

International Trade

US Customs Developments

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US Import Policy

CBP Announces Plans to Develop IP Component of Importer Self Assessment Program

On December 9, 2009, US Customs and Border Protection (CBP) officials announced plans to develop an intellectual property component for its Importer Self Assessment (ISA) program. Under the current ISA program, importers may voluntarily monitor their own compliance with trade regulations. In exchange, ISA participants receive certain benefits, such as less scrutiny by CBP and consideration of ISA participation as a mitigating factor in penalty or liquidated damages proceedings. CBP aims to accept members into the ISA program incorporating the intellectual property component in 2011. To be eligible for membership, applicants must be members of the Customs-Trade Partnership Against Terrorism (C-TPAT) supply chain security program.

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Tariffs and Import Restrictions

WTO Director-General Appoints Panelists to Rule on Mexico's Challenge Against US Tuna Labeling

On December 15, 2009, World Trade Organization (WTO) Director-General Pascal Lamy announced his appointment of three panelists to consider a complaint that Mexico filed against the United States challenging its dolphin-safe labeling requirements for tuna.

At issue is the 1990 US Dolphin Protection Consumer Information Act (the Act), which establishes labeling standards for tuna products that are exported from or offered for sale in the United States. The Act bans the use of the "dolphin-safe" label for tuna harvested with purse-seine nets because of dolphins trapped in the nets. In 1997, the legislation was amended by the International Dolphin Conservation Program Act, which allowed the importation into the United States of tuna caught using purse-seine nets, provided maximum dolphin kill levels (set above dolphin death rates) were not exceeded. However, in 2007, a US court ruled that "dolphin-safe" labeling requirements must be interpreted as meaning that the tuna was not harvested with purse-seine nets, and that no dolphins were killed or seriously injured when the tuna were caught.

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Mexico contends that the Act and the 2007 US court ruling interpreting it result in the less favorable treatment of Mexican tuna exports and tuna imported from other countries in favor of US tuna producers, in violation of the national treatment and most favored nation (MFN) obligations under the General Agreement on Tariffs and Trade (GATT) 1994. Mexico further argues that it should be permitted to use the dolphin-safe labels because its fishing practices comply with the standard established by the Inter-American Tropical Tuna Commission, of which Mexico and the United States are members.

The United States argues that the dispute should be resolved under the North American Free Trade Agreement's (NAFTA's) settlement dispute procedures, rather than by the WTO, because it invoked Article 2005(4) of NAFTA, which permits the defending country to choose to resolve the dispute solely under NAFTA where the dispute involves environment, health, safety, or conservation concerns.

US House Members Reintroduce Footwear Legislation

On December 16, 2009, US House Representatives Joseph Crowley (D-NY) and Kevin Brady (R-TX) introduced legislation to eliminate duties on imports of various footwear products. The Affordable Footwear Act (H.R. 4316) is designed to eliminate what many regard as the regressive tax on footwear (i.e., higher duty rates for lower-valued merchandise) put in place in the 1930s to protect a manufacturing sector that no longer exists. The legislation would not, however, eliminate duties on imports of footwear that compete with the few footwear products manufactured in the United States. According to the American Apparel & Footwear Association (AAFA), 99 percent of all shoes purchased each year in the United States are made outside the United States.

Similar legislation (S. 730) sponsored by Senators Maria Cantwell (D-WA) and John Ensign (R-NV) with 15 bipartisan cosponsors has been introduced in the Senate.

US Congress Fails To Pass a Miscellaneous Tariff Bill by December 31

The US Congress failed to pass Miscellaneous Tariff Bill (MTB) legislation last year to replace the MTB that expired on December 31, 2009. As a result, products covered by the expired MTB are subject to duties until a new bill is passed.

The US Senate Finance and House Ways and Means Committees will now likely adopt a two-prong approach under which the Committees will pass an initial MTB early this year, followed by a more comprehensive second MTB later in the year. The first bill, which would reflect a compromise framework

agreement executed in December 2009, would extend some duty suspensions that expired on December 31, and also suspend duties on new products that have been vetted by the US International Trade Commission (ITC). Once the first bill is introduced, the Finance Committee will then focus on preparing a second MTB, which would cover additional duty suspensions not included in the first bill, "as soon as possible," and hopefully before the end of March 2010. Progress on the second MTB depends in part on how quickly the ITC is able to vet the additional products under consideration.

WTO Establishes Dispute Panel on China's Complaint Against US Tire Safeguards

On January 20, 2010, the WTO accepted a request from China for the establishment of a WTO dispute panel to determine whether the United States violated international trade rules by imposing China-specific safeguard tariffs on imports of Chinese passenger vehicle and light truck tires. Section 421 of the Trade Act was enacted for the purpose of implementing the transitional safeguard provisions set forth in China's WTO accession protocol in 2001, which will remain in place for 12 years, i.e., until December 2013. China argues that the Section 421 provisions violate WTO rules because they impose a narrower definition of cause of injury than that set out under China's accession agreement.

Preferential Duty Programs

Importer Wins Suit Seeking Drawback on Fees Paid on Imported Petroleum

On December 15, 2009, the US Court of International Trade (CIT) issued its decision in *Delphi Petroleum, Inc. v. United States* in a dispute involving Delphi Petroleum, Inc.'s (Delphi's) claims for drawback of Harbor Maintenance Taxes (HMT) and Merchandise Processing Fees (MPF). When Delphi filed its drawback claims, CBP regulations expressly prohibited HMT and MPF drawback. Delphi did not include HMT or MPF drawback in its original claims, relying on the advice of a CBP official that it could file a protest following any court decision or legislation allowing drawback on these taxes and fees. When CBP denied Delphi's subsequent protest—despite 2004 legislation clarifying that HMT and MPF are eligible for drawback—Delphi challenged CBP's decision in the instant action.

An importer may file drawback claims for the refund in full, less one percent, of duties paid on imports used in the manufacture or production of "commercially interchangeable" merchandise that is subsequently exported from the United States or destroyed.

A claimant has three years from the date of exportation or destruction of the merchandise to file a drawback claim. The three-year filing deadline may be extended only if it is established that CBP is responsible for an untimely filing. Here, CBP argued that Delphi's claims for HMT and MPF drawback set forth in its 2003 protest were outside of the three-year statutory limit.

The CIT rejected Delphi's first claim that prior correspondence with CBP—which did not include calculations for HMT and MPF drawback—included in its original drawback claims was sufficient to protect its HMT and MPF claims. The CIT reasoned that an effective protective claim "must be complete (i.e., must include calculations) and timely submitted, despite the fact that Customs would have rejected it." Accordingly, the CIT further rejected Delphi's second claim that its drawback claims were timely because the protest merely perfected the original "complete" claims. The CIT was convinced, however, by Delphi's third and final claim that its delay in filing complete claims for HMT and MPF drawback was the result of incorrect advice from CBP to request HMT and MPF drawback by filing a protest after liquidation, rather than including a claim for such taxes and fees in its initial claims.

US Congress Extends Preferential Treatment under the ATPA/ATPDEA and GSP

On December 28, 2009, President Obama signed legislation extending for a year the duty-free treatment available to qualifying developing countries under the Generalized System of Preferences (GSP) program. This legislation also extended for a year the Andean Trade Preference Act (ATPA) as amended by the Andean Trade Promotion Drug Eradication Act (ATPDEA), which currently applies to imports from Colombia, Ecuador and Peru. The legislation did not restore ATPA/ATPDEA benefits to Bolivia. The GSP and parts of the ATPA/ATPDEA were scheduled to expire at the end of 2009.

President Obama Designates Countries under the African Growth and Opportunity Act and GSP

On December 29, 2009, President Obama issued a proclamation in which he designated Mauritania as both an eligible and beneficiary sub-Saharan African country under the African Growth and Opportunity Act (AGOA), and determined that Mauritania met the statutory requirements as a lesser developed beneficiary sub-Saharan African country under section 112(c) of the AGOA, which provides special rules for certain apparel articles imported from countries so designated. The President terminated the designation of Guinea, Madagascar and Niger as beneficiary sub-Saharan African countries. The redesignations of Guinea, Madagascar and Niger took effect on January 1, 2010; the designation of Mauritania took effect on December 23, 2009.

On December 30, 2009, President Obama issued a proclamation determining that Croatia and Equatorial Guinea have become "high income" countries, and terminating their status as beneficiary developing countries under the GSP program, effective January 1, 2011. Effective January 1, 2010, the President also terminated the designation of Cape Verde as a least-developed beneficiary country, and Trinidad and Tobago as a beneficiary developing country. In addition, the President redesignated Maldives as a beneficiary developing country, the designation of which had previously been suspended, with respect to goods entered into the United States on or after December 23, 2009.

The President's December 30 proclamation also extended certain tariff concessions for agricultural products from Israel for one year, and made several technical amendments to the rules of origin under the US-Dominican Republic-Central America, North American, US-Chile and US-Singapore Free Trade Agreements.

Under the AGOA and GSP, eligible imports from beneficiary countries are entered into the United States at a free rate of duty.

CBP Amends Regulations Governing BFTA Eligibility

On December 29, 2009, CBP adopted as a final rule, interim amendments to its regulations enforcing the United States-Bahrain Free Trade Agreement (BFTA) to more closely conform these regulations to the BFTA and its implementing statute. The amendments related to the requirement that a good must be "imported directly" from one BFTA party to the other to qualify for preferential tariff treatment under the BFTA. Specifically, the amendments removed the condition that a good passing through a non-BFTA country en route from one BFTA party to the other must remain under the control of the customs authority of the non-BFTA country. The final rule is effective January 28, 2010.

USTR Accepts Petitions to Grant a Competitive Need Limitation Waiver and Revoke GSP Eligibility for Certain Products

On January 5, 2010, the Office of the United States Trade Representative (USTR) announced that it had received petitions to waive the competitive need limitations (CNL) on new pneumatic rubber radial tires used on motor cars from Thailand, classified within Harmonized Tariff Schedule of the United States (HTSUS) subheading 4011.10.10. CNLs represent the statutory limit that imports of a product may not exceed, absent a waiver, to be eligible for duty-free treatment under the GSP.

The USTR also accepted a petition on January 26 to remove certain textile sleeping bags classified within HTSUS subheading 9404.30.80 from the list of products eligible for duty-free treatment under the GSP program. The Petitioner claims the sleeping bags are import-sensitive products and, therefore, are statutorily exempt from GSP coverage.

In its announcements in the Federal Register, the USTR set forth the schedule for review of the CNL and GSP removal petitions. The ITC is scheduled to publish its report in April 2010, and modifications to the list of articles eligible for duty-free treatment under the GSP as a result of the 2009 Annual Review will be published on June 30, 2010.

CIT Affirms CBP's Denial of NAFTA Refund Claim

On January 12, 2010, the CIT issued its decision in *Ford Motor Company v. United States* in a dispute over the refund under NAFTA of duties Ford Motor Company (Ford) paid on a representative entry of automotive parts it imported from Canada into the United States. In the underlying dispute, Ford entered the subject goods at the general rates of duty without asserting their eligibility for duty-free treatment under NAFTA. After CBP liquidated the goods as entered, Ford filed a post-entry claim seeking a refund under NAFTA pursuant to 19 USC § 1520(d), which was denied by CBP at the port of entry because Ford failed to provide a Certificate of Origin within the one-year statutory period from the date of importation. Ford subsequently filed a protest to contest this denial, which CBP denied on the same grounds. Ford filed the instant action to challenge CBP's denial of its protest, invoking jurisdiction under 28 USC § 1581(a).

The CIT ultimately dismissed Ford's challenge for lack of subject matter jurisdiction. The CIT determined that Ford's claim for a NAFTA refund was invalid as a result of Ford's failure to timely file a Certificate of Origin. The CIT then concluded that it had no jurisdiction under section 1581(a) because this section requires CBP to reach a "decision" on a protest before a party may sue, and CBP could not reach such a decision in the absence of a claim filed in accordance with law. The CIT further held that jurisdiction under section 1581(i) was improper where jurisdiction "is or could have been available" under another subsection of 1581.

CIT Rules Against US Government in Penalties Case

On January 13, 2010, the CIT issued its decision in *United States v. Tip-Top Pants, Inc. and Saad Nigri* on a motion for summary judgment by the US Government under 19 USC § 1592 to recover penalties and duties for the alleged material false statements or acts, or material omissions, made in connection with a single entry of apparel from Mexico. At the time of entry, Defendant Tip-Top

Pants, Inc. (Tip-Top) claimed duty-free treatment under HTSUS subheading 9802.00.9000, which provides duty-free treatment for apparel goods assembled in Mexico from fabric components wholly formed and cut in the United States. CBP eventually issued a penalty claim stating that Tip-Top "entered or caused to be entered merchandise...by means of material false statements, acts and/or omissions" by making a false 9802.00.9000 claim. Tip-Top filed a petition pursuant to 19 USC § 1618 in response to the penalty claim seeking cancellation or mitigation of the penalty. CBP did not issue a decision on the petition, but rather, issued an amended penalty notice.

The CIT ultimately denied the US Government's motion for summary judgment, and sua sponte dismissed Mr. Nigri as a defendant. With respect to the summary judgment motion, the CIT reasoned that the US Government failed to demonstrate that it complied with the requirements to recover a penalty under section 592(e). Among those statutory requirements is that a person to whom a written penalty claim is issued "shall have a reasonable opportunity under 19 USC § 1618 to make representations, both oral and written, seeking remission or mitigation of the monetary penalty." The CIT explained that this statutory requirement was not met where a decision under 19 USC § 1618 (i.e., on Tip-Top's petition) was never issued. The CIT clarified that the statute specifies the decision must be separate from, and subsequent to, the penalty claim or notice.

With respect to Mr. Nigri's dismissal as a defendant, the CIT held that the US Government failed to state a valid claim against Mr. Nigri. The CIT reasoned that the complaint failed to plead a basis on which Mr. Nigri, in his personal capacity, would have incurred liability allegedly incurred by Tip-Top, where it did not allege Mr. Nigri "did, or failed to do, anything whatsoever." The CIT further explained that the fact that Mr. Nigri was the Chairman and Chief Executive Officer of Tip-Top at the time of importation was insufficient, by itself, to establish Mr. Nigri's liability for acts committed by Tip-Top found to be in violation of section 592.

Valuation

CBP Revokes Ruling on the Inclusion of Commissions in Transaction Value

After a notice-and-comment period, CBP published Headquarters ruling (HQ) H022168 (Nov. 23, 2009) in which CBP determined that certain payments made to a purported buying agent constituted bona fide buying commissions and, thus, were not included in transaction value as part of the price actually paid or payable or as an addition thereto. Substantially identical merchandise entered on or after February 8, 2010 will be subject to the analysis set forth in HQ H022168.

Country of Origin

CBP Determines Origin of Multifunctional Machines for US Government Procurement Contracts

On December 7, 2009, CBP published notice of its final determination in HQ H039955 (Nov. 20, 2009) concerning the country of origin of certain multifunctional machines which may be offered to the US Government under a government procurement contract. CBP concluded that the multifunctional machines at issue would be substantially transformed in Japan and, thus, the country of origin of the finished multifunctional machines for purposes of the US Government was Japan. In reaching its conclusion, CBP reasoned that the final assembly of the subassemblies (many of which were assembled in China) into a finished product, testing and related operations in Japan were sufficiently complex and meaningful to result in a new and distinct article of commerce that possessed a new name, character and use. Given the substantial number of parts assembled in China, however, CBP noted that the transfer of additional parts or processing from Japan to China might yield a different result.

Classification

CIT Affirms CBP's Classification of Wall Panels and Locator Tabs

On December 18, 2009, the CIT issued its decision in *Storewall, LLC v. United States* in a dispute involving the proper classification of "Storewall" wall panels and "HangUp" locator tabs imported by Plaintiff Storewall, LLC (Storewall). The subject wall panels consisted of polyvinyl chloride (PVC) plastic panels designed to accept an array of article holders and accessories, such as shelves, brackets, hooks and so forth.

CBP claimed that the wall panels and locator tabs were properly classified as other articles of plastics within HTSUS (2003) subheading 3926.90.98, dutiable at 5.3 percent ad valorem. Storewall claimed the wall panels should have been classified as other furniture of plastics within HTSUS (2003) subheading 9403.70.80 or, alternatively, as parts of other furniture within HTSUS (2003) subheading 9403.90.50, and that the locator tabs should have been classified as furniture parts within HTSUS (2003) subheading 9403.90.50, all at a free rate of duty. The CIT ultimately granted summary judgment in favor of the US Government.

In reaching its decision, the CIT first relied on Note 2(u) to Chapter 39 of the HTSUS, which provides that articles covered

by Chapter 94 to the HTSUS, such as furniture, are not covered by Chapter 39. Accordingly, the CIT first evaluated whether the wall panels and locator tabs were properly classifiable as other "furniture and parts thereof" within HTSUS heading 9403, reasoning that, if they were, they were precluded from classification as articles of plastic within HTSUS heading 3926. Citing Note 2 to Chapter 94, the CIT explained that the items could only be classified within HTSUS heading 9403 if they were designed "for placing on the floor or ground," or if the items constituted "cupboards, bookcases, other shelved furniture and unit furniture" designed "to be hung, to be fixed to the wall or to stand one on the other." The items were not designed for placing on the floor or ground and, thus, the CIT concluded that they must constitute unit furniture "to be hung, to be fixed to the wall or to stand one on the other" to be classified within HTSUS heading 9403.

Combining dictionary definitions, Explanatory Note requirements, and the Brussels Nomenclature Committee Report, the CIT determined that "unit furniture" could be defined for purposes of the HTSUS as an item: "(a) fitted with other pieces to form a larger system or which is itself composed of smaller complementary items, (b) designed to be hung, to be fixed to the wall, or to stand one on the other or side by side, and (c) assembled together in various ways to suit the consumer's individual needs to hold various objects or articles, but (d) exclud[ing] other wall fixtures such as coat, hat and similar racks, key racks, clothes brush hangers, and newspaper racks."

Applying these criteria, the CIT found that the subject items did not always constitute unit furniture because consumers could choose to accessorize the wall panels only with hooks—rendering the combined unit an excluded rack—as opposed to shelves or baskets. Because a completed Storewall system did not always constitute unit furniture, the wall panels and locator tabs could not be classified as furniture or furniture parts within HTSUS heading 9403. As there was no dispute that the wall panels were made of PVC plastic and the locator tabs of ABS plastic, the CIT then concluded that the subject items were properly classified as other articles of plastic within HTSUS subheading 3926.90.98.

CIT Assigns Classification to Mellorine

On December 22, 2009, the CIT issued its decision in *Arko Foods International, Inc. v. United States* in a dispute involving the correct classification of a frozen dessert known as mellorine imported by Plaintiff Arko Foods International, Inc. (Arko). The subject mellorine had a consistency and manner of consumption similar to ice cream, and was manufactured from various ingredients including water, refined sugar, vegetable oil, fruit puree or preserve, corn syrup, skim milk powder, whey, stabilizers, emulsifiers, artificial food flavors and maltodextrin. Depending on the variety, the

mellorine could also contain cheese, whole milk powder, purple yam or pieces of fruit.

CBP classified the mellorine as “[i]ce cream and other edible ice” and a “dairy product described in additional US note 1 to chapter 4” within HTSUS subheading 2105.00.40 because it considered the mellorine an “article[] of milk or cream”—the first of three categories described in the additional note. Arko argued that the mellorine was not an article of milk or cream, and that it was properly classified as a composite good whose classification was controlled by the element imparting the mellorine’s essential character pursuant to General Rule of Interpretation (GRI) 3(b). In this regard, Arko claimed that the mellorine either fell within HTSUS heading 0811 as a fruit or nut or, alternatively, within HTSUS heading 2016 as a food preparation not elsewhere specified. The CIT ultimately rejected both Arko’s and the CBP’s classification, and determined that the mellorine was properly classified as “other edible ice” other than a dairy product within HTSUS subheading 2105.00.50, at a duty rate of 17 percent ad valorem.

In making its determination, the CIT explained that the GRIs are to be applied in order, noting that GRI 1 requires classifying a good according to the terms of the headings and any relative section or chapter notes. Applying GRI 1, and relying on dictionary definitions of the term “edible ice,” examples of edible ice listed in Explanatory Note (EN) 21.05, and items covered by a US Food and Drug Administration (FDA) regulation governing frozen desserts, the CIT found that the mellorine constituted “other edible ice” within the meaning of HTSUS heading 2105. Because the CIT found that mellorine could be classified by application of GRI 1, it rejected Arko’s claim that GRI 3(b) should dictate classification of the mellorine. The CIT agreed with Arko, however, that the subject mellorine did not constitute an article of milk or cream. Applying factors set forth in *Wilsey Foods, Inc. v. United States*, the CIT found that milk or cream was not an essential ingredient, an ingredient of chief value, or a preponderant ingredient, of the mellorine. Accordingly, the CIT concluded that the mellorine was properly classified within the provision of HTSUS heading 2105, covering edible ice that is not a dairy product—2105.00.50.

CAFC Reverses CIT Ruling on the Classification of Bottle and Jug Wraps

On January 5, 2010, the US Court of Appeals for the Federal Circuit (CAFC) reversed the CIT’s decision in *Outer Circle Products v. United States*. The CAFC held that the CIT erred when it ruled that the bottle and jug wraps should be classified as “bottle cases” under HTSUS subheading 4202.92.90 and subject to a duty rate of 19.3 percent ad valorem. The CAFC determined that the subject articles were food organizers, properly classified as other plastic kitchenware under HTSUS subheading 3924.10.50 and, therefore,

subject to a duty rate of 3.4 percent ad valorem. The bottle and jug wraps at issue consisted of soft-sided, flexible wraps constructed of a PVC closed-cell thermal-insulating foam layer.

In reaching its decision, the CAFC noted that it had previously ruled in *SGI, Inc. v. United States* that HTSUS heading 4202 did not include “containers that organize, store, protect, or carry food and beverages.” The CAFC rejected the CIT’s attempt to distinguish the *SGI* coolers from the subject bottle and jug wraps on the basis that the *SGI* coolers were fully capable of storing food or beverage while the subject articles required the insertion of a bottle or jug before achieving such capability. Rather, the CAFC found that both the coolers in *SGI* and the subject bottle and jug wraps were not designed to hold uncontained food or beverage and, because the subject articles “organize, store, protect, or carry food or beverages,” they could not be classified under HTSUS heading 4202.

CBP Seeks Comments on Petition to Reclassify Wickless Wax Objects from China

On January 5, 2010, CBP issued a Federal Register notice seeking comments on the correctness of the classification of wickless wax objects from China, challenged in a petition recently filed on behalf of the National Candle Association (NCA). NCA argues that the wax objects, which are currently classified as “Molded or carved articles of wax” under HTSUS subheading 9602.00.40, should instead be classified as candles under HTSUS subheading 3406.00.00. NCA claims the wax objects are unfinished candles, or blanks having the essential character of a candle. Alternatively, the NCA contends the wax objects are either: (1) unassembled candles, or (2) prima facie classifiable in HTSUS headings 9602 and 3604, the latter of which is more specific. As support for its position, the NCA cites to a 2007 circumvention order that found that wickless wax forms in certain shapes that were being imported into the United States were circumventing the antidumping order on petroleum wax candles from China. CBP, however, has consistently held in its rulings that the essential character of a candle is imparted by the wick and the wax components. Comments on the correctness of the current classification of wickless wax objects from China must be received on or before March 8, 2010.

Liz Claiborne Settles with US Government over Garments Made with Lyocell

On January 7, 2010, Liz Claiborne settled one of its cases at the CIT against the US Government over duties imposed on garments made with lyocell. The lawsuit was one of several in which Liz Claiborne challenged the classification of its women’s pullovers. Liz Claiborne argued that CBP misclassified the pullovers as being made of “man-made fibers,” resulting in a duty rate of

32.7 percent ad valorem, when the pullovers should have been classified as being made of “other textile materials” and, thus, subject to the lower rate of six percent ad valorem. As part of the settlement, Liz Claiborne agreed to accept a refund of US\$96,218.68, with interest, in exchange for its termination of all its lycocell lawsuits against the US Government.

CBP Publishes Proposed and Final Modifications and Revocations of Prior Rulings

In December 2009 and January 2010, CBP published notice of, or proposal of, the revocation or modification of several Classification Rulings, including the following:

- Proposed **HQ H071105** is intended to revoke NY N020433 (Dec. 20, 2007) with respect to the tariff classification of table placemats made of cotton woven fabric coated on the front side with a clear plastic material and on the back side with a foam plastic material. HQ H071105 determined that the placemats were properly classified within HTSUS subheading 3924.90, as other household articles of plastics, rather than as tableware and kitchenware of plastics within HTSUS subheading 3926.10. CBP will take no action until it considers written comments received on or before January 11, 2010.
- **HQ H062211 (Nov. 23, 2009)** revokes HQ 963001 (July 22, 1999) on the tariff classification of certain electrically-heated throws and seat pads for automotive use. HQ H062211 determined that the throws and seat pads at issue were properly classified in HTSUS subheading 8516.79.00 as “[o]ther electrothermic appliances of a kind used for domestic purposes,” rather than within HTSUS heading 8543 as “[e]lectrical machines and apparatus, having individual functions, not specified or included elsewhere in [Chapter 85].” Substantially identical merchandise entered on or after February 8, 2010 will be classified according to the analysis set forth in HQ H062211.
- Proposed **HQ H045151** is intended to modify NY L83194 (April 4, 2005) with respect to the tariff classification of certain pressure-mounted safety gates. HQ H045151 determined that the safety gates at issue were properly classified within HTSUS subheading 3924.90.56 as other plastic household articles, rather than as “Builder’s ware of plastics. Not elsewhere specified or included: Other” within HTSUS subheading 3925.90.00. CBP will take no action until it considers written comments received on or before January 11, 2010.
- Proposed **HQ H028098** is intended to revoke NY R01762 (April 26, 2005) with respect to the tariff classification of certain mass flow controllers (MFCs) consisting of closed-loop devices that set, measure and control the flow of gases or liquids. HQ H028098 determined that the MFCs were properly classified within HTSUS subheading 9032.89.6060 as “Automatic regulating or controlling instruments and apparatus...Other instruments and apparatus: Other: Other Flow and liquid level control instruments,” rather than as valves within HTSUS subheading 8481.80.9015. CBP will take no action until it considers written comments received on or before January 11, 2010.
- Proposed **HQ H024874, HQ H024876 and HQ H024878** are intended to revoke NY H87026 (Jan. 28, 2002) and NY 81650 (Dec. 19, 1995), and to modify NY 817979 (Jan. 26, 1996), respectively, pertaining to the tariff classification of certain light-emitting diode (LED) modules consisting of several LED bulbs mounted on a printed circuit board (PCB) and/or connected to a power supply unit. HQ H024874, HQ H024876 and HQ H024878 determined that the LED modules were properly classified within HTSUS heading 9405, which provides for “Lamps...not elsewhere specified or included,” rather than as “light-emitting diodes” within HTSUS heading 8541. CBP will take no action until it considers written comments received on or before January 11, 2010.
- Proposed **HQ H009365** is intended to modify NY N00392 (Dec. 29, 2006) with respect to the tariff classification of certain ski mittens. HQ H009365 determined that the ski mittens were properly classified within HTSUS subheading 6116.10.08 as mittens specially designed for use in sports, rather than as “Gloves, mittens and mitts, knitted or crocheted: impregnated, coated or covered with plastics or rubber: other: without fourchettes: cut and sewn from preexisting machine-knit fabric that is impregnated, coated or covered with plastics or rubber: other: containing over 50 percent by weight of plastics or rubber” within HTSUS subheading 6116.10.4400. CBP will take no action until it considers written comments received on or before January 11, 2010.
- Proposed **HQ H009527** is intended to modify NY R03289 (Mar. 13, 2006) with respect to the tariff classification of NAD, Lithium, which is lithium salt of NAD (nicotinamide adenine dinucleotide) (CAS # 64417-72-7). HQ H009527 determined that the NAD, Lithium was properly classified within HTSUS subheading 2934.99.39, which provides for “Nucleic acids and their salts, whether or not chemically defined; other heterocyclic compounds: Other: Other: Aromatic or modified aromatic: Other: Products described in additional US note 3 to section VI,” rather than as other heterocyclic compounds within HTSUS subheading 2934.99.9000. CBP will take no action until it considers written comments received on or before January 11, 2010.
- Proposed **HQ H027029 and HQ H029003** is intended to revoke NY N014061 (July 25, 2007) and NY D88203 (Mar. 23, 1999), respectively, with respect to the tariff classification of automotive fan shrouds (aka “automotive fan housings”). In the two rulings subject to proposed revocation, CBP classified the fan shrouds in two different headings relative to the part of the automobile incorporating

the finished fan: (1) parts of an automotive radiator in HTSUS heading 8708, or (2) parts of an automotive air conditioner in HTSUS heading 8415. It is now CBP's position, as set forth in HQ H027029 and HQ H029003, that the fan shrouds are classifiable as parts of a fan within HTSUS subheading 8414.90.10. CBP will take no action until it considers written comments received on or before January 11, 2010.

- Proposed **HQ H025781** is intended to revoke NY N021072 (Dec. 28, 2007) pertaining to the tariff classification of a piezoelectric ceramic stack. HQ H025781 determined that the piezoelectric ceramic stack was properly classified within HTSUS subheading 8541.60.00 as "mounted piezoelectric crystals," rather than "ceramic wares for laboratory, chemical or other technical uses" within HTSUS heading 6909. CBP will take no action until it considers written comments received on or before January 11, 2010.
- **HQ H042584 (Nov. 23, 2009)** revokes NY K87594 (July 22, 2004) on the tariff classification of lawn sweeper bags made predominantly of plastics, and designed to be pulled behind a lawn tractor. HQ H042584 determined that the lawn sweeper bags were properly classified within HTSUS heading 8479, as parts of machines with individual functions, rather than as articles of plastic within HTSUS heading 3926. Substantially identical merchandise entered on or after February 8, 2010 will be classified according to the analysis set forth in HQ H042584.
- **HQ H055387 (Nov. 23, 2009)** modifies NY N042400 (Nov. 14, 2008), NY N042401 (Nov. 14, 2008) and NY N042402 (Nov. 14, 2008) on the tariff classification of several styles of cold weather/winter sports gloves. In HQ H055387, CBP determined the correct classification by evaluating: (1) whether the material of the palmside or outer shell imparted the essential character of the subject gloves and (2) whether the subject gloves were classified as gloves specially designed for use in sports or "other" gloves. Specifically, CBP determined the following with respect to the various styles of gloves: (1) the leather palmside—not the outer shell—imparted the essential character of the gloves for classification purposes where it provided the grip necessary for the sport for which the gloves were used; (2) the outer knit shell—not the suede leather palm patch—imparted the essential character for classification purposes where the suede portion played a minimum role in relation to the textile portion; (3) the gloves were properly classified as gloves specifically designed for use in sports where the general characteristics of the gloves evidenced a design for a sport and/or where evidence demonstrated the gloves were designed, marketed, or sold as gloves for use in a particular sport and (4) gloves/liners of knit fabric with partially elasticized wrists were unsuitable for use in skiing and, thus, classified as gloves for use in sports other than skiing. The sports gloves where the leather palmside—not the outer shell—imparted the essential character were classified within HTSUS subheadings 4203.21.60 and 4203.21.80. The sports gloves where the knit outer shell imparted the essential character were classified within HTSUS subheading 6116.93.08. Substantially identical merchandise entered on or after February 8, 2010 will be classified according to the analysis set forth in HQ H055387.
- Proposed **HQ 065718** and **HQ 065720** are intended to revoke NY 859202 (Jan. 18, 1991) and NY J88055 (Sept. 3, 2003) pertaining to the tariff classification of auxiliary vehicle heater units. HQ 065718 and HQ 065720 determined that the auxiliary vehicle heater units were properly classified within HTSUS subheading 8419.50.50, which provides for "machinery, plant or laboratory equipment, whether or not electrically heated...for the treatment of materials by a process involving a change in temperature such as heating: Heat exchange units: Other," rather than "air heaters not electrically heated, incorporating a motor-driven fan or blower" within HTSUS subheading 7322.90.00. CBP will take no action until it considers written comments received on or before January 11, 2010.
- **HQ H055635 (Nov. 23, 2009)** and **H055636 (Nov. 23, 2009)** revoke NY I87349 (Oct. 29, 2002) and NY G88540 (April 12, 2001), respectively, pertaining to the tariff classification of pellicles. HQ H055635 and HQ H055636 determined that the pellicles were properly classified within HTSUS subheading 8486.90.00 as parts of machines "used solely or principally for the manufacture of semiconductor boules or wafers, semiconductor devices, electronic integrated circuits or flat panel displays," rather than "optical elements" within HTSUS heading 9002. Substantially identical merchandise entered on or after February 8, 2010 will be classified according to the analysis set forth in HQ H055635 and HQ H055636.
- **HQ H058796 (Nov. 23, 2009)** revokes NY B89965 (Jan. 7, 1998) pertaining to the tariff classification of FC-77 Fluorinert (CAS 86508-42-1). HQ H058796 determined that the FC-77 Fluorinert was properly classified within HTSUS subheading 3824.90.92, which provides for: "Prepared binders for foundry molds or cores; chemical products and preparations of the chemical or allied industries (including those consisting of mixtures of natural products), not elsewhere specified or included: Other: Other: Other: Other: Other," rather than as a mixture of halogenated hydrocarbons classified in HTSUS subheading 3824.90.55 (now 3824.90.55). Substantially identical merchandise entered on or after February 8, 2010 will be classified according to the analysis set forth in HQ H058796.

Procedures

CBP Requires Tax ID Numbers for Payments

On December 4, 2009, CBP announced that all persons making payment to CBP by check must include their Taxpayer Identification Number (TIN) on the face of the check. A social security account number and an employer identification number each constitute a TIN for purposes of payment to CBP.

CBP Issues Technical Corrections to the "10 + 2" Rule and Announces Escalated Enforcement

On December 23, 2009, CBP published technical corrections to the "10 + 2" rule. The corrections expressly permit importers to use single transaction bonds for an Importer Security Filing (ISF) bond, which is required as security for the ISF requirement. The technical corrections also formally specify that, in the event of a breach of the bond, liquidated damages in the amount of US\$5,000 per violation must be paid.

Enforcement of the 10 + 2 rule entered into effect on January 26, 2010, and Director of Importer Security Filing, CBP Office of Field Operations, Richard DiNucci announced one day earlier that it will apply an escalated approach as it enters enforcement mode. During the remainder of the first quarter of 2010, CBP will review ISFs for timeliness, completeness and accuracy, and place companies that are not meeting filing requirements on notice to correct any problems. During the second and third quarters, CBP intends to escalate its approach to include placing holds on shipments or conducting nonintrusive inspections (NII) or physical examinations. CBP will not likely issue liquidated damages for ISF violations until the third or fourth quarter. DiNucci notes, however, that CBP reserves the right to take any action necessary to maintain security and ensure compliance.

For more information on requirements under the 10 + 2 rule, please see the October and December 2009 issues of this newsletter.

CBP Amends Regulations on Class 9 Bonded Warehouse Procedures

On December 29, 2009, CBP published a final rule amending its regulations to extend the blanket withdrawal procedure for duty-free merchandise under certain circumstances, and to expand and create a uniform time period for Class 9 warehouse proprietors to file an entry, provide written confirmation of certain shortages, overages and damages, and to pay duties, taxes and interest on overages and shortages. The final rule amends the regulations to align them with actual business practices.

Specifically, the final rule allows the appropriate Field Operations director to extend the blanket withdrawal procedures in instances where the Class 9 warehouse and the destination port are within the director's authority. This blanket withdrawal may only be used if the vessel to which the merchandise is transferred is destined for a foreign destination. In addition, the final rule provides Class 9 proprietors 20 calendar days to provide written confirmation of any reported shortages, overages or damages. The final rule also

modifies the provision that lists the information required for the annual reconciliation report, reducing the reporting requirements for Class 9 warehouse proprietors who can show that they would report shortages within 20 days of discovery. Other amendments included in the final rule address alternatives to marking merchandise for Class 9 warehouse proprietors that use electronic systems that can distinguish between duty-paid and US-origin merchandise, and remove the requirement that sales tickets must be submitted in triplicate. The final rule is effective January 28, 2010.

CBP Amends Regulations to Reflect Centralization of Bond Program

On January 5, 2010, CBP published proposed amendments to its regulations to reflect the centralization of its continuous bond program at CBP's Revenue Division, Office of Finance in Indianapolis, IN. Pursuant to this centralization, continuous bonds must be filed with the Revenue Division instead of with the ports (as is currently the case).

The proposed amendments would require that the documentation for continuous bonds, including CBP Form 301, applications, riders, terminations, power of attorney forms and Importer ID Input Records (CBP Form 5106) must be filed at the Revenue Division via mail, fax, or in an electronic format prescribed by CBP. Many of the proposed amendments are intended to facilitate the use of the electronic submission of bond documentation (e.g., continuous bonds submitted electronically would not require an affixed seal, but would require electronic certification language in a State that requires a seal). CBP is accepting comments on the proposed amendments received on or before March 8, 2010.

Consumer Product Safety

CPSC Revised the Terms of Its Stay of Enforcement of Testing and Certification Requirements

On December 28, 2009, the US Consumer Product Safety Commission (CPSC) announced its decision to revise the terms of its stay of the enforcement of certain testing and certification requirements under the Consumer Product Safety Act (CPSA), as amended by the Consumer Product Safety Improvement Act of 2008 (CPSIA). On February 9, 2009, the CPSC announced a stay of enforcement that would remain in effect until February 10, 2010 on testing and certification requirements applicable to children's product safety rules for which accreditation requirements for third

party conformity assessment bodies had not yet been published, or that were not in effect prior to enactment of the CPSIA (e.g., certification based on a reasonable testing program for nonchildren's products subject to a consumer product safety rule).

Under the revised terms, effective February 10, 2010, the CPSC will lift the stay on children's product safety rules applicable to certain children's products, including bicycle helmets, bunk beds, rattles and dive sticks, and on consumer product safety rules applicable to certain nonchildren's products, including lead-in-paint in paint and on furniture, child-resistance requirements on portable gas containers, special packaging, extremely flammable contact adhesives, unstable refuse bins and refrigerator door latches. The stay will remain in effect with respect to the rule on bicycles (children's and nonchildren's) until May 17, 2010, and the rule on total lead content in children's products until February 10, 2011. The stay will remain in effect until further notice with respect to rules on carpets and rugs; vinyl plastic film; wearing apparel; caps and toy guns; phthalates; ASTM F963; clacker balls; baby walkers; bath seats; children's sleepwear; electronic toys and durable infant products. Children's products subject to a lift of the stay of enforcement will require testing by an accredited third party laboratory and certification based on that testing. Nonchildren's products subject to a lift will require testing based on a reasonable testing program and general conformity certification.

CPSC Issues Final Rule on Registration of Durable Infant Products

On December 29, 2009, the CPSC issued a final rule under section 104(d) of the CPSIA. In accordance with that section, the final rule requires each manufacturer of a durable infant or toddler product to: (1) provide a postage-paid consumer registration form with each product; (2) keep records of consumers who register their products with the manufacturer and (3) permanently place the manufacturer's name and contact information, model name and number and the date of manufacture on each such product. The final rule specifies the text and format for the registration form and establishes requirements for online registration. The final rule becomes effective on June 28, 2010.

CPSC Launches Investigation of Cadmium in Children's Jewelry

On January 12, 2010, CPSC Chairman Inez Tennenbaum announced that the CPSC has launched a formal investigation into children's metal jewelry from China that, according to Associated Press (AP) reports, contains unsafe levels of cadmium. Many Chinese manufacturers have turned to cadmium as a replacement for lead in light of new lead limits and testing and certification requirements established by the CPSIA. Tennenbaum urged Chinese manufacturers not to use cadmium, barium or antimony

as lead replacements in their children's products. Currently, there are no federal limits on cadmium in children's jewelry.

CPSC Exempts Certain Children's Electronic Devices from Lead Content Limits

On January 20, 2010, the CPSC issued a final rule concerning certain electronic devices for which it is not technologically feasible to meet the lead content limits (currently 300 ppm) required under section 101 of the CPSIA. Section 101(b)(4) of the CPSIA provides that the CPSC shall issue requirements by regulation to eliminate or minimize the potential for exposure to and accessibility of lead in such electronic devices, and establish a schedule for achieving full compliance, unless the CPSC determines that full compliance with the lead limits is not technologically feasible within such a schedule. In accordance with this section, certain children's electronic devices for which the CPSC has determined it is not technologically feasible to meet the lead content limits are exempt under this rule. The final rule is effective on January 20, 2010.

CPSC Issues Guidelines on Mandatory Recall Notices

On January 21, 2010, the CPSC published a final rule establishing guidelines and requirements for mandatory recall notices as required by section 214 of the CPSIA. The rule sets forth information that must appear on mandatory recall notices ordered by the CPSC or a United States district court pursuant to certain sections of the CPSA. The rule also contains CPSC guidelines with respect to additional information, the inclusion of which the CPSC or a court may order. The final rule is effective on February 22, 2010.

Miscellaneous

CAFC Upholds CIT Finding in Mushrooms Liquidation Case

On December 15, 2009, the CAFC affirmed the CIT's decision in *Agro Dutch Industries Ltd. v. United States*, in which the CIT ordered reliquidation of certain entries of preserved mushrooms imported into the United States by Plaintiff Agro Dutch Industries (Agro Dutch). The case involved the inadvertent liquidation of the subject entries during a grace period between the date the CIT issued an injunction against liquidation and the effective date of the injunction. The CAFC agreed with the CIT in rejecting the US Government's position that Agro Dutch's challenge was rendered moot because the inadvertent liquidation occurred during this grace period. The CAFC further rejected the Government's reliance on *SKF USA Inc. v. United States* and *Zenith Radio Corp. v. United States*, in which the CAFC held that liquidation of the

entries rendered the case moot and reliquidation was therefore barred. The CAFC noted an injunction had not been issued in *SKF*. The CAFC also dismissed the contention that *Zenith* supported the Government's position because it found there were exceptions to the *Zenith* rule that were applicable in this case. The CAFC held that the five-day grace period between when the injunction was issued and when it took effect was not intended to authorize liquidation of imported entries before the injunction took effect. Rather, it was to protect CBP officials from being subject to contempt sanctions for inadvertently liquidating entries.

CIT Holds Surety Liable Under Bonds

On December 16, 2009, the CIT issued its decision in *Hartford Fire Ins. Co. v. United States* in which Hartford Fire Insurance Company (Hartford) sought a declaration that its bonds were unenforceable. Hartford filed this action in response to CBP's demand for payment of antidumping duties under the bonds, which CBP issued after it was unable to recover antidumping duties from the importer of record. The CIT ultimately dismissed the challenge for lack of subject matter jurisdiction.

Hartford sought to invoke the CIT's jurisdiction under 28 USC § 1581(i), which grants the CIT exclusive residual jurisdiction over certain civil actions against the United States not covered by subsections 1581(a) through (h). The US Government sought dismissal, arguing that the proper mechanism to challenge CBP's charge was by protest, the denial of which protest could have been reviewed by the CIT under subsection 1581(a). In support of its claim that jurisdiction was proper under subsection 1581(i), Hartford made two arguments. First, Hartford claimed that it learned of the bases for its present causes of action after the period for protesting CBP's demand for payment on its bonds had already expired. Therefore, it could not have availed itself of

the protest remedy, and jurisdiction under 1581(i) was appropriate. Second, Hartford argued that its claim should be conceived not as the protest of a charge that could have been brought under subsection 1581(a), but rather as a broader contractual claim that the bonds were unenforceable as a result of CBP's material misrepresentations regarding the importer's ability to pay, which properly belonged under subsection 1581(i). The CIT agreed with the Government, finding that jurisdiction would have been available pursuant to 28 USC § 1581(a) if Hartford had filed a timely protest with CBP and, thus, jurisdiction under 28 USC § 1581(i) was precluded by Hartford's failure to utilize the administrative protest remedy available to it. The CIT reasoned that the "true nature" of Hartford's claim was a challenge to the CBP's charge, and that Hartford's allegations as to the unenforceability of the bonds merely constituted a theory of defense upon which CBP could have granted the relief of cancelling that charge in response to a timely protest.

Spectranetics Settles with DOJ over Illegally Imported Medical Devices

On December 30, 2009, the US Department of Justice (DOJ) announced a settlement with medical laser manufacturer, Spectranetics Corp. (Spectranetics), over allegations that the company illegally imported and sold medical devices for patient use that had not been approved by the FDA. According to the DOJ, Spectranetics also caused false claims to be made to the Medicare program, and failed to meet certain reporting obligations to the FDA. Spectranetics agreed to pay US\$5 million in fines and penalties in exchange for the DOJ's agreement not to prosecute the company. In addition, the company entered into a corporate integrity agreement with the Office of the Inspector General for the US Department of Health and Human Services.

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