U.S. Customs and Border Protection

19 CFR PART 4

CBP DEC. 22–14

RIN 1651–AB41

VESSEL REPAIR DUTIES FOR VESSELS ENTERING U.S. PORTS

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

ACTION: Final rule.

SUMMARY: This rule amends U.S. Customs and Border Protection (CBP) regulations to streamline the vessel repair entry process by extending the timeframe from 90 days to 150 days for vessel owners, masters, or authorized agents ("vessel operators") to provide completed vessel repair entries and to apply for relief from assessment of those vessel repair duties. Because CBP is extending the timeframe from 90 days to 150 days, CBP is also eliminating provisions that allow for requests for an additional 30-day extension to submit all of the relevant evidence as those extensions are no longer necessary.

DATES: This final rule is effective July 29, 2022.

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SUPPLEMENTARY INFORMATION:

I. Background

Under section 466 of the Tariff Act of 1930, as amended (19 U.S.C. 1466), purchases for repairs or repairs made to certain vessels while outside the United States are subject to declaration, entry, and payment of ad valorem duty upon vessel arrival in any port of the United States. Duties owed for vessel repairs made in a foreign country apply to all vessels documented under U.S. law that engage in foreign or coasting trade, as well as those intended to be employed in such trade.

19 U.S.C. 1466(a). The statute also specifies the situations in which vessel operators may be relieved from paying such duties.[1]

Section 4.14 of title 19 of the Code of Federal Regulations (19 CFR 4.14) implements 19 U.S.C. 1466. Section 4.14(a)(1) requires vessel operators to declare, enter, and be subject to payment of duty for vessel repair purchases or repairs made to vessels while outside of the United States upon vessel arrival to the United States or Puerto Rico. The duties owed on these repairs and purchases are based on the actual foreign cost of the vessel repair or expenditure. 19 CFR 4.14(a)(1). Certain foreign vessel repair expenditures are not subject to declaration, entry, or duty at all. *See* 19 CFR 4.14(a)(2)(i)–(iii). Some expenditures may not require duty payments but must still follow declaration and entry procedures. *See* 19 CFR 4.14(a)(3), (h)(1)–(4).

Upon arrival, vessel operators must declare and enter all foreign repairs or related expenses to U.S. Customs and Border Protection (CBP) on CBP Form 226, or an electronic equivalent, to be processed by CBP's Vessel Repair Unit (VRU) in New Orleans, Louisiana ("vessel repair entry"). *See* 19 CFR 4.14(d), (e), (g). The vessel repair entry must include all foreign voyage expenditures for equipment, parts of equipment, repair parts, materials, and labor. 19 CFR 4.14(e). The regulations currently require a vessel operator to submit a completed vessel repair entry within 90 days of vessel arrival into the United States. 19 CFR 4.14(f). A completed vessel repair entry must contain evidence of the cost of each foreign repair or related expense. *Id.* The vessel operator can request additional time from the VRU to file a completed vessel repair entry. *Id.* The VRU may grant, and in practice almost always does grant, a 30-day extension period for vessel operators to submit the completed entry.[2] If additional time is needed, the Cargo Security, Carriers, and Restricted Merchandise Branch (CCR) at CBP Headquarters may grant, and in practice almost

[1] Vessel operators may be relieved from paying duties for foreign repairs to vessels when: materials purchased and repairs made to vessels outside the United States were a result of damage caused by inclement weather or other casualties; purchased materials were made in the United States and installed by U.S. residents or the vessel's crew; or purchased materials were used for dunnage cargo, packing, erection of temporary bulkheads, or in preparation for the carrying of liquid cargo. 19 U.S.C. 1466(d).

[2] Based on communication with the Cargo Security, Carriers, and Restricted Merchandise Branch on April 13, 2022. A subject matter expert stated that the VRU nearly always approves the 30-day extension requests subject to timeliness of such request. In 2021–2022, VRU approved 100% of all requests for extensions.

always does grant, a second extension.[3] Normally, in this instance, the CCR will grant an additional 30-day extension after the first extension. Therefore, in practice, vessel operators have a total of 150 days to submit a completed vessel repair entry supported by evidence showing the cost of each foreign repair or expense.

Before the vessel may depart from a U.S. port, the vessel operator must also submit the estimated cost of duties, or evidence of a bond, for all potential repairs or expenses declared in the vessel repair entry. 19 CFR 4.14(c). The current regulations set forth the circumstances in which the vessel operator may be relieved from assessment of these duties. Such relief is available when: (i) the expenditure is not considered to be a repair or purchase within the terms of 19 U.S.C. 1466 or as determined under judicial or administrative interpretation; (ii) foreign repairs or expenditures were the result of damage caused by inclement weather or other casualties; (iii) materials used for repair were made in the United States and installed by U.S. residents or the vessel's crew; (iv) materials were used for the purpose of providing dunnage for the packing of cargo, erection of temporary bulkheads, or in preparation for the carrying of liquid cargo; (v) for vessels that continuously remained outside the United States for two years, expenditures were made after the first six months of their absence; (vi) expenditures were made for Lighter Abroad Ship (LASH) operations; (vii) spare repair parts or materials were certified for use on a cargo vessel, if duty was previously paid under the appropriate U.S. commodity classification; and (viii) spare repair parts were necessarily installed prior to first entry into the United States, if duty was paid under the appropriate U.S. commodity classification. 19 U.S.C. 1466(a), (d), (e), (h); 19 CFR 4.14(h)(1)–(3).

Under the current regulations, the operator must apply for relief from these duties within 90 days of the vessel's arrival into the United States. 19 CFR 4.14(i). Similar to the timeline for submitting a completed vessel repair entry, the VRU may grant, and in practice almost always does grant, a 30-day filing extension, and the CCR may grant an additional filing extension for vessel operators to apply for relief from assessment of such duties.[4] The CCR almost always grants an additional 30-day extension, which results in an additional 60 days for vessel operators to file for relief from duty payment after the initial 90-day timeline expires. Therefore, in practice, current proce-

[3] Based on communication with the Cargo Security, Carriers, and Restricted Merchandise Branch on April 13, 2022. A subject matter expert stated that vessel operators are sophisticated users understanding what is required and as a result, CCR nearly always approves a second extension request subject to the timeliness of the request. In 2021–2022, CCR approved 100% of all second requests for extensions.

[4] *See* 19 CFR 4.14(f) for extension procedures.

dures almost always allow vessel operators a total of 150 days to file for relief from assessment of vessel repair duties.

Although both the VRU and CCR rarely deny filing extensions for vessel operators seeking to submit completed vessel repair entries or to apply for relief from assessment of vessel repair duties, the two offices are still faced with the administrative burden of processing extension requests. For instance, on average, the CCR processes 42 vessel repair extension requests annually. The VRU processes annually over three times this number of extension requests.[5] The hours expended on extension requests create an unnecessary burden on both CBP and vessel operators filing such requests with no benefit to CBP, vessel operators or the public by maintaining the extensions.[6]

II. Discussion of Regulatory Changes

CBP is streamlining the vessel repair entry process under 19 CFR 4.14 by amending the timeframe to submit complete vessel repair entries with supporting evidence for the costs of each repair and to apply for relief from assessment of vessel repair duties. This rule will also eliminate the need for filing extension requests. In particular, paragraphs (f) and (i) are amended to eliminate provisions allowing for extensions and to change the timeline for document submission from 90 to 150 days. These amendments allow the same timeframe as the current practice, which provides for a 90-day deadline and the potential to file two extensions, for a total of 150 days. Accordingly, the amendments will simplify the process and alleviate unnecessary burdens placed on CBP to process extension requests and on vessel operators to file such requests. The amendments are described below.

A. Evidence for Cost of Repair

Paragraph (f) requires vessel operators to submit to CBP completed vessel repair entries with supporting evidence of the final cost of each foreign repair or expenditure within 90 days of the vessel's arrival. 19 CFR 4.14(f). The vessel operator is permitted to submit initial or interim cost estimates if sufficient evidence to show final costs or expenditures is not yet available, but must submit a completed entry within 90 days of the vessel's arrival. 19 CFR 4.14(f). If additional time is needed to submit completed vessel repair entries, vessel op-

[5] The VRU processes on average 152 extension requests annually. *See* Part IV, Table 1. Time Burden to Complete Extension Requests.

[6] Based on communication with the Cargo Security, Carriers, and Restricted Merchandise Branch on April 13, 2022, subject matter experts stated that the only reason VRU or CCR had ever denied a request for an extension was an untimely request which occurred one time with VRU over the last several years. Vessel operators are sophisticated users who understand what is required to obtain an extension.

erators are required to submit to the VRU a written request explaining their need for filing extensions before the 90-day timeline expires. 19 CFR 4.14(f). Paragraph (f) allows the VRU to grant a 30-day extension and the CCR to grant a second extension. 19 CFR 4.14(f). Current practice allows vessel operators a total of 150 days to submit vessel repair entries because both the VRU and CCR rarely deny extension requests. In practice, the CCR will grant a second 30-day extension. Therefore, the filing extensions provide vessel operators with an additional 60 days to file completed vessel repair entries. The amendment to paragraph (f) thus removes the provision regarding extensions and provides 150 days from vessel arrival for operators to submit a completed vessel repair entry, as opposed to the existing 90-day deadline and the possibility of filing for two extensions.

B. Application for Relief From Assessment of Vessel Repair Duties

Paragraph (i) requires vessel operators to apply for relief from assessment of vessel repair duties within 90 days of vessel arrival for the opportunity to qualify for relief from assessment of these duties. 19 CFR 4.14(i). An Application for Relief must clearly state the legal basis for granting relief for one of the reasons specified in paragraph (h). Although the Application for Relief is not required to be submitted in any particular format, it must certify that all repair operations performed aboard the vessel during the one-year period prior to the current submission have been declared and entered and must be supported by certain evidence outlined in paragraph (i)(1)(i)–(vi) and (i)(2).[7] 19 CFR 4.14(i)(1). Paragraph (i) allows the VRU to grant a 30-day extension and the CCR to grant a second extension for vessel operators to file for relief from assessment of vessel repair duties. Similar to the procedure for vessel repair entries in paragraph (f), the CCR normally grants a second 30-day extension. Therefore, current practice allows vessel owners 150 days to file an Application for Relief from assessment of vessel repair duties, because, as a practical matter, the VRU and CCR usually grant all extension requests. The amendments therefore remove the extension provisions and expand

[7] Each Application for Relief must include copies of: (i) itemized bills, receipts, and invoices for items shown in 19 CFR 4.14(e); (ii) photocopies of relevant parts of vessel logs, as well as of any classification society reports which detail damage and remedies; (iii) a certification by the senior officer with personal knowledge of all relevant circumstances relating to casualty damage; (iv) a certification by the senior officer with personal knowledge of all relevant circumstances relating to foreign repair expenditures; (v) a certification by the master that casualty-related expenditures were necessary to ensure the safety and seaworthiness of the vessel in reaching its U.S. port of destination; and (vi) any permits or other documents filed with or issued by any U.S. Government agency other than CBP regarding the operation of the vessel that are relevant to the request for relief. 19 CFR 4.14(i).

the original 90-day timeline to 150 days from vessel arrival for owners to apply for relief from assessment of vessel repair duties.

IV. Statutory and Regulatory Analysis

A. Inapplicability of Prior Notice and Delayed Effective Date

According to section 553 of the Administrative Procedure Act (APA) (5 U.S.C. 553), rulemaking generally requires prior notice and comment and a 30-day delayed effective date, subject to specified exceptions. Pursuant to 5 U.S.C. 553(b)(3)(A), the prior notice and comment and delayed effective date requirements do not apply when agencies promulgate rules concerning agency organization, procedure, or practice. In addition, section 553(d) of the APA requires that a final rule have a 30-day delayed effective date. The APA, however, provides exceptions from the prior notice and public comment requirement and the delayed effective date requirements, when an agency for good cause finds that such procedures are impracticable, unnecessary, or contrary to the public interest.

This rule does not require prior notice and comment because it relates to agency organization, procedure, or practice. Specifically, the final rule merely updates the regulations to simplify CBP's procedures and does not substantially change any parties' right to file evidence for the cost of vessel repair or to apply for relief from assessment of vessel repair duties. Moreover, the new amendment seeks to codify what is done in practice.

Current practice almost always provides vessel operators with 150 days to file the supporting evidence for repairs and to apply for relief from assessment of duties, which the new amendment will still allow. Current regulations allow 90 days from vessel arrival to file these documents. Upon the request of a vessel operator, the VRU and CCR usually grant two 30-day filing extensions, for a total of an additional 60 days. The final rule will eliminate the extension request procedure and allow for a total of 150 days without extensions, rather than an initial 90 days with two 30-day extensions, to file these documents. As a result, this rule merely streamlines the vessel repair entry process by eliminating the need for vessel owners to file extension requests and by providing the same timeframe for these documents to be filed.

Additionally, CBP finds that prior notice and comment are unnecessary and that good cause exists to issue this rule effective upon publication. Prior notice and comment are unnecessary because the rule does not substantively alter the underlying rights or interests of vessel operators and streamlines the process for both vessel operators and CBP.

B. Executive Orders 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This amendment is not a "significant regulatory action," under section 3(f) of Executive Order 12866. Accordingly, OMB has not reviewed this regulation. In summary, CBP expects there to be a combined total savings of approximately $55,209 annually to the Federal Government and vessel owners as a result of this rule. Following is analysis of this estimated cost savings.

Purchases for repairs or repairs made to certain vessels while outside the United States are subject to entry and payment of duty. This amendment to 19 CFR 4.14 extends the timeframe for U.S. vessel operators to provide a completed vessel repair entry to CBP and to apply for relief from the assessment of duty usually required for vessel repairs occurring in a foreign country to reflect current CBP practice. Currently, vessel operators have 90 days to submit a completed vessel repair entry with supporting evidence for each repair. In certain circumstances, vessel operators can apply for relief from assessment of these duty amounts, if they provide the appropriate documentation. Vessel operators are likewise given 90 days from vessel arrival into the United States to apply for relief.

In both scenarios, current regulations, 19 CFR 4.14(f), (i), allow vessel operators to request extensions to complete vessel repair entries and apply for relief from duty assessment. Vessel operators can request two separate extensions, allowing them, in practice, a total of 150 days to provide all the necessary information to complete their vessel repair entries or Applications for Relief. This amendment to 19 CFR 4.14 changes the deadline from 90 to 150 days and eliminates the requirement that vessel operators request extensions. This amendment would obviate the need for vessel operators to make extension requests and would eliminate all costs associated with these requests. CBP estimates that this amendment would provide an overall savings to the U.S. economy by taking away the time burden associated with the extension requests for both vessel repair entries and relief from duty payments on vessel repairs made abroad.

Under the current regulations located at 19 CFR 4.14, when certain vessels undergo repairs outside of the United States, the value of the foreign repairs may be subject to duties when these vessels re-enter the United States or Puerto Rico.[8] Upon re-entry to a U.S. or Puerto Rico port, vessel operators are required to submit a vessel repair declaration and entry documentation, including an estimated duty payment (or produce evidence of a bond), before the vessel can be released from that U.S. port of entry. Specifically, the values of foreign parts and foreign repairs made to certain vessels at foreign shipyards are subject to duty upon re-entry to a U.S. or Puerto Rico port. The duty amount is based on the actual foreign costs to the vessel operator for purchases of articles used in repairs and labor costs for repairs made outside the United States by foreign shipyards and foreign labor. According to existing regulations, for articles previously imported into the United States and then exported for use in foreign vessel repairs, vessel owners are required to pay duties. The duties owed are based on the foreign purchase price of the articles when initially imported into the United States.

Vessel operators submitting vessel repair entries must provide supporting documentation validating the costs of all foreign parts and repairs. If vessel operators do not have all of the required information at the time of entry, they can file an incomplete vessel repair entry as long as they can provide complete evidence to the VRU within 90 days of vessel arrival. Vessel operators must provide the final foreign cost of articles used and any repairs within this 90-day deadline to complete a vessel repair entry. However, vessel operators may be granted an extension to complete a vessel repair entry if they are unable to before the deadline. Upon the vessel operator's submission of a written request justifying the need for additional time, the VRU may grant a 30-day extension. As discussed above, in practice, the VRU nearly always approves requests made by vessel operators for a 30-day extension.[9] A second extension may also be granted beyond the initial 30-day extension. This second request must be approved by the CCR.[10] If both requests for extensions are granted, vessel operators, in practice, are given a total of 150 days to provide complete evidence of costs for vessel repair entries. If all cost evidence is not provided by the specified deadlines, the VRU can refer the matter to

[8] According to 19 CFR 4.14(a), duties owed for vessel repairs occurring outside the United States apply to all vessels documented under U.S. law that engage in foreign or coasting trade, as well as those intended to engage in those trades, under CBP interpretations.

[9] Based on communication with the Cargo Security, Carriers, and Restricted Merchandise Branch on April 13, 2022. A subject matter expert stated that the VRU nearly always approves the 30-day extension requests, only 1 request had been denied in the past several years and denial was based on a late submission well after the deadline.

[10] CBP notes that these second extension requests for vessel repair entries are rarely denied. Data received from the Cargo Security, Carriers, and Restricted Merchandise Branch on October 28, 2020. A subject matter expert stated that the CCR nearly always approves a second extension request.

U.S. Immigration and Customs Enforcement to acquire the information needed to complete the vessel repair entry.

In the current regulations, there are limited circumstances under which vessel operators can be granted relief from paying the duties on foreign articles and foreign repairs.[11] In these cases, vessel operators may apply for relief from assessment of the duties. However, Applications for Relief from assessment of vessel repair duties require a significant amount of documentation to support such claims for relief.[12] These applications must provide information regarding all vessel repair operations performed aboard that vessel within the 12-month period prior to the most current vessel repair entry. As with filing incomplete vessel repair entries, vessel operators likewise have 90 days from vessel arrival at a U.S. port to file these Applications for Relief. Vessel operators can similarly request an extension to the initial 90-day deadline to apply for relief, assuming vessel operators can justify the need for a 30-day extension. These extension requests are comparable to the extension requests for completing vessel repair entries which include: waiting on receipts, invoices, documents, certifications, surveyor reports, and third party organization reports. The VRU determines whether to grant extensions for submitting Applications for Relief, and in practice, the VRU rarely declines such requests.[13] In addition, vessel operators can request a second exten-

[11] According to 19 CFR 4.14(h) and (i), there are a few circumstances where vessels can qualify for duty relief. These include but are not limited to: matters involving vessels normally subject to 19 U.S.C. 1466(a), (d), (e), or (h). These situations include vessels that continuously remain outside the United States for two years or longer; expenditures on LASH barges; relief on certain spare repair parts or materials; and relief on certain spare parts necessarily installed on a vessel prior to their first entry into the United States.

[12] According to 19 CFR 4.14(i), each Application for Relief should include the following documentation: itemized bills, receipts, and invoices for items shown in 19 CFR 4.14(e); the cost of items for which a request for relief is made must be segregated from the cost of the other items listed in the vessel repair entry; photocopies of relevant parts of vessel logs, as well as of any classification society reports which detail damage and remedies; a certification by the senior officer with personal knowledge of all relevant circumstances relating to casualty damage (time, place, cause, and nature of damage); a certification by the senior officer with personal knowledge of all relevant circumstances relating to foreign repair expenditures (time, place, and nature of purchases and work performed); a certification by the master that casualty-related expenditures were necessary to ensure the safety and seaworthiness of the vessel in reaching its U.S. port of destination and any permits or other documents filed with or issued by any U.S. Government agency other than CBP regarding the operation of the vessel that are relevant to the request for relief.

[13] Based on communication with the Cargo Security, Carriers, and Restricted Merchandise Branch on April 13, 2022; subject matter expert stated that the VRU essentially always approves the 30-day extension requests. During the past several years, only 1 request has been denied and the denial was solely due to the extension request being submitted well after the deadline.

sion, which the CCR may grant.[14] If the vessel operator does not file an Application for Relief or does not provide an appropriate justification for relief, the vessel operator is responsible for the full duty amount as determined by the vessel repair entry.

This amendment changes the deadline for vessel operators to provide complete information for vessel repair entries and to submit Applications for Relief. The amendment extends the time period from 90 days to 150 days and eliminates the need for extension requests. CBP believes that extending the initial deadline will provide vessel operators additional time to provide the appropriate and accurate information. In addition, by changing the deadline to 150 days, the amendment would eliminate the necessity for vessel operators to request deadline extensions to complete vessel repair entries and Applications for Relief. CBP expects that the amendment will generate savings to both vessel operators and the Federal Government by eliminating the costs associated with completing and reviewing extension requests beyond the initial 90-day deadline in the existing regulations. CBP does not expect this amendment to impose any costs to vessel operators or the Federal Government.

TABLE 1—TIME BURDEN TO COMPLETE EXTENSION REQUESTS

	Expected annual extension requests	Time burden per request to vessel operators (hours)	Annual time burden to vessel operators (hours)	Time burden per request to CBP (hours)	Annual time burden to CBP (hours)
VRU Extension Requests	152	1	152	0.5	76
CCR Extension Requests	42	1	42	0.56	24

Vessel operators and CBP will benefit from this amendment because the extension request process is time-consuming for both the government and private parties. CBP estimates that the VRU reviews approximately 152 extension requests annually, while the CCR reviews on average 42 extension requests each year.[15] CBP estimates the average time burden placed on vessel operators or representa-

[14] CBP notes that these second extension requests for Applications for Relief are rarely denied. Data received from the Cargo Security, Carriers, and Restricted Merchandise Branch on April 13, 2022; subject matter expert stated that the CCR nearly always approves a second extension request.

[15] Data provided by the Cargo Security, Carriers, and Restricted Merchandise Branch on November 9, 2020. Data obtained included the average number of extension requests reviewed by the VRU and CCR from FY 2018–FY 2020. CBP calculated the average annual expected extension requests by looking at the annual requests reviewed in FY 2018, FY 2019 and FY 2020. The extension request numbers include both extension requests for completing vessel repair entries and applications for duty assessment relief.

tives to complete a single extension request (both the initial and subsequent requests) is approximately one hour each.[16] Meanwhile, CBP estimates that the time burden placed on CBP to review and approve the extension requests is approximately 30 minutes (0.5 hours) to review each VRU extension request and approximately 34 minutes (0.56 hours) to review each CCR extension request.[17]

Benefits From Eliminating VRU Extension Requests

Extension requests for vessel repair entries and applications for duty assessment relief are typically filed on behalf of the vessel operators by legal representatives or vessel agents. Unfortunately, CBP does not have exact data on the proportion of how many extension requests are completed by legal representatives on behalf of the vessel operators and how many are filed by vessel agents. Therefore, CBP assumes that half of all extension requests are filed by legal representatives and half are filed by vessel agents.

TABLE 2—EXPECTED ANNUAL SAVINGS FROM ELIMINATING VRU 30-DAY EXTENSION REQUESTS

	Estimated time burden to vessel operators (hours)	Estimated time burden to vessel legal representatives (hours)	Cost to vessel agents	Cost to vessel legal representatives	Estimated time burden to CBP (hours)	Cost to CBP	Total savings
VRU Extension Requests	76	76	$4,265	$32,669	76	$5,796	$42,730

On average, CBP estimates that vessel operators file approximately 152 extension requests every year that are reviewed by the VRU. CBP assumes that half of these 152 requests (76) are filed by a vessel operator's legal representative and half (76) are filed by vessel agents. The expected savings to vessel operators from eliminating these extension requests is based on the estimated burden hours for half of the VRU extension requests (76 hours, 1 hour per request), multiplied by the average loaded hourly wage rate for vessel legal representatives ($429.86). CBP determined that this is the best estimate for private lawyers hired outside of a company, because the data was obtained from an American Intellectual Property Law Association (AIPLA) study on the average hourly billing rate for lawyers. AIPLA's

[16] Data received from the Vessel Repair Unit on November 10, 2020. Subject matter expert's best estimate on time burden placed on vessel operators to file extension requests is approximately one hour.

[17] Data obtained from the Cargo Security, Carriers, and Restricted Merchandise Branch on October 28, 2020, providing an estimated time burden on CBP to review each VRU and each CCR extension request.

study surveyed intellectual property (IP) lawyers and was used in the 2017 Report of the Economic Survey. The study found the median hourly billing rate for these lawyers was $400 in 2016 dollars, which is the most recent data available, and $429.86 after adjustment to 2020 dollars.[18] To estimate the cost of filing VRU extension requests imposed on vessel agents, CBP used the estimated burden hours for half of VRU extension requests (76 hours, 1 hour per request), multiplied by the average loaded hourly wage rate for vessel operators ($56.12).[19] CBP estimated that the savings each year from eliminating these extension requests to vessel agents ($4,265) and legal representatives ($32,669) would be approximately $36,934.

In addition to the cost to vessel operators, the Federal Government incurs costs from reviewing VRU extension requests every year. The expected annual cost to the Federal Government associated with the review of VRU extension requests is based on the number of responses that must be reviewed (152) multiplied by the time burden to review and process each response (0.5 hours) = 76 hours. This is then multiplied by the average hourly loaded rate for other CBP employees ($76.26) = $5,796.[20] CBP thus estimates that the savings to the Federal Government from eliminating VRU requests would be approximately $5,796 on an annual basis. Considering the combined savings to vessel operators and the Federal Government as a result of eliminating VRU extension requests, CBP estimates that this rule's annual savings is approximately $42,730.

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[18] American Intellectual Property Law Association. *2017 Report of the Economic Survey.* "Billable Hours, Billing Rate, Dollars Billed (Q29, Q30, Q27)." June 2017. CBP calculated the 2020 adjusted dollar amount using the percent increase in the Annual Average GDP Price Deflator (2015 = 100) between 2016 and 2020. The annual average GDP Price Deflator value in 2016 = 101.0481, the annual average GDP Price Deflator value in 2020 = 108.5904, the percent increase was estimated to be around 7.4641% (108.5904/101.0481 = 1.07.4641 or 7.4641%). This percent increase was applied to the 2016 estimated hourly billing rate of $400 for external attorneys to estimate the 2020 hourly billing rate of $429.86 for external attorneys.

[19] CBP calculated this loaded wage rate by first multiplying the Bureau of Labor Statistics' (BLS) 2020 median hourly wage rate for Captains, Mates, and Pilots of Water Vessels ($37.08) by the ratio of BLS' average 2020 total compensation to wages and salaries for Transportation and Material Moving occupations (1.5134), the assumed occupational group for captains, mates, and pilots of water vessels, to account for non-salary employee benefits. These figures are in 2020 U.S. dollars and CBP assumes an annual growth rate of 0 percent; the 2020 U.S. dollar values are equal to the 2021 U.S. dollar values.

[20] Data obtained from the Cargo Security, Carriers, and Restricted Merchandise Branch on October 28, 2020. The Cargo Security, Carriers, and Restricted Merchandise Branch calculated the time burden to GS–12 litigation specialists at 30 minutes to review each VRU extension requests. CBP used its estimates for Other CBP Employees at the GS–12 Step 3 level, as the best proxy for average hourly loaded wage rate. CBP based this wage on the FY 2021 salary and benefits of the national average of other CBP positions, which is equal to a GS–12, Step 3. Source: Email correspondence with CBP's Office of Finance on September 7, 2021.

Benefits From Eliminating CCR Extension Requests

As discussed above, CBP expects that, on average, the CCR reviews about 42 requests for 30-day extensions every year. These amendments will have the effect of eliminating extension requests and their associated costs, constituting a net savings to all associated parties. CBP calculated these costs by combining the costs to vessel operators and the Federal Government for filing and reviewing these subsequent extension requests, for completing vessel repair entries, and for applying for relief from duty payments. CBP assumes that the time burden on vessel operators to file the subsequent extension requests (which are reviewed by the CCR) is one hour per extension request. Like extension requests to the VRU, CBP expects that the costs incurred by these extension requests to the CCR represent potential savings from the amendment. CBP expects that half of the 42 extension requests to the CCR (21) are completed by legal representatives on behalf of vessel operators and half (21) are completed by vessel agents.

TABLE 3—EXPECTED ANNUAL SAVINGS FROM ELIMINATING CCR 30-DAY EXTENSION REQUESTS

	Estimated time burden to vessel operators (hours)	Estimated time burden to vessel legal representatives (hours)	Cost to vessel agents	Cost to vessel legal representatives	Estimated time burden to CBP (hours)	Cost to CBP	Total savings
CCR Extension Requests	21	21	$1,169	$8,955	24	$2,354	$12,479

CBP calculated the savings from removing the subsequent requests for 30-day extensions based on the estimated burden hours for half of the CCR extension requests (21 hours, 1 hour per request), multiplied by the average loaded hourly wage rate for vessel legal representatives equaling $429.86).[21] For the second half of the CCR extension

[21] CBP determined this is the best estimate for private lawyers hired outside of a company and was obtained from an American Intellectual Property Law Association (AIPLA) study on the average hourly billing rate for lawyers. AIPLA's study surveyed intellectual property (IP) lawyers that were used in the *2017 Report of the Economic Survey.* The median hourly billing rate for these lawyers was $400 in 2016 dollars, which is the most recent data available, and $424.75 after adjustment to 2019 dollars. American Intellectual Property Law Association. *2017 Report of the Economic Survey.* "Billable Hours, Billing Rate, Dollars Billed (Q29, Q30, Q27)." June 2017. CBP calculated the 2020 adjusted dollar amount using the percent increase in the Annual Average GDP Price Deflator (2015 = 100) between 2016 and 2020. The annual average GDP Price Deflator value in 2016 = 101.0481, the annual average GDP Price Deflator value in 2020 = 108.5904, the percent increase was estimated to be around 7.4641% (108.5904/101.0481 = 1.074641 or 7.4641%). This percent increase was applied to the 2016 estimated hourly billing rate of $400 for external attorneys to estimate the 2020 hourly billing rate of $429.86 for external attorneys.

requests, which CBP assumes are filed by vessel agents, CBP used the estimated burden hours for half of the CCR extension requests (21 hours, 1 hour per request), multiplied by the average loaded hourly wage rate for vessel operators equaling $56.12.[22] CBP calculated that the estimated annual savings to vessel operators by eliminating the CCR extension requests will be approximately $10,125.

By eliminating the need for subsequent extension requests, the amendments will provide savings to the Federal Government, as the CCR staff would no longer need to review extension requests. The estimated annual savings from this portion of the amendment to the Federal Government is based on the number of responses that must be reviewed (42) multiplied by the time burden to review and process each response (0.5625 hours) = 24 hours multiplied by the average hourly loaded wage rate for a CBP attorney-advisor ($98.10) = $2,354.[23] [24] The total savings from eliminating CCR extension requests was estimated by combining savings to both vessel operators ($10,125) and CBP ($2,354), which is approximately $12,479 each year.

CBP expects the amendment will result in savings to the U.S. economy on an annual basis. CBP calculated the total savings as the combination of savings accrued by both the Federal Government and vessel operators from extending the filing deadlines to 150 days. CBP calculated the total savings by adding the expected savings to vessel operators generated by eliminating VRU extension requests ($36,934) and CCR extension requests ($10,125). CBP also included in total savings of the amendment, the added savings to the Federal Government generated by eliminating VRU extension requests

[22] CBP calculated this loaded wage rate by first multiplying the Bureau of Labor Statistics' (BLS) 2020 median hourly wage rate for Captains, Mates, and Pilots of Water Vessels ($37.08) by the ratio of BLS' average 2020 total compensation to wages and salaries for Transportation and Material Moving occupations (1.5134), the assumed occupational group for captains, mates, and pilots of water vessels, to account for non-salary employee benefits. These figures are in 2020 U.S. dollars and CBP assumes an annual growth rate of 0 percent; the 2020 U.S. dollar values are equal to the 2021 U.S. dollar values.

[23] Data obtained from the Cargo Security, Carriers, and Restricted Merchandise Branch on October 28, 2020, providing an estimated time burden to the CCR to review the secondary extension requests. Of the 80 requests reviewed in FY 2020, the estimated time burden was about 45 hours for attorney-advisors, equivalent to about 0.5625 hours per request to review. A lack of detailed data for FY 2019 and FY 2018 prevented CBP from obtaining exact time burdens to complete the requests made during those years. Therefore, CBP used the FY 2020 average time burden per request and applied that average to the total number of requests reviewed in FY 2019 and FY 2018 to estimate the annual expected time burden associated with secondary extension requests.

[24] CBP based this wage on the FY 2021 salary and benefits of the national average of CBP Attorney positions. Source: Email correspondence with CBP's Office of Finance on March 18, 2022.

($5,796) and CCR extension requests ($2,354). CBP estimates that the overall savings to the U.S. economy from this amendment will be approximately $55,209 each year.

Overall, CBP expects that the impact from amending the deadlines from 90 to 150 days for vessel operators to provide completed vessel repair entries and applications for duty assessment relief does not result in a “significant” economic impact in any given year. After considering the impacts of the amendment, CBP expects there to be a net savings of approximately $55,209 annually to the U.S. economy. At the same time, CBP does not expect any costs associated with this amendment.

C. Regulatory Flexibility Act

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

D. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) requires that CBP consider the impact of paperwork and other information collection burdens imposed on the public. As there is no collection of information in this document, the provisions of the Paperwork Reduction Act are inapplicable.

V. Signing Authority

This document is being issued in accordance with 19 CFR 0.2(a), which provides that the authority of the Secretary of the Treasury with respect to CBP regulations that are not related to customs revenue functions was transferred to the Secretary of Homeland Security pursuant to Section 403(l) of the Homeland Security Act of 2002. Accordingly, this final rule to amend such regulations may be signed by the Secretary of Homeland Security (or his or her delegate).

List of Subjects in 19 CFR Part 4

Exports, Freight, Harbors, Maritime carriers, Oil pollution, Reporting and recordkeeping requirements, Vessels.

Amendments to the Regulations

For the reasons set forth in the preamble, CBP amends part 4 of title 19 of the Code of Federal Regulations (19 CFR part 4) as set forth below.

PART 4—VESSELS IN FOREIGN AND DOMESTIC TRADES

■ 1. The general authority citation for part 4 and the specific authority citation for § 4.14 continues to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1415, 1431, 1433, 1434, 1624, 2071 note; 46 U.S.C. 501, 60105.

* * * * *

Section 4.14 also issued under 19 U.S.C. 1466, 1498; 31 U.S.C. 9701.

* * * * *

■ 2. In § 4.14, revise paragraphs (f) and (i)(1) to read as follows:

§ 4.14 Equipment purchases for, and repairs to, American vessels.

* * * * *

(f) *Time limit for submitting evidence of cost.* A complete vessel repair entry must be supported by evidence showing the cost of each item entered. If the entry is incomplete when submitted, evidence to make it complete must be received by the VRU as identified in paragraph (g) of this section within 150 calendar days from the date of vessel arrival. That evidence must include the final cost of repairs. In the event that all final cost evidence is not furnished within 150 days, or is of doubtful authenticity, the VRU may refer the matter to U.S. Immigration and Customs Enforcement to begin procedures to obtain the needed evidence. That agency may also investigate the reason for a failure to file or for an untimely submission. Unexplained or unjustified delays in providing CBP with sufficient information to properly determine duty may result in penalty action as specified in paragraph (j) of this section.

* * * * *

(i) * * *

(1) *Applications for Relief.* Relief from the assessment of vessel repair duty will not be granted unless an Application for Relief is filed with CBP. Relief will not be granted based merely upon a claim for relief made at the time of entry under paragraph (e) of this section. If

relief is sought, an Application is not required to be presented in any particular format, but it must clearly present the legal basis for granting relief, as specified in paragraph (h) of this section. An Application must also state that all repair operations performed aboard a vessel during the one-year period prior to the current submission have been declared and entered. A valid Application is required to be supported by complete evidence as detailed in paragraphs (i)(1)(i) through (vi) and (i)(2) of this section. Except as further provided in this paragraph, the deadline for receipt of an Application and supporting evidence is 150 calendar days from the date that the vessel first arrived in the United States following foreign operations. Applications must be addressed and submitted by the vessel operator to the VRU and will be decided in that unit. The VRU may seek the advice of the Cargo Security, Carriers & Restricted Merchandise Branch, Office of Trade, in CBP Headquarters with regard to any specific item or issue which has not been addressed by clear precedent. If no Application is filed or if a submission which does not meet the minimal standards of an Application for Relief is received, the duty amount will be determined without regard to any potential claims for relief from duty assessment (see paragraph (h) of this section). Each Application for Relief must include copies of:

* * * * *

Alejandro N. Mayorkas,
Secretary of Homeland Security.

[Published in the Federal Register, July 29, 2022 (85 FR 45642)]

CBP Dec. 22–17

COBRA FEES TO BE ADJUSTED FOR INFLATION IN FISCAL YEAR 2023

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

ACTION: General notice.

SUMMARY: This document announces that U.S. Customs and Border Protection (CBP) is adjusting certain customs user fees and corresponding limitations established by the Consolidated Omnibus Budget Reconciliation Act (COBRA) for Fiscal Year 2023 in accordance with the Fixing America's Surface Transportation Act (FAST Act) as implemented by the CBP regulations.

DATES: The adjusted amounts of customs COBRA user fees and their corresponding limitations set forth in this notice for Fiscal Year 2023 are required as of October 1, 2022.

FOR FURTHER INFORMATION CONTACT: Tina Ghiladi, Senior Advisor, International Travel & Trade, Office of Finance, 202–344–3722, *UserFeeNotices@cbp.dhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

A. Adjustments of COBRA User Fees and Corresponding Limitations for Inflation

On December 4, 2015, the Fixing America's Surface Transportation Act (FAST Act, Pub. L. 114–94) was signed into law. Section 32201 of the FAST Act amended section 13031 of the Consolidated Omnibus Budget Reconciliation Act (COBRA) of 1985 (19 U.S.C. 58c) by requiring the Secretary of the Treasury (Secretary) to adjust certain customs COBRA user fees and corresponding limitations to reflect certain increases in inflation.

Sections 24.22 and 24.23 of title 19 of the Code of Federal Regulations (19 CFR 24.22 and 24.23) describe the procedures that implement the requirements of the FAST Act. Specifically, paragraph (k) in section 24.22 (19 CFR 24.22(k)) sets forth the methodology to determine the change in inflation as well as the factor by which the fees and limitations will be adjusted, if necessary. The fees and limitations subject to adjustment, which are set forth in Appendix A and Appendix B of part 24, include the commercial vessel arrival fees, commercial truck arrival fees, railroad car arrival fees, private vessel arrival fees, private aircraft arrival fees, commercial aircraft and vessel passenger arrival fees, dutiable mail fees, customs broker permit user fees, barges and other bulk carriers arrival fees, and merchandise processing fees, as well as the corresponding limitations.

B. Determination of Whether an Adjustment Is Necessary for Fiscal Year 2023

In accordance with 19 CFR 24.22, CBP must determine annually whether the fees and limitations must be adjusted to reflect inflation. For Fiscal Year 2023, CBP is making this determination by comparing the average of the Consumer Price Index—All Urban Consumers, U.S. All items, 1982–1984 (CPI–U) for the current year (June 2021–May 2022) with the average of the CPI–U for the comparison year (June 2020–May 2021) to determine the change in inflation, if any. If there is an increase in the CPI–U of greater than one (1) percent, CBP must adjust the customs COBRA user fees and corresponding limitations using the methodology set forth in 19 CFR 24.22(k). Following the steps provided in paragraph (k)(2) of section 24.22, CBP has determined that the increase in the CPI–U between the most recent June to May twelve-month period (June 2021–May 2022) and the comparison year (June 2020–May 2021) is 6.87[1] percent. As the increase in the CPI–U is greater than one (1) percent, the customs COBRA user fees and corresponding limitations must be adjusted for Fiscal Year 2023.

C. Determination of the Adjusted Fees and Limitations

Using the methodology set forth in section 24.22(k)(2) of the CBP regulations (19 CFR 24.22(k)), CBP has determined that the factor by which the base fees and limitations will be adjusted is 18.629 percent (base fees and limitations can be found in Appendices A and B to part 24 of title 19). In reaching this determination, CBP calculated the values for each variable found in paragraph (k) of 19 CFR 24.22 as follows:

- The arithmetic average of the CPI–U for June 2021–May 2022, referred to as (A) in the CBP regulations, is 279.974;
- The arithmetic average of the CPI–U for Fiscal Year 2014, referred to as (B), is 236.009;
- The arithmetic average of the CPI–U for the comparison year (June 2020– May 2021), referred to as (C), is 261.992;

[1] The figures provided in this notice may be rounded for publication purposes only. The calculations for the adjusted fees and limitations were made using unrounded figures, unless otherwise noted.

- The difference between the arithmetic averages of the CPI–U of the comparison year (June 2020–May 2021) and the current year (June 2021–May 2022), referred to as (D), is 17.982;
- This difference rounded to the nearest whole number, referred to as (E), is 18;
- The percentage change in the arithmetic averages of the CPI–U of the comparison year (June 2020–May 2021) and the current year (June 2021–May 2022), referred to as (F), is 6.87 percent;
- The difference in the arithmetic average of the CPI–U between the current year (June 2021–May 2022) and the base year (Fiscal Year 2014), referred to as (G), is 43.966; and
- Lastly, the percentage change in the CPI–U from the base year (Fiscal Year 2014) to the current year (June 2021–May 2022), referred to as (H), is 18.629 percent.

D. Announcement of New Fees and Limitations

The adjusted amounts of customs COBRA user fees and their corresponding limitations for Fiscal Year 2023 as adjusted by 18.629 percent set forth below are required as of October 1, 2022. Table 1 provides the fees and limitations found in 19 CFR 24.22 as adjusted for Fiscal Year 2023, and Table 2 provides the fees and limitations found in 19 CFR 24.23 as adjusted for Fiscal Year 2023.

TABLE 1—CUSTOMS COBRA USER FEES AND LIMITATIONS FOUND IN 19 CFR 24.22 AS ADJUSTED FOR FISCAL YEAR 2023

19 U.S.C. 58c	19 CFR 24.22	Customs COBRA user fee/limitation	New fee/limitation adjusted in accordance with the FAST Act
(a)(1)	(b)(1)(i)	Fee: Commercial Vessel Arrival Fee	$518.41
(b)(5)(A)	(b)(1)(ii)	Limitation: Calendar Year Maximum for Commercial Vessel Arrival Fees	7,064.34
(a)(8)	(b)(2)(i)	Fee: Barges and Other Bulk Carriers Arrival Fee	130.49
(b)(6)	(b)(2)(ii)	Limitation: Calendar Year Maximum for Barges and Other Bulk Carriers Arrival Fees	1,779.43

19 U.S.C. 58c	19 CFR 24.22	Customs COBRA user fee/limitation	New fee/limitation adjusted in accordance with the FAST Act
(a)(2)	(c)(1)	Fee: Commercial Truck Arrival Fee[2 3]	6.5
(b)(2)	(c)(2) and (3) ...	Limitation: Commercial Truck Calendar Year Prepayment Fee[4]	118.63
(a)(3)	(d)(1)	Fee: Railroad Car Arrival Fee	9.79
(b)(3)	(d)(2) and (3) ...	Limitation: Railroad Car Calendar Year Prepayment Fee	118.63
(a)(4)	(e)(1) and (2) ...	Fee and Limitation: Private Vessel or Private Aircraft First Arrival/ Calendar Year Prepayment Fee. ...	32.62
(a)(6)	(f)	Fee: Dutiable Mail Fee	6.52
(a)(5)(A)	(g)(1)(i)	Fee: Commercial Vessel or Commercial Aircraft Passenger Arrival Fee	6.52
(a)(5)(B)	(g)(1)(ii)	Fee: Commercial Vessel Passenger Arrival Fee (from one of the territories and possessions of the United States).	2.29
(a)(7)	(h)	Fee: Customs Broker Permit User Fee..	163.71

[2] The Commercial Truck Arrival Fee is the CBP fee only; it does not include the United States Department of Agriculture (USDA) Animal and Plant Health Inspection Service (APHIS) Agricultural and Quarantine Inspection (AQI) Services Fee (currently $7.55) that is collected by CBP on behalf of USDA to make a total Single Crossing Fee of $14.05. *See* 7 CFR 354.3(c) and 19 CFR 24.22(c)(1). Once eighteen Single Crossing Fees have been paid and used for a vehicle identification number (VIN)/vehicle in a Decal and Transponder Online Procurement System (DTOPS) account within a calendar year, the payment required for the nineteenth (and subsequent) single-crossing is only the AQI fee (currently $7.55) and no longer includes CBP's $6.50 Commercial Truck Arrival fee (for the remainder of that calendar year).

[3] The Commercial Truck Arrival fee is adjusted down from $6.52 to the nearest lower nickel. *See* 82 FR 50523 (November 1, 2017).

[4] The Commercial Truck Calendar Year Prepayment Fee is the CBP fee only; it does not include the AQI Commercial Truck with Transponder Fee (currently $301.67) that is collected by CBP on behalf of APHIS to make the total Commercial Vehicle Transponder Annual User Fee of $420.30.

TABLE 2—CUSTOMS COBRA USER FEES AND LIMITATIONS FOUND IN 19 CFR 24.23 AS ADJUSTED FOR FISCAL YEAR 2023

19 U.S.C. 58c	19 CFR 24.23	Customs COBRA user fee/limitation	New fee/limitation adjusted in accordance with the FAST Act
b)(9)(A)(ii)	(b)(1)(i)(A)	Fee: Express Consignment Carrier/ Centralized Hub Facility Fee, Per Individual Waybill/Bill of Lading Fee. .	$1.19
(b)(9)(B)(i)	(b)(4)(ii)[5]	Limitation: Minimum Express Consignment Carrier/Centralized Hub Facility Fee[6]..	0.42
(b)(9)(B)(i)	(b)(4)(ii)[7]	Limitation: Maximum Express Consignment Carrier/Centralized Hub Facility Fee	1.19
(a)(9)(B)(i); (b)(8)(A)(i). ..	(b)(1)(i)(B)[8]	Limitation: Minimum Merchandise Processing Fee[9]	29.66
(a)(9)(B)(i); (b)(8)(A)(i). ..	(b)(1)(i)(B)[10] ...	Limitation: Maximum Merchandise Processing Fee[11] [12]	575.35
(b)(8)(A)(ii)	(b)(1)(ii)	Fee: Surcharge for Manual Entry or Release	3.56
(a)(10)(C)(i)	(b)(2)(i)	Fee: Informal Entry or Release; Automated and Not Prepared by CBP Personnel	2.37
(a)(10)(C)(ii) ...	(b)(2)(ii)	Fee: Informal Entry or Release; Manual and Not Prepared by CBP Personnel	7.12
(a)(10)(C)(iii) ..	(b)(2)(iii)	Fee: Informal Entry or Release; Manual; Prepared by CBP Personnel .	10.68
(b)(9)(A)(ii)	(b)(4)	Fee: Express Consignment Carrier/ Centralized Hub Facility Fee, Per Individual Waybill/Bill of Lading Fee. .	1.19

[5] Appendix B of part 24 inadvertently included a reference to paragraph (b)(1)(i)(B)(2) of section 24.23. However, the reference should have been to paragraph (b)(4)(ii). CBP intends to publish a future document in the **FEDERAL REGISTER** to make several technical corrections to part 24 of title 19 of the CFR, including corrections to Appendix B of part 24. The technical corrections will also address the inadvertent errors specified in footnotes 7, 8, and 10 below.

[6] Although the minimum limitation is published, the fee charged is the fee required by 19 U.S.C. 58c(b)(9)(A)(ii).

[7] Appendix B of part 24 inadvertently included a reference to paragraph (b)(1)(i)(B)(2) of section 24.23. However, the reference should have been to paragraph (b)(4)(ii).

[8] Appendix B of part 24 inadvertently included a reference to paragraph (b)(1)(i)(B)(1) of section 24.23. However, the reference should have been to paragraph (b)(1)(i)(B).

[9] Only the limitation is increasing; the *ad valorem* rate of 0.3464 percent remains the same. *See* 82 FR 50523 (November 1, 2017).

[10] Appendix B of part 24 inadvertently included a reference to paragraph (b)(1)(i)(B)(1) of section 24.23. However, the reference should have been to paragraph (b)(1)(i)(B).

[11] Only the limitation is increasing; the *ad valorem* rate of 0.3464 percent remains the same. *See* 82 FR 50523 (November 1, 2017).

[12] For monthly pipeline entries, see *https://www.cbp.gov/trade/entry-summary/pipeline-monthly-entry-processing/pipeline-line-qa.*

Tables 1 and 2, setting forth the adjusted fees and limitations for Fiscal Year 2023, will also be maintained for the public's convenience on the CBP website at *www.cbp.gov.*

Chris Magnus, the Commissioner of CBP, having reviewed and approved this document, is delegating the authority to electronically sign this document to Robert F. Altneu, who is the Director of the Regulations and Disclosure Law Division for CBP, for purposes of publication in the **Federal Register**.

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

[Published in the Federal Register, August 1, 2022 (85 FR 45973)]

PROPOSED MODIFICATION OF TWO RULING LETTERS AND PROPOSED REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF MUSICAL CANDLE HOLDERS PACKAGED WITH WAX BIRTHDAY CANDLES

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

ACTION: Notice of proposed modification of two ruling letters, and proposed revocation of treatment relating to the tariff classification of musical candle holders packaged with wax birthday candles.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) intends to modify two ruling letters concerning tariff classification of musical candle holders packaged with wax birthday candles. under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP intends to revoke any treatment previously accorded by CBP to substantially identical transactions. Comments on the correctness of the proposed actions are invited.

DATES: Comments must be received on or before September 16, 2022.

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

FOR FURTHER INFORMATION CONTACT: Reema Bogin, Chemicals, Petroleum, Metals and Miscellaneous Classification Branch, Regulations and Rulings, Office of Trade, atreema.bogin@cbp.dhs.gov.

SUPPLEMENTARY INFORMATION:

BACKGROUND

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

Pursuant to 19 U.S.C. § 1625(c)(1), this notice advises interested parties that CBP is proposing to modify two ruling letters pertaining to the tariff classification of musical candle holders packaged with wax birthday candles. Although in this notice, CBP is specifically referring to New York Ruling Letter ("NY") D84817, dated December 9, 1998 (Attachment A) and NY D85291, dated December 24, 1998 (Attachment B), this notice also covers any rulings on this merchandise which may exist, but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the two identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should advise CBP during the comment period.

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

In NY D84817 and NY D85291, CBP classified musical candle holders packaged with wax birthday candles in heading 3406, HTSUS, specifically in subheading 3406.00.00, HTSUS, which provides for "Candles, tapers and the like." CBP has reviewed NY D84817 and NYD85291 and has determined the ruling letters to be in error. It is now CBP's position that musical candle holders packaged with wax birthday candles are properly classified, in heading 9505, HTSUS, specifically in subheading 9505.90.40, HTSUS, which provides for "Festive, carnival or other entertainment articles, including magic tricks and practical joke articles; parts and accessories thereof: Other: Confetti, paper spirals or streamers, party favors and noisemakers; parts and accessories thereof."

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is proposing to modify NY D84817 and NY D85291, and to revoke or modify any other ruling not specifically identified to reflect the analysis contained in the proposed Headquarters Ruling Letter ("HQ") H320995, set forth as Attachment C to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is proposing to revoke any treatment previously accorded by CBP to substantially identical transactions.

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

Allyson Mattanah
for
Craig T. Clark,
Director
Commercial and Trade Facilitation Division

Attachments

ATTACHMENT A

NY D84817

December 9, 1998
CLA-2-34:RR:NC:2:236 D84817
CATEGORY: Classification
TARIFF NO.: 3406.00.0000

Mr. Anthony Mok
Uni-King Marketing Inc.
2770 Steeles Ave. W., Unit 3,
Concord, Ontario L4K 4N5

RE: The tariff classification of Candles from China.

Dear Mr. Mok:

In your letter dated November 10, 1998, you requested a tariff classification ruling.

The samples submitted are as follows:

Item 10A2 consists of 24 candles, each molded in the shape of clown. Each candle measures approximately 2″ in height and 1″ in width.

Item 12C1 consists of 4 birthday candles with a musical candle holder in a blister package. Each candle measures approximately 31/4″ in height and 1/4″ in diameter.

The applicable subheading for the above described samples will be 3406.00.0000, Harmonized Tariff Schedule of the United States, which provides for Candles, tapers and the like. The rate of duty will be 1.2 percent ad valorem.

The Department of Commerce has determined that petroleum wax candles in the following shapes: tapers, spirals, and straight-sided dinner candles; rounds, columns, pillars, votives; and various wax-filled containers are within the scope of the antidumping duty order on petroleum wax candles from China. The Department has also determined that candles molded in the shape of certain which folder objects, such as an amend or a numeral and birthday candles are not within the scope of the antidumping duty order on petroleum wax candles from China. In our opinion, the samples are not within the scope of the antidumping duty order on petroleum wax candles from China.

This ruling is being issued under the provisions of Part177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist V. Gualario at 212-466-5744.

Sincerely,

Robert B. Swierupski
Director,
National Commodity Specialist Division

ATTACHMENT B

NY D85291

December 24, 1998
CLA-2-34:RR:NC:2:236 D85291
CATEGORY: Classification
TARIFF NO.: 3406.00.0000

Mr. Anthony Mok
Uni-King Marketing Inc.
2770 Steeles Ave. W., Unit 3
Concord, Ontario L4K 4N5

RE: The tariff classification of Candles from China.

Dear Mr. Mok:

In your letter dated November 26, 1998, you requested a tariff classification ruling.

The samples submitted are as follows:

Item 12C3- Clown Musical Candle- consists of a birthday candle with a musical candle holder in a blister package. Each candle measures approximately 3 1/4″ in height and 1/4″ in diameter.

Item 13B2-10″ Chick Family Taper- is a tapers candle molded in the shape of four chicks stacked on top of each other. The candle measure approximately 10″ in height and 1″ in diameter.

Item 6F3- 12″ Boy Pilgrim Candle- is a candle molded in the shape of a sailor holding a life preserver. The candle measures approximately 6 1/2″ in height and 4″ across its base.

The applicable subheading for the above described candles will be 3406.00.0000, Harmonized Tariff Schedule of the United States, (HTS), which provides for Candles, tapers and the like. The rate of duty will be 1.2 percent ad valorem. Effective January 1, 1999, the rate of duty will be Free.

The Department of Commerce (DOC) has determined that petroleum wax candles in the following shapes: tapers, spirals, and straight-sided dinner candles; rounds, columns, pillars, votives; and various wax-filled containers are within the scope of the antidumping duty order on petroleum wax candles from China. The Department has also determined that candles molded in the shape of certain identifiable objects, such as an animal or a numeral, are not within the scope of the antidumping duty order. In our opinion, the samples are not within the scope of the antidumping duty order on petroleum wax candles from China.

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

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist V. Gualario at 212-466-5744.

Sincerely,

Robert B. Swierupski
Director,
National Commodity Specialist Division

ATTACHMENT C

HQ H320995
OT:RR:CTF:CPMM H320995 RRB
CATEGORY: Classification
TARIFF NO.: 9505.90.40

Mr. Anthony Mok
Uni-King Marketing Inc.
2770 Steeles Ave. W., Unit 3
Concord, Ontario L4K 4N5

RE: Modification of NY D84817 and NY D85291; tariff classification of musical candle holders packaged with wax birthday candles from China

Dear Mr. Mok,

This letter is to inform you that U.S. Customs and Border Protection ("CBP") has reconsidered New York Ruling Letter ("NY") D84817, dated December 9, 1998, and NY D85291, dated December 24, 1998, regarding the classification of musical candle holders packaged with wax birthday candles. The musical candle holders packaged with wax birthday candles in each of these rulings were classified in subheadings 3406.00.00, Harmonized Tariff Schedule of the United States ("HTSUS"), as "Candles, tapers and the like." For the reasons set forth below, we hereby modify NY D84817 and NY D85291 with respect to the classification of the musical candle holders packaged with wax birthday candles only. The remaining analysis of NY D84817 and NY D85291 remains unchanged.

FACTS:

In NY D84817, the musical candle holders packaged with wax candles were described as follows:

> Item 12C1 consists of 4 birthday candles with a musical candle holder in a blister package. Each candle measures approximately 31/4″ in height and 1/4″ in diameter.

In NY D85291, the musical candle holders packaged with wax candles were described as follows:

> Item 12C3- Clown Musical Candle- consists of a birthday candle with a musical candle holder in a blister package. Each candle measures approximately 3 1/4″ in height and 1/4″ in diameter.

ISSUE:

Whether the musical candle holders packaged with wax birthday candles are properly classified in heading 3406, HTSUS, as "Candles, tapers and the like," or in heading 9505, HTSUS, as "Festive, carnival or other entertainment articles, including magic tricks and practical joke articles; parts and accessories thereof."

LAW AND ANALYSIS:

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

Under GRI 1, we must look to the terms of headings and any relevant section or chapter notes in order to classify the good. When no single heading provides for all of the articles in the kit, we must proceed to GRI 2. GRI 2 provides that unfinished articles, as well as mixtures and combinations, are to be classified pursuant to GRI 3. GRI 3(a) states that when merchandise is classifiable under more than one heading, the merchandise should be classified in the most specific heading. However, GRI 3(a) further states that "when two or more headings each refer to . . . part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods." GRI3(b) states, in relevant part, that goods put up in sets for retail sale shall be classified as if consisting of the material or component which gives them their essential character, insofar as this criterionis applicable.

The HTSUS provisions under consideration are as follows:

3406 Candles, tapers and the like:

* * *

9505 Festive, carnival or other entertainment articles, including magic tricks and practical joke articles; parts and accessories thereof:

* * *

In understanding the language of the HTSUS, the Explanatory Notes ("ENs") of the Harmonized Commodity Description and Coding System may be utilized. The ENs, although not dispositive or legally binding, provide a commentary on the scope of each heading, and are generally indicative of the proper interpretation of the HTSUS. *See* T.D. 89-80, 54 Fed. Reg. 35127 (August 23, 1989).

The EN to GRI 3(b) states, in pertinent part:

> (VII) In all these cases the goods are to be classified as if they consisted of the material or component **which gives them their essential character**, insofar as this criterion is applicable.
>
> (VIII) The factor which determines essential character will vary as between different kinds of goods. It may, for example, be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods.
>
> [. . .]
>
> (X) For the purposes of this Rule, the term "goods put up in sets for retail sale" shall be taken to mean goods which:
>
> (a) consist of at least two different articles which are, *prima facie*, classifiable in different headings. Therefore, for example, six fondue forks cannot be regarded as a set within the meaning of this Rule;
>
> (b) consist of products or articles put up together to meet a particular need or carry out a specific activity; and
>
> (c) are put up in a manner suitable for sale directly to end users without repacking (e.g., in boxes or cases or on boards).

EN 95.05 states, in pertinent part:

Festive, carnival or other entertainment articles, which in view of their intended use are generally made of non-durable material. They include

(1) Festive decorations used to decorate rooms, tables, etc. (such as garlands, lanterns, etc.); decorative articles for Christmas trees (tinsel, coloured balls, animals and other figures, etc); cake decorations which are traditionally associated with a particular festival (e.g., animals, flags)

The merchandise in NY D84817 and NY D85291 consists of two different components packaged together in a blister package: the wax birthday candles and the musical candle holder. There is no single provision in the HTSUS that completely describes the product under GRI 1. Likewise, the merchandise is not classifiable under GRI 2(a) or 2(b) because it is not in an unassembled or incomplete state. GRI 3(a) does not apply because there is no heading that provides a specific description for the entire product.

Turning to GRI 3(b), we note that pursuant to EN (X) to GRI3(b), the terms "goods put up in sets for retail sale," shall be taken to mean goods which: (a) consist of at least two different articles which are, *prima facie*, classifiable in different headings; (b) consist of products or articles put together to meet a particular need or carry out a specific activity; and (c) are put up in a manner suitable for sale directly to users without repacking. Under EN (VII) to GRI 3(b), GRI 3(b) sets are to be classified as if they consisted of the material or component which gives them their essential character. *See Estee Lauder, Inc. v. United States*, 46 Cust. B. & Dec. 4, 13 - 28 (Ct. Int'l Trade 2012).

The musical candle holder and birthday candle sets in NY D84817 and NY D85291 meet all three of the above criteria described in EN (X) to GRI 3(b). Under criteria (a), the musical candle holder set consists of articles classifiable in different headings. Under criteria (b), the set consists of articles put together to meet a particular need or carry out a specific activity, namely, to decorate and illuminate a birthday cake and celebrate the festive occasion of one's birthday. Under criteria (c), the articles are put up in a manner suitable for sale directly to users without repacking, namely, both the candles and candle holder are packaged together in a blister pack for retail sale.

For sets that meet the above criteria under the ENs to GRI3(b), classification is made according to the component or components taken together, which can be regarded as conferring on the set as a whole its essential character. In NY D84817 and NY D85291, without any analysis, the musical candle holders packaged with wax birthday candles were classified in heading 3406, HTSUS. We now believe this classification to be in error. First, we note that the musical candle holder component is designed to hold a single birthday candle on top of a birthday cake while playing the "Happy Birthday" song. The battery powered musical candle holderis activated by holding the base and turning a silver metallic band around its neck clockwise. The music is stopped by turning the band counter clockwise. It is also intended for reuse with candle refills. Although no cost breakdown is indicated in NY D84817 or NY D85291, the battery powered musical candle holder would likely be more expensive than the wax birthday candles with which it is packaged. Moreover, a consumer would choose to purchase the packaged set for the musical feature of the candle holder, not merely for the candles or even for the candle holder's utilitarian function of holding a single candle. Therefore, we find that the musical candle holder component of the packaged set imparts the essential character under GRI 3(b), and that the merchandise was improperly classified in heading 3406, HTSUS, based on the wax candle component.

Turning to the classification of the component imparting the essential character of the entire set—the musical candle holders—we note that in

Midwest of Cannon Falls, Inc. v. United States (Midwest), 122 F.3d 1423, 1429 (Fed. Cir. 1997), the Court of Appeals for the Federal Circuit ("CAFC") held that classification of merchandise as "festive articles"under chapter 95 requires that the article satisfy two criteria: (1) it must be closely associated with a festive occasion, and (2) it must be used or displayed principally during that festive occasion. Additionally, the item must be "'closely associated with a festive occasion' " to the degree that "'the physical appearance of an article is so intrinsically linked to a festive occasion that its use during other time periods would be aberrant.'" *Park B. Smith, Ltd. v. United States*, 347 F.3d 922, 927 (Fed. Cir. 2003) (quoting *Park B. Smith, Ltd. v. United States*, 25 CIT 506, 509 (2001)). Hence, the courts have established a 2-prong test to determine whether an article is "festive,"and have not said that heading 9505, HTSUS, is a "principal use" provision. *See* HQ H258442, dated August 18, 2016.

Under the 2-prong test set forth in *Midwest* and *Park B. Smith, Ltd.*, an article's physical appearance and the court's examination of such is part of the determination of whether an article is *prima facie* classifiable as a "festive article." "Festive occasions" are not limited to recognized holidays but can also include "special occasions and events such as weddings, anniversaries, and birthdays." *Wilton Industries, Inc. v. United States*, 31 CIT 863, 890 (2007). Accordingly, merchandise classifiable under the 2-prong test in heading 9505, HTSUS, includes articles associated with a birthday celebration.

Applying the 2-prong test, we note that under the first prong, the musical candle holder, which holds a wax birthday candle and plays the "Happy Birthday" song, is closely associated with birthdays, which the CIT has recognized as a festive occasion for purposes of classification in heading 9505, HTSUS. *See Wilton Industries, Inc.*, 31 CIT at 890. In addition, the musical candle holder that plays the "Happy Birthday" song is principally used during birthday celebrations and is closely associated with birthday festivities where guests sing the "Happy Birthday" song in unison to fete the individual celebrating a birthday. To use such a musical candle holder outside the context of a birthday celebration would be aberrant. Thus, the musical candle holder satisfies the 2-prong test set forth in *Midwest* and *Park B. Smith, Ltd.* for determining whether an article is *prima facie* classifiable as a "festive article" under heading 9505, HTSUS. Moreover, under EN 95.05, a musical candle holder that plays the "Happy Birthday" song falls under the description of festive articles that includes "cake decorations which are traditionally associated with a particular festival." Thus, under the 2-prong test and pursuant to the ENs to 95.05, the musical candle holders that impart the essential character of the entire set in NY D84817 and NY D85291 are properly classified in heading 9505, HTSUS. Our determination is supported by prior CBP rulings. *See, e.g.,* NY H89959, dated March 29, 2002 (classifying in heading 9505, HTSUS, an electronic ornament intended as a birthday cake decoration that is essentially a plastic container holding a birthday candle that plays the "Happy Birthday" song) and NY N233641, dated October 4, 2012 (classifying an almost identical musical candle holder and wax birthday candle set in heading 9505, HTSUS).

Based on the foregoing, we find that the musical candle holder and wax birthday candles packaged together as GRI 3(b) sets in NY D84817 and NY D85291 are classified in subheading 9505.90.4000, HTSUSA ("Annotated"), as "Festive, carnival or other entertainment articles, including magic tricks and practical joke articles; parts and accessories thereof: Other: Confetti, paper spirals or streamers, party favors and noise makers; parts and accessories thereof."

Candles from China may be subject to antidumping duties under the Antidumping Duty Order on Petroleum Wax Candles from the People's Republic of China, case A-570-504. Written decisions regarding the scope of antidumping/ countervailing duty ("AD/CVD") orders are issued by the Enforcement and Compliance office in the International Trade Administration of the U.S. Department of Commerce ("DOC") and are separate from tariff classification and origin rulings issued by CBP. You can contact them at http://trade.gov/enforcement (click on "Contact Us"). For your information, you can view a list of current AD/CVD cases at the United States International Trade Commission website at http://www.usitc.gov (click on "Antidumping and Countervailing Duty" under "Popular Topics" at the top of the screen), and you can search AD/CVD deposit and liquidation messages using CBP's AD/CVD Search tool at https://aceservices.cbp.dhs.gov/adcvdweb. Your product may be subject to prohibition and recall under the laws and regulations administered by the U.S. Consumer Product Safety Commission (CPSC). You are advised to contact the CPSC to determine if your merchandise complies with pertinent safety standards and regulations. Import compliance information may be obtained by contacting the Office of Compliance, Consumer Product Safety Commission, 4330 East West Highway, Bethesda MD 20814-4408, by calling (301) 504-7912 or by e-mail contact through their website at www.cpsc.gov.

HOLDING:

Pursuant to GRIs 3(b) and 6, the musical candle holders and wax birthday candles packaged together in a blister package are classified in heading 9505, HTSUS, specifically in subheading 9505.90.4000, HTSUSA, which provides for "Festive, carnival or other entertainment articles, including magic tricks and practical joke articles; parts and accessories thereof: Other: Confetti, paper spirals or streamers, party favors and noise makers; parts and accessories thereof." The 2022 column one, general rate of duty is Free.

EFFECT ON OTHER RULINGS:

NY D84817, dated December 9, 1998, and NY D85291, dated December 24, 1998, are hereby MODIFIED as set forth above with respect to the classification of the musical candle holder and wax birthday candle sets described therein.

Sincerely,

Craig T. Clark,
Director
Commercial and Trade Facilitation Division

U.S. Court of Appeals for the Federal Circuit

VICENTIN S.A.I.C., OLEAGINOSA MORENO HERMANOS S.A., MOLINOS AGRO S.A., Plaintiffs LDC ARGENTINA S.A., Plaintiff-Appellant v. UNITED STATES, NATIONAL BIODIESEL BOARD FAIR TRADE COALITION, Defendants-Appellees

Appeal No. 2021–1988

Appeal from the United States Court of International Trade in Nos. 1:18-cv-00111-CRK, 1:18-cv-00119-CRK, Judge Claire R. Kelly.

Decided: August 2, 2022

GREGORY J. SPAK, White & Case LLP, Washington, DC, argued for plaintiff-appellant. Also represented by JESSICA LYND.

JOSHUA E. KURLAND, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for defendant-appellee United States. Also represented by BRIAN M. BOYNTON, PATRICIA M. MCCARTHY, LOREN MISHA PREHEIM.

MYLES SAMUEL GETLAN, Cassidy Levy Kent USA LLP, Washington, DC, argued for defendant-appellee National Biodiesel Board Fair Trade Coalition. Also represented by THOMAS M. BELINE, CHASE DUNN, JACK ALAN LEVY, JAMES EDWARD RANSDELL, IV.

Before MOORE, *Chief Judge*, TARANTO and HUGHES, *Circuit Judges*.

HUGHES, *Circuit Judge*.

This is an appeal from an antidumping investigation of biodiesel from Argentina. Appellant LDC Argentina S.A. challenges two calculations Commerce used to determine antidumping duties: export price and constructed value of the subject biodiesel.

Certain renewable fuels, such as the biodiesel at issue here, are entitled to tradeable tax credits. In calculating export price, Commerce subtracted the value of these tradeable credits, calling the credits “price adjustments” under 19 C.F.R. § 351.401(c). Because the credits fall within the regulatory definition of a “price adjustment” and substantial evidence supports the value Commerce used for the credits, we affirm Commerce’s export price calculation.

Calculating constructed normal value of biodiesel in Argentina, Commerce used an international market price for soybeans, the primary input into biodiesel, because the price of soybeans in Argentina is subsidized. Commerce also addressed the same soybean subsidy through countervailing duties. LDC argues that correcting for the soybean subsidy in the export price creates an improper double remedy. But Commerce demonstrated with substantial evidence that its constructed value calculation does not result in a double remedy. We affirm the constructed value.

BACKGROUND

The National Biodiesel Board Fair Trade Coalition and its members submitted an antidumping petition alleging that biodiesel from Argentina was sold at less-than-fair value into the United States. Commerce initiated an antidumping investigation and selected Vicentin S.A.I.C. and LDC Argentina S.A. as mandatory respondents. Decision Memorandum for the Preliminary Determination in the Less-Than-Fair-Value Investigation of Biodiesel from Argentina at 3, 82 ITADOC 50391 (Oct. 19, 2017) (*Preliminary Results Memo*).

In an antidumping investigation, Commerce determines whether the subject merchandise was sold at less than fair value by subtracting the "export price," the price at which the subject merchandise was first sold to a purchaser in the United States, from the "normal value," which is the price of identical or similar merchandise sold outside the United States. 19 U.S.C. §§ 1677(35), 1677a(a), 1677b(a). The difference between the two is the dumping margin, and Commerce imposes antidumping duties in an amount equal to the dumping margin. 19 U.S.C. §§ 1673, 1677(35)(A). In this appeal, LDC challenges Commerce's determination of both the export price and the normal value.

I

The U.S. Environmental Protection Agency (EPA) incentivizes the use of renewable fuels by requiring certain entities, including United States gasoline and diesel fuel producers and importers, to meet an annual "renewable volume obligation." *Preliminary Results Memo* at 28–29. Entities show compliance with their renewable volume obligation by submitting to the EPA Renewable Identification Numbers (RINs) equaling the number of gallons in their renewable volume obligations. *Id*. RINs are tradeable credits created by the importation and domestic production of renewable fuels. RINs are "attached" to biodiesel at the time of importation, and importers can later sell them as "detached" or "separated" RINs.

When calculating export price, 19 C.F.R. § 351.401(c) directs Commerce to "use a price that is net of price adjustments, as defined in section 351.102(b), that are reasonably attributable to the subject merchandise." Commerce considered the value of RINs generated by the importation of the subject biodiesel to be a "price adjustment" and so subtracted the value of the RINs from the export price. Final Results of Redetermination Pursuant to Ct. Remand at 1–2, 14–15

(*First Remand Results*), *Vicentin S.A.I.C. v. United States*, 404 F. Supp. 3d 1323 (Ct. Int'l Trade 2019) (No. 18–00111) (*Vicentin I*), ECF No. 79–1.[1] Commerce explained that the value of RINs is a "price adjustment" as defined in 19 C.F.R. § 351.102(b)(38) because "the invoice price does not reflect the true 'starting price' of biodiesel or 'price at which the *subject merchandise* is first sold' because it includes a RIN value." *Id*. at 10.

In support of its finding that the invoice price includes the value of RINs, Commerce cited a statement by LDC's U.S. affiliate that "the price of [biodiesel] is comprised of the cost of biodiesel . . . plus a RIN value" and that "buyers are cognizant of the value of RINs associated with a sale and likely factor [the value of RINs] in when negotiating a price." *Id*. at 12. Commerce also relied on an ITC report showing that biodiesel with RINs attached costs much more than biodiesel without RINs. *Id*. at 11–12. So the RINs value "must be accounted for to arrive at the net price actually paid by the customer for the merchandise under investigation." *Id*. at 11.

For the value of RINs attached to the imported biodiesel, Commerce used the "daily spot prices" of separated RINs as reported by LDC and other parties. *Id*. at 38. Commerce relied on the statements of exporters in related ITC proceedings that "if a given RIN has a value of $0.75, it would *add* $0.75 to a gallon [of] biodiesel . . . [and] industry participants assume that a gallon of RINless [biodiesel] should be $0.75 per gallon less expensive than a gallon of [biodiesel] with . . . RINs attached." *Id*. at 13–14.

The Court of International Trade sustained Commerce's decision to subtract the value of RINs from export price. *Vicentin S.A.I.C. v. United States*, 466 F. Supp. 3d 1227, 1233–37, 1239–42. (Ct. Int'l Trade 2020) (*Vicentin II*).

II

Calculating the normal value of the subject biodiesel, Commerce determined that "domestic biodiesel sales prices are established by the [Argentinian] government and are not based on competitive market conditions." Issues and Decision Memorandum for the Final Affirmative Determination in the Antidumping Duty Investigation of Biodiesel from Argentina at 16, 83 ITADOC 8837 (Feb. 20, 2018) (*Final Results Memo*). Without a viable sales price in Argentina, Commerce based the normal value on a constructed value calculation

[1] At first, Commerce added the value of RINs to normal value. Issues and Decision Memorandum for the Final Affirmative Determination in the Antidumping Duty Investigation of Biodiesel from Argentina at 12, 83 ITADOC 8837 (Feb. 20, 2018) (*Final Results Memo*). On remand, it adjusted the export price instead. *First Remand Results* at 2.

pursuant to 19 U.S.C. § 1677b(a)(4). *Id.* Constructed value includes "the cost of materials . . . employed in producing the merchandise, during a period which would ordinarily permit the production of the merchandise in the ordinary course of trade." 19 U.S.C. § 1677b(e)(1). But under the recent Trade Preferences Extension Act of 2015, "if a particular market situation exists such that the cost of materials and fabrication or other processing of any kind does not accurately reflect the cost of production in the ordinary course of trade," then Commerce "may use . . . any other calculation methodology" for the cost of materials. Trade Preferences Extension Act of 2015 § 504, 19 U.S.C. § 1677b(e).

Soybeans are the primary input into biodiesel. National Biodiesel argued "that Argentina levies high export taxes on feedstock, [including soybeans,] which has the effect of lowering the feedstock cost domestically." Appx11979 (internal quotation marks omitted). In a parallel countervailing duty investigation, Commerce found that the same export tax regime was a countervailable subsidy for sales of soybean-based products. Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Biodiesel from the Republic of Argentina at 13, 16–29, 82 ITADOC 53477 (Nov. 6, 2017).

In this antidumping investigation, National Biodiesel alleged that the soybean subsidy creates a particular market situation affecting respondents' reported costs of soybeans. Commerce agreed. Using "any other methodology" under 19 U.S.C. § 1677b(e), Commerce disregarded the respondents' actual reported soybean costs in favor of an international market price.

Respondents appealed Commerce's final antidumping determination to the Court of International Trade, arguing that Commerce could not reasonably adjust the cost of soybeans to account for the soybean subsidy because Commerce had offset the same program as a countervailable subsidy in the parallel investigation. *Vicentin I*, 404 F. Supp. 3d at 1334. The Court of International Trade twice remanded for Commerce to explain why it made the particular market situation adjustment for the soybean subsidy if the parallel countervailing duty investigation addressed the same program. *Id.* at 1340–43; *Vicentin II*, 466 F. Supp. 3d at 1242–45. Commerce maintained that it was not required to "measure or alleviate any double remedy" when relying on 19 U.S.C. § 1677b(e). Final Results of Redetermination Pursuant to Ct. Remand at 16, *Vicentin II*, 466 F. Supp. 3d. 1227 (No. 18–00111), ECF No. 108–1 (*Second Remand Results*).

Under protest, Commerce also determined that using the international soybean price did not create a double remedy. It borrowed the "pass-through" analysis from 19 U.S.C. § 1677f-1(f)(1), a provision meant to mitigate double remedies arising from parallel antidumping and countervailing duty proceedings in nonmarket economies. *Second Remand Results* at 9.

Commerce found that the effect of the soybean subsidy was not "passed through" to lower the biodiesel export price because the "record demonstrates overwhelmingly that the respondents price their U.S. sales by reference to U.S. market prices, either for conventional 'petro-diesel' or soybean oil." *Id.* at 10. LDC admitted that it "signed contracts with the customers, agreeing to provide B99 biodiesel that was *generally priced based on New York Mercantile Exchange (NYMEX) heating oil* futures prices plus some specified premium" when selling to U.S. companies. *Id.* Officials at Vicentin likewise "explained that the company may sell biodiesel at a flat price or based on a Chicago Board of Trade (CBOT) futures price, plus or minus a premium." *Id.* at 11. Documentary evidence of both respondents' sales confirmed this narrative. *Id.*

Commerce also cited an ITC finding that "biodiesel prices have been influenced by the price of petroleum-based diesel fuel, adjusted for government incentives supporting renewable fuels, *rather than biomass based diesel production costs.*" *Id.* (quoting Biodiesel from Argentina and Indonesia, Investigation Nos. 701-TA-571–572 and 731-TA-1347–1348 (Preliminary) at VI-7, U.S. ITC Publication 4690 (May 2017)). Commerce explained that the same ITC report "demonstrates a lack of correspondence between the subsidy at issue and Argentine prices." *Id.* Argentinian biodiesel dropped in price from 2014 to 2015 and partially rebounded in 2016. *Id.* at 11–12. During the same period, the export tax on Argentinian soybeans fell. *Id.* at 12. But rather than increasing to reflect the changing subsidy, the price for Argentinian biodiesel followed the same pattern as the price of biodiesel from Canada and Indonesia, as well as overall United States prices. *Id.*

Having found that the soybean subsidy was not linked to the export price, Commerce concluded that its use of the international soybean prices did not lead to any double remedy, explaining that "as both sides of the [less-than-fair-value] equation in this instance are unaffected by the export tax on soybeans, the differential between U.S. prices and normal value (*i.e.*, the dumping margin) is not partially the result of the subsidy, and thus the [particular market situation] adjustment to fair value does not remedy the subsidy." *Id.*

The Court of International Trade affirmed Commerce's finding that the soybean subsidy is not passed through to export prices and affirmed Commerce's reasoning that the pass-through analysis showed that Commerce did not provide a double remedy. *Vicentin S.A.I.C. v. United States*, 503 F. Supp. 3d 1255, 1261–68 (Ct. Int'l Trade 2021) (*Vicentin III*). It thus permitted Commerce to rely on international soybean prices under the particular market situation provision of 19 U.S.C. § 1677b(e).

LDC appeals Commerce's treatment of RINs as a price adjustment and its use of international soybean prices to correct for the soybean subsidy. We have jurisdiction under 28 U.S.C. § 1295(a)(5).

ANALYSIS

"We review a decision of the Court of International Trade evaluating an antidumping determination by Commerce by reapplying the statutory standard of review. . . . We will uphold Commerce's determination unless it is unsupported by substantial evidence on the record or otherwise not in accordance with the law." *Peer Bearing Co.-Changshan v. United States*, 766 F.3d 1396, 1399 (Fed. Cir. 2014) (citation omitted); 19 U.S.C. § 1516a(b)(1)(B)(i).

I

LDC challenges Commerce's legal authority to subtract the value of RINs from the export price as a "price adjustment" under 19 C.F.R. § 351.401(c). LDC also argues that substantial evidence does not support Commerce's finding that it could use the value of separated RINs on the spot market as a proxy for the value of attached RINs.

A

Commerce's calculation accords with the statute. Commerce found that the invoice price does not reflect the "price at which the *subject merchandise* is first sold," as required by 19 U.S.C. § 1677a(a) "because [the invoice price] includes a RIN value." *First Remand Results* at 10. Further, as Commerce explained, subtracting the value of the RINs to isolate the price paid for biodiesel alone effects the overall statutory scheme for the less-than-fair-value comparison, which "seeks to produce a fair 'apples-to-apples' comparison between" the normal value and export price. *Id.* at 4 (quoting *Torrington Co. v. United States*, 68 F.3d 1347, 1352 (Fed. Cir. 1995)).

LDC argues that Commerce's treatment of the RINs conflicts with the statute. LDC relies on our holding in *AK Steel Corp. v. United States* defining "sold" under 19 U.S.C. § 1677a(a)–(b) "to require both a 'transfer of ownership to an unrelated party and consideration.'" *AK Steel Corp. v. United States*, 226 F.3d 1361, 1371 (Fed. Cir. 2000) (quoting *NSK Ltd. v. United States*, 115 F.3d 965, 975 (Fed. Cir. 1997)). LDC contends that these attributes of a sale "indicate that the 'first sold' price is a price that was discussed and agreed upon between the parties to the sale." Appellant's Br. 25. But transfer of ownership and consideration show whether and between whom a sale has occurred. *See AK Steel*, 226 F.3d at 1371 (relying on the definition for this purpose). The definition in *AK Steel* does not bear on the price for that sale.

Turning to the language of the regulation, 19 C.F.R. § 351.401(c) provides: "In calculating export price, . . . the Secretary normally will use a price that is net of price adjustments, as defined in § 351.102(b), that are reasonably attributable to the subject merchandise . . . ." Section 351.102(b)(38) defines "price adjustment" as "a change in the price charged for subject merchandise or the foreign like product, such as a discount, rebate, or other adjustment, including, under certain circumstances, a change that is made after the time of sale . . . , that is reflected in the purchaser's net outlay." The two phrases "such as" and "or other adjustment" convey that the definition is not limited to discounts and rebates. *See also* Modification of Regulations Regarding Price Adjustments in Antidumping Duty Proceedings, 81 Fed. Reg. 15,641, 15,644 (Mar. 24, 2016) (amending the definition "to clarify that a price adjustment is not just limited to discounts or rebates, but encompasses other adjustments as well"). Overall, the regulations direct Commerce to use the purchaser's "net outlay," or "net price actually paid" for the subject merchandise, rather than any invoice price that does not account for discounts, rebates, and other adjustments. *See* 19 C.F.R. § 351.102(b)(38); Antidumping Duties; Countervailing Duties; 62 Fed. Reg. 27,296, 27,344 (May 19, 1997) ("[P]rice adjustments include such things as discounts and rebates that do not constitute part of the net price actually paid by a customer.").

LDC contends that the regulation requires "(1) a starting price actually paid by a customer and (2) an adjusted price agreed between the buyer and seller." Appellant's Br. 33. We see no requirement that an unadjusted starting price be a price "actually paid." To the contrary, a discount applied before payment is still a discount. We also see no requirement that the buyer and seller expressly state or negotiate an adjusted price. The example of a manufacturer's rebate is illustrative. A manufacturer could sell its product to an importer through a distributor and pay a rebate directly to the importer. There would be no need for the distributor and importer to agree on what the price would have been without the rebate. Because rebates are a type of "price adjustment" contemplated by 19 C.F.R. § 351.02(b)(38), Commerce would subtract the value of the manufacturer's rebate and use for its export price the importer's "net outlay" after the rebate. RINs from the sale of biodiesel into the United States are similar. The importer receives a fungible credit affecting its "net outlay" for the biodiesel, and the importer and exporter do not expressly negotiate what the price would have been without the credit. Given the similarities between RINs and rebates, the non-limiting language of the regulation, and the fact that Commerce's calculation effects the overall statutory scheme, the regulation unambiguously permits Commerce to subtract the RINs values.[2]

We agree with Commerce that 19 C.F.R. §§ 351.401(c) and 351.102(b)(38) allow it to subtract the value of RINs from export price as a "price adjustment."

B

LDC next argues that the value Commerce used for the RINs is not supported by substantial evidence because Commerce used "the value of separated-RINs, which are different from attached-RINs or the RINs-eligibility of biodiesel" and "none of the RIN values used in the price adjustment were actually connected to those individual transactions that make up the record." Appellant's Br. 37. In other words, "[t]here is no record evidence that the buyer in LDC's actual transactions investigated by Commerce assigned the same value to the RIN-generating value of LDC's biodiesel as a buyer that needed RINs would pay for separated-RINs on the spot market." *Id.* at 38.

But Commerce did cite evidence that the value of separated RINs on the spot market is an accurate estimate of the value of attached RINs. Commerce cited the statements of exporters in related ITC proceedings that "if a given RIN has a value of $0.75, it would *add* $0.75 to a gallon [of] biodiesel . . . [and] industry participants assume that a gallon of RINless [biodiesel] should be $0.75 per gallon less expensive than a gallon of [biodiesel] with . . . RINs attached." *First Remand Results* at 13–14. This statement, which LDC does not ac-

[2] LDC contends that Commerce's broad interpretation of 19 C.F.R. §§ 351.401(c) and 351.102(b)(38) departs from its "longstanding interpretation of 'price adjustment'" that the adjustment be "one that actually existed in the transaction as agreed upon between the parties and changed the price from a starting price to an adjusted price." Appellant's Br. 35. Commerce's interpretation creates "unfair surprise," LDC argues, and thus we should not defer to it. Appellant's Br. 34–35 (citing *Kisor v. Wilkie*, 139 S. Ct. 2400, 2418 (2019)). Because we hold that the regulation unambiguously permits Commerce to subtract the RINs values, we do not reach this argument regarding deference. In any event, Commerce previously indicated that it believes the regulation to be broad and non-limiting. *E.g.*, Modification of Regulations Regarding Price Adjustments in Antidumping Duty Proceedings, 81 Fed. Reg. at 15,644. LDC offers scant support for its contrary characterization of Commerce's "longstanding interpretation." It provides examples and cases relating to Commerce's "practice . . . to add circumstances of sale adjustment in the U.S. market to constructed value or to deduct them from constructed export price," as an alternative to using the price adjustment regulations. Appellant's Br. 29–31. But these authorities do not show any prior conflicting interpretation of the price adjustment regulation Commerce relied on here.

knowledge in its briefing, provides substantial evidence to support Commerce's use of the separated RINs price.

II

Turning to Commerce's constructed normal value calculation, LDC challenges Commerce's interpretation of the particular market situation provision of 19 U.S.C. § 1677b(e). LDC argues that Commerce unreasonably interpreted the provision to "permit[] it to adjust allegedly distortive production costs when Commerce has already imposed a countervailing duty." Appellant's Br. 40. LDC argues that this interpretation is unreasonable because it creates a double remedy. Commerce argues that its reliance on 19 U.S.C. § 1677b(e) here is lawful because it found that the soybean subsidy is not passed through to the export price and therefore Commerce correcting for the soybean subsidy in the constructed value calculation did not create any double remedy. LDC responds that this finding is unsupported by substantial evidence.

A

The antidumping and countervailing duty laws remedy different practices. The countervailing duty statute broadly addresses market distortions caused by foreign government subsidization, while the antidumping statute focuses on whether a domestic industry is being injured by foreign producers or exporters selling imported merchandise at "less than its fair value." *Compare* 19 U.S.C. § 1671(a), *with* 19 U.S.C. § 1673(1).

To avoid antidumping duties, exporters must sell their merchandise at or above the "fair value," which is the normal value as defined in 19 U.S.C. § 1677b. The normal value is the price for merchandise identical or similar to the subject merchandise and sold outside the United States. 19 U.S.C. §§ 1677b(a)(1), 1677(16). Critically, the normal value is the price "in the ordinary course of trade." 19 U.S.C. §§ 1677b(a)(1)(B)(i), (a)(1)(C)(iii), (b)(1), (f)(2),1677(15)(A)–(C) (requiring Commerce to disregard sales outside the ordinary course of trade). And if Commerce cannot determine the normal value using prices in the exporting country, Commerce may approximate the normal value with a "constructed" normal value. 19 U.S.C. § 1677b(a)(4).Commerce calculates the constructed value under 19 U.S.C. § 1677b(e) by summing the costs of production and selling, general and administrative expenses, and profits.

A particular market situation that reduces a respondent's costs below the costs in the ordinary course of trade tends to make Commerce's calculation of the constructed normal value an underestimate of the normal value in the ordinary course of trade. This underestimate is an issue if a respondent does not pass its reduced costs through as reduced prices of the exported merchandise. Under these circumstances, the particular market situation would decrease the constructed normal value but not the export price. If Commerce used the underestimated constructed normal value, then the dumping margin would shrink, and Commerce would not remedy dumping to the full extent permitted by the antidumping laws.

The particular market situation provision of 19 U.S.C.§ 1677b(e) authorizes Commerce to correct such a distortion. If Commerce finds a particular market situation that reduces a respondent's cost of an input below the cost in the ordinary course of trade, then Commerce may use a different measure of the cost. If the respondent does not pass the reduced cost through to the price of its exported merchandise, then Commerce may instead use the cost as it would be in the ordinary course of trade, i.e., as it would be without the particular market situation. The result is a constructed value that is an appropriate estimate of the normal value and that can be fairly compared with the export price without the particular market situation impacting either value. Making this correction allows Commerce to remedy dumping to the full extent of the law.

That is exactly what Commerce did here. Commerce found a particular market situation that reduced LDC's soybean costs.[3] Finding that LDC had not passed the reduced soybean price through to the price of biodiesel exported to the United States, Commerce chose to adjust the constructed value upward to match the value in the ordinary course of trade, using the clear statutory authority of 19 U.S.C. § 1677b(e). As a result of its particular market situation adjustment, Commerce arrived at a constructed value that approximates normal value based on sales of biodiesel in the ordinary course of trade. And use of this constructed value resulted in an adequate remedy for dumping, which is not duplicative of the countervailing duty remedy.

Framed another way, Commerce has relied on an international market price for soybeans in place of the Argentinian cost. Because of this adjustment, the soybean subsidy did not affect the constructed normal value of biodiesel. Commerce found that the respondents did not pass the soybean subsidy through to biodiesel exported to the United States, and therefore the subsidy did not affect the export price of biodiesel either. These two facts support Commerce's inference that "no portion of the [less-than-fair-value] differential can be

[3] LDC does not challenge the notion that an export tax that reduces the price of an input may be a "particular market situation" in general, only that Commerce should not correct for such a regime under 19 U.S.C. § 1677b(e) if Commerce has imposed countervailing duties to address the regime.

attributed to the subsidy," *Second Remand Results* at 9, and therefore, the antidumping duty did not provide a remedy duplicative of the countervailing duty.

B

Commerce found that the respondents did not pass the soybean subsidy through to the export price because exporters do not set the biodiesel price based on the cost of soybeans. LDC argues that Commerce departed from its usual practice in nonmarket economy investigations of collecting direct evidence of a subsidies-to-cost link and cost-to-price link through a questionnaire it sends to producers and exporters, and that as a result its finding is unsupported by substantial evidence. Even assuming LDC exhausted administrative remedies for this challenge, Commerce's method of gathering information does not alone undermine the substantiality of the evidence supporting its conclusion. Although a questionnaire might be the easiest way for Commerce to gather the evidence required, other methods and sources of evidence are not prohibited. *See Wheatland Tube Co. v. United States*, 26 F. Supp. 3d 1372, 1385 (Ct. Int'l Trade 2014). Commerce cited evidence that biodiesel export prices are set based on international prices for heating oil with a fixed premium, rather than based on volatile feedstock costs, and that the price of Argentinian biodiesel tracked prices from other countries rather than responding to changes in the Argentinian subsidy. This amounts to substantial evidence that "there is no significant link between the subsidy and U.S. prices." *Second Remand Results* at 12.

We affirm Commerce's finding that there is no risk of double counting in this case. We therefore need not address LDC's argument that the statute does not allow Commerce to make an adjustment that results in a double remedy or that creates a risk of a double remedy.

* * *

For these reasons, the judgment of the Court of International Trade is

AFFIRMED

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