

BRIEF *AMICUS CURIAE*

Pursuant to Supreme Court Rule 37.3(a) on written consent of all parties, the Joint Industry Group, the Alliance of Automobile Manufacturers and the International Mass Retail Association respectfully submit this brief *amicus curiae* in support of respondent The Mead Corporation's (Mead) opposition to the Government's position in this case.¹

INTERESTS OF *AMICUS CURIAE*

The Joint Industry Group is a coalition of over 160 companies, trade associations and businesses actively involved in international trade, which represents the interests of its members before the Customs Service, the Department of Commerce, the United States Trade Representative, other government agencies and the Congress. The members of the Alliance of Automobile Manufacturers ("Alliance") include thirteen global manufacturers of cars and light trucks. The Alliance represents the interests of its members in public policy matters, with particular emphasis on vehicle safety, the environment, and customs procedures, among other issues. The International Mass Retail Association is the world's leading alliance of retailers and their product and service suppliers, representing over 200 retail companies and 550 supplier companies before both the Federal and State governments.

¹ This brief was not authored in whole or in part by counsel for a party to this case. No person or entity, other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of the brief. The individual members of each association included within the *amicus curiae* are listed in the Appendix.

The members of these associations either are importers or assist importers. They request thousands of rulings from the Customs Service annually and, when necessary, litigate adverse rulings in the Court of International Trade and the Court of Appeals for the Federal Circuit. The decision of the Court in this case will directly affect their decisions on whether to seek pre-importation guidance from the Customs Service on the classification of imported merchandise and other laws enforced by Customs through the administrative rulings process or, alternatively, to by-pass the rulings process entirely and rely ultimately on the courts for guidance on the construction of the tariff laws.

STATEMENT

For more than a century,² importers have sought guidance from the United States Customs Service on how imported products should be classified and appraised under the various tariff laws that have been enacted by Congress. The Customs Service has provided that guidance through ruling letters. These are almost always issued in response to an importer's written request³ and, according to the procedural regulations issued by Customs, are limited to the facts presented in the request and binding only on Customs with respect to the importer who requested the ruling.⁴

² The Customs Service has been issuing such decisions at least since 1868. U.S. Treasury Dep't, *Synopsis of Sundry Decisions Rendered by the Treasury Department under the Tariff and Other Acts*, U.S. Gov't Printing Office (1869).

³ On occasion Customs issues rulings in response to internal inquiries from its field personnel without any notice to parties in the importing community that may be affected by the decisions therein.

⁴ 19 C.F.R. § 177.9(a).

The importer is also bound to follow the ruling,⁵ unless and until the ruling is overturned by the courts, or revoked or modified by Customs in accordance with the procedures set forth in 19 U.S.C. § 1625(c). Rulings are issued by customs officials at ports of entry (principally, New York) and the Office of Regulations and Rulings at Customs headquarters in Washington, D.C.⁶

At present, importers make extensive use of the ruling letter procedure for obtaining Customs' current position on various issues, including the classification and appraisement of the millions of different products that enter the country. Customs also issues ruling letters on, among other things, country of origin and country of origin marking; drawback; trademarks and copyrights; the entry of merchandise; foreign trade zones; the entry and clearance of vessels, vehicles and aircraft entering and leaving the United States; customs bonds; customs brokers; vessel repairs; overtime charges; and the merchandise processing and harbor maintenance fees. Rulings on these topics vary little from rulings on classification and appraisement,⁷ except for the subject matter. While classification rulings tend to be very brief,⁸ simply stating the facts and Customs'

⁵ 19 C.F.R. § 177.8(a)(2).

⁶ 19 C.F.R. § 177.2(a).

⁷ 19 U.S.C. § 1502(a), the legislative authority relied on by the Government, only mentions classification, appraisement, and the assessment of duties.

⁸ In 1999, Customs' field officers at the ports issued approximately 10,000 brief classification rulings, and the Office of Regulations and Rulings issued almost 600 classification rulings containing a fuller discussion and analysis of the facts and applicable law. This information was obtained through a query of Fuglei's "Customs Info" CD-ROM database, which is commercially available and widely used in the trade community. The query covered classification rulings issued in calendar year 1999.

opinion as to the correct classification, some rulings from Customs headquarters do provide a fuller analysis of the facts and applicable law.⁹

The substance of a ruling letter involving classification, whether it be brief or expansive in explaining how the conclusion was reached, can, with one exception,¹⁰ only be challenged by the importer through filing an administrative protest contesting the liquidation of an entry covering an actual importation of the product. Such a protest may be filed, however, even though the importer did not obtain a ruling. If the protest is denied by Customs, the importer may obtain judicial review of Customs' classification decision by filing a summons in the Court of International Trade.

This case presents the narrow question of whether the courts must defer under *Chevron U.S.A., Inc. v. Natural*

⁹ Nearly all rulings result from an importer-initiated request and are made available electronically through the Internet on Customs' website, or through private publishers to whom Customs provides the rulings electronically. Other than revocations or modifications of existing rulings that must by law be published in the Customs Bulletin and Decisions (the Customs Service's "official" publication), these rulings are not required to be published. In fact, only seven rulings or other documents announcing Customs' position on a classification matter have appeared in that publication since 1996. Of these seven, five were published in 1996 (T.D. 96-5, T.D. 96-7, T.D. 96-24, T.D. 96-80, and General Notice: Tariff Classification of Hydraulic Mine Roof Shield Supports). Only two have been published since 1997 (C.S.D. 97-1 and General Notice: Guidance Concerning the Tariff Classification of Pharmaceutical Products Imported for Clinical Research).

¹⁰ Rulings can be challenged directly in the Court of International Trade without filing a protest upon a showing of irreparable harm. *See* 28 U.S.C. § 1581(h).

Resources Defense Council, Inc., 467 U.S. 837 (1984), to the tariff classification rulings issued by the Customs Service. The decision of this Court is likely to have broad ramifications for importers. Unless this Court continues to adhere to the “bright line” rule announced in *Chevron* and reaffirmed in *United States v. Haggart Apparel Co.*, 526 U.S. 380 (1999), and most recently in *Christensen v. Harris County*, 120 S. Ct. 1655 (2000), which limited deference to interpretive regulations promulgated under the Administrative Procedure Act,¹¹ the decision will inject greater uncertainty and less uniformity into the law than exist today, contrary to the Government’s assertion, and will result in increased litigation and, thus, increased costs to business.

SUMMARY OF ARGUMENT

Extending *Chevron* deference to tariff classification rulings is both legally and commercially inappropriate. Applicable judicial precedent draws a clear, workable distinction between regulations, which have the force of law, and rulings, which do not. This Court’s decisions emphasize that *Chevron* deference is warranted only when agencies act pursuant to a Congressional delegation of authority. In the most recent decision of this Court discussing *Chevron* deference, *Christensen v. Harris County*, this Court refused to extend *Chevron* to an agency’s ruling letter. Here, where again the Government argues that this Court should give controlling weight to an agency’s ruling letter, it cites 19 U.S.C. § 1502(a) as a specific Congressional delegation of authority. We

¹¹ 5 U.S.C. § 551 *et seq.*

submit, however, that a plain reading of the statute and its legislative history establishes that such rulings are simply another form of general information on classification and appraisement that Congress has long directed should be disseminated to Customs officials at ports of entry to ensure that imported merchandise arriving at any port in the country is treated fairly and uniformly. The Government's attempt to dignify customs "binding rulings" as a form of delegated lawmaking therefore fails.

Practical and commercial considerations also militate against extending *Chevron* deference to classification rulings. First, there is no simple way to distinguish classification rulings from Customs' interpretive pronouncements in other contexts. There are many types of rulings and interpretive statements, of varying degrees of applicability and persuasiveness. Customs ruling letters themselves are "binding" in only a limited sense, as they bind only the requesting party and the Customs Service and are limited to the facts presented in the request, be it from an importer or a customs officer. Other types of rulings and agency pronouncements may be of broader applicability and carry more precedential weight. Tariff classification rulings are frequently revoked or modified, and therefore, at the time a ruling is issued Customs explicitly warns third parties not to rely upon them. Given the wide variety of agency interpretive statements (rulings and otherwise), granting *Chevron* deference to this category of rulings would create great uncertainty as to the level of deference due to Customs' numerous other kinds of pronouncements.

The commercial considerations weighing against the Government's position in this case also include the likely effect on the behavior of private parties. Granting *Chevron* deference to classification rulings would undermine the current legal framework that seeks to promote uniformity and predictability in commercial transactions by encouraging importers to seek guidance from Customs. If courts were to give classification rulings *Chevron* deference, importers would be discouraged from seeking such advance guidance because of the risk of having to bear a higher burden in a subsequent judicial challenge. Importers would instead have the incentive to litigate classification disputes directly in court, without having obtained an advance ruling. Thus, it is highly likely that granting *Chevron* deference to such rulings would result in greater uncertainty and more litigation for the trade community.

ARGUMENT

1. The Applicable Judicial Precedent Rightly Distinguishes Regulations from Rulings.

The decision of the United States Court of Appeals for the Federal Circuit in this case correctly followed this Court's decision in *United States v. Haggard Apparel Co.*, 526 U.S. 380 (1999), in determining the type of agency action that warrants controlling-weight deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The Federal Circuit concluded that *Chevron* deference should not be extended to ordinary classification rulings. *Mead Corp. v. United States*, 185 F.3d. 1304, 1307 (Fed. Cir. 1999). This Court in *Christensen v. Harris County*, 120 S. Ct. 1655 (2000), reaffirmed this principle and clarified that *Chevron* deference is warranted only where agency action has the force of law, as when it promulgates regulations under the Administrative Procedure Act.

Informal administrative ruling letters of the type at issue in this case do not have the force of law, and therefore are not entitled to *Chevron* deference. Such rulings have a limited purpose to provide only the importer who asked for the ruling with certainty as to the rate of duty on goods it intends to import and to ensure that the same classification and rate of duty will be applied by customs officers “at the various ports of entry.” 19 U.S.C. § 1502(a).

A. Rulings, Unlike Regulations, Do Not Have the Force of Law.

In the initial classification ruling in this case, Customs informed Mead that, for tariff classification purposes, its product is an “other (nonenumerated) article[] similar to registers, account books, notebooks, receipt books and diaries.”¹² Customs subsequently reversed the initial ruling and classified the product as a bound diary.¹³ This ruling did not contain general guidelines, and it was not subject to notice-and-comment or any other form of reasoned or deliberative rulemaking. In fact, the customs regulations caution importers about the limited application of such interpretive rulings, stating that “[n]o other person should rely on the ruling letter or assume that the principles of that ruling will be applied in connection with any transaction other than the one described in the letter.” 19 C.F.R. § 177.9(c). Thus, the customs regulations provide that the classification ruling here can only be applied to Mead and cannot be relied upon by other parties.¹⁴

¹² N.Y. Ruling 864206 (June 19, 1991).

¹³ Headquarters Ruling 953126 (Jan. 11, 1993).

¹⁴ The government cites to the provision of the regulations that makes such rulings binding on all Customs officials (19 C.F.R. § 177.9(a)) to somehow suggest that the rulings have greater force. This argument is misplaced. The binding nature of such rulings is intended to promote the goal of uniformity among the ports. This is not the same, however, as

B. Chevron Deference is Warranted Only When Agencies Act Pursuant to a Congressional Delegation of Authority.

The object of deference to agency action under *Chevron* is to give effect to the intent of Congress where it has delegated its lawmaking authority. See John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612 (1996). In this way, the courts do not usurp power granted to the executive branch. As this Court noted in *Chevron*, the courts should not engage in policy determinations that are vested in other branches. 467 U.S. at 866, citing *TVA v. Hill*, 437 U.S. 153, 195 (1978).

The decisions of this Court have established an effective and comprehensive framework for the courts to use in determining when to accord *Chevron*-style deference to a given agency action. This framework rests on the separation of powers and the very limited role of the judiciary. This Court has drawn a clear path for agencies and the courts: where deference is sought or to be given, the agency must be engaged in a deliberative process of lawmaking. If not, as here, the policy concerns raised by this Court in *Chevron* are absent and deference of that type is unwarranted.¹⁵

adopting a rule of general applicability that has the force of law as to parties other than Customs and the applicant.

¹⁵ As indicated in Respondent's Supplemental Brief, the government has failed to raise the question of whether a lesser deference standard is available; the consideration of such a standard has therefore been waived.

C. **This Court in *Christensen* Recognized that Rulings of this Type are Not Entitled to *Chevron* Deference.**

This Court properly accorded *Chevron* deference to duly promulgated regulations in *United States v. Haggar Apparel Co.* However, in *Haggar*, a primary consideration was that the agency engaged in notice and comment rulemaking in promulgating the regulation at issue. 526 U.S. at 390. To deny deference to an agency action of this nature “implies a significant departure from conventional contemporary administrative practice.” *Id.* In *Christensen*, by contrast, this Court confronted “an interpretation contained in an opinion letter, not one arrived at after, for example, a formal adjudication or notice-and-comment rulemaking.” 120 S. Ct. at 1662. In holding that the opinion letter was not entitled to *Chevron* deference, the Court stated:

Interpretations such as those in opinion letters – like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law – do not warrant *Chevron*-style deference.

Id. Thus, the Court underscored the clear distinction between the promulgation of a regulation which is subject to a deliberative process, as was at issue in *Haggar*, and the issuance of an informal ruling letter which involves only a limited review.

II. The Government's Expansive Reading of 19 U.S.C. § 1502(a) Is Not Supported by a Plain Reading of the Statute or Its Legislative History.

The Government cites 19 U.S.C. § 1502 throughout its brief, but in disregard for how the Congress actually worded the statute. The Government states in its brief, beginning on page 5:

That statute authorizes the Secretary of the Treasury to adopt “rules and regulations” providing for the issuance of such “binding rulings prior to the entry of the merchandise” as may “be necessary to secure a just, impartial, and uniform appraisement of imported merchandise and the classification and assessment of duties thereon * * * .”

The law itself, however, reads differently:

(a) Powers of Secretary of the Treasury

The Secretary of the Treasury shall establish and promulgate such rules and regulations not inconsistent with the law (*including regulations establishing procedures* for the issuance of binding rulings prior to the entry of the merchandise concerned), and may disseminate such information as may be necessary to secure a just, impartial, and uniform appraisement of imported merchandise and the classification and assessment of duties thereon at the various ports of entry.

19 U.S.C. § 1502 (emphasis added).

Congress authorized the Customs Service to “promulgate such rules and regulations” . . . “(including regulations establishing *procedures for the issuance* of binding rulings prior to the entry of merchandise.)” The parenthetical language in 19 U.S.C. § 1502(a) was added in 1993 by Section 640 of the North American Free Trade Agreement Implementation Act, Public Law 103-182 (1993). The House of Representatives Report explains that the amendments to 19 U.S.C. § 1502, among other things, “authorize the Secretary to prescribe regulations for the issuance of binding rulings prior to the entry of merchandise.” H.R. Rep. No. 361, 103d Cong., 1st Sess. 138 (1993). This amendment simply ratified what the Secretary had been doing for decades – promulgating procedural regulations for the issuance of rulings and issuing rulings on not only classification and appraisement, but also on every other aspect of the law the Customs Service administers.

The legislative history establishes that the purpose for adding the parenthetical language was to provide importers with a procedure by which they could obtain guidance from the Customs Service *prior to entry* in exercising their new responsibilities to classify and appraise merchandise imposed by Section 637(a) of the North American Free Trade Agreement Implementation Act. Long before 1993, Congress had directed that the Secretary of the Treasury provide rules and regulations and disseminate classification and appraisement information. The statute was and still is directed to Customs officials themselves, not the public and not the courts, and was intended to ensure that Customs officials throughout the country classify and appraise merchandise fairly, impartially, and uniformly. The Government’s expansive reading of 19 U.S.C. § 1502(a) is dictated by its need, after this Court’s decision in *Christensen*, to find a specific Congressional delegation to issue rulings. However, a plain reading of the statute and its legislative history establishes that Congress’ intent was much more limited.

III. There are Practical, Commercial Reasons for Not Giving Deference to Customs Service Classification Rulings.

A. It is Difficult to Distinguish Between Different Types of Rulings.

The standard established by *Chevron* is clear that only interpretive regulations, which are promulgated through the formal notice and comment procedures, are entitled to judicial deference. Extending this deference to classification and appraisement rulings would require the courts to draw distinctions between various forms of such rulings, between classification and appraisement letter rulings and letter rulings on other laws administered by Customs, and between letter rulings and other types of Customs policy pronouncements. There is no simple way to distinguish, for purposes of determining the applicable level of deference, between tariff classification rulings and Customs' pronouncements of policy and interpretation in other contexts. Should the Court depart from its current "bright-line" position, it would create great uncertainty as to the deference to be accorded to these other agency statements.

1. **Tariff classification rulings represent only one of the many ways Customs issues interpretive statements of agency position.**

A review of the various forms of Customs' written pronouncements may demonstrate to the Court the inappropriateness of extending any form of deference to classification rulings. Such rulings may take the form of a brief letter describing the merchandise and providing a reference to the applicable tariff provisions, or they may contain a detailed description of the merchandise and a fuller analysis of the relevant tariff provisions, the history of those provisions, and pertinent court decisions. In addition to rulings, other forms of agency written decisions include: internal advice memoranda issued by Customs' headquarters in response to requests from officials at local ports of entry (issued after goods have entered the country);¹⁶ protest review decisions, which are issued by headquarters in response to a request from an importer who seeks independent review of a port official's decision (issued after goods have entered the country);¹⁷ Treasury Decisions, generally published in the Customs Bulletin and on occasion in the Federal Register, which are issued by headquarters to address particular policy issues, including its interpretation of tariff terms; General Notices, yet another form of policy statement issued by headquarters, generally published in the Federal Register; "Informed Compliance" publications on the classification of many products, which are made available to the public on Customs' website;¹⁸ and Directives and other documents

¹⁶ 19 C.F.R. § 177.11.

¹⁷ 19 C.F.R. § 174.23 *et seq.*

¹⁸ According to a statement contained at the beginning of every Informed Compliance publication, these publications reflect "the Customs Service's position on or interpretation of the applicable laws or regulations as of the date of publication." Informed Compliance

published on Customs' website and electronic bulletin board, which contain official statements of agency position.

2. Customs rulings are “binding” in only a limited sense.

As the Government asserts, the law authorizes Customs to promulgate “regulations establishing procedures for the issuance of binding rulings.”¹⁹ The term “binding rulings,” though much relied upon by the Government, is not defined either in the statute or in Customs' regulations. While the regulations address the “binding” nature of ruling letters, they also indicate a distinction between “rulings” and “ruling letters.” Customs defines the term “ruling” as “a written statement issued by the Headquarters Office or the appropriate office of Customs ... that interprets and applies the provisions of the Customs and related laws to a specific set of facts.”²⁰ Rulings may be set forth in “ruling letters” issued in response to written requests,²¹ or they may be “other rulings,” which are “statements of the official position of the Customs Service which are likely to be of widespread interest and application” and “are published in the Customs Bulletin, as described in § 177.10.”²²

Section 177.10, in turn, refers to the publication of “any precedential decision,” which term includes, for purposes of that paragraph, “any ruling letter, internal advice memorandum, or

publications are usually entitled, “What Every Member of the Trade Community Should Know About: [Issue or Commodity Name].” Customs has issued Informed Compliance publications addressing the classification of over thirty types of commodities, such as caviar, children's apparel, and festive articles.

¹⁹ 19 U.S.C. § 1502(a).

²⁰ 19 C.F.R. § 177.1(d)(1).

²¹ *Id.*

²² 19 C.F.R. § 177.8(b).

protest review decision.”²³ However, whereas § 177.8(b) rulings are to be published in the Customs Bulletin, “precedential decisions” need not be as long as they are made available for public inspection.

While the regulations do not discuss binding rulings, Customs makes very clear in its regulations that a ruling letter (as opposed to a ruling) is “binding” only on the Customs Service and on the party who requested it,²⁴ and that other parties are not to rely on it:

A ruling letter is subject to modification or revocation without notice to any person, except the person to whom the letter was addressed. Accordingly, no other person should rely on the

²³ 19 C.F.R. § 177.10(a).

²⁴ 19 C.F.R. § 177.9(a). “A ruling letter issued by the Customs Service under the provisions of this part represents the official position of the Customs Service with respect to the particular transaction or issue described therein and is binding on all Customs Service personnel in accordance with the provisions of this section until modified or revoked.”

ruling letter or assume that the principles of that ruling will be applied in connection with any transaction other than the one described in the letter.

19 C.F.R. § 177.9(c).

Thus, under its authority to promulgate regulations for the issuance of “binding rulings,” Customs has created a confusing array of agency pronouncements. Ruling letters are binding only on the requesting party and on Customs; some ruling letters (as well as “other rulings”) may be “precedential” and “of widespread interest and application” and are to be published in the Customs Bulletin or otherwise made available to the public; *but under no circumstances should third parties rely upon them or assume that the rulings’ principles will be applied to any other transaction.* Nonetheless, the Government asks the Court in this context to extend *Chevron* deference to tariff classification rulings, when Customs will not permit any third party to rely on those rulings.

As acknowledged in *Chevron*, “[t]he power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.” *Chevron*, 467 U.S. at 843. Where the Customs Service counsels in its regulations against relying on any ruling or the principles contained in those rulings, even in so-called “precedential decisions,” it can not be said to be “making . . . rules to fill any gap left, implicitly or explicitly, by Congress.”

3. **The inconsistent and changeable nature of Customs rulings makes them an inappropriate subject for *Chevron* deference.**

As noted above, customs rulings may be issued either by attorneys at Customs headquarters or by import specialists at individual ports of entry. As the Federal Circuit noted in *Mead*, these rulings are “an even less formalized body of interpretation than IRS revenue rulings.” 185 F.3d at 1308. Unlike IRS revenue rulings, they do not issue from a single entity within the agency, and few of them are actually published. *See id.* Customs rulings suffer from a lack of consistency in terms of both the nature and degree of legal analysis. For example, one importer may obtain a one-paragraph ruling from an import specialist stating how a particular product should be classified but giving no explanation for the conclusion, whereas another importer may obtain a lengthy, well-reasoned ruling from Customs headquarters which supports its conclusion with a clear exposition of the facts and controlling legal authority. A decision that all tariff classification rulings deserve deference would also encompass the former type.

Furthermore, Customs appears not even to have a full appreciation of rulings it has issued in the past. This results in, among other problems,²⁵ the issuance of rulings that reach different conclusions on the correct classification of what appear to be identical products.²⁶ Customs appears not always to research its

²⁵ Even where Customs revokes or modifies a ruling, it does not attempt to identify existing rulings which may be affected. Instead, it inserts the following standard language into all notices of revocation or modification: “This [revocation or modification] will cover any rulings on this issue which may exist but have not been specifically identified.”

²⁶ For example, in an August 4, 1999, “General Notice,” the Customs Service admitted that it “has issued inconsistent rulings

own position on a particular product before issuing another ruling pertaining to that product. If deference is to be given to all classification rulings, courts will have difficulty reconciling such conflicting rulings. It is conceivable that a court could be asked to review a ruling -- and give judicial deference to that ruling -- when another ruling exists in which the agency reached a contradictory conclusion.

This inconsistency is underscored by the frequency with which such rulings are modified or revoked. Since January 1994, there have been 459 rulings either modified or revoked by Customs, and of these, 135 were rulings prepared by attorneys in the Office of Regulations and Rulings in Customs' headquarters.²⁷ These numbers suggest the rather perfunctory process by which the rulings are often issued and the frequency with which the agency acknowledges that they are incorrect or inconsistent.

4. Granting *Chevron* deference to tariff classification rulings would create uncertainty as to the level of deference owed to other forms of agency statements.

Extending *Chevron* deference to classification rulings raises the question whether deference is due to the myriad other types of

regarding chemical compounds imported in bulk . . ." and requested comments from the public as to how to reconcile these rulings. General Notice: Solicitation of Comments Regarding the Classification of Pharmaceutical Products Imported for Clinical Research, 33 CUST. BULL. & DEC. 31 at 14 (Aug. 4, 1999).

²⁷ This information was obtained through a query of Fuglei's "Customs Info" CD-ROM database, which is commercially available and widely used in the trade community. The query covered the period January 1, 1994, through May 19, 2000.

non-regulation agency actions.²⁸ Most of Customs' pronouncements are in the nature of general policy statements (as in the case of Treasury Decisions or "informed compliance" publications), even though they may be issued through formal notice-and-comment procedures (as in the case of some -- but not all -- "General Notices"). This Court in *Christensen* clearly stated that such interpretations "do not warrant *Chevron*-style deference." *Christensen*, 120 S. Ct. at 1662. The courts' current standard -- according deference only to interpretive regulations -- is clear and workable.

Granting judicial deference to Customs' pronouncements would also require courts to acquiesce in what may be improper assumptions of authority by the agency. For example, in a "final interpretation" published in the Federal Register regarding criteria to be used in determining country of origin marking, Customs announced that it was departing from judicial precedent on the issue because it believed that precedent was no longer valid. While the court had expressly indicated that a shift from a producers' good to a consumers' good is relevant in determining whether the good undergoes a substantial transformation for marking purposes (*Midwood Indus., Inc. v. United States*, 313 F. Supp. 951 (Cust. Ct. 1970), *appeal dismissed*, 57 C.C.P.A. 141 (1970)), Customs announced its decision not to follow this case. "It is Customs' opinion that based on subsequent court decisions applying

²⁸ Many rulings are not issued under 19 U.S.C. § 1502, which only applies to classification and appraisement rulings.

substantial transformation analysis, *Midwood* would be decided differently today.” *Application of Producers’ Good Versus Consumers’ Good Test in Determining Country of Origin Marking; Final Interpretation*, 65 Fed. Reg. 13,827 (2000). This statement of the agency’s position was, like a customs regulation, promulgated through formal notice and comment procedures and intended to be a rule of general application. If deference were extended to customs rulings, which lack such procedural safeguards, then a court would also seem to be required to grant deference to agency pronouncements such as these, giving Customs almost unfettered discretion to contradict

otherwise valid case law in establishing agency policy.²⁹ There is no possible reason for requiring the courts to defer to Customs on the construction of a law when Customs feels free to disregard court decisions it finds unpersuasive.

B. Giving *Chevron* Deference to Rulings Would Discourage Commercial Parties from Seeking a Ruling from the Customs Service, and Would Result in Increased Litigation and Unpredictable Outcomes.

The Government argues that there is "substantial practical importance" attending the decision whether to defer to rulings issued by the Customs Service. Government's Brief at 37. According to the Government, the Customs Service "routinely employs" what it calls "binding rulings" to "address the proper application of the detailed customs provisions to the 'limitless factual variations' created by modern commerce." *Id.* at 37-38 (citation omitted). The Government concludes that without deference, both importers

²⁹ Since the publication of this notice, at least one judge of the Court of International Trade has indicated continuing approval of the *Midwood* rationale by citing case law that follows *Midwood*: "See, e.g., *S.D.I. Technologies, Inc.* . . . (noting that a shift from producer goods to consumer goods may have some evidentiary value)." *Sassy, Inc. v. United States*, Slip Op. No. 00-93, at 9 (Ct. Int'l Trade August 2, 2000) (internal citation omitted).

and the Customs Service would be left "without effective guidance for a wide range of transactions." *Id.* at 38.

The companies that make up this *amicus curiae* agree that there is a "substantial practical importance" to the issue before the Court today. If courts are required to give *Chevron* deference -- "controlling weight"-- to Customs Service rulings, the effect would be to discourage commercial parties from seeking a ruling in the first place. After all, if an importer receives a ruling from the Customs Service with which it is dissatisfied, that importer would be in the anomalous position of having a more difficult burden in court than an importer who did not receive a ruling from the Customs Service. That is, the importer would be required to show that the statute at issue is unambiguous, or if ambiguous, that Customs' interpretation is unreasonable.

Importers are not required to seek a ruling from the Customs Service. If an importer is not satisfied with the decision of the Customs Service reflected in the liquidation of an entry of merchandise, the importer must file an administrative protest contesting the decision as a prerequisite to obtaining judicial review of the matter. If the importer files a protest with the Customs Service, it will receive a decision on the protest simply allowing, denying, or allowing in part the protest. If, however, the importer also requests "further review" of the protest³⁰ and Customs determines that further review is warranted, then in addition to a decision on the protest, the importer will also receive a ruling in the

³⁰ 19 C.F.R. § 174.23.

form of a "protest review decision" from the Customs Service providing the reasons for the Customs Service's decision.

If the courts are required to give deference to Customs Service rulings, the effect would be to discourage importers from requesting a protest review decision. Importers who receive a simple decision on the protest without a ruling would then be able to challenge the decision in court without having the court give "controlling weight" to the position taken by the Customs Service.

Moreover, the Government has argued that the Federal Circuit's decision not to give deference to rulings will result in "expensive customs litigation and unpredictable outcomes." Government's Brief at 38. The member companies of this *amicus curiae* believe that the opposite is true.

As noted above, giving deference to rulings would discourage commercial parties from seeking rulings from the Customs Service. Importers would refrain from seeking rulings, and would use the protest procedures to obtain judicial review of any adverse ruling without having to overcome the high hurdle of proving its "unreasonableness." As is currently the practice, the courts would consider the validity of Customs' decisions based on the evidence presented at trial and the persuasiveness of the legal reasoning.

The Government has indicated that Customs' headquarters issues more than 1,000 "binding rulings" each year "involving tariff classification, customs valuation and country of origin determinations."³¹ Government's Brief at 38, note 26. We acknowledge that, as Congress intended, these rulings are in many

³¹ The Government conveniently ignores the more than 10,000 ruling letters issued by other offices within Customs.

cases helpful and provide guidance to the importing community as to the Customs Service's current position on a given topic, and provide a measure of certainty to those engaged in importing. The ruling process was not, however, intended to give Customs unfettered power to limit the rights of importers and other parties to obtain effective judicial review. However, if importers are discouraged from requesting rulings because the courts must give *Chevron* deference to Customs' pronouncements, they will have lost the benefit of having this corpus of interpretation and guidance. The result would be, using the Government's terms, "expensive litigation and unpredictable outcomes."

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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