

U.S. Customs and Border Protection



8 CFR PARTS 251 AND 258

19 CFR PART 4

CBP DEC. NO. 21-19

RIN 1651-AB18

AUTOMATION OF CBP FORM I-418 FOR VESSELS

AGENCY: U.S. Customs and Border Protection, DHS.

ACTION: Interim final rule; solicitation of comments.

SUMMARY: This rule amends the regulations in title 8 and title 19 of the Code of Federal Regulations (CFR) regarding the submission of U.S. Customs and Border Protection (CBP) Form I-418, Passenger List—Crew List (Form I-418) in paper form. Currently, the master or agent of every commercial vessel arriving in the United States, with limited exceptions, must submit Form I-418, along with certain information regarding longshore work, in paper form to CBP at the port where immigration inspection is performed. Most commercial vessel operators are also required to submit a paper Form I-418 to CBP at the final U.S. port prior to departing for a foreign place. DHS is modifying the applicable regulations to provide for the electronic submission of Form I-418. Under this rule, vessel operators will be required to electronically submit the data elements on Form I-418 to CBP through an electronic data interchange system (EDI) approved by CBP in lieu of submitting a paper form. This will streamline vessel arrival and departure processes by providing for the electronic submission of the information collected on the Form I-418, eliminating redundant data submissions, simplifying vessel inspections, and automating recordkeeping.

DATES:

Effective date: This rule is effective February 28, 2022.

Comments due date: Comments must be received on or before February 28, 2022.

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

• *Federal eRulemaking Portal*: <http://www.regulations.gov>. Follow the instructions for submitting comments via docket number US-CBP-2021-0046.

Due to COVID-19-related restrictions, CBP has temporarily suspended its ability to receive public comments by mail.

Instructions: All submissions received must include the agency name and docket number for this rulemaking. All comments received will be posted without change to <http://www.regulations.gov>, including any personal information provided. For detailed instructions on submitting comments and additional information on the rulemaking 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 <http://www.regulations.gov>. Due to relevant COVID-19-related restrictions, CBP has temporarily suspended on-site public inspection of submitted comments.

FOR FURTHER INFORMATION CONTACT: For title 8 of the Code of Federal Regulations inquiries, contact Stephen Dearborn, Enforcement Programs Division, Admissibility and Passenger Programs, Office of Field Operations, Stephen.M.Dearborn@cbp.dhs.gov or (202) 344-1707; for title 19 of the Code of Federal Regulations inquiries, contact Brian Sale, Manifest and Security Division, Cargo and Conveyance Security, Office of Field Operations, Brian.A.Sale@cbp.dhs.gov or (202) 325-3338.

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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. The Department of Homeland Security (DHS) and U.S. Customs and Border Protection (CBP) invite comments that relate to the economic, environmental, or federalism effects that might result from this interim final rule. Comments that will provide the most assistance to CBP will reference a specific portion of the interim final rule, explain the reason for any recommended change, and include data, information, or authority that support such recommended change.

II. Background

A. Overview

As discussed in detail below, current regulations require commercial vessels and their operators¹ to meet several data submission requirements when arriving in the United States from a foreign place or outlying possession of the United States and when departing the United States for a foreign place or outlying possession of the United States. Both CBP and the U.S. Coast Guard (USCG) collect information in these contexts, and many of the data elements that the two agencies collect overlap. Some of this data must be submitted electronically, while some of it must be submitted on paper, such as the Form I-418, Passenger List—Crew List. *See* section 251.5 of title 8 of the Code of Federal Regulations (8 CFR 251.5). Through this rule, CBP is streamlining the vessel arrival and departure processes by eliminating redundant data submissions, providing for the electronic submission of the information collected on the Form I-418, simplifying vessel inspections, and automating recordkeeping for the Form I-418.

¹ For the purposes of this document, vessel “operators” include masters or commanding officers, or authorized agents, owners, or consignees.

The USCG requires commercial vessel operators to submit a Notice of Arrival (NOA) to the National Vessel Movement Center (NVMC)² through its electronic Notice of Arrival/Departure (eNOA/D) system or via email in advance of U.S. arrival.³ *See* 33 CFR 160.201–216. In addition to other data elements, each NOA must include information on the crew and passengers on board the vessel. *See* 33 CFR 160.206(a). Upon satisfactory submission, USCG processes the information via the eNOA/D web portal and then the system automatically transmits it to CBP as an Advance Passenger Information System (APIS) manifest. An APIS manifest is a CBP pre-arrival requirement. *See* 8 CFR 231.1(a) and 19 CFR 4.7b.

In addition to the APIS manifest data, which must be submitted electronically to CBP prior to arrival, DHS regulations require the master or agent of every vessel arriving in the United States from a foreign place or outlying possession of the United States, with the exception of certain vessels in the Great Lakes, to present a manifest of all crewmen onboard, on a Form I–418, to CBP at the port of entry where immigration inspection is performed.^{4 5} *See* 8 CFR 251.1(a)(1). Manifest information collected on the Form I–418 includes details about the passengers and crewmen on board the vessel and whether any of the crewmen will be performing longshore work at any U.S. port before the vessel departs from the United States. *See* 8 CFR 251.1. If longshore work is to be performed, Form I–418 requires the vessel operator to note which exception of the Immigration and Nationality Act permits the work. *See* 8 CFR 251.1(a)(2)(ii) and 258.2.

If manifest information changes after the initial submission, the vessel operator must update the APIS manifest electronically through the eNOA/D system. *See* 19 CFR 4.7b(b)(2)(ii). Additionally, a CBP officer at the coastwise port generally updates the vessel's original paper Form I–418 to reflect any changes.

Upon departure from the United States, USCG collects updated manifest information from commercial vessel operators via a Notice of Departure (NOD) submitted to the NVMC through eNOA/D or

² The NVMC was established by USCG in 2001 to operate as a single clearinghouse for the submission and processing of notice of arrival and departure information for vessels entering and departing U.S. ports and facilities.

³ When a vessel operator is in an area without internet access or experiences technical difficulties, and he or she has no shore-side support available, the vessel operator may fax or phone the submission to the NVMC. *See* 33 CFR 160.210(a).

⁴ For more information on the exemptions for certain Great Lakes vessels, *see* 8 CFR 251.1(a)(3).

⁵ Due to the high volume of crew and passengers on cruise ships, cruise ship operators generally submit the two signature pages of the Form I–418 on paper along with a compact disc containing their passenger and crew manifest details.

another electronic format. *See* 33 CFR 160.201–216. Also at the time of departure, CBP requires vessel operators to update their original paper Form I–418 submission to include a list of departing crew, crew changes, and trip departure details.⁶ *See* 8 CFR 251.3. A CBP officer at the port of departure typically verifies any changes to the Form I–418 information and sends the updated form to the vessel’s first port of arrival for final data reconciliation and recordkeeping purposes.

Despite similarities in the vessel arrival and departure data submitted in accordance with the Form I–418, APIS, and USCG requirements, data transmitted electronically, such as through eNOA/D, does not satisfy the current Form I–418 regulatory requirements, which state that Form I–418 must be submitted in paper format. *See* 8 CFR 251.5. As described in depth below, these overlapping submission requirements create a substantial burden on vessel operators, and the maintenance, verification, and storage of the paper Form I–418 is a significant burden on CBP officers and the agency as a whole.

To reduce redundant data submissions and to ease burdens on vessel operators and the agency itself, CBP is modifying its regulations to allow for the electronic submission of Form I–418 only. The updated regulations require vessel operators to submit the data elements required on Form I–418 electronically via an electronic data interchange system (EDI) approved by CBP. Presently, the CBP-approved EDI is eNOA/D. Data submitted via eNOA/D will be automatically transmitted to CBP, which will use the information to populate an electronic version of the Form I–418.⁷ The information currently collected through eNOA/D will satisfy the required data elements for populating the electronic version of the Form I–418 for CBP’s purposes. The act of electronically submitting the data elements required on Form I–418 constitutes the Master’s certification that CBP baggage declaration requirements have been made known to incoming passengers; that any required CBP baggage declarations have been or will simultaneously be filed as required by law and regulation with the proper CBP officer; that the responsibilities of the vessel operator have been or will be done as required by law or regulation before the proper CBP officer; and that there are no steerage passengers on board the vessel. As explained further below, CBP will no longer collect the vessel operator’s signature for the Master’s

⁶ Certain Great Lakes vessels are also exempt from this requirement. *See* 8 CFR 251.3(b).

⁷ The embark date required on Form I–418 is transmitted to CBP via eNOA/D. The disembark date/date separated (*i.e.*, the date when a crewmember permanently departs the vessel) is calculated by CBP. This rule does not change this practice.

certification during inspection. The electronically submitted information will then be reviewed and confirmed by the inspecting CBP officer. This rule will streamline vessel arrival and departure processes by eliminating redundant data submissions, simplifying vessel inspections, and automating recordkeeping. Any changes regarding the CBP-approved EDI will be announced in a notice published in the **Federal Register**.

B. Current Commercial Vessel Arrival and Departure Process

Commercial vessels arriving at and departing from U.S. ports of entry must comply with statutory and regulatory requirements to engage in U.S. trade.⁸ Commercial vessels, regardless of whether they are cargo, non-cargo,⁹ or cruise ships, traveling to a U.S. port of entry from a foreign port or place must begin their trip by submitting certain manifest information electronically to USCG and CBP prior to arrival. Once at a U.S. port of entry, commercial vessels must submit additional information and undergo customs and immigration inspections and processing. These arrival requirements vary by commercial vessel type and slightly differ by port of entry.

1. Cargo and Non-Cargo Vessels

In general, upon a cargo or non-cargo vessel's arrival, CBP officers at the port of entry travel to the vessel's docking station and board it. Next, CBP requests and reviews the vessel's entry and manifest documentation, along with passenger and crew passports and visas. For manifest verification, the vessel's operator or agent typically submits two copies of the vessel's passenger and crew manifest using Form I-418 to the CBP officers aboard the vessel. CBP uses the paper Form I-418 for crew and passenger admissibility inspections and processing.

During the admissibility inspection process, a CBP officer verifies the actual crew and passengers on hand and those departing the vessel using a copy of the paper Form I-418, the previously submitted APIS manifest, pre-arrival screening results, and passports and visas. Barring any unresolvable issues, the CBP officer annotates the inspection results, including any discrepancies, on the paper Form I-418 submissions. The CBP officer collects the vessel operator's signature on the form and signs and stamps the documents. The CBP officer then provides one copy of the signed, stamped, and annotated

⁸ The regulatory requirements concerning how and when a vessel operator must submit an I-418 are contained in parts 251 and 258 of title 8 of the Code of Federal Regulations, and in part 4 of title 19 of the Code of Federal Regulations.

⁹ For the purposes of this document, non-cargo commercial vessels include all commercial vessels other than cargo ships and cruise ships. Tugboats fall under this classification.

Form I-418 to the vessel operator to use during coastwise travel and upon departure from the United States. The CBP officer at the first port of arrival retains the other copy of the original signed, stamped, and annotated Form I-418 for subsequent data reconciliation and recordkeeping purposes.

After the admissibility inspections and processing are complete, the CBP officers disembark the vessel, travel back to their port office, manually record the results of their inspections and related actions into CBP data systems, and send applicable Form I-418 supporting documentation, to the next port of arrival.

Once granted entry, the vessel may engage in further coastwise travel within the territorial waters of the United States or depart the United States. If manifest information changes after initial submission, the vessel operator must update the APIS manifest electronically through the eNOA/D system. The vessel operator must also present the initial signed, stamped, and annotated Form I-418 copy to a CBP officer when requested at a coastwise port of arrival.¹⁰ The CBP officers at these subsequent ports of arrival update the Form I-418 to reflect any manifest changes, verify new supporting documentation if applicable, take admissibility actions as necessary, and provide the updated Form I-418 to the vessel operator for further U.S. travel and ultimate departure. The CBP officers at each coastwise port send a copy of the updated Form I-418 to the vessel's first port of arrival for data reconciliation and recordkeeping purposes.

Upon departure from the United States, USCG requires commercial vessel operators to submit a NOD to NVMC through eNOA/D or another electronic format. CBP requires these vessel operators to update their APIS manifest electronically through the eNOA/D system; update their paper Form I-418 to include a list of departing crew, crew changes, and trip departure details; and submit the paper Form I-418 to CBP. A CBP officer at the port of departure verifies any additional modifications to the form information and sends the completed Form I-418 and supporting documentation to the vessel's first port of arrival. There, a CBP officer manually reconciles the original Form I-418 retained during the initial arrival inspection with the subsequently updated versions of the form and related documentation.

CBP officers spend considerable time vetting pre-arrival data, traveling to/from a vessel, boarding/disembarking the ship, and conducting admissibility inspections and processing. In addition, CBP officers

¹⁰ Per sections 235 and 252 of the Immigration and Nationality Act, CBP may board and inspect vessels at subsequent coastwise ports of arrival. *See* 8 U.S.C. 1225(d); *See also* 8 U.S.C. 1282.

typically spend 120 minutes (2 hours) performing post-inspection processing for each vessel's paper Form I-418 submission from arrival to departure.¹¹ This includes the time CBP spends manually recording form information and actions into CBP systems, communicating between ports of arrival and departure, manually validating and reconciling data, gathering and sending supporting documentation, physically storing and shipping the manifest package, and tracking the manifest package.

2. Cruise Ships

Cruise ships follow slightly different procedures from cargo and non-cargo vessels upon arriving at a U.S. port of entry. At their first port of arrival, cruise ship crewmembers and passengers generally offload the ship at a designated terminal, where CBP officers are stationed and readily available to conduct customs and immigration inspections and processing. Under the standard arrival process, the cruise ship operator generally provides two copies of Form I-418's complete passenger and crew manifest with all printed pages.¹² Cruise ship operators arriving at some POEs submit just two copies of the two signature pages of the paper Form I-418 and a compact disc of the manifest in lieu of submitting numerous pages of paper to CBP.

During the standard admissibility inspection process, a CBP officer validates and verifies the cruise ship's actual crew and passengers on hand and those departing the vessel generally using the Form I-418, the previously submitted APIS manifest, pre-arrival screening results, and passports and visas. Any inspection results and admission/landing rights from such processing are directly recorded into CBP data systems. During cruise ship crew and passenger processing, the CBP officer also collects the vessel operator's signature on the form copies, signs and stamps the documents. The CBP officer then provides one copy of the signed and stamped Form I-418 or signature pages for the vessel operator to retain and use in coastwise travel and upon departure from the United States. The CBP officer at the first port of arrival retains the other copy of the signed, stamped, and annotated Form I-418 or signature pages for subsequent data reconciliation and recordkeeping purposes.

Once granted entry, the cruise ship may engage in further coastwise travel or depart the United States. If manifest information

¹¹ Source: Correspondence with CBP's Office of Field Operations on November 6, 2020.

¹² An unknown number of cargo and non-cargo vessel operators and cruise ship operators arriving/departing at some POEs may provide additional copies of the Form I-418 to CBP during each standard arrival/departure. Source: Email correspondence with CBP's Office of Field Operations on November 18, 2020.

changes during coastwise movement, the vessel operator must update the APIS manifest electronically through the eNOA/D system. The vessel operator must also present the initial signed, stamped, and annotated Form I-418 signature pages to a CBP officer at each coastwise port of arrival upon request. The CBP officers at these subsequent ports of arrival review the Form I-418 or signature pages and update CBP data systems to reflect any manifest changes, verify new, applicable supporting documentation, take admissibility actions as necessary, and provide the Form I-418 or signature pages to the vessel operator for further U.S. travel.

As discussed above, upon departure from the United States, USCG requires commercial vessel operators to submit a NOD to the NVMC through eNOA/D or another electronic format. CBP requires these vessel operators to update their APIS manifest electronically through an approved system (currently, the eNOA/D system) and submit the two signature pages of the signed and stamped Form I-418 to CBP. *See* 8 CFR 251.3. A CBP officer at the port of departure verifies any additional modifications to the form information and sends the completed Form I-418 signature page and supporting documentation to the vessel's first port of arrival. There, a CBP officer manually reconciles the original Form I-418 signature page, supporting documentation, and manifest compact disc with the subsequently updated versions of the form and related documentation.

In addition to time spent vetting pre-arrival data and conducting admissibility inspections and processing, CBP officers spend an average of 20 minutes (0.333 hours) performing post-inspection processing for each cruise ship's Form I-418 submission from arrival to departure.¹³ This includes the time CBP spends manually validating and reconciling data, gathering supporting documentation, communicating between ports of arrival and departure (when necessary), physically storing and shipping the manifest package, and tracking the manifest package (when necessary).

3. Additional Form I-418 Requirements for Vessels Under Title 19 CFR

Part 4 of title 19 of the CFR provides additional requirements as to when and how a vessel operator must submit Form I-418. Under 19 CFR 4.7(a), the master of every vessel arriving in the United States and required to make entry must have on board a manifest that includes Form I-418. In some instances, a vessel operator may submit a Form I-418 in lieu of the Crew's Effects Declaration, CBP Form

¹³ Source: Email correspondence with CBP's Office of Field Operations on June 2, 2020.

1304, with supporting documentation. *See* 19 CFR 4.7(a), 4.7a(b)(2), and 4.81(d). However, when given the option, most vessel operators submit CBP Form 1304 instead of Form I-418 with additional supporting documentation, such as individual CBP Forms 5129, Crew Member's Declaration.

C. Form I-418 Automation Test Program

Recognizing the need to reduce redundant data collection and implement a seamless process to receive and use vessel arrival and departure information under various regulations, CBP developed a voluntary Form I-418 automation test program. The program tested CBP's ability to gather and reconcile information submitted for eNOA/D, APIS, and other electronic purposes for use in generating an automated, electronic Form I-418. CBP implemented this test in two phases as described below. The test varied somewhat across participating ports. Although the automated test program is still in operation at many ports of entry, the test program will be replaced by the regulatory program addressed in this rule.

CBP launched the first phase of the voluntary automation test program at four ports of entry in January 2011. The first phase allowed CBP officers and ports to evaluate the submission of Form I-418 data in both electronic and paper format to verify the similarity of information captured and identify any anomalies in the methods used. Moreover, it allowed CBP officers to rely solely on electronic manifest data submissions to build a vessel's departure manifest, thus eliminating the need for vessel operators to submit the departure manifest in paper format.

By June 2011, CBP implemented the second and final phase of the voluntary test program, which fully transitioned the submission of Form I-418 data to an automated, paperless process for certain commercial vessel operators. In place of submitting the required I-418 information on the paper Form I-418, vessel operators participating in the I-418 Automation test program could transmit this data through eNOA/D and APIS data submissions. Under the automation test, CBP systems automatically compiled eNOA/D, APIS, and any other electronic manifest data submitted electronically by test participants prior to arrival and at departure into a pre-populated electronic Form I-418. Upon a participating cargo or non-cargo vessel's arrival, CBP largely pre-vetted the electronic Form I-418 and printed out a paper copy of the form for customs and immigration inspection and processing purposes.

As with current arrival requirements for cargo and non-cargo commercial vessels, a CBP officer then boarded the vessel, conducted

inspections, annotated the admissibility inspection results on the paper Form I-418, collected the vessel operator's signature on the form, and signed and stamped the document. Before disembarking the vessel, the CBP officer had the vessel operator make a copy of the signed, stamped, and annotated paper Form I-418 for further coastwise travel and departure. The CBP officer then returned to the port office to manually record the inspection results and related actions annotated on the original Form I-418 into CBP data systems.

For cruise ships participating in the I-418 Automation test program, CBP generally pre-vetted the electronic Form I-418, printed out a paper copy of the Form I-418's two signature pages, and conducted passenger and crew processing like the standard process at a terminal. Instead of requiring the submission of a full paper Form I-418 or manifest CDs, CBP officers largely conducted arrival inspections and processing electronically at the terminal. CBP officers also used the two paper Form I-418 signature pages to collect the vessel operator's signature and to sign and stamp the pages to generally meet existing paper Form I-418 retention requirements.

Before departing for their next port of call, test participants could transmit any manifest changes subsequent to the initial inspection at the port of arrival via the eNOA/D system. These changes included, but were not limited to, the sign-on or sign-off of crewmembers. As under the standard commercial vessel arrival/departure process, a CBP officer at the next port of call verified that the information submitted met the vessel's regulatory requirements. Upon departure from the United States, a CBP officer at the port of departure performed an electronic reconciliation of the vessel's arrival, coastwise, and departure manifest data and addressed any discrepancies. Then, the officer sent all paper documentation, typically via fax, to the first port of arrival.

In 2015, CBP migrated to mobile devices that allowed CBP officers to electronically conduct Form I-418 processing for cargo and non-cargo vessel arrivals (including I-418 Automation test program participants and non-participants) at different ports of entry, thereby removing the need to print off a paper Form I-418. With these devices, CBP officers directly recorded the inspection results and related actions into CBP data systems at the time of inspection and processing. In 2016, CBP successfully deployed its preexisting electronic signature (hereafter, "e-signature") capability through its mobile devices at five major sea ports of entry. This tool allowed for the electronic collection of vessel operator and CBP officer signatures on the Form I-418, which removed the need to print off a copy of the Form I-418 and have the vessel operator sign it. Despite these streamlined

electronic processing methods, CBP continued to also record vessel inspection results and signatures on the paper form and physically stamp the form to meet the regulatory requirements in place regarding the submission and retention of paper Form I-418.

Most U.S. ports of entry along with approximately 15 percent of cargo and non-cargo vessels and 56 percent of cruise ships are fully or partially participating in the above-described voluntary automation test program, including electronic submissions and e-signature capabilities.¹⁴

D. Form I-418 Automation Regulatory Program

CBP is amending its regulations to require the electronic submission of the data elements required on Form I-418 in lieu of its current paper form. This will streamline vessel arrival and departure processes by eliminating redundant data submissions, simplifying vessel inspections, and automating recordkeeping. The updated regulations will require vessel operators to electronically submit the data elements required on the Form I-418 via an EDI approved by CBP. CBP will continue to use the eNOA/D system as the approved EDI. Under this process, CBP systems will compile eNOA/D, APIS, and any other electronic manifest data submitted by vessel operators to the NVMC prior to arrival and at departure into an automated CBP system. CBP will use its system for all commercial vessel crew and passenger admissibility inspections and processing, and thus generally establish a fully paperless passenger and crew list process for all commercial vessel arrivals and departures. Any changes to the CBP-approved EDI will be announced in a notice published in the **Federal Register**.

With this automated system, for each commercial vessel arrival from a foreign port or place, CBP will be able to pre-vet the vessel's electronic passenger and crew list, travel to/from and board/disembark the vessel (for cargo and non-cargo vessels only), conduct inspections, and record the admissibility inspection results and related actions in real time using a mobile device or computer station (for the majority of cruise ships).¹⁵ During arrivals/departures processed with mobile devices, CBP officers will directly record the inspection results and related actions into CBP data systems at the time of inspection and processing, eliminating the need for CBP officers to manually input the inspection results and related actions into CBP data systems later at the port office. CBP will also use the

¹⁴ Based on fiscal year (FY) 2019 data.

¹⁵ CBP processes the majority of cruise ship arrivals at terminals using computer stations; however, CBP now processes some cruise ship arrivals using mobile devices.

mobile devices to verify the electronically submitted data during the inspection process. The inspecting CBP officer will no longer collect the vessel operator's signature for the Master's certification, as now the act of submitting the data electronically will constitute certification. Once the passenger and crew list is verified electronically by the inspecting CBP officer, CBP will generate and transmit a read-only copy of the electronic Form I-418, only upon request, with an electronic CBP receipt number, by email to the vessel operator for use during coastwise movement or upon departure from the United States. The verified electronic passenger and crew list will also be converted to a writeable file and stored in CBP data systems.

As in the automation test program, before departing for their next port of call, vessel operators will be able to transmit any manifest changes subsequent to the vessel's inspection at the first port of arrival via the NVMC. A CBP officer at the next port of arrival will verify these changes and record all updates, inspection results, and related actions in real time in the CBP system using a mobile device or computer station. The CBP officer will then save the updated electronic passenger and crew list in CBP data systems, and email a read-only copy to the vessel operator, if requested. Upon departure from the United States, a CBP officer at the port of departure will verify the vessel's arrival, coastwise, and departure manifest data, which CBP data systems will reconcile automatically, and address any discrepancies. Thereafter, the CBP officer will save the completed electronic passenger and crew lists in CBP data systems, where it will be stored electronically for at least five years. In the limited instances where a paper Form I-418 is submitted, CBP will continue its current process of collecting, verifying, and physically storing all paper Form I-418 supporting documentation.

E. Discussion of Regulatory Changes

DHS is amending parts 251 and 258 of title 8 of the CFR, as well as part 4 of title 19 of the CFR, as set forth below, to automate Form I-418 and, in some provisions, eliminate the option to submit the Form I-418 in lieu of other required forms in order to reflect current trade practices and improve efficiency in data submission. The amendments also update the regulations to incorporate "plain language" consistent with Executive Order 13563, "Improving Regulation and Regulatory Review" (76 FR 3821).

1. 8 CFR Part 251

Section 251.1 addresses "Arrival manifests and lists" in the immigration context. Section 251.1(a) sets out the requirements for arrival

manifests and lists for vessels. Specifically, this section requires the master or agent of every vessel to submit a paper Form I-418 to CBP at the port where immigration inspection is performed and that the master or agent provide certain information regarding longshore work. This section is being amended to reflect the new procedure through which the information requested on Form I-418 and about longshore work is submitted electronically through an EDI approved by CBP. Conforming amendments are being made throughout this section to accommodate the new submission process. For instance, where the regulations state that the master or agent must “note on” the manifest certain information about longshore work, the regulations are being amended to state that this information must now be “indicate[d] in” the manifest, because such additional information and annotations will generally no longer be collected on a hard copy, but will be done through an electronic interface.

Section 251.1(a) is also being amended to include two exceptions to the new general rule that I-418 and longshore work data be submitted electronically. The first exception is where the master or agent of the vessel is unable to electronically submit the data elements required on Form I-418 via an electronic data interchange system approved by CBP due to technical issues, such as when the onboard computer system is malfunctioning, or there is no internet access, and there is no shore-side support available. The second is where CBP is experiencing technical difficulties affecting its receipt or processing of electronically submitted information, or where CBP, in its discretion, determines that a paper Form I-418 is acceptable under the circumstances presented by the master or agent of a vessel. The latter includes, but is not limited to, where there is a medical or weather emergency, or, in the case of longshore work, when information and relevant data cannot be submitted through the eNOA/D system due to its format.

Lastly, additional minor amendments are being made to section 251.1 to incorporate “plain language” including replacing the word “shall” with either “must” or “will”, as appropriate.

Section 251.3 addresses “Departure manifests and lists for vessels” in the immigration context. Specifically, this section requires the master or agent of every vessel to submit a paper Form I-418 to CBP at the port from which the vessel is to depart directly to some foreign place or outlying possession of the United States. This section is being amended to reflect the new procedure through which the information requested on the Form I-418 is submitted electronically through an EDI approved by CBP.

Section 251.3 is also being amended to include two exceptions to the new general rule that I-418 data be submitted electronically. The first is where the master or agent of the vessel is unable to electronically submit the data elements required on Form I-418 via an electronic data interchange system approved by CBP due to technical issues, such as when an onboard computer system is malfunctioning. The second exception allows for a paper Form I-418 to be submitted when CBP is experiencing technical issues or where CBP, in its discretion, determines that a paper Form I-418 is acceptable under the circumstances presented by the master or agent of a vessel.

Section 251.5 requires the master or commanding officer, or authorized agent, owner, or consignee, of a commercial vessel or commercial aircraft arriving in or departing from the United States to submit arrival and departure manifests in a paper format in accordance with §§ 251.1, 251.3, and 251.4. This section is being amended to remove references to paper, as this information will now be submitted electronically in the vessel context.

2. 8 CFR Part 258

Section 258.2 requires masters and agents who use nonimmigrant crewmen to perform longshore work under one of the exceptions listed in the section, to indicate on the crew manifest that an exception is being used and to note which exception will be performed. Among other things, it sets forth the documentation that must be presented. This section is being amended to reflect the new procedure through which the information requested on the Form I-418 is submitted electronically through an EDI approved by CBP. This rule does not make changes to any of the other documentation requirements in section 258.2. Additional minor amendments are being made to section 258.2, such as replacing the term “shall” with “must.” The term “Immigration and Naturalization Service” is also being updated and replaced with “CBP.”

3. 19 CFR Part 4

Section 4.7 concerns “Inward foreign manifest; production on demand; contents and form; advance filing of cargo declaration.” Pursuant to section 4.7(a), a paper Form I-418 is a required document for the manifest. This section is being amended to reflect the new electronic submission of the data elements required on Form I-418. Section 4.7(a) is being amended to require vessel operators to submit the data elements required on Form I-418 via the EDI approved by CBP, and to provide that the electronic submission will be considered part of the manifest required under this section.

Section 4.7a addresses “Inward manifest; information required; alternative forms.” Pursuant to Section 4.7a(b)(2), the master of a vessel may, in lieu of describing the articles on CBP Form 1304, furnish a CBP Form I-418. However, submitting CBP Form I-418 with the required CBP Form 5129 instead of CBP Form 1304 generally takes more time for the trade community to complete and takes more time for CBP to review and process the forms, as well as providing redundant information contained in other required forms. Therefore, to reflect current trade practices and improve data submission efficiency, this section is being amended to remove the option of filing a paper Form I-418 instead of CBP Form 1304. Conforming edits are also being made to section 4.7(a), for the same reason.

Sections 4.7a(d) and (e) are being amended to incorporate the information submission requirements contained in section 4.7b concerning the APIS data. Section 4.7a(e) is being amended to remove the certification requirements. Currently, the regulation requires a paper form certification to be attached to Form I-418. In light of the automation of CBP Form I-418, it will be impractical to require a paper form certification. Under this rule, vessel operators will be required to submit the data elements required on CBP Form I-418 via an electronic data interchange system approved by CBP. The regulation specifies that the act of electronically submitting the data will serve as the Master’s certification, as described further in this preamble’s discussion of the amendments to section 4.50.

Section 4.50 concerns the passenger lists that the master of every vessel arriving at a U.S. port from a foreign port or place must submit. Specifically, section 4.50(a) requires the master of the vessel to submit Form I-418 if the vessel is arriving from a noncontiguous foreign territory and is carrying steerage passengers. Section 4.50(a) is being amended to reflect the new procedure for submitting the data elements of Form I-418 through an EDI approved by CBP, including reference to the required information required under section 4.7b(b)(3) for such passengers. Section 4.50 is also being amended to include a new paragraph (c) that will replace the paper form certification requirement in section 4.7a(e). New subsection 4.50(c), provides that by the act of submitting the data elements required on CBP Form I-418 via an electronic data interchange system approved by CBP, the vessel operator certifies that CBP baggage declaration requirements have been made known to incoming passengers; that any required CBP baggage declarations have been or will simultaneously be filed as required by law and regulation with the proper CBP officer; that the responsibilities of the vessel operator have been or will be

done as required by law or regulation before the proper CBP officer; and that there are no steerage passengers on board the vessel.

Section 4.81 addresses “Reports of arrivals and departures in coast-wise trade.” Section 4.81(d) provides the master of the vessel with an option of either submitting the traveling Crew’s Effects Declaration, Customs Form 1304, or Form I–418 with attached Customs Form 5129, with the port director upon arrival at each port in the United States. Like the amendment to remove the option to submit Form I–418 in section 4.7a, this section is being amended to remove the option of filing a Form I–418 instead of CBP Form 1304 to reflect current trade practices and improve data submission and efficiency.

Section 4.91 concerns the diversion of a vessel and the transshipment of cargo. Section 4.91(c) requires that when inward foreign cargo or passengers are transshipped to another vessel under customs supervision, a separate traveling manifest must be used for the transshipped cargo or passengers. Section 4.91(c) provides the master of the vessel with the option of submitting either a Cargo Declaration, CBP Form 1302, or Form I–418. This section is being amended to reflect the new procedure for submitting the data elements of Form I–418 through an EDI approved by CBP.

III. Statutory and Regulatory Requirements

A. Administrative Procedure Act

The Administrative Procedure Act (APA) generally requires agencies to publish a notice of proposed rulemaking in the **Federal Register** (5 U.S.C. 553(b)) and provide interested persons the opportunity to submit comments (5 U.S.C. 553(c)). However, the APA provides an exception to this prior notice and comment requirement for “rules of agency organization, procedure, or practice” 5 U.S.C. 553(b)(A). This interim final rule is a procedural rule promulgated for efficiency purposes that falls within this exception.

This rule is procedural because it merely automates an existing reporting requirement for vessel masters or agents pursuant to existing statutes and regulations. *See* 8 U.S.C. 1103, 1182, 1221, 1281, 1282; 8 CFR part 2; 19 U.S.C. 66, 1431, 1433, 1434, 1624, 2071 note; and 19 CFR part 4. The rule changes the format in which vessel masters or agents must present required information to CBP. Under the amended regulations, vessel masters or agents will no longer be required to complete and submit the paper Form I–418. Instead, all required information must be submitted to CBP electronically through the electronic data interchange system approved by CBP, which has been the practice for most vessel masters and agents by submitting the information through eNOA/D. This rule neither af-

fects the substantive criteria by which CBP officers inspect vessels upon arrival or departure nor the nature of the information required by CBP.

Although this procedural rule is exempt from prior notice and comments procedures, DHS is providing the public with the opportunity to comment without delaying implementation of this rule. DHS will respond to the comments received when it issues a final rule.

B. Executive Order 13563 (Improving Regulation and Regulatory Review) and Executive Order 12866 (Regulatory Planning and Review)

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

The Office of Management and Budget (OMB) has designated this rule a “significant regulatory action,” although not economically significant, under section 3(f) of Executive Order 12866. Accordingly, the rule has been reviewed by OMB. CBP has also prepared a regulatory impact assessment to help inform stakeholders of the impacts of this rule, which CBP has summarized below. The complete standalone analysis can be found in the public docket for this rulemaking at <http://www.regulations.gov>. The standalone analysis also focuses on the costs and benefits experienced during the I-418 Automation test program period (FY 2011 through FY 2020).

1. Executive Summary

Through the Automation of CBP Form I-418 for Vessels Interim Final Rule, CBP will amend its regulations under 8 CFR part 251, 8 CFR part 258, and 19 CFR part 4 to require the electronic submission of the data elements required from vessel operators on Form I-418 in lieu of paper form submissions. CBP will no longer require the paper Form I-418. The updated regulations will require vessel operators to electronically submit the data elements required on the Form I-418 via an EDI approved by CBP. CBP will continue to use USCG’s eNOA/D system as the approved EDI. Under this process, CBP systems will compile eNOA/D and other electronic manifest data submitted by vessel operators prior to arrival and at departure into a

passenger and crew list format reflective of an electronic Form I-418.¹⁶ The act of electronically submitting the data elements required on Form I-418 will also constitute the (vessel) Master's certification that the manifest information is accurate,¹⁷ and eliminate the current need to generally collect Form I-418's vessel master (or operator) and CBP officer signatures for certification.¹⁸ CBP will also retain its authority to require paper Form I-418 submissions in the event of certain technical difficulties, such as system outages and disruptions, that make it impossible to submit or receive manifest data electronically, and according to CBP discretion.¹⁹ This rule will streamline vessel arrival and departure processes by eliminating redundant data submissions, simplifying vessel inspections, and automating recordkeeping.

CBP is currently operating an I-418 Automation test program, which serves as the basis for the regulatory program. The impact of the I-418 Automation regulatory program will slightly differ from the I-418 Automation test program due to its complete paper Form I-418 automation, eased administrative burdens, and elimination of signatures and paper processing. With its transition to a fully automated, electronic passenger and crew list (*i.e.*, Form I-418) process, the I-418 Automation regulatory program will discontinue the test program. Under the regulatory program, CBP systems will automatically reconcile eNOA/D and other manifest data submitted electronically by vessel operators prior to arrival and at departure into a passenger and crew list format reflective of an electronic Form I-418. This transition will affect commercial vessel operators and CBP.

¹⁶ The embark date required on Form I-418 is transmitted to CBP via eNOA/D. The disembark date/date separated (*i.e.*, the date when a crewmember permanently departs the vessel) is calculated by CBP systems. This rule does not change this practice.

¹⁷ This includes certifying that certification that CBP baggage declaration requirements have been made known to incoming passengers; that any required CBP baggage declarations have been or will simultaneously be filed as required by law and regulation with the proper CBP officer; that the responsibilities of the vessel operator have been or will be done as required by law or regulation before the proper CBP officer; and that there are no steerage passengers on board the vessel.

¹⁸ CBP officer signatures are generally dictated on the form as a unique receipt number tied to the officer. For the purposes of this analysis, CBP refers to these receipt numbers as signatures.

¹⁹ The Automation of CBP Form I-418 for Vessels Interim Final Rule describes particular exceptions to the electronic submission requirement. In particular, CBP will also retain its authority to require paper submissions in the event the master or agent of the vessel is unable to electronically submit the data elements required on Form I-418 via an electronic data interchange system approved by CBP due to technical issues, such as when the onboard computer system is malfunctioning or there is no internet access, and there is no shoreside support available; CBP is experiencing technical difficulties affecting its receipt or processing of electronically submitted information; or where CBP, in its discretion, determines that a paper Form I-418 is acceptable under the circumstances presented by the master or agent of a vessel.

Vessel operators will generally not incur any costs from this rule, though CBP will. CBP will sustain technology and printing costs from the regulatory program, including costs to maintain mobile devices for real-time, electronic processing and print paper Form I-418s until the admissibility inspection process is completely paperless. Across the period of analysis, these monetized costs will equal \$45,000 in present value and \$12,000 on an annualized basis. These costs represent the total costs of the rule.

Following this rule's implementation, vessel operators will enjoy \$16.1 million in monetized present value cost savings from automated Form I-418 submissions and forgone printing and dual processing between FY 2021 and FY 2025 (using a 7 percent discount rate). During the same period, CBP will experience a total monetized present value cost saving of \$37.2 million from the rule's forgone printing requirements, streamlined mobile processing and post-inspection tasks, and forgone storage and shipping costs (using a 7 percent discount rate). CBP may dedicate these cost savings to other agency mission areas, such as improving border security or facilitating trade. In total, the monetized cost savings of this rule will equal \$53.3 million in present value and \$13.9 million on an annualized basis over the period of analysis (using a 7 percent discount rate).

The Executive Summary Table outlines the estimated costs and benefits (cost savings) of the I-418 Automation regulatory program from FY 2021 to FY 2025. As illustrated, the benefits (cost savings) of this rule outweigh its costs, with the total monetized net benefit (net cost saving) of the regulatory program measuring \$53.3 million in present value and \$13.9 million on an annualized basis (using a 7 percent discount rate).

EXECUTIVE SUMMARY TABLE: NET BENEFIT (COST SAVING) OF I-418
AUTOMATION REGULATORY PROGRAM, FY 2021-FY 2025

[2019 U.S. Dollars]

	Present values		Annualized values	
	3% Dis- count rate	7% Dis- count rate	3% Dis- count rate	7% Dis- count rate
Total Cost	\$52,067	\$45,458	\$11,710	\$11,863
Total Benefit.....	62,546,086	53,306,084	14,066,940	13,910,918
Total Net Benefit.....	62,494,018	53,260,626	14,055,230	13,899,055

Notes: The estimates in this table are contingent upon CBP's vessel arrival/departure projections as well as the discount rates applied. Estimates may not sum to total due to rounding.

2. Purpose of Rule

Commercial vessels arriving at and departing from U.S. ports of entry (POEs) must comply with statutory and regulatory requirements to engage in U.S. trade. As previously mentioned, under current regulations commercial vessels, regardless of whether they are cargo, non-cargo,²⁰ or cruise ships, traveling to U.S. POEs from a foreign port or place must begin their trip by submitting similar manifest information electronically to USCG through eNOA/D and APIS, and then submitting the same manifest data to CBP on the paper Form I-418. At departure, commercial vessels must submit similar departure data to USCG and CBP. Despite similarities in the vessel arrival and departure data submitted per Form I-418, APIS, and eNOA/D requirements, current regulations do not allow data to be transmitted electronically, such as through eNOA/D or email, to satisfy Form I-418's passenger and crew list submission requirement. In fact, failure to submit the arrival or departure manifest in paper format may result in fines and penalties. To reduce redundant data submissions and automate manifest recordkeeping, CBP launched the I-418 Automation test program in 2011. This test has allowed for the automated, electronic submission of the data elements on Form I-418 from test participants using manifest data previously submitted electronically to the NVMC through eNOA/D, APIS, or other means. Based on the successful operation of the test, CBP now intends to establish the automated, electronic Form I-418 data submission process by regulation.

Through this rulemaking, CBP will amend its regulations under 8 CFR part 251, 8 CFR part 258, and 19 CFR part 4 to require the electronic submission of the data elements required from vessel operators on Form I-418 in lieu of paper form submissions. CBP will generally no longer require the paper Form I-418. The updated regulations will require vessel operators to electronically submit the data elements required on the Form I-418 via an EDI approved by CBP. CBP will continue to use the eNOA/D system as the approved EDI. Under this process, CBP systems will compile eNOA/D, APIS, and any other electronic manifest data submitted by vessel operators prior to arrival and at departure into a passenger and crew list format reflective of an electronic Form I-418.²¹ The act of electronically submitting the data elements required on Form I-418 will also con-

²⁰ For the purposes of this analysis, non-cargo commercial vessels include all commercial vessels other than cargo ships and cruise ships. Tugboats fall under this classification.

²¹ The embark date required on Form I-418 is transmitted to CBP via eNOA/D. The disembark date/date separated (*i.e.*, the date when a crewmember permanently departs the vessel) is calculated by CBP systems. This rule does not change this practice.

stitute the (vessel) Master's certification that the manifest information is accurate,²² and eliminate the current need to generally collect Form I-418's vessel master (or operator) and CBP officer signatures for certification.²³ CBP will also retain its authority to require paper Form I-418 submissions in the event of certain technical difficulties, such as system outages and disruptions, that make it impossible to submit or receive manifest data electronically, and according to CBP discretion.²⁴ This rule will streamline vessel arrival and departure processes by eliminating redundant data submissions, simplifying vessel inspections, and automating recordkeeping.

3. Population Affected by Rule

This rule will affect commercial vessel operators and CBP, though at different magnitudes according to the arriving vessel type and I-418 Automation test program participation during the period of analysis spanning from FY 2021 to FY 2025. To determine the extent of the population affected by this rule, CBP relies on historical commercial vessel arrivals/departures and test participation data.

From FY 2015 to FY 2019, cargo and non-cargo vessel arrivals/departures of I-418 Automation test program participants grew at a compound annual rate of 6.0 percent while non-participant cargo and non-cargo vessel arrivals/departures declined at a compound annual rate of 1.9 percent. During the same period, participant and non-participant cruise ship arrivals/departures both grew at a compound annual rate of 2.4 percent (see Table 1). In the future, CBP projects that commercial vessel arrivals/departures will remain consistent with their more conservative historical trends prior to the COVID-19 pandemic beginning in 2020. Accordingly, CBP estimates that future cargo and non-cargo vessel arrivals/departures of I-418 Automation test program participants will increase increasing at a rate of 6.0

²² This includes certifying that certification that CBP baggage declaration requirements have been made known to incoming passengers; that any required CBP baggage declarations have been or will simultaneously be filed as required by law and regulation with the proper CBP officer; that the responsibilities of the vessel operator have been or will be done as required by law or regulation before the proper CBP officer; and that there are no steerage passengers on board the vessel.

²³ CBP officer signatures are generally dictated on the form as a unique receipt number tied to the officer. For the purposes of this analysis, CBP refers to these receipt numbers as signatures.

²⁴ As described above, CBP will retain its authority to require paper submissions in the event the master or agent of the vessel is unable to electronically submit the data elements required on Form I-418 via an electronic data interchange system approved by CBP due to technical issues, such as when the onboard computer system is malfunctioning or there is no internet access, and there is no shore-side support available; CBP is experiencing technical difficulties affecting its receipt or processing of electronically submitted information; or where CBP, in its discretion, determines that a paper Form I-418 is acceptable under the circumstances presented by the master or agent of a vessel.

percent per year, non-participant cargo and non-cargo vessel arrivals/departures will decrease at a rate of 1.9 percent per year, and all cruise ship arrivals/departures will increase at a rate of 2.4 percent per year from their FY 2019 values between FY 2021 and FY 2025.²⁵ CBP believes that these projections best represent the normal, recent growth of commercial vessel arrivals/departures while still accounting for the projected economic and travel slowdowns due to the COVID–19 pandemic. CBP did not use FY 2020 data as a basis for future growth because it exhibits extreme, abnormal drops in vessel arrivals/departures due to the COVID–19 pandemic beginning during that year. However, CBP recognizes the uncertainty in this assumption and that the rate of economic recovery from the COVID–19 pandemic will depend on many factors, including how quickly businesses can recover, rates of infection, and global supply chains. CBP does not believe that this rule will directly affect the volume of future commercial vessel arrivals/departures, and thus predicts that the projected arrivals/departures will be the same with and without this rule’s implementation (*i.e.*, the baseline).

To estimate future commercial vessel arrivals/departures with and without this rule, CBP first applies the projected growth rates for cargo and non-cargo vessel arrivals/departures of I–418 Automation test program participants and non-participants (6.0 percent and 1.9 percent, respectively) and cruise ship arrivals/departures (2.4 percent) to their respective FY 2019 values (see Table 1). CBP then projects the estimates forward through the period of analysis, FY 2021 to FY 2025. When making such projections, CBP presumes that the I–418 Automation test program will continue to exist during the

²⁵ Based on historical commercial vessel data and future commercial vessel demand outlooks. For future cargo and non-cargo vessel outlook information, see: Pallis, Athanasios A, et al. *Transport and Trade Facilitation: COVID–19 and Maritime Transport Impact and Responses*, United Nations Conference on Trade and Development (UNCTAD), Series No. 15, March 2021. Available at https://unctad.org/system/files/official-document/dtl1b2021d1_en.pdf. Accessed July 23, 2021; World Bank Group. *Global Economic Prospects*. Chpt. 1. World Bank Group Publishing. June 2021. Available at <https://openknowledge.worldbank.org/bitstream/handle/10986/35647/9781464816659-ch01.pdf>. Accessed July 23, 2020; “Moody’s: Outlook for US public ports revised to stable on strengthening economic activity, improving cargo volumes.” *Moody’s Investors Service*, December 7, 2020. Available at http://www.moody.com/researchdocumentcontentpage.aspx?docid=PBC_1247050. Accessed July 23, 2021; Ohse, Friedemann. “Will 2021 bring about recovery for the global maritime industry?” *OceanInsights*, September 30, 2020. Available at https://www.ocean-insights.com/business-news/will-2021-bring-about-recovery-for-the-global-maritime-industry/?cli_action=1602257398.7141/8. Accessed October 9, 2020. For future cruise ship outlook information, see: Giese, Monique. “COVID–19 Impacts on Cruise Industry.” *KPMG*, July 23, 2020. Available at <https://home.kpmg/xx/en/blogs/home/posts/2020/07/covid-19-impacts-on-global-cruise-industry.html>. Accessed October 23, 2020; McMahon, Shannon. “5 takeaways from the cruise industry’s report on a return to sailing.” *Washington Post*, September 21, 2020. Available at <https://www.washingtonpost.com/travel/2020/09/21/cruise-return-report-covid-19/>. Accessed October 23, 2020.

period of analysis in the absence of any rulemaking to automate the Form I-418 process. In contrast, the test program will transition into a regulatory program in which all commercial vessel operators participate in an automated Form I-418 data submission process upon this rule's implementation.

As previously stated, CBP does not believe that this rule will directly affect the future volume of commercial vessel arrivals/departures, and thus predicts that future commercial vessel arrivals/departures will be the same with and without this rule's implementation (*i.e.*, the baseline). As Table 1 shows, CBP estimates that almost 424,000 commercial vessel arrivals/departures will occur between FY 2021 and FY 2025, including 372,000 cargo and non-cargo vessel arrivals/departures and 53,000 cruise ship arrivals/departures. Nearly 98,000 (23 percent) of these arrivals/departures will correspond to former (or ongoing in the absence of this rule) I-418 Automation test program participants, while the remaining 326,000 (77 percent) will correspond to non-former I-418 Automation test program participants (or non-test participants in the absence of this rule). Nearly all of these vessel operators will be affected by the rule. Of the arrivals/departures of former (or ongoing) I-418 Automation test program participants, CBP estimates that 50 percent will correspond to participants who fully participated in the test program and the remainder will correspond to participants who only partially participated (see Table 1). According to field interviews, the majority of vessel operators participating in the I-418 Automation test program continued to provide a paper Form I-418 upon arrival/departure despite having submitted an electronic Form I-418 to ensure full compliance with CBP regulations.²⁶ For the purposes of this analysis, CBP refers to these vessel operators as those who partially participated in the I-418 Automation test program. Under the baseline, non-I-418 Automation test program participants and 50 percent of test program participants will continue to submit paper Form I-418s with each projected arrival/departure, while the remaining test participants will submit only automated versions of Form I-418 with each future arrival/departure. Alternatively, with the rule, each arrival/departure will presumably result in an automated Form I-418 submission.

²⁶ Although the I-418 Automation test program waived the regulatory requirement to submit Form I-418s by paper, certain test participants insisted on submitting paper Form I-418s to ensure full compliance with CBP regulations. Source: Email correspondence with CBP's Office of Field Operations on February 23, 2016.

TABLE 1—PROJECTED COMMERCIAL VESSEL ARRIVALS AND DEPARTURES

Number of	FY 2019*		FY 2019*		FY 2022		FY 2023		FY 2024		FY 2025		Total, FY 2021-FY 2025	
	Cargo & non-cargo vessels	Cruise ships	Cargo & non-cargo vessels	Cruise ships	Cargo & non-cargo vessels	Cruise ships	Cargo & non-cargo vessels	Cruise ships	Cargo & non-cargo vessels	Cruise ships	Cargo & non-cargo vessels	Cruise ships	Cargo & non-cargo vessels	Cruise ships
Non-I-418 Automation Test Program Participants														
Growth in Vessel Arrivals/Departures.....			-1.9%	2.4%	-1.9%	2.4%	-1.9%	2.4%	-1.9%	2.4%	-1.9%	2.4%		
Vessel Arrivals/Departures.....	64,155	4,319	62,936	4,423	61,740	4,529	60,567	4,638	59,416	4,749	58,287	4,863	302,946	23,202
Form I-418 Submissions.....	64,155	4,319	62,936	4,423	61,740	4,529	60,567	4,638	59,416	4,749	58,287	4,863	302,946	23,202
I-418 Automation Test Program Participants														
Growth in Vessel Arrivals/Departures.....			6.0%	2.4%	6.0%	2.4%	6.0%	2.4%	6.0%	2.4%	6.0%	2.4%		
Total Vessel Arrivals/Departures.....	11,487	5,496	12,176	5,628	12,907	5,763	13,681	5,901	14,502	6,043	15,372	6,188	68,638	29,523
Vessel Arrivals/Departures of Participants Fully Participating in Test ...	5,744	2,748	6,088	2,814	6,454	2,882	6,841	2,951	7,251	3,022	7,686	3,094	34,320	14,763
Vessel Arrivals/Departures of Participants Partially Participating in Test.....	5,743	2,748	6,088	2,814	6,453	2,881	6,840	2,950	7,251	3,021	7,686	3,094	34,318	14,760
Total Form I-418 Submissions +.....	11,487	5,496	12,176	5,628	12,907	5,763	13,681	5,901	14,502	6,043	15,372	6,188	68,638	29,523
Form I-418 Submissions from Participants Fully Participating in Test ...	5,744	2,748	6,088	2,814	6,454	2,882	6,841	2,951	7,251	3,022	7,686	3,094	34,320	14,763
Form I-418 Submissions from Participants Partially Participating in Test.....	5,743	2,748	6,088	2,814	6,453	2,881	6,840	2,950	7,251	3,021	7,686	3,094	34,318	14,760
Total														
Vessel Arrivals/Departures.....	75,642	9,815	75,112	10,051	74,647	10,292	74,248	10,539	73,918	10,792	73,659	11,051	371,584	52,725
Form I-418 Submissions.....	75,642	9,815	75,112	10,051	74,647	10,292	74,248	10,539	73,918	10,792	73,659	11,051	371,584	52,725

* Not in period of analysis.
 + Form I-418s submitted in both electronic and paper format only counted as one form submission.
 Notes: Estimates may not sum to total due to rounding.

4. Costs of Rule

This rule will automate the Form I-418 process for all commercial vessel operators and eliminate the regulatory guidelines in place regarding the submission and retention of paper Form I-418s. These changes will generally not introduce new costs to commercial vessel operators, but they will introduce some costs to CBP. If vessel operators request a copy of their stamped and annotated electronic Form I-418, which they receive by paper now for CBP processing, they will incur negligible costs to do so.²⁷ CBP will sustain technology and printing costs from the Form I-418 Automation regulatory program, including costs to maintain mobile devices for real-time, electronic processing, and to print the paper Form I-418 until the admissibility inspection process is completely paperless. Across the period of analysis, these monetized costs will equal \$46,000 in present value and \$12,000 on an annualized basis (using a 7 percent discount rate). These costs represent the total costs of the rule, as illustrated in Table 2.

²⁷ Source: Correspondence with CBP’s Office of Field Operations on November 24, 2020.

TABLE 2—TOTAL PRESENT VALUE AND ANNUALIZED COSTS OF I–418
AUTOMATION REGULATORY PROGRAM, FY 2020–FY 2024

[2019 U.S. Dollars]

	3% Discount rate	7% Discount rate
Present Value Cost.....	\$52,067	\$45,458
Annualized Cost	11,710	11,863

Note: The estimates in this table are contingent upon CBP's vessel arrival/departure projections as well as the discount rates applied.

5. Benefits (Cost Savings) of Rule

Besides its costs to CBP, this rule will provide considerable benefits (cost savings) to vessel operators and CBP. Following this rule's implementation, vessel operators will enjoy \$16.1 million in monetized present value cost savings from forgone paper Form I–418 submissions and form printing between FY 2021 and FY 2025 (using a 7 percent discount rate). During the same period, CBP will experience a total monetized present value cost saving of \$37.2 million from the rule's avoided printing, streamlined mobile post-inspection processing and electronic recordkeeping (using a 7 percent discount rate). CBP may dedicate these cost savings to other agency mission areas, such as improving border security or facilitating trade. In total, the monetized cost savings of this rule will equal \$53.3 million in present value and \$13.9 million on an annualized basis over the period of analysis (using a 7 percent discount rate; see Table 3).

TABLE 3—TOTAL PRESENT VALUE AND ANNUALIZED BENEFITS (COST SAVINGS)
OF I–418 AUTOMATION REGULATORY PROGRAM FY 2020–FY 2024

[2019 U.S. Dollars]

	3% Discount rate	7% Discount rate
Present Value Benefit	\$62,546,086	\$53,306,084
Annualized Benefit.....	14,066,940	13,910,918

Note: The estimates in this table are contingent upon CBP's vessel arrival/departure projections as well as the discount rates applied.

6. Net Impact of Rule

Table 4 summarizes the monetized costs and benefits (cost savings) of the I–418 Automation regulatory program to vessel operators and CBP from FY 2021 to FY 2025. As illustrated, the savings from this rule outweigh its costs, with the total monetized net cost saving of the regulatory program measuring \$53.3 million in present value and \$13.9 million on an annualized basis (using a 7 percent discount rate).

TABLE 4—NET BENEFIT (COST SAVING) OF I-418 AUTOMATION REGULATORY PROGRAM, FY 2020–FY 2024

[2019 U.S. Dollars]

	Present values		Annualized values	
	3% Dis-count rate	7% Dis-count rate	3% Dis-count rate	7% Dis-count rate
Total Cost	\$52,067	\$45,458	\$11,710	\$11,863
Total Benefit.....	62,546,086	53,306,084	14,066,940	13,910,918
Total Net Benefit.....	62,494,018	53,260,626	14,055,230	13,899,055

Notes: The estimates in this table are contingent upon CBP’s vessel arrival/departure projections as well as the discount rates applied. Estimates may not sum to total due to rounding.

C. Regulatory Flexibility Act

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

D. Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

E. Executive Order 13132

This rule will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, DHS has determined that this final rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

F. Executive Order 12988 Civil Justice Reform

This rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988. Executive Order 12988 requires agencies to conduct reviews on civil justice and litigation impact issues before proposing legislation or issuing proposed regulations. The order requires agencies to exert reasonable efforts to ensure that the regulation identifies clearly preemptive effects, effects on existing federal laws or regulations, identifies any retroactive effects of the regulation, and other matters. DHS has determined that this regulation meets the requirements of Executive Order 12988 because it does not involve retroactive effects, preemptive effects, or the other matters addressed in the Executive Order.

G. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (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. The Form I-418 information collected under 8 CFR part 251.1 and 8 CFR part 251.3 is included under OMB control number 1651-0103. Under the Automation of CBP Form I-418 for Vessels rule, CBP systems will automatically reconcile eNOA/D, APIS, and any other manifest data submitted electronically by vessel operators prior to arrival and at departure to create an electronic version of Form I-418. CBP will use the automated, electronic Form I-418 for all commercial vessel crew and passenger admissibility inspections and processing, and thus generally establish a completely paperless Form I-418 process for all commercial vessel arrivals and departures. CBP plans to retain the paper Form I-418 and conduct paper Form I-418 processing only when the master or agent of the vessel is unable to electronically submit the data elements required on Form I-418 via an electronic data interchange system approved by CBP due to technical issues, such as when the onboard computer system is malfunctioning or there is no internet access, and there is no shore-side support available; CBP is experiencing technical difficulties affecting its receipt or processing of electronically submitted information; or where CBP, in its discretion, determines that a paper Form I-418 is acceptable under the circumstances presented by the master or agent of a vessel. CBP will conduct such processing to not hinder, stop, or otherwise penalize maritime traffic. In accordance with the OMB Notice of Action dated April 3, 2018, CBP will submit a discontinuation request for OMB control number 1651-0103 along with this rule's publication because this information collection is duplicative.

H. Privacy Interests

DHS will ensure that all Privacy Act requirements and policies are adhered to in the implementation of this rule, and will issue or update any necessary Privacy Impact Assessment and/or Privacy Act System of Records notice to fully outline processes that will ensure compliance with Privacy Act protections.

List of Subjects

8 CFR Part 251

Air carriers, Airmen, Aliens, Maritime carriers, Reporting and recordkeeping requirements, Seamen.

8 CFR Part 258

Aliens, Longshore and harbor workers, Reporting and recordkeeping requirements, Seamen.

19 CFR Part 4

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

Amendments to the Regulations

For the reasons stated in the preamble, DHS is amending 8 CFR parts 251 and 258, and 19 CFR part 4, as set forth below.

TITLE 8—ALIENS AND NATIONALITY

PART 251—ARRIVAL AND DEPARTURE MANIFESTS AND LISTS: SUPPORTING DOCUMENTS

■ 1. The general authority citation for part 251 continues to read as follows:

Authority: 8 U.S.C. 1103, 1182, 1221, 1281, 1282, 8 CFR part 2.

§ 251.1 [Amended]

■ 2. Amend § 251.1 as follows:

- a. Revise paragraph (a)(1);
- b. Revise paragraph (a)(2) introductory text;
- c. In paragraph (a)(2)(i), remove the word “notation” and add in its place “information”;
- d. In paragraph (a)(2)(ii) introductory text, remove the words “shall note” and adding in their place “must indicate”;
- e. In paragraph (a)(2)(iii)(A), remove the words “shall note on” and adding in their place “must indicate in”;

- f. In paragraph (a)(2)(iii)(B):
- i. Remove the words “shall note on” and add in their place “must indicate in”; and
- ii. Remove the the words “shall show” and add in their place “must show”;
- g. In paragraph (a)(2)(iv) introductory text:
 - i. In the first sentence remove the words “shall note on” and add in their place “must indicate in”; and
 - ii. In the second sentence, remove the words “shall note” and add in their place “must indicate”;
- h. In paragraph (a)(2)(v):
 - i. Remove the words “shall note on” and add in their place “must indicate in”; and
 - ii. Remove the words “will note the” and add in their place “will indicate the”;
- i. In paragraph (a)(3)(i) introductory text, remove the words “shall not be” and add in its place “is not”;
- j. In paragraph (a)(3)(ii), remove the words “shall note the manifest in the manner” and add in their place “must follow the instructions”;
- k. In paragraph (a)(3)(iii):
 - i. Remove the words “shall not be” and adding in their place “is not”; and
 - ii. remove the words “noted on” and add in their place “indicated in”;
- l. In paragraph (a)(4), remove the words “shall annotate Form I-418 presented at the onward port to indicate” and add in their place “must electronically submit via an electronic data interchange system approved by CBP”;
- m. In paragraph (a)(5), remove the words “accompany the manifest” and add in their place “be sent to CBP electronically or be presented to CBP upon arrival at the port of immigration inspection”;
- n. Add paragraph (a)(6);
- o. In paragraph (b):
 - i. Remove the word “shall” wherever it appears and add in its place “must”;
 - ii. Remove the words “United States Customs Service” and add in their place “CBP”; and
 - iii. Remove the word “annotate” and add in its place “electronically update the data in”;
- p. In paragraph (c), remove the word “shall” and add in its place “must”.

The revisions and addition read as follows:

§ 251.1 Arrival manifests and lists.

(a) * * * (1) *General.* Except as provided in paragraph (a)(6) of this section, the master or agent of every vessel arriving in the United States from a foreign place or an outlying possession of the United States must submit a manifest of all crewmen on board by electronically submitting the data elements required on CBP Form I-418, Passenger List—Crew List, via an electronic data interchange system approved by CBP.

(2) *Longshore work information.* Except as provided in paragraph (a)(6) of this section, the master or agent of the vessel must electronically submit via an electronic data interchange system approved by CBP an affirmation as to whether crewmen aboard the vessel will be used to perform longshore work at any United States port before the vessel departs the United States.

* * * * *

(6) *Exception to the requirement to submit Form I-418 data elements and longshore work information electronically.* The master or agent of any vessel that is arriving in the United States from a foreign place or an outlying possession of the United States, and is required to submit a manifest, may submit a paper Form I-418 to CBP upon arrival at the port where immigration inspection is performed when:

- (i) The master or agent of the vessel is unable to electronically submit the data elements required on Form I-418 via an electronic data interchange system approved by CBP because there is no internet access in that location or onboard computers are experiencing technical difficulties, and there is no shore-side support available; or
- (ii) CBP is experiencing technical difficulties affecting its receipt or processing of electronically submitted information, or, in its discretion, CBP determines that a paper Form I-418 is acceptable under the circumstances presented by the master or agent of a vessel.

* * * * *

- 3. Amend § 251.3 by:
 - a. Revising paragraph (a); and
 - b. Adding a new paragraph (c);

The revision and addition read as follows:

§ 251.3 Departure manifests and lists for vessels.

(a) *Form I-418, Passenger List-Crew List.* Except as provided in paragraphs (b) and (c) of this section, the master or agent of every vessel departing from the United States directly to some foreign place

or outlying possession of the United States must electronically submit the data elements required on Form I-418 via an electronic data interchange system approved by CBP, except when a manifest is not required pursuant to section 251.1(a). Submission of inaccurate or incomplete data will be regarded as lack of compliance with section 251(c) of the Act.

* * * * *

(c) *Exception to the requirement to submit Form I-418 data elements electronically.* The master or agent of any vessel that is departing from the United States directly to some foreign place or outlying possession of the United States, and is required to submit a manifest, may submit a paper Form I-418 to CBP at the port from which such vessel is to depart when:

(1) The master or agent of the vessel is unable to submit the data elements required on Form I-418 electronically via an electronic data interchange system approved by CBP because there is no internet access in that location or onboard computers are experiencing technical difficulties, and there is no shore-side support available; or

(2) CBP is experiencing technical difficulties affecting its receipt or processing of electronically submitted information, or, in its discretion, CBP determines that a paper Form I-418 is acceptable under the circumstances presented by the master or agent of a vessel.

- 4. Amend § 251.5 as follows:
- a. Revise the section heading; and
- b. Remove the words “in a paper format”.

The revision reads as follows:

§ 251.5 Arrival and departure manifests for crew.

* * * * *

PART 258—LIMITATIONS ON PERFORMANCE OF LONGSHORE WORK BY ALIEN CREWMEN

- 5. The general authority citation for part 258 continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1281; 8 CFR part 2.

§ 258.2 [Amended]

- 6. Amend § 258.2 as follows:
- a. In the introductory text, remove the words “shall note” and add in their place “must indicate”;
- b. In paragraph (a)(2), remove the words “shall note on” and add in

their place “must indicate in”;

■ c. In paragraph (b)(2)(i), remove the words “states on the manifest, Form I-418,” and add in their place “indicates in the manifest, or on Form I-418 if submitting the paper version,”;

■ d. In paragraph (b)(2)(ii):

■ i. Remove the words “states on” and add in their place “indicates in”; and

■ ii. Remove the words “shall present” and add in their place “must present”;

■ e. In paragraph (b)(2)(iii)(A), remove the word “shall” and add in its place “must”;

■ f. In paragraph (b)(2)(iii)(B):

■ i. Remove the word “shall” and add in its place “must”; and

■ ii. Remove the words “Immigration and Naturalization Service” and add in their place “CBP”;

■ g. In paragraph (b)(2)(iv):

■ i. In the first sentence, remove the words “states on” and add in their place “indicates in”;

■ ii. In the second sentence, remove the word shall and add in its place “must” and remove the words “shall note on” and add in their place “must indicate in”;

■ h. In paragraph (b)(3), in the third sentence, remove the words “shall annotate” and add in their place “must indicate in”;

■ i. In paragraph (b)(4):

■ i. In the first sentence, remove the words “the Immigration and Naturalization Service” wherever they appear, and add in their place “CBP” and remove “258(c)(E)(i)” and add “258(c)(4)(E)(i)” in its place; and

■ ii. In the second sentence, remove the words “The Service” and add in their place “CBP”; and

■ j. In paragraph (e):

■ i. In the first sentence, remove the word “shall” and add in its place “must”; and

■ ii. In the second sentence, remove “noted on the Form I-410” and add in its place “indicated on the electronically populated, or in the circumstances specified in section 251.1 of this chapter, paper, Form I-418”.

TITLE 19—CUSTOMS DUTIES

PART 4—VESSELS IN FOREIGN AND DOMESTIC TRADES

■ 7. The general authority citation for part 4 continues to read as follows:

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

■ 8. Amend § 4.7 by revising paragraph (a) to read as follows:

§ 4.7. Inward foreign manifest; production on demand; contents and form; advance filing of cargo declaration.

(a) The master of every vessel arriving in the United States and required to make entry must have on board the vessel a manifest, as required by section 431, Tariff Act of 1930 (19 U.S.C. 1431), and by this section. The manifest must be legible and complete. If it is in a foreign language, an English translation must be furnished with the original and with any required copies. The required manifest consists of a Vessel Entrance or Clearance Statement, CBP Form 1300, and the following documents: (1) Cargo Declaration, CBP Form 1302, (2) Ship’s Stores Declaration, CBP Form 1303, and (3) Crew’s Effects Declaration, CBP Form 1304, to which are attached crewmembers’ declarations on CBP Form 5129, if the articles will be landed in the United States. Unless the exception at 8 CFR 251.1(a)(6) applies and a paper form is submitted, the master must also electronically submit the data elements required on CBP Form I–418 via an electronic data interchange system approved by CBP, which will be considered part of the manifest. Any document which is not required may be omitted from the manifest provided the word “None” is inserted in items 16, 18, and/or 19 of the Vessel Entrance or Clearance Statement, as appropriate. If a vessel arrives in ballast and therefore the Cargo Declaration is omitted, the legend “No merchandise on board” must be inserted in item 16 of the Vessel Entrance or Clearance Statement.

* * * * *

■ 9. Amend § 4.7a as follows:

- a. Remove paragraph (b)(2);
- b. Redesignate paragraphs (b)(3) and (b)(4) as paragraphs (b)(2) and (b)(3), respectively;
- c. Add paragraph (c)(5);
- d. In paragraph (d), add the words “§ 4.7b and with” after “in accordance with”; and
- e. Revise paragraph (e).

The addition and revision read as follows:

§ 4.7a. Inward manifest; information required; alternative forms.

* * * * *

(c) * * *

(5) Unaccompanied baggage must be listed on CBP Form 1302, or transmitted via an electronic data interchange system approved by CBP.

* * * * *

(e) *Passenger List*. (1) The Passenger List must be completed in accordance with § 4.7b, § 4.50, and with the requirements of applicable DHS regulations administered by CBP (8 CFR part 231).

* * * * *

■ 10. Amend § 4.50 as follows:

- a. In paragraph (a), remove the second sentence;
- b. Add paragraph (c).

The addition reads as follows:

§ 4.50 Passenger lists.

* * * * *

(c) By the act of submitting the data elements required on CBP Form I-418 via an electronic data interchange system approved by CBP, the master certifies that CBP baggage declaration requirements have been made known to incoming passengers; that any required CBP baggage declarations have been or will simultaneously be filed as required by law and regulation with the proper CBP officer; that the responsibilities of the vessel operator have been or will be done as required by law or regulation before the proper CBP officer; and that there are no steerage passengers on board the vessel.

§ 4.81 [Amended]

■ 11. In § 4.81, amend paragraph (d) by removing the phrase “, and Customs and Immigration Form I-418 with attached Customs Form 5129,”.

■ 12. In § 4.85 amend paragraph (c)(1) by:

- a. In the third sentence, removing the words “a Passenger List, Customs and Immigration Form I-418, in such number of copies as may be required for local Customs purposes, of any cargo or passengers on board manifested for discharge at that port,”; and
- b. Adding a sentence following the third sentence.

The addition reads as follows:

§ 4.85 Vessels with residue cargo for domestic ports.

* * * * *

(c) * * *

(1) * * * The master must also update the data elements required on CBP Form I-418 that were electronically submitted via an electronic

data interchange system approved by CBP for any passengers on board that are manifested for discharge at that port. * * *

* * * * *

§ 4.91 [Amended]

■ 13. In § 4.91 amend paragraph (c) by removing, in the second sentence, the words “Passenger List, Customs and Immigration Form I–418” and adding in their place “updated data elements required on CBP Form I–418 that were submitted electronically via an electronic data interchange system approved by CBP”

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

[Published in the Federal Register, December 28, 2021 (85 FR 73618)]

COLLECTION OF ADVANCE INFORMATION FROM CERTAIN UNDOCUMENTED INDIVIDUALS ON THE LAND BORDER

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

ACTION: 30-Day notice and request for comments; reinstatement with change of an existing collection of information.

SUMMARY: The Department of Homeland Security, U.S. Customs and Border Protection will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). The information collection is published in the **Federal Register** to obtain comments from the public and affected agencies.

DATES: Comments are encouraged and must be submitted (no later than January 26, 2022) to be assured of consideration.

ADDRESSES: Written comments and/or suggestions regarding the item(s) contained in this notice should be sent within 30 days of publication of this notice to www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting “Currently under 30-day Review—Open for Public Comments” or by using the search function.

FOR FURTHER INFORMATION CONTACT: Requests for additional PRA information should be directed to Seth Renkema, Chief, Economic Impact Analysis Branch, U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, 90 K Street NE, 10th Floor, Washington, DC 20229–1177, Telephone number

202–325–0056 or via email *CBP_PRA@cbp.dhs.gov*. Please note that the contact information provided here is solely for questions regarding this notice. Individuals seeking information about other CBP programs should contact the CBP National Customer Service Center at 877–227–5511, (TTY) 1–800–877–8339, or CBP website at <https://www.cbp.gov/>.

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on the proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This proposed information collection was previously published in the **Federal Register** (Volume 86 FR Page 53667) on September 28, 2021, allowing for a 60-day comment period. This notice allows for an additional 30 days for public comments. This process is conducted in accordance with 5 CFR 1320.8. Written comments and suggestions from the public and affected agencies should address one or more of the following four points: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency’s estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) suggestions to enhance the quality, utility, and clarity of the information to be collected; and (4) suggestions to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses. The comments that are submitted will be summarized and included in the request for approval. All comments will become a matter of public record.

Overview of This Information Collection

Title: Collection of Advance Information from Certain Undocumented Individuals on the Land Border.

OMB Number: 1651–0140.

Form Number: N/A.

Current Actions: Reinstatement with change.

Type of Review: Reinstatement with change.

Affected Public: Individuals.

Abstract: The Department of Homeland Security (DHS), in consultation with U.S. Customs and Border Protection (CBP), has established a process to streamline the processing of undocumented noncitizens under Title 8 of the United States

Code at certain ports of entry (POEs), as these individuals require secondary processing upon their arrival, which takes longer than when individuals arrive with sufficient travel documentation.

CBP is proposing extending and amending this data collection, which was established on an emergency basis on May 3, 2021. This data collection expands on the previous collection process for persons who may warrant an exception to the CDC's *Order Suspending the Right To Introduce Certain Persons from Countries Where a Quarantinable Communicable Disease Exists* ("CDC Order") (85 FR 65806), to include undocumented noncitizens who will be processed under Title 8 at the time they arrive at the POE after the CDC Order is rescinded, in whole or in part. The purpose is to continue to achieve efficiencies to process undocumented noncitizens under Title 8 upon their arrival at the POE, consistent with public health protocols, space limitations, and other restrictions.

CBP collects certain biographic and biometric information from undocumented noncitizens prior to their arrival at a POE, to streamline their processing at the POE. The requested information is that which CBP would otherwise collect from these individuals during primary and/or secondary processing. This information is voluntarily provided by undocumented noncitizens, directly or through non-governmental organizations (NGOs) and international organizations (IOs). Providing this information is not a prerequisite for processing under Title 8, but reduces the amount of data entered by CBP Officers (CBPOs) and the length of time an undocumented noncitizen remains in CBP custody.

The biographic and biometric information being collected in advance, that would otherwise be collected during primary and/or secondary processing at the POEs includes, but is not limited to, descriptive information such as: Name, Date of Birth, Country of Birth, City of Birth, Country of Residence, Contact Information, Addresses, Nationality, Employment history (optional), Travel history, Emergency Contact (optional), U.S. and foreign addresses, Familial Information (optional), Marital Status (optional), Identity Document (not a Western Hemisphere Travel Initiative (WHTI) compliant document) (optional), Gender, Preferred Language, Height, Weight, Eye color and Photograph.

This information is submitted to CBP by undocumented noncitizens (directly or through NGOs and IOs) on a voluntary basis, for the purpose of facilitating and implementing CBP's mission. This collection is consistent with DHS' and CBP's authorities, including under 6 U.S.C. 202 and 211(c). Pursuant to these sections, DHS and CBP are generally charged with "[s]ecuring the borders, territorial waters,

ports, terminals, waterways, and air, land, and sea transportation systems of the United States,” and “implement[ing] screening and targeting capabilities, including the screening, reviewing, identifying, and prioritizing of passengers and cargo across all international modes of transportation, both inbound and outbound.”

Proposed Changes:

This information collection is being changed to require the submission of the photograph—previously optional—for all who choose to provide advance information. The submission of a photograph in advance will provide CBPOs with a mechanism to match a noncitizen who arrives at the POE with the photograph submitted in advance, therefore identifying those individuals, and verifying their identity. The photograph is particularly important for identity verification once NGOs/IOs are no longer facilitating the presentation of all individuals for CBP processing (NGOs/IOs will be able to continue assisting for some individuals but others will be able to participate on their own).

CBP will also allow individuals to request to present themselves for processing at a specific POE on a specific day and time, although such a request does not guarantee that an individual will be processed at a given time. Individuals will have the opportunity to modify their requests within the CBP One™ application to an alternate day or time. In all cases, CBP will inspect, and process individuals based on available capacity at the POE. This new functionality does not require the collection of new Personal Identifiable Information (PII) data elements.

Type of Information Collection: Advance Information on Undocumented Travelers.

Estimated Number of Respondents: 91,250.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 91,250.

Estimated Time per Response: 16 minutes.

Estimated Total Annual Burden Hours: 24,333.

Dated: December 21, 2021.

SETH D. RENKEMA,
Branch Chief,
Economic Impact Analysis Branch,
U.S. Customs and Border Protection.

19 CFR PART 177**REVOCAION OF THREE RULING LETTERS AND
REVOCAION OF TREATMENT RELATING TO THE
TARIFF CLASSIFICATION OF CHILD CAR SEAT
CUSHIONS**

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

ACTION: Notice of revocation of three ruling letters, and revocation of treatment relating to the tariff classification of child car seat cushions.

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 three ruling letters concerning tariff classification of child car seat cushions 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. 55, No. 15, on April 21, 2021. 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 March 13, 2022.

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

SUPPLEMENTARY INFORMATION:**BACKGROUND**

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

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

Pursuant to 19 U.S.C. § 1625(c)(1), a notice was published in the *Customs Bulletin*, Vol. 55, No. 15, on April 21, 2021, proposing to revoke three ruling letters pertaining to the tariff classification of child car seat cushions. 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 N132069, NY N245061, and NY N246761, CBP classified child car seat cushions in heading 9401, HTSUS, specifically in subheading 9401.90.50, HTSUS, which provides for “[s]eats (other than those of heading 9402), whether or not convertible into beds, and parts thereof: [p]arts: [o]ther: [o]ther”. CBP has reviewed the aforementioned rulings and determined the ruling letters to be in error. It is now CBP's position that child car seat cushions are properly classified in heading 9404, HTSUS, specifically in subheading 9404.90.20, HTSUS, which provides for “[m]attress supports; articles of bedding and similar furnishing (for example, mattresses, quilts, eiderdowns, cushions, pouffes and pillows) fitted with springs or stuffed or internally fitted with any material or of cellular rubber or plastics, whether or not covered: [o]thers: [p]illows, cushions and similar furnishings: [o]thers”.

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is revoking NY N132069, NY N245061, and NY N246761, and revoking or modifying any other ruling not specifically identified to reflect the analysis contained in Headquarters Ruling Letter (“HQ”) H293786, set forth as an attachment to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions.

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

Dated: December 20, 2021

for
CRAIG T. CLARK,
Director
Commercial and Trade Facilitation Division

Attachment

HQ H293786

December 20, 2021

OT:RR:CTF:CPMMA H293786 AJK

CATEGORY: Classification

TARIFF NO: 9404.90.20

MR. R. KEVIN WILLIAMS

RODRIGUEZ, O'DONNELL, GONZALEZ & WILLIAMS, P.C.

ATTORNEYS & COUNSELORS AT LAW

8430 WEST BRYN MAWR AVENUE, SUITE 525

CHICAGO, IL 60631

RE: Revocation of NY N132069, NY N245061, and NY N246761;
Classification of Child Car Seat Cushions

DEAR MR. WILLIAMS:

This letter is in reference to your New York Ruling Letter (NY) N132069, issued to you by U.S. Customs and Border Protection (CBP) on November 18, 2010, concerning the tariff classification of cushions for child car seats under the Harmonized Tariff Schedule of the United States (HTSUS). We have reviewed your ruling classifying the cushions in subheading 9401.90.50, HTSUS, as parts of seats, and determined that the classification of the merchandise was incorrect.

We have also reviewed NY N245061, dated August 30, 2013, and NY N246761, dated November 13, 2013, classifying similar merchandise in subheading 9401.90.50, HTSUS, and have determined that the aforementioned rulings were incorrect. For the reasons set forth below, we revoke these three ruling letters.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. § 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), a notice of the proposed action was published in the Customs Bulletin, Volume 55, No. 15, on April 21, 2021. One comment was received in response to this notice. Although the proposed ruling discussed the classification of canopies for child car seats, we are declining to discuss the canopies in this final ruling.

FACTS:

The child car seat cushions with clips were described in NY N132069 as follows:

The merchandise at issue is two styles of infant car seat cushions, identified by Graco as the Comfort Sport and My Ride. Each of the seat cushions, are covers designed and shaped to go over a molded infant car seat shell with a molded foam insert. Each cushion is composed of polyurethane foam and polyester batting, and has two plastic clips per cushion that anchors the cushion to the bottom of the car seat frame. The seat cushions have two horizontal slits for each of the shoulders and one horizontal slit for the lap that secures the infant to the car seat by means of harness straps. The harness straps are not imported with the cushions. These cushions with their clips are imported together.

The child car seat cushions with clips were described in NY N245061 as follows:

The merchandise concerned pertains to five cover sets packaged for retail sales designed for attachment and use with Britax's child safety seats. These cover sets have components that either cover over or attach to their respective child safety seat. All five cover sets have clips on the component identified as the {car seat cover} and these clips attach the cover to the frame of their respective child safety seat. To clarify, the car seat covers are upholstered cushion covers that form only part of the covering for child safety seats; the other components are needed to fully cover over and pad each of the child safety seats. From observation of the sample and an understanding of the illustrative literature only the car seat covers have clips to attach to the frame of the child safety seat, while the other components secure to the seat by means of Velcro, loops or slide-through slits.

Cover set # 1, Marathon 70-G3 consists of a one piece body pillow and car seat cover, a head pad, a body pillow, a belly pad and two comfort pads. Cover set # 2, Roundabout 55 consists of a car seat cover, body pillow, a belly pad and two comfort pads. Cover set # 3, Boulevard 70-G3 consists of a car seat cover, a head pillow, a body pillow, a belly pad and two comfort pads. Cover set # 4, Pavilion 70-G3 consists of a car seat cover, a head pad, a body pillow, a belly pad and two comfort pads. Cover set # 5, Advocate 70 consists of a car seat cover, a head pillow, a body pillow, a belly pad and two comfort pads.

The child car seat cushions with clips described in NY N246761 are substantially similar to the product described above.¹

ISSUE:

Whether the child car seat cushions with clips are classified in heading 9401, HTSUS, as parts of car seats; or heading 9404, HTSUS, as cushions.

LAW AND ANALYSIS:

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.

* * * * *

The HTSUS provisions at issue are as follows:

9401	Seats (other than those of heading 9402), whether or not convertible into beds, and parts thereof:
9401.90	Parts:
	Other:

¹ A typographical error notes the classification in the "Tariff No." as 9403.90.5121. However, the holding section of the ruling states that "[t]he applicable subheading for the three cover sets will be 9401.90.5021, Harmonized Tariff Schedule of the United States (HTSUS), which provides for Seats (other than those of heading 9402), whether or not convertible into beds, and parts thereof: Parts: Other: Other; Other of textile material, cut to shape."

- 9401.90.50 Other:
- 9404 Mattress supports; articles of bedding and similar furnishing (for example, mattresses, quilts, eiderdowns, cushions, pouffes and pillows) fitted with springs or stuffed or internally fitted with any material or of cellular rubber or plastics, whether or not covered:
- 9404.90 Other:
Pillows, cushions and similar furnishings:
- 9404.90.20 Other

The Legal Note to Chapter 94, HTSUS, provides, in pertinent part:

2. The articles (other than parts) referred to in headings 9401 to 9403 are to be classified in those headings only if they are designed for placing on the floor or ground.

The following are, however, to be classified in the above-mentioned headings even if they are designed to be hung, to be fixed to the wall or to stand one on the other:

...

(b) Seats and beds.

3. ...

(b) Goods described in heading 9404, entered separately, are not to be classified in heading 9401, 9402 or 9403 as parts of goods.

* * * * *

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

EN 94.01 provides, in pertinent part, as follows:

Subject to the exclusions mentioned below, this heading covers all seats (including those for vehicles, provided that they comply with the conditions prescribed in Note 2 to this Chapter), for example:

Lounge chairs, arm-chairs, folding chairs, deck chairs, infants' high chairs and children's seats designed to be hung on the back of other seats (including vehicle seats)

The Parts EN to heading 9401, HTSUS, provides:

The heading also covers identifiable parts of chairs or other seats, such as backs, bottoms and arm-rests (whether or not upholstered with straw or cane, stuffed or sprung), seat or backrest covers for permanent attachment to a seat, and spiral springs assembled for seat upholstery.

Separately presented cushions and mattresses, sprung, stuffed or internally fitted with any material or of cellular rubber or plastics whether or not covered, are excluded (heading 94.04) even if they are clearly specialised as parts of upholstered seats (e.g., settees, couches, sofas). When these articles are combined with other parts of seats, however, they remain classified in this heading. They also remain in this heading when presented with the seats of which they form part.

EN 94.04 provides, in pertinent part, as follows:

This heading covers:

...

(B) Articles of bedding and similar furnishing which are sprung or stuffed or internally fitted with any material (cotton, wool, horsehair, down, synthetic fibres, etc.), or are of cellular rubber or plastics (whether or not covered with woven fabric, plastics, etc.)

* * * * *

In *Bauerhin Techs. Ltd. Pshp. v. United States*, the U.S. Court of Appeals for the Federal Circuit reviewed cushions for child car seats and classified them under heading 9404, HTSUS. 110 F.3d 774, 775–6 (Fed. Cir. 1997), *aff'g*, 19 C.I.T. 1441 (1995). Similar to the instant child car seat cushions, the cushions in *Bauerhin* contained plastic clips that were sewn into the cushions, were in the shape and form of child car seats, and were imported separately from the car seats with which they were parts. *See id.* at 775. According to Note 3(b) of Chapter 94, which states that “[g]oods described in heading 9404, entered separately, are not to be classified in heading 9401, 9402 or 9403 as parts of goods”, the Federal Circuit held that goods—such as the instant child car seat cushions with clips—are excluded from heading 9401, if they are classifiable in both headings 9401 and 9404, HTSUS. *See id.* at 777. Furthermore, the Parts EN to heading 9401, HTSUS, provides that “[s]eparately presented cushions and mattresses ... are excluded (heading 94.04) even if they are clearly specialised as parts of upholstered seats.” As stated in EN 94.04, heading 9404, HTSUS, covers “[a]rticles of bedding and similar furnishing which are stuffed or internally fitted with any material”. Specifically, subheading 9404.90.20, HTSUS, which provides for cushions, is an *eo nomine* provision that wholly characterizes cushions, such as those in the instant case. The *Bauerhin* court, therefore, classified the child car seat cushions with clips in subheading 9404.90.20, HTSUS, as cushions.

The instant child car seat cushions are similar to those described in HQ 953673, dated October 6, 1993,² which was the ruling on the protested merchandise discussed in *Bauerhin* and affirmed by the Federal Circuit, as they contain clips, are imported separately from the child car seats, and are padded with other materials. In HQ 953673, CBP held that the clips that are sewn to cushions “are not part of the seats but rather form a unitary whole with the cushion.” Similarly, the clips that are part of the instant child car seat cushions are only utilized to secure the placement of the cushions in the child car seats and thus, do not form an actual part of the seats in which the cushions are used. In addition to HQ 953673, we found that similar child car seat cushions with clips were classified in subheading 9404.90.20, HTSUS, as cushions, in NY C85243, dated March 26, 1998, NY D83542, dated October

² The merchandise in HQ 953673 was described as follows: “The merchandise involved consists of pads or cushions for an infant’s car seat All the pads are stuffed with polyester fiberfill. The outer surface on one side is a printed 50% polyester, 50% cotton woven fabric. The pads are backed with a nonwoven man-made fiber fabric. These pads have various slots for seat restraints and clips for attachment to the seat.”

29, 1998, and NY F88897, dated July 14, 2000.³ Pursuant to GRI 1, therefore, the child car seat cushions with clips are classified in subheading 9404.90.20, HTSUS, as cushions.

As noted above, we received one comment in response to the notice of the proposed revocation. The commenter contends that the three rulings at issue concerning the classification of child car seat cushions were correct because the cushions and their clips constitute parts of the seat within heading 9401, HTSUS. The commenter argues that they should be classified as parts of the seat because they are designed and used solely for their respective seat structure, and neither the body of the car seats nor the cushions would function without the attached clips. As explained above, however, the Federal Circuit held in *Bauerhin* that child car seat cushions with clips are classified in heading 9404, HTSUS, as cushions. As the subject merchandise is substantially similar to the child car seat cushions with clips that were analyzed in *Bauerhin*, CBP is bound to follow this judicial precedent. The child car seat cushions with clips, therefore, are properly classified in heading 9404, HTSUS.

HOLDING:

By application of GRIs 1 and 6, the child car seat cushions with clips are classified in heading 9404, HTSUS, specifically in subheading 9404.90.20, HTSUS, which provides for “[m]attress supports; articles of bedding and similar furnishing (for example, mattresses, quilts, eiderdowns, cushions, pouffes and pillows) fitted with springs or stuffed or internally fitted with any material or of cellular rubber or plastics, whether or not covered: [o]ther: [p]illows, cushions and similar furnishings: [o]ther”. The 2021 column one, general rate of duty is six percent *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 at www.usitc.gov/tata/hts.

EFFECT ON OTHER RULINGS:

NY N132069, dated November 18, 2010; NY N245061, dated August 30, 2013; and NY N246761, dated November 13, 2013, are hereby revoked.

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

Sincerely,

for

CRAIG T. CLARK,

Director

Commercial and Trade Facilitation Division

CC: Mr. Chris Reynolds
Senior Manager, Trade Services
Barthco International, Inc., d/b/a OHL-International
5101 S. Broad Street
Philadelphia, PA 19112

³ See also NY G82439, dated Oct. 5, 2000 (classifying an infant’s car safety seat cushion cover, which is comprised of 90 percent cotton, in subheading 9404.90.10, HTSUS); NY 893893, dated February 9, 1994 (classifying an infant’s car seat cover in subheading 9404.90.20, HTSUS).

U.S. Court of International Trade

Slip Op. 21–174

BORUSAN MANNESMANN BORU SANAYI VE TICARET A.Ş., Plaintiff, AMERICAN CAST IRON PIPE COMPANY, et al., Consolidated Plaintiffs, v. UNITED STATES, Defendant, AMERICAN CAST IRON PIPE COMPANY, et al., Defendant-Intervenor, and BORUSAN MANNESMANN BORU SANAYI VE TICARET A.Ş., Consolidated Defendant-Intervenor.

Before: Jane A. Restani, Judge
Consol. Court No. 19–00056

[Commerce’s Final Results of Redetermination Pursuant to Court Remand in Large Diameter Welded Pipe from the Republic of Turkey are sustained]

Dated: December 28, 2021

Donald Bertrand Cameron, Morris, Manning & Martin, LLP, of Washington, DC, for Plaintiff and Consolidated Defendant-Intervenor Borusan Mannesmann Boru Sanayi ve Ticaret A.Ş. With him on the brief were *Brady Warfield Mills*, *Edward John Thomas, III*, *Eugene Degnan*, *Jordan L. Fleischer*, *Julie Clark Mendoza*, *Mary Shannon Hodgins*, *Ragan William Updegraff*, *Rudi Will Planert*, and *Sabat Chaudhary*.

Timothy C. Brightbill, Wiley Rein, LLP, of Washington, DC, for Consolidated Plaintiffs and Defendant-Intervenors American Cast Iron Pipe Company, Berg Steel Pipe Corporation, Berg Spiral Pipe Corporation, Dura-Bond Industries, Stupp Corporation, Greens Bayou Pipe Mill, LP, JSW Steel (USA) Inc., Skyline Steel, Trinity Products LLC, and Welspun Tubular LLC USA. With him on the brief were *Adam Milan Teslik*, *Elizabeth Seungyon Lee*, *Enbar Toledano*, *Laura El-Sabaawi*, *Maureen Elizabeth Thorson*, and *Tessa Victoria Capeloto*.

Robert Ralph Kieपुरa, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendant United States of America. With him on the brief was *Eric J. Singley*. Of Counsel was *Reza Karamloo*, Office of the Chief Counsel for Trade Enforcement and Compliance. U.S. Department of Commerce.

OPINION

Restani, Judge:

This matter is before the court following the Department of Commerce’s (“Commerce”) second remand redetermination in the anti-dumping duty investigation of Large Diameter Welded Pipe (“LDWP”) from the Republic of Turkey. Plaintiff and defendant-intervenor, Borusan Mannesmann Boru Sanayi ve Ticaret A.Ş. (“BMB”), has challenged previous determinations and resulting antidumping duty orders as to LDWP. *See Large Diameter Welded Pipe from the Republic of Turkey: Final Determination of Sales at Less Than Fair Value*, 84 Fed. Reg. 6,362 (Dep’t Commerce Feb. 27, 2019)

(“*Final Determination*”); *Large Diameter Welded Pipe from the Republic of Turkey: Amended Final Affirmative Antidumping Duty Determination & Antidumping Duty Order*, 84 Fed. Reg. 18,799 (Dep’t Commerce May 2, 2019); *Borusan Mannesmann Boru Sanayi ve Ticaret A.Ş. v. United States*, 426 F. Supp. 3d 1395 (CIT 2020) (“*Borusan I*”).

Following a post-appeal remand, Commerce revised BMB’s post-sale price adjustment, removed an adjustment to BMB’s cost of production (“COP”) that was based on a finding of a cost-based particular market situation (“PMS”), and declined to reconsider BMB’s U.S. date of sale. Final Results of Redetermination Pursuant to Court Remand at 9, ECF No. 115 (Nov. 2, 2021) (“*Second Remand Redetermination*”). The adjustments resulted in a *de minimis* estimated weight-average dumping margin. *Id.* at 8–9. Accordingly, Commerce found the date-of-sale issue to be moot because the effective margin would not change, even if addressed, and the analysis would be an exercise in futility. *Id.* The second remand redetermination adequately addresses the court’s concerns and it is supported by substantial evidence. Thus, the second remand redetermination is sustained.

BACKGROUND

While the court presumes familiarity with the record, the court briefly summarizes the relevant record evidence for ease of reference. Commerce initiated an antidumping investigation of LDWP from Turkey for the period January 1, 2017, through December 31, 2017. *Large Diameter Welded Pipe from Canada, Greece, India, the People’s Republic of China, the Republic of Korea, and the Republic of Turkey: Initiation of Less-Than-Fair-Value Investigations*, 83 Fed. Reg. 7,154, 7,155 (Feb. 20, 2018). In *Borusan I*, the court sustained Commerce’s determination that BMB was entitled to a downward post-sale price adjustment for the foregoing home-market sales expenses, and remanded to Commerce to reconsider: (1) the amount of a post-sale price adjustment for certain of BMB’s home-market sales; and (2) the date of sale for BMB’s United States sales. See *Borusan I*, 426 F. Supp. 3d at 1400, 1406 n.11., 1415. The court stated that “no adjustment for a PMS is permitted for the sales below cost test,” and ordered that “Commerce may not adjust the costs based on a PMS for purposes of the sales below cost of production test.” *Id.* at 1411, 1414.

On the first remand, Commerce granted BMB the post-sale price adjustment in full. Final Results of Redetermination Pursuant to Court Remand at 11, ECF No. 86 (Dep’t Commerce Mar. 9, 2020) (“*First Remand Redetermination*”). Commerce determined it was unnecessary to reach any remaining issue because BMB’s margin was

de minimis after applying the full post-sale price adjustment. *Id.* The court sustained Commerce’s first remand redetermination. *Borusan Mannesmann Boru Sanayi ve Ticaret A.Ş. v. United States*, Slip. Op. 20–71, 2020 WL 2613345, at *5 (CIT May 22, 2020) (“*Borusan II*”).

American Line Pipe Producers Association (“ALPPA”), consolidated plaintiffs and defendant-intervenors, appealed the court’s judgment in *Borusan II*, challenging the amount of BMB’s post-sale price adjustment. Notice of Appeal of Slip Op. 20–71, ECF No. 105 (June 24, 2020). The Federal Circuit reversed and remanded, holding that Commerce’s original granting of a partial post-sale price adjustment was supported by substantial evidence. *Borusan Mannesmann Boru Sanayi Ve Ticaret A.Ş. v. Am. Cast Iron Pipe Co.*, 5 F.4th 1367, 1377 (Fed. Cir. 2021) (“*Borusan III*”). This court then remanded the action to Commerce “to address any issues remaining from the prior remand that [were] no longer moot.” *Order*, ECF No. 110 (Aug. 26, 2021).

In the second remand redetermination, Commerce, consistent with *Borusan III*, granted BMB the original partial post-sale price adjustment. *Second Remand Redetermination* at 9. Commerce also recalculated BMB’s estimated weight-average dumping margin without a PMS adjustment to the sales-below-cost test in accordance with this court’s direction in *Borusan I. Id.* at 5–7. Commerce determined that BMB had an estimated weight-average dumping margin of zero percent. *Id.* at 5, 9. As a result, Commerce declined to reexamine the U.S. date-of-sale issue because it would not change the dumping margin, and thus, was moot. *Id.* at 5–6, 8–9.

BMB filed comments agreeing with Commerce’s finding that the dumping margin was zero. Comments on Remand Results at 1, ECF No. 118 (Nov. 22, 2021) (“*BMB Comments*”). BMB asked the court to hold, however, that Commerce’s failure to address the date-of-sale issue was a waiver. *Id.* at 3. BMB argued that the court should enter judgment in its favor on the date-of-sale issue. *Id.*

ALPPA also filed comments, indicating its agreement with the partial post-sale price adjustment. Comments on Remand Results in Opposition to Final Results of Redetermination Pursuant to Court Remand at 2, ECF No. 119 (Nov. 22, 2021) (“*ALPPA Comments*”). ALPPA also argued, however, that Commerce erred by removing the adjustment for a PMS because the statute allows the application during the sales-below-cost test. *Id.* at 2. Finally, ALPPA asserted that the court should not grant relief on the date-of-sale issue. *Id.* at 14–16.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) and 19 U.S.C. § 1516a(a)(2)(B)(i). The court sustains Commerce’s results of an administrative review of an antidumping duty order unless it is “unsupported by substantial evidence on the record, or otherwise not in accordance with law[.]” 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

I. Commerce’s Removal of an Adjustment for a PMS Is Not Contrary to Law

ALPPA argues that Commerce erred by removing the adjustment for a PMS. *ALPPA Comments* at 2. It asserts that the PMS adjustment is available when the sales-below-cost test is utilized and that the court erred in earlier decisions that held it was not available under the statute for a COP analysis. *See generally id.* at 2–13. BMB and the government, however, request that the court sustain Commerce’s second remand redetermination as to the PMS adjustment. *BMB Comments* at 3–4; Reply to Comments on Remand Results at 4, ECF No. 120 (Dec. 7, 2021). Commerce originally applied the PMS adjustment for the sales-below-cost test under 19 U.S.C. § 1677b(b)(3). *Issues and Decision Memorandum for the Final Affirmative Determination in the Less-Than-Fair-Value Investigation of Large Diameter Welded Pipe from the Republic of Turkey*, A-489–833, POI 1/1/2017–12/31/2017 at 3 (Dep’t Commerce Feb. 19, 2019).

As the court has recently explained, no adjustment for a PMS is permitted for the sales-below-cost test. *See e.g., Borusan I*, 426 F. Supp. 3d at 1411; *Husteel Co. v. United States*, 426 F. Supp. 3d 1376, 1383–87 (CIT 2020); *Dong-A Steel Co. v. United States*, 475 F. Supp. 3d 1317, 1337–41 (CIT 2020); *Saha Thai Steel Pipe Public Co. v. United States*, 422 F. Supp. 3d 1363, 1369–70 (CIT 2019). The Federal Circuit has affirmed this ruling, holding that Commerce cannot “use the existence of a PMS as a basis for adjusting a respondent’s costs of production to determine whether a respondent has made home market sales below cost.” *Hyundai Steel Co. v. United States*, No. 2021–1748, 2021 WL 5856804, at *1 (Fed. Cir. Dec. 10, 2021). The Federal Circuit reasoned that Congress intended to limit PMS adjustments to “constructed value” determinations in § 1677b(e) and did not authorize Commerce to apply the adjustments to the sale-below-cost determinations in § 1677b(b). *Id.* at *3; *see also* 19 U.S.C. § 1677b.

The court may lack jurisdiction over this argument. The court ordered Commerce to remove the adjustment for a PMS in *Borusan I*. *See Borusan I*, 426 F. Supp. 3d at 1411, 1414. In the first remand

redetermination, Commerce did not do a recalculation based on removal of the PMS adjustment, even though it could not do otherwise, if it would affect the outcome. *See First Remand Redetermination at 4*. As developments revealed, however, the issue was only temporarily moot. *Id.* After the court sustained the first remand redetermination, *see Borusan II*, Slip. Op. 20–71, 2020 WL 2613345, at *1. ALPPA apparently did not raise any issue on appeal regarding the court’s order to remove the PMS. *See generally Borusan III*, 5 F.4th at 1367. The issue is arguably “precluded from further adjudication” because it was likely included in the scope of the final appealed judgment. *See Phil-Insul Corp. v. Airlite Plastics Co.*, 854 F.3d 1344, 1357 (Fed. Cir. 2017) (“An issue that falls within the scope of the judgment appealed from but is not raised by the appellant in its opening brief on appeal is necessarily waived. . . . [A]ll issues within the scope of the appealed judgment are deemed incorporated within the mandate and thus are precluded from further adjudication.”) (internal citations omitted). The scope of the appealed judgment likely included the removal of the PMS adjustment in the first remand redetermination because it was an issue finally decided in *Borusan I* and *Borusan II*, and left no opportunity for further explanation or reconsideration by Commerce. *See id.* Thus, the court may lack jurisdiction over the issue because ALPPA did not raise the argument on appeal when it had the opportunity to do so.

Assuming the court has jurisdiction over the issue, it sustains Commerce’s removal of the adjustment for a PMS. In *Borusan I*, the court ordered Commerce to remove the adjustment, holding that the PMS adjustment does not apply to the sales-below-cost test. *See Borusan I*, 426 F. Supp. 3d at 1411, 1414–15. Commerce is now complying with the court’s order. *See Second Remand Redetermination at 5–6*. ALPPA has shown no reason for the court to depart from that order. Further, the Federal Circuit has also recently held that Commerce is not authorized to apply the PMS adjustment for the sales-below-cost test. *See Hyundai Steel*, 2021 WL 5856804 at *1, *5. Here, because Commerce was determining BMB’s COP for purpose of the sales-below-cost test, it was not permitted to apply the PMS adjustment. *See id.*

II. It Is Not Necessary for the Court to Address the Date-of-Sale Argument

While BMB requests that the court sustain the second redetermination, it also urges the court to find in its favor regarding “outstanding issues,” including its U.S. date of sale. *BMB Comments at 4*. BMB argues that Commerce failed to act on the court’s instruction to “address all open issues,” and Commerce’s characterization of the

date-of-sale issue as moot was in error. *Id.* at 2. It asserts that Commerce’s decision warranted the court holding that Commerce waived the opportunity to use any date other than the contract date, and thus, the court should rule in BMB’s favor. *Id.* ALPPA asserts that the court should not grant relief in BMB’s favor. *ALPPA Comments* at 16–17.

It is not necessary for Commerce to calculate an adjustment if it “would impose a needless expense and waste the agency’s time” because it would not change the ultimate rate determination. *See Roses Inc. v. United States*, 15 CIT 465, 471, 774 F. Supp. 1376, 1381 (1991). Here, Commerce’s determinations have rendered BMB’s estimated weighted-average dumping margin *de minimis* and the date-of-sale determination would not change the rate determination. *See Second Remand Redetermination* at 8–9. Commerce does not need to calculate an adjustment if BMB has already secured the “maximum possible relief” when the margin rate was already *de minimis*. *See Borusan II*, 2020 WL 2613345, at *5; *see also Roses*, 15 CIT at 471, 774 F. Supp. at 1381. Commerce correctly assumed that the court would not require useless acts. Accordingly, Commerce’s second remand redetermination is sustained in full.

CONCLUSION

For the foregoing reasons, the second remand redetermination is **SUSTAINED**. Judgment will issue accordingly.

Dated: December 28, 2021

New York, New York

/s/ Jane A. Restani
JANE A. RESTANI, JUDGE

Slip Op. 21–175

PT. KENERTEC POWER SYSTEM, Plaintiff, v. UNITED STATES, Defendant,
WIND TOWER TRADE COALITION Consolidated Plaintiff and
Defendant-Intervenor.

Before: Jane A. Restani, Judge
Consol. Court No. 20–03687
PUBLIC VERSION

[Sustaining the U.S. Department of Commerce’s final negative determination as amended on remand in the countervailing duty investigation of utility-scale wind towers from Indonesia.]

Dated: December 28, 2021

Daniel Robert Wilson, and *Henry David Almond* Arnold & Porter Kaye Scholer LLP, of Washington, DC, argued for Plaintiff PT. Kenertec Power System. With them on the

brief were *Jaehong David Park, Henry Bowman Morris, Kang Woo Lee, Leslie Claire Bailey, and Michael Tod Shor.*

Elizabeth Anne Speck, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for the Defendant. With her on the brief were *Patricia Mary McCarthy*, and *Joshua Ethan Kurland*. Of counsel was *Saad Younus Chalchal*, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce.

Robert Edward DeFrancesco, III, Wiley Rein, LLP, of Washington, DC, argued for Defendant-Intervenor Wind Tower Trade Coalition. With him on the brief were *Alan Hayden Price, Daniel Brian Pickard, Derick G. Holt, Elizabeth Seungyon Lee, John Allen Riggins, Laura El-Sabaawi, Maureen Elizabeth Thorson, Robert Edward DeFrancesco, III, Tessa Victoria Capeloto, and Theodore Paul Brackemyre.*

OPINION

Restani, Judge:

Before the court is a motion for judgment on the agency record pursuant to United States Court of International Trade (“USCIT”) Rule 56.2, in an action challenging findings in both the final determination and the final remand redetermination of the United States Department of Commerce (“Commerce”). *See Utility Scale Wind Towers from Indonesia*, 85 Fed. Reg. 40,241 (Dep’t Commerce July 6, 2020) (“*Final Determination*”); Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Utility Scale Wind Towers from Indonesia, C-560–834, POI: 01/1/2018–12/31/2018 (Dep’t Commerce June 29, 2018) (“*IDM*”); Final Results of Redetermination Pursuant to Court Remand, ECF No. 43 (“*Final Remand Redetermination*”). The final determination and final remand redetermination at issue resulted from Commerce’s countervailing duty (“CVD”) investigation of utility-scale wind towers from Indonesia.

The extant issues arising respectively from the final determination and the final remand redetermination are: 1) whether Commerce’s determination that Krakatau POSCO was neither an authority nor entrusted or directed by the Indonesian government to provide cut-to-length steel plate (“CTL Plate”) to Kenertec at less-than-adequate remuneration (“LTAR”) is supported by substantial evidence, and 2) whether Commerce’s determination that the Rediscount Loan Program is an export subsidy, and thus excluded from the upstream subsidy calculation, is supported by substantial evidence. After the final remand redetermination, both the Government and Plaintiff PT. Kenertec Power System (“Kenertec”) maintain that Commerce’s determinations are supported by substantial evidence and in accordance with law. *See* PT. Kenertec Resp. to WTTC R.56.1 Mot. for J. on the Agency Record, ECF No. 31 (July 9, 2021); PT Kenertec Resp. to WTTC Supp. Br. at 9–10, ECF No. 56 (Sept. 21, 2021); Gov’t Op. to R. 56.2 Mot. for J. on the Agency Record at 59, ECF No. 34 (July 9, 2021)

(“Gov’t Br.”); Gov’t Resp. to WTTC Supp. Br. at 14, ECF No. 55 (Sept. 17, 2021) (“Gov’t Supp. Br.”) Plaintiff-intervenor Wind Tower Trade Coalition (“WTTC”) contests Commerce’s determinations. *See* WTTC Resp. to Kenertec Mot. for J. on the Agency Record Br., ECF No. 36 (July 12, 2021) (“WTTC Br.”); WTTC Supplemental Brief at 13, ECF No. 56 (Sept. 8, 2021) (“WTTC Supp. Br.”). The court sustains the final determination as amended by the final remand redetermination.

BACKGROUND

On July 9, 2019, WTTC submitted a countervailing duty petition to Commerce regarding imports of wind towers from Indonesia. *See Petitioner’s Letter, Petitions for the Imposition of Antidumping and Countervailing Duties on Utility Scale Wind Towers from Canada, Indonesia, the Republic of Korea, and the Socialist Republic of Vietnam*, C.R. 1–33, P.R. 1–33 (July 9, 2019). WTTC alleged that an Indonesian wind tower producer had purchased CTL Plate for LTAR. *See id.*

On July 29, 2019, Commerce initiated a CVD investigation of *inter alia* an alleged provision of CTL Plate for LTAR. *Utility Scale Wind Towers from Canada, Indonesia, and the Socialist Republic of Vietnam*, 84 Fed. Reg. 38,216 (Dep’t Commerce Aug. 6, 2019) (“*Initiation Notice*”). The period of investigation (“POI”) was January 1, 2018 through December 31, 2018. *Initiation Notice*, 84 Fed. Reg. at 38,217. During the POI, Commerce identified Kenertec as the only known company with U.S. exports. *Initiation Notice*, 84 Fed. Reg. at 38,219. Commerce found that Kenertec reported it only purchased CTL Plate from PT. Krakatau POSCO (“Krakatau POSCO”) during the POI. *See* Kenertec’s September 23, 2019 Countervailing Duty Questionnaire Response at 12 (citing Ex. INPUT-1), C.R. 56–66, P.R. 99 (Sept. 23, 2019) (“*Kenertec’s Sept. 23 Resp.*”). Krakatau POSCO is a joint venture of POSCO, a private Korean steel company, and PT. Krakatau Steel (“Krakatau Steel”), a government-owned Indonesian company. The Government of Indonesia controls Krakatau Steel as the majority shareholder. *See* Government of Indonesia’s Sept. 27, 2019 Questionnaire Response at 10, C.R. 83–110, P.R. 102–128 (Sept. 17, 2019) (“*GOI QR*”).

On December 13, 2019, Commerce published its affirmative preliminary determination and found that Kenertec had received countervailable subsidies at an estimated *ad valorem* net subsidy rate of 20.29 percent. *Utility Scale Wind Towers from Indonesia: Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Determination with Final Antidumping Duty Determination*, 84 Fed. Reg. 68,109, 68,110 (Dep’t Commerce Dec. 13, 2019) (“*Prelimi-*

nary Determination”); *Decision Memorandum for the Preliminary Determination of the Countervailing Duty Investigation of Utility Scale Wind Towers from Indonesia*, C-560-834, POI 1/1/2018–12/31/2018, P.R. 183 (Dep’t Commerce Dec. 6, 2019) (“PDM”) at 7–18. Commerce preliminarily determined that Kenertec’s purchases of CTL Plate were a countervailable financial contribution because it found that the Government of Indonesia had entrusted and directed Krakatau POSCO to provide CTL Plate for LTAR. *See PDM* at 7–16; *see also* Government of Indonesia’s Nov. 4, 2019, First Supplemental Questionnaire Response at Ex. GOI-SUPP-3, GOI-SUPP-10, C.R. 148–149, P.R. 156–57 (“GOI SQR”).

Two months later, on February 3, 2020, WTTC submitted a timely additional allegation that CTL Plate producers in Indonesia, including Krakatau POSCO, had received countervailable upstream subsidies that had passed through to Kenertec. Letter from Petitioner, *Upstream Subsidy Allegation*, C.R. 234–35, P.R. 207–8 (Feb. 4, 2020) (“*Upstream Subsidy Allegation*”). Commerce initiated an investigation because it found that the allegation provided a reasonable basis to believe or suspect the existence of a CVD upstream subsidy under 19 U.S.C. §1677–1(a) and 19 C.F.R. § 351,523(a)(1). *See* Memorandum from Dep’t Commerce, *Upstream Subsidy Allegation* at 2–9, C.R. 242, P.R. 231 (Mar. 12, 2020) (“*Upstream Subsidy Memorandum*”). Commerce then decided to defer its upstream subsidy investigation pursuant to 19 U.S.C. § 1671b(2)(B)(i) until after the final determination. *See Upstream Subsidy Memorandum* at 1–2; *Utility Scale Wind Towers from Canada, Indonesia, and the Socialist Republic of Vietnam: Postponement of Preliminary Determinations of Countervailing Duty Investigations*, 84 Fed. Reg. 48,329 (Sept. 13, 2019).

On July 6, 2020, Commerce published its final determination. *See Final Determination*, 85 Fed. Reg. 40,241. Commerce concluded that Krakatau POSCO was not an authority because the record evidence on balance showed that neither the Indonesian government itself nor Krakatau Steel exerted meaningful control over the joint venture. *Id.*; *IDM* at 33. Commerce also reconsidered the decision to defer its investigation of upstream subsidization of CTL Plate, *see IDM* 57–58; *Upstream Subsidy Memorandum* at 9, and ultimately proceeded with that upstream subsidy investigation. *See IDM* at 59–63.

After briefing before the court, Commerce requested a partial remand to address Kenertec’s argument that the Rediscount Loan Program included in Commerce’s upstream subsidy calculation was an export subsidy not cognizable as an upstream subsidy. Gov’t Mot. for Partial Voluntary Remand, ECF No. 35 (July 9, 2021). On July 20, 2021, the court granted the motion permitting a limited remand

proceeding. *Order*, ECF No. 38 (July 20, 2021). Pursuant to the court's order, Commerce filed its final remand redetermination on August 19, 2021. *See Final Remand Redetermination*. In the final remand redetermination, Commerce determined that the Rediscount Loan Program was export contingent, excluded the subsidy in the upstream calculation, and reached a negative CVD determination. *See id.* at 6.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) and 19 U.S.C. § 1516a(a)(2)(B)(i) (2021). The court will uphold Commerce's determinations in a countervailing duty proceeding unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law[.]" 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

I. Commerce Properly Found That Krakatau POSCO Is Neither an Authority nor Directed or Entrusted by an Authority

A subsidy is countervailable if the following elements are satisfied: 1) an authority has provided a financial contribution directly, or entrusts or directs a private entity to make a financial contribution; 2) a benefit is thereby conferred on a recipient of the financial contribution; and 3) the subsidy is specific to a foreign enterprise or foreign industry, or a group of such enterprises or industries. 19 U.S.C. § 1677(5)(A)–(B), (D)–(E), (5A). In the final determination, Commerce found that that the purchases of CLT Plate were not a financial contribution under the statute, because Krakatau POSCO is neither an "authority" nor a private entity whom the Indonesian government "entrusts or directs." *See* 19 U.S.C. § 1677(5), (5)(B)(iii). Commerce and Kenertec find themselves in alignment, and both parties now ask the court to sustain the Commerce's final determination. WTTC disagrees and asserts that Commerce improperly disregarded record evidence in reaching the final determination. For the following reasons, the court holds that Commerce's analysis is in accordance with law and supported by substantial evidence.

A. Commerce Properly Found That Krakatau POSCO Is not Itself an Authority Within the Meaning of 19 U.S.C. § 1677(5)(B)

Commerce first found that Kenertec was a privately-owned producer of wind towers in Indonesia, and that Krakatau POSCO was Kenertec's sole Indonesian CTL Plate provider during the POI.

Kenertec’s Sept. 23 Resp. at Ex. INPUT-1; *PDM* at 8. In the final determination, Commerce found that Krakatau POSCO is not an authority under 19 U.S.C. § 1677(5)(B), and therefore the CTL Plate it sold to Kenertec was not a countervailable financial contribution from an authority. *Final Determination* 85 Fed. Reg. at 40,243; *IDM* at 31–33. Commerce considered evidence regarding the circumstances of Krakatau POSCO’s corporate ownership, management structure, and voting procedures to reach its determination. *See IDM* at 31–33; *see also GOI QR* at Ex. GOI-CTL-1, Ex. GOT-CTL-3 at Ch. 8, Ex. GOI-CTL-12; *GOI SQR* at Ex. GOI-SUPP-3.

The statute defines “authority” as “a government of a country or any public entity within the territory of the country.” 19 U.S.C. § 1677(5)(B). “Public entity,” is not a defined term, and therefore Commerce receives substantial deference in its interpretation. *Borusan Mannesmann Boru Sanayi ve Ticaret A.S. v. United States*, 37 CIT 1276, 61 F. Supp. 3d 1306, 1314 (2015); *see Guangdong Wireking Housewares & Hardware Co. v. United States*, 37 CIT 319, 900 F. Supp. 2d 1362, 1377 (2013), *aff’d*, 745 F.3d 1194 (Fed. Cir. 2014). Evidence of government ownership, although highly relevant, is not dispositive. *See Borusan*, 61 F. Supp. 3d at 1320 (finding that the analysis is not “limited to consideration of corporeal voting rights and other corporate formalities”). In the final determination, Commerce analyzed Krakatau POSCO’s corporate governance structure and cited record evidence in three categories to support its finding that Krakatau POSCO was not an authority under 19 U.S.C. § 1677(5)(B). *See IDM* at 31–33.

To support its finding Commerce first considered Krakatau POSCO’s ownership structure. Commerce identified Krakatau POSCO as a joint venture of POSCO, a private Korean steel company, and Krakatau Steel, a majority Indonesian government-owned company. *See GOI QR* at 8–10; *IDM* at 31–32. Further, Commerce found that Krakatau POSCO was 70 percent owned by POSCO, with the remaining 30 percent owned by Krakatau Steel. *IDM* at 31–32; *see GOI SQR* at Ex. GOI-SUPP-3 Art 3. Commerce concluded that based on ownership alone, the Krakatau POSCO joint venture was primarily controlled by POSCO, a private company, not the Government of Indonesia. *IDM* at 32.

Next, Commerce considered Krakatau POSCO’s management structure, which included a primary management Board of Directors (“BOD”) and supervisory Board of Commissioners (“BOC”). *See GOI QR* at Ex. GOI-CTL-1; *GOI SQR* at Ex. GOI-SUPP-3. The BOD was comprised of [[]] members. POSCO was authorized to appoint [[]] members, and Krakatau Steel was authorized to appoint

[[]] members to the BOD. *See GOI QR* at Ex. GOI-CTL-12. The primary duty of the BOD was to [[

]]. *GOI QR* at Ex. GOI-CTL-12. The BOD [[

]] *See GOI SQR* at Ex. GOI-CTL-12 Art. 8 (emphasis added). The Government of Indonesia further explained that [[

]] *GOI QR* at 52–53 (emphasis added).

The BOC was comprised of four members. POSCO and Krakatau Steel were each authorized to appoint [[]] members to the BOC. *Id.* Krakatau Steel was also authorized to nominate the [[]] whose role was to provide: [[

]] *See GOI QR* at Ex. GOI-CTL-12 Art. 15 (emphasis added). In the final determination Commerce found that Krakatau Steel board members, who served on either the BOD or BOC, did not exert meaningful control over Krakatau POSCO’s operations during the period of investigation. *IDM* at 32.

Finally, Commerce considered Krakatau POSCO’s voting rights:

Each director casts one vote and decisions are made [[
]] A quorum exists if [[
]] If a quorum is not achieved,
 then [[]], and in the [[]]
 a quorum exists [[

]]

Memorandum from Dep’t Commerce, Additional Analysis Regarding the Final Determination at 2, C.R. 263, P.R. 262 (July 1, 2020) (citing *GOI QR* at 52–53, Ex. GOI-CTL-12) (“*Commerce Final Determination Add’l Analysis Memorandum*”). Additionally, certain decisions by the BOD [[

]]
GOI QR at Ex. GOI-CTL-12 Art. 11. Considering the Articles of Association and Joint Venture Agreement, Commerce concluded that Krakatau POSCO’s BOD may adopt binding resolutions without any involvement or control from Krakatau Steel, because POSCO’s [[]]

BOD members represented a majority. *Commerce Final Determination Add'l Analysis Memorandum* at 2; see *IDM* at 32–33.

WTTC challenges Commerce's determinations on several counts. Primarily, WTTC contends that Commerce disregarded record evidence and did not adequately address the role of the BOC, asserting that Krakatau Steel's presence on the BOC provided it and the Indonesian government with meaningful control over Krakatau POSCO. See WTTC Mem. in Supp. of their R.56.1 Mot. for J. on the Agency Record at 17–19, 26–27, ECF No. 21 (Apr. 7, 2021) (“WTTC Motion”). Here, the petitioner's argument fails primarily because it overstates the role of the BOC, and it is plainly incorrect regarding the lack of record evidence to support Commerce's final determination. Commerce preliminarily determined that the BOC was the “ultimate supervisory organ of the company.” *PDM* at 10; see also *Preliminary Determination*, 84 Fed. Reg. at 68,110. Following further investigation, however, Commerce reasonably determined that the BOD and not the BOC maintained organizational control of Krakatau POSCO for the reasons previously stated. See *IDM* 32–33; see also *Commerce Final Determination Add'l Analysis Memorandum* at 1–2.

Next WTTC challenged POSCO's comparative strength on both the BOC and BOD if a quorum is not reached. WTTC alleges that if a [[]] quorum is not reached for a BOD meeting; the procedure requires the meeting to be [[

]] *GOI QR* at Ex. GOI-CTL-12 Arts. 11, 22. Under these limited, hypothetical circumstances, WTTC alleges that the [[

]] can adopt binding resolutions “without any involvement of POSCO.” WTTC Motion at 16–17. WTTC could point to no record evidence of the minority BOD members exerting control in such a way during the POI. Further, the quorum rules still require [[]] to proceed, nullifying the argument that minority BOC members can exert control without “any” POSCO involvement. See *id.*; *GOI QR* at Ex. GOI-CTL-12 Art. 12. Therefore, Commerce's decision to consider, and reject, WTTC's argument is reasonable and supported by record evidence.

Finally, WTTC argued that major operational decisions require [[]] through its 30 percent control of the joint venture. Commerce did not find WTTC's reasons compelling, citing Krakatau POSCO's Articles of Association by-laws. See *GOI QR* at Ex. GOI-CTL-12 Art. 11; *IDM* at 32. Commerce explained that if the requirement of [[

]] See *IDM* at 32; Gov't Br. at 20; see also *GOI QR* at Ex. GOI-CTL-12 Arts. 11, 22.

Commerce asserts that on balance, the Government of Indonesia, through Krakatau Steel, did not exert meaningful control over Krakatau POSCO during the POI. On these facts, the court cannot say that Commerce erred in its finding that Krakatau POSCO is not a government authority under 19 U.S.C. § 1677(5)(B).

B. Commerce Properly Found That the Indonesian Government Did Not Entrust or Direct Krakatau POSCO to Provide CTL Plate to Kenertec Pursuant to 19 U.S.C. § 1677(5)(B)(iii)

Under 19 U.S.C. § 1677(5)(B)(iii), a countervailable subsidy may be provided by an authority who “entrusts or directs a private entity to make a financial contribution, if providing the contribution would normally be vested in the government and the practice does not differ in substance from practices normally followed by governments.” 19 U.S.C. § 1677(5)(B)(iii). Commerce asserts that the Statement of Administrative Action Accompanying the Uruguay Round Agreements Act establishes guidance that authorizes Commerce to analyze this issue on a case-by-case basis. *See* Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103–316, vol. 1, at 925–26 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4209, 4239–40 (“SAA”). When there is no direct legislation to entrust or direct private parties to provide a financial contribution, Commerce relies on circumstantial information to determine whether there was entrustment or direction. *See Hynix Semiconductor, Inc. v. United States*, 29 CIT 995, 1005–6, 391 F. Supp. 2d 1337, 1347–48 (2005).

Absent direct evidence that the government entrusted or directed a private entity to provide a financial contribution, Commerce applies a two-part test to examine: “1) whether the government has in place during the relevant period a governmental policy to support the respondent; and 2) whether evidence on the record establishes a pattern of practices on the part of the government to act on that policy to entrust or direct the associated private entity decisions.”¹ *Id.* In the final determination, Commerce found that the Government of Indonesia’s policy to support the wind tower industry during the period of investigation met the requirements of the first prong. *IDM* at 27. This appears undisputed. Commerce, however, did not find an established “pattern of practices” under the second prong. *IDM* at 30. Commerce ultimately declined to find that the Government of Indonesia

¹ The prototypical case involves a government implementing “direct legislation to entrust or direct private parties to provide a financial contribution.” *Biodiesel from the Republic of Indonesia: Final Affirmative Countervailing Duty Determination*, 82 Fed. Reg. 53,477 (Nov. 16, 2017), and accompanying Issues and Decision Memorandum, at 20.

entrusted or directed Kenertec POSCO to provide a countervailable financial contribution. *Id.*

Commerce preliminarily determined that established practices of the Indonesian government satisfied the second prong of the test. *See PDM* at 12. Commerce based this finding on the Government of Indonesia's "Master Plan of National Industry Development 2015–2035 of the Republic of Indonesia" ("RIPIN"); the existence of a plan to develop a steel cluster in a region of Cilegon as support for Krakatau Steel's significant influence on Krakatau POSCO; and the alignment of Krakatau POSCO's objectives with government policies. *PDM* at 12; *see GOI SQR* Ex. GOI-SUPP-10 ("RIPIN") at 19–21). In the final determination, however, Commerce reversed its position and found that the Indonesian government had not met the second prong. *IDM* at 30. Commerce adequately supported its new decision with record evidence.

First, Commerce accepted clarifications from the Indonesian government about the RIPIN. *See GOI SQR* at 18–20; *see also* Government of Indonesia's Nov. 22, 2019 Second Supplemental Questionnaire Response at 2–3, C.R. 219, P.R. 180 (Nov. 22, 2019) ("*GOI SSQR*"). The Indonesian government submitted a verification report that framed the Cilegon steel cluster not as a governmental plan, but as a long-term commercial goal independently established by Krakatau Steel and Krakatau POSCO. *See GOI SSQR* at 2–3. In its clarifications, the Government of Indonesia described the RIPIN as a non-binding aspiration guideline, as opposed to a "pattern of practices." *See GOI SQR* at 18–20. Neither the Cilegon cluster, nor Krakatau Steel or Krakatau POSCO are mentioned in the RIPIN. *GOI SQR* at Ex. GOI-SUPP-1. Further evidence supports that Krakatau POSCO's long-term commercial strategy towards the Cilegon cluster was independent of the Government of Indonesia's development plan because: 1) Krakatau POSCO's business plan towards the Cilegon cluster predates the RIPIN, and 2) "Krakatau Steel and Krakatau POSCO's crude steel capacity goal remains unchanged since it was initially set, which suggests there was no attempt to align production with governmental policies." *IDM* at 27–28; *see also GOI SQR* at 20, Ex. GOI-SUPP-10 at 23–27.

Second, as discussed, Commerce amended its preliminary understanding of Krakatau POSCO's corporate governance. *Compare Preliminary Determination* 84 Fed. Reg. at 68,110. *with Final Determination* 85 Fed. Reg. at 40,243; *see also IDM* at 29. Commerce found that Krakatau Steel held a [[] ownership of the joint venture Krakatau POSCO and did not exert control over Krakatau POSCO through either the BOD or the supervisory BOC.

See *IDM* at 32. Without this link the finding of entrustment or direction was undermined, and Commerce's final determination was substantially supported.

II. Commerce Properly Reached a Negative Upstream Subsidy Determination

In its final determination, Commerce found an *ad valorem* net countervailable subsidy rate of 5.90 percent for Kenertec. *Final Determination*, 85 Fed. Rep. at 40,242. Pursuant to its decision on remand, Commerce reversed course and reached a negative CVD determination based on a *de minimis* subsidy rate. *Final Remand Redetermination* at 21–22. Specifically, Commerce found that the Rediscount Loan Program, found to be a countervailable subsidy in a prior proceeding and included in the CVD rate here, was export contingent and therefore not eligible to be considered a countervailable upstream subsidy. *Id.* Commerce and Kenertec ask the court to sustain the final remand redetermination. Gov't Supp. Br. at 5–8; Kenertec Supp Br. at 9–10. WTTC claimed that Commerce's decision to exclude the Redistrict Loan Program in its upstream subsidy calculation was improper because there is no evidence on this record demonstrating that the Redistrict Loan Program was an export subsidy. WTTC Supp. Br. at 3.

WTTC also posits that if Commerce does not retain the Rediscount Loan Program in the upstream subsidy calculation or rely on record information as facts available to reach a positive CVD rate, it must reopen the record and complete a full upstream subsidy investigation. WTTC Supp. Br. at 11–12. WTTC has cited nothing that constitutes such a legal compulsion. Further, if Commerce believed its investigation to be inadequate it could have requested a remand to perform an adequate investigation. It did not do so; only WTTC seeks this relief.²

An “upstream subsidy” is any countervailable subsidy, *other than an export subsidy*, that: (1) is paid or bestowed by an authority with

² WTTC also claims that Commerce did not investigate matters it alleged apart from the prior CTL Plate subsidy investigations. Commerce apparently found inadequate reasons to further investigate the additional matters raised by WTTC. See *Final Remand Redetermination* at 18–19. As indicated, preliminarily Commerce decided to defer the entire upstream subsidy investigation. At that point, WTTC clearly had the opportunity to withdraw its upstream subsidy allegation and refile its petition if it believed it could better support its allegation or that Commerce simply did not have the time to adequately investigate, as WTTC's allegation was filed late in the investigation, even if timely. See 19 C.F.R. § 351.311(c). Whether or not WTTC could have withdrawn its petition when it became aware that Commerce decided it could conduct its investigation with prior subsidy results, WTTC apparently did not seek to do so then, or at any other time. Having foregone the remedy available under § 351.311(c) and having accepted the results of the normal but narrow investigative practice of Commerce, it is too late for WTTC to ask the court to compel Commerce to redo its investigation simply because WTTC disagrees with the final determination after remand.

respect to an input product that is used in the same country as the authority in the manufacture or production of subject merchandise; (2) in Commerce's judgment bestows a competitive benefit on the merchandise; and (3) has a significant effect on the manufacturing or production costs of the subject merchandise. 19 U.S.C. § 1677-1(a) (emphasis added). Therefore, Commerce's classification of the Rediscount Loan Program as an export-contingent subsidy, if supported, would be fatal to its inclusion in the upstream subsidy calculation.

Here, Commerce asserts that information included in the current record regarding the extent of a countervailable upstream subsidy provided to Krakatau POSCO was either not available or not able to be verified, and thus it was reasonable to rely on the results of prior investigations. *Final Remand Redetermination* at 6; *IDM* at 59. Commerce has promulgated a practice to rely primarily on previous subsidy findings when conducting an upstream subsidy analysis. See *Countervailing Duties*, 63 Fed. Reg. 65,348, 65,392 (Dep't Commerce Nov. 25, 1998). As with its initial decision to attribute subsidy rates from previous proceedings to Krakatau POSCO, Commerce also found that the Rediscount Loan Program was contingent upon export performance based on previous subsidy findings in *CTL Plate from Indonesia* and *Extruded Rubber Thread from Indonesia*. See *Final Affirmative Countervailing Duty Determination: Certain Cut-to-Length Carbon-Quality Steel Plate from Indonesia*, 64 Fed. Reg. 73,155 (Dep't Commerce Dec. 29, 1999) ("*CTL Plate from Indonesia*"); *Final Negative Countervailing Duty Determination: Extruded Rubber Tread from Indonesia*, 64 Fed. Reg. 14695 (Dep't Commerce Mar. 26, 1999) ("*Extruded Rubber Thread from Indonesia*"); *Final Remand Redetermination* at 8-10.

WTTC challenges Commerce's methodology here. WTTC posits that Commerce erred in removing the Redistrict Loan Program from the upstream subsidy calculation because it is based on evidence not in the record. WTTC Supp. Br. at 3-6. Commerce counters that it has authority to make a determination on the basis of facts available from other proceedings. See 19 U.S.C. § 1677e(a)(1), (a)(2)(D); *Final Remand Redetermination* at 13. Whether or not Commerce relied upon "facts otherwise available" as set forth in § 1677e(a), or simply included facts in the record from previous subsidy findings to determine that the Redistrict Loan Program is an export subsidy program, substantial evidence supports Commerce's decision. Commerce may make a determination based on these facts, because no other facts on the record contradict them. See § 1677e(a); *Countervailing Duties*, 63 Fed. Reg. at 65,392. Thus, Commerce may reasonably consider *CTL*

Plate from Indonesia and *Extruded Rubber Thread from Indonesia* that concluded that the Redistrict Loan Program was contingent upon export performance. See *Extruded Rubber Thread from Indonesia*, 63 Fed. Reg. at 48,192; *CTL Plate from Indonesia*, 64 Fed. Reg. at 73,162.

For its part WTTC provided no evidence contrary to the facts Commerce relied on. It makes strained arguments essentially that Commerce can cherry-pick the facts as long as it reaches a positive CVD rate. Commerce reasonably relied on a neutral assessment of the facts on hand to determine that the Redistrict Loan Program was export contingent, and properly excluded the program from the upstream subsidy rate calculation pursuant to 19 U.S.C. § 16771-(a). Commerce's determination was supported by substantial evidence and in accordance with law.³

CONCLUSION

The affirmative CVD determination preliminarily reached was undermined as facts became available and the law was applied properly. This may be disappointing to WTTC but Commerce's final negative CVD determination as amended is accordance with the law and is therefore sustained. First, the court sustains the final determination finding that Krakatau POSCO is neither an authority, nor did the Government of Indonesia entrust or direct it to provide CTL Plate to Kenertec for LTAR. Second, the court sustains the final remand redetermination finding that there was no applicable upstream subsidy.

Dated: December 28, 2021
New York, New York

/s/ Jane A. Restani
JANE A. RESTANI, JUDGE

³ Kenertec's outstanding claims that Commerce unlawfully initiated an upstream subsidy investigation, and that Commerce's upstream subsidy analysis was unsupported by substantial record evidence, are moot.

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