

U.S. Customs and Border Protection



19 CFR PART 177

REVOCAION OF ONE RULING LETTER AND MODIFICATION OF ONE RULING LETTER AND REVOCAION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF GLOVES AND A MITT

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

ACTION: Notice of revocation of one ruling letter, modification of one ruling letter and revocation of treatment relating to the tariff classification of gloves and a mitt.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) is revoking one ruling letter and modifying one ruling letter concerning tariff classification of gloves and a mitt 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. 53, No. 29, on August 21, 2019. No comments were received in response to that notice.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after December 30, 2019.

FOR FURTHER INFORMATION CONTACT: Karen S Greene, Chemicals, Petroleum, Metals & Miscellaneous Articles Branch, Regulations and Rulings, Office of Trade, at (202) 325–0041.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Current customs law includes two key concepts: informed compliance and shared responsibility. Accordingly, the law imposes an obligation on CBP to provide the public with information concerning the

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

Pursuant to 19 U.S.C. § 1625(c)(1), a notice was published in the *Customs Bulletin*, Vol. 53, No. 29, on August 21, 2019, proposing to revoke one ruling letter and modify one ruling letter pertaining to the tariff classification of gloves and a mitt. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should have advised CBP during the comment period.

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

In NY B871119, dated July 8, 1997, and NY N006668, dated February 14, 2007, CBP classified gloves and a mitt in heading 9505, HTSUS, specifically in subheading 9505.90.60, HTSUS, which provides for "Festive, carnival or other entertainment articles, including magic tricks and practical joke articles; parts and accessories thereof: Other: Other." CBP has reviewed the rulings and has determined the ruling letters to be in error. It is now CBP's position that the gloves and a mitt are properly classified, in heading 6116, HTSUS, specifically in subheading 6116.93.88, HTSUS, which provides for "Gloves, mittens and mitts, knitted or crocheted: Other: Of synthetic fibers: Other: Without fourchettes."

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is revoking NY B871119 and modifying NY N006668 and revoking or modifying any other ruling not specifically identified to reflect the analysis contained in HQ 261881, 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: September 30, 2019

ALLYSON MATTANAH
for

MYLES B. HARMON,
Director

Commercial and Trade Facilitation Division

Attachment

HQ H261881

September 30, 2019

OT:RR:CTF:CPMM H261881 KSG

CATEGORY: Classification

TARIFF NO.: 6116.93.88

LAUREN E. HONG
CUSTOMS REPRESENTATIVE
THE WALT DISNEY COMPANY
101 NORTH BRAND BOULEVARD
SUITE 1000
GLENDALE CA 91203
IRENE TSLAVOS
FUNWORLD
80 VOICE ROAD
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RE: Revocation of NY B87119 and modification of NY N006668

DEAR MADAMS:

This ruling is in reference to the revocation of New York Ruling Letter (NY) B87119, dated July 8, 1997, regarding the tariff classification of a “Mickey” mitt which is a reference to the Mickey Mouse character; and the modification of a pair of “cartoon hand” gloves classified in NY N006668, dated February 14, 2007.¹

In NY B87119, and NY N006668, U.S. Customs & Border Protection (CBP) classified the Mickey mitt and cartoon hand gloves in subheading 9505.90.60, HTSUS, which provides for “Festive, carnival or other entertainment articles, including magic tricks and practical joke articles; parts and accessories thereof: Other: Other.”

We have reviewed NY B87119, and NY N006668, and determined that the rulings are in error. Accordingly, for the reasons set forth below, CBP is revoking NY B87119, and modifying NY N006668.

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, notice proposing to revoke NY B87119 and to modify NY N006668 was published on August 21, 2019, in Volume 53, Number 29, of the *Customs Bulletin*. No comments were received in response to this Notice.

FACTS:

NY B87119 involves a large, white, acrylic pile mitt which is worn on the hand to create the appearance of the three digit hand of the cartoon character “Mickey Mouse.” It allows for the insertion of the thumb and separate insertion of the fingers.

¹ We note that NY N006668 also provides the tariff classification for werewolf gloves, ninja gloves and skull gloves which may also be excluded from Chapter 95, HTSUS, pursuant to chapter note 1(v), HTSUS. In NY B81326, dated February 6, 1997, CBP classified a singular glove known as a “Freddy’s” glove, which refers to a character from the movie “A Nightmare on Elm Street” in heading 9505, HTSUS. It may also be excluded from Chapter 95, HTSUS, pursuant to Note 1(v). However, we have insufficient information regarding the constituent materials of the gloves considered in the above rulings to classify them.

The cartoon hands classified in NY N006668 are an oversized pair of “cartoon hand” style gloves, 12” wide and 11” in length, with one thumb and three fingers made from 100 percent polyester knit fabric and stuffed with foam. It also allows for the insertion of the thumb and separate insertion of the fingers.

ISSUE:

Whether the mitt and gloves, described above, are properly classified in heading 6116, HTSUS, as gloves or a mitt or in heading 9505, HTSUS, as festive articles.

LAW AND ANALYSIS:

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

GRI 6 provides that for legal purposes, the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related subheading notes and, *mutatis mutandis*, to the above Rules, on the understanding that only subheadings at the same level are comparable. For the purposes of this Rule the relative section and chapter notes also apply, unless the context otherwise requires.

The HTSUS headings under consideration are the following:

6116	Gloves, mitten and mitts, knitted or crocheted:
9505	Festive, carnival or other entertainment articles, including magic tricks and practical joke articles; parts and accessories thereof: Other.

Chapter note 1(v), chapter 95, HTSUS, provides that the chapter does not cover “gloves, mittens and mitts (classified according to their constituent materials).” The chapter notes have the same legal force as the text of the headings. *See Roche Vitamins, Inc. v. United States*, 772 F.3d 728 at 730 (Fed. Cir. 2014).

In *Rubies Costume Co. v. United States*, 279 F. Supp. 3d 1145 (Ct. Intl Trade 2017), *aff’d*, No. 2018–1305, 2019 U.S. App. LEXIS 12747 (Fed. Cir. April 29, 2019), the court considered whether a Santa Claus costume was classified as a festive article in heading 9505, HTSUS. White knit 100 percent polyester gloves, which were a part of the costume, were classified in heading 6116, HTSUS. The court cited to the exclusionary language in chapter note 1(u) (now chapter 95 note 1(v)), as the basis for the decision to classify the gloves in heading 6116, HTSUS.

In understanding the language of the HTSUS, the Explanatory Notes (ENs) of the Harmonized Commodity Description and Coding System, constitute the official interpretation of the Harmonized System at the international level. While neither legally binding nor dispositive, the ENs provide a commentary on the scope of each heading of the HTSUS and are generally

indicative of the proper interpretation of these headings. See T.D. 89–80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

The EN for heading 6116, HTSUS, states that the heading includes ordinary short gloves with separate fingers, mittens covering only part of the fingers, mitts with separation for the thumb only and gauntlet or other long gloves that may cover the forearm or even part of the upper arm.

In Headquarters Ruling Letter (HQ) 957261, dated August 11, 1995, CBP affirmed the classification of a power ranger sound effect glove in subheading 6116.10, HTSUS. The ruling examined the definition of “gloves” and found that the article had a separate sheath for each finger and for the thumb and that the article was a glove. Then, CBP applied chapter note 1(v) and interpreted it to mean that the exclusionary language to chapter 95, HTSUS, operated to specifically exclude the power ranger glove from chapter 95, HTSUS.² Accordingly, if the article to be classified is a glove, mitten or mitt, the article is excluded from classification in chapter 95, HTSUS.³

Since the articles involved are either gloves or a mitt, classification in chapter 95, HTSUS, is expressly precluded by chapter note 1(v), and the articles would be classified by their constituent material.⁴ Both the Mickey mitt and the cartoon hands gloves have a separate enclosed opening for the fingers and for the thumb like the article in HQ 957261.

Both the “Mickey” mitt and cartoon gloves are unlikely to be coated or to have a fourchette. Based on the information provided regarding the materials, they would be classified in subheading 6116.93.88, HTSUS, which provides for “Gloves, mittens and mitts, knitted or crocheted: Other: Of synthetic fibers: Other: Without fourchettes.”

HOLDING:

We are revoking NY B87119, and modifying NY N006668. The Mickey mitt and cartoon gloves are classified in subheading 6116.93.88, HTSUS. The column one, general rate of duty is 18.6%.

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 for at www.usitc.gov.

EFFECT ON OTHER RULINGS:

NY B87119 is revoked and NY N006668 is modified in accordance with the above analysis.

In accordance with 19 U.S.C. 1625©, this ruling will become effective 6 days after publication in the CUSTOMS BULLETIN.

² HQ 957261 considered whether the articles were classified in heading 6116 as a glove or in heading 9503 as a toy. CBP concluded that the article was a “glove containing a sound device that provides some amusement” and not a toy.

³ We note that in NY N050418, dated February 13, 2009, CBP classified a pair of three dimensional PVC toy hands in Chapter 95 (heading 9503), HTSUS. Three dimensional PVC toy hands are distinguishable from gloves, mitts or mittens and thus are not excluded from chapter 95 by chapter note 1(v).

Sincerely,
ALLYSON MATTANAH
for
MYLES B. HARMON,
Director
Commercial and Trade Facilitation Division

**PROPOSED MODIFICATION OF ONE RULING LETTER
AND MODIFICATION OF TREATMENT RELATING TO THE
COUNTRY OF ORIGIN OF STUFFED MATTRESS COVERS**

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

ACTION: Notice of proposed modification of one ruling letter and modification of treatment relating to the country of origin of stuffed mattress covers.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. §1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) intends to modify one ruling letter concerning the country of origin of stuffed mattress covers. 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 November 29, 2019.

ADDRESS: Written comments are to be addressed to U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, Attention: Trade and Commercial Regulations Branch, 90 K St., NE, 10th Floor, Washington, DC 20229–1177. Submitted comments may be inspected at the address stated above during regular business hours. Arrangements to inspect submitted comments should be made in advance by calling Mr. Joseph Clark at (202) 325–0118.

FOR FURTHER INFORMATION CONTACT: Tanya Secor, Food, Textiles and Marking Branch, Regulations and Rulings, Office of Trade, at (202) 325–0062.

SUPPLEMENTARY INFORMATION:**BACKGROUND**

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

Pursuant to 19 U.S.C. §1625(c)(1), this notice advises interested parties that CBP is proposing to modify one ruling letter pertaining to the country of origin of stuffed mattress covers. Although in this notice, CBP is specifically referring to New York Ruling Letter ("NY") N303580, dated April 10, 2019 (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 N303580, CBP determined El Salvador to be the country of origin of the stuffed mattress covers. CBP has reviewed NY N303580 and has determined the ruling letter to be in error. It is now CBP's position that the country of origin of the stuffed mattress covers is either the United States, China, or El Salvador, depending on the style of mattress cover and respective fabric origin.

Pursuant to 19 U.S.C. §1625(c)(1), CBP is proposing to modify NY N303580 and to revoke or modify any other ruling not specifically identified to reflect the analysis contained in the proposed Headquarters Ruling Letter (“HQ”) H304571, 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: October 4, 2019

MYLES B. HARMON,
Director
Commercial and Trade Facilitation Division

Attachments

ATTACHMENT A

N303580

April 10, 2019

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

CATEGORY: Classification; Marking;

Trade Agreement

TARIFF NO.: 9404.90.9522

JENNIFER R. DIAZ, Esq.

DIAZ TRADE LAW

12700 BISCAYNE BOULEVARD, SUITE 301

NORTH MIAMI, FL 33181

RE: The tariff classification, marking, and status under the Dominican Republic-Central America-United States Free Trade Agreement (DR-CAFTA), of stuffed mattress covers from El Salvador.

DEAR Ms. DIAZ:

In your letter dated March 21, 2019, you requested a binding ruling on behalf of your client, Dolven Enterprises, Inc. Illustrative literature, product descriptions and samples were received.

Dolven Enterprises items, S-10", S-12", S-14", T-10", and T-12" are man-made, nonwoven, zippered, stuffed mattress covers used to encase and protect twin, twin long, full, queen, king, and California king mattress frames. You indicate the expectation of the subject merchandise are to provide an additional layer of cushioned surface for slumbering.

You assert classification of the subject merchandise to be within subheading 9404.90.2000, Harmonized Tariff Schedule of the United States, (HTSUS). This office disagrees.

The applicable subheading for the subject merchandise is 9404.90.9522, HTSUS, which provides for "Mattress supports; articles of bedding and similar furnishing (for example, mattresses, quilts, eiderdowns, cushions, pouffes and pillows) fitted with springs or stuffed or internally fitted with any material or of cellular rubber or plastics, whether or not covered: Other: Other: Other: With outer shell of man-made fibers."

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

Dolven Enterprises presents a group of circumstances wherein the subject merchandise raw material components (fabric, zippers, labels) originates in the United States, China, Mexico and El Salvador. In each circumstance cutting, sewing, and assembly operations will be performed in El Salvador along with folding, packaging, boxing, marking, and loading into a container for export.

Section 334 of the Uruguay Round Agreements Act (codified at 19 U.S.C. 3592) (URAA), enacted on December 8, 1994, provided rules of origin for textiles and apparel entered, or withdrawn from warehouse for consumption, on and after July 1, 1996. Section 102.21, Customs Regulations (19 C.F.R. 102.21), published September 5, 1995 in the Federal Register, implements Section 334 (60 FR 46188). Section 334 of the URAA was amended by section 405 of the Trade and Development Act of 2000, enacted on May 18, 2000, and accordingly, section 102.21 was amended (68 Fed. Reg. 8711). Thus, the

country of origin of a textile or apparel product shall be determined by the sequential application of the general rules set forth in paragraphs (c)(1) through (5) of Section 102.21.

Paragraph (c)(1) states, “The country of origin of a textile or apparel product is the single country, territory, or insular possession in which the good was wholly obtained or produced.” As the subject merchandise is not wholly obtained or produced in a single country, territory or insular possession, paragraph (c)(1) of Section 102.21 is inapplicable.

Paragraph (c)(2) states, “Where the country of origin of a textile or apparel product cannot be determined under paragraph (c)(1) of this section, the country of origin of the good is the single country, territory, or insular possession in which each of the foreign materials incorporated in that good underwent an applicable change in tariff classification, and/or met any other requirement, specified for the good in paragraph (e) of this section.” Paragraph (e) in pertinent part states, “The following rules will apply for purposes of determining the country of origin of a textile or apparel product under paragraph (c)(2) of this section”:

HTSUS	Tariff shift and/or other requirements
9404.90	Except for goods of subheading 9404.90 provided for in paragraph (e)(2) of this section, the country of origin of a good classifiable under subheading 9404.90 is the country, territory, or insular possession in which the fabric comprising the good was formed by a fabric-making process.

The subject merchandise are made from manmade fabrics and polyester fill. As the material components comprising the subject merchandise are formed in more than one country, Section 102.21(c)(2) is inapplicable.

Paragraph (c)(3) states, “Where the country of origin of a textile or apparel product cannot be determined under paragraph (c)(1) or (2) of this section”:

- (i) If the good was knit to shape, the country of origin of the good is the single country, territory, or insular possession in which the good was knit; or
- (ii) Except for goods of heading 5609, 5807, 5811, 6213, 6214, 6301 through 6306, and 6308, and subheadings 6209.20.5040, 6307.10, 6307.90, and 9404.90, if the good was not knit to shape and the good was wholly assembled in a single country, territory, or insular possession, the country of origin of the good is the country, territory, or insular possession in which the good was wholly assembled.

As the subject merchandise is neither knit to shape, nor wholly assembled in a single country, territory, or insular possession, and subheading 9404.90 is excepted from provision (ii), Section 102.21 (c)(3) is inapplicable.

Paragraph (c)(4) states, “Where the country of origin of a textile or apparel product cannot be determined under paragraph (c)(1), (2) or (3) of this section, the country of origin of the good is the single country, territory, or insular possession in which the most important assembly or manufacturing process occurred.”

As the most important assembly or manufacturing process of the subject merchandise is the cutting, sewing, and assembly of the fabric panels and zippers, Section 102.21(c)(4) is applicable. Therefore, the country of origin is El Salvador, the country in which those operations are performed.

Marking

Part 134, of 19 CFR implements the country of origin marking requirements of 19 U.S.C. 1304. Unless excepted by law, every article of foreign origin imported into the United States shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article (or container) will permit, in such a manner as to indicate to the ultimate purchaser in the United States the English name of the country of origin of the article. As a product of El Salvador, the subject merchandise is to be marked accordingly.

Trade Agreement - DR-CAFTA

GN29, HTSUS, sets forth the criteria for determining whether a good is originating under the DR-CAFTA. To be an “originating good” the material components must be transformed in the territory of El Salvador pursuant to GN29(b)(ii)(A)(n), HTSUS, which states:

Chapter 94, Rule 5: A change to subheading 9404.90 from any other chapter, except from headings 5007, 5111 thru 5113, 5208 through 5212, 5309 through 5311, 5407 through 5408 or 5512 through 5516 or subheading 6307.90.

A change in tariff occurs in El Salvador as a result of manufacturing operations. Based on the circumstances presented, the material components from the United States, China, and Mexico are classifiable outside of Section XX (miscellaneous manufactured articles), and a change in tariff occurs in El Salvador as a result of manufacturing, therefore, the subject merchandise is eligible for DR-CAFTA preferential duty treatment.

The holding set forth above applies only to the specific factual situation and merchandise description as identified in the ruling request. This position is clearly set forth in 19 CFR 177.9(b)(1). In the event that the facts or merchandise are modified in any way, you should bring this to the attention of U.S. Customs and Border Protection (CBP) and resubmit for a new ruling in accordance with 19 CFR 177.2.

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, please contact National Import Specialist Dharmendra Lilia at dharmendra.lilia@cbp.dhs.gov.

Sincerely,

STEVEN A. MACK

Director

National Commodity Specialist Division

ATTACHMENT B

HQ H304571
OT:RR:CTF:FTM H304571 TJS
CATEGORY: Origin

JENNIFER R. DIAZ, Esq.
DIAZ TRADE LAW
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NORTH MIAMI, FL 33181

RE: Modification of NY N303580; Country of Origin of Stuffed Mattress Covers

DEAR Ms. DIAZ,

This is to inform you that U.S. Customs and Border Protection (“CBP”) has reconsidered New York Ruling Letter (“NY”) N303580, issued to you on April 10, 2019, regarding the classification, marking, and the eligibility for preferential tariff treatment under the Dominican Republic-Central America-United States Free Trade Agreement (“DR-CAFTA”) of certain stuffed mattress covers. In NY N303580, CBP classified certain stuffed mattress covers in subheading 9404.90.9522, Harmonized Tariff Schedule of the United States Annotated (“HTSUSA”). CBP also determined the country of origin to be El Salvador and that the subject merchandise was eligible for DR-CAFTA preferential tariff treatment. We have reviewed NY N303580 and determined that it is partially incorrect with respect to the country of origin marking analysis and determination. For the reasons set forth below, we hereby modify NY N303580.

In your initial request for a binding ruling, you requested that certain information be kept confidential pursuant to 19 C.F.R. § 177.2(b)(7). With respect to this request, we only discuss information referenced in NY N303580.

FACTS:

The subject merchandise consists of five styles of stuffed mattress covers, identified as S-10”, S-12”, S-14”, T-10”, and T-12”. These zippered mattress covers, imported by Dolven Enterprises, consist of different fabric components made of man-made, nonwoven and knit fabrics. The covers are used to encase and protect mattresses of various sizes. You indicate that the subject merchandise is meant to provide an additional layer of cushioned surface for slumbering.

In your ruling request, you presented various scenarios where the fabric components are manufactured in the United States, China, and Mexico. The scenarios are outlined as follows:

S-10” and 12”

- Stuffed Fabric/Top and Border Knit/Cover are formed in the United States.
- Bottom Fabric is formed in the United States.

S-14”

- Stuffed Fabric/Top Knit/Cover is formed in the United States.
- Border Fabric is formed in China.
- Bottom Fabric is formed in the United States.

T-10" and 12"

- Stuffed Fabric/Top Knit/Cover are formed in Mexico or China.
- Border Fabric is formed in China.
- Bottom Fabric is formed in China.

Additionally, the zippers for each style will be manufactured in China or El Salvador. In each circumstance above, the cutting, sewing, and assembly operations will be performed in El Salvador along with folding, packaging, boxing, marking, and loading into a container for export.

NY N303580 classified the subject mattress covers under subheading 9404.90.9522, HTSUSA, and determined the country of origin of the subject mattress covers to be El Salvador. In making the country of origin determination, CBP applied 19 C.F.R. § 102.21(c)(4), which confers country of origin based on where the most important assembly or manufacturing process occurs. In NY N303580, CBP considered the cutting, sewing, and assembly of the fabric panels and zippers as the most important assembly or manufacturing processes. As such, the country of origin was El Salvador, where these operations occurred.

ISSUE:

What is the country of origin for marking purposes of stuffed mattress covers?

LAW AND ANALYSIS:

Section 334 of the Uruguay Round Agreements Act, codified at 19 U.S.C. § 3592, provides rules of origin for textiles and apparel entered, or withdrawn from warehouse, for consumption, on and after July 1, 1996. 19 C.F.R. § 102.21 implements section 334, and 19 C.F.R. § 102.0 refers to 19 C.F.R. § 102.21 for determining the country of origin of textile and apparel products. Pursuant to 19 C.F.R. § 102.21(c), the country of origin of a textile or apparel product will be determined by sequential application of the general rules set forth in paragraphs (c)(1) through (5).

Section 102.21(c)(1) provides that “the country of origin of a textile or apparel product is the single country, territory, or insular possession in which the good was wholly obtained or produced.” As the subject mattress covers are not wholly obtained or produced in a single country, territory, or insular possession, paragraph (c)(1) is inapplicable.

Paragraph (c)(2) provides, “Where the country of origin of a textile or apparel product cannot be determined under paragraph (c)(1) of this section, the country of origin of the good is the single country, territory, or insular possession in which each of the foreign materials incorporated in that good underwent an applicable change in tariff classification, and/or met any other requirement, specified for the good in paragraph (e) of this section:”

The applicable subheading for the subject mattress covers is 9404.90.9522, HTSUSA, which provides for “Mattress supports; articles of bedding and similar furnishing (for example, mattresses, quilts, eiderdowns, cushions, pouffes and pillows) fitted with springs or stuffed or internally fitted with any material or of cellular rubber or plastics, whether or not covered: Other: Other: Other: With outer shell of man-made fibers.” Section 102.21(e)(1) in pertinent part provides, “The following rules will apply for purposes of determining the country of origin of a textile or apparel product under paragraph (c)(2) of this section”:

HTSUS	Tariff shift and/or other requirements
9404.90	Except for goods of subheading 9404.90 provided for in paragraph (e)(2) of this section, the country of origin of a good classifiable under subheading 9404.90 is the country, territory, or insular possession in which the fabric comprising the good was formed by a fabric-making process.

Subheading 9404.90.95, HTSUS, is included in the paragraph (e)(2) exception to the above tariff shift rule. 19 CFR § 102.21(e)(2)(i) states, “The country of origin of the good is the country, territory, or insular possession in which the fabric comprising the good was both dyed and printed when accompanied by two or more of the following finishing operations: bleaching, shrinking, fulling, napping, decatizing, permanent stiffening, weighting, permanent embossing, or moireing.” Paragraph (e)(2)(i) only applies when the fabric comprising the good is both dyed and printed. You indicate that the fabric comprising the mattress covers is not printed, and therefore, paragraph (e)(2)(i) is inapplicable.

Paragraph (e)(2)(ii) provides, “If the country of origin cannot be determined under paragraph (e)(2)(i) of this section, [. . .] the country of origin is the country, territory, or insular possession in which the fabric comprising the good was formed by a fabric-making process.” As the fabric comprising the S-10” and S-12” mattress covers are manufactured in the United States, the country of origin for those styles is the United States. Since the S-14” mattress covers are comprised of fabric components manufactured in two different countries, the United States and China, paragraph (e)(2)(ii) is inapplicable. The fabric components comprising the T-10” and T-12” mattress covers are manufactured either entirely in China, or in both China and Mexico. Where the fabric comprising styles T-10” and T-12” are manufactured in China, the country of origin is China. Where the fabric components are manufactured in China and Mexico, paragraph (e)(2)(ii) is inapplicable. To determine the country of origin for these certain T-10” and T-12” mattress covers, along with style S-14”, we continue applying the general rules set forth by 19 C.F.R. § 102.21(c).

Paragraph (c)(3) states, “Where the country of origin of a textile or apparel product cannot be determined under paragraph (c)(1) or (2) of this section”:

- (i) If the good was knit to shape, the country of origin of the good is the single country, territory, or insular possession in which the good was knit; or
- (ii) Except for goods of heading 5609, 5807, 5811, 6213, 6214, 6301 through 6306, and 6308, and subheadings 6209.20.5040, 6307.10, 6307.90, and 9404.90, if the good was not knit to shape and the good was wholly assembled in a single country, territory, or insular possession, the country of origin of the good is the country, territory, or insular possession in which the good was wholly assembled.

As the subject merchandise is neither knit to shape, nor wholly assembled in a single country, territory, or insular possession, and subheading 9404.90 is excepted from provision (ii), Section 102.21(c)(3) is inapplicable.

Paragraph (c)(4) provides, “Where the country of origin of a textile or apparel product cannot be determined under paragraph (c)(1), (2) or (3) of this section, the country of origin of the good is the single country, territory, or insular possession in which the most important assembly or manufactur-

ing process occurred.” NY N303580 considered the most important assembly or manufacturing process of the subject mattress covers to be the cutting, sewing, and assembly of the fabric panels and zippers. However, the most important manufacturing process occurs at the time of the fabric making. See NY N304732 (July 11, 2019); NY N112937 (July 15, 2010); NY H85550 (Sept. 4, 2001); and Headquarters Ruling Letter (“HQ”) 959256 (June 20, 1996). Since the fabric for the mattress covers is formed in multiple countries, and no one fabric is more important than the other, the country of origin cannot be readily determined based on the fabric making process. As such, paragraph (c)(4) is inapplicable.

Paragraph (c)(5) provides, “Where the country of origin of a textile or apparel product cannot be determined under paragraph (c)(1), (2), (3) or (4) of this section, the country of origin of the good is the last country, territory or insular possession in which an important assembly or manufacturing process occurred.” Accordingly, for certain T-10” and T-12” styles, as well as style S-14”, country of origin is conferred by the last country in which an important assembly or manufacturing process occurred. Here, the last country in which as important assembly process occurred is El Salvador where the fabric comprising the mattress covers is cut and sewn, and ultimately assembled into the final product.

HOLDING:

The country of origin for the S-10” and S-12” mattress covers is the United States.

The country of origin for the S-14” mattress cover is El Salvador.

The country of origin for the T-10” and T-12” mattress covers in which the component fabric is manufactured in China, is China.

The country of origin for the T-10” and T-12” mattress covers in which the component fabrics are manufactured in China and Mexico, is El Salvador.

EFFECT ON OTHER RULINGS:

NY N303580, dated April 10, 2019, is hereby **MODIFIED** in accordance with the above analysis.

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

Sincerely,

MYLES B. HARMON,

Director

Commercial and Trade Facilitation Division



PROPOSED MODIFICATION OF THREE RULING LETTERS AND REVOCATION OF TWO RULING LETTERS, AND PROPOSED REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF CERTAIN ASIAN DUMPLINGS

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

ACTION: Notice of proposed modification of three ruling letters and revocation of two ruling letters, and proposed revocation of treatment relating to the tariff classification of turkey shomai, chicken wontons, shrimp har gow, shrimp pot stickers, shrimp shumai, hau kau and “party pack” dumplings.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (“CBP”) intends to modify three ruling letters and revoke two ruling letters concerning tariff classification of certain Asian dumplings 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 November 29, 2019.

ADDRESS: Written comments are to be addressed to U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, Attention: Trade and Commercial Regulations Branch, 90 K St., NE, 10th Floor, Washington, DC 20229–1177. Submitted comments may be inspected at the address stated above during regular business hours. Arrangements to inspect submitted comments should be made in advance by calling Mr. Joseph Clark at (202) 325–0118.

FOR FURTHER INFORMATION CONTACT: Tatiana Salnik Matherne, Food, Textiles, and Marking Branch, Regulations and Rulings, Office of Trade, at (202) 325–0351.

SUPPLEMENTARY INFORMATION:

BACKGROUND

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

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

Pursuant to 19 U.S.C. § 1625(c)(1), this notice advises interested parties that CBP is proposing to modify three ruling letters and revoke two ruling letters pertaining to the tariff classification of turkey shomai, chicken wontons, shrimp har gow, shrimp pot stickers, shrimp shumai, hau kau and “party pack” Asian dumplings. Although in this notice CBP is specifically referring to Headquarters Ruling Letter (“HQ”) 086283, dated May 14, 1990 (Attachment A), New York Ruling Letter (“NY”) M86459, dated October 11, 2006 (Attachment B), NY N303010, dated February 13, 2019 (Attachment C), NY 810007, dated May 16, 1995 (Attachment D), and NY N100268, dated April 27, 2010 (Attachment E), 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 five 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 HQ 086283, CBP classified turkey shomai in heading 1602, HTSUS, specifically in subheading 1602.31.00, HTSUS, which provides for “Other prepared or preserved meat, meat offal or blood: Of poultry of heading 0105: Of turkeys,” and chicken wontons and shrimp har gow in heading 1605, HTSUS, specifically in subheading 1605.20.05, which provided for “Crustaceans, molluscs and other aquatic invertebrates, prepared or preserved: Shrimps and prawns: Products containing fish meat; prepared meals.” In HQ M86459, CBP classified shrimp potstickers in heading 1605, HTSUS, specifically in subheading 1605.20.05. In NY N100268, CBP classified “party pack” dumplings in heading 1605, HTSUS, specifically in subheading 1605.20.05, HTSUS. In NY 810007, CBP classified hau kau in head-

ing 1605, HTSUS, specifically in subheading 1605.20.05, HTSUS. In NY N303010, CBP classified shrimp shumai in heading 1605, specifically in subheading 1605.21.10, HTSUS, which provides for “Crustaceans, molluscs and other aquatic invertebrates, prepared or preserved: Shrimps and prawns: Not in airtight containers: Other.” CBP has reviewed HQ 086283, NY M86459, NY N100268, NY N303010 and NY 810007, and has determined these ruling letters to be in error. It is now CBP’s position that the turkey shomai, chicken wontons, shrimp har gow, shrimp pot stickers, shrimp shumai, hau kau and “party pack” Asian dumplings at issue are classified in heading 1902, HTSUS, specifically in subheading 1902.20.00, HTSUS, which provides in relevant part for: “Pasta, whether or not cooked or stuffed (with meat or other substances) or otherwise prepared, such as spaghetti, macaroni, noodles, lasagna, gnocchi, ravioli, cannelloni...: Stuffed pasta, whether or not cooked or otherwise prepared.”

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is proposing to modify HQ 086283, NY M86459 and NY N100268, revoke NY 810007 and NY N303010, and to revoke or modify any other ruling not specifically identified to reflect the analysis contained in the proposed HQ H199095, set forth as Attachment F 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: October 7, 2019

MYLES B. HARMON,
Director
Commercial and Trade Facilitation Division

Attachments

ATTACHMENT A

HQ 086283

May 14, 1990

CLA-2:CO:R:C:G 086283 SER

CATEGORY: Classification

TARIFF NO.: 1602.31.0020, 1605.20.0510,
1605.20.0590, 1901.90.9060, 1901.90.9095

MR. DENNIS KOVLER
TRAFFIC MANAGER
MITSUI FOODS, INC.
CONTINENTAL PLAZA
401 HACKENSACK AVENUE
P.O. BOX 825
HACKENSACK, NJ 07602

RE: Modification of New York Ruling Letter 828470; Oriental foods, Dim Sum

DEAR MR. KOVLER:

This is in reference to New York Ruling Letter (NYRL) 828470, dated April 20, 1988, which classified food products under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA). Upon review of that ruling, it has been determined that the classifications in NYRL 828470 are incorrect and, therefore, that ruling is modified pursuant to 177.9(d), of the Customs Regulations (19 C.F.R. 177.9(d)).

FACTS:

The merchandise at issue consists of five products of oriental foods imported from Hong Kong. They are: turkey shomai, comprised of 27 percent turkey meat and 20 percent shrimp; chicken wonton, comprised of 27 percent shrimp and 13 percent chicken; hargrow, comprised of 37 percent shrimp; turkey wok sticker and turkey cocktail spring roll, both comprised of less than 20 percent, by weight, of meat. All consist of a dough jacket filled with a mixture of the meat, fish, and/or vegetables, that is shaped, steamed, frozen and packaged.

ISSUE:

What is the proper classification of the oriental food items under the HTSUSA?

LAW AND ANALYSIS:

Classification of goods under the HTSUSA is governed by the General Rules of Interpretation (GRI's), taken in order. GRI 1 provides that classification shall be determined according to the terms of the Headings and any relative section or chapter notes.

In NYRL 828470 the spring rolls were classified in subheading 2106.90.6095, HTSUSA, which provides for food preparations not elsewhere specified or included . . . frozen. The shomai, wok sticker, wonton, and hargrow were classified in subheading 1902.20.0040, HTSUSA, which provides for stuffed pasta, whether or not cooked or otherwise prepared . . . frozen. The rate of duty for all of the products was 10 percent ad valorem. Upon further review, it is Customs position that the products at issue are properly classified in different subheadings.

Although the products classified as pasta are similar in construction to stuffed pasta, these Oriental specialty items are best described as filled dumplings. In trade, such products are never referred to or marketed as pasta products. In addition, these products are not commercially interchangeable with pasta products. Like pasta, these dumplings have their own, distinct, commercial identity.

Chapter 16, HTSUS, more specifically covers the products at issue. The chapter notes state that “food preparations fall in this chapter provided that they contain more than 20 percent by weight of sausage, meat, meat offal, blood, fish or crustaceans, molluscs or other aquatic invertebrates, or any combination thereof. In cases where the preparation contains two or more of the products mentioned above, it is classified in the heading of Chapter 16 corresponding to the component or components which predominate by weight.” The Notes to Chapter 19, HTSUS, further support classification in Chapter 16, HTSUS. They exclude “food preparations containing more than 20 percent by weight of sausage, meat, meat offal, . . . , fish or crustaceans, . . . , or any combination thereof (Chapter 16).” Following this analysis the shomai, wonton, and hargrow are classified in Chapter 16, HTSUS, in the Heading corresponding to the component that predominates by weight. The shomai, with 27 percent turkey meat and 20 percent shrimp, would be classified in subheading 1602.31.0020, HTSUSA. The wonton, with 27 percent shrimp and 13 percent chicken, and the hargrow, with 37 percent shrimp, would be classified in subheading 1605.20.0510, HTSUSA, when in airtight containers, or 1605.20.0590, HTSUSA, when otherwise put up.

Chapter 16, as mentioned, precludes products which contain less than 20 percent by weight of meat, fish, etc. The wok sticker and the spring rolls contain 20 percent or less of meat or shellfish, and therefore, is precluded from classification in this Chapter. These products consist of a cereal-based dough jacket, and it is Customs position that the dough wrapper distinguishes these products from other products. Therefore, the products are properly classified in subheading 1901.90.9060, HTSUSA, when put up for retail sale, or 1901.90.9095, HTSUSA, when otherwise put up.

This classification change is made pursuant to 19 C.F.R. 177.9(d)(1) which states “any ruling letter found not to be . . . in accordance with the current view of the Customs Service may be modified or revoked. Modification or revocation of a ruling letter shall be effected by Customs Headquarters by giving notice to the person to whom the ruling letter was addressed”

The effect of the modification of ruling letters is stated in 19 C.F.R. 177.9(d)(2), which provides, “the modification . . . of a ruling letter will not be applied retroactively with respect to the person to whom the ruling was issued, or to any person directly involved in the transaction to which that ruling related”

HOLDING:

The shomai is properly classified in subheading 1602.31.0020, HTSUSA, which provides for other prepared or preserved meat, meat offal or blood: of poultry of heading 0105: of turkeys: prepared meals. The rate of duty is 10 percent ad valorem. The wonton and hargrow are properly classified, when in airtight containers, in subheading 1605.20.0510, HTSUSA, which provides for prepared or preserved fish . . . : shrimps and prawns: products containing fish meat; prepared meals: in airtight containers, dutiable at 10 percent ad

valorem. If otherwise put up, the wonton and hargrow, are properly classified in subheading 1605.20.0590, HTSUSA. The rate of duty is 10 percent ad valorem.

The spring rolls and wok sticker are properly classified, if put up for retail sale, in subheading 1901.90.9060, HTSUSA, which provides for food preparations of flour, meal, . . ., not elsewhere specified or included: other: put up for retail sale. Or if otherwise put up, in subheading 1901.90.9095, HTSUSA. The rate of duty is 10 percent ad valorem.

This modification is prospective, and thus, there is no change for past entries. A copy of this ruling letter should be attached to any further entries of this merchandise.

NYRL 828470 is hereby modified.

Sincerely,

JOHN DURANT,

Director

Commercial Rulings Division

ATTACHMENT B

NY M86459

October 11, 2006
CLA-2-16:RR:NC:SP:231 M86459
CATEGORY: Classification
TARIFF NO.: 1605.20.0590

MR. DON M. OBERT
THE LAW OFFICE OF DON M. OBERT, P.C.
350 FIFTH AVENUE, SUITE 628
NEW YORK, N.Y. 10118

RE: The tariff classification of shrimp egg rolls and shrimp potstickers
(Asian-style dumplings) from China.

DEAR MR. OBERT:

In your letter dated September 18, 2006, you requested a tariff classification ruling on behalf of Glacier Imports Inc. (Edmonton, Canada).

The ruling was requested on *Lucky Jade Food* brand “Shrimp Egg Rolls” and “Shrimp Potstickers.” Each of these two separate products consists of a dough jacket (of whole meal flour, salt, water and vegetable shortening) stuffed with shrimp (about 40% of the item’s total weight, in each instance) and various lesser percentages of cabbage, carrots, vermicelli, salt, sugar, vegetable shortening, sesame oil, mushrooms, and spring onions. Each individual “Shrimp Egg Roll” and “Shrimp Potsticker” will weigh approximately 15 grams. Prior to packaging, the egg rolls will be fried, while the potstickers will be steamed. Subsequently, ten (10) pieces of either the “Shrimp Egg Rolls” or the “Shrimp Potstickers” will be sealed in plastic bags (not “air-tight”), inserted into their respective cardboard retail boxes, and frozen prior to their exportation to the United States.

The applicable subheading for both of the above-described products will be 1605.20.0590, Harmonized Tariff Schedule of the United States (HTSUS), which provides for crustaceans, molluscs and other aquatic invertebrates, prepared or preserved: shrimps and prawns: ... prepared meals, other than in airtight containers, imported in accordance with Statistical Note 1 to chapter 16. The rate of duty will be 5%.

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 merchandise is subject to The Public Health Security and Bioterrorism Preparedness and Response Act of 2002 (The Bioterrorism Act), which is regulated by the Food and Drug Administration (FDA). Information on the Bioterrorism Act can be obtained by calling FDA at 301-575-0156, or at the Web site www.fda.gov/oc/bioterrorism/bioact.html.

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 Nathan Rosenstein at 646-733-3030.

Sincerely,
ROBERT B. SWIERUPSKI
Director,
National Commodity Specialist Division

ATTACHMENT C

N303010

February 13, 2019

CLA-2-16:OT:RR:NC:N2:231

CATEGORY: Classification

TARIFF NO.: 1605.21.1030

MS. ASHLEY HONG

NISSIN INTERNATIONAL TRANSPORT USA INC.

1540 W. 190TH STREET

TORRANCE, CA 90501

RE: The tariff classification of Shrimp Dumplings from Japan. Correction to Ruling Number N302411

DEAR MS. HONG:

This replaces Ruling Number N302411, dated February 7, 2019, which contained a clerical error. The tariff classification for Shrimp Dumplings (Item Number WAF 97713, also known as Shrimp Shumai) was indicated as 1901.90.9095 instead of the correct 1605.21.1030. A complete corrected ruling follows.

The two products under review are as follows:

Shrimp Dumplings (Item Number WAF 91869, also known as Shrimp Shumai) is composed of onion, shrimp (21.17 percent), potato starch, wheat flour, oils, Lizardfish paste, water, egg white, soy protein, sugar, salt, monosodium glutamate, spices, wheat protein, soybean flour, shrimp extract, dextrin, potassium chloride, sodium citrate, calcium lactate, disodium succinate, disodium inosinate and disodium guanylate.

Shrimp Dumplings (Item Number WAF 97713, also known as Shrimp Shumai) is composed of onion, shrimp (17.85 percent), Pollock paste (17.85 percent), water, wheat flour, oils, potato starch, egg white, soy protein, sugar, salt, wheat protein, monosodium glutamate, spices, shrimp extract, potassium chloride, sodium citrate, calcium lactate, disodium succinate, disodium inosinate and disodium guanylate. Both products will be imported in a frozen state. The consumer is directed to either fry, steam or microwave the items prior to consumption. You state that item number WAF 97713 will be placed on trays, inserted into a polypropylene bag and packed 12 bags to a cardboard box. Item number WAF 91869 will be placed on trays, inserted into a microwavable bag and packed 10 bags to a cardboard box. The former items are sold to the food service industry, and the latter items are intended for retail sale. The applicable subheading for the Shrimp Dumplings (Item Numbers WAF 97713, WAF 91869) will be 1605.21.1030, Harmonized Tariff Schedule of the United States (HTSUS), which provides for crustaceans, molluscs and other aquatic invertebrates, prepared or preserved: Shrimps and prawns: Not in airtight containers: Other, Frozen, imported in accordance with Statistical Note 1 to this chapter: Other. The rate of duty will be Free. Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on the World Wide Web at <https://hts.usitc.gov/current>.

This merchandise is subject to The Public Health Security and Bioterrorism Preparedness and Response Act of 2002 (The Bioterrorism Act), which is regulated by the Food and Drug Administration (FDA). Information on the

Bioterrorism Act can be obtained by calling the FDA at 301-575-0156, or at the Web site www.fda.gov/oc/bioterrorism/bioact.html.

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 Ekeng Manczuk at ekeng.b.manczuk@cbp.dhs.gov.

Sincerely,

STEVEN A. MACK

Director

National Commodity Specialist Division

ATTACHMENT D

NY 810007

May 16, 1995

CLA-2-16:S:N:N7:231 810007

CATEGORY: Classification

TARIFF NO.: 1605.20.0510; 1605.20.0590

MR. PETER HSU
PETER HSU ENTERPRISES, INC.
650 NORTH CANNON AVENUE
LANSDALE, PA 19446

RE: The tariff classification of shrimp dumplings from Thailand.

DEAR MR. HSU:

In your letter, dated May 5, 1995, you have requested a tariff classification ruling.

The merchandise consists of the following two products:

1. Hau Kau (shrimp dumplings) - fresh, uncooked, and frozen. The ingredients are shrimp (38 percent), vegetables, seasoning, and pastry. There are two methods of packaging: 1) packed 2 kilograms per carton, 6 cartons to a master cartons, 2) 500 grams per carton, 20 cartons to a master carton.
2. Crispy Seafood Deli - fresh, uncooked, and frozen. The ingredients are shrimp and fish meat (23 percent), vegetables, seasoning, and pastry. Packed 1.5 kilograms per carton, 6 cartons to a master carton.

In order to issue a binding ruling on the Crispy Seafood Deli, this office requires a breakdown of the shrimp vs. fish meat.

The applicable subheading for the Hau Kau (shrimp dumplings), if in airtight containers, will be 1605.20.0510, Harmonized Tariff Schedule of the United States (HTS), which provides for crustaceans, molluscs and other aquatic invertebrates, prepared or preserved, shrimps and prawns, products containing fish meat; prepared meals, in airtight containers. The rate of duty will be 9 percent ad valorem.

The applicable subheading for the Hau Kau (shrimp dumplings), if not in airtight containers, will be 1605.20.0590, HTS, which provides for crustaceans, molluscs and other aquatic invertebrates, prepared or preserved, shrimps and prawns, products containing fish meat; prepared meals, other. The rate of duty will be 9 percent ad valorem.

Articles classifiable under subheadings 1605.20.0510, HTS, and 1605.20.0590, HTS, which are products of Thailand, are entitled to duty free treatment under the Generalized System of Preferences (GSP) upon compliance with all applicable regulations.

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

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

Sincerely,

JEAN F. MAGUIRE
Area Director
New York Seaport

ATTACHMENT E

N100268

April 27, 2010

CLA-2-16:OT:RR:NC:2:231

CATEGORY: Classification

TARIFF NO.: 1605.20.1020; 1605.20.0590

MR. VI NGUYEN

TRANGS GROUP USA INC.

10375 FERN AVENUE, SUITE D

STANTON, CALIFORNIA 90680

RE: The tariff classification of frozen seafood products from Vietnam.

DEAR MR. NGUYEN:

In your undated letter received here on April 6, 2010, you requested a tariff classification ruling.

Descriptions and photos of three different frozen seafood products were submitted for our review. You also provided additional information by telephone. All of the products will be imported packed in non-airtight plastic bags placed within printed cardboard retail boxes. After importation, all of the products will be sold in supermarkets to be taken home and either cooked in the oven or deep-fried.

The first item, identified as "Honey Shrimp," is a frozen prepared shrimp product (*Panaeus vannemei*) comprised of the following ingredients: peeled/tailless/headless shrimp (60%), wheat flour, tapioca starch, rice flour, corn flour, water, baking powder, honey, sugar, salt and vegetable oil. Based on a submitted photo, the goods have the typical appearance of whole, individual breaded shrimp. Sachets of honey sauce (containing wheat flour, honey, sugar and water) will also be included in the retail box.

The applicable subheading for the "Honey Shrimp" will be 1605.20.1020, Harmonized Tariff Schedule of the United States (HTSUS), which provides for crustaceans, molluscs and other aquatic invertebrates, prepared or preserved: shrimps and prawns: other: frozen, imported in accordance with Statistical Note 1 to chapter 16: other: breaded. The rate of duty will be free.

The second item, identified as "Potato Shrimp," is said to consist mainly of tail-on shrimp (*Panaeus vannemei*) wrapped in potato strands. The ingredients are shrimp (35.2%), potato (44%), whitefish paste (*Pangasius hypophthalmus*), seasoned sweet chili, salt, modified starch, onion oyster sauce, sugar, pepper, salt and garlic. In a submitted photo, the item has the appearance of a roll of wound potato strips, with the bare tail of a shrimp extending from the center of one end of the roll. The other ingredients are said to be sandwiched between the potato strips and the shrimp. Sachets of sweet chili sauce (water, wheat flour, chili, garlic, sugar, salt) will also be included in the retail box.

The applicable subheading for the "Potato Shrimp" will be 1605.20.0590, HTSUS, which provides for crustaceans, molluscs and other aquatic invertebrates, prepared or preserved: shrimps and prawns: products containing fish meat; prepared meals: other, imported in accordance with Statistical Note 1 to chapter 16. The rate of duty will be 5% ad valorem.

The third item, identified as a "Party Pack," is made up principally of Asian-style dumplings of three different kinds, packed (mixed) together in one common bag. The three kinds are as follows:

- “Money Purses (Bags),” each of which consists of a dough jacket, shaped like a drawstring-type cloth coin bag, filled with fish, shrimp and other foodstuffs. The ingredients are filo pastry [wheat flour, water, salt, vegetable oil] (35%), whitefish [*Pangasius hypophthalmus*] (27.1%), chopped shrimp (15.52%), onion, modified starch, spring onion, peas, bean, cabbage, sweet corn, yam bean, carrot, salt, pepper, oyster sauce, sesame oil, garlic.
- “Shrimp Triangles,” each of which consists of a triangular-shaped dough jacket filled with shrimp, vegetables and other foodstuffs. The ingredients are *vannemei* shrimp (48%), filo pastry [water, wheat flour, vegetable oil, salt], cabbage, “vice vermicelli” (rice noodles), bean sprouts, carrot, vegetable oil, spring onion, corn starch, soy sauce, onion, garlic, sesame oil, red Thai curry seasoning, salt, sugar, pepper.
- “Filo Shrimp,” each of which consists of a cylinder-like dough jacket filled with shrimp and other foodstuffs. The ingredients are *vannemei* shrimp (50%), filo pastry [wheat flour, water, salt, vegetable oil], garlic powder, pepper.

In addition to the above-described dumplings, the “Party Pack” box will also contain sachets of teriyaki sauce (water, soybean sauce, sesame oil, sugar, salt) and sweet chili sauce (water, wheat flour, chili, garlic, sugar, salt).

The applicable subheading for the complete “Party Pack” will be 1605.20.0590, HTSUS, which provides for crustaceans, molluscs and other aquatic invertebrates, prepared or preserved: shrimps and prawns: products containing fish meat; prepared meals: other, imported in accordance with Statistical Note 1 to chapter 16. The rate of duty will be 5% 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 merchandise is subject to The Public Health Security and Bioterrorism Preparedness and Response Act of 2002 (The Bioterrorism Act), which is regulated by the Food and Drug Administration (FDA). Information on the Bioterrorism Act can be obtained by calling FDA at 301-575-0156, or at the Web site www.fda.gov/oc/bioterrorism/bioact.html.

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 Nathan Rosenstein at (646) 733-3030.

Sincerely,

ROBERT B. SWIERUPSKI

Director

National Commodity Specialist Division

ATTACHMENT F

HQ H199095
OT:RR:CTF:FTM H199095 TSM
CATEGORY: Classification
TARIFF NO.: 1902.20.00

MS. ESTELLE BUTTS
EXECUTIVE ASSISTANT
MITSUI FOODS, INC.
35 MAPLE STREET NORWOOD, NJ 07648

RE: Modification of HQ 086283, NY M86459 and NY N100268; Revocation of NY N303010 and NY 810007; Classification of Turkey Shomai, Chicken Wontons, Shrimp Har Gow, Shrimp Pot Stickers, Shrimp Shumai, Hau Kau and “Party Pack”

DEAR MS. BUTTS:

This is in reference to Headquarters Ruling Letter (“HQ”) 086283, dated May 14, 1990, issued to Mitsui Foods, Inc., concerning the tariff classification of certain Asian foods under the Harmonized Tariff Schedule of the United States (“HTSUS”).¹ In that ruling, U.S. Customs and Border Protection (“CBP”) classified turkey shomai in heading 1602, HTSUS, which provides in relevant part for “Other prepared or preserved meat.” CBP also classified chicken wontons and shrimp har gow in heading 1605, HTSUS, which provides for “Crustaceans, molluscs and other aquatic invertebrates, prepared or preserved.”² We have reviewed HQ 086283 and find it to be in error with regard to the tariff classification of the turkey shomai, chicken wontons and shrimp har gow, shrimp pot stickers, shrimp shumai, hau kau and “party pack.” For the reasons set forth below, we hereby modify HQ 086283.

This is also in reference to four other rulings with substantially similar merchandise: (1) New York Ruling Letter (“NY”) M86459, dated October 11, 2006, which was issued to Glacier Imports, Inc., classifying shrimp pot stickers in heading 1605, HTSUS;³ (2) NY N303010, dated February 13, 2019, which was issued to Nissin International Transport USA Inc., classifying shrimp shumai dumplings in heading 1605, HTSUS; (3) NY 810007, dated May 16, 1995, issued to Peter Hsu Enterprises, Inc., classifying hau kau dumplings under heading 1605, HTSUS; and, (4) NY N100268, dated April 27, 2010, issued to Trangs Group USA Inc., classifying “party pack” dumplings under heading 1605, HTSUS.⁴

FACTS:

In HQ 086283, the subject merchandise is described as follows:

The merchandise at issue consists of ... oriental foods imported from Hong Kong. They are: turkey shomai, comprised of 27 percent turkey meat and 20 percent shrimp; chicken wonton, comprised of 27 percent shrimp and

¹ HQ 086283 modified New York Ruling Letter (“NY”) 828470, dated April 20, 1988.

² We note that NY 086283 also classified two other products, turkey wok stickers and turkey cocktail spring rolls, which are not at issue here.

³ We note that NY M86459 also classified one other product, shrimp egg rolls, which is not at issue here.

⁴ We note that NY N100268 also classified two other products, honey shrimp and potato shrimp, which are not at issue here.

13 percent chicken; hargrow, comprised of 37 percent shrimp ... All consist of a dough jacket filled with a mixture of the meat, fish, and/or vegetables, that is shaped, steamed, frozen and packaged.

In NY M86459, the subject merchandise is described as follows:

The ruling was requested on ... “Shrimp Potstickers.” ... [T]hese ... products consist of a dough jacket (of whole meal flour, salt, water and vegetable shortening) stuffed with shrimp (about 40% of the item’s total weight, in each instance) and various lesser percentages of cabbage, carrots, vermicelli, salt, sugar, vegetable shortening, sesame oil, mushrooms, and spring onions. Each individual ... “Shrimp Potsticker” will weigh approximately 15 grams. Prior to packaging, ... the potstickers will be steamed. Subsequently, ten (10) pieces of ... the “Shrimp Potstickers” will be sealed in plastic bags (not “air-tight”), inserted into their respective cardboard retail boxes, and frozen prior to their exportation to the United States.

In NY N303010, the subject merchandise is described as follows:

Shrimp Dumplings (Item Number WAF 91869, also known as Shrimp Shumai) is composed of onion, shrimp (21.17 percent), potato starch, wheat flour, oils, Lizardfish paste, water, egg white, soy protein, sugar, salt, monosodium glutamate, spices, wheat protein, soybean flour, shrimp extract, dextrin, potassium chloride, sodium citrate, calcium lactate, disodium succinate, disodium inosinate and disodium guanylate.

Shrimp Dumplings (Item Number WAF 97713, also known as Shrimp Shumai) is composed of onion, shrimp (17.85 percent), Pollock paste (17.85 percent), water, wheat flour, oils, potato starch, egg white, soy protein, sugar, salt, wheat protein, monosodium glutamate, spices, shrimp extract, potassium chloride, sodium citrate, calcium lactate, disodium succinate, disodium inosinate and disodium guanylate.

Both products will be imported in a frozen state. The consumer is directed to either fry, steam or microwave the items prior to consumption. You state that item number WAF 97713 will be placed on trays, inserted into a polypropylene bag and packed 12 bags to a cardboard box. Item number WAF 91869 will be placed on trays, inserted into a microwavable bag and packed 10 bags to a cardboard box. The former items are sold to the food service industry, and the latter items are intended for retail sale.

In NY 810007, the subject merchandise is described as follows:

Hau Kau (shrimp dumplings) - fresh, uncooked, and frozen. The ingredients are shrimp (38 percent), vegetables, seasoning, and pastry. There are two methods of packaging: 1) packed 2 kilograms per carton, 6 cartons to a master cartons, 2) 500 grams per carton, 20 cartons to a master carton.

In NY N100268, the subject merchandise is described as follows:

The third item, identified as a “Party Pack,” is made up principally of Asian-style dumplings of three different kinds, packed (mixed) together in one common bag. The three kinds are as follows:

- “Money Purses (Bags),” each of which consists of a dough jacket, shaped like a drawstring-type cloth coin bag, filled with fish, shrimp and other foodstuffs. The ingredients are filo pastry [wheat flour, water, salt,

vegetable oil] (35%), whitefish [*Pangasius hypophthalmus*] (27.1%), chopped shrimp (15.52%), onion, modified starch, spring onion, peas, bean, cabbage, sweet corn, yam bean, carrot, salt, pepper, oyster sauce, sesame oil, garlic.

- “Shrimp Triangles,” each of which consists of a triangular-shaped dough jacket filled with shrimp, vegetables and other foodstuffs. The ingredients are *vannemei* shrimp (48%), filo pastry [water, wheat flour, vegetable oil, salt], cabbage, “vice vermicelli” (rice noodles), bean sprouts, carrot, vegetable oil, spring onion, corn starch, soy sauce, onion, garlic, sesame oil, red Thai curry seasoning, salt, sugar, pepper.
- “Filo Shrimp,” each of which consists of a cylinder-like dough jacket filled with shrimp and other foodstuffs. The ingredients are *vannemei* shrimp (50%), filo pastry [wheat flour, water, salt, vegetable oil], garlic powder, pepper.

In addition to the above-described dumplings, the “Party Pack” box will also contain sachets of teriyaki sauce (water, soybean sauce, sesame oil, sugar, salt) and sweet chili sauce (water, wheat flour, chili, garlic, sugar, salt).

ISSUE:

Are the subject Asian dumplings classified in headings 1602 or 1605, HTSUS, as prepared or preserved meat or crustaceans respectively? Or are they classified in heading 1902, HTSUS, which provides for stuffed pasta?

LAW AND ANALYSIS:

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

The HTSUS provisions under consideration are as follows:

1602	Other prepared or preserved meat, meat offal or blood: * * *
1605	Crustaceans, molluscs and other aquatic invertebrates, prepared or preserved: * * *
1902	Pasta, whether or not cooked or stuffed (with meat or other substances) or otherwise prepared, such as spaghetti, macaroni, noodles, lasagna, gnocchi, ravioli, cannelloni; couscous, whether or not prepared: * * *

Note 2 to Chapter 16 provides as follows:

2. Food preparations fall in this chapter provided that they contain more than 20 percent by weight of sausage, meat, meat offal, blood, fish or crustaceans, molluscs or other aquatic invertebrates, or any combina-

tion thereof. In cases where the preparation contains two or more of the products mentioned above, it is classified in the heading of chapter 16 corresponding to the component or components which predominate by weight. *These provisions do not apply to the stuffed products of heading 1902 or to the preparations of heading 2103 or 2104 (emphasis added).*

* * *

Note 1(a) to Chapter 19 provides as follows:

1. This chapter does not cover:

- (a) Except in the case of stuffed products of heading 1902, food preparations containing more than 20 percent by weight of sausage, meat, meat offal, blood, fish or crustaceans, molluscs or other aquatic invertebrates, or any combination thereof (chapter 16);

* * *

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

EN 19.02 states that:

The pasta of this heading are unfermented products made from semolinas or flours of wheat, maize, rice, potatoes, etc. These semolinas or flours (or intermixtures thereof) are first mixed with water and kneaded into a dough which may also incorporate other ingredients (e.g., very finely chopped vegetables, vegetable juice or purées, eggs, milk, gluten, diastases, vitamins, colouring matter, flavouring).

The doughs are then formed (e.g., by extrusion and cutting, by rolling and cutting, by pressing, by moulding or by agglomeration in rotating drums) into specific predetermined shapes (such as tubes, strips, filaments, cockleshells, beads, granules, stars, elbow-bends, letters). In this process a small quantity of oil is sometimes added. These forms often give rise to the names of the finished products (e.g., macaroni, tagliatelle, spaghetti, noodles).

The products are usually dried before marketing to facilitate transport, storage and conservation; in this dried form, they are brittle. The heading also covers undried (i.e., moist or fresh) and frozen products, for example, fresh gnocchi and frozen ravioli.

The pasta of this heading may be cooked, stuffed with meat, fish, cheese or other substances in any proportion or otherwise prepared (e.g., as prepared dishes containing other ingredients such as vegetables, sauce, meat). Cooking serves to soften the pasta without changing its basic original form.

Stuffed pasta may be fully closed (for example, ravioli), open at the ends (for example, cannelloni) or layered, such as lasagne.

* * *

Note 2 to Chapter 16 and Note 1(a) to Chapter 19 state that products which contain more than twenty percent by weight of meat are classified in Chapter 16. However, the Notes state that stuffed pasta is always classified in heading 1902, HTSUS, regardless of the meat's weight. As such, we must first determine whether the turkey shomai, chicken wontons, shrimp har gow and shrimp pot stickers are stuffed pasta.

In HQ H180095, dated September 3, 2013, we proffered several definitions of the term "pasta."⁵ We cited to *Webster's College Dictionary*, which defines "pasta" as "a flour paste or dough made of semolina and dried, as for spaghetti and macaroni, or used fresh, as for ravioli." See *Webster's College Dictionary* 1053 (4th Ed. 2007). We also cited *The American Heritage Dictionary*, which defines "pasta" as "1. Unleavened dough, made of wheat flour, water, and sometimes eggs, that is molded into any of a variety of shapes and boiled." These definitions are consistent with EN 19.02, which defines pasta as being comprised of semolina or flour which is mixed with water and then kneaded into dough. EN 19.02 further states that pasta may be cooked and stuffed with meat, fish or other substances. Heading 1902, HTSUS, also covers frozen stuffed pasta, such as frozen ravioli.

According to the aforementioned definitions, stuffed pasta consists of a semolina or flour dough jacket stuffed with meat, fish or other substances. The subject turkey shomai, chicken wontons, shrimp har gow, shrimp pot stickers, shrimp shumai, hau kau and "party pack" all consist of a flour dough jacket stuffed with turkey, chicken, shrimp and/or fish. Like frozen ravioli, the subject merchandise is molded into specific shapes and frozen. As such, the subject merchandise is classifiable as stuffed pasta of heading 1902, HTSUS. Note 2 to Chapter 16 excludes these products from classification in Chapter 16.

HOLDING:

By application of GRI 1, the turkey shomai, chicken wontons, shrimp har gow and shrimp pot stickers are classified under heading 1902, HTSUS, and specifically under subheading 1902.20.00, HTSUS, which provides in relevant part for: "Pasta, whether or not cooked or stuffed (with meat or other substances) or otherwise prepared, such as spaghetti, macaroni, noodles, lasagna, gnocchi, ravioli, cannelloni...: Stuffed pasta, whether or not cooked or otherwise prepared." The 2019 column one, general rate of duty is 6.4 percent *ad valorem*.

EFFECT ON OTHER RULINGS:

HQ 086283, dated May 14, 1990, is hereby modified with regard to the tariff classification of the turkey shomai, chicken wonton and shrimp har gow.

NY M86459, dated October 11, 2006, is hereby modified with regard to the tariff classification of the shrimp pot stickers.

⁵ When, as in this case, a tariff term is not defined by the HTSUS or its legislative history, "the term's correct meaning is its common meaning." *Mita Copystar Am. v. United States*, 21 F.3d 1079, 1082 (Fed. Cir. 1994). The common meaning of a term used in commerce is presumed to be the same as its commercial meaning. *Simod Am. Corp. v. United States*, 872 F.2d 1572, 1576 (Fed. Cir. 1989). To ascertain the common meaning of a term, a court may consult "dictionaries, scientific authorities, and other reliable information sources" and "lexicographic and other materials." *C.J. Tower & Sons v. United States*, 673 F.2d 1268, 1271 (CCPA 1982); *Simod*, 872 F.2d at 1576.

NY N100268, dated April 27, 2010, is hereby modified with regard to the tariff classification of the “Party Pack” Asian-style dumplings.

NY 810007, dated May 16, 1995, is hereby revoked.

NY N303010, dated February 13, 2019, is hereby revoked.


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

Sincerely,

MYLES B. HARMON,

Director

Commercial and Trade Facilitation Division



**PROPOSED MODIFICATION OF ONE RULING LETTER
AND PROPOSED REVOCATION OF TREATMENT
RELATING TO THE TARIFF CLASSIFICATION OF PLASTIC
STETHOSCOPE COVERS**

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

ACTION: Notice of proposed modification of one ruling letter and proposed revocation of treatment relating to the tariff classification of plastic stethoscope covers.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) intends to modify one ruling letter concerning the tariff classification of plastic stethoscope covers 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 November 29, 2019.

ADDRESS: Written comments are to be addressed to U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, Attention: Trade and Commercial Regulations Branch, 90 K St., NE, 10th Floor, Washington, DC 20229–1177. Submitted comments may be inspected at the address stated above during regular business hours. Arrangements to inspect submitted comments should be made in advance by calling Mr. Joseph Clark at (202) 325–0118.

FOR FURTHER INFORMATION CONTACT: Suzanne Kingsbury, Electronics, Machinery, Automotive and International Nomenclature Branch, Regulations and Rulings, Office of Trade, at (202) 325-0113.

SUPPLEMENTARY INFORMATION:

BACKGROUND

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

Pursuant to 19 U.S.C. § 1625(c)(1), this notice advises interested parties that CBP is proposing to modify one ruling letter pertaining to the tariff classification of plastic stethoscope covers. Although in this notice CBP is specifically referring to Headquarters Ruling Letter ("HQ") 967233, dated February 18, 2005 (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 HQ 967233, CBP affirmed the classification of two styles of stethoscope covers the subject of New York Ruling Letters ("NY")

K83122, dated February 20, 2004, and NY K83786, dated March 24, 2004. Specifically, HQ 967233 affirmed the classification of a Stethocap™ in subheading 9018.90.80, HTSUS, which provides for, in pertinent part, accessories of instruments and appliances used in the medical field, and the classification of a Stethocap™ treated with antimicrobial agent in subheading 3808.90.70, HTSUS, which provides for, in pertinent part, insecticides, rodenticides, fungicides, herbicides, antisprouting products and plant-growth regulators, disinfectants and similar products, put up in forms or packings for retail sale or as preparations or articles. CBP has reviewed HQ 967233 and has determined the ruling letter to be partially in error as regards the classification of the plastic stethoscope cover without antimicrobial agent. It is now CBP's position that the plastic stethoscope cover without antimicrobial agent is properly classified in heading 3926, HTSUS, specifically 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 modify HQ 967233 and to revoke or modify any other ruling not specifically identified to reflect the analysis contained in the proposed HQ H304940, 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: October 7, 2015

GREG CONNOR
for

MYLES B. HARMON,
Director

Commercial and Trade Facilitation Division

Attachments

ATTACHMENT A

HQ 967233

February 18, 2005

CLA-RR:CR:GC 967233 IOR

CATEGORY: Classification

TARIFF NO.: 3808.90.70; 9018.90.80 HTSUS

MR. CRAIG LEWIS, ESQ.
HOGAN & HARTSON LLP
555 THIRTEENTH ST, NW
WASHINGTON DC 20004-1109

RE: Stethocap™ with antimicrobial; NY K83122 and NY K83786 affirmed

DEAR MR. LEWIS:

This letter is in response to your May 21, 2004 request for reconsideration, on behalf of your client The Buzz Group LLC (Buzz Group), of New York Ruling Letters (NY) K83122, dated February 20, 2004, and K83786, dated March 24, 2004, issued to another party, on behalf of your client, by the Director, National Commodity Specialist Division, New York, with respect to the classification under the Harmonized Tariff Schedule of the United States (“HTSUS”), of a Stethocap™ and a Stethocap™ with antimicrobial. Our decision follows a September 15, 2004 teleconference between you and your client, and staff of the Office of Regulations and Rulings, General Classification Branch, and receipt of an additional submission on behalf of Buzz Group, dated September 24, 2004. We have found both NY K83122 and K83786 to be correct. We grant the request in your September 24, 2004 submission, that certain information pertaining to the quantity and cost of the antimicrobial for each Stethocap™ with antimicrobial, be treated as confidential.

FACTS:

In NY K83122, Customs and Border Protection (“CBP”) wrote, in relevant part:

The submitted sample, designated as Stethocap™, consists of a blister pack containing two, circular, plastic caps, each measuring 2” in diameter. Each cap bears the name of a prescription medication on its outer surface, and has been treated with an antimicrobial preparation containing silver as the active ingredient. The cap is designed to be snapped onto the diaphragm of a standard manual stethoscope, prior to auscultating the patient, to prevent the transmission of microorganisms - and the risk of infection - from the diaphragm to the patient. Disposal and replacement of the cap is recommended after 90 days of use. You state in your letter that drug companies will use the subject product as a “giveaway” to promote their products.

The Stethocap™ with antimicrobial was classified under subheading 3808.90.7000, HTSUS, which provides for “[i]nsecticides, rodenticides, fungicides, herbicides, antisprouting products and plant-growth regulators, disinfectants and similar products, put up in forms or packings for retail sale or as preparations or articles (for example, sulfur-treated bands, wicks and candles, and flypapers: Other: Other: Other: Containing an inorganic substance.”

In NY K83786, CBP wrote, in relevant part:

The two sample Stethocaps are as described in New York Ruling Letter K83122–238, issued to you on February 20, 2004, except that there is no inscription on it and that you indicate that it was not treated with an antimicrobial agent.

The Stethocap™ without antimicrobial was classified under subheading 9018.90.8000, 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.”

You have described to us in the teleconference that the Stethocap™ without antimicrobial is intended to be a hygienic device, used as a barrier between the bell of the stethoscope and a patient’s skin, that can be used for a period of 90 days, and that the Stethocap™ with or without antimicrobial are intended to be used in the same setting, but the Stethocap™ with antimicrobial has the added feature of the antimicrobial. In your September 24, 2004 submission, you assert that the antimicrobial comprises a minimal weight and cost of the Stethocap™ with antimicrobial. In your September 24, 2004 submission, p. 9, you assert that the key features of the Stethocap™ with antimicrobial is that first, “it creates a good physical barrier between the patient’s skin and those parts of the stethoscope that can harbor bacteria – i.e., the permanent stethoscope diaphragm and the rim that secures the diaphragm to the stethoscope – without compromising the audio functions of the stethoscope,” and second, “the Stethocap™ is both cheap and easy to remove and, therefore, highly disposable.” You assert that these two core functions can, and are, achieved without the addition of an antimicrobial treatment to the plastic. Further, on p. 11, you state that the Stethocap™ with antimicrobial “is designed for a singular purpose; to be used as an accessory to a stethoscope to prevent the accumulation of bacteria on the permanent diaphragm and under the rim of the stethoscope so as to limit transmission of microorganisms from stethoscope to patient,” and “this function is substantially achieved without the presence of an antimicrobial.” In your May 21, 2004 reconsideration request, the end-use for which the Stethocap™ was designed was stated to be “to provide a clean surface on the diaphragm of a stethoscope to prevent the transmission of microorganisms from the diaphragm to a patient.”

You have provided us with the packaging for the Stethocap™ with antimicrobial. The instructions for use are the only text on the packaging pertaining to the Stethocap™, and they state as follows:

Built-in silver-based antimicrobial helps reduce the growth of damaging bacteria on the surface of the product. For best results, we recommend replacing after 90 days of use.

You state that you do not have any packaging for the Stethocap™ without antimicrobial, and have indicated that none had been imported as of the time of the September 15, 2004 teleconference.

A website, describing a Stethocap, <http://www.stethocap.com>, describes the article as a “tool for the prevention of the spread of microorganisms through the stethoscope,” and explains its use as follows:

Stethocap is a snap on and easy to dispose plastic. Just snap it on to the diaphragm when using the stethoscope and dispose the Snap-On in the regular garbage after use.

This website appears to be from the year 2000, and does not describe a stethoscope diaphragm cover with antimicrobial. The website also refers to the “Stethocap” as a “disposable diaphragm.”

Research into stethoscope diaphragm covers indicates that for covers not treated with any kind of antimicrobial, disposal after use is recommended. The only disposable stethoscope cover on the market not treated with an antimicrobial that we could locate, consists of what appears to be a thin, flat, round adhesive cover for the diaphragm. It is stated to operate as a barrier against cross-contamination, by containing contaminants on the adhesive cover instead of on the chestpiece. We have not been provided with any evidence that the Stethocap™ without antimicrobial is marketed in any way. References made to cleaning the stethoscope with alcohol indicate that such cleaning is insufficient protection against contamination, and that healthcare providers have insufficient time to clean the stethoscope between patients. Regarding other types and brands of stethoscope covers impregnated with antimicrobial compounds, they are stated to suppress the growth and migration of bacteria and mold to minimize surface contamination, and reduce the spreading of bacteria from patient to stethoscope and stethoscope to patient. The covers are also frequently referred to as “diaphragms.”

ISSUE:

What is the proper tariff classification for the Stethocap™ and the Stethocap™ with antimicrobial?

LAW AND ANALYSIS:

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

The HTSUS subheadings under consideration are as follows:

- 3808 Insecticides, rodenticides, fungicides, herbicides, antisprouting products and plant-growth regulators, disinfectants and similar products, put up in forms or packings for retail sale or as preparations or articles (for example, sulfur-treated bands, wicks and candles, and flypapers):
- 3808.90 Other:
 - Other:
 - Other:
- 3808.90.70 Containing an inorganic substance
- 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:
- 9018.90 Other instruments and appliances and parts and accessories thereof:
 - Other:

9018.90.40	Percussion hammers, stethoscopes and parts of stethoscopes
9018.90.80	Other

We find that the Stethocap™ with antimicrobial meets the terms of heading 3808, HTSUS, which provides for “[I]nsecticides, rodenticides, fungicides, herbicides, antisprouting products and plant-growth regulators, disinfectants and similar products, put up ...as...articles.” The imported merchandise consists of an article impregnated with an antimicrobial which destroys microorganisms, as does a disinfectant. However, the article at issue destroys microorganisms that come into contact with the Stethocap™ itself, as opposed to having to be physically wiped or sprayed onto the microorganisms. It acts as a disinfectant or similar product and is put up as an article.

The Harmonized Commodity Description And Coding System Explanatory Notes (EN’s) constitute the official interpretation of the Harmonized System. While not legally binding on the contracting parties, and therefore not dispositive, the EN’s provide a commentary on the scope of each heading of the Harmonized System and are thus useful in ascertaining the classification of merchandise under the system. CBP believes the EN’s should always be consulted. *See* T.D. 89–80, 54 Fed. Reg. 35127, 35128 (Aug. 23, 1989).

EN 38.08 states that the heading covers “a range of products...intended to destroy pathogenic germs....” The EN further states that the subject products can be classified in the heading “when they are put up in the form of articles.” Exemplars of such articles are “sulphur-treated bands, wicks and candles..., fly-papers..., grease bands for fruit trees..., papers impregnated with salicylic acid for preserving jams, papers or small wooden sticks coated with lindane and acting by combustion, etc.” “Disinfectants” are described as “agents which destroy or irreversibly inactivate undesirable bacteria, viruses or other micro-organisms, generally on inanimate objects.” Examples of the use of “disinfectants” includes cleaning walls in hospitals or sterilizing instruments.

You take the position that the Stethocap™ with antimicrobial is a composite product whose essential character is as a disposable accessory to a medical device, and not as an antimicrobial. The EN to 38.08 states that the heading excludes preparations “covered by more specific headings of the Nomenclature, or having subsidiary disinfecting, insecticidal, etc., properties,” and disinfectant soap is given as an example. In this case, from the evidence available, the primary purpose of the Stethocap™ with antimicrobial, is as a disinfectant of the Stethocap™ itself. The evidence available does not support the conclusion that the antimicrobial property of the Stethocap™ with antimicrobial is merely subsidiary to a primary purpose.

You have represented the purpose of both types of Stethocap™ variously:

1. To be used as a barrier between the bell of the stethoscope and a patient’s skin, to prevent the accumulation of bacteria on the permanent diaphragm and under the rim of the stethoscope, so as to limit transmission of microorganisms from stethoscope to patient.
2. To provide a clean surface on the diaphragm of a stethoscope to prevent the transmission of microorganisms from the diaphragm to a patient.

The first purpose is to protect the stethoscope itself from bacteria and microorganisms. The second purpose is to provide a surface free of bacteria or microorganisms on the diaphragm of the stethoscope. We find that the first purpose stated is inconsistent with the literature available about stethoscope covers, and is inconsistent with the packaging information for the Stethocap™ with antimicrobial. If, as asserted by you, both types of Stethocap™ can be used for 90 days, the second described purpose above can only be accomplished by the Stethocap™ with antimicrobial. The information on the “Stethocap” website indicates that the “Stethocap” (which is not represented as having been treated with an antimicrobial) should be disposed of after use, therefore it cannot be used for ninety days and accomplish the second purpose. The packaging for the Stethocap™ with antimicrobial, indicates that the antimicrobial reduces the growth of bacteria on the Stethocap™ itself, thereby providing a clean diaphragm surface, and preventing the transmission of microorganisms to a patient.

The literature in general regarding the diaphragm covers indicates that the purpose of the covers with antimicrobials is to suppress the growth and migration of bacteria and mold to minimize surface contamination and reduce the spreading of bacteria from patient to stethoscope and stethoscope to patient. Contrary to your assertion, the evidence indicates that the primary purpose of the stethoscope cover with antimicrobial is not as a barrier between the permanent portions of the stethoscope and the patient's skin, but is to provide a clean stethoscope surface, thereby minimizing the transmission of microorganisms.

In NY J86441, dated July 10, 2003, a silver based antimicrobial was classified under subheading 3808.90.70, HTSUS. The silver based antimicrobial was substantially similar to the one with which the Stethocap™ is impregnated. The classification in J86441 is consistent with our finding that the antimicrobial character of the Stethocap™ with antimicrobial is classifiable in heading 3808, HTSUS, as a disinfectant or similar product.

You cite as examples other items which have antimicrobial or disinfecting properties, but have been nevertheless classified in headings other than 3808, HTSUS. You cite to, NY I88352, dated December 6, 2002 (pertaining to surgical drapes, some of which were antimicrobial), NY B89595, dated September 26, 1997 (pertaining to first aid dressings for burns treated with an antimicrobial), NY 883006, dated March 11, 1993 (pertaining to deodorizer with antimicrobial properties, designed for use in vacuum cleaners), HQ 964237, dated May 22, 2002 (pertaining to a cooler with a molded plastic compartment treated with an antimicrobial), and HQ 964449, dated January 14, 2002 (pertaining to a cooler with a molded plastic compartment treated with an antimicrobial). In the cited rulings, in all instances the antimicrobial property of the item at issue was subsidiary to a primary purpose. For example, with respect to the coolers, the primary purpose is to be used to transport food or beverages and keep them hot or cold.

On the basis that stethoscope covers impregnated with antimicrobial compounds are intended to provide an uncontaminated stethoscope surface and suppress the growth and migration of bacteria and mold for ninety days, we conclude that the Stethocap™ with antimicrobial is described in heading 3808, HTSUS, specifically in subheading 3808.90.70, HTSUS, which provides for “[i]nsecticides, rodenticides, fungicides, herbicides, antisprouting products and plant-growth regulators, disinfectants and similar products, put up

in forms or packings for retail sale or as preparations or articles (for example, sulfur-treated bands, wicks and candles, and flypapers: Other: Other: Other: Containing an inorganic substance.”

You disagree that the Stethocap™ with antimicrobial is even potentially classifiable under heading 3808, HTSUS, on the basis that the antimicrobial agent is *de minimis*, and therefore may be ignored for purposes of classification, and that the antimicrobial does not alter the essential character of the Stethocap™ without antimicrobial. We first address the argument that the antimicrobial agent is *de minimis*. The principle, *de minimis non curat lex* (“the law does not care for trifles”) may be applied to determinations under the customs laws (*see, e.g., Alcan Aluminum Corp. v. United States*, 165 F.3d 898 (Fed. Cir. 1999), and the cases cited therein). The commentary on the rule of *de minimis* in Customs Law & Administration, by Ruth F. Sturm (3rd Ed., 1995, §51.13) states, in part:

An ingredient or component may or may not be disregarded for tariff purposes, not necessarily because of the quantity present, but on the basis of varying circumstances, including the purpose of Congress and whether or not the amount of the material has changed the nature of the article or its salability. ...

Materials added for transportation purposes or for the mechanical purpose of holding ingredients together have been disregarded, but not those deliberately added to change or enhance the product. [Among other cases cited for this proposition is *Northam Warren Corp. v. United States*, 60 CCPA 117, C.A.D. 1092, 475 F.2d 647 (1973), in which the Court affirmed a Customs Court decision that a very small amount (0.15%) of a coal tar derivative could not be ignored under the *de minimis* rule because “the coal tar derivative ingredient performed a function affecting the appearance of a product whose appearance is part of its functional role ...” (60 CCPA at 121)]. ...

In this case, the antimicrobial is an intentionally added feature which enhances the product by extending the period of time the Stethocap™ can reduce the growth of bacteria, and changes the Stethocap™ from a diaphragm cover that should be either disposed of after use or cleaned after each use, to one that can be used for 90 days to maintain an uncontaminated stethoscope surface without cleaning after each use. While you state that the Stethocap™ without antimicrobial can be used for 90 days, that is inconsistent with the information we have obtained independently. The information we have obtained indicates that in order to maintain an uncontaminated stethoscope surface, stethoscope diaphragm covers without an antimicrobial should be disposed of after use. Other than your unsubstantiated assertions, we do not find any information indicating that the reuse of a stethoscope diaphragm cover without antimicrobial serves any purpose whatsoever. Your statement that the Stethocap™ “is designed to be used as an accessory to a stethoscope to prevent the accumulation of bacteria on the permanent diaphragm and under the rim of the stethoscope so as to limit transmission of microorganisms from stethoscope to patient,” does not reflect the purpose of a stethoscope cover as indicated in our research. The Stethocap™ without antimicrobial can only accomplish the purpose you state, if it is disposed of and replaced after each use, or thoroughly cleaned. We find that the antimicrobial agent is not *de minimis*, and therefore classification of the article under heading 3808, HTSUS, is not precluded.

The Stethocap™ with antimicrobial is also described in heading 9018, as accessories of instruments and appliances used in medical, surgical, dental, or veterinary sciences.

In accordance with GRI 1, taking into consideration only the headings, the Stethocap™ with antimicrobial could be classified under either heading 3808, HTSUS, as a disinfectant article or heading 9018, HTSUS, as an accessory to a medical appliance.

Under GRI 1, we must also consider the relevant Section and Chapter notes. Note 2 to Section VI, HTSUS, which covers Chapter 38, HTSUS, states that, with some exceptions not pertinent in this case, “goods classifiable in heading 3004, 3005, 3006, 3212, 3303, 3304, 3305, 3306, 3307, 3506, 3707 or 3808 by reason of being put up in measured doses for retail sale are to be classified in those headings and in no other heading of the tariff schedule.”

Note 2 to Chapter 90, HTSUS, provides as follows:

Subject to note 1 above, parts and accessories for machines, apparatus, instruments or articles of this chapter are to be classified according to the following rules:

- (a) Parts and accessories which are goods included in any of the headings of this chapter or of chapter 84, 85 or 91 (other than heading 8485, 8548 or 9033) are in all cases to be classified in their respective headings;
- (b) Other parts and accessories, if suitable for use solely or principally with a particular kind of machine, instrument or apparatus, or with a number of machines, instruments or apparatus of the same heading (including a machine, instrument or apparatus of heading 9010, 9013, or 9031) are to be classified with the machines, instruments or apparatus of that kind;
- (c) All other parts and accessories are to be classified in heading 9033.

Section VI, Note 2, does not apply, to the Stethocap™ with antimicrobial, because the Stethocap™ with antimicrobial is not classifiable in heading 3808, HTSUS, by reason of being put up in measured doses or for retail sale. The Stethocap™ with antimicrobial is instead classifiable in heading 3808 because it is a disinfectant put up as an article. See *Mita Copystar America v. United States*, 160 F.3d 710 (Fed. Cir. 1998), in which the merchandise consisted of toner cartridges which were arguably classifiable in headings 3707, HTSUS, as “chemical preparations for photographic uses,” and 9009, HTSUS, as “parts and accessories of electrostatic photocopying apparatus.” Heading 3707, HTSUS, is also subject to Section VI, Note 2, and Chapter 90, Note 2(b) was also applicable. The court concluded that the toner cartridges were classifiable in heading 3707, HTSUS, whether or not they were put up in measured doses or for retail sale. Therefore, Section VI, Note 2, was determined to be inapplicable to the classification of toner cartridges. The court determined that Section VI, Note 2, was applicable only where merchandise put up in measured doses or for retail sale would be classified elsewhere, but for being put up in measured doses or for retail sale. As it was determined that Section VI, Note 2 was not applicable, there was no conflict between Section VI, Note 2, and Chapter 90, Note 2(b), and the toner cartridges could be classified in heading 9009, HTSUS, under GRI 1. In the instant case, the Stethocap™ with antimicrobial, is not classified in heading 3808, HTSUS for the reason that it is put up in measured doses or for retail

sale. Therefore the Stethocap™ with antimicrobial is not required to be classified in heading 3808, HTSUS, by Section VI, Note 2, and can also be classified in heading 9018, HTSUS.

However, in *Mita Copystar America v. United States*, Additional U.S. Rule of Interpretation 1(c) was not applied. Additional U.S. Rule of Interpretation 1(c) provides:

In the absence of special language or context which otherwise requires ... a provision for parts of an article covers products solely or principally used as a part of such articles but a provision for “parts” or “parts and accessories” shall not prevail over a specific provision for such part or accessory[.]

See *Sharp Microelectronics Technology, Inc. v. United States*, 122 F.3d 1446, 1453 (Fed. Cir. 1997) (“Additional U.S. Rule of Interpretation 1(c) further provides a tool to assist in finding the correct classification home for articles, such as those in issue, for which two headings compete”).

By its terms, Additional U.S. Rule 1(c), HTSUS, applies in the absence of special language or context which otherwise requires. The application of Additional U.S. Rule 1(c), HTSUS, has frequently been considered in the context of Section XVI, Note 2. Section XVI, Note 2(a) has been determined to be “special language or context” that renders Rule of Interpretation 1(c) inapplicable to the extent that they conflict.” See *Mitsubishi International Corporation v. United States*, 182 F.3d 884, 886 (Fed. Cir. 1999). CBP has consistently taken the position that Section XVI, Note 2, is special language or context that precludes the application of Additional U.S. Rule 1(c), HTSUS. See e.g. HQ 966963, dated April 30, 2004, HQ 966854, dated January 16, 2004. Chapter 90, Note 2, has language substantially identical to that of Section XVI, Note 2, therefore we conclude that Chapter 90, Note 2, is also special language or context. However, it is also the position of CBP that the special language or context, only precludes the application of Additional U.S. Rule 1(c), HTSUS, where the competing provisions at issue are both within the same section or Chapter (depending on whether the “special language or context” arises in the context of a section note or chapter note). See *Sharp Microelectronics Technology, Inc. v. United States*, *supra*, (Additional U.S. Rule 1(c), HTSUS, was applied where one competing provision was subject to Section XVI, Note 2, and the other competing provision was in Chapter 90, HTSUS). Cf. *Nidec Corp. v. United States*, 861 F. Supp. 136, *aff’d* 68 F. 3d 1333 (Fed Cir. 1995) (Additional U.S. Rule 1(c), HTSUS was not applied, where both competing provisions were subject to Section XVI, Note 2, HTSUS). Therefore, in this case, because one of the competing provisions, Heading 3808, HTSUS, is outside of Chapter 90, Note 2 to that chapter does not provide special language or context which precludes the application of Additional U.S. Rule of Interpretation 1(c), HTSUS.

Therefore we must determine whether heading 3808, HTSUS is a specific provision for the Stethocap™ with antimicrobial. In HQ 965968, dated December 16, 2002, heading 9405, HTSUS, providing for “lamps and lighting fixtures was found to be a specific provision for a dental lamp designed to be mounted onto a dentist chair, as opposed to heading 9402, HTSUS, providing for “parts” of dentists’ chairs. In HQ 966854, dated January 16, 2004, heading 9401, HTSUS, providing for “seats” was found to be a specific provision for seats for fork-lift trucks, as opposed to heading 8431, HTSUS, providing for “parts” suitable for certain machinery. Similarly, in this case, we find heading 3808, HTSUS, providing for “...disinfectants and similar products, put up

in...articles...” to be a specific provision for the Stethocap™ with antimicrobial, as opposed to heading 9018, HTSUS, providing for “[i]nstruments and appliances used in medical, surgical, dental or veterinary sciences...; parts and accessories thereof.”

You assert that the Stethocap™ is regulated by the Food and Drug Administration (“FDA”), as support for the argument that the Stethocap™ is more specifically described in heading 9018, HTSUS. However, “it is well established that statutes, regulations and administrative interpretations relating to ‘other than tariff purposes’ are not determinative of Customs classification disputes.” *Amersham Corp. v. United States*, 5 CIT 49, 56 (1983). Articles are classified by the FDA to protect public safety, not as guidance to customs classification. HQ 085064, dated August 24, 1990.

In the teleconference you indicated that an alternative heading for the Stethocap™ is a basket provision for articles of plastic. We do not agree that the Stethocap™ with antimicrobial is classifiable under heading 3926, HTSUS, which provides for “[o]ther articles of plastics,” because, heading 3926, HTSUS, is a general heading or basket provision, as evidenced by the word “other.” See *The Item Company v. United States*, 98 F. 3d 1294, 1296 (Fed. Cir. 1996). Classification of imported merchandise in a basket provision is only appropriate if there is no tariff provision that covers the merchandise more specifically. See *EM Industries, Inc. v. United States*, 22 C.I.T. 156, 165, 999 F. Supp. 1473, 1480 (1998) (“‘Basket’ or residual provisions of HTSUS Headings. . . are intended as a broad catch-all to encompass the classification of articles for which there is no more specifically applicable subheading”). See also *Apex Universal Inc. v. United States*, 22 CIT 465, 471 (1998). In this case there are more specifically applicable headings therefore, the Stethocap™ with antimicrobial is precluded from classification in heading 3926, HTSUS.

Finally, as we conclude that the classification of the Stethocap™ with antimicrobial, is classified under GRI 1, we do not reach the essential character argument raised in your submission of September 24, 2004.

You have requested reconsideration of the classification of the Stethocap™ without antimicrobial within heading 9018. In NY K83786, the Stethocap™ without antimicrobial was classified in subheading 9018.90.8000, HTSUS. You assert that the correct classification is in subheading 9018.90.4000, 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: Percussion hammers, stethoscopes and parts of stethoscopes,” stating that the subheading provides for “accessories to stethoscopes.”

Contrary to your assertion, subheading 9018.90.40, HTSUS, provides only for “parts” of stethoscopes and does not include accessories. Therefore the classification of an “accessory” in that subheading is precluded. There is no dispute, that the Stethocap™ is an accessory, as opposed to a part of a stethoscope. Other subheadings of heading 9018, HTSUS, clearly provide for “parts and accessories,” in which case either parts or accessories could be classified therein. In this instance the principle of *expressio unius est exclusio alterius* (the expression of one thing implies the exclusion of all others) applies. In subheading 9018.90.40, only the term “parts” was included, thereby implying the exclusion of the term “accessories.” With regard to Note 2(b), it is the CBP position that the note provides for the classification of parts

and accessories at the heading level, and classification at the subheading level is in accordance with GRI 6, according to which “the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related subheading notes and *mutatis mutandis*, to [rules 1 through 5], on the understanding that only subheadings at the same level are comparable.” Therefore we affirm that the correct classification of the Stethocap™ without antimicrobial, is within heading 9018, HTSUS, specifically in 9018.90.8000, 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.”

Based on the above analysis, we affirm the holdings in NY K83122, dated February 20, 2004 and K83786, dated March 24, 2004.

HOLDING:

The Stethocap™ with antimicrobial is classifiable, according to GRI 1, under subheading, 3808.90.7000, HTSUSA, which provides for “[i]nsecticides, rodenticides, fungicides, herbicides, antisprouting products and plant-growth regulators, disinfectants and similar products, put up in forms or packings for retail sale or as preparations or articles (for example, sulfur-treated bands, wicks and candles, and flypapers: Other: Other: Other: Containing an inorganic substance,” with a column one, general duty rate of 5% *ad valorem*.

The Stethocap™ without antimicrobial is classifiable, according to GRI 1, under subheading, 9018.90.8000, HTSUSA, 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,” with a column one, general duty rate of “[f]ree.”

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 K83122, and NY K83786 are affirmed.

Sincerely,

MYLES B. HARMON,
Director

Commercial Rulings Division

ATTACHMENT B

HQ H304940
OT:RR:CTF:EMAIN H304940 SK
CATEGORY: Classification
TARIFF NO.: 3926.90.99

MR. CRAIG LEWIS, ESQ.
HOGAN & HARTSON, LLP
555 13TH STREET, N.W.
WASHINGTON, DC 20004-1109

RE: Modification of HQ 967233; stethoscope cover without antimicrobial agent; Stethocap™; other made up articles.

DEAR MR. LEWIS:

In HQ 967233, issued to you on February 18, 2005, on behalf of your client The Buzz Group LLC (Buzz Group), U.S. Customs and Border Protection (CBP) affirmed the classification under the Harmonized Tariff Schedule of the United States (HTSUS) of two styles of stethoscope covers the subject of New York Ruling Letters (NY) K83122, dated February 20, 2004, and K83786, dated March 24, 2004. Specifically, HQ 967233 affirmed the classification of a Stethocap™ in subheading 9018.90.80, HTSUS, which provides for, in pertinent part, accessories of instruments and appliances used in the medical field, and the classification of a Stethocap™ with antimicrobial agent in subheading 3808.90.70, HTSUS, which provides for, in pertinent part, insecticides, rodenticides, fungicides, herbicides, antisprouting products and plant-growth regulators, disinfectants and similar products, put up in forms or packings for retail sale or as preparations or articles.

Upon review, we now believe HQ 967233 to be partially in error as regards the classification of the Stethocap™ without antimicrobial agent.

FACTS:

Two styles of stethoscope covers were at issue in HQ 967233. This reconsideration concerns only the Stethocap™ style presented without an antimicrobial agent.

In HQ 967233, the Stethocap™ (without antimicrobial agent) is described as consisting of a blister pack containing two, circular, plastic caps, each measuring 2" in diameter. The cap is designed to be snapped onto the diaphragm of a standard manual stethoscope, prior to auscultating the patient, to prevent the transmission of microorganisms - and the risk of infection - from the diaphragm to the patient.

ISSUE:

What is the proper tariff classification of the stethoscope cover (without antimicrobial agent)?

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 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 subheadings under consideration are as follows:

- 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:

Notes 1 and 2 to Chapter 39, HTSUS, provide, in pertinent part:

1. Throughout the tariff schedule the expression “plastics” means those materials of headings 3901 to 3914 which are or have been capable, either at the moment of polymerization or at some subsequent stage, of being formed under external influence (usually heat and pressure, if necessary with a solvent or plasticizer) by molding, casting, extruding, rolling or other process into shapes which are retained on the removal of the external influence.

* * *

2. This chapter does not cover:

* * *

(u) Articles of Chapter 90 (for example, optical elements, spectacle frames, drawing instruments);

* * *

Note 2 to Chapter 90, HTSUS, provides:

Subject to note 1 above, parts and accessories for machines, apparatus, instruments or articles of this chapter are to be classified according to the following rules:

- (d) Parts and accessories which are goods included in any of the headings of this chapter or of chapter 84, 85 or 91 (other than heading 8485, 8548 or 9033) are in all cases to be classified in their respective headings;
- (e) Other parts and accessories, if suitable for use solely or principally with a particular kind of machine, instrument or apparatus, or with a number of machines, instruments or apparatus of the same heading (including a machine, instrument or apparatus of heading 9010, 9013, or 9031) are to be classified with the machines, instruments or apparatus of that kind;
- (f) All other parts and accessories are to be classified in heading 9033.

The Harmonized Commodity Description and Coding System Explanatory Notes (EN's) constitute the official interpretation of the Harmonized System. While not legally binding on the contracting parties, and therefore not dispositive, the EN's provide a commentary on the scope of each heading of the Harmonized System and are thus useful in ascertaining the classification of merchandise under the system. CBP believes the EN's should always be consulted. *See* T.D. 89-80, 54 Fed. Reg. 35127, 35128 (Aug. 23, 1989).

The EN to heading 9018, HTSUS, states, in pertinent part:

This heading covers a very wide range of instruments and appliances which, in the vast majority of cases, are used only in professional practice (e.g., by doctors, surgeons, dentists, veterinary surgeons, midwives), ei-

ther to make a diagnosis, to prevent or treat an illness or to operate, etc. Instruments and appliances for anatomical or autoptic work, dissection, etc., are also included, as are, under certain conditions, instruments and appliances for dental laboratories (see Part (II) below). The instruments of the heading may be made of any material (including precious metals).

As Chapter 39 Note 2(u) excludes articles of Chapter 90, our initial analysis is whether the subject merchandise is classifiable as an accessory of instruments and appliances used in medical, surgical, dental or veterinary sciences of heading 9018, HTSUS.

The term “accessory” is not defined in the HTSUS or in the ENs. This office has previously stated that the term “accessory” is generally understood to mean an article that must directly contribute to the effectiveness of the principal article (e.g., facilitate the use or handling of the particular article, widen the range of its uses, or improve its operation). See HQ 301594, dated December 18, 2018; HQ 958710, dated April 8, 1996; and, HQ 950166, dated November 8, 1991. We also employ the common and commercial meanings of the term “accessory,” as per *Rollerblade v. United States*, wherein the Court of International Trade (C.I.T.) derived from various dictionaries that an accessory must relate directly to the thing accessorized. See *Rollerblade, Inc. v. United States*, 116 F.Supp. 2d 1247 (Ct. Int’l Trade 2000), *aff’d*, 282 F.3d 1349 (Fed. Cir. 2002) (holding that inline roller skating protective gear is not an accessory because the protective gear does not directly act on the roller skates).

In applying the court’s standard to the instant facts, we must examine whether the subject covers directly contribute to the effectiveness of a stethoscope’s function. A stethoscope is a medical instrument for “detecting sounds produced in the body that are conveyed to the ears of the listener through rubber tubing connected with a piece placed upon the area to be examined.” See <https://www.merriam-webster.com/dictionary/stethoscope> (last visited August 2019). In HQ 967233, the subject stethoscope caps are described as providing a barrier to prevent contamination of a stethoscope. As such, they do not directly add to or enhance a stethoscope’s function of detecting sounds in the body. Therefore, the subject stethoscope covers do not rise to the level of an accessory of a medical instrument or appliance of heading 9018, HTSUS.

As the subject articles are not accessories of heading 9018, HTSUS, Note 2(b) to Chapter 90 is inapplicable. The subject plastic stethoscope covers are also not included under any other more specific provision in Chapter 39, and therefore they fall to heading 3926, HTSUS, specifically subheading 3926.90, HTSUS, as other articles of plastic. We further note that CBP has historically classified various styles of protective barriers used in the medical arena to cover medical apparatus according to their constituent material. In NY 883919, dated April 13, 1993, CBP classified plastic disposable banded bags, used to cover non-sterile items in the operating room, and surgical drapes, under subheading 3926.90, HTSUS, as other articles of plastic. In NY C81283, dated November 28, 1997, CBP classified a protective drape designed to protect equipment in an operating room under subheading 3926.90, HTSUS. See also NY 8708868, dated February 13, 1992, in which CBP classified protective barriers designed to shield C-arm and mobile X-ray drapes, microscope, laser and video camera drapes, and x-ray cassette

drapes” under 3926.90, HTSUS. In NY N041298, dated November 3, 2008, CBP classified a general purpose probe cover used to shield medical apparatus in subheading 3926.90, HTSUS.

HOLDING:

By application of GRIs 1 and 6, the Stethocap™ without antimicrobial is classifiable under 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.” The column one, general duty rate of duty is 5.3 percent *ad valorem*. Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on the internet at *www.usitc.gov*.

EFFECT ON OTHER RULINGS:

HQ 967233 is modified in accordance with the above analysis.

Sincerely,

MYLES B. HARMON,

Director

Commercial Rulings Division

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**PROPOSED REVOCATION OF TWO RULING LETTERS
AND REVOCATION OF TREATMENT RELATING TO THE
TARIFF CLASSIFICATION OF “PERNOD ABSINTHE
SUPERIEURE” AND “RICARD PASTIS DE MARSEILLE”**

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

ACTION: Notice of proposed revocation of two ruling letters, and revocation of treatment relating to the tariff classification of “Pernod Absinthe Superieure” and “Ricard Pastis de Marseille.”

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 two ruling letters concerning tariff classification of “Pernod Absinthe Superieure” and “Ricard Pastis de Marseille” 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 November 29, 2019.

ADDRESS: Written comments are to be addressed to U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, Attention: Trade and Commercial Regulations Branch, 90 K St., NE, 10th Floor, Washington, DC 20229-1177. Submitted comments may be inspected at the address stated above during regular business hours. Arrangements to inspect submitted comments should be made in advance by calling Mr. Joseph Clark at (202) 325-0118.

FOR FURTHER INFORMATION CONTACT: Catherine Miller, Food, Textiles, and Marking Branch, Regulations and Rulings, Office of Trade, at (202) 325-0101.

SUPPLEMENTARY INFORMATION:

BACKGROUND

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

Pursuant to 19 U.S.C. §1625(c)(1), this notice advises interested parties that CBP is proposing to revoke two ruling letters pertaining to the tariff classification of "Pernod Absinthe Superieure" and "Ricard Pastis de Marseille." Although in this notice, CBP is specifically referring to New York Ruling Letters ("NY") N304274 (Attachment A) and NY N304276, (Attachment B), both dated June 7, 2019, 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 two 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 N304274 and NY N304276, CBP classified "Pernod Absinthe Superieure" and "Ricard Pastis de Marseille" in heading 2208, HTSUS, specifically in subheading 2208.70.0030, HTSUSA, which provides for "Undenatured ethyl alcohol of an alcoholic strength by volume of less than 80 percent vol.; spirits, liqueurs and other spirituous beverages: Liqueurs and cordials: In containers each holding not over 4 liters." CBP has reviewed NY N304274 and NY N304276 and has determined the ruling letters to be in error. It is now CBP's position that "Pernod Absinthe Superieure" and "Ricard Pastis de Marseille" are properly classified, in heading 2208, HTSUS, specifically in subheading 2208.90.7500, HTSUSA, which provides for "Undenatured ethyl alcohol of an alcoholic strength by volume of less than 80 percent vol.; spirits, liqueurs and other spirituous beverages: Other: Other: Spirits: Other."

Pursuant to 19 U.S.C. §1625(c)(1), CBP is proposing to revoke NY N304274 and NY N304276 and to revoke or modify any other ruling not specifically identified to reflect the analysis contained in the proposed HQ H305105, set forth as Attachment C to this notice. Additionally, pursuant to 19 U.S.C. §1625(c)(2), CBP is proposing to revoke any treatment previously accorded by CBP to substantially identical transactions.

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

Dated: October 4, 2019

GREG CONNOR
for

MYLES B. HARMON,
Director

Commercial and Trade Facilitation Division

Attachments

ATTACHMENT A

N304274

June 7, 2019

CLA-2-22:OT:RR:NC:N2:232

CATEGORY: Classification

TARIFF NO.: 2208.70.0030

ADENA M. SANTIAGO
HUSCH BLACKWELL LLP
750 17TH STREET N.W., SUITE 900
WASHINGTON, D.C. 20006-4675

RE: The tariff classification of “Pernod Absinthe Superieure” from France

DEAR Ms. SANTIAGO:

In your letter dated May 7, 2019 you requested a tariff classification ruling on behalf of Pernod Ricard USA, LLC (“Pernod Ricard”) for “Pernod Absinthe Superieure”. Ingredients breakdown, a photograph and descriptive literature were submitted with your request.

The subject merchandise is “Pernod Absinthe Superieure”. The product consists of a distillate of anise seed and wormwood, drinking water, and herbs extract. “Pernod Absinthe Superieure” has an alcohol volume of 68 percent. The product will be imported in 375 ml bottles.

The applicable subheading for the “Pernod Absinthe Superieure”, will be 2208.70.0030, Harmonized Tariff Schedule of the United States (HTSUS), which provides for Undenatured ethyl alcohol of an alcoholic strength by volume of less than 80 percent vol.; spirits, liqueurs and other spirituous beverages: Liqueurs and cordials: In containers each holding not over 4 liters. The general rate of duty will be Free.

Imports under this subheading may be subject to Federal Excise Tax (26 U.S.C. 5001, 26 U.S.C. 5041 or 26 U.S.C. 5051). Additional requirements may be imposed on this product by the Alcohol and Tobacco Tax and Trade Bureau (TTB). You may contact the TTB at the following number: (1-866-927-2533), Email-ttbinternetquestions@ttb.gov. Written requests may be addressed to: Alcohol and Tobacco Tax and Trade Bureau, Advertising, Labeling and Formulation Division, 1310 G Street NW, Box 12, Washington, DC 20005.

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

This merchandise is subject to The Public Health Security and Bioterrorism Preparedness and Response Act of 2002 (The Bioterrorism Act) which is regulated by the Food and Drug Administration (FDA). Information on the Bioterrorism Act can be obtained by calling FDA at telephone number (301) 575-0156, or at the website www.fda.gov/oc/bioterrorism/bioact.html.

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 Frank Troise at frank.l.troise@cbp.dhs.gov.

Sincerely,
STEVEN A. MACK
Director
National Commodity Specialist Division

ATTACHMENT B

304276

June 7, 2019

CLA-2-22:OT:RR:NC:N2:232

CATEGORY: Classification

TARIFF NO.: 2208.70.0030

ADENA M. SANTIAGO
HUSCH BLACKWELL LLP
750 17TH STREET N.W., SUITE 900
WASHINGTON, D.C. 20006-4675

RE: The tariff classification of “Ricard Pastis de Marseille” from France

DEAR Ms. SANTIAGO:

In your letter dated May 7, 2019 you requested a tariff classification ruling on behalf of Pernod Ricard USA, LLC (“Pernod Ricard”) for “Ricard Pastis de Marseille”. Ingredients breakdown, a photograph and descriptive literature were submitted with your request.

The subject merchandise, “Ricard Pastis de Marseille”, is Ricard’s Pastis Anise and Licorice Flavored Spirits. The product consists of a mixture of water, ethyl alcohol, sugar, natural extracts of licorice, aniseed, burned sugar, and a blend of aromatic plants. “Ricard Pastis de Marseille” has an alcohol volume of 45 percent. The product will be imported in 750 ml bottles.

The applicable subheading for the “Ricard Pastis de Marseille”, will be 2208.70.0030, Harmonized Tariff Schedule of the United States (HTSUS), which provides for Undenatured ethyl alcohol of an alcoholic strength by volume of less than 80 percent vol.; spirits, liqueurs and other spirituous beverages: Liqueurs and cordials: In containers each holding not over 4 liters. The general rate of duty will be Free.

Imports under this subheading may be subject to Federal Excise Tax (26 U.S.C. 5001, 26 U.S.C. 5041 or 26 U.S.C. 5051). Additional requirements may be imposed on this product by the Alcohol and Tobacco Tax and Trade Bureau (TTB). You may contact the TTB at the following number: (1-866-927-2533), Email-ttbinternetquestions@ttb.gov. Written requests may be addressed to: Alcohol and Tobacco Tax and Trade Bureau, Advertising, Labeling and Formulation Division, 1310 G Street NW, Box 12, Washington, DC 20005.

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

This merchandise is subject to The Public Health Security and Bioterrorism Preparedness and Response Act of 2002 (The Bioterrorism Act) which is regulated by the Food and Drug Administration (FDA). Information on the Bioterrorism Act can be obtained by calling FDA at telephone number (301) 575-0156, or at the website www.fda.gov/oc/bioterrorism/bioact.html.

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 Frank Troise at frank.l.troise@cbp.dhs.gov.

Sincerely,
STEVEN A. MACK
Director
National Commodity Specialist Division

ATTACHMENT C

HQ H305105
OT:RR:CTF:FTM: H305105 CDM
CATEGORY: Classification
TARIFF NO.: 2208.90.7500

MR. J. KEVIN HORGAN
DEKIEFFER & HORGAN, PLLC
1090 VERMONT AVENUE, NW, SUITE 800
WASHINGTON, DC 20005

RE: Revocation of NY N304274 (classification of “Pernod Absinthe Superieure”) and NY N304276 (classification of “Ricard Pastis de Marseille”)

DEAR MR. HORGAN:

On June 7, 2019, U.S. Customs and Border Protection (“CBP”) issued New York Ruling Letters (“NY”) N304274 and NY N304276 to Adena M. Santiago at Husch Blackwell LLP, representing Pernod Ricard USA, LLC (“Pernod Ricard”). The rulings pertained to the tariff classification under the Harmonized Tariff Schedule of the United States (“HTSUS”) of “Pernod Absinthe Superieure” (NY N304274) and “Ricard Pastis de Marseille” (NY N304276). In NY N304274 and NY N304276, CBP classified both “Pernod Absinthe Superieure” and “Ricard Pastis de Marseille” in subheading 2208.70.00, HTSUS, which provides for “Undenatured ethyl alcohol of an alcoholic strength by volume of less than 80 percent vol.; spirits, liqueurs and other spirituous beverages: Liqueurs and cordials: In containers each holding not over 4 liters.”

You submitted a request for reconsideration of NY N304274 and NY N304276, dated July 16, 2019, on behalf of your client, Pernod Ricard. We have reviewed NY N304274 and NY N304276 and determined them to be in error because the products do not meet the requisite sugar, dextrose, or levulose amount to be classified as liqueurs and cordials, as defined by the regulations of the United States Tobacco Tax and Trade Bureau, providing the standards of identity for distilled spirits. Accordingly, NY N304274 and NY N304276 are revoked.

You have asked that certain information submitted in connection with this request be treated as confidential, pursuant to 19 C.F.R. § 177.2(b)(7). Your request for confidentiality is approved. The information concerning the percentages and/or amounts of ingredients will not be released to the public.

FACTS:

In NY N304274, “Pernod Absinthe Superieure” from France was described as follows:

The product consists of a distillate of anise seed and wormwood, drinking water, and herbs extract. “Pernod Absinthe Superieure” has an alcohol volume of 68 percent. The product will be imported in 375 ml bottles.

In NY N304276, “Ricard Pastis de Marseille” from France was described as follows:

“Ricard Pastis de Marseille” [] is Ricard’s Pastis Anise and Licorice Flavored Spirits. The product consists of a mixture of water, ethyl alcohol, sugar, natural extracts of licorice, aniseed, burned sugar, and a blend of

aromatic plants. “Ricard Pastis de Marseille” has an alcohol volume of 45 percent. The product will be imported in 750 ml bottles.

In both rulings, Pernod Ricard submitted an ingredients’ breakdown, a photograph, and descriptive literature of the product. Pursuant to the information submitted in NY N304274 and NY N304276, “Pernod Absinthe Superieure” contained no sugar and “Ricard Pastis de Marseille” contained sugar content less than 2.5 percent by weight. In your request for reconsideration of NY N304274 and NY N304276, you confirmed that “Pernod Absinthe Superieure” and “Ricard Pastis de Marseille” contain sugar content of less than 2.5 percent volume by weight. There were no samples submitted for reconsideration.

ISSUE:

Whether “Pernod Absinthe Superieure” and “Ricard Pastis de Marseille” are properly classified in subheading 2208.70.00, HTSUS, as liqueurs and cordials, or in subheading 2208.90.75, HTSUS, as other spirits.

LAW AND ANALYSIS:

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

The 2019 HTSUS provisions under consideration are as follows:

2208	“Undenatured ethyl alcohol of an alcoholic strength by volume of less than 80 percent vol.; spirits, liqueurs and other spirituous beverages: * * *
2208.70.00	Liqueurs and cordials: In containers each holding not over 4 liters * * *
2208.90.75	Other: Spirits: Other

You argue that “Pernod Absinthe Superieure” and “Ricard Pastis de Marseille” are flavored spirituous beverages that do not contain the required minimum amount of sweeteners to be classified in subheading 2208.70.00, HTSUS, as liqueurs or cordials and therefore they should be classified in subheading 2208.90.75, HTSUS, which provides for ““Undenatured ethyl alcohol of an alcoholic strength by volume of less than 80 percent vol.; spirits, liqueurs and other spirituous beverages: Other: Other: Spirits: Other.”

You also argue that the Explanatory Notes (“ENs”) to the Harmonized Tariff Schedule support your argument that heading 2208, HTSUS, covers, whatever their alcoholic strength:

- (A) Spirits produced by distilling wine, cider or other fermented beverages or fermented grain or other vegetable products, without adding flavouring; they retain, wholly or partly, the secondary constituents

(esters, aldehydes, acids, higher alcohols, etc.) which give the spirits their peculiar individual flavours and aromas.

- (B) Liqueurs and cordials, being spirituous beverages to which sugar, honey or other natural sweeteners and extracts or essences have been added (e.g., spirituous beverages produced by distilling, or by mixing, ethyl alcohol or distilled spirits, with one or more of the following : fruits, flowers or other parts of plants, extracts, essences, essential oils or juices, whether or not concentrated). These products also include liqueurs and cordials containing sugar crystals, fruit juice liqueurs, egg liqueurs, herb liqueurs, berry liqueurs, spice liqueurs, tea liqueurs, chocolate liqueurs, milk liqueurs and honey liqueurs.
- (C) All other spirituous beverages not falling in any preceding heading of this Chapter.

Provided that their alcoholic strength by volume is less than 80% vol, the heading also covers undenatured spirits (ethyl alcohol and neutral spirits) which, contrary to those at (A), (B) and (C) above, are characterised by the absence of secondary constituents giving a flavour or aroma. These spirits remain in the heading whether intended for human consumption or for industrial purposes.

In addition to undenatured ethyl alcohol of an alcoholic strength by volume of less than 80% vol, the heading includes, *inter alia*:

* * *

- (6) Spirituous beverages (generally known as liqueurs), such as anisette (obtained from green anise and badian), curaçao, (manufactured with the peel of the bitter orange), kummel (flavoured with caraway or cumin seeds).
- (7) The liqueurs known as “crèmes”, because of their consistency or colour. They are generally of relatively low alcoholic content and very sweet (for example, creams of cocoa, bananas, vanilla, coffee). The heading also covers spirits consisting of emulsions of spirit with products such as egg yolk or cream.

* * *

- (13) Alcoholic aperitives (absinth, bitters, etc.) other than those with a basis of wine of fresh grapes which fall in heading 22.05.

* * *

EN 22.08. Relying on this EN, you assert that paragraph 13 indicates that aperitives containing insufficient sweeteners should not be grouped with liqueurs and cordials and further that absinth and bitters are to be classified together as unsweetened aperitives. You assert “Pernod Absinthe Superieure” and “Ricard Pastis de Marseille” do not contain the required minimum amount of sweeteners to be classified under subheadings 2208.20 through 2208.70, HTSUS, and therefore the only appropriate subheading is the basket provision 2208.90.7500, HTSUSA, for other spirituous products.

“Pernod Absinthe Superieure” and “Ricard Pastis de Marseille” are classifiable under heading 2208, HTSUS, which provides for “Undenatured ethyl alcohol of an alcoholic strength by volume of less than 80 percent vol.; spirits, liqueurs and other spirituous beverages.”

The issue lies at the six-digit subheading level. The industry standards of identity for cordials and liqueurs indicate that liqueurs or cordials must contain “sugar, dextrose, or levulose, or a combination thereof, in an amount not less than 2.5 percent by weight of the finished product” as defined by Title 27 (Alcohol, Tobacco Products and Firearms) of the Code of Federal Regulations, administered by the Alcohol and Tobacco and Tax and Trade Bureau (“TTB”) of the United States Department of the Treasury. *See* 27 C.F.R. § 5.22(h). Furthermore, CBP has recognized that to be classified as cordials or liqueurs, the imported spirituous products must contain a minimum of 2.5 percent sugar content. *See, e.g.*, NY J88195, dated September 17, 2003; Headquarters Ruling Letter (“HQ”) 085902, dated February 12, 1990.

Under the facts presented, “Pernod Absinthe Superieure,” which contains no sugar content, and “Ricard Pastis de Marseille,” which contains under one percent sugar content, do not meet the requisite sugar content to be classified as a liqueur or cordial because they both contain under 2.5 percent sugar content. Therefore, under GRI 1, “Pernod Absinthe Superieure” and “Ricard Pastis de Marseille” do not meet the terms of the subheading for liqueurs and cordials.”

Since “Pernod Absinthe Superieure” and “Ricard Pastis de Marseille” do not fall under any of the provisions in subheadings 2208.20–2208.70, HTSUS, these products are classified under the basket provision provided in 2208.90, HTSUS. This comports with the guidance provided in EN 22.08 which covers, *eo nomine*, absinth under heading 2208, HTSUS, as alcoholic aperitives. Accordingly, we find that “Pernod Absinthe Superieure” and “Ricard Pastis de Marseille” are classified in subheading 2208.90.7500, HTSUSA, which provides for “Undenatured ethyl alcohol of an alcoholic strength by volume of less than 80 percent vol.; spirits, liqueurs and other spirituous beverages: Other: Other: Spirits: Other.”

HOLDING:

Under the authority of GRI 1, “Pernod Absinthe Superieure” and “Ricard Pastis de Marseille” are classified under heading 2208, HTSUS, and specifically in subheading 2208.90.7500, HTSUSA, which provides for “Undenatured ethyl alcohol of an alcoholic strength by volume of less than 80 percent vol.; spirits, liqueurs and other spirituous beverages: Other: Other: Spirits: Other.” The 2019 column one, general rate of duty is free.

EFFECT ON OTHER RULINGS:

NY N304274, dated June 7, 2019, is REVOKED.

NY N304276, dated June 7, 2019, is REVOKED.

Sincerely,

MYLES B. HARMON,

Director

Commercial and Trade Facilitation Division

DEPARTMENT OF THE TREASURY**19 CFR Parts 113, 133, 148, 151 and 177****RIN 1515-AE26****ENFORCEMENT OF COPYRIGHTS AND THE DIGITAL
MILLENNIUM COPYRIGHT ACT**

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

ACTION: Notice of proposed rulemaking.

SUMMARY: This document proposes to amend the U.S. Customs and Border Protection (CBP) regulations pertaining to importations of merchandise that violate or are suspected of violating the copyright laws, including the Digital Millennium Copyright Act (DMCA), in accordance with Title III of the Trade Facilitation and Trade Enforcement Act of 2015 (TFTEA). The proposed amendments set forth in this document are intended to clarify the definition of “piratical articles,” simplify the detention process involving goods suspected of violating the copyright laws, and prescribe new regulations enforcing the DMCA.

DATES: Comments on the proposed rule must be received on or before December 16, 2019.

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

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments via docket number USCBP-2019-0037.
- *Mail:* Trade and Commercial Regulations Branch, Regulations and Rulings, Office of Trade, U.S. Customs and Border Protection, 90 K Street NE, 10th Floor, Washington, DC 20229-1177.

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

Docket: For access to the docket to read background documents or comments received, go to <http://www.regulations.gov>. Submitted comments may also be inspected during regular business days between the hours of 9 a.m. and 4:30 p.m. at the Trade and Commercial Regulations Branch, Regulations and Rulings, Office of Trade, U.S. Customs and Border Protection, 90 K Street NE, 10th Floor, Washington, DC. Arrangements to inspect submitted comments should be made in advance by calling Joseph Clark at (202) 325-0118.

FOR FURTHER INFORMATION CONTACT: Alex Bamiagis, Intellectual Property Rights Branch, Regulations and Rulings, Office of Trade, U.S. Customs and Border Protection, (202) 325-0415.

SUPPLEMENTARY INFORMATION:

Public Participation

Interested persons are invited to participate in this rulemaking by submitting written data, views, or arguments on all aspects of the proposed rule. CBP also invites comments that relate to the economic, environmental, or federalism effects that might result from this proposed rule. If appropriate to a specific comment, the commenter should reference the specific portion of the proposed rule, explain the reason for any recommended change, and include data, information, or authority that support such recommended change.

Background

I. Purpose of Proposed Amendments

U.S. Customs and Border Protection (CBP) has responsibilities for border enforcement of intellectual property rights (IPR) laws and regulations. The majority of the CBP regulations regarding these efforts are found in part 133 of title 19 of the Code of Federal Regulations (19 CFR part 133). Part 133 provides for the recordation of trademarks, trade names, and copyrights with CBP and prescribes the enforcement procedures applicable to suspected infringing merchandise. Part 133 also sets forth procedures for the seizure and disposition of articles bearing prohibited marks or names, and piratical articles, including release to the importer in appropriate circumstances.

CBP is proposing amendments to part 133 of the CBP regulations pursuant to Title III of the Trade Facilitation and Trade Enforcement Act of 2015 (Pub. L. 114-125; 130 Stat. 122; Section 628a of the Tariff Act of 1930 (19 U.S.C. 1628a), as amended) (TFTEA). Among the changes made by TFTEA are certain provisions regarding enforcement of the Digital Millennium Copyright Act (Pub. L. 105-304, 112

Stat. 2860, as amended by Pub. L. 106–113, 113 Stat. 1536, (codified at 17 U.S.C. 1201)) (DMCA). Among other things, the DMCA prohibits the importation of devices used to circumvent the technological measures used by certain copyright owners to protect their works (“copyright protection measures”). Section 303(a) of TFTEA specifically provides that CBP may seize merchandise containing a circumvention device violating the DMCA.

TFTEA requires CBP to make certain pre-seizure disclosures to right holders if CBP determines that these disclosures would assist the agency in determining whether imported merchandise violates the copyright laws, including the DMCA. These disclosures assist CBP in determining whether certain goods are, in fact, in violation of the copyright laws, including the DMCA.

The proposed amendments to part 133 of the CBP regulations provide for such disclosures upon detention of merchandise suspected of violating the copyright laws, including the DMCA. In accordance with TFTEA, these pre-seizure disclosures may only be made where the copyright has been recorded with CBP. In accordance with TFTEA, CBP will not provide these disclosures when doing so would compromise an ongoing law enforcement investigation or national security.

As noted above, TFTEA provides for seizure of merchandise containing a circumvention device in violation of the DMCA. TFTEA directs CBP to disclose to persons injured by merchandise seized for violation of the DMCA information equivalent to the information disclosed to copyright owners when merchandise is seized for violation of the copyright laws. To identify those persons eligible to receive these post-seizure disclosures, TFTEA directs CBP to create a list of persons eligible to receive disclosures when injured by violations of the DMCA resulting in seizure of the violative merchandise. Section 133.47 of the proposed regulations provide for such disclosures and the establishment of the list. CBP will publish a notice in the **Federal Register** when the list is established, and again any time the list is revised.

On October 5, 2004, CBP published a proposed rulemaking in the **Federal Register** (69 FR 59562) proposing amendments to part 133 of 19 CFR to set forth changes to CBP’s enforcement procedures, including enhanced disclosure provisions and provisions to enforce the DMCA. Although comments were solicited and received from the public on the proposed amendments, CBP did not publish a final rule adopting the proposal. Due to the passage of time since the publication of the 2004 proposed rulemaking, CBP is proposing new amendments to part 133 of the CBP regulations.

II. Disclosure of Information Pertaining to Certain Intellectual Property Rights Enforced at the Border

A. *The Trade Secrets Act and Disclosure Under the Current Regulations*

The Trade Secrets Act (18 U.S.C. 1905) bars the unauthorized disclosure by government officials of any information received in the course of their employment or official duties when such information “concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association.” 18 U.S.C. 1905.

Specifically, the Trade Secrets Act protects those required to furnish commercial or financial information to the government by shielding them from the competitive disadvantage that could result from disclosure of that information by the government. In turn, this protection encourages those providing information to the government to furnish accurate and reliable information that is useful to the government.

The Trade Secrets Act, however, permits those covered by the Act to disclose protected information when the disclosure is otherwise “authorized by law,” which includes both statutes expressly authorizing disclosure and properly promulgated substantive agency regulations authorizing disclosure based on a valid statutory interpretation. *See Chrysler v. Brown*, 441 U.S. 281, 294–316 (1979). For example, the current CBP regulations set forth in 19 CFR 133.21 allow disclosure to a right holder of certain information that may comprise information otherwise protected by the Trade Secrets Act for the purposes of assisting CBP in determining whether merchandise bears a counterfeit mark. *See* CBP Dec. 15–12, published in the **Federal Register** (80 FR 56370) on September 18, 2015, effective October 19, 2015, for background information.

B. *Statutory Analysis Concerning Disclosure of Commercial or Financial Information*

The Secretary of the Treasury has authority to disclose information otherwise protected under the Trade Secrets Act when such disclosures are authorized by law.

Disclosures meeting the “authorized by law” standard of the Trade Secrets Act include those made under regulations that are: (1) In compliance with the provisions of the Administrative Procedure Act (5 U.S.C. 551 *et seq.*); and (2) based on a valid statute. *Chrysler*, 441 U.S. at 294–96 and 301–03. Various provisions in titles 15 and 19 of

the United States Code authorize CBP to promulgate regulations to prohibit the importation of merchandise that infringes intellectual property rights. Among these, TFTEA provides statutory authority for information disclosure, amending provisions in title 19 of the United States Code (U.S.C.) to permit, and in some instances require, CBP to provide information otherwise protected under the Trade Secrets Act to IPR owners under specified conditions.

Title III of TFTEA permits, and in some instances requires, CBP to disclose information to IPR owners, to allow them to assist with enforcement. CBP enforces statutes prohibiting the importation of infringing merchandise. Specifically, 19 U.S.C. 1526 prohibits the importation of merchandise that infringes a trademark, 17 U.S.C. 602 prohibits the importation of merchandise that infringes a copyright under that title, and lastly, 17 U.S.C. 1201 prohibits the importation of devices that circumvent copyright protection systems. In order to aid CBP in enforcing these prohibitions, 17 U.S.C. 602(b) permits the Secretary of the Treasury to prescribe a procedure by which CBP will notify an interested party (which CBP has defined as the owner of the copyright) of the importation of articles that appear to be copies or phonorecords of a copyrighted work. *See* Copyright Act of 1976, Public Law 94–553, 90 Stat. 2541 (Oct. 19, 1976). The disclosure of information mandated by TFTEA is only available where the underlying trademark or copyright has been recorded with CBP.

Section 302 of TFTEA amended the Tariff Act of 1930 by inserting section 628a (19 U.S.C. 1628a) after section 628 (19 U.S.C. 1628), requiring CBP to provide IPR owners with information appearing on imported articles or their packaging and labels, including unredacted images of those articles, if the examination of the merchandise by the IPR owner would assist CBP in determining if those articles violate IPR laws enforced by CBP. Section 302 of TFTEA also permits CBP to provide to the IPR owner unredacted samples of the merchandise, subject to applicable bonding requirements, if the IPR owner's help would assist CBP in determining if the importations occurred in violation of 17 U.S.C. 602 (copyright), 17 U.S.C. 1201 (circumvention devices), or 19 U.S.C. 1526 (trademark). The information may only be released where the underlying trademark or copyright has been recorded with CBP. CBP may not disclose information, photographs, or samples when such disclosure would compromise an ongoing law enforcement investigation or national security.

In 2015, CBP finalized new regulations for trademark enforcement, providing for disclosure of information to mark owners. CBP has proposed to update 19 CFR 133.21 to include updated bond provisions in keeping with the TFTEA disclosures, to limit disclosure of infor-

mation to owners of properly recorded trademarks, as required by 19 U.S.C. 1628a(c), and to conform 19 CFR 133.21 to the copyright and DMCA provisions proposed in 19 CFR 133.42 and 133.47, respectively. For more information on prior changes to trademark enforcement, *see* CBP Dec. 15–12, published in the **Federal Register** (80 FR 56370) on September 18, 2015, effective October 19, 2015.

Section 303(a) of TFTEA amended section 596(c)(2) of the Tariff Act of 1930 (19 U.S.C. 1595a(c)(2)) by adding subparagraph G (19 U.S.C. 1595a(c)(2)(G)), which provides for the seizure of articles containing circumvention devices imported in violation of the DMCA (17 U.S.C. 1201). Correspondingly, section 303(b) of TFTEA requires that when merchandise containing a circumvention device is seized pursuant to 19 U.S.C. 1595a(c)(2)(G), CBP must disclose to the parties injured by that circumvention device information regarding the seized merchandise that is equivalent to information that CBP currently provides to copyright owners upon seizure of merchandise for violation of the copyright laws. (For more information regarding the information provided to copyright owners, *see* proposed 19 CFR 133.42(e) in this document.) Section 303(b)(2) of TFTEA directs CBP to establish and maintain a list of persons eligible to receive such disclosures, and section 303(b)(3) of TFTEA requires the Secretary of the Treasury to prescribe regulations establishing procedures to implement these practices. Section 624 of the Tariff Act of 1930 (19 U.S.C. 1624), as amended, also authorizes the Secretary of the Treasury to promulgate regulations to carry out the provisions of the Tariff Act of 1930, as amended, and provides authority for further regulations implementing the changes directed by TFTEA.

This proposed rule is intended to authorize, and in some cases require, CBP personnel to disclose, either at the time of detention of suspect merchandise or after seizure of violative merchandise, information that might reveal commercial or financial information otherwise protected by the Trade Secrets Act. The proposed rule replicates the procedural safeguards implemented in the trademark regulations at 19 CFR 133.21 to mitigate potential risks from the disclosure of protected information. For more information on these safeguards, *see* CBP Dec. 15–12, published in the **Federal Register** (80 FR 56370) on September 18, 2015, effective October 19, 2015.

III. Description of Proposed Amendments to Part 133

CBP is proposing changes to part 133 of the CBP regulations to implement certain provisions of TFTEA. First, CBP is proposing to amend the scope provision at § 133.0 to include TFTEA-mandated disclosures. Next, CBP is proposing to amend subpart E of part 133 regarding detention of merchandise suspected of violating the copy-

right laws, seizure of such violative merchandise, and disclosure of information to right holders. The proposed changes are intended to require pre-seizure disclosure of certain information to right holders if review of the information, or examination or testing of the imported merchandise, by the right holder would assist CBP in its determination as to whether suspect merchandise does, in fact, violate the copyright laws. The proposed amendments to subpart E also provide procedural safeguards to limit the release of information concerning non-violative shipments and simplify the detention process relative to goods suspected of violating the copyright laws.

Also, CBP is proposing a new subpart F to part 133 (existing subpart F is proposed to be redesignated as new subpart G). Proposed subpart F prescribes the disclosure of information, and potential provision of samples, upon detention or seizure of goods suspected of violating the DMCA to enhance CBP's ability to prohibit circumvention devices from being entered into the United States. Prior to seizure, CBP will disclose information appearing on the imported merchandise to the owner of the recorded copyright who employs the copyright protection measure that the imported merchandise is suspected of circumventing, if it will assist CBP in determining whether the merchandise is violative. Similarly, when CBP seizes violative merchandise, it will disclose information appearing on the imported merchandise, as well as information received in connection with the importation, to certain right holders.

A. Subpart E to Part 133: Importations Violating Copyright Laws

CBP is proposing several amendments to subpart E of part 133 of the CBP regulations. The proposed changes would simplify procedures and strengthen CBP's ability to enforce the copyright laws and the prohibition against the importation of piratical articles.

1. Definition of "Piratical Articles"

Section 133.42(a) currently provides that "[i]nfringing copies or phonorecords are 'piratical' articles." To more accurately define "piratical articles" for enforcement purposes, CBP is proposing to amend paragraph (a) of § 133.42 to define "piratical articles" as those that constitute unlawful (made without the authorization of the copyright owner) copies or phonorecords of a recorded copyright. Eligible copyrights may be recorded with CBP using the Intellectual Property Rights e-Recordation (IPRR) application found at <https://iprr.cbp.gov/>.

2. Procedures on Suspicion of Piratical Copies

Existing § 133.43 sets forth the procedures CBP employs when it suspects that imported articles may be infringing copies or phonorecords of recorded copyrights and provides for: (1) Notice of detention of suspected articles to the importer and to the copyright owner, including the disclosure of certain information; (2) the release of redacted samples of suspected articles to the copyright owner; (3) the release of the goods in the case of inaction by the copyright owner; (4) in cases where the copyright owner makes a written demand for the exclusion of the suspected articles, a bonding requirement and exchange of briefs process culminating in submission to CBP for administrative review; and (5) alternative procedures to the administrative process (court action).

CBP believes that the procedure requiring a copyright owner to file a written demand for exclusion of the suspected infringing copies, and requiring an exchange of additional evidence, briefs, and other pertinent material to substantiate a claim or denial of piracy between the parties is ineffective for enforcing the Copyright Act of 1976 and is inconsistent with TFTA. CBP believes that these procedures are an outdated and inefficient mechanism to address situations where CBP has a suspicion that certain goods may be piratical. These provisions are rarely used and unduly burdensome on CBP and all other parties involved. Essentially, these procedures limit CBP's ability to conduct the required examination and render its decision in a timely and efficient manner. The related provision, § 133.44, prescribes the actions to be taken when CBP sustains or denies a claim of piracy under § 133.43. Accordingly, CBP is proposing to remove §§ 133.43 and 133.44 in their entirety from title 19 of the CFR.

However, CBP proposes to retain the procedures regarding detention of suspected infringing copies or phonorecords of recorded copyrights, notice of such detention to the importer and to the copyright owner, and the disclosure of certain information and release of redacted samples to the copyright owner currently provided for in § 133.43 in a revised § 133.42. Section 133.42 currently provides that the importation of infringing copies or phonorecords of works copyrighted in the United States is prohibited and sets forth provisions regarding the seizure and forfeiture of such infringing works. CBP proposes to amend and expand § 133.42 as follows to provide more comprehensive regulations on the manner in which it detains suspected piratical articles, seizes piratical articles, and exchanges information with affected parties:

- Proposed § 133.42(a) sets forth definitions for purposes of part 133.
- Proposed § 133.42(b)(1) prescribes that CBP may detain imported articles suspected of constituting a piratical copy of a copyrighted work for which a claim to copyright has been recorded with CBP.
- Proposed § 133.42(b)(2)(i)(A) specifies that, pursuant to 19 CFR 151.16(c) and 19 U.S.C. 1499(c)(2), a notice of detention is issued to the importer within five business days from the date of CBP's decision to detain suspect merchandise. CBP will also inform the importer that certain information may already have been disclosed to the owner of the recorded copyright, and in any event, CBP will disclose such information to the owner no later than the date of issuance of the detention notice.
- Proposed § 133.42(b)(2)(i)(B) sets forth that CBP may disclose to the owner of the recorded copyright information that appears on the detained merchandise and/or its retail packaging, including unredacted photographs, images, or samples, as described in proposed paragraph (b)(3) of this section, unless the importer provides information within seven business days of issuance of the detention notice that is sufficient for CBP to determine that the detained merchandise is not piratical.
- Proposed § 133.42(b)(2)(ii) provides that if the importer does not provide information to CBP within seven business days of issuance of the detention notice that is sufficient for CBP to determine that the detained merchandise is not piratical, and CBP still suspects the merchandise to be violative, CBP will proceed with disclosure to the owner of the recorded copyright as described in proposed paragraph (b)(3) of this section, if CBP concludes that disclosure would assist CBP in determining whether the merchandise is piratical, and such disclosure would not compromise an ongoing law enforcement investigation or national security.
- Proposed § 133.42(b)(3) sets forth the information CBP will disclose to the owner of the recorded copyright pursuant to paragraph (b)(2)(ii) if CBP concludes that disclosure would assist CBP in determining whether the merchandise is piratical, and such disclosure would not compromise an ongoing law enforcement investigation or national security. This includes information appearing on the goods and their retail packaging and unredacted images or photographs of the merchandise. Proposed

§ 133.42(b)(3) also provides that CBP may release a sample to the owner of the recorded copyright, subject to the bonding and return requirements of proposed § 133.42(c).

- Proposed § 133.42(b)(4) describes the basic importation information to be disclosed to the owner of the recorded copyright.
- Proposed § 133.42(b)(5) provides for disclosure of redacted photographs or images, or the provision of redacted samples, including retail packaging or labels, to the owner of the recorded copyright. Identifying information to be redacted would include serial numbers; dates of manufacture; lot codes; batch numbers; universal product codes; the name or address of the manufacturer, exporter, or importer of the merchandise; or any markings that could reveal the name or address of the manufacturer, exporter, or importer of the merchandise. CBP may release the sample identified in this paragraph when the owner of the recorded copyright furnishes to CBP a bond in the form and amount specified by CBP. CBP may demand the return of the sample at any time.
- Proposed § 133.42(c) pertains to the disclosure of unredacted photographs or images, or the provision of unredacted samples, including retail packaging or labels, to the owner of the recorded copyright under paragraph (b) of this section. Paragraph (c) provides that, with the disclosure of the photographs or images, or provision of the sample, CBP will notify the owner of the recorded copyright that some or all of the information it receives may be subject to the protections of the Trade Secrets Act, is being issued to the owner of the recorded copyright by CBP under an exception to the Trade Secrets Act, and is not to be used by the owner of the recorded copyright (nor by parties related to the owner of the recorded copyright or agents thereof) for any purpose other than to assist CBP in determining whether the merchandise described in the notice of detention is piratical. CBP will release the sample identified in this paragraph when the owner of the recorded copyright furnishes to CBP a bond in the form and amount specified by CBP. CBP may demand the return of the sample at any time.
- Proposed § 133.42(d) provides for disclosure of unredacted photographs or images, including photographs or images of retail packaging or labels, to the importer any time after presentation of the suspect goods to CBP for examination. Proposed § 133.42(d) also provides that, upon the importer's request, CBP

will provide samples to the importer, including samples of retail packaging or labels, any time after presentation of the suspect goods to CBP for examination.

- Proposed § 133.42(e) provides that, in cases involving the seizure of piratical articles, CBP will disclose to the owner of the recorded copyright certain limited information pertaining to the attempted importation.
- Proposed § 133.42(f) provides that, after seizure, CBP will provide—upon receipt of a request by the owner of the recorded copyright and upon that owner furnishing a bond to CBP in the form and amount specified by CBP— photographs, images, or samples, including retail packaging or labels, to the owner of the recorded copyright. CBP may demand the return of the sample at any time.
- Proposed § 133.42(g) provides for the consent of the owner of the recorded copyright to allow entry of the seized and forfeited merchandise, or other disposition subject to the importer’s right to petition for relief under § 171.

B. New Re-Designated Subpart F to Part 133: Enforcement Provisions for the Digital Millennium Copyright Act (DMCA)

In 1998, Congress enacted the DMCA. Among other things, the DMCA prohibits the circumvention of technological measures used by copyright owners to protect their works. Section 1201(a)(3)(B) of title 17 of the United States Code (17 U.S.C. 1201(a)(3)(B)) provides that, “[a] technological measure ‘effectively controls access to a work’ if the measure, in the ordinary course of its operation, requires the application of information, or a process or a treatment, with the authority of the copyright owner, to gain access to the work.” Section 1201(b)(2)(B) of title 17 of the United States Code (17 U.S.C. 1201(b)(2)(B)) provides that “[a] technological measure ‘effectively protects a right of a copyright owner under this title’ if the measure, in the ordinary course of its operation, prevents, restricts, or otherwise limits the exercise of a right of a copyright owner under this title.” Pursuant to section 303(b)(3) of TFTEA, the Secretary of the Treasury must prescribe regulations establishing procedures relative to the seizure of articles the importation of which is prohibited by and found to violate the DMCA.

Although the current CBP regulations do not specifically provide for the detention and seizure of articles that constitute violations of the DMCA, CBP has implemented the DMCA by providing CBP

personnel with internal enforcement guidelines and advice on how to enforce the DMCA. Where CBP finds that certain devices violate the DMCA by circumventing a recorded copyright owner's copyright protection measure, the goods are currently subject to seizure and forfeiture under 19 U.S.C. 1595a(c)(2)(C) for a violation of the DMCA (17 U.S.C. 1201). Section 303 of TFTEA amended section 596(c)(2) of the Tariff Act of 1930 (19 U.S.C. 1595a(c)(2)) by adding subparagraph G (19 U.S.C. 1595a(c)(2)(G)) for DMCA violations, which, in essence, accomplishes the same enforcement as that carried out under the internal enforcement guidelines. However, the current CBP internal enforcement guidelines and advice on how to enforce the DMCA include neither the post-seizure DMCA disclosure to those persons injured by DMCA violations nor the establishment of a list of those persons approved to receive information post-seizure, as provided for in section 303 of TFTEA. When final, the proposed regulations will replace the existing internal enforcement guidelines.

Pursuant to 19 U.S.C. 1628a, CBP is proposing to add regulatory provisions for the detention and seizure of articles that constitute violations under the DMCA. Specifically, CBP is proposing to redesignate existing subpart F in part 133, which contains regulations pertaining to procedures following forfeiture or assessment of liquidated damages, as a new subpart G, and to add a new subpart F with a new § 133.47, setting forth regulatory provisions that prescribe the detention and seizure of certain articles that violate the DMCA. The regulatory provisions proposed in § 133.47 closely mirror the comparable provisions for trademark as laid out in § 133.21 and copyright as laid out in proposed § 133.42, described above. Pursuant to 19 U.S.C. 1499(c)(2), CBP will issue a notice of detention to the importer within five business days from the date of CBP's decision to detain suspect merchandise. CBP will inform the importer that the importer may provide information within seven business days of issuance of the detention notice to help CBP to determine whether the detained merchandise violates the DMCA. After that period, if CBP still suspects the merchandise may be violative, CBP will disclose information appearing on the detained merchandise and/or its retail packaging to the owner of the recorded copyright who employs a copyright protection measure, if CBP concludes that the disclosure would assist CBP in its determination and disclosure would not compromise and ongoing law enforcement investigation or national security. Disclosed information may also include unredacted samples, if necessary to assist CBP in determining whether or not the detained merchandise violates the DMCA. The detention will be for a period of up to 30 days from the date on which the merchandise is presented for examina-

tion. In accordance with 19 U.S.C. 1499(c), if, after the detention period, the article is not released, the article will be deemed excluded for purposes of 19 U.S.C. 1514(a)(4).

In the event that CBP determines that such detained articles violate 17 U.S.C. 1201, CBP will seize the articles under 19 U.S.C. 1595a(c)(2)(G) and institute forfeiture proceedings in accordance with 19 CFR part 162. CBP will, within 30 business days of the seizure, notify the person CBP determines is injured by the violation of the DMCA and will disclose certain information regarding the shipment to such person, provided that person meets the requirements detailed below. In the event that articles released from CBP custody are determined to be violative, proposed § 133.48 provides for redelivery of the articles. Articles determined by CBP not to violate 17 U.S.C. 1201 will be released. Importers may petition for relief from the seizure and forfeiture under the provisions of 19 CFR part 171. Articles that have been seized and forfeited to the U.S. Government under part 133 will be disposed of in accordance with 19 CFR 133.52(b).

The proposed regulations define persons eligible for pre-seizure and post-seizure DMCA disclosures. Under the proposed regulations, a person eligible for pre-seizure disclosures is the owner of a recorded copyright who employs a copyright protection measure that may have been circumvented or attempted to be circumvented by articles that violate the importation prohibitions of the DMCA. Likewise, the proposed regulations define an injured person authorized to receive post-seizure DMCA disclosures as the owner of a recorded copyright who employs a copyright protection measure that has been circumvented or attempted to be circumvented by articles seized for violation of the importation prohibitions of the DMCA, and who has successfully applied to CBP for DMCA protections.

Pursuant to section 303(b) of TFTA, CBP will establish and maintain a list of the persons who have successfully applied to CBP to receive disclosures from CBP when injured by violations of the DMCA. Under proposed § 133.47(b)(2)(iii), CBP will publish a notice in the **Federal Register** announcing the establishment of a list of approved persons. Persons who believe they have been injured by a DMCA violation may request to be added to the list through a separate application to the IPR Branch supplemental to an application to record a copyright. After the list has been established, CBP will publish a notice in the **Federal Register** when the list is revised.

IV. Other Amendments

As a consequence of the proposed removal of §§ 133.43 and 133.44, it is also proposed to revise a related provision in § 113.70, which sets

forth bond conditions to indemnify the United States for detention of copyrighted material. CBP proposes to revise 19 CFR 113.70 to set forth, in one centralized location, the bond conditions for an IPR owner to obtain samples of imported merchandise suspected of being infringing. Currently, there is bond language that pertains to IPR sample bonds in various provisions throughout 19 CFR part 133. To reduce redundancy, CBP is proposing to add a cross reference to the new IPR sample bond conditions set forth in § 113.70 in proposed § 133.21(b)(5), (c)(2), and (f), § 133.25(c), § 133.42(b)(5), (c)(2), and (f), and § 133.47(b)(5), (c)(2), and (f), and to consolidate duplicated bond condition language from these provisions. Accordingly, CBP is proposing to remove references to § 133.43 in existing § 113.42.

As noted above, CBP is proposing additional amendments to 19 CFR 133.21 to clarify the “identifying information” that CBP will redact prior to disclosing information pursuant to § 133.21(b)(5). Section 133.21(b)(5) provides examples of information that CBP would redact prior to disclosure under this provision, including “any mark that could reveal the name or address of the manufacturer, exporter, or importer of the merchandise.” CBP is proposing to replace the word “mark” with the more general term “markings,” as “mark” is a more narrowly defined term of art. CBP is proposing further changes to conform § 133.21(b) and (f) to the related copyright (§ 133.42(b) and (f)) and DMCA (§ 133.47(b) and (f)) provisions proposed in this document.

In addition, CBP is proposing conforming amendments to § 133.25. These include replacing “trademark owner” with “owner of the recorded mark” and replacing references to the legacy Customs Service with CBP. CBP is proposing to amend § 133.51(a), to reflect the addition of proposed § 133.48, which will provide for redelivery of merchandise found to violate the DMCA. Similarly, CBP is proposing to amend § 133.52(b) to account for the alternative dispositions of seized merchandise reflected in proposed §§ 133.42(g) and 133.47(g).

Section 151.16 of title 19 of the CFR provides for the detention of merchandise, and states that CBP will make a final determination with respect to the admissibility of detained merchandise within 30 days after the merchandise has been presented to CBP for examination. Within § 151.16, paragraph (a) identifies certain categories of articles that are excepted from this provision, including detentions arising from “possibly piratical copies (*see* part 133, subpart E, of this Chapter).” The current detention procedures in subpart E of 19 CFR part 133 allow up to 120 days for an importer or right holder of a suspect article to provide CBP with evidence, briefs, or other pertinent information to substantiate a claim or denial of infringement,

prior to CBP's issuance of an admissibility determination. Due to the proposed amendments to § 133.42, discussed above, which shorten many of the data exchange time frames and require CBP to issue a final determination with respect to the admissibility of detained merchandise within 30 days after the merchandise has been presented to CBP for examination, there is no longer any reason to exempt possibly piratical copies or phonorecords from the 30-day detention period set forth in § 151.16. Accordingly, this document proposes to amend 19 CFR 151.16(a) by removing the reference to "possibly piratical copies (*see* part 133, subpart E, of this Chapter)" and by adding a cross-reference to 19 CFR 151.16(c) to the notice provisions set forth in §§ 133.42(b)(2) and 133.47(b)(2). This document also proposes non-substantive editorial changes to § 151.16.

Likewise, this document proposes to amend 19 CFR 177.0 by removing the existing exception for copyright determinations under part 133. Currently, § 133.43 provides a unique process for determinations of copyright infringement, an exception to the rulings process laid out in part 177. As a consequence of the proposed changes to §§ 133.42 and 133.43, that process will be replaced. As a result, rulings related to copyright determinations may be requested pursuant to part 177, and no longer constitute an exception to the process laid out therein.

In addition, this document proposes to augment the existing personal use exemption in 19 CFR 148.55, and clarify its application. Currently, this exemption provides for the entry of limited quantities of merchandise that otherwise would be prohibited from entry for trademark violations, when the merchandise accompanies any individual arriving in the United States. However, 17 U.S.C. 602(a)(3)(B) provides a similar personal use exemption permitting the entry of merchandise otherwise prohibited for violating copyright law, under certain conditions. CBP has proposed amendments to § 148.55, to reflect this statutory exemption. The conditions are set forth in existing § 148.55(b), which is not being proposed for amendment. The conditions are that (1) the exemption "shall not be granted to any person who has taken advantage of the exemption for the same type of article within the 30-day period immediately prior to his arrival in the United States," and (2) "[i]f an article which has been exempted is sold within one year of the date of importation, the article or its value (to be recovered from the importer), is subject to forfeiture" (except in the case of a "sale subject to judicial order or in the liquidation of an estate").

This document also proposes amendments to the general and specific authority citations to part 133 to more accurately reflect the

statutory authority that pertains to the part and that which pertains more specifically to particular sections within part 133.

Executive Orders 12866, 13563, and 13771

Executive Orders 12866 (“Regulatory Planning and Review”) and 13563 (“Improving Regulation and Regulatory Review”) direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. Executive Order 13771 (“Reducing Regulation and Controlling Regulatory Costs”) directs agencies to reduce regulation and control regulatory costs and provides that “for every one new regulation issued, at least two prior regulations be identified for elimination, and that the cost of planned regulations be prudently managed and controlled through a budgeting process.”

This rule is a significant regulatory action under section 3(f) of Executive Order 12866. Accordingly, OMB has reviewed this regulation. As the impacts of this rule are de minimis, this rule is exempt from Executive Order 13771. *See* OMB’s Memorandum, “Guidance Implementing Executive Order 13771, Titled ‘Reducing Regulation and Controlling Regulatory Costs’” (April 5, 2017).

One of CBP’s roles is to safeguard the U.S. economy from the importation of goods that violate intellectual property rights. Under current regulations, if CBP suspects that a shipment may be violative, it can share redacted samples of the suspect imported good with a right holder.¹ To implement TFTEA’s intellectual property rights provisions, CBP is proposing regulatory changes that will, among other things, allow it to share unredacted images of suspect imports with right holders, if examination by right holders would assist CBP’s determination.

Sharing these unredacted samples and images with right holders may provide access to information about the importer protected by the Trade Secrets Act. The proposed rule establishes a procedure under which, following the notice to the importer required by 19 U.S.C. 1499, the importer has seven business days to establish to CBP that the suspect imports are not piratical and are instead admissible. If the importer is unable to demonstrate the admissibility of

¹ Note that this rule does not alter CBP’s ability to provide redacted samples of an import to a right holder without prior notification to the importer.

its imports within this timeframe, CBP will share information with the right holder by disclosing or releasing unredacted samples of the imports in question.

As CBP is establishing a new process for copyrights, it does not have data on the number of times CBP suspects shipments are piratical. However, in 2012 CBP published an interim final rule that established similar procedures for trademarks. (77 FR 24375, September 24, 2012). For analytical purposes, CBP can assume that this rule will have similar effects after adjusting for the differing volumes. Between fiscal years 2014 and 2018, CBP sent out an average of 824 detention letters every fiscal year for suspected trademark infringements. Based on the proportion of live trademark recordations² available to support the agency's IPR seizures every fiscal year, relative to the copyright recordations, CBP estimates an average of approximately 21,423 seizures based on trademark, 8,881 based on copyright, and 116 DMCA seizures. If the number of detention letters is proportional to the number of seizures, CBP would estimate that this rule will result in 345 more detention letters for possible copyright infringing importations.

CBP estimates that the procedure to demonstrate that the imports are not piratical will take two hours per affected importer at a cost of \$29.76 per hour.^{3 4} This is based on the existing information collection for the Notice of Detention (OMB Control Number 1651-0073), which is being updated for this rulemaking. CBP estimates that importers will bear an opportunity cost as a result of the higher number of detention notices caused by this rule. CBP estimates that

² Source: CBP's IPRiS database. Sampling methodology averaged five equally spaced dates in every fiscal year to estimate the IPRiS live recordations available for IPR seizures (95% CI, $p = 0.05$) annually. CBP took several sample counts per year as opposed to a single annual count to ensure a representative measure as IPRiS recordations enter and expire throughout the year.

³ Source: U.S. Bureau of Labor Statistics. Occupational Employment Statistics, "May 2017 National Occupational Employment and Wage Estimates, United States- Median Hourly Wage by Occupation Code." Updated March 30, 2018. Available at https://www.bls.gov/oes/2017/may/oes_nat.htm. Accessed June 11, 2018.

⁴ The total compensation to wages and salaries ratio is equal to the calculated average of the 2017 quarterly estimates (shown under Mar., June, Sep., Dec.) of the total compensation cost per hour worked for Office and Administrative Support occupations (\$26.2600) divided by the calculated average of the 2017 quarterly estimates (shown under Mar., June, Sep., Dec.) of wages and salaries cost per hour worked for the same occupation category (\$17.7425). Source of total compensation to wages and salaries ratio data: U.S. Bureau of Labor Statistics. Employer Costs for Employee Compensation. Employer Costs for Employee Compensation Historical Listing March 2004–March 2018, "Table 3. Civilian workers, by occupational group: employer costs per hours worked for employee compensation and costs as a percentage of total compensation, 2004–2018 by respondent type." March 2018. Available at <https://www.bls.gov/web/ecec/ececrtn.pdf>. Accessed June 11, 2018.

this opportunity cost will total \$20,534 ($345 * 2 * \29.76) for copyright detentions and \$238 ($4 * 2 * 29.76$) for DMCA detentions for a total monetized cost of \$20,534.

CBP is also proposing to formalize the existing practices used to enforce the DMCA. As discussed above, in 1998, Congress enacted the DMCA. The DMCA prohibits the importation of devices used to circumvent the copyright protection measures copyright owners use to protect their works. Although current regulations do not specifically provide for detention and seizure of articles that constitute violations of the DMCA, CBP has enforced the DMCA by providing CBP personnel with internal enforcement guidelines and advice on how to enforce DMCA violations. In FY 2016 there were approximately 70 DMCA seizures. It is possible that the provisions of this rule that were already discussed will result in a small increase in DMCA seizures. TFTEA requires CBP to formalize the foregoing processes with respect to the DMCA. The formalization of these existing practices in regulations does not change current practice, so this provision will not have additional impacts if this rule is finalized.

In addition to the proposed use of unredacted samples, CBP is proposing to amend the detention procedures applicable to imported articles that are suspected of being a piratical copy or phonorecord of a copyrighted work. The current detention procedures in the regulations allow up to 120 days for an importer or right holder of a suspect article to provide CBP with evidence, briefs, or other pertinent information to substantiate a claim or denial of infringement, prior to CBP's issuance of an admissibility determination. To expedite this process, CBP is proposing to amend the regulations to require the agency to render an admissibility decision within 30 days from the date the articles are presented to CBP for examination. As the current detention procedures are seldom used, according to CBP subject matter experts, CBP does not believe the proposed changes will impose a significant effect on the public.

The Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et. seq.*) (RFA), as amended by the Small Business Regulatory Enforcement and Fairness Act of 1996, requires agencies to assess the impact of regulations on small entities. A small entity may be a small business (defined as any independently owned and operated business not dominant in its field that qualifies as a small business per the Small Business Act); a small not-for-profit organization; or a small governmental jurisdiction (locality with fewer than 50,000 people). Section 604 of the RFA requires an agency to perform a regulatory flexibility analysis for a

rule unless the agency certifies under section 605(b) that the regulatory action would not have a significant economic impact on a substantial number of small entities.

As described in the Executive Orders 12866, 13563, and 13771 analysis above, CBP estimates that this rule will result in the issuance of 345 additional notices of detention. CBP's current examination policies, use of shared enforcement systems, and targeting criteria that take into account previous examinations when determining risk make it unlikely that an importer who receives a notice of detention with this rule will be required to repeatedly prove the admissibility of their imports.⁵ As such, CBP assumes for the purposes of this analysis that the number of affected importers from this rule will be equal to the number of additional detention notices resulting from this rule—345—with each importer receiving only one detention notice. To the extent that an importer must prove the admissibility of their imports more than once with this rule, the number of importers affected by this rule would be lower and the cost of this rule per affected importer would be higher.

These importers are not centered in any particular industry; any importer of goods covered by a recorded copyright may be affected by this rule if CBP has a reasonable suspicion to believe their imported merchandise may constitute a piratical copy and CBP cannot determine if an import is a piratical copy or prohibited circumvention device without the use of the provisions of this rule. CBP has conducted a study of importers to determine how many are small entities and has concluded that the vast majority (about 88 percent) of importers are small entities.⁶ Therefore, CBP believes this rule may affect a substantial number of small entities.

Although the proposed rule, if adopted, may affect a substantial number of small entities, CBP believes the economic impact would not be significant. As described in the Executive Orders 12866, 13563, and 13771 section of this document, CBP estimates that it takes an importer two hours to provide proof of the admissibility of an import to CBP. CBP estimates the average wage of an importer is \$29.76 per hour. Thus, CBP estimates it will cost a small entity \$59.52 to prove the admissibility of its import with this rule. CBP does not believe \$59.52 constitutes a significant economic impact.

⁵ CBP reserves the right to detain any imported merchandise, even if an importer has previously shown that its merchandise is admissible. This will depend on the particulars of the importation. Previous importations are taken into account in the risk profile, so having proven the authenticity of an importation in the past makes it less likely that an importer will receive a Notice of Detention for subsequent importations.

⁶ See "CBP Analysis of Small Importers," November 2018. Available in the docket of this rulemaking.

CBP recognizes that repeated inquiries into the admissibility of an importer's imports could eventually rise to the level of a significant economic impact. However, it is unlikely that importers will be repeatedly required to prove the admissibility of their imports, as previously mentioned. Additionally, CBP does not anticipate law-abiding importers to be subject to the provisions in this rule on a repeated basis. Once CBP has determined the admissibility of an importation, it will record that information in the system so it can be viewed by CBP import specialists on future importations and successful previous importations are a favorable factor in the importation's risk profile. Further, CBP notes that providing this information to CBP is optional on the part of the importer. Therefore, CBP believes there will not be a significant economic impact on small entities.

Accordingly, although this rule may have an effect on a substantial number of small entities, as discussed above, CBP believes that an estimated cost of \$59.52 to an importer does not constitute a significant economic impact. Thus, CBP certifies this regulation would not have a significant economic impact on a substantial number of small entities.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507), the collections of information for this document are included in an existing collection for Notices of Detention (OMB control number 1651-0073). An agency may not conduct, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number assigned by OMB. The burden hours related to the Notice of Detention for OMB control number 1651-0073 are as follows:

Number of Respondents: 1,695.

Number of Responses: 1.

Time per Response: 2 hours.

Total Annual Burden Hours: 3,390.

Because CBP estimates that the availability of the procedures in this proposed rule will increase the number of Notices of Detention issued for IPR violations, there is an increase in burden hours under this collection with this proposed rule.

Signing Authority

This rulemaking is being issued in accordance with 19 CFR 0.1(a)(1), pertaining to the authority of the Secretary of the Treasury (or that of his or her delegate) to approve regulations concerning copyright enforcement.

List of Subjects

19 CFR Part 113

Bonds, Customs duties and inspection, Imports, Surety bonds.

19 CFR Part 133

Bonds, Circumvention devices, Copy or simulating trademarks, Copyrights, Counterfeit goods, Customs duties and inspection, Demand for redelivery, Detentions, Disclosure, Labeling, Liquidated damages, Piratical copies, Phonorecords, Recordation, Restricted merchandise, Seizures and forfeitures, Trademarks, Trade names.

19 CFR Part 148

Copyright, Customs duties and inspection, Trademarks.

19 CFR Part 151

Customs duties and inspection, Examination, Imports, Penalties, Reporting and recordkeeping requirements, Sampling and testing.

19 CFR Part 177

Administrative practice and procedure, Government procurement, Reporting and recordkeeping requirements.

Proposed Amendments to the CBP Regulations

For the reasons stated above in the preamble, CBP proposes to amend 19 CFR parts 113, 133, 148, 151 and 177 as follows:

PART 113—CBP BONDS

■ 1. The general authority citation for part 113 continues to read as follows:

Authority: 19 U.S.C. 66, 1623, 1624.

* * * * *

■ 2. Section 113.42 is revised to read as follows:

§ 113.42 Time period for production of documents.

Except when another period is fixed by law or regulations, any document for the production of which a bond or stipulation is given must be delivered within 120 days from the date of notice from CBP requesting such document. If the period ends on a Saturday, Sunday, or holiday, delivery on the next business day will be accepted as timely.

■ 3. Section 113.70 is revised to read as follows:

§ 113.70 Bond conditions for owners of recorded marks or recorded copyrights to obtain samples from CBP relating to importation of merchandise suspected of infringing recorded marks or recorded copyrights, or circumventing copyright protection measures.

Prior to obtaining samples of imported merchandise pursuant to §§ 133.21, 133.25, 133.42, or 133.47 of this chapter, for suspected infringement of a recorded mark or recorded copyright, or suspected circumvention of a protection measure safeguarding a recorded copyright, the owner of the recorded mark or the recorded copyright must furnish to CBP a single transaction bond in the amount specified by CBP containing the conditions listed in this section.

Bond Conditions for Owners of Recorded Marks or Recorded Copyrights To Obtain Samples From CBP Relating to Importation of Merchandise Suspected of Infringing Such Recorded Marks or Recorded Copyrights, or Circumventing Copyright Protection Measures

(a) *Agreement to use sample for limited purpose of assisting CBP.* If CBP provides to an owner of a recorded mark or a recorded copyright a sample of imported merchandise suspected of infringing the recorded mark or copyright, or suspected of circumventing a copyright protection measure, including samples provided pursuant to §§ 133.21, 133.25, 133.42, or 133.47 of this chapter, the obligors (principal and surety) agree that such samples may only be used for the limited purpose of providing assistance to CBP in enforcing intellectual property rights.

(b) *Agreement to indemnify—(1) Improper use of sample.* If the sample identified in paragraph (a) of this section is used by the owner of the recorded mark or the recorded copyright for any purpose other than to provide assistance to CBP in enforcing intellectual property rights, the obligors (principal and surety) agree to indemnify the importer or owner of the imported merchandise, in the amount specified by CBP, against any loss or damage resulting from the improper use.

(2) *Physical loss, damage, or destruction of disclosed sample.* The owner of a recorded mark or a recorded copyright must return any sample identified in paragraph (a) of this section upon demand by CBP or at the conclusion of any examination, testing, or similar procedure performed on the sample. If the sample identified in paragraph (a) of this section is lost, damaged, or destroyed as a result of CBP's furnishing it to such owner, the obligors (principal and surety)

agree to indemnify the importer or owner of the imported merchandise, in the amount specified by CBP, against any resulting loss or damage.

PART 133—TRADEMARKS, TRADE NAMES, AND COPYRIGHTS

■ 4. The general authority citation for part 133 is revised to read as follows, the specific authority for §§ 133.21 to 133.25 is removed, and a specific authority citation for § 133.47 is added to read as follows:

Authority: 15 U.S.C. 1124, 1125, 1127; 17 U.S.C. 101, 104, 106, 601, 602, 603; 18 U.S.C. 1905; 19 U.S.C. 66, 1202, 1499, 1526, 1595a, 1623, 1624, 1628a; 31 U.S.C. 9701.

Section 133.47 also issued under 17 U.S.C. 1201.

* * * * *

§ 133.0 Scope.

■ 5. In § 133.0, revise the last sentence to read as follows:

* * * It also sets forth the procedures for the disposition, including release to the importer in appropriate circumstances, of articles bearing prohibited marks or names, piratical articles, and prohibited circumvention devices, as well as the disclosure of information concerning such articles when such disclosure would not compromise an ongoing law enforcement investigation or national security.

■ 6. Amend § 133.21 by:

■ a. Removing the words “owner of the mark” wherever they appear and adding in their place the words “owner of the recorded mark”;

■ b. Revising paragraphs (b)(2)(ii) and (b)(3) and the second sentence of paragraph (b)(4) introductory text;

■ c. Removing the word “mark” and adding in its place the word “markings” in the second sentence of paragraph (b)(5);

■ d. Revising the third sentence of paragraph (b)(5) and the first sentence of paragraph (c)(2) and paragraph (f).

The revisions read as follows:

§ 133.21 Articles suspected of bearing counterfeit marks.

* * * * *

(b) * * *

(2) * * *

(ii) *Failure of importer to respond or insufficient response to notice.* Where the importer does not provide information within the seven business day response period, or the information is insufficient for CBP to determine that the merchandise does not bear a counterfeit mark, CBP will proceed with the disclosure of information as described in paragraph (b)(3) of this section to the owner of the recorded mark if CBP concludes that the disclosure would assist CBP in its determination, and provided that the disclosure would not compromise an ongoing law enforcement investigation or national security. CBP will notify the importer in case of any such disclosure.

(3) *Disclosure to owner of the recorded mark of information appearing on detained merchandise and/or its retail packaging, including unredacted photographs, images or samples.* CBP will disclose information appearing on the merchandise and/or its retail packaging (including labels) and images (including photographs) of the merchandise and/or its retail packaging in its condition as presented for examination (*i.e.*, an unredacted condition) if CBP concludes that the disclosure of information to the owner of the mark as described in paragraph (b)(2)(ii) of this section would assist CBP in its determination, and provided that disclosure would not compromise an ongoing law enforcement investigation or national security. CBP may also provide a sample of the merchandise and/or its retail packaging in its condition as presented for examination to the owner of the recorded mark. The release of a sample will be in accordance with, and subject to, the bond and return requirements of paragraph (c) of this section. The disclosure may include any serial numbers, dates of manufacture, lot codes, batch numbers, universal product codes, or other identifying markings appearing on the merchandise or its retail packaging (including labels), in alphanumeric or other formats.

(4) * * * If the information is unavailable at the time the notice of detention is issued, CBP may release the information after issuance of the notice of detention. * * *

* * * * *

(5) * * * CBP may release a sample under this paragraph when the owner of the recorded mark furnishes to CBP a bond in an amount specified by CBP and containing the conditions set forth in § 113.70 of this chapter. * * *

* * * * *

(c) * * *

(2) * * * CBP may release a sample under paragraphs (b)(2)(ii) and (3) of this section when the owner of the recorded mark furnishes to

CBP a bond in an amount specified by CBP and containing the conditions set forth in § 113.70 of this chapter. * * *

* * * * *

(f) *Disclosure to owner of the recorded mark, following seizure, of unredacted photographs, images, and samples.* At any time following a seizure of merchandise bearing a counterfeit mark under this section, and upon receipt of a proper request from the owner of the recorded mark, CBP may provide, if available, photographs, images, or a sample of the seized merchandise and its retail packaging, in its condition as presented for examination, to the owner of the recorded mark. CBP may release a sample under this paragraph when the owner of the recorded mark furnishes to CBP a bond in an amount specified by CBP and containing the conditions set forth in § 113.70 of this chapter. CBP may demand the return of the sample at any time. The owner of the recorded mark must return the sample to CBP upon demand or at the conclusion of the examination, testing, or other use. In the event that the sample is damaged, destroyed, or lost while in the possession of the owner of the recorded mark, the owner must, in lieu of return of the sample, certify to CBP that: “The sample described as [insert description] and provided pursuant to 19 CFR 133.21(f) was (damaged/destroyed/lost) during examination, testing, or other use.”

* * * * *

§ 133.25 [Amended]

■ 7. Section 133.25 is amended:

■ a. By removing the word “Customs” wherever it appears, and in its place adding the word “CBP”;

■ b. In paragraph (b) by removing the words “owner of the trademark” wherever it appears, and adding in their place the words “owner of the recorded mark”; and

■ c. In paragraph (c):

■ i. By removing the words “trademark or trade name owner” and adding in their place the words “owner of the recorded mark or trade name” in the paragraph heading;

■ ii. By removing the words “owner of the trademark” and adding in their place “owner of the recorded mark” in the first sentence;

- iii. By revising the second sentence; and
- iv. By removing the words “trademark or trade name owner” and adding in their place the words “owner of the recorded mark or trade name” in the fifth sentence.

The revision reads as follows:

§ 133.25 Procedure on detention of articles subject to restriction.

* * * * *

(c) * * * CBP may release a sample under this paragraph when the owner of the recorded mark or trade name furnishes to CBP a bond in an amount specified by CBP and containing the conditions set forth in § 113.70 of this chapter. * * *

* * * * *

- 8. Section 133.42 is revised to read as follows:

§ 133.42 Piratical articles; Unlawful copies or phonorecords of recorded copyrighted works.

(a) *Definition.* A “piratical article,” for purposes of this part, is an unlawfully made (without the authorization of the copyright owner) copy or phonorecord of a recorded copyrighted work, importation of which is prohibited by the Copyright Act of 1976, as amended.

(b) *Detention, notice, and disclosure of information—(1) Detention period.* CBP may detain any article of domestic or foreign manufacture imported into the United States that is suspected of constituting a piratical article in violation of a copyright recorded with CBP. The detention will be for a period of up to 30 days from the date on which the merchandise is presented for examination. In accordance with 19 U.S.C. 1499(c), if, after the detention period, the article is not released, the article will be deemed excluded for purposes of 19 U.S.C. 1514(a)(4).

(2) *Notice of detention to importer and disclosure to owner of the recorded copyrighted work—(i) Notice and seven business day response period.* Within five business days from the date of a decision to detain suspect merchandise, CBP will notify the importer in writing of the detention as set forth in § 151.16(c) of this chapter and 19 U.S.C. 1499. CBP will also inform the importer that for purposes of assisting CBP in determining whether the detained merchandise is a piratical article:

(A) CBP may have previously disclosed to the owner of the recorded copyright, prior to issuance of the notice of detention, limited importation information concerning the detained merchandise, as de-

scribed in paragraph (b)(4) of this section, and, in any event, such information may be released to the owner of the recorded copyright, if available, no later than the date of issuance of the notice of detention; and

(B) CBP may disclose to the owner of the recorded copyright information that appears on the detained merchandise and/or its retail packaging, including unredacted photographs, images, or samples, as described in paragraph (b)(3) of this section, unless the importer provides information within seven business days of the notification establishing that the detained merchandise is not piratical.

(ii) *Failure of importer to respond or insufficient response to notice.* Where the importer does not provide information within the seven business day response period, or the information provided is insufficient for CBP to determine that the merchandise is not piratical, CBP will proceed with the disclosure of information as described in paragraph (b)(3) of this section to the owner of the recorded copyright, if CBP concludes that the disclosure would assist CBP in its determination, and provided that disclosure would not compromise an ongoing law enforcement investigation or national security. CBP will notify the importer in case of any such disclosure.

(3) *Disclosure to owner of the recorded copyright of information appearing on detained merchandise and/or its retail packaging, including unredacted photographs, images, or samples.* CBP will disclose information appearing on the merchandise and/or its retail packaging (including labels), and images (including photographs) of the merchandise and/or its retail packaging in its condition as presented for examination (*i.e.*, an unredacted condition) if CBP concludes that the disclosure of information to the owner of the recorded copyright as described in paragraph (b)(2)(ii) of this section would assist CBP in its determination, and provided that disclosure would not compromise an ongoing law enforcement investigation or national security. CBP may also provide a sample of the merchandise and/or its retail packaging in its condition as presented for examination to the owner of the recorded copyright. The release of a sample will be in accordance with, and subject to, the bond and return requirements of paragraph (c) of this section. The disclosure may include any serial numbers, dates of manufacture, lot codes, batch numbers, universal product codes, or other identifying markings appearing on the merchandise or its retail packaging (including labels), in alphanumeric or other formats.

(4) *Disclosure to owner of recorded copyright of limited importation information.* From the time merchandise is presented for examination, CBP may disclose to the owner of the recorded copyright limited

importation information to obtain assistance in determining whether an imported article is a piratical article. If the information is unavailable at the time the notice of detention is issued, CBP may release the information after issuance of the notice of detention. The limited importation information CBP may disclose to the owner of the recorded copyright consists of:

(i) The date of importation;

(ii) The port of entry;

(iii) The description of the merchandise, for merchandise not yet detained, from the paper or electronic equivalent of the entry (as defined in § 142.3(a)(1) or (b) of this chapter), the CBP Form 7512, cargo manifest, advance electronic information or other entry document as appropriate, or, for detained merchandise, from the notice of detention;

(iv) The quantity, for merchandise not yet detained, as declared on the paper or electronic equivalent of the entry (as defined in § 142.3(a)(1) or (b) of this chapter), the CBP Form 7512, cargo manifest, advance electronic information, or other entry document as appropriate, or, for detained merchandise, from the notice of detention; and

(v) The country of origin of the merchandise.

(5) *Disclosure to owner of recorded copyright of redacted photographs, images and samples.* Notwithstanding the notice and seven business day response procedure of paragraph (b)(2) of this section, CBP may, in order to obtain assistance in determining whether an imported article is a piratical article and at any time after presentation of the merchandise for examination, provide to the owner of the recorded copyright photographs, images, or a sample of the suspect merchandise or its retail packaging (including labels), provided that identifying information has been removed, obliterated, or otherwise obscured. Identifying information includes, but is not limited to, serial numbers, dates of manufacture, lot codes, batch numbers, universal product codes, the name or address of the manufacturer, exporter, or importer of the merchandise, or any markings that could reveal the name or address of the manufacturer, exporter, or importer of the merchandise, in alphanumeric or other formats. CBP may release a sample under this paragraph when the owner of the recorded copyright furnishes to CBP a bond in an amount specified by CBP and containing the conditions set forth in § 113.70 of this chapter. CBP may demand the return of the sample at any time. The owner of the recorded copyright must return the sample to CBP upon demand or at the conclusion of any examination, testing, or similar procedure performed on the sample. In the event that the sample is damaged, destroyed, or lost while in the possession of the owner of the

recorded copyright, the owner must, in lieu of return of the sample, certify to CBP that: “The sample described as [insert description] and provided pursuant to 19 CFR 133.42(b)(5) was (damaged/ destroyed/ lost) during examination, testing, or other use.”

(c) *Conditions of disclosure to owner of recorded copyright of information appearing on detained merchandise and/or its retail packaging, including unredacted photographs, images and samples*—(1) *Disclosure for limited purpose of assisting CBP in piratical merchandise determinations.* In accordance with paragraphs (b)(2)(ii) and (b)(3) of this section, when CBP discloses information to the owner of the recorded copyright prior to seizure, CBP will notify the owner of the recorded copyright that some or all of the information being released may be subject to the protections of the Trade Secrets Act, and that CBP is only disclosing the information to the owner of the recorded copyright for the purpose of assisting CBP in determining whether the merchandise is a piratical article.

(2) *Bond.* CBP may release a sample under paragraphs (b)(2)(ii) and (3) of this section when the owner of the recorded copyright furnishes to CBP a bond in an amount specified by CBP and containing the conditions set forth in § 113.70 of this chapter. CBP may demand the return of the sample at any time. The owner of the recorded copyright must return the sample to CBP upon demand or at the conclusion of any examination, testing, or similar procedure performed on the sample. In the event that the sample is damaged, destroyed, or lost while in the possession of the owner of the recorded copyright, the owner must, in lieu of return of the sample, certify to CBP that: “The sample described as [insert description] and provided pursuant to 19 CFR 133.42(c) was (damaged/ destroyed/lost) during examination, testing, or other use.”

(d) *Disclosure to importer of unredacted photographs, images, and samples.* CBP will disclose to the importer unredacted photographs, images, or an unredacted sample of imported merchandise suspected of being a piratical article at any time after the merchandise is presented to CBP for examination. CBP may demand the return of the sample at any time. The importer must return the sample to CBP upon demand or at the conclusion of any examination, testing, or similar procedure performed on the sample. In the event that the sample is damaged, destroyed, or lost while in the possession of the importer, the importer must, in lieu of return of the sample, certify to CBP that: “The sample described as [insert description] and provided pursuant to 19 CFR 133.42(d) was (damaged/destroyed/lost) during examination, testing, or other use.”

(e) *Seizure and disclosure to owner of the recorded copyright of comprehensive importation information.* Upon a determination by CBP, made any time after the merchandise has been presented for examination, that an article of domestic or foreign manufacture imported into the United States is a piratical article, CBP will seize such merchandise and, in the absence of the written consent of the owner of the recorded copyright (see paragraph (g) of this section), forfeit the seized merchandise in accordance with the customs laws. When merchandise is seized under this section, CBP will disclose to the owner of the recorded copyright the following comprehensive importation information, if available, within 30 business days from the date of the notice of the seizure:

- (1) The date of importation;
- (2) The port of entry;
- (3) The description of the merchandise from the notice of seizure;
- (4) The quantity as set forth in the notice of seizure;
- (5) The country of origin of the merchandise;
- (6) The name and address of the manufacturer;
- (7) The name and address of the exporter; and
- (8) The name and address of the importer.

(f) *Disclosure to owner of recorded copyright, following seizure, unredacted photographs, images, and samples.* At any time following a seizure of a piratical article under this section, and upon receipt of a proper request from the owner of the recorded copyright, CBP may provide, if available, photographs, images, or a sample of the seized merchandise and its retail packaging, in its condition as presented for examination, to the owner of the recorded copyright. CBP may release a sample under this paragraph when the owner of the recorded copyright furnishes to CBP a bond in the amount specified by CBP and containing the conditions set forth in § 113.70 of this chapter. CBP may demand the return of the sample at any time. The owner of the recorded copyright must return the sample to CBP upon demand or at the conclusion of the examination, testing, or other use. In the event that the sample is damaged, destroyed, or lost while in the possession of the owner of the recorded copyright, the owner must, in lieu of return of the sample, certify to CBP that: “The sample described as [insert description] and provided pursuant to 19 CFR 133.42(f) was (damaged/ destroyed/lost) during examination, testing, or other use.”

(g) *Consent of the owner of the recorded copyright; failure to make appropriate disposition.* The owner of the recorded copyright, within thirty days from notification of seizure, may provide written consent to the importer allowing the importation of the seized merchandise in

its condition as imported or its exportation, entry after obliteration of the recorded copyright, or other appropriate disposition. Otherwise, the merchandise will be disposed of in accordance with § 133.52, subject to the importer's right to petition for relief from forfeiture under the provisions of part 171 of this chapter.

§§ 133.43 and 133.44 [Removed and Reserved]

■ 9. Sections 133.43 and 133.44 are removed and reserved.

■ 10. Redesignate subpart F as subpart G and add new subpart F, consisting of §§ 133.47 and 133.48, to read as follows:

Subpart F—Enforcement of the Prohibition on Importation of Merchandise Capable of Circumventing Technological Measures for Protection of Copyright

§ 133.47 Articles suspected of violating the Digital Millennium Copyright Act

(a) *Definitions*—(1) *Copyright protection measure*. A technological measure that effectively controls access to a copyrighted work for which the copyright has been recorded with CBP.

(2) *Articles that violate the DMCA*. Articles that violate the importation prohibitions of the Digital Millennium Copyright Act (DMCA), 17 U.S.C. 1201, consist of products, devices, components, or parts thereof primarily designed or produced for the purpose of circumventing a copyright protection measure, or which have only a limited commercially significant purpose or use other than such circumvention, or which are knowingly marketed by the manufacturer, importer, consignee, or other trafficker in such articles, or another acting in concert with the manufacturer importer, consignee, or trafficker for use in such circumvention.

(3) *Eligible person*. The owner of a recorded copyright, who employs a copyright protection measure that may have been circumvented or attempted to be circumvented by articles that violate the importation prohibitions of the DMCA.

(4) *Injured person*. The owner of a recorded copyright, who employs a copyright protection measure that has been circumvented or attempted to be circumvented by articles seized for violation of the importation prohibitions of the DMCA, and who has successfully applied to CBP for DMCA protections pursuant to paragraph (b)(2)(iii) of this section.

(b) *Detention, notice, and disclosure of information*—(1) *Detention period*. CBP may detain any article of domestic or foreign manufacture imported into the United States that it suspects is in violation of

the DMCA, as described in paragraph (a)(1) of this section. The detention will be for a period of up to 30 days from the date on which the merchandise is presented for examination. In accordance with 19 U.S.C. 1499(c), if, after the detention period, the article is not released, the article will be deemed excluded for the purposes of 19 U.S.C. 1514(a)(4).

(2) *Notice of detention to importer and disclosure to eligible persons*—(i) *Notice and seven business day response period.* Within five business days from the date of a decision to detain suspect merchandise, CBP will notify the importer in writing of the detention as set forth in § 151.16(c) of this chapter and 19 U.S.C. 1499. CBP will also inform the importer that for purposes of assisting CBP in determining whether the detained merchandise violates the DMCA:

(A) CBP may have previously disclosed to the eligible person, prior to issuance of the notice of detention, limited importation information concerning the detained merchandise, as described in paragraph (b)(4) of this section, and, in any event, such information may be released to the eligible person, if available, no later than the date of issuance of the notice of detention; and

(B) CBP may disclose to the eligible person information that appears on the detained merchandise and/or its retail packaging, including unredacted photographs, images, or samples, as described in paragraph (b)(3) of this section, unless the importer provides information within seven business days of the notification establishing that the detained merchandise does not violate the DMCA.

(ii) *Failure of importer to respond or insufficient response to notice.* Where the importer does not provide information within the seven business day response period, or the information provided is insufficient for CBP to determine that the merchandise does not violate the DMCA, CBP will proceed with the disclosure of information, as described in paragraph (b)(3) of this section, to the eligible person if CBP concludes that the disclosure would assist CBP in its determination, and provided that the disclosure would not compromise an ongoing law enforcement investigation or national security. CBP will notify the importer in case of any such disclosure.

(iii) *Request for DMCA protections and establishment of a list of persons approved for post-seizure disclosures.* Eligible persons may apply to receive post-seizure disclosures from CBP by attaching a letter requesting such disclosures to an application to record copyright. CBP will add those persons CBP approves for such disclosures to a list that CBP will maintain. CBP will provide the post-seizure disclosures described in this section to injured persons, as defined in this part, appearing on the list. CBP will publish notice of the estab-

lishment of the list in the **Federal Register**. After the list has been established, CBP will publish notice of revisions to the list in the **Federal Register**.

(3) *Disclosure to eligible persons of information appearing on detained merchandise and/or its retail packaging, including unredacted photographs, images or samples.* CBP will disclose information appearing on the merchandise and/or its retail packaging (including labels) and images (including photographs) of the merchandise and/or its retail packaging in its condition as presented for examination (*i.e.*, an unredacted condition) if CBP concludes that the disclosure of information to the eligible person as described in paragraph (b)(2)(ii) of this section would assist CBP in its determination, and provided that the disclosure would not compromise an ongoing law enforcement investigation or national security. CBP may also provide a sample of the merchandise and/or its retail packaging in its condition as presented for examination to the eligible person. The release of a sample will be in accordance with, and subject to, the bond and return requirements of paragraph (c) of this section. The disclosure may include any serial numbers, dates of manufacture, lot codes, batch numbers, universal product codes, or other identifying markings appearing on the merchandise or its retail packaging (including labels), in alphanumeric or other formats.

(4) *Disclosure to eligible person of limited importation information.* From the time merchandise is presented for examination, CBP may disclose to the eligible person limited importation information in order to obtain assistance in determining whether an imported article violates the DMCA. If the information is unavailable at the time the notice of detention is issued, CBP may release the information after issuance of the notice of detention. The limited importation information CBP may disclose to the eligible person consists of:

- (i) The date of importation;
- (ii) The port of entry;
- (iii) The description of the merchandise, for merchandise not yet detained, from the paper or electronic equivalent of the entry (as defined in § 142.3(a)(1) or (b) of this chapter), the CBP Form 7512, cargo manifest, advance electronic information or other entry document as appropriate, or, for detained merchandise, from the notice of detention;
- (iv) The quantity, for merchandise not yet detained, as declared on the paper or electronic equivalent of the entry (as defined in § 142.3(a)(1) or (b) of this chapter), the CBP Form 7512, cargo manifest, advance electronic information, or other entry document as appropriate, or, for detained merchandise, from the notice of detention; and
- (v) The country of origin of the merchandise.

(5) *Disclosure to eligible person of redacted photographs, images and samples.* Notwithstanding the notice and seven business day response procedure of paragraph (b)(2) of this section, CBP may, in order to obtain assistance in determining whether an imported article violates the DMCA and at any time after presentation of the merchandise for examination, provide to the eligible person photographs, images, or a sample of the suspect merchandise or its retail packaging (including labels), provided that identifying information has been removed, obliterated, or otherwise obscured. Identifying information includes, but is not limited to, serial numbers, dates of manufacture, lot codes, batch numbers, universal product codes, the name or address of the manufacturer, exporter, or importer of the merchandise, or any markings that could reveal the name or address of the manufacturer, exporter, or importer of the merchandise, in alphanumeric or other formats. CBP may release a sample under this paragraph when the eligible person furnishes to CBP a bond in an amount specified by CBP and containing the conditions set forth in § 113.70 of this chapter. CBP may demand the return of the sample at any time. The eligible person must return the sample to CBP upon demand or at the conclusion of any examination, testing, or similar procedure performed on the sample. In the event that the sample is damaged, destroyed, or lost while in the possession of the eligible person, the eligible person must, in lieu of return of the sample, certify to CBP that: “The sample described as [insert description] and provided pursuant to 19 CFR 133.47(b)(5) was (damaged/destroyed/lost) during examination, testing, or other use.”

(c) *Conditions of disclosure to eligible person of information appearing on detained merchandise and/or its retail packaging, including unredacted photographs, images and samples—(1) Disclosure for limited purpose of assisting CBP in DMCA determinations.* In accordance with paragraphs (b)(2)(ii) and (3) of this section, when CBP discloses information to an eligible person prior to seizure, CBP will notify the eligible person that some or all of the information being released may be subject to the protections of the Trade Secrets Act, and that CBP is only disclosing the information to the eligible person for the purpose of assisting CBP in determining whether the merchandise violates the DMCA.

(2) *Bond.* CBP may release a sample under paragraphs (b)(2)(ii) and (3) of this section when the eligible person furnishes to CBP a bond in an amount specified by CBP and containing the conditions set forth in § 113.70 of this chapter. CBP may demand the return of the sample at any time. The eligible person must return the sample to CBP upon demand or at the conclusion of any examination, testing, or similar

procedure performed on the sample. In the event that the sample is damaged, destroyed, or lost while in the possession of the eligible person, the eligible person must, in lieu of return of the sample, certify to CBP that: “The sample described as [insert description] and provided pursuant to 19 CFR 133.47(c) was (damaged/destroyed/lost) during examination, testing, or other use.”

(d) *Disclosure to importer of unredacted photographs, images or samples.* CBP will disclose to the importer unredacted photographs, images, or an unredacted sample of imported merchandise suspected of violating the DMCA at any time after the merchandise is presented to CBP for examination. CBP may demand the return of the sample at any time. The importer must return the sample to CBP upon demand or at the conclusion of any examination, testing, or similar procedure performed on the sample. In the event that the sample is damaged, destroyed, or lost while in the possession of the importer, the importer must, in lieu of return of the sample, certify to CBP that: “The sample described as [insert description] and provided pursuant to 19 CFR 133.47(d) was (damaged/destroyed/lost) during examination, testing, or other use.”

(e) *Seizure and disclosure to injured person of comprehensive importation information.* Upon a determination by CBP, made any time after the merchandise has been presented for examination, that an article of domestic or foreign manufacture imported into the United States violates the DMCA as described in paragraph (a)(1) of this section, CBP will seize such merchandise and, in the absence of written consent of the injured person (see paragraph (g) of this section), forfeit the seized merchandise in accordance with the customs laws. When merchandise is seized under this section, CBP will disclose to the injured person the following comprehensive importation information, if available, within 30 business days from the date of the notice of the seizure:

- (1) The date of importation;
- (2) The port of entry;
- (3) The description of the merchandise from the notice of seizure;
- (4) The quantity as set forth in the notice of seizure;
- (5) The country of origin of the merchandise;
- (6) The name and address of the manufacturer;
- (7) The name and address of the exporter; and
- (8) The name and address of the importer.

(f) *Disclosure to injured person, following seizure, of unredacted photographs, images and samples.* At any time following a seizure of DMCA-violative merchandise under this section, and upon receipt of a proper request from the injured person, CBP may provide, if avail-

able, photographs, images, or a sample of the seized merchandise and its retail packaging or labels, in its condition as presented for examination, to the injured person. CBP may release a sample under this paragraph when the injured party furnishes to CBP a bond in an amount specified by CBP and containing the conditions set forth in § 113.70 of this chapter. CBP may demand the return of the sample at any time. The injured person must return the sample to CBP upon demand or at the conclusion of the examination, testing, or other use. In the event that the sample is damaged, destroyed, or lost while in the possession of the injured person, the injured person must, in lieu of return of the sample, certify to CBP that: “The sample described as [insert description] and provided pursuant to 19 CFR 133.47(f) was (damaged/destroyed/lost) during examination, testing, or other use.”

(g) *Consent of the owner of the recorded copyright; failure to make appropriate disposition.* The owner of the recorded copyright, within thirty days from notification of seizure, may provide written consent to the importer allowing the importation of the seized merchandise in its condition as imported or its exportation, entry after obliteration of the recorded copyright, or other appropriate disposition. Otherwise, the merchandise will be disposed of in accordance with § 133.52 of this part, subject to the importer’s right to petition for relief from forfeiture under the provisions of part 171 of this chapter.

§ 133.48 Demand for redelivery of released articles

If it is determined that articles which have been released from CBP custody are subject to the prohibitions or restrictions of this subpart, an authorized CBP official will promptly make demand for redelivery of the articles in accordance with § 141.113 of this chapter. If the articles are not redelivered to CBP custody under the terms of the bond on CBP Form 301, containing the bond conditions set forth in § 113.62 of this chapter, a claim for liquidated damages will be made in accordance with § 141.113 of this chapter.

§ 133.51 [Amended]

- 11. Section 133.51 is amended in paragraph (a) by:
 - a. Adding the words “including the DMCA,” after the words “trademark or copyright laws,”; and
 - b. Removing the phrase “§ 133.24 or § 133.46.” and adding in its place the phrase “§§ 133.24, 133.46, or 133.48 of this part.”

§ 133.52 [Amended]

■ 12. Section 133.52 is amended in paragraph (b) by adding the phrase “except as provided in §§ 133.42(g) and 133.47(g) of this part” after the word “destroyed”.

PART 148—PERSONAL DECLARATIONS AND EXEMPTIONS

■ 13. The general authority citation for part 148 continues and new specific authority is added for § 148.55, to read as follows:

Authority: 19 U.S.C. 66, 1496, 1498, 1624. The provisions of this part, except for subpart C, are also issued under 19 U.S.C. 1202 (General Note 3(i), Harmonized Tariff Schedule of the United States).

* * * * *

Section 148.55 also issued under 17 U.S.C. 602 and 19 U.S.C. 1526;

* * * * *

■ 14. Amend § 148.55 by revising the section heading and paragraphs (a) and (c) to read as follows:

§ 148.55 Exemption for articles embodying American trademark or copyright.

(a) *Application of Exemption.* An exemption is provided for articles bearing a counterfeit mark (as defined in § 133.21(a) of this chapter) or piratical articles (as defined in § 133.42(a) of this chapter) accompanying any person arriving in the United States which would be prohibited entry under 19 U.S.C. 1526, 15 U.S.C. 1124, or 17 U.S.C. 602. The exemption may be applied either to those piratical articles or to those articles bearing a counterfeit mark that are of foreign manufacture and bear a recorded mark owned by a citizen of, or a corporation or association created or organized within, the United States, when imported for the arriving person’s personal use in the quantities provided in paragraph (c) of this section.

* * * * *

(c) *Quantities.* Generally, every 30 days, persons arriving in the United States may apply the exemption to the following: one piratical article of each type, or one article of each type bearing a counterfeit mark, and/or one piratical article of each type that is also an article bearing a counterfeit mark. The Commissioner shall determine if more than one article may be entered and, with the approval of the Secretary of the Treasury, publish in the **Federal Register** a list of types of articles and the quantities of each entitled to the exemption. If the owner of a recorded mark or recorded copyright allows importation of more than one article normally prohibited entry under 19

U.S.C. 1526, 15 U.S.C. 1124, or 17 U.S.C. 602, the total of those articles authorized by the owner may be entered without penalty.

PART 151—EXAMINATION, SAMPLING, AND TESTING OF MERCHANDISE

■ 15. The general authority citation for part 151 continues to read as follows:

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

* * * * *

■ 16. Amend § 151.16 by:

■ a. Revising paragraphs (a), (b), and (c);

■ b. Removing the word “Customs” wherever it appears and adding in its place the term “CBP”, and removing the word “shall” wherever it appears and adding in its place the word “will” in paragraph (d);

■ c. Removing the word “Customs” and adding in its place the term “CBP” in paragraph (e);

■ d. Removing the word “Customs” wherever it appears and adding in its place the term “CBP”, and removing the word “shall” and adding in its place the word “will” in paragraph (f);

■ e. Removing the word “shall” and adding in its place the word “will” in paragraph (g);

■ f. Removing the word “Customs” and adding in its place the term “CBP” in paragraph (h);

■ g. Removing the word “Customs” and adding in its place the term “CBP”, and removing the word “shall” and adding in its place the word “will” in paragraph (i); and

■ h. Removing the word “Customs” and adding in its place the term “CBP” in paragraph (j).

The revisions read as follows:

§ 151.16 Detention of merchandise.

(a) *Exemptions from applicability.* The provisions of this section are not applicable to detentions effected by CBP on behalf of other agencies of the U.S. Government in whom the determination of admissibility is vested.

(b) *Decision to detain or release.* Within five business days from the date on which merchandise is presented for CBP examination, CBP will decide whether to release or detain merchandise. Merchandise that is not released within the five business day period will be considered to be detained merchandise under 19 U.S.C. 1499(c)(1). For purposes of this section, merchandise will be considered to be presented for CBP examination when it is in a condition to be viewed and examined by a CBP officer. Mere presentation to the examining officer of a cargo van, container, or instrument of international traffic in which the merchandise to be examined is contained will not be considered to be presentation of merchandise for CBP examination for purposes of this section. Except when merchandise is examined at the public stores, the importer must pay all costs relating to the preparation and transportation of merchandise for CBP examination.

(c) *Notice of detention.* If a decision to detain merchandise is made, or the merchandise is not released within the five business day period described in paragraph (b) of this section, CBP will issue a notice to the importer or other party having an interest in such merchandise within five business days from such decision or failure to release. Issuance of a notice of detention is not to be construed as a final determination as to admissibility of the merchandise. The notice will be prepared by the CBP officer detaining the merchandise and will advise the importer or other interested party of the:

- (1) Initiation of the detention, including the date the merchandise was presented for examination;
- (2) Specific reason for the detention;
- (3) Anticipated length of the detention;
- (4) Nature of the tests or inquiries to be conducted; and
- (5) Nature of any information which, if supplied to CBP, may accelerate the disposition of the detention.

* * * * *

PART 177—ADMINISTRATIVE RULINGS

■ 17. The general authority citation for part 177 continues to read as follows:

Authority: 5 U.S.C. 301, 19 U.S.C. 66, 1202 (General Note 3(i), Harmonized Tariff Schedule of the United States), 1502, 1624, 1625.

* * * * *

§ 177.0 [Amended]

■ 18. In § 177.0 remove the words “part 133 (relating to disputed claims of piratical copying of copyrighted matter),”.

ROBERT E. PEREZ,
Deputy Commissioner,
U.S. Customs and Border Protection.

Dated: October 2, 2019.

TIMOTHY E. SKUD,
Deputy Assistant Secretary of the Treasury.

[Published in the Federal Register, October 16, 2019 (84 FR 55251)]

AGENCY INFORMATION COLLECTION ACTIVITIES:

Report of Diversion

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

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

SUMMARY: The Department of Homeland Security, U.S. Customs and Border Protection will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). The information collection is published in the **Federal Register** to obtain comments from the public and affected agencies. Comments are encouraged and must be submitted no later than December 16, 2019 to be assured of consideration.

ADDRESSES: Written comments and/or suggestions regarding the item(s) contained in this notice must include the OMB Control Number 1651–0025 in the subject line and the agency name. To avoid duplicate submissions, please use only *one* of the following methods to submit comments:

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

(2) *Mail.* Submit written comments to CBP Paperwork Reduction Act Officer, U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, Economic Impact Analysis Branch, 90 K Street NE, 10th Floor, Washington, DC 20229–1177.

FOR FURTHER INFORMATION CONTACT: Requests for additional PRA information should be directed to Seth Renkema, Chief, Economic Impact Analysis Branch, U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, 90 K Street NE, 10th Floor, Washington, DC 20229–1177, Telephone number

202–325–0056 or via email *CBP_PRA@cbp.dhs.gov*. Please note that the contact information provided here is solely for questions regarding this notice. Individuals seeking information about other CBP programs should contact the CBP National Customer Service Center at 877–227–5511, (TTY) 1–800–877–8339, or CBP website at *https://www.cbp.gov/*.

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

Overview of This Information Collection

Title: Report of Diversion.

OMB Number: 1651–0025.

Form Number: CBP Form 26.

Current Actions: This submission is being made to extend the expiration date with no change to the burden hours or to the information collected on Form 26.

Type of Review: Extension (without change).

Abstract: CBP Form 26, *Report of Diversion*, is used to track vessels traveling coastwise from U.S. ports to other U.S. ports when a change occurs in scheduled itineraries. This form is initiated by the vessel owner or agent to notify and request approval by CBP for a vessel to divert while traveling coastwise from a U.S. port to another U.S. port, or a vessel traveling to a foreign port having to divert to a U.S. port when a change occurs in the vessel itinerary. CBP Form 26 collects information such as

the name and nationality of the vessel, the expected port and date of arrival, and information about any related penalty cases, if applicable. This information collection is authorized by 46 U.S.C. 60105 and 19 CFR 4.91. CBP Form 26 is accessible at <https://www.cbp.gov/newsroom/publications/forms?title=26&=Apply>.

Affected Public: Businesses.

Estimated Number of Respondents : 1,400.

Estimated Number of Annual Responses per Respondent:
2.

Estimated Number of Total Annual Responses: 2,800.

Estimated Time per Response: 5 minutes.

Estimated Total Annual Burden Hours: 233.

Dated: October 9, 2019.

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

[Published in the Federal Register, October 15, 2019 (84 FR 55167)]