RETAIL Trade Issues

A Newsletter About Trade Issues Affecting the Retail Industry

January 2011

TRADE ISSUES FACING RETAILERS IN 2011: ACTIVITY TO WATCH

Now that pro-trade Republicans hold leadership positions in the House of Representatives and President Obama is moving forward with two free trade agreements (FTAs), the trade agenda has come alive again in Washington. A number of issues of importance to retailers will be under discussion. This article previews those likely to be of particular concern in the coming months.

China

Trade with China will continue to dominate Congressional and Administration trade attention. The year begins with a state visit of Chinese President Hu Jintao January 18 and 19, and the slow rate of appreciation of China's currency is likely to continue to be a big topic of conversation. That conversation could well include early Congressional consideration of anti-China legislation, which some Senators pushed hard to have considered by Congress in the waning days of the 111th Congress (*see related story, this issue*). Legislation considered in the 111th Congress would need to be reintroduced to have it considered in the 112th Congress, and a flurry of anti-China bills is to be expected in the early months of 2011. Whether they will gain or lose traction in the new Congress is not yet clear, as the new "Tea Party" candidates elected to office have yet to reveal their positions on the China currency issue.

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NATIONAL RETAIL FEDERATION

Import Safety

Implementation of the food safety bill (*see related story, this issue*), on-going implementation of the Consumer Product Safety Improvement Act (CPSIA), and product recalls and investigations affecting imported products will present challenges for retailers in 2011. The food safety legislation will make far-reaching changes to U.S. food safety regulations and procedures, including imposing new requirements on imported food. The challenge in 2011 will be to convert the law into regulations that do not impede the ability to import foreign food products in a timely manner. Already, some Republicans in the House are expressing alarm at the cost implementing the changes will impose on the U.S. Government (as the user fees originally proposed to fund most of the changes were deleted from the legislation in the final days leading up to enactment). The Republican Members have threatened to refuse to fund implementation of the law in the coming rounds of Congressional consideration of appropriations for the Food and Drug Administration. Republicans will also want to review the CPSIA to see how the Consumer Product Safety Commission (CPSC) has implemented the law, and what changes can be made to the law to render it less burdensome to businesses.

Supply Chain Security Initiatives

Following the recent failed bomb plot using printer cartridges from Yemen aboard a UPS cargo plane, Congress will continue to look at supply chain security as a priority issue. The main focus will be on cargo carried on cargo planes. The Transportation Security Administration (TSA) and U.S. Customs and Border Protection (CBP) have announced pilot projects with air cargo carriers to obtain key shipment information earlier in the process, prior to loading, so that the agencies can conduct their risk assessment to determine whether shipments pose a threat. Some in Congress have called for 100 percent screening of all cargo, which the Department of Homeland Security (DHS) has said is impracticable.

Congress will also revisit the SAFE Port Act to examine the progress on maritime cargo security. In addition, Congress will likely reauthorize certain programs, including the Customs Trade Partnership Against Terrorism (C-TPAT) and the Container Security Initiative (CSI). Congress will also review the 100 percent scanning mandate for maritime cargo that was included in the 9/11 Implementation Act. DHS has said that it will not meet the 2012 deadline to scan all cargo overseas prior to lading. Congress may consider either amending or eliminating the deadline.

Trans-Pacific Partnership FTA, Other FTAs

The aim of the Administration is to complete negotiations of the Trans-Pacific Partnership (TPP) FTA in advance of the APEC Economic Leaders Meeting, to be held in Honolulu in November 2011. The TPP holds the potential to be of particular benefit to retailers of apparel and footwear, because an agreement would include Vietnam and Malaysia. However, the U.S. textile industry has already staked out a strong position in opposition to the FTA, charging that Vietnam will prove to be a transshipment point for Chinese apparel exports (*see related story this issue*). Conclu-

sion of the TPP will also require Congress to extend to President Obama "trade promotion authority" (TPA), which expired July 1, 2007 but will be required if the Administration hopes to submit the TPP to Congress for approval under a set legislative clock for passage without amendments.

The first half of 2011 will also see a push by the Obama administration to win Congressional approval of legislation implementing the U.S.-Korea FTA (*see related story, this issue*). Congressional Republicans, particularly in the House, have already stated their intention to insist that the FTAs for Panama and Colombia be considered at the same time, or closely thereafter. The FTA with Colombia would benefit retailers importing cut flowers, apparel and leather goods from that country, as it would replace duty-free benefits now available only under the Generalized System of Preferences (GSP) or the Andean Trade Preferences Act (ATPA), both of which regularly expire or threaten to expire (*see related story, this issue*).

Customs Issues

Congress will seek to reintroduce legislation reauthorizing Customs and Border Protection, which will likely include provisions focused on trade facilitation and enforcement. The U.S. textile industry will also likely find co-sponsors to reintroduce the "Textile Enforcement and Security Act of 2010" (*see the June 2010* **Retail Trade Issues** *for a summary of the legislation*). Retailers and importers have been working with textile industry representatives to see if some accommodation can be found on changes to the provision of the legislation. Those discussions made some progress, and it is hoped that any re-introduction of the legislation in 2011 will be based on a consensus among industry stakeholders, including retailers. Apparel retailers, manufacturers and importers are seeking changes that will effectively address the problem of customs fraud without impeding legitimate commerce or placing undue burdens on importers.

Trade Preferences

The GSP program expired on December 31, 2010, and the ATPA will expire on February 12, 2011. Congress will be under considerable pressure to renew these programs, but whether it manages to do so quickly remains an open question. If the past is any indication, both programs are likely to remain expired, with importers paying duties, for most of 2011. The expectation is that renewal, should it materialize, would be retroactive to the date of expiration, so that importers would be able to apply for refund (with interest) of duties paid. However, there is no guarantee that Congress would agree to a retroactive renewal especially if offsetting the revenue impact is problematic.

Labor Issues

The Labor Department will likely remain energized about maintaining and updating the various lists it publishes of goods allegedly made by forced or indentured child labor (*see related story, this issue*). How those lists ultimately impact retailers remains to be seen, however, as they currently only affect U.S. Government procurement of the targeted goods. But inclusion on the list "taints" the products im-

ported from the given country and could present retailers with a public relations problem if consumers believe that the same goods sold by retailers are also produced by child labor.

Of particular concern is the lack of substantive progress in getting the Uzbek government to eliminate child labor in the cotton industry notwithstanding the joint efforts of the retail industry, labor NGOs and organized labor on the issue. Uzbekistan is a major producer of cotton, which remains on the Labor Department's forced child labor list.

Implementation of Lacey Act Changes, Conflict Mineral Legislation

Implementation of the changes to the Lacey Act will continue into 2011. It appears that the lead implementing agencies in the Departments of Agriculture and the Interior are not planning at this time to add additional products onto the list of those for which an import declaration must be filed. Instead, the agencies will focus on fleshing out the list of products that fall under the definition of "common cultivar" or "common food crop," which are exempt from the Lacey Act requirements, and identifying additional groupings of plant species and other ways to simplify the reporting requirements under the Act.

Like the effort to implement the Lacey Act changes, implementing the new conflict minerals legislation will prove to be much more challenging than the legislation's authors expected (*see related story, this issue*). In short, the law requires publicly traded retailers and other importers to essentially prove a negative: that products they source from abroad do not contain so-called "conflict minerals," including gold, tungsten, and tin, produced in the Democratic Republic of the Congo and neighboring countries. While complete repeal is not an option, 2011 may see efforts by importers to amend the law to make it easier to implement. In the interim, retailers will need to find a way to comply with it as now drafted. In addition, much of the year will be spent working with the lead implementing agency - the Securities and Exchange Commission (SEC) – to help the SEC define key terms (e.g., "due diligence," and "manufacturer") and to understand the particular nuances of retail sourcing and supply chains.

Push to Conclude Doha Round

World Trade Organization (WTO) Members are making a push to re-energize and complete the Doha Development Agenda round of trade negotiations by the end of 2011. The preliminary target is to reach a deal by the middle of 2011, so that Members could spend the second half of the year reviewing Members' schedules of commitments. Members would then sign off on the final package at a scheduled December 15-17 WTO Ministerial meeting. The President would need to have in hand "trade promotion authority" (TPA) in advance of that event in order for the United States to be able to agree to the texts to the satisfaction of other WTO Members. Thus, it is anticipated that Congress may attempt one more time to shape the outcome of those negotiations by putting additional terms and conditions into TPA.

The thorniest issue of key interest to retailers that these negotiations would

affect is reform of U.S. trade remedy laws – antidumping and countervailing duty practices, in particular. The steel industry has been and will remain active in Congressional efforts to change U.S. trade remedy laws in ways that would be harmful to retailers. Those efforts will continue into 2011, and be redoubled with the TPA debate as the industry seeks to narrow the ability of U.S. negotiators to agree, for example, to eliminating the U.S. practice of "zeroing" as a methodology for calculating antidumping margins. Yet, changes to U.S. trade remedy laws mandated by the Doha round are perhaps the only avenue for retailers to win relief from onerous U.S. practices employed in administering these laws, not only on "zeroing" but also on how the International Trade Commission evaluates injury caused by imports to U.S. producers.

Federal Surface Transportation Spending

As Republicans will take the leadership of the House in the next Congress, we are likely to see the new House Transportation and Infrastructure (T&I) Committee eliminate or reduce funding for certain programs in an effort to narrowly focus federal transportation priorities. Consideration of expansive transportation priorities, including a definition of a national freight program, will remain difficult given Republican opposition to increases in federal motor fuels taxes.

The incoming T&I Committee Chairman, Rep. John Mica (R-FL), has publicly stated his opposition to increasing federal motor fuels taxes as a means of funding surface transportation needs, following in the footsteps of House Republican leadership's high profile opposition of taxes. As an alternative, the incoming Chairman intends to focus federal transportation spending priorities more narrowly to fit within existing federal motor fuels tax receipts. Mica is likely to propose eliminating many programs that do not fall within a narrow definition of federal spending priorities. The savings would be used to help insure that targeted priorities are adequately funded. Mica has been a frequent critic of expanding Amtrak service outside of popular routes such as the Northeast Corridor and will most likely support a discontinuation of federal support for high-speed rail service. Mica, along with many Republican House members, publicly opposed the discretionary grant program for transportation funded through the stimulus bill, claiming that many of the projects selected were of dubious benefit to mass transit or goods movement. Most likely, states, localities or even private investments will need to fund transportation initiatives that do not make the new priority list.

It is also unknown if Mica will consider an expansive program to address increasing and costly freight transportation bottlenecks, particularly if it requires an increase in the federal diesel tax paid by motor carriers to fund high priority road and highway projects specific to freight.

Clean Ports Act

It is unlikely that Congress will act on "clean ports" legislation, which was introduced to amend longstanding federal interstate trucking rules to allow states and localities to eliminate independent truckers in favor of employee drivers. However,

while Congress will most likely not move such legislation, the issue will remain alive as supporters of the effort continue their activities at the state level. Proponents may now focus their efforts on the classification of drivers serving U.S. ports under the argument that they should be considered employee drivers rather than independent contractors, thereby allowing them to be unionized.

ATPA, TAA EXTENDED FOR SIX WEEKS; GSP ALLOWED TO EXPIRE

In one of its last actions before adjourning for the year, Congress passed a pared down version of H.R. 6517, the "Omnibus Trade Act of 2010." The final version extended the Andean Trade Preferences Act (ATPA) that included a graduation of Peru from the program and the expanded Trade Adjustment Assistance (TAA) program for just six weeks until February 12, 2011. The ATPA provisions apply only to Colombia and Ecuador, since Peru now has a free trade agreement (FTA) with the United States. Although the original House version of the bill included an extension of the Generalized System of Preferences (GSP) program as well, an unresolved dispute over sleeping bags as an eligible product under the program led the Senate to strip the GSP provisions out of the package (*see the December 2010* **Retail Trade Issues**). As a result, retailers must pay duties on all GSP-eligible products beginning January 1, 2011, and can expect another fight over extending ATPA beyond February in the coming weeks.

Among the 111th Congress' end-of-year business were several trade programs that were set to expire on December 31, including ATPA, GSP, and TAA. In addition, the House wanted to pass a second Miscellaneous Tariff Bill (MTB) with duty suspensions that were not included in first MTB of the year, which passed in July (*see the August 2010* **Retail Trade Issues**). However, each of these programs had its own issue that made passage uncertain, including sleeping bags for GSP, the treatment of Ecuador for ATPA, Republican concerns about "merit staffing" for TAA, and the recently announced ban on earmarks by Senate Republicans for the MTB. The Senate leadership preference of considering the trade measures under "unanimous consent" (UC) procedures further complicated matters. As individual Senators voiced their opposition to passing the bill by UC, Senate Finance Committee staff attempted to attach individual pieces of it, primarily ATPA and GSP, to "must pass" legislation like the tax extenders package and the omnibus appropriations bill, but Senate leadership blocked these moves.

In an effort to break the logjam, House Ways and Means Committee Chairman Sander Levin (D-MI) introduced one bill including all of the trade measures (H.R. 6517) on December 13. As introduced, the bill would have extended ATPA, GSP, and TAA for 18 months, passed the second batch of MTB duty suspensions, and extended certain benefits for domestic apparel manufacturers also set to expire. By including programs that nearly everyone had an interest in passing, Levin had hoped to force action on the entire package in the Senate over the potential objections of a few. A deal with House Republicans on the TAA merit

staffing issue allowed bipartisan passage of the bill in the House by a voice vote on December 15.

The House-passed bill ran into immediate problems in the Senate. Senator Jeff Sessions (R-AL) insisted that he would place a hold on the bill if sleeping bags remained eligible for GSP benefits. Rank-and-file Republicans expressed concerns about the optics of Senate Republicans voting for legislation containing the MTB shortly after announcing a ban on earmarks, which under the rules includes targeted duty benefits. Opposition from Senate Republican leadership, led by Senator John Kyl (R-AZ), proved most troublesome to moving the legislation. Kyl viewed the expiration of the expanded TAA provisions as leverage to extract concessions from Democrats to move the pending FTAs with Colombia and Panama – larger priorities for the Republicans than any of the components of the trade bill. Without pressure from Republican leadership, individual holdouts like Sessions had little incentive to compromise and let the bill pass by unanimous consent.

As the Senate moved closer to adjournment, the package got smaller and the extensions became shorter until they reached a final compromise: a six-week extension of just two of the expiring programs. The expiration of ATPA and TAA in February sets up not only another fight over the programs – and larger trade issues such as the FTAs – but also an opportunity to extend programs that were allowed to expire, such as GSP.

Retailers using GSP, in particular, should continue to process their import documents for otherwise eligible items as if they continued to be eligible for GSP. This means ensuring that the appropriate Customs forms note that the products are eligible for GSP benefits. If Congress renews GSP with retroactive duty-free treatment, retailers will then be eligible to receive refunds (with interest) of duties paid. The process is automatic for those entries for which GSP eligibility has been noted. For those for which eligibility has not been noted, retailers will need to file individual requests for refunds, entry by entry.

IMPLEMENTATION OF CONFLICT MINERALS LAW WILL PROVE DIFFICULT FOR RETAILERS

The Securities and Exchange Commission (SEC) December 15 issued proposed rules implementing new conflict minerals provisions included as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act signed into law this summer. Conflict minerals include columbite-tantalite, gold, wolframite and their derivatives and are used in the manufacture of a wide range of goods, including cell phones, computers and video game systems, medical equipment, high-speed tools, machine parts, glass and lamps. The Act requires new disclosures by companies filing annual reports with the SEC concerning conflict minerals that originated in the Democratic Republic of the Congo or an adjoining country (*see the May 2010 and June 2010* **Retail Trade Issues**). The SEC is seeking comments from the public by January 31, 2011.

Application of the Rules

The proposed rules would apply to any company filing annual reports with the SEC for which conflict minerals (generally tantalum, tin, gold, or tungsten) are "necessary to the functionality or production of a product manufactured, or contracted to be manufactured," by that company. A company would be considered to be "contracting to manufacture" a product if it (1) has any influence over the product's manufacturing, or (2) if it offers a generic product under its own brand name or a separate brand name, regardless of whether the company has any influence over the manufacturing specifications of the product, provided the company has contracted to have the product manufactured specifically for itself.

Reporting Requirement

Companies subject to the reporting requirement would have to disclose in the body of its annual report to the SEC whether its conflict minerals originated in the Democratic Republic of the Congo or an adjoining country ("DRC countries").

Under the proposed rules, the disclosure requirement would be based on a "reasonable country of origin" inquiry. If a company concludes that its conflict minerals did not originate in the DRC countries, the company would disclose this determination in its annual report and on its website and the reasonable country of origin inquiry process it used in reaching this determination.

If conflict minerals are present, or if the company cannot determine if they are present, the filer would be required to furnish a separate report as an exhibit to its annual report stating its finding. If conflict minerals are present, the disclosure must include, among other matters, a description of the measures taken by the company to exercise "due diligence" on the source and chain of custody of its conflict minerals. These due diligence measures would include, but would not be limited to, an independent private sector audit of the company's report. Any company furnishing such a report would also be required, in that report, to certify that it obtained an independent private sector audit of its report, provide the audit report, and make its reports available to the public on its Internet website.

Conflict Minerals Reports would be required to include a description of the products manufactured or contracted to be manufactured containing conflict minerals that are or are not "DRC conflict free" as defined in the rules, the facilities used to process conflict minerals, those conflict minerals' country of origin, and the efforts to determine the mine or location of origin with the greatest possible specificity. It would also include a description of the measures the company took to exercise "due diligence" in assessing the source and chain of custody of the conflict minerals, including audit reports.

Recycled or Scrap Sources

If a filer's conflict minerals are derived from recycled or scrap sources rather than from mined sources, the company would be permitted to file a Conflict Minerals Report stating that its conflict minerals were obtained from recycled or scrap

sources and providing the basis on which it believes its conflict minerals are recycled or scrap. Filers would be required to exercise due diligence in determining that their conflict minerals were recycled or scrap. The Conflict Minerals Report would be subject to the independent private sector audit requirement.

Impact on Retailers

The potential impact on most retailers is small, as most retailers are not publicly traded. However, for those that are, the impact could be significant, especially if they sell products like gold jewelry, private-label electronics or even hardware products containing tin solder. Key unknowns will be how the SEC enforces requirements for traceability through the supply chain, or how flexibly it interprets "due diligence". Auditing foreign-made goods may also not always be possible and thus a particular burden for retailers.

Perhaps one helpful development involves recent press reports that the leaders of 11 countries in Central Africa recently signed a pledge to implement a regional certification system to track conflict minerals as they are exported from Africa. Mechanisms to be pursued include a "system in which minerals are tagged at their point of origin" and a "database to make it easier to identify and track minerals that originate in areas of conflict."

DOL SEEKS TO AMEND CHILD LABOR PRODUCT LIST

In a December 16 notice, the U.S. Department of Labor (DOL) proposed to revise the list of products subject to the Government's prohibition on the purchase of products made by forced or indentured child labor. DOL proposes to (1) add one to the list that DOL "preliminarily" believes might have been mined, produced, or manufactured by forced or indentured child labor; and (2) remove one product from the list where, preliminarily, DOL has reason to believe that the use of forced or indentured child labor has been significantly reduced if not eliminated. DOL invited public comment by February 15, 2011.

On September 11, 2009, DOL published an initial determination in the *Federal Register* listing 29 products from 21 countries as likely made by forced or indentured child labor (*see the October 2009* **Retail Trade Issues**). According to the recent notice, "Based on recent, credible, and appropriately corroborated information from various sources, the Departments of Labor, State, and Homeland Security have preliminarily concluded that there is a reasonable basis to believe that [hand-woven textiles from Ethiopia] might have been mined, produced, or manufactured by forced or indentured child labor" and that "there is no longer a reasonable basis to believe that the use of forced or indentured child labor in the production of" charcoal from Brazil. For further information, see the December 16, 2010 *Federal Register* (pp. 78,755-78,758).

In the same issue of the *Federal Register*, DOL issued a notice announcing the publication of an updated list of goods--along with countries of origin--that the it has reason to believe are produced by child labor or forced labor in violation

of international standards. The Trafficking Victims Protection Reauthorization Act of 2005 (``TVPRA'') requires the publication of this list.

According to the notice, DOL published the first List of Goods Produced by Child Labor or Forced Labor on Sept. 10, 2009. That List included 122 goods from 58 countries, based on research on 77 countries. DOL updated the List, reflecting research on 39 additional countries as well as review of information submitted to DOL pursuant to its TVPRA procedural guidelines. This update adds six new goods and 12 new countries to the List. A full report, including the updated List and a discussion of the List's context, scope, methodology, and limitations, as well as Frequently Asked Questions and a bibliography of sources, are available on the DOL Web site at: http://www.dol.gov/ilab/programs/ocft/tvpra.htm.

CONGRESS TO CONSIDER U.S.-KOREA FTA

The Obama administration and the Government of Korea reached agreement in December on changes needed to the U.S.-Korea Free Trade Agreement (KORUS FTA) that will enable the Administration to submit implementing legislation to Congress for approval. While the Agreement contains little of interest to retailers because it continues the yarn-forward rule of origin for apparel products, it does open the door to Congressional discussion of related Customs issues that will likely impact retailers.

Incoming House Ways and Means Trade Subcommittee Chairman Kevin Brady (R-TX) indicated that House Republicans want to move legislation implementing the FTAs with Korea, Colombia and Panama through Congress by the end of next June. Republicans are planning an "aggressive trade strategy" according to Brady. Brady said Republicans want President Obama to send all three FTAs to Congress at the same time but that they recognize alternate approaches might be necessary.

While two U.S. labor unions – the United Auto Workers and the United Food and Commercial Workers International Union – have endorsed the Agreement, the U.S. textile industry remains strongly opposed to it. They view the FTA as a potential back door to transshipments from China and have called for stronger Customs enforcement resources targeted on textile and apparel products. Their complaints have found sympathetic ears on Capitol Hill, and retailers need to watch carefully how the Administration drafts Customs implementing legislation for the Agreement.

COMMERCE DEPARTMENT ISSUES REPORT COMPARING RETROSPECTIVE AND PROSPECTIVE TRADE REMEDIES SYSTEMS

December 2, the U.S. Department of Commerce released its report it had previously sent to Congress comparing the advantages and disadvantages of the prospective versus retrospective antidumping (AD) and countervailing duty (CVD) collection systems. The United States is the only country that uses a retrospective system. Under that system, Commerce conducts periodic reviews of sales over the

past year to determine and impose final antidumping and countervailing duties on imports entered during that time period. In other countries, such as Canada and the EU, final antidumping duty rates are applied to all imports that enter after the imposition of the antidumping or countervailing duty order.

U.S. importers, including retailers, are highly critical of the U.S. retrospective system for its unpredictability by creating an unquantifiable contingent liability for importers of products subject to AD or CVD orders. In preparation for this report, NRF submitted comments in support of moving the U.S. toward a prospective system, which is a major objective for retailers in reforming the U.S. trade remedies system. The final report notes that a challenge in conducting a comparison between the two systems arises from the fact that there is no one single prospective system. On this issue, NRF urged the Commerce Department to look at Canada as a model, which has a system that most closely resembles the U.S. model. The report then examined the various positions of proponents of the two systems with regard to six issues. Commerce endorsed neither position.

Remedying Injurious Dumping or Subsidized Exports to the United States

Proponents of the retrospective (current U.S.) system have emphasized that it is more accurate than a prospective system because final margins are calculated on the basis of actual sales. Further, by setting final margins for future imports, the prospective system encourages lower prices and additional dumping.

Retailers and others supporting the prospective system countered that administrative reviews responding to changed market conditions can ensure the accuracy of margins; the accuracy of the retrospective system is lost when "facts available" are used to calculate margins, no administrative review is conducted, or the review does not examine sales by individual companies; the retrospective system has little remedial effect because the final duty cost is unknowable and cannot be factored into pricing decisions by importers; the prospective system also allows importers and exporters to raise their prices and thereby avoid paying duties entirely rather than having to request a refund through an administrative review; the prospective system can both afford an effective remedy to petitioners while providing importers predictability and certainty, and the retrospective system has resulted in abuses where petitioners negotiate payment by exporters in exchange for withdrawing a request for an investigation or administrative review (which some have likened to a form of extortion).

Minimizing Uncollected Duties

Proponents of the retrospective (current U.S.) system argued that the prospective system under-collects duties because it cannot adjust the duties when the level of dumping increases, which should trigger higher duties. Accordingly, the problem of duty collection is enforcement rather than systemic. Advocates further charge that the prospective system looks only at export price with respect to whether a duty is imposed, but cannot adjust (as can the retrospective system) when increased dumping results from higher home-market prices or

changes in costs. Because the problem of duty evasion is limited to a few countries, products and importers, it makes more sense to change bonding requirements rather than the entire AD/CVD regime to address this problem

Meanwhile, citing a Government Accountability Office (GAO) report on the issues of uncollected duties, proponents of the prospective system argued that the GAO found that the duty under-collection problem is largely a function of the retrospective system that imposes duties some time in the future rather than immediately at the time of importation. In addition, changes in home-market prices or costs can be effectively addressed through timely administrative reviews.

Reducing Incentives and Opportunities for Importers to Evade Antidumping and Countervailing Duties

Proponents of the prospective system argued that the immediacy of the duty collection reduces the opportunity to evade duties. In contrast, proponents of the retrospective (U.S.) system argued that once a duty rate is established, a prospective system does not address any increase in dumping or subsidization, which has the same effect as duty evasion.

Effectively Targeting High-Risk Importers

Proponents of the prospective system argued that the immediacy of the duty collection reduces the risk of fraud by high-risk importers. Because administration is easier, it would free up resources for better enforcement.

Proponents of the retrospective (U.S.) system argued that the prospective system poses a greater risk of increased dumping, which would be a bigger problem than duty evasion. The retrospective system is better at identifying high-risk importers who evade duties.

Addressing the Impact of Retrospective Rate Increases on U.S. Importers and Their Employees

The report noted that because the judicial review process of AD and CVD orders results in the suspension of liquidation and imposition of final duties, the U.S. system would retain some aspects of the current retrospective system even if it were to change to the prospective system.

Proponents of the prospective system argued that the unpredictability of the current system has a substantial negative impact companies' (particularly small businesses) operations, expenses, and supply chains. Importers have to set aside considerable cash reserves against possible duties (money that can't be put to more productive purposes), shift to higher-cost suppliers, or moving production offshore (all of which impact jobs).

Proponents of the retrospective (U.S.) system discussed the adverse impact on small businesses from competing with unfairly priced imports.

Creating Minimal Administrative Burdens

Finally, the report noted the lack of evidence supporting the view that a transition from a retrospective to prospective

system would reduce administrative burdens on the Department of Commerce. The impact depends partly on the number, frequency, and nature of the administrative reviews that would be conducted under both systems. It was also not clear which system would result in simpler import data management. Similarly, while there would be fewer liquidation instructions to Customs and Border Protection (CBP), it is not clear that the liquidation system would be simpler under a prospective or retrospective system. The Department of Homeland Security did opine that a prospective system would simply the CBP's administrative burden, and would free up resources for use in enforcement.

In conclusion, it is expected that this report can provide a basis for advancing significant reform in the current U.S. AD/CVD system. However, the report also highlights that there are significant disagreements among stakeholders over this issue that would result in a protracted fight over any changes to the trade remedies laws to address these issues.

CONGRESS FAILS TO PASS CHINA CURRENCY BILL IN WANING DAYS

Despite strong pressure from Republican and Democratic Senators alike and overwhelming passage by the House of Representatives in September (*see the October 2010* **Retail Trade Issues**), the Senate did not pass a punitive China currency bill before the 111th Congress adjourned for the year. Similar legislation will likely be considered in the next Congress, but the process will need to start over in both the House and the Senate (*see related article, this issue*).

The China currency bill was a top end-of-year priority for Senators Charles Schumer (D-NY) and Lindsey Graham (R-SC), who have been working together to pass legislation on the issue since 2003. Senators Sherrod Brown (D-OH) and Olympia Snowe (R-ME) also pushed for a vote on the House-passed bill after sending a letter to Senate Leadership in late November (*see the November 2010* **Retail Trade Issues**).

Efforts to pass the China bill continued until the Senate's last day in session. On December 21, there was a request to "hotline" – or pass by unanimous consent – the House version of the currency bill. Several Republican Senators placed holds on the bill, though, effectively killing any chance to pass legislation before the end of the year. Brown and Snowe previously attempted to attach the currency legislation to the Tax Relief, Unemployment Insurance Reauthorization and Job Creation Act of 2010, which passed the Senate on December 15, but withdrew their amendment when it became clear that it could not gain unanimous consent.

TEN NEW REPUBLICANS JOIN WAYS AND MEANS

After picking up more than 60 seats and reclaiming the majority in the House of Representatives, incoming Ways and Means Committee Chairman Dave Camp (R-MI) announced that 10 new Republicans, including two elected to the House for the first time in November, will join the Committee in the 112th Congress.

New members will include Rick Berg (R-ND), Diane Black (R-TN), Vern Buchanan (R-FL), Jim Gerlach (R-PA), Lynn Jenkins (R-KS), Chris Lee (R-NY), Erik Paulsen (R-MN), Tom Price (R-GA), Aaron Schock (R-IL), and Adrian Smith (R-NE). Berg defeated current Ways and Means Member Earl Pomeroy (D-ND), joining Black as the only other freshman on the Committee. Two Republicans, Reps. Ginny Brown-Waite (R-FL) and John Linder (R-GA), did not seek reelection in 2010.

Five Ways and Means Democrats either retired or lost their election in 2010, including Pomeroy, Trade Subcommittee Chairman John Tanner (D-TN), Kendrick Meek (D-FL), Artur Davis (D-AL), and Bob Etheridge (D-NC). Several Democrats will likely be removed from the Committee to reflect new Republican majorities. In the 111th Congress, Democrats held a 26-15 advantage in Committee members, whereas Republicans would only hold a 23-21 advantages if all current Democrats remain. Reps. Danny Davis (D-IL), Linda Sanchez (D-CA), Brian Higgins (D-NY), and John Yarmuth (D-KY), all of whom joined Ways and Means in 2009, are the most likely to be removed from the committee.

Finally, Congressman Kevin Brady (R-TX), a vocal advocate for free trade, will replace Tanner as chairman of the Ways and Means Trade Subcommittee. Brady has frequently championed retail industry trade priorities.

USTR ANNOUNCES CNL PETITIONS ACCEPTED FOR ANNUAL GSP REVIEW; SUSPENDS REVIEW PENDING REAUTHORIZATION

In a December 29 *Federal Register* notice, the Office of the U.S. Trade Representative (USTR) announced that it accepted petitions seeking a "competitive need limit" (CNL) waiver for four products as part of the 2010 Generalized System of Preferences (GSP) Annual Review. Normally, USTR would begin hearings and request comments, but USTR suspended the review indefinitely because of the GSP program's expiration on December 31, 2010 (*see related article, this issue)*. USTR will announce the rest of the schedule in the *Federal Register* "if and when the program is reauthorized."

The products accepted for review upon reauthorization include lysine from Brazil, tires from Sri Lanka, rubber gloves from Thailand, and certain ferroalloys from Argentina. However, USTR denied a petition from The Gem & Jewelry Export Promotion Council of India to reinstate GSP benefits and grant CNLs to certain jewelry from India.

For more information, see the December 29, 2010 *Federal Register* (p. 82,130).

EU DENIED WAIVER FOR EXTRA GSP BENEFITS FOR PAKISTAN

At a November 30 meeting at the World Trade Organization (WTO), the European Union requested a waiver to provide temporary trade preferences, primarily on imports of textiles and apparel, for Pakistan.

The benefits, covering 75 tariff lines, would have remained in place for two years with the possibility of a one-year renewal. The EU requested the waiver to implement the duty suspensions as part of a recovery package for Pakistan following floods this summer (*see the November 2010* **Retail Trade Issues**).

However, India and other developing countries objected to the waiver, which would give Pakistani products an advantage in the EU market. The countries claim the benefits are poorly targeted, since they would not help the farmers hardest hit by the floods, and noted that numerous countries have experienced natural disasters without receiving similar benefits.

India has previously challenged EU efforts to provide expanded duty-free treatment to developing countries if those preferences exclude India. Several years back, India won a WTO case against the EU's special benefits for countries combating drug trafficking. As a result, the EU changed its "GSP+" program. Despite denying the waiver, India and other countries pledged to work with the EU and Pakistan before the next WTO meeting on trade in goods, which is scheduled for April 2011.

CITA ESTABLISHES 12-MONTH CAP FOR DUTY-FREE IMPORTS UNDER HAITIAN HOPE ACT

On December 20, the Committee for the Implementation of Textile Agreements (CITA) published its latest 12-month cap on the quantity of apparel from Haiti eligible for duty-free treatment under the Haitian Hemispheric Opportunity Through Partnership for Encouragement (HOPE) Act. The HOPE Act establishes a quantitative limit to the amount of Haitian apparel eligible for duty-free benefits when imported into the United States, and this limit must be recalculated every 12 months. In the 12-month period beginning December 20, 2010, apparel eligible for benefits cannot exceed 1.25 percent of the aggregate square meter equivalent (SME) of all U.S. imports of apparel articles.

CITA announced that, for the December 20, 2010 to December 19, 2011 period, the quantity of imports from Haiti eligible for duty-free treatment will be approximately 324 million SMEs. CITA based this threshold on trade data from the 12-month period ending October 31, 2010 – the most recent data available. Any U.S. apparel imports from Haiti above this cap would be subject to standard tariff rates.

For more information, see the December 15, 2010 *Federal Register* (p. 78,215).

UPDATES . . .

. . . ON FOOD SAFETY BILL. After a series of legislative procedural setbacks, on December 21 Congress finally passed the "Food Safety Modernization Act" (H.R. 2751). President Obama is expected to sign the bill on January 4, 2011.

The legislation makes major changes the U.S. food safety system for the first time since 1938. The trade-related provisions of the legislation give the U.S. Food and Drug Administration authority to inspect and detain suspect imported food products, including the right to initiate a

recall of a food product. It allows FDA to require certification for high-risk foods and to deny entry to a food that lacks certification or that is from a foreign facility that has refused U.S. inspectors. It also requires importers to verify the safety of foreign suppliers. The bill also allows the FDA to enable qualified third parties to certify that foreign food facilities comply with U.S. food safety standards.

. . . ON TPP NEGOTIATIONS. The textile industry has reportedly backed away from its threat to strongly oppose a Trans-Pacific Partnership (TPP) agreement that includes apparel from Vietnam – as long, the National Council of Textile Organizations (NCTO) says, as the agreement includes a yarn-forward rule of origin (and limiting that rule even further to exclude the use of yarns and fabrics from other TPP countries) and stronger customs enforcement provisions than those contained in the U.S.-Korea free trade agreement. NCTO also wants the agreement to include measures that deal with the fact that Vietnam is a non-market economy and that its apparel industry is (allegedly) state-owned and subsidized by the government. One provisions advocated is a special safeguard for apparel imported from Vietnam.

By insisting on such a limited yarn-forward rule of origin, NCTO hopes to reduce the ability of Vietnam to export apparel under the TPP. Vietnam has only a small textile industry, importing raw materials largely from China. (Ironically, NCTO does not seem to understand that a yarn forward rule would encourage Vietnam to develop a textile industry – in direct competition with U.S. producers.)

. . . ON PREFERENCE PROGRAM ELIGIBILITY. In a December 24 *Federal Register* notice, President Obama revoked the Democratic Republic of the Congo's eligibility as a beneficiary country under the African Growth and Opportunity Act (AGOA). The proclamation will take effect on January 1, 2011. For more information, see the December 24, 2010 *Federal Register* (pp. 81,077-81,080).

. . . ON FUR LABELING. On December 18, the President signed into law H.R. 2480, the "Truth in Fur Labeling Act," which eliminates the "small value exception" to the Fur Products Labeling Act and requires the Federal Trade Commission (FTC) to publish in the Federal Register notice of, and an opportunity to comment on, a review of the Fur Products Name Guide. The Senate approved the bill on December 7 following a vote by the House of Representatives in July (*see the August 2010* **Retail Trade Issues**). The new labeling requirements will enter into effect on March 18, 2011.

By removing "small value exception," all products containing fur will not be required to have a fur-specific label that includes the type of animal, country of origin, and other information (*see the June 2010* **Retail Trade Issues**). The fur labeling bill did not include two provisions to which NRF objected, one provision that would have added Asiatic Raccoon to an existing ban on commerce in dog and cat fur and another that would have allowed local jurisdictions to enact more restrictive labeling requirements than those established by federal law.

. . . ON SUNSET REVIEW OF AD DUTIES ON WOODEN BEDROOM FURNITURE FROM CHINA. Following a year-long review of the antidumping (AD) duties on wooden bedroom furniture from China, the U.S. International Trade Commission (ITC) determined that revocation of the duty order would be likely to lead to continuation or recurrence of material injury to the domestic industry. As a result, AD duties will continue to range from 0.83 percent for imports from Markor International Furniture to 198.08 percent on general imports. Imports from Lacquer Craft Mfg. were excluded from the review. For more information, see the December 22, 2010 *Federal Register* (pp 80,528-80,529).

. . .ON JORDAN LABOR ISSUES. On December 1, the Government of Jordan announced that participation in the International Labor Organization (ILO)/International Finance Corporation (IFC) Better Work Jordan (BWJ) program would now be mandatory for all apparel manufacturers exporting directly to the United States and Israel. International labor rights groups have accused apparel factories in Jordan of numerous labor violations, in particular regarding the treatment of foreign workers. In response, the BWJ program was created in mid-2008 at the request of the Government of Jordan, but until the most recent announcement, the program has been voluntary.

Specifications: Certain Woven Polyester/Rayon/Spandex Fabric

HTS classifications:
5407.52.2060; 5407.53.2060; 5407.61.9935; 5407.61.9955; 5407.69.2060; 5407.69.4060; 5407.72.0060; 5407.73.2060; 5407.92.2010; 5407.92.2050; 5407.93.2010; 5407.93.2050; 5512.19.0005; 5512.19.0045; 5512.99.0005; 5512.99.0040; 5515.11.0005; 5515.11.0040; 5515.12.0040; 5515.19.0005; 5515.19.0040.

Fiber Content: 60 to 90 percent polyester; 10 to 40 percent rayon; 0 to 3 percent spandex (yarns of filament and/or staple fiber; textured and/or non-textured).

Yarn Size: various

Thread Count: Metric - 43 to 56 ends per cm by 29 to 38 filling pics per cm (English - 110 to 140 ends per inch by 75 to 95 filling picks per inch).

Weave type: woven twill

Weight: Metric - 356 to 407 grams per sq. m. (English: 10.5 to 12 ounces per sq. yard)

Width: Greater than 30 centimeters

Finish: Piece dyed or yarn-dyed; and napped on both sides

. . . ON DR-CAFTA SHORT SUPPLY. In a December 6 *Federal Register* notice, the Committee for the Implementation of Textile Agreements (CITA) determined that certain woven flannel fabric of polyester, rayon, and spandex, as specified in the table below, is not available in commercial quantities in a timely manner in the region covered by the Dominican Republic-Central America Free Trade Agreement (DR-CAFTA). The company, Rothschild, submitted the petition in October (*see the November 2010* **Retail Trade Issues**). The subject product will be added to the Annex 3.25 list, effective from the date of publication. See the previous page for a detailed description of the product. For more information, see the December 6, 2010 *Federal Register* (pp. 75,664-75,665).

. . . ON SUNSET REVIEW OF AD DUTIES ON PETROLEUM WAXED CANDLES FROM CHINA. On December 16, the U.S. International Trade Commission (ITC) determined that revoking the anti-dumping (AD) duty order on petroleum wax candles from China would likely lead to continuation or recurrence of material injury to the domestic industry. In 2006 Commerce determined that candles would be subject to AD duties of 108.3 percent if they contained any amount of petroleum-based wax (*see the July 2010 and November 2006* **Retail Trade Issues**). As a result of the ITC determinations, those duties will continue. For more information, see the December 23, 2010 *Federal Register* (pp. 80,843).

Key Dates* in Multilayered Wood Flooring Investigation

- October 21, 2010 – Petitions Filed
- November 10, 2010 – Commerce Investigation Initiation Date
- December 6, 2010 – ITC Preliminary Determination**
- March 30, 2011 – Commerce Preliminary Determination (CVD)
- March 30, 2011 – Commerce Preliminary Determination (AD); Commerce Final Determination (CVD)
- May 16, 2011 – ITC Final Determination (CVD)
- May 23, 2011 – Issuance of Orders (CVD)
- June 13, 2011 – Commerce Final Determination (AD)
- July 28, 2011 – ITC Final Determination (AD)
- August 4, 2011 – Issuance of Orders (AD)

* Available at http://ia.ita.doc.gov/download/factsheets/factsheet-prc-mlwf-init-20101112.pdf
** A negative determination at any of the following stages would terminate the investigation.

. . . ON AD/CVD INVESTIGATIONS OF MULTILAYERED WOOD FLOORING FROM CHINA. On December 3, the U.S. International Trade Commission (ITC) voted 6-0 that there is a reasonable indication that an industry in the United States is materially injured or threatened with material injury by imports of multilayered wood flooring from China. The Coalition for American Hardwood Parity, an *ad hoc* association of U.S. manufacturers of multilayered wood flooring, filed the petition in November (*see the December 2010* **Retail Trade Issues**). The ITC sent its preliminary determination to the Commerce Department on December 13. Commerce expects to make its preliminary countervailing duty determination by January 14, 2011 and its preliminary antidumping duty determination by March 30, 2011. See the previous page for a summary of key dates in the investigation.

. . . ON ANTIDUMPING METHODOLOGY. After a string of losses in dispute settlement cases at the World Trade Organization over use the controversial methodology of "zeroing" to calculate antidumping margins, the Department of Commerce is proposing to abandon the practice in administrative reviews. Commerce has already ceased using zeroing in original antidumping investigations. Commerce has requested public comment. Retailers have opposed the use of zeroing as an outcome-oriented methodology designed to artificially inflate antidumping margins. For more information, see the December 28, 2010 *Federal Register* (pp. 81,533).

As the world's largest retail trade association and the voice of retail worldwide, the National Retail Federation's global membership includes retailers of all sizes, formats and channels of distribution as well as chain restaurants and industry partners from the U.S. and more than 45 countries abroad. In the U.S., NRF represents the breadth and diversity of an industry with more than 1.6 million American companies that employ nearly 25 million workers and generated 2009 sales of $2.3 trillion.

Retail Trade Issues is a monthly newsletter prepared by The Trade Partnership for members of the National Retail Federation. Subscriptions for non-members are available at a cost of $250 a year. Address all comments and inquiries to Erik Autor, Vice President and International Trade Counsel, at (202) 783-7971.

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