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December 10, 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 Additional 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 respond to the Department's October 25, 2007 Federal Register notice seeking additional comments with respect to the Department's proposal to establish criteria for market oriented enterprises ("MOEs"). As indicated on the Department's Import Administration website, the deadline for submitting comments is December 10, 2007. As noted in JCPenney's comments to the Department's initial request for comments, 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's request for additional comments on selected aspects of its consideration of granting MOE status. See Antidumping Methodologies in Proceedings Involving Certain Non-Market Economies: Market-Oriented Enterprise; Request for Comment, 72 FR 60649 (October 25, 2007). JCPenney appreciates the opportunity to present its views on this important issue. This submission provides comments with respect to four issues specifically raised by the Department:

- Whether there is a legal basis for a MOE test;
- Consideration of the administrative feasibility in proposing how the Department could identify an MOE operating within a broader NME environment;
- Consideration of to what extent, and under what conditions, the Department should rely on an MOE's prices and costs, particularly for those inputs that are inextricably linked to the broader operating economic environment, i.e., labor, land and capital; and
- Consideration of the administrative feasibility in proposing the extent and conditions under which a finding of an MOE might be limited.

I. Whether a Legal Basis for an MOE Test Exists

The simple and correct answer to the Department's question is incontrovertibly "yes." Section 773(c)(1) reads as follows:

> In general. If
> (A) the subject merchandise is exported from a nonmarket economy country, and

> (B) the administering authority finds that available information does not permit the normal value of the subject merchandise to be determined under subsection (a).
>
> the administering authority shall determine the normal value of the subject merchandise on the basis of the value of the factors of production..."

The statutory construction is unambiguous, through the use of the word "and" joining 773(c)(1)(A) with 773(c)(1)(B). That is, section 773(c)(1) explicitly allows for the application of the standard NME methodology only where the subject merchandise exported from a nonmarket economy country ***and*** the administering authority finds that available information does not permit the normal value of the subject merchandise to be determined under subsection (a)." Thus, the statute in no way prohibits the Department from using its normal, market-economy methodology for determining normal value, even in cases involving countries designated as NME countries. If there were no such possibility, the statute would not include Section 773(c)(1)(B). In this regard, the position espoused by some commenters that the Department "has construed the statute to implicitly acknowledge that, while the law provides a theoretical option to rely on actual costs and prices in NME cases, as a practical matter that option is not viable" is untenable. See Letter from Stewart and Stewart at page 4. A U.S. administering authority has no authority to read out any portion of the governing statute. Louisville & Nashville R. Co. v. Motley, 219 U.S. 467, 475 (1911) ("We must have regard to all the words used by Congress, and as far as possible give effect to them."); accord United States v. Atl. Research Corp., 127 S. Ct. 2331, 2336-37 (2007).

Congress clearly intended to include the possibility for determining normal value using standard, market-economy methods, even in NME cases. Indeed, Senate Report No. 100-71, 100th Congress, 1st Session, 108 (1987) included the following text:

> "{T}he bill does not prohibit {DOC} from using its normal methodology for determining foreign market value in cases regarding non-market economy countries. If information submitted by a non-market economy country to the DOC permits foreign market value to be determined accurately using the normal methodology, then the committee expects such methodology to be used by the DOC."

Regardless, the assertion of some commenters that the statute does not allow for the application of market economy dumping calculation methods has already been disproved by the Department itself. That is, the Department's establishment of the market oriented industry (MOI) test could not be justified under the statute without Section 773(c)(1)(B). The Department has established a test to determine whether conditions within an industry in an NME country are such that normal (i.e., market-economy) dumping methodologies can be applied. The fact that that the Department has not yet affirmatively determined any industry to quality under its MOI test does not negate the significance of the establishment of the MOI test: simply put, the Department would not have established an MOI test that has been in existence for 15 years if it were not allowable under the statute.

Some commenters have defended their erroneous interpretation of Section 773(c) of the statute by citing to the definition of a non-market economy in Section 771(18) of the statute. Specifically, they note that 771(18) states that:

> The term 'nonmarket economy country' means any foreign country that the administering authority determines does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise."

Based on this language, some parties have argued that this definition precludes reliance on actual prices and costs for normal value. See, e.g., Letter from Ames True Temper at pp. 2-3.

This is a backwards reading of these two Sections of the law. Section 771(18) merely defines a nonmarket economy country. It does not mandate the dumping methodological treatment of foreign companies (or industries) within that country. Section 773(c) describes the methodologies that are to be used within that country, and such methodologies explicitly include those detailed in Section 773(a) of the statute (i.e., market economy methodologies). If the Department were to agree with the above interpretation, again, there would be no need for a MOI test. Finally, if the Department were to adopt JCPenney's proposal to rely on third country sales[1], any concerns the Department might have regarding the definition of nonmarket economy country

[1] See Section III below for a detailed description of the use of third country prices.

become entirely moot. This is because the use of third country sales would obviate any need to rely on "the sales of merchandise {that} do not reflect the fair value of the merchandise."

Some parties (such as ICL Performance Products, LP and Innophos, Inc.) have argued that the 2001 protocol of China's accession to the World Trade Organization somehow prohibits the consideration of granting company-specific market economy treatment, simply because there is explicit reference only to "industry" in the Protocol, and the Department should not undermine that carefully bargained agreement by introducing an MOE test. JCPenney notes, in this regard, that subsection 15(a)(ii) of the Protocol, which further defines the general rule set out in 15(a), explicitly states that the

> "importing WTO Member *may* use a methodology that is not based on a strict comparison with domestic prices or costs in China if the producers under investigation cannot clearly show that market economy conditions prevail in the industry producing the like product with regard to manufacture, production and sale of that product." {emphasis added}

See Protocol and Decision of the Accession of The People's Republic of China to the World Trade Organization, WT/1/43223 (Nov. 2001). The use of the term "may," rather than "shall," undoubtedly also was intentionally agreed upon by all parties to the negotiations of the Accession Agreement. While the above-cited text thus obviously allows the importing WTO Member to use nonmarket economy calculation methods, it clearly does not mandate it. If the negotiators had meant to impost a requirement, certainly the text would have used "shall" rather than "may."

Finally, and akin to the point made above with respect to the governing statute, JCPenney notes that reliance on third country sales would entirely obviate any potential concerns about the language of the Protocol, because reliance on third country sales would obviously comport with the Protocol as a methodology "that is not based on a strict comparison with domestic prices or costs in China…"

II. Consideration of the Administrative Feasibility in Proposing How the Department Could Identify an MOE Operating within a Broader NME Environment

JCPenney respects the very real concerns facing the Department regarding the administrative feasibility of instituting an MOE test. In fact, JCPenney offered suggestions in its previous letter that, if followed, should make the institution of an MOE test entirely manageable, in contrast to the wildly exaggerated claims from some commenters, such as U.S. Steel, that institution of an MOE test "has all the makings of an administrative nightmare." See Letter from United States Steel Corporation at page 5.

For example, if the Department were to adopt the criteria recommended by JCPenney for qualification as an MOE, then, for the overwhelming majority of respondent companies in NME proceedings, the Department could simply add two additional checklist items to its current separate rate application: one covering whether the company has independently audited financial statements kept in accordance with generally accepted accounting principles, and one attesting to the absence of inappropriate (which would be further elaborated in the application) government

intervention with respect to the company's business decision-making activities. This hardly represents a significant additional burden to the Department.

Moreover, as JCPenney also previously suggested, the Department could 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. 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 only one case; rather, a certificate would be filed to reconfirm MOE status granted in an earlier proceeding. A blanket certificate is the most minimal additional "burden" imaginable.

III. Consideration of the Extent, and Under What Conditions, the Department Should Rely on an MOE's Prices and Costs, Particularly for Those Inputs that are Inextricably Linked to the Broader Operating Economic Environment, i.e., Labor, Land and Capital;

With respect to the extent to which the Department should rely on an MOE's prices, JCPenney believes that the adoption by the Department of its proposed practice, as explained in detail in its earlier submission, of relying on third country sales entirely resolves any issue. Certainly, a Department that is content to rely on U.S. prices entirely must also be equally able to rely on (market economy) third country prices.

As discussed in detail in JCPenney's earlier submission, comparison to third country sales is directly contemplated in the governing statute, to be relied upon where home market sales cannot be used. Moreover, as discussed above, section 773(c)(1)(B) specifically allows for the application of market economy methodologies to an NME. The benefits of using third country market sales would also be significant. For example, reliance on the largest viable third country market would greatly increase transparency for both the foreign exporter/producer and the U.S. importer. In short, the knowledge that the Department would consider third country sales as the basis of normal value will better allow the monitoring of U.S. selling practices so as to ensure there is no dumping -- which is the ultimate goal of the antidumping law.

Regarding costs, JCPenney refers the Department to its previous submission, in which JCPenney proposed a rebuttable presumption that all costs for an MOE that is foreign-owned or privately-owned are usable, and a rebuttable presumption that costs for an SOE are distorted. 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.[2] 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).

Finally, JCPenney notes that the application of rebuttable presumptions significantly reduces the workload on the Department, as it will eliminate the need to make many individual affirmative determinations through the collection and analysis of submitted information.

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

IV. Consideration of the Administrative Feasibility in Proposing the Extent and Conditions Under Which a Finding of an MOE Might be Limited

The Department seems to be seeking comment on the appropriateness of mixing market vs. NME methodologies.[3] In this regard, JCPenney notes that the Department is already quite accustomed to mixing actual cost/expense data with surrogate data. In NME cases, the Department already utilizes actual costs for inputs that are sourced from market economies, and mixes these in with surrogate values to fill out the constructed value calculation. There is no conceptual difference were the Department to utilize a company's actual costs plus surrogate values for an MOE. Moreover, JCPenney would also refer the Department to its previous recommendation that the Department automatically treat insignificant inputs at actual cost. Such a step would significantly ease the burden on the Department's analysts, making the timely calculation of a dumping margin administratively more feasible. Indeed, adoption of this proposal would reflect a marked improvement on the current system, in which the Department (and petitioners and respondents) wastes precious human resources tracking down surrogate values for dozens, or even hundreds, of insignificant parts that yield no improvement to the ultimate calculation and in fact significantly increase the likelihood of clerical errors.

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[3] In this regard, the Department's Federal Register notice states "{f}or example, how appropriate and feasible would it be to consider using a respondent's own prices and costs within China in conjunction with certain surrogate prices and costs in our antidumping duty calculations?" See page 60650.

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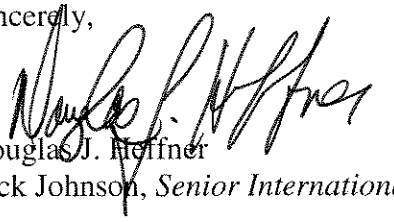
As required by the terms specified in the Department's request for public comments, J.C. Penney hereby files a signed original and six copies of its comments. Additionally, for the Department's convenience J.C. Penney is transmitting, via email, a PDF version of these comments to the Department. Please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

Sincerely,



Douglas J. Heffner
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cc: Lawrence Norton
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