U.S. Customs and Border Protection

DEPARTMENT OF THE TREASURY

19 CFR PART 24

CBP DEC. 23–13

RIN 1515–AE81

ELIMINATION OF DEBIT VOUCHER INTEREST ACCRUING BEFORE THE ISSUANCE OF A BILL

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

ACTION: Interim final rule; solicitation of comments.

SUMMARY: This document amends the U.S. Customs and Border Protection (CBP) regulations to reflect the elimination of CBP's collection of interest specific to debit vouchers in order to enable CBP to efficiently include debit voucher bills in CBP's automated billing process in the Automated Commercial Environment. As a result of this change, CBP will automatically issue debit voucher bills, inclusive of all applicable interest accruing on such bills and dishonored payment fees. Interest on the debited amount will accrue from the date of the issuance of a debit voucher bill, and no longer from the date of the debit voucher.

DATES: This interim final rule is effective as of November 4, 2023; comments must be received by December 22, 2023.

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

Federal eRulemaking Portal: https://www.regulations.gov. Follow the instructions for submitting comments via docket number USCBP–2023–0025.

Instructions: All submissions received must include the agency name and docket number for this rulemaking. All comments received will be posted without change to *https://www.regulations.gov,* including any personal information provided. For detailed instructions on submitting comments and additional information on the rulemak-

ing process, see the "Public Participation" heading of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: For access to the docket to read background documents or comments received, go to *https://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Steven J. Grayson, Program Manager, Investment Analysis Office, Office of Finance, U.S. Customs and Border Protection, (202) 579–4400, or *ACECollections@cbp.dhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Public Participation

Interested persons are invited to participate in this rulemaking by submitting written data, views, or arguments on all aspects of this interim final rule. See **ADDRESSES** above for information on how to submit comments. CBP also invites comments that relate to the economic, environmental, or federalism effects that might result from this regulatory change. Comments that will provide the most assistance to CBP will reference a specific portion of the rule, explain the reason for any recommended change, and include data, information or authority that supports such recommended change.

II. Background

A. Ongoing Modernization of the Collections System at U.S. Customs and Border Protection

U.S. Customs and Border Protection (CBP) is modernizing its collections system, allowing CBP to eventually retire the Automated Commercial System (ACS) and transfer all collections processes into the Automated Commercial Environment (ACE). This modernization effort, known as ACE Collections, includes the consolidation of the entire collections system into the ACE framework, which will enable CBP to utilize trade data from ACE modules, benefitting both the trade community and CBP with more streamlined and better automated payment processes. The new collections system in ACE will reduce costs for CBP, create a common framework that aligns with other initiatives to reduce manual collection processes, and provide additional flexibility to allow for future technological enhancements. ACE Collections will also provide the public with more streamlined and better automated payment processes with CBP, including better visibility into data regarding specific transactions.

ACE Collections supports the goals of the Customs Modernization Act (Pub. L. 103–182, 107 Stat. 2057, 2170, December 8, 1993, Title VI of the North American Free Trade Agreement Implementation

Act), of modernizing the business processes that are essential to securing U.S. borders, speeding up the flow of legitimate shipments, and targeting illicit goods that require scrutiny. ACE Collections also fulfills the objectives of Executive Order 13659 (79 FR 10655, February 25, 2014), to provide the trade community with an integrated CBP trade system that facilitates trade, from entry of goods to receipt of duties, taxes, and fees.

CBP is implementing ACE Collections through phased releases in ACE. Release 1 was deployed on September 7, 2019, and dealt with statements integration, the collections information repository (CIR) framework, and automated clearinghouse (ACH) processing. *See* 84 FR 46749 and 84 FR 46678 (September 5, 2019), with a minor correction on September 23, 2019 (84 FR 49650).

Release 2 was deployed on February 5, 2021, and focused on non-ACH electronic receivables and collections, for Fedwire and *Pay.gov*, that included user fees, and Harbor Maintenance Fee (HMF) and Seized Assets and Case Tracking System (SEACATS) payments. All the changes in Release 2 were internal to CBP and did not affect the trade community; as such, no notice was published.

Release 3 was deployed on May 1, 2021, and primarily implemented technical changes to the liquidation process, and deferred tax bills, which were internal to CBP. *See* 86 FR 22696 (April 29, 2021). Release 3 also harmonized the determination of the due date for deferred tax payments with the entry summary date, streamlined the collections system, and provided importers of record with more flexibility and access to data when making deferred payments of internal revenue taxes owed on distilled spirits, wines, and beer imported into the United States.

Release 4 was deployed on October 18, 2021, and primarily implemented technical changes to the production and management of the internal CBP processes for supplemental bills, certain reimbursable bills, and non-reimbursable/miscellaneous bills issued by CBP to the public. *See* 86 FR 56968 (October 13, 2021). Release 4 also made available to importers of record, licensed customs brokers, and other ACE account users, an option to electronically view certain, unpaid, open bill details as reports in ACE Reports and adopted a new, enhanced format for the CBP Bill Form.

Release 5 was deployed on March 21, 2022, and implemented internal technical changes to the production, tracking, and management of overdue bills and delinquent accounts and the bonds associated with them, including enhancements to the unpaid, open bill details reports in ACE Reports. *See* 87 FR 14899 (March 16, 2022). Release 5 also included a May 1, 2022 delayed deployment of minor

modifications to the mailed Formal Demand on Surety for Payment of Delinquent Amounts Due (also informally referred to as the 612 Report) and the ability to electronically view 612 Reports in ACE Reports.

Most recently, Release 6 was deployed on August 29, 2022. Release 6 focused on the management of refunds, and included mainly internal, technical changes to the ability to search, create, and review/certify those refunds. *See* 87 FR 49600 (August 11, 2022). Release 6 also included enhancements that improve transparency and access to information through ACE for ACE account users who have sought refunds from CBP to view certain information regarding the ACE account user's own refunds.

As explained more fully below, Release 7 will be deployed on November 4, 2023. Release 7 will enhance CBP's budget clearing account (BCA)[1] management, reducing processing times for clearing collections off the BCA and allowing for improved reconciliation of open receivables. This release will further integrate the port collections process into ACE Collections to allow for the full entry lifecycle to be contained in one system. The remaining ACS functionalities, including Point of Sale (POS), Treasury and port reconciliations, Deposits in Transit (DIT), debit voucher[2] processing, collections in transit, serial numbered forms (SNF) and system transfers, will also be moved to ACE. Specifically for debit vouchers, Release 7 will streamline the tracking and notification process for debit vouchers within ACE by transitioning the entire debit voucher process (from bill creation to payment application) from a manual to an automated process. This transition is accomplished by including debit vouchers in CBP's general billing process and making several regulatory changes to the debit voucher interest accrual provision. All changes, except the change to debit voucher processing, are internal to CBP and will not affect the trade community. The completion of this release will enable CBP to retire the ACS mainframe and move all ACS functionality to ACE. CBP will announce the retirement of ACS by notice in the **Federal Register** once ready to do so.

B. Overview of CBP's Debit Voucher Process

CBP is authorized to collect duties, taxes, and fees arising from customs activities from individuals or entities. *See generally* 19 U.S.C. 58a, 58b, 58b–1, 58c, 1505, and 26 U.S.C. 4461. The regulations found in part 24 of title 19 of the Code of Federal Regulations

[1] A budget clearing account records unidentifiable transactions and credits pending transfer to the applicable receipt or expenditure account. *See* 31 U.S.C. 3513.

[2] A bank issues a debit voucher on Form SF 5515 notifying CBP that a CBP account is being debited due to a dishonored payment.

(CFR) address the financial and accounting procedures for when CBP collects these duties, taxes, fees, interest, and other applicable charges. *See generally* 19 CFR 24.1–24.36. CBP collects and manages numerous types of bills and uses several systems and processes to manage them. CBP separates the bills it collects into broad categories, which include accrual bills, supplemental bills, reimbursable bills, non-reimbursable/miscellaneous bills, debit vouchers, and fines, penalties, and forfeiture bills. *See generally* § 24.3a. Supplemental bills constitute the majority of bills that CBP generates for collection purposes. These bills arise from liquidation or reliquidation processes and are generated because of the nonpayment or underpayment of duties, taxes, and fees at the time of entry for imported merchandise. In most cases, debit voucher bills (covered by §§ 24.3(e) and 24.3a(b)(2)(i)(C)) resulting from dishonored payments[3] such as dishonored checks or dishonored ACH[4] transactions, function similarly to supplemental bills in their purpose, *i.e.,* nonpayment or underpayment of duties, taxes, and fees. Thus, debit voucher bills are included in the provisions regarding bill payment, due date and interest accrual for supplemental bills, although the due date and interest assessment for debit vouchers differ from supplemental bills. *See* §§ 24.3(e) and 24.3a(b)(2)(ii).

Section 24.3a contains detailed provisions regarding CBP bills for supplemental duties, taxes, and fees, vessel repair duties with interest, reimbursable services, and miscellaneous amounts. Specifically, § 24.3a(a) discusses the due date for these CBP bills and refers to the due date calculation set forth in § 24.3(e). Section 24.3(e) states that bills resulting from dishonored checks or dishonored ACH transactions are due and payable within 15 days of the date of the issuance of the bill, whereas all other bills are due and payable within 30 days of the date of the issuance of the bill.

CBP assesses interest on the nonpayment or underpayment of estimated duties, taxes, and fees, or interest, owed by an individual or entity, as set forth in § 24.3a(b). *See* also 19 U.S.C. 1505(c). Section 24.3a(b)(1) concerns interest charges due to the late payment of bills for vessel repair duties, reimbursable services and miscellaneous amounts, whereas paragraph (b)(2) describes the procedures for charging interest due to the underpayment of supplemental duties,

[3] Even though §§ 24.3(e) and 24.3a(b)(2)(i)(C) mention only checks and ACH transactions, every payment type may result in a debit voucher, with dishonored checks and dishonored ACH transactions being the majority of dishonored payments that CBP processes. Even though §§ 24.3(e) and 24.3a(b)(2)(i)(C) mention only checks and ACH transactions, every payment type may result in a debit voucher, with dishonored checks and dishonored ACH transactions being the majority of dishonored payments that CBP processes.

[4] For additional information on the ACH debit and ACH credit processes, please see 19 CFR 24.25 and 24.26.

taxes, fees, and interest. Section 24.3a(b)(2) is divided into paragraph (i) dealing with interest on initial underpayments, and paragraph (ii) involving interest on overdue bills. Paragraph (b)(2)(i) is further broken out into paragraphs (A) through (C) covering factual situations that arise under current CBP transactions and produce variations in the interest computation period under the basic statutory rule of 19 U.S.C. 1505(d). Paragraph (A) concerns excessive refunds by CBP prior to liquidation or reliquidation, paragraph (B) describes three scenarios involving additional deposits made by an individual or entity prior to liquidation or reliquidation, and paragraph (C) concerns situations where CBP receives a debit voucher indicating that a payment to CBP was not made because of a dishonored check or dishonored ACH transaction.

According to § 24.3a(b)(2)(i)(C), if a depository bank notifies CBP by a debit voucher that a CBP account is being debited due to a dishonored check or dishonored ACH transaction, interest will accrue on the debited amount from the date of the debit voucher to either the date of the payment of the debt represented by the debit voucher or the date of the issuance of a bill for payment, whichever date is earlier. Thus, interest begins to accrue on a debit voucher from the date of the debit voucher. If the debit voucher is paid before CBP generates a bill, interest accrues from the date of the debit voucher to the date of payment. If the debit voucher is not paid before CBP generates a bill, interest accrues on the amount of the debit voucher until the date the bill is generated. CBP charges this debit voucher interest in addition to any interest accrued on the underlying underpayment of duties, taxes, and fees as prescribed by 19 U.S.C. 1505(c) or 1677g.

Section 24.3a(b)(2)(ii) involves interest on overdue bills, and states that if duties, taxes, fees, and interest are not paid in full within the applicable period specified in § 24.3(e), any unpaid balance will be considered delinquent and will bear interest until the full balance is paid. As noted above, § 24.3(e) provides that, generally, a debtor has 30 days after the bill date (also known as the date of issuance of the bill) to make payment. On the 31st day after the bill date, the bill is considered delinquent, and interest will accrue in 30-day periods. In the case of debit vouchers, § 24.3(e) provides that a debtor has 15 days after the bill date to make payment, and on the 16th day after the bill date, the bill is considered delinquent. Initial interest accrues on the debit voucher bill within the 15-day period, and in 30-day periods thereafter. *See generally* 19 U.S.C. 1505(d); 19 CFR 24.3a.

For CBP, the current debit voucher process is very labor-intensive. Because the interest calculation for debit vouchers differs from that for other CBP bills, debit voucher bills cannot be automated along

with other CBP bills. Therefore, CBP accounting technicians are tasked with manually creating draft debit voucher bills for only the amount of the debit voucher in ACS, manually calculating interest outside of the system for each debit voucher, and manually creating and mailing to the individual or entity a letter notifying of the debit voucher interest and any amount owed on the debit voucher. This bill, in the form of a letter, is mailed to notify the debtor of the amount owed on a particular debt.[5] Payments that are made on debit voucher bills are posted to the BCA until payment and bill are manually matched up and payment is applied to the bill. If payment is not made, subsequent letters with any remaining amount owed, plus additional accrued interest, must be manually created and mailed every 30 days, consistent with § 24.3(e) and § 24.3a(c)(3).

The banking industry practice regarding debit vouchers has changed significantly since CBP first implemented debit voucher interest through regulatory amendments in 1999.[6] Debit vouchers were historically mailed to payees (resulting in a delay of days or weeks before a bill could be issued) but are now transmitted electronically such that CBP receives near-immediate electronic notice when a payment is dishonored. Consequently, debit vouchers are paid and resolved or billed by CBP within a day or two of receiving electronic notice of the dishonored payment. Thus, the accrued interest on debit vouchers in this short time frame is minimal, in contrast to the significant time and resources CBP must spend manually processing debit vouchers and issuing bills for their payment. In addition, the individual or entity may receive a dunning letter despite having already made payment in full because CBP has not processed the payment yet, *i.e.,* matched up and applied the payment to the bill, before mailing the letter, thus resulting in inaccurate billing.

III. Discussion of Changes to 19 CFR 24.3 and 24.3a

As described above, the current regulatory requirement in § 24.3a(b)(2)(i)(C) to assess debit voucher interest prior to the creation of the debit voucher bill inhibits CBP's ability to automate the debit voucher billing process and align it with the billing process for the majority of bills issued by CBP. In order to address the problems posed by the manual debit voucher process, CBP is amending its

[5] It is common practice for CBP accounting technicians to create draft debit voucher bills without interest as soon as CBP is notified of the debit voucher to keep the accruing debit voucher interest low; the debit voucher interest is frequently calculated at a later time and mailed subsequently in a dunning letter.

[6] CBP published an interim final rule in the **Federal Register** on October 20, 1999 (64 FR 56433) amending regulations regarding interest on underpayments and overpayments of customs duties, taxes, fees, and interest.

regulations to eliminate the requirement in § 24.3a(b)(2)(i)(C) to assess interest on debit vouchers for the period between the date of the debit voucher and the date of the creation of the debit voucher bill. Instead, interest will only accrue on the amount of the debit voucher from the date of issuance of the debit voucher bill, resulting in the same starting point for the interest calculation for debit voucher bills as all other bills.

As part of Release 7, debit voucher bills will be processed automatically like other bills, inclusive of all applicable interest accruing on such bills and dishonored payment fees. The system (ACE) will generate an initial debit voucher bill due 15 days from the date of issuance of the bill, and subsequent bills every 30 days from the due date. To enable this automation of the debit voucher process, CBP is reorganizing § 24.3a(b) by moving the debit voucher provision in paragraph (b)(2)(i)(C) to a new paragraph (b)(3) titled, "Interest accrual on debit vouchers." As debit voucher bills will be included in CBP's automated billing process, the debit voucher provision under paragraph (b)(2)(i)(C) is no longer considered an exception to the general rule in § 24.3a(b)(2)(i). Moreover, the debit voucher provision deals with a specific scenario of dishonored payments on any type of debt owed to CBP, whereas paragraph (b)(2) in general describes situations arising in the context of liquidation or reliquidation, thus, the placement of the debit voucher provision in a separate paragraph will fit better within the structure of CBP's billing regulations.

The new paragraph (b)(3) will set forth the rules for interest accrual on debit vouchers and will state that if a depository bank notifies CBP by a debit voucher that a CBP account is being debited due to a dishonored payment (*e.g.,* check or ACH transaction), interest will accrue on the debited amount from the date of the bill. Further, if payment is not received by CBP on or before the late payment date appearing on the bill, interest charges will be assessed on the debited amount. The initial late payment date is the date 15 days after the interest computation date. The interest computation date is the date from which interest is calculated and is initially the bill date. New paragraph (b)(3) will further state that no interest charge will be assessed if the individual or entity timely pays the debt at the location designated on the bill within the initial 15-day period (consistent with § 24.3a(c)(3), which similarly provides that no interest will be assessed for the initial 30-day period in which timely payment is made on a CBP bill). Finally, after the initial 15-day period, interest will be assessed in 30-day periods pursuant to paragraph § 24.3a(c)(3).

To account for the removal of paragraph (b)(2)(i)(C) in § 24.3a(b)(2)(i), CBP is also removing the reference to paragraph (b)(2)(i)(C) from the introductory text of § 24.3a(b)(2)(i), leaving only paragraphs (b)(2)(i)(A) and (b)(2)(i)(B) as the exceptions to the general interest accrual rule in paragraph (b)(2)(i). In addition, CBP is modifying § 24.3(e) to clarify that a debit voucher may be generated for different types of dishonored payments, including checks and ACH transactions as examples of two payment types. The revision includes a more general reference to dishonored payments followed by a parenthetical reading, "(*e.g.,* check or Automated Clearinghouse (ACH) transaction)." Lastly, in the second sentence of § 24.3(e), CBP is adding "and payable" after the word "due" to be consistent with the same phrase used in the preceding sentence.

Despite forgoing a small amount of interest that accrues between the debit voucher date and the issuance of a bill or the payment of the debit voucher (whichever is earlier), eliminating this interest assessment in § 24.3a(b)(2)(i)(C) will bring about major efficiency gains for CBP, significantly decreasing manual processing of debit vouchers, and thereby improving revenue-collecting operations and better utilizing resources currently spent on manual processing. The trade community will also benefit from improved visibility into specific debit voucher debts as CBP will no longer mail multiple bills (in the form of a letter) for the amount of the debit voucher and interest to the individual or entity on the debts owed, and payment by the individual or entity on a debit voucher will be reflected automatically on the bill record in ACE. In addition, the trade community will receive periodic reminders in the form of subsequent bills following the initial bill until the debt is paid.

As a result of these changes, most debit voucher bills will be created and mailed automatically, decreasing the volume of manual processing significantly. Some manual processing will still occur to finalize debit voucher bills for dishonored ACH credit and check payments. Payments through ACH debit represent the majority of dishonored transactions, and for debit vouchers received on these debts, the system will automatically create a full debit voucher record and create and mail the bill(s) with the information populated from the original dishonored payment. For dishonored ACH credit and check payments, the system will prepare a draft bill, as not all information that is needed to create a final bill is available in ACE, *e.g.,* what debt is being paid and who is responsible for the debt. CBP accounting technicians will fill in the missing information to complete the record using outside research. Once a full debit voucher record is created, a bill will be automatically generated, with interest automatically cal-

culated by the system, and mailed. The trade community will receive notification of the total amount owed, due within 15 days, on an initial bill, with automatic subsequent notifications following in 30-day periods. Most payments on debit vouchers will be posted directly to the bill, and no longer to the BCA, as system limitations that exist in ACS will be eliminated with Release 7.

IV. Statutory and Regulatory Requirements

A. Executive Orders 13563 and 12866 Analysis

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

This interim final rule is part of ACE Collections Release 7. CBP is amending its regulations in 19 CFR 24.3a to reflect the elimination of debit voucher interest that CBP currently charges to align debit voucher processing with CBP's automated billing process. CBP has prepared the following analysis to help inform stakeholders of the impacts of this interim final rule.

1. Purpose of Rule

This interim final rule will eliminate a requirement in current regulations relating to the accrual of interest on dishonored payments. When a payment to CBP, whether paper or electronic, is dishonored for lack of funds, the bank issues a debit voucher and notifies CBP. Regulation currently requires CBP to assess interest on the dishonored payment amount between the date of a debit voucher to either the date of the payment or the date of the issuance of the bill. This interim final rule will eliminate this initial period in which interest accrues. Under this interim final rule, interest will instead accrue from the date of the bill, initially for 15 days, and then in 30-day periods until the bill is paid, in alignment with CBP practices for other payments.

2. Background

In the course of doing business, CBP bills individuals and entities for duties, taxes, fees, interest, or other charges. When an individual's or entity's payment is dishonored, CBP may charge additional interest. Current 19 CFR 24.3(b)(2)(i)(C) states:

If a depository bank notifies CBP by a debit voucher that a CBP account is being debited due to a dishonored check or dishonored Automated Clearinghouse (ACH) transaction, interest will accrue on the debited amount from the date of the debit voucher to either the date of payment of the debt represented by the debit voucher or the date of issuance of a bill for payment, whichever date is earlier.

Before electronic banking was widely available, notification of a dishonored payment could take days to weeks, as the affected bank had to notify CBP via a paper debit voucher. After receipt of notice, CBP would calculate the interest owed on the dishonored amount based on the date of the debit voucher, create a bill with just the amount of the debit voucher in ACS, place a hold on that bill, and mail a letter containing the amount of the debit voucher and interest to the individual or entity. With the advent of electronic payments and messaging, the time between a debit voucher's creation and the bank's notification to CBP is significantly reduced, usually taking no more than three days. Often, the individual or entity has become aware of the problem and made the payment before CBP receives notification or calculates the interest and issues a bill, or the individual or entity makes the payment after the bill is generated but before it is received, causing confusion. As CBP's debit voucher process has not yet been automated, CBP accounting technicians must continue to process debit vouchers manually by checking for a (late) payment, calculating interest, and generating a bill. If the individual or entity continues to fail to pay after the initial bill, CBP may mail subsequent letters as interest accrues in further 30-day periods, but because the process is handled manually, subsequent letters are rarely mailed.

CBP seeks to automate the debit voucher process as a part of ACE Collections Release 7 to better serve the trade community, promote efficiency, and improve collections. However, because of the structure of CBP's electronic systems, processing of debit vouchers can only be automated if CBP eliminates the requirement to assess interest between the date of the debit voucher to either the date of the payment or the date of the issuance of the bill. Under an automated system made possible through this interim final rule, CBP will systemically mail the CBP bill inclusive of all applicable interest accruing on the bill and dishonored payment fees. Thus, payments for a debit voucher

will automatically be posted to the individual's or entity's bill record in CBP systems instead of requiring manual processing by an accounting technician to adjust remaining interest and the bill record after payment has been made. The debit voucher process will be completely electronic, with both initial and subsequent bills mailed automatically if payment is not made.

3. Costs of the Rule

CBP does not anticipate any costs resulting from this interim final rule. Although CBP has invested resources into automating the debit voucher process, those costs were borne regardless of this interim final rule as CBP modernizes its financial systems and moves most business activities to ACE. CBP's ACE Collections effort is large and ongoing, and the debit voucher process represents a minor part. The trade community will see no costs from this interim final rule and will likely save time in the payment and billing process as electronic payment and automatic account updates make settling accounts quicker and easier.

4. Benefits of the Rule

CBP considers this interim final rule to be beneficial to both CBP and the trade community. Automating debit voucher processing will bring clarity and efficiency to the interest accrual and collection environment, making it clear to the individuals and entities involved how much they owe and when, and allowing them to make payments quickly. Individuals and entities will no longer receive bills for payments they may have already made and CBP's accounting technicians will no longer need to spend time calculating interest and generating bills for every debit voucher received by CBP. Automation will also allow for better collection of interest accrued after the initial bill. Under current manual practice, subsequent bills are rarely generated and mailed. Under this interim final rule, that process will be automated, enabling CBP to pursue payment.[7]

5. Transfers

CBP will likely see a small reduction in the amount of interest charged to and collected from individuals and entities because, as part of Release 7, interest will start accruing at a later date—at the time the debit voucher bill is issued rather than at the time of the

[7] Note that some individuals and entities that owe CBP interest on their longer-term dishonored payments will, in practice, pay more interest since subsequent bills with updated accruing interest amounts will be mailed with better regularity. CBP does not consider this a cost of this interim final rule as it is a cost of compliance with current regulations.

debit voucher itself. This reduction is not counted as a cost of this interim final rule but as a transfer, as the reduction in CBP's income will be equal to the corresponding increase in funds retained by the individual or entity paying the debit voucher bill. As the total resources available to society will not change, this is a transfer and not a cost.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement and Fairness Act of 1996, requires agencies to assess the impact of regulations on small entities. A small entity may be a small business (defined as any independently owned and operated business not dominant in its field that qualifies as a small business concern per the Small Business Act); a small organization (defined as any not-for-profit enterprise which is independently owned and operated and is not dominant in its field); or a small governmental jurisdiction (defined as a locality with fewer than 50,000 people). Since a general notice of proposed rulemaking is not necessary for this rule, CBP is not required to prepare a regulatory flexibility analysis for this interim final rule.

C. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. 3507), an agency may not conduct, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number assigned by OMB. There are no information collections associated with this rule.

D. Inapplicability of Notice and Comment Requirement and Delayed Effective Date

The Administrative Procedure Act (APA) requirements in 5 U.S.C. 553 govern agency rulemaking procedures. Section 553(b) of the APA generally requires notice and public comment before issuance of a final rule. In addition, section 553(d) of the APA requires that a final rule have a 30-day delayed effective date. The APA, however, provides exceptions from the prior notice and public comment requirement and the delayed effective date requirement, when an agency for good cause finds that such procedures are impracticable, unnecessary, or contrary to the public interest. *See* 5 U.S.C. 553(b)(B) and (d)(3).

Pursuant to 5 U.S.C. 553(b)(B), CBP has determined for good cause that prior notice and comment are unnecessary because the interim final rule mainly changes CBP's internal accounting procedures and does not negatively affect the substantive rights of the members of

the trade community. As explained in more detail above, the elimination of the debit voucher interest and the automation of the debit voucher billing process will bring clarity as to the debts owed and efficiency as to the debit voucher process itself, benefitting both the trade community and CBP. For the same reasons, CBP finds that good cause exists pursuant to section 553(d)(3) of the APA to issue this interim final rule effective upon publication.

Signing Authority

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

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

List of Subjects in 19 CFR Part 24

Accounting, Claims, Exports, Freight, Harbors, Reporting and recordkeeping requirements, Taxes.

Amendments to the Regulations

For the reasons stated above, part 24 of title 19 of the Code of Federal Regulations (19 CFR part 24) is amended as set forth below:

PART 24—CUSTOMS FINANCIAL AND ACCOUNTING PROCEDURE

■ 1. The general authority citation for part 24 continues to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 58a–58c, 66, 1202 (General Note 3(i), Harmonized Tariff Schedule of the United States), 1505, 1520, 1624; 26 U.S.C. 4461, 4462; 31 U.S.C. 3717, 9701; Pub. L. 107–296, 116 Stat. 2135 (6 U.S.C. 1 *et seq.*).

* * * * *

■ 2. Revise § 24.3(e) to read as follows:

§ 24.3 Bills and accounts; receipts.

* * * * *

(e) Except for bills resulting from dishonored payments (*e.g.,* a check or Automated Clearinghouse (ACH) transaction), all other bills for duties, taxes, fees, interest, or other charges are due and payable within 30 days of the date of the issuance of the bill. Bills resulting from dishonored payments are due and payable within 15 days of the date of the issuance of the bill.

■ 3. In § 24.3a:

■ a. Revise the first sentence of the introductory text of paragraph (b)(2)(i);

■ b. Remove paragraph (b)(2)(i)(C); and

■ c. Add a new paragraph (b)(3).

The revision and addition read as follows:

§ 24.3a CBP bills; interest assessment on bills; delinquency; notice to principal and surety.

* * * * *

(b) * * *

(2) * * *

(i) *Initial interest accrual.* Except as otherwise provided in paragraphs (b)(2)(i)(A) and (b)(2)(i)(B) of this section, interest assessed due to an underpayment of duties, taxes, fees, or interest will accrue from the date the importer of record is required to deposit estimated duties, taxes, fees, and interest to the date of liquidation or reliquidation of the applicable entry or reconciliation. * * *

* * * * *

(3) *Interest accrual on debit vouchers.* If a depository bank notifies CBP by a debit voucher that a CBP account is being debited due to a dishonored payment (*e.g.,* a check or Automated Clearinghouse (ACH) transaction), interest will accrue on the debited amount from the date of the bill resulting from the dishonored payment. If payment is not received by CBP on or before the late payment date appearing on the bill, interest charges will be assessed on the debited amount. The initial late payment date is the date 15 days after the interest computation date. The interest computation date is the date from which interest is calculated and is initially the bill date. No interest charge will be assessed where the payment is actually received at the "Send Payment To" location designated on the bill within the initial 15-day period. After the initial 15-day period, interest will be assessed in 30-day periods pursuant to paragraph (c) of this section.

* * * * *

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

[Published in the Federal Register, October 23, 2023 (88 FR 72675)]

19 CFR PART 177

REVOCATION OF ONE RULING LETTER AND REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF A "3-IN-1 CAR CLEANER"

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

ACTION: Notice of revocation of one ruling letter and of revocation of treatment relating to the tariff classification of a "3-in-1 Car Cleaner" consisting of a combination automobile ice scraper, squeegee, and bristle brush with a detachable handle.

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 combination automobile ice scraper, squeegee, and bristle brush with a detachable handle under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Notice of the proposed action was published in the *Customs Bulletin*, Vol. 57, No. 33, on September 13, 2023. One comment was received in support of the proposed action.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after January 7, 2024.

FOR FURTHER INFORMATION CONTACT: Claudia K. Garver, Chemicals, Petroleum, Miscellaneous and Manufactured Articles Classification Branch, Regulations and Rulings, Office of Trade, at (202) 325–0024.

SUPPLEMENTARY INFORMATION:

BACKGROUND

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

importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and to provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics, and determine whether any other applicable legal requirement is met.

Pursuant to 19 U.S.C. § 1625(c)(1), a notice was published in the *Customs Bulletin*, Vol. 57, No. 33, on September 13, 2023, proposing to revoke one ruling letter pertaining to the tariff classification of combination automobile ice scraper, squeegee, and bristle brush with a detachable handle. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should have advised CBP during the comment period.

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

In Headquarters Ruling Letter ("HQ") 952654, dated January 27, 1993, CBP classified combination automobile ice scraper, squeegee, and bristle brush with a detachable handle in heading 9603, HTSUS, specifically in subheading 9603.90.80, HTSUS, which provides for "Brooms, brushes (including brushes constituting parts of machines, appliances or vehicles), hand-operated mechanical floor sweepers, not motorized, mops and feather dusters; prepared knots and tufts for broom or brush making; paint pads and rollers; squeegees (other than roller squeegees): Other: Other: Other" CBP has reviewed HQ 952654 and has determined the ruling letter to be in error. It is now CBP's position that combination automobile ice scrapers, squeegees, and bristle brushes with a detachable handle are properly classified, in heading 8708, HTSUS, specifically in subheading 8708.99.81, HTSUS, which provides for "Parts and accessories of the motor vehicles of headings 8701 to 8705: Other parts and accessories: Other: Other: Other: Other: Other."

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is revoking HQ 952654, and revoking or modifying any other ruling not specifically identified to reflect the analysis contained in HQ H313099, 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 on January 7, 2024.

YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

Attachment

HQ H313099
October 24, 2023
OT:RR:CTF:CPMMA H313099 CKG
CATEGORY: Classification
TARIFF NO: 8708.99.81

MR. DAVID A. EISEN, ESQ.
SIEGEL, MANDELL & DAVIDSON, P.C.
COUNSELORS AT LAW
1515 BROADWAY, 43RD FLOOR
NEW YORK, NEW YORK 10036

RE: Revocation of HQ 952654; classification of combination automobile ice scraper, squeegee, and bristle brush with a detachable handle

DEAR MR. EISEN:

This is in reference to Headquarters Ruling Letter (HQ) 952654, dated January 27, 1993, concerning the tariff classification of a combination automobile ice scraper, squeegee, and bristle brush with a detachable handle. In HQ 952654, CBP classified this item, referred to as the "3-in-1 Car Cleaner," in heading 9603, Harmonized Tariff Schedule of the United States (HTSUS). We have reviewed HQ 952654, and have determined that the classification of the "3-in-1 Car Cleaner" in heading 9603, 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, notice proposing to revoke HQ 952654 was published on September 13, 2023, in Volume 57, Number 33 of the *Customs Bulletin*. One comment was received in support of the proposed action.

FACTS:

The merchandise at issue was described in HQ 952654 as follows:

> The "3-in-1 Car Cleaner" consists of a plastic handle and three interchangeable components; a plastic ice scraper, a foam squeegee with rubber blade, and a bristle brush. Each component may be separately secured to the handle and may be detached by pressing the handle "clip".

ISSUE:

Whether the 3-in-1 Car Cleaner is classifiable as a brush or squeegee under heading 9603, HTSUS, or in heading 8708, HTSUS, as a part or accessory of a motor vehicle of headings 8701 to 8705.

LAW AND ANALYSIS:

Merchandise is classifiable under the HTSUS in accordance with the General Rules of Interpretation (GRIs). GRI 1 provides that classification shall be determined according to the terms of the headings 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 or notes do not require otherwise, the remaining GRIs 2 through 6 may be applied.

The 2023 HTSUS provisions under consideration are as follows:

9603: Brooms, brushes (including brushes constituting parts of machines, appliances or vehicles), hand-operated mechanical floor sweepers, not motorized, mops and feather dusters; prepared knots and tufts for broom or brush making; paint pads and rollers; squeegees (other than roller squeegees).

8708: Parts and accessories of the motor vehicles of headings 8701 to 8705.

Note 2 to Section XVII provides, in relevant part:

> The expressions "*parts*" and "*parts and accessories*" do not apply to the following articles, whether or not they are identifiable as for the goods of this section:
>
> (l) Brushes of a kind used as parts of vehicles (heading 9603).

Note 3 to Section XVII provides, in pertinent part:

> References in chapters 86 to 88 to "*parts*" or "*accessories*" do not apply to parts or accessories which are not suitable for use solely or principally with the articles of those chapters.

* * * *

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

Part III of the General EN's to Section XVII, HTSUS, provides, in pertinent part:

> [T]hese headings apply **only** to those parts or accessories which comply with **all three** of the following conditions :
>
> (a) They must not be excluded by the terms of Note 2 to this Section (see paragraph (A) below).
>
> and (b) They must be suitable for use solely or principally with the articles of Chapters 86 to 88 (see paragraph (B) below).
>
> and (c) They must not be more specifically included elsewhere in the Nomenclature (see paragraph (C) below).

EN 87.08 provides as follows:

> This heading covers parts and accessories of the motor vehicles of headings 87.01 to 87.05, **provided** the parts and accessories fulfil **both** the following conditions:
>
> (i) They must be identifiable as being suitable for use solely or principally with the above-mentioned vehicles;
>
> and (ii) They must not be excluded by the provisions of the Notes to Section XVII (See the corresponding General Explanatory Note).

* * * *

As a preliminary matter, we note that Note 2(l) to Section XVII, which excludes "brushes of a kind used as parts of vehicles (heading 9603)" from classification under heading 8708, HTSUS, does not apply to the 3-in-1 Car

Cleaner because the 3-in-1 Car Cleaner is not a part of a motor vehicle but rather is an accessory. An "accessory" is not defined in the HTSUS - the term is generally understood to mean an article which is not necessary to enable the goods with which it is intended to function. Accessories are of secondary importance, but must, however, contribute to the effectiveness of the principal article (e.g., facilitate the use or handling of the particular article, widen the range of its uses, or improve its operation). *See* HQ 958710, dated April 8, 1996; HQ 950166, dated November 8, 1991.

The 3-in-1 Car Cleaner is classifiable at GRI 1 in heading 8708, HTSUS, as an accessory to a motor vehicle of headings 8701 to 8705. In addition to the definitions set forth via rulings above, CBP also employs the common and commercial meanings of the term "accessory", as the courts did in *Rollerblade v. United States*, wherein the Court of International Trade derived from various dictionaries that an accessory must relate directly to the thing accessorized. *See Rollerblade, Inc. v. United States*, 116 F.Supp. 2d 1247 (CIT 2000), *aff'd*, 282 F.3d 1349 (Fed. Cir. 2002) (holding that inline roller-skating protective gear is not an accessory because the protective gear does not directly act on or contact the roller skates in any way, and does not affect the skates' operation); *See also* HQ 966216, dated May 27, 2003.

Additionally, Note 2(l) only excludes from heading 8708, HTSUS, an item that is classified in its entirety at GRI 1 under heading 9603, HTSUS. Here, only certain parts of the 3-in-1 Car Cleaner are classified under heading 9603—the brush and the squeegee, but not the ice scraper. The 3-in-1 Car Cleaner is therefore not classifiable at GRI 1 in heading 9603, HTSUS, and so Note 2(l) does not exclude it from classification under heading 8708, HTSUS.

The 3-in-1 Car Cleaner contributes to the effectiveness and affects the operation of motor vehicles of headings 8701 to 8705 by enabling the removal of ice or snow from their windows, lights, and other parts for better visibility while driving. The item is identifiably suitable for use solely or principally for a motor vehicle of headings 8701 to 8705. Moreover, the item is not excluded from classification as an accessory to a motor vehicle of headings 8701 to 8705, and it is not further specified elsewhere in the Nomenclature. Accordingly, the 3-in-1 Car Cleaner is classifiable under heading 8708, HTSUS, by application of GRI 1.

Conversely, the 3-in-1 Car Cleaner is not wholly described by heading 9603, as a brush or squeegee. Because it is *prima facie* classifiable at GRI 1 in heading 8708, HTSUS, and there is no need for an essential character determination under GRI 3.

This conclusion is consistent with prior CBP rulings classifying other combination ice scrapers and similar articles as accessories under heading 8708, HTSUS. *See, e.g.*, HQ 956382, dated September 28, 1994; HQ 081825, dated June 22, 1988; New York Ruling Letter (NY) 860694, dated March 8, 1991; NY 896244, dated April 6, 1994; NY A82053, dated April 15, 1996; NY G88216, dated March 12, 2001; NY R01280, dated January 19, 2005; NY N012544, dated June 27, 2007; NY N022822, dated February 12, 2008; NY N073479, dated September 22, 2009; NY N082460, dated November 20, 2009; NY N110536, dated July 12, 2010; and NY N251145, dated March 31, 2014. The instant merchandise is accordingly classified in heading 8708, HTSUS.

HOLDING:

By application of GRIs 1 and 6, the 3-in-1 Car Cleaner is classified in heading 8708, HTSUS, specifically subheading 8708.99.8180, HTSUSA, which provides for "Parts and accessories of the motor vehicles of headings 8701 to 8705: Other parts and accessories: Other: Other: Other: Other: Other: Other." The 2023 column one, general rate of duty is 2.5% *ad valorem*.

EFFECT ON OTHER RULINGS:

HQ 952654, dated January 27, 1993, is hereby revoked.

In accordance with 19 U.S.C. § 1625(c), this ruling will become effective on January 7, 2024.

Sincerely,

YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

19 CFR PART 177

MODIFICATION OF ONE RULING LETTER AND REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF STRAPRAIL AND ROPERAIL TENSIONING SYSTEMS

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

ACTION: Notice of modification of one ruling letter and of revocation of treatment relating to the tariff classification of the StrapRail and RopeRail Tensioning Systems.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) is modifying one ruling letter concerning tariff classification of the StrapRail and RopeRail under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Notice of the proposed action was published in the *Customs Bulletin*, Vol. 57, No. 32, on September 6, 2023. One 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 January 7, 2024.

FOR FURTHER INFORMATION CONTACT: Nataline Viray-Fung, Electronics, Machinery, Automotive and International Nomenclature Branch, Regulations and Rulings, Office of Trade, at nataline.viray-fung@cbp.dhs.gov.

SUPPLEMENTARY INFORMATION:

BACKGROUND

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

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

Pursuant to 19 U.S.C. § 1625(c)(1), a notice was published in the *Customs Bulletin*, Vol. 57, No. 32, on September 6, 2023, proposing to modify one ruling letter pertaining to the tariff classification of the StrapRail and RopeRail. 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 N246928, CBP classified a StrapRail Tensioning System and a RopeRail Tensioning System in heading 8425, HTSUS, specifically in subheading 8425.39.01, HTSUS, which provides for "Pulley tackle and hoists other than skip hoists, winches and capstans; jacks: Winches and capstans: Other" by application of General Rules of Interpretation (GRIs) 1, 3(c) and 6. CBP has reviewed NY N246928 and has determined the ruling letter to be in error. It is now CBP's position that the StrapRail Tensioning System is properly classified in heading 8479, HTSUS, specifically in subheading 8479.89.95, HTSUS which provides for "Machines and mechanical appliances having individual functions, not specified or included elsewhere in this chapter; parts thereof: Other machines and mechanical appliances: Other: Other." Both the StrapRail and RopeRail products are classified pursuant to GRIs 1, 3(b) and 6.

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is modifying NY N246928 and revoking or modifying any other ruling not specifically identified to reflect the analysis contained in HQ H323869, 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 on January 7, 2024.

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

Attachment

HQ H323869
October 19, 2023
OT:RR:CTF:EMAIN H323869 NVF
CATEGORY: Classification
TARIFF NO.: 8425.39.01, 8479.89.95

MR. BRIAN KAVANAUGH
DERINGER LOGISTICS CONSULTING GROUP
173 WEST SERVICE ROAD
CHAMPLAIN, NY 12919

RE: Modification of NY N246928; Classification of StrapRail and RopeRail Systems

DEAR MR. KAVANAUGH:

On November 14, 2013, we issued binding ruling letter New York ("NY") N264928 to your client, Superchute Ltd. ("Superchute"). We have since reviewed NY N264928 and are modifying it in accordance with the reasoning below.

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, notice proposing to revoke NY N264928 was published on September 6, 2023, in Volume 57, Number 32, of the Customs Bulletin. One comment was received in response to this Notice.

FACTS:

The StrapRail is described in NY N264928 as a portable web strap guardrail system imported as a complete unassembled article. The main purpose of the system is to prevent workers and objects from falling from elevated building levels. The system consists of three polyester straps that are anchored and tensioned by a ratchet mechanism and attached to either an aluminum post or to the building. The steel ratchet is a 4" ratchet used to tension the StrapRail system only. The ratchet is manually activated by cranking the gear and is left in place once the tension is applied. The system also contains strap buckles of drop forged steel, steel quick-links, steel posts, concrete anchor bolts, stainless steel labels for the posts, aluminum anti-deflection posts, nuts and bolts, washers, rivnuts, semi-tubular rivets, pop rivets, aluminum and plastic column posts, a polyester mesh netting and zip ties. The ratchets and buckles are sewn to the straps in their condition as imported. Depending on the customer's preference, the StrapRail components can be shipped in a supplied zippered nylon duffel bag. The StrapRail system also contains a PVC post bag with a zipper to fit the posts, and a polyester pink pouch with a Velcro closure to fit the surplus installed strap.

The RopeRail system is also imported as a complete unassembled article. It contains 2 steel anchor posts, 4 intermediate steel posts, a steel wire rope assembly, a lever operated manual winch and a roll of polyethylene mesh netting. The difference between the RopeRail Tensioning system and the StrapRail Tensioning system is that the RopeRail Tensioning system uses a cam winch instead of a ratchet to tension the RopeRail wire. This is because the RopeRail is designed for longer spans. The cam winch can accept an infinite wire length and tension the slack out of the wire until the wire is stretched. Ratchets have a very small capacity drum and would quickly fill up before the wire is fully extended. The winch is manually activated by hand pumping the winch lever with the supplied pipe handle. The winch is left in

place once the tension is applied. A RopeRail assembly consists of the pressed fittings such as swages and teardrop thimbles found on the end of the wire rope.

ISSUE:

Whether the StrapRail and RopeRail systems are classified under heading 8425, HTSUS as winches or under heading 8479, HTSUS as a mechanical appliance with individual functions not specified elsewhere.

LAW AND ANALYSIS:

The HTSUS provisions under consideration are as follows:

8425 Pulley tackle and hoists other than skip hoists; winches and capstans; jacks.
8479 Machines and mechanical appliances having individual functions, not specified or included elsewhere in this chapter; parts thereof.

Classification of goods under the HTSUS is governed by the General Rules of Interpretation (GRI). 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.

GRI 3(a) states that the heading that provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings refer to only part of the items in a composite good or set, those headings are to be regarded as equally specific in relation to the goods, even if one of the gives a more complete or precise description of the good. As such, they are regarded as equally specific and classification of the composite good or set is to be determined by GRI 3(b) or GRI 3(c).

GRI 3(b) states that composite goods or sets which cannot be classified by reference to GRI 3(a) are to be classified as if they consisted of the component that gives them their essential character. GRI 3(c) states that if goods cannot be classified pursuant to GRI 3(a) or (b), then they are classified under the heading which is last in numerical order among the headings which equally merit consideration.

In this case, the StrapRail and the RopeRail are both sets and therefore are classified pursuant to GRI 3(b) or 3(c). The StrapRail and the RopeRail are used as temporary railings on construction sites to prevent workers and objects from falling from open building levels. As such, the railing, regardless of material, must be appropriately tensioned in order to support the weight of a human being or objects used for or in construction. We find that the devices used to tension the railing impart the essential character of the instant sets. Specifically, the ratchet used to tension the webbing in the StrapRail and the winch used to tension the cable in the RopeRail impart the essential character of the sets.

We observe that there is a narrow category of machinery that utilizes a separate, winch type hand crank or electric drum to tension straps for various purposes. *See* HQ H031587 (Apr. 1, 2011). For example, in HQ H031587, we classified a device that mounts underneath the bed of a truck and consists of

a steel plate and a hand-operated ratchet drum over which webbing or cable is wound under heading 8425, HTSUS, as a winch. This comported with the common meaning of the term "winch", noting in particular the following:

> The Oxford English Dictionary defines "winch" as "a hoisting or hauling apparatus consisting essentially of a horizontal drum round which a rope passes and a crank by which it is turned." Webster's College Dictionary defines a "winch" as "1. a crank with a handle for transmitting motion, as to a grindstone. 2. a machine for hoisting, lowering, or hauling, consisting of a drum or cylinder turned by a crank or motor; a rope or cable tied to the load is wound on the drum or cylinder." The Web Sling & Tie Down Association, a trade group, defines a winch as "a tensioning device, which is mounted directly to a vehicle for tensioning synthetic web tie downs to secure cargo." *See* http://www.wstda.com/products/wstda_winches_t-3.pdf.

The winch used in the RopeRail is similarly an independently housed tensioning device that operates on the same principles as the winch at issue in HQ H031587. It is therefore properly classified under heading 8425, HTSUS. Because the winch imparts the essential character of the RopeRail set, the RopeRail is classified in heading 8425, HTSUS as a winch.

By contrast, rachets used to tension straps are not "winches" for purposes of classification because they are not independently housed devices that consist of a drum or cylinder turned by a crank or motor. As such, they are not covered by heading 8425, HTSUS, and are properly classified under heading 8479, HTSUS, as machines having individual functions not specified elsewhere. HQ 089411 (June 20, 1991). Ratchets classified in heading 8479, HTSUS, contain a gear and pawl mechanism that holds the straps firmly in place and has a lever that provides the user with a mechanical advantage to tighten the straps beyond what could be achieved by merely pulling on them. The ratchets used in the StrapRail are substantially similar to the ratchets we have previously classified in heading 8479, HTSUS. Because the essential character of the StrapRail set is imparted by the ratchet, the StrapRail is classified in heading 8479, HTSUS as machines having individual functions not specified elsewhere.

The commenter argues that the StrapRail and RopeRail should be classified in the same heading because they both form a guardrail barrier by tensioning a wire rope or strap. The commenter further asserts that all strap ratchets perform the same function regardless of whether they use a ratchet or a winch. This argument misses the point, made above, that a classification analysis under GRI 3(b) focuses on which component imparts the essential character of a good. Because the straps and accompanying tensioning system are imported together, our analysis thus focuses on which component of each tensioning system imparts the essential character, not what they are used for. We acknowledge that both the StrapRail and the RopeRail are used to set up temporary rope/strap/wire barriers, however our analysis cannot end there because there is no HTSUS heading that provides for tensioning straps, and

the two systems use different methods of tensioning with varying degrees of mechanical advantage.[1]

In light of the foregoing, the StrapRail is classified under heading 8479, HTSUS as a machine having individual functions not specified or included elsewhere, and the RopeRail is classified under heading 8425, HTSUS as a winch.

HOLDING:

By application of GRIs 1, 3(b), and 6, the StrapRail system is classified under subheading 8479.89.95, HTSUS which provides for: Machines and mechanical appliances having individual functions, not specified or included elsewhere in this chapter; parts thereof: Other machines and mechanical appliances: Other: Other. The column one rate of duty is 2.5 percent ad valorem.

By application of GRIs 1, 3(b), and 6, the RopeRail system is classified under subheading 8425.39.01, HTSUS which provides for: Pulley tackle and hoists other than skip hoists; winches and capstans; jacks: Winches; capstans: Other." The 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 on the World Wide Web at https://www.usitc.gov.

Please note that 19 C.F.R. § 177.9(b)(1) provides that "[e]ach ruling letter is issued on the assumption that all the information furnished in connection with the ruling request and incorporated in the ruling letter, either directly, by reference, or by implication, is accurate and complete in every material respect. The application of a ruling letter by a Customs Service field office to the transaction to which it is purported to relate is subject to the verification of the facts incorporated in the ruling letter, a comparison of the transaction described therein to the actual transaction, and the satisfaction of any conditions on which the ruling was based."

EFFECT ON OTHER RULINGS:

NY N246928, dated November 14, 2013, is MODIFIED.

In accordance with 19 U.S.C. § 1625(c), this ruling will become effective on January 7, 2024.

Sincerely,

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

[1] The remainder of the comment consists of observations that do not directly address the analysis set forth in the proposed ruling that was published in the Customs Bulletin, Vol. 57 No. 32 (Sep. 6, 2023). Nonetheless, we appreciate the communication and address the relevant arguments above. We also note that commenter clarified that the StrapRail ratchet is not manufactured in China and that the majority of other Superchute products are manufactured in Canada using components and materials sourced primarily from the United States and Canada.

19 CFR PART 177

REVOCATION OF TWO RULING LETTERS AND REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF A PLASTIC PLAYMAT FROM SOUTH KOREA AND A PRINTED PLAYMAT FROM SOUTH KOREA

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

ACTION: Notice of revocation of two ruling letters, and of revocation of treatment relating to the tariff classification of a plastic playmat from South Korea and a printed playmat from South Korea.

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 two ruling letters concerning tariff classification of a plastic playmat from South Korea and a printed playmat from South Korea under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Notice of the proposed action was published in the *Customs Bulletin*, Vol. 57, No. 33, on September 13, 2023. No comments were received in response to that notice.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after on January 7, 2024.

FOR FURTHER INFORMATION CONTACT: Michele A. Boyd, Chemicals, Petroleum, Metals and Miscellaneous Articles Branch, Regulations and Rulings, Office of Trade, at (202) 325–0136.

SUPPLEMENTARY INFORMATION:

BACKGROUND

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

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

Pursuant to 19 U.S.C. § 1625(c)(1), a notice was published in the *Customs Bulletin*, Vol. 57, No. 33, on September 13, 2023, proposing to revoke two ruling letters pertaining to the tariff classification of a plastic playmat from South Korea and a printed playmat from South Korea. 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 New York Ruling Letter ("NY") N091575, dated February 12, 2010, CBP classified a plastic playmat from South Korea in heading 3924, HTSUS, specifically in subheading 3924.90.1050, HTSUSA ("Annotated"), which provides for "Tableware, kitchenware, other household articles and hygienic or toilet articles, of plastics: Other: Curtains and drapes, including panels and valances; napkins, table covers, mats, scarves, runners, doilies, centerpieces, antimacassars and furniture slipcovers and like furnishings...Other." In NY N213371, dated May 11, 2012, CBP classified a printed playmat from South Korea in heading 4911, HTSUS, specifically in subheading 4911.99.8000, HTSUSA, which provides for "Other printed matter, including printed pictures and photographs: Other: Other: Other: Other." CBP has reviewed NY N091575 and NY N213371 and has determined the ruling letters to be in error. It is now CBP's position that the plastic playmat from South Korea in NY N091575 is properly classified in heading 4911, HTSUS, specifically in subheading 4911.99.8000, HTSUSA, which provides for "Other printed matter, including printed pictures and photographs: Other: Other: Other: Other." It is also now CBP's position that the printed playmat from South Korea in NY N213371 is properly classified in heading 3918, HTSUS, specifically in subheading 3918.90.1000, HTSUSA, which provides for "Floor coverings of plastics, whether or not self-adhesive, in rolls or in the form of tiles ...: Of other plastics: Floor coverings."

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is revoking NY N091575 and NY N213371 and revoking or modifying any other ruling not specifically identified to reflect the analysis contained in Headquarters Ruling Letter ("HQ") H328952, 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 on January 7, 2024.

YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

Attachment

HQ H328952
October 23, 2023
OT:RR:CTF:CPMMA H328952 MAB
CATEGORY: Classification
TARIFF NO: 3918.90.1000; 4911.99.8000

MR. SEBIN IM
IJA TRADING INC.
#304C-10090 152ND STREET
SURREY
BRITISH COLUMBIA
V3R 8X8
CANADA

RE: Revocation of NY N091575 and NY N213371; Classification of a plastic playmat and a printed playmat from South Korea

DEAR MR. IM:

This letter is in reference to New York Ruling Letters ("NY") N091575, dated February 12, 2010, issued to IJA Trading Inc., and NY N213371, dated May 11, 2012, issued to Costco Wholesale Corporation, by U.S. Customs and Border Protection ("CBP") concerning the classification of a plastic playmat and a printed playmat from South Korea, respectively, under the Harmonized Tariff Schedule of the United States ("HTSUS"). In NY N091575, CBP classified a plastic playmat in subheading 3924.90.1050, HTSUSA ("Annotated"), which provides for "Tableware, kitchenware, other household articles and hygienic or toilet articles, of plastics: Other: Curtains and drapes, including panels and valances; napkins, table covers, mats, scarves, runners, doilies, centerpieces, antimacassars and furniture slipcovers; and like furnishings ... Other." In NY N213371, CBP classified a printed playmat in subheading 4911.99.8000, HTSUSA, which provides for "Other printed matter, including printed pictures and photographs: Other: Other: Other: Other," respectively. After reviewing these two rulings, CBP believes that they were issued in error. For the reasons set forth below, CBP hereby revokes NY N091575 and NY N213371.

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, 2186 (1993), notice of the proposed action was published on September 13, 2023, in Volume 57, Number 33, of the Customs Bulletin. No comments were received in response to this notice.

FACTS:

In NY N091575, CBP described the plastic playmat, identified as a "Toddler Playmat," as follows:

> The submitted illustration depicts an item that is identified as a Toddler Playmat. This mat has rounded corners and is made of polyvinyl chloride (PVC) foam plastic material. The size of the imported mat will range from 6' x 4' to 8' x 5'. The top surface of the mat is decorated with animation characters.

We have also reviewed the background file in NY N091575 and note there is no information as to what form the subject playmat is imported, e.g., rolls, tiles, folded, other, etc.

In NY N213371, CBP described the printed playmat, identified as a "Children's PVC Interactive Play Mat," as follows:

> The ruling was requested on the Children's PVC Interactive Play Mat identified as Costco item number 925551. You submitted four photos of the item for our examination. The interactive play mat is constructed of 100% polyvinyl chloride (PVC) foam plastic material. The play mat measures approximately 82.7" (l) x 55.1" (w) x .51" (d).
>
> The interactive play mat is reversible and serves a dual purpose as an educational learning resource and a decorative floor covering. It is printed on both sides with bright colors and illustrations that depict letters, numbers and objects. One side of the mat is designed with representative pictures and words to correspond with each letter of the alphabet. The opposite side of the play mat is illustrated with a play scene that identifies various animal figures. This play mat is used as an interactive educational learning resource to engage a young child and to encourage the recognition of letters, words, and numbers. The play mat is designed for use by children ages 0–7 years old.

We have also reviewed the background file in NY N213371 and note there is information indicating that the subject playmat is imported in the form of rolls.

ISSUE:

Whether the subject plastic playmat and printed playmat are classified in heading 3918, HTSUS, as "Floor coverings of plastics," in heading 3924, HTSUS, as "other household articles ... of plastics," or in heading 4911, HTSUS, as "Other printed matter, including printed pictures and photographs."

LAW AND ANALYSIS:

The classification of goods under the HTSUS is governed by the General Rules of Interpretation ("GRIs"). 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. If 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 GRI's 2 through 6 may then be applied in order.

The 2023 HTSUS headings under consideration are as follows:

3918	Floor coverings of plastics, whether or not self-adhesive, in rolls or in the form of tiles; wall or ceiling coverings of plastics, as defined in note 9 to this chapter:
3924	Tableware, kitchenware, other household articles and hygienic or toilet articles, of plastics:
4911	Other printed matter, including printed pictures and photographs:

***

Note 2 to Section VII, HTSUS, provides as follows:

> Except for the goods of heading 3918 or 3919, plastics, rubber, and articles thereof, printed with motifs, characters or pictorial representations, which are not merely subsidiary to the primary use of the goods, fall in chapter 49.
>
> ***

The Harmonized Commodity Description and Coding System Explanatory Notes ("ENs") constitute the official interpretation of the Harmonized System ("HS") at the international level. While not legally binding, the ENs provide a commentary on the scope of each heading of the HS and are thus useful in ascertaining the proper classification of merchandise. *See* T.D. 89–90, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

Section Note 2 to the General EN to Section VII, states as follows:

> Goods of heading 39.18 (floor coverings and wall or ceiling coverings of plastics) and heading 39.19 (self-adhesive plates, etc., of plastics), even if printed with motifs, characters or pictorial representations, which are not merely subsidiary to the primary use of the goods, do not fall in Chapter 49 but remain classified in the above-mentioned headings. However, all other goods of plastics or rubber of the kind described in this Section fall in Chapter 49 if the printing on them is not merely subsidiary to their primary use, and the plastics or rubber serves only as a medium for the printing.

EN 39.18 states, in relevant part, as follows:

> The first part of the heading covers plastics of the types normally used as floor coverings, in rolls or in the form of tiles. It should be noted that self-adhesive floor coverings are classified in this heading.
>
> ***
>
> It should be noted that this heading includes articles printed with motifs, characters or pictorial representations, which are not merely subsidiary to the primary use of the goods (see Note 2 to Section VII).

Note 2 to the EN to Chapter 49, states as follows:

> For the purposes of Chapter 49, the term "printed" also means reproduced by means of a duplicating machine, produced under the control of an automatic data processing machine, embossed, photographed, photocopied, thermocopied or typewritten.

The General EN to Chapter 49 states, in relevant part, as follows:

> With the few **exceptions** referred to below, this Chapter covers all printed matter of which the essential nature and use is determined by the fact of its being printed with motifs, characters or pictorial representations.
>
> ***
>
> Goods of **heading[s] 39.18**... are also excluded from this Chapter, even if they are printed with motifs, characters or pictorial representations, which are not merely subsidiary to the primary use of the goods.
>
> ***
>
> For the purposes of this Chapter, the term "printed" includes ... reproduction by duplicating machines, production under the control of an automatic data processing machine, embossing, photography, photocopy-

ing thermocopying or typewriting (see Note 2 to this Chapter), irrespective of the form of the characters in which the printing is executed (e.g., letters of any alphabet, figures, shorthand signs, Morse or other code symbols, Braille characters, musical notations, pictures, diagrams). The term **does not** , however, **include** coloration or decorative or repetitive-design printing.

***

In general the goods of this Chapter are executed on paper but the goods may be on other materials provided they have the characteristics described in the first paragraph of this General Explanatory Note.

EN 49.11 states, in relevant part, as follows:

This heading covers all printed matter (including photographs and printed pictures) of this Chapter (see the General Explanatory Note above) but not more particularly covered by any of the preceding headings of the Chapter.

***

The following articles, in particular, are also **excluded** from this heading:
***

(b) Goods of **heading[s] 39.18**...

***

It has been CBP's longstanding position that floor coverings of plastic are classified either in heading 3918, HTSUS, if imported in rolls or in the form of tiles, or in heading 3924, HTSUS, if imported in any other form. *See, e.g.,* HQ H318409, dated March 9, 2023 (plastic foam playmat referred to as a "Funtime Gelli Mat™" imported in rolls with a decorative repetitive design printed on each side, measuring 78.75" x 59" x 0.39", and marketed for young children ages 0–3 years old as a protective jumbo floor mat that provides additional cushioning for playing, rolling, crawling, and tumbling, classified in subheading 3918.90.1000, HTSUSA); HQ H290312, dated November 27, 2018 (plastic foam mats imported in rolls measuring 46″ x 93″ that are placed over existing flooring for additional cushioning and support while performing tasks, exercise, or to protect existing flooring, classified in subheading 3918.90.1000, HTSUSA)[1]; HQ H270254, dated June 9, 2016 (interlocking plastic foam tiles sized 2' x 2' x 0.47″ imported in sets of six or eight designed to form a mat and intended to cover floors used in a variety of household settings, including child play areas, classified in subheading 3918.90.1000, HTSUSA). Since it is indisputable that both the plastic playmat in NY N091575 and the printed playmat in NY N213371 are also floor coverings of plastic,[2] we will first consider classification either in heading 3918, HTSUS, or in heading 3924, HTSUS.

[1] Although not stated explicitly in the ruling, we have reviewed the background file in HQ H290312 and have confirmed that the plastic foam mats were imported in rolls.

[2] In NY N091575, the ruling states that the importer requested classification of the plastic playmat either as a floor covering of plastic in subheading 3918.10.1000, HTSUSA, or as a toy in chapter 95. In NY N213371, the description of the printed playmat states that the playmat serves a dual purpose as an educational learning resource and a decorative floor covering.

The subject playmats in NY N091575 and NY N213371 are most similar to the plastic foam playmat referred to as a "Funtime Gelli Mat™" in HQ H318409, which was classified in heading 3918, HTSUS, as a floor covering of plastic imported in rolls. *See supra.* Like the Funtime Gelli Mat™, both playmats are also made from plastic foam material, of similar size, used as floor coverings, with designs printed on either one or both sides[3] and marketed for children (the plastic playmat in NY N091575 is identified as a "Toddler Playmat" while the printed playmat in NY N213371 is identified as a "Children's PVC Interactive Play Mat"). Although the printed playmat in NY N213371 is imported in rolls like the Funtime Gelli Mat™, the plastic playmat in NY N02575 is imported in a form other than rolls or tiles[4] . Thus, applying CBP's longstanding position that floor coverings of plastic are classified either in heading 3918, HTSUS, if imported in rolls or in the form of tiles, or in heading 3924, HTSUS, if imported in any other form, we initially find that the plastic playmat in NY N091575 is classifiable in heading 3924, HTSUS, as it is a floor covering of plastic imported in a form other than rolls or tiles, while the printed playmat in NY N213371 is classifiable in heading 3918, HTSUS, as it is a floor covering of plastic imported in rolls.

Note 2 to Section VII, HTSUS, however, requires that we also consider classification in chapter 49, HTSUS, as the plastic playmats in both NY N091575 and NY N213371 are printed with motifs, characters, or pictorial representations (*see* footnote 3, *supra).* Specifically, per Note 2 to Section VII, HTSUS, we must determine whether or not the printed motifs, characters, or pictorial representation are merely subsidiary to the primary use of the goods. Note 2 to Section VII, HTSUS, excludes goods of heading 3918 from classification in chapter 49, even if printed with motifs, characters or pictorial representations, which are not merely subsidiary to the primary use of the goods. As further explained in EN 39.18, goods of heading 39.18, including floor coverings of plastic, even if printed with motifs, characters, or pictorial representations, which are not merely subsidiary to the primary use of the goods, do not fall in Chapter 49 but remain classified in heading 3918, HTSUS. *See also* Section Note 2 to General EN to Section VII, General EN to Chapter 49, and EN 49.11(b).

Thus, we first examine the plastic Toddler Playmat in NY N091575. Since this article is a floor covering of plastic that is imported in a form other than rolls or tiles, it is excluded from classification in heading 3918, HTSUS. However, because the plastic Toddler Playmat is printed with animation characters on one side, we must also consider classification in chapter 49, HTSUS. The threshold question in our analysis then becomes whether the

[3] In HQ H318409, the Funtime Gelli Mat™ is reversible with a different decorative repetitive design printed on each side. In NY N091575, the top surface of the Toddler Playmat is printed with animation characters. In NY N213371, the Children's PVC Interactive Play Mat is printed on both sides with bright colors and illustrations that depict letters, numbers, and objects. One side is designed with representative pictures and words to correspond with each letter of the alphabet. The opposite side is illustrated with a play scene that identifies various animal figures.

[4] As noted above, since NY N091575 does not definitively state what form the subject playmat is imported, e.g., rolls, tiles folded, etc., we reviewed the background file but could not find conclusive evidence on this issue. However, we note that NY N091575 rejected the importer's proposed classification in heading 3918, HTSUS, asserting "...heading 3918 only provides for floor coverings that are in rolls or in the form of tiles." Thus, we are left to assume that the subject plastic playmat from South Korea is imported in a form other than rolls or tiles.

animation characters are not merely subsidiary to the primary use of the playmat. Or, as explained in the General EN to Chapter 49, whether the animation characters determine the playmat's "essential nature and use." As described in NY N091575, the plastic Toddler Playmat is a floor covering.[5] However, we must also consider the role of the printed animation characters and whether or not they are subsidiary to the primary use of the plastic playmat as a floor covering, *i.e.*, do they form its essential nature and use. With its friendly animation characters,[6] the plastic Toddler Playmat is fabricated to create an attractive atmosphere for toddlers so that they interact with the printed animation characters with delight, excitement, and pleasure, in contrast to a playmat printed with solid coloration or decorative or repetitive-designs.[7] Thus, we find that the printed animation characters, which are pleasing to a toddler's sensibilities, form the subject playmat's essential nature and use.[8] Accordingly, the animation characters are not merely subsidiary to the primary use of the playmat such that the plastic Toddler Playmat in NY N091575 is classified in heading 4911, HTSUS, as "[o]ther printed matter, including printed pictures and photographs" and not in heading 3924, HTSUS, as "other household articles ... of plastics."

We next examine the printed Children's PVC Interactive Play Mat in NY N213371, wherein the article was classified in heading 4911, HTSUS. As noted above, the printed playmat is designed for use by children ages 0–7 years old and printed on both sides with bright colors and illustrations that depict letters, numbers, and objects. One side is printed with representative pictures and words to correspond with each letter of the alphabet and the reverse side is illustrated with a play scene identifying various animal figures. We concur with the decision in NY N213371, denying classification of the printed playmat as a toy in chapter 95, HTSUS, because it lacks any manipulative play value. Also, there is no dispute with the findings in NY N213371 that the Children's PVC Interactive Play Mat's printed motifs, characters, and pictorial representations are designed to be particularly pleasing and delightful to children ages 0–7 and, in effect, form its essential nature and are not merely subsidiary to its primary use as a floor covering. However, in classifying the printed Children's PVC Interactive Play Mat in heading 4911, HTSUS, NY N213371 overlooked classification in heading 3918, HTSUS. Pursuant to Note 2 to Section VII, HTSUS, as a floor covering of plastic imported in rolls that is classifiable in heading 3918, HTSUS, the instant printed playmat is excepted from classification in chapter 49, even if printed with motifs, characters or pictorial representations, which are not merely subsidiary to the primary use of the goods. Thus, we find that the printed playmat in NY N213371 is classified in heading 3918, HTSUS, as a "floor covering of plastic," and not in heading 4911, HTSUS, as "[o]ther printed matter, including printed pictures and photographs.

---

[5] "The mat is designed to provide cushioning that will protect children from hurting themselves if they fall, as well as to muffle noise and create a barrier between the child and a cold floor."

[6] The animation characters are described by the importer as "friendly" as confirmed in the background file to NY N091575.

[7] We note that the term "printed" in chapter 49, HTSUS, does not include "coloration or decorative or repetitive-design printing." *See* General EN to Chapter 49.

[8] As an alternative to classification in heading 3918, the importer in NY N091575 requested classification of the merchandise as a toy in chapter 95, HTSUS.

Based on the foregoing, we therefore affirm CBP's longstanding position that floor coverings of plastic such as the plastic playmat in NY N213371, which are for use in the home such as carpets, rugs, mats, or tiles, are classified in heading 3918, HTSUS, if imported in rolls or in the form of tiles, even if they are printed with motifs, characters or pictorial representations, which are not merely subsidiary to the primary use of the goods. Similar floor coverings in any form other than rolls or tiles are classified in heading 3924, HTSUS, unless they are printed with motifs, characters or pictorial representations, which are not merely subsidiary to the primary use of the goods, wherein they are classified in heading 4911, HTSUS. Accordingly, printed playmats such as those in NY N091575 are classified in heading 4911, HTSUS.

HOLDING:

By operation of GRIs 1 and 6, the subject plastic playmat from South Korea in NY N091575 is classified in heading 4911, HTSUS, specifically in subheading 4911.99.8000, HTSUSA, which provides for "Other printed matter, including printed pictures and photographs: Other: Other: Other: Other." The 2023 column one, general rate of duty is *Free.* The printed plastic playmat from South Korea in NY N213371 is classified in heading 3918, HTSUS, specifically in subheading 3918.90.1000, HTSUSA, which provides for "Floor coverings of plastics, whether or not self-adhesive, in rolls or in the form of tiles ...: Of other plastics: Floor coverings." The 2023 column one, general rate of duty is 5.3% *ad valorem*.

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

EFFECT ON OTHER RULINGS:

NY N091575, dated February 12, 2010, and NY N213371, dated May 11, 2012, are hereby REVOKED as set forth above.

In accordance with 19 U.S.C. § 1625(c), this ruling will become effective on January 7, 2024.

Sincerely,

YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

cc: Mr. John A. Whitson
Costco Wholesale Corporation
999 Lake Drive
Issaquah, WA 98027

19 CFR PART 177

MODIFICATION OF ONE RULING LETTER AND REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF STEEL TIE WIRE CARTRIDGES

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

ACTION: Notice of modification of one ruling letter and of revocation of treatment relating to the tariff classification of steel tie wire cartridges.

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 combination automobile ice scraper, squeegee, and bristle brush with a detachable handle under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Notice of the proposed action was published in the *Customs Bulletin*, Vol. 57, No. 33, on September 13, 2023. No comments were received in response to that notice.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after on January 7, 2024.

FOR FURTHER INFORMATION CONTACT: Lily C. Baron, Electronics, Machinery, Automotive, & International Nomenclature Branch, Regulations and Rulings, Office of Trade, at (202) 325–1807.

SUPPLEMENTARY INFORMATION:

BACKGROUND

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

importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and to provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics, and determine whether any other applicable legal requirement is met.

Pursuant to 19 U.S.C. § 1625(c)(1), a notice was published in the *Customs Bulletin*, Vol. 57, No. 33, on September 13, 2023, proposing to modify one ruling letter pertaining to the tariff classification of steel tie wire cartridges. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should have advised CBP during the comment period.

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

In Headquarters Ruling Letter ("HQ") H300804, dated July 2, 2019, CBP classified steel tie wire cartridges in heading 8467, HTSUS, specifically in subheading 8467.29.00, HTSUS, which provides for "Tools for working in the hand, pneumatic, hydraulic or with self-contained electric or nonelectric motor, and parts thereof: With self-contained electric motor: Other." CBP has reviewed HQ H300804 and has determined the ruling letter to be in error. It is now CBP's position that steel tie wire cartridges are properly classified, in heading 8467, HTSUS, specifically in subheading 8467.99.01, HTSUS, which provides for "Tools for working in the hand, pneumatic, hydraulic or with self-contained electric or nonelectric motor, and parts thereof: Parts: Other."

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is modifying HQ H300804 and revoking or modifying any other ruling not specifically identified to reflect the analysis contained in HQ H330409, 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 on January 7, 2024.

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

Attachment

HQ H330409
October 26, 2023
OT:RR:CTF:EMAIN 330409 LCB
CATEGORY: Classification
TARIFF NO.: 8467.99.01

JAN DE BEER
FROST BROWN TODD LLC
250 WEST MAIN STREET
SUITE 2800
LEXINGTON, KENTUCKY 40507–1749

RE: Modification of HQ H300804; Tariff classification of steel tie wire cartridges

DEAR MR. DE BEER:

This ruling pertains to Headquarters Ruling Letter ("HQ") H300804 (July 2, 2019), which concerned the classification of imported steel tie wire cartridges and the applicability of subheading 9802.00.50, Harmonized Tariff Schedule of the United States ("HTSUS") to the subject merchandise. In HQ H300804, U.S. Customs and Border Protection ("CBP") classified steel wire cartridges in subheading 8467.29.00, HTSUS, which provides for "Tools for working in the hand, pneumatic, hydraulic or with self-contained electric or nonelectric motor, and parts thereof: With self-contained electric motor: Other." We have since reviewed HQ H300804 and determined that the portion of the ruling pertaining to the classification of the steel tie wire cartridges under heading 8467, HTSUS, is in error. Accordingly, CBP is modifying HQ H300804 pursuant to the analysis set forth below.

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, notice proposing to modify HQ H300804 was published on September 13, 2023, in Volume 57, Number 33, of the Customs Bulletin. No comments were received in response to this Notice.

FACTS:

The products at issue are steel tie wire cartridges consisting of either spools of black annealed wire (referenced as TW898 USA), or spools of polyester coated wire (referenced as TW898-PC USA) wrapped around black polypropylene cores. The cartridges do not resemble the typical packaging associated with wire products. Rather, they have a sprocket-like appearance and are specially molded into a unique design that allows them to properly fit inside the designated MAX USA Rebar Tying Tool (models RB518, RB398, and RB218) (hereinafter the "Rebar Tying Tool"). The Rebar Tying Tool is a battery-powered handheld power tool that incorporates a self-contained direct current ("DC") motor. It is used to tie and secure concrete rebar by holding the crossed reinforcing bars and feeding, winding, cutting, and tying the steel tie wire in one action.

ISSUE:

Whether the steel wire cartridges are classified under heading 7217, HTSUS, as wire of iron or nonalloy steel, or heading 8467, HTSUS, as parts of tools for working in the hand, pneumatic, hydraulic or with self-contained electric or nonelectric motor.

LAW AND ANALYSIS:

Classification under the HTSUS is determined in accordance with the General Rules of Interpretation ("GRIs"). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely based on 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.

GRI 6 provides as follows:

> For legal purposes, the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related Subheading Notes and, mutatis mutandis, to the above Rules, on the understanding that only subheadings at the same level are comparable. For the purposes of this Rule the relative Section and Chapter Notes also apply, unless the context otherwise requires.

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

Initially, we note that this ruling does not address the applicability of subheading 9802.00.50, and that the classification of the subject steel tie wire cartridges in heading 8467, HTSUS, is not in dispute. As such, applying GRI 6, *supra*, the HTSUS provisions under consideration in this ruling are as follows:

8467	Tools for working in the hand, pneumatic, hydraulic or with self-contained electric or nonelectric motor, and parts thereof:
	* * *
	With self-contained electric motor:
8467.29.00	Other...
	* * *
	Other:
8467.99.01	Other...

Note 2 to Section XVI, which governs the classification of parts within Section XVI, provides, in pertinent part:

> Subject to Note 1 to this Section, Note 1 to Chapter 84 and Note 1 to Chapter 85, parts of machines (not being parts of the articles of heading 84.84, 85.44, 85.45, 85.46 or 85.47) are to be classified according to the following rules:
>
> (a) Parts which are goods included in any of the headings of chapter 84 or 85 (other than headings 8409, 8431, 8448, 8466, 8473, 8487, 8503, 8522, 8529, 8538 and 8548) are in all cases to be classified in their respective headings;
>
> (b) Other parts, if suitable for use solely or principally with a particular kind of machine, or with a number of machines of the same heading (including a machine of heading 84.79 or 85.43) are to be classified

> with the machines of that kind or in heading 84.09, 84.31, 84.48, 84.66, 84.73, 85.03, 85.22, 85.29 or 85.38 as appropriate. However, parts which are equally suitable for use principally with the goods of headings 85.17 and 85.25 to 85.28 are to be classified in heading 85.17....

The Rebar Tying Tool (for which the instant steel tie wire cartridges are designed and used), is a handheld tool incorporating a self-contained electric motor. As such, it would be classified under subheading 8467.29.00, HTSUS, which provides for "Tools for working in the hand, pneumatic, hydraulic or with self-contained electric or nonelectric motor: Other: Other." However, the instant steel wire cartridges are not themselves tools of heading 8467, HTSUS, but are rather moving parts incorporated into the Rebar Tying Tool.

The term "part" is not defined in the HTSUS. In the absence of a statutory definition, the courts have fashioned two distinct though not inconsistent tests for determining whether a particular item qualifies as a "part" for tariff classification purposes.[1] The test articulated in *United States v. Willoughby Camera Stores, Inc.*[2] requires a determination of whether the imported item is an "integral, constituent, or component part, without which the article to which it is to be joined, could not function as such article."[3] Under the test articulated in *United States v. Pompeo*,[4] a good is a "part" if it is "dedicated solely for use" with a particular article and, "when applied to that use ... meets the *Willoughby* test."[5]

In *Mita Copystar America v. United States*,[6] the court classified toner cartridges that were shaped to fit into specific electrostatic photocopiers as parts of such machines. The court based its decision on Note 2(b), Chapter 90, HTSUS, which provides for the classification of parts and accessories of articles of Chapter 90 and is substantively similar to Note 2, Section XVI, HTSUS, quoted above. In determining that the cartridges were parts of photocopiers, the court noted that the toner cartridges were sold with toner inside, remained with the toner throughout its use by the photocopier, served as the standard device for providing toner to the photocopier, and were not designed for reuse.[7] Similarly, in New York Ruling Letter (NY) N308917 (January 24, 2020), CBP found that various parts of the Metabo Angle Grinder are classified in heading 8467, HTSUS, noting that the parts are "specifically and solely designed for use with" that machine.

In the present case, the subject steel tie wire cartridges meet the definition of "parts" as defined by the courts and applied by previous CBP rulings because they are integral to, and dedicated solely for use with, the Rebar

---

[1] *See Bauerhin Techs. Ltd. P'ship. v. United States*, 110 F. 3d 774 (Fed. Cir. 1997).

[2] 21 C.C.P.A. 322, 324 (1933).

[3] *Bauerhin*, 110 F.3d at 778 (quoting *Willoughby*, 21 C.C.P.A. 322 at 324).

[4] 43 C.C.P.A. 9, 14 (1955).

[5] *Bauerhin*, 110 F.3d at 779 (citing *Pompeo*, 43 C.C.P.A. at 14); *Ludvig Svensson, Inc. v. United States*, 63 F. Supp. 2d 1171, 1178 (Ct. Int'l Trade 1999) (holding that a purported part must satisfy both the Willoughby and Pompeo tests).

[6] 160 F.3d 710 (Fed. Cir. 1998).

[7] *Id.* at 712–713. *See also* HQ 251008 (June 14, 2018) (classifying media rolls imported on plastic reels with code apertures as part or printers by operation of Note 2(b) to Section XVI).

Tying Tool. Similar to the articles at issue in *Mita Copystar*, the subject cartridges are sold with steel tie wire inside, remain with the steel tie wire throughout its use by the rebar tying tool, are the standard device for providing steel tie wire to the rebar tying tool, and are not designed for reuse. Furthermore, and similarly to the articles at issue in N308917, the steel tie wire cartridges are designed exclusively for use with the Rebar Tying Tool and are sold for use only with such tools, which could not function without these cartridges. As a result, we find that the subject articles are specially designed as part of certain rebar tying tools as to warrant classification with such machines.

We further note that the articles at issue are distinguishable from the monofilament at issue in New York Ruling Letter (NY) K81013 (December 30, 2003). In that ruling, cut-to-length monofilament imported in material lengths, either on ordinary packing spools or in a "donut" form, was classified as monofilament. While the subject cartridges contain steel tie wire wound on spools in material lengths, the similarities to the monofilament at issue in K81013 end there. In K81013, the material lengths of monofilament were placed either on non-descript generic spools or on no spools at all. In comparison, the steel tie wire in this case cannot be bought separately for use with the Rebar Tying Tool without it being contained in the cartridge. Furthermore, as discussed above, the cartridge itself is not a generic spool used to support wire but has a sprocket-like appearance and is specifically designed for exclusive use with the Rebar Tying Tool. Accordingly, because the subject articles do not fall under the scope of a single heading of Section XVI as goods unto themselves, per Note 2(a) to Section XVI, we find that they are properly classified under heading 8467, HTSUS, as parts of hand tools by operation of Note 2(b) to Section XVI.

Specifically, we find that the steel tie wire cartridges are classified in 8467.99.01, HTSUS, which provides for "Tools for working in the hand, pneumatic, hydraulic or with self-contained electric or nonelectric motor, and parts thereof: Parts: Other."

HOLDING:

By application of GRIs 1 (Note 2(b) to Section XVI) and 6, the steel tie wire cartridges at issue (referenced as TW 898 USA and TW898-PC) are classified in subheading 8467.99.01, HTSUS, which provides for "Tools for working in the hand, pneumatic, hydraulic or with self-contained electric or nonelectric motor, and parts thereof: Parts: Other." The column one general rate of duty is free.

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

EFFECT ON OTHER RULINGS:

HQ H300804 is hereby MODIFIED.

In accordance with 19 U.S.C. §1625(c), this ruling will become effective on January 7, 2024.

Sincerely,

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

U.S. Court of International Trade

Slip Op. 23–150

PAO TMK, Plaintiff, v. UNITED STATES, Defendant, and UNITED STATES STEEL CORPORATION and VALLOUREC STAR, LP, Defendant-Intervenors.

Before: M. Miller Baker, Judge
Court No. 21–00532

[The court grants Plaintiff's motion for judgment on the agency record in part and denies it in part.]

Dated: October 12, 2023

Daniel J. Cannistra and *Pierce J. Lee*, Crowell & Moring LLP of Washington, DC, argued for Plaintiff. With Mr. Cannistra on Plaintiff's opening brief was *John Anwesen.*

Madeline R. Heeren, Attorney-Advisor, Office of the General Counsel, U.S. International Trade Commission of Washington, DC, argued for Defendant. With her on the brief was *Andrea C. Casson*, Assistant General Counsel for Litigation.

Elizabeth J. Drake, Schagrin Associates of Washington, DC, argued for Defendant-Intervenor Vallourec Star, LP. With her on Defendant-Intervenors' brief was *Roger B. Schagrin* for Vallourec Star and *Thomas M. Beline* and *Mary Jane Alves*, Cassidy Levy Kent (USA) LLP of Washington, DC, for United States Steel Corporation.

OPINION

Baker, Judge:

In this case, a Russian producer of seamless pipe challenges the International Trade Commission's conclusion that such imports from that country are non-negligible for purposes of a material injury determination. For the reasons below, the court sustains the Commission's decision in part and remands in part.

I

To combat unfair trade practices, the Tariff Act of 1930, as amended, provides a mechanism for imposing remedial duties on imported merchandise dumped into U.S. markets (sold for less than normal value in the home market), 19 U.S.C. § 1673(1), or that foreign governments subsidize, *id.* § 1671(a)(1). Before imposing antidumping (for the former) or countervailing (for the latter) duties, the Department of Commerce must investigate whether dumping is occurring or a subsidy is being provided, while the ITC investigates whether imports materially injure domestic producers. If both agencies find in the affirmative, Commerce imposes duties as applicable. *See id.*§ 1673; *id.* § 1671(a).

In evaluating material injury, the Commission must "cumulatively assess the volume and effect of imports of the subject merchandise from all countries," if such imports compete with each other and with domestic like products. *Id.* § 1677(7)(G)(i)(I), (II). The ITC refers to this requirement as "cumulation."

The statute, however, provides an exception to cumulation. In making its material injury determination, the ITC must disregard imports of a subject country's merchandise that are "negligible." *Id.* §§ 1671b(a)(1), 1673b(a)(1). Subject to an exception not relevant here, "imports from a country corresponding to a domestic like product identified by the Commission are negligible" if they "account for less than 3 percent of the volume of all such merchandise imported into the United States in the most recent 12-month period for which data are available." *Id.* § 1677(24)(A)(i). For these calculations, the ITC "may make reasonable estimates on the basis of available statistics." *Id.* § 1677(24)(C). If the Commission finds negligibility, then the investigation of that country terminates, and imports from that nation escape duties. *See id.* §§ 1671b(a)(1), 1673b(a)(1), 1677(7)(G)(ii)(II).

II

In 2020, Vallourec Star, LP, a domestic producer, petitioned for the imposition of antidumping and countervailing duties on seamless pipe imports from Czechia, South Korea, Russia, and Ukraine. Appx1001. Vallourec alleged that such imports materially injured it and other domestic producers. Appx15651; *see* 19 U.S.C. §§ 1671, 1673. After the Commission made a preliminary determination of material injury, Appx32642–32682, Commerce began investigations under 19 U.S.C. §§ 1671d and 1673d. *Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from Czechia, Korea, Russia, and Ukraine*, 85 Fed. Reg. 53,398 (ITC Aug. 28, 2020), Appx1002.

In that investigation, the Department issued producer, importer, purchaser, and foreign producer questionnaires to various entities, including PAO TMK, a Russian producer. Appx34049, Appx34063. These questionnaires asked respondents to separately identify the quantity of their seamless pipe imports from each of the subject countries, as well as Mexico and Germany, from 2018–2020. Appx33200–33217.

The ITC then used the questionnaire data along with official statistics to determine whether the seamless pipe imports from any subject country were below the statutory negligibility threshold of

three percent.[1] This exercise required the estimation of the volume of seamless pipe imports from all countries during the 12-month "negligibility period" preceding the petition—July 2019 through June 2020. *Id.* The prehearing staff report used official import statistics under the primary HTS numbers during that period, deducting any reported merchandise outside the scope of the investigation. Appx45599 n.3. This report found that imports of Russian seamless pipe were below the statutory negligibility threshold during the relevant period. Appx45605.

Three respondents then revised their questionnaire responses by recategorizing some of their pipe imports from non-subject countries as *non*-seamless. Appx48489–48678. Based on the revised questionnaire responses, the Commission calculated that Russia accounted for [[ ]] percent of imports during the preceding 12-month period, just barely above the statutory negligibility standard of "less than 3 percent . . . ." Appx2191 (citing 19 U.S.C. § 1677(24)(A)(i)). The Commission issued its determination of material injury shortly afterward. *Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from Korea, Russia, and Ukraine*, 86 Fed. Reg. 46,882 (ITC Aug. 20, 2021), Appx2228.

III

TMK brought this suit under 19 U.S.C. § 1516a(a)(2)(B)(i) to challenge the Commission's finding that Russia was a non-negligible source of subject imports. *See* ECF 10 (complaint). The court has subject-matter jurisdiction over such actions under 28 U.S.C. § 1581(c).

Vallourec and U.S. Steel Corporation intervened as defendants supporting the Commission. *See* ECF 18 and 23. TMK then moved for judgment on the agency record. ECF 33 (confidential); ECF 34 (public). The ITC (ECF 44, confidential; ECF 45, public) and the intervenors (ECF 39, confidential; ECF 40, public) responded and TMK replied (ECF 48, confidential; ECF 49, public). The court heard oral argument and received a more detailed proposed remand order from TMK (ECF 65) and supplemental briefing. *See* ECF 67 (TMK); ECF (71) (agency); ECF 69 (defendant-intervenors).

In § 1516a(a)(2) actions such as this, "[t]he court shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). That is, the ques-

[1] The Commission compiled official import statistics from the U.S. Census Bureau for each of the relevant Harmonized Tariff Schedule (HTS) numbers during the period of investigation. ECF 36, at 17–18; Appx2134. These statistics are public data. ECF 36, at 18 n.5.

tion 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 the Commission's conclusion.

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

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

In addition, the ITC's exercise of discretion in § 1516a(a)(2) cases is subject to the default standard of the Administrative Procedure Act, which authorizes a reviewing court to "set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *see Solar World Americas, Inc. v. United States*, 962 F.3d 1351, 1359 n.2 (Fed. Cir. 2020) (explaining that in § 1516a cases brought under section 516A of the Tariff Act of 1930, APA "section 706 review applies since no law provides otherwise") (citing 28 U.S.C. § 2640(b)).

IV

A

1

TMK challenges the Commission's failure to "capture all imports from Germany and Mexico in its negligibility analysis." ECF 34–2, at 15. Even though Customs Net Import File data (Customs data) available to the ITC demonstrated that several companies imported seamless pipe from both Germany and Mexico, *see id.* at 16; *see also* ECF 33–2, Exs. 1–4, the Commission relied solely on questionnaire data from Company A[2] as to Germany and Company B[3] as to Mexico. Appx2134.

The Commission and the defendant-intervenors do not dispute that the Commission ignored the Customs data contradicting the agency's determination that only Company A imported seamless pipe from Germany and Company B imported such pipe from Mexico. Instead, they argue that TMK waived this issue by not raising it in the

[2] "Company A" refers to [[ ]].

[3] "Company B" refers to [[ ]].

company's final comments. *See* ECF 45, at 40–41, 43–44 (government).

TMK replies, however, that "the Commission never took the position that there was one importer from Mexico and Germany until after the period for commenting was closed." ECF 49, at 25; *see also id.* at 25–29. The court agrees: Because up until the final decision the ITC's calculations were based on *all* imports from Mexico and Germany, the company had no opportunity to challenge the Commission's course change. Waiver thus does not apply. *See LTV Steel Co. v. United States*, 985 F. Supp. 95, 120 (CIT 1997) (where a "plaintiff had no opportunity to raise the issue at the administrative level," "exhaustion doctrine [will] not preclude judicial review").

Because the ITC failed to address the Customs data contradicting its determination that only Company A imported seamless pipe from Germany and only Company B imported such pipe from Mexico, the court remands for the Commission to do so. "[A]n agency acts arbitrarily, and therefore unreasonably, when it . . . 'offers an explanation for its decision that runs counter to the evidence before it.' " *Ad Hoc Shrimp Trade Ac tion Comm. v. United States*, 70 F. Supp. 3d 1328, 1335 (CIT 2015) (cleaned up and citing *Motor Vehicle Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

2

As to imports from Germany, TMK further argues that the Commission arbitrarily accepted Company A's questionnaire response while rejecting Company C's.[4] ECF 34–2, at 18–21. This contention fails.

The ITC observed that the combined in-scope and out-of-scope imports from Germany reported by Companies A and C in their *revised* questionnaires exceeded the total amount stated in the official statistics during the negligibility period. Appx1486. Unable to resolve these discrepancies, the Commission explained that it would not rely on these new responses. Appx1559. Instead, the agency opted to rely on these companies' *initial* questionnaire responses. *Id*.

Company A's initial response disclosed in-scope imports from Germany. Appx48627. Company C's, on the other hand, did not. Appx48498. The ITC explained that official import data contradicted only Companies A and C's revised questionnaire data—not their initial responses. Appx1486. The agency therefore did not act arbitrarily in relying on the initial questionnaire responses.

That said, TMK submitted evidence of in-scope imports that it contends calls Company C's initial questionnaire response into doubt.

[4] Company C refers to [[ ]].

See ECF 34–2, at 28–30. It is undisputed that the Commission did not meaningfully address this evidence, even though it conflicts with the agency's decision. *Cf. Ad Hoc Shrimp*, 70 F. Supp. 3d at 1335 ("Importantly, the substantiality of the evidence must take into account whatever in the record fairly detracts from its weight.") (cleaned up and quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)). On remand, the ITC must do so, for it cannot simply avert its gaze from evidence that contradicts its determination.

B

TMK challenges the Commission's calculation of import data from Argentina and Italy. ECF 34–2, at 21–25. The company contends that the ITC's reliance on data reported by Company C is not supported by substantial evidence because it conflicts with certain unspecified data. *See id*. at 22–23 (citing Appx2163). As the government observes, "the basis for Plaintiff's calculations of purported total imports from Italy and Argentina is unclear," as the cited Appendix page "contains no reference to such data." ECF 45, at 33 n.9. TMK made no effort on reply to salvage its incomplete argument about Argentine and Italian imports, so the court treats it as abandoned.

C

TMK also takes aim at the Commission's estimate of seamless pipe imports from Ukraine, ECF 34–2, at 25–28, which relied on unadjusted official import statistics. Appx1560. In so doing, TMK argues, the agency ignored a questionnaire response from Company D.[5] That response claimed an amount of seamless pipe imports from Ukraine that [[ ]] Appx1487. TMK characterizes this approach as arbitrary and capricious because the Commission accepted questionnaires from Companies A, B,[6] and C but not from Company D. ECF 33, at 26–28.

This argument glosses over that certain questionnaire responses conflicted with official statistics while others did not. This occurred in only two instances: with Company D's questionnaire response from Ukraine, and with Companies A and C's *revised* questionnaire responses from Germany. Appx1486–1487. The ITC rejected using the data from any of these three questionnaires, choosing instead to rely on unadjusted official statistics for Ukraine and on Company A's and Company C's *initial* questionnaire responses for Germany. *Id.*

[5] Company D refers to [[ ]].

[6] Although TMK asserts that the Commission expressed "methodological concerns" with Company B's *Mexican* data, ECF 34–2, at 25, the former's brief cites no record support for this proposition. Thus, the court disregards the reference to Company B in TMK's challenge to the Commission's calculation of Ukrainian import data.

Because the ITC has discretion to select its methodology when calculating negligibility, it acted arbitrarily only if it "offer[ed] insufficient reasons for treating similar situations differently." *Shandong Rongxin Imp. & Exp. Co. v. United States*, 203 F. Supp. 3d 1327, 1337 (CIT 2017) (quoting *Jiangsu Jiasheng Photovoltaic Tech. Co. v. United States*, 28 F. Supp. 3d 1317, 1323 (CIT 2014)). The Commission's explanation for its treatment of questionnaire responses from Company A and C on the one hand, and Company D on the other, suffices because the situations were materially different. The initial questionnaire responses from Companies A and C did not conflict with official statistics, whereas Company D's response did.

D

Finally, TMK argues that "the Commission unlawfully declined to make the necessary determination as to what imports are to be considered as corresponding to a domestic like product." ECF 34–2, at 39. The company cites the following statement:

> We recognize that there are conflicting party arguments as to the interpretation of the scope of investigation and whether the importers' reported out-of-scope products are in fact excluded from the scope. However, as noted above, on this record any further interpretation of the scope is a matter for Commerce, not the Commission.

Id. (quoting Appx1485).

TMK's characterization of the cited passage misses the mark. The Commission "define[d] a single domestic like product of all [seamless] pipe, coextensive with the scope" set by Commerce. Appx1474. No party contested that definition. *Id*.

The statute required the ITC to calculate negligibility using "imports from a country of merchandise corresponding to a domestic like product identified by the Commission." 19 U.S.C. § 1677(24)(A)(i). Keeping with its definition of "domestic like product," the Commission calculated negligibility "using imports from subject and nonsubject sources that correspond to Commerce's scope of investigations." Appx1484. The ITC committed no legal error in so doing.

TMK's challenge to the Commission's purported failure to determine what imported products correspond to domestic like products in effect repackages its immediately preceding argument that the ITC "blindly accepted" the questionnaire responses of Companies A, B, and C. *See* ECF 34–2, at 31–38. First, the ITC did no such thing, at least in regard to the responses of Companies A & C as previously

discussed. More importantly, insofar as the ITC relied on the questionnaires, it's not for the court to reweigh that evidence on its own merits. *See AL Tech Specialty Steel Corp. v. United States*, 27 CIT 1791, 1802 (2003) ("[T]he credibility of sources is largely a matter within the province of the Commission, as the trier of fact.").[7] Rather than identifying any legal error or even asserting a legal argument, TMK's quarrel is with how the ITC weighed the questionnaire responses of Companies A, B, and C, and that weighing is the Commission's exclusive province.

* * *

For the foregoing reasons, the court grants TMK's motion for judgment on the agency record in part and sustains the Commission's determination in part. A separate remand order will issue.

Dated: October 12, 2023
New York, NY

/s/ M. Miller Baker
JUDGE

[7] Of course, and as discussed above, even if the ITC reasonably relied on the questionnaire responses *on their own terms*, it does not excuse the agency's failure to address evidence that contradicts those responses.

Slip Op. 23–153

QINGDAO GE RUI DA RUBBER CO., LTD., Plaintiff, v. UNITED STATES, Defendant, and UNITED STEEL, PAPER AND FORESTRY, RUBBER MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO, CLC, Defendant-Intervenor.

Before: Mark A. Barnett, Chief Judge
Court No. 22–00229

[Sustaining the U.S. Department of Commerce's final results in the 2020 administrative review of the countervailing duty investigation of truck and bus tires from the People's Republic of China]

Dated: October 20, 2023

Weronika Bukowski, Crowell & Moring, LLP, of Washington, DC, argued for Plaintiff. With her on the brief were *Daniel Cannistra* and *Kelsey Clinton*.

Sosun Bae, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for Defendant. With her on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, and *L. Misha Preheim*, Assistant Director. Of counsel on the brief was *Ashlande Gelin*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

Christopher Cloutier, Schagrin Associates, of Washington, DC, argued for Defendant-Intervenor. With him on the brief were *Roger B. Schagrin* and *Nicholas J. Birch*.

OPINION

Barnett, Chief Judge:

This matter is before the court following the U.S. Department of Commerce's ("Commerce" or "the agency") final results in the second administrative review of the countervailing duty ("CVD") order on truck and bus tires from the People's Republic of China ("China") for the period of review ("POR") from January 1, 2020, through December 31, 2020. *See Truck and Bus Tires From the People's Republic of China*, 87 Fed. Reg. 39,063 (Dep't Commerce June 30, 2022) (final results of [CVD] admin. review; 2020) ("*Final Results*"),[1] ECF No. 19–5, and accompanying Issues and Decision Mem., C-570–041 ("I&D Mem.") (June 24, 2022), ECF No. 19–4.[2]

[1] The *Final Results* were amended to correct a ministerial error that does not affect the court's review of this matter. *See Truck and Bus Tires From the People's Republic of China*, 87 Fed. Reg. 52,364 (Dep't Commerce Aug. 25, 2022) (am. final results of [CVD] admin. review; 2020), ECF No. 19–6.

[2] The administrative record filed in connection with the *Final Results* is divided into a Public Administrative Record ("PR"), ECF No. 19–2, and a Confidential Administrative Record ("CR"), ECF No. 19–3. Parties filed joint appendices containing record documents cited in their briefs. Public J.A., ECF No. 42; Conf. J.A. ("CJA"), ECF No. 41. Citations are to the CJA unless stated otherwise.

Plaintiff Qingdao Ge Rui Da Rubber Co., Ltd. ("Plaintiff" or "GRT") challenges Commerce's determination to use facts available with an adverse inference ("AFA") in assigning Plaintiff a 1.78 percent CVD rate under the Export Buyer's Credit Program ("EBCP"). *See* Mem. in Supp. of Pl.'s Rule 56.2 Mot. for J. on the Agency R. ("Pl.'s Mem."), ECF No. 28; Pl.'s Reply Br. in Supp. of Rule 56.2 Mot. for J. on the Agency R. ("Pl.'s Reply"), ECF No. 38.

Defendant United States ("Defendant") filed a response in support of Commerce's use of AFA with respect to the EBCP. Def.'s Resp. to Pl.'s Mot. for J. on the Agency R. ("Def.'s Resp."), ECF No. 32. Defendant primarily contends that GRT did not exhaust its arguments at the administrative level, as it was required to do. *Id.* at 13–15. Defendant-Intervenor United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC concurred with and adopted by reference Defendant's arguments. Resp. Br. of Def.-Int. in Opp'n to Pl.'s Mot. for J. on the Agency R., ECF No. 33.

For the reasons herein, the court sustains the *Final Results*.

BACKGROUND

On April 1, 2021, Commerce initiated the second administrative review of the CVD order on truck and bus tires from China. *Initiation of Antidumping and [CVD] Admin. Reviews*, 86 Fed. Reg. 17,124 (Dep't Commerce Apr. 1, 2021). Commerce selected Plaintiff as a mandatory respondent. *See* Truck and Bus Tires from the People's Republic of China: Resp't Selection in [CVD] Admin. Review for 2020 (May 10, 2021) at 1, PR 39, CR 9, CJA Tab 1. Plaintiff is a producer and exporter of subject merchandise and is majority-owned by Cooper Tire & Rubber Company ("CTRC"), a U.S. importer. *See Trucks and Tires From The People's Republic Of China* /GRT Resp. To Initial Questionnaire (July 14, 2021) ("GRT IQR") at III-6–III-7, PR 73–74, CR 38–47, CJA Tab 5. As part of its review, Commerce issued questionnaires to Plaintiff and the Government of China ("the GOC") requesting, among other things, information related to the EBCP, a state-subsidized loan program administered by the state-owned Export-Import Bank of China ("Ex-Im Bank"). *See* Second Admin. Review of Truck and Bus Tires from the People's Republic of China: [CVD] Questionnaire (May 24, 2021) ("Initial Questionnaire"), PR 41, CJA Tab 2.

GRT's initial questionnaire response addressed the EBCP. GRT provided a customer list showing a single U.S. customer, CTRC. *See* GRT IQR at III-26, Ex. 16. GRT asserted "that none of its customers applied for, used, or benefited from the alleged program during the

POR." *Id.* at III-27. GRT further stated that it was "never contacted by any of its customers to provide any of the information that is required to obtain an export buyer's credit" and it was thus "impossible that any . . . customers could have possibly received export buyer's credit" under the EBCP process. *Id.* Jack Jay McCracken, Vice President, Assistant General Counsel & Assistant Secretary for CTRC and GRT, certified, as required by Commerce regulation, that the responses were "accurate and complete" and "subject to verification." *Id.* at Company Certification.

Meanwhile, Commerce requested that the GOC provide: (1) a copy of the September 6, 2016 GOC 7th Supplemental Response to the CVD Investigation of Certain Amorphous Silica Fabric from China ("EBCP Supplemental Questionnaire Response"), (2) original and translated copies of any law, regulations, or other governing documents cited in the EBCP Supplemental Questionnaire Response, and (3) a list of all partner banks involved in the disbursement of funds under the EBCP. Initial Questionnaire at II-23. The GOC declined to provide any of these documents, stating that the EBCP Supplemental Questionnaire Response was not relevant and that Commerce's request for partner banks was broad and not necessary. *See GOC Initial Questionnaire Resp.* in the 2020 Admin. Review of the [CVD] Order on Truck and Bus Tires [ ] from the People's Republic of China (C-570–041) (July 14, 2021) ("GOC IQR") at 107–09, PR 65–72, CR 29–37, CJA Tab 4.

Commerce also requested that the GOC provide a list of each respondent's customers that had outstanding EBCP loans and, if no customers used the EBCP, a detailed explanation of the steps the GOC took to determine such non-use. *See* Initial Questionnaire at II-23. The GOC responded that it obtained a list of customers from the respondents, it provided those customer lists to the Ex-Im Bank, and the Ex-Im Bank searched its database to confirm that the listed customers did not use the EBCP. GOC IQR at 109–12. The GOC directed Commerce to a purported screenshot of the Ex-Im Bank's database search results. *Id.* at 109 (citing Ex. II.F.3). The GOC further stated its understanding that "Respondents are providing in their own questionnaire responses affidavits from their US customers to the effect that none of the customers obtained any Export Buyers Credits from the EX-IM Bank." *Id.* at 110.

Commerce issued a supplemental questionnaire to the GOC again requesting (1) the EBCP Supplemental Questionnaire Response, (2) the 2013 Administrative Measures revisions to the EBCP, and (3) a list of partner banks involved in the disbursement of funds under

EBCP. *See GOC Suppl. Questionnaire Resp.* in the 2020 Admin. Review of the [CVD] Order on Truck and Bus Tires [ ] from the People's Republic of China (C-570–041) (Nov. 22, 2021) at Questions and Answers 14–16, PR 90, CR 52, CJA Tab 7. The GOC again refused to provide this requested information, claiming that the 2013 Administrative Measures revisions were "internal to the bank, non-public, and not available for release" and that the EBCP Supplemental Questionnaire Response and list of partner banks were not necessary to confirm or verify use of the EBCP. *Id.*

On March 8, 2022, Commerce published its preliminary results. *Truck and Bus Tires From the People's Republic of China*, 87 Fed. Reg. 12,929 (Dep't Commerce Mar. 8, 2022) (prelim. results of [CVD] admin. review) ("*Preliminary Results*"); *see* Decision Mem. for the Prelim. Results of [CVD] Admin. Review, Recission in Part and Prelim. Intent to Rescind in Part; 2020: Truck and Bus Tires from the People's Republic of China ("Prelim. Mem."), C-570–041, (Feb. 25, 2022), PR 264, CJA Tab 13. Commerce preliminarily found that the use of AFA was warranted in determining the countervailability of the EBCP because the GOC failed to provide requested information necessary for the agency to analyze the EBCP and verify that GRT's customers had not used the program. Prelim. Mem. at 9–10. Furthermore, Commerce found that GRT failed to provide evidence or declarations from its U.S. customers demonstrating nonuse of the EBCP. *Id.* at 10.

Plaintiff and the GOC submitted case briefs contesting Commerce's preliminary results. As relevant here, GRT argued, "[i]n summary, [that] the GOC fully cooperated to the best of its ability to provide all the necessary information requested by [Commerce]." Truck and Bus Tires from the People's Republic of China: *GRT's Case Br.* (Apr. 7, 2022) ("GRT Case Br.") at 6, PR 274, CR 121, CJA Tab 17. GRT explained that the GOC's confirmation of non-use and provision of screenshots from a search query sufficiently verified GRT's own questionnaire response asserting customer non-use. *Id.* at 4–5. As relevant here, while GRT maintained that it had "confirmed," "further confirmed," and "stated" that its customers did not apply for, use, or benefit from the EBCP during the POR, GRT did not assert or suggest that its customers had made such representations to Commerce. *Id.* at 5.

For its part, the GOC argued to Commerce that the purportedly missing information had "no bearing on establishing *usage* of the program or the ability to verify its usage." *GOC Admin. Case Br.* — Second Admin. Review of the [CVD] Order on Truck and Bus Tires from the People's Republic of China (C-570–041) (Apr. 7, 2022) ("GOC Case Br.") at 14, PR 273, CR 120, CJA Tab 16. The GOC also averred

that "the respondents provided statements of non-use in their initial responses after confirmation with their U.S. customers and submission of customer declarations." *Id.* at 17 (citing only to the other mandatory respondent's Initial Questionnaire Response).

On June 30, 2022, Commerce published the *Final Results*. Commerce again found that it was unable to verify non-use of the EBCP by GRT and CTRC based on the GOC's refusal to provide requested information and GRT's failure to provide non-use certifications. I&D Mem. at 16–28. Commerce thus continued to use AFA. *Id.* at 17.

GRT challenges the *Final Results*, arguing that Commerce's use of AFA was unsupported by substantial evidence because the agency relied on the lack of non-use certifications from GRT's U.S. customers. *See* Pl.'s Mem. at 15–17. According to GRT, the assistant general counsel's certification accompanying the questionnaire response constituted a customer non-use certification, and Commerce had to rely on that record evidence rather than using AFA. *See id.*

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to section 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) and 28 U.S.C. § 1581(c) (2018).[3] The court will uphold an agency determination that is supported by substantial evidence and otherwise in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i).

LEGAL FRAMEWORK

During a CVD investigation or administrative review, Commerce solicits information from the foreign government alleged to have conferred the subsidy. *See Fine Furniture (Shanghai) Ltd. v. United States*, 748 F.3d 1365, 1369–70 (Fed. Cir. 2014). When an interested party, such as a foreign government, "withholds information" requested by Commerce, "significantly impedes a proceeding," "fails to provide [ ] information by the deadlines for submission of the information," or provides information that cannot be verified pursuant to 19 U.S.C. § 1677m(i), Commerce shall use the "facts otherwise available" in making its determination. 19 U.S.C. § 1677e(a)(2). Additionally, if Commerce determines that a party "has failed to cooperate by not acting to the best of its ability to comply with a request for information," the agency "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)(A).

[3] Further citations to the Tariff Act of 1930, as amended, are to Title 19 of the U.S. Code. All references to the U.S. Code are to the 2018 edition unless otherwise specified.

In reviewing Commerce's determinations, this court "shall, where appropriate, require the exhaustion of administrative remedies." 28 U.S.C. § 2637(d). Administrative exhaustion commonly requires parties to raise all arguments in administrative briefs before presenting them to this court. *Dorbest Ltd. v. United States*, 604 F.3d 1363, 1375 (Fed. Cir. 2010); *see also* 19 C.F.R. § 351.309(c)(2) (stating Commerce's requirement that parties raise all arguments in case briefs before the agency). Administrative exhaustion "protect[s] administrative agency authority and promot[es] judicial efficiency." *Corus Staal BV v. United States*, 502 F.3d 1370, 1379 (Fed. Cir. 2007) (quoting *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992)).

This court retains discretion to permit exceptions to the exhaustion requirement. *ABB, Inc. v. United States*, 920 F.3d 811, 818 (Fed. Cir. 2019). Previously identified exceptions include situations in which: raising an argument at the administrative level would have been futile; an intervening judicial interpretation would have impacted the agency's actions; a plaintiff raises a pure question of law; a plaintiff had no reason to believe the agency would not follow established precedent, *ABB Inc. v. United States*, 40 CIT __, __, 190 F. Supp. 3d 1159, 1180 n.35 (2016); or "the agency in fact thoroughly considered the issue in question," *Pakfood Public Co. v. United States*, 34 CIT 1122, 1145, 724 F. Supp. 2d 1327, 1351 (2010) (citations omitted).

DISCUSSION

Plaintiff argues that Commerce's findings are contrary to law and unsupported by substantial evidence. Specifically, GRT argues that, because the official who certified GRT's response that no customers used the EBCP was an official of both GRT and CRTC, "as a practical matter" GRT provided a non-use certification from its only customer and Commerce failed to take account of it. Pl.'s Mem. at 16–17. Plaintiff also contends that Commerce failed to determine whether a benefit was conferred upon GRT or CTRC, *id.* at 28, and failed to provide GRT an opportunity to verify the evidence on record, *id.* at 29. Defendant counters that GRT failed to present these arguments at the administrative level and, thus, the court should not consider these arguments. Def.'s Resp. at 13–15, 24–25. Plaintiff responds that it exhausted its remedies or was excused from doing so, and that Commerce's determination is not otherwise supported by substantial evidence. Pl.'s Reply at 7–13.

In support of its argument that it exhausted its administrative remedies, Plaintiff points to the statement in its administrative case brief arguing that Commerce "must accept the *certified* record evidence from both the GOC and GRT that neither GRT nor any of its

customers used the [EBCP]." Pl.'s Reply at 8 (quoting GRT Case Br. at 6–7). However, GRT's reference to the certified record was preceded by discussion of the record evidence from the GOC's response. GRT Case Br. at 4–6. GRT asserted that it had "confirmed" its customers' non-use, but GRT failed to identify any purported customer non-use certification or, indeed, any statement from its customer, or otherwise explain that it sought to have Commerce consider its questionnaire response, combined with the certification of accuracy required by 19 C.F.R. § 351.303(g), as the equivalent of a customer non-use certification. *See id.* at 5. "[M]erely mentioning a broad issue" like certified record evidence, without more, is inadequate to exhaust remedies if it is insufficient to "alert[] the agency to the argument with reasonable clarity" and provide the agency an opportunity to address it. *Timken Co. v. United States*, 26 CIT 434, 460, 201 F. Supp. 2d 1316, 1340–41 (2002) (citing *Hormel v. Helvering*, 312 U.S. 552 (1941) and *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990)).

Moreover, Commerce expressly stated in its *Preliminary Results* that GRT "did not provide any evidence or declarations to demonstrate its customers did not use [the EBCP]." Prelim. Mem. at 10. Thus, Commerce indicated to GRT that the agency believed that it did not have any customer non-use certifications from GRT, thereby placing the onus on GRT to exhaust its arguments with respect to such evidence before the agency. This scenario is more clear than that addressed in *Boomerang Tube LLC v. United States*, 856 F.3d 908, 913 (Fed. Cir. 2017), wherein the Court of Appeals for the Federal Circuit found that Boomerang failed to exhaust its administrative remedies when Boomerang knew information was before the agency and another party made arguments to the agency based on that information, but Boomerang failed to argue for its desired outcome to Commerce. Rather than clearly and explicitly challenge this preliminary finding and point to what GRT considered contradictory record evidence, Plaintiff argued that Commerce should determine that GRT did not benefit from the EBCP because the GOC fully responded to Commerce's requests and provided screenshots from the Ex-Im Bank showing that no credits were provided to GRT or its customers. In GRT's view, this confirmed that its customers did not apply for, use, or benefit from the EBCP. GRT Case Br. at 4–5. However, because Plaintiff's argument before this court is distinct from that before the agency, and the agency had no opportunity to consider, in the first instance, whether GRT's regulatory certification of accuracy to the entirety of GRT's questionnaire response, read with that questionnaire response, is reasonably read as a customer certification of non-use, Plaintiff failed to exhaust its administrative remedies.

Alternatively, Plaintiff seeks to invoke various exceptions to the exhaustion doctrine with respect to its arguments regarding non-use certification. First, GRT argues that exhaustion need not be required because Commerce "fully considered" whether any of GRT's evidence constituted a non-use certification. Pl.'s Reply at 9. GRT claims that Commerce ultimately determined that GRT "did not provide any evidence or declarations to demonstrate its customers did not use [the EBCP]," and, therefore must have considered whether the questionnaire response and certification of accuracy, in combination, constituted a non-use certification. *Id.* at 10 (quoting I&D Mem. at 26). Plaintiff also relies on the GOC's assertion that respondents "provided statements of non-use in their initial responses after confirmation with their U.S. customers and submission of customer declarations." *Id.* at 9 (quoting GOC Case Br. at 17).

Plaintiff's argument is unpersuasive. Commerce concluded that GRT "did not provide any evidence or declarations to demonstrate its customers did not use [the EBCP]." I&D Mem. at 26; *see also* Prelim. Mem. at 10 (stating the same). But Commerce drew this conclusion in the context of addressing a case brief in which GRT failed to identify what it considered to be a customer certification of non-use. Moreover, while GRT seeks to rely on arguments made by the GOC, the GOC did not identify any submission *from GRT* that would constitute a customer non-use certification and, instead, the GOC supported its argument to Commerce with a record citation to a certification provided by the other mandatory respondent, not GRT. GOC Case Br. at 17; *see also* I&D Mem. at 26 (explaining that the other mandatory respondent "only provided a customer declaration or 'non-use certification' from one of its U.S. customers" to the agency and GRT had provided none). Moreover, the GOC made this argument after having represented to the agency that the respondents would be providing affidavits confirming non-use. GOC IQR at 110. Because nothing indicates that Commerce considered whether GRT's questionnaire response and its required certification of accuracy constituted a customer non-use certification, the court rejects GRT's invocation of this exception to the exhaustion requirement. *See Pakfood Public Co.*, 34 CIT at 1147, 724 F. Supp. 2d at 1353 (declining to excuse exhaustion when there was "no indication . . . that the agency did indeed fully consider the issue").

Next, Plaintiff argues that case law on non-use certifications has changed since GRT filed its case brief. Pl.'s Reply at 10–12. Plaintiff contends that, because of these intervening changes in the law, any failure by GRT to raise this issue before the agency should be ex-

cused. *See id*. Plaintiff is mistaken. Plaintiff seeks to litigate whether the certification of its questionnaire response by an official of both GRT and its affiliated customer was effectively a customer non-use certification. By contrast, in the cases cited by Plaintiff, it was uncontested that respondents had provided customer certifications that both directly and expressly indicated non-use of the EBCP. *See, e.g.*, *Risen Energy Co. v. United States*, Slip Op. 23–48, 2023 Ct. Int'l Trade LEXIS 52 (CIT Apr. 11, 2023) (remanding when respondent provided non-use certifications from customers constituting about 95 percent of its sales). Here, the agency found that GRT provided no such customer certification. I&D Mem. at 26. Therefore, the court declines to find that the identified case law represents a relevant intervening change in law that excuses GRT from having presented its argument to Commerce in the first instance.

Plaintiff has also suggested that it would have been futile to present its argument to Commerce because Commerce indicated that customer non-use certifications would not have changed the decision. Pl.'s Reply at 12. The "narrow" exception for futility applies when preserving an argument would require parties "to go through obviously useless motions." *Corus Staal BV*, 502 F.3d at 1379 (quotations omitted). Plaintiff's speculation that presenting this argument to Commerce would have been "obviously useless" fails because, as Plaintiff acknowledges, Commerce's approach to analyzing customer non-use certifications was already undergoing change pursuant to court review in other cases. *See, e.g., Guizhou Tyre Co., Ltd. v. United States*, 44 CIT __, __, 447 F. Supp. 3d 1373, 1374 (2020) (sustaining redetermination after remand when Commerce declined to countervail EBCP).

GRT also claims that Commerce erred because it should have determined that GRT and CRTC did not benefit from the EBCP. Pl.'s Reply at 13. GRT's argument of no benefit, however, is premised on its claimed non-use of the program, a factual claim that Commerce rejected because of the lack of evidence to support non-use. *See* I&D Mem. at 17, 26. Moreover, contrary to Plaintiff's argument, this issue is not a pure question of law. *See* Pl.'s Reply at 13–14. While an issue involving a pure question of law may be excused from exhaustion, Plaintiff's argument "must be of purely legal nature . . . requir[ing] neither further agency involvement nor additional fact finding or opening up the record." *Thai I-Mei Frozen Foods Co. v. United States*, 31 CIT 334, 359, 477 F. Supp. 2d 1332, 1354 (2007). Here, Plaintiff presents a mixed question of fact and law in which the factual predicate for the legal argument is in doubt and Plaintiff failed to make the factual argument to Commerce.

Finally, Plaintiff argues that even if GRT failed to exhaust its administrative remedies, Commerce's findings are still unsupported by substantial evidence. *See* Pl.'s Reply at 14 (citing Pl.'s Mem. at 26–29). First, Plaintiff argues that Commerce failed to make an *affirmative* finding that GRT benefited from the EBCP, instead concluding that no evidence established that GRT *did not* benefit from the program. Pl.'s Mem. at 28. This argument, like those before, was not raised at the administrative level, despite Commerce's preliminary determination containing the exact same language. *Compare* Prelim. Mem. at 10, *with* I&D Mem. at 26 ("GRT . . . did not provide any evidence or declarations to demonstrate its customers did not use this program."). Moreover, Commerce did go on to "find that GRT . . . used and benefited from [the EBCP]." I&D Mem. at 27. Second, Plaintiff contends that Commerce erred by not verifying GRT's assertions of non-use. Pl.'s Mem. at 29. Again, Commerce preliminarily determined that GRT did not provide any non-use certifications from its U.S. customers, Prelim. Mem. at 10, impliedly finding that it would have had nothing to verify. GRT failed to identify any non-use certifications to the agency, and, in the Final Results, Commerce reasonably explained that it had nothing to verify, I&D Mem. at 17.

CONCLUSION

Plaintiff was required to raise all arguments that it believed to be relevant to the agency's final determination in its case brief to the agency. *See* 19 C.F.R. § 351.309(c)(2). Because Plaintiff failed to raise these issues below, the court is unable to review Commerce's findings with respect to these arguments. Plaintiff's motion for judgment on the agency record is denied and the court will sustain Commerce's *Final Results*. Judgment will enter accordingly.

Dated: October 20, 2023
New York, New York

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

Slip Op. 23–154

MIDWEST-CBK, LLC, Plaintiff, v. United States, Defendant.

Before: Jennifer Choe-Groves, Judge
Consol. Court No. 17–00154

[Granting Plaintiff's motion for final judgment of dismissal.]

Dated: October 20, 2023

John M. Peterson and *Patrick B. Klein*, Neville Peterson, LLP, of New York, N.Y., for Plaintiff Midwest-CBK, LLC.

Monica P. Triana and *Brandon A. Kennedy*, Trial Attorneys, International Trade Field Office, U.S. Department of Justice, of New York, N.Y., for Defendant.

OPINION

Choe-Groves, Judge:

Before the Court is Plaintiff Midwest-CBK, LLC's Motion for Final Judgment of Dismissal to be Entered. Pl.'s Mot. Final J. Dismissal Entered ("Pl.'s Mot."), ECF No. 87. At the request of the Parties, the Court bifurcated this case into two phases. Order (May 10, 2021), ECF No. 52. In Phase I, the Court held that Plaintiff's import transactions constituted a sale "for exportation to the United States" and that the subject entries were not deemed liquidated by operation of law. *Midwest-CBK, LLC v. United States*, 46 CIT __, 578 F. Supp. 3d 1296 (2022). Remaining for Phase II are questions of valuation of the subject merchandise.

Plaintiff filed a status report on September 8, 2023, informing the Court that "it will not be able to provide further evidence relating to the issues to be addressed in Phase II of this litigation." Pl.'s Status Rep., ECF No. 86. Plaintiff explained that Defendant has requested the production of all evidence necessary to determine a dutiable value for the subject merchandise. *Id.* at 1; *see also* Pl.'s Mot. at 1. Though Plaintiff concedes that the production request is not per se unreasonable, Plaintiff argues that its business model and the considerable number of individual sales of goods that entered the United States would require "years of work and hundreds of thousands of dollars in expense" to comply. Pl.'s Status Rep. at 1–2; *see also* Pl.'s Mot. at 1–2. Plaintiff further advises the Court that it maintains its corporate existence, but ceased doing business in 2018. Pl.'s Status Rep. at 1; *see also* Pl.'s Mot. at 1.

Plaintiff moves the Court to enter a final judgment of dismissal against Plaintiff based on the findings of the Court's prior opinion.[1] Pl.'s Mot. at 2–3. Entry of a final judgment would permit Plaintiff to appeal the Phase I holdings to the U.S. Court of Appeals for the Federal Circuit ("CAFC"). Plaintiff stipulates that should the CAFC affirm the Court's final judgment, Plaintiff will abandon all further claims in this case. *Id.* at 3. Plaintiff also stipulates that should the CAFC reverse the Court's holding, Plaintiff will present no further evidence as to the calculation of transaction value. *Id.* Defendant United States consents to the motion. *Id.* at 4.

Rule 41(a)(2) provides that "an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper." USCIT R. 41(a)(2). The Court is obligated to resolve cases in a "just, speedy, and inexpensive" manner. USCIT R. 1. The Court concludes that dismissal is proper in this case because doing so would effectuate resolution of the dispute and avoid potentially time-consuming and costly litigation. Plaintiff has expressed its intention to appeal the Court's Phase I holding. Because an appeal is likely to reduce or eliminate the need for prolonged litigation, the Court is persuaded by Plaintiff's argument that it would be impractical and costly to require the Parties to engage in expensive Phase II discovery at this time.

Upon consideration of Plaintiff's Motion for Final Judgment of Dismissal to be Entered, and all other papers and proceedings in this action, it is hereby

ORDERED that Plaintiff's Motion for Final Judgment of Dismissal to be Entered, ECF No. 87, is granted.

Judgment shall issue accordingly.

Dated: October 20, 2023
New York, New York

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

[1] Plaintiff stresses that it consents only to a form of judgment of dismissal, not a stipulated judgment. Pl.'s Mot. at 3–4.

Slip Op. 23–155

PRIMESOURCE BUILDING PRODUCTS, INC., Plaintiff, v. UNITED STATES, et al., Defendants.

Before: Jennifer Choe-Groves, Judge
M. Miller Baker, Judge
Timothy C. Stanceu, Judge
Court No. 20–00032

[Denying motion for a partial stay of enforcement of the judgment. Judge Baker joins this Opinion and Order and also issues a concurring opinion.]

Dated: October 23, 2023

Jeffrey S. Grimson, Mowry & Grimson, PLLC, of Washington, D.C., for plaintiff. With him on the briefs were *Kristin H. Mowry*, *Jill A. Cramer*, *Sarah M. Wyss*, and *Bryan P. Cenko*.

Stephen C. Tosini, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for defendant. With him on the briefs were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, and *Tara K. Hogan*, Assistant Director.

OPINION AND ORDER

Stanceu, Judge:

Plaintiff PrimeSource Building Products, Inc. ("PrimeSource") moves for a "partial stay" of enforcement of the judgment this Court entered in response to the decision of the Court of Appeals for the Federal Circuit ("Court of Appeals") in *PrimeSource Building Products, Inc. v. United States*, 59 F.4th 1255 (Fed. Cir. 2023) ("*PrimeSource Building Products*"). We deny the motion.

I. BACKGROUND

In *PrimeSource Building Products,* 59 F.4th at 1263, the Court of Appeals reversed the judgments this Court issued in favor of plaintiff PrimeSource and plaintiffs Oman Fasteners LLC, Huttig Building Products, Inc., and Huttig, Inc. (collectively, "Oman Fasteners"), in their actions to contest a proclamation ("Proclamation 9980") the President of the United States issued under section 232 of the Trade Expansion Act of 1962, *as amended*, 19 U.S.C. § 1862.[1] *See PrimeSource Building Products, Inc. v. United States*, 45 CIT __, 505 F. Supp. 3d 1352 (2021). Proclamation 9980 imposed duties of 25% *ad valorem* on various products ("derivatives") made of steel. *Adjusting Imports of Derivative Aluminum Articles and Derivative Steel Articles Into the United States*, 85 Fed. Reg. 5,281 (Exec. Office of the Presi-

[1] Citations to the United States Code herein are to the 2018 edition.

dent Jan. 29, 2020) ("*Proclamation 9980*"). The Court of Appeals "remand[ed] the cases for entry of judgment against PrimeSource and Oman Fasteners, including dismissal of the claims against the President." *PrimeSource Building Products*, 59 F.4th at 1263.

Following issuance of the mandates in the appellate litigation, CAFC Mandate in Appeal No. 21–2066 (July 5, 2023), ECF No. 133; CAFC Mandate in Appeal No. 21–2252 (July 6, 2023), Consol. Ct. No. 20–00037, ECF No. 150, this Court entered judgments in favor of defendants that, *inter alia*, ordered liquidation of the entries at issue in this litigation in accordance with the decision of the Court of Appeals. Judgment (July 13, 2023), ECF No. 134; Judgment (July 13, 2023), Consol. Ct. No. 20–00037, ECF No. 151.

On July 21, 2023, PrimeSource filed a petition for a writ of certiorari and, on the same day, filed its "partial stay" motion in this Court. Pl. PrimeSource Building Products, Inc.'s Mot. for Partial Stay of the Enforcement of J. Pending Appeal (July 21, 2023), ECF No. 136 ("Pl.'s Mot."). Defendants oppose the motion. Defs.' Opp'n to Pl.'s Mot. to Stay Enforcement of the Federal Circuit's Mandate (Aug. 11, 2023), ECF No. 137. Plaintiff replied to defendants' opposition. Reply to Defs.' Opp'n to Pl. PrimeSource Building Products, Inc.'s Mot. for Partial Stay of the Enforcement of the J. Pending Appeal (Sept. 12, 2023), ECF No. 141.

II. DISCUSSION

Section 2101(f) of Title 28, United States Code, provides as follows:

> In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court.

28 U.S.C. § 2101(f). It further provides that "[t]he stay may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court." *Id*.

In its motion, PrimeSource seeks a stay of this Court's judgment ordering liquidation of its entries subject to this litigation and "calling for payment of Section 232 duties and interest on PrimeSource's past imports entered, or withdrawn from warehouse for consumption," prior to the date of any stay order this Court issues, "pending resolution of PrimeSource's petition before the Supreme Court." Draft Order (July 21, 2023), ECF No. 136. Should the stay be granted, PrimeSource states that it "shall pay cash deposits of Section 232

duties pursuant to Proclamation 9980 . . . on entries filed by PrimeSource Building Products, Inc. on [and] after 12:01 a.m. of the date of this Court's judgment in slip op 23–101 [July 13, 2023]." *Id*.

In support of its stay motion, PrimeSource addresses arguments to the four factors by which a court considers a claim for equitable relief, arguing that it will be irreparably harmed by the liquidation of its entries absent the stay it seeks, Pl.'s Mot. 9–15, that its petition for a writ of certiorari is likely to succeed on the merits, *id*. at 15–26, that the relief it seeks will not substantially injure the government, *id*. at 27–28, and that granting the stay is favored by the public interest, *id*. at 29–30.

This is PrimeSource's second motion to obtain a stay following the ruling of the Court of Appeals on the merits of PrimeSource's claims. Following a June 6, 2023 denial by the Court of Appeals of PrimeSource's petition for rehearing in *PrimeSource Building Products*, PrimeSource moved in the Court of Appeals for a stay of that court's mandate under Federal Rule of Appellate Procedure 41. Mot. of Pl.-Appellee PrimeSource Building Products, Inc. to Stay the Mandate Pending Petition for Writ of Certiorari (June 26, 2023), CAFC No. 21–2066, ECF No. 99 ("*Pl.'s Rule 41 Mot.*"). Under that rule, PrimeSource was required to "show that the petition would present a substantial question and that there is good cause for a stay." Fed. R. App. P. 41(d)(1). In support of its motion to stay the mandate, PrimeSource argued that its petition for a writ of certiorari raises a substantial question, *Pl.'s Rule 41 Mot.* at 5–16, and, as to "good cause," argued that "PrimeSource will be irreparably harmed as the liquidation of its entries may moot its appeal to the Supreme Court," *id*. at 17. The Court of Appeals denied that motion in a summary order issued on June 27, 2023. Order (June 27, 2023), CAFC No. 21–2066, ECF No. 100. The summary order does not specify the reasons for denial of the motion to stay the mandate but must be interpreted to mean that at least one of the two requirements of Federal Rule of Appellate Procedure 41, i.e., either the "substantial question" or the "good cause" requirement, which PrimeSource based on its contention of irreparable harm in the absence of a stay of the mandate, was not met.

PrimeSource had not met its burden of demonstrating its entitlement to a different outcome than that reached by the Court of Appeals on its previous motion to stay. If PrimeSource has not presented what is, in the view of the Court of Appeals, a "substantial question" on the merits of its continuing litigation, then we defer to that decision in ruling on the instant stay motion and must conclude on that basis that PrimeSource has not shown a likelihood of success on the merits

in its litigation before the Supreme Court. If, on the other hand, the Court of Appeals denied the previous stay motion on the ground that PrimeSource has not made an adequate showing of irreparable harm, then we defer to that decision. In short, we decline to revisit either of the two possible grounds upon which the Court of Appeals denied the previous stay motion. Because a showing of irreparable harm and a showing of likelihood of success on the merits are essential to a grant of equitable relief, PrimeSource has not met its burden for obtaining the stay it now seeks.

With particular respect to its irreparable harm argument, PrimeSource maintains, first, that "liquidation of its entries may moot any appeal before the Supreme Court," Pl.'s Mot. 9, on the premise that a court's ability to order relief in the face of liquidated entries is uncertain in light of certain precedents of the Court of Appeals following that court's decision in *Shinyei Corp. of America v. United States*, 355 F.3d 1297 (Fed. Cir. 2004), including *American Signature, Inc. v. United States*, 598 F.3d 816 (Fed. Cir. 2010). Second, PrimeSource asserts that it "will suffer from significant 'business disruptions' associated with paying the applicable cash deposits of Section 232 duties with interest on its past imports." Pl.'s Mot. 13. It argues that "PrimeSource will need to expend significant resources on the mechanics of paying the applicable cash deposits of Section 232 duties with interest on its many thousands of past imports." *Id.* at 14. Neither argument is persuasive.

Despite what PrimeSource characterizes as uncertainty as to a possible post-liquidation remedy, PrimeSource has not made a convincing showing that the Supreme Court, should it grant PrimeSource's petition for a writ of certiorari and invalidate Proclamation 9980, would consider itself precluded from ordering any relief it deemed necessary, regardless of asserted unsettled issues arising from lower court decisions. PrimeSource's argument that it may incur "business disruptions" is also unavailing. In ordering the liquidation of entries, this Court's entry of judgment effectuated the mandate of the Court of Appeals, which upheld the validity of Proclamation 9980 and, therefore, of the liability of PrimeSource, like that of any similarly situated importer, for duties of 25% *ad valorem* on entries arising from its past business activities.

III. CONCLUSION AND ORDER

Upon consideration of Plaintiff PrimeSource Building Products, Inc.'s Motion for Partial Stay of the Enforcement of Judgment Pending Appeal (July 21, 2023), ECF No. 136, defendants' opposition, and plaintiff's reply, and upon due deliberation, it is

ORDERED that the motion be, and hereby is, denied.

Dated: October 23, 2023
New York, New York

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

/s/ *M. Miller Baker*
M. MILLER BAKER, JUDGE

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

Baker, Judge, concurring: I join Judge Stanceu's opinion in full. I write separately to provide some more reasons why we should deny PrimeSource's motion, which the company euphemistically describes as requesting us to "partially stay the enforcement of [our] judgment . . . pending PrimeSource's appeal to the U.S. Supreme Court." ECF 136, at 1 (citing USCIT Rules 7 and 62).

Truth be told, PrimeSource seeks an *injunction* under USCIT R. 62(d) to prevent U.S. Customs and Border Protection from liquidating entries subject to Section 232 duties challenged by the company—that is, relief that the Federal Circuit *denied* in reversing our grant of summary judgment. *See PrimeSource Bldg. Prods., Inc. v. United States*, 505 F. Supp. 3d 1352 (CIT 2021), *rev'd*, 59 F.4th 1255 (Fed. Cir. 2023), *pet. for cert. filed*, No. 23–69 (U.S. July 25, 2023).

A stay only "operates upon the judicial proceeding itself . . . by halting or postponing some portion of the proceeding," *Nken v. Holder*, 556 U.S. 418, 428 (2009), but an injunction "is directed at someone, and governs that party's conduct." *Id.* ; *see also Black's Law Dictionary* 784 (6th ed. 1990) (defining "injunction" as "[a] court order prohibiting someone from doing some specified act or commanding someone to undo some wrong or injury"). Thus, injunctions have a coercive effect that stays do not, as they directly "tell[ ] someone what to do or not to do." *Nken*, 556 U.S. at 428. PrimeSource wants us to tell Commerce to direct Customs not to liquidate the company's entries while Supreme Court proceedings play themselves out, the very definition of an injunction.

But we have zero authority to grant any such relief. After reversing us, the Federal Circuit summarily denied PrimeSource's motion for a stay of the mandate. *See* ECF 137, Ex. C; *see also* Fed. R. App. P. 41(d)(1). Under the familiar mandate rule, "issues actually decided on appeal—those within the scope of the judgment appealed from, minus those explicitly reserved or remanded by the court—are foreclosed from further consideration." *Amado v. Microsoft Corp.*, 517 F.3d 1353, 1360 (Fed. Cir. 2008) (cleaned up). And PrimeSource's "motion obligate[s]" us, after having "been reversed by a reviewing court, to weigh the likelihood that [we] might be later vindicated by [the Federal Circuit's] own reversal." *See In re A.F. Moore & Assocs., Inc.*, 974 F.3d 836, 841 (7th Cir. 2020). "That analysis is only a step removed from [our] declaring that [we were] right all along and entering the judgment just reversed—the most obvious violation of the mandate rule." *Id*. So the mandate rule precludes us from granting PrimeSource the injunctive relief that the Federal Circuit previously denied.

Quite apart from the mandate rule's prohibition of such relief, our own Rule 62 does not permit us to issue an injunction pending cer-

tiorari after a Federal Circuit judgment. Instead, the rule only authorizes injunctive relief "while an appeal is pending from an interlocutory order or final judgment" *of the CIT* "that grants, continues, modifies, refuses, dissolves, or refuses to dissolve or modify an injunction . . . ." USCIT R. 62(d). We know that this rule only applies to appeals from *CIT* judgments (rather than petitions for certiorari from Federal Circuit judgments) because of this sentence:

> If the judgment *appealed from* is rendered by a three-judge panel, the order must be made either: (1) by *that court* sitting in open session; or (2) by *the assent of all its judges*, as evidenced by their signatures.

Id. (emphasis added). The injunction pending appeal must be issued by the court rendering the judgment "appealed from." *Id*. Because PrimeSource seeks Supreme Court review of the *Federal Circuit's* judgment, Rule 62(d) does not apply here.

What applies here instead is the federal statute governing Supreme Court review, which provides in relevant part that

> [i]n any case in which the final judgment or decree of any court *is subject to review by the Supreme Court on writ of certiorari*, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court. *The stay may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court* . . . .

28 U.S.C. § 2101(f) (emphasis added). In this case, it is the judgment of the Federal Circuit—not *our* judgment—that "is subject to review by the Supreme Court on a writ of certiorari," and thus only the Federal Circuit or a justice of the Supreme Court may grant the relief that PrimeSource seeks.

We know that it is the Federal Circuit's judgment that is subject to certiorari review for § 2101(f) purposes because the Supreme Court's jurisdiction here extends only to that judgment. *See* 28 U.S.C. § 2101(c) ("[A]ny writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days *after the entry of such judgment or decree*.") (emphasis added); *see also* 28 U.S.C. § 1254 (providing for review of cases in the *courts of appeals* by writ of certiorari). Accordingly, PrimeSource's petition for certiorari forthrightly declares that the company "petitions for a writ of certiorari *to review the judgment of the U.S. Court of Appeals for the Federal*

Circuit." *PrimeSource Bldg. Prods., Inc. v. United States*, No. 23–69, Pet. for Cert. at 1 (U.S. July 21, 2023) (emphasis added).

Because the company seeks certiorari review of the Federal Circuit's judgment, we lack authority under 28 U.S.C. § 2101(f) to stay its effect, which an injunction against reliquidation would certainly do (and then some). *See In re Stumes*, 681 F.2d 524, 525 (8th Cir. 1982) (per curiam) ("It appears, therefore, that only a judge of this Court, or a justice of the Supreme Court, is empowered by 28 U.S.C. Section 2101(f) to stay the execution or enforcement of this Court's judgment."); *In re Time Warner Cable, Inc*., 470 F. App'x 389, 390 (5th Cir. 2012) (per curiam) ("Congress has only authorized the court of appeals or a Justice of the Supreme Court to stay the execution or enforcement of the court of appeals' judgment pending a petition for certiorari.").

Finally, even if we otherwise had authority to consider PrimeSource's injunction request, I would vote to deny it because the company has not demonstrated irreparable injury, an essential element of any request for such relief. As I recently explained at length, in all cases properly brought under our residual 28 U.S.C. § 1581(i) jurisdiction, the Administrative Procedure Act's waiver of sovereign immunity in 5 U.S.C. § 702 permits us to grant injunctive relief ordering reliquidation provided that ordinary equitable principles are satisfied. *See AM/NS Calvert LLC v. United States*, Slip Op. No. 23–129, at 21– 30, 2023 WL 5750865, at **8–11 (CIT Sept. 6, 2023).

PrimeSource, however, asserts that even under *Calvert*'s reasoning, re-liquidation "is subject to equitable principles that may not be appropriate in all circumstances and may be limited to claims under the [APA]." ECF 141, at 15. Taking these points in reverse order, APA § 702's waiver of sovereign immunity in actions seeking equitable relief is not limited to APA causes of action. *See Trudeau v. Fed. Trade Comm'n*, 456 F.3d 178, 186 (D.C. Cir. 2006) ("[T]he '*APA's waiver of sovereign immunity applies to any suit whether under the APA or not*.' There is nothing in the language of the second sentence of § 702 that restricts its waiver to suits brought under the APA. The sentence waives sovereign immunity for '[a]n action in a court of the United States seeking relief other than money damages,' not for an action brought under the APA.") (cleaned up and emphasis added) (quoting *Chamber of Com. v. Reich,* 74 F.3d 1322, 1328 (D.C. Cir. 1996), and 5 U.S.C. § 702).

That PrimeSource brings *non*-APA claims for equitable relief under our inherent authority against various officials based on the President's alleged ultra vires and unconstitutional conduct in issuing

Proclamation 9980[1] thus makes no difference as to the availability of reliquidation. As it is undisputed that PrimeSource properly invoked our residual jurisdiction, "no other statute *can* be 'addressed to the type of grievance' for which the [company] seeks relief." *Calvert*, Slip Op. No. 23–129, at 29, 2023 WL 5750865, at *11 (emphasis in original and quoting *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 216 (2012)).

APA § 702's waiver of sovereign immunity therefore applies. Should PrimeSource prevail in the Supreme Court as to its non-APA claims, we have authority under our inherent powers to make the company whole by ordering reliquidation if the company can satisfy ordinary equitable principles. *See* 28 U.S.C. §§ 2643(c)(1) (as relevant here, authorizing the CIT to "order any other form of relief that is appropriate in a civil action"), 1585 (stating that the CIT "shall possess all the powers in law *and equity* of, or as conferred by statute upon, a district court") (emphasis added).

Under those principles, injunctive relief would be available to Prime-Source if it demonstrated (1) that it would "suffer an irreparable injury absent reliquidation, i.e., loss of duties paid; (2) that [it] has no adequate remedy at law for that loss; (3) that, considering the balance of hardships between both sides, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *Calvert*, Slip Op. No. 23–129, at 36, 2023 WL 5750865, at *14 (citing *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006)).

In my view, it's inconceivable that PrimeSource would be unable to demonstrate those elements. After all, it unquestionably would suffer irreparable injury absent reliquidation (loss of its money) and would have no adequate remedy at law for the recovery of that loss. The balance of the hardships would lopsidedly favor the company, and it's impossible for me to see how the public interest could be served by the government's retention of money to which it has no legitimate claim. In short, although injunctive relief ordering reliquidation is not available *of right* in cases properly brought under our residual jurisdiction, as a practical matter it would (or at least should) always be awarded. Thus, should PrimeSource prevail in the Supreme Court, it has no reason to fear that reliquidation of its entries would be unavailable.

* * *

[1] *See PrimeSource Bldg. Prods., Inc. v. United States*, 497 F. Supp. 3d 1333, 1366 n.10 (CIT 2021) (Baker, J., concurring in part and dissenting in part) (explaining the analytical framework for non-APA claims brought against the President's subordinates based on the *President*'s alleged statutory violations and unconstitutional conduct); *see also id*. at 1364–65 (examining PrimeSource's various APA and non-APA claims).

We have no authority to enjoin the liquidation of PrimeSource's entries pending the company's petition to the Supreme Court for certiorari from the Federal Circuit's judgment. Even if we had such power, the company would not suffer irreparable injury from liquidation in the meantime due to our ability to later order reliquidation if the *eBay* requirements were satisfied, which they doubtless would be. I therefore concur in denying the so-called motion to stay.

Index

Customs Bulletin and Decisions
Vol. 57, No. 41, November 8, 2023

U.S. Customs and Border Protection
CBP Decisions

General Notices

U.S. Court of International Trade
Slip Opinions

U.S. G.P.O.: 2023—427-373/30047