National Retail Federation®
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April 20, 2010

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Deputy Assistant Secretary for Import Administration
U.S. Department of Commerce
14th Street and Constitution Ave., NW
Room 1870
Washington, DC 20230

Re: Report to Congress: Retrospective Versus Prospective Antidumping and Countervailing Duty Systems; Request for Comment and Notice of a Public Hearing

On behalf of its member companies in the U.S. retail industry, the National Retail Federation ("NRF") is submitting these comments to the Department of Commerce ("the Department") in response to its request published in the Federal Register (75 Fed. Reg. 16079) on March 31, 2010, for public comment regarding the relative advantages and disadvantages of the retrospective and prospective antidumping ("AD") and countervailing duty ("CVD") systems.

Due to numerous problems encountered by both U.S. petitioning industries and importers stemming from the retrospective system currently in place in the United States for the assessment and collection of AD and CV duties, NRF and the retail industry have long advocated its replacement with a prospective system similar to that in Canada, which we believe will largely eliminates many of these problems.

On this point, the Department has asked interested parties to address several questions regarding the relative merits of the retrospective and prospective AD/CVD systems, *viz*. the extent to which each type of system would likely achieve the goals of:

1. Remedying injurious dumping or subsidized exports to the United States;
2. Minimizing uncollected duties;
3. Reducing incentives and opportunities for importers to evade antidumping and countervailing duties;
4. Effectively targeting high-risk importers;
5. Addressing the impact of retrospective rate increases on U.S. importers and their employees; and
6. Creating minimal administrative burdens.

In examining the operation of the U.S. trade remedies laws generally, it must be recognized that the U.S. economy is much more trade-dependent and interconnected than when most of these laws were first written decades ago. To be competitive in this environment, all U.S. industries – in retail, manufacturing and agriculture – now have global supply chains, importing many products and inputs from their foreign suppliers and exporting products to their foreign customers.

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Under these circumstances, it is evident that the trade remedies laws can have a sweeping impact on other domestic companies and even the U.S. economy as a whole. Specifically with respect to the impact on retailers and other U.S. companies that must rely on a global supply chain, trade-remedy cases brought against imports into the United States can have a significant and adverse effect by increasing costs, generating unpredictability in their business operations, and undermining their ability to compete globally.[1]

These problems are particularly acute under the U.S. retrospective system, which is unique among countries that employ trade remedies laws. Under this system, final duties are not determined and assessed on subject imports following the imposition of an AD or CVD order until after an administrative review has been conducted a year later to calculate margins based upon sales over the preceding twelve months. What this system in effect does is to create an unquantifiable contingent liability for U.S. importers of a product subject to an AD or CVD order, where the importer cannot know what the final duty cost will be. In many instances the U.S. importer may be presented a bill from Customs and Border Protection ("CBP") for retroactive duties, sometimes in the millions of dollars, on goods it imported and sold months beforehand. In such situations there is no way to recoup these costs.

In order to plan and execute their operations and compete effectively, American companies need a regulatory and business environment that provides predictability and consistency. But the U.S. retrospective system creates uncertainty and arbitrariness. When faced with the contingent risk of an AD or CVD case, many American companies simply stop doing business with suppliers in the target country and shift their source of supply to another country. This option is obviously not available when the foreign manufacturer is effectively the only viable supplier of a product that a U.S. company must import for its operations, in which case the company may be forced pull its operations out of the United States entirely and move them offshore.[2]

Those countries that use the prospective system for calculating and assessing antidumping duties mitigate the problem of risk and unpredictability for their domestic retailers, manufacturers, and farmers, and the resulting unintended consequences. Under the prospective system, the final

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[1] Due to the way in which the U.S. trade remedies law operates, the threat of investigations creates a huge degree of unpredictability and risk for U.S. industries, like retailing, that rely on global supply chains and must place orders with their suppliers months before delivery. This unpredictability and risk have large impacts on sourcing decisions, supply chain management, and costs. For example, the Vietnam textile monitoring system had a substantial negative impact on apparel retail sourcing in Vietnam, with many retailers exiting Vietnam rather than face the possibility of a government self-initiated antidumping investigation and bills for retroactive duties on products they had already imported and sold.

[2] A good example of this situation was in the 1980s, when a small group of U.S. producers of flat panel computer screens filed an antidumping petition against imported flat panel screens from Japan. At the time, Japan supplied nearly all flat panel screens to U.S. computer companies for their production of laptop computers. As a result of the high import taxes imposed in this case, U.S. computer companies were forced to move their entire U.S. laptop computer production offshore at the loss of thousands of U.S. jobs.

AD or CVD margin is calculated during the initial investigation and assessed on all imports entered after the imposition of an order. As a result, petitioning industries are able to obtain relief against unfairly-priced imports, while importers have greater predictability and are able to know what their duty liability will be and plan their business operations accordingly.

While it is clear that the prospective system is preferable over the retrospective system for U.S. companies that import through their global supply chains, the prospective system also offers some distinct advantages over the retrospective system to domestic petitioning industries.

As a preliminary point, there is no evidence that a prospective system is generally less effective in offering relief to a petitioning industry in AD/CVD investigations than the retrospective system. Indeed, the European Union, which has a prospective system, employs trade remedies as frequently as the United States. This point suggests that European petitioners view the EU trade remedies system as an effective remedial mechanism to injurious dumping and countervailable government subsidies.

In addition, both systems allow for the adjustment of margins through annual reviews. Under the prospective system, this review resets final AD and CV duties on goods imported subsequent to the review. This is a simpler system to administer than the retrospective system where annual reviews set the final (retroactive) duty rate for imports that were entered during the 12 months preceding the review and the estimated duty deposit rate for goods imported subsequent to the review. The convoluted retrospective system does benefit trade lawyers through the complex work necessary to conduct an administrative review, but adds substantial and largely unnecessary cost for petitioners, respondents, and importers.

With respect to effective collection of duties, the prospective system is much superior to the retrospective system, and thus offers a better remedy to address unfairly-traded imports. In its March 2008 report on the collection of antidumping and countervailing duties, the Government Accountability Office ("GAO") confirmed that CBP has been unable to collect hundreds of millions of dollars in AD and CV duties.[3] Indeed, ineffective duty collection and duty evasion are a constant complaint from petitioners in the United States. They have advocated a variety of ways to address this issue, including through the negotiation of new rules in trade agreements and requiring foreign exporters to the U.S. market to post additional bonds and maintain agents in the United States.

It is evident, however, that simply adopting a prospective AD/CVD system would largely alleviate the duty collection problem for both petitioners and administering agencies. This conclusion is confirmed in the subsequent GAO report that identified the retrospective AD/CVD system as one of the key factors contributing to the problem:

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[3] GAO, *Antidumping and Countervailing Duties: Congress and Agencies Should Take Additional Steps to Reduce Substantial Shortfalls in Duty Collection*, GAO-08-391 (Mar. 26, 2008).

> Unlike the United States, other major trading partners have AD/CV duty systems that establish the final amount of AD/CV duties when goods enter the country. As a result, the existence of significant uncollected AD/CV duties is unique to the United States . . . .[4]

The underlying issue is that, under the retrospective system, final duties may exceed cash deposits, in some cases by many millions of dollars. CBP must then attempt to collect the difference long after the imported goods have entered the United States. By then, an importer (particularly high-risk or unscrupulous importers) may no longer be in business. Others may have declared bankruptcy, or are unable to pay for financial reasons. The prospective system largely avoids this problem by assessing final duties at time of importation. As the GAO concluded:

> As long as the United States maintains a system that involves attempting to collect duties from importers years after they import products into the United States, it will have difficulties collecting the full amount of duties owed.[5]

Thus, by eliminating the intransigent problem of uncollected duties under the prospective system that petitioners argue undermines proper administration of the trade remedies laws, adoption of a prospective system would provide more effective relief to petitioners against unfairly-trade imports and would be easier for agencies to administer.

Another nagging problem under the U.S. trade remedies system that could be effectively rendered moot under a prospective system is the controversial use of zeroing to calculate normal value. Zeroing refers to the administrative practice of assigning a value of zero for all sales priced above "normal value" when examining multiple sales of the subject imports in the U.S. market to calculate a weighted average dumping margin.

The Department of Commerce abandoned the practice of zeroing in most instances after several U.S. trading partners successfully challenged the methodology in a series of cases before the WTO Dispute Settlement Body (DSB) as a violation of WTO rules. Petitioner groups strongly support zeroing under the argument that it is necessary to capture the full extent of dumping, and there have been ongoing attempts in Congress to reinstate the practice legislatively. However, U.S. importers strongly oppose the use of zeroing under the argument that it is an outcome oriented methodology that artificially inflates margins and fails to provide a fair comparison in calculating normal value.

However, this controversy would largely be rendered moot were the United States to adopt a prospective AD/CVD system. Under this system, the *de facto* use of zeroing could continue in calculating normal value without the risk of violating WTO rules because duties would be collected entry by entry. Thus, when the U.S. price is below the normal value, duties are collected, and when the U.S. price is above normal value, duties are not collected but other entries are not offset by the negative dumping (thus zeroing continues).

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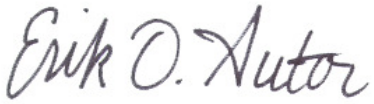
[4] GAO, *Agencies Believe Strengthening International Agreements to Improve Collection of Antidumping and Countervailing Duties Would Be Difficult and Ineffective*, GAO-08-876R (July 24, 2008) (emphasis added).
[5] Ibid.

For the reasons stated above, we strongly advocate abandoning the retrospective AD/CVD system and adopting a prospective system. Finally, we believe that Canada provides the best model for a prospective system as it is most similar to the U.S. administrative system in terms of structure, fairness, and transparency.

As the world's largest retail trade association and the voice of retail worldwide, the National Retail Federation's global membership includes retailers of all sizes, formats and channels of distribution as well as chain restaurants and industry partners from the U.S. and more than 45 countries abroad. In the U.S., NRF represents the breadth and diversity of an industry with more than 1.6 million American companies that employ nearly 25 million workers and generated 2009 sales of $2.3 trillion.

Sincerely,



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