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1700 N. Moore Street, Suite 2250, Arlington, VA 22209
Phone: (703) 841-2300 Fax: (703) 841-1184
Email: info@rila.org Web: www.rila.org

September 16, 2009

The Honorable Gary Locke
Secretary of Commerce
Attn: Alex Villanueva
Import Administration
APO/Dockets Unit, Room 1870
U.S. Department of Commerce
14th Street & Constitution Avenue, NW
Washington, DC 20230

Re: Petroleum Wax Candles from the People's Republic of China: Request for Comments on the Scope of the Antidumping Duty Order and the Impact on Scope Determinations

Dear Secretary Locke:

The Retail Industry Leaders Association (RILA) submits these comments in response to the Commerce Department's request for input from interested parties on the best method for the Department to analyze whether novelty candles fall within the scope of the antidumping duty order on petroleum wax candles from the People's Republic of China.[1] See *Petroleum Wax Candles from the People's Republic of China: Request for Comments on the Scope of the Antidumping Duty Order and the Impact on Scope Determinations*, 74 Fed. Reg. 42230 (Aug. 21, 2009) ("Request for Comments").

[1] See *Antidumping Duty Order: Petroleum Wax Candles from the People's Republic of China, 51 Fed. Reg.* 30686 (August 28, 1986) ("Order").

RILA members include the largest and fastest growing companies in the retail industry – retailers, product manufacturers, and service suppliers – which together account for more than $1.5 trillion in annual sales. RILA members provide millions of jobs and operate more than 100,000 stores, manufacturing facilities and distribution centers domestically and abroad. RILA's mission is to promote consumer choice and economic freedom through public policy and industry operational excellence. RILA's members include importers of petroleum wax candles from China and they have for many years relied on the Department's scope rulings, including the novelty candles exception, when making purchasing decisions.

RILA supports the Department's desire to improve clarity and predictability in its interpretation of the Order. In doing so, the Department must be guided by two fundamental principles: (1) Commerce has the authority to interpret and clarify the scope of an order but does not have the authority to alter the scope of an order;[2] and (2) the importance of finality prevents Commerce from reversing prior scope rulings for reasons of policy rather than error.[3]

With respect to the first principle, it is now well settled that the scope of the Order does not include "novelty candles". The "novelty candle" exclusion is described in a 1987 Customs notice that states:

> The Department of Commerce has determined that certain novelty candles, such as Christmas novelty candles, are not within the scope of the antidumping duty order on petroleum–wax candles from the People's Republic of China (PRC). Christmas novelty candles are candles specially designed for use only in connection with the Christmas holiday season. This use is clearly indicated by Christmas scenes and symbols depicted in

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[2] See *Wheatland Tube Co. v. United States*, 161 F.3d 1365,1370 (Fed. Cir. 1998).

[3] See *Wheatland Tubs Co. v. United States*, 973 F. Supp. 149, 158 (Ct. Int'l Trade 1997).

> the candle design. Other novelty candles not within the scope of the order include *candles having scenes or symbols of other occasions (e.g.,religious holidays or special events*) depicted in their designs, *figurine candles,* and *candles shaped in the form of identifiable objects (e.g., animals or numerals*).[4]

Commerce based the novelty candle exclusion on the language of the scope, which explicitly notes that the subject candles "are sold in the following shapes: tapers, spirals, and straight–sided dinner candles; rounds, columns, pillars; votives; and various wax–filled containers."[5] Commerce also relied on the International Trade Commission's like product definition, which explicitly excluded "birthday, birthday numeral and figurine type candles." See *Candles from the People's Republic of China*, Inv. No. 731–TA–282 (Final), USITC Pub. 1888 (August 1986) at 4, note 5, and A–2.

Accordingly, as noted in the Request for Comments, over the life of the Order Commerce has, in accordance with 19 C.F.R. § 351.225(k)(1), interpreted to the Order to exclude "certain novelty candles (*i.e.*, candles in the shape of an identifiable object or with holiday–specific design both being discernable from multiple angles).[6] In sum, the novelty candle exception represents a legally sound interpretation of the Order. See, *San Francisco Candle Company, Inc. v. United States*, 265 F. Supp.2d 1374 (Ct. Int'l Trade 2003); *Russ Berrie & Co. v. United States*, 57 F. Supp. 2d 1184 (Ct. Int'l Trade 1999) ("*Russ Berrie*").

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[4] See Request for Comments, quoting Customs Information Exchange, CIE N-212/85, 09/21/87("Customs Notice").

[5] See Request for Comments, 74 Fed. Reg. at 42230, citing Antidumping Petition on Behalf of the National Candle Association, September 4, 1985, at 7.

[6] See Request for Comments, 74 Fed. Reg. at 42230.

With that historical background, we now consider the two options specifically set forth in the Request for Comments. We begin with Option B, which states:

> The Department would consider all candle shapes, including novelty candles, to be within the scope of the Order including those not in the shapes listed in the scope of the Order, as that is not an exhaustive list of shapes, but simply an illustrative list of common candle shapes.[7]

Option B would make shape entirely irrelevant and therefore impermissibly expand the scope of the Order. As Commerce stated in the 2001 JCPenney Ruling,[8] the first sentence of the scope language refers generally to "petroleum wax candles made from petroleum wax and having fiber or paper-cored wicks."[9] The language does not end there, however. The second sentence further states that the covered candles "are sold in the following shapes: tapers, spirals, and straight–sided dinner candles; rounds, columns, pillars; votives; and various wax–filled containers." Thus, the subject candles are described not only by their wax content and wick, but also by their shape. In interpreting the scope Commerce cannot read the first sentence in isolation and must give meaning to all of the scope language. In particular, the list of covered shapes is not qualified in any way by terms such as "including" or "such as" or "normally" or "various" that would indicate that the list of shapes is merely illustrative. Therefore, as Commerce stated in the *Russ Berrie* ruling, "the scope of

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[7] See Request for Comments, 74 Fed. Reg. at 42231.

[8] See Final Scope Ruling; Antidumping Duty Order on Petroleum Wax Candles From the People's Republic of China (A-570-504); JCPenney Purchasing Corporation (Nov. 2001) ("JCPenney Ruling").

[9] See JCPenney Ruling at 4, footnote 1.

the order is specifically limited to certain shapes for those candles not in containers . . . "; a position the court has noted with approval.[10]

The JCPenney ruling may have changed the Department's analytical approach, but it did not alter the agency's conclusion, consistent with the language of the scope, that not all candle shapes are covered by the scope of the Order. In fact, the JCPenney ruling confirmed that candles possessing the characteristics set out in the 1987 Customs Notice, which includes "identifiable shapes", are not within the scope of the Order[11] and Commerce has continued to rule accordingly. [12] Thus, the JCPenney ruling cannot be read to suggest that shape is not a factor limiting the scope of the Order. Rather, it is more accurately read as interpreting the general terms "tapers, spirals, and straight–sided dinner candles; rounds, columns, pillars; votives" broadly to encompass all candle shapes other than those in the form of identifiable objects.

Administrative burden does not provide Commerce with the authority to expand the scope of the Order; therefore Option B should be rejected. Consistent with the language in the petition, the ITC's original determination and prior scope rulings, Commerce should continue to interpret the scope of the Order as excluding candles in the shape of identifiable objects. The issue of clarity and predictability is

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[10] See *Russ Berrie*, 57 F.Supp.2d at 1190. The Court, like Commerce, contrasted the unqualified list of candles shapes with use of the term "various" in referring to wax filled containers".

[11] See JCPenney Ruling at 4-5.

[12] See Request for Comments, 74 Fed. Reg. at 42231; see also, *e.g.*, Final Scope Ruling: Antidumping Duty Order on Petroleum Wax Candles from the People's Republic of China (A-570-504); Atico International, Inc. (2002) (angel bear candle is an identifiable object not within the scope of the Order).

more properly addressed by establishing guidelines and objective criteria to define what constitutes an identifiable shape.

We turn now to Option A, which states:

> The Department would consider all candle shapes identified in the scope of the Order, (i.e., tapers, spirals, and straight-sided dinner candles; rounds, columns, pillars, votives; and various wax-filled containers) to be within the scope of the Order, regardless of etchings, prints, moldings or other artistic or decorative enhancements including any holiday-related art. All other candle shapes would be considered outside the scope of the Order.[13]

Option A would continue to recognize that the scope does not cover candles in the shape of identifiable objects. Under this approach, however, Commerce would entirely eliminate the holiday/special occasion exclusion, an interpretation described in the Customs Notice, applied by Commerce for the past two decades and relied upon by purchasers and importers. Such an expansion of the scope is neither permissible nor necessary to address Commerce's concerns about administrative burden.

The court has stated that the "holiday novelty exclusion is defined narrowly. [citations omitted]. Decorative images must be specific to the holiday; generic and seasonal designs are not grounds for exclusion."[14] Thus, much of the debate over what is or is not a holiday candle centers on what symbols or objects are specific to a holiday and how obvious those symbols or objects must be on the candle in question. We would therefore urge the Department to modify Option A to preserve the holiday novelty exclusion, consistent with the court's ruling. Specifically, the

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[13] See Request for Comments, 74 Fed. Reg. at 42231.

[14] See *San Francisco Candle Company v. United States*, 206 F.Supp.2d 1304, 1310 (Ct. Int'l Trade 2002).

Department could draw on prior rulings, and input from interested parties, to establish objective criteria, such as a list of symbols and objects that are specific to a holiday (*e.g.*, Christmas tree, menorah, holly with berries),[15] and numerical standards for what portion of the candle surface must be covered by such symbols (*e.g.*, 50 percent). Candles that meet those objective criteria would be outside the scope of the Order. Option A modified to include objective criteria for the holiday candles exclusion should reduce the need for individual scope rulings and simplify decision-making when rulings are requested.

With respect to the principle of finality, as noted in the Request for Comments, the Department has issued hundreds of rulings on the scope of the Order. As discussed above, those rulings are legally sound and companies have reasonably relied upon them in making business decisions. Thus, although steps to enhance clarity and predictability should not alter the scope of the Order, we wish to stress that Commerce should not apply any change in policy retroactively to bring within the scope of the Order articles which Commerce has already ruled are outside the scope. Final rulings remain binding.

Finally, while establishing clear guidance and objective criteria is a critical first step, confusion within, and inconsistency among, the ports is also a significant factor driving the need for scope ruling requests. We therefore believe it is also critical for Commerce to engage more closely with Customs to ensure that there is an accurate and consistent understanding of the scope of the Order and any guidelines established by the Department.

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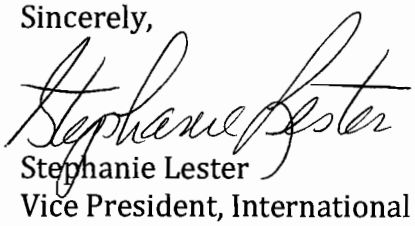
[15] Commerce could consider additions to the list upon request, followed by notice and comment.

We appreciate the opportunity to provide these comments and welcome the opportunity to work constructively with the Department to address this issue.

Sincerely,



Stephanie Lester
Vice President, International Trade