U.S. Customs and Border Protection

CBP Decisions

DEPARTMENT OF THE TREASURY

19 CFR PARTS 10, 163, and 178

Docket No. USCBP–2007–0062

CBP Dec. 08–24

RIN 1505–AB82

HAITIAN HEMISPHERIC OPPORTUNITY THROUGH PARTNERSHIP ENCOURAGEMENT ACTS OF 2006 AND 2008

AGENCIES: Customs and Border Protection, Department of Homeland Security; Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document adopts as a final rule, with some changes, interim amendments to title 19 of the Code of Federal Regulations which were published in the **Federal Register** on June 22, 2007, as CBP Dec. 07–43 to implement the duty-free provisions of the Haitian Hemispheric Opportunity through Partnership Encouragement ("HOPE I") Act of 2006. The regulatory amendments adopted as a final rule in this document include changes necessitated by enactment of the Haitian Hemispheric Opportunity through Partnership Encouragement ("HOPE II") Act of 2008.

DATES: This final rule is effective on September 30, 2008.

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SUPPLEMENTARY INFORMATION:

Background

On June 22, 2007, interim regulations were promulgated to implement the duty-free provisions of the Haitian Hemispheric Opportunity through Partnership Encouragement ("HOPE I") Act of 2006. The regulatory amendments adopted as a final rule in this document include changes necessitated by the June 18, 2008 enactment of the Haitian Hemispheric Opportunity through Partnership Encouragement ("HOPE II") Act of 2008. Detailed information on both the HOPE I and HOPE II Acts follows.

Haitian Hemispheric Opportunity through Partnership Encouragement Act of 2006

On December 20, 2006, the President signed into law the Tax Relief and Health Care Act of 2006 ("the 2006 Act"), Public Law 109–432, 120 Stat. 2922. Title V of the Act concerns the extension of certain trade benefits to Haiti and is referred to in the Act as the "Haitian Hemispheric Opportunity through Partnership Encouragement Act of 2006" ("HOPE I Act").

Section 5002 of the Act amended the Caribbean Basin Economic Recovery Act (the CBERA, also referred to as the Caribbean Basin Initiative, or CBI, statute codified at 19 U.S.C. 2701–2707) by adding a new section 213A, entitled "Special Rules for Haiti" and codified at 19 U.S.C. 2703A, to authorize the President to extend additional trade benefits to Haiti for a five-year period (ending on December 19, 2011) if the President determines that the country meets certain specified eligibility conditions and requirements. As created by the HOPE I Act, section 213A of the CBERA consisted of six principal subsections, each of which is summarized below.

Subsection (a) of section 213A of the CBERA set forth definitions of several terms used in section 213A. Subsection (b) of section 213A specified the conditions and requirements that must be met for certain apparel articles from Haiti to receive duty-free treatment. Subsection (c) of section 213A of the CBERA provided for the duty-free treatment of any article classifiable in subheading 8544.30.00 of the Harmonized Tariff Schedule of the United States (HTSUS) (wiring sets), as in effect on December 20, 2006, that is the product or manufacture of Haiti and is imported directly from Haiti into the customs territory of the United States, provided a specified value-content requirement is met.

Subsection (d) of section 213A set forth certain eligibility requirements that Haiti must meet as a prerequisite for articles to receive

duty-free treatment under this section. This subsection required that the President determine whether Haiti met these requirements within 90 days after the date of enactment of the HOPE Act (or by March 20, 2007).

Subsection (e) of section 213A (redesignated as subsection (f) by HOPE II Act) provided that preferential tariff treatment for apparel articles under this section shall not apply unless the President certifies to Congress that Haiti is meeting certain conditions, such as the adoption of an effective visa system, that are primarily intended to avoid illegal transshipment situations.

Subsection (f) of section 213A (redesignated as subsection (g) by HOPE II Act) provided that the President shall issue regulations to carry out this section not later than 180 days after the date of enactment of the HOPE Act. Section 213A(f) further provided that the President shall consult with the Committee on Ways and Means of the House of Representatives and the Committee on Finance of the Senate in preparing such regulations. CBP consulted with the Committee on Ways and Means and the Committee on Finance regarding the implementing interim regulations.

For a more detailed description of the statutory provisions set forth in the HOPE I Act, please see CBP Dec. 07–43.

On March 19, 2007, the President signed Proclamation 8114 to implement the provisions of the HOPE I Act, among other purposes. The Proclamation, which was published in the **Federal Register** on March 22, 2007 (72 FR 13655), included determinations by the President that Haiti (1) meets the eligibility requirements set forth in section 213A(d) of the CBERA and (2) is meeting the conditions set forth in section 213A(e) (redesignated as section 213A(f) by HOPE II). The Proclamation also modified subchapter XX of Chapter 98 of the Harmonized Tariff Schedule of the United States ("HTSUS") as set forth in Annex 1 to the Proclamation. The modifications to the HTSUS included the creation of new subheadings encompassing the various articles that are eligible for duty-free treatment under the HOPE Act.

On June 22, 2007, Customs and Border Protection ("CBP") published in the **Federal Register** (72 FR 34365) as CBP Dec. 07–43 an interim rule setting forth amendments to title 19 of the Code of Federal Regulations ("CFR") to implement the duty-free provisions of the HOPE I Act set forth in subsections (a) through (c) of section 213A of the CBERA. As the HOPE Act was signed on December 20, 2006, implementing regulations were due on June 20, 2007 by subsection (f) of section 213A of the CBERA. In order to provide transparency and facilitate their use, the interim implementing regulations were included within new subpart O in part 10 of the CBP regulations (19 CFR part 10, subpart O). Action to adopt these interim regulations as a final rule was withheld pending anticipated

action on the part of Congress to amend the underlying statutory provisions in the Food, Conservation and Energy Act of 2008 (Haiti HOPE II Act).

Although the interim regulatory amendments were promulgated without prior public notice and comment procedures and took effect on June 22, 2007, CBP Dec. 07–43 provided for the submission of public comments that would be considered before adopting the interim regulations as a final rule. The prescribed public comment period closed on August 21, 2007. A discussion of the comments received by CBP is set forth below.

Haitian Hemispheric Opportunity through Partnership Encouragement Act of 2008

On May 21, 2008, the Food, Conservation and Energy Act of 2008 (Public Law 110–234) ("2008 Act") became law when Congress overrode the President's veto of this legislation. Part I, Subtitle D, Title XV of the 2008 Act, referred to in the Act as the Haitian Hemispheric Opportunity through Partnership Encouragement Act of 2008 (HOPE II Act), amended certain provisions of section 213A of the CBERA. The HOPE II Act amendments that require implementation through regulation by CBP are set forth in section 15402 of the 2008 Act, which amended subsections (a) and (b) of section 213A of the CBERA concerning the textile and apparel articles to which preferential tariff treatment applies under this program. A summary of the principal substantive amendments to section 213A(b) effected by section 15402 of the 2008 Act are set forth below.

1. Section 213A(a) was amended by adding definitions of the terms "imported directly from Haiti or the Dominican Republic", "knit-to-shape", and "wholly assembled". It is noted that the statutory "knit-to-shape" definition requires no change to the interim regulatory text as this definition is nearly identical to the definition of the same term set forth in the interim regulations (see 19 CFR 10.842(j)). The remaining two new statutory definitions referenced above require changes to the interim regulatory text.

2. Re-designated section 213A(b)(1)(A) (formerly 231A(b)(1) under the HOPE I Act) was amended to provide that apparel articles of a producer or entity controlling production may be imported directly from Haiti or the Dominican Republic. Under the HOPE I Act, such articles were required to be imported directly from Haiti.

3. Re-designated section 213A(b)(1)(B)(iv)(IV) (formerly 213A(b)(2)(D)(iv) under the HOPE I Act), was amended by deleting references to specific apparel articles (i.e., woven articles and brassieres) that may or may not be included in the annual aggregation calculation for purposes of meeting the applicable value-content requirement for apparel articles of a producer or entity controlling production. This provision now states, more generally, that entries of apparel articles receiving preferential treatment under any provision of law (other

than under section 213A(b)(1)) or are subject to the "General" subcolumn of column 1 of the HTSUS are not included in the annual aggregation calculation unless the producer or entity controlling production elects to include those entries.

4. Re-designated section 213A(b)(1)(C) (formerly section 213A(b)(3) under the HOPE I Act), was amended by revising the annual quantitative limits for the third through the fifth applicable 1-year periods that apply to apparel articles of a producer or entity controlling production. The amendments to this provision do not require changes to the interim regulatory text.

5. Former section 213A(b)(4), which set forth the conditions and requirements that must be met for certain woven apparel articles of chapter 62 of the HTSUS from Haiti to receive duty-free treatment, was removed and a new section 213A(b)(2) was added. This new provision provides for the duty-free treatment of any knit article of chapter 61 (subject to certain exclusions) or any woven article of chapter 62 of the HTSUS that is wholly assembled, or knit-to-shape, in Haiti from any combination of fabrics, fabric components, components knit-to-shape, or yarns and is imported directly from Haiti or the Dominican Republic, without regard to the source of the fabric, fabric components, components knit-to-shape, or yarns from which the article is made, subject to certain specified quantitative limitations. The exclusions from the special rule for articles of chapter 61 of the HTSUS include certain T-shirts, singlets, sweatshirts, and pullovers for men or boys. The duty-free treatment provided for in new section 213A(b)(2) is effective from October 1, 2008, through September 30, 2018.

6. Former section 213A(b)(5), which set forth the conditions and requirements that must be met for articles of subheading 6212.10, HTSUS (brassieres), to receive duty-free treatment was removed and a new section 213A(b)(3) was added, which provides for the duty-free treatment of certain apparel articles (including brassieres) and other articles set forth below. The duty-free treatment provided for in new section 213A(b)(3) is effective from October 1, 2008, through September 30, 2018, and is not subject to quantitative limitations. The articles to which this provision applies are as follows:

a. Articles of subheading 6212.10, HTSUS (brassieres), that are wholly assembled, or knit-to-shape, in Haiti from any combination of fabrics, fabric components, components knit-to-shape, or yarns and are imported directly from Haiti or the Dominican Republic, without regard to the source of the fabric, fabric components, components knit-to-shape, or yarns from which the article is made;

b. Any of the following apparel articles that is wholly assembled, or knit-to-shape, in Haiti from any combination of fabrics, fabric components, components knit-to-shape, or yarns and is imported directly from Haiti or the Dominican Republic, without re-

gard to the source of the fabric, fabric components, components knit-to-shape, or yarns from which the article is made:

(i) Any apparel article that is of a type listed in chapter rule 3, 4, or 5 for chapter 61 of the HTSUS (as such chapter rules are contained in section A of the Annex to Presidential Proclamation 8213 of December 20, 2007) as being excluded from the scope of such chapter rule, except that, for purposes of this provision, reference in such chapter rules to subheading 6104.12.00, HTSUS, is deemed to refer to subheading 6104.19.60, HTSUS; and

(ii) Any apparel article (other than articles of subheading 6212.10 of the HTSUS) that is of a type listed in chapter rule 3(a), 4(a), or 5(a) for chapter 62 of the HTSUS, as such chapter rules are contained in paragraph 9 of section A of the Annex to Presidential Proclamation 8213 of December 20, 2007;

c. Articles of subheading 4202.12, 4202.22, 4202.32, or 4202.92, HTSUS that are wholly assembled in Haiti and are imported directly from Haiti or the Dominican Republic, without regard to the source of the fabric, components, or materials from which the article is made;

d. Articles of heading 6501, 6502, or 6504, or subheading 6505.90, HTSUS, that are wholly assembled, knit-to-shape, or formed in Haiti from any combination of fabrics, fabric components, components knit-to-shape, or yarns and are imported directly from Haiti or the Dominican Republic, without regard to the source of the fabric, fabric components, components knit-to-shape, or yarns from which the article is made; and

e. Any of the following apparel articles that is wholly assembled, or knit-to-shape, in Haiti from any combination of fabrics, fabric components, components knit-to-shape, or yarns and is imported directly from Haiti or the Dominican Republic, without regard to the source of the fabric, fabric components, components knit-to-shape, or yarns from which the article is made:

(i) Pajama bottoms and other sleepwear for women and girls, of cotton, of subheading 6208.91.30, HTSUS, or of man-made fibers, of subheading 6208.92.00, HTSUS; and

(ii) Pajama bottoms and other sleepwear for girls, of other textile materials, of subheading 6208.99.20 HTSUS.

7. Section 213A(b) was amended by adding a new paragraph (4) which provides for the duty-free treatment of apparel articles that are wholly assembled, or knit-to-shape, in Haiti from any combination of fabrics, fabric components, components knit-to-shape, or yarns, without regard to the source of the fabric, fabric components, components knit-to-shape, or yarns from which the articles are made, if such apparel articles are accompanied by an earned import allowance certificate issued by the Department of Commerce reflecting the amount of credits equal to the total square meter equivalents of such apparel articles and the articles are imported directly from

Haiti or the Dominican Republic. The duty-free treatment provided for in new section 213A(b)(4) is effective from October 1, 2008, through September 30, 2018, and is not subject to quantitative limitations.

8. Section 213A(b) was further amended by adding a new paragraph (5) that provides for the duty-free treatment of apparel articles that are wholly assembled, or knit-to-shape, in Haiti from any combination of fabrics, fabric components, components knit-to-shape, or yarns, without regard to the source of the fabrics, fabric components, components knit-to-shape, or yarns from which the article is made, if the fabrics, fabric components, components knit-to-shape, or yarns comprising the component the determines the tariff classification of the article are of any of the fabrics or yarns set forth below and the articles are imported directly from Haiti or the Dominican Republic. The duty-free treatment provided for in new section 213A(b)(5) is effective from October 1, 2008, through September 30, 2018, and is not subject to quantitative limitations.

a. Fabrics or yarns, to the extent that apparel articles of such fabrics or yarns would be eligible for preferential treatment, without regard to the source of the fabrics or yarns, under Annex 401 of the North American Free Trade Agreement (NAFTA); or

b. Fabrics or yarns, to the extent that such fabrics or yarns are designated as not being available in commercial quantities for purposes of:

(i) Section 213(b)(2)(A)(v) of the CBERA (19 U.S.C. 2703(b)(2)(A)(v));

(ii) Section 112(b)(5) of the African Growth and Opportunity Act (19 U.S.C. 3721(b)(5));

(iii) Section 204(b)(3)(B)(i)(III) or 204(b)(3)(B)(ii) of the Andean Trade Preference Act (19 U.S.C. 3203(b)(3)(B)(i)(II) or 3203 (b)(3)(B)(ii)); or

(iv) Any other provision, relating to determining whether a textile or apparel article is an originating good eligible for preferential treatment, of a law that implements a free trade agreement entered into by the United States that is in effect at the time the claim for preferential tariff treatment is made.

Regulatory Amendments to Reflect Changes made by the HOPE II Act

As noted earlier, this final rule incorporates in the regulatory text certain statutory changes made to section 213A of the CBERA by the HOPE II Act. Because these changes to the interim regulatory text, described below, are not interpretative in nature but closely reflect the language of the statute, they are included in this final rule without need for comment. Section 15407 of the 2008 Act provides that regulations necessary to carry out section 15402 must be issued not later than September 30, 2008, and section 15412 of the 2008 Act

provides that section 15402 shall take effect on October 1, 2008, and shall apply to articles entered, or withdrawn from warehouse for consumption, on or after that date.

1. The heading to 19 CFR part 10, subpart O has been revised to add a reference to the HOPE II Act;

2. Section 10.841, regarding the applicability of subpart O, has been revised to add a reference to the HOPE II Act;

3. In § 10.842(p), the definition of "wholly assembled in Haiti" has been revised to conform to the statutory definition of the term set forth in the HOPE II Act;

4. As a result of the amendments to section 213A of the CBERA effected by the HOPE II Act, all of the textile and apparel articles to which duty-free treatment applies under this program must be "imported directly from Haiti or the Dominican Republic." Under the HOPE I Act, all eligible articles were required to be "imported directly from Haiti". However, no change was made by the HOPE II Act to the "imported directly" requirement for articles eligible for duty-free treatment under section 213A(c) of the CBERA (wiring sets). Therefore, those articles must continue to be "imported directly from Haiti". Accordingly, the introductory text to § 10.843, which sets forth a list of the articles to which duty-free treatment applies under this program, has been revised to reflect this disparity in treatment between textile and apparel articles on the one hand and wiring sets on the other with regard to the "imported directly" requirement;

5. Section 10.843 has been further amended to reflect the new and revised categories of textile and apparel articles that are eligible for duty-free treatment under the HOPE II Act;

6. In § 10.844, relating to the value-content requirement for apparel articles of a producer or entity controlling production:

a. Paragraph (a)(2)(iii) has been revised to reflect the new statutory language (see section 213A(b)(1)(B)(iv)(IV) of the CBERA) concerning exclusions from the annual aggregation calculation;

b. Paragraph (a)(5)(ii)(D) has been revised to replace the words "under the Bipartisan Trade Promotion Authority Act of 2002" with the words "with respect to the United States" to conform to an amendment to re-designated section 213A(b)(1)(B)(vii)(I)(bb)(DD) of the CBERA (formerly section 213A(b)(2)(G)(i)(II)(dd)) by the HOPE II Act; and

c. Paragraph (c)(2) has been revised to replace the words "under the Bipartisan Trade Promotion Authority Act of 2002 (19 U.S.C. 3801 et seq.)" with the word "thereafter" to conform to an amendment to re-designated section 213A(b)(1)(B)(iii)(II) of the CBERA (formerly section 213A(b)(2)(C)(ii)) by the HOPE II Act;

7. Section 10.846, relating to the "imported directly" requirement, has been revised to reflect the statutory definition of the term "imported directly from Haiti or the Dominican Republic" created by the

HOPE II Act (see section 213A(a)(3) of the CBERA). As noted previously, while the "imported directly from Haiti or the Dominican Republic" requirement applies to all textile and apparel articles eligible for duty-free treatment under this program, it does not apply to articles eligible for duty-free treatment under section 213A(c) of the CBERA (wiring sets). Those articles must continue to be "imported directly from Haiti". Therefore, § 10.846 has been further revised to clarify that wiring sets are subject to the "imported directly from Haiti" requirement, as those words are currently defined in § 10.846 of the interim rule. However, consistent with the statutory definition of "imported directly from Haiti or the Dominican Republic", the definition of "imported directly from Haiti" has been altered by removing the words "provided that the articles are imported as a result of the original commercial transaction between the importer and the producer or the producer's sales agent", as set forth in current § 10.846(a)(3)(ii) of the interim rule; and

8. Section 10.847(a), concerning the filing of claims for duty-free treatment for articles described in § 10.843, has been revised to set forth the new subheadings within Subchapter XX of Chapter 98 of the HTSUS under which the new categories of textile and apparel articles created by HOPE II are classified.

This final rule document addresses the comments submitted in response to the interim rulemaking published as CBP Dec. 07–43 and adopts, as a final rule, the HOPE I Act implementing regulations contained in the interim rule document with changes reflecting the statutory amendments made by the HOPE II Act as well as other changes identified below in the discussion of public comments received.

Discussion of Comments in Response to CBP Dec. 07–43

A total of 8 commenters responded to the solicitation of public comments on the interim regulations set forth in CBP Dec. 07–43. It is noted that these comments were received prior to the recent statutory changes effected by the HOPE II Act. To the extent that the comments received were unaffected by these subsequent changes, CBP has responded. References in this comment discussion to the "HOPE Act" are intended to refer to the HOPE program in general.

General Comments Regarding Interpretation and Implementation of the HOPE Act

1. Comment:

Five commenters pointed out that section 5004 of the Act expresses the "sense of the Congress that the executive branch . . . should interpret, implement, and enforce" the preference provisions under the HOPE Act for textile and apparel articles "broadly in order to expand trade by maximizing opportunities for imports of such

articles from Haiti." In view of this statement of the intent of Congress, these commenters urged that the HOPE Act final regulations be interpreted and issued in a manner that will expand, and not restrict, trade with Haiti.

CBP's Response:

CBP is cognizant of Congressional desire that the HOPE Act benefit Haiti to the maximum extent possible and that the executive branch, in matters subject to interpretation, choose the interpretation most beneficial to Haiti that is legally supportable. CBP endeavored to adhere to this mandate while drafting regulations to implement the specific language of the statute which created special tariff preference provisions for Haiti within the existing framework of the Caribbean Basin Economic Recovery Act (CBERA)(19 U.S.C. 2701 et seq.).

2. Comment:

One commenter indicated that as "the textile and apparel trade has the highest fraud content of any manufactured good", it is imperative that the regulations implementing the HOPE Act be written in a way that provides for meaningful and effective customs enforcement while allowing for the flow of legitimate trade. The commenter stated that the interim regulations are a reasonable approach to achieving this objective and commended CBP for its efforts in this regard. This commenter also stated that it was very encouraged to see an emphasis on importer requirements throughout the HOPE regulations as importers of textile products should be held more accountable for their transactions and the preference claims made on goods they import into the United States. In addition, this commenter expressed strong support for the "penalty provisions" set forth in the HOPE I Act implementing regulations (e.g., denial of duty-free treatment for failure to meet applicable requirements and the imposition of an increased value-content percentage requirement under certain circumstances) and stated that, through these provisions, CBP has built in very strong incentives for compliance.

CBP's Response:

CBP appreciates the comment as it always strives to balance the goals of effective enforcement while facilitating the flow of legitimate commerce.

3. Comment:

One commenter noted that the interim regulations were issued some months after the commencement of the first statutory applicable year and urged CBP to issue the final regulations on an expeditious basis so that companies may rely on clear, transparent, and predictable rules to conduct business with Haiti.

CBP's response:

CBP notes that the date of enactment of the HOPE I Act (December 20, 2006) marked the beginning of the first of five one-year periods during which certain apparel articles from Haiti may be eligible for duty-free treatment under the Act. However, the Haiti Act preference program for apparel articles was implemented by Presidential Proclamation effective with respect to goods entered, or withdrawn from warehouse, on or after March 20, 2007 (see Proclamation 8114 dated March 19, 2007, published in the **Federal Register** on March 22, 2007 (72 FR 13655)). CBP awaited the publication of Presidential Proclamation 8114 so that its interim regulations would be complete. The interim regulations implementing the HOPE I Act were required to be issued not later than 180 days after December 20, 2006, and the interim regulations were published in the **Federal Register** on June 22, 2007.

CBP notes that issuance of this final rule was delayed pending anticipated action on the part of Congress to amend the underlying statutory provisions which resulted in the HOPE II Act.

4. Comment:

One commenter urged that the visa system for the HOPE program be deployed in such a way that it facilitates trade and does not impose additional hurdles or burdens for Haitian exporters or U.S. importers. This commenter indicated that it had heard reports that, due to problems in the administration of the visa system, several companies have been unable to export goods to the United States.

CBP's Response:

The HOPE Act requires the establishment of a visa system to ensure that only those apparel articles that meet the applicable requirements for preferential tariff treatment under the Act receive the benefits of that treatment. An effective visa system affords Haiti the ability to administer and enforce the program with respect to exports of apparel articles to the United States and allows the United States to monitor imports of such articles from that country. CBP does not believe that the HOPE Act visa system currently in place is too complex or imposes unreasonable burdens on Haitian exporters or U.S. importers. It is noted that the Haitian government has not communicated to CBP that it is experiencing difficulties in implementing the visa system.

Definitions

5. Comment:

Six of the commenters asserted that the definition of "wholly assembled in Haiti" set forth in § 10.842(p) of the interim regulations

is overly restrictive in that it requires that all of the components of the article (including minor components) be joined together in Haiti. Five of these commenters stated that this phrase must be read in the light of the clear intent of the legislation to provide for non-origin conferring events and operations to be performed within HOPE Act eligible countries. Four commenters suggested that the definition of the phrase should follow the more liberal definition set forth in § 102.21(b)(6) of the CBP regulations, which would allow minor parts to be added in eligible countries other than Haiti. One of these commenters recommended that the HOPE Act preference provisions be more broadly applied to textile and apparel articles from Haiti or the designated beneficiary countries as long as the key assembly operations are performed in Haiti.

CBP's response:

The definition of "wholly assembled in Haiti" set forth in § 10.842(p) has been revised in this final rule document to conform to the statutory definition of that term set forth in the HOPE II Act (see section 213A(a)(5) of the CBERA). CBP believes that this statutory and resulting regulatory change address these commenters' concerns.

6. Comment:

One commenter stated that the definitions should make clear that not all cutting and sewing is required in Haiti and that, specifically, cutting and sewing operations performed in the United States would not disqualify a garment.

CBP's response:

Although the HOPE Act requires apparel articles of a producer or entity controlling production to be wholly assembled or knit-to-shape in Haiti (as those terms are defined in section 213A(a) of the CBERA), it allows the materials (e.g., fabric components) from which the articles are made to be produced anywhere. See section 213A(b)(1)(B)(i)(I) and section 213A(b)(1)(B)(ii)((I) of the CBERA. "Fabric component" is defined in § 10.842(g) of the HOPE Act implementing regulations as "a component cut from fabric to the shape or form of the component as it is used in the apparel article." Therefore, CBP believes it is clear from the statute and the implementing regulations that cutting operations may be performed outside of Haiti.

In regard to sewing, CBP believes that the revised definition of "wholly assembled in Haiti" set forth in § 10.842(p) of this final rule document, which conforms to the statutory definition of that term set forth in the HOPE II Act, addresses the commenter's concerns.

Annual Aggregation

7. Comment:

Five commenters stated that the final regulations should clarify, through the use of specific examples, the application of the annual aggregation method in meeting the value-content requirement for apparel articles that are wholly assembled or knit-to-shape in Haiti. Three of these commenters raised certain specific issues regarding the annual aggregation method by offering the exact same scenarios and questions as follows:

a. Haitian Producer A elects to use the annual aggregation method in the initial applicable one-year period, and also elects, pursuant to § 10.844(a)(2)(iii)(C) of the interim regulations, to include in the aggregation calculation entries of apparel articles receiving preferential tariff treatment under other preference programs as well as articles subject to a Normal Trade Relations (NTR) rate of duty. Producer A ships to the United States four shipments during the initial applicable one-year period (all are entered during that period). The first shipment of apparel (qualifying for preference under the Caribbean Basin Trade Partnership Act (CBTPA)) has an appraised value of $100,000 and meets a value-content percentage (under § 10.844(a)) of 80%. The second shipment of apparel is wholly assembled in Haiti, has an appraised value of $100,000, and meets a value-content percentage of 40%. The third shipment is wholly assembled in Haiti, has an appraised value of $50,000, and meets a value-content percentage of 0%. The last shipment is wholly assembled in Haiti, has an appraised value of $20,000, and meets a value-content requirement of 80%. Taken together, the four shipments have an appraised value of $270,000 and meet a value-content percentage of 50.4%. Will all apparel goods that are shipped to the U.S. in the last three shipments by Producer A qualify for duty-free treatment under the HOPE Act?

b. Importer D, an entity controlling production, purchases apparel articles that are wholly assembled in Haiti from Producers A, B, and C and enters those articles during the initial applicable one-year period. Importer D elects to use the annual aggregation method during that period. The three producers also produce apparel for other U.S. importers and each producer elects to use the annual aggregation method. The total appraised value of the apparel purchased by Importer D from the three producers and entered during the initial applicable one-year period is $300,000, and these shipments meet a value-content percentage of 51.7%. However, the value-content percentage met by all the apparel that is wholly assembled in Haiti by Producer C and entered (including the apparel imported by Importer D) during the initial applicable one-year period is 49%. Does the failure of Producer C to meet the applicable value-content requirement for the apparel that it produces during

this period affect the preferential status of the apparel articles produced by Producer C and imported by Importer D?

CBP's response:

Based on the facts presented in the first scenario, the apparel articles that were wholly assembled in Haiti and shipped to the U.S. in the last three shipments by Producer A would qualify for duty-free treatment under the HOPE Act, as the applicable value-content requirement for the initial applicable one-year period (50%) would be met. This conclusion assumes that: (1) the CBTPA-eligible apparel articles in the first shipment (that were included in the annual aggregation calculation at the election of the producer) were wholly assembled or knit-to-shape in Haiti, as required by § 10.844(a)(2)(iii)(C); and (2) the articles in the last three shipments satisfy all other applicable requirements set forth in subpart O, part 10, CBP regulations (e.g., declaration of compliance and "imported directly" requirements).

In regard to the facts set forth in the second scenario, pursuant to section 213A(b)(1)(iv)(I) of the CBERA and § 10.844(a)(2)(i) of the interim regulations, in determining whether apparel articles of a producer or entity controlling production that are entered under the annual aggregation method in the initial applicable one-year period satisfy the applicable value-content requirement (50%) in that period, "all apparel articles of that producer or entity controlling production that are wholly assembled or knit-to-shape in Haiti and are entered in the initial applicable one-year period" must be considered. Thus, for the entity controlling production in this scenario (Importer D), the apparel articles that must be considered are those that are purchased by Importer D from Producers A, B, and C and entered during the initial applicable one-year period. As all of the articles, in the aggregate, purchased by Importer D from the three producers and entered during the initial applicable one-year period satisfy the 50% value-content requirement, all of these articles are entitled to duty-free treatment under the HOPE Act, assuming all other applicable requirements are met.

With respect to Producer C, the apparel articles that must be considered in determining compliance with the 50% value-content requirement under the annual aggregation method are all those articles that are wholly assembled or knit-to-shape in Haiti by Producer C and entered in the initial applicable one-year period. In this scenario, all of the articles, in the aggregate, that are wholly assembled by Producer C and entered during the initial applicable one-year period (including the articles sold to Importer D) do not satisfy the 50% value-content requirement. However, the failure of Producer C to meet the value-content requirement under these circumstances should not and will not affect the duty-free status of the articles purchased by Importer D from Producer C since, as noted above, the cu-

mulative total of all of the articles whose production is controlled by Importer D (an entity controlling production) meets the 50% value-content requirement. Therefore, the consequences of Producer C's failure to meet the 50% value-content requirement include the denial of duty-free treatment for all articles that are wholly assembled by Producer C and entered during the initial applicable one-year period, except for those articles sold by Producer C to Importer D. CBP is amending § 10.844(a)(4) in this final rule to clarify the circumstances under which this exception applies by adding a new paragraph (a)(4)(iii) to § 10.844, resulting in the re-designation of current paragraphs (a)(4)(iii) through (a)(4)(v) as paragraphs (a)(4)(iv) through (a)(4)(vi), respectively.

CBP notes that, pursuant to § 10.844(a)(4)(i)(C), an additional consequence of Producer C's failure to meet the value-content requirement in the initial applicable one-year period would be that articles wholly assembled by Producer C and entered during succeeding applicable one-year periods will be ineligible for duty-free treatment until the appropriate increased value-content requirement has been met, except to the extent the articles retroactively qualify for preference under § 10.845.

CBP agrees with the commenters that additional examples should be included in the HOPE Act implementing regulations to clarify the application of the annual aggregation method. Therefore, CBP is amending paragraph (a)(2)(iii) and new paragraph (a)(4)(iii) of § 10.844 by adding two examples (one in each paragraph) patterned after the two scenarios presented by the commenters.

8. Comment:

Three commenters stated that the interim regulations (specifically, § 10.844(a)) are unclear regarding whether a producer or entity controlling production may elect to use the individual entry method during an applicable one-year period and then switch to the annual aggregation method for the following year. Assuming that a producer or entity controlling production may use the individual entry method during the first applicable one-year period and then elect to use the annual aggregation method during the second applicable one-year period, two of these commenters asked whether it would be necessary to submit a declaration of compliance following the end of the first applicable one-year period. One commenter stated that § 10.844(a)(3) "seems to imply" that once an election is made to use the annual aggregation method, use of the individual entry method is foreclosed for any subsequent one-year period.

CBP's response:

There is nothing in the HOPE Act or the implementing interim regulations (including § 10.844(a)(3)) that would preclude a producer or entity controlling production from electing to use either the

annual aggregation or individual entry method during one applicable one-year period and then switching to the other method during the subsequent one-year period. This assumes, of course, that all applicable requirements are met during the applicable one-year period preceding the period in which the switch is to be made. The underlying purpose of § 10.844(a)(3), as set forth in the interim rule, is to make it clear that, regardless of the method chosen for a particular period, that method must be used for all articles of a producer or entity controlling production during that period. As recommended by these commenters, CBP is amending § 10.844(a)(3) in this final rule document to clarify that a producer or entity controlling production may elect to use the individual entry or annual aggregation method in any applicable one-year period and then switch to the other method during the next one-year period.

In response to the question posed by two of the commenters, CBP believes that a declaration of compliance must be submitted following the end of any applicable one-year period in which the individual entry method is used if an election is made to use the annual aggregation method during the next applicable one-year period. As section 203A(b)(1)(B)(iv)(II) of the CBERA and § 10.844(a)(2)(ii) of the interim regulations make clear, an election to use the annual aggregation method in the second, third, fourth, or fifth applicable one-year period is conditioned on compliance with the applicable value-content requirement by all apparel articles of the producer or entity controlling production, in the aggregate, that are entered during the previous applicable one-year period. Thus, an importer may enter articles under the annual aggregation method in each of the second through fifth applicable one-year periods only if it can assure CBP through the submission of a declaration of compliance, as set forth in § 10.848, that the aggregate total of all apparel articles of the producer or entity controlling production met the applicable value-content requirement during the previous applicable one-year period. This is true even if all articles of the producer or entity controlling production were entered under the individual entry method during that previous applicable one-year period. CBP is amending § 10.848 in this final rule document to specifically address this issue.

9. Comment:

Five commenters noted that § 10.844(a)(2)(iii)(C) of the interim regulations permits apparel articles receiving preferential tariff treatment under any provision of law other than the HOPE Act to be included in the annual aggregation calculation (at the election of the producer or entity controlling production). However, these commenters objected to the requirement in the regulation that the apparel articles must be "wholly assembled" in Haiti. According to the commenters, this is an impermissible expansion of the statutory language "that sets another hurdle for Haitian goods for qualifica-

tion of merchandise otherwise produced in Haiti." Several of these commenters stated that this additional requirement seems excessive considering that these other preference programs (e.g., CBTPA) do not require "such a wholly assembled definition."

CBP's response:

CBP notes initially that § 10.844(a)(2)(iii) has been amended in this final rule document to conform to an amendment to section 213A(b)(1)(B)(iv)(IV) of the CBERA by the HOPE II Act (deleting specific references to woven apparel articles and brassieres). However, amended § 10.844(a)(2)(iii) continues to require that the referenced apparel articles must be "wholly assembled or knit-to-shape" in Haiti.

CBP maintains that if the statute is read as a whole, the rationale for the "wholly assembled or knit-to-shape" requirement in § 10.844(a)(2)(iii) becomes clear. Annual aggregation applies to apparel articles of a producer or entity controlling production that enter during an applicable one-year period and is calculated by aggregating certain costs incurred with respect to all apparel articles of that producer or entity controlling production that are wholly assembled, or knit-to-shape, in Haiti and entered during the first year of the program or, for subsequent years, entered during the preceding year. See section 213A(b)(1)(B)(iv)(I) and (II) of the CBERA. Paragraph (IV) of section 213A(b)(1)(B)(iv) clarifies that the universe of apparel articles wholly assembled, or knit-to-shape, in Haiti to be included in the calculation of all apparel articles so produced in Haiti and entered during the year under consideration is not to include entries of apparel articles receiving preferential treatment under any provision of law other than section 213A(b)(1) or entries of apparel articles subject to the Normal Trade Relations "general" rate of duty, unless the producer or entity controlling production elects to include such entries. In other words, the phrase "all apparel articles" for purposes of section 213A(b)(1)(B)(iv)(I) and (II) is defined in section 213A(b)(1)(B)(iv)(IV). Defining the scope of "all apparel articles" does not relieve the articles from the requirements of section 213A(b)(1)(B)(iv)(I) and (II) that they be wholly assembled, or knit-to-shape in Haiti. The commenters are mistaken in their belief that CBP is expanding the statutory language to construct a "hurdle" for Haitian goods. CBP is merely reading the statute as a whole and recognizes that section 213A(b)(1)(B)(iv)(IV) serves to clarify Congressional intent regarding the scope of the words "all apparel articles", as used in section 213A(b)(1)(B)(iv)(I) and (II).

10. Comment:

One commenter stated that the final regulations should make it clear that an entity controlling production and a manufacturer will

not both be penalized if one of the parties fails to meet its annual aggregation percentage requirement and they are not exclusively producing for or importing from each other. Another commenter indicated that the failure of a producer (electing to use the annual aggregation method) to meet the applicable value-content requirement in a particular year should not be "transferred" to U.S. importers who take appropriate steps to ensure that their imported goods satisfy the value-content requirement.

CBP's response:

CBP has previously addressed in this comment discussion the circumstances under which the failure of an entity controlling production and/or a producer to meet the applicable value-content requirement under the annual aggregation method in a particular one-year period will affect the duty-free status of the apparel articles that they control or produce in situations in which they do not exclusively produce for or import from each other. As previously indicated, CBP is amending § 10.844(a)(4) in this final rule to clarify this matter.

CBP disagrees with the second commenter's assertion that the failure of a producer to meet the applicable value-content requirement under the annual aggregation method should not be "transferred" to U.S. importers who take appropriate steps to ensure that their imported goods satisfy the value-content requirement. All U.S. importers of apparel articles for which preferential tariff treatment is sought under the HOPE Act are required to exercise reasonable care to ensure that those articles are in fact entitled to such treatment. Thus, if a producer fails to meet the applicable value-content percentage in a particular one-year period, all importers who purchase apparel articles from that producer will be subject to rate advances due to the failure of the articles to satisfy the applicable HOPE Act requirements.

11. Comment:

One commenter stated that it was unable to find any Congressional intent or statutory language that supports the requirement in § 10.844(c) of the interim regulations that there be an "irreversible election" to use the annual aggregation method. It was this commenter's understanding, as the HOPE I Act bill was being drafted, that a producer or entity controlling production could choose to use the aggregate or individual entry method in such a way and at such time as to maximize the duty-free benefit of the program. In addition, this commenter complained that the interim regulations provide no information as to how such an election is to be made so that it may take legal effect, and that the regulations do not make clear that CBTPA-type operations count toward the aggregate value-content requirement, assuming the apparel product is wholly assembled in Haiti.

CBP's response:

CBP disagrees with the commenter's assertion that there is no statutory authority for the requirement in § 10.844(c) that a producer or entity controlling production that elects to use the annual aggregation method during an applicable one-year period must continue to use that method for all its qualifying apparel articles throughout that period. Section 203A(b)(1)(B)(iv) of the CBERA provides that the use of the annual aggregation method in an applicable one-year period involves aggregating costs with respect to "all apparel articles" of the producer or entity controlling production that are entered during the applicable one-year period (initial period for an election in that period and preceding period for an election in subsequent periods). Consequently, allowing a producer or entity controlling production to elect to use the annual aggregation method for some of its apparel articles that are entered during an applicable one-year period and use the individual entry method for other articles entered during the same period would be inconsistent with the clear wording of the statute.

Regarding the other points made by the commenter, paragraphs (a)(2) and (b) of § 10.847 set forth the procedure for filing a claim for duty-free treatment for apparel articles described in § 10.843(a) when an election has been made by the producer or entity controlling production (through the use of a certification to that effect) to use the annual aggregation method. Section 10.844(a)(2)(iii) addresses an election to include in the annual aggregation calculation an entry of apparel articles receiving duty-free treatment under another preference program (such as the CBTPA), provided the articles are wholly assembled or knit-to-shape in Haiti.

Increased Value-content Percentage

12. Comment:

Three commenters objected to CBP's interpretation and application of the statutory increased value-content percentage requirement (see section 213A(b)(1)(B)(vi)(II) of the CBERA), as reflected in § 10.844(a)(4)(iii) of the interim regulations (now § 10.844(a)(4)(iv)) and Example 1 under § 10.844(a)(4)(iv) (now § 10.844(a)(4(v)). These commenters contend that the words "plus ten percent" in the statute mean that ten percent is to be applied against the applicable percentage to arrive at the increased value-content percentage (e.g., 50% + 10% of 50% = 55%). According to these commenters, CBP has adopted a more strict (and, in fact, an erroneous) interpretation of the words "plus ten percent" by actually adding 10 percentage points to the applicable percentage (e.g., 50% + 10% = 60%) in calculating the increased value-content percentage. Another commenter alleges,

without further elaboration, that § 10.844(a)(4)(iii) (now § 10.844(a)(4)(iv)) is inconsistent in delineating the increased value-content percentages.

CBP's response:

CBP disagrees with the commenters' interpretation of section 213A(b)(1)(B)(vi)(II) of the CBERA, which sets forth the increased-value content percentage requirement. This provision states, in pertinent part, that if a producer or entity controlling production is not in compliance with the statutory requirements in an applicable one-year period, then apparel articles of that producer or entity controlling production shall be ineligible for preferential treatment during any succeeding period until the sum of the relevant costs "is not less than the applicable percentage under clause (v)(I), plus 10 percent, of the aggregate declared customs value of all apparel articles of that producer or entity controlling production. . . ." The words "plus 10 percent" are set off by commas and clearly refer to the words "the aggregate declared customs value" — not "the applicable percentage." Therefore, in CBP's opinion, § 10.844(a)(4)(iii) (now § 10.844(a)(4)(iv)) and Example 1 under § 10.844(a)(4)(iv) (now § 10.844(a)(4)(v)) are correct in requiring that the increased value content percentage be determined by adding 10 percent to the applicable percentage — not by applying 10 percent against the applicable percentage and then adding that result to the applicable percentage. Had Congress intended the latter meaning, CBP believes that Congress would have used statutory language to clearly accomplish that intent.

In regard to the assertion that § 10.844(a)(4)(iii) (now § 10.844(a)(4)(iv)) is "inconsistent in delineating the increased value-content percentages", CBP cannot discern any inconsistency in this provision, which CBP notes closely follows the statutory language in § 213A(b)(1)(B)(vi)(II) of the CBERA.

New Producer or Entity Controlling Production

13. Comment:

Five commenters disagreed with the requirement in § 10.844(a)(4)(iv) of the interim regulations (now § 10.844(a)(4)(v)) that a new producer or entity controlling production (one who did not participate in the program during the preceding applicable one-year period) that elects to use the annual aggregation method must first meet an increased value-content percentage during the first year of participation before beginning to receive duty-free treatment during the next applicable one-year period. These commenters maintained that this requirement unjustifiably and unfairly penalizes new entrants to the program and is inconsistent with the language and goals of the HOPE Act.

CBP's response:

CBP believes it is constrained by the statutory language to require that new entrants to the program (in the second through fifth applicable one-year periods) that elect to use the annual aggregation method must first meet an increased value-content percentage during the first year of participation before becoming eligible for preference during the next applicable one-year period. As noted previously in this comment discussion, section 213A(b)(1)(B)(vi)(II) of the CBERA conditions use of the annual aggregation method during each of the second through fifth applicable one-year periods on compliance with the applicable value-content requirement by all qualifying apparel articles of the producer or entity controlling production that are entered during the previous applicable one-year period. A new entrant obviously cannot meet the applicable value-content requirement during the previous applicable one-year period if there was no production (and therefore no entries) during that previous year. As a result of a new entrant's inability to meet the applicable value-content requirement during the previous year, section 213A(b)(1)(B)(vi)(II) of the CBERA requires that apparel articles of the producer or entity controlling production be treated as ineligible for preferential treatment until the year after those articles meet the increased value-content percentage requirement. The statute sets forth no exception to the increased value-content percentage requirement for articles of a new producer or entity controlling production.

CBP notes that in the context of somewhat similar statutory language in section 213(b)(2)(A)(iv)(II) and (III) of the CBERA (19 U.S.C. 2703(b)(2)(A)(iv)(II) and (III)), relating to the preferential treatment of brassieres from designated Caribbean Basin countries under the United States-Caribbean Basin Trade Partnership Act (CBTPA), CBP determined that a new producer or entity controlling production must first establish compliance with a higher value-content percentage (85% rather than 75%) as a prerequisite to receiving preferential treatment (see § 10.228(b)(2)(i)(G) and Example 7 under § 10.228(b)(2)(ii) of the CBP regulations (19 CFR 10.228(b)(2)(i)(G) and 10.228(b)(2)(ii)). Thus, § 10.844(a)(4)(iv) of the HOPE I Act implementing regulations (now § 10.844(a)(4)(v)) and § 10.228(b)(2)(i)(G) of the CBTPA implementing regulations are consistent in their treatment of new producers and entities controlling production under those programs.

14. Comment:

One commenter stated that in the final regulations, § 10.844(a)(4)(iv) (now § 10.844(a)(4)(v)) should clarify that a new producer or entity controlling production that elects to use the individual entry method is not subject to an increased value-content percentage requirement.

CBP's response:

Although Example 2 under § 10.844(a)(4)(iv) (now § 10.844 (a)(4)(v)) indirectly addresses this issue, CBP agrees with the commenter that the text of the regulation itself should be amended to reflect that apparel articles of a new producer or entity controlling production electing to use the individual entry method are not subject to the requirement of first meeting the increased value-content percentage as a prerequisite to receiving preferential treatment during the first year of participation in the program or in succeeding years. Therefore, § 10.844(a)(4)(iv) (now § 10.844(a) (4)(v)) is being amended in this final rule document to clarify this point.

Eligible Countries

15. Comment:

Four commenters suggested that § 10.844(c)(3) of the interim regulations should specify the designated beneficiary countries (under the Andean Trade Preference Act, African Growth and Opportunity Act, and Caribbean Basin Trade Partnership Act) that qualify as "eligible countries" for purposes of the HOPE program, rather than merely referring the reader to the HTSUS General Notes under which the designated beneficiary countries are listed. In addition, these commenters stated that this regulation should clarify whether qualifying inputs from these designated beneficiary countries will continue to be eligible under the HOPE program should these other preference programs subsequently expire.

CBP's response:

Section 213A(b)(1)(B)(iii) of the CBERA specifies that certain material and processing costs incurred in the following countries may be counted toward meeting the applicable value-content percentage requirement: (1) the United States; (2) any country that is a party to a free trade agreement with the United States that is in effect on the date of the enactment of the HOPE Act, or that enters into force thereafter; (3) any country designated as a beneficiary country under the CBTPA; (4) any country designated as a beneficiary country under the African Growth and Opportunity Act (AGOA); and (5) any country designated as a beneficiary country under the Andean Trade Preference Act (ATPA).

Only the countries referenced in (2) above (parties to a free trade agreement in effect as of the date of enactment of the HOPE Act) are subject to a specific effective date insofar as determining whether qualifying material or processing costs from such countries may be counted under the HOPE Act. As the countries referenced in (3), (4), and (5) above (relating to CBTPA, AGOA, and ATPA) are not subject to an effective date, CBP believes it was the intent of Congress that

a determination regarding a country's status as a beneficiary country under these programs should be made at the time a claim for preferential tariff treatment is filed under the HOPE Act. For example, if a country loses its designated beneficiary country status under one of these programs as of July 1, 2008, material and processing costs incurred in that country may no longer be counted toward meeting the applicable HOPE Act value-content requirement effective for apparel articles entered on or after that date.

With respect to these commenters' suggestion that § 10.844(c)(3) of the HOPE I Act implementing regulations should specify the designated beneficiary countries under the CBTPA, AGOA, and ATPA, CBP prefers not to identify each of these countries in this regulatory provision as changes in their status as beneficiary countries would require repeated amendments to the regulation. CBP believes that the regulation's cross-reference to the listings of designated beneficiary countries in General Notes 11 (ATPA), 16 (AGOA), and 17 (CBTPA) of the HTSUS is sufficient as these listings are easily accessible at http://www.usitc.gov/tata/hts/bychapter/0800gntoc.htm.

Direct Costs of Processing Operations

16. Comment:

One commenter stated that § 10.844(e) of the interim regulations should be amended to include as a "direct cost of processing operation" the cost of packaging materials (such as labels, hangtags, and bags) if such materials are required to be included with the article. This commenter also asked that "direct costs of processing operations" include the cost of any post production procedures, such as mending or finishing that may be needed to present the finished article for sale. According to this commenter, the definition of the term "wholly assembled" in § 10.842(p) of the interim regulations could be interpreted as precluding such operations, contrary to the intent of the statute.

CBP's response:

Because the HOPE Act includes no definition of the words "direct costs of processing operations", CBP based the definition set forth in § 10.844(e) of the interim regulations on the definition of the same term found in section 213(a)(3) of the CBERA (19 U.S.C. 2703(a)(3)) and § 10.197 of the CBP's CBERA implementing regulations (19 CFR 10.197). CBP believes that determinations regarding whether specific costs not mentioned in § 10.844(e), such as those referenced by the commenter, qualify as "direct cost of processing operations" should best be made on a case-by-case basis pursuant to CBP's administrative rulings program (see part 177 of the CBP regulations (19 CFR part 177)).

Imported Directly

17. Comment:

Six commenters maintained that § 10.846 of the interim regulations sets forth an unnecessarily strict construction of the statutory "imported directly" requirement, thereby placing untenable restrictions on the process of shipping goods to the United States via intermediary countries, contrary to the intent of Congress. Five of these commenters noted that the "imported directly" rules set forth in § 10.846 are similar to rules applied to certain other preference programs, and that interpretative rulings issued by CBP have concluded that the prohibition relating to the "entry into commerce" of an intermediate country means that the goods may not be "manipulated" in that country. These commenters stated that, by so doing, CBP has not permitted operations (other than loading or unloading or other activities necessary to preserve the goods in good condition) even in a bonded warehouse and even where "the invoices, bills of lading, and other shipping documents show the United States as the final destination." According to these commenters, this is an incorrect interpretation under the other preference programs and would be particularly so under the HOPE program.

CBP's response:

Although the HOPE I Act included no definition of the term "imported directly", the HOPE II Act included a definition of "imported directly from Haiti or the Dominican Republic" (see section 213A(a)(3) of the CBERA). Section 10.846 has been amended to conform to this statutory definition.

With respect to the concerns expressed by some of the commenters regarding the correctness of certain administrative rulings issued by CBP interpreting the "imported directly" requirement under the CBERA and other preference programs, CBP does not believe it is appropriate to address these concerns in the context of the HOPE Act implementing regulations. In CBP's opinion, these concerns should properly be addressed through the CBP administrative rulings process (see part 177 of the CBP regulations (19 CFR part 177)).

18. Comment:

Three commenters urged that CBP broaden the "imported directly" concept, at least with respect to apparel articles subject to value-added provisions, to permit passage through, and permit operations in, the territory of other HOPE "eligible countries"(as enumerated in § 10.844(a)), as long as the origin-conferring operations are performed in Haiti. These commenters indicated that Congress' intent in setting up this program was to create linkages between Haiti and other HOPE "eligible countries." Two of these commenters stated that, alternatively, CBP should permit HOPE eligible goods to

be exported from the Dominican Republic because of its geographic proximity to, and existing co-production agreements with, Haiti. As an example, one commenter stated that § 10.846 should not be interpreted as prohibiting activities such as screen printing, repairing, and embellishing articles, as well as "warehouse/pack/sticker" activities in the Dominican Republic.

CBP's response:

The HOPE II Act amended the HOPE program to allow eligible textile and apparel articles to be imported directly from Haiti or the Dominican Republic. CBP believes that this change, along with the statutory definition of "wholly assembled in Haiti" included in the HOPE II Act, addresses these commenters' concerns.

Declaration of Compliance

19. Comment:

Four commenters complained that the declaration of compliance requirement in § 10.848 of the interim regulations is overly restrictive in that it requires that value information be provided with line number and line value specificity. These commenters allege that this is unduly burdensome for the producer when it is filing its own declaration of compliance as the entity controlling production.

CBP's response:

Under the HOPE Act preference program relating to certain apparel articles, meeting the applicable value-content requirement is a prerequisite to qualifying for duty-free treatment. For CBP to be able to properly verify that a producer or entity controlling production has met the applicable value-content requirement when the annual aggregation method is used, it is critical that CBP have access to pertinent value information with respect to all affected entries (and all affected apparel articles covered by those entries) that are filed during the applicable one-year period. Without the information required by the declaration of compliance (e.g., entry numbers, line number and value), CBP would be unable to determine, on the basis of submitted documentation, that an annual aggregation calculation satisfies the applicable value-content requirement. If a producer or entity controlling production finds that providing the information required by the declaration of compliance is unduly burdensome, the entry-by-entry method may be used for purposes of satisfying the value-content requirement.

20. Comment:

One commenter stated that the requirement in § 10.848 that the declaration of compliance be filed with CBP within 30 days of the end of the applicable one-year period is overly restrictive. This com-

menter maintained that it will be extremely difficult to obtain actual values within the 30-day time period with respect to entries subject to reconciliation, especially when a fiscal year fails to coincide with the end of the applicable one-year period. Therefore, this commenter asked that § 10.848 include an exception or provisional treatment for filing the declaration of compliance for entries that are subject to reconciliation.

CBP's response:

CBP recognizes that there may be situations in which an importer may not have access to actual values within the 30-day period required for submission of the declaration of compliance in § 10.848(a) of the HOPE Act implementing regulations. In these situations, the declaration of compliance filed with CBP during the 30-day period may reflect estimated values until more accurate value-content figures are known, at which time the importer may amend the declaration. Again, if a producer or entity controlling production finds that providing the information necessary for the submission of a declaration of compliance is unduly burdensome, the entry-by-entry method is available as an alternative to the annual aggregation method.

21. Comment:

One commenter was troubled that § 10.848 places the responsibility for submitting the declaration of compliance on the importer, considering that compliance is measured at the level of the producer or entity controlling production. This commenter indicated that it could envision a situation in which an importer is required to certify compliance for a producer "when the producer's total production is not compliant but when the product the importer bought from the producer is." This commenter inquired regarding what CBP would do if the producer elected to use the individual entry method but the importer used the annual aggregation method, or vice-versa. The commenter urged that CBP shift the responsibility for preparing and filing the declaration of compliance on the producer or entity controlling production "so the importer has greater certainty he is relying upon a known quantity."

CBP's response:

The commenter is correct that, under the HOPE Act, compliance with the requirements for preferential treatment for apparel articles is addressed in the context of the producer or entity controlling production. However, as is the case with respect to all preferential tariff treatment programs, it is responsibility of the U.S. importer of the articles for which preference is sought to file the entry with CBP and to make the claim for duty-free treatment under the HOPE Act (see § 10.847 of the HOPE Act implementing regulations). Consequently,

it is the importer's responsibility to file the declaration of compliance with CBP under the circumstances set forth in § 10.848 of the implementing regulations.

In regard to the situation envisioned by the commenter in which a producer's total production is not in compliance with the applicable value-content requirement although the portion purchased by the importer is, § 10.848(c)(2)(v) requires that the declaration of compliance include "[t]he value-content percentage that was met during the applicable one-year period with respect to each producer or entity controlling production." Thus, the importer must obtain and provide to CBP information regarding the value-content percentage that was met with respect to all apparel articles of each producer or entity controlling production that were entered during the applicable one-year period-not just the articles purchased by the importer.

In answer to the commenter's question concerning what CBP would do if the producer elects to use one method for purposes of meeting the value-content requirement but the importer uses the other method, § 10.847(b) of the interim regulations was drafted to prevent such an occurrence. Under this provision, an importer may enter articles using the annual aggregation method only if the importer is in possession of a copy of a certification by the producer or entity controlling production setting forth its election to use the annual aggregation method. In the absence of such a certification, the importer is required to enter the articles using the individual entry method.

22. Comment:

One commenter expressed concern that, as currently written, §§ 10.848 and 10.849 would impose upon a customs broker serving as nominal importer of record the responsibility for certifying the eligibility of articles for duty-free treatment under the HOPE Act. According to this commenter, a broker acting as nominal importer of record would be unable to certify or verify the accuracy of the information provided. The commenter stated that the actual importer is the party most knowledgeable regarding the facts and circumstances of the importation and, as such, should be solely responsible for making HOPE Act claims and submitting the declaration of compliance. The commenter recommended that CBP clarify the regulations to distinguish between a broker serving as a nominal importer of record in an import transaction and the actual importer.

CBP's response:

As indicated previously in this comment discussion, it is the responsibility of the importer of record of articles for which preference is sought under the HOPE Act to obtain sufficient information concerning the transaction to know whether the articles meet all applicable requirements and, therefore, are entitled to duty-free treat-

ment. If the importer does not possess that information, no claim for preference under the HOPE Act should be made. In a situation in which a broker serves as nominal importer of record, the broker should either obtain all necessary information from the consignee or other parties regarding whether the articles qualify for preference under the HOPE Act or insist that the owner or producer of the goods act as importer of record for the transaction and be the party responsible for certifying that the articles qualify for preference.

Conclusion

Accordingly, based on the analysis of comments received as set forth above and the additional considerations discussed above, CBP is adopting as a final rule the interim regulations published as CBP Dec. 07–43 with certain changes as discussed above and as set forth below.

Inapplicability of Delayed Effective Date Requirement

Section 553(d)(3) of the Administrative Procedure Act ("APA") (5 U.S.C. 553(d)(3)), permits agencies to make a rule effective less than 30 days after publication if the rule grants or recognizes an exemption or relieves a restriction, or when the agency finds that good cause exists for dispensing with a delayed effective date. As these regulations implement the tariff preference provisions of the HOPE Act and thus grant an exemption from normal duty rates for qualifying articles, a delayed effective date is not required. Moreover, for this reason, CBP finds that good cause exists to make these regulations effective without a delayed effective date.

Executive Order 12866 and Regulatory Flexibility Act

This document does not meet the criteria for a "significant regulatory action" as specified in Executive Order 12866 of September 30, 1993 (58 FR 51735, October 1993). In addition, because a notice of proposed rulemaking is not required under section 553(b) of the APA for the reasons described above, CBP notes that the provisions of the Regulatory Flexibility Act, as amended (5 U.S.C. 601 et seq.), do not apply to this rulemaking. Accordingly, CBP also notes that this rule is not subject to the regulatory analysis requirements or other requirements of 5 U.S.C. 603 and 604.

Paperwork Reduction Act

The collections of information contained in these regulations have previously been reviewed and approved by the Office of Management and Budget in accordance with the requirements of the Paperwork Reduction Act (44 U.S.C. 3507) under control number 1651–0129.

The collections of information in these regulations are in § 10.847 (claim for duty-free treatment) and §§ 10.844(a)(4)(vi) and 10.848

(declaration of compliance). This information is required in connection with certain claims for duty-free treatment under the HOPE Act and will be used by CBP to determine eligibility for preferential tariff treatment under that Act. The likely respondents are business organizations including importers, exporters and manufacturers.

The estimated average annual burden associated with the collection of information in this final rule is 39.2 hours per respondent or record keeper. Under the Paperwork Reduction Act, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid OMB control number.

Signing Authority

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

List of Subjects

19 CFR Part 10

Customs duties and inspection, Imports, Preference programs, Reporting and recordkeeping requirements.

19 CFR Part 163

Administrative practice and procedure, Customs duties and inspection, Imports, Reporting and recordkeeping requirements.

19 CFR Part 178

Administrative practice and procedure, Collections of information, Imports, Reporting and recordkeeping requirements.

Amendments to the CBP Regulations

Accordingly, the interim rule amending parts 10, 163, and 178 of the CBP regulations (19 CFR parts 10, 163, and 178), which was published at 72 FR 34365 on June 22, 2007, is adopted as a final rule with certain changes as discussed above and set forth below.

PART 10 – ARTICLES CONDITIONALLY FREE, SUBJECT TO A REDUCED RATE, ETC.

1. The general authority citation for part 10, CBP regulations, and the specific authority for subpart O (§§ 10.841 through 10.850) continue to read as follows:

Authority: 19 U.S.C. 66, 1202 (General Note 3(i), Harmonized Tariff Schedule of the United States), 1321, 1481, 1484, 1498, 1508, 1623, 1624, 3314;

* * * * *

Sections 10.841 through 10.850 also issued under 19 U.S.C. 2703A.

2. The subpart O heading is amended by removing the words "Act of 2006" and adding in its place the words "Acts of 2006 and 2008".

3. Section 10.841 is revised to read as follows:

§ 10.841 Applicability.

Title V of Public Law 109–432, entitled the Haitian Hemispheric Opportunity through Partnership Encouragement Act of 2006 (HOPE I Act), amended the Caribbean Basin Economic Recovery Act (the CBERA, 19 U.S.C. 2701–2707) by adding a new section 213A (19 U.S.C. 2703A) to authorize the President to extend additional trade benefits to Haiti. Part I, Subtitle D, Title XV of Public Law 110–234, entitled the Haitian Hemispheric Opportunity through Partnership Encouragement Act of 2008 (HOPE II Act) amended certain provisions within section 213A. Section 213A of the CBERA provides for the duty-free treatment of certain apparel articles and certain wiring sets from Haiti. The provisions of this subpart set forth the legal requirements and procedures that apply for purposes of obtaining duty-free treatment pursuant to CBERA § 213A.

4. In § 10.842, paragraph (p) is revised to read as follows:

§ 10.842 Definitions.

* * * * *

(p) Wholly assembled in Haiti. "Wholly assembled in Haiti" means that all components, of which there must be at least two, pre-existed in essentially the same condition as found in the finished good and were combined to form the finished good in Haiti. Minor attachments and minor embellishments (for example, appliqués, beads, spangles, embroidery, and buttons) not appreciably affecting the identity of the good, and minor subassemblies (for example, collars, cuffs, plackets, and pockets), will not affect the determination of whether a good is "wholly assembled in Haiti".

* * * * *

5. Section 10.843 is amended by revising the introductory text and paragraphs (b) through (d) and adding paragraphs (e) through (k) to read as follows:

§ 10.843 Articles eligible for duty-free treatment.

The duty-free treatment referred to in § 10.841 of this subpart applies to the articles described in paragraphs (a) through (j) of this section that are imported directly from Haiti or the Dominican Republic into the customs territory of the United States and to the articles described in paragraph (k) of this section that are imported di-

rectly from Haiti into the customs territory of the United States.

* * * * *

(b) Certain woven apparel articles. Apparel articles classifiable in Chapter 62 of the HTSUS that are wholly assembled or knit-to-shape in Haiti from any combination of fabrics, fabric components, components knit-to-shape, and yarns, without regard to the source of the fabric, fabric components, components knit-to-shape, or yarns from which the article is made, subject to the applicable quantitative limits set forth in U.S. Note 6(h), Subchapter XX, Chapter 98, HTSUS.

(c) Brassieres. Apparel articles classifiable in subheading 6212.10 of the HTSUS that are wholly assembled or knit-to-shape in Haiti from any combination of fabrics, fabric components, components knit-to-shape, or yarns, without regard to the source of the fabric, fabric components, components knit-to-shape, or yarns from which the article is made.

(d) Certain knit apparel articles. (1) General. Apparel articles classifiable in Chapter 61 of the HTSUS (other than those described in paragraph (d)(2) of this section) that are wholly assembled or knit-to-shape in Haiti from any combination of fabrics, fabric components, components, components knit-to-shape, or yarns, without regard to the source of the fabric, fabric components, components knit-to-shape, or yarns from which the article is made, subject to the applicable quantitative limits set forth in U.S. Note 6(j), Subchapter XX, Chapter 98, HTSUS.

(2) Exclusions. Duty-free treatment for the articles described in paragraph (d)(1) of this section will not apply to the following:

(i) The following apparel articles of cotton, for men or boys, that are classifiable in subheading 6109.10.00 of the HTSUS:

(A) All white T-shirts, with short hemmed sleeves and hemmed bottom, with crew or round neckline or with V-neck and with a mitered seam at the center of the V, and without pockets, trim, or embroidery;

(B) All white singlets, without pockets, trim, or embroidery; and

(C) Other T-shirts, but not including thermal undershirts;

(ii) T-shirts for men or boys that are classifiable in subheading 6109.90.10 of the HTSUS;

(iii) The following apparel articles of cotton, for men or boys, that are classifiable in subheading 6110.20.20 of the HTSUS:

(A) Sweatshirts; and

(B) Pullovers, other than sweaters, vests, or garments imported as part of playsuits; or

(iv) Sweatshirts for men or boys, of man-made fibers and containing less than 65 percent by weight of man-made fibers, that are classifiable in subheading 6110.30.30 of the HTSUS.

(e) Other apparel articles. Any of the following apparel articles that is wholly assembled or knit-to-shape in Haiti from any combination of fabrics, fabric components, components knit-to-shape, or yarns, without regard to the source of the fabric, fabric components, components knit-to-shape, or yarns from which the article is made:

(1) Any apparel article that is of a type listed in chapter rule 3, 4, or 5 for chapter 61 of the HTSUS (as such chapter rules are contained in section A of the Annex to Presidential Proclamation 8213 of December 20, 2007) as being excluded from the scope of such chapter rule, when such chapter rule is applied to determine whether an apparel article is an originating good for purposes of General Note 29(n), HTSUS, except that, for purposes of this provision, reference in such chapter rules to subheading 6104.12.00 of the HTSUS is deemed to refer to subheading 6104.19.60 of the HTSUS; or

(2) Any apparel article (other than articles to which paragraph (c) of this section applies (brassieres)) that is of a type listed in chapter rule 3(a), 4(a), or 5(a) for chapter 62 of the HTSUS, as such chapter rules are contained in paragraph 9 of section A of the Annex to Presidential Proclamation 8213 of December 20, 2007.

(f) Luggage and similar items. Articles classifiable in subheading 4202.12, 4202.22, 4202.32, or 4202.92 of the HTSUS that are wholly assembled in Haiti, without regard to the source of the fabric, components, or materials from which the article is made.

(g) Headgear. Articles classifiable in heading 6501, 6502, or 6504, or subheading 6505.90 of the HTSUS that are wholly assembled, knit-to-shape, or formed in Haiti from any combination of fabrics, fabric components, components knit-to-shape, or yarns, without regard to the source of the fabric, fabric components, components knit-to-shape, or yarns from which the article is made.

(h) Certain sleepwear. Any of the following apparel articles that is wholly assembled or knit-to-shape in Haiti from any combination of fabrics, fabric components, components knit-to-shape, or yarns, without regard to the source of the fabric, fabric components, components knit-to-shape, or yarns from which the article is made:

(1) Pajama bottoms and other sleepwear for women and girls, of cotton, that are classifiable in subheading 6208.91.30, HTSUS, or of man-made fibers, that are classifiable in subheading 6208.92.00, HTSUS; or

(2) Pajama bottoms and other sleepwear for girls, of other textile materials, that are classifiable in subheading 6208.99.20, HTSUS.

(i) Earned import allowance rule. Apparel articles wholly assembled or knit-to-shape in Haiti from any combination of fabrics, fabric components, components knit-to-shape, or yarns, without regard to the source of the fabric, fabric components, components knit-to-shape, or yarns from which the articles are made, if such apparel articles are accompanied by an earned import allowance certificate

issued by the Department of Commerce that reflects the amount of credits equal to the total square meter equivalents of such apparel articles, in accordance with the earned import allowance program established by the Secretary of Commerce pursuant to 19 U.S.C. 2703A(b)(4)(B).

(j) Apparel articles of short supply materials. Apparel articles that are wholly assembled or knit-to-shape in Haiti from any combination of fabrics, fabric components, components knit-to-shape, or yarns, without regard to the source of the fabrics, fabric components, components knit-to-shape, or yarns from which the article is made, if the fabrics, fabric components, components knit-to-shape, or yarns comprising the component that determines the tariff classification of the article are of any of the following:

(1) Fabrics or yarns, to the extent that apparel articles of such fabrics or yarns would be eligible for preferential treatment, without regard to the source of the fabrics or yarns, under Annex 401 of the North American Free Trade Agreement (NAFTA); or

(2) Fabrics or yarns, to the extent that such fabrics or yarns are designated as not being available in commercial quantities for purposes of:

(i) Section 213(b)(2)(A)(v) of the CBERA (19 U.S.C. 2703(b)(2)(A)(v));

(ii) Section 112(b)(5) of the African Growth and Opportunity Act (19 U.S.C. 3721(b)(5));

(iii) Section 204(b)(3)(B)(i)(III) or 204(b)(3)(B)(ii) of the Andean Trade Preference Act (19 U.S.C. 3203(b)(3)(B)(i)(II) or 3203(b)(3)(B)(ii)); or

(iv) Any other provision, relating to determining whether a textile or apparel article is an originating good eligible for preferential treatment, of a law that implements a free trade agreement entered into by the United States that is in effect at the time the claim for preferential tariff treatment is made under § 10.847 of this subpart.

(k) Wiring sets. Any article classifiable in subheading 8544.30.00 of the HTSUS, as in effect on December 20, 2006, that is the product or manufacture of Haiti, provided the article satisfies the value-content requirement set forth in § 10.844(b) of this subpart. For purposes of this paragraph, the term "product or manufacture of Haiti" refers to an article that is either:

(1) Wholly the growth, product, or manufacture of Haiti; or

(2) A new or different article of commerce that has been grown, produced, or manufactured in Haiti.

6. In § 10.844:

a. Paragraphs (a)(2)(iii), (a)(3), and the introductory text of paragraphs (a)(4)(i) and (a)(4)(ii) are revised;

b. Paragraphs (a)(4)(iii), (a)(4)(iv), and (a)(4)(v) are re-designated as paragraphs (a)(4)(iv), (a)(4)(v), and (a)(4)(vi), respectively, and a new paragraph (a)(4)(iii) is added;

c. The introductory text of re-designated paragraph (a)(4)(v) is revised;

d. Re-designated paragraph (a)(4)(vi) is amended by removing the reference to "(a)(4)(iii)" and adding in its place "(a)(4)(iv)", and by removing the reference to "(a)(4)(iv)" and adding in its place "(a)(4)(v)";

e. Paragraph (a)(5)(ii)(D) is amended by removing the words "under the Bipartisan Trade Promotion Authority Act of 2002" and adding in their place the words "with respect to the United States"; and

f. Paragraph (c)(2) is amended by removing the words "under the Bipartisan Trade Promotion Authority Act of 2002 (19 U.S.C. 3801 et seq.)" and adding in their place the word "thereafter".

The revisions read as follows:

§ 10.844 Value-content requirement.

(a) * * *

(2) * * *

(iii) Exclusions from annual aggregation calculation. The entry of an apparel article that is wholly assembled or knit-to-shape in Haiti and is receiving preferential tariff treatment under any provision of law other than section 213A(b)(1) of the CBERA (19 U.S.C. 2703A(b)(1)) or is subject to the "General" subcolumn of column 1 of the HTSUS will only be included in an annual aggregation under paragraph (a)(2)(i) or (a)(2)(ii) of this section if the producer or entity controlling production elects, at the time the annual aggregation calculation is made, to include such entry in the aggregation.

Example. A Haitian producer elects to use the annual aggregation method in the initial applicable one-year period, and also elects to include in the aggregation calculation an entry of apparel articles receiving preferential tariff treatment under another preference program. The producer ships to the United States four shipments during the initial applicable one-year period and all are entered during that period. The first shipment of apparel (qualifying for and receiving preference under the Caribbean Basin Trade Partnership Act (CBTPA)) has an appraised value of $100,000 and meets a value-content percentage (under § 10.844(a) of this section) of 80%. The second shipment of apparel is wholly assembled in Haiti, has an appraised value of $100,000, and meets a value-content percentage of 40%. The third shipment is wholly assembled in Haiti, has an appraised value of $50,000, and meets a value-content percentage of 0%. The last shipment is wholly assembled in Haiti, has an appraised value of $20,000, and meets a value-content requirement of 80%. Taken together, the four shipments have an appraised value of $270,000 and meet a value-content percentage of 50.4%. The apparel

articles shipped to the United States in the last three shipments would qualify for duty-free treatment under section 213A(b)(1) of the CBERA and § 10.843(a) of this subpart as the applicable value-content requirement for the initial applicable one-year period (50 %) is satisfied. This conclusion assumes that: the CBTPA-eligible apparel articles in the first shipment (that were included in the annual aggregation calculation at the election of the producer) were wholly assembled or knit-to-shape in Haiti, as required in § 10.844(a)(2)(iii) of this section; and the articles in the last three shipments that were wholly assembled in Haiti satisfy all other applicable requirements set forth in this subpart.

(3) Election to use the annual aggregation method for an applicable one-year period. A producer or entity controlling production may elect to use the individual entry or annual aggregation method in any applicable one-year period and then elect to use the other method during the subsequent applicable one-year period, provided that all applicable requirements are met during the applicable one-year period preceding the period in which the switch is made. If a producer or entity controlling production using the individual entry method in an applicable one-year period elects to use the annual aggregation method during the subsequent applicable one-year period, the declaration of compliance described in § 10.848 of this subpart must be submitted to CBP within 30 days following the end of the applicable one-year period in which the individual entry method was used.

(4) Failure to meet applicable requirements. (i) Initial applicable one-year period. Except as provided in paragraph (a)(4)(iii) of this section, if CBP determines that apparel articles of a producer or entity controlling production that are entered as articles described in § 10.843(a) of this subpart during the initial applicable one-year period have not met the requirements of § 10.843(a) of this subpart or the applicable value-content requirement set forth in paragraph (a)(1) of this section, then:

* * * * *

(ii) Other applicable one-year periods. Except as provided in paragraph (a)(4)(iii) of this section, if CBP determines that apparel articles of a producer or entity controlling production that are entered as articles described in § 10.843(a) of this subpart during any applicable one-year period following the initial applicable one-year period have not met the requirements of § 10.843(a) or the applicable value-content requirement set forth in paragraph (a) of this section, then:

* * * * *

(iii) Entity controlling production of apparel articles of a producer also producing for its own account. Where an entity controlling production controls the production of apparel articles, as de-

scribed in § 10.843(a) of this subpart, of a producer that also produces for its own account, the failure of apparel articles of that producer to meet the requirements of § 10.843(a) of this subpart or the applicable value-content requirement set forth in paragraph (a) of this section in an applicable one-year period, either under the annual aggregation method or the individual entry method, will not affect the eligibility for duty-free treatment under § 10.843(a) of this subpart of those apparel articles of that producer which are part of a claim for such treatment made on behalf of the entity controlling production.

Example. Importer D, an entity controlling production, purchases apparel articles that meet the description in § 10.843(a) of this subpart from Haitian Producers A, B, and C and enters those articles during the initial applicable one-year period. Importer D elects to use the annual aggregation method during that period. The three producers also produce apparel for other U.S. importers and each producer elects to use the annual aggregation method. The apparel articles purchased by Importer D from the three producers and entered during the initial applicable one-year period meet a value-content percentage of 51.7%. However, the value-content percentage met by all the apparel that is wholly assembled in Haiti by Producer C and entered (including the apparel imported by Importer D) during the initial applicable one-year period is 49%. As all of the articles, in the aggregate, purchased by Importer D from the three producers and entered during the initial applicable one-year period satisfy the applicable value-content requirement (50%), all of these articles are entitled to duty-free treatment under section 213A(b)(1) of the CBERA and § 10.843(a) of this subpart, assuming all other applicable requirements are met. The failure of Producer C to meet the 50% value-content requirement with respect to all of the articles that it wholly assembled in Haiti and entered during the initial applicable one-year period will not prevent duty-free status being claimed for the articles purchased by Importer D from Producer C. Therefore, the consequences of Producer C's failure to meet the 50% value-content requirement include the denial of preferential tariff treatment for all articles that are wholly assembled in Haiti by Producer C and entered during the initial applicable one-year period, except for those articles sold by Producer C to Importer D. An additional consequence of Producer C's failure to meet the value-content requirement in the initial applicable one-year period is that articles wholly assembled in Haiti by Producer C and entered during succeeding applicable one-year periods will be ineligible for duty-free treatment until the appropriate increased value-content requirement has been met (see § 10.844(a)(4)(i)(C) of this subpart), except to the extent the articles qualify for preference under § 10.845 of this subpart.

* * * * *

(v) Articles of a new producer or entity controlling production. Apparel articles of a new producer or entity controlling production electing to use the annual aggregation method for purposes of meeting the applicable value-content requirement must first meet the increased value-content percentage specified in paragraph (a)(4)(iv) of this section as a prerequisite to receiving duty-free treatment during a succeeding applicable one-year period. Apparel articles of a new producer or entity controlling production electing to use the individual entry method are not subject to the requirement of first meeting the increased value-content percentage as a prerequisite to receiving duty-free treatment during the first year of participation or in any succeeding applicable one-year period. For purposes of this paragraph, a "new producer or entity controlling production" is a producer or entity controlling production that did not produce or control production of articles that were entered as articles pursuant to § 10.843(a) of this subpart during the immediately preceding applicable one-year period.

* * * * *

7. Section 10.846 is revised to read as follows:

§ 10.846 Imported directly.

(a) Textile and apparel articles. To be eligible for duty-free treatment under this subpart, textile and apparel articles described in paragraphs (a) through (j) of § 10.843 of this subpart must be imported directly from Haiti or the Dominican Republic into the customs territory of the United States. For purposes of this requirement, the words "imported directly from Haiti or the Dominican Republic" mean:

(1) Direct shipment from Haiti or the Dominican Republic to the United States without passing through the territory of any intermediate country;

(2) If shipment is from Haiti or the Dominican Republic to the United States through the territory of an intermediate country, the articles in the shipment do not enter into the commerce of the intermediate country and the invoices, bills of lading, and other shipping documents show the United States as the final destination; or

(3) If shipment is through an intermediate country and the invoices and other documents do not show the United States as the final destination, the articles in the shipment are imported directly only if they:

(i) Remained under the control of the customs authority in the intermediate country;

(ii) Did not enter into the commerce of the intermediate country except for the purpose of a sale other than at retail; and

(iii) Have not been subjected to operations other than loading and unloading, and other activities necessary to preserve the articles in good condition.

(b) Wiring sets. To be eligible for duty-free treatment under this subpart, articles described in paragraph (k) of § 10.843 of this subpart must be imported directly from Haiti into the customs territory of the United States. For purposes of this requirement, the words "imported directly from Haiti" mean:

(1) Direct shipment from Haiti to the United States without passing through the territory of any intermediate country;

(2) If shipment is from Haiti to the United States through the territory of an intermediate country, the articles in the shipment do not enter into the commerce of the intermediate country and the invoices, bills of lading, and other shipping documents show the United States as the final destination; or

(3) If shipment is through an intermediate country and the invoices and other documents do not show the United States as the final destination, the articles in the shipment are imported directly only if they:

(i) Remained under the control of the customs authority in the intermediate country;

(ii) Did not enter into the commerce of the intermediate country except for the purpose of a sale other than at retail; and

(iii) Have not been subjected to operations other than loading and unloading, and other activities necessary to preserve the articles in good condition.

(c) Documentary evidence. An importer making a claim for duty-free treatment under § 10.847 of this subpart may be required to demonstrate, to CBP's satisfaction, that the articles were "imported directly" as that term is defined in paragraphs (a) and (b) of this section. An importer may demonstrate compliance with this section by submitting documentary evidence. Such evidence may include, but is not limited to, bills of lading, airway bills, packing lists, commercial invoices, receiving and inventory records, and customs entry and exit documents.

8. Section 10.847 is amended by revising paragraphs (a)(1) through (5) and adding paragraphs (a)(6) through (12) to read as follows:

§ 10.847 Filing of claim for duty-free treatment.

(a) * * *

(1) Subheading 9820.61.25 for apparel articles described in § 10.843(a) of this subpart for which the individual entry method is used for purposes of meeting the applicable value-content requirement set forth in § 10.844(a) of this subpart;

(2) Subheading 9820.61.30 for apparel articles described in § 10.843(a) of this subpart for which the annual aggregation method is used for purposes of meeting the applicable value-content requirement set forth in § 10.844(a) of this subpart;

(3) Subheading 9820.62.05 for apparel articles described in § 10.843(b) of this subpart;

(4) Subheading 9820.62.12 for brassieres described in § 10.843(c) of this subpart;

(5) Subheading 9820.61.35 for apparel articles described in § 10.843(d) of this subpart;

(6) Subheading 9820.61.40 for apparel articles described in § 10.843(e) of this subpart;

(7) Subheading 9820.42.05 for articles described in § 10.843(f) of this subpart;

(8) Subheading 9820.65.05 for articles described in § 10.843(g) of this subpart;

(9) Subheading 9820.62.20 for articles described in § 10.843(h) of this subpart;

(10) Subheading 9820.62.25 for articles described in § 10.843(i) of this subpart;

(11) Subheading 9820.62.30 for articles described in § 10.843(j) of this subpart; and

(12) Subheading 9820.85.44 for wiring sets described in § 10.843(k) of this subpart.

* * * * *

JAYSON P. AHERN,
Acting Commissioner,
Customs and Border Protection.

Approved: September 25, 2008

TIMOTHY E. SKUD,
Deputy Assistant Secretary of the Treasury.

[Published in the Federal Register, September 30, 2008 (73 FR 56715)]

General Notices

DEPARTMENT OF HOMELAND SECURITY

U.S. CUSTOMS AND BORDER PROTECTION

NOTICE OF ISSUANCE OF FINAL DETERMINATION CONCERNING CERTAIN MESH DRESSING

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

ACTION: Notice of final determination.

SUMMARY: This document provides notice that U.S. Customs and Border Protection ("CBP") has issued a final determination concerning the country of origin of certain mesh dressing known as Tegaderm™ Ag Mesh Dressing. Based upon the facts presented, CBP has concluded in the final determination that the United States is the country of origin of the Tegaderm™ Ag Mesh Dressing for purposes of U.S. Government procurement.

DATE: The final determination was issued on September 22, 2008. A copy of the final determination is attached. Any party-at-interest, as defined in 19 CFR § 177.22(d), may seek judicial review of this final determination within October 27, 2008.

FOR FURTHER INFORMATION CONTACT: Cynthia Reese, Valuation and Special Programs Branch, Regulations and Rulings, Office of International Trade (202–572–8812).

SUPPLEMENTARY INFORMATION: Notice is hereby given that on September 22, 2008, pursuant to subpart B of part 177, Customs and Border Protection (CBP) Regulations (19 CFR Part 177, Subpart B), CBP issued a final determination concerning the country of origin of Tegaderm™ Ag Mesh Dressing which may be offered to the United States Government under an undesignated government procurement contract. This final determination, in HQ H035776, was issued at the request of 3M Company under procedures set forth at 19 CFR Part 177, Subpart B, which implements Title III of the Trade Agreements Act of 1979, as amended (19 U.S.C. § 2511–18). In the final determination, CBP has concluded that, based upon the facts presented, Tegaderm™ Ag Mesh Dressing which is produced in the United States from foreign nonwoven cotton fabric is a product of the United States for purposes of U.S. Government procurement.

Section 177.29, CBP Regulations (19 CFR § 177.29), provides that notice of final determinations shall be published in the *Federal Register* within 60 days of the date the final determination is issued. Section 177.30, CBP Regulations (19 CFR § 177.30), provides that any party-at-interest, as defined in 19 CFR § 177.22(d), may seek

judicial review of a final determination within 30 days of publication of such determination in the *Federal Register*.

Dated: September 22, 2008

JEREMY BASKIN,
Acting Director,
Border Security and Trade Facilitation Division.

Attachment

DEPARTMENT OF HOMELAND SECURITY.
U.S. CUSTOMS AND BORDER PROTECTION,
HQ H035776
September 22, 2008
VAL–2 OT:RR:CTF:VS H035776 CMR
CATEGORY: Marking
TARIFF NO.: 3005.90

MR. MATTHEW FULLER
TRADE COMPLIANCE DEPARTMENT
3M COMPANY
3M Center
Building 225–4S–18
St. Paul, MN 55144–1000

RE: Origin determination of Tegaderm™ Ag Mesh Dressing for purposes of Government Procurement

DEAR MR. FULLER:

This ruling is in response to your request of August 6, 2008, for a determination as to the country of origin of Tegaderm™ Ag Mesh Dressing which is sold by 3M. You indicate that 3M is the importer of record of the nonwoven cotton fiber fabric used in the production of Tegaderm™ Ag Mesh Dressing and, as such, has standing to request this ruling pursuant to 19 C.F.R. § 177.23(a) and § 177.24.

FACTS:

3M imports nonwoven cotton fiber fabric which is produced by and purchased from suppliers outside the United States. At the time of importation, the nonwoven cotton fabric is in large (Jumbo) rolls and has no finishing on it. It is classifiable as a nonwoven fabric of heading 5603 of the Harmonized Tariff Schedule of the United States (HTSUS).[1]

After importation, the nonwoven cotton fabric is processed so as to be impregnated with silver sulfate which is manufactured in the United States.

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[1] Heading 5603, HTSUS, provides for "Nonwovens, whether or not impregnated, coated, covered or laminated." We note that you indicate a belief that the nonwoven cotton fabric which is imported by 3M is classifiable in subheading 5603.12, HTSUS, however, that provision provides for nonwovens of man-made filaments. The correct subheading is 5603.92.00, HTSUS, which provides for nonwovens of other than man-made filaments, weighing more than 25 g/m^2 but not more than 70 g/m^2.

The impregnated fabric is then slit to desired widths, cut to size (length), and packaged into pouches which are then sealed. The pouches are labeled, packed into cases, and then sent for sterilization. The finished Tegaderm™ Ag Mesh Dressings are then ready for retail sale in the United States or for export.

The silver sulfate with which the nonwoven fabric is impregnated is the "active ingredient" in the product. It is the silver sulfate which causes wounds to heal quicker. On its web site, 3M claims with regard to this product: "Silver sulfate releases as silver ions in the dressing creates an effective antimicrobial barrier for up to 7 days." It is further claimed that these silver ions reduce the number of bacteria and yeast.

You assert that the finished dressings are products of the United States under application of the rules of origin for textile and apparel products set forth in the Customs and Border Protection (CBP) regulations at 19 C.F.R. 102.21 (implementing 19 U.S.C. § 3592). In the alternative, you assert that the finished dressings are products of the United States under the traditional substantial transformation test set forth in 19 U.S.C. § 2518.[2] The CBP regulations implementing 19 U.S.C. § 2515(b)(1), which provides that the Secretary of the Treasury shall issue advisory rulings and final determinations on the origin of an article under the provisions of 19 U.S.C. § § 2511 through 2518, are found at 19 CFR § § 177.21 through 177.31. 19 U.S.C. § § 2511 through 2518 implement Title III of the Trade Agreements Act of 1979, as amended, which effectuated U.S. obligations under the Agreement on Government Procurement.[3]

ISSUE:

What is the country of origin of the finished Tegaderm™ Ag Mesh Dressings for purposes of U.S. Government procurement?

LAW AND ANALYSIS:

Pursuant to Subpart B of Part 177, 19 C.F.R. 177.21 et seq., which implements Title III, Trade Agreements Act of 1979, as amended (19 U.S.C. § § 2511–2518), CBP issues country of origin advisory rulings and final determinations as to whether an article is or would be a product of a designated country or instrumentality for the purpose of granting waivers of certain "Buy American" restrictions in U.S. law or practice for products offered for sale to the U.S. Government.

Initially, we note that 3M is permitted to request this ruling as it is the importer of record and thus meets the requirements of 19 C.F.R. § § 177.23(a) and 177.24. In addition, 3M meets the definition of a party-at-interest as defined at 19 C.F.R. § 177.22(d) and is entitled to a final determination as to the country of origin of the finished Tegaderm™ Ag Mesh Dressings produced from imported nonwoven cotton fabric.

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[2] 19 U.S.C. § 2518(4)(B) defines the rule of origin for purposes of Government Procurement.

[3] *See* Title III, Trade Agreements Act of 1979, as amended, and the Agreement on Government Procurement, General Agreement on Tariffs and Trade, 12 April 1979, Geneva (GATT 1979).

The rule of origin set forth in 19 U.S.C. § 2518(4)(B) states:

> An article is a product of a country or instrumentality only if (i) it is wholly the growth, product, or manufacture of that country or instrumentality, or (ii) in the case of an article which consists in whole or in part of materials from another country or instrumentality, it has been substantially transformed into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was so transformed.
>
> *See also* 19 C.F.R. § 177.22(a) defining "country of origin" in identical terms.

In rendering advisory rulings and final determinations for purposes of U.S. Government procurement, CBP applies the provisions of Subpart B of Part 177 consistent with the Federal Procurement Regulations. See 19 C.F.R. § 177.21. In this regard, CBP recognizes that the Federal Procurement Regulations restrict the U.S. Government's purchase of products to U.S. – made or designated country end products for acquisitions subject to the TAA. See 48 C.F.R. § 25.403(c)(1). The Federal Procurement Regulations define "U.S.-made end product" as: . . . an article that is mined, produced, or manufactured in the United States or that is substantially transformed in the United States into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed. 48 C.F.R. § 25.003. Therefore, the question presented in this final determination is whether, as a result of the operations performed in the United States, the nonwoven cotton fabric is substantially transformed into a product of the United States.

The rules of origin for textile products for purposes of the customs laws and the administration of quantitative restrictions are set forth in 19 U.S.C. § 3592. These provisions are implemented in the CBP Regulations at 19 C.F.R. § 102.21. The rules set forth in § 3592 apply to textile and apparel products, unless otherwise provided for by statute. The rule of origin in § 2518(4)(B) is a rule of origin otherwise provided for by statute, however, it is a general rule, whereas § 3592 is specific to textile products. Section 3592 has been described as Congress's expression of substantial transformation as it relates to textile products.

The rules of origin in 19 U.S.C. § 3592 are implemented in the CBP Regulations in 19 C.F.R. § 102.21. The imported product is a nonwoven textile fabric. The finished product, Tegaderm™ Ag Mesh Dressings, is also a textile product as defined by 19 C.F.R. § 102.21(b)(5). Tegaderm™ Ag Mesh Dressings are classified in subheading 3005.90, HTSUS, which provides for "Wadding, gauze, bandages and similar articles (for example, dressings, adhesive plasters, poultices), impregnated or coated with pharmaceutical substances or put up in forms or packings for retail sale for medical, surgical, dental or veterinary purposes" other than adhesive dressings and other articles having an adhesive layer.

As the finished dressing is produced by processing in more than one country, its origin cannot be determined by application of § 102.21(c)(1), wholly obtained or produced rule, and resort must be made to § 102.21(c)(2). Section 102.21(c)(2) states that the origin of a good is the country "in which each foreign material incorporated in that good underwent an applicable change in tariff classification, and/or met any other requirement, specified

for the good in paragraph (e) of [102.21]." Section 102.21(e) provides in pertinent part:

> (1) The following rules will apply for purposes of determining the country of origin of a textile or apparel product under paragraph (c)(2) of this section:
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> | | |
> |---|---|
> | 3005.90 | If the good contains pharmaceutical substances, a change to subheading 3005.90 from any other heading; . . . |

The material of foreign origin in this case is the nonwoven cotton fabric classifiable in heading 5603, HTSUS. The processing in the United States causes the foreign origin material to make a tariff shift from heading 5603 to subheading 3005.90, HTSUS. Therefore, by application of the rules set forth in 19 C.F.R. § 102.21, the finished Tegaderm™ Ag Mesh Dressings are products of the United States for purposes of government procurement.

HOLDING:

Based on the facts and analysis set forth above, the finished Tegaderm™ Ag Mesh Dressings are products of the United States for the purpose of government procurement.

Notice of this final determination will be given in the *Federal Register*, as required by 19 C.F.R. § 177.29. Any party-at-interest other than the party which requested this final determination may request, pursuant to 19 C.F.R. § 177.31, that CBP reexamine the matter anew and issue a new final determination. Pursuant to 19 C.F.R. § 177.30, any party-at-interest may, within 30 days after publication of the *Federal Register* notice referenced above, seek judicial review of this final determination before the Court of International Trade.

JEREMY BASKIN,
Acting Director,
Border Security and Trade Facilitation Division.

[Published in the Federal Register, September 26, 2008 (73FR 55860)]

ANNOUNCEMENT

Chief Judge Jane A. Restani has announced the call of the 15th Judicial Conference of the United States Court of International Trade. The Conference is scheduled for Wednesday, November 19, 2008 at Bridgewaters, 11 Fulton Street, Fulton Market Building, South Street Seaport, New York, New York and will commence promptly at 8:30 a.m.

The theme of the Conference is: **"Looking Back to the Road Ahead: Testing the Boundaries of Customs and Trade Litigation."**

The Conference will be attended by the Judges of the United States Court of International Trade. Officials from the International Trade Commission, Customs and Border Protection, the Departments of Justice, Commerce, Labor and Agriculture, as well as other distinguished guests, have been invited to attend. The keynote speaker at the luncheon will be Commissioner Raymond W. Kelly, Police Commissioner of the City of New York.

All interested persons are invited to attend. Since capacity is limited, early return of your registration form is suggested. To facilitate final arrangements, it would be appreciated if your registration form is received by the close of business on October 31, 2008. Additional information regarding the program, including CLE credits, is available at the Judicial Conference page on the Court's Website.

We look forward to your participation in the Conference.

September 15, 2008

TINA POTUTO KIMBLE,
Clerk of the Court.