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DEPARTMENT OF THE TREASURY

Alcohol and Tobacco Tax and Trade Bureau

27 CFR Part 5

[Docket No. TTB-2012-0002; T.D. TTB-112; Ref: Notice No. 127]

RIN: 1513-AB33

Amendment to the Standards of Identity for Distilled Spirits

AGENCY: Alcohol and Tobacco Tax and Trade Bureau, Treasury.

ACTION: Final rule; Treasury decision.

SUMMARY: The Alcohol and Tobacco Tax and Trade Bureau is amending the regulations setting forth the standards of identity for distilled spirits to include “Cachaça” as a type of rum and as a distinctive product of Brazil. This amendment follows requests received from the Government of Brazil and subsequent discussions with the Office of the United States Trade Representative.

DATES: Effective Date: [INSERT DATE 45 DAYS FROM DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Existing certificates of label approval that contain the term “Cachaça” and do not comply with the regulations in 27 CFR part 5 will be revoked by operation of regulation on [INSERT DATE 180 DAYS FROM DATE OF PUBLICATION IN THE FEDERAL REGISTER].

Section 5.35a (27 CFR 5.35a) is effective from [INSERT DATE 45 DAYS FROM DATE OF PUBLICATION IN THE FEDERAL REGISTER] to February 25, 2015.

FOR FURTHER INFORMATION CONTACT: Kate M. Bresnahan, Regulations and Rulings Division, Alcohol and Tobacco Tax and Trade Bureau, 1310 G Street NW., Suite 200E, Washington, DC 20005; telephone 202–453–1039, Ext. 151.

SUPPLEMENTARY INFORMATION:

Background

TTB Authority

Section 105(e) of the Federal Alcohol Administration Act (FAA Act), codified in the United States Code at 27 U.S.C. 205(e), authorizes the Secretary of the Treasury to prescribe regulations relating to the packaging, marking, branding, labeling, and size and fill of containers of alcohol beverages that will prohibit consumer deception and provide the consumer with adequate information as to the identity and quality of the product. The Alcohol and Tobacco Tax and Trade Bureau (TTB) administers the FAA Act pursuant to section 1111(d) of the Homeland Security Act of 2002, codified at 6 U.S.C. 531(d). The Secretary has delegated various authorities through Treasury Department Order 120–01 (Revised), dated January 21, 2003, to the TTB Administrator to perform the functions and duties in the administration and enforcement of this law. Regulations implementing the provisions of section 105(e) as they relate to distilled spirits are set forth in part 5 of title 27 of the Code of Federal Regulations (27 CFR part 5).

Classes and Types of Spirits

The TTB labeling regulations require that the class and type of distilled spirits appear on the product's brand label (see 27 CFR 5.32(a)(2) and 5.35). Those regulations provide that the class and type must be stated in conformity with § 5.22 of the TTB regulations (27 CFR 5.22) if defined therein. Otherwise, the product must be designated in accordance with trade and consumer understanding thereof, or, if no such understanding exists, by a distinctive or fanciful name, and, in either case (with limited exceptions), followed by a truthful and adequate statement of composition (see 27 CFR 5.35).

Section 5.22 establishes standards of identity for distilled spirits products and categorizes these products according to various classes and types. As used in § 5.22, the term "class" refers to a general category of spirits, such as "whisky" or "brandy." Currently, there are 12 different classes of distilled spirits recognized in § 5.22, including whisky, rum, and brandy. The term "type" refers to a subcategory within a class of spirits. For example, "Cognac" is a type of brandy, and "Canadian whisky" is a type of whisky.

Classification of Cachaça

"Cachaça" is a term recognized by the Brazilian Government as a designation for a Brazilian distilled spirits product made from sugar cane. Currently, Cachaça products are generally classified as rum under TTB's labeling regulations. The standard of identity for rum is set forth in § 5.22(f) as an alcoholic distillate from the fermented juice of sugar cane, sugar cane syrup, sugar cane molasses, or other sugar cane by-products, produced at less than

190° proof in such manner that the distillate possesses the taste, aroma and characteristics generally attributed to rum, and bottled at not less than 80° proof; and also includes mixtures solely of such distillates. The above standard does not currently provide for any subcategories or “types” of rum.

By letter dated April 30, 2001, the Embassy of the Government of Brazil submitted a petition to TTB’s predecessor agency, the Bureau of Alcohol, Tobacco and Firearms (ATF), in which it requested that ATF amend its regulations to recognize “Cachaça” as a distinctive product of Brazil. After preliminary discussions with the Brazilian Embassy, no further action was taken with regard to the request.

In a second petition, dated March 6, 2006, the Brazilian Embassy asked TTB to amend its regulations to recognize Cachaça as a distinctive product of Brazil. Among other things, the Embassy noted Brazilian Decree No. 4851, of October 2, 2003, which defines “Cachaça” as “the typical and exclusive designation of the sugar cane aguardente produced in Brazil, with an alcohol content of 38 to 48 percent by volume at 20 degrees Celsius, obtained from the distillation of the fermented must of sugar cane with specific sensory characteristics, to which up to six grams of sugar per liter may be added, expressed in terms of sucrose.”

In addition, following discussions between officials of Brazil and the Office of the United States Trade Representative (USTR), and after consultations between USTR and TTB, the United States Trade Representative and Brazil’s Minister of Development, Industry, and Foreign Trade signed an agreement on

April 9, 2012, setting out a procedure that could lead each party to recognize certain distinctive distilled spirits produced in the other party's territory, including Cachaça. The agreement provides in part that if, following the publication of a notice of proposed rulemaking, the United States publishes a final rule that provides, among other things, that Cachaça is a type of rum that is a distinctive product of Brazil, then Brazil, within 30 days thereafter, will recognize Bourbon Whiskey and Tennessee Whiskey as distinctive products of the United States.

Besides the petition from the Brazilian Government and advice from USTR, TTB also received a number of essentially identical letters from private parties supporting the recognition of Cachaça as a distinctive type of distilled spirit.

Notice of Proposed Rulemaking and Comments Received

On April 30, 2012, TTB published in the **Federal Register** at 77 FR 25382 a notice of proposed rulemaking, Notice No. 127, which proposed to amend the regulations setting forth the standards of identity for distilled spirits contained in 27 CFR 5.22 to include Cachaça as a type of rum that is a distinctive product of Brazil. Specifically, TTB proposed amending § 5.22(f), which lays out the standard of identity for rum.

Under the proposed regulatory changes, Cachaça would be recognized as a type within the class designation "rum" that is a distinctive product of Brazil, manufactured in Brazil in compliance with the laws of Brazil regulating the manufacture of Cachaça for consumption in that country. Under the proposed

rule, the product could simply be labeled as “Cachaça” without the term “rum” appearing on the label.

In Notice No. 127, TTB noted that the proposed type description would not include as "Cachaça" any spirits that use corn or corn syrup in the fermentation process. Some product labels currently include "Cachaça" as additional information or fanciful names for products that have been manufactured using a small quantity of corn or corn syrup in the fermentation process. Since these products were not distilled exclusively from sugar cane or sugar cane by-products, TTB has required that these products be labeled with distinctive or fanciful names, as well as statements of composition, in accordance with § 5.35. TTB has confirmed with the Brazilian Government that the Brazilian standard for Cachaça would not allow for the use of corn or corn syrup in the fermentation process.

TTB also noted that the Brazilian standard for Cachaça provides that Cachaça may contain up to six grams of added sugar per liter. The addition of sugar in this amount would not remove the product from the standard of identity for rum, pursuant to the provisions of 27 CFR 5.23. Accordingly, a Cachaça product, which is manufactured in Brazil in compliance with the laws of Brazil regulating the manufacture of Cachaça for consumption in that country, and which contains up to six grams of added sugar per liter, would fall within the standard of identity for rum. In Notice No. 127, TTB stated that the Brazilian standard allows products designated as Cachaça to have an alcohol content ranging from 38 to 48 percent alcohol by volume. TTB further noted that, since

the standard of identity contained in the proposed rule identified Cachaça as a type of rum and the United States standard requires that rum must be bottled at not less than 40 percent alcohol by volume, or 80° proof, any “Cachaça” imported into the United States would have to conform to this minimum bottling proof requirement. A product that is bottled at below 40 percent alcohol by volume would fall outside the class and type designation. Depending on the way that such a product is manufactured, it may be labeled as a “diluted Cachaça” or a distilled spirits specialty product bearing a statement of composition.

In Notice No. 127, TTB sought comments on the proposed regulatory changes, and specifically requested comments on whether the proposed amendment would have an adverse impact on owners of U.S. trademarks. TTB also expressed specific interest in receiving comments on the extent to which distilled spirits labeled as Cachaça are produced outside Brazil in order to help determine whether Cachaça should be recognized as a distinctive product of Brazil.

During the comment period, TTB received a request from the European Union (EU) to extend the comment period “in order to have time to analyze and prepare comments” on the proposal. In response to this request, on June 29, 2012, TTB published in the **Federal Register** at 77 FR 38758 Notice No. 127A which extended the comment period for Notice No. 127 an additional 10 days. Accordingly, the comment period for the proposal outlined in Notice No. 127 closed on July 9, 2012.

TTB received a total of 13 responses to Notice No. 127, in addition to the request to extend the comment period (see comment 4 within Docket No. TTB–2012–0002 at “Regulations.gov,” www.regulations.gov). The 13 responses were received from industry and trade associations (6), consumers (3), businesses (2), the Government of Brazil, and the European Union.

Twelve of the commenters commented in support of TTB’s proposal to recognize Cachaça as a distinctive product of Brazil in the United States. Eight of the commenters supported the regulatory proposal in Notice No. 127 without further change or clarification. Four expressed support for the regulatory proposal but also requested changes to or clarifications of the proposed regulatory text. The EU did not express support or opposition to the proposal, but suggested several changes to, and requested some clarification of, the proposed regulatory text. The requested changes and clarifications are discussed in detail below. None of the comments TTB received asserted that the proposed amendment would have an adverse impact on owners of U.S. trademarks or that any distilled spirits products labeled as Cachaça are produced outside Brazil. The four comments requesting changes to or clarifications of the proposed regulatory text and the EU comment are discussed in detail below.

Comments Concerning Flavored Cachaça

INOX North America (comment 2) supported TTB’s proposal to amend the standards of identity for distilled spirits to include Cachaça as a distinctive type of rum, but asked that TTB consider an appropriate designation within the Cachaça subclass for flavored varieties of Cachaça, which contain natural or artificial

flavors and have an alcohol content of 35 percent alcohol by volume. INOX North America stated that these products currently are sold legally in Brazil and that TTB has approved labels for three flavored Cachaça products.

With regard to flavored Cachaça and the comment submitted by INOX North America, the Brazilian Institute of Cachaça (comment 9) and the Government of Brazil (comment 11), stated that Brazilian law does not allow flavors to be added to Cachaça in Brazil. The Brazilian Institute of Cachaça asked TTB to carefully scrutinize labels for flavored distilled spirits specialty products that claim to be Cachaça or that refer to Cachaça in their fanciful names, as these labels may mislead consumers regarding the origin, identity, or characteristics of the products. The comment from the Brazilian Government urged TTB not to approve labels for flavored distilled spirits products referring to Cachaça, because they could mislead consumers regarding the origin, identity, or characteristics of the product.

TTB Response

According to the comment submitted by the Government of Brazil, Brazilian law does not authorize the use of a “flavored Cachaça” designation. Further, the use of such a designation is outside the scope of the proposed rule. Accordingly, TTB is not amending the regulations in § 5.22(f) in order to set forth a special category for “flavored Cachaça” as requested by the commenter.

TTB notes that the products described by INOX North America, which contain added flavors and have an alcohol content of 35 percent, would not meet the standard of identity proposed for Cachaça as a type of rum. However, the

regulations in § 5.22 already contain a standard of identity for flavored rum. Under § 5.22(i), the standard of identity for “flavored rum” is rum “to which have been added natural flavoring materials, with or without the addition of sugar, and bottled at not less than 60° proof”. Thus, products that are made by adding natural flavors to Cachaça, and which comply with the standards of section 5.22(i), may be designated as “flavored rum.” Products that do not meet the “flavored rum” standards may be labeled with distinctive or fanciful names in accordance with § 5.35. In such cases, the label would have to include a statement of composition that identified the base distilled spirits (if applicable, Cachaça) and the ingredients added to the product (such as “natural and artificial flavors”). The designation “Cachaça” may not be used on such labels in a manner that creates the misleading impression that the final product is Cachaça, but it may be used to accurately designate the base distilled spirits.

Comment Concerning Aged Cachaça and Sweetened Cachaça

The EU (comment 12) asked for clarification on TTB’s position concerning the labeling of “Aged Cachaça” and “Sweetened Cachaça”. The EU stated that under Brazilian legislation, “Aged Cachaça” may be used on a label if the bottle contains a minimum of 50 percent Cachaça that has been aged for a year or longer, which differs from the U.S. provisions on statements of age. The EU also stated that in Brazil “Sweetened Cachaça” may contain a maximum of 30 grams of added sugar per liter, while in the United States the total addition of coloring, flavoring, or blending materials in distilled spirits products may not exceed 2½ percent by volume of the finished product.

TTB Response

Labels bearing a statement of age for Cachaça products being sold or distributed for consumption in the United States would have to comply with TTB regulations applicable to statements of age contained in 27 CFR 5.11 and 5.40(b).

Section 5.11 contains the following definition of “Age”: “The period during which, after distillation and before bottling, distilled spirits have been stored in oak containers.” Section 5.40(b) covers the use of statements of age on wine labels for rum, brandy, and Tequila. Section 5.40(b) states, in part, that age may, but need not, be stated on labels of rums, brandies, and Tequila. If age is stated, it shall be substantially as follows: “_____years old”; the blank to be filled in with the age of the youngest distilled spirits in the product.

The statement “aged Cachaça” would not comply with section 5.40(b), which requires such statements to specify the age of the youngest distilled spirits in the product. However, the statement could be used in conjunction with an age statement that complies with section 5.40(b) (such as “___ years old”). A Cachaça or other rum that contains distilled spirits that have not been aged at all in oak containers would not be entitled to any age statement under TTB regulations, because § 5.40(b) requires age statements to be based on the age of the youngest distilled spirits in the product.

With regard to the question concerning labeling of products with the term “Sweetened Cachaça,” Brazilian law currently states that Cachaça that contains sugars in quantities above 6 and below 30 grams per liter shall be called “Sweetened Cachaça”.

The applicable TTB regulation, 27 CFR 5.23(a)(2), generally allows for the addition of certain harmless coloring, flavoring, or blending materials, including sugar, to any class or type of distilled spirits, without a change in class or type, where the ingredients are not an essential component part of the particular distilled spirits to which added, but are customarily employed therein in accordance with established trade usage. However, the added coloring, flavoring, or blending materials must not total more than 2½ percent by volume of the finished product.

The Brazilian standard for “Sweetened Cachaça” is expressed in terms of grams of sugar per liter. Under the final rule, any Cachaça product containing more than 2½ percent by volume of added sugar would not be allowed to be labeled as Cachaça under § 5.22(f), because such a product would not meet the standards for the “rum” designation. If a product does not conform to any of the standards of identity set forth in § 5.22, it must be labeled in accordance with § 5.35. Under this provision, the product must be designated in accordance with trade and consumer understanding thereof, or, if no such understanding exists, by a distinctive or fanciful name, and, in either case (with limited exceptions), followed by a truthful and adequate statement of composition. Thus, consistent with § 5.35, a Cachaça product containing more than 2½ percent of added sugar by volume in the finished product could be labeled with a statement of composition such as “Cachaça sweetened with sugar.” If the product contains no more than 2½ percent by volume of added sugar but is no longer entitled to a “Cachaça” designation under Brazilian law because it contains more than

6 grams of sugar per liter, the product could still be labeled as “rum” under TTB regulations.

Comments Concerning the Regulatory Text

The Distilled Spirits Council of the United States (DISCUS) supported TTB’s proposal to recognize Cachaça as a distinctive product of Brazil, but suggested a change to the regulatory text in proposed § 5.22(f)(1) (comment 7). The regulatory text proposed in Notice No. 127 stated that Cachaça must be “manufactured in Brazil in compliance with the laws of Brazil regulating the manufacture of Cachaça for consumption in that country” (emphasis added). DISCUS commented that the highlighted language could inadvertently cause confusion as to whether a product that is produced in full conformity with Brazil’s regulations governing the manufacture of Cachaça for consumption in Brazil and bottled at less than 40 percent alcohol by volume could be labeled and sold in the United States as “Cachaça.” DISCUS believes that removing the words “for consumption in that country” from proposed § 5.22(f)(1) would bring the proposed regulatory text into conformity with the U.S.–Brazil exchange of letters that occurred on April 9, 2012, and with TTB’s intentions regarding the labeling of Cachaça bottled at less than 40 percent alcohol by volume.

DISCUS also noted that this change to the text would be consistent with TTB Notice No. 126, Standards of Identity for Pisco and Cognac, published in the **Federal Register** of March 27, 2012 (77 FR 18146).

The EU also recommended changes to the proposed regulatory text. The EU suggested that TTB reword proposed § 5.22(f)(1) as follows:

(1) “Cachaça” is a rum, as defined in 27 CFR Part 5[...], which is a distinctive product of Brazil manufactured in Brazil in compliance with the laws of Brazil regulating the manufacture of Cachaça for consumption in that country. The word “Cachaça” may be spelled with or without the diacritic mark. This product may be labeled as “Cachaça” without the term “rum” on the label, provided that it complies with the standard of identity for rum as established in this section.

The EU asked that TTB rewrite the regulatory text in this way in order to specify that the labeling derogation for Cachaça will only apply to a product if that product conforms entirely with the U.S. definition of rum, and not only with regard to the minimum alcohol content.

TTB Response

TTB is not removing the phrase “for consumption in that country” from the regulatory text proposed in Notice No. 127. That phrase is similar to language in other type designations already in our regulations, including Scotch whisky (§ 5.22(b)(7)), Irish whisky (§ 5.22(b)(8)), and Canadian whisky (§ 5.22(b)(9)), and it is identical to the language found in the class designation for tequila (§ 5.22(g)). Removing that phrase from the regulatory language might suggest that the new regulatory text would have a meaning that is different from existing regulatory language regarding distilled spirits products that are distinctive products of a foreign country. TTB does not want to adopt language that might be interpreted as suggesting that the Brazilian laws governing the manufacture of Cachaça could provide different standards for products to be exported from those for products to be consumed within Brazil. As for the comparison to language used in Notice No. 126, TTB may consider these comments when drafting the final rule amending the standard of identity for Pisco brandy in § 5.22(d).

TTB is accepting the EU's suggestion to remove the words "type of" from the first sentence of the proposed regulatory text. TTB also will remove the word "a" before rum. TTB believes that these changes in language will conform the regulatory text to other type designations in § 5.22. Nonetheless, the final rule will still establish Cachaça as a type of rum.

TTB does not consider it necessary to include the rest of the EU's suggestions regarding the regulatory text in this final rule. As a type of rum, Cachaça must meet all the requirements for the rum class designation specified in § 5.22(f), as well as all of the Brazilian requirements for Cachaça, and TTB believes that further clarification of the proposed regulatory text in Notice No. 127 is unnecessary. As amended, the standards of identity will provide that Cachaça is a rum. Any product that is not entitled to a "rum" designation under § 5.22(f) will not be entitled to a "Cachaça" designation under § 5.22(f)(1).

TTB Finding

For the reasons stated above, TTB considers it appropriate to recognize "Cachaça" as a type within the class designation "rum" that is a distinctive product of Brazil, manufactured in Brazil in compliance with the laws of Brazil regulating the manufacture of Cachaça for consumption in that country. Therefore, TTB adopts the regulatory changes proposed in Notice No. 127, incorporating the modifications discussed above.

Effect on Existing Labels

Consistent with the proposed rule, distilled spirits for which corn or corn syrup has been used in the fermentation process would not meet the standard for

“Cachaça” because they are not manufactured in compliance with the laws of Brazil regulating the manufacture of Cachaça for consumption in that country, and because they do not comply with the standard for “rum” under section 5.22. Such products would instead continue to be labeled with distinctive or fanciful names, as well as statements of composition, in accordance with § 5.35. Because the base distilled spirits used in such a product are not entitled to be designated as “Cachaça” under the final rule, the use of the term “Cachaça” as a fanciful name or in a statement of composition would similarly be prohibited. Thus, any labels for such products that include the term “Cachaça” would be revoked by operation of regulation.

The use of the term “Cachaça” as additional information on labels of products that are currently designated as “rum” or “Brazilian rum” will continue to be allowed as long as the products in question meet the new regulatory standards for designation as “Cachaça.” Once the final rule goes into effect, such products may be designated as “Cachaça” without the use of the designation “rum” on the label.

Labels containing the term “Cachaça” that do not comply with the new regulatory language contained in § 5.22(f) will be revoked by operation of regulation under the provisions of 27 CFR 13.51 and 13.72. Section 13.51 provides that TTB will not individually notify all holders of certificates of label approval that their approvals have been revoked if the revocation occurs by operation of regulation. Moreover, in such cases, it is the responsibility of the

certificate holder to voluntarily surrender all certificates that are no longer in compliance.

Section 13.72 provides that revocations by operation of regulation become effective on the effective date of the change in the regulation with which the label does not comply, or, if a separate label compliance date is given, on that date. TTB believes that only a small number of industry members have labels that will be revoked by operation of this final rule. In order to minimize any adverse effect on industry members who have noncompliant labels, TTB is adding a label compliance provision to the regulation that allows the continued use of previously approved “Cachaça” labels for 180 days from the date that the final rule is published in the **Federal Register**. Accordingly, under the terms of this final rule, noncompliant labels will not be revoked by operation of law until [insert date 180 days from the publication of this final rule in the **Federal Register**.] This document includes the transition period provisions in the codified regulations at a new § 5.35a for ease of reference, but provides for the expiration of this provision after 2 years, because industry members will no longer have a need to refer to this temporary transition rule after that time.

Regulatory Flexibility Act

TTB certifies that these regulations will not have a significant economic impact on a substantial number of small entities. The final rule amends the standards of identity for rum at 27 CFR 5.22(f) and does not impose any new reporting, recordkeeping, or other administrative requirement. TTB did not receive any comments indicating that products made outside of Brazil were

currently using the designation “Cachaça”, and we believe that only a small number of labels will be noncompliant with the new regulation. The final rule allows the continued use of noncompliant labels for a 180-day period in order to allow sufficient time for necessary labeling changes. Therefore, no regulatory flexibility analysis is required.

Executive Order 12866

It has been determined that this final rule is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required.

Drafting Information

Kate M. Bresnahan of the Regulations and Rulings Division prepared this final rule.

List of Subjects in 27 CFR Part 5

Advertising, Consumer protection, Customs duties and inspection, Imports, Labeling, Liquors, and Packaging and containers.

Amendments to the Regulations

For the reasons discussed in the preamble, TTB amends 27 CFR, chapter I, part 5, as follows:

PART 5—LABELING AND ADVERTISING OF DISTILLED SPIRITS

1. The authority citation for part 5 continues to read as follows:

Authority: 26 U.S.C. 5301, 7805, 27 U.S.C. 205.

2. Amend § 5.22 by revising paragraph (f) to read as follows:

§ 5.22 The standards of identity.

* * * * *

(f) Class 6; rum. “Rum” is an alcoholic distillate from the fermented juice of sugar cane, sugar cane syrup, sugar cane molasses, or other sugar cane by-products, produced at less than 190° proof in such manner that the distillate possesses the taste, aroma, and characteristics generally attributed to rum, and bottled at not less than 80° proof; and also includes mixtures solely of such distillates.

(1) “Cachaça” is rum that is a distinctive product of Brazil, manufactured in Brazil in compliance with the laws of Brazil regulating the manufacture of Cachaça for consumption in that country. The word “Cachaça” may be spelled with or without the diacritic mark (i.e., “Cachaça” or “Cachaca”).

(2) [Reserved]

* * * * *

3. Add new § 5.35a to read as follows:

§ 5.35a Transition period for labels containing the term “Cachaça.”

Holders of certificates of label approval issued prior to [INSERT DATE 45 DAYS FROM DATE OF PUBLICATION IN THE FEDERAL REGISTER] for labels that contain the term “Cachaça” in a manner that does not comply with the labeling requirements contained in part 5 of this title may continue to use those certificates until [INSERT DATE 180 DAYS FROM DATE OF PUBLICATION IN THE FEDERAL REGISTER], at which time those certificates shall be revoked by operation of regulation.

Signed: November 30, 2012

John J. Manfreda

Administrator.

Approved: December 13, 2012

Timothy E. Skud

Deputy Assistant Secretary,
(Tax, Trade, and Tariff Policy).

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