U.S. Customs and Border Protection

19 CFR Part 111

CBP Dec. 23–04

RIN 1651–AB03

CONTINUING EDUCATION FOR LICENSED CUSTOMS BROKERS

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

ACTION: Final rule.

SUMMARY: This document adopts as final, with changes, proposed amendments to the U.S. Customs and Border Protection (CBP) regulations requiring continuing education for individual customs broker license holders (individual brokers) and the framework for administering this requirement. By requiring individual brokers to remain knowledgeable about recent developments in customs and related laws as well as international trade and supply chains, CBP's framework will enhance professionalism and competency within the customs broker community. CBP has determined that this framework will contribute to increased trade compliance and better protection of the revenue of the United States.

DATES: This final rule is effective as of July 24, 2023.

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SUPPLEMENTARY INFORMATION:

Table of Contents

I. Background and Summary

A. Authority for the Continuing Broker Education Requirement

Section 641 of the Tariff Act of 1930, as amended (19 U.S.C. 1641), provides that individuals and business entities must hold a valid customs broker's license and permit to transact customs business on behalf of others. The statute also sets forth standards for the issuance of broker licenses and permits, provides for disciplinary action against customs brokers in the form of suspension or revocation of such licenses and permits or assessment of monetary penalties and provides for the assessment of monetary penalties against persons for conducting customs business without the required broker's license.

Section 641 authorizes the Secretary of the U.S. Department of the Treasury (Treasury) to prescribe rules and regulations relating to the customs business of brokers as may be necessary to protect importers and the revenue of the United States and to carry out the other provisions of section 641. *See* 19 U.S.C. 1641(f). That authority was delegated to the Secretary of the U.S. Department of Homeland Security (DHS) as a result of the enactment of the Homeland Security

Act of 2002 (Pub. L. 107–296, 116 Stat. 2142).[1] Accordingly, the Secretary of DHS is authorized to prescribe rules and regulations relating to the customs business of brokers as may be necessary to protect importers and the revenue of the United States and to carry out the other provisions of section 641. *See* 19 U.S.C. 1641(f).

Furthermore, 19 U.S.C. 1641(b)(4) imposes upon customs brokers the duty to exercise responsible supervision and control over the customs business that it conducts. The statute also permits the Secretary of DHS to test persons for their knowledge of customs and related laws prior to issuing a license. *See* 19 U.S.C. 1641(b)(2). Based upon 19 U.S.C. 1641, U.S. Customs and Border Protection (CBP) has promulgated regulations setting forth additional obligations of customs brokers pertinent to the conduct of their customs business. CBP believes that maintaining current knowledge of customs laws and procedures is essential for customs brokers to meet their legal duties. Requiring a customs broker to fulfill a continuing education requirement is the most effective means to ensure that the customs broker keeps up with an ever-changing customs practice after passing the broker exam and subsequently receiving the license.

B. Prior Related Publications

On October 28, 2020, CBP published an advance notice of proposed rulemaking (ANPRM) in the **Federal Register** (85 FR 68260) soliciting comments on a potential framework of continuing education requirements for licensed customs brokers. CBP sought to gather information and data from the broader customs community, analyze the potential impact of such a framework on the customs brokers, and consider whether such a requirement would contribute to increased trade compliance. The ANPRM provided for a 60-day public comment period, which closed on December 28, 2020. CBP received 29 comments in response to the ANPRM.

These comments were addressed in a notice of proposed rulemaking (NPRM) that CBP published in the **Federal Register** (86 FR 50794) on September 10, 2021, announcing a proposed framework for individual customs broker license holders (individual brokers) to admin-

[1] The Homeland Security Act of 2002 generally transferred the functions of the former U.S. Customs Service from the Secretary of the Treasury to the Secretary of DHS and provided that the Secretary of the Treasury retain authority over customs revenue functions, unless specifically delegated to the Secretary of DHS. *See* 6 U.S.C. 212(a)(1). Paragraph 1(a)(i) of Treasury Department Order No. 100–16 contains a list of subject matters over which the Secretary of the Treasury retained authority. *See* Appendix to part 0 of title 19, Code of Federal Regulations (Appendix to 19 CFR part 0). The other functions of the former U.S. Customs Service not expressly listed in paragraph 1(a)(i) of Treasury Department Order No. 100–16 were transferred from the Secretary of the Treasury to the Secretary of DHS. As paragraph 1(a)(i) of Treasury Department Order No. 100–16 does not list the regulation of customs brokers, the Secretary of the Treasury did not retain authority over this subject matter.

istratively maintain their license through completion of qualified continuing broker education.[2] CBP proposed to require individual brokers to complete at least 36 continuing education credits per triennial period with limited exceptions. The NPRM provided for a 60-day public comment period, which closed on November 9, 2021.[3] CBP received 70 comments in response to the NPRM.

Below is a summary of the rationale provided for the rule. For a more detailed discussion, including background information for the development of this rule, please refer to the NPRM.

C. Overview of Licensing Requirements for Individual Brokers

CBP is responsible for administering the licensing requirements for customs brokers and sets forth those requirements in part 111 of title 19 of the Code of Federal Regulations (19 CFR part 111). A prospective customs broker must pass a broker exam administered by CBP which is designed to determine the individual's knowledge of customs and related laws, regulations and procedures, bookkeeping, accounting, and all other appropriate matters. Subsequently, the individual submits an application for a broker's license. If CBP finds that the applicant is qualified, following an investigation, and has paid all applicable fees, then CBP will issue a broker's license. In order to qualify for a license, an individual must be a United States citizen who is at least 21 years of age and not an officer or employee of the United States Government, be in possession of good moral character, and pass a broker exam administered by CBP. *See* 19 CFR 111.11.

Customs brokers administratively maintain a license through the filing of reports pursuant to 19 U.S.C. 1641(g) and 19 CFR 111.30(d) (the triennial status report), the payment of fees required in 19 CFR 111.96, and notifications to CBP as set forth in 19 CFR 111.30, as well as fulfilling other legal obligations.[4] *See generally* 19 CFR 111.21–111.45. This document finalizes an additional administrative requirement, *i.e.,* completion of the continuing broker education requirement, for individual brokers to maintain their licenses. As dis-

[2] For clarity, in this document, CBP will refer to individuals who obtained a valid customs broker's license as an "individual customs broker license holder," "individual customs broker," or "individual broker." "Customs brokers" refers to the entire body of individuals, partnerships, associations, and corporations that have obtained a valid customs broker's license. *See* 19 CFR 111.1.

[3] The comments received in response to the NPRM can be viewed in their entirety on the public docket, Docket No. USCBP–2021–0030, which can be accessed through *https://www.regulations.gov.*

[4] Customs brokers have legal obligations, to CBP and to the broker's clientele, including, but not limited to, the exercising of due diligence in making financial settlements, answering correspondence, and preparing paperwork or filings related to customs business. *See* 19 CFR 111.29(a). Under 19 U.S.C. 1641(b)(4), a customs broker has the statutory duty to exercise responsible supervision and control over the customs business that he or she conducts. *See also* 19 CFR 111.1 and 111.28(a).

cussed in greater detail in the NPRM, recent developments have demonstrated the need for key parties involved in importing, exporting, claiming drawback, etc., to keep up to date on training and continuously build and maintain their knowledge of current requirements.[5]

D. Initial Certification Date

As detailed in Section II and in the responses to relevant comments in Section III below, individual brokers will be required to certify compliance with the continuing broker education requirements (trainings and educational activity that have been accredited by a CBP-selected accreditor or identified by CBP per § 111.103(a)) as part of the filing of their 2027 triennial status reports (approximately between December 15, 2026, and February 28, 2027). To allow for the full implementation of the continuing education requirement, CBP will reduce the number of required continuing education credits for the triennial period beginning on February 1, 2024. It is important to note that the proration will only affect the triennial period between 2024 and 2027 and all triennial periods thereafter will require the completion and certification of completion of 36 continuing education credits. For the triennial period beginning on February 1, 2024, CBP will reduce the 36 continuing education credits, required to be completed, by six credits for approximately every six months that elapse between February 1, 2024 and the compliance date on which individual brokers may begin completing qualified continuing broker education courses, as announced in a **Federal Register** notice, following the publication of this final rule. Along with specifying the number of required continuing education credits the **Federal Register** notice will also announce the date on which qualified continuing broker education courses will be available to individual brokers to begin meeting the requirement. CBP will publish this **Federal Register** notice at least 30 days prior to the compliance date announced therein. No educational activities or trainings completed before the compliance date announced in the **Federal Register** notice will qualify towards the continuing education credits required to be completed by the filing of the 2027 triennial status report.

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[5] Recent developments, include, but are not limited to, drawback modernization, 83 FR 64942 (Dec. 18, 2018), implementation of the Agreement between the United States of America, the United Mexican States, and Canada (the USMCA), United States–Mexico–Canada Agreement Implementation Act, Public Law 116–113, 134 Stat. 11 (19 U.S.C. Chapter 29), the dramatic increase in low-value shipments (19 U.S.C. 1321(a)(2)(C)), and CBP's updates to 19 CFR part 111, the regulations governing customs brokers and their obligations to clients and CBP. *See* 87 FR 63267 (Oct. 18, 2022) and 87 FR 63262 (Oct. 18, 2022).

E. CBP Implementation of the Continuing Broker Education Requirement

To ensure qualified trainings and educational activities are available to individual brokers, CBP will take certain necessary steps to implement the continuing broker education requirement. To collect information about standards and to identify qualified accreditors, CBP is utilizing the System for Award Management (SAM), which will involve a Request for Information (RFI) and Request for Proposals (RFPs).[6] Subsequently, CBP will announce the CBP-selected accreditors on its website at CBP.gov, to ensure that all individual brokers are aware of the selected accreditors. Afterwards, CBP, in conjunction with the CBP-selected accreditors, will establish standards and guidelines for qualified continuing broker education, including information on how and when CBP-selected accreditors will begin considering trainings and educational activities for accreditation. Finally, CBP will announce the initial qualified continuing broker education trainings and educational activities available to individual brokers and the means through which individual brokers may identify additional qualified trainings and educational activities.

II. Summary of Changes From the Proposed Regulations

CBP received 70 comments in response to the NPRM. As more fully discussed in Section III below, CBP carefully considered all public comments to the NPRM and determined to finalize the continuing broker education framework with minor changes. While considering the public comments, CBP identified five changes that would reduce confusion and increase the intended flexibility of the continuing broker education requirement, and one nomenclature change intended to provide clarity and consistency. CBP is also changing one amendatory instruction to account for an amendment made by another final rule document[7] that amended the broker regulations in part 111 between the issuance of the NPRM and this document, as described in more detail below.

In the NPRM, CBP did not specify when individual brokers would be expected to certify completion of the initial three-year cycle of the continuing broker education requirement. *See* 86 FR 50794 (Sept. 10, 2021). In this rule, as discussed in more detail below in the relevant comments, CBP is specifying that the first time at which individual

[6] Access to and additional information about the SAM may be viewed at *www.sam.gov.*

[7] On October 18, 2022, CBP published a final rule document in the **Federal Register** entitled "Modernization of the Customs Broker Regulations" (the Part 111 Rewrite). *See* 87 FR 63267.

brokers will be required to certify completion of the continuing broker education requirement will be with the filing of their 2027 triennial status reports.

In the NPRM, at § 111.1, CBP proposed the smallest unit of continuing education credit as one credit per one hour of continuous participation in qualified continuing broker education. *See* 86 FR 50794 (Sept. 10, 2021). In this rule, as discussed in more detail below in the relevant comments, CBP will allow for the recognition of "half credits" (30 minutes of continuous participation in qualifying continuing broker education) as the smallest unit of continuing education credit.

In the NPRM, in § 111.103(a)(1), CBP proposed that qualified continuing broker education must be offered by a government agency or be approved and assigned continuing education credit by a CBP-selected accreditor. *See* 86 FR 50794 (Sept. 10, 2021). In this rule, as discussed in more detail below in the relevant comments, when qualified continuing broker education is offered by a government agency, CBP will identify the specific qualified continuing broker education opportunities offered by CBP or another government agency, after consultation with the other government agency, that are relevant to customs business and may provide continuing education credit upon completion.

In the NPRM, in § 111.103(a)(2), CBP proposed four broad categories of recognized trainings or educational activities. *See* 86 FR 50794 (Sept. 10, 2021). In this rule, as discussed in more detail below in the relevant comments, CBP will amend the description of the first category (allowing for seminars, webinars, or workshops) and add a fifth category to allow for self-guided trainings and educational activities which culminate in a retention test.

In the NPRM, in § 111.103(d), CBP outlined the responsibilities of CBP-selected accreditors towards the accreditation process. *See* 86 FR 50794 (Sept. 10, 2021). In this rule, as discussed in more detail below in the relevant comments, CBP will explicitly prohibit CBP-selected accreditors from denying accreditation to training or educational activity solely because it was previously denied by the CBP-selected accreditor or any other CBP-selected accreditor.

Additionally, CBP has decided to use the phrase "individual brokers" in the regulations for clarity and consistency when referring to the specific subset of customs brokers affected by the continuing broker education requirement. For clarity, CBP differentiates between the entire body of entities with a valid customs broker license and individuals with a valid customs broker license. For consistency, the entire licensed body is referred to as "customs brokers" and

licensed individuals are referred to as "individual brokers." The continuing education requirement only applies to individual brokers and not to the entire body of customs brokers (which includes individuals, partnerships, associations, and corporations). This final rule document adds the phrase "individual brokers" in §§ 111.0 and 111.1 when referring to the continuing education requirement and adds "individual brokers" elsewhere in the following other §§ of the newly added title of subpart F of part 111: 111.101, 111.102, 111.103, and 111.104. For additional information, please see the relevant comments in Section III below.

Finally, on October 18, 2022, CBP published a final rule document in the **Federal Register** entitled "Modernization of the Customs Broker Regulations" (the Part 111 Rewrite). *See* 87 FR 63267. That final rule substantially rewrote part 111 of title 19 of the CFR and made certain changes to 19 CFR 111.30. As such, in this document, CBP has made technical and conforming changes to 19 CFR 111.30(d) from what was proposed in the NPRM to incorporate the structural changes made in the Part 111 Rewrite. CBP is further making a minor change to the section heading of 19 CFR 111.30. CBP had included a sightly revised section heading in the Part 111 Rewrite final rule, as well as in the preceding NPRM[8] but inadvertently failed to include an instruction for the **Federal Register** to make that change. In addition, CBP is correcting a grammatical error in § 111.19(c) that was made in a concurrent final rule, published in the **Federal Register** on the same day, entitled "Elimination of Customs Broker District Permit Fee" (87 FR 63262). The term "permit user fee" was inadvertently written as "user permit fee."

III. Discussion of Comments

CBP has carefully considered all comments submitted in response to the NPRM. During the 60-day public comment period, CBP received 70 comments. Of the 70 comments, 68 comments were responsive, one comment was a duplicate, and one comment was beyond the scope of the proposed rule. Of the 68 responsive comments, 57 comments explicitly supported the continuing broker education requirement, while seven comments explicitly disputed the need to have a continuing broker education requirement, with one of the seven comments disputing the application of the requirement to brokers only. Four commenters sought additional information. Generally, the 68 responsive comments addressed multiple topics that CBP has divided, grouped, and addressed below.

[8] 85 FR 34836 (June 5, 2020).

A. The Continuing Broker Education Requirement

In the NPRM, CBP proposed an additional administrative requirement for individual brokers to maintain their licenses by completing qualified continuing broker education. CBP received many comments expressing support for the continuing broker education requirement and multiple comments disputing the need for a continuing broker education requirement.

Comment: Many commenters stated that a continuing broker education requirement was necessary. Certain commenters highlighted that the requirement would ensure better outcomes for clients, professionalize the field, ensure individual brokers remained knowledgeable about the law, and help individual brokers avoid costs such as fines and time spent correcting filings. Commenters also highlighted that continuing education promotes compliance and engagement that assists CBP in protecting U.S. borders, increases trade compliance, and helps protect the revenue of the United States.

Response: CBP appreciates the supportive comments regarding the need for the continuing broker education requirement. CBP concurs with the comments as summarized above and in CBP's opinion those comments support CBP's assessment of the need for a continuing education requirement.

Comment: Multiple commenters stated that a continuing broker education requirement is unnecessary because the customs broker licensing exam was a sufficiently effective barrier to entry of unqualified individuals and clearly demonstrated the superior and sufficient knowledge base of individuals passing the exam. Commenters also highlighted that open access to the statutes and regulations and CBP's public communications are sufficient to keep individual brokers informed and knowledgeable.

Response: CBP disagrees that the licensing exam, free webinars and symposiums, open access to governing statutes and regulations, etc., continue to be sufficient to ensure a professional and up-to-date broker community. For example, the licensing exam ensures an extensive and accurate knowledge base at a certain point in time. (Section 111.102(a)(2) explicitly recognizes this reality and provides newly licensed individual brokers with a waiver of the continuing broker education requirement for the triennial period in which they receive their licenses.) However, the exam does not ensure that an individual broker will maintain an up-to-date knowledge base in the future, particularly when dealing with a very dynamic international trade environment that is changing frequently. Furthermore, free and easy access to CBP information and the regulations does not ensure individual brokers are taking advantage of access and staying

informed. Accordingly, continuing education is required, and 36 continuing education credits over three years is a reasonable expectation of someone who holds a Federally issued, professional license.

Comment: Multiple commenters stated that a continuing broker education requirement was an unnecessary expense and a burden on individuals and companies.

Response: CBP disagrees that the continuing broker education requirement is an unnecessary expense and a burden. CBP has examined the costs and burdens that the continuing broker education requirement will place on individual brokers and companies and has determined it is not overly burdensome. *See* Section V, Statutory and Regulatory Requirements, below for more information. Furthermore, CBP will ensure that there will be free qualified continuing broker education activities available to individual brokers through CBP and other U.S. government agency offerings that is available on CBP's website *CBP.gov*.

Comment: Multiple commenters requested that the continuing broker education requirement should not present additional costs to individual brokers.

Response: CBP agrees in principle and does not intend to create a specific financial burden on individual brokers. There will be some burden imposed by the continuing broker education requirement because individual brokers will need to receive 36 continuing education credits over three years. However, CBP believes this burden will not be significant and has taken steps to lessen the burden. *See* Section V, Statutory and Regulatory Requirements, below for more information. For example, CBP will be providing enough free continuing education credits from CBP online modules and in-person events to cover the 36 continuing education credits required in a triennial period.

Comment: Multiple commenters expressed concern that a continuing broker education requirement will have an outsized effect concerning time, expense, etc., on small businesses and individual brokers who are working for themselves.

Response: CBP recognizes that this requirement will have an outsized impact on small businesses relative to larger firms. However, as more fully discussed in the Regulatory Flexibility Act section, CBP does not consider this rule to have a significant economic impact on a substantial number of small entities. *See* Section V, Statutory and Regulatory Requirements. While CBP realizes that a greater number of employees of smaller firms will be required to begin continuing education as a result of the rule, CBP designed the continuing broker education requirement so that it is the same for every individual

broker. First, every individual broker is required to complete qualified continuing broker education and maintain his or her own records. Second, all qualified continuing broker education must be identified by CBP, as explained in Subsection G below, or accredited by a CBP-selected accreditor. As such, all individual brokers must complete the same requirements and the sources for completing those requirements are restricted in the same way. CBP does recognize that small businesses and individuals, sometimes operating in remote locations, may have a more difficult time finding accredited continuing broker education than individual brokers working in a larger entity in a metropolitan area. Therefore, CBP will ensure that there is a central location on CBP's website for individual brokers to access and find qualified continuing broker education. Additionally, as discussed in the comment response above, CBP will be offering enough free continuing education courses in the form of online modules and in-person events to cover the required 36 continuing education credits in a triennial period.

Comment: Multiple commenters expressed concern that CBP may be creating a conflict of interest in setting continuing broker education requirements that would benefit CBP as an entity offering continuing broker education, may disadvantage other education providers, create a CBP education monopoly, or allow CBP to create a private education monopoly.

Response: CBP disagrees that it is creating a conflict of interest that would benefit CBP. The new requirements will give individual brokers significant flexibility on how to meet the continuing broker education requirement. CBP intends for individual brokers to have access to a wide range of private- and public-offered qualified continuing broker education. CBP has provided free, online, education modules and in-person workshops to customs brokers, importers, and other members of the trade community for many years. The modules and workshops are designed to inform participants about practices and procedures when conducting customs business and provide updates to laws, regulations, and policies. CBP will continue to produce and disseminate the modules and workshops because doing so ensures that the trade community is aware of the most important changes or updates. More importantly, CBP will continue to offer the modules for free so that individual brokers have a baseline option to satisfy their continuing broker education requirement that will not allow the formation of a private continuing broker education monopoly and will ensure that CBP does not financially profit from instituting a continuing broker education requirement. CBP will

work closely with CBP-selected accreditors to create standards that ensure robust and diverse private sector education offerings exist for individual brokers to access.

Comment: Two commenters requested that qualified continuing broker education be administered by a government entity and stated that it should not be outsourced to any private parties.

Response: CBP disagrees as it does not have the resource capabilities to create or administer all trainings or educational activities, nor does it have the capacity to vet or accredit every potentially valid training or educational activity that could arise. As mentioned throughout this document, CBP believes a continuing broker education requirement will substantially benefit CBP, importers, exporters, customs brokers, and the trade community in general. CBP intends the continuing broker education requirement to be as attainable and as flexible as possible for individual brokers. Therefore, CBP has determined that a private sector continuing broker education option needs to exist, and that option needs to contain certain safeguards, explained elsewhere in this document, which guarantee individual brokers are receiving the requisite level of quality in the private sector offerings. However, CBP understands the commenter's concerns and believes that, by providing enough CBP-identified, free qualified continuing broker education alternatives, individual brokers will have the flexibility and alternatives that allow the individual broker to complete the continuing broker education requirement in a manner and at a cost that suits his or her individual needs.

Comment: One commenter requested that the continuing broker education framework include fewer participating entities to allow for easier implementation and to avoid overwhelming or confusing individual brokers.

Response: CBP disagrees that the number of participating entities should be limited. The continuing broker education program will involve as many parties as are necessary to provide individual brokers with a wide range of trainings, educational activities, and topics, while still being a manageable program. CBP believes individual broker confusion will be minimized by allowing an individual broker to certify that he or she has completed the continuing broker education requirement with the filing of the triennial status report and by allowing an individual broker to maintain his or her own records.

Comment: One commenter asked CBP to hold monthly meetings in person or virtually with a uniform format to meet the continuing broker education requirement rather than the proposed process.

Response: CBP already holds regular information sessions, local industry days, and conference calls to inform the trade community of

changes in trade law, regulations, procedures, etc. However, CBP has found attendance to be sub-optimal and believes mandating attendance at such sessions would not provide individual brokers enough flexibility. CBP recognizes that many individual brokers specialize in certain areas, and not every topic or new development is equally important to every individual broker. As such, CBP has determined that the best approach to guarantee an informed customs broker community is to allow an individual broker to choose the topics he or she believes will help him or her stay current, informed, and effective in his or her practice area.

B. Certification Dates

In the NPRM, CBP proposed that individual brokers be required to certify, with the filing of their triennial status reports, pursuant to 19 U.S.C. 1641(g) and 19 CFR 111.30(d), the completion of 36 continuing education credits of qualified continuing broker education over the prior three years. Multiple commenters expressed concern or sought clarification regarding the requirement's initial and ongoing certification date.

Comment: Two commenters sought clarification concerning the start and end dates of the three-year triennial period as it relates to the continuing broker education requirement. Specifically, the commenters sought clarification concerning the interaction between the end of a continuing broker education cycle and the triennial reporting period. One commenter suggested new dates for the continuing broker education cycle to better accommodate early filing of the triennial status report. One commenter suggested that CBP consider allowing brokers who exceed the 36-hour requirement for one triennial period to carry over and apply a limited number of continuing education credits to the subsequent triennial period.

Response: CBP appreciates the opportunity to clarify. The timeline for triennial status reporting is prescribed by 19 U.S.C. 1641(g). Every three years after 1985 is a reporting year and a triennial status report is due on February 1st of the reporting year (the triennial reporting period). However, 19 U.S.C. 1641(g)(2) provides that a customs broker license is suspended only when a customs broker fails to file the required triennial status report by March 1st of the reporting year. CBP allows licensed customs brokers to file triennial status reports over a multi-month period, starting mid-December on a date announced on CBP's website and ending on the last day of February of the reporting year. CBP determined that requiring individual brokers to certify completion of continuing broker education requirements at the same time as filing the triennial status report would

significantly simplify and alleviate administrative reporting burdens on individual brokers. CBP does not have discretion to adjust the triennial reporting period. As such, the 36-month cycle of the continuing broker education requirement will end on January 31st and begin on February 1st every three years coinciding with the due date of the triennial status report. That means participation in any qualified continuing broker education on or before the last day of January, marking the end of a triennial reporting period, can only count as qualified continuing broker education for that cycle. Any participation in qualified continuing broker education after the last day of January, marking the end of a triennial reporting period, can only count as qualified continuing broker education for the next three-year triennial reporting period. Individual brokers may continue to file their triennial status reports earlier than the due date but should be certain they have completed 36 continuing education credits in the slightly shorter timeframe. To respond to the last comment, CBP does not allow for individual brokers to carry over any continuing education credits they completed in one triennial period in excess of the 36-hour requirement into the subsequent triennial period. This requirement is meant to encourage individual brokers to maintain a current knowledge base by completing training or educational activities within a three-year period. Training or educational activities completed any time between three to six years prior to the credit being applied to the next triennial period would undercut that purpose.

Comment: Two commenters requested that CBP implement the continuing broker education requirement with a delayed effective date. The commenters highlighted that a continuing broker education requirement is a significant change within the customs broker community and time must be given for the accreditation process to progress so that enough qualified trainings and educational activities are available for use by individual brokers. Similarly, one commenter requested that CBP establish an effective date that coincides with a complete triennial reporting period.

Response: CBP agrees that time will be needed to set up the accreditation process. In this final rule, the first triennial reporting period that will require individual brokers to complete the continuing broker education requirement will close on January 31, 2027 (with the triennial status report due on February 1, 2027). *See* 19 U.S.C. 1641(g). As such, CBP is modifying § 111.101 by adding a sentence to the end of the section to make it clear that the requirement to certify completion of the continuing broker education requirement will be with the filing of the 2027 status report, and every status report

thereafter. Therefore, the first time at which individual brokers will be required to certify completion of the continuing broker education requirement will be with the filing of the 2027 triennial status report. As discussed above, CBP will reduce the number of required continuing education credits for the triennial period beginning on February 1, 2024 and ending on January 31, 2027 by six credit hours for approximately every six month that elapse between February 1, 2024 and the compliance date on which individual brokers may begin meeting the requirement, as announced in a **Federal Register** notice following the publication of this final rule. Following the 2027 triennial status report, individual brokers will be required to certify completion of the 36-credit continuing broker education requirement with every triennial status report, unless an exception applies as outlined in § 111.102(a).

C. Individuals to Whom the Requirement Applies

In the NPRM, CBP proposed a continuing broker education requirement that applies to all individual brokers. CBP proposed that individual brokers who voluntarily suspended their licenses, under 19 CFR 111.52, and individual brokers who have not held their licenses for an entire triennial period, be excepted from the requirement. Multiple comments were received regarding the scope of the continuing broker education requirement, including to whom the requirement would apply.

Comment: One commenter requested that the continuing broker education requirement not extend to those who are working at a brokerage firm or company because the person practices with customs rulings every day.

Response: CBP disagrees because individual brokers working in a brokerage firm or company do not transact customs business differently, for the purposes of the continuing broker education requirement, from other individual brokers to warrant different treatment. Individuals transacting customs business are required to have a license unless specifically excepted. *See* 19 CFR 111.2(a). Any individual holding an active customs broker license will be required to certify completion of the continuing broker education requirement when submitting his or her triennial status report, with two limited caveats. Those caveats are: if an individual has not held his or her license for an entire triennial period or if an individual license is voluntarily suspended. If an individual has not held an active customs broker license for an entire triennial period or is reactivating a license that was voluntarily suspended, then that person is required to complete a prorated version of the requirement. In these two scenarios, the required number of continuing education credits that

an individual broker must complete will be calculated on a prorated basis of one continuing education credit for each complete remaining month until the end of the triennial period. *See* 19 CFR 111.102(b). Furthermore, the continuing broker education requirement is not linked to the nature of the customs business the individual transacts. Individual brokers have different experiences, specializations, knowledge bases, and day-to-day interactions with customs business. Differentiating among individual brokers based on things such as experience, employer, or specialization would be unworkable and controversial. CBP believes the only fair and consistent way to implement the continuing broker education requirement is to apply the same requirement to all individual brokers.

Comment: One commenter requested that CBP exempt individual brokers from the requirement if the licensee is not actively engaged in customs business.

Response: CBP has determined that an individual holding an active license is the most fair and administrable distinction to determine whether an individual must complete qualified continuing broker education. In the NPRM, CBP explicitly stated that all individual brokers are required to complete the same continuing broker education requirement due to the complex and evolving realm of international trade. As mentioned above, on October 18, 2022, CBP published a final rule entitled "Modernization of the Customs Broker Regulations," in the **Federal Register**, which substantially rewrote certain provisions of part 111 of title 19 of the CFR and made certain changes to 19 CFR 111.30. As such, in this document, CBP has made technical and conforming changes to 19 CFR 111.30(d) while maintaining the original intent of the NPRM to apply the continuing broker education requirement to all individual brokers. CBP, through the Part 111 Rewrite, does recognize a difference, under 19 CFR 111.30, between the contents required in a triennial status report submitted by individual brokers "actively engaged in transacting business as a broker" and brokers who are "not actively engaged in transacting business as a broker." However, filing a triennial status report is required for non-active individual brokers and the continuing broker education requirement will be as well. CBP intends for all individual brokers to be current in their knowledge of transacting customs business and to complete the same continuing broker education requirement. Even brokers who are not actively engaged in transacting business as a broker might nonetheless be leveraging their broker license in other ways, for example, as an employee of a company or as a consultant. Furthermore, a broker could become active at any point in time from a period of inactivity and such brokers must then meet the same levels of professionalism and knowledge as any other broker who has been actively engaged in transacting business. Lastly, if a broker

expects to not actively engage in transacting business as a broker for a longer period of time, then that broker could have his or her license voluntarily suspended in accordance with 19 CFR 111.52, and thereby, not be subject to the broker continuing education requirement during the period of voluntary suspension.

Comment: One commenter asked CBP to extend the continuing broker education requirement to an importer or exporter who transacts customs business solely on his or her own account.

Response: CBP disagrees with the request because those individuals do not need a customs broker license as they are not transacting customs business on behalf of others. CBP wants to ensure that licensed individual brokers who handle business on behalf of others and are paid for those services are knowledgeable and informed about the applicable laws and regulations in order to provide high quality service to their clients. CBP has consistently recognized that certain limited circumstances and certain specific individuals performing customs business do not require a license. *See* 19 CFR 111.2(a)(2). This final rule does not change the nature of, nor the reason for, those exceptions.

Comment: One commenter requested that the continuing broker education requirement extend to CBP Officers and personnel.

Response: CBP disagrees with this request because it is unnecessary. The duties and responsibilities of CBP Officers and personnel are significantly different from those of individual brokers. The continuing broker education requirement is designed to address the needs, value, and credibility of individual brokers. This continuing broker education requirement is not designed for any other professional service involved in transacting customs business. It should be noted that CBP Officers and personnel do receive regular training to address their dynamic environments as well as to conduct compliance and enforcement activities related to new laws, regulations, and policies.

D. Completing the 36 Continuing Education Credits

In the NPRM, CBP proposed that individual brokers complete 36 continuing education credits of qualified continuing broker education over the three years of a triennial period. CBP also created a definition for continuing education credit. CBP received many comments regarding the definition of continuing education credit and hours required.

Comment: Many commenters expressed agreement with CBP that 36 continuing education credits of qualifying continuing broker education each triennial period is a reasonable and attainable requirement.

Response: CBP agrees and notes that 36 continuing education credits over three years is easily prorated as circumstances dictate. For individual brokers, one credit per month should be easy to track and provide sufficient time to identify qualified continuing broker education opportunities capable of meeting the requirement.

Comment: One commenter felt that 36 continuing education credits should be required annually and not per every triennial period.

Response: CBP disagrees with this commenter because requiring 36 credits of continuing broker education every triennial period is attainable and easily prorated when necessary. CBP believes that requiring significantly more continuing education credit in an annual or triennial period would significantly increase the burden of the continuing broker education requirement on all individual brokers and may increase non-compliance with the requirement. CBP does not intend to create a new barrier for individuals seeking or maintaining a customs broker license that outweighs the benefits of continuing broker education.

Comment: One commenter requested that small businesses or businesses with under 10 employees be required to complete fewer continuing broker education credits, such as 24 credit hours.

Response: CBP disagrees with this request to lower the number of credit hours. Requiring the same number of credit hours ensure fairness and a similar level of education for all brokers. Furthermore, CBP has assessed the effect of this final rule on small businesses, which may be reviewed below in Section V, Statutory and Regulatory Requirements. CBP has determined that there would not be a significant economic impact on small businesses. CBP believes that completing 36 continuing education credits over the span of three years will not be a significant hurdle for individual brokers or the businesses with which they are associated, regardless of the business size, especially given the availability of low-cost or free options.

Comment: Many commenters requested that CBP recognize the smallest unit of continuing broker education credit as a 30-minute half credit due to the frequency of trainings and educational activities offered for this length of time.

Response: CBP agrees and has adopted this suggestion in the final rule by revising the definition of continuing education credit found in the proposed amendments to § 111.1. The NPRM had proposed that the first continuing education credit provided by a qualified continuing broker education provider must be one hour of continuous participation in the activity and additional half credits would be approved for each 30 minutes of continuous participation in continuing education thereafter. In this final rule, qualified continuing broker

education may award half a credit for 30 minutes of continuous participation and an additional half a credit for each full 30 minutes of continuous participation in continuing education thereafter. CBP believes individual brokers should have the maximum flexibility to complete the continuing broker education requirement. Allowing half credit trainings or educational activities provides for more specialization of topics and more diversity among qualified continuing broker education opportunities available to individual brokers. In addition, CBP modified the proposed language in § 111.103(b)(1) to allow instructors, discussion leaders, and speakers to claim half of one continuing education credit for each full 30 minutes spent on presenting or preparing for a presentation at a training or educational activity as described in § 111.103(a)(2)(i) and (ii).

Comment: Many commenters requested that CBP award one full credit for every fifty-five (55) minutes of continuing broker education to allow for breaks, technical issues, etc.

Response: CBP understands the sentiment and logic behind accounting for variance, but believes the issue is better addressed outside of regulation. For the sake of simplicity and clarity, one credit of qualifying continuing education must come from a training or educational activity that adds up to one continuous hour in length (the time could be one full continuous hour or two full continuous 30-minute segments). CBP recognizes that variances will always exist in how a presenter performs, how much the audience participates, how a participant clicks through an online module, etc. The existence of those variances is one of the many reasons CBP is requiring that qualifying continuing broker education be accredited. Accreditation allows standardization of how many continuing education credits are rewarded from any given activity and will allow for technical difficulties, breaks, etc., to be accounted for and measured consistently. The number of continuing education credits assigned to government-offered trainings and educational activities will follow the same standards as those for accreditation.

Comment: One commenter noted that eligibility on receiving education credits should be based on the amount of time designated for the material rather than the minutes of continuous participation.

Response: CBP disagrees as each qualified continuing education activity will provide continuing education credit based on the predetermined amount of continuous participation required to complete the training or educational activity. The actual amount of continuous participation that a specific individual broker takes is not relevant to the calculation. Basically, qualified continuing broker education will have a specific number of continuing education credits assigned based

on a determination of the number of continuous 30-minute participation segments required to complete the activity. Activity extending over 30 minutes must have another 30 minutes of continuous participation (totaling one hour of continuous participation) to then count as one continuing education credit and the calculation continues for longer continuing broker education. However, a training or educational activity requiring 45 minutes of continuous participation will only count for half a continuing education credit. Time spent allowing for breaks, pauses, technical issues, excess time answering questions, etc., will not adjust the quantity of continuing education credits that an activity will provide. CBP or CBP-selected accreditors will preapprove the continuing education credit for all qualified continuing broker education. Individual brokers will know the number of continuing education credits before participating in an activity.

Comment: Multiple commenters highlighted the private sector Certified Customs Specialist (CCS) designation/ certification and continuing education program. The commenters specifically asked whether the CCS certification and continued maintenance of the certification would qualify brokers as having met the 36 continuing education credits required in a triennial reporting period for the continuing broker education requirement.

Response: Until CBP selects accreditors, CBP cannot say for certain whether the education requirement for a CCS certification will meet the continuing broker education requirement of this final rule. CBP has not evaluated the specific training materials required or "continuing education units" (CEU) required to attain the CCS certification. In accordance with this final rule, only qualified trainings or educational activities will provide individual brokers with continuing education credit. As of now, there are no qualified trainings or educational activities because CBP has not identified nor have any CBP-selected accreditors accredited any trainings or educational activities. However, CBP envisions future accreditors will likely determine that trainings and educational activities designed for CCS certification and CEUs will qualify as continuing broker education under § 111.103, given the history of this certificate program and its reputation in the brokerage community. *See* the economic analysis presented below in Section V, Statutory and Regulatory Requirements.

Comment: One commenter noted that an individual broker should be allowed to choose which specific trainings to attend based on his or her specific needs and general business environment.

Response: CBP agrees that individual brokers should be allowed to choose trainings to attend based on their specific needs. The continuing broker education requirement was designed to provide individual

brokers the maximum flexibility to complete the requirement from qualified sources. These regulations do not require individual brokers to fill the 36 continuing education credits with specific trainings or educational activities, such as ethics trainings. Individual brokers are encouraged to seek the trainings, educational activity, and topics that best suit their needs during each triennial period. Furthermore, the 36 continuing education credits can be completed at any time during the triennial period.

E. Recordkeeping

In the NPRM, to comply with the continuing broker education requirement, individual brokers must certify completion of 36 continuing education credits at the time of filing their triennial status report and must maintain certain records of the qualified continuing broker education completed for three years after certifying completion and make those records available to CBP upon request. In proposed § 111.02, CBP also proposed the minimum data elements required to appear in the maintained records concerning each qualified training or educational activity completed. CBP received multiple comments regarding recordkeeping requirements and procedures.

Comment: One commenter requested that CBP should consider alternatives to the proposed recordkeeping requirements and allow for an individual broker to be able to retain an extract of completed coursework from an employer's learning management system.

Response: CBP agrees with the commenter and the regulations will allow individual brokers such flexibility regarding the location where records may be stored. Individual brokers will be in compliance with the recordkeeping requirement so long as the broker's records meet the criteria of § 111.102(d)(1), and the individual broker is capable of producing the records in a timely manner if requested by CBP. The customs broker license is held by the individual and the responsibility to maintain the license requirements rests with the individual broker. The requirements in § 111.102(d) are designed to provide individual brokers with the flexibility to maintain their continuing broker education records in a manner best suited for them. If an individual broker chooses to maintain all or some of his or her records within an employer's learning management system that is his or her prerogative, but nonetheless the individual broker remains responsible for recordkeeping requirements.

Comment: Multiple commenters requested that CBP should recognize a transcript or similar electronic certification as encompassing all the essential information for recordkeeping requirements. Additionally, one commenter requested that records that are kept in the

normal course of business should meet the standard for required documentation or that CBP should not require a specific form or format.

Response: CBP agrees with the commenters and intends for individual brokers to have such flexibility maintaining the records of the continuing broker education credits in whatever format is convenient for the individual broker. For that reason, proposed § 111.102(d) had been written to be very general and this final rule adopts the proposed language. If an individual broker's records are complete, contain 36 continuing education credits in a triennial period, and each credit can be connected to the six criteria (§ 111.102(d)(1)(i–vi)), the individual broker will be in compliance. The record may be either physical or electronic and evidentiary documentation of activity or training completion may be physical or electronic. A transcript or similar electronic certification will suffice and, CBP anticipates the identification and accreditation processes will ensure qualifying trainings and educational activities provide individual brokers with the necessary information and documentation of completion meeting the requirements of § 111.102(d). However, it will be incumbent on an individual broker to maintain his or her records in a form that allows the individual broker to easily and timely respond to CBP record requests.

Comment: One commenter sought greater clarity concerning how individual brokers will be able to prove completion of government-created continuing broker education trainings or educational activity.

Response: As explained elsewhere in this preamble, CBP is working with Partner Government Agencies (PGAs) to identify specific government-provided online modules and in-person activities that are relevant to customs business as qualifying continuing broker education. CBP will assign the appropriate continuing education credit to the qualified continuing broker education. CBP will work with PGAs to provide information or a record, upon training or activity completion, to individual brokers to satisfy the requirements of § 111.102(d)(1)(i–vi). However, the exact format of the provided record will be determined after CBP has selected accreditors and leveraged their expertise to create consistency for individual brokers between private and public offerings. CBP will provide additional information on its website, *CBP.gov*, in the future.

Comment: One commenter recommended that recordkeeping requirements should be extended to all accredited entities providing continuing education for individual brokers so that individual brokers can rely upon the continuing education organization to provide a record directly to CBP.

Response: CBP disagrees because records held by providers of accredited trainings and educational activities will not produce data that is easily usable by CBP nor is such a system helpful to individual brokers to ensure that the required number of credits has been completed. Simply put, records maintained by providers of accredited continuing broker education will only demonstrate which individuals attended the provider's specific trainings and educational activities. That data is only useful when reorganized and collated with data from other providers and individual brokers. Such a system is highly susceptible to failure, and the failure would generally fall outside the control of individual brokers even though the individual brokers have the duty to complete the requirement. The chosen recordkeeping requirements place the responsibility of recordkeeping on the individual broker, who is in the best position to maintain the records.

Comment: One commenter requested that CBP develop an online reporting portal. Similarly, another commenter asked CBP to develop a means of tracking verifiable continuing education credits through the Automated Commercial Environment (ACE) system.

Response: CBP disagrees as it cannot commit to the development of a tracking tool on *CBP.gov* or through ACE. CBP may pursue developing an online reporting/ACE tracking tool, but the development of this tool will be dependent on resources and CBP priorities. For that reason, CBP has made the requirements of § 111.102(d) very general and flexible for individual brokers to meet. CBP does anticipate individual brokers will only need to check a box certifying completion of 36 continuing education credits when filing their triennial status reports in the electronic Customs and Border Protection (eCBP) Portal.[9]

Comment: One commenter mentioned that a CCS certificate presented to the individual broker should satisfy the recordkeeping requirement. The commenter also asserted that the CCS certificate should suffice as proof of completing the continuing broker education requirement and obviate the need to keep individualized records of each activity completed.

Response: CBP understands the commenter's concerns, however, neither CBP nor a CBP-selected accreditor has formally evaluated whether documents demonstrating CCS certification meet the continuing education requirements. Without formal evaluation, the CCS certification cannot be used to meet the requirements. The recordkeeping requirement in § 111.102(d) requires the individual brokers to maintain a record that states the title, provider, date, credits, and

[9] The eCBP Portal and additional information may be accessed through *https://e.cbp.dhs.gov/ecbp/#/main.*

location of accredited activity completed, along with documentary evidence of an individual "broker's registration for, attendance at, completion of, or other activity bearing upon the individual broker's participation in and completion of the qualifying continuing broker education."

Comment: Two commenters noted confusion concerning proposed § 111.102(d)(1)(v), regarding the requirement to maintain documentation pertaining to the location of the training or educational activity, and the paragraph's interaction with training done via webinars or other online courses.

Response: Proposed § 111.102(d)(1)(v) requires that records be maintained as to "[t]he location of the training or educational activity, if the training or educational activity is offered in person." To clarify that CBP does not differentiate between in-person and online training or educational activity, CBP slightly revised the proposed provision to require that the record include the location of the qualifying continuing education. For trainings or educational activity offered electronically, such as via webinar or online course, the individual broker may simply record the location of the activity as "online."

Comment: Two commenters sought additional information concerning CBP requests for continuing education records under proposed § 111.102(d)(2), including the time brokers will have to provide the documentation, whether a set/standardized review will be conducted, and whether the record request would be conducted onsite or electronically. Additionally, many commenters requested that CBP should provide a reasonable timeframe (such as 30 days) for submission of records, particularly when requesting an in-person inspection, under proposed § 111.102(d)(2), in case the broker is away or unavailable.

Response: The focus of a record request is to ensure compliance with the continuing broker education requirement by reviewing records maintained in accordance with § 111.102(d)(1). Individual brokers must maintain those records in a manner that is capable of retrieval under § 111.102(d)(2). CBP recognizes the recordkeeping requirement is new and will work closely with individual brokers to accommodate the transition. CBP agrees that it is important for brokers to have a reasonable timeframe in place for the submission of records upon request, and thus, CBP added a 30-calendar day timeframe from the date of receipt of CBP's record request in the first sentence of § 111.102(d)(2), which is in accordance with general recordkeeping requirements in 19 CFR part 163. As with other broker matters, CBP

will work with the individual broker to ensure production of the records requested in a manner and timeframe that is feasible for CBP and the individual broker.

F. CBP-Selected Accreditors

In the NPRM, CBP proposed that qualified continuing broker education must either be created by the government or accredited by a CBP-selected accreditor. CBP also outlined the process for selecting accreditors and the responsibilities of CBP-selected accreditors. CBP received comments regarding the selection criteria and process for selecting accreditors.

Comment: One commenter requested that CBP become an accreditor because it would give CBP the ability to monitor the training that individual brokers are receiving, provide for a cost-efficient accreditation process, and provide individual brokers with a secure accreditor to prevent disclosures of confidential business processes.

Response: CBP disagrees as CBP believes a public-private partnership is necessary to ensure the best qualified continuing broker education opportunities for individual brokers. CBP will select accreditors and the process will provide CBP with a sufficient window into the types of trainings and educational activities receiving accreditation. Additionally, CBP will institute a framework for the trade community to inform CBP of issues or make suggestions concerning continuing broker education. Furthermore, CBP does not have the capacity to vet all potential trainings and educational activity for accreditation, which would likely occur if CBP were to act as a "cost-efficient" accreditor alternative. Finally, the limitations and requirements placed on parties to maintain their accreditor status will prevent disclosure of confidential business processes. As such, CBP needs to ensure there is room in the continuing broker education process for private parties to operate.

Comment: Multiple commenters expressed the belief that CBP's proposed selection of accreditors through SAM would be too cumbersome and time-consuming due to additional and more detailed technical requirements. The commenters also requested that CBP adopt a streamlined accreditation process akin to that used for commercial laboratories that are approved by CBP.

Response: CBP disagrees that the SAM process would be too cumbersome. SAM is familiar to the public and its use is appropriate in this circumstance. CBP has determined that selection of accreditors will require a contracting-type process. All potential accreditors must be afforded the same access and same opportunity to present their credentials. The system for accrediting commercial laboratories is

very involved (including site visits), specific to the unique requirements placed on laboratories addressing concerns about human health and safety and is unnecessary in these circumstances. CBP will only be vetting parties for their capabilities to be accreditors and ensure those selected parties understand the standards for qualified continuing broker education. The accreditation process, discussed above in Section I, requires response to an RFI and RFP, which will produce a binding agreement between the selected party and CBP. The RFI and RFP process will ensure a more dynamic and responsive vetting process and produce a diverse pool of accreditors.

Comment: One commenter requested that if an applicant's proposal to be an accreditor is deficient for any reason, or if CBP intends to deny the proposal, that the applicant be advised in writing of any deficiency and provided with a reasonable opportunity to amend the proposal.

Response: In accordance with § 111.103(c), the application process to be an accreditor will be conducted via SAM following the announcement of an RFI and an RFP. The normal process for responding to RFIs and RFPs will apply. All parties desiring to participate as an accreditor should carefully review the RFIs and RFPs and carefully respond to the instructions of the RFIs and RFPs.

Comment: Multiple commenters requested that certain specific parties be automatically recognized as accrediting organizations without CBP selection, and that this designation should continue indefinitely unless complaints are filed, and a study shows that the party has not fulfilled its obligations as an accreditor.

Response: CBP disagrees with these comments. No private party will simply be designated as an accreditor without any review process. All parties wishing to be an accreditor will have the same opportunity to submit proposals and demonstrate their credentials.

Comment: One commenter noted the importance of having a transparent application process with multiple approved accreditors and agreed that CBP-selected accreditors should be required to renew their accreditor statuses on a periodic basis.

Response: CBP agrees and intends for the RFI and RFP process to be transparent and produce multiple qualified accreditors. CBP anticipates that the accreditation process will require adjustment over time to address standards, add new accreditors, address substandard accreditors, etc. As such, CBP will have accreditor status sunset and publish new RFIs and RFPs to select new accreditors as circumstances require. The first set of CBP-selected accreditors will be approved for three years.

Comment: One commenter requested that the term of third-party accreditors be extended to six years from the date of approval.

Response: CBP disagrees because the continuing broker education requirement is new, and the public-private partnership envisioned to designate accredited continuing broker education for individual brokers needs flexibility and a period of applied learning. The period of award must be the same for all parties selected, it must provide enough time for the selected accreditors to establish their systems, it must be short enough to allow new interested parties to enter without waiting too long, and it must be long enough to allow selected parties to accredit sufficient trainings and educational activities. CBP has determined three years is an appropriate period of time and allows CBP to ensure that the accreditor selection process does not interfere with the close of a triennial period. CBP may adjust the contracted period in future RFIs and RFPs as circumstances and hindsight dictate the best practice.

Comment: Two commenters requested that CBP include specific criteria in proposed § 111.103 that describes required criteria for accreditors.

Response: CBP disagrees with these commenters and will not add criteria to the regulations at this time. There will be criteria for vetting the proposals received in accordance with § 111.103(c). However, CBP anticipates the criteria will change as CBP makes the first selection of accreditors and then evaluates the outcomes. Therefore, including accreditor criteria in CBP's regulations would be too restrictive at this juncture. The accreditor criteria will be outlined in the RFP issued to solicit potential accreditors, and the RFP is a public document that any party can review.[10]

Comment: One commenter requested that the employment of a licensed broker be treated as a factor, but not a requirement, to becoming an accreditor.

Response: CBP disagrees with the commenter, as a licensed broker has passed the exam and has the requisite knowledge to vet trainings and educational activities. CBP believes that parties without a licensed customs broker on staff will have problems vetting trainings and educational activities and may accredit inferior continuing broker education. CBP is cognizant that individual brokers deserve qualified continuing broker education that is useful and accurate. The best way to ensure that accredited trainings and educational activities meet minimum standards is to have the continuing education vetted by licensed customs brokers. As such, and as stated in the NPRM, employment of a licensed customs broker will be a require-

[10] RFPs may be viewed by the public online at *www.sam.gov.*

ment for a party to be an accreditor. CBP may adjust this requirement in future RFIs and RFPs as circumstances dictate.

Comment: Multiple commenters expressed concern about non-governmental accreditors receiving access to confidential business procedures that a business would not want shared with its competitors.

Response: CBP appreciates this concern and notes that business procedures are not necessarily outside the scope of continuing broker education if they relate to transacting customs business. However, CBP believes protections related to confidentiality are not appropriate for this regulation and better addressed in the RFPs and in limitations and security expectations placed on accreditors selected by CBP as a requirement/condition to maintain their accreditor status.

G. Qualified Continuing Broker Education

In the NPRM, CBP proposed basic standards for trainings and educational activities to qualify as continuing broker education and provide individual brokers with continuing education credit. CBP also proposed specific allowances for instructors, discussion leaders, and speakers to receive limited continuing education credit. CBP received multiple comments regarding the validity and type of trainings and educational activities available.

Comment: Multiple commenters specifically requested information on how an individual interested in continuing broker education will be able to identify appropriate courses or programs.

Response: Following publication of the **Federal Register** notice announcing the availability of qualified continuing broker education courses, CBP will publish the initial list of available qualified continuing broker education opportunities on *CBP.gov*. Furthermore, CBP will ensure there is a central location on *CBP.gov* that allows individual brokers to identify and link to all available qualified continuing broker education opportunities.

Comment: Two commenters requested additional information regarding how individual brokers will be able to confirm the validity of any accreditations that a continuing education provider claims to hold.

Response: CBP and the CBP-selected accreditor will not be accrediting education providers but specific trainings and educational activities. CBP anticipates individual brokers will have several ways to determine what trainings and educational activities are accredited and count for continuing education credit. First, CBP will announce every party that is a CBP-selected accreditor, and the accreditor will

provide an open access list that tracks every training and educational activity accredited by that accreditor. Second, CBP will maintain a central location on *CBP.gov* that lists the accreditors, provides links to the accreditors' listings, and provides access to CBP and PGA continuing broker education opportunities. CBP is exploring additional avenues to inform brokers of available qualified continuing broker education.

Comment: One commenter requested that CBP develop a web page on *CBP.gov* listing all available qualifying training materials provided by CBP and PGAs.

Response: CBP agrees and intends to do so after CBP has identified a sufficient quantity of qualified trainings and educational activities to include on *CBP.gov.* The specific page will be announced at a later date.

Comment: One commenter requested that public meetings, webinars, and other activities, hosted by CBP, be clearly identified as qualifying or not qualifying for continuing education credit.

Response: CBP agrees that qualifying events hosted by CBP should be clearly identified. The NPRM had proposed that all CBP and other PGA trainings and educational activities relevant to customs business would be qualified continuing broker education. In this final rule, CBP is modifying proposed § 111.103(a)(1)(i) to explicitly state that CBP will identify when a government-offered training or educational activity is related to customs business and qualified continuing broker education. This modification will ensure that individual brokers will be directly informed of when they will receive continuing education credit from government offerings and avoid confusion concerning what qualifies or require individual brokers to parse the scope of "relevant to customs business" on their own. After consultation with the relevant PGA, CBP will identify and collect all existing CBP and PGA trainings and educational activities into one online location with specific details concerning the number of continuing education credits assigned to each. Furthermore, CBP will clearly identify what future events qualify as continuing broker education and the continuing education credits connected to the events.

Comment: Multiple commenters stated that continuing broker education should not be limited to customs business in the narrow sense and should involve the full range of PGAs with border clearance responsibilities.

Response: CBP agrees with the commenters in principle. CBP intends for the continuing broker education requirement to be flexible and relevant to individual brokers. CBP recognizes that transacting customs business can cross many issue areas and involve statutes,

regulations, policies, and procedures of governing agencies besides CBP. As such, CBP has modified proposed § 111.103 such that, "training or educational activity offered by another U.S. government agency" will qualify as continuing broker education as long as "the content is relevant to customs business as identified by CBP in coordination with the appropriate U.S. government agency when applicable." CBP believes "relevant to customs business" provides CBP the ability to ensure individual brokers will have access to a wide variety of education topics that cover the range of Trade issues involving other government agencies. As previously noted and in Section II, for the sake of clarity, CBP will clearly identify the government-offered trainings and educational activity, in coordination with PGAs when applicable, that qualify as continuing broker education.

Comment: One commenter requested additional guidance concerning the specific training and educational activities that CBP will accept from other government agencies and provide a list of preapproved programs from other government agencies.

Response: CBP cannot at this point provide additional guidance concerning the specific PGA trainings or educational activities that will qualify as continuing broker education. CBP is working with PGAs to determine what trainings and educational activities exist, what should be identified as qualified continuing broker education, and the number of continuing education credits assignable to each. CBP will provide individual brokers with a list of qualified PGA and CBP offerings in an online format. CBP will update the list as new PGA and CBP trainings and educational activities are available and identified by CBP as relevant to customs business.

Comment: Multiple commenters sought clarification concerning the cost and credit hours of qualified continuing broker education offered by CBP or PGAs.

Response: Nearly all CBP and PGA-offered trainings and educational activities that will be eligible for continuing broker education credit will, as they are now, be offered at no cost to interested participants. The number of continuing education credits associated with any given training or educational activity will depend upon the same criteria dictating continuing education credit assigned by accreditors. Additionally, CBP believes, based on existing modules, planned modules, and regularly scheduled events, that CBP will provide individual brokers enough qualified continuing broker education that they will be able to fulfill the continuing broker education requirement from the CBP and PGA offerings alone.

Comment: Two commenters requested further information as to the meaning of qualifying education. The first commenter requested that

CBP adopt a clear set of guidelines as to what constitutes education, potentially including practical case studies and a list of overarching trade topics and aspects of professional development, and second commenter requested that CBP adopt a more specific definition of training and educational activities.

Response: CBP disagrees with the comments requesting that CBP establish a more specific definition and guidelines as to what constitutes education. CBP recognizes that flexibility is necessary in this field to ensure that an adequate quantity and the best quality of qualified continuing broker education is available for individual brokers. At this time, a more precise definition, definitive guidelines, or lists of what constitutes permissible trainings, educational activities, or topics, more detailed than what appears in § 111.103(a) is not practical. CBP, in conjunction with the CBP-selected accreditors, will establish standards and guidelines for continuing broker education. CBP will provide further updates in the future.

Comment: Many commenters requested that CBP edit the language of the requirements for recognized trainings or educational activities in proposed § 111.103(a)(2) because it does not allow for "asynchronous delivery of on-line training" or "self-guided learning" which can be completed by students on a self-paced, anytime-anywhere basis.

Response: CBP agrees with these comments and has always intended for self-guided online modules to be viable sources of continuing broker education credit because they represent a significant expansion of the types of education available to individual brokers. The language proposed in the NPRM does not explicitly prohibit self-guided online modules, but the consistent confusion in the comments received has demonstrated that an amendment and additional clarity is warranted. As such, CBP has added a new subparagraph, § 111.103(a)(2)(iii), to explicitly allow for online training and educational activity, whether live or self-guided, that culminates in a retention test. Accordingly, CBP has also renumbered the other four categories and edited proposed § 111.103(a)(2)(i) so that it is clearly delineated from § 111.103(a)(2)(iii), as trainings or educational activity that are led or guided by another individual. This change will allow individual brokers to engage in qualified self-guided learning that also guarantees a minimum level of engagement from the participant.

Comment: One commenter sought clarification regarding whether online training may be offered in a recorded format, *i.e.,* given by a speaker who records a script of accredited content.

Response: Online training may be offered in a recorded format if the recording of the script has been approved for continuing education

credit by a CBP-selected accreditor. Simply recording an individual reciting content that appears in a different accredited activity will not suffice as continuing education on its own merits. The entire recording must be submitted to a CBP-selected accreditor and accredited. Further, proper documentation of the training must also be available to make clear that the broker received the training from an accredited source and that verifies proper completion of the course.

Comment: One commenter sought clarification regarding whether online training may be in the form of a slide presentation of accredited content.

Response: CBP agrees that online training may be in the form of slides if the entire slide deck has been approved for continuing education credit by a CBP-selected accreditor. Please note the changes discussed above, and in Section II, concerning online self-guided learning. Simply taking content or slides that appear in a different accredited activity and combining them into a new presentation will not suffice as continuing education on its own merits. The specific online training must be submitted to a CBP-selected accreditor and accredited.

Comment: One commenter requested that qualified continuing broker education should be permitted in either a classroom setting or online, as long as such training is taught or overseen by a licensed customs broker, a trade attorney, an experienced consultant, or a qualified representative of CBP or any PGA.

Response: CBP disagrees with the commenter to the extent this comment seeks an exemption from accreditation if the training is provided by such private individuals. To the extent the commenter seeks to restrict presentation of training to the listed persons, then CBP disagrees with the comment because the request is unnecessarily restrictive. If a training or educational activity qualifies as continuing broker education under § 111.103(a) then it will provide continuing education credit upon completion. The identity of the presenter, instructor, or other attendees is not relevant.

Comment: One commenter requested that CBP allow individual brokers to earn continuing broker education credit for time spent publishing subject matter for an accredited course even if the license holder preparing the material is not an instructor, discussion leader, or speaker.

Response: CBP disagrees with this comment because allowing credit for publication would be unworkable and controversial. CBP does not believe there is a consistent manner to determine how significant an individual's engagement with material is when involved in the publication of educational material. Furthermore, CBP

believes that determining when to allocate credits for publishing material would be very controversial and difficult because trainings and educational activities must be accredited before they may count as continuing broker education credit. Certain individual brokers may rely upon publication and then accreditation to meet their continuing broker education requirements and fail to meet the 36 continuing education credits required because an activity is not accredited or does not provide enough credit. CBP believes clarity and consistency are essential to allow individual brokers to meet this new requirement and, therefore, no credit will be awarded for publishing education materials.

Comment: Two commenters suggested that CBP reconsider its proposal to prevent participation in various federal advisory committees from counting as continuing education.

Response: CBP disagrees because participation in federal advisory committee meetings is considered a privilege, and the meetings do not serve an educational purpose. As stated in proposed § 111.103(a)(2)(ii), meetings that are conducted in accordance with the provisions of the Federal Advisory Committee Act, as amended (5 U.S.C. App.) (FACA), are expressly excluded as qualified continuing broker education. Individual brokers will not be permitted to claim continuing education credit for their participation in committees, subcommittees, workgroups, and any other group organized under the auspices of FACA, including participating in public meetings. Instead, FACA meetings serve to solicit advice from committee members and to receive input from the public that may later form the basis for government decisions. Not all activities relating to customs business qualify as education, and participation in FACA meetings does not qualify as a training or an educational activity.

Comment: One commenter requested that a company's in-house training should not be an eligible option for continuing education credit, whether approved by an accreditor or not.

Response: CBP disagrees with the commenter because declaring in-house training as being unqualified to be continuing broker education would not provide the flexibility to produce the best quality and quantity of continuing broker education opportunities for individual brokers. In-house training is also, presumably, intended to provide individuals within the company the most relevant information on that company's processes and best practices, something that is vital to a business's viability and can be inextricably intertwined with legitimate topics concerning transacting customs business. Greater guidance, restrictions, or even liberalization of what constitutes qualified continuing broker education will come after CBP has se-

lected accreditors and consulted with them on working guidelines for accrediting continuing broker education.

Comment: One commenter sought clarification regarding whether the presenter or speaker of accredited content is required to have certain qualifications.

Response: CBP will not require that the presenter of an accredited training or educational activity have any specific qualifications. CBP does not require presenters of education material for the customs broker exam to have specific qualifications and will not require such qualifications for the presentation of continuing broker education.

H. The Accreditation Process

In the NPRM, CBP proposed regulations detailing the responsibilities of CBP-selected accreditors. CBP also specified a limitation on a CBP-selected accreditor's ability to accredit the entity's own educational activity. CBP reviewed multiple comments regarding the accreditation process.

Comment: Multiple commenters requested that educational activity (membership meetings, seminars, etc.) offered by broker associations should not require third-party accreditation.

Response: CBP disagrees because the continuing broker education requirement is new, and no existing trainings or educational activities have been developed with the specific needs of this requirement in mind. Any training or educational activity, not offered by CBP or other U.S. government agency, seeking to provide continuing education credit must be accredited. If existing trainings or educational activities qualify, based on their content and quality, then the activities will receive accreditation.

Comment: Many commenters requested that a continuing broker education program provider should have the option to apply for and obtain accreditation after the training or educational activity is provided.

Response: CBP disagrees because post-event accreditation could produce unwelcome confusion. Individual brokers are entitled to consistency and predictability when meeting the continuing broker education requirement. When continuing broker education is completed, the individual broker will know exactly how many continuing education credits he or she earned. Allowing for trainings or educational activities to be accredited after the event has occurred does not serve that purpose and will create confusion. For example, if an individual broker participates in a non-accredited training, believing it will provide 1.5 credits just before the triennial status report is due, but an accreditor approves the activity for 1 credit, then the licensed

customs broker has not completed the continuing broker education requirement, through no fault of his or her own. However, the licensed customs broker and CBP will be required to expend valuable time and resources determining the correct number of continuing education credits completed. Furthermore, CBP does not want to create a system that allows for undue pressure to be placed on CBP-selected accreditors to accredit trainings or educational activities because individual brokers believed they would receive credit or a specific amount of credit for attending or participating. As such, CBP will not allow continuing education credit to extend to participation in a continuing broker education program before the training or educational activity was accredited.

Comment: Many commenters requested that providers of trainings and educational activities should be permitted to request approval from an additional accreditor if initially denied accreditation. The commenters were concerned that an accreditor could deny an applicant's courses for accreditation for competitive reasons or due to lack of familiarity with a subject matter. One commenter asked that the applicant be advised in writing of the reason(s) for denial of accreditation and provided with a reasonable opportunity to amend the denied application for accreditation.

Response: CBP agrees and always intended to allow applicants of denied trainings and educational activities to either reapply for accreditation or amend an original application. Further, accreditors will provide the applicant seeking approval the reason(s) for the denial of an accreditation of a course. Greater flexibility in the accreditation process will produce better continuing broker education options for individual brokers. CBP believes the accreditation process will be dynamic and wants to ensure parties may re-submit trainings and educational activities for vetting following a denial. As such, CBP has made an amendment to the proposed regulations to guarantee clarity on this topic. Specifically, CBP has edited proposed § 111.103(d) to explicitly prohibit CBP-selected accreditors from denying review or approval of a training or educational activity for continuing education credit solely because it was previously denied by the CBP-selected accreditor or any other CBP-selected accreditor. CBP will address specific processes and timeframes in the RFPs, however, CBP will not be making definitive guidelines concerning accreditation standards at this time. After selecting qualified accreditors, standard guidelines for accreditation will be developed. CBP will provide additional information in the future.

Comment: Two commenters requested that CBP allow a single accreditation to apply to all programs/classes in a course or to allow blanket accreditation.

Response: CBP disagrees with these comments as CBP cannot commit to specific accreditation procedures at this time. CBP believes the accreditation process will be flexible to allow greater quantity and quality of continuing broker education opportunities. However, the exact way potential continuing broker education is evaluated, whether courses may be grouped or individually examined, how continuing education credits will be assigned in a symposium or convention, etc., will be determined after CBP has selected qualified accreditors and leveraged their expertise. CBP will provide additional information in the future.

Comment: Many commenters requested that CBP should enable CBP-selected accreditors to self-certify the party's own training and educational activities.

Response: CBP disagrees because self-certification of an accreditor's own trainings and educational activities is not viable. CBP is not prohibiting CBP-selected accreditors from also producing qualified continuing broker education. However, to limit the risk of conflicts of interest and self-dealing, CBP must prohibit accreditors from accrediting their own training and educational activities. CBP would be doing a disservice to individual brokers if it selected accreditors that devoted their time to accrediting their own trainings and educational activities instead of vetting the trainings and educational activities of other content providers. Individual brokers deserve to have diverse continuing broker education. If a CBP-selected accreditor's trainings and educational activities meet the standards for accreditation, then a separate accreditor is just as capable of reaching the same conclusion and accrediting. The guidelines and standards for accrediting trainings and educational activities will be determined after CBP has selected qualified accreditors and leveraged their expertise. These standards will be followed by every CBP-selected accreditor, as monitored by CBP. CBP will provide additional information in the future.

Comment: One commenter specifically requested that brokerage firms, regardless of their form, and broker associations should be able to self-certify trainings or educational activities that they deliver in-house or to their members.

Response: CBP disagrees with this comment as CBP will not allow self-certification of trainings or educational activities, in any form, to limit the risk of conflicts of interest and self-dealings. Furthermore, a training or education activity will only provide continuing education credit to an individual broker if it is accredited by a CBP-selected

accreditor or offered by CBP or another U.S. government agency. The guidelines and standards for accrediting trainings and educational activities can best be determined after CBP has selected qualified accreditors and leveraged their expertise. CBP will provide additional information in the future.

Comment: One commenter requested that the term of valid accreditation for a training or educational activity be extended from one year to two years under proposed § 111.103(d). Another commenter requested that the term of valid accreditation for a training or educational activity be extended to no longer than three years.

Response: CBP disagrees with the commenters because CBP intends for all qualified continuing broker education to stay current. One of the major goals of the continuing broker education requirement is to ensure individual brokers have the latest information to access and meet their continuing education credit requirements. To that end, outdated trainings or educational activities cannot be allowed to go unchanged for years at a time with the potential to circulate outdated information. CBP believes that requiring all accredited continuing broker education to be reaccredited every year as specified in § 111.103(d), is a small cost compared to the net benefit of ensuring that the trainings and educational activities are reexamined for inconsistencies or updated with new information. If details on a specific topic have not changed, then the training or educational activity will likely receive reapproval.

I. Enforcement

In the NPRM, CBP proposed specific consequences for an individual broker who fails to certify completion of his or her continuing broker education. CBP also outlined immediate steps that may be taken by the individual broker to return his or her license to good standing. CBP received several comments regarding enforcement of the requirements. For a more detailed discussion of record requests see Subsection E.

Comment: One commenter requested that CBP change the language in the NPRM of "false, misleading, or omitting material fact" to include the qualifier "knowingly."

Response: CBP disagrees because the regulations finalized in this document only address enforcement actions against individual brokers who fail to certify completion of the continuing education requirement when submitting their triennial status reports. This document does not change in any way 19 CFR 111.53(a), which authorizes CBP to initiate proceedings for the suspension, for a specific period of time, or revocation of the license or permit of a customs broker, if the

broker has, among other things, made in any report filed with CBP any statement which was, at the time and in light of the circumstances under which it was made, false or misleading with respect to any material fact, or has omitted to state in any report any material fact which was required. However, CBP notes that individual brokers may face suspension or revocation of their licenses if they violate 19 CFR 111.53(a) when certifying completion of the continuing broker education requirement or when submitting records to CBP under § 111.102(d).

Comment: Many commenters requested that CBP provide an automated warning or notification message to individual brokers who fail to include their continuing education credits with their status reports to ensure awareness and that appropriate action is taken. One commenter stated that there should be a way, preferably online, for a broker to verify, and if need be, update the broker's contact information to ensure that CBP has the correct information on file.

Response: CBP disagrees that it should provide for an automated warning or notification message. All individual brokers should be aware of the continuing education requirement and the requirement to certify completion of the requirement with the filing of the 2027 triennial status report or in any future reporting year. Individual brokers should note that they will only be required to certify completion of the requirement and will not be required to input or attach evidence of the 36 continuing education credits completed with their triennial status reports. Individual brokers will only need to produce their continuing broker education records if CBP requests them under § 111.102(d)(2). Further, CBP cannot say for certain that the eCBP Portal will have the capability to notify an individual broker of a "missing field" when an individual broker is filing the triennial status report. However, individual brokers may verify and/or update their contact information in the ACE Portal to ensure that CBP is sending the notification to the correct address.[11] CBP will send notifications to an individual broker's email address, if an email address is on file, otherwise to an individual broker's physical address.

Comment: Many commenters requested that CBP provide individual brokers 60 days to respond to a notification of failure to certify compliance with the continuing education requirements before suspension, instead of 30 days as specified in proposed § 111.104. Additionally, one commenter requested that the suspension period of 120

[11] The ACE Portal is a web-based entry point for ACE to connect CBP, trade representatives and government agencies who are involved in importing goods into the United States. The eCBP Portal is currently the access point for a new system for electronic payments of licensed customs broker fees. When fully implemented, the eCBP portal will allow for easy collection of many types of duties, taxes, and fees.

days before license revocation in proposed § 111.104(d) be extended to one year to allow sufficient time for a first-time offender to correct any deficiency and that repeat offenders should be restricted to a period of less than six months to correct deficiencies.

Response: CBP disagrees with the commenters requesting a longer timeframe to respond because 30 days is a standard window used when CBP is seeking a response or action from customs brokers. Furthermore, the 30-day timeframe in § 111.104 is only triggered in the specific and limited circumstance when an individual broker files an incomplete triennial status report by failing to certify compliance with the continuing broker education requirement. Certifying completion of continuing broker education is an essential requirement and necessary to maintain an active license in good standing. Failure to complete or certify completion of the continuing broker education requirement will have an immediate effect on individual brokers. More importantly, a license suspension under § 111.104(c) can be avoided with taking corrective action on or before 30 calendar days from the date of issuance of the notification of the potential suspension. If the license is suspended, an individual broker under § 111.104(d) can still take corrective action on or before 120 calendar days from the date of issuance of the order of suspension. Corrective action can range from certifying completion of the requirement to completing 36 continuing education credits. CBP has determined that 120 calendar days is sufficient time in the most extreme situation for an individual broker to complete all 36 continuing education credits and return to good standing. Furthermore, CBP believes a universally applied timeframe avoids unnecessary and potentially harmful confusion around a substantial license status change. Individual brokers must be aware that CBP is serious about compliance with the continuing broker education requirement, but CBP also wants to ensure minor mistakes can be quickly corrected with limited effect on the license.

IV. Conclusion

Based on the analysis of the comments and further consideration, CBP has decided to adopt as final the proposed rule published in the **Federal Register** (86 FR 50794) on September 10, 2021, as modified by the changes noted in Section II, Summary of Changes from the Proposed Regulations, above and in Section III, Discussion of Comments.

V. Statutory and Regulatory Requirements

A. Executive Orders 12866 and 13563

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

CBP published the proposed rule titled, "Continuing Education for Licensed Customs Brokers," on September 10, 2021, and received 70 comments from the public.[12] CBP adopts the regulatory amendments specified in the proposed rule with a few changes. After careful consideration of the public comments, CBP has made the following modifications: the recognition of half credits for 30 minutes of continuing broker education; the clarification that CBP will identify, in coordination with other U.S. government agencies when applicable, the qualified continuing broker education offered by a government agency that is relevant to customs business; the clarification that self-guided online modules qualify towards continuing education requirements; and the clarification that content providers may apply to multiple accreditors. With the adoption of the proposed regulatory amendments, CBP applies the 2021 NPRM's economic analysis approach to this final rule, updating the data as necessary. The modifications adopted in this final rule are discussed in greater detail in Sections II and III above, and do not affect the assumptions underlying the economic analysis.

1. Purpose of Rule

The final rule requires active individual customs broker license holders ("individual brokers") to complete 36 hours of continuing education every three years, in line with the triennial status reporting period. A continuing broker education requirement will increase the knowledge base from which brokers work, educate them on changing customs requirements, regulations, and laws, and reduce the number of errors in filings and resultant penalties. CBP believes that requiring continuing broker education will enhance the credibil-

[12] 86 FR 50794.

ity and value of an individual customs broker license and improve an individual broker's skills, performance, and productivity. Furthermore, CBP believes that mandating continuing broker education will increase the quality of service for individual brokers' clients and importers' compliance with customs laws, which will protect the revenue of the United States and aid in maintaining a high standard of professionalism in the customs broker community.

2. Background

On October 28, 2020, CBP published an advance notice of proposed rulemaking (ANPRM), entitled "Continuing Education for Licensed Customs Brokers," in the **Federal Register** (85 FR 68260). The ANPRM presented a basic outline for a continuing broker education requirement for individual brokers and posed questions pertaining to the potential costs and benefits of such a requirement. Some of the public comments that CBP received in response to the ANPRM addressed the questions pertaining to the potential costs and benefits of such a requirement, although very few responses contained specific information or data. Any information that was provided on these issues was taken into account in formulating the analysis in the Notice of Proposed Rulemaking (NPRM) of the same title, which CBP published in the **Federal Register** on September 10, 2021 (86 FR 50794). CBP did not receive comments about CBP's economic analysis of the proposed rule. CBP has adopted a few suggestions from the public comments, as outlined above. In this final rule, CBP describes the new requirement for continuing broker education for individual brokers.

i. Customs Brokers

A customs broker assists clients with the importation of goods into the United States, and also with the filing of drawback claims. Customs brokers can be individuals, partnerships, associations, or corporations and must be licensed by CBP. Brokers are responsible for helping clients meet all relevant requirements for importing and submitting drawback claims, submitting information and payments to CBP on their client's behalf, and exercising responsible supervision and control over their employees and customs business.[13] Only

[13] 19 U.S.C. 1641(b)(4). For more details on responsible supervision and control, see 19 CFR 111.1 and 111.28.

licensed customs brokers may perform customs business.[14] Brokers may have expertise in any number of trade-related areas, including entry, admissibility, classification, valuation, and duty rates for imported goods. Some brokers specialize in a specific area of customs business, like drawback or valuation, while others are more general practitioners. As of 2022, there are 13,952 active individual brokers in the United States.[15]

To become a licensed customs broker, an eligible individual[16] must pass the Customs Broker License Examination, submit a broker license application and appropriate fees to CBP, and be approved by CBP.[17] Once applicants have passed the broker exam, they may apply for an individual, corporate, partnership, or association license. To maintain the license, the individual broker or the licensed entity (for corporations, partnership, or associations) must submit a triennial status report and requisite fees. The triennial status report and fees must be submitted by February 1, every three years, since 1985.[18] Once an individual has been approved as a customs broker, the primary ongoing requirement for maintaining the license under current regulations is the submission of the triennial status report and appropriate fee in three-year periods. Given the established three-year cycle of triennial status reporting, CBP employs a seven-year period of analysis to calculate costs and benefits that result from this rule, accounting for one year of preparation by CBP and two triennial cycles.

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[14] Customs business is defined as: those activities involving transactions with U.S. Customs and Border Protection concerning the entry and admissibility of merchandise, its classification and valuation, the payment of duties, taxes, or other charges assessed or collected by U.S. Customs and Border Protection upon merchandise by reason of its importation, or the refund, rebate, or drawback thereof. It also includes the preparation of documents or forms in any format and the electronic transmission of documents, invoices, bills, or parts thereof, intended to be filed with U.S. Customs and Border Protection in furtherance of such activities, whether or not signed or filed by the preparer, or activities relating to such preparation, but does not include the mere electronic transmission of data received for transmission to CBP. *See* 19 U.S.C. 1641(a)(2).

[15] A customs broker may voluntarily suspend his or her license for a number of reasons and may re-activate the license at a later time. A broker's license may also be suspended as part of a penalty. For more information, see 19 CFR 111.52 and 111.53.

[16] To be eligible, an individual must be a United States citizen at least 21 years of age, in possession of good moral character, and not be an employee of the U.S. government. For more information, see U.S. Customs and Border Protection, *Becoming a Customs Broker* (Dec. 12, 2018), *available at https://www.cbp.gov/trade/programs-administration/customs-brokers/becoming-customs-broker.*

[17] To be approved, a broker who has passed the broker exam must also pass an investigation of his or her relevant background. *See* 19 CFR 111.14.

[18] 19 CFR 111.30(d). For more information on the triennial status report, see U.S. Customs and Border Protection, *2021 Customs Broker Triennial Status Report FAQs* (Feb. 26, 2021), *available at https://help.cbp.gov/s/article/Article-1711?language=en_US.*

A broker license may be suspended or revoked, or a monetary penalty assessed, for several violations, ranging from falsifying information on the license application to willfully and knowingly deceiving, misleading, or threatening a client.[19] CBP generally assesses monetary penalties for less serious infractions, such as the incorrect filing of entry forms or the misclassification of goods. However, the majority of civil monetary penalties assessed against brokers for violations of 19 U.S.C. 1641 involve egregious violations or the failure to take satisfactory corrective actions following written notice and a reasonable opportunity to remedy the deficiency, as the penalties process provides noncompliant brokers with several opportunities to avoid or mitigate penalty liability.[20] Monetary penalties may not exceed $30,000 per violation. From 2017–2021, the average penalty assessed was $26,670 and the average collected amount was $2,423 due to mitigations allowed by CBP.[21]

In the fiscal years from 2017 to 2021, CBP assessed an average of 67 penalties to brokers per year.[22] However, in FY 2017 and FY 2018, CBP assessed 20 and 21 penalties, respectively, while in FY 2019 and FY 2020, CBP assessed over 100 penalties each year, with an additional 71 penalties assessed in FY 2021 (see Table 1). The significant increase in penalties from 2018 to 2019 and into 2020, and the slight decline in 2021 is likely due to rapid changes in the international trade environment in those years, and the experience gained with those changes. During that time, CBP began enforcing several significant changes in the realm of international trade, including new

[19] *See,* 19 U.S.C. 1641(d)(1) and (g)(2) and 19 CFR 111.53.

[20] In the case of non-egregious violations, CBP will first attempt to work with the broker through the informed compliance process of communication and education. *See*U.S. Customs and Border Protection, *Electronic Invoice Program (EIP) and Remote Location Filing (RLF) Handbook* (May 2013), p. 22, *available at https://www.cbp.gov/sites/default/files/assets/documents/2016-Dec/Revised_eip_rlf_handbook_12–15_16.pdf.* This is an attempt to improve the broker's performance, and precedes the issuance of a pre-penalty notice, which is a written notice that advises the broker of the allegations or complaints against the broker. *See id.;* 19 CFR 111.92(a). If this process fails to remedy the deficiencies, or in case of egregious violations, CBP will issue a pre-penalty notice to the broker, which, *inter alia,* explains that the broker has the right to respond to the allegations or complaints. *See* 19 CFR 111.92(a). If the broker files a timely response to the pre-penalty notice, CBP will either cancel the case, issue a penalty notice in an amount lower than that provided in the pre-penalty notice, or issue a penalty notice in the same amount as the pre-penalty notice. *See* 19 CFR 111.92(b). Upon the issuance of the penalty notice, the broker is afforded the opportunity to file a petition for relief in accordance with the provisions of 19 CFR part 171, which may result in the cancellation or mitigation of the penalty, and subsequently a supplemental petition for relief. *See* 19 CFR 111.93 and 111.95.

[21] 19 U.S.C. 1641(d)(2)(B). Penalty information comes from CBP's Seized Currency and Asset Tracking System (SEACATS). Although the average value of assessed penalty is $26,670, CBP allows brokers to mitigate penalties, such that the amount collected is often significantly less, averaging $2,423 from 2017–2021.

[22] SEACATS.

antidumping and countervailing duties (AD/CVD) and the tariffs imposed by the Trump Administration under section 201 of the Trade Act of 1974 (19 U.S.C. 2251), as amended, section 232 of the Trade Expansion Act of 1962 (19 U.S.C. 1862), as amended, and sections 301 through 310 of the Trade Act of 1974 (19 U.S.C. 2411 *et seq.*), as amended.[23] These changes affected a significant number of imported goods. CBP provided many opportunities for individual brokers to learn about the changes, including webinars, Question and Answer sessions, public forums, and **Federal Register** notices. External organizations, like regional broker associations, also provided information regarding these changes to the customs laws, which would have led to greater understanding for individual brokers.

Although CBP sought information in the ANPRM on the number of companies employing individual brokers who already complete continuing education, CBP did not receive enough specific information to estimate the proportion of companies already providing ongoing training. Comments in response to the NPRM did not yield any more information, though commenters did not take issue with the assumptions made below. Based on information gathered via self-reporting by individual brokers, CBP is aware of about 300 companies that employ at least one individual broker who holds an industry certification that requires annual continuing education.[24] In the fiscal years from 2017 to 2021, a group of about 120 of those companies were responsible for 54 percent of the entries but only nine percent of the penalties.[25] Overall, these 120 companies filed 94,808,248 of the total 174,132,601 entries between 2017 and 2021, but only account for 29 of 337 total penalties assessed in that period.[26] For companies outside of this group, CBP does not know how much continuing education is currently taken.

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[23] Trade remedies implemented by CBP include Section 201 trade remedies on solar cells and panels and washing machines and parts; Section 232 trade remedies on aluminum and steel; Section 232 trade remedies on derivatives; and Section 301 trade remedies to be assessed on certain goods from China. *See* U.S. Customs and Border Protection, *Trade Remedies, available at https://www.cbp.gov/trade/programs-administration/trade-remedies* (last visited on March 16, 2023).

[24] Information was provided by the National Customs Broker and Forwarders Association of America (NCBFAA). Nine companies employ at least 48 brokers certified by programs provided by the NCBFAA's Education Institute (NEI), and often employ more. An additional 292 companies employing at least one individual broker with an NEI certification were identified via a survey of NEI's students.

[25] Significant at the 99 percent confidence level.

[26] Entry data was pulled from ACE, and penalty data from SEACATS.

TABLE 1—ANNUAL PENALTIES ASSESSED BY CBP

FY	Number of penalties
2017	20
2018	21
2019	119
2020	106
2021	71

ii. Continuing Education

Continuing education refers to the training and learning pursued by professionals outside of the formal education system, usually as part of career development. Many licensed professions have some sort of continuing education requirement for license-holders, including attorneys, accountants, medical professionals, and teachers.[27] Continuing education is particularly important for professions characterized by continuously changing rules, standards, and norms. Customs and international trade is one such profession. Since 2000, the United States has added two new preferential trade programs and several new free trade agreements, the most recent being the USMCA, which replaced the NAFTA.[28] Additionally, the logistical aspects of customs have changed significantly over time. For example, CBP introduced the single window, enabling most CBP forms to be submitted electronically through the Automated Commercial Environment (ACE), which was fully implemented in 2016, with added functionalities being deployed on an ongoing basis.

There have been several other significant changes to the customs environment, including the implementation of the Trade Facilitation and Trade Enforcement Act (TFTEA), changes in duty rates and tariffs, and the modernization of the drawback requirements. Individual brokers must maintain awareness of and adapt to these changes to provide quality service to clients. However, aside from the broker exam at the beginning of their careers, individual brokers do not currently have any requirements ensuring that they maintain up-to-date knowledge of customs rules, regulations, and practices. As

[27] The number of hours of continuing education required for many professions varies by state as the state is the licensing authority.

[28] In October 2000, the United States implemented the Caribbean Basin Trade Partnership Act, which will expire in 2030 (*https://www.cbp.gov/trade/priority-issues/trade-agreements/special-trade-legislation/caribbean-basin-initiative/cbtpa*). The African Growth and Opportunity Act was also enacted in 2000 (*https://ustr.gov/issue-areas/trade-development/preference-programs/african-growth-and-opportunity-act-agoa*). *See https://www.state.gov/trade-agreements/outcomes-of-current-u-s-trade-agreements/* for a list of free trade agreements currently in force.

stated above, CBP believes that the vigorous pace and expanding scope of international trade require a more stringent continuing education framework for individual brokers who provide guidance to importers and drawback claimants.

The effects of continuing education programs are not easily measured and not often the subject of research.[29] Some studies show that various licensed professions do see a mild increase in positive perception of their industry, performance, and professionalism after the implementation of continuing education requirements.[30] Studies have also demonstrated a positive link between continuing education for teachers and student outcomes as well as between continuing medical education and patient outcomes.[31]Additionally, one study found that continuing professional education was correlated to an improvement in financial outcomes for accounting firms, particularly large firms.[32] Finally, a study of Internal Revenue Service-certified tax preparers found that mandatory continuing education was potentially linked to reduced civil penalties, a decrease in non-compliance, and increased accuracy of tax returns.[33]

Under the terms of this rule, individual brokers will be required to complete 36 hours of qualifying continuing broker education over each three-year reporting period. Qualifying activities will include attending or presenting at accredited events, such as courses, seminars, symposia, and conventions.[34] Online activities, including qualified trainings provided in-house will also be education opportunities. Individual brokers will be required to self-attest to the completion of the required continuing broker education on each triennial status

[29] "Evaluation of Current Customs Broker Continuing Education Practices and Literature Review of Continuing Education in Other Professions." Report for CBP prepared by IEC on June 30, 2014. This document is included in the docket for this final rule, which is posted on *Regulations.gov*.

[30] *See* Bradley, S., Drapeau, M. and DeStefano, J. (2012), *The relationship between continuing education and perceived competence, professional support, and professional value among clinical psychologists.* J. Contin. Educ. Health Prof., 32: 31–38; O'Leary, P.F., Quinlan, T.J., & Richards, R.L. (2011). Insurance Professionals' Perceptions of Continuing Education Requirements. Journal of Insurance Regulation, 30, 101–117; and Wessels, S. (2007). Accountants' Perceptions of the Effectiveness of Mandatory Continuing Professional Education. Accounting Education, 16(4), 365–378.

[31] Darling-Hammond, L., Hyler, M.E., and Gardner, M. (2017). *Effective Teacher Professional Development.* Learning Policy Institute; Cervero, R. M., & Gaines, J.K. (2014). Effectiveness of continuing medical education: updated synthesis of systematic reviews. Accreditation Council for Continuing Medical Education.

[32] Chen, Y.-S., Chang, B.-G., & Lee, C.-C. (2008). The association between continuing professional education and financial performance of public accounting firms. International Journal of Human Resource Management, 19(9), 1720–1737.

[33] Diehl, K. A. (2015). Does Requiring Registration, Testing, and Continuing Professional Education for Paid Tax Preparers Improve the Compliance and Accuracy of Tax Returns?—US Results. Journal of Business & Accounting, 8(1), 138–147.

[34] *See* 19 CFR 111.103(a).

report and maintain records consisting of certain documentation received from the provider or host of the qualifying continuing broker education, if such documentation was made available to the individual broker, and containing information pertaining to the dates, titles, providers, credit hours earned, and location (if applicable) for each training. The records can be in any format (*i.e.,* electronically or on paper), and the regulations provide CBP with authority to conduct a record request for a period of three years following the submission of the status report.

iii. Accreditation

To ensure the quality and relevance of continuing education offerings, they are often accredited by a leading body within the field in question. For example, the American Medical Association (AMA) is accredited to provide training by the Accreditation Council for Continuing Medical Education.[35] An accreditor is responsible for reviewing course content and determining the number of credits or hours to be granted for each course.

Under the final rule, after an application process (using the RFP, as described above), CBP will designate entities outside of CBP to act as accreditors for qualifying continuing broker education. Currently, CBP anticipates releasing, every three years, an RFP soliciting applications to become an accreditor for the continuing broker education program. Every three years following the first cycle, existing accreditors will also apply for renewal. To apply, potential and existing accreditors may submit an application to CBP detailing their standards for accreditation, quality control practices, application process, and other information. A panel of CBP experts will convene to review and approve or deny applications. Once approved, accreditors can begin accepting submissions from program creators or companies seeking accreditation for specific programs. However, training or educational activities offered by U.S. government agencies—so long as the content is relevant to customs business as identified by CBP in coordination with the offering agency—do not require accreditation.[36]

iv. Performance Improvement

Once brokers have passed the broker exam, thereby proving their basic knowledge and competency to perform the duties of a licensed customs broker at the time of the exam, they are free to practice in

[35] *See* American Medical Association, *About the AMA's CME Accreditation,*available at *https://edhub.ama-assn.org/pages/ama-cme* (last accessed on May 11, 2021).

[36] Per section 111.103(a)(1)(i), a training or educational activity offered by a U.S. government agency other than CBP must be relevant to customs business.

perpetuity unless the license is suspended or revoked. The statute dictates that while practicing under the auspices of his or her broker license, a customs broker must maintain responsible supervision and control.[37] CBP's regulations likewise place additional legal obligations upon customs brokers, including, but not limited to, the requirement for exercising due diligence in making financial settlements, answering correspondence, and preparing or assisting in the preparation and filing of information relating to customs business.[38] Staying current on developments in customs law is needed for individual brokers to comply with their legal obligations, but presently there are no standards for how much continuing broker education is needed.

Under baseline conditions, meaning the world as it is prior to this rule, CBP does not require brokers to complete any additional training or prove their ongoing knowledge. The broker exam only tests knowledge of customs and related laws that are in place at the time of the exam. While the exam ensures that brokers have a solid base level of knowledge when they begin practicing, there is no requirement that they keep up the knowledge, and evidence suggests that as more time passes since brokers took their exam, the more errors they make. Individual brokers who were assessed penalties by CBP between 2017 and 2020 have held their individual broker license for, on average, 37 years. In contrast, the average individual broker license has been held for 24 years. This suggests that as more time passes since the passing of the customs broker exam, more errors are made. Furthermore, the exam does not test for any of the requirements of the more than 40 PGAs involved in regulating imports. Depending on the individual brokers' needs, CBP believes that continuing broker education should also include courses relating to the PGAs' international trade requirements, although there is no minimum requirement for certain subject matters in this rule.

Given the often fast-paced and evolving nature of the international trade environment, CBP believes that a continuing broker education requirement will help to ensure that individual brokers remain current with their understanding of international trade laws and continue to expand their knowledge of customs regulations and practices. A more competent and educated customs broker community will also prevent costly errors, potentially saving brokers' clients time and money, as well as relieving CBP from expending valuable audit and penalty assessment and collection resources.

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[37] *See* 19 U.S.C. 1641(b)(4).

[38] *See* 19 CFR 111.29(a), and 19 CFR part 111 generally for additional obligations.

3. Overview of Assessment

The final rule will result in costs and benefits for individual brokers, accreditors, providers of continuing education, and CBP. Many of the costs for individual brokers come in the form of time spent researching, registering for, attending, and reporting trainings. Individual brokers will also experience some opportunity cost as they forgo time spent on other tasks in favor of fulfilling a continuing broker education requirement. Accreditors must apply to CBP. Though CBP will not charge a fee, the accreditors will need to spend time in creating their applications. Similarly, providers of continuing broker education must apply to accreditors to have their coursework certified. Finally, CBP must designate accreditors, and, following the full implementation of the rule's framework, CBP may request records from individual brokers to confirm compliance.

The benefits from the final rule will be largely qualitative. A continuing broker education requirement will help to professionalize and improve the reputation of the customs broker community, as well as to improve customer service and outcomes. Quantitatively, continuing education will likely lead to a reduction in errors in documentation and associated penalties assessed by CBP for some infractions and violations. Not only will individual brokers not need to pay the associated penalties, but CBP will save the time of identifying, assessing, and collecting such penalties. Similarly, CBP will likely see a reduction in regulatory audits of individual brokers.

4. Historical and Projected Populations Affected by the Rule

The final rule applies to any individual holding an active customs broker license.[39] Individual brokers who have voluntarily suspended their licenses are not required to complete continuing broker education until they elect to reactivate their licenses, at which point the requirements are pro-rated depending upon the timing within the triennial reporting period. Individual brokers who have not held their license for an entire triennial period at the time their first triennial status report is due are also exempted from completing training and reporting in their first triennial status report, though are bound by the terms of the rule in the following years. As of 2022, there are 13,952 active, individual broker licenses. All of those brokers, as well as any brokers who receive their licenses in 2023 will be required to begin complying with the terms of the rule with the 2024–2027 reporting period, with the first certification of compliance due at the

[39] Entities holding corporate, association, or partnership licenses must employ at least one individual broker, who will be required to comply with the rule. *See* 19 CFR 111.11(a) and (b).

time of filing the 2027 triennial status report.[40] Those brokers receiving their licenses in 2024, 2025, and 2026 will begin complying with continuing broker education requirements after completing their first triennial status reports in 2027 and will perform their first certifications in 2030.[41]

CBP approves approximately 600 new licenses per year, although the number of licenses added annually has been decreasing since at least 2016. *See* Table 2 for a summary of licensing history for the previous six years.

TABLE 2—LICENSING HISTORY FROM 2016–2021

Year	Total licenses[42]	Corporate licenses	Individual licenses
2016	653	21	632
2017	580	16	564
2018	558	27	531
2019	464	15	449
2020[43]	187	7	180
2021	496	31	465
Total	3,708	133	3,575

[40] Triennial status reports are due in February of the reporting year and cover the previous three years. For these brokers, compliance is expected to begin in 2024, with the 2027 triennial status report certifying completion of 36 hours of continuing broker education in 2024, 2025, and or 2026. As discussed above in Section I, D. Initial Certification Date, CBP has the ability to prorate the initial requirements if the rule is implemented part way through the triennial cycle. If needed, CBP will reduce the number of required continuing education credits for the triennial period beginning on February 1, 2024, as deemed necessary based on a revised implementation date. For the purposes of this analysis, CBP assumes a requirement of 36 hours of continuing education to be certified in 2027. To the extent that CBP must delay full implementation and prorate the number of required credits, actual costs for brokers in the triennial cycle from 2024–2027 will be proportionally lower.

[41] Although brokers may complete their required broker continuing education at any point in the three years of the triennial period, for ease of presentation, CBP assumes that brokers will complete 12 hours of training each year. Brokers receiving their licenses in 2024, 2025, and 2026 will certify to the completion of their requirements in 2030, covering training taken in 2027, 2028, and 2029.

[42] CBP sometimes issues licenses that are later suspended or terminated (either voluntarily or as a penalty). This table includes all licenses issued in these years that remain active as of 2022, as only holders of an active license will need to abide by the terms of the rule.

[43] The number of licenses applied for and issued in 2020 was significantly lower than in previous years due to the effects of the COVID–19 pandemic and related closures and delays. CBP excluded this year from calculations of growth rates due to its anomalous nature. Data for 2021 indicates that broker license applications have mostly returned to their pre-2020 levels.

Based on the compound annual growth rate from 2017–2021, which shows a decline of 4 percent in the number of individual licenses issued, CBP estimates it will issue 447 new individual licenses in 2022, the year preceding the period of analysis.[44] CBP estimates it will issue 2,692 new individual licenses over a seven-year period of analysis from 2023–2029, and 2,261 new individual licenses from 2024–2029, the part of the period of analysis during which brokers will need to fulfill the requirements of the rule (see Table 3). Not all those license holders will be required to complete continuing broker education during the seven-year period of analysis; those brokers receiving their licenses in 2027, 2028, and 2029 will not need to begin compliance until after their first triennial reporting period in 2030. All new individual license holders will need to comply with the terms of the rule once it is in effect and they have completed their first triennial status report. This includes the 13,952 individual brokers licensed and active as of January 2022 as well as the 447 individual brokers projected to receive their licenses in 2022 and the 430 individual brokers projected to receive their licenses in 2023. Individual brokers who receive licenses in 2024–2026 will not need to comply with the rule until after their first triennial reporting period, beginning in 2027. CBP estimates that 1,196 individual brokers will receive licenses from 2024–2026, with 1,065 receiving them from 2027–2029 and completing their first continuing education certification outside the period of analysis. In total, therefore, CBP estimates that 16,026 individual brokers will be required to abide by the rule in the six years from 2024 to 2029.[45] No brokers will be required to comply with the rule in 2023, though brokers licensed that year will need to comply in subsequent years.

[44] The rate of decline in licenses can vary based on the years chosen for calculations. In the NPRM, CBP estimated a decline of 12 percent, but data from 2021 indicates that licensing recovered to and increased from levels seen before disruptions from the COVID–19 pandemic, resulting in a reduction in the rate of decline in licenses issued. CBP believes that this recovery is likely to continue for a few more years as the industry adjusts.

[45] 14,828 individual brokers will certify compliance in the 2027 triennial report (who will comply from 2024–2026) = 13,952 (2022 active) + 447 (2022 new) + 430 (2023 new)). 16,026 individual brokers will certify compliance in the 2030 triennial report (who will comply from 2027– 2029) = 14,828 (2024 active) + 414 (2024 new) + 398 (2025 new) + 383 (2026 new).

TABLE 3—PROJECTED LICENSES ISSUED FROM 2023–2029

Year	Total licenses issued	Corporate licenses	Individual licenses	New licenses affected by the rule
2023	459	29	430	0
2024	442	28	414	[46]1,343
2025	425	27	398	0
2026	409	26	383	0
2027	393	25	369	1,196
2028	379	24	355	0
2029	364	23	341	0
Total	2,871	179	2,692	2,539

* Totals may not sum due to rounding.

Although the majority of active individual brokers will be required to complete continuing education under the rule, feedback from the broker community indicates that many brokers already complete the amount of continuing education that will satisfy this requirement.[47] Many companies that employ individual brokers provide and require in-house training and continuing education. Both independent brokers and brokers employed by brokerages often attend government-sponsored webinars, as well as trade conferences and symposia, which will qualify as continuing broker education under the terms of the rule. Many individual brokers also pursue professional certifications like the National Customs Brokers and Freight Forwarders Association of America's (NCBFAA) Certified Customs Specialist (CCS) and Certified Export Specialist (CES).[48] Under the baseline, or the world as it is now, these individual brokers likely will be in compliance with the final rule and, assuming similar activities when

[46] All active, licensed, individual customs brokers will begin complying with the rule in 2024, regardless of what year they received their license. The 1,343 licenses newly affected in 2024 include those brokers who received their licenses in 2021, 2022, and 2023 and will complete their first triennial status report in 2024.

[47] Feedback was provided in the form of public comments on the ANPRM and was not disputed in public comments on the NPRM. Additional feedback was provided in various meetings and discussions between CBP personnel and customs brokers, as well as at trade conferences and meetings of the Task Force for Continuing Education for Licensed Customs Brokers, a part of the Commercial Customs Operations Advisory Committee (COAC). COAC is jointly appointed by the Secretary of the Treasury and the Secretary of DHS and advises the Secretary of the Treasury and the Secretary of Homeland Security on all matters involving the commercial operations of CBP. Meetings of COAC are presided over jointly by the Deputy Assistant Secretary for Tax, Trade, and Tariff Policy of the Department of Treasury and Commissioner of CBP, as described in section 109 of TFTEA. *See* III. Discussion of Comments, above.

[48] We included both individual brokers qualifying as CCS and CES in our analysis as the coursework for both has significant overlap and is relevant to customs business.

a continuing education requirement is imposed, will not incur new costs under the new requirements, except for new reporting costs.

Overall, CBP estimates that approximately 60 percent of individual brokers already pursue continuing education and will be in compliance with the rule.[49] CBP bases this estimation on several factors. First, the NCBFAA estimates that approximately 4,456 individual brokers hold a CCS or CES certification in 2020, representing 32 percent of total individual brokers.[50] In order to maintain these professional certifications, these individual brokers are required to earn 20 continuing education credits per year.[51] Additionally, public comments in response to the ANPRM, as well as discussions between CBP and various broker organizations, indicate that most large businesses employing individual brokers already provide, and often mandate, internal training and continuing education. Based on data from the U.S. Census Bureau, approximately 61 percent of those employed within the Freight Transportation Arrangement Industry (NAICS code 448510) are not employed by small businesses. A small business within the Freight Transportation Arrangement Industry is defined as one whose annual receipts are less than $20.0 million in 2022 dollars ($17,274,816 in 2017 dollars, using the CPI to account for inflation), regardless of the number of employees.[52] Table 4 shows the receipts per firm, in millions of dollars (2017), for firms employing each number of employees.[53] The average firm within Categories 7 and 9 has annual receipts of greater than $17.5 million in 2017

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[49] CBP requested information about the proportion of individual brokers already complying with the rule in the ANPRM. Although CBP did not receive specific information in the public comments, several commenters said they will be compliant and believed that significant numbers of other individual brokers will be as well. Many also noted that their companies require their broker employees to complete continuing education. Public comments in response to the NPRM did not dispute this assumption.

[50] Discussion with officials at the NCBFAA on April 5, 2021. This includes individual brokers renewing their certification in 2020, as well as those becoming certified for the first time. The CCS certification program requires enough hours of continuing education to comply with the terms of the rule and the NCBFAA has expressed interest in becoming an accredited provider.

[51] *See* National Customs Brokers & Forwarders Association of America, Inc., *Continuing Education* available at *https://www.ncbfaa.org/education/continuing-education*. Accessed March 16, 2023.

[52] Small business size standards are defined in 13 CFR part 121. To calculate the effects of inflation from January 2017 to January 2022, see *https://www.bls.gov/data/inflation_calculator.htm*.

[53] United States Census Bureau, "2017 County Business Patterns and 2017 Economic Census," Released March 6, 2020, *https://www.census.gov/data/tables/2017/econ/susb/2017-susb-annual.html*. Accessed March 15, 2021.

dollars and is considered a large business. These firms employ 161,463 people, or approximately 61 percent of the total employees in the industry.

TABLE 4—SMALL BUSINESSES IN THE FREIGHT TRANSPORTATION ARRANGEMENT INDUSTRY, 2017

Employment size[54]	Number of employees	Preliminary receipts (all firms, $1,000s)[55]	Receipts per firm ($)	Small business?
01: Total	265,192	$67,276,572	$4,454,222	
02: <5	15,939	6,315,166	708,614	Yes.
03: 5–9	18,025	5,392,992	1,974,732	Yes.
04: 10–19	20,288	5,870,163	3,851,813	Yes.
05: <20	54,252	17,578,321	1,335,029	Yes.
06: 20–99	49,477	13,973,780	10,397,158	Yes.
07: 100–499	44,715	10,886,028	30,493,076	No.
08: <500	148,444	42,438,129	2,854,327	Yes.
09: 500+	116,748	24,838,443	105,247,640	No.

Given the proportion of individual brokers working for larger businesses, the feedback on the ANPRM indicating high rates of compliance, the proportion of individual brokers pursing certifications, and input from CBP subject matter experts who frequently interact with the broker community, CBP estimates that approximately 60 percent of individual brokers are already in compliance with the requirements of the rule and will not face new costs, assuming a continuing level of similar activity, aside from recordkeeping and reporting, as a result of the rule's implementation. CBP did not receive any comments on this assumption in response to the NPRM. Based on the likely proportion of individual brokers already in compliance, CBP estimates that 6,410 affected individual brokers, or approximately 40 percent, will need to come into compliance with the rule over a seven-year period of analysis (see Table 5). Although we requested comment on our assumption that 60 percent of brokers already spend at least 36 hours per three-year period on continuing education and that the remaining 40 percent of brokers will need to increase their training by the full 36 hours triennially to meet the requirement, the

[54] Note that some of the categories are sums of other categories. For example, Category 8, <500, is a sum of Categories 2, 3, 4, 6, and 7. Thus, Categories 7 and 9 are not consecutive, but represent all firms employing 100 or more people.

[55] The Survey of U.S. Businesses (SUSB) from which this data is taken is conducted in years ending in 2 and 7.

public comments received in response to the NPRM did not address this question. We therefore maintain the same assumption for the final rule.

TABLE 5—PROJECTION OF BROKERS AFFECTED BY THE FINAL RULE

Year	Total licenses	Proportion in compliance (%)	Total licensed brokers affected
2023	13,952	60	0
2024	14,830	60	5,932
2025	14,830	60	5,932
2026	14,830	60	5,932
2027	16,026	60	6,410
2028	16,026	60	6,410
2029	16,026	60	6,410
Total	16,026		6,410

Although individual brokers are the primary party affected by the terms of the rule, the rule will also have an impact on CBP, providers of continuing broker education, and the bodies who accredit continuing broker education. Each party will see both costs and benefits under the final rule.

5. Costs of the Rule

i. To Brokers

The primary cost to individual brokers upon implementation of the rule will be those costs associated with finding and attending 36 hours of continuing broker education over a three-year period. These costs include time spent researching reputable and relevant trainings, travel and incidental expenses to attend in-person events like conferences, and the tuition or fees for the courses themselves. Many individual brokers might satisfy the continuing broker education requirement with training supplied by their employers. Other individual brokers, particularly those self-employed or employed by small businesses, will need to seek external training. For external training, individual brokers may attend free webinars, seminars, and trade events sponsored by CBP, other government agencies, and various

related organizations like local freight forwarder and broker associations.[56] Alternatively, individual brokers might choose paid trainings, conferences, or symposia, or seek certifications offered by trade organizations or educational institutions. Based on comments received in response to the NPRM, CBP is also clarifying that self-guided, online courses or content, whether free or paid, which culminate in a retention test are also acceptable if accredited.

CBP does not know exactly which option each individual broker is likely to choose. Many individual brokers already hold certifications, attend webinars, and fulfill internal training requirements, though they may need to increase the number of hours completed to comply with the final rule. Therefore, CBP has estimated a range of costs. Some individual brokers will fulfill their continuing broker education requirements with only free trainings. Others will follow a medium-cost path by opting for a mix of free, lower-cost, and internal trainings. CBP further assumes that individual brokers electing the medium-cost path will travel to attend one major conference or symposium in-person per year. Finally, some will meet requirements by completing only paid courses representing the highest-cost offerings. CBP assumes that individual brokers choosing the higher-cost option will travel to attend an average of two conferences per year.

There are several organizations that provide continuing education for customs brokers, ranging from regional broker associations to national entities, such as the American Association of Exporters and Importers (AAEI). Continuing broker education that qualifies under the terms of the rule includes webinars, seminars, and trade conferences. The hourly cost of such trainings (excluding free events provided by government agencies and other organizations) usually ranges from around $25 to $70. Fees are often tiered based on membership of the hosting organization. Members of an organization may pay $25 while non-members pay $45. CBP cannot predict which organizations will seek accreditation for their events, although free webinars and trainings hosted by Federal government agencies and identified by CBP will qualify and do not require approval by a CBP-selected accreditor. Therefore, we assume that the average hourly monetary cost will range from $0.00 (low) to $30 (medium) to $50 (high). This assumption is based on current fees charged for

[56] For example, the Florida Customs Broker and Forwarders Association offers both paid and free events. Information on CBP-hosted webinars can be found at *https://www.cbp.gov/trade/stakeholder-engagement/webinars.* Many other government agencies also provide webinars on trade-related topics. For example, in 2020, the Food and Drug Administration (FDA) hosted a series of webinars on the importation of medical devices in light of the COVID–19 pandemic. *See https://www.fda.gov/medical-devices/workshops-conferences-medical-devices/webinar-series-respirators-and-other-personal-protective-equipment-ppe-health-care-personnel-use.*

various continuing education certifications, webinars, and trade conferences, and CBP did not receive any comments on these assumptions in response to the NPRM.[57]

In addition to fees, individual brokers will need to spend some time in researching relevant and accredited trainings. CBP assumes that an individual broker will spend approximately three hours finding and registering for continuing broker education during every triennial period, an assumption that was not commented upon in response to the NPRM. Many individual brokers are members of both local and national organizations that provide continuing education opportunities and will likely be notified of opportunities via newsletters or listservs. Other individual brokers will need to spend some time finding and verifying accreditation for qualifying events. All individual brokers will spend some time registering for events. Based on an average loaded wage rate of $34.81, the process of researching and registering for trainings will cost brokers approximately $2.90 per credit hour.[58]

Many individual brokers also travel to attend trade conferences each year. CBP assumes that those individual brokers electing the lower-cost options will forgo travel and either attend virtually (paying only the fee) or not attend at all. CBP assumes that individual brokers in the medium-cost tier will travel to attend one conference each year, while individual brokers in the high-cost tier will travel to

[57] CBP does not have information on the cost for an employer to provide training internally, although such information was requested in the ANPRM. CBP believes the cost for internal training will be closer to that of attending external trainings as a member, since member fees are likely much closer to base cost of provision than non-member fees.

[58] The median wage rate for brokers is best represented by BLS's Occupational Employment and Wage Statistics estimate for the median hourly wage rate for Cargo and Freight Agents (Occupation Code #43–5011), which was $22.55 in 2021. To account for non-salary employee benefits, CBP multiplied the median hourly wage by the 2021 ratio of BLS's Employer Cost for Employee Compensation quarterly estimate of total compensation to wages and salaries for Office and Administrative Support occupations, the assumed occupational group for brokers. To adjust to 2022 dollars, CBP also assumes an annual growth rate of 4.15% based on the prior year's change in the implicit price deflator, published by the Bureau of Economic Analysis. Sources: U.S. Bureau of Labor Statistics. Occupational Employment Statistics, "May 2021 National Occupational Employment and Wage Estimates United States." Updated March 31, 2022. Available at *https://www.bls.gov/oes/2021/may/oes_nat.htm,* Accessed May 25, 2022. The total compensation to wages and salaries ratio is equal to the calculated average of the 2021 quarterly estimates (shown under Mar, Jun, Sep, Dec) of the total compensation cost per hour worked for Office and Administrative Support occupations ($29.6125) divided by the calculated average of the 2021 quarterly estimates (shown under March, June, Sept., Dec.) of wages and salaries cost per hour worked for the same occupation category ($19.9825). Source of total compensation to wages and salaries ratio data: U.S. Bureau of Labor Statistics. Employer Costs for Employee Compensation. "ECEC Civilian Workers—2004 to Present." March 2022. Available at *https://www.bls.gov/web/ecec.supp.toc.htm.* Accessed May 25, 2022. Because median hourly wage information was not available for this respondent, CBP adjusted the annual median wage for this respondent to an hourly estimate using the standard 2,080 hours worked per year.

attend two conferences.[59] Tuition and fees for conferences, broken down into an hourly rate, are already accounted for in the average costs of $30–$50 per hour. Traveling to attend a single 3-day conference costs approximately $332 in airfare, $288 for lodging, and $177 for meals and incidentals, for a total of $797 for one conference or $1,593 for two conferences (see Table 6).[60] Over the three years of the triennial cycle, attending a single conference per year costs $2,391 and attending two conferences per year costs $4,779. Spread across 36 hours of training, travel costs account for an additional $66 per hour (medium) or $133 per hour (high).

TABLE 6—TRAVEL AND INCIDENTAL COSTS TO ATTEND IN-PERSON EVENTS
[2022 U.S. dollars]

Cost	General cost	Low	Medium	High
Transportation	$332	$0	$332	$664
Hotel	288	0	288	576
Meals & Incidentals	177	0	177	354
Total (Per Year)	797	0	797	1,593

To determine the total costs of the rule to a single broker, CBP calculated the costs of tuition for qualifying continuing education, travel to conferences, and research and registration on a per-credit hour basis. As described above, CBP assumes the per-credit hour cost of trainings to range from $0 (low) to $30 (medium) to $50 (high). The cost of research and registration is constant across tiers, as described above, and totals $2.90 per credit hour. The per-credit hour cost of travel is calculated by multiplying the per year cost of attending conferences described in Table 6 by 3 years and then dividing by 36 credit hours per triennial period. This results in costs of $0 (low), $66 (medium), and $133 (high). The total, per-credit hour cost for a single

[59] Some individual brokers will pay for their travel out of pocket, while other will have their travel expenses covered by their employers.

[60] CBP bases these costs off the average, annual price of a domestic flight in 2021, and the General Services Administration's per diem cost for lodging and meals and incidental expenses. For the flight costs, CBP used the inflation-adjusted national average for 2021, annual. Source for flight costs: The Bureau of Transportation Statistics, "Average Domestic Airline Itinerary Fares," *https://www.transtats.bts.gov/AverageFare/*. Accessed March 21, 2023 (select 'Annual' and '2021' from the drop-down menu). To calculate the lodging costs, CBP used the General Services Administration's FY22 standard lodging per diem rate for the Continental United States ($96) and assumed an average stay of 3 nights (3 nights * $96 per night = $288). To calculate the cost of meals and incidentals, CBP used the GSA's meals and incidental expenses reimbursement rate ($59 per day) and again assumed an average stay of 3 days ($59 per day * 3 days = $177). Source for per diem costs: U.S. General Services Administration, "FY22 Per Diem Highlights," *https://www.gsa.gov/cdnstatic/FY_2022_Per_Diem_Rates_ Highlights.docx.* Accessed March 21, 2023.

broker therefore comes to $2.90 (low; $0 + $2.90 + $0), $99 (medium; $30 + $2.90 + $66), and $186 (high; $50 + $2.90 + $133).

Overall, as a result of the rule, an individual broker will likely incur monetary costs ranging from $34.81 (low) to $1,191 (medium) to $2,228 (high) per year to complete 36 hours of continuing education in a three-year period. Over a seven-year period of analysis, these costs sum to $209 (low), $7,148 (medium), or $13,367 (high). *See* Table 7 for a summary of these costs.

TABLE 7—ANNUAL COSTS FOR ONE BROKER

[2022 U.S. dollars]

Year	Hours[61]	Low		Medium		High	
		Costs[62]	Total	Costs	Total	Costs	Total
2023	0	$0.00	$0.00	$0	$0	$0	$0
2024	12	2.90	34.81	99	1,191	186	2,228
2025	12	2.90	34.81	99	1,191	186	2,228
2026	12	2.90	34.81	99	1,191	186	2,228
2027	12	2.90	34.81	99	1,191	186	2,228
2028	12	2.90	34.81	99	1,191	186	2,228
2029	12	2.90	34.81	99	1,191	186	2,228
Total	72	17	209	596	7,148	1,114	13,367

* Totals may not sum due to rounding.

There were 13,952 licensed individual brokers at the beginning of 2022, with 447 and 430 additional brokers projected to receive their licenses in 2022 and 2023, respectively. Therefore, 14,830 brokers will be required to begin complying with the rule in 2024. Additionally, brokers newly licensed in 2024, 2025, or 2026 will be required to begin complying with the rule in 2027, for a total of 16,026 brokers reporting compliance in their 2030 triennial reports. CBP estimates that a total of 6,410 will be required to begin to complete continuing broker education under the terms of the rule in the seven-year period of analysis, based on a current estimated compliance rate of 60 percent (see Historical and Projected Populations Affected by the Rule, above). Therefore, CBP estimates that brokers will incur costs related to searching for training, fees, travel, and incidentals, totaling from

[61] Individual brokers may complete whatever number of hours they prefer during each year, so long as it totals 36 hours in three years. CBP designates 12 hours per year both for ease of presentation and to account for pro-rating for individual brokers who re-activate their licenses within the triennial period.

[62] Costs include tuition/fees, travel costs, and research time costs for each level.

$1,288,903 (low) to $44,111,892 (medium) to $82,491,664 (high) over the seven-year period of analysis. *See* Table 8.

TABLE 8—TOTAL ANNUAL TRAINING COSTS FOR INDIVIDUAL BROKER LICENSE HOLDERS

[2022 U.S. dollars]

Year	Brokers[63]	Low		Medium		High	
		Cost	Total	Cost	Total	Cost	Total
2023	0	$0.00	$0.00	$0	$0	$0	$0
2024	5,932	34.81	206,491	1,191	7,067,013	2,228	13,215,702
2025	5,932	34.81	206,491	1,191	7,067,013	2,228	13,215,702
2026	5,932	34.81	206,491	1,191	7,067,013	2,228	13,215,702
2027	6,410	34.81	223,144	1,191	7,636,952	2,228	14,281,519
2028	6,410	34.81	223,144	1,191	7,636,952	2,228	14,281,519
2029	6,410	34.81	223,144	1,191	7,636,952	2,228	14,281,519
Total	6,410	209	1,288,903	7,148	44,111,892	13,367	82,491,664

* Totals may not sum due to rounding.

To create a primary estimate, CBP assumes that approximately one third of individual brokers will elect the lowest cost path ($34.81 each year), one third will elect the medium-cost path ($1,191 each year), and one third will elect the highest cost path ($2,228 each year) once the rule is in place. CBP did not receive any comments on this assumption in response to the NPRM. Under these conditions, individual brokers who begin pursuing continuing education as a result of the rule will face $42,630,820 in costs related to searching for training, fees, travel, and incidentals over the seven-year period of analysis. *See* Table 9.

[63] Only the 40 percent of individual brokers who do not already complete continuing education will face these costs. The total number of individual brokers affected in the final year of analysis (2029) is the same as the number of individual brokers overall because each year represents the same population with a small amount of growth.

TABLE 9—PRIMARY ESTIMATE OF TRAINING & TRAVEL COSTS FOR BROKERS
[2022 U.S. dollars]

Year	Total brokers	Brokers choosing each path	Total cost
2023	0	0	$0
2024	5,932	1,977	6,829,735
2025	5,932	1,977	6,829,735
2026	5,932	1,977	6,829,735
2027	6,410	2,137	7,380,538
2028	6,410	2,137	7,380,538
2029	6,410	2,137	7,380,538
Total	6,410		42,630,820

* Totals may not sum due to rounding.

All individual brokers, including those who already complete continuing education and will not face new costs for research, tuition, and travel, will also be required to store records of their completed continuing broker education and report their compliance to CBP.[64] Record storage will require maintaining either paper or digital copies of any documentation received from the provider or host of the qualifying continuing broker education and a document of some kind listing the date, title, provider, number of credit hours, and location (if applicable) for each training. To report and certify compliance, individual brokers who file paper-based triennial status reports with CBP will include a written statement in the triennial status report, and individual brokers who file their triennial status reports electronically through the eCBP portal will check a box in the eCBP portal while filing their triennial status report electronically. Individual brokers will further be required to produce their records of compliance if requested by CBP, though CBP will only require individual brokers to maintain their records for the three years following the submission of the triennial status report.[65] CBP estimates that recordkeeping and reporting will take each individual broker 30 minutes (0.5 hours) per year. After the first triennial reporting period in which individual brokers self-attest to completing their training, 10 percent of individual brokers each year will incur the cost of produc-

[64] Some individual brokers will likely face additional time-costs should they fail to complete and/or report their required continuing broker education and need to take corrective action or reapply for their licenses following revocation (see section 111.104(d) for details). However, CBP only reports the costs affected populations will face to maintain compliance with the rule.

[65] Note that many other records must be maintained for five years. The three-year standard applies only to records of continuing education.

ing records to submit to CBP following a record request, which CBP estimates will take 15 minutes (0.25 hours).[66] Therefore, individual brokers will see $1,652,969 in new reporting and recordkeeping costs over the seven-year period of analysis. *See* Table 10.

TABLE 10—REPORTING COSTS FOR ALL BROKERS
[2022 U.S. dollars]

Year	Brokers	Time for recordkeeping (hours)[67]	Time for producing records (10% of brokers)	Loaded wage	Total
2023	0	0.00	0.00	34.81	$0
2024	14,830	0.50	0.00	34.81	258,113
2025	14,830	0.50	0.00	34.81	258,113
2026	14,830	0.50	0.00	34.81	258,113
2027	16,026	0.50	0.25	34.81	292,876
2028	16,026	0.50	0.25	34.81	292,876
2029	16,026	0.50	0.25	34.81	292,876
Total	16,026	3	0.75		1,652,969

* Totals may not sum due to rounding.

To comply with the final rule, individual brokers who do not already do so will be required to spend 36 hours over three years completing continuing broker education in whatever form they choose. Additionally, CBP estimates they will spend three hours per three-year cycle researching and registering for trainings. Finally, individual brokers will need to spend about 30–45 minutes (0.5–0.75 hours) on recordkeeping per year. Overall, individual brokers will need to spend about 40.5 hours over a three-year period, or 81 hours over a seven-year period of analysis, to comply with the rule.

Some individual brokers will choose to complete their trainings outside of work hours, while others will complete training as part of their assigned duties. Individual brokers will also spend time in researching, registering for, and maintaining records of their continuing broker education, for a total of 12 hours per year of training plus 1.5 to 1.75 hours per year in research and recordkeeping. Based on the average loaded wage rate for brokers of $34.81, the opportunity cost of researching, registering for, attending, and reporting

[66] The exact percentage of record requests made will vary across each triennial reporting period. For the purposes of this analysis, we assume CBP will randomly select 10 percent of individual brokers to request records from each year.

[67] Note that only 10 percent of individual brokers will spend 45 minutes per year, while the remaining 90 percent will spend 30 minutes per year. Furthermore, CBP will only begin record requests after the first triennial period during which the rule is in effect.

continuing broker education is approximately $17,432,417 over the seven-year period of analysis. *See* Table 11.

TABLE 11—SUMMARY OF OPPORTUNITY COST FOR BROKERS
[2022 U.S. dollars]

Year	Brokers	Hours	Loaded wage rate	Cost
2023	0	0.0	$34.81	$0
2024	5,932	13.5	34.81	2,792,787
2025	5,932	13.5	34.81	2,792,787
2026	5,932	13.5	34.81	2,792,787
2027	6,410	13.5	34.81	3,018,019
2028	6,410	13.5	34.81	3,018,019
2029	6,410	13.5	34.81	3,018,019
Total	6,410	81	243.67	17,432,417

* Totals may not sum due to rounding.

Total costs for all individual brokers, including tuition and travel expenses for those who must begin continuing broker education regimens because of the rule (see Tables 8 and 9) as well as opportunity costs (see Table 11) and reporting costs (see Table 10) for all individual brokers, range from $20,374,289 to $101,577,050. The primary estimate, which accounts for one third of individual brokers choosing each cost tier, comes to $61,716,206 over the seven-year period of analysis. *See* Table 12.

TABLE 12—TOTAL COSTS FOR ALL BROKERS
[2022 U.S. dollars]

Year	Total cost: low estimate	Total cost: medium estimate	Total cost: high estimate	Total cost: primary estimate
2023	$0	$0	$0	$0
2024	3,257,391	10,117,913	16,266,602	9,880,635
2025	3,257,391	10,117,913	16,266,602	9,880,635
2026	3,257,391	10,117,913	16,266,602	9,880,635
2027	3,534,039	10,947,847	17,592,414	10,691,433
2028	3,534,039	10,947,847	17,592,414	10,691,433
2029	3,534,039	10,947,847	17,592,414	10,691,433
Total	20,374,289	63,197,278	101,577,050	61,716,206

* Totals may not sum due to rounding.

ii. To CBP

To implement the requirements of the rule, CBP will need to designate entities or companies as approved accreditors of continuing broker education. To do so, CBP will solicit applications from parties interested in becoming accreditors, or (following the first application cycle) accreditors seeking renewal of their status, by publishing an RFP.[68] A panel of CBP experts will evaluate the applications and select the entities approved or renewed as accreditors. CBP estimates that the process of developing and submitting the RFP will take two personnel 10 hours each. Application evaluation will take a further 40 hours per employee and will require four CBP personnel. The process of designating accreditors will occur before the continuing broker education requirements go into effect, to allow accreditors to be ready for the rule's implementation and ensure equal footing for all providers.[69] Accreditors and CBP will need to complete the process three times in a seven-year period. Overall, designation of accreditors will require six CBP personnel 180 hours total, three times in a seven-year period of analysis, for a cost to CBP of $59,260 (see Table 13).

TABLE 13—COSTS TO CBP TO DESIGNATE ACCREDITORS
[2022 U.S. dollars]

Year	Personnel for RFP	Personnel for evaluation	Fully-loaded wage rate[70]	Total hours	Total
2023	2	4	109.74	180	19,753
2024	0	0	109.74	0	0
2025	0	0	109.74	0	0
2026	2	4	109.74	180	19,753
2027	0	0	109.74	0	0
2028	0	0	109.74	0	0
2029	2	4	109.74	180	19,753
Total					59,260

* Totals may not sum due to rounding.

CBP's Broker Management Branch (BMB) will also face the costs of requesting records for compliance with the continuing broker education requirement. Although individual brokers will self-attest to their completion of the continuing broker education requirement with each

[68] *See* 19 CFR 111.103(c).

[69] *See* Section I.E. of this final rule.

[70] CBP bases this rate on the FY 2022 salary, benefits, premium pay, non-salary costs, and awards of the national average of CBP Trade and Revenue positions, which is equal to a GS–12, Step 10. This represents the average, fully-loaded wage per hour, including salary, benefits, premium pay, and non-salary costs (assuming 2,080 work hours/year). Source: Email correspondence with CBP's Office of Finance on June 27, 2022.

triennial status report, CBP will occasionally conduct record requests by randomly selecting a certain subset of individual brokers to produce records. For the purposes of this analysis, CBP estimates it will select 10 percent of brokers per year, although the record requests will only cover the continuing broker education reported for the most recently completed triennial period. A continuing broker education record request will involve CBP personnel reviewing the reported coursework of the selected individual broker and potentially working with individual brokers to identify gaps or higher quality training opportunities. Such activity will take approximately one hour on average; therefore, CBP estimates that each record request will cost CBP approximately $109.74. For the first four years of the period of analysis, no record request will take place because individual brokers will not yet have reported their training at the end of the first triennial period. For the purposes of this analysis CBP assumes over the next three years, CBP will request records from 10 percent of active individual brokers each year.[71] With about 1,603 record requests performed per year, costs to CBP will amount to $527,603 over the seven-year period of analysis. *See* Table 14.

TABLE 14—RECORD REQUEST COSTS FOR CBP

[2022 U.S. dollars]

Year	Requests	Cost per request	Total
2023	0	$0	$0
2024	0	0	0
2025	0	0	0
2026	0	0	0
2027	1,603	110	175,868
2028	1,603	110	175,868
2029	1,603	110	175,868
Total	4,809	329	527,603

* Totals may not sum due to rounding.

iii. To Accreditors

Accrediting bodies interested in becoming designated accreditors for continuing broker education under the terms of the rule will need to apply to CBP during an open RFP period and then re-apply to confirm their status every three years. Costs to respond to the RFP

[71] Those individual brokers who have not yet completed a triennial status report since taking their broker exam will be exempt from completing continuing broker education until after their first triennial status report and, therefore, will also be exempt from continuing broker education record requests during that time.

include only the preparation of the application. Overall, CBP estimates that the preparation of an application to CBP to become an accreditor will take two employees 40 hours each, to be completed three times in a seven-year period. Accreditor-applicants will need to apply three times in a seven-year period. Therefore, CBP estimates that CBP-selected accreditors will incur approximately $17,182 in costs over a seven-year period of analysis. See Table 15.

TABLE 15—COSTS TO ACCREDITORS

[2022 U.S. dollars]

Year	Personnel	Loaded wage rate[72]	Hours per employee	Total
2023	2	$71.59	40	$5,727
2024	0	71.59	0	0
2025	0	71.59	0	0
2026	2	71.59	40	5,727
2027	0	71.59	0	0
2028	0	71.59	0	0
2029	2	71.59	40	5,727
Total			120	17,182

* Totals may not sum due to rounding.

iv. To Providers

Providers of continuing broker education will also face new costs under the terms of the rule. Specifically, providers will need to submit applications to accreditors to have their coursework or events accred-

[72] The median wage rate for accreditors is best represented by BLS's Occupational Employment and Wage Statistics estimate for the median hourly wage rate for General and Operations Managers (Occupation Code #11–1021), which was $47.10 in 2021. To account for non-salary employee benefits, CBP multiplied the median hourly wage by the 2021 ratio of BLS's Employer Cost for Employee Compensation quarterly estimate of total compensation to wages and salaries for Management, business, and financial occupations (1.4593), the assumed occupational group for accreditors. To adjust to 2022 dollars, CBP also assumes an annual growth rate of 4.15% based on the prior year's change in the implicit price deflator, published by the Bureau of Economic Analysis. Sources: U.S. Bureau of Labor Statistics. Occupational Employment Statistics, "May 2021 National Occupational Employment and Wage Estimates United States." Updated March 31, 2022. Available at *https://www.bls.gov/oes/2021/may/oes_nat.htm*, Accessed May 25, 2022. The total compensation to wages and salaries ratio is equal to the calculated average of the 2021 quarterly estimates (shown under March, June, Sept., Dec.) of the total compensation cost per hour worked for Management, business, and financial occupations ($74.1275) divided by the calculated average of the 2021 quarterly estimates (shown under Mar, Jun, Sep, Dec) of wages and salaries cost per hour worked for the same occupation category ($50.7975). Source of total compensation to wages and salaries ratio data: U.S. Bureau of Labor Statistics. Employer Costs for Employee Compensation. "ECEC Civilian Workers—2004 to Present." March 2022. Available at *https://www.bls.gov/web/ecec.supp.toc.htm*. Accessed May 25, 2022.

ited. Officials at the NCBFAA Education Institute estimate that they currently approve approximately 1,000 courses per year. With the rule in place, CBP believes the number of events submitted for accreditation will increase substantially because companies' internal trainings and external offerings will need to be accredited. Therefore, CBP estimated that about 2,000 courses will require accreditation each year. Providers will likely pay a fee and will need to renew their accreditation annually to ensure their coursework remains up to date. The fee for accreditation is likely to vary based on accreditor, but CBP estimates it will average $25.[73] Overall, CBP estimates that providers of continuing broker education for customs brokers will face $350,000 of new costs over a seven-year period of analysis. *See* Table 16.

TABLE 16—COSTS TO PROVIDERS
[2022 U.S. dollars]

Year	Courses	Fee	Total
2023	2,000	$25.00	$50,000
2024	2,000	25.00	50,000
2025	2,000	25.00	50,000
2026	2,000	25.00	50,000
2027	2,000	25.00	50,000
2028	2,000	25.00	50,000
2029	2,000	25.00	50,000
Total			350,000

* Totals may not sum due to rounding.

Based on the primary estimate, costs total $62,670,250 over the seven-year period of analysis. Using a three percent discount rate, the annualized total costs are $8,799,855. *See* Table 17 for an annual breakdown and Table 18 for discounting.

[73] This fee is based on that charged by the NCBFAA. Although CBP sought information in the ANPRM on how much accreditors might charge, CBP did not receive specific information. Comments to the NPRM yielded no new information.

TABLE 17—TOTAL COSTS TO ALL PARTIES

[2022 U.S. dollars]

Year	Costs to brokers—primary estimate	Costs to accreditors	Costs to providers	Costs to CBP—accrediting and requesting[74]	Total costs
2023	$0	$5,727	$50,000	$19,753	$75,480
2024	9,880,635	0	50,000	0	9,930,635
2025	9,880,635	0	50,000	0	9,930,635
2026	9,880,635	5,727	50,000	19,753	9,956,116
2027	10,691,433	0	50,000	175,868	10,917,301
2028	10,691,433	0	50,000	175,868	10,917,301
2029	10,691,433	5,727	50,000	195,621	10,942,781
Total	61,716,206	17,182	350,000	586,862	62,670,250

* Totals may not sum due to rounding.

TABLE 18—DISCOUNTED TOTAL COSTS

[2022 U.S. dollars]

	3%		7%	
	PV	AV	PV	AV
Costs	$54,825,586	$8,799,855	$46,319,331	$8,594,701

6. Costs Not Estimated in This Analysis

The parties affected by the rule will also face several, mostly minor costs that CBP is unable to quantify. To provide individual brokers who choose to file their triennial status report electronically through the eCBP portal the ability to self-attest to their continuing broker education completion, CBP will need to include a field within the triennial status report, which is submitted via the eCBP portal. The programming to include this field does not add significantly to the application development budget as CBP constantly makes small changes to many aspects of CBP's authorized electronic data interchanges.

Additionally, some potential accreditors may face costs related to protesting CBP's initial decisions regarding their proposals to become accreditors. Accreditor-applicants have the right to protest in accordance with procedures set out in the Federal Acquisition Regulations System (FAR). CBP expects these costs to be minor and protests to be rare. Individual brokers' clients may see slight price increases for broker services. As individual broker costs increase, they may pass

[74] *See* Tables 13 and 14.

some of these costs onto their clients in the form of increased prices. However, CBP believes that the per transaction increase in prices will be so small as to be insignificant.

7. Benefits of the Rule

This final rule will have many benefits to individual brokers, CBP, and the general public. CBP is able to estimate some of the benefits of the rule, but many others are qualitative in nature. Individual brokers will benefit from improved reputation and a professionalization of the customs broker community while their clients will benefit from better performance and improved compliance. The continuing broker education requirement will provide importers and drawback claimants with greater assurance that their agents are knowledgeable of customs laws and regulations, familiar with operational processes, and can properly exercise a broker's fiduciary duties. The requirements will also help maintain a measure of consistency across all customs brokers. Providers will benefit from increased prestige due to CBP-approved accreditation. Other benefits of the rule are quantitative.

CBP will benefit from a reduction in regulatory audits of broker compliance. Both CBP and brokers will benefit from fewer errors committed by brokers and fewer penalties assessed by CBP. CBP examined data on broker penalties, regulatory audits, and validation activities between a group of companies who employ one or more individual brokers known to voluntarily hold an industry certification that requires meeting a continuing education requirement and the broader population of brokers (which includes those who voluntarily complete continuing education and those who do not). This group of individual brokers with continuing education represents about 120 companies, which make up 54 percent of entries filed between 2017 and 2021 and 53 percent of entries filed between 2016 and 2021. CBP found that at the 99 percent confidence level, there is a statistically significant difference between these groups. Those who voluntarily hold this certification and complete continuing education have significantly lower rates of penalties, audits, and validation activities. *See* Table 19.[75] Individual brokers who are not known to have continuing education are assessed 13 times as many penalties per entry filing, are audited seven times as often, and have nine times as many validation activities performed by CBP to investigate discrepancies

[75] Source of data of companies with at least one individual broker with continuing education: data received from NCBFAA on companies participating in its broker certification program on April 28, 2021. Data on enforcement actions and the number of entries per company was obtained from ACE on April 11, 2021.

when compared to companies that are known to employ individual brokers who voluntarily take continuing education.

TABLE 19—ENFORCEMENT ACTION RATE FOR DIFFERENT GROUPS

Enforcement action	Total	By all other companies (%)	By 120 companies with continuing education (%)	Ratio
Penalty	337	0.00039	0.000031	13 to 1
Regulatory Audit	90	0.00008	0.000011	7 to 1
Validation Activity	515	0.00047	0.00005	9 to 1

* Rates are defined as the number of enforcement actions divided by the number of entries filed.

Aside from penalties, CBP enforcement often takes the form of a regulatory audit. Regulatory audits usually occur because a CBP Officer or Import Specialist flags unusual or suspicious activity. CBP then performs a regulatory audit of the broker's activity, investigating the potential infraction, as well as the broker's overall compliance with regulations, rules, and CBP guidance. These audits may lead to a settlement agreement in which a penalty is assessed, but they more often lead to discussion between the broker and CBP as to how the broker can improve compliance and performance. With continuing education in place, CBP believes that fewer regulatory audits will be necessary. From 2016 to 2021, CBP performed 82 regulatory audits of broker compliance, for an average of 14 per year.[76] The number of audits holds approximately steady across the five-year period, so CBP does not believe it likely that the number of audits will grow in the period of analysis. Therefore, CBP projects 96 audits will be performed during the seven-year period of analysis under baseline conditions, or 14 each year. *See* Table 20.

TABLE 20—PROJECTION OF AUDITS AND BROKER SURVEYS UNDER THE BASELINE

Year	Audits
2023	14
2024	14
2025	14
2026	14
2027	14
2028	14
2029	14
Total	96

* Total does not sum due to rounding.

[76] Data provided by CBP's Regulatory Audit and Agency Advisory Services Directorate on April 11, 2021, and January 31, 2022.

CBP estimates that a regulatory audit of broker compliance takes CBP approximately 593 hours, on average.[77] Based on the average fully-loaded wage rate for a CBP Trade and Revenue employee of $109.74 per hour, we estimate the average broker audit costs $65,049. Based on a review of outcomes from the audits completed from 2016–2021, CBP estimates that approximately 40 percent will likely have been avoided had a continuing education requirement been in place. CBP believes that, had customs brokers been required to complete continuing education on an individual level, and, therefore, stayed current on the rules and regulations governing customs business, they would have made fewer errors and avoided the audits. Over a seven-year period of analysis under the terms of the rule, CBP estimates it will avoid 33 audits, for a cost savings of $2,133,623. *See* Table 21.

TABLE 21—CBP COST SAVINGS FROM REDUCED REGULATORY AUDIT ACTIVITIES
[2022 U.S. dollars]

Year	Audits avoided	Cost savings per audit	Total savings
2023	0	$0	$0
2024	5	65,049	355,604
2025	5	65,049	355,604
2026	5	65,049	355,604
2027	5	65,049	355,604
2028	5	65,049	355,604
2029	5	65,049	355,604
Total	33	390,297	2,133,623

* Totals may not sum due to rounding.

The number of penalties assessed against brokers between 2017 and 2021 grew significantly. In 2017, CBP assessed 20 penalties, with another 21 penalties assessed in 2018. The number of penalties then jumped in 2019, to 119, with 106 penalties following in 2020 (see Table 1, above). CBP assessed fewer penalties in 2021 relative to 2020, although, with 71 penalties assessed, the number did not return to 2017/18 levels. Between 2017 and 2021, the number of penalties issued increased with a compound annual growth rate (CAGR) of 29 percent. The jump in penalties between 2019 and 2020 is likely attributable to changes in the environment surrounding antidumping and countervailing duty cases, and CBP does not believe that penal-

[77] Audits conducted from 2015 to 2021 took, on average, 593 hours to conclude. Data provided by the Regulatory Audit and Agency Advisory Services Directorate on January 31, 2022, based on internal metrics.

ties per year will continue to grow at the same rate. This is confirmed by the decrease in penalties issued in 2021. Based on trends before and after the jump, we do not believe that the number of penalties assessed per year will consistently grow at any meaningful rate. The average number of penalties assessed per year of available data after the change in AD/CVD duties (2019–2021) was 99. Based on a 0 percent growth rate, CBP estimates that over the seven-year period of analysis from 2023 to 2029, CBP will assess 691 penalties, or an average of 99 penalties per year. *See* Table 22 for an annual count.

TABLE 22—PROJECTION OF PENALTIES ASSESSED FROM 2022–2027 UNDER THE BASELINE

Year	Penalties
2023	99
2024	99
2025	99
2026	99
2027	99
2028	99
2029	99
Total	691

When CBP assesses a penalty against a broker for a customs violation, CBP incurs the cost of detecting and investigating the violation, as well as determining the appropriate monetary fine and handling any appeals from the broker. The broker must pay the penalty, which is capped at $30,000 by statute. CBP also works with brokers against whom a fine has been assessed to mitigate the penalty, resulting in the collection of amounts that are usually significantly lower. From 2017–2021, monetary penalties collected from individual brokers averaged $2,423. CBP estimates that the entire process of assessing a penalty against a broker, from detection to working through mitigation, costs CBP approximately $6,584 per penalty.[78] With the rule implemented, CBP believes that individual brokers will commit approximately 20 percent fewer penalizable violations.[79] As a

[78] CBP bases this estimate on an average of 60 hours worked per penalty at an average fully-loaded wage of $109.74 per hour for a CBP Trade and Revenue employee, as described above.

[79] Approximately 20 percent of the penalties assessed between 2017 and 2021 were for infractions that CBP believes would have been avoided had the individual broker been required to complete continuing education. CBP assumes the rule would eliminate all such violations. The majority of the remaining penalties were for late filing. Penalty data is taken from SEACATS.

result, individual brokers will save approximately $286,883 in fines avoided, while CBP will save approximately $779,593 in processing costs.[80] *See* Tables 23 and 24.

TABLE 23—PENALTIES AVOIDED BY BROKERS

[2022 U.S. dollars]

Year	Penalties avoided	Fines avoided per penalty	Total
2023	0	$0	$0
2024	20	2,423	47,814
2025	20	2,423	47,814
2026	20	2,423	47,814
2027	20	2,423	47,814
2028	20	2,423	47,814
2029	20	2,423	47,814
Total	118	14,538	286,883

* Totals may not sum due to rounding.

TABLE 24—COSTS AVOIDED BY CBP

[2022 U.S. dollars]

Year	Penalties avoided	Cost savings per penalty	Total
2023	0	$0	$0
2024	20	6,584	129,932
2025	20	6,584	129,932
2026	20	6,584	129,932
2027	20	6,584	129,932
2028	20	6,584	129,932
2029	20	6,584	129,932
Total	118	39,506	779,593

* Totals may not sum due to rounding.

8. Net Impact of the Rule

The rule will lead to costs for individual brokers in the form of tuition, travel expenses, opportunity cost, and time spent research-

[80] Penalties are a transfer payment from the broker to CBP that do not affect total resources available to society. Accordingly, CBP does not include penalties or penalties avoided in the final accounting of costs and benefits of this rule. In addition, penalties are an enforcement tool that are intended to bring a noncompliant party in line with existing requirements. Any costs and benefits that result from compliance with the underlying requirement are included in the analysis, but not the enforcement mechanism. In the same way, if a rule results in the seizure of illegal merchandise, CBP does not include the cost of the lost merchandise to the importers.

ing, registering for, keeping records of, and reporting continuing broker education. CBP will face the costs of designating accreditors and requesting records from individual brokers. Accreditors will incur the costs of responding to a CBPissued RFP, and education providers will incur the costs of drafting applications and fees charged by the accreditors for reviewing their accreditation requests. CBP will also see cost savings (benefits) from avoided penalty assessment and avoided regulatory audits. CBP has found that companies employing one or more brokers who complete continuing education are statistically less likely to face enforcement actions. Over a seven-year period of analysis, the primary estimate of the net costs totals $59,757,034 (see Table 25). Using a discount rate of three percent, annualized costs total $8,389,981 (see Table 26).

TABLE 25—PRIMARY ESTIMATE OF NET COSTS
[2022 U.S. dollars]

Year	Benefits	Costs	Net costs[81]
2023	$0	$75,480	$75,480
2024	485,536	9,930,635	9,445,099
2025	485,536	9,930,635	9,445,099
2026	485,536	9,956,116	9,470,580
2027	485,536	10,917,301	10,431,765
2028	485,536	10,917,301	10,431,765
2029	485,536	10,942,781	10,457,245
Total	2,913,216	62,670,250	59,757,034

TABLE 26—PRIMARY ESTIMATE OF NET PRESENT AND ANNUALIZED COSTS
[2022 U.S. dollars]

	3%		7%	
	PV	AV	PV	AV
Savings	$2,553,632	$409,874	$2,162,922	$401,337
Costs	54,825,586	8,799,855	46,319,331	8,594,701
Net Costs	52,271,953	8,389,981	44,156,409	8,193,364

CBP presents four estimates of the net costs depending on the cost of training pursued by each individual broker. The low-cost path assumes all individual brokers will pursue only free trainings and forgo travel. In the medium-cost path, all individual brokers will pursue a mix of free and paid trainings and travel to a single conference or in-person event per year. In the high-cost path, all individual

[81] Note that we only include costs of remaining compliant with the rule in the net costs. Similarly, we do not include penalties avoided in the final accounting of benefits.

brokers will pursue all paid trainings and travel to two in-person events or conferences per year. The primary estimate assumes that one third of individual brokers will choose each path. Overall, the quantifiable effects of the rule result in a net, annualized cost ranging from $2,583,379 to $13,988,561, using a three percent discount rate over the seven-year period of analysis. A summary of net costs under all four estimates presented in the analysis can be found in Table 27.

TABLE 27—SUMMARY OF NET COSTS
[2022 U.S. dollars]

Estimate	Value	3%	7%
Primary	Net PV	$52,271,953	$44,156,409
	Net AV	8,389,981	8,193,364
Low	Net PV	16,095,183	13,582,366
	Net AV	2,583,379	2,520,252
Medium	Net PV	53,567,985	45,251,723
	Net AV	8,598,002	8,396,603
High	Net PV	87,152,692	73,635,138
	Net AV	13,988,561	13,663,237

As stated before, many benefits of the rule are qualitative. Individual brokers will benefit from improved reputation and a professionalization of the customs broker community while their clients will benefit from better performance, less non-compliance, and improved outcomes. Providers will benefit from increased prestige due to CBP-approved accreditation. CBP believes that the combination of quantified benefits and unquantified benefits exceed the costs of this rule. CBP requested comment on this conclusion in the NPRM and received no comments in response.

9. Analysis of Alternatives

Alternative 1: 72 hours every three years.

Alternative 1 is the same as the chosen alternative except that the continuing broker education requirement would be raised to 72 hours each triennial period instead of 36 hours. This alternative is modeled on the Internal Revenue Service's (IRS) Enrolled Agent program, which requires 72 hours of continuing education every three years.[82] An enrolled agent is an individual who may represent clients in matters before the IRS and, like a licensed customs broker, must pass a rigorous examination to prove his or her knowledge and competence, making it a reasonable analog to the CBP program. Once the

[82] *See* Internal Revenue Service, Enrolled Agent Information (Apr. 6, 2021), *available at https:/ / www.irs.gov/tax-professionals/enrolled-agents/enrolled-agent-information*.

agent has passed the exam, he or she has unlimited practice rights, providing he or she completes the requisite continuing education.

CBP has determined that 72 hours every three years would be inappropriate for individual brokers. Were CBP to mandate 72 hours of continuing broker education every three years, individual brokers who already voluntarily pursue continuing education would need to increase the amount of training they complete, often by 100 percent. Costs incurred by both individual brokers who do not already pursue continuing education and those who do would be much greater. Such a requirement would be too onerous, particularly for small businesses, which make up a significant proportion (approximately 39 percent) of the employers of individual brokers. CBP estimates that such a requirement would cost individual brokers up to $284,775,217 over a seven-year period of analysis, or about $17,770 per broker. *See* Table 28.

TABLE 28—BROKER COSTS UNDER A 72-HOUR CONTINUING EDUCATION REQUIREMENT

[2022 U.S. dollars]

Year	Brokers	Low		Medium		High	
		Cost	Total	Cost	Total	Cost	Total
2023	13,952	$69.62	$582,803	$2,383	$19,946,058	$4,456	$37,300,226
2024	14,830	69.62	619,472	2,383	21,201,038	4,456	39,647,106
2025	14,830	69.62	619,472	2,383	21,201,038	4,456	39,647,106
2026	14,830	69.62	619,472	2,383	21,201,038	4,456	39,647,106
2027	16,026	69.62	669,431	2,383	22,910,855	4,456	42,844,558
2028	16,026	69.62	669,431	2,383	22,910,855	4,456	42,844,558
2029	16,026	69.62	669,431	2,383	22,910,855	4,456	42,844,558
Total	*COM001*16,026	487.34	4,449,513	16,679	152,281,735	31,190	284,775,217

* Totals may not sum due to rounding.

Alternative 2: 36 hours every three years.

Alternative 2 is the chosen alternative.

Alternative 3: CBP list of individual brokers voluntarily meeting continuing education standards.

Under Alternative 3, instead of mandating any kind of continuing education program, CBP would release annually a list of brokerages or companies employing individual brokers who voluntarily provide continuing education to their broker employees. As with Alternative 1, qualifying events would include internal training, government-sponsored webinars, trade conferences and events, and other activities. CBP would draft this list each year by requesting that companies report whether they provide a continuing education program. CBP

might request details from the company to ensure the training provided meets a certain threshold for quality and relevance.

Under baseline conditions, CBP estimates that about 60 percent of individual brokers already complete continuing education on a voluntary basis. CBP does not believe that publishing a list of brokerages that provide continuing education would induce the remaining 40 percent of individual brokers to pursue continuing education, though some individual brokers might do so. Under Alternative 3, those individual brokers who already complete ongoing training would continue to do so, while many of those brokers who do not, would not, absent a mandate, be likely to change. CBP estimates that an additional five percent of brokers might begin a continuing education program in order to be included on CBP's list, representing about 201 additional companies.[83] While fewer individual brokers would face the costs of tuition, travel, and record-keeping, approximately 801 would face these costs of continuing education over the seven-year period of analysis. Additionally, CBP would incur the costs of composing the list each year and companies employing individual brokers would face the costs of applying to be included on the list. Assuming two CBP personnel spend about 40 hours each, annually to compose the list, that one person from each company spends about 10 hours compiling and submitting information to CBP annually, and that one third of affected individual brokers choose each cost path, Alternative 3 results in costs of $10,654,089 over the seven-year period of analysis. *See* Table 29.

[83] CBP assumes that large companies employing more than 100 people already have a continuing education program. Therefore, those companies that would need to add continuing education in order to be included on CBP's list would likely be small to medium sized businesses, meaning there would be a significant number of them, employing a few brokers each.

TABLE 29—TOTAL COSTS UNDER ALTERNATIVE 3
[2022 U.S. dollars]

Year	CBP cost	Brokerage costs	Broker costs	Total
2023	$17,558	$270,324	$1,131,008	$1,418,891
2024	17,558	270,324	1,202,815	1,490,697
2025	17,558	270,324	1,202,815	1,490,697
2026	17,558	270,324	1,202,815	1,490,697
2027	17,558	270,324	1,299,820	1,587,702
2028	17,558	270,324	1,299,820	1,587,702
2029	17,558	270,324	1,299,820	1,587,702
Total	122,909	1,892,267	8,638,913	10,654,089

* Totals may not sum due to rounding.

If only five percent more individual brokers elect to begin continuing education under the terms of Alternative 3, fewer non-compliance actions would be avoided. CBP estimates that only an eighth as many penalties and audits would be avoided as compared to Alternative 2. Therefore, CBP and individual brokers would avoid two penalties and one audit annually, for a total cost savings of $60,692 per year. However, CBP does not typically include avoided penalties in the overall accounting of costs and benefits of a rule. Therefore, over a seven-year period of analysis, Alternative 3 leads to $364,152 in cost savings.

TABLE 30—TOTAL SAVINGS UNDER ALTERNATIVE 3
[2022 U.S. dollars]

Year	Savings for brokers	Savings for CBP	Total savings
2023	$0	$0	$0
2024	0	60,692	60,692
2025	0	60,692	60,692
2026	0	60,692	60,692
2027	0	60,692	60,692
2028	0	60,692	60,692
2029	0	60,692	60,692
Total	0	364,152	364,152

* Totals may not sum due to rounding.

One of the primary goals of the rule is to reduce compliance issues, penalties, and regulatory audits, and CBP does not believe that a system based on voluntary reporting would do enough to reach that goal. With only an additional five percent of brokers pursuing con-

tinuing education, Alternative 3 would not do enough to further professionalize the customs broker community, nor would their clients see an appreciable decline in compliance issues. Additionally, such a system would still result in a net cost of about $10.7 million over the seven-year period of analysis. Therefore, CBP believes that Alternative 3 is less preferable than the chosen alternative.

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 agencies to assess the impact of regulations on small entities. A small entity may be a small business (defined as any independently owned and operated business not dominant in its field that qualifies as a small business concern per the Small Business Act); a small organization (defined as any not-for-profit enterprise which is independently owned and operated and is not dominant in its field); or a small governmental jurisdiction (defined as a locality with fewer than 50,000 people). A small business within the Freight Transportation Arrangement Industry, the industry that employs individual brokers, is defined as one whose annual receipts are less than $20.0 million in 2022 dollars ($17,274,816 in 2017 dollars, using the CPI to account for inflation), regardless of the number of employees.[84] Data from the U.S. Census Bureau shows that approximately 96 percent of businesses in the Transportation Arrangement Industry (NAICS Code 448510) are small businesses (see Table 31). All businesses employing individual brokers under this NAICS Code are affected by this rule. Additionally, some small businesses may elect to become accreditors or training providers. Therefore, CBP concludes that this rule will affect a substantial number of small entities.

[84] Small business size standards are defined in 13 CFR 121.

TABLE 31—SMALL BUSINESSES IN THE FREIGHT TRANSPORTATION ARRANGEMENT INDUSTRY, 2017[85]

Employment size[86]	Number of firms	Number of employees	Preliminary receipts (all firms, $1,000s)[87]	Receipts per firm ($)	Small business?
01: Total	15,104	265,192	$67,276,572	$4,454,222	
02: <5	8,912	15,939	6,315,166	708,614	Yes.
03: 5–9	2,731	18,025	5,392,992	1,974,732	Yes.
04: 10–1	1,524	20,288	5,870,163	3,851,813	Yes.
05: <20	13,167	54,252	17,578,321	1,335,029	Yes.
06: 20–99	1,344	49,477	13,973,780	10,397,158	Yes.
07: 100–499	357	44,715	10,886,028	30,493,076	No.
08: <500	14,868	148,444	42,438,129	2,854,327	Yes.
09: 500+	236	116,748	24,838,443	105,247,640	No.

Some small businesses may choose to apply to CBP to become accreditors. Those businesses will face the costs of applying to CBP, the potential costs of any protests they choose to file should they disagree with CBP's decision regarding their proposals, and the costs of being an accreditor. Small businesses may also choose to become training providers and to incur the costs of producing and providing trainings. However, CBP believes that those costs will be recouped by tuition and fees. CBP further expects any costs not directly covered by fees to be minor and included in general business expenses.

Individual brokers employed by these small businesses will be required to attain 36 hours of continuing broker education every three years under the terms of the rule. They will also face the opportunity cost of attending trainings as well as the costs of record-keeping, reporting, and participating in any continuing broker education record request initiated by CBP. Accordingly, the impacts of the rule to individual brokers and affected businesses will depend on if the individual broker currently meets the training requirements. Based on public comments in response to the ANPRM and discussions between CBP and various broker organizations, CBP estimates most large businesses employing individual brokers already provide, and often mandate, internal training and continuing education. CBP es-

[85] United States Census Bureau, "2017 County Business Patterns and 2017 Economic Census," Released March 6, 2020, *https://www.census.gov/data/tables/2017/econ/susb/2017-susbannual.html*. Accessed March 15, 2021.

[86] Note that some of the categories are sums of other categories. For example, Category 8, <500, is a sum of Categories 2, 3, 4, 6, and 7. Thus, Categories 7 and 9 are not consecutive, but represent all firms employing 100 or more people.

[87] The Survey of U.S. Businesses (SUSB) from which this data is taken is conducted in years ending in 2 and 7.

timates that these 60 percent of individual brokers already in compliance will not face new costs aside from recordkeeping and reporting. CBP estimates the remaining 40 percent of individual brokers, mostly at smaller businesses, will need to come into compliance with the rule. Using the primary estimate under which one third of individual brokers selects each cost tier, the total cost born by brokers in the first year in which they will face costs due to the rule (2024) is $9,880,635 (see Table 12, above). The rule will affect 5,932 individual brokers in that first year, for an average annualized cost of $1,666 per broker. The average annual receipts for small businesses in the Freight Transportation Arrangement Industry, according to the Census data in Table 31, is $2,174,357.[88] The number of individual brokers employed by each business will vary among the small businesses in question, but assuming an average of four brokers per company,[89] the cost of continuing education for each firm will be approximately $6,663 annually, or about 0.3 percent of annual receipts. CBP generally considers effects of 1 percent or less of annual receipts not to be a significant impact. Accordingly, CBP certifies that this rule does not have a significant economic impact on a substantial number of small entities.

C. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. 3507) 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 the Office of Management and Budget (OMB). The collections of information contained in these regulations are provided for by OMB control number 1651–0034 (CBP Regulations Pertaining to Customs Brokers).

The rule will require individual brokers to maintain records of completed continuing education (including, among others, the date, title, provider, location (if applicable), and credit hours) and certify the completion of the required number of continuing education credits on the triennial status report. Based on these changes, CBP estimates a small increase in the burden hours for information col-

[88] To calculate this average, CBP totaled the annual receipts of firms qualifying as small businesses ($6,315,166, $5,392,992, $5,870,163, and $13,973,780 from Table 31 above), then multiplied by 1000 to account for units. Finally, CBP divided by the total number of firms in those categories (8,912, 2,731, 1,524, and 1,344 from Table 31 above).

[89] Many brokerages are sole proprietorships and many employ individual brokers who supervise other employees. The average number of employees per firm is seven. CBP assumes the average firm employs four individual brokers and three other employees, such as human resource managers. CBP did not receive any comments on this assumption in response to the NPRM.

lection related to customs brokers regulations. CBP will submit to OMB for review the following adjustments to the previously approved Information Collection under OMB control number 1651–0034 to account for this rule's changes. The addition of the self-attestation and submission of records will add about 30–45 minutes (0.5–0.75 hours) per respondent.

CBP Regulations Pertaining to Customs Brokers

Estimated Number of Respondents: 13,952.

Estimated Number of Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 0.333.

Estimated Time per Response: 31.5 minutes (0.525 hours).

Estimated Total Annual Burden Hours: 2,442 hours.

VI. Signing Authority

This document is being issued in accordance with 19 CFR 0.1(b)(1), which provides that the Secretary of the Treasury delegated to the Secretary of DHS authority to prescribe and approve regulations relating to customs revenue functions on behalf of the Secretary of the Treasury for when the subject matter is not listed in paragraph 1(a)(i) of Treasury Department Order No. 100–16. Accordingly, this rule may be signed by the Secretary of DHS (or his or her delegate).

List of Subjects in 19 CFR Part 111

Administrative practice and procedure, Brokers, Penalties, Reporting and recordkeeping requirements.

Amendments to Regulations

For the reasons set forth in the preamble, Part 111 of title 19 of the Code of Federal Regulations (19 CFR part 111) is amended as set forth below:

PART 111—CUSTOMS BROKERS

■ 1. The general authority citation for part 111 continues to read as follows:

Authority: 19 U.S.C. 66, 1202 (General Note 3(i), Harmonized Tariff Schedule of the United States), 1624; 1641.

■ 2. Revise the second sentence of § 111.0 to read as follows:

§ 111.0 Scope.

* * * This part also prescribes the duties and responsibilities of brokers, the grounds and procedures for disciplining brokers, includ-

ing the assessment of monetary penalties, the revocation or suspension of licenses and permits, and the obligation for individual brokers to satisfy a continuing education requirement.

■ 3. In § 111.1, add the definitions "*Continuing broker education requirement*", "*Continuing education credit*", "*Qualifying continuing broker education*", and "*Triennial period*" in alphabetical order to read as follows:

§ 111.1 Definitions.

* * * * *

Continuing broker education requirement."Continuing broker education requirement" means an individual broker's obligation to complete a certain number of continuing education credits of qualifying continuing broker education, as set forth in subpart F of this part, in order to maintain sufficient knowledge of customs and related laws, regulations, and procedures, bookkeeping, accounting, and all other appropriate matters necessary to render valuable service to importers and drawback claimants.

* * * * *

Continuing education credit."Continuing education credit" means the unit of measurement used for meeting the continuing broker education requirement. The smallest recognized unit is half of one continuing education credit, which requires 30 minutes of continuous participation in qualifying continuing broker education, as defined in § 111.103(a). For qualifying continuing broker education lasting more than 30 minutes, half of one continuing education credit may be claimed for every full 30 minutes of continuous participation thereafter. For example, for qualifying continuing broker education lasting more than 60 minutes but less than 90 minutes, only one continuing education credit may be claimed. In contrast, for qualifying continuing broker education lasting 90 minutes, 1.5 continuing broker education credits may be claimed.

* * * * *

Qualifying continuing broker education."Qualifying continuing broker education" means any training or educational activity that is eligible or, if required, has been approved for continuing education credit, in accordance with § 111.103.

* * * * *

Triennial period."Triennial period" means a period of three years commencing on February 1, 1985, or on February 1 in any third year thereafter.

* * * * *

■ 4. In § 111.19, revise the first sentence of paragraph (c) to read as follows:

§ 111.19 National permit.

* * * * *

(c) * * * A national permit issued under paragraph (a) of this section is subject to the permit application fee specified in § 111.96(b) and to the customs permit user fee specified in § 111.96(c). * * *

■ 5. Amend § 111.30 by revising the section heading and paragraph (d)(2) to read as follows:

§ 111.30 Notification of change in address, organization, name, or location of business records; status report; termination of brokerage business.

* * * * *

(d) * * *

(2) *Individual.* Each individual broker must state in the report required under paragraph (d)(1) of this section whether he or she is actively engaged in transacting business as a broker.

(i) If the individual broker is actively engaged in transacting business as a broker, the individual broker must also:

(A) State the name under which, and the address at which, the broker's business is conducted if he or she is a sole proprietor, and an email address;

(B) State the name and address of his or her employer if he or she is employed by another broker, unless his or her employer is a partnership, association or corporation broker for which he or she is a qualifying member or officer for purposes of § 111.11(b) or (c)(2);

(C) State whether or not he or she still meets the applicable requirements of §§ 111.11 and 111.19 and has not engaged in any conduct that could constitute grounds for suspension or revocation under § 111.53; and

(D) Report and certify the broker's compliance with the continuing broker education requirement as set forth in § 111.102.

(ii) If the individual broker is not actively engaged in transacting business as a broker, the individual broker must also:

(A) State the broker's current mailing address and email address;

(B) State whether or not he or she still meets the applicable requirements of §§ 111.11 and 111.19 and has not engaged in any conduct that could constitute grounds for suspension or revocation under § 111.53; and

(C) Report and certify the broker's compliance with the continuing broker education requirement as set forth in § 111.102.

* * * * *

§§ 111.97 through 111.100 [Reserved]

■ 6. Add and reserve §§ 111.97 through 111.100.

■ 7. Add subpart F, consisting of §§ 111.101 through 111.104, to read as follows:

Subpart F—Continuing Education Requirements for Individual Brokers

Sec.

§ 111.101 Scope.

This subpart sets forth regulations providing for a continuing education requirement for individual brokers and the framework for administering this requirement. The continuing broker education requirement is for individual brokers, in order to maintain sufficient knowledge of customs and related laws, regulations, and procedures, bookkeeping, accounting, and all other appropriate matters necessary to render valuable service to importers and drawback claimants. Individual brokers will be required to certify completion of the continuing broker education requirement with the filing of their 2027 status report, required under § 111.30(d), and every status report thereafter, in accordance with the provisions of this subpart.

§ 111.102 Obligations of individual brokers in conjunction with continuing broker education requirement.

(a) *Continuing broker education requirement.* All individual brokers must complete qualifying continuing broker education as defined in § 111.103(a), except:

(1) During a period of voluntary suspension as described in § 111.52; or

(2) When individual brokers have not held their license for an entire triennial period at the time of the submission of the status report as required under § 111.30(d).

(b) *Required minimum number of continuing education credits.* All individual brokers who are subject to the continuing broker education requirement must complete at least 36 continuing education credits of qualifying continuing broker education each triennial period, except upon the reinstatement of a license following a period of voluntary suspension as described in § 111.52. Upon the reinstatement of a license following a period of voluntary suspension as described in § 111.52, the number of continuing education credits that an individual broker must complete by the end of the triennial period during which the reinstatement of the license occurred will be calculated on a prorated basis of one continuing education credit for each complete remaining month until the end of the triennial period.

(c) *Reporting requirements.* Individual brokers who are subject to the continuing broker education requirement must report and certify their compliance upon submission of the status report required under § 111.30(d).

(d) *Recordkeeping requirements*—(1) *General.* Individual brokers who are subject to the continuing broker education requirement must retain the following information and documentation pertaining to the qualifying education completed during a triennial period for a period of three years following the submission of the status report required under § 111.30(d):

(i) The title of the qualifying continuing broker education attended;

(ii) The name of the provider or host of the qualifying continuing broker education;

(iii) The date(s) attended;

(iv) The number of continuing education credits accrued;

(v) The location of the qualifying continuing broker education; and

(vi) Any documentation received from the provider or host of the qualifying continuing broker education that evidences the individual broker's registration for, attendance at, completion of, or other activity bearing upon the individual broker's participation in and completion of the qualifying continuing broker education.

(2) *Availability of records.* In order to ensure that the individual broker has met the continuing broker education requirement, upon CBP's request, the individual broker must make available to CBP the information and documentation described in paragraph (d)(1) of this section on or before 30 calendar days from the date of receipt of CBP's

request. CBP can request that the information and documentation be made available for in-person inspection or be delivered to CBP by either hard-copy or electronic means, or any combination thereof.

§ 111.103 Accreditation of qualifying continuing broker education.

(a) *Qualifying continuing broker education.* In order for a training or educational activity to be considered qualifying continuing broker education, it must meet the following two requirements:

(1) *Providers of qualifying continuing broker education.* The training or educational activity must be offered by one of the following providers:

(i) *Government agencies.* Qualifying continuing broker education constitutes any training or educational activity offered by CBP, whether online or in-person, and training or educational activity offered by another U.S. government agency, whether online or in-person, but only if the content is relevant to customs business as identified by CBP in coordination with the appropriate U.S. government agency when applicable. Accreditation is not required for trainings or educational activities offered by U.S. government agencies.

(ii) *Other providers requiring accreditation.* Any other training or educational activity not offered by a U.S. government agency, whether online or in-person, will not be considered a qualifying continuing broker education, unless the training or educational activity has been approved for continuing education credit by a CBP-selected accreditor before the training or educational activity is provided.

(2) *Recognized trainings or educational activities.* The training or educational activity must constitute one of the following:

(i) A seminar, webinar, or a workshop, whether online or in-person, whether experienced live or recorded, that is conducted by an instructor, discussion leader, or speaker;

(ii) A symposium or convention, with the exception of the attendance at a meeting conducted in accordance with the provisions of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), whether online or in-person;

(iii) Online coursework, a workshop, or a module, conducted as self-guided education, culminating in a retention test;

(iv) The preparation of a subject matter for presentation as an instructor, discussion leader, or speaker at a training or educational activity described in paragraph (a)(2)(i) or (a)(2)(ii) of this section, subject to the requirements set forth in paragraph (b) of this section; and

(v) The presentation of a subject matter as an instructor, discussion leader, or speaker at a training or educational activity described in

paragraph (a)(2)(i) or (a)(2)(ii) of this section, subject to the requirements set forth in paragraph (b) of this section.

(b) *Special allowance for instructors, discussion leaders, and speakers.* (1) Contingent upon the approval by a CBP-selected accreditor, an individual broker may claim half of one continuing education credit for each full 30 minutes spent:

(i) Presenting subject matter as an instructor, discussion leader, or speaker at a training or educational activity described in paragraph (a)(2)(i) or (ii) of this section; or

(ii) Preparing subject matter for presentation as an instructor, discussion leader, or speaker at a training or educational activity described in paragraph (a)(2)(i) or (ii) of this section.

(2) The special allowance for instructors, discussion leaders, and speakers is subject to the following limitations:

(i) For any session of presentation given at one time, regardless of the duration of that session, an individual broker may claim, at a maximum, one continuing education credit for the time spent preparing subject matter for that presentation pursuant to paragraph (b)(1)(ii) of this section.

(ii) Per triennial period, an individual broker may claim, at a maximum, a combined total of 12 continuing education credits earned in accordance with paragraphs (b)(1)(i) and (ii) of this section.

(3) Regardless of whether the training or educational activity is offered by a U.S. government agency or another provider, any instructor, discussion leader, or speaker seeking to claim continuing education credit in accordance with paragraph (b)(1) of this section must obtain the approval of a CBP-selected accreditor.

(c) *Selection of accreditors.* The Office of Trade will select accreditors based on a Request for Information (RFI) and a Request for Proposal (RFP) announced through the System for Award Management (SAM) or any other electronic system for award management approved by the U.S. General Services Administration, in accordance with the Federal Acquisition Regulation (48 CFR 1.000 *et seq.*), for a specific period of award, subject to renewal. The Executive Assistant Commissioner, Office of Trade, will periodically publish notices in the **Federal Register** announcing the criteria that CBP will use to select an accreditor, the period during which CBP will accept applications by potential accreditors, and the period of award for a CBP-selected accreditor.

(d) *Responsibilities of CBP-selected accreditors.* CBP-selected accreditors administer the accreditation of trainings or educational activities other than those described in paragraph (a)(1) of this section for the purpose of the continuing broker education requirement by reviewing and approving or denying such educational content for

continuing education credit. A CBP-selected accreditor's approval of a training or educational activity for continuing education credit is valid for one year, and the accreditation may be renewed through any CBP-selected accreditor. CBP-selected accreditors will not deny review or approval of a training or educational activity for continuing education credit solely because it was previously denied by the CBP-selected accreditor or any other CBP-selected accreditor.

(e) *Prohibition of self-certification by an accreditor.* CBP-selected accreditors may not approve their own trainings or educational activities for continuing education credit.

§ 111.104 Failure to report and certify compliance with continuing broker education requirement.

(a) *Notification by CBP.* If an individual broker is subject to the continuing broker education requirement pursuant to § 111.102 and submits a status report as required under § 111.30(d)(2) but fails to report and certify compliance with the continuing broker education requirement as part of the submission of the status report, then CBP will notify the individual broker of the broker's failure to report and certify compliance in accordance with § 111.30(d). The notification will be sent to the address reflected in CBP's records or transmitted electronically pursuant to any electronic means authorized by CBP for that purpose.

(b) *Required response to notice.* Upon the issuance of such notification, the individual broker must on or before 30 calendar days:

(1) Submit a corrected status report that, in accordance with § 111.30(d), reflects the individual broker's compliance with the continuing broker education requirement, if the individual broker completed the required number of continuing education credits but failed to report and certify compliance with the requirement as part of the submission of the status report; or

(2) Complete the required number of continuing education credits of qualifying continuing broker education and submit a corrected status report that, in accordance with § 111.30(d), reflects the individual broker's compliance with the continuing broker education requirement, if the individual broker had not completed the required number of continuing education credits at the time the status report was due.

(c) *Suspension of license.* Unless the individual broker takes the corrective actions described in paragraph (b)(1) or (b)(2) of this section on or before 30 calendar days from the issuance date of the notification described in paragraph (a) of this section, CBP will take actions to suspend the individual broker's license in accordance with subpart D of this part.

(d) *Revocation of license.* If the individual broker's license has been suspended pursuant to paragraph (c) of this section and the individual broker fails to take the corrective actions described in paragraph (b)(1) or (b)(2) of this section on or before 120 calendar days from the issuance date of the order of suspension, CBP will take actions to revoke the individual broker's license without prejudice to the filing of an application for a new license in accordance with subpart D of this part.

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

[Published in the Federal Register, June 23, 2023 (88 FR 41224)]

U.S. Court of International Trade

Slip Op. 23–94

AG Der Dillinger Hüttenwerke, Plaintiff, and Ilsenburger Grobblech GmbH, Salzgitter Mannesmann Grobblech GmbH, Salzgitter Flachstahl GbmH, Salzgitter Mannesmann International GmbH, and Friedr. Lohmann GmbH, Consolidated Plaintiffs, and Thyssenkrupp Steel Europe AG, Plaintiff-Intervenor, v. United States, Defendant, and Nucor Corporation and SSAB Enterprises LLC, Defendant-Intervenors.

Before: Leo M. Gordon, Judge
Consol. Court No. 17–00158

[Commerce's application of facts otherwise available to Dillinger and partial adverse facts available to Salzgitter sustained; Commerce's application of its model-match methodology remanded.]

Dated: June 23, 2023

Marc E. Montalbine, deKieffer & Horgan, PLLC, of Washington, D.C., argued for Plaintiff AG der Dillinger Hüttenwerke. With him on the brief were *Gregory S. Menegaz*, *Alexandra H. Salzman*, and *Merisa A. Horgan*.

Ron Kendler and *Allison Kepkay*, White & Case LLP, of Washington, D.C., argued for Consolidated Plaintiffs Ilsenburger Grobblech GmbH, Salzgitter Mannesmann Grobblech GmbH, Salzgitter Flachstahl GmbH, and Saltzgitter Mannesmann International GmbH. With them on the brief was *David E. Bond*.

Kara M. Westercamp, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice of Washington, D.C., argued for Defendant United States. On the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, and *Tara K. Hogan*, Assistant Director. Of counsel was *Ayat Mujais*, Attorney, U.S. Department of Commerce, Office of Chief Counsel for Trade Enforcement and Compliance of Washington, D.C.

Jeffrey Gerrish, Schagrin Associates, of Washington, D.C., argued for Defendant-Intervenor SSAB Enterprises LLC. With him on the brief were *Roger B. Schagrin, Luke A. Meisner*, and *Nicholas J. Birch*.

Stephanie M. Bell, Wiley Rein LLP, of Washington, D.C., argued for Defendant-Intervenor Nucor Corporation. With her on the brief were *Alan H. Price* and *Christopher B. Weld*.

OPINION and ORDER

Gordon, Judge:

This consolidated action involves challenges to the final determination in the antidumping ("AD") investigation conducted by the U.S. Department of Commerce ("Commerce") of certain carbon and alloy steel cut-to-length plate ("CTL plate") from the Federal Republic of

Germany. *See Certain Carbon and Alloy Steel Cut-to-Length Plate from the Federal Republic of Germany*, 82 Fed. Reg. 16,360 (Dep't of Commerce Apr. 4, 2017) ("*Final Determination*"), and accompanying Issues and Decision Memorandum, A-428–844 (Mar. 29, 2017), http://enforcement.trade.gov/frn/summary/germany/2017–06628–1.pdf (last visited this date) ("*Decision Memorandum*").

Before the court are Commerce's Final Results of Redetermination Pursuant to Court Remand, ECF No. 153 ("*Third Remand Results*") filed pursuant to the court's remand order in *AG der Dillinger Huttenwerke v. United States*, 46 CIT ___, 592 F. Supp. 3d 1344 (2022) ("*Dillinger II*"). Plaintiff AG der Dillinger Hüttenwerke ("Dillinger") challenges Commerce's determination to use "likely selling price" for the cost of production for non-prime plate as facts otherwise available when it was missing necessary actual cost information, as well as Commerce's rejection of Dillinger's proposed change to the agency's model-match methodology to include a proposed additional quality code for "sour transport plate."[1] *See* Pl. Dillinger's Comments in Opp'n to Final Results of Redetermination, ECF No. 162 ("Dillinger Comments"); *see also* Def.'s Resp. to Comments on Remand Redetermination, ECF No. 168 ("Def.'s Resp."); Pl. Dillinger Mem. in Supp. of Rule 56.2 Mot. for J. on the Agency R., ECF No. 40 ("Dillinger MSJ"); Def.'s Mem. Opp. Pls.' Rule 56.2 Mots. for J. on the Admin. R., ECF No. 55 ("Def.'s MSJ Resp."); Reply Br. of Pl. Dillinger, ECF No. 62 ("Dillinger MSJ Reply").

Separately, Consolidated Plaintiffs Ilsenburger Grobblech GMBH, Salzgitter Mannesmann Grobblech GMBH ("SMSD"), Salzgitter Flachstahl GMBH, and Salzgitter Mannesmann International GMBH (collectively, "Salzgitter") challenge Commerce's determination from the results of the previous remand to use partial AFA for certain home market CTL plate sales made by their respective affiliates when Salzgitter failed to submit manufacturing information. *See* Salzgitter Consol. Pls.' Comments on Remand Redetermination, ECF No. 135 ("Salzgitter Comments"); Commerce's Final Results of Redetermination Pursuant to Court Remand, ECF No. 129 ("*Second Remand Results*"); *see also* Def.'s Resp. to Comments on Remand Redetermination, ECF No. 141 ("Def.'s 2RR Resp."); Def.-Int. SSAB's Comments on Remand Redetermination, ECF No. 139; Def.-Int. Nucor Corporation's Comments on Remand Redetermination, ECF No.

[1] The parties refer to the products covered by proposed quality code 771 with different terms including "Sour Service Petroleum Transport Plate" and "Sour Service Line Pipe Steel." *See Decision Memorandum* at 77 ("Dillinger first proposed a distinct quality reporting code for sour service petroleum transport plate in its Dillinger Model Match Comments."); Dillinger Br. at 11 (describing "sour service petroleum transport or line pipe steel (code 771)"). The court will continue to use the shorthand term "sour transport plate" for consistency.

146. The court has jurisdiction pursuant to Section 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii),[2] and 28 U.S.C. § 1581(c) (2018).

For the reasons set forth below, the court sustains: (1) Commerce's determination to assign the "likely selling price" as the cost of production for non-prime plate recorded in Dillinger's books and records as "the best available information on the record" for evaluating and adjusting the cost of production under 19 U.S.C. § 1677b(f); and (2) Commerce's application of partial AFA to Salzgitter. The court remands the issue of Commerce's application of its model-match methodology to Dillinger for further explanation, or if appropriate, reconsideration.

I. Standard of Review

The court sustains Commerce's "determinations, findings, or conclusions" unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). More specifically, when reviewing agency determinations, findings, or conclusions for substantial evidence, the court assesses whether the agency action is reasonable given the record as a whole. *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1350–51 (Fed. Cir. 2006); *see also Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951) ("The substantiality of evidence must take into account whatever in the record fairly detracts from its weight."). Substantial evidence has been described as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *DuPont Teijin Films USA v. United States*, 407 F.3d 1211, 1215 (Fed. Cir. 2005) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Substantial evidence has also been described as "something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966). Fundamentally, though, "substantial evidence" is best understood as a word formula connoting reasonableness review. 3 Charles H. Koch, Jr. & Richard Murphy, *Administrative Law and Practice* § 9.24[1] (3d ed. 2023). Therefore, when addressing a substantial evidence issue raised by a party, the court analyzes whether the challenged agency action "was reasonable given the circumstances presented by the whole record." 8A *West's Fed. Forms*, National Courts § 3.6 (5th ed. 2023).

[2] Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2018 edition.

II. Discussion

A. Use of "Likely Selling Price" to Calculate Cost of Production under § 1677b

The court presumes familiarity with its prior decisions regarding Commerce's calculation of the cost of production of Dillinger's non-prime products under 19 U.S.C. § 1677b. In its most recent opinion, the court held that "[b]ecause Dillinger has failed to place information on the record demonstrating the actual cost of production of its non-prime products, Commerce may reasonably rely on facts otherwise available pursuant to § 1677e(a)(1)." *Dillinger II*, 46 CIT at ___, 592 F. Supp. 3d at 1349. However, the court remanded the determination of facts otherwise available for Commerce to "explain how its reliance on information indicating the 'likely selling price' of non-prime products accords with its obligation to ensure that the reported costs of production reasonably reflect the *cost of producing the merchandise* under consideration." *Id.* On remand, Commerce explained "how the information recorded for non-prime products in Dillinger's normal books and records is not only the best available information on the record, but also ensures that the reported costs reasonably reflect the cost of producing both prime and non-prime products." *Third Remand Results* at 5; *see also id.* at 4 (noting that Commerce continues "to rely on ['the likely selling price' information from] Dillinger's normal books and records," which Commerce maintains is "the only reasonable approach for determining the allocation of total costs between prime and non-prime products, and the per-unit costs of non-prime products.").

Dillinger continues to challenge the reasonableness of Commerce's finding that Dillinger values the cost of producing non-prime merchandise at the "likely selling price" in its normal books and records. Dillinger contends that the application of facts otherwise available, *i.e.*, Commerce's reliance on the "likely selling price" of the non-prime merchandise recorded in Dillinger's books and records, was unreasonable given the totality of the record as well as the guidance from the U.S. Court of Appeals for the Federal Circuit ("Court of Appeals") in *Dillinger France S.A. v. United States*, 981 F.3d 1318, 1321 (Fed. Cir. 2020). *See* Dillinger Comments at 1. Dillinger further maintains that Commerce misread the record by finding that Dillinger uses the likely selling price of non-prime products to value costs in its audited financial statements. *Id.* at 4. Dillinger also argues that "[b]y using the likely selling price of non-prime plate rather than the actual cost of production allocated to non-prime plate in Dillinger's verified cost calculation, Commerce has imposed an impermissible adverse infer-

ence." *Id.* at 14. As explained below, because Dillinger has failed to demonstrate that Commerce's application of facts otherwise available was unreasonable given the limited information in the record, the court is unpersuaded by Dillinger's arguments and sustains Commerce's determination on this issue.

The parties' dispute centers on Commerce's finding that "[t]he information recorded in Dillinger's normal books and records, including the likely selling price of non-prime products, to allocate costs for the [period of investigation ("POI")] is the most reasonable information on the record to fill in the informational gap caused by Dillinger's failure to provide either the actual cost of producing non-prime products and their physical characteristics, or other information from its production records." *Third Remand Results* at 9. Commerce emphasizes that Dillinger "could have provided Commerce with the information needed to ascertain the non-prime product's actual costs and to comply with the Federal Circuit's directive [in *Dillinger France*] to determine the actual costs of prime and non-prime products." *Id.* Commerce highlights the fact that it had previously re-opened the record to allow Dillinger to provide such critical actual cost information for Commerce's calculations, but Dillinger's failure to provide such information resulted in Commerce resorting to using facts otherwise available under 19 U.S.C. § 1677e(a). *Id.* at 3, 9–10.

Dillinger maintains that Commerce should have used Dillinger's proffered information regarding the average actual total cost of manufacture for all of its plate sold during the POI. *See* Dillinger Comments at 7. While Dillinger acknowledges that its proposal would require Commerce to accept data from an "average," Dillinger maintains that its preferred calculation nonetheless represents the "most reasonable calculation of the actual production costs" because Dillinger's proffered information "is based upon ***actual*** costs." *Id.* In rejecting Dillinger's proposed alternative, Commerce explained that:

> Dillinger's normal books and records are more reasonable to use as facts otherwise available because they recognize that the lost value of the non-prime products, which is an inevitable result of Dillinger's production of prime products, is appropriately considered to be a cost of producing the prime products. Consequently, Dillinger's proposal to assign the overall average cost of all prime products is unreasonable because it would distort the disparity in cost across prime CTL plate products, as well as the disparity in "size, specification, and grade" among non-prime products. Thus, although both Dillinger's proposal and Dillinger's normal books and records are flawed because Dillinger chooses not to track the actual costs of producing non-prime

> products, we find that the use of the amounts recorded in Dillinger's normal books and records is reasonable for use as facts otherwise available.

Third Remand Results at 5–6.

Dillinger responds by emphasizing Commerce's obligation under 19 U.S.C. § 1677b(b)(3) to calculate Dillinger's actual cost of production of non-prime products. Dillinger contends that Commerce may resort to facts otherwise available under § 1677e(a) only to fill an "informational gap" in the record, and that Commerce's reliance on the likely sales price for non-prime merchandise as a substitute for the actual cost of production is an unreasonable application of facts otherwise available as the estimated sales values of non-prime merchandise "has absolutely nothing to do with the costs of production." Dillinger Comments at 2–4. Dillinger maintains that Commerce unreasonably relied on this selling price information because this information was not how Dillinger actually valued the cost of production for non-prime products in its audited financial statements. *See id.* at 1–2 (arguing that Commerce unreasonably conflated record here with record in *Dillinger France*, which was subject to different generally accepted accounting principles and practices).

Dillinger's argument is unpersuasive. Dillinger placed this likely selling price information on the record as part of its response in the Supplemental Section D Questionnaire regarding "the 'quantity and value of non-prime, defective, and low quality plates sold during the POI.'" *See id.* at 3 (citing Dillinger's Supplemental Section D Questionnaire Response). Commerce has previously explained the importance of reviewing information as to the "physical characteristics of the non-prime products produced and the actual cost of producing the non-prime products," and even re-opened the record to allow Dillinger to place actual cost information on the record. See Third Remand Results at 3. When Dillinger failed to provide this actual cost information, Commerce determined it was necessary to resort to facts otherwise available under § 1677e(a) and to use the best available information on the record to fill this gap, a determination already sustained in *Dillinger II*. *See id.* at 9–10. Commerce found that this likely selling price information submitted by Dillinger is the "best available information" on the record to value the cost of producing non-prime products in the absence of accurate, actual cost of production data. *See id.* at 4, 5.

Despite maintaining that Commerce's reliance on Dillinger's likely selling price information was unreasonable as that information was

unrelated to the cost of production, Dillinger fails to demonstrate that Commerce acted unreasonably in finding that "Dillinger values non-prime products at their likely selling price, rather than full cost." *See id.* at 10. In light of this finding based on Dillinger's questionnaire response, coupled with Dillinger's failure to put data corresponding to the actual cost of production of non-prime products on the record, the court sustains Commerce's use of the likely selling price information to value the cost of production of non-prime products as a reasonable application of facts otherwise available under § 1677e(a).

Dillinger lastly contends that "[b]y using the likely selling price of non-prime plate rather than the actual cost of production allocated to non-prime plate in Dillinger's verified cost calculation, Commerce has imposed an impermissible adverse inference." Dillinger Comments at 14. Dillinger maintains that "[u]nder the statute, Commerce may only impose an adverse inference when it 'finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with the request for information.'" *Id.* (quoting 19 U.S.C. § 1677e(b)). Dillinger argues that "[b]y rejecting all of these other cost of production figures and applying an unreasonably low cost of production to non-prime plate based upon resale value, Commerce is applying an adverse inference that impermissibly shifts costs from non-prime plate to prime plate and thereby increases the dumping margin." *Id.* at 20.

Dillinger's argument is unsupported by the record. Dillinger's naked assertion that Commerce is applying an adverse inference lacks any basis beyond the fact that Commerce's selection of facts otherwise available ultimately resulted in an increase in Dillinger's calculated dumping margin. As Commerce explained:

> Dillinger is quite simply mistaken that Commerce's reliance on its books and records to fill an informational gap created by Dillinger's decision is an impermissible adverse inference because Commerce's reliance on the information recorded in Dillinger's normal books and records accords with its own recognition that the information recorded in its normal books and records results in the total direct and indirect costs reasonably attributable to the production of prime products being allocated to prime products.

Third Remand Results at 16. Defendant further highlights that Commerce did not make a finding that an adverse inference was warranted pursuant to 19 U.S.C. § 1677e(b)—a prerequisite for applying an adverse inference when selecting from among the facts otherwise

available on the record. *See* Def.'s Resp. at 9 (citing *Third Remand Results*). Dillinger's dissatisfaction with its resulting dumping margin, without more, does not demonstrate that Commerce's selection of facts otherwise available was made with an impermissible adverse inference. Dillinger's remaining arguments and cited case law are without merit as they are predicated on the unfounded assumption that Commerce applied an adverse inference here. Accordingly, the court sustains Commerce's reliance on Dillinger's normal books and records as a reasonable application of facts otherwise available.

B. Application of Partial AFA to Salzgitter

In a previous remand redetermination, Commerce explained that it used different AFA methodologies to calculate Dillinger and Salzgitter's margins, resulting in totals of 4.98% and 22.9% respectively, because the scope of Salzgitter's non-disclosures was significantly larger than Dillinger's non-disclosures. *See Second Remand Results* at 27, ECF No. 129. Salzgitter challenged the reasonableness of this determination, and the court reserved decision on this issue in *Dillinger II*. See Dillinger II, 46 CIT at ___, 592 F. Supp. 3d at 1347; *see also* Salzgitter Comments; Def.'s 2RR Resp. In calculating Salzgitter's margin, Commerce applied AFA to incentivize Salzgitter's future cooperation. *Second Remand Results* at 27. Specifically, Commerce explained that:

> [T]he application of the *Dillinger France I*[3] partial AFA methodology to Salzgitter deprives Commerce of the ability to apply [19 U.S.C. § 1677c] meaningfully in this proceeding. It is well established that Congress intended Commerce to use AFA as a means to induce cooperation in its proceedings and address evasion concerns. The purpose of AFA is to provide respondents

[3] In *Dillinger France S.A. v. United States*, 42 CIT ___, 350 F. Supp. 3d 1349 (2018) ("*Dillinger France I*"), the court remanded Commerce's application of partial AFA to Dillinger France, concluding that the decision "to utilize the highest non-aberrational net price among Dillinger's downstream home market sales" was unreasonable because "the reliability of the reported sales prices has not been called into question and there is no informational gap in the sale prices for Commerce to fill." *See id.* at ___, 350 F. Supp. 3d at 1364. On remand, Commerce followed the court's guidance and determined that it would "treat[] these downstream home market sales transactions as Dillinger France-produced plate, rather than treating these transactions as sales of plate produced by an unrelated manufacturer; and 2) rel[y] on the sale prices as reported." *See Dillinger France S.A. v. United States*, 43 CIT ___, ___ 393 F. Supp. 3d 1225, 1228 (2019) (quoting Commerce's remand results adopting *Dillinger France I* methodology), *rev'd in part on other grounds*, 981 F.3d 1318 (Fed. Cir. 2020); *see also AG der Dillinger Huttenwerke v. United States*, 43 CIT ___, ___, 399 F. Supp. 3d 1247, 1256–57 (2019) ("*Dillinger I*") (explaining that in *Dillinger France*, Commerce initially applied highest net-aberrational price to all sales without manufacturer information, but ultimately accepting the sales prices as reported, classifying all sales without manufacturer information as Dillinger produced sales—*Dillinger France I* methodology).

> with an incentive to cooperate in Commerce's investigations and reviews and ensure that necessary information is placed on the record to enable Commerce to reach a reasonable determination. However, the change in the AFA methodology prescribed by the Court in *Dillinger France I* and applied to Salzgitter in the *Dillinger I* Remand Redetermination frustrates Commerce's goal of inducing cooperation by ensuring that a non-cooperating respondent does not receive a more favorable AFA rate than it would have received it would have fully cooperated.

Id. at 29.

Dillinger reported manufacturer information for more than 99 percent of its downstream sales in this matter and, while the "number of sales with missing manufacturer information was not on the record" in *Dillinger France*, Commerce reported that "it was only a small number of Dillinger France's downstream sales." *Id.* at 27. Commerce could therefore approximate what Dillinger and Dillinger-France's margins would have been had they disclosed manufacturer information for all their downstream sales and could be sure that the *Dillinger France I* methodology would not materially impact either margin calculation. *Id.* at 27–28.

In contrast, Salzgitter did not report manufacturer information for approximately 28,000 downstream sales of CTL plate, representing a not-insignificant percentage of home market sales used in Commerce's analysis. *Id.* at 27. Thus, Commerce maintains that it "could not determine what Salzgitter's margin would have been if Salzgitter had fully cooperated with [its] requests for information and properly reported the manufacturer of the downstream sales at issue," so Salzgitter "may well receive a more favorable margin [using the *Dillinger France I* methodology] than it would have received if [it] had fully cooperated." *Id.* at 29–31. As a result, Commerce applied the highest non-aberrational net price for all of Salzgitter's sales without manufacturer information to insure it did not receive a lower margin than it otherwise would have. *Id.* at 30.

Salzgitter maintains that this approach is unreasonable because Commerce compared the scope of each exporter's non-disclosures inconsistently. First, Salzgitter argues that "substantial evidence does not support Commerce's conclusion that the sales at issue for *Dillinger France* were smaller than the sales at issue for Salzgitter." Salzgitter Comments at 6. Further, Salzgitter notes that even if the scope of its non-disclosure was larger, very few of those sales would be necessary to calculate its antidumping margin. *Id.* at 4. Specifically, Salzgitter notes that:

> Commerce claimed that the universe of sales considered with respect to Salzgitter was larger than the universe of sales considered with respect to Dillinger France, Commerce did not similarly consider the linkage between the number of Salzgitter sales affected and Salzgitter's dumping margin. Indeed, were Commerce to apply the analysis used for Dillinger France to Salzgitter, it is clear that only a very small fraction of SMSD's sales for which manufacturer information was unknown were use "as a basis for normal value" and were "actually compared to U.S sales prices."

Id. (quoting *Dillinger France S.A. v. United States*, 43 CIT ___, ___, 393 F. Supp. 3d 1225, 1228 (2019)). Salzgitter maintains that, if Commerce only considered sales that were necessary for its home market comparison, there would be little difference between the scope of Salzgitter and Dillinger's non-disclosures. *Id.*

Salzgitter further contends that Commerce's application of § 1677e is unreasonable because there is no indication that Salzgitter benefitted from not fully disclosing all requested information, and there is no evidence that Salzgitter intentionally obscured any information for this purpose. First, Salzgitter notes that it did not maliciously or dishonestly omit information, but rather its information systems were not equipped to record all of the information Commerce requested. *Id.* at 6. Second, Salzgitter maintains that it does not benefit from these omissions because its antidumping margin would likely have been zero percent even if it had disclosed all requested information. *Id.* at 8.

Commerce disagrees. First, Commerce notes that there is a factual difference between the overall number of sales that Dillinger and Dillinger-France reported without manufacturer information and the number of sales that Salzgitter reported without manufacturer information, and not just a difference in how many sales are relevant to each exporter's margin calculation. *Second Remand Results* at 28. Specifically, Commerce notes that the AFA methodology applied to Dillinger's sales without manufacturer information in this matter, as well as Dillinger-France's sales without manufacturer information, did not impact the margin calculation for Dillinger in either proceeding. *Id.* at 27; *see also First Remand Results* at 2, ECF No. 85 (finding that applying partial AFA methodology of *Dillinger France I* to Dillinger did not impact Dillinger's margin calculation). Salzgitter's margin, however, would have been reduced from 22.90 percent, when Commerce applied the highest net-aberrational price, to *zero* percent

under the *Dillinger France I* methodology. *Second Remand Results* at 28, 54.

Commerce further explained that "these differences affected Commerce's goals in using partial AFA as a means to induce cooperation because the margin result for Salzgitter under the *Dillinger France I* methodology provides no incentive for Salzgitter to cooperate by providing requested information to Commerce." *Id.* at 54. Commerce rejected Salzgitter's suggested view of the record, stating that "Salzgitter would have Commerce establish a new test of materiality to determine whether AFA is warranted – a test that would allow a respondent, not Commerce, to determine what information is relevant for Commerce's analysis." *Id.* at 55. Commerce maintains that Salzgitter's margin must reflect the full extent of its non-disclosure, and determined that using the *Dillinger France I* methodology to assign Salzgitter a zero percent margin would not incentivize future cooperation. *Id*. at 54–57.

Since a zero percent margin cannot, by definition, be higher than what Salzgitter's margin would otherwise have been if it had disclosed all its manufacturer information, Commerce reasonably found that applying AFA to Salzgitter using the *Dillinger France I* methodology would be inconsistent with the intent of § 1677e. For the same reason, Commerce's refusal to adopt one of Salzgitter's three proposed alternative methods for calculating normal value is also reasonable, as all three of Salzgitter's proposed alternatives would have left Salzgitter with a *de minimis* dumping margin. *See* Salzgitter Comments at 8–9 (explaining Salzgitter's proposed alternatives that Commerce calculate its margin by (1) treating none of the sales as Salzgitter-manufactured plate; (2) treating all sales as Salzgitter-manufactured plate; or (3) treating a percentage of each sale as Salzgitter-manufactured plate based on SMSD's purchases from each supplier"); see also Second Remand Results at 55–56 (noting that "[u]nder the *Dillinger France I* partial AFA methodology, Salzgitter would receive a zero rate and, consequently, would be excluded from the AD order. Because of Salzgitter's failure to provide requested information, Commerce cannot determine what the resulting margin would have been if Salzgitter had complied fully with Commerce's requests to report the manufacturer information for all of its home market sales. Thus, it is reasonable to assume that Salzgitter would receive a more favorable result under the Dillinger France I methodology as a result of withholding information than by providing the requested information and allowing Commerce to properly analyze the sales in question").

19 U.S.C. § 1677e provides Commerce with discretion in applying AFA methodologies. *See, e.g.*, *Nippon Steel Corp. v. United States*, 337 F.3d 1373,1383 (Fed. Cir. 2003) (noting that 19 U.S.C. § 1677e does not require Commerce to find "evidence of nefarious intentions" to apply AFA against the importer); *F.lli de Cecco di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000) (stating that 19 U.S.C. § 1677c gives Commerce "broad discretion" in calculating antidumping margins for "uncooperative respondents"). As the court observed in *Dillinger I*, Salzgitter has failed to demonstrate that its proposed alternative methods provide a reliable measure or approximation of what its margin would be if it fully disclosed all relevant information. *See Dillinger I*, 43 CIT at ___, 399 F. Supp. 3d at 1255–56. Since Salzgitter did not provide any additional information to show that one of these alternative methodologies constituted the only reasonable path forward on this record, the court again concludes that Commerce acted reasonably in rejecting those proposed alternatives.

Salzgitter contends that, even if Commerce acted reasonably in applying a different AFA methodology than was applied to Dillinger, Commerce still unreasonably ignored information that Salzgitter had already placed on the record in calculating its margin. Salzgitter Comments at 10–11. Specifically, Salzgitter maintains that under 19 U.S.C. §1677m(e) "Commerce was not permitted on remand to disregard [its] verified sales prices for the sales at issue as a result of the missing manufacturer [information]." *Id.* at 10. Salzgitter maintains that it has demonstrated that "it would not receive a more favorable AFA rate using the methodology applied to Dillinger France than it would have received if it reported the manufacturer for all sales." *Id.* at 8. Nevertheless, Salzgitter admits that this conclusion requires Commerce to "not unjustifiably 'ignore record information that is not in dispute,' namely the prices and other information for the SMSD sales, which Commerce verified." *Id.* Although the court in *Dillinger France* raised concerns about Commerce's refusal to consider the submitted sales price data in applying AFA, this Court refused to reach the same conclusion in *Dillinger I*, observing that "Commerce has clear statutory authority pursuant to 19 U.S.C. § 1677m(d) to '*disregard all or part* of the original and subsequent responses' in an adverse inference scenario." *Dillinger I*, 43 CIT at ___, 399 F. Supp. 3d at 1256; *see also Second Remand Results* at 55 (highlighting that "the Court acknowledged Commerce's statutory authority under section 782(d) of the Act to 'disregard all or part of the original and subsequent responses' when relying on AFA").

Salzgitter responds that Commerce may only exercise this authority subject to § 1677m(e) and contends that Salzgitter's pricing information could not be disregarded by Commerce because Salzgitter's submission of information met all of the criteria under this provision. Salzgitter Comments at 10–11. The court previously addressed and rejected this same argument. *See Dillinger I*, 43 CIT at ___, 399 F. Supp. 3d at 1253 (explaining that "the 'information' to which § 1677m(e) refers, in the context of this proceeding, is the missing manufacturer information, not the remainder of 'the information' that Plaintiffs submitted. Plaintiffs acknowledge that the identity of the CTL plate manufacturers is relevant to whether home market transactions should or should not be included in margin calculations, and that they did not identify all of them. Plaintiffs thus cannot escape the conclusion that they failed to satisfy § 1677m(e) with respect to that information."). Because Salzgitter has failed to demonstrate any error in the court's prior analysis of this issue, the court again concludes that "Plaintiffs' reliance upon § 1677(m)(e) is misplaced." *Id.* As a result, the court cannot agree that Commerce's selected methodology for applying partial AFA to Salzgitter was unreasonable.

Lastly, Salzgitter contends that "Commerce's selection of the highest non-aberrational net price as AFA is inappropriate." Salzgitter Comments at 12. Salzgitter maintains that "that the sale from which this price was derived would not even be used as a basis for normal value in Salzgitter's margin calculation" because the product at issue in that sale "was *so dissimilar to the products sold to the United States that it was not compared to a single U.S. sale*." *Id.* Consequently, Salzgitter argues that "[i]t is unreasonable and punitive for Commerce to extrapolate the price of a wholly dissimilar product, and use that price as the basis for normal value for all of Salzgitter's home-market sales for which it could not identify the manufacturer." *Id.* at 13. Commerce stated that "[t]o determine the highest non-aberrational net price [] to be assigned to the downstream sales with missing manufacturer information, Commerce sorted all of SMSD's net prices for these sales in descending order and selected the transaction at the beginning of a smooth continuum of net prices." *Second Remand Results* at 30 (confidential information omitted). Commerce further explained that "[b]ecause Salzgitter failed to report the manufacturer of these sales, we cannot determine if the net prices correlated to the manufacturer of the CTL plate. Commerce cannot rule out the possibility that the sales with the highest prices were entirely or primarily of CTL plate manufactured by Salzgitter, and Salzgitter's failure to report the manufacturer information was an

attempt to obscure this fact, thereby distorting the margin." *Id.* at 30–31.

Beyond generally decrying the unreasonableness of Commerce's selected AFA sale price, Salzgitter fails to suggest an alternative basis for an AFA sale price that would instead be the one and only reasonable option on the record. While Salzgitter emphasizes the fact that Commerce does not have "unlimited authority" in applying AFA, Salzgitter does not identify how Commerce exceeded the bounds of reasonableness here, or what alternative AFA price Commerce should have selected in order to meet the purpose of § 1677e(b). *See* Salzgitter Comments at 13 (noting that "[t]he purpose of section 1677e(b) is to provide respondents with an incentive to cooperate, not to impose punitive, aberrational, or uncorroborated margins." (quoting *F.Lii de Cecco di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000)). There is no dispute that Commerce has the discretion, where appropriate, to select the highest non-aberrational net price in applying AFA. *See BMW of N. Am. v. United States*, 926 F.3d 1291, 1300 (Fed. Cir. 2019) (noting that court has "previously held that Commerce has wide discretion to assign the 'highest calculated rate' to uncooperative parties," but warning that "use of the highest rate is not automatic, however, and 'will depend upon the facts of a particular case.'" (internal citations omitted)). Here, Commerce has considered the totality of the record and explained the factors that led to its differing application of AFA to Salzgitter as compared to Dillinger. *See Second Remand Results* at 57 (highlighting differences in "(1) the number of sales lacking the requested manufacturer information; (2) the net prices among the sales with the missing data; and (3) the impact on the margin caused by the respondents' failure to provide the requested information."). While Salzgitter contends that Commerce's selected AFA price (and resulting margin of 22.9%) is "punitive," Salzgitter fails to explain how Commerce's selection was unreasonable given the totality of the circumstances on the record. Salzgitter also fails to suggest any alternative price from the record that Commerce could have selected as a reasonable application of AFA. Based on the record as a whole, the court cannot agree with Salzgitter's contention that Commerce's selection of the highest non-aberrational net price on the record was "unreasonable and punitive." *See* Salzgitter Comments at 13. Accordingly, the court sustains Commerce's application of partial AFA to Salzgitter.

C. Rejection of Dillinger's Proposed Quality Code for Sour Transport Plate

In a previous memorandum and order addressing Dillinger's challenge to Commerce's model-match methodology, the court sustained Commerce's rejection of Dillinger's proposed quality code for sour vessel plate but stayed consideration of "Dillinger's challenge to Commerce's rejection of Dillinger's other proposed quality code (sour transport plate), pending the outcome of the remanded issues." *See* Memorandum and Order, ECF No. 121 (Aug. 18, 2021); *see also* Dillinger MSJ; Def.'s MSJ Resp.; Def.-Intervenor Nucor Corporation Resp. Br., ECF No. 58; Dillinger MSJ Reply. The court assumes familiarity with that decision, which outlined the basic details as to how Commerce applies its model-match methodology and how that methodology was applied in this matter. The court remands this issue again to Commerce for further consideration, and if appropriate, reconsideration.

Commerce rejected Dillinger's proposed quality code 771 (for sour transport plate), explaining:

> In its Dillinger Model Match Comments, Dillinger identified two examples of products contained in its proposed sour service petroleum transport plate quality subcategory: NACE TM0284/ISO 15156–2 and NACE MR0175/ISO 15156. We did not adopt this suggested quality subcategory in the final model match methodology issued to interested parties, and instead we identified a single quality code for petroleum transport plate.
>
> Nonetheless, Dillinger reported sales in its questionnaire responses using its proposed quality code subcategory for this product, and also changed the examples it provided for the subcategory to be "steel grades L450MS-PSL2, 5L-X65MS-PSL2, etc." without explanation. Dillinger did not identify what standards it had provided, if any, to identify the products to which it refers. The absence of any actual standards, identifying the full range of properties for such products, limits our ability to evaluate how such products compare to other petroleum transport plate products.
>
> Dillinger provided a "Presentation on Requirements for Steel Plates in Sour Service" (Sour Service Presentation), which appears to be a slide presentation containing information about sour service. However, the Sour Service Presentation does not provide a systematic or clear reference to the range of properties of the products in question. Of the four example products Dillinger listed in the Dillinger Model Match Comments and its

section B response, only one of them (*i.e.*, NACE FR0175/ISO 15156) appears to be clearly identified in the Sour Service Presentation for use in the corrosive hydrogen sulfide environments Dillinger indicates require such plate, while the example products listed in Dillinger's section B response are not referenced at all.

Dillinger indicates that the sulfur content must be strictly limited for sour service petroleum transport plate, and we note that the Sour Service Presentation does appear to refer to a maximum allowable percentage level, which it refers to as "low." However, it is not evident that such a requirement applies to the two example "grades" (L450MS-PSL2, 5L-X65MS-PSL2) identified in Dillinger's section B response. Even assuming, arguendo, that those grades are within the API 5L line pipe specification, as the petitioner states, that would support the petitioner's argument that Dillinger's petroleum transport plate products are covered under the same specification as other petroleum plate products identified by the quality code established by the Department. The Sour Service Presentation also does not refer to the content requirements of carbon or the "expensive alloys" (*i.e.*, copper and nickel) discussed in the Dillinger Model Match Comments.

Furthermore, assuming these elements are pertinent to the analysis, the Department's model match methodology contains product characteristic fields that segregate products based on minimum specified content of two of those three elements (*i.e.*, carbon and nickel). If the levels of these chemical elements are important distinguishing factors for sour service petroleum transport plate, as Dillinger indicates, the separate product characteristic fields for those elements would distinguish sour service petroleum transport plate products from other plate products.

Similarly, the heat treatment product characteristic may also distinguish these products from other petroleum transport plate products. The Sour Service Presentation refers to the use of "Q&T" (*i.e.*, quenching and tempering) to effect the desired end properties of the sour service petroleum transport plate. Products that have been quenched and tempered will be assigned a different heat treatment code than those which have not undergone that treatment.

> Therefore, we do not agree that a new quality reporting code is required to distinguish sour service petroleum transport plate from other products. We find that Dillinger did not subsequently provide information that would justify either allowing it to report revised quality codes for different petroleum transport plate products or revisiting this issue once parties had submitted their questionnaire responses. Instead, we find that Dillinger has failed to both: 1) justify creating a quality code subcategory for this product; and 2) clearly identify the products that would be classified in its proposed subcategory. Consequently, consistent with the Preliminary Determination, we continued to reassign all products which Dillinger reported with a quality code of 771 to have a quality code 772, thereby assigning all petroleum transport plate products the same quality code.

Decision Memorandum at 77–79 (footnotes omitted).

The model-match methodology, based on 19 U.S.C. § 1677(16)(A), determines matches based on physical differences. Courts have noted that this is a consideration apart from whether physical characteristics result in price and cost differences between products. *See Maverick Tube Corp. v. United States*, 39 CIT ___, ___, 107 F. Supp. 3d 1318, 1330 (2015) ("differences in costs do not constitute differences in products in and of themselves").

As noted above, Dillinger explains that its sour transport plate is used with "sour" petroleum products containing high amounts of hydrogen sulfide, thus the sour transport plate is made with "extremely low levels of phosphorus and sulfur" to withstand the corrosion effects of the hydrogen sulfide. *See* Dillinger MSJ at 11. Dillinger thus maintains that there are non-minor, commercially significant differences in physical characteristics between sour transport plate and other petroleum transport products. *See id.* at 11–15; Dillinger MSJ Reply at 4–7 (citing *Pesquera Mares Australes Ltda. v. United States,* 266 F.3d 1372, 1384 (Fed. Cir. 2001) for proposition that merchandise can only be treated as identical under 19 U.S.C. § 1677(16)(A) if it has either (1) no differences in physical characteristics or (2) the differences are only minor and 'not commercially significant'").

Dillinger highlights *Bohler Bleche GMBH & Co. KG v. United States*, 42 CIT ___, 324 F. Supp. 3d 1344 (2018) ("*Bohler*"), in which the court "struck down the model-match methodology used in this investigation." Dillinger MSJ Reply at 1. Relying on this decision, Dillinger maintains that it should receive similar relief as the respon-

dent in that case. *Id.* at 2. In *Bohler*, the plaintiff-respondents challenged a final determination by Commerce, which relied on the same model-match methodology that was used in the underlying proceeding here, arguing that Commerce had failed to adequately account for "the alloy content of Plaintiffs' specialized high alloy steel products, thereby failing to account for significant differences in physical characteristics, costs, and price." *See Bohler*, 42 CIT at ___, 324 F. Supp. 3d at 1348. While Commerce there disagreed "that the newly proposed methodologies would have the effect of creating closer matches between exported merchandise and home market merchandise," the court ultimately agreed with the plaintiffs that the "methodology insufficiently accounts for alloy content in Plaintiffs' products" and remanded the issue to Commerce for reconsideration. *Id.*, 42 CIT at ___, 324 F. Supp. 3d at 1348, 1354. On remand, Commerce changed course and revised its methodology to better account for these alloy content differences.[4]

Here, in a similar fashion, Commerce rejected Dillinger's contention that the record reflected that lower levels of phosphorus and sulfur in these steels distinguished them from other petroleum transport plate. *See Decision Memorandum* at 77–79 (reviewing record evidence cited by Dillinger in support of its position, and explaining findings that "Dillinger has failed to both: 1) justify creating a quality code subcategory for this product; and 2) clearly identify the products that would be classified in its proposed subcategory."). Thus, although Commerce acknowledged the record evidence supporting a finding that Dillinger's sour transport plate had different physical characteristics than other comparable products (*i.e.*, lower maximum sulfur content), Commerce ultimately did not agree "that a new quality reporting code is required to distinguish sour service petroleum transport plate from other products." *Decision Memorandum* at 79. Given Commerce's apparent recognition in *Bohler* that its model-match methodology insufficiently accounted for variations in the alloy content of the products at issue in that proceeding, the court concludes that Commerce should have the opportunity to explain why a similar outcome is not warranted here.

[4] While Commerce noted that it was changing its model-match methodology to meet the respondent's concerns in that matter "under protest," the Government did not appeal the court's subsequent decision sustaining those remand results. *See Bohler Bleche Remand Results* at 2, Court No. 17–00163, ECF No. 55 (explaining that Commerce would adopt respondent's proposed alternative model-match methodology under protest); *Bohler Bleche GMBH & Co. KG v. United States*, 43 CIT ___, 362 F. Supp. 3d 1377 (2019) (sustaining as reasonable Commerce's adoption on remand of plaintiffs' alternative model-match methodology "as it fairly compares commercially significant differences in physical characteristics").

Because *Bohler* and Commerce's subsequent remand results in that action were not published until after the submission of the Government's response brief in this litigation, Commerce has had no opportunity to address whether the circumstances in *Bohler* are comparable to those here. At oral argument, the court noted its concern for the parties that any response by the Government or Defendant-Intervenor to the circumstances of *Bohler* might constitute *post hoc* rationalization that the court could not use to sustain the decision-making of Commerce without potentially violating fundamental principles of administrative law. *See, e.g., Burlington Truck Lines Inc. v. United States*, 371 U.S. 156, 168 (1962) ("courts may not accept appellate counsel's *post hoc* rationalizations for agency action"); *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947) (warning that courts "must judge the propriety of [agency] action solely by the grounds invoked by the agency"). As the circumstances in *Bohler* appear analogous, the court reiterates its observation that "[r]easoned decision-making requires a certain measure of consistency." *See Dillinger I*, 43 CIT at ___, 399 F. Supp. 3d at 1257. Accordingly, the court remands this issue for Commerce to further explain why its determination is reasonable in light of its approach in *Bohler*, or if appropriate, reconsider its rejection of Dillinger's proposed quality code for sour transport plate.

III. Conclusion

For the foregoing reasons, it is hereby

ORDERED that Commerce's determinations as to the cost adjustments for Dillinger's non-prime plate, as well as the application of partial AFA to Salzgitter, are sustained; it is further

ORDERED that Commerce's determination to reject Dillinger's proposed quality code for sour transport plate is remanded for further explanation, and if appropriate, reconsideration; it is further

ORDERED that Commerce shall file its remand results on or before September 7, 2023; and it is further

ORDERED that, if applicable, the parties shall file a proposed scheduling order with page limits for comments on the remand results no later than seven days after Commerce files its remand results with the court.

Dated: June 23, 2023
New York, New York

/*s*/ *Leo M. Gordon*
JUDGE LEO M. GORDON

Slip Op. 23–95

PROSPERITY TIEH ENTERPRISE CO., LTD. AND YIEH PHUI ENTERPRISE CO., LTD., Plaintiffs, v. UNITED STATES, Defendant, and CALIFORNIA STEEL INDUSTRIES, INC., CLEVELAND-CLIFFS STEEL CORP., CLEVELAND-CLIFFS STEEL LLC, NUCOR CORP., STEEL DYNAMICS, INC., AND UNITED STATES STEEL CORP., Defendant-Intervenors.

Before: Timothy C. Stanceu, Judge
Consolidated Court No. 16–00138

[Sustaining certain decisions reached in a second remand redetermination submitted in response to court order]

Dated: June 23, 2023

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Roger B. Schagrin and *Jeffrey D. Gerrish*, Schagrin Associates, of Washington, D.C., for defendant-intervenors Steel Dynamics, Inc. and California Steel Industries, Inc.

Thomas M. Beline and *Sarah E. Shulman*, Cassidy Levy Kent (USA) LLP, of Washington, D.C., for defendant-intervenor United States Steel Corp.

OPINION

Stanceu, Judge:

Plaintiffs Prosperity Tieh Enterprise Co., Ltd. ("Prosperity" or "PT") and Yieh Phui Enterprise Co., Ltd. ("Yieh Phui" or "YP") brought actions, now consolidated, to contest an affirmative "less-than-fair-value" determination issued by the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Depart-

ment") in an antidumping duty investigation of certain corrosion resistant steel products ("CORE") from Taiwan.

Before the court is the decision (the "Second Remand Redetermination"), Commerce submitted in response to this Court's opinion and order in *Prosperity Tieh Enterprise Co., Ltd. v. United States*, 45 CIT __, 532 F. Supp. 3d 1401 (2021) ("*Prosperity IV*"). Final Results of Redetermination Pursuant to Ct. Remand (Int'l Trade Admin. Feb. 14, 2022), ECF Nos. 155–1 (conf.), 156–1 (public) ("*Second Remand Redetermination*").

In *Prosperity IV*, this Court, responding to the mandate of the U.S. Court of Appeals for the Federal Circuit ("Court of Appeals") in *Prosperity Tieh Enterprise Co., Ltd. v. United States*, 965 F.3d 1320 (Fed. Cir. 2020) ("*Prosperity III*"), ordered Commerce to "submit, in accordance with the instructions herein, a second determination upon remand" that is "consistent with the opinion of the Court of Appeals." *Prosperity IV*, 45 CIT at __, 532 F. Supp. 3d at 1409.

Plaintiffs and defendant support the Second Remand Redetermination; defendant-intervenors are opposed. The court sustains decisions Commerce reached in the Second Remand Redetermination but, as discussed later in this Opinion, does not sustain a speculative statement Commerce improperly included in that document.

I. BACKGROUND

Background on this case is presented in prior opinions and is briefly summarized and supplemented herein. *Prosperity IV*, 45 CIT at __, 532 F. Supp. 3d at 1402–05; *Prosperity III*, 965 F.3d at 1322–26; *Prosperity Tieh Enterprise Co., Ltd. v. United States*, 42 CIT __, __, 358 F. Supp. 3d 1363, 1365–66 (2018) ("*Prosperity II*"); *Prosperity Tieh Enterprise Co., Ltd. v. United States*, 42 CIT __, __, 284 F. Supp. 3d 1364, 1366–68 (2018) ("*Prosperity I*").

A. The Parties

Plaintiffs Prosperity and Yieh Phui are Taiwanese producers and exporters of CORE. Defendant is the United States. The defendant-intervenors, domestic producers of steel products, are California Steel Industries, Inc., Cleveland-Cliffs Steel Corp., Cleveland-Cliffs Steel LLC, Nucor Corp., Steel Dynamics, Inc., and United States Steel Corp.

B. The Department's Final and Amended Final Less-than-Fair-Value Determinations

The agency decision contested in this litigation (the "Amended Final Determination") was published as *Certain Corrosion-Resistant Steel Products From India, Italy, the People's Republic of China, the*

Republic of Korea and Taiwan: Amended Final Affirmative Antidumping Determination for India and Taiwan, and Antidumping Duty Orders, 81 Fed. Reg. 48,390 (Int'l Trade Admin. July 25, 2016) ("*Amended Final Determination and Order*"), which modified the Department's earlier decision (the "Final Determination") in *Certain Corrosion-Resistant Steel Products From Taiwan: Final Determination of Sales at Less Than Fair Value and Final Affirmative Determination of Critical Circumstances, in Part*, 81 Fed. Reg. 35,313 (Int'l Trade Admin. June 2, 2016) ("*Final Determination*"). The period of investigation ("POI") was April 1, 2014 through March 31, 2015. *Final Determination*, 81 Fed. Reg. at 35,313.

In the Final Determination, Commerce determined an estimated weighted average dumping margin of 3.77% *ad valorem* for what it treated as a single entity consisting of Prosperity, Yieh Phui, and a third Taiwanese producer of CORE, Synn Industrial Co., Ltd. ("Synn"). *Final Determination*, 81 Fed. Reg. at 35,314. Commerce incorporated by reference an explanatory memorandum to support its conclusions in the Final Determination. *Issues and Decision Memorandum for the Final Determination in the Antidumping Duty Investigation of Certain Corrosion-Resistant Steel Products from Taiwan* (May 24, 2016), ECF No. 42–6, PR Doc. 372 ("*Final I&D Mem.*").[1] In the Amended Final Determination, Commerce modified its calculation in response to an allegation of a ministerial error and assigned the Prosperity/Yieh Phui/Synn entity a revised estimated weighted-average dumping margin of 10.34%. *Amended Final Determination and Order*, 81 Fed. Reg. at 48,391.

In the preliminary phase of its investigation, Commerce identified Yieh Phui and Prosperity as "mandatory" respondents, i.e., respondents it would investigate individually. *Prosperity IV*, 45 CIT at __, 532 F. Supp. 3d at 1403 (citing *Selection of Respondents for the Antidumping Duty Investigation on Certain Corrosion-Resistant Steel Products from Taiwan* at 4 (Int'l Trade Admin. July 20, 2015), PR Doc. 62). Commerce identified Synn as another Taiwanese producer of CORE that had manufactured but had not exported the subject merchandise to the United States during the POI. *Prosperity I*, 42 CIT at __, 284 F. Supp. 3d at 1367 n.4 (citation omitted). Commerce preliminarily determined that Synn was an affiliate of Yieh Phui "pursuant to section 771(33)(E) of the [Tariff] Act," 19 U.S.C. § 1677(33)(E), and

[1] References cited as "PR Doc. __" are to documents that were on the record as of the proceedings in *Prosperity Tieh Enterprise Co., Ltd. v. United States*, 42 CIT __, 284 F. Supp. 3d 1364 (2018), Joint Appendix (June 7, 2017), ECF Nos. 73 (conf.), 74 (public). References cited as "Remand PR Doc. __" are to documents placed on the agency record during Commerce's redetermination proceedings, Joint Appendix (May 20, 2022), ECF Nos. 171 (conf.), 172 (public). All citations are to public versions.

preliminarily determined that Yieh Phui and Synn "should be collapsed together and treated as a single company, pursuant to the criteria laid out in 19 C.F.R. § 351.401(f)." *Prosperity IV*, 45 CIT at __, 532 F. Supp. 3d at 1403 (citing *Final Determination*, 81 Fed. Reg. at 35,314). For both Prosperity and the combined Yieh Phui/Synn entity, Commerce "preliminarily determined zero margins" and therefore "reached a negative less-than-fair-value determination." *Id.* (citing *Certain Corrosion-Resistant Steel Products from Taiwan: Negative Preliminary Determination of Sales at Less Than Fair Value*, 81 Fed. Reg. 72, 73 n.8 (Int'l Trade Admin. Jan. 4, 2016)).

Commerce reached an affirmative final less-than-fair-value determination. *Id*. (citing *Final I&D Mem.* at 11–19 and *Final Determination*, 81 Fed. Reg. at 35,313). Commerce continued to "collapse" Yieh Phui and Synn, i.e., treat them as a single entity, and "determined that PT is also affiliated with Synn" such that "the three companies should be collapsed together and treated as a single company." *Id*., 45 CIT at __, 532 F. Supp. 3d at 1404 (quoting *Final Determination*, 81 Fed. Reg. at 35,314). Concluding that Prosperity had "misreported the yield strength of certain of its sales of CORE," Commerce, "invoking its authority under 19 U.S.C. § 1677e, applied 'facts otherwise available' and an 'adverse inference' [described by Commerce as 'adverse facts available'] to the costs of the sales it found to be misreported." *Id*. Commerce assigned the combined Prosperity/Yieh Phui/Synn entity an estimated weighted-average dumping margin of 3.77%. *Id*. While recalculating this margin to 10.34% in the Amended Final Determination to adjust for the ministerial error, Commerce did not alter its decisions to collapse the three companies and to draw an adverse inference for the reporting by Prosperity. *Id*. (citing *Amended Final Determination and Order*, 81 Fed. Reg. at 48,393).

C. Prior Proceedings

In contesting the Amended Final Determination, plaintiffs sought judgment on the agency record. Rule 56.2 Mot. For J. Upon the Agency R. on Behalf of Pl. Yieh Phui Enterprise Co., Ltd. (Dec. 15, 2016), ECF No. 51; Mem. of Points and Authorities in Supp. of Pl. Yieh Phui Enterprise Co., Ltd.'s Rule 56.2 Mot. for J. on the Agency R. (Dec. 15, 2016), ECF Nos. 52 (conf.), 53 (public); Mot. of Pl. Prosperity Tieh Enterprise Co., Ltd. for J. Upon the Agency R. & Pl. Prosperity Tieh Enterprise Co., Ltd.'s Br. in Supp. of its Mot. for J. on the Agency R. (Dec. 15, 2016), ECF Nos. 54 (conf.), 55 (public). Plaintiffs contested the Department's decision to collapse Prosperity with Yieh Phui/Synn and the Department's invoking facts otherwise available with an adverse inference in response to Prosperity's reported yield

strengths. *Prosperity IV*, 45 CIT at __, 532 F. Supp. 3d at 1404.

In *Prosperity I*, this Court ruled that Commerce reached certain findings unsupported by the record in making its collapsing decision. *Prosperity I*, 42 CIT at __, 284 F. Supp. 3d at 1375. This Court also ruled that Commerce had erred in using an adverse inference on a finding that Prosperity had misreported yield strength information, Commerce having failed to specify that yield strength was to be reported according to an external industry standard as opposed to manufacturer's specifications. *Id.*, 42 CIT at __, 284 F. Supp. 3d at 1376–82. Reasoning that Commerce had an obligation to issue adequate reporting instructions for its questionnaire, this Court noted a "lack of specificity arising from the breadth of the terms Commerce used" and the "absence of definitions for those terms." *Id*., 42 CIT at __, 284 F. Supp. 3d at 1380.

Commerce issued its "First Remand Redetermination" in response to the order in *Prosperity I*. Final Results of Redetermination Pursuant to Ct. Remand (May 23, 2018), ECF Nos. 86 (conf.), 87 (public) ("*First Remand Redetermination*"). Commerce "again determined that it should collapse Prosperity with the Yieh Phui/Synn entity" and, under protest, "used Prosperity's reported yield strength data for its CORE production rather than facts otherwise available and an adverse inference." *Prosperity IV*, 45 CIT at __, 532 F. Supp. 3d at 1405 (citing *First Remand Redetermination* at 2). Commerce determined an estimated weighted-average dumping margin of 3.66% for the combined entity. *Id*. (citation omitted). In *Prosperity II*, the court sustained the First Remand Redetermination.

The plaintiffs and one of the defendant-intervenors (AK Steel Corp.) appealed the judgment accompanying *Prosperity II*, and in *Prosperity III* the Court of Appeals vacated this Court's judgment in *Prosperity II* and remanded the decision "for further proceedings consistent with this opinion." *Prosperity III*, 965 F.3d at 1328. Specifically, the Court of Appeals held that "Commerce did not engage in a permissible analysis in reaching its decision on collapsing of producers" and "further, that Commerce did not err in invoking its authority to use facts otherwise available with an adverse inference in response to Prosperity's reporting of yield strength." *Prosperity IV*, 45 CIT at __, 532 F. Supp. 3d at 1405 (citing *Prosperity III*, 965 F.3d at 1326–28). Pursuant to the mandate issued by the Court of Appeals in *Prosperity III*, CAFC Mandate in Appeal # 19–1400 (Sept. 8, 2020), ECF No. 132, this Court remanded the First Remand Redetermination to Commerce in *Prosperity IV*.

Commerce issued a draft version of the Second Remand Redetermination to the parties and invited comments, which it received from

defendant-intervenors and Yieh Phui. *Draft Results of Redetermination Pursuant to Ct. Remand* (Int'l Trade Admin. Nov. 24, 2021), Remand PR Doc. 2; *Corrosion-Resistant Steel Products From Taiwan: Comments on Draft Results of Second Redetermination* (Dec. 10, 2021), Remand PR Doc. 11; *Corrosion-Resistant Steel Products from Taiwan: Rebuttal Comments on the Second Draft Results of Redetermination* (Jan. 26, 2022), Remand PR Doc. 15. Commerce submitted the Second Remand Redetermination to the court on February 14, 2022.

Plaintiffs submitted comments in support of the Second Remand Redetermination on March 30, 2022. Pl. Prosperity Tieh's Comments on the U.S. Department of Commerce's [February 14], 2022 Final Redetermination Pursuant to Ct. Remand, ECF No. 163; Comments of Pl. Yieh Phui Enterprise Co., Ltd. on the Final Results of Redetermination Pursuant to Ct. Remand, ECF No. 162. Defendant-intervenors submitted their comments in opposition on the same day. Def.-Intervenors' Comments on Final Results of Redetermination Pursuant to Ct. Remand, ECF Nos. 164 (conf.), 165 (public) ("Def.-Ints.' Comments"). Defendant responded to defendant-intervenors' comments on May 6, 2022, Def.'s Resp. to Def.-Intervenors' Comments on Remand Results, ECF Nos. 168 (conf.), 169 (public), and updated their response on June 2, 2022, Def.'s Corrected Resp. to Def.-Intervenors' Comments on Remand Results, ECF Nos. 177 (conf.), 178 (public).

II. DISCUSSION

A. Jurisdiction and Standard of Review

The court exercises subject matter jurisdiction under section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(c), which grants jurisdiction over civil actions brought under section 516A of the Tariff Act of 1930 ("Tariff Act"), *as amended* 19 U.S.C. § 1516a.[2] Among the decisions that may be contested according to Section 516A are "[f]inal affirmative determinations" that Commerce issues concerning the sale of goods at less than fair value. *Id*. §§ 1516a(a)(2)(B)(i), 1673d. In reviewing an agency determination, including one issued in response to court remand, the court must set aside any determination, finding, or conclusion found "to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." *Id*. § 1516a(b)(1)(B)(i). Substantial evidence refers to "such relevant evidence as a reasonable mind might accept as adequate to support a

[2] All citations herein to the United States Code are to the 2012 edition except where otherwise noted. All citations to the Code of Federal Regulations are to the 2021 edition.

conclusion." *SKF USA, Inc. v. United States*, 537 F.3d 1373, 1378 (Fed. Cir. 2008) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

B. The Second Remand Redetermination

In the Second Remand Redetermination, Commerce "reconsidered the determination to collapse Prosperity with YP/Synn upon further consideration of the record" and "determined that the record does not provide sufficient information to support collapsing Prosperity with the YP/Synn entity." *Second Remand Redetermination* at 2. Effectuating this determination, Commerce "recalculated separate margins for Prosperity and YP/Synn." *Id*. at 2–3.

Commerce determined an estimated weighted-average dumping margin for Prosperity of 11.04%, *id*. at 4, which, in response to this Court's order effectuating the decision of the Court of Appeals, reflected the reinstatement of findings for the use of facts otherwise available and an adverse inference in response to Prosperity's reporting of yield strength, *id*. at 7. Commerce determined a *de minimis* estimated weighted-average dumping margin of 1.20% for what it now determined to be the separate Yieh Phui/Synn entity, "which, if sustained by the Court, will result in the exclusion of entries of subject merchandise produced and exported by the YP/Synn entity from the antidumping duty order." *Id*. at 4; *see Amended Final Determination and Order*, 81 Fed. Reg. at 48,391–93.

C. Commerce's Decision in the Second Remand Redetermination Not to Collapse Prosperity with the Yieh Phui/Synn Entity

In *Prosperity III*, the Court of Appeals held that:

> Commerce, in applying its collapsing regulation [19 C.F.R. § 351.401(f)] to a situation involving three or more affiliated producers, must apply the criteria in its regulation to the evidence of relationships between all three or more of those producers, even when a previous decision to collapse two of those producers was not contested by any party to the litigation that gave rise to the remand proceeding.

Prosperity IV, 45 CIT at __, 532 F. Supp. 3d at 1406 (citing *Prosperity III*, 965 F.3d at 1326). Commerce, in this proceeding, must determine "either: (i) the relationship between each individual entity being considered for collapse (here, Prosperity to Synn, Prosperity to Yieh, and Yieh to Synn) or (ii) the relationship between an individual entity and an already collapsed entity with which it is being considered for further collapsing (here, Prosperity to Yieh/Synn)." *Id*., 45 CIT at __,

532 F. Supp. 3d at 1406–07 (quoting *Prosperity III*, 965 F.3d at 1328). "The Court of Appeals viewed as impermissible the Department's deeming an analysis of the relationship between Prosperity and Synn to *be* an analysis of the relationship between Prosperity and the Yieh Phui/Synn entity, regardless of the earlier, uncontested collapsing [of Yieh Phui and Synn]." *Id*., 45 CIT at __, 532 F. Supp. 3d at 1407.

In its earlier determinations (the Final and Amended Final Determinations, as well as the First Remand Redetermination), Commerce analyzed *only* the relationships between Prosperity and Synn and between Yieh Phui and Synn and, upon determining that Prosperity and Synn could be collapsed, assumed that Prosperity also could be collapsed with the Yieh Phui/Synn single entity. Commerce did not assess separately whether Prosperity and Yieh Phui could be collapsed, independently of their respective relationships with Synn. In the Second Remand Redetermination, Commerce chose to evaluate "the relationship between Prosperity and the Yieh Phui component of the YP/Synn single entity." *Second Remand Redetermination* at 2.

Under its regulations, Commerce may "treat two or more . . . producers as a single entity" in antidumping proceedings when three requirements are satisfied. 19 C.F.R. § 351.401(f); *see also Prosperity III*, 965 F.3d at 1323. First, the entities must be affiliated. 19 C.F.R. § 351.401(f)(1). Second, affiliated producers must "have production facilities for similar or identical products that would not require substantial retooling of either facility in order to restructure manufacturing priorities." *Id*. Third, "there is a significant potential for the manipulation of price or production." *Id*.

For purposes of the first requirement, Commerce determined that Prosperity and Synn were "affiliated" within the meaning of section 771(33)(E) of the Tariff Act, 19 U.S.C. § 1677(33)(E) (2018), "based on Prosperity's ownership share of Synn during the period of investigation (POI)." *Second Remand Redetermination* at 10. Commerce found, further, that "Prosperity and Yieh Phui were affiliated based on a familial relationship and because together they were in a position to control Synn, pursuant to sections 771(33)(A) and (F) of the [Tariff] Act, respectively." *Id*. at 10–11. Commerce found the second requirement to be met because "Prosperity, Synn, and Yieh Phui all produced subject merchandise during the POI" and, therefore, that "there was no need for these producers to retool their facilities in order to restructure manufacturing priorities." *Id*. at 11.

In contesting the Department's decision in the Second Remand Redetermination not to collapse Prosperity and the Yieh Phui component of the Yieh Phui/Synn entity, defendant-intervenors argue that substantial record evidence did not support the Department's

negative determination under the third requirement in § 351.401(f)(1) for collapsing, "a significant potential for manipulation of price or production." As required by its regulation, Commerce addressed the following non-exhaustive criteria in applying the third requirement:

> (1) "[t]he level of common ownership," (2) "the extent to which managerial employees or board members of one firm sit on the board of directors of an affiliated firm," and (3) "whether operations are intertwined," for example, "through the sharing of sales information, involvement in production and pricing decisions, the sharing of facilities or employees, or significant transactions between the affiliated producers."

Id. at 11–12 (quoting 19 C.F.R. § 351.401(f)(2)(i)–(iii)) (citation omitted). "While the Department 'need not find all of the factors . . . present,' Commerce 'must consider the totality of the circumstances.'" *Prosperity IV*, 45 CIT at __, 532 F. Supp. 3d at 1406 (quoting *Prosperity III*, 965 F.3d at 1323 (citations omitted)). Commerce is not precluded from collapsing even where "not all three of the factors are met or where the case for collapsing is not strong under each one of them when considered separately." *Prosperity II*, 42 CIT at __, 358 F. Supp. 3d at 1368. Nevertheless, collapsing "requires a '*significant*' potential for manipulation of price or production," which is a "more demanding standard." *Prosperity IV*, 45 CIT at __, 532 F. Supp. 3d at 1407 (quoting *Prosperity III*, 965 F.3d at 1323–24 (citation omitted)).

In its Final Determination, Amended Final Determination, and First Remand Redetermination, Commerce "did not consider Prosperity's relationship with Yieh or Prosperity's relationship with Yieh/Synn." *Prosperity III*, 965 F.3d at 1325. To address this shortcoming, Commerce conducted "additional analysis of the relationship between Prosperity and Yieh Phui not addressed previously." *Second Remand Redetermination* at 10. Based on its new analysis, Commerce concluded "that the record contains insufficient evidence to form a factual basis that 'significant potential for manipulation' exists between Yieh Phui and Prosperity." *Id*. at 12. In reaching that conclusion, Commerce addressed the three factors provided in 19 C.F.R. § 351.401(f)(2) and determined that they were not satisfied:

> First, Prosperity and Yieh Phui do not share any significant common ownership, and there is no overlap in their largest shareholders. Second, none of Prosperity or Yieh Phui's managers and directors serve as managers or directors of the other firm. Third, the record does not reflect that the operations of Prosperity and Yieh Phui are intertwined in any way; specifi-

> cally, the firms do not share sales information, have no involvement in each other's production and pricing decisions, do not share facilities or employees, and had no significant transactions with each other.

Id. (citations omitted). Commerce concluded, further, that "[t]he record contains several specific factors which *could* support Commerce's finding of a 'potential for manipulation of price or production' between Prosperity and Yieh Phui," *id*., but also concluded these were "scant pieces of evidence" that were insufficient because "the collapsing criterion requires a 'significant' potential for manipulation of price or production based on the totality of the circumstances," *id*. at 13 (footnote omitted). Among the "factors" Commerce considered relevant but insufficient to show such a significant potential were:

> (1) a familial relationship between Prosperity and Yieh Phui (suggesting common family control); and (2) the notation in Prosperity's verification report that an "informal agreement" exists between Prosperity and Yieh Phui which provides that Prosperity and Yieh Phui may each appoint one of Synn's three directors (suggesting informal coordination between respondents).

Id. at 12–13 (footnote omitted).

Commerce considered the first factor insufficient under the criterion because, despite the familial relationship between the two companies (in both of which members of the Lin family held various positions in ownership, directorship, or management), "the record does not support common family control by a family grouping." *Id*. at 13. Commerce found, as to the second factor, that "the informal agreement noted in the verification report is elsewhere established on record as a formalized agreement, whereby the three largest shareholders in Synn each appoint a representative director to Synn's board." *Id*. (footnote omitted). "Such an arrangement between the largest shareholders in a company is not extraordinary and we do not consider it, in itself, evidence of potential for manipulation." *Id*.

On the decision not to collapse Prosperity and Yieh Phui, defendant-intervenors argue that Prosperity and Yieh Phui had the potential to manipulate price or production because of the roles various members of the Lin family, considered "in the aggregate," performed in ownership, board membership, and management of the two companies. Def.-Ints.' Comments 9–13. According to their argument, Commerce should have applied the criteria of 19 C.F.R. §§ 351.401(f)(2)(i) (level of common ownership) and (ii) (extent to which

managerial employees or board members of one firm sit on the board of directors of the affiliated firm) so as to treat the Lin family as a unified "family entity." *Id*. at 10. They maintain that "Commerce rejected this analysis, however, because it erroneously believed that, even in cases involving control of two companies by a family entity, the factors at 19 C.F.R. §§ 351.401(f)(2)(i) and (ii) can support collapsing only when the *same individual family members* own both companies . . . and when the *same individual family members* serve as managers or directors of both companies." *Id*. (citing *Second Remand Redetermination* at 26, 29, 30).

1. Participation of Members of the Lin Family in the Ownership, Control, or Management of Prosperity and Yieh Phui

Commerce considered the Lin family to be something other than a "unified" family entity and instead regarded it as having two distinct branches. Commerce found that the ownership, board, or management of Prosperity involved a different branch of the Lin family than did the ownership, board, or management of Yieh Phui. Commerce found, specifically, that "the Lin family members involved in the ownership, board, or management of Prosperity and its affiliates are all direct family relations (*i.e.*, sibling, spouse, or parent/child) of Mr. Kao-Huang Lin" and that "the Lin family members involved in the ownership, board, or management of Yieh Phui are all direct family relations of Mr. Lin, I Shou." *Second Remand Redetermination* at 26. Commerce found, further, that:

> Critically, there is no overlap of ownership, directorship, or management by any individual member of either branch of the Lin family with the other (*i.e.*, involvement of Lin family members in Yieh Phui remains distinct to direct family members of Mr. Lin, I Shou, and the involvement of Lin family members in Prosperity remains distinct to direct family members of Mr. Kao-Huang Lin).

Id. at 26–27 (footnote omitted). Commerce found, further, that "Prosperity and Yieh Phui are competitors" and "there is very little personal or professional interaction among the family members involved in the respective companies." *Id*. at 27 (footnote omitted). Commerce concluded that "the two Lin family groups do not operate collectively, as a cohesive unit, sharing a common interest or consisting of relationships that could impact business decisions." *Id.* at 27–28.

Asserting that "Commerce assumed that a collapsing analysis must be conducted at the level of individual family members rather than

considering the family as a collective unit," defendant-intervenors insist that "Commerce is simply wrong as a matter of law." Def.-Ints.' Comments 11. They submit that "[t]he cases make clear that the regulatory factors to be considered under 19 C.F.R. § 351.401(f)(2) are non-exhaustive, and the statute broadly permits Commerce to find a 'significant potential for manipulation' based on family ownership, management positions, and board memberships *in the aggregate*." *Id*. at 11. They argue that "Commerce failed to properly analyze the significance of collective family ownership and control here because it erroneously believed that it was precluded from finding a potential for manipulation absent the appearance of the same individuals on the boards of both PT and YP, or ownership by the same individuals." *Id*. at 12. These arguments are unconvincing.

No rule of law required Commerce to consider an extended family such as the Lin family to be a single, unified entity when applying the criteria of 19 C.F.R. §§ 351.401(f)(2)(i) and (ii).[3] Moreover, defendant-intervenors mischaracterize the reasoning Commerce employed. Commerce did not conclude that, as a matter of law, it could not find a significant potential for manipulation of price or production "absent the appearance of the same individuals on the boards of both PT and YP, or ownership by the same individuals." *Id*. at 12. It concluded instead that "the mere fact that there are 'familial relations' between the two entities does not *in itself* support a determination that the two entities constitute a single person for purposes of affiliation and collapsing." *Second Remand Redetermination* at 26 (emphasis added) (citing *Echjay Forgings v. United States*, 44 CIT __, __, 475 F. Supp. 3d 1350, 1374 (2020)). Commerce performed the required analysis, making its collapsing determination according to its non-exhaustive criteria and based on a totality of the circumstances. Defendant-intervenors arguments amount, at the most, to a contention that Commerce *could have* found that one or more of its criteria were met based on the familial relationships. They do not demonstrate that Commerce reached findings unsupported by substantial record evidence, considered on the whole, such that it was required to rule otherwise than it did.

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[3] In support of this legal argument, defendant-intervenors cite *Echjay Forgings v. United States*, 44 CIT __, 475 F. Supp. 3d 1350 (2020), *Jinko Solar Co. v. United States*, 41 CIT __, 229 F. Supp. 3d 1333 (2017), and *Zhaoqing New Zhongya Aluminum Co. v. United States*, 39 CIT __, 70 F. Supp. 3d 1298 (2015). Def.-Intervenors' Comments on Final Results of Redetermination Pursuant to Ct. Remand, ECF Nos. 164 (conf.), 165 (public). The holdings in these cases do not support the existence of a rule or principle under which Commerce was required, on the record before it, to regard the Lin family as a single, unified entity.

2. The Department's Considering a Development Occurring After the Close of the POI in Deciding Not to Collapse Prosperity with the Yieh Phui/Synn Entity

Defendant-intervenors argue that Commerce, in declining to collapse Prosperity with the Yieh Phui/Synn entity, improperly considered evidence of an event that occurred after the close of the period of investigation on March 31, 2015. Def.-Ints.' Comments 4–9. The event at issue is Prosperity's divesting itself of an ownership interest in Synn, which divestment became effective in December 2015, after the close of the POI but before Commerce issued the Preliminary Determination in May 2016. *See id*. at 4 (citing *Second Remand Redetermination* at 32–33). According to defendant-intervenors' arguments, considering the divestment was unlawful because it departed from agency practice without explanation, violated the doctrine of "law of the case," and violated the doctrine of judicial estoppel. *Id*. at 4–5.

The Department's deciding to consider record evidence of a post-POI development was atypical, but defendant-intervenors are incorrect that Commerce failed to explain its rationale for doing so. Commerce explained that the divestment was relevant in response to the petitioners' argument in the remand proceeding that "Prosperity and Yieh Phui could manipulate price and production through their ownership of Synn." *Second Remand Redetermination* at 33 (footnote omitted). Commerce explained, further, in responding to this argument, that "the collapsing criterion standard is focused on the price or production manipulation which might transpire in the future," and, accordingly, that "the fact that Prosperity divested its interest in Synn prior to the issuance of the *Preliminary Determination* and, thus, prior to the imposition of AD duties indicates that concerns regarding the potential for future manipulation are unfounded." *Id*. (footnote omitted).

Nor are defendant-intervenors correct in asserting that Commerce acted contrary to what they term "the law of the case." According to their argument, "we have a clear legal finding—upheld by this Court—that transactions or occurrences are relevant to 'future manipulation' in the collapsing analysis only when they take place during the POI" and "[t]hat particular issue already has been resolved and may not be reopened in this subsequent stage of the litigation." Def.-Ints.' Comments 8. For support, they rely upon this Court's rulings in *Prosperity II* and *Prosperity I*. *Id*. at 8–9. But neither of those cases ruled so broadly as defendant-intervenors describe.

Prosperity II sustained the Department's decision to collapse Prosperity with the Yieh Phui/Synn entity despite Prosperity's argument that its divesting of the interest in Synn negated a possibility of

future manipulation. *Prosperity II*, 42 CIT at __, 358 F. Supp. 3d at 1369. Commenting that Prosperity's ownership interest in Synn "had significance through and beyond the POI itself," *id*., this Court held that the "collapsing decision rests on findings supported by substantial evidence on the record considered as a whole," *id*., 42 CIT at __, 358 F. Supp. 3d at 1370. In other words, this Court declined to hold that the post-POI divestiture was sufficient in itself to negate the Department's decision to proceed with the collapsing decision. (This Court's affirming that decision in *Prosperity II* was reversed by the Court of Appeals in *Prosperity III* on a different ground, as discussed previously in this Opinion.) The rulings of this Court in *Prosperity II* were not equivalent to a holding that Commerce, in any future circumstance that might arise in this litigation, could not consider evidence of events occurring outside of the POI when making a collapsing decision.

The Second Remand Redetermination presented just such a circumstance. Commerce addressed a new and different issue that arose as a result of the decision of the Court of Appeals in *Prosperity III*: specifically, whether Prosperity should be collapsed with the Yieh Phui portion of the Yieh Phui/Synn entity. The divesting occurring in December 2015 is evidence relevant to that new issue. Defendant-intervenors fail to show that the doctrine of law of the case precluded Commerce from considering whether it was pertinent to, and supportive of, its ultimate decision.

In support of their argument, defendant-intervenors also argue that "[m]oreover, this Court agreed with PT that Commerce erred in considering other evidence regarding cold-rolling services occurring outside the POI to support the collapsing decision." Def.-Ints.' Comments 6 (citing *Prosperity I*, 42 CIT at __, 284 F. Supp. 3d at 1375). They add that "[a]s the Court of Appeals for the Federal Circuit would later describe it, 'the Trade Court vacated Commerce's Final Determination, concluding that Commerce had improperly relied on evidence outside the period of investigation.'" *Id*. (quoting *Prosperity III*, 965 F.3d at 1324). Contrary to defendant-intervenors' argument, this Court's opinion in *Prosperity I* did not state a broad holding that Commerce was not permitted to rely upon evidence outside the POI in making a collapsing decision. Instead, the opinion identified errors by Commerce in concluding that certain evidence of intertwined operations between Prosperity and Synn pertained, or pertained specifically, to the POI when in fact it did not. As the opinion stated, "[r]egarding the timing of the cold-rolling services that Synn performed for Prosperity, defendant admits that Commerce incorrectly stated in the Collapsing Memorandum that the cold-rolling services

Synn provided for Prosperity occurred during the POI." *Prosperity I*, 42 CIT at __, 284 F. Supp. 3d at 1375 (citation omitted). "Defendant also acknowledges that the data detailing Synn's sales to Prosperity and its purchases from Prosperity were for calendar year 2014, rather than for the POI, as found by Commerce." *Id*. (citation omitted).

The court also disagrees with defendant-intervenors that defendant is judicially estopped from arguing in support of the Second Remand Redetermination that Commerce was permitted to consider the post-POI divestment, having argued in an earlier phase of this litigation that Commerce acted permissibly in disregarding it. *See* Def.-Ints.' Comments 8–9. For the Second Remand Redetermination, Commerce considered the divesting of the interest in Synn when resolving an issue that arose in the special circumstance resulting from the decision of the Court of Appeals in *Prosperity III*. That Commerce had discretion to disregard this record evidence during the investigation does not compel a conclusion that Commerce lacked discretion to consider this evidence for a different purpose. In short, the doctrine of judicial estoppel does not bar defendant from arguing that Commerce could exercise its discretion to consider this evidence in resolving the new issue as it arose in the current remand proceeding.

D. The Department's Decision to Maintain Its Collapsing of Yieh Phui and Synn Rather than Collapse Synn and Prosperity

Defendant-intervenors contend that even had Commerce decided (over their objection) not to collapse all three companies into a single entity, it should have collapsed Prosperity and Synn rather than collapsing Yieh Phui and Synn. *Id*. at 13–17. The court does not find merit in this contention.

Defendant-intervenors' argument conflates what actually are two separate issues. In effect, they are arguing that Commerce, on this record, was *required*: (1) to "uncollapse" the Yieh Phui/Synn entity that Commerce recognized early in the investigation; and (2) after that is accomplished, to collapse Prosperity and Synn. Of course, it would not have been possible for Commerce to collapse Prosperity with Synn without first uncollapsing the Yieh Phui/Synn entity (an action not required by the decision of the Court of Appeals in *Prosperity III*), and each of these two separate actions would entail application of the regulatory criteria in 19 C.F.R. § 351.401(f)(2). By conflating the two actions, defendant-intervenors sidestep the issue of whether Synn, following the additional remand order that they seek, could or should be investigated as a separate exporter/producer. Nor do they confront the complications such an uncollapsing, absent a

subsequent collapsing of Prosperity and Synn, would entail. For example, as noted previously in this Opinion, Synn did not export CORE to the United States during the POI. *Prosperity I*, 42 CIT at __, 284 F. Supp. 3d at 1367 n.4 (citation omitted). In addition, as Commerce pointed out, "Yieh Phui reported without objection relevant margin calculation information regarding Synn's cost of production and home market sales." *Second Remand Redetermination* at 35 (footnote omitted).

Commerce addressed the relationships between Yieh Phui and Synn, and those between Prosperity and Synn, as they pertain to the factor described in 19 C.F.R. § 351.401(f)(2)(i), "[t]he level of common ownership." Commerce justifiably concluded that this factor strongly favored the Department's continuing to treat Synn and Yieh Phui as single entity rather than adopting the course of action defendant-intervenors advocate. Commerce noted that "Yieh Phui is the largest single owner of Synn," *id*. at 35, and compared this ownership interest to that of Prosperity, *id*. at 36, which had been Synn's second largest shareholder but divested itself entirely of that ownership interest. Regarding the divesting, defendant-intervenors argue that Commerce improperly considered this event occurring after the close of the POI and assert the same grounds they asserted in arguing for a single entity consisting of all three companies, i.e., that Commerce failed to explain its departure from practice, law of the case, and judicial estoppel. Def.-Ints.' Comments 14. For the reasons discussed above, the court again must reject their argument, and accordingly the court finds no fault in the Department's giving significant weight to Prosperity's divesting of its interest in Synn when deciding in the Second Remand Redetermination not to uncollapse Yieh Phui and Synn and not to collapse Prosperity and Synn. Even though it was completed after the close of the POI, the divestment had significant implications for any determination on whether Prosperity and Synn should be treated as one entity. As Commerce explained with respect to its decision not to collapse all three companies into a single entity, a collapsing determination necessarily involves the issue of whether price or production manipulation might transpire in the future, and the occurrence of the divesting before issuance of the Preliminary Determination indicated that concerns of the potential for such future manipulation were "unfounded." *Second Remand Redetermination* at 33 (citation omitted). The same rationale pertains to the issue of whether Prosperity should be collapsed with only the Synn portion of the Yieh Phui/Synn entity following an uncollapsing of that entity.

Commerce found that the second factor, the extent to which managerial employees or board members of one firm sit on the board of

directors of an affiliated firm, 19 C.F.R. § 351.401(f)(2)(ii), was met with respect to the Yieh Phui-Synn relationship and also with respect to the Prosperity-Synn relationship but also concluded that the ties were more extensive as to the former. Commerce noted that "Yieh Phui's President is on Synn's board, Yieh Phui's vice president is also a vice president of Synn," and "various Yieh Phui managers are also managers at Synn." *Id*. at 35. Commerce stated that "Prosperity's chairman was also on the board of Synn (though no other overlap of board or management between Prosperity and Synn was found)." *Id*. at 36.

On the third factor, i.e., the presence of intertwined operations, 19 C.F.R. § 351.401(f)(2)(iii), Commerce found that they existed between Prosperity and Synn and also between Yieh Phui and Synn. Defendant-intervenors take issue with this finding, asserting that "Synn should be collapsed with PT rather than with YP, because it was highly intertwined operationally with the former and was not at all intertwined with the latter." Def.-Ints.' Comments 14. They add that "in the event that Commerce was deciding which company to collapse with Synn, the 'intertwined operations' factor at 19 C.F.R. § 351.401(f)(2)(iii) should have weighed heavily in favor of collapsing Synn with PT rather than YP." *Id*. at 14–15.

In the Second Remand Redetermination, Commerce found that the record contained "clear evidence of operational intertwining" between Yieh Phui and Synn, "such as co-located facilities and payments of salaries for managers." *Second Remand Redetermination* at 35–36 (footnote omitted). Commerce stated that "[r]ecord evidence demonstrates a significant level of common management of Yieh Phui and Synn Industrial," offering as examples, *inter alia*, that Yieh Phui's president served on Synn's board, its vice president served as Vice President of Synn's Financial Division, and employees of Yieh Phui served as managers of Synn. *Id*. at 36 n.198 (citing *Less Than Fair Value Investigation of Certain Corrosion-Resistant Steel Products from Taiwan: Preliminary Affiliation and Collapsing Memorandum for Yieh Phui Enterprise, Co., Ltd.* at 5 (Int'l Trade Admin. Dec. 21, 2015), PR Doc. 272 ("*Prelim. Collapsing Mem.*")). Defendant-intervenors object that the finding as to common management "relates to the separate factor at 19 C.F.R. § 351.401(f)(2)(ii) regarding the extent to which managerial employees serve both companies, rather than to the 'intertwined operations' factor at 19 C.F.R. § 351.401(f)(2)(iii)." Def.-Ints.' Comments 15. They also point to the lack of "evidence of shared facilities or transactions between the entities." *Id*. This argument is misguided.

The factor described in 19 C.F.R. § 351.401(f)(2)(iii) is broader than defendant-intervenors presume. The text of the regulation contains a non-exhaustive list of exemplars for consideration: "the sharing of sales information, involvement in production and pricing decisions, *the sharing of* facilities or *employees*, or significant transactions between the affiliated producers." 19 C.F.R. § 351.401(f)(2)(iii) (emphasis added). Therefore, it was reasonable for Commerce to regard Yieh Phui's and Synn's co-location of factory facilities and sharing of management personnel as valid considerations under this factor. Overall, the Department's affirmative finding on this factor was within the intended scope of the regulation.

In arguing that Commerce erred in collapsing Synn with Yieh Phui rather than Prosperity, defendant-intervenors highlight that Commerce, in the Second Remand Redetermination, chose to cite the "Preliminary Collapsing Memorandum" for "clear evidence of operational intertwining" between Yieh Phui and Synn, Def.-Ints.' Comments 15 (quoting *Second Remand Redetermination* at 35, 36 n.198 (citing *Prelim. Collapsing Mem.* at 5)), and ignored contrary conclusions contained in its "Final Collapsing Memorandum," *Less Than Fair Value Investigation of Certain Corrosion-Resistant Steel Products from Taiwan: Final Affiliation and Collapsing Memorandum* at 7, PR Doc. 379 (May 24, 2016) (stating, *inter alia*, that "[t]he record does not contain evidence to suggest that operations were intertwined between either Yieh Phui and Synn Industrial or Yieh Phui and Prosperity Tieh during the POI."). This argument is also unpersuasive. Commerce was free to re-examine the record during the remand proceeding and make findings contrary to those it had made during the investigation.

The most that can be said for defendant-intervenors' position is that the record, which contained evidence of transactions between Prosperity and Synn, *see* Def.-Ints.' Comments 16, could have supported a finding that the intertwining of Prosperity's and Synn's operations was more extensive than the intertwining of Yieh Phui's and Synn's operations. But that finding, standing alone, would not invalidate the Department's determination on the issue, which rested primarily on the first two factors of 19 C.F.R. § 351.401(f)(2). Nothing required Commerce to base its conclusion exclusively on the third factor. That the third factor, considered in isolation, could have favored collapsing Synn with Prosperity instead of with Yieh Phui is not a sufficient basis upon which the court may disallow the Department's ultimate conclusion on the question presented. As Commerce concluded,

> For this final redetermination, we find that the higher ownership stake in Synn maintained by Yieh Phui (as its largest

> individual owner), the significant ownership overlap and co-location of factory facilities, and in particular the record information which demonstrates that Prosperity divested its interest in Synn discussed above, support our determination in the Draft Results to include Synn's information in the calculation of the margin for YP/Synn and calculate a separate margin for Prosperity, and we continue to do so in this final redetermination.

Second Remand Redetermination at 36–37. The court must reject defendant-intervenors' contention that the record evidence required Commerce to collapse Synn with Prosperity and not with Yieh Phui.

E. Commerce's Reinstatement of Facts Otherwise Available and an Adverse Inference for the Reporting of Yield Strength Data in the Second Remand Redetermination

The Court of Appeals held in *Prosperity III* that "the Trade Court erred [in *Prosperity II*] when it reversed Commerce's finding that Prosperity misreported yield strength. We vacate that aspect of the Trade Court's judgment." 965 F.3d at 1328. Accordingly, in *Prosperity IV* this court ordered that "in the Second Remand Redetermination Commerce, in determining a margin for Prosperity, shall employ the use of facts otherwise available with an adverse inference as to the reporting of yield strength by Prosperity that it used in its final and amended determinations." *Prosperity IV*, 45 CIT at __, 532 F. Supp. 3d at 1409. Commerce has done so, and no party contests this aspect of the Second Remand Redetermination.

F. Exclusion of the Yieh Phui/Synn Entity from the Antidumping Duty Order

Further to the Department's permissible decisions in the Second Remand Redetermination not to collapse Prosperity with the Yieh Phui/Synn entity and not to alter its decision to maintain Yieh Phui and Synn as a collapsed entity, the court will sustain the Department's assigning Prosperity an estimated weighted average dumping margin of 11.04% and its assigning a *de minimis* estimated weighted average dumping margin of 1.20% to the Yieh Phui/Synn entity, as a consequence of which the Yieh Phui/Synn entity must be excluded from the Order. In sustaining these decisions, the court does not sustain the following statement in the Second Remand Redetermination:

> While YP/Synn will be excluded from the order as a result of this redetermination, in the future, to the extent evidence indicates that the circumstances have changed and that the three companies are acting as a collapsed entity, Commerce has au-

> thority to investigate the relationship of the companies and may find the merchandise produced by the collapsed entity to be subject to the order.

Second Remand Redetermination at 37. In including this statement within the Second Remand Redetermination, Commerce asserts that it may exercise the authority in the future (ostensibly, in a future review conducted under section 751(b) of the Tariff Act, 19 U.S.C. § 1675(b) (2018)) to assess antidumping duties on merchandise produced or exported by a company, entity, or companies that have been excluded from the Order as a result of having been assigned a *de minimis* margin in an antidumping duty investigation. In including this statement in the determination before the court, Commerce is attempting, speculatively, to decide an issue or issues that are not before the court in this litigation and, therefore, are not among the issues Commerce was authorized to decide in the remand proceeding that it conducted under the court's supervision. The court, therefore, does not sustain the sentence in question. The court's entry of a judgment that will conclude this consolidated action does not signify that the sentence in question is a correct statement with respect to law or fact.

III. CONCLUSION

The court will sustain the decisions in the Second Remand Redetermination assigning Prosperity an estimated weighted average dumping margin of 11.04%, assigning the Yieh Phui/Synn entity a *de minimis* margin of 1.20%, and excluding that entity from the Order. The court does not sustain the Department's statement on the possibility that the outcome of a future proceeding may alter or affect the exclusion from the Order of the Yieh Phui/Synn entity. The court will enter judgment accordingly.

Dated: June 23, 2023
New York, New York

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

Index

Customs Bulletin and Decisions
Vol. 57, No. 27, July 12, 2023

U.S. Customs and Border Protection
CBP Decisions

U.S. Court of International Trade
Slip Opinions

GPO U.S. G.P.O.: 2023—423-106/30033