U.S. Customs and Border Protection

19 CFR PART 122

RIN 1651–AB43

ADVANCE PASSENGER INFORMATION SYSTEM: ELECTRONIC VALIDATION OF TRAVEL DOCUMENTS

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

ACTION: Notice of proposed rulemaking.

SUMMARY: U.S. Customs and Border Protection (CBP) regulations require commercial air carriers to electronically transmit passenger information to CBP's Advance Passenger Information System (APIS) prior to an aircraft's departure to the United States from a foreign port or place or departure from the United States so that the Department of Homeland Security (DHS) can determine whether the carrier must conduct an additional security analysis or security screening of the passengers. CBP proposes to amend these regulations to incorporate additional commercial carrier requirements that would enable CBP to determine whether each passenger is traveling with valid, authentic travel documents prior to the passenger boarding the aircraft. The proposed regulations would also require commercial air carriers to transmit additional data elements through APIS for all commercial aircraft passengers arriving, or intending to arrive, in the United States in order to support border operations and national security and safety. Additionally, this proposal includes changes to conform existing regulations to current practice. Finally, the proposed regulations would allow commercial carriers to transmit an aircraft's registration number to CBP via APIS. This proposed rule is intended to increase the security and safety of the international traveling public, the international air carrier industry, and the United States.

DATES: Comments must be received by April 3, 2023.

ADDRESSES: Please submit comments, identified by docket number, by the following method:

- *Federal eRulemaking Portal: https://www.regulations.gov*. Follow the instructions for submitting comments via docket number USCBP–2023–0002.

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.

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

FOR FURTHER INFORMATION CONTACT: Robert Neumann, Office of Field Operations, U.S. Customs and Border Protection, by phone at 202–412–2788.

SUPPLEMENTARY INFORMATION:

I. Public Participation

Interested persons are invited to participate in this rulemaking by submitting written data, views, or arguments on all aspects of the notice of proposed rulemaking. The Department of Homeland Security (DHS) also invites comments that relate to the economic, environmental, or federalism effects that might result from this proposal.

Comments that will provide the most assistance to the Department in developing these procedures will reference a specific portion of the proposed rule, explain the reason for any recommended change, and include data, information, or authority that support such recommended change.

II. Statutory Authority

Multiple statutes require air carriers to electronically transmit passenger information to Customs and Border Protection (CBP) prior to arriving in or departing from the United States.[1] For instance, section 115 of the Aviation and Transportation Security Act (Pub. L. 107–71, 115 Stat. 623, Nov. 19, 2001) requires air carriers operating a passenger flight in foreign air transportation to the United States to

[1] Those statutes include, but are not limited to, section 115 of the Aviation and Transportation Security Act (Pub. L. 107–71, 115 Stat. 623, 49 U.S.C. 44909), section 402 of the Enhanced Border Security and Visa Entry Reform Act of 2002 (Pub. L. 107–173, 116 Stat. 557, 8 U.S.C. 1221), section 4012 of the Intelligence Reform and Terrorism Prevention Act of 2004 (Pub. L. 108–458; 49 U.S.C. 44909(c)), and certain authorities administered by the Transportation Security Administration (TSA) (49 U.S.C. 114, 49 CFR parts 1550, 1544, 1546).

electronically transmit a passenger manifest to CBP. *See* 49 U.S.C. 44909(c). Pursuant to this statute, the manifest must contain the following data for each passenger: full name; date of birth; citizenship; sex; passport number and country of issuance (if a passport is required for travel); U.S. visa number or resident alien card, as applicable; and such other information as the Administrator of the Transportation Security Administration (TSA), in consultation with the Commissioner of CBP, determines is reasonably necessary to ensure aviation safety. *See* 49 U.S.C. 44909(c)(2). The passenger manifest must be transmitted in advance of the aircraft landing in the United States in such manner, time, and form as CBP requires. *See* 49 U.S.C. 44909(c)(4).

Section 402 of the Enhanced Border Security and Visa Entry Reform Act of 2002 (Pub. L. 107–173, 116 Stat. 557) requires a master or commanding officer, or the authorized agent, owner, or consignee of a commercial aircraft that is either departing the United States or arriving in the United States to transmit to CBP manifest information about each passenger on board. *See* 8 U.S.C. 1221(a)–(b). The manifest information must contain the following information: complete name; date of birth; citizenship; sex;[2] passport number and country of issuance; country of residence; U.S. visa number, date and place of issuance, where applicable; alien registration number, where applicable; and U.S. address while in the United States. *Id.* The Secretary of Homeland Security (Secretary) may also require additional manifest information if the Secretary, in consultation with the Secretary of State and the Secretary of the Treasury, determines that the information is necessary for the identification of the persons transported, the enforcement of the immigration laws, or the protection of safety and national security. *See* 8 U.S.C. 1221(c); 8 U.S.C. 1103(a)(1). Together, these and other applicable broad statutes cited as authority for CBP's Advance Passenger Information System (APIS) regulations allow CBP to require that commercial air carriers transmit to CBP manifest information relating to each individual traveling onboard an aircraft arriving in or departing from the United States and specify the type of information that must be submitted.[3]

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[2] APIS allows carriers to transmit male, female, or any gender code included on a Government-issued ID. See DHS Consolidated User Guide Part 4—UN/EDIFACT Implementation Guide, September 6, 2016, available at *https://www.cbp.gov/sites/default/files/assets/documents/2016-Sep/DHS_CUG_v4%202_09–06–2016_Pt%204_EDIFACT.pdf* (last accessed October 29, 2021).

[3] Additional document validation procedures and advance data submitted through APIS supports CBP's mission to identify and interdict nefarious actors before departing to and from the United States. *See* 6 U.S.C. 211. For more information regarding the purpose of the proposed regulations see section IV.

Additionally, section 4012 of the Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA) (Pub. L. 108–458, 118 Stat. 3638) requires DHS to perform security vetting of passengers on board aircraft bound for or departing from the United States prior to the departure of the aircraft. Specifically, section 4012 requires DHS to compare passenger information for any international flight to or from the United States against the consolidated and integrated terrorist watch list maintained by the Federal Government before departure of the flight. *See* 49 U.S.C. 44909(c)(6). IRTPA authorizes the Secretary of Homeland Security to issue regulations to implement these requirements. Regulations implementing section 4012 of IRTPA were published on August 23, 2007 (72 FR 48320). Those regulations are described below.

III. Background and Current Requirements

Current CBP regulations require commercial air carriers to transmit information electronically to CBP for individuals traveling or intending to travel to or from the United States on board an aircraft. The focus of this proposed rulemaking is commercial aircraft arriving in or departing from the United States. Unless otherwise specified, use of the term "carrier" throughout this proposed rulemaking refers to "commercial air carriers."[4] Section 122.49a of title 19 of the Code of Federal Regulations (19 CFR 122.49a) specifies the information that commercial carriers must transmit for each passenger checked in for a flight arriving in the United States from a foreign place.[5] Title 19 CFR 122.75a specifies the information that commercial carriers must transmit for each passenger checked in for an aircraft departing the United States for a foreign place.[6] Under the current APIS regulations, carriers submit passenger data to CBP between 72 hours and 30 minutes before departure, and no later than securing the aircraft doors for individual submissions. The required information varies depending on whether the aircraft is departing or arriving, but it generally must include: the passenger's name; date of birth; sex;

[4] Separate regulations that address electronic manifest requirements for crew and non-crew members arriving in or departing from the United States by commercial aircraft, *see* 19 CFR 122.49b, 122.75b, and individuals onboard private aircraft arriving in and departing from the United States, *see* 19 CFR 122.22, are not affected by this proposed rulemaking.

[5] CBP regulations do not require commercial air carriers to transmit this information to CBP for active-duty U.S. military personnel being transported as passengers on Department of Defense commercial chartered aircraft. 19 CFR 122.49a(c), 122.75a(c).

[6] A more detailed description of the history of electronic manifest information requirements, and the relevant authorities, is set forth in the APIS final rule published on April 7, 2005 (70 FR 17820) and the pre-departure final rule published on August 23, 2007 (72 FR 48320).

citizenship; status on board the aircraft (*i.e.,* passenger); travel document type; passport number, country of issuance, and expiration date (if a passport is required); location of boarding and departure; and the date of arrival or departure for each individual.

Carriers have two options for transmitting the required information to CBP. Under the first option, a carrier uses an interactive electronic transmission system that is capable of transmitting data to APIS and receiving electronic messages from CBP. *See* 19 CFR 122.49a(b)(1)(ii)(B), 122.49a(b)(1)(ii)(C), 122.75a(b)(1)(ii)(B), and 122.75a(b)(1)(ii)(C). Before using an interactive electronic transmission system, the carrier must subject its system to CBP testing, and CBP must certify that the carrier's system is capable of interactively communicating with the CBP system for effective transmission of manifest data and receipt of appropriate messages in accordance with the regulations. *See* 19 CFR 122.49a(b)(1)(ii)(E) and 122.75a(b)(1)(ii)(E). Once CBP certifies the interactive electronic transmission system, the carrier may use it to transmit the required electronic data. The vast majority of commercial carriers use an interactive CBP-certified transmission system.

Under the second option, the carrier may electronically transmit the required information through a non-interactive electronic transmission system approved by CBP. *See* 19 CFR 122.49a(b)(1)(ii)(A) and 122.75a(b)(1)(ii)(A). This includes the electronic Advance Passenger Information System (eAPIS), which is an online transmission system that meets all APIS data element requirements for all mandated APIS transmission types. eAPIS is a web-based transmission system that can be accessed through the internet.

Regardless of the transmission method, carriers must transmit the required information through APIS to CBP prior to the securing of the aircraft, with certain transmission methods requiring transmission no later than 30 minutes prior to securing of the aircraft.[7] *See* 19 CFR 122.49a(b)(2) and 19 CFR 122.75a(b)(2). After receiving a transmission of APIS manifest information either through a CBP-certified transmission system or through eAPIS, CBP stores APIS information

[7] ry personnel being transported as passengers on Department of Defense commercial chartered aircraft. 19 CFR 122.49a(c), 122.75a(c).

in a data system called TECS.[8] CBP simultaneously transfers this information to the Automated Targeting System (ATS)[9] to perform multiple enforcement and security queries against various databases, including multiagency law enforcement databases and the terrorist watch list.[10]

After performing the security vetting, the CBP system transmits to the carrier an electronic message. This message is generally referred to as CBP's response message. If the carrier is using an interactive transmission system, the response message provides certain instructions to the carrier. Specifically, it states whether each passenger is authorized to board, requires additional security screening, or is prohibited by TSA from boarding based on the security status of the passenger. Depending on the instructions received in the response message, the carrier may be required to take additional steps, including coordinating secondary security screening with TSA, before loading the baggage of or boarding the passenger at issue. If the carrier is using eAPIS, the CBP system will send a message to the carrier through a non-interactive method, such as email, that states whether the flight is cleared, meaning that no passengers were identified as not being cleared for boarding. If the flight is not cleared, the carrier is required to contact TSA in order to resolve the security status of one or more passengers.[11]

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[8] CBP retains APIS information in TECS for 13 months. TECS is the name of a computerized information system designed to identify individuals and businesses suspected of violations of federal law. TECS also serves as a communications system permitting the transmittal of messages between CBP and other national, state, and local law enforcement agencies. While the term "TECS" previously was an acronym for the Treasury Enforcement Communications System, it is no longer an abbreviation and is now simply the name of the system. For more information, see DHS's Privacy Impact Assessments on TECS at *https://www.dhs.gov/publication/tecs-system-cbp-primary-and-secondary-processing-tecs-national-sar-initiative.*

[9] ATS is a decision support tool that compares traveler, cargo, and conveyance information against law enforcement, intelligence, and other enforcement data.

[10] CBP retains APIS information in TECS for 13 months and ATS for 15 years. CBP uses such data for all routine purposes permitted by the ATS System of Records Notice (SORN) and the APIS SORN. CBP shares passenger data automatically with other law enforcement and national security partners pursuant to agreements with those partners for use throughout a period of time specified by the relevant agreement. CBP's current APIS regulations contemplate such sharing. *See* 19 CFR 122.49a(e), 122.75a(e). For further details, please see the APIS SORN, ATS SORN, privacy impact assessments regarding APIS and ATS, and section VI.F. CBP's privacy impact assessments are available at *https://www.dhs.gov/privacy-documents-us-customs-and-border-protection.*

[11] CBP regulations, procedures, and actions may be subject to oversight by the DHS Office for Civil Rights and Civil Liberties, the Privacy Office, the Office of General Counsel, and the Office of Inspector General. *See* 6 U.S.C. 345; 6 U.S.C. 113; 6 U.S.C. 142; 42 U.S.C. 2000ee–1.

IV. Purpose of Rule and APIS Document Validation Program

Although CBP currently uses APIS to compare the passenger information submitted by the carriers to various law enforcement databases and the terrorist watch list, to enhance national security and safety, CBP and the air carrier industry, under the governing statutes and regulations, continue to take steps to further strengthen the quality of the results and protect vital industries and the public. To further improve CBP's vetting processes with respect to APIS data and enhance communication with air carriers, CBP proposes to amend its regulations to require carriers to ensure that their systems are capable of accepting document validation instructions from CBP's system and to contact CBP, if necessary, to take appropriate action to resolve the travel document status of each passenger intending to board an aircraft arriving in or departing from the United States.

To mitigate the risk regarding the potential use of fraudulent or invalid travel documents, in 2013 CBP implemented the voluntary Document Validation Program (DVP), which enables CBP to use APIS to vet the validity of each travel document and provide an electronic response message, either via response message or email, to the carriers as a result of that vetting. Under the DVP, APIS vets the information transmitted by carriers by comparing the information to CBP's databases, which include access to information regarding valid Department of State-issued U.S. passports and U.S. visas, DHS-issued Permanent Resident Cards, Electronic System for Travel Authorization (ESTA) approvals, and Electronic Visa Update System (EVUS) enrollments.[12] APIS then transmits a response message to the carriers participating in the voluntary program. Unlike the original (non-DVP) response message, which contains one element, the DVP response message contains two elements. The first element indicates the security status of each passenger, as required by current regulations. *See* 19 CFR 122.49a(b) and 122.75a(b). The second element states whether each passenger's travel documents have been validated, meaning that the travel document was matched to a valid, existing travel document in CBP's databases. Multiple carriers participate in the voluntary program and have updated their transmission systems in order to receive the document validation message.

[12] Nonimmigrants intending to travel under the Visa Waiver Program (VWP) must have a valid ESTA approval prior to travel. *See* 8 CFR part 217. Nonimmigrants who hold a passport issued by a country identified for inclusion in EVUS containing a U.S. nonimmigrant visa of a designated category are required to enroll in EVUS. *See* 8 CFR part 215. EVUS enrollment is currently limited to nonimmigrants who hold unrestricted, maximum validity B–1 (visitor for business), B–2 (visitor for pleasure), or combination B–1/B–2 visas, contained in a passport issued by the People's Republic of China.

The voluntary DVP has enabled CBP to more efficiently identify passengers attempting to use fraudulent travel documents and electronically communicate that information to air carriers. As a result, carriers have prevented those passengers from boarding aircraft destined for or departing from the United States. For example, in 2016, a participating carrier received a response message from CBP stating that seven passengers on one flight had travel documents that could not be validated. The carrier therefore refused to board the passengers. Later investigations revealed that all seven passengers were attempting to travel with visa numbers that had been reported as lost or stolen. In 2017, a participating carrier refused to board a passenger whose visa could not be validated by CBP. Although the visa appeared authentic and showed the passenger's name, the passenger's date of birth did not match the date of birth listed for the visa in CBP's databases. As a result, the visa was not validated, and the carrier refused to board the individual. An investigation indicated that the passenger likely shared a name with his father and was attempting to travel using a visa issued to his father.

These examples demonstrate that document validation instructions have the potential to increase security and safety for the commercial air industry and the United States and significantly improve rapid communication between CBP and air carriers. Without mandatory requirements, however, not all carriers will take the steps necessary to electronically receive CBP's document validation instructions and contact CBP prior to issuing boarding passes to passengers whose travel documents are not validated.

In addition to enhancing document validation procedures, CBP proposes to require carriers to transmit additional contact data for all passengers on commercial flights arriving in the United States to support CBP border and national security missions and safety. The proposed additional requirements assist CBP in identifying and locating individuals suspected of posing a risk to national security and safety and aviation security before departing to and from the United States. For instance, in December 2009 an individual suspected of receiving explosives training arrived in the United States from Pakistan. That individual was later linked to the failed detonation of a vehicle-borne improvised explosive device at Times Square in New York City using data related to the individual's flight to the United States. DHS was ultimately able to interdict the individual just as he was about to board an international flight. Although DHS was able to prevent this individual from boarding an international flight at the last minute, additional contact information including a primary and alternative phone number and email address will better assist CBP in

identifying and locating potential nefarious actors in the future. Additionally, prior to September 11, 2001, CBP refused entry to the so-called "20th hijacker." CBP concluded, after its review of this incident, that the inclusion of a phone number, alternate phone number, and email address would have provided CBP with an opportunity to identify other individuals associated with the traveler.

In addition to terrorism-related concerns, the inclusion of these additional data elements would also increase CBP's ability to investigate or respond to suspected crimes occurring on international flights. For example, in 2013, a passenger was suspected of kidnapping his daughter and taking her on a flight to Jamaica to avoid U.S. authorities. CBP was ultimately able to help locate the missing child. Had the passenger been required to provide a phone number, email information and U.S. address, CBP could have located the child more quickly.

As a result of these and other incidents, CBP has concluded that the inclusion of a primary and alternative phone number, email address, and address while in the United States for all passengers (other than those in transit to a location outside the United States) will enable CBP to further mitigate risks to border, national and aviation security.

V. Proposed Requirements

CBP is proposing four main changes to CBP's regulations in this Notice of Proposed Rulemaking. First, CBP proposes to require carriers to participate in the DVP program in order to receive the document validation message from CBP and to contact CBP regarding any passengers whose travel documents cannot be validated. Second, CBP proposes to require carriers to transmit additional data elements for all passengers on commercial flights arriving in the United States. Third, CBP proposes to enable carriers to include an aircraft's registration number as an optional data element in the APIS transmission. Fourth, CBP proposes several changes to conform the regulations to current practice. Each proposal is discussed in detail below.

A. Document Validation Message, Requirement To Contact CBP, and Recommendation Not To Board

Title 19 CFR 122.49a describes the electronic manifest requirement for passengers onboard commercial aircraft arriving in the United States. Title 19 CFR 122.75a describes the electronic manifest requirement for passengers onboard commercial aircraft departing from the United States. Both sections require the appropriate official of a commercial aircraft arriving in or departing from the United

States to transmit through APIS to CBP an electronic passenger arrival or departure manifest. The arrival and departure manifest requirements are nearly the same and specify the transmission methods, the information that must be included in the manifest, and the applicable exceptions.

CBP proposes to add a new paragraph (c) to both 19 CFR 122.49a and 122.75a. The new paragraphs would be identical for both sections. The new paragraphs would be divided into two sub-paragraphs and would describe the document validation message and the recommendation not to board passengers whose travel documents cannot be validated. This proposed rule differs from current practice in three respects. First, this proposed rule would enable CBP to more efficiently validate the travel documents of each passenger. Second, this proposed rule would require the carrier to receive a second message from CBP stating whether the passenger's travel documents are validated. Third, the proposed rule would require the carrier to take appropriate action if CBP is unable to validate the travel documents of a passenger.

1. Document Validation Message

Proposed paragraphs (c)(1) to 122.49a and 122.75a describe the required process for the document validation message. The general process is as follows. After a carrier transmits passenger manifest information to CBP through APIS, CBP responds to the carrier with a document validation message.

The carrier would be required to ensure its transmission system is capable of receiving the document validation message. For carriers using an interactive transmission method, APIS would transmit the document validation message through the interactive system. The document validation message from CBP would state whether CBP's system matched each passenger's travel documents to a valid, existing travel document in CBP's databases.

This proposal would add two new definitions in 19 CFR 122.49a(a) to define terms used in 122.49a and 122.75a. A "travel document" would be defined as any document or electronic record presented for travel to or from the United States, including DHS-approved travel documents, U.S.-issued visas, Electronic System for Travel Authorization (ESTA) approvals, and Electronic Visa Update System (EVUS) enrollments. "DHS-approved travel document" would be defined as a document approved by DHS for travel in or out of the United States, such as a passport or other Western Hemisphere Travel Initiative (WHTI) approved document.

2. Requirement To Contact CBP

If the document validation message states that the CBP system could not validate a passenger's travel documents and the carrier is unable to resolve the issue on its own, the carrier would be required to contact CBP prior to issuing a boarding pass to that passenger or allowing the passenger to board the aircraft. However, the carrier would not be required to contact CBP for individuals who are ineligible to travel or will not travel on the flight.

To facilitate the document validation process, and prior to contacting CBP, a carrier using an interactive transmission method may transmit additional biographical information as listed in paragraph (b)(3) of 19 CFR 122.49a and 122.75a.[13] For example, for a passenger with more than one travel document whose name appears differently on the travel documents, the carrier may transmit the names as they appear on each travel document. If, after submitting the additional biographical information, the CBP document validation message states that the passenger's travel documents were validated, the carrier is not required to contact CBP to resolve that passenger's travel document status prior to issuing a boarding pass to that passenger.

For carriers using a non-interactive transmission method, the CBP system would respond to the carrier with a document validation message indicating whether the flight was cleared. The carrier must ensure that it is capable of receiving the document validation message through a non-interactive method, such as email. A cleared flight for document validation purposes means that the CBP system matched each passenger's travel documents to a valid, existing travel document in CBP's databases. If the document validation message states that the CBP system was unable to clear the flight, the carrier must contact CBP prior to issuing any boarding passes for that flight or boarding any passengers. Upon the carrier contacting CBP, CBP would provide the carrier additional details as to which passenger's travel documents could not be validated.

3. Recommendation Not To Board

Proposed paragraph (c)(2) of 19 CFR 122.49a and 122.75a states that if CBP is unable to validate a passenger's travel documents even

[13] Biographical information refers to the information set forth in the proposed 19 CFR 122.49a(b)(3)(i) through (v), (vii) through (xi), and (xiii) for arriving aircraft and 19 CFR 122.75a(b)(3)(i) through (iv), and (vi) through (xi) for departing aircraft. That is: full name; date of birth; gender; citizenship; country of residence (for arriving passengers); DHS-approved travel document type, number, country of issuance, and expiration date (if a DHS-approved travel document is required); alien registration number (where applicable), and passenger name record locator (if available).

after the carrier has contacted CBP, CBP would issue a recommendation to the carrier not to board the passenger. However, it is within the discretion of the carrier whether to board the passenger upon receiving CBP's recommendation.[14]

B. Additional APIS Data Elements

The required data elements in the electronic passenger arrival manifest are specified in 19 CFR 122.49a(b)(3). CBP proposes to amend this provision to require the carrier to transmit four additional data elements for each passenger in the arrival manifest: phone number with country code, alternative phone number with country code, email address, and address while in the United States. The carrier would be required to transmit an address in the United States for all passengers, except for passengers who are in transit to a location outside the United States.

Under current regulations, carriers are not required to transmit a U.S. address for U.S. citizens, lawful permanent residents (LPRs), and those in transit to locations outside the United States. *See* 19 CFR 122.49a(b)(3)(xii). When promulgating the current regulations, CBP explained that a U.S. address for U.S. citizens and LPRs could be obtained through other means. *See* 70 FR 17829–17830. The primary method for obtaining these addresses in 2005 was the Customs Declaration Form 6059B, which is a paper form filled out by the traveler upon arrival in the United States. Since 2005, CBP has automated much of the processing of arriving passengers. As a result, the collection of an address from U.S. citizens and LPRs through the Customs Declaration is no longer effective for use with all of CBP's electronic systems. Accordingly, CBP has determined that the collection of a U.S. address from U.S. citizens and LPRs prior to arrival and through the electronic APIS process is necessary to ensure that CBP has the information in a timely manner and in a format that can be easily accessed. Once the proposed APIS regulatory changes are implemented, other regulatory changes may be proposed to reduce redundancies in the collection of personal information. However, the proposed APIS changes are foundational before other changes to information collection can be made.

Under current regulations, carriers are not required to transmit through APIS a phone number with country code, alternative phone number with country code, or email address for any passenger. Requiring this additional contact information through APIS for all pas-

[14] CBP cannot require that a passenger be denied boarding. However, if an air carrier boards a passenger who is then denied entry to the United States, the air carrier may have to pay a penalty and bear the costs of transporting that passenger out of the United States.

sengers arriving in the United States, including U.S. Citizens, LPRs, and visitors provides CBP with additional avenues to identify and locate individuals suspected of posing a risk to national security and safety and aviation security.

In addition to promoting national security and safety, the collection of these additional data elements would also enable CBP to further support the efforts of the Centers for Disease Control and Prevention (CDC), within the Department of Health and Human Services (HHS), to monitor and conduct contact tracing related to public health incidents. In 2017, the CDC promulgated regulations requiring any airline arriving in the United States to make certain data available to the CDC Director for passengers or crew who may be at risk of exposure to a communicable disease, to the extent that such data is already available and maintained by the airline. *See* 82 FR 6890 (Jan. 19, 2017) and 42 CFR 71.4. CBP also provides support to the CDC pursuant to 42 U.S.C. 268, which states that it "shall be the duty of the customs officers . . . to aid in the enforcement of quarantine rules and regulations." Pursuant to these authorities, DHS and HHS have developed procedures and technical infrastructure that facilitate DHS sharing traveler information with HHS upon request, including safeguards for data privacy and security.

In response to the COVID–19 pandemic, the CDC issued an interim final rule (IFR) on February 12, 2020 (85 FR 7874), requiring that "any airline with a flight arriving into the United States, including any intermediate stops between the flight's original and final destination, shall collect and, within 24 hours of an order by the Director [of the CDC], transmit to the Director" certain data regarding passengers and crew arriving from foreign countries "for the purposes of public health follow-up, such as health education, treatment, prophylaxis, or other appropriate public health interventions, including travel restrictions." Pursuant to the IFR, airlines must submit the following five data elements to CDC with respect to each passenger and crew member, to the extent that such information exists for the individual, and in a format acceptable to the Director when ordered by CDC to do so: full name, address while in the United States, email address, primary phone number, and secondary phone number. According to the CDC, these data elements are the most useful for responding to a critical health crisis. In light of COVID–19, CBP issued a Privacy Impact Assessment (PIA) documenting CBP efforts to support the CDC public health response.[15]

[15] For more information, please access *https://www.dhs.gov/publication/dhscbppia-066-cbp-support-cdc-public-health-contact-tracing.*

If this proposed rule is implemented and the carrier submits the required information through APIS, CBP would also have the ability to share these data elements with the CDC upon its request, using existing communication channels between DHS and HHS, which would mitigate the need for airlines to separately transmit the same information to the CDC if the airline has already transmitted the necessary information to CBP.

Lastly, the proposed regulations were developed to comply with the United States' international obligations.[16] The International Civil Aviation Organization (ICAO), of which the United States is a contracting state, directs contracting states to use a single window to collect advance passenger information from air carriers and then provide necessary data to agencies that require the information, rather than require individual transmissions from carriers to each relevant agency within one contracting state. Convention on International Civil Aviation, 61 Stat. 1180, 15 U.N.T.S. 295, Annex 9, SARP 9.1 (Chicago, 1944) (Chicago Convention). The Chicago Convention is the international agreement which established the ICAO and ICAO standards and recommended practices (SARPs). In accordance with the ICAO SARPs covering advance passenger information (API), CBP is using APIS to collect data from carriers that can be provided to other agencies that require the information. This ensures that carriers are required to provide only one electronic API message to the U.S. government, which can be used to satisfy the needs of multiple government agencies.

ICAO permits contracting states to establish rules that deviate from the SARPs, so long as the contracting state notifies ICAO of the deviation by filing a difference. Chicago Convention, art. 38. The United States currently files a difference with ICAO concerning Annex 9, SARP 9.10, which requires contracting states to require as advanced passenger information only data elements that are available in machine readable form on accepted travel documents. The United States already files a difference under SARP 9.10 because CBP requires carriers to collect street address and country of residence, which are not available in machine readable form on accepted travel documents. *See* 19 CFR 122.49a(b)(3). The additional data elements that DHS is now proposing (primary phone number with country code, alternative phone number with country code, and email address) similarly are not available in machine readable form on accepted travel documents. Therefore, the United States would need

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[16] Nothing in the proposed rule is intended to change existing bilateral agreements between the United States and other entities.

to amend the difference that is already on file with ICAO to include the additional data requirements under the proposed regulations.

C. Changes Conforming Regulations With Current Practices

1. Close-Out Message

Carriers must submit passenger manifest information to CBP upon the aircraft's departure or arrival. Pursuant to existing regulatory requirements, carriers may use an interactive transmission option to transmit a "close-out message" not later than 30 minutes after securing the aircraft. *See* 19 CFR 122.49a(b)(1)(ii)(B) and (C) and 19 CFR 122.75a(b)(1)(ii)(B) and (C). The close-out message includes a header (information about the carrier sending a secure link to CBP), flight information (flight number, departure time, estimated arrival time), and passenger manifest information. This option is described in 19 CFR 122.49a(b)(1)(ii)(B) and (C) for arriving aircraft and section 19 CFR 122.75a(b)(1)(ii)(B) and (C) for departing aircraft. The current regulations permit the carrier to select one of two ways to format the close-out messages. Under the first option, the carrier can transmit a message for any passengers who checked in but who were not onboard the flight. Under the second option, the carrier can transmit a message for all passengers who boarded the flight.

CBP proposes to amend 19 CFR 122.49a(b)(1)(ii)(B) and (C) and 19 CFR 122.75a(b)(1)(ii)(B) and (C) to eliminate the option to transmit messages for any passengers who checked in but who were not onboard the flight. Carriers subject to these provisions would be required to transmit a close-out message that identifies all passengers onboard the flight.

Allowing carriers to transmit a message identifying passengers who checked in but were not onboard the flight has impeded CBP's efforts to document who was actually on board a flight. Under the current regulations, a carrier could submit a close-out message that only identifies individuals who checked in but did not board the flight. This allows for instances where an individual reserves a flight, the carrier transmits APIS data that includes this individual to CBP, then the individual cancels before checking in. A carrier that transmits a close-out message identifying only individuals that checked in but did not board would not indicate that this passenger also did not board because the passenger never checked in. CBP would then consider that the individual described above was onboard the flight. Because of this discrepancy, carriers have ceased transmitting close-out messages that transmit a message only identifying those individuals who checked in but who were not onboard the flight. Instead, it is common

practice for carriers to transmit a message identifying only those individuals who boarded the flight. CBP proposes to amend the regulations to reflect the current practice.

2. U.S. Electronic Data Interchange for Administration, Commerce and Transport (U.S. EDIFACT) Format

19 CFR 122.49a(b)(1)(i) and 19 CFR 122.75a(b)(1)(i) state that a passenger manifest must be transmitted separately from a crew member manifest if the transmission is in U.S. EDIFACT format. CBP proposes to eliminate the references to U.S. EDIFACT.

In March 2003, the World Customs Organization adopted the U.N. EDIFACT format as the global standard for advance passenger information messaging. As a result, when CBP published the final rule requiring the transmission of passenger manifest information through APIS, CBP announced that U.N. EDIFACT would be the mandatory format 180 days after the publication of the final rule. *See* 70 FR 17831 (Apr. 7, 2005). Because U.N. EDIFACT is now the mandatory format for APIS transmissions, the references to U.S. EDIFACT in 19 CFR 122.49a and 122.75a are no longer necessary and would be removed.

3. 2005 Exception

19 CFR 122.49a(b)(3) lists the data elements that must be transmitted in the arrival manifest. 19 CFR 122.75a(b)(3) lists the data elements that must be transmitted in the departure manifest. Both sections state that certain information is not required until after October 4, 2005. As this exception no longer applies, the language is no longer necessary and would be removed.

4. DHS-Approved Travel Document

In accordance with section 7209 of the IRTPA, the Secretary of Homeland Security is authorized to require passengers entering the United States from the Western Hemisphere to present a passport or other documents that the Secretary of Homeland Security has determined to be sufficient to denote identity and citizenship. *See* Public Law 108–458, 118 Stat. 3638 (Dec. 17, 2004). In order to reflect the inclusion of travel documents, in addition to passports, which are approved for travel to or from the United States in certain situations, CBP proposes to amend 19 CFR 122.49a(b)(3) and 122.75a(b)(3) to replace the references to “passport” with “DHS-approved travel document.” As stated above, “DHS-approved travel document” would be defined as a travel document approved by the U.S. Department of

Homeland Security for travel in or out of the United States, such as a passport, or other Western Hemisphere Travel Initiative (WHTI) approved document.[17]

Further, 19 CFR 122.49a(b)(3) and 122.75a(b)(3) list the data elements that must be included in the passenger manifest and require a carrier to submit each passenger's travel document type (*e.g.,* passport), passport number, passport country of issuance, and passport expiration date (if a passport is required). Under the proposed amendments, carriers would instead be required to transmit the DHS-approved travel document type, DHS-approved travel document number, DHS-approved travel document country of issuance, and DHS-approved travel document expiration date.

D. Optional Additional Data Element: Aircraft Registration Number

As discussed above, carriers that use an interactive transmission option must transmit the close-out message not later than 30 minutes after securing the aircraft. *See* 19 CFR 122.49a(b)(1)(ii)(B) and (C) and 19 CFR 122.75a(b)(1)(ii)(B) and (C). CBP proposes to permit carriers that use an interactive electronic transmission system to include the aircraft's registration number in the close-out message.

The change is proposed as part of CBP's efforts to automate the General Declaration (CBP Form 7507). The General Declaration is a paper form submitted by owners or operators of commercial aircraft to CBP at the time of an aircraft's departure from or arrival to the United States. The General Declaration includes information on the arrival and departure of aircraft entering or departing the United States, the flight itinerary, and passenger and crew information. One of the required data elements of the CBP Form 7507 is the aircraft's registration number. This data element is not collected through any other means and is critical to CBP operations. If CBP automates CBP Form 7507 through a subsequent rulemaking, it is likely that transmission through APIS would be one option for a carrier to continue transmitting the aircraft registration number to CBP. Unless and until the existing regulatory requirements change regarding submission of Form 7507, carriers that transmit the aircraft's registration number in APIS will still need to submit the General Declaration.

VI. Statutory and Regulatory Reviews

A. Executive Order 12866 and 13563

Executive Orders 13563 and 12866 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regula-

[17] For more information on WHTI, see 73 FR 18383 (Apr. 3, 2008).

tion is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This proposed rule has been designated as a "significant regulatory action" under section 3(f) of Executive Order 12866. Accordingly, the Office of Management and Budget (OMB) has reviewed this regulation.

Purpose of Rule

Entry into the United States by U.S. citizens and foreign travelers via air travel requires certain travel documents containing biographical information, such as a passenger's name and date of birth. As a security measure, CBP compares the information on passengers' documents to various databases and the terrorist watch list and recommends that air carriers deny boarding to those who are likely to be deemed inadmissible upon arrival in the United States. However, current processes for advising carriers regarding passengers who may be presenting fraudulent travel documents would be improved through CBP providing electronic messages to carriers indicating if the false information on their documents does not match the information in CBP databases. This proposed rule would allow CBP to add a document validation message to the electronic messages currently exchanged between air carriers and CBP prior to departure to the United States from a foreign port or place or departure from the United States. The addition of the proposed electronic validation of travel documents and response messaging to carriers to the preboarding vetting process would allow CBP and carriers to more efficiently identify and prevent those passengers with fraudulent or improper documents from traveling to the United States. The proposed rule would also reduce the number of errors in CBP records that must be corrected by CBP officers during inspections.

The proposed rule also would require carriers to transmit additional passenger information to CBP, including phone number with country code, alternative phone number with country code, email address, and address while in the United States. The carrier would be required to transmit an address in the United States for all passengers, except for passengers who are in transit to a location outside of the United States. Submission of such information would enable CBP to identify and interdict more quickly individuals posing a risk to border, national, and aviation safety and security. Collecting these additional data elements would also enable CBP to further assist

CDC to monitor and trace the contacts of those involved in serious public health incidents, when CDC requests such assistance from CBP.

Finally, the proposed rule would give carriers the option to include the aircraft registration number in their electronic messages to CBP and would make technical changes to conform with current practice.

Background

United States citizens traveling outside the United States require a passport or other WHTI-approved travel document to re-enter the United States. Foreign travelers coming to the United States by air must possess either a visa or approval under the Electronic System for Travel Authorization (ESTA), in addition to other appropriate travel documentation, such as a foreign passport, to be presented to CBP for inspection when required.[18] Though a visa or ESTA approval is not required to purchase a ticket, it is required to check in for a flight. When a traveler arrives at an airport for a flight, the carrier is required to check the ticket and travel documents to confirm the document appears to be valid for travel to the United States, and the passenger is the person to whom the travel document was issued. Current regulations also require air carriers to submit information electronically for each individual traveling or intending to travel to or from the United States, including passengers, crew, and non-crew. The required information is different for flights departing from and arriving in the United States, but generally includes biographical information, such as a passenger's name, date of birth, sex, status on the aircraft, passport type and number, country of issuance, expiration date, and departure or arrival details. CBP checks these details against various databases and the terrorist watch list and sends a response in the form of numbers and letters to the carrier, indicating whether the passengers are cleared to board or if CBP recommends they not be boarded.[19] Under this proposed regulation, as part of the Document Validation Program (DVP) and in addition to current

[18] Approved ESTA applications (ESTAs) are required of travelers who are traveling by air or sea to the U.S. under the Visa Waiver Program. Most citizens and nationals from visa waiver countries do not require a visa to travel to the United States for a period not exceeding 90 days; instead, they may apply for an ESTA approval, which is valid for two years or until their passport expires. ESTA holders are not required to provide a physical copy of a document. Rather, DHS can communicate their status to air carriers. *See https://esta.cbp.dhs.gov/* for more information on the ESTA program.

[19] As discussed in footnote 14 above, CBP cannot require that a passenger be denied boarding. However, if an air carrier boards a passenger who is then denied entry to the United States, the air carrier may have to pay a penalty and bear the costs of transporting that passenger out of the United States.

checks, CBP would also include in the response message to carriers a character that indicates whether a passenger's travel documents are validated.

Carriers submit required electronic manifest information to CBP through APIS. Most large, commercial operators use a CBP-certified interactive system capable of transmitting and receiving messages to or from APIS electronically. Beginning 72 hours before the departure time, carriers may submit individual records or batches of passenger information through APIS acquired during ticket reservation for validation. Carriers must submit all non-interactive and interactive batch transmission information at least 30 minutes prior to securing the aircraft doors, and all interactive individual passenger information transmission messages up to the time of securing the aircraft doors. Passenger information is automatically vetted against CBP databases and the terrorist watch list. CBP transmits vetting results back to the carrier in batches or through individual interactive messages, with one vetting response for each name uniquely identified in the transmission. During check-in, carriers may submit passenger information through APIS Quick Query in up to 10-person batches, with responses coming within 4 seconds. The Quick Query mode is often used to send updates for passengers whose information has already been submitted or for last minute ticket reservations. APIS Quick Query allows passengers to print their boarding passes at home or at an airport kiosk without consulting a gate agent.

Smaller carriers and charter carriers usually use a non-interactive, web-based portal called eAPIS to send uploaded manifest information through APIS for validation. Smaller carriers usually use eAPIS to avoid the costs of setting up and maintaining an interactive system. Many of these carriers fly infrequently and with small passenger counts. Those using eAPIS must submit information to CBP via the internet at least 30 minutes prior to securing the aircraft doors and will receive messages back electronically, usually through email. The response message contains vetting results and states whether the carrier should continue with printing boarding passes or boarding passengers. Because charters and small carriers generally have smaller passenger lists and fly less frequently, they do not require the same processing speeds enabled by an interactive system.

With APIS, carriers receive a response message from CBP noting whether individuals are cleared to board, require additional security screening, or are recommended to be denied boarding based on checks against law enforcement databases. With eAPIS, carriers receive a single response message for the entire manifest, in the form of an email, stating whether the entire flight is cleared or not. In the event

a flight is not cleared, additional processes will be developed such as the carrier logging back in to their eAPIS account for greater details on which passengers are not cleared and how they may resolve the issue.[20] The proposed rule requires carriers to receive additional data in the response message(s) they receive from CBP indicating whether each passenger's travel documents have been validated. Travel documents would be defined as any document or electronic record presented for travel to the United States, including DHS-approved travel documents, U.S.-issued visas, Electronic System for Travel Authorization (ESTA) approvals, and Electronic Visa Update System (EVUS) enrollments.[21] Passengers cleared by CBP whose documents are validated may be issued a boarding pass automatically, online or at an airport kiosk.

With the addition of document validation to pre-flight APIS transmissions via the voluntary DVP, discussed in more detail below, carriers follow the same information collection and submission procedures as established in existing regulations and discussed above. When the travel document information gets to CBP, it undergoes an additional database check to validate the travel documents. The results of that additional check are returned to the carriers in the form of a character in the APIS response message they already receive. Carriers participating in DVP receive the same message as those not yet participating, but with the addition of the DVP-specific character indicating whether documents were validated against the CBP database. Any carrier not enrolled in the DVP would, under existing regulation, not receive the document validation part of the response message through APIS. In that case, the validity of documents is not confirmed via a CBP database check and would not affect whether the passenger or flight is cleared. Under the terms of the proposed rule, all commercial carriers transporting passengers must participate in document validation program, and CBP will work with carriers to implement changes to receive DVP response messages from CBP.

The response message from CBP includes characters indicating a passenger's status. Passenger information sent by commercial carriers is checked against various databases and the terrorist watch list, and the results are submitted to the carrier in the form of alphanumeric codes. For TSA information, numerical characters indicate statuses like cleared or selectee for further review, among others. Under current regulations, CBP includes a letter indicating the passenger's

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[20] No smaller carriers using the eAPIS system are currently enrolled in the voluntary DVP. This system and protocols will be developed as those carriers implement the program.

[21] Chinese nationals holding a 10-year B1, B2, or B1/B2 visa must enroll in EVUS. *See https://www.cbp.gov/travel/international-visitors/electronic-visa-update-system-evus/frequently-asked-questions.*

travel status. With the DVP, CBP can indicate particular document validation errors, such as valid ESTA on file, ESTA denial, no U.S. travel documents on file, or that CBP recommends the carrier not board the passenger. Some of these codes have been in use since interactive APIS was deployed, though CBP introduced new letters to accommodate the DVP.

Under current regulations and practices, errors can occur when a passenger submits their information to the carrier. This often happens when documents are damaged, smudged, or scanned incorrectly. Minor errors like a misspelled name or incorrectly recorded passport number may be fixed by the passenger. More egregious errors or errors a passenger cannot correct themselves would require the assistance of a carrier employee to complete the check-in process, or the need to contact CBP for assistance if unable to resolve the issue. In some instances, though, errors like a misspelled name remain in the APIS record during travel and would be corrected upon arrival. Under the DVP and the proposed rule, these simple errors may cause legitimate travel documents to not be validated. Such errors would, without DVP, either require intervention by a carrier employee or be missed and only noted and corrected upon arrival. In some instances, failure to validate indicates intentional deception or fraud.

Often, a passenger traveling with a carrier participating in DVP whose documents are not validated when initially submitted as part of the check-in process can quickly identify an error like an incorrect birthdate while they are still online or at an airport kiosk attempting to check-in for a flight. They are then able to correct that information manually, by re-scanning the document or manually entering the data, and resubmitting. The documents will then be validated and the passenger may print their boarding pass without assistance from a carrier employee. However, if, after the information is submitted and the passenger has attempted any necessary corrections, a passenger's documents are still not validated, they may seek assistance from carrier staff to complete check-in. In the event the carrier employee is unable to validate the document by re-submitting the information or performing a manual check, they would need to work with CBP and the passenger to resolve the issue.[22]

Before calling CBP, an agent for a DVP-enrolled carrier may resubmit the information in order to correct any entry errors or account for changes that have occurred since the document was issued. Pas-

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[22] If a gate agent is unable to resolve a passenger issue, for example by manually checking for a visa, the gate agent may call CBP for assistance. CBP provides support to carriers via the Immigration Advisory Program and the Regional Carrier Liaison Group. *See https://www.cbp.gov/document/fact-sheets/immigration-advisory-program-iap* and *https://www.cbp.gov/travel/travel-industry-personnel/carrier-liaison-prog* for more information.

sengers with multiple travel documents may be more likely to require assistance. This can occur, for example, if a dual citizen uses one passport to reserve his or her ticket and the other to check-in to the flight. Some passengers from Visa Waiver Program (VWP) countries who under other circumstances would not require a visa, must travel with a visa if, for instance, they are staying in the United States for longer than 90 days or attending an American university and may require additional help resubmitting information to validate those documents. Though document validation automatically checks for a visa for a VWP passenger without an ESTA approval, carrier agents may need to check for a visa manually. Additionally, those passengers with multiple travel documents may re-submit their information, adding their second document, for validation. If a passenger's documents are still not validated, the carrier must contact CBP for resolution.

Carriers both enrolled and not enrolled in DVP and using the interactive system receive validation messages almost in real time or in batches of multiple passengers, which indicate whether CBP cleared each passenger. DVP-enrolled carriers also receive a message indicating whether CBP has validated their travel documents. All carriers using the non-interactive system receive a single response message for the entire manifest, in the form of an email, indicating whether the entire flight is cleared or not. If the flight is not cleared, the carrier may log in to their eAPIS account for greater detail to determine which passenger or passengers are at issue. Those enrolled in DVP will also receive validation information in their response messages. To resolve any issues they cannot resolve themselves, carriers must contact CBP regardless of DVP enrollment status.

Error in the APIS record regarding traveler documentation not identified and resolved by carriers before departure are generally identified and corrected by CBP Officers (CBPOs) during inspection once the passenger has arrived at a United States port of entry. CBPOs compare document information against APIS data and modify the APIS record to reflect the correct information when errors are identified. Adding document validation to the pre-departure APIS system checks would reduce the number of errors CBPOs would encounter and need to correct during inspections as passengers have a better opportunity to identify and resolve these errors themselves.

CBP began the voluntary DVP to test document validation in 2013. Because carriers were already required to submit information to

APIS beginning in 2005,[23] the infrastructure to send and receive messages was already in place. Most large, commercial carriers have already incurred the cost of setting up an interactive system for communicating with APIS to comply with other regulations. Smaller carriers and charter carriers submit their information to CBP through eAPIS. This web portal allows information to be transmitted over the internet once the user has established an account. CBP does not believe that any carriers would choose to switch from eAPIS to APIS as a result of this proposed rule.

In the following sections, CBP provides a full accounting of the costs and benefits of the proposed rule, including during the regulatory period from 2022–2026, and the voluntary DVP period from 2013–2021.

Costs of the Rule

Technology Costs

To comply with this proposed rule, carriers would be required to ensure their systems can both transmit and receive messages. Because carriers already must use a CBP-certified system to connect to APIS, and any system already certified by CBP is able to receive messages, they face minimal or no costs to be able to receive the document validation message required by the proposed rule or to submit additional passenger information.[24] Because carriers participating in the voluntary DVP already have the systems in place to send passenger information and receive CBP response codes, they require no new technology. Carriers would not face additional technology maintenance costs to comply with this proposed rule. CBP does not anticipate that this proposed rule would cause any more carriers to switch to and bear the costs of adopting an interactive system.

CBP has already configured its system to check travel document information automatically against CBP databases, as well as to send and receive the appropriate messages. Development of the document validation system occurred in 2012 and 2013 and is discussed in detail in the *Voluntary Period* section below. The database of travel documents used in document validation was already built for use in other CBP programs. In the years since 2013, the DVP has cost CBP approximately $500,000 per year for ongoing technological mainte-

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[23] Source: U.S. Department of Homeland Security, "Advance Passenger Information System Fact Sheet," November 12, 2013, *https://www.cbp.gov/document/fact-sheets/advance-passenger-information-system-fact-sheet.* Accessed August 26, 2020.

[24] CBP bases this assumption on discussions between Office of Field Operations personnel and participating carriers.

nance.[25] CBP has already established a channel of communication with other agencies, including the CDC, and would not need to make any updates in order to collect and share, when appropriate, additional passenger biographical information. Therefore, technology costs for the proposed rule would include $500,000 per year in maintenance costs.

Time Costs To Resolve Errors

Under the current regulations, air carriers submit passenger data to CBP between 72 hours and 30 minutes before departure, and no later than securing the aircraft doors for interactive individual submissions. CBP systems automatically perform checks between the data and information stored in CBP databases. CBP sends response messages to the carriers indicating whether CBP has cleared each passenger for boarding or requires additional screening, or recommends the air carrier deny boarding, although under existing regulations there is no document validation message included. Once the flight arrives, passengers must go through CBP inspection where a CBPO checks their travel documents against APIS manifest information. Errors in the manifest data, such as misspellings or incorrect date information, are corrected at this time.

By adding document validation to the checks CBP already runs on passenger information, many of the errors corrected by a CBPO during inspection upon arrival could be corrected by the passenger during the check-in process. For example, should the date of birth read incorrectly when a passenger scans their document pre-flight with their phone or at an airport kiosk, the document may not be validated and the passenger will receive an error message.[26] The passenger may review their data, correct the mistake, and resubmit their information. The document would then be validated and the passenger could automatically print the boarding pass. Without the DVP, the error might require the passenger to seek assistance from carrier employees or may not be caught before the boarding pass is printed, but would then be noticed by the CBPO, who would correct the APIS record during inspection after the flight arrives in the United States.

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[25] Source: CBP's Office of Field Operations on Jan. 6, 2022.

[26] The passenger does not see the response message from CBP. Instead, the passenger sees whatever error message the individual carrier uses in its system. That message is based upon the response from CBP. Such an error might direct the passenger to review the passenger's data and try submitting again or, in the case of a more egregious issue such as a recommendation not to board the passenger, might direct the passenger to seek assistance from a carrier employee.

Some errors require the passenger to seek assistance and the carrier agent to call CBP to resolve an issue, though such calls are rare. Under DVP, passengers would correct the majority of errors either online or at an airport kiosk during check-in. These corrections would lead to an increase in the time spent by these passengers during check-in. CBP estimates that passengers needing to correct personal information average about 10 seconds in making the correction. Because they no longer spend about 20 seconds waiting for a CBPO to make the correction (discussed further in the *Benefits of the Rule* section below), this represents a partial burden transfer. Although passengers would spend an additional 10 seconds pre-flight to correct the error, they then save 20 seconds during processing. By allowing passengers to make their own corrections online or at a kiosk, the overall check-in process would be more efficient. Enabling passengers to correct errors themselves, whether it be a spelling mistake or the submission of the wrong document, allows them to continue using an automated check-in process rather than seeking assistance with manual validation. This would reduce time spent waiting in line for help, as well as the number of instances where carrier employees must manually validate documents or seek CBP assistance if they cannot resolve the error in some way. For example, a passenger traveling from a VWP country who does not have an ESTA but does have a valid visa would, without DVP, require assistance from carrier personnel because the system would not find an ESTA upon initial submission of passenger information. With DVP, the system automatically checks for a visa if an ESTA is not found, so the passenger could continue using the automated check-in process and would not require assistance. Air carriers participating in the DVP voluntarily have reported increased efficiency pre-flight.[27]

For smaller carriers using the non-interactive, eAPIS system, the travel document error resolution process is similar to the interactive version. Carriers send in passenger data and receive a response message. Generally, the entire manifest is cleared, but should there be an issue, the carrier is notified via an email. The carrier may review the data to determine which passenger is at issue, then log back into their eAPIS account to re-submit corrected data. Should the problem not be resolvable by re-submitting corrected data, the carrier may call CBP for assistance in the same way as users of the interactive system. The vast majority of flights and passengers are processed through the interactive APIS system. Approximately 0.4 percent of passenger data is submitted via the non-interactive, eAPIS system.

[27] Source: discussion with the Office of Field Operations on July 28, 2020.

Some errors and corrections would require carriers to call into a CBP support center for assistance. For example, if a passenger has a visa that appears valid, but the CBP response indicated it was not, the carrier agent may call to verify if the visa has been revoked. In another scenario, if a passenger's visa has been washed to remove the ink and the data altered, the DVP system would fail to validate the document and the carrier might call CBP to manually verify the information they see on the document.[28] These calls generally take no more than five minutes. CBP does not anticipate the number of calls for assistance to increase from pre-DVP levels, nor does CBP believe that either carriers or the support centers would need to increase staffing to accommodate additional calls.

Carriers not participating in DVP currently sometimes call CBP to verify travel documents. Using the automated process can confirm that a document is valid, which can prevent additional calls. CBP does not collect information on the frequency of these calls or what issues each call addresses and so cannot estimate how many calls would be prevented if passengers or carrier agents catch and correct a greater number of data errors as a result of mandating the DVP.

In total, CBP has already incurred technology costs described above in preparation for the proposed rule. Some passengers would experience an increased time burden during check-in in order to identify and correct errors in information submitted through APIS. CBP does not anticipate increased costs for air carriers as a result of the proposed rule.

Changes Conforming Regulations With Current Practices

CBP is making several changes to conform the regulations to current practice in this proposed rule, as described in the **SUMMARY** section above. These changes are unlikely to result in increased costs to carriers, passengers or CBP. The changes, including updates to the requirements for close-out messages, removal of superfluous language from the regulations, and the replacement of "passport" with "DHS-approved travel document" would simplify the regulations without imposing an additional burden on carriers, passengers, or CBP. Because carriers already send close-out messages, the change to the requirements would not result in additional programming costs, technology investments, or an increased time burden for carrier personnel. It is common practice for carriers to transmit a message identifying only those individuals who boarded the flight. The other revisions reflect current practice or minor, clarifying changes.

Benefits of the Rule

[28] In this instance, if the document had been improperly altered, the document would not be validated and the passenger would not receive a boarding pass.

To Passengers, Carriers, and CBP

As error correction is moved from CBP inspection to the pre-departure period, passengers and CBPOs would experience greater efficiency after flights have arrived in the United States. Because CBPOs would not need to re-run as much information or modify as many records, they would complete inspection of passengers more quickly, leading to shortened wait times for everyone. Because CBP has instituted a number of programs to reduce inspection wait times throughout the time that the voluntary DVP has been in place, it is impossible to estimate precisely the degree to which the DVP may have impacted overall wait times in the voluntary phase of the program. However, CBP believes it has contributed to faster overall processing.

Approximately 135,747,880 commercial passengers arrived in the United States by air in Fiscal Year (FY) 2019.[29] Over the 5-year period from FY 2015 to FY 2019, arrivals in the United States grew at a compound annual growth rate of 3.8 percent.[30] Over the 5-year period of analysis from FY 2022 to FY 2026, CBP projects that 820,115,824 commercial air passengers will arrive in the United States, assuming a continued growth rate of 3.84 percent per year. Under the terms of proposed rule, all arriving commercial air passengers would be subject to the DVP, rather than the 67 percent of commercial air passengers covered as of 2021 in the voluntary program. See Table 1 for historical passenger arrival data and Table 2 future projections.

TABLE 1—HISTORIC COMMERCIAL AIR PASSENGER ARRIVALS FROM FY 2015–FY 2019

Fiscal year	Arriving passengers
2015	112,505,410
2016	119,253,895
2017	124,262,060

[29] The COVID–19 pandemic led to a significant decrease in passenger arrivals in both 2020 and 2021, so those years are excluded from calculations as highly anomalous. CBP also cannot predict when or if passenger arrivals might return to pre-2020 trends, so we have used data from 2015–2019 as a basis for passenger number projections.

[30] CBP is aware that the COVID–19 pandemic will likely reduce the volume of arriving travelers in the short run. Consequently, using historical growth rates and figures from FY 2015 to FY 2019 to estimate arriving passenger volumes for FY 2021 through FY 2025 will not reflect any impacts from the COVID–19 pandemic. It is not clear what level of reductions the pandemic will have on arriving passenger volumes or how CBP would estimate such an impact with any precision given available data. Therefore, the arriving passenger projections that CBP uses in this analysis may be overestimations for the period of analysis, resulting in potential overestimations of this proposed rule's costs and benefits.

Fiscal year	Arriving passengers
2018	130,833,520
2019	135,747,880
Total	622,602,765

Note: Estimates may not sum to total due to rounding.

TABLE 2—PROJECTED COMMERCIAL AIR PASSENGER ARRIVALS FROM FY 2022–FY 2026

Fiscal year	Arriving passengers
2022	151,938,854
2023	157,754,144
2024	163,792,007
2025	170,060,963
2026	176,569,857
Total	820,115,824

Note: Estimates may not sum to total due to rounding.

Common errors corrected by CBPOs during inspections that would be corrected pre-flight with the DVP in place include a passenger's misspelled last name, incorrect date of birth, and incorrect document number. Based on a sampling of more than three million commercial passengers arriving in FY 2019, CBP estimates that 7.5 percent of passengers require a simple correction to their APIS record upon arrival at CBP inspection.[31] Of those 7.5 percent of passengers that require a simple correction, CBP estimates based on its experience with the voluntary program that initially 50 percent would be corrected pre-flight under the proposed rule, meaning that neither the passenger nor the CBPO would need to expend time in making corrections during CBP inspection. This would save each party about 20 seconds (0.0056 hours) per inspection. Note that the passenger would have spent about 10 seconds making the correction before the flight during the check-in process and, on average, would see a net time savings of about 10 seconds. The remaining 50 percent would continue to be resolved upon arrival when the CBPO processes the traveler.

Over the 5-year period of analysis, approximately 820,115,824 commercial passengers are projected to arrive in the United States by air. Under the baseline, approximately 67 percent of those passengers would arrive via carriers participating in the voluntary DVP as of 2021. Under the terms of the proposed rule, the remaining 33 percent

[31] Source: email correspondence with the Office of Field Operations on August 11, 2020.

of passengers would arrive on carriers newly required to join the DVP. We estimate that those passengers would experience 20,269,456 errors over 5 years. Under the proposed rule, about 50 percent, or 10,134,728 of those errors would be corrected pre-flight, saving CBPOs and air passengers $6,181,058. This benefit estimate is based on a wage rate of $86.23 for CBPOs and $47.10 for air passengers, resulting in a combined wage rate of $133.33.[32] See Table 3 for a summary.

Individual time savings may also accumulate to create greater overall time savings for entire groups of arriving air passengers. If half of all passengers with a data error save 20 seconds each during CBP inspection, the passengers waiting behind them for inspection would also benefit from the effects of that 20 seconds saved per passenger. CBP cannot reliably estimate the net impact of this time savings, because those passengers with errors to be corrected would be, in any given group, randomly dispersed among all the passengers. However, CBP does believe the proposed rule would result in additional time savings to passengers overall as individual time savings allow groups to move more quickly through CBP inspection.[33]

TABLE 3—SUMMARY OF BENEFITS FOR COMMERCIAL AIR PASSENGERS AND CBPOs

[Undiscounted 2021 U.S. dollars]

Fiscal year	Arriving passengers newly affected	Errors avoided	Time per error (hrs, CBP)	Time per error (hrs, Passenger)	Benefits
2022	50,139,822	1,877,612	0.0056	0.0028	$1,145,134
2023	52,058,867	1,949,475	0.0056	0.0028	1,188,963
2024	54,051,362	2,024,089	0.0056	0.0028	1,234,469
2025	56,120,118	2,101,559	0.0056	0.0028	1,281,717

[32] Because both passengers and CBPOs would save time under the proposed rule, this wage rate encompasses both the wage rate of a CBPO ($86.23) and the wage rate for an all-purpose air traveler ($47.10). CBP bases this wage on the FY 2021 salary and benefits of the national average of CBP Officer Positions, which is equal to a GS–11, Step 9. Source: Email correspondence with CBP's Office of Finance on September 7, 2021. Source for the passenger wage rate: U.S. Department of Transportation, Office of Transportation Policy. The Value of Travel Time Savings: Departmental Guidance for Conducting Economic Evaluations Revision 2 (2016 Update), "Table 4 (Revision 2—2016 Update): Recommended Hourly Values of Travel Time Savings for Intercity, All-Purpose Travel by Air and High-Speed Rail." September 27, 2016. Available at *https://www.transportation.gov/sites/dot.gov/files/docs/2016%20Revised%20Value%20of%20Travel%20Time%20Guidance.pdf* Accessed June 12, 2021.

[33] This analysis is performed from a global perspective and includes individuals who travel to the United States. Not all individuals benefiting from the proposed rule are U.S. citizens or permanent residents.

Fiscal year	Arriving passengers newly affected	Errors avoided	Time per error (hrs, CBP)	Time per error (hrs, Passenger)	Benefits
2026	58,268,053	2,181,994	0.0056	0.0028	1,330,774
Total	270,638,222	10,134,728			6,181,058

Note: Estimates may not sum to total due to rounding.

In addition to time savings from correcting errors earlier in the process, as a result of the proposed rule, fewer passengers would ultimately be denied entry upon arrival in the United States because their fraudulent or expired documents are discovered in CBP inspection, instead of before boarding. In FY 2022, carriers will incur penalties of $6,215.00[34] for each boarded passenger who was subsequently denied entry, though penalties are modified or reduced for those carriers who have signed a Memorandum of Understanding with CBP regarding their penalty mitigation practices. Carriers are eligible for mitigation based on their violation records and status with CBP. Mitigated amounts are generally 25 percent or 50 percent of the base penalty. In addition to the penalty, carriers are responsible for the costs of returning the passenger to their home country.[35] With the DVP, some passengers with fraudulent or improper documents may be identified before boarding, in which case the carrier may deny boarding, saving the air carrier both the cost of the penalty and the cost of securing and transporting the passenger out of the United States, which amounts to about $10,000 for a single passenger.[36]

The number of penalties that would be issued to air carriers for improperly transporting some passengers is difficult or close to impossible to predict. The average number of penalties issued annually between 2015 and 2019 was 415.[37] CBP cannot project the number of penalties that might be incurred over the coming years, but CBP's subject matter experts estimate that roughly 20 percent of penalties could be avoided due to the DVP.[38] Based on this rough estimate, carriers would avoid $515,845 in penalty costs (2022 U.S. Dollars) per year as well as the costs to transport those individuals back to their home countries.

[34] Penalties are indexed to inflation. *See* Department of Homeland Security, Final Rule, "Civil and Monetary Adjustments for Inflation," 87 FR 1317 (January 11, 2022).

[35] *See* 8 U.S.C. 1231(c)–(e).

[36] Source: discussions with the Office of Field Operations on July 28, 2020.

[37] As with passenger arrivals, the number of penalties per year was significantly affected by the flight cancellations and travel restrictions associated with the COVID–19 pandemic. Therefore, CBP has used penalty counts from 2015–2019. Data provided by CBP's Office of Regulations and Rulings.

[38] Source: discussions with the Office of Field Operations on July 28, 2020.

Benefits and Costs Not Estimated in This Analysis

CBP is unable to estimate some costs and benefits to carriers. For example, while air carriers already have a CBP-certified system to send and receive pre-flight messages, some air carriers may need to make programming improvements to handle the messages required by the proposed rule, though no participating carriers report burdensome programming costs. Therefore, these programming costs are expected to be minor and are generally built into overall technology maintenance budgets, making them impossible to separate. The potential benefits are equally difficult to estimate given variations in travel patterns, the impossibility of predicting when and how passengers may attempt to use fraudulent documents, and the fact that CBP has instituted several time-saving programs (such as Global Entry), which make separating out the time-savings from the DVP impossible.

Mandating the DVP would promote greater efficiency during the CBP inspection process at ports of entry as fewer passengers would require corrections to their information, which would lead to fewer missed flight connections and a better experience for all parties. Carriers enrolled in the voluntary DVP have also reported greater efficiency pre-flight. Additionally, by further enabling carriers to prevent individuals with fraudulent documents from boarding planes to the United States, the proposed rule would increase U.S. national security and safety, in addition to saving the carriers the cost of returning passengers.

The Voluntary Period

CBP began the voluntary DVP in 2013. Initially, a single carrier joined the program, representing about 1 percent of flights arriving in the U.S. that year. Over the next 8 years, 39 carriers joined the voluntary DVP.[39] The 40 total carriers participating in 2021 include the largest U.S. and foreign carriers and cover approximately 67 percent of flights. See Table 4 for more detail.

TABLE 4—HISTORY OF THE VOLUNTARY DVP

Year	Carriers added	Cumulative proportion of flights (%)
2013	1	1
2014	3	12

[39] Source: Office of Field Operations records, received on December 15, 2021.

Year	Carriers added	Cumulative proportion of flights (%)
2015	2	24
2016[40]	13	47
2017	6	59
2018	9	63
2019	3	65
2020	2	66
2021	1	67
Total	40	67

Carriers participating in the voluntary DVP, the passengers on the flights offered by participants, and CBP all experienced costs and benefits during the voluntary period from 2013 to 2021. Though there are no fees to enroll in the voluntary DVP and no carrier was required to do so during the voluntary period, carriers may have experienced minor programming costs to ensure they were able to receive the additional codes included in CBP response messages.

Passengers faced no additional net costs as a result of the voluntary DVP. Some passengers would likely have faced additional time costs to resolve errors in the pre-flight check-in process, but those costs would have been outweighed by faster processing after the flight. See *Time Costs to Resolve Errors,* above, for more detail.

CBP incurred programing and IT development costs in 2012 and 2013, and maintenance costs throughout the voluntary period. The DVP's main IT development took place from 2012 to 2013 in preparation for the voluntary DVP. However, the development of the technical infrastructure for the program was a part of a larger series of IT improvements and integration during those years which connected CBP systems with TSA Secure Flight systems, upgraded existing database technology, and improved data integration, response time, and coordination between the systems. The entire program cost $12,893,000 over the two-year period, including initial development costs of $7,493,000 and maintenance costs of $2,700,000 per year for the two years.[41] However, CBP works to efficiently add technological changes that can support multiple efforts, saving costs for both government and industry, so it is challenging to appropriately allocate these costs among programs. Many of the IT upgrades would have

[40] In 2016 and 2018, participating carriers merged, such that the number of participants was reduced by one, although passengers of those carriers were still covered by DVP.

[41] Source of IT cost information and timing: CBP's Office of Information and Technology on December 16, 2021.

been undertaken without the inclusion of the DVP and the current technological backbone behind the DVP also serves other programs, specifically, TSA's Secure Flight, as well as the CBP ESTA and EVUS programs. Additionally, because these IT costs cannot be recovered by not pursuing the proposed rule, CBP considers them a sunk cost. See Table 5 for a summary of IT development costs.

TABLE 5—IT DEVELOPMENT COSTS FOR THE DVP AND OTHER IT IMPROVEMENTS
[2021 U.S. dollars]

Year	Development cost	Maintenance cost	Total cost
2012	$5,887,000	$2,700,000	$8,587,000
2013	1,606,000	2,700,000	4,306,000
Total	7,493,000	5,400,000	12,893,000

All three parties did benefit from participation in the DVP as well, saving time during pre-flight check-in and post-flight processing. These costs and benefits all accrued during the voluntary period and cannot be recovered should the proposed rule not move forward. Therefore, these costs and benefits are excluded from the overall costs of the proposed rule during the regulatory period. See Table 6 for a quantification of the benefits during the voluntary period. Costs and benefits are based on a time savings of 20 seconds and a wage rate of $86.23 for CBPOs and a time savings of 10 seconds (net) and a wage rate of $47.10 for commercial air passengers, as well as an error correction rate of 50 percent for 7.5 percent of passengers requiring them, all discussed in more detail above.[42]

TABLE 6—BENEFITS DURING THE VOLUNTARY PERIOD
[2021 U.S. dollars]

Fiscal year	Arriving commercial air passengers	Passengers in the DVP	Errors (7.5% × DVP passengers)	Avoided (50% of errors)	Benefit (CBP + passengers)
2013	102,221,415	1,022,214	76,559	38,279	$23,346

[42] CBP bases this wage on the FY 2021 salary and benefits of the national average of CBP Officer Positions, which is equal to a GS–11, Step 9. Source: Email correspondence with CBP's Office of Finance on September 7, 2021. Source for the passenger wage rate: U.S. Department of Transportation, Office of Transportation Policy. The Value of Travel Time Savings: Departmental Guidance for Conducting Economic Evaluations Revision 2 (2016 Update), "Table 4 (Revision 2—2016 Update): Recommended Hourly Values of Travel Time Savings for Intercity, All-Purpose Travel by Air and High-Speed Rail." September 27, 2016. Available at *https://www.transportation.gov/sites/dot.gov./files/docs/2016%20Revised%20Value%20of%20Travel%20Time%20Guidance.pdf.* Accessed June 12, 2020.

Fiscal year	Arriving commercial air passengers	Passengers in the DVP	Errors (7.5% × DVP passengers)	Avoided (50% of errors)	Benefit (CBP + passengers)
2014	107,048,937	12,845,872	962,092	481,046	293,385
2015	112,505,410	27,001,298	2,022,263	1,011,131	616,678
2016	119,253,895	56,049,331	4,197,816	2,098,908	1,280,101
2017	124,262,060	73,314,615	5,490,900	2,745,450	1,674,419
2018	130,833,520	82,425,118	6,173,231	3,086,616	1,882,493
2019	135,747,880	88,236,122	6,608,447	3,304,223	2,015,209
2020	140,943,478	93,022,696	6,966,937	3,483,469	2,124,529
2021	146,337,933	98,046,415	7,343,189	3,671,594	2,239,265
Total	972,816,595	433,917,266	32,498,244	16,249,122	12,149,424

Over the years of the voluntary period following IT development in 2012, CBP estimates that the DVP cost approximately $500,000 per year in ongoing technical operation and maintenance costs.[43] See Table 7 for a summary of the net benefits of the voluntary period.[44]

TABLE 7—NET BENEFITS DURING THE VOLUNTARY PERIOD

Year	Benefit	Cost	Net benefit
2013	$23,346	$500,000	- $476,654
2014	293,385	500,000	- 206,615
2015	616,678	500,000	116,678
2016	1,280,101	500,000	780,101
2017	1,674,419	500,000	1,174,419
2018	1,882,493	500,000	1,382,493
2019	2,015,209	500,000	1,515,209
2020	2,124,529	500,000	1,624,529
2021	2,239,265	500,000	1,739,265
Total	12,149,424	4,500,000	7,649,424

Net Impact of the Rule

The proposed rule would result in $6,181,058 in undiscounted gross benefits (*i.e.,* cost savings) to air carriers, CBP, and passengers from FY 2022–2026. See Table 8 for a summary of these benefits. CBP estimates the undiscounted net benefits of the proposed rule to total $3,681,058 over a 5-year period, as CBPOs and air passengers save time and air carriers face fewer penalties and associated costs. The

[43] Source: CBP's Office of Field Operations on January 6, 2022.

[44] CBP does not include the development costs identified in Table 5, above, because CBP is unable to isolate the costs CBP incurred solely for DVP from all of the IT upgrades made at the same time.

proposed rule therefore results in a net benefit ranging from $2,992,942 to $3,359,080 discounted at either seven or three percent. The annualized net benefit comes to approximately $730,000 using either rate.

TABLE 8—NET BENEFITS SUMMARY
[Undiscounted 2021 U.S. dollars]

Fiscal year	Total benefit of rule	Total costs of rule	Net benefits
2022	$1,145,134	$500,000	$645,134
2023	1,188,963	500,000	688,963
2024	1,234,469	500,000	734,469
2025	1,281,717	500,000	781,717
2026	1,330,774	500,000	830,774
Total	6,181,058	2,500,000	3,681,058

Note: Estimates may not sum to total due to rounding.

TABLE 9—NET PRESENT VALUE AND ANNUALIZED BENEFITS
[2021 U.S. dollars]

3% Discount rate		7% Discount rate	
Present value benefit	Annualized benefit	Present value benefit	Annualized benefit
$3,359,080	$733,470	$2,992,941	$729,950

TABLE 10—OMB CIRCULAR A–4 ACCOUNTING STATEMENT: CLASSIFICATION OF RULE'S IMPACTS, FY 2022–FY 2026
[2021 U.S. dollars]

	3% Discount rate		7% Discount rate	
	Present value	Annualized	Present value	Annualized
Total Cost:				
Monetized	$2,289,854	$500,000	$2,050,099	$500,000
Non-Monetized, but Quantified				
Non-Monetized and Non-Quantified				
Total Benefit:				
Monetized	5,648,934	1,233,470	5,043,040	1,229,950
Non-Monetized, but Quantified				
Non-Monetized and Non-Quantified	Greater efficiency and passenger satisfaction in pre-boarding; improved national security; participant enthusiasm; fewer penalties for carriers following entry denial of a passenger; faster post-flight processing.			
Total Net Benefit:				
Monetized	3,359,080	733,470	2,992,941	729,950

	3% Discount rate		7% Discount rate	
	Present value	Annualized	Present value	Annualized
Non-Monetized, but Quantified....	....	....	....	....
Non-Monetized and Non-Quantified	Benefits: Greater efficiency and passenger satisfaction in pre-boarding; improved national security; participant enthusiasm; fewer penalties for carriers following entry denial of a passenger; faster post-flight processing.			

Note: Estimates may not sum to total due to rounding.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement and Fairness Act of 1996, requires 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.

This proposed rule would not have a significant economic impact on small businesses or entities. All of the estimated costs are to the federal government instead of carriers. Although some small businesses, particularly smaller charter carriers, would be required to comply with the requirements of the proposed rule, the necessary systems are already in place because of other programs. CBP does not anticipate that these entities would need to upgrade their technology to comply with the proposed rule. Smaller carriers that currently transmit data through non-interactive submissions are currently also required to compare the travel document presented by the passenger with the information it is transmitting to CBP, in order to ensure that the information is correct, the document appears to be valid for travel to the United States, and the passenger is the person to whom the travel document was issued. The DVP will support small entities in meeting this requirement by providing a response message on whether the data submitted matches to a valid document or not. Charter carriers would also likely benefit from increased efficiency for their customers moving through CBP inspection. CBP thus certifies that this proposed rule would not have a significant economic impact on a substantial number of small entities.

C. Paperwork Reduction Act

The collections of information in this document will be submitted for OMB review in accordance with the requirements of the Paperwork Reduction Act (44 U.S.C. 3507) under control number

1651–0088. An agency may not conduct, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number assigned by OMB. The collections of information for this rulemaking are included in an existing collection for the automated information collection system, APIS, under the OMB control number 1651–0088.

This proposed rule would, among other things, require commercial air carriers to transmit additional data elements to CBP before departure of flights bound for the United States. These elements include a passenger's phone number with country code, alternative phone number with country code, email address, and address while in the United States. Because the passenger generally provides most of these data elements when booking a ticket for air travel and the carrier then forwards this information to CBP, the estimated time burden for this information collection has not increased. While private aircraft pilots, bus, and rail carriers are covered by this information collection, they are unaffected by the proposed rule.

Comments should be submitted to CBP per the instructions outlined in the introductory text of this proposed rulemaking, as CBP is not currently accepting comments via mail due to COVID–19. The comments should address: (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimates of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden including the use of automated collection techniques or the use of other forms of information technology; and (e) the annual cost burden to respondents or record keepers form the collection of information (total capital/startup costs and operations and maintenance costs).

Passenger and Crew Manifest

Commercial Air Carriers:
Estimated Number of Respondents: 1,130.
Estimated Number of Total Annual Responses: 1,850,878.
Estimated Time per Response: 10 minutes.
Estimated Total Annual Burden Hours: 307,246.
Commercial Air Carrier Passengers (3rd party):
Estimated Number of Respondents: 184,050,663.
Estimated Number of Total Annual Responses: 184,050,663.
Estimated Time per Response: 10 seconds.
Estimated Total Annual Burden Hours: 496,937.
Private Aircraft Pilots:

Estimated Number of Respondents: 460,000.
Estimated Number of Total Annual Responses: 460,000.
Estimated Time per Response: 15 minutes.
Estimated Total Annual Burden Hours: 115,000.
Commercial Passenger Rail Carrier:
Estimated Number of Respondents: 2.
Estimated Number of Total Annual Responses: 9,540.
Estimated Time per Response: 10 minutes.
Estimated Total Annual Burden Hours: 1,590.
Bus Passenger Carrier:
Estimated Number of Respondents: 9.
Estimated Number of Total Annual Responses: 309,294.
Estimated Time per Response: 15 minutes.
Estimated Total Annual Burden Hours: 77,324.

D. Privacy

CBP seeks input from the public regarding whether the data should be retained, used, and shared under the terms of the current APIS data, and if not, what use, retention, and sharing limitations are appropriate. CBP will also consult with the DHS Privacy Office, Office for Civil Rights and Civil Liberties, and Office of General Counsel regarding these questions. CBP will ensure that all Privacy Act requirements and DHS Privacy policies and guidance are adhered to in the implementation of this proposed rule.[45] CBP will issue or update any necessary Privacy Impact Assessment and/or Privacy Act System of Records notice to outline processes fully and ensure compliance with Privacy Act protections.

E. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 requires agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. This proposed rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions are necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

[45] Comments regarding minimization of impacts on privacy, civil rights, and civil liberties should be submitted per the instructions outlined in the introductory text of this proposed rulemaking. Due to COVID–19-related restrictions, CBP has temporarily suspended its ability to receive public comments by mail.

VII. Signing Authority

The signing authority for these amendments falls under 19 CFR 0.2(a). Accordingly, this document is signed by the Secretary of Homeland Security (or his delegate).

List of Subjects in 19 CFR Part 122

Air carriers, Aircraft, Airports, Reporting and recordkeeping requirements, Security measures.

Proposed Regulatory Amendments

For the reasons stated in the preamble, U.S. Customs and Border Protection proposes to amend 19 CFR part 122 as follows:

19 CFR PART 122—AIR COMMERCE REGULATIONS

■ 1. The authority citation for part 122 continues to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 58b, 66, 1415, 1431, 1433, 1436, 1448, 1459, 1590, 1594, 1623, 1624, 1644, 1644a, 2071 note.
Section 122.22 is also issued under 46 U.S.C. 60105.
Section 122.49a also issued under 8 U.S.C. 1101, 1221, 19 U.S.C. 1431, 49 U.S.C. 44909.
Section 122.49b also issued under 8 U.S.C. 1221, 19 U.S.C. 1431, 49 U.S.C. 114, 44909.
Section 122.49c also issued under 8 U.S.C. 1221, 19 U.S.C. 1431, 49 U.S.C. 114, 44909.
Section 122.49d also issued under 49 U.S.C. 44909(c)(3).
Section 122.75a also issued under 8 U.S.C. 1221, 19 U.S.C. 1431.
Section 122.75b also issued under 8 U.S.C. 1221, 19 U.S.C. 1431, 49 U.S.C. 114.

■ 2. Amend § 122.49a by:

■ a. In paragraph (a), adding in alphabetical order the definitions for “DHS-approved travel document” and “Travel document”;

■ b. Revising paragraph (b)(1)(i);

■ c. Revising the last two sentences in paragraph (b)(1)(ii)(B);

■ d. Revising the last two sentences in paragraph (b)(1)(ii)(C);

■ e. Revising paragraph (b)(3) introductory text, and paragraphs (b)(3)(vii) through (x), (xii), and (xviii) through (xxii);

■ f. Adding paragraphs (b)(3)(xx) through (xxii);

■ g. Redesignating paragraphs (c) through (e), as paragraphs (d) through (f); respectively; and

■ h. Adding a new paragraph (c).

The revisions and additions read as follows:

122.49a Electronic manifest requirement for passengers onboard commercial aircraft arriving in the United States.

(a) * * *

DHS-approved travel document. "DHS-approved travel document" means a document approved by the U.S. Department of Homeland Security for travel in or out of the United States, such as a passport, or other Western Hemisphere Travel Initiative (WHTI) approved document.

* * * * *

Travel document. "Travel document" means any document or electronic record presented for travel to or from the United States, including DHS-approved travel documents, U.S.-issued visas, Electronic System for Travel Authorization (ESTA) approvals, and Electronic Visa Update System (EVUS) enrollments.

* * * * *

(b) * * *

(1) * * *

(i) *Basic requirement.* Except as provided in paragraph (d) of this section, an appropriate official of each commercial aircraft (carrier) arriving in the United States from any place outside the United States must transmit to the Advance Passenger Information System (APIS) (referred to in this section as the U.S. Customs and Border Protection (CBP) system), the electronic data interchange system approved by CBP for such transmissions, an electronic passenger arrival manifest covering all passengers checked in for the flight. A passenger manifest must be transmitted separately from a crew member manifest required under § 122.49b. The passenger manifest must be transmitted to the CBP system at the place and time specified in paragraph (b)(2) of this section, in the manner set forth under paragraph (b)(1)(ii) of this section.

(ii) * * *

(B) * * * No later than 30 minutes after the securing of the aircraft, the carrier must transmit to the CBP system a message reporting all passengers onboard the flight. The message must identify the passengers by a unique identifier selected or devised by the carrier or by

specific passenger data (*e.g.,* name) and may include the aircraft's registration number.

(C) * * * No later than 30 minutes after the securing of the aircraft, the carrier must transmit to the CBP system a message reporting all passengers onboard the flight. The message must identify the passengers by a unique identifier selected or devised by the carrier or by specific passenger data (*e.g.,* name) and may include the aircraft's registration number.

* * * * *

(3) *Information required.* Except as provided in paragraph (d) of this section, the electronic passenger arrival manifest required under paragraph (b)(1) of this section must contain the following information for all passengers:

* * * * *

(vii) DHS-approved travel document type (*e.g.,* P = passport; A = alien registration card), if a DHS-approved travel document is required;

(viii) DHS-approved travel document number, if a DHS-approved travel document is required;

(ix) DHS-approved travel document country of issuance, if a DHS-approved travel document is required;

(x) DHS-approved travel document expiration date, if a DHS-approved travel document is required;

* * * * *

(xii) Address while in the United States (number and street, city, state, and zip code), except that this information is not required for persons who are in transit to a location outside the United States;

* * * * *

(xviii) Flight number;

(xix) Date of aircraft arrival;

(xx) Phone number with country code;

(xxi) Alternative phone number with country code; and

(xxii) Email address.

(c) *Document Validation Message and Requirements*—(1) *Document Validation Message.* After the submission of the required information in paragraph (b)(3) of this section, the carrier will receive a document validation message from CBP. The message and carrier requirements vary depending on whether the carrier is using an interactive transmission method or a non-interactive transmission method.

(i) *Carriers using an interactive transmission method.* (A) For carriers using an interactive transmission method, the CBP system will respond to the carrier with a document validation message stating whether the CBP system validated each passenger's travel documents.

(B) The carrier must ensure its interactive transmission system is capable of receiving the document validation message.

(C) Except as provided in paragraph (c)(1)(i)(D) of this section, if the document validation message states that the CBP system was unable to validate a passenger's travel documents, the carrier must contact CBP to resolve that passenger's travel document status prior to issuing a boarding pass to or boarding that passenger.

(D) To facilitate the document validation process, prior to contacting CBP as required by paragraph (c)(1)(i)(C), the carrier may transmit additional biographical information as listed in paragraph (b)(3) of this section.

(ii) *Carriers using a non-interactive transmission method.* (A) For carriers using a non-interactive transmission method, the CBP system will respond to the carrier with a document validation message stating whether the CBP system cleared the flight.

(B) The carrier must ensure it is capable of receiving the document validation message through a non-interactive method, such as email.

(C) If the document validation message states that the CBP system was unable to clear the flight, the carrier must contact CBP prior to issuing any boarding passes or boarding any passengers for that flight.

(2) *Recommendation Not to Board.* If CBP is unable to validate a passenger's travel documents, CBP will recommend that the carrier not board the passenger.

* * * * *

■ 3. Amend § 122.75a by:

■ a. Revising paragraph (b)(1)(i);

■ b. Revising the last two sentences in paragraph (b)(1)(ii)(B);

■ c. Revising the last two sentences in paragraph (b)(1)(ii)(C);

■ d. Revising paragraph (b)(3) introductory text, and paragraphs (b)(3)(vi) through (ix);

■ e. Redesignating paragraphs (c) through (e), as paragraphs (d) through (f) respectively; and

■ f. Adding a new paragraph (c).

The revisions and additions read as follows:

§ 122.75a Electronic manifest requirement for passengers onboard commercial aircraft departing from the United States.

* * * * *

(b) * * *

(1) * * *

(i) *Basic requirement.* Except as provided in paragraph (d) of this section, an appropriate official of each commercial aircraft (carrier) departing from the United States en route to any port or place outside the United States must transmit to the Advance Passenger Information System (APIS) (referred to in this section as the U.S. Customs and Border Protection (CBP) system), the electronic data interchange system approved by CBP for such transmissions, an electronic passenger departure manifest covering all passengers checked in for the flight. A passenger manifest must be transmitted separately from a crew member manifest required under § 122.75b. The passenger manifest must be transmitted to the CBP system at the place and time specified in paragraph (b)(2) of this section, in the manner set forth under paragraph (b)(1)(ii) of this section.

(ii) * * *

(B) * * * No later than 30 minutes after the securing of the aircraft, the carrier must transmit to the CBP system a message reporting all passengers onboard the flight. The message must identify the passengers by a unique identifier selected or devised by the carrier or by specific passenger data (*e.g.,* name) and may include the aircraft's registration number.

(C) * * * No later than 30 minutes after the securing of the aircraft, the carrier must transmit to the CBP system a message reporting all passengers onboard the flight. The message must identify the passengers by a unique identifier selected or devised by the carrier or by specific passenger data (*e.g.,* name). The message may include the aircraft's registration number.

* * * * *

Information required. The electronic passenger departure manifest required under paragraph (b)(1) of this section must contain the following information for all passengers:

* * * * *

(vi) DHS-approved travel document type (*e.g.,* P = passport; A = alien registration card), if a DHS-approved travel document is required;

(vii) DHS-approved travel document number, if a DHS-approved travel document is required;

(viii) DHS-approved travel document country of issuance, if a DHS-approved travel document is required;

(ix) DHS-approved travel document expiration date, if a DHS-approved travel document is required;

* * * * *

(c) *Document Validation Message and Requirements*—(1) *Document Validation Message.* After the submission of the required information in paragraph (b)(3) of this section, the carrier will receive a document validation message from CBP. The message and carrier requirements vary depending on whether the carrier is using an interactive transmission method or a non-interactive transmission method.

(i) *Carriers using an interactive transmission method.* (A) For carriers using an interactive transmission method, the CBP system will respond to the carrier with a document validation message stating whether the CBP system validated each passenger's travel documents.

(B) The carrier must ensure its interactive transmission system is capable of receiving the document validation message.

(C) Except as provided in paragraph (c)(1)(i)(D) of this section, if the document validation message states that the CBP system was unable to validate a passenger's travel documents, the carrier must contact CBP to resolve that passenger's travel document status prior to issuing a boarding pass to or boarding that passenger.

(D) To facilitate the document validation process, prior to contacting CBP as required by paragraph (c)(1)(i)(C), the carrier may transmit additional biographical information as listed in paragraph (b)(3) of this section.

(ii) *Carriers using a non-interactive transmission method.* (A) For carriers using a non-interactive transmission method, the CBP system will respond to the carrier with a document validation message stating whether the CBP system cleared the flight.

(B) The carrier must ensure it is capable of receiving the document validation message through a non-interactive method, such as email.

(C) If the document validation message states that the CBP system was unable to clear the flight, the carrier must contact CBP prior to issuing any boarding passes or boarding any passengers for that flight.

(2) *Recommendation Not to Board.* If CBP is unable to validate a passenger's travel documents, CBP will recommend that the carrier not board the passenger.

* * * * *

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

[Published in the Federal Register, February 2, 2023 (88 FR 7016)]

19 CFR PART 177

MODIFICATION OF ONE RULING LETTER AND REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF PAPER FACE MASKS

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 paper face masks.

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 one ruling letter concerning tariff classification of paper face masks 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. 56, No. 41, on October 19, 2022. No comment was received in response to that notice.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after April 16, 2023.

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

SUPPLEMENTARY INFORMATION:

BACKGROUND

Current customs law includes two key concepts: informed compliance and shared responsibility. Accordingly, the law imposes an 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. 56, No. 41, on October 19, 2022, proposing to modify one ruling letter pertaining to the tariff classification of paper face masks. 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 Headquarters Ruling Letter (HQ) 088173, dated March 26, 1991, CBP classified paper face masks, if imported separately, in heading 4818, HTSUS, specifically in subheading 4818.50.00, HTSUS, which provides for "Toilet paper and similar paper, cellulose wadding or webs of cellulose fibers, of a kind used for household or sanitary purposes, in rolls of a width not exceeding 36 cm, or cut to size or shape; handkerchiefs, cleansing tissues, towels, tablecloths, table napkins, bed sheets and similar household, sanitary or hospital articles, articles of apparel and clothing accessories, of paper pulp, paper, cellulose wadding or webs of cellulose fibers: Articles of apparel and clothing accessories". CBP has reviewed HQ 088173 and has determined the ruling letter to be in error. It is now CBP's position that if imported separately, paper face masks are properly classified

in heading 4818, HTSUS, specifically in subheading 4818.90.00, HTSUS, which provides for "Toilet paper and similar paper, cellulose wadding or webs of cellulose fibers, of a kind used for household or sanitary purposes, in rolls of a width not exceeding 36 cm, or cut to size or shape; handkerchiefs, cleansing tissues, towels, tablecloths, table napkins, bed sheets and similar household, sanitary or hospital articles, articles of apparel and clothing accessories, of paper pulp, paper, cellulose wadding or webs of cellulose fibers: Other".

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is modifying HQ 088173, and revoking or modifying any other ruling not specifically identified to reflect the analysis contained in HQ H311239, 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*.

YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

Attachment

HQ H311239

January 25, 2023
OT:RR:CTF:CPMMA H311239 AJK
CATEGORY: Classification
TARIFF NO.: 4818.90.00; 6210.10.50

MR. CAMERON MURPHY
IC SYSTEMS LTD.
P.O. BOX 3853
VANCOUVER, B.C.
CANADA V6B 3Z3

RE: Modification of HQ 088173; Classification of Paper Face Masks; Modification by Operation of Law

DEAR MR. MURPHY:

This letter is in reference to Headquarters Ruling Letter (HQ) 088173, issued to you on March 26, 1991, concerning the tariff classification of a disposable protection kit, which contained a Tyvek protection suit, one pair of latex gloves, two Tecnol paper face masks and a large plastic bag for solid waste, under the Harmonized Tariff Schedule of the United States (HTSUS). In HQ 088173, U.S. Customs and Border Protection (CBP) held that because all components of the disposable kit were equally important, the merchandise was classified, under GRI 3(c), based upon the component whose heading occurred last in numerical order, which was the Tyvek protection suit. Accordingly, CBP classified the entire disposable protection kit in the provision for the Tyvek protection suit, which was subheading 6210.10.4010, HTSUSA (Annotated) (1991), which provided for "Garments, made up of fabrics of heading 5602, 5603, 5903, 5906 or 5907: Of fabrics of heading 5602 or 5603: Other: Nonwoven disposable apparel designed for use in hospitals, clinics, laboratories or contaminated areas". In the GRI 3(c) analysis, CBP classified the Tecnol paper face masks in subheading 4818.50.00, HTSUS, as clothing accessories of paper. We have reviewed the aforementioned ruling and find that the classification determination regarding the paper face masks was incorrect.

In addition to modifying the classification of the paper face masks, the classification of the Tyvek protection suit in HQ 088173 is modified by operation of law. This modification is the result of the change to subheading 6210.10.40, HTSUS, subsequent to the publication of HQ 088173. In the 1995 Basic Edition of the HTSUS, subheading 6210.10.4010, HTSUSA (1994), was removed and replaced by subheading 6210.10.5000, HTSUSA (1995), which provided for "Garments, made up of fabrics of heading 5602, 5603, 5903, 5906 or 5907: Of fabrics of heading 5602 or 5603: Other: Nonwoven disposable apparel designed for use in hospitals, clinics, laboratories or contaminated areas".[1] In the current version of the HTSUSA, this provision is now found under subheading 6210.10.50, HTSUS. Accordingly, the classification of the Tyvek protection suit is modified by operation of law and is now classified in subheading 6210.10.50, HTSUS.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. § 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North

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[1] Although subheading 6210.10.4010, HTSUSA, was removed and replaced by subheading 6210.10.5000, HTSUSA, the text in both numerical subheadings remained the same.

American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), a notice of the proposed action was published in the Customs Bulletin, Vol. 56, No. 41, on October 19, 2022. No comment was received in response to this notice.

FACTS:

The paper face masks are described in HQ 088173 as follows:

> [T]he Tecnol High Filtration Iso Mask is made of a lightweight paper pulp. It is specially folded to fan out over and cover the mouth, a construction which is also known as a "surgical mask pleat design." Two stretch loops which fit over the ears are sewn into either side of the mask. The top edge of the mask has a wire insert which can be bent to conform securely over the nose when worn.

ISSUE:

Whether the paper face masks are classified in subheading 4818.50.00, HTSUS, as clothing accessories of paper, or in subheading 4818.90.00, HTSUS, as other sanitary or hospital paper articles.

LAW AND ANALYSIS

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

* * * * * *

The HTSUS provisions at issue are as follows:

4818	Toilet paper and similar paper, cellulose wadding or webs of cellulose fibers, of a kind used for household or sanitary purposes, in rolls of a width not exceeding 36 cm, or cut to size or shape; handkerchiefs, cleansing tissues, towels, tablecloths, table napkins, bed sheets and similar household, sanitary or hospital articles, articles of apparel and clothing accessories, of paper pulp, paper, cellulose wadding or webs of cellulose fibers:
4818.50.00	Articles of apparel and clothing accessories
4818.90.00	Other

* * * * * *

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

EN 48.18 provides, in pertinent part, as follows:

> This heading covers toilet paper and similar paper, cellulose wadding and webs of cellulose fibres, of a kind used for household or sanitary purposes:
>
> (1) in strips or rolls of a width not exceeding 36 cm;

(2) in rectangular (including square) sheets of which no side exceeds 36 cm in the unfolded state;

(3) cut to shape other than rectangular (including square).

It also covers household, sanitary or hospital articles, as well as articles of apparel and clothing accessories, of paper pulp, paper, cellulose wadding or webs of cellulose fibres.

EN 63.07 provides, in pertinent part, as follows:

[This heading] includes, in particular:

...

(22) Textile face-masks of a kind worn by surgeons during operations.

(23) Face-masks for protection against dust, odours, etc., not equipped with a replaceable filter, but consisting of several layers of nonwovens, whether or not treated with activated carbon or having a central layer of synthetic fibres. ...

* * * * * *

There is no dispute that paper face masks are classified in heading 4818, HTSUS. The issue herein is whether they are classified at the 6-digit level as clothing accessories of paper in subheading 4818.50.00, HTSUS, or as other sanitary or hospital paper articles in subheading 4818.90.00, HTSUS.

To determine whether the subject paper face masks constitute "clothing accessories of paper" within heading 4818, HTSUS, we must first analyze whether the merchandise is considered an accessory. The term "accessory," however, is not defined in the HTSUS or ENs. In the absence of a definition of a term in the HTSUS or ENs, the term is construed in accordance with its common and commercial meaning. *See Toyota Motor Sales, Inc. v. United States*, 7 C.I.T. 178, 182 (1984), *aff'd*, 753 F.2d 1061 (Fed. Cir. 1985); *Nippon Kogaku (USA), Inc. v. United States*, 69 C.C.P.A. 89 (1982). Dictionaries and other lexicographic authorities may be utilized to determine a term's common meaning. *See Mast Indus., Inc. v. United States*, 9 C.I.T. 549 (1985), *aff'd*, 786 F.2d 1144 (Fed. Cir. 1986). Merriam-Webster Dictionary defines "accessory" as "an object or device that is not essential in itself but adds to the beauty, convenience, or effectiveness of something else." *Accessory*, Merriam-Webster, https://www.merriam-webster.com/dictionary/accessory (last visited July 27, 2021). Moreover, CBP has historically defined "clothing accessory" as a non-essential item that is related to clothing, of secondary importance to clothing, and intended solely or principally as an accessory for use with clothing. *See, e.g.*, HQ 088540, dated June 3, 1991; HQ 950470, dated Jan. 7, 1992; HQ 963734, dated Mar. 28, 2001; HQ 963874, dated Sept. 18, 2001; HQ H312436, dated Feb. 10, 2021.

The subject paper face masks do not constitute clothing accessories because they are not a class or kind of goods that are principally used to accessorize clothing or that add to the beauty, convenience, or effectiveness of clothing; instead, they are independently used for sanitary purposes. The subject merchandise is generally used to cover the user's nose and mouth to reduce the user's outward particle emission and to protect the user against any harmful airborne particulates. Therefore, if imported separately, the paper face masks would be precluded from classification in subheading 4818.50.00, HTSUS, because they are not used for clothing purposes or to accessorize articles of clothing. In fact, whereas articles of apparel and clothing accesso-

ries are classified in headings of chapters 61 and 62 within section XI of the HTSUS, textile face masks are classified separately in heading 6307, HTSUS, as other made up articles, in accordance with EN 63.07. *See, e.g.*, NY 810977, dated June 2, 1995; NY J86722, dated July 22, 2003; NY J86741, dated July 22, 2003; NY N262565, dated Apr. 1, 2015; HQ H313043, dated Oct. 22, 2020. Accordingly, the fact that textile face masks are specifically enumerated as examples of "other made up articles" in EN 63.07 further supports our holding that the subject paper face masks are properly classified in subheading 4818.90.00, HTSUS, as other sanitary paper articles.

HOLDING:

By application of GRI 1, if imported separately, paper face masks, are classified in heading 4818, HTSUS, specifically in subheading 4818.90.00, HTSUS, which provides for "Toilet paper and similar paper, cellulose wadding or webs of cellulose fibers, of a kind used for household or sanitary purposes, in rolls of a width not exceeding 36 cm, or cut to size or shape; handkerchiefs, cleansing tissues, towels, tablecloths, table napkins, bed sheets and similar household, sanitary or hospital articles, articles of apparel and clothing accessories, of paper pulp, paper, cellulose wadding or webs of cellulose fibers: Other." The 2022 column one, general rate of duty is free.

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

EFFECT ON OTHER RULINGS:

HQ 088173, dated March 26, 1991, is hereby modified to reflect the correct classification of the paper face masks in the disposable protection kit. In addition, the classification of the Tyvek protection suit in HQ 088173 is modified by operation of law.

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

Sincerely,

YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

WITHDRAWAL OF PROPOSED REVOCATION OF THREE RULING LETTERS AND PROPOSED REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF WIRELESS HEADPHONE SETS

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

ACTION: Notice of withdrawal of proposed revocation of three ruling letters and revocation of treatment relating to the classification of wireless headphone sets.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) is withdrawing its proposal to revoke three ruling letters pertaining to the tariff classification of wireless headphone sets and to revoke any treatment previously accorded by CBP to substantially identical transactions. Notice of the proposed revocation was published in the Customs Bulletin, Vol. 56, No. 44 (November 9, 2022). Two comments were received in response to that notice. CBP is withdrawing its proposed action.

EFFECTIVE DATE: This action is effective immediately.

FOR FURTHER INFORMATION CONTACT: Dwayne Rawlings, Electronics, Machinery, Automotive and International Nomenclature Branch, Regulations and Rulings, Office of Trade, at *dwayne.rawlings@cbp.dhs.gov*.

SUPPLEMENTARY INFORMATION:

BACKGROUND

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

Pursuant to 19 U.S.C. § 1625(c)(1), a notice was published in the *Customs Bulletin*, Vol. 56, No. 44, on November 9, 2022, proposing to revoke New York Ruling Letters ("NY") N022195 (February 20, 2008), NY N022204 (February 20, 2008), and NY N240329 (April 22, 2013), pertaining to the tariff classification of wireless headphone sets. Upon careful consideration of the comments that were submitted in response to the notice, CBP is withdrawing the aforementioned notice of proposed revocation in order to further consider the classification of the subject wireless headphone sets, including whether additional rulings not previously identified should be reconsidered.

GREGORY CONNOR
for
YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

U.S. Court of International Trade

Slip Op. 23–8

LECO SUPPLY, INC., Plaintiff, v. UNITED STATES, Defendant, and M&B METAL PRODUCTS CO., INC. Defendant-Intervenor.

Before: Mark A. Barnett, Chief Judge
Court No. 21–00136
PUBLIC VERSION

[Sustaining U.S. Customs and Border Protection's affirmative determination of evasion in EAPA Consolidated Case No. 7357, as amended by the remand redetermination.]

Dated: January 24, 2023

Heather Jacobson, Junker & Nakachi P.C., of Seattle, WA, argued for Plaintiff.
Kelly A. Krystyniak, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for Defendant. With her on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, and *Patricia M. McCarthy*, Director. Of counsel on the brief was *Jennifer L. Petelle*, Attorney, Office of the Chief Counsel, U.S. Customs and Border Protection.
Kimberly R. Young, Vorys, Sater, Seymour and Pease LLP, of Washington, DC, argued for Defendant-Intervenor. With her on the brief was *Frederick P. Waite*.

OPINION

Barnett, Chief Judge:

This matter is before the court on U.S. Customs and Border Protection's ("CBP" or "the agency") first remand redetermination in connection with EAPA Consolidated Case No. 7357. *See* Remand Redetermination ("Remand Results"), ECF No. 47.[1] CBP issued the Remand Results pursuant to the court's remand order. Order (Aug. 3, 2021) ("Remand Order"), ECF No. 42. The Remand Results concern CBP's affirmative determination of evasion of the antidumping and countervailing duty orders on certain steel wire garment hangers from the Socialist Republic of Vietnam ("Vietnam"). *Id.* at 2; *see also*

[1] The administrative record for the Remand Results is contained in a Confidential Remand Record ("CRR"), ECF Nos. 48–1 (CRR 1–27) and 48–2 (CRR 28–45), and a Public Remand Record ("PRR"), ECF Nos. 49–1 (PRR 1–25), 49–2 (PRR 26–78) and 49–3 (PRR 79–117). An index of the administrative record for CBP's final evasion determination was also filed with the court. Business Confid. Index ("CR"), ECF No. 221; Public Doc. Index ("PR"), ECF No. 19–1. Plaintiff filed joint appendices containing record documents cited in parties' briefs. *See* Confid. J.A. ("CJA"), ECF Nos. 65–1 (Tabs 1–56), 65–2 (Tabs 57–59), 65–3 (Tab 60 part 1), 65–4 (Tab 60 part 2), 65–5 (Tab 60 part 3), 65–6 (Tab 60 part 4), 65–7 (Tabs 61–85), and 65–8 (Tabs 86–103); Public J.A. ("PJA"), ECF Nos. 66–1 (Tabs 1–39), 66–2 (Tabs 40–91), and 66–3 (Tabs 92–103). The CJA and PJA contain documents from both the administrative record for CBP's final evasion determination and the administrative record for the Remand Results. The court references the confidential version of the record documents, unless otherwise specified.

Confid. Notice of Determination as to Evasion, EAPA Case No. 7357 (Oct. 26, 2020) ("Evasion Determination"), ECF No. 22–2; Letter Re: Enforce and Protect Act ("EAPA") Consol. Case No. 7357 (Feb. 24, 2021) ("Admin. Review"), ECF No. 19–3. CBP issued its evasion determination pursuant to its authority under the Enforce and Protect Act ("EAPA"), 19 U.S.C. § 1517 (2018).[2]

Plaintiff Leco Supply, Inc. ("Leco") opposes the Remand Results. Confid. Pl. [Leco's] Mem. in Supp. of its Mot. for J. on the Agency R. ("Pl.'s Mem."),[3] ECF No. 52; Confid. Pl. [Leco's] Reply to Def. Resp. to Mot. for J. on the Agency R. ("Pl.'s Reply"), ECF No. 63. Defendant United States ("the Government") responded in support of the Remand Results.[4] Confid. Def.'s Resp. to Pl.'s Mot. for J. on the Agency R. ("Def.'s Resp."), ECF No. 60.

Leco raises four challenges to CBP's evasion determination. Leco argues that (1) CBP improperly initiated the EAPA investigation, Pl.'s Mem. at 10–13; (2) CBP's evasion determination was not supported by substantial evidence, *id*. at 13–26; (3) CBP denied Leco procedural due process and redacted material evidence in violation of CBP's regulations, *id*. at 26–46; and (4) CBP's refusal to accept Leco's written arguments during the remand proceeding was an abuse of discretion, *id*. at 46–47. For the following reasons, the court sustains CBP's final evasion determination, as amended by the Remand Results.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to section 517(g) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1517(g) (2018), and 28 U.S.C. § 1581(c) (2018). EAPA directs the court to determine whether a determination issued pursuant to 19 U.S.C. § 1517(c) or an administrative review issued pursuant to 19 U.S.C. § 1517(f) was "conducted in accordance with those subsections." 19 U.S.C. § 1517(g)(2). In so

[2] "Evasion" is defined as "entering covered merchandise into the customs territory of the United States by means of any document or electronically transmitted data or information, written or oral statement, or act that is material and false, or any omission that is material, and that results in any cash deposit or other security or any amount of applicable antidumping or countervailing duties being reduced or not being applied with respect to the merchandise." 19 U.S.C. § 1517(a)(5)(A). Congress enacted EAPA as part of the Trade Facilitation and Trade Enforcement Act of 2015, Pub. L. No. 114–125, § 421, 130 Stat. 122, 161 (2016).

[3] Although the case is before the court on remand, Leco fashioned its response as a motion for judgment on the agency record consistent with the court's Remand Order, recognizing that the results of the administrative review were remanded to CBP before Leco had the opportunity to brief the merits of its case. *See* Remand Order.

[4] Defendant-Intervenor M&B Metal Products Co., Inc. ("M&B") filed a letter in lieu of a brief indicating its support for the Government's position and urging the court to sustain the Remand Results. *See* Letter in Lieu of a Br., ECF No. 62.

doing, the court "shall examine . . . whether [CBP] fully complied with all procedures under subsections (c) and (f)" and "whether any determination, finding, or conclusion is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.*

"The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). However, CBP "must examine the relevant data and articulate a satisfactory explanation for its action[,] including a 'rational connection between the facts found and the choice made.'" *Id.* (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)). "An abuse of discretion occurs [when] the decision is based on an erroneous interpretation of the law, on factual findings that are not supported by substantial evidence, or represents an unreasonable judgment in weighing relevant factors." *Consol. Bearings Co. v. United States*, 412 F.3d 1266, 1269 (Fed. Cir. 2005) (citation omitted). "Courts look for a reasoned analysis or explanation for an agency's decision as a way to determine whether a particular decision is arbitrary, capricious, or an abuse of discretion." *Wheatland Tube Co. v. United States*, 161 F.3d 1365, 1369 (Fed. Cir. 1998).

BACKGROUND

Leco is a domestic importer of metal wire hangers purportedly manufactured by Truong Hong Development Multidisciplinary Group Ltd. ("Truong Hong"), a Lao company. *See* Compl. ¶¶ 4, 11, ECF No. 2. On October 2, 2019, M&B, a domestic producer of metal wire hangers, lodged an allegation with CBP in which it averred that Leco and nine other importers entered hangers that had been manufactured in Vietnam and transshipped through Laos in violation of antidumping ("AD") order A-552–812 and countervailing duty ("CVD") order C-552–813 (together, the "AD/CVD Orders") on hangers from Vietnam. *See* Compl. ¶ 8; Def.'s Resp. at 2–3. In support of its allegations, M&B provided a report prepared by a foreign market researcher ("Market Research Report"), which concluded that the Truong Hong factory in Laos did not have the capacity to produce the volume of hangers allegedly imported from Truong Hong. EAPA Duty Evasion Allegation Concerning Steel Wire Garment Hangers Imported from Laos—Importer: Leco Supply (Oct. 2, 2019) ("Allegation Narrative")[5] at 7, CR 14, PR 12, CJA Tab 3. M&B also cited changes

[5] The public version of the Allegation Narrative contained in the PJA is referred to herein as the "Public Allegation Narrative." *See* Public Allegation Narrative, CR 14, PR 12, PJA Tab 3.

in metal hanger production trends reflecting a significant decrease in hanger production in Vietnam and corresponding increases in Laos and China. *Id.* at 4. In response to these allegations, on October 25, 2019, CBP initiated EAPA investigations into imports by Leco and the nine other importers identified in M&B's submissions. Notice of Initiation of Investigation and Interim Measures Taken (Jan. 30, 2020) ("Initiation Notice") at 3, available at https://www.cbp.gov/sites/default/files/assets/documents/2020Mar/EAPAInvestigation%207357%20%28508%20compliant%29.pdf (last visited Jan. 24, 2023).[6] On January 30, 2020, CBP consolidated its investigations of all ten importers into EAPA Consolidated Case No. 7357. *Id.* at 12.

Pursuant to 19 C.F.R. § 165.5, CBP sent requests for information ("RFI(s)") to Leco and the other importers requesting information about their import policies and procedures, purchase and sales records for the hangers, and corporate structure. Evasion Determination at 3. CBP also sent an RFI to Truong Hong requesting information about its manufacturing process for hangers, including detailed production capabilities and capacities; the sources of its raw materials; its corporate structure and affiliations; and the source of any finished hangers not produced on-site. *Id.* at 3–4. Truong Hong failed to provide a substantive response to the RFI. *Id.* at 5.

On October 26, 2020, CBP issued an affirmative determination as to evasion. *Id.* at 1. CBP found that "substantial evidence exist[ed] demonstrating that the Importers misrepresented the country of origin on their imports of hangers" and that "[e]vidence on the record strongly suggest[ed] that a Truong Hong [[ ]] in Vietnam actually manufactured the hangers." *Id.* at 11. CBP explained that, despite having requested and received multiple extensions from CBP, Truong Hong failed to provide a substantive response to the RFI. *Id.* at 5. Based on CBP's finding that Truong Hong failed to cooperate with the EAPA investigation to the best of its ability, CBP determined to use facts available with an adverse inference. *Id.* at 10–11.

On November 24, 2020, Leco requested an administrative review of the Evasion Determination. Req. for Admin. Review of Evasion Determination (Nov. 25, 2020), CR 319, PR 476, CJA Tab 89. In the subsequent decision, CBP explained that the questionable authenticity of the documentation submitted by Leco and other importers, coupled with evidence of significant ties between Truong Hong and DNA Investment Joint Stock Company ("DNA"), a Vietnamese company subject to the AD/CVD Orders, supported a finding that the

[6] The confidential version of the Initiation Notice was also filed, *see* Confid. Notice of Initiation of Investigation and Interim Measures Taken (Jan. 30, 2020), CRR 42, PRR 97, CJA Tab 31, but the version filed in the CJA only contained the first three pages of the confidential document.

hangers imported by Leco during the period of investigation were manufactured in Vietnam. Admin. Review at 9–11.

In the Administrative Review, CBP specifically addressed several issues relevant to this litigation. First, CBP found that Truong Hong's receipts for its purchased raw materials and packaging materials appeared to be self-generated because they were printed on Truong Hong's own letterhead. *Id*. at 9. CBP also determined that the record did not support a finding that Truong Hong could produce the volume of wire hangers that it exported to the United States during the period of investigation. *Id*. at 10. Specifically, the importers being investigated submitted inconsistent quantities of machines and employees employed by Truong Hong and the production capacity reports appeared to have been created by Truong Hong because most were printed on Truong Hong's letterhead. *Id*. Furthermore, the only other evidence of production capacity was "some poor quality photos" allegedly taken in 2013 and 2014, and eleven undated photographs provided by Truong Hong through the importers. *Id*. Finally, CBP discussed Truong Hong's ties to DNA. *Id*. CBP noted that (1) Truong Hong's registered business address is in Vietnam; and (2) many of the individuals representing Truong Hong in communications with the importers were also involved in the operations of DNA and did not appear on Truong Hong's employee list. *Id*. CBP also noted that Leco did not visit the factory in Laos to verify production, but that Leco's General Manager did meet with Truong Hong representatives in Vietnam. *Id*. at 10–11. CBP also determined that the record did not support the application of adverse inferences as to Leco because Leco had timely responded to all CBP requests and provided "a significant amount of documentation and full responses" to the RFIs. *Id*. at 11.

Leco timely sought judicial review of CBP's determination pursuant to 19 U.S.C. § 1517(g). *See* Summons, ECF No. 1; Compl. The Government requested a remand to consider certain documents inadvertently omitted from the administrative review of the Evasion Determination and to consider allegations in the complaint regarding CBP's compliance with its regulations concerning business proprietary information and public summaries of such information. *See* Def.'s Mot. for Voluntary Remand and to Suspend the Current Briefing Schedule, ECF No. 39. The court granted the Government's remand request. *See* Remand Order.

CBP issued its remand determination on November 10, 2021. *See* Remand Results at 1. On remand, CBP again found that its affirmative evasion determination was supported by substantial evidence. *See id*. at 6–7.

During the remand, CBP requested that Leco and M&B review previously submitted business confidential documents and justify why any bracketed information consisted of statutorily protected trade secrets and confidential or commercial information. *Id.* at 9. CBP invited parties to submit rebuttal information and arguments relevant to any revised public documents. *Id.* CBP granted Leco a partial extension for its written arguments; however, Leco failed to timely submit its written arguments and CBP rejected the submission. *Id.* at 11–12.

DISCUSSION

I. CBP's Initiation of EAPA Investigation

A. Parties' Contentions

Leco contends that CBP should not have initiated an EAPA investigation because the evasion allegation did not reasonably suggest that evasion had occurred. *See* Pl.'s Mem. at 10–13. Leco argues that CBP should have rejected the Market Research Report as non-credible, *id.* at 12, and that it was unreasonable for CBP to accept the production capacity estimates provided in the allegation because there was no explanation as to how they were calculated. *Id.* at 13.

The Government argues that CBP's determination to initiate an investigation was reasonable.[7] Def.'s Resp. at 43–44.[8]

[7] While the Government frames CBP's determination as "reasonable," the standard of review for CBP's EAPA determinations is whether such determinations are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" and whether CBP "fully complied with all procedures" in making such determinations. 19 U.S.C. § 1517(g)(2).

[8] The Government also contends that CBP's determination to initiate an investigation is not subject to judicial review. Def.'s Resp. at 42–43. The Government asserts that because 19 U.S.C. § 1517 limits judicial review to determinations made under subsection 1517(c) and administrative reviews made under subsection 1517(f), *see* 19 U.S.C. § 1517(g)(1), the United States has not waived its sovereign immunity with respect to challenges to CBP's initiation of EAPA investigations, Def.'s Resp. at 42–43. However, in the context of agency proceedings, interlocutory decisions made by the agency, such as determinations to initiate an investigation, may be subsumed by a final determination that is subject to judicial review. *See, e.g., M S Int 'l, Inc. v. United States*, 44 CIT __, __, 425 F. Supp. 3d 1332, 1337 (2020) (plaintiff could only challenge the U.S. Department of Commerce's ("Commerce") initiation determination after the agency reached a final determination in the investigations); *Gov't of People's Republic of China v. United States*, 31 CIT 451, 459, 483 F. Supp. 2d 1274, 1281 (2007) (plaintiff could challenge agency authority to initiate a countervailing duty investigation at the conclusion of the investigation); *Hilsea Inv. Ltd. v. Brown*, 18 CIT 1068, 1071 (1994) (interlocutory decisions may be subsumed in a final agency determination).

B. Analysis

Pursuant to 19 U.S.C. § 1517(b)(1), CBP "shall initiate an investigation if [CBP] determines that the information provided in the allegation . . . reasonably suggests that covered merchandise has been entered into the customs territory of the United States through evasion." *See also* 19 C.F.R. § 165.15 (requiring CBP to initiate an investigation if an allegation "reasonably suggests" the occurrence of evasion). CBP's determination that M&B's allegation reasonably suggested evasion is not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.[9]

As CBP explained in the Initiation Notice, the allegation contained information indicating that Truong Hong did not have enough employees or hanger forming machines to produce hangers in the quantity that Truong Hong was responsible for shipping. Initiation Notice at 4. Furthermore, the allegation contained trade data indicating that, following the imposition of the AD/CVD Orders, shipments of hangers from Vietnam decreased significantly while imports from Laos increased significantly, suggesting that wire hangers imported from Laos were transshipped to avoid the applicable antidumping and countervailing duties. *Id.* at 4–5. In short, the information provided in the allegation is adequate to support CBP's decision to initiate the EAPA investigation.

II. Whether CBP's Determination of Evasion is Supported by Substantial Evidence, and is not Arbitrary, Capricious, an Abuse of Discretion or Otherwise not in Accordance with Law

A. Parties' Contentions

Leco argues that CBP's determination that Truong Hong lacked the capacity to produce the wire hangers it exported is not supported by substantial evidence and that, instead, substantial evidence supports the conclusion that Leco's imported wire hangers were produced in

[9] At oral argument, the court asked whether Leco had exhausted its administrative remedies with respect to challenging CBP's initiation of an investigation. Oral Arg. at 03:02–03:16 (time stamp from the recording on file with the court). Leco explained that it did not raise this argument during the initial investigation because the specifics of the basis for initiating the investigation were not available to Leco. *Id.* at 3:40–4:30. The court agrees that Leco could not have raised this argument at the administrative level because the redactions to the allegation and supporting documents limited Leco's ability to assess whether the allegation "reasonably suggested" that evasion was occurring. *See generally* Initiation of Investigation for EAPA Case No. 7370 – Leco Supply (Oct. 25, 2019), CR 54, PR 57, PJA Tab 17 (public version of CBP's explanation for initiating an investigation as to Leco); *see also* Public Allegation Narrative Exs. ("Public Allegation Exs."), Ex. 4, Ex. 7, CRR 28, PRR 79, PJA Tab 2.

Laos. See Pl.'s Mem. at 14–24. Leco further contends that the relationship between Truong Hong and DNA does not support a finding of evasion. *See id*. at 25–26.

The Government contends that substantial evidence supports CBP's evasion determination, and that Leco simply disagrees with how CBP weighed and considered record evidence. Def.'s Resp. at 22.

B. Analysis

Leco contends that CBP's evasion determination was arbitrary and capricious because the agency ignored or purportedly rejected record evidence "without justification." Pl.'s Mem. at 14. Leco maintains that record documents demonstrated that Truong Hong had the capacity to produce approximately 20,217,600 wire hangers per month,[10] an amount greater than the total number of hangers imported by the importers under review in the months Leco's hangers were entered and the months immediately prior thereto. *See id*. at 14–15. Leco contends that "no credible record evidence . . . refutes or contradicts" those production capacity calculations because CBP did not [[ ]] or identify any information indicating that production levels are contrary to those submitted by importers. *Id*. at 16.

To support its argument, Leco relies on record documents that Truong Hong provided to the investigated importers and those importers submitted to CBP. *See* Summary of Factual Info. Regarding Enforce and Protect (EAPA) Consolidated Case 7357 (Sept. 16, 2020) ("RAAAS Mem.") at 14–16, CRR 35, PRR 87, CJA Tab 86. CBP, however, determined that these production capacity documents were unreliable. *See* Evasion Determination at 8 ("[B]ecause Truong Hong failed to respond to the RFI, any documentation purported to be from Truong Hong and submitted by [the importers subject to the investigation] shall be deemed unreliable."); Admin. Review at 10 ("[I]mporters did not provide consistent numbers of machinery and numbers of employees to indicate production capacity."); Remand Results at 21 ("[R]ebuttal information that Leco submitted on remand to support its assertion that the foreign manufacturer was capable of producing the number of hangers in Laos that it actually exported was insufficient to support a reversal of the determination of evasion.").

As explained in the RAAAS Memorandum, the information submitted by the importers regarding Truong Hong's production capacity

[10] Leco claims that record documents indicate that Truong Hong had the production capacity to make 32,400 wire hangers per hour and that Truong Hong's factory could operate at full capacity twenty-four hours per day, six days per week, resulting in a monthly production capacity of approximately 20,217,600 hangers. Pl.'s Mem. at 14–15.

was inconsistent. RAAAS Mem. at 16. Because Truong Hong failed to respond to the RFI, CBP was unable to verify the accuracy of this conflicting information. *See* Evasion Determination at 8–10; Remand Results at 21. Substantial evidence supports CBP's determination that record documents purporting to show Truong Hong's production capacity were unreliable because they were inconsistent and, absent Truong Hong's participation, CBP was unable to obtain consistent, accurate capacity information.

Leco also challenges CBP's "rejection" of production documentation submitted by Leco as arbitrary and capricious. Pl.'s Mem. at 17. Leco submitted an array of documents, including alleged certificates of origin, ASEAN Customs Declarations, trucking records, raw material purchase records, and payment records, purporting to support a finding that its imported hangers were produced in Laos. *See* Pl.'s Mem. at 17; Remand Results at 32–33. CBP did not reject the documents as Leco argues. Instead, three separate times, CBP explained why it found these documents to be unreliable. *See* Evasion Determination at 8–9; Admin. Review at 9–10; Remand Results at 32–37.

With respect to the certificates of origin, CBP found that the numbers on these certificates appeared to have been made using a numbering stamp—which could simplify the act of counterfeiting—leading CBP to question whether the certificates were counterfeit. *See* Remand Results at 32. CBP's determination that the certificates of origin were unreliable is further bolstered by the fact that [[ ]] informed CBP that it did not issue any [[ ]] to Truong Hong. Evasion Determination at 3.

CBP similarly explained that it found the ASEAN Customs Declarations, purporting to show Truong Hong's purchase and importation of certain input material, to be unreliable. Remand Results at 32–33. CBP's suspicions as to the ASEAN Customs Declarations were confirmed by [[ ]]. *See* Evasion Determination at 8. Moreover, CBP explained that the declarations were either not completed or were completed incorrectly, Remand Results at 32–33; *see also* RAAAS Mem. at 19–22 (noting that multiple declarations contained an incorrect harmonized tariff number), and were suspicious because "all ASEAN Customs Declarations were [[ ]]," and these were not, RAAAS Mem. at 19. Additionally, for inputs from China, CBP questioned the legitimacy of corresponding ASEAN documents because China was not a party to ASEAN. Evasion Determination at 8. CBP rejected Leco's characterization of these mistakes as "minor errors" based on the record as a whole and the absence of evidence that Truong Hong paid the value-added taxes identified on the ASEAN Customs Declarations. Remand Results at 33.

CBP also provided a reasoned explanation as to why it found trucking and payment records submitted by Leco to be unreliable. CBP noted that the truck bills "did not include invoice numbers" and that it was unusual that the truck bills were in English instead of Vietnamese or Laotian and "included an unusual mixture of font types." RAAAS Mem. at 19. CBP explained that the payment records were written in English and some forms lacked relevant information such as the SWIFT code, beneficiary address, and reference number or any other unique identifier, and it appeared that certain stamps were placed on the forms before the forms had been filled out, leading CBP to conclude that they "appeared to be counterfeits." *See* Remand Results at 35–36; *see also* RAAAS Mem. at 19–20.[11] Furthermore, CBP noted that neither Leco nor any of the other importers provided bank statements or wire transfer receipts to support Truong Hong's alleged payments for transportation services. *See* Remand Results at 35–36; RAAAS Mem. at 19–20.

Leco argues that CBP's rejection of production documentation submitted by Leco based on Truong Hong's failure to participate in the investigation "amounts to application of adverse inferences." Pl.'s Mem. at 25. This argument is without merit. CBP did not apply adverse inferences with respect to Leco. *See* Admin. Review at 11. Although CBP noted that Truong Hong's failure to participate made it difficult to confirm whether the information provided by Leco and other importers was accurate, *see* Evasion Determination at 8–9; Remand Results, Addendum at 4, Truong Hong's failure to respond was not the only reason CBP found the documentation submitted by Leco to be unreliable. The documents submitted by the importers contained inconsistencies regarding production capabilities; and the certificates of origin, ASEAN Customs Declarations, and trucking and payment records appeared, on their face, to be counterfeit. *See* Remand Results at 32–37. CBP relied on these multiple inconsistencies to find that the documents were unreliable—not on Truong Hong's failure to respond to the RFI.

[11] At oral argument, Leco argued that CBP's reasons for not relying on the payment records generally (such as the absence of SWIFT codes and other reference information) did not apply to the documents that Leco supplied. Oral Arg. at 25:05– 25:40, 27:38–28:50. Leco subsequently filed the referenced documents with the court. *See* Confid. Resp. to Ct.'s Req. for Docs., ECF Nos. 70–1 through 70–4. Leco argued that these documents trace the importation of raw materials for use in production of the wire hangers in Laos. Oral Arg. at 1:20:10–1:21:51. While some of these documents do appear to be related on their face, *see* ECF No. 70–3 at CR008207–08, the connection between others is not apparent on its face. Regardless, any "traceability" within these documents does not rebut CBP's conclusion that the documents appeared to be counterfeits because they were completed in English and the forms had been stamped before they were filled out. *See* Remand Results at 35–36; RAAAS Mem. at 19–20.

Leco next contends that because CBP and M&B conceded that Truong Hong had the capacity to produce enough hangers to meet Leco's total import volume during the period of investigation, substantial evidence cannot support CBP's evasion determination. *See* Pl.'s Mem. at 17. This argument is unpersuasive. Interested parties, including both foreign producers and importers, bear the burden to provide sufficient evidence of production capabilities. *Cf. Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1190–91 (Fed. Cir. 1990) (placing "the burden of production on the [party] which has in its possession the information capable of rebutting the agency's inference"); *Royal Brush Mfg., Inc. v. United States* ("*Royal Brush II*"), 45 CIT __, __, 545 F. Supp. 3d 1357, 1373 (2021) ("[I]nterested parties bear the burden of supplying [CBP] with accurate information that withstands verification."). Here, both Leco and Truong Hong failed to provide evidence that the merchandise imported by Leco was produced in Laos. *See* Remand Results at 38. The fact that Truong Hong *theoretically* could have produced the wire hangers that Leco imported is inconclusive as to whether it *actually* did. *See Royal Brush II*, 545 F. Supp. 3d at 1373 (rejecting importer's suggestion that "CBP was required to assume that its pencils were among the orders that the [alleged manufacturer] had the capacity to produce").

Leco also contends that record evidence differs significantly between Leco and the other nine importers subject to the investigation and, as such, Leco should be considered distinct from the other importers. *See* Pl.'s Mem. at 25. The Government treats the issue as one of consolidation,[12] contending that the factual overlap in the allegations against all the subject importers, including the use of the same alleged manufacturer and exporter, justified CBP's determination to consolidate the investigations.[13] *See* Def.'s Resp. at 45.

CBP "may consolidate multiple allegations . . . into a single investigation if [CBP] determines it is appropriate to do so." 19 U.S.C. § 1517(b)(5). CBP's regulations further provide that CBP may consolidate multiple allegations based upon whether the allegations involve relationships between the importers, the similarity of covered merchandise, the similarity of antidumping and countervailing duty orders, and overlap in time periods of entries of covered merchandise. 19 C.F.R. § 165.13(b). CBP explained that all ten importers were alleged to have entered hangers manufactured in Vietnam, during the same period, all of which were covered by the AD/CVD Orders,

[12] Leco does not challenge CBP's consolidation decision.

[13] The Government contends that its decision to consolidate investigations is not subject to judicial review. Def.'s Resp. at 45. CBP's decision to consolidate investigations is the type of interlocutory agency decision that is subsumed by its final determination and is therefore subject to judicial review. *See supra* note 8.

and had a single common alleged manufacturer/exporter. Initiation Notice at 12. Given these commonalities from the outset, CBP's decision to consolidate the allegations into a single investigation was not arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law.

The inquiry does not end there.[14] Nevertheless, Leco has failed to identify a sufficient factual basis as to why it was entitled to an individualized analysis or determination in this case, other than asserting that Leco did not have a pre-existing connection with Truong Hong and that "many of the errors and omissions CBP identified in the production documentation are not present in the documentation submitted by Leco." Pl.'s Mem. at 25. The record belies Leco's assertions. Not only did CBP discuss in detail its finding that documents submitted by Leco were unreliable, *see* Admin. Review at 9; Remand Results at 30–37, but the agency also addressed the fact that Leco's general manager met with Truong Hong representatives in Vietnam, Admin. Review at 10–11.

Finally, Leco contends that, absent other evidence indicating evasion, Truong Hong's relationship with DNA does not support a finding of evasion. *See* Pl.'s Mem. at 25–26. Leco's contention fails because, as discussed above, there is a surfeit of evidence supporting CBP's evasion determination. While the court need not consider whether this relationship alone supports a finding of evasion, the connections between Truong Hong and DNA bolster CBP's determination. CBP found that one of Leco's points of contact to purchase hangers from Truong Hong was a "significant shareholder" in DNA, served as its Director-Legal Representative, and sat on its board of directors. RAAAS Mem. at 12. The email address at which Leco contacted this representative was the same email address the representative used in his capacity as General Manager of DNA's predecessor[15] to submit questionnaire responses to Commerce in connection with its antidumping investigation. *Id.* at 13. Finally, CBP determined that Truong Hong's website had been registered to DNA. *See id.* at 12. Although Leco characterizes this relationship (i.e., shifting manufacturing to a country not subject to antidumping or countervailing duties) as an "entirely logical and lawful response of a business to the sudden imposition of [duties] on hangers produced in Vietnam," Pl.'s Mem. at 25, coupled with other record evidence indicating that eva-

[14] The Government cites no authority for the notion that consolidation precludes different determinations as to different importers such that the court's affirmance of CBP's consolidation decision ends the inquiry.

[15] At the time of the investigation underlying the AD/CVD Orders, DNA was known as [[ ]]. *See* Evasion Determination at 6–7.

sion had occurred, Truong Hong's relationship with DNA reinforces CBP's affirmative evasion determination.

III. Whether CBP Complied with 19 C.F.R. § 165.4 and Provided Due Process to Leco

A. Parties' Contentions

Leco contends that "CBP's refusal to require rebracketing of documents not in compliance with [19 C.F.R. § 165.4(a)] . . . violates the [ ] Remand Order and CBP's own regulations, and is therefore arbitrary, capricious, an abuse of discretion and not in accordance with law." Pl.'s Mem. at 26. Leco further contends that its lack of access to information designated as business confidential information ("BCI") violated its due process rights. *See id.* at 36–46. Specifically, Leco argues that CBP erred in (1) allowing M&B to bracket the entire Market Research Report, *id.* at 29–31, 40–41; Pl.'s Reply at 14–16; (2) allowing M&B to bracket certain public information in its calculation of Truong Hong's alleged production capacity, Pl.'s Mem. at 31–32, 40–41; Pl.'s Reply at 14–16; (3) allowing M&B to bracket information in the Allegation Narrative derived from the Market Research Report and M&B's production capacity calculation, Pl.'s Mem. at 33; (4) bracketing the subject and central conclusion of two internal CBP memoranda, as well as continuing to bracket that information in the RAAAS Memorandum, *id.* at 33–35, 41–45; Pl.'s Reply at 16–17; and (5) refusing to provide Leco with entry data from other importers, Pl.'s Mem. at 39–40; Pl.'s Reply at 20–21.[16]

The Government contends that the bracketing and public summaries of all documents comply with CBP's regulation and are otherwise in accordance with law and that Leco has "failed to establish that . . . those summaries prevented it from advancing any arguments or placing any documents on the record that it otherwise would have." Def.'s Resp. at 32.

[16] Leco also suggests that the lack of an administrative protective order ("APO") mechanism violates its due process rights. Pl.'s Mem. at 38–46. The court has previously considered this assertion and concluded that the lack of such a mechanism does not, in and of itself, violate due process. *See Royal Brush II*, 545 F. Supp. 3d at 1367 n.11 (declining invitation to impose an extra-statutory requirement akin to the APO procedure used in Commerce proceedings); *Royal Brush Mfg., Inc. v. United States*, 44 CIT __, __, 483 F. Supp. 3d 1294, 1306–1308 (2020) (finding that due process did not require CBP to provide an interested party with confidential information). Leco advances no new arguments with respect to this issue and the court rejects Leco's suggestion for the reasons articulated in these *Royal Brush* opinions.

B. Additional Background

i. EAPA Regulations

EAPA does not require or establish a procedure for the issuance of an APO similar to the procedure used in antidumping and countervailing duty proceedings. *Compare* 19 U.S.C. § 1517 (governing EAPA investigations), *with id.* § 1677f(c)(1)(A)–(B) (establishing procedures for the disclosure of proprietary information pursuant to a protective order in Commerce proceedings). Instead, CBP has promulgated a regulation governing the release of information provided by interested parties: 19 C.F.R. § 165.4.

Pursuant to 19 C.F.R § 165.4, interested parties may request that any part of its submission to CBP be treated as BCI. *Id.* § 165.4(a). Information will only be treated as BCI if it “consists of trade secrets and commercial or financial information . . . which is privileged or confidential in accordance with 5 U.S.C. § 552(b)(4).” *Id.* An interested party claiming its submission contains BCI must explain why each item of BCI is entitled to confidential treatment, *id.* § 165.4(a)(1), and provide “a summary of the bracketed information in sufficient detail to permit a reasonable understanding of the substance of the information,” or, if claiming summarization is not possible, “a full explanation of the reasons supporting that claim,” *id.* § 165.4(a)(2).

ii. Due Process

“The Fifth Amendment prohibits the deprivation of life, liberty, or property without due process of law.” U.S. Const. amend. V. Thus, “[t]he first inquiry in every due process challenge is whether the plaintiff has been deprived of a protected interest in ‘property’ or ‘liberty.’” *Int’l Custom Prods., Inc. v. United States*, 791 F.3d 1329, 1337 (Fed. Cir. 2015) (citation omitted). While “engaging in foreign commerce is not a fundamental right protected by notions of substantive due process,” *NEC Corp. v. United States*, 151 F.3d 1361, 1369 (Fed. Cir. 1998), an importer participating in an administrative proceeding has a procedural due process right to “notice and a meaningful opportunity to be heard,” *PSC VSMPO-Avisma Corp. v. United States*, 688 F.3d 751, 761–62 (Fed. Cir. 2012) (“*Avisma*”) (quoting *LaChance v. Erickson*, 522 U.S. 262, 266 (1998)); *see also Nereida Trading Co. v. United States*, 34 CIT 241, 248, 683 F. Supp. 2d 1348, 1355 (2010) (assuming that the plaintiff had “a protected interest in the proper assessment of tariffs on goods already imported” and further examining “what process is due”) (citation omitted). In gen-

eral, "notice [must be] reasonably calculated, under all the circumstances, to appri[s]e interested parties of the pendency of the action and afford them an opportunity to present their objections." *Transcom, Inc. v. United States*, 24 CIT 1253, 1272, 121 F. Supp. 2d 690, 708 (quoting *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950)). Such opportunity must occur "at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

In determining "whether the administrative procedures provided [in a given case] are constitutionally sufficient," the court undertakes a fact-based inquiry focused on three factors: "the private interest that will be affected by the official action;" "the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any of additional or substitute procedural safeguards;" and "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id.* at 335. The court has found that, in the context of EAPA investigations, compliance with due process requires that summaries of confidential information contain "sufficient detail to permit a reasonable understanding of the substance of the information" such that they "provide[] importers . . . an adequate opportunity . . . to respond to the evidence used against them." *Royal Brush II,* 545 F. Supp. 3d at 1367.

C. Analysis

i. CBP's Compliance with its Regulations

1. The Market Research Report, Exhibit 7, and Allegation Narrative

M&B requested proprietary treatment of the contents of two exhibits to its evasion allegation, the Market Research Report, Public Allegation Exs., Ex. 4, and M&B's calculation of how much equipment Truong Hong would need to produce the volume of hangers it allegedly shipped to the United States ("Exhibit 7"), Public Allegation Exs., Ex. 7. M&B provided a limited public summary for both the Market Research Report and the contents of Exhibit 7. *Id*. The Public Allegation Narrative also contained information redacted in the Market Research Report, including details about the location and ownership of Truong Hong and the number of containers allegedly shipped from Laos to the United States during the period of review. *Compare* Public Allegation Narrative at 7–8, *with* Allegation Narrative at 7–8. The Public Allegation Narrative did not reveal certain information contained in the Market Research Report, namely, the entities and

persons from whom the market researcher obtained information, the alleged number of workers employed by Truong Hong, and the alleged number of hangers Truong Hong produced monthly. *See* Public Allegation Narrative at 5–7. Additionally, the Public Allegation Narrative did not provide the calculations contained in Exhibit 7 estimating the number of machines that would be required to produce the 376 containers of hangers that Truong Hong had reportedly shipped to the United States over a twelve-month period. *See* Public Allegation Narrative at 8.

Leco contends that the Market Research Report contains no trade secrets, and that, even if it did, redaction of the entire document is not justified. Pl.'s Mem. at 29. Leco also challenges redactions made to Exhibit 7, contending that "the vast majority of the information in [Exhibit 7] is publicly available and therefore ineligible for business confidential treatment, and the remainder is not 'commercial or financial information.'" *Id.* at 31–32 (asserting that the document should have been made entirely public). Leco contends that the lack of access to this information deprived it of the ability to review and rebut the allegations of evasion. *Id.* at 40–41.

When determining whether to treat submitted information as BCI, CBP relies on the submitting party's explanation of why each redacted item is entitled to confidential treatment. *See* 19 C.F.R. § 165.4(a)(1). CBP is subject to the Trade Secrets Act, pursuant to which its officials may be liable for civil penalties for disclosing confidential information in violation of law, and thus, as explained in the Remand Results, "CBP must be cautious in exercising its discretion whether to reject a submission if there is a possibility the information is trade secrets or commercial or financial information." Remand Results at 24; *see also* 18 U.S.C. § 1905. Thus, CBP must be afforded some discretion to determine what information qualifies as confidential.

Nevertheless, CBP does not have unlimited discretion to defer to a party's request for confidential treatment. CBP must evaluate any request for confidential treatment in light of publicly available information and information already on the public record of the proceeding. Here, while M&B requested confidential treatment for the entire Market Research Report, M&B referenced certain of that information in its public allegation. *See* Def.'s Resp. at 36–37; *see also* Public Allegation Narrative at 5–8. Thus, it should have been clear to CBP that this information should not have been afforded BCI treatment elsewhere in the same record.

In this case, however, it does not appear that further court intervention is warranted. A public summary was provided by means of

the Public Allegation Narrative along with the limited public summaries of the Market Research Report and Exhibit 7. Additionally, Leco received access to the confidential information in this litigation and has not identified any information or arguments that it was unable to present at the administrative level. *See, e.g.*, Resp. to Def.'s Mot. for Voluntary Remand at 3, ECF No. 40 (noting that Leco had reviewed the confidential administrative record pursuant to a judicial protective order). Absent any showing of prejudice to Leco, the court declines to require further remand proceedings to adjust the locations of public information otherwise already available to Leco. Agency action will be "set aside 'only for *substantial* procedural or substantive reasons.'" *Intercargo Ins. Co. v. United States*, 83 F.3d 391, 394 (Fed. Cir. 1996) (emphasis added) (quoting *Sea–Land Serv., Inc. v. United States*, 14 CIT 253, 257, 735 F. Supp. 1059, 1063 (1990), *aff'd and adopted*, 923 F.2d 838 (Fed. Cir. 1991)).

2. Memoranda to File and RAAAS Memorandum

Leco also contends that CBP's bracketing of three agency memoranda did not comply with CBP's regulations: (1) a January 27, 2020, Memorandum to the File ("January 27 Memo"); (2) a May 1, 2020, Memorandum to the File ("May 1 Memo," and, together with the January 27 Memo, the "Memoranda to the File"); and (3) the RAAAS Memorandum. Pl.'s Mem. at 33–36, 41–42.

With respect to the January 27 Memo, CBP redacted the fact that the [[ ]] had not been authenticated and that CBP was informed of this lack of authentication by [[ ]]. Mem. to the File (Jan. 27, 2020), CRR 38, PRR 91, CJA Tab 29. In the May 1 Memo, CBP redacted the conclusions of the memorandum—[[

]]. Mem. To the File (May 1, 2020), CRR 39, PRR 92, CJA Tab 71. The RAAAS Memorandum similarly redacted information bracketed in the January 27 Memo and May 1 Memo, as well as bracketing the facts that the CBP Attaché [[

]], that [[

]], and that the CBP Attaché was [[

]] concerning certain financial information. RAAAS Mem. At 5.

Leco argues that this information does not qualify as trade secrets or commercial or financial information, and that disclosure of the bracketed information is unlikely to cause substantial competitive

harm to any party or impair CBP's ability to obtain this type of information in the future. Pl.'s Mem. At 34–35.

The court encourages CBP to be more transparent in its reasoning for protecting information from public disclosure. Nevertheless, the court discerns that both the information received, and the source of that information, were treated as BCI as a condition of the source providing the information. The information was received from a non-interested party, such that 19 C.F.R. § 165.4(a) does not apply and, as a matter of comity and respect for the separation of powers, the court declines to second-guess the agency's treatment of this information.[17] Moreover, as with the Market Research Report and Exhibit 7, Leco obtained access to all confidential documents by means of the judicial protective order but made no substantive submissions or arguments based on that access.

ii. CBP's Compliance with Due Process

Leco argues that its inability to review the redacted information (or at the very least be provided with more detailed summaries of the redacted information) in the Market Research Report, Exhibit 7, the Memoranda to the File, and RAAAS Memorandum, as well as the entry data provided to CBP by other importers subject to the investigation, violated Leco's procedural due process rights.[18] *See* Pl.'s Mem. 39–45; Pl.'s Reply at 19–22; Oral Arg. at 43:40–43:46. Leco has not demonstrated that its lack of access to this information violated due process.

The procedural due process rights to which Leco is entitled must necessarily be viewed through the lens of the procedural rights parties are afforded under the statute and regulations governing EAPA investigations. In the absence of a statutorily provided APO mechanism, Leco is not entitled to access to all confidential information, particularly that protected from disclosure by other statutes such as the Trade Secrets Act, 18 U.S.C. § 1905. Leco has not established that it has any procedural due process rights beyond obtaining public summaries of BCI "in sufficient detail to permit a reasonable understanding of the substance of the information" such that it "provides importers . . . an adequate opportunity . . . to respond to the evidence

[17] Furthermore, to the extent that Leco contends that CBP failed to comply with 19 C.F.R. § 165.4(e), which requires CBP to provide a public summary of BCI placed on the record by CBP, the court finds that a public summary of the redacted information could not have been provided without divulging the source of the information.

[18] While Leco frames its argument in terms of the *Mathews* balancing test, *see*Pl.'s Mem. at 37–46, the bulk of Leco's argument focuses on the risk of erroneous deprivation of its asserted private interest, namely, "the proper assessment of tariffs on goods already imported." *Id.* at 37.

used against them." *Royal Brush II,* 545 F. Supp. 3d at 1367. As the court has noted before, nothing obligates CBP to establish "an extra-statutory requirement akin to the APO procedure used in Commerce proceedings." *Id.* at 1367 n.11. With this in mind, the court addresses Leco's various due process arguments.

First, even without access to BCI, Leco was aware of the crux of the allegation—that Leco had imported wire hangers that were transshipped from Vietnam through Laos in violation of EAPA. CBP's acceptance of requests for proprietary treatment for the particular formulas estimating the number of workers, machines, and hours worked at Truong Hong to produce wire hangers, the facts surrounding the site visit described in the Market Research Report, and the details of what entity confirmed CBP's suspicion that certain documents were inauthentic did not constrain Leco or Truong Hong from putting credible, verifiable information on the record detailing Truong Hong's actual production and export data. *See* Pl.'s Mem. at 40–41. It was Leco's burden to provide record evidence, such as accurate, verifiable certificates of origin, ASEAN Customs Declarations, and other production documents to demonstrate that its imports were manufactured by Truong Hong. *Cf. Zenith Elec. Corp. v. United States*, 988 F.2d 1573, 1583 (Fed. Cir. 1993) ("The burden of production should belong to the party in possession of the necessary information."). As discussed above, Leco and Truong Hong failed to provide this evidence.

With respect to the Memoranda to the File and the RAAAS Memorandum, Leco does not explain how CBP's treatment of the information as non-public violated its due process rights or affected its ability to respond to the evidence CBP used in making its determination. In fact, many of the documents placed on the remand record by Leco represented Leco's effort to respond directly to CBP's stated reasons for determining that the certificates of origin and ASEAN Customs Declarations were unreliable. *See generally* Def.'s Resp. at 40 (referencing CRR 1–27). Thus, the record shows that Leco was able to submit information and advance its argument that CBP's conclusions regarding the unreliability of these documents were incorrect. Leco has not shown that it was prejudiced by the redactions CBP made in the three memoranda. *Cf., e.g., Shinseki v. Sanders*, 556 U.S. 396, 409 (2009) ("[T]he burden of showing that an error is harmful normally falls upon the party attacking the agency's determination.").[19]

[19] Leco's counsel had full access to the confidential administrative record on remand and it is unclear how due process could have been violated by any redactions made in the public administrative record.

Finally, Leco contends that CBP's refusal to provide Leco with entry data placed on the record by other investigated importers deprived Leco of an opportunity to offer rebuttal information and argument. Pl.'s Mem. at 39–40; Pl.'s Reply at 20–21. Leco contends that with access to the entry data, it "could have offered rebuttal information and argument with regard to the fact that whereas [its] entry data shows the country of export as [[ ]], in many cases the entries of the other importers listed the country of export as [[ ]]". Pl.'s Mem. at 39 (comparing RAAAS Mem., Attach. VIII, with RAAAS Mem., Attach. I).

Leco concedes that the details of the entry data are unquestionably the type of confidential information protected from disclosure by statute; nevertheless, Leco maintains that no public summary would adequately provide it with the opportunity to offer rebuttal information and argument. *See id.* at 39–40. Regardless, Leco fails to explain why the entry data was necessary for it to argue that its hangers were not transshipped and to rebut CBP's ultimate finding—that Truong Hong was not able to produce steel wire hangers in the quantities it shipped to the United States. CBP made a finding of evasion specific to Leco in the administrative review, based on Leco's inability to provide sufficient information to establish that its imported wire hangers were of Lao origin. *See* Remand Results at 38; Admin. Review at 9–10. The ratio of entries listing [[ ]] as the country of origin had no bearing on Leco's ability to present additional evidence or argue that its entries originated in Laos.[20] In short, Leco was not deprived of its right to "notice and a meaningful opportunity to be heard." *Avisma*, 688 F.3d at 761–62.

Once again, the fact that Leco had access to the confidential record prior to the remand underscores the futility of Leco's due process arguments. On remand, Leco had full access to the confidential record and, thus, had the ability to make any arguments, or provide additional information, rebutting *all* record information which detracted from its position. Leco's argument that it was "unable to offer rebuttal information or identify exculpatory information within the confidential record" in violation of its due process rights, Pl.'s Mem. at 38, fails because the premise of Leco's argument is not supported by the record.

[20] To the extent that this is another variation on Leco's argument that Truong Hong had the capacity to produce the hangers that Leco imported, the court has rejected that argument above.

IV. Whether CBP's Rejection of Leco's Untimely Submission was an Abuse of Discretion

A. Parties' Contentions

Leco contends that CBP's refusal to accept Leco's untimely written arguments in the remand proceeding was an abuse of discretion. Pl.'s Mem. at 46–47. Leco suggests that because the submission was only six hours late, accepting the submission would not have burdened CBP or "impact[ed] CBP's interest in finality," and would have promoted the interests of accuracy and fairness in the proceedings. *Id*. at 47.

The Government contends that CBP's regulations make clear that CBP has the discretion to reject untimely submissions and that CBP did not abuse its discretion in declining to accept Leco's submission. Def.'s Resp. at 41.

B. Additional Background

During the remand proceeding, CBP invited parties to submit written arguments relating to the revised public documents placed on the administrative record. Letter from Patricia Tran to Heather Jacobson, *et al.* (Sept. 3, 2021), PRR 82, CJA Tab 94. Leco requested a five-day extension to file its written arguments, *see* [Leco] Req. for Extension of Time to Submit Written Args. (Sept. 15, 2021) ("Extension Req."), PRR 105, CJA Tab 97. CBP granted Leco five additional days; however, the agency required that submissions be filed no later than 10:00 AM Eastern Time on that date. *See* Resp. to [Extension Req.] (Sept. 17, 2021), PRR 106, CJA Tab 99.

Leco submitted its written arguments at 4:36 PM Eastern Time on September 27, 2021, six-and-a-half hours after the deadline. [Leco] Cmts. on Draft Remand Redetermination (Nov. 2, 2021) at 6–7, PRR 115, CJA Tab 101. CBP rejected the submission as untimely and informed Leco that it would not consider or retain Leco's written arguments for the administrative record. *Id*. at 7. At 6:15 PM Eastern Time on September 27, 2021, Leco submitted a request for an extension of the deadline and acceptance of the written arguments. Leco – Obj. to Rejection of Written Args. (Sept. 27, 2021), PRR 107, CJA Tab 100 ("Leco-Obj."). Leco explained that the late submission was caused by Leco's mistaken belief that the submission deadline was at 5:00 PM. *Id*. CBP rejected this extension request and did not accept Leco's written arguments. *See* Remand Results at 27–28.

C. Analysis

Pursuant to 19 C.F.R. § 165.5(c)(2), untimely filed submissions will not be considered by CBP or retained in the administrative record. CBP may extend submission deadlines upon request when CBP determines there is good cause for such extension. 19 C.F.R. § 165.5(c)(1). Absent extraordinary circumstances, however, such extension requests must be submitted no less than three business days before the deadline. *Id.*

Courts traditionally afford agencies broad discretion to determine their own procedures, including setting deadlines and enforcing them by rejecting untimely filings. *See NTN Bearing Corp. v. United States*, 74 F.3d 1204, 1206–07 (Fed. Cir. 1995); *Yantai Timken Co. v. United States*, 31 CIT 1741, 1755, 521 F. Supp. 2d 1356, 1371 (2007) ("In order for Commerce to fulfill its mandate to administer the antidumping duty law, including its obligation to calculate accurate dumping margins, it must be permitted to enforce the time frame provided in its regulations."). However, an agency's discretion to set and enforce deadlines is not absolute. *NTN Bearing*, 74 F.3d at 1207. A deadline-setting regulation that "is not required by statute may, in appropriate circumstances, be waived and must be waived where failure to do so would amount to an abuse of discretion." *Id.* at 1207. In determining whether rejection of an untimely filing amounts to an abuse of discretion, the court weighs "the burden imposed upon the agency by accepting the late submission," *Usinor Sacilor v. United States*, 18 CIT 1155, 1164, 872 F. Supp. 1000, 1008 (1994), "the consideration of whether the information will increase the accuracy" of a determination, *see Pro-Team Coil Nail Enterprise, Inc. v. United States*, 43 CIT __, __, 419 F. Supp. 3d 1319, 1332 (2019), and "the need for finality at the final results stage," *Timken U.S. Corp. v. United States*, 434 F.3d 1345, 1353 (Fed. Cir. 2006).

Leco has failed to show that CBP abused its discretion in rejecting Leco's written arguments. First, Leco has failed to show how the written arguments would have increased the accuracy of CBP's EAPA determination.[21] At this stage in the proceedings, Leco had already furnished CBP with the additional factual information it wanted CBP to consider. *See* [Leco] Obj. to Revised Docs. Placed on the Record by [CBP] and [M&B] (Sept. 15, 2021) ("Remand Rebuttal Information"),

[21] There is no prior case law discussing abuse of discretion under the EAPA statute with respect to rejection of untimely submissions, and the court draws from case law discussing abuse of discretion in the context of antidumping and countervailing duty proceedings. While EAPA determinations must also be accurate (i.e., determinations must be supported by substantial evidence), the nature of CBP's determination is different—rather than calculating a duty to be applied, CBP's determination is in the nature of an affirmative or negative evasion finding.

PRR 103, CJA Tab 96; [Remand Rebuttal Information], Exs. 19–21 (Sept. 15, 2021), PRR 104, CJA Tab 95. While Leco might have preferred CBP to interpret the factual record in a light more favorable to Leco, there is nothing to suggest that CBP's determination was less accurate in the absence of Leco's written arguments.

Second, CBP's interest in finality and the burden of accepting the late-submitted arguments weigh heavily in favor of CBP. Leco cites three cases in support of its position: *Celik Halat ve Tel Sanayi AS v. United States*, 44 CIT __, 485 F. Supp. 3d. 1404 (2020); *Stupp Corp. v. United States*, 43 CIT __, 359 F. Supp. 3d 1293 (2019); and *Grobest & I-Mei Indus. (Vietnam) v. United States*, 36 CIT 98, 815 F. Supp. 2d 1342 (2012). These cases are inapposite. In *Celik*, the court did not address the merits of the plaintiff's claim that Commerce abused its discretion by rejecting untimely responses. 485 F. Supp. 3d at 1412. In *Stupp*, Commerce had rejected a supplemental case brief because the plaintiff "exceeded the scope for supplemental briefing," not because plaintiff had failed to comply with a deadline. 359 F. Supp. 3d at 1312–1313. Finally, the burden for CBP to incorporate the late submission is greater than it was in *Grobest*, when Commerce had seven months to process the late submission before the deadline for releasing preliminary results and one year before releasing its final results. 815 F. Supp. 2d at 1367.[22] While Leco's submission was less than seven hours late,—the submission deadline was less than five weeks before CBP was required to file the Remand Results by court order. *See* Pl.'s Mem. at 7–8; *see also* Remand Results at 28.

[22] Each of the cited cases arose in the context of antidumping and countervailing duty proceedings. Although both CBP's and Commerce's regulations regarding rejection of untimely submissions and requests for extensions are similar, *compare* 19 C.F.R. § 165.5(c), *with id.* § 351.302, the context behind antidumping and countervailing duty investigations and EAPA investigations is different. It is well established that the purpose of the antidumping and countervailing duty statute is remedial, not punitive. *See, e.g.*, *Chaparral Steel Co. v. United States*, 901 F.2d 1097, 1103–04 (Fed. Cir. 1990). This remedial nature has thus guided the court's consideration of whether Commerce has abused its discretion. *Id.*; *see also Grobest,* 36 CIT at 123, 815 F. Supp. 2d at 1365. Moreover, for antidumping and countervailing duty proceedings, accuracy is of the utmost importance—detailed information is required in order to calculate accurate dumping margins—and this importance is reflected in the statute. *See* 19 U.S.C. § 1677m(d) (requiring Commerce to allow parties to correct deficient submissions); *id.* § 1677m(i) (requiring verification of all information relied upon in final determination of investigations). While EAPA investigations are not expressly designed to be punitive, the fact that the statute was designed to address evasion of U.S. antidumping and countervailing duties suggests that EAPA is more of an enforcement tool than a purely remedial one. *See* Signing Statement for H.R. 644, 2016 WL 737735 (Feb. 24, 2016) ("[EAPA] will . . . heighten accountability throughout the [antidumping and countervailing duty] enforcement process, and more effectively counter attempts at duty evasion."). In that vein, EAPA is designed to affect only those parties that enter merchandise by means of "material and false" statements or omissions. 19 U.S.C. § 1517(a)(5). Also, as noted above, while antidumping and countervailing duty proceedings are for the purpose of calculating a duty rate, the result of an affirmative EAPA determination serves as a tool to collect previously established duties that would have been collected but for the occurrence of evasion.

Leco has not shown that CBP abused its discretion in denying its request for an extension of time. CBP's regulation is permissive, and timely extension requests may be granted only when CBP finds there is "good cause," while requests made less than three days before a deadline are subject to an extraordinary circumstances standard. 19 C.F.R. § 165.5(c)(1). Rather than attempt to address either standard in its post-deadline extension request, Leco disputed the applicability of the regulation to the remand deadline, arguing that there is no constraint on CBP's ability to grant the requested extension. Leco-Obj. at 1. Regardless of the applicability of the regulation, Leco has failed to demonstrate that CBP abused its discretion by rejecting Leco's untimely extension request based on Leco's calendaring error.

CONCLUSION

Based on the foregoing, the court will sustain CBP's final determination of evasion as amended by the Remand Results. Judgment will enter accordingly.

Dated: January 24, 2023
New York, New York

/s/ Mark A. Barnett
MARK A. BARNETT, CHIEF JUDGE

Slip Op. 23–11

GRUPO ACERERO S.A. de C.V., GRUPO SIMEC S.A.B. de C.V., et al., Plaintiffs, and GERDAU CORSA, S.A.P.I. de C.V., Plaintiff-Intervenor, v. UNITED STATES, Defendant, and REBAR TRADE ACTION COALITION, Defendant-Intervenor.

Before: Stephen Alexander Vaden, Judge
Consol. Court No. 1:22-cv-00202

[Granting Defendant's Motion to Correct the Record.]

Dated: January 27, 2023

James L. Rogers, Jr., Nelson Mullins Riley & Scarborough LLP, of Greenville, SC, for the Joint Plaintiffs. With him on the brief were *Irene H. Chen,* VCL Law LLP, *Mark B. Lenhart,* Law Offices of David L. Simon, LLP, and *Craig A. Lewis,* Hogan Lovells US LLP.

Kara M. Westercamp, Trial Attorney, U.S. Department of Justice, of Washington, DC, for the Defendant. With her on the brief were *Brian M. Boynton,* Principal Deputy Assistant Attorney General, *Patricia M. McCarthy,* Director, *L. Misha Preheim*, Assistant Director, U.S. Department of Justice, Commercial Litigation Branch, and *Ian A. Mclnerney,* Of Counsel, U.S. Department of Commerce, Office of the Chief Counsel for Trade Enforcement and Compliance.

John R. Shane, Wiley Rein LLP, of Washington, DC, for the Defendant-Intervenor. With him on the brief were *Alan H. Price, Maureen O. Thorson, Jeffrey O. Frank*, and *Paul J. Coyle.*

OPINION

Vaden, Judge:

On August 8, 2022, Grupo Simec S.A.B. de C.V., et al. (including fourteen subsidiaries as plaintiffs, collectively, Grupo Simec) filed a complaint challenging the Final Results of the Department of Commerce's (Commerce) Administrative Review in *Steel Concrete Reinforcing Bar from Mexico: Final Results of Antidumping Duty Administrative Review; 2019–2020* (Final Results), 87 Fed. Reg. 34,848 (June 8, 2022). Compl. ¶ 1, ECF. No 8. On October 17, 2022, Commerce filed what it termed a "Consent Motion to Correct the Record." Consent Mot. to Correct the R., ECF No. 20. Plaintiffs Grupo Acerero S.A. de C.V. and Gerdau Corsa, S.A.P.I. de C.V. (collectively, Consolidated Plaintiffs) consented, but Plaintiff Grupo Simec had not consented. After an in-person status conference to discuss the consent issue, consolidation, and a dispute over the proposed briefing schedule, the Court ordered consolidation and set a briefing schedule for the contested Motion to Correct the Record. *See* Order, ECF No. 27. Commerce now moves to correct the record to include the Grupo Simec Questionnaire Deficiencies Analysis (Deficiencies Memorandum) that was neither included in the administrative record provided to the Court nor given to the parties. Def.'s Mot. Correct Record (Def.'s Mot.) at 2, ECF No. 28. Plaintiffs oppose this Motion, claiming that Commerce seeks to unlawfully place new factual information on the record and that Commerce acts in bad faith. Pls.' Resp. in Opposition to Def.'s Mot. for Leave to Correct the R. (Pls.' Resp.) at 1–2, ECF No. 29. Defendant-Intervenor Rebar Trade Coalition (the Coalition) supports Commerce's Motion. Def.-Int.'s Reply, ECF No. 34. For the reasons that follow, Commerce's Motion to Correct the Record is **GRANTED.**

BACKGROUND

I. Procedural Background

On November 6, 2014, Commerce issued an antidumping duty order on concrete reinforcing bar (rebar) from Mexico. *Steel Concrete Reinforcing Bar from Mexico: Antidumping Duty Order*, 79 Fed. Reg. 65,925 (Nov. 6, 2014). Commerce began an annual review of the Order on January 6, 2021. *Initiation of Antidumping Duty and Countervailing Duty Administrative Reviews*, 86 Fed. Reg. 511 (Jan. 6, 2021). Grupo Simec and Deacero S.A.P.I. de C.V. were selected as mandatory respondents on February 8, 2021, and the other Consolidated Plain-

tiffs remained subject to the review. *See Steel Concrete Reinforcing Bar from Mexico: Preliminary Results of Antidumping Duty Administrative Review; 2019–2020* (Preliminary Results), 86 Fed Reg. 68,632, 68,633 (Dec. 3, 2021). In the Preliminary Results, Commerce assigned a 66.7% dumping margin to Grupo Simec, drawing adverse inferences from facts otherwise available. *Id.* at 68,633; *see also* 19 U.S.C. § 1677(e)(a)(l)(B). Commerce published its Final Results on June 8, 2022, continued to apply facts otherwise available with an adverse inference to Grupo Simec, and maintained its dumping margin of 66.7%. Final Results, 87 Fed. Reg. at 38,849. Commerce then calculated a 33.35% dumping margin for the companies not selected for individual examination by averaging the dumping margins of Grupo Simec and Deacero, which received a 0% dumping margin. *Id.* at 38,849–50.

On August 8, 2022, Grupo Simec filed a complaint challenging Commerce's Final Results. Compl. ¶¶ 8–11, ECF No. 8. The Coalition intervened as Defendant-Intervenor on August 30, 2022. Order Granting Intervention, ECF No. 16. Grupo Acerero initiated a separate action challenging the Final Results and filed its complaint on August 26, 2022. Compl., ECF No. 8, Case No. 22–00230. Grupo Acerero challenged the same issues as Grupo Simec and also challenged the 33.5% dumping rate that Commerce applied to it as unsupported by substantial evidence. *Id.* ¶ 7. The Coalition intervened as a Defendant-Intervenor in this case as well on September 6, 2022. Order Granting Intervention, ECF No. 16, Case No. 22–00230. Gerdau Corsa also joined as Plaintiff-Intervenor on September 23, 2022. Order Granting Intervention, ECF No. 23, Case No. 22–00230. After the in-person status conference on October 26, 2022, and with the consent of all the parties, the Court consolidated the two actions with Grupo Simec's action designated as the lead case. Order, ECF No. 27.

II. The Present Dispute

In antidumping cases, the Court reviews Commerce's decision to determine whether it is "unsupported by substantial evidence on the record[.]" 19 U.S.C. § 1516a(b)(l)(B)(i). The record is defined as a "copy of all information presented to or obtained by the Secretary, the administering authority, or the commission during the course of the administrative proceeding, including all governmental memoranda pertaining to the case[.)" 19 U.S.C. § 1516a(b)(2)(A)(i). CIT Rule 73.2 explains that "within 40 days after the date of service of the complaint [Commerce] must file the official record of the civil action." USCIT Rule 73.2(a). The rule mirrors the language of the statutory definition and the language found in Commerce's own regulations by stating

that the record includes "[a] copy of all information presented to or obtained by the administering authority or the Commission during the course of the administrative proceedings, including all governmental memoranda pertaining to the case." *Id.; accord* 19 U.S.C. § 1516a(b)(2)(A)(i); 19 C.F.R. § 351.04.

On September 19, 2022, Commerce filed the indices of both the public and confidential versions of the administrative record with the Court. Administrative Record Index, ECF No. 18. On October 17, 2022, the Government filed what it termed a Consent Motion for Leave to Correct the Administrative Record. Def.'s Consent Mot., ECF No. 20. The Motion explained that the Final Deficiencies Memorandum, which Commerce cited in its Final Results, "was inadvertently omitted from the administrative record." *Id.* at 2. Commerce sought to correct this mistake because "the Final Deficiencies Memorandum was actually considered by the agency decision maker when making the challenged decision.'" *Id.* The Court entered an order granting the "Consent Motion" that same day. Order Granting Consent Motion, ECF No. 21.

The next day, Grupo Simec contacted the Court and stated that it had not consented to the Motion. Instead, it had requested a copy of the missing document so that it could determine whether it should consent. The Court called for the parties to submit their email correspondence regarding the issue of consent to the Motion. *See* Appendix to Opinion. A review of the emails between the Department of Commerce and Grupo Simec confirmed that Grupo Simec had never consented to Commerce's Motion. Meanwhile, Plaintiffs Grupo Acerero and Gerdau Corsa began to have second thoughts about their earlier consent, withdrew that consent, and reserved the right to object to any "correction of the record." *Id.*

To bring order to this procedural chaos, the Court scheduled an in-person status conference for October 26, 2022. *See* Order Scheduling Joint Status Conference, ECF No. 25. Commerce explained that it omitted the Deficiencies Memorandum because the analyst assigned to the case was on leave and the replacement analyst who certified and assembled the record was unfamiliar with the case. Joint Status Conf. Recording at 16:15–16:28. The Court proposed placing the Deficiencies Memorandum on the record while permitting the parties to dispute its addition as part of their Motions for Judgment on the Agency Record. Counsel for Grupo Simec was amenable to this proposition, but the counsels for Consolidated Plaintiffs were opposed. The Court then granted a recess to allow the parties to confer and reach a common position.

After the recess, Plaintiffs returned to the courtroom and stated that they wished for the record issue to be resolved before filing their Motions for Judgment on the Agency Record. Commerce had no objection to this and offered to give unredacted copies of the Deficiencies Memorandum to the Plaintiffs' Counsel to assist with the briefing. Counsel for Grupo Simec accepted Commerce's offer, but Counsel for Grupo Acerero rejected it. Joint Status Conf. Recording at 50:20–51:00. The Court left each party to make its own decision about whether to view the contested document before the Court resolved the document's disputed status. The parties were able to agree to consolidate the two cases into one, with Case Number 22–202 becoming the lead case. *See* Order, ECF No. 27. The Court also set a briefing schedule for the contested Motion to Correct the Administrative Record. *Id.*

On November 18, 2022, Commerce filed its Motion, arguing that the Deficiencies Memorandum is part of the record because it was considered by Commerce in making its decision and that adding it to the record for review would not prejudice any party. Def.'s Mot. at 4–6, ECF No. 28. The Plaintiffs filed a joint response in opposition to Commerce's Motion, arguing that they would be prejudiced by the addition because the omitted document contains new factual information that they had neither seen nor had an opportunity on which to comment. Pls.' Resp. at 6, ECF No. 29. On December 14, 2022, Commerce filed its reply brief arguing that the Deficiencies Memorandum was part of the Final Results of the administrative review and that parties do not have an opportunity to comment on the Final Results. Def.'s Reply at 2–4, ECF No. 33. Commerce asserts that the omitted document is automatically part of the record and that it did not omit the document in bad faith. *Id.* at 5–8. On December 21, 2022, the Coalition filed a reply brief in support of Commerce's Motion. It argued that a denial of the Motion would needlessly delay resolution of the case because the appropriate remedy if Commerce were to lose on the merits would be to remand to Commerce for it to include the document in the record. Def.-Int.'s Reply at 4, ECF No. 34. The Motion is now ripe for consideration.

STANDARD OF REVIEW AND JURISDICTION

The Court has exclusive jurisdiction over Plaintiffs' challenge to the Final Results under 19 U.S.C. § 1516a(a)(2)(B)(i) and 28 U.S.C. § 1581(c), which grant the Court authority to review actions contesting final affirmative determinations in an antidumping order. Because the Court has jurisdiction over the underlying action, it has jurisdiction over Defendant's Motion to Correct the Record.

The record for judicial review consists of a "copy of all information presented to or obtained by the Secretary, the administering authority, or the Commission during the course of the administrative proceeding, including all governmental memoranda pertaining to the case[.]" 19 U.S.C. § 1516a(b)(2)(A)(i); *accord* 19 C.F.R. § 351.104; USCIT Rule 73.2. This Court has previously noted that the "administrative record" is not necessarily "those documents that the agency has compiled and submitted as 'the' administrative record" but rather "consists of all documents and materials directly or indirectly considered by agency decision-makers and includes evidence contrary to the agency's position." *Hyundai Elec. & Energy Sys. Co. v. United States*, 477 F. Supp. 3d 1324, 1329 (CIT 2020) (quoting *F. Lli De Cecco Di Filippo Fara San Martino S.P.A. v. United States,* 980 F. Supp. 485, 488–89 (CIT 1997)). The Court therefore "consider[s] matters outside of the administrative record submitted by the agency" when "there is a *reasonable basis* to believe the administrative record is incomplete." *Id.* (emphasis in original) (quoting *F. Lli De Cecco*, 980 F. Supp. at 487). Indeed, "a court may order completion or supplementation of the record in light of clear evidence that the record was not properly designated or the identification of reasonable grounds that documents considered by the agency were not included in the record." *JSW Steel (USA) Inc. v. United States,* 466 F. Supp. 3d 1320, 1328–29 (CIT 2020); *see Saha Thai Steel Pipe Pub. Co., Ltd. v. United States,* 592 F. Supp. 3d 1299, 1308 (CIT 2022) (ordering the record supplemented with information cited by respondent during investigation). When the omitted information is "sufficiently intertwined with the relevant inquiry" so that "the decision can[not] be reviewed properly without" it, then the Court should correct the record, as long as it would not unduly prejudice any party. *See Floral Trade Council v. United States,* 709 F. Supp. 229, 230 (CIT 1989).

DISCUSSION

The Deficiencies Memorandum is properly part of the record because it was produced during the investigation and was considered by the agency in making the decision. The omission of the Deficiencies Memorandum would frustrate judicial review: Commerce's decision cannot properly be reviewed without its inclusion. Because it is properly part of the record, the record should be corrected to include it as long as its inclusion does not unduly prejudice any party and

Commerce did not act in bad faith in omitting it.[1] The Deficiencies Memorandum's inclusion will not unduly prejudice any party because the parties would not have received an opportunity to comment on it and Plaintiffs point to no argument they forfeited as a result of Commerce's not providing them with it earlier. There is also no compelling evidence Commerce acted in bad faith, and government agents are presumed to act in good faith absent strong evidence to the contrary. Plaintiffs have not rebutted this presumption; therefore, Commerce's Motion to Correct the Record is **GRANTED.**

I. The Deficiencies Memorandum Is Part of the Record

The first and most important issue facing the Court is whether the Deficiencies Memorandum is properly part of the record as defined by statute. Commerce argues that the Deficiencies Memorandum is part of the Final Results because "it is referenced numerous times throughout the IDM,[2] is referred to in the Federal Register notice, was dated 'concurrently' with the final results, 'accompanies this decision memorandum,' and analyzes Grupo Simec's proprietary information[.]" Def.'s Mot. at 4–5, ECF No. 28. The Plaintiffs counter that Commerce failed to comply with the statutory deadline for submitting the record and cannot now add the omitted document, which they allege contains new factual information. Pls.' Resp. at 12–13, ECF No. 29. Because the Deficiencies Memorandum is statutorily part of the record, it may not be omitted.

The record "shall" include "all governmental memoranda pertaining to the case[.]" 19 U.S.C. § 1516a(b)(2)(A)(i). The record is not confined to "those documents that the agency has compiled and submitted as 'the' administrative record," but rather "consists of all documents and materials directly or indirectly considered by agency decision-makers[.]" *Hyundai Elec.,* 477 F. Supp. 3d at 1329 (quoting *F. Lli De Cecco,* 980 F. Supp. at 488).

The Issues and Decisions Memorandum and the Final Results reference the Deficiencies Memorandum extensively. *See, e.g.,* IDM at 15, Barcode: 4247887–02 A-201–844 REV; Final Results, 87 Fed. Reg. at 34,849 n.10. Indeed, the IDM cites the Deficiencies Memorandum nine separate times. IDM at 15–16, 24–26, Barcode: 4247887–02 A-201–844 REV. The Deficiencies Memorandum is dated concurrently

[1] The Court does not address whether good cause supports the correction of the record because good cause is foreign to the case law governing motions to correct or supplement the record. *Cf.* Def.'s Mot. at 1, ECF No. 28; Pls.' Resp. at 13–14, ECF No. 29; Def.'s Reply at 6–7, ECF No. 33. The Court has not found supporting case law where the good cause standard has been applied in this context. It would be improper for the Court to insert an extraneous standard into consideration of this Motion.

[2] Issues and Decisions Memorandum, detailing Commerce's final decision.

with the IDM, demonstrating that Commerce produced and considered the document as it made its final decision. Final Deficiencies Memorandum at 1, Barcode: 4301434–01 A-202–844 REV. As such, it is part of the record. *See* 19 U.S.C. § 1516a(b)(2)(A)(i). Further, as Commerce explained in its decision, "[d]ue to the proprietary nature of certain information and issues, Commerce has separately addressed the deficiencies and the arguments raised by parties in the Deficiencies Memorandum." IDM at 15, Barcode: 4247887–02 A-201–844 REV. In other words, Commerce created the separate Deficiencies Memorandum to protect the parties' business confidential information. A separate document makes redaction easier.

Plaintiffs' objections that Commerce is barred from adding the Deficiencies Memorandum to the record and that Commerce is only allowed to correct ministerial errors are incorrect. *See* Pls.' Resp. at 11–13, ECF No. 29. Commerce, at the time it makes a final determination, must "publish the facts and conclusion supporting that determination[.]" 19 U.S.C. § 1677f(i)(l). Plaintiffs argue that Commerce's violation of this statute bars it from correcting the record now. Pls.' Resp. at 11, ECF No. 29. However, the statute does not explain how to remedy the apparent conflict. Commerce violated two statutes—one providing what is in the record for review and one providing what Commerce must publish when it makes its determination. *Compare* 19 U.S.C. § 1516a(b)(2)(A)(i) (listing the required contents of the record for review), *with* 19 U.S.C. § 1677f(i) (obligating Commerce to publish the facts and conclusions supporting its determinations). The statute offers no reason to conclude that a document that is part of the record cannot be added to correct the record for review when mistakenly omitted. As the Federal Circuit has explained, statutes establishing procedural requirements that do not prescribe remedies or consequences for their breach do not grant enforceable rights. *See Andrews v. Principi,* 351 F.3d 1134, 1137 (Fed. Cir. 2003) (citing *Rodriguez v. West,* 189 F.3d 1351, 1355 (Fed. Cir. 1999)); *see also United States v. James Daniel Good Real Property,* 510 U.S. 43, 63 (1993) ("We have held that if a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction.").

Plaintiffs' other contention that Commerce's statutory authority to correct ministerial errors does not extend to adding an entire memorandum to the record misses the point. Pls.' Resp. at 12, ECF No. 29. Commerce is not proceeding under the ministerial error statute. *See* 19 U.S.C. § 1675(h). Rather, Commerce is admitting it violated the statutes governing the record and the publication of the final results.

See Def.'s Mot. at 2–3, ECF No. 28. The appropriate remedy for this violation is correction of the record, provided omission would frustrate judicial review, such correction does not unduly prejudice any party, and the error was not made in bad faith. The Court now turns to consider those questions.

II. Omission Would Frustrate Judicial Review

Commerce argues that the Deficiencies Memorandum was integral to its decision to apply facts otherwise available with an adverse inference to Grupo Simec and that the Court "cannot properly review th[e] determination" without the document. Def.'s Reply at 10, ECF No. 33 (citing *Saha Thai,* 594 F. Supp. 3d at 1308). Plaintiffs concede that "Commerce's rationale without the Omitted Memorandum is significantly different from its rationale with the Omitted Memorandum." Pls.' Resp. at 16, ECF No. 29. The omission of the Deficiencies Memorandum would frustrate judicial review because it is integral to understanding the challenged Final Results.

"A court considering a request to supplement an administrative record should determine 'whether supplementation of the record was necessary in order not "to frustrate effective judicial review."'" *Ass'n of Am. Sch. Paper Suppliers v. United States,* 683 F. Supp. 2d 1317, 1321 (CIT 2010) (quoting *Axiom Resource Mgmt. v. United States,* 564 F.3d 1374, 1381 (Fed. Cir. 2009) (quoting *Camp v. Pitts,* 411 U.S. 138, 142–43 (1973))). An incomplete record will frustrate judicial review when the absent materials are "sufficiently intertwined with the relevant inquiry" so that "the decision can[not] be reviewed properly without" them. *Floral Trade Council,* 709 F. Supp. at 230.

According to the IDM, the Deficiencies Memorandum contains a "robust discussion" of the decision to apply adverse inferences drawn from facts otherwise available to Grupo Simec. IDM at 24, Barcode: 4247887–02 A-201–844 REV. The Deficiencies Memorandum is referenced nine separate times in the IDM as providing a more detailed explanation or further support for Commerce's conclusions. *See, e.g., id.* at 15 ("As the Deficiencies Memorandum discusses, the deficiencies contained in the supplemental questionnaire responses and evaluated in the Preliminary Results were all deficiencies that arose in the initial questionnaire responses and that Grupo Simec failed to correct or explain in the supplemental questionnaire responses[.]"). Plaintiffs admit that Commerce's rationale for its Final Results is significantly clearer when considered alongside the Deficiencies Memorandum. *See* Pls.' Resp. at 16, ECF No. 29. This likely explains why Plaintiffs make the extraordinary request that the Court remand to Commerce with specific instructions that Commerce may *not* place

the Deficiencies Memorandum on the record. *Id.* at 20. Without the Deficiencies Memorandum, Commerce's decision may be incomplete because of the lack of explanation found solely in the Final Results. Better evidence could not be found that the Deficiencies Memorandum is inextricably intertwined with Commerce's decision in this case such that its omission would frustrate judicial review.

III. Plaintiffs Are Not Prejudiced

Plaintiffs argue that Commerce's failure to provide them with the Deficiencies Memorandum was prejudicial because they never had the opportunity to review and comment on it during the administrative proceedings. *Id.* at 9. They necessarily also contend that the information in the Deficiencies Memorandum is new factual information; and, thus, they had a right to rebut those new facts. *Id.* at 8. Commerce counters that the Deficiencies Memorandum is part of the Final Results and would never have been given to the Plaintiffs for comment or examination before its issuance with the Final Results. Def.'s Reply at 3–4, ECF No. 33. Commerce also argues that the Deficiencies Memorandum does not contain new factual information but instead provides a detailed analysis of the facts already on the record. *Id.* at 2-3.

The administrative law principle of harmless error requires a showing of substantial prejudice resulting from an agency failure to follow statutory requirements or agency regulations. *See SolarWorld Americas, Inc. v. United States,* 962 F.3d 1351, 1359 (Fed. Cir. 2020) ("In the antidumping context, a party challenging a purported error by Commerce must show that it was harmed as a result of the error."); *Intercargo Ins. Co. v. United States,* 83 F.3d 391, 394 (Fed. Cir. 1996) ("It is well settled that principles of harmless error apply to the review of agency proceedings."); *see also PAM S.p.A. v. United States,* 463 F.3d 1345, 1348 (Fed. Cir. 2006) (requiring a showing of substantial prejudice when Commerce violated its own regulation that required it to give notice to a foreign exporter).

Commerce admits that it failed to include the Deficiencies Memorandum in the record as required by the statute, but that alone is insufficient to show substantial prejudice. Def.'s Mot. at 1, ECF No. 28. Plaintiffs claim that they are prejudiced by the lack of opportunity to comment on the Deficiencies Memorandum. Pls.' Resp. at 9, ECF No. 29. But plaintiffs do not have an opportunity to comment on the final results and accompanying explanation of an administrative review. Their final opportunity for comment comes after the agency issues its Preliminary Determination. *See* 19 C.F.R. § 351.309(c)(l)(ii) (detailing that a party's final administrative case brief must be sub-

mitted "30 days after the date of publication of the preliminary results of review"). At that time, parties are to file a brief with the agency stating all grounds of objection to the preliminary results along with any supporting legal argument. *See* 19 C.F.R. § 351.309 ("The case brief must present all arguments that continue in the submitter's view to be relevant to the Secretary's final determination or final results, including any arguments presented before the date of publication of the preliminary determination or preliminary results."). Any non-ministerial objections to the Final Results have only one forum — federal court. *See* 28 U.S.C. § 1581(c).

Plaintiffs further claim that they are prejudiced by not having access to the Deficiencies Memorandum in preparing their Motions for Judgment on the Agency Record. However, Plaintiffs will have ninety days after the resolution of this Motion to develop their briefs. *See* Def.'s Reply at 9, ECF No. 33; *see also* Order, ECF No. 27. And Plaintiffs have already been offered access to the Deficiencies Memorandum while this Motion is pending so that they may review it and note any additional arguments they wish to bring before the Court. Joint Status Conf. Recording at 50:20–51:00. Despite having been offered access to the Deficiencies Memorandum, it is notable that none of the Plaintiffs have identified any specific amendments to their present pleadings they need to make. *See* Pls.' Resp. at 8–10, ECF No. 29 (failing to identify any amendment of the pleadings necessitated by the Deficiencies Memorandum).

Plaintiffs object that there is prejudice because the Deficiencies Memorandum consists of new factual information, which is apparent because "discussion of Simec's responses in the *Preliminary IDM* [PDM] is only six pages; the [Deficiencies Memorandum] is twenty-five pages long." *Id.* at 6. The problem with this argument is that it puts the cart before the horse. The Court can only address these issues if the Deficiencies Memorandum is on the record and reviewable by the Court. The question of whether the Deficiencies Memorandum contains new factual information goes to the merits and not to whether it belongs on the record. If the Court finds these claims meritorious after review under USCIT Rule 56.2, then it can remand the case back to Commerce to give further explanation or to take new agency action. *See Dep't of Homeland Sec. v. Regents of the Univ. of Cal.,* 140 S. Ct. 1891, 1907–08 (2020).

To show prejudice, a plaintiff "must show that it was harmed as a result of the error." *SolarWorld,* 962 F.3d at 1359. Yet Plaintiffs point to no arguments that they have forfeited and for which they cannot seek remedy in their forthcoming Motions for Judgment on the Agency Record. Pls.' Resp. at 8–10, ECF No. 29. Plaintiffs have failed

to demonstrate they were harmed by Commerce's failure to timely provide them with the Deficiencies Memorandum. Commerce's error was harmless.

IV. Commerce Did Not Act in Bad Faith

Plaintiffs finally argue that Commerce acted in bad faith because Commerce only sought to correct the record four months after the Final Results and then only after Grupo Simec brought the omitted memorandum to its attention. *Id.* at 16. They also allege — without providing any evidence — that Commerce may have fabricated the omitted memorandum after the publication of the Final Results. *Id.* at 15. Commerce replies that Plaintiffs' allegations of bad faith or fraud are specious and violate the presumption that government officials act in good faith in the exercise of their duties. Def.'s Reply at 7, ECF No. 33.

The Federal Circuit has held that "[t]he presumption that government officials act in good faith is enshrined in our jurisprudence." *Croman Corp. v. United States,*724 F.3d 1357, 1364 (Fed. Cir. 2013) (citing *Am-Pro Protective Agency, Inc. v. United States,* 281 F.3d 1234, 1239 (Fed. Cir. 2002)). The Court must presume that government officials "act conscientiously in the discharge of their duties," and that presumption may only be overcome by "clear and convincing evidence" of bad faith. *Id.*

Bad faith requires evidence, not mere allegation. Commerce admits that it erred in failing to provide the Deficiencies Memorandum when it published the Final Results. *See* Def.'s Mot. at 2, ECF No. 28. Plaintiffs allege without evidence that Commerce fabricated the document after the Final Results' publication:

> Although Commerce cited to a 'Deficiencies Memo' in the Final IDM, there is no record of its creation prior to, or concurrent with the decision-making process. Commerce's explanation to the Court is only its 'understanding' about what happened, but Commerce does not provide a definitive explanation of when the Memorandum was created or when it was discussed or finalized in the decision-making process. The only evidence Commerce cites for the omission is that the Final IDM includes several citations to a 'Deficiencies Memo.' Without details about the circumstances of [the Deficiencies Memorandum], it is objectively just as likely that someone at Commerce suggested that it would be nice to have a [Deficiencies Memorandum], but that this document was not actually created until some point in time after the Final Results were signed and issued. There is no

> information indicating that any form of the [Deficiencies Memorandum] was actually considered by Commerce during the decision-making process.

Pls.' Resp. at 15, ECF No. 29 (internal citations omitted).

Plaintiffs argue that there is no evidence Commerce created the Deficiencies Memorandum but acknowledge that the document is cited repeatedly in the IDM. *Id.* To explain this contradiction, Plaintiffs argue that it is not just plausible but "objectively just as likely" that, rather than the document's omission being inadvertent error, (1) Commerce determined it would like to create a Deficiencies Memorandum; (2) Commerce officials conspired to execute an elaborate fraud; (3) as part of that fraud, Commerce inserted nine references to a yet-unwritten Deficiencies Memorandum in support of specific arguments; and (4) sometime between then and October 19, 2022, Commerce officials wrote and had senior officials approve a Deficiencies Memorandum backdated to the same date as the Final Results. To refer to these two situations as "equally likely" is absurd.[3] Given "the presumption that government officials act in good faith," fanciful allegations unsupported by evidence are insufficient to provide the required "clear and convincing evidence" of bad faith. *Croman Corp.,* 724 F.3d at 1364. Commerce did not act in bad faith.

CONCLUSION

Plaintiffs have tried to argue that the full record of this proceeding should not be considered with a barrage of arguments that miss the mark. The Deficiencies Memorandum is an integral part of the Final Results, and it would frustrate judicial review to omit the memorandum from the record. Plaintiffs are not prejudiced by its inclusion, and Commerce did not act in bad faith. Commerce's Motion to Correct the Record is **GRANTED.**

Dated: January 27, 2023
New York, New York

Stephen Alexander Vaden,
JUDGE

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[3] *See, e.g.,* Occam's Razor: "The principle that in explaining anything no more assumptions should be made than are necessary." OXFORD ENGLISH DICTIONARY (Mar. 2022), https://bit.ly/3GUJtba.

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