U.S. Customs and Border Protection

DEPARTMENT OF THE TREASURY

19 CFR Parts 10, 102, 132, 134, 163, 182 and 190

CBP Dec. 21–10

RIN 1515–AE56

AGREEMENT BETWEEN THE UNITED STATES OF AMERICA, THE UNITED MEXICAN STATES, AND CANADA (USMCA) IMPLEMENTING REGULATIONS RELATED TO THE MARKING RULES, TARIFF-RATE QUOTAS, AND OTHER USMCA PROVISIONS

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

ACTION: Interim final rule; request for comments.

SUMMARY: This interim final rule amends the U.S. Customs and Border Protection (CBP) regulations to include implementing regulations for the preferential tariff treatment and related customs provisions of the Agreement Between the United States of America, the United Mexican States, and Canada (USMCA). The USMCA applies to goods from Canada and Mexico entered for consumption, or withdrawn from warehouse for consumption, on or after July 1, 2020. This document amends the Code of Federal Regulations (CFR) to implement the provisions in Chapters 1, 2, 5, and 7 of the USMCA related to general definitions, confidentiality, import requirements, export requirements, post-importation duty refund claims, drawback and duty-deferral programs, general verifications and determinations of origin, commercial samples, goods re-entered after repair or alteration in Canada or Mexico, and penalties. This document makes amendments to apply the marking rules in determining the country of origin for marking purposes for goods imported from Canada or Mexico and for other purposes specified by the USMCA. This document also includes amendments to add the sugar-containing products subject to a tariff-rate quota under Appendix 2 to Annex 2–B of Chapter 2 of the USMCA to the CBP regulations governing the requirement for an export certificate, and conforming amendments for

the declaration required for goods re-entered after repair or alteration in Canada or Mexico, recordkeeping provisions, and the modernized drawback provisions. Concurrently with this interim final rule, CBP is publishing a notice of proposed rulemaking that proposes to apply the rules for all non-preferential origin determinations made by CBP for goods imported from Canada or Mexico. CBP will also issue additional USMCA implementing regulations in an interim final rule to be published in the **Federal Register** at a later date.

DATES: *Effective date:* This interim final rule is effective on July 1, 2021.

Comments due date: Comments must be received by September 7, 2021.

ADDRESSES: You may submit comments, identified by *docket number* USCBP–2021–0026, by *one* of the following methods:

- Federal eRulemaking Portal at *http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Due to COVID–19-related restrictions, CBP has temporarily suspended its ability to receive public comments by mail.

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

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov.* Due to the relevant COVID–19-related restrictions, CBP has temporarily suspended on-site public inspection of the public comments.

FOR FURTHER INFORMATION CONTACT: *Operational Aspects and Audit Aspects:* Queena Fan, Director, USMCA Center, Office of Trade, U.S. Customs and Border Protection, (202) 738–8946 or *usmca@cbp.dhs.gov.*

Legal Aspects: Craig T. Clark, Director, Commercial and Trade Facilitation Division, Regulations and Rulings, Office of Trade, U.S. Customs and Border Protection, (202) 325–0276 or *craig.t.clark@cbp.dhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Public Participation

Interested persons are invited to participate in this rulemaking by submitting written data, views, or arguments on all aspects of this

interim final rule. U.S. Customs and Border Protection (CBP) also invites comments that relate to the economic, environmental, or federalism effects that might result from this interim final rule. Comments that will provide the most assistance to CBP will reference a specific portion of the interim final rule, explain the reason for any recommended change, and include data, information or authority that support such recommended change.

II. Background

On November 30, 2018, the "Protocol Replacing the North American Free Trade Agreement with the Agreement Between the United States of America, the United Mexican States, and Canada" (the Protocol) was signed to replace the North American Free Trade Agreement (NAFTA). The Agreement Between the United States of America, the United Mexican States (Mexico), and Canada (the USMCA)[1] is attached as an annex to the Protocol and was subsequently amended to reflect certain modifications and technical corrections in the "Protocol of Amendment to the Agreement Between the United States of America, the United Mexican States, and Canada" (the Amended Protocol), which the Office of the United States Trade Representative (USTR) signed on December 10, 2019.

Pursuant to section 106 of the Bipartisan Congressional Trade Priorities and Accountability Act of 2015 (19 U.S.C. 4205) and section 151 of the Trade Act of 1974 (19 U.S.C. 2191), the United States adopted the USMCA through the enactment of the United States-Mexico-Canada Agreement Implementation Act (USMCA Act), Public Law 116–113, 134 Stat. 11 (19 U.S.C. Chapter 29), on January 29, 2020. Section 103(a)(1)(B) of the USMCA Act (19 U.S.C. 4513(b)(1)) provides the authority for new or amended regulations to be issued to implement the USMCA, as of the date of its entry into force.

Mexico, Canada, and the United States certified their preparedness to implement the USMCA on December 12, 2019, March 13, 2020, and April 24, 2020, respectively. As a result, pursuant to paragraph 2 of the Protocol, which provides that the USMCA will take effect on the first day of the third month after the last signatory party provides written notification of the completion of the domestic implementation of the USMCA through the enactment of implementing legislation, the USMCA entered into force on July 1, 2020.

Subsequent to the USMCA's entry into force date, on December 27, 2020, the Consolidated Appropriations Act, 2021 (Appropriations

[1] The Agreement Between the United States of America, the United Mexican States, and Canada is the official name of the USMCA treaty. Please be aware that, in other contexts, the same document is also referred to as the United States-Mexico-Canada Agreement.

Act), Public Law 116–260, was enacted with Title VI of the Act containing technical corrections to the USMCA Act. All of the changes contained within Title VI of the Appropriations Act are retroactively effective on July 1, 2020, which is the entry into force date of the USMCA. These changes include amending section 202 of the USMCA Act (19 U.S.C. 4531) to prohibit non-originating goods used in production processes within foreign trade zones (FTZs) from qualifying as originating goods under the USMCA. *See* section 601(b) of Title VI of the Appropriations Act. Additionally, section 601(e) of Title VI of the Appropriations Act amended 19 U.S.C. 1520(d) to allow the refund of merchandise processing fees for USMCA post-importation claims.

Pursuant to Article 5.16 of the USMCA, the United States, Mexico, and Canada trilaterally negotiated and agreed to Uniform Regulations. The USMCA Free Trade Commission adopted the Uniform Regulations in its Decision No. 1, effective as of the date of entry into force of the USMCA. Annex I to that decision includes:[2]

- The Uniform Regulations Regarding the Interpretation, Application, and Administration of Chapter 4 (Rules of Origin) and Related Provisions in Chapter 6 (Textile and Apparel Goods) (Uniform Regulations regarding rules of origin), and
- The Uniform Regulations Regarding the Interpretation, Application, and Administration of Chapters 5 (Origin Procedures), 6 (Textile and Apparel Goods), and 7 (Customs Administration and Trade Facilitation) of the Agreement Between the United States of America, the United Mexican States, and Canada (Uniform Regulations regarding origin procedures).

In accordance with USMCA Article 5.16, modifications or additions to the Uniform Regulations shall be considered regularly to reduce their complexity and to ensure better compliance. To this end, further iterations of the Uniform Regulations may be negotiated. Part 182 of title 19 of the Code of Federal Regulations (CFR)(19 CFR part 182) will be amended through rulemaking to reflect future changes to the Uniform Regulations, as needed.

The USMCA superseded NAFTA and its related provisions on the USMCA's entry into force date. *See* Protocol, paragraph 1. Section 601 of the USMCA Act repealed the North American Free Trade Agreement Implementation Act (NAFTA Implementation Act), Public Law 103–182, 107 Stat. 2057 (19 U.S.C. 3301), as of the date that the USMCA entered into force. The NAFTA provisions set forth in part 181 of title 19 of the CFR (19 CFR part 181) and in General Note 12,

[2] Available at: *https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/free-trade-commission-decisions/usmca-free-trade-commission-decision-no-1.*

Harmonized Tariff Schedule of the United States (HTSUS), continue to apply to goods entered for consumption, or withdrawn from warehouse for consumption, prior to July 1, 2020.

Claims for preferential tariff treatment under the USMCA may be made as of July 1, 2020. On July 1, 2020, CBP published an interim final rule (IFR), entitled "Implementation of the Agreement Between the United States of America, the United Mexican States, and Canada (USMCA) Uniform Regulations Regarding Rules of Origin," in the **Federal Register** (85 FR 39690), amending part 181 and adding a new part 182 containing several USMCA provisions, including the Uniform Regulations regarding rules of origin (Appendix A to part 182). In addition to those regulations and the regulations set forth in this document, persons intending to make USMCA preference claims may refer to the CBP website at *https://www.cbp.gov/trade/priority-issues/trade-agreements/free-trade-agreements/USMCA* for further guidance, including the U.S. USMCA Implementing Instructions. The United States International Trade Commission has modified the HTSUS to include the addition of a new General Note 11, incorporating the USMCA rules of origin for preference purposes, and the insertion of the special program indicator "S" or "S+" for the USMCA in the HTSUS "special" rate of duty subcolumn.[3]

A. The Customs Related USMCA Provisions

The USMCA is composed of 34 chapters along with additional side letters. CBP is responsible for administering the customs related provisions contained within Chapters 1 (Initial Provisions and General Definitions), 2 (National Treatment and Market Access for Goods), 4 (Rules of Origin), 5 (Origin Procedures), 6 (Textile and Apparel Goods) and 7 (Customs Administration and Trade Facilitation) of the USMCA and the Uniform Regulations regarding rules of origin as well as the Uniform Regulations regarding origin procedures, pursuant to Article 5.16 of the USMCA.

This IFR amends the CBP regulations to implement significant portions of the USMCA, but does not contain all relevant subparts. CBP will promulgate the remaining USMCA implementing regulations and solicit public comments at a later date. Additionally, future trilateral negotiations on the Uniform Regulations may result in additional provisions that must be included in the rulemaking process at a later date. CBP will address any comments received in a final rule published in the **Federal Register**.

[3] The S+ indicator is used for certain agricultural goods and textile tariff preference levels (TPLs).

1. Customs Related USMCA Provisions Addressed in This IFR

Chapter 1 of the USMCA contains the general definitions and country-specific definitions applicable to the USMCA, unless otherwise provided.

Chapter 2 of the USMCA sets forth the national treatment and market access provisions. Unless otherwise provided, each USMCA country shall apply a customs duty on an originating good in accordance with its Schedule to Annex 2–B (Tariff Commitments) of Chapter 2 of the USMCA. *See* Article 2.4 of the USMCA. Appendix 2 to Annex 2–B of Chapter 2 of the USMCA contains the Tariff Schedule of the United States reflecting the tariff-rate quotas that the United States will apply to certain originating goods from Canada under the USMCA. Specifically, paragraph 15 of Appendix 2 to Annex 2–B contains the tariff-rate quota for sugar-containing products of Canada that necessitates an amendment to the CBP regulations. Chapter 2 of the USMCA also sets forth the definition of "commercial samples of negligible value" (Article 2.1); the duty-free treatment of those commercial samples of negligible value, subject to certain conditions (Article 2.9); the duty-free treatment of goods re-entered after being temporarily exported to another USMCA country for repair or alteration, subject to certain exceptions and conditions (Article 2.8); and the drawback and duty-deferral program provisions (Article 2.5).

Chapter 5 of the USMCA sets forth the origin procedures. Specifically, Chapter 5 of the USMCA contains the rules for making a claim for preferential tariff treatment (Article 5.2); the requirements for a certification of origin (Article 5.2); the set of minimum data elements required for a certification of origin (Annex 5–A); the basis of the certification of origin (Article 5.3); the importer's obligations regarding importations when claiming preferential tariff treatment (Article 5.4); the exporter's and producer's obligations (Article 5.6); the recordkeeping requirements for importers, exporters, and producers (Article 5.8); the general origin verification requirements and procedures (Article 5.9); the determination of origin provisions (Article 5.10); the right to file for refunds and claims for preferential tariff treatment after importation (Article 5.11); and the confidentiality provisions related to the exchange of information between USMCA countries (Article 5.12). Additionally, Article 5.5 of the USMCA sets forth the exceptions to the certification of origin requirement. Pursuant to Article 5.5, a certification of origin is not required, with some exceptions related to evading compliance, for a claim of preferential tariff treatment if the value of the importation does not exceed $1,000 U.S. dollars or any higher amount as the importing USMCA country

may establish, or it is an importation of a good for which the USMCA country into whose territory the good was imported has waived the requirement for a certification of origin. Consistent with this article, the United States has established, with the same exceptions related to evading compliance, a higher importation value amount of $2,500 U.S. dollars for commercial importations and has waived the certification of origin requirement for the entire category of non-commercial importations.

The penalties provisions for the USMCA are described in Chapters 5 and 7. Article 5.13 provides that each USMCA country shall maintain criminal, civil, or administrative penalties for violations of its laws and regulations related to Chapter 5 (*see also* Articles 5.4.2 and 5.6.3). Chapter 7 of the USMCA generally sets forth provisions related to customs administration and trade facilitation. Specifically, Article 7.18 states that each USMCA country shall adopt or maintain measures that allow for the imposition of a penalty by a USMCA country's customs administration for breach of its customs laws, regulations, or procedural requirements, including those governing tariff classification, customs valuation, transit procedures, country of origin, or claims for preferential tariff treatment. Chapter 7 of the USMCA also contains the confidentiality provisions related to the protection of information collected from traders. The confidentiality provisions in Article 7.22, in combination with the confidentiality provisions in Article 5.12, ensure the protection of confidential information provided to a USMCA country's customs administration and prevent the unauthorized disclosure of this information to third parties and to other USMCA countries.

The Chapters 1, 2, 5, and 7 provisions discussed above are reflected in this IFR.

2. Customs Related Provisions Addressed in Previously Published IFR

Chapter 4 of the USMCA contains the general rules of origin for preferential tariff treatment provisions, and Chapter 6 includes the rules of origin specific to textiles and apparel goods. CBP has already incorporated these rules of origin into the CBP regulations. On July 1, 2020, CBP published an IFR in the **Federal Register** (85 FR 39690) to, in part, add the Uniform Regulations regarding rules of origin trilaterally agreed upon by the United States, Mexico, and Canada as Appendix A of new part 182 to title 19 of the CFR (19 CFR part 182).

3. Customs Related Provisions To Be Addressed in Subsequent Rulemaking

Any additional CBP regulations needed to implement USMCA provisions will be included in a subsequent rulemaking to be published in the **Federal Register** at a later date.

B. Verifications and Determinations of Origin

Chapter 5 of the USMCA and the Uniform Regulations regarding origin procedures govern the verification and determination of origin requirements and procedures. Pursuant to Article 5.9.1 of Chapter 5 of the USMCA, a USMCA country, through its customs administration, may conduct a verification to determine whether a good qualifies for USMCA preferential tariff treatment by one or more of the following means: A written request or questionnaire seeking information, including documents, from the importer, exporter, or producer; a verification visit to the premises of the exporter or producer in order to request information, including documents, and to observe the production process and the related facilities; for a textile or apparel good, the procedures set out in USMCA Article 6.6; or any other procedure as may be decided by the USMCA countries. For textile or apparel goods, the verification procedures set out in USMCA Article 6.6 provide an alternative verification means that a USMCA country has the discretion to utilize only when conducting a textile or apparel goods verification. The USMCA Article 6.6 site visit verification requirements and procedures will be addressed in a subsequent rulemaking to be published in the **Federal Register** at a later date.

A USMCA country may choose to initiate a verification, using any of these verification means, with the importer or with the person who completed the certification of origin. *See* USMCA Article 5.9.2. If the USMCA country initiates a verification other than with the importer, it must inform the importer, only for the purpose of the importer's knowledge, of the initiation of the verification. *See* USMCA Article 5.9.6 and the Uniform Regulations regarding origin procedures.

USMCA Article 5.9 and the Uniform Regulations regarding origin procedures set forth the information that must be contained in a written request for information, questionnaire, or request for a verification visit (*see* USMCA Article 5.9.5), the requirements that a USMCA country must follow during a verification (*see* USMCA Article 5.9.7(a) and (b)), the time that the importer, exporter, or producer has to respond to a request for information or questionnaire (*see* USMCA Article 5.9.7(c)), and the time that the exporter or producer has to consent to or refuse a verification visit request (*see* USMCA Article 5.9.7(d)).

Pursuant to USMCA Article 5.9.9, when a USMCA country initiates a verification through a verification visit request, the USMCA country is required to provide a copy of the verification visit request to the customs administration of the USMCA country in whose territory the visit is to occur, and, if requested by the USMCA country in whose territory the visit is to occur, the embassy of that USMCA country in the territory of the USMCA country proposing to conduct the visit. USMCA Article 5.9 contains additional provisions governing verification visit procedures, including providing the circumstances under which the exporter or producer whose premises are to be visited during the verification visit, or the customs administration of the USMCA country in whose territory the verification visit is to occur, may postpone the verification visit. *See* USMCA Article 5.9.10 and 5.9.11.

During a verification, there are also requirements that records be made available for inspection. USMCA Article 5.8 requires that importers, exporters, and producers maintain certain documentation and records. Pursuant to the Uniform Regulations regarding origin procedures, these records must be maintained in such a manner as to enable an officer of the USMCA country's customs administration, when conducting a verification under USMCA Article 5.9, to perform detailed verifications of the documentation and records to verify the information on the basis of which the certification of origin was completed and the claim for preferential tariff treatment was made. Importers, exporters, and producers that are required to maintain records pursuant to USMCA Article 5.8.1 and 5.8.2 must make those records available for inspection by an officer of the USMCA country's customs administration conducting a verification, and in the case of a verification visit, provide facilities for that inspection.

The Uniform Regulations regarding origin procedures also clarify that, where a USMCA country's customs administration is conducting a verification of a good under USMCA Article 5.9, the customs administration may conduct an origin verification of a material that is used in the production of that good. The verification of that material is expected to be conducted in accordance with certain USMCA procedures. The Uniform Regulations regarding origin procedures enumerate the specific USMCA articles and Uniform Regulations regarding origin procedures paragraphs that apply to the verification of materials.[4] The USMCA country's customs administration may,

[4] *See* Uniform Regulations regarding origin procedures, Origin Verifications Section, paragraph 10, which states that where the customs administration of a USMCA country, in conducting an origin verification of a good imported into its territory under USMCA Article 5.9, conducts an origin verification of a material that is used in the production of the good, the origin verification of that material is expected to be conducted in accordance with the

during a verification of a material that is used in the production of a good, consider the material to be non-originating in determining whether the good is an originating good, if the producer or supplier of that material does not allow the customs administration access to information required to make a determination of whether the material is originating by denying access to its records; failing to respond to a verification questionnaire or letter; or refusing to consent to a verification visit within the required time.

After the verification is conducted, the USMCA country must provide the importer, and the exporter or producer that completed the certification of origin and is the subject of the verification, with a written determination of origin that includes the findings of facts and the legal basis for the determination. *See* USMCA Article 5.9.14. Prior to issuing this determination of origin, if the USMCA country intends to deny USMCA preferential tariff treatment, the USMCA country must inform the importer, and any exporter or producer who is the subject of the verification and provided information during the verification, of the preliminary results of the verification and a notice of intent to deny that includes when the denial would be effective and a period of at least 30 days for the submission of additional information, including documents, related to the originating status of the good. *See* USMCA Article 5.9.16. The reasons that a USMCA country may deny USMCA preferential tariff treatment are set forth in USMCA Article 5.10.2. Additionally, in accordance with USMCA Article 5.9.17, if a verification indicates a pattern of conduct by an importer, exporter, or producer of false or unsupported representations that a good imported into the country's territory qualifies as an originating good, the USMCA country may withhold preferential tariff treatment to identical goods imported, exported, or produced by such person until that person establishes compliance with USMCA Chapters 4, 5, and 6.

Section 207(a)(1)(A) of the USMCA Act (19 U.S.C. 4533(a)(1)(A)) provides the Secretary of the Treasury with the authority to conduct a verification, pursuant to USMCA Article 5.9, of whether a good is an originating good under section 202 of the USMCA Act (19 U.S.C. 4531) or section 202A of the USMCA Act (19 U.S.C. 4532). Section 207(b) of the USMCA Act (19 U.S.C. 4533(b)(1)) sets forth the basis for a negative determination of origin that applies to verifications conducted under USMCA Chapter 5. Specifically, section 207(b) of the USMCA Act provides that a negative determination is a determination by the Secretary that a claim by the importer, exporter, or producer that the good qualifies as an originating good under 19

procedures set out in: USMCA Article 5.9(1), (5), (7 through 11), (13), and (18); and paragraphs 3, 6, 13, 14, and 15 of the Origin Verifications Section of the Uniform Regulations regarding origin procedures.

U.S.C. 4531 is inaccurate; that the good does not qualify for preferential tariff treatment under the USMCA because the importer, exporter, or producer failed to respond to a request for information or failed to provide sufficient information to determine that the good qualifies as an originating good; after receipt of a notification of a verification visit, the exporter or producer did not provide written consent for the visit; the importer, exporter, or producer does not maintain, or denies access to, records or documentation required under section 508(1) of the Tariff Act of 1930, as amended (19 U.S.C. 1508(1)); or the importer, exporter, or producer otherwise fails to comply with the requirements of section 207 of the USMCA Act or, based on the preponderance of the evidence, circumvents the requirements of section 207 of the USMCA Act. Section 207(c)(1) of the USMCA Act (19 U.S.C. 4533(c)(1)) provides that, upon making a negative determination, the Secretary may deny preferential tariff treatment under the USMCA with respect to the good while section 207(c)(2) of the USMCA Act (19 U.S.C. 4533(c)(2)) allows the Secretary to withhold preferential tariff treatment for identical goods based on a pattern of conduct.

To address these general USMCA verification and determination of origin requirements and procedures, CBP has included subpart G, *Origin Verifications and Determinations,* in part 182 of title 19 of the CFR.

C. Marking Rules

Section 304(a) of the Tariff Act of 1930, as amended (19 U.S.C. 1304), provides that, unless excepted, 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 manner as to indicate to an ultimate purchaser in the United States the English name of the country of origin of the article. The regulations issued under the authority of section 304 to implement the country of origin marking requirements are set forth in 19 CFR part 134. Part 134 identifies the articles subject to marking, the methods and manner of marking that should be used, the exceptions to the marking requirements, the marking requirements for containers or holders, and the procedures for articles found not legally marked.

CBP employs two primary methods for determining the country of origin for marking purposes when imported goods are processed in, or contain materials from, more than one country. One method uses case-by-case adjudication to determine whether the goods have been substantially transformed in a particular country. The other method

consists of codified rules, also used to determine whether the goods have been substantially transformed, primarily expressed through a change in the HTSUS classification, often referred to as a "tariff shift."

Part 134 sets forth the country of origin marking requirements and exceptions. Section 134.1(b) defines "country of origin" as the country of manufacture, production, or growth of any article of foreign origin entering the United States. Further work or material added to an article in another country must effect a substantial transformation in order to render such other country the "country of origin" within the meaning of part 134; however, for a good of a NAFTA country, the marking rules set forth in part 102 of title 19 of the CFR (19 CFR part 102) apply (although these rules have commonly been referred to as the NAFTA Marking Rules, they apply in other contexts as well and are thus referred to herein as the "part 102 rules").). The part 102 rules are codified rules that determine the country of origin for marking purposes using primarily the "tariff shift" method. CBP first promulgated these codified part 102 rules to fulfill the United States' commitment under Annex 311 of NAFTA, which required the parties to establish rules for determining whether a good is a good of a NAFTA country. Although the NAFTA Implementation Act was repealed by the USMCA Act as of July 1, 2020, the part 102 rules remain in effect. The part 102 rules are also used for several other trade agreements. For instance, as indicated in the scope provision for part 102 (§ 102.0), the rules set forth in §§ 102.1 through 102.21 also apply for purposes of determining whether an imported good is a new or different article of commerce under § 10.769 of the United States-Morocco Free Trade Agreement regulations and § 10.809 of the United States-Bahrain Free Trade Agreement regulations.

The USMCA does not contain a general marking requirement. Except for certain agricultural goods, a good does not need to first qualify to be marked as a good of Mexico or Canada in order to receive preferential tariff treatment under the USMCA. For most goods, only the general Uniform Regulations regarding rules of origin set forth in Appendix A of part 182 of title 19 of the CFR and the product-specific rules of origin contained in General Note 11, HTSUS, are needed to determine whether a good is an originating good under the USMCA to receive preferential tariff treatment. Therefore, in line with the present scope of the part 102 rules, the part 102 rules will continue to be applicable to determine country of origin for marking purposes for goods imported from Canada or Mexico under the USMCA (regardless of whether preferential tariff treatment is claimed).

The Secretary of the Treasury has general rulemaking authority, pursuant to 19 U.S.C. 1304 and 1624, to make such regulations as may be necessary to carry out the provisions of section 304(a) of the Tariff Act of 1930, as amended, related to the country of origin marking requirements for imported articles of foreign origin. CBP believes that extending application of the well-established part 102 rules to USMCA goods will provide continuity for the Canadian and Mexican importing community because those rules have been applied to all imports from Canada and Mexico since 1994. As a result of this longevity, the importing community has made extensive efforts to comply with the part 102 rules and CBP has significant experience in applying those rules to goods from Canada and Mexico. These factors provide predictability and consistency in the application of the marking rules and in CBP's administration of the rules. The codified part 102 rules are a simplified and standardized approach for determining the country of origin for marking purposes (regardless of whether preferential tariff treatment is claimed).

The importing communities from Canada and Mexico are used to applying the part 102 rules as opposed to the case-by-case method. Accordingly, to make the transition from NAFTA to the USMCA as least disruptive to the importing community as possible, CBP has decided to continue application of the current part 102 rules to determine the country of origin for marking purposes of a good imported from Canada or Mexico to articles imported pursuant to the USMCA. However, the other marking requirements in 19 CFR part 134, such as the rules for marking containers, the exceptions applicable to the marking requirements, and the methods of marking, also previously applied to goods from Canada and Mexico, and continue to apply to these goods. Thus, CBP is amending parts 102 and 134 of title 19 of the CFR to continue the application of the part 102 rules for determining origin for marking purposes for Mexico and Canada, and also to reflect the continued applicability of the other marking requirements and the relevant exceptions.

Origin determinations are also required in other instances, such as in the administration of quantitative restrictions. Concurrently with this IFR, CBP is publishing a notice of proposed rulemaking (NPRM) that proposes to apply the part 102 rules for non-preferential origin determinations made by CBP for goods imported from Canada or Mexico, including government procurement determinations.[5] In addition to promoting uniformity and transparency, the NPRM will

[5] That proposed rule does not apply for purposes of determining whether merchandise is subject to the scope of antidumping and countervailing duty proceedings under Title VII of the Tariff Act of 1930, as amended, as such determinations fall under the authority of the

implement USMCA Article 13.4.5, which provides as follows: "For the purposes of covered procurement, a Party shall not apply rules of origin to goods or services imported from or supplied from the other Party that are different from the rules of origin the Party applies at the same time in the normal course of trade to imports or supplies of the same goods or services from the same Party."[6]

Adverse Marking Decisions

Under NAFTA, an adverse marking decision is a decision by CBP which an exporter or producer of merchandise believes to be contrary to the provisions of Annex 311 of NAFTA. While Article 510 of NAFTA provides specific rights of review and appeal for marking determinations, the USMCA does not provide any such rights. Additionally, section 209 of the USMCA Act struck the language from subsection (k) of section 304 of the Tariff Act of 1930, as amended (19 U.S.C. 1304(k)), that provided these specific petition rights, such as with respect to adverse marking decisions, for NAFTA exporters and producers. Thus, these specific rights and procedures are not provided for under the USMCA or the USMCA Act. Accordingly, an importer, or an exporter or producer (only when acting as the importer of record (IOR)) wishing to request review and/or appeal of CBP marking determinations must follow the procedures set forth in part 174 of the CFR.

Part 174 sets forth the general protest procedures pursuant to 19 U.S.C. 1514, which allows for the administrative review of challenges to CBP determinations, including marking and other origin decisions. As the general statutory and regulatory authority for protests in 19 U.S.C. 1514 and 19 CFR part 174 and the specific USMCA authority under the USMCA and the USMCA Act do not provide exporters or producers the right to request administrative review and appeal of marking decisions, USMCA exporters and producers may not file a protest of a marking determination under the USMCA, unless the exporter or producer is acting as the IOR.

D. Tariff-Rate Quota for Sugar-Containing Products Originating in Canada

Tariff-rate quotas permit a specified quantity ("in-quota quantity") of merchandise to be entered or withdrawn for consumption at a

Department of Commerce. Specifically, notwithstanding a CBP country of origin determination, that merchandise may be subject to the scope of antidumping and/ or countervailing duty proceedings associated with a different country.

[6] Although Canada is not a party to Chapter 13 of the USMCA, the United States has a similar commitment to Canada through Article IV–5 of the World Trade Organization (WTO) Revised Agreement on Government Trade, as amended on Mar. 30, 2012, Marrakesh Agreement Establishing the World Trade Organization, Annex 4(b), 1915 U.N.T.S. 103.

reduced duty rate ("in-quota tariff rate of duty") during a specified period. *See* 19 CFR 132.1(b). Appendix 2 to Annex 2–B of Chapter 2 of the USMCA, entitled Tariff Schedule of the United States—(Tariff Rate Quotas), reflects the tariff-rate quotas that the United States will apply to certain originating goods from Canada under the USMCA. These originating goods from Canada are permitted entry into the territory of the United States, at the in-quota quantity, subject to the reduced quota rates instead of the rates of duty specified in Chapter 1 through Chapter 97 of the HTSUS.

Paragraph 15 of Appendix 2 to Annex 2–B of the USMCA sets out the tariff-rate quota for sugar-containing products of Canada, including the aggregate quantity of originating goods of Canada permitted to enter free of duty in each calendar year and the article description of the qualifying originating goods. Pursuant to section 103(c)(4) of the USMCA Act, which authorizes the President to take necessary actions to implement the tariff-rate quotas in the Schedule of the United States to Annex 2–B of the USMCA, the special classification provisions in Chapter 98 of the HTSUS have been modified to include the sugar-containing products subject to this tariff-rate quota.

The tariff-rate quota for sugar-containing products of Canada under the USMCA will be administered using export certificates. When Canada provides the United States with the written notification of its intent to require export certificates for sugar-containing products in accordance with paragraph 15(d) of Appendix 2 of Annex 2–B of the USMCA, the USTR will publish a notice in the **Federal Register** announcing this determination. In any year for which the USTR has published such a determination in the **Federal Register**, imports of the sugar-containing products of Canada, at the in-quota quantity, will only be eligible for the in-quota tariff rate of duty if the U.S. importer makes a declaration to CBP, in the form and manner determined by CBP, that a valid export certificate issued by the Government of Canada is in effect for the goods.

Section 132.17 of title 19 of the CFR (19 CFR 132.17) sets forth the form and manner determined by CBP to constitute a required declaration that a valid export certificate is in effect for the goods. Specifically, § 132.17 governs the requirement for an export certificate for sugar-containing products to qualify for the tariff-rate quota and provides a description of the sugar-containing products subject to these requirements, when the export certificate is valid, and the recordkeeping retention and production requirements. For the sugar-containing products described in § 132.17(a), the importer must possess a valid export certificate in order to claim the in-quota tariff rate of duty on the products at the time they are entered or withdrawn from warehouse for consumption. The importer must record the

unique identifier of the export certificate for these products on the entry summary or warehouse withdrawal for consumption (Customs Form 7501, column 34), or its electronic equivalent. The Government of Canada will issue the export certificates. A certificate is valid if it meets the requirements of 15 CFR 2015.3(b). If the export certificate is valid, it will authorize entry into the United States at the in-quota tariff rate of duty established under the USMCA.

III. Amendments to the Regulations

Pursuant to 19 U.S.C. 4535(a), the Secretary of the Treasury has the authority to prescribe such regulations as may be necessary to implement the USMCA. Section 103(b)(1) of the USMCA Act (19 U.S.C. 4513(b)(1)) requires that initial regulations necessary or appropriate to carry out the actions required by or authorized under the USMCA Act or proposed in the Statement of Administrative Action approved under 19 U.S.C. 4511(a)(2) to implement the USMCA shall, to the maximum extent feasible, be prescribed within one year after the date on which the USMCA enters into force. This IFR amends the CBP regulations to implement significant portions of the USMCA. CBP will promulgate the remaining USMCA implementing regulations.

In order to provide transparency and facilitate their use, the majority of the USMCA implementing regulations are set forth in part 182 of title 19 of the CFR, entitled the *United States-Mexico-Canada Agreement.* Part 182 sets forth the USMCA preferential tariff treatment and other customs related provisions. This IFR amends part 182 to add regulations implementing significant portions of USMCA Chapters 1, 2, 5, and 7, as discussed above, in the existing part 182 regulatory framework. Additionally, this document makes necessary amendments to other parts of title 19 of the CFR to implement relevant USMCA provisions and to apply the part 102 rules when determining the country of origin for marking purposes for goods imported from USMCA countries.

All of the regulatory amendments made in this document are consistent with the provisions of the USMCA, the Uniform Regulations regarding origin procedures, and the USMCA Act (19 U.S.C. Chapter 29).

A. Part 10

Section 10.8 sets forth the documentation requirements for articles exported for repairs or alterations. As explained further in Section III.F., *Subpart J—Commercial Samples and Goods Returned after Repair or Alteration* below, CBP is applying the documentation pro-

visions of § 10.8(a), (b), and (c) to the entry of goods which are returned from Canada or Mexico after having been exported for repairs or alterations and which are claimed to be duty-free. Section 10.8(a)(2) provides that a declaration must be completed by the owner, importer, consignee, or agent having knowledge of the pertinent facts and filed during entry of the articles that are returned after having been exported for repairs or alterations. Currently, this declaration requires the individual completing it to state that such articles were exported from the United States for repairs or alterations and without benefit of drawback. This portion of the declaration is necessary because ordinarily these re-entered goods do not qualify for a reduced duty rate with the benefit of drawback. However, there is an exception provided in U.S. Note 1 of Subchapter II, Chapter 98, HTSUS, for NAFTA and USMCA drawback. Goods re-entered after repair or alteration are eligible for duty-free treatment even if subject to NAFTA or USMCA drawback. Accordingly, CBP is amending the declaration in § 10.8(a)(2) to clarify this distinction by adding "(unless subject to USMCA drawback)" after "without the benefit of drawback."

B. Part 102

Part 102, *Rules of Origin,* sets forth rules for determining the country of origin of certain imported goods. CBP is amending part 102 of title 19 of the CFR (19 CFR part 102) to apply its rules of origin to determine the country of origin for marking purposes of goods imported from Canada or Mexico under the USMCA (regardless of whether preferential tariff treatment is claimed).

1. Scope

This document amends § 102.0 to extend the scope of part 102 to include the USMCA. Section 102.0 is revised to state that the rules set forth in §§ 102.1 through 102.18 and 102.20 also determine the country of origin for marking purposes for goods imported from a USMCA country. Under the USMCA, the Uniform Regulations regarding rules of origin set forth in Appendix A to part 182 and the product-specific rules of origin contained in General Note 11, HTSUS, are needed to determine whether a good originates under the USMCA to receive preferential tariff treatment. The USMCA includes, *inter alia,* provisions that rely on whether goods qualify to be marked as goods of Canada, Mexico, or, under General Note 11, HTSUS, the United States, to determine the appropriate tariff benefit, thus also requiring the part 102 rules. *See* USMCA Chapter 2, Annex 2–B, Tariff Schedule of the United States, General Notes.

2. Definitions

Section 102.1 sets forth the general definitions applicable to this part. CBP is adding a new definition for "inventory management method" to provide clarity to the public. Currently, part 102 refers to the inventory management method merely with cross-references to part 181 without defining the term or providing a specific citation for where the method is described. As the term "inventory management method" is used for purposes of NAFTA and the USMCA, CBP believes that adding the definition in § 102.1 is necessary. Thus, the term "inventory management method" is added as paragraph (l) and is defined as "(1) averaging; (2) "last-in, first-out;" (3) "first-in, first-out;" or (4) any other method that is recognized in the Generally Accepted Accounting Principles (GAAP) of the country in which the production is performed or otherwise accepted by that country." In order to add the term in alphabetical order, CBP is redesignating paragraphs (l) through (p) as paragraphs (m) through (q).

CBP is also revising the definition of "value." The definition of "value" provides different methods for calculating the value of goods or materials for purposes of determining whether foreign material that does not undergo the applicable change in tariff classification (set out in § 102.20) or satisfies the other applicable requirements of that section is considered de minimis (set out in § 102.13). CBP is adding the clarifier "under NAFTA" to paragraphs (1) and (2) to make clear that the methods set forth in these paragraphs only apply to NAFTA. CBP is adding a new paragraph (3) to set forth the method used for calculating the value of goods or materials under the USMCA for purposes of determining whether foreign material is considered de minimis. Under the USMCA, the value of a good or material is its customs value or transaction value within the meaning of the Uniform Regulations regarding rules of origin set forth in Appendix A to part 182.

3. Inapplicability of NAFTA Preference Override to USMCA Claims

CBP is amending § 102.19 to limit the NAFTA preference override to apply to NAFTA only. Under NAFTA, to receive preferential tariff treatment, a good must be "originating" under General Note 12, HTSUS, and the good must qualify to be marked as a good of a NAFTA country under the part 102 rules in § 102.20. Under the USMCA, unlike NAFTA, a good does not need to qualify to be marked as a good of Canada or Mexico in order to receive preferential tariff treatment. Accordingly, the NAFTA preference override provisions are no longer necessary under the USMCA. Thus, CBP is adding a

new paragraph (c) to § 102.19 to state that the NAFTA preference override in paragraphs (a) and (b) applies only to goods entered for consumption, or withdrawn from warehouse for consumption, prior to July 1, 2020, which is the date that the USMCA entered into force.

4. Conforming Amendments

As a result of adding the definition of "inventory management method" to § 102.1, CBP needs to make several conforming amendments to other sections of part 102. Accordingly, CBP is removing the phrase "provided under the appendix to part 181 of this chapter" from § 102.11(b)(2) and "provided under the appendix to part 181 of the Customs Regulations" from § 102.12(b). These cross-references to the inventory management methods in the appendix to part 181 are no longer needed because the definition of "inventory management method" is now contained in the general definitions of part 102.

C. Part 132

Part 132, *Quotas,* sets forth the rules and procedures applicable to quotas administered by CBP. CBP is amending § 132.17(a) to reflect the tariff-rate quota for sugar-containing products of Canada established in paragraph 15 of Appendix 2 to Annex 2–B of Chapter 2 of the USMCA. CBP has decided to adopt a similar approach for describing the sugar-containing products as used in the preceding section of this part when describing the beef products subject to an export certificate requirement. This simpler approach removes the specific HTSUS subheading classifications and, alternatively, cross-references to the USTR definition of sugar-containing products and the description of the products in paragraph 15 of Appendix 2 to Annex 2–B of Chapter 2 of the USMCA. As CBP is not the party responsible for determining the sugar-containing products that qualify for the tariff-rate quota, this approach ensures that the CBP regulations contain an accurate description of the products in the event of a change in the HTSUS subheadings or a change in the USTR definition.

D. Part 134

Part 134, *Country of Origin Marking,* sets forth the regulations implementing the country of origin marking requirements and exceptions of section 304 of the Tariff Act of 1930, as amended (19 U.S.C. 1304). For purposes of the USMCA, the part 102 rules will be applied to determine the country of origin for marking purposes of a good imported from Canada or Mexico (regardless of whether preferential tariff treatment is claimed). Thus, CBP is making the necessary amendments to part 134. Part 134 identifies the articles subject to

marking, the methods and manner of marking that should be used, the exceptions to the marking requirements, the marking requirements for containers or holders, and the procedures for articles found not legally marked.

1. Definitions

Section 134.1 contains the definitions for part 134. CBP is adding the USMCA to several definitions to clarify that, for those purposes, a good may be from either a NAFTA or USMCA country. In the "country of origin" definition in § 134.1(b), CBP is adding language to clarify that for a good of a NAFTA or USMCA country, the rules set forth in part 102 determine the country of origin for marking purposes. The definition of the "NAFTA Marking Rules" in paragraph (j) has been replaced with a new definition for the "Part 102 Rules," which are rules promulgated for purposes of determining whether a good is a good of a NAFTA country and to determine the country of origin for marking purposes for goods imported from USMCA countries.

For the definition of "ultimate purchaser" in § 134.1(d), CBP is adding "or USMCA" to note that, instead of the general definition of "ultimate purchaser," the USMCA will use the same definition of "ultimate purchaser" as applied to a good of a NAFTA country. For a good of a NAFTA or USMCA country, the "ultimate purchaser" is the last person in the United States who purchases the good in the form in which it was imported. The words "or USMCA" have also been added to the examples and the term "part 102 Rules" has replaced the term "NAFTA Marking Rules," in the examples of an "ultimate purchaser," as appropriate.

CBP is further amending § 134.1(g) to add the USMCA to the definition of a "good of a NAFTA country" and to replace references to the "NAFTA Marking Rules" with "part 102 Rules." The paragraph heading of paragraph (g) has been revised to read "good of a NAFTA or USMCA country" and "or USMCA" has been added to the definition to define a "good of a NAFTA or USMCA country" for marking purposes, as an article for which the country of origin is Canada, Mexico, or the United States as determined under the part 102 Rules. Paragraph (i) defining a "NAFTA country" has similarly been revised. The paragraph heading of paragraph (i) has been revised to read "NAFTA or USMCA country" and the appropriate cross-reference to the definition of "territory" in the USMCA has been added. Accordingly, a "NAFTA or USMCA country" is defined as the territory of the United States, Canada, or Mexico, as defined in Annex 201.1 of the NAFTA and Chapter 1, Section C of the USMCA.

Finally, § 134.1 has added a new paragraph (l) to include a definition of "USMCA" and has revised the definition of "NAFTA" in paragraph (h). The new paragraph (l) defines "USMCA" as the Agreement between the United States of America, the United Mexican States, and Canada (USMCA), entered into force by the United States, Canada and Mexico on July 1, 2020. CBP has also added a second sentence to the definition of "NAFTA" stating that NAFTA is not applicable to goods entered for consumption, or withdrawn from warehouse for consumption, on or after July 1, 2020 to clarify in part 134 that the USMCA superseded NAFTA when it entered into force.

2. Marking of Containers

Subpart C of part 134 addresses the marking requirements and exceptions under 19 U.S.C. 1304(b) for containers and holders. CBP is amending §§ 134.22, 134.23 and 134.24, which provide the general rules for marking of containers or holders, the rules for containers or holders designed for or capable of reuse, and the rules for containers or holders not designed for or capable of reuse, to add the necessary USMCA references. Specifically, CBP is adding "or USMCA" to §§ 134.22(b), (d)(2), and (e)(1) to indicate that a good of a USMCA country which is a usual container is treated the same as a good of a NAFTA country. No marking is required for any good of a NAFTA or USMCA country that is a usual container.

CBP is amending § 134.23(a) to note that the exception for goods of a NAFTA country which are usual containers also applies to the USMCA with the addition of the words "or USMCA." CBP is also revising §§ 134.24(c)(1), (c)(2), and (d)(1) by adding "or USMCA" to clarify that disposable containers or holders are treated the same under the USMCA as under NAFTA.

3. Exceptions to the Marking Requirements

In section 209 of the USMCA Act, Congress amended section 304(k) of the Tariff Act of 1930, as amended (19 U.S.C 1304(k)), to create the same exceptions to the marking requirements for the goods of a USMCA country as under NAFTA. Section 134.32 contains the general exceptions to the marking requirements. CBP is adding "or USMCA" to paragraphs (h), (p) and (q) of § 134.32 to indicate that the exceptions to the marking requirements apply to NAFTA and the USMCA. These general exceptions to the marking requirements are: to articles of a USMCA country for which the ultimate purchaser must reasonably know the country of origin by reason of the circumstances of their importation or by reason of the character of the articles even though they are not marked to indicate their origin; to

goods of a USMCA country which are original works of art; and to goods of a USMCA country which are provided for in subheading 6904.10 or heading 8541 or 8542 of the HTSUS.

4. Other Marking Provisions

CBP is also adding "or USMCA" to multiple other provisions in part 134 to indicate that goods of a USMCA country are subject to the same treatment and marking requirements as goods of a NAFTA country. Specifically, CBP is revising §§ 134.35(a) and (b), 134.43(a), (c)(3), (d)(3), and 134.45(a)(2) to include the USMCA. These sections address articles substantially changed by manufacture, methods of marking specific articles, and approved markings of country name, respectively. Additionally, CBP is revising § 134.35(b) to replace a reference to the "NAFTA Marking Rules" with "part 102 Rules."

E. Part 163

Part 163, *Recordkeeping,* sets forth the recordkeeping requirements and procedures governing the maintenance, production, inspection, and examination of records. As discussed in more detail in Section III.F., *Subpart C—Export Requirements* below, 19 CFR 182.21(c) requires an exporter or producer who completes a certification of origin or a producer who provides a written representation for a good exported from the United States to Canada or Mexico to maintain all records and supporting documents relating to the origin of a good for which the certification of origin was completed. The records must be maintained as provided for in § 163.5. Because § 163.5(a) qualifies that the requirement to maintain records for the required retention periods and in the prescribed format only pertains to persons listed in § 163.2, CBP is amending § 163.2 to add USMCA exporters and producers.

CBP is amending the scope provision in § 163.0, redesignating § 163.2(c)(2) to (c)(3), and adding a new § 163.2(c)(2) to include the USMCA exporters or producers. It is not necessary to amend § 163.2 to include the USMCA importers because § 163.2 includes all importers without qualification. CBP will make any additional amendments to part 163 necessary to implement the USMCA and to incorporate modifications to the Uniform Regulations in a subsequent rulemaking to be published in the **Federal Register** at a later date.

F. Part 182

Part 182, *United States-Mexico-Canada Agreement,* implements the duty preference and related customs provisions applicable to imported goods under the USMCA. CBP is amending part 182 of title 19 of the CFR (19 CFR part 182) to promulgate additional USMCA

implementing regulations related to Chapters 1, 2, 5, and 7 of the USMCA. Currently, part 182 contains a framework with its various subparts outlined. The existing part 182 substantive provisions include the scope, a rules of origin subpart (Subpart F), and Appendix A that sets forth the Uniform Regulations regarding rules of origin trilaterally agreed upon by the United States, Mexico, and Canada.

This document amends part 182 to add the general definitions and confidentiality provisions to Subpart A (General Provisions), and to add the implementing regulations for Subparts B (Import Requirements), C (Export Requirements), D (Post-Importation Duty Refund Claims), E (Restrictions on Drawback and Duty-Deferral Programs), G (Origin Verifications and Determinations), J (Commercial Samples and Goods Returned after Repair or Alteration), and K (Penalties). The implementing regulations for the remaining part 182 subparts will be included in a subsequent rulemaking to be published in the **Federal Register** at a later date.

Subpart A—General Provisions

Definitions

Section 182.1 sets forth the general definitions applicable to this part. Chapter 1 of the USMCA sets forth the general and country-specific definitions to be applied throughout the USMCA, unless otherwise noted. Since § 182.1 contains the definitions of the common terms that are used in multiple places in part 182, it includes definitions from 19 U.S.C. 4502, several Chapters of the USMCA, and the Uniform Regulations regarding rules of origin set forth in Appendix A to part 182. Additional definitions that are not common terms throughout part 182 and are applicable on a more limited basis are set forth elsewhere with the substantive provisions to which they relate. For instance, Appendix A to part 182 contains many definitions that are applicable only to the Uniform Regulations regarding rules of origin.

Confidentiality

To ensure protection of confidential information provided to a USMCA country's customs administration and to prevent the unauthorized disclosure of this information to third parties and to other USMCA countries, the USMCA contains confidentiality protections. These confidentiality provisions are set forth in USMCA Articles 5.12, 7.22, 7.26, and 7.28. The USMCA also extends the confidentiality provisions in Articles 5.12 and 7.22 to textile and apparel goods under USMCA Chapter 6. *See* USMCA Article 6.9.

Article 5.12 generally governs the treatment of confidential information exchanged by USMCA countries. A USMCA country that receives information designated as confidential from another USMCA country or that is deemed confidential under the receiving USMCA country's laws is required to maintain the confidentiality of this information pursuant to its respective laws. The receiving USMCA country may use or disclose the confidential information, however, for purposes of administration or enforcement of its customs laws or as otherwise provided for under its law, including in an administrative, quasi-judicial, or judicial proceeding. *See* USMCA Article 5.12.1 and 5.12.3. A USMCA country may decline to provide information requested by another USMCA country if it has failed to act to keep information confidential in accordance with its law. *See* USMCA Article 5.12.2. USMCA Article 7.28 extends these confidentiality protections to Section B in USMCA Chapter 7 on cooperation and enforcement. USMCA Article 7.26 governs the exchange of specific confidential information between USMCA countries and sets forth the procedures for USMCA countries to request and provide information that is normally collected in connection with the importation, exportation, or transit of a good for purposes of enforcing or assisting in the enforcement of measures concerning customs offenses.

USMCA Article 7.22 governs the protection of information, related to members of the trade community (traders), received by the USMCA country's customs administration. It requires that each USMCA country's customs administration apply measures governing the collection, protection, use, disclosure, retention, correction, and disposal of information that it collects from traders. *See* USMCA Article 7.22.1. Each USMCA country's customs administration must protect confidential information from use or disclosure, in accordance with its laws, that could prejudice the competitive position of the trader to whom the confidential information relates. *See* USMCA Article 7.22.2. The customs administration may use or disclose confidential information, however, for the purposes of administration or enforcement of its customs laws or as otherwise provided under its law, including in an administrative, quasi-judicial, or judicial proceeding. *See* USMCA Article 7.22.3. The confidentiality provisions as set forth in USMCA Articles 5.12, 7.22, 7.26, and 7.28 apply to all applicable exchanges of confidential information between the USMCA countries, including a USMCA Article 7.27 verification report containing information obtained during a verification, such as data and documents, that is provided when a USMCA country requests another USMCA country conduct a verification in its territory. Additionally, to further safeguard confidential information, the

USMCA allows the importer, exporter, or producer to send information directly to the USMCA country conducting a verification, including documents, to allow the party to protect its proprietary information. *See* USMCA Article 5.9.3.

Several U.S. statutes and regulations govern CBP's treatment and disclosure of confidential information. The exchange of information between USMCA countries is governed by 19 U.S.C. 1628. Section 209(c) of the USMCA Act amended section 628 of the Tariff Act of 1930 (19 U.S.C. 1628) by striking subsection (c) and inserting language applicable to the USMCA in accordance with USMCA Articles 5.12, 7.26, and 7.28. Pursuant to 19 U.S.C. 1628(c), the Secretary may authorize CBP to exchange information with any government agency of a USMCA country if the Secretary reasonably believes the exchange of information is necessary to implement USMCA chapters 2, 4, 5, 6, or 7, and obtains assurances from such agency that the information will be held in confidence and used only for governmental purposes.

The Privacy Act (5 U.S.C. 552a) governs the collection, maintenance, use, and dissemination of personally identifiable information (PII) in systems of records maintained by Federal agencies. PII is defined as information that permits the identity of an individual to be directly or indirectly inferred, including any other information that is linked or linkable to that individual, regardless of whether the individual is a U.S. citizen, lawful permanent resident, visitor to the United States, or employee or contractor of the Department of Homeland Security.

The Freedom of Information Act (FOIA) (5 U.S.C. 552) provides that any person has the right to request access to records from any federal agency. Under FOIA's terms, federal agencies must disclose records upon receiving a written request for them, except for those records or portions of records protected from disclosure by any of the nine exemptions or three exclusions found in the statute.

Part 5 of title 6 of the CFR (6 CFR part 5) governs the disclosure of information created or maintained by CBP and requested pursuant to the FOIA and Privacy Act. Part 103 of title 19 of the CFR (19 CFR part 103) governs the production and disclosure of CBP-maintained information under other statutory or regulatory provisions and/or as requested through administrative and/or legal processes. Accordingly, part 5 of title 6 and part 103 of title 19 apply where the impetus for the release of information to a member of the public by CBP stems from a request from a member of the public, while USMCA-related disclosures involve CBP proactively releasing information to third parties, for example, the importer, exporter, producer, or other

USMCA country, to fulfill the United States' commitments under the USMCA. Nonetheless, CBP will maintain the confidentiality and disclosure protections in part 103 for USMCA-related information disclosures, including § 103.23(b) detailing the circumstances where disclosures will not be made and § 103.33 addressing the release of information to foreign agencies.

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." *See* 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. The courts have interpreted the Trade Secrets Act as covering the same type of information that falls under Exemption 4 of the FOIA. *See, e.g., CNA Fin. Corp. v. Donovan,* 830 F.2d 1132, 1140 (D.C. Cir. 1987). Exemption 4 of the FOIA protects "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential." *See* 5 U.S.C. 552(b)(4).

The Trade Secrets Act 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, 19 U.S.C. 1514(e) grants the Secretary of the Treasury authority to provide, in the case of a negative USMCA determination, the entry number and any other entry information considered necessary to allow the exporter or producer, who is the subject of the determination and completed the certification of origin, to exercise its protest rights pursuant to 19 CFR part 174, except when there is a pattern of conduct of false or unsupported representations pursuant to 19 U.S.C. 1514(f).

Thus, CBP is adding a new § 182.2 to address CBP's responsibility to maintain the confidentiality of the USMCA-related information it receives from the public in accordance with existing statutory and regulatory requirements, including 19 CFR part 103, 6 CFR part 5, and all other applicable statutes and regulations, the legally permitted disclosures of this information that CBP is authorized to make to third parties and other USMCA countries, and the information shar-

ing that is permissible with U.S. government authorities, including the Department of Labor with respect to the USMCA's labor value content requirements.

Section 182.2 fulfills CBP's commitment under USMCA Article 7.22 to apply measures governing the protection, use, and disclosure of information collected from traders. Section 182.2 is focused on USMCA-related disclosures of information collected from members of the trade community (traders). As discussed in more detail in Section III.F., *Subpart G—Origin Verifications and Determinations* below, the USMCA requires several notifications, unique to the USMCA, that permit authorized disclosures to importers, exporters, or producers of information collected from traders. Under the USMCA and the Uniform Regulations regarding origin procedures, the confidentiality requirements apply when CBP provides a determination of origin, originally issued to the exporter or producer, to the importer in accordance with USMCA Article 5.9.14 and the Uniform Regulations regarding origin procedures.

In order to ensure compliance with the applicable U.S. statutory and regulatory provisions, CBP is also extending the confidentiality regulations in § 182.2 to any of the notifications made during a verification that potentially involve information disclosures to third parties. These include CBP's notification of the initiation of a verification to the importer (§ 182.73(c)), sending a request for information to the exporter or producer prior to issuing a negative determination (§ 182.75(c)(1)), the issuance of a positive or negative determination of origin (§ 182.75), and the issuance of the intent to deny (§ 182.75(c)(3)). Section 182.2(b) also authorizes CBP to disclose confidential information collected from traders to U.S. government authorities responsible for the administration and enforcement of USMCA requirements, such as the information in the labor value content vehicle certifications to the Department of Labor. The provision that allows the importer, exporter, or producer to send information directly to CBP to protect its proprietary information is set forth in § 182.72(c). *See* subpart G of part 182.

While § 182.2 is intended to address only USMCA-specific information collections and disclosures, CBP will continue to treat all confidential information received from the public, such as routine entry information, in accordance with existing statutory and regulatory requirements, including the routine uses of the systems of record notices (SORNs) for the trade systems maintained by CBP. As discussed above, the exchange of information between USMCA countries is governed by statutory authority (19 U.S.C. 1628).

Subpart B—Import Requirements

Subpart B of part 182 (19 CFR 182.11–182.16) contains the USMCA import requirement provisions, as provided for in Chapter 5 of the USMCA, including the filing of a claim for preferential tariff treatment upon importation (§ 182.11), certification of origin requirements (§ 182.12), importer obligations (§ 182.13), certification of origin not required (§ 182.14), maintenance of records (§ 182.15), effect of noncompliance, and failure to provide documentation regarding transshipment (§ 182.16).

Section 182.11, *Filing of claim for preferential tariff treatment upon importation,* sets forth the procedure for making a claim for preferential tariff treatment upon importation, the basis for making a claim, and the requirement that the importer correct a claim if it has reason to believe that the claim is based on inaccurate information or is otherwise invalid. In accordance with Article 5.2.1 of the USMCA, an importer may make a claim for USMCA preferential tariff treatment based on a certification of origin completed by the importer, exporter, or producer for the purpose of certifying that a good being exported from the territory of a USMCA country into the territory of another USMCA country qualifies as an originating good. An importer who makes a claim for preferential tariff treatment upon importation, pursuant to § 182.11(b), also qualifies for an exemption from the merchandise processing fee.

Section 182.12, *Certification of Origin,* indicates the requirements for the certification of origin, consistent with Articles 5.2 and 5.3 of the USMCA, including the specifics on what the certification of origin must contain, its form, its basis, its applicability, and its validity.

Section 182.14, *Certification of origin not required,* sets forth the types of importations, consistent with Article 5.5 of the USMCA, where an importer will not be required to submit a copy of a certification of origin. Unless § 182.14(b) applies, an importer will not be required to submit a copy of a certification of origin for a noncommercial importation of a good; or a commercial importation for which the value of the originating goods does not exceed $2,500 in U.S. dollars.

Section 182.15, *Maintenance of records,* contains the recordkeeping requirements, in accordance with Article 5.8.1 of the USMCA, that apply to an importer claiming USMCA preferential tariff treatment for a good imported into the United States. The importer must maintain the certification of origin and all records and documents that the importer has demonstrating that the good qualifies for preferential tariff treatment under the USMCA, including those related to transit and transshipment, for a minimum of five years from the date of

importation of the good. These records are in addition to any other records that the importer is required to prepare, maintain, or make available to CBP under part 163.

Pursuant to § 182.16(a), if the importer fails to comply with applicable requirements under this subpart, including submission of a complete certification of origin prepared in accordance with §§ 182.12 and 182.14, when requested, CBP may deny preferential tariff treatment to imported goods. In addition, pursuant to § 182.16(b), CBP may deny preferential tariff treatment to an originating good if the good is transported outside the territories of the USMCA countries, and at the request of CBP, the importer of the good does not provide evidence demonstrating to the satisfaction of CBP that the transit and transshipment conditions of the USMCA were met.

Subpart C—Export Requirements

Subpart C of part 182 (19 CFR 182.21) sets forth the obligations of an exporter or producer who completes a certification of origin for a good exported from the United States to Canada or Mexico. These export requirements are in accordance with Article 5.6 of the USMCA. These requirements include the submission of the certification of origin to CBP upon request, and a requirement to provide prompt notification of errors in the certification of origin that could affect its accuracy or validity to every person to whom the certification was provided, including CBP.

Paragraph (c) of § 182.21 sets forth the recordkeeping requirements, in accordance with Article 5.8.2 of the USMCA, that apply to an exporter or producer who completes a certification of origin or a producer who provides a written representation for a good exported from the United States to Canada or Mexico. These records must be maintained as provided for in 19 CFR 163.5 and must be stored and made available for examination and inspection by the appropriate CBP official in the same manner as provided in part 163. As discussed in Section III.E. Part 163 above, to impose these recordkeeping requirements on the USMCA exporters and producers, CBP had to make conforming amendments to 19 CFR 163.2(c).

Subpart D—Post-Importation Duty Refund Claims

Subpart D of part 182 (19 CFR 182.31–182.33) sets forth the provisions related to post-importation claims for preferential tariff treatment. Under 19 U.S.C. 1520(d), CBP may reliquidate an entry to refund any excess duties paid at importation on a good qualifying for preferential tariff treatment under the rules of origin for certain enumerated trade agreements for which a claim for preferential tariff

treatment was not filed at importation (1520(d) claims). Notwithstanding the fact that a valid protest was not filed, and provided a claimant files the required documents as described in 19 CFR 182.32(b), this provision allows the claimant to receive refunds for any excess duties. *See* 19 U.S.C. 1520(d).

Section 182.31 sets forth the right to make this post-importation claim for preferential tariff treatment. Specifically, where a good would have qualified as an originating good when it was imported into the United States but no claim for preferential tariff treatment was made, the importer of that good may file a claim for a refund of any excess duties at any time within one year after the date of importation of the good in accordance with the procedures set forth in § 182.32. CBP may refund any excess duties by liquidation or reliquidation of the entry covering the good in accordance with § 182.33 of this subpart.

As described above, on December 27, 2020, the Appropriations Act was enacted with Title VI of the Act setting forth technical corrections to the USMCA Act. Prior to the enactment of the Appropriations Act and the technical corrections, section 205(a)(1)(C) of the USMCA Act only permitted an importer who made a claim for USMCA preferential tariff treatment upon importation pursuant to § 182.11(b) to qualify for an exemption from the merchandise processing fee while importers who filed a USMCA post-importation claim under 19 U.S.C. 1520(d) (1520(d) claim) were limited to the refund of any excess duties paid at importation and were specifically excluded from receiving the refund of any merchandise processing fees paid at importation. Section 601(e) of Title VI of the Appropriations Act amended 19 U.S.C. 1520(d) to allow the refund of merchandise processing fees for USMCA post-importation claims. This change is retroactively effective as of July 1, 2020, USMCA's entry into force date, and authorizes CBP to issue refunds of the merchandise processing fees for USMCA post-importation claims.

Subpart E—Restrictions on Drawback and Duty-Deferral Programs

Subpart E of part 182 (19 CFR 182.41–182.54) sets forth the provisions regarding drawback claims and duty-deferral programs, as provided for under Article 2.5 of the USMCA, and applies to any good that is a "good subject to USMCA drawback" within the meaning of 19 U.S.C. 4534. Drawback, as generally provided for in section 313 of the Tariff Act of 1930, as amended (19 U.S.C. 1313), is the refund or remission, in whole or in part, of duties, taxes, and fees imposed and paid under Federal law upon entry or importation.

The requirements and procedures set forth in subpart E for USMCA drawback are in addition to the general definitions, requirements, and procedures for drawback claims set forth in part 190 of title 19 of the CFR, unless otherwise specified. Further, the requirements and procedures of subpart E are also in addition to those for manipulation, manufacturing, and smelting and refining warehouses contained in parts 19 and 144, for foreign trade zones under part 146, and for temporary importations under bond in part 10.

Subpart E contains sections on applicability (§ 182.41), duties and fees not subject to drawback (§ 182.42), eligible goods subject to USMCA drawback (§ 182.43), calculation of drawback (§ 182.44)—which includes the lesser of duty rule for USMCA drawback at § 182.44(a), goods eligible for full drawback (§ 182.45), filing of drawback claim (§ 182.46), completion of claim for drawback (§ 182.47), retention of records (§ 182.49), liquidation and payment of drawback claims (§ 182.50), prevention of improper payment of claims (§ 182.51), subsequent claims for preferential tariff treatment (§ 182.52), verification of claim for drawback, and waiver or reduction of duties (§ 182.54). Certain sections and paragraphs in subpart E of part 182 remain reserved. CBP is reviewing these reserved sections and paragraphs because of outstanding policy considerations and they will be addressed in a subsequent rulemaking. With the exception of the specific sections discussed below, the USMCA drawback provisions contained in subpart E are substantially similar to the NAFTA drawback provisions contained in part 181.

In § 182.44(d), *Substitution manufacturing drawback under 19 U.S.C. 1313(b),* CBP is allowing substitution using the 8-digit HTSUS subheading number standard for the USMCA. *See* 19 U.S.C. 4534(b). This 8-digit HTSUS subheading number standard is the standard previously provided for in section 906, *Drawback and Refunds,* of the Trade Facilitation and Trade Enforcement Act of 2015 (TFTEA) (Pub. L. 114–125, 130 Stat. 122, February 24, 2016). CBP is adding a paragraph (d)(2), *Special rule for sought chemical elements,* in § 182.44, that was not part of NAFTA drawback. This paragraph (d)(2) is intended to clarify the term "same kind and quality" as it applies to sought chemical elements.

The USMCA drawback provisions in § 182.45 include a few differences from NAFTA drawback. In § 182.45, CBP has made changes to paragraph (d), *Certain goods exported to Canada or Mexico,* regarding, *inter alia,* certain sugar tariffs that are excluded from the lesser of duty rule as provided for in 19 U.S.C. 4534(a)(6). In § 182.45, CBP also has added new paragraph (e), *Certain goods exported to Canada,* as provided for in 19 U.S.C. 4534(a)(7) and (a)(8), and a new para-

graph (f), *Certain goods that are exported or deemed exported,* as provided for in 19 U.S.C. 4534(a)(3).

The USMCA did not provide for the time or method of filing a USMCA drawback claim. Accordingly, CBP has made conforming changes to the procedures in § 182.46, *Filing of drawback claim,* to better align with the general requirements of part 190, *Modernized Drawback,* as provided for in 19 U.S.C. 1313, as amended. These conforming changes will ensure a more uniform approach to the filing and processing of all drawback claims by requiring claims to be filed within 5 years after the date of importation and to be transmitted electronically in the Automated Commercial Environment (ACE).

Subpart G—Origin Verifications and Determinations

Subpart G of part 182 (19 CFR 182.71– 182.76) contains the general USMCA verification and determination of origin provisions, including the applicability of these provisions (§ 182.71), verification of claim for preferential tariff treatment (§ 182.72), notification and response procedures (§ 182.73), verification visit procedures (§ 182.74), determinations of origin (§ 182.75), and repeated false or unsupported preference claims (§ 182.76).

Section 182.71, *Applicability,* states that subpart G contains the general origin verification and determination provisions applicable to goods claiming USMCA preferential tariff treatment. USMCA Articles 5.9 and 5.10 and the Uniform Regulations regarding origin procedures address general verification and determinations of origin.

Additional verification procedures that apply to textile and apparel goods and automotive goods will be set forth in Subpart H, *Textile and Apparel Goods,* and Subpart I, *Automotive Goods,* in part 182. These subparts will be included in a subsequent rulemaking to be published in the **Federal Register** at a later date. Please refer to the CBP website at *https://www.cbp.gov/trade/priority-issues/trade-agreements/free-trade-agreements/USMCA* for more information, including the U.S. USMCA Implementing Instructions, regarding verifications of textile and apparel goods and automotive goods.

Section 182.72, *Verification of claim for preferential tariff treatment,* describes the means that CBP may use to conduct a verification, contains the provisions related to verifications of a material, states that CBP will accept information directly from the importer, exporter, or producer during a verification, and contains the accounting principles that apply to a verification. A claim for USMCA preferential tariff treatment will be subject to such verification as CBP deems necessary. A verification described in subpart G of part 182 may be conducted by a Center of Excellence and Expertise (Center) or by Regulatory Audit and Agency Advisory Services. In accordance with

USMCA Article 5.9.2, CBP may initiate the verification of goods imported into the United States under the USMCA with the importer, or with the exporter or producer who completed the certification of origin.

A verification of a claim for USMCA preferential tariff treatment may be conducted by means of one or more of the following: Requests for information, including documents, from the importer, exporter, or producer; questionnaires seeking information, including documents, from the importer, exporter, or producer; verification visits to the premises of the exporter or producer in Mexico or Canada in order to request information, including documents, and to observe production processes and facilities; and any other procedure to which the USMCA countries may agree.

As described in § 182.72(b), when conducting a verification of a good imported into the United States, CBP may conduct a verification of the material that is used in the production of that good. A verification of a material producer may be conducted pursuant to any of the verification means set forth in § 182.72(a). Please note that CBP believes that the term "material producer" and our application of the verification of materials in part 182 to be sufficiently broad to encompass a verification of either a material producer or a material supplier. CBP encourages public comment on this issue, including whether a material supplier should be separately accounted for in the regulations. In accordance with the Uniform Regulations regarding origin procedures,[7] with the exception of the notification to the importer of the initiation of a verification (§ 182.73(c)) and the determination of origin provisions (§ 182.75), subpart G applies when CBP is conducting a verification of a material.

Section 182.73, *Notification and response procedures,* contains the notification and response procedures for requests for information, questionnaires, and verification visits. Paragraph (a) specifies the contents of a request for information and a questionnaire, in accordance with USMCA Article 5.9.5, and that the importer, exporter, or producer must make records available for inspection by a CBP official during a verification. Paragraph (b) states that, prior to conducting a verification visit in Canada or Mexico, CBP will provide the exporter or producer with a notification stating the intent to conduct a verifi-

[7] *See* Uniform Regulations regarding origin procedures, Origin Verifications Section, paragraph 10, which states that where the customs administration of a USMCA country, in conducting an origin verification of a good imported into its territory under USMCA Article 5.9, conducts an origin verification of a material that is used in the production of the good, the origin verification of that material is expected to be conducted in accordance with the procedures set out in: USMCA Article 5.9(1), (5), (7 through 11), (13), and (18); and paragraphs 3, 6, 13, 14, and 15 of the Origin Verifications Section of the Uniform Regulations regarding origin procedures.

cation visit, and provides the contents of that notification in accordance with USMCA Article 5.9.5. Paragraph (c) sets forth the importer notification that is required, pursuant to USMCA Article 5.9.6 and the Uniform Regulations regarding origin procedures, when CBP initiates a verification with the exporter or producer. Paragraph (d) provides the means of communication that CBP may use to contact the exporter or producer. In accordance with USMCA Article 5.9.18, all communication to the exporter or producer will be sent by any means that can produce a confirmation of receipt, with the Uniform Regulations regarding origin procedures specifying the specific means. Paragraph (e) contains information regarding when the time periods in subpart G begin, and paragraph (f) sets forth the amount of time that the importer, exporter, or producer has to respond to a request for information and a questionnaire, and that an exporter or producer has to consent to or deny the verification visit.

Section 182.74, *Verification visit procedures,* sets forth the verification visit procedures applicable to CBP when it is conducting a verification visit of an exporter or producer in Canada or Mexico. CBP may conduct a verification visit of the exporter or producer's premises in-person or remotely. The same verification visit procedures apply to both in-person and remote verification visits, including the notification of a verification visit to the exporter or producer whose premises are to be visited (§ 182.73(b)), the response time for responding to a notification of a verification visit (§ 182.73(f)(2)), the written consent required prior to the verification visit (§ 182.74(a)), the option to request a postponement of the visit (§ 182.74(b)), the records that must be made available for inspection by a CBP official conducting the verification, the facilities provided for that inspection (§ 182.74(c)), and the right to have observers (§ 182.74(d)).

Section 182.75, *Determinations of origin,* sets forth the contents of a determination of origin and the parties that will receive the determination of origin. While USMCA Article 5.9.14 only requires that a USMCA country provide a written determination of origin to the importer, and the exporter or producer that completed the certification of origin and is the subject of a verification, CBP has decided to extend the parties to whom it will issue a determination of origin. As stated in § 182.75(b), CBP will issue the determination of origin to the importer, and to the exporter or producer who is subject to the verification and either completed the certification of origin or provided information directly to CBP during the verification to ensure that the same parties receive both the intent to deny and the determination of origin. This determination of origin will be issued to these parties within 120 days or, in exceptional cases and upon notification to the

appropriate parties, within 210 days, after CBP has determined that it has received all the information necessary to issue a determination in accordance with USMCA Article 5.9.15.

USMCA Article 5.9.15 requires the USMCA country conducting the verification to, as expeditiously as possible and within 120 days after it has received all the information necessary (including any information collected pursuant to a verification request to an exporter or producer) to make the determination and provide the written determination to the appropriate parties. The Uniform Regulations regarding origin procedures further clarify that "all the information necessary" includes information that may be required regarding the materials used in the production of a good or any assistance requested under USMCA Article 5.9.8 during a verification from another USMCA country. Pursuant to USMCA Article 5.9.15, the USMCA country may extend this 120-day period, in exceptional cases, for up to 90 days after notifying the importer, and any exporter or producer who is subject the verification or provided information during the verification. CBP has decided to provide this notification of the extension to all parties to whom it will issue a determination of origin pursuant to 19 CFR 182.75(b), including to the exporter or producer who is subject to the verification and either completed the certification of origin or provided information directly to CBP during the verification.

Paragraph (c) of § 182.75 contains the provisions that apply to negative determinations of origin when CBP intends to deny USMCA preferential tariff treatment. This paragraph sets forth the circumstances under which CBP must send a request for information to the exporter or producer prior to issuing a negative determination in accordance with USMCA Article 5.9.4, the reasons that CBP may deny preferential tariff treatment, the intent to deny provision, and the additional requirements that apply when CBP issues a negative determination. Paragraph (c)(2) contains the reasons that CBP may deny USMCA preferential tariff treatment as set forth in USMCA Article 5.10.2. CBP will amend paragraph (c)(2) in a subsequent rulemaking to be published in the **Federal Register** at a later date to reflect the application of the USMCA Article 5.10.2 reasons for denial to textile and apparel goods and automotive goods and to ensure that paragraph (c)(2) contains a comprehensive list of the reasons for denial with the appropriate cross-references.

As described above, pursuant to USMCA Article 5.9.16, prior to issuing a written determination of origin, if the USMCA country intends to deny USMCA preferential tariff treatment, the USMCA country must inform the importer, and any exporter or producer who is subject to the verification and provided information during the

verification, of the preliminary results of the verification and provide those persons with a notice of intent to deny. Paragraph (c)(3) of § 182.75 contains the intent to deny provision, including that CBP will inform the importer, and the exporter or producer who is subject to the verification and either completed the certification of origin or provided information directly to CBP during the verification, of CBP's intent to deny preferential tariff treatment. As discussed above, CBP has decided to extend the parties who receive an intent to deny, beyond the requirements in USMCA Article 5.9.16, to ensure that the same parties receive the intent to deny and the determination of origin. The intent to deny will contain the preliminary results of the verification, the effective date of the denial of preferential tariff treatment, and a notice to the importer, exporter, or producer that CBP will provide 30 days to submit additional information, including documents, related to the preferential tariff treatment of the good. Pursuant to paragraph (c)(4), if, 30 days after the importer receives the intent to deny, CBP determines that one or more of the reasons for the denial of preferential tariff treatment continues to apply, CBP will issue a negative determination of origin. In addition to the contents of the determination set forth in § 182.75(a), a negative determination of origin will provide the exporter or producer with the information necessary to file a protest as provided for in 19 U.S.C. 1514(e) and part 174, unless CBP determines that there is a pattern of conduct of false or unsupported representations pursuant to § 182.76. Pursuant to 19 U.S.C. 1514(e), CBP is authorized to provide exporters or producers who receive a negative determination of origin with the entry number and any other entry information considered necessary to allow the exporter or producer to exercise its protest rights under 19 U.S.C. 1514 and part 174, unless CBP determines that there is a pattern of conduct of false or unsupported representations pursuant to 19 U.S.C. 1514(f). CBP will be amending part 174 to allow exporters and producers to exercise their protest rights in a subsequent rulemaking to be published in the **Federal Register** at a later date.

Section 182.76, *Repeated false or unsupported preference claims,* states that, in accordance with USMCA Article 5.9.17, if a verification reveals a pattern of conduct by the importer, exporter, or producer of false or unsupported representations that a good imported into the United States qualifies for USMCA preferential tariff treatment, CBP may withhold preferential tariff treatment for entries of identical goods until CBP determines that representations of that person are in conformity with part 182 and with General Note 11, HTSUS.

As explained in more detail above in Section III.F., *Subpart A—General Provisions,* CBP has a duty to ensure the protection of con-

fidential business information. In order to ensure compliance with the applicable U.S. statutory and regulatory provisions, CBP has decided to apply the confidentiality regulations in § 182.2 to any of the notifications made during a verification that potentially involve information disclosures to third parties. These include CBP's notification of the initiation of a verification to the importer (§ 182.73(c)), sending a request for information to the exporter or producer prior to issuing a negative determination (§ 182.75(c)(1)), the issuance of a positive or negative determination of origin (§ 182.75), and the issuance of the intent to deny (§ 182.75(c)(3)). The provision that allows the importer, exporter, or producer to send information directly to CBP to protect its proprietary information is set forth in § 182.72(c).

Subpart I—Automotive Goods

Subpart I of part 182 pertains to automotive goods. The regulations in subpart I, which are currently reserved as §§ 182.91–182.93, may be more expansive than previously anticipated. To allow for this possibility, the numbering structure of the regulations in subpart J has been modified, as explained below. The actual text of the subpart I regulations will be included in a subsequent rulemaking to be published in the **Federal Register** at a later date.

Subpart J—Commercial Samples and Goods Returned After Repair or Alteration

Subpart J (19 CFR 182.111–182.112) provides for the duty-free treatment of commercial samples of negligible value and goods reentered after repair or alteration in Canada or Mexico. The regulations in subpart J, which were previously reserved as § 182.101 and § 182.102, are redesignated as § 182.111 and § 182.112 due to changes in the numbering structure of subpart I of part 182, discussed above.

Commercial Samples

Section 182.111 defines *commercial samples of negligible value,* based on Article 2.1 of the USMCA, as commercial samples which have a value, individually or in the aggregate as shipped, of not more than one U.S. dollar, or the equivalent amount in the currency of Canada or Mexico; or which are so marked, torn, perforated, or otherwise treated that they are unsuitable for sale or for use except as commercial samples. These commercial samples of negligible value qualify for duty-free entry from Canada or Mexico, in accordance with Article 2.9 of the USMCA, only if the samples are imported solely for the purpose of soliciting orders for foreign goods or services.

Goods Re-Entered After Repair or Alteration in Canada or Mexico

Section 182.112 sets forth the rules that apply for purposes of obtaining duty-free treatment on goods returned after repair or alteration in Canada or Mexico. This section also contains the conditions under which these goods are not eligible for duty-free treatment and provides the documentation requirements. The documentary requirements set forth in § 10.8(a), (b), and (c) apply to goods claiming duty-free treatment under § 182.112. While CBP is aware that under ordinary circumstances § 10.8 applies to articles claimed to be subject to duty on the value of the repairs or alterations performed abroad, for purposes of the USMCA, the same documentation requirements in § 10.8(a), (b), and (c) apply in connection with the entry of goods returned after repairs or alterations from Canada or Mexico which are claimed to be duty-free under the USMCA.

Subpart K—Penalties

Subpart K of part 182 (19 CFR 182.121–182.124) sets forth penalties provisions, including those related to general penalties under the USMCA (§ 182.121), corrected claim or certification of origin by importers (§ 182.122), corrected certification of origin by U.S. exporters or producers (§ 182.123), and the framework for correcting claims or certifications of origin (§ 182.124). The regulations in subpart K, which were previously reserved as §§ 182.111–182.114, are redesignated as §§ 182.121–182.124 due to changes in the numbering structure of subparts I and J of part 182, as discussed above. These provisions are in accordance with Articles 5.13, 5.4.2, 5.6.3, and 7.18 of the USMCA.

As stated in § 182.121, except as otherwise provided in subpart K, all criminal, civil, or administrative penalties which may be imposed on U.S. importers, exporters, and producers for violations of the customs and related U.S. laws and regulations will also apply to U.S. importers, exporters, and producers for violations of the U.S. laws and regulations relating to the USMCA. An importer who makes a corrected claim or certification of origin, and an exporter or producer who provides written notification of an incorrect certification of origin will not be subject to civil or administrative penalties under 19 U.S.C. 1592 if the corrected claim, certification of origin, or written notification is made promptly and voluntarily. Section 182.124, *Framework for correcting claims or certifications of origin,* defines "promptly and voluntarily" for these purposes, provides that in cases involving fraud or subsequent incorrect claims a person may not voluntarily correct a claim or certification of origin, sets forth the requirements for the statement that must accompany each corrected claim or certification

of origin, and requires that a U.S. importer who makes a corrected claim must tender any actual loss of duties and merchandise processing fees, if applicable.

G. Part 190

Part 190, *Modernized Drawback,* sets forth the general provisions applicable to all drawback claims and specialized provisions applicable to specific types of drawback claims filed under 19 U.S.C. 1313, as amended. CBP is amending part 190 to make conforming edits to include USMCA drawback claims. The scope provision in § 190.0 is amended to clarify that additional drawback provisions relating to the USMCA are contained in subpart E of part 182. Section 190.0a addresses claims filed under NAFTA and CBP is amending the paragraph heading of § 190.0a to reflect that this section is applicable to claims filed under both NAFTA and the USMCA. Section 190.0a is also amended to clarify that USMCA drawback claims filed under the provisions of part 182 must be filed separately from claims filed under the provisions of part 190 (currently it only lists NAFTA drawback claims filed under part 181). And lastly, § 190.51 provides the process for completion of drawback claims and CBP is making conforming changes such as referencing the USMCA and part 182 to indicate that the same process is used for both NAFTA drawback and USMCA drawback claims.

IV. Statutory and Regulatory Requirements

A. Administrative Procedure Act

Under section 553 of the Administrative Procedure Act (APA) (5 U.S.C. 553), agencies generally are required to publish a notice of proposed rulemaking in the **Federal Register** that solicits public comment on the proposed regulatory amendments, consider public comments in deciding on the content of the final amendments, and publish the final amendments at least 30 days prior to their effective date. This rule is exempt from APA rulemaking requirements pursuant to 5 U.S.C. 553(a)(1) as a foreign affairs function of the United States because it is promulgating several of the U.S. domestic regulations necessary to implement the preferential tariff treatment and customs related provisions of the USMCA, which is a trilateral agreement negotiated between the United States, Mexico, and Canada. However, CBP is soliciting comments on this IFR and will consider all comments received before issuing a final rule.

For the same reasons, a delayed effective date is not required under 5 U.S.C. 553(d)(3). The USMCA entered into force on July 1, 2020. CBP provided guidance to the public on how to comply with the requirements of the USMCA by posting on the CBP website, available

at *https://www.cbp.gov/trade/priority-issues/trade-agreements/free-trade-agreements/USMCA,* the U.S. USMCA Implementing Instructions, which were issued on March 25, 2020 and updated on June 30, 2020. The provisions of this IFR codify several of these Implementing Instructions. A delayed effective date would cause additional confusion and would be impractical, unnecessary, and contrary to public interest.

B. Executive Orders 13563 and 12866

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

Rules involving the foreign affairs function of the United States are exempt from the requirements of Executive Orders 13563 and 12866. Because this rule involves a foreign affairs function of the United States by implementing a trilaterally negotiated agreement between the United States, Mexico, and Canada, this rule is not subject to the provisions of Executive Orders 13563 and 12866.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement and Fairness Act of 1996, requires an agency to prepare and make available to the public a regulatory flexibility analysis that describes the effect of a proposed rule on small entities (*i.e.,* small businesses, small organizations, and small governmental jurisdictions) when the agency is required to publish a general notice of proposed rulemaking for a rule. Since a notice of proposed rulemaking is not necessary for this rule, CBP is not required to prepare a regulatory flexibility analysis for this rule.

D. Paperwork Reduction Act

The collection of information in this document has been approved by OMB in accordance with the Paperwork Reduction Act (44 U.S.C. 3507) under OMB control numbers 1651–0117, 1651–0098, and 1651–0023. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by OMB. The collections of information and recordkeeping requirements related to this rule have been ap-

proved by OMB under an emergency revision and extension of collection number 1651–0117 (Free Trade Agreements), an emergency revision of collection number 1651–0098 (NAFTA Regulations and Certificate of Origin), and an emergency revision and extension of collection number 1651–0023 (CBP Form 28 Request For Information). The revision of collection number 1651–0117 is necessary for CBP to collect the information needed to implement the USMCA. The revision of collection number 1651–0023 is necessary to reflect an increase in burden hours due to the use of CBP Form 28 for an additional purpose: Requesting additional information needed for enforcing the USMCA. The revision of collection number 1651–0098 is necessary to reflect the reduction in burden hours that results from the USMCA superseding NAFTA and the repeal of the NAFTA Implementation Act, as of the USMCA's entry into force date of July 1, 2020. Importers, who did not claim preferential tariff treatment at the time of importation, have one year from the date of importation of the originating goods to file post-importation claims. These importers may need to use the NAFTA Certificate of Origin to file a post-importation claim for goods from Canada and Mexico entered for consumption, or withdrawn from warehouse for consumption, prior to July 1, 2020 during that one-year time period. Once one year has elapsed, CBP will discontinue this information collection. The likely respondents for these information collections are importers, exporters, producers, and customs brokers.

The information collection requirements will result in the following estimated burden hours:

Free Trade Agreements

Estimated Number of Annual Respondents: 4,699,460.

Estimated Number of Annual Responses per Respondent: 1.00034.

Estimated Total Annual Responses: 4,701,060.

Estimated Time per Response: 2 hours.

Estimated Total Annual Burden Hours: 9,402,120.

NAFTA Certificate of Origin

Estimated Number of Annual Respondents: 13,000.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Total Annual Responses: 13,000.

Estimated Time per Response: 2 hours.

Estimated Total Annual Burden Hours: 26,000.

NAFTA Questionnaire

Estimated Number of Annual Respondents: 400.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Total Annual Responses: 400.

Estimated Time per Response: 2 hours.

Estimated Total Annual Burden Hours: 800.

NAFTA Motor Vehicle Averaging Election

Estimated Number of Annual Respondents: 11.

Estimated Number of Annual Responses per Respondent: 1.28.

Estimated Total Annual Responses: 14.

Estimated Time per Response: 1 hour.

Estimated Total Annual Burden Hours: 14.

CBP Form 28 Request for Information

Estimated Number of Annual Respondents: 62,000.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Total Annual Responses: 62,000.

Estimated Time per Response: 2 hours.

Estimated Total Annual Burden Hours: 124,000.

Comments concerning the collection of information and the accuracy of the estimated annual burden, and suggestions for reducing that burden, should be directed to the Office of Management and Budget, Attention: Desk Officer for Customs and Border Protection, Department of Homeland Security, Office of Information and Regulatory Affairs, Washington, DC 20503. A copy should also be sent to the Trade and Commercial Regulations Branch, Regulations and Rulings, U.S. Customs and Border Protection, 90 K Street NE, 10th Floor, Washington, DC 20229–1177. Comments are specifically welcome on (a) whether the proposed collection of information is necessary for the proper performance of the mission of the agencies, and whether the information will have practical utility; (b) the accuracy of the estimate of the burden of the collections of information; (c) ways to enhance the quality, utility, and clarity of the information collection; (d) ways to minimize the burden of the information collection, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to maintain the information. Comments should be received on or before September 7, 2021.

V. 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 related to certain customs revenue functions.

List of Subjects

19 CFR Part 10

Bonds, Exports, Imports, Reporting and recordkeeping requirements, Trade agreements.

19 CFR Part 102

Canada, Mexico, Reporting and recordkeeping requirements, Trade agreements.

19 CFR Part 132

Imports.

19 CFR Part 134

Labeling, Packaging and containers.

19 CFR Part 163

Administrative practice and procedure, Exports, Imports, Penalties, Reporting and recordkeeping requirements.

19 CFR Part 182

Administrative practice and procedure, Canada, Exports, Mexico, Reporting and recordkeeping requirements, Trade agreements.

19 CFR Part 190

Alcohol and alcoholic beverages, Claims, Exports, Foreign trade zones, Guantanamo Bay Naval Station, Cuba, Packaging and containers, Reporting and recordkeeping requirements, Trade agreements.

For the reasons stated above, amend parts 10, 102, 132, 134, 163, 182, and 190 of title 19 of the Code of Federal Regulations as set forth below.

PART 10—ARTICLES CONDITIONALLY FREE, SUBJECT TO A REDUCED RATE, ETC.

■ 1. The general authority citation for part 10 is revised to read as follows:

Authority: 19 U.S.C. 66, 1202 (General Note 3(i), Harmonized Tariff Schedule of the United States (HTSUS)), 1321, 1481, 1484, 1498, 1508, 1623, 1624, 4513.

§ 10.8 [Amended]

■ 2. In § 10.8(a)(2) amend the declaration by adding the words "(unless subject to USMCA drawback)" after the words "without the benefit of drawback."

PART 102—RULES OF ORIGIN

■ 3. The general authority citation for part 102 is revised to read as follows:

Authority: 19 U.S.C. 66, 1202 (General Note 3(i), Harmonized Tariff Schedule of the United States), 1624, 3592, 4513.

§ 102.0 [Amended]

■ 4. Amend § 102.0 as follows:

■ a. In the beginning of the second sentence, remove the word "These" and add in its place the words "Under NAFTA, these"; and

■ b. Add a new third sentence.

The addition reads as follows:

§ 102.0 Scope. * * * The rules set forth in §§ 102.1 through 102.18 and 102.20 also determine the country of origin for marking purposes of imported goods under the Agreement Between the United States of America, the United Mexican States, and Canada (USMCA). * * *

* * * * *

■ 5. In § 102.1:

■ a. Paragraph (a) is amended by removing the reference to "(m)(5), (m)(6), and (m)(7)" and adding in its place the reference to "(n)(5), (n)(6), and (n)(7)";

■ b. Paragraph (i) is amended by removing the reference to "(m)(5), (m)(6), and (m)(7)" and adding in its place the reference to "(n)(5), (n)(6), and (n)(7)";

■ c. Paragraphs (l) through (p) are redesignated as paragraphs (m) through (q);

■ d. A new paragraph (l) is added;

■ e. In redesignated paragraph (q)(1), add the words "under NAFTA" after the word "good";

■ f. In redesignated paragraph (q)(2), add the words "under NAFTA" after the word "material"; and

■ g. Add paragraph (q)(3).

The additions read as follows:

§ 102.1 Definitions.

* * * * *

(l) *Inventory management method.* "Inventory management method" means:

(1) Averaging;

(2) "Last-in, first-out;"

(3) "First-in, first-out;" or

(4) Any other method that is recognized in the Generally Accepted Accounting Principles (GAAP) of the country in which the production is performed or is otherwise accepted by that country.

* * * * *

(q) * * *

(3) In the case of a good or material under the USMCA, its customs value or transaction value within the meaning of Appendix A to part 182 of this chapter.

§ 102.11 [Amended]

■ 6. Amend § 102.11(b)(2) by removing the phrase "provided under the appendix to part 181 of this chapter".

§ 102.12 [Amended]

■ 7. Amend § 102.12(b) by removing the phrase "provided under the appendix to part 181 of the Customs Regulations".

§ 102.19 [Amended]

■ 8. In § 102.19, add paragraph (c) to read as follows:

§ 102.19 NAFTA preference override.

* * * * *

(c) Paragraphs (a) and (b) of this section apply only to goods entered for consumption, or withdrawn from warehouse for consumption, prior to July 1, 2020.

PART 132—QUOTAS

■ 9. The general and specific authority citations for part 132 continue to read as follows:

Authority: 19 U.S.C. 66, 1202 (General Note 3(i), Harmonized Tariff Schedule of the United States (HTSUS)), 1623, 1624.

Sections 132.15, 132.17, and 132.18 also issued under 19 U.S.C. 1202 (additional U.S. Note 3 to Chapter 2, HTSUS; additional U.S. Note 8 to Chapter 17, HTSUS; and subchapter II of Chapter 99, HTSUS, respectively), 1484, 1508.

§ 132.17 [Amended]

■ 10. Amend § 132.17 by revising the first sentence of paragraph (a) to read as follows:

(a) * * * For sugar-containing products defined in 15 CFR 2015.2(a), and as described in paragraph 15 of Appendix 2, Tariff Schedule of the United States—(Tariff Rate Quotas), to Annex 2–B of Chapter 2 of the Agreement Between the United States of America, the United Mexican States, and Canada (USMCA), for which preferential tariff treatment is claimed under the USMCA, and that are products of a participating country, as defined in 15 CFR 2015.2(e), the importer must possess a valid export certificate in order to claim the in-quota tariff rate of duty on the products at the time they are entered or withdrawn from warehouse for consumption. * * *

* * * * *

PART 134—COUNTRY OF ORIGIN MARKING

■ 11. The general authority citation for part 134 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), 1304, 1624.

■ 12. Amend § 134.1 as follows:

■ a. Revise the second sentence of paragraph (b);

■ b. In paragraph (d), add the words "or USMCA" after the words "good of a NAFTA" each place it appears and remove the words "NAFTA Marking Rules" each place they appear and add in their place the words "part 102 Rules";

■ c. In paragraph (g):

■ i. Add the words "*or USMCA*" after the term "*NAFTA*" in the paragraph heading;

■ ii. Add the words "or USMCA" after the words "good of a NAFTA"; and

■ iii. Remove the words "NAFTA Marking Rules" and add in their place the words "part 102 Rules";

■ e. Add a second sentence to paragraph (h);

■ f. Revise paragraph (i);

■ g. Revise paragraph (j); and

■ h. Add paragraph (l).

The revisions and additions read as follows:

§ 134.1 Definitions.

* * * * *

(b) * * * Further work or material added to an article in another country must effect a substantial transformation in order to render such other country the "country of origin" within the meaning of this part; however, for a good of a NAFTA or USMCA country, the marking rules set forth in part 102 of this chapter (hereinafter referred to as the part 102 Rules) will determine the country of origin.

* * * * *

(h) * * * NAFTA is not applicable to goods entered for consumption, or withdrawn from warehouse for consumption, on or after July 1, 2020.

(i) *NAFTA or USMCA country.* "NAFTA or USMCA country" means the territory of the United States, Canada or Mexico, as defined in Annex 201.1 of NAFTA and Chapter 1, Section C of the USMCA.

(j) *Part 102 Rules.*"Part 102 Rules" are the rules promulgated for purposes of determining whether a good is a good of a NAFTA country, as set forth in part 102 of this chapter. The rules also apply to determine the country of origin for marking purposes for goods imported under the USMCA.

* * * * *

(l) *USMCA.* "USMCA" means the Agreement Between the United States of America, the United Mexican States, and Canada (USMCA), entered into force by the United States, Canada and Mexico on July 1, 2020.

§ 134.22 [Amended]

■ 13. Amend § 134.22 as follows:

■ a. In paragraph (b), add the words "or USMCA" after the term "NAFTA";

■ b. In paragraph (d)(2):

■ i. Add the words "*or USMCA*" after the term "*NAFTA*" in the paragraph heading; and

■ ii. Add the words "or USMCA" after the term "NAFTA" in the first sentence; and

■ c. In paragraph (e)(1), add the words "or USMCA" after the term "NAFTA".

§ 134.23 [Amended]

■ 14. Amend § 134.23(a) by adding the words "or USMCA" after the term "NAFTA" in the first sentence.

§ 134.24 [Amended]

■ 15. Amend § 134.24 by adding the words "or USMCA" after the term "NAFTA" each place it appears.

§ 134.32 [Amended]

■ 16. Amend § 134.32 as follows:

■ a. In paragraph (h), add the words "or USMCA" after the term "NAFTA";

■ b. In paragraph (p), add the words "or USMCA" after the term "NAFTA"; and

■ c. In paragraph (q), add the words "or USMCA" after the term "NAFTA".

§ 134.35 [Amended]

■ 17. Amend § 134.35 as follows:

■ a. In paragraph (a), add the words "*or USMCA*" after the term "*NAFTA*" in the paragraph heading;

■ b. In paragraph (b):

■ i. Add the words "*or USMCA*" after the term "*NAFTA*" in the paragraph heading;

■ ii. Add the words "or USMCA" after the words "goods of a NAFTA" in the first sentence; and

■ iii. Remove the words "NAFTA Marking Rules" and add in their place the words "part 102 Rules".

§ 134.43 [Amended]

■ 18. Amend § 134.43 by adding the words "or USMCA" after the term "NAFTA" in each place it appears.

§ 134.45 [Amended]

■ 19. Amend § 134.45(a)(2) by adding the words "or USMCA" after the term "NAFTA".

PART 163—RECORDKEEPING

■ 20. The general and specific authority citations for part 163 continue to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1484, 1508, 1509, 1510, 1624.

Section 163.2 also issued under 19 U.S.C. 3904, 3907.

§ 163.0 [Amended]

■ 21. Amend § 163.0 as follows:

■ a. Add the words "and the Agreement Between the United States of America, the United Mexican States, and Canada (USMCA)" after the words "North American Free Trade Agreement";

■ b. Add the words "and 182" after the number "181".

■ 22. Amend § 163.2(c) by:

■ a. Adding the words "*and producers*" after the word "*exporters*" in the paragraph heading;

■ b. Redesignating paragraph (c)(2) as paragraph (c)(3);

■ c. Adding a new paragraph (c)(2).

The addition reads as follows:

§ 163.2 Persons required to maintain records.

* * * * *

(c) * * *

(2) *USMCA.* Any exporter or producer who completes a certification of origin or a producer who provides a written representation for a good exported from the United States to Canada or Mexico pursuant to the Agreement Between the United States of America, the United Mexican States, and Canada (USMCA) must maintain records in accordance with part 182 of this chapter.

* * * * *

PART 182—UNITED STATES-MEXICO-CANADA AGREEMENT

■ 23. The general and specific authority citations for part 182 are revised to read as follows:

Authority: 19 U.S.C. 66, 1202 (General Note 3(i) and General Note 11, Harmonized Tariff Schedule of the United States (HTSUS)), 1624, 4513, 4535;

Section 182.1 also issued under 19 U.S.C. 4502;

Subpart D also issued under 19 U.S.C. 1520(d);

Subpart E also issued under 19 U.S.C. 4534;

Subpart 182.61 also issued under 19 U.S.C. 4531, 4532;

Subpart G also issued under 19 U.S.C. 4533.

Subpart A—General Provisions

■ 24. Add § 182.1 to read as follows:

§ 182.1 General definitions.

The definitions applicable to rules of origin are contained in Appendix A. This section sets forth the general definitions used throughout this part. As used in this part, the following terms will have the meanings indicated unless either the context in which they are used requires a different meaning or a different definition is prescribed for a particular section of this part:

Canada, when used in a geographical rather than governmental context, means the "Territory" of Canada as defined in Appendix A to this part;

Claim for preferential tariff treatment means a claim that a good is entitled to the customs duty rate applicable under the USMCA to an originating good and to an exemption from the merchandise processing fee;

Commercial importation means the importation of a good into the United States, Canada, or Mexico for the purpose of sale, or any commercial, industrial, or other like use.

Customs duty includes a duty or charge of any kind imposed on or in connection with the importation of a good, and any surtax or surcharge imposed in connection with such importation, but does not include any:

(1) Charge equivalent to an internal tax imposed consistently with Article III:2 of the GATT 1994;

(2) Fee or other charge in connection with the importation commensurate with the cost of services rendered;

(3) Antidumping or countervailing duty; and

(4) Premium offered or collected on an imported good arising out of any tendering system in respect of the administration of quantitative import restrictions, tariff-rate quotas, or tariff preference levels;

Customs Valuation Agreement means the Agreement on Implementation of Article VII of the *General Agreement on Tariffs and Trade 1994,* set out in Annex 1A to the WTO Agreement;

Days means calendar days, and includes Saturdays, Sundays and holidays;

Enterprise means an entity constituted or organized under applicable law, whether or not for profit, and whether privately-owned or governmentally-owned or controlled, including a corporation, trust, partnership, sole proprietorship, joint venture, association or similar organization;

Exporter means an exporter located in the territory of a USMCA country and an exporter required under this part to maintain records regarding exportations of a good;

GATT 1994 means the *General Agreement on Tariffs and Trade 1994,* set out in Annex 1A to the WTO Agreement;

Goods means merchandise, product, article, or material;

Goods of a USMCA country means domestic products as these are understood in the GATT 1994 or such goods as the USMCA country may agree, and includes originating goods of a USMCA country;

HTSUS means the Harmonized Tariff Schedule of the United States as promulgated by the U.S. International Trade Commission;

Identical goods means goods that are the same in all respects, including physical characteristics, quality, and reputation, irrespective of minor differences in appearance that are not relevant to a determination of origin of those goods;

Importer means an importer located in the territory of a USMCA country and an importer required under this part to maintain records regarding importations of a good;

Indirect material means a material used or consumed in the production, testing, or inspection of a good but not physically incorporated into the good, or a material used or consumed in the maintenance of buildings or the operation of equipment associated with the production of a good, including:

(1) Fuel and energy,

(2) Tools, dies, and molds,

(3) Spare parts and materials used or consumed in the maintenance of equipment or buildings,

(4) Lubricants, greases, compounding materials and other materials used or consumed in production or used to operate equipment or buildings,

(5) Gloves, glasses, footwear, clothing, safety equipment, and supplies,

(6) Equipment, devices and supplies used or consumed for testing or inspecting the goods,

(7) Catalysts and solvents, and

(8) Any other material that is not incorporated into the good but if the use in the production of the good can reasonably be demonstrated to be a part of that production;

Material means a good that is used in the production of another good, and includes a part or ingredient;

Mexico, when used in a geographical rather than governmental context, means the "Territory" of Mexico as defined in Appendix A to this part;

Originating, when used with regard to a good or material, means a good or material qualifying as originating under the rules of origin set forth in General Note 11, HTSUS, and in Appendix A to this part;

Person means a natural person or an enterprise;

Post-importation duty refund claim means a claim filed by the importer of a good for a refund of any excess customs duties at any time within one year after the date of importation of the good where the good would have qualified as an originating good when it was imported into the United States but no claim for preferential tariff treatment was made.

Preferential tariff treatment means the customs duty rate applicable under the USMCA to an originating good;

Producer means a person who engages in the production of a good;

Series of importations means two or more customs entries covering a good arriving the same day from the same exporter and consigned to the same person;

United States, when used in a geographical rather than governmental context, means the territory of the United States as defined in Appendix A to this part;

Used means used or consumed in the production of a good;

USMCA means the Agreement between the United States of America, the United Mexican States, and Canada, entered into force by the United States, Canada and Mexico on July 1, 2020.

USMCA country means a Party to the USMCA;

Value means the value of a good or material for the purpose of calculating customs duties or for the purpose of applying this part;

WTO means the World Trade Organization; and

WTO Agreement means the *Marrakesh Agreement Establishing the World Trade Organization* done at Marrakesh on April 15, 1994.

■ 25. Add § 182.2 to subpart A to read as follows:

§ 182.2 Confidentiality.

(a) *Maintaining confidentiality.* Subject to paragraph (b) of this section, CBP must maintain the confidentiality of the information that it receives from the public when the information is considered trade secrets under the Trade Secrets Act (18 U.S.C. 1905), personally identifiable information under the Privacy Act (5 U.S.C. 552a), or privileged or confidential commercial or financial information. This information must be maintained as confidential in accordance with part 103 of this chapter, 6 CFR part 5, and all other applicable statutes and regulations.

(b) *Authorized disclosures.* CBP may only disclose the confidential information in paragraph (a) of this section to third parties and to other USMCA countries for purposes of administration or enforcement of the customs laws or if otherwise authorized by law, and pursuant to the routine uses of the systems of record notices (SORNs) for the trade systems maintained by CBP. This does not preclude the disclosure of confidential information to U.S. government authorities responsible for the administration and enforcement of USMCA requirements, such as the Department of Labor, and of customs and revenue matters.

Subpart B—Import Requirements

■ 26. Add § 182.11 to read as follows:

§ 182.11 Filing of claim for preferential tariff treatment upon importation.

(a) *Basis of claim.* An importer may make a claim for USMCA preferential tariff treatment, including an exemption from the mer-

chandise processing fee, based on a written or electronic certification of origin, as specified in § 182.12, completed by the importer, exporter, or producer for the purpose of certifying that a good qualifies as an originating good.

(b) *Making a claim.* The claim is made by including on the entry summary, or equivalent documentation, or by the method specified for equivalent reporting via a CBP-authorized electronic data interchange system, the letters "S" or "S+" as a prefix to the subheading of the HTSUS under which each originating good is classified.

(c) *Corrected claim.* If, after making the claim specified in paragraph (b) of this section, the importer has reason to believe that the certification of origin is based on inaccurate information or is otherwise invalid, the importer must promptly and voluntarily correct the claim or certification of origin, pay any duties that may be due, and submit a statement either in writing to the CBP office where the original claim was filed or via a CBP-authorized electronic data interchange system in accordance with § 182.124 of this part (*see* §§ 182.122 and 182.124 of this part).

■ 27. Add § 182.12 to read as follows:

§ 182.12 Certification of origin.

(a) *General.* An importer who makes a claim, pursuant to § 182.11(b), based on a certification of origin completed by the importer, exporter, or producer that the good is originating must submit, at the request of CBP, a copy of the certification of origin. The certification of origin:

(1) Need not be in a prescribed format but must be in writing or must be transmitted electronically pursuant to any electronic means authorized by CBP for that purpose;

(2) May be provided on an invoice or any other document, except an invoice or commercial document issued in the territory of a non-USMCA country;

(3) Must be in the possession of the importer at the time the claim for preferential tariff treatment is made;

(4) Must include the following information to be valid:

(i) Whether the certifier is the importer, exporter, or producer in accordance with this subpart;

(ii) The certifier's name, title, address (including country), telephone number, and email address;

(iii) The exporter's name, address (including country), email address, and telephone number if different from the certifier, unless the producer is completing the certification of origin and does not know the identity of the exporter;

(iv) The producer's name, address (including country), email address, and telephone number, if different from the certifier or exporter; or if there are multiple producers, "Various" or a list of producers (*see also* paragraph (c) of this section);

(v) If known, the importer's name, address, email address, and telephone number; or if there are multiple importers, "Various" or a list of importers;

(vi) The legal name, address (including country), telephone number, and email address (if any) of the responsible official or authorized agent of the importer, exporter, or producer signing the certification;

(vii) A description of the good for which preferential tariff treatment is claimed, which must be sufficiently detailed to relate it to the invoice and the Harmonized System (HS) nomenclature;

(viii) The HTSUS tariff classification, to six or more digits, as necessary for the specific change in tariff classification rule for the good set forth in General Note 11, HTSUS;

(ix) The applicable rule of origin set forth in General Note 11, HTSUS, under which the good qualifies as an originating good;

(x) In the case of a good listed in Schedule II of Appendix A of this part, the following statement must be included: "Schedule II of the USMCA Rules of Origin Uniform Regulations";

(xi) If the certification of origin covers a single shipment of a good, the invoice number related to the exportation, if known;

(xii) In case of a blanket certification issued with respect to multiple shipments of identical goods within any period specified in the certification of origin, not exceeding 12 months from the date of certification, the period that the certification covers; and

(5) Must include the following statement: "I certify that the goods described in this document qualify as originating and the information contained in this document is true and accurate. I assume responsibility for proving such representations and agree to maintain and present upon request or to make available during a verification visit, documentation necessary to support this certification."

(b) *Address.* For the purposes of the certification of origin provided for in paragraph (a) of this section:

(1) The address of the exporter provided under paragraph (a)(4)(iii) is the place of export of the good in a USMCA country's territory;

(2) The address of a producer provided under paragraph (a)(4)(iv) is the place of production of the good in a USMCA country's territory; and

(3) The address of the importer provided under paragraph (a)(4)(v) must be in a USMCA country's territory.

(c) *Confidentiality of producer information.* For the purposes of the information provided under paragraph (a)(4)(iv) of this section, a person that wishes for this information to remain confidential may state "Available upon request by the importing authorities."

(d) *Responsible official or agent.* The certification of origin provided for in paragraph (a) of this section must be signed and dated by a responsible official of the importer, exporter, or producer, or by the importer's, exporter's, or producer's authorized agent having knowledge of the relevant facts.

(e) *Language.* The certification provided for in paragraph (a) of this section must be completed in English, French, or Spanish. If the certification of origin is not in English, CBP may require the importer to submit an English translation of the certification.

(f) *Basis of a certification of origin.* (1) A certification of origin may be completed by the importer, exporter, or producer of the good on the basis of:

(i) The certifier of the certification of origin of the good having information, including documents, that demonstrate that the good is originating; or

(ii) In the case of an exporter who is not the producer of the good, reasonable reliance on the producer's written representation, such as in a certification of origin, that the good is originating.

(2) CBP may not require that an exporter or producer complete a certification of origin, or provide a certification of origin or written representation to another person.

(g) *Applicability of certification of origin.* The certification of origin provided for in paragraph (a) of this section may be applicable to:

(1) A shipment of goods into the United States, which may consist of:

(i) A single shipment of goods that results in the filing of one or more entries; or

(ii) More than one shipment of goods that results in the filing of one entry.

(2) Multiple shipments of identical goods into the United States that occur within a specified blanket period, not exceeding 12 months, set out in the certification.

(h) *Validity of certification of origin.* A certification of origin that is properly completed, signed, and dated in accordance with the requirements of this section will be accepted as valid for four years following the date on which it was completed.

■ 28. Add § 182.13 to read as follows:

§ 182.13 Importer obligations.

(a) *General.* An importer who makes a claim for USMCA preferential tariff treatment:

(1) Will be deemed to have made a statement based on a valid certification of origin that the good qualifies as an originating good;

(2) Is responsible for the truthfulness of the claim and of all the information and data contained in the certification of origin provided for in § 182.12; and

(3) Is responsible for submitting supporting documents requested by CBP, and for the truthfulness of the information contained in those documents. When a certification of origin prepared by an exporter or producer forms the basis of a claim for preferential tariff treatment and CBP requests the submission of supporting documents, the importer will provide to CBP, or arrange for the direct submission by the exporter or producer of, information relied on by the exporter or producer in preparing the certification.

(b) *Exemption from penalties.* An importer will not be subject to civil or administrative penalties under 19 U.S.C. 1592 for making an incorrect claim for preferential tariff treatment or submitting an incorrect certification of origin, provided that the importer promptly and voluntarily corrects the claim or certification of origin, pays any duties and merchandise processing fees, if applicable, that may be due, and submits a statement either in writing or via a CBP-authorized electronic data interchange system to the CBP office where the original claim was filed in accordance with § 182.124 (*see* §§ 182.122 and 182.124).

■ 29. Add § 182.14 to read as follows:

§ 182.14 Certification of origin not required.

(a) *General.* Except as otherwise provided in paragraph (b) of this section, an importer will not be required to submit a copy of a certification of origin under § 182.12 for:

(1) A non-commercial importation of a good; or

(2) A commercial importation for which the value of the originating goods does not exceed $2,500 in U.S. dollars.

(b) *Exception.* If CBP determines that an importation described in paragraph (a) of this section is part of a series of importations carried out or planned for the purpose of evading compliance with the certification requirements of § 182.12, CBP will notify the importer that for that importation the importer must submit to CBP a copy of the certification of origin. The importer must submit such a copy within

30 days from the date of the notice. Failure to timely submit a copy of the certification of origin will result in denial of the claim for preferential tariff treatment.

■ 30. Add § 182.15 to read as follows:

§ 182.15 Maintenance of records.

(a) *General.* An importer claiming USMCA preferential tariff treatment for a good must maintain for a minimum of five years from the date of importation of the good, all records and documents that the importer has demonstrating that the good qualifies for preferential tariff treatment under the USMCA, including the certification of origin and records related to transit and transshipment. These records are in addition to any other records that the importer is required to prepare, maintain, or make available to CBP under part 163 of this chapter.

(b) *Method of maintenance.* The records and documents referred to in paragraph (a) of this section must be maintained by importers as provided in § 163.5 of this chapter.

■ 31. Add § 182.16 to read as follows:

§ 182.16 Effect of noncompliance; failure to provide documentation regarding transshipment.

(a) *General.* If the importer fails to comply with applicable requirements under this subpart, including submission of a complete certification of origin prepared in accordance with §§ 182.12 and 182.14, when requested, CBP may deny preferential tariff treatment to the imported good.

(b) *Failure to provide documentation regarding transshipment.* Where the requirements for preferential tariff treatment set forth elsewhere in this subpart are met, CBP nevertheless may deny preferential tariff treatment to an originating good if the good is transported outside the territories of the USMCA countries, and at the request of CBP, the importer of the good does not provide evidence demonstrating to the satisfaction of CBP that the transit and transshipment conditions set forth in Appendix A of this part were met.

Subpart C—Export Requirements

■ 32. Add § 182.21 to read as follows:

§ 182.21 Certification of origin for goods exported to Canada or Mexico.

(a) *Submission of certification of origin to CBP.* An exporter or producer who completes a certification of origin for a good exported

from the United States to Canada or Mexico must provide a copy of the certification of origin (written or electronic) to CBP upon request.

(b) *Notification of errors in certification of origin.* An exporter or producer who completes a certification of origin for a good exported from the United States to Canada or Mexico and who has reason to believe that the certification contains or is based on incorrect information must promptly and voluntarily notify every person, in writing, to whom the certification was provided of any change that could affect the accuracy or validity of the certification. Notification of an incorrect certification must also be given either in writing or via a CBP-authorized electronic data interchange system to CBP specifying the correction in accordance with § 182.124 (*see* §§ 182.123 and 182.124).

(c) *Maintenance of records*—(1) *General.* An exporter or producer who completes a certification of origin or a producer who provides a written representation for a good exported from the United States to Canada or Mexico must maintain, for a period of at least five years after the date the certification was completed, all records and supporting documents relating to the origin of a good for which the certification of origin was completed, including the certification or copies thereof and records and documents associated with:

(i) The purchase, cost, value, and shipping of, and payment for, the good or material;

(ii) The purchase, cost, value, and shipping of, and payment for, all materials, including indirect materials, used in the production of the good or material; and

(iii) The production of the good in the form in which the good is exported or the production of the material in the form in which it was sold.

(2) *Method of maintenance.* The records referred to in paragraph (c) of this section must be maintained as provided in § 163.5 of this chapter.

(3) *Availability of records.* For purposes of determining compliance with the provisions of this part, the records required to be maintained under this section must be stored and made available for examination and inspection by a CBP official in the same manner as provided in part 163 of this chapter.

Subpart D—Post-Importation Duty Refund Claims

■ 33. Add § 182.31 to read as follows:

§ 182.31 Right to make post-importation claim for preferential tariff treatment and refund duties.

Notwithstanding any other available remedy, where a good would have qualified as an originating good when it was imported into the United States but no claim for preferential tariff treatment was made, the importer of that good may file a claim for a refund of any excess customs duties at any time within one year after the date of importation of the good in accordance with 19 U.S.C. 1520(d) and the procedures set forth in § 182.32. Unless the importer fails to comply with the applicable requirements in this part, CBP may refund any excess customs duties by liquidation or reliquidation of the entry covering the good in accordance with § 182.33.

■ 34. Add § 182.32 to read as follows:

§ 182.32 Filing procedures.

(a) *Place of filing.* A post-importation claim for a refund must be filed with CBP, either at the port of entry or electronically.

(b) *Contents of claim.* A post-importation claim for a refund must be filed by presentation of the following:

(1) A written or electronic declaration or statement stating that the good was an originating good at the time of importation and setting forth the number and date of the entry or entries covering the good;

(2) A copy of a written or electronic certification of origin prepared in accordance with § 182.12 demonstrating that the good qualifies for preferential tariff treatment;

(3) A written statement indicating whether the importer of the good provided a copy of the entry summary or equivalent documentation to any other person. If such documentation was so provided, the statement must identify each recipient by name, CBP identification number, and address and must specify the date on which the documentation was provided; and

(4) A written statement indicating whether or not any person has filed a protest, petition, or request for reliquidation; and if any such protest, petition, or request for reliquidation has been filed, the statement must identify the filing by number and date.

■ 35. Add § 182.33 to read as follows:

§ 182.33 CBP processing procedures.

(a) *Status determination.* After receipt of a post-importation claim made pursuant to § 182.32, CBP will determine whether the entry covering the good has been liquidated and, if liquidation has taken place, whether the liquidation has become final.

(b) *Pending protest, petition, or request for reliquidation or judicial review.* If CBP determines that any protest, petition, or request for reliquidation relating to the good has not been finally decided, CBP will suspend action on the claim filed under § 182.32 until the decision on the protest, petition, or request for reliquidation becomes final. If a summons involving the tariff classification or dutiability of the good is filed in the Court of International Trade, CBP will suspend action on the claim filed under § 182.32 until judicial review has been completed.

(c) *Allowance of claim*—(1) *Unliquidated entry.* If CBP determines that a claim for a refund filed under § 182.32 should be allowed and the entry covering the good has not been liquidated, CBP will take into account the claim for refund in connection with the liquidation of the entry.

(2) *Liquidated entry.* If CBP determines that a claim for a refund filed under § 182.32 should be allowed and the entry covering the good has been liquidated, whether or not the liquidation has become final, the entry must be reliquidated in order to effect a refund of customs duties under this section. If the entry is otherwise to be reliquidated based on administrative review of a protest or as a result of judicial review, CBP will reliquidate the entry taking into account the claim for refund under § 182.32.

(d) *Denial of claim*—(1) *General.* CBP may deny a claim for a refund filed under § 182.32 if the claim was not filed timely, if the importer has not complied with the requirements of § 182.32 or the other applicable requirements in this part, or if, following an origin verification, CBP determines either that the imported good was not an originating good at the time of importation or that a basis exists upon which preferential tariff treatment may be denied.

(2) *Unliquidated entry.* If CBP determines that a claim for a refund filed under § 182.32 should be denied and the entry covering the good has not been liquidated, CBP will deny the claim in connection with the liquidation of the entry, and notice of the denial and the reason for the denial will be provided to the importer in writing or via a CBP-authorized electronic data interchange system.

(3) *Liquidated entry.* If CBP determines that a claim for a refund filed under § 182.32 should be denied and the entry covering the good has been liquidated, whether or not the liquidation has become final, the claim may be denied without reliquidation of the entry. If the entry is otherwise to be reliquidated based on administrative review of a protest, petition, or request for reliquidation or as a result of judicial review, such reliquidation may include denial of the claim filed under this subpart. In either case, CBP will provide notice of the

denial and the reason for the denial to the importer in writing or via a CBP-authorized electronic data interchange system.

Subpart E—Restrictions on Drawback and Duty-Deferral Programs

■ 36. Add § 182.41 to read as follows:

§ 182.41 Applicability.

This subpart sets forth the provisions regarding drawback claims and duty-deferral programs under Article 2.5 of the USMCA and applies to any good that is a "good subject to USMCA drawback" within the meaning of 19 U.S.C. 4534. The provisions of this subpart apply to goods which are entered for consumption, or withdrawn from warehouse for consumption, into the United States on or after July 1, 2020. The requirements and procedures set forth in this subpart for USMCA drawback are in addition to the general definitions, requirements, and procedures for all drawback claims set forth in part 190 of this chapter, unless otherwise specifically provided in this subpart. Also, the requirements and procedures set forth in this subpart for USMCA duty-deferral programs are in addition to the requirements and procedures for manipulation, manufacturing, and smelting and refining warehouses contained in part 19 and part 144 of this chapter, for foreign trade zones under part 146 of this chapter, and for temporary importations under bond contained in part 10 of this chapter.

■ 37. Add § 182.42 to read as follows:

§ 182.42 Duties and fees not subject to drawback.

The following duties or fees which may be applicable to a good entered for consumption or withdrawn from warehouse for consumption in the Customs territory of the United States are not subject to drawback under this subpart:

(a) Antidumping and countervailing duties;

(b) A premium offered or collected on a good with respect to quantitative import restrictions, tariff-rate quotas or tariff preference levels; and

(c) Customs duties paid or owed under unused merchandise substitution drawback. There will be no payment of such drawback under 19 U.S.C. 1313(j)(2) on goods exported to Canada or Mexico.

■ 38. Add § 182.43 to read as follows:

§ 182.43 Eligible goods subject to USMCA drawback.

Except as otherwise provided in this subpart, drawback is authorized for an imported good that is entered for consumption and is:

(a) Subsequently exported to Canada or Mexico (*see* 19 U.S.C. 1313(j)(1));

(b) Used as a material in the production of another good that is subsequently exported to Canada or Mexico (*see* 19 U.S.C. 1313(a)); or

(c) Substituted by a good of the same kind and quality as defined in § 182.44(d) and used as a material in the production of another good that is subsequently exported to Canada or Mexico (*see* 19 U.S.C. 1313(b)).

■ 39. Add § 182.44 to read as follows:

§ 182.44 Calculation of drawback.

(a) *General.* Except in the case of goods specified in § 182.45, drawback of the duties previously paid upon importation of a good into the United States may be granted by the United States, upon presentation of a USMCA drawback claim under this subpart, on the lower amount of:

(1) The total duties paid or owed on the good in the United States; or

(2) The total amount of duties paid on the exported good upon subsequent importation into Canada or Mexico.

(b) *Individual relative value and duty comparison principle.* For purposes of this section, relative value will be determined, and the comparison between the duties referred to in paragraph (a)(1) of this section and the duties referred to in paragraph (a)(2) of this section will be made, separately with reference to each individual exported good, including where two components or materials are used to produce one exported good or one component or material is divided among multiple exported goods.

(c) *Direct identification manufacturing drawback under 19 U.S.C. 1313(a).* Upon presentation of the USMCA drawback claim under 19 U.S.C. 1313(a), in which the amount of drawback payable is based on the lesser amount of the customs duties paid on the good either to the United States or to Canada or Mexico, the amount of drawback refunded may not exceed 99 percent of the duty paid on such imported merchandise into the United States.

(d) *Substitution manufacturing drawback under 19 U.S.C. 1313(b).* Upon presentation of a USMCA drawback claim under 19 U.S.C. 1313(b), on which the amount of drawback payable is based on the lesser amount of the customs duties paid on the good either to the United States or to Canada or Mexico, the amount of drawback is the same as that which would have been allowed had the substituted merchandise used in manufacture been itself imported.

(1) *General.* For purposes of drawback under this subpart, the term "same kind and quality" has the same meaning as the 8-digit HTSUS substitution standard established in 19 U.S.C. 1313(b)(1) (*see* §§ 190.2 and 190.22(a)(1)(i) of this chapter).

(2) *Special rule for sought chemical elements.* For purposes of drawback under this subpart, for sought chemical elements, the term "same kind and quality" has the same meaning as the 8-digit HTSUS substitution standard established in 19 U.S.C. 1313(b)(4) (*see* § 190.22(a)(2) of this chapter).

(e) *Meats cured with imported salt.* Meats, whether packed or smoked, which have been cured with imported salt may be eligible for drawback in aggregate amounts of not less than $100 in duties paid on the imported salt upon exportation of the meats to Canada or Mexico (*see* 19 U.S.C. 1313(f)).

(f) *Jet aircraft engines.* A foreign-built jet aircraft engine that has been overhauled, repaired, rebuilt, or reconditioned in the United States with the use of imported merchandise, including parts, may be eligible for drawback of duties paid on the imported merchandise in aggregate amounts of not less than $100 upon exportation of the engine to Canada or Mexico (19 U.S.C. 1313(h)).

(g) *Unused goods under 19 U.S.C. 1313(j)(1) that have changed in condition.* An imported good that is unused in the United States under 19 U.S.C. 1313(j)(1) and that is shipped to Canada or Mexico not in the same condition within the meaning of § 182.45(b)(1) may be eligible for drawback under this section except when the shipment to Canada or Mexico does not constitute an exportation under 19 U.S.C. 1313(j)(4).

■ 40. Add § 182.45 to read as follows:

§ 182.45 Goods eligible for full drawback.

(a) *Goods originating in Canada or Mexico.* A Canadian or Mexican originating good that is dutiable and is imported into the United States is eligible for drawback without regard to the limitation on drawback set forth in § 182.44 if that good is originating under the rules of origin set out in General Note 11, HTSUS, and Appendix A of this part, and is:

(1) Subsequently exported to Canada or Mexico;

(2) Used as a material in the production of another good that is subsequently exported to Canada or Mexico; or

(3) Substituted by a good of the same 8-digit HTSUS subheading number and used as a material in the production of another good that is subsequently exported to Canada or Mexico.

(b) *Claims under 19 U.S.C 1313(j)(1) for goods in same condition.* A good imported into the United States and subsequently exported to Canada or Mexico in the same condition is eligible for drawback under 19 U.S.C. 1313(j)(1) without regard to the limitation on drawback set forth in § 182.44.

(1) *Same condition defined.* For purposes of this subpart, a reference to a good in the "same condition" includes a good that has been subjected to any of the following operations provided that no such operation materially alters the characteristics of the good:

(i) Mere dilution with water or another substance;

(ii) Cleaning, including removal of rust, grease, paint or other coatings;

(iii) Application of preservative, including lubricants, protective encapsulation, or preservation paint;

(iv) Trimming, filing, slitting or cutting;

(v) Putting up in measured doses, or packing, repacking, packaging or repackaging; or

(vi) Testing, marking, labelling, sorting, grading, or inspecting a good.

(2) *Commingling of fungible goods*—(i) *General*—(A) *Inventory of other than all non-originating goods.* Commingling of fungible originating and non-originating goods in inventory is permissible provided that the origin of the goods and the identification of entries for designation for same condition drawback are on the basis of an approved inventory management method set forth in the Appendix A to this part (*see* 19 CFR 102.1).

(B) *Inventory of the non-originating goods.* If all goods in a particular inventory are non-originating goods, identification of entries for designation for same condition drawback must be on the basis of one of the accounting methods in § 190.14 of this chapter, as appropriate.

(ii) *Exception.* Agricultural goods imported from Mexico may not be commingled with fungible agricultural goods in the United States for purposes of same condition drawback under this subpart.

(c) *Goods not conforming to sample or specifications or shipped without consent of consignee under 19 U.S.C. 1313(c).* An imported good exported to Canada or Mexico by reason of failure of the good to conform to sample or specification or by reason of shipment of the good without the consent of the consignee is eligible for drawback under 19 U.S.C. 1313(c) without regard to the limitation on drawback set forth in § 182.44. Such a good must be exported or destroyed within the statutory 5-year time period and in compliance with the requirements set forth in subpart D of part 190 of this chapter, as applicable.

(d) *Certain goods exported to Canada or Mexico.* A good provided for in U.S. tariff items 1701.13.20 or 1701.14.20 that is imported into the Customs territory of the United States under any re-export or like program that is used as a material, or substituted for by a good of the same kind and quality that is used as a material, in the production of a good provided for in Canadian tariff item 1701.99.00 or Mexican tariff items 1701.99.01, 1701.99.02, and 1701.99.99 (relating to refined sugar), is eligible for drawback without regard to the limitation on drawback set forth in § 182.44. Same kind and quality for purposes of this subsection means that the imported good and the substituted good must be capable of being used interchangeably in the manufacture or production of the exported or destroyed articles with no substantial change in the manufacturing or production process.

(e) *Certain goods exported to Canada.* Goods identified in Article 2.5.6(g) of the USMCA and in 19 U.S.C. 4534(a)(7) and (8), if exported to Canada, are eligible for drawback without regard to the limitations on drawback set forth in § 182.44.

(f) *Certain goods that are exported or deemed exported.* Goods that are delivered:

(1) To a duty-free shop,

(2) For ship's stores or supplies for ships or aircrafts, or

(3) For the use in a project undertaken jointly by the United States and a USMCA country, and destined to become the property of the United States, are eligible upon exportation for drawback without regard to the limitations on drawback set forth in § 182.44.

■ 41. Add § 182.46 to read as follows:

§ 182.46 Filing of drawback claim.

(a) *Time of filing.* A drawback claim under this subpart must be filed within 5 years after the date of importation of the goods on which drawback is claimed. No extension will be granted unless it is established that a CBP official was responsible for the untimely filing. Drawback will be allowed only if the completed good is exported within 5 years after importation of the merchandise identified or designated to support the claim.

(b) *Method of filing.* A drawback claim must be filed electronically through a CBP-authorized electronic system (*see* § 190.51 of this chapter).

■ 42. Add § 182.47 to read as follows:

§ 182.47 Completion of claim for drawback.

(a) *General.* A claim for drawback will be granted, upon the submission of appropriate documentation to substantiate compliance

with the drawback laws and regulations of the United States, evidence of exportation to Canada or Mexico, and satisfactory evidence of the payment of duties to Canada or Mexico. Unless otherwise provided in this subpart, the documentation, filing procedures, time and place requirements and other applicable procedures required to determine whether a good qualifies for drawback must be in accordance with the provisions of part 190 of this chapter, as appropriate; however, a drawback claim subject to the provisions of this subpart must be filed separately from any part 190 drawback claim (that is, a claim that involves goods exported to countries other than Canada or Mexico). Claims inappropriately filed or otherwise not completed within the periods specified in § 182.46 will be considered abandoned.

(b) *Complete drawback claim*—(1) *General.* A complete drawback claim under this subpart must consist of the filing of the appropriate completed drawback entry, evidence of exportation (a copy of the Canadian or Mexican customs entry showing the amount of duty paid to Canada or Mexico) and its supporting documents, and a certification from the Canadian or Mexican importer as to the amount of duties paid. Each drawback entry filed under this subpart must be filed using the indicator "USMCA Drawback".

(2) *Specific claims.* The following documentation, for the drawback claims specified below, must be submitted to CBP in order for a drawback claim to be processed under this subpart. Missing documentation or incorrect or incomplete information on required customs forms or supporting documentation will result in an incomplete drawback claim.

(i) *Manufacturing drawback claim.* The following must be submitted in connection with a claim for direct identification manufacturing drawback or substitution manufacturing drawback:

(A) A completed CBP Form 331, or its electronic equivalent, to establish the manufacture of goods made with imported merchandise and, if applicable, the identity of substituted domestic, duty-paid or duty-free merchandise, and including the tariff classification number of the imported merchandise;

(B) CBP Form 7501, or its electronic equivalent, or the import entry number;

(C) [Reserved]

(D) Evidence of exportation and satisfactory evidence of the payment of duties in Canada or Mexico, as provided in paragraph (c) of this section;

(E) Waiver of right to drawback. If the person exporting to Canada or Mexico was not the importer or the manufacturer, written waivers executed by the importer or manufacturer and by any intervening

person to whom the good was transferred must be submitted in order for the claim to be considered complete; and

(F) An affidavit of the party claiming drawback stating that no other drawback claim has been made on the designated goods, that such party has not provided an exporter's certification of origin pertaining to the exported goods to another party except as stated on the drawback claim, and that the party agrees to notify CBP if the party subsequently provides such an exporter's certification of origin to any person.

(ii) *Same condition drawback claim under 19 U.S.C. 1313(j)(1).* The following must be submitted in connection with a drawback claim covering a good in the same condition:

(A) The foreign entry number and date of entry, the HTSUS classification for the foreign entry, the amount of duties paid for the foreign entry and the applicable exchange rate, and, if applicable, a certification from the claimant that provides as follows: "Same condition—The undersigned certifies that the merchandise herein described is in the same condition as when it was imported under the above import entry(s) and further certifies that this merchandise was not subjected to any process of manufacture or other operation except the allowable operations as provided for by regulation.";

(B) Information sufficient to trace the movement of the imported goods after importation;

(C) In-bond application submitted pursuant to part 18 of this chapter, if applicable. This is required for merchandise which is examined at one port but exported through border points outside of that port. Such goods must travel in bond from the location where they were examined to the point of the border crossing (exportation). If examination is waived, in-bond transportation is not required;

(D) *Notification of intent to export or waiver of prior notice.* CBP must be notified at least 5 business days in advance of the intended date of exportation in order to have the opportunity to examine the goods (*see* § 190.35 of this chapter);

(E) *Evidence of exportation.* Acceptable documentary evidence of exportation to Canada or Mexico may include originals or copies of any of the following documents that are issued by the exporting carrier: bill of lading, air waybill, freight waybill, export ocean bill of lading, Canadian customs manifest, and cargo manifest. Supporting documentary evidence must establish fully the time and fact of exportation, the identity of the exporter, and the identity and location of the ultimate consignee of the exported goods;

(F) *Waiver of right to drawback.* If the party exporting to Canada or Mexico was not the importer, a written waiver from the importer and

from each intermediate person to whom the goods were transferred is required in order for the claim to be considered complete; and

(G) An affidavit of the party claiming drawback stating that no other drawback claim has been made on the designated goods.

(iii) *Nonconforming or improperly shipped goods drawback claim.* The following must be submitted in the case of goods not conforming to sample or specifications, or shipped without the consent of the consignee and subject to a drawback claim under 19 U.S.C. 1313(c):

(A) Customs Form 7501, or its electronic equivalent, to establish the fact of importation, the receipt of the imported goods, and the identity of the party to whom drawback is payable (*see* § 182.48(b));

(B) [Reserved]

(C) CBP Form 7512, or its electronic equivalent, if applicable;

(D) Notification of intent to export or waiver of prior notice. CBP must be notified at least 5 business days in advance of the intended date of exportation in order to have the opportunity to examine the goods (*see* § 190.42 of this chapter); and

(E) Evidence of exportation, as provided in paragraph (b)(2)(ii)(E) of this section.

(iv) *Meats cured with imported salt.* The provisions of paragraph (b)(2)(i) of this section relating to direct identification manufacturing drawback will apply to claims for drawback on meats cured with imported salt filed under this subpart insofar as applicable to and not inconsistent with the provisions of this subpart, and the forms referred to in that paragraph must be modified to show that the claim is being made for refund of duties paid on salt used in curing meats.

(v) *Jet aircraft engines.* The provisions of paragraph (b)(2)(i) of this section relating to direct identification manufacturing drawback will apply to claims for drawback on foreign-built jet aircraft engines repaired or reconditioned in the United States filed under this subpart insofar as applicable to and not inconsistent with the provisions of this subpart and the provisions of subpart N of part 190 of this chapter.

(c) [Reserved]

■ 43. Add § 182.49 to read as follows:

§ 182.49 Retention of records.

All records required to be kept by the exporter, importer, manufacturer or producer under this subpart with respect to manufacturing drawback claims, and all records kept by others which complement the records of the importer, exporter, manufacturer or producer, including any person who transfers or enables another person to make

or perfect a drawback claim, must be retained for at least three years from the date of liquidation of such claims or longer period if required by law (*see* §§ 190.10, 190.15, 190.38, and 190.175(c) of this chapter).

■ 44. Add § 182.50 to read as follows:

§ 182.50 Liquidation and payment of drawback claims.

(a) *General.* When the drawback claim has been fully completed by the filing of all required documents, and exportation of the articles has been established and the amount of duties paid to Canada or Mexico has been established, the entry will be liquidated to determine the proper amount of drawback due either in accordance with the limitation on drawback set forth in § 182.44 of this subpart or in accordance with the regular drawback calculation. The liquidation procedures of subpart H of part 190 of this chapter, as appropriate, will control for purposes of this subpart.

(b) [Reserved]

(c) *Accelerated payment.* Accelerated drawback payment procedures will apply as set forth in § 190.92 of this chapter, as appropriate. However, a person who receives drawback of duties under this procedure must repay the duties paid if a USMCA drawback claim is adversely affected thereafter by administrative or court action.

■ 45. Add § 182.51 to read as follows:

§ 182.51 Prevention of improper payment of claims.

(a) *Double payment of claim.* The drawback claimant must certify to CBP that the claimant has not earlier received payment on the same import entry for the same designation of goods. If, notwithstanding such a certification, such an earlier payment was in fact made to the claimant, the claimant must repay any amount paid on the second claim.

(b) *Preparation of Certification of Origin.* The drawback claimant must, within 30 calendar days after the filing of the drawback claim under this subpart, submit to CBP a written statement as to whether the claimant has prepared, or has knowledge that another person has prepared, a certification of origin provided for under § 182.12 and pertaining to the goods which are covered by the claim. If, following such 30-day period, the claimant prepares, or otherwise learns of the existence of, any such certification of origin, the claimant must, within 30 calendar days thereafter, disclose that fact to CBP.

■ 46. Add § 182.52 to read as follows:

§ 182.52 Subsequent claims for preferential tariff treatment.

If a claim for a refund of duties is allowed by the Canadian or Mexican customs administration under Article 5.11 of the USMCA (post-importation claim) or under any other circumstance after drawback has been granted under this subpart, the appropriate CBP official must reliquidate the drawback claim and obtain a refund of the amount paid in drawback in excess of the amount permitted to be paid under § 182.44.

■ 47. Add § 182.54 to read as follows:

§ 182.54 Verification of claim for drawback, waiver or reduction of duties.

The allowance of a claim for drawback, waiver or reduction of duties submitted under this subpart is subject to such verification, including verification with the Canadian or Mexican customs administration, of any documentation obtained in Canada or Mexico and submitted in connection with the claim, as CBP may deem necessary.

Subpart G—Origin Verifications and Determinations

■ 48. Add § 182.71 to read as follows:

§ 182.71 Applicability.

This subpart contains the general origin verification and determination provisions applicable to goods claiming preferential tariff treatment under § 182.11(b) or § 182.32.

■ 49. Add § 182.72 to read as follows:

§ 182.72 Verification of claim for preferential tariff treatment.

(a) *Verification.* A claim for preferential tariff treatment made under § 182.11(b) or 182.32, including any statements or other information submitted to CBP in support of the claim, will be subject to such verification as CBP deems necessary. CBP may initiate the verification of goods imported into the United States under the USMCA with the importer, or with the exporter or producer who completed the certification of origin. A verification of a claim for preferential tariff treatment under the USMCA may be conducted by means of one or more of the following:

(1) Requests for information or questionnaires, including a request for documents, to the importer, exporter, or producer;

(2) Verification visits to the premises of the exporter or producer in Mexico or Canada in order to request information, including documents, and to observe production processes and facilities; and

(3) Any other procedure to which the USMCA countries may agree.

(b) *Verification of a material.* When conducting a verification of a good imported into the United States, CBP may conduct a verification of the material that is used in the production of that good. A verification of a material producer may be conducted pursuant to any of the verification means set forth in paragraph (a) of this section. With the exception of §§ 182.73(c) and 182.75, the provisions in this subpart also apply to the verification of a material and references to the term "producer" apply to a producer of a good or to a material producer.

(c) *Sending information directly to CBP.* During a verification, CBP will accept information, including documents, directly from an importer, exporter, or producer.

(d) *Applicable accounting principles.* When conducting a verification to which Generally Accepted Accounting Principles or an otherwise accepted inventory method may be relevant, CBP will apply and accept the Generally Accepted Accounting Principles applicable in the USMCA country in which the production is performed or from which the good is exported, as appropriate, or an otherwise accepted inventory management method as provided for in Appendix A of this part. If information, including documents, books and records, were not maintained accordingly, CBP will provide the importer, exporter or producer 30 days to record costs in accordance with Appendix A of this part.

■ 50. Add § 182.73 to read as follows:

§ 182.73 Notification and response procedures.

(a) *Requests for information and questionnaires.* When conducting a verification through a request for information or a questionnaire as provided for in § 182.72(a)(1), CBP will send the importer, exporter or producer a written request for information, a written questionnaire, or its electronic equivalent, including a request for specific documentation to support the claim for preferential tariff treatment.

(1) *Contents.* The written request for information, written questionnaire, or its electronic equivalent will contain the following:

(i) The objective and scope of the verification, including the specific issue that the verification is seeking to resolve; and

(ii) Sufficient information to identify the good or material that is the subject of the verification.

(2) *Availability of records*—(i) *Verification of a good.* The importer, exporter, or producer must make the records, which are required to be maintained to demonstrate that the good qualifies for preferential tariff treatment under the USMCA, available for inspection by a CBP official conducting a verification. CBP may deny the claim for prefer-

ential tariff treatment of the good for failure to maintain the required records or if a CBP official is denied access to the records.

(ii) *Verification of a material.* During the verification of a material, any records in the material producer's possession demonstrating that the material qualifies as originating must be made available for inspection by a CBP official conducting a verification. CBP may consider the material that is used in the production of the good and is the subject of the verification to be non-originating material if a CBP official is denied access to these records.

(b) *Notification of a verification visit.* Prior to conducting a verification visit in Canada or Mexico, CBP will provide the exporter or producer, using one of the communication means specified in paragraph (d)(2) of this section, with a notification stating the intent to conduct a verification visit and containing the following:

(1) The objective and scope of the verification, including the specific issue that the verification is seeking to resolve;

(2) Sufficient information to identify the good or material that is the subject of the verification;

(3) A request for the written consent of the exporter or producer whose premises are going to be visited;

(4) The legal authority for the visit;

(5) The proposed date and location of the visit;

(6) The specific purpose of the visit; and

(7) The names and titles of the U.S. officials conducting the visit.

(c) *Importer notification.* When CBP initiates a verification by sending a request for information or questionnaire under paragraph (a) of this section to an exporter or producer or by sending a notification of a verification visit under paragraph (b) of this section, CBP will notify the importer claiming preferential tariff treatment of the good that CBP has initiated a verification of that good, subject to the confidentiality provisions in § 182.2.

(d) *Means of communications.* (1) For purposes of a verification, it is sufficient for CBP to use the contact information provided in the certification of origin for any communication sent to the importer, exporter, or producer.

(2) For purposes of a verification, CBP will send all communication to the exporter or producer by any means that can produce a confirmation of receipt including:

(i) Electronic mail;

(ii) International courier services;

(iii) Certified or registered mail services; or

(iv) A CBP-authorized electronic data interchange system.

(e) *Time periods.* Any time periods specified in this subpart begin from the date of confirmation of receipt, provided for in paragraph (d)(2) of this section, when sending communication to the exporter or producer, and begin from the date the communication is sent when sending communication to the importer.

(f) *Response time for a request for information, a questionnaire, and a notification of a verification visit*—(1) *Request for information and questionnaire.* When CBP sends a request for information or a questionnaire, the importer, exporter, or producer will have 30 days from the date specified in paragraph (e) of this section to respond and provide the requested documentation. CBP may deny the claim for preferential tariff treatment of the good, or consider the material that is used in the production of the good to be non-originating material, for failure to respond to the request for information subject to the conditions in § 182.75(c)(1), or for failure to respond to the questionnaire.

(2) *Notification of a verification visit.* When CBP sends a notification of a verification visit, the exporter or producer will have 30 days from the date specified in paragraph (e) of this section to consent to or deny the verification visit. CBP may deny the claim for preferential tariff treatment of the good, or consider the material that is used in the production of the good to be non-originating material, for failure to provide consent for a verification visit within the 30-day response period, unless a postponement is requested in accordance with § 182.74(b).

■ 51. Add § 182.74 to read as follows:

§ 182.74 Verification visit procedures.

(a) *Written consent required.* Prior to conducting a verification visit in Canada or Mexico, CBP must obtain the written consent of the exporter or producer whose premises are to be visited. The exporter or producer must submit this written consent, requested in the notification of a verification visit under § 182.73(b)(3), to CBP through one of the communication means specified in § 182.73(d)(2), within the time period provided in § 182.73(f)(2), unless a postponement is requested in accordance with paragraph (b) of this section.

(b) *Postponement of a verification visit*—(1) *Request for postponement by an exporter or producer.* Within 15 days of confirmed receipt of the notification of a verification visit, the exporter or producer may, on a single occasion, using one of the communication means specified in § 182.73(d)(2), request the postponement of the verification visit for a period not to exceed 30 days from the proposed date of the visit.

(2) *Notification of a postponement.* CBP will notify the exporter or producer when a postponement request under paragraph (b)(1) of this section is received and will provide the new date of the verification visit. The Mexican or Canadian customs administration where the verification visit will occur may also, within 15 days of confirmed receipt of the notification of a verification visit, postpone the verification visit for a period not to exceed 60 days from the proposed date of the visit or for a longer period as CBP and the Mexican or Canadian customs administration may decide. CBP will notify the exporter or producer if the verification visit is postponed at the request of the Mexican or Canadian customs administration.

(c) *Availability of records*—(1) *Verification of a good.* The exporter or producer must make the records, which are required to be maintained to demonstrate that the good qualifies for preferential tariff treatment under the USMCA, available for inspection by a CBP official conducting a verification and provide facilities for that inspection during the verification visit. CBP may deny the claim for preferential tariff treatment of the good for failure to maintain these records or if a CBP official is denied access to these records.

(2) *Verification of a material.* During the verification of a material, any records in the material producer's possession demonstrating that the material qualifies as originating must be made available for inspection by a CBP official conducting a verification. CBP may consider the material that is the used in the production of the good and is the subject of the verification visit to be non-originating material if a CBP official is denied access to these records.

(d) *Observers.* The exporter or producer may designate up to two observers to be present during the verification visit, if the exporter or producer chooses, provided that:

(1) The observers do not participate in a manner other than as observers;

(2) The failure of the exporter or producer to designate observers does not result in the postponement of the visit; and

(3) The exporter or producer identifies to CBP any observers designated to be present during the visit.

■ 52. Add § 182.75 to subpart G to read as follows:

§ 182.75 Determinations of origin.

(a) *Contents.* For verifications initiated under this part, CBP will issue a determination of origin that sets forth:

(1) A description of the good that was the subject of the verification;

(2) A statement setting forth the findings of facts made in connection with the verification and upon which the determination is based; and

(3) The legal basis for the determination.

(b) *Parties who will receive a determination of origin.* CBP will issue the determination of origin to the importer, and to the exporter or producer who is subject to the verification and either completed the certification of origin or provided information directly to CBP during the verification, subject to the confidentiality provisions in § 182.2, within 120 days (or in exceptional cases and upon notification to the parties, within 210 days) after CBP has determined that it has received all the information necessary to issue a determination of origin, including any information necessary from the exporter or producer.

(c) *Negative determinations*—(1) *When a request for information must be sent to the exporter or producer prior to issuing a negative determination.* If a claim for preferential tariff treatment is based on a certification of origin completed by the exporter or producer, and, in response to a request for information, the importer does not provide CBP with sufficient information to verify or substantiate the claim, CBP will send a written request for information or its electronic equivalent to the exporter or producer that completed the certification of origin, subject to the confidentiality provisions in § 182.2, prior to issuing a negative determination.

(2) *Denial of preferential tariff treatment.* CBP may deny the claim for preferential tariff treatment if:

(i) The certification of origin is not submitted to CBP upon request as required pursuant to § 182.12(a);

(ii) The claim or certification of origin is invalid or based on inaccurate information and is not corrected within the required time period pursuant to § 182.11(c);

(iii) CBP determines that the importer, exporter, or producer failed to provide sufficient information to substantiate the claim;

(iv) CBP determines that the good does not qualify for preferential tariff treatment, including failing to meet the rules of origin requirements in General Note 11, HTSUS, and Appendix A to this part;

(v) The importer, exporter, or producer fails to respond to the request for information pursuant to § 182.73(f)(1) subject to the conditions in § 182.75(c)(1);

(vi) The importer, exporter, or producer fails to respond to the questionnaire pursuant to § 182.73(f)(1);

(vii) The exporter or producer fails to consent to a verification visit pursuant to § 182.74;

(viii) The importer, exporter, or producer fails to maintain records demonstrating that the good qualifies for preferential tariff treatment as required pursuant to this part;

(ix) The importer, exporter, or producer denies access, as requested by CBP, to records or documentation that are in its possession or required to be maintained pursuant to this part;

(x) The exporter or producer denies access to records or documentation that are in its possession or required to be maintained, or to facilities during a verification visit as required pursuant to this part;

(xi) CBP finds a pattern of conduct pursuant to § 182.76; or

(xii) CBP determines that any other reason to deny a claim for preferential tariff treatment as set forth in this part applies

(3) *Intent to deny.* Prior to issuing a negative determination, CBP will inform the importer, and the exporter or producer who is subject to the verification and either completed the certification of origin or provided information directly to CBP during the verification, of CBP's intent to deny preferential tariff treatment, subject to the confidentiality provisions in § 182.2. This intent to deny will contain the preliminary results of the verification, the effective date of the denial of preferential tariff treatment, and a notice to the importer, exporter, or producer that CBP will provide 30 days to submit additional information, including documents, related to the preferential tariff treatment of the good.

(4) *Issuance of a negative determination of origin.* CBP will issue a negative determination of origin to the parties specified in paragraph (b) of this section if CBP determines, at least 30 days after receipt by the importer, exporter, or producer of the intent to deny issued pursuant to paragraph (c)(3) of this section, that one or more of the reasons for denial of preferential tariff treatment under paragraph (c)(2) of this section continues to apply. In addition to the contents of the determination set forth in paragraph (a) of this section, unless CBP determines that there is a pattern of conduct of false or unsupported representations pursuant to § 182.76, a negative determination of origin will provide the exporter or producer with the information necessary to file a protest as provided for in 19 U.S.C. 1514(e) and part 174 of this chapter.

■ 53. Add § 182.76 to subpart G to read as follows:

§ 182.76 Repeated false or unsupported preference claims.

Where the verification reveals a pattern of conduct by the importer, exporter, or producer of false or unsupported representations relevant to a claim that a good imported into the United States qualifies for preferential tariff treatment under the USMCA, CBP may withhold

preferential tariff treatment under the USMCA for entries of identical goods covered by subsequent statements, declarations, or certifications by that importer, exporter, or producer until CBP determines that representations of that person are in conformity with this part and with General Note 11, HTSUS.

■ 54. Revise subpart J consisting of §§ 182.111 through 182.112 to read as follows:

Subpart J—Commercial Samples and Goods Returned after Repair or Alteration

Sec.

§ 182.111 Commercial samples of negligible value.

(a) *General.* Commercial samples of negligible value imported from Canada or Mexico may qualify for duty-free entry under subheading 9811.00.60, HTSUS. For purposes of this section, "commercial samples of negligible value" means commercial samples which have a value, individually or in the aggregate as shipped, of not more than one U.S. dollar, or the equivalent amount in the currency of Canada or Mexico, or which are so marked, torn, perforated, or otherwise treated that they are unsuitable for sale or for use except as commercial samples.

(b) *Qualification for duty-free entry.* Commercial samples of negligible value imported from Canada or Mexico will qualify for duty-free entry under subheading 9811.00.60, HTSUS, only if:

(1) The samples are imported solely for the purpose of soliciting orders for foreign goods or services; and

(2) If valued over one U.S. dollar, the samples are properly marked, torn, perforated or otherwise treated prior to arrival in the United States so that they are unsuitable for sale or for use except as commercial samples.

§ 182.112 Goods re-entered after repair or alteration in Canada or Mexico.

(a) *General.* This section sets forth the rules that apply for purposes of obtaining duty-free treatment on goods returned after repair or alteration in Canada or Mexico as provided for in subheadings 9802.00.40 and 9802.00.50, HTSUS. Goods returned after having been repaired or altered in Canada or Mexico, regardless of whether

the repair or alteration could be performed in the United States or has increased the value of the good and regardless of their origin, are eligible for duty-free treatment, provided that the requirements of this section are met. For purposes of this section, "repairs or alterations" means restoration, addition, renovation, re-dyeing, cleaning, re-sterilizing, or other treatment that does not destroy the essential characteristics of, or create a new or commercially different good from, the good exported from the United States.

(b) *Goods not eligible for duty-free treatment after repair or alteration.* The duty-free treatment referred to in paragraph (a) of this section will not apply to goods that:

(1) In their condition, as exported from the United States to Canada or Mexico, are incomplete for their intended use and for which the processing operation performed in Canada or Mexico constitutes an operation that is performed as a matter of course in the preparation or manufacture of finished goods; or

(2) Are imported under a duty-deferral program that are exported for repair or alteration and are not re-imported under a duty-deferral program.

(c) *Documentation.* The provisions of § 10.8(a), (b), and (c) of this chapter, relating to the documentary requirements for goods entered under subheading 9802.00.40 or 9802.00.50, HTSUS, will apply in connection with the entry of goods which are returned from Canada or Mexico after having been exported for repairs or alterations and which are claimed to be duty-free.

■ 55. Revise subpart K consisting of §§ 182.121 through 182.124 to read as follows:

Subpart K—Penalties

Sec.

§ 182.121 General.

Except as otherwise provided in this subpart, all criminal, civil, or administrative penalties which may be imposed on U.S. importers,

exporters, and producers for violations of the customs and related U.S. laws and regulations will also apply to U.S. importers, exporters, and producers for violations of the U.S. laws and regulations relating to the USMCA.

§ 182.122 Corrected claim or certification of origin by importers.

An importer who makes a corrected claim under § 182.11(c) will not be subject to civil or administrative penalties under 19 U.S.C. 1592 for having made an incorrect claim or having submitted an incorrect certification of origin, provided that the corrected claim is promptly and voluntarily made in accordance with § 182.124.

§ 182.123 Corrected certification of origin by U.S. exporters or producers.

Civil or administrative penalties provided for under 19 U.S.C. 1592 will not be imposed on an exporter or producer who completed a certification of origin for a good exported from the United States to Canada or Mexico when the exporter or producer promptly and voluntarily provides written notification pursuant to §§ 182.21(b) and 182.124 with respect to the making of an incorrect certification of origin.

§ 182.124 Framework for correcting claims or certifications of origin.

(a) "*Promptly and voluntarily*" *defined.* Except as provided for in paragraph (b) of this section, for purposes of this part, the making of a corrected claim or certification of origin by an importer or the providing of written notification of an incorrect certification of origin by an exporter or producer will be deemed to have been done promptly and voluntarily if:

(1)(i) Done before the commencement of a formal investigation, within the meaning of § 162.74(g) of this chapter; or

(ii) Done before any of the events specified in § 162.74(i) of this chapter has occurred; or

(iii) Done within 30 days after the importer, exporter, or producer initially becomes aware that the claim or certification is incorrect; and

(2) Accompanied by a statement setting forth the information specified in paragraph (c) of this section; and

(3) In the case of a corrected claim or certification of origin by an importer, accompanied or followed by a tender of any actual loss of duties and merchandise processing fees, if applicable, in accordance with paragraph (d) of this section.

(b) *Exception in cases involving fraud or subsequent incorrect claims*—(1) *Fraud.* Notwithstanding paragraph (a) of this section, a person who acted fraudulently in making an incorrect claim or certification of origin may not make a voluntary correction of that claim or certification of origin. For purposes of this paragraph, the term "fraud" will have the meaning set forth in paragraph (C)(3) of Appendix B to part 171 of this chapter.

(2) *Subsequent incorrect claims.* An importer who makes one or more incorrect claims after becoming aware that a claim involving the same merchandise and circumstances is invalid may not make a voluntary correction of the subsequent claims pursuant to paragraph (a) of this section.

(c) *Statement.* For purposes of this part, each corrected claim or certification of origin must be accompanied by a statement, submitted in writing or via a CBP-authorized electronic data interchange system, which:

(1) Identifies the class or kind of good to which the incorrect claim or certification of origin relates;

(2) In the case of a corrected claim or certification of origin by an importer, identifies each affected import transaction, including each port of importation and the approximate date of each importation;

(3) In the case of a written notification of an incorrect certification of origin by an exporter or producer, identifies each affected export transaction, including each port of exportation and the approximate date of each exportation. A producer who provides written notification that certain information in a certification of origin is incorrect and who is unable to identify the specific export transactions under this paragraph must provide as much information concerning those transactions as the producer, by the exercise of good faith and due diligence, is able to obtain;

(4) Specifies the nature of the incorrect statements or omissions regarding the claim or certification of origin; and

(5) Sets forth, to the best of the person's knowledge, the true and accurate information or data which should have been covered by or provided in the claim or certification of origin, and states that the person will provide any additional information or data which is unknown at the time of making the corrected claim or certification of origin within 30 days or within any extension of that 30-day period as CBP may permit in order for the person to obtain the information or data.

(d) *Tender of actual loss of duties.* A U.S. importer who makes a corrected claim must tender any actual loss of duties at the time of making the corrected claim, or within 30 days thereafter, or within

any extension of that 30-day period as CBP may allow in order for the importer to obtain the information or data necessary to calculate the duties owed.

PART 190—MODERNIZED DRAWBACK

■ 56. The general and specific authority citations for part 190 continue 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), 1313, 1624;

§§ 190.2, 190.10, 190.15, 190.23, 190.38, 190.51 issued under 19 U.S.C. 1508;

* * * * *

§ 190.0 [Amended]

■ 57. Amend § 190.0 by adding the phrase ", and provisions relating to the Agreement Between the United States of America, the United Mexican States, and Canada (USMCA) are contained in subpart E of part 182 of this chapter" after the words "part 181 of this chapter".

§ 190.0a [Amended]

■ 58. Amend § 190.0a as follows:

■ a. Add the words "and USMCA" after the term "NAFTA" in the paragraph heading;

■ b. Add the words "or part 182" after the number "181".

§ 190.51 [Amended]

■ 59. Amend § 190.51(a)(2)(xv) as follows:

■ a. Add the words "and USMCA" after the words "For NAFTA";

■ b. Remove the words "part 181" and add in their place the words "parts 181 and 182";

■ c. Remove the words "to NAFTA countries".

Troy A. Miller, the Senior Official Performing the Duties of the Commissioner, having reviewed and approved this document, is delegating the authority to electronically sign this document to Robert F. Altneu, who is the Director of the Regulations and Disclosure Law Division for CBP, for purposes of publication in the **Federal Register**.

Dated:

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

Approved:

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

[Published in the Federal Register, July 6, 2021 (85 FR 35566)]

19 CFR PARTS 102 AND 177

RIN 1515–AE63

NON-PREFERENTIAL ORIGIN DETERMINATIONS FOR MERCHANDISE IMPORTED FROM CANADA OR MEXICO FOR IMPLEMENTATION OF THE AGREEMENT BETWEEN THE UNITED STATES OF AMERICA, THE UNITED MEXICAN STATES, AND CANADA (USMCA)

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

ACTION: Notice of proposed rulemaking; request for comments.

SUMMARY: This document proposes to amend the U.S. Customs and Border Protection (CBP) regulations regarding non-preferential origin determinations for merchandise imported from Canada or Mexico. Specifically, this document proposes that CBP will apply certain tariff-based rules of origin in the CBP regulations for all non-preferential determinations made by CBP, specifically, to determine when a good imported from Canada or Mexico has been substantially transformed resulting in an article with a new name, character, or use. For consistency, this document also proposes to modify the CBP regulations for certain country of origin determinations for government procurement. Collectively, the proposed amendments in this notice of proposed rulemaking (NPRM) are intended to reduce administrative burdens and inconsistency for non-preferential origin determinations for merchandise imported from Canada or Mexico for purposes of the implementation of the Agreement Between the United States of America, the United Mexican States, and Canada

(USMCA). Elsewhere in this issue of the **Federal Register**, CBP is publishing an interim final rule to amend various regulations to implement the USMCA for preferential tariff treatment claims. The interim final rule amends the CBP regulations, *inter alia,* to apply certain tariff-based rules of origin for determining the country of origin for the marking of goods imported from Canada or Mexico.

DATES: Comments must be received by August 5, 2021.

ADDRESSES: You may submit comments, identified by *docket number* USCBP–2021–00X25 by *one* of the following methods:

- Federal eRulemaking Portal at *http://www.regulations.gov.* Follow the instructions for submitting comments.
- Mail: Due to COVID–19-related restrictions, CBP has temporarily suspended its ability to receive public comments by mail.

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

Docket: For access to the docket to read background documents or comments received, go to *http:// www.regulations.gov.* Due to the relevant COVID–19-related restrictions, CBP has temporarily suspended on-site public inspection of the public comments.

FOR FURTHER INFORMATION CONTACT: *Operational Aspects:* Queena Fan, Director, USMCA Center, Office of Trade, U.S. Customs and Border Protection, (202) 738–8946 or *usmca@cbp.dhs.gov.*

Legal Aspects: Craig T. Clark, Director, Commercial and Trade Facilitation Division, Regulations and Rulings, Office of Trade, U.S. Customs and Border Protection, (202) 325–0276 or *craig.t.clark@cbp.dhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Public Participation

Interested persons are invited to participate in this rulemaking by submitting written data, views, or arguments on all aspects of this notice of proposed rulemaking (NPRM). U.S. Customs and Border Protection (CBP) also invites comments that relate to the economic, environmental, or federalism effects that might result from this proposed rule. Comments that will provide the most assistance to CBP will reference a specific portion of the NPRM, explain the reason for

any recommended change, and include data, information or authority that support such recommended change.

II. Background

The country of origin of merchandise imported into the customs territory of the United States (the fifty states, the District of Columbia, and Puerto Rico) is important for several reasons. The country of origin of merchandise determines the rate of duty, admissibility, quota, eligibility for procurement by government agencies, and marking requirements. There are various rules of origin for goods imported into the customs territory of the United States, generally referred to as "preferential" and "non-preferential" rules of origin. "Preferential" rules are those that apply to merchandise to determine eligibility for special treatment, including reduced or zero tariff rates, under various trade agreements or duty preference legislation, *e.g.,* Generalized System of Preferences. "Non-preferential" rules are those that generally apply for all other purposes.[1] CBP uses the substantial transformation standard to determine the country of origin of goods for non-preferential purposes. For a substantial transformation to occur, "a new and different article must emerge, 'having a distinctive name, character or use.'" *Anheuser-Busch Brewing Ass'n* v. *United States,* 207 U.S. 556, 562 (1908) (quoting *Hartranft* v. *Wiegmann,* 121 U.S. 609, 615 (1887)).

CBP applies two different methods for determining if merchandise has been substantially transformed. One method involves case-by-case adjudication, relying primarily on tests articulated in judicial precedent and past administrative rulings. The other method consists of codified rules in part 102 of title 19 of the Code of Federal Regulations (19 CFR part 102) (referred to as the part 102 rules), which are primarily expressed through specified differences in the Harmonized Tariff Schedule of the United States (HTSUS) classification of the good and its materials. This method is often referred to as the

[1] The term "non-preferential purposes" generally refers to purposes set forth in laws, regulations, and administrative determinations of general application applied to determine the country of origin of goods not related to the granting of tariff preferences pursuant to a trade agreement or a trade preference program such as the Generalized System of Preferences. Non-preferential purposes include antidumping and countervailing duties; safeguard measures; origin marking requirements; and any discriminatory quantitative restrictions or tariff quotas. They also include rules of origin used for trade statistics and for determining eligibility for government procurement. *See, e.g.,* Art. I, Uruguay Round Agreement on Rules of Origin. They do not include the rules of origin used to determine eligibility for preferential tariff treatment under trade agreements unless otherwise explicitly specified in those agreements. Notwithstanding the above, under Title VII of the Tariff Act of 1930, as amended, merchandise within the scope of the Department of Commerce's antidumping and/or countervailing duty proceedings may be associated with a country of origin (for purposes of the scope of antidumping/countervailing duties) that is different from the country of origin determined by CBP for other purposes.

"change in tariff classification" or "tariff shift" method. Both the case-by-case and tariff shift methods are intended to produce the same determinations as to origin because both apply the same substantial transformation standard.

CBP first promulgated the part 102 rules in 1994 to fulfill the commitment of the United States under Annex 311 of the North American Free Trade Agreement (NAFTA), which required the parties to establish rules for determining whether a good is a good of a NAFTA party (*i.e.,* the United States, Mexico, or Canada). In contrast to the case-by-case method, the part 102 rules were intended to provide for more certainty, transparency, and consistency in application of origin decisions. They codify, rather than constitute an alternative to, the substantial transformation standard and are intended to implement the standard consistently.[2]

> *Country of Origin Marking Requirements for Imported Merchandise From Canada or Mexico Pursuant to the Agreement Between the United States of America, the United Mexican States, and Canada (USMCA)*[3]

On November 30, 2018, the "Protocol Replacing the North American Free Trade Agreement with the Agreement Between the United States of America, the United Mexican States, and Canada" (the Protocol) was signed to replace the NAFTA. Section 601 of the United States-Mexico-Canada Agreement Implementation Act (USMCA Act), Public Law 116–113, 134 Stat. 11 (19 U.S.C. Chapter 29), repealed the North American Free Trade Agreement Implementation Act (NAFTA Implementation Act), Public Law 103–182, 107 Stat. 2057 (19 U.S.C. 3301 *et seq.*), as of the date that the USMCA entered into force, July 1, 2020. The NAFTA provisions set forth in part 181 of title 19 of the CFR (19 CFR part 181) and in General Note 12, Harmonized Tariff Schedule of the United States (HTSUS), continue to apply to goods entered for consumption, or withdrawn from warehouse for consumption, prior to July 1, 2020. On July 1, 2020, CBP published an interim final rule (IFR) in the **Federal Register** (CBP Dec. 20–11) amending 19 CFR part 181 and adding a new part 182 of title 19 of the CFR (19 CFR part 182) containing several USMCA provisions, including the Uniform Regulations regarding rules of origin (appendix A to part 182). *See* 85 FR 39690 (July 1, 2020).

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[2] *See* "Rules for Determining the Country of Origin of a Good for Purposes of Annex 311 of the North American Free Trade Agreement; Rules of Origin Applicable to Imported Merchandise," 60 FR 22312, 22314 (May 5, 1995), citing, in part, "Rules of Origin Applicable to Imported Merchandise," 59 FR 141 (Jan. 3, 1994).

[3] The Agreement Between the United States of America, the United Mexican States, and Canada is the official name of the USMCA treaty. Please be aware that, in other contexts, the same document is also referred to as the United States-Mexico-Canada Agreement.

In another IFR published elsewhere in this issue of the **Federal Register** ("Agreement Between the United States of America, the United Mexican States, and Canada (USMCA) Implementing Regulations Related to the Marking Rules, Tariff-rate Quotas, and Other USMCA Provisions" (RIN 1515–AE56)), CBP is amending the CBP regulations to include additional USMCA implementing regulations in 19 CFR part 182 and to amend other portions of title 19 of the CFR. The IFR includes amendments to parts 102 and 134 of title 19 of the CFR (19 CFR parts 102 and 134) to apply the rules of origin set forth in 19 CFR part 102 for determining the country of origin for the marking of goods imported from Canada or Mexico. Those amendments facilitate the transition from the NAFTA to the USMCA by maintaining the status quo for country of origin for marking determinations.

Non-Preferential Origin Determinations for Merchandise Imported From Canada or Mexico

Although the NAFTA Implementation Act was repealed by the USMCA Act as of July 1, 2020, the part 102 rules remain in 19 CFR part 102 and are applicable for country of origin marking determinations for goods imported from Canada or Mexico under the USMCA (pursuant to the IFR, being concurrently published, as explained above). The part 102 rules, specifically §§ 102.21 through 102.25, are also to be used by CBP to determine the country of origin of textile and apparel products (imported from all countries except from Israel (*see* 19 CFR 102.22)), including the administration of quantitative restrictions, if applicable.

After the part 102 rules were promulgated in 1994, the rules were subsequently amended to also include references to specific U.S. trade agreements that incorporated those rules as part of the determination for trade preference eligibility, *i.e.,* for preference purposes. For example, as indicated in the scope provision for part 102, the rules set forth in §§ 102.1 through 102.21 also apply for purposes of determining whether an imported good is a new or different article of commerce under § 10.769 of the United States-Morocco Free Trade Agreement regulations and § 10.809 of the United States-Bahrain Free Trade Agreement regulations.

Unlike the NAFTA, the USMCA does not refer to a marking requirement, except with regard to certain agricultural goods. For certain agricultural goods, the USMCA does contain a requirement that a good must first qualify to be marked as a good of Canada or Mexico in order to receive preferential tariff treatment under the USMCA. For most goods, only the general Uniform Regulations regarding rules of origin set forth in Appendix A of part 182 of title 19 (19 CFR part 182) and the product-specific rules of origin contained in General

Note 11, HTSUS, are needed to determine whether a good is an originating good under the USMCA and therefore is eligible to receive preferential tariff treatment.

The Secretary of the Treasury has general rulemaking authority, pursuant to 19 U.S.C. 1304 and 1624, to make such regulations as may be necessary to carry out the provisions of section 304(a) of the Tariff Act of 1930, as amended, related to the country of origin requirements for imported articles of foreign origin. The Department of the Treasury and CBP have concluded that extending application of the well-established part 102 rules to goods imported from the USMCA countries of Canada and Mexico will provide continuity for the importing community because those rules have been applied to all imports from these countries since 1994.[4] The importing community has made extensive efforts to comply with the part 102 rules and CBP has significant experience in applying those rules to imported merchandise from Canada and Mexico. The part 102 rules, as codified, are a reliable, simplified, and standardized method for CBP when determining the country of origin for customs purposes.

When promulgating the part 102 rules in 1994, the U.S. Customs Service (now CBP) explained:

> . . . the long history of the substantial transformation rule, [and] its administration has not been without problems. These problems devolve from the fact that application of the substantial transformation rule is on a case-by-case basis and often involves subjective judgments as to what constitutes a new and different article or as to whether processing has resulted in a new name, character, and use. As a result, application of the substantial transformation rule has remained essentially nonsystematic in that a judicial or administrative determination in one case more often than not has little or no bearing on another case involving a different factual pattern. Thus, while judicial and administrative decisions involving the substantial transformation rule may have some value as restatements or refinements of the basic rule, they are often of little assistance in resolving individual cases involving the myriad of issues or tests that have arisen, such as the distinction between producer's goods and consumer's goods, the significance of further manufacturing or finishing operations, and the issue of dedication to

[4] This rule does not apply for purposes of determining whether merchandise is subject to the scope of antidumping and countervailing duty proceedings under Title VII of the Tariff Act of 1930, as amended, as such determinations fall under the authority of the Department of Commerce. Specifically, notwithstanding a CBP country of origin determination, that merchandise may be subject to the scope of antidumping and/or countervailing duty proceedings associated with a different country.

> use. The very fact that the substantial transformation rule has been the subject of a large number of judicial and administrative determinations is testament to the basic problem: The case-by-case approach, involving application of the rule based on specific sets of facts, has led to varied case-specific interpretations of the basic rule, resulting in a lack of predictability which in turn has engendered a significant degree of uncertainty both within Customs and in the trade community as regards the effect that a particular type of processing should have on an origin determination.

"Rules for Determining the Country of Origin of a Good for Purposes of Annex 311 of the North American Free Trade Agreement," 59 FR 110, 141 (January 3, 1994).

Importers of goods from Canada and Mexico are well-versed in the part 102 rules, and the greater specificity and transparency those rules provide will facilitate the determination of eligibility for USMCA tariff preferences for certain agricultural goods, as noted above. Accordingly, to make the transition from the NAFTA to the USMCA as smooth as possible for the importing community, CBP is amending 19 CFR parts 102 and 134, in the IFR concurrently published today, to continue application of the part 102 rules to determine the country of origin for marking purposes of a good imported from Canada or Mexico.

CBP has not previously applied the part 102 rules for non-preferential origin determinations involving goods imported from Canada and Mexico other than for textile products and for purposes of determining country of origin marking. CBP has, instead, used case-by-case adjudication for other non-preferential origin determinations. CBP makes such non-preferential origin determinations for purposes such as admissibility, quota, procurement by government agencies, and application of duties imposed under sections 301 to 307 of the Trade Act of 1974, as amended (19 U.S.C. 2411–2417, commonly referred to as "Section 301"). This means that importers of goods from Canada and Mexico are subject to two different non-preferential origin determinations for imported merchandise: One for marking; and, another for determining origin for other purposes. Consequently, these importers must also potentially comply with requirements to declare two different countries of origin for the same imported good (*e.g.,* Canada and China). This burdens importers with unnecessary additional requirements, creates inconsistency, and reduces transparency.

To address these burdens, CBP is proposing to amend the scope section of part 102 of title 19 of the CFR so that the substantial

transformation standard will be applied consistently across all non-preferential origin determinations that CBP makes for merchandise imported from Canada and Mexico. This purpose is accomplished by adding new language to the scope provision of the part 102 rules. The proposed regulatory change will obviate the need for importers of merchandise from Canada and Mexico wishing to comply with the various laws that require CBP origin determinations from having to request multiple non-preferential country of origin determinations from CBP for a particular good. The proposed regulatory change also means that CBP will no longer need to issue rulings with multiple non-preferential origin determinations goods imported from Canada or Mexico, and there will no longer be rulings that conclude that a good imported from Canada or Mexico has two different origins under the USMCA (*i.e.,* one for marking and one for other, customs non-preferential purposes). CBP's application of the part 102 rules would not, however, affect similar determinations made by other agencies, such as the Department of Commerce's scope determinations in antidumping or countervailing duty proceedings (*see* 19 CFR 351.225), determinations by the Agricultural Marketing Service under the Country of Origin Labeling ("COOL") law (*see* 7 CFR part 65), or origin determinations made by other agencies for purposes of government procurement under the Federal Acquisition Regulation (*see* 48 CFR chapter 1).

CBP is also proposing to make corresponding edits to part 177 of title 19 of the CFR, which sets forth the requirements for various types of administrative rulings. Specifically, subpart B of part 177 applies to the issuance of country of origin advisory rulings and final determinations relating to government procurement for purposes of granting waivers of certain "Buy American" restrictions in U.S. law and practice for products from eligible countries. As noted in 19 CFR 177.21, the subpart is intended to be applied consistent with the Federal Acquisition Regulation (48 CFR chapter 1) and the Defense Acquisition Regulations System (48 CFR chapter 2). It is also noted that Chapter 13 of the USMCA provides that the United States will apply the same rules of origin to Mexican imports for government procurement as it does for other trade. The United States has the same obligation to Canada under Article IV:5 of the WTO Agreement on Government Procurement. While the substantial transformation standard already applies by statute (19 U.S.C. 2518(4)(B)), CBP's proposed application of the part 102 rules to make these substantial transformation determinations would ensure the consistency of CBP determinations for goods imported from Mexico and Canada. The proposed regulatory change will specifically provide that, when mak-

ing country of origin determinations for purposes of subpart B of part 177, the part 102 rules will be applied by CBP to determine whether goods imported into the United States from Canada or Mexico previously underwent a substantial transformation in Canada or Mexico. The proposed regulatory change would not affect the origin determinations other agencies make related to procurement.

III. Discussion of Proposed Amendments

Pursuant to 19 U.S.C. 4535(a), the Secretary of the Treasury has the authority to prescribe such regulations as may be necessary to implement the USMCA. Section 103(b)(1) of the USMCA Act (19 U.S.C. 4513(b)(1)) requires that initial regulations necessary or appropriate to carry out the actions required by or authorized under the USMCA Act or proposed in the Statement of Administrative Action approved under 19 U.S.C. 4511(a)(2) to implement the USMCA shall, to the maximum extent feasible, be prescribed within one year after the date on which the USMCA enters into force. The Secretary also has general rulemaking authority, pursuant to 19 U.S.C. 1304 and 1624, to make such regulations as may be necessary to carry out the provisions of the Tariff Act of 1930, as amended, related to the country of origin requirements for imported articles of foreign origin. The Secretary also has authority under 19 U.S.C. 1502 to regulate the procedures for issuing binding rulings, and 19 U.S.C. 2515(b)(1) requires the Secretary to make rulings and determinations as to substantial transformation under 19 U.S.C. 2518(4)(B).

CBP is proposing to amend the scope provision in 19 CFR part 102 to apply the substantial transformation standard consistently across country of origin determinations CBP makes for imported goods from the USMCA countries of Canada and Mexico for non-preferential purposes.[5] Specifically, CBP proposes to amend section 102.0 to extend the scope of part 102 to state that the rules set forth in §§ 102.1 through 102.18 and 102.20 are intended to apply to CBP's country of origin determinations for non-preferential purposes for goods imported from Canada and Mexico.

CBP is also proposing to amend subpart B of 19 CFR part 177 to add a cross-reference to clarify that, for "country of origin" in § 177.22(a), the determination pursuant to 19 U.S.C. 2515(b)(1) as to whether an article has been substantially transformed into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was so transformed, for purposes of granting waivers of certain "Buy American" restric-

[5] *See supra* footnote 4.

tions, must be made using the rules set forth in §§ 102.1 through 102.18 and 102.20 of title 19 of the CFR for goods from Canada and Mexico.

IV. Statutory and Regulatory Authority

A. Executive Orders 13563 and 12866

Executive Orders 13563 and 12866 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rulemaking is a "significant regulatory action," although not an economically significant regulatory action, under section 3(f) of Executive Order 12866. Accordingly, the Office of Management and Budget (OMB) has reviewed this regulation.

Background and Purpose of Rule

All merchandise of foreign origin imported into the United States must generally be marked with its country of origin, and it is subject to a country of origin determination by CBP.[6] The country of origin of imported goods may be used as a factor to determine preferential trade treatment, such as eligibility under various trade agreements and special duty preference legislation, like the Generalized System of Preferences. The country of origin of imported goods is also used to determine non-preferential trade treatment, such as admissibility, marking, and trade relief.[7] Importers must exercise reasonable care in determining the country of origin of their goods and often make this determination on their own. However, some importers may seek advice from CBP to determine the country of origin for their goods for preferential and/or non-preferential purposes.

CBP applies two methods for determining the country of origin of imports for non-preferential purposes, as stated above. One method involves case-by-case adjudication to determine whether the goods have been substantially transformed in a particular country, relying primarily on judicial precedent and past administrative rulings. The other method consists of codified rules in part 102 of title 19 of the Code of Federal Regulations (19 CFR part 102) (referred to as the part 102 rules), which are also used to determine whether the goods have

[6] *See* 19 U.S.C. 1304 and 19 CFR part 134.

[7] *See supra* footnote 4.

been substantially transformed, but are primarily expressed through specific changes in the Harmonized Tariff Schedule of the United States (HTSUS) classification, often referred to as a "tariff shift." Both the case-by-case and tariff shift methods implement the substantial transformation standard and are intended to lead to the same result.

Prior to the USMCA, under the NAFTA, country of origin marking determinations were made using the NAFTA marking rules codified in 19 CFR part 102 that specify whether a good imported from Canada or Mexico that is not entirely of Canadian or Mexican origin has been substantially transformed through processes that resulted in changes in the tariff classification (*i.e.,* tariff shifts) in Canada or Mexico. To determine the country of origin of goods imported from Canada or Mexico for other non-preferential purposes (*i.e.,* purposes other than marking), CBP employed case-by-case adjudication to determine whether such goods were substantially transformed in those NAFTA countries. These different non-preferential country of origin-determination methods required some importers to determine and declare two different countries of origin for the same imported good (*e.g.,* Canada and China).

The USMCA, which recently superseded the NAFTA, was generally silent as to how the country of origin should be determined for goods imported from Canada and Mexico for marking and other non-preferential purposes. However, CBP is concurrently publishing an IFR in this issue of the **Federal Register** that, among other things, continues to apply the existing part 102 rules for determining the country of origin for marking of goods imported from Canada or Mexico. In this proposed rule, CBP proposes to expand the scope of the part 102 rules to provide that those rules are also to be generally applicable for all other (*i.e.,* other than marking) non-preferential origin determinations made by CBP for goods imported from the USMCA countries of Canada and Mexico. CBP's application of the part 102 rules would not, however, affect similar determinations made by other agencies, such as the Department of Commerce's scope determinations in antidumping or countervailing duty proceedings (*see* 19 CFR 351.225).

With this regulatory change, all non-preferential country of origin determinations by CBP for goods imported from Canada or Mexico would be based on substantial transformation pursuant to the tariff shift rules required by 19 CFR part 102. This would eliminate the need for some importers of products from Canada or Mexico to request two different non-preferential determinations—one for country of origin marking and one for case-by-case adjudication for other non-preferential purposes—to confirm CBP's treatment of their im-

ports and avoid potentially different determinations. The rulemaking would also eliminate the need for some importers to comply with requirements to declare two different countries of origin for the same imported good (*e.g.,* Canada and China). CBP is proposing these changes to simplify and standardize country of origin determinations by CBP for all non-preferential purposes for goods imported from Canada or Mexico.

Population Affected by Rule

This rulemaking would directly affect certain importers of goods from Canada and Mexico and the U.S. Government (particularly CBP). In fiscal year (FY) 2019, 38,832 importers[8] made 2.6 million non-NAFTA-preference entries of goods from Canada and Mexico.[9] All of these entries were subject to non-preferential country of origin marking requirements, while some of these goods were also subject to other non-preferential country of origin determinations, like trade remedies, that involve case-by-case adjudication. Around the same time, in FY 2020 and the start of FY 2021, CBP issued 52 rulings determining the origin of goods imported from Canada and Mexico for non-preferential purposes.[10] These rulings, except for those involving the importation of certain textile and apparel products, employed case-by-case adjudication to determine whether such goods were substantially transformed in Canada or Mexico or other countries.

In the future, CBP projects that around 38,832 importers would continue to make around 2.6 million entries of goods from Canada and Mexico that are subject to non-preferential trade treatment, with or without this rule, each year. An unknown share of these importers would enter goods subject to non-marking-related non-preferential treatment. CBP also projects that about 52 case-by-case non-preferential country of origin determinations would be requested and issued each year in the absence of this rulemaking based on the historical number of case-by-case adjudications. This rulemaking would eliminate such case-by-case determination requests and the issuance of such rulings.

Costs and Revenue Impacts of Rule

This rulemaking may introduce changes in non-preferential payments from importers to the U.S. Government. In addition, there may be minimal costs for some importers, as discussed in this section.

[8] Based on unique importer of record (IOR) numbers of importers who entered goods in FY 2019. In some cases, multiple IOR numbers correspond to the same entity.

[9] These goods were not eligible for the generalized system of preferences.

[10] Based on data from October 1, 2019, to December 16, 2020.

Changing from case-by-case adjudications for other non-preferential origin purposes to part 102's tariff shift rules may impose some costs on importers with goods from Canada and Mexico. Importers who switch from using these two determination methods for non-preferential origin purposes to just the part 102 rules with this rulemaking may, for example, incur some one-time, minor costs to adjust their inventory tracking systems and Automated Commercial Environment (ACE) entries to reflect the part 102-based non-marking, non-preferential country of origin for their goods in those cases where origin determinations under the current practice have been inconsistent.[11] In such instances, importers may also need to adjust their business practices to ensure that they properly use the part 102 rules for all non-preferential country of origin purposes when the goods are sourced from Canada or Mexico under this proposed rule. These same importers must also ensure that they use case-by-case adjudications for any goods sourced outside of Canada or Mexico that are subject to non-preferential treatment. The extent of these costs on importers is unknown, but likely to be minimal. CBP requests public comments on these costs and any other costs of this rule to importers. This rule would not introduce costs to CBP.

In addition to costs, applying the part 102 (tariff shift) rules of origin rather than case-by-case adjudications to determine the origin for other non-preferential purposes could lead to trade policy outcomes different from historical and current practice. If an importer's goods are subject to inconsistent origin determinations under the current practice, this proposed rule may lead to a change in non-preferential payments from importers to the U.S. Government, which would result in an equal change in U.S. Government revenue. The number of instances where an importer would receive a different non-preferential country of origin determination under this rulemaking compared to current practice would likely be low, especially considering both methods apply the same substantial transformation standard and are intended to reach the same results. The specific effects of these different determinations on revenue are unknown. Any change in payments from importers to the U.S. Government as a result of this rulemaking are considered transfers rather than costs or benefits as they are moving money from one part of society to

[11] As an example, if an importer has an inventory tracking system that identifies the non-marking, non-preferential country of origin for its goods from Canada and Mexico based on existing case-by-case adjudication rules, with this rule, that importer may need to revise the system to ensure that it identifies the goods based on the part 102 rules if the importer is importing goods subject to inconsistent origin determinations under the current practice.

another.[12] CBP requests public comments on the potential number of instances where a good would be treated differently under trade remedy laws and relief under the new rule compared to historical and current practice and any related effects on revenue.

Benefits of Rule

Besides costs and revenue impacts, this rulemaking would introduce benefits to importers and the U.S. Government. Importers must exercise reasonable care when determining the country of origin for their goods, which can include researching previous case-by-case adjudications on substantial transformation. This rulemaking would enhance the consistency of country of origin marking and non-preferential country of origin determinations for goods imported from Canada and Mexico. All determinations made by CBP would be based on substantial transformation through application of the part 102 rules. This change would allow importers of goods from Canada and Mexico to comply with just one non-preferential country of origin determination made by CBP for their goods rather than two.

The overall benefit to importers of complying with just one country of origin determination method from CBP for their goods from Canada and Mexico is unknown. Some importers who require CBP ruling requests to determine the country of origin for non-preferential purposes would enjoy greater benefits from the transition to just one non-preferential determination method. As previously described, importers of goods from Canada and Mexico must currently request two country of origin rulings from CBP if they cannot determine the country of origin for non-preferential purposes—one for country of origin marking and one for case-by-case adjudication for other non-preferential purposes. CBP estimates that a case-by-case determination request takes an importer at least 8 hours on average to request, at a time cost of $250.96 per request according to an importer's average hourly time value of $31.37.[13] Based on this time cost and the

[12] As described in OMB Circular A–4, transfer payments occur when ". . . monetary payments from one group [are made] to another [group] that do not affect total resources available to society." Examples of transfer payments include payments for insurance and fees paid to a government agency for services that an agency already provides.

[13] CBP bases this $31.37 loaded wage rate on the Bureau of Labor Statistics' (BLS) 2020 median hourly wage rate for Cargo and Freight Agents ($21.04), which CBP assumes best represents the wage for importers, multiplied by the ratio of BLS' average 2020 total compensation to wages and salaries for Office and Administrative Support occupations (1.4912), the assumed occupational group for importers, to account for non-salary employee benefits. Source of median wage rate: U.S. Bureau of Labor Statistics. Occupational Employment Statistics, "May 2020 National Occupational Employment and Wage Estimates United States- Median Hourly Wage by Occupation Code- Occupation Code 43–5011." Updated March 31, 2020. Available at *https://www.bls.gov/oes/2020/may/oes_nat.htm.* Accessed June 1, 2021. The total compensation to wages and salaries ratio is equal to the

historical average of about 52 case-by-case adjudication requests for non-preferential country of origin determinations for goods imported from Canada and Mexico, CBP estimates that importers would save at least $13,050 in research time costs each year from no longer submitting case-by-case adjudication requests to CBP for their non-preferential country of origin requests for goods from Canada and Mexico. These requests may impose an unknown amount of additional time and resource costs on importers from an importer's gathering of information for the process and drafting the request, which could be avoided with this rulemaking.

Furthermore, CBP's country of origin determinations sometimes result in an imported good being determined to be a product of Canada or Mexico for some customs purposes and a good of a third country for other purposes. This rulemaking would eliminate these different determinations, which would standardize country of origin determinations for non-preferential purposes for goods imported from the USMCA countries of Canada and Mexico. CBP's application of the part 102 rules would not, however, affect similar determinations made by other agencies, such as the Department of Commerce's scope determinations in antidumping or countervailing duty proceedings (*see* 19 CFR 351.225). This standardized approach would provide additional benefits to importers, but the extent of these benefits is unknown. CBP requests public comments on the benefits of this change to importers. Although this rulemaking would eliminate the need for some importers to request case-by-case country of origin determinations for non-preferential purposes, it may require such importers to now request classification determinations for their goods imported from Canada and Mexico. The extent of these new classification requests is unknown. To the extent that importers would need to request additional classification determinations in place of case-by-case adjudications, the benefits of this rulemaking to importers would be lower. CBP requests public comments on any other benefits of this rulemaking to importers.

As previously stated, CBP issued 52 non-preferential determinations adjudicated on a case-by-case basis for goods imported from

calculated average of the 2020 quarterly estimates (shown under Mar., June, Sep., Dec.) of the total compensation cost per hour worked for Office and Administrative Support occupations ($28.8875) divided by the calculated average of the 2020 quarterly estimates (shown under Mar., June, Sep., Dec.) of wages and salaries cost per hour worked for the same occupation category ($19.3725). 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–December 2020, "Table 3. Civilian workers, by occupational group: employer costs per hours worked for employee compensation and costs as a percentage of total compensation, 2004–2020." March 2021. Available at *https://www.bls.gov/web/ecec/ececqrtn.pdf*. Accessed June 1, 2021.

Canada and Mexico from October 2019 to December 2020. This rulemaking would eliminate the need for CBP to make such case-by-case determinations for similar goods imported from Canada and Mexico in the future. The current method for CBP to determine country of origin on a case-by-case basis for non-preferential purposes is generally more time and resource-intensive than the tariff-shift method. For CBP, country of origin determinations for non-preferential purposes based on case-by-case adjudications are highly individual, fact-intensive exercises. This rulemaking would largely make it easier for CBP to administer rules of origin for non-preferential country of origin determinations for goods imported from Canada and Mexico by employing the codified part 102 rules for both country of origin marking and other non-preferential purposes. By eliminating the need for importers to request non-preferential case-by-case determinations of their goods from Canada and Mexico, CBP would save an average of 5 hours to 40 hours currently dedicated to each case-by-case adjudication. This would translate to a time cost saving of between $494.90 and $3,959.20 based on a CBP attorney's average hourly time value of $98.98.[14] CBP estimates that with this proposed rule, CBP would no longer have to make 52 case-by-case rulings determining the origin of goods imported from Canada or Mexico for non-preferential purposes according to historical data. Considering these forgone determinations and the average time cost per determination, CBP would save approximately $25,735 to $205,878 per year from this rulemaking. These benefits would represent time cost savings to CBP rather than budgetary savings, meaning that CBP could use the savings to perform other agency missions, such as facilitating trade. As previously stated, this rulemaking may increase requests for classifications of goods imported from Canada and Mexico, though the extent of these requests is unknown. To the extent that CBP would need to conduct additional classifications in place of case-by-case adjudications, the benefits of this rulemaking to CBP would be lower.

Net Impact of Rule

In summary, this rulemaking would introduce costs, revenue changes, and benefits to importers and the U.S. Government. Some importers, for example, whose goods are subject to inconsistent origin determinations under the current practice, may incur minor costs to adjust their inventory tracking systems, ACE entries, and business practices to reflect the new country of origin determination for other non-preferential purposes, as described above. Transitioning to the

[14] CBP bases this wage on the FY 2019 salary, benefits, and non-salary costs (*i.e.,* fully loaded wage) of the national average of CBP attorney positions.

proposed tariff shift system could also lead to an increase or decrease in non-preferential payments from importers, which would lead to an equal increase or decrease in revenue to the U.S. Government. The exact amounts of these costs and revenue changes are unknown, but they should be small considering the tariff shift methodology implements the same substantial transformation standard as the existing case-by-case method. Additionally, the rule would implement a simpler, standardized administration system for country of origin determinations made by CBP for all non-preferential purposes for goods imported from Canada and Mexico that would save importers and the U.S. Government time and resources. Importers could save at least an estimated $13,050 in time costs annually from this rulemaking, while the U.S. Government could save between $25,735 and $205,878 in time costs each year. Overall, CBP believes this rulemaking's benefits would outweigh the costs.

B. Regulatory Flexibility Act

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

This rulemaking proposes to expand the scope of the 19 CFR part 102 rules to provide that those rules are to be generally applicable to all non-preferential country of origin determinations made by CBP for goods imported from the USMCA countries of Canada and Mexico. With this change, country of origin marking and all other non-preferential country of origin determinations made by CBP for goods imported from Canada or Mexico would be based on substantial transformations occurring with tariff shifts as defined under part 102. CBP's application of the part 102 rules would not, however, affect similar determinations made by other agencies, such as the Department of Commerce's scope determinations in antidumping or countervailing duty proceedings (*see* 19 CFR 351.225).

In FY 2019, 38,832 importers[15] made 2.6 million non-NAFTA-preference entries of goods from Canada and Mexico, valued at $155 billion.[16] All of these entries were subject to non-preferential country

[15] Based on unique importer of record numbers of importers who entered goods in FY 2019. In some cases, multiple IOR numbers correspond to the same entity.

[16] These goods were not eligible for the Generalized System of Preferences.

of origin marking requirements, while some were also subject to other non-preferential country of origin determinations, like trade remedies, that involve case-by-case adjudication. CBP does not have precise data on the number of importers who entered goods from Canada and Mexico that were subject to country of origin requirements for marking and another non-preferential purpose that would be affected by this rulemaking. Based on available FY 2019 data on goods from Canada and Mexico subject to part 102 rules for marking and that involve case-by-case adjudication for the non-preferential purposes of Section 201 and Section 232 duties and quotas, as well as the 38,832 importers who entered non-NAFTA preference goods from Canada and Mexico in FY 2019, CBP estimates that this rulemaking could affect between approximately 10,000 and 38,832 unique importers entering goods from the USMCA countries of Canada and Mexico each year. These importers would range from individual buyers (households or businesses) to large businesses across many different industries. Some industries and businesses may be more affected than others, depending on the ultimate country of origin determination and the classification of the merchandise being imported. The exact number of small importers affected by this rulemaking is unknown. However, according to a separate CBP analysis, the vast majority of importers are classified as small businesses. Because this rulemaking would directly affect importers and the vast majority of importers are small businesses, the rule could affect a substantial number of small entities.

The Regulatory Flexibility Act does not specify thresholds for economic significance but instead gives agencies flexibility to determine the appropriate threshold for a particular rule. Changing from case-by-case adjudications for other non-preferential origin purposes to part 102's tariff shift rules may impose some costs on importers with goods from Canada and Mexico. Importers who switch from using these two determination methods for non-preferential origin purposes to just the part 102 rules with this rulemaking may incur some one-time, minor costs to adjust their inventory tracking systems and Automated Commercial Environment entries to reflect the part 102-based non-marking-related, non-preferential country of origin for their goods. As an example, if an importer has an inventory tracking system that identifies the non-marking, non-preferential country of origin for its goods from Canada and Mexico based on existing case-by-case adjudication rules, with this rulemaking, that importer may need to revise the system to ensure that it identifies the goods based on the part 102 rules if the importer is importing goods subject to inconsistent origin determinations under the current practice. These

determinations should match the country of origin determinations that importers must already make for non-preferential marking purposes. According to representatives of the Commercial Operations Advisory Committee, these costs will be approximately $2,000-$3,000 per company.

Some importers who source the same goods from Canada or Mexico and another country may also need to adjust their business practices to ensure that they properly use the part 102 rules for customs non-preferential country of origin purposes when the good is sourced from Canada or Mexico once this rulemaking is in effect and use case-by-case adjudications for any goods sourced outside of Canada or Mexico that are subject to non-preferential treatment. According to representatives of the Commercial Operations Advisory Committee, these costs are minimal. For mid to large companies, these costs would total at most $2,000 to $3,000 (note that this is in addition to a similar estimate above). Smaller companies would have smaller costs.

CBP does not believe that these costs, a maximum of $4,000–$6,000, would have a significant economic impact on importers, including those considered small under the RFA. The annual value of importations average $4 million per importer, so these one-time costs make up less than one percent of the value of their importations. In addition, trade members have expressed that the non-monetized benefits of operating under a single set of rules well outweigh the minimal costs to comply with this rulemaking. Therefore, CBP certifies that this rulemaking, if finalized, will not have a significant economic impact on a substantial number of small entities. CBP welcomes comments on this conclusion.

C. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) requires that CBP consider the impact of paperwork and other information collection burdens imposed on the public. CBP has determined that there is no collection of information that requires a control number assigned by the Office of Management and Budget.

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 related to certain customs revenue functions.

List of Subjects

19 CFR Part 102

Canada, Customs duties and inspections, Imports, Mexico, Reporting and recordkeeping requirements, Trade agreements.

19 CFR Part 177

Administrative practice and procedure, Customs duties and inspection, Government procurement, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

For the reasons given above, it is proposed to amend parts 102 and 177 as set forth below:

PART 102—RULES OF ORIGIN

■ 1. The general authority citation for part 102 is revised to read as follows:

Authority: 19 U.S.C. 66, 1202 (General Note 3(i), Harmonized Tariff Schedule of the United States), 1624, 3592, 4513.

■ 2. Amend § 102.0 by revising the second sentence and adding four sentences after the second sentence to read as follows:

§ 102.0 Scope.

* * * For goods imported into the United States from Canada or Mexico and entered for consumption, or withdrawn from warehouse for consumption, before [EFFECTIVE DATE OF FINAL RULE], these specific purposes are: country of origin marking; determining the rate of duty and staging category applicable to originating textile and apparel products as set out in Section 2 (Tariff Elimination) of Annex 300–B (Textile and Apparel Goods) under NAFTA; and determining the rate of duty and staging category applicable to an originating good as set out in Annex 302.2 (Tariff Elimination) under NAFTA. CBP will determine the country of origin for all non-preferential purposes for goods imported into the United States from Canada or Mexico and entered for consumption, or withdrawn from warehouse for consumption, on or after [EFFECTIVE DATE OF FINAL RULE], using the rules set forth in §§ 102.1 through 102.18 and 102.20. The rules in this part regarding goods wholly obtained or produced in a country are intended to apply consistently for all such purposes. The rules in this part which determine when a good becomes a new and different article or a new or different article of

commerce as a result of manufacturing processes in a given country are also intended to apply consistently for all purposes where this requirement exists for "country of origin" or "product of" determinations made by CBP for goods imported from Canada or Mexico. The rules in this part do not affect similar determinations made by other agencies, such as the Department of Commerce's scope determinations in antidumping or countervailing duty proceedings (see 19 CFR 351.225). * * *

PART 177—ADMINISTRATIVE RULINGS

■ 3. The general authority citation for part 177 is revised 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, 2515.

■ 4. Amend § 177.22 by adding a sentence to the end of paragraph (a) to read as follows:

§ 177.22 Definitions.

(a) * * * (For goods imported into the United States after processing in Canada or Mexico and entered for consumption, or withdrawn from warehouse for consumption, on or after [EFFECTIVE DATE OF FINAL RULE], substantial transformation will be determined using the rules set forth in §§ 102.1 through 102.18 and 102.20.)

* * * * *

Troy A. Miller, the Senior Official Performing the Duties of the Commissioner, having reviewed and approved this document, is delegating the authority to electronically sign this document to Robert F. Altneu, who is the Director of the Regulations and Disclosure Law Division for CBP, for purposes of publication in the **Federal Register**.

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

Approved:

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

[Published in the Federal Register, July 6, 2021 (85 FR 35422)]

HARBOR MAINTENANCE FEE

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

DATES: Comments are encouraged and must be submitted (no later than September 7, 2021) 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 1651–0055 in the subject line and the agency name. Please use the following method to submit comments:

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

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

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: Harbor Maintenance Fee.

OMB Number: 1651–0055.

Form Number: CBP Form 349 and 350.

Current Actions: Extension with an increase in burden hours.

Type of Review: Extension (with change).

Affected Public: Businesses.

Abstract: The Harbor Maintenance Fee (HMF) and Trust Fund is used for the operation and maintenance of certain U.S. channels and harbors by the Army Corps of Engineers. U.S. Customs and Border Protection (CBP) is required to collect the HMF from importers, domestic shippers, and passenger vessel operators using federal navigation projects. *See* 19 CFR 24.24. Commercial cargo loaded on or unloaded from a commercial vessel is subject to a port use fee of 0.125 percent of its value if the loading or unloading occurs at a port that has been designated by the Army Corps of Engineers. 19 CFR 24.24(a). The HMF also applies to the total ticket value of embarking and disembarking passengers and on cargo admissions into a Foreign Trade Zone (FTZ). *See* 19 CFR 24.24(e)(2)(iii).

CBP Form 349, *Harbor Maintenance Fee Quarterly Summary Report,* and CBP Form 350, *Harbor Maintenance Fee Amended Quarterly Summary Report* are completed by domestic shippers, foreign trade zone applicants, and passenger vessel operators and submitted with payment to CBP. 19 CFR 24.24(e).

CBP uses the information collected on CBP Forms 349 and 350 to verify that the fee collected is timely and accurately submitted. These forms are authorized by the Water Resources Development Act of 1986 (26 U.S.C. 4461, *et seq.*) and provided for by 19 CFR 24.24, which also includes the list of designated ports. CBP Forms 349 and 350 are accessible at *http://www.cbp.gov/newsroom/publications/forms* or they may be completed and filed electronically at *www.pay.gov.*

Type of Information Collection: CBP Form 349.

Estimated Number of Respondents: 846.

Estimated Number of Annual Responses per Respondent: 4.

Estimated Number of Total Annual Responses: 3,384.

Estimated Time per Response: 0.5 hours.

Estimated Total Annual Burden Hours: 1692.

Type of Information Collection: CBP Form 350.

Estimated Number of Respondents: 23.

Estimated Number of Annual Responses per Respondent: 4.

Estimated Number of Total Annual Responses: 92.

Estimated Time per Response: 0.5 hours.

Estimated Total Annual Burden Hours: 46.

Type of Information Collection: Record Keeping.

Estimated Number of Respondents: 869.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 869.

Estimated Time per Response: 0.166 hours.

Estimated Total Annual Burden Hours: 144.

Dated: July 1, 2021.

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

[Published in the Federal Register, July 7, 2021 (85 FR 35816)]

GUARANTEE OF PAYMENT

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.

DATES: Comments are encouraged and must be submitted (no later than September 7, 2021) 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 1651–0127 in the subject line and the agency name. Please use the following method to submit comments:

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

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

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: Guarantee of Payment.

OMB Number: 1651–0127.

Form Number: CBP Form I–510.

Current Actions: Extension without Change.

Type of Review: Extension (without change).

Affected Public: Businesses.

Abstract: Section 253 of the Immigration and Nationality Act (INA), 8 U.S.C. 1283, requires that an alien crewman found to be or suspected of having any of the diseases named in section 255 of the INA must be hospitalized or otherwise treated, with the associated expenses paid by the carrier. The owner, agent, consignee, commanding officer, or master of the vessel or aircraft must complete CBP Form I–510, *Guarantee of Payment,* that certifies the guarantee of payment for medical and other related expenses required by section 253 of the INA. No vessel or aircraft can be granted clearance until such expenses are paid or the payment is appropriately guaranteed.

CBP Form I–510 collects information such as the name of the owner, agent, commander officer or master of the vessel or aircraft; the name of the crewmember; the port of arrival; and signature of the guarantor. This form is provided for by 8 CFR 253.1(a) and is accessible at: *https://www.cbp.gov/newsroom/publications/forms?title=I-510*.

Type of Information Collection: CBP Form I–510.

Estimated Number of Respondents: 100.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 100.

Estimated Time per Response: 0.083 hours.

Estimated Total Annual Burden Hours: 8.

Dated: July 1, 2021.

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

[Published in the Federal Register, July 7, 2021 (85 FR 35817)]

WITHDRAWAL OF PROPOSED REVOCATION OF ONE RULING LETTER AND PROPOSED REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF AN AIR SPRING

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

ACTION: Withdrawal of notice of proposed revocation of one ruling letter and proposed revocation of treatment relating to tariff classification of an air spring.

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 withdrawing its proposed revocation of a ruling concerning the tariff classification of an air spring under the Harmonized Tariff Schedule of the United States (HTSUS). CBP is also withdrawing its proposal to revoke any treatment previously accorded by it to substantially identical transactions. Notice of the proposed revocation was published on April 14, 2021, in the *Customs Bulletin*, Volume 55, No. 14. Two comments were received, one in opposition to the proposed revocation and one in support. After further review, we have determined that revocation of the subject ruling as proposed is not appropriate.

EFFECTIVE DATE: This action is effective immediately.

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

SUPPLEMENTARY INFORMATION:

Background

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

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

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. §1625(c)(1)), as amended by section 623 of Title VI, a notice was published in the *Customs Bulletin*, Vol. 55, No. 14, on April 14, 2021, proposing to revoke New York Ruling Letter (NY) R01224, dated January 18, 2005, with respect to the tariff classification of one of the articles at issue in that ruling (Part 18–45068–000, an air spring designed to dampen road vibrations and shocks transmitted from the truck frame to the passenger compartment) under heading 8708 of the Harmonized Tariff Schedule of the United States (HTSUS), specifically subheading 8708.99.55, HTSUS, which provides for "[P]arts and accessories of the motor vehicles of headings 8701 to 8705: other parts and accessories: other: other: other." In the April 14, 2021 *Customs Bulletin* notice, we proposed to classify an air spring in heading 4016, HTSUS, specifically subheading 4016.99.55, HTSUS, which provides for "[O]ther articles of vulcanized rubber other than hard rubber: other: other: other: other." Upon reconsideration of the matter during the comment period, we have determined that no revocation is appropriate and the subject air spring is properly classified in subheading 8708.99.55, HTSUS, pursuant to General Rule of Interpretation 1.

Pursuant to 19 U.S.C. §1625(c), and 19 C.F.R. §177.7(a), which provides that CBP will not issue a ruling where it appears contrary to the sound administration of the customs and related laws to do so, CBP is withdrawing its proposed revocation of NY R01224.

Dated:

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

RECEIPT OF APPLICATION FOR "LEVER-RULE" PROTECTION

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

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

SUMMARY: Pursuant to 19 CFR 133.2(f), this notice advises interested parties that CBP has received an application from The Proctor & Gamble Company seeking "Lever-Rule" protection for the federally registered and recorded "VICKS" trademark.

FOR FURTHER INFORMATION CONTACT: Tracie Siddiqui, Intellectual Property Rights Branch, Regulations & Rulings, Tracie.R.Siddiqui@cbp.dhs.gov.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to 19 CFR 133.2(f), this notice advises interested parties that CBP has received an application from The Proctor & Gamble Company seeking "Lever-Rule" protection. Protection is sought against importations of foreign made antitussive drug products intended for sale outside the United States that bear the recorded "VICKS" mark, U.S. Trademark Registration No. 867,818 / CBP Recordation No. TMK 89–00470. In the event that CBP determines that the antitussive drug products under consideration are physically and materially different from the antitussive drug products authorized for sale in the United States, CBP will publish a notice in the Customs Bulletin, pursuant 19 CFR 133.2(f), indicating that the above-referenced trademark is entitled to "Lever-Rule" protection with respect to those physically and materially different antitussive drug products.

Dated:

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

PROPOSED REVOCATION OF FIVE RULING LETTERS AND PROPOSED REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF SELF-WRAPPING TUBULAR PROTECTIVE SLEEVE

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

ACTION: Notice of proposed revocation of five ruling letters and proposed revocation of treatment relating to the tariff classification of self-wrapping tubular protective sleeve.

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 five ruling letters concerning tariff classification of self-wrapping tubular protective sleeve 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 August 20, 2021.

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

FOR FURTHER INFORMATION CONTACT: John Rhea, Food, Textiles and Marking Branch, Regulations and Rulings, Office of Trade, at (202) 325–0035.

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 five ruling letters pertaining to the tariff classification of self-wrapping tubular protective sleeve. Although in this notice, CBP is specifically referring to New York Ruling Letter ("NY") N282623, dated February 17, 2017, NY N259747, dated May 13, 2016, NY N259737, dated May 13, 2016, NY N259736, dated December 24, 2014, and NY N259746, dated December 23, 2014 (Attachments A, B, C, D, and 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 rulings. 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 N282623, NY N259747, and NY N259737, CBP classified self-wrapping tubular protective sleeves in heading 5806, HTSUS, specifically in subheading 5806.32.2000, HTSUSA, which provides for "Narrow woven fabrics, other than goods of 5807, narrow fabrics consisting of warp without weft assembled by means of an adhesive (bolducs): Other woven fabrics: Of man-made fibers: Other." In NY N259736 and NY N259746, CBP classified self-wrapping tubular protective sleeves in heading 5808, HTSUS, specifically in subheading 5808.10.7000, HTSUSA, which provides for "Braids in the piece; ornamental trimmings in the piece, without embroidery, other than knitted or crocheted; tassels, pompons and similar articles: Braids in the piece: Other: Of cotton or man-made fibers." CBP has reviewed NY N282623, NY N259747, NY N259737, NY N259746, and NY N259746 and has determined the ruling letters to be in error. It is now CBP's position that self-wrapping tubular protective sleeves is properly classified, in heading 5911, HTSUS, specifically in subhead-

ing 5911.90.0080, HTSUSA, which provides for "Textile products and articles, for technical uses, specified in note 7 to this chapter: Other: Other."

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is proposing to revoke NY N282623, NY N259747, NY N259737, NY N259736, and NY N259746 and to revoke or modify any other ruling not specifically identified to reflect the analysis contained in the proposed Headquarters Ruling Letter ("HQ") H291579, 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:

For

CRAIG T. CLARK,
Director
Commercial and Trade Facilitation Division

Attachments

N259736
December 24, 2014
CLA-2–58:OT:RR:NC:N3:350
CATEGORY: Classification
TARIFF NO.: 5808.10.7000

MS. NORMA DIAZ CHB
ED GROUP & TFS BROKERS, INC.
8502 KILLAM INDUSTRIAL BOULEVARD
LAREDO, TX 78045

RE: The tariff classification of a polyester tubular braided protective sleeve from Mexico

DEAR MS. DIAZ:

In your letter dated November 12, 2014, you requested a tariff classification ruling on behalf of Vitrica S.A. de C.V., Mexico, DF. Two samples were provided.

VitriFlex™ Product Code NRPTCI (Noise Reduction Polyester Circular) / Noise Reduction Protective Wrap Product is a flexible tubular braided fabric without a core, said to be composed of a combination of polyester monofilament and multifilament strands. The monofilaments measure under one millimeter in cross-section and therefore meet the definition of textile as found in Note 1(g) to Section XI. According to the literature provided, this tubular braid is designed to bundle and to protect wire harnesses, cable assemblies, hoses and fluid-carrying tubing components. Applications include automotive, marine, aviation, wire harness and electronics. The product is available in nominal sizes of 1/4 inch to 1–1/2 inches in diameter, and is supplied on spools, in lengths of 25 to 100 feet; cut lengths are also available.

In your submission you suggest classification as a textile article for technical use under 5911.90.0080, Harmonized Tariff Schedule of the United States (HTSUS). You cite New York Ruling 890332 (September 20, 1993), noting changes in technology since that ruling was written. However, this product is not a textile fabric nor article of the type specified in Note 7 to Chapter 59, reproduced below:

> 7. Heading 5911 applies to the following goods, which do not fall in any other heading of section XI:
>
> (a) Textile products in the piece, cut to length or simply cut to rectangular (including square) shape (other than those having the character of the products of headings 5908 to 5910), the following only:
>
> (i) Textile fabrics, felt and felt-lined woven fabrics, coated, covered or laminated with rubber, leather or other material, of a kind used for card clothing, and similar fabrics of a kind used for other technical purposes, including narrow fabrics made of velvet impregnated with rubber, for covering weaving spindles (weaving beams);
>
> (ii) Bolting cloth;
>
> (iii) Straining cloth of a kind used in oil presses or the like, of textile material or of human hair;

(iv) Flat woven textile fabrics with multiple warp or weft, whether or not felted, impregnated or coated, of a kind used in machinery or for other technical purposes;

(v) Textile fabric reinforced with metal, of a kind used for technical purposes;

(vi) Cords, braids and the like, whether or not coated, impregnated or reinforced with metal, of a kind used in industry as packing or lubricating materials;

(b) Textile articles (other than those of headings 5908 to 5910) of a kind used for technical purposes (for example, textile fabrics and felts, endless or fitted with linking devices, of a kind used in papermaking or similar machines (for example, for pulp or asbestos-cement), gaskets, washers, polishing discs and other machinery parts).

The applicable subheading for VitriFlex™ Product Code NRPTCI (Noise Reduction Polyester Circular) / Noise Reduction Protective Wrap Product will be 5808.10.7000, HTSUS, which provides for Braids in the piece ... Of cotton or man-made fibers. The rate of duty will be 7.4 percent ad valorem.

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

This ruling is being issued under the assumption that the subject goods, in their condition as imported into the United States, conform to the facts and the description as set forth both in the ruling request and in this ruling. In the event that the facts or merchandise are modified in any way, you should bring this to the attention of Customs and you should resubmit for a new ruling in accordance with 19 CFR 177.2. You should also be aware that the material facts described in the foregoing ruling may be subject to periodic verification by Customs.

The samples will be retained in our official case file.

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 Maribeth Dunajski at maribeth.dunajski@cbp.dhs.gov.

Sincerely,

GWENN KLEIN KIRSCHNER
Director
National Commodity Specialist Division

N259737
May 13, 2016
CLA-2–58:OT:RR:NC:N3:350
CATEGORY: Classification
TARIFF NO.: 5806.32.2000

MS. NORMA DIAZ CHB
ED GROUP & TFS BROKERS, INC.
8502 KILLAM INDUSTRIAL BOULEVARD
LAREDO, TX 78045

RE: The tariff classification of a polyester triaxial weave tubular protective wrap sleeving from Mexico

DEAR MS. DIAZ:

In your letter dated November 12, 2014, you requested a tariff classification ruling on behalf of Vitrica SA de CV, Mexico, DF. A sample was provided.

VitriFlex-Tube ™ PT CI Protective Product (color black) is a lightweight flexible textile tube, said to be composed of polyester monofilament yarns. The monofilament yarns measure under one millimeter in cross-section and therefore meet the definition of textile as found in Note 1(g) to Section XI. According to the literature provided, this product is designed to bundle and protect wire harnesses, cable assemblies, hoses and fluid carrying tubing components. This product will be used in various industries, such as electronic, automotive, marine, and aviation. The product is available in nominal sizes ranging from 1/4 inch to 2 inches (6.3 to 50.8 mm) in diameter, and is supplied on spools or coils, in lengths of 25 to 100 feet; cut lengths are also available.

In your submission you suggest classification as a textile article for technical use under 5911.90.0080, Harmonized Tariff Schedule of the United States (HTSUS). You cite New York Ruling 890332 (September 20, 1993), but note changes in technology since that ruling was written. However, this product is not a textile fabric or article of the type specified in Note 7 to Chapter 59, reproduced below:

Heading 5911 applies to the following goods, which do not fall in any other heading of section XI:

> (a) Textile products in the piece, cut to length or simply cut to rectangular (including square) shape (other than those having the character of the products of headings 5908 to 5910), the following only:
>
> (i) Textile fabrics, felt and felt-lined woven fabrics, coated, covered or laminated with rubber, leather or other material, of a kind used for card clothing, and similar fabrics of a kind used for other technical purposes, including narrow fabrics made of velvet impregnated with rubber, for covering weaving spindles (weaving beams);
>
> (ii) Bolting cloth;
>
> (iii) Straining cloth of a kind used in oil presses or the like, of textile material or of human hair;
>
> (iv) Flat woven textile fabrics with multiple warp or weft, whether or not felted, impregnated or coated, of a kind used in machinery or for other technical purposes;
>
> (v) Textile fabric reinforced with metal, of a kind used for technical purposes;

> (vi) Cords, braids and the like, whether or not coated, impregnated or reinforced with metal, of a kind used in industry as packing or lubricating materials;
>
> (b) Textile articles (other than those of headings 5908 to 5910) of a kind used for technical purposes (for example, textile fabrics and felts, endless or fitted with linking devices, of a kind used in papermaking or similar machines (for example, for pulp or asbestos-cement), gaskets, washers, polishing discs and other machinery parts).

Alternatively, you suggest classification under subheading 5808.10, HTSUS, which provides for braids in the piece, other, of cotton or man-made fiber. However, U.S. Customs and Border Protection (CBP) laboratory analysis has determined that the sample, which weighs 359.7 g/m^2, is a tubular textile of triaxial weave, constructed of one monofilament polyester yarn and one multifilament polyester yarn. Therefore, the product at issue is a not braid of heading 5808, HTSUS.

Note 5(a) to Chapter 58, Harmonized Tariff Schedule of the United States (HTSUS), sets forth the meaning of "narrow woven fabrics" for the purposes of heading 5806. It states:

> Woven fabrics of a width not exceeding 30 cm, whether woven as such or cut from wider pieces, provided with selvages (woven, gummed or otherwise made) on both edges;

The Explanatory Notes (EN), which are the official interpretation of the Harmonized Code at the international level, further describe narrow woven fabrics and the selvages required for classification under heading 5806. Part (A)(2) of the EN for heading 5806 states in part:

> Strips of a width not exceeding 30 cm, cut (or slit) from wider pieces of warp and weft fabric (whether cut (or slit) longitudinally or on the cross) and provided with false selvedges on both edges, or a normal woven selvedge on one edge and a false selvedge on the other. False selvedges are designed to prevent unravelling of a piece of cut (or slit) fabric and may, for example, consist of a row of gauze stitches woven into the wider fabric before cutting (or slitting), of a simple hem, or they may be produced by gumming the edges of strips, or by fusing the edges in the case of certain ribbons of man-made fibers. They may also be created when a fabric is treated before it is cut into strips in a manner that prevents the edges of those strips from unravelling. No demarcation between the narrow fabric and its false selvedges need be evident in that case. Strips cut (or slit) from fabric but not provided with a selvedge, either real or false, on each edge, are excluded from this heading and classified with ordinary woven fabrics.

Since the product at issue is not of braided construction, but is of triaxial weave construction, and meets the definition of narrow woven fabric above, it would be considered a narrow woven fabric.

The applicable subheading for VitriFlex-Tube™ PT CI Protective Product will be 5806.32.2000, HTSUS, which provides for narrow woven fabrics, [...] other woven fabrics: of man-made fibers: other. The rate of duty will be 6.2 percent ad valorem.

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

This ruling is being issued under the assumption that the subject goods, in their condition as imported into the United States, conform to the facts and the description as set forth both in the ruling request and in this ruling. In the event that the facts or merchandise are modified in any way, you should bring this to the attention of Customs and you should resubmit for a new ruling in accordance with 19 CFR 177.2. You should also be aware that the material facts described in the foregoing ruling may be subject to periodic verification by Customs.

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 Maribeth Dunajski via email at maribeth.dunajski@cbp.dhs.gov.

Sincerely,

DEBORAH C. MARINUCCI
Acting Director
National Commodity Specialist Division

N259746
December 23, 2014
CLA-2–58:OT:RR:NC:N3:350
CATEGORY: Classification
TARIFF NO.: 5808.10.7000

MS. NORMA DIAZ CHB
ED GROUP & TFS BROKERS, INC.
8502 KILLAM INDUSTRIAL BOULEVARD
LAREDO, TX 78045

RE: The tariff classification of a nylon tubular braided protective sleeve from Mexico

DEAR MS. DIAZ:

In your letter dated November 12, 2014, you requested a tariff classification ruling on behalf of Vitrica S.A. de C.V., Mexico, DF. Two samples were provided.

VitriFlex™ Product Code NYL / Self-fitting Protective Oversleeve Product is a flexible tubular braid without a core, said to be composed of nylon monofilament yarns. The monofilaments measure under one millimeter in cross-section and therefore meet the definition of textile as found in Note 1(g) to Section XI. According to the literature provided, this tubular braid is used to protect cable assemblies, hoses and wire harnesses from chafing, cutting and abrasion. Applications include automotive, aerospace, computer, electronics, appliance, marine, etc. The product is available in nominal sizes of 1/8 inch to 2 inches in diameter, and is supplied on spools, in lengths of 25 to 100 feet; cut lengths are also available.

In your submission you suggest classification as a textile article for technical use under 5911.90.0080, Harmonized Tariff Schedule of the United States (HTSUS). You cite New York Ruling 890332 (September 20, 1993), noting changes in technology since that ruling was written. However, this product is not a textile fabric or article of the type specified in Note 7 to Chapter 59, reproduced below:

> 7. Heading 5911 applies to the following goods, which do not fall in any other heading of section XI:
>
> (a) Textile products in the piece, cut to length or simply cut to rectangular (including square) shape (other than those having the character of the products of headings 5908 to 5910), the following only:
>
> (i) Textile fabrics, felt and felt-lined woven fabrics, coated, covered or laminated with rubber, leather or other material, of a kind used for card clothing, and similar fabrics of a kind used for other technical purposes, including narrow fabrics made of velvet impregnated with rubber, for covering weaving spindles (weaving beams);
>
> (ii) Bolting cloth;
>
> (iii) Straining cloth of a kind used in oil presses or the like, of textile material or of human hair;
>
> (iv) Flat woven textile fabrics with multiple warp or weft, whether or not felted, impregnated or coated, of a kind used in machinery or for other technical purposes;

(v) Textile fabric reinforced with metal, of a kind used for technical purposes;

(vi) Cords, braids and the like, whether or not coated, impregnated or reinforced with metal, of a kind used in industry as packing or lubricating materials;

(b) Textile articles (other than those of headings 5908 to 5910) of a kind used for technical purposes (for example, textile fabrics and felts, endless or fitted with linking devices, of a kind used in papermaking or similar machines (for example, for pulp or asbestos-cement), gaskets, washers, polishing discs and other machinery parts).

The applicable subheading for VitriFlex™ Product Code NYL / Self-fitting Protective Oversleeve Product will be 5808.10.7000, HTSUS, which provides for Braids in the piece ... Of cotton or man-made fibers. The rate of duty will be 7.4 percent ad valorem.

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

The samples will be retained in our official case file.

This ruling is being issued under the assumption that the subject goods, in their condition as imported into the United States, conform to the facts and the description as set forth both in the ruling request and in this ruling. In the event that the facts or merchandise are modified in any way, you should bring this to the attention of Customs and you should resubmit for a new ruling in accordance with 19 CFR 177.2. You should also be aware that the material facts described in the foregoing ruling may be subject to periodic verification by Customs.

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 Maribeth Dunajski at Maribeth.dunajski@cbp.dhs.gov.

Sincerely,

GWENN KLEIN KIRSCHNER
Director
National Commodity Specialist Division

N259747
May 13, 2016
CLA-2–58:OT:RR:NC:N3:350
CATEGORY: Classification
TARIFF NO.: 5806.32.2000

MS. NORMA DIAZ CHB
ED GROUP & TFS BROKERS, INC.
8502 KILLAM INDUSTRIAL BOULEVARD
LAREDO, TX 78045

RE: The tariff classification of a woven polyester open tubular protective wrap sleeving from Mexico

DEAR MS. DIAZ:

In your letter dated November 12, 2014, you requested a tariff classification ruling on behalf of Vitrica S.A. de C.V., Mexico, DF. A sample was provided.

VitriFlex-Tube Product Code: PTWWR / Protective Wrap Product (color black) is a flexible narrow woven fabric, rolled into an open tubular form, said to be composed of monofilament and multifilament polyester yarns. These yarns measure under one millimeter in cross-section and therefore meet the definition of textile as found in Note 1(g) to Section XI. According to the literature provided, this product is designed to bundle wire harnesses, cable assemblies, and hoses, and protect them from chafing, cutting and abrasion. Your correspondence states that the self-wrapping design minimizes the need for taping when conforming to parts. This product will be used in various industries, such as electronic, automotive, marine, aviation, etc. The product is available in nominal sizes from 5 to 38 millimeters, and is available on spools or as cut pieces.

In your submission you suggest classification as a textile article for technical use under 5911.90.0080, Harmonized Tariff Schedule of the United States (HTSUS). You cite New York Ruling 890332 (September 20, 1993), but note changes in technology since that ruling was written. However, this product is not a textile fabric or article of the type specified in Note 7 to Chapter 59, reproduced below:

Heading 5911 applies to the following goods, which do not fall in any other heading of section XI:

> (a) Textile products in the piece, cut to length or simply cut to rectangular (including square) shape (other than those having the character of the products of headings 5908 to 5910), the following only:
>
> (i) Textile fabrics, felt and felt-lined woven fabrics, coated, covered or laminated with rubber, leather or other material, of a kind used for card clothing, and similar fabrics of a kind used for other technical purposes, including narrow fabrics made of velvet impregnated with rubber, for covering weaving spindles (weaving beams);
>
> (ii) Bolting cloth;
>
> (iii) Straining cloth of a kind used in oil presses or the like, of textile material or of human hair;
>
> (iv) Flat woven textile fabrics with multiple warp or weft, whether or not felted, impregnated or coated, of a kind used in machinery or for other technical purposes;
>
> (v) Textile fabric reinforced with metal, of a kind used for technical purposes;

> (vi) Cords, braids and the like, whether or not coated, impregnated or reinforced with metal, of a kind used in industry as packing or lubricating materials;
>
> (b) Textile articles (other than those of headings 5908 to 5910) of a kind used for technical purposes (for example, textile fabrics and felts, endless or fitted with linking devices, of a kind used in papermaking or similar machines (for example, for pulp or asbestos-cement), gaskets, washers, polishing discs and other machinery parts).

Alternatively, in your letter you indicate that the product should be classified under subheading 5808.10, HTSUS, which provides for braids in the piece, other, of cotton or man-made fiber. However, U.S. Customs and Border Protection (CBP) laboratory analysis has determined that the sample is an open tubular textile fabric of twill weave construction, constructed of one monofilament polyester yarn and one multifilament polyester yarn, weighing 371.5 g/m^2.

Note 5(a) to Chapter 58, HTSUS, sets forth the meaning of "narrow woven fabrics" for the purposes of heading 5806. It states:

> Woven fabrics of a width not exceeding 30 cm, whether woven as such or cut from wider pieces, provided with selvages (woven, gummed or otherwise made) on both edges;

The Explanatory Notes (EN), which are the official interpretation of the Harmonized Code at the international level, further describe narrow woven fabrics and the selvages required for classification under heading 5806. Part (A)(2) of the EN for heading 5806 states in part:

> Strips of a width not exceeding 30 cm, cut (or slit) from wider pieces of warp and weft fabric (whether cut (or slit) longitudinally or on the cross) and provided with false selvedges on both edges, or a normal woven selvedge on one edge and a false selvedge on the other. False selvedges are designed to prevent unravelling of a piece of cut (or slit) fabric and may, for example, consist of a row of gauze stitches woven into the wider fabric before cutting (or slitting), of a simple hem, or they may be produced by gumming the edges of strips, or by fusing the edges in the case of certain ribbons of man-made fibers. They may also be created when a fabric is treated before it is cut into strips in a manner that prevents the edges of those strips from unravelling. No demarcation between the narrow fabric and its false selvedges need be evident in that case. Strips cut (or slit) from fabric but not provided with a selvedge, either real or false, on each edge, are excluded from this heading and classified with ordinary woven fabrics.

Therefore, since the product at issue is not of braided construction, but is of twill weave construction and does meet the definition of narrow woven fabric above, it would be considered a narrow woven fabric.

The applicable subheading for VitriFlex-Tube Product Code: PTWWR / Protective Wrap Product will be 5806.32.2000, HTSUS, which provides for narrow woven fabrics [...] other woven fabrics: of man-made fibers: other. The rate of duty will be 6.2 percent ad valorem.

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

This ruling is being issued under the assumption that the subject goods, in their condition as imported into the United States, conform to the facts and the description as set forth both in the ruling request and in this ruling. In the event that the facts or merchandise are modified in any way, you should bring this to the attention of Customs and you should resubmit for a new ruling in accordance with 19 CFR 177.2. You should also be aware that the material facts described in the foregoing ruling may be subject to periodic verification by Customs.

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 Maribeth Dunajski via email at maribeth.dunajski@cbp.dhs.gov.

Sincerely,

DEBORAH C. MARINUCCI
Acting Director
National Commodity Specialist Division

N282623
February 17, 2017
CLA-2–58:OT:RR:NC:N3:350
CATEGORY: Classification
TARIFF NO.: 5806.32.2000

MR. SYDNEY H. MINTZER
MAYER BROWN LLP
1999 K STREET, NW
WASHINGTON, DC 20006–1101

RE: The tariff classification of narrow woven polyester open tubular self-wrapping protective sleeving from various countries

DEAR MR. MINTZER:

In your letter dated January 18, 2017, you requested a tariff classification ruling on behalf of Federal Mogul Corporation. Samples were previously provided.

TwistTube®, standard color black (samples and literature provided are for style TwistTube® 2420), is a flexible narrow woven fabric, approximately five centimeters (cm) in width in the open flattened state, permanently rolled into an open tubular form, and said to be composed of polyester monofilament and multifilament yarns. These yarns measure under one millimeter (mm) in cross-section and therefore the woven fabric meets the definition of textile as found in Note 1(g) to Section XI. According to the literature provided, "TwistTube® 2420 is a self-wrapping sleeve designed to provide abrasion protection and acoustical noise suppression... [It] maintains a circular profile when flexed. Its self-wrapping design allows for quick and easy bundling of wire and cable assemblies. The unique design easily allows for breakouts and can be installed over completed assemblies." Typical applications include instrument panel harnesses, engine compartment harnesses, and tubing, hose and cable assemblies, protecting them from chafing, cutting and abrasion. The product is available in a variety of sizes and lengths, with nominal inner diameter sizes ranging in size from 5 to 38 mm, and in bulk lengths or cut to specification.

In your submission and previous contact you suggest classification under subheading 8708.99.8180, Harmonized Tariff Schedule of the United States (HTSUS), as a part solely or principally used with motor vehicles.

The General Rules of Interpretation (GRIs) govern classification of goods under the HTSUS. GRI 1 provides that classification shall be determined according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied. The Explanatory Notes (ENs) to the Harmonized Commodity Description and Coding System, which represent the official interpretation of the Harmonized System at the international level, facilitate classification under the HTSUS by offering guidance in understanding the scope of the headings and GRIs.

The E.N. for heading 8708 state in pertinent part:

> This heading covers parts and accessories of the motor vehicles of headings 8701 to 8705, provided the parts and accessories fulfill both of the following conditions:

(i) They must be identifiable as being suitable for use solely or principally with the above-mentioned vehicles.

However, the term "accessory" is not defined in either the tariff schedule or the ENs. In Headquarters Ruling Letter (HQ) 950525, dated February 7, 1992, Customs stated:

> A part is generally an article which is an integral, constituent or component part, without which the article to which it is joined could not function. An accessory is generally a nonessential but useful item that has a supplementary function to that of the larger article to which the accessory is attached. An accessory must be identifiable as being intended solely or principally for use with a specific article. Accessories are of secondary or subordinate importance, not essential in and of themselves. In addition, they generally contribute to the effectiveness of the principal article (e.g., facilitate the use or handling of the principal article, widen the range of its uses, or improve its operation).

The Twist-Tube® is not a constituent or component part of the vehicle. The tube is not a necessary part without which the vehicle cannot function. The tube is also not an accessory for the vehicle. It does not contribute to the effectiveness of the principal article (e.g., facilitate the use or handling of the vehicle, widen the range of its uses, or improves its operation). As such, the Twist-Tube® is precluded from classification in heading 8708.

Alternatively, in your letter you suggest classification as a textile article for technical use under heading 5911, HTSUS. However, this product is not a textile article as defined by Note 7 to Section XI, HTSUS, reproduced below:

7. For the purposes of this section, the expression "made up" means:

(a) Cut otherwise than into squares or rectangles;

(b) Produced in the finished state, ready for use (or merely needing separation by cutting dividing threads) without sewing or other working (for example, certain dusters, towels, tablecloths, scarf squares, blankets);

(c) Cut to size and with at least one heat-sealed edge with a visibly tapered or compressed border and the other edges treated as described in any other subparagraph of this note, but excluding fabrics the cut edges of which have been prevented from unraveling by hot cutting or by other simple means;

(d) Hemmed or with rolled edges, or with a knotted fringe at any of the edges, but excluding fabrics the cut edges of which have been prevented from unraveling by whipping or by other simple means;

(e) Cut to size and having undergone a process of drawn thread work;

(f) Assembled by sewing, gumming or otherwise (other than piece goods consisting of two or more lengths of identical material joined end to end and piece goods composed of two or more textiles assembled in layers, whether or not padded); or

(g) Knitted or crocheted to shape, whether presented as separate items or in the form of a number of items in the length.

Additionally, this product does not meet the definitions of textile articles for technical use of the type specified in Note 7 to Chapter 59, HTSUS, reproduced below:

Heading 5911 applies to the following goods, which do not fall in any other heading of section XI:

(a) Textile products in the piece, cut to length or simply cut to rectangular (including square) shape (other than those having the character of the products of headings 5908 to 5910), the following only:

(i) Textile fabrics, felt and felt-lined woven fabrics, coated, covered or laminated with rubber, leather or other material, of a kind used for card clothing, and similar fabrics of a kind used for other technical purposes, including narrow fabrics made of velvet impregnated with rubber, for covering weaving spindles (weaving beams);

(ii) Bolting cloth;

(iii) Straining cloth of a kind used in oil presses or the like, of textile material or of human hair;

(iv) Flat woven textile fabrics with multiple warp or weft, whether or not felted, impregnated or coated, of a kind used in machinery or for other technical purposes;

(v) Textile fabric reinforced with metal, of a kind used for technical purposes;

(vi) Cords, braids and the like, whether or not coated, impregnated or reinforced with metal, of a kind used in industry as packing or lubricating materials;

(b) Textile articles (other than those of headings 5908 to 5910) of a kind used for technical purposes (for example, textile fabrics and felts, endless or fitted with linking devices, of a kind used in papermaking or similar machines (for example, for pulp or asbestos-cement), gaskets, washers, polishing discs and other machinery parts).

Note 5(a) to Chapter 58, HTSUS, sets forth the meaning of "narrow woven fabrics" for the purposes of heading 5806. It states:

Woven fabrics of a width not exceeding 30 cm, whether woven as such or cut from wider pieces, provided with selvages (woven, gummed or otherwise made) on both edges;

The Explanatory Notes (EN) further describe narrow woven fabrics and the selvages required for classification under heading 5806. Part (A)(2) of the EN for heading 5806 states in part:

Strips of a width not exceeding 30 cm, cut (or slit) from wider pieces of warp and weft fabric (whether cut (or slit) longitudinally or on the cross) and provided with false selvedges on both edges, or a normal woven selvedge on one edge and a false selvedge on the other. False selvedges are designed to prevent unravelling of a piece of cut (or slit) fabric and may, for example, consist of a row of gauze stitches woven into the wider fabric before cutting (or slitting), of a simple hem, or they may be produced by gumming the edges of strips, or by fusing the edges in the case of certain ribbons of man-made fibers. They may also be created when a fabric is treated before it is cut into strips in a manner that prevents the edges of those strips from unravelling. No demarcation between the narrow fabric and its false selvedges need be evident in that case. Strips cut (or slit)

> from fabric but not provided with a selvedge, either real or false, on each edge, are excluded from this heading and classified with ordinary woven fabrics.

Therefore, since the product at issue is of woven construction, with two selvages, and measures less than 30 cm in width, it meets the definition of narrow woven fabrics above, and would therefore be considered a narrow woven fabric.

The applicable subheading for TwistTube® will be 5806.32.2000, HTSUS, which provides for narrow woven fabrics [...] other woven fabrics: of man-made fibers: other. The rate of duty will be 6.2 percent ad valorem.

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

This ruling is being issued under the assumption that the subject goods, in their condition as imported into the United States, conform to the facts and the description as set forth both in the ruling request and in this ruling. In the event that the facts or merchandise are modified in any way, you should bring this to the attention of Customs and you should resubmit for a new ruling in accordance with 19 CFR 177.2. You should also be aware that the material facts described in the foregoing ruling may be subject to periodic verification by Customs.

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 Maribeth Dunajski via email at maribeth.dunajski@cbp.dhs.gov.

Sincerely,

STEVEN A. MACK
Director
National Commodity Specialist Division

HQ H291579
OT:RR:CTF:TCM H291579 JER
CATEGORY: Classification
TARIFF NO.: 5911.90.00

SYDNEY MINTZER
MAYER BROWN, LLP
1999 K ST., NW
WASHINGTON, DC 20006

RE: Revocation of NY N282623; Tariff Classification of Textile Tubular Sleeves Used to Cover Electrical Wiring Harnesses

DEAR MR. MINTZER:

This is in response to your request of October 20, 2017, on behalf of your client Federal Mogul Corporation ("FMC"), for reconsideration of New York Ruling Letter ("NY") N282623, issued on February 17, 2017, concerning the classification of certain merchandise under the Harmonized Tariff Schedule of the United States ("HTSUS"). In NY N282623, U.S. Customs and Border Protection ("CBP") classified the imported tubular sleeve, known as the Twist-Tube, under heading 5806, HTSUS. In particular, the Twist-Tube was classified under subheading 5806.32.2000, HTSUSA, which provides for: "Narrow woven fabrics, other than goods of heading 5807; narrow woven fabrics consisting of warp without weft assembled by means of an adhesive (bolducs): Other woven fabrics: Of man-made fibers: Other." It is your contention that heading 5806, HTSUS, is not the proper heading and that it does not describe the merchandise at issue. After reviewing NY N282623, we have found that ruling to be in error. For the reasons set forth in this ruling, we are revoking NY N282623.

FACTS:

In NY N282623, CBP described the woven fabric as follows:

> TwistTube®, standard color black (samples and literature provided are for style TwistTube® 2420), is a flexible narrow woven fabric, approximately five centimeters (cm) in width in the open flattened state, permanently rolled into an open tubular form, and said to be composed of polyester monofilament and multifilament yarns. These yarns measure under one millimeter (mm) in cross-section...[.] According to the literature provided, "TwistTube® 2420 is a self-wrapping sleeve designed to provide abrasion protection and acoustical noise suppression... [It] maintains a circular profile when flexed. Its self-wrapping design allows for quick and easy bundling of wire and cable assemblies. The unique design easily allows for breakouts and can be installed over completed assemblies." Typical applications include instrument panel harnesses, engine compartment harnesses, and tubing, hose and cable assemblies, protecting them from chafing, cutting and abrasion. The product is available in a variety of sizes and lengths, with nominal inner diameter sizes ranging in size from 5 to 38 mm, and in bulk lengths or cut to specification.

In the submission dated October 20, 2017, you described the subject Twist-Tube as follows:

> The Twist-Tube is woven of both monofilament and multifilament polyester yarns. The two yarns are combined together on a large spool called a beam using a machine called a warper. The beam is then transported to

the loom (weaving machine). The monofilament yarn is introduced perpendicular to the multifilament yarn by the loom in the weaving process. It is produced as a flat woven textile fabric with multiple warp or weft; having a plain weave with dual fill and dual pick. The dual fill means there are two (multiple) weft yarns being inserted and interlacing with each individual warp yarn. The dual pick is a standard of narrow fabric weaving whereby each fill (weft) yarn is inserted back and forth across the fabric structure. Each warp yarn is interlaced by four ends of weft yarn. The finished tape (called feedstock) is collected and then run through a heating process to create a tube shape. The tube is then cut to length.

In a supplemental submission dated April 1, 2019, FCM provided photographs of the installed versions of the Twist-Tube, along with information pertaining to its installation. The April 1, 2019 submission along with the FMC website further described the Twist-Tube as being principally used to cover wiring assemblies in automobiles and light trucks. It is specifically designed as an original equipment manufacturer ("OEM") certified part and is used by car manufacturers to satisfy National Highway Traffic Safety Administration ("NHTSA") regulations governing flammability. The Twist-Tube is also said to have the capacity for heat prevention, and to also prevent abrasion while enhancing noise suppression.

CBP Lab Report NY20171862, dated February 2, 2018, described the subject merchandise as a narrow woven fabric with complete selveges on both edges (one woven selvege on one edge and one chain knit stich on the other edge). It was composed of two yarns (one polyester monofilament and one polyester multifilament) and measured 6.5 centimeters in width in the open flattened state.

ISSUE:

Whether the subject merchandise is a narrow woven fabric of heading 5806, HTSUS, or a textile fabric intended and designed for technical purposes and therefore classifiable under heading 5911, HTSUS.

LAW AND ANALYSIS:

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

The HTSUS provisions under consideration are as follows:

5806	Narrow woven fabrics, other than those goods of heading 5807; narrow fabrics consisting of warp without weft assembled by means of an adhesive (bolducs):
	Other woven fabrics:
5806.32	Of man-made fibers:
5806.32.2000	Other...

* * *

5911		Textile products and articles, for technical uses, specified in note 7 to this chapter:
		* * *
5911.90.00		Other...
		* * *

Section XI, Note 7 provides that:

7. For the purposes of this section, the expression "*made up*" means:

(a) Cut otherwise than into squares or rectangles;

(b) Produced in the finished state, ready for use (or merely needing separation by cutting dividing threads) without sewing or other working (for example, certain dusters, towels, tablecloths, scarf squares, blankets);

(c) Cut to size and with at least one heat-sealed edge with a visibly tapered or compressed border and the other edges treated as described in any other subparagraph of this note, but excluding fabrics the cut edges of which have been prevented from unraveling by hot cutting or by other simple means;

(d) Hemmed or with rolled edges, or with a knotted fringe at any of the edges, but excluding fabrics the cut edges of which have been prevented from unraveling by whipping or by other simple means;

(f) Assembled by sewing, gumming or otherwise (other than piece goods consisting of two or more lengths of identical material joined end to end and piece goods composed of two or more textiles assembled in layers, whether or not padded); or

(g) Knitted or crocheted to shape, whether presented as separate items or in the form of a number of items in the length.

Note 5(a) to Chapter 58 provides as follows:

For the purposes of heading 5806, the expression "*narrow woven fabrics*" means:

(a) Woven fabrics of a width not exceeding 30 cm, whether woven as such or cut from wider pieces, provided with selvages (woven, gummed or otherwise made) on both edges;

* * *

Note 1 to Chapter 59 provides as follows:

Except where the context otherwise requires, for purposes of this chapter the expression "*textile fabrics*" applies only to woven fabrics of chapters 50 to 55 and headings 5803 and 5806, the braids and ornamental trimmings in the piece of heading 5808 and the knitted or crocheted fabrics of headings 6002 to 6006.

Note 7 to Chapter 59 provides as follows:

Heading 5911 applies to the following goods, which do not fall in any other heading of section XI:

(a) Textile products in the piece, cut to length or simply cut to rectangular (including square) shape (other than those having the character of the products of headings 5908 to 5910), the following only:

(i) Textile fabrics, felt and felt-lined woven fabrics, coated, covered or laminated with rubber, leather or other material, of a kind used for card clothing, and similar fabrics of a kind used for other technical purposes;

(ii) Bolting cloth;

(iii) Straining cloth of a kind used in oil presses or the like, of textile material or of human hair;

(iv) Flat woven textile fabric with multiple warp or weft, whether or not felted, impregnated or coated, of a kind used in machinery or for other technical purposes;

(v) Textile fabric reinforced with metal, of a kind used for technical purposes;

(vi) Cords, braids and the like, whether or not coated, impregnated or reinforced with metal, of a kind used in industry as packing or lubricating materials; (b) Textile articles (other than those of headings 5908 to 5910) of a kind used for technical purposes (for example, textile fabrics and felts, endless or fitted with linking devices, of a kind used in papermaking or similar machines (for example, for pulp or asbestos-cement), gaskets, washers, polishing discs and other machinery parts).

* * *

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

EN 58.06(A) describes narrow woven fabric as follows:

(1) Warp and weft fabrics in strips of a width not exceeding 30cm, provided with selvedges (flat or tubular) on both edges. These articles are produced on special ribbon looms several ribbons often being produced simultaneously; in some cases the ribbons may be woven with wavy edges on one or both sides.

(2) Strips of a width not exceeding 30 cm, cut (or slit) from wider pieces of warp and weft fabric (whether cut (or slit) longitudinally or on the cross) and provided with false selvedges on both edges, or a normal woven selvedge on one edge and a false selvedge on the other. False selvedges are designed to prevent unravelling of a piece of cut (or slit) fabric and may, for example, consist of a row of gauze stitches woven into the wider fabric before cutting (or slitting), of a simple hem, or they may be produced by gumming the edges of strips, or by fusing the edges in the case of certain ribbons of man-made fibers. They may also be created when a fabric is treated before it is cut into strips in a manner that prevents the edges of those strips from unravelling. No demarcation between the narrow fabric and its false selvedges need be evident in that case. Strips cut (or slit) from fabric but not provided with a selvedge, either real or false, on each edge, are **excluded** from this heading and classified with ordinary woven fabrics.

* * *

EN 59.11

The textile products and articles of this heading present particular characteristics which identify them as being for use in various types of machinery, apparatus, equipment or instruments or as tools or parts of tools.

EN 59.11

(B) Textile Articles of Kind Used for Technical Purposes

All textile articles of kind used for technical purposes (other than those of headings 58.08 to 59.10) are classified in this heading and **not** elsewhere in Section XI (see Note 7(b) to the Chapter); for example :

(1) Any of the fabrics of (A) above which have been made up (cut to shape, assembled by sewing, etc.)...[.]

* * *

In NY N282623, CBP classified the subject Twist-Tube in heading 5806, HTSUS, as a narrow woven fabric. The decision in NY N282623 determined that the subject Twist-Tube was not classifiable under heading 5911, HTSUS, because the Twist-Tube was not a textile article since it did not satisfy the definition of being "made-up" as set forth in Note 7 to Section XI.

In your request for reconsideration, you assert that the Twist-Tube is properly classified in heading 5911, HTSUS, as a textile product designed for technical uses. In support of your contention, you state that the Twist-Tube meets the requirements of Note 7(a) to Chapter 59, HTSUS, excluding it from heading 5806, HTSUS. You further assert that the Twist-Tube is described by the ENs to heading 5911, as it is a textile product or textile article which is designed for use with a certain type of machinery, specifically, motor vehicles. You note that CBP has previously classified textile products and articles used in motor vehicles and vehicle parts under heading 5911, HTSUS; citing to NY N239632, dated April 12, 2013. Similarly, you state that the Twist-Tube is an OEM certified part used by vehicle manufacturers to satisfy NHTSA regulations governing flammability.

Finally, you argue that the Twist-Tube is classifiable under heading 5911, HTSUS, because it has a technical purpose and allows for the technical functioning of another good. In support of this contention you cite to Headquarters Ruling Letter ("HQ") 957218, dated March 24, 1995, arguing that the Twist-Tube creates a barrier between the electrical wiring assembles and the heat from the vehicle's engine which allows the electrical wiring assembles to function properly. From this you conclude that the Twist-Tube has a technical purpose as described by the terms of heading 5911, HTSUS.

Concerning the rationale in NY N282623 that the Twist-Tube was not a textile article because it did not satisfy the definition of being "made-up", we note that Note 7 to Section XI primarily applies to tariff provisions which include the phrase "made-up" in the terms of its heading or subheading. For example, heading 6307, HTSUS, provides for: "Other made up articles..." Likewise, heading 5608, HTSUS, provides for: Knotted netting...; made up fishing nets and other made up nets, of textile materials." Heading 5702, HTSUS, provides, in relevant part, for: "Carpets...whether or not made up..." It follows that Note 7 to Section XI is intended to explain or define the meaning of the phrase "made up" as it is used in various tariff headings of Section XI. Yet, the language of heading 5911, HTSUS, does not include or make reference to the phrase "made up." Likewise, the legal notes to Chapter

59, HTSUS, do not include or make reference to the phrase "made up." However, subheading 5911.20, HTSUS, includes the phrase in its terms (i.e., "Bolting cloth, whether or not made up."). Likewise, EN 59.11 (B)(1) states, in pertinent part, "(1) Any of the fabrics of (A) above which have been made up (cut to shape, assembled by sewing, etc.)." Accordingly, not all goods classifiable under heading 5911, HTSUS, are subject to Note 7 to Section XI unless its classification concerns the specific "made up" requirement.[1]

In the instant case, the Twist-Tube features characteristics that are present in both heading 5806, HTSUS, and heading 5911, HTSUS. In particular, the Twist-Tube is produced as a flat woven textile fabric with multiple warp and weft. The finished tape is run through a heating process to create its tubular shape. Moreover, according to CBP Lab Report NY20171862, the subject Twist-Tube is a narrow woven fabric with two selveges on both ends (one heat sealed; the other knitted), which measures 6.5 centimeters in width in its open flattened state. Hence, based on its woven construction, measurements and dimensions, the subject Twist-Tube meets the definition of a narrow-woven fabric within the meaning Note 5(a) to Chapter 58, HTSUS and EN 58.06(A)(1) and (2).

However, the fact that the Twist-Tube is a narrow woven fabric, does not preclude the Twist-Tube from classification under heading 5911, HTSUS. Instead, we note that the scope of heading 5911, HTSUS, includes flat woven textile fabrics with multiple warp and weft, and other woven textile fabrics – so long as those goods also satisfy the conditions of Note 7, to Chapter 59, HTSUS. In fact, the classification of (flat or tubular) narrow woven fabrics is contemplated by the terms of Chapter 59, HTSUS. Specifically, Note 1 to Chapter 59 provides, in relevant part, that: "Except where the context otherwise requires, for purposes of this chapter the expression "*textile fabrics*" applies only to the woven fabrics of chapters 50 to 55 and headings 5803 and 5806...[.]" It follows that textile fabrics that are considered narrow woven textile fabrics of heading 5806, HTSUS, are not excluded from heading 5911, HTSUS. Accordingly, beyond its measurements, dimensions and construction, the fundamental purpose and primary use of the Twist-Tube also warrant consideration.

In particular, classification in heading 5911, HTSUS, requires establishing that the Twist-Tube is either a "textile products used for technical purposes" or a "textile articles suitable for industrial use." Although the terms: "textile products used for technical purposes" and "textile articles suitable for industrial use" are not specifically defined by the HTSUS, EN 59.11 states that: "[t]he textile products and articles of this heading present particular characteristics which identify them as being for use in various types of machinery, apparatus, equipment or instruments or as tools or parts of tools." In keeping with the definition set out in EN 59.11, CBP has determined that certain textile products and articles have possessed the characteristics which identify them as being for use in various types of machinery, apparatus, equipment or instruments. For example, in HQ 081817, dated January 17, 1989, CBP classified roll covers for damper rollers used in the printing industry. The covers, were of tubular shape, cut to size and fit over the damper rollers. According to HQ 081817, the function of the host damper rollers is to moisten

[1] The Court of International Trade noted that "the examples of Note 7(b) articles listed in the Explanatory Notes also include articles that have been "made up," i.e., "cut to shape." *Airflow Tech., Inc. v. United States*, 804 F. Supp. 2d 1292, 1308 (CIT 2011).

the non-image areas of a lithographic plate so that the plate will not accept ink from the ink rollers. In HQ 081817, CBP determined that the roll covers were textile articles that served as an integral and necessary part of a lithographic printing press. As such, CBP determined that the roll covers had a technical purpose within the meaning of Note 7(b) to Chapter 59, HTSUS, and therefore classified in heading 5911, HTSUS.

Similarly, in HQ 084937, dated November 29, 1989, CBP classified woven textile tubing fabric used on the plate surface of acid batteries under heading 5911, HTSUS, because it was a flat woven fabric with multiple weft and warp that would be further produced into a tubular battery gauntlet. In HQ 962967, dated November 21, 2000, CBP classified gaskets used in automatic data processing machines and similar computer equipment under heading 5911, HTSUS, after determining that the gaskets had a technical purpose within the meaning of Note 7 to Chapter 59, HTSUS. *See also*, HQ 956956, dated September 23, 1994 (In which CBP classified shielding gaskets in heading 5911, HTSUS, as the gaskets were used to prevent leakage of electromagnetic waves from electrical machinery and apparatus). Likewise, in HQ 967012, dated July 7, 2004, CBP determined that felt washers used in brass musical instruments were classified in heading 5911, HTSUS, because they were constructed of felt textile material, were provided for *eo nomine* in the exemplars of EN 59.11 and presented a particular characteristic which identified them as having a technical use with an instrument. *See* HQ 966913, dated July 7, 2004, (Wherein CBP classified felt piano washers used for pedal rod assemblies, in heading 5911, HTSUS). *See also*, NY G89391, dated April 17, 2001, (In which CBP classified roll covering wrap for use on laundry flatwork ironers that press laundered sheets, pillow cases and table clothes, in heading 5911, HTSUS).

The subject Twist-Tube is principally used to cover wiring assemblies in automobiles and light trucks. Moreover, the Twist-Tube sheaths and protects the electrical cable harnesses and wiring assemblies while simultaneously creating a barrier between the electrical wiring assemblies and the heat from the vehicle's engine which ultimately allows electrical wiring assembles to function properly. Accordingly, based on its principal use, the Twist-Tube presents with an industrial or technical purpose which identifies it as being for use with a particular type of machinery, apparatus, or equipment; namely automotive engine components.

Having established that the subject Twist-Tube is used for a technical purpose or is otherwise suitable for industrial use — we must now determine whether it is a textile "product" or a textile "article" for purposes of Note 7 to Chapter 59. In *Airflow Tech v. United States*, 804 F. Supp. 2d 1292, the Court noted that Note 7 to Chapter 59 articulates a fundamental distinction between "products" and "articles" explaining that "the terms "product" and "article" — for purposes of Note 7 to Chapter 59 — must be given different meanings." The Court further explained that:

> "...as the terms are used in Note 7 to Chapter 59, a "textile product" appears to refer to textile materials (*e.g.*, textile fabrics, felts, cloth), whereas a "textile article" refers to a textile object or item with a fixed identity and dimensions (*e.g.*, gaskets, washers, polishing disks). *See* Pl.'s Brief at 22 (explaining that "textile *materials* of Chapter Note 7(a) are textile products which are used to make finished goods; the textile *articles* of Chapter Note 7(b) are finished goods themselves. . . Unlike Note 7(a) "textile products," which may be imported in rolls or bolts, Note 7(b)

> "textile articles" upon importation possess the fixed identity and specific dimensions required for use with a particular machine or for some other specific technical application."

Airflow Tech, at 1308. This fundamental distinction is significant in determining which subsection of Note 7 to Chapter 59, HTSUS, best describes the Twist-Tube. According to the definition in *Airflow Tech*, the Twist-Tube is not a "textile product" of Note 7(a) to Chapter 59 – as it is not used to "make" or later create a finished good. Instead, the Twist Tube is itself a finished article of commerce. According to the April 2019 FMC submission and the FMC website, the Twist-Tube does not require any post-importation modifications or additional manufacturing prior to its use by the ultimate consumer. Instead, the Twist-Tube is cut to specification prior to importation and is ready for use upon delivery. Upon importation, the Twist-Tube can be installed by hand, utilizing its self-wrapping construction. Once wrapped around the bundle or harness, the user must then twist the Twist-Tube around the harness to secure it in place. In instances, where twisting does not sufficiently affix the Twist-Tube to the bundle, tape can be used at each end to secure it in place.

Additionally, the Twist-Tube is produced in its finished state and is ready for use in its condition as imported. Lastly, based on its unique technical uses, fixed dimensions and OEM specifications, we find that the Twist-Tube presents with a fixed identity within the meaning *Airflow Tech*. Moreover, much like the gaskets and washers of HQ 967012 and HQ 956956, which seal the junction between two mating surfaces and secures a greater bearing on the surface of the structure beneath, the Twist-Tube sheaths and protects the electrical cable harnesses and wiring assemblies from abrasion with other engine components. Similarly, like the damper roller covers of HQ 081817, and the textile tubing fabric of HQ 084937, the Twist-Tube's tubular self-wrapping construction covers cable assembly harnesses and electrical harnesses inside the automotive engine compartment while simultaneously providing OEM certified flame retardation. Accordingly, we find that the Twist-Tube is a textile article of a kind used for technical purposes within the meaning of Note 7(b) to Chapter 59, HTSUS, and is consistent with the definition of a textile article as set forth in *Airflow Tech*.

HOLDING:

By application of GRI 1 and Note 7(b) to Chapter 59, HTSUS, the Twist-Tube textile self-wrapping tubular sleeve is classifiable in heading 5911, HTSUS. The merchandise is specifically classified in subheading 5911.90.0080, HTSUSA, which provides for: Textile products and articles, for technical uses, specified in note 7 to this chapter: Other, Other." The 2019 column one, general rate of duty is 3.8% *ad valorem*.

EFFECT ON OTHER RULINGS:

NY N282623, dated February 17, 2017, is hereby REVOKED.

Additionally, NY N259736, dated December 24, 2014, NY N259746, dated December 23, 2014, NY N259737, dated May 13, 2016, NY N259747, dated May 13, 2016, are hereby REVOKED.

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

Sincerely,
For

CRAIG T. CLARK,
Director
Commercial and Trade Facilitation Division

19 CFR PART 177

MODIFICATION OF ONE RULING LETTER AND REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF SINK BASKET STRAINERS

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

ACTION: Notice of modification of one ruling letter, and revocation of treatment relating to the tariff classification of a sink basket strainer.

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 modifying New York Ruling Letter (NY) 889651, dated September 22, 1993, concerning the tariff classification of a plastic sink basket strainer under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Notice of the proposed action was published in the *Customs Bulletin*, Vol. 55, No. 15, on April 21, 2021. No comments were received in response to that notice.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after September 19, 2021.

FOR FURTHER INFORMATION CONTACT: Claudia Garver, Chemicals, Petroleum, Metals and Miscellaneous Classification Branch Branch, Regulations and Rulings, Office of Trade, at (202) 325–0024.

SUPPLEMENTARY INFORMATION:

BACKGROUND

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

Pursuant to 19 U.S.C. § 1625(c)(1), a notice was published in the *Customs Bulletin*, Vol. 55, No. 15, on April 21, 2021, proposing to modify one ruling letter pertaining to the tariff classification of a plastic sink basket strainer. 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 889651, CBP classified a plastic sink basket strainer, identified as Sample A, in heading 3926, HTSUS, specifically in subheading 3926.90.95[1], HTSUS, which provides for "Other articles of plastics and articles of other materials of headings 3901 to 3914: Other: Other." CBP has reviewed NY 889651 and has determined the ruling letter to be in error with respect to the classification of Sample A. It is now CBP's position that Sample A is properly classified, in heading 3922, HTSUS, specifically subheading 3922.90.00, which provides for "Baths, shower baths, sinks, washbasins, bidets, lavatory pans, seats and covers, flushing cisterns and similar sanitary ware, of plastics: Other."

[1] Subheading 3926.90.95 has been renumbered as 3926.90.99 in the 2021 HTSUS.

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is modifying NY 889651 and revoking or modifying any other ruling not specifically identified to reflect the analysis contained in Headquarters Ruling Letter ("HQ") H296172, 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: July 6, 2021

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

Attachment

HQ H296172

July 6, 2021
CLA-2 OT:RR:CTF:CPMM H296172 CkG
CATEGORY: Classification
TARIFF NO: 3922.90.00

MR. ANDREW GOODMAN
INTERNATIONAL MANUFACTURING CORPORATION
P.O. BOX 9106
1515 WASHINGTON STREET
BRAINTREE, MA 02184

RE: Proposed modification of NY 889651; classification of plastic basket strainer

DEAR MR. GOODMAN:

This is in reference to New York Ruling Letter (NY) 889651, dated September 22, 1993, concerning the tariff classification of two sink basket strainers and a waste overflow apparatus. In NY 889651, CBP classified three items, referred to as Samples A, B and C, in headings 3926, 7324, and 8481, HTSUS, respectively. We have reviewed NY 889651, and have determined that the classification of Sample A (a basket strainer of plastic) in heading 3926, HTSUS, was incorrect.

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 889651 was published on April 21, 2021, in Volume 55, Number 15, of the *Customs Bulletin*. No comments were received in response to this Notice.

FACTS:

The merchandise at issue in NY 889651 was described as follows:

> Three samples were included with your request. The first, labelled sample A, is a basket strainer for a kitchen sink. It is made entirely of plastics, except for the threaded metal portion which connects the upper and lower basket together and into which the strainer fits. The essential character of this basket strainer is imparted by the plastics.

Sink basket strainers are installed in the base of the sink basin. They direct wastewater into the drainage pipe and filter out large particles to prevent clogging.

ISSUE:

Whether the basket strainer are classifiable as sanitary ware of heading 3922, HTSUS, or as other articles of plastic in heading 3926, HTSUS.

LAW AND ANALYSIS:

Merchandise is classifiable under the HTSUS in accordance with the General Rules of Interpretation (GRIs). GRI 1 provides that classification shall be determined according to the terms of the headings 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 or notes do not require otherwise, the remaining GRIs 2 through 6 may be applied.

GRI 3 states, in pertinent part:

> When by application of [GRI] 2(b) or for any other reason, goods are, *prima facie*, classifiable under two or more headings, classification shall be effected as follows:
>
> ...
>
> (b) Mixtures, composite goods consisting of different materials or made up of different components . . . which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

The HTSUS provisions under consideration are as follows:

3922: Baths, shower-baths, sinks, wash-basins, bidets, lavatory pans, seats and covers, flushing cisterns and similar sanitary ware, of plastics.

3926: Other articles of plastics and articles of other materials of headings 39.01 to 39.14.

The Harmonized Commodity Description and Coding System Explanatory Notes ("ENs") constitute the official interpretation of the HTSUS. While not legally binding or 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 at the international level. *See* T.D. 89–80, 54 Fed. Reg. 35127 (August 23, 1989).

EN 39.22 provides as follows:

> This heading covers fittings designed to be permanently fixed in place, in houses, etc., normally by connection to the water or sewage systems. It also covers other sanitary ware of similar dimensions and uses, such as portable bidets, baby baths and camping toilets.
>
> Flushing cisterns of plastics remain classified in this heading, whether or not equipped with their mechanisms.

However, the heading **excludes**:

> (a) Small portable sanitary articles such as bed pans and chamber-pots (**heading 39.24**).
>
> (b) Soap dishes, towel rails, tooth-brush holders, toilet paper holders, towel hooks and similar articles for bathrooms, toilets or kitchens; these articles fall in **heading 39.25** if intended for permanent installation in or on walls or other parts of buildings, otherwise in **heading 39.24**.

EN 73.24 provides, in pertinent part, as follows:

> This heading comprises a wide range of iron or steel articles, **not more specifically covered** by other headings of the Nomenclature, used for sanitary purposes.
>
> ...
>
> The heading includes, baths, bidets, hip-baths, foot-baths, sinks, wash basins, toilet sets; soap dishes and sponge baskets; douche cans, sanitary pails, urinals, bedpans, chamber-pots, water closet pans and flushing cisterns whether or not equipped with their mechanisms, spittoons, toilet paper holders.

* * * *

As a preliminary matter, we agree with the conclusion in NY 889651 that the essential character of Sample A is imparted by the plastic body, which constitutes the majority of the bulk of the good, and performs the essential function of channeling and filtering wastewater into the sink drain.

Within Chapter 39, two headings are implicated; heading 3922, HTSUS, for sanitary ware of plastics, and heading 3926, HTSUS, for other articles of plastic. Specifically, heading 3922 covers "Baths, shower-baths, sinks, wash-basins, bidets, lavatory pans, seats and covers, flushing cisterns and similar sanitary ware, of plastics." Sinks and wash-basins are types of sanitary ware described *eo nomine* in EN 39.22, and classified as such by CBP. *See e.g.*, NY R00296, dated May 6, 2004. Sink drains and strainers, as integral components of a kitchen sink, could be considered parts of sanitary ware; however, heading 3922 does not provide for parts of sanitary ware. The question is, therefore, whether they are included in the scope of "similar sanitary ware."

The Macmillan Dictionary, available at www.macmillandictionary.com, defines "sanitary" as "relating to people's health, especially to the system of supply water and dealing with human waste." "Sanitary ware" is also defined at *www.dictionary.reference.com* as: "plumbing fixtures, as sinks or toilet bowls, made of ceramic material or enameled metal." The Explanatory Note to heading 3922 further states that heading 3922 covers "fittings designed to be permanently fixed in place, in houses, etc., normally by connection to the water or sewage systems. It *also* covers *other* sanitary ware of similar dimensions and uses, such as portable bidets, baby baths and camping toilets." (emphasis added). EN 39.22 excludes, however, "Small portable sanitary articles such as bed pans and chamber-pots (**heading 39.24**), as well as items such as soap dishes, towel rails, toilet paper holders and similar articles for bathrooms, toilets or kitchens. Heading 3922 is therefore more limited in scope than heading 7324, which does include such items as soap dishes and toilet paper holders.

"Sanitary ware" for the purposes of heading 3922, HTSUS, therefore covers permanent fixtures such as toilets and showers (as well as specific components such as lavatory seats and covers), typically connected to the building's plumbing system and used for the removal of waste from the home.

We have further consulted the standards jointly developed by the American Society of Mechanical Engineers (ASME) and the Canadian Standards Association (CSA) regarding plumbing supply fittings (ASME A112.18.1/CSA B125.1), which can be found on the ASME website at *www.asme.org*. The scope of the ASME A112.18.1/CSA B125.1 standard for plumbing supply fittings can be found in Part 1, Section 1.1, which states that the standard applies to plumbing supply fittings and accessories located between the supply line stop and the terminal fitting, including, in relevant part, "(g) Kitchen, sink, and lavatory supply fittings". Part 3, entitled "Definitions and abbreviations", at Section 3.1 Definitions, states, in relevant part: "The following definitions apply in this Standard:

> Accessory—a component that can, at the discretion of the user, be readily added, removed, or replaced, and that, when removed, will not prevent the fitting from fulfilling its primary function. Note: Examples include aerators, hand-held shower assemblies, shower heads, and in-line flow controls.
>
> * * *

Fixture—a device for receiving water, waste matter, or both and directing these substances into a sanitary drainage system

As the instant drains connect to the home's water system in order to receive and direct wastewater into a sanitary drainage system, they are within the scope of the above definitions of sanitary ware and plumbing fixtures. They are not akin to the examples of portable sanitary articles such as bed pans, or fixtures such as toilet paper holders or soap dishes, which are excluded by EN 39.22. Such articles are easily replaceable and do not connect to a home's plumbing system or otherwise play a direct role in removing waste from a person or the home.

The instant drains can also be distinguished from accessories of plumbing systems such as showerheads, which CBP has consistently classified outside of headings 3922 and 7324; unlike the instant drains, showerheads do not receive water or waste matter and direct it to a sanitary drainage system. *See e.g.*, HQ H092556, dated July 10, 2015; NY N246906, dated November 18, 2013; NY N033873, dated August 21, 2008; NY I81474, dated May 22, 2002; NY H80605, dated June 5, 2001; and NY G85952, dated January 17, 2001.

HOLDING:

By application of GRI 1 and GRI 3, Sample A is classified in heading 3922, HTSUS, specifically subheading 3922.90.00, which provides for "Baths, shower baths, sinks, washbasins, bidets, lavatory pans, seats and covers, flushing cisterns and similar sanitary ware, of plastics: Other." The 2020 column one, general rate of duty is 6.3% *ad valorem*.

EFFECT ON OTHER RULINGS:

NY 889651, dated September 22, 1993, is hereby modified with respect to the classification of the product identified as Sample A.

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

Sincerely,

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

19 CFR PART 177

MODIFICATION OF ONE RULING LETTER AND REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF BRASS DRAINS

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

ACTION: Notice of modification of one ruling letter, and revocation of treatment relating to the tariff classification of brass drains.

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 NY N267667, dated August 31, 2015, NY N267669, dated August 31, 2015, NY N262071, dated March 16, 2015, and NY N262072, dated March 9, 2015, concerning the tariff classification of brass drains under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Notice of the proposed action was published in the *Customs Bulletin*, Vol. 55, No. 9, on March 10, 2021. No comments were received in response to that notice.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after September 19, 2021.

FOR FURTHER INFORMATION CONTACT: Claudia Garver, Chemicals, Petroleum, Metals and Miscellaneous Classification Branch, Regulations and Rulings, Office of Trade, at (202) 325–0024.

SUPPLEMENTARY INFORMATION:

BACKGROUND

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

Pursuant to 19 U.S.C. § 1625(c)(1), a notice was published in the *Customs Bulletin*, Vol. 55, No. 9, on March 10, 2021, proposing to revoke four ruling letters pertaining to the tariff classification of brass drains. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or deci-

sion, 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 N267667, NY N267669, NY N262071 and NY N262072, CBP classified bath and sink drains of brass in heading 7419, HTSUS, specifically in subheading 7419.99.50, HTSUS, which provides for "Other articles of copper: Other: Other: Other: Other: Brass plumbing goods not elsewhere specified or included." CBP has reviewed NY N267667, NY N267669, NY N262071 and NY N262072 and has determined the ruling letters to be in error. It is now CBP's position that the subject drains are properly classified in heading 7418, HTSUS, specifically subheading 7418.20.10, HTSUS, which provides for "Table, kitchen or other household articles and parts thereof, of copper; pot scourers and scouring or polishing pads, gloves and the like, of copper; sanitary ware and parts thereof, of copper: Sanitary ware and parts thereof: Of copper-zinc base alloys (brass)."

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is revoking NY N267667, NY N267669, NY N262071 and NY N262072 and revoking or modifying any other ruling not specifically identified to reflect the analysis contained in Headquarters Ruling Letter ("HQ") H306046, 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: July 6, 2021

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

Attachment

HQ H306046

July 6, 2021
OT:RR:CTF:CPMM HQ H306046 CKG
CATEGORY: Classification
TARIFF NO.: 7418.20.10

MS. DANIELLE SEBRING
GLOBAL COMPLIANCE AND LOGISTICS MANAGER
OATEY COMPANY
4675 WEST 160TH STREET
CLEVELAND, OH 44135

RE: Revocation of NY N267667, NY N267669, NY N262071 and NY N262072; classification of brass drains

DEAR MS. SEBRING:

This is to inform you that U.S. Customs and Border Protection ("CBP") has reconsidered New York ("NY") Ruling Letters N267667 and N267669, issued to Oatey Company on August 31, 2015, regarding the classification under the Harmonized Tariff Schedule of the United States ("HTSUS") of brass drains. After reviewing these rulings in their entirety, we believe that they are in error. We have also reconsidered related rulings on brass drains, specifically NY N262071, dated March 16, 2015 and NY N262072, dated March 9, 2015. For the reasons set forth below, we hereby revoke NY N267667, NY N267669, NY N262071 and NY N262072.

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 N267667, NY N267669, NY N262071 and NY N262072 was published on March 10, 2021, in Volume 55, Number 9, of the *Customs Bulletin*. No comments were received in response to this Notice.

FACTS:

At issue in NY N267667 were drains identified as Oatey part numbers 42393 and 42394. Part number 42393 is composed of a chrome plated brass adjustable drain barrel, a square chrome plated brass strainer, four stainless steel collar bolts, and an ABS reversible clamping ring and drain base. Part number 42394 is composed of a chrome plated brass adjustable drain barrel, a square chrome plated brass strainer, four stainless steel collar bolts, and a PVC reversible clamping ring and drain base.

In NY N267669, the Oatey drains were identified as part numbers 42218 and 42219. Part number 42218 is composed of a chrome plated brass adjustable drain barrel, a round stainless steel strainer, four stainless steel collar bolts, and an ABS reversible clamping ring and drain base. Part number 42219 is composed of a chrome plated brass adjustable drain barrel, a round stainless steel strainer, four stainless steel collar bolts, and a PVC reversible clamping ring and drain base.

In NY N262071, the merchandise at issue was identified as "Model ITD35 — Island Tub Drain" and the "Model SDB47 — Tub & Shower Brass Side Discharge Pan Drain – Round Grate." The Model ITD35 drain consisted of an 18 gauge epoxy coated metal deck flange (stainless steel), 2 x 17G brass tailpieces (fine thread and flanged), ABS adapter kit, an Island Drain Assem-

bly with 1–1/2" DWV ABS tailpiece, and a 2" x 1–1/2" ABS reducing bushing. All of the items included in the Model ITD35 - Island Tub Drain will be used to complete the bath tub drain.

The Model SDB47 drain consists of a low profile brass base, extra-long ABS body, reversible ABS collar, 3 solid brass bolts and a stainless steel grate...It is most commonly used as a shower drain. All of the items that comprise the Model SDB47 - Tub & Shower Brass Side Discharge Pan Drain – Round Grate will be packaged together in a cardboard box ready for retail sale prior to importation into the United States.

Finally, in NY N262072, the product under consideration was identified as the Model 3600WC 1–1/4" Lavatory Drain Plug & Chain, consisting of a rubber plug & chain stopper, chrome finish, cast brass, 17 gauge 1–1/4" x 8–3/8" brass tailpiece, locknut, heavy rubber gasket, forged brass strainer, and cast brass elbow." All of the essential components in the Model 3600WC 1–1/4" Lavatory Drain Plug & Chain make up the lavatory drain, with the plug and chain being the closure.

ISSUE:

Whether the brass waste shoe is classified in heading 7418, HTSUS, as sanitary ware of copper, or in heading 7419, HTSUS, as other articles of copper.

LAW AND ANALYSIS:

Merchandise imported into the United States is classified under the HTSUS, in accordance with the General Rules of Interpretation ("GRIs"). GRI 1 requires that classification be determined first according to the terms of the headings of the tariff schedule and any relative section or chapter notes and, unless otherwise required, according to the remaining GRIs taken in order. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the heading and legal notes do not otherwise require, the remaining GRIs 2 through 6 may then be applied in order. Pursuant to GRI 6, classification at the subheading level uses the same rules, mutatis mutandis, as classification at the heading level.

The HTSUS provisions under consideration are as follows:

7418:	Table, kitchen or other household articles and parts thereof, of copper; pot scourers and scouring or polishing pads, gloves and the like, of copper; sanitary ware and parts thereof, of copper:
7418.20:	Sanitary ware and parts thereof:
7418.20.10:	Of copper-zinc base alloys (brass)...
7419:	Other articles of copper:
	Other:
7419.99:	Other:
	Other:
7419.99.50:	Other...

* * *

The Harmonized Commodity Description and Coding System Explanatory Notes ("ENs") constitute the official interpretation of the HTSUS. While not legally binding or dispositive, the ENs provide a commentary on the scope of each heading of the HTSUS and are generally indicative of the proper inter-

pretation of these headings at the international level. *See* T.D. 89–80, 54 Fed. Reg. 35127 (August 23, 1989).

The Explanatory Note to heading 7418 provides, in pertinent part, as follows:

> The Explanatory Notes to headings 73.21, 73.23 and 73.24 apply, *mutatis mutandis*, to this heading.
>
> This heading covers, *inter alia*, copper cooking or heating apparatus of a kind used for domestic purposes, e.g., small appliances such as petrol, paraffin, spirit stoves, as normally used for travelling, camping, etc. and for certain household uses. The heading also covers domestic apparatus of the kind described in the Explanatory Note to heading 73.22.

EN 39.22 provides, in pertinent part:

> This heading covers fittings designed to be permanently fixed in place, in houses, etc., normally by connection to the water or sewage systems. It also covers other sanitary ware of similar dimensions and uses, such as portable bidets, baby baths and camping toilets.

EN 69.10 provides, in pertinent part:

> This heading covers fittings designed to be **permanently fixed in place**, in houses, etc., normally by connection to the water or sewage systems. They must therefore be made impervious to water by glazing or by prolonged firing (e.g., stoneware, earthenware, fire-clay sanitary ware, imitation porcelain, or vitreous china). In addition to the fittings specified, the heading includes such items as lavatory cisterns.
>
> Ceramic flushing cisterns remain classified in this heading, **whether or not** equipped with their mechanisms.
>
> The heading **does not**, however, **include** small accessory bathroom or sanitary fittings, such as soap dishes, sponge baskets, tooth-brush holders, towel hooks and toilet paper holders, even if of a kind designed for fixing to the wall, nor portable sanitary articles such as bed pans, urinals and chamber-pots; these goods fall in **heading** 69.11 or 69.12.

EN 73.24 provides:

> This heading comprises a wide range of iron or steel articles, **not more specifically covered** by other headings of the Nomenclature, used for sanitary purposes.
>
> These articles may be cast, or of iron or steel sheet, plate, hoop, strip, wire, wire grill, wire cloth, etc., and may be manufactured by any process (moulding, forging, punching, stamping, etc.). They may be fitted with lids, handles or other parts or accessories of other materials **provided** that they retain the character of iron or steel articles.
>
> The heading includes, baths, bidets, hip-baths, foot-baths, sinks, wash basins, toilet sets; soap dishes and sponge baskets; douche cans, sanitary pails, urinals, bedpans, chamber-pots, water closet pans and flushing cisterns whether or not equipped with their mechanisms, spittoons, toilet paper holders.

EN 74.19 provides, in pertinent part:

> This heading covers all articles of copper **other than** those covered by the preceding headings of this Chapter or by Note 1 to Section XV, or articles

specified or included in **Chapter 82** or **83**, or more specifically covered elsewhere in the Nomenclature.

* * * *

In NY N267667, NY N267669, NY N262071, and NY N262072, CBP classified various shower or bath drain assemblies of brass in heading 7419, HTSUS, as other articles of copper. We have reconsidered these rulings, and find that the subject drains are properly classified in heading 7418, HTUSS, as sanitary ware.

As a preliminary matter, we note that heading 7419, HTSUS, only covers "other" articles of copper, not more specifically described elsewhere in the Nomenclature. Therefore, classification in heading 7419, HTSUS, is precluded if the merchandise is covered more specifically in heading 7418, HTSUS.

In NY N267667 and NY N267669, CBP specifically considered and discarded classification in heading 7418, HTSUS, as sanitary ware of copper, because the drains were not similar in kind to the exemplars of sanitary ware listed in the Explanatory Note to heading 7418. However, lists of examples such as the types of sanitary ware that may be included in the heading are illustrative only, and cannot narrow or broaden the scope of the heading.

Heading 7418, HTSUS, provides for, *inter alia*, sanitary ware of copper. "Sanitary ware" is not defined in the HTSUS or Explanatory Notes; we therefore turn to the common and commercial meaning of the term for guidance. *See Nippon Kogasku (USA) Inc. v. United States*, 69 C.C.P.A. 89, 92–93 (1982); *C.J. Towers & Sons v. United States*, 69 C.C.P.A. 128, 133–134 (1982). The Macmillan Dictionary, available at www.macmillandictionary.com, defines "sanitary" as "relating to people's health, especially to the system of supply water and dealing with human waste." "Sanitary ware" is also defined at www.dictionary.reference.com as: "plumbing fixtures, as sinks or toilet bowls, made of ceramic material or enameled metal." The Explanatory Notes to headings 3922 and 6910 further specify that "sanitary ware" covers "fittings designed to be permanently fixed in place, in houses, etc., normally by connection to the water or sewage systems.

We have further consulted the standards jointly developed by the American Society of Mechanical Engineers (ASME) and the Canadian Standards Association (CSA) regarding plumbing supply fittings (ASME A112.18.1/CSA B125.1), which can be found on the ASME website at www.asme.org. The scope of the ASME A112.18.1/CSA B125.1 standard for plumbing supply fittings can be found in Part 1, Section 1.1, which states that the standard applies to plumbing supply fittings and accessories located between the supply line stop and the terminal fitting, including, in relevant part, "(b) bath and shower supply fittings". Part 3, entitled "Definitions and abbreviations", at Section 3.1 Definitions, states, in relevant part: "The following definitions apply in this Standard:

> Accessory—a component that can, at the discretion of the user, be readily added, removed, or replaced, and that, when removed, will not prevent the fitting from fulfilling its primary function. Note: Examples include aerators, hand-held shower assemblies, shower heads, and in-line flow controls (emphasis added).
>
> * * *

Fixture—a device for receiving water, waste matter, or both and directing these substances into a sanitary drainage system

"Sanitary ware" for the purposes of heading 7418, HTSUS, therefore covers permanent fixtures such as toilets and baths typically connected to the building's plumbing system and used for the removal of waste from the home, as well as small, portable articles such as toilet paper holders.

As the instant drains connect to the home's water system in order to receive and direct wastewater into a sanitary drainage system, they are within the scope of the above definitions of sanitary ware and plumbing fixtures.

The instant drains can also be distinguished from accessories of plumbing systems such as showerheads, which CBP has consistently classified as other than sanitary; unlike the instant drains, showerheads are easily replaceable, are not permanently installed in walls or floors, and do not receive water or waste matter and direct it to a sanitary drainage system. *See e.g.*, HQ H092556, dated July 10, 2015; NY N246906, dated November 18, 2013; NY N033873, dated August 21, 2008; NY I81474, dated May 22, 2002; NY H80605, dated June 5, 2001; and NY G85952, dated January 17, 2001.

The instant drains are sanitary ware provided for specifically in heading 7418, HTSUS. Because they are specified elsewhere in the Nomenclature, they are precluded from classification in heading 7419, HTSUS, as other articles of copper.

HOLDING:

Pursuant to GRI 1, the brass drain products at issue are classified in heading 7418, HTSUS, specifically subheading 7418.20.10, HTSUS, which provides for "Table, kitchen or other household articles and parts thereof, of copper; pot scourers and scouring or polishing pads, gloves and the like, of copper; sanitary ware and parts thereof, of copper: Sanitary ware and parts thereof: Of copper-zinc base alloys (brass)." The 2019 column one, general rate of duty is 3% ad valorem.

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

EFFECT ON OTHER RULINGS:

NY N267667, dated, August 31, 2015, NY N267669, dated, August 31, 2015, NY N262071, dated March 16, 2015 and NY N262072, dated March 9, 2015, are hereby revoked.

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

Sincerely,

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

U.S. Court of International Trade

Slip Op. 21–81

IN RE SECTION 301 CASES

Before: Mark A. Barnett, Claire R. Kelly and Jennifer Choe-Groves, Judges
Court No. 21–00052

[Granting Plaintiffs' motions for leave to file a reply and for a preliminary injunction. Chief Judge Barnett dissents from the entry of a preliminary injunction.]

Dated: July 6, 2021

Matthew R. Nicely and *Pratik A. Shah*, Akin Gump Strauss Hauer & Feld LLP, of Washington, DC, argued for plaintiffs HMTX Industries LLC, Halstead New England Corporation, Metroflor Corporation, and Jasco Products Company LLC. With them on the brief were *James E. Tysse*, *Devin S. Sikes*, *Daniel M. Witkowski*, and *Sarah B. W. Kirwin*.

Jamie L. Shookman, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY, argued for defendants. Also on the brief were *Brian M. Boynton*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, *L. Misha Preheim*, Assistant Director, *Justin R. Miller*, Attorney-In-Charge, International Trade Field Office, and *Sosun Bae*, Senior Trial Counsel, and *Ann C. Motto*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC. Of Counsel on the brief were *Megan Grimball*, Associate General Counsel, *Philip Butler*, Associate General Counsel, and *Edward Marcus*, Assistant General Counsel, Office of the U.S. Trade Representative, of Washington, DC, and *Paula Smith*, Assistant Chief Counsel, *Edward Maurer*, Deputy Assistant Chief Counsel, and *Valerie Sorensen-Clark*, Attorney, Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection, of New York, NY.

OPINION

Kelly, Judge:

Plaintiffs HMTX Industries LLC, Halstead New England Corporation, Metroflor Corporation, and Jasco Products Company LLC commenced the first of approximately 3,600 cases (the "Section 301 Cases") contesting the imposition of a third and fourth round of tariffs by the Office of the United States Trade Representative ("USTR") pursuant to Section 301 of the Trade Act of 1974, 19 U.S.C. § 2411, *et seq.* ("the Trade Act"). *See generally* Am. Compl., *HMTX Indus. LLC v. United States*, Court No. 20-cv-00177 (CIT Sept. 21, 2020), ECF No. 12 ("20–177 Am. Compl."). Plaintiffs now move the court for a preliminary injunction pursuant to U.S. Court of International Trade ("CIT") Rule 65(a) suspending liquidation of unliquidated entries

subject to the contested tariffs.[1] Pls.' Mot. for Prelim. Inj. Limited to Suspension of Liquidation, April 23, 2021, ECF No. 287 ("Pls.' Mot."). Plaintiffs request that any injunction extend to all Section 301 Cases "subject to an opt-out mechanism" for individual plaintiffs. Pls.' Mot. at 2. Defendants United States, et al. ("the Government") oppose the motion. Defs.' Opp'n to Pls.' Mot. for Prelim. Inj. Limited to Suspension, May 14, 2021, ECF No. 304 ("Defs.' Opp'n"). Plaintiffs further move for leave to file a reply to the Government's opposition. Pls.' Mot. for Leave to File a Reply in Supp. of a Prelim. Inj. Limited to Suspension of Liquidation, May 20, 2021, ECF No. 307; *see also* Proposed Reply in Supp. of Pls.' Mot. for Prelim. Inj. Limited to Suspension of Liquidation, May 20, 2021, ECF No. 307–1 ("Pls.' Reply"). The Government defers to the court's discretion as to acceptance of Plaintiffs' Reply. Defs.' Resp. to Pls.' Mot. for Leave to File a Reply in Supp. of a Prelim. Inj. Limited to Suspension of Liquidation, May 26, 2021, ECF No. 309. For the reasons set forth below, both of Plaintiffs' motions are granted.[2]

BACKGROUND

On August 14, 2017, the President issued a memorandum instructing the USTR to consider, consistent with Section 302(b) of the Trade Act, initiating an investigation addressing the Government of the People's Republic of China's ("China") "laws, policies, practices, or actions that may be unreasonable or discriminatory and that may be harming American intellectual property rights, innovation, or technology development." *Addressing China's Laws, Policies, Practices, and Actions Related to Intellectual Property, Innovation, and Technology*, 82 Fed. Reg. 39,007 (Aug. 17, 2017). The USTR initiated an investigation on August 18, 2017. *Initiation of Section 301 Investigation; Hearing; and Request for Public Comment: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation*, 82 Fed. Reg. 40,213 (Aug. 24, 2017). On March 22, 2018, the USTR published a report announcing the results of its investigation. OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, FINDINGS OF THE INVESTIGATION INTO CHINA'S ACTS, POLICIES, AND PRACTICES RELATED TO TECHNOLOGY TRANSFER, INTELLECTUAL PROPERTY, AND INNOVATION

[1] Plaintiffs do not seek to enjoin the collection of List 3 and List 4A duties (as defined below). Pls.' Mot. at 1.

[2] Absent leave of court, parties may not file a reply brief in further support of a non-dispositive motion. *See* CIT Rule 7(d); *Retamal v. U.S. Customs & Border Prot., Dep't of Homeland Sec.*, 439 F.3d 1372, 1377 (Fed. Cir. 2006) (noting that the court may allow reply briefs for non-dispositive motions). Plaintiffs' proposed reply brief aids the court's understanding of the disagreement between the parties. Thus, the court will grant Plaintiffs' motion.

UNDER SECTION 301 OF THE TRADE ACT OF 1974 (2018), https://ustr.gov/sites/default/files/Section%20301%20FINAL.PDF.

On June 20, 2018, the USTR published notice of a final list of products covering 818 tariff subheadings that would be subject to an additional duty of 25 percent *ad valorem*. *Notice of Action and Request for Public Comment Concerning Proposed Determination of Action Pursuant to Section 301: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation*, 83 Fed. Reg. 28,710 (June 20, 2018) ("List 1"). On August 16, 2018, the USTR published notice of an additional list of products covering 279 tariff subheadings that would be subject to an additional duty of 25 percent *ad valorem*. *Notice of Action Pursuant to Section 301: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation*, 83 Fed. Reg. 40,823 (Aug. 16, 2018) ("List 2").

During the time period between the USTR's finalization of List 1 and List 2, the USTR indicated its intent to modify the action by imposing an additional duty of 10 percent *ad valorem* on another list of products imported from China. *Request for Comments Concerning Proposed Modification of Action Pursuant to Section 301: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation*, 83 Fed. Reg. 33,608 (July 17, 2018). On September 21, 2018, the USTR published final notice of new duties with an effective date of September 24, 2018. *Notice of Modification of Action Pursuant to Section 301 Action: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation*, 83 Fed. Reg. 47,974 (Sept. 21, 2018) ("List 3"). The rate of additional duty on products covered by List 3 was set to increase to 25 percent *ad valorem* on January 1, 2019. *Id.* After several extensions of the date of implementation of the List 3 tariffs issued in connection with ongoing trade negotiations, on May 10, 2019 (or June 15, 2019, depending on the date of export), List 3 duties increased to 25 percent *ad valorem*. *Notice of Modification of Section 301 Action: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation*, 84 Fed. Reg. 20,459 (May 9, 2019); *Implementing Modification to Section 301 Action: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation*, 84 Fed. Reg. 21,892 (May 15, 2019); *Additional Implementing Modification to Section 301 Action: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation*, 84 Fed. Reg. 26,930 (June 10, 2019).

The USTR subsequently established an exclusion procedure pursuant to which importers could request exclusion of their products from

List 3 duties. *Procedures for Requests to Exclude Particular Products From the September 2018 Action Pursuant to Section 301: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation*, 84 Fed. Reg. 29,576 (June 24, 2019). Plaintiffs obtained exclusions for certain of their imports, effective September 24, 2018, through August 7, 2020. *Notice of Product Exclusions: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation*, 84 Fed. Reg. 61,674 (Nov. 13, 2019); *Notice of Product Exclusions: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation*, 84 Fed. Reg. 69,012 (Dec. 17, 2019); *Notice of Product Exclusions: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation*, 85 Fed. Reg. 549 (Jan. 6, 2020); *Notice of Product Exclusions: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation*, 85 Fed. Reg. 9921 (Feb. 20, 2020).

On May 17, 2019, the USTR announced its intent to again modify the action to impose additional duties up to 25 percent *ad valorem* on another list of products imported from China. *Request for Comments Concerning Proposed Modification of Action Pursuant to Section 301: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation*, 84 Fed. Reg. 22,564 (May 17, 2019). On August 20, 2019, the USTR announced that it was imposing additional duties of 10 percent *ad valorem* on products identified in the May 17, 2019 request for comments. *Notice of Modification of Section 301 Action: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation*, 84 Fed. Reg. 43,304 (Aug. 20, 2019) ("List 4"). List 4 was further categorized into List 4A and List 4B. *Id.*

Thereafter, the USTR provided notice of its intent to increase the additional duty rate applicable to List 4A and List 4B from 10 percent *ad valorem* to 15 percent *ad valorem*. *Notice of Modification of Section 301 Action: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation*, 84 Fed. Reg. 45,821 (Aug. 30, 2019). On December 18, 2019, the USTR indefinitely suspended the additional duties of 15 percent *ad valorem* on List 4B, but not List 4A. *Notice of Modification of Section 301 Action: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation*, 84 Fed. Reg. 69,447 (Dec. 18, 2019).

On January 22, 2020, the USTR halved the additional duty on products covered by List 4A from 15 percent to 7.5 percent *ad va-*

lorem. *Notice of Modification of Section 301 Action: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation*, 85 Fed. Reg. 3741 (Jan. 22, 2020).

On September 10, 2020, Plaintiffs commenced an action challenging the Section 301 duties imposed pursuant to List 3 and List 4A. Compl., *HMTX Indus. LLC v. United States*, Court No. 20-cv-00177 (CIT Sept. 10, 2020), ECF No. 2; *see also* 20–177 Am. Compl. Count one alleges a violation of the Trade Act based on Plaintiffs' view that the USTR's imposition of the List 3 and List 4A duties was not authorized by the USTR's modification authority under Section 307 of the Trade Act and seeks a declaratory judgment to that effect. 20–177 Am. Compl. ¶¶ 63–70. Count two alleges violations of the Administrative Procedure Act ("APA"). *Id.* ¶¶ 71–75.

On February 5, 2021, Plaintiffs' action, among others,[3] was assigned to this panel. *See, e.g.*, Order, *HMTX Indus. LLC v. United States*, Court No. 20-cv-00177, (CIT Feb. 5, 2021), ECF No. 43. On February 10, 2021, the panel designated a "master case" under the name "*In Re* Section 301 Cases" to function as the primary vehicle by which the court would manage the litigation of the Section 301 Cases. Std. Procedural Order No. 21–01 (Feb. 10, 2021), ECF No. 1. After receiving input from the parties, on March 31, 2021, the court designated Plaintiffs' case as "the sample case for purposes of the court's initial consideration and resolution of Plaintiffs' claims." Std. Procedural Order 21–04 (Mar. 31, 2021), ECF No. 267. The court stayed all other Section 301 Cases and appointed a Plaintiffs' Steering Committee to aid the court's adoption of case management procedures and coordinate the preparation of consolidated briefs and court submissions. *Id.; see also* Std. Procedural Order 21–02 (Feb. 16, 2021), ECF No. 82 (explaining the duties of the steering committee). On April 12, 2021, the parties filed a Joint Status Report with a proposed briefing schedule governing disposition of the merits of the sample case. Joint Status Report, Apr. 12, 2021, ECF No. 274 ("Jt. Status Report"). The parties explained their respective positions on the issue of relief in the event Plaintiffs prevail. *Id.* at 4–9. The following day, the court entered a Scheduling Order. *See* Scheduling Order, Apr. 13, 2021, ECF No. 275.

Plaintiffs filed the instant motion on April 23, 2021. *See* Pls.' Mot. The Government responded and, as noted, the court will accept Plaintiffs' Reply. *See* Defs.' Opp'n; Pls.' Reply. A remote oral argument on the motion was held on June 17, 2021. Docket Entry, June 17, 2021, ECF No. 327, *available at* https://www.cit.uscourts.gov/sites/cit/files/061721–21–00052–3JP.mp3 ("Oral Arg.").

[3] Approximately 3,600 Section 301 Cases were assigned to this panel.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(i)(1)(B) (2018), which grants the court "exclusive jurisdiction of any civil action commenced against the United States . . . that arises out of any law of the United States providing for . . . tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue." "The Court of International Trade shall possess all the powers in law and equity of, or as conferred by statute upon, a district court of the United States." 28 U.S.C. § 1585.

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). To obtain a preliminary injunction, a party must demonstrate "(1) likelihood of success on the merits, (2) irreparable harm absent immediate relief, (3) the balance of interests weighing in favor of relief, and (4) that the injunction serves the public interest." *Silfab Solar, Inc. v. United States*, 892 F.3d 1340, 1345 (Fed. Cir. 2018) (citing *Winter*, 555 U.S. at 20).

The Court of Appeals for the Federal Circuit has historically applied a "sliding scale" approach. *See Qingdao Taifa Grp. Co. v. United States*, 581 F.3d 1375, 1381–82 (Fed. Cir. 2009); *see also Ugine & Alz Belg. v. United States*, 452 F.3d 1289, 1293 (Fed. Cir. 2006). Under the sliding scale approach, "the greater the potential harm to the plaintiff, the lesser the burden on Plaintiffs to make the required showing of likelihood of success on the merits." *Ugine*, 452 F.3d at 1293 (internal quotation marks and citations omitted). Thus, where the harm is great, a movant must only "demonstrate that it has at least a fair chance of success on the merits." *Wind Tower Trade Coal. v. United States*, 741 F.3d 89, 96 (Fed. Cir. 2014). Conversely, courts may not lessen a movant's burden of demonstrating a likelihood of irreparable harm, regardless of the strength of the other factors. *Winter*, 555 U.S. at 22.

DISCUSSION

Plaintiffs have established their entitlement to a preliminary injunction. Here, Plaintiffs demonstrated they will likely suffer irreparable harm because their entries of subject merchandise will liquidate absent an injunction. Moreover, Plaintiffs persuasively argue that there is sufficient uncertainty as to the availability of relief under *Shinyei Corp. of America v. United States*, 355 F.3d 1297 (Fed. Cir. 2004), to establish the likelihood that Plaintiffs will be unable to recover duties unlawfully paid should they be successful in their claim on the merits, thus demonstrating irreparable harm. *See Am. Signature, Inc. v. United States*, 598 F.3d 816, 829 (Fed. Cir. 2010).

Consequently, Plaintiffs' burden to demonstrate a likelihood of success on the merits is reduced, and Plaintiffs satisfy their reduced burden by raising sufficiently serious and substantial questions regarding the interpretation and application of Section 307 of the Trade Act. Likewise, Plaintiffs have sufficiently demonstrated that the balance of the equities and public interest factors weigh heavily in their favor.

I. Irreparable Harm

For the reasons that follow, the liquidation of Plaintiffs' entries constitutes irreparable harm in this case because it may foreclose Plaintiffs' ability to challenge the Government's imposition of duties paid or have those duties returned. Irreparable harm is a "viable threat of serious harm which cannot be undone," *Zenith Radio Corp. v. United States*, 710 F.2d 806, 809 (Fed. Cir. 1983) (emphasis removed) (quoting *S.J. Stile Assocs. Ltd. v. Snyder*, 649 F.2d 522, 525 (C.C.P.A. 1981)), or remedied by money damages, *see, e.g., Metalcraft of Mayville, Inc. v. Toro Co.*, 848 F.3d 1358, 1368 (Fed. Cir. 2017). The potential unavailability of reliquidation or refund in this case sufficiently demonstrates irreparable harm.[4] Moreover, the Government fails to meaningfully dispute that liquidation will cause harm that cannot be undone and instead argues that any unlawfully collected duties would be forever unrecoverable.

Liquidation, as the final computation of duties, will constitute irreparable harm unless an importer can obtain refunds or reliquidation because it cuts off judicial review and eliminates any chance of recovery of unlawful exactions. *See Zenith*, 710 F.2d at 810. In *Zenith*, the Court of Appeals held that liquidation of entries moots the action with respect to those entries and constitutes irreparable harm. *Id.* The Court of Appeals explained that liquidation would not only involve economic harm, but also the "statutory right to obtain judicial review of the determination." *Id.* Here, without reliquidation or refunds, Plaintiffs will be denied meaningful judicial review for each entry that liquidates.[5] The denial of judicial review is irreparable harm.

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[4] Liquidation is defined as "the final computation or ascertainment of duties." 19 C.F.R. § 159.1.

[5] As to the deprivation of judicial review, at oral argument Defendant argued that *Zenith*'s concern regarding the availability of judicial review might not be present in this case. Oral Arg. at 00:22:13. Although *Zenith* involved a domestic producer's claim that antidumping duties imposed on an importer's entries should be higher, the facts of this case suggest that mootness is a concern here. The importers here may have multiple entries that may be subject to the 301 duties, but each entry is its own transaction and occurrence giving rise to its own cause of action. *See United States v. Stone & Downer Co.*, 274 U.S. 225, 236 (1927). Thus, although an importer may have more than one chance to challenge 301 duties

Further, although the CIT is granted broad statutory authority to order appropriate relief, the Court of Appeals has cast sufficient doubt as to the scope of that authority to create a likelihood of irreparable harm. "The Court of International Trade shall possess all the powers in law and equity of, or as conferred by statute upon, a district court of the United States." 28 U.S.C. § 1585.[6] "The Court of International Trade may enter a money judgment for or against the United States in any civil action commenced under section 1581 or 1582 of this title." *Id.* § 2643(a)(1). Moreover, the CIT can order "any other form of relief that is appropriate in a civil action, including, but not limited to, declaratory judgments, orders of remand, injunctions, and writs of mandamus and prohibition." *Id.* § 2643(c)(1). Given this seemingly broad statutory authority to fashion appropriate relief, the court would like to agree with the Dissent that we have the clear power to order reliquidation in the event Plaintiffs are ultimately successful, as we view the statute as providing this Court with the explicit power to order reliquidation and refunds where the government has unlawfully exacted duties.[7]

(and it is conceivable that it may not, it may have only had one entry) it may lose its right to judicial review on any entry that is liquidated. The loss of judicial review for that entry is a harm. *Stone & Downer*, which focused on classification of entries, held that *res judicata* did not bar claims previously litigated with respect to prior entries. *Id.* at 236–37. Here, the danger is not that judicial review will be unavailable because a claim has already been litigated but that judicial review will be unavailable because it may never be litigated with respect to an entry that has been liquidated. Nevertheless, it is unclear why the rationales underlying *Stone & Downer* would not also be applicable here. Accepting the view that the loss of judicial review for some entries is not irreparable harm because there are other entries for which review still exists leads to the illogical conclusion that allegedly unlawful government exactions for which there is no recompense cannot constitute irreparable harm so long as those exactions are ongoing.

[6] The legislative history of the Customs Courts Act of 1980, Pub. L. No. 96–417, 94 Stat. 1727 (1980), supports the broad interpretation of Congress' grant of authority to the CIT. *See, e.g.*, 126 Cong. Rec. H9333–49, at H9342–43 (daily ed. Sept. 22, 1980) (statement of Rep. Rodino) ("Another essential provision in this legislation is proposed section 1585. This section removes any doubt that the [CIT] has authority to award the relief necessary to remedy an alleged injury in a civil action before the court. The committee intends to make it clear that the court possesses *all plenary powers* in law and equity, thereby completing the full transformation of the court to article III status." (emphasis added)).

[7] The Government specifically asks this court not to reach the issue for the purposes of this motion. Defs.' Opp'n at 42 (asking the court to deny Plaintiff's motion "without reference to the availability, or not, of reliquidation as a remedy at the end of the case."). Opting not to assert a serious challenge to the reparability of the undeniable harm of liquidation, the Government is left to argue that Plaintiffs' delay in seeking an injunction undercuts their motion. *Id.* at 33–34. This argument fails to acknowledge that Plaintiffs commenced their action soon after their Section 301 exclusion expired. *Id.* at 32; Pls.' Reply at 22. This argument also ignores the fact that the Government did not articulate its position as to refund relief until the filing of the Joint Status Report on April 12, 2021. *See* Jt. Status Report at 7–8. Up until the point when the Government asserted its position that it would seek to preclude reliquidation or refund, Plaintiffs had no reason to seek an injunction. *See, e.g., Sumecht N.A., Inc. v. United States*, 923 F.3d 1340, 1348 (Fed. Cir. 2019) (Government concession regarding the availability of refunds defeated the motion for a preliminary

However, the Court of Appeals has explicitly and implicitly called the breadth of the CIT's statutory authority into question. For example, in *Shinyei*, the Court of Appeals did not simply hold that the CIT had the authority to order reliquidation based on the plain language of the statute, but rather went on to state that reliquidation was appropriate in that case because to hold otherwise "would preclude enforcement of court orders as to duty determinations as soon as entries subject to those orders are liquidated." *Shinyei*, 355 F.3d at 1312. Arguably, the holding of *Shinyei* is that the Court of Appeals "decline[d] to find that the statute as a whole was intended to preclude judicial enforcement of court orders after liquidation."[8] *Id.* One view of *Shinyei* would be that it confirmed the CIT's power to order money judgment in Section 1581 actions and to order reliquidation if necessary; however, subsequent cases suggest that the holding in *Shinyei* was a narrow one.

In *Ugine*, an importer challenged Commerce's liquidation instructions on the grounds that the instructions "for entries imported prior to the fourth administrative review are inconsistent with Commerce's determination in the subsequent fourth administrative review." 452 F.3d at 1296. The Court of Appeals characterized the key consideration in *Shinyei* to be that the importer "was complaining that Commerce's instructions . . . did not reflect the results of the administrative review that covered those entries," and found that because that was not the exact theory propounded by the importer in *Ugine* that the "difference between the two cases—and the possibility that *Shinyei* will not be interpreted to encompass the sort of claim at issue here—raises doubt whether [Plaintiffs] will have the opportunity to obtain reliquidation once [their] entries are liquidated." *Id.* By describing *Shinyei* in such narrow terms—suggesting that a different type of challenge to Commerce's liquidation instructions might lead to a different result and failing to even mention the CIT's statutory authority to fashion relief—*Ugine* casts doubt as to the availability of reliquidation and refunds in this case.

Similarly, the Court of Appeals in *American Signature* held that *Shinyei* relief was in doubt where an importer challenged Commerce's attempt to correct an error contained in the final results of its administrative review of an antidumping duty. 598 F.3d at 822–24, 829. In *American Signature*, the Court of Appeals stated that *Shinyei* stands for the proposition that "in an action challenging liquidation

injunction). The Government cannot complain of Plaintiffs' delay in moving for injunctive relief when Defendants' past conduct gave Plaintiffs every reason to believe such a motion would be unnecessary.

[8] Indeed, the Government makes this argument. *See* Defs.' Opp'n at 40.

instructions under 28 U.S.C. § 1581(i), the [CIT] may, under certain circumstances, use its equitable powers to compel reliquidation of entries if a preliminary injunction has been sought and denied." *Id.* at 828 (citing *Shinyei*, 355 F.3d at 1312). Thus, the Court of Appeals continued to cast *Shinyei* in an extremely narrow light. Rather than interpreting *Shinyei* as setting forth the CIT's broad remedial powers based on clear, wide-ranging statutory authority, the Court of Appeals limited *Shinyei* relief to an undefined set of "certain circumstances" only where a preliminary injunction had been sought and denied. *Id.* *American Signature* did not address the statutory framework in its discussion of irreparable harm and did not provide any further clarification as to when *Shinyei* applies. *Id.* at 828–29.[9]

Finally, in *Sumecht*, when affirming the denial of a preliminary injunction because irreparable harm could not be shown, the Court of Appeals did not stop with the statutory language, but rather went on to cast doubt upon the applicability of *Shinyei* in 1581(i) cases. 923 F.3d at 1347–48. Indeed, the Court of Appeals did not affirmatively

[9] The Dissent notes that in *Ugine* the CIT did not analyze *Shinyei* in its denial of a preliminary injunction, and that the Court of Appeals declined to decide whether *Shinyei* relief would be available absent a ruling from the CIT or briefing from two of the three parties. Dissent at 40–41. That the Court of Appeals in *Ugine* declined to decide whether *Shinyei* relief was available and held that uncertainty over such relief constitutes irreparable harm weigh strongly in favor of granting preliminary relief here. The Dissent also states that the nature of the relief sought in *Ugine* (challenging Commerce's liquidation instructions) differs from the relief sought in this case, and that *Ugine* was decided prior to *Winter*. *Id.* at 41. However, *Ugine, American Signature*, and this case were all commenced under 28 U.S.C. § 1581(i), so the court's statutory authority for granting relief is the same, making the differing theories of harm immaterial. *See Ugine*, 452 F.3d at 1296; *Am. Signature*, 598 F.3d at 822; *see also* 28 U.S.C. § 2643. Although the Dissent concedes that *American Signature* was decided post-*Winter* and that the CIT had denied a preliminary injunction specifically because it found *Shinyei* to be applicable (thus satisfying two of the Dissent's three concerns regarding *Ugine*), Dissent at 41–42, the Dissent claims that the Court of Appeals did not explain why *Shinyei* would not be available and that the Court of Appeals has since distanced itself from *Ugine* and *American Signature* by stating that those cases do not create a presumption of the uncertainty of *Shinyei* relief in the preliminary injunction context. *Id.* at 42. Once again, the Court of Appeals' decision to find that *Shinyei* relief was uncertain weighs in favor of granting an injunction here, particularly because the Court of Appeals declined to explain the scope of *Shinyei* relief. Although we agree with the Dissent's analysis of the court's statutory authority in Section 1581(i) cases to order reliquidation and/or a refund of duties that may be found to have been unlawfully exacted, we are bound to follow Court of Appeals precedent. The Court of Appeals has repeatedly called into question this Court's authority to grant reliquidation in Section 1581(i) cases, declined to pronounce the scope of such authority or when *Shinyei* relief is available, and held that the uncertainty over such relief sufficiently demonstrates the likelihood of irreparable harm, even post-*Winter*. There is no need to rely on a "presumption" of uncertainty of *Shinyei* relief here, as the Government expressly argues that it is unavailable, unlike in *Sumecht*, where the Government conceded reliquidation was an available remedy. *See Sumecht*, 923 F.3d at 1348. Since we cannot say that the Court of Appeals would agree that this court has the authority to order reliquidation under 28 U.S.C. § 2643, we must find that the availability of *Shinyei* relief is uncertain and therefore that Plaintiffs have demonstrated irreparable harm.

analyze whether *Shinyei* relief would be available in *Sumecht*, but rather held that the Government was judicially estopped from asserting that reliquidation would be unavailable in the event the importer was ultimately successful on the merits, eliminating even the possibility of irreparable harm. *Id.* at 1348.

Thus, despite the broad statutory language granting the Court authority to order whatever relief is appropriate, the Court of Appeals has consistently refrained from relying on that language in finding the CIT has authority to order reliquidation or refunds in 1581(i) cases and has raised doubts about the CIT's authority to do so. It may be that on appeal the Court of Appeals will make clear that 28 U.S.C. §§ 1585 and 2643 empower the CIT to "enter a money judgment . . . against the United States in any civil action commenced under section 1581" for the return of unlawfully collected duties, 28 U.S.C. § 2643(a)(1), or "may . . . order any other form of relief" including reliquidation, *id.* § 2643(c)(1), but, until it does, we must conclude that liquidation will result in irreparable economic harm.[10] The Government does not argue that liquidation is not a harm, nor does it argue that it is a harm that can be remedied. Defs.' Opp'n at 34–42. Instead, the Government relies upon the truism that financial harm alone is not irreparable. *Id.* at 34 (arguing the court "repeatedly has declined to find irreparable harm based merely on claims of financial losses"). The Government's argument elides the *sine qua non* of reparability in this case, namely the availability of reliquidation or refund.[11] Indeed, instead of arguing that Plaintiffs' alleged irreparable harm is reparable (because the court can order reliquidation or refund), the Government asserts the opposite proposition, i.e., that the court cannot order reliquidation or refunds. *See* Defs.' Opp'n at 41. Thus, the Government's position is that any duties paid are permanently unrecoverable regardless of whether they may have been col-

[10] We cannot disagree with our colleague in the Dissent that "*Winter* establishes that it is not enough for a plaintiff to identify irreparable harm as a *possible* outcome of the denial of the motion for a preliminary injunction." Dissent at 30–31. However, in *Winter* the Court took note that the government "strongly dispute[s]" the harm alleged. *Winter*, 555 U.S. at 14. Here, the Government does not argue that there will not be a harm, or that it will be reparable. The only contingency, and one the Government argues against, is whether the Court of Appeals will rule that this Court is empowered by 28 U.S.C. § 2643 to remedy that harm; whether the Court of Appeals will so rule is uncertain. Under Federal Circuit precedent, that uncertainty is irreparable harm. *Am. Signature*, 598 F.3d at 829.

[11] The Government's reliance on *Corus Group PLC v. Bush,* 26 CIT 937 (2002), and Shandong Huarong General Group Corp. v. United States, 24 CIT 1286 (2000), is misplaced. *See* Defs.' Opp'n at 34. Unlike here, where Plaintiffs only seek limited relief, i.e., the suspension of liquidation, both cases involved motions seeking to enjoin the Government from the collection of duties. *See Corus Grp.,* 26 CIT at 938; *Shandong Huarong,* 24 CIT at 1286–87.

lected unlawfully. *Id.* at 42. According to Plaintiffs, the Government would stand to gain an undue windfall of "at least hundreds of millions of dollars and probably billions." Pls.' Reply at 20. The Government's position, if correct, concedes irreparable harm. *See Ohio Oil Co. v. Conway*, 279 U.S. 813, 815 (1929) (per curiam) (enjoining the collection of a state tax where "[t]he laws of the state afford no remedy whereby restitution of the money so paid may be enforced, even where the payment is under both protest and compulsion.").

II. Likelihood of Success on the Merits

Plaintiffs raise sufficiently serious and substantial questions as to the proper interpretation of Section 307 of the Trade Act to warrant injunctive relief in this case. Plaintiffs argue that Sections 307(a)(1)(B)–(C) of the Trade Act limit the President's and the USTR's authority to increase tariffs in the context of Section 301(b). Pls.' Reply at 6–11. Defendants defend the President's authority based upon, *inter alia*, the plain language of the statute. Defs.' Opp'n at 21–22. Plaintiffs' interpretation of the statute raises serious and substantial questions about the scope of the USTR's statutory authority to act, which should be resolved via full litigation of the merits of these claims.

Plaintiffs need only demonstrate a fair chance of success on the merits because, as discussed, the factor of irreparable harm weighs sharply in favor of granting a preliminary injunction. *See Qingdao*, 581 F.3d at 1381–82; *Wind Tower*, 741 F.3d at 96 (a movant must only "demonstrate that it has at least a fair chance of success on the merits").[12] Under the sliding scale approach, "the greater the potential harm to the plaintiff, the lesser the burden on Plaintiffs to make the required showing of likelihood of success on the merits." *Ugine*, 452 F.3d at 1293 (internal quotation marks and citations omitted).

> Where it is clear that the moving party will suffer substantially greater harm by the denial of the preliminary injunction than

[12] Although Defendants assert that the Court of Appeals' "sliding scale" approach may have been overruled by *Winter*, the Supreme Court did not expressly prohibit a sliding scale approach in all circumstances, and instead found that the Ninth Circuit's diminished irreparable harm requirement was inappropriate. *See Winter*, 555 U.S. at 22. Furthermore, at least two Courts of Appeals have refused to interpret *Winter* in the broad manner that Defendants urge the court to adopt. *Reilly v. City of Harrisburg*, 858 F.3d 173, 176–79 (3d Cir. 2017); *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131–35 (9th Cir. 2011). *But see Am. Trucking Ass'ns v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009). Moreover, the Federal Circuit has continued to apply the sliding scale even post-*Winter*. *See Qingdao*, 581 F.3d at 1381–82. The Court of Appeals' statement in *Silfab*, that it was "not deciding" whether the sliding scale approach was still good law, falls far short of overruling prior precedent. 892 F.3d at 1345. Therefore, until the Federal Circuit states otherwise, the sliding scale approach as articulated in *Qingdao* remains good law in courts bound by Court of Appeals for the Federal Circuit precedent. *See generally*, 581 F.3d at 1381–82.

> the non-moving party would by its grant, it will ordinarily be sufficient that the movant has raised serious, substantial, difficult and doubtful questions that are the proper subject of litigation.[13]

Id. (internal quotation marks omitted) (quoting *Ugine-Savoie Imphy v. United States*, 24 CIT 1246, 1251 (2000)).

Section 301 of the Trade Act authorizes the President and the USTR to take action to eliminate certain acts, policies, or practices of a foreign government that burden U.S. commerce. *See* 19 U.S.C. § 2411. As relevant here, the USTR may exercise discretionary authority when the USTR determines "an act, policy, or practice of a foreign country is unreasonable or discriminatory and burdens or restricts United States commerce" and action by the United States is appropriate. *Id.* § 2411(b)(1). Section 307(a)(1) of the Trade Act provides the USTR authority to "modify" an action commenced under Section 301 under certain enumerated circumstances. *See id.* § 2417(a)(1). At issue here are the conditions and scope of permissible modifications.

Section 307 provides, in relevant part,

> (a) In general
>
> (1) The Trade Representative may modify or terminate any action, subject to the specific direction, if any, of the President with respect to such action, that is being taken under section 2411 of this title [Section 301] if—
>
> (A) any of the conditions described in section 2411(a)(2) of this title [Section 301(a)(2)] exist,
>
> (B) the burden or restriction on United States commerce of the denial rights, or of the acts, policies, and practices, that are the subject of such action has increased or decreased, or
>
> (C) such action is being taken under section 2411(b) of this title [Section 301(b)] and is no longer appropriate.

Id. § 2417(a).

Plaintiffs contend that the text of Sections 307(a)(1)(B) and 307(a)(1)(C), both of which Defendants claim as authority for promulgating the List 3 and List 4A duties, limit the USTR's authority to either reduce or terminate Section 301(b) tariffs, or to increase the

[13] Other circuit courts have stated that a fair chance is less than 50%. *See Citigroup Glob. Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 34–38 (2d Cir. 2010) (rejecting claim that *Winter* requires a showing of greater than 50% chance of success); *D.M. v. Minn. State High Sch. League*, 917 F.3d 994, 999–1000 (8th Cir. 2019) (defining "fair chance" as less than 50%); *Leiva-Perez v. Holder*, 640 F.3d 962, 967–68 (9th Cir. 2011) (movant does not need to show success is more likely than not).

tariffs in limited circumstances not applicable here. Pls.' Reply at 6–11. Plaintiffs argue the clause, "that are the subject of such action," in Section 307(a)(1)(B) requires that any increase in an action relate to the same conduct that formed the basis of the USTR's initial action. *Id.* at 7. Moreover, Plaintiffs contend that Section 307(a)(1)(C), when read as a counterpart to Section 307(a)(1)(A), must be interpreted as only providing the President and the USTR with the authority to "reduce or terminate" a Section 301(b) action when the USTR finds such action is "no longer appropriate." *Id.* at 9.

Plaintiffs' proffered interpretation of the phrase "that are the subject of" the Section 301 action undeniably raises a serious and substantial question as it would limit the President's ability to increase a Section 301 action only when there is a change in the conduct giving rise to the Section 301 action, not when a country retaliates against the Section 301 action by taking action that is adverse to U.S. commerce, but not, at least superficially, the type of action that the initial Section 301 action sought to remedy. *Id.* at 6–8. If Plaintiffs' interpretation is correct, the USTR's modification of the Section 301(b) action falls outside the scope of delegated authority. Plaintiffs' interpretation of Section 307(a)(1)(B) is a plausible literal reading of the statute raising a serious and substantial question. Thus, Plaintiffs have demonstrated a fair chance of success that their interpretation of Section 307(a)(1)(B) prevents the USTR from increasing a Section 301(b) action in response to retaliatory, but superficially unrelated, tariffs.[14]

That Plaintiffs' interpretation is plausible does not diminish Defendants' argument that "the increase in the tariffs was necessary to further encourage China to eliminate the unfair policies identified in the USTR's investigation (that List 1 and List 2 had demonstrably failed to do), and thus to further support the effectiveness of the initial section 301 action." Defs.' Opp'n at 22. Likewise, Defendants' position that China's retaliatory tariffs were enacted with the goal of pressuring the President and the USTR to drop the Section 301 action so that China could continue its unfair practices is a compelling argument. *Id.* According to Defendants, the USTR's List 3 and List 4A tariffs do constitute a modification of the Section 301(b) action in response to an increased burden of the acts, policies, and practices that are the subject of the action on U.S. Commerce. *Id.* However, at this stage of the proceedings without full briefing, Defendants' posi-

[14] Here, Plaintiffs assert that the USTR's stated justification for promulgating the List 3 and List 4A tariffs was an increased burden on U.S. commerce resulting from China's retaliatory tariffs, which were not the subject of the initial Section 301(b) action.

tion is not so clearly correct as to prevent Plaintiffs from preserving the status quo pending the resolution of the merits of the parties' claims.

Likewise, Plaintiffs' argument that Section 307(a)(1)(C) fails to supply the needed authority in this case is not without merit and it too raises a difficult and substantial question. Plaintiffs claim that Section 307(a)(1)(C) must be read as a mirror of Section 307(a)(1)(A), but while Section 307(a)(1)(A) deals with modification of mandatory actions commenced under Section 301(a), Section 307(a)(1)(C) deals with modification of discretionary actions commenced under Section 301(b). Pls.' Reply at 8–10. According to Plaintiffs, the circumstances in which Section 307(a)(1)(A) permits "modification" make clear that only a reduction or termination of the Section 301(a) action is permitted. *Id.* Thus, Plaintiffs urge the court to interpret Section 307(a)(1)(C) as similarly limiting the USTR when it finds a Section 301(b) action to "no longer be appropriate." *Id.* Although Defendants argue that nothing in the plain text of Section 307(a)(1)(C) limits the USTR's authority to "modify" a Section 301(b) action when the USTR finds that action is "no longer appropriate," *see* Defs.' Opp'n at 22–24, given that "[i]t is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme," *Lal v. M.S.P.B.*, 821 F.3d 1376, 1378 (Fed. Cir. 2016) (citations omitted), and that neither party has cited any case in which the Government has increased an action under Section 301(b) under the claimed authority of Section 307(a)(1)(C), Plaintiffs at this stage of the proceedings raise substantial and serious questions, which should be determined after full briefing.

Finally, Plaintiffs assert a plausible APA claim on which they have a fair chance of success on the merits. Plaintiffs assert that the USTR failed to provide an adequate opportunity to comment on its determination to implement the List 3 and List 4A duties. *See* Pls.' Reply at 16. The Government asserts that the action was that of the President, rather than the USTR, and thus not subject to the APA. Defs.' Opp'n at 26–27. Neither party adequately addresses the question of whether the court should consider List 3 and List 4A the products of Presidential action or USTR action. *See* Pls.' Reply at 18–19; Defs' Opp'n at 26. Further, the Government claims that even if the challenged action is that of the USTR, the USTR provided adequate opportunity to comment. Defs.' Opp'n at 28. Both parties' treatment of this issue is cursory at best. Plaintiffs allege that "initial and rebuttal List 3 comments were due simultaneously, while List 4 rebuttal comments were due just days after the hearing (with over 300 wit-

nesses) concluded." Pls.' Reply at 16. Plaintiffs also claim that the USTR announced the imposition of List 3 duties "mere days after the comment period ended," which they suggest is evidence that the USTR did not consider the comments prior to implementing the duties. *Id.* The Government contends that the USTR imposed the duties "following seven weeks of public notice, hearings, and extensive opportunities for comment." Defs.' Opp'n at 12. Defendants further assert that they "provided sufficient notice," "solicited comments from the public," and "held a public hearing, even though none was required." *Id.* at 28. Neither party offers dispositive evidence or argumentation on the adequacy of the comment period, so the court concludes that Plaintiffs raise a serious question that warrants meaningful review. Regardless, the amount of time given for interested parties to comment as well as the amount of time the USTR had to consider public comments suggest that Plaintiffs have a fair chance of success in their APA claim should the court conclude that the APA applies. Pls.' Reply at 16.

Although Defendants' position as to the President's and the USTR's authority to act under the statute may ultimately prevail, it is not "so clear-cut" as to foreclose Plaintiffs' ability to fully litigate the matter. *See Ugine*, 452 F.3d at 1295. Plaintiffs raise a serious, substantial, and difficult question which, for the purposes of this motion, meet their reduced burden to show a "fair chance" of success on the merits. *See Wind Tower*, 741 F.3d at 96.[15]

III. Balance of the Equities

The balance of the equities tips in Plaintiffs' favor. Plaintiffs seek narrow relief, the suspension of liquidation. Although the administrative burden on the Government to effectuate the suspension of liquidation is not insignificant, *see* Decl. of Thomas Overacker in Supp. of Defs.' Opp'n to Pls.' Mot. for a Prelim. Inj., May 13, 2021, ECF No. 304–1 ("Overacker Decl."), ¶¶ 4–12, the court can fashion an injunction which allows the Government to minimize that burden.

Plaintiffs' request for relief is narrow; Plaintiffs ask for the suspension of liquidation. Pls.' Mot. at 1. Suspension of liquidation maintains the status quo: the Government will still collect the duties pending the merits determination, but as liquidation is the final

[15] Defendants also raise a number of defenses to Plaintiffs' action that they plan to address more fully in the briefing on the merits and which they fault Plaintiffs for not fully addressing. These defenses include: that the President is not subject to the APA; that the determination was a non-justiciable political question; that the determination falls in the foreign affairs function exception; and that even if the APA applies, the USTR's actions were not arbitrary and capricious. Defs.' Opp'n at 25. It is unclear at this stage in the proceedings whether any of these defenses may ultimately prevail and none is so clear cut as to defeat the fair chance that Plaintiffs may prevail.

computation of duties, their finality is delayed. If Plaintiffs are unsuccessful in their challenge, the Government will not lose any revenue.

Undeniably, implementing the stay will impose a burden on the Government.[16] Defendants explain that suspending liquidation for millions of entries is an enormous task.[17] *See* Overacker Decl. ¶¶ 4–12. To effectuate liquidation, each affected importer would have to be identified by its importer number. Defs.' Opp'n at 30–32; Overacker Decl. ¶ 7. U.S. Customs and Border Protection would then need to identify the relevant Customs Center for each importer. Overacker Decl. ¶ 7. Alternatively, a task force could be established to handle mass suspensions. *Id.* A report would need to be generated for each importer to identify any unliquidated entries subject to the challenged tariffs. *Id.* The Government claims that it would have to run over 6,500 reports just to identify the unliquidated entries filed by each individual importer. *Id.* Each entry would then need to be suspended, which could be complicated by the fact that some entries may already be suspended. *Id.* ¶ 8. We agree that the Government's resources are not unlimited, and personnel required to effectuate the suspension will necessarily be unable to perform other duties that are important. Nonetheless there is a solution to these competing interests.

Plaintiffs argue that the Government could avoid the burden of suspending liquidation during the pendency of these proceedings simply by conceding that the court has the power to order refunds or reliquidate any liquidated entries.[18] Pls.' Reply at 1, 2, 24. Indeed, the Government has avoided the need to suspend liquidation by conceding the availability of refunds. *Sumecht*, 923 F.3d at 1348. Such a concession is problematic as it would estop the Government from challenging the authority of the Court to grant reliquidation or re-

[16] As of March 31, 2021, there had been approximately 12.7 million entries of subject merchandise since the USTR commenced the Section 301(b) action. *See* Overacker Decl. ¶ 4. There are approximately 6500 individual importers that would be subject to this injunction. *Id.* ¶ 7(a). Customs would need to identify imports that are subject to both the Section 301 tariffs and the injunction on a rolling basis and take the administrative actions described in the Overacker Decl. in an expedient manner given that without intervening action, entries will generally liquidate by operation of law one year after entry. *See* 19 U.S.C. § 1504(a); 19 C.F.R. § 159.11.

[17] Although Plaintiffs argue that the task of suspending liquidation is a routine burden and is a fairly straightforward task, *see* Oral Arg. at 00:43:54, even the simplest task can be overwhelming if one has to do it millions of times.

[18] The Government has admitted that the CIT can order reliquidation and stipulated to such relief in the past. *See Sumecht*, 923 F.3d at 1347; *J. Conrad Ltd. v. United States*, 44 CIT __, __, 457 F. Supp. 3d 1365, 1379 (2020); *see also* 28 U.S.C. §§ 1585,2643(a)(1) (CIT has all the powers of a district court, including the authority to issue a money judgement against the United States).

fund. *Id.* The Government is within its right to craft an argument that the Court of Appeals should not allow reliquidation in this case based upon Court of Appeals precedent post-*Shinyei*. *See* Defs.' Opp'n at 36–42. Indeed, the Government may also change its view of what the law allows.[19] If the Government has a good faith belief that the Court does not have the power to order refunds or liquidation under the law, then it should not be forced to sacrifice that position for the sake of administrative convenience. Nonetheless, the Government's right to make a good faith challenge to the Court's power should not leave Plaintiffs without a remedy should the exactions ultimately be determined to have been unlawful. The absence of a remedy for an unlawful exaction is the definition of inequity.

Therefore, the court will fashion an order that relieves some of the burden imposed upon the Government while maintaining the status quo, i.e., preserving a remedy for unliquidated entries subject to the challenged tariffs. It is within the court's power to issue an injunction that requires the Government to suspend liquidation for each entry unless the Government opts to stipulate that it will refund the unlawfully collected duties for that specific entry. Consequently, the Government will not be conceding the availability of refunds for all Section 301 duties paid as a result of List 3 and List 4A, rather it will be stipulating that it will refund only unlawful duties paid in connection with entries for which it refuses to suspend liquidation. Such an order maintains the status quo, preserves the Government's ability to challenge the Court's power to refund or order reliquidation, and offers the Government, at its option, a route to avoid the administrative burden of suspending liquidation on millions of entries.

The consequences of this order sufficiently balance the equities. If Plaintiffs are successful with their Section 301 challenge as well as their claim that the Court has the power to order refunds or liquidation, then no harm will have been done. If Plaintiffs are successful with their Section 301 challenge and not with their claim that the Court has the power to order a refund and re-liquidation, then again no harm will have been done because this order will have prevented the unlawful collection of duties without a refund possibility, a clear irreparable harm. If Defendants are successful in their defenses, then the Government will collect all the duties to which it is entitled regardless of the Court's power to refund or order reliquidation. Thus, the only objection Defendants could have to the court issuing its order would be that Defendants would potentially forgo a windfall of unlawfully paid and irrecoverable duties. It is both inequitable and

[19] Plaintiffs do not dispute that the Government can change its position. *See generally*, Pls.' Mot. at 8–12.

against the public interest for the Government to retain unlawfully collected duties. At the same time, the order will allow the Government to avoid the burden of effectuating suspension of liquidation for as many entries as it wishes without conceding the issue of the Court's power to order refund or reliquidation.

IV. Public Interest

The Government's argument that there should be no stay of liquidation and that there is no right to refund would effectively deny judicial review of the imposition of the Section 301 duties on liquidated goods. Short-circuiting judicial review violates the public interest. *Neo Solar Power Corp. v. United States*, 40 CIT __, __, Slip Op. 16–58, at 5–6 (June 9, 2016).

The Government argues that the public interest is the "policy underlying the specific legislation." Defs.' Opp'n at 30. Even accepting Defendants' position as correct, the issuance of an injunction does not undermine that interest, it merely maintains the status quo. *See Ugine*, 452 F.3d at 1297; *see also Am. Signature*, 598 F.3d at 830 ("The public interest is served by ensuring that governmental bodies comply with the law."). Indeed, preserving judicial review of the application of the underlying legislation fosters the public interest in the lawful application of that legislation. *Neo Solar Power*, 40 CIT at __, Slip Op. 16–58 at 5. The Government argues that "[a] suspension of liquidation would encourage China to maintain its harmful practices while awaiting resolution of the [S]ection 301 cases" or might encourage importers to rush to purchase Chinese goods. Defs.' Opp'n at 30. The court cannot understand this argument. Although Plaintiffs seek to suspend liquidation, they do not seek to enjoin the collection of the Section 301 tariffs. Importers must still deposit those tariffs and will not be able to have them refunded unless Plaintiffs are successful. If the Government's argument is that it serves the public's interest to retain duties ultimately determined to be unlawful, to render meaningless a determination as to lawfulness, the Government is mistaken.

CONCLUSION

In sum, the court will grant Plaintiffs' motion for leave to file a reply and Plaintiffs' motion for a preliminary injunction. Moreover, to give the parties time to implement appropriate procedures, gather pertinent information, and otherwise take necessary action to comply with this order, the court will temporarily restrain liquidation of any unliquidated entries of merchandise imported from China by any plaintiffs in the Section 301 Cases which are subject to List 3 or List 4A duties.

Dated: Tuesday, July 6, 2021
New York, New York

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

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

Barnett, Chief Judge, dissenting:

I must dissent from my colleagues' grant of the preliminary injunction. While I agree with much of their analysis, there is a critical area of disagreement between us: namely, I find that Plaintiffs have failed to establish a likelihood of irreparable harm and this failure is fatal to their motion for a preliminary injunction.

The four-factor test the court considers in evaluating a motion for a preliminary injunction is well established. *See Winter v. Nat. Res. Def. Council, Inc*., 555 U.S. 7, 20 (2008). Nevertheless, in *Winter*, the U.S. Supreme Court considered whether the lower court properly evaluated the irreparable harm factor when the lower court found that the plaintiffs had demonstrated a "strong" likelihood of success on the merits. *Id.* at 20–22. In that case, the lower court had used a sliding scale analysis and concluded that the plaintiffs need only show "a 'possibility' of irreparable harm." *Id.* at 21. The Supreme Court rejected that approach and found, consistent with the extraordinary nature of preliminary relief, that the plaintiffs must demonstrate not merely a possibility, but a likelihood, that they would be irreparably harmed without an injunction. *Id.* at 22.

Regardless of the continuing validity of the sliding scale approach as it is typically applied in trade cases post-*Winter*,[1] *Winter* establishes that it is not enough for a plaintiff to identify irreparable harm as a *possible* outcome of the denial of the motion for a preliminary injunction. Instead, a plaintiff must establish that any irreparable harm is *likely*. In this case, I cannot find that there is a likelihood of irreparable harm when my colleagues and I agree that any harm arising from liquidation would be reparable by the court by means of an order of reliquidation or a money judgment pursuant to 28 U.S.C.

[1] In trade cases, it is often the situation that liquidation leads to irreparable harm such that, in the context of evaluating a preliminary injunction motion, the court has applied a sliding scale approach to analyzing the likelihood of success on the merits. The sliding scale requires a plaintiff to demonstrate a "fair chance of success on the merits" by raising "questions which are 'serious, substantial, difficult and doubtful.'" *Kwo Lee, Inc. v. United States*, 38 CIT __, __, 24 F. Supp. 3d 1322, 1326 (2014). Because I find that Plaintiffs have not established a likelihood of irreparable harm, I do not address this aspect of the sliding scale approach post-*Winter*.

§ 2643(a)(1) or (c)(1). *See Sampson v. Murray*, 415 U.S. 61, 90 (1974) ("The possibility that adequate compensatory or other corrective relief will be available at a later date . . . weighs heavily against a claim of irreparable harm." (quoting *Va. Petroleum Jobbers Ass'n v. Fed. Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958) (per curiam))); Maj. Op. at 12 ("[W]e view the statute as providing this Court with the explicit power to order reliquidation and refunds where the government has unlawfully exacted duties."). Defendants' ("the Government") arguments notwithstanding, where I disagree with my colleagues is in my view of the binding precedent from the U.S. Court of Appeals for the Federal Circuit ("Federal Circuit"). In contrast with the Majority, I find that this binding precedent suggests no more than a remote chance that the appellate court would find that this court is not empowered to provide relief with respect to any liquidated entries and, therefore, that Plaintiffs have established a likelihood of irreparable harm.

The scope of the court's powers in law and equity[2] are not often at issue given the unique jurisdiction of the U.S. Court of International Trade ("CIT"), which typically involves addressing customs protest challenges, reviewing administrative determinations in unfair trade or evasion cases, and presiding over enforcement actions against importers. *See generally* 28 U.S.C. §§ 1581, 1582 (stating the court's jurisdictional bases). This case generally, and Plaintiffs' motion for a preliminary injunction specifically,[3] requires the court to consider the scope of its remedial powers in the context of alleged injury arising from liquidation. Notwithstanding the investiture of broad equitable powers in the CIT, Congress also enacted specific statutory provisions pursuant to which liquidation that is final and conclusive precludes the court from awarding relief. While the vast majority of actions before the CIT arise in connection with the statutory provisions for which Congress has expressly spoken with respect to the effect of

[2] Pursuant to 28 U.S.C. § 1585, the CIT "shall possess all the powers in law and equity of, or as conferred by statute upon, a district court of the United States."

[3] The Government asserts that the court need not reach the issue of refunds or reliquidation because, according to the Government, the motion may be denied on other grounds. *See* Defs.' Opp'n to Pls.' Mot. for Prelim. Inj. Limited to Suspension ("Defs.' Opp'n") at 35, 42, ECF No. 304. The Government's reluctance in this regard likely stems from its precarious legal position. The Government's position regarding the lack of an available remedy for liquidated entries effectively amounts to an argument against its position on the likelihood of irreparable harm, leaving it to instead rely on assertions of undue delay and the insufficiency of economic harm to undermine Plaintiffs' case. *See id.* at 33–35. As discussed herein, however, the Government's arguments that the court lacks the authority to order reliquidation are unpersuasive. Notwithstanding the Government's suggestion, *see infra* note 8, further briefing on remedy is not necessary at this time. The issue here is only whether the court could provide a remedy—an issue plainly in play based on Plaintiffs' motion. The Government will have an opportunity to brief various options for appropriate remedies, if necessary, when the court reaches the merits.

liquidation, this case arises under the court's residual jurisdiction provision, pursuant to which the court retains all its powers in law and equity to provide relief consistent with 28 U.S.C. § 2643.

In cases arising pursuant to the court's jurisdiction under 28 U.S.C. § 1581(a), the finality of liquidation is governed by 19 U.S.C. § 1514(a). That provision provides:

> [D]ecisions of the Customs Service . . . as to . . . (2) the classification and rate and amount of duties chargeable; [or] . . . (5) the liquidation or reliquidation of an entry . . . shall be final and conclusive upon all persons . . . unless a protest is filed in accordance with this section, or unless a civil action contesting the denial of a protest, in whole or in part, is commenced in the [CIT].

19 U.S.C. § 1514(a)(2), (5). Thus, section 1514(a) precludes the CIT from reviewing a challenge to—and ordering reliquidation based on—an erroneous decision by U.S. Customs and Border Protection ("Customs" or "CBP") unless the statutory protest requirements are met. *See, e.g., Juice Farms, Inc. v. United States*, 68 F.3d 1344, 1345 (Fed. Cir. 1995); *Mitsubishi Elecs. Am., Inc. v. United States*, 18 CIT 167, 172, 848 F. Supp. 193, 197 (1994).

In litigation under 28 U.S.C. § 1581(c) seeking to challenge an antidumping or countervailing duty determination, the finality of liquidation is governed by a different statutory provision, 19 U.S.C. § 1516a.[4] That provision indicates that liquidation in accordance with the agency determination is generally final and conclusive unless an interested party secures a statutory injunction to ensure liquidation in accordance with any final court decision reviewing the agency determination. *See* 19 U.S.C. § 1516a(c), (e). This statutory scheme was addressed by the Federal Circuit at length in *Zenith Radio Corp. v. United States*, 710 F.2d 806 (Fed. Cir. 1983).

In *Zenith*, the appellate court reversed the CIT's denial of a preliminary injunction to suspend the liquidation of entries subject to an administrative review conducted by the U.S. Department of Commerce ("Commerce") under 19 U.S.C. § 1675. 710 F.2d at 808.[5] The

[4] Section 1581(c) also confers exclusive jurisdiction on the CIT to review civil actions commenced pursuant to 19 U.S.C. § 1517, pursuant to which CBP investigates allegations of evasion of antidumping and countervailing duty orders. That section also provides for judicial review of Customs' determinations in those investigations. While the Government has consented to the entry of preliminary injunctions suspending liquidation of entries subject to those determinations, *see, e.g.*, Consent Mot. for a Prelim. Inj., *Royal Brush Mfg., Inc. v. United States*, Court No. 19-cv-00198 (CIT Nov. 26, 2019), the status of the court's remedial authority in such cases absent preliminary relief has not been litigated and is immaterial to the court's disposition of this motion.

[5] Determinations issued pursuant to 19 U.S.C. § 1675 are reviewable under 19 U.S.C. § 1516a(a)(2)(B)(iii).

appellate court explained that section 1516a "permits liquidation in accordance with a favorable [final court] decision . . . only on merchandise entered after the court decision is published or on earlier entries 'the liquidation of which was enjoined under subsection (c)(2).'" *Id.* at 810 (quoting 19 U.S.C. § 1516a(e)). In the absence of a "provision permitting reliquidation in this case or imposition of higher dumping duties after liquidation if [Zenith Radio Corp. ('Zenith')] is successful on the merits," the appellate court concluded that, "[o]nce liquidation occurs, a subsequent decision by the trial court on the merits of Zenith's challenge can have no effect on the dumping duties assessed on [subject] entries."[6] *Id.*; *cf. Mid Continent Steel & Wire, Inc. v. United States*, 44 CIT __, __, 427 F. Supp. 3d 1375, 1382–84 (2020) (in litigation regarding the final determination in an investigation in which success on the merits could lead to revocation of the antidumping duty order, relying on *Zenith*, among other authorities, the court preliminarily enjoined the liquidation of entries subject to the first and subsequent administrative reviews).

Zenith, however, is limited to actions reviewable pursuant to 19 U.S.C. § 1516a and is not applicable to an action under the Administrative Procedure Act ("APA"). *Shinyei Corp. of Am. v. United States*, 355 F.3d 1297, 1309 (Fed. Cir. 2004) ("This court's ruling in *Zenith* . . . was explicitly based on the liquidation and injunction provisions in [19 U.S.C. § 1516a], and those provisions are inapplicable here.").

In contrast with the foregoing caselaw, this case implicates the court's jurisdiction pursuant to 28 U.S.C. § 1581(i), whereby the court is within its authority to order reliquidation or other appropriate relief. Specifically, the court's remedial authority is set forth in 28 U.S.C. § 2643.[7] The statute provides, *inter alia*, that the CIT "may enter a money judgment . . . for or against the United States in any civil action commenced under section 1581 or 1582 of this title," 28 U.S.C. § 2643(a)(1),[8] and, with exceptions not relevant

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[6] While this discussion of the finality of liquidation was critical to the *Zenith* opinion, that court's finding of irreparable harm was based on the court's finding that the plaintiff's entire case would be mooted by the combination of the finality of the liquidation of prior entries and the inability of any final court decision to provide prospective relief because future entries could be subject to future administrative review determinations. 710 F.2d at 810.

[7] Congress enacted 28 U.S.C. §§ 1585 and 2643 as part of the Customs Courts Act of 1980, Pub. L. No. 96–417, 94 Stat. 1727 (1980).

[8] At oral argument, the Government represented that the CIT lacks the authority in this case to order a money judgment pursuant to 28 U.S.C. § 2643(a)(1) and requested the opportunity to further brief the issue. Oral Arg. 07:40–08:20, 45:45–47:15, *available at* https://www.cit.uscourts.gov/sites/cit/files/061721–21–00052–3JP.mp3 (last visited July 6, 2021) (approximate time stamp from the recording). As discussed *supra* note 3, further briefing at this time is unnecessary given my clear view that relief would be available to prevailing Plaintiffs pursuant to 28 U.S.C. § 2643(c)(1).

here,[9] may "order *any other form of relief* that is appropriate in a civil action, including, but not limited to, declaratory judgments, orders of remand, injunctions, and writs of mandamus and prohibition," *id.* § 2643(c)(1) (emphasis added).[10] The statute confers "broad remedial powers" on the CIT, *Shinyei*, 355 F.3d at 1312, that are not constrained by liquidation in the absence of a statutory limitation on reliquidation. "The legislative history of the Customs Courts Act of 1980 leaves no doubt that 28 U.S.C. § 2643(c)(1) 'is a general grant of authority for the [CIT] to order *any form of relief* that it deems appropriate under the circumstances.'" *United States v. Mizrahie*, 9 CIT 142, 146, 606 F. Supp. 703, 707 (1985) (quoting H.R. Rep. No. 96–1235, at 61 (1980)) (emphasis added).[11]

In keeping with that view, the court has recognized its authority to order the remedy of reliquidation when appropriate. *See, e.g., PrimeSource Building Prods., Inc. v. United States*, 45 CIT __, __, 505 F. Supp. 3d 1352, 1357–58 (2021) (ordering a refund of any section 232 duties paid on entries liquidated despite the court's preliminary injunction suspending liquidation); *J. Conrad Ltd. v. United States*, 44 CIT __, __, 457 F. Supp. 3d 1365, 1379 (2020) (finding no irreparable harm given the court's authority to order reliquidation and noting the Government's position that liquidation would not preclude the court from ordering such relief); *Gilda Indus., Inc. v. United States*, 33 CIT 751, 760, 625 F. Supp. 2d 1377, 1385 (2009) (ordering CBP to refund certain section 301 retaliatory duties without regard to liquidation status), *aff'd*, 622 F.3d 1358 (Fed. Cir. 2010). While the Government has stipulated to the refund or reliquidation of duties in certain cases,

[9] While the exceptions are not germane to this case, Congress's enumeration of specific exceptions to the CIT's broad remedial authority further indicates that Congress did not intend the court to read additional exceptions into the statute absent contrary congressional intent. *See, e.g., United States v. Brockamp*, 519 U.S. 347, 352 (1997) (declining to read an equitable exception into the detailed statutory time limitations set forth in 26 U.S.C. § 6511 given Congress's "explicit listing of exceptions"); *United States v. Smith*, 499 U.S. 160, 166–67 (1991) (declining to infer a third exception to the rule that the Federal Tort Claims Act constitutes the exclusive remedy for torts by Government employees when Congress provided for two exceptions by statute).

[10] The list is not exhaustive. Moreover, the term "injunction" may include an affirmative injunction compelling agency action. *See generally Home Prods. Int'l, Inc. v. United States*, 43 CIT __, 405 F. Supp. 3d 1368 (2019) (relying, in part, on the court's authority pursuant to 28 U.S.C. § 2643(c)(1) to enforce a judgment through an affirmative injunction requiring CBP to reliquidate entries at the rates established in the court's judgment), *appeal dismissed*, 846 F. App'x 890 (Fed. Cir. 2021).

[11] Section 2643 of Title 28 complements section 1585. According to the legislative history, section 1585 was enacted to "remove[] any doubt" as to the scope of the CIT's remedial powers and "make it clear that the [CIT] possesses all plenary powers in law and equity, thereby completing the full transformation of the court to article III status." 126 Cong. Rec. 26,554–55 (1980) (statement of Rep. Rodino); *see also* H.R. Rep. No. 96–1235, at 50 (1980) ("It is the Committee's intent to make clear that the [CIT] does possess the same plenary powers as a federal []district court.").

see Defs.' Opp'n at 36, the CIT's authority to order refund or reliquidation is based on statute, not stipulation.[12]

The authority to order reliquidation was expressly addressed by the Federal Circuit in *Shinyei*. *Shinyei* addressed a challenge to Commerce's liquidation instructions issued after litigation regarding an administrative review of the antidumping duty order. *See Shinyei*, 355 F.3d at 1299–1304. The plaintiff, Shinyei Corporation of America ("Shinyei"), had "deposited estimated antidumping duties on the entries at issue at a rate of 45.83% ad valorem." *Id.* at 1300. Following litigation, Commerce's amended results set forth rates ranging from 1.83 percent to 16.71 percent, depending on the manufacturer. *Id.* at 1302. Commerce's amended liquidation instructions did not specifically address Shinyei's entries of subject merchandise from certain manufacturers purportedly covered by the amended results. *Id.* Commerce subsequently issued "clean-up" instructions directing CBP to liquidate "as entered" any remaining entries of subject merchandise that were not covered by the previous instructions. *Id.* at 1303. CBP then liquidated Shinyei's entries at the cash deposit rate. *Id.* Shinyei claimed that the clean-up instructions violated 19 U.S.C. § 1675(a)(2) and sought reliquidation at the lower rates. *Id.* at 1303–04, 1306.

The CIT dismissed Shinyei's complaint for lack of subject matter jurisdiction based on the court's view that liquidation of the subject entries mooted Shinyei's action under the APA. *Id.* at 1304. On appeal, the Federal Circuit held that the CIT retained jurisdiction pursuant to 28 U.S.C. § 1581(i) over an APA cause of action challenging Commerce's liquidation instructions notwithstanding Customs' liquidation of the subject entries. *Id.* at 1305–12. The appellate court reasoned, *inter alia*, that the finality of liquidation provided for in 19 U.S.C. § 1514(a) is inapplicable when "the alleged agency error [is] on the part of Commerce, not Customs." *Id.* at 1311 (further stating that section 1514(a) "is not . . . fairly construed to prohibit reliquidation in all cases"). Further, in recognition of the CIT's "broad remedial powers," *id.* at 1312 (citing 28 U.S.C. § 2643 (2000)), the Federal Circuit concluded that, in that case, reliquidation was "easily construed" as an appropriate form of relief, *id.* More recently, in *Sumecht NA, Inc. v. United States*, the Federal Circuit affirmed the CIT's denial of preliminary relief because Sumec North America ("Sumec") failed to demonstrate irreparable harm. 923 F.3d 1340, 1347–48 (Fed. Cir. 2019). The appellate court based its decision, at least in part, on its

[12] I agree with the Majority that the Government is entitled to change its position and litigate its new position. However, as a matter of statutory interpretation, I believe this court may resolve the issue consistent with Federal Circuit precedent and deny the motion for preliminary injunction.

previous recognition of the CIT's equitable power to order reliquidation in section 1581(i) actions. *Id.* at 1347.[13]

Consistent with these opinions, I find that the court possesses the authority to order reliquidation and, if Plaintiffs prevail, reliquidation constitutes at least one type of "relief that [would be] appropriate in [this] civil action." *See* 28 U.S.C. § 2643(c)(1).[14]

Although Plaintiffs largely agree with this view, *see* Pls.' Mot. for Prelim. Inj. Limited to Suspension of Liquidation ("Pls.' Mot.") at 6–9, ECF No. 287, they rely on the Federal Circuit's grant of preliminary relief in *Ugine & Alz Belgium v. United States*, 452 F.3d 1289, 1297 (Fed. Cir. 2006), and *American Signature, Inc. v. United States*, 598 F.3d 816, 829 (Fed. Cir. 2010), to contend that an injunction should issue nevertheless, Pls.' Mot. at 10–12. However, those cases are distinguishable and, more importantly, do not obviate the requirement that a plaintiff must establish a *likelihood* of irreparable harm.

Ugine addressed an importer's challenge to Commerce liquidation instructions. 452 F.3d at 1291. The importer obtained the parties' consent to a preliminary injunction to suspend the liquidation of unliquidated entries, but the CIT denied the motion, in part, based on the absence of "unequivocal irreparable harm." *Id.* at 1292. While the court reasoned that the importer could protest any liquidations occurring during the pendency of the action, the court did not, however, discuss *Shinyei*. *See id.*

The Federal Circuit reversed the CIT's denial of a preliminary injunction. *Id.* at 1290. As to irreparable harm, the Federal Circuit recognized that although "*Shinyei* appears to provide [the importer] with an avenue for seeking a judicial remedy even if liquidation occurs," there remained "the possibility that *Shinyei* will not be interpreted to encompass the sort of claim at issue" in *Ugine*. *Id.* at 1296 (observing that the importer challenged Commerce's liquidation instructions for earlier review periods as inconsistent with the more recent, fourth, review with respect to country of origin).

Notably, in *Ugine*, the CIT had not addressed *Shinyei* and the parties had not fully briefed it before the Federal Circuit. *Id.* at 1296–97. Thus, "[r]ather than deciding the scope of *Shinyei* in a preliminary injunction context, without a decision by the trial court

[13] The court also noted that Sumec's entries were covered by a statutory injunction in a separate case, *Sumecht*, 923 F.3d at 1346, and that the Government conceded that Sumec would be entitled to reliquidation if it prevailed, *id.* at 1348.

[14] What constitutes "appropriate relief" is a case-specific determination. The Government has not directly argued that reliquidation (and a corresponding refund of List 3 and List 4A duties) *would not* be "appropriate" if Plaintiffs prevail on the merits. However, in light of the Government's arguments regarding the balance of equities and public interest factors, the Government may, in fact, prefer a monetary judgment to reliquidation to minimize the burden on the Government in such a circumstance.

or briefing by two of the three parties, [the appellate court] conclude[d] that the issue [was] sufficiently complex that we should resolve it only in a setting in which it has been litigated by the parties and decided by the trial court." *Id.* at 1297. As a result, *Ugine* is distinguishable based on the nature of the underlying claim and the lack of this court's insight into the scope of its remedial authority pursuant to 28 U.S.C. § 2643 in the event the importer prevailed on that claim. Perhaps of most significance for this case, *Ugine* predates *Winter* by more than two years and therefore lacks the benefit of the appellate court reconciling the possibility of *Shinyei* relief with the Supreme Court's clarification of the requisite showing of a likelihood of irreparable harm.[15]

In *American Signature*, the Federal Circuit also reversed the CIT's denial of a preliminary injunction in a case challenging Commerce's liquidation instructions. 598 F.3d at 819. This time, the CIT had relied on *Shinyei* to find that the plaintiff had "an available and adequate remedy to correct the erroneous liquidation of entries caused by incorrect liquidation instructions, even if liquidation is permitted to go forward." *Id.* at 828 (citation omitted). Nevertheless, despite the CIT's reference to *Shinyei*, the Federal Circuit pointed to language in *Ugine* to conclude again that "the possibility of *Shinyei* relief" did not defeat the plaintiff's assertions of irreparable harm. *Id.* at 829 (discussing *Ugine*, 452 F.3d at 1297). The Federal Circuit did not, however, explain why *Shinyei* relief might not be available or explain why uncertainty as to the availability of *Shinyei* relief rendered the plaintiff's showing of irreparable harm sufficiently likely pursuant to *Winter*. *See id.*

The Federal Circuit has since said that it does not interpret "*Ugine* and *American Signature* as creating a presumption that, in the preliminary injunction context, *Shinyei* relief is uncertain for purposes of irreparable harm in [section] 1581(i) actions because such a presumption runs counter to *Shinyei*'s holding that the CIT has 'broad remedial powers,' including the ability to order reliquidation." *Sumecht*, 923 F.3d at 1348 (quoting *Shinyei*, 355 F.3d at 1312). The Federal Circuit also observed that *American Signature* was distinct from *Ugine* because "the underlying complaint [filed in *American Signature*] expressly referenced [19 U.S.C.] § 1675(a)(2)(C) to allege that Commerce's corrected liquidation instructions were erroneous as a matter of law." *Id.* at 1347 n.8. While the *American Signature* court

[15] While the *Ugine* court found a "strong showing of irreparable harm," that showing appeared to be based on the notion "that the denial of a preliminary injunction *could* result in denying [the importer] its opportunity for a decision on the merits of its claim regarding the duties for merchandise imported" prior to the fourth administrative review. 452 F.3d at 1297 (emphasis added).

did not completely reconcile its decision with *Shinyei*, the court's discussion of likelihood of success on the merits suggests that, in contrast to *Shinyei*, Commerce had more closely incorporated its processes for developing the liquidation instructions into the administrative review determination under 19 U.S.C. § 1675(a)(2)(A) such that jurisdiction under 28 U.S.C. § 1581(c) might be appropriate. *Am. Signature*, 598 F.3d at 824–26. Notwithstanding these questions about the appropriate jurisdictional basis for challenging Commerce's liquidation instructions, at issue here is the scope of the CIT's remedial powers pursuant to 28 U.S.C. § 2643 in a case not involving antidumping or countervailing duties and the associated interplay with 19 U.S.C. § 1516a and *Zenith*. Thus, *Ugine* and *American Signature* do not require the court to find a likelihood of irreparable harm particularly when, as here, the Parties have put the issue of remedy squarely before the court and briefed their respective positions. *See* Pls.' Mot. at 6–9; Defs.' Opp'n at 35–42.[16]

The Government's preservation of its right to appeal any determination that reliquidation is an appropriate remedy fails to inject enough uncertainty into the issue to render any irreparable harm likely. *See* Defs.' Opp'n at 42 (preserving its right to appeal); Pls.' Mot. at 11–12 (arguing that the uncertainty generated by the Government's litigating position and preservation of its right to appeal establishes irreparable harm). "Critically, irreparable harm may not be speculative." *Comm. Overseeing Action for Lumber Int'l Trade Investigations or Negots. v. United States*, 43 CIT __, __, 393 F. Supp. 3d 1271, 1276 (2019) (citation omitted). Rather, the harm "must be both certain and great; . . . actual and not theoretical. . . . '[T]he party seeking injunctive relief must show that the injury complained of [is] of such *imminence* that there is a "clear and present need" for equitable relief to prevent irreparable harm.'" *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (fourth alteration original) (quoting *Ashland Oil, Inc. v. FTC*, 409 F. Supp. 297, 307 (D.D.C.), *aff'd*, 548 F.2d 977 (D.C. Cir. 1976)); *cf. Winter*, 555 U.S. at 22. The Government's arguments as to why reliquidation is not an available remedy in this case are unpersuasive.

The Government first points to language in 19 U.S.C. § 1514(a) concerning the finality of liquidation to assert that, "[o]nce a liquida-

[16] The Majority asserts that "the differing theories of harm" alleged in *Ugine* and *American Signature* are "immaterial" to the question of remedy because both cases arose under the court's section 1581(i) jurisdiction and therefore implicate the same statutory remedial authority. Maj. Op. at 15 n.9. The differing theories of harm are relevant, however, because reliquidation would only be available when it constitutes an "appropriate" form of relief in the particular action. *See* 28 U.S.C. § 2643(c)(1).Accordingly, such differences must be considered in order to ascertain the degree to which *Ugine* and *American Signature* compel the entry of an injunction.

tion becomes final and conclusive, generally neither CBP nor the Courts may alter or set aside the transaction, including the assessment of duties." Defs.' Opp'n at 37. The Government omits that section 1514(a) refers to "decisions of the Customs Service" as the decisions that are "final and conclusive" barring a protest and action commenced pursuant to 28 U.S.C. § 1581(a). 19 U.S.C. § 1514(a); *see also, e.g.*, *Shinyei*, 355 F.3d at 1311 (section 1514(a) is inapplicable when "the alleged agency error [is] on the part of Commerce, not Customs"); *Am. Signature*, 598 F.3d at 829 (same).[17]

The Government next relies on *Zenith* to argue that "the rule of finality of liquidations is not limited to Customs decisions that can be protested pursuant to 19 U.S.C. § 1514(a)." Defs.' Opp'n at 37. According to the Government, *Zenith* demonstrates that, absent an injunction suspending liquidation, "an entry will liquidate in the normal administrative course and that liquidation will become final and conclusive." *Id.* at 38. While acknowledging the distinct jurisdictional bases, the Government argues, in effect, that if finality attaches to liquidations that are not protested and subject to judicial review pursuant to 28 U.S.C. § 1581(a) and finality attaches to the liquidation of entries covered by a determination reviewable pursuant to 28 U.S.C. § 1581(c) unless it is enjoined, then "reliquidation should not be available upon a successful challenge under [28 U.S.C. §] 1581(i) either." *Id.*

In making this argument, the Government overlooks the distinctions between the statutory bases that govern the finality of liquidation in the context of actions implicating the court's jurisdiction under section 1581(a) and (c). As set forth above, *Zenith* is limited to actions arising under 19 U.S.C. § 1516a and "is inapplicable" to "an action under the APA." *Shinyei*, 355 F.3d at 1309. *Zenith* therefore does not support the Government's assertion that reliquidation is not (or

[17] By seeking to tie the court's authority to order reliquidation to section 1514(a), the Government implies the presence of a protestable Customs decision. In so doing, the Government argues against the position it has taken in *Koch Supply & Trading, LP v. United States*, Court No. 20-cv-00063 ("*Koch Supply*"). There, an importer asserted jurisdiction pursuant to 28 U.S.C. § 1581(a) and (i) to challenge the lawfulness of section 232 duties (under section 1581(i)) and a denied protest contesting Customs' collection of the allegedly unlawful duties (under section 1581(a)). Compl., *Koch Supply* (CIT Mar. 23, 2020). Customs denied the protest shortly after it was filed as non-protestable. *Id.* ¶ 28. In a consent motion to stay the case, the Government represented that the court lacked jurisdiction pursuant to 28 U.S.C. § 1581(a) to review the denied protest claim. Consent Mot. to Stay Proceedings at 3, *Koch Supply* (CIT May 19, 2020). The Government's position in *Koch Supply* is inconsistent with its position here as to whether Customs collection of section 232 or 301 duties is protestable and, therefore, a possible basis for jurisdiction under 28 U.S.C. § 1581(a).

should not be) available to a successful litigant in a section 1581(i) action.[18]

The Government also attempts to limit the court's authority to order reliquidation to situations in which it is "necessary to protect a judgment of [the CIT], rather than authority for reliquidation as a garden variety remedy in any case brought pursuant to section 1581(i)." Defs.' Opp'n at 40. The Government relies on the following language from *Shinyei*:

> [T]o accept the government's argument would preclude enforcement of court orders as to duty determinations as soon as entries subject to those orders are liquidated, even where liquidation was under erroneous instructions that fail to reflect the amended administrative review results implementing the courts' determinations, as required by section 1675(a)(2)(C).

Id. (quoting *Shinyei*, 355 F.3d at 1312).[19]

The Government omits, however, the immediately preceding paragraph, in which the Federal Circuit explained that "the [CIT] has been granted broad remedial powers." *Shinyei*, 355 F.3d at 1312 (citing 28 U.S.C. § 2643 (2000)). The appellate court noted that the CIT can enter a money judgment against the Government in an action commenced under 28 U.S.C. § 1581, *id.* (citing 28 U.S.C. § 2643(a)(1)), and can "order *any other form of relief that is appropriate* in a civil action," *id.* (quoting 28 U.S.C. § 2643(c)(1)). The Federal Circuit thus found that "[t]he absence of an express reliquidation provision should not be read as a prohibition of such relief when the statute provides the [CIT] with such broad remedial powers" and, in that case, reliquidation was "easily construed" as an appropriate form

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[18] The Government's attempt to characterize *Shinyei* as in conflict with *Zenith* fails. *See* Defs.' Opp'n at 41. Moreover, the Government's assertion that "no statutory provision allows the liquidation of entries to be enjoined by the [c]ourt in section 1581(i) actions, and the liquidation of any entries at issue in the section 301 cases should therefore be held to be final and conclusive," *id.* at 41–42, lacks merit. The Government does not seriously contest the court's authority to enter the requested injunction upon the requisite showing, *see id.* at 17–18 (summarizing the standard of review), and the absence of express statutory authority beyond that already provided by 28 U.S.C. § 2643 is immaterial. The Government also appears to conflate the *Zenith* court's reference to "the absence of a statutory provision permitting reliquidation" in 19 U.S.C. § 1516a with the absence of a statutory injunction applicable to section 1581(i). *Id.* at 41–42 (citing *Zenith*, 710 F.2d at 810). The Government does not, however, explain the basis for this attempted analogy.

[19] The Government also seeks to rely on *Agro Dutch Industries Ltd. v. United States*, 589 F.3d 1187, 1191–92 & n.1 (Fed. Cir. 2009). Defs.' Opp'n at 41. *Agro Dutch* affirmed the CIT's authority to (1) amend the effective date of a statutory injunction to remove a five-day grace period, and (2) order reliquidation of subject entries liquidated within that grace period. 589 F.3d at 1190–94. While the *Agro Dutch* court cited *Shinyei* for the proposition that "mootness does not occur when steps are required to enforce a valid injunction," *id.* at 1191, the *Agro Dutch* court did not address the limits of *Shinyei* relief or otherwise suggest that this court's authority to provide reliquidation or other appropriate monetary relief is, in fact, limited to judicial enforcement of prior orders.

of relief.[20] *Shinyei* does not, therefore, support the Government's suggested limitation on the court's authority to provide appropriate relief. Nevertheless, a finding by this court that it has the authority to order reliquidation as a possible form of relief in this case, specifically, would not constrain the court's discretion in subsequent cases brought under the court's residual jurisdiction to determine what "relief . . . is appropriate." 28 U.S.C. § 2643(c)(1).

In light of the CIT's broad remedial authority, the court asked the Parties to identify any cases in which "the Federal Circuit found that the CIT erred in its exercise of discretion as to appropriate relief." Letter from the Court at 1 (June 14, 2021), ECF No. 321. Plaintiffs pointed to *Co-Steel Raritan, Inc. v. Int'l Trade Comm'n*, 357 F.3d 1294 (Fed Cir. 2004), and *NTN Bearing Corp. of America v. United States*, 892 F.2d 1004 (Fed. Cir. 1989), while noting that those cases are readily distinguished. The Government pointed to *National Corn Growers Ass'n v. Baker*, 840 F.2d 1547 (Fed. Cir. 1988). Oral Arg. 04:30–10:40.

None of the identified cases suggest that the court would overstep its authority to order reliquidation to prevailing Plaintiffs in this case. *Co-Steel Raritan* recognized the CIT's general authority to

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[20] While not expressly agreeing with the Government's interpretation of the holding of *Shinyei*, the Majority opines that the Government's interpretation arguably is correct. Maj. Op. at 13 & n.8. I disagree. The Federal Circuit's observation concerning the logical extent of the Government's argument in that case was not essential to the appellate court's finding that reliquidation was authorized under the CIT's remedial statute and would be an appropriate remedy in the event Shinyei established that its entries liquidated at rates that were inconsistent with Commerce's liquidation instructions. Such statements are not controlling. *See, e.g., K-Tech Telecomms., Inc. v. Time Warner Cable, Inc.*, 714 F.3d 1277, 1287 n.1 (Fed. Cir. 2013) (Wallach, J., concurring) (noting that "statements in judicial opinions upon a point or points not necessary to the decision of the case" consist of "dictum" that is neither "authoritative" nor controlling) (quoting *In re McGrew*, 120 F.3d 1236, 1238 (Fed. Cir. 1997)). Indeed, in the Federal Circuit's second opinion in the litigation concerning Shinyei's rate, the appellate court characterized *Shinyei* as

> [holding] that the liquidation of Shinyei's entries did not preclude judicial review of Shinyei's Commerce-error claim under the APA, because the Tariff Act [of 1930] does not expressly or impliedly forbid the relief sought by Shinyei for erroneous liquidation instructions—namely, "reliquidation of the subject entries at the lower rate so [Shinyei] can receive a refund of the overpaid duties."

Shinyei Corp. of Am. v. United States ("*Shinyei II*"), 524 F.3d 1274, 1282 (Fed. Cir. 2008) (quoting *Shinyei*, 355 F.3d at 1306); *see also id.* at 1280 (discussing the holding of *Shinyei* in relatively broad terms). The *Shinyei II* court also clarified the reason why reliquidation would be an appropriate form of relief in response to Commerce's error, namely, that, "[i]f there was an error in the instruction process, then Shinyei is entitled to a judgment ordering reliquidation pursuant to new, correct instructions." *Id.* at 1284. So too here, there is no express or implied prohibition on reliquidation of entries if they liquidated inclusive of unlawful Section 301 duties. Further, if the court ultimately finds that there was legal error in the imposition of List 3 and List 4A duties on Plaintiffs' entries, Plaintiffs are entitled to a judgment ordering reliquidation exclusive of duties. Nothing in *Shinyei II* suggests that the *Shinyei* court's statement concerning the preclusion of judicial enforcement of court orders consisted of anything more than a rejection of the Government's argument as opposed to a limitation on its holding.

remand an agency determination pursuant to 28 U.S.C. § 2643(c)(1) while finding that the CIT erred in ordering a remand to the U.S. International Trade Commission to reconsider a negative preliminary material injury determination in an antidumping investigation to account for subsequent developments. 357 F.3d at 1313–17. *NTN Bearing* recognized the CIT's "broad injunctive powers" pursuant to 28 U.S.C. §§ 1585 and 2643(c)(1) while finding that the CIT erred in entering what amounted to an injunction enjoining the collection of antidumping duty cash deposits and ordering the return of duties previously paid following the entry of partial summary judgment, without the requisite final court decision pursuant to 19 U.S.C. § 1516a(e). 892 F.2d at 1006.

The Government's reliance on *National Corn Growers* also is inapposite. While the Government sought to rely on that case for the proposition that the CIT cannot award monetary damages in a section 1581(i) case in circumvention of a statutory limit on reliquidation authority, *see Nat'l Corn Growers*, 840 F.2d at 1560, such discussion is purely dicta. The Federal Circuit first determined that the CIT lacked jurisdiction pursuant to 28 U.S.C. § 1581(i); jurisdiction pursuant to 28 U.S.C. § 1581(b) was available; and any remedy pursuant to section 1581(b) was limited, by statute, to prospective entries. *Id.* at 1550–59. Thus, *National Corn Growers* would not limit the court's authority to require the Government to return wrongfully obtained duties through reliquidation when there is no particular statutory prohibition on reliquidation or limitation to prospective relief.

In sum, given the CIT's broad remedial authority and the absence of any explicit disagreement from my colleagues concerning the court's authority to order reliquidation as a remedy in this case, I conclude that Plaintiffs' showing of irreparable harm is speculative, at best. My reading of the Federal Circuit precedent does not allow me to conclude that Plaintiffs have established a likelihood of irreparable harm. In the absence of such a showing, I would deny the motion for a preliminary injunction without reaching the other requirements for issuing such an injunction. Because I do not believe that Plaintiffs are entitled to the "extraordinary remedy" of preliminary relief, *see Winter*, 555 U.S. at 22, I therefore dissent.

/s/ Mark A. Barnett

MARK A. BARNETT, CHIEF JUDGE

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