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Ms. Charlotte Skey
Senior Regulatory Economist
Office of the General Counsel
U.S. Department of Homeland Security
Washington, D.C.
Submitted via the Federal eRulemaking Portal: www.regulations.gov

Docket number DHS-2014-0006

Dear Ms. Skey:

In response to the Department of Homeland Security's federal register notice titled *Retrospective Review of Existing Regulations; Request for Public Input* 79 Fed. Reg. 10760 (February 26, 2014), the Retail Industry Leaders Association (RILA) provides these comments on existing regulations that the Department should consider as candidates for modification, streamlining, expansion, or repeal.

By way of background, RILA represents the largest and fastest growing companies in the retail industry, which together provide millions of jobs, operate more than 100,000 stores, manufacturing facilities and distribution centers domestically and abroad and generate more than $1.5 trillion in annual sales. RILA promotes consumer choice and economic freedom through public policy and industry operational excellence.

RILA members are some of the largest U.S. importers and purchase billions of dollars in merchandise from producers in the United States and around the world.[1] Regulatory uncertainty, lack of clarity, and unnecessarily burdensome regulations can cost the industry hundreds of millions of dollars. Thus, while RILA's members understand and appreciate the role of regulations, they also have a substantial interest in ensuring that regulations are written, interpreted, and modified in a rational and balanced manner that is reflective of the realities of today's marketplace. RILA strongly supports efforts to review outdated regulations with the goal of modifying, consolidating, or repealing regulations in order to reduce compliance costs, encourage growth and innovation, and improve competitiveness.

[1] CBP's list of Top 5000 importers for 2012, http://www.cbp.gov/xp/cgov/trade/trade_outreach/trade_info/, and Journal of Commerce Top 100 Importers in 2012, May 24, 2013.

In pursuit of these goals, we offer these comments for the Department's consideration. RILA recommends that the specific regulations listed below be considered as candidates for modification, streamlining, expansion, or repeal.

1. **19 CFR 10.183 Proof of Use:**

   Within 3 years from the date of entry or withdrawal from warehouse for consumption, the importer shall submit in duplicate in support of his claim for free entry or for a reduced rate of duty a certificate executed by (1) the superintendent or manager of the manufacturing plant, or (2) the individual end-user or other person having knowledge of the actual use of the imported article. The certificate shall include a description of the processing in sufficient detail to show that the use contemplated by the law has actually taken place. A blanket certificate covering all purchases of a given type of merchandise from a particular importer during a given period, or all such purchases with specified exceptions, may be accepted for this purpose, provided the importer shall furnish a statement showing in detail, in such manner as to be readily identified with each entry, the merchandise which he sold to such manufacturer or end-user during such period.

Currently, Customs and Border Protection (CBP) allows importers to submit the Proof of Use certificate at the time of entry rather than post entry as required by the above regulation. Additionally, as it is not always possible for retailers to certify the end use of a product, CBP's informed compliance publication[2] recognizes that mass merchandisers are unable to certify how every item they sell is actually used by the consumer and provides leniency recognizing fugitive use of these goods. RILA recommends modifying this section to reflect CBP's current enforcement practice.

2. **19 CFR 10.172 Claim for exemption from duty under the Generalized System of Preferences**

   A claim for an exemption from duty on the ground that the Generalized System of Preferences applies shall be allowed by the port director only if he is satisfied that the requirements set forth in this section and §§ 10.173 through 10.178 have been met. If duty-free treatment is claimed at the time of entry, a written claim shall be filed on the entry document by placing the symbol ''A'' as a prefix to the sub-heading of the Harmonized Tariff Schedule of the United States for each article for which such treatment is claimed.

[2] "What Every Member of the Trade Community Should Know about: The Agricultural Actual Use Provisions, Tariff Classification Issues of Headings 9817.00.50 and 9817.00.60." *CBP ICP* March (2010): p 16. *http://www.cbp.gov/sites/default/files/documents/act_use_prov_3.pdf.*

In anticipation of the renewal of the Generalized System of Preferences (GSP) program, RILA offers the following comments. 10.172 is an example of several regulations that are not currently being enforced by CBP. In this case, CBP is not currently collecting the document required above. RILA requests that DHS review this and similar regulations that require documents at time of entry that are not actually being collected. Additionally, most special trade programs include similar language that should be revised to reflect actual collection. RILA suggests requiring the importer to make the original certificate or affidavit available to CBP upon request.

3. **19 CFR 101.9 Test Programs or Procedures; Alternate Requirements**

   (a) General testing. For purposes of conducting a test program or procedure designed to evaluate the effectiveness of new technology or operational procedures regarding the processing of passengers, vessels, or merchandise, the Commissioner of Customs may impose requirements different from those specified in the Customs Regulations, but only to the extent that such different requirements do not affect the collection of the revenue, public health, safety, or law enforcement. The imposition of any such different requirements shall be subject to the following conditions…

RILA members support the testing and evaluation of new procedures to spur innovation, streamline processes and create efficiencies. We also recommend that CBP be accountable for the timing and execution of test programs, and be required to share the test results with stakeholders. The regulation should be modified to include these requirements.

Additionally, there are current test programs that have been in a "test mode" for an extended period of time. These programs should be reviewed to determine if they should be codified or ended. For example, the post summary correction (PSC) process and reconciliation are still in "test mode." These programs have proven to be successful and should be codified. However, as part of the PSC test, CBP requests a quarterly tracking report from importers for *de minimis* errors that do not rise to the threshold for reporting under the PSC guidelines. The industry has come to understand that this report serves no purpose for CBP beyond reporting for the sake of reporting. Regulations and requirements such as this are very time consuming for importers to capture the required data, and it seems to have no benefit. When CBP codifies the PSC process, RILA suggests that CBP not include the quarterly tracking report in the final rule.

4. **19 CFR 111 Customs Brokers**

   "Corporate compliance activity" means activity performed by a business entity to ensure that documents for a related business entity or entities are prepared and filed with CBP using "reasonable care," but such activity does not extend to the actual preparation or filing of the documents or their electronic equivalents. For purposes of this definition, a "business entity" is an entity that is registered or otherwise on record with an

appropriate governmental authority for business licensing, taxation, or other legal purposes, and the term "related business entity or entities" encompasses a business entity that has more than a 50 percent ownership interest in another business entity, a business entity in which another business entity has more than a 50 percent ownership interest, and two or more business entities in which the same business entity has more than a 50 percent ownership interest.

RILA members emphasize the importance of reevaluating and rewriting this section, specifically regarding the definition of "corporate compliance activity." RILA encourages DHS to expand the definition of "corporate compliance activity" be further reviewed and updated to reflect current business practices. For example, the definition should be expanded to allow the ability for importers to file and prepare documents for related business entities.

5. 19 CFR 141.113 (b) and (h) Conditional Release of Textiles

(b) Textiles and textile products. For purposes of determining whether the country of origin of textiles and textile products subject to the provisions of § 102.21 or § 102.22 of this chapter, as applicable, has been accurately represented to CBP, the release from CBP custody of any such textile or textile product shall be deemed conditional during the 180-day period following the date of release. If the port director finds during the conditional release period that a textile or textile product is not entitled to admission into the commerce of the United States because the country of origin of the textile or textile product was not accurately represented to CBP, he shall promptly demand its return to CBP custody. Notwithstanding the provisions of paragraph (h) of this section and § 113.62(m)(1) of this chapter, a failure to comply with a demand for return to CBP custody made under this paragraph shall result in the assessment of liquidated damages equal to the value of the merchandise involved.

As described in this section, the current regulations allow for a 180 day conditional release on textiles to allow the port director to validate the country of origin of the textiles. With the elimination of the system of quotas for textiles and the origin of a textile is no longer an admissibility issue, therefore this extended period of time for conditional release of textiles is no longer necessary. In addition, retailers no longer import and warehouse merchandise for lengthy periods of time. Today, in order to remain competitive, retailers use "just in time" inventory systems that give them the flexibility to adapt quickly to rapidly changing fashions and consumer demands. A 180 day conditional release period is no longer feasible or realistic in today's retail environment. RILA recommends that the regulation be revised to include a 30 day conditional release period.

(h) Time limitation. A demand for the return of merchandise to CBP custody shall not be made after the liquidation of the entry covering such merchandise has become final.

Section (h) should also be updated to reflect shorter release periods, and should not be based on liquidation, which now gives CBP more than 300 days to request the return of merchandise.

6. 19 CFR 163.5 Methods for Storage of Records

> *(2) Standards for alternative storage methods. Methods commonly used in standard business practice for storage of records include, but are not limited to, machine readable data, CD ROM, and microfiche. Methods that are in compliance with generally accepted business standards will generally satisfy Customs requirements, provided that the method used allows for retrieval of records requested within a reasonable time after the request and provided that adequate provisions exist to prevent alteration, destruction, or deterioration of the records. The following standards must be applied by record keepers when using alternative storage methods:*

The above section is an example of regulatory text that does not reflect today's technological realities and advances. RILA encourages DHS to update regulations to today's technological environment. Further, there are many references to typewriters, facsimiles, copies in duplicate, etc. that should also be omitted or updated.

> *(3) Changes to alternative storage procedures. No changes to alternative recordkeeping procedures may be made without first notifying the Director of the Miami regulatory audit field office. The notification must be in writing and must be provided to the director at least 30 calendar days before implementation of the change.*
>
> *(4) Penalties. All persons listed in § 163.2 who use alternative storage methods for records and who fail to maintain or produce the records in accordance with this part shall be subject to penalties pursuant to § 163.6 for entry records or sanctions pursuant to §§ 163.9 and 163.10 for other records.*
>
> *(5) Failure to comply with alternative storage requirements. If a person listed in § 163.2 uses an alternative storage method for records that is not in compliance with the conditions and requirements of this section, the appropriate Customs office may instruct the person in writing to discontinue use of the alternative storage method. The instruction shall take effect upon receipt thereof and shall remain in effect until the noncompliance has been rectified and alternative storage has recommenced in accordance with the procedures set forth in paragraph (b)(1) of this section.*

The above requirements impose undue operational and administrative burdens on importers and CBP. Businesses should have the ability and flexibility to devise record keeping systems that meet their operational needs as long as importers maintain proper documentation for the required time period and are able to provide this documentation to CBP in a timely manner upon request.

RILA recommends that CBP eliminate the requirement for importers to request permission for alternative storage as well as the penalties for failure to do so.

Further, RILA encourages CBP to take this opportunity to set a standard for the implementation of scanning technology. Information stored through scanning in easily searchable and would increase the ease of retrieving records such as entry number and bill of lading number.

7. **19 CFR 163.12 Recordkeeping Compliance Program**

> *(a) General. The Recordkeeping Compliance Program is a voluntary Customs program under which certified recordkeepers may be eligible for alternatives to penalties (see paragraph (d) of this section) that might be assessed under § 163.6 for failure to produce a demanded entry record. However, even where a certified recordkeeper is eligible for an alternative to a penalty, participation in the Recordkeeping Compliance Program has no limiting effect on the authority of Customs to use a summons, court order or other legal process to compel the production of records by that certified recordkeeper…*

This provision provides for a benefit (eligibility for alternatives to penalties) for those who participate in voluntary recordkeeping compliance programs. All applicants to the Importer Self-Assessment (ISA) program must demonstrate their ability to meet the highest standards for customs recordkeeping, monitoring and oversight, and thereafter continue to certify compliance annually. Therefore, members of the ISA program should also be eligible for alternatives to penalties as provided under the Recordkeeping Compliance program. The regulations should be amended accordingly.

8. **19 CFR 149.3 Importer Security Filing**

> *(a) Shipments intended to be entered into the United States and shipments intended to be delivered to a foreign trade zone. Except as otherwise provided for in paragraph (b) of this section, the following elements must be provided for each good listed at the six-digit HTSUS number at the lowest bill of lading level (i.e., at the house bill of lading level, if applicable). The manufacturer (or supplier), country of origin, and commodity HTSUS number must be linked to one another at the line item level…*

As RILA members understand this section, CBP's intent is to know the last party to come in contact with the container, where it is stuffed and sealed. However, this section states that the manufacturer identification (MID) number can be used to fulfill this requirement, but the manufacturer may not always be the last party to come in contact with the container before

shipment. For example, a trading company, freight forwarder or consolidator could all be the party to stuff and seal a container prior to shipment to the U.S.

9. 19 CFR 102.23 Origin and Manufacturer Identification

(a) Textile or apparel product manufacturer identification. All commercial importations of textile or apparel products must identify on CBP Form 3461 (Entry/Immediate Delivery) and CBP Form 7501 (Entry Summary), and in all electronic data transmissions that require identification of the manufacturer, the manufacturer of such products through a manufacturer identification code (MID) constructed from the name and address of the entity performing the origin-conferring operations pursuant to §102.21 or §102.22 of this part, as applicable. The code must be accurately constructed using the methodology set forth in the appendix to this part, including the use of the two-letter International Organization for Standardization (ISO) code for the country of origin of such products. When a single entry is filed for products of more than one manufacturer, the products of each manufacturer must be separately identified. Importers must be able to demonstrate to CBP their use of reasonable care in determining the manufacturer. If an entry filed for such merchandise fails to include the MID properly constructed from the name and address of the manufacturer, the port director may reject the entry or take other appropriate action. For purposes of this paragraph, "textile or apparel products" means goods classifiable in Section XI, Harmonized Tariff Schedule of the United States (HTSUS), and goods classifiable in any 10-digit HTSUS number outside of Section XI with a three-digit textile category number assigned to the specific subheading.

The concept of the Manufacturer Identification Code (MID) as mentioned in this regulation is outdated and a vestige of the textile quota system. Considering that textiles are no longer subject to quotas, RILA encourages a reevaluation of the purpose of MID numbers. Other than in apparel and textiles, MID's may reflect a variety of different parties and sometimes even reflect the US invoicing party. If the purpose of MID is for targeting, RILA encourages CBP to develop a more effective means for gathering this information. An example could be to require factories to register with CBP and receive a unique factory ID number that would be used at the time of entry.

10. 19 CFR 351.402(f) Antidumping Non-reimbursement Statements

(f)Reimbursement of antidumping duties and countervailing duties—
(1) In general.

(i) In calculating the export price (or the constructed export price), the Secretary will deduct the amount of any antidumping duty or countervailing duty which the exporter or producer:

(A) Paid directly on behalf of the importer; or (B) Reimbursed to the importer.

(ii) The Secretary will not deduct the amount of any antidumping duty or countervailing duty paid or reimbursed if the exporter or producer granted to the importer before initiation of the antidumping investigation in question a warranty of nonapplicability of antidumping duties or countervailing duties with respect to subject merchandise which was: A) Sold before the date of publication of the Secretary's order applicable to the merchandise in question; and
(B) Exported before the date of publication of the Secretary's final anti-dumping determination.
(iii) Ordinarily, under paragraph (f)(1)(i) of this section, the Secretary will deduct the amount reimbursed only once in the calculation of the export price (or constructed export price).

(2) Certificate. The importer must file prior to liquidation a certificate in the following form with the appropriate District Director of Customs: I hereby certify that I (have) (have not) entered into any agreement or understanding for the payment or for the refunding to me, by the manufacturer, producer, seller, or ex-porter, of all or any part of the antidumping duties or countervailing duties assessed upon the following importations of (commodity) from (country): (List entry numbers) which have been purchased on or after (date of publication of antidumping notice suspending liquidation in the FEDERAL REGISTER) or purchased before (same date) but exported on or after (date of final determination of sales at less than fair value).

(3) Presumption. The Secretary may presume from an importer's failure to file the certificate required in paragraph (f)(2) of this section that the exporter or producer paid or reimbursed the antidumping duties or countervailing duties.

Traditionally, CBP and the Commerce Department have taken a strict stance on the absence of antidumping duty (ADD) non-reimbursement statements (NRS). Under the above regulation, failure to timely provide a NRS would result in the automatic doubling of the ADD and often resulted in additional penalties that were not subject to mitigation. CBP issued the below clarification in 2012 providing importers the ability to protest this action by providing the NRS prior to final liquidation of the entry.

Upon assessment of antidumping duties, CBP shall require that the importer provide a reimbursement statement, as described in section 351.402(f)(2) of commerce's regulations. The importer should provide the reimbursement statement prior to liquidation of the entry. If the importer certifies that it has an agreement with the manufacturer, producer, seller, or exporter, to be reimbursed antidumping duties, CBP shall double the antidumping duties in accordance with the above-referenced regulation. Additionally, if the importer does not provide the reimbursement statement prior to liquidation, reimbursement shall be presumed and CBP shall double the antidumping duties due. If an importer timely files a protest challenging the presumption of

reimbursement and doubling of duties, consistent with CBP's protest process, CBP may accept the reimbursement statement filed with the protest to rebut the presumption of reimbursement.

RILA encourages DHS to update the current regulations related to the filing of NRS to reflect this clarification and importer protest rights.

11. 19 CFR 113.35 Individual Sureties

(2) Married women. A married woman may be accepted as a surety, unless the state in which the bond is executed prohibits her from acting in that capacity.

(3) Granting of power of attorney. Any individual other than a married woman in a state where she is prohibited from acting as a surety may grant a power of attorney to sign as surety on Customs bonds. Unless the power is unlimited, all persons to which the power relates shall be named.

RILA members appreciate that this section was initially promulgated to accommodate the then applicable state laws related to sureties and powers of attorney. However, it is now woefully outdated and does not reflect the current legal status of women, married or otherwise, and the tremendous progress that has been made over the last 50 years to eliminate gender bias. RILA respectfully recommends that DHS eliminate section (2) above and modify section (3), and all other sections that contain references or language incorporating gender biases to reflect the full equal status of women and the current reality of gender roles and state laws.

12. Anti-Dumping/Countervailing Duties (AD/CVD)

RILA members believe that the current retrospective system to collect antidumping and countervailing duties (ADD/CVDs) is outdated, resource-intensive, and less effective in remedying unfair trade than alternative prospective normal value systems. The lag time between date of import and the Commerce Department's determination of final duties owed creates substantial risk and unpredictability for U.S. businesses and also severely inhibits CBP's ability to collect the full amount of ADD/CVD duties owed. Predictable global sourcing is a fundamental requirement to maintain American economic competitiveness, and CBP should be able to more effectively utilize resources to enforce and collect ADD/CVD duties owed. Moreover, the retrospective collections cannot be incorporated into the normal duty collections processes utilized by CBP, and require redundant systems.

RILA echoes the repeated recommendations of the Advisory Committee on Commercial Operations of Customs and Border Protection (COAC) and the Government Accountability Office (GAO) that the U.S. adopt a prospective system to collect ADD/CVD duties. U.S. companies are willing to pay fairly traded prices, and they need to know what these prices are in

order to make informed business decisions. A prospective collections system would improve duty collection, decrease supply chain uncertainty, and enhance U.S. competitiveness.

Under a "prospective normal value" system, Commerce would determine a fair trade price and CBP would apply those results prospectively on a transaction-by-transaction basis. Thus, if subject merchandise were imported at a price below the normal value, CBP would, at the time of import, immediately collect final ADD duties equal to the amount of the price difference (the dumping margin). Zero duties would be assessed on non-dumped imports. The same system would apply for calculating and assessing CVD duties. Under such a system, then, injurious dumping or subsidization would be remedied immediately upon importation, and U.S. companies would know in advance the actual fairly traded cost associated with each potential supplier.

RILA urges DHS to work with other agencies, such as the Department of Commerce to modernize and streamline ADD/CVD duty collections. A couple short term steps could include:

- Create and implement a pilot program under which a small number of ADD/CVD orders would be administered through a prospective normal value collections system to apply to facilitate development of, and transition to a prospective duty assessment system.
- Work with the Department of Commerce to eliminate the retroactive application of policy changes in ADD/CVD cases. These policy changes are the biggest reason for unexpected rate increases and the unpredictability, and retroactive application of such policy changes is inherently unfair and denies due process.

13. CBP Port Operations Rules – Gate Operations

Currently, CBP's operations at the ports for processing freight entries are frequently limited to weekday operations only. The current protocol requires importers to make a request for CBP weekend operations seven days in advance of the anticipated work day to allow CBP to determine the ability of CBP to accommodate the request for weekend operations to receive and process shipments. Limitation of port and CBP operations only to weekdays is unreasonable in light of the current port congestion and the lack of equipment to pull containers from the ports.

In addition, RILA members believe that seven days request period is not a reasonable time frame for importers as it does not allow CBP and importers to address unanticipated events such as hurricanes or ship accidents that impact port operations The seven day request system and the resulting time lag make fulfilling "just in time" inventory demands difficult and costly for the industry. RILA encourages CBP to create flexible schedules for CBP port personnel to allow CBP to be more responsive to industry's needs regarding weekend operations.

14. Paper Forms and Other Government Agencies (OGA)

Currently, some OGA's require importers of record to physically sign documents required for importation and then require customs brokers to keep a copy of those documents on file for specified periods of time. On February 19, 2014 the President issued Executive Order 13659; "Streamlining the Export/Import Process for America's Businesses" establishing "one window" at the border requiring that all import related documentation be filed through CBP's ACE system and establishing a timeline for implementation. RILA members welcome the strategic plan as outlined in EO 13659 and encourage and support CBP's efforts to work with OGA's to transition all import-related documentation to the ACE platform.

15. ACE

RILA applauds DHS's transition and rollout of ACE and members look forward to continuing to work with DHS in its development. However, RILA has heard concerns that the data in ACE is not reliable and cannot be counted on for full importer history. For example, when an importer runs aggregate reports out of ACE, some data are consistently missing. ACE technicians are aware of the problem but currently seem unable to correct it.

Conclusion

RILA members recognize the leadership of DHS and CBP and outreach to industry in the area of trade facilitation and enforcement. RILA strongly supports fair and balanced regulations that have a positive impact on international trade and promote efficient supply chain operations. We welcome the opportunity to provide feedback on regulations that should be considered as candidates for modification, consolidation, streamlining, expansion, or repeal in order to reduce compliance costs, encourage growth and innovation, and improve competitiveness.

We appreciate your consideration of our comments and look forward to our continued partnership. Please do not hesitate to contact me if you have any questions at (703) 600-2046 or by email at stephanie.lester@rila.org.

Sincerely,

Stephanie Lester
Vice President, International Trade