**DEPARTMENT OF HOMELAND SECURITY**

**U.S. Customs and Border Protection**

**DEPARTMENT OF THE TREASURY**

**19 CFR PART 102**

**[Docket No. USCBP-2016-0041]**

**RIN 1515-AD78**

# North American Free Trade Agreement; Preference Override

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

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The United States, Canada and Mexico have agreed to liberalize provisions of the North American Free Trade Agreement (NAFTA) preference rules of origin that relate to certain goods, including certain spices. However, such liberalization cannot take effect unless U.S. Customs and Border Protection (CBP) amends its regulations to allow the NAFTA preference override to apply to certain spice products and other food products. This document proposes such an amendment.

**DATES:** Comments must be received on or before **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

**ADDRESSES:** You may 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-2016-0041.

- Mail: Trade and Commercial Regulations Branch, Regulations and Rulings, Office of International Trade, Customs and Border Protection, 90 K Street, NE, 10th Floor, Washington, DC 20229-1177.

Instructions: All submissions received must include the agency name and docket number for this rulemaking. All comments received will be posted without change to http://www.regulations.gov, including any personal information provided. For detailed instructions on submitting comments and additional information on the rulemaking process, see the "Public Participation" heading of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: For access to the docket to read background documents or comments received, go to http://www.regulations.gov. Submitted comments may be inspected during regular business days between the hours of 9 a.m. and 4:30 p.m. at the Trade and Commercial Regulations Branch, Regulations and Rulings, Office of International Trade, Customs and Border Protection, 90 K Street, NE, 10th Floor, Washington, DC. Arrangements to inspect submitted comments should be made in advance by calling Mr. Joseph Clark at (202) 325-0118.

**FOR FURTHER INFORMATION CONTACT:** Monika Brenner, Chief, Valuation and Special Programs Branch, Regulations and Rulings, Office of International Trade, (202) 325-0038.

**SUPPLEMENTARY INFORMATION:**

## Public Participation

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

## Background

On December 17, 1992, the United States, Canada, and Mexico (the parties) entered into the North American Free Trade Agreement (NAFTA). The provisions of the NAFTA were adopted by the United States with enactment of the North American Free Trade Agreement Implementation Act, Pub. L. 103-182, 107 Stat. 2057 (December 8, 1993). Under Article 401 of the NAFTA, an imported good qualifies as an originating good of a NAFTA party if: (1) It is wholly obtained or produced in one or more of the NAFTA parties; (2) it is produced entirely in one or more of the NAFTA parties exclusively from materials that originate in those parties; or (3) each of the non-originating materials used in the production of the good undergoes an applicable change in tariff classification as a result of production occurring entirely in the territory of one or more of the parties and satisfies any other applicable requirement (which may include a regional value-content requirement). The NAFTA preference change in tariff classification (or "tariff-shift") rules are set forth in General Note 12(t) of the Harmonized Tariff Schedule of the United States (HTSUS).

General Note 12(a), HTSUS, provides that an imported good is eligible for preferential tariff treatment under the NAFTA only if it is an originating good of a NAFTA party and it qualifies to be marked as a good of Canada or Mexico under the rules for determining the country of origin of a good for purposes of Annex 311 of the NAFTA. The rules for determining the country of origin for marking in such cases are included in part 102, CBP regulations (19 CFR part 102). In situations in which an imported good is determined under Article 401 of the NAFTA to be originating but fails to qualify as a good of Canada or Mexico under the other applicable provisions set forth in 19 CFR part 102, the NAFTA preference override in § 102.19 may provide a basis for enabling the good to qualify as a good of Canada or Mexico. Under § 102.19, if a good which has NAFTA originating status is not determined to be a good of Canada or Mexico under § 102.11(a) or (b) or § 102.21, the country of origin of the good is determined to be the last NAFTA country in which the good underwent production other than minor processing, provided that a NAFTA Certificate of Origin has been completed and signed for the good (emphasis added). "Production" is broadly defined in § 102.1(n) as "growing, mining, harvesting, fishing, trapping, hunting, manufacturing, processing or assembling a good." "Minor processing" is defined in § 102.1(m) and includes "[p]utting up in measured doses, packing, repacking, packaging, repackaging."

Thus in certain instances § 102.19 allows the originating status of a good to "override" a determination that it is not a good of Canada or Mexico. In other words, it allows NAFTA preferential tariff treatment to be granted to certain goods that otherwise would be ineligible for such treatment due to the General Note 12(a)'s requirement that originating goods qualify to be marked as goods of Canada or Mexico under the NAFTA Marking Rules. However, under §

102.19, as it currently reads, minor processing would not be a type of production that would qualify a good to be labeled as a product of the country in which the labeling took place and thus would not enable the good to take advantage of NAFTA tariff preferences.

## Explanation of Amendments

Since the NAFTA entered into effect, the three parties to the Agreement have agreed to liberalizations to the NAFTA preference rules of origin for various goods. As a result, a lesser degree of processing in a NAFTA party is required to constitute "production" which will confer originating status to certain non-NAFTA materials. The United States took steps to implement these changes by amending the NAFTA preference tariff-shift rules in General Note 12(t), HTSUS, through Presidential Proclamations 7870 dated February 9, 2005 (published in the **Federal Register** on February 14, 2005 (70 FR 7611)), 8067 dated October 11, 2006 (published in the **Federal Register** on October 13, 2006 (71 FR 60649)), and 8405 dated August 31, 2009 (published in the **Federal Register** on September 2, 2009 (74 FR 45529)).

For spices and certain other food products, Presidential Proclamation 7870 specifically liberalized various rules of origin in General Note 12(t) to permit minor processing operations in a NAFTA party, such as packaging, to confer originating status on a good. For example, the NAFTA preference rule for tea (heading 0902, HTSUS) was changed to permit blending and/or packaging to confer NAFTA originating status. Similarly, changes to the preference rules of origin for products such as peppers (subheading 0904.12, HTSUS), cloves (heading 0907, HTSUS), poppy seeds (subheading 1207.91, HTSUS), and certain other spices were also liberalized by Proclamation 7870 to allow these goods to become NAFTA originating as a

result of packaging operations in a NAFTA party. It is noted that blending is considered to be more than a minor processing operation for purposes of the NAFTA Marking Rules. See, for example, CBP Headquarters Ruling Letter (HQ) 561986 dated August 21, 2001.

However, contrary to the intentions of the NAFTA parties, these goods are not receiving NAFTA preferential tariff treatment when imported into the United States from Canada or Mexico because they do not qualify to be marked as goods of Canada or Mexico under the NAFTA Marking Rules in 19 CFR part 102, as required by General Note 12(a), HTSUS. This anomalous result stems, in part, from the fact that, in regard to those goods that obtain originating status as a result of minor processing in a NAFTA party, the pertinent NAFTA marking rules in 19 CFR 102.20 are more stringent than the comparable liberalized NAFTA preference rules set forth in General Note 12(t), HTSUS. As discussed above, the NAFTA preference override provision in § 102.19(a) fails to resolve this problem since, as discussed above, this provision overrides a determination that a good is not a good of Canada or Mexico only in situations in which the good undergoes production other than minor processing, in a NAFTA country.

CBP notes that 19 CFR 102.17 provides that a foreign material will not be considered to have undergone an applicable change in tariff classification specified in § 102.20 or § 102.21 or to have met any other applicable requirements of those sections merely by reason of having been subjected to certain specified operations, including "[s]imple packing, repacking or retail packaging without more than minor processing." This provision clearly is not an impediment to the proposed amendment set forth in this document as the "non-qualifying operations"

specified in § 102.17 relate only to the application of the rules set forth in §§ 102.20 and 102.21 and not to the NAFTA preference override in § 102.19.

CBP understands that, as a result of actions taken or interpretations adopted by the Governments of Canada and Mexico, the above-referenced spices and other food products subject to the NAFTA liberalizations are receiving NAFTA preferential tariff treatment when imported from the United States into Canada and Mexico (assuming compliance with all applicable requirements). To rectify the problem discussed above with respect to imports from Canada and Mexico, CBP is proposing to amend § 102.19 by adding a new paragraph (c) to allow the NAFTA preference override to apply to these specific goods. This proposed change, if finalized, will give effect to the intentions of the NAFTA parties by extending NAFTA preferential tariff treatment to certain goods imported from Canada and Mexico that, under the liberalized rules of origin in General Note 12(t), are considered NAFTA originating as a result of minor processing operations (e.g., packaging) performed in a NAFTA party.

## Statutory and Regulatory Requirements

### A. Executive Order 13563 and Executive Order 12866

Executive Orders 13563 and 12866 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rulemaking is not a "significant regulatory action," under section 3(f) of the Executive Order 12866. Accordingly, OMB has not reviewed this proposed rule.

**B. Regulatory Flexibility Act**

This section examines the impact of the rule on small entities as required by the Regulatory Flexibility Act (5 U.S.C. 601 et. seq.), as amended by the Small Business Regulatory Enforcement and Fairness Act of 1996 (SBREFA). A small entity may be a small business (defined as any independently owned and operated business not dominant in its field that qualifies as a small business per the Small Business Act); a small not-for-profit organization; or a small governmental jurisdiction (locality with fewer than 50,000 people).

The proposed rule, if finalized, will extend NAFTA preferential tariff treatment to certain goods imported from Mexico and Canada that currently are not receiving such treatment, despite the fact that these goods presently qualify as NAFTA originating under General Note 12(t), HTSUS. Therefore, the proposed amendment would benefit importers of such goods from Canada and Mexico by eliminating the customs duties and merchandise processing fees that presently are due for these importations. To the extent that this rulemaking affects small entities, these entities would experience a cost savings. Therefore, CBP certifies that the proposed rule would not have a significant economic impact on a substantial number of small entities.

**Paperwork Reduction Act**

As there is no collection of information proposed in this document, the provisions of the Paperwork Reduction Act (44 U.S.C. 3507) are inapplicable.

## Signing Authority

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

## List of Subjects in 19 CFR Part 102

Canada, Customs duties and inspections, Imports, Mexico, Reporting and recordkeeping requirements, Trade agreements.

## Proposed Amendments to the CBP Regulations

For the reasons set forth above, part 102 of title 19 of the Code of Federal Regulations (19 CFR part 102) is proposed to be amended as set forth below.

## PART 102 – RULES OF ORIGIN

1. The authority citation for part 102, CBP regulations, continues to read as follows:

**Authority:** 19 U.S.C. 66, 1202 (General Note 3(i), Harmonized Tariff Schedule of the United States (HTSUS)), 1624, 3314, 3592.

**§ 102.19 [Amended]**

2. In § 102.19:

a. Paragraph (a) is amended by adding the words “or (c)” after the words “paragraph (b)”; and

b. Paragraph (c) is added to read as follows:

(c) If a good classifiable under heading 0907, 0908, 0909, or subheading 0910.11, 0910.12, 0910.30, 0910.99 or 1207.91, HTSUS, is originating within the meaning of section 181.1(q) of this chapter, but is not determined under section 102.11(a) or (b) to be a good of a single NAFTA country, the country of origin of such good is the last NAFTA country in which that good underwent production, provided that a Certificate of Origin (see § 181.11 of this Chapter) has been completed and signed for the good.

**R. Gil Kerlikowske**,

*Commissioner,*

*U.S. Customs and Border Protection*.

Approved: July 1, 2016.

**Timothy E. Skud**,

*Deputy Assistant Secretary of the Treasury*.

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