FILE COPY

HUNTON& WILLIAMS

HUNTON & WILLIAMS LLP
1900 K STREET, N.W.
WASHINGTON, D.C. 20006-1109

TEL 202 • 955 • 1500
FAX 202 • 778 • 2201

DOUGLAS HEFFNER
DIRECT DIAL: 202-419-2014
EMAIL: dheffner@hunton.com

FILE NO: 23458.000008

June 25, 2007

By Hand

David Spooner
Assistant Secretary
for Import Administration
Central Records Unit, Room 1870
U.S. Department of Commerce
Pennsylvania Avenue at 14th Street, N.W.
Washington, DC. 20230

RE: DOC Request for Public Comments Regarding Market-Oriented Enterprise Treatment in Non-Market Economy Antidumping Proceedings

Dear Mr. Assistant Secretary:

We are writing on behalf of J. C. Penney Corporation, Inc. and its wholly owned international sourcing subsidiary, J. C. Penney Purchasing Corporation (together "JCPenney") to express our support for a proposal by the Department of Commerce to establish criteria for market oriented enterprises ("MOEs"). JCPenney is one of America's largest department store, catalog, and e-commerce retailers. It operates 1,037 JCPenney department stores throughout the United States and Puerto Rico and employs 155,000 people nationwide. JCPenney sells a wide variety of consumer products to its customers recording sales of over $19.9 billion in 2006.

This letter is filed in response to the Department of Commerce solicitation of public comments regarding whether it should calculate the dumping margin differently for market oriented enterprises in China by granting market-economy treatment to individual respondents in antidumping proceedings involving China, the conditions under which individual firms should be granted market-economy treatment, and how such treatment might affect the antidumping calculation for such qualifying respondents. See Antidumping Methodologies in Proceedings Involving Certain Non-Market Economies: Market-Oriented Enterprise, 72 FR 29302, 29303 (May 25, 2007). JCPenney appreciates the opportunity to present its views on this important issue.

I. Overview

As an initial matter, it is not clear from the Department's notice whether it intends a MOE analysis to focus on a company's internal organization and business practices (an "internal" approach), or whether it would instead concentrate on factors out of an individual company's control, such as the geographic location of the company's facilities and the accompanying costs associated with securing certain inputs such as labor and energy (an "external" approach).

JCPenney firmly believes that the Department should adopt an approach that enables individual companies to control their fate by concentrating on criteria that are, to a great extent, within the company's ability to control. Such an approach would encourage Chinese companies to fully adopt market business practices, in contrast to an approach (such as the market oriented industry, or MOI, policy, which has never been granted by the Department) that punishes a company for operating in China *per se*, and offers no realistic hope that a company's adoption of market-based business practices will result in fair treatment by the Department.

II. Qualifying Criteria

The Department has a firmly established analysis to determine whether a company's export operations operate free from government control, namely its separate rate practice. Conceptually, JCPenney believes that the Department should consider a company to qualify for MOE treatment where the company's operations more generally operate free from government control. Therefore, JCPenney suggests that the criteria that the Department applies to determine whether a company qualifies as an MOE would include the same criteria as those used to establish "separate rates" treatment for a company's export operations. As discussed below, however, because MOE treatment would go beyond a company's export operations -- rather would go to the company's overall operations -- JCPenney also recommends additional criteria.

A. Separate Rates Criteria

Under the Department's current practice, a company granted separate rates treatment is considered free from government control (in law and in fact) with respect to its export operations. Evidence supporting a finding of the absence of governmental control in law over export activities includes:

- An absence of restrictive stipulations associated with an individual exporter's business and export licenses;
- Any legislative enactments decentralizing control of companies; and
- Any other formal measures by the government decentralizing control of companies.

The absence of governmental control in fact over exports is based on whether the respondent:

- Sets its own export prices independent of the government and other exporters;
- Retains the proceeds from its export sales and makes independent decisions regarding the disposition of profits or financing of losses;
- Has the authority to negotiate and sign contracts and other agreements; and
- Has autonomy from the government regarding the selection of management.

JCPenney also recommends that the Department continue to make these requirements necessary in order to be eligible for MOE treatment. Put another way, any company securing separate rates treatment would, by definition, be eligible for MOE treatment.

B. Additional Criteria

Because, as JCPenney is suggesting, granting MOE treatment goes beyond a company's export activities to encompass its general operations, JCPenney recommends an additional two criteria:

- A company must have independently audited financial statements and those financial statements must be in accordance with generally accepted accounting principles; and
- No evidence must exist of inappropriate government intervention with respect to the company's business decision-making activities.

Independently Audited Financial Statements

With respect to the first additional criterion, requiring independently audited financial statements that are in accordance with GAAP would be fully consistent with the Department's preference to rely on independently audited financials, both with respect to market economy cases and with respect to surrogate financial statements in NME cases.[1] Moreover, the Court of International Trade has noted the high reliability of independently audited financials.[2] Requiring that a company's financial statements be independently audited ensures that the company's business is accurately stated and a trustworthy standard on which the Department may rely.

Absence of Evidence of Governmental Interference

With respect to the second additional criterion, it would be inappropriate to rely on a company's accounting records if the relevant information therein, while accurate, is nonetheless affected by inappropriate government intervention in the company's internal affairs. At the same time, mere state ownership or the presence of former government officials on the board or in

---

[1] See, e.g., Final Determination of Sales at Less Than Fair Value: Collated Roofing Nails From Taiwan, 62 FR 51427-28 (October 1, 1997) (Department attempted to use other sources to substantiate unaudited financial statements. When it was unable to do this, the Department determined ultimately that, because the respondent had not notified the Department promptly that it had no reliable source to substantiate its financial statements, the application of an adverse inference was warranted.) See also Issues and Decision Memorandum for the 2001-2002 Antidumping Duty Administrative Review of Persulfates from the People's Republic of China, December 5, 2003 ("As Gujarat's financial statements have been independently audited in accordance with generally accepted accounting standards in India, and we have no reason to question the veracity of these auditing standards or procedures, we have continued to utilize the financial statements of Gujarat…).

[2] See, e.g., Inland Steel Industries, Inc., et al., v. United States and Usinor Sacilor et al., 967 F. Supp. 1338 (Ct. Intl. Trade 1997) ("The Court observes the data contained in the Annual Reports are especially reliable based on their being audited by an independent accounting firm").

management positions should not be presumptive of inappropriate governmental interference. In this regard, evidence of a lack of inappropriate intervention could include, *inter alia*, minutes from board of directors' meetings revealing no undue influence from a government official; evidence of firing or hiring senior management not based on political considerations; evidence of an absence of governmental influence in the selection of suppliers and/or the negotiation of contracts with those suppliers; evidence of an absence of interference in negotiations between management and labor, etc.

III. Margin Calculation Methodology

If the Department were to grant a company MOE treatment, JCPenney proposes that the DOC first examine whether the company's U.S. sales prices could be compared to the company's third country sales (to the largest "market economy" market) as the "first choice" for normal value.

Comparison to third country sales is directly contemplated in the governing statute, at section 773 (a)(1)(C):

> (C) Third country sales. This subparagraph applies when
>
> (i) the foreign like product is not sold (or offered for sale) for consumption in the exporting country as described in subparagraph (B)(i),
>
> (ii) the administering authority determines that the aggregate quantity (or, if quantity is not appropriate, value) of the foreign like product sold in the exporting country is insufficient to permit a proper comparison with the sales of the subject merchandise to the United States, or

> (iii) the particular market situation in the exporting country does not permit a proper comparison with the export price or constructed export price.

As indicated by the above language, third country sales are relied on where home market sales cannot be used. JCPenney suspects, in this regard, that the Department may find that the "particular market situation in" China "does not permit a proper comparison with the export price or constructed export price."[3] However, suspected price distortions in the Chinese market do not preclude price-to-price comparisons for antidumping purposes, given the statutory option to use third-country sales.

Moreover, section 773(c)(1)(B) specifically allows for the application of the standard NME methodology only where:

> "the administering authority finds that available information does not permit the normal value of the subject merchandise to be determined under subsection (a)." {that is, generally, using price comparisons, including third country prices}."

The consideration of third country sales as the primary choice for developing normal value would represent a significant improvement in the method the Department of Commerce uses to measure alleged dumping of Chinese products. Most important, reliance on the largest

---

[3] See, e.g., the Department's analysis in its March 29, 2007 memorandum Countervailing Duty Investigation of Coated Free Sheet Paper from the People's Republic of China - Whether the Analytical Elements of the *Georgetown Steel* Opinion are Applicable to China's Present-Day Economy ("Georgetown Applicability Memorandum").

viable third country market would greatly increase transparency for both the foreign exporter/producer and the U.S. importer. For the foreign exporter, the knowledge that the Department would consider third country sales as the basis of normal value will better allow that exporter to monitor its U.S. selling practices so as to ensure that it is not dumping -- which is the ultimate goal of the antidumping law. The reason it would be easier for the exporter to monitor its U.S. sales is that, quite frankly, the standard NME methodology makes it nearly impossible to accurately gauge what U.S. selling prices "should" be. For example, foreign exporters do not know what surrogate country the Department will choose in any particular investigation. Moreover, even if they did know, they have no idea what financial statements will be used to develop overhead, SG&A, and profit ratios. Nor do they know the surrogate values the Department will choose to value material inputs. In short, it is essentially impossible under the current NME methodology for an exporter to know if the Department will consider its U.S. prices to be dumped. Such a system does not encourage responsible international selling practices; rather, it may simply lead a company to view any potential U.S. antidumping investigation with cynicism and contempt for the international fair trade rules, surely an undesirable result for the global economy.

Moreover, the inability of the exporter to monitor its sales also harms the U.S. importer. This point is extremely significant, for the obvious reason that it is in fact the U.S. importer who bears ultimate liability for the payment of antidumping duties. Furthermore, the Department has even established a practice of assuming "importer knowledge" of dumping, for purposes of its critical circumstances analysis, where CEP transactions are found to have been dumped by 15%, and EP transactions by 25%.[4] This presumption is particularly unfair, because it assumes that the importer can have some reasonable idea that the Department's standard NME methodology would lead to a finding of dumping at the specified levels. But without a transparent basis for normal value, of course importers cannot know this.

Finally, if insufficient third country sales exist upon which to base normal value, the Department should next resort to constructed value. With regard to the calculation methodology for constructed value and cost of production for MOEs, please see the next section of these comments.

IV. Cost Calculation for MOE

The use of third country sales, of course, would not preclude an allegation by domestic industry of comparison market sales being made below the cost of production (COP). In addition, as stated above, if insufficient third country sales exist upon which to base normal value,

[4] See Notice of Preliminary Determination of Sales at Less Than Fair Value: Stainless Steel Butt-Weld Pipe Fittings from Germany, 65 FR 47384, 47386 (August 2, 2000), citing Certain Cut-to-Length Carbon Steel Plate From the People's Republic of China, 62 FR 31972, 31978 (June 11, 1997) ("In determining whether there is a reasonable basis to believe or suspect that an importer knew or should have known that the exporter was selling the stainless steel butt-weld pipe fittings at less than fair value, the Department's normal practice is to consider for EP sales margins of 25 percent or more sufficient to impute knowledge of dumping.").

the Department should rely on constructed value (CV). For both CV and COP purposes, the Department would have to determine how to analyze costs of a company operating in the People's Republic of China.

JCPenney begins by proposing that the Department adopt the general presumption that the production costs of all majority foreign-owned or privately-owned firms are not distorted through government intervention. Large multinationals, for example, are purely market-based decision makers, who source, produce, and sell globally in order to maximize profit. There can be no question that all significant production decisions of companies such as these are made free of Chinese government interference. Private companies likewise seek to maximize profits. Nonetheless, JCPenney would agree that it may still be possible that certain cost inputs could be distorted due to the broader Chinese economic distortions, as noted by the Department in its Georgetown Applicability Memorandum. In such cases, JCPenney proposes that the Department would analyze allegations from U.S. domestic industry of specific input cost distortions.

On the other hand, state-owned enterprises (SOE) would be subject to the presumption that their cost inputs are distorted through government intervention, based on the Department's specific concerns regarding SOE's as expressed in the Georgetown Applicability Memorandum.[5]

---

[5] See Georgetown Applicability Memorandum at 8 ("In addition to this legal right of oversight, continued local and central government involvement in the business decisions of SOEs (for example,
(continued...)

However, analogous to the presumption with majority foreign- and privately-owned enterprises, this presumption could be overcome through the provision of information showing no distortion exists (for example, data showing that purchases were made at costs on a par with market-economy costs for the same inputs).

And of course, if a particular input is found to be so distorted that it cannot be used to evaluate a company's costs, then reversion to the standard NME methodology inputs would occur for that input only.

Finally, although somewhat unrelated to the general thesis, JCPenney would also argue that insignificant inputs be automatically valued using actual costs. As the Department is aware, it can be an extremely tedious exercise, yielding no discernible increase in the accuracy of calculated dumping margins, to identify surrogate values for sometimes hundreds of extremely minor inputs.[6] In order to reduce the administrative burden on the Department, to increase transparency for the foreign producer/exporter, and to reduce the possibility of distortions to the

---

through board appointments), as well as social policy concerns, may affect the commercial nature of SOE operations.").

[6] See, e.g., November 21, 2003 Memorandum to the File: Preliminary Determination Factors Valuation Memorandum at Attachment 1, Certain Color Television Receivers from the People's Republic of China, where the factor valuation memorandum for the preliminary determination included approximately 278 material input and packing surrogate values.

margin through the application of inappropriate surrogate values, JCPenney proposes that the Department apply an automatic rule for valuing insignificant inputs using a company's actual costs, regardless of the ownership of that company.

V. Related Issues

Finally, should the Department adopt a new "MOE" classification system, it must also consider certain ramifications of bestowing such status more generally.

Universal Qualification as an MOE

First, JCPenney proposes that the Department adopt a rule whereby, if a company is found to be an MOE in one antidumping proceeding, it should automatically qualify as an MOE for all proceedings. Because an MOE determination would be made with respect to a company's general operations, it must follow that, absent a significant change to any of the relevant company-specific facts, the company would qualify as an MOE for all antidumping proceedings. Confirmation of no change could be made in the same fashion as continued separate rate status is made, i.e., through a certificate. However, unlike the separate rate certificate, an MOE certificate would not be specific to subject merchandise in one case; rather, a certificate would be filed to reconfirm MOE status granted in an earlier proceeding.

Note that failure to qualify for MOE status should not, however, disqualify a company from obtaining MOE status in another investigation automatically. Rather, the company would have another opportunity in that other investigation to qualify itself for MOE treatment.[7]

"MOE" Rate

Second, if the Department creates a new category of companies under the MOE methodology, then the Department must consider how to assign dumping margins to non-investigated producers who qualify for MOE treatment. In this respect, JCPenney proposes that the Department should calculate and apply to non-mandatory MOE companies a weighted average rate of all calculated MOE company margins exclusively (an "MOE Rate"). For example, if the Department were to investigate only 8 of over 200 companies in an AD investigation, and determine that 6 of those companies qualified for MOE treatment, then of the remaining 192 companies that qualify for MOE treatment (under an application process analogous to, and perhaps completed as an addendum to, the separate rate application process), a weighted average of those 6 MOE companies would apply. Non-investigated companies receiving separate rate status, but not MOE treatment, would receive the weighted average of

[7] For example, if a respondent did not qualify in an investigation because it did not have audited financial statements, but did have audited financials in the review, it should not automatically be disqualified from obtaining MOE status.

mandatory companies receiving separate rate status. Any companies failing to achieve either MOE or separate rate status would of course still receive the country-wide rate.

Adoption of such a practice for non-investigated firms would lead to greater accuracy in assigning dumping margins, because of the fair assumption that MOEs behave qualitatively differently from firms not qualifying for MOE status, and, in general, MOEs respond to the same market forces in the United States and other export markets.

* * * *

As required by the terms specified in the Department's request for public comments, J.C. Penney hereby files a signed original and ten copies of its comments. Additionally, for the Department's convenience J.C. Penney is transmitting, via email, a PDF version of these comments to the Department. Please contact the undersigned if you have any questions.

Sincerely,

Douglas J. Heffner

Douglas J. Heffner
Rick Johnson, *Senior International Trade Analyst*

cc: Carrie Blozy
Lawrence Norton