



March 26, 2009

The President  
The White House  
Washington, DC 20001

Dear Mr. President:

On behalf of our member companies in the U.S. retail industry, the National Retail Federation (NRF) offers our congratulations on the occasion of the confirmation of Ron Kirk as U.S. Trade Representative and Gary Locke as Secretary of Commerce to lead your Administration's trade policy team. At this time, the state of the U.S. and global economies are obviously of paramount importance. International trade is an important element of the nation's economic activity, and has a central role to play in addressing the current crisis. Now that your key trade policy advisors are in place, we would like to take the opportunity to provide our industry's views on international trade policy and issues involving the agencies responsible for administering those policies.

### Overview

Commerce has historically provided the basis for U.S. economic growth and prosperity. Nonetheless, there is a pervasive and growing backlash in the country against international commerce, often arising out of concerns and anxieties that have little to do with trade. More specifically, many Americans express apprehension and even hostility to imports and foreign investment both by U.S. companies abroad and foreign companies in the United States. Many Members of Congress also echo this popular sentiment voiced by their constituents, reinforced in no small measure by populist pundits in the press. They place the blame for the loss of jobs on the bilateral trade deficit with China and "cheating foreigners." They condemn investment by U.S. companies in foreign markets as outsourcing U.S. jobs. They decry needed investment in the United States by foreign companies, such as Dubai Ports World, as selling out America.

Despite all evidence to the contrary, the mercantilist and economic isolationist views expressed by these various groups present a facile and false picture of international commerce – that in the trade equation, only exports provide economic benefits, while imports (facilitated by the reduction of barriers to trade and foreign investment) hurt the U.S. economy and destroy jobs. Accordingly, this viewpoint posits a policy position that imports (and foreign direct investment) must be restrained by government action.

Notwithstanding protestations to the contrary by their advocates, these viewpoints represent paradigm protectionism – operating under the false premise that restricting and reducing imports and the ability of U.S. companies to invest abroad – all in the name of "fair trade" – will promote

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economic growth and jobs at home. In refutation of these arguments, evidence and history clearly demonstrate that imports rise during periods of prosperity when consumer and industry demand rises, and decline during periods of falling economic activity as is currently the case. Evidence shows that imports also support millions of U.S. jobs, and help U.S. companies to enhance their productivity, competitiveness, and ability to expand employment. Research demonstrates that imports support more than 10 million American jobs, and that imports from China alone support nearly 1 million net jobs in the United States.<sup>1</sup> Thus, creeping protectionism that is currently evident in this and other countries is a very dangerous view, which, if allowed to go unchallenged, poses serious threats to the U.S. economy, productivity, competitiveness, and employment, and will retard the ability for our country and the world to climb out of the current economic crisis.

If allowed to go unchecked, these views also present serious challenges to U.S. industry, including retail, which, as the following most recent annual (2007) statistics demonstrate, contributes substantially to the U.S. economy, standard of living, and employment:

- The U.S. retail industry comprises more than 1.1 million retail companies;
- Among American retail companies, the vast majority (95 percent) are small businesses located in every Congressional district in the country;
- The U.S. retail industry had annual sales of nearly \$4.5 trillion;
- Of the two-thirds of U.S. GDP generated from consumer spending, almost half of that spending (*i.e.*, 30 percent of U.S. GDP) occurs in retail establishments;
- With 25 million employees – nearly one in five American workers – the retail industry provides more jobs than any other U.S. industry;
- Retail employees averaged \$16.49 per hour in total compensation (wages, salaries, and benefits).<sup>2</sup>

Like any other business, retailers face the daily challenge of creating value for their customers and shareholders, in an industry marked by cutthroat competition and an average profit margin of 2-3 percent. Currently, retailers are struggling through the worst economic environment for our industry in over 40 years. As a result, retailers are now experiencing a growing number of bankruptcies and store closures, impacting to date over half a million jobs – over one fifth of all the job losses in 2008.

Retailing is an also extremely trade reliant industry that is directly impacted by, and has a considerable stake in the direction and operation of U.S. trade policy. Like other U.S. industries, including manufacturing and agriculture, every retailer, from the largest national chains to the smallest neighborhood shop, depends on a global supply chain to procure the products that American consumers need and want. Moreover, future growth of American retailing will depend on

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<sup>1</sup> See, *e.g.*, *Imports and America: The Rest of the Story*, prepared by The Trade Partnership for the National Retail Institute and the Council of the Americas, August 1998, and *Impact of Imports from China on U.S. Employment*, prepared by Trade Partnership Worldwide, LLC for the National Retail Federation, November 2005.

<sup>2</sup> Source, *Retail Industry Indicators*, Prepared for the NRF Foundation by The Trade Partnership (Aug. 2008).

the ability to serve customers in foreign markets. The commercial activity generated by retail global sourcing of consumer goods supports good-paying, blue and white collar jobs, many of them union jobs. These millions of American workers are employed not only in the retail industry, but also in many industries that support retail operations and supply chains – e.g., manufacturing, farming, ports, rail, trucking, warehousing, air delivery, and logistics.<sup>3</sup>

With these points in mind, NRF is pleased to offer the following views and recommendations on the structure of the trade bureaucracy in the U.S. Government and principles necessary to establish a sound trade policy that promotes U.S. economic growth, competitiveness, and new and growing employment opportunities for a 21<sup>st</sup> Century workforce, including the retail workforce.

### **Trade Agencies' Industry Relations, Organization, and Staffing**

#### **1. On Textile and Apparel Issues, USTR Must Improve Consultation with All Stakeholders**

The United States has never had a rational or coherent textile and apparel trade policy. Rather, we have operated with a bureaucracy that is biased toward extending or maintaining barriers to imported textiles and apparel. Appointees to key positions, such as the USTR Special Textile Negotiator and the Chair of the Committee for the Implementation of Textile Agreements, have either been textile industry insiders, or have come from the staffs of textile state Congressmen and Senators. As a result, when USTR and other trade agencies have addressed textile and apparel issues, they have focused mainly on accommodating the objectives of U.S. textile manufacturers, while often ignoring the equally important – if not more significant in terms of job impacts -- interests of other U.S. industry stakeholders, such as apparel manufacturers, retailers, and importers.

One of the most egregious examples of this problem was the decision in 2007 to create a monitoring system for imports of apparel from Vietnam with the possibility of government self-initiation of antidumping investigations against those imports. This system was agreed upon solely in consultation with the textile lobby and one textile state Senator. Once U.S. apparel retailers, manufacturers, and importers were notified of the decision, it was effectively a fait accompli.

This was a particularly disturbing example of a closed-door policy decision that favored one American industry at the expense of the larger group of U.S. industries in the textile and apparel supply chain. Equally troubling, this initiative was done as a means to help the textile industry circumvent the standing requirements under U.S. trade remedies laws by contemplating the initiation of antidumping investigations against imported apparel on behalf of textile producers who do not manufacture a like or directly competitive product.

What USTR and other government officials failed to appreciate or even consider is that due to the way in which the U.S. antidumping law operates, the threat of antidumping investigations

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<sup>3</sup> See, *Imports and America, Ibid.*

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.

Under these circumstances, it is unwise and even harmful to the broader U.S. economic interests for one industry stakeholder to be able to dictate trade policy decisions in this sector. Accordingly, trade policy officials at USTR and in other executive departments and offices must consult all affected industries before major policy decisions of this sort are undertaken on behalf of one industry seeking protection from import competition. Indeed, to ensure that such decisions are fully transparent, and avoid being arbitrary and capricious, the requirements of the Administrative Procedures Act should apply.

## 2. Reorganize the USTR Textile Office

In looking over the current structure and staffing needs at USTR, NRF questions the continued need for the post of Chief Textile Negotiator. This position was created primarily for the negotiation of bilateral textile agreements to set quotas limiting access to the U.S. market. Following the end of the MFA quota system in 2005, the principle reason for this position was effectively eliminated. This point was recognized when the Chief Textile Negotiator was downgraded from an ambassadorial appointment.

With the end of quotas on textiles and apparel, the time has long passed when it made any sense for the textile sector to be treated as a special product category separate from other manufactured products. This point is particularly compelling when one considers that the mandate of the USTR Textiles Office is largely a political function to advance the interests of one industry to limit access to the U.S. market even at the expense of other U.S. industry stakeholders.

Market access, rules of origin and other issues affecting textiles and apparel in trade negotiations can be easily and effectively handled by the Assistant USTR responsible for industry and market access, with the assistance of industry specialists at the Commerce Department and the U.S. International Trade Commission. This move will also save budget and FTE resources that can be better used on more pressing needs.

## 3. Add Staff at USTR Responsible for Administering the Generalized System of Preferences

One area of pressing need is for additional staff at USTR responsible for the Generalized System of Preferences (GSP). This program provides significant benefits not only to countries eligible to receive GSP benefits, but also to American companies and employees (manufacturers, farmers and retailers) who import products using GSP. However, currently, GSP issues are handled under the Office of Trade and Development by one full-time professional staff person at USTR, an Executive Director for GSP, and one part-time secretary. Current staff levels are clearly

insufficient to handle the GSP office responsibilities for administering various petitions, comments, and hearings on GSP, including country practice reviews, decisions on competitive needs limits and waivers, comments on eligibility, and chairing the GSP subcommittee of the interagency Trade Policy Staff Committee (TPSC). Therefore, NRF recommends that a full-time junior professional staff person and a full-time secretary be assigned to this office to assist the Executive Director. Additional staff will not only help the GSP office expedite the activities under its purview, but will also allow the Executive Director to conduct more outreach and assist beneficiary countries and U.S. companies to use the GSP program more fully and effectively.

#### 4. Eliminate the Committee for the Implementation of Textile Agreements

Turning to the current structure and staffing needs at the International Trade Administration at the U.S. Department of Commerce, NRF recommends the elimination of the Committee for the Implementation of Textile Agreements (CITA), chaired by the head of the ITA Office of Textiles and Apparel (OTEXA). Like the position of USTR Chief Textile Negotiator, this interagency group was created primarily to administer the bilateral textile agreements to set quotas limiting access to the U.S. market. Meanwhile, OTEXA's main function should be to promote the export of U.S.-made textile products. Other functions, such as short supply determinations under U.S. free trade agreements and preference programs, could be shifted to the U.S. International Trade Commission.

At a minimum, decisions by CITA should be subject to the Administrative Procedures Act to ensure transparency, consultation with all interested parties, and decisions on the record.

#### 5. Distribution Services Should be Better Represented in the Commerce Department

The Commerce Department has been frequently the subject of criticism for operating under a structure that reflects the U.S. economy of half a century ago. There is too much focus on the manufacturing sector, with whole offices, such as OTEXA, devoted entirely to one manufacturing industry. Meanwhile, the service sector, which accounts for 80 percent of U.S. GDP, is largely under-represented. In particular, there is no office devoted to distribution services, which includes the retail sector accounting for one-fifth of the U.S. workforce.

In addition, there is an institutional bias at the Commerce Department against importing industries, such as retailing, in favor of exporting industries, specifically manufacturing. This mercantilist outlook is outdated in an age where every U.S. industry – including retail, manufacturing, and agriculture – is dependent on global supply chains, entailing both importing and exporting, in order to be competitive.

Therefore, NRF recommends that the incoming Administration redress these problems through appropriate reorganization of the Commerce Department and International Trade Administration.

## **Trade Agenda Issues**

The trade and globalism model has been built over many years on a fundamental commitment to the rules based trading system and a strong belief in the net economic benefit of eliminating barriers at home and abroad to commerce and investment. While reasonable minds may differ on specific trade issues, a trade policy that questions or seeks to reverse this basic paradigm will fail to promote economic growth, job creation and enhanced competitiveness. Accordingly, the U.S. retail industry's objective is a trade policy that supports all U.S. companies and workers and enhances U.S. economic competitiveness and growth in the 21<sup>st</sup> Century globalized economy. In order to realize this vision, it should be the policy of the United States to:

- Support elimination of barriers to trade and investment in both in the United States and abroad;
- Support all U.S. companies that are competing in the global economy, not just exporters;
- Reject politically expedient actions that benefit particular companies or industries but adversely impact other U.S. industries or the economy to an even greater degree;
- Reject actions that would violate rules of the World Trade Organization or other international obligations.<sup>4</sup>
- Reject the false dichotomy suggesting that “fair” trade and “free” trade are incompatible and exclusive goals.

The following is a discussion of how this vision should be applied to particular facets of trade policy.

### **1. Trade Remedies**

As the focus of the Administration and Congress on trade policy turns more toward enforcement, U.S. trade remedies laws governing antidumping, countervailing duty, and safeguards measures will likely be in play. Industries that traditionally use the trade remedies laws, such as steel and textiles, have long called for strengthening these laws – *i.e.*, to make it easier for petitioning industries to obtain relief against import competition – and have opposed changes that they believe will “weaken” those laws – *i.e.*, make it comparatively harder for petitioning industries to use those laws to limit imports.

In response to proposals to strengthen the trade remedies laws, however, 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 from their foreign suppliers and exporting products to their foreign customers. In this environment, trade-remedy cases brought against imports into the United States can have a significant and adverse effect on U.S. companies that must rely on a global supply chain, by

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<sup>4</sup> On this point, NRF notes with appreciation Vice President Biden's statement on January 29, 2009, regarding trade issues with China that the Administration “will not impose . . . , nor attempt to impose . . . , restraints that benefit our economy inconsistent with international trade agreements . . . .”

increasing costs, generating unpredictability in their business operations, and undermining their ability to compete globally.

Moreover, trade remedies cases are no longer a struggle solely between a foreign manufacturer and a domestic manufacturer. Rather, they increasingly pit competing American companies against each other. When the importer is also a manufacturer, losing this fight can force it to shutter its U.S. operations and move offshore. Under these circumstances, we can no longer afford a trade remedies system that operates in a simplistic, mercantilist manner, dividing the world into domestic manufacturers and importers. In an economy where most domestic companies are also importers either directly or indirectly, having a system that pits these two groups against each other is not a formula for supporting U.S. economic growth and competitiveness in the 21<sup>st</sup> Century global economy.

As an industry with an important stake in the structure and operation of the trade remedies rules, retailers agree that changes are needed in the trade remedies laws. We would like to see reforms and improvements to the trade remedies system to make it more balanced and fair to all American industries that have a stake in, and are impacted by these laws. Accordingly, we will support reforms to the trade remedies system that will prevent its misuse and manipulation to the detriment of U.S. exporters and importers; that support rather than undermine the ability of U.S. companies and workers to compete and succeed in the 21<sup>st</sup> Century international economy; and that do not end up pitting U.S. interests against each other.

By the same token, we reject the notion that only one segment of U.S. industry – the comparative minority that actively use the trade remedies laws – should be allowed to dictate how these laws are structured and administered, especially when they can have a sweeping impact on other domestic companies and the U.S. economy. A trade remedies system that operates only to the benefit of petitioners and to the detriment of other U.S. stakeholders is unbalanced and unfair.

With international commerce becoming an increasingly large and important component of the U.S. economy and all major U.S. commercial sectors operating global supply chains for the manufacture and import and export of goods and services, these points are not merely academic. They have real impact on companies, workers, farmers, and the economy. Twenty years ago, the United States, the European Union, Canada, and Australia were the main users of trade remedies. By the early 1990s other countries, such as Mexico, began to use these laws more aggressively, often against U.S. exports. Now, more than 50 countries use these mechanisms, the largest being India and China, with U.S. exports being a prime target. Under these circumstances, allowing these rules to be manipulated and misused as unfair trade barriers threatens to undermine the significant gains in trade liberalization and market access that we have achieved over the years. In this instance, the United States provides a model for other countries, and must lead by example.

Finally, while we support enforcing U.S. rights under the international trading system, we view with great incredulity claims suggesting that the U.S. trade deficit is, to a substantial degree, the result of unfair trade practices by U.S. trading partners and the failure of effective trade enforcement. The false premise underlying these claims is that the trade deficit, which is largely driven by macro-economic factors, can be corrected by more aggressive trade enforcement. While

there may be persuasive reasons to undertake a more aggressive posture on trade enforcement, reversing the trade deficit is clearly not one of them.

With these considerations in mind, we will oppose efforts to rewrite the trade remedies laws in ways that will make them more unbalanced, unfair, and unpredictable. We will also vigorously oppose efforts by some petitioning industries to manipulate and game the system to circumvent the trade remedies rules, or to rewrite those rules in ways that are inconsistent with WTO requirements and harm other U.S. industries. Indeed, we would rather see no changes to the trade remedies rules and continuation of the status quo, than permit the implementation of proposals by petitioner interests that fail those basic tests of fairness and balance.

The following discussion lays out the U.S. retail industry's views on particular issues in the structure and administration of the trade remedies rules.

a. Retailers Oppose Changes to the U.S. Retrospective Antidumping System that Will Hurt American Companies and Undermine Their Competitiveness

As illustrated earlier in the discussion about the impact of the monitoring system for imports of apparel from Vietnam, one of the major concerns of American industry regarding the U.S. trade remedies system is the unpredictability that antidumping actions create for businesses, like retail, that must operate and rely on global supply chains. The problem arises from the fact that the United States, alone among those countries that actively use the antidumping mechanism, has a so-called retrospective system to calculate and assess antidumping duties, whereas other countries, such as Canada, employ a so-called prospective system.

Under the U.S. retrospective system, final antidumping duties are not determined and assessed on subject imports following the imposition of an antidumping order until after an administrative review has been conducted a year later to calculate dumping 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 antidumping 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 for retroactive duties, sometimes in the millions of dollars, on goods it imported and sold months beforehand.

In order to plan and execute their business operations and compete effectively, American companies need a regulatory and business environment that provides predictability and consistency. What the U.S. antidumping system creates is uncertainty and arbitrariness. When faced with the contingent risk of an antidumping case, many American companies simply stop doing business with suppliers in the target country and shift their source of supply to another country, as in the Vietnam textile monitoring case. 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 to pull its operations out of the United States entirely and move them offshore.<sup>5</sup>

Petitioners are well aware of this situation, which permits them in some cases to game and abuse the system for anticompetitive purposes to disrupt trade and handicap their competitors.<sup>6</sup> The result is that an antidumping case frequently devolves into a fight between two U.S. industries or companies.<sup>7</sup>

In contrast, those countries that use the prospective system for calculating and assessing antidumping duties mitigate for their domestic retailers, manufacturers, and farmers the problems of risk and unpredictability and the resulting unintended consequences inherent in the retrospective system. Under the prospective system, the final dumping margin is calculated during the initial investigation and assessed on all imports entered after the imposition of an antidumping 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.

Given the deficiencies of the U.S. retrospective antidumping law, the NRF and U.S. retailers will oppose any changes to the antidumping law that will make the system even more unpredictable and arbitrary.

b. Retailers Oppose Requiring Adjustments to Dumping Margins to Offset Currency Undervaluation

One particular issue that will make the U.S. antidumping remedy even more unpredictable and arbitrary is the proposal to require adjustments to antidumping margins in investigations and reviews to offset the amount by which a country's currency may be undervalued or "misaligned."

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<sup>5</sup> 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.

<sup>6</sup> For example, In the 1980s, U.S. typewriter manufacturer, Smith Corona, filed a series of antidumping petitions against its main competitor, Japanese typewriter manufacturer, Brother. To avoid antidumping duties, Brother moved its production to the United States, while Smith Corona moved its production to Mexico to lower its costs. Soon thereafter, Brother filed an antidumping petition as the U.S. domestic producer against Smith Corona typewriters imported from Mexico.

<sup>7</sup> The record of antidumping cases is replete with examples of this problem. For instance, recent efforts to extend antidumping orders on imported steel pitted the U.S. steel industry against the U.S. automobile industry. Struggling U.S. automakers argued that with steel supplies limited and costs high, access to imported steel was essential to their ability to remain competitive with their European and Asian rivals who were not saddled with the cost of paying antidumping duties on steel.

This proposal was contained in a bill (S. 1919) introduced in 2008 by the Chairman of the Senate Finance Committee, Max Baucus (D-MT).

Perhaps the biggest problem with this proposal is that there is no widely accepted benchmark for determining the extent to which a particular currency may be undervalued. In the case of China, it was claimed the Yuan was undervalued by 15 to 40 percent. That is a huge range that demonstrates the imprecision of the calculation. Thus, any calculation by the Commerce Department, that has no expertise on such matters, will be an entirely arbitrary exercise, and therefore subject to political influence. However, the bigger threat from this proposal is the precedent that would allow any country to game the antidumping process by unilaterally setting an arbitrary value on another country's currency. The result will be to make the trade remedies system even more unpredictable for U.S. importers and exporters.

Another problem with this proposal is that it would violate Article 2.4.1 of the WTO Agreement on Antidumping (AD Agreement), which establishes the rule for currency conversion and adjustments by reference to the value set by currency markets:

“When the comparison [between export price and normal value] requires a conversion of currencies, such conversion should be made using the rate of exchange on the date of sale, provided that when a sale of foreign currency on forward markets is directly linked to the export sale involved, the rate of exchange in the forward sale shall be used.” (emphasis added)

No other provision of the AD Agreement would permit this type of adjustment. Notably, Article VI.2 of the General Agreement on Tariffs and Trade applies only to multiple currency practices, not “fundamentally misaligned currencies.”

In addition, the surrogate country methodology used in AD investigations against imports from China and other non-market economy (NME) countries already addresses the effect of any currency undervaluation. In calculating an AD margin in NME cases, the Commerce Department uses market-based values from a surrogate country to determine the normal value of the subject imports, which it then compares to the U.S. export price. As a result, the AD calculation effectively offsets the effect of the currency undervaluation on price. Requiring an additional adjustment would violate WTO rules by capturing the effect of the undervaluation twice.

c. Retailers Oppose the Use of Zeroing to Calculate Antidumping Margins

A major issue in the administration of the antidumping law that has pitted U.S. industries against each other is the use of zeroing to calculate antidumping margins. 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. Since then, there have been ongoing attempts to reinstate the practice legislatively, most recently in the bill (H.R. 496) reintroduced by Ways and Means Chairman, Charles Rangel (D-NY), in January 2009.

NRF and U.S. retailers strongly oppose these efforts to resurrect zeroing. As a purported means to calculate an average dumping margin, zeroing has obvious and fundamental flaws. In mathematics, there are three ways to calculate an average (mean, median, and mode). With zeroing, the Commerce Department effectively invented a fourth way to calculate an average that is neither fair, nor accurate. Indeed, any school math teacher would fail a student who used zeroing in a test on calculating averages. Zeroing is simply an outcome-oriented practice designed to inflate dumping margins well beyond any actual level of dumping. It violates the requirement in the WTO Antidumping Code<sup>8</sup> for a fair comparison between export price and normal value, and reinforces the perception among many U.S. businesses that the antidumping law is not balanced or fair.

Proponents defend zeroing as necessary to capture the full effect of dumping through an analogy to speeding – *viz.* that a driver caught speeding cannot raise as a defense, nor can the policeman consider in calculating his speed, that the driver was under the speed limit for some of the time. However, this analogy is patently false for several reasons. First, speeding is illegal, dumping is not.

The term “illegal” implies that somebody has committed a crime that could result in punishment through jail or fine. The WTO permits, but does not require countries to define dumping as an unfair trade practice if it results in material injury to a domestic industry, and to offset that harm by imposing an antidumping duty. Therefore, it is evident that the antidumping law is not punitive (*i.e.*, doesn’t punish illegal trade). Rather it is remedial or corrective (*i.e.*, offsets what is deemed to be unfair trade). If dumping were per se illegal, then U.S. law would punish American companies if they sold their products at below the cost of production – something it clearly does not. This argument underscores the point that the antidumping rules must be carefully constructed and applied to prevent punishing normal and perfectly legal business activity that both U.S. and foreign companies do all the time, such as adjusting prices according to different supply and demand conditions in particular markets.

Even if we accept the speeding analogy of zeroing proponents, the way U.S. antidumping law works, the “driver” can never know what the speed limit is until the “cop” tells him. Also, the “cop” will decide whether the “driver” is “speeding” based on such factors as whether he is an American or a foreigner, where he bought his car, how much he paid for it, the interest rate on his car loan, the car’s depreciation, the price of gas, etc. In addition, once the “driver” gets the “speeding ticket,” he will be presumed to be speeding and must continue to pay the fine (*i.e.*, antidumping duties) for as long as he “drives” (*i.e.*, sells in the United States).

The substantive weakness of the case for zeroing is further highlighted by the fact that its proponents have focused almost exclusively on the question of whether the WTO had the right and

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<sup>8</sup> See, paragraph 2.4 of the WTO Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994.

authority to rule against use of zeroing by the U.S. Department of Commerce in antidumping investigations, rather than the proper and more important question – does it make sense for the United States, as a matter of policy, to continue the use of zeroing. Retailers, and many in American manufacturing and agriculture, believe the answer to that question is a resounding no.

Through the imposition on imports of excessive taxes (*i.e.*, duties) inflated through the use of zeroing solely to benefit companies that use the antidumping remedy, the practice hurts retailers and other U.S. companies in manufacturing and agriculture that need those imported products to stay in business and compete in a tough global marketplace against foreign companies that are not subject to these artificial costs.

By requiring the United States to continue to seek approval (“clarification”) by other WTO members of the practice of zeroing as part of the Doha Round negotiations, the Ways and Means trade enforcement bill would also require USTR to waste time and resources to negotiate endlessly in an ultimately futile and self-defeating attempt to resurrect zeroing. There is no reason why countries that have successfully challenged the practice in WTO dispute settlement would relent on the issue in negotiations unless the United States agreed to pay an unacceptably high price by giving up on more vital trade issues, such as market access.

We may not always agree with decisions by the WTO DSB, as zeroing proponents clearly do not. However, the United States must lead by example to preserve our credibility in insisting that WTO Members live up to their international trading obligations. Therefore, as in the case of zeroing, when the United States has exhausted all opportunities for appeal and the WTO dispute settlement process repeatedly finds against us on an issue, we must accept that fact, and change the offending practice. If we do not, we not only risk exposing U.S. exports to billions of dollars in trade retaliation, we also lose any moral ground to ask others to abide by WTO rules and decisions.

d. Retailers Oppose Efforts to Circumvent and Manipulate U.S. Trade Remedies Laws Through Government Monitoring and Self-Initiation of Investigations Targeting Apparel

Retailers will continue to oppose efforts by the U.S. textile industry for government monitoring of and self-initiation of antidumping, countervailing duty, and safeguards cases against imported apparel, particularly from China and other Asian countries. We also reject the suggestion that effective enforcement of our trade laws is contingent on government self-initiation of trade cases.

In order for the Department of Commerce to initiate an investigation under the U.S. antidumping and CVD laws, a petitioner must have “standing” with respect to the products listed in the petition. First, the petition must be filed “by or on behalf” of a domestic industry producing a product “like” the imported product (*i.e.*, identical or nearly identical). Second, the domestic producers or workers who filed the petition (*i.e.*, the petitioners) must represent at least 25 percent of total domestic production of the like product. Third, a majority of all domestic producers expressing an opinion on the petition must voice their support for it. In addition, an antidumping or countervailing duty order may only be imposed following a finding by the U.S. International Trade Commission (ITC) of injury or threat of injury to a domestic industry producing a like product.

Safeguards actions, including investigations under Section 421 of the Trade Agreements Act of 1974 against imports from China, also limit initiation of investigations and provision of relief to domestic producers of a like product.

Since the termination of the quota system, the U.S. textile industry has sought the imposition of antidumping and countervailing duties and safeguards quotas on imported apparel. However, textile manufacturers produce yarns and fabrics, not clothing, and, therefore, do not fall under the definition in U.S. law of producers of a like product. Accordingly, they do not meet the standing requirements for filing a petition, and whether they claim to be harmed by imported apparel cannot be the basis for an affirmative injury determination in an investigation.

As in the case of the Vietnam monitoring program discussed above, the U.S. textile industry has sought to circumvent these legal requirements by convincing the U.S. Government to monitor apparel imports and self-initiate cases on their behalf. Congress and the Administration should not facilitate such efforts to circumvent the law. To do so would be particularly unjustifiable when apparel retailers who are not importers of record do not meet the definition of “interested party” under those same rules, and are thus denied the opportunity to defend their interests fully in trade remedies proceedings. Although government officials may defend a decision to monitor imports with the argument that an actual case is unlikely, the Vietnam case demonstrates that the mere threat that a trade remedy investigation may be initiated is considered to be a sufficient risk as to lead American companies to abandon a target country as a sourcing location.

Under these circumstances, the retail industry will continue to oppose efforts by the textile industry to circumvent U.S. antidumping, countervailing duty, and safeguards laws through monitoring and government self-initiation of trade remedy investigations against imported apparel, and we urge the Administration and Congress to reject such demands.

e. Retailers Oppose Limiting Presidential Discretion in 421 Safeguards Cases

Section 421 is a safeguard-like trade remedy permitting temporary limits through quotas and/or duties on goods from China when an increase in imports injures U.S. producers of those goods. Section 421 investigations are conducted by the U.S. International Trade Commission (ITC), which recommends a remedy if it finds injury. The President then decides whether to impose the recommended relief based on whether the benefit of such relief to some producers is outweighed by the adverse impact on the U.S. economy or national security. Of six 421 cases to date, the ITC has reached an affirmative determination in four, and President Bush denied relief in all four. These decisions have been widely criticized, and have prompted legislation, including the Ways and Means trade enforcement bill (H.R. 496), that would effectively require the President to impose the ITC recommendation.

For the following reasons, retailers oppose elimination, or even any limitation, of the President’s discretion to weigh the benefit versus the potential harm to broader economic interests in deciding whether to accept the ITC recommendation in imposing trade restraints under section 421.

First, Section 421 has the potential to create considerable disruption to commerce and should, therefore, be used cautiously. As a safeguards measure, Section 421 targets imported goods from China that are increasing rapidly, but not alleged to be unfairly traded.<sup>9</sup> Section 421 also has a very low injury standard (market disruption) compared to both antidumping and other safeguards remedies. Moreover, the remedies that may be imposed have a more unpredictable impact on the business operations of adversely-affected U.S. companies than even antidumping cases. Given these considerations, the current system under section 421 maintains an important balance necessary when dealing with trade restrictions on legitimate commerce. It makes little sense under these circumstances to impose a remedy that only benefits a narrow economic interest, if the President determines it would result in serious and disproportionate harm to a wider segment of the U.S. economy.

Second, the United States agreed in China's WTO accession protocol that interested parties may submit information on the national economic interest in section 421 investigations. Thus, removing this element from the decision may result in the United States violating WTO rules by unilaterally changing China's rights under the terms of its accession.

f. Retailers Oppose Efforts to Define Currency Undervaluation as a Countervailable Export Subsidy

In the 110<sup>th</sup> Congress, the retail industry strongly opposed several bills<sup>10</sup> that would have redefined countervailable subsidies to include the undervaluation of a foreign currency through exchange rate manipulation or misalignment, determined by examination of a foreign country's balance of trade with the United States and other trading partners, the amount of foreign direct investment, and foreign currency reserves. NRF argued that this unilateral attempt by Congress to redefine what constitutes a countervailable subsidy would conflict with WTO rules and risk trade retaliation or reciprocal action to the detriment of U.S. companies and workers.

The WTO Subsidies Code<sup>11</sup> identifies three types of subsidies – prohibited; actionable (*i.e.*, subject to countervailing duties); and non-actionable (*i.e.*, permitted). Articles 1 and 2 of the Subsidies Code specify that to be countervailable, a subsidy must be: (1) a financial contribution from a government (2) that provides a benefit (3) to a specific industry or industries or enterprise or group of enterprises.

Because the “benefit” from currency valuation is generally available to all economic players in a country, the proposed legislative change would conflict with the specificity requirement under WTO rules. Because currency policy does not involve the transfer of anything of tangible value

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<sup>9</sup> Remedies already exist under U.S. antidumping and countervailing duty law to redress injury from imports that a domestic industry claims are unfairly traded.

<sup>10</sup> *E.g.*, S. 364 (Rockefeller) and H.R. 2942 (Ryan-Hunter).

<sup>11</sup> WTO Agreement on Subsidies and Countervailing Measures of the General Agreement on Tariffs and Trade 1994.

from the government, the proposed legislation would also conflict with the financial contribution requirement under WTO rules. Currency policy also cannot meet the WTO definition of a prohibited subsidy because its benefit is not contingent on exportation and does not require the use of domestic goods.

Moreover, determining currency misalignment based on a country's trade balance, amount of foreign direct investment, and foreign currency reserves fails to recognize that these matters are influenced by many factors that may not have anything to do with a country's currency policy. Defining a countervailable subsidy in a way that violates WTO rules would undermine efforts to ensure that other countries abide by international trade rules, and would also expose exports of U.S. goods and services to possible trade sanctions.

g. Retailers Have Serious Concerns About Problems Arising From Applying Countervailing Duty Law to Non-Market Economy Countries

Several bills, including the Ways and Means trade enforcement bill (H.R. 496), would explicitly authorize the Department of Commerce to apply the countervailing duty (CVD) law to non-market economy (NME) countries, such as China and Vietnam, and set forth methodologies for calculating subsidies. The legislation would be in addition to the special NME methodology currently used in antidumping proceedings.

In our opinion, there is no need for this statutory change given that the Department of Commerce has, on its own authority, already initiated CVD cases against imports from China, on which there is a concurrent antidumping investigation or order.<sup>12</sup> Nevertheless, the way Commerce administers the CVD remedy against imports from NME countries, and the changes proposed in the legislation raise serious problems that are of great concern to retailers.

In particular, the more stringent surrogate country methodology used in antidumping investigations against imports from China and other NME countries already provides a mechanism to offset many government subsidies. In calculating an antidumping margin in NME cases, the Department of Commerce uses market-based values from a surrogate country to determine the normal value of the subject imports, which it then compares to the U.S. export price. Unlike a market economy case involving domestic subsidies, however, the NME surrogate-country calculation is not adjusted to offset domestic subsidies. As a result, the antidumping calculation effectively provides a remedy to offset the domestic subsidies under the NME methodology. Unless Commerce is directed to avoid double-counting, the combination of these methodologies will result in giving petitioners two bites at the apple and thereby violate WTO rules by capturing the effect of the subsidies twice.<sup>13</sup> Therefore, at a minimum, any legislation should be modified to add a

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<sup>12</sup> Since 1984, the Department of Commerce had declined to pursue CVD cases against NME countries under the theory that it is not possible to identify specific subsidies and calculate their benefits in countries where prices are not set by the market, and everything is, in effect, subsidized.

<sup>13</sup> The following example illustrates this problem. It costs a Chinese company \$20 to make a widget, which it sells in the United States for \$10, creating a dumping margin of 100 percent. The Chinese Government gives the manufacturer a subsidy of \$10 per widget, which effectively lowers its cost of production to \$10, the same

provision to address the double-remedies problem, similar to language included in H.R. 3283, approved by the House of Representatives in 2005.<sup>14</sup>

#### h. Retailers Oppose Reinstating the Byrd Amendment

NRF and U.S. retailers also strongly oppose efforts to reinstate the Continued Dumping and Subsidy Offset Act (CDSOA) also known as the “Byrd Amendment.”

The CDSOA became law as a result of what could only be described as an abuse of the legislative process. One Member of the Senate Appropriations Committee succeeded in slipping the provision into a conference report on an agriculture appropriations bill the night before the House of Representatives was scheduled to vote on the massive piece of legislation.<sup>15</sup> Not only were most Members of Congress unaware that the CDSOA had been added to the legislation until after the vote, they were denied the opportunity to understand its full ramifications through committee hearings, public comment, or debate.

Following its passage, the CDSOA proved to be one of the worst pieces of trade legislation passed in recent memory. It became an outrageous example of corporate welfare that doled out to a handful of companies over \$1 billion dollars in no-strings-attached subsidies courtesy of the American taxpayer.<sup>16</sup>

The CDSOA also undermined the proper administration of the trade remedies laws in several ways. First, it an unwarranted and improper benefit that is inconsistent with the remedial

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as its U.S. price. In an antidumping case, the Department of Commerce will ignore the Chinese company's actual costs in calculating what the normal value of the widget is in China, and instead use market-based costs in a surrogate market economy country like India. If the actual cost of production in India is \$30, the result is not only a higher dumping margin of 200 percent, but the benefit of the \$10 subsidy is completely offset by the NME antidumping methodology which ignores the Chinese company's costs. If no adjustments are made, the application of CVD and AD duties on the same product will result in prohibited double-counting.

<sup>14</sup> The CVD investigations the Department of Commerce has so far launched against imports from China do not appear to address the double remedy problem, and may be vulnerable to challenge under WTO rules.

<sup>15</sup> The provision was in neither version of the appropriations bill that had earlier passed the House and Senate. In addition, this action violated the rule against placing legislation of this sort on appropriations bills. Moreover, because the provision was added to a conference report, there was virtually no chance that Members would be able to object to its inclusion even if they knew the provision had been inserted into the report.

<sup>16</sup> In fiscal year 2004, Byrd amendment distributions totaled nearly \$281 million, of which three quarters (approximately \$210 million) went to four industries – bearings, steel, candles, and cement. The bearings industry alone received almost \$80 million in Byrd distributions, of which the lion's share of over \$65 million was handed over to two companies – Timken Company and MPB Corporation. By the same token, one candle manufacturer, Lancaster Colony Corp., received over half (\$26 million) of the more than \$51 million in Byrd money distributed to the U.S. candle industry that year.



nature of the antidumping remedy.<sup>17</sup> Second, it encouraged, and in effect subsidized, companies to join in the filing of antidumping and countervailing duty petitions they would otherwise not have supported, and against products that would otherwise not have been included in the scope of the investigations because they are not produced in the United States.<sup>18</sup> It also induced recipients to oppose termination of antidumping orders either through settlement or sunset reviews, even when any rationale for keeping orders in place had long passed.

Ultimately, Congress repealed the CDSOA in 2005 after the law was correctly found to violate U.S. obligations under the WTO rules, and American companies were threatened with billions of dollars in trade retaliation against their exports and U.S. federal courts found it violates the North American Free Trade Agreement.<sup>19</sup>

In short, the CDSOA is a particularly-egregious example of how efforts to circumvent the legislative process result in ill-considered and flawed statutes, from which flow a host of damaging consequences. Notwithstanding its appalling record, supporters of the CDSOA – companies and industries that have a vested financial interest in the gravy train – continue to work to persuade Members of Congress to reinstate it. In response, NRF and the retail industry will vigorously

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<sup>17</sup> It is unmerited because the antidumping and countervailing duties that are imposed on “unfair” imports renders those imports “fair,” by increasing their cost at the U.S. border by the amount of the subsidy or dumping rates. As such, when the imports enter U.S. commerce, they are no longer “unfair.” The assessment of the antidumping or countervailing duties remedies the imbalance and adjusts the price of the imports to their “fair value.” This is all the antidumping and countervailing duty laws are intended to do. Further transferring those collected duties to U.S. producers is thus an unintended and unwarranted double benefit to those companies and industries. Not only do they no longer need to compete with “unfair” imports due to the increase in prices created by the offsetting duties, but they get a (frequently) huge check from the U.S. Treasury with no restrictions as to how they spend the money. One could imagine the hue and cry in Congress were other countries to employ a similar mechanism to the CDSOA, thereby forcing U.S. exporters essentially to subsidize their foreign competitors.

<sup>18</sup> Companies that did not support a petition were ineligible for the CDSOA government subsidy, and thereby placed themselves at a distinct disadvantage vis-à-vis their domestic competitors. Thus, the CDSOA effectively put the U.S. Government in the position of picking winners and losers among competing U.S. companies. Moreover, the CDSOA distribution formula ensured that large companies with greater resources at their disposal received the lion’s share of the Byrd distribution money, thereby further disadvantaging small, struggling U.S. companies. These large, politically-connected companies, like ball bearing manufacturer Timken Co. and steelmaker United States Steel Corp., ended up receiving tens of millions of taxpayer dollars for doing nothing more than checking a box on a questionnaire from the U.S. International Trade Commission. Needless to say, these companies were also staunch defenders of the CDSOA, and are actively working for its reinstatement.

<sup>19</sup> In *Canadian Lumber Trade Alliance v. United States*, 517 F. 3d 1319 (Fed. Cir. 2008), the U.S. Court of Appeals for the Federal Circuit affirmed an earlier decision by the CIT that the CDSOA had been illegally applied against imports from Mexico and Canada in violation of the North American Free Trade Agreement. It is on the basis of this decision, that U.S. Customs and Border Protection has demanded repayment from companies that received improperly distributed monies under the CDSOA.

oppose any effort to resurrect this illegal and wasteful corporate welfare program, and we urge the Administration to state unequivocally that it will also not support reinstatement of the CDSOA.

## 2. China

Much of the national economic anxiety over trade and globalization is focused on issues in the U.S.-China trade relationship as China has become an increasingly significant player in the global economy. In the unfolding debate on the U.S.-China trade relationship, few U.S. industries have more at stake than retailers. Consumer goods comprise nearly 80 percent of all U.S. imports from China, and China is a key supplier, and sometimes the dominant supplier, in every consumer goods category. Moreover, retailers have been adversely impacted by a recent increase in trade remedies investigations (antidumping, countervailing duty and safeguards) against imported consumer products mainly targeting China. Indeed, many of the proposed changes to the trade remedies laws discussed above are intended primarily to target China.

The retail industry acknowledges that there are serious and legitimate issues with China that need to be effectively addressed, including inadequate protection of intellectual property rights, market access issues, the need to develop a more flexible currency regime, ensuring that China abides by its obligations under international trade rules, and dealing with the difficulties inherent in China's transformation from an isolated, centrally-planned, non-market economy to a market-economy country. In considering how best to address these issues, the retail industry urges prudence and thoughtfulness on the part of policy makers. Policy makers should support appropriate action through diplomatic efforts and the use of multilateral mechanisms to address issues in the U.S.-China relationship that can yield effective progress and are consistent with World Trade Organization (WTO) rules.

However, many of those with a political axe to grind against China continue to describe issues in the U.S.-China trade relationship in the most sweeping, facile, and grossly exaggerated terms – China “cheats”; China has “stolen” “millions” of American jobs; China exports goods made by “slave labor” working for “pennies a day”; the “devastating” impact of China’s “enormous” subsidies and “massive” currency undervaluation; a “flood” of unsafe and poisonous” Chinese products; etc.<sup>20</sup> The intention behind this hyperbole is not to propose serious solutions to any of the issues the United States has with China. Rather the goal is to justify a protectionist agenda – blocking imports from China and punishing U.S. companies that do business in China all purportedly in the emotionally-charged, but largely meaningless name of “fairness.” The U.S.-China trade relationship is simply too complex and important to be driven by such emotional rhetoric.

In looking at serious policy options to address issues in the U.S.-China trade relationship, NRF and the retail industry have supported both the Strategic Economic Dialogue (SED) and recent

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<sup>20</sup> See e.g., AFL-CIO website, [www.aflcio.org](http://www.aflcio.org); American Trade Action Coalition (AMTAC) website, [www.amtacd.org](http://www.amtacd.org); National Council of Textile Organizations (NCTO) website, [www.ncto.org](http://www.ncto.org); Public Citizen website, [www.citizen.org](http://www.citizen.org); Stand Up For Steel website, [www.standupforsteel.org](http://www.standupforsteel.org); UNITE-HERE! website, [www.unitehere.org](http://www.unitehere.org).

actions by the U.S. Trade Representative's Office against China under the WTO dispute settlement mechanism over practices that violate WTO rules. We applaud statements by the new Administration emphasizing the use of all available diplomatic avenues and constructive dialogue with China to address issues such as currency policy and practices. Diplomatic avenues, such as the SED, may be a slower process than some may want, but are most likely to yield positive results while avoiding unintended consequences that could hurt the U.S. economy and jobs. By the same token, it is appropriate to challenge China at the WTO if it is providing prohibited subsidies and failing to adhere to international trade rules on the protection of intellectual-property rights.

On the other hand, the Administration and Congress should reject unilateral, counterproductive, and WTO illegal restrictions on imports of Chinese goods as a policy tool to compel action by China. There is no evidence that these actions would be effective in addressing any of the issues in the U.S.-China trade relationship. Meanwhile, they would impose huge costs on the U.S. economy, seriously harm U.S. retailers, manufacturers, services providers and farmers that depend on trade with China and global supply chains, and adversely affect millions of American consumers.

a. Currency

Chinese currency policy and the value of the Yuan are central issues in the debate over U.S.-China trade relations. Some claim that the Yuan is greatly undervalued vis-à-vis the dollar, and blame it as the driving factor behind the sizable bilateral trade deficit with China and the loss of U.S. manufacturing jobs.<sup>21</sup> Their proposed remedy is to impose trade barriers to imports from China through various means, including changes to the U.S. antidumping and countervailing duty laws discussed in the previous section of this paper. They would also essentially force the U.S. Trade Representative to initiate dispute settlement proceedings at the World Trade Organization (WTO) against Chinese currency policy and the Secretary of the Treasury to determine that China is a currency manipulator. Not surprisingly, these proposals are strongly endorsed by certain domestic industries, such as steel and textiles, that for decades have relied on, and continue to seek new means to impose trade barriers against imports, particularly from China.

There is no real disagreement that China must move toward a currency whose value is set by the market. The only disagreements are the means to effect that change and how quickly it can reasonably be accomplished without creating further turmoil in the financial sector, and adversely impacting the U.S. economy. As a guiding principle, we oppose unilateral, counterproductive, and

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<sup>21</sup> Evidence does not support the claim that China's exchange rate is a significant factor in the size of the U.S. trade deficit or in the loss of "millions" of U.S. manufacturing jobs. As the US-China Business Council correctly observed in its paper, *China and the US Economy: Advancing a Winning Trade Agenda* (Jan. 2009), much of what is imported from China had been imported from other Asian countries. Moreover, while transportation and labor costs, as well as inflation had a significant impact on the price of imports from China in the first half of 2008, there is little evidence of such an impact from the 20 percent appreciation in the Yuan, which had the offsetting effect of lowering the cost of imports into China. Accordingly, it is simply not credible that forcing China to appreciate its currency further will reverse the U.S. trade deficit. The economic crisis is already resulting in a huge drop in Chinese exports – 17.5 percent in January 2009 – which is adversely impacting both the U.S. and Chinese economies.

WTO illegal restrictions on imports of Chinese goods as a policy tool to compel action by China. By the same token, we are convinced that the best course of action is dialogue and negotiation through mechanisms such as the SED and the Joint Commission on Commerce and Trade (JCCT). A deft diplomatic strategy by the United States will ultimately be a much more effective tool in identifying mutually-beneficial goals, and moving the Chinese Government in a more constructive direction, while strengthening, rather than undermining the important U.S.-China economic relationship.

By the same token, we will continue to oppose the use of trade remedies as a means to address China's currency policy for two reasons. First, as explained in the previous section above, many of the proposed changes to the trade remedies laws would violate WTO rules. Second, there may be widespread consensus among economists that the Chinese currency is undervalued, but there clearly is no agreement over the extent to which the Yuan is undervalued. Thus, any attempt to quantify the degree to which the Yuan may be undervalued, with the degree of specificity required in an antidumping or CVD case, will result in an entirely arbitrary and inaccurate calculation.

Finally, it should be noted that there has been a significant change in the economic environment that existed when the currency issue first gained attention five years ago. Since 2005, the Yuan has appreciated approximately 20 percent against the dollar, which had a noticeable impact on retail sourcing patterns. As demand collapsed in the wake of the global financial crisis, there has been a precipitous drop in the U.S. merchandise trade deficit, including with China.<sup>22</sup> Under these circumstances, and given the precarious state of the global economy, prudence would dictate a very careful approach to the entire currency issue.

Thus, before acting on any legislation targeting Chinese currency policy, Congress and the Administration need to ask three questions: (1) Does the legislation conform to WTO rules?; (2) Will the legislation be effective in achieving the stated goal?; (3) Will any benefits of the legislation outweigh the harm it may inflict on U.S. companies, workers, and the economy? If the answers to any one of these questions is no, then the entire exercise will be seen as merely protectionist political posturing.

#### b. Subsidies

Many U.S. manufacturers complain that they are placed at a competitive disadvantage vis-à-vis their Chinese counterparts due to subsidies they claim the Chinese Government provides to its industrial sector. They argue that these subsidies, many of which they allege are WTO-prohibited export or domestic-content subsidies, are a key factor driving the burgeoning U.S. trade deficit with China and loss of millions of manufacturing jobs.<sup>23</sup>

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<sup>22</sup> It should be noted that among the many actions the Chinese government has undertaken to address the economic crisis, it has not devalued its currency.

<sup>23</sup> See, e.g., National Council of Textile Organizations (NCTO) website, [www.ncto.org](http://www.ncto.org), Letter from NCTO President, Cass Johnson to U.S. Department of Commerce, Senior Office Director for Import Administration, Susan H. Kuhbach re Application of Countervailing Duty Law to Imports from the People's Republic of China (January 12, 2007).

We believe it appropriate for the United States to initiate dispute settlement proceedings at the World Trade Organization when China or any other country provides subsidies to its industries that are prohibited under WTO rules. Indeed, the USTR has had some success in using existing mechanisms through the WTO dispute-settlement mechanism to address the problem of Chinese government subsidies. As a result, China has already agreed to eliminate twelve subsidy programs that the United States asserted violated WTO rules.

However, we reject the argument that Chinese Government subsidies are a major factor driving the U.S. trade deficit and fundamental problems in the U.S. manufacturing sector. We also strongly oppose unilateral action to attack Chinese imports over this issue through changes in the trade remedies laws, discussed in the previous section, that are frequently inconsistent with U.S. obligations under WTO rules and that will harm many U.S. companies, including retailers.

We are also concerned about the textile industry hurling baseless and unsubstantiated allegations mischaracterizing certain Chinese policies as “illegal” export subsidies, when it is clear that some of the programs in question, such as rebates on value added taxes paid by Chinese exporters and Chinese government policy on the value of the yuan, do not meet the definition of an export subsidy under WTO rules.

Finally, we should hardly have to note that after acquiring considerable equity shares in banking, insurance, and other industries as part of the financial rescue efforts, and providing billions of dollars to domestic automobile manufacturers and other struggling industries, the United States is not on strong moral ground to attack other countries over the issue of government subsidies.

#### c. The Retail Industry Opposes New Quotas on Textile and Apparel Imports

Since the end of the quota system on January 1, 2005, the U.S. textile industry has actively lobbied for reimposition and continuation of quotas on imports of textiles and apparel from China. At the time, they argued that, to adjust to import competition from China, they needed the full ten-year phase-out period in the Uruguay Round Agreement dated from the time of China's accession to the WTO in December 2001. They succeeded, first through a textile safeguard, followed by the negotiation of a textile bilateral agreement, in getting quotas re-imposed through December 31, 2008, – an additional four years after the quota system ended, seven years after China joined the WTO, and fourteen years after the conclusion of the Uruguay Round, in which it was agreed to end the quota system.

Now that latest set of quotas on imports from China has terminated as of January 1, 2009, the textile industry is again aggressively pushing for the imposition of new quotas on China. Their argument now is that when quotas were removed in 2005, there was an “enormous surge” and drop in prices resulting in the loss of “thousands” of U.S. textile jobs. They suggest that the United States faces a similar scenario this year unless the government moves to self-initiate a trade remedy case.<sup>24</sup>

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<sup>24</sup> See, Letter of 5 Nov. 2008 from NCTO Chairman, Anderson Warlick, to President-elect Obama.

NRF and the U.S. retail industry strongly oppose efforts to reinstate textile and apparel quotas, especially through government self-initiation of trade cases. With the U.S. and the rest of the world facing the most serious economic crisis in decades, and with global trade, including exports from China, and U.S. consumer demand falling precipitously, any claim that there will be a “surge” in textile and apparel imports from China is simply not credible.<sup>25</sup>

In addition, the growth in textile and apparel imports from China following the original removal of U.S. quotas on January 1, 2005, was due to a unique set of circumstances. Specifically, the quotas that had been set on China were particularly restrictive compared to other major textile and apparel-producing countries, and given the size of the Chinese industry and the rapid growth in consumer demand at the time. As a simple matter of supply and demand economics, it was expected that once the severe quantitative limits were lifted that there would be a large increase in percentage terms of textile and apparel imports from China. Trade patterns show that this growth came at the expense of other Asian suppliers, and soon leveled out as costs in China began to increase. This observation is evidenced by the fact that the quotas re-imposed on China did not fill, and is another argument refuting claims of an impending surge in imports from China.

The textile and apparel quota system imposed huge costs on working Americans amounting to \$800 a year in hidden and regressive taxes on a family of four for products that are essentials of life. The Administration should reject efforts, based on false, misleading, and spurious claims, to turn back the clock and recreate a system that was an abysmal failure in protecting American jobs or improving the competitiveness of U.S. industry.

### **3. Free Trade Agreements**

The retail industry has been very supportive of free trade agreements (FTAs). We endorse the pending FTAs and call for their expeditious approval by Congress. Particularly in the current tough economic climate, expanding trade and opening markets will help the United States and other countries grapple with the daunting task of turning around the global economic crisis.

As a goal for your Administration, you have stated your intention to undertake a review of free trade agreements, including NAFTA, to see how they might be made to work better. In this

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<sup>25</sup> In its continuing effort to pressure the Administration into imposing a new monitoring program on imported apparel from China, the National Council of Textile Organizations (NCTO) issued a press release on March 16, 2009, citing import data from the U.S. International Trade Commission (ITC) that shows, in their words a substantial “surge” in percentage terms of apparel imported from China in January 2009. Key information that NCTO conveniently omitted – information readily available to them – is that in every apparel category they cite – shirts, trousers, underwear and hosiery – ITC data also show that imports from China fell precipitously in February 2009 (as did imports from the rest of the world) to levels even lower than a year ago in February 2008. Moreover, anecdotal evidence from apparel retail companies supports the view that the February import data is indicative of what we will likely see for the foreseeable future as retail orders continue to drop in response to the rapid fall in U.S. consumer demand.

context, we would like to suggest ways in which our FTAs could be improved so that they enhance commercial benefits to U.S. companies, help make them more competitive, and provide greater economic benefits to the U.S. economy and American families.

The first issue is that our system of FTAs is not uniform or inter-connected. Each agreement operates independently with slightly different rules. As agreements proliferate, the growing differences between agreements have had the unintended consequence of making trade more, not less, complicated and expensive, and is often incompatible with the way U.S. retailers and other companies with global supply chains operate their businesses. As a result, it is more difficult for U.S. companies to take advantage of economies of scale that a more rational and interconnected system would afford.

A second issue is that the FTAs have not addressed the problem of trade remedies rules and the obstacles they can create for trade and investment. This problem has two consequences. First, when U.S. retailers open stores in an FTA-partner country, they confront the challenge of stocking those stores in the face of trade barriers that many countries impose, mainly through antidumping and safeguards actions, against imports from other countries, including the United States. For retailers, these barriers can present a sizable obstacle to maintaining a viable retail operation. The inability to overcome such barriers to supply their stores has led a number of U.S. retailers to shut down their operations in countries such as Argentina, Brazil and Mexico, and abandon those markets. On a broader scale, these barriers can negate the market-access commitments in an FTA for U.S. companies.

This problem is further exacerbated by the apparent inability of the United States to address meaningful reform to trade remedies laws in its trade agreements. Although it will not correct this particular problem, one good start would be to exempt bilateral trade agreement partner countries from the antidumping law. Since a free trade agreement precludes the ability of an FTA-partner country to maintain a sanctuary market, the major argument underpinning the application of antidumping remedies ceases to exist.

A third issue with our FTAs, particularly for apparel retailers, is the fact that the U.S. textile industry has been allowed to dictate rules of origin for imported apparel. These rules are so complicated and restrictive that they can negate the commercial benefits of an agreement to other U.S. companies making and selling apparel. Since the negotiation of the North American Free Trade Agreement (NAFTA), all free trade agreements have incorporated the so-called “yarn forward” rule of origin for textiles and apparel, which determines origin according to where the inputs used to make the final product are produced. Yarn forward is a “triple transformation” rule that allows duty free treatment only for apparel made from yarn and fabric originating either from the FTA partner country or the United States.

This rule has two immediate negative consequences. First, it creates the anomalous situation where the effective amount of value added processing necessary for qualifying apparel is substantially higher than for all other products – in the range of 80 to 90 percent. Second, FTA-partner countries, particularly those that do not have an integrated industry producing fiber, fabric, yarns and apparel, production, are severely constrained in their ability to service their customers’

needs, thereby undercutting their ability to compete effectively with Asian manufacturers under the current “full-package” production system. The net result is that the yarn forward rule retards rather than promotes textile and apparel trade in the free trade zone.

Because it increases the cost of apparel production, even when the savings from the elimination of tariffs and quota charges are factored in, the yarn-forward rule has also resulted in accelerating the shift in apparel trade away from preferential trading partner countries, such as Mexico, to certain large Asian suppliers, notably China.

Thus, while segments of the U.S. textile industry continue to advocate a yarn-forward rule of origin in FTAs as necessary to protect domestic yarn and fabric production from Chinese competition, experience shows that such a rule has exactly the opposite effect by driving business away from FTA-partner countries to China and other Asian countries that are not subject to the complicated and cumbersome restrictions of the yarn-forward rule. Also, by insisting upon restrictive rules that stifle trade in textiles and apparel, the U.S. textile industry has ensured that it will see little or no economic benefit from our system of FTAs.

The problems with the yarn-forward rule are further complicated when an FTA lacks additional flexibility to use non-originating inputs. Such flexibility is essential, as apparel manufacturing has evolved from the old “cut-and-sew” model to the so-called “full package” production. Due to these significant changes in production, those producers who have access to the widest range of yarns and fabrics will be able to fill their customers’ orders and will be the most competitive. Some additional flexibility can be achieved through a cumulation provision allowing for the use of inputs from other FTA partner countries, revised short supply procedures, a list of products deemed in short supply, workable tariff preference levels (TPLs), and other exceptions that might ameliorate the inherent deficiencies of the yarn-forward rule of origin under current production models, provide sufficient incentives to protect current levels of trade, and generate new trade and investment.

We hope you will consider these points on the rules governing preferential trade in textile and apparel in light of the position stated in your letter of 24 October 2008 to the National Council of Textile Organizations (NCTO), in which you voiced support for the yarn-forward rule of origin in free trade agreements.

Finally, these issues underscore the point that we need to rethink our bilateral trade agreement model. Accordingly, we urge you to undertake efforts to rationalize, simplify, and link our system of FTAs. This process could begin with the adoption of cumulation to allow the inputs from other trade partner countries in the production of qualifying goods to provide U.S. companies greater economies of scale from our trade agreement system, and thereby enhance their global competitiveness.



#### **4. Unilateral Trade Preference Programs/Least Developed Countries**

The retail industry has strongly supported U.S. trade preference programs for developing countries, such as the Generalized System of Preferences (GSP), the African Growth and Opportunity Act (AGOA), the Caribbean Basin Initiative/Caribbean Basin Trade Preferences Act (CBI/CBTPA), the Andean Trade Preferences and Drug Eradication Act (ATPDEA), and the Haitian Hemispheric Opportunity through Partnership Encouragement (HOPE) Act. U.S. retailers have used the preference programs to import a variety of consumer goods. In the process, they have provided needed export markets for poor countries, jobs and economic opportunity for people in those countries, particularly women, and greater value to U.S. consumers, particularly lower-income Americans, on products they need and want.

Notwithstanding their benefits, the preference programs have several flaws that prevent them from fully achieving the Administration's goal of assisting developing countries to engage more successfully in the world economy. Therefore, we endorse efforts in Congress to ensure that our trade preferences operate more effectively for both beneficiary countries and U.S. users of the programs.

The preference programs share one major problem that we identified regarding the free trade agreements. We have too many programs with too many separate, and in some instances, complicated rules. In addition, these programs are temporary and require periodic reauthorization with the recurring issue of securing sufficient offsets under budget rules. These problems create inefficiencies, added costs, and unpredictability that can become disincentives to using the programs.

To correct this problem, the current programs need to be consolidated into one permanent program with one set of simple and easily-administered origin rules. To this end, we recommend adoption of the current GSP rules that determine origin based on value added.

Another problem with the preference programs is that many of the poorest countries lack the ability to take full advantage of the benefits they have been provided due, in part, to inadequate infrastructure, inability to obtain investment capital, limited access to raw materials and other inputs, and a low-skilled and poorly-trained workforce. In many instances, the duty preferences are simply not enough to overcome these substantial hurdles, which impose sizable costs on U.S. companies seeking to do business in those countries. Therefore, capacity building and trade financing are essential elements in any successful effort to assist developing countries and allow them to take advantage of the benefits they have been provided.

We caution, however, that reducing or eliminating preferences for certain more advanced developing countries, such as India and Brazil, will not result in any significant shift in preferential trade to the least developed countries. Instead, that trade will move either to China or other more advanced developing countries, such as Turkey. In addition, such action would be very disruptive and costly to the business operations of U.S. companies that have relied on program.

A better approach is to provide enhanced special benefits to AGOA countries and other least developed countries in the form of a lower value-added requirement to meet the preferential rule of origin, and targeted aid for trade funding.

Finally, it is necessary to expand product coverage, particularly on products, such as apparel and footwear, that developing countries are most capable of making and are still subject to substantial U.S. tariffs.<sup>26</sup> In most instances, these products are already imported to a significant degree, and the largest supplier is China. Making these products eligible for duty-free treatment would assist developing countries to gain a stronger foothold in the U.S. market and compete more effectively for business in the global economy. Continuing to exclude these products will not protect U.S. manufacturers from import competition, will limit retail sourcing options beyond China, and will hinder achieving the development goals of our preferences regime.

## **5. Doha Round**

Retailers stand to reap substantial benefits from a successful conclusion of the Doha Round of multilateral trade negotiations at the World Trade Organization (WTO) across many of the negotiating sectors:

- Under the negotiations on trade in agriculture, food retailers and restaurants could benefit from the lowering and elimination of tariffs and other trade barriers on processed food products.
- Under the negotiations on non-agricultural trade, retailers would benefit from the lowering and elimination of tariffs and trade barriers on consumer goods, including textiles, apparel, and footwear.
- The rules negotiations could result in needed reforms to the use of trade remedies (antidumping, countervailing duties, safeguards) that will make them more balanced and fair to industries, like retail, that must rely on global supply chains.
- The services negotiations would lower barriers to trade in distribution services that impede retailers from opening stores or retail operations in foreign countries.
- The negotiations on trade facilitation would help harmonize customs rules and procedures, and rules of origin that would substantially lower the transaction costs for retailers in managing their supply chains.
- The negotiations on trade-related intellectual property rights would help retailers to protect their trademarks in foreign countries.

Accordingly, NRF and the retail industry support efforts by the Administration to restart these important negotiations.

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<sup>26</sup> Some of the largest trade barriers imposed by the United States are on consumer goods imported from least developed countries. For example, three high-tariff products that are produced mainly in LDCs – footwear, textiles and apparel – account for only 7 percent of U.S. trade, but fully one half of all duties collected by customs. Not only do these trade barriers hurt the economies and workers in some of the poorest countries in the world, but the assessed duties are highly regressive, falling most heavily on poor Americans.

## **6. Trade Promotion Authority**

The position of the retail industry is that Congress should provide every President with trade promotion authority (TPA), and that the Obama Administration should request Congress to grant that authority as soon as possible. As a contract between the Administration and Congress, TPA is an essential mechanism to protect Congress' constitutional prerogatives on trade. TPA ensures that Congress has a means through which it can communicate a consensus position on trade negotiating objectives, and that the Administration consults with Congress on a regular basis during the course of a negotiation.

## **7. Trade Adjustment Assistance**

While retailers support TAA and other efforts to educate and train American workers to ensure their continued employability and ability to compete in the global economy, this program does not directly impact retail workers. Although hundreds of thousands of retail workers have lost their jobs over the last few months, they are not eligible for TAA, which is available only to workers displaced due to trade. For retail employment, trade has only a positive effect.

Although we support the program, we do have some concerns about the messaging on TAA. Our economy generates considerable job churn that eliminates many jobs for a wide variety of reasons – e.g., advances in technology and productivity, bad corporate management, etc. – but on balance has historically resulted in a net increase of better, higher-paying jobs. By providing income support and training only to workers displaced by trade, TAA tends to reinforce the false perception that trade accounts for the majority of lost jobs, particularly in manufacturing. For example, even when layoffs are the result of other factors, companies and unions have an incentive to blame trade competition for job losses so that unemployed workers will be eligible for TAA benefits. The result is to exaggerate the trade impact on unemployment when studies show that trade accounts for at most 2 percent of layoffs nationwide.

## **8. Other Issues**

NRF and American retailers are increasingly concerned about the proliferation of mandates that Congress, state legislatures, and local governments are placing on importers in efforts to address serious issues of security, product safety, environment, labor, and infrastructure needs. While the objectives are often laudable, the means employed too often result in the creation of insurmountable enforcement and compliance hurdles for agencies and importers. Specific examples include:

- The requirement for 100 percent scanning of cargo containers, which the Department of Homeland Security and independent experts have confirmed cannot be implemented without imposing huge costs on and disruption to global trade.
- Changes to the Lacey Act in the 2008 Farm Bill requiring importers to file an import declaration on products containing any quantity of wood or plant material, and to identify the genus, species and country of harvest of that wood or plant material;
- Retroactive product safety standards impacting goods already on the store shelf.
- Proposals to tax only importers to pay for the nation's infrastructure needs.

Unless greater care and consideration is undertaken, these mandates can become a new set of non-tariff trade barriers that will severely hurt the U.S. economy, jobs and competitiveness.

The National Retail Federation appreciates the opportunity to submit these views and looks forward to working with your Administration on these and other trade issues impacting the retail industry and our nation. Please direct any questions or comments to NRF Vice President and International Trade Counsel, Erik Autor, at (202) 626-8104 or [autore@nrf.com](mailto:autore@nrf.com).

Sincerely,



Tracy Mullin  
President & CEO



Erik O. Autor  
Vice President, International Trade Counsel

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Secretary of Commerce, Gary Locke