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MEMORANDUM TO: David M. Spooner
Assistant Secretary
for Import Administration

FROM: Stephen J. Claeys
Deputy Assistant Secretary
for Import Administration

SUBJECT: Antidumping Duty Order on Petroleum Wax Candles from the People's Republic of China: Issues and Decision Memorandum for Final Results of the Eighth Administrative Review

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SUMMARY

We have analyzed the case and rebuttal briefs of interested parties in the eighth administrative review of the antidumping duty order ("order") on petroleum wax candles from the People's Republic of China ("PRC"). We recommend no changes to the preliminary results. See Petroleum Wax Candles from the People's Republic of China: Preliminary Results and Partial Rescission of the Eighth Administrative Review, 72 FR 26595 (May 10, 2007) ("Preliminary Results").

We recommend that you approve the positions described in the "Discussion of the Issues" section of this Issues and Decision Memorandum. Below is the complete list of the issues in this antidumping duty administrative review for which we received comments and rebuttal comments from interested parties:

Comment 1: Total Adverse Facts Available ("AFA")
Comment 2: Separate Rate Status
Comment 3: Scope of the Antidumping Duty Order
Comment 4: Retroactive Application of the Anti-Circumvention Determination

BACKGROUND:

The merchandise covered by the order are petroleum wax candles as described in the "Scope of the Order" section of the Preliminary Results.[1] The period of review ("POR") is August 1, 2005,

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[1] Additionally, on October 6, 2006, the Department of Commerce ("Department") published its final determination of circumvention of the antidumping duty order on petroleum wax candles from the PRC. See

through July 31, 2006. In accordance with section 351.309(c)(ii) of the Department's regulations, we invited parties to comment on our Preliminary Results. On June 12, 2007, Petitioner[2] and Deseado International, Ltd. ("Deseado") filed comments. On June 18, 2007, Petitioner and Deseado filed rebuttal comments.

DISCUSSION OF THE ISSUES:

Comment 1: Total Adverse Facts Available ("AFA")

Petitioner states that the Department correctly determined that the application of AFA with respect to Deseado was warranted due to Deseado's failure to provide necessary information requested by the Department and failure to report requested information in a timely manner, thus impeding the proceeding. Citing the Preliminary Results, Petitioner notes Deseado's failure to provide complete sales data as well as factors of production ("FOP") data, which Deseado entirely excluded from its responses. Petitioner notes that Deseado requested this review in August 2006,[3] and that it was not until March 19, 2007, or seven months after the initial administrative review request, that Deseado informed the Department that it was unable to provide the FOP data due to its uncooperative Chinese supplier/manufacturer. Petitioner further notes that Deseado did not provide any explanation of why this FOP data could not be provided by the supplier/manufacturer, nor did it offer any alternative forms by which it might be able to comply with the Department's requests. Petitioner contends that the record clearly shows instances of Deseado's repeated failure to provide the information necessary for the Department to calculate an antidumping duty margin. Petitioner further contends that the record evidence supports the Department's AFA determination because Deseado failed to cooperate by not acting to the best of its ability to comply with the Department's multiple requests for information and by impeding the Department's ability to calculate an antidumping duty margin. Petitioner urges the Department to continue to apply AFA to Deseado for the final results. See id.

Deseado did not submit comments on this issue.

Department's Position:

In the Preliminary Results, the Department applied total AFA to Deseado pursuant to sections 776(a)(2)(A), (B), and (C), and 776(b) of the Tariff Act of 1930, as amended ("the Act").

Later-Developed Merchandise Anticircumvention Inquiry of the Antidumping Duty Order on Petroleum Wax Candles from the People's Republic of China: Affirmative Final Determination of Circumvention of the Antidumping Duty Order, 71 FR 59075 (October 6, 2006) ("Anti-circumvention Final Determination") and accompanying Issues and Decision Memorandum. The Department determined that candles composed of petroleum wax and over 50 percent or more palm and/or other vegetable oil-based waxes (mixed-wax candles) are later-developed products of petroleum wax candles. In addition, the Department determined that mixed-wax candles containing any amount of petroleum are covered by the scope of the antidumping duty order on petroleum wax candles from the PRC.

[2] Petitioner is the National Candle Association ("NCA").

[3] See Petitioner's case brief dated June 12, 2007, at pages 5-27.

Specifically, pursuant to sections 776(a)(2)(A), (B), and (C) of the Act, we applied facts available to exports by Deseado because Deseado: (1) failed to provide information requested by the Department; (2) failed to report in a timely manner information that was requested by the Department; and (3) significantly impeded the proceeding. Additionally, we determined that, pursuant to section 776(b) of the Act, Deseado failed to cooperate by not acting to the best of its ability to comply with the Department's multiple requests for information and significantly impeded this proceeding, and that the application of AFA was warranted. As a result, we applied as AFA the rate of 108.30 percent, the highest calculated rate from any segment of this proceeding. See Preliminary Results, 72 FR at 26599. In accordance with section 776(c) of the Act, we also corroborated our selection of the 108.30 percent rate. See id.

We note that we did not receive any information or comments since the issuance of the Preliminary Results that provides a basis for reconsideration of this determination. Thus, consistent with the Preliminary Results and for the reasons set out in the Preliminary Results, we continue to find that Deseado failed to cooperate by not acting to the best of its ability to comply with the Department's requests for information and that an adverse inference is warranted, pursuant to sections 776(a)(2)(A), (B), and (C), and 776(b) of the Act. See Preliminary Results, 72 FR at 26596. Accordingly, for the final results, we continue to assign Deseado a margin of 108.30 percent.

Comment 2: Separate Rate Status

Petitioner argues that Deseado does not merit separate rate status due to various alleged contradictions within Deseado's section A and supplemental questionnaire responses that, Petitioner alleges, call Deseado's basis for separate rate status into question. Specifically, Petitioner notes that throughout the course of the review, Deseado repeatedly failed to explain discrepancies and conflicting information in its submissions, such as: (1) ownership of Deseado and the role of certain Deseado employees within the company's operations; (2) claims of non-affiliations despite documentation indicating affiliations with companies in the PRC; (3) failure or refusal to provide documentation relevant to establishing separate rate status; and (4) a questionable invoicing practice which affects Deseado's assertion that it sold subject merchandise within the POR. See Petitioner's case brief dated June 11, 2007, at 10-21.[4] Consequently, Petitioner contends that the Department cannot grant a separate rate for Deseado based on the record evidence.

Deseado challenges Petitioner's claim that its status as a Hong Kong-based company is unclear. Deseado claims that it: (1) submitted documents regarding its status as a corporation organized under the laws of Hong Kong and doing business in Hong Kong; and (2) provided its business registration certificate, proof of ownership, proof of share transfer, and tax return in its

[4] Additionally, in its case brief dated June 12, 2007, Petitioner provided several examples of the Department's supplemental questions to Deseado that were not answered by Deseado. See Petitioner's case brief dated June 12, 2007, at 22-24. Petitioner also re-submitted Deseado's website pages from its deficiency letter dated January 26, 2007, to illustrate evidence of conflicting information compared to Deseado's questionnaire responses. See id., at Attachment 1.

submission dated January 4, 2007. Deseado also contends that Petitioner's assertion that the record does not demonstrate that Deseado exported subject merchandise during the POR is groundless. Deseado notes that its sales database and invoices demonstrated both sales and exports of subject merchandise during the POR. Additionally, Deseado notes that U.S. Customs and Border Protection ("CBP") documentation submitted to the Department demonstrate that estimated retroactive antidumping duty deposits were required by CBP on entries of merchandise that Deseado exported during the POR. Consequently, Deseado argues that the record contains ample evidence that Deseado sold and exported subject merchandise during the POR and that Petitioner's argument to the contrary is inaccurate.

Department's Position:

The Department disagrees with Petitioner's argument that we are unable to make a separate rate determination with respect to Deseado's status as a company owned and operated in Hong Kong. In the Preliminary Results, the Department assigned a separate rate to Deseado because the record evidence established that Deseado was a wholly foreign-owned entity located and registered in a market economy, Hong Kong. See Preliminary Results, 72 FR at 26596.

We continue to find that Deseado is a wholly foreign-owned company in Hong Kong and is eligible for a separate rate, based on the information that Deseado submitted in its section A questionnaire response, notwithstanding Deseado's failure to provide accurate and complete sales and FOP data, resulting in our AFA determination.[5] Contrary to Petitioner's arguments regarding Deseado's ownership, the record evidence is clear that Deseado is a Hong Kong-owned and operated company. The record contains business registration certificates, share transfer agreements, tax documentation and financial statements that establish that Deseado is a Hong Kong company. See Deseado's Section A questionnaire response dated January 5, 2007, at Attachment A. Although Deseado's dates of sale from the sales database are unclear, Deseado submitted: (1) multiple invoices dated within the POR in its questionnaire responses; and (2) numerous CBP 7501 Entry Summary documents to show that it had entries of subject merchandise during the POR. Therefore, as the Department determined in the WBF Final, where a respondent company satisfies the separate-rates test, but fails to participate to the best of its ability in other aspects of the administrative review process, resulting in the application of AFA, the Department may assign the AFA rate as a separate rate. See id. Thus, the Department will continue to assign Deseado the AFA rate of 108.30 as a separate rate.

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[5] See, e.g., Amended Final Results of Antidumping Duty Administrative Review and New Shipper Reviews: Wooden Bedroom Furniture From the People's Republic of China, 72 FR 46957 (August 22, 2007) and accompanying Issues and Decision Memorandum ("WBF Final"), results unchanged from Wooden Bedroom Furniture from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review, Preliminary Results of New Shipper Reviews and Notice of Partial Rescission, 72 FR 6201, 6212 (February 9, 2007) (where the Department stated that "with respect to First Wood's Section A questionnaire responses and its information regarding separate–rate eligibility, the Department has determined that First Wood has responded fully to this part of the questionnaire. Moreover, First Wood has not declined to participate in verification and, therefore, has not impeded the proceeding with respect to the issue of its separate–rate status").

Comment 3: Scope of the Antidumping Duty Order

Deseado argues that its candles are outside the scope of the order. Deseado states that its exports were mixed-wax candles consisting of less than fifty percent petroleum wax as evidenced in Deseado's submission of original CBP 7501 documents for each relevant entry of the merchandise made during the POR. Deseado claims that these documents demonstrated that Deseado's candles entered the United States without being subject to deposit of estimated antidumping duties because, at the time of entry, the candles were not subject to the order. Deseado notes that the Department issued its Anti-circumvention Final Determination subsequent to the entry of its merchandise and the initiation of this review. Deseado argues that the anti-circumvention statute does not permit the Department to include previously excluded items within the scope of the order.

Deseado notes that in the Anti-circumvention Final Determination, the Department stated that "candles composed of petroleum wax and over fifty percent or more palm and/or other vegetable oil-based waxes are later-developed merchandise and thus, are circumventing the Antidumping Duty Order on petroleum wax candles from the People's Republic of China." See Anti-circumvention Final Determination, 71 FR at 59075. Deseado also notes that the Department determined that mixed-wax candles containing any amount of petroleum are covered by the scope of the order. Deseado notes that despite having consistently determined through various scope rulings that petroleum wax candles with less than fifty percent petroleum wax content were excluded from the order, the Department subsequently determined in the Anti-circumvention Final Determination that such candles could be included, retroactively, within the scope of the order.[6] Deseado argues that the Department's use of 19 U.S.C. § 1677j(d) for this conclusion does not authorize the inclusion of merchandise that was previously excluded from the class or kind of imported merchandise. Deseado claims that the Department has rewritten the scope of the order rather than clarifying it. Furthermore, Deseado argues that the Department cannot expand or otherwise amend an order under the guise of clarifying its coverage, particularly when it previously had ruled that the order's terms specifically excluded certain merchandise, citing to Wheatland Tube Co. v. United States, 161 F.3d 1365, 1370 (Fed. Cir. 1998) ("Wheatland"). Deseado argues that the class or kind of merchandise subject to the underlying investigation, and the consequent scope of the order, was limited to petroleum wax candles and explicitly excluded mixed wax candles. Deseado notes that the later-developed products provision of the anti-circumvention statute does not permit expansion of the order's scope. Therefore, Deseado argues that the Department should determine that Deseado's mixed wax candles are outside the scope of the antidumping duty order.

Petitioner argues that Deseado is attempting to re-litigate the Department's Anti-circumvention

[6] See, e.g., Final Scope Ruling: Antidumping Duty Order on Petroleum Wax Candles from the People's Republic of China (A-570-504); Leader Light Ltd. (December 12, 2002) and Final Scope Ruling - Antidumping Duty Order on Petroleum Wax Candles from the People's Republic of China (A-570-504), Ocean State Jobbers (December 18, 1998).

Final Determination, finding that mixed-wax candles containing any amount of petroleum wax are later-developed merchandise, thus, subject to the order. Petitioner contends that Deseado's argument is simply a thinly-veiled defense to rationalize its failure to cooperate to the best of its ability in this administrative review. Petitioner further contends that: (1) Deseado cannot collaterally attack a final determination made by the Department in an entirely separate proceeding within the instant proceeding; (2) the only permissible recourse available to Deseado, if it disagreed with the Anti-circumvention Final Determination, was to timely appeal that decision to the U.S. Court of International Trade ("CIT"); (3) the Department does not have the legal authority to reopen the anti-circumvention inquiry in this administrative review; and (4) Deseado's challenge to the Anti-circumvention Final Determination in this review is both untimely and inappropriate. Petitioner notes that in Deseado's case brief, Deseado stated that it was aware of the later-developed merchandise inquiry involving mixed-wax candles. Petitioner contends that Deseado could have participated as an interested party in that inquiry, or the appeal currently pending before the CIT.

Additionally, Petitioner argues that both the Department in the Anti-circumvention Final Determination and the International Trade Commission in the Second Sunset Review properly found mixed-wax candles were not excluded from the original order. Thus, Petitioner contends that Wheatland did not preclude the later-developed circumvention inquiry. Rather, Petitioner notes that, in this review, Wheatland is simply irrelevant. Petitioner argues that under the Department's Anti-circumvention Final Determination in the later-developed anti-circumvention inquiry, mixed-wax candles containing any amount of petroleum wax are subject to the scope of the order. Thus, Petitioner argues that even if the candles exported by Deseado are composed of mixed-wax, they clearly fall within the scope of the order. However, Petitioner argues that the final results of the instant proceeding is not the proper forum to argue the Department's final determinations from other proceedings. Therefore, Petitioner urges the Department to disregard Deseado's arguments as irrelevant and inapposite to this review.

Department's Position:

In the Anti-circumvention Final Determination, the Department made a final determination that:

> candles composed of petroleum wax and over fifty percent or more palm and/or other vegetable oil-based waxes ("mixed-wax candles") are later-developed merchandise and thus, are circumventing the antidumping duty order on petroleum wax candles from the People's Republic of China ("PRC") under the later-developed merchandise provision, pursuant to section 781(d) of the Tariff Act of 1930, as amended ("the Act"). See Notice of Antidumping Duty Order: Petroleum Wax Candles from the People's Republic of China, 51 FR 30686 (August 28, 1986) ("Order"). In addition, we determine that mixed-wax candles containing any amount of petroleum are covered by the scope of the Order.

See Anti-Circumvention Final Determination, 71 FR at 59075.

This determination was an entirely separate segment of the proceeding. The Department

considered the issues Deseado raises in the context of the anti-circumvention inquiry and may not revisit them in this administrative review. However, the Department will take the opportunity in this case to reiterate that, although Deseado claims that its exports were mixed-wax candles, the Department was unable to determine whether Deseado's actual reported sales for the POR were, in fact, for mixed-wax candles due to Deseado's repeated failure to provide a sales database with a control number ("CONNUM") which would have established wax content and percentage of wax content for each sale during the POR.[7] Secondly, Deseado's claim that Wheatland supports its argument regarding a past mixed-wax exclusion for this case is neither accurate nor relevant. In Wheatland, the Court of Appeals for the Federal Circuit ("CAFC") found that an anti-circumvention inquiry was not proper for the product at issue if it was "unequivocally excluded from the scope of the order in the first place." See Wheatland, 161 F.3d at 1371. In the Anti-Circumvention Final Determination, the Department found Wheatland to be inapplicable as follows:

> The literal language of the scope of the Order states that "**the products covered by this order are certain scented or unscented petroleum wax candles made from petroleum wax and having fiber or paper-cored wicks**." See Order, 51 FR at 30687. **Although there is consistent reference to petroleum wax candles, there is no definition of a petroleum wax**. Therefore, **unlike Wheatland Tube**, where the CAFC found that the product at issue was "clearly excluded from the scope of the order," **mixed-wax candles subject to this anticircumvention inquiry are not considered in the language of the scope of the Order**. See Wheatland Tube, 161 F.3d at 1371. Accordingly, a finding that Petitioners deliberately excluded candles made from the specific combination of petroleum wax and other waxes subject to this inquiry is not supported by Respondents' arguments and references to the literal scope of the Order.

See Anti-Circumvention Final Determination at Comment 1 (*emphasis added*).

As for Deseado's argument that the Department already excluded certain mixed wax candles in previous scope rulings, the Department stated in the Anti-Circumvention Final Determination that "the Department's prior scope ruling are not dispositive in reaching a decision under section 781(d)(1) of the Act because the factors to be considered in section 351.225(k)(1) of the Department's regulations are not the same factors as those required under section 781(d)(1) of the Act." See id. at Comment 2. The Department further stated that:

> **{A}lthough the Department recognizes that it made previous scope rulings finding certain mixed-wax candles outside the scope of the Order, it did so using an analysis guided by section 351.225(k)(1) of the Department's regulations and not section 781(d)(1) of the Act**. . . .{T}he Department

[7] See the Department's letter dated March 8, 2007, to Deseado requesting a sales database based on CONNUM-specific sales data; see also Preliminary Results at footnote 9.

> continues to find that its prior scope rulings do not prevent it from continuing this circumvention analysis under section 781(d) of the Act on mixed-wax candles. Accordingly, the Department finds that, because there were prior scope rulings on mixed-wax candles, it is not precluded, pursuant to section 781(d) of the Act, from conducting this anticircumvention inquiry. Moreover, **the Department determines that the findings of these prior scope rulings are no longer relevant because the analysis with these scope rulings, such as the Pier 1 Final Scope Ruling, have been superseded by the Department's analysis in this anticircumvention inquiry**.

See id. (*emphasis added*).

Given the Department's findings in the Anti-Circumvention Final Determination, Deseado's arguments with regard to its alleged mixed-wax candles in the context of the anti-circumvention inquiry are misplaced in the context of this administrative review. Further, as noted earlier, we were unable to determine whether Deseado's exports were mixed wax candles because of Deseado's failure to provide a sales database with a CONNUM showing wax content for each sale during the POR.

Comment 4: Retroactive Application of the Anti-Circumvention Determination

Deseado argues that, given the Department's previous rulings that mixed wax candles were outside the scope of the order, the final anti-circumvention determination should not be given retroactive effect. Deseado argues that the Department has recognized that retroactively including merchandise previously presumed to have been outside the scope of an order and not subject to suspension of liquidation is unfair, citing Final Rule: Antidumping Duties; Countervailing Duties 62 FR 27295, 27328 (May 19, 1997) ("Final Rule"). Deseado further argues that, despite the Department's regulation providing for retroactive suspension of liquidation and deposit of estimated antidumping duties, this course of action is inappropriate given the circumstances of the current proceeding, where the Department previously had affirmatively stated its position that mixed wax candles were outside the order. Deseado claims that the Department cannot retroactively change its position on the scope issue in this manner, citing to Springwater Cookie & Confections, Inc. v. United States, 20 CIT 1192, 1196 (1996) ("Springwater"). Additionally, Deseado contends that, to the extent that the Department's regulation provides for retroactive application of antidumping duties in these circumstances, it is contrary to the statutory scheme and is improper. See, e.g., California Industrial Products, Inc. v. United States, 436 F.3d 1341 (Fed. Cir. 2006) ("California Industrial").

In rebuttal, Petitioner first argues that the Department has already considered and rejected the argument that the anti-circumvention statute does not permit the Department to include previously excluded items. See Anti-circumvention Final Determination at Comment 1. However, Petitioner reiterates that, as previously noted in its case brief, a significant question exists as to whether Deseado's sales even occurred during the POR. For these reasons, Petitioner urges the Department to dismiss Deseado's argument. Secondly, Petitioner rejects

Deseado's argument with respect to the unfairness of retroactive suspension of liquidation following the Anti-circumvention Final Determination. Specifically, Petitioner notes that the Department stated in the initiation notice of the anti-circumvention inquiry that if the Department issued a preliminary affirmative determination in the later-developed anti-circumvention inquiry, it would then instruct CBP to suspend liquidation and require a cash deposit of estimated duties on the merchandise. Petitioner argues that the Department provided fair notice of the retroactive application of duties on mixed-wax candles to all parties as early as the anti-circumvention inquiry initiation notice. See Petroleum Wax Candles From the People's Republic of China: Initiation of Anticircumvention Inquiries of Antidumping Duty Order, 70 FR 10962 (March 7, 2005) ("Anti-Circumvention Initiation"). Petitioner contends that Deseado cannot now argue that it was denied fair notice.

Department's Position:

In the Anti-circumvention Final Determination, the Department determined that:

> the merchandise subject to suspension of liquidation are mixed-wax candles containing any amount of petroleum wax. Therefore, the Department finds that for this final determination it has the regulatory authority, pursuant to section 351.225(l)(3) of its regulations, to suspend liquidation and collect cash deposits on entries dating back to the date of initiation of this anticircumvention inquiry.

See Anti-Circumvention Final Determination at Comment 7.

This determination was an entirely separate segment of the proceeding. The Department already considered the issues Deseado now raises in the context of the anti-circumvention inquiry and may not revisit them in this administrative review. Additionally, the Department restated above the regulatory authority allowing the Department to retroactively apply the findings of the Anti-Circumvention Final Determination. Moreover, the Department notes that the POR for this segment is August 1, 2005, through July 31, 2006, and that the initiation of the anti-circumvention inquiry was published on March 7, 2005. See Anti-Circumvention Initiation. As such, the only entries made by Deseado and subject to this review were between August 1, 2005, and July 31, 2006. Moreover, the Department clearly stated in the initiation of the anti-circumvention inquiry that:

> The Department will not order the suspension of liquidation of entries of any additional merchandise at this time. However, in accordance with 19 CFR 351.225(l)(2), if the Department issues a preliminary affirmative determination, we will then instruct CBP to suspend liquidation and require a cash deposit of estimated duties on the merchandise.

See Anti-Circumvention Initiation, 70 FR at 10964.

Moreover, Deseado incorrectly cites Springwater as support for its argument that the Department cannot retroactively change its position on scope. In Springwater, the CIT reversed the

Department's scope ruling that candles imprinted with Christmas holly were covered by the same antidumping order underlying this segment. See Springwater, 20 CIT at 1196. The CIT found that the Department's scope ruling was not supported by substantial evidence and not consistent with its scope analyses of other Christmas candles. See id. The CIT did not discuss retroactivity in Springwater. Additionally, Deseado incorrectly cites California Industrial, which is inapposite to Deseado's assertion that the Department cannot retroactively apply antidumping duties in this case. The CIT in California Industrial dealt with a different factual scenario and legal issue: whether CBP could change its practice and deny certain duty drawback claims without first engaging in a notice and comment process. See California Industrial, 436 F.3d at 1347-1350.

Despite Deseado's references to Springwater, California Industrial, and Final Rule, we stated in the Anti-Circumvention Final Determination and restated above that the Department has the regulatory authority, pursuant to section 351.225(l)(3) of its regulations, to suspend liquidation and collect on entries dating back to the initiation. See Anti-Circumvention Final Determination at Comment 7. Moreover, exporters were put on notice for the potential retroactive application of an affirmative anti-circumvention determination when the notice of initiation in the anti-circumvention inquiry was published on March 7, 2005. See Anti-Circumvention Initiation. Therefore, as an exporter of petroleum wax candles, Deseado was effectively put on notice, before any entries were made, that it could potentially be subject to the retroactive application of an affirmative determination.

Consequently, as stated above, although the Department has considered Deseado's arguments regarding the outcome of the Anti-Circumvention Final Determination, those arguments have no relevance in the context of this administrative review.

RECOMMENDATION:

Based on our analysis of the comments received, we recommend adopting all of the above positions. If accepted, we will publish the final results of this administrative review in the Federal Register.

AGREE_____ DISAGREE_____

_____
David M. Spooner
Assistant Secretary
for Import Administration

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Date