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CIRC: 60cc to 99cc Engines
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September 13, 2021

MEMORANDUM TO: Christian Marsh
Acting Assistant Secretary
for Enforcement and Compliance

FROM: James Maeder
Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Certain Vertical Shaft Engines Between 99cc and 225cc from the
People's Republic of China: Decision Memorandum for
Initiation of Anti-Circumvention Inquiry

I. SUMMARY

On July 30, 2021, the Department of Commerce (Commerce) received a letter from Briggs & Stratton, LLC,¹ the petitioner in the underlying investigations, alleging that engines with a displacement of 60 up to and including 99 cubic centimeters (cc) (60cc up to 99cc engines) are circumventing the antidumping (AD) and countervailing duty (CVD) orders on certain vertical shaft engines between 99cc and up to 225cc, and parts thereof (small vertical engines), from China, pursuant to sections 781(c) and (d) of the Tariff Act of 1930, as amended (the Act).² As explained below, we recommend initiating a minor alterations anti-circumvention inquiry, pursuant to section 781(c) of the Act, and recommend declining to initiate a later-developed merchandise anti-circumvention inquiry, pursuant to section 781(d) of the Act.

II. BACKGROUND

On July 30, 2021, the petitioner requested that Commerce initiate an anti-circumvention inquiry proceeding, pursuant to 781(c) and 781(d) of the Act and 19 CFR 351.225(i) and 19 CFR 351.225(j), to determine whether 60cc up to 99cc engines from China involve a minor alteration to subject merchandise and/or are later-developed merchandise, such that they should be subject to the *Orders*.³

¹ See Petitioner's Letter, "Request for Anti-Circumvention Inquiry Pursuant to Section 781(c) and/or Section 781(d) of the Tariff Act of 1930", dated July 30, 2021 (Circumvention Allegation).

² See *Certain Vertical Shaft Engines Between 99cc and Up To 225cc, and Parts Thereof from the People's Republic of China: Antidumping and Countervailing Duty Orders*, 86 FR 23675 (May 4, 2021) (*Orders*).

³ See Circumvention Allegation.



On August 27, 2021, MTD Products Inc. (MTD), an original equipment manufacturer and importer, submitted comments requesting that Commerce reject the petitioner's request to initiate an anti-circumvention inquiry.⁴ On September 3, 2021, the petitioner submitted rebuttal comments to MTD's request; however, these comments were filed too late for consideration in our anti-circumvention inquiry initiation determination.⁵

III. SCOPE OF THE ORDERS

The merchandise covered by the *Orders* are small vertical engines from China. For a complete description of the scope of the *Orders*, see the appendix of the accompanying *Federal Register* notice.

IV. MERCHANDISE SUBJECT TO THE ANTI-CIRCUMVENTION INQUIRY

The merchandise subject to the anti-circumvention inquiry are small vertical engines with displacement between 60cc and up to 99cc produced in China and exported to the United States (inquiry merchandise).⁶

V. LEGAL FRAMEWORK

Minor Alterations

Section 781(c)(1) of the Act provides that Commerce may find circumvention of an AD and/or CVD order when products that are of the class or kind of merchandise subject to an AD and/or CVD order have been "altered in form or appearance in minor respects... whether or not included in the same tariff classification." While the Act is silent as to what factors to consider in determining whether alterations are properly considered "minor," the legislative history of this provision indicates that there are certain factors which should be considered before reaching a circumvention determination. Concerning the allegation of minor alteration under 781(c) of the Act and 19 CFR 351.225(i), Commerce examines "such criteria as the overall characteristics of the merchandise, the expectations of ultimate users, the use of the merchandise, the channels of marketing{, } and the cost of any modification relative to the total value of the imported product."⁷ Each case is highly dependent on the facts on the record and must be analyzed in light of those specific facts. Thus, along with the five factors enumerated above, Commerce has also considered additional factors, such as the circumstances under which the products at issue enter the United States, the timing of the entries during the period at issue, and the quantity of merchandise imported during the period at issue.⁸

⁴ See MTD's Letter, "Request to Reject Anti-Circumvention Inquiry Request," dated August 27, 2021 (MTD's Rebuttal).

⁵ See Petitioner's Letter, "Comments on Request to Reject Anti-Circumvention Inquiry Request," dated September 3, 2021.

⁶ *Id.* at 1.

⁷ See S. Rep. No. 100-71 (1987) at 100.

⁸ See, e.g., *Certain Uncoated Paper from Australia, Brazil, the People's Republic of China, Indonesia, and Portugal: Initiation of Anti-Circumvention Inquiry*, 81 FR 78117, 78118 (November 7, 2016).

However, section 781(c)(2) of the Act provides an exception that “paragraph (1) shall not apply with respect to altered merchandise if the administering authority determines that it would be unnecessary to consider the altered merchandise within the scope of the {AD or CVD order}.”

The Court of International Trade, affirmed by the Court of Appeals for the Federal Circuit (Federal Circuit) in its *Wheatland* decision, has ruled that Commerce must adhere to the following standard when conducting minor alterations anti-circumvention inquiries:

{T}he intent of Congress is clear and the statutory language is unambiguous, applying only to merchandise that has been ‘*altered in form or appearance in minor respects*’ from that which appears to have been originally within the scope of the antidumping order.... The minor alterations provision does not apply to a distinct product that is originally unambiguously outside the scope of the order and is not produced by altering subject merchandise.⁹

The Federal Circuit held in *Wheatland* that a product specifically excluded from the scope of an order may not be brought back within the scope in the context of an anti-circumvention inquiry applicable to covered merchandise.¹⁰ Moreover, the Federal Circuit has distinguished that *Wheatland* applies to instances of explicit exclusions and an order that sets a cross-sectional range cannot be read to expressly exclude products outside that range.¹¹

Later-Developed Merchandise

Section 781(d)(1) of the Act provides that Commerce may find circumvention of an AD and/or CVD order(s) when merchandise is developed after an investigation is initiated (*i.e.*, is “later-developed merchandise”). In conducting later-developed merchandise anti-circumvention inquiries, Commerce first applies a commercial availability test to determine whether the merchandise subject to the inquiry is “later developed.”¹² In doing so, Commerce examines whether the merchandise at issue was commercially available at the time of the initiation of the AD and/or CVD investigation(s).¹³ Commerce defines “commercially available” as “present in

⁹ See *Wheatland Tube Co. v. United States*, 973 F. Supp. 149, 162 (CIT 1997), *aff’d* *Wheatland Tube Co. v. United States*, 161 F.3d 1365, 1368 (Fed. Cir. 1998) (*Wheatland*).

¹⁰ See *Wheatland*, 161 F.3d at 1371.

¹¹ See *Deacero S.A. de C.V. v. United States*, 817 F.3d 1332, 1338 (Fed. Cir. 2016) (*Deacero*) (“Unlike *Wheatland*, the duty order at issue contains no explicit exclusion of small-diameter steel wire rod. Although the scope of the duty order sets a cross-sectional range (5.00mm to 19.00mm), that cannot be read to expressly exclude for purposes of anti-circumvention inquiries all products outside that range.”).

¹² See, e.g., *Aluminum Extrusions from the People’s Republic of China: Affirmative Final Determination of Circumvention of the Antidumping and Countervailing Duty Orders and Rescission of Minor Alterations Anti-Circumvention Inquiry*, 82 FR 34630 (July 26, 2017) (citing *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, 32035 (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).

¹³ See, e.g., *Aluminum Extrusions from the People’s Republic of China: Affirmative Final Determination of Circumvention of the Antidumping and Countervailing Duty Orders and Rescission of Minor Alterations Anti-*

the commercial market or fully developed, *i.e.*, tested and ready for commercial production, but not yet in the commercial market.”¹⁴ If Commerce does not find that the product is later-developed (*i.e.*, the product was commercially available before the initiation of the AD and/or CVD investigation(s)), it need not examine the factors under section 781(d)(1) of the Act.¹⁵

If Commerce determines that such merchandise was not commercially available at the time of the initiation of the AD and/or CVD investigation(s) and is, thus, later-developed, Commerce will consider whether the later-developed merchandise is covered by the order(s). In making a determination of whether the later-developed merchandise is within the scope of an order, Commerce evaluates whether: (1) the general physical characteristics of the merchandise under consideration are the same as subject merchandise covered by the order(s); (2) the expectations of the ultimate purchasers of the merchandise under consideration are no different than the expectations of the ultimate purchasers of subject merchandise; (3) the ultimate use of the subject merchandise and the merchandise under consideration are the same; (4) the channels of trade of both products are the same; and (5) there are any differences in the advertisement and display of both products.¹⁶ Commerce, after taking into account any advice provided by the United States International Trade Commission (ITC), pursuant to section 781(e) of the Act, may include such imported merchandise within the scope of the order(s).

VI. ANALYSIS

A. Minorly-Altered Merchandise

Petitioner’s Allegation

The petitioner argues that an anti-circumvention inquiry should be initiated pursuant to section 781(c) of the Act because Chongqing Zongshen General Power Machine Co., Ltd. (Zongshen), a manufacturer of merchandise subject to the *Orders*, began producing inquiry merchandise (specifically, 79cc engines) in China by minorly altering engines subject to the *Orders*.¹⁷

Circumvention Inquiry, 82 FR 34630 (July 26, 2017), and accompanying IDM at Comment 2; and *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, 59077 (October 6, 2006), and accompanying IDM at Comment 4, amended by Redetermination Pursuant to Court Remand Order in *Target Corp. v. United States*, 578 F. Supp. 2d 1369 (CIT 2008) (November 7, 2008), available at <https://enforcement.trade.gov/remands/08-101.pdf>, *aff’d Target Corp. v. United States*, 626 F. Supp. 2d 1285 (CIT 2009) (*Target I*); and *Target Corp. v. United States*, 609 F.3d 1352, 1358-60 (Fed. Cir. 2010) (*Target II*) (holding that Commerce’s interpretation of later-developed merchandise as depending on whether the merchandise was commercially available at the time of the investigation is reasonable).

¹⁴ See *Target II*, 609 F.3d at 1358.

¹⁵ See *Certain Hardwood Plywood Products from the People’s Republic of China: Preliminary Affirmative Determination of the Antidumping Duty and Countervailing Duty Orders*, 84 FR 27081 (June 11, 2019) (*Hardwood Plywood from China Anti-Circumvention Prelim*), and accompanying Preliminary Decision Memorandum (PDM) at “V. Analytical Framework for Later- Developed Merchandise Anti-Circumvention Inquiry” (explaining that Commerce will analyze these factors if Commerce determines that the merchandise at issue is later-developed).

¹⁶ See section 781(d)(1) of the Act.

¹⁷ See *Circumvention Allegation* at 4-5.

According to the petitioner, prior to the *Orders*, the entirety of the U.S. walk-behind mower market consisted of walk-behind mowers with engines from 99cc to 224cc, and engines with displacement below 99cc were typically used in handheld devices.¹⁸ Thus, the petitioner asserts that the inquiry merchandise produced by Zongshen is subject merchandise that is minorly-altered in form or appearance to evade the *Orders*.

The petitioner states that, although the Act does not define what qualifies as “minor” alterations, past proceedings indicate that there are certain factors that should be considered before reaching an affirmative circumvention determination.¹⁹ The petitioner argues that the following factors support initiation based on the thresholds for what qualifies as minor alterations:

Overall physical characteristics of inquiry merchandise: The petitioner argues that, other than the displacement of the engines, the inquiry merchandise would fall within the scope of the *Orders* and fulfills all criteria that Commerce has historically examined to determine whether merchandise is minorly-altered to circumvent an existing order.²⁰ The petitioner notes that the production and assembly process for inquiry merchandise is the same as that for vertical shaft engines within the scope of the *Orders*, and the same facilities and machinery can be used to construct inquiry merchandise and subject merchandise.²¹ Moreover, the petitioner claims that the degree of alterations that must be made to produce two in-scope engines with different displacements (*e.g.*, a 125cc engine to a 200cc engine) is the same that must be made to shift from producing in-scope products to producing inquiry merchandise (*e.g.*, alteration from a 125cc engine to a 79cc engine).²² Changes, such as the sizes of certain components, the mold of casting, and programming the tools for machining the engine size, would be made regardless of whether the engine would have displacement within the scope of the *Orders* or within the range of the inquiry merchandise. The petitioner also claims that the walk-behind mowers with inquiry merchandise sold in the U.S. market are distinct from those sold in the European market because of the speed at which the engine operates. According to the petitioner, the 79cc engine being sold in the United States is rated at 3,250 revolutions per minute (RPM) compared to engines rated at 2,800 or 2,900 RPM in Europe, and this difference in RPM requires a physical alteration to the engine.

Expectations of ultimate users and use of merchandise: The petitioner asserts that the expectations of the ultimate purchasers and use of inquiry merchandise are the same as those of subject merchandise. According to the petitioner, both products are used in walk-behind lawn mowers, typically purchased by individual consumers from retailers with the expectation that the engine will generate sufficient power to allow the individual to walk behind the mower as it cuts grass effectively.²³ The petitioner cites screen shots of lawnmower retailer Lowe’s website listing MTD’s Yard Machines Mower with a 79cc engine as evidence.²⁴ The petitioner also notes that the “intermediate purchaser” has the same expectations and uses for both inquiry and

¹⁸ *Id.* at 14.

¹⁹ *Id.* at 20 (citing *Steel Concrete Reinforcing Bar from Mexico: Initiation of Anti-Circumvention Inquiry of Antidumping Duty Order*, 84 FR 58132 (October 30, 2019)).

²⁰ *Id.* at 24-25.

²¹ *Id.* at 24.

²² *Id.* at 25.

²³ *Id.* at 25-26.

²⁴ *Id.* at 26.

in-scope merchandise as well. According to the petitioner, MTD (an original equipment manufacturer that imports both inquiry merchandise and in-scope merchandise), purchases 79cc engines with the expectation that they will function in walk-behind lawn mowers that will be sold to retailers.²⁵ These are the same expectations and use as for their purchases of vertical shaft engines between 99cc and 225cc.

Channels of trade: The petitioner argues that the channels of trade for inquiry and in-scope merchandise are identical. In support, the petitioner points to a finding by the ITC that small vertical engines are sold to original equipment manufacturers (OEMs) that produce walk-behind lawn mowers and other outdoor power equipment, which in turn sell their equipment to retailers such as Lowe's and Home Depot for ultimate purchase by individual consumers.²⁶ Citing to screen shots of Lowe's Website and sworn declarations, the petitioner maintains that inquiry merchandise is sold in the exact same channel of trade. The petitioner states that OEMs such as MTD purchase 79cc engines from Zongshen and install the engines onto their walk-behind mowers, and retailers such as Home Depot purchase the mowers from the OEMs and make them available for individual consumption.²⁷ The petitioner also provides evidence that MTD's walk-behind mower with a 79cc engine is being sold in the same category of mowers containing in-scope engines on Lowe's website.

Channels of marketing: The petitioner argues that the manner in which inquiry merchandise is marketed is the same manner in which in-scope merchandise is advertised and displayed. The petitioner asserts that "small vertical engines are primarily advertised and displayed at retailers while mounted on walk-behind lawn mowers. Subject merchandise and inquiry merchandise are advertised and displayed in identical manners at retailers,"²⁸ citing to Lowe's website displaying MTD mowers with 79cc engine displacement marketed next to other mowers with in-scope engines with displacements of 125cc, 140cc, 163cc, and 170cc, among others. The petitioner also provides screen shots from Zongshen's website that markets four vertical shaft engines in its "NP series" that have engine displacements both within the scope of the *Orders* and in the range of inquiry merchandise.²⁹

Cost of modification: The petitioner estimates that the cost of altering the casting and programming of machining tools to produce an engine with displacement between 60cc and 99cc as compared to in-scope merchandise is a minimal percent of the cost of manufacturing the engine, according to a sworn declaration of an industry expert.³⁰ Relative to the purported price of Zongshen's 79cc engine, the petitioner asserts that the cost to modify in-scope engines to circumvent the order is insignificant.³¹ The petitioner adds that "there is no additional cost for switching production between a 99cc engine and a 79cc or another piece of inquiry merchandise compared to switching production between a 125cc engine and a 99cc engine;"³² thus, the cost

²⁵ *Id.*

²⁶ *Id.* at 27.

²⁷ *Id.*

²⁸ *Id.* at 28.

²⁹ *Id.* at 29.

³⁰ *Id.* at 29-30.

³¹ *Id.* at 30.

³² *Id.*

and degree of modification is equivalent whether the modification is from one in-scope engine to another in-scope engine of different displacement or to inquiry merchandise.

Circumstances under which the product entered the United States: The petitioner alleges that the circumstances under which inquiry merchandise has entered the United States indicates that Zongshen is altering subject merchandise in order to avoid AD and CVD duties on merchandise subject to the *Orders*. According to the petitioner, the combined AD and CVD margins of 322.48 percent give Zongshen financial incentive to circumvent the *Orders*.³³ Moreover, the petitioner notes that Commerce made affirmative critical circumstances findings with respect to Zongshen in the underlying investigations.³⁴ The petitioner asserts that these critical circumstances findings indicate that Zongshen exported in-scope engines to the United States prior to Commerce's preliminary determinations to avoid paying provisional duties on these products and highlight Zongshen's attempts to access the U.S. market without paying AD/CVD duties.³⁵ The petitioner also states that prior to 2021, it had not witnessed a 79cc engine, considered a "handheld" engine by the U.S. Environmental Protection Agency (EPA), mounted on a walk-behind lawnmower in the U.S. market.³⁶ The petitioner maintains that the lack of walk-behind lawnmowers with 79cc engines in the United States prior to 2021 supports the argument that Zongshen is actively attempting to circumvent the *Orders* by using "handheld" engines on walk-behind mowers.

Timing and quantities of entries of the product: The petitioner states that it was not aware of any sales of inquiry merchandise in the U.S. market or of any walk behind mowers with engines of a displacement between 60cc and less than 99cc in the United States prior to April 2020.³⁷ Citing sworn declarations, shipment manifest data, and the engine model number on a MTD walk-behind mower with a Zongshen 79cc vertical shaft engine, the petitioner deduces that there were six shipments of 79cc MTD Yard Machines mowers containing thousands of inquiry merchandise engines during October and November 2020, all of which shipped after Commerce's preliminary CVD determination in August 2020 while five of the six shipped after Commerce's preliminary AD determination in October 2020.³⁸ The petitioner notes that MTD imported both the merchandise subject to the aforementioned positive critical circumstances determination and the inquiry merchandise.³⁹

MTD's Rebuttal

MTD opposes the initiation of a minor alterations anti-circumvention inquiry because it claims that there is a difference in class and categorization between the merchandise subject to the *Orders* and the inquiry merchandise. MTD argues against the petitioner's interpretation of minor alterations, stating that engines below 99cc, such as a 79cc engine, are completely different engines with different parts and displacements that are nearly 20 percent lower than those of in-scope engines; thus, according to MTD, engines with displacements below 99cc

³³ *Id.*

³⁴ *Id.* at 30-31 (citing the *Orders*).

³⁵ *Id.*

³⁶ *Id.* at 31.

³⁷ *Id.* at 32.

³⁸ *Id.*

³⁹ *Id.* at 34.

should qualify as entirely new engines rather than minorly-altered in-scope engines.⁴⁰ MTD adds that 79cc and 99cc engines have different carburetor sizes, tuning, pistons, piston rings, and crankcases.⁴¹ MTD states that the EPA’s categorization of engines 100cc and greater as a different class than 99cc and smaller engines further proves that they are separate groups of engines. Additionally, MTD argues that 79cc engines are not capable of the same applications suited for larger displacement engines (*i.e.*, they are not capable of performing as well in walk-behind mowers for mowing large areas of grass), as evidenced by the difference in marketing of the engines of different displacements.⁴² MTD argues that the scope of the *Orders* is not defined in terms of end use, *e.g.*, in lawnmower applications, and the *Orders* cover a broader category of engines that are used in non-hand-held outdoor power equipment.⁴³ Lastly, MTD cites to the petitioner’s testimony before the ITC regarding small vertical engines, where the petitioner stated that “there is a clear dividing line between the engines at issue here and smaller engines with a displacement of 99cc.”⁴⁴ In sum, MTD argues, there is a clear line that divides the class of engines subject to the scope of the *Orders* and the class of engines regarded as inquiry merchandise by the petitioner.

Analysis

As explained above, although the Act does not define what qualifies as “minor alterations,” past proceedings indicate that there are certain factors which should be considered in determining whether inquiry merchandise was minorly altered in an attempt to circumvent an order, such as: (1) the overall physical characteristics of the merchandise; (2) the expectations of the ultimate users; (3) the use of the merchandise; (4) the channels of marketing; and (5) the cost of any modification relative to the total value of the imported product.⁴⁵ We find that, for initiation purposes, the information included in the petitioner’s allegation addresses the five factors, with respect to 60cc up to 99cc engines. While MTD raises questions regarding the relevance of the end use of the inquiry merchandise, the function and purpose of the inquiry merchandise remains the same as merchandise subject to the scope of the *Orders*, and the petitioner’s allegations do not define the inquiry merchandise on the basis of end-use. Moreover, Commerce’s regulations require a party requesting an anti-circumvention inquiry provide information about the product at issue and supporting factual evidence “to the extent reasonably available to the interested party.”⁴⁶ If Commerce cannot determine whether circumvention is occurring solely upon the application, it will initiate a formal inquiry within 45 days.⁴⁷ Although we note that we would not have enough information to make a final ruling based on the current record, we find the petitioner has provided sufficient evidence regarding the five factors enumerated above to warrant initiation of an anti-circumvention inquiry pursuant to section 781(c) of the Act. We

⁴⁰ See MTD’s Rebuttal at 17-18.

⁴¹ *Id.* at 18.

⁴² *Id.* at 19.

⁴³ *Id.* at 7 and 14.

⁴⁴ *Id.* at 21.

⁴⁵ See *Steel Concrete Reinforcing Bar from Mexico: Initiation of Anti-Circumvention Inquiry of Antidumping Duty Order*, 84 FR 58132 (October 30, 2019); *Carbon and Certain Alloy Steel Wire Rod from Mexico: Initiation of Anti-Circumvention Inquiry of Antidumping Duty Order*, 83 FR 5405 (February 7, 2018); and *Deacero* 817 F.3d at 1332.

⁴⁶ See 19 CFR 351.225(c).

⁴⁷ See 19 CFR 351.225(d).

note the issues MTD has raised; however, we find that the proper avenue through which to address these issues is a formal anti-circumvention inquiry. As such, if our recommendation to initiate is accepted, Commerce will consider and address the arguments and factual information from the parties during the course of this anti-circumvention inquiry.

B. Later-Developed Merchandise

Petitioner's Allegation

The petitioner also argues that inquiry merchandise is merchandise that is later-developed to fall outside of the scope of the *Orders*, warranting an anti-circumvention inquiry pursuant to the later-developed merchandise provision of section 781(d) of the Act.

In addition to the aforementioned factors, the petitioner asserts that an anti-circumvention inquiry should be initiated given the evidence indicating the lack of commercial availability at the time of the investigations. As noted above, the petitioner states that prior to 2021 it had never seen any engine below 99cc used on a walk-behind lawn mower in the United States; the petitioner also asserts it had not seen inquiry merchandise in the U.S. market prior to the initiation of the AD and CVD investigations, restating that inquiry merchandise such as 79cc engines were typically used for handheld functions.⁴⁸ Additionally, the petitioner points out that the EPA categorizes engines as those with a displacement below 100cc or between 100cc and less than 225cc, the latter of which it defines as “Class I” engines.⁴⁹

The petitioner notes that Zongshen sold 79cc vertical shaft engines for use in MTD walk-behind mowers in Europe between 2017 and 2019 and that MTD has sold walk-behind mowers with 79cc engines in Australia.⁵⁰ The petitioner also states that Texas A/S, an OEM in Denmark, markets walk-behind mowers in Europe with Zongshen’s 79cc engines.⁵¹ However, the petitioner asserts that these 79cc engines used in walk-behind mowers in Europe are typically mounted on smaller mower platforms than those used in the U.S. market and less effective with 79cc engines compared to the larger mower decks now used with 79cc engines in the U.S. market.⁵² As previously mentioned, the petitioner claims that the walk-behind mowers with inquiry merchandise sold in the U.S. market are distinct from those sold in the European market because of the speed at which the engine operates. According to the petitioner, the 79cc engine being sold in the United States is rated at 3,250 revolutions per minute (RPM) compared to engines rated at 2,800 or 2,900 RPM in Europe, and this difference in RPM requires a physical alteration to the engine. Consequently, the petitioner argues that the 79cc engine sold in the United States is distinct from the 79cc engines sold by Zongshen in Europe, and, even if the engines were the same, the 79cc engine would still not be considered “commercially available” in the United States at the time of the investigation because it was not sold in the U.S. market.⁵³

⁴⁸ See Circumvention Allegation at 31.

⁴⁹ *Id.* at 35-36.

⁵⁰ *Id.* at 36-38.

⁵¹ *Id.* at 38.

⁵² *Id.* at 37-38.

⁵³ *Id.* at 38-39 (citing *Target I*, 626 F. Supp. 2d at 1290 (CIT 2009); and *Laminated Woven Sacks from the People's Republic of China: Negative Final Determination of Circumvention*, 78 FR 12716 (February 25, 2013) (*Laminated Woven Sacks*), and accompanying IDM at Comment 1).

Additionally, the petitioner argues that inquiry merchandise produced by Zongshen for use in products such as edgers or other power equipment should still qualify as later-developed merchandise when modified into use for walk-behind mowers.⁵⁴

MTD's Rebuttal

MTD argues that the scope of the *Orders* is not defined in terms of end use in lawnmower applications, and the *Orders* cover a broader category of non-hand-held outdoor power equipment.⁵⁵ Moreover, according to MTD, the petitioner's circumvention allegation is insufficient because the petitioner ignores that engines under 99cc were used in mowers and other non-hand-held power equipment (e.g., edgers) prior to the underlying investigations, and the scope of the *Orders* does not necessitate specific end-use of the merchandise. Thus, MTD asserts, Commerce should not base its initiation analysis on end use when end use is not a criterion in the scope.

MTD further argues that 79cc walk-behind mowers had been tested, were ready for commercial production, and were well-known in the United States years before the petitions were filed in the underlying investigations and cites to marketing materials and public presentations for their line of 79cc walk-behind mower engines.⁵⁶ MTD adds that Zongshen and MTD agreed to develop a 79cc engine for use on walk-behind lawnmowers in early 2017, and, in 2018, the California Air Resources Board issued its compliance certification for the 79cc engine, noting its intended use on 2019 model year walk behind lawnmowers, prior to the initiation of the underlying investigations.⁵⁷ As such, MTD argues, the inquiry merchandise cannot be defined as later-developed within the meaning of section 781(d) of the Act.

Analysis

As discussed above, in conducting a later-developed merchandise anti-circumvention inquiry, we first consider whether the merchandise subject to the inquiry is later-developed by applying a commercial availability test. 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, at the time of the initiation of the underlying investigation.⁵⁸ If the product was commercially available before the initiation of the AD and/or CVD investigation(s), Commerce need not examine the factors under section 781(d)(1) of the Act.⁵⁹

We find that the petitioner failed to sufficiently allege that the inquiry merchandise was not commercially available at the time of the initiation of the AD and CVD investigations that led to the *Orders*. Indeed, the information in the petitioner's allegation shows that the inquiry merchandise was present in the commercial markets of Europe and Australia prior to the

⁵⁴ *Id.* at 40.

⁵⁵ See MTD's Request to Decline Initiation at 14.

⁵⁶ *Id.* at 12.

⁵⁷ *Id.* at 9-10.

⁵⁸ See *Laminated Woven Sacks* IDM at Comment 1 (citing *Target I*, 626 F. Supp. 2d at 1285; and *Target II*, 609 F.3d at 1358-60).

⁵⁹ See *Hardwood Plywood from China Anti-Circumvention Prelim PDM* at "V. Analytical Framework for Later-Developed Merchandise Anti-Circumvention Inquiry."

initiation of the investigations,⁶⁰ which demonstrates that even if the inquiry merchandise was not being sold in the U.S. market, it was commercially available prior to the initiation of the investigations because it was tested and ready for commercial production.” Further contrary to petitioner’s claim, MTD provided evidence that inquiry merchandise was not only tested and ready for production, but also present in the U.S. market and used in walk-behind mowers prior to the initiation of the investigations.⁶¹ Because the inquiry merchandise was commercially available prior to the initiation of the investigations, we find that is not appropriate to initiate an anti-circumvention inquiry pursuant to section 781(d) of the Act.

VII. RECOMMENDATION

We recommend initiating an anti-circumvention inquiry pursuant to section 781(c) of the Act, minor alterations, in this proceeding for the reasons set forth above.

We recommend not initiating an anti-circumvention inquiry pursuant to section 781(d) of the Act, later-developed merchandise, in this proceeding for the reasons set forth above.

☒

Agree

☐

Disagree

9/13/2021

X



Signed by: CHRISTIAN MARSH

Christian Marsh
Acting Assistant Secretary
for Enforcement and Compliance

⁶⁰ See Circumvention Allegation at 36-37.

⁶¹ See MTD’s Rebuttal at 10-11.