individual goods are intended to be used together.

* * *

The EN to 64.06(II) provides as follows:

(II) GAITERS, LEGGINGS, AND SIMILAR ARTICLES, AND PARTS THEREOF

These articles are designed to cover the whole or part of the leg and in some cases part of the foot (e.g., the ankle and instep). They differ from socks and stockings, however, in that they do not cover the entire foot. They may be made of any material (leather, canvas, felt, knitted or crocheted fabrics, etc.) **except** asbestos. They include gaiters, leggings, spats, puttees, “mountain stockings” without feet, leg warmers and similar articles. Certain of these articles may have a retaining strap or elastic band which fits under the arch of the foot. The heading also covers identifiable parts of the above articles.

The EN to 95.05(A)(3) provides as follows:

This heading covers:

(A) **Festive, carnival or other entertainment articles**, which in view of their intended use are generally made of non-durable material. They include:

* * *

(3) Articles of fancy dress, e.g., masks, false ears and noses, wigs, false beards and moustaches (**not being** articles of postiche - **heading 67.04**), and paper hats. However, the heading **excludes** fancy dress of textile materials, of **Chapter 61** or **62**.

Heading 6406, HTSUS, provides for gaiters and leggings. The terms “gaiters” and “leggings” are not defined in the HTSUS.¹ Headquarters Ruling Letter (“HQ”) 088454, dated October 11, 1991, defines a gaiter as “1. A leather or heavy cloth covering for the legs extending from the instep to the ankle or knee. 2. An ankle-high shoe with elastic sides. 3. An overshoe with a cloth top.” *Id.* (citing *The American Heritage Dictionary*, (2nd College Ed. 1982)). HQ 088454 provides two definitions for “legging”: 1) “[a] leg covering of material such as canvas or leather” and 2) a “[c]overing for leg and ankle extending to knee or sometimes secured by stirrup strap under arch of foot. Worn in 19th c. by armed services and by civilian men. *See* PUTTEE and GAITER. Worn by women in suede, patent, and fabric in late 1960s.” *Id.* (citing *The American Heritage Dictionary*, (2nd College Ed. 1982) and *Fairchild’s Dictionary of Fashion*, (2nd Ed. 1988)). *See also* HQ 089582, dated November 6, 1991 and NY L81551, dated January 4, 2005.

In addition to gaiters and leggings, heading 6406, HTSUS, provides for “similar articles.” To “determine the scope of [a] general . . . phrase”, the

¹ “When...a tariff term is not defined in either the HTSUS or its legislative history”, its correct meaning is its common or commercial meaning. *See Rocknel Fastener, Inc. v. United States*, 267 F.3d 1354, 1356 (Fed. Cir. 2001). “To ascertain the common meaning of a term, a court may consult ‘dictionaries, scientific authorities, and other reliable information sources’ and ‘lexicographic and other materials.’” *Id.* at 1356–1357 (quoting *C.J. Tower & Sons v. United States*, 69 C.C.P.A. 128, 673 F.2d 1268, 1271 (CCPA 1982); *Simod Am. Corp. v. United States*, 872 F.2d 1572, 1576 (Fed. Cir. 1989)).

United States Court of International Trade has used the rule of *ejusdem generis*. See *A.D. Sutton & Sons v. United States*, 32 C.I.T. 804, 808 (Ct. Int'l Trade 2008) (citing *Aves. in Leather, Inc. v. United States*, 178 F.3d 1241, 1244 (Fed. Cir. 1999)). Under the rule of *ejusdem generis*, “the general word or phrase is held to refer to things of the same kind as those specified.” *Id.* (citing *Sports Graphics, Inc. v. United States*, 24 F.3d 1390, 1392 (Fed. Cir. 1994)). Therefore, “to fall within the scope of the general term, the imported good ‘must possess the same essential characteristics of purposes that unite the listed examples preceding the general term or phrase.’” *Id.* (citing *Aves. in Leather, Inc.*, 178 F.3d at 1244).

Applying the rule of *ejusdem generis*, we note that the definitions of gaiters and leggings provided in HQ 088454 indicate that the articles are both leg coverings. Similarly, EN 64.06(II) describes gaiters, leggings and similar articles as “designed to cover the whole or part of the leg and in some cases part of the foot....Certain of these articles may have a retaining strap or elastic band which fits under the arch of the foot.” The EN further states that these articles are different from socks because they do not cover the entire foot.

We find that the leg coverings in the “Power Ranger” Costume Accessory Sets share the same characteristics as leggings and gaiters of heading 6406, HTSUS. The subject leg coverings provide leg coverage like leggings and gaiters, which provide leg coverage extending to the ankle or to the knee. Finally, consistent with EN 64.06(II), the subject leg coverings do not appear to cover the entire foot. Accordingly, the subject polyester leg coverings are classifiable under heading 6406, HTSUS, as articles similar to leggings and gaiters, and are specifically classified in subheading 6406.90.15, HTSUS, which provides for “Parts of footwear (including uppers whether or not attached to soles other than outer soles); removable insoles, heel cushions and similar articles; gaiters, leggings and similar articles, and parts thereof: Other: Of other materials: Of textile materials.”

In NY M82946, CBP classified the leg coverings in heading 9505, HTSUS. Heading 9505, HTSUS, provides, in relevant part, for festive articles and “parts and accessories” of festive articles. EN 95.05(A)(3) states that the heading covers costume accessories such as masks, false ears, noses, wigs, false beards, mustaches and paper hats. See *Rubie’s Costume Co. v. United States*, 337 F.3d 1350, 1359 (Fed. Cir. 2003) (stating that the Explanatory Notes do not narrow the scope of heading 9505, HTSUS, to only accessories to costumes). CBP has classified similar costume accessories under heading 9505, HTSUS. See, e.g., NY N245614, dated August 29, 2013 (stretchable sleeves covered in fake tattoos are classifiable in heading 9505, HTSUS) and NY N162276 (butterfly wings and wand are classifiable in heading 9505, HTSUS). Similar to the articles described in the exemplars provided in EN 95.05(A)(3) and the cited rulings, the subject merchandise are costume accessories.

When goods are *prima facie* classifiable under two or more headings, we must proceed to GRI 3. According to GRI 3(a), “[t]he heading which provides the most specific description shall be preferred to headings providing a more general description.” In *Russ Berrie & Co. v. United States*, 381 F.3d 1334 (Fed. Cir. 2004), the U.S. Court of Appeals for the Federal Circuit (“CAFC”) determined that Christmas and Halloween-themed lapel pins and earrings

were *prima facie* classifiable as both imitation jewelry of heading 7117, HTSUS, and as festive articles of heading 9505, HTSUS. Applying GRI 3(a), the CAFC reasoned that:

We have recognized that festive articles include such disparate items as ‘placemats, table napkins, table runners, and woven rugs’ depicting ‘Christmas trees, Halloween jack-o-lanterns, [and Easter] bunnies,’ (citation omitted) ‘cast iron stocking hangers[;] ... Christmas water globes; ... [and] Easter water globes,’ (citation omitted) and jack-o-lantern mugs and pitchers (citation omitted).

Because heading 9505 covers a far broader range of items than heading 7117, the latter is more specific than the former. It is also more specific because it describes the item by name (‘imitation jewelry’) rather than by class (‘festive articles’). It therefore follows that the imported merchandise is classifiable under heading 7117 rather than under heading 9505.

Id. at 1338.

In the instant case, the “gaiters, leggings and similar articles” heading is more specific than the “festive articles” heading because “it covers a narrower set of items.” *See id.* The relevant portion of heading 6406, HTSUS, pertains to leg coverings, whereas the relevant portion of heading 9505, HTSUS, specifically “‘festive articles’... need only to be closely associated with and used or displayed during a festive occasion.” *Id.* Accordingly, heading 6406, HTSUS, is more specific than heading 9505, HTSUS, and by application of GRI 3(a), the subject leg coverings are properly classified under heading 6406, HTSUS.

Next, we turn to the classification of the subject costume accessory sets, which consists of knit gloves and the leg coverings. In NY M82946, CBP classified the knit gloves in heading 6116, HTSUS, and that classification is not at issue in this ruling. As determined above, the leg coverings are classified in heading 6406, HTSUS. Applying the definition of the phrase “goods put up in sets for retail sale” provided in the EN(X) to GRI 3(b), the three “Power Ranger” Costume Accessory Sets meet the first requirement because the products each consist of articles that are *prima facie* classifiable in different headings of the HTSUS, specifically, the knit gloves and the leg coverings. In addition, the two products meet the second requirement because the articles are put up together to be used to carry out the specific activity of making the costume wearer look like a “Power Ranger.” Finally, the two products are put up in a manner suitable for sale because they are packaged together for retail sale. Therefore, the three “Power Ranger” Costume Accessory Sets are “goods put up in sets for retail sale,” which must be classified using GRI 3(b).

GRI 3(b) states, in relevant part, that retail sets shall be classified as if they consisted of the component which gives them their essential character. The EN to GRI 3(b) (VIII) lists factors to help determine the essential character of such goods: “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 U.S. Court of International Trade (“CIT”) has indicated that the factors listed in the EN to GRI 3(b) (VIII) are “instructive” but “not exhaustive” and has indicated that the goods must be “reviewed as a whole.” *The Home Depot, U.S.A., Inc. v. United States*, 30 Ct. Int’l Trade

445, 459–460 (2006) (citing *A.N. Deringer, Inc. v. United States*, 66 Cust. Ct. 378, 384 (1971) (citation omitted)). With regard to the good which imparts the essential character, the court has stated that it is “that which is indispensable to the structure, core or condition of the article, i.e., what it is.” *Id.* at 460 (citing *A.N. Deringer, Inc.*, 66 Cust. Ct. at 383).

Applying the aforementioned factors, the leg coverings and the gloves are both comprised of polyester fabric. There are two leg coverings and there are two gloves. We do not know whether one of the goods consists of more material or is more valuable. However, it is evident that the role of these goods is essentially equivalent, i.e., creating the appearance of a “Power Ranger” character for the wearer. Considering the merchandise as a whole, neither of these goods imparts the essential character to the set.

In accordance with GRI 3(c), “[w]hen goods cannot be classified by reference to 3(a) or 3(b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration.” Therefore, while considering headings 6116, HTSUS, and 6406, HTSUS, we conclude that the three “Power Ranger” Costume Accessory Sets are classified under heading 6406, HTSUS, because it occurs last in numerical order.

HOLDING:

By application of GRI 3(c) and 6, the “Power Ranger” Costume Accessory Sets are classified under heading 6406, HTSUS, and specifically, in subheading 6406.90.15, HTSUS, which provides for “Parts of footwear (including uppers whether or not attached to soles other than outer soles); removable insoles, heel cushions and similar articles; gaiters, leggings and similar articles, and parts thereof. Other: Of other materials: Of textile materials.” The 2021 column one, general rate of duty is 14.9 percent *ad valorem*.

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

EFFECT ON OTHER RULINGS:

NY M82946, dated May 3, 2006, is REVOKED.

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

Sincerely,
For

CRAIG T. CLARK,
Director

Commercial and Trade Facilitation Division

19 CFR PART 177

REVOCATION OF ONE RULING LETTER AND REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF FROZEN SOYBEANS OR EDAMAME

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

ACTION: Notice of revocation of one ruling letter and of revocation of treatment relating to the tariff classification of frozen soybeans or edamame.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) is revoking one ruling letter concerning tariff classification of frozen soybeans or edamame under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Notice of the proposed action was published in the *Customs Bulletin*, Vol. 55, No. 31, on August 11, 2021. No comments were received in response to that notice.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after November 28, 2021.

FOR FURTHER INFORMATION CONTACT: Michael J. Dearden, Food, Textiles, and Marking Branch, Regulations and Rulings, Office of Trade, at (202) 325–0101.

SUPPLEMENTARY INFORMATION:

BACKGROUND

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

information necessary to enable CBP to properly assess duties, collect accurate statistics, and determine whether any other applicable legal requirement is met.

Pursuant to 19 U.S.C. § 1625(c)(1), a notice was published in the *Customs Bulletin*, Vol. 55, No. 31, on August 11, 2021, proposing to revoke one ruling letter pertaining to the tariff classification of frozen soybeans or edamame. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should have advised CBP during the comment period.

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

In NY N296408, CBP classified frozen soybeans or edamame in heading 0710, HTSUS, specifically in subheading 0710.22.3700, HTSUSA, which provides for "Vegetables (uncooked or cooked by steaming or boiling in water), frozen: Leguminous vegetables, shelled or unshelled: Beans (*Vigna* spp., *Phaseolus* spp.): Not reduced in size: Other." CBP has reviewed NY N296408 and has determined the ruling letter to be in error. It is now CBP's position that frozen soybeans or edamame are properly classified, in heading 2008, HTSUS, specifically in subheading 2008.99.6100, HTSUSA, which provides for "Fruit, nuts and other edible parts of plants, otherwise prepared or preserved, whether or not containing added sugar or other sweetening matter or spirit, not elsewhere specified or included: Other, including mixtures other than those of subheading 2008.19: Other: Soybeans."

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is revoking NY N296408 and revoking or modifying any other ruling not specifically identified to reflect the analysis contained in HQ H317126, set forth as an attachment to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions.

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

For
CRAIG T. CLARK,
Director
Commercial and Trade Facilitation Division

Attachment

HQ H317126

September 14, 2021

OT:RR:CTF:FTM H317126 MD

CATEGORY: Classification

TARIFF NO.: 2008.99.6100

MR. ANTHONY SCHOLLEN

NATURE'S CLASSICS

26190 124 AVENUE

MAPLE RIDGE, BRITISH COLUMBIA, V2W 1C4, CANADA

RE: Revocation of NY N296408; Tariff Classification of Frozen Soybeans or Edamame

DEAR MR. SCHOLLEN:

On May 16, 2018, U.S. Customs and Border Protection ("CBP") issued New York Ruling ("NY") N296408 to you. The ruling letter pertained to the tariff classification of "Edamame" under the Harmonized Tariff Schedule of the United States ("HTSUS"). In NY N296408, CBP classified the product at-issue under subheading 0710.22.3700, HTSUSA, which provides for "Vegetables (uncooked or cooked by steaming or boiling in water), frozen: Leguminous vegetables, shelled or unshelled: Beans (*Vigna spp.*, *Phaseolus spp.*): Not reduced in size: Other." The general duty rate was 4.9 cents per kilogram.

We have since reviewed NY N296408 at the request of our National Commodity Specialist Division ("NCSD") and determined it to be in error. For the reasons set forth below, we hereby revoke NY N296408. It is now CBP's position that the product at-issue is classified under subheading 2008.99.6100, HTSUSA, which provides for "Fruit, nuts and other edible parts of plants, otherwise prepared or preserved, whether or not containing added sugar or other sweetening matter or spirit, not elsewhere specified or included: Other, including mixtures other than those of subheading 2008.19: Other: Soybeans." The general rate of duty is 3.8 percent *ad valorem*.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. § 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057, 2186 (1993), notice of the proposed action was published on August 11, 2021, in Volume 55, Number 31, of the *Customs Bulletin*. No comments were received in response to this notice.

FACTS:

In NY N296408, the frozen edamame was described as follows:

You describe "Edamame" as 100% young soybeans in the pods to be consumed as microwavable snacks. You state that the beans are picked, washed, boiled [sic] for three to four minutes, and flash frozen within hours of being picked. The beans will be packaged in a box containing eight bags each 2.4 kg (5.25 lbs.), net weight. You state in your inquiry that the product is imported into Canada as described and no manufacturing takes place in Canada prior to its importation into the United States. As you state, the country of origin of the "Edamame" is China, therefore, there is no trade program or agreement that applies to this merchandise coming from China.

While previously classified under 0710.22.3700, HTSUSA, CBP now believes that the proper classification for the frozen edamame is under subheading 2008.99.6100, HTSUSA.

ISSUE:

Whether the frozen edamame at-issue is classified under subheading 0710.22.3700, HTSUSA, or subheading 2008.99.6100, HTSUSA.

LAW AND ANALYSIS:

Classification under the Harmonized Tariff Schedule of the United States (“HTSUS”) is determined in accordance with the General Rules of Interpretation (“GRI”). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs 2 through 6 may then be applied in order. GRI 6 requires that the classification of goods in the subheadings of headings shall be determined according to the terms of those subheadings, any related subheading notes and, *mutatis mutandis*, to GRIs 1 through 5.

The 2021 HTSUS provisions under review are as follows:

0710	Vegetables (uncooked or cooked by steaming or boiling in water), frozen:
	Leguminous vegetables, shelled or unshelled:
0710.22	Beans (<i>Vigna spp.</i> , <i>Phaseolus spp.</i>):
	Not reduced in size:
0710.22.3700	Other
	* * *
2008	Fruit, nuts and other edible parts of plants, otherwise prepared or preserved, whether or not containing added sugar or other sweetening matter or spirit, not elsewhere specified or included:
	Other, including mixtures other than those of subheading 2008.19:
2008.99	Other:
2008.99.6100	Soybeans
	* * *

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

The ENs to Heading 0708, providing for “Leguminous vegetables, shelled or unshelled, fresh or chilled,” state, in relevant part:

0708 – Leguminous vegetables, shelled or unshelled, fresh or chilled.

0708.10 – Peas (*Pisum sativum*)

0708.20 – Beans (*Vigna spp.*, *Phaseolus spp.*)

0708.90 – Other leguminous vegetables

This heading **excludes:**

- (a) Soya beans (**heading 12.01**)

* * *

The ENs for Heading 0710 state, in relevant part:

07.10 – Vegetables (uncooked or cooked by steaming or boiling in water), frozen

- Leguminous vegetables, shelled or unshelled:

0710.21 - - Peas (*Pisum sativum*)

0710.22 - - Beans (*Vigna spp.*, *Phaseolus spp.*)

0710.29 - - Other

* * *

The ENs for Heading 1201 provides for:

12.01 – Soya beans, whether or not broken

[...]

The soya beans of this heading may be heat-treated for the purpose of de-bittering.

* * *

The ENs for Heading 2008 state, in pertinent part:

This heading covers fruit, nuts and other edible parts of plants, whether whole, in pieces or crushed, including mixtures thereof, prepared or preserved otherwise than any of the processes specified in other Chapters or in the preceding headings of this Chapter.

* * *

As noted, the frozen edamame at-issue are understood to consist of “100% young soybeans in the pods” meant to be consumed at microwaveable snacks. Despite the fact that soybeans are provided for *eo nomine* within the HTSUS, the product at-issue was classified elsewhere within NY N296408. We consider this original classification, within subheading 0710.22.3700, HTSUSA, to be incorrect. The ENs to Heading 0710 provide a list of vegetables which are properly classified therein when frozen. In these ENs is a list of “leguminous vegetables,” either shelled or unshelled. Leguminous vegetables, when not frozen, are properly provided for within heading 0708, HTSUS. The ENs for heading 0708 are explicit, providing a list of vegetables and exclusions for classification therein. Pursuant to the ENs, those leguminous vegetables within heading 0710, HTSUS, are the frozen varieties of those which would normally be classified within heading 0708, HTSUS. While the list of inclusions within the heading 0708 ENs is important, there is a notable exclusion. The ENs to heading 0708 explicitly exclude “[s]oya beans,” which are instead provided for *eo nomine* within heading 1201, HTSUS. As a result of this, we find the initial classification set forth within NY N296408 to be improper, as the product consisting of “100% young soybeans” would be excluded from such classification.

Instead, the frozen edamame soybeans are properly classified under sub-heading 2008.99.6100, HTSUSA, which provides for “Fruit, nuts and other

edible parts of plants, otherwise prepared or preserved, whether or not containing added sugar or other sweetening matter or spirit, not elsewhere specified or included: Other, including mixtures other than those of subheading 2008.19: Other: Soybeans.” The frozen edamame is not classified under heading 1201, HTSUS, because they are prepared beyond what is allowed within that specific heading. The ENs for heading 1201 note that soybeans classified therein may be “heat-treated” for the express purpose of debittering. Here, the soybeans have been frozen. As a result of this further preparation, we find that the frozen soybeans are properly classified within Chapter 20, which provides for “preparations of vegetables, fruit, nuts or other parts of plants.” Specifically, we classify the frozen edamame within heading 2008, HTSUS, and the *eo nomine* subheading 2008.99.6100, HTSUSA.

A line of CBP rulings involving the classification of frozen soybeans supports this classification. In NY 866417, dated September 19, 1991, the product at-issue was described as “[w]hole soybeans, in the pod, that have been blanched in water, frozen, and packed in plastic pouches containing 16 ounces, net weight.” The frozen soybeans were classified under subheading 2008.99.6100, HTSUSA. In NY D87519, dated March 5, 1999, the product at-issue was described as “[s]oybeans that have been removed from their pods, blanched in water or by ‘moderate heat,’ flash frozen, and put up in bulk containers. These frozen soybeans were also classified under subheading 2008.99.6100, HTSUSA. In NY N251647, dated April 7, 2014, the product at-issue was described as “[r]aw soybeans [which] are shelled and blanched in hot water [at] 95 degrees centigrade for ten seconds before entering the IQF [(“Individual Quick Freezing”)] freezing tunnel.” Again, the frozen soybeans were classified under subheading 2008.99.6100, HTSUSA.

As noted within NY N296408, the frozen edamame at-issue here are “picked, washed, boiled [sic] for three to four minutes, and flash frozen within hours of being picked.” This production process mirrors those enumerated in the rulings above, which consists of some form of blanching of the soybeans before being frozen and subsequently packed. The only processing difference between the rulings discussed and the frozen edamame here is that within NY D87519 and NY N251647, the soybeans are shelled before being blanched; however, we consider this minor processing difference to be immaterial. The notes to Chapter 12, HTSUS, provide that “[t]he seeds and fruits covered by this heading may be whole, broken, crushed, husked, or shelled,” enumerating that the shelling of soybeans does not explicitly remove it from classification therein. In contrast, neither the Chapter 12, HTSUS, notes nor the heading 1201 ENs provide for freezing soybeans as a contemplated preparation. As such, the processing of the edamame goes beyond the scope of classification within heading 1201, HTSUS, and the products are issue are classified under subheading 2008.99.6100, HTSUSA.

HOLDING:

Under the authority of GRIs 1 and 6, the frozen edamame is classified under subheading 2008.99.6100, HTSUSA, which provides for “Fruit, nuts and other edible parts of plants, otherwise prepared or preserved, whether or not containing added sugar or other sweetening matter or spirit, not elsewhere specified or included: Other, including mixtures other than those of subheading 2008.19: Other: Soybeans.” The general rate of duty is 3.8 percent *ad valorem*.

EFFECT ON OTHER RULINGS:

NY N296408, dated May 16, 2018, is hereby REVOKED.

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

*Sincerely,
For*

CRAIG T. CLARK,
Director

Commercial and Trade Facilitation Division



19 CFR PART 177

**REVOCATION OF ONE RULING LETTER AND
REVOCATION OF TREATMENT RELATING TO THE
TARIFF CLASSIFICATION OF PRESS SLEEVES**

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

ACTION: Notice of revocation of one ruling letter and of revocation of treatment relating to the tariff classification of press sleeves.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) is revoking one ruling letter concerning tariff classification of press sleeves under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Notice of the proposed action was published in the *Customs Bulletin*, Vol. 55, No. 29, on July 28, 2021. No comments were received in response to that notice.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after November 28, 2021.

FOR FURTHER INFORMATION CONTACT: Michael J. Dearden, Food, Textiles, and Marking Branch, Regulations and Rulings, Office of Trade, at (202) 325–0101.

SUPPLEMENTARY INFORMATION:**BACKGROUND**

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

Pursuant to 19 U.S.C. § 1625(c)(1), a notice was published in the *Customs Bulletin*, Vol. 55, No. 29, on July 28, 2021, proposing to revoke one ruling letter pertaining to the tariff classification of press sleeves. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should have advised CBP during the comment period.

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

In NY N312791, CBP classified press sleeves in heading 5911, HTSUS, specifically in subheading 5911.32.0080, HTSUSA, which provides for "Textile products and articles, for technical uses, specified in note 7 to this chapter: Textile fabrics and felts, endless or fitted with linking devices, of a kind used in papermaking or similar machines (for example, for pulp or asbestos-cement): Weighing 650 g/m² or more: Other." CBP has reviewed NY N312791 and has determined the ruling letter to be in error. It is now CBP's position that press sleeves are properly classified, in heading 3926, HTSUS, specifically in subheading 3926.90.9985, HTSUSA, which provides for "Other articles of plastics and articles of other materials of headings 3901 to 3914: Other: Other: Other."

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is revoking NY N312791 and revoking or modifying any other ruling not specifically identified to reflect the analysis contained in HQ H315231, set forth as an attachment to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions.

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

For

CRAIG T. CLARK,
Director

Commercial and Trade Facilitation Division

Attachment

HQ H315231

September 14, 2021

OT:RR:CTF:FTM H315231 MD

CATEGORY: Classification

TARIFF NO.: 3926.90.9985

MR. DAVID MCKNIGHT

VOITH U.S. INC.

760 EAST BERLIN ROAD

YORK, PENNSYLVANIA 17408

RE: Revocation of NY N312791; Tariff Classification of Press Sleeves from Germany

DEAR MR. MCKNIGHT:

On July 21, 2020, U.S. Customs and Border Protection (“CBP”) issued New York Ruling Letter (“NY”) N312791 to you. The ruling letter pertained to the tariff classification of press sleeves from Germany under the Harmonized Tariff Schedule of the United States (“HTSUS”).¹ Specifically, CBP classified the products at issue under subheading 5911.32.0080, HTSUSA, which provides for “Textile products and articles, for technical uses, specified in note 7 to this chapter: Textile fabrics and felts, endless or fitted with linking devices, of a kind used in papermaking or similar machines (for example, for pulp or asbestos-cement): Weighing 650 g/m² or more: Other.” The general duty rate was 3.8% ad valorem.

On October 9, 2020, you submitted a request for reconsideration of NY N312791. In light of your request, we have reviewed NY N312791 and have found it to be in error with respect to the classification of the merchandise. Accordingly, NY N312791 is revoked.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. § 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. No. 103–182, 107 Stat. 2057, 2186 (1993), notice of the proposed action was published on July 28, 2021, in Volume 55, Number 29, of the *Customs Bulletin*. No comments were received in response to this notice.

FACTS:

As described within NY N312791, the press sleeves are “polyurethane sleeve[s] with 100 percent polyester threading embedded into the sleeve for stability purposes.” Your original submission, discussed within the New York ruling, indicates that “the products are intended to be used in the papermaking process for the dewatering performance of a shoe press... that the goods will be imported as [] finished product[s]... [and] are stated to weigh 23,427 g/m².” On the basis of this information, CBP classified the product at issue under subheading 5911.32.0080, HTSUSA, which provides for “Textile products and articles, for technical uses, specified in note 7 to this chapter: Textile fabrics and felts, endless or fitted with linking devices, of a kind used in papermaking or similar machines (for example, for pulp or asbestos-cement): Weighing 650 g/m² or more: Other.” The general duty rate was 3.8% ad

¹ Technical literature identifies the five press sleeves as members of the “QualiFlex Press Sleeve” line of products; namely, the “QualiFlex S, QualiFlex G, QualiFlex GS, QualiFlex B, [and] QualiFlex BG.”

valorem. In doing so, CBP rejected your initial contention that the press sleeves were classified under subheading 5910.00.1090, HTSUSA, which provides for “Transmission or conveyor belts or belting, of textile material, whether or not impregnated, coated, covered or laminated with plastics, or reinforced with metal or other material: Of man-made fibers.”

On October 9, 2020, you submitted a reconsideration request, in which you clarified the description of the product as well as its purpose. Within your request, you suggested that the press sleeves “do[] not belong in Chapter 59 and [are] more akin to commodities of Chapter 84.” In support of your assertion, you describe the press sleeves are “a sheath in the form of a cylindrical elastic body (polyurethane) with embedded non-woven thread for reinforcement and specific surface structure.” You note that “[t]he main purpose of a press-sleeve is to move the paper-web and press-felt through the nip-gap or a shoe-press.” Further, you provide that a second function of the press sleeves is “to offer an additional void volume for higher and more equal dewatering in the shoe-press for getting higher dryness into the paper-web within the press section.”

ISSUE:

What is the proper classification under the HTSUS for the press sleeves from Germany?

LAW AND ANALYSIS:

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

The 2021 HTSUS provisions under consideration are as follows:

3926	Other articles of plastics and articles of other materials of headings 3901 to 3914:
3926.90	Other:
3926.90.99	Other:
3926.90.9985	Other.
	* * *
5910	Transmission or conveyor belts or belting, of textile material, whether or not impregnated, coated, covered or laminated with plastics, or reinforced with metal or metal material:
5910.00.10	Of man-made fibers:
5910.00.1090	Other:
	* * *
5911	Textile products and articles, for technical uses, specified in note 7 to this chapter: Textile fabrics and felts, endless or fitted with linking devices, of a kind used in papermaking or similar machines (for examples, for pulp or asbestos-cement):
5911.32.00	Weighing 650 g/m ² or more:
5911.32.0080	Other:

	* * *
8420	Calendering or other rolling machines, other than for metals or glass, and cylinders therefor; parts thereof:
	Parts:
8420.99	Other:
8420.99.20	Of machines for making paper pulp, paper or paperboard
	* * *

Note 1 to Chapter 59, HTSUS, states, in relevant part:

Except where the context otherwise requires, for the purposes of this Chapter, the expression “textile fabrics” applies only to woven fabrics of Chapters 50 to 55 and headings 58.03 and 58.06, the braids and ornamental trimmings in the piece of heading 58.08 and the knitted or crocheted fabrics of headings 60.02 to 60.06.

Note 7 to Chapter 59, HTSUS, states, in relevant part:

(b) Textile articles (other than those of headings 59.08 to 59.10) of a kind used for technical purposes (for example, textile fabrics and felts, endless or fitted with linking devices, of a kind used in paper-making or similar machines (for example, for pulp or asbestos-cement), gaskets, washers, polishing discs and other machinery parts).

* * *

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

In relevant part, the ENs for Heading 3926 are as follows:

This heading covers articles, not elsewhere specified or included, of plastics (as defined in Note 1 to the Chapter) or of other materials of headings 39.01 to 39.14.

* * *

The ENs for Heading 5910 read, in relevant part:

These transmission or conveyor belts or belting are used for the transmission of power or the conveyance of goods. They are usually woven or plaited from yarns of wool, cotton, man-made fibers, etc. They are in various widths and may be in the form of two or more plies of such material woven or bonded together; sometimes they are woven with a short looped pile surface or with corded edges. They may be impregnated with linseed oil, Stockholm tar, etc., and may be coated with varnish, red lead, etc., to counter deterioration cause by atmospheric conditions, acid fumes, etc.

This heading also includes belts and belting made from woven synthetic fibres, in particular polyamides, coated, covered or laminated with plastics.

* * *

Further, the ENs for Heading 5911 provide, in relevant part:

(B) TEXTILE ARTICLES OF A KIND USED FOR TECHNICAL PURPOSES

All textile articles of a kind used for technical purposes (**other than** those of **headings 59.08 to 59.10**) are classified in this heading and **not** elsewhere in Section XI (see Note 7 (b) to the Chapter); for example:

- (2) Textile fabrics and felts, endless or fitted with linking devices, of a kind used in paper-making or similar machines (for example, for pulp or asbestos-cement) (**excluding** machinery belts of **heading 59.10**).

* * *

Lastly, the ENs for Heading 8420 state, in relevant part:

PARTS

Subject to the general provisions regarding the classification of parts (see the General Explanatory Note to Section XVI), parts of machines of this heading are classified here. These include **cylinders** clearly identifiable as for use with calendaring or rolling machines of this heading. These cylinders may be made of metal, wood, or other suitable material (e.g. compressed paper). They may be of various lengths and diameters, may be solid or hollow and, depending on the particular purpose for which they are required, their surface may be polished, corrugated, grained, or may bear engraved patterns. They may also be covered with other materials (e.g. leather, textile fabrics or rubber). Metal cylinders are usually so designed so that they can be heated internally by means of steam, gas, etc. Sets of cylinders for a particular calendaring machine may comprise cylinders of different composition.

* * *

There are four competing headings under the HTSUS which must be considered for the classification of the merchandise at-issue: heading 3926, which specifically provides for “Other articles of plastics and articles of other materials of headings 3901 to 3914;” heading 5910, which specifically provides for “Transmission or conveyor belts or belting, of textile material, whether or not impregnated, coated, covered or laminated with plastics, or reinforced with metal or other material;” heading 5911, which specifically provides for “Textile products and articles, for technical uses;” and heading 8420, which specifically provides for “Calendaring or other rolling machines, other than for metals or glass, and cylinders therefor; parts thereof.” In your request for reconsideration, you posit that the press sleeves are not classifiable in Chapter 59, HTSUS. Specifically, you cite to Note 1 to Chapter 59, HTSUS, asserting that the press sleeves are neither “textile fabrics” nor “textile articles” and are thus precluded from classification in Chapter 59, HTSUS. We agree.

Note 1 to Chapter 59, HTSUS, states that “[e]xcept where the context otherwise requires, for the purposes of this chapter the expression ‘textile fabrics’ applies only to the woven fabrics of Chapters 50 to 55 and headings 58.03 and 58.06, the braids and ornamental trimmings in the piece of heading 58.08 and the knitted or crocheted fabrics of headings 60.02 to 60.06.” Information provided clearly establishes that the press sleeves consist of a polyurethane body, containing embedded polyester yarns which are arranged

parallel and perpendicular to one another and are neither adhesively nor thermally bonded at the intersections. The yarns are held in place by the plastic material surrounding them. Although the polyester yarns are made from a man-made textile fiber, the yarns do not meet the classification criteria set forth for “textile fabrics” in Note 1 to Chapter 59, HTSUS. Moreover, there is no provision in Chapter 59 that would otherwise allow for these products to be classified there.

While this precludes the press sleeves from classification within Chapter 59, specifically in either heading 5910 or 5911, the ENs for both of these headings solidify this understanding, as none of the ENs describe products that would be similar to the press sleeves at issue. The ENs for heading 5910 outlines two types of products, both containing “textile fabrics” as defined within Note 1 to Chapter 59, HTSUS. The first is a “textile fabric” which is coated in some way, shape, or form as a means of protecting the fabric itself and to allow its continued operation as a transmission or conveyor belt. The second is a transmission or conveyor belt, made of *woven* synthetic fibers, which is covered in some way with plastics. Although the press sleeves here resemble the latter of the transmission or conveyor belts described in the heading 5910 ENs, in that they consist of synthetic fibers (polyester) which are covered by plastics (polyurethane), they do not meet the requirements specified in the ENs.

Similarly, the ENs for heading 5911 enumerate that “textile fabrics” and “textile articles” are classified therein, so long as they do not meet the character of products in the preceding headings. While the definition of “textile fabrics” is shared with Note 1 to Chapter 59, Note 7 to Chapter 59 and the ENs for heading 5911 elaborate on what a “textile article” is. In the exemplars, a “textile article” is defined as “of a kind used for technical purposes (for example, textile fabrics and felts, endless or fitted with linking devices, of a kind used in paper-making or similar machines (for example, for pulp or asbestos-cement), gaskets, washers, polishing discs and other machinery parts).” Of interest is the notion that “textile articles,” in relevant part here, are the “textile fabrics” of Note 1 to Chapter 59, as the press sleeves would be “of a kind used in paper-making or similar machines.” However, as the press sleeves do not contain the “textile fabrics” required within the Chapter Notes and the respective heading ENs, they are precluded from classification from Chapter 59 generally and headings 5910 and 5911 specifically.

Provided within the request for reconsideration was an alternative classification for the press sleeves somewhere within Chapter 84, which provides for “Nuclear Reactors, Boilers, Machinery and Mechanical Appliances; Parts Thereof.” With this suggestion, we find that the most accurate place to classify the press sleeves would be within subheading 8420.99.2000, HTSUSA, which provides for “Calendering or other rolling machines, other than for metals or glass, and cylinders therefor; parts thereof: Parts: Other: Of machines for making paper pulp, paper or paperboard.” However, in identifying the closest classification within Chapter 84 for the press sleeves, we have reached the conclusion that such a classification is improper.

The press sleeves are described as “a sheath in the form of a cylindrical elastic body... for sheathing of a press roller in the shoe press of a paper machine.” From this description, and supplemental information provided, it is evident that the press sleeves *are added* to a type of machine classifiable under Chapter 84, HTSUS, but are not in and of themselves such a machine

or a part of such a machine. Further evidence of this is available in diagrams displaying the location of the press sleeves in use. One such diagram displays the two, parallel cylindrical rollers of a paper machine; the upper cylinder – the “shoe press” – is fitted with the press sleeve, whereas the lower cylinder – the “counter roll” – is not. Whereas the paper machine, which consists of “two or more parallel cylinders or rollers revolving with their surfaces in more or less close contact,” the press sleeve merely covers one of the cylinders to assist with the process. Thus, while the paper machine itself may be classifiable under Chapter 84, HTSUS, the press sleeves, as optional components designed to merely increase the efficiency of such a machine, are not.

While the ENs to heading 8420 make clear that “parts of machines of this heading are [also] classified here,” additional evidence supports the conclusion that the press sleeves are not “parts” of paper machines. As discussed above, the description of the press sleeves and their intended purpose convey an understanding that they are merely *attached* to paper machines in order to aid in the efficiency of the paper-making process. Additional information, provided alongside the request for reconsideration, suggests that the press sleeves can be used in conjunction with single cylinder tissue machines – “Yankee Cylinders” – as well as within the aforementioned position within a traditional paper machine. While it is noted that *most* of these tissue machines have some form of shoe press, it is important to underscore that Yankee Cylinders have been classified in headings other than heading 8420,² meaning that the press sleeves themselves are versatile enough to be utilized for the same functionality across different products and are thus not an integral “part” of any such machine for classification purposes.

Having exhausted the classifications discussed within NY N312791 and the proposed classification within the request for reconsideration, we classify the press sleeves under subheading 3926.90.9985, HTSUSA, which specifically provides for “Other articles of plastics and articles of other materials of headings 3901 to 3914: Other: Other: Other.”

The ENs for Heading 3926 read as follows:

This heading covers articles, not elsewhere specified or included, of plastics (as defined in Note 1 to the Chapter) or of other materials of headings 39.01 to 39.14.

We note that within heading 3926, HTSUS, is subheading 3926.90.5900, HTSUSA, which provides for “Other articles of plastics and articles of other materials of headings 3901 to 3914: Other: Belting and belts, for machinery, containing textile fibers: Other: Other.” As our removal of the press sleeves from heading 5910, HTSUS, was due to their construction, rather discussing whether or not they were “[t]ransmission or conveyor belts,” a brief discussion into the matter is warranted.

In Headquarters Ruling Letter (“HQ”) 963619, dated July 12, 2002, CBP defined the definitions of “belt” and “belting” as applied to paper manufacturing industry. Notable within HQ 963619 is a consultation with National Import Specialists (“NIS”) on the matter, whose extensive research and analysis of the industry yielded the following definitions:

Belt: Can be constructed or any material or combinations of materials to a predetermined length. It may be formed by a closed loop (i.e., a con-

² See HQ 951001 (dated March 12, 1992); HQ 085354 (dated June 7, 1990); HQ 083183 (dated July 11, 1989).

tinuous length with no end) or may be formed by stitching or seaming the ends. Alternatively, the predetermined length may be fitted with linking devices that when joined will effectively form a “closed loop.”

Belting: Can be constructed of any material or combination of material which is in the piece (i.e. long lengths) that will be further processed or manufactured by cutting to a specific length or sitting to a specific width. The ends of the material are then joined to form a “belt” of a desired dimension for a specific machine application.

Although HQ 963619 ultimately classified the product at-issue within Chapter 59, its conclusion that belts *eo nomine* “provide one of two functions – either transferring power, i.e., motion from one shaft to another, or the conveyance goods, i.e., moving goods from one place to another” is applicable here.

Provided schematics clearly show that the press sleeves are placed *around* a roller within a paper machine. It is this roller, rather than the press sleeves themselves, which “move the paper-web and press-felt through the nip-gap or a shoe-press.” While the press sleeves “offer an additional void volume for higher and more equal dewatering in the shoe-press for getting higher dryness into the paper-web within the press section,” they neither transfer power nor convey goods. As such, while the press sleeves are properly classified within heading 3926, HTSUS, subheading 3926.90.5900, HTSUSA, specifically, is precluded.

Support for classification within heading 3926, HTSUS, comes from the composition of the press sleeves. As noted, the press sleeves consist of polyester yarns *embedded* within polyurethane. These yarns are neither adhesively nor thermally bonded at the intersection and are referred to within the request for reconsideration as “reinforcement.” In contrast, the polyurethane of the press sleeve is markedly important – the five varieties of press sleeves at-issue here differ not in their polyester yarn count, but the manufactured variety of their polyurethane exteriors and the impact this has on the conveyance of paper.

As a result, we see the press sleeves as a Chapter 39 plastic (polyurethanes are specifically provided within heading 3909, HTSUS) which contains textile fibers (polyester is repeatedly provided throughout Chapter 59 as a man-made textile fiber). As such, their proper classification would be the above-noted subheading 3926.90.9985, HTSUSA. Support for this classification from previous rulings comes in the form of general analyses of classifying similar goods in either Chapter 39 or Chapter 59. In HQ 084682, dated August 25, 1989, subject merchandise from South Africa were discussed to determine their proper classification. Although they were ultimately classified under heading 5910, HTSUS, CBP posited their classification under heading 3926, HTSUS. Specifically, CBP noted that the merchandise was classifiable under *both* headings 3926 and 5910 by an application of GRI 1, as they were constructed of a solid *woven* fabric of polyester which had been coated in PVC. Thus, as a textile fiber embedded within a Chapter 39 plastic, the subject merchandise met the requirements for classification under either heading. Similarly, the press sleeves here consist of a textile fiber (polyester yarns) embedded within a Chapter 39 plastic (polyurethane); however, crucially, as indicated above, the press sleeves are excluded from Chapter 59. As a result, we can apply the same understanding as was demonstrated within

HQ 084682, but without the conflict at-hand – with the press sleeves only meeting one such classification, it is classified as such, under heading 3926, HTSUS.

In HQ 957620, dated February 28, 1996, CBP used similar methodology to classify the product at-issue within Chapter 39. Specifically, the product consisted of a woven textile fabric – embedded within PVC, so that from an external examination the belting appeared to be made entirely of plastics. Although CBP found that the predominance of the plastics, and the use of the embedded textiles as a form of reinforcement, supported classification in Chapter 39, it ultimately classified the conveyor belting under heading 3921, HTSUS; however, this was done on the basis that the belting was imported “in lengths up to 1200 feet” and better fit the description of plastic sheets. CBP also noted the ENs for heading 3921, which state that further worked plastic sheets would belong in alternative headings, such as heading 3926. In this case, the construction of the press sleeves, for the basis of Chapter 39 classification, remains similar – the press sleeves consist of textile fibers embedded within a Chapter 39 plastic. However, this plastic is further worked; provided information shows that the press sleeves have grooves carved into them, and each press sleeve is of finite dimensions to properly attach to paper machines. As a result, because of the predominance of a Chapter 39 plastic and its effect on the subject merchandise, as well as the notion that the textile fibers within it are a mere form of reinforcement, the press sleeves are properly classified under heading 3926, HTSUS, as other articles of plastic.

HOLDING:

Under the authority of GRIs 1 and 6, the QualiFlex press sleeves are classified under heading 3926, HTSUS, and specifically in subheading 3926.90.9985, HTSUSA, which provides for “Other articles of plastics and articles of other materials of headings 3901 to 3914: Other: Other: Other.”³ The 2021 column one, general rate of duty is 5.3 percent *ad valorem*.

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

EFFECT ON OTHER RULINGS:

NY N312791, dated July 21, 2020, is REVOKED.

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

*Sincerely,
For*

CRAIG T. CLARK,
Director

Commercial and Trade Facilitation Division

³ The Court of International Trade’s (“CIT”) decision in *Semperit Industrial Products, Inc. v. United States*, 855 F. Supp. 1292 (CIT 1994), which involved the classification of industrial conveyor belts of vulcanized rubber and textile material, held that the term “predominate” requires the presence of at least two elements. As the textile component in the press sleeves consists of only one man-made fiber, the press sleeves are classified as though no textile component predominates.

GRANT OF “LEVER-RULE” PROTECTION

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

ACTION: Notice of grant of “Lever-Rule” protection.

SUMMARY: Pursuant to 19 CFR 133.2(f), this notice advises interested parties that CBP has granted “Lever-Rule” protection to Monster Energy Company (“Monster”) in connection with certain beverage products described below. Notice of the receipt of an application for “Lever-Rule” protection was published in the September 8th, 2021, issue of the *Customs Bulletin*.

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 granted “Lever-Rule” protection for gray market Monster Energy 500ML beverages which are bottled in South Africa, intended for sale in South Africa, bearing the “M & DESIGN” trademarks (USPTO Registration No. 3,434,822/ CBP Recordation No. TMK 10- 00656; Registration No. 3,434,821, CBP Recordation No. TMK 15-01224), “MONSTER ENERGY” trademark (USPTO Registration No. 3,044,315, CBP Recordation No. TMK 15- 01223) and “M DESIGN” trademark (USPTO Registration No. 5,580,962, CBP Recordation No. TMK 19-00076). This “Lever-Rule” protection is in addition to the protection previously granted on August 10, 2020 for importations of Monster Energy 250ML beverages bottled in the Netherlands, intended for sale in the Netherlands, and bearing the above mentioned trademarks. CBP also granted protection on April 21, 2021 for importations of Monster Energy 500ML beverages bottled in Ireland, Netherlands, and/or Poland, intended for sale in Europe, and bearing the above mentioned trademarks.

In accordance with *Lever Bros. Co. v. United States*, 981 F.2d 1330 (D.C. Cir. 1993), CBP has determined that the gray market Monster Energy 500ML beverages which are bottled in South Africa, intended for sale in South Africa, and bear the above mentioned trademarks differ physically and materially from the Monster Energy beverages authorized for sale in the United States with respect to the following

product characteristics: physical properties, operation, performance, labels, warnings, product codes, contact information, and measurements.

ENFORCEMENT

Importation of gray market Monster Energy 500ML beverages that are bottled in South Africa, intended for sale in South Africa, and bear the above referenced trademarks is restricted unless the labeling requirements of 19 CFR § 133.23(b) have been satisfied.

Dated: September 9, 2021

ALAINA VAN HORN

Chief,

*Intellectual Property Enforcement Branch
Regulations and Rulings, Office of Trade*

U.S. Court of International Trade

Slip Op. 21–115

WORLDWIDE DOOR COMPONENTS, INC., Plaintiff, v. UNITED STATES,
Defendant, and ALUMINUM EXTRUSIONS FAIR TRADE COMMITTEE AND
ENDURA PRODUCTS, INC., Defendant-Intervenors

Before: Timothy C. Stanceu, Judge
Court No. 19–00012

[Remanding for reconsideration an agency decision, issued in response to court order, interpreting the scope of antidumping and countervailing duty orders on aluminum extrusions]

Dated: September 14, 2021

John M. Foote, Kelley Drye & Warren LLP, of Washington, DC, for plaintiff.

Brian M. Boynton, Acting Assistant Attorney General, Civil Division, U.S. Department of Justice, of New York, New York, for defendant. With him on the brief were *Jeanne E. Davidson*, Director; *Aimee Lee*, Assistant Director; and *Tara K. Hogan*, Assistant Director. Of counsel on the brief was *Nikki Kalbing*, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, D.C.

Robert E. DeFrancesco, III, Wiley Rein, LLP, of Washington, D.C., for defendant-intervenors. With him on the brief was *Alan H. Price* and *Elizabeth S. Lee*.

OPINION AND ORDER

Stanceu, Judge:

Plaintiff Worldwide Door Components, Inc. (“Worldwide”) brought this action to contest a decision (the “Scope Ruling”) by the International Trade Administration, U.S. Department of Commerce (“Commerce” or the “Department”) that Worldwide’s imported products, “door thresholds” containing aluminum extrusions, are within the scope of antidumping and countervailing duty orders on aluminum extrusions from the People’s Republic of China (the “Orders”).

Before the court is the decision Commerce submitted in response to the court’s opinion and order in *Worldwide Door Components, Inc. v. United States*, 44 CIT __, 466 F. Supp. 3d 1370 (2020) (“*Worldwide I*”). In *Worldwide I*, the court remanded the contested scope ruling to Commerce for reconsideration.

The court again issues a remand order. The court holds that the Department’s new decision impermissibly relies on a factual finding or inference pertaining to Worldwide’s door thresholds that is contradicted by certain evidence on the record and unsupported by any specific evidence that Commerce cited. The court directs Commerce to

reconsider the impermissible finding or inference and then determine anew whether Worldwide’s door thresholds qualify for a specific exclusion (the “finished merchandise exclusion”) set forth in the Orders.

I. BACKGROUND

Background on this litigation is presented in the court’s previous opinion and summarized and supplemented herein. *See Worldwide I*, 44 CIT at __, 466 F. Supp. 3d. at 1372–73.

The decision contested in this litigation is *Antidumping and Countervailing Duty Orders on Aluminum Extrusions from the People’s Republic of China: Final Scope Rulings on Worldwide Door Components Inc., MJB Wood Group Inc., and Columbia Aluminum Products Door Thresholds* (Int’l Trade Admin. Dec. 19, 2018) (AD Rem. P.R. Doc. 36; CVD Rem. P.R. Doc. 37) (“*Scope Ruling*”).¹

Commerce issued the antidumping duty and countervailing duty orders pertinent to this litigation (the “Orders”) in May 2011. *Aluminum Extrusions from the People’s Republic of China: Antidumping Duty Order*, 76 Fed. Reg. 30,650 (Int’l Trade Admin. May 26, 2011) (“*AD Order*”); *Aluminum Extrusions From the People’s Republic of China: Countervailing Duty Order*, 76 Fed. Reg. 30,653 (Int’l Trade Admin. May 26, 2011) (“*CVD Order*”).

Worldwide submitted a “Scope Ruling Request” to Commerce on August 3, 2017, describing eighteen “base models” of door thresholds. *Letter from Baker & McKenzie LLP to Sec’y of Commerce re: Request for a Scope Ruling Finding that Certain Fully Assembled Door Thresholds from the People’s Republic of China are not Subject to the Antidumping and Countervailing Duty Orders on Aluminum Extrusions from the People’s Republic of China* (P.R. Doc. 1) (Aug. 3, 2017) (“*Scope Ruling Request*”). During the scope ruling proceeding, Worldwide submitted additional information in responses to questionnaires from Commerce. *Letter from Baker & McKenzie LLP to Sec’y of Commerce re: Response to Supplemental Questionnaire on Scope Ruling Request for Worldwide Door Thresholds* (P.R. Doc. 10) (Nov. 7, 2017); *Response from Baker & McKenzie LLP to Sec’y of Commerce re: Response to Second Supplemental Questionnaire on Scope Ruling Request for Worldwide Door Thresholds* (P.R. Doc. 18) (Feb. 20, 2018); *Letter from Baker & McKenzie LLP to Sec’y of Commerce re: Response to Third Supplemental Questionnaire on Scope Ruling Request for Worldwide Door Thresholds* (P.R. Doc. 23) (June 18, 2018).

¹ All citations to documents from the administrative record are to public documents. References cited as “P.R. Doc. __” are to documents on the original agency record; references cited as “Rem. P.R. Doc. __” are to documents placed on the record during the Department’s redetermination proceeding.

The Scope Ruling Request stated that each of the 18 base models “may be imported in various lengths, colors and finishes.” *Scope Ruling Request 2*. It added that these products “contain, in addition to aluminum extrusions, non-aluminum extrusion components such as synthetic plastic polymers (e.g., polyvinyl chloride (‘PVC’), polyethylene, polyurethane, polypropylene, and thermoplastic elastomer), wood and stainless steel.” *Id.* at 2–3. It also stated that “all contain some form of PVC, and most contain other elements, such as steel screws and washers, plastic screw covers, wood, and weather stripping, made from polyethylene, polyurethane, polypropylene, and thermoplastic elastomer.” *Id.* at 3. The Scope Request described the thresholds as “fully assembled at the time of entry, complete with all of the necessary components to be ready for installation within a door frame, or residential or commercial building without any further finishing or fabrication.” *Id.*

Commerce issued the Scope Ruling on December 19, 2018, in response to Worldwide’s Scope Ruling Request and the requests of Columbia Aluminum Products, LLC and MJB Wood Group, Inc., each of which also sought a scope ruling on assembled door thresholds. *Scope Ruling 1*. In the Scope Ruling, Commerce concluded that the aluminum extrusion components within Worldwide’s door thresholds, and within those of the other two requestors, are subject to the Orders but that the non-aluminum components are not. *Id.* at 37–38.

Worldwide brought this action to contest the Scope Ruling on January 18, 2019. Summons, ECF No. 1; Compl. (Feb. 19, 2019), ECF No. 13. The Aluminum Extrusions Fair Trade Committee, which was the petitioner in the antidumping and countervailing duty investigations resulting in the Orders, and Endura Products, Inc., a domestic producer of door thresholds, are defendant-intervenors.

In response to Worldwide’s motion for judgment on the agency record, the court issued its Opinion and Order remanding the Scope Ruling to Commerce for reconsideration. *Worldwide I*, 44 CIT at ___, 466 F. Supp. 3d at 1380. Commerce filed its decision in response to *Worldwide I* (the “Remand Redetermination”) on December 23, 2020. *Final Results of Redetermination Pursuant to Ct. Remand* (Dec. 23, 2020), ECF No. 64–1. (“*Remand Redetermination*”). Worldwide filed comments in opposition. Pl.’s Comments in Opp’n to Remand Redetermination (Feb. 1, 2021), ECF No. 70 (“Worldwide’s Comments”). Defendant-intervenors filed comments supporting the Remand Redetermination on the merits but also arguing that Worldwide failed to exhaust administrative remedies when it did not file comments with Commerce on draft remand results that Commerce circulated to the parties. Def.-Int.’s Comments on Final Results of Redetermination

Pursuant to Ct. Remand (Feb. 1, 2020), ECF No. 71 (“Def.-Int.’s comments”). Defendant filed a response to the comments, in which it too argued that Worldwide failed to exhaust administrative remedies. Def.’s Resp. to Comments on Remand Redetermination (Mar. 4, 2021), ECF No. 76 (“Def.’s Resp.”).

II. DISCUSSION

A. Jurisdiction and Standard of Review

The court exercises subject matter jurisdiction under section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(c), which grants jurisdiction over civil actions brought under section 516A of the Tariff Act of 1930 (“Tariff Act”), 19 U.S.C. § 1516a.² Among the decisions that may be contested according to Section 516A is a determination of “whether a particular type of merchandise is within the class or kind of merchandise described in an . . . antidumping or countervailing duty order.” *Id.* § 1516a(a)(2)(B)(vi). In reviewing the Scope Ruling, the court must set aside any determination, finding, or conclusion found “to be unsupported by substantial evidence on the record, or otherwise not in accordance with law.” *Id.* § 1516a(b)(1)(B)(i).

B. Exhaustion of Administrative Remedies

During the administrative proceedings following the court’s issuance of *Worldwide I*, Commerce provided Worldwide and defendant-intervenors, on November 20, 2020, draft remand results and invited the parties to submit comments thereon by December 2, 2020. *Remand Redetermination* 10. Worldwide did not submit comments to Commerce during this agency comment period.

On December 24, 2020, the day following the Department’s submission of the Remand Redetermination, Worldwide filed a motion requesting that the court issue a “narrow” order that would: (1) remand the Remand Redetermination back to Commerce, (2) allow Worldwide five days to file comments on the Department’s draft remand results, and (3) direct Commerce to consider Worldwide’s comments in an amended final remand redetermination. Pl.’s Mot. for Remand and Leave to File Comments 2 (Dec. 24, 2020), ECF No. 65.

In its motion seeking a narrow remand, Worldwide explained the circumstances under which it sought an opportunity to comment on the draft remand results. Worldwide explained that “[o]n November 20, 2020, Plaintiff’s former counsel, Baker McKenzie LLP, filed an appearance on behalf of Worldwide Door in the underlying remand segment before Commerce” and that “[o]n November 30, 2020, two

² All citations to the United States Code are to the 2012 edition and all citations to the Code of Federal Regulations are to the 2020 edition.

days prior to the deadline for filing comments on the draft remand results, Worldwide notified Baker McKenzie that it had retained Kelly Drye & Warren LLP to represent it in this scope ruling litigation.” *Id.* at 1–2. The motion explained, further, that “owing to an administrative oversight derivative of this transition between firms,” counsel submitting the motion “did not enter an appearance in the remand case segment before Commerce” and “did not receive actual or constructive notice that the draft results had been published.” *Id.* at 2.

Defendant and defendant-intervenor opposed Worldwide’s motion for a narrow remand order. Def.’s Opp’n to Pl.’s Mot. for Remand and Leave to File Comments (Jan. 14, 2021), ECF No. 67; Def.-Int.’s Resp. to Pl.’s Mot. for Remand and Leave to File Comments (Jan. 14, 2021), ECF No. 68. The court denied the plaintiff’s motion, concluding that “plaintiff’s motion does not present grounds justifying the interruption of the orderly progression of the remand proceeding.” Order 2 (Jan. 19, 2021), ECF No. 69. The court added that plaintiff, in its comments to the court on the Remand Redetermination, “may present its reasons why it believes the court, in its discretion and under the circumstances presented, should not decline to consider plaintiff’s comments on the Final Remand Results for plaintiff’s failure to exhaust administrative remedies.” *Id.* at 2–3. “Due to the substitution of counsel and the circumstances presented in plaintiff’s motion, the court is ordering a ten-day extension of the filing dates for the comments and the response thereto on the Final Remand Results.” *Id.* at 3.

In its comments on the Remand Redetermination, Worldwide raises two arguments in support of the court’s not requiring exhaustion of administrative remedies in these circumstances. It argues, first, that any argument raised by Worldwide would have been futile. Worldwide’s Comments 15–16. Worldwide argues that in a remand redetermination Commerce submitted in other litigation contesting the Scope Ruling at issue here (“*Columbia Remand Results*”), Commerce rejected the “nearly identical” concerns Worldwide is raising in this litigation. *Id.* at 16 (citing the Department’s remand redetermination in response to the court’s opinion and order in *Columbia Aluminum Products, LLC v. United States*, 44 CIT ___, 470 F. Supp. 3d 1353 (2020)). Plaintiff argues that “[a]s Worldwide Door raises nearly identical concerns, its comments before the agency would have been pretextual for the Department to reissue the same explanations as in the *Columbia Remand Results*.” *Id.* Worldwide observes that the Remand Redetermination Commerce filed in this proceeding “and *Columbia Remand Results* are remarkably similar and, in certain

sections, appear to be the same, paragraph-by-paragraph.” *Id.* at 16 n.5. Plaintiff argues, second, that exhaustion of administrative remedies should not be required when a pure legal issue is involved and that such is the case here, where the issue is an interpretation of the scope language. *Id.* at 17–18.

In its reply to comments, defendant argues, *inter alia*, that the futility exception should be applied narrowly and only when the party already presented the arguments to the agency in some form. Def.’s Resp. 10 (citations omitted). It argues, further, that the exception should not be applied here because the arguments allegedly rejected previously were made in a separate proceeding, not this one. *Id.* (citation omitted). As to the “pure legal question” argument, defendant submits that the issue in this case, as in all proceedings related to scope rulings, is fact-specific, involving facts associated with Worldwide’s door thresholds. *Id.* at 11 (citations omitted). Defendant-intervenors, similarly, argue that the court should require exhaustion of administrative remedies due to Worldwide’s failure to comment on the draft remand results. Def.-Int.’s Comments 17–19.

The court concludes that it is appropriate to apply the doctrine of exhaustion of administrative remedies in this circumstance. Were the court to excuse plaintiff’s failure to exhaust administrative remedies in this situation, the court would be considering the arguments Worldwide made in comments to the court that Worldwide could have, and should have, allowed Commerce to consider in the first instance. Moreover, the court declines to presume, based on comments made by a different party in another proceeding, that it would have been futile for Worldwide to have made these arguments to Commerce.

The next issue is the consequence the court should attach to plaintiff’s failure to exhaust its administrative remedies. Defendant argues that “[i]n sum, Worldwide neglected to comment during the remand proceeding and due to its failure to exhaust administrative remedies, we request that the Court decline to consider the comments Worldwide submitted to this Court and limit its review to whether Commerce complied with the Remand Order.” Def.’s Resp. 12 (citation omitted). On that issue, defendant argues that Commerce complied with the court’s remand order. *Id.* at 14.

The court agrees with the consequence defendant requests. Accordingly, the court does not consider the arguments made in Worldwide’s comment submission to the court and confines its judicial review to whether the Remand Redetermination complies with the court’s order in *Worldwide I*.

In *Worldwide I*, the court ruled that Commerce erred in declining to consider whether Worldwide's door thresholds could qualify for the finished merchandise exclusion provided in the scope language of the Orders. The court held that in submitting a redetermination, "Commerce now must give full and fair consideration to the issue of whether this exclusion applies, upon making findings that are supported by substantial record evidence." *Worldwide I*, 44 CIT at ___, 466 F. Supp. 3d at 1380.

For the reasons discussed below, the court rules that Commerce, although complying with the court's remand order in part by addressing the issue of whether the finished merchandise exclusion applies, did not comply with it in full. As discussed in this Opinion and Order, Commerce, contrary to the court's direction, reached a factual finding or inference on a material issue in this litigation that is contradicted by record evidence. The court instructs Commerce to re-examine that factual issue and then reach a new determination on whether the finished merchandise exclusion applies to Worldwide's imported door thresholds.

C. Methodology for Scope Determinations

According to the Department's regulations, "in considering whether a particular product is included within the scope of an order . . . the Secretary [of Commerce] will take into account the following: (1) the descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of the Secretary (including prior scope determinations) and the [International Trade] Commission." 19 C.F.R. § 351.225(k)(1).³ The provision is not written so as to identify the *only* sources of information Commerce is permitted to consider. As a fundamental matter, the Department's inquiry must center on the scope language of the antidumping or countervailing duty order, for the Department's role in issuing a scope ruling is to interpret, not modify, the scope language. *Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1095 (Fed. Cir. 2002) ("Commerce cannot interpret an antidumping order so as to change the scope of that order, nor can Commerce interpret an order in a manner contrary to its terms." (internal quotation marks and citation omitted)). Moreover, to be sustained upon judicial review, the determination must be supported by the record evidence considered on the whole. This necessarily requires consideration of the record information contained in

³ If the "criteria" of § 351.225(k)(1) "are not dispositive, the Secretary will further consider: (i) The physical characteristics of the product; (ii) The expectations of the ultimate purchasers; (iii) The ultimate use of the product; (iv) The channels of trade in which the product is sold; and (v) The manner in which the product is advertised and displayed." 19 C.F.R. § 351.225(k)(2).

the scope ruling request, which ordinarily will include, *inter alia*, “[a] detailed description of the product, including its technical characteristics and uses.” 19 C.F.R. § 351.225(c)(1)(i).

D. The Scope Language of the Orders and the Court’s Opinion and Order in *Worldwide I*

The relevant scope language, which is the same in both Orders, applies generally to “aluminum extrusions which are shapes and forms, produced by an extrusion process, made from aluminum alloys having metallic elements corresponding to the alloy series designations published by The Aluminum Association commencing with the numbers 1, 3, and 6 (or proprietary equivalents or other certifying body equivalents).” *AD Order*, 76 Fed. Reg. at 30,650; *CVD Order*, 76 Fed. Reg. at 30,653. Such extrusions may be “produced and imported in a wide variety of shapes and forms,” and, after extrusion, may be subjected to drawing and to further fabrication and finishing. *AD Order*, 76 Fed. Reg. at 30,650; *CVD Order*, 76 Fed. Reg. at 30,654. The scope language also provides that:

[S]ubject extrusions may be identified with reference to their end use, such as fence posts, electrical conduits, door thresholds, carpet trim, or heat sinks (that do not meet the finished heat sink exclusionary language below). Such goods are subject merchandise if they otherwise meet the scope definition, regardless of whether they are ready for use at the time of importation.

AD Order, 76 Fed. Reg. at 30,651; *CVD Order*, 76 Fed. Reg. at 30,654. In addition to a good that is itself an aluminum extrusion, the scope language of the Orders, by operation of a “subassemblies” provision, potentially brings within the scope of the Orders an assembled good that contains one or more aluminum extrusions as parts. The pertinent scope language and context are as follows:

Subject aluminum extrusions may be described at the time of importation as parts for final finished products that are assembled after importation, including, but not limited to, window frames, door frames, solar panels, curtain walls, or furniture. Such parts that otherwise meet the definition of aluminum extrusions are included in the scope. The scope includes the aluminum extrusion components that are attached (*e.g.*, by welding or fasteners) to form subassemblies, *i.e.*, partially assembled merchandise unless imported as part of the finished

goods “kit” defined further below.⁴ The scope does not include the non-aluminum extrusion components of subassemblies or subject kits.

AD Order, 76 Fed. Reg. at 30,650–51; *CVD Order*, 76 Fed. Reg. at 30,654. The scope also contains a “finished merchandise” exclusion for “finished merchandise containing aluminum extrusions as parts that are fully and permanently assembled and completed at the time of entry, such as finished windows with glass, doors with glass or vinyl, picture frames with glass pane and backing material, and solar panels.” *AD Order*, 76 Fed. Reg. at 30,651; *CVD Order*, 76 Fed. Reg. at 30,654. In the Scope Ruling, Commerce concluded that it was unnecessary for it to consider whether Worldwide’s door thresholds satisfied the requirements of the finished merchandise exclusion. See *Scope Ruling* 33–34. Commerce reasoned that Worldwide’s door thresholds were expressly identified in the scope language as “door thresholds” and as “parts for final finished products that are assembled after importation, including, but not limited to . . . door frames.” *Id.* at 33.

The court held in *Worldwide I* that Commerce misread the scope language in concluding that the finished merchandise exclusion was irrelevant to its analysis. *Worldwide I*, 44 CIT at __, 466 F. Supp. 3d at 1380. Commerce determined that each of Worldwide’s imported door thresholds is “partially assembled merchandise” described by the “subassemblies” provision because it contains an aluminum extrusion as a part and because it is produced to be assembled into a door unit. *Scope Ruling* 33. Commerce cited the scope language references to door thresholds and parts of doors in concluding that the finished merchandise exclusion was inapplicable. See *id.* at 33–34. Commerce overlooked that the subject of the sentence of the scope

⁴ [The “finished goods kit exclusion” reads as follows:

The scope also excludes finished goods containing aluminum extrusions that are entered unassembled in a “finished goods kit.” A finished goods kit is understood to mean a packaged combination of parts that contains, at the time of importation, all of the necessary parts to fully assemble a final finished good and requires no further finishing or fabrication, such as cutting or punching, and is assembled “as is” into a finished product. An imported product will not be considered a “finished goods kit” and therefore excluded from the scope of the investigation merely by including fasteners such as screws, bolts, *etc.* in the packaging with an aluminum extrusion product.

Aluminum Extrusions from the People’s Republic of China: Antidumping Duty Order, 76 Fed. Reg. 30,650, 30,651 (Int’l Trade Admin. May 26, 2011) (“*AD Order*”); *Aluminum Extrusions From the People’s Republic of China: Countervailing Duty Order*, 76 Fed. Reg. 30,653, 30,654 (Int’l Trade Admin. May 26, 2011) (“*CVD Order*”). Worldwide does not argue that the finished goods kit exclusion applies to its door thresholds.]

language referring to “door thresholds” is “subject *extrusions*” and, similarly, that the subject of the sentence referring to “parts for final finished products . . . including . . . door frames” is, similarly, “subject aluminum *extrusions*.” See *AD Order*, 76 Fed. Reg. at 30,650–51; *CVD Order*, 76 Fed. Reg. at 30,654 (emphasis added). The latter sentence is confined specifically to extrusions “described at the time of importation as parts for final finished products,” and the following sentence clarifies that “[s]uch parts that *otherwise meet the definition of aluminum extrusions* are included in the scope.” *AD Order*, 76 Fed. Reg. at 30,650–51; *CVD Order*, 76 Fed. Reg. at 30,654 (emphasis added). The scope language defines aluminum extrusions as “shapes and forms, produced by an extrusion process.” *AD Order*, 76 Fed. Reg. at 30,650; *CVD Order*, 76 Fed. Reg. at 30,653. The extruded aluminum components in Worldwide’s door thresholds are described by these words, but the assembled door thresholds are not. Logically, an article cannot be both an “extrusion” and an assembly containing an extrusion as one part among several other parts that are not aluminum extrusions. As *Worldwide I* observed, “according to the uncontested facts, Worldwide’s door thresholds are not ‘aluminum extrusions’ at the time of importation; rather, they are door thresholds that contain an aluminum extrusion as a component in an assembly.” 44 CIT at ___, 466 F. Supp. 3d at 1357.

E. The Remand Redetermination Reaches a Finding or Inference that Is Unsupported by Record Evidence

In the Remand Redetermination, Commerce disagreed that the finished merchandise exclusion was relevant to its analysis. See *Remand Redetermination* 10–11. Under protest, Commerce proceeded to address the issue of whether the finished merchandise exclusion applied to Worldwide’s imported door thresholds.⁵ Commerce concluded that Worldwide’s door thresholds are “partially assembled merchandise” and “intermediate products” for purposes of the subas-

⁵ In protesting the court’s ruling, Commerce relies upon certain judicial decisions, none of which involved the products at issue in this case. Commerce states in the Remand Redetermination that “we believe that the Federal Circuit’s holdings in *Meridian* and *Whirlpool* (which were not addressed by the Court in the *Remand Order*) are instructive and support Commerce’s Final Scope Ruling.” *Final Results of Redetermination Pursuant to Ct. Remand* 11 (Dec. 23, 2020), ECF No. 64–1 (“*Remand Redetermination*”) (citing *Meridian Prods., LLC v. United States*, 890 F.3d 1272 (Fed. Cir. 2018) and *Whirlpool Corp. v. United States*, 890 F.3d 1302 (Fed. Cir. 2018)). These decisions by the Court of Appeals for the Federal Circuit do not support the Department’s position that it need not consider the finished merchandise exclusion if it deems the good at issue to be a “subassembly.” See *Remand Redetermination* 15 (“Finally, because we find the door thresholds are subassemblies under the general scope language, we also find that they do not meet the exclusion criteria for ‘finished merchandise’ and are therefore covered by the scope of the *Orders*.”).

semblies provision in the Orders. *Id.* at 23. From the fact that Worldwide’s door thresholds are produced “for installation within a door frame or residential or commercial building,” Commerce concluded that “Worldwide’s door thresholds do not function on their own, but rather are incorporated into a larger downstream product,” *id.*, to which Commerce also referred as a “completed door unit,” *id.* at 36.

In concluding that Worldwide’s door thresholds did not qualify for the finished merchandise exclusion, Commerce also relied on certain other record evidence submitted by the petitioner and Endura, as follows:

Moreover, the record evidence submitted by the petitioner and Endura indicates that the completed door unit is highly customizable, and may require additional cutting and machining of the door threshold. Door pre-hangers may further customize door thresholds, along with other door unit components, before final assembly of the door unit. Although door thresholds are available in a variety of standard lengths, they are generally manufactured to a longer length that is cut or machined to meet the requirements of a specific order. The evidence submitted by the petitioner and Endura also indicates that in the remodeling market segment for door thresholds, thresholds can be sold as parts of pre-hung door units or as replacement parts for finished door assemblies. Thresholds sold by retailers in the remodeling segment often require further cutting and sizing to meet the specific requirements of the door assembly into which the thresholds are incorporated. Thus, we find that the information submitted by the petitioner and Endura is consistent with and supports our determination that Worldwide’s door thresholds are not, in and of themselves, final finished products, but are, rather, an intermediate product that is meant to be incorporated into a larger downstream product, which is the finished merchandise.

Id. at 36–37 (footnotes omitted). The quoted language infers (but does not state unambiguously) from the record that the particular door thresholds at issue in this litigation, i.e., those described in Worldwide’s Scope Ruling Request, are so designed and manufactured as to require cutting or machining prior to assembly of a door unit or other structure. But whether the court interprets the Department’s language to be a finding of fact or an inference does not matter. In either case, it is contrary to certain record evidence consisting of the description of Worldwide’s door thresholds in the Scope Ruling Request, which described the thresholds as “fully assembled at the time of

entry, complete with all of the necessary components to be ready for installation within a door frame, or residential or commercial building *without any further finishing or fabrication.*” *Scope Ruling Request 3* (emphasis added). While identifying evidence submitted by the petitioner and Endura referring *generally* to door thresholds, Commerce does not bring to the court’s attention evidence that the articles actually at issue in this litigation are so designed and manufactured as to require cutting or machining prior to use. And if they are so designed and manufactured, then they are not the articles described in the Scope Ruling Request.

In their comments on the Remand Redetermination, defendant-intervenors state that “[w]hile door thresholds are available in a variety of standard lengths, they are *generally* manufactured to a longer length that is cut or machined once the order-specific requirements are known.” Def.-Int.’s Comments 10 (emphasis added) (citing their own submissions on the record). Defendant-intervenors conclude from this statement that “[b]ecause of the need to customize the threshold to match the many specific requirements of the particular door assembly, it would not make economic sense as an import model to finish the customization of the threshold prior to importation and it is likely that imported door threshold products *generally* are further cut to size either at importers’ domestic facilities or at pre-hangers’ facilities.” *Id.* at 10–11 (emphasis added) (citing their own submissions on the record). They add that “even thresholds sold as replacement parts also *generally* must be cut to size to match the particular door assembly they are going to be a part of.” *Id.* at 12 (emphasis added) (citing their own submissions on the record).

Defendant-intervenors’ comments, and the evidence they cite, are not directed to the specific issue the court identifies, which is whether *Worldwide’s* imported thresholds, as identified in the Scope Ruling Request, are so designed and manufactured as to require cutting or machining prior to use as a component in a door unit or other structure. The evidence submitted by defendant-intervenors, as identified by Commerce in the Remand Redetermination and by defendant-intervenors in their comment submission, and as viewed against the record as a whole, does not constitute substantial evidence to support a conclusion or inference that *Worldwide’s* door thresholds are so designed and manufactured. But because Commerce relied, at least in part, on this evidence to conclude that the finished merchandise exclusion was not applicable to *Worldwide’s* door thresholds, the court must remand the agency’s decision once again. The issue to which this evidence pertains, i.e., whether *Worldwide’s* door thresholds are designed and manufactured so as to require cutting or machining

prior to use, is directly relevant to the applicability of the finished merchandise exclusion, which pertains to “finished merchandise containing aluminum extrusions as parts that are fully and permanently assembled *and completed* at the time of entry.” *AD Order*, 76 Fed. Reg. at 30,651; *CVD Order*, 76 Fed. Reg. at 30,654 (emphasis added).

F. Commerce Must Reconsider the Applicability of the Finished Merchandise Exclusion Based on the Exemplars Stated Therein

The scope exclusion central to this case has a list of exemplars. *AD Order*, 76 Fed. Reg. at 30,651; *CVD Order*, 76 Fed. Reg. at 30,654 (listing as exemplars “finished windows with glass, doors with glass or vinyl, picture frames with glass pane and backing material, and solar panels”). In the Remand Redetermination, Commerce reasoned, as to these exemplars, that “[w]e find that these product examples do not constitute subassemblies within the meaning of the general scope language, but, rather, are examples of fully and permanently assembled and completed products.” *Remand Redetermination* 18. Commerce added that “[a]ccordingly, an assembled aluminum extrusion door frame without glass could be considered a subassembly, and therefore covered by the scope, thus falling short of the final finished door with glass which would be excluded.” *Id.* at 18–19.

In distinguishing Worldwide’s door thresholds from goods Commerce considered to satisfy the finished merchandise exclusion, Commerce reasoned that “[a] subassembly is merchandise which is designed for the sole purpose of becoming part of a larger whole.” *Id.* at 24. Under the Department’s reasoning, the express mention of the finished goods kit exclusion, but not the finished merchandise exclusion, in the subassemblies language of the Orders supports its interpretation that a good Commerce considers to be a “subassembly” within the meaning of the subassemblies provision cannot qualify for the finished merchandise exclusion. *Id.* at 18 (“The lack of such express language supports the conclusion that products that are included in the scope because they satisfy the subassemblies language cannot also be excluded as finished merchandise under the finished merchandise exclusion.”).

Commerce considered Worldwide’s door thresholds to be “subassemblies” because they “do not function on their own, but rather are incorporated into a larger downstream product.” *Id.* at 23. Commerce described that product as “an entire door unit” and as “a completed door unit” that “requires additional parts, such as door jambs, a door panel, glass, hinges, weatherstripping, and other hardware parts.” *Id.* at 36.

The Remand Redetermination appears to overlook a critical distinction: the exemplar in the finished merchandise exclusion explicitly refers to “doors with glass or vinyl,” not “finished door units” or “completed door units” consisting of assembled combinations of a door, a door frame, and other parts such as door jambs, weatherstripping, and necessary hardware. A “door” assembled from one or more aluminum extrusions and components of vinyl or glass, is itself only a component of what Commerce itself described as a finished or completed door unit. Like one of Worldwide’s door thresholds, it is “designed for the sole purpose of becoming part of a larger whole,” *id.* at 24. To interpret the words “doors with glass or vinyl” to refer only to complete, assembled door units, i.e., those complete with doors, door frames, hinges, weatherstripping, and all other necessary hardware and fittings, as Commerce apparently did, is to adopt an interpretation that is contrary to the plain meaning of the door exemplar as it appears in the scope language. The door exemplar refers to “doors,” making no mention of door “units,” door “frames,” or complete assemblies with hardware and other required components. The Department’s role in a scope ruling is to interpret, not modify, the scope language, and it may not interpret an order contrary to its terms. *Duferco Steel*, 296 F.3d at 1095 (Fed. Cir. 2002).

Under the Department’s analysis, only goods that are not “designed for the sole purpose of becoming part of a larger whole,” *Remand Redetermination* 24, can satisfy the finished merchandise exclusion, but this rationale is contrary to the terms by which that exclusion is expressed in the scope language. Two of the exemplars—the aforementioned door exemplar and the “finished windows with glass” exemplar—are specifically designed for the sole purpose of becoming part of a larger whole. Even the products Commerce itself considered to satisfy the finished merchandise exclusion, i.e., a complete, assembled door unit, and a “final finished door with glass,” *id.* at 19, do not “function on their own,” *id.* at 23, and cannot function until incorporated into a wall or other part of a building. The Remand Redetermination does not offer a plausible explanation of why the articles mentioned in the “door” and “window” exemplars of the finished merchandise exclusion satisfy that exclusion but that Worldwide’s door thresholds, as described in the Scope Ruling Request, do not.

III. CONCLUSION AND ORDER

In conclusion, Commerce did not comply fully with the court’s instruction in *Worldwide I* with respect to the finished merchandise exclusion. *Worldwide I*, 44 CIT at __, 466 F. Supp. 3d at 1380 (“Com-

merce now must give *full and fair* consideration to the issue of whether this exclusion applies, upon making findings that are *supported by substantial record evidence.*" (emphasis added)). On remand, Commerce must undertake this task again. After reaching a finding from the record evidence that the door thresholds at issue in this case either are, or are not, so designed and produced as to require cutting or machining prior to use, Commerce must consider that finding in deciding anew whether the finished merchandise exclusion applies to the specific door thresholds at issue in this litigation.

Therefore, upon consideration of the Remand Redetermination and all papers and proceedings had herein, and upon due deliberation, it is hereby

ORDERED that the Remand Redetermination is remanded to Commerce for reconsideration in light of this Opinion and Order; it is further

ORDERED that Commerce, within 90 days from the date of issuance of this Opinion and Order, shall submit a second redetermination upon remand ("Second Remand Redetermination") that complies with this Opinion and Order; it is further

ORDERED that plaintiff and defendant-intervenors shall have 30 days from the filing of the Second Remand Redetermination in which to submit comments to the court; and it is further

ORDERED that should plaintiff or defendant-intervenors submit comments, defendant shall have 15 days from the date of filing of the last comment to submit a response.

Dated: September 14, 2021

New York, New York

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

Slip Op. 21–116

COLUMBIA ALUMINUM PRODUCTS, LLC, Plaintiff, v. UNITED STATES, Defendant, and ALUMINUM EXTRUSIONS FAIR TRADE COMMITTEE AND ENDURA PRODUCTS, INC., Defendant-Intervenors.

Before: Timothy C. Stanceu, Judge
Court No. 19–00013

[Remanding for reconsideration an agency decision, issued in response to court order, interpreting the scope of antidumping and countervailing duty orders on aluminum extrusions]

Dated: September 14, 2021

Jeremy W. Dutra, Squire Patton Boggs (US), LLP, of Washington, D.C., for plaintiff. With him on the brief was *Peter Koenig*.

Tara K. Hogan, Assistant Director, Civil Division, U.S. Department of Justice, of New York, New York, for defendant. With her on the brief were *Brian M. Boynton*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Aimee Lee*, Assistant Director. Of counsel on the brief was *Nikki Kalbing*, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, D.C.

Robert E. DeFrancesco, III, Wiley Rein, LLP, of Washington, D.C., for defendant-intervenors. With him on the brief were *Alan H. Price* and *Elizabeth S. Lee*.

OPINION AND ORDER

Stanceu, Judge:

Plaintiff Columbia Aluminum Products, LLC (“Columbia”) brought this action to contest a decision by the International Trade Administration, U.S. Department of Commerce (“Commerce” or the “Department”) that its imported products, “door thresholds” containing aluminum extrusions among other components, are within the scope of antidumping and countervailing duty orders on aluminum extrusions from the People’s Republic of China (the “Orders”). Before the court is the decision Commerce has submitted in response to the court’s opinion and order in *Columbia Aluminum Products, LLC v. United States*, 44 CIT __, 470 F. Supp. 3d 1353 (2020) (“*Columbia I*”), which remanded the contested determination to Commerce for reconsideration.

The court again issues an order of remand, concluding that the decision now before the court relies on a finding or inference pertaining to Columbia’s door thresholds that is contradicted by certain record evidence and is unsupported by any specific evidence Commerce cited in that decision. The court directs Commerce to reconsider the impermissible finding or inference and then determine anew whether Columbia’s door thresholds qualify for a specific exclusion (the “finished merchandise exclusion”) set forth in the scope language of the Orders.

I. BACKGROUND

Background on this litigation is presented in the court’s previous opinion and summarized and supplemented herein. *See id.* at __, 470 F. Supp. at 1354–56.

Contested in this litigation (the “Scope Ruling”) is *Antidumping and Countervailing Duty Orders on Aluminum Extrusions From the People’s Republic of China: Final Scope Rulings on Worldwide Door Components Inc., MJB Wood Group, Inc., and Columbia Aluminum*

Products Door Thresholds (Int'l Trade Admin. Dec. 19, 2018) (Rem. P.R. Doc. 39) (“*Scope Ruling*”).¹

Commerce issued the antidumping duty and countervailing duty orders pertinent to this litigation (the “Orders”) in May 2011. *Aluminum Extrusions from the People’s Republic of China: Antidumping Duty Order*, 76 Fed. Reg. 30,650 (Int'l Trade Admin. May 26, 2011) (“*AD Order*”); *Aluminum Extrusions From the People’s Republic of China: Countervailing Duty Order*, 76 Fed. Reg. 30,653 (Int'l Trade Admin. May 26, 2011) (“*CVD Order*”).

Columbia submitted a “Scope Ruling Request” to Commerce on March 14, 2018, describing therein, and in a supplemental response to Commerce, ten models of door thresholds. *Letter from Sandler, Travis & Rosenberg, P.A. to Sec’y of Commerce re: Aluminum Extrusions from the People’s Republic of China: Scope Ruling Request for Columbia Aluminum Products, LLC* (Mar. 14, 2018) (Rem. P.R. Doc. 1) (“*Scope Ruling Request*”); *Letter from Sandler, Travis & Rosenberg, P.A. to Sec’y of Commerce re: Aluminum Extrusions from the People’s Republic of China: Supplement to Columbia Aluminum Products, LLC’s Scope Ruling Request 4–6* (July 10, 2018) (Rem. P.R. Doc. 10) (“*Supplement to Scope Ruling Request*”). As described in the Scope Ruling Request, each door threshold is an assembly consisting of various components, including a component fabricated from an aluminum extrusion and various components that are not made of aluminum, e.g., components made of plastic or wood. *Scope Ruling Request 1–3*.

Commerce issued the Scope Ruling on December 19, 2018, in response to Columbia’s Scope Ruling Request, and the requests of Worldwide Door Components, Inc. and MJB Wood Group, Inc., each of which also sought a scope ruling on assembled door thresholds. *Scope Ruling 1*. The Scope Ruling concluded that the aluminum extrusion component within each of Columbia’s door thresholds, and within those of the other two requestors, are subject to the Orders but that the non-aluminum components are not. *Id.* at 37–38.

Columbia brought this action to contest the Scope Ruling on January 18, 2019. Summons, ECF No. 1; Compl., ECF No. 3. The Aluminum Extrusions Fair Trade Committee, which was the petitioner in the antidumping and countervailing duty investigations resulting in the Orders, and Endura Products, Inc., a domestic producer of door thresholds, are defendant-intervenors. Order (Feb. 19, 2019), ECF No. 16.

¹ All citations to documents from the administrative record are to public documents. References cited as “P.R. Doc. ___” are to documents on the original agency record; references cited as “Rem. P.R. Doc. ___” are to documents placed on the record during the Department’s redetermination proceeding.

In response to Columbia’s motion for judgment on the agency record, the court issued its Opinion and Order remanding the Scope Ruling to Commerce for reconsideration. *Columbia I*, 44 CIT at __, 470 F. Supp. 3d at 1362. Commerce filed its decision upon remand (“Remand Redetermination”) on December 23, 2020. *Final Results of Redetermination Pursuant to Ct. Remand* (Dec. 23, 2020), ECF No. 48–1 (“*Remand Redetermination*”). Columbia filed comments in opposition. Pl. Columbia Alum. Prods., LLC’s Comments on Commerce’s Final Remand Redetermination (Feb. 1, 2021), ECF No. 52 (“Columbia’s Comments”). Defendant-Intervenors filed comments in support of the Remand Redetermination. Def.-Int.’s Comments on Final Results of Redetermination Pursuant to Ct. Remand (Feb. 1, 2021), ECF No. 53 (“Def.-Int.’s Comments”). Defendant responded to the comment submissions. Def.’s Resp. to Comments on Remand Redetermination (Feb. 18, 2021), ECF No. 55 (“Def.’s Resp.”).

II. DISCUSSION

A. Jurisdiction and Standard of Review

The court exercises subject matter jurisdiction under section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(c), which grants jurisdiction over civil actions brought under section 516A of the Tariff Act of 1930 (“Tariff Act”), 19 U.S.C. § 1516a.² Among the decisions that may be contested according to Section 516A is a determination of “whether a particular type of merchandise is within the class or kind of merchandise described in an . . . antidumping or countervailing duty order.” *Id.* § 1516a(a)(2)(B)(vi). In reviewing the Scope Ruling, the court must set aside any determination, finding, or conclusion found “to be unsupported by substantial evidence on the record, or otherwise not in accordance with law.” *Id.* § 1516a(b)(1)(B)(i).

B. Methodology for Scope Determinations

The Department’s regulations provide that “in considering whether a particular product is included within the scope of an order . . . the Secretary [of Commerce] will take into account the following: (1) the descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of the Secretary (including prior scope determinations) and the [International Trade] Commis-

² Citations to the United States Code are to the 2012 edition. Citations to the Code of Federal Regulations are to the 2020 edition unless otherwise noted.

sion.” 19 C.F.R. § 351.225(k)(1).³ The provision is not properly read to identify the *only* sources of information Commerce is permitted to consider. As a fundamental matter, the Department’s inquiry must center on the scope language of the antidumping or countervailing duty order, for the Department’s role in issuing a scope ruling is to interpret, not modify, the scope language. *Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1095 (Fed. Cir. 2002) (“*Duferco*”) (“Commerce cannot interpret an antidumping order so as to change the scope of that order, nor can Commerce interpret an order in a manner contrary to its terms.” (internal quotation marks and citation omitted)). Moreover, to be sustained upon judicial review, the determination must be supported by the record evidence considered on the whole. This necessarily requires consideration of the record information contained in the scope ruling request, which ordinarily will include, *inter alia*, “[a] detailed description of the product, including its technical characteristics and uses.” 19 C.F.R. § 351.225(c)(1)(i).

C. The Scope Language of the Orders and the Court’s Decision in *Columbia I*

The relevant scope language, which is the same in both Orders, applies generally to “aluminum extrusions which are shapes and forms, produced by an extrusion process, made from aluminum alloys having metallic elements corresponding to the alloy series designations published by The Aluminum Association commencing with the numbers 1, 3, and 6 (or proprietary equivalents or other certifying body equivalents).” *AD Order*, 76 Fed. Reg. at 30,650; *CVD Order*, 76 Fed. Reg. at 30,653. Such extrusions may be “produced and imported in a wide variety of shapes and forms,” and, after extrusion, may be subjected to drawing and to further fabrication and finishing. *AD Order*, 76 Fed. Reg. at 30,650; *CVD Order*, 76 Fed. Reg. at 30,654. It is uncontested that the component in each of *Columbia*’s door thresholds that is fabricated from an aluminum extrusion is made of an aluminum alloy identified in the scope language of the Orders. See *Remand Redetermination 22*. The scope language also provides that:

[S]ubject extrusions may be identified with reference to their end use, such as fence posts, electrical conduits, door thresholds, carpet trim, or heat sinks (that do not meet the finished heat sink exclusionary language below). Such goods are subject mer-

³ If the “criteria” of § 351.225(k)(1) “are not dispositive, the Secretary will further consider: (i) The physical characteristics of the product; (ii) The expectations of the ultimate purchasers; (iii) The ultimate use of the product; (iv) The channels of trade in which the product is sold; and (v) The manner in which the product is advertised and displayed.” 19 C.F.R. § 351.225(k)(2).

chandise if they otherwise meet the scope definition, regardless of whether they are ready for use at the time of importation.

AD Order, 76 Fed. Reg. at 30,651; *CVD Order*, 76 Fed. Reg. at 30,654. In addition to a good that is itself an aluminum extrusion, the scope language of the Orders, by operation of a “subassemblies” provision, potentially brings within the scope of the Orders an assembled good that contains one or more aluminum extrusions as parts. The pertinent scope language and context are as follows:

Subject aluminum extrusions may be described at the time of importation as parts for final finished products that are assembled after importation, including, but not limited to, window frames, door frames, solar panels, curtain walls, or furniture. Such parts that otherwise meet the definition of aluminum extrusions are included in the scope. The scope includes the aluminum extrusion components that are attached (*e.g.*, by welding or fasteners) to form subassemblies, *i.e.*, partially assembled merchandise unless imported as part of the finished goods ‘kit’ defined further below.⁴ The scope does not include the non-aluminum extrusion components of subassemblies or subject kits.

AD Order, 76 Fed. Reg. at 30,650–51; *CVD Order*, 76 Fed. Reg. at 30,654. The scope also contains a “finished merchandise” exclusion for “finished merchandise containing aluminum extrusions as parts that are fully and permanently assembled and completed at the time of entry, such as finished windows with glass, doors with glass or vinyl, picture frames with glass pane and backing material, and solar panels.” *AD Order*, 76 Fed. Reg. at 30,651; *CVD Order*, 76 Fed. Reg. at 30,654. In the Scope Ruling, Commerce concluded that it was unnecessary for it to consider whether Columbia’s door thresholds satisfied the requirements of the finished merchandise exclusion. Commerce reasoned that Columbia’s door thresholds were expressly identified in

⁴ The “finished goods kit exclusion” reads as follows:

The scope also excludes finished goods containing aluminum extrusions that are entered unassembled in a “finished goods kit.” A finished goods kit is understood to mean a packaged combination of parts that contains, at the time of importation, all of the necessary parts to fully assemble a final finished good and requires no further finishing or fabrication, such as cutting or punching, and is assembled “as is” into a finished product. An imported product will not be considered a “finished goods kit” and therefore excluded from the scope of the investigation merely by including fasteners such as screws, bolts, *etc.* in the packaging with an aluminum extrusion product.

Aluminum Extrusions from the People’s Republic of China: Antidumping Duty Order, 76 Fed. Reg. 30,650, 30,651 (May 26, 2011); *Aluminum Extrusions from the People’s Republic of China: Countervailing Duty Order*, 76 Fed. Reg. 30,653, 30,654 (May 26, 2011). Columbia does not argue that the finished goods kit exclusion applies to its door thresholds.

the scope language as “door thresholds” and as “parts for final finished products that are assembled after importation, including, but not limited to . . . door frames.” *Scope Ruling* 33.

The court held in *Columbia I* that Commerce misread the scope language in concluding that the finished merchandise exclusion was irrelevant to its analysis. 44 CIT at __, 470 F. Supp. 3d at 1360. Commerce decided that each of Columbia’s imported door thresholds is “partially assembled merchandise” described by the “subassemblies” provision because it contains an aluminum extrusion as a part and because it is produced to be assembled into a door frame or what Commerce termed a “door unit.” *Scope Ruling* 33. Commerce cited the scope language references to door thresholds and parts of door frames in concluding that the finished merchandise exclusion was inapplicable. *See id.* at 33–34. Commerce overlooked that the subject of the sentence of the scope language referring to “door thresholds” is “subject *extrusions*” and, similarly, that the subject of the sentence referring to “parts for final finished products . . . including . . . door frames” is, similarly, “subject aluminum *extrusions*.” *See AD Order*, 76 Fed. Reg. at 30,650–51; *CVD Order*, 76 Fed. Reg. at 30,654. The latter sentence is confined specifically to extrusions “described at the time of importation as parts for final finished products,” and the following sentence clarifies that “[s]uch parts that *otherwise meet the definition of aluminum extrusions* are included in the scope.” *AD Order*, 76 Fed. Reg. at 30,650–51; *CVD Order*, 76 Fed. Reg. at 30,654 (emphasis added). The scope language defines aluminum extrusions as “shapes and forms, produced by an extrusion process.” *AD Order*, 76 Fed. Reg. at 30,650; *CVD Order*, 76 Fed. Reg. at 30,653. The extruded aluminum components in Columbia’s door thresholds are described by these words, but the assembled door thresholds are not. Logically, an article cannot be both an “extrusion” and an assembly containing an extrusion as one part among several other parts that are not aluminum extrusions. As *Columbia I* observed, “according to the uncontested facts, Columbia’s door thresholds are not ‘aluminum extrusions’ at the time of importation; rather, they are door thresholds that contain an aluminum extrusion as a component in an assembly.” 44 CIT at __, 470 F. Supp. 3d at 1357. The court ordered Commerce to reconsider its decision and specifically to consider whether the finished merchandise exclusion applies in this case.

D. The Remand Redetermination Reaches a Finding or Inference that Is Contradicted by Record Evidence

In the Remand Redetermination, Commerce disagreed that the finished merchandise exclusion was relevant to its analysis. Under

protest, Commerce proceeded to address the issue of whether the finished merchandise exclusion applied to Columbia's imported door thresholds.⁵ Commerce concluded that Columbia's door thresholds are an "intermediate product" and "partially assembled merchandise" for purposes of the subassemblies provision in the Orders. *Remand Redetermination* 43. It concluded, further, that the articles did not qualify for the finished merchandise exclusion, considering them to be parts of what it termed "door units" (containing "additional parts, such as door jambs, a door panel, glass, hinges, weatherstripping, and other hardware parts") rather than finished merchandise. *Id.* at 44 (explaining that "[t]he record evidence submitted by the petitioner and Endura indicates that door 'pre-hangers' obtain all of the components necessary to assemble an entire door unit that is subsequently installed in a building.") (footnote omitted).

In the Remand Redetermination, Commerce reasoned that goods falling within the subassemblies provision of the Orders cannot also be considered goods qualifying for the finished merchandise exclusion, i.e., Commerce considers these two categories to be mutually exclusive. *See Remand Redetermination* 17–22. Thus, Commerce employed an analysis under which any goods it deems to be described by the subassemblies provision are, *per se*, ineligible for the finished merchandise exclusion. The court need not decide whether this analysis is a correct interpretation of the scope language, for even if it is, the Department's decision still must be remanded to Commerce because it relies upon an impermissible finding or inference. Specifically, in rejecting the argument that the finished merchandise exclusion described Columbia's door thresholds, Commerce impermissibly relied on certain other record evidence submitted by the petitioner and Endura, as follows:

Moreover, the record evidence submitted by the petitioner and Endura indicates that the completed door unit is highly customizable, and may require additional cutting and machining of the

⁵ In disagreeing with, and protesting, the court's ruling, Commerce relies upon certain judicial decisions, none of which involved the products at issue in this case. Commerce states in the Remand Redetermination that "we believe that the Federal Circuit's holdings in *Meridian* and *Whirlpool* (which were not addressed by the Court in the *Remand Order*) are instructive and support Commerce's Final Scope Ruling." *Final Results of Redetermination Pursuant to Ct. Remand* 11 (Dec. 23, 2020), ECF No. 48–1 ("*Remand Redetermination*") (citing *Meridian Prods., LLC v. United States*, 890 F.3d 1272 (Fed. Cir. 2018) and *Whirlpool Corp. v. United States*, 890 F.3d 1302 (Fed. Cir. 2018)). These decisions by the Court of Appeals for the Federal Circuit do not support the Department's position that it need not consider the finished merchandise exclusion if it deems the good at issue to be a "subassembly." *See Remand Redetermination* 15 (in which Commerce reasons that "because we find the door thresholds are subassemblies under the general scope language, we also find that they do not meet the exclusion criteria for 'finished merchandise' and are therefore covered by the scope of the *Orders*.").

door threshold. Door pre-hangers may further customize door thresholds, along with other door unit components, before final assembly of the door unit. Although door thresholds are available in a variety of standard lengths, they are generally manufactured to a longer length that is cut or machined to meet the requirements of a specific order. The evidence submitted by the petitioner and Endura also indicates that in the remodeling market segment for door thresholds, thresholds can be sold as parts of pre-hung door units or as replacement parts for finished door assemblies. Thresholds sold by retailers in the remodeling segment often require further cutting and sizing to meet the specific requirements of the door assembly into which the thresholds are incorporated. Thus, we find that the information submitted by the petitioner and Endura is consistent with and supports our continued determination that Columbia's door thresholds are not, in and of themselves, a final finished product, but rather, an intermediate product that is meant to be incorporated into a larger downstream product, which is the finished merchandise.

Id. at 44–45 (footnotes omitted). The quoted language infers (but does not state unambiguously) that the specific door thresholds at issue in this proceeding are so designed and manufactured as to require cutting or machining prior to incorporation into a door frame or other structure. But whether the court considers this language to be a finding or an inference does not matter: in either case, it is contradicted by the record evidence contained in the Scope Ruling Request and the supplement thereto. Commerce does not cite any record evidence to support a finding or inference that Columbia's imported door thresholds, in particular, are so designed and produced as to require cutting or machining prior to incorporation into a door frame or other structure.

In its comments to the court, Columbia states that “[e]vidence that Columbia submitted during the original scope ruling, including videos, demonstrate[s] that Columbia’s assembled thresholds *cannot* be cut to custom sizes because doing so destroys the assembled thresholds, rendering them unuseable [*sic*].” Columbia’s Comments 8 (citing *Supplement to Scope Ruling Request* 11–12 & Ex. 11). In the cited supplement to its Scope Ruling Request, Columbia stated that the thresholds at issue “are made for standard size doors” and that “[t]o be explicitly clear, Columbia’s thresholds in this Scope Request cannot be cut to be utilized for different standard door sizes. The thresh-

old would not be functional if cut.” *Supplement to Scope Ruling Request* 11. Citing a video attached as an exhibit to the submission showing the effects of cutting, Columbia stated that “[o]nce cut, the nailing block within the threshold is gone. Without a nailing block, the threshold has no way to be utilized in a door.” *Id.* at 11–12 (citing *id.* at Ex. 11). Columbia added that “once cut Columbia’s finished thresholds no longer seal against water or insulate air.” *Id.* at 12. In another exhibit to that submission, Columbia attached letters from two of its customers to support its statement that its thresholds are ready for use without further processing. *Id.* at 7 (citing *id.* at Ex. 6).

In its supplement to its Scope Ruling Request, Columbia also stated that it manufactures in the United States “certain thresholds that are manufactured intended to be cut by the end user.” *Id.* at 8 n.23, *see id.* at 11 (explaining that these “cuttable thresholds,” which it describes as similar to Endura’s sills, “give end-users customizable options and excess materials. As a result, these thresholds are more expensive due to their ability to fit multiple sized standard door sizes and use of more materials.”). Columbia contrasted these with the thresholds at issue. *Id.* at 11 (“However, the finished merchandise subject to Columbia’s Scope Request cannot undergo any cutting or fabrication after importation without losing the functionality of the product.”).

In their comments on the Remand Redetermination, defendant-intervenors state that “[w]hile door thresholds are available in a variety of standard lengths, they are *generally* manufactured to a longer length that is cut or machined once the order-specific requirements are known.” Def.-Int.’s Comments 10 (emphasis added) (citing their own submissions on the record). Defendant-intervenors conclude from this statement that “[b]ecause of the need to customize the threshold to match the many specific requirements of the particular door assembly, it would not make economic sense as an import model to finish the customization of the threshold prior to importation and it is likely that imported door thresholds products *generally* are further cut to size either at importers’ domestic facilities or at pre-hangers’ facilities.” *Id.* (emphasis added) (citing their own submissions on the record).

The evidence from the petitioner and Endura that door thresholds “generally” are further cut or machined to size does not address the critical question of fact the court has identified, which pertains to the door thresholds at issue in this litigation. That issue bears on the language in the finished merchandise exclusion referring to “finished merchandise containing aluminum extrusions as parts that are fully and permanently assembled *and completed* at the time of entry.” AD

Order, 76 Fed. Reg. at 30,651; *CVD Order*, 76 Fed. Reg. at 30,654 (emphasis added).

In summary, the court is not aware of any evidence on the administrative record supporting a finding or inference that the specific door thresholds at issue in this litigation are so designed and produced as to require cutting or machining prior to incorporation into a door frame or other structure. Moreover, Commerce has not brought any such evidence to the court's attention in the Remand Redetermination and appears to disregard record evidence to the contrary. In the second remand proceeding, Commerce must make a factual determination to resolve this issue based on a consideration of the record evidence, viewed in the entirety.

E. Commerce Must Reconsider the Applicability of the Finished Merchandise Exclusion Based on the Exemplars Stated Therein

The scope exclusion for finished merchandise includes exemplars. *AD Order*, 76 Fed. Reg. at 30,651; *CVD Order*, 76 Fed. Reg. at 30,654 (excluding from the scope of the Orders "finished merchandise containing aluminum extrusions as parts that are fully and permanently assembled and completed at the time of entry, such as finished windows with glass, doors with glass or vinyl, picture frames with glass pane and backing material, and solar panels"). In the Remand Redetermination, Commerce reasoned, as to the exemplars, that "[w]e find that these product examples do not constitute subassemblies within the meaning of the general scope language, but, rather, are examples of fully and permanently assembled and completed products." *Remand Redetermination* 18–19. Commerce added that "[a]ccordingly, an assembled aluminum extrusion door frame without glass could be considered a subassembly, and therefore covered by the scope, thus falling short of the final finished door with glass which would be excluded." *Id.* at 19.

After considering whether the door thresholds at issue in this case either are, or are not, so designed and produced as to require cutting or machining prior to incorporation into a larger structure, Commerce must decide anew whether the finished merchandise exclusion applies in this case. It then will be necessary for Commerce to address the effect of the exemplars, including, in particular, the exemplar for "doors with glass or vinyl."

As described by Commerce in the Remand Redetermination, "a final finished door with glass," *Remand Redetermination* 19, would satisfy the requirements of the finished merchandise exclusion. The product identified in the "door" exemplar—a door with glass or vinyl—in the finished merchandise exclusion is closely similar to a

complete, assembled door threshold consisting of an aluminum extrusion and non-aluminum components. Both are assemblies containing one or more aluminum extrusions, and both are components of what Commerce described in the Remand Redetermination as a “door unit.” See *Remand Redetermination* 44 (describing the various parts of a door unit). Commerce fails to provide a reasoned explanation in the Remand Redetermination why a door threshold is a “subassembly” ineligible for the finished merchandise exclusion but a door with glass or vinyl is not. In this regard, the court notes that the exemplar in the finished merchandise exclusion explicitly refers to “doors with glass or vinyl,” not “door units” or a similar such term referring to a combination consisting of a door, a door frame, and all other parts such as hinges, latches, jambs, and other hardware. See *AD Order*, 76 Fed. Reg. at 30,651; *CVD Order*, 76 Fed. Reg. at 30,654. The role of Commerce in a scope ruling proceeding is to interpret scope language in an order, not to change it. *Duferco*, 296 F.3d at 1095.

Commerce reasoned, further, that “[a] subassembly is merchandise which is designed for the sole purpose of becoming part of a larger whole,” *Remand Redetermination* 24, and that each of Columbia’s assembled door thresholds, which “must work in tandem with other components to be functional,” *id.* at 23 (citation omitted), and is “a component of a larger downstream product,” *id.* at 24, therefore cannot qualify for the finished merchandise exclusion. This is so, according to Commerce, even if the article requires no further fabrication or assembly to perform its function. *Id.* at 18 (“Further, the fact that the subassembly could be described in its own right with reference to its end use, or that such subassembly requires no further fabrication or assembly to perform its function as a subassembly, does not mean that it will constitute finished merchandise under the exclusion.”).

Commerce fails to reconcile its analysis with certain of the exemplars the finished merchandise exclusion specifically identifies. If an assembled door threshold containing an aluminum extrusion is within the class of goods identified by the reference in the scope language to “subassemblies, i.e., partially assembled merchandise” because it is designed to become part of a larger whole, e.g., a door unit or other structure, then so is a “door with vinyl or glass.” The same can be said for a “finished window with glass.” Such a good is also “designed for the sole purpose” of being incorporated into a part of a larger structure, such as a wall or a dormer, that, like a door unit, is itself part of an even larger whole, i.e., a building.

In the Remand Redetermination, Commerce declined to consider the similarities between assembled door thresholds and the exem-

plars in the finished merchandise exclusion, including, specifically, those referring to doors and windows. Commerce reasoned that:

[T]hese exemplars are defined by the scope as finished merchandise that, in and of themselves, satisfy the finished merchandise exclusion. Because they are themselves finished merchandise, they are not intermediary products to finished merchandise that might qualify as a subassembly. There is no need to further analyze whether the enumerated products in the finished merchandise exclusion work in conjunction with other products, and no requirement that, for example, a window with glass or a door with glass or vinyl be assembled into a house to satisfy the finished merchandise exclusion. In contrast, because door thresholds are not specifically enumerated examples of finished merchandise, Commerce must undertake an analysis of whether they satisfy the criteria for the finished merchandise exclusion. As explained above, we have determined that Columbia's door thresholds are subassemblies meant to be incorporated into a larger downstream product and, consequently, do not satisfy the criteria for the finished merchandise exclusion.

Id. at 46. This reasoning is based on a serious misinterpretation of the scope language setting forth the finished merchandise exclusion. Contrary to the express terms of that exclusion, Commerce interprets the exemplars therein as separate, individual exclusions rather than as what they plainly are. They are exemplars, as shown by the use of the words "such as." See *AD Order*, 76 Fed. Reg. at 30,651; *CVD Order*, 76 Fed. Reg. at 30,654 (excluding "finished merchandise containing aluminum extrusions as parts that are fully and permanently assembled and completed at the time of entry, *such as* finished windows with glass, doors with glass or vinyl, picture frames with glass pane and backing material, and solar panels" (emphasis added)). Here again, Commerce attempts to rewrite the scope language, contrary to plain meaning and the principle enunciated in *Duferco*. See 296 F.3d at 1095.

The limitation on the finished merchandise exclusion Commerce attempts to impose is contrary to the exemplars for doors and windows that the scope language used for the purpose of illustration. Commerce provides no convincing explanation of why goods that are, in the Department's words, "designed for the sole purpose of becoming part of a larger whole," *Remand Redetermination* 24, or "meant to be incorporated into a larger downstream product," *id.* at 46, must be disqualified from the finished merchandise exclusion by that characteristic alone, despite the exemplars of products that also are de-

signed for the sole purpose of becoming part of a larger whole yet are listed in the scope language as examples of products that satisfy the terms of the finished merchandise exclusion.

Commerce attempts to justify its overly-narrow interpretation of the finished merchandise exclusion by alluding to the intent as expressed in “the Petition and related documents.” *Remand Redetermination* 19–20; see 19 C.F.R. § 351.225(k)(1). Commerce states that “[t]hrough their explanation and revisions, the petitioners clearly and consistently expressed their intent to exclude from the *Orders* certain aluminum extrusions imported as part of a kit, but include in the *Orders* other aluminum extrusions that are attached to form subassemblies that are not imported as part of a kit.” *Id.* at 20. This reasoning is also unsound. The finished goods kit exclusion applies only to goods imported in unassembled form, and the specific mention of this exclusion in the subassemblies provision logically parallels the description of subassemblies as “partially assembled merchandise.” *AD Order*, 76 Fed. Reg. at 30,651; *CVD Order*, 76 Fed. Reg. at 30,654. The finished merchandise exclusion, in contrast, applies only to goods that are imported in fully assembled form. Each must be interpreted according to the requirements stated therein. That a good be fully assembled at the time of importation is a requirement of the finished merchandise exclusion. According to plain meaning and logic, it cannot also be a disqualification for the finished merchandise exclusion.

In summary, the court cannot sustain the Remand Redetermination, which relies upon a factual finding or inference that is contradicted by the record evidence pertaining specifically to Columbia’s imported door thresholds. The court directs that Commerce, in a new decision, reconsider in the entirety the decision reached in the Remand Redetermination as to the finished merchandise exclusion and reach a new determination that complies with the instructions in this Opinion and Order. In so doing, Commerce must address the specific factual issue the court has identified and ensure that all of its findings are supported by substantial evidence on the record.

III. CONCLUSION AND ORDER

Upon consideration of the Remand Redetermination and all papers and proceedings had herein, and upon due deliberation, it is hereby **ORDERED** that the Remand Redetermination is remanded to Commerce for reconsideration in light of this Opinion and Order; it is further

ORDERED that Commerce, within 90 days from the date of issuance of this Opinion and Order, shall submit a second redetermination upon remand (“Second Remand Redetermination”) that complies with this Opinion and Order; it is further

ORDERED that plaintiff and defendant-intervenors shall have 30 days from the filing of the Second Remand Redetermination in which to submit comments to the court; and it is further

ORDERED that should plaintiff or defendant-intervenors submit comments, defendant shall have 15 days from the date of filing of the last comment to submit a response.

Dated: September 14, 2021

New York, New York

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

Slip Op. 21–117

UNICATCH INDUSTRIAL CO., LTD AND TC INTERNATIONAL, INC., Plaintiff,
PRIMESOURCE BUILDING PRODUCTS, INC., Plaintiff-Intervenor, and
ROMP COIL NAILS INDUSTRIES INC., Consolidated-Plaintiff, v. UNITED
STATES, Defendant, and MID CONTINENT STEEL & WIRE, INC.,
Defendant-Intervenor.

Before: Mark A. Barnett, Chief Judge
Consol. Court No. 20–00079

[Sustaining the U.S. Department of Commerce’s third administrative review of the antidumping duty order on certain steel nails from Taiwan, denying Consolidated Plaintiff’s motion for a preliminary injunction, construed as a motion to amend the statutory injunction, and granting Defendant’s motion to dismiss count two of Consolidated Plaintiff’s complaint.]

Dated: September 14, 2021

Ned H. Marshak, Max F. Schutzman, Dharmendra N. Choudhary, Andrew T. Schutz, and Eve Q. Wang, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, of New York, NY, for Plaintiffs Unicatch Industrial Co., Ltd. and TC International, Inc. *Kelly A. Slater, Edmund W. Sim, and Jay Y. Nee*, Appleton Luff Pte Ltd, of Washington, DC, for Consolidated Plaintiff Romp Coil Nails Industries Inc.

Jeffrey S. Grimson, Jill A. Cramer, Bryan P. Cenko, Mowry & Grimson, PLLC, of Washington, DC, for Plaintiff-Intervenor PrimeSource Building Products, Inc.

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

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

OPINION AND ORDER**Barnett, Chief Judge:**

This consolidated action is before the court on three motions for judgment on the agency record pursuant to U.S. Court of International Trade (“CIT”) Rule 56.2 challenging the final results of the U.S. Department of Commerce’s (“Commerce” or “the agency”) third administrative review (“AR3”) of the antidumping duty order on certain steel nails from Taiwan. *See Certain Steel Nails from Taiwan*, 85 Fed. Reg. 14,635 (Dep’t Commerce Mar. 13, 2020) (final results of antidumping duty admin. review; 2017–2018) (“*Final Results*”), ECF No. 29–4, and accompanying Issues and Decision Mem., A-583–854 (Mar. 9, 2020) (“I&D Mem.”), ECF No. 29–5;¹ *see also* Confidential Pls.’ Mot. for J. on the Agency R., ECF No. 37; Rule 56.2 Mot. for J. Upon the Agency R. on Behalf of Consol. Pl. Romp Coil Nails Indus. Inc., ECF No. 35; Rule 56.2 Mot. for J. on the Agency R. of Pl.-Int. PrimeSource Building Prods., Inc., ECF No. 41.

With respect to the Rule 56.2 motions, Plaintiff Unicatch Industrial Co., Ltd. (“Unicatch”), a Taiwanese producer of subject steel nails and mandatory respondent in the review, challenges Commerce’s decision to calculate normal value based on home market sales prices; Commerce’s exclusion of antidumping duty deposits (“ADD deposits”) from the freight revenue cap; and Commerce’s disregard of certain transactions involving an affiliated supplier and corresponding adjustment to Unicatch’s total cost of manufacturing (“TOTCOM”). Mem. of Law in Supp. of Pls.’ Mot. for J. on the Agency R. (“Pls.’ Mem.”) at 7–34, ECF No. 37; *see also* Confidential Pls.’ Reply to Def. and Def.-Ints. Resp. to Pls.’ Mot. for J. on the Agency R. (“Pls.’ Reply”), ECF No. 46.² Consolidated Plaintiff Romp Coil Nails Industries Inc. (“Romp”), a Taiwanese producer and exporter of subject merchandise that received the “all-others” rate, challenges Commerce’s reliance on Unicatch’s above-cost home market sales to calculate constructed value profit (“CV profit”). Mem. in Supp. of Consol. Pl. Romp Coil Nails Indus. Inc. Rule 56.2 Mot. for J. Upon the Agency R. (“Consol. Pl.’s Mem.”) at 4–6, ECF No. 36; *see also* Letter to the Ct. (May 7, 2021), ECF No. 45 (Romp’s letter in lieu of a reply). Plaintiff-

¹ The administrative record is divided into a Public Administrative Record (“PR”), ECF No. 29–2, and a Confidential Administrative Record (“CR”), ECF No. 29–3. Plaintiff submitted joint appendices containing record documents cited in Parties’ briefs and additional documents upon the court’s request. *See* Pub. J.A., ECF No. 50; Confidential J.A. (“CJA”), ECF No. 49; Confidential Pl.’s Resp. to Court’s Req. for Add’l Docs. (“Suppl. CJA”), ECF No. 51; Pub. Pl.’s Resp. to Court Req. for Add’l Docs., ECF No. 52. The court references the confidential version of the relevant record documents unless otherwise specified.

² Unicatch is joined by its affiliated U.S. reseller, TC International, Inc. (“TC International”). *See* Pls.’ Mem. at 1; Compl. ¶ 3, ECF No. 10.

Intervenor PrimeSource Building Products, Inc. (“PrimeSource”)³ adopts by incorporation Unicatch’s and Romp’s respective arguments. Mem. of P&A in Supp. of Rule 56.2 Mot. for J. on the Agency R. of Pl.-Int. PrimeSource Building Prods., Inc. at 5–6, ECF No. 41–1; Reply Br. of Pl.-Int. [PrimeSource] in Supp. of Rule 56.2 Mot. for J. on the Agency R. at 2–3, ECF No. 48.

Defendant United States (“the Government”) and Defendant-Intervenor Mid Continent Steel & Wire, Inc. (“Mid Continent”), the petitioner in the underlying proceeding, urge the court to sustain the *Final Results*. Def.’s Resp. to Pls.’ and Consol. Pl.’s Mots. for J. Upon the Agency R. (“Def.’s Resp.”), ECF No. 43; Def.-Int. Mid Continent Steel & Wire, Inc.’s Resp. Br. (“Def.-Int.’s Resp.”), ECF No. 44.

Also pending are Romp’s motion for a preliminary injunction filed in the member case,⁴ see Partial Consent Mot. for Prelim. Inj. to Enjoin the Liquidation of Certain Entries (“Consol. Pl.’s Mot. Prelim. Inj.”), ECF No. 11 (Ct. No. 20–80), and the Government’s motion to dismiss count two of Romp’s complaint, see Def.’s Resp. in Partial Opp’n to Pl.’s Mot. for Prelim. Inj. and Partial Mot. to Dismiss (“Def.’s Mot. Dismiss”), ECF No. 22 (Ct. No. 20–80). Romp seeks to enjoin liquidation “pending a final and conclusive court decision in the appeal of [Commerce’s] original antidumping duty investigation of certain steel nails from Taiwan.” Consol. Pl.’s Mot. Prelim. Inj. at 1 (citing *Mid Continent Steel & Wire, Inc. v. United States*, Court No. 15-cv-00213 (CIT) (“*Mid Continent Litigation*”). The Government consented to an injunction pending a final and conclusive decision in the instant action and otherwise opposed the requested duration. *Id.*; see also Def.’s Mot. Dismiss. at 1–2, 5–9. The Government requests the court to dismiss count two of Romp’s complaint for failure to state a claim upon which relief may be granted pursuant to CIT Rule 12(b)(6) in the event the court denies Romp’s request for preliminary relief. *Id.* at 10.

For the reasons discussed herein, the court sustains the *Final Results*, denies Romp’s request for preliminary relief coextensive with the *Mid Continent Litigation*, and dismisses count two of Romp’s complaint.

BACKGROUND

On May 20, 2015, Commerce published its final determination in an antidumping duty investigation of certain steel nails from Taiwan.

³ PrimeSource is a U.S. importer. See Am. Consent Mot. to Intervene as of Right, ECF No. 27.

⁴ For ease of reference, the court will include the designation “(Ct. No. 20–80)” when citing to documents filed in the member case, *Romp Coil Nails Industries Inc. v. United States*, Court No. 20-cv-00080 (CIT).

See *Certain Steel Nails From Taiwan*, 80 Fed. Reg. 28,959 (Dep't Commerce May 20, 2015) (final determination of sales at less than fair value). On July 13, 2015, Commerce issued an order imposing antidumping duties on certain steel nails from Taiwan. See *Certain Steel Nails From the Republic of Korea, Malaysia, the Sultanate of Oman, Taiwan, and the Socialist Republic of Vietnam*, 80 Fed. Reg. 39,994, 39,995–96 (Dep't Commerce July 13, 2015) (antidumping duty orders) (“ADD Order”).

Mid Continent and several Taiwanese plaintiffs—not including Romp—commenced actions challenging Commerce’s final affirmative determination. See generally *Mid Continent Steel & Wire, Inc. v. United States*, 44 CIT __, __, 427 F. Supp. 3d 1375, 1379–80 (2020) (reviewing the extensive history of the *Mid Continent Litigation*).

In September 2018, Commerce initiated AR3. *Initiation of Anti-dumping and Countervailing Duty Admin. Reviews*, 83 Fed. Reg. 45,596 (Dep't Commerce Sept. 10, 2018). The period of review (“POR”) was July 1, 2017, to June 30, 2018. *Id.* at 45,600. Commerce selected Liang Chyuan Industrial Co. Ltd. (“Liang Chyuan”), PT Enterprise Inc. and its affiliated producer Pro-Team Coil Nail Enterprise Inc (together, “PT”), and Unicatch as mandatory respondents in the review. Respondent Selection Mem. (Nov. 7, 2018), CR 5, PR 31, CJA Tab 3.

On September 12, 2019, Commerce published its preliminary results. *Certain Steel Nails From Taiwan*, 84 Fed. Reg. 48,116 (Dep't Commerce Sept. 12, 2019) (prelim. results of antidumping duty admin. review; 2017–2018) (“*Prelim. Results*”), and accompanying Decision Mem. for Prelim. Results of Antidumping Duty Admin. Review (Sept. 5, 2019) (“*Prelim. Mem.*”), PR 189, CJA Tab 9.

Commerce issued the *Final Results* on March 13, 2020. For the *Final Results*, Commerce calculated company-specific dumping margins for Liang Chyuan, PT, and Unicatch in the amounts of 2.54 percent, 6.72 percent, and 27.69 percent, respectively. 85 Fed. Reg. at 14,636. Commerce also established an all-others rate of 12.90 percent. *Id.* at 14,636 & n.10. This appeal followed.

On May 13, 2020, Romp filed its partial consent motion for a preliminary injunction to enjoin the liquidation of its entries subject to the administrative review. Consol. Pl.’s Mot. Prelim. Inj. On June 3, 2020, the Government opposed the motion in part and further moved to dismiss count two of Romp’s complaint. Def.’s Mot. Dismiss at 10; see also Compl. ¶ 14, ECF No. 10 (Ct. No. 20–80) (count two of Romp’s complaint, which asserts that the court should “permit the injunction” of Romp’s entries pending resolution of the *Mid Continent Litigation*). On June 5, 2020, the court held a telephone conference

during which the court indicated that it would entertain a consent motion for a statutory injunction consistent with the Government's partial consent to Romp's request and later convert Romp's motion to a motion to amend the statutory injunction. *See* Docket Entry, ECF No. 23. Later that day, the court granted Romp's consent request for a statutory injunction enjoining the liquidation of Romp's entries pending a final and conclusive decision in this case. Order for Statutory Inj. Upon Consent (June 5, 2020) ("Statutory Inj."), ECF No. 26 (Ct. No. 20–80).

On July 9, 2020, Romp filed a reply in support of its motion for a preliminary injunction and opposition to the Government's partial motion to dismiss. *See* Mot. for Leave to File Out of Time Pl.'s [Resp.] to Def.'s Partial Mot. to Dismiss and Reply to Def.'s Mot. to Dismiss ("Consol. Pl.'s Resp. & Reply"), ECF No. 37 (Ct. No. 20–80).

On July 17, 2020, the court consolidated these actions. *See* Order (July 17, 2020), ECF No. 33.

On July 24, 2020, the Government filed its reply in support of its partial motion to dismiss. Def.'s Reply in Supp. of Partial Mot. to Dismiss ("Def.'s Reply Mot. Dismiss"), ECF No. 42 (Ct. No. 20–80).

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to section 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2018), and 28 U.S.C. § 1581(c) (2018).⁵ The court will uphold an agency determination that is supported by substantial evidence and otherwise in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i).

Section 1516a(c)(2) permits the court to "enjoin the liquidation of some or all entries of merchandise covered by a [Commerce] determination . . . , upon a request by an interested party for such relief and a proper showing that the requested relief should be granted under the circumstances." 19 U.S.C. § 1516a(c)(2). "[E]ntries, the liquidation of which was enjoined under subsection (c)(2), shall be liquidated in accordance with the final court decision in the action." *Id.* § 1516a(e)(2).⁶

A preliminary injunction may also be granted as an exercise of the court's equitable powers, but such an "injunction is an extraordinary remedy never awarded as of right." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008) (citation omitted). To obtain a preliminary

⁵ All citations to the Tariff Act of 1930, as amended, are to Title 19 of the U.S. Code, and references to the U.S. Code are to the 2018 edition, unless otherwise stated.

⁶ An injunction entered pursuant to section 1516a(c)(2), frequently referred to as a "statutory injunction," may be obtained by filing a "Form 24" with the court. *See, e.g., YC Rubber Co. (N. Am.) LLC v. United States*, 43 CIT __, __, 415 F. Supp. 3d 1240, 1242–46 (2019) (addressing a motion to modify a statutory injunction entered after the filing of a Form 24).

injunction, a party must demonstrate “(1) likelihood of success on the merits, (2) irreparable harm absent immediate relief, (3) the balance of interests weighing in favor of relief, and (4) that the injunction serves the public interest.” *Silfab Solar, Inc. v. United States*, 892 F.3d 1340, 1345 (Fed. Cir. 2018) (citing *Winter*, 555 U.S. at 20).

A court may properly dismiss a claim pursuant to CIT Rule 12(b)(6) when the plaintiff’s factual allegations, assumed to be true, are not “enough to raise a right to relief above the speculative level.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555–56 (2007).

DISCUSSION

I. Rule 56.2 Motions

An antidumping duty is “the amount by which the normal value” of the subject merchandise “exceeds the export price (or the constructed export price) for the merchandise.” 19 U.S.C. § 1673. To determine the amount of any dumping, the statute directs Commerce to make “a fair comparison . . . between the export price or constructed export price and normal value,” *id.* § 1677b(a), and further directs the steps Commerce must follow in order to achieve a “fair comparison,” see *Haba Ş Sinai Ve Tibbi Gazlar Istihsal Endüstrisi, A. Ş. v. United States*, 43 CIT __, __, 415 F. Supp. 3d 1195, 1210 (2019) (noting that “the ‘fair comparison’ requirement is met when normal value is calculated in accordance with the statute”). This case requires the court to consider three challenges to Commerce’s determinations regarding normal value and constructed export price (“CEP”): (1) home market viability and related calculation of certain CV profit; (2) treatment of ADD deposits in the agency’s calculation of the freight revenue cap as a component of CEP; and (3) Commerce’s application of the “transactions disregarded rule” to certain steel wire rod prices paid to an affiliated supplier and the resulting adjustment to Unicatch’s total cost of manufacturing. Each issue is discussed, in turn.

A. Home Market Viability and CV Profit

1. Relevant Background

Generally, normal value is the “price at which the foreign like product is first sold . . . for consumption in the exporting country, in the usual commercial quantities and in the ordinary course of trade and, to the extent practicable, at the same level of trade as the export price or constructed export price.” 19 U.S.C. § 1677b(a)(1)(B)(i). “Thus, [while] the starting point for determining normal value is home market sales,” *Itochu Bldg. Prods., Co. v. United States*, 41 CIT __, __, 208 F. Supp. 3d 1377, 1385 (2017), there may be instances

when Commerce must rely on other bases. Commerce’s decision whether to use sales in the home market as the basis for normal value, referred to as “home market viability,” is generally made early in the proceeding. *See Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296, 27,358 (Dep’t Commerce May 19, 1997) (final rule) (explaining that, while Commerce “should strive to make viability determinations early in an investigation or review[,] . . . there may be instances in which [Commerce] must delay or reconsider a decision on viability”); Uruguay Round Agreements Act (“URAA”), Statement of Administrative Action (“SAA”), H.R. Doc. No. 103–316, vol.1, at 821 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4162 (recognizing the need for a “clear standard” because “Commerce must determine whether the home market is viable at an early stage in each proceeding to inform exporters which sales to report”).⁷

To determine home market viability, Commerce compares “the aggregate quantity . . . of the foreign like product sold in the exporting country” to “the aggregate quantity . . . of sales of the subject merchandise to the United States.” 19 U.S.C. § 1677b(a)(1)(C). The aggregate quantity of home market sales is considered “insufficient to permit a proper comparison with the sales of the subject merchandise to the United States,” *id.* § 1677b(a)(1)(C)(ii), when “such quantity is less than 5 percent of the aggregate quantity . . . of sales of the subject merchandise to the United States.” *Id.* § 1677b(a)(1)(C); *cf.* 19 C.F.R. § 351.404(b)(2) (home market is viable when there are “[five] percent or more of the aggregate quantity . . . of its sales of the subject merchandise to the United States”). When the home market is not viable, normal value may be based on third country sales, 19 U.S.C. § 1677b(a)(1)(B)(ii), or constructed value, *id.* § 1677b(a)(4).⁸

“Sales outside the ordinary course of trade are excluded from normal value.” *Saha Thai Steel Pipe Pub. Co. v. United States*, 44 CIT ___, ___, 487 F. Supp. 3d 1323, 1328 (2020). Thus, when calculating normal value using home market sales, the statute further directs Commerce to disregard such sales when the agency “has reasonable grounds to believe or suspect” that those sales “have been made at prices which represent less than the cost of production.” 19 U.S.C. § 1677b(b)(1); *see also id.* § 1677(15) (defining “outside the ordinary course of trade” to include “[s]ales disregarded under section 1677b(b)(1)”). “Whenever such sales are disregarded, normal value shall be based on the remaining sales of the foreign like product in the ordinary course of

⁷ The SAA is the authoritative interpretation of the statute. 19 U.S.C. § 3512(d).

⁸ Constructed value consists of the cost of production, selling, general, and administrative expenses, profit, and expenses incidental to preparing the subject merchandise for export to the United States. 19 U.S.C. § 1677b(e).

trade.” *Id.* § 1677b(b)(1). When, however, “no sales made in the ordinary course of trade remain, the normal value shall be based on the constructed value of the merchandise.” *Id.*;⁹ *see also Antidumping Duties; Countervailing Duties*, 61 Fed. Reg. 7,308, 7,337 (Dept Commerce Feb. 27, 1996) (notice of proposed rulemaking and request for Public Comments) (noting that, following enactment of the URAA, Commerce “is required to use *any* existing above-cost sales to compute normal value if such sales were made in the ordinary course of trade”) (emphasis added).

When Commerce calculates normal value using constructed value, the statute directs Commerce to utilize “the actual amounts incurred and realized . . . 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.” 19 U.S.C. § 1677b(e)(2)(A); *see also Mid Continent Steel & Wire, Inc. v. United States*, 941 F.3d 530, 535 (Fed. Cir. 2019) (“*Mid Continent (Oman)*”)¹⁰ (referring to subsection (e)(2)(A) as the “preferred method”). If, however, “actual data are not available,” 19 U.S.C. § 1677b(e)(2)(B), the statute identifies three “alternative methods” for Commerce to use, *Mid Continent (Oman)*, 941 F.3d at 535.

In the underlying proceeding, Commerce concluded that Unicatch’s home market was viable for purposes of calculating normal value because “the total aggregate quantity of Unicatch’s home market sales of subject merchandise during the PO[R] is greater than five percent of the aggregate quantity of its U.S. sales of subject merchandise during the PO[R].” I&D Mem. at 17.¹¹ Commerce rejected Unicatch’s argument that the agency should reconsider home market viability after many of its home market sales failed the sales-below-

⁹ Prior to the URAA, section 1677b(b)(1) directed Commerce to assess whether the remaining above-cost sales were adequate as a basis for normal value (then termed “foreign market value”). *See* 19 U.S.C. § 1677b(b) (1988). Importantly, the URAA revised section 1677b(b)(1) to direct “Commerce to use above-cost sales if they exist” and “are otherwise in the ordinary course of trade, and to use constructed value “[o]nly if there are *no* above-cost sales in the ordinary course of trade.” SAA at 833, *reprinted in* 1994 U.S.C.C.A.N. at 4170–71. This change was further reflected in Commerce’s regulations.

¹⁰ *Mid Continent (Oman)* addresses challenges to Commerce’s antidumping finding with respect to certain steels nails from Oman and is distinct from the *Mid Continent Litigation* referenced herein.

¹¹ No party disputes that Unicatch’s home market sales exceed the five percent threshold when the home market sales include below cost sales. The relevant proprietary numbers may be found in Commerce’s memorandum titled Final Results Margin Calculation for [Unicatch] (Mar. 10, 2020) (“Final Calc. Mem.”) at 1 (U.S. quantity), Attach. 1 at ECF p. 75 (home market quantity), CR 310, PR 222, Suppl. CJA Ex. 2.

cost test. *Id.* at 16–18. Commerce reasoned that 19 C.F.R. § 351.404(b) directs Commerce to consider home market sales in the aggregate and does not direct Commerce to “only consider those home market sales deemed to have been made in the ordinary course of trade.” *Id.* at 17. Commerce rejected Unicatch’s argument that a failure to reconsider home market viability resulted in an “absurdly high” margin. *Id.* at 18. Commerce explained that it applied standard methodologies and used Unicatch’s information to calculate the margin, the reasonableness of which does not depend on rates obtained in prior segments of the proceeding. *Id.* Pursuant thereto, Commerce relied on Unicatch’s above-cost home market sales to calculate normal value for most of Unicatch’s sales and to calculate CV profit. The CV profit was included in the constructed value used as normal value for the few sales for which Commerce was unable to identify identical or similar model matches. *See id.* at 17–19.

2. Parties’ Contentions

Unicatch contends that Commerce should have used constructed value rather than a small number of above-cost home market sales to determine normal value. Pls.’ Mem. at 15. Unicatch asserts that the statute can reasonably be interpreted to require Commerce to either exclude below-cost home market sales *before* determining home market viability or rely on constructed value “when the home market sales quantity in a particular CONNUM is five percent or less than the quantity of U.S. sales in that CONNUM.” *Id.* While Unicatch concedes that Commerce’s methodology “may be reasonable in the majority of proceedings,” *id.* at 16, Unicatch contends that Commerce’s reliance on its usual methodology was unreasonable in this case, *id.* at 16–24 (discussing, *inter alia*, *Yangzhou Bestpak Gifts & Crafts Co. v. United States*, 716 F.3d 1370, 1378 (Fed. Cir. 2013), and *Mid Continent (Oman)*, 941 F.3d at 538–39). Romp advances substantially similar arguments to support its contention that Commerce should not have used Unicatch’s above-cost home market sales to calculate CV profit. *See* Consol. Pl.’s Mem. at 2–6.

The Government contends that Commerce’s interpretation of the statute is consistent with both congressional intent, Def.’s Resp. at 10 (citing SAA at 821–22, 833, *reprinted in* 1994 U.S.C.C.A.N. at 4161–62, 4170–71), and Commerce’s regulations, *id.* at 11 (citing 19 C.F.R. § 351.404(b)). The Government further contends that Unicatch has not pointed to any evidence indicating that the home market sales used for comparison purposes were aberrational or otherwise made outside the ordinary course of trade. *Id.* at 13–15.

Mid Continent contends that section 1677b(a)(1)(C) plainly requires Commerce to “examine ‘the *aggregate quantity . . .*’ of a respondent’s home market sales when evaluating” home market viability, Def.-Int.’s Resp. at 2 (emphasis added), and parallels the requirement for Commerce to make its viability determination early in the proceeding so that “exporters [know] which sales to report,” *id.* at 3 (quoting SAA at 821, *reprinted in* 1994 U.S.C.C.A.N. at 4162).

3. Analysis

Unicatch acknowledges that its aggregate POR home market sales met the requisite threshold for its home market to be considered viable. Pls.’ Mem. at 10. Unicatch also acknowledges that some home market sales survived the cost test. *Id.* Unicatch contends, however, that Commerce’s use of Unicatch’s above-cost home market sales to calculate normal value failed to “reach the commercially realistic result required by law” and, thus, Commerce should have used a different methodology. *Id.* at 15. Unicatch is mistaken.

The statute permits Commerce to disregard sales below cost and to calculate normal value using “the remaining sales . . . in the ordinary course of trade.” 19 U.S.C. § 1677b(b)(1)(B). While the pre-URAA statute required Commerce to consider the adequacy of the remaining home market sales, Congress removed that requirement with the passage of the URAA such that Commerce must now “use above-cost sales if they exist” and “are otherwise in the ordinary course of trade.” SAA at 833, *reprinted in* 1994 U.S.C.C.A.N. at 4170. Unicatch does not argue that its remaining home market sales were outside the ordinary course of trade; rather, Unicatch argues that its above-cost sales that matched to U.S. sales were too few in number. *See* Pls.’ Mem. at 10, 12. To the extent Unicatch requests the court to impose the pre-URAA standard on Commerce’s decision-making in this regard, *see id.* at 19 (“The home market should only be used for comparison if there are sufficient home market sales in the ordinary course of trade to be compared to U.S. sales.”), the court declines Unicatch’s request, *see Van Buren v. United States*, 141 S. Ct. 1648, 1660–61 (2021) (rejecting a statutory interpretation that would “capture [the] very concept” that Congress removed when it amended the relevant statute because “courts must presume” that Congress “intends [its amendments] to have real and substantial effect”) (quoting *Ross v. Blake*, 136 S. Ct. 1850, 1858 (2016)).¹²

¹² Unicatch’s reliance on *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, et al.*, 60 Fed. Reg. 10,900, 10,936 (Dep’t Commerce Feb. 28, 1995) (final results of antidumping duty admin. reviews, partial termination of admin. reviews, and revocation in part of antidumping duty orders) (“AFBs”), is inapposite because, there, Commerce based its determination on the pre-URAA version of 19 U.S.C. § 1677b(b).

Unicatch's attempt to impose a "commercially realistic" test on the result of Commerce's normal value calculations also lacks merit. *See, e.g.*, Pls.' Mem. at 15. Unicatch seeks to rely on *Bestpak*, *see id.* at 16, but that case is inapposite.

Bestpak addressed Commerce's use of a simple average of a *de minimis* rate and a rate based on adverse facts available in a non-market economy case to determine the "separate rate" to be applied to certain companies consistent with 19 U.S.C. § 1673d(c)(5). 716 F.3d at 1377–78. While the SAA refers to the weighted average of such rates as the "expected method," it also provides that "if it results in an average that would not be reasonably reflective of potential dumping margins for non-investigated exporter or producers, Commerce may use other reasonable methods." *Id.* at 1373 (quoting SAA at 873, *reprinted in* 1994 U.S.C.C.A.N. at 4200). Although Commerce's methodology was facially reasonable, *see id.* at 1378, the *Bestpak* court concluded that the methodology was unreasonable as applied because the resulting rate was not "reasonably reflective of potential dumping" by the "non-investigated exporter[s] or producers." 716 F.3d at 1373; *see also id.* at 1378–80. Unicatch has not pointed to any requirement particular to the normal value provisions of the statute that requires Commerce to engage in such a results-driven reconsideration as Unicatch suggests. *See* Pls.' Mem. at 15–24. A determination "is 'accurate' if it is correct as a mathematical and factual matter, thus supported by substantial evidence." *Nan Ya Plastics Corp. v. United States*, 810 F.3d 1333, 1344 (Fed. Cir. 2016). Thus, when Commerce determines normal value consistent with the statutory requirements, Unicatch's objections that the result is higher than Unicatch's previous margins of dumping, or simply too high, is insufficient to call that determination into question.

Unicatch's reliance on *Mid Continent (Oman)* also is misplaced. There, the question was whether Commerce appropriately disregarded a small volume of home market sales for purposes of determining constructed value profit. *See Mid Continent (Oman)*, 941 F.3d at 538. In that case, the U.S. Court of Appeals for the Federal Circuit sustained Commerce's decision not to rely on those sales when Commerce had already determined that the home market was not viable and was within its discretion to consider some smaller number of home market sales to be insufficient such that "actual data [were] not

See Pls.' Mem. at 19 & nn.10–11. Counsel for Unicatch are cautioned not to allow their efforts at zealous advocacy to supersede their duty of candor as officers of the court. Counsel's citation to *AFBs* to support its legal interpretation, without any disclosure that Commerce's analysis therein was based on a version of the statute substantially altered with regard to the very proposition for which Unicatch cites the decision might be perceived as misleading, notwithstanding counsel's minimal acknowledgement that the decision is "not directly on point." *Id.* at 19.

available” for purposes of section 1677b(e)(2)(B). *Id.* at 538–39. *Mid Continent (Oman)* was, thus, dependent upon distinct statutory authority that allowed Commerce to consider the adequacy of the non-viable volume of home market sales and does not require Commerce to reconsider its home market viability determination in this case.¹³

While Unicatch asserts that the circumstances of this case are “unique,” Pls.’ Mem. at 21, and the resulting margin is “anomalous,” Pls.’ Reply at 4, and “commercially unreasonable,” *id.* at 5, at most, Unicatch points to the fact that its margin in AR3 is higher than Unicatch’s margin in the second administrative review of the *ADD Order* (“AR2”), PT’s margin in AR3, and Unicatch’s margin when normal value is based on constructed value, Pls.’ Mem. at 18. Unicatch relies on *Baoding Mantong Fine Chemistry Co. v. United States*, 39 CIT __, __, 113 F. Supp. 3d 1332, 1333–1342 (2015), to assert that the differing margins impugn Commerce’s determination, *see* Pls.’ Mem. at 17–18, but that results-driven argument is misplaced.

Unicatch relies on *Baoding* in a manner rejected by this court in *T.T. International Co. v. United States*, 44 CIT __, 439 F. Supp. 3d 1370 (2020). As explained therein, “in *Baoding* [], the court faulted the way in which Commerce calculated the dumping margin, including the challenged [surrogate values] for certain inputs and surrogate financial statements . . . [It] did not establish a separate, ‘backstop’ test for high margins that could independently require remand if found by the court to be ‘commercially impossible.’” *Id.* at 1385. In the absence of any justified challenge to Commerce’s antidumping margin calculation, *Baoding* is of no help to Unicatch.

Lastly, Romp argues that Commerce erred in basing CV profit on Unicatch’s above-cost sales. Consol. Pl.’s Mem. at 4–5. Romp’s argument, however, is premised on Romp’s erroneous claim that Unicatch’s home market was not viable. *Id.* As was the case with Uni-

¹³ Likewise, Romp errs in relying on *Mid Continent (Oman)* to assert that Commerce’s home market viability test should “be limited to above-cost sales only” as the appellate court’s opinion did not address the requirements of that test. Consol. Pl.’s Mem. at 3. Romp’s argument that Commerce “arbitrarily” included below-cost sales in its analysis of home market viability, *id.* at 4, also lacks merit because, as Romp acknowledges, Commerce’s home market viability test typically relies on all sales—both above and below cost, *see id.* at 3.

Neither Unicatch nor Romp reference *Stupp Corp. v. United States*, a case in which this court required Commerce to revisit its home market viability determination after taking into consideration evidence indicating that home market sales may have incorrectly included some sales that had been made for export. *See* 43 CIT __, 413 F. Supp. 3d 1326 (2019). On remand, Commerce excluded those sales from the aggregate home market sales figures and again found the home market to be viable, and the court affirmed. *See Stupp Corp. v. United States*, 44 CIT __, 435 F. Supp. 3d 1307 (2020). That case is distinguishable from the present case because the basis for the challenge went to an error in the initial home market viability determination. Here, Unicatch and Romp have failed to establish that the inclusion of below cost sales in the initial viability determination was erroneous.

catch, Romp then seeks to rely on *Baoding* to complain that the rate was “absurdly high,” *id.* at 4, and “perverts the purpose of the [anti-dumping] statute,” *id.* at 5. Romp’s conclusory assertions are based solely on the volume of Unicatch’s above-cost sales and otherwise fails to connect its objections to any particular legal standard beyond generalized references to accuracy. *See id.* at 5. The statute, however, directs Commerce to calculate CV profit using “the actual amounts . . . realized by the specific exporter or producer . . . in connection with the production and sale of a foreign like product, *in the ordinary course of trade*,” 19 U.S.C. § 1677b(e)(2)(A) (emphasis added), when such “data” are “available,” *id.* § 1677b(e)(2)(B). Romp does not challenge Commerce’s determination that “actual data” were “available” on sales in the “ordinary course of trade” for purposes of its calculation of CV profit and, therefore, Romp’s challenge fails.¹⁴

Because substantial evidence supports the agency’s analysis of home market viability and its decision to use home market sales as the basis for normal value is in accordance with the law, the court will sustain Commerce on this issue. The court will also sustain Commerce’s use of Unicatch’s above-cost sales to calculate CV profit.¹⁵

B. Freight Revenue Cap

1. Relevant Background

Section 1677a(c)(2) directs Commerce to reduce the price used to establish CEP 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.” 19 U.S.C. § 1677a(c)(2)(A). To calculate a net freight expense, “Commerce offsets [a] respondent[’s] freight expenses with related freight revenues, capping those revenues at the level of the associated expenses.” *ABB, Inc. v. United States*, 41 CIT __, __, 273 F. Supp. 3d 1200, 1208 (2017); *see also Dongguan Sunrise Furniture Co. v. United States*, 36 CIT __, __, 865 F. Supp. 2d 1216, 1248 (2012). In other words, to the extent that

¹⁴ While *Mid Continent (Oman)* sustained Commerce’s determination that “actual data” were *not* “available” when the respondent lacked a viable home market, 941 F.3d at 538–40, neither the appellate court’s opinion nor Commerce’s statutory interpretation offered in the course of that proceeding constrain Commerce from using actual data when a respondent—such as Unicatch—has a viable home market.

¹⁵ Commerce adequately set forth its rationale for finding Unicatch’s home market to be viable and for using its preferred method to calculate CV profit. I&D Mem. at 16–17, 18–19. Thus, contrary to Unicatch’s assertion, Pls.’ Reply at 3, a remand is unnecessary for Commerce to further examine Unicatch’s arguments.

a respondent receives freight revenue from a customer, Commerce will include that revenue in the price, up to, but no more than, the amount of freight expense.

Commerce does not treat antidumping duties as import duties or costs for purposes of section 1677a(c)(2)(A). *See, e.g., Hoogovens Staal BV v. United States*, 22 CIT 139, 146, 4 F. Supp. 2d 1213, 1220 (1998).¹⁶ This is because antidumping duties “are special duties that implement a trade remedy,” not “normal selling expenses [or] customs duties.” *APEX Exports v. United States*, 777 F.3d 1373, 1379 (Fed. Cir. 2015). Antidumping duties are imposed “to prevent dumping by effectively raising the price of subject merchandise in the U.S. to the fair value,” and, as such, constitute “an element of a fair and reasonable price.” *Id.* (quoting *Hoogovens Staal BV*, 22 CIT at 146, 4 F. Supp. 2d at 1220).

In the underlying proceeding, Unicatch reported payments received from certain U.S. customers¹⁷ in two fields: GRSUPRU (gross unit price) and FREIGREVU (freight revenue). Unicatch’s CQR at 22, 33.¹⁸ An exhibit appended to Unicatch’s questionnaire response indicated that Unicatch included five elements in its reported freight revenue for these CEP direct sales customers: (1) ocean freight; (2) U.S. inland freight, port to customer; (3) brokerage; (4) U.S. customs duty; and (5) ADD deposits. *Id.* at 33, Ex. C-20a.

For the *Preliminary Results*, Commerce capped Unicatch’s freight revenue based on the sum of the four expenses deducted from U.S. price, i.e., ocean freight, U.S. inland freight, port to customer, brokerage, and U.S. customs duty. Prelim. Determination Margin Calc. for [Unicatch] (Sept. 5, 2019) (“Prelim. Calc. Mem.”) at 5, CR 267, PR 184, CJA Tab 8; Prelim. Mem. at 12–13. Unicatch challenged Commerce’s decision to exclude ADD deposits from the freight revenue cap, arguing that, in so doing, Commerce effectively removed the ADD deposits from U.S. price. Admin. Case Br. of Unicatch and PT (Oct. 25,

¹⁶ *Hoogovens Staal BV* discusses 19 U.S.C. § 1677a(d)(2)(A) (1988), which was redesignated as subsection (c)(2)(A) as part of the statutory amendments effected by the URAA. *See* URAA § 223 (amending 19 U.S.C. § 1677a).

¹⁷ This issue is limited to certain CEP direct sales shipped from Unicatch in Taiwan to TC International’s customers in the United States. *See* Unicatch Sec. B, C & D Resp. (Feb. 13, 2019) (“Unicatch’s BCD Resp.”), ECF pp. 228–277 (“Unicatch’s CQR”) at 16, CR 28–53, 55, 57, 59–60, 62–71, 78, 80, 82, 84, 86–90, 92, 97–101, 112–116, 122–126, PR 67–70, CJA Tab 4 (identifying four channels of distribution, the first of which constitutes CEP direct sales); Pls.’ Mem. at 24. For such sales, Unicatch used two terms of delivery: “freight separately itemized” or “freight in price.” Unicatch’s CQR at 18–19. For sales with “freight separately itemized,” Unicatch reported freight revenue in a separate field. *Id.* at 33, Ex. C-20a.

¹⁸ Citations to Unicatch’s Section C Questionnaire Response point to the document’s internal pagination or accompanying exhibits. As noted *supra* note 17, Unicatch’s Section C Questionnaire Response was filed jointly with its Section B and D Questionnaire Responses and spans ECF page numbers 228 through 277.

2019) at 15–16, CR 295, PR 204, CJA Tab 12. Unicatch argued that, if Commerce’s decision was not the result of clerical error, it constituted “a methodological mistake” that was contrary to Commerce’s practice as reflected in AR2. *Id.* at 17 (citing Issues and Decision Mem. for the Final Results of the 2016–2017 Admin. Review of the Antidumping Duty Order on Certain Steel Nails from Taiwan (Mar. 15, 2019) (“AR2 I&D Mem.”) at Cmt. 9, *available at* <https://enforcement.trade.gov/frn/summary/taiwan/2019-05427-1.pdf> (last visited Sept. 14, 2021)).

For the *Final Results*, Commerce continued to omit Unicatch’s ADD deposits from the freight revenue cap. I&D Mem. at 20–21; *see also* Final Calc. Mem. at 3. Commerce reasoned that “each segment of a proceeding stands on its . . . record,” I&D Mem. at 20 & n.105 (citation omitted), and the record for this review “does not support the assertion implied in Unicatch’s arguments that [ADD deposits] are not fully captured in the reported gross unit price.” *Id.* Commerce noted that its practice is “not to deduct [antidumping] duties from the U.S. price,” and stated that excluding ADD deposits from the freight revenue cap was “consistent with [this] practice.” *Id.* at 21 & n.109 (citation omitted).

2. Parties’ Contentions

Unicatch contends that Exhibit C-20a establishes that ADD deposits were included in its freight revenue calculation and not in gross unit price, which is consistent with Unicatch’s reporting of certain CEP direct sales using the sales term “freight separately itemized.” Pls.’ Mem. at 28–29. While Unicatch agrees with Commerce’s assertion that ADD deposits are not movement expenses, Unicatch contends that they constitute “revenue items” and Commerce’s failure to include the payments in U.S. price amounts to a decision by Commerce to treat ADD deposits as an expense to be deducted. *Id.* Unicatch further contends that Commerce should have requested additional information from Unicatch pursuant to 19 U.S.C. § 1677m(d) rather than deny the adjustment. *Id.* at 29.

The Government contends that Unicatch’s arguments are premised on the unsupported assumption that “Unicatch’s gross unit price does not capture the [ADD deposits].” Def.’s Resp. at 17. According to the Government, evidence indicating that Unicatch “also charged antidumping duties as part of freight . . . is [in]sufficient to show that antidumping duties were not part of its gross unit price” because “nothing on the record actually supports Unicatch’s contention.” *Id.* at 17–18. The Government further contends that Unicatch failed to administratively exhaust its argument that Commerce should have

requested additional information, and the argument fails on the merits because Unicatch's section C questionnaire response did not factually demonstrate any deficiency concerning gross unit price. *Id.* at 18–19. Mid Continent advances substantially similar arguments. Def.-Int.'s Resp. at 8–10.

In reply, Unicatch counters that the Government's exhaustion argument lacks merit because "Unicatch reasonably assumed that Commerce's decision was a clerical error" given its inconsistency with AR2. Pls.' Reply at 8.

3. Analysis

Unicatch's arguments on this issue unnecessarily complicate what is, in fact, a simple factual issue regarding a favorable adjustment to U.S. price that Unicatch hoped to obtain but which Commerce denied as unsupported by the record. Unicatch identifies no evidence that the agency failed to consider, and the court finds that Commerce's treatment of freight revenue and the ADD deposits allegedly included therein was based on substantial evidence.

To understand this issue and Commerce's analysis of it, it may help to recap the issues upon which the parties appear to agree:

- 1) Unicatch charged certain U.S. customers for "freight" separate from the gross unit price for subject merchandise;
- 2) Commerce does not deduct ADD deposits from gross unit price when calculating antidumping margins; and
- 3) When a customer pays separately for freight and subject merchandise, Commerce will cap the freight revenue it recognizes by the freight expenses.

The disagreement here revolves around the ADD deposits. Unicatch reported that certain U.S. sales were made with the "freight separately itemized" and when it reported the separately itemized freight revenue, it asserted that the difference between the reported total freight revenue and the freight expenses represented customer payment of ADD deposits that should be added to U.S. price. *See* Unicatch's CQR at 18–19, 33, Ex. C-20a. In other words, Unicatch's position is that Commerce should have recognized this additional revenue without subjecting it to the "cap" on freight revenue based on freight expenses. Commerce rejected that assertion as unsupported. *See* I&D Mem. at 20 (explaining that "there is no record evidence to support including [ADD] deposits in a freight revenue calculation" and rejecting Unicatch's implied assertion that ADD deposits "are not fully captured in the reported gross unit price"). In its brief to the

court, Unicatch identified no record evidence that its customers agreed to pay for ADD deposits as part of the separately itemized freight.

The court understands Unicatch to be arguing that by declining to recognize this revenue as the separate payment of ADD deposits, Commerce is effectively deducting ADD deposits from U.S. price, contrary to the statute and established judicial precedent. *See, e.g.,* Pls.' Mem. at 30. In other words, Unicatch believes that this alleged payment of ADD deposits as part of the freight revenue should be added to the gross unit price (without regard to any application of the cap on freight revenue determined by freight expenses). Accepting the logical soundness of Unicatch's argument for purposes of this discussion, the argument is entirely dependent upon Unicatch having established that "freight separately itemized" meant that freight *and* ADD deposits were separately itemized in the freight revenue (or that freight inclusive of ADD deposits was separately itemized). Commerce understood this to be Unicatch's claim and determined that it was up to Unicatch to support such a claim and that Unicatch had not. *See* I&D Mem. at 20–21. Thus, for sales reported as "freight separately itemized," Commerce treated the separate revenue as freight revenue and capped that freight revenue by the amount of freight expenses, *see* Final Calc. Mem. at 3, rejecting as unsupported Unicatch's request for recognition of the difference as payment of ADD deposits, *see* I&D Mem. at 20.

Having dissected the Parties' arguments, the court finds that substantial evidence supports Commerce's application of the freight revenue cap. Commerce expressly found that the record "does not support the assertion implied in Unicatch's arguments that [ADD deposits] are not fully captured in the reported gross unit price." I&D Mem. at 20. Before the court, Unicatch simply repeats the arguments it made to Commerce and points to Exhibit C-20a for support. *See* Pls.' Mem. at 24–25. Exhibit C-20a is a chart that Unicatch described as a worksheet showing freight revenue for CEP direct sales. *See* Unicatch's CQR at 33 and Ex. C-20a. While Unicatch identified "ADD (\$)" on that chart, *id.* at Ex. C-20a, Unicatch does not identify evidence in the administrative record that calls into question Commerce's findings that "[ADD] deposits are not freight or other movement related expenses" and "there is no record evidence demonstrating that [ADD] deposits are not captured in [gross unit price]." I&D Mem. at 21.

This situation is analogous to that faced by the court in *ABB*, in which the court explained that "[t]he inclusion of multiple expense fields in the cap on [the respondent's] domestic inland freight revenue

would allow the revenue to offset more expenses and, therefore, be a favorable adjustment for the respondent.” 273 F. Supp. 3d at 1209. While Unicatch does not seek to offset additional expenses with its freight revenue, it seeks to exclude some of that revenue from the expense-based cap, thereby adding that revenue to U.S. price, by claiming that the revenue represents the payment of ADD deposits. See Unicatch’s CQR at Ex. C-20a. As was the case in *ABB*, “a respondent bears the burden of establishing its entitlement to any favorable adjustment.” 273 F. Supp. 3d at 1209 (citation omitted); see also *QVD Food Co. v. United States*, 658 F.3d 1318, 1324 (Fed. Cir. 2011) (allocating the burden of creating an adequate record to the interested party with the information). Here, Commerce reasonably found that Unicatch had failed to meet that burden.

With respect to Unicatch’s argument that Commerce altered its treatment of Unicatch’s freight revenue between AR2 and AR3 without explanation, Pls.’ Mem. at 26–27; Pls.’ Reply at 7–8, “each administrative review is a separate exercise of Commerce’s authority that allows for different conclusions based on different facts in the record,” see, e.g., *Qingdao Sea-Line Trading Co. v. United States*, 766 F.3d 1378, 1387 (Fed. Cir. 2014). In AR2, for example, Commerce found that ADD deposits were “charged to the customer” and “paid by the customer.” AR2 I&D Mem. at 26 & nn.152–53 (citations omitted). There is insufficient information on the record of this review to allow the court to find that the records of the two administrative reviews are sufficiently similar such that Commerce must provide further explanation for its contrary conclusion in this review.

Finally, with respect to Unicatch’s argument that Commerce failed to comply with 19 U.S.C. § 1677m(d) because it did not request additional information from Unicatch, Pls.’ Mem. at 29, Unicatch failed to exhaust its administrative remedies with respect to this argument by failing to raise it before Commerce. “[T]he Court of International Trade shall, where appropriate, require the exhaustion of administrative remedies.” 28 U.S.C. § 2637(d). While certain exceptions to this general rule exist, none would appear to apply in this instance and Unicatch has not developed its argument in any case; consequently, the court declines to consider Unicatch’s argument in the first instance.¹⁹ Accordingly, the court will sustain Commerce on this issue.

¹⁹ Unicatch seeks to avoid responsibility for raising this argument before Commerce by noting its belief that Commerce’s preliminary decision with respect to this issue “was a clerical error” and, when filing its administrative case brief, “Unicatch did not know, and had no reason to believe, that Commerce would adopt a directly contrary position in [AR]3” as compared to AR2. Pls.’ Reply at 8. Commerce’s preliminary memoranda were clear with respect to the agency’s calculation of the freight revenue cap. See Prelim. Mem. at 13; Prelim. Calc. Mem. at 5. Unicatch’s failure to raise all relevant arguments before Commerce

C. TOTCOM Adjustment

1. Relevant Background

In the underlying proceeding, Unicatch informed Commerce that it purchased inputs of steel wire rod from both affiliated²⁰ and unaffiliated suppliers. Unicatch's DQR at 9, Ex. D-5; Unicatch Resp. to Sec. D Suppl. Questionnaire (July 17, 2019) ("Unicatch's SDQR") at Ex. SD-3, CR 234–39, PR 168, CJA Tab 7 (revising Exhibit D-5). Unicatch provided the weighted-average purchase price for each affiliated supplier as well as a single average price for all unaffiliated suppliers combined. Unicatch's SDQR at Ex. SD-3.²¹ Commerce asked Unicatch to "provide evidence that Unicatch paid market prices for all purchases from [Supplier X]." *Id.* at 3. Unicatch pointed to invoices it claimed demonstrated that Supplier X purchased the steel wire rod inputs from companies unaffiliated with Unicatch and resold those inputs to Unicatch at higher prices. *Id.* (citing *id.* at Ex. SD-4).

Commerce has discretion to disregard transactions between affiliated entities when calculating cost of production "if, in the case of any element of value required to be considered, the amount representing that element does not fairly reflect the amount usually reflected in sales of merchandise under consideration in the market under consideration." 19 U.S.C. § 1677b(f)(2). For purposes of section 1677b(f)(2), Commerce's "preference is to compare the transfer price paid by the respondent to affiliated parties for production inputs to the price paid to unaffiliated suppliers." Issues and Decision Mem. for the Antidumping Duty Admin. Review of Polyethylene Retail Carrier Bags from Thailand (Jan. 17, 2007) ("PRCB from Thailand 2007 Mem.") at 18, *available at* <https://enforcement.trade.gov/frn/summary/thailand/E7-552-1.pdf> (last visited Sept. 14, 2021). When Commerce finds that prices between affiliates are for less than fair market value, Commerce makes an upward adjustment to the respondent's cost data to so that the price paid for the input reflects a market price. *See id.*

precludes Unicatch from seeking to raise this new argument now. *See, e.g., Boomerang Tube LLC v. United States*, 856 F.3d 908, 912 (Fed. Cir. 2017) (noting that 28 U.S.C. § 2673(d) "indicates a congressional intent that, absent a strong contrary reason, the court should insist that parties exhaust their remedies before the pertinent administrative agencies") (citation omitted).

²⁰ The two affiliated suppliers are identified in Unicatch's questionnaire response and referred to as "Supplier X" and "Supplier Y." Unicatch's BCD Resp., ECF pp. 278–319 ("Unicatch's DQR") at 9, Ex. D-5. Their respective identities are not relevant to this litigation.

²¹ Supplier X's average price was below that of the unaffiliated suppliers whereas Supplier Y's average price was above that of the unaffiliated suppliers. *Id.*

For the *Preliminary Results*, Commerce increased Unicatch's costs to account for purchases from Supplier X at less than market value. Prelim. Calc. Mem. at 3, Attach. 3. Unicatch argued to the agency that Exhibit SD-3 demonstrates that the combined weighted-average purchase price paid to both Supplier X and Supplier Y "was higher than the weighted average price paid to the unaffiliated suppliers" and Commerce should have analyzed the affiliated suppliers in the aggregate. Admin. Rebuttal Br. of Unicatch and PT (Nov. 1, 2019) at 3, CR 298, PR 212, Suppl. CJA Ex. 1. Unicatch further argued that if Commerce continued to "reject the lower of the two purchase prices paid to one affiliate, it should also reject the higher of the two purchase prices paid to the other affiliate." *Id.* at 4.

Commerce disagreed. I&D Mem. at 26–27. Commerce explained that its "practice [is] to analyze the input transfer price from each supplier individually, not as a weight average from all affiliated suppliers." *Id.* at 26 & n.129 (citation omitted). Because Commerce concluded that its adjustment was consistent with this practice, it made no changes for the *Final Results* except to correct clerical errors. *Id.* at 27.²²

2. Parties' Contentions

Unicatch contends that Commerce acted unreasonably in disregarding certain transactions because the combined weighted-average purchase price from the two affiliates was higher than Unicatch's purchase price from its unaffiliated suppliers. Pls.' Mem. at 32–34; Pls.' Reply at 8–9. Unicatch also contends that Commerce erred in disregarding certain transfer prices paid to Supplier X because Unicatch provided evidence demonstrating that the prices Unicatch paid to Supplier X were higher than the prices Supplier X paid its unaffiliated suppliers for the inputs. Pls.' Mem. at 31–32 (citing Unicatch's SDQR at 3, Ex. SD-4); *see also* Pls.' Reply at 9. Unicatch contends that Commerce's determination in OCTG from Mexico 2006²³ supports Unicatch's position because there, Commerce compared the purchase price between affiliates to the price the affiliate paid its unaffiliated suppliers. Pls.' Mem. at 32. Lastly, Unicatch contends that Commerce should have excluded above-market prices. Pls.' Reply at 9.

²² For the *Preliminary Results*, Commerce adjusted Unicatch's costs based on the combined weighted-average price from affiliated and unaffiliated suppliers. Prelim. Calc. Mem., Attach. 3. For the *Final Results*, the adjustment was based on the weighted-average price from unaffiliated suppliers alone. Final Calc. Mem., Attach. 3.

²³ Unicatch refers to this determination as "2016 Mexico OCTG" but cites to the Federal Register notice accompanying the 2006 decision memorandum. *See* Pls.' Mem. at 32 n.21 (citing *Certain Oil Country Tubular Goods from Mexico*, 71 Fed. Reg. 54,614 (Dep't Commerce Sep. 18, 2006) (notice of final results and partial rescission of antidumping duty admin. review)).

The Government contends that Commerce’s “practice is to analyze the transfer prices of the input for each affiliated supplier individually.” Def.’s Resp. at 21 (cataloguing Commerce determinations). The Government also contends that Unicatch’s focus on the resale value of the input is misplaced because “Commerce prefers to determine market value using the price the respondent is willing to pay its unaffiliated supplier for the same input.” *Id.* at 22 (citation omitted).

Mid Continent adds that comparing “the weighted-average transfer price from all affiliated parties against the market price . . . would allow individual affiliated parties whose transfer price is below the market price to escape scrutiny” when, as here, “the weighted-average transfer price is above the market price.” Def.-Int.’s Resp. at 12.

3. Analysis

Unicatch takes issue with Commerce’s reliance on the purchase price from individual affiliates rather than the combined weighted average to determine whether such prices are above market price. Pls.’ Mem. at 31–32; Pls.’ Reply at 8. When a respondent purchases inputs or services from more than one affiliate, however, Commerce may reasonably decide to examine each affiliate individually. The statute vests Commerce with discretion to determine how best to apply the transactions disregarded rule, *see* 19 U.S.C. § 1677b(f)(2), and Unicatch does not argue that Commerce’s methodology represents an impermissible construction of the statutory terms. At most, Unicatch asserts that Commerce used the weighted-average purchase price from both affiliates in AR2 and therefore acted unreasonably in declining to do so in AR3. Pls.’ Mem. at 31–34. The relevant parts of the AR2 record are not on the record of this review, however, and the issue was not presented to Commerce in that segment of the proceeding for the agency to explain its determination. *See generally* AR2 I&D Mem. Without any basis for comparing Commerce’s purportedly inconsistent decisions, the court finds no reason to remand the issue in this proceeding. Accordingly, Commerce’s decision to compare each affiliate’s price to the market price is in accordance with the law.

Unicatch also takes issue with Commerce’s reliance on the weighted-average purchase price from Unicatch’s unaffiliated suppliers instead of the affiliated supplier’s acquisition cost as the basis for market price. Pls.’ Mem. at 33–34; Pls.’ Reply at 8. “In establishing the market price,” however, Commerce’s preference “is to use the price paid by the respondent itself in transactions with unaffiliated suppliers” involving identical products when such information is

available “because this price best represents the respondent’s own experience in the market under consideration.” PRCB from Thailand 2007 Mem. at 18; *cf. Mid Continent Steel & Wire, Inc. v. United States*, 41 CIT __, __, 219 F. Supp. 3d 1326, 1349 (2017) (sustaining Commerce’s disregard of certain transactions for services performed by affiliated tollers based on a comparison to the average market prices for services performed by unaffiliated tollers); *cf. Issues and Decision Mem. for the Antidumping Duty Investigation of Large Residential Washers from Mexico* (Dec. 18, 2012) at 12, *available at* <https://enforcement.trade.gov/frn/summary/mexico/2012-31077.txt> (last visited Sept. 14, 2021) (using the affiliates’ cost of production to determine market value when the respondent purchased no relevant services from unaffiliated suppliers and the affiliates did not sell to “other outside parties”).

While in OCTG from Mexico 2006 Commerce used “the affiliated resellers’ acquisition cost from an unaffiliated party, plus selling, general, and administrative costs, and financial costs,” as the baseline for comparison to the transfer price to the respondent, OCTG from Mexico 2006 Mem. at 13, in that case, the respondent had argued that its input purchases “from unaffiliated suppliers [were] not comparable [to its affiliated party] transactions” and the petitioner had failed to timely raise the issue for Commerce to further investigate, *id.* at 11. Unicatch does not argue that its steel wire rod purchases from unaffiliated suppliers are unsuitable as a basis for testing the affiliated party price. *See* Pls.’ Mem. at 30–33; Pls.’ Reply at 8–9. Thus, Commerce’s decision to use the weighted-average price paid to Unicatch’s unaffiliated suppliers as the market price is supported by substantial evidence and in accordance with the law.

Lastly, Unicatch offers no support for its contention that Commerce was required to also exclude above-market prices. *See* Pls.’ Reply at 9. Even if the statute might reasonably be interpreted to permit such an adjustment, it certainly does not require it. Accordingly, the court will sustain Commerce’s cost of manufacturing adjustment.

II. Romp’s Motion for a Preliminary Injunction and the Government’s Partial Motion to Dismiss

A. Parties’ Contentions

Romp seeks to extend the duration of the statutory injunction the court entered in this case until a final and conclusive court decision in the *Mid Continent Litigation*. Consol. Pl.’s Mot. Prelim. Inj. at 1, 6–7. Romp contends that an extension is merited because Romp has demonstrated that the four criteria for a preliminary injunction are satisfied. *Id.* at 3.

The Government contends that Romp is not entitled to the requested duration of its injunction because Romp “failed to participate in the investigation litigation” and, thus, “failed to preserve its right to an injunction” pending a final and conclusive court decision in that action. Def.’s Mot. Dismiss at 5–6; *see also id.* at 7 (discussing *Capella Sales & Servs. Ltd. v. United States*, 40 CIT __, 180 F. Supp. 3d 1293 (2016), *aff’d* 878 F.3d 1329 (Fed. Cir. 2018), and *Capella Sales & Servs. Ltd. v. United States*, 40 CIT __, __, 181 F. Supp. 3d 1255, 1263–64 (2016), *aff’d* 878 F.3d 1329 (Fed. Cir. 2018)). The Government also contends that Romp has failed to demonstrate fulfillment of each criteria necessary for a preliminary injunction. *Id.* at 9–10. “Because Romp is not entitled to an injunction for the duration of the investigation litigation,” the Government contends, “it has failed to state a claim on which relief can be granted with regard [to] count two of its complaint” and the court should dismiss that count. *Id.* at 10; *see also* Def.’s Reply Mot. Dismiss at 1–2 (asserting that Romp does not contest dismissal of count two if the court declines to extend the duration of the injunction).

B. Analysis

Pursuant to the statutory injunction entered on June 5, 2020, Romp’s entries subject to AR3 “shall be liquidated in accordance with the final court decision in the action,” including all appeals. 19 U.S.C. § 1516a(e); *see also* Statutory Inj. at 3; *Yancheng Baolong Biochem. Prods. Co. v. United States*, 406 F.3d 1377, 1381 (Fed. Cir. 2005) (discussing the meaning of “final court decision in the action” for purposes of section 1516a(e)). The question presented in this case is whether the court should use its equitable powers to extend the duration of the injunction through a final and conclusive decision in the *Mid Continent Litigation*. As discussed below, the answer to that question is “no.”

To obtain a preliminary injunction, a plaintiff must show that it is likely to succeed on the merits of its claim. *Silfab Solar*, 892 F.3d at 1345. Romp seeks to fulfill the “likelihood of success on the merits” criterion by pointing to the “serious question of law” Romp raises with respect to its challenges to the *Final Results*. Consol. Pl.’s Mot. Prelim. Inj. at 5. Setting aside the question whether “sliding-scale jurisprudence remains good law after *Winter*,” *Silfab Solar*, 892 F.3d at 1345 (declining to address whether “a lesser showing of likelihood of success is acceptable” when “there is a significant showing of irreparable injury”), Romp’s focus on the likelihood that it will succeed in this case is misplaced for two reasons: (1) the statutory injunction Romp obtained preserves Romp’s right to liquidation in accordance

with a final court decision concerning AR3, *see* 19 U.S.C. § 1516a(e); Statutory Inj. at 3; and (2) with the issuance of the court's decision rejecting Romp's present claims, its likelihood of success is clearly diminished.

Romp also offers no arguments or authority supporting the court's consideration of the likelihood that other plaintiffs will succeed in obtaining revocation of the *ADD Order* in the *Mid Continent Litigation*, in which Romp elected not to participate, to determine whether to grant preliminary relief in this case. Moreover, Romp has not addressed why those plaintiffs are likely to succeed, particularly when the court recently upheld Commerce's remand redetermination maintaining an above-*de minimis* margin for PT, a mandatory respondent in the investigation, thereby leaving the *ADD Order* in place. *See Mid Continent Steel & Wire, Inc. v. United States*, 45 CIT ___, 495 F. Supp. 3d 1298 (2021), *appeal docketed*, No. 21-1747 (Fed. Cir. Mar. 17, 2021). While the appeal is ongoing, Romp's failure to address this aspect of its motion defeats its request. *See Silfab Solar*, 892 F.3d at 1345 (preliminary relief is improper when the movant does not demonstrate any probability of success).

In sum, Romp has failed to establish a likelihood of success on the merits; thus, the court need not address the other criteria for a preliminary injunction. Romp's motion for a preliminary injunction, construed as a motion to modify the statutory injunction, will be denied, and the court will dismiss count two of Romp's complaint.

CONCLUSION AND ORDER

In accordance with the foregoing, it is hereby

ORDERED that Commerce's *Final Results* are sustained; it is further

ORDERED that Romp's motion for a preliminary injunction, construed as a motion to modify the statutory injunction (ECF No. 11 (Ct. No. 20-80)), is **DENIED**; and it is further

ORDERED that count two of Romp's complaint (ECF No. 10 (Ct. No. 20-80)) is **DISMISSED**.

Judgment will be entered accordingly.

Dated: September 14, 2021
New York, New York

/s/ Mark A. Barnett

MARK A. BARNETT, CHIEF JUDGE

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