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BY HAND DELIVERY

The Honorable James J. Jochum
Assistant Secretary for Import Administration
U.S. Department of Commerce
Central Records Unit, Room 1870
U.S. Department of Commerce
Pennsylvania Avenue and 14th Street, N.W.
Washington, DC 20230

PUBLIC DOCUMENT

Re: Comments Regarding Separate Rates Practice In Antidumping Proceedings Involving Non-Market Economy Countries – 69 Fed. Reg. 77722 (December 28, 2004)

Dear Mr. Jochum:

The American Furniture Manufacturers Committee for Legal Trade and the Polyethylene Retail Carrier Bag Committee (“the Committees”) submit these comments regarding the Department’s separate rates practice in antidumping investigations involving non-market economy (“NME”) countries.¹ The Department first requested comments on its separate rates

¹ Separate Rates Practice in Antidumping Proceedings Involving Non-Market Economy Countries, 69 Fed. Reg. 77722 (Dec. 28, 2004) (“Third Notice”).

practice and options for changes in May 2004.² After considering submissions from 23 interested parties, the Department presented three proposals with respect to its separate rates practice and requested additional public comment on these proposals. Separate Rates Practice in Antidumping Proceedings Involving Non-Market Economy Countries, 69 Fed. Reg. 56188 (Sept. 20, 2004) (“Second Notice”). Taking into account the comments provided, the Department announced in its Third Notice that it was provisionally adopting an application process for evaluation of separate rate requests by non-investigated firms in non-market economy proceedings. 69 Fed. Reg. at 77722. In addition, the Department stated that it is considering instituting combination rates for all firms receiving a separate rate in non-market economy cases. Id. The Department provided a draft application on its website³ and requested comments on both the application process and its draft application. Id.

I. INTRODUCTION

The Department’s provisional application process and Draft Application are positive steps toward an effective, meaningful separate rates policy. As the Committees stated in their June 2, 2004 and October 15, 2004 Separate Rates Comments, the Department must establish clear guidelines for the administration of its separate rates policy in order to return the policy to its original purpose, to streamline the process, to ease the administrative burden on the Department, and to achieve consistency and predictability of outcomes. Accordingly, the

² Separate Rates Practice in Antidumping Proceedings Involving Non-Market Economy Countries, 69 Fed. Reg. 24119 (May 3, 2004) (“First Notice”).

³ Office Of AD Enforcement Separate Rate Application and Required Supporting Documentation, Pre-Decisional Draft, December 17, 2004, available at <http://ia.ita.doc.gov/ia-highlights-and-news.html> (“Draft Application”).

Department's Draft Application must state clearly what is required of separate rates applicants and describe explicitly the consequences for failure to conform to those requirements.

Therefore, the Committees submit the following comments and suggest the following changes to the Department's application process and Draft Application. In addition, as the Committees previously stated, they support the Department's intention to institute combination rates for all mandatory and Separate Rates Respondents in non-market economy proceedings.

II. THE DEPARTMENT'S DRAFT APPLICATION SHOULD CLEARLY STATE THE CONSEQUENCES FOR ANY FAILURES TO PROVIDE TIMELY, COMPLETE RESPONSES

As stated above, the Department should state clearly what is required of Separate Rates Respondents in order to receive a separate rate. It is equally important, however, that the Department explicitly describe the consequences for any failure to comply with those requirements. This will ease the Department's administrative burden and enable it to deal with unfounded challenges more efficiently. For example, Separate Rates Respondents should not be able to challenge the Department's denial of a separate rate based on claims that they were unaware of the Department's requirements. To that end, the Committees suggest certain changes to the Department's language in its Draft Application.

At page 2 of the Draft Application, the Department states:

Applicants must individually complete and submit this form with all the required supporting documentation by sixty calendar days after the date of initiation of this investigation, which appears in the heading of this application.

The Department should add the following language to the end of this statement:

Untimely submissions will be rejected, and the application for a separate rate will be denied.

In addition, footnote 13 at page 11 of the Department's Draft Application states:

Applicants should provide documents showing price negotiations, not documents merely confirming that a sale will take place at a given price. If your firm conducts its price negotiation by phone and therefore has no records of price negotiation, consider attaching an affidavit signed by the U.S. customer attesting that it conducts independent price negotiation with the applying firm. Affidavits must provide adequate information to link the applicant to the party signing the affidavit.

The Department should add the following language:

Applications submitted without sufficient evidence of price negotiation will be rejected, and the application for a separate rate will be denied.

III. THE DEPARTMENT SHOULD ASK ADDITIONAL QUESTIONS REGARDING THE ESTABLISHMENT OF PRICE NEGOTIATIONS

A. The Department Should Ask Whether There Are Meetings Of The Company Where A Government Official Is Present And Production And Pricing Are Discussed

In Section IV of the Draft Application dealing with price negotiation, the Department should specifically ask Separate Rates Respondents to disclose if government officials are present at any meetings at which production and pricing decisions are discussed. Although a government official may not exert influence in an official capacity, *e.g.*, as a member of the company's board of directors or as a shareholder with an ownership stake, government control can be exerted on an informal level. Therefore, as stated in the Committees' October 15, 2004 Separate Rates Comments at page 5, the Department should request information about

government involvement in pricing or production decisions so that it can analyze whether such circumstances amount to government control of the Separate Rates Respondent.

B. The Department Should Ask Whether The Company Is A Member Of Any Trade Association Controlled By The Government

As noted in the Committees' October 15, 2004 Separate Rates Comments at 6, exporters may coordinate in setting prices or determining the markets to which companies will sell through trade associations. In those circumstances, producers and exporters that are members of the trade association may be subject to government control when the trade association is subject to government control or influence. The Department, therefore, should ask questions in Section IV of its Draft Application to determine whether a Separate Rates Respondent or any of its affiliates or suppliers is a member of a trade association, whether any government officials are officers or members of the trade association or participate in trade association activities, and whether the trade association exerts any influence over sales or pricing decisions made by its member companies.

IV. THE DEPARTMENT SHOULD VERIFY A REPRESENTATIVE SAMPLE OF SEPARATE RATES RESPONDENTS IN EVERY INVESTIGATION

At page 4 of the Department's Draft Application, the Department states that it "may verify applicants deemed to meet the standards for a separate rate." As stated in the Committees' June 2, 2004 and October 15, 2004 Separate Rates Comments, verification is a necessary aspect of an effective process to establish eligibility for a separate rate. Requiring the NME producers and exporters to certify their responses, while important, is not a sufficient safeguard to establish the veracity of their questionnaire responses. Without the real possibility of verification of the

information provided, there is no incentive for a Separate Rates Respondent to provide complete and accurate responses to the Department's inquiries. The Department should verify a representative sample of Separate Rates Respondents in every case and, in addition, conduct a surprise verification of at least one Separate Rates Respondent in every investigation.

Furthermore, as part of its verification policy, the Department should clarify that if there is any material failure at verification the applicant will fail the verification and will receive the country-wide rate. In particular, if the Department cannot verify the Quantity and Value ("Q&V") information provided by a Separate Rates Respondent, the company should fail verification and receive the country-wide rate because accurate Q&V information is critical to the selection of the mandatory respondents in an investigation.

V. THE DEPARTMENT SHOULD NOT LIMIT THE REQUIREMENT OF A TIMELY RESPONSE TO ITS MINI-SECTION A QUESTIONNAIRE ONLY TO COMPANIES IDENTIFIED BY PETITIONERS IN THE PETITION

As stated in the Committees' previous comments, the Department should not grant a separate rate to any company that ignores its initial request for Q&V information. The Department requires Q&V information from all known producers in the subject country so that the Department has accurate and complete information with which to select mandatory respondents during its investigation. If there is no incentive for foreign producers and exporters to submit accurate and complete Q&V information in response to the Department's mini Section A questionnaire, the process by which the Department selects mandatory respondents in an investigation will be compromised.

In its Draft Application, the Department states:

If the Department named your firm in the initiation notice, your firm must also respond to the Department's Quantity and Value ("Q&V") questionnaire to receive consideration for a separate rate.

Although the Committees support the principle that any firm named in the initiation notice must submit a Q&V questionnaire to receive consideration for a separate rate, the Department should not limit the application of this principle to those companies named in the petition. Such an approach potentially could exclude some of the largest exporters, because petitioners are not in the best position to gain access to the information necessary to identify all exporters. Therefore, the Department should consider other means -- for example, Customs data -- to identify exporters that will be named in the initiation notice, and that will be required to submit a timely response to the Department's Q&V questionnaire. Consistent with current practice, the Department should rely on the Chinese government to notify interested parties. Given that a Q&V questionnaire typically is not issued until at least six weeks after the petition is filed, there is no valid excuse for a producer or exporter of subject merchandise to avoid responding to the Q&V questionnaire.

VI. COMPANIES THAT ARE 100 PERCENT FOREIGN OWNED OR THAT HAVE AN AFFILIATE IN A MARKET ECONOMY COUNTRY SHOULD BE REQUIRED TO SUBMIT A COMPLETE SEPARATE RATE APPLICATION

At page 2 of its Draft Application, the Department states:

Firms owned wholly by entities located in market-economy countries, provided that the ultimate owners are also located in market-economy countries, need only fill out the certifications and provide supporting documentation for the fields in the application that are marked with the asterisk, "*" ⁴ These marked fields pertain

⁴ This includes firms that are wholly owned by Hong Kong or Taiwanese entities.

to the firm's eligibility for a separate rate by having sold subject merchandise during the POI and support the firm's claim that it is in fact wholly owned by a market-economy entity. This information is also necessary for administration once a separate rate has been issued.

As the Committees stated in their June 2, 2004 and October 15, 2004 Separate Rates Comments, non-market economy producers and exporters that are 100 percent foreign owned or that have administrative or sales offices in market economy countries should not automatically receive a separate rate. Consistent with its prior practice, which required Separate Rates Respondents to submit a timely Section A questionnaire response,⁵ the Department should announce a clear policy that regardless of its ownership status, every Separate Rates Respondent must file a complete, timely separate rate application.

First, antidumping investigations are concerned with subject merchandise produced in the non-market economy country that is the target of the investigation. Thus, the Department's separate rates analysis should focus on the subject merchandise that is produced in the NME, regardless of the location of an affiliated company. Second, there is no basis to assume that the PRC government does not or cannot exert control over a company's production facility in the PRC merely because it has an affiliate located in Hong Kong. Third, according to the Department's current approach, one could argue that it should automatically assign a separate rate to a company with an affiliate in any market economy, including, for example, a company with a sales office in the United States. This makes no sense. Finally, the current policy

⁵ See, e.g., Wooden Bedroom Furniture From the People's Republic of China, Untimely Request for Separate-Rate Status of Certain PRC Exporters, Memorandum from Jeffrey May to James Jochum, dated September 20, 2004, at 4

provides substantial opportunities for circumvention by Chinese manufacturers. In order to receive a separate rate in an antidumping duty investigation, the Chinese manufacturer merely would have to restructure its operations to obtain Hong Kong ownership or a Hong Kong address and thereby escape the Department's separate rates analysis.

For these reasons, the Department should require a PRC producer with an affiliated sales or administrative entity in Hong Kong or any other market economy to demonstrate its eligibility for a separate rate through the submission of a complete application. The Department should not automatically award a separate rate to a PRC producer with an affiliated sales or administrative entity in Hong Kong or any other market economy.

VII. THE DEPARTMENT SHOULD ASSIGN COMBINATION RATES TO NON-MANDATORY RESPONDENTS TO AVOID CIRCUMVENTION OF ANTIDUMPING DUTY ORDERS

As stated in their previous comments, the Committees agree with the Department's proposal to assign exporter-producer combination rates to NME exporters receiving a separate rate so that only the specific exporter-producer combination that existed during the period of investigation or review receives the rate calculated in the investigation or review. Under the current practice, evasion of antidumping duties can be addressed only in an administrative review. Administrative reviews do not provide an effective remedy to the problem of producers selling through exporters with a low cash deposit rate, however, because the first administrative review is not concluded until at least two years after the final determination in an investigation, and not all investigated respondents necessarily will be reviewed.

As the Committees explained in their October 15, 2004 Separate Rates Comments at pages 15-17, the Department clearly has the authority under the statute and regulations to assign combination rates in NME investigations and reviews and the duty to apply its law in a manner to prevent the evasion of antidumping duties. Assigning combination rates to all NME exporters receiving a separate rate will prevent circumvention, yet it will not inhibit or deter legitimate trade. In addition, assignment of combination rates will not result in a heavier administrative burden for the Department. The Department must simply issue specific, detailed liquidation instructions to Customs, which must then enforce the order in accordance with those instructions.

Finally, if a supplier was not investigated in the original investigation and does not have a combination rate, that supplier's merchandise should be subject to the country-wide rate until a specific combination rate is established in an administrative review. Merchandise from a supplier that was not previously investigated should not receive an exporter's separate rate that was calculated based on sales of another supplier's merchandise. This approach is consistent with the Department's current practice of presuming that merchandise is subject to the country-wide rate until it is established that the merchandise should be subject to a separate rate.

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VIII. CONCLUSION

The Department should revise and clarify its application process and Draft Application in accordance with these comments. Please contact us if you have any questions about these recommendations.

Respectfully submitted,



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