



A-570-967, C-570-968  
Anti-Circumvention Inquiry  
**Public Document**  
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July 20, 2017

MEMORANDUM TO: Gary Taverman  
Deputy Assistant Secretary  
for Antidumping and Countervailing Duty Operations,  
performing the non-exclusive functions and duties of the  
Assistant Secretary for Enforcement and Compliance

FROM: James Maeder  
Senior Director  
performing the duties of Deputy Assistant Secretary  
for Antidumping and Countervailing Duty Operations

SUBJECT: Anti-Circumvention Inquiry Regarding the Antidumping Duty and  
Countervailing Duty Orders on Aluminum Extrusions from the  
People's Republic of China: Issues and Decision Memorandum

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## Summary

On March 21, 2016, the Department published its notice of initiation of this anti-circumvention inquiry.<sup>1</sup> On November 14, 2016, the Department of Commerce (the Department) published the *Preliminary Determination* in the anti-circumvention inquiry of the antidumping duty (AD) and countervailing duty (CVD) orders of aluminum extrusions from the People's Republic of China (PRC),<sup>2</sup> pursuant to sections 781(c) and (d) of the Tariff Act of 1930, as amended (the Act).<sup>3</sup> The products covered by this inquiry are heat-treated extruded aluminum products from the PRC that meet the chemical specifications for 5050-grade aluminum alloy, regardless of producer, exporter, or importer. The Department has analyzed the record evidence and comments submitted by the interested parties, and, based upon our analysis, we continue to find that heat-treated extruded aluminum products from the PRC that meet the chemical specifications for 5050-grade aluminum alloy, regardless of producer, exporter, or importer, constitute later-

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<sup>1</sup> See *Aluminum Extrusions from the People's Republic of China: Initiation of Anti-Circumvention Inquiry*, 81 FR 15039 (March 21, 2016) (*Initiation Notice*).

<sup>2</sup> See *Aluminum Extrusions from the People's Republic of China: Antidumping Duty Order*, 76 FR 30650 (May 26, 2011) and *Aluminum Extrusions from the People's Republic of China: Countervailing Duty Order*, 76 FR 30653 (May 26, 2011) (collectively, the *Orders*).

<sup>3</sup> See *Aluminum Extrusions from the People's Republic of China: Affirmative Preliminary Determination of Circumvention of the Antidumping and Countervailing Duty Orders and Intent To Rescind Minor Alterations Anti-Circumvention Inquiry*, 81 FR 79444 (November 14, 2016) (*Preliminary Determination*) and accompanying Preliminary Decision Memorandum (PDM).

developed merchandise pursuant to section 781(d) of the Act that is circumventing, and should be included within, the scope of the *Orders*. We are also rescinding the minor alterations anti-circumvention inquiry pursuant to section 781(c) of the Act. In addition, we are not adopting a certification requirement for importers. Below is a complete list of issues for which we received comments from parties:

1. The Department's Authority to Conduct an Anti-Circumvention Inquiry
2. Later-Developed Merchandise and Commercial Availability
3. Scope Exclusion
4. Country-Wide Ruling
5. Certification Requirement
6. Effective Cash Deposit Date

## Background

The Department published the *Preliminary Determination* in the *Federal Register* on November 14, 2016.<sup>4</sup> In the *Preliminary Determination*, the Department indicated that it would consider accepting new factual information from interested parties on a case-by-case basis.<sup>5</sup> On November 30, 2016, and January 6, 2017, after receiving approval from the Department, Regal Ideas Inc. (Regal), an importer of merchandise subject to this inquiry, submitted new factual information.<sup>6</sup> On January 9, 2017, the Department extended the final determination deadline, until April 10, 2017.<sup>7</sup> On January 18, 2017, after receiving approval from the Department, Tai Ao Aluminum Taishan Co., Ltd. (Tai Ao), a PRC exporter of merchandise subject to this inquiry, submitted new factual information.<sup>8</sup> On February 8, 2017, the Aluminum Extrusions Fair Trade Committee (the petitioner) filed rebuttal new factual information.<sup>9</sup> On April 10, 2017, we issued the briefing schedule and a draft of proposed certification language for importers of certain merchandise.<sup>10</sup> Also on April 10, 2017, the Department extended the final determination deadline, until June 29, 2017.<sup>11</sup> On April 24, 2017, we received case briefs from the petitioner, IKEA Purchasing Services (US), Inc. (IKEA),<sup>12</sup> Tai Ao, and Regal.<sup>13</sup> On April 28, 2017, we received an untimely request and submission of new factual information from Regal.<sup>14</sup> On May 1, 2017, we received rebuttal briefs from the petitioner, Regal, Tai Ao, and Endura Products, Inc.

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<sup>4</sup> See *Preliminary Determination*, 81 FR at 79444, and PDM.

<sup>5</sup> See *Preliminary Determination*, 81 FR at 79446.

<sup>6</sup> See Regal's November 30, 2016 New Factual Information Submission (Regal November 30, 2016 Submission); Regal's January 6, 2017 New Factual Information Submission (Regal NFI).

<sup>7</sup> See Letter from the Department, dated January 17, 2017.

<sup>8</sup> See Tai Ao's January 18, 2017 New Factual Information (Tai Ao NFI).

<sup>9</sup> See Petitioner's February 8, 2017 Rebuttal Factual Information (Petitioner RFI).

<sup>10</sup> See Memorandum, Anti-Circumvention Inquiry on Aluminum Extrusions from the People's Republic of China: Briefing Schedule, dated April 10, 2017 (Briefing Schedule). See Memorandum, Anti-Circumvention Inquiry on Aluminum Extrusions from the People's Republic of China: Proposed Certification Language from Importers, dated April 10, 2017 (Proposed Certification Language).

<sup>11</sup> See Letter from the Department, dated April 10, 2017.

<sup>12</sup> IKEA is an importer of merchandise subject to this inquiry.

<sup>13</sup> See Petitioner's April 24, 2017 Case Brief Submission (Petitioner Brief); see also IKEA's April 24, 2017 Case Brief Submission (IKEA Brief); see also Regal's April 24, 2017 Case Brief Submission (Regal Case Brief); see also Tai Ao April 24, 2017 Case Brief Submission (Tai Ao Case Brief).

<sup>14</sup> See Regal's April 28, 2017 Second New Factual Information Submission (Regal Second NFI).

(Endura), a U.S. producer of extruded aluminum products.<sup>15</sup> On May 1, 2017, the Department denied and rejected Regal's new factual information request and submission.<sup>16</sup> On May 19, 2017, the Department rejected Regal's rebuttal brief, because it contained certain deficiencies.<sup>17</sup> On May 23, 2017, Regal timely resubmitted its rebuttal brief correcting the deficiencies the Department had identified.<sup>18</sup> On June 29, 2017, the Department extended the final determination deadline, until July 13, 2017.<sup>19</sup> On July 13, 2017, the Department extended the final determination deadline, until July 20, 2017.<sup>20</sup>

## Scope of the Orders

The merchandise covered by the *Orders* are aluminum extrusions which are shapes and forms, produced by an extrusion process, made from aluminum alloys having metallic elements corresponding to the alloy series designations published by The Aluminum Association commencing with the numbers 1, 3, and 6 (or proprietary equivalents or other certifying body equivalents). Specifically, the subject merchandise made from aluminum alloy with an Aluminum Association series designation commencing with the number 1 contains not less than 99 percent aluminum by weight. The subject merchandise made from aluminum alloy with an Aluminum Association series designation commencing with the number 3 contains manganese as the major alloying element, with manganese accounting for not more than 3.0 percent of total materials by weight. The subject merchandise is made from an aluminum alloy with an Aluminum Association series designation commencing with the number 6 contains magnesium and silicon as the major alloying elements, with magnesium accounting for at least 0.1 percent but not more than 2.0 percent of total materials by weight, and silicon accounting for at least 0.1 percent but not more than 3.0 percent of total materials by weight. The subject aluminum extrusions are properly identified by a four-digit alloy series without either a decimal point or leading letter. Illustrative examples from among the approximately 160 registered alloys that may characterize the subject merchandise are as follows: 1350, 3003, and 6060.

Aluminum extrusions are produced and imported in a wide variety of shapes and forms, including, but not limited to, hollow profiles, other solid profiles, pipes, tubes, bars, and rods. Aluminum extrusions that are drawn subsequent to extrusion (drawn aluminum) are also included in the scope.

Aluminum extrusions are produced and imported with a variety of finishes (both coatings and surface treatments), and types of fabrication. The types of coatings and treatments applied to subject aluminum extrusions include, but are not limited to, extrusions that are mill finished (*i.e.*, without any coating or further finishing), brushed, buffed, polished, anodized (including bright-dip anodized), liquid painted, or powder coated. Aluminum extrusions may also be fabricated,

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<sup>15</sup> See Petitioner's May 1, 2017 Rebuttal Brief Submission (Petitioner Rebuttal Brief); *see also* Regal's May 1, 2017 Rebuttal Brief Submission; *see also* Tai Ao's May 1, 2017 Rebuttal Brief Submission (Tai Ao Rebuttal Brief); *see also* Endura's May 1, 2017 Rebuttal Brief Submission (Endura Rebuttal Brief).

<sup>16</sup> See Letter from the Department, dated May 1, 2017.

<sup>17</sup> See Letter from the Department, dated May 19, 2017.

<sup>18</sup> See Regal's May 23, 2017, Rebuttal Brief Submission (Regal Rebuttal Brief).

<sup>19</sup> See Letter from the Department, dated June 27, 2017; *see also* Memorandum, Anti-Circumvention Inquiry on Aluminum Extrusions from the People's Republic of China: Correction of Extension of Final, dated June 29, 2017.

<sup>20</sup> See Letter from the Department, dated July 13, 2017.

*i.e.*, prepared for assembly. Such operations would include, but are not limited to, extrusions that are cut-to-length, machined, drilled, punched, notched, bent, stretched, knurled, swedged, mitered, chamfered, threaded, and spun. The subject merchandise includes aluminum extrusions that are finished (coated, painted, etc.), fabricated, or any combination thereof.

Subject aluminum extrusions may be described at the time of importation as parts for final finished products that are assembled after importation, including, but not limited to, window frames, door frames, solar panels, curtain walls, or furniture. Such parts that otherwise meet the definition of aluminum extrusions are included in the scope. The scope includes the aluminum extrusion components that are attached (*e.g.*, by welding or fasteners) to form subassemblies, *i.e.*, partially assembled merchandise unless imported as part of the finished goods ‘kit’ defined further below. The scope does not include the non-aluminum extrusion components of subassemblies or subject kits.

Subject extrusions may be identified with reference to their end use, such as fence posts, electrical conduits, door thresholds, carpet trim, or heat sinks (that do not meet the finished heat sink exclusionary language below). Such goods are subject merchandise if they otherwise meet the scope definition, regardless of whether they are ready for use at the time of importation.

The following aluminum extrusion products are excluded: aluminum extrusions made from aluminum alloy with an Aluminum Association series designations commencing with the number 2 and containing in excess of 1.5 percent copper by weight; aluminum extrusions made from aluminum alloy with an Aluminum Association series designation commencing with the number 5 and containing in excess of 1.0 percent magnesium by weight; and aluminum extrusions made from aluminum alloy with an Aluminum Association series designation commencing with the number 7 and containing in excess of 2.0 percent zinc by weight.

The scope also excludes finished merchandise containing aluminum extrusions as parts that are fully and permanently assembled and completed at the time of entry, such as finished windows with glass, doors with glass or vinyl, picture frames with glass pane and backing material, and solar panels. The scope also excludes finished goods containing aluminum extrusions that are entered unassembled in a “finished goods kit.” A finished goods kit is understood to mean a packaged combination of parts that contains, at the time of importation, all of the necessary parts to fully assemble a final finished good and requires no further finishing or fabrication, such as cutting or punching, and is assembled “as is” into a finished product. An imported product will not be considered a “finished goods kit” and therefore excluded from the scope of the *Orders* merely by including fasteners such as screws, bolts, *etc.* in the packaging with an aluminum extrusion product.

The scope also excludes aluminum alloy sheet or plates produced by other than the extrusion process, such as aluminum: products produced by a method of casting. Cast aluminum products are properly identified by four digits with a decimal point between the third and fourth digit. A letter may also precede the four digits. The following Aluminum Association designations are representative of aluminum alloys for casting: 208.0, 295.0, 308.0, 355.0, C355.0, 356.0, A356.0, A357.0, 360.0, 366.0, 380.0, A380.0, 413.0, 443.0, 514.0, 518.1, and 712.0. The scope also excludes pure, unwrought aluminum in any form.

The scope also excludes collapsible tubular containers composed of metallic elements corresponding to alloy code 1080A as designated by The Aluminum Association where the tubular container (excluding the nozzle) meets each of the following dimensional characteristics: (1) length of 37 millimeters (“mm”) or 62 mm, (2) outer diameter of 11.0 mm or 12.7 mm, and (3) wall thickness not exceeding 0.13 mm.

Also excluded from the scope of these *Orders* are finished heat sinks. Finished heat sinks are fabricated heat sinks made from aluminum extrusions the design and production of which are organized around meeting certain specified thermal performance requirements and which have been fully, albeit not necessarily individually, tested to comply with such requirements.

Imports of the subject merchandise are provided for under the following categories of the Harmonized Tariff Schedule of the United States (HTSUS):

6603.90.8100, 7616.99.51, 8479.89.94, 8481.90.9060, 8481.90.9085, 9031.90.9195, 8424.90.9080, 9405.99.4020, 9031.90.90.95, 7616.10.90.90, 7609.00.00, 7610.10.00, 7610.90.00, 7615.10.30, 7615.10.71, 7615.10.91, 7615.19.10, 7615.19.30, 7615.19.50, 7615.19.70, 7615.19.90, 7615.20.00, 7616.99.10, 7616.99.50, 8479.89.98, 8479.90.94, 8513.90.20, 9403.10.00, 9403.20.00, 7604.21.00.00, 7604.29.10.00, 7604.29.30.10, 7604.29.30.50, 7604.29.50.30, 7604.29.50.60, 7608.20.00.30, 7608.20.00.90, 8302.10.30.00, 8302.10.60.30, 8302.10.60.60, 8302.10.60.90, 8302.20.00.00, 8302.30.30.10, 8302.30.30.60, 8302.41.30.00, 8302.41.60.15, 8302.41.60.45, 8302.41.60.50, 8302.41.60.80, 8302.42.30.10, 8302.42.30.15, 8302.42.30.65, 8302.49.60.35, 8302.49.60.45, 8302.49.60.55, 8302.49.60.85, 8302.50.00.00, 8302.60.90.00, 8305.10.00.50, 8306.30.00.00, 8414.59.60.90, 8415.90.80.45, 8418.99.80.05, 8418.99.80.50, 8418.99.80.60, 8419.90.10.00, 8422.90.06.40, 8473.30.20.00, 8473.30.51.00, 8479.90.85.00, 8486.90.00.00, 8487.90.00.80, 8503.00.95.20, 8508.70.00.00, 8515.90.20.00, 8516.90.50.00, 8516.90.80.50, 8517.70.00.00, 8529.90.73.00, 8529.90.97.60, 8536.90.80.85, 8538.10.00.00, 8543.90.88.80, 8708.29.50.60, 8708.80.65.90, 8803.30.00.60, 9013.90.50.00, 9013.90.90.00, 9401.90.50.81, 9403.90.10.40, 9403.90.10.50, 9403.90.10.85, 9403.90.25.40, 9403.90.25.80, 9403.90.40.05, 9403.90.40.10, 9403.90.40.60, 9403.90.50.05, 9403.90.50.10, 9403.90.50.80, 9403.90.60.05, 9403.90.60.10, 9403.90.60.80, 9403.90.70.05, 9403.90.70.10, 9403.90.70.80, 9403.90.80.10, 9403.90.80.15, 9403.90.80.20, 9403.90.80.41, 9403.90.80.51, 9403.90.80.61, 9506.11.40.80, 9506.51.40.00, 9506.51.60.00, 9506.59.40.40, 9506.70.20.90, 9506.91.00.10, 9506.91.00.20, 9506.91.00.30, 9506.99.05.10, 9506.99.05.20, 9506.99.05.30, 9506.99.15.00, 9506.99.20.00, 9506.99.25.80, 9506.99.28.00, 9506.99.55.00, 9506.99.60.80, 9507.30.20.00, 9507.30.40.00, 9507.30.60.00, 9507.90.60.00, and 9603.90.80.50.

The subject merchandise entered as parts of other aluminum products may be classifiable under the following additional Chapter 76 subheadings: 7610.10, 7610.90, 7615.19, 7615.20, and 7616.99, as well as under other HTSUS chapters. In addition, fin evaporator coils may be classifiable under HTSUS numbers: 8418.99.80.50 and 8418.99.80.60. While HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of these *Orders* is dispositive.

## Merchandise Subject to the Anti-Circumvention Inquiry

The products covered by this inquiry are heat-treated extruded aluminum products from the PRC that meet the chemical specifications for 5050-grade aluminum alloy (inquiry merchandise), regardless of producer, exporter, or importer.<sup>21</sup>

The petitioner argues that the scope of the *Orders* “creates an overlap between the chemical composition standards {in that} there is a narrow window in which a 5xxx-series alloy may and does exist that is comprised of more than one percent but less than two percent magnesium by weight{,}” and that “{i}n order to use 5xxx-series alloy (*i.e.*, 5050 alloy) in an extrusion application,...the metal would have to be heat-treated to achieve the mechanical properties that make 6xxx-series alloy so attractive for extrusion applications{.}”<sup>22</sup> Thus, the petitioner maintains that the aluminum alloy extrusion products at issue are manipulated in two ways to evade the scope of the *Orders*: First, the billet producer must create a precise ratio of silicon to magnesium to result in an alloy that satisfies the chemical composition limits of a 5050 alloy, but behaves and is extrudable like an in-scope 6xxx-series alloy.<sup>23</sup> Second, once the alloy is subject to a heat-treatment tempering process, this allows the extruded alloy to achieve the desired tensile strength to mimic the functionality of in-scope 6xxx-series alloy.<sup>24</sup> The petitioner argues that The Aluminum Association, the certifying body for the domestic aluminum industry, does not currently recognize heat-treatment as a tempering process for 5050-grade aluminum alloy, which is historically tempered through strain-hardening and/or cold-working processes.<sup>25</sup> Rather, The Aluminum Association recognizes heat-treatment as a tempering process for 6xxx-series alloy.<sup>26</sup> In short, the petitioner alleges that inquiry merchandise is subject to chemical and mechanical manipulation, *i.e.*, tempering, which results in circumvention of the *Orders*.

## Discussion of the Issues

### Comment 1: The Department’s Authority to Conduct an Anti-Circumvention Inquiry

Regal’s Arguments:<sup>27</sup>

- The Department lacks authority to expand the scope of the *Orders* to include series 5xxx aluminum extrusions, which were not part of the International Trade Commission (ITC)’s injury investigation.
- Neither the Department, nor the petitioner, may use an anti-circumvention proceeding to place non-subject merchandise under the scope of an order, or to bypass the requisite

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<sup>21</sup> Metallurgists state that the heat treatment is necessary, while maintaining a necessary magnesium to silicon ratio, to create  $Mg_5Si_6$  in the alloy to make it malleable enough to not impact the extrusion process’ speed, productivity, and per-unit production cost. See Letter to the Secretary, “Aluminum Extrusions from the People’s Republic of China: Resubmission of Circumvention Inquiry Request Pursuant to the Department’s Request,” dated December 30, 2015 (Petitioner’s Resubmission of Circumvention Inquiry), at 45-48, Exhibit 23, and Exhibit 26.

<sup>22</sup> *Id.*, at 40.

<sup>23</sup> *Id.*, at 42-44.

<sup>24</sup> *Id.*, at 42-45

<sup>25</sup> *Id.*, at 46-47.

<sup>26</sup> *Id.*, at Exhibit 21.

<sup>27</sup> See Regal Case Brief, at 1-2, 11-17.



affirmative injury determination that must be made prior to the imposition of AD and CVD orders.

- In its January 6, 2017, submission, Regal thoroughly explained and documented the numerous instances where the petitioner intentionally limited the underlying investigation to aluminum extrusions manufactured with series 1, 3, and 6 aluminum alloy, and specifically excluded aluminum extrusions manufactured with series 5 aluminum alloy.<sup>28</sup> These numerous examples also demonstrate that series 5xxx aluminum extrusions were not part of the underlying ITC injury determination since they were not covered by the scope of the *Orders*.
- The Department's decision to unlawfully expand the scope of the *Orders* presents serious legal and policy concerns, as such expansion would allow the petitioner to narrowly define the scope of AD/CVD investigations for a favorable injury determination, and then include additional products once the order is in place.
- The courts have been clear that the Department cannot expand the scope of an order once it is issued, and an order must be supported by an ITC injury determination.<sup>29</sup>
- The Department cannot include products specifically excluded from the *Orders* into the scope *ex post facto*.

#### Petitioner's Rebuttal Arguments:<sup>30</sup>

- The Department's preliminary finding is a proper interpretation of the *Orders* to prevent duty evasion.
- Section 781(d) of Tariff Act of 1930, as amended (the Act) gives the Department express authority to find that a product developed after the initiation of the AD and CVD investigations can be covered by the scope, despite not being included in the petitions for the investigations. A separate AD/CVD determination by the Department or injury determination by the ITC is not needed.
- Section 781 of the Act dictates when the Department notifies the ITC (*i.e.*, of a significant technological advance or significant alteration of an earlier product). The ITC may consult with the Department after receiving any notice and provide advice if inclusion of merchandise would be inconsistent the ITC's affirmative determination.
- The Department did not find a significant technological advance or significant alteration of an earlier product and did not need to notify the ITC. Thus, contrary to Regal's claims, the Department is not ignoring the need to have an injury determination, but has followed statutory procedures.
- The 5050 series aluminum extrusions were developed to replace in-scope 6xxx series merchandise and have been determined to be the same class and kind as in-scope 6xxx series merchandise. This means the original injury determination is applicable for the this finding.

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<sup>28</sup> See Regal Case Brief at 2, 12-13, citing Regal NFI at 8-14 and accompanying Exhibits.

<sup>29</sup> See Regal Case Brief, at 1-2, 11-17, citing *Wheatland Tube Co. v. United States*, 973 F. Supp. 149 (Ct. Int'l Trade 1997), *aff'd*, 161 F.3d 1365 (Fed. Cir. 1998) (*Wheatland Tube*); *A.L. Patterson, Inc. v. United States*, 585 Fed. Appx. 778 (Fed. Cir. 2014) (*AL Patterson*); and *Fedmet Resources Corporation v. United States*, 755 F.3d 912 (Fed. Cir. 2014) (*Fedmet*).

<sup>30</sup> See Petitioner Rebuttal Brief, at 3-7.

- The cases that Regal references in its case brief pertain to scope inquiries, not anti-circumvention inquiries, which are fundamentally different. Under section 781(d) of the Act, the Department determines whether the merchandise at issue, which falls outside the literal scope of the *Orders*, was commercially available at the time of initiation of the investigations at issue and whether the later-developed merchandise meets five separate criteria. Under 19 CFR 351.225(k), the Department determines whether a product is within the literal scope of the *Orders*, while considering descriptions of merchandise in the petitions, the initial investigations, and determinations by the Department and the ITC.
- The Department and courts have recognized the distinction between scope inquiries and anti-circumvention inquiries, and as such, Regal’s claims that 5050 aluminum extrusions cannot be determined to be included within the scope of the *Orders* are misplaced.<sup>31</sup>
- The petitioner is not “gaming the system.” The petitioner could not have intentionally excluded 5050 aluminum extrusions from the scope of the *Orders* in an attempt to obtain an affirmative injury determination because 5050 aluminum extrusions simply did not exist at the time of the investigation.

### Department’s Position:

We disagree with Regal’s contentions that the Department unlawfully expanded the scope of the *Orders*, and that the Department may not use the circumvention law to find that merchandise not covered by the literal scope of an AD or CVD order should be included within the scope of an order. As an initial matter, although Regal’s case brief contains arguments relating to series 5xxx aluminum extrusions, we note that the instant anti-circumvention proceeding only relates to the inquiry merchandise described above, and does not cover all series 5xxx aluminum extrusions. Furthermore, we find that the Department has the authority to conduct this anti-circumvention inquiry under section 781 of the Act. Once an AD or CVD order has been issued, this statutory provision is available to address possible circumvention of an existing order. Section 781(a)-(d) of the Act provides that the Department may find circumvention of an AD or CVD order when merchandise is: (a) completed or assembled in the United States; (b) completed or assembled in other foreign countries; (c) altered in a minor way; or (d) developed after the initiation of the investigation.<sup>32</sup>

The Department conducts a scope inquiry to determine whether a product is within the scope of an order, relying on its regulations, 19 CFR 351.225(k)(1) and (2).<sup>33</sup> As recognized by the courts, the Department conducts an anti-circumvention proceeding to determine whether it may lawfully include within the scope of an AD or CVD order merchandise which falls outside the literal scope of the order.<sup>34</sup>

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<sup>31</sup> See Petitioner Rebuttal Brief at 8, citing *Target Corp. v. United States*, 609 F.3d 1352 (Fed. Cir. 2010) (*Target III*).

<sup>32</sup> See also 19 CFR 351.225(j).

<sup>33</sup> See *Target III*, 609 F.3d at 1362 (Conventional scope inquiries are different from anticircumvention inquiries because they are separate proceedings and address separate issues.”)

<sup>34</sup> See *Target III*, 609 F.3d at 1362 (“The court {has previously} recognized that merchandise that might otherwise fall outside the literal scope of the order may be included within the scope pursuant to the minor alterations provision.”) (citing *Wheatland Tube*, 161 F.3d at 1371); *Deacero S.A. De C.V. v. United States*, 817 F.3d 1332, 1337-38 (Fed. Cir. 2016) (*Deacero*) (“In order to effectively combat circumvention of antidumping duty orders,



In this instance, the Department determines that inquiry merchandise is circumventing the *Orders*, pursuant to section 781(d) of the Act. The legislative history of section 781(d) of the Act establishes that Congress intended for this section to address situations where the product was not developed at the time of the investigation(s). Specifically, the Conference Report on H.R. 3, Omnibus Trade and Competitiveness Act of 1988 (H.R. 3 Conference Report) states: “The Senate amendment addresses the application of outstanding antidumping and countervailing duty orders to merchandise that is essentially the same merchandise subject to an order, but was developed after the original investigation was initiated.”<sup>35</sup>

In the *Preliminary Determination*, the Department analyzed whether, and determined that, inquiry merchandise was not commercially available at the time of the investigations. Furthermore, in accordance with sections 781(d)(1)(A)-(E) of the Act, the Department considered whether inquiry merchandise and subject merchandise had the same (or similar): A) general physical characteristics, B) expectations of the ultimate purchasers, C) ultimate uses; D) channels of trade; and E) advertisement and display.<sup>36</sup> As such, the Department preliminarily determined that inquiry merchandise was later-developed merchandise circumventing the *Orders*.<sup>37</sup> As discussed below under Comment 2, we continue to find inquiry merchandise is circumventing the *Orders*, in accordance with section 781(d) of the Act. Based on the legislative history, the later-developed anti-circumvention inquiry provision was intended for the Department to consider this sort of scenario. Therefore, we disagree with Regal’s argument that the Department cannot use the circumvention law to find otherwise non-subject merchandise to be covered by the scope of an order.

Regal argues that the petitioner chose not to include 5xxx series aluminum extrusions in the scope of the *Orders*, as evidenced by the scope language and the record of the investigations. However, as noted above, these arguments relate to series 5xxx aluminum extrusions more generally, while the instant anti-circumvention proceeding only relates to the inquiry merchandise described above, and does not cover all series 5xxx aluminum extrusions. Moreover, as discussed in further detail below under Comments 2 and 3, we find with respect to the later-developed merchandise inquiry before us, the fact that inquiry merchandise is subject to an express exclusion in the scope, rather than merely falling outside the *Orders*’ general scope language, and, further, that it was not contemplated by the petition or investigation, is of no moment; the merchandise was not commercially available at the time of the initiation of the investigations and, thus, at that time, was contemplated by neither the scope language nor the investigation documents.<sup>38</sup> For these same reasons, we disagree that this is an improper inclusion of products specifically excluded from the scope of the *Orders*.

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Commerce may determine that certain types of articles are within the scope of a duty order, even when the articles do not fall within the order’s literal scope. The Tariff Act identifies four articles that may fall within the scope of a duty order without unlawfully expanding the order’s reach{.}” (internal citations omitted).

<sup>35</sup> See H.R. Conf. Rep. No. 100-576, at 601 (1988).

<sup>36</sup> See *Preliminary Determination*, 81 FR at 79446, and PDM.

<sup>37</sup> *Id.*

<sup>38</sup> See *Target III*, 609 F.3d at 1362 (“{A}s later-developed merchandise was not present in the market at the time of the LTFV investigation the Candles Antidumping Order could not have addressed mixed-wax candles.”)

With respect to Regal's argument that a separate affirmative injury determination is required, we disagree. In accordance with section 781(d)(1) of the Act, the Department, after taking into account any advice provided by the ITC under section 781(e) of the Act, where applicable, may include later-developed merchandise within the scope of an order. Section 781(e)(1)(C) of the Act provides that the Department shall notify the ITC of its proposed inclusion of relevant merchandise in an order pursuant to section 781(d) with respect to any later-developed merchandise which incorporates a significant technological advance or significant alteration of an earlier product. In the *Preliminary Determination*, the Department explained that not all types of merchandise which are found to be later-developed require notification to the ITC – only those which the Department has determined incorporate a significant technological advance or significant alteration of an earlier product—an interpretation affirmed by the CIT.<sup>39</sup> This interpretation is further supported by the H.R. 3 Conference Report, which recognized that “the anti-circumvention provisions are intended to address efforts to import the same class or kind of merchandise in slightly modified form and should typically fall within the ITC’s prior finding of injury.”<sup>40</sup>

Furthermore, in the *Preliminary Determination* the Department determined, based on the evidence before it, that the manipulation in chemical composition and heat-treatment of 5050 aluminum alloy does not constitute a significant technological advancement or a significant alteration of in-scope merchandise. Thus, the Department did not notify the ITC of its *Preliminary Determination*.<sup>41</sup> Importantly, Regal does not challenge the Department’s findings regarding significant technological advancement or significant alteration of in-scope merchandise. Regal’s argument, therefore, ignores the express statutory framework and fails to otherwise challenge the Department’s finding that notification to the ITC is not required under these circumstances.

In light of the above, we agree with the petitioner that Regal’s reliance on *Wheatland Tube*, *AL Patterson*, and *Fedmet* for the proposition that the Department may not expand the scope of the *Orders* in this later-developed merchandise anti-circumvention inquiry is misplaced. Regal cites *Wheatland Tube* as support of its argument that the petitioner belatedly urged a broader application of the scope after the implementation of the *Orders* without an applicable injury determination in place. *Wheatland Tube* involved a minor alteration circumvention proceeding under section 781(c) of the Act, in which the product at issue was known at the time of the investigation, but specifically excluded from the scope of the order. In contrast, in the instant case, the inquiry merchandise was developed after the initiation of the investigations.

Regal also cites *Fedmet*, which concerned a scope ruling under 19 CFR 351.225(k) on a product that was specifically excluded from the orders and was commercially available at the time of the investigations, as further support of its argument that the petitioner belatedly urged a broader application of the scope after the implementation of the *Orders* without an applicable injury

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<sup>39</sup> See PDM at 6 (citing Redetermination Pursuant to Court Remand Order in *Target Corporation v. United States*, 578 F. Supp. 2d 1369 (CIT 2008) (*Target I*) (November 7, 2008) at 8-10 (Candles Anticircumvention Remand), available at <http://enforcement.trade.gov/remands/08-101.pdf>; *Target I*, 578 F. Supp. 2d at 1377-78).

<sup>40</sup> See H.R. Conf. Rep. No. 100-576, at 602-03 (1988).

<sup>41</sup> See PDM, at 13.

determination in place. In contrast to *Fedmet*, the instant case involves an anti-circumvention inquiry, where the inquiry merchandise was developed after the initiation of the investigations.

Regal also cites *AL Patterson*, in which the court determined that the Department could not impose antidumping duties on coil rod because coil rod was not included in the ITC injury decision, to support its claim that an ITC injury determination is necessary in the current proceeding. However, *AL Patterson* involved a scope ruling under 19 CFR 351.225(k), which is different than the current inquiry, which is an anti-circumvention inquiry, and, therefore, not applicable.

Thus, in light of the above, we disagree with Regal that the Department lacks authority to include inquiry merchandise within the scope of the *Orders*.

## **Comment 2: Later-Developed Merchandise and Commercial Availability**

Petitioner's Arguments:<sup>42</sup>

- The record conclusively demonstrates that series 5050 aluminum extrusions were not commercially available prior to the initiation of the investigations and were later developed to evade duties.
- Chinese producers and exporters took advantage of the scope language and the chemical composition overlap between series 5050 aluminum and series 6xxx aluminum to create 5050 aluminum extrusions.
- A declaration from an importer shows that customers had been sourcing series 6xxx extrusions after the imposition of the *Orders*. It then admitted that the 5050 alloy version was developed specifically for the purpose of avoiding duties.
- After the imposition of the *Orders*, product brochures from Columbia Aluminum Products LLC (Columbia) began indicating that its door thresholds could be produced from either series 6063 or 5050 aluminum alloy. In the past, Columbia's brochures listed only series 6063 extruded aluminum.
- Domestic producers have been asked to provide price quotes for aluminum extrusion products using series 6xxx aluminum alloy to compete against products made from inquiry merchandise.
- Chemical composition tests for two products identical in appearance, one from 2009 and one from 2015, show that the products' chemical composition changed from 6xxx series aluminum alloy to 5050 series aluminum alloy.
- China Zhongwang Holdings Ltd. and its affiliates (collectively, Zhongwang) failed to cooperate in the proceeding, while the record clearly indicates that it started exporting inquiry merchandise after the imposition of the *Orders*.
- The overall physical characteristics, expectations of ultimate users, channels of trade, advertisement and display of inquiry merchandise are the same as for in-scope 6xxx series aluminum extrusions and, therefore, inquiry merchandise meets the statutory requirements set forth in section 781(d) of the Act.

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<sup>42</sup> See Petitioner Brief, at 7-12.

Tai Ao's Arguments and Tai Ao's Rebuttal Arguments:<sup>43</sup>

- Series 5050 aluminum extrusions are not later-developed merchandise.
- Tai Ao was extruding series 5052 aluminum prior to the initiation of the investigations, using a process which is identical to the process used for series 5050 aluminum extrusions.<sup>44</sup>
- The Standard Specifications for Urban Infrastructure Works (SSUIW), published by the Australian government, shows that series 5050 extruded aluminum products have been commercially available since 2002. The SSUIW also references the "T" treatment, which is a "thermal treatment" used by extruded aluminum products.<sup>45</sup>
- The petitioner's industry expert in its rebuttal factual information submission (*i.e.*, Luke Hawkins, at Capral Aluminum)<sup>46</sup> has only nine years of experience compared to the 14 year old SSUIW and is not qualified to know whether 5050 extrusions were used in Australia for lateral supports on road signs in 2002.

Regal's Arguments and Regal's Rebuttal Arguments:<sup>47</sup>

- The question of whether 5050 alloy was used for "rolling and plate applications" is not relevant because it was available at the time of the *Orders*. This is not an instance of a minor alteration to chemical composition of subject merchandise, but rather, a product that is specifically excluded from the *Orders*, similar to door thresholds made of steel.
- The fact that The Aluminum Association did not recognize heat-treating series 5050 alloys at the time of the investigations does not mean that it had not occurred, only that there had been no request to recognize the process formally. The Aluminum Association simply notes that no TX type tempers of 5005 or 5050 have been registered with them and the Aluminum Association teal paper, referenced by the petitioner, does not preclude this tempering. Heat treatment or processing of aluminum alloys does not impact the classification of an aluminum extrusion, nor alter it from a 5xxx series to a 6xxx series alloy.
- Record evidence shows that series 5xxx aluminum extrusions are not a new product and were, in fact, commercially available at the time of the investigations. In the petitions, the petitioner acknowledged the existence of series 5xxx aluminum extrusions, *i.e.*, 5083, 5086, 5154, and 5454, thereby confirming the existence of series 5xxx aluminum extrusions at the time of investigations. Tai Ao provided evidence that it produced series 5052 aluminum extrusions prior to May 26, 2011. The SSUIW, dated September 2002, demonstrates that 5050 aluminum extrusions were in commercial use before the investigations.
- The declaration from an importer proves nothing as to the commercial availability at the time of investigations elsewhere in the industry, or with other Chinese companies.
- The Columbia brochures have been hand-picked and do not disprove that inquiry merchandise was otherwise commercially available.

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<sup>43</sup> See Tai Ao Case Brief, at 1-3; *see also* Tai Ao Rebuttal Brief, at 1-2.

<sup>44</sup> See Tai Ao NFI, at 2-3 and Exhibit 1.

<sup>45</sup> *Id.*, at 3 and Exhibit 2.

<sup>46</sup> See Petitioner RFI, at Exhibit 5.

<sup>47</sup> See Regal Case Brief, at 4-11 and 17-23; *see also* Regal Rebuttal Brief, at 2-14.

- Series 5050 aluminum extrusions are physically different from in-scope subject merchandise because the chemical content of the aluminum alloys varies between each Aluminum Association series.
- Regarding expectations of the ultimate users and ultimate use of the product, purchasers obtain aluminum extrusions based upon the chemical composition, and it is not uncommon for aluminum extrusions of different aluminum alloy series to be used for similar applications.
- Regarding channels of trade, other non-subject extrusions are also used for similar purposes as supported by evidence placed on the record by Regal.
- Regarding advertising and display, both subject and other non-subject extrusions would be sold as aluminum extrusions.
- The administrative record demonstrates that Zhongwang did not respond, because it no longer manufactures inquiry merchandise. The Department has failed to solicit information from additional Chinese companies. The Department should examine whether it was possible to produce inquiry merchandise prior to the investigations.
- The Department's prior scope rulings (*e.g.*, Kota Scope Ruling, Trending Imports Scope Ruling and Sinobec Scope Ruling)<sup>48</sup> demonstrate that tempering (*e.g.*, heat treatment) is not a defining characteristic of the scope of the *Orders* and is not relevant to this proceeding. In addition, these scope rulings were made under 19 CFR 351.225(k)(1) and retroactively resolved the issue of whether the *Orders* covered inquiry merchandise at the time the *Orders* were issued. The Department cannot rule a product outside-the-scope in one proceeding and in-scope in another proceeding.

Petitioner's Rebuttal Arguments.<sup>49</sup>

- There is substantial evidence on the record establishing that series 5050 aluminum extrusions were developed exclusively to evade duties, and Regal and Tai Ao have failed to provide any evidence to the contrary.
- Regal's and Tai Ao's arguments pertaining to 5xxx series aluminum extrusions in general are inapposite, inappropriate, and irrelevant.
- The Department provided parties sufficient opportunity to submit new factual information on the record to show commercial availability.
- The patent Regal placed on the record only supports the conclusion that series 5050 aluminum extrusions were not commercially available at the time of the investigations, as the patent was granted in 2015. Additionally, the patent pertains to series 5xxx alloy used in armor plate with a magnesium content well above that of 5050 alloy.
- Regal's claim that a product cannot circumvent the *Orders* if it is made from non-subject merchandise, *e.g.*, a door threshold made of steel vs. a door threshold made of aluminum, clearly illustrates that Regal does not understand the statutory framework for anti-

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<sup>48</sup> See Memorandum, Preliminary Scope Ruling on Trending Imports LLC's 5050 Series Products, dated March 14, 2016 (Trending Imports Scope Ruling); *see also* Memorandum, Final Scope Ruling on Aluminum Rails for Showers and Carpets, dated September 6, 2012 (Sinobec Scope Ruling); *see also* Memorandum to the File, "Antidumping and Countervailing Duty Orders on Aluminum Extrusions from the People's Republic of China: Scope Rulings Relevant to this Proceeding," dated November 3, 2016 (Relevant Scope Rulings Memorandum) at Attachment 2 and Attachment 3.

<sup>49</sup> See Petitioner Rebuttal Brief, at 13-18.



circumvention inquiries. Regal's example is flawed; door thresholds made of steel would not meet the statutory requirements for a finding of circumvention because they have different physical characteristics than door thresholds made of aluminum (*i.e.*, they are different metals).

- Regal's argument that the existence of series 5050 aluminum in rolling plate applications is irrelevant misunderstands the key issue. The fact that 5050 was used in rolling plate applications and not aluminum extrusions demonstrates that the alloy was manipulated for use in extrusion applications.
- The SSUIW guidelines suggesting a material for the use of road signs in one city in Australia do not establish the commercial availability of heat-treated 5050 aluminum extrusions. Luke Hawkins is the general manager at Australia's largest manufacturer and distributor of aluminum profiles, and has substantial knowledge of products commercially produced and sold in Australia, which 5050 extrusions are not. Mr. Hawkins states that the mention of grade 5050 aluminum in the SSUIW appears to be in error or a reference to rolled aluminum sheet, rather than extrusions.
- Record evidence, such as product brochures, import data, industry standards, expert reports, affidavits, and website excerpts, establish that series 5050 aluminum extrusions were not commercially available prior to the initiation of the investigations and were developed after the imposition of the *Orders*.
- Tai Ao's claims regarding its series 5052 drawn tubes are irrelevant and do not establish the commercial availability of inquiry merchandise because 5052 aluminum extrusions are made from a different aluminum alloy than the aluminum alloy in inquiry merchandise.
- Regal's claims that the Trending Imports and Sinobec scope rulings establish that 5050 aluminum extrusions are not newly developed merchandise is inaccurate and false. There is no evidence in either proceeding that address the question of later-developed merchandise.

#### Endura's Rebuttal Arguments:<sup>50</sup>

- The Department correctly found in its *Preliminary Determination* that series 5050 aluminum extrusions are later-developed merchandise within the meaning of section 781(d) of the Act.
- At the time of the issuance of the *Orders*, 5050 aluminum alloy existed, but was used for specific applications such as plating or rolling, not extrusions.
- The Aluminum Association does not recognize 5050 grade aluminum extrusions.
- The later-developed merchandise provision (*i.e.*, section 781(d) of the Act) was designed to encompass the type of re-engineering and repurposing of materials to escape a scope of an order, such as inquiry merchandise.
- Series 5050 aluminum extrusions differ from other 5xxx series aluminum extrusions, because of its 1-2 percent magnesium content range. This magnesium content range makes the 5050 aluminum alloy a midpoint between "soft alloys" like 6xxx series aluminum and "hard alloys" like 5xxx series aluminum.

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<sup>50</sup> See Endura Rebuttal Brief, at 3-5.

- Series 5xxx aluminum extrusions normally have specialized applications, *i.e.*, marine, military, and aerospace applications, and are not subject to this circumvention proceeding. This proceeding applies only to series 5050 aluminum extrusions, as these extrusions were developed after the initiation of the investigations.

### Department's Position:

We continue to find that the anti-circumvention finding reached in the *Preliminary Determination* with respect to later-developed merchandise is consistent with the statute and established Department practice, and is supported by record evidence. Section 781(d)(1) of the Act provides that the Department may find circumvention of an AD or CVD order when merchandise is developed after an investigation is initiated (later-developed merchandise).<sup>51</sup> In conducting a later-developed merchandise anti-circumvention inquiry under section 781(d)(1) of the Act, the Department determines whether the merchandise under consideration is “later-developed.” In so doing, the Department examines whether the merchandise at issue was commercially available at the time of the initiation of the AD and CVD investigation.<sup>52</sup> In this regard, we define commercial availability as “present in the commercial market or fully developed, *i.e.*, tested and ready for commercial production, but not yet in the commercial market{.}”<sup>53</sup> This practice has been affirmed by the Court of International Trade (CIT) and Court of Appeals for the Federal Circuit (CAFC).<sup>54</sup>

If the Department determines that such merchandise was not commercially available at the time of the investigation and is, thus, later-developed, the Department will consider whether the later-developed merchandise is covered by the orders pursuant to the statutory factors identified in section 781(d)(1) of the Act. This analysis considers: (A) whether the general physical characteristics of the merchandise under consideration are the same as subject merchandise

<sup>51</sup> See also 19 CFR 351.225(j).

<sup>52</sup> See *Later-Developed Merchandise Anticircumvention Inquiry of the Antidumping Duty Order on Petroleum Wax Candles from the People's Republic of China: Affirmative Preliminary Determination of Circumvention of the Antidumping Duty Order*, 71 FR 32033, 32037-40 (June 2, 2006) unchanged in *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) (*Candles Anticircumvention Final*); *Candles Anticircumvention Final*, 71 FR at 59077 and accompanying Issues and Decision Memorandum at Comment 4, amended by Redetermination Pursuant to Court Remand Order in *Target Corporation v. United States*, 578 F. Supp. 2d 1369 (CIT 2008) (*Target I*) (November 7, 2008) (*Candles Anticircumvention Remand*), available at <http://enforcement.trade.gov/remands/08-101.pdf> affirmed by *Target Corp. v. United States*, 626 F. Supp. 2d 1285 (CIT 2009) (*Target II*), and *Target Corp. v. United States*, 609 F.3d 1352, 1358-1360 (Fed. Cir. 2010) (*Target III*) (holding that the Department's interpretation of later-developed, as turning on whether the merchandise was commercially available at the time of the investigation, is reasonable). See also *Erasable Programmable Read Only Memories from Japan*; *Final Scope Ruling*, 57 FR 11599 (April 6, 1992) (*EPROMs from Japan*); *Electrolytic Manganese Dioxide from Japan*; *Final Scope Ruling*, 57 FR 395 (January 6, 1992) (*EMD from Japan*); *Portable Electronic Typewriters from Japan*, 55 FR 47358 (November 13, 1990).

<sup>53</sup> See *Candles Anticircumvention Final*, 71 FR at 59077, and accompanying Issues and Decision Memorandum at Comment 4.

<sup>54</sup> See *Target I*, 578 F. Supp. 2d at 1375-76; *Target III*, 609 F.3d at 1358-60 (“{T}he later-developed merchandise provision is designed to prevent circumvention of an antidumping order by a comparable product (as determined by the *Diversified Products* analysis) to the subject merchandise. Commerce's interpretation accomplishes this objective since it reaches comparable products that emerge in the market after imposition of the antidumping order.”).

covered by the order(s); (B) whether the expectations of the ultimate purchasers of the merchandise under consideration are the same as the expectations of the ultimate purchasers of subject merchandise; (C) whether the ultimate use of the subject merchandise and the merchandise under consideration are the same; (D) whether the channels of trade of both products are the same; and (E) whether both products are advertised and displayed in a similar manner. Moreover, the statute does not indicate whether any one of these factors is dispositive. Thus, we find that because each case is highly dependent on the facts on the record, these factors must be analyzed in light of those specific facts.

In the *Preliminary Determination*, the Department analyzed and determined that inquiry merchandise was not commercially available at the time of the investigations.<sup>55</sup> Furthermore, in accordance with sections 781(d)(1)(A)-(E) of the Act, the Department determined that inquiry merchandise and subject merchandise had the same (or similar): A) general physical characteristics, B) expectations of the ultimate purchasers, C) ultimate uses; D) channels of trade; and E) advertisement and display.<sup>56</sup> In addition, the Department determined that other factors, such as that the circumstance under which the products enter the United States, the timing of entries, and the quantity of merchandise entered demonstrate that inquiry merchandise is later-developed merchandise.<sup>57</sup> The Department also based its preliminary decision, in part, on the failure of Zhongwang to respond to the Department's questionnaire, pursuant to section 776(a) and (b) of the Act.<sup>58</sup> As such, the Department preliminarily determined that inquiry merchandise was later-developed merchandise circumventing the *Orders*.<sup>59</sup> For the reasons discussed below, the Department continues to reach this finding for purposes of this final determination.

### *Commercial Availability*

In the *Preliminary Determination*, the Department analyzed whether, and determined that, inquiry merchandise was not commercially available at the time of the investigations.<sup>60</sup> In particular, the Department examined the available record evidence and determined that:

- At the time of the AD and CVD investigations on aluminum extrusions from the PRC in 2010-2011, series 5050 alloy existed but was used for rolling and plate applications through strain hardening and/or cold working processes, rather than being used for extrusions.<sup>61</sup>
- Heat-treated 5050 alloy extrusions are not recognized by The Aluminum Association<sup>62</sup> for the purposes normally associated with aluminum extrusions. Additionally, The

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<sup>55</sup> See PDM, at 8-9.

<sup>56</sup> See *Preliminary Determination*, 81 FR at 79446, and PDM at 9-12.

<sup>57</sup> See PDM, at 12-13.

<sup>58</sup> *Id.*, at 7-8.

<sup>59</sup> See *Preliminary Determination*, 81 FR at 79446.

<sup>60</sup> See PDM, at 8-9.

<sup>61</sup> See PDM, at 8; see also Petitioner's Resubmission of Circumvention Inquiry, at 54.

<sup>62</sup> The Aluminum Association maintains the standards for the aluminum industry for aluminum alloy designations, the chemical composition for the alloys, and the approved tempering methods for the different alloys. See PDM, at 8, see also Petitioner's Resubmission of Circumvention Inquiry at Exhibit 21, Exhibit 23, and Exhibit 24.

Aluminum Association did not recognize heat-treating series 5050 alloys at the time of the investigations, and still does not recognize doing so to the present day.<sup>63</sup>

- A letter from an importer of inquiry merchandise demonstrates that PRC companies developed heat-treated 5050 alloy to meet the requirements of the extrusion industry around the time of the imposition of the tariffs.<sup>64</sup>
- Product brochures from importer Columbia from 2009, 2010, and 2012 demonstrate that all of Columbia's door threshold products at that time were made from 6xxx-series aluminum alloy, *i.e.*, generally, in-scope merchandise.<sup>65</sup> However, after the issuance of the *Orders* in 2012, Columbia began marketing in its product brochures from 2015 and 2016 that its products could also be produced from 5050 alloy.<sup>66</sup> Additional evidence provided by Endura, which is proprietary, demonstrates that Columbia has now become one of the largest sources of inquiry merchandise for door thresholds and sills.<sup>67</sup>
- Endura submitted test results of a Chinese producer's product from 2009, *i.e.*, before the initiation of the investigations, which demonstrate that products from that time were made from 6xxx-series aluminum alloy.<sup>68</sup> Endura also submitted similar test results of an identical product from 2015, *i.e.*, after the initiation of the investigations, which demonstrate that the products from that time were made from 5050 aluminum alloy.<sup>69</sup>
- Endura provided evidence demonstrating that Chinese producers are actively offering inquiry merchandise to potential customers, well after the imposition of the *Orders*.<sup>70</sup>
- Zhongwang did not respond to the Department's questionnaire in which the Department asked for information pertaining to the commercial availability of Zhongwang's merchandise at the time of the investigations.<sup>71</sup>

In the *Preliminary Determination*, the Department announced that it would consider accepting new factual information on a case-by-case basis.<sup>72</sup> Several parties, including Regal, submitted new factual information; however, no evidence has been provided (discussed in detail below) which compels a finding that inquiry merchandise was commercially available prior to the initiation of the investigations.<sup>73</sup>

We disagree with Regal that the record evidence discussed above does not support a finding that inquiry merchandise was not commercially available at the time of the initiation of the investigations. First, we disagree with Regal that it is irrelevant whether 5050 alloy was used in rolling and plate applications. To the contrary, evidence on the record demonstrates that, at the

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<sup>63</sup> See PDM, at 8; *see also* Petitioner's Resubmission of Circumvention Inquiry at 54, Exhibit 21, and Exhibit 27.

<sup>64</sup> See PDM, at 8; *see also* Petitioner's Resubmission of Circumvention Inquiry at Exhibit 28 ("It was at that time that the Chinese developed the 5050 alloy that met the requirements of our industry.") Metallurgists state on the record that the heat treatment is necessary, while maintaining a necessary magnesium to silicon ratio, to create Mg<sub>5</sub>Si<sub>6</sub> in the alloy to make it fungible enough for the extrusion process. *Id.* at 45-48, Exhibit 23, and Exhibit 26.

<sup>65</sup> See PDM, at 9; *see also* Endura September 28, 2016 Circumvention Submission (Endura Submission), at 17 and Exhibit 5.

<sup>66</sup> See PDM, at 9; *see also* Petitioner's Resubmission of Circumvention Inquiry at 17 and Exhibits 3 and 5.

<sup>67</sup> See PDM, at 9; *see also* Petitioner's Resubmission of Circumvention Inquiry at 17 and Exhibit 4.

<sup>68</sup> See PDM, at 9; *see also* Petitioner's Resubmission of Circumvention Inquiry at 17 and Exhibit 1A.

<sup>69</sup> See PDM, at 9; *see also* Petitioner's Resubmission of Circumvention Inquiry at 18 and Exhibit 1A.

<sup>70</sup> See PDM, at 9; *see also* Petitioner's Resubmission of Circumvention Inquiry at 19 and Exhibit 11.

<sup>71</sup> See PDM at 7-8.

<sup>72</sup> See *Preliminary Determination*, 81 FR at 79446.

<sup>73</sup> See Regal's NFI, *see also* Tai Ao's NFI, and *see also* Petitioner's RFI.

time of the investigations, 5050 alloy was used in rolling and plate applications, which constitute a different process from extrusion applications, but not that 5050 alloy was used in extrusion applications.<sup>74</sup> The Department gave parties the opportunity to submit evidence that demonstrated that 5050 alloy was used in extrusion applications at the time of the investigations, but no party did so. We also disagree with Regal that this is an instance in which a product specifically excluded from the scope was under consideration at the time of the *Orders* – because, as demonstrated above, and as discussed further below under Comment 3, there is ample evidence that inquiry merchandise was not commercially available at the time of the investigations. Similarly, we also find Regal’s arguments concerning door thresholds made from other materials (*i.e.*, steel) to be inapposite, because these products are not before us in this anti-circumvention inquiry.

Second, Regal argues that The Aluminum Association’s failure to recognize heat-treating, *i.e.*, a T-temper, for 5050 alloys does not mean that it had not occurred, only that there had been no request at that time to formally recognize the process. Regal further argues that this does not preclude the registration of this temper for 5050 alloys. As an initial matter, the question before the Department is not whether registration of a T-temper for 5050 alloys would be precluded, as that determination is left to The Aluminum Association, which maintains the standards for the aluminum industry for aluminum alloy designations, the chemical composition for the alloys, and the approved tempering methods for the different alloys.<sup>75</sup> Rather, for purposes of this anti-circumvention inquiry, we are examining whether heat-treated 5050 alloy extrusion products were commercially available at the time of the initiation of the investigations. We note that The Aluminum Association did not recognize heat-treating series 5050 alloys at the time of the investigations.<sup>76</sup> In addition, the petitioner provided a letter from an importer of inquiry merchandise, which states that PRC companies developed heat-treated 5050 alloy to meet the requirements of the extrusion industry around the time of the imposition of the tariffs.<sup>77</sup> We note that no party submitted evidence to contradict this information. This evidence taken *in toto* supports a finding that inquiry merchandise was not commercially available at the time of the investigations.<sup>78</sup>

In addition, Regal’s argument that heat-treating series 5050 aluminum alloy does not transform it to a series 6xxx aluminum alloy is inapposite. This anti-circumvention inquiry is focused on whether inquiry merchandise is circumventing the *Orders*. It is not about whether heat-treating series 5050 aluminum alloy changes its Aluminum Association alloy classification to a series 6xxx aluminum alloy, as suggested by Regal. The Department has not made the type of determination described by Regal during this inquiry; therefore, we find Regal’s argument inapposite.

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<sup>74</sup> See Petitioner’s Resubmission of Circumvention Inquiry, at Exhibit 21. See also Petitioner’s Rebuttal Brief, at 16-17.

<sup>75</sup> See Petitioner’s Resubmission of Circumvention Inquiry at Exhibit 21, Exhibit 23, and Exhibit 24.

<sup>76</sup> *Id.*, at 54, Exhibit 21, and Exhibit 27.

<sup>77</sup> *Id.*, at Exhibit 28 (“It was at that time {the implementation of the *Orders*} that the Chinese developed the 5050 alloy that met the requirements of our industry.”) Metallurgists state on the record that the heat treatment is necessary, while maintaining a necessary magnesium to silicon ratio, to create Mg<sub>5</sub>Si<sub>6</sub> in the alloy to make it fungible enough for the extrusion process. *Id.* at 45-48, Exhibit 23, and Exhibit 26.

<sup>78</sup> See *Preliminary Determination*, and PDM at 8.



Third, we disagree with Regal that the declaration from an importer proves nothing as to the commercial availability at the time of investigations elsewhere in the industry, or with other Chinese companies. The letter from an importer of inquiry merchandise states that PRC companies developed heat-treated 5050 alloy to meet the requirements of the extrusion industry around the time of the imposition of the tariffs.<sup>79</sup> This provides additional evidence taken *in toto* with other evidence on the record that inquiry merchandise was indeed developed after the initiation of the investigations and developed to circumvent the *Orders*. Additionally, while Regal contends that the Columbia brochures were hand-picked and do not disprove that inquiry merchandise was otherwise commercially available, we find that whether selectively chosen or not, the brochures support a finding that inquiry merchandise was not available at the time of the initiation of the investigations. The Columbia brochures from 2009, 2010, and 2012 demonstrate that all of Columbia's door threshold products at that time were made from 6xxx-series aluminum alloy, *i.e.*, generally, in-scope merchandise.<sup>80</sup> However, after the issuance of the *Orders* in 2012, Columbia began marketing in its product brochures from 2015 and 2016 that its products could also be produced from 5050 alloy.<sup>81</sup> This is another strong indicator taken *in toto* with other evidence on the record that inquiry merchandise was indeed developed after the initiation of the investigations. Neither Regal nor any other party has provided alternative brochures that demonstrate that inquiry merchandise was commercially available at the time of the initiation of the investigations. Therefore, we continue to find that the declaration from an importer and Columbia's brochure indicate that inquiry merchandise became commercially available sometime after the initiation of the investigations.

We further disagree with Tai Ao's and Regal's argument that there is additional record evidence which compels a finding that inquiry merchandise was commercially available at the time of the investigations.

First, Tai Ao and Regal argue that the SSUIW published by the Australian government in 2002 demonstrates that grade 5050 aluminum was an extruded product used for commercial purposes prior to the initiation of the investigations. The SSUIW provides:

Guide signs shall be supplied compete with lateral supports manufactured from 28.5mm x 25.5mm extruded aluminium 'C' section to CAPRAL die EI5052 or approved equal, or manufactured from Grade 5050 - T5 aluminium, slotted to receive M10 square neck galvanised cup head bolts, or M10 galvanised bolts with 'twist-lock' heads.<sup>82</sup>

The petitioner contends that the SSUIW is a 2002 government publication from the city of Canberra, Australia, which consists only of guidelines and standards for certain road signs. The petitioner further contends that, according to the affidavit from Mr. Hawkins, the general manager at Capral Aluminum, Australia's largest manufacturer and distributor of aluminum profiles, who has substantial knowledge of products commercially produced and sold in

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<sup>79</sup> *Id.*, at Exhibit 28 ("It was at that time that the Chinese developed the 5050 alloy that met the requirements of our industry.") Metallurgists state on the record that the heat treatment is necessary, while maintaining a necessary magnesium to silicon ratio, to create Mg<sub>5</sub>Si<sub>6</sub> in the alloy to make it fungible enough for the extrusion process. *Id.* at 45-48, Exhibit 23, and Exhibit 26.

<sup>80</sup> *Id.*, at 17 and Exhibit 5.

<sup>81</sup> *Id.*, at 17 and Exhibits 3 and 5.

<sup>82</sup> See Tai Ao NFI, at Exhibit 2.

Australia, the mention of grade 5050 aluminum in the SSUIW appears to be in error or a reference to rolled aluminum sheet rather than extrusions. Additionally, according to Mr. Hawkins, there are no commercial uses for, or sales of, 5050 aluminum alloy, and, in particular, the T5 temper designation is not applicable to 5050 aluminum alloy.<sup>83</sup> Tai Ao argues that Mr. Hawkins is unqualified to comment on the SSUIW, because he has only worked in the aluminum industry for nine years, and at Capral Aluminum for only three years.<sup>84</sup> However, no other information has been placed on the record to disprove Mr. Hawkins' qualifications and knowledge of the Australian aluminum industry, past and present.

In light of the above, we find that there is conflicting record evidence as to the reliability of the SSUIW as evidence of commercial availability of inquiry merchandise. However, assuming *arguendo* that the SSUIW refers to guidelines for street signs that may be manufactured from 5050 alloy aluminum extrusions with a T-Temper designation, we still find, given the totality of the evidence, that this does not lead to a finding of commercial availability of inquiry merchandise. The SSUIW merely provides guidelines for street signs for one city in Australia in 2002. Given the lack of any other evidence concerning the commercial use or sale of inquiry merchandise in Australia generally, or elsewhere, we disagree with Tai Ao and Regal's arguments. Therefore, we continue to find that inquiry merchandise was not commercially available prior to the initiation of the investigations.

Second, we also disagree with Regal's claim that because series 5xxx aluminum extrusions (*i.e.*, 5083, 5086, 5154, and 5454) were available at the time of the petitions, inquiry merchandise is not later-developed merchandise. This anti-circumvention inquiry pertains specifically to inquiry merchandise described above (*i.e.*, heat-treated extruded aluminum products from the PRC that meet the chemical specifications for 5050-grade aluminum alloy), which were not specifically referenced in the petition. Furthermore, as discussed above, evidence on the record demonstrates that 5050 aluminum extrusions were not commercially available at the time of the petitions.

Third, we disagree with Regal and Tai Ao that the heating process for series 5052 aluminum extrusions is sufficient to establish that inquiry merchandise is not later-developed. As an initial matter, whether 5052 aluminum extrusions were commercially available at the time of the investigations is inapposite for this inquiry. The focus of this inquiry is whether inquiry merchandise was commercially available. We, therefore, disagree with Tai Ao's assertion that because series 5052 aluminum extrusions were available at the time of the petitions, then inquiry merchandise must necessarily be commercially available. Series 5052 aluminum extrusions are a different product and have a different aluminum alloy (containing a different chemical composition) than the inquiry merchandise. Although the process employed to produce 5052 aluminum extrusions and inquiry merchandise may be similar, as alleged by Tai Ao, we find that this does not demonstrate that inquiry merchandise was commercially available at the time of the investigations. Moreover, we agree with the petitioner that, although Tai Ao claims that it extruded 5052 aluminum prior to the filing of the petitions, it has not made such a statement as to 5050 alloy extrusions, thus indicating that Tai Ao in fact did not produce 5050 alloy extrusions prior

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<sup>83</sup> See Petitioner RFI, at 11-12 and Exhibit 5.

<sup>84</sup> See Tai Ao Brief, at 2-3.

to the filing of the petitions and Tai Ao's 5050 extruded products are later-developed merchandise.<sup>85</sup> Therefore, we find that Tai Ao's arguments do not provide evidence of the commercial availability of the inquiry merchandise.

Fourth, we agree with the petitioner that the patent Regal placed on the record only supports the conclusion that series 5050 aluminum extrusions were not commercially available at the time of the investigations, as the patent was granted in 2015 and indicates that the products intended to be developed utilizing the specified processes are for armor plate products, not aluminum extrusions. Additionally, the patent pertains to series 5xxx alloy used in armor plate with a magnesium content ranging from 2 to 7 percent by weight, which is above 5050 alloy's magnesium content of less than 2 percent by weight.<sup>86</sup> Therefore, the patent does not apply to the aluminum alloy at issue of this circumvention proceeding (*i.e.*, 5050).

Thus, in weighing all the record evidence, we find that the record evidence (*i.e.*, product brochures, import data, industry standards, expert reports, affidavits, and website excerpts) demonstrates that inquiry merchandise was not commercially available at the time of the initiation of the investigations.<sup>87</sup>

#### *Statutory Factors*

We further disagree with Regal's argument that the statutory requirements have not been met for the merchandise at issue to be considered later-developed. Section 781(d)(1) outlines several factors for the Department to consider when making a circumvention determination: general physical characteristics, expectations of the ultimate purchasers and use of merchandise, advertisement, display, and channels of trade. The Department analyzed each of these factors in the *Preliminary Determination*, and continues to reach the same conclusion in this final determination, based on the information on the record.<sup>88</sup>

We disagree, in part, with Regal's argument that the inquiry merchandise's physical characteristics are different than in-scope merchandise's physical characteristics. We agree with Regal that the chemical composition of inquiry merchandise is indeed different from in-scope series 6xxx series aluminum alloy under The Aluminum Associations standards. However, based on record evidence provided by the petitioner, the inquiry merchandise requires a 0.2 percent by weight magnesium increase to a 6063 aluminum alloy or 6463 aluminum alloy and precise silicon to magnesium ratio, which makes it virtually indistinguishable from the chemical composition limits for a 6xxx-series alloy, *i.e.*, in-scope merchandise.<sup>89</sup> Further, once a precise ratio of silicon to magnesium is achieved, the same tempering process used for 6xxx-series alloy – heat-treatment – results in a product similar to a 6xxx-series aluminum extrusion product, save

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<sup>85</sup> See Petitioner's Rebuttal Brief, at 18; *see also* Petitioner's Rebuttal NFI, at 10.

<sup>86</sup> See Petitioner's Rebuttal Brief, at 15.

<sup>87</sup> See Endura's September 28, 2016 Circumvention Comments (Endura Submission), at Exhibit 15; *see also* Petitioner's Resubmission of Circumvention Inquiry, at 54-68, Exhibit 8, Exhibit 21 - Exhibit 24, Exhibit 28, Exhibit 30, and Exhibit 31.

<sup>88</sup> See *Preliminary Determination*, at 81 FR 79446, and PDM at 9-12.

<sup>89</sup> See *Initiation Notice*, 81 FR at 15042; *see also* Petitioner's Resubmission of Circumvention Inquiry, at 52.

for the minor increase in magnesium.<sup>90</sup> Therefore, we find that the chemical composition of inquiry merchandise is not significantly different from in-scope merchandise.

Furthermore, evidence on the record shows that an importer has admitted to sourcing extruded 5050-grade aluminum alloy products for use in products and applications which have traditionally used 6xxx-series alloys, as well as evidence relating to a domestic producer that has been asked to provide price quotes for the manufacture of products using 5050 alloy which have been made previously with 6xxx-series alloy.<sup>91</sup> Evidence on the record shows that, to mimic the characteristics of in-scope 6xxx series (*i.e.*, the extrudable qualities of in-scope merchandise), the 5050 alloy must contain a precise magnesium to silicon content ratio, and be heat-treated.<sup>92</sup> Record evidence also shows inquiry merchandise is advertised and displayed by Chinese producers to purchasers in the same manner that in-scope merchandise is advertised, which indicates to customers and end-users that these products are interchangeable with 6xxx-series products.<sup>93</sup> Also, the product catalog provided by Endura shows the channels of trade for Columbia's inquiry merchandise are the same as in-scope merchandise, as it makes no distinction in the alloys used.<sup>94</sup> This information suggests that aluminum extrusions formed from 5050 series aluminum alloy which has been heat-treated and aluminum extrusion formed from 6xxx series aluminum alloy which has been heat-treated appear to be interchangeable.

Additionally, the petitioner and Endura also obtained and tested specimens labeled as 5050-grade aluminum alloy products from various producers, which demonstrate that the chemical composition overlapped with 6xxx-series standards, and had been heat-treated.<sup>95</sup> Endura tested products from a Chinese producer of aluminum extrusions of an identical model door threshold produced before and after the issuance of the *Orders* showing they have the same general physical characteristics as in-scope merchandise.<sup>96</sup> Taken *in toto*, evidence on the record shows that inquiry merchandise and in-scope merchandise have the same general physical characteristics, despite the minor difference in chemical composition, because the products are interchangeable (*e.g.*, a door threshold made of 6xxx series aluminum alloy or 5050 series aluminum alloy). Therefore, due to the interchangeability of inquiry merchandise and in-scope merchandise despite the chemical differences, the Department continues to find the inquiry merchandise has the same general physical characteristics as merchandise that is subject to the *Orders*.

Regal further argues that the expectations of the ultimate users, the ultimate use of the product, the channels of trade, and the advertising and display of both subject and other non-subject extrusions would be similar; they are each aluminum extrusions. We find that Regal's arguments further support, and are in line with, the Department's later-developed merchandise determination pursuant to sections 781(d)(1)(B)-(E) of the Act, because the Department found inquiry merchandise and in-scope merchandise have the same (or similar): B) expectations of the

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<sup>90</sup> See *Initiation Notice*, 81 FR at 15042; see also Petitioner's Resubmission of Circumvention Inquiry, at 52-53.

<sup>91</sup> See Petitioner's Resubmission of Circumvention Inquiry, at 56-57.

<sup>92</sup> *Id.*, at Exhibit 23.

<sup>93</sup> See Petitioner's Resubmission of Circumvention Inquiry, at 60; see also Endura Submission, at 32-34.

<sup>94</sup> See Endura Submission, at 32 and Exhibit 5.

<sup>95</sup> *Id.*, at 57-58; see also Endura Submission, at 29 and Exhibit 1A.

<sup>96</sup> See Endura Submission, at 29 and Exhibit 1A.

ultimate purchasers, C) ultimate uses; D) channels of trade; and E) advertisement and display.<sup>97</sup> Additionally, as discussed earlier, evidence on the record shows inquiry merchandise and in-scope merchandise are interchangeable. Therefore, Regal's arguments support the Department's determination that inquiry merchandise is circumventing the *Orders*.

### *Other Issues*

Regal argues that the Department's prior scope rulings (*e.g.*, Kota Scope Ruling, Trending Imports Scope Ruling and Sinobec Scope Ruling) demonstrate that inquiry merchandise is outside the scope of the *Orders*, and that tempering (*e.g.*, heat treatment) is not a defining characteristic of the scope of the *Orders* and is not relevant to this proceeding. Regal further argues that these scope rulings, which the Department applies on a retroactive basis, demonstrate that series 5xxx aluminum extrusions are not later-developed merchandise, because they were considered in those scope rulings. As an initial matter, Regal once again confuses series 5xxx aluminum extrusions generally with the specific inquiry merchandise before us, heat-treated 5050 alloy aluminum extrusions.

In any event, as discussed further in Comments 1 and 3, although the Department has found aluminum extrusions made from 5050 alloy to be outside of the scope of the *Orders* in the Sinobec Scope Ruling and the Trending Imports and Kota Preliminary Scope Rulings, and did not consider tempering in the context of those decisions, the Department is still permitted to separately analyze inquiry merchandise and, specifically, tempering, in the context of an anti-circumvention proceeding.<sup>98</sup> Moreover, the Trending Imports and Kota Preliminary Scope Rulings were not final scope rulings, and, as discussed in the final scope rulings for those proceedings, issued concurrently with this anti-circumvention final determination, the Department has reversed its preliminary ruling. Furthermore, we disagree that it is an improper expansion of the scope to consider tempering for purposes of this anti-circumvention inquiry; as discussed above, inquiry merchandise (*i.e.*, heat-treated extruded aluminum products from the PRC that meet the chemical specifications for 5050 grade aluminum alloy) was not commercially available at the time of the initiation of the investigations and, thus, at that time, was not contemplated by the scope of the *Orders*.<sup>99</sup> Therefore, it is indeed lawful for the Department to find a product outside-the-scope in one proceeding (*i.e.*, scope inquiry) and in-scope in another proceeding (*i.e.*, anti-circumvention). As such, we do not find the Regal's arguments compelling.

We disagree with Regal's arguments that the administrative record demonstrates that Zhongwang did not respond to the Department's questionnaire because it no longer manufactures inquiry merchandise. The record provides ample evidence of Zhongwang's production and export of inquiry merchandise.<sup>100</sup> Furthermore, Zhongwang failed to respond to the Department's questionnaire concerning these issues, and the Department has properly reached its

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<sup>97</sup> See PDM, at 9-13.

<sup>98</sup> See *Target III*, 609 F.3d at 1362 (holding that, in the context of a later-developed merchandise inquiry, "Commerce {was not} precluded by its earlier conventional scope rulings that had previously found mixed-wax candles not within the scope of the antidumping order.")

<sup>99</sup> See *Target III*, 609 F.3d at 1362 ("{A}'s later-developed merchandise was not present in the market at the time of the LTFV investigation the Candles Antidumping Order could not have addressed mixed-wax candles.")

<sup>100</sup> See Petitioner's Resubmission of Circumvention Inquiry, at 49-51.



determination, in part, on the basis of adverse facts available.<sup>101</sup> The press release provided by Regal concerning Zhongwang's alleged production and export of 5050 extrusions<sup>102</sup> does not alter our conclusion that inquiry merchandise was not commercially available at the time of the investigations, nor our finding that Zhongwang has failed to cooperate to the best of its ability. To the extent the press release is a belated attempt to respond to the Department's questionnaire, we find this to be insufficient evidence of Zhongwang's production and export of inquiry merchandise.

As discussed further in Comment 4, below, we also disagree with Regal that the Department failed to investigate other Chinese aluminum extruders concerning the commercial availability of inquiry merchandise in this anti-circumvention inquiry, and that the Department was required to examine whether it was possible to produce inquiry merchandise prior to the investigations. In the *Initiation Notice*,<sup>103</sup> the Department stated that it "intends to consider whether the inquiry should apply to all imports of extruded aluminum products that meet the chemical specification for 5050-grade aluminum alloy and are heat-treated, regardless of producer, exporter or importer, from the PRC{,}"<sup>104</sup> which put all parties on notice. And parties commented on the issue. Prior to the *Preliminary Determination*, Endura submitted information relating to this matter on the record.<sup>105</sup> Additionally, in the *Preliminary Determination*, the Department announced that it would consider accepting new factual information on a case-by-case basis.<sup>106</sup> Several parties, including Regal, submitted over 1000 pages of new factual information,<sup>107</sup> which the Department has considered above. Thus, parties were given ample opportunity to submit information in this inquiry. Based on the foregoing, the Department disagrees with Regal's arguments. Finally, we disagree with Regal that the Department is required to examine whether it was possible to produce inquiry merchandise prior to the investigations. As noted above, the judicially-approved standard of commercial availability is "present in the commercial market or fully developed, *i.e.*, tested and ready for commercial production, but not yet in the commercial market{.}"<sup>108</sup>

### Comment 3: Scope Exclusion

IKEA's Arguments:<sup>109</sup>

- The Department may not expand the scope of the *Orders* to include merchandise specifically excluded from the scope. The Department has issued scope rulings finding that series 5050 aluminum extrusions were specifically excluded from the *Orders*.
- Importers rely on the Department to stand by the plain language of the scope of its orders. Unlawfully expanding the scope of the *Orders* to include non-subject merchandise places

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<sup>101</sup> See PDM, at 7-8.

<sup>102</sup> See Regal Case Brief, at 21 (citing Regal November 30, 2016 Submission).

<sup>103</sup> See *Initiation Notice*.

<sup>104</sup> See *Initiation Notice*, 81 FR at 15042.

<sup>105</sup> See Endura Submission.

<sup>106</sup> See *Preliminary Determination*, 81 FR at 79446.

<sup>107</sup> See Regal November 30, 2016 Submission, Regal NFI, *see also* Tai Ao's NFI, and *see also* Petitioner's RFI.

<sup>108</sup> See *Candles Anticircumvention Final*, 71 FR at 59077, and accompanying Issues and Decision Memorandum at Comment 4; *see also Target I*, 578 F. Supp. 2d at 1375-76; *Target III*, 609 F.3d at 1358-60.

<sup>109</sup> See IKEA Case Brief, at 2-5.

importers in an unreasonable position where it is impossible to determine the scope an order without a scope ruling.

- The petitioner has the remedy to file AD and CVD petitions with the Department and ITC.

#### Tai Ao's Arguments:<sup>110</sup>

- The *Orders* expressly and unambiguously exclude from the scope series 5xxx aluminum extrusions, as recognized in the Kota and Trending Imports preliminary scope rulings.
- In the investigations, the Department, the petitioner and the ITC expressly excluded series 5xxx aluminum extrusions from the scope of the *Orders*.
- The Department is bound by *Deacero*,<sup>111</sup> as series 5xxx aluminum was “well known” when the *Order* were issued and the *Orders* contain “explicit exclusion of” series 5xxx aluminum extrusions.

#### Regal's Arguments:<sup>112</sup>

- The plain language of the scope of the *Orders* specifically excludes series 5xxx aluminum extrusions, including 5050 aluminum extrusions, and the Department's *Preliminary Determination* contradicts this plain language.

#### Endura's Rebuttal Arguments:<sup>113</sup>

- While the Department has found that certain series 5050 aluminum extrusions are outside the scope of the *Orders* in prior scope rulings, these prior scope rulings are irrelevant, because scope proceedings have a different purpose than this anti-circumvention proceeding.
- The purpose of a scope inquiry is to determine whether specified imported products fall inside or outside the scope of the current *Orders*, while anti-circumvention proceedings address products that sit, improperly, outside of the scope.

#### Petitioner's Rebuttal Arguments:<sup>114</sup>

- The petitions identified only four series 5xxx alloys that the Aluminum Association recognized for extrusion applications at the time (*i.e.*, series 5083, 5086, 5154, and 5454).
- The *Orders* do not unequivocally exclude 5050 aluminum extrusions, because 5050 aluminum extrusions did not exist at the time of the investigations and were developed after the initiation of the investigations. Evidence on the record indicates that 5050 aluminum extrusions were developed to exploit a chemical overlap between 5xxx and 6xxx series aluminum.

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<sup>110</sup> See Tai Ao Case Brief, at 3-6.

<sup>111</sup> See *Deacero S.A. de C.V. v. United States*, 817 F.3d 1332, 1334-39 (Fed. Cir. 2016) (*Deacero*) (citing *Wheatland Tube*, 161 F.3d at 1369-70; *Nippon Steel Corp. v. United States*, 219 F.3d 1348 (Fed. Cir. 2000)).

<sup>112</sup> See Regal Case Brief, at 3-4.

<sup>113</sup> See Endura Case Brief, at 5-6.

<sup>114</sup> See Petitioner Rebuttal Brief, at 10-13.

- Chinese producers developed series 5050 aluminum extrusions that could function as 6xxx series alloy extrusions by manipulating the mechanical properties and tempering. The mechanical properties and tempering are not what make 5050 aluminum extrusions in-scope merchandise, as Regal suggests.
- The petitioner did not specifically exclude a product that was commercially available at the time of the investigations, as in *Fedmet*.
- *Deacero* was a case concerning minor alterations of a product, not later-developed merchandise, so it is not applicable to this proceeding.
- At the time of the investigations, neither the Department nor the petitioner could have reasonably expected that the product at issue would be developed, nor could they have made a conscious decision to exclude it.
- This situation is not like that in *Wheatland Tube*, where the explicit exclusions were well known when the order was issued.

### Department's Position:

As discussed above in Comment 1, the Department has the authority under section 781(d) of the Act to conduct this anti-circumvention inquiry. The scope of the *Orders* expressly excludes “aluminum extrusions made from aluminum alloy with an Aluminum Association series designation commencing with the number 5 and containing in excess of 1.0 percent magnesium by weight{.}” Thus, the specific inquiry merchandise at issue – heat-treated extruded aluminum products that meet the chemical specifications for 5050 grade aluminum alloy – falls outside the literal scope of the *Orders*, pursuant to this broad scope exclusion for 5xxx series aluminum extrusions. However, as has been established above in Comment 2, such inquiry merchandise constitutes later-developed merchandise, as it was not commercially available at the time of the investigations. Thus, in establishing the scope exclusion for 5xxx series aluminum extrusions at the time of the investigations, neither the petitioner, the Department, nor the ITC contemplated inquiry merchandise, which is a narrow subset of, and falls within, the scope exclusion.

As discussed above under Comment 1, the courts have long-recognized that an anti-circumvention inquiry is different from a scope ruling, and allows the Department to lawfully find within the scope of an AD or CVD order merchandise which falls outside the literal scope of the order.<sup>115</sup> We find with respect to the later-developed merchandise inquiry before us, the fact that inquiry merchandise is subject to an express exclusion, rather than merely falling outside the *Orders*' general scope language, is of no moment; the merchandise was not commercially available at the time of the initiation of the investigations and, thus, at that time, was contemplated by neither the general scope language nor the exclusion.<sup>116</sup>

For similar reasons, we disagree with IKEA's arguments. As noted above, section 781(d) of the Act permits the Department to include within the scope of the *Orders* later-developed merchandise, such as the inquiry merchandise at issue here. Thus, this is not an unlawful expansion of the *Orders*, nor is the petitioner required to file new petitions with the Department and the ITC under such circumstances. Moreover, we disagree that importers have been placed

<sup>115</sup> See *Target III*, 609 F.3d at 1362; *Wheatland Tube*, 161 F.3d at 1371.

<sup>116</sup> See *Target III*, 609 F.3d at 1362 (“{A}'s later-developed merchandise was not present in the market at the time of the LTFV investigation the Candles Antidumping Order could not have addressed mixed-wax candles.”)

in an unreasonable position, as the statute permits the Department to include the inquiry merchandise at issue here within the scope of the *Orders*.

In this manner, the situation at issue differs from that of *Wheatland Tube*. In *Wheatland Tube*, which involved a minor alteration anti-circumvention inquiry under section 781(c) of the Act, the product at issue (standard pipe) was well-known at the time of the investigation, but specifically excluded from the scope of the order on line pipe. In contrast, in the instant case, we find that the inquiry merchandise was developed after the initiation of the investigations. In addition, unlike the products at issue in *Wheatland Tube*, here, the Department has established that the inquiry merchandise does not constitute a significant technological advancement or a significant alteration of in-scope merchandise, pursuant to section 781(e) of the Act. In any event, as recognized by the court in *Target III*, “the statement in *Wheatland Tube*, that the minor alteration provision ‘does not ... apply to products unequivocally excluded from the order in the first place,’ was made ‘in determining the propriety of Commerce’s conducting a scope rather than a minor alternations inquiry.’”<sup>117</sup> For these reasons, we find *Wheatland Tube* distinguishable from the instant situation, involving a later-developed merchandise inquiry.

Furthermore, although the Department has found inquiry merchandise to be outside of the scope of the *Orders* in the Sinobec Scope Ruling and made a similar preliminary decision in the Trending Imports and Kota Preliminary Scope Rulings,<sup>118</sup> the Department is still permitted to analyze inquiry merchandise separately in the context of an anti-circumvention proceeding.<sup>119</sup> As discussed above, the Department and the courts have recognized the difference between scope rulings and anti-circumvention inquiries.<sup>120</sup> In scope rulings, governed by 19 CFR 351.225(k), the Department determines whether a product is within the scope of an order, based on, *e.g.*, descriptions of merchandise in the petition, the initial investigation, and determinations of the Department and the ITC.<sup>121</sup> In an anti-circumvention inquiry, the Department may find circumvention of an AD or CVD order when merchandise is: (a) completed or assembled in the United States; (b) completed or assembled in other foreign countries; (c) altered in a minor way; or (d) created after the initiation of an investigation.<sup>122</sup> As such, we agree with the petitioner and Endura that the focus of this inquiry differs from that of a scope ruling.

In light of the above, we agree with the petitioner that this anti-circumvention inquiry is unlike *Fedmet*, which dealt with a scope ruling on a product specifically excluded from the relevant orders and was commercially available at the time of the investigations. In contrast with *Fedmet*, the current inquiry involves merchandise developed after the initiation of the investigations. In addition, we disagree with Tai Ao that inquiry merchandise cannot be included within the scope

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<sup>117</sup> *Id.* (quoting *Nippon*, 219 F.3d at 1356 (internal quotation marks omitted)).

<sup>118</sup> See Memorandum, “Antidumping and Countervailing Duty Orders on Aluminum Extrusions from the People’s Republic of China: Scope Rulings Relevant to this Proceeding,” dated November 11, 2016 (Relevant Scope Rulings Memorandum).

<sup>119</sup> See *Target III*, 609 F.3d at 1362 (holding that, in the context of a later-developed merchandise inquiry, “Commerce {was not} precluded by its earlier conventional scope rulings that had previously found mixed-wax candles not within the scope of the antidumping order.”)

<sup>120</sup> *Id.* (“Conventional scope inquiries are different from anticircumvention inquiries because they are separate proceedings and address separate issues.”)

<sup>121</sup> See 19 CFR 351.225(k).

<sup>122</sup> See also 19 CFR 351.225(j).

of the *Orders* because 5xxx series aluminum extrusions were well-known at the time of the investigation. As an initial matter, as established above, inquiry merchandise is not 5xxx series aluminum extrusions, but a subset of those products which was not commercially available at the time of the investigations. Tai Ao references *Deacero*, where the court upheld the Department's finding that 4.75 mm wire-rod was a minor alteration that was circumventing the relevant antidumping duty order. The court further found that the scope expressly covered only wire rod between 5.00 mm to 19.00 mm and the scope contained no explicit exclusion for small-diameter wire rod. We disagree with Tai Ao on the applicability of *Deacero* on the current inquiry. *Deacero* involved a minor alteration proceeding under section 781(c) of the Act, which does not address the issue of commercial availability. Furthermore, as discussed in Comment 2, above, the Department continues to find that inquiry merchandise was not commercially available at the time of initiation of the investigations. Since inquiry merchandise was not commercially available at the time of the initiation of the investigations, any interpretation which would require the Department and the petitioner to unreasonably expect a product like inquiry merchandise at the time of the investigations would frustrate the express provision of the statute, as the petitioner suggests in its rebuttal brief. Therefore, we agree with the petitioner and find that *Deacero* is unlike the current anti-circumvention inquiry to the extent it involved the minor alternations provision of the statute (section 781(c) of the Act) whereas the Department is conducting this inquiry pursuant to section 781(d) of the Act. In that respect, the analysis in that case is different and, accordingly, not applicable. Accordingly, we find that we can include inquiry merchandise within the scope of the *Orders* in this anti-circumvention inquiry.

#### **Comment 4: Country-Wide Ruling**

##### **Petitioner's Arguments:**<sup>123</sup>

- The Department should continue to apply its ruling regardless of producer, exporter, or importer.
- The record establishes that Zhongwang and its extensive network of affiliates and at least 25 additional Chinese companies are producing and exporting inquiry merchandise.
- Since the Department's affirmative *Preliminary Determination*, more companies claiming to export or import the inquiry merchandise have entered the proceeding, which further supports a conclusion that the circumvention of the *Orders* using 5050 aluminum extrusions is widespread.

##### **Regal's Rebuttal Arguments:**<sup>124</sup>

- A circumvention finding may only apply to Zhongwang, as the Department never investigated other companies to see if they were actually circumventing the *Orders*.
- The Department made its preliminary ruling based on essentially no evidence from relevant producers, exporters, or importers from the PRC.

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<sup>123</sup> See Petitioner Brief, at 13-14.

<sup>124</sup> See Regal Rebuttal Brief, at 14-15.



## Department's Position:

In the *Preliminary Determination*, the Department applied its anti-circumvention determination to all imports of heat-treated 5050 aluminum extrusions from the PRC, regardless of producer, exporter, or importer.<sup>125</sup> We continue to find that the Department's anti-circumvention determination should be applied on a country-wide basis. Section 781(d) of the Act contains no requirement that a determination by the Department under this section be applied only to specific companies, and we note that the Department has applied rulings in other later-developed merchandise anti-circumvention inquiries on a country-wide basis (*i.e.*, regardless of producer, exporter, or importer).<sup>126</sup>

At the time of the initiation of this anti-circumvention inquiry, the record contained evidence indicating that Zhongwang and its numerous alleged affiliates were producing, exporting, and/or importing inquiry merchandise.<sup>127</sup> Based on this evidence, the Department indicated in the *Initiation Notice* that it intended to consider applying the determination in this inquiry to all imports of extruded aluminum products that meet the chemical specifications for 5050-grade aluminum alloy and are heat-treated, regardless of producer, exporter, or importer, from the PRC.<sup>128</sup>

Prior to the *Preliminary Determination*, the petitioner and Endura submitted comments and factual information concerning country-wide exports of inquiry merchandise.<sup>129</sup> The petitioner provided information indicating that at least 25 other Chinese companies were producing and/or exporting inquiry merchandise.<sup>130</sup> Additionally, Endura similarly provided evidence that multiple companies, such as Columbia, Global Products International Group, LLC, and Worldwide Door Components, Inc., were importing inquiry merchandise from multiple producers/exporters.<sup>131</sup> Moreover, the Department's prior and concurrent scope segments concerning series 5050 aluminum extrusions demonstrate that companies such as Sinobec Resources LLS, Kota International LTD, Trending Imports LLC, and Regal Ideas, Inc. are

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<sup>125</sup> See *Preliminary Determination*, 81 FR at 79445 and accompanying memorandum: Anti-Circumvention Inquiry Regarding the Antidumping Duty and Countervailing Duty Orders on Aluminum Extrusions from the People's Republic of China: Preliminary Determination Decision Memorandum, dated November 3, 2016 (PDM), at 7-8.

<sup>126</sup> See, e.g., *Later-Developed Merchandise Anticircumvention Inquiry of the Antidumping Duty Order on Petroleum Wax Candles from the People's Republic of China: Affirmative Preliminary Determination of Circumvention of the Antidumping Duty Order*, 71 FR 32033, 32037-40 (June 2, 2006), unchanged in *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) (*Candles Anti-circumvention Final*), and accompanying Issues and Decision Memorandum at Comment 4, amended by Redetermination Pursuant to Court Remand Order in *Target Corporation v. United States*, 578 F. Supp. 2d 1369 (CIT 2008) (*Target I*) (November 7, 2008) (*Candles Anticircumvention Remand*) (available at <http://enforcement.trade.gov/remands/08-101.pdf>), affirmed by *Target Corp. v. United States*, 626 F. Supp. 2d 1285 (CIT 2009) (*Target II*), and *Target Corp. v. United States*, 609 F.3d 1352, 1358-1360 (Fed. Cir. 2010) (*Target III*).

<sup>127</sup> See Petitioner's Resubmission of Circumvention Inquiry.

<sup>128</sup> See *Initiation Notice*, 81 FR at 15042.

<sup>129</sup> See Petitioner's October 7, 2017 Additional Information (Petitioner's Additional Information), *see also* Endura Submission.

<sup>130</sup> See Petitioner's Additional Information.

<sup>131</sup> See Endura Submission, at Exhibit 4.

likewise producing, exporting, and/or importing inquiry merchandise.<sup>132</sup> As a result, we found in the *Preliminary Determination* that substantial evidence supported a preliminary finding that multiple parties are producing and/or exporting inquiry merchandise.<sup>133</sup> Finally, since the *Preliminary Determination*, additional companies including Tai Ao, Perfectus Aluminum, Inc., and IKEA have indicated that they either produce or import inquiry merchandise, which further supports the Department's determination to apply its anti-circumvention determination on a country-wide basis.<sup>134</sup>

Based on evidence on the record of this proceeding, we disagree with Regal's argument that the anti-circumvention inquiry should apply only to Zhongwang. The Department announced its intention to consider whether the inquiry should apply to all imports of inquiry merchandise from the PRC, regardless of producer, exporter, or importer, in the *Initiation Notice*, thus putting parties on notice as of that date, as to the potential results of this inquiry.<sup>135</sup> We also disagree with Regal's claim that the Department's preliminary ruling was based on essentially no evidence. As noted in Comment 2, above, we have based our determination on the record evidence developed in this inquiry.

Additionally, we disagree with Regal's claim that the Department did not adequately solicit information from companies other than Zhongwang. In the *Preliminary Determination*, the Department announced that it may solicit new factual information in this inquiry, and that it may consider accepting new factual information from interested parties on a case-by-case basis.<sup>136</sup> Several parties, including Regal, submitted over 1000 pages of new factual information,<sup>137</sup> which the Department has considered above in Comment 2. Thus, we find that the Department provided the opportunity for parties other than Zhongwang to participate in this inquiry.

Based on the foregoing, the Department continues to find that the record supports applying the results of this inquiry to all imports of inquiry merchandise from the PRC, regardless of producer, exporter, or importer.

## **Comment 5: Certification Requirement**

Petitioner's Arguments:<sup>138</sup>

- The certification requirement for importers was developed in the context of certain scope proceedings to differentiate series 5050 aluminum extrusions from series 6xxx aluminum extrusions. However, a certification requirement is not necessary in the context of this

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<sup>132</sup> See Memorandum: Antidumping and Countervailing Duty Orders on Aluminum Extrusions from the People's Republic of China: Scope Rulings Relevant to this Proceeding," dated November 3, 2016 (Relevant Scope Rulings Memorandum).

<sup>133</sup> See PDM, at 7-8.

<sup>134</sup> See Regal's November 11, 2016 Entry of Appearance; see also Sinobec's November 11, 2016 Entry of Appearance; see also Tai Ao's November 16, 2016 Entry of Appearance; see also Perfectus' March 10, 2017, Entry of Appearance; see also IKEA Case Brief.

<sup>135</sup> See *Initiation Notice*, 81 FR at 15042; see also, e.g., *Target II*.

<sup>136</sup> See *Preliminary Determination*, 81 FR at 79446.

<sup>137</sup> See Regal November 30, 2016 Submission, Regal NFI, see also Tai Ao's NFI, and see also Petitioner's RFI.

<sup>138</sup> See Petitioner Brief, at 14-15.

anti-circumvention inquiry, as the only merchandise at issue for the proceeding is series 5050 aluminum extrusions, which are later-developed merchandise.

- A certification requirement is superfluous and only creates another avenue for duty evasion.

#### Regal's Arguments:<sup>139</sup>

- A certification violates the Department's preference to avoid the use of certificates to determine out-of-scope merchandise. The proposed certification is equivalent to an end-use certificate, which the Department has previously found to be an administrative burden that does not ensure against misclassification and circumvention.
- A certification requirement fails to assist CBP with enforcement of the *Orders*. CBP currently has sufficient means to address evasion.

#### IKEA's Arguments:<sup>140</sup>

- A certification requirement unduly burdens importers of non-subject merchandise.
- The Department's claims that certification would assist CBP in enforcing the *Orders* have no merit and simply place additional administrative and recordkeeping requirements on importers.
- Importers already certify to the accuracy of the CBP 7501 import documentation, and the proposed certification does not provide additional accuracy.
- CBP already has effective tools to protect against evasion, and importers already face strict civil and criminal sanction for fraud.

#### Regal's Rebuttal Arguments:<sup>141</sup>

- The Department should not implement a certification requirement, as it would impose administrative burdens for CBP, would be difficult to administer, and would not augment enforcement.
- A certification is not necessary as 5050 aluminum extrusions are not later-developed merchandise.

#### Department's Position:

In the *Preliminary Determination*, the Department announced that it would consider requiring a certification from importers of inquiry merchandise, and released a draft of the proposed certification for comment.<sup>142</sup> After reviewing the comments from interested parties on the draft certification language, the Department has determined not to impose a certification requirement for importers of inquiry merchandise in this final determination.

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<sup>139</sup> See Regal Case Brief, at 24-29.

<sup>140</sup> See IKEA Brief, at 5-8.

<sup>141</sup> See Regal Rebuttal Brief, at 15-18.

<sup>142</sup> See *Preliminary Determination*, 81 FR at 79446, and accompanying PDM at 13, *see also* Memorandum "Anti-Circumvention Inquiry on Aluminum Extrusions from the People's Republic of China: Proposed Certification Language from Importers," dated April 10, 2017.

## Comment 6: Effective Cash Deposit Date

Regal's Arguments:<sup>143</sup>

- The date for suspending liquidation should be based on the date of the *Preliminary Determination*, as the Department included only Zhongwang in its initiation and did not consider exports of other Chinese exporters or manufacturers. It was not until the Department's *Preliminary Determination* that importers were notified that the determination applied to all exports of 5050 aluminum.

Tai Ao's Arguments:<sup>144</sup>

- The cash deposit requirements of AD and CVD duties for Tai Ao should be based on the date of the *Preliminary Determination*. The initiation notice focused solely on Zhongwang, while stating that the Department would consider whether the inquiry should apply to imports regardless of producers, exporter, or importer, from the PRC. Thus, the *Preliminary Determination* constituted an initiation notice for Tai Ao.
- On September 6, 2012, the Department ruled that Tai Ao's 5050 aluminum extrusions were outside the scope of the *Orders*. Additionally, there were two scope proceedings occurring concurrently with this anti-circumvention proceeding (*i.e.*, Trending Imports and Kota), which also preliminarily determined 5050 exports to be outside the scope of the *Orders*. Because of these three scope proceedings, Tai Ao had no reason to know that its entries of series 5050 aluminum extrusions would require retroactive antidumping and countervailing duties.
- Normally, cash deposits on inquiry merchandise are based on the date of initiation of an anti-circumvention proceeding; however, requiring cash deposits for Tai Ao's shipments prior to the publication of the *Preliminary Determination* would be inconsistent with the letter and spirit of the Department's regulations.

Petitioner's Rebuttal Arguments:<sup>145</sup>

- It is well established by 19 CFR 351.225(1)(2) and the CIT that in anti-circumvention proceedings, the Department suspends liquidation and collects cash deposits on entries dating back to the date of initiation.
- The Department gave notice to importers like Regal and Tai Ao in the *Initiation Notice* that it would consider all producers, exporters, or importers from the PRC, and that it would issue instructions with in accordance with 19 CFR 351.225(1)(2).

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<sup>143</sup> See Regal Case Brief, at 23-24.

<sup>144</sup> See Tai Ao Case Brief, at 6-9.

<sup>145</sup> See Petitioner Rebuttal Brief, at 18-20.

## Tai Ao's Rebuttal Arguments:<sup>146</sup>

- In the petitioner's case brief, the petitioner stated that the *Initiation Notice* applied only to Zhongwang. Additionally, the petitioner's October 7, 2016, letter constitutes a petition requesting that the Department investigate Tai Ao exports, which, taken together, support Tai Ao's position that the Department require cash deposits for AD and CVD duties on shipments from the date of publication of the *Preliminary Determination*.
- Tai Ao had no reason to know that its 5050 exports would be subject to retroactive assessment of duties when the Department published the *Initiation Notice*.

## Department's Position:

We agree with the petitioner that cash deposits are required from the date of initiation of this inquiry. In the *Initiation Notice*, the Department stated that it "intends to consider whether the inquiry should apply to all imports of extruded aluminum products that meet the chemical specification for 5050-grade aluminum alloy and are heat-treated, regardless of producer, exporter or importer, from the PRC."<sup>147</sup> Also in the *Initiation Notice*, the Department indicated that "in accordance with 19 CFR 351.225(l)(2), if the Department issues a preliminary affirmative determination, we will then instruct U.S. Customs and Border Protection to suspend liquidation and require a cash deposit of estimated duties, at the applicable rate, for each unliquidated entry of the merchandise at issue, entered or withdrawn from warehouse for consumption on or after the date of initiation of the inquiry."<sup>148</sup> Additionally, the Department stated in the *Preliminary Determination* that it would instruct CBP to suspend liquidation from the date of the *Initiation Notice* in accordance with 19 CFR 351.225(l)(2).<sup>149</sup>

We disagree with Regal and Tai Ao's argument that duties on inquiry merchandise produced, exported, or imported by an entity other than Zhongwang may only be assessed from the date of the *Preliminary Determination*. As stated above, the Department clearly articulated in the *Initiation Notice* its intention to consider whether the inquiry should apply to all imports of 5050 aluminum extrusions regardless of producer, exporter, or importer from the PRC.<sup>150</sup> Furthermore, the Department also indicated in the *Initiation Notice* that, in accordance with 19 CFR 351.225(l)(2), we would instruct CBP to suspend liquidation from the date of the initiation notice.<sup>151</sup> Section 351.225(l)(2) of the Department's regulations states:

If the Secretary issues a preliminary scope ruling under paragraph (f)(3) of this section to the effect that the product in question is included within the scope of the order, any suspension of liquidation described in paragraph (l)(1) of this section will continue. If liquidation has not been suspended, the Secretary will instruct the Customs Service to suspend liquidation and to require a cash deposit

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<sup>146</sup> See Tai Ao Rebuttal Brief, at 2-4.

<sup>147</sup> See *Initiation Notice*, 81 FR at 15042.

<sup>148</sup> *Id.*, at 15044.

<sup>149</sup> See *Preliminary Determination*, at 79446.

<sup>150</sup> See *Initiation Notice*, at 15042.

<sup>151</sup> *Id.*, at 15044.



of estimated duties, at the applicable rate, for each unliquidated entry of the product entered, or withdrawn from warehouse, for consumption on or after the date of initiation of the scope inquiry. If the Secretary issues a preliminary scope ruling to the effect that the product in question is not included within the scope of the order, the Secretary will order any suspension of liquidation on the product ended, and will instruct the Customs Service to refund any cash deposits or release any bonds relating to that product.

Thus, we find that parties were on notice as to the potential impact of an affirmative determination.

Moreover, we note that this decision is consistent with *Target II*, wherein the Department published a notice in the *Federal Register* alerting parties of the legal consequences of an affirmative circumvention determination pursuant to 19 CFR 351.225(l).<sup>152</sup> Additionally, the CIT has noted that 19 CFR 351.225(l) was promulgated and published in the *Federal Register* in 1997, and has found that parties are charged with knowledge of the regulation as of that date.<sup>153</sup>

### **Rescission of Minor Alterations Anti-Circumvention Inquiry**

Because we are making an affirmative final determination of circumvention with respect to later-developed merchandise pursuant to section 781(d) of the Act, we find that it is not necessary to make a determination with respect to a minor alterations anti-circumvention inquiry pursuant to section 781(c) of the Act. Thus, we are rescinding the minor alterations anti-circumvention inquiry.

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<sup>152</sup> See *Target II*, at 779. “Plaintiffs argue that the multiple scope determinations excluding mixed-wax candles from the petroleum wax candle order created a settled expectation on their part that mixed-wax candles were outside the scope of the order. Although this may have been true prior to the initiation of the anticircumvention inquiry (and may have informed Plaintiffs’ expectations about its eventual result), Plaintiffs were nevertheless always aware of the legal consequences of an affirmative circumvention determination (and the operation of 19 C.F.R. § 351.225(l)): Entries of mixed-wax candles found to be circumventing the Order would be suspended as of the date of initiation.”

<sup>153</sup> *Id.*, at 780.

## Recommendation

Pursuant to section 781(d) of the Act and 19 CFR 351.225(j), we recommend finding that heat-treated extruded aluminum products from the PRC that meet the chemical specifications for 5050-grade aluminum alloy, regardless of producer, exporter, or importer are circumventing the *Orders*. We also recommend that the inquiry pursuant to section 781(c) of the Act be rescinded.



\_\_\_\_\_  
Agree



\_\_\_\_\_  
Disagree

7/20/2017

X 

Signed by: GARY TAVERMAN

\_\_\_\_\_  
Gary Taverman  
Deputy Assistant Secretary  
for Antidumping and Countervailing Duty Operations,  
performing the non-exclusive functions and duties of the  
Assistant Secretary for Enforcement and Compliance