RETAIL INDUSTRY LEADERS ASSOCIATION

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Jeffrey I. Kessler
Assistant Secretary for Enforcement and Compliance
Room 1870
Department of Commerce
1401 Constitution Avenue, NW
Washington, D.C. 20230

Re: Proposed Rule and Request for Comments on Regulations to Improve Administration and Enforcement of Antidumping and Countervailing Duty Laws (Docket No. ITA-2020-0001)

Dear Assistant Secretary Kessler,

The Retail Industry Leaders Association (RILA) appreciates the opportunity to comment on the proposed rule entitled "*Regulations to Improve Administration and Enforcement of Antidumping and Countervailing Duty Laws*" (Docket No. ITA-2020-0001) issued by the U.S. Department of Commerce's International Trade Administration (Commerce) on August 13, 2020 (hereinafter "*Proposed Rule*").

RILA is the trade association of the world's largest, most innovative, and recognizable retail companies and brands. We convene decision-makers, advocate for the industry, and promote operational excellence and innovation. Our aim is to elevate a dynamic industry by transforming the environment in which retailers operate. RILA members include more than 200 retailers, product manufacturers, and service suppliers, which together account for more than $1.5 trillion in annual sales, millions of American jobs, and more than 100,000 stores, manufacturing facilities, and distribution centers domestically and abroad. RILA's membership includes some of the largest importers in the United States.

In its 32-page Federal Register notice dated August 6, Commerce outlined several proposed changes to the regulations concerning the enforcement of antidumping (AD) and countervailing duty (CVD) orders. The proposed changes include:

- To modify its regulation concerning the time for submission of comments pertaining to industry support;
- To modify its regulation regarding new shipper reviews;

- To modify its regulation concerning scope inquiries;
- To promulgate a new regulation concerning circumvention;
- To promulgate a new regulation concerning covered merchandise referrals received from U.S. Customs and Border Protection (CBP);
- To promulgate a new regulation pertaining to Commerce requests for certifications from interested parties to establish whether merchandise is subject to an AD or CVD order;
- To modify its regulation regarding importer reimbursement certifications filed with CBP; and
- To modify its regulations regarding letters of appearance in AD and CVD proceedings and importer filing requirements for access to business proprietary information.

Our comments on a number of the various proposals are set forth below.

Industry Support in AD and CVD Proceedings. In Section 351.203 of the *Proposed Rule*, Commerce proposes an effective deadline of 15 days from the filing of an AD/CVD petition to receive comments addressing industry support. Commerce's rationale for the proposed deadline is that such comments were being filed "up to and including the scheduled date of an initiation determination." As a result, Commerce often has had "little or no time" to consider such comments in light of the 20-day statutory deadline for Commerce to initiate an investigation.[1]

RILA is appreciative of Commerce's efforts to afford thoughtful consideration to concerns that a petition has not demonstrated the requisite level of industry support. However, the time crunch at the pre-initiation stage could be remedied if Commerce more readily invoked the statutory provision allowing the extension of the 20-day initiation deadline to 40 days in cases where industry support is legitimately at issue.[2]

While Commerce has a ready solution to address this issue, the proposed 15-day deadline is unworkable. U.S. companies often do not become aware that a petition has been filed for days, if not weeks, after the fact. It then takes days, if not weeks, for U.S. companies to acquire legal counsel to advise on issues including scope (which often changes during the initiation process) and industry support. These aforementioned issues are magnified for small and medium sized entities (SMEs) that often do not have the compliance and government relations expertise to monitor Commerce's docket.

Regardless, by the time most U.S. companies become aware of a petition and issues related to industry support and can draft detailed comments on standing, Commerce's

[1] 19 U.S.C. § 1673a(c)(1)(a).
[2] 19 U.S.C. § 1673a(c)(1)(b).

proposed deadline would have passed. And given the statutory prohibition against revisiting standing decisions after initiation,[3] the U.S. industry would have no recourse to challenge petitions that lack adequate industry support.

In sum, rather than impose a non-workable deadline on U.S. companies, RILA suggests that Commerce extend the 20-day period to 40 days in any proceeding in which the agency receives credible information that questions whether the petitioner has established standing.[4] Upon extension, Commerce could establish a schedule that affords adequate due process protections to all interested parties.

Scope Matters in AD and CVD Proceedings. RILA is deeply concerned regarding Commerce's proposal to apply retroactive cash deposit requirements stemming from an affirmative scope inquiry to unliquidated entries. As an initial matter, retroactive application of cash deposit requirements is a substantial departure from Commerce's current practice, which is to apply cash deposit requirements only after the date of initiation of the scope inquiry.

The current practice, which is based on notice of potential liability being afforded to the importing community when a scope inquiry is initiated, is consistent with the fact that importers often do not realize that the imported product could be subject to retroactive liability.

In addition, retroactive application of cash deposits only occurs (to date) following a finding of critical circumstances, which almost never occurs in AD/CVD investigations due to negative critical circumstance findings by the U.S. International Trade Commission (ITC). Commerce's proposal is, therefore, unprecedented.

While Commerce is correct that the impact of this provision will be lessened by the fact that some imports will have already liquidated, RILA members often have significant quantities awaiting liquidation at any given time. Moreover, many SMEs might face bankruptcy if they are subject to retroactive liability for products that they did not believe at the time of importation were subject to an AD/CVD order. For example, attempts by a petitioner to apply retroactive AD/CVD duties in the *Quartz Surface Products from China* led to reports of potential bankruptcies for a number of U.S. SMEs who were not aware that the imported product was subject to an AD/CVD order.[5]

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[3] 19 U.S.C. § 1673a(c)(4)(e).

[4] In addition, one potential solution is to require that any request that the 20-day period be extended to 40-days be filed within 15 days of the filing of the petition.

[5] Small stone dealers fear fallout from quartz trade fight, available at https://www.stltoday.com/business/columns/david-nicklaus/small-stone-dealers-fear-fallout-from-quartz-trade-fight/article_27105316-4f78-5b9a-8f33-8e3097feac3a.html

RILA is also concerned about the proposed timing for scope inquiries. Under proposed revisions to Section 351.225, Commerce would afford itself 300 days to address scope inquiries, which is an additional 6 months from the current 120-day deadline. As discussed below, the proposed extended deadline is unnecessary, inconsistent with other provisions in the *Proposed Rule*, and an additional burden to U.S. importers.

As an initial matter, it is unclear why Commerce needs an additional 6 months to interpret its own administrative orders. In fact, elsewhere in the *Proposed Rule*, Commerce downplays what occurs in a scope inquiry. Specifically, Commerce notes in the *Proposed Rule* that scope inquiries do not clarify the existing scope of an (otherwise ambiguous) order, but rather determine whether the "product has always been within the scope of the order." This argument forms the basis as to why Commerce is attempting to impose retroactive tariff liability – i.e., because it is telling importers what products have always been covered, not clarifying orders with an unclear scope. Given this new stated rationale for scope inquiries, there is no reason why Commerce must take 300 days to tell the importing community what its administrative orders have always meant.

Regardless of the inconsistency of Commerce affording itself more time in scope inquires with its proposal to apply retroactive duty liability, the proposal should be rejected because it imposes a steep burden on U.S. importers. The current 120-day deadline is already exceedingly difficult on U.S. companies, which face legal and business uncertainty as to the ultimate status of products subject to a scope inquiry. A 300-day deadline would increase that burden exponentially. Accordingly, Commerce should not adopt the proposed extension of the deadline for scope inquiries.

Circumvention of AD and CVD Orders. Similar to the provision on scope inquiries, Commerce has proposed the extension of retroactive liability to unliquidated entries in circumvention proceedings. For the reasons outlined above, RILA strongly believes that Commerce should not apply retroactive liability in circumvention proceedings.

In fact, the case for retroactive liability is even more flawed in the context of a circumvention inquiry. As Commerce acknowledges in the *Proposed Rule*, "Commerce may determine that certain products are circumventing existing AD/CVD orders, and thus lawfully may be considered within the scope of the order(s), ***even when the products do not fall within the literal scope language*** (emphasis added). In many cases, it is impossible for importers to predict what products may be circumventing an AD/CVD order given the issue is – according to Commerce – not covered by "the literal scope language." To apply retroactive duty liability to U.S. importers, notwithstanding the fact that the product at issue is not covered by the language of the order, violates due process and creates tremendous uncertainty to the importing community.

Commerce Requests for Certifications. Under proposed Section 351.228, Commerce may determine to impose a certification requirement on an importer or another interested party to ensure that entries of merchandise subject to an AD/CVD order are appropriately classified as subject merchandise. This additional requirement is duplicative and potentially conflicts with pre-existing Customs requirements regarding the exercise of reasonable care.

Importers are already required to exercise reasonable care in classifying and entering imports into the United States, including stating whether the entry is a so-called "03" entry – i.e., an entry subject to an AD/CVD order. To require the importer to re-assert that the entry is an "01" entry – i.e., an entry that is not subject to an AD/CVD order – in a certification is simply duplicative of the information already contained on the entry form. In addition, given the importer is already required to declare if the import is an 03 or 01 entry, the certification requirement places an undue administrative burden on U.S. importers with no tangible benefit in regards to the enforcement of the AD/CVD laws.

The *Proposed Rule* also creates an inconsistency in the diligence standards set forth by Commerce and CBP. Commerce's proposed standard in regards to such certifications is that they not be "materially false, fictitious or fraudulent {,,,}, or contain{…} material omissions." This proposed standard is different than the reasonable care standard set forth by CBP and, as a result, creates two different and conflicting requirements for classification upon importation. It is also unclear how the certification requirement might function if an import without a certification has already been liquidated. Accordingly, the provision should not be enacted.

We appreciate the opportunity to provide our members' thoughts on the *Proposed Rule* and would be happy to answer any questions.

Sincerely,

Blake Harden

Blake Harden
Vice President, International Trade
Retail Industry Leaders Association