

U.S. Customs and Border Protection



19 CFR PART 177

REVOCATION OF EIGHT RULING LETTERS, MODIFICATION OF FOUR RULING LETTERS, AND REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF FLOCKED PAPER SETS

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

ACTION: Notice of revocation of eight ruling letters, modification of four ruling letters, and revocation of treatment relating to the tariff classification of flocked paper 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 eight ruling letters and modifying four ruling letters concerning the tariff classification of flocked paper 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. 33, on August 25, 2021. No comment was received in response to the notice.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after April 24, 2022.

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

SUPPLEMENTARY INFORMATION:

BACKGROUND

Current customs law includes two key concepts: informed compliance and shared responsibility. Accordingly, the law imposes an obli-

gation 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. 33, on August 25, 2021, proposing to revoke eight ruling letters and modify four ruling letters pertaining to the tariff classification of flocked paper 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) K83080, NY K83204, NY K86534, NY L83248, NY I83703, NY J80696, NY L81409, NY N038315, and NY N217077, CBP classified flocked paper sets in heading 4823, HTSUS, specifically in subheading 4823.90.67, HTSUS, which provides for "Other paper, paperboard, cellulose wadding and webs of cellulose fibers, cut to size or shape; other articles of paper pulp, paper, paperboard, cellulose wadding or webs of cellulose fibers: Other: Other: Other: Of coated paper or paperboard: Other". In NY N099452, CBP classified the subject merchandise in subheading 4823.90.86, HTSUS, which provides for "Other paper, paperboard, cellulose wadding and webs of cellulose fibers, cut to size or shape; other articles of paper pulp, paper, paperboard, cellulose wadding or webs of cellulose fibers: Other: Other: Other: Other: Other". In NY G82351, CBP classified the subject merchandise in subheading 4911.91.40, HTSUS, which provides for "Other printed matter, including printed pictures and photographs: Other: Pictures, designs and photographs: Other: Other". Lastly, in Headquarters Ruling

Letter (HQ) 950774, CBP classified the subject merchandise in subheading 9608.20.00, HTSUS, which provides for “Ball point pens; felt tipped and other porous-tipped pens and markers; fountain pens, stylograph pens and other pens; duplicating styli; propelling or sliding pencils (for example, mechanical pencils); pen-holders, pencil-holders and similar holders; parts (including caps and clips) of the foregoing articles, other than those of heading 9609: Felt tipped and other porous-tipped pens and markers”. CBP has reviewed the aforementioned rulings and has determined the ruling letters to be in error. It is now CBP’s position that the subject flocked paper sets are properly classified, in heading 4811, HTSUS, specifically in either subheading 4811.90.90, HTSUS, which provides for “Paper, paperboard, cellulose wadding and webs of cellulose fibers, coated, impregnated, covered, surface-colored, surface-decorated or printed, in rolls or rectangular (including square) sheets, of any size, other than goods of the kind described in heading 4803, 4809 or 4810: Other paper, paperboard, cellulose wadding and webs of cellulose fibers: Other”, or in subheading 4811.90.20, HTSUS, which provides for “Paper, paperboard, cellulose wadding and webs of cellulose fibers, coated, impregnated, covered, surface-colored, surface-decorated or printed, in rolls or rectangular (including square) sheets, of any size, other than goods of the kind described in heading 4803, 4809 or 4810: Other paper, paperboard, cellulose wadding and webs of cellulose fibers: In strips or rolls of a width exceeding 15 cm or in rectangular (including square) sheets with one side exceeding 36 cm and the other side exceeding 15 cm in the unfolded state: Other: Wholly or partly covered with flock, gelatin, metal or metal solutions.”

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is revoking NY K83080, NY K83204, NY K86534, NY L83248, NY I83703, NY J80696, NY L81409 and NY N099452; modifying HQ 950774, NY G82351, NY N038315 and NY N217077; and revoking or modifying any other ruling not specifically identified to reflect the analysis contained in HQ H303761, set forth as an attachment to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions.

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

Dated: February 9, 2022

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

Attachment

HQ H303761

February 9, 2022

OT:RR:CTF:CPMMA H303761 AJK

CATEGORY: Classification

TARIFF NO: 4811.90.20; 4811.90.90

MR. KEVIN MAHER

C-AIR CUSTOMHOUSE BROKERS

181 So. FRANKLIN AVE.

VALLEY STREAM, NY 11581

RE: Revocation of NY K83080, NY K83204, NY K86534, NY L83248, NY I83703, NY J80696, NY L81409, and NY N099452; Modification of HQ 950774, NY G82351, NY N038315, and NY N217077; Modification by Operation of Law; Classification of Flocked Paper Sets

DEAR MR. MAHER:

This letter is in reference to your New York Ruling Letters (NY) K83080, dated February 26, 2004, NY K83204, dated February 26, 2004, NY K86534, dated June 10, 2004, and NY L83248, dated March 18, 2005, concerning the tariff classification of flocked paper sets. In the aforementioned rulings, U.S. Customs and Broder Protection (CBP) classified the merchandise in heading 4823, Harmonized Tariff Schedule of the United States (HTSUS), as other paper. We have reviewed the rulings and have determined that the classification of flocked paper sets in heading 4823, HTSUS, was incorrect.

We have also reviewed Headquarters Ruling Letter (HQ) 950774, dated January 28, 1992, NY I83703, dated June 28, 2002, NY J80696, dated February 7, 2003, NY L81409, dated December 20, 2004, NY N099452, dated April 28, 2010, NY G82351, dated September 22, 2000, NY N038315, dated October 14, 2008, and NY N217077, dated June 5, 2012, concerning the tariff classification of flocked paper sets, and have determined that the aforementioned rulings were incorrect. For the reasons set forth below, we revoke eight ruling letters and modify four ruling letters.

In addition to the modification of the classification of flocked paper set, HQ 950774 is modified by operation of law with respect to the classification of flocked paper only. The modification by operation of law is precipitated by the change to note 7(A) to chapter 48, which previously stated that heading 4811, HTSUS, included paper in the form of rectangular sheets that exceeded 36 cm (14.17 inches) by 15 cm (5.9 inches) only. In 2002, however, note 7(A) to chapter 48 was replaced with note 8(b), and the general size limitation on goods of heading 4811, HTSUS, was removed. Accordingly, the classification of flocked paper in the form of 11 inches (27.94 cm) by 14 inches (35.56 cm) rectangular sheet in HQ 950774 is modified by operation of law.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. § 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), a notice of the proposed action was published in the Customs Bulletin, Volume 55, No. 33, on August 25, 2021. No comments were received in response to the notice.

FACTS:

In all twelve rulings, the flocked paper sets contain flocked paper and an assortment of items to decorate flocked paper. Although all of the flocked paper sets are substantially similar as they consist of flocked paper, each set varies by component and size of flocked paper. In addition, some sets are contained in paperboard retail display boxes while others are merely packaged together as sets. The subject merchandise is described in NY K83080 as follows:

“Funtime Fuzzy Poster Value Set” ... consists of the following items put up together for retail sale in a printed paperboard display box:

- 5 “fuzzy posters,” which are sheets of white paper, partially coated with black flock so as to form pictures and designs. The white, unflocked areas are meant to be colored in by the user. The “posters” range in size from 6” [15.24 cm] x 9” [22.86 cm] to 16” [40.64 cm] x 20” [50.8 cm].
- A “fuzzy portfolio,” which is a paperboard pocket folder measuring 9½” x 11½” in the closed position. Its face has a flocked design suitable for coloring.
- 8 washable markers in assorted colors.
- A packet of sequins.
- A small tube of white glue.
- A wooden “design stick” to assist in the application of the sequins.

ISSUE:

Whether the flocked paper sets are classified in heading 4811, HTSUS, as covered or surface decorated rectangular sheets of paper; heading 4823, HTSUS, as other paper; heading 4911, HTSUS, as other printed matter; or heading 9608, HTSUS, as ball point pens.

LAW AND ANALYSIS:

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

GRI 3(b) states, in pertinent part:

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

* * * * *

The HTSUS provisions at issue are as follows:

- 4811 Paper, paperboard, cellulose wadding and webs of cellulose fibers, coated, impregnated, covered, surface-colored, surface-decorated or printed, in rolls or rectangular (including square) sheets, of any size, other than goods of the kind described in heading 4803, 4809 or 4810:
- 4811.90 Other paper, paperboard, cellulose wadding and webs of cellulose fibers:
 In strips or rolls of a width exceeding 15 cm or in rectangular (including square) sheets with one side exceeding 36 cm and the other side exceeding 15 cm in the unfolded state:
 Other:
- 4811.90.20 Wholly or partly covered with flock, gelatin, metal or metal solutions
- 4811.90.90 Other
- ***
- 4823 Other paper, paperboard, cellulose wadding and webs of cellulose fibers, cut to size or shape; other articles of paper pulp, paper, paperboard, cellulose wadding or webs of cellulose fibers:
- 4823.90 Other:
 Other:
 Other:
 Of coated paper or paperboard:
 Other
- 4823.90.67 Other:
 Other
- 4823.90.86 Other
- ***
- 4911 Other printed matter, including printed pictures and photographs:
 Other:
- 4911.91 Pictures, designs and photographs:
 Printed not over 20 years at time of importation:
 Other:
- 4911.91.40 Other
- ***
- 9608 Ball point pens; felt tipped and other porous-tipped pens and markers; fountain pens, stylograph pens and other pens; duplicating styli; propelling or sliding pencils (for example, mechanical pencils); pen-holders, pencil-holders and similar holders; parts (including caps and clips) of the foregoing articles, other than those of heading 9609:
- 9608.20.00 Felt tipped and other porous-tipped pens and markers

Note 2 to chapter 49 provides, in pertinent, as follows:

2. For the purposes of chapter 49 the term “printed” also means reproduced by means of a duplicating machine, produced under the control of an automatic data processing machine, embossed, photographed, photocopied, thermocopied or typewritten.

* * * * *

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

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

- (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 ...;
 - (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).

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.

EN to chapter 49 provides, in pertinent part:

For the purposes of this Chapter, the term “printed” includes not only reproduction by the several methods of ordinary hand printing (e.g., prints from engravings or woodcuts, other than originals) or mechanical printing (letterpress, offset printing, lithography, photogravure, etc.), but also reproduction by duplicating machines, production under the control of an automatic data processing machine, embossing, photography, photocopying, thermocopying or typewriting (see Note 2 to this Chapter), irrespective of the form of the characters in which the printing is executed (e.g., letters of any alphabet, figures, shorthand signs, Morse or other code symbols, Braille characters, musical notations, pictures, diagrams). The term does not, however, include coloration or decorative or repetitive-design printing.

EN 48.11 provides, in pertinent part, as follows:

Paper and paperboard are classified in this heading only if they are in strips or rolls or in rectangular (including square) sheets, of any size. If they have been cut to any other shape, they fall in later headings of this Chapter (for example, 48.23). Subject to these conditions and the exceptions mentioned in the heading and those referred to at the end of this Explanatory Note, this heading applies to the following in rolls or sheets:

- (A) Paper, paperboard, cellulose wadding and webs of cellulose fibres, to which superficial coatings of materials *other than* (emphasis added) kaolin or other inorganic substances have been applied over the whole or part of one or both surfaces (e.g., thermosensitive paper used, for example, in telefax machines).

EN 48.23 provides, in pertinent part, as follows:

This heading includes:

- (A) Paper and paperboard, cellulose wadding and webs of cellulose fibres, not covered by any of the previous headings of this Chapter:
 - in strips or rolls of a width not exceeding 36 cm;

- in rectangular (including square) sheets of which no side exceeds 36 cm in the unfolded state;
- cut to shape other than rectangular (including square)

EN 49.11 provides, in pertinent part:

This heading covers all printed matter (including photographs and printed pictures) of this Chapter (see the General Explanatory Note above) but not more particularly covered by any of the preceding headings of the Chapter.

* * * * *

As a preliminary matter, we note that each flocked paper set in the aforementioned rulings varies in component, packaging material, and form and size of the flocked paper parts. Each set consists of a variety of items (*e.g.*, flocked paper, pen[s] or marker[s], glue stick, glitter, etc.) that comprise the flocked paper set and are packaged together for retail sale. Among the rulings, some flocked paper sets are packaged in paperboard retail display boxes. Moreover, the size and form of the flocked paper parts in these sets vary as some are imported in rolls of flocked paper while others are in the form of rectangular sheets in various sizes. As explained below, however, the difference in each flocked paper set does not affect our analysis.

The classification of flocked paper sets is determined by the application of GRI 3(b), which applies to “[g]oods put up in sets for retail sale”. The General EN to GRI 3(b) defines “sets for retail sale” as “goods which are intended to be sold to the end user where the individual goods are intended to be used together.” In the instant case, the flocked paper sets constitute “sets for retail sale” because the merchandise consists of multiple items with distinctly classifiable headings while no specific provision encompasses the set as a whole. Moreover, the components of the sets are put up together for the final consumers to decorate flocked paper, and the sets are packaged together for sale without repackaging after importation. *See* EN to GRI 3(b). In NY N038315, however, CBP analyzed a flocked paper set, which contained markers, a glue stick, flocked paper, plastic stick-on jewels, and sequins, and incorrectly classified each component of the flocked paper set in its corresponding heading. It is now CBP’s position that the flocked paper set in NY N038315 constitutes a set for retail sale under GRI 3(b). Pursuant to GRI 3(b), therefore, the flocked paper sets are “sets for retail sale” for classification purposes and thus, they are classified as a whole, not by the individual components of the set.

To classify under GRI 3(b), CBP must identify the component of the subject merchandise that imparts the merchandise with its essential character. “The ‘essential character’ of an article is ‘that which is indispensable to the structure, core or condition of the article, i.e., what it is.’” *Structural Industries v. United States*, 360 F. Supp. 2d 1330, 1336 (Ct. Int’l Trade 2005). Accordingly, the flocked paper sets are classified in the heading in which the component that imparts the essential character of the subject merchandise is classified. In the instant case, the flocked paper sets are commonly marketed as velvet or fuzzy art sets and they are sold by showcasing the flocked paper parts. Moreover, the flocked paper sets are comprised of items that are necessary for the activity of crafting flocked paper. For example, the pens or markers are utilized to color the unflocked spaces of flocked paper while the glue and glitters are similarly used to decorate flocked paper. In HQ 950774, CBP

found that the pens and flocked paper in flocked paper sets were equally significant and thus, classified the merchandise in heading 9608, HTSUS, as pens, under GRI 3(c). As explained above, however, the pens contained in these sets do not impart the essential character of the merchandise because they are merely auxiliary components that support the user's utility of flocked paper—to color, craft, and decorate flocked paper. Under GRI 3(b), the essential character of the flocked paper sets is imparted by the flocked paper parts and thus, the classification of the merchandise in the heading of other components—such as heading 9608, HTSUS—is precluded.

Heading 4911, HTSUS, provides for other printed matter. The EN to chapter 49 defines “printed” as “reproduction by the several methods of ordinary hand printing (e.g., prints from engravings or woodcuts, other than originals) or mechanical printing (letterpress, offset printing, lithography, photogravure, etc.), but also reproduction by duplicating machines, production under the control of an automatic data processing machine, embossing, photography, photocopying thermocopying or typewriting”. See also Note 2 to Chapter 49. Moreover, the Merriam-Webster Dictionary defines “print” as “to make a copy of by impressing paper against an inked printing surface”. *Print*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/print> (last visited May 7, 2021). Accordingly, flocked papers do not qualify as “printed” matter within the HTSUS due to the distinct process of flocking paperboard. Unlike the process of printing, which is a reproduction process by impressing paper against an inked printing surface either via hand or machine, flocked paper is created by partially covering paper with flock; it does not undergo a reproduction or printing process as prescribed in the EN to chapter 49. In NY G82351, however, CBP incorrectly classified a flocked paper set and flocked paper in heading 4911, HTSUS, as printed matter. Because flocked paper—which is a paper covered with flock—is not a reproduced or printed product, it is not classifiable in heading 4911, HTSUS, as other printed matter.

EN 48.11 states that heading 4811, HTSUS, includes covered paper that contains “superficial coatings of materials *other than* kaolin or other inorganic substances” (emphasis added). To be classified in this heading, however, the paper must be “in strips or rolls or in rectangular (including square) sheets” See EN 48.11. As such, paper that has been cut to any shape other than rectangular or square sheets are classified in heading 4823, HTSUS, as other paper. See *id.*; see also EN 48.23. Accordingly, the subject flocked paper in all twelve rulings are classified in heading 4811, HTSUS, because the papers, which are in the form of strips and rectangular sheets, are partially covered in flock, thereby creating a decoration. Thus, flocked paper is properly classified in heading 4811, HTSUS, as covered paper.

Specifically, subheading 4811.90.20, HTSUS, is an *eo nomine* provision for paper covered with flock. This subheading, however, encompasses flocked paper that are “in strips or rolls of a width exceeding 15 cm [5.9 inches] or in rectangular (including square) sheets with one side exceeding 36 cm [14.17 inches] and the other side exceeding 15 cm [5.9 inches] in the unfolded state” only. Thus, the flocked paper sets in NY K83204, NY K86534, NY L83248, and NY L81409 in part are classified in subheading 4811.90.20, HTSUS, as paper covered with flock, because they fall within the specified measurements. However, the flocked paper sets in NY I83703, NY J80696, NY L81409 in part, NY N099452, NY G82351, NY N038315, and NY N217077 are classified in subheading 4811.90.90, HTSUS, as other covered paper, because

they do not meet the specified measurements for subheading 4811.90.20, HTSUS, and are thus excluded therefrom.

HOLDING:

By application of GRI 3(b), the subject flocked paper sets are classified in heading 4811, HTSUS. The flocked paper sets with flocked paper that are in strips or rolls of a width exceeding 15cm (5.9 inches) or in rectangular or square sheets with one side exceeding 36 cm (14.17 inches) and the other side exceeding 15 cm (5.9 inches) are classified in subheading 4811.90.20, HTSUS, which provides for “[p]aper, paperboard, cellulose wadding and webs of cellulose fibers, coated, impregnated, covered, surface-colored, surface-decorated or printed, in rolls or rectangular (including square) sheets, of any size, other than goods of the kind described in heading 4803, 4809 or 4810: [o]ther paper, paperboard, cellulose wadding and webs of cellulose fibers: [i]n strips or rolls of a width exceeding 15 cm or in rectangular (including square) sheets with one side exceeding 36 cm and the other side exceeding 15 cm in the unfolded state: [o]ther: [w]holly or partly covered with flock, gelatin, metal or metal solutions”. The 2021 column one, general rate of duty is free.

Alternatively, the flocked paper sets with flocked paper that are smaller than the measurements outlined above are classified in subheading 4811.90.90, HTSUS, which provides for “[p]aper, paperboard, cellulose wadding and webs of cellulose fibers, coated, impregnated, covered, surface-colored, surface-decorated or printed, in rolls or rectangular (including square) sheets, of any size, other than goods of the kind described in heading 4803, 4809 or 4810: [o]ther paper, paperboard, cellulose wadding and webs of cellulose fibers: [o]ther”. The 2021 column one, general rate of duty is free.

In accordance with the change of note 7(A) to chapter 48 in 2002, the flocked paper in HQ 950774 that was classified in heading 4823, HTSUS, is now classified in heading 4811, HTSUS, specifically subheading 4811.90.90, HTSUS, which provides for “[p]aper, paperboard, cellulose wadding and webs of cellulose fibers, coated, impregnated, covered, surface-colored, surface-decorated or printed, in rolls or rectangular (including square) sheets, of any size, other than goods of the kind described in heading 4803, 4809 or 4810: [o]ther paper, paperboard, cellulose wadding and webs of cellulose fibers: [o]ther”. The 2021 column one, general rate of duty is free.

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

EFFECT ON OTHER RULINGS:

NY K83080, dated February 26, 2004, NY K83204, dated February 26, 2004, NY K86534, dated June 10, 2004, NY L83248, dated March 18, 2005, NY I83703, dated June 28, 2002, NY J80696, dated February 7, 2003, NY L81409, dated December 20, 2004, and NY N099452, dated April 28, 2010, are hereby revoked.

NY G82351, dated September 22, 2000, NY N038315, dated October 14, 2008, and NY N217077, dated June 5, 2012, are modified. In addition, HQ 950774, dated January 28, 1992, is modified in part by operation of law with respect to the classification of the flocked paper only.

Sincerely,

for

CRAIG T. CLARK,
Director

Commercial and Trade Facilitation Division

CC: Ms. Lorianne Aldinger
Rite Aid Corporation
P.O. Box 3165
Harrisburg, PA 17105

Mr. Daniel Shapiro
Tompkins & Davidson, LLP
One Astor Plaza
1515 Broadway
New York, NY 10036-8901

Ms. Krista B. Ruffoni
Family Dollar Services, Inc.
10401 Monroe Road
Matthews, NC 28105

Mr. Joseph Stinson
Liss Global, Inc.
7746 Dungan Road
Philadelphia, PA 19111

Ms. Theresa Buell
Western Graphics Corp.
P.O. Box 22310
Eugene, OR 97402-0417

Mr. Michael J. Mercer
Corbett International, Inc.
Cargo Service Building 80
J.F.K. International Airport
Jamaica, N.Y. 11430



**PROPOSED REVOCATION OF ONE RULING LETTER AND
PROPOSED REVOCATION OF TREATMENT RELATING TO
THE TARIFF CLASSIFICATION OF BABIES' SWIMWEAR**

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

ACTION: Notice of proposed revocation of one ruling letter and proposed revocation of treatment relating to the tariff classification of babies' swimwear.

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 one ruling letter concerning tariff classification of babies' swimwear 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 March 25, 2022.

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: 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), this notice advises interested parties that CBP is proposing to revoke one ruling letter pertaining to the tariff classification of babies' swimwear. Although in this notice, CBP is specifically referring to New York Ruling Letter ("NY") N245655, dated September 12, 2013 (Attachment A), this notice also covers any rulings on this merchandise which may exist, but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the one identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should advise CBP during the comment period.

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

In NY N245655, CBP classified babies' swimwear in heading 6111, HTSUS, which provides for "Babies' garments and clothing accessories, knitted or crocheted." CBP has reviewed NY N245655 and has determined the ruling letter to be in error. It is now CBP's position that the babies' swimwear is properly classified, in heading 9619.00, HTSUS, which provides for "Sanitary towels (pads) and tampons, diapers and diaper liners for babies and similar articles, of any material."

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is proposing to revoke NY N245655 and to revoke or modify any other ruling not specifically identified to reflect the analysis contained in the proposed Headquarters Ruling Letter ("HQ") H304671, set forth as Attachment B to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is proposing to revoke any treatment previously accorded by CBP to substantially identical transactions.

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

Dated:

CRAIG T. CLARK,
Director
Commercial and Trade Facilitation Division

Attachments

N245655

September 12, 2013

CLA-2-61:OT:RR:NC:N3:358

CATEGORY: Classification

TARIFF NO.: 6111.30.5070

MS. DEANA FERRON
PVH
200 MADISON AVENUE
NEW YORK, NY 10016

RE: The tariff classification of babies' swimwear from China.

DEAR MS. FERRON:

In your letter dated August 23, 2013, you requested a classification ruling. You have submitted two samples. As requested, the samples will be returned to you.

Style 7570512 and Style 7570513 are babies' swimwear with an interior diaper component. The outer shells and interior linings of both garments are constructed of polyester knit fabric. Between the outer shells and the interior linings is an interior layer of thin nylon woven fabric that has a polyurethane coating. The lining assists in preventing waste and bacteria from getting into the water.

Style 7570512 is for boys. It has swim trunk styling and a fully elasticized waistband. The interior panty section is sewn into the interior waistband and has elasticized fabric at the leg openings.

Style 7570513 is for girls. It has panty styling, a fully elasticized waistband with fabric bow and elasticized fabric at the leg openings.

Both styles will be imported in babies' sizes 6 to 18 months.

The applicable subheading for Style 7570512 and Style 7570513 will be 6111.30.5070, Harmonized Tariff Schedule of the United States (HTSUS), which provides for babies' garments and clothing accessories, knitted or crocheted: of synthetic fibers: other, other. The duty rate will be 16 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 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 Bruce Kirschner at 646-733-3048.

Sincerely,

MYLES B. HARMON
*Acting Director,
National Commodity
Specialist Division*

HQ H304671
OT:RR:CTF:FTM H304671 PJG
CATEGORY: Classification
TARIFF NO.: 9619.00

DIANA FERRON
PVH
200 MADISON AVENUE
NEW YORK, NEW YORK 10016

RE: Revocation of NY N245655 and NY N100856; tariff classification of babies' swimwear

DEAR Ms. FERRON:

On September 12, 2013, U.S. Customs and Border Protection ("CBP") issued to you New York Ruling Letter ("NY") N245655. The ruling pertains to the tariff classification under the Harmonized Tariff Schedule of the United States ("HTSUS") of two styles of babies' swimwear, specifically, style numbers 7570512 and 7570513. We have since reviewed NY N245655 and determined it to be in error with respect to the classification of these products. Similarly, we have reviewed NY N100856, dated April 15, 2010, and determined it to be in error with respect to the classification of style GT210, which is a babies' swim diaper. Accordingly, NY N245655 and NY N100856 are revoked. Specifically, NY N100856 is revoked by operation of law because it was issued before heading 9619, HTSUS, was introduced. It is now CBP's position that style numbers 7570512, 7570513, and GT210 are classified in heading 9619.00, HTSUS.

FACTS:

In NY N245655, styles 7570512 and 7570513 are described as follows:

Style 7570512 and Style 7570513 are babies' swimwear with an interior diaper component. The outer shells and interior linings of both garments are constructed of polyester knit fabric. Between the outer shells and the interior linings is an interior layer of thin nylon woven fabric that has a polyurethane coating. The lining assists in preventing waste and bacteria from getting into the water.

Style 7570512 is for boys. It has swim trunk styling and a fully elasticized waistband. The interior panty section is sewn into the interior waistband and has elasticized fabric at the leg openings.

Style 7570513 is for girls. It has panty styling, a fully elasticized waistband with fabric bow and elasticized fabric at the leg openings.

Both styles will be imported in babies' sizes 6 to 18 months.

In NY N245655, CBP classified styles 7570512 and 7570513 in subheading 6111.30.5070, HTSUSA, which provides for "Babies' garments and clothing accessories, knitted or crocheted: Of synthetic fibers: Other: Other: Other."

In NY N100856, style GT210 is described as follows:

Style GT210 is a babies' swim diaper consisting of an outer shell and a detachable inner shell. The outer shell is constructed from 92% cotton, 8% spandex knit jersey fabric. The outer shell features elasticized leg openings, an elasticized waistband with hook and loop closures that fasten at the front of the diaper onto hook and loop strips, an embroidered g and

ruffles on the front of the diaper. The detachable inner shell is constructed of a nylon woven polyurethane coated material and is held in place by four plastic snaps. The essential character of the garment is imparted by the knit outer shell.

In NY N100856, CBP classified style GT210 in subheading 6111.20.6070, HTSUSA, which provides for “Babies’ garments and clothing accessories, knitted or crocheted: Of cotton: Other: Other.”

ISSUE:

Whether the subject babies’ swimsuits are classifiable in heading 6111, HTSUS, which provides for “Babies’ garments and clothing accessories, knitted or crocheted,” or in heading 9619.00, HTSUS, which provides for “Sanitary towels (pads) and tampons, diapers and diaper liners for babies and similar articles, of any material.”

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 may then be applied.

The HTSUS provisions under consideration are as follows:

6111 Babies’ garments and clothing accessories, knitted or crocheted:

9619.00 Sanitary towels (pads) and tampons, diapers and diaper liners for babies and similar articles, of any material:

GRI 3(a) and (b) provide 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.

Note 6 to Chapter 61 provides as follows:

For the purposes of heading 6111:

- (a) The expression “*babies’ garments and clothing accessories*” means articles for young children of a body height not exceeding 86 centimeters;
- (b) Articles which are, *prima facie*, classifiable both in heading 6111 and in other headings of this chapter are to be classified in heading 6111.

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.

(IX) For the purposes of this Rule, composite goods made up of different components shall be taken to mean not only those in which the components are attached to each other to form a practically inseparable whole but also those with separable components, **provided** these components are adapted one to the other and are mutually complementary and that together they form a whole which would not normally be offered for sale in separate parts.

* * *

(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. For example, different foodstuffs intended to be used together in the preparation of a ready-to-eat dish or meal, packaged together and intended for consumption by the purchaser would be a “set put up for retail sale”.

* * *

The EN to 96.19 states, in pertinent part:

This heading covers sanitary towels (pads) and tampons, napkins (diapers) and napkin liners for babies and similar articles, including absorbent hygienic nursing pads, napkins (diapers) for adults with incontinence and pantyliners, of any material.

In general, the articles of this heading are disposable. Many of these articles are composed of (a) an inner layer (e.g., of nonwovens) designed to wick fluid from the wearer’s skin and thereby prevent chafing; (b) an absorbent core for collecting and storing fluid until the product can be disposed of; and (c) an outer layer (e.g., of plastics) to prevent leakage of fluid from the absorbent core. The articles of this heading are usually shaped so that they may fit snugly to the human body. This heading also includes similar traditional articles made up solely of textile materials, which are usually re-usable following laundering.

This heading **does not cover** products such as disposable surgical drapes and absorbent pads for hospital beds, operating tables and wheelchairs or non-absorbent nursing pads or other non-absorbent articles (in general, classified according to their constituent material).

When considering the classification of apparel made up of woven and knit fabrics, guidance may be found in HQ memo 084118. In that memo, we stated with regard to upper body garments:

- (a) For upper or lower body garments, if one component exceeds 60 percent of the visible surface area, that component will determine the classification of the garment unless the other component:
 - (1) forms the entire front of the garment; or
 - (2) provides a visual and significant decorative effect (e.g., a substantial amount of lace); or
 - (3) is over 50 percent by weight of the garment; or
 - (4) is valued at more than 10 times the primary component.

If no component comprises 60 percent of the visible surface area, or if any of the above four listed conditions are present, classification will be according to GRI 3(b) or 3(c), as appropriate.

Section XI, Note 1(u), HTSUS, provides that Section XI, which includes Chapters 61 and 62, HTSUS, does not cover “[a]rticles of chapter 96 (for example, brushes, travel sets for sewing, slide fasteners, typewriter ribbons, sanitary towels (pads) and tampons, napkins (diapers) and napkin liners for babies).” Therefore, first, we must consider whether styles 7570512 and 7570513 are classifiable in Chapter 96, HTSUS.

Classification of style 7570513

First, we will address the classification of style 7570513, which is a baby girls’ panty style swimwear with an interior diaper component and a fully

elasticized waistband and elasticized leg openings. In NY N070405, dated August 3, 2009, CBP found that the cotton terry knit crotch with polyurethane laminate barrier that was designed to retain waste imparted the essential character to the babies' swim diapers that were comprised of different materials. In style 7570513, the waste retention is accomplished with the absorption qualities of the polyester knit fabric and the thin nylon woven fabric that has a polyurethane coating.

In the 2012 Basic Edition of the HTSUS, heading 9619, HTSUS, was introduced to provide for "Sanitary towels (pads) and tampons, diapers and diaper liners for babies and similar articles, of any material." The diaper component of style 7570513 fits the description provided by EN 96.19 for articles that are classifiable in heading 9619, HTSUS, because it is composed of (a) an interior lining of polyester knit fabric that helps wick the fluid from the babies' body and prevents chafing; (b) an absorbent component (the textile composition of which we are unaware) that collects and stores the fluid until the product can be washed and reused; (c) a layer of thin nylon woven fabric that has a polyurethane coating to prevent leakage of the fluid and bacteria from the absorbent core; and (d) the diaper component is designed to fit snugly to the baby's body. We conclude, therefore, that style 7570513 is classifiable in heading 9619.00, HTSUS, as "similar articles."

Since the diaper component of style 7570513 is comprised of different materials, specifically, polyester knit fabric, nylon woven fabric with polyurethane coating, and the textile composition of the absorbent component, the appropriate subheading for the subject merchandise cannot be determined pursuant to GRI 1. GRI 2(a) does not provide assistance and in accordance with the guidance provided by GRI 2(b), "[t]he classification of goods consisting of more than one material or substance shall be according to the principles of rule 3." Applying GRI 3(a) in the context of the subheading, we find that more than two subheadings, specifically, subheading 9619.00.64, HTSUS (Knitted; Of man-made fibers), subheading 9619.00.74, HTSUS (Other; Of man-made fibers), and subheading 9619.00, HTSUS (the eight digit subheading would depend upon the textile composition of the absorbent component), refer to only part of the materials that comprise the subject merchandise. As such, we refer to GRI 3(b), which states that "[m]ixtures, 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." In HQ H271286, dated April 4, 2017, we stated that the absorbent component imparts the essential character to articles of heading 9619, HTSUS.

In the instant case, we do not have information concerning the textile composition of the absorbent component of style 7570513. As such, style 7570513 we can only provide the classification of this product at the six-digit level, specifically, in subheading 9619.00, HTSUS, which provides for "Sanitary towels (pads) and tampons, diapers and diaper liners for babies and similar articles, of any material: Other, of textile materials."

Classification of style 7570512

Second, we will address the classification of style 7570512, which is a baby boys' trunk style swimwear with an interior diaper component and a fully

elasticized waistband. The diaper component is sewn into the interior waistband and has elasticized fabric at the leg openings.

Initially, we must consider whether the garment is swimwear or shorts. The Court of International Trade (“CIT”) held in *Hampco Apparel, Inc. v. United States*, 12 Ct. Int’l Trade 92, 95 (1988), that we must look at the following features and, if *all* are present, then the garment is swimwear and not shorts:

- 1) whether the garment has a elasticized waistband through which a drawstring is threaded;
- 2) whether the garment has an inner lining of lightweight material, namely, nylon tricot; and
- 3) whether the garment was designed and constructed for swimming.

While style 7570512 has an elasticized waistband, it does not have a drawstring, therefore, style 7570512 is shorts and not swimwear for classification purposes.

Since style 7570512 is a lower body garment made from both woven and knit fabrics, the merchandise is classifiable in heading 6111, HTSUS (knit)¹, or 6209, HTSUS (woven),² and we must consider HQ memo 084118. In accordance with HQ memo 084118 section (a)(3), we needed to determine the weights of the knit and woven components. We do not have a sample of the merchandise to determine the weights of the knit and woven components, however, in the instant case, style 7570512 also has an absorbent component that we must consider under a GRI 3(b) analysis in classifying the merchandise.

For the same reasons discussed above for style 7570513, style 7570512 is classified at the six-digit level in subheading 9619.00, HTSUS, which provides for “Sanitary towels (pads) and tampons, diapers and diaper liners for babies and similar articles, of any material: Other, of textile materials.”

HOLDING:

Under the authority of GRIs 1, 3(b), and 6, style 7575013 is classified in subheading 9619.00, HTSUS, which provides for “Sanitary towels (pads) and tampons, diapers and diaper liners for babies and similar articles, of any material: Other, of textile materials.”

¹ The term “[b]abies’ garments and clothing accessories” is defined by Note 6(a) to Chapter 61, HTSUS, and Note 4(a) to Chapter 62, HTSUS, as “articles for young children of a body height not exceeding 86 centimeters.” Based on the information in NY N245655, style 7570512 will be imported in babies’ sizes 6 to 18 months old. In the *Guidelines for the Reporting of Imported Products in Various Textile and Apparel Categories*, 53 Fed. Reg. 52563 (Dec. 28, 1988), we noted that “[b]abies’ sizes 0–24 months normally fall within” the measurement “for young children of a body height not exceeding 86 centimeters.” Accordingly, style 7570512 could be classifiable in heading 6111, HTSUS, or heading 6209, HTSUS, as “[b]abies’ garments and clothing accessories.”

² In the past, U.S. Customs and Border Protection (“CBP”) has classified similar merchandise that was constructed of woven fabric in Chapter 62, HTSUS, when the merchandise was missing one or more of the features described in *Hampco*. See NY N183425 (Sept. 15, 2011); NY N068491 (July 15, 2009); NY N022635 (Feb. 7, 2008). Rulings concerning similar merchandise constructed of knit fabric could not be located in the Customs Rulings Online Search System (“CROSS”).

Under the authority of GRIs 1, 3(b), and 6, style 7575012 is classified in subheading 9619.00, HTSUS, which provides for “Sanitary towels (pads) and tampons, diapers and diaper liners for babies and similar articles, of any material: Other, of textile materials.”

EFFECT ON OTHER RULINGS:

NY N245655, dated September 12, 2013, is REVOKED.

NY N100856, dated April 15, 2010, is REVOKED by operation of law. The essential character of style GT210 is based on the absorbent component and the merchandise is classified at the six-digit level in subheading 9619.00, HTSUS. Further information concerning the textile composition of the absorbent component would be necessary to determine the classification of the merchandise beyond the six-digit level and to determine the appropriate duty rate.

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

Sincerely,

CRAIG T. CLARK,

Director

Commercial and Trade Facilitation Division



**PROPOSED REVOCATION OF ONE RULING LETTER AND
PROPOSED REVOCATION OF TREATMENT RELATING TO
THE TARIFF CLASSIFICATION OF PLASTIC URINE
DRAINAGE BAGS**

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

ACTION: Notice of proposed revocation of one ruling letter and proposed revocation of treatment relating to the tariff classification of plastic urine drainage bags.

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 one ruling letter concerning tariff classification of plastic urine drainage bags 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 March 25, 2022.

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 one ruling letter pertaining to the tariff classification of plastic urine drainage bags. Although in this notice, CBP is specifically referring to New York Ruling Letter (“NY”) E83373, dated June 28, 1999 (Attachment A), this notice also covers any rulings on this merchandise which may exist, but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the one identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice

memorandum or decision, or protest review decision) on the merchandise subject to this notice should advise CBP during the comment period.

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

In NY E83373, CBP classified plastic urine drainage bags in heading 9018, HTSUS, specifically in subheading 9018.90.80, HTSUS, which provides for "[I]nstruments and appliances used in medical, surgical, dental or veterinary sciences, including scintigraphic apparatus, other electro-medical apparatus and sight-testing instruments; parts and accessories thereof: Other instruments and appliances and parts and accessories thereof: Other: Other." CBP has reviewed NY E83373 and has determined the ruling letter to be in error. It is now CBP's position that plastic urine drainage bags are properly classified in heading 3926, HTSUS, specifically in subheading 3926.90.99, HTSUS, which provides for "[O]ther articles of plastics and articles of other materials of headings 3901 to 3914: Other: Other."

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is proposing to revoke NY E88373 and to revoke or modify any other ruling not specifically identified to reflect the analysis contained in the proposed Headquarters Ruling Letter ("HQ") H322386, set forth as Attachment B to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is proposing to revoke any treatment previously accorded by CBP to substantially identical transactions.

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

Dated:

GREGORY CONNOR
for

CRAIG T. CLARK,
Director

Commercial and Trade Facilitation Division

Attachments

ATTACHMENT A

NY E83373

June 28, 1999

LA-2-90:RR:NC:MM:105 E83373

CATEGORY: Classification

TARIFF NO.: 9018.90.8000

MR. JACK ALSUP
ALSUP & ALSUP, INC.
P.O. BOX 1251
DEL RIO, TX 78841

RE: The tariff classification of Urine Drainage Bags from Mexico

DEAR MR. ALSUP:

In your letter, dated June 9, 1999, for Plasco, Inc., you requested a tariff classification ruling.

The samples are a MDI 87-012 Deluxe Rehab Leg Bag and a 85-005 Classic U.D. Bag. You state both are made of plastics. Both include a transparent bag marked in milliliters to permit easy measurement of the urine and tubes to connect it to, we assume, an indwelling catheter. The leg bag has straps to attach it to the patient's leg.

The applicable subheading for both items will be 9018.90.8000, Harmonized Tariff Schedule of the United States (HTS), which provides for "other" instruments and appliances used in medical, dental or veterinary sciences. The general rate of duty will be free.

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 James Sheridan at 212-637-7037.

Sincerely,

ROBERT B. SWIERUPSKI
Director,
National Commodity
Specialist Division

ATTACHMENT B

HQ H322386
OT:RR:CTF:EMAIN H322386 SKK
CATEGORY: Classification
TARIFF NO.: 3926.90.99

MR. JACK ALSUP
ALSUP & ALSUP, INC.
P.O. BOX 1251
DEL RIO, TX 78841

RE: Revocation of NY E83373; Tariff classification of plastic urine drainage bags from Mexico; Capacity measures

DEAR MR. ALSUP:

This ruling is in reference to New York Ruling Letter (NY) E83373, issued to you on behalf of Plasco, Inc. on June 28, 1999, in which U.S. Customs and Border Protection (CBP) classified plastic urine drainage bags under heading 9018, Harmonized Tariff Schedule of the United States (HTSUS), specifically subheading 9018.90.80, HTSUS, which provides for “other” instruments and appliances used in medical, dental or veterinary sciences. We have determined that NY E83373 is in error and are revoking it pursuant to the following analysis.

FACTS:

The articles at issue in NY E83373 are plastic urine drainage bags, identified as the “MDI 87–012 Deluxe Rehab Leg Bag” and the “85–005 Classic U.D. Bag.” Both articles include a transparent bag marked in milliliters to permit measurement of urine and connective tubes. The leg bag also features leg straps.

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. If 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.

The following HTS headings are under consideration:

- 3926 Other articles of plastics and articles of other materials of headings 3901 to 3914:
- 9018 Instruments and appliances used in medical, surgical, dental or veterinary sciences including scintigraphic apparatus, other electro-medical apparatus and sight-testing instruments; parts and accessories thereof:

Chapter 39, Note 2(u), excludes articles of chapter 90.

Chapter 90, Note 1(m), excludes “[C]apacity measures, which are to be classified according to their constituent material.”

Read together, articles of Chapter 90 are excluded from classification in Chapter 39 unless they are “capacity measures” under Note 1(m) to Chapter 90, in which case they are to be classified according to their constituent

material. Per the facts of NY E83373, the subject urine drainage bags are marked in milliliters to permit measurement of urine by virtue of the capacity of the bags. They are “capacity measures” and thereby precluded from classification in heading 9018, HTSUS, by application of Note 1(m) to Chapter 90, *supra*.

The subject plastic drainage bags are classified according to their constituent material in heading 3926, HSTUS, specifically subheading 3926.90.99, HTSUS, which provides for, in pertinent part, plastic laboratory ware. This conclusion is consistent with NY N005768, dated February 6, 2007, in which CBP classified a pediatric plastic urine collection bag as plastic laboratory ware under subheading 3926.99.98, HTSUS.

HOLDING:

By application of GRIs 1 and 6, the plastic urine drainage bags at issue in NY E83373 are classified under heading 3926, HTS, specifically under subheading 3926.90.9910, HTSUS, which provides for “[O]ther articles of plastics and articles of other materials of headings 3901 to 3914: Other: Other: Laboratory ware.” The applicable rate of duty is 5.3% *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.

EFFECT ON OTHER RULINGS:

NY E88373, dated June 28, 1999, is hereby REVOKED.

Sincerely,

CRAIG T. CLARK,

Director

Commercial and Trade Facilitation Division



**DATES AND DRAFT AGENDA OF THE SIXTY-NINTH
SESSION OF THE HARMONIZED SYSTEM COMMITTEE OF
THE WORLD CUSTOMS ORGANIZATION**

AGENCIES: U.S. Customs and Border Protection, Department of Homeland Security, and U.S. International Trade Commission.

ACTION: Publication of the dates and draft agenda for the 69th session of the Harmonized System Committee of the World Customs Organization.

SUMMARY: This notice sets forth the dates and draft agenda for the next session of the Harmonized System Committee of the World Customs Organization.

DATE: February 4, 2022

FOR FURTHER INFORMATION CONTACT: Maria E. Solorzano, maria.e.solorzano@cbp.dhs.gov, Paralegal Specialist, Office of Trade, Regulations and Rulings, U.S. Customs and Border Protection (202–325–0010), or Daniel Shepherdson, daniel.shepherdson@usitc.gov, Senior Attorney Advisor, Office of Tariff Affairs and Trade Agreements, U.S. International Trade Commission (202–205–2598).

SUPPLEMENTARY INFORMATION:

BACKGROUND

The United States is a Contracting Party to the International Convention on the Harmonized Commodity Description and Coding System (“Harmonized System Convention”). The Harmonized Commodity Description and Coding System (“Harmonized System”), an international nomenclature system, forms the core of the U.S. tariff, the Harmonized Tariff Schedule of the United States. The Harmonized System Convention is under the jurisdiction of the World Customs Organization (established as the Customs Cooperation Council).

Article 6 of the Harmonized System Convention establishes a Harmonized System Committee (“HSC”). The HSC is composed of representatives from each of the contracting parties to the Harmonized System Convention. The HSC’s responsibilities include issuing classification decisions on the interpretation of the Harmonized System. Those decisions may take the form of published tariff classification opinions concerning the classification of an article under the Harmonized System or amendments to the Explanatory Notes to the Harmonized System. The HSC also considers amendments to the legal text of the Harmonized System. The HSC meets twice a year in Brussels, Belgium. The next session of the HSC will be its 69th. Including the “presessional working party”, the HSC will be held from February 28, 2022 through March 25, 2022.

In accordance with section 1210 of the Omnibus Trade and Competitiveness Act of 1988 (Pub. L. 100–418), the Department of Homeland Security, represented by U.S. Customs and Border Protection, the Department of Commerce, represented by the Census Bureau, and the U.S. International Trade Commission (USITC), jointly represent the United States. The U.S. Customs and Border Protection representative serves as the head of the delegation at the sessions of the HSC.

Attached to this notice is the draft agenda for the next session of the HSC. Copies of available agenda-item documents may be obtained

from either U.S. Customs and Border Protection or the USITC. Comments on agenda items may be directed to the above-listed individuals.

/s/ GREGORY CONNOR,
Chief,
Electronics, Machinery, Automotive,
and International Nomenclature Branch

Attachment



WORLD CUSTOMS ORGANIZATION
ORGANISATION MONDIALE DES DOUANES

Established in 1952 as the Customs Co-operation Council
Créée en 1952 sous le nom de Conseil de coopération douanière

HARMONIZED SYSTEM
COMMITTEE

-
69th Session

NC2857Eb

Brussels, 27 January 2022.

DRAFT AGENDA FOR THE 69TH SESSION
OF THE HARMONIZED SYSTEM COMMITTEE

N.B.: The Preessional Working Party (to examine the questions under Agenda Item VI) will be held with four KUDO sessions from Monday 28 February to Thursday 3 March 2022 (12:00 – 15:00).

Tuesday 15 March 2022: Adoption of the Report of the 59th Session of the HS Review Sub-Committee.

Tuesday 22 March 2022: Adoption of the Report of the 37th Session of the Scientific Sub-Committee.

I.	<p>ADOPTION OF THE AGENDA</p> <ol style="list-style-type: none"> 1. Draft Agenda 2. Draft Timetable 	<p>NC2857Eb NC2858Fb NC2858Eb</p>
II.	<p>REPORT BY THE SECRETARIAT</p> <ol style="list-style-type: none"> 1. Position regarding Contracting Parties to the HS Convention, HS Recommendations and related matters; progress report on the implementation of HS 2022 - status and challenges 2. Report on the latest meeting of the Policy Commission (85th Session) 3. Approval of decisions taken by the Harmonized System Committee at its 68th Session 4. Capacity building activities of the Nomenclature and Classification Sub-Directorate 5. Co-operation with other international organizations 6. New information provided on the WCO Web site 7. Other 	<p>NC2859 NC2860 NG0271Ea NC2856Ea NC2861 NC2862 NC2864</p>

III.	<p>GENERAL QUESTIONS</p> <ol style="list-style-type: none"> 1. Consultation on the possible strategic review of the HS 2. Possible amendment to the Rules of Procedure of the Harmonized System Committee to clarify the voting procedures (proposal by the Secretariat) 3. Possible amendment of the Rules of Procedure to reflect gender neutral language (proposal by the Secretariat) 4. Scope of the Seventh Harmonized System Review Cycle 5. Draft Corrigendum amendments to the Compendium of Classification Opinions 6. Draft Corrigendum amendments to the Explanatory Notes 7. Consultation on continued inclusion of Tariff Engineering in the Revenue Package 8. Template for Work Programmes of WCO Working Bodies 	<p>NC2865Ea NC2865EAE1a</p> <p>NC2866Ea</p> <p>NC2867Ea NC2867FAE1a</p> <p>NC2868</p> <p>NC2869Ea NC2869FAB1a</p> <p>NC2870</p> <p>NC2871</p> <p>NC2924</p>
IV.	<p>REPORT OF THE SCIENTIFIC SUB-COMMITTEE</p> <ol style="list-style-type: none"> 1. Report of the 37th Session of the Scientific Sub-Committee (available 4 March 2022) 2. Matters for decision 	<p>NC2872</p>
V.	<p>REPORT OF THE HS REVIEW SUB-COMMITTEE</p> <ol style="list-style-type: none"> 1. Report of the 59th Session of the HS Review Sub-Committee 2. Matters for decision 	<p>NR1489Ec NR1489EAB1c</p> <p>NC2873</p>
VI.	<p>REPORT OF THE PRESESSIONAL WORKING PARTY</p> <p>Possible amendments to the Compendium of Classification Opinions and the Explanatory Notes consequential to the decisions taken by the Committee at its 68th Session</p> <ol style="list-style-type: none"> 1. Amendment to the Compendium of Classification Opinions to reflect the decision to classify varieties of fruit spreads in heading 20.07 (subheading 2007.99) 2. Amendment to the Compendium of Classification Opinions to reflect the decision to classify the product called “Herbal Tea Concentrate” in heading 21.01 (subheading 2101.20) 3. Amendment to the Compendium of Classification Opinions to reflect the decision to classify a product called “Soya-bean flakes” in heading 23.04 (HS Code 2304.00) 	<p>NC2874Ea NC2874EAB1a</p> <p>PRESENTATION_ Annex_A</p> <p>PRESENTATION_ Annex_B</p> <p>PRESENTATION_ Annex_C</p>

	<p>4. Amendment to the Compendium of Classification Opinions to reflect the decision to classify certain products of Chapter 24 Product 1: [redacted] Inhaler in heading 24.04 (subheading 2404.12); Product 2 [redacted] Oral Nicotine Pouches in heading 24.04 (subheading 2404.91); Product 2 (b): [redacted] Oral Nicotine Pouches in heading 24.03 (subheading 2403.99); Product 3: [redacted] Essential Oil Diffusers in heading 24.04 (subheading 2404.19); Product 4: Nicotine Packs in heading 24.04 (subheading 2404.12) and Product 5: Nasal Snuff in heading 24.03 (subheading 2403.99)</p> <p>5. Amendment to the Compendium of Classification Opinions to reflect the decision to classify three products called “Shampoo & gel 2 in 1” in heading 33.05 (subheading 3305.10)</p> <p>6. Amendment to the Compendium of Classification Opinions to reflect the decision to classify derivatives of isothiazolinones in heading 38.08 (subheading 3808.94)</p> <p>7. Amendment to the Compendium of Classification Opinions to reflect the decision to classify a 1.75mm ABS Refill Filament manufactured for an additive manufacturing machine (3D printer) in heading 39.16 (subheading 3916.90)</p> <p>8. Amendment to the Compendium of Classification Opinions to reflect the decision to classify two types of “plastic clothes hangers” (“standard” hangers and specialized hangers) in heading 39.24 (subheading 3924.90)</p> <p>9. Amendment to the Compendium of Classification Opinions to reflect the decision to classify a mat with rounded corners called [redacted] in heading 39.26 (subheading 3926.90)</p> <p>10. Amendment to the Compendium of Classification Opinions to reflect the decision to classify new pneumatic tyres (Products A and B), of rubber, intended for vehicles used for the transportation of goods in construction, mining or industry in heading 40.11 (subheading 4011.20)</p> <p>11. Amendment to the Compendium of Classification Opinions to reflect the decision to classify “round pickets and stakes, product 1” in heading 44.04 (subheading 4404.10) and “squared pickets and stakes, product 2” in heading 44.21 (subheading 4421.99)</p> <p>12. Amendment to the Compendium of Classification Opinions to reflect the decision to classify a product called “Quilt bag” in heading 63.05 (subheading 6305.39)</p>	<p>PRESENTATION_ Annex_D</p> <p>PRESENTATION_ Annex_E</p> <p>PRESENTATION_ Annex_F</p> <p>PRESENTATION_ Annex_G</p> <p>PRESENTATION_ Annex_H</p> <p>PRESENTATION_ Annex_IJ</p> <p>PRESENTATION_ Annex_K</p> <p>PRESENTATION_ Annex_L</p> <p>PRESENTATION_ Annex_M</p>
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	<p>13. Amendment to the Compendium of Classification Opinions to reflect the decision to classify a “heat-resistant glass lid” in heading 70.10 (subheading 7010.20)</p> <p>14. Amendment to the Explanatory Note to headings 70.10 or 70.13 to clarify the classification of a “heat-resistant glass lid</p> <p>15. Amendment to the Explanatory Note to heading 84.19 to clarify the classification of sterilisers using an aqueous solution of formaldehyde as a volatile sterilising agent</p> <p>16. Amendment to the Compendium of Classification Opinions to reflect the decision to classify a product called “digital smart pen (smart pen) [redacted] in heading 84.71 (subheading 8471.60)</p> <p>17. Amendment to the Compendium of Classification Opinions to reflect the decision to classify a floor polisher called [redacted] in heading 84.79 (subheading 8479.89)</p> <p>18. Amendment to the Compendium of Classification Opinions to reflect the decision to classify an electronic speed controller called [redacted] in heading 85.04 (subheading 8504.40)</p> <p>19. Amendment to the Compendium of Classification Opinions to reflect the decision to classify certain projectors (Product B) in heading 85.28 (subheading 8528.62)</p> <p>20. Amendment to the Compendium of Classification Opinions to reflect the decision to classify mild hybrid vehicles in heading 87.03 (subheading 8703.22)</p> <p>21. Amendment to the Compendium of Classification Opinions to reflect the decision to classify a product called [redacted] in heading 94.05 (subheading 9405.40)</p>	<p>PRESENTATION_ Annex_N</p> <p>PRESENTATION_ Annex_O</p> <p>PRESENTATION_ Annex_P</p> <p>PRESENTATION_ Annex_Q</p> <p>PRESENTATION_ Annex_R</p> <p>PRESENTATION_ Annex_S</p> <p>PRESENTATION_ Annex_T</p> <p>PRESENTATION_ Annex_U</p> <p>PRESENTATION_ Annex_V</p>
VII.	<p>REQUESTS FOR RE-EXAMINATION (RESERVATIONS)</p> <p>1. Re-examination of the classification of two products called [redacted] (Request by Korea)</p> <p>2. Re-examination of the classification of an electronic speed controller called [redacted] (Request by China)</p> <p>3. Re-examination of the classification of dried fish subsequently treated with water (rehydrated dried fish) (Request by Japan)</p> <p>4. Re-examination of the classification of rooibos tea (Request by the United States)</p> <p>5. Re-examination of the classification of the [redacted] Commercial Utility vehicle (Request by the United States)</p>	<p>NC2875Ea</p> <p>NC2876Ea</p> <p>NC2877</p> <p>NC2878</p> <p>NC2879Ea</p>

	<ol style="list-style-type: none"> 6. Re-examination of the classification of a device called [REDACTED] GPS running watch with wristbased heart rate monitor” (Requests by Switzerland and Russian Federation) 7. Re-examination of the classification of a product called [REDACTED] (Request by the Russian Federation) 8. Re-examination of the classification of a balancing block called [REDACTED] (Request by Switzerland) 9. Re-examination of the classification of a “cutter/ripper” (Request by the Russian Federation) 10. Re-examination of the classification of two products called “Coffee Makers” (Request by Guatemala) 	<p>NC2880</p> <p>NC2881Ea</p> <p>NC2882</p> <p>NC2883Ea</p> <p>NC2884Ea</p>
VIII.	<p>FURTHER STUDIES</p> <ol style="list-style-type: none"> 1. Possible amendment of the Explanatory Note to heading 27.10 (Proposal by Japan) 2. Classification of certain food preparations in liquid form (Request by Tunisia) 3. Classification of a “System for the production of animal feed in pellet form” (Request by Colombia) 4. Classification of certain “ Edible collagen casings for sausages ” (Request by Peru) 5. Classification of a product called [REDACTED] (Request by Tunisia) 6. Classification of a product called [REDACTED] (Request by Tunisia) 7. Possible amendment to the Nomenclature and the Explanatory Notes to clarify the classification of “pickets and stakes” (Proposal by the Secretariat) 8. Classification of a rectangular mat with rightangled corners called [REDACTED] (Request by the Secretariat) 9. Possible amendment to the Nomenclature to clarify the classification of cellular bamboo panels (Proposal by the Secretariat) 10. Possible amendment to the Explanatory Notes to clarify the classification of sterilisers using an aqueous solution of formaldehyde as a volatile sterilising agent (Proposal by the Secretariat) 11. Possible amendment to the Explanatory Note to heading 38.08 (Request by the EU) 	<p>NC2885Ea</p> <p>NC2886</p> <p>NC2887</p> <p>NC2888</p> <p>NC2889</p> <p>NC2890</p> <p>NC2891</p> <p>NC2892Ea</p> <p>NC2893</p> <p>NC2894Ea NC2894EAB1a</p> <p>NC2895</p>
IX.	<p>NEW QUESTIONS</p> <ol style="list-style-type: none"> 1. Possible amendment of the Explanatory Note to heading 85.28 to clarify the expression “designed for use with” (Proposal by the Secretariat) 	<p>NC2896Ea</p>

2.	Possible amendment of the Explanatory Note to heading 85.18 concerning micro-phones (Proposal by China)	NC2897Ea
3.	Possible amendment to the English version of the Explanatory Note to heading 04.06 to better align its meaning with that of the French version (Proposal by Canada)	NC2898Ea
4.	Possible amendment to exclusion b) in the Explanatory Note to Chapter 47 (Proposal by Canada)	NC2899Ea NC2899EAB1a
5.	Possible amendment to the Explanatory Note to heading 56.03 (Proposal by Canada)	NC2900
6.	Classification of a “PVC canvas” bearing the reference [REDACTED] (Request by Morocco)	NC2901
7.	Classification of a product called “Dump truck tire” (Request by Colombia)	NC2902
8.	Possible misalignment between the English and French texts in the Explanatory Note to heading 32.05 (Proposal by the Secretariat)	NC2903Ea
9.	Classification of an aluminum composite panel (Request by Yemen)	NC2904
10.	Possible misalignment between the text of subheading 8430.3 and the relevant EN (Request by Armenia)	NC2905Ea
11.	Classification of fixed and mobile bleachers” (Request by Jamaica)	NC2906
12.	Classification of a product called “[REDACTED] Herbal cough lozenges” (Request by Uganda)	NC2907Ea
13.	Classification of a product called “[REDACTED] Ice Lollies”(Request by Mauritius)	NC2908Ea
14.	Classification of an “inlet valve” (Request by Uganda)	NC2909Ea
15.	Classification of certain thin bricks (Request by the Secretariat)	NC2910
16.	Classification of hydraulic hammers (Request by the Secretariat)	NC2911
17.	Classification of “unshelled pumpkin seeds intended for human consumption” (Request by Ukraine)	NC2912
18.	Possible amendment to the Explanatory Notes to Chapter 29 (List of Narcotic Drugs and Psychotropic Substances) (Proposal by the Secretariat)	NC2913
19.	Classification of [REDACTED] (sugar confectionary) (Request from the EU)	NC2914
20.	Classification of pedestal jib cranes (Request from the EU)	NC2920
21.	Possible amendments to the HSEN to heading 70.18 (Proposal from the EU)	NC2915

	<p>22. Classification of a product called “Greenish Yellow Polyester Premier Paint” (Request by Colombia)</p> <p>23. Classification of a self-propelling ice filling machine (Request by the Russian Federation)</p> <p>24. Classification of a turbo-shaft engine (Request by the Russian Federation)</p> <p>25. Possible amendments to the HSEN to heading 84.11 (Proposal from the EU)</p> <p>26. Possible amendments to the HSEN to heading 90.27 (Proposal from the EU)</p>	<p>NC2916</p> <p>NC2917</p> <p>NC2918</p> <p>NC2863</p> <p>NC2921</p>
X.	<p>ADDITIONAL LIST</p> <p>1. Review on interpretation of species In the Annex to Chapter 44 “Appellation of certain tropical woods” (Proposal by Korea)</p> <p>2. Classification of a product called “ [REDACTED] Interacting Conference Terminals” (Request by China)</p>	<p>NC2922</p> <p>NC2923</p>
XI.	<p>OTHER BUSINESS</p> <p>1. List of questions which might be examined at a future session</p>	<p>NC2919</p>
XII.	<p>DATES OF NEXT SESSIONS</p>	

U.S. Court of International Trade

Slip Op. 22–9

FINE FURNITURE (SHANGHAI) LIMITED, et al., Plaintiffs, and
METROPOLITAN HARDWOOD FLOORS, INC., et al., Plaintiff-Intervenors,
v. UNITED STATES, Defendant, and COALITION FOR AMERICAN
HARDWOOD PARITY, Defendant-Intervenor.

Before: Timothy C. Stanceu, Judge
Consol. Court No. 14–00135

JUDGMENT

Before the court in this consolidated action are the Final Results of Redetermination Pursuant to Court Order (July 12, 2021), ECF Nos. 376, 376–1 (“Remand Redetermination”), the comments of certain parties thereon, Consolidated Pls.’ Comments on Final Remand Results (Aug. 11, 2021), ECF No. 379, and defendant’s reply to the comments, Def.’s Reply to Comments on Remand Redetermination (Aug. 24, 2021), ECF No. 381 (“Def.’s Reply”).

Also before the court is the response of plaintiff Fine Furniture (Shanghai) Limited (“Fine Furniture”) to the court’s Opinion and Order (June 2, 2021), ECF No. 374, concerning the status of relief to that party, in which Fine Furniture informs the court that it has received full relief as a result of liquidation of entries and the refund of excess duties. Notice of Full Relief Pursuant to Court Order (July 30, 2021), ECF No. 378. Plaintiff Dunhua City Jisen Wood Industry Co., Ltd. (“Dunhua Jisen”) also has informed the court, in response to the court’s Opinion and Order, that it “considers that it has received full relief with respect to its shipments subject to this litigation.” Notice of Full Relief Pursuant to Court Order 2 (Aug. 11, 2021), ECF No. 380.

No party commented in opposition to the Remand Redetermination. Additionally, with respect to the remaining issue in this litigation, which is the rate to be determined for the separate rate respondents, defendant has informed the court that the International Trade Administration, U.S. Department of Commerce (“Commerce”) “has now complied with the instructions in the Court’s order” and “revised the separate rate calculated for separate rate respondents who are party to this litigation and have injunctions in place,” determining “the revised separate rate to be 0.00 percent, based on the zero percent rates calculated for Armstrong Wood Products (Kunshan) Co., Ltd. and Nanjing Minglin Wooden Industry, Co., Ltd.” Def.’s Reply 2. In the Remand Redetermination, Commerce informed the court that

“[s]hould the CIT affirm these final results of redetermination we intend to issue an amended final results and instructions to CBP [U.S. Customs and Border Protection], accordingly.” Remand Redetermination 7.

Therefore, upon consideration of all papers and proceedings had herein, and upon due deliberation, it is hereby

ORDERED that the Remand Redetermination be, and hereby is, sustained; and it is further

ORDERED that, in accordance with the statements by Commerce, Remand Redetermination 6–7, Commerce shall issue amended final results and liquidation instructions to U.S. Customs and Border Protection that are in accordance with the decisions reached in the Remand Redetermination.

Dated: February 7, 2022

New York, New York

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

Slip Op. 22–10

BOTH-WELL (TAIZHOU) STEEL FITTINGS, CO., LTD., Plaintiff, v. UNITED STATES, Defendant, and BONNEY FORGE CORPORATION, Defendant-Intervenor.

Before: Claire R. Kelly, Judge
Court No. 21–00166

[Remanding the U.S. Department of Commerce’s final determination in the first administrative review of the countervailing duty order covering forged steel fittings from the People’s Republic of China.]

Dated: February 8, 2022

Peter Koenig and Jeremy W. Dutra, Squire Patton Boggs (US) LLP, of Washington, D.C. for plaintiff Both-Well (Taizhou) Steel Fittings, Co., Ltd.

Claudia Burke, Assistant Director, and *Kara M. Westercamp*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C. for defendant. Also on the brief were *Brian M. Boynton*, Acting Assistant Attorney General, and *Jeanne E. Davidson*, Director. Of counsel on the brief was *Jared M. Cynamon*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington D.C.

Roger B. Schagrin, *Christopher T. Cloutier*, *Benjamin J. Bay*, and *Michelle R. Avrutin*, Schagrin Associates, of Washington, D.C. for defendant-intervenor Bonney Forge Corporation.

OPINION AND ORDER

Kelly, Judge:

Before the court is Both-Well (Taizhou) Steel Fittings, Co., Ltd.'s ("Both-Well") rule 56.2 motion for judgment on the agency record challenging the U.S. Department of Commerce's ("Commerce") final determination in the 2018 administrative review of the countervailing duty ("CVD") order on forged steel fittings ("FSF") from the People's Republic of China ("China"). See Pl.'s Mot. for J. on Agency R., Aug. 30, 2021, ECF No. 25 ("Pl.'s Mot."); *[FSF] from [China]*, 86 Fed. Reg. 14,722 (Dep't Commerce Mar. 18, 2021) (final results of [CVD] Admin. Review; 2018) ("*Final Results*") and accompanying Issues and Decision Memo., C-570-068, (Mar. 10, 2021), ECF No. 19-5 ("Final Decision Memo."); *[FSF] from [China]*, 83 Fed. Reg. 60,396 (Dep't Commerce Nov. 26, 2018) ([CVD] Order) ("*FSF CVD Order*"). Both-Well challenges Commerce's decision to use facts available with an adverse inference to assign a CVD rate of 10.54% for its use of China's Export Buyer's Credit Program ("EBCP") despite un rebutted evidence of non-use from Both-Well and its U.S. customers (the "non-use certifications," "Customer Declaration," or "declarations"). Memo. of Points and Authorities in Supp. of [Pl.'s Mot.] 4-8, Aug. 30, 2021, ECF No. 25 ("Pl.'s Br."). Defendant counters that Commerce lawfully and reasonably resorts to facts available with an adverse inference because the Government of China (the "GOC") failed to cooperate to the best of its ability by failing to provide Commerce with information about the administration of the EBCP necessary to verify the non-use certifications, creating a gap in the record. Def.'s Resp. to [Pl.'s Mot.] at 11-21, Nov. 2, 2021, ECF No. 30 ("Def.'s Br."). Commerce filled the gap using facts available with an adverse inference and determined that Both-Well benefitted from the EBCP. *Id.* at 18. For the following reasons, the court remands Commerce's *Final Results*.

BACKGROUND

Commerce issued a CVD order covering FSF from China in 2018. *FSF CVD Order*. On January 17, 2020, Commerce initiated an administrative review of the *FSF CVD Order*, at the request of Both-Well and domestic producer Bonney Forge Corporation ("Bonney Forge") for the period of March 14, 2018 through December 31, 2018. Letter from Roger B. Schagrín and Christopher T. Cloutier, Schagrín Associates to Sec. of Commerce Re: [FSF] from China: Request for Admin. Review, PD 2, Doc No. 3916313- 01 (Nov. 27, 2019); Letter from Peter Koenig, Squire Patton Boggs (US) LLP to Sec. of Commerce Re: [FSF] from China: Antidumping, PD 3, Doc. No. 3916587-

01 (Nov. 27, 2019); *Initiation of Antidumping and [CVD] Admin. Reviews*, 85 Fed. Reg. 3,014, 3,022 (Dep't Commerce Jan. 17, 2020).¹ On March 12, 2020, petitioners Bonney Forge and the United Steel, Paper, Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union alleged that Both-Well may have received preferential lending through the EBCP. Letter from Roger B. Schagrin and Christopher T. Cloutier, Schagrin Associates to Sec. of Commerce Re: [FSF] from China: New Subsidy Allegation, PD 36, Doc No. 3953930-01 (Mar. 13, 2020) ("New Subsidy Allegation"); Decision Memo. for the Preliminary Results: Admin. Review of the [CVD] Order on [FSF] from [China] C570-068 3, PD 85, Doc. No. 4050966-01 (Dep't Commerce Nov. 20, 2020) ("Prelim. Decision Memo."). The EBCP is a program backed by the GOC providing medium-and long-term loans to importers at preferential, low interest rates to finance eligible projects. *See* Final Decision Memo. at 11, 19, 23 n.99.

On April 7, 2020, Commerce initiated an investigation into the New Subsidy Allegation and issued questionnaires to Both-Well and the GOC seeking additional information about the use and administration of the EBCP. Memo. from Janae Martin and Kate Johnson, International Trade Compliance Analysts, Antidumping and Countervailing Duty Operations to Irene Darzenta Tzafolias, Director Office VIII, Re: Decision Memo. for New Subsidy Allegation, PD 42, Doc No. 3962212-01 (Apr. 7, 2020); Letter from Rebecca Trainor, Program Manager, AD/CVD Operations, Office VIII, Dep't Commerce to Mr. Gu Yu, First Secretary, Embassy of [China], Economic and Commercial Office Re: Admin. Review of the [CVD] Order on [FSF] from [China]: New Subsidy Allegations Questionnaire, PD 45, Doc No. 3962767-01 (Apr. 8, 2020) ("GOC Questionnaire"); Letter from [Commerce] to Peter Koenig, Squire Patton Boggs (US) LLP Re: 2018 Admin. Review of the [CVD] Order on [FSF] from [China]: New Subsidy Allegations Questionnaire for Both-Well, PD 46, Doc. No. 3962772-01 (Apr. 8, 2020); Prelim. Decision Memo. at 3.

Both-Well and the GOC timely responded to Commerce's questionnaires. Resp. from [China] Ministry of Commerce, Trade Remedy and Investigation Bureau to [Commerce] Re: GOC New Subsidy Allegation Questionnaire Response: First Admin. Review of the [CVD] Investigation on [FSF] from [China] (C-570-068), PD 54, CD, 14 Doc.

¹ On May 25, 2021, Defendant submitted indices to the public and confidential administrative records underlying Commerce's final determination. These indices are located on the docket at ECF Nos. 19-2 and 19-3, respectively. All references in this opinion to documents from the administrative record underlying Commerce's final determination are identified by the numbers assigned by Commerce in those indices and preceded by "PD" and "CD" to denote public or confidential documents.

No. 3966875–01 (Apr. 21, 2020) (“GOC NSA Resp.”); Resp. from Squire Patton Boggs (US) LLP to [Commerce] Re: [FSF] from China, PD 60, CD 16, Doc. No. 3969927–01 (Apr. 22, 2020) (“Both-Well NSA Resp.”). Both-Well certified that it did not benefit from the EBCP and “it did not assist any of its customers in obtaining buyer’s credits, and never had contact nor was associated with China’s Ex-Im Bank during the period of review.” Pl.’s Br. at 2; *see also* Both-Well NSA Resp. at 2–3. Both-Well included a list of its customers and non-use certifications from all its U.S. customers certifying that they did not finance any purchases from Both-Well using the EBCP in its response. Both-Well NSA Resp. at Exs. NSA-1, NSA-2; *see also* Pl.’s Br. at 2.

In both its initial questionnaire and a subsequent supplemental questionnaire, Commerce requested that the GOC provide the information in Commerce’s Standard Questions Appendix,² the 2013 revisions to the Administrative Regulations (the “2013 Administrative Regulations”) for the EBCP, and a list of partner or correspondent banks³ involved with the disbursement of EBCP funds. Final Decision Memo. at 16–18; *see also* GOC Questionnaire; Letter from [Commerce] to Embassy of [China] re: Admin. Review of the [CVD] Order of [FSF] from [China]: GOC Supplemental Questionnaire, PD 74, Doc No. 4002506–01 (July 16, 2020) (“GOC Supplemental Questionnaire”). The GOC did not provide all the documents requested by Commerce and instead confirmed that none of Both-Well’s U.S. customers “applied for, used, or benefitted from the alleged program during the P[eriod] O[f] I[n]vestigation”⁴ therefore, “a response to the Standard Questions Appendix is not necessary.” GOC NSA Resp. at 1. Furthermore, the GOC stated that in light of the non-use, Commerce’s request for a list of intermediary banks was “overly broad

² “The Standard Questions Appendix request[s] various information that Commerce requires in order to analyze the specificity and financial contribution of [the EBCP], including . . . translated copies of the laws and regulations pertaining to the [EBCP]; a description of the agencies and types of records maintained for administration of the program; a description of the program and the application process; program eligibility criteria; and program usage.” Final Decision Memo. at 16.

³ Commerce’s questionnaire to the GOC requests a list of “partner/correspondent banks,” GOC Questionnaire at 4, however, Commerce refers to these banks by a variety of names in the Final Decision Memo. *See, e.g.*, Final Decision Memo. at 11 (“third-party banks”), 18 (“intermediary banks”), 18 n.73 (“correspondent banks”). For clarity, the court will refer to these banks as intermediary banks.

⁴ The GOC stated that it received Both-Well’s customer list and provided it to the China Export-Import Bank. GOC NSA Resp. at 3. The China Export-Import Bank stated that it searched its records and confirmed that none of the listed customers received “Export Buyers Credits” from the China Export-Import Bank during the period of review. *Id.* The GOC attached screenshots of the search results to its response. GOC NSA Resp. at Ex. 4.

. . . and . . . unnecessary.”⁵ *Id.* at 3. The GOC failed to provide the 2013 Administrative Regulations because it claimed they are “internal to the [China Export-Import] [B]ank, non-public, and not available for release.” GOC NSA Resp., Ex. 1 at 3; *see also* Letter re: [GOC Supplemental Questionnaire] 2, PD 78, Doc No. 4004744–01 (July 22, 2020) (“GOC NSA Supp. Resp.”).

In the Final Decision Memo. Commerce determined that it was unable to verify the non-use certifications provided by Both-Well and its U.S. customers because the GOC failed to provide necessary information pertaining to the administration of the EBCP. Final Decision Memo. at 15–20. Specifically, Commerce explained that it could not verify the non-use certifications without the names of the intermediary banks that might appear in the books and records of the recipient because record evidence indicates that the EBCP uses a “complicated structure of loan disbursements.” *Id.* at 18–19. Commerce also determined that verification of the non-use certifications is further complicated by revisions to the EBCP made in 2013, which may have eliminated the \$2 million minimum disbursement requirement, increasing the number of potential loans for Commerce to review. *Id.* at 17–18. Consequently, Commerce determined that it lacked information necessary to verify the non-use certifications due to the GOC’s failure to cooperate, creating a gap in the record that Commerce filled using facts available with an adverse inference. *Id.* at 23, 25–26. Commerce assigned Both-Well a countervailable subsidy rate of 10.54%. *Id.* at 27. Both-Well now challenges Commerce’s decision to disregard the non-use certifications on the record and use facts available with an adverse inference. Pl.’s Br. at 1.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to § 516A(a)(2)(B)(iii) of the Tariff Act of 1930 as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2018),⁶ and 28 U.S.C. § 1581(c) (2018), which grant the court authority to review actions contesting the final determination in an administrative review of a CVD order. The court will uphold Commerce’s determination unless it is “unsupported by substantial evidence on the record, or otherwise not in accordance with law.” 19 U.S.C. § 1516a(b)(1)(B)(iii).

⁵ The GOC directed Commerce to decisions from this Court “which [have] held that information such as the EX-IM Bank’s internal guidelines are not necessary or material to the question of non-usage.” *Id.* at 5.

⁶ Further citations to the Tariff Act of 1930, as amended, are to the relevant provision of Title 19 of the U.S. Code, 2018 edition.

DISCUSSION

Both-Well argues that Commerce's decision to use facts available with an adverse inference to find that Both-Well benefited from the EBCP and assign Both-Well a 10.54% CVD rate for its use is unsupported by substantial evidence. Pl.'s Br. at 4–8. Both-Well argues it provided un rebutted non-use certifications from all its U.S. customers stating they did not benefit from the EBCP. *Id.* Furthermore, Both-Well argues that Commerce did not attempt to verify the non-use certifications and therefore cannot conclude there is a gap in the record warranting the use of facts available with an adverse inference. *Id.* at 9–12. Defendant argues that the use of facts available with an adverse inference is supported by substantial evidence and in accordance with law because the GOC failed to cooperate to the best of its ability when it failed to provide necessary information regarding the administration of the EBCP requested by Commerce. Def.'s Br. at 11–21. Without the requested information, Defendant asserts Commerce could not verify the non-use certifications, resulting in a gap in the record and the need to use facts available with an adverse inference. *Id.* at 19, 21. Defendant-Intervenor Bonney Forge argues Commerce should not rely on the non-use certifications because the GOC failed to provide necessary information about the administration of the EBCP, preventing Commerce from verifying non-use. Def-Intervenor's Resp. Br. in Opp. to [Pl.'s Mot.] 6–9, Nov. 2, 2021, ECF No. 29.

If Commerce determines that a foreign government or public entity “is providing, directly or indirectly, a countervailable subsidy with respect to the manufacture, production, or export of a class or kind of merchandise imported, or sold (or likely to be sold) for importation, into the United States,” Commerce will impose a duty in the amount equal to the net countervailable subsidy. 19 U.S.C. § 1671(a). A subsidy is countervailable when a foreign government provides a financial contribution that confers a benefit and is specific, i.e., provided to a particular industry, enterprise, or for the purpose of export. *See* 19 U.S.C. § 1677(5)(B), (5A). In countervailing duty investigations, Commerce requires information regarding subsidies from both the foreign government and the producers or exporters. *Essar Steel Ltd. v. United States*, 34 C.I.T. 1057, 1070 (2010), *aff'd in part, rev'd in part on other grounds*, 678 F.3d 1268 (Fed. Cir. 2012)). When Commerce is missing information necessary to make a countervailing duty determination, it must use facts otherwise available to fill the gap in the record

created by the missing information.⁷ See 19 U.S.C. § 1677e(a). If a gap exists and a party failed to cooperate to the best of its ability,⁸ Commerce may use an adverse inference when selecting facts available to fill the gap. 19 U.S.C. § 1677e(b). In cases where Commerce confronts non-use certifications connected to the EBCP, determining that a gap exists requires Commerce to explain “exactly what information is missing from the record necessary to verify non-use” and why “only the withheld information can fill the gap.”⁹ See *Jiangsu*, 405 F. Supp. 3d at 1333; see also *Guizhou III*, 523 F. Supp. 3d at 1359–61 & nn.43–48 (collecting cases). Although using facts available with an adverse inference may be permissible, doing so when it collaterally affects a cooperating party is disfavored. *Fine Furniture (Shanghai) Ltd. v. United States*, 36 C.I.T. 1206, 1212 n.10 (2012), *aff'd*, 748 F.3d 1365 (Fed. Cir. 2014); *GPX Int’l Tire Corp. v. United States*, 37 C.I.T. 19, 58–59 (2013), *aff'd*, 780 F.3d 1136 (Fed. Cir. 2015) (Commerce is expected to consider evidence on the record that fills the gaps created by the government’s lack of cooperation); *Changzhou Trina Solar Energy Co. v. United States*, No. 17–00246, 2019 WL 6124908, at *3 (Ct. Int’l Trade Nov. 18, 2019) (“*Changzhou IV*”) (citing *Archer Daniels Midland Co. v. United States*, 917 F. Supp. 2d 1331, 1342 (Ct. Int’l Trade 2013)).

In this case, Both-Well submitted non-use certifications from its U.S. customers supporting Both-Well’s claim of non-use and detracting from Commerce’s conclusion to the contrary. Both-Well NSA Resp. at Ex. NSA-2. Commerce explains that it cannot verify the non-use certifications because the record is missing two pieces of information: the 2013 Administrative Regulations, specifically whether the China

⁷ The Statement for Administrative Action indicates that Commerce may resort to facts otherwise available if “requested information is missing from the record or cannot be used because, for example, it has not been provided, it was provided late, or Commerce could not verify the information.” Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103–316, vol. 1, at 869 (1994), reprinted in 1994 U.S.C.A.N. 4040, 4209. Commerce must “consider information requested from interested parties that: (1) is on the record; (2) was filed within the applicable deadlines; and (3) can be verified.” *Id.*

⁸ A respondent cooperates to the best of its ability when it does “the maximum it is able to do.” *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003).

⁹ Prior court opinions have provided a framework for explaining what Commerce must do to support a decision to use facts available with an adverse inference. *Jiangsu Zhongji Lamination Materials Co. v. United States*, 405 F. Supp. 3d 1317, 1333 (Ct. Int’l Trade 2019) (Commerce must “(1) define the gap in the record by explaining exactly what information is missing from the record necessary to verify non-use; (2) establish how the withheld information creates this gap by explaining why the information the GOC refused to give was necessary to verify claims of non-use; and (3) show that only the withheld information can fill the gap by explaining why other information, on the record or accessible by respondents, is insufficient or impossible to verify”); see also *Guizhou Tyre Co., Ltd. v. United States*, 523 F. Supp. 3d 1312, 1361 (Ct. Int’l Trade 2021) (“*Guizhou III*”). The court assumes familiarity with this framework and adds that essentially this test boils down to whether the missing information is the only information that can be used to verify the non-use certifications.

Export-Import Bank eliminated the \$2 million threshold required to receive an Export Buyers Credit, and a list of intermediary banks authorized to disburse Export Buyers Credits.¹⁰ Final Decision Memo. at 17–18. Commerce specifically requested this information from the GOC twice and the GOC failed to provide it. *See id.* at 16–17 (citing GOC Questionnaire; GOC Supplemental Questionnaire). Commerce concludes that verification of the non-use certifications without the missing information “would be extremely difficult, if not impossible.” *Id.* at 20. Commerce explains that it currently understands that the EBCP provides loans to a respondent’s customers in unknown amounts and may route those loans from the China Export-Import Bank to customers through intermediary banks, an understanding that has evolved since its initial investigation of the program in 2012.¹¹ *Id.* at 11–18. Commerce speculates that a U.S. customer seeking an Export Buyers Credit may obtain funding through the following process: first a customer opens a loan account for an Export Buyers Credit with an intermediary bank or the China Export-Import Bank. *See Id.* at 19. Next, the requested funding is sent from the China Export-Import Bank to the customer’s bank account. *Id.* Finally, the funds are sent to the respondent’s bank account. *Id.* Commerce states that the recipients of an Export Buyers Credit may not be limited to the customer of a company respondent. *Id.* at 23 (“the potential recipients of the export buyer’s credits are not limited to the customers of the company respondent, as they may be received by [intermediary] banks”); Def.’s Br. at 17; *see also* GOC NSA Resp., Ex. 1 at 5 (“the borrower must be an importer or a bank approved by the China Ex[port]-Im[port] Bank”). Commerce’s account of its concerns provides an explanation of why it wants the 2013

¹⁰ Commerce finds the GOC’s response deficient in “two key respects,” namely the GOC’s failure to provide the intermediary bank list and the 2013 Administrative Regulations. Final Decision Memo. at 17–18. However, Commerce later asserts that even if this information was provided to Commerce, verification would not be possible. *Id.* at 21 (explaining that even if the GOC provided the intermediary bank list and confirmed whether the \$2 million threshold was removed, Commerce would still need examples of the documents required to apply for and receive the Export Buyers Credit in order to complete verification). On remand, Commerce should clarify exactly what missing information is necessary for verification.

¹¹ Commerce’s initial understanding of the EBCP was that the program provided short-and medium-term loans directly from the China Export-Import Bank to the borrowers, i.e., a respondent’s customers, without the involvement of third parties such as exporters or intermediate banks. *Id.* at 11–12. Commerce’s understanding of the EBCP began changing in 2014 with *Citric Acid and Certain Citrate Salts*, 79 Fed. Reg. 78,799 (Dep’t Commerce Dec. 31, 2014) (Final Results of [CVD] Admin. Review; 2012), when Commerce began to gain a better understanding of how and when the EBCP disbursed funds. *Id.* at 14. In 2016, Commerce began requesting the 2013 Administrative Regulations and learned that Export Buyers Credits may be disbursed through correspondent banks. *Id.* at 14–16.

Administrative Regulations and a list of intermediary banks authorized to disburse Export Buyers Credits.

As has happened in several cases before this Court, although Commerce explains why it wants the information it seeks, it fails to explain why that information is necessary, i.e., why it is the only information that can verify the U.S. customers' non-use certifications. *See Clearon Corp. v. United States*, 474 F. Supp. 3d 1339, 1353 (Ct. Int'l Trade 2020) ("*Clearon II*"). Commerce explains what it wants from the GOC, and why it wants it. *See Guizhou III*, 523 F. Supp. 3d at 1364 (explaining that Commerce's assertion that the missing intermediary bank and threshold information prevented Commerce from understanding "the flow to and from foreign buyers' . . . sounds reasonable" but Commerce failed to explain why Commerce could not track the flow of the Export Buyers Credits without such information). Commerce explains that both the 2013 Administrative Regulations, specifically confirmation of the existence of a \$2 million minimum threshold, and the intermediary bank list provide necessary parameters for verification. Final Decision Memo. at 17–18, 24. The intermediary bank list guides Commerce by indicating which loans from which banks to flag when reviewing the books and records of a respondent and its U.S. customers. *Id.* at 19–20. Knowing if a minimum threshold for EBCP loans exists further narrows the number of loans that must be reviewed.¹² *Id.* at 17–18. Thus, Commerce adequately lays out its reasoning of why what it seeks is useful.¹³

¹² Both-Well argues "Commerce conflates the operation of the [EBCP] with its use (or non-use)," noting courts have recognized a distinction between the operation of a subsidy program and "the 'existence and amount of the benefit conferred' under the program." Pl.'s Br. at 5 (quoting *Essar*, 34 C.I.T. at 1070), 6, 10; *see also* Reply Br. in Supp. of [Pl.'s Mot.] 2–3, Nov. 30, 2021, ECF No. 31. Both-Well correctly identifies the distinction but its argument is unpersuasive. As an initial matter, the *Essar* court explains that foreign governments are in a better position to provide information regarding the administration of subsidy programs and respondent companies are in a better position to provide information regarding the "existence and amount of the benefit conferred." *Essar* 34 C.I.T. at 1070. Commerce requires information from both parties to make a CVD determination. *See id.* at 1070–71. Both-Well argues that because it provided Commerce with non-use certifications from its U.S. customers, Both-Well has confirmed the non-existence of the subsidy and therefore, information about the administration of the EBCP is immaterial. Pl.'s Br. at 6. However, understanding how the EBCP is administered aides in the verification of the non-use certifications. *See* Final Decision Memo. at 19–25. (explaining that Commerce requires information about the administration of the EBCP to request the proper documents during the verification process and ensure completeness of the information provided).

¹³ Indeed, as noted by the *Guizhou III* court, Commerce provides some explanation of why at least some of the information held by the GOC is useful. *Guizhou III*, 523 F. Supp. 3d at 1364, 1364 n.50 (comparing Commerce's explanation for needing information from the GOC in *Guizhou III* to Commerce's explanation in its remand redetermination in *Clearon II*). Nonetheless, information is necessary not only because it is useful for a purpose, but also because it is uniquely useful for that purpose, i.e., no other information can serve that purpose. *Cf. id.* at 1364 (noting Commerce failed to explain how the lack of the information it sought otherwise crippled its efforts).

Commerce's explanation of why the information it seeks from the GOC is useful is a necessary, but not sufficient, justification for its determination that it cannot verify the information. *See Guizhou III*, 523 F. Supp. 3d at 1359–61 & nn.43–48 (collecting cases holding same). Put simply, Commerce fails to show that the information it seeks is the only information it can use to verify the non-use certifications. For example, although the GOC states that it cannot compel the China Export-Import Bank to turn over the 2013 Administrative Regulations, GOC NSA Supp. Resp. at 2, and “a response to the Standard Questions Appendix is not necessary,” *id.*, it is unclear to the court why Both-Well's U.S. customers might not have that information, or other information allowing Commerce to verify the non-use certifications and why Commerce could not ask Both-Well to obtain such information from its customers. *See Changzhou IV*, 2019 WL6124908 at *3 (directing “the parties [to] discuss potential ways forward and Commerce should request records that may answer the question of EBCP use from respondent, and, if necessary, their importers”).

Indeed, the U.S. customers' non-use certifications themselves suggest that the customers must have information that could be used to verify the non-use certifications. *See Both-Well NSA Resp. at Ex. NSA-2*. Commerce could ask Both-Well's U.S. customers for detailed explanations of how they were able to certify that they did not participate in the EBCP. *See Clearon II*, 474 F. Supp. 3d at 1354 (instructing the parties “to confer and jointly devise a procedure, which may include modifications of the usual method, by which [Commerce] can conduct verification of the declarations of non-use”). Presumably, the non-use certifications resulted from some meaningful review by the U.S. customers which could be confirmed with appropriate documentation.¹⁴ *See Both-Well NSA Resp. at Ex. NSA-2*. Both-Well's U.S. customers certified that they “did not borrow money or otherwise finance . . . purchases through the use of the [EBCP] (or any other export buyer credit program made available through any arm of the [GOC]).” *Id.* Each Customer Declaration states that the U.S. customer did not act directly or indirectly “through any third-party bank.” *Id.* ¶ 4. In order to make these declarations, customers must have a methodology to review their books and records before certifying non-use of the EBCP. Further, each Customer Declaration asserts

¹⁴ It is reasonably discernable from Commerce's supposition of how the EBCP operates, as well as the Final Decision Memo. as a whole, that Commerce believes that there is a distinct application for the EBCP that a customer is required to fill out before receiving an Export Buyers Credit. *See Final Decision Memo.* at 11, 19, 21, 23. Presumably, Commerce could ask Both-Well or its U.S. customers to procure an application. *See Both-Well NSA Resp. at Ex. NSA-2* ¶ 5. Commerce could then use the application to review the documents underlying the books and records of Both-Well and its U.S. customers.

the customer is “willing to cooperate with any additional request for information and invites [Commerce] to verify the source of [the] Company’s short-and medium-term borrowings.” *Id.* ¶ 5. One of Commerce’s questions to Both-Well’s U.S. customers might be whether they knew the identity of the intermediary banks used by the China Export-Import Bank, and if they did not, how they could possibly certify non-use.¹⁵ If they had knowledge of the intermediary banks, their explanations might lead to a simpler verification path.¹⁶ See Final Decision Memo. at 21–22. Alternatively their explanations, or their lack of knowledge regarding the intermediary banks, might lead to the conclusion that indeed only the GOC can provide the necessary information because either (i) the non-use certifications were not the result of meaningful reviews, or (ii) the path laid out by the customers establishes that it would be too onerous for Commerce to verify the non-use certifications.

Commerce states that it would be too onerous “if not impossible” for it to verify the non-use certifications. Final Decision Memo. at 21–22. It is reasonably discernible that Commerce believes that the burden of examining the number of documents and ledgers necessary to confirm the accuracy of the non-use certifications makes the task nearly impossible. Final Decision Memo. at 20, 24. Commerce’s position assumes that it cannot narrow the scope of its inquiry. See *Guizhou III*, 523 F. Supp. 3d at 1372–73 (noting Commerce’s logic regarding the burden it faces is not unfounded). But to know whether it can narrow the scope, or establish an alternative method of verification, Commerce needs to ask the Both-Well and its U.S. customers for assistance. See *Guizhou Tyre Co. v. United States*, 415 F. Supp. 3d 1335, 1344 (Ct. Int’l Trade 2019) (“*Guizhou II*”) (instructing Commerce to use a variety of tools to attempt to verify the non-use”); *Clearon II*, 474 F. Supp. 3d at 1354 (same).¹⁷

¹⁵ As the U.S. customers certified they did not apply for an Export Buyers Credit indirectly, they should be able to demonstrate how they could so certify. See Both-Well NSA Resp. at Ex. NSA-2 ¶ 4.

¹⁶ Commerce states that “There is no indication on the record that other parties had access to information regarding the [intermediary] banks utilized by the China Ex[port]-Im[port] Bank.” Final Decision Memo at 18 n.73. Yet, the non-use certifications would appear to be record evidence that the U.S. customers had knowledge of the identity of the intermediary banks or at least a means to establish that a bank was not an intermediary. Both-Well NSA Resp. at Ex. NSA-2. Otherwise the U.S. customers would not have been able to certify non-use. Thus, the first question Commerce may wish to ask the U.S. customers is how they would know if they obtained an Export Buyers Credit through an intermediary of the China Export-Import Bank and how they could demonstrate that they did not receive an Export Buyers Credit.

¹⁷ The court appreciates the burden Commerce faces when attempting verification using third parties. See *CS Wind Vietnam Co. v. United States*, 219 F. Supp. 3d 1273, 1279, 1284 (Ct. Int’l Trade 2017), *aff’d*, 721 F. App’x 993 (Fed. Cir. 2018). However, Commerce can attempt verification by asking Both-Well’s U.S. customers to explain their certification

Here, Both-Well suggested that Commerce verify the non-use certifications by visiting Both-Well and its U.S. customers. Case Br. Both-Well [FSF] from [China] (C-570–068) 10, Doc. No. 4066953–01 (Dec. 18, 2020); Pl.’s Br. at 10. It is unclear whether Both-Well suggested a path to narrow the scope of work Commerce would encounter. More information from the U.S. customers may assist Commerce with cross-referencing the importers’ and exporter’s records to see if any funds originated from the China Export-Import Bank. *Changzhou Trina Solar Energy Co., Ltd. v. United States*, No. 17–00198, 2019 WL 5856438, *1, 3 n.7, 4 (Ct. Int’l Trade Nov. 8, 2019) (“*Changzhou III*”). See also *Guizhou III*, 523 F. Supp. 3d at 1370–72; *Jiangsu*, 405 F. Supp. 3d at 1334; *Guizhou II*, 415 F. Supp. 3d at 1343 (“If the record contains information that could close the gap, Commerce must attempt to verify the information on the record”). Thus, it is unclear to the court how Commerce can assert that the GOC information is indeed necessary, when it has not sought alternative means to verify the non-use certifications.¹⁸

Thus, on remand if Commerce wishes to continue using facts available with an adverse inference, it must attempt to verify the non-use certifications by either asking Both-Well to have its U.S. customers explain in detail how the customers were able to certify that they did not either directly or indirectly benefit from the ECBP, or through some other alternative means of verifying the non-use certifica-

methodology. Although Commerce has previously chosen to forgo using facts available with an adverse inference rather than attempting to verify the non-use certifications, it is unclear to the court why Commerce would not at least attempt to ask for the information from customers before concluding any attempt at verification would be too difficult. See, e.g., *Clearon Corp. v. United States*, Ct. No. 17–00171, 2021 WL 1821448 (Ct. Int’l Trade May 6, 2021) (“*Clearon III*”) (reaching its determination under protest).

¹⁸ What might be required in each case will depend on the record in that case. In some cases there are many customers, here seven, and in others only one. *Changzhou III*, 2019 WL 5856438 at *4. Some cases lacked non-use certifications from customers. *Changzhou Trina Solar Energy Co., Ltd. v. United States*, 195 F. Supp. 3d 1334, 1355 (Ct. Int’l Trade 2016) (“*Changzhou I*”). In some cases, Commerce attempted to visit the China Export-Import Bank to verify, and others it did not. Compare *id.* at 1354 (Commerce attempted to visit the China Export-Import Bank and was told it lacked the “proper authorization” to review the records); *RZBC Grp. Shareholding Co. v. United States*, 15–00022, 2016 WL 3880773 (Ct. Int’l Trade June 30, 2016) (Commerce attempted to visit the China Export-Import Bank but was denied access); *Cooper (Kunshan) Tire Co., Ltd. v. United States*, 539 F. Supp. 3d 1316, 1328 (Ct. Int’l Trade 2021) (the GOC asserts that requested information is “internal to the bank, non-public, and not available for release.”) with *Clearon Corp. v. United States*, 359 F. Supp. 3d 1344 (Ct. Int’l Trade 2019) (“*Clearon I*”) (and its progeny); *Guizhou Tyre Co., Ltd. v. United States*, 348 F. Supp. 3d 1261 (Ct. Int’l Trade 2018) (“*Guizhou I*”) (and its progeny); *Changzhou Trina Solar Energy Co., Ltd. v. United States*, 255 F. Supp. 3d 1312 (Ct. Int’l Trade 2017) (“*Changzhou II*”) (and its progeny); *Yama Ribbons and Bows Co. v. United States*, 419 F. Supp. 3d 1341 (Ct. Int’l Trade 2019) (and its progeny) (Commerce did not attempt to visit the China Export-Import Bank). Therefore, the reasonableness of Commerce’s approach will be case specific to some degree.

tions.¹⁹ See *Jiangsu*, 405 F. Supp. 3d at 1334; *Guizhou II*, 415 F. Supp. 3d at 1343; *Clearon II*, 474 F. Supp. 3d at 1353–54; *Changzhou IV*, 2019 WL 6124908 at *3. If Commerce attempts verification and determines verification is not possible without the missing information, Commerce must explain, in detail, the specific ways in which Commerce attempted verification of the non-use certifications.

CONCLUSION

For the foregoing reasons, it is

ORDERED that Commerce’s application of facts available with an adverse inference in calculating Both-Well’s CVD rate is remanded to the agency for further explanation or reconsideration consistent with this Opinion and Order; and it is further

ORDERED that Commerce shall file its remand determination with the court within 90 days of the date of this Opinion and Order; and it is further

ORDERED that the parties shall have 30 days thereafter to file comments on the remand determination; and it is further

ORDERED that the parties shall have 30 days thereafter to file a reply to comments on the remand determination; and it is further

ORDERED that the parties shall have 14 days thereafter to file the Joint Appendix; and it is further

ORDERED that Commerce shall file the administrative record within 14 days of the date of filing of its remand redetermination.

Dated: February 8, 2022

New York, New York

/s/ Claire R. Kelly

CLAIRE R. KELLY, JUDGE

¹⁹ The Court has proposed several alternative methodologies for verification. *Changzhou III*, 2019 WL 5856438, at *4 (proposing cross-referencing the importers’ and exporter’s records); *Changzhou IV*, 2019 WL 6124908 at *4 (same); see *Guizhou III*, 523 F. Supp. 3d at 1344 (proposing spot checks).

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