No. 2020-1734

**UNITED STATES COURT OF APPEALS**
**FOR THE FEDERAL CIRCUIT**

**THE NATIONAL ASSOCIATION OF MANUFACTURERS, THE BEER INSTITUTE,**

*Plaintiffs-Appellees*,

v.

**DEPARTMENT OF THE TREASURY, UNITED STATES CUSTOMS AND BORDER PROTECTION, STEVEN MNUCHIN, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE TREASURY, JOHN SANDERS, IN HIS OFFICIAL CAPACITY AS ACTING COMMISSIONER OF UNITED STATES CUSTOMS AND BORDER PROTECTION,**

*Defendants-Appellants.*

Appeal from the United States Court of International Trade
No. 1:19-cv-00053-JAR

# CORRECTED RESPONSE BRIEF OF PLAINTIFF-APPELLEE THE BEER INSTITUTE

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# UNITED STATES COURT OF APPEALS
# FOR THE FEDERAL CIRCUIT

## CERTIFICATE OF INTEREST

**Case Number** 2020-1734

**Short Case Caption** National Association v. Treasury

**Filing Party/Entity** Appellee The Beer Institute

**Instructions:** Complete each section of the form. In answering items 2 and 3, be specific as to which represented entities the answers apply; lack of specificity may result in non-compliance. **Please enter only one item per box; attach additional pages as needed and check the relevant box**. Counsel must immediately file an amended Certificate of Interest if information changes. Fed. Cir. R. 47.4(b).

I certify the following information and any attached sheets are accurate and complete to the best of my knowledge.

Date: 10/14/2020

Signature: s/ James E. Tysse

Name: James E. Tysse

| **1. Represented Entities.** Fed. Cir. R. 47.4(a)(1). | **2. Real Party in Interest.** Fed. Cir. R. 47.4(a)(2). | **3. Parent Corporations and Stockholders.** Fed. Cir. R. 47.4(a)(3). |
|---|---|---|
| Provide the full names of all entities represented by undersigned counsel in this case. | Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities.<br><br>☑ None/Not Applicable | Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities.<br><br>☐ None/Not Applicable |
| The Beer Institute | | See attached. |
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☑ Additional pages attached

**4. Legal Representatives.** List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

☐ None/Not Applicable ☐ Additional pages attached

| | | |
|---|---|---|
| Jeffrey Kane (Akin Gump Strauss Hauer & Feld LLP) | Raymond P. Tolentino (formerly of Akin Gump Strauss Hauer & Feld LLP) | |
| | | |
| | | |

**5. Related Cases.** Provide the case titles and numbers of any case known to be pending in this court or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. Do not include the originating case number(s) for this case. Fed. Cir. R. 47.4(a)(5). See also Fed. Cir. R. 47.5(b).

☑ None/Not Applicable ☐ Additional pages attached

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**6. Organizational Victims and Bankruptcy Cases**. Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6).

☑ None/Not Applicable ☐ Additional pages attached

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**ATTACHMENT TO THE BEER INSTITUTE'S CERTIFICATE OF INTEREST**

3. The Beer Institute has no parent corporation and no publicly held company owns 10% or more of the Beer Institute's stock. The Beer Institute is a national trade association comprising the following members:

Anheuser-Busch Inbev S.A.

Boston Beer Company, Inc.

Constellation Brands Inc.

Craft Brew Alliance, Inc.

Crown Holdings, Inc.

Florida Ice & Farm SA

Heineken N.V.

Micro-Star International Co. Ltd.

Molson Coors Brewing Company

Nielsen Holdings plc

Owens-Illinois Inc.

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## STATEMENT OF RELATED CASES

Pursuant to Federal Circuit Rule 47.5, counsel for Plaintiff-Appellee The Beer Institute states that no other appeal in or from the same civil action or proceeding in the U.S. Court of International Trade was previously before this or any other appellate court. No cases are known to counsel to be pending in this or or any other court or agency that will directly affect or be directly affected by this Court's decision in the pending appeal.

## STATEMENT OF THE ISSUES

I. Whether Defendants' new drawback restrictions, which for the first time preclude drawback of excise taxes on a substitution drawback claim if no excise tax was paid on the substitute exported merchandise, are invalid.

II. Whether Defendants' new drawback restrictions, even if valid, may be applied retroactively to limit substitution drawback claims filed before the February 19, 2019 effective date of those restrictions.

## INTRODUCTION

The Beer Institute agrees with the lower court and the National Association of Manufacturers ("NAM"): The drawback restrictions promulgated in the rule at issue, *Modernized Drawback*, 83 Fed. Reg. 64,942 (Dec. 18, 2018) (Appx033-158) ("Final Rule"), are invalid. The Court of International Trade properly so declared and enjoined Defendants' Final Rule. Accordingly, the Beer Institute adopts the NAM's arguments in full. If this Court agrees with the NAM, it need not consider this brief further.

In the event the Court does not affirm the Court of International Trade's primary holding, this brief addresses the government's final argument, which concerns whether it would be impermissibly retroactive for Defendants to apply the new drawback restrictions to substitution drawback claims for commodities other than wine. If the Court reaches that argument, it should uphold the lower court's determination that Defendants cannot apply the Final Rule retroactively to claims that were filed before its effective date.

Defendants acknowledge that they cannot apply the Final Rule to substitution drawback claims for one commodity (wine) without running

afoul of fair notice and retroactivity concerns, and therefore do not purport to do so. But Defendants nonetheless argue that their new Rule may apply (paradoxically) even to claims filed *before the Rule became effective* for non-wine commodities—ostensibly because doing so would have no impermissible retroactive effect.

Defendants cannot believe their own theory. It runs headlong into their prior official acknowledgement that other commodities, like wine, "may also be the subject of" so-called "double drawback" claims; it ignores that the Final Rule changes Defendants' legal interpretations in various significant ways; and it overlooks that applying the Final Rule retroactively would attach new legal consequences to claims filed, and conduct completed, years earlier. That Defendants fail to cite a single authority in their superficial treatment of what are substantial retroactivity issues involving hundreds of millions of dollars in claims filed before the Rule's effective date only underscores that their theory has no merit.

## STATEMENT OF THE CASE

### A. Statutory And Regulatory Background

#### *1. Substitution Drawback*

Under the Internal Revenue Code, companies must pay excise taxes on certain imported goods, including (as relevant here) beer, wine, distilled spirits, tobacco products, and certain petroleum products. *See* Appx167 (*Modernized Drawback*, Notice of Proposed Rulemaking, 83 Fed. Reg. 37,886, 37,894 (Aug. 2, 2018)) ("NPRM"). In some circumstances, however, U.S. customs law permits companies to obtain refunds of paid excise taxes from the government. *See Tabacos de Wilson, Inc. v. United States*, 324 F. Supp. 3d 1304, 1307 (Ct. Int'l Trade 2018). Those refunds are known as "drawbacks." *See* Appx033 (83 Fed. Reg. at 64,942).

There are various types of drawbacks, but the one at the heart of this case is called "substitution drawback." Substitution drawback permits refunds of duties or excise taxes paid on imported goods when similar "substitute" goods are exported (or destroyed). Appx003. For instance, if a beer producer imported a barrel of beer and paid excise taxes on it, the beer producer could later obtain a refund of those taxes if

the beer producer exported (or destroyed) a barrel of sufficiently similar domestic beer.

For many years, substitution drawback was available in relatively narrow circumstances—only if the imported goods were the "same kind and quality" as, or "commercially interchangeable" with, the substituted goods. *See* 19 U.S.C. § 1313(j)(2) (2015) (now superseded by the Trade Facilitation and Trade Enforcement Act of 2015). Under that standard, beer was seldom eligible for substitution drawback because, as a practical matter, domestically produced beer was not often of the "same kind and quality" as, or "commercially interchangeable" with, imported beer. *See Texport Oil Co. v. United States*, 185 F.3d 1291, 1295 (Fed. Cir. 1999) (good commercially interchangeable only where a reasonable competitor would accept either the imported or substituted goods for the good's primary purpose); *see, e.g.*, HQ 229320, 2002 WL 31342505, at *9-10 (July 29, 2002) (fact that imported and destroyed products are both "beer made from malt" is "minimally persuasive" in establishing interchangeability).

Substitution drawback was widely utilized, however, for other goods—particularly wine, which since 2008 has been subject to a special statutory standard that permits substitution drawback so long as the

imported and exported wine "are of the same color" and within 50% of the same price. 19 U.S.C. § 1313(j)(2). And certain petroleum products have long been eligible for substitution drawback if the qualified and substituted articles share the same 8-digit classification under the Harmonized Tariff Schedule of the United States ("HTSUS"). *See id.* § 1313(p).

Throughout this period (indeed, since 1993), the statutory scheme also prohibited what it termed "multiple drawback claims"—*i.e.*, using the export or destruction of one good to obtain a drawback on more than one import. 19 U.S.C. § 1313(v) ("Merchandise that is exported or destroyed to satisfy any claim for drawback shall not be the basis of any other claim for drawback[.]"). But Defendants never took the position that this provision required Customs and Border Protection ("CBP") to deny drawback if the substitute merchandise was exported free of excise taxes. On the contrary, in granting drawback claims in the past, CBP acknowledged that it was not even required to "verify whether substitute exported merchandise is tax paid" and did not even keep "records" of the same. Appx169 (83 Fed. Reg. at 37,896). Nor did the predecessor version of the substitution drawback regulation limit the amount of drawback to

the amount of taxes paid. *See* 19 C.F.R. § 191.32 (2017) ("Substitution drawback").

*2. The Trade Facilitation And Trade Enforcement Act Of 2015*

The restrictive "commercially interchangeable" standard (which applied to commodities other than wine) proved difficult to implement and imposed significant burdens on regulated parties. Appx162 (83 Fed. Reg. at 37,889). In an effort to ease those burdens and "liberalize the standards for substituting merchandise," Congress enacted reforms to the substitution drawback scheme through the Trade Facilitation and Trade Enforcement Act of 2015 ("TFTEA"). Appx033 (83 Fed. Reg. at 64,942).

TFTEA overhauled the old drawback regime and significantly "liberalized" access to substitution drawback in particular. Appx033 (83 Fed. Reg. at 64,942); *see* Appx004 (noting TFTEA's "liberalization of the substitution drawback requirements"). Under TFTEA's modified statutory regime, a claimant is now entitled to substitution drawback if (1) the claimant paid a federal excise tax, duty, or fee on an imported good, and (2) the claimant exports, or destroys under CBP supervision, a substituted good classified in the same HTSUS subheading as the

imported good within five years. *See* 19 U.S.C. § 1313(j)(2). As long as those two conditions are met, the statute provides that the government "shall" pay the claimant a drawback in "an amount calculated pursuant to regulations prescribed by the Secretary of the Treasury under subsection (*l*)" "notwithstanding any other provision of law." *Id.* Subsection (*l*), in turn, specifies that those regulations "shall provide for a refund" of 99 percent of the duties, taxes, and fees imposed on the imported goods. *Id.* § 1313(*l*)(2)(B).

Although Congress passed TFTEA in 2016, the statute did not permit parties to file claims under the new drawback regime until February 24, 2018. *See* 19 U.S.C. § 1313(*l*)(2)(A), (*l*)(3), (r)(4). TFTEA also directed Defendants to promulgate implementing regulations for the new drawback regime by that same date. *See id.* § 1313(*l*)(2)(A). But Defendants failed to publish even proposed rules by the deadline. *See Tabacos de Wilson*, 324 F. Supp. 3d at 1308 (noting that the "two-year deadline *** lapsed on February 24, 2018," prior to the NPRM).[1]

[1] TFTEA further provided claimants a "transition period, beginning February 24, 2018, and ending February 23, 2019, during which claimants may file claims under" either the pre-TFTEA "process and

*3. Defendants' Interim Guidance And The NPRM*

In March 2018, one month after TFTEA's statutory deadline expired, Defendants issued interim guidance, which "reflect[ed] CBP's tentative and conditional framework for drawback pending the issuance of a Final Rule," and which allowed claimants to file TFTEA drawback claims electronically. *See* U.S. CUSTOMS & BORDER PROTECTION, *Drawback: Interim Guidance for Filing TFTEA Drawback Claims* 1 (Version 3, Mar. 2018).[2]

Five months later (and six total months past the deadline for the *final* rule), Defendants issued a belated notice of *proposed* rulemaking to implement the TFTEA drawback provisions. *See* Appx159 (83 Fed. Reg. 37,886). The NPRM proposed, among other things, regulations that would impose new restrictions on substitution drawback of excise taxes. Appx168-169 (83 Fed. Reg. at 37,895-37,896). Those proposed drawback

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regulations," or under the amended statute and implementing regulations, "on a claim-by-claim basis." Appx161 (83 Fed. Reg. at 37,888). The claims filed by the Beer Institute's members were filed under the amended statute.

[2] *Available at* https://www.cbp.gov/sites/default/files/assets/documents/2018-Mar/ACE%20Drawback%20Interim%20Guidance%20%2803-26-2018%29_0.pdf.

restrictions purported to disallow so-called "double drawback" claims—Defendants' newly coined term describing claims paid on imported merchandise in situations where no excise tax was paid upon the exported substitute goods. *See* Appx168 (83 Fed. Reg. at 37,895). Defendants acknowledged that, for approximately 15 years, "CBP has approved substitution unused drawback claims based on *wine exports* for which no excise tax has been paid"—and accordingly conceded that "its treatment of this issue must be changed through a notice and comment process." Appx169 (83 Fed. Reg. at 37,896) (emphasis added); *see* Appx167-168 (83 Fed. Reg. at 37,894-37,895) (recognizing that "CBP currently permits this practice" "with respect to wine").

The NPRM also stated, without evidence, that CBP had "denied" requests for drawback from manufacturers of distilled spirits that have "sought the same treatment for their products that wine currently receives." Appx169 (83 Fed. Reg. at 37,896). But Defendants did not explain how they could have denied such claims on the ground that the substitute good was exempt from tax, considering that "drawback under 19 U.S.C. § 1313 does not require CBP to verify whether substitute exported merchandise is tax paid," and therefore "CBP does not have

records that would identify instances of double drawback" in the past. *Id.* To the extent drawback claims were denied, the denials were likely because those claims were subject to the restrictive "commercially interchangeable" and "same kind and quality" standards under the old statutory regime. *See* 19 U.S.C. § 1313(j)(2) (2015); *cf.* Appx265 (74 Fed. Reg. at 52,929) (acknowledging in 2009 that the regulatory structure permitted drawback on tax-free substituted "distilled spirits and beer" as well as wine).

In light of this history, under which "CBP has approved substitution unused drawback claims based on wine exports for which no excise tax has been paid," Defendants explained that "its treatment of this issue must be changed through a notice and comment process." Appx169 (83 Fed. Reg. at 37,896) (citing 19 U.S.C. § 1625(c)). Defendants thus acknowledged that the new drawback restrictions would need to operate prospectively, *i.e.*, only "for *drawback claims filed on or after 60 days* from the date of publication of the final rule," *i.e.*, February 19, 2019. Appx193 (83 Fed. Reg. at 37,920) (emphasis added).

*4. The Final Rule*

On December 18, 2018, almost a full year after TFTEA's statutory deadline—and after the Court of International Trade faulted Defendants for having "unlawfully withheld rulemaking" by "exceed[ing] [that] legislative deadline," *Tabacos de Wilson*, 324 F. Supp. 3d at 1315-1316—Defendants at long last issued the Final Rule. *See* Appx033 (83 Fed. Reg. 64,942). Under the new drawback restrictions, substitution drawback is "limited to the amount of taxes paid (and not returned by refund, credit, or drawback) on the substituted merchandise." Appx099, 102 (83 Fed. Reg. at 65,008, 65,011). The Final Rule enumerates six relevant "amendments regarding the drawback of excise taxes." Appx033 (83 Fed. Reg. at 64,942); *see* 19 C.F.R. §§ 190.22(a)(1)(*ii*)(C), 190.32(b)(3), 190.171(c)(3), 191.22(a), 191.32(b)(4), and 191.171(d).

According to Defendants, these restrictions are mandated not by TFTEA, but by section 1313(v), which since 1993 has provided that "[m]erchandise that is exported or destroyed to satisfy any claim for drawback shall not be the basis of any other claim for drawback." 19 U.S.C. § 1313(v). Under Defendants' novel interpretation of this provision, the definition of "claim for drawback" now encompasses not

only situations involving the refund of taxes on *imports*, but also situations where no excise tax was ever paid, determined, or imposed on an *export*.

The upshot of the Final Rule is that many domestically produced goods, including beer—which is exempt from excise taxes when produced and then exported, 26 U.S.C. § 5053(a); 27 C.F.R. § 25.203—are no longer eligible for substitution drawback. That is true even though no such restriction can be found in section 1313(j)(2) (as amended by TFTEA) or in any other TFTEA provision, and despite Defendants' continued acknowledgment in the Final Rule that such drawback has been permitted on wine claims (at least) for approximately 15 years. *See* Appx051 (83 Fed. Reg. at 64,960) (acknowledging that a "CBP field office" has paid such claims, but noting that "CBP is not aware of granting double drawback claims for commodities other than wine"); Appx056 (83 Fed. Reg. at 64,965) ("CBP believes that it began paying claims that resulted in double drawback of excise taxes for wine in 2004.").

Although nearly all of the Final Rule's provisions took effect immediately upon publication, Defendants delayed "[t]he effective date for amendments regarding the drawback of excise taxes"—the subject of

this action—until "February 19, 2019." Appx033 (83 Fed. Reg. at 64,942). Thus, while the Final Rule suggests that it "correctly prohibits double drawback for all claims without regard to the transition period provided for TFTEA changes," it immediately confirms its prospective-only nature: "However, as noted above, CBP is providing a *60-day delayed effective date* for regulations regarding the drawback of excise taxes and clarifying the prohibition on double drawback." Appx052 (83 Fed. Reg. at 64,961) (emphasis added).

### B. Procedural History

#### *1. The Beer Institute And Its Members*

The Beer Institute, founded in 1862, is a national trade association representing the $328 billion beer industry—an industry that includes 7,000 brewers and more than 2.1 million American jobs. Decl. of Mary Jane Saunders in Supp. of Beer Institute's Mot. for J. on the Agency R. ¶ 3, ECF No. 27-3 ("Beer Institute Aff."). It comprises both large and small brewers, as well as importers and industry suppliers, and represents the beer industry before Congress, state legislatures, courts, and public forums across the country. *Id.*

Beginning on February 24, 2018, members of the Beer Institute began to prepare and file substitution drawback claims based on

TFTEA's expanded substitution drawback scheme. *See* Beer Institute Aff. ¶ 8. These drawback claims were filed prior to the February 19, 2019 effective date of the Final Rule, and involved substituted goods that were not subject to excise tax. *Id.* Collectively, these claims amount to tens of millions of dollars in value. *Id.* Based on the new TFTEA provisions related to substituted goods, Beer Institute members booked the revenue from the anticipated refunds, recognizing tens of millions of dollars in income and receivables. *Id.* at ¶¶ 10-11. But "liquidation of their drawback claims that implicate the Final Rule filed in 2018 and 2019 ha[d] been extended by Customs," and "accelerated payment ha[d] been suspended on such claims," until the Beer Institute and the NAM secured the judicial relief that Defendants now challenge on appeal. Decl. of Mary Jane Saunders in Supp. Of Plfs.' Joint Opp. To Defs.' Mot. for a Stay and Suspension of Drawback Claims Pending Appeal ¶ 10, ECF No. 52-3 ("Beer Institute Stay Opp. Aff.").

*2. The NAM And The Beer Institute Successfully Challenge The Final Rule's New Drawback Restrictions*

The NAM filed this action in the U.S. Court of International Trade under 28 U.S.C. § 1581(*i*), seeking to invalidate the new drawback restrictions of the Final Rule or, in the alternative, to enjoin their

retroactive application. *See* NAM Compl., ECF No. 2. The Beer Institute subsequently intervened. Beer Institute Compl., ECF No. 14-1; Order Granting Intervention, ECF No. 24. Both the NAM and the Beer Institute filed motions for judgment on the agency record. *See* ECF Nos. 20, 27.

The Court of International Trade granted the motions for judgment, holding that the Final Rule and Defendants' attempted retroactive application of it were invalid. Appx001-022. On the substantive challenge, the court determined that the familiar *Chevron* inquiry of statutory interpretation "ends at step one because the Final Rule conflicts with the unambiguous text" of the relevant statute, in at least three respects. Appx009.

First, the court determined that Defendants' definition of drawback was inconsistent with how Congress used that term in both Title 19 and Title 26, *see* Appx011-013, including how it "selectively used the terms in some sections, but not others," Appx012. Second, "the Final Rule creates irreconcilable conflicts with statutory provisions that evince that the agencies' Final Rule is not a valid interpretation of the statute," Appx013, including the "unequivocal" section 1313(j)(2), which "mandates that

drawback 'shall' issue so long as the enumerated preconditions are met," Appx015. Third, the court deemed its conclusion "well-supported by the legislative history of drawback," Appx018, which "demonstrates that Congress made a policy choice to encourage exports by expanding the ability to claim drawback, even with the knowledge that industries may then avoid some payment of excise tax," Appx020.

Regarding "the retroactivity challenge"—the primary subject of this brief—the court determined that Defendants had "attempt[ed] to apply the Final Rule to claims filed before its effective date." Appx020. Such retroactive application was impermissible, the court held, because it would "run[] afoul of fair notice." *Id.* Because Defendants "delayed publishing regulations to implement the TFTEA until well after the statutory deadline had lapsed," Defendants were at fault for "the regulatory quandary in which [they] found themselves, whereby a period during which no path for operation of the new statute existed." Appx020-021 (citing *Tabacos de Wilson*, 324 F. Supp. 3d 1304). Thus, even if Defendants' policy arguments were "valid," they provided no excuse for Defendants to "constructively amend[]" the statute through retroactively applied agency action. Appx021.

The court thus entered judgment in favor of the NAM and the Beer Institute, "[h]old[ing] unlawful and set[ting] aside" the Final Rule as foreclosed by the relevant statutory scheme. Appx022. The court also "declare[d] that Defendants must process and pay substitution drawback claims that comply with the governing statutory and regulatory requirements." *Id.*

*3. The Court Of International Trade Denies Defendants' Motion For A Stay Pending Appeal*

Two months later, Defendants noticed an appeal and filed a motion requesting that the Court of International Trade "stay the enforcement of its judgment" and "suspend the processing of all drawback claims involving the regulatory provisions held unlawful and set aside by the Court in its judgment" pending appeal. Mot. for Stay of Enforcement of J. & Suspension of Drawback Claims Pending Appeal, ECF No. 50, at 1 ("Defs.' Stay Mot."); Notice of Appeal, ECF No. 49. The lower court denied the stay, finding that the government "will not likely succeed on appeal" or suffer any irreparable harm. Opinion and Order 8, ECF No. 60 (May 15, 2020) ("Stay Order"). Instead, the court adopted the NAM's and the Beer Institute's proposal to suspend liquidation and "requir[e] the government to process fully-bonded claims for accelerated drawback"

pending appeal, especially given that Defendants' actions had "result[ed] in the delayed or nonpayment of drawback to claimants" for years. Stay Order 5-6.

## SUMMARY OF ARGUMENT

**I.** Defendants' new drawback restrictions embodied in the Final Rule are invalid. The Beer Institute adopts the NAM's arguments and agrees that the Court of International Trade's order should be affirmed.

**II.** Although the Court need not reach this argument if it agrees that the drawback restrictions are invalid, the lower court also correctly held that those restrictions could not apply retroactively to claims filed before the restrictions even became effective. Defendants agree that the restrictions cannot be applied retroactively with respect to one commodity: wine. But they contend that it is permissible to apply the Final Rule retroactively to all other commodities, including beer and distilled spirits. That is wrong: The Final Rule constitutes a significant change in the law, meaningfully alters the consequences of past actions for the Beer Institute and the NAM's members, and offends fair notice and settled expectations.

**A.** Defendants admit that the Final Rule constitutes a change in law for wine and that therefore it may not be applied to wine claims filed prior to February 19, 2019. Thus, the only question is whether it also constitutes a change in law for beer and distilled spirits claims filed before that date as well.

The answer is yes. When attempting to implement similar regulations a decade ago, Defendants acknowledged that, under the then-prevailing "statutory and regulatory scheme," beer and distilled spirits "may also be the subject of" the same types of claims as wine. Because TFTEA undisputedly made beer and distilled spirits producers eligible to enjoy the same favorable treatment that wine has long enjoyed, the Final Rule thus constitutes a change in law for beer and distilled spirits claims as much as for wine claims. Beyond that, the Final Rule also represents a significant change in Defendants' legal interpretation of various aspects of the broader drawback regime—including the base definition of "drawback" itself.

**B.** Properly construed, this significant change in the law would meaningfully alter the consequences of beer and other commodity producers' prior actions. Not only does the Final Rule strip those

producers of the revenue they anticipated from claims that were valid when filed, but it also imposes *post hoc* tax consequences on conduct that beer manufacturers and others have completed and cannot undo. Defendants offer no authority (legal or factual) to counter the substantial harms the companies have shown they will suffer if their settled expectations are retroactively upended.

**C.** Applying the Final Rule to claims filed before it became effective would also offend principles of fair notice and settled expectations. The only reason that commodity producers could not enjoy substitution drawback on tax-free exports prior to February 2018 is because of the restrictive commercial-interchangeability standard that was lifted with TFTEA's enactment. The fact that Defendants badly missed their statutory deadline and failed to publish even a *proposed* Rule until after claims for beer and other commodities were filed is a regulatory quandary of Defendants' own making and highlights how unfair it would be to allow them to retroactively invalidate those claims now.

# ARGUMENT

## I. STANDARD OF REVIEW

This Court reviews *de novo* the Court of International Trade's decision to grant judgment on the agency record. *See Information Tech. & Applications Corp. v. United States*, 316 F.3d 1312, 1318 (Fed. Cir. 2003). Accordingly, the Court "essentially step[s] into the shoes of the Court of International Trade and duplicate[s] its review," but "do[es] not altogether ignore its informed opinion." *Parkdale Int'l v. United States*, 475 F.3d 1375, 1378 (Fed. Cir. 2007). Under the applicable standard, an agency's final rule must be held "unlawful and set aside" if it is found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(A), (C); *see* 28 U.S.C. § 2640(e).

## II. THE DRAWBACK RESTRICTIONS ARE INVALID, AND THE COURT OF INTERNATIONAL TRADE'S ORDER SHOULD BE AFFIRMED

Congress has "unambiguously foreclose[d]" Defendants' attempt to promulgate new drawback restrictions based on their unilaterally expanded definition of "drawback"—a definition that is inconsistent with the statutory text, leads to "irreconcilable conflicts" within the carefully

calibrated statutory scheme, and runs counter to the congressional purpose evinced by the relevant history. Appx011-020. Regardless of Defendants' view of what administrative action would "best harmonize[]" the drawback and excise-tax regimes, Br. 34, they "cannot now attempt to alter [Congress's] policy choice by way of a regulation that does not comport with the animating statute," Appx018. The Beer Institute is thus in agreement with, and fully adopts, the arguments in the NAM's response brief supporting affirmance.

## III. THE COURT OF INTERNATIONAL TRADE CORRECTLY HELD THAT APPLYING THE NEW DRAWBACK RESTRICTIONS TO CLAIMS FILED BEFORE THE FINAL RULE'S EFFECTIVE DATE WOULD RUN AFOUL OF FAIR NOTICE

In the event this Court were to reverse the judgment below and hold the new drawback restrictions valid, it should affirm the Court of International Trade's alternative holding that applying the new restrictions to claims filed before the February 19, 2019 effective date would "run[] afoul of fair notice." Appx020-021. The dispositive question in evaluating a retroactivity challenge is whether the new drawback restrictions "change the legal landscape" with respect to these commodities. *Arkema Inc. v. EPA*, 618 F.3d 1, 7, 9-10 (D.C. Cir. 2010)

(holding that change in policy "may shield the Agency's *prospective* application of the Final Rule from an arbitrary and capricious challenge," but vacating rule "insofar as it operates retroactively"). This Court resolves that question by analyzing "the nature and extent of the change in the law," "the degree of connection between the operation of the new rule and a relevant past event," and "familiar considerations of fair notice, reasonable reliance, and settled expectations." *Princess Cruises, Inc. v. United States*, 397 F.3d 1358, 1362 (Fed. Cir. 2005); *see*, *e.g.*, *Moffitt v. McDonald*, 776 F.3d 1359, 1364-1365 (Fed. Cir. 2015). All of these factors support affirmance of the lower court's "fair notice" holding.

### A. The Final Rule Constitutes A Significant Change In The Law With Respect To All Commodities

#### *1. The Final Rule Represents A Marked Change In Defendants' Prior Treatment Of Beer And Distilled Spirits Claims*

**a.** The Final Rule would mark a significant change in the law with respect to all commodities, not just wine, if applied to commodity claims filed even before the "effective date" of those restrictions. Appx033 (83 Fed. Reg. at 64,942); *see* Appx052 (83 Fed. Reg. at 64,961) (clarifying that, unlike "[o]ther sections of the regulation," "CBP is providing a 60-day

delayed effective date for regulations regarding the drawback of excise taxes and clarifying the prohibition on double drawback").

Defendants acknowledge that the Final Rule would be impermissibly retroactive if applied to wine claims, which undisputedly enjoyed favorable treatment for approximately 15 years. *See* Br. 54 (Final Rule constitutes a "change in practice" for wine claims). Defendants nonetheless contend that the Rule may be applied to claims for all commodities besides wine, supposedly because "CBP has never granted any claims resulting in the double drawback of excise taxes" for such commodities, and therefore the new drawback restrictions "do[] not reflect a change in CBP's treatment of these products." Br. 53.

As a threshold matter, Defendants wholly fail to substantiate that the Final Rule does not "reflect a change in CBP's treatment" for beer, distilled spirits, and other commodities. Br. 53 (citing nothing). Defendants now employ categorical language, but previously Defendants admitted that "CBP does not have records that would identify instances of double drawback" because there was no reason to keep them. Appx169 (83 Fed. Reg. at 37,896). Thus, Defendants are, at best, simply "*not aware* of granting double drawback claims for commodities other than

wine." Appx051 (83 Fed. Reg. at 64,960) (emphasis added). And even that assertion contradicts Defendants' recent concession that, before the new restrictions, "importers have been able to *** claim double drawback on claims" "for imports of *** wine *and petroleum*." Oct. 2, 2018 Hr'g Tr. 19:3-8, ECF No. 56, *Tabacos de Wilson, Inc. v. United States,* No. 1:18-cv-59 (Ct. Int'l Trade) (emphasis added).

Regardless, a decade ago, Defendants explicitly conceded in a formal rulemaking that beer and distilled spirits were eligible for excise tax drawback. In 2009, Defendants proposed rules that sought to impose essentially the same limitations on so-called "double" drawback found in the Final Rule's new drawback restrictions. *See* Appx264, 266 (*Drawback of Internal Revenue Excise Tax*, Notice of Proposed Rulemaking, 74 Fed. Reg. 52,928, 52,930 (Oct. 15, 2009)); Appx268 (*Drawback of Internal Revenue Taxes*, Notice of Proposed Rulemaking, 74 Fed. Reg. 52,937 (Oct. 15, 2009)). In touting the broader impact of those 2009 proposals, Defendants explained that "[i]n addition to" drawback claims for wine, "given the present statutory and regulatory structure within which these claims are administered, *other products* that are subject to excise tax under the [Tax Code] may also be the subject of such drawback claims

where the excise taxes on the good have been refunded, remitted, or not paid"—including "*distilled spirits and beer*." Appx265 (74 Fed. Reg. at 52,929) (emphases added); *see id.* (conducting analysis under a subheading titled "Diverse Commodities Potentially Impacted").[3]

Thus, until recently, Defendants' official position was that distilled spirits and beer—no less than wine—would be entitled to drawback for excise taxes. Appx265 (74 Fed. Reg. at 52,929); *see also* Oct. 2, 2018 Hr'g Tr. 19:12-15, *supra* (characterizing new restrictions as "a change in practice in how the agency has previously treated [drawback] claims" for excise taxes). Defendants do not even address this prior published view, let alone attempt to harmonize it with their current one.

**b.** To be sure, prior to TFTEA, beer and distilled spirits claims were, as a practical matter, seldom eligible for substitution drawback due to restrictive rules about the type of "commercially interchangeable" goods that qualified. 19 U.S.C. § 1313(j)(2) (2015) (superseded by TFTEA). By contrast, wine has long enjoyed a special standard permitting substitution drawback so long as the imported and exported

[3] That proposal faced widespread opposition from Congress and was withdrawn in 2010. *See* Appx169 (83 Fed. Reg. at 37,896); Appx019-020.

wine "are of the same color" and within 50% of the same price. *See* 19 U.S.C. § 1313(j)(2).

That all changed in February 2016 with TFTEA's enactment. Congress undisputedly "liberalize[d] the standards for substituting merchandise" through TFTEA's enactment, Appx033 (83 Fed. Reg. at 64,942), significantly broadening access to substitution drawback for all commodities, *see* Appx004. Today, TFTEA permits all claimants—including not only wine importers, but also beer and distilled spirits importers—to file claims under these liberalized drawback standards and thereby benefit from the same favorable treatment that wine manufacturers have long enjoyed. *See* 19 U.S.C. § 1313(j)(2). Thus, when Beer Institute members filed claims between February 2018 and the Final Rule's February 2019 effective date, those claims were as valid as wine claims were. Applying the Final Rule retroactively to bar claims that were valid when filed necessarily changes the legal landscape.

*2. The Final Rule Modifies Defendants' Longstanding Legal Interpretations In Other Ways*

Beyond that, there can be no doubt that Defendants' Final Rule marks a significant change from Defendants' prior interpretation of federal law in multiple respects.

**a.** Defendants previously understood section 1313(v)—the purported statutory basis for their new drawback restrictions—to mean only that the same export could not be used to obtain drawbacks on multiple imports. *See* HQ 229892, 2003 WL 22408906, at *5 (July 3, 2003) ("The statutory purpose of section 1313(v) is to prevent multiple claims on the same exported or destroyed merchandise. *** [I]f the identified export articles were not claimed more than once, the provisions of 19 USC 1313(v) would not preclude drawback."); HQ H025565, 2010 WL 4034768, at *4 (July 22, 2010) ("Additionally, we note that the drawback statute includes a provision that precludes claimants from doubledipping on their drawback claims. *** Chevron is therefore precluded from using another [certificate of manufacture] that could possibly include the five subject exports to make a separate drawback claim."). Indeed, that is the reading of section 1313(v) that Defendants now acknowledge to be most apparent "[o]n its face"—*i.e.*, that it "precludes exported or destroyed merchandise for which drawback has already been claimed from being used as the basis for any other drawback claim." Br. 25.

The Final Rule, however, substantially broadens that interpretation by, as Defendants explain, "fill[ing]" in an additional restriction meant to advance the agencies' policy goals. Br. 25. Under this new construction, section 1313(v) "provid[es] that an exported product for which excise-tax liability has been cancelled, or has already been refunded, *** cannot be used for a *** refund of excise taxes on an imported product." *Id.* at 25-26.

Even if that is a "reasonable" "clarif[ication]" that is "not unambiguously preclude[d]" by the statute, Defs.' Br. 25-26, it at least "substantially expands" the agency's longstanding "definition of drawback," Appx010 (discussing 19 C.F.R. § 190.2). *See Arkema Inc.*, 618 F.3d at 7 (statute operates retroactively where, *inter alia*, it is "substantively inconsistent" with a prior agency interpretation). An interpretation "changes the legal landscape" when it establishes "a precise interpretation" from "a range of possible interpretations of the statutory language." *National Mining Ass'n v. U.S. Dep't of Interior*, 177 F.3d 1, 8 (D.C. Cir. 1999) (internal quotation marks omitted). Thus, Defendants' arguments that "section 1313(v) does not unambiguously *preclude* [their] interpretation," Br. 26 (emphasis added), or that this

dispute concerns only "whether the agencies could *reasonably interpret*" 1313(v) in this manner, Br. 2 (emphasis added), proves that their new interpretation at least changes the legal landscape.

**b.** Beyond "substantially expand[ing]" their understanding of "drawback" generally, Appx010, Defendants have expanded it even further with respect to beer specifically—such that their construction of "drawback" now encompasses even the *non-imposition* (*i.e.*, not just refund or cancellation) of taxes on exported beer.

Defendants formerly took the position that "drawback" generally applied to refunds or remissions of excise taxes paid on *imported* goods, with one export-related exception: "the refund of internal revenue taxes paid on [exported] domestic alcohol as prescribed in 19 U.S.C. § 1313(d)." 19 C.F.R. § 191.2(*i*) (2015). Section 1313(d), in turn, applies to refunds of taxes on "the exportation of *bottled distilled spirits and wines*," 19 U.S.C. § 1313(d) (emphasis added), without mentioning beer. That omission is consistent with the Internal Revenue Code, which provides that tax is not "imposed" on domestically produced beer unless it is "removed *for consumption or sale[] within the United States*." 26 U.S.C. § 5051(a)(1)(A) (emphasis added). Thus, when beer is "removed from the brewery *** for

export," no tax liability attaches. 26 U.S.C. § 5053(a); *see id.* § 5054(a) (providing that excise tax "shall be determined at the time it is removed for consumption or sale"); 27 C.F.R. § 25.203 ("A brewer may remove beer without payment of tax *** for exportation[.]"); *id.* § 28.141(a) (same).[4] Yet the Final Rule, by "limit[ing]" excise tax drawback "to the amount of taxes paid *** on the substituted merchandise," Appx099 (83 Fed. Reg. at 65,008), Appx102 (83 Fed. Reg. at 65,011), expands the definition of "drawback" to encompass even this *non-imposition* of tax on domestically produced exported beer.

On appeal, Defendants sidestep this issue, contending that beer, no different from other commodities, "is subject to excise-tax liability immediately upon production," and that such "tax liability is *extinguished* once exportation occurs." Br. 6-7 (emphasis added) (citing 26 U.S.C. § 5053(a)); *see id.* at 17, 31 (contending that excise taxes are

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[4] Indeed, the form that a beer producer must submit to demonstrate proof of a bond "to cover the removal of beer or beer concentrate from brewery premises for exportation without payment of tax" makes clear that brewers are only "*liable* for taxes for all beer removed for consumption or sale, including beer *** remove[d] without payment of tax for export, *** *which is not exported or used as authorized*." Alcohol and Tobacco Tax and Trade Bureau, Brewer's Bond, TTB F 5130.22, at 2 (emphases added).

"cancell[ed]" on beer). That erroneous interpretation, which Defendants never explain, flatly contradicts the provisions cited above. Even if it were reasonable, however, it would at least be a significant change in the government's position, given that the term "drawback" has never before "applied to all of the scenarios to which the agencies now attempt to apply the term"—including as to domestically produced beer. Appx012 (citing, *inter alia*, 26 U.S.C. § 5053(a)).

In sum, even if the term "drawback" could encompass "cancellation of excise-tax liability on exports," Defs.' Br. 3—itself a "substantial[] expan[sion]" of "drawback," Appx010—extending the definition of drawback to claims based on beer exports for which no tax was ever even *imposed* plainly reflects a new (mis)interpretation of governing law.

### B. Applying The Final Rule Retroactively Would Meaningfully Alter The Consequences Of Past Events

Applying the Final Rule to pending beer and distilled spirits claims would "meaningfully alter[] the consequences of relevant past events" in multiple respects. *Kernea v. Shinseki*, 724 F.3d 1374, 1380-1381 (Fed. Cir. 2013). The record below showed that applying the Final Rule to pending claims "would have impermissible retroactive effect" because it "would render invalid" millions of dollars' worth of drawback claims "that

[were] valid when filed." *Durr v. Nicholson*, 400 F.3d 1375, 1380 (Fed. Cir. 2005). Defendants neither questioned the Beer Institute's or the NAM's sworn affidavits on this point, nor introduced any evidence of their own. *See, e.g.*, Beer Institute Aff. ¶¶ 9-14; Beer Institute Stay Opp. Aff. ¶ 8; *see also* NAM Compl., ECF Nos. 2-2 & 2-3 (Hanesworth Decl. ¶¶ 5-7; Tortorice Decl. ¶¶ 9-11). On the contrary, Defendants acknowledged below that pending claims "filed since February 24, 2018," totaled close to $400 million. Defs.' Stay Mot. 7. Applying the Final Rule to deny hundreds of millions of dollars in otherwise valid claims obviously alters the consequences of claimants' past actions.

The Final Rule, if applied to beer and other claims filed prior to February 19, 2019, would also significantly alter the consequences of the tax-driven conduct those companies completed before the effective date of the new drawback restrictions. After TFTEA was passed, members of the Beer Institute and the NAM reasonably expected to receive substitution drawbacks based on products not subject to excise tax. Beer Institute Aff. ¶ 9. Beer Institute members, as well as members of the NAM, made numerous business decisions based on the settled expectation that drawback of excise taxes would be available for beer

following TFTEA's enactment, including how much to import, export, and produce domestically. *See id.* ¶¶ 8-10, 12-14; *see also* NAM Compl., ECF Nos. 2-2 & 2-3 (Hanesworth Decl. ¶¶ 5-7; Tortorice Decl. ¶¶ 9-11). Some Beer Institute members additionally recognized the revenue from the anticipated drawback refunds as a receivable in their financial statements years ago. Beer Institute Aff. ¶¶ 8-10.

Applying the Final Rule retroactively would alter the consequences of these completed actions, which cannot be undone. *See Kernea*, 724 F.3d at 1380; *see, e.g.*, *E.I. du Pont de Nemours & Co. v. United States*, 561 F. Supp. 2d 1320, 1350-1351 (Ct. Int'l Trade 2008) (construing 1991 drawback entry "according to the 1998 regulatory amendments potentially would be prejudicial to du Pont's substantive drawback rights and therefore unfair"). Applying the Final Rule retroactively thus meaningfully alters the consequences of these completed actions as well.

### C. Applying The Final Rule Retroactively Would Offend Fair Notice, Reasonable Reliance, And Settled Expectations

The fact that Beer Institute members (and other claimants) cannot avoid any of the significant consequences flowing from Defendants' new interpretations confirms that applying the Final Rule to pending claims

would "run[] afoul of fair notice." Appx020; *see Kernea*, 724 F.3d at 1381 (explaining substantial overlap between third *Princess Cruises* factor and other factors). Defendants' passing assertion (at 53) that "CBP has never granted any" so-called "double" drawback claims for beer is not just unsupported, *see* pp. 25-27, *supra*; it is totally non-responsive to Appellees' "fair notice" concerns. As noted, any prior denials were based on the since-discarded restrictive commercial-interchangeability standard. *See* pp. 27-28, *supra*. After Congress passed TFTEA without including any version of Defendants' prior failed attempts to impose "double drawback" limitations, beer producers had every reason to expect that they would receive substitution drawback on exported beer—and no reason to suspect that Defendants would resuscitate their long-dead regulatory proposal. *See* Beer Institute Aff. ¶¶ 9-10, 15-17.

Compounding the "fair notice" concerns with retroactive application is the "regulatory quandary *** of the agencies' own making," in which Defendants "delayed publishing regulations to implement the TFTEA until well after the statutory deadline had lapsed." Appx020-021 (citing *Tabacos de Wilson*, 324 F. Supp. 3d 1304). TFTEA required Defendants to promulgate rules implementing its provisions by February

2018—the same date TFTEA's substitution-drawback standard would take effect. 19 U.S.C. § 1313(*l*)(2)(A); *see* Appx161 (83 Fed. Reg. at 37,888). But Defendants did not even promulgate an *NPRM* until August 2018. *See* Appx159 (83 Fed. Reg. 37,886). And nothing in the NPRM put beer companies on notice that the Final Rule would apply prior to the effective date of the proposed regulation. *See* Appx193 (83 Fed. Reg. at 37,920) (announcing that drawback restrictions would "become applicable *for drawback claims filed on or after 60 days from the date of publication* of the final rule") (emphasis added). Even then, Defendants waited several more months to promulgate the Final Rule in December 2018—long after beer producers had begun filing substitution drawback claims under TFTEA in February 2018. Appx033 (83 Fed. Reg. 64,942); *see* Beer Institute Aff. ¶ 8.

Accordingly, Defendants' decision to withhold a "path for operation of the new statute," Appx021, and "flout[] their statutory obligations to promulgate regulations in a timely fashion," "resulted in some drawback claims remaining unprocessed for years," Stay Order 6. That delay caused claimants "to lose the time value of money" and deprived them of critical "working capital," relative to the drawback they reasonably relied

on when making tax-driven decisions over imports and exports. *Id.* at 6-7; Beer Institute Aff. ¶¶ 8-10, 12-14. Permitting Defendants to apply their new restrictions retroactively to strip beer producers (and others) of that revenue permanently would only magnify the "fair notice" problems discussed above, and wholly upend those claimants' long-settled expectations.

## CONCLUSION

This Court should affirm the judgment of the Court of International Trade. In the alternative, the Court should affirm the portion of the judgment holding that the new drawback restrictions cannot apply to claims filed before the restrictions' February 19, 2019 effective date.

October 14, 2020

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on October 14, 2020, I electronically filed the foregoing with the Clerk of the Court of the United States Court of Appeals for the Federal Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the CM/ECF system.

*/s/ James E. Tysse*
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## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Circuit Rule 32(a). The brief contains 7,005 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Federal Circuit Rule 32(b).

2. This brief complies with the typeface and type-styles requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6). The brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook type style.