

Beginning date	Ending date	Under-payments (percent)	Over-payments (percent)	Corporate overpayments (eff. 1-1-99) (percent)
070101 .....	123101	7	7	6
010102 .....	123102	6	6	5
010103 .....	093003	5	5	4
100103 .....	033104	4	4	3
040104 .....	063004	5	5	4
070104 .....	093004	4	4	3
100104 .....	033105	5	5	4
040105 .....	093005	6	6	5
100105 .....	063006	7	7	6
070106 .....	123107	8	8	7
010108 .....	033108	7	7	6
040108 .....	063008	6	6	5
070108 .....	093008	5	5	4
100108 .....	123108	6	6	5
010109 .....	033109	5	5	4
040109 .....	123110	4	4	3
010111 .....	033111	3	3	2
040111 .....	093011	4	4	3
100111 .....	123113	3	3	2

Dated: October 18, 2013.

THOMAS S. WINKOWSKI,  
*Acting Commissioner.*

[Published in the Federal Register, October 23, 2013 (78 FR 63238)]

**TEST METHOD FOR THE ADMINISTRATION OF  
ADDITIONAL U.S. NOTE 5 TO CHAPTER 64, HTSUS,  
CONCERNING THE CLASSIFICATION OF FOOTWEAR  
WITH TEXTILE MATERIAL ON THE OUTER SOLE**

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

**ACTION:** Final Notice of analysis for classification of footwear covered by Additional U.S. Note 5 to Chapter 64, Harmonized Tariff Schedule of the United States (“HTSUS”).

**SUMMARY:** This notice advises interested parties that U.S. Customs and Border Protection (“CBP”) has finalized its analysis for the administration of Additional U.S. Note 5 to Chapter 64, HTSUS

(“Note 5”). Notice of the proposed action was published in the *Customs Bulletin*, Vol. 47, No. 14, on March 27, 2013. Six (6) comments were received in response to the notice.

**EFFECTIVE DATE:** This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after [INSERT THE DATE OF PUBLICATION IN THE *Customs Bulletin* ].

**FOR FURTHER INFORMATION CONTACT:** Gregory Connor, Tariff Classification and Marking Branch, Regulations and Rulings, Office of International Trade, (202) 325–0025.

### **SUPPLEMENTARY INFORMATION:**

#### **Background**

On December 8, 1993, Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter “Title VI”), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are “**informed compliance**” and “**shared responsibility**.” These concepts are premised on the idea that in order to maximize voluntary compliance with customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on U.S. Customs and Border Protection (“CBP”) to provide the public with improved information concerning the trade community’s responsibilities and rights under the customs and related laws. In addition, both the trade and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. §1484), the importer of record is responsible for using reasonable care to enter, classify, and value imported merchandise, and to provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Classification under the Harmonized Tariff Schedule of the United States (“HTSUS”) is made in accordance with the General Rules of Interpretation (“GRIs”). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs 2 through 6 may then be applied in order.

Footwear is classified in Chapter 64, HTSUS. Note 4(b) to Chapter 64, HTSUS, which covers footwear, states as follows:

[T]he constituent material of the outer sole shall be taken to be the material having the greatest surface area in contact with the ground, no account being taken of accessories or reinforcements such as spikes, bars, nails protectors or similar attachments.

CBP has previously classified certain styles of footwear featuring outer soles of rubber or plastics to which textile material has been added under heading 6405, HTSUS, which provides for “[o]ther footwear”. *See, e.g.*, Headquarters Rulings Letter (HQ) 964978, dated April 18, 2002, and HQ 965751, dated November 18, 2002.

Thereafter, the U.S. International Trade Commission (ITC) conducted an investigation pursuant to Section 1205(a) of the Omnibus Competitiveness Act of 1988 (19 U.S.C. §3005(a)) (Investigation No. 1205–8) in response to a request from the Department of the Treasury regarding certain footwear featuring outer soles of rubber or plastics to which a layer of textile material has been added. The request stated that changes to the HTS would promote the uniform application of the Harmonized Commodity Description and Coding System Convention as well as alleviate unnecessary administrative burdens.

Taking into consideration comments received during the course of its investigation, the ITC issued its final report on Investigation 1205–8 on February 18, 2011, with the layover requirements of Section 1206(b) being satisfied on June 30, 2011. Based on the results of the ITC final report, Presidential Proclamation 8742 was issued on October 31, 2011, wherein the President of the United States proclaimed the enactment of certain modifications to the HTSUS, including the insertion of Additional Note 5 to Chapter 64 (“Note 5”), set forth in Investigation No. 1205–8. Presidential Proclamation 8742 was published in the **Federal Register** (76 FR 68271) on November 3, 2011.

Note 5 states as follows:

For the purposes of determining the constituent material of the outer sole pursuant to Note 4(b) to this Chapter, no account shall be taken of textile materials which do not possess the characteristics usually required for normal use of an outer sole, including durability and strength.

Accordingly, Note 5 provides the authoritative legal standard to be used in determining the classification of footwear with textile material on the outer soles. Previous rulings issued on this issue have been superseded by Note 5. CBP has the responsibility of administering this new standard.

## DISCUSSION OF COMMENTS

After taking into consideration the comments made in response to a preliminary request for input on the CBP website, CBP advised interested parties by publication in the *Customs Bulletin*, Vol. 47, No. 14, on March 27, 2013, of its proposal to recognize International Organization for Standardization (ISO) 20871, entitled “Footwear – Test Methods for Outsoles – Abrasion Resistance”, in assessing the characteristics of textile material attached to outer soles. The protocol for ISO 20871 tests the performance of footwear outer soles by taking three (3) samples from the subject outer sole and subjecting their surface areas to the specified abrading machine for testing. The samples are weighed before and after subjecting them to the abrasion testing. Unlike the tests recommended to CBP in the preliminary comments, ISO 20871 is an abrasion resistance test intended for all outer soles irrespective of material, and thus permits the application of a single test to textile material added to all types of outer soles, not merely to rubber. Results of the test are generally expressed in terms of relative mass lost.<sup>1</sup>

CBP proposed to adapt the expression of results of the ISO 20871 test such that the determination of whether textile material possesses the characteristics normally required for use of an outer sole will be based on whether the textile material subjected to ISO 20871 remains present on the samples after testing. Employing the ISO 20871 test in this manner was judged to be an appropriate, practical, and efficient means to apply the standard established by Note 5 that would yield consistent results.

Six (6) commenters responded to the proposed notice. A description of the comments received, together with CBP’s responses, is set forth below.

### *Comment:*

Two commenters expressed the idea that a finding on whether certain textile material possesses the characteristics usually required for normal use of an outer sole should be based on commercial acceptability, thus nullifying the need to determine the strength and durability in the course of CBP’s administration of Note 5.

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<sup>1</sup> ISO 20880, entitled “Footwear – Performance requirements for components for footwear – Outsoles”, is a technical report that sets forth the acceptable performance standards for footwear subject to the ISO 20871 procedure. These performance standards consist of various figures of mass lost due to the ISO 20871 test and depend on the type of footwear being tested, ranging from general purpose sports footwear to infant footwear to fashion footwear.

*CBP Response:*

We do not agree that the fact that textile appears on the outer sole of footwear at the time of importation, which may be commercially acceptable equates to a determination of the durability and strength of that textile. Moreover, Note 5 provides CBP with specific directions in how to determine the constituent material of the outer sole under Note 4(b) to Chapter 64. Neither note takes into consideration consumer preference; accordingly, CBP will also not take into consideration the commercial acceptability of textile material when determining the constituent material of outer soles of imported footwear.

*Comment:*

One commenter hypothesized that textile material added to an outer sole would necessarily protect the outer sole from abrasion and wear as compared to outer soles with no textile material, and that a proper test would be to compare the results of a sample with textile material added with the results of a sample without textile material present.

*CBP Response:*

Inherent in the commenter's statement is the presumption that the textile material cannot be considered as the outer sole material. However, the focus of Note 5 is indeed to determine whether the textile material itself is to be taken into account when identifying the constituent material of the outer sole under Note 4(b) to Chapter 64. If the textile material does not possess the characteristics usually required for normal use of an outer sole, then the textile material is simply disregarded. The effect that the textile material may or may not have on the underlying material's resistance to abrasion is irrelevant for classification purposes at the heading level.

*Commenter:*

Remarking on the specification in ISO 20871 that the sample be subjected to the abrasion machine for eighty-four revolutions, one commenter opined that such a requirement does not relate to the "wearability" of the outer sole of the footwear. Moreover, the commenter notes that the proposed test does not take into account the "age, weight and use of the wearer".

*CBP Response:*

We note that the stated purpose of ISO 20871 is to determine the resistance to abrasion of footwear outer soles, irrespective of material. Accordingly, through its acceptance within the International

Standards Organization and by its use within the footwear industry for the same purpose, the procedure set forth in the test does, in fact, measure the “wearability” of outer soles. CBP agrees with the commenter that the procedure set forth in ISO 20871 does not take into account the “age, weight and use of the wearer” of a particular type of footwear. However, we nevertheless believe that the ISO 20871 as applied above represents a reasonable basis on which to determine the strength and durability of textile outer soles.

*Comment:*

Three commenters requested clarification or objected to CBP’s proposal to presume that footwear falling under the definition of “house slippers” in Statistical Note 1(d) to Chapter 64, HTSUS, satisfy the requirements of Note 5.

*CBP Response:*

CBP’s proposal not to subject “house slippers” to the proposed laboratory testing served as an acknowledgment, based on the feedback received during the preliminary comments, that the ISO 20871 procedure would not always be a useful tool in assessing whether textile material on outer soles of footwear worn exclusively indoors satisfy the terms of Note 5. After considering the comments, CBP agrees that the definition of “house slippers” set forth in Statistical Note 1(d) to Chapter 64, HTSUS, does not accurately capture the universe of so-called “indoor footwear”. For example, a slipper - in the commercial sense - that features a textile outer sole may not meet the definition of “house slipper” in Statistical Note 1(d) to Chapter 64, HTSUS. But the textile material on the outer soles of such footwear may possess the physical characteristics usually required for normal use of footwear worn exclusively indoors even if the textile material does not survive the ISO 20871 testing procedure. Accordingly, CBP withdraws the proposal to use Note 1(d) to Chapter 64, HTSUS, in this respect. While importers may always submit data from the ISO 20871 test to illustrate the physical characteristics of textile outer soles on footwear worn exclusively indoors, CBP will determine on a case-by-case basis whether testing is required to assess whether certain articles of footwear are considered “indoor footwear” and thus do not need to be subjected to testing for the purposes of Note 5.

*Comment:*

The vast majority of commenters requested that CBP clarify the interpretation of the results to ISO 20871. Specifically, it was noted that the procedure for ISO 20871 specified that three samples should

be taken from the subject outer sole, with results expressed as the average of the mass lost from the three samples. Because CBP proposed not to make use of average mass lost from the abrasion resistance test but merely as a determination of whether textile material was present after testing, the question arose of whether the textile material must be present on all of the samples or only one of the samples.

*CBP Response:*

If textile material is present on one of the three samples taken pursuant to the ISO 20871 procedure, all of the textile material on the outer sole of the subject footwear in contact with the ground will be deemed to possess the characteristics usually required for normal use of an outer sole. Therefore textile material may be present on only one of the three samples in order for the textile material to be determined to possess the characteristics usually required for normal use of an outer sole.

*Comment:*

One commenter questioned whether importers are obliged under the duty to exercise reasonable care to subject footwear to the ISO 20871 test where the importer has judged that the textile material on the outer sole does not possess the characteristics usually required for normal use of an outer sole and thus enters the merchandise under the proper provision under heading 6402, HTSUS, or 6404, HTSUS, that references textile material which is not taken into account under the terms of Note 5.

*CBP Response:*

CBP proposed to recognize the results of ISO 20871 in assessing the physical characteristics of textile materials attached to footwear outer soles. Accordingly, importers may subject footwear, including the footwear described by the commenter, to testing in the course of exercising reasonable care. If however, an importer judges that textile material added to an outer sole of rubber or plastics obviously does not possess the physical characteristics usually required for normal use of an outer sole, we do not believe that in the course of exercising reasonable care such importer would be obliged to conduct testing in order to justify entering the merchandise under a heading in Chapter 64 other than heading 6405, HTSUS. CBP nevertheless reserves the right to request that testing be conducted or by requesting a sample for testing by the CBP Office of Laboratory and

Scientific Services by issuing a CBP Form 28 to the importer, in any situation where deemed warranted.

*Comment:*

One commenter suggested that a superior alternative to using the ISO 20871 procedure from the proposal would be to recognize results from the “Martindale Abrasion Test”, which is described by the American Society for Testing and Materials (ASTM) 4966–10 procedure, and is used for upholstery fabric. The procedure requires samples to be cut from the outer soles of footwear (only for indoor shoes or house slippers, according to one of the commenters) and rubbed across an abrasive grit paper in a variable elliptical pattern for one thousand passes.

*CBP Response:*

In the proposal, CBP explained why using a derivative of the “Martindale Abrasion Test”, SATRA TM31a, to administer Note 5 was not appropriate, because the testing protocol carries inherent problems with repeatability between laboratories, and even amongst operators within the same laboratory. In our view, the lack of precision significantly limits the utility of SATRA TM31a for the purposes of administering Note 5. As the commenter correctly notes, the proposal did not directly address the possible application of the “Martindale Abrasion Test” (ASTM 4966–10) for assessing whether textile material possesses the physical characteristics usually required for normal use of an outer sole. In any event, in light of the fact that the test is designed to test the durability of upholstery fabric (and not outer soles of footwear) it is not a viable option for the purposes of administering Note 5.

*Comment:*

One commenter took the position that the proposal to consider textile material remaining after subsection to the ISO 20871 to possess the characteristics usually required for normal use of an outer sole was “wholly unrealistic and ignores the substance and clear direction of Additional U.S. Note 5.” The commenter went on to state that the proposed standard amounted to a requirement that the textile materials possess a modicum of durability and strength to be considered as a constituent material of the outer sole as opposed to the physical characteristics usually required for normal use of an outer sole. As an alternative, the commenter suggested that CBP incorporate a testing protocol whereby the mass loss figures under ISO 20871 are collected, with a mass loss within the range of twenty-



five percent to fifty percent constituting an appropriate and rational indicator of whether the textile material possesses the characteristics usually required for normal use of an outer sole.

*CBP Response:*

There are inherent problems in utilizing mass loss figures. For instance, the figures collected would not reflect only the mass of textile lost because subjecting footwear to the ISO 20871 protocol would produce mass loss from the textile material as well as the substrate material underlying the textile. Accordingly, even if CBP could form a rational basis for determining the correct mass loss figure that would signal when a textile material possesses the characteristics usually required for normal use of an outer sole, it would be impossible to ascertain whether this figure was reached in light of the fact that the mass loss figure would account for two materials as opposed to one. Consequently, CBP will proceed with determining that textile material possesses the characteristics usually required for normal use of an outer sole if it survives the ISO 20871 test.

*Comment:*

The same commenter from the previous comment also indicated that the ISO 20871 test, when applied to outer sole samples composed of multiple materials, may abrade the sample in such a way that the materials on the outer edge of the sample may not come into proper contact with the abrader. Therefore, the commenter suggested that it is necessary to make certain that the outer sole sample is fully in contact with the specified ISO 20871 abrading material throughout the test.

*CBP Response:*

CBP agrees with the commenter that the outer sole samples must be properly prepared and the testing conducted according to the specifications established in the ISO 20871 procedure. After consultation with CBP's Office of Laboratory and Scientific Services, we have confirmed that proper adherence to the testing procedures will limit to the extent possible the chances of improper exposure of the sample to the abrader as described by the commenter. However, as mentioned in the proposal, CBP reserves the right to request that testing be conducted or to request samples in order to conduct testing on its own. Such requests via a CBP Form 28 can be made for entries of footwear that have not been subjected to testing previously or to confirm the results of testing under the ISO20871 procedure conducted by the importer prior to importation.

*Comment:*

One commenter requested that CBP clarify whether footwear featuring outer soles composed predominantly or entirely of textile material that is not attached to a rubber or plastic substrate will be subjected to laboratory testing. The commenter also cited two examples of such footwear: bowling shoes and waders with felt outer soles.

*CBP Response:*

Without regard to the specific examples mentioned by the commenter, testing under the ISO 20871 procedure will not be regarded as necessary in cases where the textile material is the only material that can possibly be the constituent material of the outer sole (i.e. where the textile material in question is not added to substrate of a second material like rubber or plastic, as mentioned by the commenter).

*Comment:*

Two commenters expressed concern that if samples collected under the ISO 20871 testing procedure possessed shallow recesses or protrusions that are commonly featured on the patterns of footwear outer soles, then such features may prevent the abrader from coming into contact with textile, thus ensuring its survival during the testing. One commenter went on to request that CBP clarify that the samples taken for the purpose of testing under ISO 20871 be flat.

*CBP Response:*

First, CBP clarifies that the three samples taken for the purposes of laboratory testing under the ISO 20871 protocol must be taken from portions of the outer sole that come into contact with the ground within the meaning of Note 4(b) to Chapter 64. CBP has not determined the depth at which point recessed material is no longer “in contact with the ground”. Such a determination will be made on a case-by-case basis. Where it is determined that the material does not come in contact with the ground, the textile material will be disregarded. Furthermore, we note that in many cases, footwear features outer soles that are patterned in their entirety, thus making the collection of a flat sample impracticable.

*Comment:*

One commenter pointed out that the proposed test would always result in textile material being present if footwear manufacturers

incorporated textile material throughout the outer sole rather than only near the outer layer of the sole.

*CBP Response:*

A footwear manufacturer theoretically could ensure that the ISO 20871 test would result in textile material remaining on the sample if it produced footwear featuring outer soles with a sufficient amount of textile material incorporated throughout the outer sole material, rather than on the surface.

**ADMINISTRATION OF NOTE 5**

After considering the responses to the proposal, CBP has determined that ISO 20871 will be recognized in assessing the characteristics of textile material attached to outer soles, taking into consideration the above clarifications regarding the test's applicability and interpretation of its results.

Accordingly, in order to demonstrate that the terms of Note 5 have been met, either as part of a request for prospective ruling under the CBP regulations (19 CFR Part 177), in response to a request for information via CBP Form 28, or attached to entry documentation, importers should present independent laboratory reports applying ISO 20871, as described above. Similarly, CBP may conduct its own testing by applying ISO 20871 on footwear samples when circumstances warrant.

This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after the date of publication in the *Customs Bulletin*.

Dated: October 18, 2013

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