U.S. Customs and Border Protection

GENERAL NOTICE
19 CFR PART 177

PROPOSED MODIFICATION AND REVOCATION OF RULING LETTERS RELATING TO CUSTOMS APPLICATION OF THE JONES ACT TO THE TRANSPORTATION OF CERTAIN MERCHANDISE AND EQUIPMENT BETWEEN COASTWISE POINTS

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

ACTION: Notice of proposed modification and revocation of headquarters' ruling letters relating to U.S. Customs and Border Protection's ("CBP") application of the coastwise laws to certain merchandise and vessel equipment that are transported between coastwise points.

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 CBP is proposing to modify HQ 101925 (Oct. 7, 1976) to make it more consistent with federal statutes and regulations that were amended or promulgated after HQ 101925 was issued, and to clarify the proper reasoning underlying the conclusions reached regarding the subjects covered in the ruling. In addition, CBP proposes to revise its rulings which have determined that articles transported between coastwise points are vessel equipment pursuant to Treasury Decision ("T.D.") 49815(4).

CBP intends to revoke or modify all prior rulings inconsistent with the proposed modifications. Comments on the proposed actions and potential impacts are invited.

DATES: Comments must be received on or before February 17, 2017.

ADDRESSES: Written comments are to be submitted to U.S. Customs and Border Protection, Office of Trade, Regulations and

Rulings, by electronic mail at *CBPPublicationsResponse@cbp.dhs.gov*. Submitted comments may be inspected on line at *www.cbp.gov*.

FOR FURTHER INFORMATION CONTACT: Chief, Cargo Security, Carriers, and Restricted Merchandise Branch, at (202) 325–0030.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerged from the law are **informed compliance** and **shared responsibility**. These concepts are premised on the idea that in order to maximize voluntary compliance with customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on CBP to provide the public with improved information concerning the trade community's responsibilities and rights under the customs and related laws. In addition, both the trade and CBP share responsibility in carrying out import and other requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. 1484), the importerof record is responsible for using reasonable care to enter, classify and value imported merchandise, and 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 section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, this notice advises interested parties that CBP proposes to modify HQ 101925 (Oct. 7, 1976) to make it more consistent with federal statutes that were amended after HQ 101925 was issued, and to revise its rulings which have determined that articles transported between coastwise points are vessel equipment pursuant to Treasury Decision ("T.D.") 49815(4).

Although in this notice CBP specifically refers to the revocation and modification of the Headquarters Ruling Letters listed below, this notice covers any rulings raising the subject issues which may exist but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to those identified. No further rulings have been found. Pursuant to 19

C.F.R. § 177.12(b)(1), CBP invites any member of the public *who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision, or protest review decision) subject to this notice* that has not been identified to advise CBP during this comment period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, CBP proposes to modify or revoke any treatment previously accorded by CBP to substantially identical transactions. Pursuant to 19 C.F.R. § 177.12(c), any person involved in substantially similar transactions should advise CBP during this comment period. A party'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 party or its agents for coastwise transportation of merchandise subsequent to the effective date of the final decision on this notice.

In light of the current regulations on general ruling practice set forth in 19 C.F.R. § 177, *et seq.*, "[i]t is in the interest of the sound administration of the Customs and related laws that persons engaging in any transaction affected by those laws fully understand the consequences of the transaction prior to its consummation." *See* 19 C.F.R. § 177.1(a)(1). Not only are rulings instructive for the ruling requesters engaging in their specific transactions, but they provide guidance for CBP field offices relating to these ruling requesters' specific transactions. *See* 19 CFR § 177.11. Therefore, it is in the interest of CBP to issue rulings that will provide guidance not only to the ruling requesters regarding their specific transactions, but to the individuals in the field that have to enforce these rulings. However, "no other person should rely on the ruling letter[s] or assume that the principles of [those] ruling[s] will be applied in connection with any transactions other than the one[s] described in [those] letter[s]." *See* 19 CFR § 177.9(c).

Proposed Modification of HQ 101925 (Oct. 7, 1976)

Headquarters ruling letter ("HQ") 101925 (Attachment A) was issued to a Texas marine construction company and was published in the Treasury Decisions (T.D.) at 78–387. The decision was issued based on facts provided by the company regarding their proposed use of a foreign-built barge. Many of the holdings in HQ 101925 are no longer applicable due to amendments made to 46 U.S.C. § 55102 (formerly 46 U.S.C. App. 883), the Outer Continental Shelf Lands Act,[1] and 19 C.F.R. § 4.80b(a), resulting in less consistency with 46 U.S.C. § 55102. Accordingly, we are resolving these issues by propos-

[1] Pub. L. 95–372, Title II, sec. 203 (Sept. 19, 1978) codified at 43 U.S.C. § 1333.

ing to modify HQ 101925 to the extent the transactions that were the subject of HQ 101925 are still ongoing. This is explained in HQ H082215 (Attachment B), the proposed ruling that will modify HQ 101925. CBP also intends to revoke other rulings that, based on the facts provided, cite HQ 101925 (T.D. 78–387) as authority and are less consistent with proposed ruling HQ H082215. Accordingly, we are revoking the following rulings to the extent they are contrary to the guidance set forth in this notice and to the extent that the transactions are past and concluded:
HQ 108223 (Mar. 13, 1986)
HQ 108442 (Aug. 13, 1986)
HQ 113838 (Feb. 25, 1997)
HQ 115185 (Nov. 20, 2000)
HQ 115218 (Nov. 30, 2000)
HQ 115311 (May 10, 2001)
HQ 115522 (Dec. 3, 2001)
HQ 115771 (Aug. 19, 2002)

Further, pursuant to 19 U.S.C. § 1625(c)(2), CBP intends by this notice to revoke or modify any treatment previously accorded by CBP to substantially identical transactions.

Vessel Equipment

Based on our research, the definition of vessel equipment that CBP has used in its coastwise trade rulings, has been based, in part, on T.D. 49815(4) (Mar. 13, 1939) which interprets § 309 of the Tariff Act of 1930, codified at 19 U.S.C. § 1309. Section 1309 provides for the duty-free withdrawal of supplies and equipment for certain vessels and aircraft.

> The term "equipment", as used in section 309, as amended, includes *portable articles necessary and appropriate for the navigation, operation or maintenance of the vessel and for the comfort and safety of the persons on board*. It does not comprehend consumable supplies either for the vessel and its appurtenances or for the passengers and the crew. The following articles, for example, have been held to constitute equipment: rope, sail, table linens, bedding, china, table silverware, cutlery, bolts and nuts.

T.D. 49815(4) (Mar. 13, 1939) (emphasis added). CBP has been applying the aforementioned definition of equipment to rulings involving the transportation of merchandise under 46 U.S.C. § 55102 and the predecessor statute, 46 U.S.C. App. 883, since 1982. In addition to

citing the italicized language above in its rulings, CBP required that the use of the item in question be "in furtherance of the primary mission of the vessel" *see* HQ 105644 (June 7, 1982), HQ 110402 (Aug. 18, 1989), HQ 114305 (Mar. 31, 1998), and HQ 115333 (Apr. 27, 2001); "in furtherance of the operation of the vessel" *see* HQ 111892 (Sept. 16, 1991); "essential to the mission of the vessel" *see* HQ 113841 (Feb. 28, 1997); "necessary for the accomplishment of the mission of the vessel" *see* HQ 114435 (Aug. 6, 1998) and HQ H004242 (Dec. 22, 2006); "in furtherance of the mission of the vessel" *see* HQ 115381 (June 15, 2001); 'necessary to the accomplishment of the mission of the vessel" *see* HQ 115487 (Nov. 20, 2001); "fundamental to the vessel's operation" *see* HQ 115938 (Apr. 1, 2003); "used by a vessel in the course of it's business" *see* HQ 116078 (Feb. 11, 2004); and "necessary to carry out a vessel's functions" *see* HQ H029417 (June 5, 2008) and H032757 (July 28, 2008).

In applying T.D. 49815(4) to 46 U.S.C. § 55102 rulings, CBP reasoned that if the article was used in the activity in which the vessel was about to engage, *e.g.,* "in furtherance of the mission", "fundamental to the operation of the vessel", etc., the article would be considered vessel equipment. As such, although T.D. 49815(4) was cited, its original meaning was expanded by the phrases quoted above and, thus, used out of context, with the expanded reading applied as the rule of law in these cases. Such an application, however, is less consistent with the more narrow meaning of "vessel equipment" contemplated by T.D. 49815(4).

Headquarters rulings HQ 111889 (Feb. 11, 1992) and HQ 115938 (Apr. 1, 2003) imply that certain articles to be installed, *e.g.*, multiwell templates, marine risers, oilfield equipment, and structural components, are vessel equipment under T.D. 49815(4). Headquarters rulings 112218 (July 22, 1992) and 113137 (June 27, 1994) imply that cement, chemicals and other materials, are vessel equipment within the meaning of T.D. 49815(4). CBP recognizes that the implications of these rulings do not comport with our proposed interpretation of the effect of 46 U.S.C. § 55102.

Accordingly, we are proposing to revoke the following rulings to the extent they are contrary to the guidance set forth in this notice and to the extent that the transactions are past and concluded:

HQ 105644 (June 7, 1982)
HQ 110402 (Aug. 18, 1989)
HQ 111889 (Feb. 11, 1992)
HQ 112218 (July 22, 1992)
HQ 113841 (Feb. 28, 1997)
HQ 114305 (Mar. 31, 1998)

HQ 114435 (Aug. 6, 1998)
HQ 115333 (Apr. 27, 2001)
HQ 115487 (Nov. 20, 2001)
HQ 115938 (Apr. 1, 2003)
HQ H004242 (Dec. 22, 2006)

Further, pursuant to 19 U.S.C. § 1625(c)(2), CBP proposes by this notice to revoke or modify any treatment previously accorded by CBP to substantially identical transactions.

CBP proposes to modify the following rulings to the extent they are contrary to the guidance set forth in this notice and to the extent that the transactions are past and concluded, because although the holdings and rationale are correct, they cite to rulings that CBP is proposing to revoke. These rulings may be located on the CBP website at *www.cbp.gov* in the Customs Ruling Online Search System (CROSS).
111892 (Sept. 16, 1991)
115381 (June 15, 2001)
116078 (Feb. 11, 2004)
H029417 (June 5, 2008)
H032757 (July 28, 2008)

CBP recognizes that its list of rulings and decisions referenced above in this notice may not be complete and other rulings may exist which have not been identified but which are inconsistent with this notice. Accordingly, this notice is intended to cover any ruling which pertains to whether certain articles transported on vessels are considered vessel equipment pursuant to T.D. 49815(4). CBP also intends to revoke and/or modify all other previously issued ruling letters with findings that are inconsistent with this notice.

In addition, pursuant to 19 U.S.C. § 1625(c)(2), CBP intends by this notice to revoke or modify any treatment previously accorded by CBP to substantially identical transactions. Before modifying or revoking the above-cited rulings or other similar rulings pertaining to what is considered vessel equipment or merchandise under T.D. 49815(4) and HQ 101925, consideration will be given to any written comments timely received.

Dated: January 10, 2017

GLEN E. VEREB,
Director
Border Security and
Trade Compliance Division

ATTACHMENT A

OCT 7 1976

VES-3–06-R:CD:C
101925 NL

MR. J. R. SELLERS
VICE PRESIDENT – MARINE CONSTRUCTION
OCEANEERING INTERNATIONAL, INC.
9219 KATY FREEWAY
HOUSTON, TEXAS 77024

DEAR MR. SELLERS:

In your letter of December 2, 1975, you request advice concerning the proposed operation of a diving support work barge in United States waters. You state that the barge will be constructed in a foreign shipyard, towed to the United States and then used primarily in support of Oceaneering International's diving operations in the construction, maintenance, repair and inspection of offshore petroleum-related facilities.

While there is no requirement in the laws administered by the Customs Service to the effect that such vessel need obtain American registry in order to operate in United States waters, whether or not such registry can be obtained is a question which should be addressed to the Merchant Vessel Documentation Division, United States Coast Guard. It is clear, though, that a foreign-built vessel may not engage in the coastwise trade of the United States. Generally speaking, coastwise trade involves the transportation of passengers or merchandise between points in the United States embraced within the coastwise laws. All points within and the territorial waters surrounding the United States and nearly all the territories and possessions thereof are embraced within those laws.

Title 46, United States Code, section 883, prohibits (with certain exceptions not relevant here) the transportation of merchandise between points in the United States in a foreign-flag vessel, a foreign-built vessel, or a vessel which at one time has been under foreign flag or ownership. Section 289 of title 46 prohibits the transportation of passengers between points in the United States on a foreign vessel.

However, not every movement between points in the United States is deemed to be a transportation within the meaning of the coastwise laws. We will advise you of the permissibility of the proposed operations in United States waters by this foreign-built diving support work barge in the order in which you presented them. It is suggested, though, that the appropriate office of the Coast Guard be contacted in order to ascertain whether any laws or regulations administered by that agency, other than those relating to vessel documentation, would be applicable in this matter.

(1) The Customs Service has held that the sole use of a vessel in laying pipe is not a use in the coastwise trade of the United States, even when the pipe is laid between two points in the United States embraced within the coastwise laws. Further, since the use of a vessel in pipelaying is not a use in the coastwise trade, a foreign-built vessel may carry the pipe which it is to lay between such points. It is the fact that the pipe is not landed but only paid out in the course of the pipelaying operation which makes such operation permissible.

However, the transportation of pipe by any vessel other than a pipelaying vessel to a pipelaying location at a point within United States territorial waters would be considered coastwise trade and would therefore have to be accomplished by a vessel meeting the statutory requirements entitling it to engage in such trade.

(2) Similarly, the Customs Service is of the opinion that for the purpose of the coastwise laws there is no distinction to be made between repairing pipe and the laying of new pipe. Therefore, the sole use of the work barge in repairing pipe is not a use in the coastwise trade, and in view of the unique characteristics of pipelaying operations which take them out of the purview of the coastwise laws, the transportation of pipe and repair materials by the work barge, to be used by the crew of the work barge in the repair of the pipeline, is also an activity that is not prohibited by the coastwise laws.

(3) Although the installation of anodes on a subsea pipeline or offshore drilling platform may have more of a preventative than restorative effect, such installation is considered to be in the nature of a repair and thus not a use of the vessel in the coastwise trade. However, since the installation of a preventative substance is an intrinsically foreseeable operation, the transportation of anodes to the operational location within United States waters must be accomplished by a vessel entitled to engage in the coastwise trade.

(4) The transportation of pipeline burial tools by the work barge for use by the crew of the work barge to accomplish the pipelaying operations is not an activity prohibited by the coastwise laws since such tools are considered to be part of the legitimate equipment of that vessel.

(5) Since a foreign-built work barge may engage in the laying and repairing of pipe in territorial waters, in our opinion, the use of the vessel in the installation of pipeline connectors to offshore drilling platforms and subsea wellheads is likewise not a use in the coastwise trade. In addition, the transportation of pipeline connectors to be installed by the crew of the work barge incidental to the pipelaying operations of the work barge is not an activity prohibited by the coastwise laws.

(6) The Customs Service is of the opinion that the sole use of a vessel in effecting underwater repairs to offshore or subsea structures is not considered a use in coastwise trade. Further, the transportation by the vessel of such materials and tools as are necessary for the accomplishment of the mission of the vessel (i.e., materials to be expended during the course of the underwater inspection and repair operations and tools necessary in such operations) for use by the crew of the vessel is not, generally speaking, an activity prohibited by the coastwise laws since such transportation is incidental to the vessel's operations.

However, while materials and tools, as described above, which are necessary for the accomplishment of the mission of the vessel are not considered merchandise within the meaning of section 883, any article which is to be installed and therefore, in effect, landed at an offshore drilling platform is normally considered merchandise. We are of the opinion that if the necessity for the repair of, or the installation of repair materials on to, the underwater portions of the drilling platform is foreseen and re-

quires a repair material or component of more than *de minimis* value (such as a structural member), the transportation to the repair site must be effected by a vessel entitled to engage in the coastwise trade. Nevertheless, in view of the nature of these underwater operations, a vessel engaging in the inspection and repair of offshore or subsea structures may carry with it repair materials of *de minimis* value or materials necessary to accomplish unforeseen repairs, provided that such materials are usually carried aboard the vessel as supplies.

In summary, none of the aforementioned operations of the diving support work barge in United States waters, as proposed, would be considered a use in the coastwise trade provided such barge does not take on board passengers or merchandise at one point within these waters and discharge the passengers or merchandise at another such point. Crewmembers, including technicians and divers, necessary in the vessel's inspection, installation, and repair operations, are not considered passengers, nor are construction personnel who are on the barge in connection with its business. However, persons transported on the barge between points embraced within the coastwise laws who are not connected with the operation, navigation, ownership, or business of the barge are considered passengers within the meaning of the coastwise laws. Legitimate equipment and stores of the barge for its use are not considered merchandise within the meaning of section 883. However, articles transported on the barge between points embraced within the coastwise laws which are not legitimate stores and equipment of the barge, other than pipe laden on board to be paid out in the course of operations, pipeline connectors, pipeline repair materials, and the other repair materials specified above, are subject to forfeiture under section 883.

It should be emphasized that the transportation of persons or materials as described above takes on a wholly different character if it results in the delivery of such persons or materials to a subsea or offshore structure, such as a drilling platform, for use by such structure. For example, while the transportation of repair materials by the work barge for use by its crew in effecting repairs on or from the barge, or in its service capacity underwater, is not prohibited by the coastwise laws, the delivery of such materials or persons to an offshore drilling platform to effect repairs thereon would be a transportation of something other than the legitimate equipment or crew of the work barge, and as such, would have to be accomplished by a vessel entitled to engage in the coastwise trade.

(7) The use of a vessel in the transportation of "salvaged" materials from offshore drilling platforms or pipelines in United States waters, other than pipe being retrieved incidental to a pipeline repair operation, would be deemed a use in the coastwise trade, and would therefore have to be accomplished by a vessel entitled to engage in the coastwise trade.

(8) The use of a vessel in the transportation of machinery or production equipment to an offshore production platform would be deemed a use in the coastwise trade, and would therefore have to be accomplished by a vessel entitled to engage in the coastwise trade. However, the sole use of the diving support work barge in lifting and depositing heavy loads at a fixed site in the territorial waters of the United States is not considered coastwise trade and such activity would not be prohibited by the coast-

wise laws. Further, the mere movement of the work barge incidental to the lifting and depositing of heavy loads at the site of the lifting would not be deemed coastwise trade.

(9) As was just stated, with regard to the transportation of machinery or production equipment to an offshore production platform, the movement of workover rigs from one production platform to another would be considered to be coastwise transportation, but the mere lifting and depositing of such rigs by the crane of the work barge, for transportation on a vessel entitled to engage in the coastwise trade, would not of itself be considered a use in the coastwise trade.

(10) The use of a vessel in the transportation of a wellhead assembly to a location on the seabed within United States waters would be deemed a use in the coastwise trade. At the same time, though, the sole use of a vessel in the installation of a wellhead assembly at a location within United States waters, after transportation of such assembly by a vessel entitled to engage in the coastwise trade, is not considered a use in coastwise trade, nor is the sole use of a vessel in servicing wellheads. The transportation of wellhead equipment, valves and valve guards to be installed on an already existing wellhead assembly in the servicing capacity of the work barge by the crew of the work barge is not an activity prohibited by the coastwise laws, provided that such materials are of *de minimis* value or necessary to accomplish unforeseen repairs or adjustments and are usually carried aboard the work barge as supplies. On the other hand, if the necessity for specific wellhead equipment or other materials of more than *de minimis* value is foreseen, such transportation to the diving site must be effected by a vessel entitled to engage in the coastwise trade.

The laws on entrance and clearance of vessels are applicable to movements of the diving support work barge to, from and between points in United States waters, with specific requirements depending on whether the vessel is under United States or foreign flag. We will be happy to discuss such requirements when we are made aware of the intended flag of registry of the work barge.

You state that the work barge will be supplied by crewboat or helicopter. Further information about the helicopters, especially their registry, is required before we can rule on the applicability of the air cabotage law (49 U.S.C. 1508(b)). The navigation laws, on the other hand, are fully applicable to supply vessels operating within United States territorial waters. Accordingly, a supply vessel which transports supplies, equipment, etc., or crewmembers between points embraced within the coastwise laws of the United States (including the work barge when located at a point within United States waters) would be considered as operating in the coastwise trade and would have to meet the statutory requirements entitling it to engage in such trade.

Finally, General Headnote 5 of the Tariff Schedules of the United States provides that:

> For the purpose of headnote 1-***(e) vessels which are not "yachts or pleasure boats" within the purview of subpart D, part 6, Schedule 6, "are not articles subject to the provisions of these schedules."

As the vessel in question is not a yacht or pleasure boat, it would not be treated as an article subject to the provisions of the Tariff Schedules and would not, therefore, be subject to duty.

This decision is being circulated to all Customs officers to ensure uniformity in the administration of the customs and navigation laws.

Sincerely yours,

(SIGNED) J. P. TEBEAU

J. P. TEBEAU
Director
Carriers, Drawback and Bonds Division

Cc: R.C., Houston
New Orleans

ATTACHMENT B

HQ H082215
VES-3–06 OT:RR:BSTC:CCR H082215 LLB
Category: Carriers

MR. J.R. SELLERS
VICE PRESIDENT-MARINE CONSTRUCTION
OCEANEERING INTERNATIONAL, INC.
D11911 FM 529
HOUSTON, TEXAS 77041–3000, US

Re: Headquarters ruling letter 101925 (Oct. 7, 1976); T.D. 78–387; 46 U.S.C. § 55102; 19 C.F.R. § 4.80b(a); Outer Continental Shelf Lands Act, Pub. L. 95–372, Title II, sec. 203 (Sept. 19, 1978); 43 U.S.C. § 1333.

DEAR MR. SELLERS:

On October 7, 1976, the United States Customs Service (now Customs and Border Protection ("CBP"))[1] issued Headquarters Ruling Letter ("HQ") 101925.[2] In HQ 101925, you proposed using a foreign-built work barge to conduct certain repair, installation, and servicing operations as well as transport materials and tools needed to conduct these operations. As explained below, CBP held that the foregoing activities were not in violation of the coastwise laws. We have recently recognized that several of the holdings, based on the facts presented in HQ 101925, are not entirely consistent with 46 U.S.C. § 55102, 19 C.F.R. § 4.80b(a), and the Outer Continental Shelf Lands Act (OCSLA).[3] Consequently, this ruling, HQ H082215, modifies HQ 101925 as to Subparagraphs (2), (3), (4), (6), (7), and (10) and provides an analysis of the facts set forth therein that is more consistent with the foregoing statutes and regulation.

FACTS:

The facts are limited to those presented in the ruling and in Subparagraphs (2), (3), (4), (6), (7), and (10). You propose using a foreign-built work barge (hereinafter "the vessel") primarily in support of diving operations in the construction, maintenance, repair and inspection of offshore petroleum-related facilities. The vessel will be constructed in a foreign shipyard and towed to the United States. The vessel would engage in the following activities: repair a subsea pipeline, install anodes on a subsea pipeline or offshore drilling platform, install pipeline connectors to offshore drilling platforms and subsea wellheads, repair underwater portions of a subsea platform, and service and install wellhead assemblies.

In addition, once the vessel is towed to the United States, you propose to use it to transport the following to locations within U.S. waters as well as to offshore platforms: pipeline repair material; anodes; pipeline connectors; wellhead equipment, valves, and valve guards; damaged pipeline; and platform repair material.

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[1] The U.S. Customs Service will hereinafter be referred to as CBP.

[2] The ruling is published in the Treasury Decisions (T.D.) 78–387.

[3] Pub. L. 95–372, Title II, sec. 203 (Sept. 19, 1978) codified at 43 U.S.C. § 1333.

ISSUE:

1. Whether the repair, installation, and servicing activities of the vessel constitute a violation of 46 U.S.C. § 55102.

2. Whether the vessel's transportation of pipeline repair material; anodes; pipeline connectors; wellhead equipment, valves, and valve guards; damaged pipeline; and platform repair material from a U.S. point to another point within U.S. waters and/or those on the Outer Continental Shelf that are coastwise points pursuant to the OCSLA constitutes a violation of 46 U.S.C. § 55102.

LAW AND ANALYSIS

Issue 1

In HQ 101925, CBP held that various types of repair and installation work to be done by the vessel did not constitute an engagement in coastwise trade. *See* Subparagraphs (2), (3), (4), (6), and (10). Although the holdings, as they pertain to repair and installation work, are correct, the rationale for the holdings is questionable. In Subparagraph (2), CBP held that there is no distinction between repairing pipe and laying pipe and therefore, the former did not constitute an engagement in coastwise trade. In Subparagraph (3), CBP held that the installation of anodes on a subsea pipeline did not constitute an engagement in coastwise trade because that activity was deemed to be "in the nature of a repair." In Subparagraph (4), CBP held that since the vessel may engage in laying and repairing of pipe in territorial waters, "the use of the vessel in the installation of pipeline connectors to offshore drilling platforms and subsea wellheads is likewise not a use in the coastwise trade." In Subparagraph (6), CBP held that the "sole use of a vessel in effecting underwater repairs to offshore or subsea structures is not considered a use in coastwise trade." In Subparagraph (10), CBP held that the sole use of a vessel in the installation or servicing of a wellhead assembly at a location within U.S. waters is not considered a use in the coastwise trade.

Prior to the 2006 recodification of the shipping laws in Title 46 of the United States Code,[4] the coastwise laws were found throughout Title 46. These laws are now specifically codified in Chapter 551 of Title 46. *See* 46 U.S.C. §§ 55101–55122. At no time either before or after this recodification did there exist a coastwise law that prohibited installation or repair work by foreign-built vessels accomplished separate and apart from any transportation done by such vessels pursuant to these activities. Accordingly, such repair and installation work done by the vessel, as described above, is permissible because such work does not constitute coastwise trade under Chapter 551 of Title 46.

Issue 2

The Merchant Marine Act of 1920, also known as the '"Jones Act", provided, in pertinent part:

> That no merchandise shall be transported by water, or by land and water, on penalty of forfeiture thereof, between points in the United States, including Districts, Territories, and possessions thereof embraced within

[4] *See* Pub. L. 109–304, enacted on October 6, 2006.

> the coastwise laws, either directly or via a foreign port, or for any part of the transportation, in any other vessel than a vessel built in and documented under the laws of the United States and owned by persons who are citizens of the United States, or vessels to which the privilege of engaging in the coastwise is extended by sections 18 or 22 of this Act.

Ch. 250, § 27, 41 Stat. 988, 999. In 1988, the Act was amended to include valueless material in the term "merchandise"[5] and in 1992, the Act was further amended to include "merchandise owned by the United States Government, a State (as defined in section 2101 of title 46 United States Code), or a subdivision of a State."[6]

The Jones Act provision relating to transportation of merchandise, 46 U.S.C. App. § 883, was recodified at 46 U.S.C. § 55102[7] which provides, in pertinent part:

> Except as otherwise provided in this chapter or chapter 121 of this title, a vessel may not provide any part of the transportation of merchandise by water, or by land and water, between points in the United States to which the coastwise laws apply, either directly or via foreign port, unless the vessel—
>
> (1) is wholly owned by citizens of the United States for purposes of engaging in the coastwise trade; and
> (2) has been issued a certificate of documentation with a coastwise endorsement under chapter 121 or is exempt from documentation but would otherwise be eligible for such a certificate and endorsement.

The statutory definition of merchandise which reflects the 1988 and 1992 amendments to the Jones Act states "[m]erchandise, includes (1) merchandise owned by the United States Government, a State, or a subdivision of a State; and (2) valueless material." 46 U.S.C. § 55102(a). The regulations promulgated under the authority of 46 U.S.C. § 55102(a), provide in pertinent part:

> A coastwise transportation of merchandise takes place, within the meaning of the coastwise laws, when merchandise laden at a point embraced within the coastwise laws ("coastwise point") is unladen at another coastwise point, regardless of the origin or ultimate destination of the merchandise.

19 C.F.R. § 4.80b(a). The coastwise laws are extended by Section 4(a) of the OCSLA, as amended,[8] to:

> ... the subsoil and seabed of the outer Continental Shelf and to all artificial islands, and all installations and other devices permanently or temporarily attached to the seabed, which may be erected thereon for the purpose of exploring for, developing, or producing resources therefrom, or any such installation or device (other than a ship or vessel) for the

[5] *See* 102 Stat. 588, Pub. L. 329 (June 7, 1988).

[6] *See* 106 Stat. 5039, 5085, Pub. L. 102–587 (Nov. 4, 1992).

[7] *See* Pub. L. 109–304, enacted on October 6, 2006.

[8] Pub. L. 95–372, Title II, sec. 203 (Sept. 19, 1978) codified at 43 U.S.C. § 1333.

> purpose of transporting such resources, to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State.

See also, 43 U.S.C. § 1333(a)(1).

The foregoing changes in the law, other than the preamended version of the OCSLA, occurred after the issuance of HQ 101925. Accordingly, CBP has reexamined the holdings in Subparagraphs (2), (3), (4), (6), (7), and (10) as they pertain to the transportation of the following: pipeline repair material; anodes; pipeline connectors; wellhead equipment, valves, and valve guards; damaged pipeline; and platform repair material. These holdings provide that the transportation from the U.S. points of lading to points of unlading within U.S. waters and offshore platforms and pipelines would not violate the Jones Act, if certain conditions were met. We will discuss each paragraph in turn.

Subparagraph 2

CBP held that the transportation of pipe and repair materials by the vessel would not be prohibited by the coastwise laws. CBP reasoned that it made no distinction between the repair of pipe and the laying of new pipe, thus the repair of pipe was outside the coastwise laws. In addition, CBP reasoned that because the activity, i.e. pipe repair, was not coastwise trade, the transportation of the repair materials would not be prohibited by the coastwise laws as well.

Pipeline repair in and of itself, is not a transportation activity and therefore, is not prohibited by the coastwise laws. However, with regard to the transportation of the repair materials, the holding is inconsistent with the plain meaning of 46 U.S.C. § 55102, as amended. The 1988 amendment to the Jones Act included valueless material in its definition of merchandise. Accordingly, repair materials, being articles of value, would appear to be merchandise as well. Pursuant to 46 U.S.C. § 55102, the transportation of merchandise between points embraced by the coastwise laws by a non-coastwise-qualified vessel is prohibited. The statute does not provide exceptions for certain activities. It does not state that if the activity the vessel is engaged in does not constitute coastwise trade then the transportation of the merchandise in order for the vessel to engage in such activity does not violate 46 U.S.C. § 55102. While there are statutory provisions exempting vessels engaging in certain transportation from the applicability of 46 U.S.C. § 55102, provided certain conditions are met, those provisions cover specific transportation scenarios not contemplated by this ruling. *See* 46 U.S.C. §§ 55106–55108; 55115–55117, 55119, and 55121.

Thus, the holding in HQ 101925 that allows the transportation of the pipe and repair materials on the basis that the repair operation does not violate the coastwise laws is not consistent with the current version of 46 U.S.C. § 55102. Accordingly, although the repair of the pipeline is not an engagement in coastwise trade, the transportation of the pipe and repair materials by the vessel from a U.S. point to a repair site that is considered to be a coastwise point in order to accomplish those repairs would violate 46 U.S.C. § 55102.

Subparagraph 3

CBP held in part that the transportation of anodes from a U.S. point to an operational location in U.S. waters had to be accomplished by a coastwise-qualified vessel. CBP reasoned that the anodes were a "preventative sub-

stance" and the installation of the anodes was an "intrinsically foreseeable" operation. Although the holding is correct, the rationale is not consistent with 46 U.S.C. § 55102.

As in the case of pipeline repair discussed above, the installation of anodes in and of itself is not an engagement in coastwise trade because such activity is not transportation prohibited by the coastwise laws. Pursuant to 46 U.S.C. § 55102, the transportation of merchandise between points embraced by the coastwise laws by a non-coastwise qualified vessel is prohibited. The statute does not condition the transportation of merchandise upon whether the merchandise is a "preventative substance" or whether the merchandise being installed is an "intrinsically foreseeable" operation. Accordingly, based on these facts, the anodes transported between coastwise points should be transported by a coastwise-qualified vessel.

Subparagraph 4

CBP held that the transportation of pipeline connectors to be installed by the crew of the work barge "incidental to the pipelaying operations" of the vessel would not be an activity prohibited by the coastwise laws. 46 U.S.C. § 55102, however, does not condition whether the transportation of merchandise is prohibited based on whether it is incidental to a pipelaying operation. Thus, the holding in HQ 101925 creates an exception to 46 U.S.C. § 55102 that is inconsistent with the statute.

In addition, pursuant to 46 U.S.C. § 55102 and 19 C.F.R. § 4.80b(a), where the merchandise is laden and unladen determines whether a coastwise transportation has occurred. Merchandise to be transported "incidental to an operation" could possibly imply that it may be transported over the span of several voyages, *e.g.*, unladen and laden at different coastwise points as many times as necessary during the time the vessel is engaged in an operation. As such, allowing merchandise to be transported by foreign-built vessels regardless of when, where, or how many times it is laden or unladen, merely on the basis that it is "incidental" to an operation, is inconsistent with 46 U.S.C. § 55102 and 19 C.F.R. § 4.80b(a).

Accordingly, the transportation of the pipeline connectors by the vessel between U.S. points and offshore drilling platforms and subsea wellheads that are coastwise points pursuant to the OCSLA would violate 46 U.S.C. § 55102 and 19 C.F.R. § 4.80b(a).

Subparagraph 6

First Paragraph

CBP held the transportation by the vessel of materials and tools "necessary for the accomplishment of the mission of the vessel (i.e., materials to be expended during the course of the underwater inspection and repair operations and tools necessary in such operations) for use by the crew of the vessel" is not prohibited by the coastwise laws since such transportation is incidental to the vessel's operations. With regard to the repair materials, the language of 46 U.S.C. § 55102 prohibits the transportation of merchandise between points embraced by the coastwise laws, regardless of whether the merchandise is "necessary for the accomplishment of the mission of the vessel," "incidental to the vessel's operations," or "expended" during the course of the repair. Moreover, as stated in our analysis in Subparagraph 4, such language

is inconsistent with 46 U.S.C. § 55102 and 19 C.F.R. § 4.80b(a) because it could possibly contemplate transportation of merchandise by non-coastwise-qualified vessels over the course of several voyages as opposed to when and where the merchandise is laden and unladen. Accordingly, with regard to the repair material, the transportation of the material by the vessel from a U.S. point to an offshore or subsea structure that is a coastwise point would violate 46 U.S.C. § 55102.

With regard to the transportation of the tools being used to make the repairs, notwithstanding the fact that you do not propose to unlade the tools, such articles would be considered vessel equipment. Pursuant to T.D. 49815(4) (Mar. 13, 1939), vessel equipment "includes portable articles necessary and appropriate for the navigation, operation or maintenance of the vessel and for the comfort and safety of the persons on board." Insofar as the tools are being used by the crew of the vessel to install the repair material during the voyage, they would be considered necessary for the operation of the vessel and therefore, are vessel equipment the transportation of which would not be a violation of 46 U.S.C. § 55102.

Second Paragraph

The following paragraph provides:

> However, while materials and tools, as described above, which are necessary for the accompalishment [sic] of the mission of the vessel are not considered merchandise, any article which is to be installed and therefore, in effect, landed at an offshore drilling platform is normally considered merchandise. We are of the opinion that if the necessity for the repair of, or the installation of repair materials on to, the underwater portions of the drilling platform is foreseen and requires a repair material or component of more than *de minimis value* (such as a structural member), the transportation to the repair site must be effected by a vessel entitled to engage in the coastwise trade. Nevertheless, in view of the nature of these underwater operations, a vessel engaging in the inspection and repair of offshore or subsea structures may carry with it repair materials of *de minimis value* or materials necessary to accomplish unforeseen repairs, provided such materials are usually carried aboard the vessel as supplies.

(emphasis added).

First, the foregoing holding distinguishes between merchandise laden on the underwater portion versus the topside of the drilling platform. Pursuant to the OCSLA, the laws of the U.S. extend to ". . . all installations and other devices permanently or temporarily attached to the seabed, which may be erected thereon for the purpose of exploring for, developing, or producing resources therefrom . . . ." The OCSLA does not distinguish between different parts of an installation. A coastwise point embodies the entire structure, not just parts of it. Thus, the distinction of the parts of the platform in determining whether merchandise has been unladen at a coastwise point is in tension with the OCSLA. Second, the holding allows the subject vessel to transport repair materials as long as they are of "*de minimus value*." The foregoing holding is inconsistent with the plain language of 46 U.S.C. § 55102 which includes "valueless material" in its definition of merchandise. Last, the holding allows transportation of "materials necessary to accomplish unforeseen repairs, provided that such materials are usually carried aboard the vessel as supplies." As stated above, 46 U.S.C. 55102 prohibits the transpor-

tation of merchandise between points embraced by the coastwise laws regardless of whether the need for the merchandise is unforeseen.

Accordingly, the transportation of repair materials, regardless of their value or whether their use is foreseen, by the subject vessel from a U.S. point that is unladen on any part of the drilling platform that is a coastwise point pursuant to the OCSLA, would violate 46 U.S.C. § 55102.

Subparagraph 7

CBP held damaged pipe retrieved "incidental to a pipeline repair operation" could be accomplished by a non-coastwise qualified vessel. As stated in our analysis in Subparagraphs (4) and (6), such language is inconsistent with 46 U.S.C. § 55102 and 19 C.F.R. § 4.80b(a) because it could possibly contemplate transportation of merchandise by foreign-built vessels over the course of several voyages as opposed to when and where the merchandise is laden and unladen. Accordingly, the transportation of the damaged pipe by the vessel between coastwise points would violate 46 U.S.C. § 55102 and 19 C.F.R. § 4.80b(a).

Subparagraph 10

CBP held that the transportation of wellhead equipment, valves and valve guards from a U.S. point to a wellhead assembly that is a coastwise point pursuant to the OCSLA would not be prohibited by the coastwise laws if such wellhead equipment, valves, and valve guards are of de minimis value or necessary to accomplish unforeseen repairs or adjustments and are usually carried aboard the work barge as supplies. As stated in our analysis in Subparagraph (6), paragraph 2, value of the merchandise is irrelevant to a determination that a coastwise transportation of merchandise has taken place and is contrary to the plain language of the statutory definition of merchandise which includes valueless material. Similarly, as stated in our analysis of Subparagraph (3), 46 U.S.C. § 55102 does not condition the transportation of merchandise upon whether the activity in which the merchandise is being used is foreseeable. Therefore, the transportation of wellhead equipment, valves and valve guards from a U.S. point to a wellhead assembly that is a coastwise point pursuant to the OCSLA would violate 46 U.S.C. § 55102.

HOLDING:

1. The repair, installation, and servicing activities of the vessel separate and apart from any transportation do not constitute a violation of 46 U.S.C. § 55102.

2. The vessel's transportation of pipeline repair material; anodes; pipeline connectors; wellhead equipment, valves, and valve guards; damaged pipeline; and platform repair material from a U.S. point to points within U.S. waters and/or those on the Outer Continental Shelf that are coastwise points pursuant to the OCSLA constitutes a violation of 46 U.S.C. 55102.

EFFECT ON OTHER RULINGS: Modifies Subparagraphs (2), (3), (4), (6), (7), and (10) of HQ 101925 (Oct. 7, 1976).

Sincerely,

GLEN E. VEREB,
Director
Border Security and
Trade Compliance Division

8 CFR Parts 214 and 264

REMOVAL OF REGULATIONS RELATING TO SPECIAL REGISTRATION PROCESS FOR CERTAIN NONIMMIGRANTS

AGENCY: Department of Homeland Security.

ACTION: Final rule.

SUMMARY: The Department of Homeland Security (DHS) is removing outdated regulations relating to an obsolete special registration program for certain nonimmigrants. DHS ceased use of the National Security Entry-Exit Registration System (NSEERS) program in 2011 after finding that the program was redundant, captured data manually that was already captured through automated systems, and no longer provided an increase in security in light of DHS's evolving assessment of the threat posed to the United States by international terrorism. The regulatory structure pertaining to NSEERS no longer provides a discernable public benefit as the program has been rendered obsolete. Accordingly, DHS is removing the special registration program regulations.

DATES: This rule is effective December 23, 2016.

FOR FURTHER INFORMATION CONTACT: Mr. Kekoa Koehler, Office of Policy, U.S. Department of Homeland Security. Phone: 202–447–4125. Email: *Russell.koehler@hq.dhs.gov.*

SUPPLEMENTARY INFORMATION:

Background

History of the Special Registration Program

In 1991, the legacy Immigration and Naturalization Service (INS), then part of the Department of Justice (DOJ), published a final rule requiring the registration and fingerprinting of certain nonimmigrants bearing Iraqi and Kuwaiti travel documents, due to various

factors, including concerns about misuse of Kuwaiti passports.[1] In 1993, INS removed the regulations specific to such nonimmigrants, but added to the regulations at 8 CFR 264.1(f) a provision that allowed the Attorney General to require certain nonimmigrants of specific countries to be registered and fingerprinted upon arrival to the United States, pursuant to section 263(a) of the Immigration and Nationality Act (INA), 8 U.S.C. 1303(a).[2] Pursuant to the amendment, the Attorney General could designate countries by **Federal Register** notice.[3]

In June 2002, after the September 11, 2001 terrorist attacks, INS proposed to expand the existing registration and fingerprinting program at 8 CFR 264.1(f) to require certain nonimmigrants to report to INS upon arrival, approximately 30 days after arrival, every 12 months after arrival, upon certain events such as a change of address, and at the time of departure from the United States.[4] The proposed rule provided that the program would apply to nonimmigrants from countries that INS would designate in **Federal Register** notices and to individual nonimmigrants designated by either a U.S. consular officer or immigration officer at a U.S. port-of-entry as indicating a need for closer monitoring. Under the proposed rule, designated nonimmigrants would be required to be fingerprinted and photographed and to provide additional biographical information. The proposed rule also authorized INS to designate certain ports of departure for nonimmigrants subject to the program. In addition, INS proposed to amend 8 CFR 214.1 to require nonimmigrants selected for special registration to comply with 8 CFR 264.1(f) as a condition of maintaining nonimmigrant status.

The INS received 14 comments on the proposed rule, some in support of the proposed program and others opposed to it. In August 2002, INS finalized the proposed program, which became known as the National Security Entry-Exit Registration System (NSEERS), without substantial change.[5] In September 2002, INS announced by **Federal Register** notice that the new program would be applied to those who were subject to the earlier registration program—nonimmigrants from Iraq, Iran, Libya, and Sudan—and added nonimmigrants from Syria.[6] INS announced in November 2002 that only

[1] 56 FR 1566 (Jan. 16, 1991). Those regulations were at 8 CFR 264.3.

[2] 58 FR 68024 (Dec. 23, 1993).

[3] The Attorney General initially required nonimmigrants from Iraq and Sudan to be registered and fingerprinted under the new provision and later added Iran and Libya. *See* 58 FR 68157 (Dec. 23, 1993) (Iraq and Sudan) and 61 FR 46829 (Sept. 5, 1996) (Iran and Libya). The INS consolidated the two notices in 1998. 63 FR 39109 (July 21, 1998).

[4] 67 FR 40581 (June 13, 2002).

[5] 67 FR 52584 (Aug. 12, 2002).

[6] 67 FR 57032 (Sept. 6, 2002).

males 16 years of age and older from designated countries would be required to register under the program.[7] Between November 2002 and January 2003, INS added another 20 countries to the compliance list, bringing the total to 25 countries.[8] The responsibility for administering NSEERS was transferred to the Department of Homeland Security (DHS) in 2003 as part of the Homeland Security Act of 2002.[9]

In December 2003, DHS amended the NSEERS regulations by interim final rule to suspend the 30-day post-arrival and annual re-registration requirements.[10] DHS determined that automatically requiring 30-day and annual re-registration for designated nonimmigrants was no longer necessary as DHS was implementing other systems to help ensure that all nonimmigrants remain in compliance with the terms of their visa and admission.[11] The interim final rule provided that DHS would utilize a more tailored system in which, as a matter of discretion and on a case-by-case basis, the Department would notify nonimmigrants subject to the program to appear for re-registration interviews where DHS deemed it necessary to determine whether they were complying with the conditions of their status and admission. The interim final rule did not affect the procedures at ports-of-entry for nonimmigrants subject to the program.

In 2011, DHS published a notice in the **Federal Register** indicating that DHS would no longer register nonimmigrants under NSEERS and removing all countries from the NSEERS compliance list.[12] DHS had added no new countries to the compliance list since 2003, and it had since implemented multiple new automated systems that capture information of nonimmigrant travelers to the United States and support individualized determinations of admissibility.[13] Among the new programs and practices that had been implemented by that time were the United States Visitor and Immigrant Status Indicator Technology Program (US–VISIT), which stores and manages the fingerprint scans and photographs required upon entry to

[7] 67 FR 67766 (Nov. 6, 2002).

[8] *See* 67 FR 70526 (Nov. 22, 2002); 67 FR 77642 (Dec. 18, 2002); and 68 FR 2363 (Jan. 16, 2003). The 25 countries ultimately included in the compliance list were: Afghanistan, Algeria, Bahrain, Bangladesh, Egypt, Eritrea, Indonesia, Iran, Iraq, Jordan, Kuwait, Lebanon, Libya, Morocco, North Korea, Oman, Pakistan, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, United Arab Emirates, and Yemen.

[9] *See* Homeland Security Act of 2002, Public Law 107–296, secs. 402, 441, 442, 451, 1512(d), 1517, 116 Stat. 2135 (6 U.S.C. 202, 251, 252, 271, 552(d), 557); Homeland Security Act of 2002 Amendments, Public Law 108–7, div. L, sec. 105 (2003); *see also* 6 U.S.C. 542 note; 8 U.S.C. 1103(a), 1551 note.

[10] 68 FR 67578 (Dec. 2, 2003).

[11] *Id.* at 67579.

[12] 76 FR 23830 (Apr. 28, 2011).

[13] *Id.* at 23831 (stating that since the establishment of NSEERS, "DHS has developed substantial infrastructure and adopted more universally applicable means to verify the entry and exit of aliens into and out of the United States").

the United States,[14] and the Advance Passenger Information System (APIS), which requires that commercial vessels and commercial and private aircraft arriving in or departing the United States submit advance passenger and crew manifest information to U.S. Customs and Border Protection (CBP).[15] In light of these and other improved programs and practices, as well as improved information sharing with foreign counterparts, DHS determined that the data captured by NSEERS, which DHS personnel entered manually, had become redundant and no longer provided any increase in security.[16] Although the 2011 notice announced that DHS would no longer use the program for any countries, the notice did not remove the regulatory framework for NSEERS from the DHS regulations.

2012 DHS Office of Inspector General Report

In 2012, the DHS Office of the Inspector General (OIG) issued a report on border security information sharing within DHS that, among other things, recommended DHS fully eliminate NSEERS by removing the regulatory structure for the program.[17] The OIG report found that processing NSEERS registrations constituted a significant portion of CBP's workload at ports-of-entry while the program was in operation, and that the NSEERS database often did not function properly. The report noted that CBP officers believed NSEERS reporting to be of little utility and that the time spent processing registrations constituted an inefficient use of resources. The OIG report found that DHS's newer automated targeting systems enabled more sophisticated data analysis and intelligence-driven targeting than under NSEERS, as the newer targeting systems consolidate passenger data from various systems, can search across those systems for certain trends or patterns, and can be updated quickly without the need for public notification in the **Federal Register**. The OIG report also found US–VISIT to be the more logical system for capturing biometric information at ports-of-entry due to US–VISIT's superior functionality. The OIG report concluded that advancements in information technology had rendered NSEERS obsolete and that leaving the program in place did not provide any discernable public benefit.[18] The OIG report thus recommended removing the regulatory structure of NSEERS from DHS regulations.

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[14] *See* 8 CFR 235.1(f)(1)(ii).

[15] *See* 19 CFR 4.7b, 4.64(b), 122.22, 122.26, 122.31, 122.49a, 122.49b, 122.75a, and 122.75b.

[16] The manual collection of information required by NSEERS had also become a significant resource drain for CBP, particularly at its busiest ports of entry.

[17] Department of Homeland Security, Office of Inspector General, *Information Sharing on Foreign Nationals: Border Security,* OIG–12–39 (Feb. 2012).

[18] *See id.* at p. 35 ("The availability of newer, more capable DHS data systems argues against ever utilizing the NSEERS data system again.").

Removal of the NSEERS Framework Regulations

Although DHS retained the regulations that provide the NSEERS framework, subsequent experience has confirmed that NSEERS is obsolete, that deploying it would be inefficient and divert personnel and resources from alternative effective measures, and that the regulation authorizing NSEERS is unnecessary. Since the suspension of NSEERS in 2011, DHS has not found any need to revive or consider the use of the program. Indeed, during this period, DHS's other targeting, data collection, and data management systems have become even more sophisticated. DHS now engages in security and law enforcement efforts that were not possible when NSEERS was established in 2002, and the Department continues to make significant progress in its abilities to identify, screen, and vet all travelers arriving to the United States; to collect and analyze biometric and biographic data; to target high-risk travelers for additional examination; and to track nonimmigrants' entry, stay, and exit from the country.

The information that was previously captured through NSEERS is now generally captured from nonimmigrants through other, more comprehensive and efficient systems. Below we describe several of DHS's data collections, systems, and procedures relating to nonimmigrants and their relation to the NSEERS program.

• *Biometric Information.* At the time of NSEERS' implementation in 2002, most nonimmigrants were admitted to the United States without being either photographed or fingerprinted.[19] Today, in contrast, CBP fingerprints and photographs nearly all nonimmigrants, regardless of nationality, at the time of entry into the United States. Furthermore, systems such as the Automated Biometric Identification System (IDENT), which were initially implemented by US–VISIT, are now used throughout DHS.[20] IDENT is the central DHS-wide system for storage and processing of biometric and associated biographic information for a wide range of uses including national security, law enforcement, immigration and border management, intelligence, and background investigations. IDENT stores and processes biometric data—digital fingerprints, photographs, iris scans, and facial images—and links biometrics with biographic infor-

[19] *See* 67 FR at 40581–82 (June 13, 2002) (noting in 2002 that "current procedures do not provide for the collection of fingerprints at the port of entry from many aliens"); 67 FR at 52586 (Aug. 12, 2002).

[20] The Consolidated and Further Continuing Appropriations Act of 2013, Public Law 113–6, enacted on March 26, 2013, made dramatic changes to US–VISIT's mission set and organization. The 2013 Act transferred activities such as entry-exit policy and operations and overstay analysis to operational components within DHS. Responsibility for the DHS's Automated Biometric Identification System was given to the newly-created Office of Biometric Identity Management, a subcomponent of the National Protection and Programs Directorate.

mation to establish and verify identities. As noted above, these systems and procedures were not in place in 2002.

• *Arrival and Departure Information.* CBP receives arrival and departure data from commercial vessel and aircraft carriers, as well as private aircraft, through APIS. CBP tracks this information, which is vetted against various law enforcement databases, in its Arrival and Departure Information System. CBP confirms the accuracy of this data information as part of the interview process for travelers arriving in the United States. And the available biographic departure data are matched against arrival data to determine who has complied with the terms of admission and who has overstayed. These systems and procedures did not exist in their current form in 2002.

• *Visa Information.* Visa data is automatically vetted through various mechanisms through a joint coordination effort involving CBP, U.S. Immigration and Customs Enforcement, and the Department of State. This effort permits the relevant agency to take appropriate action, such as revoking visas or requiring additional scrutiny. These information sharing systems and procedures were not in place in 2002.

• *Nonimmigrant Students.* Data on nonimmigrant students is now entered into the Student and Exchange Visitor Information System (SEVIS) by designated school officials at certified institutions and responsible officials in the Exchange Visitor Program. CBP officers at ports-of-entry can interface with SEVIS in real time to determine whether a student or exchange visitor has a current and valid certificate of eligibility to enter the United States. SEVIS did not exist when NSEERS was created.

• *Visa Waiver Program.* The Electronic System for Travel Authorization (ESTA) now captures information used to determine the eligibility of visitors seeking to travel to the United States without a visa under the Visa Waiver Program (VWP). All travelers who intend to apply for entry under the VWP are now required to obtain an ESTA approval prior to boarding a carrier to travel by air or sea to the United States.[21] CBP continuously vets ESTA applications against law enforcement databases for new information throughout the validity period and takes additional action as needed, including revocation of an ESTA approval. In November 2014, February 2016 and June 2016, DHS strengthened the VWP's security by adding additional elements on the ESTA application and revising the eligibility questions.[22] The Visa Waiver Program Improvement and Terrorist Travel Prevention Act of 2015, enacted on December 18, 2015, pro-

[21] *See* 8 U.S.C. 1187(a)(11), (h)(3); 8 CFR 217.5.

[22] 79 FR 65414 (Nov. 4, 2014); 81 FR 8979 (Feb. 23, 2016); 81 FR 39681 (June 17, 2016).

hibits certain travelers who have been present in or are nationals of certain countries to travel or be admitted to the United States under the VWP.[23] None of these measures related to the VWP were in place when NSEERS was promulgated.

• *Electronic Visa Update System:* The Electronic Visa Update System (EVUS), which became effective on October 20, 2016, is an online system that allows for the collection of biographic and other information from nonimmigrants who hold a passport issued by an identified country containing a U.S. nonimmigrant visa of a designated category.[24] Nonimmigrants subject to these regulations must periodically enroll in EVUS and obtain a notification of compliance with EVUS prior to travel to the United States. Though currently limited to nonimmigrants who hold a B1, B2, or B–1/B–2 visa issued without restriction for maximum validity contained in a passport issued by the People's Republic of China,[25] additional countries could be added to address emerging national security issues.

Due to such changes, DHS has determined that the NSEERS model for border vetting and security, which focused on designated nationalities for special processing, is outmoded. Since the implementation of NSEERS in 2002, DHS has increasingly moved away from the NSEERS model and instead focused on a targeted, intelligence-driven border security model that identifies current and emerging threats in real time. For these reasons, DHS has concluded that NSEERS is obsolete and inefficient; that its implementation would be counterproductive to the Department's comprehensive security measures; and that the regulatory authority for NSEERS should thus be rescinded. For these reasons, DHS is removing the special registration program regulations found in 8 CFR 264.1(f).

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[23] The Visa Waiver Program Improvement and Terrorist Travel Prevention Act of 2015, sec. 203, enacted as part of Division O, Title II of the Consolidated Appropriations Act of 2016, Public Law 114–113, applies to nationals of VWP countries who have been present in Iraq, Syria, countries listed under specified designation lists (currently Syria, Iran, and Sudan), or countries designated by the Secretary of Homeland Security (currently Libya, Somalia, and Yemen) at any time on or after March 1, 2011 (with limited government/military exceptions) and to nationals of VWP countries who are also nationals of Iran, Iraq, Sudan, or Syria. *See* 8 U.S.C. 1187(a)(12). CBP modified the ESTA application on February 23, 2016 to include questions pertaining to dual citizenship or nationality, and travel to restricted countries. 81 FR 8979 (Feb. 23, 2016). CBP updated the ESTA application again on June 17, 2016 with new questions pertaining to the applicant's participation in the Global Entry Program and travel on or after March 1, 2011 to Libya, Somalia or Yemen. 81 FR 39680 (June 17, 2016).

[24] 8 CFR 215.23–215.24; 81 FR 72481 (Oct. 20, 2016).

[25] *See* 81 FR 72600 (Oct. 20, 2016).

Conforming Amendment

DHS is making a conforming amendment to 8 CFR 214.1(f) to remove the specific reference to 8 CFR 264.1(f), which INS added when it implemented NSEERS in 2002. The amendment reinstates the text of 8 CFR 214.1(f) prior to the implementation of NSEERS, with a minor change to reflect the transfer of duties from INS to DHS.

Statutory and Regulatory Requirements

Administrative Procedure Act

The Administrative Procedure Act (APA) generally requires agencies to publish a notice of proposed rulemaking in the **Federal Register** and provide interested persons the opportunity to submit comments.[26] The APA provides an exception to this prior notice and comment requirement for "rules of agency organization, procedure, or practice."[27] This final rule is a procedural rule promulgated for agency efficiency purposes. DHS is removing regulations related to an outdated, inefficient, and decommissioned program. Thus, removing these regulations, which have not been used since 2011, reflects the current practice and procedure of DHS and will not affect the substantive rights or interests of the public.

The APA also provides an exception from notice and comment procedures when an agency finds for good cause that those procedures are "impracticable, unnecessary, or contrary to the public interest."[28] DHS finds good cause to issue this rule without prior notice or comment, as such procedures are unnecessary. The removal of these regulations will have no substantive effect on the public because the regulations relate to a program which has not been utilized since 2011 and which has been made obsolete by DHS's more advanced and efficient processes, programs, and systems.

Further, the APA generally requires that substantive rules incorporate a 30-day delayed effective date.[29] This rule, however, is merely procedural and does not impose substantive requirements; thus DHS finds that a delayed effective date is unnecessary.

Executive Orders 12866 and 13563

This regulation has been drafted and reviewed in accordance with Executive Orders 12866 and 13563. This rule is not a significant regulatory action under Executive Order 12866, and accordingly this

[26] *See* 5 U.S.C. 553(b) and (c).

[27] 5 U.S.C. 553(b)(A).

[28] 5 U.S.C. 553(b)(3)(B).

[29] 5 U.S.C. 553(d).

rule has not been reviewed by the Office of Management and Budget.

Regulatory Flexibility Act

Because DHS is of the opinion that this rule is not subject to the notice and comment requirements of 5 U.S.C. 553, DHS does not consider this rule to be subject to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 is intended, among other things, to curb the practice of imposing unfunded Federal mandates on State, local, and tribal governments. Title II of the Act requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may result in a $100 million or more expenditure (adjusted annually for inflation) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector.

This rule does not include any unfunded mandates. The requirements of Title II of the Act, therefore, do not apply, and DHS has not prepared a statement under the Act.

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Act of 1996. This rule will not result in an annual effect on the economy of $100 million or more, a major increase in costs or prices, or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States companies to compete with foreign-based companies in domestic and export markets.

Executive Order 13132—Federalism

This rule would not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

Executive Order 12988—Civil Justice Reform

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

Regulatory Amendments

List of Subjects

8 CFR Part 214

Administrative practice and procedure, Aliens, Cultural exchange programs, Employment, Foreign officials, Health professions, Reporting and recordkeeping requirements, Students.

8 CFR Part 264

Aliens, Reporting and recordkeeping requirements.

Amendments to the Regulations

For the reasons stated in the preamble, DHS amends chapter 1 of title 8 of the Code of Federal Regulations as set forth below.

8 CFR CHAPTER 1

PART 214—NONIMMIGRANT CLASSES

▮ 1. The general authority for part 214 continues to read as follows:

Authority: 6 U.S.C. 202, 236; 8 U.S.C. 1101, 1102, 1103, 1182, 1184, 1186a, 1187, 1221, 1281, 1282, 1301–1305 and 1372; sec. 643, Public Law 104–208, 110 Stat. 3009–708; Public Law 106–386, 114 Stat. 1477–1480; section 141 of the Compacts of Free Association with the Federated States of Micronesia and the Republic of the Marshall Islands, and with the Government of Palau, 48 U.S.C. 1901 note, and 1931 note, respectively; 48 U.S.C. 1806; 8 CFR part 2.

▮ 2. Amend § 214.1 by revising paragraph (f) to read as follows:

§ 214.1 Requirements for admission, extension, and maintenance of status.

* * * * *

(f) *False information.* A condition of a nonimmigrant's admission and continued stay in the United States is the full and truthful disclosure of all information requested by DHS. A nonimmigrant's willful failure to provide full and truthful information requested by DHS (regardless of whether or not the information requested was material) constitutes a failure to maintain nonimmigrant status under section 237(a)(1)(C)(i) of the Act.

* * * * *

PART 264—REGISTRATION AND FINGERPRINTING OF ALIENS IN THE UNITED STATES

■ 3. The general authority citation for part 264 continues to read as follows:

Authority: 8 U.S.C. 1103, 1201, 1303–1305; 8 CFR part 2.

* * * * *

§ 264.1 [Amended]

■ 4. In § 264.1, remove and reserve paragraph (f).

JEH CHARLES JOHNSON,
Secretary.

[Published in the Federal Register, December 23, 2016 (81 FR 94231)]