U.S. Customs and Border Protection

DEPARTMENT OF THE TREASURY

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INVESTIGATION OF CLAIMS OF EVASION OF ANTIDUMPING AND COUNTERVAILING DUTIES

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

ACTION: Final rule.

SUMMARY: This document adopts as final, with changes, interim amendments to the U.S. Customs and Border Protection (CBP) regulations that were published in the **Federal Register** on August 22, 2016, as CBP Dec. 16–11, which implemented procedures to investigate claims of evasion of antidumping and countervailing duty (AD/CVD) orders in accordance with section 421 of the Trade Facilitation and Trade Enforcement Act of 2015. This document also announces that CBP deployed a case management system in April 2021, which CBP and the public use for filing, tracking, and adjudicating allegations of evasion of AD/CVD orders.

DATES: Effective on April 17, 2024.

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I. Background

A. Enforce and Protect Act of 2015

On February 24, 2016, President Obama signed into law the Trade Facilitation and Trade Enforcement Act of 2015 (TFTEA), which contains Title IV—Prevention of Evasion of Antidumping and Countervailing Duty Orders (short title "Enforce and Protect Act of 2015" or "EAPA") (Pub. L. 114– 125, 130 Stat. 122, 155 (Feb. 24, 2016) (19 U.S.C. 4301 note)). EAPA established a formal process for U.S. Customs and Border Protection (CBP) to investigate allegations of evasion of antidumping and countervailing duty (AD/CVD) orders. Section 421 of TFTEA amended the Tariff Act of 1930 by establishing a new framework for CBP to investigate allegations of evasion of AD/CVD orders, under newly created section 517 ("Procedures for Investigating Claims of Evasion of Antidumping and Countervailing Duty Orders"), and required that regulations be prescribed as necessary, and provisions be implemented within 180 days of TFTEA's enactment. *See* 19 U.S.C. 1517.

B. Interim Final Rule

On August 22, 2016, CBP published an interim final rule (the "IFR") (CBP Dec. 16–11) in the **Federal Register** (81 FR 56477), setting forth procedures for the investigation of claims of evasion of antidumping and countervailing duty orders in a new part 165 in title 19 of the Code of Federal Regulations (19 CFR part 165), with a 60-day public comment period. The IFR became effective on August 22, 2016. On September 8, 2016, CBP published a technical correction in the **Federal Register** (81 FR 62004) to correct language in the definition of "evade or evasion" in 19 CFR 165.1, by adding a comma that was inadvertently omitted. On October 21, 2016, CBP published an extension of the comment period in the **Federal Register** (81 FR 72692), providing an additional 60 days for interested persons to submit comments in response to the IFR in order to have as much public participation as possible in the formulation of the final rule.

Operations

The first EAPA allegation was submitted to CBP in September 2016, approximately one month after the interim regulations became effective. Between September 2016 and the end of fiscal year 2021, CBP's Trade Remedy Law Enforcement Directorate (TRLED) has processed approximately 490 EAPA allegations and initiated 179 investigations; in addition, CBP has processed 39 requests for administrative review and issued 19 final administrative determinations.

In these past few years, CBP has gained considerable expertise processing EAPA allegations and has continued to ensure that EAPA proceedings are transparent and that all parties are afforded an opportunity for full participation and engagement during the investigation. To enhance convenience and provide further transparency, on April 1, 2021, CBP deployed the EAPA Portal, an electronic case management system for the filing, tracking, and adjudicating of EAPA allegations, and maintaining an administrative record, in one centralized location, which may be accessed on CBP's website at *https://www.cbp.gov/trade/trade-enforcement/tftea/eapa* when clicking on the field titled "Filing an EAPA Allegation."[1]

[1] Trade users must submit an EAPA allegation through the EAPA Portal. The EAPA Portal can be reached in two ways. First, through the Trade Violation Reporting (TVR) system, also known as e-Allegations, used for reporting various trade violations. Trade users can access e-Allegations at *https://eallegations.cbp.gov/s* and submit an EAPA allegation by clicking on the field entitled "Report Enforce and Protect Act Violations." Second, trade users may also access the EAPA Portal via the EAPA website at *https://cbp.gov/trade/trade-enforcement/tftea/eapa* by clicking the field titled "Filing an EAPA Allegation." To submit an EAPA allegation in the EAPA Portal, trade users must create a CBP user account first, at *https://www.login.gov/create-an-account.* As new technology becomes available, CBP may replace the current process or utilize additional methods for accepting EAPA allegations or requests for investigations from Federal agencies.

In the EAPA Portal, parties to the investigation may view decisions and public administrative record documents (including public versions of documents associated with the investigation), check the status of the investigation, and submit factual information, written arguments, and documents relevant to the investigation. The EAPA Portal also sends notifications to the parties to the investigation with deadline reminders and actions to be taken. In addition, when this final rule is effective, an alleger will be able to withdraw an allegation and a Federal agency will be able to withdraw a request for an investigation (referral) in the EAPA Portal.[2] With a new case management system in place, and CBP's extensive experience with the current EAPA process, CBP is now ready to finalize the interim regulations, with several modifications as described below.

II. Discussion of Comments

Although the interim regulatory amendments were promulgated without prior public notice and comment procedures pursuant to the agency organization, procedure, and practice exemption in 5 U.S.C. 553(b)(A), the IFR provided for the submission of public comments that would be considered by CBP before adopting the interim amendments as final. The 60-day public comment period was set to end on October 21, 2016, but was extended that day for an additional 60 days. The extended comment period closed on December 20, 2016.

CBP received 17 submissions in response to the publication of the interim regulations, each of them including comments on multiple topics. The comments involved various aspects of the EAPA process, from the initiation of an investigation to the administrative review of a determination as to evasion. CBP reviewed all public comments received in response to the interim final rule and made some changes to the interim regulations based on those comments. In addition, CBP has included some clarifications where needed to ensure a transparent investigation process. A description of the public comments received, along with CBP's analysis, are set forth below. The comments and responses have been grouped together by subpart of the EAPA regulations, where appropriate.

General Provisions (Subpart A)

Subpart A (General Provisions) provides definitions of terms relevant to the EAPA process, specifies the entries that may be the

[2] Guidance for trade users regarding the EAPA Portal, and additional resources, such as a quick reference guide and a recorded demonstration on how to access and navigate within the EAPA Portal, can be found on CBP's website at *https://www.cbp.gov/trade/trade-enforcement/tftea/eapa* when clicking on the field titled "Filing an EAPA Allegation" at the bottom of the page.

subject of an allegation, identifies when a power of attorney is required, and addresses the submission of business confidential information. This subpart further sets forth the means by which CBP may obtain information for EAPA proceedings, addresses the circumstances when CBP may apply adverse inferences in an EAPA investigation and in an administrative review, and details the reporting responsibilities in case of public health and safety issues associated with an investigation. Multiple comments were received regarding subpart A, dealing with questions on the various definitions in § 165.1, and the submission requirements in §§ 165.3 and 165.5. Some commenters requested clarification on certain aspects of the application of adverse inferences in case of a party's failure to comply with CBP's request for information.

Comment: Multiple commenters stated that CBP should not require the identification of an importer as a condition for initiation of an investigation. The commenters noted that Congress did not require the identification of an importer of record and that by doing so, CBP could be encouraging the proliferation of shell or paper companies to act as importers. The commenters further stated that TFTEA instructed CBP to investigate any allegation that reasonably suggests that covered merchandise has been entered into the customs territory of the United States through evasion. Therefore, the commenters suggest that CBP should remove the phrase "by an importer" in § 165.1 in the "allegation" definition, and, for the same reason, remove references to the identification of an importer in various sections of part 165, such as §§ 165.4(c)(3), 165.11(b)(3) and 165.14(b)(1). One commenter referenced the Trade Secrets Act (18 U.S.C. 1905) and the statute's goal to bar against unauthorized disclosure by government officials of confidential information received in the course of their employment or official duties, which could include the identity of an importer. The commenter argued that CBP may protect the identity of an importer without having to narrow the scope of the investigation by simply not requiring the specific identification of an importer of record in an allegation.

Response: CBP disagrees with the commenters' suggestion to remove language in the regulations that requires that an alleger provide the identity of the importer against whom an allegation is filed. The text of 19 U.S.C. 1517(b)(2) refers to ". . . an allegation that *a person* has entered covered merchandise . . ." (emphasis added), which requires the specific identification of an importer. Removing the reference to "a person," *i.e.,* an importer, in the regulations, would require a statutory change prior to making a change in the regulation. Furthermore, CBP considers the requirements in the regula-

tions to be consistent with the Trade Secrets Act. While the Trade Secrets Act protects against the unauthorized disclosure of confidential information, CBP does not consider the identity of the importer to be confidential. In fact, § 165.4(c)(3) specifically states that the name and address of an importer against whom the allegation is brought is not protected as business confidential information.

Comment: One commenter requested that an illustrative list of examples of evasion schemes be included in the definition of “evade or evasion” in § 165.1.

Response: CBP agrees with the commenter that it would be helpful to add some examples of evasion to the definition, such as the transshipment, misclassification and/or undervaluation of covered merchandise. Accordingly, CBP has added such language at the end of the definition of “evade or evasion” in § 165.1.

Comment: One commenter expressed concern that the EAPA provisions would be misused by domestic interested parties or competitors in an effort to disrupt the supply chains of foreign producers and U.S. importers. Another commenter raised the concern that the EAPA provisions have the potential to brand innocent importers as evaders of the law, regardless of their good faith efforts to comply with AD/CVD orders.

Response: While CBP understands these concerns, CBP carefully investigates and reviews the evidence, in accordance with all applicable legal requirements, at each stage of the process before making a determination as to evasion.

Comment: Multiple commenters asked CBP to expand the list of interested parties who are allowed to participate in EAPA investigations. The commenters argued that the limitation in the interim regulations deprives CBP of the resources, experience, and insights from other domestic producers or importers, especially in cases when Federal agencies request an investigation, such that the domestic industry affected by the evasion would have no right to provide information or otherwise participate in the investigation. One of the commenters suggested to amend the regulation to include in an EAPA investigation, whether initiated pursuant to the filing of an allegation by an interested party or pursuant to a request by a Federal agency, “any other party meeting the definition of “interested party” in § 165.1 that submits an entry of appearance to CBP in a timely fashion,” in addition to the interested party who filed an allegation and the importer who allegedly engaged in evasion. Two other commenters stated that CBP should expand the regulatory

definition of "interested party" to align with the broader statutory definition of the "United States importer" in section 517(a)(6)(A)(i) of the Tariff Act of 1930.

Response: CBP disagrees with the commenters' requests to expand the list of interested parties who are allowed to participate in EAPA investigations. The primary focus of CBP's determination in an EAPA investigation is narrow, *i.e.,* whether evasion, as defined by 19 U.S.C. 1517(a)(5), occurred or not. CBP's current EAPA process does not allow for interested parties other than the alleger to participate during the first 90 days of an investigation.

Moreover, the regulatory definition of the term "interested party" aligns with the statutory definition. *See* 19 U.S.C. 1517(a)(6)(A) and 19 CFR 165.1. Both provisions allow for interested parties to participate in an investigation by filing an allegation. The statutory definition for "interested party" includes, *inter alia,* the United States importer of covered merchandise. The regulatory definition of an "interested party" in § 165.1, which is not limited to importers of record, but includes any importer of covered merchandise, including the party against whom the allegation is brought, is consistent with the statutory definition.

Comment: One commenter suggested to limit the definition of the term "importer" to an importer of record of covered merchandise and amend the definition of "interested party" in § 165.1 accordingly. The commenter argued that CBP did not provide any reason for expanding the definition beyond the importer of record, and thus only the alleger and alleged evader should be included in the definition.

Response: CBP disagrees with the commenter's definition of "importer." In current practice, allegations are usually made against importers of record of covered merchandise, in accordance with the statute. However, CBP has defined the term "importer" by regulation in 19 CFR 101.1 as the importer of record, the consignee, the actual owner of the merchandise, or the transferee of the merchandise, and CBP may initiate investigations against such parties if an allegation reasonably suggests that evasion is occurring.

Comment: Multiple commenters asked for clarification of the interaction of the evasion provisions with the penalties provision (section 592 of the Tariff Act of 1930, as amended (19 U.S.C. 1592)), the impact of a prior disclosure pursuant to section 592(c)(4) on an EAPA investigation, and identification of appropriate cases involving AD/CVD orders where penalties would be contemplated and potentially assessed. One of the commenters opined that an EAPA investigation is not a section 592 investigation and cannot lead to a section 592 penalties matter; thus, the investigation definition in § 165.1 should

be deleted. Another commenter suggested that CBP clarify in § 165.28(a) that CBP is not required to initiate any other actions, including a section 592 proceeding. Lastly, a commenter asked for the revision of § 165.11 to expressly provide that the filing of an evasion allegation operates as a "formal investigation" to preclude the acceptance of a prior disclosure, with regard to the same set of facts, importer(s), entries and AD/CVD orders, under 19 U.S.C. 1592.

Response: CBP welcomes the opportunity to provide some clarification in response to the comments received on the interaction between an EAPA investigation and section 592 actions, as well as the impact of a prior disclosure on an EAPA investigation. An importer may be precluded from filing a prior disclosure for violations discovered during the course of an EAPA investigation but may not be precluded from filing a prior disclosure for violations discovered outside of the course of the EAPA investigation. The determination of whether a prior disclosure is accepted requires a fact-specific assessment as to the importer(s), entries and AD/CVD order(s) involved. In addition, CBP disagrees with the commenter's request for a regulatory change to the "investigation" definition in § 165.1 as the definition is accurate and should not be removed. CBP retains the discretion to accept or reject a prior disclosure for any facts that were not discovered during the course of an EAPA investigation.

Further, CBP does not agree with the amendment of § 165.28(a), as one of the commenters suggested. CBP appreciates the opportunity to clarify that CBP is not required to initiate any other actions, including section 592 proceedings. If CBP finds that entries are already liquidated when an affirmative determination as to evasion is made, then CBP's recourse to recover the lost duties is to initiate a section 592 proceeding or any other appropriate action separate from the EAPA proceeding. If TRLED makes an affirmative determination of evasion, pursuant to § 165.27, a Center of Excellence and Expertise (Center) will be directed to collect cash deposits and take other enforcement actions as necessary. TRLED may also refer the case to other components within CBP and partner government agencies (PGAs) to review the facts and perhaps assess a penalty, depending on the circumstances.

Finally, CBP disagrees with the last commenter, that an EAPA investigation operates as a formal investigation and precludes prior disclosure under 19 U.S.C. 1592. The importer who is alleged to have engaged in evasion will have the burden to show that it is not aware of an ongoing investigation. If the importer is able to do so, and meets all other relevant criteria, then the importer may have the opportunity to file a prior disclosure with CBP.

Comment: Multiple commenters stated that the one-year threshold for entries that may be the subject of an allegation is too narrow as it severely restricts the allegations that can be pursued, and thus should be eliminated. One of the commenters argued that there is no statutory support for this limitation. Another commenter suggested the application of a statute of limitations (SOL) that is consistent with the SOL for violations of section 592 of the Tariff Act of 1930, as amended, in order to provide interested parties with sufficient time to uncover evasion and prepare an allegation. *See* 19 U.S.C. 1621. Finally, one commenter expressed support for the regulation and claimed that only entries made within one year before receipt of an allegation may be the subject of an allegation.

Response: CBP appreciates the comments but disagrees that CBP is limited to investigating entries of merchandise made within one year before the receipt of an allegation. As stated in the preamble of the IFR, CBP deemed a one-year period for an EAPA investigation appropriate as it would allow for a timely determination using current and readily available information, and prevent situations where CBP would encounter entries that were already liquidated, or importers that are no longer active. *See* 81 FR 56477, at 56479. Notwithstanding the above, the regulations provide CBP with the discretion to investigate other entries of such covered merchandise, and CBP will exercise such authority on a case-by-case basis. *See* 19 CFR 165.2.

Comment: One commenter stated that § 165.3 does not specify what action CBP will take if the required proof of execution of a power of attorney is missing.

Response: CBP agrees with the commenter's statement and, accordingly, has added a new paragraph (f) in § 165.3, clarifying that CBP will reject any submission, and not consider or place such submission on the administrative record, if a party has not provided proof of execution of a power of attorney to CBP, as required pursuant to the first sentence of paragraph (e) of § 165.3, within five business days of an interested party's first submission during an investigation or administrative review. CBP further added language in the new paragraph (f), that CBP will reject any submission, and not consider or place such submission on the administrative record, if a party has not provided proof of authority to execute a power of attorney pursuant to paragraph (c) of § 165.3 upon CBP's request.

Comment: One commenter stated that CBP did not specify what action it may take if a submission fails to meet the form requirements of § 165.5(b)(1), and thus proposed to add a paragraph (b)(4) to include the rejection of a submission as a consequence for failure to meet those requirements.

Response: CBP welcomes the opportunity to clarify that CBP will reject a submission that does not fulfill the form requirements of § 165.5(b)(1), and will not consider or place it on the administrative record. Accordingly, CBP added a new paragraph (b)(4) in § 165.5 to reflect this clarification. For the same reasons, CBP amended § 165.41(f) to clarify that CBP will reject a request for administrative review if the content requirements in paragraph (f) are not met.

Comment: One commenter stated that it is unclear whether the person making a submission pursuant to § 165.5(b)(2) can be the authorized representative of the party, the party itself, or both. The commenter stated that the final regulation should clarify who needs to sign each type of certification.

Response: CBP disagrees with the commenter's statement. The interim regulation is clear as it reads "on behalf of," allowing for an authorized representative, such as an attorney, in addition to the party itself to make the certification. Moreover, this has not been an issue in practice.

Comment: One commenter expressed concern that adverse inferences may be imposed on a party if an importer complies with CBP's request, but the foreign supplier does not. The commenter requested clarification as to whether evasion could be found in the described scenario with regard to the foreign supplier, but not the importer, and what such a finding would mean in terms of the application of duties or other measures. Another commenter expressed a similar concern and asked for § 165.5 to be amended to include a requirement that CBP notify the importer whenever CBP issues a questionnaire to a foreign supplier to give the importer the opportunity to leverage its relationship with the supplier to obtain the supplier's full cooperation and avoid adverse inferences.

Response: A determination of evasion is based on an analysis of the record, including responses to requests for information by both the U.S. importer and foreign manufacturer. The scenario where one party cooperates to the best of its ability, and another does not, creates a difficult situation for CBP to conduct its analysis, and thus evasion could still be found, depending on the available information. CBP evaluates carefully on a case-by-case basis and may apply adverse inferences as to the party not acting to the best of its ability to cooperate with the investigation, in accordance with 19 U.S.C. 1517(c)(3)(B). The consequences, if any, that flow from such a finding will vary on a case-by-case basis. With regard to the suggestion to include a notification requirement in § 165.5, CBP provides the public

versions of all documents, including questionnaires, to all parties to the investigation and does not believe that any additional notifications are necessary.

Comment: Two commenters noted that the use of a party's behavior in a prior proceeding should not be an indicator for whether to apply adverse inferences in the current proceeding, as stated in § 165.6(b), arguing that only the party's behavior in the current proceeding should be relevant for adverse inferences. Another commenter asked CBP to amend paragraph (b) to clarify the distinction between the intent of paragraph (a) and paragraph (b) by stating that CBP may select from facts otherwise available, including information from a prior determination in another CBP investigation, when applying adverse inferences under paragraph (a).

One of the commenters also stated that the way paragraph (c) of § 165.6 is written, it unfairly applies adverse inferences even if the information sought is already on the record. According to the commenter, it should be irrelevant which party provided the information as long as the information was provided to CBP.

Response: CBP disagrees; section 165.6, as written, accurately reflects the statutory language. Both the statute and the regulation distinguish between adverse inferences to be applied when a party fails to cooperate and comply with CBP's request for more information in the current proceeding (§ 165.6(a) and section 412(b)(1)(A) of TFTEA), and adverse inferences to be applied based on a prior determination in another CBP proceeding, or any other available information (§ 165.6(b) and section 412(b)(2)(B) and (C) of TFTEA). However, to be clearer and avoid any confusion, CBP has revised § 165.6(b) so the regulatory language more closely resembles the statutory language in section 412(b)(2) of TFTEA, without making any changes to the substance of the language. In addition, CBP further amended § 165.6(b) to clarify that CBP may only consider "any other available information" that has been placed on the administrative record for purposes of applying adverse inferences.

CBP believes that when it comes to adverse inferences, the determination to be made is whether the party from whom CBP requested information provided the information. The fact that another party had already provided information to CBP does not relieve the party of its obligation to provide the requested information, as the other party's submission may have been incorrect or incomplete. Lastly, as to the commenter's unfairness argument, the regulations allow for due process via administrative review by CBP and judicial review by the U.S. Court of International Trade (CIT) in case an interested party believes that adverse inferences were inappropriately applied.

Comment: One commenter talked about instances where CBP requests information from a foreign government and receives no response, and stated that, in such situations, CBP would need to examine the facts available on the record to determine how to address the failure to respond, and reach a determination based on those facts available.

Response: CBP agrees as 19 U.S.C. 1517(c)(2)(a)(iv) and (c)(3) clearly state that CBP cannot apply adverse inferences as a result of failure of a foreign government to respond to a CBP information request. CBP will make a determination based on the facts available on the administrative record, which may include, among other things, adverse inferences made against other interested parties.

Comment: One commenter stated that the "to the best of its ability" standard in § 165.6(a) is vague and lacks a definition. The commenter argued that it is unclear as to what level of cooperation with CBP's information request is acceptable and what level is insufficient, making the regulatory language unfair.

Response: CBP disagrees with the commenter's statement. CBP ensures that the request procedure is transparent to those parties involved in an EAPA investigation by providing all documents on the administrative record. Further, the parties to the investigation, which include the party filing the allegation and the importer, and the foreign producer or exporter of the covered merchandise, are given sufficient time during an EAPA investigation to gather and provide the requested information to CBP. CBP then carefully evaluates the information on a case-by-case basis to determine whether the party cooperated and complied with CBP's request to the best of its ability and takes into account the specific circumstances surrounding each request before deciding whether adverse inferences are appropriate. The regulations also provide for due process in the form of administrative review and judicial review in cases where the importer is of the opinion that the "to the best of its ability" standard was met, but CBP nonetheless applied adverse inferences.

B. Initiation of Investigations (Subpart B)

Subpart B (Initiation of Investigations) deals with the initiation of an investigation, such as the filing of an allegation by an interested party or a request for investigation (referral) by another Federal agency, specifies the date of receipt of an allegation, and discusses the consolidation of allegations, as well as referrals to the Department of Commerce (Commerce) to determine whether merchandise described in the allegation is properly within the scope of an AD/CVD order. Commenters submitted questions on the availability of technical as-

sistance and guidance for small businesses and requested additional methods for withdrawal of allegations and requests from Federal agencies. CBP also received several comments surrounding the process of the consolidation of allegations, and CBP's notification procedures. Lastly, commenters asked for additional information about the timing of CBP's scope referral and Commerce's scope proceeding.

Comment: While one commenter supported the requirement in § 165.11(e) for CBP to provide technical assistance and guidance to small businesses, another commenter was concerned with the provision and stated that CBP should not assist small businesses with the preparation and filing of an allegation. The commenter argued that it should be the filing party's responsibility to meet the filing requirements in order to maintain a fair and transparent investigation.

Response: CBP appreciates the comments. Small businesses are entitled to technical assistance, upon request, from CBP if they satisfy the applicable standards set forth in 15 U.S.C. 632 and 13 CFR part 121. CBP notes that section 411(b)(4)(E) of TFTEA requires the provision of technical assistance and advice to eligible small businesses to prepare and submit an allegation. Furthermore, CBP encourages filings by small and medium businesses and continues to provide technical assistance to those businesses upon request.

Comment: One commenter suggested that CBP include a paragraph (f) in § 165.11, limiting communications with CBP to the parties to the investigation. The commenter asked CBP not to publicize the filing of an allegation or accept or respond to any unsolicited oral communication concerning the allegation or investigation from any person other than from a party to the investigation prior to a determination to not initiate an investigation under § 165.15, or a determination as to evasion under § 165.27(a).

Response: CBP disagrees with the commenter's request to include a paragraph (f) in § 165.11 that would limit communications to the parties to the investigation. CBP believes that the notice of initiation of an investigation, which includes facts and evidence from the submitted allegation, is the best time at which to notify all parties to the investigation, as well as the public, in an effort to make the EAPA proceedings as transparent as possible. If, and when, unsolicited information is submitted to CBP regarding an allegation or investigation, CBP has the discretion to decide, throughout the investigation, if it will place this information on the administrative record or not (including prior to the notice of initiation of an investigation).

Comment: Multiple commenters disagreed with the term "date of receipt" in § 165.12(a). The commenters argued that the overall intent of TFTEA is for CBP to proceed swiftly and adhere to strict deadlines,

but claimed that the way the interim regulation is written, the date of receipt is entirely within CBP's control, and thus the regulatory language runs counter to the statutory language that states unambiguously that not later than 15 business days after receiving an allegation, CBP shall initiate an investigation. *See* 19 U.S.C. 1517(b)(1). For the same reasons, additional commenters requested that CBP specify the exact number of days within which CBP is required to issue an acknowledgment of receipt, one of the suggestions being that the deadline is no later than two days after receipt of the allegation.

Response: CBP disagrees with the commenters' request to redefine the term "date of receipt" and specify an exact number of days within which CBP issues an acknowledgment of receipt of an allegation. It is clearly stated in the regulation that an allegation is received when CBP acknowledges a properly filed allegation. An allegation cannot be considered to be received until it is properly filed, *i.e.,* the allegation contains all the information and certifications required pursuant to § 165.11. The statute and interim regulations provide CBP the flexibility to properly examine the allegations as resources allow. Initiating an investigation within 15 business days of an allegation being in CBP's possession could lead to an inefficient use of CBP's resources, as poorly filed allegations or incomplete allegations would cause CBP to perform work that should have been done by the alleger.

Comment: One commenter called attention to a scenario that could arise in the context of an interaction between § 165.12 (date of receipt of an allegation) and § 165.2 (entries dating back to one year before receipt of an allegation). The commenter stated that, depending on the time of receipt of the allegation by CBP pursuant to § 165.12, the time period for investigating entries made within one year prior to CBP's receipt of the allegation could become shorter unintentionally if CBP takes time to acknowledge the receipt of the allegation, and thus entries of allegedly covered merchandise could potentially end up outside of the one-year period from the date of receipt, as specified in § 165.2.

Response: CBP disagrees that the regulation should be changed to cover entries made within one year before the original date of submission of the allegation, instead of the date of receipt of the allegation. CBP acknowledges that the scenario described above could make it difficult in certain instances to cover the alleged actions in the time frame set forth in § 165.2. However, as mentioned above in response to another comment, it is in CBP's discretion to investigate other entries of covered merchandise, *i.e.,* entries outside of the one-year time frame, if the circumstances warrant.

Comment: One commenter stated that CBP should amend § 165.12(b) to provide for consequences for withdrawing an allegation, such as prohibiting re-submission of a new allegation for a specified time period after withdrawal. In addition, the commenter stated that there should be consequences for providing false allegations.

Response: CBP disagrees with the commenter that consequences should be tied to a withdrawal of an allegation. CBP further notes that consequences for making false statements in EAPA investigations are provided for in § 165.5(b)(3).

Comment: One commenter asked CBP to amend § 165.12(b) and § 165.14(a) to allow for the withdrawal of a submission through any other method approved or designated by CBP, in addition to email, to make these provisions consistent with other provisions, such as § 165.5(b)(1) and § 165.11(a).

Response: CBP agrees with the commenter. One of the new functionalities of the EAPA Portal is the ability for parties to submit withdrawal requests through this system as a method approved or designated by CBP. Accordingly, CBP has amended the language in §§ 165.12(b) and 165.14(a) to allow for additional methods for the submission of withdrawal requests. As mentioned above, this functionality will be available in the EAPA Portal upon effectiveness of this final rule.

Comment: One commenter asked CBP to consolidate allegations prior to the initiation of an investigation, noting that the "reasonably suggests" standard in § 165.15(b)(2) is met in a case where multiple importers are contributing to an evasion scheme, but each importer-specific allegation may present, on its own, insufficient information to satisfy the initiation standard. The commenter stated that it would be imperative under those circumstances for CBP to consider and consolidate the multiple allegations to meet the "reasonably suggests" standard.

Response: Under § 165.13(a), CBP has the authority to consolidate allegations at any point prior to the issuance of a determination (even prior to the initiation of an investigation) and may do so if certain criteria set forth in § 165.13(b) are met.

Comment: One commenter suggested that CBP modify its regulations to grant the parties to the investigation an opportunity to comment on (or object to) consolidation prior to any decision to consolidate. The commenter argued that such a regulatory change would promote engagement with the parties as to why or why not consolidation would be beneficial or burdensome.

Response: CBP disagrees with the commenter's suggestion to modify the regulatory language. The interim regulations already

include the ability for comments to be placed on the administrative record regarding consolidation of allegations once interim measures are announced. Pursuant to § 165.23(c), the parties to the investigation have the opportunity to submit factual information up to day 200 of the investigation. Relatedly, CBP has revised the regulatory language in § 165.23(c)(2) providing CBP with the discretion to officially extend the 200-day deadline for providing factual information, as discussed in more detail in section III below.

Comment: One commenter wrote that a consolidation of allegations does not seem appropriate in evasion investigations because only the importer is submitting the import declaration as to whether merchandise is covered by an AD/CVD order, and only the importer may evade an AD/CVD order. The commenter opined that a mere similarity of covered merchandise should not be the basis for a claim of evasion and, thus, not a basis for consolidation.

Response: CBP disagrees with the commenter. Each EAPA allegation regarding an importer stands on its own merit. CBP judiciously uses the consolidation ability and bases consolidation on various criteria, such as those listed in § 165.13(b)(1)–(4). When allegations against importers are consolidated at the interim measures point, it is because there is reasonable suspicion that all the importers are engaged in evasion.

Comment: Two commenters stated that CBP should allow for the filing of one allegation against multiple importers if they are involved together in a duty evasion scheme. Given that the entities involved in an evasion may use a host of different importers of record as alter egos by which to improperly enter goods, limiting an allegation to a single importer would decrease efficiency for filers of allegations and CBP, and increase the burden to determine which importer was involved in an evasion. One of the commenters added that if confidentiality is a concern, CBP should implement an administrative protective order (APO) process in such cases.

Response: CBP disagrees with both commenters. Every EAPA allegation stands on its own. Allowing one allegation against multiple importers would be problematic if the alleger did not correctly name one of the importers or provided insufficient facts against one of the importers. In that instance, the alleger would have to withdraw the allegation against all the importers in order to re-submit an allegation against only one or more importers. In addition, since the statutory language in 19 U.S.C. 1517(b)(2) (". . . allegation that *a person* has entered covered merchandise . . .") (emphasis added) is written in singular form, allowing allegations against more than one importer would be inconsistent with the current statutory language and would

require a statutory change. Nonetheless, CBP may consolidate allegations under certain circumstances. However, as explained in more detail below, CBP will provide for the use of APOs as part of the EAPA process going forward.

Comment: Multiple commenters voiced a concern regarding the 95-day period for notification of CBP's decision to initiate an investigation pursuant to § 165.15(d)(1). The commenters argued that such a lengthy delay in notifying the alleged evader about the initiation of an investigation could impede an importer's due process rights by significantly limiting the time to prepare a defense. It could deprive the alleged evader of an opportunity to provide information or arguments until after the interim measures are in effect. For similar reasons, another commenter asked for immediate publication of notice of the initiation of an investigation to enhance transparency.

Response: CBP disagrees with the commenters' suggestion that CBP issue a notice of initiation of an investigation earlier than 95 calendar days after a decision to initiate has been made. CBP needs adequate time to investigate the alleged evader's actions, before notifying the parties to the investigation about the initiation of an investigation. Issuing a notice of initiation early would allow the alleged evader to change its tactics in order to disrupt CBP's investigatory efforts. Pursuant to 19 U.S.C. 1517(b)(1), CBP must make a decision as to whether the allegation reasonably suggests evasion within 15 business days of receiving a properly filed allegation in order to initiate an investigation. No later than 90 calendar days after commencing an investigation, CBP must make a decision as to whether there is reasonable suspicion that covered merchandise has been entered into the U.S. customs territory through evasion. If CBP finds reasonable suspicion, CBP issues a combined notice of initiation of investigation and interim measures within five business days of that decision. Alternatively, if no interim measures are taken, CBP may issue a notice of initiation of investigation only, by day 95 of the case. Thus, for ease of administrability of this regulation and others in part 165 that provide for the notification of decisions five business days after a decision has been made, CBP has revised § 165.15(d)(1). The revised regulation states in the first sentence that CBP will issue a notice of its decision to initiate an investigation to all parties to the investigation no later than five business days after day 90 of the investigation, removing the current reference to the 95-calendar-day period. For consistency purposes, CBP also has changed the second sentence in paragraph (d)(1) to state that in case of interim measures, a notice to all parties to the investigation will occur no later than five business days after day 90 of the investigation.

Furthermore, this change will make the regulatory language consistent with the statutory language, which only mentions a 90-day timeline, and will also create uniformity for the processes for initiating and notifying of an investigation, and for taking and notifying of interim measures. Notwithstanding those time frames, CBP may make a decision earlier than 90 days if it is ready to do so after a thorough investigation and notify the parties to the investigation within five business days of that decision. Additionally, when revising § 165.15(d)(1), CBP has replaced the word "notification" in the existing regulation with "notice" since CBP serves an actual notice of initiation of an investigation on the parties to the investigation, as opposed to notification of the parties in some other fashion.

Comment: One commenter asked CBP to amend § 165.15(d) to provide that CBP notify not only the interested party who filed the allegation, but also the importer alleged to have engaged in evasion in a case where CBP determines to not initiate an investigation.

Response: CBP does not agree with the commenter to amend the regulation. In order to discourage any potential retaliatory actions by the alleged evader against the alleging party, CBP will not notify the alleged evader in case of a decision to not initiate an investigation. If CBP determines to not initiate an investigation due to insufficient evidence that there is a likelihood of evasion, CBP does not see a need to make the alleged evader's name public in a notice to not initiate an investigation.

Comment: One commenter asked that CBP provide for the opportunity to request an administrative review of a decision to not initiate an investigation so that the Commissioner of CBP may assess whether the decision was rendered in accordance with the legislative intent of a functioning mechanism for potential duty evasion and the plain language of the EAPA.

Response: Under the plain language of paragraph (f) of 19 U.S.C. 1517, administrative review may be requested for determinations made under 19 U.S.C. 1517(c). No provision in the statute authorizes CBP to conduct an administrative review of a decision to not initiate an investigation, which is not a determination under 19 U.S.C. 1517(c). Furthermore, CBP provides technical assistance to allegers on strengthening their allegations as a matter of practice and allegers have the opportunity to refile insufficient allegations as more information becomes available which would show that potential evasion is occurring.

Comment: One commenter recommended that the regulations be revised to create a single time frame for the notification of decisions to initiate and to not initiate an investigation and suggested both time frames be within 30 days of receipt of an allegation.

Response: CBP disagrees with the commenter's recommendation for the creation of a single time frame for the notification of CBP's decisions to initiate and to not initiate. Due to the different nature of these decisions, it is not practical to have one single timeframe for CBP to follow. There are different evidentiary standards and different timing requirements attached to the two types of decisions. As mentioned above, CBP has 15 business days to determine whether to initiate or to not initiate an investigation under the "reasonably suggests" standard. If CBP determines that it will not initiate an investigation, it will notify the alleger within five business days of that decision pursuant to § 165.15(d). If CBP determines within 15 business days of a properly filed allegation that it will initiate an investigation, CBP usually takes 90 calendar days to determine whether "reasonable suspicion" exists before making a decision to implement interim measures (or not) and informing the alleger and importer in case of a decision to implement interim measures. Thus, a notification 30 days after receipt of an allegation, as suggested by the commenter, is generally too short a time frame for CBP to examine all the facts and both determine whether to initiate an investigation and whether there is reasonable suspicion that evasion is occurring.

Comment: One commenter asked CBP to specify how CBP will notify of its decision to initiate, and asked CBP to require parties making allegations to provide certain information, such as the name of a contact person, mailing and email address of the importer alleged to have evaded, the foreign producer or exporter of covered merchandise, and the government of the country from which the covered merchandise was exported.

Response: CBP has been providing notices of initiation of an investigation to the parties to the investigation pursuant to § 165.15(d)(1) via email. With the implementation of the EAPA Portal, CBP notifies the parties to the investigation through the system via an email to the alleging party and the alleged evader. In addition, CBP publishes public versions of the notices of initiation of an investigation on its website. Further, to respond to the second part of the comment, CBP already requires name and address for importers; any additional specific contact information would be too burdensome for allegers to

include in an allegation, as not all the contact information the commenter listed above is relevant, and, in some instances, it is already publicly available. CBP believes that requiring this additional information would hinder the submission of allegations, without benefit to the EAPA investigation process.

Comment: One commenter stated that CBP should add language that would authorize CBP to self-initiate cases where the criteria in § 165.15(b) are met.

Response: CBP disagrees with the commenter. An amendment of § 165.15(b) would require a statutory change, as 19 U.S.C. 1517(b)(1) and (b)(3) allow for the initiation of an investigation pursuant to the submission of an allegation by an interested party or a request by another Federal agency, but not self-initiation by CBP.

Comment: One commenter stated that the "reasonably suggests" standard in § 165.15(b)(2) burdens domestic producers having to prove evasion at the outset in order to have an investigation initiated, whereas the statute only asks for information reasonably available to the party who filed the allegation. *See* 19 U.S.C. 1517(b)(2)(B).

Response: CBP disagrees with the commenter. Pursuant to 19 U.S.C. 1517(b)(2)(B), the allegation must be accompanied by information reasonably available to the party who filed the allegation. However, the threshold for initiating an investigation is that the information provided by the alleger reasonably suggests that evasion occurred, pursuant to 19 U.S.C. 1517(b)(1), which is the same standard as in § 165.15(b)(2). The regulatory language does not unduly burden the alleger by imposing a stricter standard. Moreover, CBP evaluates on a case-by-case basis the merits of each allegation and decides if the "reasonably suggests" standard for initiation of an investigation is met.

Comment: One commenter suggested that CBP periodically publish examples of information that was deemed reasonably available to the interested party and sufficient to support an allegation in prior investigations, as well as examples of information sufficient to meet the initiation standard.

Response: CBP currently informs the public through outreach to the industry in the form of presentations on EAPA and provides technical assistance and guidance when allegations are filed. In addition, as mentioned above, CBP publishes public versions of notices of initiation of an investigation on *CBP.gov,* providing examples of information that meets the initiation standard.

Comment: One commenter stated that CBP should urge Commerce to make public the procedures it intends to use in case of a covered merchandise referral and include provisions to allow interested parties to file comments.

Response: CBP disagrees with the commenter. Commerce decides how to best respond to covered merchandise referrals in EAPA investigations, according to its authority and current practices. Moreover, the referral process has been working well between the two agencies and CBP does not see a need for a change.

Comment: One commenter supported the requirement in § 165.16 that CBP refer a scope issue to Commerce at any point after receipt of the allegation, whereas a second commenter stated that CBP should, where possible, wait until after the issuance of interim measures to request a covered merchandise determination from Commerce. The second commenter argued that if CBP requested a covered merchandise determination prior to interim measures, then the covered merchandise referral might be the first time that an importer or other party learned about the evasion proceedings, which could undermine CBP's law enforcement interest to quickly investigate the allegations and gather information prior to issuing interim measures. In addition, the second commenter asked CBP to encourage Commerce to act expeditiously when processing a covered merchandise referral.

Response: CBP appreciates the comments. CBP decides on a case-by-case basis whether there is a need to refer scope issues to Commerce. According to § 165.16(a), CBP may refer the issue to Commerce for Commerce to determine whether imported merchandise constitutes covered merchandise, at any point after receiving the allegation. The statute (19 U.S.C. 1517(b)(4)) does not limit CBP's ability to refer a scope matter to Commerce within a certain time frame but allows CBP to make this decision depending on the circumstances of the specific investigation. With regard to the second part of the last comment, CBP has no jurisdiction over Commerce's authority to set timelines, and no influence over another agency's internal processes.

Comment: One commenter asked that CBP modify the interim regulations to further explain Commerce's covered merchandise proceeding, clarify whether or not interested parties would be able to participate in that proceeding, and whether Commerce's scope determination is appealable.

Response: Commerce processes covered merchandise referrals and determinations according to its own statutory and regulatory authority and CBP cannot amend CBP's regulations to discuss or clarify Commerce's authority and procedures. Nor is CBP in a position to opine on judicial review related to Commerce proceedings. We note, however, that Commerce has promulgated regulations to address covered merchandise referrals from CBP, at 19 CFR 351.227.

Comment: One commenter asked that CBP add a definition in § 165.16(c) for the word "promptly." The commenter also suggested that CBP make a referral to Commerce within 30 days of initiation of the investigation, and CBP provide notice of the referral within five days of the referral.

Response: CBP disagrees with the commenter's request to add a definition for the word "promptly." CBP makes determinations regarding covered merchandise referrals on a case-by-case basis and refers scope issues to Commerce as appropriate. As stated above, CBP may refer to Commerce at any point after receipt of an allegation. Further, CBP notifies the parties to the investigation as to when CBP sends the covered merchandise referral to Commerce.

Comment: One commenter argued that CBP should provide for a mechanism for an interested party to seek relief when CBP improperly refuses to refer a scope issue to Commerce and for situations where CBP improperly suspends liquidation of entries when the scope issue is being disputed.

Response: CBP disagrees with the commenter's argument. CBP works with the appropriate internal subject matter experts during an EAPA investigation and, in addition, works with the Customs Liaison Unit at Commerce, and refers cases to Commerce regarding the scope of an AD/CVD order when appropriate. The covered merchandise referral to Commerce pursuant to 19 U.S.C. 1517(b)(4) is a specific authority for CBP to use in EAPA investigations, as needed, and should remain within CBP's discretion. Apart from CBP's authority to refer issues to Commerce for a covered merchandise determination, an interested party also has the ability to seek resolution of a scope issue before Commerce pursuant to Commerce's regulations found at 19 CFR 351.225 and 19 CFR 351.227. CBP does not believe that an additional mechanism is needed in this rulemaking. With regard to the second part of the comment, CBP does not believe that a process is needed for a situation where the importer alleges that CBP improperly suspended liquidation of entries when the scope was being disputed. If CBP determines that there is reasonable suspicion that the importer entered covered merchandise into the customs territory of the United States, TRLED will instruct the Center to suspend

liquidation of entries of such covered merchandise that entered on or after the date of initiation of the investigation or extend the period for liquidating each unliquidated entry of such covered merchandise that entered before the date of the initiation of the investigation, and take other measures necessary to protect the revenue. CBP needs to conclude its investigation to issue a determination as to evasion, and does not overturn interim measures, such as the suspension of liquidation or the extension of the liquidation period, until a determination has been made.

Investigation Procedures (Subpart C)

Subpart C (Investigation Procedures) includes provisions setting forth the EAPA investigation procedures, such as the maintenance of an administrative record, the time period provided for an investigation and the deadline for making a determination, the types and requirements for the submission of factual information, and the issuance of interim measures. This subpart also describes CBP's authority to conduct verifications of information, deals with the submission of written arguments to CBP and responses to written arguments, and finally sets forth the process for the issuance of a determination as to evasion and the assessment of duties and other actions in case of an affirmative determination. Commenters submitted questions regarding public access to the administrative record, questions surrounding the submission of factual information, and the interim measures process, as well as the verification process.

Comment: One commenter stated that it is unclear from the regulations how and to what extent parties to the investigation would be able to access public information during the course of the investigation or administrative review. The commenter asked that CBP amend the regulations to include a provision that sets forth where CBP would maintain an up-to-date public administrative record, how CBP would guarantee access, and when and how CBP would share public information.

Response: The EAPA Portal provides the parties to the investigation with access to the public documents and public versions of documents relating to the EAPA proceeding and allows the parties to the investigation to view the public administrative record. In addition, CBP publishes public versions of notices of initiation of an investigation, notices of initiation of an investigation and interim measures, covered merchandise referrals, and determinations as to evasion on its website, in a timely manner. Finally, CBP appreciates the opportunity to announce that CBP has started publishing public versions of final

administrative review determinations.[3] CBP has uploaded earlier public versions of final administrative review determinations to its website.

Comment: While one commenter supported the opportunity for parties to the investigation to submit factual information pursuant to § 165.23(b), another commenter asked CBP to clarify in § 165.23(a) that CBP may request information from any party who has relevant information.

Response: CBP appreciates the comments. However, CBP disagrees with the second commenter that a regulatory change is needed to clarify that CBP may request information from any party who has relevant information. The universe of persons from whom CBP may request information pursuant to § 165.23(a) is broad, and CBP does not believe that it needs to be specifically defined.

Comment: One commenter stated that it would be useful for the purpose of identifying an importer, especially in situations where importers are incorporated under multiple different names, or when several related companies act as importers of record through an agent, that CBP include in the scope of an EAPA investigation activities engaged in by companies related to an identified importer, which support the allegation.

Response: CBP disagrees with the commenter's suggestion. Although an alleger is free to include information about the activities of a company related to an identified importer in its allegation, the statutory language does not require the inclusion of such information. Furthermore, such a requirement would create an additional barrier that may inhibit the submission of some legitimate allegations.

Comment: One commenter supported the establishment of a service list for purposes of serving other parties with public versions of documents, and asked CBP to amend the regulations to set forth the requirements for the maintenance of such a list.

Response: CBP does not agree with the commenter's request to add a requirement for maintenance of a service list in the regulations. CBP currently releases public versions of documents to the parties to the investigation, which CBP believes is sufficient. Public documents and public versions of documents are also available to the parties to the investigation in the EAPA Portal.

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[3] The final administrative review determinations may be found online at *https://www.cbp.gov/trade/trade-enforcement/tftea/eapa* by clicking on the field titled "Request for Administrative Review," and then on the blue "Final Administrative Determinations" button. The published determinations may also be found online at *https://www.cbp.gov/trade/trade-enforcement/tftea/eapa/requests-administrative-review* by clicking on the field titled "Final Administrative Determination," or on the blue "Final Administrative Determinations" button.

Comment: Multiple commenters asked CBP to modify its regulations so that parties can submit confidential documents via a secure electronic filing system, as opposed to email, and allow attorneys and other interested parties to easily monitor the ongoing investigation. One commenter also asked CBP to provide for the hand delivery of documents if documents contain confidential information, or delivery by mail if the document to be submitted exceeds a certain size limit.

Response: The EAPA Portal allows parties to submit confidential documents, and the parties to the investigation, as well as their attorneys, are able to monitor the status of an EAPA proceeding. Further, CBP already allows for hand delivery on a case-by-case basis, in instances of voluminous submissions or the submission of confidential documents. A party who wishes to hand-deliver documents must file a request with TRLED and provide a reason why the documents cannot be filed electronically. The regulation does not need to be amended as the option of hand delivery is already included in § 165.5(b)(1) as a method approved or designated by CBP. Regarding the last comment, delivery by mail is not allowed, but if there are size limitation issues with the EAPA Portal, parties may contact the EAPA Investigations Branch at *eapallegations@cbp.dhs.gov.*

Comment: One commenter requested that CBP add a provision in the regulations to allow for the filing of a "Bracketing Not Final" version of a submission first, followed by the final, public version the next business day. The commenter believes that this additional time is necessary to review any business confidential information to make sure that the public version is correct. The commenter argued that this change would make CBP's regulations consistent with those of Commerce, the U.S. International Trade Commission (ITC), and the CIT.

Response: CBP disagrees with the commenter's request to allow for the filing of a "Bracketing Not Final" version first, followed by a final, public version the next business day. Section 165.4(a)(2) states that the public version should be filed on the same date as the business confidential version and gives CBP the opportunity to reject a public version, if needed. Simultaneous filing ensures that the other parties to the investigation timely receive documents, since only public versions are provided to other parties in an EAPA investigation. Commerce, ITC, and CIT procedures differ in this regard, in that confidential versions are provided to other parties under protective orders.

Comment: One commenter asked CBP to modify § 165.23(c)(1) to set a deadline for service of the public version of a submission of factual information, which currently is missing in the regulations.

Response: CBP disagrees with the commenter. Section 165.23, first sentence, refers to §§ 165.4 and 165.5 with regard to the submission requirements. Specifically, § 165.4(a)(2) addresses the requirement to submit a public version on the same date as the business confidential version.

Comment: One commenter asked CBP to clarify in § 165.23(c)(2) whether the service requirement applies to the submission of all factual information, or only to factual information submitted after a certain point in the investigation. The commenter stated that pursuant to § 165.23(c)(2), parties submitting factual information are required to serve on parties to the investigation a public version of the submission. The commenter went on to say that if an alleging party submitted factual information after the initial allegation, but prior to the issuance of interim measures, it would be unclear whether service of that information on other parties would interfere with CBP's enforcement efforts in case CBP had not yet notified certain parties of the investigation.

Response: CBP disagrees with the commenter's request to modify § 165.23(c)(2). The service requirements in § 165.4 apply throughout the investigation; there is no distinction in the regulation, or in practice, regarding the timing of the submission of factual information. However, CBP wishes to clarify that any documents submitted prior to the notice of initiation of an investigation will be served by TRLED on the parties to the investigation soon after the issuance of the notice, regardless of who submitted those documents. For additional clarity, CBP added a sentence to that effect at the end of § 165.15(e).

Comment: One commenter stated that CBP should adopt a regulation that imposes interim measures if Commerce finds that imported merchandise is covered by an AD/CVD order and that tolls the CBP deadlines for the completion of the investigation. Otherwise, the commenter noted, if Commerce issues a scope determination which is subject to judicial review and CBP's regulations do not toll CBP's administrative deadlines during the pendency of judicial review, it may be the case that an importer is labeled an "evader" even though the underlying facts for the scope determination are subject to dispute. The commenter opined that adding a regulation as described above would ensure that importers will not be labeled as duty evaders unless and until all their due process rights have been exhausted.

Response: CBP disagrees with the commenter. CBP considers decisions by various internal stakeholders as well as other government agencies when reaching the decision to take interim measures, but CBP has independent authority to determine if or when to impose

interim measures. CBP takes interim measures after careful examination of the facts and information provided, concluding that there is reasonable suspicion that evasion has taken place. Judicial review of a scope determination should not put the EAPA investigation on hold because CBP needs to timely continue its process, as provided in the regulations, to fully investigate the facts relating to the allegation and make a determination as to evasion. CBP notes that Congress, through the statutory timelines set forth in EAPA, made clear that it intended prompt action on the part of CBP.

Comment: One commenter requested that CBP amend § 165.24(c) to state that CBP will share the public administrative record with Commerce upon issuing interim measures. The commenter argued that the connection between Commerce's administration and enforcement of AD/CVD orders and CBP's efforts to combat evasion under EAPA necessitates that the agencies share information and work together to maximize enforcement.

Response: CBP does not see a need to amend the regulations so CBP may share the administrative record with Commerce after the issuance of interim measures. CBP regularly shares information with Commerce, based on the circumstances of the case and in accordance with law.

Comment: One commenter asked CBP to clarify in § 165.25 that the verification process takes place sometime between initiation of the investigation and the 200th calendar day after the initiation, that a verification agenda is included, and modify the regulations to provide for a verification report that CBP will place on the administrative record.

Response: CBP does not agree with the commenter that the verification process must be completed by the 200th calendar day after initiation of an investigation. Rather, verification generally occurs after all new factual information has been submitted to the administrative record. The deadline for voluntary submission of new factual information is established in § 165.23. To clarify that CBP may conduct verifications before and after the deadline for voluntary submission of factual information, CBP has revised the language in § 165.25(b). In addition, CBP added a sentence in paragraph (b) to confirm that the purpose of the verification is to verify the accuracy of the information already placed on the administrative record. Regarding the commenter's second request, CBP already provides a verification agenda to the parties to the investigation and does not believe that it needs to be specifically stated in the regulation.

To respond to the commenter's request regarding the verification report, CBP added a new paragraph (c) stating that CBP will place a

report about the verification, *i.e.,* the verification report, on the administrative record. CBP will also require the party that underwent the verification to place verification exhibits, which will generally contain information compiled and verified by CBP at CBP's discretion during the verification, on the administrative record. In accordance with § 165.4, CBP and the party that underwent the verification will provide public versions of their verification documents, which will be served on all parties to the investigation. CBP will not accept voluntary submissions of new factual information at the verification after the deadline for such submissions, as referenced in § 165.23. Further, parties to the investigation cannot submit rebuttal information to either CBP's verification report or the verification exhibits. Parties to the investigation, however, may submit to CBP written arguments in relation to the verification report and/or its exhibits in accordance with § 165.26.

CBP also added a new paragraph (d) stating that if CBP determines that information discovered during a verification is relevant to the investigation and constitutes new factual information, CBP will place it on the administrative record separately, in accordance with § 165.23, and allow the parties to the investigation to submit rebuttal information.

Comment: One commenter expressed support of § 165.26 but was concerned that the 50-page limit in paragraph (d) may be too short in some cases. The commenter suggested that CBP explicitly state in the regulation that it would increase the page limitation upon request when good cause is shown.

Response: CBP disagrees with the commenter's suggestion and supports the regulation as currently written. Written arguments are a summary of record evidence and new information is not permitted. CBP believes that 50 pages is a reasonable limit and does not see a need to provide for exceptions in the regulation.

Comment: One commenter stated that CBP should clarify in § 165.26(c) that CBP may request written arguments on any issue from any interested party.

Response: CBP believes that § 165.26(c) as currently written is properly limited to the parties to the investigation. However, to make the terminology in § 165.26(c) clearer, CBP changed the regulatory language from "any party" to the investigation to "the parties" to the investigation.

Comment: One commenter argued that CBP should make it clear in § 165.27(a) that a determination must be based on substantial evidence on the record, and add a reference to the administrative record, as defined in § 165.21.

Response: CBP does not see a need to add a clarification in the regulation. Section 165.27(a) already contains language that a determination is based on substantial evidence as to whether covered merchandise was entered into the U.S. customs territory through evasion. In addition, § 165.21(a) states that CBP maintains an administrative record for purposes of making a determination as to evasion under § 165.27. When both regulations are read together, it is clearly stated that CBP's determination as to evasion is based on substantial evidence on the administrative record. In current practice, CBP states in its affirmative determinations that CBP reviewed the administrative record and found that it contained substantial evidence of evasion.

Comment: One commenter suggested that CBP add a sentence to § 165.27(b) to state that CBP will provide parties to the investigation with a public version of the administrative record no later than five business days after making a determination as to evasion, the same date that CBP sends the parties to the investigation a summary of the determination limited to publicly available information. This suggested language would mirror the language in § 165.24(c) for interim measures, which includes a notification of the decision to the parties of the investigation, along with a public version of the administrative record on the same date.

Another commenter suggested that § 165.27(b) be amended to provide a detailed and meaningful public explanation as to what should be covered by the summary of CBP's determination as to evasion since that summary would serve as the primary basis for a party's decision whether to request an administrative review and subsequent judicial review.

Response: With regard to the first comment, once parties to the investigation are notified of an investigation, and then throughout the remainder of the investigation, the administrative record is made available in the EAPA Portal. CBP does not agree that the regulation needs to be amended to that effect. Pursuant to § 165.27(b), CBP will provide a summary of the determination as to evasion, limited to publicly available information, to the parties to the investigation. As part of the public version of the determination as to evasion, CBP includes a short summary of the redacted information in brackets that was deemed business confidential information. Additionally, as discussed in more detail below, CBP will provide for an APO process so parties to the investigation may access business confidential information. Thus, an amendment to § 165.27(b) as suggested by the second commenter is not necessary.

Comment: One commenter stated that § 165.27 does not appear to contemplate the publication of a determination as to evasion, and a summary is available only to the parties to the investigation. The commenter suggested that CBP add a new paragraph (c) to § 165.27 stating that no later than 90 days after making a determination as to evasion, CBP would publish a summary of the determination limited to publicly available information in the *Customs Bulletin* or make the determination otherwise available for public inspection.

Response: CBP disagrees with the commenter's suggestion to amend § 165.27. In addition to informing the parties to the investigation about the determination electronically, CBP has been publishing a public version of the determination on its website. The public version of a determination is also available to the parties to the investigation in the EAPA Portal.

Comment: One commenter stated that a party's right to judicial review, as granted in 19 U.S.C. 1517(g), is restricted by the regulations as the regulations limit a party's right to public information only, and thereby deprive the party of full knowledge of the basis for CBP's determination. It is the commenter's opinion that CBP must provide the parties to the investigation with some level of access to proprietary information in order for CBP to give full effect to the statute.

Response: CBP agrees with the commenter's request to provide access to another party's proprietary information. As discussed in more detail below, CBP will establish an APO process to allow for the release of business confidential information to parties to the investigation.

Administrative Review of Determinations (Subpart D)

Subpart D (Administrative Review of Determinations) specifies the requirements for requesting an administrative review of a determination as to evasion, discusses the submission of responses to the request for administrative review, and describes CBP's authority to request additional information from the parties to the investigation. This subpart also deals with the administrative review standard, the ability to file for judicial review of the final administrative determination, and, finally, potential penalties and other actions that CBP may undertake pursuant to any other relevant laws. CBP received comments regarding the publication of final administrative determinations, the availability of rebuttal information during an administrative review, and questions on the *de novo* review process for administrative reviews.

Comment: One commenter expressed concern with regard to the 30-business-day deadline (§ 165.41(d)) for requesting an administrative review of a determination as to evasion and asked for clarification in the regulations. The commenter stated that it is unclear whether "issuance" in the regulation refers to the date CBP signs the initial determination, the date it is sent to the parties, the date it is received by the parties, or some other date.

Response: CBP appreciates the opportunity to clarify that the date of issuance is the date that the determination is signed by CBP and also electronically transmitted to the parties to the investigation. In a rare case where the determination as to evasion is signed on one day and electronically transmitted the next business day, the date of electronic transmittal is considered the date of issuance.

Comment: One commenter asked for the regulations to be amended to expressly allow for rebuttal information in administrative reviews.

Response: CBP disagrees with the commenter. Under § 165.44, CBP may request additional written information from the parties to the investigation at any time during the administrative review process; however, these requests are narrowly tailored for specific information related to a record that has already been created during the course of the investigation. CBP has a strict 60-business-day review period to issue a determination on the request for administrative review. *See* 19 U.S.C. 1517(f) and 19 CFR 165.41(i). Any rebuttal information from the parties on additional information requested by CBP would reduce the number of days that Regulations and Rulings (RR) has available to conduct a *de novo* review of the record information and issue a final administrative determination. However, should CBP determine that rebuttal information is useful, then § 165.44 permits CBP to request such information.

Comment: One commenter stated that the language in § 165.45 is contradictory because the administrative review process is described to be *de novo* and, at the same time, based on specific facts and circumstances already on the administrative record. It is the commenter's opinion that parties should be able to provide any information they deem appropriate in the administrative review process since it is a *de novo* review.

Response: CBP disagrees with the commenter's request. EAPA requires that an administrative review be rendered within 60 business days (19 U.S.C. 1517(f)), which is in contrast to a much longer time frame (up to 360 calendar days) that CBP has available to render a determination as to evasion. The short deadline for the administrative review makes it impracticable for CBP to accept additional information that parties wish to submit. Rather, the administrative

review must be based solely on the facts already on the record, with the exception being if CBP believes that it needs additional information in accordance with § 165.44 to be able to render its decision, as mentioned above. To clarify even further, CBP added the phrase "in response to a request by CBP" before "pursuant to § 165.44" to emphasize that CBP will only consider additional information if CBP specifically requested that information.

Comment: One commenter asked CBP to add a paragraph in § 165.46 that sets forth that final administrative determinations are published in the *Customs Bulletin* or are otherwise made available for public inspection no later than 90 days after the issuance of the final administrative determination.

Response: CBP disagrees with the commenter's suggestion to amend the regulation as there is no need to include in the regulatory text a requirement for the publication of the final administrative determination. As mentioned in more detail above, CBP has started publishing final administrative determinations, limited to public information, on its website.

Comment: One commenter stated that CBP should clarify that any actions taken apart from the EAPA investigation will not disadvantage False Claims Act (FCA) relators. The commenter stated that § 165.47 expressly states that no action taken under EAPA prevents CBP from assessing penalties of any sort related to such cases or taking action under any other relevant laws and that CBP should extend this recognition to claims brought under the FCA in the final regulations.

Response: CBP disagrees with the commenter's request for clarification of § 165.47. EAPA investigations do not prevent actions by CBP or other government agencies under other authorities, including FCA, and CBP's and other governmental agencies' rights to undertake additional investigations or enforcement actions in cases covered by the EAPA provisions are already established in § 165.47. *See also* 19 U.S.C. 1517(h).

Comment: Multiple commenters stated that a determination as to evasion should not be a protestable decision and asked that CBP clarify in the regulations that the administrative process and judicial review under 19 U.S.C. 1517(f)–(g) are the only avenues by which a party may challenge a determination.

Response: CBP agrees with the commenters that a determination as to evasion in an EAPA investigation is not a protestable decision. Sections 1517(f)–(g) of 19 U.S.C. establish both an administrative and judicial review process for EAPA determinations made by CBP. The administrative and judicial review processes are the exclusive means

by which EAPA determinations can be reviewed. However, CBP does not see a need to clarify this in the final regulations at this time.

Other Comments

Comment: Multiple commenters asked that CBP publicly disclose key events, such as the initiation of an investigation, or determination as to evasion, to a wider trade community, either in form of a searchable docket or some other type of publication process for the key documents. The commenters argued that such disclosure would deter future evasion attempts and promote increased compliance by all parties.

Response: CBP already publishes public versions of notices of initiation of an investigation, notices of initiation of an investigation along with interim measures (if CBP takes interim measures after initiating an investigation), covered merchandise referrals, determinations as to evasion, and now final administrative determinations as well, on its website. To further promote transparency of the EAPA process, those decisions are viewable in the EAPA Portal by the parties to the investigation.

Comment: Multiple commenters have urged CBP to create an APO process or similar process in the final regulations, which would allow authorized representatives of interested parties to obtain and review confidential information submitted by other interested parties. While the commenters acknowledge that the statute did not explicitly authorize CBP to create an APO, these commenters note that such specific statutory authorization is not necessary given that Congress has broadly authorized CBP to promulgate regulations necessary to implement the provisions of TFTEA. The commenters claim that the lack of an APO hinders the parties' ability to meaningfully participate in EAPA proceedings in multiple ways. The commenters argue that the parties affected by CBP's decision-making will not have full access to information contained on the administrative record unless and until judicial review is requested. Further, the inability to have access to other parties' business confidential information prevents other parties to the investigation from providing rebuttal information and from submitting arguments at the administrative level based on a review of the complete information. Finally, the commenters argue that the lack of an APO makes the administrative process more burdensome for CBP, because CBP must respond to irrelevant arguments and evidence submitted by parties, who, without full access to the record, are unable to assess the nature of that record and other parties' claims.

Response: CBP agrees with the commenters that Congress provided CBP with authority to "prescribe such regulations as may be necessary" to implement the requirements under the statute. CBP, by regulation, has created an investigation procedure that allows participation by the parties to the investigation. Under § 165.4, any party submitting information to CBP may request confidential treatment for information protectable under 5 U.S.C. 552(b)(4). The party must identify such confidential information by placing it in brackets, marking the first page as confidential, and providing an explanation for requesting confidential treatment. The interested party must also file a public version of the confidential document. Under § 165.4(a)(2), the public version must contain a summary of the confidential information with sufficient detail to permit a reasonable understanding of the substance of the information. If the submitting interested party claims that summarization is not possible, the claim must be accompanied by a full explanation of the reasons supporting that claim. Public summaries that do not meet this requirement will be rejected.

Moreover, in order to allow meaningful participation in the proceedings, and for purposes of transparency, CBP will not accept claims of confidential treatment for the following information: (1) name of the party to the investigation providing the information, its agent filing on its behalf, if any, and email address for communication and service purposes; (2) basis upon which the party making the allegation qualifies as an interested party as defined in § 165.1; (3) name and address of importer against whom the allegation is brought; (4) description of covered merchandise; and (5) applicable AD/CVD orders.

While CBP believes that the above process provides parties to the investigation with a meaningful opportunity to participate in the EAPA investigation, CBP acknowledges that, on July 27, 2023, the U.S. Court of Appeals issued a decision in *Royal Brush Mfg.* v. *United States,* 75 F.4th 1250 (Fed. Cir. 2023), with respect to the issue of a need for an administrative protective order in that case. In light of that precedential decision, CBP is reviewing its procedures with respect to the disclosure of business confidential information during EAPA investigations. As such, CBP has amended § 165.4 and added language in the introductory text of paragraph (a) to state that if the requirements of § 165.4 are satisfied and the information is privileged or confidential in accordance 5 U.S.C. 552(b)(4), CBP will grant business confidential treatment and issue an APO, in compliance with the mandate in *Royal Brush.* Further, CBP added a new paragraph (f), stating that in each investigation where CBP grants a request for business confidential treatment, CBP will issue an APO which will contain terms that allow the representatives of the parties to the

investigation to access the business confidential information. CBP will publish guidance to provide additional information on this new APO process, and CBP is also considering whether to initiate a separate rulemaking for purposes of further codifying an APO process. Finally, CBP made several additional changes to § 165.4, unrelated to an APO process, which may be found in section III below.

Comment: Multiple commenters stated that CBP must follow the statutorily mandated deadlines and should clarify in the final regulations that they are mandatory.

Response: CBP abides by all statutory deadlines such as CBP's decision to take interim measures no later than 90 days after initiating an investigation under 19 U.S.C. 1517(e), CBP's determination as to evasion no later than 300 days after initiating an investigation pursuant to section 1517 (c)(1)(A), and the 60-business-day timeline for making a final administrative determination pursuant to section 1517(f)(2). CBP does not believe that a clarification in the final regulations is necessary.

Comment: One commenter stated that CBP should clarify in the final regulations that all *ex parte* communications of substance will be memorialized in the administrative record and public versions of such written memorialization should be promptly disclosed to the other parties to the proceeding.

Response: CBP disagrees with the commenter that the memorialization of *ex parte* communications needs to be specifically outlined in the regulations. Substantive *ex parte* communications are memorialized, and public versions are disclosed to the parties to the investigation as a matter of practice.

Comment: One commenter voiced concerns with regard to section 411(b)(4)(B) of TFTEA, specifically the provision of information on the status of CBP's consideration of an evasion allegation and related decision whether or not to pursue any administrative inquiries or other actions as a result of an allegation to a party or parties who submitted an allegation as to evasion. The commenter stated that this provision appears to authorize CBP to allow the alleging party to request Federal documents, which will likely include business confidential information of the importer. The commenter further argued that this provision disadvantages the importer by giving the alleging party information that the importer cannot review and of which the importer is not aware, making this provision fundamentally unfair.

Response: CBP disagrees with the commenter, who is not interpreting the statute in the way that CBP is administering EAPA. While the alleging party may be aware that CBP is processing an allegation before the alleged evader is, CBP does not share business confidential

information of other entities with the alleging party at any stage of the investigation. All parties to the investigation are notified whether or not interim measures are taken once an investigation is ongoing and are allowed to participate in the investigation from that point forward.

Comment: One commenter stated that CBP should prescribe regulations that obligate customs brokers to collect and verify meaningful information regarding companies that approach the broker seeking to act as an importer of record.

Response: CBP thanks the commenter for its contribution; however, this comment is beyond the scope of this EAPA rulemaking.

III. Technical Changes and Clarifications to the Interim Regulations

In addition to carefully considering and responding to the public comments, CBP has reviewed the interim regulations in their totality to assess the effectiveness of the established EAPA process and determine whether any regulations, other than the ones addressed above in response to public comments, should be amended. Pursuant to this review, CBP has made some changes to clarify and update the interim regulations, emphasizing CBP's goal for a clear and transparent process and aligning CBP's current practice with the regulations.

CBP made some changes to § 165.1 by clarifying and updating some of the existing definitions and adding a definition. First, CBP slightly rearranged the sentence of the definition of "allegation" in § 165.1 for clarity. Next, in the definition of "TRLED" in § 165.1, CBP removed the reference to EAPA and replaced it with a reference to the Trade Facilitation and Trade Enforcement Act of 2015 (TFTEA) as it is a more accurate reference. CBP also added a definition for "Business day" in § 165.1, which mirrors the language in 19 CFR 101.1. CBP had received a general comment regarding the treatment of Inauguration Day (January 20 or January 21 if January 20 falls on a Sunday) in the context of calculating deadlines, and CBP wants to take the opportunity to clarify its position on this subject since this legal holiday in the Washington, DC, area occurs every four years. Thus, pursuant to the new definition, and in accordance with 5 U.S.C. 6103(c), Inauguration Day is not considered a business day for purposes of an EAPA investigation.

CBP made several changes to § 165.4, in addition to the changes mentioned above. In paragraph (a), CBP added a sentence at the end of the paragraph to state that all documents and communications that are submitted to CBP after notice of initiation must be served on all parties to the investigation by the submitting entity. For business

confidential documents, a public version must be served as well, in accordance with § 165.4(a)(2). This addition is not a change but merely a confirmation of CBP's practice. Further, CBP included language in the introductory sentence in paragraph (b) clarifying that rejected submissions due to failure to meet the requirements of § 165.4(a) will not be placed on the administrative record. The same language regarding the placement on the administrative record was added in § 165.4(b)(3), setting forth the effects of a rejected submission. Finally, CBP added the phrase "unless the submitting interested party takes any of the actions in paragraph (b)(2) of this section within the timeframe specified in that paragraph" at the end of the introductory sentence in paragraph (b), referring to the possibility of corrective action pursuant to § 165.4(b)(2) in case of a nonconforming submission.

In addition, CBP added two sentences at the end of paragraph (e), stating that parties who are not already subject to the requirements of § 165.4, such as suppliers or customers, must adhere to the requirements set forth in § 165.4 and § 165.5 when filing submissions. With this change, CBP is clarifying its current expectation that interested parties and other parties who submit information to CBP must follow the same submission requirements. Additionally, § 165.5(b) states that all submissions to CBP must adhere to the requirements in part 165. Thus, the addition of the two sentences in paragraph (e) simply clarifies the requirements set forth in § 165.4 and § 165.5 and the effect of a nonconforming submission.[4]

In § 165.5(b)(2), CBP added language to clarify that the certification requirement, along with other submission requirements in sections 165.4 and 165.5, applies not only to submissions by interested parties, but also to submissions requested by CBP from any other party. Lastly, CBP replaced the reference to "19 CFR" with a section symbol in two places in § 165.5(b)(2)(ii) and (iii) to make those references consistent with other references in the regulations.

In addition, CBP added a new paragraph § 165.5(b)(4), titled "Nonconforming submissions," clarifying that CBP will reject submissions that do not meet the requirements of paragraph (b) of this section, and will not consider or place them on the administrative record. In § 165.5(c)(1), CBP added language in the first sentence to clarify that the request for extensions applies not only to regulatory time limits, but also to any deadlines for the submission of information requested by CBP. CBP has allowed for requests for extension of non-regulatory deadlines in prior investigations and takes the opportunity to confirm

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[4] CBP added § 165.5(b)(4) in this final rule and the addition is explained in further detail below.

in the regulation that a party may request an extension of a deadline set by CBP. In addition, CBP added the words "by the requester" at the end of the third sentence of paragraph (c)(1) in the definition of an extraordinary circumstance, which is an unexpected event that could not have been prevented even if the requester had taken reasonable measures. In paragraph (c)(2), CBP replaced "retain it in" the administrative record with "place it on" the administrative record to make the language consistent with other sections that have similar language.

CBP revised the language in the second sentence of § 165.13(c) by replacing the 95-calendar-day reference with regulatory language that reflects CBP's practice of notifying the parties to the investigation within five business days of making formal a decision to initiate an investigation and a decision to consolidate after day 90 of the investigation. This change is similar to the change in § 165.15(d)(1), as explained above. The changes to both § 165.13(c) and § 165.15(d)(1) will create uniformity among the regulations dealing with the timing of notification of decisions that CBP makes throughout the EAPA investigation process. CBP further reorganized the first sentence in § 165.13(d) to read more easily and added a reference to public documents that need to be served on parties to the previously unconsolidated investigation once the parties subject to the consolidation are notified. Both public versions of documents and public documents are placed on the administrative record as part of the EAPA investigation. Lastly, CBP replaced the second and third mentions of the word "upon" in the first sentence of § 165.13(d) with "on" for clarity.

CBP amended the first sentence of § 165.14(a) to include the words "but not limited to" after "including" to emphasize that any Federal agency, in addition to Commerce and the ITC, may request an investigation under part 165.

CBP added a phrase to § 165.16(d) to include interim measures under § 165.24, along with the deadline to decide whether to initiate an investigation and the deadline to issue a determination as to evasion under § 165.27, setting forth that the time period for any referral to and determination by Commerce will not be counted toward the deadlines mentioned in this paragraph. The regulation is based on language in 19 U.S.C. 1517(b)(4)(C), which states that the period required for the referral to Commerce and the determination shall not be counted in calculating any deadline under this section, and interim measures are mentioned in paragraph (e) of section 1517 as well.

In §§ 165.22(a) and (d), CBP replaced the phrase "not later" with "no later" to be consistent with the use of the phrase in other regu-

lations. This technical change does not change the deadlines associated with a determination as to evasion in this section. In paragraph (d), CBP changed the word "notification" to "notice" in the paragraph heading to better reflect CBP's practice of serving the parties to the investigation with a notice, instead of simply notifying them of an extension of time to make a determination as to evasion. Further, CBP rephrased some of the language in § 165.22(b) to mirror the language in § 165.13(a), and with this final rule, both sections will include the "date of receipt of the first properly filed allegation" instead of the "date on which CBP receives the first of such allegations."

In § 165.23(b), CBP changed the words "Any party" to the investigation at the beginning of the sentence to "The parties" to the investigation. This change clarifies CBP's intent as to who may submit additional information and makes the language consistent with the term "parties to the investigation," as defined in § 165.1. For ease of reading, CBP reorganized 165.23(c)(2), breaking it out into subparagraph (i) dealing with the requirements associated with the voluntary submission of factual information and subparagraph (ii) detailing the requirements for the submission of rebuttal information to the submitted factual information.

In the newly created paragraph (c)(2)(i), CBP added language to provide CBP with the discretion to extend the deadline for voluntary submission of factual information if CBP determines that circumstances warrant an extension. In many past investigations, CBP was under considerable time constraints to timely review and assess the information gathered during the investigation before making a determination as to evasion. In exceptional cases, CBP had already extended the deadline in § 165.23(c)(2). When the interim regulations were drafted, the timelines stated therein seemed feasible; however, CBP's experience over the past seven years has shown that there are situations where CBP needs additional time to investigate and, therefore, needs to have the discretion to extend the deadline for the voluntary submission of factual information when the circumstances warrant. There may be situations where verifications are difficult to conduct due to travel restrictions or other obstacles, and CBP needs the flexibility to extend the deadline for the voluntary submission of factual information in order to conduct a fulsome investigation. If CBP extends the deadline in § 165.23(c)(2)(i), the parties to the investigation will be notified of the extension and will be given the opportunity to make submissions up to the end of the extended deadline. To make the remaining language in § 165.23 consistent with this change, CBP revised the last sentence of (c)(1) by removing the

reference to the 200-day deadline and replacing it with a reference to (c)(2), which sets forth the deadline, including the possibility for CBP to extend the deadline at its discretion. It is important to note that this discretionary extension of the deadline in § 165.23(c)(2)(i) does not go beyond the statutory limit of 360 days (19 U.S.C. 1517(c)(1)) by which CBP is required to make a determination as to evasion.

In addition, in newly created § 165.23(c)(2)(i), CBP replaced the clause "except rebuttal information as permitted pursuant to the next sentence herein" with a reference to (c)(2)(ii), pointing to the time frame and requirements for the submission of rebuttal information. Lastly, in the newly created paragraph (c)(2)(ii), CBP removed the phrase "from the date of service of any factual information," keeping only the phrase "from the date of placement of any new factual information" because CBP's practice has been to use the date of placement of new factual information on the administrative record as the trigger for the 10-calendar-day period for providing rebuttal information. Removing this phrase does not change the parties' rights to provide rebuttal information and the time frame for submitting rebuttal information.

In § 165.23(d), CBP included language in the second sentence to clarify that CBP intends to place a written summary of an oral discussion between CBP and any party from whom CBP requests factual information on the administrative record once an investigation has been initiated, consistent with CBP's practice. It is important to note that oral discussions between the alleger and CBP regarding flaws in an allegation will not be placed on the administrative record. In addition, CBP switched the order of the words "confidential" and "business" in the third sentence of paragraph (d) as the proper term is "business confidential information" and it was erroneously written in the interim regulations as "confidential business information."

In § 165.24, CBP replaced the word "notification" in the first sentence of paragraph (c) with "notice" as CBP serves an actual notice of the decision to take interim measures. In addition, CBP amended the last sentence of paragraph (c) stating that CBP will provide the public version of the administrative record within 10 business days of issuing a notice of initiation of an investigation. When the interim regulations were drafted, it seemed operationally feasible to provide the public version of the administrative record and the notice of initiation of investigation and interim measures on the same date. However, due to TRLED's heavy workload, it has proven difficult in many cases to provide the entire administrative record, limited to public information, after day 90 of the investigation, on the same day as the notice of initiation of investigation and interim measures, as CBP

needs time to prepare the public versions of documents on the administrative record before providing them to the parties to the investigation.

CBP made changes to § 165.26(a)(1) and (b)(1) that are similar to the changes discussed above for § 165.23(c), providing CBP the discretion to extend the deadlines for submitting written arguments and responses to written arguments if the circumstances warrant. The need to extend a deadline under § 165.26(a) has frequently become apparent, usually due to the verification process not being completed in time. The purpose of such an extension is to grant an additional 60 days in those instances to complete the verification, give parties adequate time to present written arguments, and for CBP to make a determination as to evasion. In addition, CBP reorganized paragraph (a)(1) and included language stating that an extension of the 230-calendar-day deadline cannot exceed 300 calendar days after the investigation was initiated, or 360 calendar days after the investigation was initiated (in case of an extension of the deadline for a determination as to evasion pursuant to § 165.22(c)). This change will provide CBP the additional time needed to make a sound decision if circumstances warrant an extension. CBP also reorganized paragraph (b)(1) to include language regarding CBP's discretion to extend the 15-calendar-day deadline if CBP deems it necessary. Further, CBP slightly revised § 165.26(d)(2) to make the language read more easily without changing the substance or meaning of the language.

In § 165.28(c), CBP added the phrase "in accordance with the instructions received from the Department of Commerce" at the end of the sentence in order to align the regulatory language with the statutory language in 19 U.S.C. 1517(d)(1)(D) and provide further clarity.

In order to bring the EAPA regulations in line with the statutory language in 19 U.S.C. 1517(c), CBP removed the word "initial" before the word "determination" throughout §§ 165.41, 165.45 and 165.46. CBP added "as to evasion" after "determination" in the heading of subpart D, as well as in the section heading for § 165.41 to distinguish a determination as to evasion from a determination that is made during the administrative review. In addition, CBP has removed the last sentence of § 165.41(i) as it is redundant and potentially confusing. The 30-business-day deadline for filing a request for an administrative review is set forth in § 165.41(d).

CBP made three changes in the introductory paragraph of § 165.41(f). First, at the end of the first sentence, CBP added the phrase "in total (including exhibits but not table of contents or table of authorities)," which can also be found in § 165.42, in order to make

the page limit requirements for a request for administrative review consistent with the requirements for a response to a request for administrative review. Second, CBP replaced the word "upon" with "on for clarity. And third, CBP added a sentence to clarify that CBP will reject a request for administrative review that does not meet the requirements of paragraph (f) and will not consider it or place it on the administrative record. Further, in § 165.41(h), CBP removed the language "involving the same importer and merchandise" as this is not a correct statement as to the consolidation of requests for administrative review. There is no limitation in practice as to the possibility of consolidating separate requests for administrative review that relate to one consolidated investigation, which may include different importers and merchandise.

In addition, CBP added a sentence in § 165.42 to clarify that the original submitter of a request for administrative review is not included as one of the parties who may submit a written response to the filed request for review. It has never been CBP's intent that a party who submitted a request for administrative review be able to respond to its own submission, and CBP wants to confirm this intent in the final regulation. CBP also replaced the word "upon" with "on" in § 165.42 for clarity.

CBP amended § 165.44 by adding two sentences at the end of the section to clarify that CBP will only accept written submissions of additional information in response to a request by CBP, and that meetings or any other methods of unsolicited submission of additional information during the administrative review are not permitted. Throughout subpart D, only written submissions and additional written information, and no other methods, such as oral discussions as allowed in subpart C, will be accepted. *See* §§ 165.41(f), 165.42, and 165.44.

Lastly, CBP made two minor changes in § 165.46. In paragraph (a), CBP replaced the reference to "EAPA" with a reference to "TFTEA" as it is more accurate. In addition, CBP replaced the term "final administrative determination" in § 165.46(b) with "administrative review" to mirror the statutory language used in 19 U.S.C. 1517(f).

IV. Conclusion

Based on the analysis of the comments and further consideration, CBP has decided to adopt as final the interim regulations published in the **Federal Register** on August 22, 2016, as modified by the changes based on public comments, and the technical changes and clarifications discussed above.

V. Statutory and Regulatory Requirements

A. Executive Orders 13563 and 12866

Executive Orders 13563 (Improving Regulation and Regulatory Review) and 12866 (Regulatory Planning and Review), as amended by Executive Order 14094 (Modernizing Regulatory Review), direct agencies to assess the costs and benefits of available regulatory alternatives, and if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility.

The Office of Management and Budget (OMB) has not designated this rule a significant regulatory action under section 3(f) of Executive Order 12866, as amended by Executive Order 14094. Accordingly, OMB has not reviewed it.

This rule has resulted in undiscounted costs to the public of $20,008,985 to file allegations and communicate to CBP during the EAPA investigation process and to file administrative review requests since the IFR was published in 2016. The rule has resulted in $20,542,915 in costs to CBP. Qualitative benefits of this rule include improved enforcement of AD/CVD orders, increased transparency and predictability in the processing of AD/ CVD evasion allegations, and increased communication with the public.

1. Purpose of the Rule

As mentioned above, on February 24, 2016, President Obama signed into law the Trade Facilitation and Trade Enforcement Act of 2015, which contains Title IV-Prevention of Evasion of Antidumping and Countervailing Duty Orders (short title “Enforce and Protect Act of 2015” or “EAPA”) (Pub. L. 114–125, 130 Stat. 122, 155, (Feb. 24, 2016) (19 U.S.C. 4301 note)). Section 421 of TFTEA requires that regulations be promulgated where necessary to implement the provisions of EAPA. Previous customs laws did not establish a set of specific formal procedures for parties to submit allegations of antidumping or countervailing duty (AD/CVD) evasion to CBP. EAPA provides CBP with new and additional tools with which to combat the problem of AD/CVD evasion with the establishment of a formal process for investigating allegations of the evasion of AD/CVD orders. On August 22, 2016, CBP published an interim final rule (IFR) in the **Federal Register** (81 FR 56477), which established a transparent process for making allegations, investigating such allegations, and

reporting the results of investigations. This process provides access to information for the parties to the investigation, giving CBP the opportunity to conduct improved and more thorough investigations of each allegation and to make informed AD/ CVD evasion decisions. This final rule makes permanent the interim regulations, including a change based on the previously published technical correction, changes in light of the public comments received in the comment period, as well as changes based on CBP's own review of the interim regulations and the established investigation process.

AD/CVD duties are an important trade measure that shields domestic companies from unfair trade practices by overseas competitors. In fiscal years 2020 and 2021, CBP assessed approximately $1.8 billion[5] and $2.4 billion[6] in antidumping and countervailing duties, respectively. With so much money at stake, the incentives to circumvent AD/CVD orders imposing these duties are high. The public benefits from having a more formalized and clear AD/CVD evasion allegation process, and such a process gives CBP the information it needs to be more effective with AD/CVD enforcement. Furthermore, this rule fulfills the legal mandate set forth in EAPA to establish a formal AD/CVD evasion allegations process and an investigation program.

Background

The antidumping (AD) law provides relief to domestic industries that have been materially injured or are threatened with material injury by imported merchandise sold in the U.S. market at prices below fair market value. The countervailing duty (CVD) law provides relief to domestic industries that have been materially injured or are threatened with material injury by imported merchandise sold in the U.S. market that has been unfairly subsidized by a foreign government or public entity. AD/CVD laws provide for additional import duties to be placed on the dumped or subsidized imports to offset the unfair dumping or subsidization of those imports.

Before the promulgation of interim final regulations, there was not a formal procedure for interested parties and other Federal agencies to submit allegations and evidence of AD/CVD evasion to CBP or a requirement for CBP to undertake a formal investigation in response to allegations of evasion. If an entity wanted to file an AD/CVD

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[5] Source: CBP. *CBP Trade and Travel Report*. Available at *https://www.cbp.gov/sites/default/files/assets/documents/2021-Feb/CBP-FY2020-Trade-and-Travel-Report.pdf*. Accessed June 15, 2022.

[6] Source: CBP. *CBP Trade and Travel Report*. Available at *https://www.cbp.gov/sites/default/files/assets/documents/2022-Apr/FINAL%20FY2021_%20Trade%20and%20Travel%20Report%20%28508%20Compliant%29%20%28April%202022%29_0.pdf*. Accessed June 15, 2022.

grievance against another business it would have had to submit a grievance via CBP's Trade Violation Reporting (TVR) system for general e-Allegations or contact CBP by other means, and a CBP employee would assist it in submitting its allegation. After the alleger provided all the required information, CBP would examine the information and determine whether to initiate an informal inquiry. There was not a formal process in place for CBP to reach out to the entity initiating the allegation to inform it of the results of its grievance and in many cases the alleger never heard back from CBP after the allegation was made. There was also no mechanism for the accused entity to know that it was under an e-Allegation investigation nor opportunity for it to provide information in its defense unless CBP decided to open a formal investigation. AD/CVD grievances submitted via the "Report Trade Violation" option on the TVR website are commonly referred to as "e-Allegations."

Costs

EAPA provides CBP with a formal process for conducting administrative investigations involving possible evasion of AD/CVD orders. CBP has established a new process under EAPA whereby CBP can formally reach out to the alleger, the alleged evader, and other interested parties with separate and distinct questionnaires in order to acquire information that will be used to determine whether an investigation is warranted and whether evasion is occurring or has occurred.

Parties submitting EAPA allegations do so through the EAPA Portal, which was launched in April 2021. New users are prompted to create an account and provide their name and email address in the account creation process. The creation of an account and submission of an allegation via the EAPA Portal are estimated to take three minutes (0.05 hours) and 12 minutes (0.20 hours) respectively, for a total time burden of 15 minutes (0.25 hours) for a first EAPA allegation by a user. Information provided during account creation is automatically inserted into documents submitted to CBP through the EAPA Portal and reduces the time burden to submit an EAPA allegation by three minutes when compared to the time burden prior to the introduction of the EAPA Portal. Users would also save the three minutes related to account creation for each allegation submitted after the first when compared to the previous method of having to submit the information again directly into the EAPA Portal. Prior to the launching of the EAPA Portal (and its EAPA-dedicated predecessor), EAPA allegations were submitted via a dedicated link on CBP's TVR system to a document for the alleger to complete and documents

submitted as part of the investigation were sent via email. The time it takes to enroll in the EAPA Portal is equal to the time saved the first time the EAPA Portal is used. For repeat users, there will be a three-minute time savings, but CBP lacks data to estimate how often this takes place. To the extent the EAPA Portal is used more than once by individual users, there will be a three-minute savings per use. For the purpose of this analysis, CBP assumes the EAPA Portal has no impact on time burdens.

CBP estimates that the submission of an EAPA allegation takes approximately 15 minutes (0.25 hours).[7] The statute requires a CBP employee to advise and provide technical assistance to the alleger in the filing of the EAPA allegation. In practice, this has eliminated the necessity of a follow-up questionnaire to be filled out by the alleger.

The alleged evader may receive a CBP Form 28 (CF–28) (Request for Information) or an Initial Request for Information questionnaire and other interested parties may receive an Initial Request for Information questionnaire. Responding to CBP's request for information via these instruments is optional; however, any party, except, *e.g.,* a foreign government, customer, or supplier, that chooses not to respond could be subject to adverse inferences and the investigation may lead to an unfavorable outcome for that party. The expected time burdens to complete and submit a response to the CF–28 and Initial Request for Information are approximately 60 and 90 hours, respectively.[8] If CBP determines that more information is required to bring an EAPA case to a close, relevant parties will receive a Supplemental Request for Information questionnaire. A Supplemental Request for Information questionnaire is typically issued because a party did not fully answer questions in the CF–28 or Initial Request for Information questionnaire. The Supplemental Request for Information questionnaire is estimated to have a time burden of 60 hours to complete and submit.[9]

To estimate the cost to the industry from filing an EAPA allegation and responding to the subsequent forms, CBP must first determine a value of time for entities who would complete and file the forms. CBP expects that, in most cases, these documents will be completed and filed by an outside attorney due to the complex and specialized nature

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[7] Source: U.S. Customs and Border Protection. Supporting Statement for Paperwork Reduction Act Submission: 1651–0131, e-Allegations Submission. September 24, 2020. Available at *https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=202009–1651–006.* Accessed November 24, 2020.

[8] Source: Email correspondence with CBP's Enforcement Operations Division on May 20, 2021.

[9] Source: Email correspondence with CBP's Enforcement Operations Division on May 20, 2021.

of international trade law. CBP estimated the cost to companies to hire an outside attorney to be $400 per hour in 2016[10] and adjusted the wage to $466.38 in 2022 dollars.[11] Each document's time burden is then multiplied by the hourly cost to hire an outside attorney to determine a total cost for each form. As shown in Table 1, the cost to file a single EAPA allegation is monetized by multiplying the time burden (.25 hours) and the hourly attorney costs ($466.38 in 2022 dollars) which results in a cost of $116.60 per filing. The estimated cost to the industry for filing each document is shown in Table 1 along with their corresponding time burdens.

This rule formalized the written argument process with the implementation of timelines for submittal. There is no additional cost to the public as a result of the new formal written argument process as the public already had the ability to submit written arguments to CBP, though not as part of a formal process.

This rule also established a process by which either the alleger or the alleged evader may request an administrative review of a determination as to evasion. The interested party has 30 business days after the determination to request an administrative review. CBP estimates an administrative review request takes 50 hours to complete and submit.

TABLE 1—TIME BURDENS FOR DOCUMENTS SUBMITTED TO CBP

Document submitted	Time burden (in hours)	Cost per submission (in 2022 dollars)
e-Allegations	0.25	$116.60
EAPA allegation	0.25	116.60
CF–28 Response	60	27,982.80
Initial Request for Information Response	90	41,974.20
Supplemental Request for Information Response	60	27,982.80
Administrative Review Request	50	23,319.00

[10] Source: American Intellectual Property Law Association. *2017 Report of the Economic Survey.*"Billable Hours, Billing Rate, Dollars Billed (Q29, Q30, Q27)." June 2017.

[11] CBP calculated the 2021 adjusted dollar amount using the percent increase in the Annual Average GDP Price Deflator (2012=100) between 2016 and 2021. The annual average GDP Price Deflator value in 2016 = 105.74, the annual average GDP Price Deflator value in 2021 = 118.37, the percent increase was estimated to be around 11.19444% (118.37/105.74 = 1.119444 or 11.19444%). This percent increase was applied to the 2016 estimated hourly billing rate of $400 for external attorneys to estimate the 2021 hourly billing rate of $447.78 for external attorneys. CBP 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, to arrive at the 2022 figure.

The total cost of this rule to the industry is fully monetized by multiplying the cost per submission from Table 1 and the number of submissions in Table 2 and then summing the results for each year. The product of the cost per submission and the submissions by fiscal year are shown in Table 3, as well as the summing of each year's undiscounted costs.

TABLE 2—SUBMISSIONS BY FISCAL YEAR

Document submitted	2016	2017	2018	2019	2020	2021
e-Allegations (AD/CVD) *	115	76	106	91	106	147
EAPA allegations	2	29	57	127	149	127
CF–28 Response	1	17	19	54	46	47
Initial Request for Information Response	2	27	18	66	42	98
Supplemental Request for Information Response	0	13	18	26	13	47
Administrative Review Requests	0	0	2	2	14	21
Total Filings Caused by Rule	5	86	114	275	264	340

Note: Submissions are sorted by the fiscal year the case was initiated, not by the year the individual document was received.
* *Note:* e-Allegation (AD/CVD) submissions are not included in Total Filings Caused by Rule.

TABLE 3—INDUSTRY COSTS CAUSED BY RULE BY FISCAL YEAR
[In undiscounted 2022 dollars]

Document submitted	2016	2017	2018	2019	2020	2021	6 Year Total
e-Allegations (AD/CVD) *	$13,408	$8,861	$12,359	$10,610	$12,359	$17,139	$74,737
EAPA allegations	233	3,381	6,646	14,808	17,373	14,808	57,248
CF–28 Response	27,983	475,708	531,673	1,511,071	1,287,209	1,315,192	5,148,835
Initial Request for Information Response	83,948	1,133,303	755,536	2,770,297	1,762,916	4,113,472	10,619,473
Supplemental Request for Information Response	0	363,776	503,690	727,553	363,776	1,315,192	3,273,988
Administrative Review Requests	0	0	46,638	46,638	326,466	489,699	909,441
Total Industry Costs Caused by Rule	112,164	1,976,169	1,844,183	5,070,367	3,757,740	7,248,361	20,008,985

Note: Submissions are sorted by the fiscal year the case was initiated, not by the year the individual document was received.
* *Note:* e-Allegation (AD/CVD) submissions are not included in Total Filings Caused by Rule.

CBP incurs costs throughout the EAPA investigative process and created two new branches to handle the new filings and resulting investigations. These two new branches are staffed with a total of 15 full-time equivalent (FTE) employees. The average CBP Trade and

Revenue fully-loaded salary in fiscal year 2022 was $228,254.61.[12] This rule created 15 full-time equivalent positions and multiplying this by the FY 2022 wage rate results in $3,423,819 in undiscounted costs annually since 2016. As shown in Table 5, the total costs to CBP for the fiscal years 2016–2021 were $22,811,066 and $26,205,984 discounted at three and seven percent, respectively.

In summary, this rule resulted in a cost to the public of $18,337,822 to file EAPA allegations and respond to the questionnaires, under the EAPA investigation process since the EAPA IFR was published in 2016. In addition, CBP estimates that it cost the public $873,171 to file administrative review requests. In total, this rule has resulted in an undiscounted cost to the public of $19,210,993 and $20,542,915 to CBP.

TABLE 4—TOTAL COST
[In undiscounted 2022 U.S. dollars]

Fiscal year	Industry	CBP	Total
2016	$112,164	$3,423,819	$3,535,984
2017	1,976,169	3,423,819	5,399,988
2018	1,844,183	3,423,819	5,268,002
2019	5,070,367	3,423,819	8,494,186
2020	3,757,740	3,423,819	7,181,559
2021	7,248,361	3,423,819	10,672,181
Total	20,008,985	20,542,915	40,551,900

TABLE 5—MONETIZED PRESENT VALUE AND ANNUALIZED COSTS BY FISCAL YEAR

Fiscal year	Industry		CBP		Total	
	3% Discount rate	7% Discount rate	3% Discount rate	7% Discount rate	3% Discount rate	7% Discount rate
2016	$133,930	$168,329	$4,088,219	$5,138,229	$4,222,149	$5,306,558
2017	2,290,921	2,771,679	3,969,145	4,802,084	6,260,066	7,573,762
2018	2,075,644	2,417,348	3,853,539	4,487,929	5,929,183	6,905,276
2019	5,540,527	6,211,417	3,741,300	4,194,326	9,281,826	10,405,743
2020	3,986,587	4,302,237	3,632,330	3,919,931	7,618,916	8,222,167
2021	7,465,812	7,755,747	3,526,534	3,663,487	10,992,346	11,419,233
Total	21,493,421	23,626,756	22,811,066	26,205,984	44,304,487	49,832,740
Annualized Cost	3,226,048	3,086,842	3,423,819	3,423,819	6,649,867	6,510,661

[12] CBP bases this wage 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. Source: Email correspondence with CBP's Office of Finance on June 27, 2022.

4. Benefits

Domestic producers and legitimate importers benefit from better enforcement as a result of this rule. In fiscal year 2021, the EAPA process prevented the evasion of over $375 million in AD/CVD duties.[13] As domestic producers and legitimate importers grow more accustomed to the EAPA process, it is likely that this number will increase but CBP is unable to quantify this growth at this time.

Importers and domestic producers also benefit from increased transparency and predictability in the processing of AD/CVD evasion allegations because of this rule. Previously, an alleger submitted an e-Allegation to CBP and CBP was not able to provide any subsequent follow up to that alleger. This rule increased the transparency of the allegation process and set clear time frames for all parties involved. Furthermore, CBP increased communication with the public as a result of this rule, specifically regarding technical assistance and advice on how to properly file AD/CVD evasion allegations. This outreach could result in faster processing and response times for grievances; however, CBP is unable to quantify these benefits.

Additionally, this rule established a stronger working relationship among CBP, the trade community, and foreign governments in the effort to prevent evasion of AD/CVD duties. This rule gave CBP access to more information from all affected parties, which helps CBP improve AD/CVD enforcement. This rule helps prevent the circumvention of the AD/CVD laws, which benefits domestic producers by shielding them from unfair trade practices. Furthermore, to the extent that this rule reduces the evasion of AD/CVD payments, the government will benefit through higher AD/CVD revenue.

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 prepare and make available to the public a regulatory flexibility analysis that describes the effect of a proposed rule on small entities (*i.e.*, small businesses, small organizations, and small governmental jurisdictions) when the agency is required to publish a general notice of proposed rulemaking for a rule. Since a general notice of proposed rulemaking was not necessary for the IFR,

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[13] Source: CBP. CBP Trade and Travel Report. Available at *https://www.cbp.gov/sites/default/files/assets/documents/2022-Apr/FINAL%20FY2021_%20Trade%20and%20Travel%20Report%20%28508%20Compliant%29%20%28April%202022%29_0.pdf*. Accessed on June 16, 2022. Although data is available for some years prior to fiscal year 2021, in light of the newness of the EAPA program, CBP does not believe the data can be used to extrapolate a trend.

CBP is not required to prepare a regulatory flexibility analysis for this rule.

Paperwork Reduction Act

The Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3507(d)) requires that CBP consider the impact of paperwork and other information collection burdens imposed on the public. 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 e-Allegations submission information collection, which is assigned OMB control number: 1651–0131,[14] is being amended to reflect the change in burden hours caused by the EAPA requirements, and to include the EAPA Portal as described above, and to reflect the provisions of §§ 165.5(a) and 165.23(a). To create an account to access the EAPA Portal and submit an EAPA allegation, users provide their first name, last name, and email address and the process of account creation is estimated to take three minutes (0.05 hours). CBP estimates that the creation of 250 EAPA Portal accounts annually will add a total time burden of approximately 13 hours to the public. CBP estimates that 149 EAPA allegations will be filed annually which is an increase of 82 from what was previously approved by OMB. These additional 82 EAPA allegations will result in an additional time burden of approximately 13 hours to the public, resulting in a total time burden of 30 hours to the public. In total, this rule resulted in an overall increase of 26 burden hours from what is currently approved by OMB. This increases the total burden hours for this collection from 289 to 315. The e-Allegations submission revisions described in this rule have been submitted to OMB for review and approval in accordance with the requirements of the Paperwork Reduction Act (44 U.S.C. 3507). OMB control number 1651–0131 is being revised to reflect the change in burden hours for EAPA respondents (*i.e.,* those responding to the EAPA submission requirements) and to confirm the burden hours for e-Allegations as follows:

E-Allegations

Estimated number of annual respondents: 1,088.
Estimated number of annual responses: 1,088.
Estimated time burden per response: 15 minutes (.25 hours).
Estimated total annual time burden: 272 hours.

[14] CBP notes that the TVR system continues to be used for purposes other than EAPA.

EAPA Allegations

Estimated number of annual respondents: 149.

Estimated number of annual responses: 149.

Estimated time burden per response: 12 minutes (0.20 hours).

Estimated total annual time burden: 30 hours.

EAPA Portal Account Creation

Estimated number of annual respondents: 250.

Estimated number of annual responses: 250.

Estimated time burden per response: 3 minutes (0.05 hours).

Estimated total annual time burden: 13 hours.

Comments concerning the collections of information and the accuracy of the estimated annual burden, and suggestions for reducing that burden, should be submitted to OMB via *https://www.reginfo.gov.*

Signing Authority

This document is being issued in accordance with 19 CFR 0.1(a)(1) pertaining to the authority of the Secretary of the Treasury (or the Secretary's delegate) to approve regulations related to certain customs revenue functions.

Troy A. Miller, Senior Official Performing the Duties of the Commissioner, having reviewed and approved this document, has delegated the authority to electronically sign this document to the Director (or Acting Director, if applicable) of the Regulations and Disclosure Law Division of CBP, for purposes of publication in the **Federal Register**.

List of Subjects in 19 CFR Part 165

Administrative practice and procedure, Business and industry, Imports.

Amendments to the Regulations

For the reasons given above, the IFR, which was published at 81 FR 56477 on August 22, 2016, adding part 165 to Chapter I of the CBP regulations (19 CFR part 165), is adopted as final with the following changes:

PART 165—INVESTIGATION OF CLAIMS OF EVASION OF ANTIDUMPING AND COUNTERVAILING DUTIES

■ 1. The general authority citation for part 165 continues to read as follows:

Authority: 19 U.S.C. 66, 1481, 1484, 1508, 1517 (as added by Pub. L. 114–125, 130 Stat. 122, 155 (19 U.S.C. 4301 note)), 1623, 1624, 1671, 1673.

■ 2. Section 165.1 is amended by:

■ a. Revising the definition of "*Allegation*";

■ b. Adding the definition "*Business day*" in alphabetical order;

■ c. Revising the definition of "*Evade* or *evasion*"; and

■ d. Revising the definition of "*TRLED*".

The addition and revisions read as follows:

§ 165.1 Definitions.

* * * * *

Allegation. The term "allegation" refers to a filing with CBP under § 165.11 by an interested party that alleges an act of evasion of AD/CVD orders by an importer.

* * * * *

Business day. The term "business day" means a weekday (Monday through Friday), excluding national holidays as specified in § 101.6(a) of this chapter.

* * * * *

Evade or *Evasion.* The terms "evade" and "evasion" refer to the entry of covered merchandise into the customs territory of the United States for consumption by means of any document or electronically transmitted data or information, written or oral statement, or act that is material and false, or any omission that is material, and that results in any cash deposit or other security or any amount of applicable antidumping or countervailing duties being reduced or not being applied with respect to the covered merchandise. Examples of evasion include, but are not limited to, the transshipment, misclassification, and/or undervaluation of covered merchandise.

* * * * *

TRLED. The term "TRLED" refers to the Trade Remedy Law Enforcement Directorate, Office of Trade, that conducts the investigation of alleged evasion under this part, and that was established as required by section 411 of the Trade Facilitation and Trade Enforcement Act of 2015 (TFTEA).

■ f. Section 165.3 is amended by adding a new paragraph (f) to read as follows:

§ 165.3 Power of attorney.

* * * * *

(f) *Return of submission.* If a party has not provided proof of execution of a power of attorney to CBP within five business days of an agent's first submission on behalf of an interested party pursuant to paragraph (e) of this section, or proof of authority to execute a power of attorney, if requested by CBP, pursuant to paragraph (c) of this section, CBP will reject the submission and will not consider or place such submission on the administrative record.

■ 4. Section 165.4 is amended by:

■ a. Revising the introductory text of paragraphs (a) and (b);

■ b. Revising paragraph (b)(3) and (e);

■ c. Adding a new paragraph (f).

The revisions and addition read as follows:

§ 165.4 Release of information provided by interested parties.

(a) *Claim for business confidential treatment.* Any interested party that makes a submission to CBP in connection with an investigation under this part, including for its initiation and administrative review, may request that CBP treat any part of the submission as business confidential information except for the information specified in paragraph (c) of this section. If the requirements of this section are satisfied and the information for which protection is sought consists of trade secrets and/or commercial or financial information obtained from any person, which is privileged or confidential in accordance with 5 U.S.C. 552(b)(4), CBP will grant business confidential treatment and issue an administrative protective order pursuant to paragraph (f) of this section. All documents and communications that are submitted to CBP after notice of initiation of an investigation must be served on all parties to the investigation by the submitting entity (for business confidential documents, a public version must be served as well, in accordance with paragraph (a)(2) of this section).

* * * * *

(b) *Nonconforming submissions.* CBP will reject a submission that includes a request for business confidential treatment but does not meet the requirements of paragraph (a) of this section and will not consider or place such submission on the administrative record unless the submitting interested party takes any of the actions in paragraph (b)(2) of this section within the timeframe specified in paragraph (b)(2) of this section.

* * * * *

(3) *Effects of rejection.* If the submitting interested party does not take any of the actions in accordance with paragraph (b)(2) of this section, CBP will not consider the rejected submission, not place such submission on the administrative record, and, if applicable, adverse inferences may be drawn pursuant to § 165.6.

* * * * *

(e) *Information placed on the record by CBP.* Any information that CBP places on the administrative record, when obtained other than from an interested party subject to the requirements of this section, will include a public summary of the business confidential information as described in paragraph (a)(2) of this section, when applicable. If CBP places information on the record from parties who are not already subject to the requirements of this section, CBP will require these parties to conform to the requirements of this section and § 165.5 when filing submissions. Otherwise, such submissions may be treated as nonconforming submissions pursuant to paragraph (b) of this section and/or § 165.5(b)(4).

(f) *Administrative protective order.* In each investigation where CBP has granted a request by an interested party to treat any part of its submission as business confidential information, CBP will issue an administrative protective order which will contain terms to allow the representatives of parties to the investigation to access the business confidential information.

■ 5. Section 165.5 is amended by:

■ a. Revising paragraph (b)(2) introductory text;

■ b. Removing in paragraphs (b)(2)(ii) and (iii) the reference "19 CFR" and adding in its place "§";

■ c. Adding a new paragraph (b)(4); and

■ d. Revising paragraphs (c)(1) and (2).

The revisions and addition read as follows:

§ 165.5 Obtaining and submitting information.

* * * * *

(b) * * *

(2) *Certifications.* Every written submission made to CBP by an interested party or requested by CBP from any other party pursuant to §§ 165.4 and 165.5 must be accompanied by the following certifications from the person making the submission:

* * * * *

(4) *Nonconforming submissions.* CBP will reject a submission that does not meet the requirements of paragraph (b) of this section and will not consider it or place it on the administrative record.

(c) ***

(1) *Requests for extensions.* CBP may, for good cause, extend any regulatory time limit, or any deadline for the submission of information requested by CBP, if a party requests an extension in a separate, stand-alone submission and states the reasons for the request. Such requests must be submitted no less than three business days before the time limit expires unless there are extraordinary circumstances. An extraordinary circumstance is an unexpected event that could not have been prevented even if reasonable measures had been taken by the requester. It is within CBP's reasonable discretion to determine what constitutes extraordinary circumstances, what constitutes good cause, and to grant or deny a request for an extension.

(2) *Rejection of untimely submissions.* If a submission is untimely filed, CBP will not consider it or place it on the administrative record and adverse inferences may be applied, if applicable.

■ 6. Section 165.6 is amended by revising paragraph (b) to read as follows:

§ 165.6 Adverse inferences.

* * * * *

(b) *Adverse inferences described.* An adverse inference used under paragraph (a) may include reliance on information derived from an allegation, a prior determination in another CBP investigation, proceeding, or action that involves evasion of AD/CVD orders, or any other available information on the administrative record.

* * * * *

■ 7. Section 165.12 is amended by revising paragraph (b) to read as follows:

§ 165.12 Receipt of allegations.

* * * * *

(b) *Withdrawal.* An allegation may be withdrawn by the party that filed it if that party submits a request to withdraw the allegation to the designated email address specified by CBP or through any other method approved or designated by CBP.

■ 8. Section 165.13 is amended by revising paragraphs (c) and (d) to read as follows:

§ 165.13 Consolidation of allegations.

* * * * *

(c) *Notice.* Notice of consolidation will be promptly transmitted to all parties to the investigation if consolidation occurs at a point in the investigation after which they have already been notified of the ongoing investigation. Otherwise, parties will be notified no later than five business days after day 90 of the investigation.

(d) *Service requirements for other parties to the investigation.* Upon notification of consolidation, parties to the consolidated investigation must serve on the newly added parties to the investigation, via an email message or through any other method approved or designated by CBP, public documents and the public versions of any documents that were previously served on parties to the unconsolidated investigation. Service must take place within five business days of the notice of consolidation.

■ 9. Section 165.14 is amended by revising paragraph (a) to read as follows:

§ 165.14 Other Federal agency requests for investigation.

(a) *Requests for investigations.* Any other Federal agency, including but not limited to the Department of Commerce or the United States International Trade Commission, may request an investigation under this part. CBP will initiate an investigation if the Federal agency has provided information that reasonably suggests that an importer has entered covered merchandise into the customs territory of the United States through evasion, unless the agency submits a request to withdraw to the designated email address specified by CBP or through any other method approved or designated by CBP.

* * * * *

■ 10. Section 165.15 is amended by revising paragraphs (d)(1) and (e) to read as follows:

§ 165.15 Initiation of investigations.

* * * * *

(d) * * *

(1) *In general.* CBP will issue a notice of its decision to initiate an investigation to all parties to the investigation no later than five business days after day 90 of the investigation, and the actual date of initiation of the investigation will be specified therein. In cases where interim measures are taken pursuant to § 165.24, notice to all parties to the investigation will occur no later than five business days after day 90 of the investigation.

* * * * *

(e) *Record of the investigation.* If an investigation is initiated pursuant to subpart B of this part, then the information considered by

CBP prior to initiation will be part of the administrative record pursuant to § 165.21. Any documents submitted prior to the issuance of a notice of CBP's decision to initiate an investigation will be served by CBP on the parties to the investigation, regardless of who submitted those documents.

■ 11. Section 165.16 is amended by revising paragraph (d).

§ 165.16 Referrals to Department of Commerce.

* * * * *

(d) *Effect on investigation.* The time period required for any referral and determination by the Department of Commerce will not be counted toward the deadlines for CBP to decide on whether to initiate an investigation under § 165.15, whether to take interim measures under § 165.24, or the deadline to issue a determination as to evasion under § 165.27.

* * * * *

■ 12. Section 165.22 is amended by:

■ a. In paragraph (a) removing the words "not later" and adding in their place the words "no later";

■ b. Revising paragraph (b);

■ c. In paragraph (d), removing the words "not later" and adding in their place the words "no later"; and

■ c. In paragraph (d), removing the word "*Notification*" and adding in its place the word "*Notice*".

The revision reads as follows:

§ 165.22 Time for investigations.

* * * * *

(b) *Time for determination with consolidated allegations.* If CBP consolidates multiple allegations under § 165.13 into a single investigation under § 165.15, the date of receipt of the first properly filed allegation will be used for the purposes of the requirement under paragraph (a) of this section with respect to the timing of the initiation of the investigation.

* * * * *

■ 13. Section 165.23 is amended by:

■ a. Revising paragraph (b);

■ b. Revising the last sentence of paragraph (c)(1);

■ c. Revising paragraph (c)(2); and

■ d. Revising paragraph (d).

The revisions read as follows:

§ 165.23 Submission of factual information.

* * * * *

(b) *Voluntary submission of factual information.* The parties to the investigation may submit additional information in order to support the allegation of evasion or to negate or clarify the allegation of evasion.

(c) * * *

(1) * * * If CBP places new factual information on the administrative record on or after the deadline for submissions of new factual information pursuant to paragraph (c)(2) of this section (or if such information is placed on the record at CBP's request), the parties to the investigation will have 10 calendar days to provide rebuttal information to the new factual information.

(2) *Voluntary submission of factual information.* (i) Factual information voluntarily submitted to CBP pursuant to paragraph (b) of this section must be submitted no later than 200 calendar days after CBP initiated the investigation under § 165.15, unless this deadline is officially extended by CBP solely at CBP's discretion. If CBP extends this deadline, parties to the investigation will be notified and may make submissions up through the end of the extended deadline. Voluntary submissions made after the 200th calendar day after initiation of the investigation, or after the extended deadline, will not be considered or placed on the administrative record, except rebuttal information as provided in paragraph (c)(2)(ii) of this section. The public version must also be served via an email message or through any other method approved or designated by CBP on the parties to the investigation.

(ii) Parties to the investigation will have 10 calendar days from the date of placement of any new factual information on the record to provide rebuttal information to that new factual information, if the information being rebutted was placed on the administrative record no later than 200 calendar days after CBP initiated the investigation under § 165.15, or no later than the extended deadline.

(d) *Oral discussions.* Notwithstanding the time limits in paragraph (c) of this section, CBP may request oral discussion either in-person or by teleconference. CBP will memorialize such discussions with a written summary that identifies who participated and the topic of discussion, and place the written summary on the administrative

record. In the event that business confidential information is included in the written summary, CBP will also place a public version on the administrative record.

■ 14. Section § 165.24 is amended by revising paragraph (c) to read as follows:

§ 165.24 Interim measures.

* * * * *

(c) *Notice.* If CBP decides that there is reasonable suspicion under paragraph (a) of this section, CBP will issue a notice of this decision to the parties to the investigation within five business days after taking interim measures. CBP will also provide parties to the investigation with a public version of the administrative record within 10 business days of the issuance of a notice of initiation of an investigation.

■ 15. Section 165.25 is amended by:

■ a. Revising paragraph (b); and

■ b. Adding new paragraphs (c) and (d).

The revision and additions read as follows:

§ 165.25 Verifications of information.

* * * * *

(b) CBP may conduct verifications before and after the deadline for the voluntary submission of new factual information as referenced in § 165.23. The general purpose of the verification is to verify the accuracy of the information already placed on the administrative record.

(c) CBP will place a report about the verification, *i.e.,* the verification report, on the administrative record. CBP will require the party that underwent the verification to place verification exhibits on the administrative record. Verification exhibits will generally contain information compiled and verified by CBP at CBP's discretion during the verification. In accordance with § 165.4, both CBP and the party that underwent the verification will provide public versions of their verification documents, which will be served on all parties to the investigation. CBP will not accept voluntary submissions of new factual information at the verification after the deadline for voluntary submission of new factual information, as referenced in § 165.23. Parties to the investigation cannot submit rebuttal information to either CBP's verification report or the verification exhibits. Parties to

the investigation may submit to CBP written arguments in relation to the verification report and/or its exhibits in accordance with § 165.26.

(d) If CBP determines that information discovered during a verification is relevant to the investigation and constitutes new factual information, CBP will place it on the administrative record separately, in accordance with § 165.23, and allow parties to the investigation to submit rebuttal information.

■ 16. Section 165.26 is amended by revising paragraphs (a), (b), (c), and (d)(2) to read as follows:

§ 165.26 Written arguments.

* * * * *

(a) *Written arguments.* Parties to the investigation:

(1) May submit to CBP written arguments that contain all arguments that are relevant to the determination as to evasion and based solely upon facts already on the administrative record in that proceeding. All written arguments must be:

(i) Submitted to the designated email address specified by CBP or through any other method approved or designated by CBP;

(ii) Submitted no later than 230 calendar days after the investigation was initiated pursuant to § 165.15, unless extended by CBP solely at CBP's discretion but no later than 300 calendar days after the investigation was initiated, or 360 calendar days after the investigation was initiated if the deadline for a determination as to evasion has been extended by CBP pursuant to § 165.22(c); and

(2) Must serve a public version of the written arguments prepared in accordance with § 165.4 on the other parties to the investigation by an email message or through any other method approved or designated by CBP the same day it is filed with CBP.

(b) *Responses to the written arguments.* Parties to the investigation:

(1) May submit to CBP a response to a written argument filed by another party to the investigation, fulfilling the following requirements:

(i) The response must be in writing and submitted to the designated email address specified by CBP, or through any other method approved or designated by CBP, no later than 15 calendar days after the written argument was filed with CBP, unless extended by CBP solely at CBP's discretion; and

(ii) The response must be limited to the issues raised in the written argument; any portion of a response that is outside the scope of the issues raised in the written argument will not be considered; and

(2) Must serve a public version of the response prepared in accordance with § 165.4 on the other parties to the investigation by an

email message or through any other method approved or designated by CBP the same day it is filed with CBP.

(c) *Written arguments submitted upon request.* Notwithstanding paragraphs (a) and (b) of this section, CBP may request written arguments on any issue from the parties to the investigation at any time during an investigation.

(d) * * *

(2) A concise summary of the argument or response to the argument;

* * * * *

■ 17. Section 165.28 is amended by revising paragraph (c) to read as follows:

§ 165.28 Assessments of duties owed; other actions.

* * * * *

(c) *Cash deposits and duty assessment.* CBP will require the posting of cash deposits and assess duties on entries of covered merchandise subject to its affirmative determination of evasion in accordance with the instructions received from the Department of Commerce.

■ 18. Revise the heading to subpart D to read as follows:

Subpart D—Administrative Review of Determinations as to Evasion

■ 19. Section 165.41 is amended by:

■ a. Removing the word “initial” in the section heading and each time it appears in the section;

■ b. Revising the introductory text of paragraph (f);

■ c. Revising paragraph (h); and

■ d. Removing the last sentence of paragraph (i). The revisions read as follows:

§ 165.41 Filing a request for review of the determination as to evasion.

* * * * *

(f) *Content.* Each request for review must be based solely on the facts on the administrative record in the proceeding, in writing, and may not exceed 30 pages in total (including exhibits but not table of contents or table of authorities). It must be double-spaced with headings and footnotes single spaced, margins one inch on all four sides,

and 12-point font Times New Roman. If it exceeds 10 pages, it must include a table of contents and a table of cited authorities. CBP will reject a request for review that does not meet the requirements of this paragraph, and will not consider it or place it on the administrative record. Each request for review must set forth the following:

* * * * *

(h) *Consolidation of requests for administrative review.* Multiple requests under the same allegation control number assigned by CBP may be consolidated into a single administrative review matter.

* * * * *

■ 20. Revise § 165.42 to read as follows:

§ 165.42 Responses to requests for administrative review.

Any party to the investigation, regardless of whether it submitted a request for administrative review, may submit a written response to the filed request(s) for review. A party who submitted a request for administrative review may not respond to its own submission. Each written response may not exceed 30 pages in total (including exhibits but not table of contents or table of authorities) and must follow the requirements in § 165.41(f). The written responses to the request(s) for review must be limited to the issues raised in the request(s) for review and must be based solely on the facts already on the administrative record in that proceeding. The responses must be filed in a manner prescribed by CBP no later than 10 business days from the commencement of the administrative review. All responses must be accompanied by the certifications provided for in § 165.5. Each party seeking business confidential treatment must comply with the requirements in § 165.4. The public version of the response(s) to the request(s) for review must be provided to the other parties to the investigation via an email message or through any other method approved or designated by CBP.

■ 21. Revise § 165.44 to read as follows:

§ 165.44 Additional information.

CBP may request additional written information from the parties to the investigation at any time during the review process. The parties who provide the requested additional information must provide a public version to the other parties to the investigation via an email message or through any other method approved or designated by CBP. The submission of additional information requested by CBP must comply with requirements for release of information in § 165.4. CBP may apply an adverse inference as stated in § 165.6 if the

additional information requested under this section is not provided. CBP will only accept written submissions of additional information in response to a request by CBP. No meetings or any other methods of unsolicited submission of additional information are permitted during the administrative review.

■ 22. Revise § 165.45 to read as follows:

§ 165.45 Standard for administrative review.

CBP will apply a de novo standard of review and will render a determination appropriate under law according to the specific facts and circumstances on the record. For that purpose, CBP will review the entire administrative record upon which the determination as to evasion was made, the timely and properly filed request(s) for review and responses, and any additional information that was received in response to a request by CBP pursuant to § 165.44. The administrative review will be completed within 60 business days of the commencement of the review.

■ 23. Section § 165.46 is amended by:

■ a. Removing in paragraph (a) the acronym "EAPA" and adding in its place the acronym "TFTEA"; and

■ b. Revising paragraph (b). The revision reads as follows:

§ 165.46 Final administrative determination.

* * * * *

(b) *Effect of the administrative review.* If the administrative review affirms the determination as to evasion, then no further CBP action is needed. If the administrative review reverses the determination as to evasion, then CBP will take appropriate actions consistent with the administrative review.

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

AVIVA R. ARON-DINE,
Acting Assistant Secretary of the Treasury for Tax Policy.

RECEIPT OF APPLICATION FOR “LEVER-RULE” PROTECTION

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

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

SUMMARY: Pursuant to 19 CFR 133.2(f), this notice advises interested parties that CBP has received an application from Energy Beverages LLC (“EBLLC”) seeking “Lever-Rule” protection for certain Bang Energy Beverages intended for sale outside of the United States that bear the federally registered and recorded “BANG” and “B & DESIGN” trademarks.

FOR FURTHER INFORMATION CONTACT: Suzanne Schultz, Intellectual Property Enforcement Branch, Regulations & Rulings, (202) 325–1989.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to 19 CFR 133.2(f), this notice advises interested parties that CBP has received an application from EBLLC seeking “Lever-Rule” protection. Protection is sought against importations of Bang Energy Beverages, intended for sale outside the United States from the following countries: Australia, Austria, Estonia, Latvia, and Lithuania, Canada, Chile, Denmark, Finland, Germany, Greece, Netherlands, Belgium, Norway, South Africa, Sweden, Switzerland, and the United Kingdom, in the flavors and sizes listed in the chart below, that bear the “BANG” (U.S. Trademark Registration No. 3,545,129/ CBP Recordation No. TMK 21–00862), “B & DESIGN” (U.S. Trademark Registration No. 4,985,030 / CBP Recordation No. TMK 21–00853), and/or the “B & DESIGN” (U.S. Trademark Registration No. 4,990,091/ CBP Recordation No. TMK 21–00856) trademark. In the event that CBP determines that the beverages under consideration are physically and materially different from the beverages authorized for sale in the United States, CBP will publish a notice in the Customs Bulletin, pursuant to 19 CFR 133.2(f), indicating that the above-referenced trademarks are entitled to “Lever-Rule” protection with respect to those physically and materially different beverages.

Relevant Bang Energy Beverages

Exhibit	Region	Sizes / Flavors
Exhibit A	Australia	500 mL Bangster Berry, Blue Razz, Candy Apple Crisp, Cotton Candy, Frosé Rosé, Mango Baugo, Miami Colru, Rainbow Unicorn, Sour Heads, Star Blast, Whole Lotta Piña Colada
Exhibit B	Austria	500mL: Bangster Berry, Candy Annie Crisp, Peach Mango
Exhibit C	Estonia, Latvia, and Lithuania	500mL: Bangster Berry, Black Cherry Vanilla, Candy Apply Crisp, Delish Strawberry Kiss, Rainbow Unicorn, Wyldin' Watermelon
Exhibit D	Canada	473mL: Bangster Berry, Birthday Cake Bash, Black Cherry Vanilla, Blue Razz, Cherry Blade Lemonade, Delish Strawberry Kiss, Frosé Rosé Peach Mango, Rainbow Unicorn, Sour Heads
Exhibit E	Chile	473mL: Blue Razz, Candy Apple Crisp, Mango Baugo, Sour Heads, Swirly Pop, Wyldin' Watermelon
Exhibit F	Denmark	500mL: Bangster Berry, Birthday Cake Bash, Candy Apple Crisp, Frosé Rosé, Mango Baugo, Peach Mango, Rainbow Unicorn, Swirly Pop, Whole Lotta Chocolata, Wyldin' Watermelon
Exhibit G	Finland	500mL: Bangster Berry, Candy Apple Crisp, Birthday Cake Bash, Cherry Blade Lemonade, Delish Strawberry Kiss, Frosé Rosé, Krazy Key Lime Pie, Mango Bango, Miami Cola, Raging Raspberry Hibiscus, Rainbow Unicorn, Sour Heads, Whole Lotta Chocolata, Whole Lotta Piña Colada, Wyldin' Watennelon
Exhibit H	Germany	500mL: Blue Razz, Candy Apple Crisp, Lemon Drop, Peach Mango, Rainbow Unicorn, Star Blast, Wyldin' Watermelon
Exhibit I	Greece	500mL: Bangster Berry, Birthday Cake Bash, Black Cherry Vanilla, Candy Apple Crisp, Delish Strawberry Kiss, Frosé Rosé, Krazy Key Lime Pie, Lemon Drop, Peach Mango, Rainbow Unicorn, Wyldin' Watermelon
Exhibit J	Chile	473mL: Blue Razz, Candy Apple Crisp, Mango Bango, Sour Heads, Swirly Pop, Wyldin' Watermelon
Exhibit K	Netherlands (Dutch)	250 mL: Bangster Berry, Candy Apple Crisp, Frosé Rosé, Lemon Drop, Peach Mango, Rainbow Unicorn, Whole Lotta Piña Colada 500 mL: Bangster Berry, Candy Apple Crisp, Frosé Rosé, Lemon Drop, Peach Mango, Rainbow Unicorn, Whole Lotta Piña Colada
Exhibit L	Belgium	250 mL: Bangster Berry, Candy Apple Crisp, Frosé Rosé, Lemon Drop, Peach Mango, Rainbow Unicorn, Whole Lotta Piña Colada 500 mL: Bangster Berry, Candy Apple Crisp, Frosé Rosé, Lemon Drop, Peach Mango, Rainbow Unicorn, Whole Lotta Piña Colada
Exhibit M	Norway	500mL: Bangster Berry, Candy Apple Crisp, Frosé Rosé, Mango Bango, Peach Mango, Rainbow Unicorn
Exhibit N	South Africa	500mL: Frosé Rosé, Mango Bango, Rainbow Unicorn, Star Blast, Swirly Pop, Wyldin' Watermelon
Exhibit O	Sweden	500mL: Bangster Berry, Birthday Cake Bash, Candy Apple Crisp, Frosé Rosé, Krazy Key Lime Pie, Mango Bango, Peach Mango, Rainbow Unicorn, Wyldin' Watermelon
Exhibit P	Switzerland	500mL: Black Cherry Vanilla Peach Mango, Rainbow Unicorn
Exhibit Q	United Kingdom	500mL: Bangster Berry, Candy Apple Crisp, Peach Mango, Rainbow Unicorn, Wyldin' Watermelon

Dated: March 15, 2024

ALAINA L VAN HORN

U.S. Court of International Trade

Slip Op. 24–32

DAIKIN AMERICA, INC., Plaintiff, v. UNITED STATES, Defendant, and GUJARAT FLUOROCHEMICALS LIMITED, Defendant-Intervenor.

Court No. 22–00122
Before: M. Miller Baker, Judge
PUBLIC VERSION

[Granting Plaintiff's motion for judgment on the agency record and remanding to the Department of Commerce for further proceedings.]

Dated: March 14, 2024

Roger B. Schagrin and *Luke A. Meisner*, Schagrin Associates of Washington, DC, on the briefs for Plaintiff.

Brian M. Boynton, Principal Deputy Assistant Attorney General; *Patricia M. McCarthy*, Director; *Claudia Burke*, Assistant Director; and *Daniel Roland*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice of Washington, DC, on the brief for Defendant. Of counsel on the brief was *Leslie M. Lewis*, Attorney, Office of Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce of Washington, DC.

Jessica R. DiPietro, *Matthew M. Nolan*, and *John M. Gurley*, ArentFox Schiff LLP of Washington, DC, on the brief for Defendant-Intervenor.

OPINION

***Baker*, Judge:**

In this case, a domestic chemical producer challenges the Department of Commerce's calculation of the dumping rate assigned to a compound imported from India. Concluding that the Department's decision is not supported by substantial evidence, the court remands for reconsideration.

I

A

At the request of Daikin America, Inc., a domestic producer of granular polytetrafluoroethylene resin, Commerce opened antidumping investigations of imports of that chemical. *Granular Polytetrafluoroethylene Resin from India and the Russian Federation: Initiation of Less-Than-Fair-Value Investigations*, 86 Fed. Reg. 10,926 (Dep't Commerce Feb. 23, 2021), Appx01026.

In its investigation as to India, the Department selected Gujarat Fluorochemicals Limited as the sole mandatory respondent. Com-

merce asked the company to report its shipping-related expenses on a unit-cost basis. Appx03539–03542. Gujarat instead provided aggregated expense totals. *Id.* In its final determination, the Department accepted this information for purposes of calculating the company's antidumping margin. Appx01060–01061.

For purposes of calculating a constructed export price offset, Commerce also asked Gujarat to "support [its] claims regarding the level of intensity at which [it] performed sales activities." Appx01902–01904. The company responded by providing a table that rated, on an intensity scale from 1–10, the selling functions that it and an affiliated reseller perform. Appx01888, Appx01904, Appx04041. The Department also requested "a quantitative analysis showing how the expenses . . . made at different claimed levels of trade impact price comparability." Appx01910. Gujarat replied, referring to the same table. *Id.*

In a supplemental questionnaire to correct "deficiencies, omissions, and areas where further clarification is needed," Appx03299, the Department again requested "documentation supporting [the company's] methodology (*i.e.*, the quantitative analysis) used to report the levels of intensity . . . for each of the figures reported in [the table]." Appx03301. Gujarat answered by repeating its justification for each intensity rating, but without providing any quantitative reasoning. *See* Appx03881.[1]

In its final determination, the Department found that "the quantitative analysis provided by [Gujarat] was inadequate in response to Commerce's initial questionnaire . . . ." Appx01063. Nor did the company provide the requested information in its supplemental questionnaire response, which the Department excused by finding that Gujarat "did not have an opportunity" under 19 U.S.C. § 1677m(d) "to remedy any deficiency in its quantitative analysis." Appx01064. Thus, the agency "accepted [the company's] information as sufficient for purposes of this segment of the proceeding" and granted it a constructed export price offset, *id.*, which had the effect of reducing the ultimate antidumping margin. Commerce warned, however, "that a more detailed and robust quantitative analysis of [Gujarat's] selling functions will be required for us to evaluate whether a [constructed export price] offset is warranted in any future administrative reviews." *Id.*

[1] Three months later, the company responded to a second set of supplemental questions from Commerce, although none of them requested quantitative evidence to support granting Gujarat a constructed export price offset. *See* Appx06695, Appx06701–06703.

B

Daikin brought this suit under 19 U.S.C. § 1516a(a)(2)(A)(i) and (B)(i) to challenge Commerce's final determination. *See* ECF 9. Subject-matter jurisdiction is conferred by 28 U.S.C. § 1581(c).

Gujarat intervened in support of the government. ECF 16. Daikin then moved for judgment on the agency record. ECF 24; *see also* USCIT R. 56.2. The government (ECF 28) and the Indian company (ECF 30) opposed, and Daikin replied (ECF 32).

In § 1516a(a)(2) actions, "[t]he court shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). That is, the question is not whether the court would have reached the same decision on the same record—rather, it is whether the administrative record as a whole permits Commerce's conclusion.

> Substantial evidence has been defined as more than a mere scintilla, as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. To determine if substantial evidence exists, we review the record as a whole, including evidence that supports as well as evidence that fairly detracts from the substantiality of the evidence.

Nippon Steel Corp. v. United States, 337 F.3d 1373, 1379 (Fed. Cir. 2003) (cleaned up).

II

A

Daikin argues that the Department breached its duty under 19 U.S.C. § 1677e(a)(2) to apply facts otherwise available to the calculation of shipping expenses. ECF 24, at 15. The company asserts that Commerce was so obligated because Gujarat failed to provide that information in the form and manner requested—specifically, on a transaction-specific basis. *Id.* at 17 ("[Gujarat] knew that it was obligated to report transaction-specific movement costs . . . ."); *see also* 19 C.F.R. § 351.401(g)(1) (authorizing the agency to "consider allocated expenses and price adjustments when transaction-specific reporting is not feasible, provided the Secretary is satisfied that the allocation method used does not cause inaccuracies or distortions"); *id.* § 351.401(g)(2) (requiring that "[a]ny party seeking to report an expense or a price adjustment on an allocated basis must demonstrate to the Secretary's satisfaction that the allocation is calculated on as specific a basis as is feasible, and must explain why the alloca-

tion methodology used does not cause inaccuracies or distortions"). As Gujarat was able to routinely associate product batch numbers with specific shipments, such as when dealing with customer complaints, ECF 24, at 19, Daikin contends that the former "should not be able to benefit from the incompleteness of a record that it alone had a duty to create," *id.* at 27.

Commerce found that "the record does not indicate how [product] batch numbers are associated with specific shipments." Appx01061. As a result, the Department was unable to conclude that "allocating movement expenses by batch number would result in a more transaction-specific cost" than Gujarat's aggregated reporting. *Id.*

The problem with this finding is that the Department failed to address record evidence—the Export Customer Complaint Register—showing that Gujarat tracks merchandise batch numbers [[ ]] *See* Appx03913, Appx03925.[2] Similarly, Commerce dismissed Daikin's arguments that Gujarat's allocated reporting of shipping expenses is distortive, *see* Appx08612–08613, without any substantive analysis. *See* Appx01060 ("[T]here is no evidence that [Gujarat's] allocation methodology causes inaccuracies or is distortive.").

As "[t]he substantiality of evidence must take into account whatever in the record fairly detracts from its weight," *CS Wind Vietnam Co. v. United States*, 832 F.3d 1367, 1373 (Fed. Cir. 2016), the court remands for Commerce to reconsider whether it was feasible for Gujarat to report its shipping-related costs on a transaction-specific basis. Insofar as the Department concludes that it was not so feasible, the agency must reconsider whether the company's expenses were calculated on as specific a basis as possible, *see* 19 C.F.R. § 351.401(g)(1), and whether its reporting of those expenses does not cause inaccuracies or distortions, *see id.*

B

Daikin argues Commerce's decision to grant Gujarat a constructed export price offset is not supported by substantial evidence because the company failed to establish "that the differences in selling activities performed in the home and U.S. markets are 'substantial.'" ECF 24, at 43 (citing *Hyundai Steel Co. v. United States*, 365 F. Supp. 3d 1294, 1300 (CIT 2019)).

The government concedes that Gujarat was required to establish "the amount and nature" of a constructed export price offset to the

[2] [[ ]] *See* Appx03925; Appx03932; Appx03935. According to Daikin, this information permitted Gujarat to calculate the shipping cost for each transaction associated with any given batch. *See* ECF 24, at 22–24.

Department satisfaction. ECF 28, at 46 (quoting 19 C.F.R. § 351.401(b)(1)). As recounted above, Commerce found that the company failed to make that showing, Appx01063–01064, but excused it having determined that Gujarat "did not have an opportunity" under 19 U.S.C. § 1677m(d) "to remedy any deficiency in its quantitative analysis," Appx01064.

Assuming that the first sentence of § 1677m(d) even applies when a respondent fails to carry its burden under 19 C.F.R. § 351.401(b)(1),[3] it is unclear why the Department concluded that the company had no opportunity to cure the deficiency. As noted above, the supplemental questionnaire referred to correcting "deficiencies, omissions, and areas where further clarification is needed," Appx03299, and it requested "documentation supporting [the company's] methodology (*i.e.*, the quantitative analysis) used to report the levels of intensity . . . for each of the figures reported in [the table]," Appx03301. Gujarat's response to the supplemental questionnaire afforded it a chance to remedy the insufficiency insofar as § 1677m(d) required any such opportunity.

Commerce found that the company failed to carry its burden under 19 C.F.R. § 351.401(b)(1) of demonstrating eligibility for a constructed export price offset and then gave it a second chance, which Gujarat declined to use. The Department let the company off with a mere warning that a similar failure would not be tolerated in future administrative reviews. That's not substantial evidence showing that Gujarat qualified for the offset, and therefore the court remands for reconsideration.

* * *

The court grants Daikin's motion for judgment on the agency record. A separate remand order will issue.

Dated: March 14, 2024
New York, NY

/s/ *M. Miller Baker*
JUDGE

[3] Although the court does not decide the question, the first sentence of §1677m(d) is likely irrelevant here because it must be read in tandem with that provision's second sentence, which governs when Commerce may "disregard all or part of" a respondent's submissions and apply facts otherwise available under 19 U.S.C. § 1677e. *Cf.* Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 167 (2012) ("Perhaps no interpretive fault is more common than the failure to follow the whole-text canon, which calls on the judicial interpreter to consider the entire text, in view of its structure and of the physical and logical relation of its many parts."). There are no facts available, adverse or otherwise, for the Department to employ when a respondent fails to carry its burden of showing eligibility for a constructed export price offset. Instead, the agency's duty is to simply deny the offset.

Slip Op. 24–33

UNITED STATES OF AMERICA, Plaintiff, v. AEGIS SECURITY INSURANCE COMPANY, Defendant.

Before: Stephen Alexander Vaden, Judge
Court No. 1:20-cv-03628 (SAV)

[Granting Defendant's Motion for Summary Judgment and denying Plaintiff's Motion for Summary Judgment.]

Dated: March 18, 2024

Beverly A. Farrell, Senior Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY, and *Peter Mancuso*, Trial Attorney, for Plaintiff United States. With them on the briefs were *Brian M. Boynton*, Principal Deputy Assistant Attorney General; *Patricia M. McCarthy*, Director, Commercial Litigation Branch; *Aimee Lee*, Assistant Director, Commercial Litigation Branch; *Justin R. Miller*, Attorney-In-Charge, International Trade Field Office, of New York, NY; and *Suzanna Hartzell-Ballard*, Office of the Assistant Chief Counsel, U.S. Customs and Border Protection, of Indianapolis, IN.

T. Randolph Ferguson,[1] Sandler, Travis & Rosenberg, P.A., of San Francisco, CA, and *Jeffrey M. Telep*, King & Spalding LLP, of Washington, DC, for Defendant Aegis Security Insurance Company.

Gilbert Lee Sandler, Sandler, Travis & Rosenberg, P.A., of Miami, FL, for Amicus Curiae the Customs Surety Coalition and its individual members the International Trade Surety Association; the National Association of Surety Bond Producers, Inc.; the Surety & Fidelity Association of America; and the Customs Surety Association. With him on the brief were *Robert B. Silverman* and *Peter W. Klestadt*, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, of New York, NY.

Michael J. Coursey, *Paul C. Rosenthal*, *John M. Herrmann II*, *Jennifer E . McCadney*, and *Cameron R. Argetsinger*, Kelley Drye & Warren, LLP, of Washington, DC; and *Louis S. Mastriani*, Adduci, Mastriani & Schaumberg, LLP, of Washington, DC, on the brief for Amici Curiae Adee Honey Farms; American Honey Producers Association; Bayou Land Seafood, LLC; Catahoula Crawfish, Inc.; Christopher Ranch, LLC; L.K. Bowman Company; Sioux Honey Association; and The Garlic Company.

OPINION

Vaden, Judge:

This saga involves a customs bond, a congressional experiment, and Chinese garlic. For a short time, Congress allowed new shippers of merchandise subject to antidumping or countervailing duties to post a bond instead of a cash deposit while undergoing a new shipper review. Aegis Security Insurance Company (Aegis) underwrote such a bond for a Chinese garlic importer. The entries that the bond backed were deemed liquidated by operation of law in 2006. Following liquidation, nothing happened for almost eight years. United States Customs and Border Protection (Customs) did not bill anyone for the unpaid duties, and no one paid the duties. Customs eventually billed

[1] The Court notes with sadness that Mr. Ferguson passed away while this case was pending.

the importer in late 2014 and then Aegis in early 2015. The importer had long since disappeared; and Aegis refused to pay, arguing Customs waited too long to demand payment. The Government then brought this action. Aegis is correct that the Government sat on its rights for too long. Therefore, its Motion for Summary Judgment is **GRANTED**, and the Government's Motion for Summary Judgment is **DENIED**.

BACKGROUND

This case involves a congressional experiment gone awry. Normally, when an importer enters goods subject to antidumping or countervailing duties, it gives Customs a cash deposit representing the estimated duties owed. *See* 19 U.S.C. § 1673e(a)(3). The retrospective duty system in the United States requires cash deposits because the system only fixes the final amount owed after importation. *See* 19 C.F.R. § 351.212(a). If a party requests an administrative review of the relevant antidumping or countervailing duty order to establish a new rate, then the liquidation or final assessment of duties occurs at the new rate established by the review — which can take years. *Id.* If no party requests an administrative review, Customs assesses duties at the rate from the most recent review or, if there has not been a review, the rate applicable at the time of entry. *Id.* When an importer owes additional fees or duties after a review, Customs must manually liquidate the entries at the higher rate and notify the importer of the liquidation. *See* 19 U.S.C. §§ 1500(c)–(e), 1505(b). If Customs fails to timely liquidate an entry within the statutorily defined time, then the entry is deemed liquidated by operation of law at the value estimated at entry — even if that value is wrong. 19 U.S.C. § 1504(a)(1). In cases of deemed liquidation, the statute does not require notice of liquidation because the cash deposits taken on entry cover the amount owed. *Id.*

This case did not follow the normal order because Congress briefly decided to allow new shippers of goods subject to antidumping or countervailing duties to post bonds instead of cash deposits while undergoing a new shipper review. *See* 19 U.S.C. § 1675(a)(2)(B)(iii) (1994); 19 C.F.R. § 351.214(e) (1997) (allowing "at the option of the importer, the posting, until the completion of the review, of a bond or security in lieu of a cash deposit"). New shippers — shippers who were not exporting subject merchandise when the current duty rate was set — can petition the U.S. Department of Commerce (Commerce) for a separate and individualized tariff rate. *See* 19 U.S.C. § 1675(a)(2)(B). In 1997, Commerce promulgated regulations to implement the bond program for new shippers. *See* 19 C.F.R. § 351.214 (1997). Congress later had second thoughts about its experiment

because the bond program allowed exporters to evade paying their duties by making large entries under bonds and then disappearing without paying the duties owed. *See Regulations to Improve Administration and Enforcement of Antidumping and Countervailing Duty Laws*, 86 Fed. Reg. 52,300, 52,301 n.11 (Dep't of Com. Sept. 20, 2021). It eliminated the bond option for new shippers. Trade Facilitation and Trade Enforcement Act of 2015, Pub. L. No. 114–125, § 433, 130 Stat. 122, 171 (2016).

Aegis issued the bond here in 2002, during the failed experiment. Pl.'s Am. Statement of Undisputed Material Facts (Pl.'s Facts) ¶ 1, ECF No. 76; Def.'s Statement of Undisputed Material Facts (Def.'s Facts) ¶ 10, ECF No. 77. Aegis underwrote the bond as part of a bond program organized by Kingsway Financial Services, Inc. (Kingsway). Def.'s Facts ¶ 2, ECF No. 77. Kingsway approached Aegis to underwrite the bond program because Aegis had the necessary regulatory authorizations. *Id.* ¶¶ 2–3. One of Kingsway's subsidiaries — Avalon Risk Management, Inc. (Avalon) — administered the bond program. *Id.* Kingsway and Aegis designed the program to protect Aegis from any risk through a reinsurance contract with another Kingsway subsidiary, Lincoln General Insurance Company (Lincoln General). *Id.* ¶ 6. Lincoln General eventually had financial difficulties, and Aegis' reinsurance contracts were dissolved in 2009 after an insurance rating agency downgraded Lincoln General. *Id.* ¶ 7. Lincoln General liquidated in November 2015 but paid claims up until that point. *Id.* ¶¶ 6–7. Following the liquidation, Aegis sued Kingsway and reached a settlement that gave Aegis a one-time payment and covered a portion of future losses and legal costs for the bonds Lincoln General insured. *Id.* ¶ 8; *see* Settlement Agreement, Def.'s Ex. 14, ECF No. 77.

On October 24, 2002, Aegis underwrote a continuous bond — one bond securing multiple entries — for Linyi Sanshan Import & Export Company (Linyi). Pl.'s Facts ¶ 1, ECF No. 76; Def.'s Facts ¶ 10, ECF No. 77. The bond was effective from October 26, 2002, until October 25, 2004, and covered entries of Chinese garlic that were subject to antidumping duties. Pl.'s Facts ¶¶ 4–6, ECF No. 76; Def.'s Facts ¶¶ 11–13, ECF No. 77. The bond incorporated by reference 19 C.F.R. § 113.62 and made Aegis jointly and severally liable to "[p]ay, as demanded by [Customs], all additional duties, taxes, and charges subsequently found due, legally fixed, and imposed on any entry secured by this bond" up to the $50,000 "limit of liability" on the bond. 19 C.F.R. § 113.62; Am. Compl. ¶ 8, ECF No. 66; Second Am. Answer ¶ 8, ECF No. 71; Pl.'s Ex. 1, ECF No. 76 (original bond listing § 113.62 as the regulation "in which conditions [are] codified").

Between January 16 and February 11, 2004, Linyi made ten entries of fresh garlic from China, all subject to antidumping duties. Pl.'s Facts ¶ 5, ECF No. 76; Def.'s Facts ¶ 14, ECF No. 77. Linyi applied to Commerce's new shipper program and posted bonds instead of cash deposits when it entered the garlic. *See Fresh Garlic from the People's Republic of China*, 68 Fed. Reg. 40,242 (Dep't of Com. July 7, 2003) (notice of Linyi's new shipper review). In addition to Aegis' continuous bond, Linyi obtained single transaction bonds for each entry from Hartford, a different surety. Pl.'s Facts ¶ 9, ECF No. 76; Def.'s Facts ¶¶ 13–14, ECF No. 77. In July 2004, Avalon noticed problems with Linyi and requested financial documents and a signed indemnity agreement from Linyi before renewing Linyi's bond. Def.'s Facts ¶ 12, ECF No. 77. When Linyi failed to respond by October 2004, Avalon did not renew the bond, allowing it to terminate on October 25, 2004. *Id.* Linyi's behavior was consistent with that of other importers who used new shipper reviews and bonds to evade duties. *See Regulations to Improve Administration and Enforcement of Antidumping and Countervailing Duty Laws*, 86 Fed. Reg. at 52,301 n.11.

In November 2004, certain petitioners requested an administrative review of the relevant antidumping duty order, including a request that Commerce review Linyi's entries. *See* Pl.'s Am. Mot. Summ. J. (Pl.'s Mot.) at 4 n.3, ECF No. 76; Def.'s Am. Mot. Summ. J. (Def.'s Mot.) at 6–7, ECF No. 77. This caused Commerce to suspend liquidation of Linyi's entries until the end of the review. *See* Pl.'s Facts ¶ 14, ECF No. 76; Def.'s Facts ¶¶ 14–16, ECF No. 77. The petitioners later withdrew their request regarding Linyi's entries. Def.'s Facts ¶¶ 15–16, ECF No. 77. Commerce rescinded its review of the Linyi entries on May 4, 2006, and lifted the suspension of liquidation. *Id.* When Customs failed to liquidate Linyi's entries within six months after Commerce lifted the suspension, the entries were deemed liquidated by operation of law on November 4, 2006, at the estimated amount of duty Linyi gave at entry. Am. Compl. ¶ 17, ECF No. 66; Second Am. Answer ¶ 17, ECF No. 71; *see also* 19 U.S.C. § 1504(d) ("Any entry ... not liquidated by [Customs] within 6 months ... shall be treated as having been liquidated at the rate of duty, value, quantity, and amount of duty asserted by the importer of record[.]").

For nearly eight years after the deemed liquidation, nothing happened. *See* Pl.'s Facts ¶¶ 12–15, ECF No. 76. Customs claims that, although notice was published in the Federal Register, it only learned of the liquidation in July 2014 because Commerce did not follow its normal practice of sending liquidation instructions to Customs after Commerce lifted the suspension of liquidation. Third Oral Arg. Tr. at

37:19–22, ECF No. 128; *see also* Pl.'s Facts ¶¶ 12–15, ECF No. 76; Def.'s Facts ¶ 18, ECF No. 77. Customs first billed Linyi for eight entries on October 3, 2014, and then for the remaining two on October 31.[2] Pl.'s Facts ¶ 15, ECF No. 76; Def.'s Facts ¶ 19, ECF No. 77. When Linyi failed to pay, Customs billed the sureties for the bonds that secured Linyi's entries — both Aegis and Hartford. *See* Pl.'s Facts ¶¶ 19–20, 24–25, ECF No. 76; Def.'s Facts ¶¶ 19–21, 24–26, ECF No. 77. Customs first billed Aegis on January 7, 2015.[3] Pl.'s Facts ¶ 20, ECF No. 76; Def.'s Facts ¶ 24, ECF No. 77. Aegis refused to pay and filed protests with Customs alleging that the applicable statute of limitations had run. Pl.'s Facts ¶¶ 32, 34, ECF No. 76; Def.'s Facts ¶ 24, ECF No. 77. Customs denied Aegis' protests. Pl.'s Mot. at 11–12, ECF No. 76; Def.'s Facts ¶ 24, ECF No. 77.

The Present Dispute

This case has a long and winding procedural history. It began on October 2, 2020, when the Government filed its initial Complaint. Compl., ECF No. 3. The Court first held oral argument in July 2021. ECF No. 47. After the first oral argument, the Court granted the parties' subsequent Motion to conduct additional discovery. *See* Disc. Order, ECF No. 62. The Court held a second oral argument in April 2023. ECF No. 97. After the second oral argument, the Court ordered supplemental briefing. Minute Order, ECF No. 96. During the supplemental briefing period, another Judge of this Court decided a similar case, *United States v. American Home Assurance Company*, 47 CIT __, 653 F. Supp. 3d 1277 (2023). The Court ordered additional briefing to address this new authority. *See* Minute Order, ECF No. 111. Finally, the Court held a third oral argument in November 2023. ECF No. 123.

After multiple rounds of briefing and oral argument, much of this case is undisputed. The parties agree that the Government and Aegis contracted for Aegis to secure Linyi's garlic entries with a continuous bond. *See* Pl.'s Facts ¶ 1, ECF No. 76; Def.'s Facts ¶ 10, ECF No. 77. They agree that Linyi failed to pay the duties for its entries. *See* Pl.'s Facts ¶ 19, ECF No. 76; Def.'s Facts ¶ 21, ECF No. 77. They agree that Aegis at one point was obligated to pay those outstanding duties. *See generally* Pl.'s Mot., ECF No. 76; *see also* Def.'s Mot. at 1, ECF No. 77. The only dispute is whether Aegis is still obligated to pay. *Compare* Pl.'s Mot. at 9, ECF No. 76 ("Aegis is liable for the unpaid

[2] The Government admits the bills it sent Linyi were incorrect because of an error by Customs. Pl.'s Facts ¶ 16, ECF No. 76.

[3] The Government also admits this bill was incorrect. Pl.'s Facts ¶ 21, ECF No. 76. The Government now seeks to collect the correct amount. *Id.* ¶ 22.

duties[.]"), *with* Def.'s Mot. at 12, ECF No. 77 ("Aegis ... cannot be held to account for such a stale claim.").

Aegis makes three main arguments for why it is no longer obligated to pay. First, the statute of limitations passed. *See* Def.'s Mot. at 12, ECF No. 77. Second, even if the statute of limitations had not run, Customs violated an implied contractual requirement in the bond that demand for payment occur in a reasonable amount of time. Def.'s Supp. Br. at 27, 29, ECF No. 104. Third, Customs' actions constitute impairment of suretyship. Def.'s Mot. at 35, ECF No. 77.

Two statutes establish the time limit for the Government to recover on a customs bond: 28 U.S.C. § 2415(a) and 19 U.S.C. § 1505(b). Section 2415(a) puts a six-year statute of limitations on Government actions for "money damages ... founded upon any contract[.]" The parties agree § 2415(a) applies to the bond contract here. *See* Pl.'s Mot. at 18, ECF No. 76; Def.'s Mot. at 12, ECF No. 77. Section 1505(b) defines when the Government's cause of action to sue on a customs bond accrues and the six-year statute of limitations starts to run. It states, "Duties, fees, and interest determined to be due upon liquidation or reliquidation are due 30 days after issuance of the bill for such payment." 19 U.S.C. § 1505(b).

The Government argues that, under § 1505(b), the statute of limitations period does not start to run until the Government sends a bill. *See* Pl.'s Reply at 19, ECF No. 89. The Government points to the phrase "are due 30 days after issuance of the bill" as the primary support for its assertion. *See id.* at 18–19; 19 U.S.C. § 1505(b). The Government also cites an amendment to § 1505(b) that changed the statute to its current form. *See* Pl.'s Reply at 18, ECF No. 89. Previously, the statute provided that duties became due "15 days after the date of ... liquidation." 19 U.S.C. § 1505(c) (1992). According to the Government, the change to "30 days after issuance of the bill" altered the statute's meaning; it previously set the due date based on liquidation but now sets it based on the billing date. *See* Pl.'s Reply at 18–19, ECF No. 89. At oral argument, the Government claimed the two relevant statutes provide no limit on how long it can wait to bill a surety. *See* First Oral Arg. Tr. at 97:1–8, ECF No. 49 (Government counsel agreeing that the Government could wait fifty years before sending a bill without offending statute of limitations).

Aegis argues § 1505(b) does not make duties due only after billing. *See* Def.'s Mot. at 18, ECF No. 77 ("Section 1505(b) does not mandate that the United States' claims accrue upon demand by Customs."). According to Aegis, the entire duty collection scheme centers on liquidation. *See* First Oral Arg. Tr. at 87:10–11, ECF No. 49 ("Everything keys off liquidation or reliquidation."). This focus on liquidation

means duties come due on the liquidation date. *See* Def.'s Mot. at 18–20, ECF No. 77. Aegis emphasizes the first portion of § 1505(b), "[d]uties ... determined to be due upon liquidation," and argues that this portion of the statute describes when duties are due, not the later portion of § 1505(b) stating duties "are due 30 days after issuance of the bill." *See id.* at 20–21.

Aegis also makes two primary arguments for why it should prevail even if the statute of limitations only starts running on demand. First, Aegis argues the bond contract contained an implied reasonable time requirement. Def.'s Supp. Br. at 27, 29, ECF No. 104. Second, Aegis argues the Government's actions constituted impairment of suretyship. *Id.* at 3. The third oral argument and the parties' supplemental briefing focused on these two issues.

According to Aegis, in contracts where one party can unilaterally delay the statute-of-limitations period by not making a demand, there is an implied reasonable time requirement. *Id.* at 29. This implied contractual term dictates that demand must be made within a reasonable time. *Id.* Such a requirement imposes a limit on the Government's ability to collect from Aegis independent of the statute of limitations. Aegis argues a reasonable time requirement exists here, and the Government violated that requirement by waiting too long to make demand. *See id.*; Third Oral Arg. Tr. at 34:17–18, ECF No. 128 ("[T]here is nothing reasonable about the delay that took place.").

The Government conceded at oral argument that the reasonableness requirement exists and applies here. *See* Third Oral Arg. Tr. at 57:16–20, ECF No. 128 (The Court: "So just to clarify, the Government does not dispute that the implied reasonableness contractual term applies to it. Its dispute is what the time period we're looking at [is] to determine whether it is reasonable." Ms. Farrell: "Right."). It instead argues the delay here was reasonable because Customs promptly billed Aegis after it learned from Commerce that Linyi's entries were deemed liquidated by operation of law years earlier. *See id.* at 44:21–45:18. This approach would have the Court examine the reasonableness of Customs' actions only, ignoring any portion of the delay attributable to Commerce. *See id.* Aegis responds that the Court should examine the delay attributable to the Government regardless of which agency contributed to it. *See id.* at 68:18–69:3. Under this approach, Aegis argues that the delay was unreasonable. *Id.* at 34:17–18.

Aegis also raises the impairment of suretyship defense. Def.'s Supp. Br. at 3, ECF No. 104. Impairment of suretyship occurs when the party protected by a suretyship contract unilaterally increases the surety's risk. *See* Restatement (Third) of Suretyship & Guaranty § 37

(Am. L. Inst. 1996); *United States v. Great Am. Ins. Co. of NY*, 738 F.3d 1320, 1332 (Fed. Cir. 2013). When this happens, the surety is excused from any further obligations under the contract. *See* Restatement (Third) of Suretyship & Guaranty § 37; *Great Am. Ins.*, 738 F.3d at 1332. Aegis claims it agreed to the bond contract with an expectation — grounded in Customs' prior practice — that the six-year statute of limitations begins to run on liquidation. Def.'s Supp. Br. at 3, ECF No. 104. By bringing suit in this case more than six years after the deemed liquidation, Aegis argues Customs unilaterally modified the contract in a way that increased Aegis' risk. *Id.* at 7.

Aegis raised several additional arguments at various points during this case but now emphasizes the above-discussed arguments. Aegis' additional arguments include a laches claim and a claim that the Government unlawfully reliquidated the entries at issue. *See, e.g.*, Def.'s Mot. at 28, 36, ECF No. 77. These arguments are unconvincing, and the Court need not address them further to decide this case.

JURISDICTION AND STANDARD OF REVIEW

The Court has jurisdiction under 28 U.S.C. § 1582(2), which gives the Court exclusive jurisdiction over actions by the United States "to recover upon a bond relating to the importation of merchandise required by the laws of the United States or by the Secretary of the Treasury[.]" The parties filed cross-motions for summary judgment under USCIT Rule 56. *See* Pl.'s Mot., ECF No. 76; Def.'s Mot., ECF No. 77. Summary judgment "shall be granted if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." USCIT Rule 56(a). The moving party bears the burden of showing no genuine issue of material fact exists. *See, e.g., id.*; *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). To determine whether a genuine issue of material fact exists, the Court reviews evidence submitted and draws all inferences against the moving party. *See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). At summary judgment, "the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986); *see also Ford Motor Co. v. United States*, 157 F.3d 849, 854 (Fed. Cir. 1998).

DISCUSSION

This case began as a case about the statute of limitations. It ends as a contract law case. Although this case involves antidumping duties, the Government seeks to recover under its contract with Aegis. That contract contains a demand requirement, which in turn contains an

implied reasonable time requirement. The requirement dictates that the Government must make a demand within a reasonable time. The Government made no demand for more than eight years and presents no good reason for the delay. Accordingly, the Government breached the contract and cannot now recover under it even though the Government filed suit within the statute of limitations.[4] Aegis' impairment of suretyship claim, however, fails.

I. The Statutory Scheme

The Government has multiple methods for recovering unpaid duties. It can sue under 28 U.S.C. § 1582(3) to recover from an importer or under § 1582(2) to recover on a bond. There is no statute of limitations for § 1582(3) actions against an importer. *United States v. E.G. Plastics, Inc.*, 45 CIT __, 494 F. Supp. 3d 1361, 1363 (2021) ("No statute of limitations exists for an importer's liability for duties assessed on entered merchandise."). If Linyi ever reappears, no matter how far in the future, the Government can recover. Here, however, the Government sued Aegis to "recover upon a bond" under 28 U.S.C. § 1582(2). Am. Compl. ¶ 2, ECF No. 66. A bond is a contract, and 28 U.S.C. § 2415(a) sets a six-year statute of limitations for any "action for money damages brought by the United States ... which is founded upon any contract[.]"

The parties agree that § 2415(a)'s six-year statute of limitations applies, and they agree the six years began to run whenever payment was due. *See* Pl.'s Mot. at 18, ECF No. 76; Def.'s Mot. at 12, ECF No. 77. 19 U.S.C. § 1505(b) governs when payment was due. However, the parties disagree on § 1505(b)'s interpretation. *Compare* Pl.'s Reply at 9–10, ECF No. 89 ("[T]he Government's cause of action could not, and did not, accrue until the bill issued to Aegis went unpaid for 30 days."), *with* Def.'s Mot. at 18, ECF No. 77 ("[A]ccrual began at liquidation, not at sending of a bill."). According to Aegis, payment was due immediately on liquidation, which started the six-year statute of limitations. *See* Def.'s Mot. at 18, ECF No. 77. According to the Government, payment was not due until the Government made a demand by sending a bill. *See* Pl.'s Reply at 9–10, ECF No. 89. Section 1505(b)'s text and history show the Government is correct.

The Court begins, as always, with the text. *See Van Buren v. United States*, 141 S. Ct. 1648, 1654 (2021) ("[W]e start where we always do: with the text of the statute."). Section 1505(b) reads:

> The Customs Service shall collect any increased or additional duties and fees due, together with interest thereon, or refund

[4] The Government made no argument it is entitled to recover under a *quantum meruit* or other similar theory.

> any excess moneys deposited, together with interest thereon, as determined on a liquidation or reliquidation. Duties, fees, and interest determined to be due upon liquidation or reliquidation are due 30 days after issuance of the bill for such payment. Refunds of excess moneys deposited, together with interest thereon, shall be paid within 30 days of liquidation or reliquidation.

19 U.S.C. § 1505(b). The critical language states that duties "are due *30 days after issuance of the bill* [.]" *Id.* (emphasis added). The plain text of the statute links the time duties become due with the billing date, not the liquidation date. The earlier phrase "determined to be due upon liquidation" does not change this. That phrase merely acknowledges that liquidation is when the amount of duty due is fixed. Like a credit card bill or utility bill, where the amount due is established on purchase and the customer is given a later date by which to pay, the duties described here are not due immediately when they are established. Instead, they are due later — thirty days after the bill is issued.[5] The next sentence of § 1505(b) proves Congress can link a due date to liquidation when it wishes. Congress requires that refunds "be paid within 30 days of liquidation or reliquidation." *Id.* That Congress did not use similar language in the preceding sentence shows that the liquidation date is not the date duties are due.

The statute's history further supports this reading. Section 1505(b) previously set when import duties became due using the liquidation date. Before changes made in the NAFTA Implementation Act, Pub. L. No. 103–182, § 642, 107 Stat. 2057, 2205 (1993), what is now § 1505(b) read "duties determined to be due upon liquidation ... shall be due *15 days after the date of that liquidation*." 19 U.S.C. § 1505(c) (1992) (emphasis added). Under this prior version, there was a definite due date based on the liquidation date. Now, however, § 1505(b) reads "[d]uties ... are due *30 days after issuance of the bill* for such payment." 19 U.S.C. § 1505(b) (emphasis added). When Congress amends a statute, courts must assume the amendment changes the statute's meaning. *Stone v. INS*, 514 U.S. 386, 397 (1995) ("When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect."); *see also GPX Int'l Tire Corp. v. United States*, 678 F.3d 1308, 1312 (Fed. Cir. 2012) ("a statute cannot be interpreted in a manner that would 'negate[] its recent revision'") (quoting *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 57–58 (2006) (alteration in original)). This principle of

[5] The Court's statutory interpretation, but not its ultimate result, differs from *American Home Assurance*. *See* 47 CIT __, 653 F. Supp. 3d at 1290, n.20.

statutory interpretation dictates that the amendment to § 1505(b) must mean something, and there is only one thing it can mean. Section 1505(b) once meant what Aegis claims it does, but no longer.

Read together, 28 U.S.C. § 2415(a) and 19 U.S.C. § 1505(b) set a six-year statute of limitations from the billing date. The Government first billed Linyi on October 3, 2014. Pl.'s Facts ¶ 15, ECF No. 76; Def.'s Facts ¶ 19, ECF No. 77. The Government filed its initial complaint on October 2, 2020. First Compl., ECF No. 3. This suit was therefore timely whether the statute of limitations began to run when the Government billed Linyi or when it billed Aegis.

II. The Contract

Regardless of the statute of limitations, contract law limits how long the Government can wait before making a demand. Contracts with a demand requirement — like the one here — contain an implied reasonable time requirement for making demand. There was an approximately eight-year delay between liquidation and demand for which the Government offers no good excuse. That delay was unreasonable and a breach of contract. Because the Government breached the bond contract, it cannot now recover under that contract.

The bond here incorporated by reference 19 C.F.R. § 113.62, which requires sureties to "[p]ay, as demanded by [Customs], all additional duties, taxes, and charges subsequently found due, legally fixed, and imposed on any entry secured by this bond." *See* Pl.'s Ex. 1, ECF No. 76 (original bond listing § 113.62 as the regulation "in which conditions [are] codified"). The parties agree this language is a demand requirement, meaning Aegis had no obligation to pay until Customs made a demand. *See* Third Oral Arg. Tr. at 26:14–19, ECF No. 128 (counsel for Aegis acknowledging the bond contains a demand requirement); Pl.'s Sur-reply Br. at 5, ECF No. 113 (describing § 113.62 as a demand requirement).

Contracts with a demand requirement and no express limitation on the time for demand contain an implied reasonable time requirement: The party required to make demand must do so within a reasonable time. *See Nyhus v. Travel Mgmt. Corp.*, 466 F.2d 440, 452–53 (D.C. Cir. 1972) ("a party is not at liberty to stave off operation of the statute [of limitations] inordinately by failing to make demand" and "the time for demand is ordinarily a reasonable time"); *United States v. Vanornum*, 912 F.2d 1023, 1027 n.5 (8th Cir. 1990) (citing *Nyhus*); *United States v. Gottlieb*, 948 F.2d 1128, 1130–31 (9th Cir. 1991) (citing *Vanornum* and *Nyhus*); *United States v. Gordon*, 78 F.3d 781, 787 (2d Cir. 1996) ("[I]f a contract does not expressly limit a party's time to perform, courts routinely require performance within a rea-

sonable time."); *see also United States v. First City Cap. Corp.*, 53 F.3d 112, 115 (5th Cir. 1995) (applying Texas law and stating that "demand ... must be made within a reasonable time" for contracts with a demand requirement). The reasonable time requirement is an implied contractual term, not an equitable defense. *United States v. Garan*, 12 F.3d 858, 860 (9th Cir. 1993) (distinguishing the reasonable time requirement from the equitable defense of laches).

The requirement also protects the contracting parties' expectations. *See Nyhus*, 466 F.2d at 452–53. Without it, one party could indefinitely delay the statute of limitations. *Id.*; *see also* First Oral Arg. Tr. at 97:1–8, ECF No. 49 (Government counsel agreeing that the Government could wait fifty years before making demand without offending the statute of limitations). The requirement is especially important in adhesion contracts — like customs bonds — where the parties have no opportunity to negotiate a time limit for demand. *See* Third Oral Arg. Tr. at 20:5–7, ECF No. 128 (Government counsel acknowledging that bond contracts are not "individually negotiated").

The Government concedes that the implied reasonable time requirement applies against the United States here. *See id.* at 57:16–20. Implied contractual duties — like other ordinary principles of contract law — apply when the United States contracts with private parties. *See Mobil Oil Expl. & Producing Se., Inc. v. United States*, 530 U.S. 604, 607–08 (2000) ("When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals.") (quoting *United States v. Winstar Corp.*, 518 U.S. 839, 895 (1996) (plurality opinion)); *see also Precision Pine & Timber, Inc. v. United States*, 596 F.3d 817, 828 (Fed. Cir. 2010) ("The United States, no less than any other party, is subject to [the implied duty of good faith and fair dealing].") (citing *First Nationwide Bank v. United States*, 431 F.3d 1342, 1349 (Fed. Cir. 2005)); *Sunrez Corp. v. United States*, 157 Fed. Cl. 640, 661 (2022) ("[T]he government's failure to fulfil [the implied duty of good faith and fair dealing] would constitute breach of contract[.]"). Multiple appellate courts acknowledge that the reasonable time requirement applies against the United States. *See, e.g.*, *Garan*, 12 F.3d at 860 (stating the reasonable time requirement applies against the United States even though laches does not); *Gordon*, 78 F.3d at 786–87; *Vanornum*, 912 F.2d at 1027 n.5; *First City Cap.*, 53 F.3d at 116.

There is no bright-line rule for what constitutes a reasonable time to make demand. Some sources suggest a reasonable time equals the

relevant statute of limitations. *See, e.g.*, *Gordon*, 78 F.3d at 786 ("[A] delay ... that does not exceed the applicable limitations period is ordinarily regarded as reasonable."). That rule, however, is not universally recognized and may have fallen out of favor. *Compare* 3A Arthur L. Corbin, *Corbin on Contracts* § 643, at 75 (1960) (although some courts measure reasonableness using the statute of limitations, there "seems to be slight reason" to do so), *with* 8 Timothy Murray, *Corbin on Contracts* § 31.4 (Matthew Bender 2024) (modern version of Corbin on Contracts omitting any reference to measuring reasonableness using the statute of limitations). Other sources suggest reasonableness depends on the parties' expectations. *See, e.g.*, *Nyhus*, 466 F.2d at 453 (reasonableness is "a matter of the parties' expectations"). A reasonable time should allow the parties sufficient opportunity to negotiate before litigation. *See United States v. Dos Cabezas Corp.*, 995 F.2d 1486, 1491 (9th Cir. 1993).

Regardless of how one measures reasonableness, the delay here was unreasonable. The relevant entries were deemed liquidated by operation of law on November 4, 2006. Am. Compl. ¶ 17, ECF No. 66; Second Am. Answer ¶ 17, ECF No. 71. Customs did not bill Aegis until January 7, 2015 — more than eight years later. *See* Pl.'s Facts ¶ 20, ECF No. 76; Def.'s Facts ¶ 24, ECF No. 77. Eight years is more than the applicable six-year statute of limitations. 28 U.S.C. § 2415(a). The Government has only one claim for why an eight-year delay was reasonable. It argues that Customs acted within a reasonable time to bill Aegis once Customs learned from Commerce in July 2014 that the relevant entries were deemed liquidated years earlier. *See* Third Oral Arg. Tr. at 44:21–45:18, ECF No. 128. The Government does not claim it was negotiating a settlement with Aegis or offer any other justification beyond Commerce's neglect to excuse the delay. When the Government haled Aegis into court, it did so as "the United States of America." Am. Compl. ¶ 1, ECF No. 66. Commerce and Customs are both part of one executive branch. *See generally* U.S. Const. art. II. The question is not whether Commerce or Customs as individual agencies unreasonably delayed making demand; the question is whether the Government collectively did.

The particular facts here constitute an unreasonable delay by any standard. Because the Government unreasonably delayed making demand for more than eight years, it breached the bond contract and cannot now recover under that contract.

III. Impairment of Suretyship

In addition to its contractual defense, Aegis raises as its primary alternative argument the affirmative defense of impairment of sure-

tyship. Despite finding for Aegis on its contractual argument, the Court addresses this claim to facilitate appellate review. To succeed in its impairment of suretyship defense, Aegis must show that the United States "fundamentally alter[ed] the risks imposed" on Aegis under the bond. Restatement (Third) of Suretyship & Guaranty § 37. Aegis bears the burden of proving this defense. *See Hartford Fire Ins. Co. v. United States*, 41 CIT __, 254 F. Supp. 3d 1333, 1365 (2017). Aegis must show it suffered a material increase in risk. *Great Am. Ins.*, 738 F.3d at 1332 (requiring the surety to show the Government's actions "materially modified the contract ... by substantially increasing its risk"); *Old Republic Ins. Co. v. United States*, 10 CIT 589, 602 (1986) ("[T]he question is whether [the Government's actions] materially increased the surety's risk[.]").

Even were it possible to view the facts in the light most favorable to Aegis, Aegis cannot show that it suffered a material increase in risk. *But see Matsushita Elec. Indus.*, 475 U.S. at 587 (requiring all inferences to be drawn against the moving party). Aegis argues the delay in demand impaired its ability to recover from its reinsurer, Lincoln General.[6] *See* Pl.'s Mot. at 36, ECF No. 77 ("By the time Customs billed the importer ... [Lincoln General] was in liquidation."). But Lincoln General was still paying claims until at least November 2015, almost a year after Customs first billed Aegis. *See* Def.'s Facts ¶ 7, ECF No. 77. Counsel for Aegis admitted at oral argument that, had Aegis made a timely claim before November 2015, Lincoln General would have paid its claim in full. *See* Third Oral Arg. Tr. at 63:11–16, ECF No. 128. Insurance companies like Aegis routinely enforce notice requirements on policyholders. *See, e.g.*, *Aegis Sec. Ins. Co. v. Hiers*, 211 Ga. App. 639, 440 S.E.2d 71, 72 (1994) (Aegis denying coverage because a policyholder failed to give timely notice). If policyholders across the nation are expected to make a timely claim with their insurers, so too is Aegis. Aegis' alternative affirmative defense of impairment of suretyship therefore fails.

CONCLUSION

When the Government enters a contract, it is not immune from the ordinary rules of contract law. The Government chose to contract with Aegis, and the parties agree that their contract contained a demand requirement. They also agree that the contract contained an implied reasonable time requirement that limited the Government's time to

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[6] To the extent Aegis also argues the delay impaired its ability to recover from Linyi, this argument fails, too. Linyi disappeared by fall 2004, more than a year before the deemed liquidation of the entries. *See* Def.'s Facts ¶ 12, ECF No. 77 (describing Linyi's failure to respond to inquiries about its bond). The undisputed facts show Aegis could not have recovered from Linyi, even if Customs billed immediately on the deemed liquidation.

make demand. The Government waited nearly a decade to make demand and gave no good excuse for doing so. The delay was unreasonable and thus a breach of contract. The Government cannot now recover under the contract it breached. Accordingly, Aegis' Amended Motion for Summary Judgment is **GRANTED**. The Government's Amended Motion for Summary Judgment is **DENIED**.

Dated: March 18, 2024
New York, New York

Stephen Alexander Vaden
STEPHEN ALEXANDER VADEN, JUDGE

Slip Op. 24–34

CLEVELAND-CLIFFS INC., Plaintiff, and NUCOR CORPORATION, STEEL DYNAMICS, INC., and UNITED STATES STEEL CORPORATION, Plaintiff-Intervenors, v. UNITED STATES, Defendant, and COMPANHIA SIDERÚRGICA NACIONAL S.A., COMPANHIA SIDERÚRGICA NACIONAL, LLC, and USINAS SIDERURGICAS DE MINAS GERAIS S.A. USIMINAS, Defendant-Intervenors.

Before: Gary S. Katzmann, Judge
Court No. 22–00257

[The court denies Plaintiffs' Motion for Judgment on the Agency Record.]

Dated: March 20, 2024

Neal J. Reynolds, King & Spalding, LLP, of New York, N.Y. and Washington, D.C., argued for Plaintiff Cleveland-Cliffs Inc. With him on the briefs were *Stephen P. Vaughn*, *Barbara Medrado* and *Nicholas Paster*.

Roger B. Schagrin and *Jeffrey D. Gerrish*, Schagrin Associates, of Washington, D.C., for Plaintiff-Intervenor Steel Dynamics, Inc.

Alan H. Price and *Christopher B. Weld*, Wiley Rein LLP, of Washington, D.C., for Plaintiff-Intervenor Nucor Corporation.

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

John D. Henderson, Attorney-Advisor, Office of the General Counsel, International Trade Commission, of Washington, D.C., argued for Defendant United States. With him on the briefs were *Dominic L. Bianchi*, General Counsel, *Andrea C. Casson*, Assistant General Counsel, and *David A. Goldfine*.

Michael G. Jacobson, Hogan & Lovells US, LLP, of Washington, D.C., argued for Defendant-Intervenors Companhia Siderúrgica Nacional S.A. and Companhia Siderúrgica Nacional, LLC. With him on the brief was *Craig A. Lewis*.

Chunlian Yang and *Lucas A. Queiroz Pires*, Alston & Bird, LLP, of Washington, D.C., for Defendant-Intervenor Usinas Siderurgicas De Minas Gerais S.A. Usiminas.

OPINION

Katzmann, Judge:

This case involves the confluence of two channels through which the Executive Branch implements the trade law of the United States. One is the U.S. International Trade Commission's ("Commission") five-year "sunset" review of antidumping and countervailing duty orders. The other is the President's imposition by proclamation of trade restrictions under section 232 of the Trade Expansion Act of 1962, Pub. L. No. 87–794, 76 Stat. 872, 877 (codified as amended at 19 U.S.C. § 1862). In the five-year review underlying this case, the Commission referenced the market effects of certain section 232 restrictions. The central question before the court is whether that reference was proper.

Plaintiff Cleveland-Cliffs Inc. ("Cleveland-Cliffs") and Plaintiff-Intervenors Steel Dynamics, Inc., Nucor Corporation, and United States Steel Corporation (collectively, "Plaintiffs") are U.S.-based steel producers. In their Motion for Judgment on the Agency Record, Plaintiffs challenge the Commission's determination not to cumulatively assess Brazilian imports in conducting its five-year review of antidumping and countervailing duty orders on Brazilian imports of cold-rolled steel flat products ("CRS"). *See* Pls.' and Pl.-Inters.' Mot. for J. on Agency R. at 1, Mar. 16, 2023, ECF No 43 ("Pls.' Br."); *see also Cold-Rolled Steel Flat Products from Brazil, China, India, Japan, South Korea, and the United Kingdom*, 87 Fed. Reg. 49886 (ITC Aug. 12, 2022), P.R. 298 ("*Five-Year Review Determination*").

Plaintiffs contend (1) that the Commission's decision not to cumulate Brazil's subject imports relied on an impermissibly "circular" analysis, rendering it not in accordance with law, (2) that the Commission deviated from its hitherto consistent treatment of section 232 measures in prior determinations without explanation, rendering this determination not in accordance with law, and (3) that the Commission failed to adequately explain certain other elements of its cumulation determination. *See* Compl. ¶¶ 17–28, Oct. 5, 2022, ECF No. 9. Plaintiffs request that the court remand the Commission's final determination for Brazil as "unsupported by substantial evidence and otherwise not in accordance with law." Pls.' Br at 1–2. Defendant the United States opposes Plaintiffs' motion, as do Defendant-Intervenors Companhia Siderúrgica Nacional S.A., Companhia Siderúrgica Nacional LLC, and Usinas Siderúrgicas de Minas Gerais S.A. – USIMINAS ("USIMINAS"). Companhia Siderúrgica Nacional S.A. and USIMINAS are Brazilian producers of CRS; Companhia Siderúrgica Nacional LLC is a U.S. importer of CRS from Brazil.

The court concludes that the Commission's cumulation determination with respect to Brazil—which is the sole aspect of the Commission's five-year review that Plaintiffs challenge—is supported by substantial evidence and in accordance with law. The court accordingly enters Judgment on the Agency Record for Defendant and Defendant-Intervenors.

BACKGROUND

I. Legal and Regulatory Framework

A. Sunset Reviews

The Tariff Act of 1930, as amended, requires the U.S. Department of Commerce ("Commerce") to order the imposition of countervailing duties on imported merchandise upon finding that "the government of a country or any public entity within the territory of a country is providing, directly or indirectly, a countervailable subsidy with respect to the manufacture, production, or export of" that merchandise. 19 U.S.C. § 1671(a)(1); *see also id.* § 1671e. Commerce is also required to order the imposition of antidumping duties on imported merchandise that "is being, or is likely to be, sold in the United States at less than its fair value." *Id.* § 1673(1); *see also id.* § 1673e. Commerce cannot impose either type of duty, however, unless the Commission separately determines (as relevant here) that "an industry in the United States (i) is materially injured, or (ii) is threatened with material injury . . . by reason of imports of that merchandise or by reason of sales (or the likelihood of sales) of [the subject] merchandise for importation." *Id.* §§ 1671(a)(2), 1673(2).

Every five years after the publication of an antidumping or countervailing duty order, the Commission is required to conduct a "sunset" review of that order. *Id.* § 1675(c)(1); *Nucor Corp. v.* United States, 32 CIT 1380, 1385, 594 F. Supp. 2d 1320, 1333 (2008), *aff'd*, 601 F.3d 1291 (Fed. Cir. 2010). The Commission's task in conducting this review is to determine whether "revocation of [the] order would be likely to lead to a continuation or recurrence of material injury within a reasonably foreseeable time." 19 U.S.C. § 1675a(a)(1). In doing so, the Commission is to consider the "likely volume, price effect, and impact of imports of the subject merchandise on the industry if the order is revoked or the suspended investigation is terminated." *Id.* If the Commission determines that revocation would likely lead to continued or recurrent material injury, Commerce cannot revoke the subject order. *Id.* § 1675(d)(2). If the Commission concludes that revocation would not have this effect, Commerce must

revoke the subject order if Commerce does not separately determine "that dumping or a countervailable subsidy, as the case may be, would be likely to continue or recur." *Id.* § 1675(d)(2)(A). The Commission's material-injury analysis is thus a critical determinant of whether an antidumping or countervailing duty order will remain in effect after the five-year sunset review.

In conducting its likely-material-injury analysis, the Commission "may cumulatively assess the volume and effect of imports" from multiple source countries—as long as those imports satisfy certain threshold criteria. 19 U.S.C. § 1675a(a)(7). The imports must be (1) "likely to compete with each other and with domestic like products in the domestic market" and (2) not be "likely to have no discernible adverse impact on the domestic industry." *Id.* If these criteria are satisfied, the Commission "may cumulatively assess the volume and effect of imports of the subject merchandise from all countries" subject to review. *Id.*[1] But as the word "may" indicates, the Commission retains discretion *not* to make a cumulative assessment (i.e., "cumulate") even where the statutory criteria are satisfied. 19 U.S.C. § 1675a(a)(7); *Nucor*, 601 F.3d at 1293. If the Commission declines to cumulate imports from a source country, it proceeds to a likely-material-injury analysis for the decumulated imports on an independent, country-specific basis. *See* 19 U.S.C. § 1675a(a)(2).

Section 1675a does not delineate any factors that the Commission must consider in determining whether to cumulate a country's imports. *See Nucor*, 601 F.3d at 1295; *Neenah Foundry Co. v. United States*, 25 CIT 702, 709, 155 F. Supp. 2d 766, 772 (2001). The Commission accordingly enjoys "wide latitude" in identifying relevant factors for cumulation in sunset reviews. *Allegheny Ludlum*, 30 CIT at 2002, 475 F. Supp. 2d at 1380 (2006). At the same time, however, the Commission's discretion "must be predicated upon a judgment anchored in the language and spirit of the relevant statutes and regulations." *Freeport Mins. Co. v. United States*, 766 F.2d 1029, 1032 (Fed. Cir. 1985).

[1] The statute's reference to "all countries" may be read to offer the Commission an all-or-nothing choice: it may either exercise its discretion to cumulate imports from all countries that import subject merchandise, or it may analyze imports from each source country individually. But the Commission, in this case and in others before it, has impliedly adopted a reading of § 1675a(a)(7) whereby "all countries" allows the Commission to choose which countries' imports to analyze cumulatively and which to analyze individually. *See, e.g.*, *USX Corp. v. United States*, 11 CIT 82, 87, 655 F. Supp. 487, 491 (describing the Commission's decision "not to cumulate Argentine imports with those from Brazil, Korea, South Africa and Spain"); *Allegheny Ludlum v. United States*, 30 CIT 1995, 1996–97, 475 F. Supp. 2d 1370, 1374–75 (2006) (describing the Commission's decision not to cumulate imports from France and the United Kingdom despite cumulating imports from Germany, Italy, Japan, Korea, Mexico, and Taiwan). This practice of making country-specific cumulation determinations creates the possibility that concurrent country-specific material-injury and cumulation determinations will rest on overlapping reasoning.

B. Presidential Action Under Section 232

Section 232 of the Trade Expansion Act of 1962 "empowers and directs the President to act to alleviate threats to national security from imports" by implementing actions "'to adjust the imports'" of certain goods. *Transpacific Steel LLC v. United States*, 4 F.4th 1306, 1311 (Fed. Cir. 2021) (quoting 19 U.S.C. § 1862(c)(1)(A)). The President may so act when the Secretary of Commerce finds that foreign goods are "being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security." 19 U.S.C. § 1862(c)(1)(A). These actions may include quotas or duties, and "[t]he President's discretion is broad enough to encompass the choice of whether a duty is to be imposed on top of the amounts of antidumping duties that would be due without the duty or, instead, is to partly or wholly substitute for such duties." *Borusan Mannesmann Boru Sanayi ve Ticaret A.S. v. United States*, 63 F.4th 25, 34 (Fed. Cir. 2023). The President may impose or rescind section 232 measures on a country-by-country basis: "there is no applicable federal-law prohibition on different treatment of the imports of articles from different countries." *Transpacific Steel*, 4 F.4th at 1335.

II. History of Relevant Administrative Proceedings

In July and September 2016, the Commission determined in a pair of decisions that the U.S. CRS industry was materially injured or threatened with material injury by certain imports of CRS from Brazil, China, India, Japan, Korea, and the United Kingdom. *See* Cold-Rolled Steel Flat Products from China and Japan, Inv. Nos. 701-TA-541 & 731-TA-1284, 1286 (Final), USITC Pub. 4619 (July 2016); Cold-Rolled Steel Flat Products from Brazil, India, Korea, Russia, and the United Kingdom, Inv. Nos. 701-TA-540, 542–44 & 731-TA-1283, 1285, 1287, 1289–90, USITC Pub. 4637 (Sept. 2016).

In conjunction with these material-injury determinations, Commerce issued a series of antidumping and countervailing duty orders on imports of CRS from Brazil, China, India, Japan, South Korea, and the United Kingdom. *See Certain Cold-Rolled Steel Flat Products from Japan and the People's Republic of China: Antidumping Duty Orders*, 81 Fed. Reg. 45956 (Dep't Com. July 14, 2016); *Certain Cold-Rolled Steel Flat Products from the People's Republic of China: Countervailing Duty Order*, 81 Fed. Reg. 45960 (Dep't Com. July 14, 2016); *Certain Cold-Rolled Steel Flat Products from Brazil, India, the Republic of Korea, and the United Kingdom: Amended Final Affirmative Antidumping Determinations for Brazil and the United Kingdom and Antidumping Duty Orders*, 81 Fed. Reg. 64432 (Dep't Com. Sept. 20,

2016); *Certain Cold-Rolled Steel Flat Products from Brazil, India, and the Republic of Korea: Amended Final Affirmative Countervailing Duty Determination and Countervailing Duty Order (the Republic of Korea) and Countervailing Duty Orders (Brazil and India)*, 81 Fed. Reg. 64436 (Dep't Com. Sept. 20, 2016) (collectively, "Commerce's Orders").[2]

Five years after the publication of Commerce's Orders, the Commission initiated full reviews of those orders pursuant to 19 U.S.C. § 1675(c). *See Cold-Rolled Steel Flat Products from Brazil, China, India, Japan, Korea, and the United Kingdom; Institution of Five-Year Reviews*, 86 Fed. Reg. 29286 (ITC June 1, 2021); *Cold-Rolled Steel Flat Products from Brazil, China, India, Japan, Korea, and the United Kingdom; Notice of Commission Determination to Conduct Full Five-Year Reviews*, 86 Fed. Reg. 52180 (ITC Sept. 20, 2021).

After conducting these reviews, the Commission determined that revoking Commerce's Orders on CRS from China, India, Japan, and South Korea, and the United Kingdom "would be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time." *Five-Year Review Determination* at 49886. However, the Commission also determined that revoking Commerce's Orders on CRS imports from Brazil "would *not* be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time." *Id.* (emphasis added). The Commission explained its views in a separate published document. *See* Cold-Rolled Steel Flat Products from Brazil, China, India, Japan, South Korea, and the United Kingdom, Inv. Nos. 701-TA-540–543 & 731-TA-1283–1287 & 1290 (Review), USITC Pub. 5339 (Aug. 17, 2022), P.R. 300 ("Views").

This document explains that in the five-year review, the Commission cumulatively assessed CRS imports from China, India, Japan, South Korea, and the United Kingdom. *See id.* at 16, 19, 44 (citing 19 U.S.C. § 1675a(a)(7)). But the Commission declined to cumulatively assess CRS imports from Brazil. *Id.* at 45. Although the Commission concluded that Brazilian CRS imports "would not likely have no discernable adverse impact on the U.S. industry," thus satisfying one of § 1675a(a)(7)'s two prerequisites for cumulation, the Commission concluded that Brazilian CRS imports did not satisfy the other prerequisite: that "such imports would be likely to compete with each other and with domestic like products in the United States market." *Id.* at 16, 23, 45 (quoting § 1675a(a)(7)).

[2] Commerce issued antidumping duty orders on CRS imports from Brazil, China, India, Japan, South Korea, and the United Kingdom. Commerce issued countervailing duty orders on CRS imports from Brazil, China, India, and South Korea. *See generally* Commerce's Orders.

The Commission split its analysis of this prerequisite into two subordinate analyses[3]: the Commission considered "whether there is a likelihood of a reasonable overlap of competition among subject imports from the subject countries and the domestic like product," and "whether subject imports are likely to compete in the U.S. market under different conditions of competition." Views at 19. It was on the basis of this second "Likely Conditions of Competition" analysis that the Commission determined not to cumulate Brazilian CRS imports. *Id.* at 41.[4] The Commission's analysis proceeded in two steps.

The Commission first compared imports of subject CRS from Brazil to those from China, India, Japan, and the United Kingdom—that is, all other reviewed source countries besides South Korea. The Commission noted that unlike those comparator imports, Brazilian CRS imports were subject to a maximum quota imposed by the President pursuant to section 232 of the Trade Expansion Act of 1962. *See* Views at 44; 19 U.S.C. § 1862. While most of the other subject nations' imports were subject to other types of section 232 measures, those imports were not subject to volume-capping quotas. *Id.* at 42 (noting that subject imports from China and India were subject to 25 percent *ad valorem* tariffs and that subject imports from Japan and the United Kingdom were subject only to tariff rate quotas ("TRQs"), which permitted "unlimited volumes of subject imports from each of [the] subject countries to enter the United States with 25 percent section 232 duty rates applied for any volumes in excess of the TRQ limits").

The Commission then compared CRS imports from Brazil to those from South Korea, which were also subject to a section 232 maximum quota. The Commission reasoned that despite this surface-level similarity, there remained "significant differences between the level of South Korea's quota and presence in the U.S. market relative to those for Brazil." Views at 43. South Korea's quota level was almost three times larger than that imposed on Brazil, and South Korean CRS imports had come closer to fulfilling their quota limit than their

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[3] Plaintiffs do not challenge the Commission's practice of conducing separate "Likelihood of a Reasonable Overlap of Competition" and "Likely Conditions of Competition" analyses as a means of carrying out the statutory directive to consider whether certain countries' imports would be "likely to compete with each other and with domestic like products." 19 U.S.C. § 1675a(a)(7).

[4] The cumulation provision permits the Commission to cumulate subject imports if they "would be *likely to compete* with each other and with domestic like products." 19 U.S.C. § 1675a(a)(7) (emphasis added). The conditions-of-competition analysis thus allows the Commission to "consider the likely differing conditions of competition to predict the domestic market for the subject merchandise in event of revocation." *Nucor*, 601 F.3d at 1296.

Brazilian counterparts during the period of review. *Id.* The Commission further noted that, unlike South Korean subject imports, subject imports from Brazil "were virtually absent from the U.S. market" during the period of review." *Id.* In a footnote, the Commission added that "[t]he Brazilian industry is also less export-oriented than the South Korean industry" and that "[i]nformation available also indicates that the Brazilian industry has substantially less production than the South Korean industry." *Id.* at 43 n.307.

The Commission concluded that the "absolute cap on the annual volume of subject imports from Brazil" meant that "unlike subject imports from Brazil, subject imports from other countries are in a position to compete for much larger volumes of sales than any of the subject producers in Brazil which must share the quota limits." *Id.* at 42, 44. In the ensuing likely-material-injury determination, the Commission accordingly considered Brazilian imports on a decumulated basis and reached a negative material-injury determination. *Id.* at 69.

The Commission rendered its cumulation determination as to Brazil over the dissent of two commissioners. Commissioners Rhonda K. Schmidtlein and Randolph J. Stayin explained that they were "not persuaded by . . . argument[s] that subject imports from Brazil are likely to compete under different conditions of competition than other subject imports." Separate and Dissenting Views of Commissioners Schmidtlein and Stayin, Views at 75 ("Dissent"). In particular, the dissenting Commissioners found that there was no reason to conclude that "any difference in the applicable section 232 measures constitute different conditions of competition," as "[t]he different measures do not affect the types of products that may be sold in the U.S. market, nor do they affect the locations or channels of distribution through which the imports may be sold." *Id.* at 77–78.

III. Procedural History

On October 5, 2022, Cleveland-Cliffs filed a complaint with the U.S. Court of International Trade ("CIT") seeking review of the Commission's final negative sunset review determination for Brazil. *See* Compl. After the complaint was filed, Companhia Siderúrgica Nacional S.A. and Companhia Siderúrgica Nacional LLC and Usinas Siderúrgicas de Minas Gerais S.A. each moved, with Plaintiff's consent, to intervene under USCIT Rule 24 as Defendant-Intervenors. *See* Mot. to Intervene, Oct. 12, 2022, ECF No. 11; Mot. to Intervene. as Def.-Inter., Oct. 26, 2022, ECF No 16. The court granted both motions. *See* Order, Oct. 12, 2022, ECF No. 15; Order, Oct. 28, 2022, ECF No. 21. Nucor, Steel Dynamics, and U.S. Steel then moved to inter-

vene as Plaintiff-Intervenors. *See* Mot. to Intervene as Pl.-Inter., Oct. 28, 2022, ECF No. 21; Mot. to Intervene as Pl.-Inter., Nov. 2, 2022, ECF No. 27; Mot. to Intervene as Pl.-Inter., Nov. 2, 2022, ECF No. 32. The court granted these motions as well. *See* Order, Oct. 28, 2022, ECF No. 25; Order, Nov. 2, 2022, ECF No. 31; Order, Nov 2, 2022, ECF No. 36.

On March 16, 2023, Cleveland-Cliffs filed its Motion for Judgment on the Agency Record under USCIT Rule 56.2. *See* Pls.' Br. Defendant and Defendant-Intervenors filed their response briefs on June 13 and June 27, 2023, respectively. *See* Def.'s Mem. in Opp'n. to Pls.' Mot. for J. on the Agency R., June 13, 2023, ECF No. 46; Br. of Def.-Inters. to Pl.'s Mot. for J. on the Agency R., June 27, 2023, ECF No. 49. Plaintiff and Plaintiff-Intervenors filed a reply on July 31, 2023. See Pl. and Pl.-Inters.' Reply Br., July 31, 2023, ECF No. 52 ("Pls.' Reply"). On August 21, 2023, Plaintiff and Plaintiff-Intervenors moved for oral argument on the Motion for Judgement on the Agency Record, *see* Mot. for Oral Arg., Aug. 21, 2023, ECF No. 56, which the court granted, *see* Order, Aug. 22, 2023, ECF No. 57. In advance of oral argument, the court issued questions to the parties and requested written responses. *See* Letter re: Qs. for Oral Arg., Oct. 24, 2023, ECF No. 60. The parties timely responded. *See* Def.-Inters.' Resp. to Ct.'s Qs. for Oral Arg., Nov. 6, 2023; Pls.' Resp. to Ct.'s Qs. for Oral Arg., Nov. 6, 2023, ECF No. 63; Def.'s Resp. to Ct.'s Qs. for Oral Arg., Nov. 6, 2023, ECF No. 65.

At oral argument on November 9, 2023, the court invited the parties to file additional submissions; the parties did so, *see* Pls.' Post-Oral Arg. Subm., Nov. 20, 2023, ECF No. 69 ("Pls.' Post-Oral Arg. Subm."); Def.-Inters.' Post-Oral Arg. Subm., Nov. 20, 2023, ECF No. 70; Def.'s Post-Oral Arg. Subm., Nov. 20, 2023, ECF No. 71 ("Def.'s Post-Oral Arg. Subm.").

JURISDICTION AND STANDARD OF REVIEW

Jurisdiction lies under 28 U.S.C. § 1581(c). The standard of review in this action is set forth in 19 U.S.C. § 1516a(b)(1)(B)(i), which states that "[t]he court shall hold unlawful any determination, finding or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law."

Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Broadcom Corp. v. Int'l Trade Comm'n*, 28 F.4th 240, 249 (Fed. Cir. 2022). To be supported by substantial evidence, a determination must account for "whatever in the record fairly detracts from its weight," including "contradictory evidence or evidence from which conflicting inferences

could be drawn." *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 44 F.3d 978, 985 (Fed. Cir. 1994) (quoting *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 487–88 (1951)).

DISCUSSION

As noted above, Plaintiffs argue that (1) the Commission's determination not to cumulate Brazil's subject imports rested on an impermissibly circular analysis, rendering it not in accordance with law; that (2) the Commission deviated from its consistent treatment of section 232 measures in prior cases without explanation, rendering its cumulation determination not in accordance with law; and that (3) other aspects of the Commission's cumulation determination are unsupported by substantial evidence and not in accordance with law because they lack adequate explanation.[5] The court concludes that (1) the Commission's reasoning underlying its determination not to cumulate subject imports from Brazil is not unlawfully circular; that (2) the Commission's treatment of section 232 measures in this case is not inconsistent with its decisions in prior sunset reviews; and that (3) the Commission adequately explained—and supported with substantial evidence—its determination not to cumulate subject imports from Brazil. The court accordingly affirms the Commission's determination and enters judgment on the agency record for Defendants.

I. The Commission Did Not Engage in Unlawfully Circular Reasoning in Declining to Cumulate Subject Imports from Brazil

Relying on the court's decisions in *Neenah Foundry*, *Allegheny Ludlum*, and *Nucor*, Plaintiffs contend that the Commission's reasoning in its determination not to cumulate subject imports from Brazil is not in accordance with law. Compl. ¶¶ 18–19. Plaintiffs assert that the Commission relied on likely absolute volume as the sole factor in both its cumulation analysis and its ultimate injury determination, thus prematurely requiring a demonstration of an "independent causation of material injury" by Brazilian imports of CRS at the cumulation stage. Pls.' Br. at 22 (quoting *Neenah*, 25 CIT at 709, 155 F. Supp. 2d at 772). This, according to Plaintiffs, rendered "cumulation a vestigial part of the causation analysis." *Id.* (quoting *Allegheny Ludlum*, 30 CIT at 2002–03, 475 F. Supp. at 1378–79). Plaintiffs

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[5] Underlying Plaintiffs' argument is an assertion that because the Commission's cumulation determination is "not supported by substantial evidence and not otherwise in accordance with law," neither is "the Commission's negative likely injury determination for Brazil." Compl. ¶¶ 27–28. Because the court sustains the Commission's cumulation determination, the court does not consider the merits of this assertion.

argue that this approach constituted "impermissible circular analysis" and that the resulting determination is not in accordance with law. *Id.* at 25.

The court has noted that a cumulation determination may not be in accordance with law when the Commission poses "the ultimate, individual-country causation question as a predicate to cumulation in a way that precludes consideration of this question on a cumulative basis." *Neenah Foundry*, 25 CIT at 711, 155 F. Supp. 2d at 774. Plaintiffs describe this as a problem of "circularity," or "circular analysis." Pls.' Reply at 6; Pls.' Br. at 25.[6]

But the Commission's cumulation determination as to Brazil in this sunset review does not rest on a prohibited category of reasoning, however termed. Plaintiffs argue as follows:

> [A]t at no point in its conditions of competition analysis for these countries did the Commission majority compare the volume or pricing trends for imports from these countries, or analyze any other, non-likely volume factor to justify its finding that the Brazilian imports and imports from China, India, Japan, and the United Kingdom would compete under different conditions of competition upon revocation. Instead, the Commission relied solely and exclusively on an impermissible comparison of the likely volumes of the subject imports from Brazil, China, India, Japan, and the United Kingdom in its conditions of competition analysis for these countries . . . . Clearly, the Commission majority's analysis represents the very type of "circular" likely volume analysis that is, in this Court's view, "impermissible" under the statute.

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[6] Despite its scattered appearances in prior decisions of the court on matters involving cumulation determinations, the term "circular" does not precisely describe the potential problem that Plaintiffs employ it to identify. True "circularity" would describe a scenario where the outcome of one determination ("Determination A") depends on the outcome of another ("Determination B"), and the outcome of Determination B in turn depends on that of Determination A: an infinite loop in which neither determination is moored to external circumstances. *See, e.g.*, *Williams v. State of N.C.*, 325 U.S. 226, 234 (1945) (Frankfurter, J.) (describing as "circular reasoning" a proposition whereby "a court's record would establish its power and the power would be proved by the record").

What the court broadly termed a "circular analysis" in *Neenah Foundry* could be more precisely described for these purposes, with no loss to accuracy, as a *cascading* analysis: "[R]elying on the same factors for refusal to cumulate as for an ultimate negative injury determination," the court opined in *Neenah Foundry*, "thwarted congressional intent in that it demanded demonstrated, independent causation of material injury before any consideration of cumulation." 155 F. Supp. 2d at 772. In other words, the problem the court identified in *Neenah Foundry* was not that the outcome of Determination A depended on the outcome of Determination B, and vice versa. It was that the outcome of Determination A—itself an independent inquiry—determined the outcome of Determination B, rendering Determination B "vestigial." *Id.* at 771 (quoting *USX Corp.*, 11 CIT at 88, 655 F. Supp. at 493).

Pls.' Br. at 27 (citations omitted).

Plaintiffs do not directly argue that the Commission's likely-material-injury analysis determined the outcome of the cumulation determination, let alone that the likely-material-injury analysis rendered the cumulation determination "vestigial." Instead, they argue that considering the absolute volume of imports as a factor in both the cumulation and material-injury determinations was "circular" because this court has previously found cumulation determinations to be "circular" where they are predicated on analyses of likely absolute volume. *See* Pls.' Br. at 22 ("[The CIT] has stated that the Commission should not rely on the likely volumes or pricing levels of the subject imports because these considerations properly belong in its analysis of the likely injury presented by the subject imports." (citing *Neenah Foundry*, 155 F. Supp. 2d at 772)).

Plaintiffs' suggested approach is straightforward: if the Commission considers likely absolute volume as an element of its conditions-of-competition analysis, any resulting negative cumulation determination will bear the dreaded mark of circular reasoning. This approach, however, is insensitive to *why* the court has previously disfavored the Commission's consideration of likely absolute volume. The court does not impose a reflexive taboo on analyses of likely absolute volume at the cumulation stage. Instead, the court looks to whether the Commission complied with its statutory mandates by conducting independent analyses for both cumulation and the ultimate material-injury determination. *See* 19 U.S.C. § 1675a(a)(1), (7). If the Commission bases its cumulation determination on likely import volumes and proceeds to base its material-injury determination on that very cumulation analysis, the Commission has likely failed to independently examine the "likely to compete" and "no discernible adverse impact" elements of the cumulation determination. *Id.* § 1675a(a)(7). But the potential problem is not intrinsic to likely import volumes as a factor—it is that the Commission has effectively performed the same analysis twice. The Commission cannot lawfully make only one determination where the statute demands two.

Even where the Commission considers the same factor for its cumulation and likely-material-injury determinations, the Commission can avoid an impermissible cascading problem by ensuring that the two determinations are independent—that is, by ensuring that the material injury–stage analysis of the factor is not a mere echo of the cumulation-stage analysis. *See, e.g.*, *Neenah Foundry*, 25 CIT at 711, 155 F. Supp. 2d at 774 (finding "the problem of circularity" to be avoided where "the Commission analyzed import volume trends in

the cumulation analysis for a different purpose than its analysis of import volume trends to determine the likelihood of increased volume effects in the event of revocation"); *see also Allegheny*, 30 CIT at 2003, 475 F. Supp. 2d at 1379 (concluding that an "overlap" of factors relied upon in cumulation and likely injury analyses was permissible because the Commission "utilized the information for different purposes in accordance with the standard articulated in *Neenah*" (citations omitted)).

The Commission has avoided the "problem" here, conducting independent cumulation and material-injury determinations with respect to Brazil in this sunset review. The Commission's stated reasoning in the conditions-of-competition prong of its cumulation analysis, while succinct, clarifies that establishing a likelihood of material injury to domestic industry by Brazil's subject imports was not a required predicate to the decision to cumulate. Views at 42–44. While the conditions-of-competition and material injury analyses may overlap in a superficial sense,[7] further examination reveals the Commission analyzed the likely volume factor for different purposes in each analysis.

In its conditions-of-competition analysis, the Commission explained that "[u]nlike all but one of the other subject countries, CRS imports from Brazil are subject to an absolute quota limit imposed under Section 232." Views at 42. The Commission noted the "absence of any absolute quota on imports from [most] other subject countries," which meant that "unlike subject imports from Brazil, subject imports from other countries are in a position to compete for much larger volumes of sales than any of the subject producers in Brazil which must share the quota limits." *Id.* at 43–44. The Commission found that "subject imports from Brazil would likely compete under different conditions of competition from the other subject countries if the orders were revoked" and declined to cumulate Brazilian imports on this basis. *Id.* at 44.

In its likely-material-injury analysis, the Commission examined each of the considerations outlined in 19 U.S.C. § 1675a(a)(1)—namely, likely volume, price effect, and impact of

[7] The parties disagree as to whether the Commission, in comparing the section 232 quota cap on Brazil to non-quota restrictions on other subject import nations and, in the case of South Korea, to quota caps of differing volumes, effectively compared likely absolute volumes. *Compare* Pls.' Post-Oral Arg. Subm. at 3 ("These 'ceilings' are volume-related caps, and the Commission's analysis discussing these quotas makes clear that this factor is significant to its analysis because it reflects import volumes."), *with* Def.'s Post-Oral Arg. Subm. at 2–3 ("The Commission's conclusion . . . addresses [the subject nations'] abilities to *compete* in light of the Section 232 restrictions, not how successful any of the competing subject industries would likely be in actually gaining any particular volume of sales."). The court declines to reach this question. In either case, the Commission analyzed the factor for a different purpose.

imports—in determining that "revocation of the antidumping and countervailing duty orders on CRS from Brazil would not be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time." Views at 74. More specifically, on the likely volume consideration,[8] the Commission explained that "Brazilian industry has little incentive or ability to export significant volumes of CRS to the U.S. market if the order were revoked." Views at 73.

These two analyses—the conditions-of-competition prong of the cumulation determination and the likely-volume prong of the likely-material-injury determination—overlap in the sense that each relied on similar input data.[9] But the Commission, in each analysis, analyzed the common input data in starkly different ways. In the conditions-of-competition analysis, the Commission considered the President's continued imposition of a section 232 quota on Brazil as a factor that *distinguished* Brazilian CRS imports from those of other countries subject to the sunset review. *See* Views at 42. In the likely-volume analysis, by contrast, the Commission considered the quota—notably, alongside several other factors—as a factor supporting a finding that import volumes would be *low* in absolute terms. Views at 72–73.

The conditions-of-competition analysis thus did not control the outcome of the likely-volume analysis; nor, indeed, did the ultimate cumulation determination control the outcome of the likely-material-injury determination. In the context of a likely-volume analysis, absolute likely volume cuts only one way—high likely volume cuts towards material injury, and low likely volume cuts against material injury. But in a conditions-of-competition analysis, similarity prevails. Absolute likely volume may cut in either direction, away from similarity: the Commission could have hypothetically declined to cumulate Brazilian imports on the basis of differing conditions of competition for the reason that the likely absolute volumes of Brazilian imports were significantly *higher* than those of cumulated countries.

The possibility of such a hypothetical scenario—wherein high likely volume cuts against cumulation but supports a positive material injury determination—underscores that the Commission's analyses

[8] Elsewhere in its determination, the Commission concluded that the restrictive quota on Brazilian producers had triggered a shift of focus to limited sales of specialty and value-added products, rather than pricing competitively for relatively small market-shares. *See id.* (noting that Brazilian producers are "likely to continue focusing on higher-value CRS products in their limited exports to the United States to maximize profits").

[9] In its discussion of likely volume, the Commission indeed referred to "conditions of competition that are distinctive to the domestic industry that also *inform* our determinations with respect to subject imports from Brazil." Views at 69 n.465.

in the sunset review underlying this case were not reduplicative. The court therefore concludes that the Commission's determination not to cumulate Brazil's subject imports was not impermissibly circular and is in accordance with law.

II. The Commission's Treatment of Section 232 Measures in This Sunset Review Is Consistent with Its Decisions in Prior Sunset Reviews

Plaintiffs argue that the Commission's treatment of section 232 measures in its determination not to cumulate Brazil's imports in this case amounts to an unlawful departure from prior agency practice. Pls.' Br. at 37. They outline five prior Commission determinations that assertedly demonstrate the Commission's consistent finding that "the existence of Section 232 relief would not prevent unfairly traded imports from entering the U.S. market in a manner that would impact the domestic industry." *Id.* at 38. Plaintiffs argue that because the Commission found otherwise in this case, the determination not to cumulate Brazilian CRS imports is not in accordance with law. *Id.* at 37, 41.

"[I]t is well-established that an agency action is arbitrary when the agency offer[s] insufficient reasons for treating similar situations differently." *SKF USA Inc. v. United States*, 263 F.3d 1369, 1382 (Fed. Cir. 2001) (internal quotation marks and citation omitted). Because "consistency has long been a core interest of administrative law, and inconsistent treatment is inherently significant," the Commission must as a general matter avoid "depart[ing] from applicable findings of a general nature from prior determinations without reasonably distinguishing them or justifying the departure." *DAK Ams. LLC v. United States*, 44 CIT __, __, 456 F. Supp. 3d 1340, 1355–56 (2020), *aff'd*, 829 F. App'x 529 (Fed. Cir. 2020). Past sunset reviews, however, are of "limited precedential value" in ascertaining the existence of an agency practice. *Ugine-Savoie Imphy v. United States*, 26 CIT 851, 863, 248 F. Supp. 2d 1208, 1220 (2002). Each such review "presents unique interactions of the economic variables the Commission considers," and "[t]he presence of a specific factor in a prior sunset review is not dispositive of how a factor is interpreted in the current sunset review." *Id.* at 863, 248 F. Supp. 2d at 1220, 1223.

Plaintiffs' argument conflates two distinct determinations within a sunset review. The established practice they attribute to the Commission relates to material injury determinations, not cumulation determinations—but Plaintiffs challenge only the Commission's cumulation determination in this section of their brief. Recall that in making a cumulation determination, the Commission looks to

whether imports from a given source are "likely to have *no discernible adverse impact* on the domestic industry." 19 U.S.C. § 1675a(a)(7) (emphasis added). For the material-injury determination, the Commission is instead required to consider the "likely volume, price effect, and *impact of imports of the subject merchandise on the industry* if the order is revoked or the suspended investigation is terminated." *Id.* § 1675a(a)(1) (emphasis added). These are two different inquiries: while a positive material-injury determination requires the Commission to perform a holistic analysis of the impact of subject imports in absolute terms, satisfying the "no discernible adverse impact" element of the cumulation determination merely requires a finding that a set of imports clears a baseline discernability threshold for adverse impact. *Nippon Steel Corp. v. U.S. Int'l Trade Comm'n*, 494 F.3d 1371, 1379 n.6 (Fed. Cir. 2007) ("The 'discernible adverse impact' presents a relatively low threshold. It is not the same as finding a negative adverse impact, however, which is part of the ultimate analysis of whether the domestic industry is likely to be materially injured." (citing *Neenah Foundry*, 155 F. Supp. 2d at 774)).

To support their argument that the Commission erred in cumulating imports from Brazil, Plaintiffs cite five of the Commission's prior material-injury determinations. Two of the reviews that Plaintiffs cite involved imports from only one country and accordingly did not involve cumulation at all. *See* Clad Steel Plate from Japan, Inv. No. 731-TA-739 (Fourth Review), USITC Pub. 4851 (Dec. 2018); Tin- and Chromium-Coated Steel Sheet from Japan, Inv. No. 731-TA-860 (Third Review), USITC Pub. 4795 (June 2018) ("Tin- and Chromium-Coated Steel Sheet"). The other three reviews did involve cumulation determinations. *See* Certain Corrosion-Resistant Steel Products from China, India, Italy, South Korea and Taiwan, Inv. Nos. 701-TA-534–537 & 731TA-1274–1278 (Review), USITC Pub. 5337 (Aug. 2022) ("Corrosion-Resistant Steel"); Non-Oriented Electrical Steel from China, Germany, Japan, Korea, Sweden, and Taiwan, Inv. Nos. 701-TA-506, 508 & 731-TA-1238–1243 (Review), USITC Pub. 5140 (Dec. 2020) ("Electrical Steel"); Carbon and Certain Alloy Steel Wire Rod from Brazil, Indonesia, Mexico, Moldova, and Trinidad and Tobago, Inv. Nos. 701-TA-417 & 731-TA-953, 957–959, 961 (Third Review), USITC Pub. 5100 (Aug. 2020) ("Steel Wire Rod"). However, the sections of these reviews that Plaintiffs cite in their opening brief are all discussions of the "Likely Volume of Subject Imports" element of the material-injury determination. *See* Pls.' Br. at 38–39; Corrosion-Resistant Steel at 51, Electrical Steel at 33 n.189; Steel Wire Rod at 46 n.298.

By relying exclusively on examples drawn from a type of statutorily mandated determination that is distinct from the one that Plaintiffs challenge, Plaintiffs have not identified an agency practice that in this case "would lead a party, in the absence of notification of change, reasonably to expect adherence to the established practice or procedure." *Ranchers-Cattlemen Action Legal Found. v. United States*, 23 CIT 861, 884–85, 74 F. Supp. 2d 1353, 1374 (1999). A party could not reasonably expect that five past material-injury determinations would require the Commission to make a certain finding in a different type of determination.[10] This is instead a case where "prior determinations are inapposite" such that the Commission's determination "is not in fact a departure at all." *DAK Ams.*, 44 CIT at __, 456 F. Supp. at 1356. The court accordingly denies this element of Plaintiffs' motion.

III. The Commission Adequately Explained Its Conditions-of-Competition Analysis

Plaintiffs argue that the Commission failed to explain three aspects of its finding, under 19 U.S.C. § 1675a(a)(7), that "subject imports from Brazil would not be likely to compete under similar conditions of competition with subject imports from the remaining subject countries in the event of revocation." Views at 42; *see also* Pls.' Br. at 29–37. Plaintiffs first argue that the Commission failed to adequately explain why differences between Brazil and Korea's production and export levels indicate that CRS imports from the two countries would compete under different conditions of competition upon revocation of the Orders. Pls.' Br. at 29–31. Second, they contend that the Com-

[10] Because the court concludes that the established practice that Plaintiffs purport to identify is irrelevant to this case, it is unnecessary to dwell on whether that practice exists at all. However, the court notes that the nature of sunset reviews in 19 U.S.C. § 1675(c) demands a fact-bound, case-by-case approach, especially with regard to the discretionary act of cumulation. *See Ugine-Savoie*, 248 F. Supp. 2d at 1223.

The past reviews that Plaintiffs cite are limited to their own facts. In Electrical Steel, for example, the Commission determined that section 232 trade tariffs alone were unlikely to discourage subject import producers in part because the Japanese "subject producers currently maintain ties with the United States, including headquarters of affiliates and business support offices in [various U.S. cities]" and "prices are generally higher in the U.S. market than in other Japanese export markets." Electrical Steel at 19. In Tin- and Chromium-Coated Steel Sheet, the Commission reached the same ultimate conclusion after reasoning that U.S. tariffs on Japanese imports were insufficient to overcome the attractiveness of the U.S. market, considering that the "U.S. market [for the subject import] is among the largest and highest-priced . . . markets . . . in the world." Tin- and Chromium-Coated Steel Sheet at 21. And in Corrosion-Resistant Steel, the Commission also considered case-specific factors in finding that section 232 measures would likely not prevent increased volumes of subject imports, including that producers had continued to export "substantial volumes of [the product], and subject imports from each source have maintained a presence in the U.S. market throughout the [period of review], demonstrating a continued interest in supplying U.S. purchasers." Corrosion-Resistant Steel at 36.

mission failed to explain how differing section 232 measures imposed on non-Brazilian importers of subject merchandise would translate to different conditions of competition. *Id.* at 32–36. Third, Plaintiffs assert that the Commission "simply ignored" evidence on the record that: (a) Brazil was pressuring the Biden Administration to revise the section 232 quotas on Brazil; and (b) the Biden Administration had already revised section 232 trade restrictions and had otherwise liberalized measures on imports from other significant trading partners, such as the United Kingdom, Japan, and members of the European Union. Pls.' Br. at 36–37. According to Plaintiffs, the Commission's failure to explain its reasoning in these three instances warrants remand. The court does not agree. The Commission has adequately explained its reasoning on each of the issues that Plaintiffs raise. These explanations, moreover, are supported by substantial evidence.

The Commission has a general duty to explain the reasoning underlying its determinations in a sunset review. *See* 19 U.S.C. § 1677f(i)(3)(B) (requiring the Commission, in reviews pursuant to 19 U.S.C. § 1675, to provide "an explanation of the basis for its determination that addresses relevant arguments that are made by interested parties who are parties to the investigation or review"); *see also Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (holding that agency "must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made") (internal quotation marks and citation omitted); *Timken U.S. Corp. v. United States*, 421 F.3d 1350, 1357 (Fed. Cir. 2005) (holding that § 1677f(i) codifies the *State Farm* standard). And while the court will "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned," *State Farm*, 463 U.S. at 43 (quoting *Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974)), the Commission's explanation "must reasonably tie the determination under review to the governing statutory standard and to the record evidence by indicating . . . what facts the agency is finding," *CS Wind Viet. Co. v. United States*, 832 F.3d 1367, 1376 (Fed. Cir. 2016).

In each part of the Commission's conditions-of-competition analysis that Plaintiffs challenge, the Commission's reasoning satisfies this standard. First, regarding the differences between Brazil and South Korea's production and export levels, the Commission explained that "[t]he Brazilian industry is also less export-oriented than the South Korean industry." Views at 43 n.307. To support this proposition, the Commission cited tables in an internal staff report that detail

country-by-country export metrics for CRS. *Id.* (citing Confidential Staff Report, Cold-Rolled Steel Flat Products from Brazil, China, India, Japan, South Korea, and the United Kingdom, Inv. Nos. 701-TA-540–543 & 731-TA-1283–1287 & 1290 (Review), Tables IV-12, IV-31, IV-35, IV-49 (ITC June 23, 2022), P.R. 300, C.R. 240). These tables allow for a comparison between, *inter alia*, Korean and Brazilian CRS producers' home-market shipments as a fraction of their respective U.S.-bound and total exports. *Id.* The Commission did not rely on this data to make the elementary point that Brazilian production and exports of CRS are low and that South Korea's are high, but rather that aspects of South Korea's CRS industry would likely impose constraints on U.S.-bound exports that differ from those imposed by Brazil's industry.[11] This is a standard inquiry in the context of conditions-of-competition analysis. *See, e.g.*, *U.S. Steel Corp. v. United States*, 36 CIT 1172, 1175–68, 856 F. Supp. 2d 1318, 1322–24 (2012) (upholding the Commission's identification of "potential differences in conditions of competition relating to export orientation" as supported by substantial evidence); *Nucor Corp.*, 32 CIT at 1412–15, 594 F. Supp. 2d at 1354–56 (upholding the Commission's consideration of export-orientation in its conditions-of-competition analysis as supported by substantial evidence), *aff'd*, 601 F.3d at 1294–97.

Plaintiffs' contention that "the differences between the production and export levels of the two countries do not demonstrate, in any way, that imports from Brazil and South Korea would compete differently in the United States upon revocation" thus misconstrues the Commission's explanation of its rationale. Pls.' Br. at 29. The Commission could have more clearly explained the connection between the country-related data it cited and the broader point that the South Korean and Brazilian CRS industries differ in their export orientation. Nevertheless, "ideal clarity" is not the relevant standard. *State Farm*, 463 U.S. at 43.

Second, the court concludes that the Commission's reference to section 232 quota levels as relevant conditions of competition is both adequately explained and supported by substantial evidence. Plaintiffs characterize the Commission's discussion on this point as constituting "only a brief justification of [the Commission's] reliance on the differences in the Section 232 measures between the subject imports in its analysis." Pls.' Br. at 32. This statement is correct—the Commission's discussion, after all, is both brief and a justification. But

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[11] The Commission further explained the relevance of section 232 measures to the conditions-of-competition analysis, noting questionnaire responses by Brazilian producers and exporters that state that the restrictive section 232 quota inhibits competition for large-volume sales. Views at 42–43 n.308.

Plaintiffs' implication that this justification is insufficient misses the mark. The Commission explained as follows:

> Given the absolute quota applicable to subject imports from Brazil, even if imports from Brazil reached that level, the substantially larger quota for South Korea and the absence of any absolute quota on imports from other subject countries means that, unlike subject imports from Brazil, subject imports from other countries are in a position to compete for much larger volumes of sales than any of the subject producers in Brazil which must share the quota limits. As stated above, if imports from Brazil reached their section 232 quota—57,251 short tons—it would amount to the equivalent of only 0.2 percent of apparent U.S. consumption in 2021. Therefore, we find that subject imports from Brazil would likely compete under different conditions of competition from the other subject countries if the orders were revoked.

Views at 43–44 (footnotes omitted). In other words, the fact that Brazilian imports face a lower quota than South Korean imports—while expressed in terms of numerical limits—amounts to a qualitative difference in the receptiveness of the U.S. market to CRS imports from each country. While this is a contestable proposition—and indeed a contested one, *see* Dissent at 77–78—it is nevertheless a reasonable explanation for why section 232 quota levels are relevant to a conditions-of-competition analysis. *See Siemens Energy v. United States*, 806 F. 3d 1367, 1372 (Fed. Cir. 2015) ("[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence.").[12] The Commission's explanation "reasonably tie[s] the determination under review to the governing statutory standard and to the record evidence." *CS Wind Viet*, 832 F.3d at 1376.

Plaintiffs also seem to overlook the Commission's statement that its reference to section 232 quotas stems in part from "prior Commission decisions in five-year-reviews identifying trade restricting measures

[12] A conclusion that the Commissioner's determination is supported by substantial evidence need not involve the rejection of dissenting Commissioners' arguments. Certainly, "[t]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence." *Siemens Energy*, 806 F. 3d at 1372. The court does not review the views of dissenting Commissioners as an alternative to the majority's findings. Instead, the court may find dissenting views as means of illuminating flaws in the majority's analysis. *See, e.g., Swiff-Train v. United States*, 37 CIT 394, 402–05, 904 F. Supp. 2d 1336, 1343–47 (2013) (remanding the Commission's findings on price suppression and impact, approvingly citing the findings of dissenting Commissioners); *Nippon Steel Corp. v. United States*, 29 CIT 695, 391, F. Supp. 2d 1258, 1279–80 (2005) (remanding the Commission's likely-volume findings, citing the dissent as an illustration of the flaws in the majority's approach).

as a relevant condition of competition . . . affecting [a subject nation's] ability to supply and compete in the U.S. market." Views at 42 n.298. As indicated by the Commission, *see id.*, these decisions reflect a practice of treating extraordinarily imposed import restrictions as generative of differences in conditions of competition. For example, in Cut-to-Length Carbon Steel Plate from China, Russia, South Africa, and Ukraine, the Commission declined to cumulate subject imports from South Africa where a proclamation by President Bush imposed safeguard duties on subject merchandise imported from cumulated countries, but not from South Africa (which was exempted). Inv. Nos. 731-TA-753–56 (Review) at 21, USITC Pub. 3626 (Sept. 2003). Reviewing courts have also affirmed the Commission's determinations where the Commission has relied on trade restrictive measures as a factor in its cumulation analysis. *See Nucor Corp. v. United States*, 32 CIT 751, 764–65, 569 F. Supp. 2d 1328, 1342 (2008) (analyzing the downstream impact of third-country tariff barriers on conditions of competition in the U.S. market); *see also Ad Hoc Committee of Domestic Uranium Producers v. United States*, 25 CIT 1010, 1013, 162 F. Supp. 2d 649, 652 (2001) (upholding a negative cumulation determination that was based in part on the Commission's finding that "trade restrictions in the United States and Europe affected exports of uranium from the successor countries to the former Soviet Union and resulted in a two-tier pricing structure"). The court accordingly concludes that the Commission's reference to section 232 measures as a factor in its conditions-of-competition analysis is both adequately explained and supported by substantial evidence.

Plaintiffs finally argue that the Commission's determination not to cumulate Brazil's subject imports is not in accordance with law because the determination failed to address the likelihood that the President would lift the quota on Brazilian CRS imports. *See* Pls.' Br. at 36–37. Plaintiffs assert the following:

> Domestic Industry provided evidence to the Commission demonstrating that the government of Brazil was putting pressure on the Administration to revise the quotas imposed under Section 232 on Brazilian imports to allow more Brazilian imports into the United States. The Domestic Industry also provided evidence to the Commission demonstrating that the Administration had already revised the Section 232 tariffs and liberalized the measures on imports from other significant U.S. trading partners, including the members of the European Union, the United Kingdom, and Japan.

Id. at 36 (citation omitted). Plaintiffs argue that the Commission "simply ignored this evidence," and that "the Commission's statement that there []was [']nothing in the record' to demonstrate that the Brazilian Section 232 quota might be revoked or modified is clearly wrong given that the Domestic Industry had provided the Commission with significant evidence to the contrary." *Id.* at 37 (quoting Views at 56). Accordingly, Plaintiffs argue, the Commission "should not, and could not, have concluded—as it did—that the quota on the Brazilian imports would remain in place in its existing form for the reasonably foreseeable future." Pls.' Reply at 15–16. In Plaintiffs' view, this conclusion renders the Commission's determination not in accordance with law—that is, with 19 U.S.C. § 1677(f)(i)(3)(B)'s requirement that the Commission explain the reasoning underlying its determinations. *See* Pls.' Br. at 37.

Contrary to Plaintiffs' assertions, however, Commission did provide an adequate explanation on this score. After noting that "parties disagree" on the future imposition of section 232 measures, the Commission discussed evidence supporting a finding that section 232 measures on Brazilian CRS imports were likely to remain stable and in place for the reasonably foreseeable future. Views at 56, 72 (citing Proclamation No. 9759, 83 Fed. Reg. 25857, 25858 (May 31, 2018) ("Proclamation")). This included evidence that (1) the Proclamation's text indicated long-term imposition, that (2) the quota on Brazil had been in place for more than four years at the time of the sunset review at the time of the *Five-Year Review Determination*'s publication, and that (3) the Biden Administration had not announced or otherwise directly indicated that a change to that quota was forthcoming. *Id.* at 72 (citing Proclamation, 83 Fed. Reg. at 25858).

At minimum, the Commission's "path may reasonably be discerned" from this discussion. *State Farm*, 463 U.S. at 43. The Commission reasonably relied on the text of the implementing Proclamation in assessing the likelihood that the section 232 quota on Brazilian imports would be lifted. *See* Proclamation, 83 Fed. Reg. at 25858 ("In my judgment, these measures will provide effective, long-term alternative means to address these countries' contribution to the threatened impairment to our national security by restraining steel articles exports to the United States from each of them."). In determining the likelihood that the President would maintain the Brazil quota as a long-term measure, the Commission's approach conformed with the principle that "[t]he language of the proclamation is the principal source for determining the President's intent." *Atl. Richfield Co. v.*

United States, 7 CIT 275, 276, 588 F. Supp. 1427, 1429 (1984), *aff'd*, 764 F.2d 837 (Fed. Cir. 1985).[13]

The Commission also reasonably relied on the absence of direct evidence that the current President intends to modify or revoke that text. Contrary to Plaintiffs' suggestion, *see* Pls.' Br. at 36, the fact that a foreign government has been applying "pressure" on the United States to perform a certain action does not compel a conclusion that the United States is likely to yield in the near future. If anything, that fact might tend to establish the United States' *resistance* to the alluded-to lobbying efforts. Nor do revisions of section 232 restrictions on other countries' imports necessarily compel a conclusion that similar revisions are forthcoming with respect to Brazil's. Plaintiffs imply, but do not establish, that the President revises section 232 restrictions in a country-by-country sequence, with each sequential revision moving Brazil closer to the front of the line.

In sum, the court concludes that the Commission provided a sufficient "explanation of the basis for its determination" with respect to each of the issues that Plaintiffs raise. 19 U.S.C. § 1677f(i)(3)(B).

CONCLUSION

The Commission's determination not to cumulate subject imports from Brazil is in accordance with law and supported by substantial evidence. The court concludes that the Commission's cumulation analysis did not engage in impermissibly "circular" reasoning, that the Commission's treatment of section 232 trade restrictions did not unexplainedly depart from an established practice, and that the Commission adequately explained its reasoning for determining not to cumulate Brazilian imports.

The Commission's final determination is sustained. Judgment on the agency record will enter for Defendant and Defendant-Intervenors accordingly.

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[13] Courts have used inferences of presidential intent to ascertain the continuing effect of presidential proclamations even when the proclaiming president no longer holds office. *See, e.g.*, *Cappaert v. United States*, 426 U.S. 128, 139–40 (1976) (holding that the text of a 1952 proclamation issued by President Truman indicated an intent to reserve certain groundwater rights to the United States, and therefore sustaining an injunction that the United States first sought in 1971 under the Nixon Administration); *Trans-Border Customs Serv., Inc. v. United States*, 76 F.3d 354, 357–58 (Fed. Cir. 1996) (considering the "purpose" of a proclamation issued by President Reagan in determining the post–Reagan Administration effect of that proclamation on the terms of the Harmonized Tariff Schedule of the United States); *see also* Benjamin B. Wilhelm, Cong. Rsch. Serv., IF11358, *Presidential Directives: An Introduction* 1 (Nov. 13, 2019) ("Presidential directives with ongoing effect remain in force across presidential transitions . . . . When researching an executive order, therefore, it is important to determine its current status.").

Dated: March 20, 2024
New York, New York

/s/ *Gary S. Katzmann*
GARY S. KATZMANN, JUDGE

Slip Op. 24–35

DEER PARK GLYCINE, LLC, Plaintiff, v. UNITED STATES, Defendant.

Before: Claire R. Kelly
Court No. 23–00238

DEER PARK GLYCINE, LLC, Plaintiff, v. UNITED STATES, Defendant.

Before Claire R. Kelly
Court No. 24–00016

[Denying Deer Park Glycine, LLC's motion to consolidate an action challenging the U.S. Department of Commerce's final scope ruling and an action challenging the U.S. Department of Commerce's rejection of a second scope ruling.]

Dated: March 20, 2024

David M. Schwartz, *Michelle Li*, and *Kerem Bilge*, Thompson Hine LLP, of Washington, D.C., for plaintiff Deer Park Glycine, LLC.

Kelly Geddes, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for defendant United States. Also on the brief were *Patricia M. McCarthy*, Director, *Claudia Burke*, Deputy Director, and *Brian M. Boynton*, Principal Deputy Assistant Attorney General for defendant United States. Of Counsel was *Joseph Grossman*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

OPINION AND ORDER

Kelly, Judge:

Before the Court is Plaintiff Dear Park Glycine, LLC's ("Plaintiff") motion to consolidate Court No. 23–00238, initiated on November 10, 2023 ("Court No. 23–238") and Court No. 24–00016, initiated on January 26, 2024 ("Court No. 24–16"). *See* Pl.'s Mot. Consol. Cases at 1, Mar. 4, 2018, Court No. 23–238 ECF No. 17; Court No. 24–16 ECF No. 11 ("Pl. Mot.").[1] Plaintiff argues consolidation of the cases will (1) allow the Court to adjudicate the common questions of law and fact, (2) promote judicial economy, and (3) ensure consistency in the separate but related actions. *Id.* at 1. The United States ("Defendant")

[1] Both Plaintiff and Defendant filed identical motions and responses in both Court Nos. 23–238 and 24–16. The Court will reference the motion, response, and relevant record documents as they pertain to Court No. 23–238 unless otherwise indicated, as that was the first action filed with the Court.

opposes the motion. *See* Def.'s Opp'n [Pl. Mot.] at 1, Mar. 18, 2024, Court No. 23–238 ECF No. 18; Court No. 24–16 ECF No. 12 ("Def. Resp."). For the following reasons, Plaintiff's motion is denied.

BACKGROUND

On October 11, 2023, the U.S. Department of Commerce ("Commerce") issued its final scope ruling determination ("Scope Ruling") that calcium glycinate is outside the scope of the antidumping and countervailing duty orders on glycine from India, Japan, Thailand, and The People's Republic of China. *See* Final Scope Ruling, Oct 11, 2023, ECF No. 11–9; *see also Glycine From India and Japan*, 84 Fed. Reg. 29,170 (Dep't Commerce Oct. 18, 2019) (amended final affirmative antidumping duty determination and antidumping duty orders); *Glycine From Thailand*, 84 Fed. Reg. 55,912 (Dep't Commerce Oct 18, 2019) (antidumping duty order); *Glycine From India and The People's Republic of China*, 84 Fed. Reg. 29,173 (Dep't Commerce June 21, 2019) (countervailing duty orders). On November 10, 2023, Plaintiff challenged the Scope Ruling by filing summons for Court No. 23–238. *See* Summons at 1, Nov. 11, 2023, ECF No. 1. On December 7, 2023, Plaintiff filed its complaint challenging Commerce's final determination. Compl. at 1, Dec. 7, 2023, ECF No. 8.

On November 29, 2023, following the issuance of the Scope Ruling, Plaintiff submitted another scope ruling application to Commerce for the same product ("Scope Application"). Pl. Mot. at 2. On December 28, 2023, Commerce rejected the Scope Application pursuant to 19 C.F.R § 351.225(d)(1)(i), finding that it was "duplicative" and "otherwise unacceptable." *Id.* On January 26, 2024, Plaintiff appealed Commerce's rejection of the Scope Application, pending as Court No. 24–16. *Id.*; *see* Summons at 1, Jan. 26, 2024, Court No. 24–16 ECF No. 1; Compl. at 1, Jan. 26, 2024, Court No. 24–16 ECF No. 2.

JURISDICTION AND STANDARD OF REVIEW

The Court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2018). Pursuant to Rule 42(a) of the Rules of the U.S. Court of International Trade, the Court may consolidate actions that "involve a common question of law or fact[.]" USCIT R. 42(a). The decision to consolidate is within the Court's "broad discretion[.]" *See Zenith Elecs. Corp. v. United States*, 15 CIT 539, 540 (1991) (quoting *Manuli, USA, Inc. v. United States*, 11 CIT 272, 277, 659 F. Supp. 244, 247 (1987)).

DISCUSSION

Plaintiff argues that consolidating Court No. 23–238 with Court No. 24–16 will allow the Court to adjudicate the common questions of law and fact raised in the two actions, promote judicial economy, and

result in consistency between the actions. Pl. Mot. at 1. Defendant argues that there are no common questions of law or fact, and that the actions involve different administrative records and are governed by different standards of review. Def. Resp. at 1.

USCIT Rule 42(a) permits the court to consolidate actions if those actions involve a common question of law or fact. *See* USCIT R. 42(a). Consolidation may be appropriate when it promotes judicial economy or avoids inconsistent results. *See* Manuli, 11 CIT at 278, 659 F. Supp. at 248 (finding no benefit to consolidation given the distinct scope and standard of review in the cases); *Brother Indus., Ltd. v. United States*, 1 CIT 102, 103–04 (1980) (consolidating cases involving common questions of law and fact and a common administrative record). Where consolidation would not further the interests of judicial economy or where dissimilar issues outweigh the common issues, consolidation is inappropriate. *See Zenith*, 15 CIT at 540–41.

Here, there are no likely benefits to consolidation. Plaintiff's challenges to the Scope Ruling and Scope Application do not share any common questions of law. The Scope Application does not involve the question of whether glycine is within the scope of the orders, but rather challenges Commerce's determination to reject the Scope Application because of the Scope Ruling concerning glycine. Compl. at ¶¶ 16–19, Jan. 26, 2024, Court No. 24–16 ECF No. 2. Although the two actions are related and stem from some common facts, the ultimate legal analyses required for disposition of the cases do not overlap. *Compare* Compl. at ¶¶ 10–17, Dec. 7, 2023, Court No. 23–238 ECF No. 8 (alleging that Commerce's finding that calcium glycinate is excluded from the scope of the antidumping duty and countervailing duty orders), *with* Compl. at ¶¶ 16–19, Jan. 26, 2024, Court No. 24–16 ECF No. 2 (alleging Commerce improperly rejected Plaintiff's scope ruling application). Unlike *RHI Refractories Liaoning Co. v. United States*, 35 CIT 407, 774 F. Supp. 2d 1280 (2011), upon which Plaintiff relies, *see* Pl. Mot. at 4, there are no common questions of law in the instant cases. The statutes at issue in both actions govern related but discrete powers conferred to Commerce. *Compare* 19 U.S.C. § 1516a(b)(2)(A) (governing review of Commerce's scope rulings), *with* 5 U.S.C. § 706 (governing review of decision to initiate a scope inquiry). Accordingly, there are no common questions of law that might raise the danger of inconsistent decisions.

Further, the Court must review each challenge on its own record. *See* 19 U.S.C. § 1516a(b)(2)(A). The Court's review of a challenge to the Scope Ruling is governed by 19 U.S.C. § 1516a(b)(2)(A), stating that, "the record, unless otherwise stipulated by the parties, shall consist of[] (i) a copy of all information presented to or obtained by the

Secretary, the administering authority, or the Commission during the course of the administrative proceeding . . .” Conversely, the challenge to the Scope Application and Commerce’s decision to initiate a scope inquiry is governed by 5 U.S.C. § 706: “the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.” Thus, each determination is based upon a separate administrative record. It is unclear why the single consolidation of both determinations would promote judicial efficiency in light of the distinct statutes involved that govern their review.

Finally, it is unclear what harm will result from allowing the challenges to the Scope Ruling to proceed independently from the challenges to the Scope Application. Because the Court reviews these separate determinations pursuant to different standards of review and distinct questions of law, there is no risk of impeding judicial efficiency and no risk of inconsistent results between the cases. The Court sees little, if any, possible benefit to consolidation here.

CONCLUSION

For the reasons discussed, the Plaintiff’s motion to consolidate Court No. 23–238 with Court No. 24–16 is denied. Although the Court had previously indicated that it would issue a scheduling order with its decision on this motion, the Court will ask the parties to propose a schedule order in each separate case. In accordance with this opinion, it is

ORDERED that the Consolidated Plaintiffs’ motion to consolidate is denied; and it is further

ORDERED that the parties in Court No. 23–238 with Court No. 24–16 shall each file joint status reports and proposed briefing schedules on or before April 1, 2024

Dated: March 20, 2024
New York, New York

/s/ Claire R. Kelly
CLAIRE R. KELLY, JUDGE

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