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August 4, 2014

Mr. Richard Di Nucci
Acting Assistant Commissioner
Office of International Trade
U.S. Customs and Border Protection
Washington, DC 20229

VIA EMAIL (richard.f.dinucci@cbp.dhs.gov)

RE: Comments in Response to the Draft Informed Compliance Publication "Bona Fide Sales and Sales for Export to the United States"

Dear Mr. Di Nucci:

On behalf of the American Apparel & Footwear Association (AAFA), I am writing to comment on the draft revisions to CBP's Informed Compliance Publication (ICP) relating to "Bona Fide Sales & Sales for Exportation to the United States," which addresses the First Sale rule.

Representing more than 1,000 world famous name brands, AAFA is the trusted public policy and political voice of the apparel and footwear industry, its management and shareholders, its four million U.S. workers, and its contribution of \$350 billion in annual U.S. retail sales.

The First Sale rule is very strongly supported by AAFA and its membership, which represents the largest concentration of users of this valuable program. Over the past 25 years, AAFA members have invested considerable time and resources in establishing, educating, and validating their supply chains on how to use the First Sale program. Trade relationships based around the First Sale rule now lay the foundation for many U.S. jobs in the apparel and footwear industries, and for valuation structures that ultimately benefit millions of U.S. consumers with affordable fashion. Further, the First Sale rule enjoys broad support among all three branches of government, and its use has been affirmed and reaffirmed over the past quarter century through court rulings, Administrative determinations, Customs rulings, and

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legislation. It is essential that the administration of the First Sale rule, including the ICP, continue to reflect its value to the U.S. economy and its considerable legal foundation.

Thank you for providing us this opportunity comment. We appreciate that you have created a collaborative process with key stakeholders to review the draft changes in the ICP so that the resulting document not undermine this program or dissuade companies from using it. We look forward to working with you in the coming weeks to resolve this matter quickly so there is not any further uncertainty or confusion surrounding the use of the First Sale rule.

Following are some initial comments:

First, we do not believe a change in the ICP is warranted. There have been no changes in the material circumstances governing the use of First Sale. Likewise, Congress has taken no action and the Courts have issued no order that would prompt a change in the ICP. While we understand there have been questions raised surrounding a handful of audits, we measure that small number of audits against the sheer volume of First Sale transactions that have occurred over the past two decades. Such a small number of problems hardly represents a sample that should prompt a change in practice to affect an entire industry. In fact, the small number suggests that no change should be contemplated at all.

Second, given the fact there have been no changes to the First Sale program, we believe that confusion over documentation requirements at the audit stage can be best addressed through training of the auditors over proper documentation requirements. Indeed, you suggested such a concern in your initial communication – as well as in several follow up conversations – to the trade on the draft ICP. We would further state that a pre-defined set of documents cannot be construed as a replacement for training since auditors will still have to learn how and when specific documents should be requested or whether they are even available. Perhaps we should focus our collective efforts on an audit curriculum.

Third, even if there is a change to the ICP, we strongly disagree that there should be a pre-set list of documents such as those found in the Appendix. Here we have several concerns:

Some of These Document Are Irrelevant or Not Available

In your email of July 9, you indicated this effort was “an attempt to establish the “ground rules” on documentation by creating an agreed upon list that reflects records that are normally kept in the ordinary course of business.” We respectfully disagree. Some of the documents identified are most likely unavailable to the majority of companies engaged in First Sale transactions and others are not necessary to substantiate a First Sale claim. Factory books and records, for example, are likely not available to the unrelated U.S. importer and are currently not used in First Sale validations because they have little relevance to verify the first sale transaction that cannot be attained by other less intrusive documents. Moreover, antitrust reasons

would prevent factories that service multiple customers from sharing their books since this could provide sensitive information to competitors. Foreign law prevents such disclosure in other cases.

A Pre-Set List Becomes A Floor for All Audits

While we understand you envision the Appendix as a list of documents that may be needed, we believe the Appendix will quickly create an expectation that all documents are needed for all First Sale scenarios. You would be, in effect, redefining “reasonable care” as requiring **all** these documents. Such an outcome is almost unavoidable as companies will migrate to the documentation requirements that appear to guarantee the most compliant outcome. If they know that all these documents may be requested in an audit, they will feel compelled to have them at the outset. Already companies are examining the ICP documents Appendix against the documents they use to support the First Sale supply chains they have employed (and validated) for years.

Additional Documentation Requirements Add Cost But No Benefit

The cost to add, generate, and store additional paperwork, even if those documents are never requested, cannot be underestimated. This cost magnifies if these documents begin to form the basis of other examinations or routine inquiries beyond audits. Such costs are especially painful given the fragile state of our economic recovery. We further note that imposing significant new paperwork burdens contravenes the purpose of a new US-supported global Trade Facilitation Agreement designed to reduce, not increase, transaction and border costs. Since one of the key goals of First Sale is for companies to improve their competitiveness by reducing costs, these additional paperwork expenses quickly erode the value of the program and undermine its utility.

Additional Documentation Requirements Contravene Paperwork Reduction Act

While we note the ICP is not a formal rule-making, the additional paperwork requirements that would be generated are being done in a manner that seems to avoid the Paperwork Reduction Act, which requires certain notices and estimates of the burden on the public before new paperwork requirements are issued. While this may be wholly unintentional, it does raise serious process concerns and questions that should be answered before any further steps are taken by CBP.

The Documentation Appendix Signals a Shift Away from Trusted Partner Approaches

We have applauded CBP in recent years for moving toward trusted partner programs such as the Importer Self-Assessment (ISA) program and the Customs Trade Partnership Against Terrorism (C-TPAT). More recently, the adoption of the Centers for Excellence and Expertise (CEE) deepens the partnership between CBP and compliant companies, enabling the agency to focus its resources on higher risk targets. Inside the First Sale

program itself, companies have spent years hiring third party firms and conducting periodic validations to build compliance into the DNA of their systems. Publishing the Appendix undermines these efforts since compliance will be judged primarily against a list of documents rather than against working systems and partnerships.

We appreciate that you are trying to “create clarity and consistency regarding the specific documents that might be asked for by auditors to substantiate a First Sale claim.” Unfortunately, the documentation requirements laid out in the draft ICP will greatly expand the regulatory burdens and costs associated with First Sale, thereby jeopardizing continued viability of this important program. It is with this in mind that we ask that the Appendix be eliminated.

Our hope is that we can work together to ensure any revisions to the ICP reflect a continued recognition that First Sale is a Court-approved, Congressionally-endorsed method of customs valuation that is fully supported by CBP.

Thank you for your attention to this urgent matter.

Sincerely,

A handwritten signature in blue ink that reads "Juanita D. Duggan". The signature is fluid and cursive, with a long horizontal stroke at the end.

Juanita D. Duggan
President & CEO