No. 99-1434

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

THE MEAD CORPORATION

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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I. Reasonable interpretations of the customs laws contained in rulings issued by the Customs Service are entitled to deference in determining the proper tariff classification of imported goods.

1. This Court has developed and applied several distinct standards of deference for administrative actions that interpret and apply statutory provisions. The highest standard of deference applies when an agency promulgates "legislative regulations" pursuant to "an express delegation of authority * * * to elucidate a specific provision of the statute by regulation." *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-844 (1984). A regulation issued under an express authority to "prescribe standards" has "legislative effect" (*Batterton* v. *Francis*, 432

U.S. 416, 425 (1977)), for it represents an exercise of "delegated lawmaking powers." *Martin* v. *Occupational Safety and Health Review Comm'n*, 499 U.S. 144, 157 (1991). When Congress has made an "explicit delegation of substantive authority" to the agency, the agency's legislative regulation is entitled "to more than mere deference or weight." *Schweiker* v. *Gray Panthers*, 453 U.S. 34, 44 (1981) (cited in *Chevron*, 467 U.S. at 844 n.12). This Court has stated that, while it "do[es] not abdicate review in these circumstances, our task is the limited one of ensuring that the Secretary did not 'excee[d] his statutory authority' and that the regulation is not arbitrary or capricious." *Schweiker* v. *Gray Panthers*, 453 U.S. at 44 (quoting *Batterton* v. *Francis*, 432 U.S. at 426). See also *Chevron*, 467 U.S. at 844; *United States* v. *Morton*, 467 U.S. 822, 834 (1984) ("legislative" regulations have "controlling weight unless they are arbitrary, capricious, or plainly contrary to the statute").

This case, however, (like *Chevron* itself) does not involve a legislative rule. Instead, it involves an interpretive rule adopted pursuant to a general delegation of authority from Congress to the agency that has been "entrusted to administer" the statute. 467 U.S. at 844.[1] Unlike a legislative rule, which has the force of law and is therefore entitled "to more than mere deference or weight" (*Schweiker* v. *Gray Panthers*, 453 U.S. at 44), an "interpretative" rule is not itself a part of the positive law that courts apply; instead, an interpretative rule is accepted by the courts only when it "represents a reasonable interpretation" of the statute. *Chevron*, 467 U.S. at 844. See also *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 315 (1979) (distinguishing between "substantive rules" that have "the binding effect of law" and "inter-

[1] The present case, like *Chevron*, involves a "definitional issue [that] was not squarely addressed in either the statute or its legislative history." *Chevron*, 467 U.S. at 858.

pretative rules" to which "deference [is] accorded"). Under this standard, the Court has long upheld "reasonable" interpretations adopted by agencies to resolve "ambiguity in a statute meant for implementation by [the] agency." *Smiley* v. *Citibank (S.D.), N.A.*, 517 U.S. 735, 740-741 (1996). See, *e.g.*, *Chevron*, 467 U.S. at 844; *Zenith Radio Corp.* v. *United States*, 437 U.S. 443, 450 (1978).

When the agency has issued an interpretation by some informal method (such as correspondence) that Congress has *not* authorized for that purpose, however, the Court has stated that the agency's pronouncement is "entitled to respect" only to the extent that it has the "power to persuade." *Christensen* v. *Harris County*, 120 S. Ct. 1655, 1663 (2000). See Pet. Br. 27-32. This latter standard is inapplicable to this case. In formally adopting "binding rulings" pursuant to 19 U.S.C. 1502(a), the Customs Service has employed the very format that Congress directed the agency to use in issuing such interpretations. When Congress has authorized the agency to adopt rules to implement and enforce the provisions of the statute, affording deference to the "reasonable interpretations" adopted by the agency in the precise manner that Congress has prescribed is necessary to "honor that congressional choice." *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 568 (1980).

Respondent errs in asserting (Resp. Br. 30-31) that only regulations that are adopted after notice and comment procedures are entitled to deference. In *Christensen*, this Court described notice-and-comment regulations merely as an "example" of agency actions for which deference is appropriate. 120 S. Ct. at 1662. Numerous decisions also afford deference to agency interpretative rulings, for which notice and comment procedures are expressly *not* required under the Administrative Procedure Act, 5 U.S.C.

553(b)(3)(A).[2] Two important examples of decisions upholding "reasonable" agency interpretative rulings are *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. at 565, and *United States* v. *Correll*, 389 U.S. 299, 306-307 (1967). Although we discuss these decisions at length in our opening brief (Pet. Br. 23-27, 31-32 & n.18), respondent has made no effort to address their reasoning or holding.[3] Indeed, these cases are

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[2] See also *Nationsbank of N.C., N.A.* v. *Variable Annuity Life Ins. Co.*, 513 U.S. 251, 254-255, 256-257 (1995), and Pension Benefit Guaranty Corp. v. LTV Corp., 496 U.S. 633, 643-644, 647-648 (1990), both according deference to statutory interpretations embodied in informal agency adjudications.

[3] Amicus Tax Executives Institute, Inc., is wrong in contending (Am. Br. 18 & 19 n.10) that *United States* v. *Correll*, 389 U.S. at 307, upheld an interpretative regulation rather than an interpretive ruling. This Court's opinion in *Correll* cited and upheld, as "reasonable," the "Commissioner's interpretation, first expressed in a 1940 ruling, I.T. 3395, 1940-2 Cum. Bull. 64, * * * originally known as the overnight rule." 389 U.S. at 302 n.10. In deferring to the interpretation established in the Commissioner's ruling, the Court did not cite or discuss any regulation. Instead, the Court treated rulings and regulations without differentiation, noting that "Congress has delegated to the Commissioner, not to the courts, the task of prescribing 'all needful rules and regulations for the enforcement' of the Internal Revenue Code." 389 U.S. at 307 (citing 26 U.S.C. 7805(a)). The Court concluded in *Correll* that the "the Commissioner's sleep or rest rule" should be upheld because it "implement[s] the congressional mandate in [a] reasonable manner." 389 U.S. at 306-307. Following that holding, the "circuit courts have uniformly held that Revenue Rulings receive significant deference * * * ." J. Coverdale, *Court Review of Tax Regulations and Revenue Rulings in the Chevron Era*, 64 Geo. Wash. L. Rev. 35, 82 (1995). See also L. Galler, *Judicial Deference to Revenue Rulings: Reconciling Divergent Standards*, 56 Ohio St. L.J. 1037, 1094 (1995) ("non-deference is now a relic of the past").

The suggestion of Amicus Tax Executives Institute, Inc., that revenue rulings are nothing more than the "litigating positions" of the agency (Am. Br. 18) is plainly incorrect. Revenue rulings are formally adopted by the Commissioner of Internal Revenue and are issued only with the "approval of the Secretary [of the Treasury]." 26 C.F.R. 301.7805-1. See also Treas.

not even cited in respondent's brief. Under the standard applied in cases such as *Chevron*, *Milhollin*, *Correll* and *Zenith Radio*, the "binding rulings" formally adopted by the Customs Service pursuant to the authority expressly conferred on that agency should be upheld so long as they reflect a "reasonable interpretation" of the statute. *Chevron*, 467 U.S. at 844.

2. Respondent and its amici suggest that the government's position in this case proves too much, for it would require deference to every routine "classification decision" or "classification ruling" issued by the agency. Resp. Br. 27; Am. Customs and International Trade Bar Ass'n Br. 5-6. It is not the ultimate classification determination itself, however, to which deference is given. Instead, in reviewing the agency's classification determinations, courts are to defer to

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Order 111-2, 1981-1 C.B. 698, 699 (delegating authority "to make the final determination" on "regulations" and "Revenue Rulings" to the Assistant Secretary of the Treasury (Tax Policy)). Revenue rulings that are promulgated by the Commissioner and approved by the Secretary under the express authority provided by 26 U.S.C. 7805(a) are a paradigmatic example of a formal interpretive rule, issued in the format prescribed by Congress, to which deference is due. See Pet. Br. 24-25 & n.11. It is only informal "rulings *not* promulgated by the Secretary" that this Court has stated are to be given little deference. *Biddle* v. *Commissioner*, 302 U.S. 573, 582 (1938) (emphasis added). The amicus further errs in suggesting (Am. Br. 5) that Revenue Rulings are not officially published. Revenue Rulings have been formally published for decades in the Cumulative Bulletin—which is widely used as the official citation for such rulings.

Under both the Tariff Act and the Internal Revenue Code, Congress has directed the Treasury to adopt not only "regulations," but also "rules" to implement the statutory schemes. 19 U.S.C. 1502(a); 26 U.S.C. 7805(a). As this Court has emphasized, deference to the rules adopted by the agency to implement these complex provisions "helps guarantee that the rules will be written by 'masters of the subject,' *United States* v. *Moore*, 95 U.S. 760, 763 (1878), who will be responsible for putting the rules into effect." *National Muffler Dealers Ass'n* v. *United States*, 440 U.S. 472, 477 (1979).

the reasonable interpretations of law established and set forth in the agency's rulings.

Respondent's statement that 10,000 to 15,000 classification rulings are issued each year (Resp. Br. 5) drastically overstates the number of rulings that contain or set forth interpretations of law to which courts would defer. The vast number of such rulings resolve merely the application, to particular facts, of legal standards that are not in dispute.[4] Routine rulings issued at ports that apply Headquarters Rulings or other precedent without elaboration of the agency's reasoning neither contain nor purport to establish the agency's interpretation of issues of law. By contrast, the detailed and thorough Headquarters Ruling involved in this case *does* contain and establish the agency's interpretation of issues of law. See Pet. App. 28a-47a. Deference is not required for the agency's application of settled law to facts; it is instead given to "reasonable" legal interpretations of the statute set forth in the formal rulings that Congress authorized the agency to adopt. See, *e.g*, *Zenith Radio*, 437 U.S. at 450.

The agency's classification determinations are subject to review in the Court of International Trade. In such proceedings, although the agency's ultimate determination "is presumed to be correct" (28 U.S.C. 2639(a)(1)), its factual determinations are reviewed *de novo*, on a "record made before the court" (28 U.S.C. 2640(a).[5] As we noted in our

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[4] As Amicus Customs and International Trade Bar Ass'n has noted (Am. Br. 2), the classification decisions issued routinely at ports of the United States upon the entry of goods ordinarily contain no discussion of legal issues.

[5] As the amici have acknowledged, 28 U.S.C. 2640(a)(1) permits "independent fact gathering" upon judicial review of customs determinations by authorizing "a trial de novo in the Court of International Trade." Amici Cargill, Inc., et al., Br. 12 (quoting H.R. Rep. No. 1235, 96th Cong., 2d Sess. 59 (1980)).

brief in the *Haggar* case (U.S. Reply Br. No. 97-2044 Br. 3-4 & n.2) the procedure for judicial review of customs determinations thus parallels the procedure for judicial review of tax determinations generally: in determining the proper amount of taxes or duties owed, the reviewing court makes *de novo* findings of fact upon a record assembled in that court; and, in applying the applicable law to those findings, the reviewing court makes an independent determination of the law. See *United States* v. *Haggar Apparel Co.*, 526 U.S. 380, 391 (1999).

Respondent and its amici are wrong in claiming (Resp. Br. 32; Am. United States Ass'n of Importers of Textiles and Apparel, et. al., Br. 3-4), that the availability of a *de novo* judicial review of facts and an independent judicial determination of the law means that the agency's legal interpretations of the statute are entitled to "no deference." This Court rejected that very contention in the *Haggar* case. The Court explained that respondent's "conclusion does not follow from the premise," for a court may give an agency's legal interpretation "proper effect even while applying the law to newfound facts, just as any court conducting a trial in the first instance must conform its rulings to controlling statutes, rules, and judicial precedents." 526 U.S. at 391.[6] The

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[6] *Chevron* deference routinely applies in cases in which the court is to determine the facts *de novo* and is to make an independent determination of the applicable law. See, *e.g.*, *Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. at 739-741 (damages suit in state court claiming that late payment charges were prohibited interest); *Auer* v. *Robbins*, 519 U.S. 452, 456-458 (1997) (suit for overtime pay); *United States* v. *O'Hagan*, 521 U.S. 642, 674 (1997) (criminal case).

Amici United States Ass'n of Importers of Textiles and Apparel, et al., err in contending (Am. Br. 6) that the decision in *Adams Fruit Co.* v. *Barrett*, 494 U.S. 638 (1990), requires a different conclusion. In *Adams Fruit*, the Court declined to afford *Chevron* deference to a regulation that interpreted the scope of the jurisdiction of courts in direct private actions

Court concluded in *Haggar* that "[d]eference to an agency's expertise in construing a statutory command is not inconsistent with" the court's ultimate responsibility to "reach[] a correct decision" as to the proper meaning of the statute. *Id.* at 392.

The fact that some classification rulings involve mixed questions of fact and law does not mean that the legal interpretations contained in such rulings are entitled to no deference. For example, in the present case, the agency adopted a reasonable interpretation of the statutory terms "bound" and "diary" and applied that interpretation to the facts of this case. Pet. App. 28a-47a. The fact that the agency's legal interpretation was adopted in a concrete factual context, rather than in a vacuum, does not deprive it of the "great deference" that is due "to the interpretation given the statute by the officers or agency charged with its administration." *Zenith Radio*, 437 U.S. at 450 (quoting *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965)). See also *NLRB* v. *Local Union No. 103, Int'l Assoc. of Bridge Workers*, 434 U.S. 335, 350 (1978). In the application of the complex tariff laws to the infinite variety of commercial activities, "a court that tries to chart a true course to the Act's purpose embarks upon a voyage without a compass when it disregards

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because "[a] precondition to deference under *Chevron* is a congressional delegation of administrative authority" and "[n]o such delegation" of authority to interpret the "enforcement" authority of the courts had been made to the agency in that case. *Id.* at 649, 650. The Court emphasized in *Adams Fruit*, however, that the agency's power to interpret the substantive provisions of the statute remained fully in place and that the statute "clearly envisioned, indeed expressly mandated, a role for the [agency] in administering the statute." *Id.* at 650. Even though the sole enforcement authority had been vested in the courts under that statute, the Court held that "determinations [made by the agency] within the scope of [its] delegated authority are entitled to deference." *Ibid.* That same conclusion applies directly here.

the agency's views." *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. at 568.

3. The suggestion of respondent that Congress did not intend to confer interpretive authority on the agency (Resp. Br. 35) is plainly incorrect. In specifically authorizing the agency to adopt "binding rulings" in advance of importation, Congress manifestly directed the agency to provide prospective, precedential guidance. The overlapping delegations of authority that Congress made under the Tariff Act are set forth in detail in our opening brief. Pet. Br. 19-20. In addition to authorizing the adoption of "binding rulings" (19 U.S.C. 1502(a)), Congress authorized the agency to adopt rules and regulations for "the final appraisement of merchandise" and to "fix the final classification and rate of duty applicable to such merchandise" (19 U.S.C. 1500(a), (b)). "In addition to the specific powers" conferred on the agency under these provisions, Congress further broadly empowered the agency "to make such rules and regulations as may be necessary to carry out the provisions" of the Tariff Act. 19 U.S.C. 1624.

By enacting these broad delegations of authority, Congress made clear that "[t]he Customs Service will be responsible for interpreting and applying" this statute. H.R. Conf. Rep. No. 576, 100th Cong., 2d Sess. 549 (1988). Respondent's contrary contention simply ignores the broad scope of the statutory authority conferred on the agency and the clear statement of congressional intent in the legislative history. In *Haggar*, this Court concluded that the delegation provisions of the Tariff Act reflect that "Congress has authorized the agency to issue rules so that the tariff statutes may be applied to unforeseen situations and changing circumstances in a manner consistent with Congress' general intent." 526 U.S. at 392-393. By empowering the agency to promulgate "binding rulings" under the Tariff Act, Congress directed the agency to apply the customs laws to

the "limitless factual variations" (*United States* v. *Correll*, 389 U.S. at 307) that arise in modern commerce. As this Court noted in *Haggar*, this power to adopt interpretive rules was given to the agency because "Congress need not, and likely cannot, anticipate all circumstances in which [its] general policy must be given specific effect." 526 U.S. at 392.

Prior to the recent series of Federal Circuit decisions that culminated in this case, the Court of International Trade and the Federal Circuit had historically afforded deference to "reasonable" legal interpretations contained in Customs Service rulings. See Pet. Br. 21-22. In both classification and valuation cases, the Federal Circuit historically held that "Customs' interpretation" of the statute is to be accepted if it is "sufficiently reasonable" and "does not contravene any clearly discernible legislative intent." *Mitsui Foods, Inc.* v. *United States*, 867 F.2d 1401, 1403 (Fed. Cir. 1989) (classification dispute); *Generra Sportswear Co.* v. *United States*, 905 F.2d 377, 379 (Fed. Cir. 1990) (valuation dispute).[7] The contrary holding of the Federal Circuit in the present case is "inconsistent with the historical practice in customs cases" and "would thwart congressional intent." *United States* v. *Haggar Apparel Co.*, 526 U.S. at 393.

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[7] Respondent acknowledges (Resp. Br. 28 n.28) that the Federal Circuit has traditionally deferred to the agency's legal interpretations in valuation disputes. Respondent erroneously claims (*ibid.*), however, that the Federal Circuit has *not* historically afforded any deference to the agency's classification rulings. In *Mitsui Foods, Inc.* v. *United States*, 867 F.2d at 1402-1403, the court expressly held that it would defer to the agency's "reasonable" interpretation in a "classification case" that presented the question whether the tariff classification of "United States pack of canned tuna" included "tuna packed in American Samoa." In that "classification case," the court of appeals quoted the standard applied by this Court in *Zenith Radio*, 437 U.S. at 450, to uphold the agency's "reasonable" interpretation of the statute. See 867 F.2d at 1403 & n.3.

4. Respondent and its amici are incorrect in stating that deference is inappropriate for the agency's "binding rulings" because they are "binding only on Customs itself and the specific importer and merchandise involved in the particular transaction." Resp. Br. 34 n.33; see also Am. Cargill, Inc., et al., Br. 9. In making that contention, respondent relies on the portion of the regulations that cautions that, because the agency's rulings are "subject to modification or revocation," other importers should not "rely on the ruling letter or assume that the principles of that ruling will be applied" to other transactions. 19 C.F.R. 177.9(c).[8] What respondent and its amici have failed to cite, however, is the very next sentence of the same regulation, which specifies that any person who wishes to rely on these rulings "may request information as to whether a previously-issued ruling letter has been modified or revoked." *Ibid.* These regulations further expressly specify that the agency's binding rulings are "precedential decisions" (19 C.F.R. 177.10(a)) and that, if the rulings have *not* been modified or revoked, they "may be cited as authority in the disposition of transactions involving the same circumstances" (19 C.F.R. 177.9(a)).

5. Respondent also errs in contending (Resp. Br. 35 n.35) that deference to the Treasury's interpretations of the customs provisions is inappropriate because any doubt as to the meaning of revenue laws should be resolved in the taxpayers' favor under the rule of lenity. That contention—based on a doctrine that has little, if any, application outside the criminal law context—overlooks numerous decisions, including in particular this Court's decision in *Zenith Radio*,

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[8] The agency's regulations specify that a ruling may be modified or revoked if it is "found to be in error or not in accordance with the current views of the Customs Service" and that notice of such action will be given "to the person to whom the ruling letter was addressed" and by "publication of a notice or other statement in the Customs Bulletin." 19 C.F.R. 177.9(d)(1).

437 U.S. at 450, which upheld the agency's "reasonable" interpretation of an ambiguous provision in the statute. See also *Haggar Apparel Co.*, 526 U.S. at 393 (noting that "judicial deference" to the agency's interpretation of ambiguous customs provisions is not "inconsistent with the historical practice in customs cases").[9] This Court has, in fact, expressly rejected the contention that the rule of lenity applies in such cases. In disposing of this contention in *White* v. *United States*, 305 U.S. 281, 292 (1938), the Court emphasized that "[w]e are not impressed by the argument that, as the question here decided is doubtful, all doubts should be resolved in favor of the taxpayer."[10]

6. Binding rulings are issued by the Customs Service in advance of importation because "[i]t is in the interest of the sound administration of the Customs and related laws that

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[9] Contrary to respondent's suggestion (Resp. Br. 11), the United States did not acquiesce in the no-deference standard applied in the Federal Circuit during the period when the government was challenging that standard in the *Haggar* case. Following the issuance of this Court's decision upholding the government's position in *Haggar*, the question of deference as applied in the specific context of this case was briefed by the parties and decided by the court of appeals. The courts below did not regard the government's orderly presentation of the deference issue first to this Court in *Haggar* to represent an abandonment or waiver of the deference question in this case. To the contrary, the court of appeals understood that the question of deference relates to the judicial responsibility correctly to interpret and apply the laws.

[10] Moreover, here, as in *Reno* v. *Koray*, 515 U.S. 50, 64-65 (1995), respondent "misconstrues the doctrine" of lenity: "The rule of lenity applies only if, 'after seizing everything from which aid can be derived,' *Smith* v. *United States*, 508 U.S. 223, 239 (1993) (internal quotation marks and brackets omitted), we can make 'no more than a guess as to what Congress intended.' *Ladner* v. *United States*, 358 U.S. 169, 178 (1958)." One of the principles "from which aid can be derived" in the interpretation of statutes is the principle that deference is to be given to the reasonable interpretations of statutes by the agency that Congress has charged with enforcement responsibility. See *Zenith Radio*, 437 U.S. at 450.

persons engaging in any transaction affected by those laws fully understand the consequences of that transaction prior to its consummation." 19 C.F.R. 177.1(a)(1). As respondent acknowledges, "prudent importers" (Resp. Br. 5) will seek customs rulings in order to reduce uncertainty in their business planning. Even when importers have not themselves made such a request, binding rulings may be issued by the Customs Service on its own initiative. 19 C.F.R. 177.8(b), 177.11(a). Whether issued in response to the request of an importer or on the agency's own initiative, the rulings issued by the Headquarters Office "represent[] the official position of the Customs Service" on that issue. 19 C.F.R. 177.9(a), 177.11(b)(6).

If deference were not afforded to the agency's interpretation of these voluminous and intricate statutory provisions, both importers and the Customs Service would be left without effective guidance for a wide range of transactions. The result of the ad hoc approach adopted by the court of appeals would be expensive customs litigation and unpredictable outcomes. It is in part to avoid such wasteful and unduly expensive litigation that this Court has long concluded that when, as here, "the administrator's reading fills a gap or defines a term in a way that is reasonable in light of the legislature's revealed design," the administrative interpretation should be given "controlling weight." *Nationsbank of N.C., N.A.* v. *Variable Annuity Life Ins. Co.*, 513 U.S. at 257 (quoting *Chevron*, 467 U.S. at 844).

II. **The Customs Service has reasonably interpreted the statutory phrase "diaries * * * bound" to include the day planners imported by respondent.**

1. For the reasons detailed in our opening brief, the Customs Service has reasonably interpreted the statutory phrase "diaries * * * bound" to include the ring-bound

day planners imported by respondent: (i) terms employed in tariff provisions are to be interpreted in light of their ordinary commercial usage, and the ordinary commercial usage of the term "diary" encompasses business diaries such as respondent's day planner; and (ii) the term "bound" was defined by the Explanatory Notes of the international drafting authority to encompass materials held together with "reinforcements or fittings of metal" and thus includes the "ring-bound" diaries imported by respondent. Pet. Br. 34-36. The agency's interpretation of these statutory terms has ample support and is "'sufficiently reasonable' to be accepted by a reviewing court." *Zenith Radio*, 437 U.S. at 450 (quoting *Train* v. *Natural Resources Defense Council*, 421 U.S. 60, 75 (1975)).

2. Respondent claims, however, that, in the context in which these provisions were enacted, the statutory terms "diaries" and "bound" are so clear and unambiguous that no reasonable disagreement can arise as to their meaning. Respondent asserts that deference therefore need not be given to the agency's interpretation. Resp. Br. 16-22.

Respondent's theory is that, because the classification provision distinguishes between articles that are "diaries" (to which the tariff applies) and articles that are "similar" to diaries (to which the tariff does not apply), anything that is not within the particular, "narrower" dictionary definition of "diary" on which *respondent* relies must necessarily be something only "similar" to a "diary" and therefore not encompassed within the statutory phrase. Resp. Br. 17-19. The central premise of that contention is manifestly flawed.

In determining what a "diary" is in the tariff classification, one need not look *only* to the particular definition of the term that respondent favors. As the Customs Service explained, the statutory term "diary" has "several definitions," and one of those definitions encompasses the established commercial product known as a business "diary." The

agency concluded that this "broader concept of diary * * * reflects the common and commercial identity of these items in the marketplace." Pet. App. 34a. Since tariff provisions are properly to be interpreted in light of the commercial usage of the classification terms, the agency's interpretation reflects a reasonable elaboration of the provision.[11]

Indeed, respondent acknowledges that the term "diary" has more than one definition in common and commercial usage. Respondent claims, however, that unless its "narrower definition" of "diary" is applied, the statutory provision for articles "similar" to diaries would be rendered irrelevant. That contention was not adopted by the court of appeals and was correctly rejected by the Court of International Trade. As that court explained, "there exists a category of merchandise more remote from 'pure' diaries than the importations but still sufficiently close to be called 'similar.'" Pet. App. 24a. The court noted that several of the agency's prior rulings had involved items that "were not actually diaries" but were "similar" to diaries within the meaning of the statutory classification. *Ibid.* (referring, for example, to rulings involving "a small diary-like book entitled 'Special Occasion Book,'" used for recording names, dates and "gift ideas for special dates," and a "Car Care Planner" that contained "information related to the maintenance of a car"). As the court concluded, the term "diary"

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[11] The court of appeals correctly acknowledged that tariff terms are to be construed "according to [their] common and commercial meanings." Pet. App. 8a (citing *Simod Am. Corp.* v. *United States*, 872 F.2d 1572, 1576 (Fed. Cir. 1989)). Amicus Filofax, Inc., also acknowledges that the terms employed in tariff classifications are to be understood "in the commercial sense" (Am. Br. 19 (quoting *Norman G. Jensen, Inc.* v. *United States*, 490 F. Supp. 497, 501 (Cust. Ct. 1980)), that some dictionaries define the term "diary" to include "dated book[s] for noting future engagements" (Am. Br. 4), and that Filofax has itself labeled its business engagement books a "diary" (Am. Br. 19).

need not be interpreted in the narrow fashion proposed by respondent "out of concern that otherwise" the term "similar" to diaries "would cover nothing at all." *Ibid.*

Respondent is similarly in error in asserting that the term "bound" is so clear that it requires no interpretation. Resp. Br. 20-22. It is evident that items such as diaries may be "bound" by various methods with varying degrees of permanence. Even respondent ultimately acknowledges that the minimal requirement for being "bound" is simply that the item not be "loose sheets." *Id.* at 21. Respondent also acknowledges that the definition of the term "bound" contained in the Explanatory Notes of the international authority that drafted the Harmonized Commodity system expressly states that this term includes any item held together with reinforcements or fittings of metal—a description that applies directly to respondent's business diaries in this case. *Id.* at 20-21 n.23. See Pet. App. 45a.[12] While we agree with

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[12] Respondent misquotes a Customs Service publication in contending that the Explanatory Notes of the Harmonized Commodity Description and Coding System apply only at 4-digit or 6-digit classification levels and are not applicable "at the eight-digit level" of tariff classifications. Resp. Br. 20-21 n.23. The Customs Service publication cited by respondent actually advises the public that the Harmonized System Explanatory Notes may be "persuasive authority" and "provide guidance at the national numerical code level (i.e., *beyond the 6-digit numerical code level*) in a contracting party's tariff system." U.S. Customs Service, *Tariff Classification Under the Harmonized Tariff Schedule* 17 (Nov. 1997) (emphasis added). As the Court of International Trade explained in rejecting respondent's contention in *Pima Western, Inc.* v. *United States*, 915 F. Supp. 399, 402 n.2 (1996):

> The eight-digit level of classification is subsidiary to, not an expansion of, the six- and four-digit levels. If the Explanatory Notes offer guidance that a product should be excluded from a four-digit heading or six-digit subheading, one can properly infer that the product is excluded from the eight-digit subheading.

respondent that these Explanatory Notes are not "binding" on the Customs Service or on the courts, the agency's reliance on the explanations contained in the official definitional notes of the drafting authority cannot be regarded as unreasonable. While the Explanatory Notes are not "legally binding" on the United States, they are "generally indicative of proper interpretation of the various provisions of the [HTSUS]." H.R. Conf. Rep. No. 576, 100th Cong., 2d Sess. 549 (1987). See Pet. Br. 36 n.24.

The statutory terms are thus not so clear and unambiguous that the agency's interpretation is precluded on the theory that "Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. Indeed, the court of appeals did not purport to reject the agency's interpretation on that theory. Instead, the court simply displaced the agency's reasonable interpretation of the statutory terms with another perhaps plausible interpretation of its own. By doing so, the court of appeals erred. When, as here, "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. "[T]he task for the Court of Appeals was not to interpret the statute as it thought best but rather the narrower inquiry into whether the [agency's] construction was 'sufficiently reasonable' to be accepted by a reviewing court." *Federal Election Comm'n* v. *Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 31-32, 39 (1981) (citing, *e.g.*, *Zenith Radio*, 437 U.S. at 450).

See also *NEC Electronics, Inc.* v. *United States*, 144 F.3d 788, 791 (Fed. Cir. 1998) ("[w]e cannot accept [the] argument that this Explanatory Note is only pertinent to the meaning of the six-digit subheading * * * but not the eight-digit subheading"); Pet. App. 45a (the value of the Explanatory Notes at the eight-digit level is that "they provide guidance and insight into the intent of the Harmonized System Committee when drafting the Nomenclature" used in these provisions).

3. Respondent also errs in claiming that the agency's ruling should be given no weight "because it is inconsistent with earlier agency positions." Resp. Br. 40. As respondent notes, the agency's New York field office had initially concluded in 1991 that the term "diary" did *not* encompass respondent's day planners. Resp. Br. 9, 41. Under the agency's regulations, however, the Headquarters Office may review field classification rulings. 19 C.F.R. 177.11(b)(1), 177.12(a). A ruling of the Headquarters Office upon review of a field classification determination is "the official position of the Customs Service." 19 C.F.R. 177.11(b)(6). The issue involved in the present case was first submitted for determination by the Headquarters Office in 1992. From that date forward, that Office has "consistently determined that articles similar in design and/or function to the instant merchandise are classifiable as diaries." Pet. App. 31a.[13]

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[13] Respondent incorrectly attempts to rely on three rulings of the Headquarters Office that were issued in years *prior* to 1992. As respondent ultimately acknowledges (Resp. Br. 9), those rulings involved articles such as "student agendas" and "teacher multi-purpose blank books" (*ibid.*, citing HQ 085086 (Sept. 13, 1989), 1989 WL 381276; HQ 085515 (Dec. 14, 1989); HQ 950984 (Jan. 27, 1992), 1992 WL 313509) that were not "identical" (Resp. Br. 9) to the articles involved here. Because those rulings did not involve the same articles involved here, respondent acknowledges that they do not govern the classification of the day planners involved in this case. Resp. Br. 9 (citing 19 C.F.R. 177.9(c)). For example, one of the cited rulings involved an article that consisted of a blank note pad, an address book, and a ball point pen. C.A. App. 35 (HQ 950984). The fact that the items involved in the earlier rulings are "similar" to (but meaningfully different from) the items involved in this case reflects the unavoidably close application of the statutory distinction between "diaries" and articles that are "similar" to diaries. See page 15, *supra*. The fact that such distinctions under the intricate and complex provisions of the tariff statute may at times be close does not make the agency's reasonable legal interpretations ineligible for judicial deference. See *Chevron*, 467 U.S. at 864 (noting that an agency may properly "adopt[] different definitions in different contexts").

The fact that the agency's "official position" (19 C.F.R. 177.11(b)(6)) was obtained following review of a contrary, initial field determination does not mean that the agency's thorough, considered views are not entitled to deference. When an agency's official position is altered upon mature reflection of the interpretive issues, such "change is not invalidating, since the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency." *Smiley* v. *Citibank (S.D.), N.A.*, 517 U.S. at 742.[14] Moreover, the process that led to the formal adoption of the agency's official position does not represent an "inconsistency"; it represents the proper functioning of the "binding ruling" program through the levels of review established in the agency's regulations. See 19 C.F.R. 177.11, 177.12. The agency's official position, as set forth in the binding rulings adopted pursuant to the authority expressly conferred on the agency by Congress, should be upheld when, as here, they establish a reasonable interpretation of the statutory text.

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[14] Respondent is wrong in contending (Resp. Br. 41) that, under the formulation of *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944), an inconsistency between the initial views of the field office and the official view of the Headquarters Office would deprive the latter of all deference. Even if the agency's final interpretation were "inconsistent with prior agency promulgations, the thoroughness and validity of the agency's reasoning" would entitle it to deference under *Skidmore*. *Aero Mayflower Transit Co.* v. *ICC*, 711 F.2d 224, 228 n.30 (D.C. Cir. 1983). "An administrative agency is not disqualified from changing its mind; and when it does, the courts still sit in review of the administrative decision and should not approach the statutory construction issue *de novo* and without regard to the administrative understanding of the statutes." *NLRB* v. *Local Union No. 103*, 434 U.S. at 351.

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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Solicitor General

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