April 14, 2008

Trade and Commercial Regulations Branch
U.S. Customs and Border Protection
1300 Pennsylvania Ave. NW
Washington, DC 20229

Dear Sir or Madam:

Thank you for the opportunity to comment on the proposed change of interpretation of the phrase "sold for exportation to the United States" in 19 U.S.C. §1401a(b) for purposes of applying the transaction value method of valuation in a series of sales that result in an importation of merchandise. This proposal was published as Docket Number USCBP 2007-0083 in Federal Register on January 24, 2008.

The Joint Industry Group (JIG) is a coalition of importers, exporters, shippers, carriers, customs brokers, trade associations, service providers and law firms with an active involvement in global commerce. JIG frequently engages Congress and the Administration on a variety of international trade-related issues. We work particularly closely with Congress, the Department of Homeland Security, and the Treasury Department to promote international trade policy that reflects the needs of both the government and private sector.

We write today to voice our strong opposition to CBP's proposed change in interpretation, which, if adopted, will significantly increase the tax burden on American business and U. S. consumers. JIG understands that U.S. Customs and Border Protection (CBP) would like to conform to the interpretation adopted by a number of other countries in the international community. Usually the goal of consistent interpretation with our trading partners is laudable; however, in this instance, United States law on "first sale" was settled nearly 20 years ago by the United States Court of International Trade (CIT) and the United States Court of Appeals for the Federal Circuit (Federal Circuit) to mean the "first sale" of the series. These court decisions established clear precedent, and nothing less than Congressional or further judicial action can now reverse the courts' interpretation of the valuation statute. Moreover, U.S. businesses have relied on this interpretation in selecting foreign manufacturers and establishing sourcing relationships. The proposed change would disrupt those relationships and result in significant additional costs to U.S. businesses and consumers.

The proposed change creates tremendous concerns within the trade community for two primary reasons. First, it suggests that the trade community can not rely on longstanding, well-settled, and uniformly applied interpretative decisions, even those issued by the courts. In light of this clearly established and long-held precedent, the trade community was extremely surprised by this proposed change. Second, the costs associated with the proposal's adoption are significant. These costs not only include the effective increase in duties and fees previously mentioned, but

also the restructuring of the manner in which business is conducted (e.g., the relationship between a company and intermediaries, analyzing tax ramifications, etc.). Included below is the consolidated feedback offered by JIG members about the monetary impact of the proposal, and CBP's legal authority to institute this sweeping change.

Questionable Authority to Implement Change

We submit CBP has no authority to make this change. Paragraph 8 of the document *Texts Issued by the Technical Committee on Customs Valuation [of the World Customs Organization]* states that "[T]here is nothing in the [Customs Valuation] Agreement to imply that any of the Technical Committee's decisions would have the force of law within the Signatories to the extent that they are not incorporated in the national laws of the Signatories." Thus, unless Congress has given the Executive Branch authority to harmonize the U.S. value law with international interpretations, CBP can not change the interpretation of statutory language that the courts have already construed. The notice in the Federal Register comments on the precedential judicial decisions of the CIT and Federal Circuit interpreting the phrase "sale for exportation" as meaning the "first sale" in a series of sales, but nevertheless proposes to change it.

JIG suggests that CBP review *Boltex Mfg. Co. v. United State*, Slip Op. 00-118 (CIT, 2000). The Court held that Customs had overstepped its authority in attempting to arrogate judicial powers by abrogating the Court's holding in *Midwood Industries, Inc. v. United States*, 313 F. Supp. 951 (Cust. Ct. 1970) rather than limiting the decision. Customs should note that the separation of powers among the executive, legislative and judicial branches of government has been the subject of numerous judicial decisions going back as far as the seminal *Marbury v. Madison* case. This issue is totally ignored in the notice published in the Federal Register. While CBP characterizes its action as "limiting" those Court decisions, it is clear from the notice that neither the facts nor the law has changed in the 20 years since the "first sale" interpretation was announced. The only thing that has changed is that the Technical Committee on Customs Valuation of the World Customs Organization has issued its own interpretation of "sale for exportation", which conflicts with U.S. courts' interpretation.

Reduction of Trade Efficiency

In its notice, CBP claims that adoption of the "last sale" interpretation will simplify procedures for both the trade community and Customs because it would permit an importer to declare, and CBP to confirm, values based on information which is available in the United States. JIG believes ease of administration should not provide the basis for crafting a legal interpretation. Furthermore, the proposal does not benefit, or simplify procedures for, the trade community because those importers who avail themselves of the first sale valuation do so voluntarily with the understanding that they must supply CBP with the information necessary to establish and confirm the first sale value.

In addition, it is not likely that CBP's proposal would, in fact, make the law easier to administer. If the proposal were adopted, importers would be forced to expend considerable time and resources in reconfiguring the manner in which they conduct business. It would also likely motivate many importers who currently transact business through intermediary companies to use

overseas buying agents. If this were to happen, not only would records remain overseas, but CBP would still be forced to address an issue (i.e., whether a transaction is a non-dutiable buying commission or a dutiable selling commission) with which it has had difficulties in the past. Moreover, there are several other situations in which value information would continue to be available only abroad, as for example where value is determined under computed value.

Unknown Impact on Trade Agreements

Not all of the economic and legal implications that will result from the proposal's adoption are known or are clear. JIG believes the adoption of the proposal will have unknown repercussions for all preference programs (e.g. GSP, NAFTA, etc), which have rules dependent on value-added. It is clear, however, that many GSP claims for duty-free treatment based on 35 percent value-added involving intermediaries would be in jeopardy, as the value-added is calculated using the lower "first sale" price, rather than the significantly higher "last sale" price. Even if goods are free of duty, the amount of HMF/MPF involved will be affected.

Potential Effects on the Economic Stimulus Package

Adopting the proposal at a time when both Congress and the Bush administration want to stimulate the economy to avoid recession will increase prices and defeat the purpose of the tax refunds being proposed. The adoption of CBP's proposal can hardly be characterized as anything other than a tax increase on both American business and U.S. consumers. JIG recommends that, at a minimum, the effects of this change should be studied by economists in the government before moving ahead. There is no indication that any such analysis has been performed, or that CBP sought the advice of the Treasury Department, the ITC, the GAO, the Council of Economic Advisors, or other entities before making its proposal.

In conclusion, the proposed change by CBP introduces added costs for U.S. businesses and consumers alike, and attempts to reverse more than 20 years of legal precedent in order to comply with a non-binding commentary. For these reasons, JIG opposes the proposal and asks CBP to withdraw it immediately.

Best regards,

Mary K. Alexander

Mary Alexander, Chairwoman
Joint Industry Group