U.S. Customs and Border Protection

6 CFR PART 27

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RIN 1601–AB07

CIVIL MONETARY PENALTY ADJUSTMENTS FOR INFLATION

AGENCY: Department of Homeland Security.

ACTION: Final rule.

SUMMARY: In this final rule, the Department of Homeland Security (DHS) makes the 2023 annual inflation adjustment to its civil monetary penalties. On November 2, 2015, the President signed into law The Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (the 2015 Act). Pursuant to the 2015 Act, all agencies must adjust their civil monetary penalties annually and publish the adjustment in the **Federal Register**. Accordingly, this final rule adjusts the Department's civil monetary penalties for 2023 pursuant to the 2015 Act and Executive Office of the President (EOP) Office of Management and Budget (OMB) guidance. The new penalties will be effective for penalties assessed after January 13, 2023 whose associated violations occurred after November 2, 2015.

DATES: This rule is effective on January 13, 2023.

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SUPPLEMENTARY INFORMATION:

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I. Statutory and Regulatory Background

On November 2, 2015, the President signed into law the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Pub. L. 114–74 section 701 (Nov. 2, 2015)) (2015 Act).[1] The 2015 Act amended the Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. 2461 note) to improve the effectiveness of civil monetary penalties and to maintain their deterrent effect. The 2015 Act required agencies to: (1) Adjust the level of civil monetary penalties with an initial "catch-up" adjustment through issuance of an interim final rule (IFR) and (2) make subsequent annual adjustments for inflation. Through the "catch-up" adjustment, agencies were required to adjust the maximum amounts of civil monetary penalties to more accurately reflect inflation rates.

For the subsequent annual adjustments, the 2015 Act requires agencies to increase the penalty amounts by a cost-of-living adjustment. The 2015 Act directs OMB to provide guidance to agencies each year to assist agencies in making the annual adjustments. The 2015 Act requires agencies to make the annual adjustments no later than

[1] The 2015 Act was part of the Bipartisan Budget Act of 2015, Public Law 114–74 (Nov. 2, 2015).

January 15 of each year and to publish the adjustments in the **Federal Register**.

Pursuant to the 2015 Act, DHS undertook a review of the civil penalties that DHS and its components administer.[2] On July 1, 2016, DHS published an IFR adjusting the maximum civil monetary penalties with an initial "catch-up" adjustment, as required by the 2015 Act.[3] DHS calculated the adjusted penalties based upon nondiscretionary provisions in the 2015 Act and upon guidance that OMB issued to agencies on February 24, 2016.[4] The adjusted penalties were effective for civil penalties assessed after August 1, 2016 (the effective date of the IFR), whose associated violations occurred after November 2, 2015 (the date of enactment of the 2015 Act). On January 27, 2017, DHS published a final rule making the annual adjustment for 2017.[5] On April 2, 2018, DHS made the 2018 annual inflation adjustment.[6] On April 5, 2019, DHS made the 2019 annual inflation adjustment.[7] On June 17, 2020, DHS made the 2020 annual inflation adjustment.[8] On October 18, 2021, DHS made the 2021 annual inflation adjustment.[9] On January 11, 2022, DHS made the 2022 annual inflation adjustment.[10]

II. Overview of the Final Rule

This final rule makes the 2023 annual inflation adjustments to civil monetary penalties pursuant to the 2015 Act and pursuant to guidance OMB issued to agencies on December 15, 2022.[11] The penalty

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[2] The 2015 Act applies to all agency civil penalties except for any penalty (including any addition to tax and additional amount) under the Internal Revenue Code of 1986 (26 U.S.C. 1 *et seq.*) and the Tariff Act of 1930 (19 U.S.C. 1202 *et seq.*). *See* sec. 4(a)(1) of the 2015 Act. In the case of DHS, several civil penalties that are assessed by U.S. Customs and Border Protection (CBP) and the U.S. Coast Guard (USCG) fall under the Tariff Act of 1930, and therefore DHS did not adjust those civil penalties in this rulemaking.

[3] 81 FR 42987.

[4] Office of Mgmt. & Budget, Exec. Office of The President, M–16–06, Implementation of the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, Table A: 2016 Civil Monetary Penalty Catch-Up Adjustment Multiplier by Calendar Year, (Feb. 24, 2016) (*https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2016/m-16–06.pdf*).

[5] 82 FR 8571.

[6] 83 FR 13826.

[7] 84 FR 13499.

[8] 85 FR 36469.

[9] 86 FR 57532.

[10] 87 FR 1317.

[11] Office of Mgmt. and Budget, Exec. Office of the President, M–23–05, Implementation of Penalty Inflation Adjustments for 2023, Pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Dec. 15, 2022) (*https://www.whitehouse.gov/wp-content/uploads/2022/12/M-23-05-CMP-CMP-Guidance.pdf*).

amounts in this final rule will be effective for penalties assessed after January 13, 2023 where the associated violation occurred after November 2, 2015. Consistent with OMB guidance, the 2015 Act does not change previously assessed penalties that the agency is actively collecting or has collected.

The adjusted penalty amounts will apply to penalties assessed after the effective date of this final rule. We discuss civil penalties by DHS component in Section III below. For each component identified in Section III, below, we briefly describe the relevant civil penalty (or penalties), and we provide a table showing the increase in the penalties for 2023. In the table for each component, we show (1) the penalty name, (2) the penalty statutory and or regulatory citation, (3) the penalty amount as adjusted in the 2022 final rule, (4) the cost-of-living adjustment multiplier for 2023 that OMB provided in its December 15, 2022, guidance, and (5) the new 2023 adjusted penalty. The 2015 Act instructs agencies to round penalties to the nearest $1. For a more complete discussion of the method used for calculating the initial "catch-up" inflation adjustments and a component-by-component breakdown to the nature of the civil penalties and relevant legal authorities, please see the IFR preamble at 81 FR 42987–43000.

III. Adjustments by Component

In the following sections, we briefly describe the civil penalties that DHS and its components, the Cybersecurity and Infrastructure Security Agency (CISA), the U.S. Customs and Border Protection (CBP), the U.S. Immigration and Customs Enforcement (ICE), the U.S. Coast Guard (USCG), and the Transportation Security Administration (TSA), assess. Other components not mentioned do not impose any civil monetary penalties for 2023. We include tables at the end of each section, which list the individual adjustments for each penalty.

A. Cybersecurity and Infrastructure Security Agency

The Cybersecurity and Infrastructure Security Agency (CISA) administers only one civil penalty that the 2015 Act affects. That penalty assesses fines for violations of the Chemical Facility Anti-Terrorism Standards (CFATS). CFATS is a program that regulates the security of chemical facilities that, in the discretion of the Secretary, present high levels of security risk. DHS established the CFATS program in 2007 pursuant to section 550 of the Department of

Homeland Security Appropriations Act of 2007 (Pub. L. 109–295).[12] The CFATS regulation is located in part 27 of title 6 of the Code of Federal Regulations (CFR). Below is a table showing the 2023 adjustment for the CFATS penalty that CISA administers.

TABLE 1—CFATS CIVIL PENALTY ADJUSTMENT

Penalty name	Citation	Penalty amount as adjusted in the 2022 FR	Multiplier *	New penalty as adjusted by this final rule
Penalty for non-compliance with CFATS regulations.	6 U.S.C. 624(b)(1); 6 CFR 27.300(b)(3).	$38,139 per day.	1.07745	$41,093 per day.

* Office of Mgmt. and Budget, Exec. Office of the President, M–23–05, Implementation of Penalty Inflation Adjustments for 2023, Pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Dec. 15, 2022) (*https://www.whitehouse.gov/wp-content/uploads/2022/12/M-23-05-CMP-CMP-Guidance.pdf*).

B. U.S. Customs and Border Protection

The U.S. Customs and Border Protection (CBP) assesses civil monetary penalties under various titles of the United States Code (U.S.C.) and the CFR. These include penalties for certain violations of title 8 of the CFR regarding the Immigration and Nationality Act of 1952 (Pub. L. 82–414, as amended) (INA). The INA contains provisions that impose penalties on persons, including carriers and aliens, who violate specified provisions of the INA. The relevant penalty provisions appear in numerous sections of the INA; however, CBP has enumerated these penalties in regulation in one location—8 CFR 280.53. For a complete list of the INA sections for which penalties are assessed, in addition to a brief description of each violation, see the 2016 IFR preamble at 81 FR 42989–42990. For a complete list and brief description of the non-INA civil monetary penalties assessed by CBP subject to adjustment and a discussion of the history of the DHS and CBP adjustments to the non-INA penalties, see the 2019 annual inflation adjustment final rule preamble at 84 FR 13499, 13500 (April 5, 2019).

Below is a table showing the 2023 adjustment for the penalties that CBP administers.

[12] Section 550 has since been superseded by the Protecting and Securing Chemical Facilities from Terrorist Attacks Act of 2014 (Pub. L. 113–254). The new legislation codified the statutory authority for the CFATS program within Title XXI of the Homeland Security Act of 2002, as amended. *See* 6 U.S.C. 621 *et seq*. Public Law 113–254 authorized the CFATS program from January 18, 2015, to January 17, 2019. Public Law 116–150 extends the CFATS program authorization to July 27, 2023.

TABLE 2—U.S. CUSTOMS AND BORDER PROTECTION CIVIL PENALTIES ADJUSTMENTS

Penalty name	Citation	Penalty amount as adjusted in the 2022 FR	Multiplier *	New penalty as adjusted by this final rule
Penalties for noncompliance with arrival and departure manifest requirements for passengers, crewmembers, or occupants transported on commercial vessels or aircraft arriving to or departing from the United States.	8 U.S.C. 1221(g); 8 CFR 280.53(b)(1) (INA section 231(g)).	$1,525.....	1.07745	$1,643.
Penalties for noncompliance with landing requirements at designated ports of entry for aircraft transporting aliens.	8 U.S.C. 1224; 8 CFR 280.53(b)(2) (INA section 234).	$4,144.....	1.07745	$4,465.
Penalties for failure to depart voluntarily	8 U.S.C. 1229c(d); 8 CFR 280.53(b)(3) (INA section 240B(d)).	$1,746–$8,736....	1.07745	$1,881–$9,413.
Penalties for violations of removal orders relating to aliens transported on vessels or aircraft under section 241(d) of the INA, or for costs associated with removal under section 241(e) of the INA.	8 U.S.C. 1253(c)(1)(A); 8 CFR 280.53(b)(4) (INA section 243(c)(1)(A)).	$3,494.....	1.07745	$3,765.
Penalties for failure to remove alien stowaways under section 241(d)(2) of the INA.	8 U.S.C. 1253(c)(1)(B); 8 CFR 280.53(b)(5) (INA section 243(c)(1)(B)).	$8,736.....	1.07745	$9,413.
Penalties for failure to report an illegal landing or desertion of alien crewmen, and for each alien not reported on arrival or departure manifest or lists required in accordance with section 251 of the INA.	8 U.S.C. 1281(d); 8 CFR 280.53(b)(6) (INA section 251(d)).	$414 for each alien	1.07745	$446 for each alien.
Penalties for use of alien crewmen for longshore work in violation of section 251(d) of the INA.	8 U.S.C. 1281(d); 8 CFR 280.53(b)(6) (INA section 251(d)).	$10,360.....	1.07745	$11,162.

Penalty name	Citation	Penalty amount as adjusted in the 2022 FR	Multiplier *	New penalty as adjusted by this final rule
Penalties for failure to control, detain, or remove alien crewmen.	8 U.S.C. 1284(a); 8 CFR 280.53(b)(7) (INA section 254(a)).	$1,036–$6,215....	1.07745	$1,116–$6,696.
Penalties for employment on passenger vessels of aliens afflicted with certain disabilities.	8 U.S.C. 1285; 8 CFR 280.53(b)(8) (INA section 255).	$2,072.....	1.07745	$2,232.
Penalties for discharge of alien crewmen.	8 U.S.C. 1286; 8 CFR 280.53(b)(9) (INA section 256).	$3,107–$6,215....	1.07745	$3,348–$6,696.
Penalties for bringing into the United States alien crewmen with intent to evade immigration laws.	8 U.S.C. 1287; 8 CFR 280.53(b)(10) (INA section 257).	$20,719.....	1.07745	$22,324.
Penalties for failure to prevent the unauthorized landing of aliens.	8 U.S.C. 1321(a); 8 CFR 280.53(b)(11) (INA section 271(a)).	$6,215.....	1.07745	$6,696.
Penalties for bringing to the United States aliens subject to denial of admission on a health-related ground.	8 U.S.C. 1322(a); 8 CFR 280.53(b)(12) (INA section 272(a)).	$6,215.....	1.07745	$6,696.
Penalties for bringing to the United States aliens without required documentation.	8 U.S.C. 1323(b); 8 CFR 280.53(b)(13) (INA section 273(b)).	$6,215.....	1.07745	$6,696.
Penalties for failure to depart	8 U.S.C. 1324d; 8 CFR 280.53(b)(14) (INA section 274D).	$874.....	1.07745	$942.
Penalties for improper entry	8 U.S.C. 1325(b); 8 CFR 280.53(b)(15) (INA section 275(b)).	$87–$438.....	1.07745	$94–$472.
Penalty for dealing in or using empty stamped imported liquor containers.	19 U.S.C. 469	$580.....	1.07745	** $625.
Penalty for employing a vessel in a trade without a required Certificate of Documentation.	19 U.S.C. 1706a; 19 CFR 4.80(i).	$1,453.....	1.07745	$1,566.

Penalty name	Citation	Penalty amount as adjusted in the 2022 FR	Multiplier *	New penalty as adjusted by this final rule
Penalty for transporting passengers coastwise for hire by certain vessels (known as Bowaters vessels) that do not meet specified conditions.	46 U.S.C. 12118(f)(3).....	$580.....	1.07745	** $625.
Penalty for transporting passengers between coastwise points in the United States by a non-coastwise qualified vessel.	46 U.S.C. 55103(b); 19 CFR 4.80(b)(2).	$873.....	1.07745	$941.
Penalty for towing a vessel between coastwise points in the United States by a non-coastwise qualified vessel.	46 U.S.C. 55111(c); 19 CFR 4.92.	$1,017–$3,198, plus $174 per ton.	1.07745	$1,096–$3,446 plus $187 per ton.

* Office of Mgmt. and Budget, Exec. Office of the President, M–23–05, Implementation of Penalty Inflation Adjustments for 2023, Pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Dec. 15, 2022) (*https://www.whitehouse.gov/wp-content/uploads/2022/12/M-23-05-CMP-CMP-Guidance.pdf*).
** No applicable conforming edit to regulatory text.

C. U.S. Immigration and Customs Enforcement

U.S. Immigration and Customs Enforcement (ICE) assesses civil monetary penalties for certain employment-related violations arising from the INA. ICE's civil penalties are located in title 8 of the CFR.

There are three different sections in the INA that impose civil monetary penalties for violations of the laws that relate to employment actions: Sections 274A, 274B, and 274C. ICE has primary enforcement responsibilities for two of these civil penalty provisions (sections 274A and 274C), and the Department of Justice (DOJ) has enforcement responsibilities for one of these civil penalty provisions (section 274B). The INA, in sections 274A and 274C, provides for imposition of civil penalties for various specified unlawful acts pertaining to the employment eligibility verification process (Form I–9, Employment Eligibility Verification), the employment of unauthorized aliens, and document fraud.

Because both DHS and DOJ implement the three employment-related penalty sections in the INA, both Departments' implementing regulations reflect the civil penalty amounts. For a complete description of the civil money penalties assessed and a discussion of DHS's and DOJ's efforts to update the penalties in years past, see the IFR

preamble at 81 FR 42991. Below is a table showing the 2023 adjustment for the penalties that ICE administers.[13]

TABLE 3—U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT CIVIL PENALTIES ADJUSTMENTS

Penalty name	Citation	Penalty amount as adjusted in the 2022 FR	Multiplier *	New penalty as adjusted by this final rule
Civil penalties for failure to depart voluntarily, INA section 240B(d).	8 U.S.C. 1229c(d); 8 CFR 280.53(b)(3).	$1,746–$8,736	1.07745	$1,881–$9,413.
Civil penalties for violation of INA sections 274C(a)(1)–(a)(4), penalty for first offense.	8 CFR 270.3(b)(1)(ii)(A)	$517–$4,144	1.07745	$557–$4,465.
Civil penalties for violation of INA sections 274C(a)(5)–(a)(6), penalty for first offense.	8 CFR 270.3(b)(1)(ii)(B)	$438–$3,494	1.07745	$472–$3,765.
Civil penalties for violation of INA sections 274C(a)(1)–(a)(4), penalty for subsequent offenses.	8 CFR 270.3(b)(1)(ii)(C)	$4,144–$10,360	1.07745	$4,465–$11,162.
Civil penalties for violation of INA sections 274C(a)(5)–(a)(6), penalty for subsequent offenses.	8 CFR 270.3(b)(1)(ii)(D)	$3,494–$8,736	1.07745	$3,765–$9,413.
Violation/prohibition of indemnity bonds	8 CFR 274a.8(b)	$2,507	1.07745	$2,701.
Civil penalties for knowingly hiring, recruiting, referral, or retention of unauthorized aliens—Penalty for first offense (per unauthorized alien).	8 CFR 274a.10(b)(1)(ii)(A)	$627–$5,016	1.07745	$676–$5,404.
Penalty for second offense (per unauthorized alien).	8 CFR 274a.10(b)(1)(ii)(B)	$5,016–$12,537	1.07745	$5,404–$13,508.

[13] Table 3 also includes two civil penalties that are also listed as penalties administered by CBP. These are penalties for failure to depart voluntarily, INA section 240B(d), and failure to depart after a final order of removal, INA section 274D. Both CBP and ICE may administer these penalties, but as ICE is the DHS component primarily responsible for assessing and collecting them, they are also listed among the penalties ICE administers.

Penalty name	Citation	Penalty amount as adjusted in the 2022 FR	Multiplier *	New penalty as adjusted by this final rule
Penalty for third or subsequent offense (per unauthorized alien).	8 CFR 274a.10(b)(1)(ii)(C) ..	$7,523–$25,076	1.07745	$8,106–$27,018.
Civil penalties for I–9 paperwork violations.	8 CFR 274a.10(b)(2).	$252–$2,507	1.07745	$272–$2,701.
Civil penalties for failure to depart, INA section 274D.	8 U.S.C. 1324d; 8 CFR 280.53(b)(14). ..	$874	1.07745	$942.

* Office of Mgmt. and Budget, Exec. Office of the President, M–23–05, Implementation of Penalty Inflation Adjustments for 2023, Pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Dec. 15, 2022) (*https://www.whitehouse.gov/wp-content/uploads/2022/12/M-23-05-CMP-CMP-Guidance.pdf*).

D. U.S. Coast Guard

The Coast Guard is authorized to assess 140 penalties involving maritime safety and security and environmental stewardship that are critical to the continued success of Coast Guard missions. Various statutes in titles 14, 16, 19, 33, 42, 46, and 49 of the U.S.C. authorize these penalties. Titles 33 and 46 authorize the vast majority of these penalties as these statutes deal with navigation, navigable waters, and shipping. For a complete discussion of the civil monetary penalties assessed by the Coast Guard, see the 2016 IFR preamble at 81 FR 42992.

The Coast Guard has identified the penalties it administers, adjusted those penalties for inflation, and is listing those new penalties in a table located in the CFR—specifically, Table 1 in 33 CFR 27.3. Table 1 in 33 CFR 27.3 identifies the statutes that provide the Coast Guard with civil monetary penalty authority and sets out the inflation-adjusted maximum penalty that the Coast Guard may impose pursuant to each statutory provision. Table 1 in 33 CFR 27.3 provides the current maximum penalty for violations that occurred after November 2, 2015.

The applicable civil penalty amounts for violations occurring on or before November 2, 2015, are set forth in previously published regulations amending 33 CFR part 27. To find the applicable penalty amount for a violation that occurred on or before November 2, 2015, look to the prior versions of the CFR that pertain to the date on which the violation occurred.

Table 4 below shows the 2023 adjustment for the penalties that the Coast Guard administers.

TABLE 4—U.S. COAST GUARD CIVIL PENALTIES ADJUSTMENTS

Penalty name	Citation	Penalty amount as adjusted in the 2022 FR	Multiplier *	New penalty as adjusted by this final rule
Saving Life and Property.....	14 U.S.C. 521(c)	$11,649	1.07745	$12,551
Saving Life and Property; Intentional Interference with Broadcast.....	14 U.S.C. 521(e)	1,195	1.07745	1,288
Confidentiality of Medical Quality Assurance Records (first offense).....	14 U.S.C. 936(i); 33 CFR 27.3	5,851	1.07745	6,304
Confidentiality of Medical Quality Assurance Records (subsequent offenses).....	14 U.S.C. 936(i); 33 CFR 27.3	39,011	1.07745	42,032
Obstruction of Revenue Officers by Masters of Vessels	19 U.S.C. 70; 33 CFR 27.3	8,723	1.07745	9,399
Obstruction of Revenue Officers by Masters of Vessels—Minimum Penalty.....	19 U.S.C. 70; 33 CFR 27.3.....	2,035	1.07745	2,193
Failure to Stop Vessel When Directed; Master, Owner, Operator or Person in Charge.....	19 U.S.C. 1581(d).....	** 5,000	N/A	** 5,000
Failure to Stop Vessel When Directed; Master, Owner, Operator or Person in Charge—Minimum Penalty.....	19 U.S.C. 1581(d)	** 1,000	N/A	** 1,000
Anchorage Ground/Harbor Regulations General	33 U.S.C. 471; 33 CFR 27.3	12,647	1.07745	13,627
Anchorage Ground/Harbor Regulations St. Mary's river	33 U.S.C. 474; 33 CFR 27.3	873	1.07745	941
Bridges/Failure to Comply with Regulations	33 U.S.C. 495(b); 33 CFR 27.3	31,928	1.07745	34,401
Bridges/Drawbridges.....	33 U.S.C. 499(c); 33 CFR 27.3	31,928	1.07745	34,401
Bridges/Failure to Alter Bridge Obstructing Navigation.....	33 U.S.C. 502(c); 33 CFR 27.3	31,928	1.07745	34,401
Bridges/Maintenance and Operation	33 U.S.C. 533(b); 33 CFR 27.3	31,928	1.07745	34,401
Bridge to Bridge Communication; Master, Person in Charge or Pilot	33 U.S.C. 1208(a); 33 CFR 27.3	2,326	1.07745	2,506
Bridge to Bridge Communication; Vessel	33 U.S.C. 1208(b); 33 CFR 27.3	2,326	1.07745	2,506
Oil/Hazardous Substances: Discharges (Class I per violation)	33 U.S.C. 1321(b)(6)(B)(i); 33 CFR 27.3	20,719	1.07745	22,324

Penalty name	Citation	Penalty amount as adjusted in the 2022 FR	Multiplier *	New penalty as adjusted by this final rule
Oil/Hazardous Substances: Discharges (Class I total under paragraph).	33 U.S.C. 1321(b)(6)(B)(i); 33 CFR 27.3	51,796	1.07745	55,808
Oil/Hazardous Substances: Discharges (Class II per day of violation).	33 U.S.C. 1321(b)(6)(B)(ii); 33 CFR 27.3	20,719	1.07745	22,324
Oil/Hazardous Substances: Discharges (Class II total under paragraph).	33 U.S.C. 1321(b)(6)(B)(ii); 33 CFR 27.3	258,978	1.07745	279,036
Oil/Hazardous Substances: Discharges (per day of violation) Judicial Assessment.	33 U.S.C. 1321(b)(7)(A); 33 CFR 27.3	51,796	1.07745	55,808
Oil/Hazardous Substances: Discharges (per barrel of oil or unit discharged) Judicial Assessment.	33 U.S.C. 1321(b)(7)(A); 33 CFR 27.3	2,072	1.07745	2,233
Oil/Hazardous Substances: Failure to Carry Out Removal/Comply With Order (Judicial Assessment).	33 U.S.C. 1321(b)(7)(B); 33 CFR 27.3	51,796	1.07745	55,808
Oil/Hazardous Substances: Failure to Comply with Regulation Issued Under 1321(j) (Judicial Assessment).	33 U.S.C. 1321(b)(7)(C); 33 CFR 27.3	51,796	1.07745	55,808
Oil/Hazardous Substances: Discharges, Gross Negligence (per barrel of oil or unit discharged) Judicial Assessment.	33 U.S.C. 1321(b)(7)(D); 33 CFR 27.3	6,215	1.07745	6,696
Oil/Hazardous Substances: Discharges, Gross Negligence—Minimum Penalty (Judicial Assessment).	33 U.S.C. 1321(b)(7)(D); 33 CFR 27.3	207,183	1.07745	223,229
Marine Sanitation Devices; Operating	33 U.S.C. 1322(j); 33 CFR 27.3	8,723	1.07745	9,399
Marine Sanitation Devices; Sale or Manufacture	33 U.S.C. 1322(j); 33 CFR 27.3	23,258	1.07745	25,059
International Navigation Rules; Operator	33 U.S.C. 1608(a); 33 CFR 27.3	16,307	1.07745	17,570
International Navigation Rules; Vessel	33 U.S.C. 1608(b); 33 CFR 27.3	16,307	1.07745	17,570
Pollution from Ships; General	33 U.S.C. 1908(b)(1); 33 CFR 27.3	81,540	1.07745	87,855
Pollution from Ships; False Statement	33 U.S.C. 1908(b)(2); 33 CFR 27.3	16,307	1.07745	17,570
Inland Navigation Rules; Operator	33 U.S.C. 2072(a); 33 CFR 27.3	16,307	1.07745	17,570
Inland Navigation Rules; Vessel	33 U.S.C. 2072(b); 33 CFR 27.3	16,307	1.07745	17,570

Penalty name	Citation	Penalty amount as adjusted in the 2022 FR	Multiplier *	New penalty as adjusted by this final rule
Shore Protection; General	33 U.S.C. 2609(a); 33 CFR 27.3	57,527	1.07745	61,982
Shore Protection; Operating Without Permit	33 U.S.C. 2609(b); 33 CFR 27.3	23,011	1.07745	24,793
Oil Pollution Liability and Compensation	33 U.S.C. 2716a(a); 33 CFR 27.3	51,796	1.07745	55,808
Clean Hulls	33 U.S.C. 3852(a)(1)(A); 33 CFR 27.3	47,424	1.07745	51,097
Clean Hulls—related to false statements	33 U.S.C. 3852(a)(1)(A); 33 CFR 27.3	63,232	1.07745	68,129
Clean Hulls—Recreational Vessel	33 U.S.C. 3852(c); 33 CFR 27.3	6,323	1.07745	6,813
Hazardous Substances, Releases, Liability, Compensation (Class I)	42 U.S.C. 9609(a); 33 CFR 27.3	62,689	1.07745	67,544
Hazardous Substances, Releases, Liability, Compensation (Class II)	42 U.S.C. 9609(b); 33 CFR 27.3	62,689	1.07745	67,544
Hazardous Substances, Releases, Liability, Compensation (Class II subsequent offense)	42 U.S.C. 9609(b); 33 CFR 27.3	188,069	1.07745	202,635
Hazardous Substances, Releases, Liability, Compensation (Judicial Assessment)	42 U.S.C. 9609(c); 33 CFR 27.3	62,689	1.07745	67,544
Hazardous Substances, Releases, Liability, Compensation (Judicial Assessment subsequent offense)	42 U.S.C. 9609(c); 33 CFR 27.3	188,069	1.07745	202,635
Safe Containers for International Cargo	46 U.S.C. 80509; 33 CFR 27.3	6,852	1.07745	7,383
Suspension of Passenger Service	46 U.S.C. 70305; 33 CFR 27.3	68,529	1.07745	73,837
Vessel Inspection or Examination Fees	46 U.S.C. 2110(e); 33 CFR 27.3	10,360	1.07745	11,162
Alcohol and Dangerous Drug Testing	46 U.S.C. 2115; 33 CFR 27.3	8,433	1.07745	9,086
Negligent Operations: Recreational Vessels	46 U.S.C. 2302(a); 33 CFR 27.3	7,628	1.07745	8,219
Negligent Operations: Other Vessels	46 U.S.C. 2302(a); 33 CFR 27.3	38,139	1.07745	41,093
Operating a Vessel While Under the Influence of Alcohol or a Dangerous Drug	46 U.S.C. 2302(c)(1); 33 CFR 27.3	8,433	1.07745	9,086
Vessel Reporting Requirements: Owner, Charterer, Managing Operator, or Agent	46 U.S.C. 2306(a)(4); 33 CFR 27.3	13,132	1.07745	14,149
Vessel Reporting Requirements: Master	46 U.S.C. 2306(b)(2); 33 CFR 27.3	2,627	1.07745	2,830

Penalty name	Citation	Penalty amount as adjusted in the 2022 FR	Multiplier *	New penalty as adjusted by this final rule
Immersion Suits	46 U.S.C. 3102(c)(1); 33 CFR 27.3	13,132	1.07745	14,149
Inspection Permit	46 U.S.C. 3302(i)(5); 33 CFR 27.3	2,739	1.07745	2,951
Vessel Inspection; General	46 U.S.C. 3318(a); 33 CFR 27.3	13,132	1.07745	14,149
Vessel Inspection; Nautical School Vessel	46 U.S.C. 3318(g); 33 CFR 27.3	13,132	1.07745	14,149
Vessel Inspection; Failure to Give Notice in accordance with (IAW) 3304(b)	46 U.S.C. 3318(h); 33 CFR 27.3	2,627	1.07745	2,830
Vessel Inspection; Failure to Give Notice IAW 3309(c)	46 U.S.C. 3318(i); 33 CFR 27.3	2,627	1.07745	2,830
Vessel Inspection; Vessel ≥1600 Gross Tons	46 U.S.C. 3318(j)(1); 33 CFR 27.3	26,269	1.07745	28,304
Vessel Inspection; Vessel <1600 Gross Tons (GT)	46 U.S.C. 3318(j)(1); 33 CFR 27.3	5,254	1.07745	5,661
Vessel Inspection; Failure to Comply with 3311(b)	46 U.S.C. 3318(k); 33 CFR 27.3	26,269	1.07745	28,304
Vessel Inspection; Violation of 3318(b)–3318(f)	46 U.S.C. 3318(l); 33 CFR 27.3	13,132	1.07745	14,149
List/count of Passengers	46 U.S.C. 3502(e); 33 CFR 27.3	273	1.07745	294
Notification to Passengers	46 U.S.C. 3504(c); 33 CFR 27.3	27,384	1.07745	29,505
Notification to Passengers; Sale of Tickets	46 U.S.C. 3504(c); 33 CFR 27.3	1,368	1.07745	1,474
Copies of Laws on Passenger Vessels; Master	46 U.S.C. 3506; 33 CFR 27.3	548	1.07745	590
Liquid Bulk/Dangerous Cargo	46 U.S.C. 3718(a)(1); 33 CFR 27.3	68,462	1.07745	73,764
Uninspected Vessels	46 U.S.C. 4106; 33 CFR 27.3	11,506	1.07745	12,397
Recreational Vessels (maximum for related series of violations)	46 U.S.C. 4311(b)(1); 33 CFR 27.3	362,217	1.07745	390,271
Recreational Vessels; Violation of 4307(a)	46 U.S.C. 4311(b)(1); 33 CFR 27.3	7,244	1.07745	7,805
Recreational vessels	46 U.S.C. 4311(c); 33 CFR 27.3	2,739	1.07745	2,951
Uninspected Commercial Fishing Industry Vessels	46 U.S.C. 4507; 33 CFR 27.3	11,506	1.07745	12,397
Abandonment of Barges	46 U.S.C. 4703; 33 CFR 27.3	1,949	1.07745	2,100
Load Lines	46 U.S.C. 5116(a); 33 CFR 27.3	12,537	1.07745	13,508
Load Lines; Violation of 5112(a)	46 U.S.C. 5116(b); 33 CFR 27.3	25,076	1.07745	27,018

Penalty name	Citation	Penalty amount as adjusted in the 2022 FR	Multiplier *	New penalty as adjusted by this final rule
Load Lines; Violation of 5112(b)	46 U.S.C. 5116(c); 33 CFR 27.3	12,537	1.07745	13,508
Reporting Marine Casualties	46 U.S.C. 6103(a); 33 CFR 27.3	43,678	1.07745	47,061
Reporting Marine Casualties; Violation of 6104	46 U.S.C. 6103(b); 33 CFR 27.3	11,506	1.07745	12,397
Manning of Inspected Vessels; Failure to Report Deficiency in Vessel Complement.	46 U.S.C. 8101(e); 33 CFR 27.3	2,072	1.07745	2,233
Manning of Inspected Vessels	46 U.S.C. 8101(f); 33 CFR 27.3	20,719	1.07745	22,324
Manning of Inspected Vessels; Employing or Serving in Capacity not Licensed by USCG.	46 U.S.C. 8101(g); 33 CFR 27.3	20,719	1.07745	22,324
Manning of Inspected Vessels; Freight Vessel <100 GT, Small Passenger Vessel, or Sailing School Vessel.	46 U.S.C. 8101(h); 33 CFR 27.3	2,739	1.07745	2,951
Watchmen on Passenger Vessels	46 U.S.C. 8102(a)	2,739	1.07745	2,951
Citizenship Requirements	46 U.S.C. 8103(f)	1,368	1.07745	1,474
Watches on Vessels; Violation of 8104(a) or (b)	46 U.S.C. 8104(i)	20,719	1.07745	22,324
Watches on Vessels; Violation of 8104(c), (d), (e), or (h)	46 U.S.C. 8104(j)	20,719	1.07745	22,324
Staff Department on Vessels	46 U.S.C. 8302(e)	273	1.07745	294
Officer's Competency Certificates	46 U.S.C. 8304(d)	273	1.07745	294
Coastwise Pilotage; Owner, Charterer, Managing Operator, Agent, Master or Individual in Charge.	46 U.S.C. 8502(e)	20,719	1.07745	22,324
Coastwise Pilotage; Individual	46 U.S.C. 8502(f)	20,719	1.07745	22,324
Federal Pilots	46 U.S.C. 8503	65,666	1.07745	70,752
Merchant Mariners Documents	46 U.S.C. 8701(d)	1,368	1.07745	1,474
Crew Requirements	46 U.S.C. 8702(e).	20,719	1.07745	22,324
Small Vessel Manning	46 U.S.C. 8906	43,678	1.07745	47,061
Pilotage: Great Lakes; Owner, Charterer, Managing Operator, Agent, Master or Individual in Charge.	46 U.S.C. 9308(a)	20,719	1.07745	22,324
Pilotage: Great Lakes; Individual	46 U.S.C. 9308(b)	20,719	1.07745	22,324

Penalty name	Citation	Penalty amount as adjusted in the 2022 FR	Multiplier *	New penalty as adjusted by this final rule
Pilotage: Great Lakes; Violation of 9303	46 U.S.C. 9308(c)	20,719	1.07745	22,324
Failure to Report Sexual Offense	46 U.S.C. 10104(b)	11,011	1.07745	11,864
Pay Advances to Seamen	46 U.S.C. 10314(a)(2)	1,368	1.07745	1,474
Pay Advances to Seamen; Remuneration for Employment	46 U.S.C. 10314(b)	1,368	1.07745	1,474
Allotment to Seamen	46 U.S.C. 10315(c)	1,368	1.07745	1,474
Seamen Protection; General	46 U.S.C. 10321	9,491	1.07745	10,226
Coastwise Voyages: Advances	46 U.S.C. 10505(a)(2)	9,491	1.07745	10,226
Coastwise Voyages: Advances; Remuneration for Employment	46 U.S.C. 10505(b)	9,491	1.07745	10,226
Coastwise Voyages: Seamen Protection; General	46 U.S.C. 10508(b).	9,491	1.07745	10,226
Effects of Deceased Seamen	46 U.S.C. 10711	548	1.07745	590
Complaints of Unfitness	46 U.S.C. 10902(a)(2)	1,368	1.07745	1,474
Proceedings on Examination of Vessel	46 U.S.C. 10903(d)	273	1.07745	294
Permission to Make Complaint	46 U.S.C. 10907(b)	1,368	1.07745	1,474
Accommodations for Seamen	46 U.S.C. 11101(f)	1,368	1.07745	1,474
Medicine Chests on Vessels	46 U.S.C. 11102(b)	1,368	1.07745	1,474
Destitute Seamen	46 U.S.C. 11104(b)	273	1.07745	294
Wages on Discharge	46 U.S.C. 11105(c)	1,368	1.07745	1,474
Log Books; Master Failing to Maintain	46 U.S.C. 11303(a)	548	1.07745	590
Log Books; Master Failing to Make Entry	46 U.S.C. 11303(b)	548	1.07745	590
Log Books; Late Entry	46 U.S.C. 11303(c)	411	1.07745	443
Carrying of Sheath Knives	46 U.S.C. 11506	137	1.07745	148
Vessel Documentation	46 U.S.C. 12151(a)(1)	17,935	1.07745	19,324
Documentation of Vessels—Related to Activities involving mobile offshore drilling units.	46 U.S.C. 12151 (a)(2)	29,893	1.07745	32,208
Vessel Documentation; Fishery Endorsement	46 U.S.C. 12151(c)	137,060	1.07745	147,675
Numbering of Undocumented Vessels—Willful violation	46 U.S.C. 12309(a)	13,693	1.07745	14,754
Numbering of Undocumented Vessels	46 U.S.C. 12309(b)	2,739	1.07745	2,951

Penalty name	Citation	Penalty amount as adjusted in the 2022 FR	Multiplier *	New penalty as adjusted by this final rule
Vessel Identification System	46 U.S.C. 12507(b)	23,011	1.07745	24,793
Measurement of Vessels	46 U.S.C. 14701	50,154	1.07745	54,038
Measurement; False Statements	46 U.S.C. 14702	50,154	1.07745	54,038
Commercial Instruments and Maritime Liens	46 U.S.C. 31309.	23,011	1.07745	24,793
Commercial Instruments and Maritime Liens; Mortgagor	46 U.S.C. 31330(a)(2)	23,011	1.07745	24,793
Commercial Instruments and Maritime Liens; Violation of 31329	46 U.S.C. 31330(b)(2)	57,527	1.07745	61,982
Ports and Waterway Safety Regulations	46 U.S.C. 70036(a); 33 CFR 27.3	103,050	1.07745	111,031
Vessel Navigation: Regattas or Marine Parades; Unlicensed Person in Charge.	46 U.S.C. 70041(d)(1)(B); 33 CFR 27.3	10,360	1.07745	11,162
Vessel Navigation: Regattas or Marine Parades; Owner Onboard Vessel	46 U.S.C. 70041(d)(1)(C); 33 CFR 27.3	10,360	1.07745	11,162
Vessel Navigation: Regattas or Marine Parades; Other Persons	46 U.S.C. 70041(d)(1)(D); 33 CFR 27.3	5,179	1.07745	5,580
Port Security	46 U.S.C. 70119(a).	38,139	1.07745	41,093
Port Security—Continuing Violations	46 U.S.C. 70119(b)	68,529	1.07745	73,837
Maritime Drug Law Enforcement	46 U.S.C. 70506(c)	6,323	1.07745	6,813
Hazardous Materials: Related to Vessels	49 U.S.C. 5123(a)(1)	89,678	1.07745	96,624
Hazardous Materials: Related to Vessels—Penalty from Fatalities, Serious Injuries/Illness or substantial Damage to Property.	49 U.S.C. 5123(a)(2)	209,249	1.07745	225,455
Hazardous Materials: Related to Vessels; Training	49 U.S.C. 5123(a)(3)	540	1.07745	582

* Office of Mgmt. and Budget, Exec. Office of the President, M–23–05, Implementation of Penalty Inflation Adjustments for 2023, Pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Dec. 15, 2022) (*https://www.whitehouse.gov/wp-content/uploads/2022/12/M-23-05-CMP-CMP-Guidance.pdf*).
** Enacted under the Tariff Act; exempt from inflation adjustments.

E. Transportation Security Administration

The Transportation Security Administration (TSA) is updating its civil penalties regulation in accordance with the 2015 Act. Pursuant to its statutory authority in 49 U.S.C. 46301(a)(1), (4), (5), (6), 49 U.S.C. 46301(d)(2), (8), and 49 U.S.C. 114(u), TSA may impose penalties for violations of statutes that TSA administers, including pen-

alties for violations of implementing regulations or orders. Note that pursuant to division K, title I, sec. 1904(b)(1)(I), of Public Law 115–254, 132 Stat. 3186, 3545 (Oct. 5, 2018), the TSA Modernization Act—part of the FAA Reauthorization Act of 2018—the former 49 U.S.C. 114(v), which relates to penalties, was redesignated as 49 U.S.C. 114(u).

TSA assesses these penalties for a wide variety of aviation and surface security requirements, including violations of TSA's requirements applicable to Transportation Worker Identification Credentials (TWIC),[14] as well as violations of requirements described in chapter 449 of title 49 of the U.S.C. These penalties can apply to a wide variety of situations, as described in the statutory and regulatory provisions, as well as in guidance that TSA publishes. Below is a table showing the 2022 adjustment for the penalties that TSA administers.

TABLE 5—TRANSPORTATION SECURITY ADMINISTRATION CIVIL PENALTIES ADJUSTMENTS

Penalty name	Citation	Penalty amount as adjusted in the 2022 FR	Multiplier *	New penalty as adjusted by this final rule
Violation of 49 U.S.C. ch. 449 (except secs. 44902, 44903(d), 44907(a)–(d)(1)(A), 44907(d)(1)(C)–(f), 44908, and 44909), or 49 U.S.C. 46302 or 46303, a regulation prescribed, or order issued thereunder by a person operating an aircraft for the transportation of passengers or property for compensation.	49 U.S.C. 46301(a)(1), (4), (5), (6); 49 U.S.C. 46301(d)(2), (8); 49 CFR 1503.401(c)(3).	$37,377 (up to a total of $598,026 per civil penalty action).	1.07745	$40,272 (up to a total of $644,343 per civil penalty action).

[14] *See, e.g.,* 46 U.S.C. 70105, 49 U.S.C. 46302 and 46303, and 49 U.S.C. chapter 449.

Penalty name	Citation	Penalty amount as adjusted in the 2022 FR	Multiplier *	New penalty as adjusted by this final rule
Violation of 49 U.S.C. ch. 449 (except secs. 44902, 44903(d), 44907(a)–(d)(1)(A), 44907(d)(1)(C)–(f), 44908, and 44909), or 49 U.S.C. 46302 or 46303, a regulation prescribed, or order issued thereunder by an individual (except an airman serving as an airman), any person not operating an aircraft for the transportation of passengers or property for compensation, or a small business concern.	49 U.S.C. 46301(a)(1), (4), (5); 49 U.S.C. 46301(d)(8); 49 CFR 1503.401(c).	$14,950 (up to a total of $74,754 for individuals or small businesses, $598,026 for others).	1.07745	$16,108 (up to a total of $80,544 for individuals or small businesses, $644,343 for others).
Violation of any other provision of title 49 U.S.C. or of 46 U.S.C. ch. 701, a regulation prescribed, or order issued thereunder.	49 U.S.C. 114(u); 49 CFR 1503.401(b).	$12,794 (up to a total of $63,973 total for individuals or small businesses, $511,780 for others).	1.07745	$13,785 (up to a total of $68,928 total for individuals or small businesses, $551,417 for others).

* Office of Mgmt. and Budget, Exec. Office of the President, M–23–05, Implementation of Penalty Inflation Adjustments for 2023, Pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Dec. 15, 2022) (*https://www.whitehouse.gov/wp-content/uploads/2022/12/M-23-05-CMP-CMP-Guidance.pdf*).

IV. Administrative Procedure Act

DHS is promulgating this final rule to ensure that the amount of civil penalties that DHS assesses or enforces reflects the statutorily mandated ranges as adjusted for inflation. The 2015 Act provides a clear formula for adjustment of the civil penalties, leaving DHS and its components with little room for discretion. DHS and its components have been charged only with performing ministerial computations to determine the amounts of adjustments for inflation to civil monetary penalties. In these annual adjustments DHS is merely updating the penalty amounts by applying the cost-of-living adjustment multiplier that OMB has provided to agencies. Furthermore, the 2015 Act specifically instructed that agencies make the required annual adjustments notwithstanding section 553 of title 5 of the U.S.C. Thus, as specified in the 2015 Act, the prior public notice-and-comment procedures and delayed effective date requirements of the Administrative Procedure Act (APA) do not apply to this rule. Further, as described above, this rule makes minor amendments to the regulations to reflect changes required by clear statutory authority,

and DHS finds that prior notice and comment procedures and a delayed effective date for these amendments are unnecessary.

V. Regulatory Analyses

A. Executive Orders 12866 and 13563

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

OMB has not designated this final rule a "significant regulatory action" under section 3(f) of Executive Order 12866. Accordingly, OMB has not reviewed this rule.

This final rule makes nondiscretionary adjustments to existing civil monetary penalties in accordance with the 2015 Act and OMB guidance.[15] DHS therefore did not consider alternatives and does not have the flexibility to alter the adjustments of the civil monetary penalty amounts as provided in this rule. To the extent this final rule increases civil monetary penalties, it would result in an increase in transfers from persons or entities assessed a civil monetary penalty to the government.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act applies only to rules for which an agency publishes a notice of proposed rulemaking pursuant to 5 U.S.C. 553(b). See 5 U.S.C. 601–612. The Regulatory Flexibility Act does not apply to this final rule because a notice of proposed rulemaking was not required for the reasons stated above.

C. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1531–1538, requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or Tribal government, in

[15] Office of Mgmt. and Budget, Exec. Office of the President, M–23–05, Implementation of Penalty Inflation Adjustments for 2023, Pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Dec. 15, 2022) (*https://www.whitehouse.gov/wp-content/uploads/2022/12/M-23-05-CMP-CMP-Guidance.pdf*).

the aggregate, or by the private sector of $100,000,000 (adjusted for inflation) or more in any one year. This final rule will not result in such an expenditure.

D. Paperwork Reduction Act

The provisions of the Paperwork Reduction Act of 1995, 44 U.S.C. chapter 35, and its implementing regulations, 5 CFR part 1320, do not apply to this final rule, because this final rule does not trigger any new or revised recordkeeping or reporting.

VI. Signing Authorities

The amendments to 19 CFR part 4 in this document are 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

6 CFR Part 27

Reporting and recordkeeping requirements, Security measures.

8 CFR Part 270

Administrative practice and procedure, Aliens, Employment, Fraud, Penalties.

8 CFR Part 274a

Administrative practice and procedure, Aliens, Employment, Penalties, Reporting and recordkeeping requirements.

8 CFR Part 280

Administrative practice and procedure, Immigration, Penalties.

19 CFR Part 4

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

33 CFR Part 27

Administrative practice and procedure, Penalties.

49 CFR Part 1503

Administrative practice and procedure, Investigations, Law enforcement, Penalties.

Amendments to the Regulations

Accordingly, for the reasons stated in the preamble, DHS is amending 6 CFR part 27, 8 CFR parts 270, 274a, and 280, 19 CFR part 4, 33 CFR part 27, and 49 CFR part 1503 as follows:

Title 6—Domestic Security

PART 27—CHEMICAL FACILITY ANTI–TERRORISM STANDARDS

■ 1. The authority citation for part 27 continues to read as follows:

Authority: 6 U.S.C. 624; Pub. L. 101–410, 104 Stat. 890, as amended by Pub. L. 114–74, 129 Stat. 599; Pub. L. 113–254, 128 Stat. 2898, as amended by Pub. L. 116–150, 134 Stat. 679.

■ 2. In § 27.300, revise paragraph (b)(3) to read as follows:

§ 27.300 Orders.

* * * * *

(b) * * *

(3) Where the Executive Assistant Director determines that a facility is in violation of an Order issued pursuant to paragraph (a) of this section and issues an Order Assessing Civil Penalty pursuant to paragraph (b)(1) of this section, a chemical facility is liable to the United States for a civil penalty of not more than $25,000 for each day during which the violation continues, if the violation of the Order occurred on or before November 2, 2015, or $41,093 for each day during which the violation of the Order continues, if the violation occurred after November 2, 2015.

* * * * *

Title 8—Aliens and Nationality

PART 270—PENALTIES FOR DOCUMENT FRAUD

■ 3. The authority citation for part 270 continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, and 1324c; Pub. L. 101–410, 104 Stat. 890, as amended by Pub. L. 104–134, 110 Stat. 1321 and Pub. L. 114–74, 129 Stat. 599.

■ 4. In § 270.3, revise paragraphs (b)(1)(ii)(A) through (D) to read as follows:

§ 270.3 Penalties.

* * * * *

(b) * * *

(1) * * *

(ii) * * *

(A) *First offense under section 274C(a)(1) through (a)(4).* Not less than $275 and not exceeding $2,200 for each fraudulent document or each proscribed activity described in section 274C(a)(1) through (a)(4) of the Act before March 27, 2008; not less than $375 and not exceeding $3,200 for each fraudulent document or each proscribed activity described in section 274C(a)(1) through (a)(4) of the Act on or after March 27, 2008, and on or before November 2, 2015; and not less than $557 and not exceeding $4,465 for each fraudulent document or each proscribed activity described in section 274C(a)(1) through (a)(4) of the Act after November 2, 2015.

(B) *First offense under section 274C(a)(5) or (a)(6).* Not less than $250 and not exceeding $2,000 for each fraudulent document or each proscribed activity described in section 274C(a)(5) or (a)(6) of the Act before March 27, 2008; not less than $275 and not exceeding $2,200 for each fraudulent document or each proscribed activity described in section 274C(a)(5) or (a)(6) of the Act on or after March 27, 2008, and on or before November 2, 2015; and not less than $472 and not exceeding $3,765 for each fraudulent document or each proscribed activity described in section 274C(a)(5) or (a)(6) of the Act after November 2, 2015.

(C) *Subsequent offenses under section 274C(a)(1) through (a)(4).* Not less than $2,200 and not more than $5,500 for each fraudulent document or each proscribed activity described in section 274C(a)(1) through (a)(4) of the Act before March 27, 2008; not less than $3,200 and not exceeding $6,500 for each fraudulent document or each proscribed activity described in section 274C(a)(1) through (a)(4) of the Act occurring on or after March 27, 2008 and on or before November 2, 2015; and not less than $4,465 and not more than $11,162 for each fraudulent document or each proscribed activity described in section 274C(a)(1) through (a)(4) of the Act after November 2, 2015.

(D) *Subsequent offenses under section 274C(a)(5) or (a)(6).* Not less than $2,000 and not more than $5,000 for each fraudulent document or each proscribed activity described in section 274C(a)(5) or (a)(6) of the Act before March 27, 2008; not less than $2,200 and not exceeding $5,500 for each fraudulent document or each proscribed activity described in section 274C(a)(5) or (a)(6) of the Act occurring on or after March 27, 2008, and on or before November 2, 2015; and not less than

$3,765 and not more than $9,413 for each fraudulent document or each proscribed activity described in section 274C(a)(5) or (a)(6) of the Act after November 2, 2015.

* * * * *

PART 274a—CONTROL OF EMPLOYMENT OF ALIENS

■ 5. The authority citation for part 274a continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1105a, 1324a; 48 U.S.C. 1806; Pub. L. 101–410, 104 Stat. 890, as amended by Pub. L. 114–74, 129 Stat. 599; Title VII of Pub. L. 110–229, 122 Stat. 754; Pub. L. 115–218, 132 Stat. 1547; 8 CFR part 2.

■ 6. In § 274a.8, revise paragraph (b) to read as follows:

§ 274a.8 Prohibition of indemnity bonds.

* * * * *

(b) *Penalty.* Any person or other entity who requires any individual to post a bond or security as stated in this section shall, after notice and opportunity for an administrative hearing in accordance with section 274A(e)(3)(B) of the Act, be subject to a civil monetary penalty of $1,000 for each violation before September 29, 1999, of $1,100 for each violation occurring on or after September 29, 1999, but on or before November 2, 2015, and of $2,701 for each violation occurring after November 2, 2015, and to an administrative order requiring the return to the individual of any amounts received in violation of this section or, if the individual cannot be located, to the general fund of the Treasury.

■ 7. In § 274a.10, revise paragraphs (b)(1)(ii)(A) through (C) and the first sentence of paragraph (b)(2) introductory text to read as follows:

§ 274a.10 Penalties.

* * * * *

(b) * * *

(1) * * *

(ii) * * *

(A) First offense—not less than $275 and not more than $2,200 for each unauthorized alien with respect to whom the offense occurred before March 27, 2008; not less than $375 and not exceeding $3,200, for each unauthorized alien with respect to whom the offense occurred occurring on or after March 27, 2008, and on or before Novem-

ber 2, 2015; and not less than $676 and not more than $5,404 for each unauthorized alien with respect to whom the offense occurred occurring after November 2, 2015;

(B) Second offense—not less than $2,200 and not more than $5,500 for each unauthorized alien with respect to whom the second offense occurred before March 27, 2008; not less than $3,200 and not more than $6,500, for each unauthorized alien with respect to whom the second offense occurred on or after March 27, 2008, and on or before November 2, 2015; and not less than $5,404 and not more than $13,508 for each unauthorized alien with respect to whom the second offense occurred after November 2, 2015; or

(C) More than two offenses—not less than $3,300 and not more than $11,000 for each unauthorized alien with respect to whom the third or subsequent offense occurred before March 27, 2008; not less than $4,300 and not exceeding $16,000, for each unauthorized alien with respect to whom the third or subsequent offense occurred on or after March 27, 2008, and on or before November 2, 2015; and not less than $8,106 and not more than $27,018 for each unauthorized alien with respect to whom the third or subsequent offense occurred after November 2, 2015; and

* * * * *

(2) A respondent determined by the Service (if a respondent fails to request a hearing) or by an administrative law judge, to have failed to comply with the employment verification requirements as set forth in § 274a.2(b), shall be subject to a civil penalty in an amount of not less than $100 and not more than $1,000 for each individual with respect to whom such violation occurred before September 29, 1999; not less than $110 and not more than $1,100 for each individual with respect to whom such violation occurred on or after September 29, 1999, and on or before November 2, 2015; and not less than $272 and not more than $2,701 for each individual with respect to whom such violation occurred after November 2, 2015. * * *

* * * * *

PART 280—IMPOSITION AND COLLECTION OF FINES

■ 8. The authority citation for part 280 continues to read as follows:

Authority: 8 U.S.C. 1103, 1221, 1223, 1227, 1229, 1253, 1281, 1283, 1284, 1285, 1286, 1322, 1323, 1330; 66 Stat. 173, 195, 197, 201, 203, 212, 219, 221–223, 226, 227, 230; Pub. L. 101–410, 104 Stat. 890, as amended by Pub. L. 114–74, 129 Stat. 599.

■ 9. In § 280.53, revise paragraphs (b)(1) through (15) to read as follows:

§ 280.53 Civil monetary penalties inflation adjustment.

* * * * *

(b) * * *

(1) Section 231(g) of the Act, penalties for non-compliance with arrival and departure manifest requirements for passengers, crewmembers, or occupants transported on commercial vessels or aircraft arriving to or departing from the United States: From $1,525 to $1,643.

(2) Section 234 of the Act, penalties for non-compliance with landing requirements at designated ports of entry for aircraft transporting aliens: From $4,144 to $4,465.

(3) Section 240B(d) of the Act, penalties for failure to depart voluntarily: From $1,746 minimum/$8,736 maximum to $1,881 minimum/ $9,413 maximum.

(4) Section 243(c)(1)(A) of the Act, penalties for violations of removal orders relating to aliens transported on vessels or aircraft, under section 241(d) of the Act, or for costs associated with removal under section 241(e) of the Act: From $3,494 to $3,765.

(5) Penalties for failure to remove alien stowaways under section 241(d)(2) of the Act: From $8,736 to $9,413.

(6) Section 251(d) of the Act, penalties for failure to report an illegal landing or desertion of alien crewmen, and for each alien not reported on arrival or departure manifest or lists required in accordance with section 251 of the Act: From $414 to $446; and penalties for use of alien crewmen for longshore work in violation of section 251(d) of the Act: From $10,360 to $11,162.

(7) Section 254(a) of the Act, penalties for failure to control, detain, or remove alien crewmen: From $1,036 minimum/ $6,215 maximum to $1,116 minimum/ $6,696 maximum.

(8) Section 255 of the Act, penalties for employment on passenger vessels of aliens afflicted with certain disabilities: From $2,072 to $2,232.

(9) Section 256 of the Act, penalties for discharge of alien crewmen: From $3,107 minimum/$6,215 maximum to $3,348 minimum/$6,696 maximum.

(10) Section 257 of the Act, penalties for bringing into the United States alien crewmen with intent to evade immigration laws: From $20,719 maximum to $22,324 maximum.

(11) Section 271(a) of the Act, penalties for failure to prevent the unauthorized landing of aliens: From $6,215 to $6,696.

(12) Section 272(a) of the Act, penalties for bringing to the United States aliens subject to denial of admission on a health-related ground: From $6,215 to $6,696.

(13) Section 273(b) of the Act, penalties for bringing to the United States aliens without required documentation: From $6,215 to $6,696.

(14) Section 274D of the Act, penalties for failure to depart: From $874 maximum to $942 maximum, for each day the alien is in violation.

(15) Section 275(b) of the Act, penalties for improper entry: From $87 minimum/$438 maximum to $94 minimum/$472 maximum, for each entry or attempted entry.

Title 19—Customs Duties

PART 4—VESSELS IN FOREIGN AND DOMESTIC TRADES

■ 10. The authority citation for part 4 continues to read in part 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.

* * * * *

Sections 4.80, 4.80a, and 4.80b also issued under 19 U.S.C. 1706a; 28 U.S.C. 2461 note; 46 U.S.C. 12112, 12117, 12118, 50501–55106, 55107, 55108, 55110, 55114, 55115, 55116, 55117, 55119, 56101, 55121, 56101, 57109; Pub. L. 108–7, Division B, Title II, § 211;

* * * * *

Section 4.92 also issued under 28 U.S.C. 2461 note; 46 U.S.C. 55111;

* * * * *

■ 11. In § 4.80, revise paragraphs (b)(2) and (i) to read as follows:

§ 4.80 Vessels entitled to engage in coastwise trade.

* * * * *

(b) * * *

(2) The penalty imposed for the unlawful transportation of passengers between coastwise points is $300 for each passenger so transported and landed on or before November 2, 2015, and $941 for each passenger so transported and landed after November 2, 2015 (46 U.S.C. 55103, as adjusted by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015).

* * * * *

(i) Any vessel, entitled to be documented and not so documented, employed in a trade for which a Certificate of Documentation is issued under the vessel documentation laws (see § 4.0(c)), other than a trade covered by a registry, is liable to a civil penalty of $500 for each port at which it arrives without the proper Certificate of Documentation on or before November 2, 2015, and $1,566 for each port at which it arrives without the proper Certificate of Documentation after November 2, 2015 (19 U.S.C. 1706a, as adjusted by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015). If such a vessel has on board any foreign merchandise (sea stores excepted), or any domestic taxable alcoholic beverages, on which the duty and taxes have not been paid or secured to be paid, the vessel and its cargo are subject to seizure and forfeiture.

■ 12. In § 4.92, revise the third sentence to read as follows:

§ 4.92 Towing.

* * * The penalties for violation of this section occurring after November 2, 2015, are a fine of from $1,096 to $3,446 against the owner or master of the towing vessel and a further penalty against the towing vessel of $187 per ton of the towed vessel (46 U.S.C. 55111, as adjusted by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015).

Title 33—Navigation and Navigable Waters

PART 27—ADJUSTMENT OF CIVIL MONETARY PENALTIES FOR INFLATION

■ 13. The authority citation for part 27 continues to read as follows:

Authority: Secs. 1–6, Pub. L. 101–410, 104 Stat. 890, as amended by Sec. 31001(s)(1), Pub. L. 104–134, 110 Stat. 1321 (28 U.S.C. 2461 note); Department of Homeland Security Delegation No. 0170.1, sec. 2 (106).

■ 14. In § 27.3, revise the third sentence of the introductory text and table 1 to read as follows:

§ 27.3 Penalty adjustment table.

* * * The adjusted civil penalty amounts listed in Table 1 to this section are applicable for penalty assessments issued after January 13, 2023, with respect to violations occurring after November 2, 2015.
* * *

TABLE 1 TO § 27.3—CIVIL MONETARY PENALTY INFLATION ADJUSTMENTS

U.S. code citation	Civil monetary penalty description	2023 Adjusted maximum penalty amount ($)
14 U.S.C. 521(c)	Saving Life and Property	$12,551
14 U.S.C. 521(e)	Saving Life and Property; Intentional Interference with Broadcast	1,288
14 U.S.C. 936(i)	Confidentiality of Medical Quality Assurance Records (first offense)	6,304
14 U.S.C. 936(i)	Confidentiality of Medical Quality Assurance Records (subsequent offenses)	42,033
19 U.S.C. 70	Obstruction of Revenue Officers by Masters of Vessels.	9,399
19 U.S.C. 70	Obstruction of Revenue Officers by Masters of Vessels—Minimum Penalty	2,193
19 U.S.C. 1581(d)	Failure to Stop Vessel When Directed; Master, Owner, Operator or Person in Charge[1]	5,000
19 U.S.C. 1581(d)	Failure to Stop Vessel When Directed; Master, Owner, Operator or Person in Charge—Minimum Penalty[1]	1,000
33 U.S.C. 471	Anchorage Ground/Harbor Regulations General	13,627
33 U.S.C. 474	Anchorage Ground/Harbor Regulations St. Mary's River	941
33 U.S.C. 495(b)	Bridges/Failure to Comply with Regulations	34,401
33 U.S.C. 499(c)	Bridges/Drawbridges	34,401
33 U.S.C. 502(c)	Bridges/Failure to Alter Bridge Obstructing Navigation	34,401
33 U.S.C. 533(b)	Bridges/Maintenance and Operation	34,401
33 U.S.C. 1208(a)	Bridge to Bridge Communication; Master, Person in Charge or Pilot	2,506
33 U.S.C. 1208(b)	Bridge to Bridge Communication; Vessel	2,506
33 U.S.C. 1321(b)(6)(B)(i)	Oil/Hazardous Substances: Discharges (Class I per violation)	22,324
33 U.S.C. 1321(b)(6)(B)(i)	Oil/Hazardous Substances: Discharges (Class I total under paragraph)	55,808
33 U.S.C. 1321(b)(6)(B)(ii)	Oil/Hazardous Substances: Discharges (Class II per day of violation)	22,324
33 U.S.C. 1321(b)(6)(B)(ii)	Oil/Hazardous Substances: Discharges (Class II total under paragraph)	279,036
33 U.S.C. 1321(b)(7)(A).	Oil/Hazardous Substances: Discharges (per day of violation) Judicial Assessment	55,808
33 U.S.C. 1321(b)(7)(A).	Oil/Hazardous Substances: Discharges (per barrel of oil or unit discharged) Judicial Assessment	2,233
33 U.S.C. 1321(b)(7)(B).	Oil/Hazardous Substances: Failure to Carry Out Removal/Comply With Order (Judicial Assessment).	55,808
33 U.S.C. 1321(b)(7)(C).	Oil/Hazardous Substances: Failure to Comply with Regulation Issued Under 1321(j) (Judicial Assessment).	55,808
33 U.S.C. 1321(b)(7)(D).	Oil/Hazardous Substances: Discharges, Gross Negligence (per barrel of oil or unit discharged) Judicial Assessment.	6,696

U.S. code citation	Civil monetary penalty description	2023 Adjusted maximum penalty amount ($)
33 U.S.C. 1321(b)(7)(D).	Oil/Hazardous Substances: Discharges, Gross Negligence—Minimum Penalty (Judicial Assessment)	223,229
33 U.S.C. 1322(j)	Marine Sanitation Devices; Operating	9,399
33 U.S.C. 1322(j)	Marine Sanitation Devices; Sale or Manufacture	25,059
33 U.S.C. 1608(a)	International Navigation Rules; Operator	17,570
33 U.S.C. 1608(b)	International Navigation Rules; Vessel	17,570
33 U.S.C. 1908(b)(1)	Pollution from Ships; General	87,855
33 U.S.C. 1908(b)(2)	Pollution from Ships; False Statement	17,570
33 U.S.C. 2072(a)	Inland Navigation Rules; Operator	17,570
33 U.S.C. 2072(b)	Inland Navigation Rules; Vessel	17,570
33 U.S.C. 2609(a)	Shore Protection; General	61,982
33 U.S.C. 2609(b)	Shore Protection; Operating Without Permit	24,793
33 U.S.C. 2716a(a)	Oil Pollution Liability and Compensation	55,808
33 U.S.C. 3852(a)(1)(A).	Clean Hulls; Civil Enforcement	51,097
33 U.S.C. 3852(a)(1)(A).	Clean Hulls; related to false statements	68,129
33 U.S.C. 3852(c)	Clean Hulls; Recreational Vessels	6,813
42 U.S.C. 9609(a)	Hazardous Substances, Releases, Liability, Compensation (Class I)	67,544
42 U.S.C. 9609(b)	Hazardous Substances, Releases, Liability, Compensation (Class II)	67,544
42 U.S.C. 9609(b)	Hazardous Substances, Releases, Liability, Compensation (Class II subsequent offense)	202,635
42 U.S.C. 9609(c)	Hazardous Substances, Releases, Liability, Compensation (Judicial Assessment)	67,544
42 U.S.C. 9609(c)	Hazardous Substances, Releases, Liability, Compensation (Judicial Assessment subsequent offense)	202,635
46 U.S.C. 80509(a)	Safe Containers for International Cargo	7,383
46 U.S.C. 70305(c)	Suspension of Passenger Service	73,837
46 U.S.C. 2110(e)	Vessel Inspection or Examination Fees	11,162
46 U.S.C. 2115	Alcohol and Dangerous Drug Testing	9,086
46 U.S.C. 2302(a)	Negligent Operations: Recreational Vessels	8,219
46 U.S.C. 2302(a)	Negligent Operations: Other Vessels	41,093
46 U.S.C. 2302(c)(1)	Operating a Vessel While Under the Influence of Alcohol or a Dangerous Drug	9,086
46 U.S.C. 2306(a)(4)	Vessel Reporting Requirements: Owner, Charterer, Managing Operator, or Agent	14,149
46 U.S.C. 2306(b)(2)	Vessel Reporting Requirements: Master	2,830
46 U.S.C. 3102(c)(1)	Immersion Suits	14,149
46 U.S.C. 3302(i)(5)	Inspection Permit	2,952
46 U.S.C. 3318(a)	Vessel Inspection; General	14,149
46 U.S.C. 3318(g)	Vessel Inspection; Nautical School Vessel	14,149
46 U.S.C. 3318(h)	Vessel Inspection; Failure to Give Notice in accordance with (IAW) 3304(b)	2,830

U.S. code citation	Civil monetary penalty description	2023 Adjusted maximum penalty amount ($)
46 U.S.C. 3318(i)	Vessel Inspection; Failure to Give Notice IAW 3309(c).	2,830
46 U.S.C. 3318(j)(1)	Vessel Inspection; Vessel ≥1600 Gross Tons	28,303
46 U.S.C. 3318(j)(1)	Vessel Inspection; Vessel <1600 Gross Tons (GT)	5,661
46 U.S.C. 3318(k)	Vessel Inspection; Failure to Comply with 3311(b)	28,303
46 U.S.C. 3318(l)	Vessel Inspection; Violation of 3318(b)–3318(f)	14,149
46 U.S.C. 3502(e)	List/count of Passengers	294
46 U.S.C. 3504(c)	Notification to Passengers	29,505
46 U.S.C. 3504(c)	Notification to Passengers; Sale of Tickets	1,474
46 U.S.C. 3506	Copies of Laws on Passenger Vessels; Master	590
46 U.S.C. 3718(a)(1)	Liquid Bulk/Dangerous Cargo	73,764
46 U.S.C. 4106	Uninspected Vessels	12,397
46 U.S.C. 4311(b)(1)	Recreational Vessels (maximum for related series of violations)	390,271
46 U.S.C. 4311(b)(1)	Recreational Vessels; Violation of 4307(a)	7,805
46 U.S.C. 4311(c)	Recreational Vessels	2,951
46 U.S.C. 4507	Uninspected Commercial Fishing Industry Vessels	12,397
46 U.S.C. 4703	Abandonment of Barges	2,100
46 U.S.C. 5116(a)	Load Lines	13,508
46 U.S.C. 5116(b)	Load Lines; Violation of 5112(a)	27,018
46 U.S.C. 5116(c)	Load Lines; Violation of 5112(b)	13,508
46 U.S.C. 6103(a)	Reporting Marine Casualties	47,061
46 U.S.C. 6103(b)	Reporting Marine Casualties; Violation of 6104	12,397
46 U.S.C. 8101(e)	Manning of Inspected Vessels; Failure to Report Deficiency in Vessel Complement	2,233
46 U.S.C. 8101(f)	Manning of Inspected Vessels	22,324
46 U.S.C. 8101(g)	Manning of Inspected Vessels; Employing or Serving in Capacity not Licensed by U.S. Coast Guard (USCG).	22,324
46 U.S.C. 8101(h)	Manning of Inspected Vessels; Freight Vessel <100 GT, Small Passenger Vessel, or Sailing School Vessel.	2,951
46 U.S.C. 8102(a)	Watchmen on Passenger Vessels	2,951
46 U.S.C. 8103(f)	Citizenship Requirements	1,474
46 U.S.C. 8104(i)	Watches on Vessels; Violation of 8104(a) or (b)	22,324
46 U.S.C. 8104(j)	Watches on Vessels; Violation of 8104(c), (d), (e), or (h).	22,324
46 U.S.C. 8302(e)	Staff Department on Vessels	294
46 U.S.C. 8304(d)	Officer's Competency Certificates	294
46 U.S.C. 8502(e)	Coastwise Pilotage; Owner, Charterer, Managing Operator, Agent, Master or Individual in Charge	22,324
46 U.S.C. 8502(f)	Coastwise Pilotage; Individual	22,324
46 U.S.C. 8503	Federal Pilots	70,752
46 U.S.C. 8701(d)	Merchant Mariners Documents	1,474

U.S. code citation	Civil monetary penalty description	2023 Adjusted maximum penalty amount ($)
46 U.S.C. 8702(e)	Crew Requirements	22,324
46 U.S.C. 8906	Small Vessel Manning	47,061
46 U.S.C. 9308(a)	Pilotage: Great Lakes; Owner, Charterer, Managing Operator, Agent, Master or Individual in Charge	22,324
46 U.S.C. 9308(b)	Pilotage: Great Lakes; Individual	22,324
46 U.S.C. 9308(c)	Pilotage: Great Lakes; Violation of 9303	22,324
46 U.S.C. 10104(b)	Failure to Report Sexual Offense	11,864
46 U.S.C. 10314(a)(2)	Pay Advances to Seamen	1,474
46 U.S.C. 10314(b)	Pay Advances to Seamen; Remuneration for Employment	1,474
46 U.S.C. 10315(c)	Allotment to Seamen	1,474
46 U.S.C. 10321	Seamen Protection; General	10,226
46 U.S.C. 10505(a)(2)	Coastwise Voyages: Advances	10,226
46 U.S.C. 10505(b)	Coastwise Voyages: Advances; Remuneration for Employment	10,226
46 U.S.C. 10508(b)	Coastwise Voyages: Seamen Protection; General	10,226
46 U.S.C. 10711	Effects of Deceased Seamen	590
46 U.S.C. 10902(a)(2)	Complaints of Unfitness	1,474
46 U.S.C. 10903(d)	Proceedings on Examination of Vessel	294
46 U.S.C. 10907(b)	Permission to Make Complaint	1,474
46 U.S.C. 11101(f)	Accommodations for Seamen	1,474
46 U.S.C. 11102(b)	Medicine Chests on Vessels	1,474
46 U.S.C. 11104(b)	Destitute Seamen	294
46 U.S.C. 11105(c)	Wages on Discharge	1,474
46 U.S.C. 11303(a)	Log Books; Master Failing to Maintain	590
46 U.S.C. 11303(b)	Log Books; Master Failing to Make Entry	590
46 U.S.C. 11303(c)	Log Books; Late Entry	443
46 U.S.C. 11506	Carrying of Sheath Knives	148
46 U.S.C. 12151(a)(1)	Vessel Documentation	19,324
46 U.S.C. 12151(a)(2)	Documentation of Vessels—Related to activities involving mobile offshore drilling units	32,208
46 U.S.C. 12151(c)	Vessel Documentation; Fishery Endorsement	147,675
46 U.S.C. 12309(a)	Numbering of Undocumented Vessels—Willful violation	14,754
46 U.S.C. 12309(b)	Numbering of Undocumented Vessels	2,951
46 U.S.C. 12507(b)	Vessel Identification System	24,793
46 U.S.C. 14701	Measurement of Vessels	54,038
46 U.S.C. 14702	Measurement; False Statements	54,038
46 U.S.C. 31309	Commercial Instruments and Maritime Liens	24,793
46 U.S.C. 31330(a)(2)	Commercial Instruments and Maritime Liens; Mortgagor	24,793

U.S. code citation	Civil monetary penalty description	2023 Adjusted maximum penalty amount ($)
46 U.S.C. 31330(b)(2) ...	Commercial Instruments and Maritime Liens; Violation of 31329	61,982
46 U.S.C. 70036(a)	Ports and Waterways Safety Regulations	111,031
46 U.S.C. 70041(d)(1)(B)	Vessel Navigation: Regattas or Marine Parades; Unlicensed Person in Charge	11,162
46 U.S.C. 70041(d)(1)(C)	Vessel Navigation: Regattas or Marine Parades; Owner Onboard Vessel	11,162
46 U.S.C. 70041(d)(1)(D)	Vessel Navigation: Regattas or Marine Parades; Other Persons	5,580
46 U.S.C. 70119(a)	Port Security	41,093
46 U.S.C. 70119(b)	Port Security—Continuing Violations	73,837
46 U.S.C. 70506	Maritime Drug Law Enforcement; Penalties	6,813
49 U.S.C. 5123(a)(1)	Hazardous Materials: Related to Vessels—Maximum Penalty	96,624
49 U.S.C. 5123(a)(2)	Hazardous Materials: Related to Vessels—Penalty from Fatalities, Serious Injuries/Illness or Substantial Damage to Property.	225,455
49 U.S.C. 5123(a)(3)	Hazardous Materials: Related to Vessels—Training ..	582

[1] Enacted under the Tariff Act of 1930 exempt from inflation adjustments.

Title 49—Transportation

PART 1503—INVESTIGATIVE AND ENFORCEMENT PROCEDURES

■ 15. The authority citation for part 1503 continues to read as follows:

Authority: 6 U.S.C. 1142; 18 U.S.C. 6002; 28 U.S.C. 2461 (note); 49 U.S.C. 114, 20109, 31105, 40113–40114, 40119, 44901–44907, 46101–46107, 46109–46110, 46301, 46305, 46311, 46313–46314; Pub. L. 104–134, as amended by Pub. L. 114–74.

■ 16. In § 1503.401, revise paragraphs (b)(1) and (2) and (c)(1), (2), and (3) to read as follows:

§ 1503.401 Maximum penalty amounts.

* * * * *

(b) * * *

(1) For violations that occurred on or before November 2, 2015, $10,000 per violation, up to a total of $50,000 per civil penalty action, in the case of an individual or small business concern ("small business concern" as defined in section 3 of the Small Business Act (15 U.S.C. 632)). For violations that occurred after November 2, 2015, $13,785

per violation, up to a total of $68,928 per civil penalty action, in the case of an individual or small business concern; and

(2) For violations that occurred on or before November 2, 2015, $10,000 per violation, up to a total of $400,000 per civil penalty action, in the case of any other person. For violations that occurred after November 2, 2015, $13,785 per violation, up to a total of $551,417 per civil penalty action, in the case of any other person.

(c) * * *

(1) For violations that occurred on or before November 2, 2015, $10,000 per violation, up to a total of $50,000 per civil penalty action, in the case of an individual or small business concern ("small business concern" as defined in section 3 of the Small Business Act (15 U.S.C. 632)). For violations that occurred after November 2, 2015, $16,108 per violation, up to a total of $80,544 per civil penalty action, in the case of an individual (except an airman serving as an airman), or a small business concern.

(2) For violations that occurred on or before November 2, 2015, $10,000 per violation, up to a total of $400,000 per civil penalty action, in the case of any other person (except an airman serving as an airman) not operating an aircraft for the transportation of passengers or property for compensation. For violations that occurred after November 2, 2015, $16,108 per violation, up to a total of $644,343 per civil penalty action, in the case of any other person (except an airman serving as an airman) not operating an aircraft for the transportation of passengers or property for compensation.

(3) For violations that occurred on or before November 2, 2015, $25,000 per violation, up to a total of $400,000 per civil penalty action, in the case of a person operating an aircraft for the transportation of passengers or property for compensation (except an individual serving as an airman). For violations that occurred after November 2, 2015, $40,272 per violation, up to a total of $644,343 per civil penalty action, in the case of a person (except an individual serving as an airman) operating an aircraft for the transportation of passengers or property for compensation.

JONATHAN E. MEYER,
General Counsel,
U.S. Department of Homeland Security.

[Published in the Federal Register, January 13, 2023 (88 FR 2175)]

19 CFR CHAPTER I

TERMINATION OF ARRIVAL RESTRICTIONS APPLICABLE TO FLIGHTS CARRYING PERSONS WHO HAVE RECENTLY TRAVELED FROM OR WERE OTHERWISE PRESENT WITHIN UGANDA

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

ACTION: Announcement of termination of arrival restrictions.

SUMMARY: This document announces the decision of the Secretary of Homeland Security to terminate arrival restrictions applicable to flights to the United States carrying persons who have recently traveled from, or were otherwise present within, Uganda due to an outbreak of Ebola disease in Uganda. These restrictions directed such flights to only land at one of the United States airports where the United States Government had focused public health resources to implement enhanced public health measures.

DATES: The arrival restrictions applicable to flights to the United States carrying persons who have recently traveled from, or were otherwise present within, Uganda are terminated as of 11:59 p.m. Eastern Standard Time on January 11, 2023.

FOR FURTHER INFORMATION CONTACT: Stephanie Watson, Office of Field Operations, U.S. Customs and Border Protection at 202–255–7018.

SUPPLEMENTARY INFORMATION:

Background

On October 12, 2022, the Secretary of Homeland Security announced arrival restrictions applicable to flights carrying persons who have recently traveled from, or were otherwise present within, Uganda, consistent with 6 U.S.C. 112(a), 19 U.S.C. 1433(c), and 19 CFR 122.32, in a **Federal Register** document titled "Arrival Restrictions Applicable to Flights Carrying Persons Who Have Recently Traveled From or Were Otherwise Present Within Uganda" (87 FR 61488). For purposes of the October 2022 arrival restrictions, a person recently traveled from Uganda if that person departed from, or was otherwise present within, Uganda within 21 days of the date of the person's entry or attempted entry into the United States.

For the reasons set forth below, the Secretary has decided to terminate the arrival restrictions applicable to flights carrying persons who have recently traveled from, or were otherwise present within, Uganda. These restrictions funnel relevant arriving air passengers to

one of five designated airports of entry where the U.S. is implementing enhanced public health measures. Since November 27, 2022, there have been no new confirmed Ebola disease cases reported in Uganda and two 21-day incubation periods have passed. With no new hospitalized patients with Ebola disease, and no contacts of confirmed Ebola disease cases still requiring monitoring, the potential risk for Ebolavirus exposure in Uganda has greatly diminished. Therefore, flight arrival restrictions are no longer required for flights to the United States carrying persons who have recently traveled from, or were otherwise present within, Uganda.

Notice of Termination of Arrival Restrictions Applicable to All Flights Carrying Persons Who Have Recently Traveled From or Were Otherwise Present Within Uganda

Pursuant to 6 U.S.C. 112(a), 19 U.S.C. 1433(c), and 19 CFR 122.32, and effective as of 11:59 p.m. Eastern Standard Time on January 11, 2023, for all affected flights arriving at a United States airport, I hereby terminate the arrival restrictions applicable to flights to the United States carrying persons who have recently traveled from, or were otherwise present within, Uganda announced in the Arrival Restrictions document published at 87 FR 61488 (October 12, 2022).

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

[Published in the Federal Register, January 17, 2023 (88 FR 2517)]

QUARTERLY IRS INTEREST RATES USED IN CALCULATING INTEREST ON OVERDUE ACCOUNTS AND REFUNDS OF CUSTOMS DUTIES

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

ACTION: General notice.

SUMMARY: This notice advises the public that the quarterly Internal Revenue Service interest rates used to calculate interest on overdue accounts (underpayments) and refunds (overpayments) of customs duties will increase from the previous quarter. For the calendar quarter beginning January 1, 2023, the interest rates for overpayments will be 6 percent for corporations and 7 percent for non-corporations, and the interest rate for underpayments will be 7 percent for both corporations and non-corporations. This notice is published for the convenience of the importing public and U.S. Customs and Border Protection personnel.

DATES: The rates announced in this notice are applicable as of January 1, 2023.

FOR FURTHER INFORMATION CONTACT: Bruce Ingalls, Revenue Division, Collection Refunds & Analysis Branch, 6650 Telecom Drive, Suite #100, Indianapolis, Indiana 46278; telephone (317) 298–1107.

SUPPLEMENTARY INFORMATION:

Background

Pursuant to 19 U.S.C. 1505 and Treasury Decision 85–93, published in the **Federal Register** on May 29, 1985 (50 FR 21832), the interest rate paid on applicable overpayments or underpayments of customs duties must be in accordance with the Internal Revenue Code rate established under 26 U.S.C. 6621 and 6622. Section 6621 provides different interest rates applicable to overpayments: one for corporations and one for non-corporations.

The interest rates are based on the Federal short-term rate and determined by the Internal Revenue Service (IRS) on behalf of the Secretary of the Treasury on a quarterly basis. The rates effective for a quarter are determined during the first-month period of the previous quarter.

In Revenue Ruling 2022–23, the IRS determined the rates of interest for the calendar quarter beginning January 1, 2023, and ending on March 31, 2023. The interest rate paid to the Treasury for underpayments will be the Federal short-term rate (4%) plus three per-

centage points (3%) for a total of seven percent (7%) for both corporations and non-corporations. For corporate overpayments, the rate is the Federal short-term rate (4%) plus two percentage points (2%) for a total of six percent (6%). For overpayments made by non-corporations, the rate is the Federal short-term rate (4%) plus three percentage points (3%) for a total of seven percent (7%). These interest rates used to calculate interest on overdue accounts (underpayments) and refunds (overpayments) of customs duties are increased from the previous quarter. These interest rates are subject to change for the calendar quarter beginning April 1, 2023, and ending on June 30, 2023.

For the convenience of the importing public and U.S. Customs and Border Protection personnel, the following list of IRS interest rates used, covering the period from July of 1974 to date, to calculate interest on overdue accounts and refunds of customs duties, is published in summary format.

Beginning date	Ending date	Underpayments (percent)	Overpayments (percent)	Corporate overpayments (eff. 1–1–99) (percent)
070174	063075	6	6	.....
070175	013176	9	9	.....
020176	013178	7	7	.....
020178	013180	6	6	.....
020180	013182	12	12	.....
020182	123182	20	20	.....
010183	063083	16	16	.....
070183	123184	11	11	.....
010185	063085	13	13	.....
070185	123185	11	11	.....
010186	063086	10	10	.....
070186	123186	9	9	.....
010187	093087	9	8	.....
100187	123187	10	9	.....
010188	033188	11	10	.....
040188	093088	10	9	.....
100188	033189	11	10	.....
040189	093089	12	11	.....
100189	033191	11	10	.....
040191	123191	10	9	.....
010192	033192	9	8	.....
040192	093092	8	7	.....
100192	063094	7	6	.....

Beginning date	Ending date	Under-payments (percent)	Over-payments (percent)	Corporate overpay-ments (eff. 1–1–99) (percent)
070194	093094	8	7	.....
100194	033195	9	8	.....
040195	063095	10	9	.....
070195	033196	9	8	.....
040196	063096	8	7	.....
070196	033198	9	8	.....
040198	123198	8	7	.....
010199	033199	7	7	6
040199	033100	8	8	7
040100	033101	9	9	8
040101	063001	8	8	7
070101	123101	7	7	6
010102	123102	6	6	5
010103	093003	5	5	4
100103	033104	4	4	3
040104	063004	5	5	4
070104	093004	4	4	3
100104	033105	5	5	4
040105	093005	6	6	5
100105	063006	7	7	6
070106	123107	8	8	7
010108	033108	7	7	6
040108	063008	6	6	5
070108	093008	5	5	4
100108	123108	6	6	5
010109	033109	5	5	4
040109	123110	4	4	3
010111	033111	3	3	2
040111	093011	4	4	3
100111	033116	3	3	2
040116	033118	4	4	3
040118	123118	5	5	4
010119	063019	6	6	5
070119	063020	5	5	4
070120	033122	3	3	2
040122	063022	4	4	3
070122	093022	5	5	4
100122	123122	6	6	5
010123	033123	7	7	6

Dated: January 11, 2023.

JEFFREY CAINE,
Chief Financial Officer,
U.S. Customs and Border Protection.

[Published in the Federal Register, January 18, 2023 (88 FR 2957)]

19 CFR PART 177

REVOCATION OF ONE RULING LETTER AND REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF UNIVERSAL BILL STACKER SUB-ASSEMBLY

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

ACTION: Notice of revocation of one ruling letter, and revocation of treatment relating to the tariff classification of universal bill stacker sub-assembly.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) is revoking one ruling letter concerning tariff classification of universal bill stacker sub-assembly under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Notice of the proposed action was published in the *Customs Bulletin*, Volume 56, No. 34, on August 31, 2022. No comment was received in response to that notice.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after April 2, 2023.

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

SUPPLEMENTARY INFORMATION:

BACKGROUND

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

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

Pursuant to 19 U.S.C. § 1625(c)(1), a notice was published in the *Customs Bulletin*, Volume 56, No. 34, on August 31, 2022, proposing to revoke one ruling letter pertaining to the tariff classification of universal bill stacker sub-assembly. Any party who has received an interpretive ruling or decision (*i.e.*, a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should have advised CBP during the comment period.

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

In NY I86148, CBP classified the universal bill stacker subassembly in heading 9504, HTSUS, specifically in subheading 9504.30.0060, HTSUSA (Annotated), which provides for "Video game consoles and machines, table or parlor games, including pinball machines, billiards, special tables for casino games and automatic bowling equipment, amusement machines operated by coins, banknotes, bank cards, tokens or by any other means of payment: Other games, operated by coins, banknotes, bank cards, tokens or by any other means of payment, other than automatic bowling alley equipment; parts and accessories thereof: Other: Parts and accessories". CBP has reviewed NY I86148 and has determined the ruling letter to be in error. It is now CBP's position that the universal bill stacker subassembly is properly classified, in heading 9031, HTSUS, specifically in subheading 9031.49.90, HTSUS, which provides for "Measuring or checking instruments, appliances and machines, not specified or included elsewhere in this chapter; profile projectors; parts and accessories thereof: Other optical instruments and appliances: Other: Other".

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is revoking NY I86148, and revoking or modifying any other ruling not specifically identified to reflect the analysis contained in Headquarters Ruling Letter (HQ) H318180, set forth as an attachment to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions.

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

Dated:

YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

Attachment

HQ H318180
January 13, 2023
OT:RR:CTF:CPMMA H318180 AJK
CATEGORY: Classification
TARIFF NO: 9031.49.9000

MR. THOMAS J. O'DONNELL
RODRIGUEZ O'DONNELL ROSS -
FUERST GONZALEZ & WILLIAMS, P.C.
20 NORTH WACKER DRIVE - SUITE 1416
CHICAGO IL 60606

RE: Revocation of NY I86148; Classification of Universal Bill Stacker Sub-Assembly

DEAR MR. O'DONNELL:

This letter is in reference to New York Ruling Letter (NY) I86148, dated September 26, 2002, concerning the tariff classification of a universal bill stacker sub-assembly. In NY I86148, U.S. Customs and Border Protection (CBP) classified the merchandise in heading 9504, Harmonized Tariff Schedule of the United States (HTSUS), as a part of casino gaming machines. We have reviewed NY I86148 and have determined that the classification of the merchandise in heading 9504, HTSUS, was incorrect.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. § 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), a notice of the proposed action was published in the *Customs Bulletin*, Volume 56, No. 34, on August 31, 2022. No comment was received in response to this notice.

FACTS:

The subject merchandise was described in NY I86148 as follows:

> The merchandise, also referred to as a cash box, is designed to receive and store paper currency in casino gaming machines. A separate validator unit mounted to the universal stacker accepts a paper bill into the stacker machine. You relate that "[a]s the bill enters the machine, the validator sensor reads the denomination to determine the value of the bill. The casino gaming machine then converts the cash into game credits....the validator then pushes the bill into the cash box where the money stays until the cash box is removed from the gaming machine." ....
>
> You state that the universal stacker sub-assembly subject of this inquiry, although capable of use in vending machines, is used primarily as a storage mechanism in casino gaming machines such as slot machines and video poker. You assert that the substantial construction of the stacker cash box housing and the fact that all units to be imported by your client will be equipped with locks or will be designed to accommodate locks is indicative of the primary or most common end use of this type of stacker in gaming machines.

ISSUE:

Whether the universal bill stacker sub-assembly is classified in heading 9031, HTSUS, as a banknote measuring machine, or heading 9504, HTSUS, as a part of a gaming machine operated by banknotes.

LAW AND ANALYSIS:

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

The ARI 1(a), which applies to principal use provisions, provides as follows:

In the absence of special language or context which otherwise requires—

(a) a tariff classification controlled by use (other than actual use) is to be determined in accordance with the use in the United States at, or immediately prior to, the date of importation, of goods of that class or kind to which the imported goods belong, and the controlling use is the principal use ....

* * * * * *

The HTSUS provisions at issue are as follows:

9031	Measuring or checking instruments, appliances and machines, not specified or included elsewhere in this chapter; profile projectors; parts and accessories thereof:	
	Other optical instruments and appliances:	
9031.49	Other:	
9031.49.90		Other
9504	Video game consoles and machines, table or parlor games, including pinball machines, billiards, special tables for casino games and automatic bowling equipment, amusement machines operated by coins, banknotes, bank cards, tokens or by any other means of payment:	
9504.30.00	Other games, operated by coins, banknotes, bank cards, tokens or by any other means of payment, other than automatic bowling alley equipment; parts and accessories thereof	
	Other:	
9504.30.0060		Parts and accessories

* * * * * *

Note 1 to chapter 90, HTSUS, provides, in pertinent part:

1. This chapter does not cover:

...

(k) Articles of chapter 95 ....

Note 3 to chapter 95, HTSUS, provides, as follows:

3. Subject to note 1 above, parts and accessories which are suitable for use solely or principally with articles of this chapter are to be classified with those articles.

Subheading note to chapter 95, HTSUS, provides, in pertinent part:

[Subheading 9504.50] does not cover video game consoles or machines operated by coins, banknotes, bank cards, tokens or by any other means of payment (subheading 9504.30).

* * * * * *

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

The General EN to chapter 95, HTSUS, provides, in pertinent part:

Each of the headings of this Chapter also covers identifiable parts and accessories of articles of this Chapter which are suitable for use solely or principally therewith, and provided they are not articles excluded by Note 1 to this Chapter.

EN 90.31, HTSUS, provides, in pertinent part:

[T]his heading covers measuring or checking instruments, appliances and machines, whether or not optical.

The Subheading EN for subheading 9031.49, HTSUS, provides as follows:

This subheading covers not only instruments and appliances which provide a direct aid or enhancement to human vision, but also other instruments and apparatus which function through the use of optical elements or processes.

EN 95.04, HTSUS, provides, in pertinent part:

This heading includes:

...

(6) Machines, operated by coins, banknotes, bank cards, tokens or by other means of payment, of the kind used in amusement arcades, cafés, funfairs, etc., for games of skill or chance (e.g., machines for revolver practice, pintables of various types)....

The Subheading EN for subheading 9504.50, HTSUS, provides as follows:

This subheading does not cover video game consoles or machines operated by coins, banknotes, bank cards, tokens or by any other means of payment; these are to be classified in subheading 9504.30.

* * * * * *

The legal note 3 to chapter 95 provides that "parts and accessories which are suitable for use solely or principally with articles of [chapter 95] are to be classified with those articles." The EN to subheading 9504.50 provides that "video game consoles or machines operated by ... banknotes" are classified in subheading 9504.30. *See also* Subheading Note to Chapter 95. Accordingly, subheading 9504.30.00, HTSUS, which provides for parts of video game machines operated by banknotes, is a principal use provision subject to ARI 1(a). To classify an article under a principal use provision, ARI 1(a) requires that the classification is controlled by the principal use of "goods of that class

or kind to which the imported goods belong". In *United States v. Carborundum Co*., the U.S. Court of Customs and Patent Appeals held that to determine whether an article is included in a particular class or kind of merchandise, the court must consider a variety of factors, including: (1) the general physical characteristics of the merchandise; (2) the channels, class or kind of trade in which the merchandise moves (*i.e.*, where the merchandise is sold); (3) the expectation of the ultimate purchasers; (4) the environment of the sale (*i.e.*, accompanying accessories and marketing); (5) usage, if any, in the same manner as merchandise which defines the class; (6) the economic practicality of so using the import; and (7) the recognition in the trade of this use. *United States v. Carborundum Co*., 536 F.2d 373, 377 (C.C.P.A. 1976). While these factors were developed under the Tariff Schedule of the United States (predecessor to the HTSUS), the courts have also applied them under the HTSUS. *See e.g., Minnetonka Brands v. United States*, 24 C.I.T. 645, 651–2 (2000); *Aromont USA, Inc. v. United States*, 671 F.3d 1310 (Fed. Cir. 2012); *Essex Manufacturing, Inc. v. United States*, 30 C.I.T. 1 (2006).

In NY I86148, CBP held that the universal bill stacker sub-assembly was classified in subheading 9504.30.0060, HTSUSA (Annotated), as a part of gaming machines operated by banknotes, because you contended that the subject merchandise is principally used with casino gaming machines. CBP, however, neglected to fully analyze the meaning of "principal use" within heading 9504, HTSUS. In the instant case, the universal bill stacker sub-assembly cannot be classified under heading 9504, HTSUS, because it is not a class or kind of machine that is principally used with casino gaming machines. In NY I86148, CBP found that the substantial construction of the stacker cash box housing and the locks used with the stacker are indicative of the primary or most common end use of this type of stacker in casino gaming machines. This finding, however, is incorrect because those physical characteristics do not prevent the subject merchandise from being used in general vending machines; thus, the universal bill stack sub-assembly has uses beyond casino gaming machines. Accordingly, since the merchandise can be used with other machines, in addition to casino gaming machines, we find that the subject merchandise is not principally used with casino gaming machines. Although we recognize the universal bill stacker sub-assembly's gaming-specific design and features, the evidence of a single importer's design for or sale to the gaming industry does not demonstrate the actual principal use of the merchandise. *See Carborundum Co*., 536 F.2d at 377 ("Susceptibility, capability, adequacy, or adaptability of the import to the common use of the class is not controlling.").

Moreover, the universal bill stacker sub-assembly is not an essential part of casino gaming machines as it does not enable the gaming function or facilitate the operation; instead, it performs a distinct function—to authenticate, accept and store banknotes. It is not limited in its ability to be used with other kinds of machines, including, but not limited to, banking, dispensing and vending, as long as they require a part—such as the universal stacker sub-assembly—to authenticate and store banknotes. In HQ 958781, dated April 30, 1996, CBP held that color picture tubes used exclusively in the video game industry were not classifiable in heading 9504, HTSUS, because they lacked the features which dedicated the tubes for sole or principal use with

video game monitors.[1] Similar to the subject universal bill stacker sub-assembly that can be used with non-casino gaming machines, the tubes were capable of being used with non-video game appliances and thus, CBP held that the tubes did not meet the requirements of the legal note 3 to chapter 95. Accordingly, the universal bill stacker sub-assembly, which is not exclusively used in the gaming industry, is not solely or principally used as a part of casino gaming machines. The primary function of the merchandise is to validate the legitimacy of the banknotes being input. Thus, the universal bill stacker sub-assembly is not classifiable under heading 9504, HTSUS, as a part of gaming machines operated by banknotes.

Accordingly, as a machine that authenticates banknotes by using validator sensors, the universal stacker sub-assembly is a distinct commercial entity that is covered in heading 9031, HTSUS, which provides for "measuring or checking instruments, appliances and machines, whether or not optical". *See* EN 90.31. In HQ 964467, dated December 1, 2000, CBP classified bill acceptors under subheading 9031.49.9000, HTSUSA. Similar to the subject universal bill stacker sub-assembly, the bill acceptors, which were placed inside of vending machines, scanned, accepted and rejected banknotes by using optical and magnetic sensors to verify them. In determining the correct heading, CBP found that the bill acceptors constitute optical checking instruments within the scope of heading 9031, HTSUS, due to their optical and magnetic sensors to verify currency and their primary function to validate banknotes. Similarly, in NY N009267, dated April 10, 2007, CBP classified optical bill acceptors, which were used as internal components of various machines to validate banknotes, under subheading 9031.49.9000, HTSUSA. Although you stated in your ruling request that the universal stacker sub-assembly "is used primarily as a storage mechanism in casino gaming machines[,] such as slot machines and video poker", we find that it is substantially similar to the products described in HQ 964467 and NY N009267 as they all share the primary function of verifying the legitimacy of, accepting or rejecting, and storing banknotes—a function that is universal to any machine that takes bills. The universal stacker sub-assembly, therefore, is classified in heading 9031, HTSUS, as a banknote measuring machine. This conclusion is consistent with prior CBP rulings classifying other banknote acceptors and similar articles under heading 9031, HTSUS.

HOLDING:

By application of GRI 1, the universal stacker sub-assembly is classified in heading 9031, HTSUS, specifically subheading 9031.49.9000, HTSUSA, which provides for "Measuring or checking instruments, appliances and machines, not specified or included elsewhere in this chapter; profile projectors; parts and accessories thereof: Other optical instruments and appliances: Other: Other". The 2022 column one, general rate of duty is free.

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

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[1] *Cf*. NY L81419, dated September 26, 2002 (classifying a display reader assembly that was specifically designed to be incorporated into casino gaming machines only under heading 9504, HTSUS, as a part of a gaming machine operated by banknotes).

EFFECT ON OTHER RULINGS:

NY I86148, dated September 26, 2002, is hereby revoked.

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

Sincerely,

YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

U.S. Court of International Trade

Slip Op. 22–155

FUSONG JINLONG WOODEN GROUP CO., LTD. et al., Plaintiffs, YIHUA LIFESTYLE TECHNOLOGY CO., LTD. et al., Consolidated Plaintiffs, and LUMBER LIQUIDATORS SERVICES, LLC et al., Plaintiff-Intervenors, v. UNITED STATES, Defendant, and AMERICAN MANUFACTURERS OF MULTILAYERED WOOD FLOORING, Defendant-Intervenor.

Before: Richard K. Eaton, Judge
Consol. Court No. 19–00144

[U.S. Department of Commerce's final results are sustained in part, and remanded.]

Dated: December 22, 2022

Alexandra H. Salzman, deKieffer & Horgan, PLLC, of Washington, D.C., argued for Plaintiffs Fusong Jinlong Wooden Group Co., Ltd., Fusong Qianqiu Wooden Product Co., Ltd., and Dalian Qianqiu Wooden Product Co., Ltd. With her on the brief was *Gregory S. Menegaz* and *J. Kevin Horgan*.

Daniel M. Witkowski and, Akin, Gump, Strauss, Hauer & Feld, LLP, of Washington, D.C., argued for Consolidated Plaintiff Sino-Maple (Jiangsu) Co., Ltd. With him on the brief was *Matthew R. Nicely* and *Dean A. Pinkert*, Hughes, Hubbard & Reed LLP, of Washington, D.C.

David J. Craven, Craven Trade Law LLC, of Chicago, IL, argued for Consolidated Plaintiffs Huzhou Chenghang Wood Co., Ltd., Hangzhou Hanje Tec Co., Ltd., Hunchun Xingjia Wooden Flooring Inc., Dunhua Shengda Wood Industry Co., Ltd., Zhejiang Fuerjia Wooden Co., Ltd., A&W (Shanghai) Woods Co., Ltd., and Dun Hua Sen Tai Wood Co., Ltd.

Adams C. Lee, Harris Bricken McVay Sliwoski LLP, of Seattle, WA, present but did not argue for Consolidated Plaintiff Zhejiang Dadongwu GreenHome Wood Co., Ltd.

Lizbeth Mohan, Fox Rothschild LLP, of Washington, D.C., argued for Consolidated Plaintiff Baishan Huafeng Wooden Product Co. With her on the brief were *Ronald M. Wisla* and *Brittney R. Powell*.

Kavita Mohan, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, of Washington, D.C., argued for Consolidated Plaintiff Scholar Home (Shanghai) New Material Co., Ltd. With her on the brief were *Elaine F. Wang*, *Francis J. Sailer*, *Ned H. Marshak*, and *Jordan C. Kahn*.

Sarah M. Wyss and *Jill A. Cramer*, Mowry & Grimson, PLLC, of Washington, D.C., present but did not argue for Consolidated Plaintiff Yihua Lifestyle Technology Co., Ltd. Of counsel on the brief was *John R. Magnus*, TradeWins LLC, of Washington, D.C.

Gregory S. McCue and *Adriana M. Campos-Korn*, Steptoe & Johnson, LLP, of Washington, D.C., present but did not argue for Consolidated Plaintiffs Struxtur, Inc. and Evolutions Flooring, Inc.

Mark R. Ludwikowski, Clark Hill PLC, of Washington, D.C., argued for Plaintiff-Intervenor Lumber Liquidators Services, LLC. With him on the brief were *William C. Sjoberg* and *Courtney G. Taylor*.

Sonia M. Orfield, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., argued for Defendant the United States. With her on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Tara K. Hogan*, Assistant Director. Of counsel on the brief was

Rachel A. Bogdan, Attorney, Office of Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

Stephanie M. Bell, Wiley Rein LLP, of Washington, D.C. argued for Defendant-Intervenor American Manufacturers of Multilayered Wood Flooring. With her on the brief were *Timothy C. Brightbill*, *Maureen E. Thorson*, and *Tessa V. Capeloto*.

OPINION AND ORDER

Eaton, Judge:

This consolidated case involves the final results of the U.S. Department of Commerce's ("Commerce" or the "Department") sixth administrative review of the antidumping duty order on multilayered wood flooring from the People's Republic of China ("China") covering the period of December 1, 2016, through November 30, 2017. *See Multilayered Wood Flooring From the People's Republic of China*, 84 Fed. Reg. 38,002 (Dep't Commerce Aug. 5, 2019) ("Final Results") and accompanying Issues and Decision Mem. (July 29, 2019), PR 484 ("Final IDM").

Before the court are twelve pending motions for judgment on the agency record by which Plaintiffs Fusong Jinlong Wooden Group Co., Ltd. et al. ("Fusong"), Consolidated Plaintiffs Sino-Maple (Jiangsu) Co., Ltd. ("Sino-Maple"), Metropolitan Hardwood Floors, Inc. et al. ("Metropolitan Hardwood"), Huzhou Chenghang Wood Co., Ltd. et al. ("Huzhou"), Zhejiang Dadongwu GreenHome Wood Co., Ltd. ("GreenHome"), Yihua Lifestyle Technology Co., Ltd. ("Yihua"), Linyi Anying Co., Ltd. and Linyi Youyou Co., Ltd. (collectively, "Linyi"), Struxtur, Inc. and Evolutions Flooring, Inc. (collectively, "Struxtur"), Scholar Home (Shanghai) New Material Co., Ltd. ("Scholar Home"), Baishan Huafeng Wooden Product Co. ("Baishan Huafeng"), together with Plaintiff-Intervenors Benxi Wood Company et al. ("Benxi Wood") and Lumber Liquidators Services, LLC ("Lumber Liquidators"), challenge several aspects of Commerce's Final Results as unsupported by substantial evidence and not in accordance with law. *See* Pls.' Mem. Supp. Mot. J. Agency R., ECF No. 51–2 ("Fusong's Br.");[1] Consol. Pl.'s Mem. Supp. Mot. J. Agency R., ECF No. 57 ("Sino-Maple's Br."); Consol. Pls.' Mem. Supp. Mot. J. Agency R., ECF No. 59–2 ("Metropolitan Hardwood's Br.");[2] Consol. Pls.' Mem. Supp. Mot. J. Agency R.,

[1] A single brief was submitted on behalf of Fusong Jinlong Wooden Group Co., Ltd., Fusong Qianqiu Wooden Product Co., Ltd., and Dalian Qianqiu Wooden Product Co., Ltd.

[2] A single brief was submitted on behalf of Metropolitan Hardwood Floors, Inc., Nakahiro Jyou Sei Furniture (Dalian) Co., Ltd., Shenyang Haobainian Wooden Co., Ltd., Cohesion Trading Limited, Galleher Corp., Galleher LLC, MGI International, Mobetta Trading Limited, and Wego International Floors LLC.

ECF No. 50–1 ("Huzhou's Br.");[3] Consol. Pl.'s Mem. Supp. Mot. J. Agency R., ECF No. 56–2 ("GreenHome's Br."); Consol. Pl.'s Mem. Supp. Mot. J. Agency R., ECF No. 47–2 ("Yihua's Br."); Consol. Pls.' Mem. Supp. Mot. J. Agency R., ECF No. 53 ("Linyi's Br.");[4] Consol. Pls.' Mem. Supp. Mot. J. Agency R., ECF No. 52 ("Struxtur's Br.");[5] Consol. Pl.'s Mem. Supp. Mot. J. Agency R., ECF No. 48 ("Scholar Home's Br."); Consol. Pl.'s Mem. Supp. Mot. J. Agency R., ECF No. 60–2 ("Baishan Huafeng's Br."); Pl.-Ints.' Mem. Supp. Mot. J. Agency R., ECF No. 55–2 ("Benxi Wood's Br.");[6] Pl.-Int.'s Mem. Supp. Mot. J. Agency R., ECF No. 54–2 ("Lumber Liquidators' Br.").

Defendant the United States, on behalf of Commerce, and Petitioner and Defendant-Intervenor American Manufacturers of Multilayered Wood Flooring ("American Manufacturers" or "Petitioner") oppose the motions. *See* Def.'s Resp. Pls.' Mots. J. Agency R., ECF No. 70 ("Def.'s Resp. Br."); Def.-Int.'s Resp. Pls.' Mots. J. Agency R., ECF No. 69 ("Def.-Int.'s Resp. Br.").

For the reasons below, the court sustains the Department's decision to use adverse facts available ("AFA") in determining Sino-Maple's dumping margin as supported by substantial evidence and in accordance with law. The court also sustains Commerce's separate rate eligibility determinations as supported by substantial evidence and in accordance with law. The court cannot sustain, however, the method Commerce used to determine Sino-Maple's AFA rate—*i.e.*, by selecting the highest transaction-specific margin on the record—because it is not in accordance with law.

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[3] A single brief was submitted on behalf of Huzhou Chenghang Wood Co., Ltd., Hangzhou Hanje Tec Co., Ltd., Hunchun Xingjia Wooden Flooring Inc., Dunhua Shengda Wood Industry Co., Ltd., Zhejiang Fuerjia Wooden Co., Ltd., A&W (Shanghai) Woods Co., Ltd., and Dun Hua Sen Tai Wood Co., Ltd.

[4] The Linyi brief states only that it "incorporate[s] herein by reference and in full the arguments and the requests for relief as presented in the motions and briefs filed by all other plaintiffs and plaintiff-intervenors in this proceeding." Linyi's Br. at 2. As such, this brief is not further discussed herein.

[5] The Struxtur brief states only that it "incorporate[s] herein by reference and in full the arguments and the requests for relief as presented in the motions and briefs filed by all other plaintiffs and plaintiff-intervenors in this proceeding." Struxtur's Br. at 2. As such, this brief is not further discussed herein.

[6] A single brief was submitted on behalf of Benxi Wood Company, Dalian Jiahong Wood Industry Co., Ltd., Dalian Kemian Wood Industry Co., Ltd., Dongtai Fuan Universal Dynamics, LLC, HaiLin LinJing Wooden Products Co., Ltd., Jiangsu Guyu International Trading Co., Ltd., Jiangsu Mingle Flooring Co., Ltd., Jiangsu Simba Flooring Co., Ltd., Jiashan HuiJiaLe Decoration Material Co., Ltd., Kemian Wood Industry (Kunshan) Co., Ltd., Suzhou Dongda Wood Co., Ltd., and Tongxiang Jisheng Import and Export Co., Ltd.

Thus, on remand, Commerce shall reconsider the method used to select an AFA rate for Sino-Maple in a manner that complies with this Opinion and Order, and the statute, 19 U.S.C. § 1677e(d).[7] Since the remaining issues are contingent upon the outcome of Commerce's redetermination of Sino-Maple's rate on remand, the court reserves decision on these issues[8] until the results of redetermination are before the court.

BACKGROUND

I. Commerce's Adverse Facts Available Determination

On December 4, 2017, Commerce issued a notice of opportunity to request an administrative review for the antidumping duty order on multilayered wood flooring from China. *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review*, 82 Fed. Reg. 57,219, 57,220 (Dep't Commerce Dec. 4, 2017).

On March 7, 2018, Commerce placed on the administrative record U.S. Customs and Border Protection ("Customs") data for mandatory respondent[9] selection purposes. *See* Release of U.S. Customs and Border Protection Data Mem. (Mar. 7, 2018), PR 40. Based on this data, Commerce initially selected Jiangsu Senmao Bamboo and Wood Industry Co., Ltd. ("Senmao") and Fine Furniture (Shanghai) Limited

[7] All references to the U.S. Code are to the 2018 edition, unless otherwise noted.

[8] The issues on which the court reserves decision are: (1) whether Commerce's inclusion of Sino-Maple's AFA rate in the calculation of the separate rate is supported by substantial evidence and in accordance with law; (2) whether Commerce's method in calculating the separate rate is reasonable under 19 U.S.C. § 1673d(c)(5)(B); (3) whether the separate rate is aberrational and not reflective of the separate rate respondents' potential dumping margins; and (4) whether Commerce's use of a rate, based entirely on AFA, in calculating the separate rate for the fully cooperative separate rate respondents, violates the excessive fines clause of the Eighth Amendment.

[9] Generally, Commerce determines an "individual weighted average dumping margin for each known exporter and producer of the subject merchandise." 19 U.S.C. § 1677f-1(c)(1). Commerce, however, may limit individual examination to mandatory respondents (*i.e.*, "exporters and producers accounting for the largest volume of the subject merchandise from the exporting country") when the "large number of exporters or producers involved in the investigation" makes it impracticable for Commerce to calculate an individual margin for each one. *Id.* § 1677f-1(c)(2).

("Fine Furniture")—the two largest exporters[10] of the subject wood flooring—as mandatory respondents. *See* Mandatory Respondent Selection Mem. (June 19, 2018) at 8, PR 258, CR 159.

On July 30, 2018, Commerce issued an additional mandatory respondent memorandum stating its intention to rescind the review with respect to Fine Furniture and to select Sino-Maple—the next largest exporter—as a mandatory respondent in its place. *See* Selection of Additional Mandatory Respondent Mem. (July 30, 2018) at 2–3, PR 276.

On July 31, 2018, Commerce issued an initial antidumping questionnaire to Sino-Maple. *See* Sino-Maple Antidumping Quest. (July 31, 2018), PR 278. Sino-Maple timely filed its responses, providing Commerce with, *inter alia*, information regarding its U.S. sales during the period of review. *See* Sino-Maple's Resp. Sec. A Quest. (Sept. 4, 2018), PR 298, 299; *see also* Sino-Maple's Resp. Secs. C & D Quest. (Sept. 13, 2018), PR 302, CR 190–202. After considering the responses and identifying a potentially relevant relationship between Sino-Maple and a U.S. affiliate—Alpha Floors, Inc.—on October 17, 2018, Commerce issued a supplemental questionnaire asking Sino-Maple to "explain [its] relationship with Alpha Floors, including whether Alpha Floors assists Sino-Maple with finding U.S. customers and/or facilitating the sale of subject merchandise." Sino-Maple First Suppl. Quest. (Oct. 17, 2018) ("First Suppl. Quest.") at 4, PR 351, CR 229. Sino-Maple responded that Alpha Floors, an affiliated company, "assist[ed it] with finding U.S. customers and facilitating the sales of subject merchandise in the United States at times during the [period of review]." Sino-Maple's Resp. First Suppl. Quest. (Nov. 5, 2018) at 5, PR 376, CR 242–44.

Several days later, Commerce issued a second supplemental questionnaire asking Sino-Maple to clarify certain aspects of its prior responses regarding its relationship with Alpha Floors. *See* Sino-Maple Second Suppl. Quest. (Nov. 9, 2018) ("Second Suppl. Quest."),

[10] "Commerce's practice has devolved to the point where it regularly chooses only two (and sometimes one) mandatory respondents to be 'representative' of unexamined respondents for the purpose of calculating the [separate] rate in a review, a [practice] that this Court has regarded with some skepticism." *Jilin Forest Indus. Jinqiao Flooring Grp. Co. v. United States*, 45 CIT __, __, 519 F. Supp. 3d 1224, 1236 (2021) (footnote omitted) (first citing *Zhejiang Native Produce & Animal By-Prods. Imp. & Exp. Corp. v. United States*, 33 CIT 1125, 637 F. Supp. 2d 1260 (2009); and then citing *Carpenter Tech. Corp. v. United States*, 33 CIT 1721, 662 F. Supp. 2d 1337 (2009)). "There can be little question that, if Commerce were to change its method and name more than two mandatory respondents, separate rate companies would receive more accurate rates, and a great deal of litigation would be avoided." *Xiping Opeck Food Co. v. United States*, 45 CIT __, __, 551 F. Supp. 3d 1339, 1356–57 (2021). The Federal Circuit has expressed similar concerns. *See, e.g.*, *YC Rubber Co. (N. Am.) LLC v. United States*, 2022 WL 3711377, at *3–4 (Fed. Cir. Aug. 29, 2022) (not reported in the Federal Reporter) (holding that "Commerce unlawfully restricted its examination to a single respondent" under 19 U.S.C. § 1677f-1(c)(2)).

PR 378, CR 252. Commerce noted that Sino-Maple's sales reconciliation indicated that the company had, in fact, made sales to its U.S. affiliate Alpha Floors during the period of review.[11] *See* Second Suppl. Quest. at 3. Sino-Maple, however, initially reported making sales to only two unaffiliated U.S. customers.

The inconsistencies in Sino-Maple's reporting led Commerce to believe that Alpha Floors was a U.S. customer of Sino-Maple. Thus, on November 9, 2018, Commerce notified Sino-Maple that, if Alpha Floors sold subject wood flooring to unaffiliated U.S. customers during the period of review, then Sino-Maple should revise its sales database to include these sales. *See* Second Suppl. Quest. at 3. The idea here was that if U.S. affiliate, Alpha Floors, sold Sino-Maple's products to an unaffiliated company in the United States, then these sales should be reported as constructed export price sales under the statute. *See* 19 U.S.C. § 1677a(b) (constructed export price is "the price at which the subject merchandise is first sold (or agreed to be sold) in the United States . . . by a seller affiliated with the producer or exporter, to a purchaser not affiliated with the producer or exporter").

In response to Commerce's second supplemental questionnaire, Sino-Maple reported that there were sales of subject merchandise originally reported as export price sales[12] (*i.e.*, sales to an unaffiliated third party) that the company now believed should have been reported as constructed export price sales[13] (*i.e.*, sales to an affiliated entity, such as Alpha Floors). *See* Sino-Maple's Resp. Second Suppl. Quest. (Nov. 16, 2018), PR 383, CR 254. That is, for these sales, Sino-Maple sold subject wood flooring directly to Alpha Floors, which then sold the subject wood flooring to an unaffiliated third-party

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[11] Sino-Maple's sales reconciliation reflected 1,710,572 Renminbi in sales to Alpha Floors during the period of review and Sino-Maple's 2016 and 2017 audited financial statements indicated 1,856,771 Renminbi in "major transactions" with Alpha Floors. Second Suppl. Quest. at 3.

[12] "Export price" means

> the price at which the subject merchandise is first sold (or agreed to be sold) before the date of importation by the producer or exporter of the subject merchandise outside of the United States to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States, as adjusted under subsection (c).

19 U.S.C. § 1677a(a).

[13] "Constructed export price" means

> the price at which the subject merchandise is first sold (or agreed to be sold) in the United States before or after the date of importation by or for the account of the producer or exporter of such merchandise *or by a seller affiliated with the producer* or exporter, to a purchaser not affiliated with the producer or exporter, as adjusted under subsections (c) and (d).

19 U.S.C. § 1677a(b) (emphasis added).

purchaser.[14] Sino-Maple explained that the sales were initially misreported as export price sales, rather than constructed export price sales, because the company "did not understand that such sales would be considered [constructed export price] sales when its affiliated company, Alpha Floors, Inc., was not the importer of record." *See* Sino-Maple's Partial Ext. Req. (Nov. 14, 2018) ("Ext. Req.") at 2, PR 380, CR 253.

Sino-Maple also reported another sale made through Alpha Floors that had not been accounted for in its original reporting because the company mistakenly believed that sale to be outside the period of review. *See* Sino-Maple's Resp. Second Suppl. Quest. at 1.

While Sino-Maple timely provided its responses to Commerce's questions in the second supplemental questionnaire, the company requested an extension of time to report additional U.S. sales information. *See* Ext. Req. at 2–3. That is, after reviewing certain sales with its counsel, Sino-Maple wished to report additional imports into the United States by Alpha Floors of multilayered wood flooring from a third-country manufacturer as constructed export price sales. *See* Ext. Req. at 2–4.

These third-country imports were not sales of multilayered wood flooring from Sino-Maple to Alpha Floors that were resold to unaffiliated U.S. customers. Rather, they were sales of multilayered wood flooring finished by a third-country manufacturer using plywood cores supplied by Sino-Maple.[15] *See* Ext. Req. at 2–4.

Apparently, the unaffiliated third-country manufacturer used the plywood cores it purchased from Sino-Maple to produce multilayered wood flooring, and then sold that wood flooring to Sino-Maple's sister company, Alpha Floors. *See* Ext. Req. at 3, Exs. 1 & 3. Alpha Floors then entered the merchandise in the United States as multilayered wood flooring from the third country. *See* Ext. Req. at 2–3. Sino-Maple maintained that it did not report these sales previously because it believed the merchandise in question was multilayered wood flooring from the third country and therefore not subject to the antidumping review covering multilayered wood flooring from China. *See* Ext. Req. at 2–3. According to Sino-Maple, the final results of a separate Customs proceeding[16] led it to reconsider whether the imports of multi-

[14] There were four sales of subject merchandise originally misreported as export price sales. *See* Sino-Maple's Resp. Second Suppl. Quest. at 1.

[15] Sino-Maple sold its plywood cores to Paladin Lake (Cambodia) Wood Industry Co., Ltd., an unaffiliated factory in Cambodia. *See* Ext Req. at 3.

[16] The separate Customs proceeding was a Generalized System of Preferences verification related to Alpha Floors' entry of multilayered wood flooring from Cambodia. *See* Ext. Req. at 3.

layered wood flooring by Alpha Floors from the third-country manufacturer were relevant to the review of multilayered wood flooring from China.

As part of the separate proceeding, Customs contacted Alpha Floors and asked for information regarding one of the company's entries of multilayered wood flooring from the third-country manufacturer. Alpha Floors responded to Customs' inquiries in February and March 2018. *See* Ext. Req. at 2–3. On September 5, 2018, Alpha Floors received a notice of action from Customs proposing to treat its entry as merchandise of Chinese origin, rather than from the third country. *See* Ext. Req., Ex. 1. The notice also stated that the merchandise would be subject to antidumping duties in the present review. *See* Ext. Req., Ex. 1. Alpha Floors disputed Customs' preliminary determination and argued that the entries were properly entered as merchandise from the third country and, therefore, should not be reclassified as merchandise from China. Nevertheless, on November 7, 2018, Customs informed Alpha Floors that, after further review, it was still Customs' position that Alpha Floors' entry would be considered merchandise of Chinese origin. *See* Ext. Req., Ex. 3.

On November 14, 2018, Sino-Maple asked for an extension of time, which it said would give it an opportunity to provide Commerce with information regarding the shipments of multilayered wood flooring made in the third country, using Sino-Maple's plywood cores, and imported by Alpha Floors. The company stated that it was convinced that these sales were now subject to antidumping duties in this review. *See* Ext. Req. Sino-Maple asked for an extension until December 17, 2018—the deadline by which Commerce was to issue the preliminary decision memorandum. *See* Ext. Req. at 4. Commerce denied Sino-Maple's request "due to the time constraints in [the] proceeding." *See* Denial Sino-Maple Partial Ext. Req. (Nov. 16, 2018) ("Ext. Req. Denial"), PR 385.

Importantly, questions related to Commerce's denial of Sino-Maple's extension request have not been raised before the court.[17]

[17] Sino-Maple argued in its case brief, before Commerce, that the Department abused its discretion when it denied the company's request for an extension of time to file additional information related to the third-country transactions involving its U.S. affiliate, Alpha Floors. *See* Sino-Maple's Case Br. (Mar. 4, 2019) at 4, PR 440, CR 277. Sino-Maple, however, did not raise this argument in its briefs before the court and has therefore forfeited this argument. *See Beijing Tianhai Indus. Co. v. United States*, 41 CIT __, __, 234 F. Supp. 3d 1322, 1330 (2017) ("[A]rguments not raised in the opening brief are waived." (quoting *SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1319 (Fed. Cir. 2006))).

GreenHome, a separate rate respondent, did not raise the issue of Sino-Maple's request for an extension of time in its case brief before Commerce, but now argues before the court that "[t]he Department's refusal to allow Sino-Maple to submit additional information regarding its U.S. affiliate[']s importations from a third-country was arbitrary and an abuse

The extension request is relevant, however, because it is when Sino-Maple first made Commerce aware of the unreported third-country sales.

Sino-Maple provided the total quantity and value for the imports by Alpha Floors from the third-country manufacturer in its November 16, 2018, response to Commerce's second supplemental questionnaire. *See* Sino-Maple's Resp. Second Suppl. Quest. at 4. Sino-Maple did not, however, supply the individual sales information necessary for Commerce to calculate the constructed export price (U.S. sales price) of the company's products.

Commerce issued its Preliminary Decision Memorandum on December 17, 2018, in which it determined a zero percent dumping margin for Senmao[18] and a margin of 96.51 percent for Sino-Maple. *See Multilayered Wood Flooring From the People's Republic of China*, 83 Fed. Reg. 65,630, 65,631 (Dep't Commerce Dec. 21, 2018) ("Preliminary Results") and accompanying Preliminary Decision Mem. (Dec. 17, 2018) ("PDM") at 1, 16, PR 403. Sino-Maple's margin was based entirely on AFA.[19] *See* Preliminary Results, 83 Fed. Reg. at 65,631.

II. Commerce's Determination of the Separate Rate

Commerce also preliminarily determined that many of the Chinese exporters and/or producers not selected for individual review were eligible for a separate rate by demonstrating *de jure* and *de facto* independence from the Chinese government (the "Separate Rate Companies"[20]). In other words, these companies had rebutted the

of discretion." GreenHome's Br. at 5. Beyond this, there is nothing in GreenHome's brief that directly addresses how Commerce abused its discretion and GreenHome does not develop its argument beyond this single assertion. Under these circumstances, the court deems this issue waived. *See United States v. Great Am. Ins. Co.*, 738 F.3d 1320, 1328 (Fed. Cir. 2013) ("It is well established that arguments that are not appropriately developed in a party's briefing may be deemed waived.").

[18] Senmao does not dispute its assigned zero percent dumping margin and is not a party to this lawsuit.

[19] Under the statute, Commerce may use "facts otherwise available" when necessary information is missing from the record. *See* 19 U.S.C. § 1677e(a). The statute also permits Commerce to make a separate finding to use adverse inferences when selecting from among the facts available if "an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information from [Commerce]." *Id.* § 1677e(b).

[20] Commerce preliminarily determined that sixty-one companies had demonstrated eligibility for a separate rate. Out of those sixty-one companies, only Fusong, Metropolitan Hardwood, Huzhou, GreenHome, Yihua, Linyi, Struxtur, and Benxi Wood are parties to this action.

Department's nonmarket economy presumption[21] that they were controlled by the Chinese government.

Pursuant to the statute, Commerce determines the estimated separate rate by taking a "weighted average of the estimated weighted average dumping margins established for exporters and producers individually investigated, excluding any zero and de minimis margins, and any margins determined entirely under [19 U.S.C. § 1677e]." 19 U.S.C. § 1673d(c)(5)(A).[22]

Here, because the margins established for all individually-examined respondents in the review were zero, de minimis, or determined entirely under 19 U.S.C. § 1677e (*i.e.*, on the basis of AFA), Commerce calculated the rate for the Separate Rate Companies under the exception to the general rule, which permits the Department to use "any reasonable method." *See id.* § 1673d(c)(5)(B). Commerce therefore took a simple average of Senmao's zero percent rate and Sino-Maple's 96.51 percent rate (the highest transaction-specific margin on the record for Senmao) to arrive at a separate rate of 48.26 percent.

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[21] "Over the years, Commerce has developed an administrative practice of applying a rebuttable presumption that all companies within a nonmarket economy country are controlled by the government of that country, *i.e.*, the 'NME Policy.'" *Jilin*, 45 CIT at __, 519 F. Supp. 3d at 1239. As part of its NME Policy, Commerce presumes that all Chinese exporters are part of the "NME Entity," a single country-wide concept employed by the Department as a sort of legal fiction. The NME Entity is neither "China" nor the "Chinese government," but rather consists of all the Chinese exporters and producers of subject merchandise. As noted, this policy has been open to question. *See id.*, 45 CIT at __, 519 F. Supp. 3d at 1239–44.

[22] Commerce used the method of calculating an "all-others" rate in investigations under 19 U.S.C. § 1673d(c)(5) to calculate the rate for the Separate Rate Companies in this review. Commerce refers to this rate as the "separate rate" in both the Preliminary and Final Results. *See* PDM at 17; *see also* Final IDM at 13, 23–27. While this "separate rate" is not technically an "all-others" rate—an "all-others" rate is limited solely to investigations under the statute—it is often referred to as the "all-others" rate in administrative reviews. *See, e.g.*, *Shanxi Hairui Trade Co. v. United States*, 39 F.4th 1357, 1361 (Fed. Cir. 2022) (emphasis added) ("In 2013, Commerce promulgated a new policy for calculating *all-others rates in administrative reviews* for NME entities.") (citing *Antidumping Proceedings: Announcement of Change in Department Practice for Respondent Selection in Antidumping Duty Proceedings and Conditional Review of the Nonmarket Economy Entity in NME Antidumping Duty Proceedings*, 78 Fed. Reg. 65,963–64 (Dep't Commerce Nov. 4, 2013)); *see also, e.g.*, *Changzhou Trina Solar Energy Co. v. United States*, 975 F.3d 1318, 1322 (Fed. Cir. 2020) (alteration in original) (emphasis added) ("In the course of an investigation *or review*, Commerce 'determine[s] the estimated weighted average dumping margin for each exporter and producer individually investigated' *or reviewed* and 'the estimated all-others rate for all exporters and producers not individually investigated' *or reviewed*." (first quoting 19 U.S.C. § 1673d(c)(1)(B)(i); and then citing 19 U.S.C. § 1677f-1(c))).

Two companies,[23] Scholar Home and Baishan Huafeng, had filed separate rate applications but were ultimately denied a separate rate. *See* PDM at 12. Commerce found that, because Scholar Home and Baishan Huafeng failed to respond in a timely manner to the Department's supplemental questionnaires regarding separate rate eligibility, it was unable to determine whether these companies were independent from the Chinese government and thus eligible for a separate rate. *See* PDM at 12.

On July 29, 2019, Commerce published its Final Issues and Decision Memorandum, in which it modified certain aspects of the Preliminary Results. *See* Final IDM. As noted above, Commerce preliminarily selected an AFA rate for Sino-Maple of 96.51 percent, which was the highest transaction-specific margin determined for Senmao—the other mandatory respondent in this review. A review of the record, however, demonstrated that this rate resulted from a clerical error. Thus, Commerce amended the AFA rate to reflect the correctly determined highest transaction-specific margin for Senmao, 85.13 percent.[24] *See* Final IDM at 12.

In the Final Results, Commerce assigned the amended AFA rate (85.13 percent) to Sino-Maple and recalculated the rate for the Separate Rate Companies accordingly. Thus, as it had in the Preliminary Results, Commerce took a simple average of the mandatory respondents' rates (*i.e.*, zero percent and 85.13 percent) to arrive at a 42.57 percent rate for the Separate Rate Companies. *See* Final IDM at 23. The rest of Commerce's Final Results remained unchanged from the Preliminary Results in all relevant respects.[25]

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction under 28 U.S.C. § 1581(c) and will sustain a determination by Commerce unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with

[23] Commerce also determined that Jilin Forest Industry Jinqiao Flooring Group Co., Ltd. ("Jilin") was ineligible for a separate rate. *See* Final IDM at 48–52. Though Jilin filed a complaint in *Jilin Forest Industry Jinqiao Flooring Group Co. v. United States*, Court No. 1900159, ECF No. 10, now part of this consolidated action, and identified a claim in the statement of the issues filed with the court, ECF No. 39, Jilin did not file a motion for judgment on the agency record pursuant to USCIT Rule 56.2(c). Thus, any claim specific to Jilin has been waived. This includes any challenge by Jilin to Commerce's determination that the company is not eligible for a separate rate.

[24] As shall be seen, a transaction-specific margin cannot withstand judicial review. Later in this opinion the court discusses in more detail that Commerce's use of the highest transaction-specific margin as an AFA rate is not authorized by the statute.

[25] Commerce made two additional findings in the Final Results that differed from the Preliminary Results. First, Commerce determined that Guangdong Yihua Timber Industry Co., Ltd. was eligible for a separate rate. *See* Final IDM at 5. Second, Commerce determined that Jiangsu Keri Wood Co., Ltd. and Dalian Guhua Wooden Product Co., Ltd. made no shipments during the period of review. *See* Final IDM at 5.

law." 19 U.S.C. § 1516a(b)(1)(B)(i). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

DISCUSSION

I. Commerce's Decision to Use Adverse Facts Available in Determining Sino-Maple's Dumping Margin Is Supported by Substantial Evidence and in Accordance with Law, but Its Method of Selecting the Company's Rate Is Not Authorized by the Statute

Here, Commerce applied what it calls "total adverse facts available" ("total AFA") to determine Sino-Maple's dumping margin. While "total AFA" is not defined by statute or agency regulation, Commerce uses this term to refer to

> a series of steps [it] takes to reach the conclusion that all of a party's reported information is unreliable or unusable and that as a result of a party's failure to cooperate to the best of its ability, it must use an adverse inference in selecting among the facts otherwise available[, even when the missing information may relate only to a respondent's U.S. sales, as is the case here].

Deacero S.A.P.I. de C.V. v. United States, 42 CIT __, __, 353 F. Supp. 3d 1303, 1305 n.2 (2018). Thus, Commerce did not calculate an individual rate for Sino-Maple. Rather, it disregarded all of Sino-Maple's reported information and applied an adverse inference in selecting the company's rate. *See* Final IDM at 10–12.

Commerce's disregard of all Sino-Maple's reported information as unusable, and its selection of a rate, resulted from the company's failure to disclose certain "sales made to [Alpha Floors] through a third country," which "left a wide range of its [U.S.] sales information missing and/or unreliable for calculating a preliminary margin" and, "overall, call[ed] into question the reliability of Sino-Maple's reported sales information."[26] Final IDM at 10; *see also* PDM at 15–16.

Commerce then applied an adverse inference in selecting Sino-Maple's rate because the company "failed to cooperate by not acting to the best of its ability to comply with [the Department's] multiple

[26] "If . . . necessary information is not available on the record . . . [Commerce] shall . . . use the facts otherwise available in reaching the applicable determination." 19 U.S.C. § 1677e(a).

requests for certain sales information[27] ," by (1) "repeatedly fail[ing] to disclose its relationship with its [U.S.] affiliate" and (2) failing to timely report certain "sales made to this U.S. affiliate through a third country," despite being "aware of the merchandise sold to its U.S. affiliate well in advance of its initial questionnaire response." *See* PDM at 15; *see also* Final IDM at 10; Sino-Maple Preliminary Adverse Facts Available Mem. (Dec. 17, 2018), PR 409, CR 270 (providing a breakdown of Sino-Maple's "reported" and "unreported" sales).[28]

A. Commerce's Facts Available Determination, in Particular, Its Decision to Disregard All of Sino-Maple's Information, Is Supported by Substantial Evidence and in Accordance with Law

Under the statute, Commerce is permitted to fill gaps in the record with facts available if "necessary information is not available on the record, or . . . an interested party or any other person . . . fails to provide . . . information [that has been requested by Commerce] . . . in the form and manner requested [or] significantly impedes a proceeding." 19 U.S.C. § 1677e(a)(1)-(2).

Sino-Maple[29] argues that Commerce's decision to disregard all of its reported information and select an AFA rate as the company's dump-

[27] "If [Commerce] finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information from [Commerce], the [Department] . . . may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available." 19 U.S.C. § 1677e(b)(1).

[28] The breakdown of Sino-Maple's "reported" and "unreported" U.S. sales is as follows:

Amounts	**Reported**	**Unreported**
Quantity (m2)	515,766	211,757
Value (USD)	$12,437,253	$5,301,981
Percentage	71%	29%

[29] Consolidated Plaintiff GreenHome incorporates by reference all factual and legal arguments raised by Sino-Maple in connection with the Department's total AFA determination. *See* GreenHome's Br. at 5.

ing margin is unsupported by substantial evidence.[30] *See* Sino-Maple's Br. at 19–33. Sino-Maple does not dispute that a significant amount of the company's U.S. sales information was missing from the record. Rather, the company argues that a discrete and identifiable gap in the record existed that could be filled by facts otherwise available. Specifically, Sino-Maple maintains that the total aggregate quantity and value of the missing U.S. sales was on the record, and could have been used to fill the gap left by the unreported U.S. sales. *See* Sino-Maple's Br. at 29–31.

Although Sino-Maple reported the *total aggregate* quantity and value for the missing U.S. sales, that information was of little worth to Commerce's antidumping duty determination because the company failed to report the sales data for each of the individual entries that compose the aggregate. Under the statute, Commerce is required to determine "(i) the normal value and export price (or constructed export price) of each entry of the subject merchandise, and (ii) the dumping margin for each such entry," when calculating an antidumping duty for subject merchandise in administrative reviews. 19 U.S.C. § 1675(a)(2)(A)(i)-(ii). Thus, without transaction-specific sales data, Commerce could not calculate dumping margins for the individual

[30] The court rejects American Manufacturers' argument that Sino-Maple failed to exhaust its administrative remedies because it failed to raise, at the agency level, its argument that Commerce should have used some of the company's information, rather than total AFA. *See* Def.-Int.'s Resp. Br. at 20. "This court has discretion to determine when it will require the exhaustion of administrative remedies." *Blue Field (Sichuan) Food Indus. Co. v. United States*, 37 CIT 1619, 1627, 949 F. Supp. 2d 1311, 1321 (2013) (citation omitted); *see* 28 U.S.C. § 2637(d) (this Court "shall, where appropriate, require the exhaustion of administrative remedies"). A respondent "cannot circumvent the requirements of the doctrine of exhaustion by merely mentioning a broad issue without raising a particular argument." *Fabrique de Fer de Charleroi S.A. v. United States*, 25 CIT 741, 744, 155 F. Supp. 2d 801, 806 (2001) (citations omitted). Nevertheless, a "brief statement of the argument is sufficient [to exhaust administrative remedies] if it alerts [Commerce] to the argument with reasonable clarity and avails the agency with an opportunity to address it." *Id.* (citations omitted).

The court finds that the issues raised in Sino-Maple's case brief were articulated clearly enough to alert Commerce to the company's arguments, and thus satisfy the requirements of the exhaustion doctrine. *See* Sino-Maple's Case Br. at 1–3 (emphasis added) ("The Department's decision to assign Sino-Maple total adverse facts available in the preliminary results was unreasonable and contrary to law," and "[d]espite its attempts to cooperate, Sino-Maple was penalized to the *fullest extent* of the law even though the Department had sufficient time to accept and consider the additional information that Sino-Maple attempted to submit for the record."). Indeed, Commerce addressed each of Sino-Maple's arguments in its decisional memoranda for the Preliminary and Final Results. Moreover, American Manufacturers' claim that there is a difference under the law as to when some information is either missing from the record or should be disregarded, and when Commerce should disregard all of the information, assumes a distinction not found in the statute. *See* 19 U.S.C. § 1677e(a)-(b) ("If . . . necessary information is not available on the record [Commerce] shall . . . use the facts otherwise available in reaching the applicable determination . . . . If [Commerce] finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information [it] may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available."). Thus, the court will consider the merits of Sino-Maple's arguments.

entries that made up Sino-Maple's missing U.S. sales—which accounted for nearly one-third of the company's total U.S. sales during the period of review. *See* 19 U.S.C. § 1677(35)(A) ("The term 'dumping margin' means the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise.").

Because Commerce could not calculate the transaction-specific dumping margins for Sino-Maple's missing U.S. sales, it was unable to calculate an accurate weighted-average dumping margin for Sino-Maple. *See Grobest & I-Mei Indus. (Vietnam) Co. v. United States*, 36 CIT 1092, 1098, 853 F. Supp. 2d 1352, 1359 (2012) ("[T]he § 1677(35)(A) dumping margin serves as the basis for a § 1677(35)(B) weighted average dumping margin, and the weighted average dumping margin serves as the basis for the antidumping duty or estimated antidumping duty.").[31] Hence, Sino-Maple's failure to provide constructed export price information on a per transaction basis for the U.S. sales made to Alpha Floors by the third-country manufacturer prevented Commerce from performing a necessary step in its overall dumping analysis.

Sino-Maple also failed to point to any record information that Commerce could use as facts otherwise available to fill the gap created by the missing U.S. sales to Alpha Floors from the third-country manufacturer. Because Sino-Maple failed to report transaction-specific sales information for the missing U.S. sales, and nothing on the record could be used to fill the gap with facts otherwise available, Commerce lacked the necessary information to determine the constructed export price of Sino-Maple's U.S. sales during the period of review.

In situations, such as this, where there is missing information that cannot be supplied by facts otherwise available, and as a result either normal value (the home market sales price) or export or constructed export price (the U.S. sales price), or both, cannot be determined, Commerce cannot perform a dumping analysis, *i.e.*, a comparison of normal value and export or constructed price.

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[31] Commerce's default method for comparing home market and export prices in administrative reviews is the "average-to-average" method. *See* 19 C.F.R. § 351.414(c)(1) (2017). On occasion, Commerce will use the "average-to-transaction" method as an alternative method for comparing home market and export prices in reviews. *See id.* § 351.414(b)(3), (e). In unusual circumstances, "such as when there are very few sales of subject merchandise and the merchandise sold in each market is identical or very similar or is custom-made," Commerce will use the "transaction-to-transaction" method. *See id.* § 351.414(c)(2). All of these methods, however, require knowing the transaction-specific data for each U.S. sale made during the relevant period of review. Therefore, Sino-Maple's failure to provide the constructed export price data for each individual entry is not specific to any particular calculation method.

Where there are no other facts on the record that can be substituted for the missing information, Commerce has been permitted to find that it cannot calculate a rate and substitute a rate for what would otherwise be a calculation. *See Hyundai Elec. & Energy Sys. Co. v. United States*, 44 CIT __, __, 466 F. Supp. 3d 1303, 1309, 1317–18 (2020) (upholding Commerce's substitution of a previously calculated rate where "one of the major categories of information necessary to perform a dumping calculation (U.S. sales, home market sales, cost of production, or constructed value) has not been provided" (citing *Steel Auth. of India, Ltd. v. United States*, 25 CIT 482, 486, 149 F. Supp. 2d 921, 927–28 (2001))).

Commerce might say—as it has here—that, in these situations, it is entitled to apply what it calls "total" facts available and assign a rate, even an adverse rate. Here, Commerce, using "total" AFA, substituted a rate for what would otherwise be a calculation. Commerce did so because it determined that all of Sino-Maple's reported information was unusable, not because it was missing certain information necessary to perform a dumping analysis. *See* Def.'s Resp. Br. at 27.

While the result may be the same (*i.e.*, disregarding all of Sino-Maple's information and selecting a rate), the court believes Commerce's analysis to be improper. This is because it is not the case that all of Sino-Maple's information is unusable. Although Commerce cannot calculate constructed export price without knowing the transaction-specific information for approximately one-third of Sino-Maple's U.S. sales, it appears that the Department would still be able to calculate normal value using information provided by the company. Therefore, using a legal fiction to find that all of Sino-Maple's information is unusable is not quite right.

Rather, what results from these circumstances is more akin to an impossibility. Thus, the proper analysis might be found in those cases holding that, given the lack of facts on the record, Commerce simply cannot perform its statutory task. *See, e.g.*, *Steel Auth. of India*, 25 CIT at 486, 149 F. Supp. 2d at 927–28 (upholding Commerce's decision to disregard all of a respondent's reported information and substitute a rate for what would otherwise be a calculation where "the absence of either cost of production, home market sales, or U.S. sales data makes it impossible for the Department to make price-to-price comparisons" necessary to determine an accurate dumping margin). In other words, where either normal value or export or constructed export price cannot be ascertained, it is simply not possible to determine a weighted-average dumping margin and hence an antidumping duty rate. *See id.*, 25 CIT at 486, 149 F. Supp. 2d at 927 ("[I]n order to make a reliable antidumping determination, the Department

needs the respondent's data on U.S. sales, home market sales, cost of production, and constructed value.").

Thus, in this case, it might be better said that Commerce may disregard all of Sino-Maple's information and assign a rate, not because all of the company's information was "unusable," as the Department claims, but because the missing information is necessary to the calculation of a dumping margin. Sino-Maple's U.S. sales information is needed for Commerce's dumping analysis because without it there is nothing to compare to normal value, and therefore it is impossible to determine a dumping margin for Sino-Maple.

Because the information needed to determine Sino-Maple's U.S. sales price is missing from the record, it is impossible for the Department to accurately calculate a dumping margin for Sino-Maple and the court thus concludes that Commerce lawfully disregarded all of Sino-Maple's information. As a result, Commerce's facts available determination is sustained.

B. Commerce's Adverse Inference Determination Is Supported by Substantial Evidence and in Accordance with Law

Here, Commerce found the use of adverse inferences was warranted because Sino-Maple failed to put forth its maximum effort, when responding to the Department's questionnaires, because it withheld information regarding certain sales made to Alpha Floors through a third country. The Department claims that Sino-Maple did not produce this information despite having repeated opportunities to do so, and despite being aware that these sales would be relevant to its reporting in this review. *See* Final IDM at 11–12.

When Commerce determines that the use of facts available is warranted under 19 U.S.C. § 1677e(a), it may use an adverse inference in selecting from among those facts available only if it makes the requisite additional finding under 19 U.S.C. § 1677e(b), that a party has "failed to cooperate by not acting to the best of its ability to comply with a request for information from the [Department]." *See* 19 U.S.C. § 1677e(a)-(b); *see also Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1381 (Fed. Cir. 2003) (citation omitted) (cleaned up) ("[S]ubsection (b) permits Commerce to use an inference that is adverse to the interests of a respondent in selecting from among the facts otherwise available, only if Commerce makes the separate determination that the respondent has failed to cooperate by not acting to the best of its ability to comply.").

To find that a respondent has failed to cooperate to the best of its ability, the Department must make two showings:

> First, it must make an *objective* showing that a reasonable and responsible [respondent] would have known that the requested information was required to be kept and maintained under the applicable statutes, rules, and regulations. Second, Commerce must then make a *subjective* showing that the respondent under investigation not only has failed to promptly produce the requested information, but further that the failure to fully respond is the result of the respondent's lack of cooperation in either: (a) failing to keep and maintain all required records, or (b) failing to put forth its maximum efforts to *investigate and obtain* the requested information from its records.

Nippon Steel, 337 F.3d at 1382–83 (emphasis added) (citing *Ta Chen Stainless Steel Pipe, Inc. v. United States*, 298 F.3d 1330, 1336 (Fed. Cir. 2002)).

There is little doubt that Sino-Maple failed objectively to produce the information Commerce requested. First, it has participated in prior reviews. *Cf.* Sino-Maple's Br. at 3. Second, Commerce sent multiple questionnaires to Sino-Maple instructing the company to report all of its U.S. sales of subject merchandise during the period of review—including merchandise shipped through third countries—and to accurately explain its relationship with Alpha Floors. *See, e.g.*, Sino-Maple Quantity & Value Quest. (May 18, 2018) at attach. 1, PR 206 ("Please include . . . sales to third-countries for which you have knowledge that the merchandise was ultimately destined for the United States . . . ."); Sino-Maple Antidumping Quest. at A-5 ("[F]or all affiliated producers of the merchandise under consideration, please provide [a d]escription of the [a]ffiliated [p]roducer's [r]elationship to the [r]espondent."); Sino-Maple's Resp. Secs. C & D Quest. at 1 ("Report each U.S. sale of merchandise entered for consumption during the [period of review]."); First Suppl. Quest. at 4 ("Explain Sino-Maple's relationship with Alpha Floors, including whether Alpha Floors assists Sino-Maple with finding U.S. customers and/or facilitating the sale of subject merchandise in the United States.").

The U.S. sales made to Alpha Floors by the third-country manufacturer that Sino-Maple failed to report were directly related to and requested by Commerce in the multiple questionnaires that were issued to Sino-Maple; and Sino-Maple makes no claim that the information does not exist. Although this review was the first time that it was selected as a mandatory respondent, a reasonable and responsible respondent in Sino-Maple's position would have known to report its sales relationship with Alpha Floors and the third-country information because (1) it had participated in prior reviews and (2) Com-

merce made clear requests for the information and provided clarifying questions in the supplemental questionnaires.

Thus, Commerce satisfied the objective requirement under *Nippon Steel* because Sino-Maple failed to report the U.S. sales information requested by the Department, even though the information was being kept, and a reasonable and responsible respondent in Sino-Maple's position would have known such information was required under the applicable statutes, rules, and regulations.

Also, Sino-Maple failed subjectively to put forth its maximum effort to investigate and obtain the requested information. In the Final Results, the Department found that Sino-Maple was "well-aware prior to its initial questionnaire response that certain third country sales would be directly relevant to its reporting in this review, and yet, Sino-Maple withheld all of this information." Final IDM at 11. Sino-Maple did not notify the Department of the existence of these sales until November 14, 2018, despite having the opportunity to report it in the company's September 13, 2018, questionnaire response, and its November 5, 2018, supplemental questionnaire response. *See* Ext. Req.; *see also* Sino-Maple's Resp. Secs. C & D Quest.; Sino-Maple's Resp. First Suppl. Quest. Both questionnaire responses were made after Customs notified Sino-Maple's affiliate, Alpha Floors, on September 5, 2018, that it intended to treat certain of its imports as wood flooring from China subject to antidumping duties in this review. *See* Ext. Req., Ex. 1. Thus, for Commerce, Sino-Maple failed to act to the best of its ability in responding to the Department's requests for information because the company "failed to report the sales of subject merchandise by its affiliate during the [period of review], despite repeated opportunities to do so." Final IDM at 12.

Sino-Maple argues that Commerce's finding is unsupported by substantial evidence because it believed, in good faith, until after November 7, 2018,[32] that the U.S. sales made to Alpha Floors by the third-country manufacturer were not relevant to its reporting requirements in this review. Thus, Sino-Maple contends that it promptly disclosed the U.S. sales made to Alpha Floors by the third-country manufacturer on November 14, 2018, as soon as it understood the relevance of these sales to its reporting requirements. *See* Sino-Maple's Br. at 22–24; *see also* Ext. Req. at 1.

This argument is hard to credit. The record shows that Sino-Maple's U.S affiliate, Alpha Floors, submitted information in response to Customs' inquiries in the separate proceeding, relating to

[32] On November 7, 2018, Customs, in the separate proceeding involving Alpha Floors' imports of subject wood flooring from Cambodia, reaffirmed its September 5, 2018, determination that such entries would be treated as wood flooring from China and therefore subject to antidumping duties in Sino-Maple's review. *See* Ext. Req., Ex. 3.

the entry of flooring manufactured in a third country, as early as six months before Sino-Maple filed its Section A Questionnaire Response on September 4, 2018.[33] *See* Ext. Req. at 3. The record further shows that Commerce requested information pertaining to all of Sino-Maple's U.S. sales of subject wood flooring—particularly as they related to the company's relationship with any U.S. affiliates (*i.e.*, Alpha Floors)—as early as July 31, 2018. *See* Sino-Maple Antidumping Quest.

In its July 31, 2018, antidumping questionnaire, Commerce asked Sino-Maple to report its relationship with any U.S. affiliates (*i.e.*, Alpha Floors) and the role they had, if any, in the company's U.S.

[33] In February and March of 2018, Alpha Floors provided information to Customs regarding the appropriate Generalized System of Preferences status of a single entry of multilayered wood flooring that Alpha Floors had purchased from the unaffiliated Cambodian manufacturer. *See* Ext. Req. at 2–3. On June 7, 2018, Customs conducted a site visit at the Cambodian manufacturer's factory. On July 31, 2018, Commerce issued an initial antidumping questionnaire to Sino-Maple. *See* Sino-Maple Antidumping Quest. Sino-Maple submitted its Section A Questionnaire Response on September 4, 2018. *See* Sino-Maple's Resp. Sec. A Quest. On September 5, 2018, Alpha Floors received a notice of proposed action from Customs stating that it had conducted a Generalized System of Preferences verification of the Cambodian factory and determined that the processing of the plywood cores from China that occurred in Cambodia was minimal and did not qualify for a tariff shift. *See* Ext. Req., Ex. 1. Thus, Customs proposed to treat Alpha Floors' imports of multilayered wood flooring from Cambodia as merchandise of Chinese origin subject to applicable antidumping and countervailing duties. *See* Ext. Req., Ex. 1. On September 13, 2018, Sino-Maple submitted its Sections C & D Questionnaire Response. *See* Sino-Maple's Resp. Secs. C & D Quest. On October 17, 2018, Commerce issued a supplemental questionnaire asking Sino-Maple to clarify inconsistencies in the company's reporting regarding certain U.S. sales involving Alpha Floors. *See* First Suppl. Quest. On October 20, 2018, Customs notified Alpha Floors that it had three days to deposit antidumping and countervailing duties in connection with its entries of multilayered wood flooring from Cambodia. *See* Ext. Req., Ex. 3. Customs, however, granted Alpha Floors' request for additional time, until November 6, 2018, to provide further explanation of the processing of Chinese-origin plywood core into multilayered wood flooring in Cambodia. *See* Ext. Req., Ex. 3. On November 5, 2018, Sino-Maple submitted its first supplemental questionnaire response. *See* Sino-Maple's Resp. First Suppl. Quest. On November 6, 2018, Alpha Floors timely submitted its response asking Customs to treat the relevant entries as wood flooring from Cambodia because the majority, and most important stages of the manufacturing process took place in Cambodia. On November 7, 2018, Customs responded to Alpha Floors, stating that it had reviewed the company's additional information, but remained of the opinion that the entries should be treated as multilayered wood flooring from China and therefore subject to applicable antidumping and countervailing duties. *See* Ext. Req., Ex. 3. On November 9, 2018, Commerce issued a second supplemental questionnaire to Sino-Maple asking the company again to clarify certain inconsistencies in its reporting regarding its relationship with Alpha Floors. *See* Second Suppl. Quest. On November 14, 2018, in response to the Department's second supplemental questionnaire, Sino-Maple filed a request for an extension of time to provide additional U.S. sales information involving Alpha Floors' imports of subject wood flooring from Cambodia. *See* Ext. Req. On November 16, 2018, Commerce denied Sino-Maple's extension request. *See* Ext. Req. Denial. Sino-Maple submitted its second supplemental questionnaire response that same day. The company described Alpha Floors' role in facilitating sales of subject wood flooring in the United States. It also reported the aggregate quantity (2,279,331 square feet) and value ($5,301,981) of Alpha Floors' imports of subject wood flooring from Cambodia as constructed export price sales. *See* Sino-Maple's Resp. Second Suppl. Quest.

sales process of the subject wood flooring. *See* Sino-Maple Antidumping Quest.

In its September 4, 2018, questionnaire response, Sino-Maple stated that it (1) "didn't sell the subject merchandise to affiliated resellers during the [period of review];" (2) "[was] not aware that any of the merchandise sold to third countries that was ultimately shipped to the United States;" (3) "produce[d] all the subject merchandise by itself without any intermediate party involved in the production;" and (4) "produced and sold the merchandise under consideration to the United States by itself." *See* Sino-Maple's Resp. Sec. A Quest.

The problem here is that, on September 5, 2018, Customs issued a proposed notice of action to Alpha Floors which explicitly stated that Alpha Floors' imports of multilayered wood flooring from the third country would be considered multilayered wood flooring from China, and subject to antidumping duties in the review of Sino-Maple. *See* Ext. Req., Ex. 1.[34] Even in the face of this notice, however, Sino-Maple made no effort to supplement its questionnaire responses made the preceding day.

It is worth keeping in mind that Sino-Maple and Alpha Floors are hardly strangers—they are sister companies. In its questionnaire responses, Sino-Maple states that Alpha Floors is "affiliated with Sino-Maple under the law" and lists Alpha Floors as "[u]nder the control of the same controller." Sino-Maple's Resp. First Supp. Quest. at 5; *see also* Sino-Maple's Resp. Sec. A Quest., Ex. A-11. The statute defines "affiliated persons," in relevant part, as "[t]wo or more persons directly or indirectly controlling, controlled by, or under common control with, any person." 19 U.S.C. § 1677(33). Thus, because Alpha Floors is "[u]nder the control of the same controller" as Sino-Maple, the companies are "affiliated persons" by law.[35]

Remarkably, despite Customs' clear statement on September 5, 2018, and Sino-Maple's close relationship with Alpha Floors, Sino-Maple failed to provide any information, or even notify Commerce of the existence of these U.S. sales, in its September 13, 2018, question-

[34] "The [third-country] manufacturer uses plywood cores from China to manufacture the final product; The processing that occurs within Cambodia is minimal and does not qualify for a tariff shift . . . ; The country of origin for the merchandise will be considered China; . . . The merchandise is subject to anti-dumping . . . duties under case number[] A-570–970 [(*i.e.*, the anti-dumping review of Sino-Maple)]." Ext. Req., Ex. 1.

[35] Indeed, Alpha Floors and Sino-Maple are sister companies operating under control of the same parent company. *See* Sino-Maple's Resp. Sec. A Quest., Ex. A-9. Alpha Floors was the only U.S. affiliate of Sino-Maple that purchased subject wood flooring from Sino-Maple during the period of review. *See* Sino-Maple's Resp. Sec. A Quest., Ex. A-9. Alpha Floors also facilitated Sino-Maple's sales of subject wood flooring in the United States by assisting Sino-Maple in finding unaffiliated U.S. customers. *See* Sino-Maple's Resp. First Supp. Quest. at 5.

naire responses, or, even more remarkably, its November 5, 2018, supplemental questionnaire response.[36] Instead, Sino-Maple waited until November 14, 2018, to bring these sales to Commerce's attention in a request for an extension of time—which Commerce denied.[37]

As the party in possession of the necessary information, Sino-Maple bore the burden of creating an accurate record by putting forth its maximum effort to investigate and obtain the information requested by Commerce. *See Zenith Elecs. Corp. v. United States*, 988 F.2d 1573, 1583 (Fed. Cir. 1993) (citation omitted) ("The burden of production [belongs] to the party in possession of the necessary information."). Sino-Maple, through its U.S. affiliate, was on notice as early as September 5, 2018, that certain third-country sales made to its U.S. affiliate, Alpha Floors, were relevant to its reporting in this review because of the separate Customs proceeding. Although Commerce did not ask Sino-Maple about these exact sales in particular, the Department did request that Sino-Maple identify all U.S. affiliates and report all U.S. sales of subject wood flooring during the period of review.

Based on this close relationship, it is reasonable, in this case, for Commerce to expect Sino-Maple to communicate with its U.S. affiliate and promptly notify Commerce of a significant number of constructed export price sales that were not initially reported. *See* 19 U.S.C. § 1677e(b). In other words, because Commerce asked Sino-Maple to explain its relationship with Alpha Floors on multiple occasions, and to report all U.S. sales of subject wood flooring during the period of review, it was not unreasonable to expect Sino-Maple to make the necessary inquiries to accurately answer Commerce's questions about these sales. *See, e.g.*, *N.M. Garlic Growers Coal. v. United States*, 42 CIT __, __, 352 F. Supp. 3d 1281, 1293–94 (2018) (holding that sub-

[36] On November 16, 2018, Sino-Maple submitted its second supplemental questionnaire response which also failed to provide the necessary information for Commerce to include these sales in its antidumping calculations. *See* Sino-Maple's Resp. Second Suppl. Quest. The Preliminary Decision Memorandum was issued on December 17, 2018, and the Final Issues and Decision Memorandum on July 29, 2019. *See* PDM; *see also* Final IDM.

[37] As noted above, whether Commerce abused its discretion when it denied Sino-Maple's request for an extension of time is not at issue in this case because Sino-Maple did not raise it before the court, and GreenHome failed to develop this argument in its brief. Moreover, unlike in *Hitachi Energy USA Inc. v. United States*, here, Commerce complied with its statutory mandate under 19 U.S.C. § 1677m(d) by providing Sino-Maple notice of its reporting deficiencies in the form of multiple supplemental questionnaires, and by providing the company with an opportunity to remedy or explain the deficiency in a timely manner. *Cf.* 34 F.4th 1375 (Fed. Cir. 2022), *modified on denial of rehearing*, No. 20–2114, 2022 WL 17175134 (Fed. Cir. Nov. 23, 2022) ("[T]he previous precedential opinion issued May 24, 2022, is modified as follows: On page 16, line 12, after 'unqualified' insert 'in the circumstances of this case.'"). Thus, the circumstances presented in *Hitachi* that led the Federal Circuit to find that the respondent had an "unqualified" right to a second bite at the apple under 19 U.S.C § 1677m(d) are not present in this case.

stantial evidence supported Commerce's determination that a producer failed to act to the best of its ability, as a sophisticated company, to provide affiliate information as a result of the producer's inadequate inquiry into the scope of Commerce's requests for information and the fact that the producer failed to remedy the deficiencies in its responses despite opportunities to do so).

The complete universe of U.S. sales is one of the most important pieces of information in an antidumping proceeding, and any reasonable respondent should know that this information is necessary. *See Hyundai Heavy Indus., Co. v. United States*, 43 CIT __, __, 399 F. Supp. 3d 1305, 1313 (2019) ("The U.S. and home market prices are central to the dumping calculation."). More, a respondent can be charged with the duty of knowing its own business.

Thus, Sino-Maple, in fulfilling its duty to investigate and obtain the information requested by Commerce, had reason to further consult Alpha Floors about its purchases. Had Sino-Maple made this inquiry, it would have learned of the separate Customs proceeding investigating its U.S. affiliate's imports of flooring from the third-country manufacturer.

Therefore, Sino-Maple did not "put forth its maximum effort," as it was able, but failed to fully investigate and obtain the requested U.S. sales information necessary to Commerce's antidumping calculations. Although for many years the statute simply provided that the Department might apply an adverse inference "in selecting from among the facts otherwise available," 19 U.S.C. § 1677e(b)(1)(A), and although a rate is certainly not a fact, s*ee Gerber Food (Yunnan) Co. v. United States*, 31 CIT 921, 944, 491 F. Supp. 2d 1326 (2007), *superseded by statute as discussed in Deosen Biochemical Ltd. v. United States*, 42 CIT __, __, 307 F. Supp. 3d 1364, 1372 (2018), *aff'd,* 767 F. App'x 1008 (Fed. Cir. 2019), the statute now confirms the Department's use of rates as facts. *See* 19 U.S.C. § 1677e(d)(1) ("If [Commerce] uses an inference that is adverse to the interests of a party . . . in selecting among the facts otherwise available, [it] may . . . in the case of an antidumping duty proceeding, use any dumping margin from any segment of the proceeding under the applicable antidumping order."). Thus, Commerce may lawfully apply an adverse inference when determining Sino-Maple's rate.

Because (1) Sino-Maple was put on notice that information related to Alpha Floors' third-country imports of subject wood flooring was needed to fully answer Commerce's questionnaires and (2) it failed to adequately investigate and obtain the information in a timely fashion, the court concludes that Commerce's finding that Sino-Maple failed to cooperate to the best of its ability is supported by substantial

evidence and in accordance with law. Therefore, the Department's use of adverse inferences to determine the company's dumping margin is sustained.

C. Commerce's Method of Determining Sino-Maple's Adverse Facts Available Rate Is Not Authorized by the Statute

Here, Commerce used what it called Senmao's highest "transaction-specific"[38] dumping margin from this review as Sino-Maple's AFA rate. *See* Final IDM at 12 ("For these final results, we have amended the AFA rate to reflect the actual highest transaction-specific dumping margin for Senmao, or 85.13 percent."). The Department stated, in the Preliminary Decision Memorandum, that it used this rate "[t]o ensure that [Sino-Maple] does not benefit from its lack of cooperation, and to select a rate that is sufficiently adverse to induce cooperation in the future . . . ." PDM at 16. In the Final Issues and Decision Memorandum, the Department neither stated the source of its legal authority to use Senmao's highest transaction-specific margin as the AFA rate assigned to Sino-Maple,[39] nor did Commerce address the

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[38] Commerce's use of the term "transaction-specific" might be a little misleading. Normally, a transaction-specific margin would be thought of as the comparison of a single U.S. sale to a single home-market sale (*i.e.*, a transaction-to-transaction comparison). *See PAM, S.p.A. v. United States*, 32 CIT 779, 780 n.2 (2008) (emphasis added) (not reported in the Federal Supplement) ("A transaction-specific dumping margin compares a single U.S. sale to a single home-market sale."); *see also* 19 C.F.R. § 351.414(b)(2) ("The 'transaction-to-transaction' method involves a comparison of the normal values of individual transactions with the export prices (or constructed export prices) of individual transactions for comparable merchandise."). Here, the 85.13 percent margin Commerce selected as Sino-Maple's AFA rate was apparently the highest margin calculated on the record for Senmao using the average-to-transaction method as part of the Department's differential pricing analysis. *See* Nonmarket Economy Margin Calculation Program (Dec. 17, 2018), CR 269. That is, to arrive at this margin, Commerce probably compared a single Senmao U.S. sale to the weighted-average normal value for the contemporaneous month. *See* 19 C.F.R. § 351.414(b)(3), (e) ("The 'average-to-transaction' method involves a comparison of the weighted average of the normal values to the export prices (or constructed export prices) of individual transactions for comparable merchandise."). Whichever method Commerce used does not affect the court's analysis.

As to Senmao's overall dumping margin, Commerce used the average-to-average method. *See* PDM at 23; *see also* 19 C.F.R. § 351.414(b)(1), (d)(3) ("The 'average-to-average' method involves a comparison of the weighted average of the normal values with the weighted average of the export prices (and constructed export prices) for comparable merchandise. . . . When applying the average-to-average method in a review, [Commerce] normally will calculate weighted averages on a monthly basis and compare the weighted-average monthly export price or constructed export price to the weighted-average normal value for the contemporaneous month.").

[39] While Commerce did not specifically provide legal authority for using the highest transaction-specific margin in the Final Results, it did state the following in the Preliminary Results: "Under [19 U.S.C. § 1677e(d),] Commerce may use any *dumping margin* from any segment of a proceeding under an [antidumping duty] order when applying an adverse inference, including the highest of such margins." PDM at 14 (emphasis added).

argument, raised by Scholar Home in its case brief, that the selection of this rate was unreasonable, punitive, and not in accordance with law. *See* Scholar Home's Case Br. (June 27, 2019) at 22–27, PR 482, CR 290. Rather, Commerce merely amended Sino-Maple's AFA rate—correcting a clerical error made in the Preliminary Results—to reflect the actual highest transaction-specific margin for Senmao (*i.e.*, 85.13 percent). *See* Final IDM at 12.

As noted, Commerce's selection of a dumping margin using an adverse inference is governed, in part, by 19 U.S.C. § 1677e(d). Paragraph (1) of § 1677e(d) states that, "[i]f [Commerce] uses an inference that is adverse to the interests of a party . . . in selecting among the facts otherwise available, [it] may . . . in the case of an antidumping duty proceeding, use any dumping margin from any *segment* of the proceeding under the applicable antidumping order." 19 U.S.C. § 1677e(d)(1) (emphasis added).

The statute defines a "dumping margin" as "the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise." *Id.* § 1677(35)(A). The term "segment" is not defined by the statute. The Department's regulations, however, define a "segment" of a proceeding as "a portion of the proceeding that is reviewable under [19 U.S.C. § 1516a]." 19 C.F.R. § 351.102(b)(47)(i). Examples of a "segment" of a proceeding, as provided in Commerce's regulations, are "[a]n antidumping or countervailing duty *investigation* or a *review* of an [antidumping or countervailing duty] order . . . ." *Id.* § 351.102(b)(47)(ii) (emphasis added).

Paragraph (2) under § 1677e(d) further authorizes Commerce, in its discretion, to use the highest *dumping margin from any segment* when applying an adverse inference in selecting from among facts available. *See* 19 U.S.C. § 1677e(d)(2) (emphasis added). Paragraph (2) reads:

> In carrying out paragraph (1), [*i.e.*, the application of adverse inferences, Commerce] may apply any of the . . . dumping margins specified under that paragraph [*i.e.*, any segment of the proceeding], including the highest such . . . margin, based on the evaluation by [Commerce] of the situation that resulted in [Commerce] using an adverse inference in selecting among the facts otherwise available.

Id. § 1677e(d)(2).

Thus, the statute permits Commerce to use the highest "dumping margin" from any "segment" of the proceeding as the AFA rate. The statute does not mention a "transaction-specific" dumping margin.

Here, Commerce apparently construes the statutory language that permits it to use its discretion to apply the highest dumping margin from any segment to mean that it may apply the highest transaction-specific dumping margin calculated for the other mandatory respondent in this review.[40] This is not a lawful interpretation of the statute.

The Trade Preferences Extension Act of 2015 amended the statute to permit Commerce to use the highest margin from any *segment*. *See* Trade Preferences Extension Act of 2015 § 502, Pub. L. No. 114–27, 129 Stat. 362 (2015) (codified in 19 U.S.C. § 1677e(d)) (emphasis added).

The amendment's inclusion of the term segment, defined by Commerce as a reviewable portion of a proceeding, indicates that the margin selected by Commerce should be one that can be reviewed. *See* 19 C.F.R. § 351.102(b)(47). A transaction-specific dumping margin is not reviewable. *See, e.g.*, 19 U.S.C. § 1516a(2)(B) (defining reviewable determination as any "[f]inal affirmative determinations by [Commerce] under section . . . 1673d of this title, including any negative part of such a determination" as well as "[a] final determination . . . by [Commerce] under section 1675 of this title").[41]

Moreover, when presented with the opportunity to include transaction-specific margins as one of the kinds of margins available for Commerce to use as the basis for selecting an AFA rate, Congress rejected it. The legislative history makes this clear. The legislative history for 19 U.S.C. § 1677e—specifically, subsections (d)(1)(B) and (d)(2)—illustrates the manner in which Congress considered how an AFA dumping margin should be determined.

The relevant language was considered by Congress for the first time in the Leveling the Playing Field Act, which was introduced in the Senate by Senator Sherrod Brown on December 10, 2014. *See* Leveling the Playing Field Act, S. 2994, 113th Cong. (2013–2014). Senator Brown's bill proposed that 19 U.S.C. § 1677e(d)(1)(B) read:

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[40] Defendant, in its brief, primarily relies on *Nan Ya Plastics Corp. v. United States* to support Commerce's use of the highest transaction-specific rate for Senmao as Sino-Maple's AFA rate. *See* Def.'s Resp. Br. at 32; *see also Nan Ya Plastics Corp. v. United States*, 810 F.3d 1333 (Fed. Cir. 2016). *Nan Ya Plastics*, however, dealt with a version of the statute that pre-dates the enactment of the Trade Preferences Extension Act of 2015, which amended 19 U.S.C. § 1677e to add section (d).

[41] It follows that the "reviewable" determinations provided under 19 U.S.C. § 1516a(2)(B), in the case of an antidumping duty proceeding, refers to the overall dumping margin percentages assigned to specific companies that serve as the basis for determining an antidumping duty rate or inform Commerce's decision to initiate an investigation or review. Some examples include (1) the weighted-average dumping margin calculated for an individually investigated respondent; (2) the separate rate calculated for companies that were not individually investigated but were able to rebut Commerce's presumption of state control; (3) the rate assigned to the "China-wide" entity; and (4) a rate derived from the petition that gave rise to an investigation or review.

(B) in the case of an antidumping duty proceeding, [Commerce may] use—

> (i) a dumping margin based on any *individual sale* of the subject merchandise calculated with respect to any exporter or producer involved in the proceeding during the investigation or review,
>
> (ii) an individual weighted average dumping margin calculated with respect to any exporter or producer involved in the proceeding during the investigation or a review,
>
> (iii) any dumping margin alleged in a petition filed under section 732(b) that was relied on by the administering authority to initiate the antidumping duty investigation, or
>
> (iv) any dumping margin found in another antidumping duty proceeding with respect to a class or kind of merchandise that is the same or similar to and from the same country as subject merchandise involved in the proceeding.

Leveling the Playing Field Act, S. 2994, 113th Cong. (2013–2014) (emphasis added).

Thus, Senator Brown's bill proposed that Commerce be permitted to use "a dumping margin based on any *individual sale* of the subject merchandise calculated with respect to any exporter or producer involved in the proceeding during the investigation or review," *i.e.*, a transaction-specific margin. *See* Leveling the Playing Field Act, S. 2994, 113th Cong. (2013 2014). But this language did not appear in the statute as enacted. In other words, Senator Brown's initial bill would have permitted the use of a transaction-specific margin, but the final wording of the statute did not. *See id.* The "individual sale" language was removed before the final version of the bill was passed by the Senate and the segment language was substituted. Thus, the subsection, as enacted, reads: "in the case of an antidumping duty proceeding, [Commerce may] use any dumping margin from any *segment* of the proceeding under the applicable antidumping order." 19 U.S.C. § 1677e(d)(1)(B) (emphasis added); *see also* Trade Preferences Extension Act of 2015 § 502, 129 Stat. at 384.

The legislative history confirms that Congress modeled the Trade Preferences Act's amendments to 19 U.S.C. § 1677e after Senator Brown's bill and that any differences between the bill and the finally enacted statute are a result of Congress acting intentionally and purposefully. That is, Congress had the opportunity to include the "individual sale" language but chose not to. Thus, the purposeful

elimination of any reference to an "individual" sale or margin (*i.e.*, a "transaction-specific" margin) in the relevant statutory provision, as enacted, can be presumed to be intentional. *See, e.g.*, *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 442–43 (1987) (citations omitted) ("Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language."); *see also e.g.*, *Russello v. United States*, 464 U.S. 16, 23–24 (1983) (citations omitted) ("Where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended."). As such, it appears that the term highest "dumping margin" from any segment, in the case of an antidumping duty proceeding, should be interpreted to exclude any "transaction-specific" dumping margin.

Accordingly, while 19 U.S.C. § 1677e(d)(2) permits Commerce to select the highest dumping margin from any segment of the proceeding and apply it as the AFA rate, pursuant to the statute Commerce may not choose a transaction-specific margin as the AFA rate. Thus, Commerce acted contrary to the statute when it used Senmao's highest transaction-specific margin as the AFA rate for Sino-Maple.

On remand, Commerce must reconsider the method used to select Sino-Maple's AFA rate in a manner consistent with this Opinion and Order, and the statute.

II. Commerce's Determination That Neither Scholar Home Nor Baishan Huafeng Was Eligible for a Separate Rate Is Supported by Substantial Evidence and in Accordance with Law

Scholar Home and Baishan Huafeng each separately challenge Commerce's determination that neither company was eligible for a separate rate.

While not without controversy,[42] in proceedings involving nonmarket economy countries,[43] such as this one, Commerce applies a re-

[42] *See Jilin*, 45 CIT at __, 519 F. Supp. 3d at 1239–44 (discussing Commerce's use of its nonmarket economy policy).

[43] A "nonmarket economy country" is defined as

> "any foreign country that [Commerce] determines does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise." The implication for entities operating subject to a nonmarket economy structure is that their financial and sales information is unreliable for the purpose of determining the "normal value" of subject merchandise.

Jilin, 45 CIT at __, 519 F. Supp. 3d at 1228 n.1 (alteration in original) (first quoting 19 U.S.C. § 1677(18)(A); then citing 19 U.S.C. § 1677b(a); and then citing *Shanghai Foreign Trade Enters. Co. v. United States*, 28 CIT 480, 481, 318 F. Supp. 2d 1339, 1341 (2004)).

buttable presumption that all respondents are subject to state control and should be assessed a single country-wide antidumping duty rate. *See Sigma Corp. v. United States*, 117 F.3d 1401, 1405–07 (Fed. Cir. 1997). Respondents that can rebut this presumption—by demonstrating an absence of both *de jure* and *de facto* control by the state—are eligible for "a rate that is separate from the country-wide rate assigned to all companies or entities that are presumptively considered state-controlled as part of an amalgamated '[nonmarket economy] entity.'" *See Jilin*, 45 CIT at __, 519 F. Supp. 3d at 1229; *see also Jiangsu Jiasheng Photovoltaic Tech. Co. v. United States*, 38 CIT __, __, 28 F. Supp. 3d 1317, 1338–39 (2014).

Commerce's evaluation as to whether a particular respondent is eligible for a separate rate requires the nonmarket economy respondent to submit a separate rate application reporting information demonstrating an absence of state control over its export functions. *See Sao Ta Foods Joint Stock Co. v. United States*, 44 CIT __, __, 475 F. Supp. 3d 1283, 1288 (2020) ("To establish independence from governmental control, a company submits a separate rate application."); *see also* Import Admin., U.S. Dep't Commerce, *Separate-Rates Practice & Application of Combination Rates in Antidumping Investigation Involving Non-Market Economy Countries*, Policy Bulletin 05.1 at 3–4 (Apr. 5, 2005), https://enforcement.trade.gov/policy/bull05–1.pdf (last visited Dec. 15, 2022).

If, in Commerce's judgment, the information in a separate rate application is insufficient to demonstrate the absence of state control, then Commerce may find that respondent ineligible for a separate rate. *Cf. Jilin*, 45 CIT at __, 519 F. Supp. 3d at 1241 (citation omitted).

For the following reasons, the court concludes that Commerce, in accordance with its policy, did not err in finding that both Scholar Home and Baishan Huafeng failed to demonstrate an absence of both *de jure* and *de facto* state control.

A. Scholar Home

On April 2, 2018, Scholar Home filed its separate rate application. *See* Scholar Home's Separate Rate Application (Apr. 2, 2018), PR 172, CR 121–23. Commerce reviewed the separate rate application and identified areas where, in its view, further information was needed to evaluate the company's separate rate eligibility. Commerce found that information regarding Scholar Home's relationship with the State-Owned Assets Supervision and Administrative Commission of

the People's Republic of China ("SASAC")[44] was insufficient to demonstrate an absence of control by the Chinese government.

On October 5, 2018, Commerce issued a supplemental questionnaire to Scholar Home asking it to clarify its separate rate application and gave the company a deadline of October 19, 2018, to respond. *See* Scholar Home Separate Rate Application Supp. Quest. (Oct. 5, 2018), PR 343.

Scholar Home failed to timely respond to Commerce's supplemental questionnaire and did not seek an extension. When, on January 29, 2019, the company tried to submit its response, the Preliminary Results had already been filed, and 102 days had passed from the October 19, 2018, deadline. The Department was closed, however, from December 22, 2018, to January 28, 2019, as a result of a partial shutdown of the federal government. The parties agree that Scholar Home should not be penalized for the forty days[45] which the Department was closed. Thus, for purposes of evaluating the timeliness of Scholar Home's supplemental questionnaire response, the court considers the company's response to have been filed sixty-two days after the official deadline.

Here, Commerce rejected Scholar Home's submission as untimely. Consequently, it found that Scholar Home was not eligible to receive a separate rate because the information requested in the supplemental questionnaire was necessary to the Department's separate rate eligibility determination. That is, without the information relating to the role any SASAC may have had in Scholar Home's business operations during the period of review, Commerce concluded that it could not reasonably determine whether the company had demonstrated an absence of state control.

By its motion, Scholar Home now challenges Commerce's rejection of its supplemental questionnaire response by way of two main arguments. First, Scholar Home argues that Commerce abused its discretion in rejecting Scholar Home's supplemental questionnaire response as untimely. *See* Scholar Home's Br. at 22–29. Second, Scholar Home argues that Commerce's finding that the company was ineligible for a separate rate is unsupported by substantial evidence and

[44] The State-Owned Assets Supervision and Administration Commission of the People's Republic of China is a government agency responsible for managing state-owned entities. *See, e.g., Diamond Sawblades Mfrs. Coal. v. United States*, 866 F.3d 1304, 1308 (Fed. Cir. 2017) (referring to "the State-Owned Assets Supervision and Administration Commissions of the State Council of the PRC" as "a Chinese government agency").

[45] While the government was technically closed for thirty-eight days, the forty-day tolling period takes into account December 21, 2018, because the government was focused on preparing for the shutdown, and January 29, 2019, because the government was focused on resuming operations after the shutdown. *See* Tolling Mem. (Jan. 28, 2019), PR 415.

not in accordance with law because the record contained sufficient information to grant the company a separate rate, even without a response to the Department's supplemental questionnaire. *See* Scholar Home's Br. at 12–21.

1. Commerce Did Not Abuse Its Discretion When It Rejected Scholar Home's Supplemental Questionnaire Response as Untimely

Scholar Home argues that Commerce erred in rejecting the company's supplemental questionnaire response as untimely. Despite Scholar Home's attempt to file its response sixty-two days after the established deadline, and after the Preliminary Results were issued, the company claims that the interests of accuracy and fairness require Commerce to accept the company's untimely response because it would result in a more accurate rate.

The court reviews whether Commerce properly rejected Scholar Home's supplemental questionnaire response as untimely under the abuse of discretion standard. *See Mid Continent Steel & Wire, Inc. v. United States*, 41 CIT __, __, 203 F. Supp. 3d 1295, 1313 (2017) (citation omitted).

"[E]nforcement of time limits[46] and other requirements is neither arbitrary nor an abuse of discretion when Commerce provides a reasoned explanation for its decision." *Maverick Tube Corp. v. United States*, 39 CIT __, __, 107 F. Supp. 3d 1318, 1331 (2015) (citing *Dongtai Peak Honey Indus. Co. v. United States*, 38 CIT __, __, 971 F. Supp. 2d 1234, 1242 (2014)). Here, as shall be seen, Commerce provided a reasoned explanation for rejecting Scholar Home's untimely submission. Thus, its decision was neither arbitrary nor an abuse of discretion.

Commerce rejected Scholar Home's supplemental questionnaire response pursuant to 19 C.F.R. § 351.302(d)[47] because the company neither requested an extension of time nor provided an adequate justification for its late submission. *See* Final IDM at 55; *see also* 19 C.F.R. § 351.302(d) (providing that any information submitted after an applicable deadline will be considered untimely and may be rejected by Commerce). Scholar Home was given a deadline of October 19, 2018, to respond to Commerce's supplemental questionnaire. That gave the company fourteen days from the date of the supplemental

[46] Here, "time limits" refer to the deadlines established by Commerce for submitting information in the administrative review. *See Goodluck India Ltd. v. United States*, 11 F.4th 1335, 1342 (Fed. Cir. 2021) (citation omitted).

[47] "An untimely filed extension request will not be considered unless the party demonstrates that an extraordinary circumstance exists." 19 C.F.R. § 351.302(c). "[Commerce] will not consider or retain in the official record of the proceeding: . . . [u]ntimely filed factual information, written argument, or other material . . . ." *Id.* § 351.302(d)(1).

questionnaire. Yet, Scholar Home did not attempt to respond until January 29, 2019—after Commerce issued the Preliminary Decision Memorandum on December 17, 2018, denying the company a separate rate.

Scholar Home could have asked for additional time to file its supplemental questionnaire response prior to the original deadline, but it did not do so.[48] As a result, the company not only missed the original deadline, but it also failed to request an extension or explain to Commerce why it was unable to timely respond during the approximately two months leading up to the Department's closure on December 22, 2018. When Commerce finally received Scholar Home's supplemental questionnaire response on January 29, 2019, the company again failed to provide an explanation as to the circumstances preventing its timely filing. Rather, Scholar Home stated that it attempted to file its supplemental questionnaire response "immediately upon . . . realizing that it had received this request." Scholar Home's Br. at 13. A puzzling response.

In this case, Commerce was transparent about its deadlines with the respondent. The supplemental questionnaire was issued on October 5, 2018, and asked Scholar Home, among other things, to clarify whether "any [of its] intermediate or ultimate shareholders are owned or supervised, in full or in part, by the SASAC." *See* Scholar Home Separate Rate Application Supp. Quest. (Oct. 5, 2018), PR 343. The supplemental questionnaire also explicitly stated that Scholar Home's response "must be received no later than 5:00 p.m. on October 19, 2018 [and p]ursuant to 19 C.F.R. § 351.302(d), any information submitted after the applicable deadline will be considered untimely." Scholar Home Separate Rate Application Supp. Quest.

Commerce complied with its obligations under 19 U.S.C. § 1677m(d).[49] *See* 19 U.S.C. § 1677m(d) ("If [Commerce] determines that a response to a request for information under this subtitle does not comply with the request, [it] shall promptly inform the person submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that person with an opportunity to

[48] It appears that Scholar Home was aware of the ability to request a deadline extension as it made such a request for the filing of its initial separate rate application, which was due on March 26, 2018. *See* Scholar Home's Separate Rate Application Extension Req. (Mar. 20, 2018), PR 66.

[49] The issue in this case is not whether Scholar Home was denied its statutory rights under 19 U.S.C. § 1677m(d), which requires Commerce to notify and permit a party to remedy or explain any deficiency in information provided during an investigation—an issue recently addressed by the Federal Circuit. *See Hitachi* 34 F.4th at 1384–85. Rather, the issue here is whether Commerce abused its discretion in refusing to accept Scholar Home's untimely supplemental questionnaire response. Therefore, *Hitachi* does not direct the outcome here.

remedy or explain the deficiency in light of the time limits established for the completion of [the review] . . . .”). Commerce was clear in its questionnaire informing Scholar Home of the nature of the deficiency in its separate rate application. Commerce also provided the company with an opportunity to remedy or explain the deficiency.

Scholar Home, however, despite being notified on October 5, 2018, of the deficiency in its separate rate application, and having approximately fourteen days to either answer the questionnaire or ask for an extension, ignored Commerce’s deadline and failed to answer or request an extension.

Of significance, when the company finally did produce a response, it provided no reason to justify its late submission. Instead, it merely claimed that it answered the questionnaire as soon as it became aware of Commerce’s request for additional information regarding certain deficiencies found in the company’s separate rate application. One would think that Scholar Home would have become aware of the request when it was made seventy-six days before the company’s response. Scholar Home simply made no real effort to explain its delay.

Therefore, because (1) Commerce made clear in its supplemental questionnaire what it considered missing from the separate rate application; (2) Scholar Home failed to answer or request an extension of time prior to the October 19, 2018, deadline; (3) Scholar Home failed to provide any reason whatsoever for filing its response sixty-two days late; and (4) Commerce provided a reasoned explanation for rejecting Scholar Home’s untimely submission, the court finds that the Department was not obligated to accept Scholar Home’s late submission and did not abuse its discretion in enforcing its deadlines.

2. Commerce’s Determination That Scholar Home Is Ineligible for a Separate Rate is Supported by Substantial Evidence and in Accordance with Law

Scholar Home argues that, even without its supplemental response, Commerce should grant it a separate rate because the record contains sufficient information for the Department to make its determination. *See* Scholar Home’s Br. at 28 (arguing that “there remain[s] extensive information on the record regarding [its] corporate structure and ownership supporting its eligibility for a separate rate”). Thus, for Scholar Home, the Department’s determination that the company was ineligible for a separate rate is unsupported by substantial evidence and not in accordance with law.

The company’s argument, however, fails to address the concerns identified by Commerce in the supplemental questionnaire. Namely,

that Scholar Home reported, in response to question (IV)(A)(1.b) of the separate rate application, that it "has no relationship with any SASAC or government entity" in one part of its separate rate application; yet, in Exhibit 8, reported at least one state-owned enterprise as an intermediate or ultimate shareholder in another part of its separate rate application. *See* Scholar Home's Separate Rate Application at 14, Ex. 8; *see also* Scholar Home Separate Rate Application Supp. Quest.

Because Scholar Home identified a state-owned enterprise as one of its shareholders and failed in its efforts to answer the supplemental questionnaire, Commerce was prevented from determining whether Scholar Home was under state control. It is apparent that Scholar Home erred in reporting that it had "no relationship" with an SASAC. Additionally, because the company did not timely answer the supplemental questionnaire, its answers elsewhere in the separate rate application remain unexplained. Commerce's questions in the supplemental questionnaire bear this out. *See* Scholar Home Separate Rate Application Supp. Quest. ("In response to question IVA.1b., you state that 'Scholar Home has no relationship with any SASAC or government entity.' However, Exhibit 8, which provides a chart entitled 'Information List of the Intermediate and Ultimate Shareholders,' shows [a state-owned entity] as an intermediate or ultimate shareholder of Scholar Home. Explain this discrepancy.").

Therefore, Commerce lacked a clear understanding of the relationship between Scholar Home and the government entity named as one of the company's intermediate or ultimate shareholders. *See* Final IDM at 55 ("Scholar Home's missing information (*i.e.*, its supplemental questionnaire response) was not unrelated and was necessary to determine Scholar Home's independence from the Chinese government. [Thus], there was not enough evidence on the record of this review to determine government control, which is a key purpose of the [separate rate application].").

Because the additional information requested by Commerce is directly related to Scholar Home's relationship with the Chinese government, and therefore was necessary to Commerce's determination, the court concludes that Scholar Home has failed to show by record evidence that the Department erred in denying the company a separate rate.

B. Baishan Huafeng

After reviewing Baishan Huafeng's separate rate application, Commerce determined that necessary information was missing from the

record for it to conduct a separate rate eligibility analysis. Accordingly, the Department issued a supplemental questionnaire to Baishan Huafeng, to which the company failed to respond. *See* PDM at 12; *see also* Baishan Huafeng Separate Rate Application Supp. Quest. (Oct. 5, 2018), PR 338, CR 222. Because Baishan Huafeng failed to answer the questionnaire, it was not eligible for a separate rate. Before Commerce, Baishan Huafeng did not file a case brief challenging this determination.

In its supplemental questionnaire, Commerce asked for information about Baishan Huafeng's year-end financial statements for 2017 and articles of association and capital verification reports for the company's key investors and shareholders. *See* Baishan Huafeng Separate Rate Application Supp. Quest. at 2 ("Provide Baishan Huafeng's audited year-end financial statements for 2017 [and] business license[s], articles of association, and capital verification report[s for the named investors/shareholders]."). Commerce was prompted to issue the supplemental questionnaire because it concluded that Baishan Huafeng's financial statements and ownership documentation were essential to determine whether the company was independent of state control. Because Baishan Huafeng failed to provide Commerce with this information, the Department found that the company had failed to demonstrate that it was eligible for a separate rate.

Baishan Huafeng now argues, for the first time before the court, that Commerce's determination that it was not eligible for a separate rate was unsupported by substantial evidence. *See* Baishan Huafeng's Br. at 9.

"The exhaustion doctrine requires a party to present its claims to the relevant administrative agency for the agency's consideration before raising these claims to the Court." *Fabrique de Fer de Charleroi S.A. v. United States*, 25 CIT 741, 743, 155 F. Supp. 2d 801, 805 (2001) (citing *Unemployment Compensation Comm'n of Alaska v. Aragon*, 329 U.S. 143, 155 (1946) (alteration in original) ("A reviewing court usurps the agency's function when it sets aside the administrative determination upon a ground not theretofore presented and deprives the [agency] of an opportunity to consider the matter, make its ruling, and state the reasons for its action.")). Therefore, under the exhaustion doctrine, "no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Essar Steel Ltd. v. United States*, 753 F.3d 1368, 1374 (Fed. Cir. 2014) (quoting *Sandvik Steel Co. v. United States*, 164 F.3d 596, 599 (Fed. Cir. 1998)).

Here, in order to exhaust its administrative remedies, Baishang Huafeng was required to raise the issue of whether it was eligible for a separate rate before Commerce. After the Department preliminarily determined that the company was ineligible for a separate rate, it had the opportunity to challenge the decision through the submission of a case brief. Not only did Baishan Huafeng fail to raise its substantial evidence issue before Commerce, it raised no issue whatsoever by not filing a case brief.

Therefore, because Baishan Huafeng did not raise this argument, or any other argument before Commerce, it has failed to exhaust its administrative remedies and, as a consequence, has abandoned its opportunity to challenge the Department's separate rate eligibility determination before the court.

CONCLUSION AND ORDER

For the reasons stated above, this matter is sustained in part, and remanded to Commerce for further proceedings in conformity with this Opinion and Order. Thus, it is hereby

ORDERED that Commerce shall submit a redetermination upon remand that complies in all respects with this Opinion and Order, is supported by substantial evidence, and otherwise in accordance with law; it is further

ORDERED that Commerce must reconsider the method used to select Sino-Maple's AFA rate to comply with the statute, 19 U.S.C. § 1677e(d), consistent with this Opinion and Order; it is further

ORDERED that the court reserves decision on the remaining issues until the results of redetermination are before the court; and it is further

ORDERED that the remand results shall be due ninety (90) days following the date of this Opinion and Order; any comments to the remand results shall be due thirty (30) days following the filing of the remand results; and any responses to those comments shall be due fifteen (15) days following the filing of the comments.

Dated: December 22, 2022
New York, New York

/s/ Richard K. Eaton
JUDGE

Slip Op. 23–5

ALUMINUM EXTRUSIONS FAIR TRADE COMMITTEE, Plaintiff, v. UNITED STATES, Defendant, and REFLECTION WINDOW + WALL, LLC, Defendant-Intervenor.

Before: Stephen Alexander Vaden, Judge
Court No. 1:21-cv-00253

[Affirming Commerce's final scope ruling.]

Dated: January 18, 2023

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OPINION AND ORDER

Vaden, Judge:

Plaintiff Aluminum Extrusions Fair Trade Committee (the Committee) challenges Defendant United States Department of Commerce's (Commerce) final scope ruling determining that Defendant-Intervenor Reflection Window + Wall, LLC's (Reflection) window wall system kits were outside the scope of the antidumping and countervailing duty orders on aluminum extrusions from China. Compl. ¶ 1, ECF No. 9; *Final Scope Ruling on Reflection Window + Wall, LLC's Window Wall System Kits* (Reflection Scope Ruling) at 1, 25, J.A. at 1,584, 1,608, ECF No. 35; *see also Aluminum Extrusions from the People's Republic of China: Antidumping Duty Order*, 76 Fed. Reg. 30,650 (Dep't of Com. May 26, 2011); *Aluminum Extrusions from the People's Republic of China: Countervailing Duty Order*, 76 Fed. Reg. 30,653 (Dep't of Com. May 26, 2011) (together, the Orders). Before the Court is the Committee's Motion for Judgment on the Agency Record, arguing that Commerce's determination that certain Reflection products are excluded from the Orders as finished goods kits is unsupported by substantial evidence and conflicts with Commerce's established practice in prior scope rulings. Pl.'s Mot. for J. on the Agency R. (Pl.'s Mot.) at 1–2, ECF No. 23. For the reasons set forth below, the Court **AFFIRMS** Commerce's decision.

BACKGROUND

Reflection is a designer, importer, and distributor of "non-load bearing fenestration system[s] provided in combination assemblies and composite units, including transparent vision panels and/or opaque glass or metal panels, which span from the top of a floor slab to the underside of the next higher floor slab." *Request for Scope Ruling on Certain Window Wall System Kits* (Initial Scope Request) at 2–3, J.A. at 1,001–02, ECF No. 35. In layman's terms, Reflection produces portions of the exterior façades of high-rise buildings. Reflection's products are custom-made to individual projects; it does not inventory or warehouse its products for later use or sell the products for generic commercial use as window wall systems. *Id.* at 2.

At issue here are Reflection's imports of its series RWW-8000, RWW-9000, RWW-9500, and RWW-12000 window wall system kits. Reflection Scope Ruling at 6–9, J.A. at 1,589–92, ECF No. 35. The parties agree that Reflection's products are covered within the general scope language of the Orders and are not finished merchandise but disagree about whether Reflection's products can be excluded as finished goods kits. *Id.* at 20; *see, e.g.*, Pl.'s Mot. at 10, ECF No. 23; Def.'s Resp. to Pl.'s Mot. (Def.'s Resp.) at 19, ECF No. 29. *See generally* Def.-Int.'s Resp. to Pl.'s Mot. (Def.-Int.'s Resp.), ECF No. 27. In its final scope ruling, Commerce found that Reflection's products "contain, at the time of importation, all of the necessary parts to fully assemble a final finished good . . . [and] contain non-aluminum extruded parts beyond mere fasteners" so that the products are finished goods kits excluded from the Orders' scope. Reflection Scope Ruling at 25, J.A. at 1,608, ECF No. 35. The Committee appeals this decision, asking that the Court hold unlawful Commerce's determination as unsupported by substantial evidence. Pl.'s Mot. at 9, ECF No. 23; *see also* 19 U.S.C. § 1516a(b)(1)(B)(i).

A. Relevant Scope Proceedings

Commerce issued the Orders on aluminum extrusions from China on May 26, 2011. 76 Fed. Reg. 30,650; 76 Fed. Reg. 30,653. The Orders read, in pertinent part:

> Subject aluminum extrusions may be described at the time of importation as parts for final finished products that are assembled after importation, including, but not limited to, window frames, door frames, solar panels, curtain walls, or furniture. Such parts that otherwise meet the definition of aluminum extrusions are included in the scope. The scope includes the aluminum extrusion components that are attached (*e.g.*, by

> welding or fasteners) to form subassemblies, *i.e.*, partially assembled merchandise unless imported as part of the finished goods 'kit' defined further below. The scope does not include the non-aluminum extrusion components of subassemblies or subject kits.

76 Fed. Reg. at 30,650–51. The Orders also contain exclusions to the scope. The exclusion language explains:

> The scope also excludes finished merchandise containing aluminum extrusions as parts that are fully and permanently assembled and completed at the time of entry, such as finished windows with glass, doors with glass or vinyl, picture frames with glass pane and backing material, and solar panels. The scope also excludes finished goods containing aluminum extrusions that are entered unassembled in a "finished goods kit." A finished goods kit is understood to mean a packaged combination of parts that contains, at the time of importation, all of the necessary parts to fully assemble a final finished good and requires no further finishing or fabrication, such as cutting or punching, and is assembled "as is" into a finished product. An imported product will not be considered a "finished goods kit" and therefore excluded from the scope of the Orders merely by including fasteners such as screws, bolts, *etc.* in the packaging with an aluminum extrusion product.

Id. at 30,651. Commerce has explained its interpretation of the Orders' scope in several rulings. It discussed seven prior scope rulings in its determination here. Reflection Scope Ruling at 10–13, J.A. at 1,593–96, ECF No. 35.

Commerce's prior scope rulings confirm that a product must contain more than just extruded aluminum, fasteners, and extraneous materials like an instruction booklet to qualify for the finished goods kit exclusion. In the Geodesic Domes Kits Scope Ruling, Commerce found that a product that contained only "extruded aluminum poles and fasteners" was not excludable as a finished goods kit because the exclusion requires more than "merely . . . including fasteners." *Final Scope Ruling on J.A. Hancock Co., Inc.'s Geodesic Structures* at 7, J.A. at 1,646, ECF No. 35. In the Meridian Trim Kits Scope Ruling, Commerce denied an exclusion for a product that included only extruded aluminum, fasteners, and an instruction manual. *Final Scope Ruling on Refrigerator/Freezer Trim Kits* at 11, J.A. at 1,664, ECF No. 35; *see also Meridian Prods., LLC v. United States*, 851 F.3d 1375, 1385 (Fed. Cir. 2017).

Commerce's prior scope rulings also evince its interpretation that, although products must enter the country together to qualify for the finished goods kit exclusion, this does not mean they must enter in a single container. In the IAP Enclosure Systems Window Kits Scope Ruling, Commerce excluded window kits from the scope — even when they enter in multiple containers — as long as the containers listed on a single 7501 Entry Summary Form contained "all the parts, including the glass panels, necessary to assemble a finished window or windows." *Final Scope Ruling on Window Kits* at 4–6, J.A. at 1,651–53, ECF No. 35; *see also Final Scope Ruling on Hand-E-Shutter Kits* at 12, J.A. at 1,735, ECF No. 35.

Commerce examined a "window wall kit" in the NR Windows Wall Kit Scope Ruling. *Final Scope Ruling on Finished Window Kits* at 1, J.A. at 1,666, ECF No. 35. There, Commerce decided that window walls were distinct from curtain walls — parts for which are explicitly included in the Orders' scope — because window walls "do not completely cover the façades of buildings." *Id.* at 10. NR's window wall kits entered the country in "multiple containers and cartons that enter under a single [7501 Entry Summary Form]." *Id.* at 9. Thus, Commerce found them to be finished goods kits excluded from the Orders' scope. *Id.* at 9–10. Similarly, in the Ventana Window Wall Kits Scope Ruling, Commerce excluded from the Orders' scope certain window wall kits under the theory that (1) they could be inserted as standalone units unattached to other window walls and (2) they are distinct from curtain walls because they "leave significant areas of the building uncovered." *Final Scope Ruling on Ventana's Window Wall Kits* at 10, J.A. at 1,723, ECF No. 35.

Commerce has considered curtain wall products — a kind of exterior cladding distinct from window walls — twice before and included them in the Orders' scope on both occasions. The first was the Northern California Glass Management Association curtain wall ruling, where Commerce found that the plain language of the Orders covered the products at issue as "parts for . . . curtain walls." *Final Scope Ruling on Curtain Wall Units and Other Parts of a Curtain Wall System* at 9, J.A. at 1,684, ECF No. 35. The second was when Commerce considered Shenyang Yuanda's curtain wall units. *Final Scope Ruling on Curtain Wall Units That Are Produced and Imported Pursuant to a Contract to Supply a Curtain Wall*, J.A. at 1,686–713, ECF No. 35; *see Shenyang Yuanda Aluminum Indus. Eng'g Co., Ltd. v. United States*, 776 F.3d 1351 (Fed. Cir. 2015) (*Shenyang Yuanda I*); *Shenyang Yuanda Aluminum Indus. Eng'g Co., Ltd. v. United States*,

918 F.3d 1355 (Fed. Cir. 2019) (*Shenyang Yuanda II*). There, the Court of Appeals for the Federal Circuit affirmed Commerce's determination finding the curtain wall units at issue within the Orders' scope. *Shenyang Yuanda II*, 918 F.3d at 1358.

B. The Scope Ruling in Question

On August 7, 2019, Commerce received a scope ruling request from Reflection, asking that it find Reflection's window wall system kits outside the Orders' scope. Initial Scope Request at 1, J.A. at 1,000, ECF No. 35. On April 26, 2021, after a long back-and-forth of supplemental questionnaires, comments from Reflection and the Committee, and an *ex parte* videoconference, Commerce issued its final scope ruling finding certain Reflection products excluded from the Orders under the finished goods kit exclusion. Reflection Scope Ruling at 1–2, J.A. at 1,584–85, ECF No. 35 (documenting Reflection's four requests for scope rulings, three responses to supplemental questionnaires, and the Committee's two sets of comments on the second and third responses).

As part of its ruling that Reflection's products were excluded, Commerce made several findings. *Id.* at 20–24. First, Commerce found Reflection's products to be aluminum extrusions within the Orders' general scope. *Id.* at 20. Next, Commerce found Reflection's products were not finished merchandise — a distinct category from finished goods kits — and declined to consider whether Reflection's products were "subassemblies," finding such a determination was "unnecessary to this ruling." *Id.* Commerce then determined that, although Reflection's products enter the United States in separate containers, they appear on a single 7501 Entry Summary Form and contain "non-aluminum extrusion components beyond mere fasteners." *Id.* at 22–23. Finally, Commerce distinguished Reflection's window wall system kits from curtain wall units on the bases that (1) the "window wall systems are inserted into the opening between the top of one floor slab and the underside of the next higher floor slab," and (2) Reflection's window wall systems "do not make up the entirety of the building's façade." *Id.* at 24. With these conclusions, Commerce found Reflection's products to be finished goods kits excluded from the Orders' scope. *Id.* at 20–21. Commerce found as a fact that "each of Reflection's window wall system kits is a packaged combination of parts that contains, at the time of importation, all the parts necessary to assemble window wall systems by the end-users in the United States and requires no further finishing or fabrication." *Id.* at 20.

Commerce narrowed the exclusion from that originally requested by Reflection. Commerce decided to take "a cautious approach" in

response to some of the Committee's criticisms and excluded only products that (1) are "designed to fit into the aperture of a wall," (2) are designed "not to vertically span a greater distance than from the top of one floor slab to the underside of the next higher floor slab," (3) span no greater than fifteen feet vertically, and (4) contain slab covers. *Id.* at 21–24. Commerce also included what amounted to a warning for Reflection before listing the necessary characteristics of excluded products: "It is incumbent upon Reflection to define its products with specificity. Hence, this ruling applies to the four products specifically as they are defined here." *Id.* at 21. Commerce then defined what it was excluding, giving a list of major components, dimensions, and design elements for each of the four excluded product series. *Id.* at 21–22. In other words, should future products deviate in any way from the specification of this ruling, they will not benefit from the exclusion. *See id.*

C. The Present Case

The Committee filed its Complaint with the Court on June 25, 2021. Compl. ¶ 11, ECF No. 9. The Complaint alleges that Commerce's determination that Reflection's products are finished goods kits outside the Orders' scope is unsupported by substantial evidence on the record and otherwise not in accordance with law. *Id.* ¶¶ 21–22. The Committee argues that Commerce's determination is unsupported by substantial evidence because: (1) There is insufficient evidence in the record to find that Reflection's window wall system kits are finished goods kits; (2) Commerce failed to appropriately consider evidence the Committee presented that detracts from Commerce's conclusion; and (3) Commerce's determination conflicts with its established practice in previous scope rulings pertaining to the Orders by treating window wall systems differently from curtain wall units. *Id.* ¶¶ 21–26. The Committee filed a Motion for Judgment on the Agency Record on November 11, 2021; Commerce and Reflection filed responses on March 1, 2022; and the Committee filed its reply on April 19, 2022. Pl.'s Mot., ECF No. 23; Def.'s Resp., ECF No. 29; Def.-Int.'s Resp., ECF No. 27; Pl.'s Reply, ECF No. 32.

At oral argument, the Court confirmed with the parties that Reflection had not submitted a 7501 Entry Summary Form for any of the products Commerce had excluded. Tr. 6:3–7:2, ECF No. 45. Counsel for Reflection offered an explanation for this seemingly strange state of affairs: Reflection had initially requested a broader scope exclusion than Commerce granted; and when Commerce requested that Reflection provide it with the last three entry forms, Reflection complied

literally. *Id.* 64:22–67:18. This resulted in Reflection's submitting 7501 Entry Summary Forms that were for products that Commerce did not actually exclude.

Having clarified these facts, the Court ordered the parties to file supplemental briefs on whether the determination could be sustained without a 7501 Entry Summary Form for the products at issue. *Id.* 103:13–105:12. Reflection filed its letter brief on August 25, 2022, arguing that there is substantial evidence in the record without considering the 7501 Entry Summary Forms. Def.-Int.'s Letter Br., ECF No. 41. Commerce filed its letter brief on September 8, 2022, arguing that it can and does exclude products without 7501 Entry Summary Forms. Def.'s Letter Br. at 10, ECF No. 42. The Committee filed its letter brief on September 22, 2022, contending that the lack of 7501 Entry Summary Forms for the excluded products prevents the decision from being supported by substantial evidence. Pl.'s Letter Br. at 1, ECF No. 44. With supplemental briefing completed, the questions before the Court are ripe for resolution.

JURISDICTION AND STANDARD OF REVIEW

The Court has jurisdiction over Plaintiff's challenge to the Scope Ruling under 19 U.S.C. § 1516a(a)(2)(B)(vi) and 28 U.S.C. § 1581(c), which grant the Court authority to review actions contesting scope determinations described in an antidumping order. The Court must sustain Commerce's "determinations, findings, or conclusions" unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). If they are unsupported by substantial evidence or not in accordance with the law, the Court must "hold unlawful any determination, finding, or conclusion found." *Id.* "[T]he question is not whether the Court would have reached the same decision on the same record[;] rather, it is whether the administrative record as a whole permits Commerce's conclusion." *See New American Keg v. United States*, No. 20–00008, 2021 WL 1206153, at *6 (CIT Mar. 23, 2021).

Reviewing agency determinations, findings, or conclusions for substantial evidence, the Court assesses whether the agency action is reasonable given the record as a whole. *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1350–51 (Fed. Cir. 2006); *see also Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951) ("The substantiality of evidence must take into account whatever in the record fairly detracts from its weight."). The Federal Circuit has described "substantial evidence" as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *DuPont Teijin*

Films USA v. United States, 407 F.3d 1211, 1215 (Fed. Cir. 2005) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

DISCUSSION

I. Summary

A "finished goods kit" is something like IKEA furniture: It ships unassembled but with all the necessary parts to assemble the finished product without the end user doing more than putting it together with the included fasteners and adhesives. The Committee challenges Commerce's conclusion that Reflection's submitted window wall system kits are "finished good kits" entitled to exclusion from the scope of the Orders. The Committee's central argument is that Reflection's products must be treated like the curtain wall units in prior scope rulings. The Committee asserts that, had Commerce fairly considered the record, it could not reasonably have found that each window wall system is a finished good. According to the Committee, Commerce must find that the only possible finished good is a completed window wall for an entire building, as is the case with curtain walls. The Committee argues that, to reach its conclusion, Commerce misunderstood how Reflection's products are used, failed to critically probe how Reflection's products are packaged, and improperly ignored record evidence that detracted from its ruling. Finally, the Committee claims the lack of a 7501 Entry Summary Form for the excluded products precludes Commerce's decision from being supported by substantial evidence.

Commerce responds with three primary arguments. First, it properly considered and weighed the evidence in the record and responded to the Committee's arguments in detail. It found that Reflection's window wall systems are each final finished goods unlike curtain wall units, and it is inappropriate for the Court to reweigh the evidence. Second, Commerce's decision is consistent with its prior scope rulings because it found Reflection's products are distinct from the curtain wall units at issue in those prior decisions. Third, a 7501 Entry Summary Form is not required for a scope ruling.

Reflection joins Commerce and supports its argument in three ways. First, Commerce granted a narrower exclusion than Reflection requested, demonstrating Commerce listened to and incorporated the Committee's contentions. Second, Commerce distinguished Reflection's products from prior decisions about curtain walls through detailed use of the record evidence Reflection submitted. Third, Commerce used the submitted 7501 Entry Summary Forms for other similar products to show that Reflection's pattern and practice of

business is to ship its products with all necessary parts as a "packaged combination" to be assembled as-is with no further finishing or fabrication required.

The Court begins by analyzing the challenged "finished goods kit" exclusion. Then the Court discusses each of the Committee's arguments. The Court finds Commerce responded to the arguments the Committee made, and the choices Commerce made are reasonable and supported by the record as a whole. Commerce distinguished Reflection's window wall systems from curtain wall units. Thus, Commerce's decision is not in conflict with prior scope rulings; and because its decision aligns with the text of the Orders, it does not modify or contradict them. Commerce's use of the 7501 Entry Summary Forms in the record is appropriate, and a completed 7501 Entry Summary Form for the product at issue is not required for a scope ruling. Therefore, the Court concludes that Commerce's determination is supported by substantial evidence. The Committee's Motion for Judgment on the Agency Record will be **DENIED**, and Commerce's scope ruling is **AFFIRMED**.

II. The "Finished Goods Kit" Exclusion

All parties agree that Reflection's products are within the general language of the Orders. The heart of this case is instead a disagreement over the "finished goods kit" exclusion. The Orders define a "finished goods kit" as "a packaged combination of parts that contains, at the time of importation, all of the necessary parts to fully assemble a final finished good and requires no further finishing or fabrication, such as cutting or punching, and is assembled 'as is' into a finished product." 76 Fed. Reg. at 30,651.

"[W]hether the unambiguous terms of a scope control the inquiry . . . is a question of law that [the Court] reviews de novo." *Meridian Prods.*, 851 F.3d at 1382. "[W]hether a product meets the unambiguous scope terms presents a question of fact reviewed for substantial evidence." *Id.* The Federal Circuit has held that "in light of its terms and Commerce's prior scope rulings, the [finished goods kit] exclusion's terms are unambiguous and, therefore, control the inquiry." *Id.* at 1384. By the unambiguous terms of the scope, an excluded kit must (1) be a final finished good once assembled; (2) be assembled "as is," without any further finishing, fabrication, or additional parts; and (3) enter as an unassembled, packaged combination of parts. These unambiguous terms of the scope — combined with prior scope rulings

interpreting the Orders — control the inquiry and dispute here.[1] *See id.* The Court turns next to the question of fact, which is reviewed under the substantial evidence standard: Whether Reflection's products meet the unambiguous scope terms.

III. Reflection's Window Wall Systems Are Finished Goods Unlike Shenyang Yuanda's Curtain Wall Units

To qualify as finished goods kits, Reflection's window wall system kits must be assembled into a final finished good. The Committee asserts that they are not because Reflection's products are principally used in tandem with each other to provide most of a building's exterior façade. Pl.'s Mot. at 16, ECF No. 23. The Committee argues that this makes Reflection's products akin to curtain walls, for which the Federal Circuit has held that the only final finished good is the entire curtain wall. *Id.*; *see Shenyang Yuanda II*, 918 F.3d at 1367. Commerce disagrees and asserts it found that Reflection's products are distinct from curtain wall products because a single window wall system has a consumptive use, works independently from other systems, and a series of window walls cannot cover a building's entire façade like a curtain wall does. Def.'s Resp. at 16, ECF No. 29; Def.-Int.'s Resp. at 21, ECF No. 27. Because Reflection's window wall systems have individual, consumptive uses and cannot cover a building's entire façade, Commerce's determination that each is a final finished good is supported by substantial evidence.

A. Shenyang Yuanda's Curtain Wall Units

A final finished good must be useful for something on its own. *See Shenyang Yuanda I*, 776 F.3d at 1358; *see also Shenyang Yuanda II*, 918 F.3d at 1367. In *Shenyang Yuanda I*, the Federal Circuit considered whether curtain wall units were appropriately classed as finished merchandise. 776 F.3d at 1358. Shenyang Yuanda imported curtain wall units that had to be attached together in order to assemble the entire exterior curtain wall of a building. *Id.* Shenyang Yuanda conceded during litigation that "absolutely no one purchases for consumption a single curtain wall piece or unit." *Id.* The Federal Circuit held that concession meant an individual curtain wall unit

[1] Although this language is sufficient here, other language in the Orders could be relevant in other disputes over the finished goods kit exclusion. *See Meridian Prods.*, 851 F.3d at 1383 (contemplating language concerning the inclusion of fasteners not at issue here). Plaintiff does not challenge Commerce's interpretation that a "packaged combination" means that all necessary parts enter on a single 7501 Entry Form — rather than in a single package.

could not be a final finished good, agreeing with the CIT's finding that "an individual curtain wall unit 'has no consumptive or practical use because multiple units are required to form the wall of a building.'" *Id.* (quoting *Shenyang Yuanda Aluminum Indus. Eng'g Co., Ltd. v. United States*, 961 F. Supp. 2d 1291, 1298–99 (CIT 2014)). "A single unit does not a curtain wall make, nor is it a finished product." *Id.* For curtain wall units, the only finished good is the entire curtain wall. *Shenyang Yuanda II*, 918 F.3d at 1367.

Shenyang Yuanda returned to the Federal Circuit four years later, presenting a different argument. *Id.* It now argued that it was importing an entire curtain wall — albeit in several shipments linked together by a contract — and that this meant it was importing a finished goods kit. *Id.* Commerce determined that the finished goods kit exclusion required that "all of the necessary curtain wall units are imported at the same time." *Id.* The Federal Circuit agreed that the finished goods kit exclusion "focuses only on the physical contents of the 'packaged combination' at a particular time, not on contractual obligations that might link one 'packaged combination' to another, later-entering one." *Id.* The Federal Circuit therefore affirmed Commerce's determination that Shenyang Yuanda's products were still not finished goods kits within the Orders' meaning.

B. Reflection's Window Wall Systems

The Committee argues that Reflection's window walls are just like Shenyang Yuanda's curtain walls. The Committee claims (1) Reflection's products, like the curtain wall units in *Shenyang Yuanda I*, are useless individually and must be installed in an interlocking sequence and that (2) as in *Shenyang Yuanda II*, Reflection had multiple shipments destined for the same building project. Thus, the Committee argues that the same result is required here: Commerce must find that the only final finished good is the entire window wall. But the Committee is mistaken. Commerce effectively distinguished Reflection's products from Shenyang Yuanda's curtain wall units. Reflection's window wall systems have an individual, consumptive use; they can be installed in no particular order; they cannot cover a building's entire façade; and they serve different functions from a curtain wall. As they do not cover the building's entire façade, there is no set minimum number of units to purchase: One unit could theoretically suffice. Because each window wall system is a finished good, each shipment of window wall systems contains multiple finished goods.

The Committee argues that one window wall system, like one curtain wall unit, cannot be a finished good. However, it is possible to

purchase just one window wall system and install it. *See* Tr. 49:5–8, 19–23, ECF No. 45 (Court: "[I]s it possible to buy just one, what you term, window system?" Government: "Oh, it certainly is."); Reflection Scope Ruling at 24, J.A. at 1,607, ECF No. 35 (noting that the exclusion was designed to ensure that the window wall systems "cannot connect with other window wall systems"); Declaration of James White of Reflection, J.A. at 80,414, ECF No. 34 ("Each window wall system installed in a building is a modular stand-alone unit.") Unlike curtain wall units, Reflection's window wall systems have an individual, consumptive use. *Cf. Shenyang Yuanda I*, 776 F.3d at 1358. The Orders confirm that "finished merchandise . . . such as finished windows with glass," are excluded from the scope if entered "fully and permanently assembled." 76 Fed. Reg. at 30,651. A window wall system is a final finished good in the same sense as a window with glass — they are both inserted into an aperture in a building to provide insulation and a view. *See* Reflection Scope Ruling at 21–22, J.A. at 1,604–05, ECF No. 35. Curtain wall units are attached to the outside of a building *and* to other curtain wall units to form a complete curtain wall that envelops the building. One window wall system — like one standard window — has a function alone; one curtain wall unit does not.

The Committee argues that Reflection's window wall systems are like Shenyang Yuanda's curtain wall units because they work together by interlocking and are shipped with an intended installation sequence. Pl.'s Mot. at 16–17, ECF No. 23; *see also Shenyang Yuanda I*, 776 F.3d at 1358. Commerce found just the opposite, *i.e.*, that Reflection's window wall systems do not depend on each other to function. *See* Reflection Scope Ruling at 16–24, J.A. at 1,599–607, ECF No. 35. Commerce went a step further and limited the exclusion to systems spanning less than fifteen vertical feet, ensuring that Reflection's products do not interlock to create a building's entire façade. *Id.* at 24. Commerce also found that an *intended* installation sequence is just a sensible business practice, not a requirement for the product's use. *Id.*; *see also* Tr. 8:17–20, ECF No. 45 (The Court: "Although it might be inefficient and not make logical sense to do so, would it be possible to install the window wall systems in any order that you wish?" Counsel for Reflection: "The answer is yes, Your Honor."). That degree of independence — rather than interdependence, as with Shenyang Yuanda's curtain wall units — makes Reflection's products finished goods.

Commerce further accentuated this distinction by adding requirements to the exclusion it granted Reflection. Commerce required that excluded products include slab covers, span no more than fifteen

vertical feet, and fit into the space between the top of one floor slab and the bottom of the next. Commerce added these requirements to ensure Reflection's products "cannot connect with other window wall systems to cover the entirety of a building's façade and compose a type of curtain wall." Reflection Scope Ruling at 24, J.A. at 1,607, ECF No. 35. Because Reflection's products do not have to connect to each other, building features not possible with curtain walls become options. Committee Comments on Reflection's Scope Ruling Request at Ex. 1 n.207 (July 13, 2020), J.A. at 1,510, ECF No. 35 (noting in remand redetermination that "window walls frequently include doors, windows, and balconies, and are used for store fronts, 'whereas curtain walls are not'"); *see* Tr. 18:9–19:16, ECF No. 45 (discussing the Court's understanding that window wall systems allow the creation of balconies or other access to the outside, which is not possible with curtain walls, and hearing no dispute from the Committee). These added requirements — requirements that Reflection neither suggested nor wanted and that disqualified some of their products from the exclusion — emphasize and enhance the distinction Commerce drew between curtain wall units and the excluded window wall systems.

Reflection sent multiple shipments destined for the same building project, each containing multiple window wall systems. *See* 7501 Entry Summary Forms, J.A. at 80,023–56, ECF No. 34. The Committee claims that this is further evidence that Reflection's products are not each final finished goods, like the curtain wall contract in *Shenyang Yuanda II*. The Committee is correct that each shipment was not, alone, the entire building project. Pl.'s Mot. at 18 n.3, ECF No. 22. But that does not prevent its constituent parts — individual window wall systems — from each being a final finished good. Finished windows with glass are specifically referenced by the Orders as finished merchandise.[2] 76 Fed. Reg. at 30,651 ("The scope also excludes finished merchandise containing aluminum extrusions as parts that are fully and permanently assembled and completed at the time of entry, such as finished windows with glass . . . .") What Reflection does is akin to taking on a contract to provide one hundred windows for a

[2] Despite internal linguistic variation in the Orders between the words "products," "goods," and "merchandise," the Orders contemplate that a finished goods kit will be assembled into "merchandise." *See, e.g.*, 76 Fed. Reg. at 30,651 ("The scope includes the aluminum extrusion components that are attached (*e.g.*, by welding or fasteners) to form subassemblies, *i.e.*, partially assembled merchandise unless imported as part of the finished goods 'kit' defined further below.") The Orders also appear to treat the words "goods" and "merchandise" identically: "Subject extrusions may be identified with reference to their end use, such as fence posts, electrical conduits, door thresholds, carpet trim, or heat sinks (that do not meet the finished heat sink exclusionary language below). Such goods are subject merchandise if they otherwise meet the scope definition, regardless of whether they are ready for use at the time of importation." *Id.*

building and shipping them in two bundles of fifty windows. Each bundle is fifty finished goods. The two bundles together are not one single finished good.

The situation in *Shenyang Yuanda* was different because — continuing the analogy — fifty curtain wall units are not fifty final finished goods. That shipment is just half a curtain wall. A curtain wall is like an outer cage that encircles a building. If a company shipped a dog cage in two shipments of three metal panels each, those would add up to one finished good: the entire dog cage. There is no individual, consumptive use for each metal panel; and three of them are no more useful than one. The metal panels are entirely dependent on one another for their function. Shenyang Yuanda's curtain wall units are the same. Until there are enough of them for an entire curtain wall, they are useless. Window wall systems are individually useful and work independently from each other. That is sufficient for Commerce to find each to be a final finished good.

IV. Substantial Evidence Supports Commerce's Determination That Reflection's Products Are Finished Goods Kits

Although each of Reflection's products — once fully assembled — is a finished good, to qualify for the exclusion it must also enter as "a packaged combination of parts that contains, at the time of importation, all of the necessary parts to fully assemble a final finished good and requires no further finishing or fabrication, such as cutting or punching, and is assembled 'as is' into a finished product." 76 Fed. Reg. at 30,651; *see Meridian Prods.*, 851 F.3d at 1383. Commerce found that Reflection's products do and thus are finished goods kits excluded from the Orders.

The Committee argues that Reflection's products do not qualify as finished goods kits because (1) Reflection's products do not contain all the necessary parts to assemble the window wall system; (2) Commerce's decision conflicts with its prior decisions construing the finished goods kit exclusion and contradicts the Orders; (3) Commerce improperly ignored record evidence the Committee presented that detracts from Commerce's conclusion; and (4) Commerce improperly relied on 7501 Entry Summary Forms Reflection submitted for products that are not excluded by the scope ruling. Pl.'s Mot. at 9–10, ECF No. 23; Pl.'s Letter Br., ECF No. 43. Commerce responds that (1) it conducted a thorough analysis of the record data, specifications, and declarations to ensure that Reflection's products do contain all necessary parts on entry; (2) its decision is consistent with prior scope rulings and the Orders because Reflection's products are not curtain walls or curtain wall units but window wall systems; (3) it did re-

spond to the Committee's evidence and arguments but disagreed; and (4) 7501 Entry Summary Forms are not required for a scope ruling. Def.'s Resp. at 22–35, ECF No. 29, *see* Def.'s Letter Br., ECF No. 42. Reflection responds that (1) it submitted voluminous record information about how its products are packaged and assembled; (2) Commerce distinguished its products from both curtain walls and curtain wall units such that this decision is consistent with prior scope rulings and the Orders; (3) the Committee's argument is a request for the Court to impermissibly re-weigh the evidence; and (4) Commerce properly considered the 7501 Entry Summary Forms in the record as showing Reflection's ordinary business practice of shipping its products with all necessary components. Def.-Int's Resp. at 18–28, ECF No. 27; *see* Def.-Int.'s Letter Br., ECF No. 41. Because there is substantial evidence on the record that Reflection's products enter as unassembled, stand-alone finished goods that contain all necessary parts, the Court upholds Commerce's determination.

A. Commerce Found Reflection's Products Contain All Necessary Parts and Require No Further Finishing or Fabrication

Each kit "must contain[], at the time of importation, all of the necessary parts . . . to be assembled 'as is.'" 76 Fed. Reg. at 30,651. The Committee argues that Reflection failed to demonstrate that its products contain all necessary parts. Pl.'s Mot. at 13–15, ECF No. 23. Commerce replies that it examined Reflection's submissions and found them credible, and it only exempted products that match the granted exclusion. Def.'s Resp. at 22–35, ECF No. 29. Reflection reiterates the information it submitted to Commerce, including a sworn statement, detailed annotated images, and entry documents. Def.-Int.'s Resp. at 24–25, ECF No. 27. Commerce found "that the evidence on the record shows that each of Reflection's window wall system kits is a packaged combination of parts that contains, at the time of importation, all the parts necessary to assemble window wall systems by the end-users in the United States and requires no further finishing or fabrication." Reflection Scope Ruling at 20, J.A. at 1,604, ECF No. 35. Deciding complex technical questions about window wall systems is well within Commerce's expertise so that the Court provides it appropriate deference on the technical questions involved. *See Fujitsu Gen. Ltd. v. United States*, 88 F.3d 1034, 1039 (Fed. Cir. 1996) (noting that the Court provides greater deference to Commerce's technical expertise than to its interpretation of ambiguous statutory language). Reflection submitted sufficient information to provide substantial evidentiary support for Commerce's finding. *See* 19 U.S.C. § 1516a(b)(1)(B)(i).

Commerce lists several categories of record evidence it used in reaching its determination. Reflection Scope Ruling at 20–21, J.A. at 1,604–05, ECF No. 35 (listing narrative statements, product instructions, packing lists, entry summaries, photographs, schematics, questionnaire responses, and a short video). The narrative statement Commerce references is a sworn statement by James White of Reflection, stating that Reflection includes all necessary primary and secondary components in its shipments. Declaration of James J. White, J.A. at 80,141–42, ECF No. 34. Commerce cites this declaration in its scope ruling when it finds that "[e]very component composing the kit, including accessory components (or 'all primary and secondary parts and components'), for each unit is shipped to the United States in the same shipment." Reflection Scope Ruling at 7, J.A. at 1,591, ECF No. 35. In response to the Committee's contentions that the secondary components were not present on the packing lists, Reflection cited annotated images it submitted. *See* J.A. at 1,134–39, ECF No. 35; J.A. at 80,130, 80,141, ECF No. 34. Those images show that the secondary components are incorporated into Reflection's products at the factory before importation. *Id.*; *see also* Def.-Int's Resp. at 25, ECF No. 26.

The Committee submitted contrary record evidence in a separate declaration. *See* Declaration, J.A. at 80,119–21, ECF No. 34. As Commerce summarized, Reflection and its declarant claimed that the Committee's declarant (1) improperly conflated window walls and curtain walls; (2) conceded that Reflection's window wall systems could be installed out of order; (3) incorrectly claimed that window walls and curtain walls could be used interchangeably for the same projects; (4) incorrectly claimed that both curtain walls and window walls span floor-to-floor, when window walls span floor-to-ceiling; and (5) made outlandish claims about how the declarant would provide window walls instead of curtain walls to a buyer after winning a bid to construct a building using a curtain wall. Reflection Scope Ruling at 16–19, J.A. at 1,600–02, ECF No. 35. Having laid out the conflicting declarations, Commerce sided with Reflection on each of the issues discussed. *See id.* at 23–25; *see also Fujitsu Gen.*, 88 F.3d at 1039 (noting the deference Commerce receives when resolving technical questions). The Committee presented other contrary arguments; for instance, that a short video Reflection had submitted showed that Reflection's products require further finishing or fabrication. *Id.* at 21 n.127. Commerce "repeatedly reviewed the video referenced by the parties and cannot find any support for the petitioner's contention that it demonstrates that there is further finishing, but conclude[s] that it shows the opposite." *Id.*

The Committee also contends that Reflection's submitted technical literature does not "provide a complete list of the necessary parts and materials or a description of the assembly or installation process for these products." Pl.'s Mot. at 14, ECF No. 23. The Committee argues that Commerce should have asked for technical literature specific to the custom projects Reflection is seeking to have excluded. *Id.* at 15. The included literature is clearly labeled: RWW-8000, J.A. at 1,399–1,416, ECF No. 35; RWW-9000, J.A. at 1,418–1,433, ECF No. 35; RWW-9500, J.A. at 1,435–1,454, ECF No. 35; RWW-12000, J.A. at 1,456–1,471, ECF No. 35. The literature contains detailed images of the listed product series. Those are the product series Commerce excluded here. Consulting technical, graphical illustrations of the product series at issue is a reasonable choice by Commerce.

The idea underlying the Committee's contentions in these arguments is that Commerce should have believed its evidence and testimony instead of Reflection's and that the Committee's evidence and testimony are stronger and made a better case. However, "it is not the province of the Court to reweigh the evidence before the agency." *Comm. for Fair Beam Imports v. United States*, 477 F. Supp. 2d 1313, 1326 (CIT 2007), *aff'd without opinion*, 260 F. App'x 302 (Fed. Cir. 2008). Commerce examined the Committee's evidence, noted its points of disagreement, and explained why it chose to credit Reflection's evidence instead. Substantial evidence supports Commerce's conclusion.

B. This Scope Ruling Is Consistent with Prior Rulings and Does Not Contradict the Orders

Across a decade of scope rulings, Commerce has consistently excluded window wall systems as finished goods kits but refused to exclude curtain wall units. Commerce's basis for doing so is simple. Window walls do not cover a building's entire façade. Curtain walls do. The Committee argues that Commerce "reached a determination that directly conflicts with its established practice in prior scope rulings under these orders" and that, because this record contains "significantly more analysis put forward than before and [is] more probing of the product at issue," Commerce could only reasonably find that Reflection's products are akin to curtain wall units. Pl.'s Mot. at 2, 27, ECF No. 23. Commerce replies, and Reflection agrees, that the exclusion is consistent "with prior scope rulings related to similar window wall products" and with the plain text of the Orders. Def.'s Resp. at 29, ECF No. 29; Def.-Int.'s Resp. at 3, ECF No. 27. The Court agrees with Commerce that the scope ruling does not contravene Commerce's past scope rulings or the Orders.

Although the Orders have spawned much litigation, Commerce has been consistent in its interpretation of them. Three separate times, Commerce has issued scope rulings excluding windows and window wall products from the Orders. In the IAP Enclosures Scope Ruling, Commerce excluded window kits containing a variable number of panes placed in apertures in building façades. *Final Scope Ruling on Window Kits*, J.A. at 1,648–53, ECF No. 35. In the NR Windows Scope Ruling, Commerce excluded window wall kits and distinguished them from curtain wall units because NR's window wall kits did not envelop or enclose a building's entire façade. *Final Scope Ruling on Finished Window Kits*, J.A. at 1,666–75, ECF No. 35. In the Ventana Scope Ruling, Commerce excluded window wall kits and distinguished them from curtain wall units because Ventana's window wall kits (1) could be inserted as standalone units and (2) did not cover a building's entire façade. *Final Scope Ruling on Ventana's Window Wall Kits*, J.A. at 1,714–23, ECF No. 35.

By contrast, Commerce has issued scope rulings including curtain wall units in the Orders' scope on two separate occasions. The first time, Commerce included curtain wall units in the scope because the plain language of the Orders included "parts for . . . curtain walls," and that is what Commerce found the curtain wall units were. *Final Scope Ruling on Curtain Wall Units and Other Parts of a Curtain Wall System*, J.A. at 1,676–85, ECF No. 35; *accord Shenyang Yuanda I*, 776 F.3d at 1356–58 (affirming the same reasoning for including Shenyang Yuanda's curtain wall units in the scope). The second time, Commerce declined to find that Shenyang Yuanda's curtain wall units were finished goods kits because (1) they were individually useless and (2) the finished goods kit exclusion could not be satisfied by contractually linking one packaged combination to a later-entering one. *Final Scope Ruling on Curtain Wall Units That Are Produced and Imported Pursuant to a Contract to Supply a Curtain Wall*, J.A. at 1,686–713, ECF No. 35; *see Shenyang Yuanda II*, 918 F.3d at 1367 (affirming Commerce's scope ruling).

Although the Committee is correct that the record of this proceeding is more developed than that of prior window wall kit scope rulings, that fact counsels in favor of the lawfulness of Commerce's scope ruling. Commerce used the extensive record to distinguish Reflection's window wall system kits from the curtain wall units in prior rulings, as discussed in Section III of this opinion. Because Commerce reasonably found that Reflection's window wall systems each constitute a final finished good by distinguishing them from curtain wall units, this scope ruling is consistent with Commerce's prior scope rulings.

The Committee also argues that Commerce unlawfully modified the Orders. Commerce has discretion in interpreting the Orders; but it may not change them, and it did not do so here. *See Global Commodity Group LLC v. United States*, 709 F.3d 1134, 1138 (Fed. Cir. 2013); *see also Shenyang Yuanda II*, 918 F.3d at 1362–63 (demonstrating the deference the Court of International Trade owes to Commerce's interpretation of the Orders). The plain text of the Orders excludes finished goods kits. Because Commerce demonstrated with substantial evidence that Reflection's window wall systems are finished goods that enter unassembled with all necessary parts to be assembled "as-is" with no further finishing or fabrication required — the exact definition of finished goods kits — Commerce has not modified the Orders. *See* 76 Fed. Reg. at 30,651; *see also ante* 24–27. Commerce's scope ruling is consistent with its prior scope rulings and with the Orders.

C. Commerce Responded Fully to the Committee's Other Arguments

Commerce responded to the Committee's detailed critiques of the scope ruling and specifically limited the ruling to avoid providing an overly broad exclusion. The Committee contends that Commerce "failed to consider evidence that fairly detracts from its conclusion and also failed to grapple with all important aspects of the problem." Pl.'s Mot. at 11, ECF No. 23. Commerce replies that it did respond to all arguments that fairly detracted from its conclusion. *See* Def.'s Resp. at 22–35, ECF No. 29. Although Commerce must consider "whatever in the record fairly detracts" from its conclusion and must grapple with all "important aspect[s] of the problem," it is "not required to address every piece of evidence submitted by participating parties . . . ." *CS Wind Vietnam Co. v. United States*, 832 F.3d 1367, 1373 (Fed. Cir. 2016) (citing *Gerald Metals, Inc. v. United States*, 132 F.3d 716, 720 (Fed. Cir. 1997)) (first quote); *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983) (second quote); *Dong-A Steel Co. v. United States*, 475 F. Supp. 3d 1317, 1343 (CIT 2020) (third quote). Commerce responded to all the evidence and arguments that fairly detracted from its conclusion. As such, its determination is supported by substantial evidence.

The simplest analysis available to the Court is to walk through the Committee's contentions and review how Commerce replied. To begin, the Committee argues that Commerce failed to define the final finished good with sufficient specificity. *See* Pl.'s Mot. at 12–13, ECF No. 23. Commerce answered this critique in two steps in its final ruling. First, Commerce cited the American Architectural Manufacturing Association's definition of a window wall system: "[A] non-load bear-

ing fenestration system provided in combination assemblies and composite units, including transparent vision panels and/or opaque glass or metal panels, which span from the top of a floor slab to the underside of the next higher floor slab." Reflection Scope Ruling at 6, J.A. at 1,589, ECF No. 35. Then Commerce wrote a detailed, bulleted list of exactly what products are excluded. *Id.* at 21–22. For the sake of brevity, the Court excerpts the first one:

> The Series RWW-8000 window wall system, consisting of four major components: (1) the window system panels; (2) the head receptors and sill receptors; (3) the window side jamb receptors; and (4) the slab cover. It is a thermally broken, butt glazed system manufactured with a 4 inch (102 mm) deep structural mullion and a 4.5 inch (114 mm) deep receptor system. It includes glass, integral louver, or metal infill. It has a one-piece extrusion slab cover. It incorporates glass thicknesses ranging from 0.94 inch (24 mm) to 1.77 inches (45mm). It is designed to fit into the aperture of a wall and does not vertically span a greater distance than from the top of one floor slab to the underside of the next higher floor slab, and such distance is no greater than 15 feet (4.57 m).

Id. at 21. The Committee asserts that this is insufficient to explain what Commerce "was defining as the 'window wall system.'" Pl.'s Mot. at 13, ECF No. 23. The Court recognizes the Committee's contention as stemming from the custom-designed nature of Reflection's product. A custom-designed product is hard to describe with exact precision; Commerce could not describe the weight of one system, how many panes come in one system, or whether one system would be used to create a balcony.

Instead, Commerce cited a commonly used industry definition of a window wall system provided by Reflection in its scope ruling request. Reflection Scope Ruling at 6, J.A. at 1,589, ECF No. 35. Commerce then provided a list of necessary components, dimensions, and design elements to define the excluded product series. *Id.* at 21. These specified details are the kind of product contemplated by the definition of a window wall system cited by Commerce in the product description. *See id.* at 6. Commerce then added specifics to the definition that Reflection did not want added, including a cap in the vertical span of fifteen feet and a requirement that the products must contain slab covers. *See* Def.-Int's Letter Br. at 2–6, ECF No. 41. These added limitations narrowed the exclusion Commerce granted and demonstrate that Commerce sought to define the excluded prod-

ucts so as not to read the finished goods kit exclusion too broadly. *Cf.* Pl.'s Mot. at 10, ECF No. 23 (arguing that scope exclusions should be construed narrowly). Indeed, the narrowed language prevented several products Reflection submitted from being excluded from the Orders' scope. *See* 7501 Entry Summary Forms, J.A. at 80,023–56, ECF No. 34.

The Committee repeatedly says that Commerce should have requested further information about the products Reflection imported. *See, e.g.,* Pl.'s Mot. at 15, ECF No. 23. But what Reflection sought — and Commerce granted — was an exclusion that would cover custom-designed products as long as they met various specifications.[3] Reflection Scope Ruling at 21, J.A. at 1,604, ECF No. 35. Commerce listed the specifications in detail and based its decision on the technical literature for the different product series that Reflection submitted. *Id.* If Reflection imports products that deviate from the exclusion's express terms, then those products are simply not excluded.

The Committee's arguments are caught in a contradiction: It seeks to simultaneously argue that Commerce's definition is too vague while also acknowledging that definition has prevented certain products Reflection submitted from being excluded. *Compare* Pl.'s Reply at 6–8, ECF No. 33 (arguing that Commerce's definition, use of submitted technical literature, and use of 7501 Entry Summary Forms is too imprecise), *with* Pl.'s Letter Br. at 6, ECF No. 44 (recognizing that the Reflection products on the submitted 7501 Entry Summary Forms were denied exclusion because they lacked slab covers). An argument divided against itself cannot stand. Because Commerce considered the evidence submitted and responded to the Committee's contravening arguments by narrowing the scope of Reflection's requested exclusion, Commerce acted according to law; and substantial evidence supports its determination.

D. Scope Rulings Do Not Require a 7501 Entry Summary Form

Although Reflection placed three 7501 Entry Summary Forms on the record for its window wall products, none of those forms are for products actually excluded in this ruling. The submitted forms all involve products that do not have slab covers so that they do not benefit from Commerce's scope ruling. *Compare* Reflection Scope Ruling at 7–9, J.A. at 1,590–91, ECF No. 35 (limiting the exclusion to

[3] Commerce may only exclude from the scope products that are already in commercial production. 19 C.F.R. § 351.225(c)(1). This requirement prevented one of the products Reflection originally requested a scope ruling for, series RWW-7000, from being considered. Reflection Scope Ruling at 9, J.A. at 1,592, ECF No. 35. Reflection avers that the other excluded products are in commercial production or have been produced at this time. *Id.*

window wall systems incorporating slab covers), *with* 7501 Entry Summary Forms, J.A. at 80,023–56, ECF No. 34 (listing the components of three Reflection imports but noting no slab covers). The Committee contends that, because there are no 7501 Entry Summary Forms for the excluded products present in the record, the decision cannot be supported by substantial evidence. Pl.'s Letter Br. at 1, ECF No. 44. Commerce notes that (1) Commerce frequently excludes yet-to-be-imported products — for which there can be no 7501 Entry Summary Forms — in scope rulings; (2) the 7501 Entry Summary Forms present in the record provide evidence that Reflection's standard practice is to import its products with all necessary components; and (3) should Reflection's products not enter on a single form, its products will not be excluded. Def.'s Letter Br. at 10, ECF No. 42; Def.'s Resp. at 35–43, ECF No. 29. Commerce supported its decision by drawing reasonable conclusions from the submitted 7501 Entry Summary Forms about how Reflection's products are normally packaged. Further, Commerce is correct that companies seek scope rulings for products before importation such that they would have no associated 7501 Entry Summary Forms. The Committee's arguments are without merit.

As noted above, Reflection's initial scope ruling request was distinct from the final exclusion in that it did not require slab covers. Commerce added that requirement *after* it asked for 7501 Entry Summary Forms for "the last three entries of Reflection's window wall system kits." *Request for Information Regarding Reflection Window + Wall, LLC's Scope Inquiry on Window Wall System Kits* (Sept. 23, 2019) at 3, J.A. at 1,098, ECF No. 35. Reflection responded to Commerce's request and submitted the three most recent 7501 Entry Summary Forms for products it was then seeking to have excluded. Those forms — and supplementary documentation — provided detailed lists of parts for window wall systems shipped by Reflection in the ordinary course of business. *Request for Scope Ruling on Certain Window Wall System Kits Qualifying as a Finished Goods Kit* (Jan. 9, 2020[4]) (Second Scope Request) at Exhibit A, J.A. at 80,023–63, ECF No. 34. Commerce reviewed the information and determined that it was Reflection's usual practice to ship all necessary components for one window wall system together. *See* Reflection Scope Ruling at 20–21,

[4] This document appears to be misdated in the record as alternately January 9, 2019, and January 6, 2019. Second Scope Request at 1, 20, J.A. at 80,000, 80,019, ECF No. 34. The signature pages list the date of January 9, 2020, and the exhibit materials are from December 2019. *Id.* at 21–23. Given that the request is responsive to Commerce's questionnaire of September 23, 2019, the Court presumes January 6 is a typographical error and that the updated scope request was submitted January 9, 2020.

J.A. at 1,603–04, ECF No. 35; *see also* Second Scope Request at 14, J.A. at 80,013, ECF No. 34.

A completed 7501 Entry Summary Form for the exact product excluded is not required for a scope ruling. Commerce must issue scope rulings on products that have not yet been imported and therefore have no 7501 Entry Summary Forms. *See Antidumping and Countervailing Duty Proceedings: Documents, Submission Procedures; APO Procedures: Final Rule*, 73 Fed. Reg. 3,634, 3,639 (Jan. 22, 2008) (providing that Commerce may issue a scope ruling even when "[t]he product [has not been] imported into the United States so long as the requestor can show evidence that the product is in production"); *see also* 19 C.F.R. § 351.225(d) (requiring Commerce to issue an official scope ruling if it "can determine, based solely upon the application" and the sources listed in subsection (k)(1) whether a product is within the scope); 19 C.F.R. § 351.225(k)(1) (requiring Commerce to consult the petition, the initial investigation, and prior determinations but not requiring a 7501 Entry Summary Form). It is for this reason that Reflection still needs to demonstrate that its imported products — past and future — meet the express terms of the exclusion. Commerce's decision here does not remove that burden. Should Reflection's products not enter as a "packaged combination,"[5] they would not benefit from the exclusion. Because Commerce's use of the submitted 7501 Entry Summary Forms is reasonable, and because the determination as a whole is supported by substantial evidence, the Court upholds it.

CONCLUSION

Reflection submitted a broad scope ruling request for its window wall systems. Commerce took evidence, developed an extensive record, narrowed the requested exclusion, and responded to the Committee's arguments to the contrary. The result is a final scope ruling that is consistent with the record before the agency, with past scope rulings interpreting the Orders, and with the Orders themselves. Keeping in mind the deference the Court owes to Commerce when it examines all the evidence before it, applies its expertise, *and* follows the procedural requirements of administrative law, *cf. Shenyang Yuanda II*, 918 F.3d at 1362–63, the Court **AFFIRMS** Commerce's scope ruling and **DENIES** Plaintiff's Motion for Judgment on the Agency Record.

[5] Commerce has consistently interpreted this language to mean entrance on a single 7501 Entry Summary Form. *See Final Scope Ruling on Window Kits* at 4–6, J.A. at 1,651–53, ECF No. 35; *see also Final Scope Ruling on Hand-E-Shutter Kits* at 12, J.A. at 1,735, ECF No. 35. The Committee has not challenged this longstanding interpretation but only Commerce's application of it to the facts of this case.

Dated: January 18, 2023
New York, New York

/s/ *Stephen Alexander Vaden*
STEPHEN ALEXANDER VADEN, JUDGE

Slip Op. 23–6

NUCOR TUBULAR PRODUCTS INC., Plaintiff, v. UNITED STATES, Defendant, and PRODUCTOS LAMINADOS DE MONTERREY S.A. DE C.V., PROLAMSA, INC., MAQUILACERO S.A. DE C.V., Defendant-Intervenors.

Before: Jennifer Choe-Groves, Judge
Court No. 21–00543

[Remanding the final results of the administrative review by the U.S. Department of Commerce in the antidumping duty investigation of heavy walled rectangular welded carbon steel pipes and tubes from Mexico.]

Dated: January 18, 2023

Alan H. Price, *Robert E. DeFrancesco, III*, *Jake R. Frischknecht*, *Enbar Toledano*, and *Nicole C. Hager*, Wiley Rein LLP, of Washington, D.C., for Plaintiff Nucor Tubular Products Inc.

Claudia Burke, Assistant Director, and *Kara M. Westercamp*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for Defendant United States. With them on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, and *Patricia M. McCarthy*, Director. Of Counsel on the brief was *Ayat Mujais*, Attorney, International Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce.

David E. Bond, *Allison J.G. Kepkay*, and *C. Alejandro Dilley*, White & Case LLP, of Washington D.C., for Defendant-Intervenors Productos Laminados de Monterrey, S.A. de C.V. and Prolamsa, Inc.

Diana Dimitriuc Quaia, *John M. Gurley*, and *Yun Gao*, ArentFox Schiff LLP, of Washington, D.C., for Defendant-Intervenor Maquilacero S.A. de C.V.

OPINION AND ORDER

Choe-Groves, Judge:

This action concerns the import of heavy walled rectangular welded carbon steel pipes and tubes from Mexico, subject to the final affirmative determination in an antidumping duty investigation by the U.S. Department of Commerce ("Commerce"). *Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes from Mexico* ("*Final Results*"), 86 Fed. Reg. 41,448 (Dep't of Commerce Aug. 2, 2021) (final results of antidumping duty administrative review; 2018–2019); *see also* Issues and Decision Mem. for the Final Results of the Antidumping Duty Administrative Review of Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes from Mexico ("Final IDM"), PR 243.

Before the Court is Plaintiff Nucor Tubular Products Inc.'s Rule 56.2 Motion for Judgment on the Agency Record and Memorandum in Support, filed by Plaintiff Nucor Tubular Products, Inc. ("Nucor"), challenging Commerce's *Final Results*. Pl.'s R. 56.2 Mot. J. Agency R. ("Plaintiff's Motion" or "Pl.'s Mot."), ECF No. 32; Pl.'s Mem. Supp. R. 56.2 Mot. J. Agency R. ("Pl.'s Br."), ECF Nos. 33, 34. Defendant United

States ("Defendant") and Defendant-Intervenor Maquilacero S.A. de C.V. ("Maquilacero" or "Defendant-Intervenor") both submitted response briefs. Def.'s Resp. Opp'n Pl.'s R. 56.2 Mot. J. Agency R. ("Def.'s Resp. Br."), ECF No. 36;Def.-Interv.'s Resp. Opp'n Pl.'s R. 56.2 Mot. J. Agency R. ("Def.-Interv.'s Resp. Br."), ECF Nos. 37, 38. Nucor submitted a reply to Defendant and Defendant-Intervenor's briefs. Pl.'s Reply Br. Supp. R. 56.2 Mot. J. Agency R. ("Pl.'s Reply Br."), ECF Nos. 41, 42, 43.

The Court reviews Commerce's determination to reject Nucor's ministerial error comments as untimely regarding Maquilacero and Productos Laminados de Monterrey S.A. de C.V. ("Prolamsa"). For the reasons discussed below, the Court concludes that Commerce's decision to reject Nucor's ministerial error comments as untimely is not in accordance with the law and remands the *Final Results* to Commerce.

BACKGROUND

Nucor challenges Commerce's rejection of Nucor's ministerial error comments as untimely and Commerce's affirmative determination in the *Final Results*. Specifically, Nucor argues that Commerce's calculations in the build-up of normal value contained errors that resulted in incorrect 0% dumping margins for both Maquilacero and Prolamsa. Pl.'s Br. at 1. Regarding Maquilacero, Nucor alleges that Commerce included in its normal value calculation sales that were made below cost, contrary to 19 U.S.C. § 1677b(b)(1) and Commerce's standard practice. *Id.* Regarding Prolamsa, Nucor alleges that Commerce changed its calculation program, and in doing so failed to accurately convert a variable from pesos to dollars, thus violating 19 U.S.C. § 1677b-1. *Id.* Nucor provided ministerial error comments to Commerce regarding each allegedly erroneous calculation, but Commerce dismissed Nucor's comments as untimely. *Id.*

Commerce published its final determination in the antidumping duty investigation of Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes from Mexico on July 21, 2016. *Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes From Mexico*, 81 Fed. Reg. 47,352 (Dep't of Commerce July 21, 2016) (final determination of sales at less than fair value). Commerce published its antidumping duty order in the Federal Register. *Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes From the Republic of Korea, Mexico, and the Republic of Turkey*, 81 Fed. Reg. 62,865 (Dep't of Commerce Sept. 13, 2016) (antidumping duty orders).

After receiving requests to conduct administrative reviews of the relevant antidumping order, Commerce initiated an administrative review of the antidumping duty order covering hot water return pipe

and tube from Mexico. *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 84 Fed. Reg. 61,011 (Dep't of Commerce Nov. 12, 2019). Commerce selected Maquilacero and Prolamsa as mandatory respondents. *See* Commerce Memorandum, re: Respondent Selection (Dec. 19, 2019) at 1, PR 21, CR 5. Commerce published the preliminary results and supporting calculations. *Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes from Mexico* ("*Preliminary Results*"), 86 Fed. Reg. 7067 (Dep't of Commerce Jan. 26, 2021) (preliminary results of antidumping duty administrative review; 2018–2019); *see also* Prelim. Decision Mem. accompanying Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes from Mexico, 86 Fed. Reg. 7,067 (Jan. 26, 2021) ("Prelim. DM"), PR 191; *see also* Commerce Memorandum, re: Preliminary Results Margin Calculation for Maquilacero S.A. de. C.V. (Jan. 15, 2021), PR 192, CR 301; *see also* Commerce Memorandum, re: Preliminary Results Sales Calculations for Productos Laminados de Monterrey S.A. de C.V. (Jan. 15, 2021), PR 196, CR 304; *see also* Commerce Memorandum, re: Cost of Production and Constructed Value Calculation Adjustments for the Preliminary Results – Maquilacero S.A. de C.V. (Jan. 15, 2021), PR 197, CR 309.

Maquilacero and Nucor each submitted an administrative case brief. Letter from Arent Fox LLP to Sec'y Commerce, re: Maquilacero S.A. de C.V.'s Case Brief (Mar. 8, 2021), PR 230, CR 374; Letter from Wiley Rein LLP to Sec'y Commerce, re: Case Brief (Mar. 8, 2021) ("Nucor's Administrative Case Brief" or "Nucor's Admin. Case Br."), PR 231, CR 375–376. Each party submitted a rebuttal brief. Letter from White & Case LLP to Sec'y Commerce, re: Rebuttal Brief (Mar. 17, 2021), PR 235, CR 377; Letter from Arent Fox LLP to Sec'y Commerce, re: Maquilacero S.A. de C.V.'s Rebuttal Brief (Mar. 17, 2021), PR 236, CR 378–379; Letter from Wiley Rein LLP to Sec'y Commerce, re: Rebuttal Brief (Mar. 17, 2021), PR 237, CR 380. Commerce published its *Final Results* and supporting calculations. *Final Results*, 86 Fed. Reg. 41,448; Final IDM.

Nucor submitted ministerial error comments addressing the margin calculations for both Prolamsa and Maquilacero. Letter from Wiley Rein LLP to Sec'y Commerce, re: Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes from Mexico: Ministerial Error Comments (Aug. 2, 2021) ("Ministerial Error Comments" or "Ministerial Error Cmts.") at 1–7, PR 253, CR 392. Both Prolamsa and Maquilacero filed rebuttal comments. Letter from White & Case LLP to Sec'y Commerce, re: Response to Ministerial Error Comments (Aug. 6, 2021), PR 256, CR 393; Letter from Arent Fox LLP to Sec'y Commerce, re: Maquilacero S.A. de C.V.'s Reply to Ministerial Error

Comments for the Final Results (Aug. 9, 2021), PR 257, CR 394. Commerce issued its ministerial error determination on August 20, 2021. *See* Commerce Memorandum, re: Ministerial Error Allegations in the Final Results of the 2018–2019 Antidumping Duty Administrative Review on Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes from Mexico (Aug. 20, 2021) ("Ministerial Error Determination"), PR 259. Commerce determined that Nucor's ministerial error allegations were untimely because Nucor should have submitted comments concerning any ministerial errors in Nucor's initial administrative case brief. *Id.* at 1.

JURISDICTION AND STANDARD OF REVIEW

The U.S. Court of International Trade has jurisdiction under 19 U.S.C. § 1516a(a)(2)(B)(i) and 28 U.S.C. § 1581(c). The Court shall hold unlawful any determination found to be unsupported by substantial evidence on the record or otherwise not in accordance with the law. 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

Commerce determines antidumping duties by calculating the amount by which the normal value of subject merchandise exceeds the export price or the constructed export price for the merchandise. 19 U.S.C. § 1673. "Normal value" is "the price at which the foreign like product is first sold . . . in the exporting country . . . in the ordinary course of trade[.]" *Id.* § 1677b(a)(1)(B)(i). The "dumping margin" (i.e., the antidumping duty) is the amount by which normal value exceeds the export price or constructed export price. *Id.* § 1677(35)(A). When reviewing antidumping duties in an administrative review, Commerce must determine: (1) the normal value and export price or constructed export price of each entry of the subject merchandise, and (2) the dumping margin for each such entry. *Id.* § 1675(a)(1)(B), (a)(2)(A). The statute dictates the steps by which Commerce may calculate normal value "to achieve a fair comparison" with export price or constructed export price. *Id.* § 1677b(a).

When calculating normal value, the statute specifies the methodology for Commerce to determine which sales should be considered and disregarded. *Id.* § 1677b(b)(1). Specifically, sales outside the "ordinary course of trade" are disregarded and excluded from normal value. *Id.*; *id.* § 1677(15). Sales outside the ordinary course of trade include sales made at less than the cost of production. *Id.* § 1677(15)(A). To determine whether "sales . . . have been made at prices which represent less than the cost of production[,]" the statute directs Commerce to conduct the sales-below-cost test. *Id.* § 1677b(b)(1). The cost of production is defined by statute to include the

cost of materials and processing, amounts for selling, general, and administrative expenses, and the cost of all containers and expenses incidental for shipment. *Id.* § 1677b(b)(3). Upon applying the sales-below-cost test, sales that Commerce determines were made at prices below the cost of production are outside the ordinary course of trade and are disregarded from the calculation of normal value. *See id.* § 1677b(b)(1), (a)(1)(B)(i). "Whenever such sales are disregarded, normal value shall be based on the remaining sales of the foreign like product in the ordinary course of trade." *See id.* § 1677b(a)(1)(B)(i), (b)(1); *id.* § 1677(15)(A). Determining which sales are included in the normal value calculation is therefore multi-faceted and fundamentally important to Commerce's determination of an antidumping duty rate. This determination must be calculated correctly and consistently to avoid any subsequent inaccuracy in Commerce's determination.

I. Nucor's Ministerial Error Comments Regarding Maquilacero

Nucor challenges Commerce's rejection of Nucor's ministerial error comments as untimely with respect to Maquilacero.

The Court first examines whether the errors raised by Nucor are ministerial in nature. Nucor argues that in the administrative proceeding, Commerce issued a preliminary decision memorandum that included a normal value calculation for Maquilacero using "arbitrary" placeholder numbers for cost construction. Pl.'s Br. at 6–8. Nucor contends that Maquilacero's normal value was inappropriately depressed because lower-value sales that would have failed the sales-below-cost test were subsequently included in normal value. *Id.* at 6–9. Commerce applied a quarterly methodology to determine costs for Maquilacero in the *Preliminary Results*. *Id.* at 7. Nucor submitted an administrative case brief regarding Maquilacero, in which Nucor argued that Commerce used "arbitrary" placeholder numbers for cost construction in the *Preliminary Results* (i.e., .1, .2, .3, etc.) and that Commerce should have used Maquilacero's actual costs instead in the *Final Results*. Nucor's Admin. Case Br. at 49–52.

In the *Final Results*, Commerce used the same quarterly methodology, but rather than using "placeholder" cost values as it did in the *Preliminary Results*, Commerce used "zero values" for the quarterly cost calculations in the *Final Results*. Pl.'s Br. at 9. After Commerce published the *Final Results*, Nucor submitted Ministerial Error Comments. *See* Ministerial Error Cmts. Nucor argued in its Ministerial Error Comments that in the *Final Results*, Commerce unintentionally and incorrectly calculated Maquilacero's constructed costs for the quarter prior to the period of investigation. *Id.* at 2. Nucor contends

that the use of zero values in the *Final Results* was a ministerial error that unintentionally reduced Maquilacero's cost calculation because the placeholder sequential numbers from the *Preliminary Results* were removed by Commerce and zeros were unintentionally inserted by the computer program. Pl.'s Br. at 8–9.

Defendant and Defendant-Intervenor argue that Commerce determined correctly that Nucor's Ministerial Error Comments were filed untimely, and Nucor failed to exhaust its administrative remedies. Def.'s Resp. Br. at 11–14, 16–18; Def.-Interv.'s Resp. Br. at 15–19. In addition, Defendant-Intervenor argues that the issue raised by Nucor was methodological, not ministerial. Def.-Interv.'s Resp. Br. at 14–15. Nucor counters that Commerce's mistake was ministerial, not methodological, and because the mistake of inserting zero values did not occur until the *Final Results*, Commerce's ministerial errors in its calculations of Maquilacero's dumping margin were not discoverable until the publication of the *Final Results* and Nucor's comments were thus timely. Pl.'s Reply Br. at 4–12.

Ministerial errors are errors "in addition, subtraction, or other arithmetic function, clerical error[s] resulting from inaccurate copying, duplication, or the like, and any other similar type of unintentional error[.]" 19 C.F.R. § 351.224(f). Errors resulting from a computer programming error in Commerce's antidumping margin calculation computer program are ministerial in nature. *Am. Signature, Inc. v. United States*, 598 F.3d 816, 823–24 (Fed. Cir. 2010). Conversely, errors resulting from considerations involving factual components are not ministerial in nature. *See Nakornthai Strip Mill Pub. Co. v. United States*, 32 CIT 1272, 1281–82, 587 F. Supp. 2d 1303, 1311–12 (2008) (holding that Commerce's choice of a particular invoice date over potential alternatives involved factual components and was therefore not within the regulation's meaning of "ministerial").

The Government does not argue that the errors were methodological rather than ministerial; the Government merely repeats its argument that Nucor's ministerial error comments were filed untimely. *See* Def.'s Resp. Br. at 11–14. The Government explains that in the *Preliminary Results*, Commerce excluded Maquilacero's reported home market sales made during the quarter preceding the period of review, but Commerce did not exclude U.S. sales made during the quarter preceding the period of review for the purpose of calculating costs of production. *Id.* at 11. The Government explains further that Commerce performed the cost recovery test using "almost identical" calculations in the *Preliminary Results* and *Final Results*, with a "small difference" of "certain adjustments to the calculations." *Id.*

This "small difference" is the crux of Nucor's ministerial error allegation: Nucor argues that the "small difference" of using zeros instead of the sequential placeholder values resulted in an incorrect reduced quarterly cost for Maquilacero, while the Government offers no explanation of why it used zeros as the cost values in the *Final Results*. The Government does not argue, for example, that it deliberately chose to use zeros as the correct cost values and therefore any error is methodological or factual in nature rather than ministerial. The Government does not dispute Nucor's contention that the zeros used in the cost calculations resulted from a computer programming error, but rather repeats its arguments that Nucor's allegations were untimely and should be disregarded.

It is apparent to the Court that the errors alleged by Nucor more closely resemble arithmetic errors in a computer programming mistake (i.e., unintentional errors) because there is no evidence that Commerce deliberately chose to use zeros in its cost calculations that would support methodological or factual considerations outside the meaning of "ministerial." Absent any contrary argument from the Government, it is reasonable to conclude that Commerce intended in the *Final Results* to disregard the placeholder numbers that had been used to calculate Maquilacero's quarterly costs in the *Preliminary Results*, and that the Government's lack of explanation for why it used zeros for the values in calculating quarterly costs for Maquilacero requires further inquiry. Because Nucor has sufficiently raised the question of whether an unintentional error resulted in the use of zeros for the cost calculations, and the Government has failed to contest this allegation adequately, the Court concludes that the alleged mistake constitutes a ministerial error pursuant to 19 C.F.R. § 351.224(f).

Defendant and Defendant-Intervenor argue that Nucor's Ministerial Error Comments were untimely. Def.'s Resp. Br. at 10–14; Def.-Interv.'s Resp. Br. at 15–16. Comments concerning ministerial errors in the preliminary results of a review should generally be included in a party's administrative case brief. 19 C.F.R. § 351.224(c)(1). A party is precluded from making arguments on appeal that were omitted before the agency. *See Carpenter Tech. Corp. v. United States*, 30 CIT 1373, 452 F. Supp. 2d 1344 (2006). An exception to the general rule exists, however, when the comments address an error in the final results that was not present in the preliminary results. *See U.S. Steel Corp. v. United States*, 36 CIT 534, 539, 2012 WL 1259085 at **4 (2012) (remanding Commerce's final results "to allow for correction of a certain ministerial error in computer programming" which became

apparent only after publication of the final results); *see also LTV Steel Co. v. United States*, 21 CIT 838, 869, 985 F. Supp. 95, 97, 120 (1997) (holding that comments following the final results were timely when the respondent could not challenge Commerce's methodology until Commerce articulated that methodology and applied it to the program at issue). This exception helps to ensure that Commerce meets its obligation to calculate antidumping duty rates as accurately as possible. *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990).

Defendant and Defendant-Intervenor argue that Nucor's allegations of ministerial errors should have been raised in Nucor's Administrative Case Brief and were properly rejected as untimely pursuant to 19 C.F.R. § 351.224(c)(1). Def.-Interv.'s Resp. Br. at 9; Def.'s Resp. Br. at 6, 7, 10. Because the unintentional errors became apparent only in the *Final Results*, the Court concludes that the exception applies here, and Nucor was permitted to address new ministerial errors that arose after Commerce completed its constructed cost calculations for normal value in the *Final Results*. *See U.S. Steel Corp.*, 36 CIT at 539, 2012 WL 1259085 at **4.

Nucor filed timely Ministerial Error Comments and the Court concludes that Nucor did not fail to exhaust its administrative remedies. Because Nucor should have been allowed to raise ministerial error concerns regarding Maquilacero in response to apparent unintentional mistakes in Commerce's *Final Results*, the Court remands for Commerce to reconsider Nucor's ministerial error comments and respond accordingly.

II. Nucor's Ministerial Error Comments Regarding Prolamsa

The second issue raised by Nucor is a challenge to Commerce's rejection of Nucor's ministerial error comments with respect to Prolamsa. Defendant requests a remand to reconsider information in Commerce's calculation of normal value for Prolamsa in the *Final Results*. Oral Arg. at 1:13:08, Dec. 20, 2022, ECF Nos. 49, 50. During oral argument, Defendant explained that after analyzing the information highlighted by Nucor regarding calculations of home market prices using faulty currency conversions, Commerce wished to reanalyze its calculations to correct any potential double-conversion errors. *Id.*

The Court has considerable discretion in deciding whether to grant a request for remand by the Government. *See SKF USA Inc. v. United States*, 254 F.3d 1022, 1029 (Fed. Cir. 2001); *Home Prod. Int'l, Inc. v. United States*, 633 F.3d 1369, 1378 (Fed. Cir. 2011). If the agency's concern is substantial and legitimate, a remand may be appropriate.

SKF USA Inc., 254 F.3d at 1029. This Court has concluded that an agency's concerns are substantial and legitimate if: (1) the agency has provided compelling justification for its remand request, (2) the need for finality does not outweigh the agency's justification, and (3) the scope of the remand request is appropriate. *See, e.g.*, *Sea Shepherd N.Z. v. United States*, 44 CIT __, __, 469 F. Supp. 3d 1330, 1335–36 (2020) (quoting *Shakeproof Assembly Components Div. of Ill. Tool Works, Inc. v. United States*, 29 CIT 1516, 1522–26, 412 F. Supp. 2d 1330, 1336–39 (2005)).

Remand of Commerce's determination regarding Prolamsa will allow Commerce to reassess its home market price calculations and correct any potential errors in its currency conversions. Commerce has an obligation to calculate dumping margins as accurately as possible. *See Rhone Poulenc, Inc.*, 899 F.2d at 1191. The Court concludes that Defendant has provided a compelling justification for its remand request, the need for finality does not outweigh the agency's justification, and the scope of Defendant's remand request is appropriate. The Court grants Defendant's remand request regarding Prolamsa.

CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that this action is remanded to Commerce for reconsideration consistent with this opinion; and it is further

ORDERED that this case shall proceed according to the following schedule:

(1) Commerce shall file its remand determination on or before March 17, 2023;

(2) Commerce shall file the administrative record on or before March 31, 2023;

(3) Comments in opposition to the remand determination shall be filed on or before April 28, 2023;

(4) Comments in support of the remand determination shall be filed on or before May 26, 2023; and

(5) The joint appendix shall be filed on or before June 23, 2023.

Dated: January 18, 2023
New York, New York

/*s*/ *Jennifer Choe-Groves*
JENNIFER CHOE-GROVES, JUDGE

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