

525 W. Monroe Street
Chicago, IL 60661-3693
312.902.5200 tel
312.902.1061 fax

MARK S. ZOLNO
mark.zolno@kattenlaw.com
312.902.5436 direct
312.577.8873 fax

June 30, 2011

VIA FEDEX

Ms. Tracey Denning
Office of International Trade,
Regulations and Rulings
U.S. Customs and Border Protection
799 9th Street, N.W., 5th Floor
Washington, DC 20229-1177

**Re: Response by ETA/Cuisenaire to CBP's Information Collection Request
on Declarations Filed under HTSUS 9817.00.40**

Dear Ms. Denning:

On behalf of our client, ETA/Cuisenaire ("ETA"), we respectfully submit the following comments in response to U.S. Customs and Border Protection's ("CBP's") notice published in the May 9, 2011 Federal Register (the "May 9 notice"). CBP states in the abstract of this notice that it "is responsible for determining whether imported articles" classified in certain subheadings of the Harmonized Tariff Schedule of the United States ("HTSUS") under Chapter 98 "are entitled to duty-free or reduced duty treatment." One of these subheadings is 9817.00.40, a duty-free tariff provision created from the United States' ratification of the Agreement on Facilitating the International Circulation of Visual and Auditory Materials of an Educational, Scientific, and Cultural Character (the "Beirut Agreement").

CBP specifically proposes in the May 9 notice to add to the information collection request the document issued by the U.S. Department of State (DS-2039) authenticating merchandise classified under subheading 9817.00.40, as described in 19 C.F.R. § 10.121. CBP states that the declaration filed with merchandise classified under these special HTSUS subheadings "enable CBP to ascertain whether the statutory conditions and requirements of these HTSUS provisions have been satisfied." This abstract insinuates that CBP has the authority to

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independently review merchandise that has been authenticated by the State Department, and potentially require supplemental documentation from the importer to support classification under HTSUS subheading 9817.00.40 or reject such a classification altogether.

ETA submits these comments to clarify the limits of CBP's statutory authority in ascertaining when merchandise may be classified under HTSUS subheading 9817.00.40. As discussed below, the obligation to "ascertain whether the statutory conditions and requirements of [subheading 9817.00.40] have been satisfied" has been designated to the Bureau of Educational and Cultural Affairs, a bureau of the State Department. The documentation referenced in 19 C.F.R. § 10.121 is the *State Department's* authentication certifying that *it* has determined that merchandise is eligible for special tariff treatment under HTSUS subheading 9817.00.40.

While CBP has the authority to ensure that the DS-2039 authentications accompany entries containing merchandise which an importer asserts are classified under HTSUS subheading 9817.00.40, it *does not* have the authority to reverse the State Department's authentication or make its own separate determination on whether merchandise is eligible for this particular tariff provision. This stands in stark contrast to the importer-generated declarations under 19 C.F.R. §§ 10.1(a), 10.8(a), and 10.9(a), which CBP can evaluate, verify, and reject if necessary. As such, ETA believes that CBP is not in a position to act or report on any information it is requesting with respect to the State Department authentication, and should, therefore, withdraw its proposal to include this document in its information collection procedure.

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DISCUSSION

A. The Beirut Agreement and its Implementation in the U.S.

On July 15, 1949, the Agreement for Facilitating the International Circulation of Visual and Auditory Materials of an Educational, Scientific, and Cultural Character (the “Beirut Agreement”) was opened for signature, and on August 12, 1954, it entered into force. The purpose of this international agreement was to extend worldwide duty-free treatment to certain auditory and visual articles of an educational, scientific, and cultural character.

The United States implemented the Beirut Agreement on October 8, 1966 under Joint House Resolution 688 (Public Law 89-634, 80 Stat. 879, *as amended*, 19 U.S.C. § 2051). Under this resolution, Congress authorized the president of the United States to designate a federal agency “which shall be responsible for carrying out the provisions” of the Beirut Agreement. The statute also states that “[i]t shall be the duty of the Federal agency or agencies *so designated* to take appropriate measures for the carrying out of the provisions of the Agreement including the issuance of regulations.” 19 U.S.C. § 2051.

On October 14, 1966, President Lyndon B. Johnson signed Executive Order 11311. The Order stated that “. . . the *United States Information Agency* is hereby designated as the agency to carry out the provisions of the [Beirut] Agreement and related protocol, and *to make any determinations and to prescribe any regulations required . . .*” (Emphasis added). On October 1, 1999, the Foreign Affairs and Restructuring Act abolished the U.S. Information Agency and transferred responsibilities for the agency’s activities to the State Department. *See Repeal, Redesignation, and Amendment of the United States Information Agency’s Former Regulations*, 64 Fed. Reg. 54,538 (Oct. 7, 1999).

Thus, based on the legislative and executive histories associated with the U.S. implementation of the Beirut Agreement, the State Department’s Bureau for Educational,

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Scientific, and Cultural Affairs currently has jurisdiction over applications for duty-free treatment pursuant to the Beirut Agreement.

B. HTSUS Subheading 9817.00.40

The authority of the State Department as the *sole* administering agency to ascertain whether merchandise is eligible for special tariff treatment is also reflected in the language of the Harmonized Tariff Schedule of the United States (“HTSUS”).

Congress’ implementation of the Beirut Agreement on October 8, 1966 resulted in the creation of *Tariff Schedule of the United States* (“TSUS”) item 870.30 and Headnote 1 to Section 8. TSUS item 870.30 was later replaced by subheading 9817.00.40 upon enactment of the HTSUS, effective January 1, 1989. This change also specifically established U.S. Notes 1(a)(i) and 1(a)(ii) to Subchapter XVII of Chapter 98 of the HTSUS which governs subheading 9817.00.40.

HTSUS subheading 9817.00.40 provides for the following merchandise:

Developed photographic film, including motion-picture film ... photographic slides; transparencies; sound recordings; recorded video tape; models (except toy models); charts; maps; globes; and posters; *all of the foregoing determined to be visual or auditory materials in accordance with U.S. Note 1(a) of this subchapter.* (Emphasis added).

U.S. Note 1(a) to Subchapter XVII of Chapter 98 states:

1. (a) *No article shall be exempted from duty under heading 9817.00.40 unless . . . –*

(i) *a Federal agency (or agencies) designated by the President* determines that such article is visual or auditory material of an educational, scientific or cultural character within the meaning of the Agreement for Facilitating the International Circulation of Visual and

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Auditory Materials of an Educational, Scientific, and Cultural Character
(17 UST (pt. 2) 1578; Beirut Agreement) . . . (Emphasis added).

Based on the plain language of HTSUS subheading 9817.00.40 and its corresponding chapter and subchapter notes, the eligibility of merchandise for tariff classification under this subheading is contingent on the finding of a “federal agency . . . designated by the president” that the merchandise is visual or auditory material of an educational, scientific, or cultural character. As noted above, the *only* agency that has been so designated by the president is the State Department.

C. Procedure for Importing Articles Under HTSUS Subheading 9817.00.40

The State Department’s regulations addressing the Beirut Agreement are found at 22 C.F.R. §§ 61.1-61.9. Consistent with the terms of the statute and the legislative history, this section begins with the statement that: “*The Department of State administers the ‘Beirut Agreement of 1948,’* a multinational treaty formally known as the Agreement for Facilitating the International Circulation of Visual and Auditory Material of an Educational, Scientific and Cultural Character.” (Emphasis added).

These regulations describe both the procedure an importer must follow to qualify articles under the Beirut Agreement and the substantive criteria the articles must meet to be eligible. The importer must first obtain a certificate from the government of the articles’ country of origin attesting that such articles are visual or auditory material of an educational, scientific, or cultural character. Once this certification is obtained, importers must submit to the State Department for authentication the foreign certificate along with samples or additional information about the articles in question. *See* 22 C.F.R. § 61.1 and § 61.5. When determining whether articles qualify for duty-free treatment under the Beirut Agreement, the State Department’s regulations specify certain factors the agency must consider before authenticating the articles. *See* 22 C.F.R. §§ 61.3(a)-(d).

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If the State Department accepts the foreign government's certificate and determines that the merchandise qualifies for Beirut Agreement treatment, it will issue the DS-2039 authentication. This is the form that must be presented to CBP at the port of entry upon importation of the covered merchandise. *See* 22 C.F.R. § 61.5(b); 19 C.F.R. § 10.121. CBP's regulation merely states that the authentication must **be filed** in connection with the entry.

ETA's concern is that the abstract of the May 9 Notice suggests that CBP has the power to review the merchandise and supporting documentation and independently determine whether the merchandise meets the criteria for classification under HTSUS subheading 9817.00.40, *i.e.*, whether it is "visual or auditory material of an educational, scientific, or cultural character." As demonstrated above, CBP does **not** have such license.

CBP does have the authority, under 19 U.S.C. § 1500(b), to "fix the final classification and rate of duty" applicable to imported merchandise. In cases involving HTSUS subheading 9817.00.40, CBP's role is limited to verifying whether merchandise classified under this subheading is accompanied by a valid State Department authentication. This is consistent with its statutory mandate, the language of the HTSUS, the law implementing the Beirut Agreement, and both CBP's and the State Department's regulations on the subject.

Unlike the declarations described in 19 C.F.R §§ 10.1(a), 10.8(a), and 10.9(a), the other "supporting" documents in the information collection request, the DS-2039 authentication is not within CBP's jurisdiction to review or validate. Because CBP neither issues the DS-2039 authentications nor has the authority to determine when such authentications should or should not be issued, ETA submits that CBP's request to gather information on the authentications is improper.

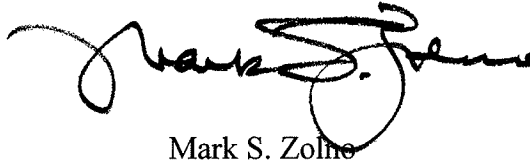
As such, CBP should withdraw its proposal to extend the scope of its information collection request to the DS-2039 authentications, and limit its information collection request to documents over which it has the power to act.

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Thank you for your consideration of these comments. Please do not hesitate to contact us should you have any further questions.

Very truly yours,

KATTEN MUCHIN ROSENMAN LLP

A handwritten signature in black ink, appearing to read "Mark S. Zolno", with a stylized, cursive script.

Mark S. Zolno

Of Counsel: Benjamin H. Shanbaum

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