

U.S. Customs and Border Protection

8 CFR PART 217

USCBP-2010-0025

CBP DEC. NO. 10-25

RIN 1651-AA83

ELECTRONIC SYSTEM FOR TRAVEL AUTHORIZATION (ESTA): TRAVEL PROMOTION FEE AND FEE FOR USE OF THE SYSTEM

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

ACTION: Interim final rule; solicitation of comments.

SUMMARY: Nonimmigrant aliens who wish to enter the United States under the Visa Waiver Program at air or sea ports of entry must obtain a travel authorization electronically through the Electronic System for Travel Authorization (ESTA) from U.S. Customs and Border Protection prior to departing for the United States. This rule requires ESTA applicants to pay a congressionally mandated fee of \$14.00, which is the sum of two amounts: a \$10 travel promotion fee for an approved ESTA statutorily set by the Travel Promotion Act and a \$4.00 operational fee for the use of ESTA as set by the Secretary of Homeland Security to ensure recovery of the full costs of providing and administering the ESTA system.

DATES: This interim final rule is effective on September 8, 2010. Comments must be received on or before October 8, 2010.

ADDRESSES: Please submit comments, identified by docket number, by one of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments via docket number USCBP-2010-0025.
- *Mail:* Border Security Regulations Branch, Office of International Trade, U.S. Customs and Border Protection, 1300 Pennsylvania Avenue, N.W. (Mint Annex), Washington, DC 20229.

- *Instructions:* All submissions received must include the agency name and docket number for this rulemaking. All comments will be posted without change to <http://www.regulations.gov>, including any personal information provided.
- *Docket:* For access to the docket to read background material or comments, go to <http://www.regulations.gov>. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552) and 19 CFR 103.11(b) on normal business days between the hours of 9 a.m. and 4:30 p.m. at the Border Security Regulations Branch, Office of International Trade, U.S. Customs and Border Protection, 799 9th Street, N.W., 5th Floor, Washington, DC 20229. Arrangements to inspect submitted comments should be made in advance by calling Mr. Joseph Clark at (202) 325-0118.
- For additional information on ESTA, visit the Web site: <http://www.cbp.gov/esta>.

FOR FURTHER INFORMATION CONTACT: Suzanne Shepherd, Office of Field Operations, CBP.ESTA@dhs.gov or (202)-344-2073.

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I. Public Comments

Interested persons are invited to submit written comments on all aspects of this interim final rule, including the amount of the fee. U.S. Customs and Border Protection (CBP) also invites comments on the economic, environmental or federalism effects of the rule, as well as comments related to the Paperwork Reduction Act. We urge commenters to explain the reason for any recommended change, and include data, information, or authorities that support such recommended change.

II. Background

Pursuant to section 217 of the Immigration and Nationality Act (INA), 8 U.S.C. 1187, the Secretary of Homeland Security, in consultation with the Secretary of State, may designate certain qualifying countries as Visa Waiver Program (VWP) countries.¹ Eligible travelers who are nationals of VWP countries are not required to obtain a visa to travel to the United States. Other nonimmigrant alien travelers generally must obtain a visa from a U.S. embassy or consulate and undergo an interview by consular officials overseas, in advance of travel to the United States.

On August 3, 2007, the President signed into law the Implementing Recommendations of the 9/11 Commission Act of 2007 (9/11 Act), Public Law 110–53. Section 711 of the 9/11 Act required that the Secretary of Homeland Security (the Secretary), in consultation with the Secretary of State, develop and implement a fully automated electronic travel authorization system to collect biographical and other information as the Secretary determines necessary to evaluate, in advance of travel, the eligibility of the applicant to travel to the United States under the VWP, and whether such travel poses a law

¹ The list of countries currently eligible to participate in the VWP is set forth at 8 CFR 217.2(a). Under the VWP, eligible nationals of VWP countries may apply for admission to the United States at a U.S. port of entry as nonimmigrant aliens for a period of ninety (90) days or less for business or pleasure without first obtaining a nonimmigrant visa, provided that they are otherwise eligible for admission under applicable statutory and regulatory authority. Further details regarding the VWP are contained in the background section of the June 9, 2008 interim final rule, at 73 FR 32440, and on the Web site www.cbp.gov/esta. As of the date of publication of this interim final rule, the current list of designated VWP countries can be found at 75 FR 15991 (Mar. 31, 2010).

enforcement or security risk. On June 9, 2008, the Department of Homeland Security (DHS) published an interim final rule (IFR) in the **Federal Register** (73 FR 32440) announcing the creation of the Electronic System for Travel Authorization (ESTA) program for aliens traveling to the United States by air or sea under the VWP. See 8 CFR 217.5.

The ESTA system now requires VWP travelers arriving in the United States by air or sea to provide certain biographical and other information electronically to CBP in advance of travel so that CBP can determine eligibility for travel to the United States under the VWP. Each ESTA travel authorization generally is valid for two years. Implementation of ESTA as a mandatory requirement initially was delayed to allow carriers and the public to become ESTA-compliant. Since January 12, 2009, all nonimmigrant aliens traveling to the United States under the VWP on an air or sea carrier must obtain travel authorization from the ESTA Web site. 73 FR 67354.

Travel authorization under ESTA allows an alien from a VWP country to travel to the United States, however, it does not serve as a determination of admissibility to the United States. If an alien's travel authorization application is denied, the alien may still seek to obtain a visa to travel to the United States through a U.S. embassy or consulate or may reapply through the ESTA Web site at a later date if circumstances change or an error was made during the application process.

Although the 9/11 Act authorized the Secretary to charge a fee for ESTA to recover the costs of providing and administering the System, the ESTA IFR did not establish a fee. At the time the IFR was issued, DHS was focused on the successful development and deployment of the ESTA system to collect the relevant traveler data and to properly vet applicants. DHS wanted to ensure the efficient operation and maintenance of the ESTA system before establishing an operational fee to recoup the costs of processing ESTA applications and vetting individual applicants. On January 12, 2009, when the ESTA system became mandatory, DHS began evaluating the costs associated with operating and maintaining the system in order to establish a fee. DHS has completed this evaluation and a detailed fee analysis explaining how the ESTA operational fee is calculated and the methodology used can be found in the public docket for this rule at www.regulations.gov.

A. Travel Promotion Act of 2009

On March 4, 2010, the United States Capitol Police Administrative Technical Corrections Act of 2009, Public Law 111-145 was enacted. The Travel Promotion Act of 2009 (TPA), which was contained in

section 9, mandates that the Secretary establish a fee for the use of the ESTA system and begin assessing and collecting that fee no later than 6 months after enactment of the TPA. *See* section 217(h)(3)(B) of the Immigration and Nationality Act, 8 U.S.C. 1187 (h)(3)(B). Accordingly, to comply with the TPA, the Secretary is required to assess and collect the fee by September 4, 2010.

The TPA expressly provides that the required initial ESTA fee shall consist of the sum of “\$10 per travel authorization” (travel promotion fee) plus “an amount that will at least ensure recovery of the full costs of providing and administering the System, as determined by the Secretary” (operational fee). The TPA provides that the \$10 per travel authorization is to be credited to the Travel Promotion Fund established by the TPA and is to be used by the Corporation for Travel Promotion, also established by the TPA, to promote international travel to the United States. The operational fee is to be transferred to the general fund of the Treasury and made available to pay the costs incurred to administer ESTA. Under the TPA, the travel promotion fee has a sunset provision and the Secretary is authorized to collect this fee only through September 30, 2015.² The operational fee, in contrast, does not include a sunset provision but will be reassessed on a regular basis to ensure it is set at a level to fully recover ESTA operating costs.

Based on the TPA, this rule establishes an initial ESTA fee that consists of the sum of “\$10 per travel authorization” (travel promotion fee) plus “an amount that will at least ensure recovery of the full costs of providing and administering the [ESTA] System, as determined by the Secretary” (operational fee) no later than 6 months after enactment of the TPA. *See* 8 U.S.C. 1187(h)(3)(B)(i).

B. Operational Fee Amount

DHS has determined that a \$4.00 fee is necessary to ensure recovery of the full costs of providing and administering the system. This fee takes into account the costs to develop, implement, maintain, and make any necessary updates to the ESTA system. A full explanation of the methodology used to determine the \$4.00 operational ESTA fee is contained in the ESTA Fee Analysis (*Explanation of the Electronic System for Travel Authorization (ESTA) Fee*, April 2010), which can be found in the public docket for this rulemaking at www.regulations.gov. A brief summary of the methodology is provided below.

² On July 2, 2010, the Homebuyer Assistance and Improvement Act of 2010, in part, amended the TPA by extending the sunset provision of the travel promotion fee and authorizing the Secretary to collect this fee through September 30, 2015. *See* Pub. L. 111-198.

The following methodology was employed to determine the \$4.00 ESTA fee for applications through FY 2015:

1. Determine the costs associated with ESTA—initial investment, direct, and indirect costs associated with ESTA development, operation, and maintenance. Costs are adjusted upward annually to account for inflation.
2. Estimate the total number of ESTA applicants—total VWP travelers adjusted downward to account for travelers who make multiple trips during the 2-year period each ESTA is valid. Travelers will remit the ESTA fee upon initial application; they need not pay the fee each time they visit the United States during the authorization period.
3. Determine the fee per applicant by dividing the total costs, plus an operating carryover amount, by the number of projected ESTA applicants. The carryover is included to assure there is sufficient funding in the event there is an unforeseen drop in ESTA applicants.

The estimated costs associated with ESTA from FY 2008 through FY 2015 are \$312 million. Costs in FY 2008 and FY 2009 totaled approximately \$39.5 million. From FY 2010 through FY 2015, costs include the administration, staffing, and operation of the system (plus overhead costs), as well as information technology for other CBP and non-CBP systems that permit information sharing and services that are necessary for ESTA to operate effectively. An additional carryover sum of \$12.5 million, equal to one fiscal quarter of operating costs, is added to the total FY 2008 through FY 2015 costs as a contingency in case travel volumes fall below expected levels.

Using traveler projection data from the Department of Commerce, Office of Travel and Tourism Industries, CBP estimated the future number of VWP travelers for FY 2011 through FY 2015. CBP then adjusted that estimate to account for the estimated number of “repeat travelers” during that period. These repeat travelers would, in most cases, be required to apply for a travel authorization only once over a 2-year period, not each time they traveled to the United States. Using data from CBP’s Advance Passenger Information System (APIS), CBP calculated an actual percentage of past repeat travelers, which was then applied as an estimated percentage of “repeat travelers” during the period from FY 2011 through FY 2015. With this adjustment for repeat travelers, the cumulative total of ESTA applicants FY 2011 through FY 2015 is an estimated 86 million travelers.

The \$4.00 fee was determined by dividing the total estimated costs (\$312 million in costs + \$12.5 million for a carryover reserve) by the

total ESTA applicants (86 million) through FY 2015, then rounding up to the nearest whole dollar amount. Exhibit 1 shows the calculation of the fee.

Exhibit 1. Calculation of ESTA Operational Fee

(A) Cumulative costs from FY 2008–2015	\$312,025,861
(B) Carryover reserve funding	12,470,060
(C) Total (A + B)	\$324,495,921
(D) Estimated number of ESTA applications from FY 2011–2015	86,180,659
(E) Calculated fee (C ÷ D)	\$3.77
Calculated fee, rounded up to the nearest whole dollar	\$4.00

Any changes to the \$4.00 ESTA operational fee will be accomplished through a future rulemaking consistent with the Administrative Procedure Act.

C. Fee Collection

During the ESTA application process, the ESTA user will be directed to provide credit card information to pay the non-refundable \$4.00 operational fee and authorize the \$10 travel promotion fee through the Federal Government's online payment system, Pay.gov. The \$10 travel promotion fee will be charged to the applicant's credit card only when the ESTA is granted. Pay.gov is a system by which parties can make secure electronic payments to many Federal Government agencies. The Pay.gov Web site is available 24 hours a day, 7 days a week (holidays included) for users to submit payments.

The operational fee discussed in this notice is for processing the application and vetting the individual applicant. The operational fee is nonrefundable if a traveler's application is denied. In the event that an ESTA application is denied, the traveler may apply for a visa through a U.S. embassy or consulate or may reapply through the ESTA Web site at a later date if circumstances change or an error was made during the ESTA application process. Each ESTA applicant will incur the \$4.00 operational fee when he or she submits an ESTA application. By contrast, an applicant will incur the \$10 travel promotion fee only if he or she receives travel authorization.

VWP travelers with a valid travel authorization will be able to update and/or correct certain information provided on the ESTA application (such as the destination address in the United States) without having to pay another operational or travel promotion fee. How-

ever, as provided in the ESTA IFR, certain events, such as the issuance of a new passport, will require the VWP traveler to apply for a new travel authorization through ESTA. In that case, the traveler would be required to pay the operational fee as part of the new application process. Travelers receiving a new authorization before September 30, 2015 would also be required to pay the \$10 travel promotion fee. Detailed instructions are available on the ESTA Web site regarding how to make ESTA updates and corrections and when a new travel authorization is required.

III. Statutory and Regulatory Requirements

A. Administrative Procedure Act

The APA generally requires agencies to publish a notice of proposed rulemaking in the **Federal Register** (5 U.S.C. 553(b)) and provide interested persons the opportunity to submit comments (5 U.S.C. 553(c)). However, pursuant to 5 U.S.C. 553(b)(B), a notice of proposed rulemaking is not required when the agency determines, for good cause, that notice and public participation is impracticable, unnecessary, or contrary to the public interest.

In this case, the TPA requires the Secretary of Homeland Security to begin assessing and collecting a fee equal to the sum of the travel promotion fee (\$10) and the operational fee (\$4.00) within 6 months of the TPA's enactment, which is September 4, 2010. *See* 8 U.S.C. 1187 (h)(3)(B)(i). The \$10 travel promotion fee is intended to fund the Corporation for Travel Promotion (Corporation) and, once collected, the \$10 travel promotion fees are to be made available by the Secretary of the Treasury to the Corporation for start-up expenses. Accordingly, the TPA requires DHS to be able to collect the ESTA fees to fund the Corporation. If DHS is unable to collect the ESTA fee, the Secretary of Treasury would be unable to appropriate funding to cover the Corporation's initial expenses and activities. Moreover, given the limited duration of the travel promotion fee, which expires on September 30, 2015, it seems likely that Congress intended that the ESTA fee would be collected as soon as possible, but no later than six months from enactment of the TPA, which is September 4, 2010.

Considering the TPA's time constraints, implementing the new ESTA fees through notice and comment rulemaking process would prevent the Corporation from promptly receiving the funds necessary to serve its function of promoting tourism to the United States. As such, the statutory timeline imposed by the TPA to collect the sum of the travel promotion fee and the operational fee by September 4, 2010, when coupled with the sunset provision for the travel promotion fee, makes it impracticable for DHS to engage in the notice and

comment rulemaking process. This IFR provides the mechanism through which DHS is able to assess and collect the ESTA fees in a manner consistent with the statutory provisions.

In sum, providing the public the opportunity to comment on these regulations prior to implementation would hamper the ability of DHS to collect the necessary fees as required under the TPA by September 4, 2010. Accordingly, DHS has determined that there is good cause to publish this rule without prior public notice and comment procedures. The Department, however, is interested in obtaining public comments on this interim final rule prior to the issuance of a final rule. Therefore, DHS is providing the public with the opportunity to comment after publication of this interim final rule. All comments received will become a matter of the public record.

B. Executive Order 12866

Executive Order 12866 (Regulatory Planning and Review; September 30, 1993) requires Federal agencies to conduct economic analyses of significant regulatory actions as a means to improve regulatory decision-making. Significant regulatory actions include those that may “(1) [h]ave an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities; (2) [c]reate a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) [m]aterially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) [r]aise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in this Executive Order.” This rule is a significant regulatory action because the annual effect on the economy is \$100 million or more in any one year. The annualized cost to applicants, primarily in the form of transfers from foreign citizens to the U.S. government, is estimated between \$152 million and \$258 million. As a result, this rule has been reviewed by the Office of Management and Budget (OMB) under Executive Order 12866. The following summary presents the costs to applicants and benefits of the rule.³

OMB Circular A-4 states the following with regard to the scope of Federal regulatory assessments: “Your analysis should focus on benefits and costs that accrue to citizens and residents of the United States. Where you choose to evaluate a regulation that is likely to

³ The complete “Regulatory Assessment” can be found in the docket for this rulemaking: <http://www.regulations.gov>.

have effects beyond the borders of the United States, these effects should be reported separately.”⁴ Additionally, Circular A-4 states: “You should not include transfers in the estimates of the benefits and costs or a regulation. Instead, address them in a separate discussion of the regulation’s distributional effects.”⁵ CBP notes that the costs estimated in this analysis are primarily transfers, in the form of fees, from foreign visitors to the U.S. government. As described in more detail below, CBP has also estimated a charge for currency conversion that ESTA users will incur when they make their fee payments in pay.gov. These currency conversion costs are not transfers, but they are incurred by foreign travelers and are paid to foreign financial institutions. Thus, the costs to applicants presented in this section are transfers or costs incurred by foreign entities.

To determine the total cost to applicants of ESTA, CBP used the population of travelers identified in the analysis for the ESTA IFR.⁶ For that analysis, CBP developed four methods to predict ESTA-affected travelers to the United States over the next 10 years using information available from the Department of Commerce, Office of Travel and Tourism Industries (OTTI), documenting historic travel levels and future projections. Method 1 employs the travel-projection percentages provided by OTTI and extrapolates them to the end of the period of analysis (OTTI projects travel only through 2013; CBP calculates a simple extrapolation to 2020). Method 2 (modified OTTI projections) presents a more pessimistic outlook on travel: all projected percentages from Method 1 are reduced by 2 percent throughout the period of analysis. Methods 3 and 4 incorporate periodic downturns (one late in the period, one early), which are prevalent, though not necessarily predictable, in international travel. CBP used Method 1 for the fee calculation because it takes into account the most recent OTTI estimate, accounts for the 2008 downturn in air travel, and it is a midrange estimate compared to the other methods. The other methods are presented here for further information.

Because a travel authorization obtained through ESTA generally is valid for 2 years, CBP adjusted the populations in accordance with the ESTA Fee Analysis to reflect only those travelers who will be required to apply for authorization in any given year. For the purposes of this analysis and to make the calculations more tractable,

⁴ See U.S. Office of Management and Budget. September 17, 2003. Circular A-4 “Regulatory Analysis.” Page 15.

⁵ See OMB Circular A-4, Page 38.

⁶ See “The Regulatory Assessment for the Interim Final Rule for Changes to the Visa Waiver Program to Implement the Electronic System for Travel Authorization.” U.S. Customs and Border Protection, June 2008. This document is available at www.regulations.gov under docket no. USCBP — 2008–0003, supporting and related materials.

CBP assumed the fee will be charged beginning in January 2011. Exhibit 2 compares the estimated number of travelers and the estimated number of ESTA applicants (“Applicants”) per year.

Exhibit 2. Total Travelers and ESTA Applicants (2011–2020, in millions)

	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020
Method 1										
Total Travelers	19.40	20.19	20.92	21.68	22.47	23.29	24.15	25.04	25.97	26.94
Applicants	15.97	16.62	17.23	17.85	18.50	19.18	19.88	20.62	21.38	22.18
Method 2										
Total Travelers	18.26	18.64	18.94	19.25	19.57	19.89	20.23	20.57	20.92	21.28
Applicants	15.03	15.35	15.59	15.85	16.11	16.38	16.65	16.93	17.22	17.52
Method 3										
Total Travelers	19.40	17.72	20.63	24.03	27.29	26.36	29.93	33.94	39.65	38.38
Applicants	15.97	14.59	16.99	19.79	22.48	21.71	24.67	27.98	32.69	31.65
Method 4										
Total Travelers	24.04	27.29	26.33	29.94	33.93	39.62	38.29	43.62	50.60	59.28
Applicants	19.81	22.48	21.69	24.68	27.96	32.67	31.57	35.97	41.75	48.92

Costs to Travelers

CBP determined that the ESTA operational fee will be \$4.00 per application. The methodology and calculations used to determine this fee can be found in the ESTA Fee Analysis (*Explanation of the Electronic System for Travel Authorization (ESTA) Fee*, April 2010). The TPA also requires a \$10 travel promotion fee to be charged through ESTA that will be credited to the Travel Promotion Fund established by the TPA and is to be used by the Corporation for Travel Promotion, also established by the TPA, to promote international travel to the United States. Per the legislation, this fee will be effective through September 30, 2015.

In addition to the ESTA operational and travel promotion fees, many credit card issuers charge a fee for foreign currency transactions, which is generally a percentage of the total transaction amount. Because the ESTA fees must be paid by credit card in U.S. dollars and not local currency, travelers from VWP countries will likely incur a transaction fee. For this analysis, CBP assumes all travelers will incur a transaction fee, whether they apply using the ESTA website or are registered by a carrier or travel agent who will then pass the fee on to the traveler. CBP calculated a weighted average of foreign currency transaction fees based on market share in

order to take into account not only the fee charged by each issuer, but the volume of purchases made using the cards of each issuer.

When the average foreign currency transaction fee of 2.7 percent is applied to the ESTA fees, the total charge will be \$14.37. Exhibit 3 displays the total fees, including those charged by the credit card companies, for visitors from each country in 2011, the first full year CBP estimates that the fee will be charged. These totals are based on the populations used by CBP to calculate the fee and only reflect unique travelers who would be required to apply in 2011.⁷

Exhibit 3. Total ESTA Fees for all Travelers in 2011 (undiscounted)

	Method 1	Method 2	Method 3	Method 4
Australia	\$ 9,435,603	\$ 8,892,390	\$ 9,435,603	\$ 10,091,673
Austria	2,224,768	2,094,348	2,224,768	2,800,120
Belgium	3,317,849	3,123,469	3,317,849	4,011,893
Czech Republic	782,466	737,637	782,466	773,296
Denmark	3,441,443	3,240,839	3,441,443	4,009,018
Estonia	132,189	123,881	132,189	199,972
Finland	1,527,821	1,438,263	1,527,821	1,839,227
France	17,975,811	16,915,414	17,975,811	21,624,714
Germany	22,406,375	21,077,979	22,406,375	28,683,080
Greece	842,330	793,361	842,330	941,230
Hungary	612,894	576,300	612,894	708,057
Iceland	474,855	444,672	474,855	755,962
Ireland	7,114,881	6,690,302	7,114,881	9,835,632
Italy	11,195,318	10,529,662	11,195,318	13,987,260
Japan	44,835,862	42,216,569	44,835,862	58,384,185
Latvia	130,794	122,602	130,794	184,118
Lithuania	167,330	157,298	167,330	177,061
Luxembourg	137,535	129,371	137,535	147,108
Malta	69,105	64,966	69,105	61,186
Netherlands	9,043,867	8,513,431	9,043,867	10,595,705
New Zealand	2,699,106	2,544,999	2,699,106	2,790,044
Norway	2,611,488	2,459,019	2,611,488	2,924,101
Portugal	1,511,077	1,422,122	1,511,077	1,818,487

⁷ Because Andorra, Brunei, Monaco, Lichtenstein, and San Marino have limited historic data, no predicted growth rates, or very few visitors (only about 1,000 each on an annual bases), they are excluded from the analysis. Travelers from these countries will still be subject to the ESTA application fee.

	Method 1	Method 2	Method 3	Method 4
Singapore	1,367,203	1,287,189	1,367,203	1,667,412
Slovakia	349,336	329,832	349,336	291,686
Slovenia	261,574	246,195	261,574	283,967
South Korea	8,728,408	8,224,994	8,728,408	11,154,010
Spain	8,829,048	8,303,456	8,829,048	11,715,276
Sweden	5,141,050	4,839,519	5,141,050	6,103,610
Switzerland	3,561,371	3,352,158	3,561,371	4,320,266
UK	58,650,315	55,176,504	58,650,315	71,806,658
Total	\$229,579,076	\$216,068,741	\$229,579,076	\$284,686,015

CBP next totaled these costs to applicants over the next 10 years at a 3 and 7 percent discount rate, per guidance provided in OMB Circular A-4. Total present value of the costs to applicants over the period of analysis could total \$1.2 billion to \$2.2 billion. Annualized costs to applicants are estimated at \$152 million to \$258 million. Method 1 was the method used to estimate the total costs and transfers due to the fee and is our primary estimate. Again, CBP notes that the bulk of these costs to applicants are transfers from foreign travelers to the U.S. government. See Exhibit 4.

Exhibit 4. Total present value and annualized costs to applicants of the ESTA fee, 2011–2020

	Total Present Value (\$millions)		Annualized Costs to Applicants (\$millions)	
	3%	7%	3%	7%
Method 1	\$1,510	\$1,295	\$172	\$179
Method 2	1,338	1,159	152	159
Method 3	1,672	1,398	190	195
Method 4	2,208	1,829	251	258

Travelers using ESTA will incur costs in addition to the fee, including the time burden of applying for authorization and the time burden and cost to obtain a visa if authorization is denied. These costs were already addressed in the Regulatory Assessment for the June 2008 ESTA IFR and should not be considered here in order to avoid double counting these costs.

Change in Travel Demand

While the ESTA operational and travel promotion fees are very low relative to the overall costs of international travel, it is still possible

that they could cause a reduction in the number of travelers coming to the United States from VWP countries. For this reason, CBP uses an “elasticity of demand” for long-haul international leisure and long-haul international business trips available from the published travel literature to analyze the impact of the change in cost (out-of-pocket expenses) for travelers using ESTA. Using an elasticity of demand allows CBP to get a sense of potential changes in the number of travelers in response to a change in the cost of a trip. Elasticities should not be viewed as the definitive level that demand could decrease due to an increase in travel price. In reality, a relatively minimal charge of \$14.37 is much more likely to reduce the amount of money a traveler spends on other portions of the trip than to cause a traveler to cancel the trip altogether.

Because the elasticity of demand differs for business and leisure travelers, we first identify the portion of travel to the United States from VWP countries that can be assigned to those purposes using air traveler survey data from OTTI. CBP then uses OTTI data to identify the average cost per VWP traveler for a flight to the United States. Airfare costs vary by purpose of travel, but range from an average \$1,406 per flight for a leisure traveler on vacation to \$2,687 per flight for a business traveler.⁸

To calculate the percent change in the average cost per flight, CBP divided the amount of the total charges by the original average cost per flight. CBP then multiplied the resulting percent increase by the elasticity of demand for air travel estimated in a study by the Canadian Department of Finance, -0.265 for long-haul international business travel and -1.040 for long-haul international leisure travel, to calculate the expected percent decrease in passenger volume.⁹ Exhibit 5 shows the total estimated number of passengers that could potentially be lost for each of the four population projections. While the impact varies for different categories of travelers, CBP estimates that up to 0.85 percent of travelers could be lost in a given year.

⁸ U.S. Office of Travel and Tourism Industries. 2008. “Overseas Travelers to the United States.” Table 26.

⁹ Gillen, David W., William G. Morrison and Christopher Stewart. “Air Travel Demand Elasticities: Concepts, Issues and Measurement.” Canada Department of Finance, October 6, 2008. Available at http://www.fin.gc.ca/consultrsp/Airtravel/airtravStdy_eng.asp.

Exhibit 5. Total Change in Visitors by Year, 2011–2020 (excluding intended benefits to tourism from spending the TPA revenue)

	Method 1	Method 2	Method 3	Method 4
2011	-135,337	-127,363	-135,337	-167,978
2012	-140,542	-129,715	-123,615	-190,212
2013	-145,501	-131,698	-143,820	-182,306
2014	-150,652	-133,728	-167,269	-208,382
2015	-156,005	-135,807	-189,536	-235,856
2016	-50,142	-42,808	-56,415	-85,365
2017	-51,936	-43,484	-64,418	-81,972
2018	-53,802	-44,177	-72,961	-93,111
2019	-55,742	-44,888	-85,111	-108,127
2020	-57,759	-45,615	-81,877	-126,441

It is important to recognize, however, the positive impacts that the Travel Promotion Fund could have on international travelers to the United States. CBP is not able to estimate or project these impacts with any degree of confidence because the program and fund are not yet in place and the details of the administration of the fund to promote travel is currently unknown. Consequently, this analysis is not making specific projections about the *overall* net increase or decrease in travel due to the Travel Promotion Act.

Because there are many unknown variables in this analysis, there are potential costs that CBP cannot quantify with any degree of confidence. Costs that are important to consider, but that CBP has not quantified include potential decreases in visitor spending, and possible reciprocity by VWP countries (where these countries could develop ESTA-like systems and charge U.S. VWP travelers for applications of admissibility).

Benefits of the Regulation

This rule allows CBP to comply with the TPA's express mandate that the Secretary establish a fee for the use of the ESTA system and also establish a \$10 travel promotion fee. The benefits of ESTA include enhanced security, cost savings associated with advanced determination of inadmissibility, and costs forgone by travelers, such as visa fees. These are discussed in the ESTA IFR Regulatory Assessment and are not considered here to avoid double-counting.

As noted above, the United States travel and tourism may benefit from increased international travelers based on promotion efforts made possible by the Travel Promotion Fund.

A-4 Accounting Statement

Note that the transfers listed in the A-4 Accounting Statement below are only for the ESTA fees (\$14.00), and do not include the currency conversion charge (\$0.37). This \$0.37 charge is paid by foreign entities to foreign entities and is not included in this accounting statement of impacts to the U.S. economy.

Classification of expenditures, 2011–2020 (\$2010)

	3% Discount Rate	7% Discount Rate
Costs		
Annualized monetized costs		
Annualized quantified, but unmonetized costs		
Qualitative (un-quantified) costs		
Transfers		
Benefits		
Annualized monetized benefits		
Annualized quantified, but unmonetized benefits		
Qualitative (un-quantified) benefits	Allows compliance with the TPA's express mandate to establish a fee for the use of the ESTA system and also establish a \$10 travel promotion fee	Allows compliance with the TPA's express mandate to establish a fee for the use of the ESTA system and also establish a \$10 travel promotion fee
Transfers	\$168 million from foreign visitors to the U.S. government	\$175 million from foreign visitors to the U.S. government

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 603(a)) as amended by the Small Business Regulatory Enforcement and Fairness Act of 1996

(SBREFA), requires an agency to prepare and make available to the public a regulatory flexibility analysis that describes the effect of a proposed rule on small entities (*i.e.*, small businesses, small organizations, and small governmental jurisdictions) when the agency is required to publish a general notice of proposed rulemaking for any proposed rule.

Since a general notice of proposed rulemaking is not necessary, a regulatory flexibility analysis is not required. Nonetheless, DHS has considered the impact of this rule on small entities. This rule directly regulates individuals, and individuals are not considered small entities. Some small entities may be indirectly impacted to the extent that business travelers work for small businesses. However, the combined charge (the ESTA fees and the credit card transaction fee) of \$14.37 is only 0.3 percent of the average cost of a business trip as estimated by OTTI (\$5,231).¹⁰ Therefore, CBP certifies that this rule will not have a significant economic impact on a substantial number of small entities.

D. Unfunded Mandates Reform Act of 1995

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

E. Executive Order 13132

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

F. Executive Order 12988 Civil Justice Reform

This rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

¹⁰ U.S. Office of Travel and Tourism Industries. 2008. "Overseas Travelers to the United States." Table 26.

G. Paperwork Reduction Act

An agency may not conduct, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number assigned by OMB. These regulations are being issued without prior public notice and comment procedures pursuant to the APA, as described above. For this reason, CBP obtained temporary, emergency approval from OMB, in accordance with the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3507) for the portion of OMB clearance 1651-0111 that was affected by this rule. CBP will solicit public comments when CBP submits a request for permanent OMB approval. The estimated burden hours related to ESTA for OMB Control Number 1651-0111 are as follows:

Estimated Number of Respondents: 18,900,000.

Estimated Time per Response: 15 minutes (0.25 hours).

Estimated Total Annual Burden Hours: 4,725,000 hours.

The burden hours in this collection have been updated to reflect new traveler levels predicted in 2011. Additionally, a portion of these travelers is new ESTA applicants, while a portion is repeat travelers. Only the new applicants or applicants whose authorization has expired will be required to pay the new fees. As noted above, approximately 16 million applicants will need to pay the fee annually (Method 1), for a total cost of \$230 million. This is based on the average estimated number of respondents paying the combined charge (the ESTA fees and the credit card transaction fee) annually (16,000,000) x \$14.37 = \$229,920,000.

H. Privacy Interests

DHS published an ESTA Privacy Impact Assessment (PIA) for the Interim Final Rule announcing ESTA on June 9, 2008. Additionally, at that time, DHS prepared a separate System of Record Notice (SORN) which was published in conjunction with the IFR on June 9, 2008. DHS has updated the ESTA PIA and SORN and both are available for viewing on CBP's Web site at <http://www.foia.cbp.gov/>.

LIST OF SUBJECTS IN 8 CFR PART 217

Air carriers, Aliens, Maritime carriers, Passports and visas.

AMENDMENTS TO REGULATIONS

For the reasons stated in the preamble, DHS is amending part 217 of title 8 of the Code of Federal Regulations (8 CFR part 217) as follows:

PART 217-VISA WAIVER PROGRAM

1. The authority citation for Part 217 continues to read as follows:

AUTHORITY: 8 U.S.C. 1103, 1187; 8 CFR part 2.

2. Section 217.5 is amended by revising paragraph (a) and adding a new paragraph (h) to read as follows:

§217.5 Electronic System for Travel Authorization.

(a) *Travel authorization required.* Each nonimmigrant alien intending to travel by air or sea to the United States under the Visa Waiver Program (VWP) must, within the time specified in paragraph (b) of this section, receive a travel authorization, which is a positive determination of eligibility to travel to the United States under the VWP via the Electronic System for Travel Authorization (ESTA), from CBP. In order to receive a travel authorization, each nonimmigrant alien intending to travel to the United States by air or sea under the VWP must provide the data elements set forth in paragraph (c) of this section to CBP, in English, in the manner specified herein, and must pay a fee as described in paragraph (h) of this section.

* * * * *

(h) *Fee.* (1) Until September 30, 2015, the fee for an approved ESTA is \$14.00, which is the sum of two amounts: a \$10 travel promotion fee to fund the Corporation for Travel Promotion and a \$4.00 operational fee to at least ensure recovery of the full costs of providing and administering the system. In the event the ESTA application is denied, the fee is \$4.00 to cover the operational costs.

(2) Beginning October 1, 2015, the fee for using ESTA is an operational fee of \$4.00 to at least ensure recovery of the full costs of providing and administering the system. ESTA applicants must pay the ESTA fee through the Treasury Department's Pay.gov financial management system.

JANET NAPOLITANO,
Secretary.

[Published in the Federal Register, August 9, 2010 (75 FR 47701)]

NOTICE OF CANCELLATION OF CUSTOMS BROKER LICENSES

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

ACTION: General Notice

SUMMARY: Pursuant to section 641 of the Tariff Act of 1930, as amended, (19 USC 1641) and the U.S. Customs and Border Protection regulations (19 CFR 111.51), the following Customs broker license and all associated permits are cancelled without prejudice.

<i>Name</i>	<i>License #</i>	<i>Issuing Port</i>
ABX Logistics USA, Inc.	17468	Dallas/Ft. Worth

Dated: July 20, 2010

DANIEL BALDWIN
Assistant Commissioner
Office of International Trade

[Published in the Federal Register, August 9, 2010 (75 FR 47825)]

NOTICE OF CANCELLATION OF CUSTOMS BROKER LICENSE

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

ACTION: General Notice

SUMMARY: Pursuant to section 641 of the Tariff Act of 1930, as amended, (19 USC 1641) and the U.S. Customs and Border Protection regulations (19 CFR 111.51(b)), the following Customs broker licenses and all associated permits are cancelled with prejudice.

<i>Name</i>	<i>License #</i>	<i>Issuing Port</i>
Hugo Jimenez	15547	Miami
Allied Customs Broker & Forwarders, Inc.	20090	Miami

Dated: July 27, 2010

DANIEL BALDWIN
Assistant Commissioner
Office of International Trade

[Published in the Federal Register, August 9, 2010 (75 FR 47825)]

**NOTICE OF ISSUANCE OF FINAL DETERMINATION
CONCERNING A CERTAIN UNIFIED COMMUNICATIONS
SOLUTION**

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 a certain unified communications solution. Based upon the facts presented, CBP has concluded in the final determination that the United States is the country of origin of the unified communications solution for purposes of U.S. government procurement.

DATES: The final determination was issued on August 2, 2010. A copy of the final determination is attached. Any party-at-interest, as defined in 19 C.F.R. § 177.22(d), may seek judicial review of this final determination within 30 days from date of publication in the *Federal Register*.

FOR FURTHER INFORMATION CONTACT: Alison Umberger, Valuation and Special Programs Branch: (202) 325–0267.

SUPPLEMENTARY INFORMATION: Notice is hereby given that on August 2, 2010, pursuant to subpart B of part 177, Customs Regulations (19 C.F.R. part 177, subpart B), CBP issued a final determination concerning the country of origin of the unified communications solution which may be offered to the U.S. Government under an undesignated government procurement contract. This final determination, in HQ H090115, was issued at the request of Avaya Inc. under procedures set forth at 19 C.F.R. 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, the unified communications solution, assembled, installed and programmed in the United States using subassemblies made in China and Israel, and software developed in the United States, is substantially transformed in the United States, such that the United States is the country of origin of the finished article for purposes of U.S. government procurement.

Section 177.29, Customs Regulations (19 C.F.R. § 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 C.F.R. § 177.30), provides that any party-at-interest, as defined in 19 C.F.R. § 177.22(d), may seek judicial review of a final determination within 30 days of publication of such determination in the *Federal Register*.

Dated: August 2, 2010

SANDRA L. BELL
Executive Director
Regulations and Rulings Office of
International Trade

Attachment

HQ H090115

August 2, 2010

OT:RR:CTF:VS H090115 ARU

CATEGORY: Marking

MR. STUART P. SEIDEL
BAKER & MCKENZIE LLP
815 CONNECTICUT AVENUE, NW
WASHINGTON, DC 20006-4078, USA

RE: U.S. Government Procurement; Title III, Trade Agreements Act of 1979 (19 U.S.C. § 2511); Subpart B, Part 177, CBP Regulations; Avaya Unified Communications Solution (“*Communication Manager*”)

DEAR MR. SEIDEL:

This is in response to your letter dated December 29, 2009, requesting a final determination on behalf of Avaya Inc. (“Avaya”), pursuant to subpart B of part 177, Customs and Border Protection (“CBP”) Regulations (19 C.F.R. § 177.21 et seq.). Pursuant to our request, you provided additional information during a meeting on March 5, 2010.

Under the pertinent regulations, which implement Title III of the Trade Agreements Act of 1979, as amended (19 U.S.C. § 2511 et seq.), 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.

This final determination concerns the country of origin of an Avaya Unified Communications Solution known as “Communication Manager.” We note that Avaya is a party-at-interest within the meaning of 19 C.F.R. § 177.22(d)(1) and is entitled to request this final determination. In addition, we have reviewed and granted the importer’s request for confidentiality pursuant to section 177.2(b)(7) of the Customs Regulations chapter 19, with respect to certain information submitted.

FACTS:

The end product at issue is a Unified Communications Solution which is made up of numerous electronic components that are assembled and integrated at an end user’s premises in the United States using software known as “Communication Manager.” Communication Manager is the IP telephony software foundation on which Avaya delivers unified communications to large and small enterprises. It can control and expand a system from fewer than 100 users to as many as 36,000 users on a single system to more than one million users on a single network. You state that the programming, assembly and installation of a system will typically take approximately one month to complete.

It is stated that Communication Manager adds functionality to certain individual components and changes functionality of other components. Although each installation at an end user’s premises is different, due to the end user’s needs, each system will consist of at least the following components: server, media gateways, circuit packs, and internet protocol (“IP”) telephone sets. Avaya’s Communication Manager software is developed and tested exclusively by Avaya in Denver, Colorado. Communication Manager is designed to run on a variety of Linux-based media servers. Linux is an open

source operating system. Communication Manager provides centralized call control for a resilient, distributed network of media gateways and a wide range of analog, digital, and IP-based communication devices. It also has several advanced built-in applications, including mobility applications, call center features, advanced conference calling, and enhanced emergency 9–1-1 capabilities. Communication Manager is the foundation for building complete enterprise communication networks by supporting SIP, H.323, and other industry-standard communications protocols over a variety of different networks. This protocol support provides centralized voice mail, attendant operations, and call centers across multiple locations.

A. Hardware

1. **Media Servers:** Each Communication Solution consists of one or more media servers. Some servers are in the form of blades. These are cards (similar to printed circuit cards with components) that are fit or assembled into Media Gateways, while others are standalone units.
2. **Media Gateways:** You describe three models of Media Gateways.
 - i. **G250 Media Gateway:** a powerful branch communication solution that packs an IP telephony gateway, an advanced IP WAN router, a VPN gateway and a high-performance LAN switch into a compact, 2U high 19" rack unit.
 - ii. **G350 Media Gateway:** a powerful converged networking solution that packs an IP telephony gateway, an advanced IP WAN router, a VPN Gateway, and a high-performance LAN switch into a compact (3U) modular chassis.
 - iii. **G450 Media Gateway:** consists of a 3U high, 19" rack mountable chassis with field-removable Supervisor Main Board Module, Power Supplies, Fan Tray, DSP resources and memory.
3. **Circuit Packs:** A circuit pack, also known as a circuit card, circuit board, or printed circuit, is an electronic circuit consisting of one or more electronic components arranged on a substrate board or card with one of more conductive layers laminated on one or more insulating layers. The electronic components on the circuit pack can be inserted into holes or surface mounted on conductive pads using various alloys of metal called solder. Such circuit packs usually leave one or more connectors to integrate them into the system of which they are a part. Avaya's circuit packs are not stand-alone devices. They are inserted as components to Avaya's Media Gateway units. Avaya offers two types of circuit packs — a "TN" card and an "MM" card. TN circuit packs are based on older technology for use in legacy telephony systems, also called Telephone Interface Cards. MM circuit packs are based on newer technology, also called Media Modules.
4. **Telephone Sets:** Internet Protocol ("IP") telephones that before integration through Communication Manager have no functionality.

B. Software

You claim that the integration of the individual components is achieved through the use of software called Communication Manager, which adds functionality to certain individual components and changes functionality of the other components. Avaya's Communication Manager software is developed and tested exclusively by Avaya in Denver, Colorado. Avaya began development of Communication Manager in 2002 and since that time has spent significant resources in the development and maintenance of Communication Manager. All the engineering, development, and design were developed in the United States; however, a small percentage of the ongoing software development takes place abroad.

C. Assembly

1. Operations in China:

There are 6 main subassemblies that compose the Communication Manager solution. Subassemblies made in China include: Gateways, Servers, Media Modules, Telsets, and Circuit Packs. The hardware listed above is manufactured in China. The raw components for the hardware are obtained from various countries throughout Asia and Europe. Certain gateways are also manufactured in Israel and other countries, but will eventually be manufactured in China.

2. Operations in the United States:

All the engineering, development, design were developed in the United States. Communication Manager will be installed onto a solid state drive or hard drive residing on the server. It will be custom configured at the end user's facility or another location in the United States to integrate the various components. Although each installation at an end user's premises is different, due to the end user's needs, each system will consist of at least the following components: server, media gateways, circuit packs, and IP telephone sets. Once actual installation begins, approximately five (5) days is needed to customize the Communication Manager software for the end user. A total of 11 days is required to assemble the necessary equipment, install the hardware, and integrate the hardware and software. The complex installation and integration requires both adjustments to hardware and customized software programming. You claim that due to the number of components assembled, number of different operations, time, skill level required, attention to detail, quality control, the value added to the Communication Manager, and the overall employment complexity in development of the software, the hardware is substantially transformed when the software is added and the system is integrated.

ISSUE:

What is the country of origin of Communication Manager Units 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 of the Trade Agreements Act of 1979, as amended ("TAA"; 19 U.S.C. § 2511 *et seq.*), CBP issues country of origin advisory rulings and final determinations on whether an article is or would be a product of a designated country or instrumentality for the purposes of granting waivers of certain "Buy American" restrictions in U.S. law or practice for products offered for sale to the U.S. Government.

Under the rule of origin set forth at 19 U.S.C. § 2518(4)(B):

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).

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 Acquisition 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.

In order to determine whether a substantial transformation occurs when components of various origins are assembled to form completed articles, CBP considers the totality of the circumstances and makes such decisions on a case-by-case basis. The country of origin of the article's components, the extent of the processing that occurs within a given country, and whether such processing renders a product with a new name, character, and use are primary considerations in such cases. Additionally, facts such as resources expended on product design and development, extent and nature of post-assembly inspection procedures, and worker skill required during the actual manufacturing process will be considered when analyzing whether a substantial transformation has occurred; however, no one such factor is determinative.

With respect to the product under consideration in the instant case, we note that CBP has not previously considered whether the components at issue are substantially transformed when brought together in the manner set forth above. However, CBP has considered whether components of various origins have been substantially transformed during the assembly of related products. Though such rulings may not be directly on point with the facts under consideration in the instant case, the guidance supplied by such cases may nonetheless be applied to resolve the issues presently before us. The determination will be in this instance "a mixed question of technology and customs law, mostly the latter." *Texas Instruments, Inc. v. United States*, 681 F.2d 778, 783 (C.C.P.A. 1982).

You claim that, "[i]n ... rulings involving hardware which lacked the functional 'intelligence' characteristics present in the completed product, and where the firmware/software provided the merchandise's functionality, CBP determined that the products were substantially transformed into products of the country where the software which provided its functionality was installed and final testing occurred." We disagree with the scope of this statement. While the location of the software installation and testing is one factor to be considered, it is not the sole determinant. The country in which the software development takes place is also relevant.

In *Data General v. United States*, 4 CIT 182 (1982), the court determined that for purposes of determining eligibility under item 807.00, Tariff Schedules of the United States, the programming of a foreign PROM (Programmable Read-Only Memory chip) substantially transformed the PROM into a U.S. article. In programming the imported PROMs, the U.S. engineers systematically caused various distinct electronic interconnections to be formed within each integrated circuit. The programming bestowed upon

each circuit its electronic function. That is, its “memory” which could be retrieved. A distinct physical change was effected in the PROM by the opening or closing of the fuses, depending on the method of programming. This physical alteration, not visible to the naked eye, could be discerned by electronic testing of the PROM. The court noted that the programs were designed by a project engineer with many years of experience in “designing and building hardware.” While replicating the program pattern from a “master” PROM may be a quick one-step process, the development of the pattern and the production of the “master” PROM required much time and expertise. The court noted that it was undisputed that programming alters the character of a PROM. The essence of the article, its interconnections or stored memory, was established by programming. The court concluded that altering the non-functioning circuitry comprising a PROM through technological expertise in order to produce a functioning read only memory device possessing a desired distinctive circuit pattern was no less a “substantial transformation” than the manual interconnection of transistors, resistors and diodes upon a circuit board creating a similar pattern.

In C.S.D. 84–86, CBP stated:

We are of the opinion that the rationale of the court in the *Data General* case may be applied in the present case to support the principle that the essence of an integrated circuit memory storage device is established by programming [W]e are of the opinion that the programming (or reprogramming) of an EPROM results in a new and different article of commerce which would be considered to be a product of the country where the programming or reprogramming takes place.

Accordingly, the programming of a device that changes or defines its use generally constitutes substantial transformation. *See also* HQ 733085, dated July 13, 1990; and HQ 558868, dated February 23, 1995 (programming of SecureID Card substantially transforms the card because it gives the card its character and use as part of a security system and the programming is a permanent change that cannot be undone); HQ 735027, dated September 7, 1993 (programming blank media (EEPROM) with instructions on it that allows it to perform certain functions of preventing piracy of software constituted substantial transformation); *but see* HQ 732870, dated March 19, 1990 (formatting a blank diskette did not constitute substantial transformation because it did not add value, did not involve complex or highly technical operations and did not create a new or different product); HQ 734518, dated June 28, 1993 (concluding that motherboards were not substantially transformed by the implanting of the central processing unit on the board because, whereas in *Data General* use was being assigned to the PROM, the use of the motherboard had already been determined when the importer imported it).

In HQ 563012, dated May 4, 2004, CBP considered whether components of various origins were substantially transformed when assembled to form a fabric switch which involved a combination of computer hardware and software. Most of the assembly of computer hardware was performed in China. Then, in either Hong Kong or the U.S., the hardware was completed and the U.S.-origin software was downloaded onto the hardware. CBP noted that the U.S.-developed software provided the finished product with its “distinctive

functional characteristics.” In making the determination that the product was substantially transformed in the United States, where the fabric switch was assembled to completion, CBP considered both the assembly process that occurred in the United States and the configuration operations that required U.S.-origin software. In the scenario where the fabric switch was assembled to completion in Hong Kong, CBP determined the origin for marking purposes was Hong Kong.

In HQ 559255, dated August 21, 1995, a device referred to as a “CardDock” was under consideration for country of origin marking purposes. The CardDock was a device which was installed in IBM PC compatible computers. After installation, the units were able to accept PCMCIA cards for the purpose of interfacing such PCMCIA cards with the computer in which the CardDock unit was installed. The CardDock units were partially assembled abroad but completed in the United States. The overseas processing included manufacturing the product’s injection molded plastic frame and installing integrated circuits onto a circuit board along with various diodes, resistors and capacitors. After such operations, these items were shipped to the United States for further processing that included mating a U.S.-origin circuit board to the foreign-origin frame and board. The assembled units were thereafter subjected to various testing procedures. In consideration of the foregoing, CBP held that the foreign-origin components, *i.e.*, the ISA boards, frame assemblies and connector cables, were substantially transformed when assembled to completion in the United States. In finding that the name, character, and use of the foreign-origin components had changed during processing in the United States, CBP noted that the components had lost their separate identity during assembly and had become an integral part of a new and distinct item which was visibly different from any of the individual foreign-origin components.

In HQ 735027, dated September 7, 1993, a device that software companies used to protect their software from piracy was under consideration for country of origin marking purposes. The device, referred to as the “MemoPlug,” was assembled in Israel from parts that were obtained from Taiwan (such as various connectors and an Electronically Erasable Programmable Read Only Memory, or “EEPROM”) and Israel (such as an internal circuit board). After assembly, these components were shipped to a processing facility in the United States where the EEPROM was programmed with special software. Such processing in the United States accounted for approximately 50 percent of the final selling price of the MemoPlugs. In finding that the foreign-origin components were substantially transformed in the United States, CBP noted that the U.S. processing transformed a blank media, the EEPROM, into a device that performed functions necessary to the prevention of software piracy.

We make our determinations based on the totality of the circumstances. Here, we take particular note of the fact that the installation of the Communication Manager software adds functionality to certain individual components and changes functionality of other components. This software is developed and tested exclusively by Avaya in Denver, Colorado. Avaya began development of Communication Manager in 2002 and since that time has spent significant resources in the development and maintenance of the software. In addition, assembly and installation of the hardware components that make up the Avaya Communication Solution will typically take approxi-

mately one month to complete and are performed in the United States. While the subassemblies are manufactured in China and Israel, all of the initial engineering, development, and design were developed in the United States.

Based upon the above precedents and the totality of the circumstances, we find that there is a substantial transformation of the component parts in the United States, the location where the final assembly and installation of the hardware as well as the application of the Communication Manager software occur. It follows that we find the country of origin for government procurement purposes is the United States.

HOLDING:

Based on the facts provided, the assembly, installation, and programming operations performed in the United States impart the essential character to Communication Manager. As such, Communication Manager will be considered a product 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. 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.

Sincerely,

SANDRA L. BELL,
Executive Director
Regulations and Rulings Office of
International Trade

[Published in the Federal Register, August 6, 2010 (75 FR 47609)]

**COPYRIGHT, TRADEMARK, AND TRADE NAME
RECORDATIONS**

(No. 7 2010)

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

SUMMARY: Presented herein are the copyrights, trademarks, and trade names recorded with U.S. Customs and Border Protection during the month of July 2010. The last notice was published in the CUSTOMS BULLETIN on July 25, 2010.

Corrections or updates may be sent to: Department of Homeland Security, U.S. Customs and Border Protection, Office of Regulations and Rulings, IPR Branch, 1300 Pennsylvania Avenue, N.W., Mail Stop 1179, Washington, D.C. 20229-1179

FOR FURTHER INFORMATION CONTACT: Delois Johnson,
Paralegal, Intellectual Property Rights Branch, (202) 325-0088.

Dated: August 9, 2010

CHARLES R. STEUART
Chief,
Intellectual Property Rights & Restricted
Merchandise Branch

CBP IPR RECORDATION — JULY 2010

Recordation No.	Effective Date	Expiration Date	Name of Cop/Tmk/Tnm	Owner Name	GM Restricted
TMK 08-00374	7/22/2010	7/14/2020	VIRGINIA SLIMS	PHILIP MORRIS USA INC.	Yes
TMK 98-00054	7/22/2010	1/10/2018	GIORGIO ARMANI	GIORGIO ARMANI S.P.A.	No
TMK 05-01018	7/22/2010	9/9/2020	CROSBY	THE CROSBY GROUP INC.	No
TMK 01-00357	7/22/2010	4/24/2020	TIMBERLAND	THE TIMBERLAND COMPANY	No
TMK 02-00421	7/22/2010	4/18/2020	NARCISO RODRIGUEZ	HAVANA IP HOLDINGS LLC	No
TMK 02-00786	7/22/2010	4/14/2012	GIO DE GIORGIO ARMANI	GIORGIO ARMANI S.P.A.,	No
TMK 03-00439	7/22/2010	3/9/2013	AX ARMANI EXCHANGE	GIORGIO ARMANI S.P.A.	No
TMK 05-00436	7/22/2010	12/30/2020	DIAMOND DESIGN	COLUMBIA SPORTSWEAR NORTH AMERICA, INC.	No
TMK 88-00150	7/22/2010	12/5/2015	CHICLETS	CADBURY ADAMS USA LLC.	No
TMK 06-00936	7/22/2010	9/11/2020	O'DOUL'S	ANHEUSER-BUSCH, INCORPORATED	No
TMK 08-00117	7/22/2010	5/8/2020	Z	NISSAN JIDOSHA KABUSHIKI KAISHA	No
TMK 10-00673	7/8/2010	6/2/2019	GG GOVALI	GEORGE VERANO USA LLC.	No
TMK 10-00716	7/22/2010	7/13/2020	DESIGN	FITNESS BRANDS, INC.	No
TMK 10-00672	7/2/2010	6/8/2020	DESIGN	FORTUNE PRODUCTS, INC.	No
TMK 10-00664	7/2/2010	6/22/2020	CORAL BAY	BDSRCO, INC.	No
TMK 10-00671	7/2/2010	5/2/2016	UNLTD AND DESIGN	IP HOLDINGS UNLTD, LLC	No
TMK 10-00669	7/2/2010	7/26/2015	ZY	IP HOLDINGS UNLTD, LLC	No
TMK 10-00717	7/22/2010	6/12/2017	VAC-U-SLOT	CWD, LLC	No

CBP IPR RECORDATION — JULY 2010

Recordation No.	Effective Date	Expiration Date	Name of Cop/Tmk/Tnm	Owner Name	GM Restricted
TMK 10-00665	7/2/2010	10/26/2014	ECOGRID	HANOVER ARCHITECTURAL PRODUCTS, INC.	No
TMK 10-00698	7/22/2010	8/4/2019	DESIGN (PERFUME BOTTLE)	BEAUTÉ PRESTIGE INTERNATIONAL, S.A.	No
TMK 10-00666	7/2/2010	4/1/2018	ZEBRA	HAMSONS INC.	No
TMK 10-00667	7/2/2010	1/29/2018	ZEBRA BRAND & DESIGN	HAMSONS INC.	No
TMK 10-00699	7/22/2010	12/26/2019	GET OUT OF THE "STONE AGE"	FORTUNE PRODUCTS, INC.	No
TMK 10-00670	7/2/2010	2/9/2020	FIRADO	VAHAGN GHAZARIAN	No
TMK 10-00706	7/22/2010	1/27/2019	U	GURU DENIM, INC	No
TMK 10-00697	7/22/2010	2/9/2020	PHILLIES	THE PHILLIES	No
TMK 10-00700	7/22/2010	8/7/2017	SUKI	SUKI, INC.	No
TMK 10-00705	7/22/2010	12/18/2017	MIYAKO BRAND AND DESIGN	MUTUAL TRADING CO., INC.	No
TMK 10-00707	7/22/2010	1/20/2019	U	GURU DENIM, INC.	No
TMK 10-00701	7/22/2010	8/26/2018	HOKOEX	HOKOCHEMIE GMBH	No
TMK 10-00712	7/22/2010	10/7/2018	BRIXTON	BRIXTON, LLC DBA BRIXTON LTD	No
TMK 10-00703	7/22/2010	9/1/2019	DESIGN (PERFUME BOTTLE)	BEAUTÉ PRESTIGE INTERNATIONAL, S.A.	No
TMK 10-00713	7/22/2010	7/24/2017	V LEATHER	LEATHERNECK JIM'S	No
TMK 10-00668	7/2/2010	3/1/2015	ZOO YORK	IP HOLDINGS UNLTD, LLC	No
TMK 10-00711	7/22/2010	6/29/2020	GARRETT	GARRETT ELECTRONICS, INC.	No

CBP IPR RECORDATION — JULY 2010

Recordation No.	Effective Date	Expiration Date	Name of Cop/Tmk/Tnm	Owner Name	GM Restricted
TMK 01-00066	7/22/2010	6/27/2020	TETRIS & DESIGN	TETRIS HOLDING, LLC.	No
TMK 10-00710	7/22/2010	6/17/2013	TEACH-A-BODIES	CYNTHIA HARNEST	No
TMK 10-00715	7/22/2010	3/18/2018	BAIKAL FILMS	IVB, INC.	No
TMK 10-00704	7/22/2010	3/6/2014	SEAGATE	SEAGATE TECHNOLOGY	No
TMK 10-00709	7/22/2010	5/20/2018	KOBE BEARING COMPANY	DOMINION BEARING COMPANY	No
TMK 10-00708	7/22/2010	7/15/2013	LIQUID WALLPAPER	SPATOLA, CARMINE	No
TMK 10-00702	7/22/2010	4/6/2020	100% SEXY	JHONY USA INC.	No
TMK 10-00678	7/22/2010	5/4/2020	MILLER RANCH	MILLER INTERNATIONAL, INC.	No
TMK 10-00688	7/22/2010	10/12/2017	AARON'S BEST	SHF INDUSTRIES LLC.	No
TMK 10-00696	7/22/2010	7/6/2020	BRIGHTEN THE SEASON	BDSRCO, INC.	No
TMK 10-00695	7/22/2010	6/15/2020	SPEED MARKETING	BELL LITHO, INC.	No
TMK 10-00687	7/22/2010	11/24/2019	MXL	MAXLINEAR, INC.	No
TMK 10-00679	7/22/2010	7/4/2019	GIORGIO ARMANI	GIORGIO ARMANI S.P.A., MILAN, SWISS BRANCH MENDRISIO	No
TMK 10-00691	7/22/2010	7/6/2020	HOVERCAM AND DESIGN	PATHWAY INNOVATIONS AND TECHNOLOGIES INC.	No
TMK 10-00683	7/22/2010	11/30/2019	EMPORIO ARMANI	GIORGIO ARMANI S.P.A., MILAN, SWISS BRANCH MENDRISIO	No
TMK 10-00686	7/22/2010	6/29/2020	PEDI PAWS AND DESIGN	TELEBRANDS CORP.	No
TMK 10-00693	7/22/2010	10/8/2016	HOLO SIGHT	L-3 COMMUNICATIONS EOTECH, INC.	No

CBP IPR RECORDATION — JULY 2010

Recordation No.	Effective Date	Expiration Date	Name of Cop/Tmk/Tnm	Owner Name	GM Restricted
TMK 10-00694	7/22/2010	8/31/2014	HWS	L-3 COMMUNICATIONS EOTECH, INC.	No
TMK 10-00692	7/22/2010	3/16/2020	FLIP AN ZIP	CTF ENTERPRISES INC.	No
TMK 10-00689	7/22/2010	3/30/2014	ORIGINAL SNAPS BRAND CLASSIC CHEWY CANDY	AMERICAN LICORICE CO.	No
TMK 10-00682	7/22/2010	9/10/2020	LYSOL	RECKITT BENCKISER INC.	No
TMK 10-00690	7/22/2010	5/11/2020	SILLYBANDZ	BCP IMPORTS, LLC	No
TMK 10-00680	7/22/2010	6/15/2020	GRAPEVINES	AMERICAN LICORICE CO.	No
TMK 10-00681	7/22/2010	2/28/2019	MAURO PISANI	OLEM SHOE CORP.	No
TMK 10-00684	7/22/2010	6/12/2016	LYSOL	RECKITT BENCKISER INC.	No
TMK 10-00685	7/22/2010	12/18/2011	DESIGN	SAMPO INC.	No
TMK 01-00432	7/22/2010	10/22/2016	ARMANI	GIORGIO ARMANI S.P.A.	No
TMK 10-00674	7/22/2010	5/10/2013	SUPER ROPES	AMERICAN LICORICE CO.	No
TMK 10-00675	7/22/2010	6/29/2020	W DESIGN	SUN WANG GROUP, INC.	No
TMK 10-00677	7/22/2010	12/23/2013	PASSION GROWERS	PASSION GROWERS LLC	No
COP 10-00144	7/22/2010	7/22/2030	SONIC EAGLE DESIGN.	UNITED STATES POSTAL SERVICE	No
TMK 10-00676	7/22/2010	6/15/2020	JUPITER JACK	TELEBRANDS CORP.	No
TMK 10-00714	7/22/2010	5/18/2013	MR. HORSEPOWER & DESIGN	CLAY SMITH ENGINEERING, INC.	No
TMK 02-00420	7/22/2010	4/4/2020	NARCISO RODRIGUEZ	HAVANA IP HOLDINGS LLC	No

Total Records: 69

Date as of: 8/2/2010

AGENCY INFORMATION COLLECTION ACTIVITIES:**Voluntary Customer Survey**

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

ACTION: 30-Day notice and request for comments; Proposal to establish a new collection of information.

SUMMARY: U.S. Customs and Border Protection (CBP) of the Department of Homeland Security will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act: Voluntary Customer Survey. This is a new collection of information that CBP is proposing. This document is published to obtain comments from the public and affected agencies. This proposed information collection was previously published in the **Federal Register** (75 FR 27563) on May 17, 2010, allowing for a 60-day comment period. This notice allows for an additional 30 days for public comments. This process is conducted in accordance with 5 CFR 1320.10.

DATES: Written comments should be received on or before September 7, 2010.

ADDRESSES: Interested persons are invited to submit written comments on this proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to the OMB Desk Officer for Customs and Border Protection, Department of Homeland Security, and sent via electronic mail to oir_submission@omb.eop.gov or faxed to (202) 395-5806.

SUPPLEMENTARY INFORMATION: U.S. Customs and Border Protection (CBP) encourages the general public and affected Federal agencies to submit written comments and suggestions on proposed and/or continuing information collection requests pursuant to the Paperwork Reduction Act (Pub. L. 104-13). Your comments should address one of the following four points:

- (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency/component, including whether the information will have practical utility;

- (2) Evaluate the accuracy of the agencies/components estimate of the burden of The proposed collection of information, including the validity of the methodology and assumptions used;
- (3) Enhance the quality, utility, and clarity of the information to be collected; and
- (4) Minimize the burden of the collections of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological techniques or other forms of information.

Title: Voluntary Customer Survey

OMB Number: Will be assigned upon approval.

Form Number: None

Abstract: Customs and Border Protection (CBP) plans to conduct a customer survey of international travelers seeking entry into the United States at the twenty highest volume airports in order to determine perceptions of the arrival process at our ports of entry. This voluntary customer survey will be conducted through short verbal surveys of travelers as they move through entry processing areas. Travelers who do not speak English will be given a written version of the survey in their language and may submit their responses in writing. The survey will include questions about wait times, ease of entry processing, and the level of communication, efficiency and professionalism of CBP officers. The results and analysis of the survey responses will be used to identify actionable items to improve services to the traveling public with respect to the entry processes for travelers arriving at United States air ports of entry.

Current Actions: This submission is being made to establish a new collection of information.

Type of Review: Approval of a new collection of information.

Affected Public: Individuals, Travelers

Estimated Number of Respondents: 21,000

Estimated Time per Respondent: 5 minutes

Estimated Total Annual Burden Hours: 1,743

If additional information is required contact: Tracey Denning, U.S. Customs and Border Protection, Office of Regulations and Rulings, 799 9th Street, NW, 7th Floor, Washington, DC. 20229-1177, at 202-325-0265.

Dated: August 3, 2010

TRACEY DENNING
Agency Clearance Officer
U.S. Customs and Border Protection

[Published in the Federal Register, August 6, 2010 (75 FR 47607)]

AGENCY INFORMATION COLLECTION ACTIVITIES:

Application for Exportation of Articles under Special Bond

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

ACTION: 60-Day Notice and request for comments; Extension of an existing collection of information: 1651-0004.

SUMMARY: As part of its continuing effort to reduce paperwork and respondent burden, CBP invites the general public and other Federal agencies to comment on an information collection requirement concerning the: Application for Exportation of Articles under Special Bond. This request for comment is being made pursuant to the Paperwork Reduction Act of 1995 (Public Law 104-13; 44 U.S.C. 3505(c)(2)).

DATES: Written comments should be received on or before October 5, 2010, to be assured of consideration.

ADDRESSES: Direct all written comments to U.S. Customs and Border Protection, Attn: Tracey Denning, Office of Regulations and Rulings, 799 9th Street, NW, 7th Floor, Washington, DC. 20229-1177.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to Tracey Denning, U.S. Customs and Border Protection, Office of Regulations and Rulings, 799 9th Street, NW, 7th Floor, Washington, DC. 20229-1177, at 202-325-0265.

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Public Law 104-13; 44 U.S.C. 3505(c)(2)). The comments should address: (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimates of

the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden including the use of automated collection techniques or the use of other forms of information technology; and (e) the annual costs burden to respondents or record keepers from the collection of information (a total capital/startup costs and operations and maintenance costs). The comments that are submitted will be summarized and included in the CBP request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this document CBP is soliciting comments concerning the following information collection:

Title: Application for Exportation of Articles under Special Bond

OMB Number: 1651-0004

Form Number: Form 3495

Abstract: This information is submitted on CBP Form 3495. This form is used by importers (and their agents) to notify CBP that the importer intends to export goods that were subject to a duty exemption based on a temporary stay in this country. It also serves as a permit to export in order to satisfy the importer's obligation to export the same goods and thereby get a duty exemption. Form 3495 is accessible at <http://www.cbp.gov/xp/cgov/toolbox/forms/>.

Current Actions: This submission is being made to extend the expiration date with no change to the burden hours.

Type of Review: Extension without change.

Affected Public: Businesses

Estimated Number of Respondents: 500

Estimated Number of Responses per Respondent: 30

Estimated Total Annual Responses: 15,000

Estimated Time per Response: 8 minutes

Estimated Total Annual Burden Hours: 2,000

Dated: August 3, 2010

TRACEY DENNING
Agency Clearance Officer
U.S. Customs and Border Protection

[Published in the Federal Register, August 6, 2010 (75 FR 47608)]