

United States International Trade Commission

**Certain Festive  
Articles:  
Recommendations for  
Modifying the  
Harmonized Tariff  
Schedule of the  
United States**

Investigation No. 1205-9

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# U.S. International Trade Commission

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# U.S. International Trade Commission

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## **Certain Festive Articles: Recommendations for Modifying the Harmonized Tariff Schedule of the United States**

Investigation No. 1205-9



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## **INTRODUCTION**

This report contains the recommendations of the U.S. International Trade Commission (Commission) to the President under section 1205 of the Omnibus Trade and Competitiveness Act of 1988 (the 1988 Act) (19 U.S.C. 3005) with respect to the tariff treatment of certain utilitarian articles with festive designs or motifs in the Harmonized Tariff Schedule of the United States (HTS).<sup>1</sup> The Commission initiated this investigation after receiving a letter from U.S. Customs and Border Protection (Customs) on July 1, 2010.

In addition to the Commission's recommendations, this report includes a summary of the information on which the Commission's recommendations are based and a copy of all written views submitted by interested Federal agencies and other interested parties. Appendix A to the report includes a copy of Customs' letter proposing certain HTS modifications and a copy of the Commission's notice announcing the investigation (which was published in the *Federal Register* on September 20, 2010). That notice also included the Commission's proposed recommendations, which for discussion purposes were the same as the modifications proposed by Customs in its letter of July 1, 2010. Appendix B contains pertinent HTS provisions and the Explanatory Note to HS heading 9505. Appendix C contains copies of Commission notices of December 2, 2010, and of March 15, 2011, which announced extensions of the date by which the Commission expected to report its recommendations to the President. Appendixes D through M contain copies of the written views submitted by interested Federal agencies and other interested parties during this investigation. Appendix N contains a copy of the full texts of sections 1205 and 1206 of the 1988 Act.

## **RECOMMENDATIONS AND PROBABLE ECONOMIC EFFECT FINDING**

The Commission recommends to the President that no modifications to the HTS be proclaimed in response to Customs' request. The Commission makes this recommendation for two principal reasons: (1) the proposed modifications are not necessary or appropriate to meet any of the objectives set forth in section 1205(a) of the 1988 Act and (2) even if they were, they would not meet the requirements of section 1205(d) of the 1988 Act in that they would not ensure substantial rate neutrality. A more detailed statement of the reasons for the Commission's recommendation is set forth later in this report.

Because it is not recommending a change to the HTS in this report, the Commission is not submitting the statement described in section 1205(c) of the 1988 Act that relates to the probable economic effect of each recommended change on any industry in the United States.

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<sup>1</sup> The 1988 Act, Public Law 100-418, approved the implementation of the HTS and repealed the former Tariff Schedules of the United States, effective as of January 1, 1989.

# **SUMMARY OF THE INFORMATION AND REASONS FOR THE RECOMMENDATIONS**

## **I. STATUTORY REQUIREMENTS**

The relevant statutory requirements relating to Commission recommendations are set out in section 1205 of the 1988 Act.<sup>2</sup> Section 1205(a) directs the Commission to keep the HTS under continuous review and periodically to recommend to the President such modifications in the HTS as the Commission considers necessary or appropriate (1) to conform the HTS with amendments to the Harmonized System (HS) Convention; (2) to promote the uniform application of the HS Convention and the Annex thereto; (3) to ensure that the HTS is kept up to date in light of changes in technology or patterns of trade; (4) to alleviate unnecessary administrative burdens; and (5) to make technical rectifications. Moreover, section 1205(d) states that the Commission may not recommend a modification unless (1) the modification is consistent with the HS Convention or any amendment thereto, is consistent with sound nomenclature principles, and ensures substantial rate neutrality; (2) any change to a rate of duty is consequent to, or necessitated by, nomenclature modifications that are recommended under section 1205; and (3) the modification does not alter existing conditions of competition for the affected U.S. industry, labor, or trade.

Section 1205(b) requires that the Commission, in formulating its recommendations, solicit and consider the views of interested Federal agencies and the public. It also requires that the Commission must give notice of its proposed recommendations and afford reasonable opportunity for interested parties to present their views in writing. Section 1205(c) requires that the Commission, in its report to the President, include its recommendations, a summary of the information on which they are based, the probable economic effect of each recommended change on any industry in the United States, a copy of all written views submitted by interested Federal agencies, and a copy or summary of views of all other interested parties.

Section 1206 describes the President's authority to take action after receiving Commission recommendations. Section 1206 also sets out the procedures the President must follow before proclaiming a modification.

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<sup>2</sup> The texts of sections 1205 (relating to the Commission's review and recommendations) and 1206 (relating to Presidential action) of the 1988 Act can be found in appendix N.



## II. BACKGROUND AND SUMMARY OF INFORMATION

### A. Introduction

At issue in this investigation is the tariff treatment for certain utilitarian articles with festive designs and/or motifs<sup>3</sup> and whether those articles should be dutiable at the rates applicable to articles with the same utilitarian function or be free of duty under HTS heading 9505 by virtue of their festive designs and/or motifs. Central to this issue is note 1(v) to chapter 95 of the HTS that the President proclaimed effective February 3, 2007, implementing a provision recommended by the World Customs Organization (WCO) in 2004.<sup>4</sup> Note 1(v) clarified that certain goods having a utilitarian function should be excluded from chapter 95 and instead should be classified in other tariff schedule chapters according to their constituent material. Also at issue is the consideration, if any, that should be given to the decision of the U.S. Court of Appeals for the Federal Circuit (“Federal Circuit”) in *Michael Simon Design, Inc. v. United States* (“*Michael Simon I*”),<sup>5</sup> issued in September 2007, seven months after proclamation of the new note. That decision addressed the appropriate classification in the HTS of certain utilitarian goods at the time of their entry in 2003, before the proclamation of new note 1(v). Customs asserts that *Michael Simon I* requires the changes in duty treatment it proposes.

### B. Customs’ proposed modifications

In its letter of July 1, 2010, Customs said that new note 1(v) to chapter 95 had the effect of increasing tariff rates on certain utilitarian articles with festive designs and/or motifs that the Federal Circuit held should receive duty-free treatment as festive articles under chapter 95.<sup>6</sup> To correct this situation, Customs proposed certain changes apparently intended to add the items on which the Federal Circuit ruled in *Michael Simon I* to those currently entitled to duty-free treatment under two subheadings of chapter 98.

Specifically, Customs proposed replacing two chapter 98 subheadings with new headings, and adding a U.S. note that would be applicable to one of the new headings. Proposed new heading 9817.95.01 would include articles now within existing subheading 9817.95.01 and the superior text thereto. Proposed new heading 9817.95.02 would replace subheading 9817.95.05 and would encompass utilitarian articles “incorporating a symbol and/or motif that is

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<sup>3</sup> Litigation discussed in this report focused mainly on textile apparel and other textile articles, but, in fact, the discussion and findings cover any utilitarian article with festive designs and/or motifs.

<sup>4</sup> WCO Document NG0094B1, 26 June 2004. Under Article 16 of the HS Convention, based on the WCO’s recommendation, note 1(v) to chapter 95 was to become effective for HS member countries as of January 1, 2007; the requirements of sections 1205 and 1206 of the 1988 Act required additional time for U.S. implementation. The Commission recommended that the President add note 1(v) to chapter 95 in order to conform the HTS to the HS Convention, as required under section 1205(a), after the WCO recommended the insertion of note 1(v) to chapter 95 in the HS Convention’s Annex in June 2004. See *Proposed Modifications to the Harmonized Tariff Schedule of the United States*, Investigation No. 1205-6 (Final), Publication 3851 (April 2006).

<sup>5</sup> *Michael Simon Design, Inc. v. United States*, 452 F. Supp. 2d 1316 (Ct. Int’l Trade 2006) (decided Aug. 24, 2006), *aff’d*, 501 F.3d 1303 (Fed. Cir. 2007) (decided Sept. 11, 2007).

<sup>6</sup> See Appendix A (Customs’ letter) at A-4.

closely associated with a festive occasion.” Articles for which duty-free entry could be claimed under the proposed new heading would also need to meet the terms of proposed new U.S. note 9 to subchapter XVII of chapter 98 of the HTS, which reads as follows:

Heading 9817.95.02 applies only to tableware, kitchenware (except baking pans, cookie cutters, cookie stamps and presses)<sup>7</sup> and toilet articles of chapter 39, 69 or 70; carpets and other textile floor coverings of chapter 57; apparel and accessories of chapter 61 or 62; and made-up textile articles of chapter 63.

Customs explained that its proposed modifications would ensure substantially rate-neutral, duty-free treatment to certain utilitarian articles with festive designs and/or motifs in accordance with the Federal Circuit’s decision in *Michael Simon I* and certain decisions cited in the court’s opinion, including *Park B. Smith, Ltd. v. United States* and *Midwest of Cannon Falls, Inc. v. United States*.<sup>8</sup> Customs also said that the proposed amendments would, when properly implemented, ensure that utilitarian or functional articles (except baking pans, cookie cutters, and cookie stamps and presses) with festive designs and/or motifs entered on or after February 3, 2007, would be classified in accordance with note 1(v) to chapter 95.<sup>9</sup>

### **C. Tariff classification of festive articles**

The Customs request pertains to a range of utilitarian articles with festive designs or motifs. Over time, an extensive body of rulings and judicial decisions has dealt with the classification of these goods, focusing on their eligibility for classification in heading 9505.

Since January 1, 1989, heading 9505 has covered “festive, carnival or other entertainment articles, including magic tricks and practical joke articles; parts and accessories thereof.” The heading has six tariff rate lines for “articles for Christmas festivities and parts and accessories thereof” and three tariff rate lines that covered other goods within the scope of the heading. Since January 1, 1995, the general duty rate for all nine rate lines has been free.<sup>10</sup>

In classifying goods of a type covered by Customs’ request, Customs considers whether a particular item should be covered by heading 9505 or by other tariff headings that might more specifically describe the goods (e.g., “festive article” versus “sweater”). Legal notes in several

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<sup>7</sup> According to Customs’ letter (Appendix A, footnote 3, p. 4), “Pending litigation in the Court of International Trade, Customs’ position is that the utilitarian or functional articles described as baking pans, cookie cutters, cookie stamps and presses, that are used in preparation for a festive occasion and not used or displayed during a festive occasion, are not festive articles within the scope of heading 9505.” Information obtained from Customs officials subsequently indicated that the litigation was settled with a stipulation between the parties that these goods are not “festive articles” for tariff purposes.

<sup>8</sup> *Park B. Smith, Ltd. v. United States*, 347 F.3d 922 (Fed. Cir. 2003); *Midwest of Cannon Falls, Inc. v. United States*, 122 F.3d 1423 (Fed. Cir. 1997).

<sup>9</sup> See Appendix A (Customs’ letter) at A-5.

<sup>10</sup> See Presidential Proclamation 6763 of Dec. 23, 1994 (60 Fed. Reg. 1007, 1419). See appendix B for a copy of heading 9505, its subordinate rate lines, and note 1 to chapter 95.

HTS chapters relate to the decision of whether goods are classifiable in heading 9505 or in other HTS headings.<sup>11</sup>

As indicated in the following sections, the change to note 1 to chapter 95 that was implemented for the United States on February 3, 2007, affected the scope of the heading by excluding items with a utilitarian function. The note made it clear that the types of goods covered by Customs' request that were imported on and after that date were not to be classified in heading 9505, but in other chapters according to their constituent material.

#### **D. WCO recommendation to clarify the scope of heading 9505**

In 2004, the WCO recommended a change to the HS to provide that certain categories of utilitarian goods are excluded from classification in chapter 95, and thus from heading 9505, which covers, *inter alia*, festive articles. The amendment added subparagraph (v) to note 1 to chapter 95, excluding the following goods from the chapter:

- (v) Tableware, kitchenware, toilet articles, carpets and other textile floor coverings, apparel, bed linen, table linen, toilet linen, kitchen linen and similar articles having a utilitarian function (classified according to their constituent material).

Under Article 16 of the HS Convention, note 1(v) would become effective as of January 1, 2007. The note formally provides for the classification by WCO members of utilitarian articles with festive designs and/or motifs, which have been the subject of numerous Customs rulings and judicial decisions in the United States.

#### **E. U.S. actions following WCO recommendation**

In response to the WCO's 2004 recommendation, in April 2006, the Commission recommended the insertion of new subparagraph (v) in note 1 to chapter 95 of the HTS, containing the language of the WCO recommendation.<sup>12</sup> Following discussions with Customs and the Office of the United States Trade Representative, the Commission also recommended the creation of provisions in subchapter XVII to chapter 98 of the HTS to reflect, in the form requested by Customs, the judicial decisions and Customs' practice from the prior 10 years that provided duty-free treatment to certain utilitarian festive articles. The Commission recommended the chapter 98 provisions as the means to ensure substantial rate neutrality, as

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<sup>11</sup> For example, note 1(c) to chapter 95 excludes from that chapter "sports clothing or fancy dress, of textiles, of chapter 61 or 62"; note 1(t) to section XI of the HTS (covering textile and apparel articles) excludes from that section "articles of chapter 95 (for example, toys, games, sports requisites and nets)"; and note 2(k) to chapter 69 (ceramic articles) excludes from chapter 69 "articles of chapter 95 (for example, toys, games and sports equipment)."

<sup>12</sup> See *Proposed Modifications to the Harmonized Tariff Schedule of the United States*, Investigation No. 1205-6 (Final), Publication 3851 (April 2006).

required by section 1205(d)(1)(C). Effective on February 3, 2007, the President proclaimed new subparagraph (v) to note 1 to chapter 95 and the recommended chapter 98 tariff lines.<sup>13</sup>

## **F. Views of Interested Parties**

In response to the Commission's request for public comments, 10 interested parties submitted written views addressing the provisions requested by Customs:<sup>14</sup>

Target and Michael Simon Design, Inc.  
Fruit of the Loom  
The Hosiery Association  
Drinker Biddle & Reath LLP  
The United States Association of Importers of Textiles and Apparel  
Gildan Activewear  
BGE Ltd.  
Specialty Graphic Imaging Association  
American Manufacturing Trade Action Coalition, National Council of Textile Organizations, and National Textile Association  
Committee for the Implementation of Textile Agreements, U.S. Department of Commerce

### *1. Proposed U.S. note*

The following parties expressed views concerning the new U.S. note requested by Customs.

**BGE Ltd.** supported the proposed U.S. note, but expressed the view that jewelry articles classifiable in HTS chapter 71 or elsewhere in the HTS should be included in the enumeration of eligible products.<sup>15</sup>

**Target and Michael Simon** supported all of the requested provisions as proposed by Customs and detailed by the Commission in its *Federal Register* notice.<sup>16</sup>

**Drinker Biddle & Reath (DBR) and the United States Association of Importers of Textiles and Apparel (USA-ITA)** supported Customs' request but did not comment on the language of the proposed U.S. note.<sup>17</sup>

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<sup>13</sup> Presidential Proclamation 8097 of Dec. 27, 2006 (72 Fed. Reg. 453); the implementing annexes are set forth in *Modifications to the Harmonized Tariff Schedule of the United States Under Section 1206 of the Omnibus Trade and Competitiveness Act of 1988*, USITC Publication 3898 (Dec. 2006), at 144, 146.

<sup>14</sup> Copies of the written submissions are set out in their entirety in Appendixes D through M.

<sup>15</sup> Appendix H.

<sup>16</sup> Appendix D.

<sup>17</sup> Appendixes J and G.

The **American Manufacturing Trade Action Coalition and others (their submission is referred to hereafter as the joint submission)** indicated the domestic textile industry’s opposition to the courts’ interpretation of what should be classified as “festive articles” and expressed the view that “textile articles with a festive design are still ordinary textile articles that should be subject to the applicable duties.” Citing the enforcement problems arising from the courts’ interpretation (and thus from the Customs proposal), the joint submission further stated that, “Apparel and home furnishing products such as shirts and rugs are certainly used on other occasions and therefore are not properly classified as festive articles.” The joint submission did not suggest specific modifications to the requested note language.<sup>18</sup>

**Fruit of the Loom (FOTL)** opposed the request, saying that it would alter the conditions of competition for the domestic industry, harm the national economic interest, and contravene WCO practice. It cited the business decisions made by the domestic industry that it says would be undercut by the provisions and the undermining of the negotiated tariff advantages accorded to free trade agreement partners. FOTL did not suggest specific modifications to the requested note language.<sup>19</sup>

**The Hosiery Association (THA)** asserted that the domestic socks and hosiery industry would be harmed if its products are included and asked for several changes in the requested HTS modifications. THA sought the exclusion of socks and hosiery from the proposed changes, or at a minimum that the “festive adornment” should be the only design or motif on the products and occupy a significant portion (30 percent or more) of the surface of each article. It also sought annual quantitative limitations on imports, by importer. Although it sought a clear definition of the term “festive,” THA did not suggest such a definition. No specific modifications to the requested legal note were presented.<sup>20</sup>

**Gildan Activewear (Gildan)** commented that the requested modifications would be damaging to domestic interests, with a significant financial impact in terms of lost revenue and would present enforcement burdens. It suggested a variety of changes in general terms, similar to those sought by THA, but did not offer specific changes to the proposed U.S. note.<sup>21</sup>

The **Specialty Graphic Imaging Association (SGIA)** expressed opposition to the inclusion of decorated garments in the proposal, stating that it would cause harm to the domestic industry engaging in “finishing operations such as screen printing and embroidery.”<sup>22</sup>

**Committee for the Implementation of Textile Agreements (CITA), U.S. Department of Commerce** supported CBP’s proposed language for a new U.S. note in chapter 98.<sup>23</sup>

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<sup>18</sup> Appendix I.

<sup>19</sup> Appendix E.

<sup>20</sup> Appendix F.

<sup>21</sup> Appendix K.

<sup>22</sup> Appendix L.

<sup>23</sup> Appendix M.

## 2. *Proposed modifications to tariff rate lines*

The Commission received written views from several interested parties concerning Customs' proposed tariff lines in chapter 98, and all such views were directed at the proposed new heading 9817.95.02. No comments concerning the modifications to existing subheading 9817.95.01 or the deletion of subheading 9817.95.05 were received. The comments may be summarized as follows:

**USA-ITA** supported the new tariff line but suggested that new heading 9817.95.02 be modified to include examples of several less well-known holidays, in order to indicate that the scope of the provision is not limited in any meaningful way.<sup>24</sup>

**BGE Ltd.** generally supported the proposed changes, but with modifications. BGE argued that, on the basis of court decisions, the interpretation of the new provisions should clearly include all holidays and private celebratory events, such as weddings and graduations. BGE also said that the terms "closely associated" and "used or displayed principally during that festive occasion and not typically at any other time" are vague. BGE expressly sought the addition of "notes" outlining a wide range of "holidays" and "celebratory events."<sup>25</sup>

**DBR** generally supported the proposed subheading. However, it said first that the texts should clearly indicate that the scope of the provisions is not limited to civic and religious holidays, but includes private festive celebrations such as birthdays and weddings. Second, DBR suggested that the text should be better aligned with the text of the WCO Explanatory Note for heading 9505. DBR pointed to the wide use of enumerations in the HTS starting with the phrase "for example" as arguing against the proposed alternative language suggested by the Commission in its notice of institution.<sup>26</sup>

**Target and Michael Simon** supported the proposed new tariff lines and favored the proposed alternative language set forth in the notice of institution of this investigation.<sup>27</sup>

**FOTL** opposed the creation of new heading 9817.95.02, saying that the changes would alter the conditions of competition in the textile industry and harm U.S. economic interests. FOTL argued that the new provisions are likely to present administrative problems and open up additional litigation. It also argued that the creation of the new provisions could be considered to be inconsistent with the United States' obligations under the International Convention on the Harmonized Commodity Description and Coding System.<sup>28</sup>

**Gildan** opposed the creation of new heading 9817.95.02, because the heading would alter the existing conditions of competition to the detriment of the U.S. economy. Gildan also

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<sup>24</sup> Appendix G.

<sup>25</sup> Appendix H.

<sup>26</sup> Appendix J.

<sup>27</sup> Appendix D.

<sup>28</sup> Appendix E.

argued that the changes would effectively result in tariff rate reductions for some products and that the changes would create additional enforcement difficulties for Customs. If the changes are implemented, Gildan requested that the phrase “or similar festive occasion” be struck from the proposed subheading and be replaced by a definitive list of specific festive occasions.<sup>29</sup>

**THA** opposed the proposed new heading. THA pointed out that the current provisions do not include socks or hosiery and that the changes would result in a change in the competitive position of the industry encouraging the transfer of manufacturing from the Western Hemisphere to Asia. THA commented that the descriptive language should not allow overly broad interpretation and that measures should be considered to limit the use of any new provisions. THA asked that the term “festive” be clearly defined and that the phrase “or similar occasions” be struck from the proposed text.<sup>30</sup>

The **joint submission** opposed the proposed new subheading and noted the competitive pressures on the domestic textile industry. Although the joint submission recognized that the proposed changes are the result of the interpretation of the term “festive articles” by the courts, it disagreed with a broad interpretation of the term and requested that measures be taken to prevent articles not covered by existing court cases from using the new provisions.<sup>31</sup>

**SGIA** opposed the proposed new subheading. If the duty-free provisions are to include garments, SGIA recommended that their applicability be narrowly limited by a clear definition of the term “festive” and clear identification of the eligible festive occasions.<sup>32</sup>

**Committee for the Implementation of Textile Agreements (CITA), U.S. Department of Commerce** supported CBP’s proposed changes to the two tariff lines in question but urged that CBP closely examine goods entering under these provisions to assure that they are festive articles. CITA stated further that, if textile and apparel products entered under these tariff lines that were not festive articles, there would be a negative impact on the U.S. textile and apparel industry.<sup>33</sup>

### III. COMMISSION RECOMMENDATIONS

The Commission’s proposed recommendations, published in the *Federal Register* on September 20, 2010, would have adopted Customs’ proposed modifications to the HTS, as summarized above.<sup>34</sup> After considering the statutory requirements, the comments submitted by interested parties and agencies, and other relevant information, and upon further consideration of Customs’ proposed modifications, however, the Commission recommends that the President

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<sup>29</sup> Appendix K.

<sup>30</sup> Appendix F.

<sup>31</sup> Appendix I.

<sup>32</sup> Appendix L.

<sup>33</sup> Appendix M.

<sup>34</sup> 75 Fed. Reg. 57293, 57294-95.

proclaim no modifications to the HTS in response to the Customs letter. The Commission has concluded that the modifications proposed by Customs are not necessary or appropriate to meet the objectives set out in section 1205(a) of the 1988 Act and, further, that the proposed modifications do not meet the requirements of section 1205(d) of the 1988 Act because they would violate the substantial rate neutrality requirement. The Commission also notes evidence presented to it that the proposed modifications would alter existing conditions of competition for the affected U.S. industry, labor, or trade, which would also make the modifications contrary to section 1205(d).

**A. Modifications not “necessary or appropriate”**

As indicated above, section 1205(a) of the 1988 Act directs the Commission to recommend to the President such modifications to the HTS as it considers necessary or appropriate to meet one or more of five stated objectives: (1) to conform the HTS with amendments made to the HS Convention; (2) to promote the uniform application of the HS Convention and particularly the Annex thereto; (3) to ensure that the HTS is kept up to date in light of changes in technology or in patterns of international trade; (4) to alleviate unnecessary administrative burdens; and (5) to make technical rectifications.

In its letter of July 1, 2010, Customs did not claim that the modifications it was proposing were necessary or appropriate to meet any of the objectives in section 1205(a), and in fact Customs did not even refer to section 1205(a) in its letter. Instead, Customs claimed that its proposed modifications were needed “to ensure substantially rate neutral duty-free treatment to certain utilitarian articles with festive designs and/or motifs in accordance with the recent judicial decision of *Michael Simon Design, Inc. v. United States*.”<sup>35</sup>

Based on its review, the Commission concludes that the modifications proposed by Customs do not meet any of the five objectives set out in section 1205(a). In the Commission’s view, the HTS already conforms to the HS Convention, in that the note recommended by the WCO was reflected in the HTS as of February 3, 2007. Further, the requested modifications would not promote the uniform application of the Convention, because they would deal only with domestic duty treatment for the goods concerned and not their classification. Likewise, the proposed changes are not intended to update the HTS for new technology or changing patterns of trade, nor would they alleviate administrative burdens (given that rulings on the eligibility of goods for the new provisions would likely ensue and that many terms are not defined) or constitute technical rectifications. As a result, the Commission finds that the modifications proposed by Customs are not necessary or appropriate to meet the objectives of section 1205(a) and accordingly do not provide a legal basis for the Commission to recommend modifications to the HTS.

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<sup>35</sup> See Appendix A (Customs’ letter) at A-1.



## B. Substantial Rate Neutrality

As stated in the “statutory requirements” section above, the Commission may not recommend any modification to the HTS unless the modification ensures substantial rate neutrality.<sup>36</sup> In its letter, Customs asserts that its proposed modifications to the HTS are necessary to ensure substantial rate neutrality by according duty-free treatment to certain utilitarian articles with festive designs and/or motifs in accordance with the Federal Circuit’s decision in *Michael Simon I*.<sup>37</sup> The Commission disagrees and finds that it is the proposed modifications themselves that would not be rate neutral.

The Commission analyzes the consistency of Customs’ proposed modifications to the HTS based on the HTS as it exists today, including note 1(v) to chapter 95, and not based on the Federal Circuit’s decision in *Michael Simon I*, which was predicated on the HTS as it existed in 2003. Note 1(v) to chapter 95 expressly precludes utilitarian articles with festive designs and/or motifs from receiving duty-free treatment as festive articles under chapter 95 and provides that such articles should instead to be classified according to their constituent material. Consequently, in most cases, utilitarian articles with festive designs and/or motifs are dutiable under the tariff headings corresponding to the utilitarian articles in question.<sup>38</sup> Customs’ proposed modifications to the HTS would accord duty-free treatment to such utilitarian articles with festive designs and/or motifs. Because Customs’ proposed modifications would eliminate the tariff rates that are currently applicable to utilitarian articles with festive designs and/or motifs, the Commission finds that the proposed modifications would violate the substantial rate neutrality requirement. The Commission’s recommendation that the President not proclaim Customs’ proposed modifications therefore ensures substantial rate neutrality in accordance with section 1205(d)(1)(C) of the 1988 Act.<sup>39</sup>

*Michael Simon I* involved sweaters emblazoned with festive designs imported into the United States in July 2003 under the HTS as it then existed. When Customs declined to classify the sweaters as festive articles eligible for duty-free treatment under chapter 95 on grounds that utilitarian articles like sweaters are excluded from the chapter, the importers appealed. In a decision issued on September 11, 2007, the Federal Circuit held that “utilitarian goods are not excluded from classification as festive articles” under heading 9505 based either on “the tariff heading language alone” or when the heading is “construed in light of the section and chapter notes, which are binding.”<sup>40</sup>

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<sup>36</sup> Section 1205(d)(1)(C) of the 1988 Act; 19 U.S.C. § 3005(d)(1)(C).

<sup>37</sup> See Appendix A (Customs’ letter) at A-1.

<sup>38</sup> For example, in its submission of October 21, 2010, the USA-ITA commented that “[a]t present, utilitarian articles (including apparel and accessories) classified in Chapter 61 or 62 of the HTS as well as made-up textile articles classified in Chapter 63 are not eligible for classification as festive articles in Chapter 95.” Appendix G at G-1. According to the comments submitted by Gildan on October 22, 2010, the effective ad valorem duty rates applicable to textile and apparel articles entered under chapters 61, 62, and 63 of the HTS, were 13.0 percent, 12.2 percent, and 6.9 percent ad valorem, respectively, in 2009. Appendix K at K-4 (citing U.S. International Trade Commission data).

<sup>39</sup> 19 U.S.C. § 3005(d)(1)(C).

<sup>40</sup> *Michael Simon I*, 501 F.3d at 1306-07 (decided Sept. 11, 2007).

Effective February 3, 2007, the President proclaimed subparagraph (v) to note 1 of chapter 95.<sup>41</sup> New note 1(v) clarifies that chapter 95 “excludes articles that contain a festive design, decoration, emblem or motif and have a utilitarian function, *e.g.*, tableware, kitchenware, toilet articles, carpets and other textile floor coverings, apparel, bed linen, table linen, toilet linen, kitchen linen and similar articles having a utilitarian function (classified according to their constituent material).” In other words, note 1(v) clarifies that utilitarian articles featuring a festive design are not to be classified as festive articles under chapter 95, but rather under the appropriate tariff heading according to the article’s constituent material.<sup>42</sup>

Because the Federal Circuit decision in *Michael Simon I* was expressly predicated on chapter 95 as it existed in 2003, the Commission does not view that decision as dispositive of its analysis of the HTS as it exists today, including note 1(v) to chapter 95. Indeed, the Court itself recognized that “[c]hapter 95’s notes have been amended to expressly exclude utilitarian items” and that its decision was “concerned with the tariff schedule as it existed at liquidation,” in July 2003.<sup>43</sup> Although the Court found that chapter 95, as it existed in 2003, did not exclude utilitarian goods from classification as festive articles, the Court did not consider note 1(v) to chapter 95, which expressly excluded utilitarian goods from classification as festive articles as of February 3, 2007.<sup>44</sup>

In sum, the Commission finds that Customs’ proposed modifications would not preserve substantial rate neutrality, because they would eliminate duties currently applicable to certain utilitarian articles with festive designs and/or motifs.

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<sup>41</sup> Presidential Proclamation 8097 of Dec. 27, 2006 (72 Fed. Reg. 453).

<sup>42</sup> WCO Document NG0094B1, dated 26 June 2004. Under Article 16 of the HS Convention, note 1(v) would become effective as of January 1, 2007. The Commission had recommended that the President add note 1(v) to chapter 95 in order to conform the HTS to the HS Convention, as required under section 1205(a), after the WCO recommended the insertion of note 1(v) to chapter 95 in the HS Convention’s Annex in June 2004. See *Proposed Modifications to the Harmonized Tariff Schedule of the United States*, Investigation No. 1205-6 (Final), Publication 3851 (April 2006).

<sup>43</sup> *Michael Simon I*, 501 F.3d 1303 (decided Sept. 11, 2007).

<sup>44</sup> The rate neutrality of the Commission’s April 2006 recommendations or the President’s 2007 proclamation is not relevant to whether the current proposed modifications comply with the statute’s rate neutrality requirement. Nevertheless, the 2006 recommendations complied with the substantial rate neutrality provision. As of April 2006, no court decision had been issued in *Michael Simon I*. In light of the court decisions that had been issued up to that time, including *Park B. Smith* and *Midwest of Cannon Falls*, the Commission recommended the addition of special classification provisions to subchapter XVII of chapter 98 to ensure that the recommended addition of note 1(v) to chapter 95 did not change the tariff treatment of utilitarian articles with festive designs and/or motifs mandated by those court decisions.

Moreover, in a case challenging the Commission’s recommendations and the President’s actions based on them, the Federal Circuit held, in relevant part, that even if the Commission’s recommendation had been inconsistent with the rate neutrality requirement, the President had the discretion under the statute to implement the recommendation, and neither the Commission’s recommendation nor the President’s proclamation was reviewable by the courts. See *Michael Simon II*, 609 F.3d at 1338, 1340, 1342-43.

### **C. Effect on Existing Conditions of Competition for the Affected U.S. Industry, Labor, or Trade**

The Commission also may not recommend any modifications to the HTS that alter existing conditions of competition for the affected United States industry, labor, or trade.<sup>45</sup> In response to the notice of investigation, the Commission received comments from five interested parties—Fruit of the Loom, the Hosiery Association, the American Manufacturing Trade Action Coalition and others, Gildan Activewear, and the Specialty Graphic Imaging Association—arguing that the proposed recommendations, if implemented, would have a significant adverse effect on the conditions of competition confronting the affected U.S. industry. Having already found that the proposed modification would not meet the substantial rate neutrality requirement, the Commission does not find that it is necessary to make a finding on this issue.

Nevertheless, the Commission observes that the comments provided by the five interested parties (which are summarized in Part II above and reproduced in appendixes to this report) offer support for the argument that the HTS modifications proposed by Customs would alter existing conditions of competition for the affected U.S. industry, labor, or trade in several respects. Further support can be found in information relating to the rates of duty on imports of festive-theme textile and apparel articles that would be eliminated—rates reportedly as high as 32 percent ad valorem for certain manmade fiber apparel articles.<sup>46</sup> The Commission also notes that none of the interested parties that filed comments in support of the proposed recommendations argued that they would not alter existing conditions of competition.<sup>47</sup>

### **D. Conclusion**

For the reasons set forth above, the Commission recommends to the President that no modifications to the HTS be proclaimed in response to Customs' request.

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<sup>45</sup> Section 1205(d)(3) of the 1988 Act; 19 U.S.C. § 3005(d)(3).

<sup>46</sup> See Gildan's Comments, Appendix K at K-4.

<sup>47</sup> See Comments of Target Corporation and Michael Simon Design, Inc., filed Oct. 8, 2010, Appendix D; USA-ITA's Comments, Appendix G; Comments of BGE Ltd., filed Oct. 22, 2010, Appendix H; Comments of Drinker Biddle & Reath LLP, filed Oct. 22, 2010, Appendix J; and comments of the U.S. Department of Commerce, filed Nov. 2010, Appendix M.

**APPENDIX A**

**REQUEST LETTER FROM U.S. CUSTOMS AND  
BORDER PROTECTION**

***FEDERAL REGISTER NOTICE INSTITUTING THE  
INVESTIGATION***



799 9th Street NW  
Washington, DC 20229

DOCKET NUMBER
2745
Office of the Secretary Int'l Trade Commission



**U.S. Customs and  
Border Protection**

CLA-2: OT:RR:CTF:TCM  
H032864 JPJ

**JUL 01 2010**

Marilyn R. Abbott, Secretary  
U.S. International Trade Commission  
500 E Street, SW  
Washington, D.C. 20436

RE: Proposed Modifications to the Harmonized Tariff Schedule of the United States (HTSUS) pursuant to Section 1205 of the Omnibus Trade and Competitiveness Act of 1988; Special classification provisions in Subchapter XVII of Chapter 98 of the HTSUS

Dear Secretary Abbott:

Pursuant to Section 1205 of the Omnibus Trade and Competitiveness Act of 1988, U.S. Customs and Border Protection (CBP) respectfully requests that the International Trade Commission (ITC) commence a Section 1205 investigation regarding Note 1(v) to Chapter 95 of the Harmonized Tariff Schedule of the United States (HTS) and its effects on the tariff treatment of imported festive articles under HTS heading 9505.

CBP further requests that the ITC recommend to the President the amendment of certain special classification provisions in Subchapter XVII of Chapter 98 of the HTSUS in order to ensure substantially rate neutral, duty-free treatment to certain utilitarian articles with festive designs and/or motifs in accordance with the recent judicial decision of *Michael Simon Design, Inc. v. United States*, 452 F. Supp 2d. 1316 (Ct. Int'l Trade 2006), *aff'd* 501 F. 3d 1303 (Fed. Cir. 2007) *reh'g denied* (Fed. Cir. April 2, 2008), which cited *Park B. Smith, Ltd. v. United States*, 25 Ct. Int'l Trade 506 (2001), *affirmed in part, vacated in part, and remanded*, 347 F. 3d 922 (Fed. Cir. 2003), *reh'g denied* (Fed. Cir. March 16, 2004), and *Midwest of Cannon Falls, Inc. v. United States*, 20 Ct. Int'l Trade 123 (1996), *aff'd in part, rev'd in part*, 122 F. 3d 1423 (Fed. Cir. 1997).

\*Original to fax.

### Judicial Decision on Festive Articles

Heading 9505, HTSUS, provides for: "Festive, carnival or other entertainment articles, including magic tricks and practical joke articles; parts and accessories thereof", and was the subject of litigation in *Park B. Smith*. During the course of the litigation in *Park B. Smith*, the Explanatory Notes for heading 9505 were amended. In May 2003, the World Customs Organization, of which the United States is a participating member, amended the Explanatory Note (EN) to heading 9505. The amended EN 9505 reads as follows:

The heading also excludes articles that contain a festive design, decoration, emblem or motif and have a utilitarian function, e.g., tableware, kitchenware, toilet articles, carpets and other textile floor coverings, apparel, bed linen, table linen, toilet linen, kitchen linen.

The amendment to EN 9505 became effective August 2003, during the time period the parties to *Park B. Smith* were awaiting the decision of the Court of Appeals for the Federal Circuit. Although U.S. courts have recognized that the ENs are not legally binding on the United States, the courts have acknowledged the importance of the ENs in determining the intended scope of a tariff heading. Thereafter, CBP published a notice to limit *Park B. Smith* to the specific entries before the courts. See *Limitation of the Application of the Decisions of the Court of International Trade and the Court of Appeals for the Federal Circuit in Park B. Smith v. United States* (Customs Bulletin, Volume 40, Number 15, April 5, 2006).

The Court of Appeals for the Federal Circuit affirmed the Court of International Trade in applying the standard from *Midwest of Cannon Falls* that in order to be classified under heading 9505, HTSUS, "(1) such articles must be 'closely associated' with a festive occasion and (2) such articles must be displayed and used by the consumer only during the festive occasion." Again citing to *Midwest*, the court went on to state: "If the physical appearance of an article is so intrinsically linked to a festive occasion that its use during other time periods would be aberrant, it is 'closely associated' to the festive occasion." *Midwest*, 122 F. 3d at 1429.

*Michael Simon Design, Inc. v. United States*, 452 F. Supp 2d. 1316 (Ct. Int'l Trade 2006), *aff'd* 501 F. 3d 1303 (Fed. Cir. 2007) *reh'g denied* (Fed. Cir. April 2, 2008), involved the classification of certain knitted cardigans, knitted blouses, and woven ladies shirts. Many of these articles were decorated with festive symbols or motifs, including "Oh Xmas tree", "Angel", "Silent Night", "Halloween Party", "Trick or Treat", "Elvira", "Black Widow", "Casper", "Cat Nip", "Catwalk", and "Fraidy Cat". Michael Simon claimed that all of the apparel at issue should be classified as festive articles under heading 9505, HTSUS, pursuant to Federal Circuit decisions which held that the scope of the term "festive articles" in heading 9505 included utilitarian articles. CBP argued that the amended EN 9505 helped to clarify that heading 9505 excluded articles that

have a utilitarian function and contain a festive design, decoration, emblem or motif. CBP also sought deference for its position because it had consistently interpreted the scope of the term "festive articles" within heading 9505 as excluding utilitarian articles. With the exception of three styles<sup>1</sup> of apparel, the Court ruled that the articles were "festive articles" properly classified in heading 9505.

The Court of International Trade rejected CBP's reliance on the amendment of the EN 9505, which expressly excluded articles that contain a festive design, decoration, emblem or motif and have a utilitarian function, including apparel, from heading 9505. The Court decided that the amended EN 9505 was inconsistent with the Court's previous interpretation of the scope of heading 9505 in *Park B. Smith* and *Midwest*. The Court held that the Federal Circuit's interpretation of the meaning and scope of the term "festive articles" controls. The Court followed the decisions of the Court of Appeals for the Federal Circuit established in *Park B. Smith* and *Midwest* and applied the two-prong test in *Park B. Smith* to decide that certain utilitarian articles of apparel are classified as festive articles.

The United States appealed the decision in *Michael Simon* to the Court of Appeals for the Federal Circuit. The Federal Circuit affirmed the trial court's ruling on the applicable law and the use of the *Park B. Smith* and *Midwest* test<sup>2</sup> to determine whether articles are classified as festive articles under heading 9505.

#### Chapter 95, Note 1(v)

Pursuant to Presidential Proclamation 8097 and 19 U.S.C. § 3005, during the course of the *Michael Simon* litigation, and effective February 3, 2007, Note 1 to Chapter 95 was amended by inserting a new subparagraph (v) to exclude certain utilitarian articles from classification in Chapter 95, as follows:

<sup>1</sup> The Court of International Trade found that three styles, "Cat Nip", "Catwalk", and "Fraidy Cat" were not festive articles. The "Cat Nip" sweater comes in a "pearl" or "yam" colored background with black trim, featuring two black cats arching their backs on the front. The "Catwalk" sweater is "lime green" with pink cuffs and three black cats wearing pink collars. The "Fraidy Cat" sweater is a black shirt with four cats outlined in white. The Court, citing *Park B. Smith*, held that these styles were not closely associated with a festive occasion because they were not so intrinsically linked to Halloween that wearing those items at other times of the year would evoke thoughts of Halloween or seem "aberrant".

<sup>2</sup> The Court of International Trade, citing *Park B. Smith* and *Midwest* on the scope and meaning of heading 9505, applied the two-prong test for determining whether a particular article falls within heading 9505: "[C]lassification as a 'festive article' under Chapter 95 requires that the article satisfy two criteria: (1) it must be closely associated with a festive occasion and (2) the article [be] used or displayed principally during that festive occasion." Additionally, the Court stated that the items must be "closely associated with a festive occasion" to the degree that "the physical appearance of an article is so intrinsically linked to a festive occasion that its use during other time periods would be aberrant."



Tableware, kitchenware, toilet articles, carpets and other textile floor coverings, apparel, bed linen, table linen, toilet linen, kitchen linen and similar articles having a utilitarian function (classified according to their constituent material).

In a footnote, the reader is also referred to HTS subheading 9817.95.

Because Note 1(v) to Chapter 95 excludes certain utilitarian articles from classification as festive articles under heading 9505 (a duty-free provision), and because the *Michael Simon* decision grants certain utilitarian articles duty-free treatment as festive articles under heading 9505, CBP is requesting that the ITC commence a Section 1205 investigation with a view to recommending to the President the adoption of a new duty-free provision in Subchapter XVII of Chapter 98 of the HTS covering certain utilitarian or functional articles with festive designs and/or motifs.

### Recommendation

CBP respectfully requests that the special classification provisions in Subchapter XVII of HTS Chapter 98 (adopted in 2007 as a result of *Proposed Modifications to the Harmonized Tariff Schedule of the United States*, Investigation No. 1205-6, ITC Pub. No. 3851 (April 2006)) be modified to ensure substantial rate neutrality for certain utilitarian articles with festive designs and/or motifs.<sup>3</sup>

Subchapter XVII of Chapter 98 of the HTSUS currently reads, in relevant part, as follows:

"Articles classifiable in subheading 3924.10, 3926.90, 6307.90, 6911.10, 6912.00, 7013.22, 7013.28, 7013.41, 7013.49, 9405.20, 9405.40 or 9405.50, the foregoing meeting the descriptions set forth below:

9817.95.01	Utilitarian articles of a kind used in the home in the performance of specific religious or cultural ritual celebrations for religious or cultural holidays, or religious festive occasions, such as Seder plates, blessing cups, menorahs or kinaras.....	Free	25%
9817.95.05	Utilitarian articles in the form of a three-dimensional representation of a symbol or motif clearly associated with a specific holiday in the United States.....	Free	25%"

<sup>3</sup> Pending litigation in the Court of International Trade, CBP's position is that the utilitarian or functional articles described as baking pans, cookie cutters, cookie stamps and presses, that are used in preparation for a festive occasion and not used or displayed during a festive occasion, are not festive articles within the scope of heading 9505.

CBP respectfully requests the following amendments:

1. Replace subheading 9817.95.01 and the superior text thereto with the following new heading:

9817.95.01	Utilitarian articles (including but not limited to Seder plates, blessing cups, menorahs or kinaras) of a kind used in the home in the performance of specific religious or cultural ritual celebrations for religious or cultural holidays, or religious festive occasions (provided for in subheading 3924.10, 3926.90, 6307.90, 6911.10, 6912.00, 7013.22, 7013.28, 7013.41, 7013.49, 9405.20, 9405.40 or 9405.50) .....	Free	25%
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2. Insert the following new U.S. Note 9 to subchapter XVII of Chapter 98:

"9. Heading 9817.95.02 applies only to tableware, kitchenware (except baking pans, cookie cutters, cookie stamps and presses) and toilet articles of chapter 39, 69 or 70; carpets and other textile floor coverings of chapter 57; apparel and accessories of chapter 61 or 62; and made-up textile articles of chapter 63."

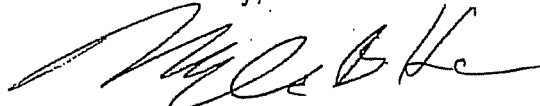
3. Replace subheading 9817.95.05 with the following new heading:

"9817.95.02	Utilitarian articles, each incorporating a symbol and/or motif that is closely associated with a festive occasion (for example, Christmas, Easter, Halloween, or Thanksgiving), the foregoing articles used or displayed principally during that festive occasion and not typically at any other time, under the terms of U.S. note 9 to this subchapter.....	Free	25%."
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These proposed amendments will, when properly implemented, ensure that utilitarian or functional articles (except baking pans, cookie cutters, cookie stamps and presses) with festive designs and/or motifs entered on or after February 3, 2007, will be classified in accordance with Note 1(v) to Chapter 95, while ensuring substantial rate neutrality for this merchandise in accordance with the decisions of the courts.

Thank you for your consideration.

Sincerely,



Myles B. Harmon  
Director, Commercial and Trade  
Facilitation Division



festive design, decoration, emblem, or motif.

**DATES:** October 22, 2010: Deadline for filing written views relating to the Commission's proposed recommendations.

November 29, 2010: Transmittal of the Commission's recommendations to the President.

**ADDRESSES:** All Commission offices are located in the United States International Trade Commission Building, 500 E Street, SW., Washington, DC. All written submissions should be addressed to the Secretary, United States International Trade Commission, 500 E Street, SW., Washington, DC 20436. The public record for this collection of proposals may be viewed on the Commission's electronic docket (EDIS) at <http://www.usitc.gov/secretary/edis.htm>.

**FOR FURTHER INFORMATION CONTACT:** Fred Schottman, Nomenclature Analyst (202-205-2077, [fred.schottman@usitc.gov](mailto:fred.schottman@usitc.gov)), or Janis L. Summers, Attorney Advisor (202-205-2605, [janis.summers@usitc.gov](mailto:janis.summers@usitc.gov)), of the Office of Tariff Affairs and Trade Agreements (fax 202-205-2616). The media should contact Margaret O'Laughlin, Office of External Affairs (202-205-1819), [margaret.olaughlin@usitc.gov](mailto:margaret.olaughlin@usitc.gov). Hearing impaired individuals may obtain information on this matter by contacting the Commission's TDD terminal at 202-205-1810. General information concerning the Commission may also be obtained by accessing its Internet Web site (<http://www.usitc.gov>). Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202-205-2000.

**Background:** Section 1205(a) of the Omnibus Trade and Competitiveness Act of 1988 (the 1988 Act) (19 U.S.C. 3005(a)) provides that the Commission shall keep the HTS under continuous review and periodically recommend to the President such modifications in the HTS as the Commission considers necessary or appropriate to accomplish five general objectives. Among these stated objectives, section 1205(a)(2) of the 1988 Act directs the Commission to consider changes to the HTS to promote the uniform application of the Harmonized System Convention and particularly the Protocol thereto, which contains the Harmonized System nomenclature structure and accompanying legal notes. Subsections (b) through (d) of section 1205 describe the procedures the Commission is to follow in formulating recommendations, including with respect to soliciting and considering views of interested Federal

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## INTERNATIONAL TRADE COMMISSION

[Investigation No. 1205-9]

### Certain Festive Articles: Recommendations for Modifying the Harmonized Tariff Schedule of the United States

**AGENCY:** United States International Trade Commission.

**ACTION:** Notice of institution of investigation and opportunity to present written views on proposed recommendations.

**SUMMARY:** Following receipt of a letter from U.S. Customs and Border Protection (CBP), the Commission instituted investigation No. 1205-9, *Certain Festive Articles: Recommendations for Modifying the Harmonized Tariff Schedule of the United States*, pursuant to section 1205 of the Omnibus Trade and Competitiveness Act of 1988 (19 U.S.C. 3005), for the purpose of making recommendations to the President regarding the addition of a U.S. note and the amendment or replacement of certain classification provisions in subchapter XVII of chapter 98 of the Harmonized Tariff Schedule of the United States (HTS) relating to certain utilitarian articles that incorporate a

agencies and the public. Section 1205(b)(1) requires that the Commission give notice of proposed recommendations and afford reasonable opportunity for interested parties to present their views in writing.

In a letter dated July 1, 2010, from Myles B. Harmon, Director, Commercial and Trade Facilitation Division, CBP asked that the Commission conduct an investigation under section 1205 for the purpose of making recommendations to the President regarding the addition of a U.S. note and the amendment or replacement of certain classification

provisions in chapter 98 of the HTS relating to certain utilitarian articles that incorporate a festive design, decoration, emblem, or motif. The letter included CBP's proposed language for a U.S. note and proposed changes in two U.S. tariff rate lines at the 8-digit level that take into account (a) Federal court decisions on the classification of particular utilitarian articles, and (b) the amendment of note 1 to chapter 95 of the international Harmonized System by the World Customs Organization (WCO).

CBP's letter requested that the following U.S. note 9 be inserted in subchapter XVII of chapter 98:

9. Heading 9817.95.02 applies only to tableware, kitchenware (except baking pans, cookie cutters, cookie stamps and presses) and toilet articles of chapter 39, 69 or 70; carpets and other textile floor coverings of chapter 57; apparel and accessories of chapter 61 or 62; and made-up textile articles of chapter 63.

The letter further requested that existing HTS subheadings 9817.95.01 and 9817.95.05 and superior text thereto be replaced by:

9817.95.01 .....	Utilitarian articles (including but not limited to Seder plates, blessing cups, menorahs or kinaras) of a kind used in the home in the performance of specific religious or cultural ritual celebrations for religious or cultural holidays, or religious festive occasions (provided for in subheading 3924.10, 3926.90, 6307.90, 6911.10, 6912.00, 7013.22, 7013.28, 7013.41, 7013.49, 9405.20, 9405.40 or 9405.50).	Free .....	25%.
9817.95.02 .....	Utilitarian articles, each incorporating a symbol and/or motif that is closely associated with a festive occasion (for example, Christmas, Easter, Halloween or Thanksgiving), the foregoing articles used or displayed principally during that festive occasion and not typically at any other time, under the terms of U.S. note 9 to this subchapter.	Free .....	25%.

CBP's letter provided additional background on the tariff classification of utilitarian articles that incorporate a festive design, decoration, emblem, or motif. The letter summarized relevant court decisions and decisions of CBP that are the basis of CBP's request. A copy of CBP's letter is being posted on the Commission's Web site at [http://www.usitc.gov/tariff\\_offairs/modifications\\_hts.htm](http://www.usitc.gov/tariff_offairs/modifications_hts.htm).

The Commission believes that a modification of CBP's description for heading 9817.95.02 should be considered in order to clarify the intended scope of the heading and conform to normal HTS language. The Commission proposes that a phrase included in the request letter's description for that heading as "a festive occasion (for example, Christmas, Easter, Halloween, or Thanksgiving)" be replaced by "Christmas, Easter, Halloween, Thanksgiving or similar festive occasion".

The Harmonized System nomenclature, which is maintained by the WCO, provides a uniform structural basis for the customs tariffs and statistical nomenclatures of all major trading countries of the world, including the United States. The Harmonized System comprises the broadest principles of classification and levels of categories in the HTS, comprising the general rules of interpretation, section and chapter titles, section and chapter legal notes, and heading and subheading texts to the 6-digit level of detail. Additional U.S. notes, further subdivisions (8-digit subheadings and 10-digit statistical

annotations) and statistical notes, as well as the entirety of chapters 98 and 99 and several appendixes, are national legal and statistical detail added for the administration of the U.S. tariff and statistical programs and are not part of the international HS.

An up-to-date copy of the HTS, which incorporates the international HS in its overall structure, can be found on the Commission's Web site (<http://www.usitc.gov/tato/hts/bychapter/index.htm>). Hard copies and electronic copies on CD can be found at many of the 1,400 Federal Depository Libraries located throughout the United States and its territories; further information about these locations can be found at <http://www.gpoaccess.gov/fdlp.html> or by contacting GPO Access at the Government Printing Office at this telephone number: 866-512-1800.

The Commission will prepare recommendations for the President in the form of a single report. In preparing these recommendations, the Commission will take into account CBP's request, as well as all other appropriate legal and technical considerations relating to HTS chapters 39, 57, 61, 62, 63, 69, 70, 94, and 95. The Commission will consider and include, where appropriate, the input submitted by other agencies and interested parties. Submissions from other agencies and the public must be filed by October 22, 2010, in order to be assured of consideration in the Commission's report and recommendations to the President.

Written submissions should be filed in accordance with the procedures

below. Such submissions should take into account the classification of the merchandise concerned under the international Harmonized System as well as domestic judicial decisions and seek to further the goals set out by section 1205 of the 1988 Act and the Harmonized System Convention. No proposals for changes to existing U.S. rates of duty or to 10-digit statistical annotations or notes will be considered by the Commission during its review. However, the Commission will examine information concerning the rates of duty currently utilized by importers in liquidated and undisputed entries of specific festive articles that are the subject of this investigation. The changes in the HTS that may result from this investigation are not intended to alter current tariff rates. The changes instead are intended to ensure that existing tariff treatment continues to be applicable following the implementation of new U.S. tariff provisions, taking into account HTS changes that were proclaimed as of February 3, 2007, and related judicial decisions and CBP classification rulings.

**Proposed Recommendations:** Section 1205(b)(1) of the 1988 Act requires that the Commission give notice of proposed recommendations and afford reasonable opportunity for interested parties to present their views in writing.

The Commission hereby gives notice that its proposed recommendations in this investigation for purposes of section 1205(b)(1) of the 1988 Act are as follows:

(1) Adopt CBP's proposed language for U.S. note 9, to be inserted in

subchapter XVII of chapter 98 of the HTS; and

(2) Adopt CBP's proposed language for HTS subheadings 9817.95.01 and

9817.95.02 and the deletion of subheading 9817.95.05 with the exception of the one change noted above regarding the parenthetical expression

shown in HTS subheading 9817.95.02, as requested, relating to festive occasions. Thus, HTS subheading 9817.95.02 would read as follows:

9817.95.02 .....	Utilitarian articles, each incorporating a symbol and/or motif that is closely associated with Christmas, Easter, Halloween, Thanksgiving or similar festive occasion, the foregoing articles used or displayed principally during that festive occasion and not typically at any other time, under the terms of U.S. note 9 to this subchapter.	Free .....	25%.
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**Written Submissions:** Interested parties and agencies are invited to file written submissions relating to the Commission's proposed recommendations. All written submissions should be addressed to the Secretary. Written submissions relating to CBP's request should be received no later than October 22, 2010. Submissions should refer to "Investigation No. 1205-9" in a prominent place on the cover page and/or the first page. All written submissions must conform with the provisions of section 201.8 of the Commission's *Rules of Practice and Procedure* (19 CFR 201.8). Section 201.8 requires that a signed original (or a copy so designated) and fourteen (14) copies of each document be filed. In the event that confidential treatment of a document is requested, at least four (4) additional copies must be filed, in which the confidential information must be deleted (see the following paragraph for further information regarding confidential business information). The Commission's rules authorize filing submissions with the Secretary by facsimile or electronic means only to the extent permitted by section 201.8 of the rules (see Handbook for Electronic Filing Procedures, [http://www.usitc.gov/secretary/fed\\_reg\\_notices/rules/documents/handbook\\_on\\_electronic\\_filing.pdf](http://www.usitc.gov/secretary/fed_reg_notices/rules/documents/handbook_on_electronic_filing.pdf)). Persons with questions regarding electronic filing should contact the Secretary (202-205-2000).

Any submissions that contain confidential business information must also conform with the requirements of section 201.6 of the *Commission's Rules of Practice and Procedure* (19 CFR 201.6). Section 201.6 of the rules requires that the cover of the document and the individual pages be clearly marked as to whether they are the "confidential" or "non-confidential" version, and that the confidential business information be clearly identified by means of brackets. All written submissions, except for confidential business information, will be made available for inspection by interested parties. Confidential business information received in the submissions

may be made available to CBP during the examination of the requested HTS modifications. The Commission will not otherwise publish or release any confidential business information received, nor release it to other government agencies or other persons.

By order of the Commission.

Issued: September 13, 2010.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. 2010-23396 Filed 9-17-10; 8:45 am]

BILLING CODE 7020-02-P



## **APPENDIX B**

**NOTE 1(v) TO HTS CHAPTER 95;  
HS EXPLANATORY NOTE TO HEADING 9505;  
HTS HEADING 9505;  
HTS SUBHEADINGS 9817.95.01 AND 9817.95.05**





Harmonized Tariff Schedule of the United States (2011)  
Annotated for Statistical Reporting Purposes

0

CHAPTER 95

TOYS, GAMES AND SPORTS EQUIPMENT; PARTS AND ACCESSORIES THEREOF

XX  
95-1

1. This chapter does not cover:

- (a) Candles (heading 3406);
- (b) Fireworks or other pyrotechnic articles of heading 3604;
- (c) Yarns, monofilament, cords or gut or the like for fishing, cut to length but not made up into fishing lines, of chapter 39, heading 4206 or section XI;
- (d) Sports bags or other containers of heading 4202, 4303 or 4304;
- (e) Sports clothing or fancy dress, of textiles, of chapter 61 or 62;
- (f) Textile flags or bunting, or sails for boats, sailboards or land craft, of chapter 63;
- (g) Sports footwear (other than skating boots with ice or roller skates attached) of chapter 64, or sports headgear of chapter 65;
- (h) Walking-sticks, whips, riding-crops or the like (heading 6602), or parts thereof (heading 6603);
- (i) Unmounted glass eyes for dolls or other toys, of heading 7018;
- (k) Parts of general use, as defined in note 2 to section XV, of base metal (section XV), or similar goods of plastics (chapter 39);
- (l) Bells, gongs or the like of heading 8306;
- (m) Pumps for liquids (heading 8413), filtering or purifying machinery and apparatus for liquids or gases (heading 8421), electric motors (heading 8501), electric transformers (heading 8504) or radio remote control apparatus (heading 8526);
- (n) Sports vehicles (other than sleds, bobsleds, toboggans and the like) of section XVII;
- (o) Children's bicycles (heading 8712);
- (p) Sports craft such as canoes and skiffs (chapter 89), or their means of propulsion (chapter 44 for such articles made of wood);
- (q) Spectacles, goggles or the like, for sports or outdoor games (heading 9004);
- (r) Decoy calls or whistles (heading 9208);
- (s) Arms or other articles of chapter 93;
- (t) Electric garlands of all kinds (heading 9405);
- (u) Racket strings, tents or other camping goods, or gloves, mittens and mitts (classified according to their constituent material); or
- (v) Tableware, kitchenware, toilet articles, carpets and other textile floor coverings, apparel, bed linen, table linen, toilet linen, kitchen linen and similar articles having a utilitarian function (classified according to their constituent material). <sup>1/</sup>

- 2. This chapter includes articles in which natural or cultured pearls, precious or semiprecious stones (natural, synthetic or reconstructed), precious metal or metal clad with precious metal constitute only minor constituents.
- 3. Subject to note 1 above, parts and accessories which are suitable for use solely or principally with articles of this chapter are to be classified with those articles.
- 4. Subject to the provisions of Note 1 above, heading 9503 applies, *inter alia*, to articles of this heading combined with one or more items, which cannot be considered as sets under the terms of General Interpretative Rule 3(b), and which, if presented separately, would be classified in other headings, provided the articles are put up together for retail sale and the combinations have the essential character of toys.
- 5. Heading 9503 does not cover articles which, on account of their design, shape or constituent material, are identifiable as intended exclusively for animals, for example, "pet toys" (classification in their own appropriate heading).

<sup>1/</sup> See subheading 9817.95

**95.05 - Festive, carnival or other entertainment articles, including conjuring tricks and novelty jokes.**

9505.10 - Articles for Christmas festivities

9505.90 - Other

This heading covers :

(A) **Festive, carnival or other entertainment articles**, which in view of their intended use are generally made of non-durable material. They include :

- (1) Festive decorations used to decorate rooms, tables, etc. (such as garlands, lanterns, etc.); decorative articles for Christmas trees (tinsel, coloured balls, animals and other figures, etc); cake decorations which are traditionally associated with a particular festival (e.g., animals, flags).
- (2) Articles traditionally used at Christmas festivities, e.g., artificial Christmas trees, nativity scenes, nativity figures and animals, angels, Christmas crackers, Christmas stockings, imitation yule logs, Father Christmases.
- (3) Articles of fancy dress, e.g., masks, false ears and noses, wigs, false beards and moustaches (**not being** articles of postiche - **heading 67.04**), and paper hats. However, the heading **excludes** fancy dress of textile materials, of **Chapter 61** or **62**.
- (4) Throw-balls of paper or cotton-wool, paper streamers (carnival tape), cardboard trumpets, "blow-outs", confetti, carnival umbrellas, etc.

The heading **excludes** statuettes, statues and the like of a kind used for decorating places of worship.

The heading also **excludes** articles that contain a festive design, decoration, emblem or motif and have a utilitarian function, e.g., tableware, kitchenware, toilet articles, carpets and other textile floor coverings, apparel, bed linen, table linen, toilet linen, kitchen linen.

(B) **Conjuring tricks and novelty jokes**, e.g., packs of cards, tables, screens and containers, specially designed for the performance of conjuring tricks; novelty jokes such as sneezing powder, surprise sweets, water-jet button-holes and "Japanese flowers".

This heading also **excludes** :

- (a) Natural Christmas trees (**Chapter 6**).
- (b) Candles (**heading 34.06**).
- (c) Packagings of plastics or of paper, used during festivals (classified according to constituent material, for example, **Chapter 39** or **48**).
- (d) Christmas tree stands (classified according to constituent material).
- (e) Textile flags or bunting of **heading 63.07**.
- (f) Electric garlands of all kinds (**heading 94.05**).

# Harmonized Tariff Schedule of the United States (2011)

Annotated for Statistical Reporting Purposes

XX  
95-3

Heading/ Subheading	Stat. Suf- fix	Article Description	Unit of Quantity	Rates of Duty		
				1		2
				General	Special	
9505		Festive, carnival or other entertainment articles, including magic tricks and practical joke articles; parts and accessories thereof:				
9505.10		Articles for Christmas festivities and parts and accessories thereof:				
		Christmas ornaments:				
9505.10.10	00	Of glass .....	X .....	Free		60%
		Other:				
9505.10.15	00	Of wood .....	X .....	Free		20%
9505.10.25	00	Other .....	X .....	Free		20%
9505.10.30	00	Nativity scenes and figures thereof .....	X .....	Free		80%
		Other:				
9505.10.40		Of plastics .....		Free		60%
	10	Artificial Christmas trees .....	No.			
	20	Other .....	X			
9505.10.50		Other .....		Free		90%
	10	Artificial Christmas trees .....	No.			
	20	Other .....	X			
9505.90		Other:				
9505.90.20	00	Magic tricks and practical joke articles; parts and accessories thereof .....	X .....	Free		70%
9505.90.40	00	Confetti, paper spirals or streamers, party favors and noisemakers; parts and accessories thereof ..	X .....	Free		45%
9505.90.60	00	Other .....	X .....	Free		25%
9506		Articles and equipment for general physical exercise, gymnastics, athletics, other sports (including table-tennis) or outdoor games, not specified or included elsewhere in this chapter; swimming pools and wading pools; parts and accessories thereof:				
		Snow-skis and other snow-ski equipment; parts and accessories thereof:				
9506.11		Skis and parts and accessories thereof, except ski poles:				
9506.11.20	00	Cross-country skis .....	prs. ....	Free		33 1/3%
9506.11.40		Other skis .....		2.6%	Free (A,AU,BH,CA, CL,E,IL,J,JO, MA,MX,OM, P,PE,SG)	33 1/3%
	10	Snowboards .....	No.			
	80	Other .....	prs.			
9506.11.60	00	Parts and accessories .....	X .....	Free		45%
9506.12		Ski bindings and parts and accessories thereof:				
9506.12.40	00	Cross-country .....	X .....	Free		45%
9506.12.80	00	Other .....	X .....	2.8%	Free (A,AU,BH,CA, CL,E,IL,J,JO, MA,MX,OM, P,PE,SG)	45%
9506.19		Other:				
9506.19.40	00	Cross-country .....	X .....	Free		45%
9506.19.80		Other .....		2.8%	Free (A,AU,BH,CA, CL,E,IL,J,JO, MA,MX,OM, P,PE,SG)	45%
	40	Ski poles and parts and accessories thereof .....	X			
	80	Other .....	X			

# Harmonized Tariff Schedule of the United States (2011)

Annotated for Statistical Reporting Purposes

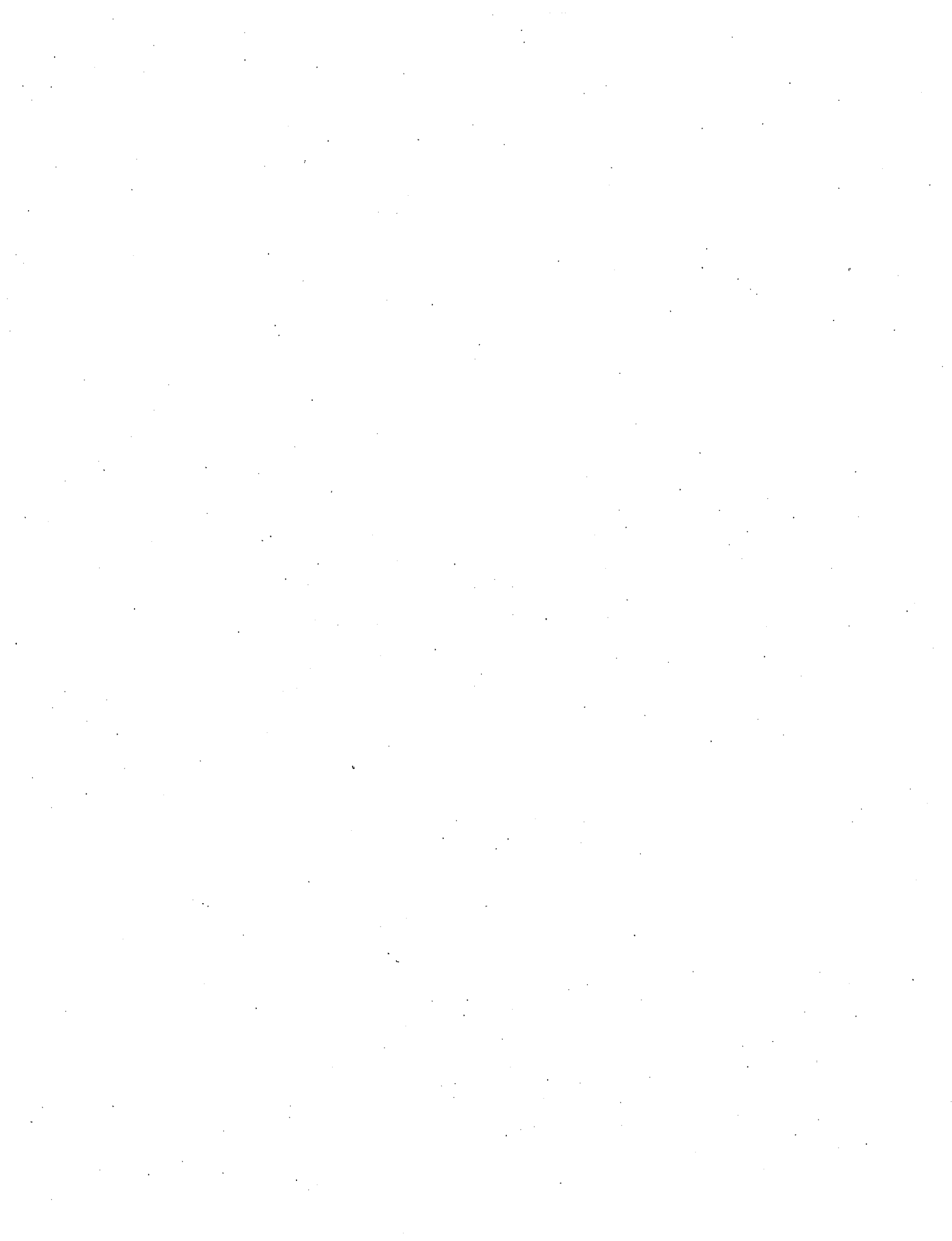
XXII  
98-XVII-8

Heading/ Subheading	Stat. Suf- fix	Article Description	Unit of Quantity	Rates of Duty		
				1		2
				General	Special	
9817.61.01	1/	Articles of ski racing apparel which, because of their padding, construction, or other special features, are specially designed to protect against injuries from the sport of ski racing, such as blows caused by slalom gates or falls (provided for in subheading 6101.30.20, 6105.20.20, 6110.11, 6110.12.20, 6110.19, 6110.20.20, 6110.30.30, 6112.20.10, 6114.30.30, 6203.43.15 or 6203.43.35) .....	1/	5.5%	Free (AU,JO, MX,P,PE) The rate applicable in the absence of this heading (A,BH,CA,CL,E,IL, J,MA,OM,SG)	The rate applicable in the absence of this heading
9817.64.01	1/	Footwear, other than goods of heading 9021, of a kind for supporting or holding the foot following an illness, operation or injury, provided that such footwear is (1) made to measure and (2) presented singly and not in pairs and designed to fit either foot equally .....	1/	Free		The rate applicable in the absence of this heading
9817.82.01	1/	Mounted tool and drill bit blanks of polycrystalline diamond (provided for in subheadings 8207.19.60, 8207.50.40 or 8207.50.80) and mounted tool blanks of polycrystalline diamond (provided for in subheadings 8207.70.60, 8207.80.60, 8207.90.45 or 8207.90.75 .....	1/	Free		The rate applicable in the absence of this heading
9817.84.01	1/	Wheelbuilding, wheel-truing, rimpunching, tire fitting and similar machines (provided for in subheading 8462.21, 8462.29, 8462.41, 8462.49, 8479.89.98 or 9031.80), all the foregoing suitable for use in the manufacture of wheels for bicycles .....	1/	Free		The rate in the absence of this heading
9817.85.01	1/	Prototypes to be used exclusively for development, testing, product evaluation, or quality control purposes .....	1/	Free		The rate applicable in the absence of this heading
9817.95.01	1/	Articles classifiable in subheadings 3924.10, 3926.90, 6307.90, 6911.10, 6912.00, 7013.22, 7013.28, 7013.41, 7013.49, 9405.20, 9405.40 or 9405.50, the foregoing meeting the descriptions set forth below: Utilitarian articles of a kind used in the home in the performance of specific religious or cultural ritual celebrations for religious or cultural holidays, or religious festive occasions, such as Seder plates, blessing cups, menorahs or kinaras .....	1/	Free		25%
9817.95.05	1/	Utilitarian articles in the form of a three-dimensional representation of a symbol or motif clearly associated with a specific holiday in the United States. ....	1/	Free		25%

1/ See statistical note 1 to this subchapter.

**APPENDIX C**

***FEDERAL REGISTER* NOTICES CHANGING THE  
DATE FOR TRANSMITTING RECOMMENDATIONS  
TO THE PRESIDENT**



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**INTERNATIONAL TRADE  
COMMISSION**

[Investigation No. 1205-9]

**Certain Festive Articles:  
Recommendations for Modifying the  
Harmonized Tariff Schedule of the  
United States**

AGENCY: United States International  
Trade Commission.

ACTION: Change in date for transmitting  
recommendations to the President.

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SUMMARY: The Commission has changed the date on which it intends to report its recommendations to the President in this matter from November 29, 2010, to December 13, 2010, to allow more time to complete the report, including its recommendations.

DATES: *December 13, 2010*: Transmittal of recommendations to the President.

ADDRESSES: All Commission offices, including the Commission's hearing rooms, are located in the United States International Trade Commission Building, 500 E Street, SW., Washington, DC. The public record for this collection of proposals may be viewed on the Commission's electronic docket (EDIS) at <http://www.usitc.gov/secretary/edis.htm>.

FOR FURTHER INFORMATION CONTACT: David Beck, Director, Office of Tariff Affairs and Trade Agreements (202-205-2603, fax 202-205-2616, [david.beck@usitc.gov](mailto:david.beck@usitc.gov)). The media should contact Margaret O'Laughlin, Office of External Affairs (202-205-1819, [morgaret.oloughlin@usitc.gov](mailto:morgaret.oloughlin@usitc.gov)). Hearing-impaired individuals may obtain information on this matter by contacting the Commission's TDD terminal at 202-205-1810. General information concerning the Commission may also be obtained by accessing its Internet Web site at <http://www.usitc.gov>. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202-205-2000.

*Background*: Notice of institution of the investigation and opportunity to comment on proposed recommendations was published in the Federal Register on September 20, 2010 (75 FR 57293). The period for filing written submissions closed on October 22, 2010.



Issued: November 24, 2010.

By order of the Commission.

**Marilyn R. Abbott,**

*Secretary to the Commission.*

[FR Doc. 2010-30281 Filed 12-1-10; 8:45 am]

BILLING CODE 7020-02-P

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should contact Margaret O'Laughlin, Office of External Affairs (202-205-1819, [margaret.olaughlin@usitc.gov](mailto:margaret.olaughlin@usitc.gov)). Hearing impaired individuals may obtain information on this matter by contacting the Commission's TDD terminal at 202-205-1810. General information concerning the Commission may also be obtained by accessing its Internet Web site at <http://www.usitc.gov>. (<http://www.usitc.gov>). Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202-205-2000. <http://www.usitc.gov/secretary/edis.htm>.

By order of the Commission.

Issued: March 15, 2011.

James R. Holbein,  
*Acting Secretary to the Commission.*

[FR Doc. 2011-6506 Filed 3-18-11; 8:45 am]

BILLING CODE 7020-02-P

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**INTERNATIONAL TRADE  
COMMISSION**

[Investigation No. 1205-9]

**Certain Festive Articles:  
Recommendations for Modifying the  
Harmonized Tariff Schedule of the  
United States**

**AGENCY:** United States International  
Trade Commission.

**ACTION:** Change in date for transmitting  
recommendations to the President.

**SUMMARY:** The Commission has changed the date on which it intends to report its recommendations to the President in this matter from December 13, 2010, to April 28, 2011, to allow more time to complete the report, including its recommendations. In an earlier notice the Commission had indicated it would transmit its recommendations by December 13, 2010 (see notice published in the *Federal Register* of December 2, 2010 (75 FR 75185)). This notice is being issued as an update only, and interested parties are not being asked or invited to submit additional views.

**ADDRESSES:** All Commission offices are located in the United States International Trade Commission Building, 500 E Street, SW., Washington, DC. The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at <http://www.usitc.gov/secretary/edis.htm>.

**FOR FURTHER INFORMATION CONTACT:** David Beck, Director, Office of Tariff Affairs and Trade Agreements (202-205-2603, fax 202-205-2616, [david.beck@usitc.gov](mailto:david.beck@usitc.gov)), or Janis Summers, Attorney Advisor, Office of Tariff Affairs and Trade Agreements (202-205-2605, [janis.summers@usitc.gov](mailto:janis.summers@usitc.gov)). The media



**APPENDIX D**

**SUBMISSION FROM  
BARNES, RICHARDSON & COLBURN,  
ON BEHALF OF  
TARGET CORPORATION AND  
MICHAEL SIMON DESIGN, INC.**

11 Dupont Circle, NW  
Suite 500  
Washington, DC 20036

Tel: 202 483-0070  
Fax: 202 483-0092  
www.barnesrichardson.com

475 Park Avenue South  
New York, NY 10016  
Tel: 212 725-0200  
Fax: 212 889-4135

303 East Wacker Drive  
Suite 1020  
Chicago, IL 60601  
Tel: 312 565-2000  
Fax: 312 565-1732

October 8, 2010

Secretary  
United States International Trade Commission  
500 E Street, S.W.  
Washington, D.C. 20436

RE: Comments relating to ITC Investigation 1205-9;  
Certain Festive Articles: Recommendations for Modifying the HTSUS

Dear Madam Secretary:

On behalf of Target Corporation ("Target") and Michael Simon Design, Inc. ("MSD"), we are filing this letter in response to the Notice which the United States International Trade Commission ("ITC") published in the Federal Register on September 20, 2010 soliciting public comment on certain proposed modifications to the Harmonized Tariff Schedule of the United States ("HTSUS"). See Certain Festive Articles: Recommendations for Modifying the Harmonized Tariff Schedule of the United States - Investigation 1205-9, 75 Fed. Reg. 57,293 (September 20, 2010). We respectfully request that your office accept the comments set forth herein.

We understand that, pursuant to a request from U.S. Customs and Border Protection ("CBP"), the ITC is investigating a proposal to add a U.S. note in subchapter XVII of chapter 98 of the HTSUS and to amend or replace certain classification provisions in chapter 98 of the HTSUS relating to certain utilitarian articles that incorporate a festive design, decoration, emblem, or motif. We further understand that the proposed changes:

... are intended to ensure that existing tariff treatment continues to be applicable following the implementation of new U.S. tariff provisions, taking into account HTS changes that were proclaimed as of February 3, 2007, and related judicial decisions and CBP classification rulings.

4

75 Fed. Reg., at 57,294.

Target imports into the United States a variety of utilitarian merchandise with holiday motifs that we believe would fit under the proposed subheadings. MSD similarly imports apparel items including shirts and sweaters which are decorated with distinctive holiday motifs. Prior to the HTS changes which took effect on February 3, 2007, these holiday items qualified for a U.S. duty rate of zero as festive articles under HTSUS Subheading 9505.10 or 9505.90 (e.g., sweaters with Christmas and Halloween motifs). The first provision covered articles for Christmas festivities. The second provision covered festive articles for holidays other than Christmas.

Target and MSD agree with the proposed language of a new U.S. note 9 to be inserted in subchapter XVII of chapter 98 and the new text set forth for in HTSUS Subheadings 9817.95.01 and 9817.95.02 as indicated in the ITC's proposal. *See id.* Further, Target and MSD agree with the slight modification of CBP's description of subheading 9817.95.02 as proposed by the ITC. *See id.* Target and MSD believe that these tariff changes are necessary to ensure substantial rate neutrality as proscribed by 19 U.S.C. § 3005(d)(1)(C).

Finally, Target and MSD respectfully request that these proposed changes be made effective retroactively with respect to entries made on or after February 3, 2007, for which liquidation is not final.

Please do not hesitate to contact us, should you have any questions or require additional information.

Sincerely,



Matthew T. McGrath  
Alan Goggins  
Cortney O'Toole Morgan

Barnes, Richardson & Colburn  
Counsel for Target Corporation and  
Michael Simon Design, Inc.

**APPENDIX E**

**SUBMISSION FROM  
FRUIT OF THE LOOM, INC.**



FRUIT OF THE LOOM.

One Fruit of the Loom Drive • P.O. Box 90015 • Bowling Green, KY 42102-9015 • 270-781-6400

October 21, 2010

Ms. Marilyn R. Abbott, Secretary  
U.S. International Trade Commission  
500 E Street, SW  
Washington, DC 20436

**Re: INVESTIGATION NO. 1205-9  
Public Comment: Certain Festive Articles: Recommendations for Modifying  
the Harmonized Tariff Schedule of the United States**

Dear Ms. Abbott:

Fruit of the Loom, Inc. ("Fruit") is a vertically integrated manufacturer that has been providing quality products to U.S. consumers for more than 150 years. On its own behalf and on behalf of its subsidiaries and related companies, including Russell Brands, LLC and Vanity Fair Brands, LP, Fruit is responding to the U.S. International Trade Commission's ("ITC's") notice of institution of an investigation and request for comments on the classification of certain festive articles under the Harmonized Tariff Schedule of the United States ("HTSUS"). For the reasons described below, Fruit requests that ITC reconsider its proposed recommendations and that ITC instead recommend *against* revision of HTSUS heading 9817.

First, ITC's proposed recommendations risk altering the conditions of competition for the U.S. textile and apparel industry and could therefore be counter to the U.S. national economic interest. Second, the proposed recommendations could be inconsistent with the International Convention on the Harmonized Commodity Description and Coding System ("the Convention"). Because ITC is required by statute to evaluate these factors when making recommendations to the President, Fruit asks that ITC reconsider its recommendations and withdraw its proposed revisions HTSUS heading 9817.



## **I. Statutory Authority**

Pursuant to 19 U.S.C. § 3005, ITC is tasked with reviewing the HTSUS and making recommendations to the President to revise the HTSUS, including to conform the HTSUS to the Convention and to alleviate unnecessary administrative burdens. ITC may not, however, recommend any modification that is inconsistent with the Convention, that is not consistent with sound nomenclature principles, that does not ensure substantial rate neutrality, or that alters existing conditions of competition for an affected U.S. industry. Pursuant to 19 U.S.C. § 3006, the President may proclaim revisions to the HTSUS based on ITC's recommendations only if the revisions (1) are in conformity with U.S. obligations under the Convention and (2) are not contrary to the national economic interest of the United States.

## **II. Historical HTSUS Classification of Festive Articles**

The U.S. Court of International Trade and the U.S. Court of Appeals for the Federal Circuit have interpreted the classification of certain festive articles under the HTSUS as it existed prior to February 3, 2007. In these decisions, the courts “rejected the position that a utilitarian article cannot be a ‘festive article.’” *Park B. Smith, Ltd. v. United States*, 347 F.3d 922, 927 (Fed. Cir. 2003) (citing *Midwest of Cannon Falls, Inc. v. United States*, 122 F.3d 1423 (Fed. Cir. 1997)); *see also Michael Simon Design, Inc. v. United States*, 452 F. Supp. 2d 1316 (Ct. Int'l Trade 2006), *aff'd*, 501 F.3d 1303 (Fed. Cir. 2007) (classifying certain holiday-themed apparel as festive articles under HTSUS chapter 95). In 2004, however, the World Customs Organization (“WCO”) created a new Note 1(v) to HTS chapter 95 to confirm that certain textile articles (including apparel) with a utilitarian function are excluded from classification as festive articles in chapter 95. ITC issued recommendations and the President issued a proclamation to

implement this change to the HTSUS. *See* Proclamation No. 8097, 72. Fed. Reg. 453 (Jan. 4, 2007).

### **III. Reconsideration of Proposed HTSUS Revisions**

#### **A. Conditions of Competition and the U.S. National Economic Interest**

Fruit is concerned that ITC's proposed revisions to the classification and tariff treatment of certain festive articles would alter the conditions of competition for the U.S. textile and apparel industry and would run counter to the national economic interest of the United States. Since the time of the President's 2007 proclamation, the classification of holiday-themed apparel articles has been settled. Such articles shall be classified in HTSUS chapter 61 and 62, according to their constituent materials. Following that proclamation, U.S. Customs and Border Protection ("CBP") issued guidance that confirmed its implementation of the HTSUS modifications implemented by the proclamation. *See* H026799: Revised Guidance on Classification of Festive Articles (Aug. 18, 2009).

The U.S. textile and apparel industry has made significant decisions regarding sourcing and production based on this clearly established principle. Many companies manufacture or source these items from countries that are partners to free trade agreements or preference programs with the United States, such as Mexico and the Central American countries. In particular, many companies manufacture or source "blanks" from free trade agreement partners and arrange for screen printing or embroidery of holiday designs in the United States. These sourcing arrangements support jobs in the U.S. and in countries that are our free trade agreement partners. In the case of Fruit, our manufacturing of "blanks" supports jobs in both the U.S. and Central America.

ITC's proposed revisions to the HTSUS would add a U.S. Note 9 to HTSUS chapter 98, subchapter XVII and a provision at HTSUS 9817.95.02 to provide for duty-free importation of holiday-themed apparel articles from any country that enjoys Normal Trade Relations with the U.S.. Holiday-themed apparel articles from almost any country, including China and other strong competitors for access to the U.S. apparel market, would enter the U.S. free of duty, thus altering the conditions of competition for U.S. companies that are importing "blanks" from free trade agreement or preference program countries and utilizing U.S. labor to adorn the garments with holiday motifs. This grant of duty-free treatment to certain apparel articles would alter conditions of competition for the U.S. textile and apparel industry and would have a negative impact on Fruit and other U.S. companies.

In addition to altering the conditions of competition for U.S. companies in the textile and apparel sector by granting an effective competitive advantage to non-U.S. producers, Fruit anticipates that ITC's proposed revisions to the HTSUS could negatively impact conditions of competition by creating uncertainty for both U.S. producers and importers. CBP rulings and case law resulting from years of litigation about what types of articles are classifiable as "festive articles" demonstrate the uncertain, case-by-case, and subjective nature of the decisions CBP and the courts were forced to make under the pre-2007 HTSUS. Articles with Christmas trees, jack-o-lanterns, and Easter bunnies were festive articles, but articles of red and green (Christmas) plaid were not. *Park B. Smith*, 347 F.3d at 929. Nutcrackers portraying U.S. presidents and famous athletes were festive articles, but jack-o-lantern and Santa Claus earrings were not. *Midwest of Cannon Falls*, 122 F.3d at 1429 (ruling on nutcrackers); *Russ Berrie & Co., Inc. v. United States*, 381 F.3d 1334 (Fed. Cir. 2004) (ruling on earrings).

The current HTSUS removes this uncertainty by classifying apparel articles according to their constituent materials, regardless the color or holiday adornments. Adding uncertainty would disadvantage U.S. companies that would no longer be able to determine with confidence the classification and duty rates applicable to imported products. This uncertainty would also consume judicial resources in a way that is unnecessary under the current HTSUS. Both uncertainty for U.S. businesses and the potential for wasteful use of judicial resources are contrary to U.S. national economic interests.

In evaluating possible revisions to the HTSUS, ITC must be mindful of the effect that changes could have on the competitive position of U.S. companies. Similarly, ITC should consider the President's responsibility to refrain from proclaiming any modification to the HTSUS that is not in the national economic interest of the United States. Revisions like those currently proposed risk detriment to the competitive position of U.S. companies, financial loss, and job loss in the U.S. textile and apparel industry. They also risk creating uncertainty and unnecessary strain on business and judicial resources. Fruit respectfully asks ITC to reconsider these risks and to refrain from recommending the proposed revisions to the HTSUS.

#### **B. Consistency with the Convention**

Fruit is also concerned about a potential conflict between ITC's proposed HTSUS revisions and U.S. international obligations. As noted above, 19 U.S.C. §§ 3005 and 3006 allow ITC to recommend and the President to proclaim only HTSUS revisions that are consistent with U.S. obligations under the Convention. Accordingly, ITC recommended and in 2007 the President proclaimed a revision to the HTSUS that removed utilitarian articles, including apparel, from classification in HTSUS chapter 95. This revision was necessary to conform the HTSUS to WCO's creation of Note 1(v) to chapter 95 under the HTS.

WCO's 2004 HTS changes declared that holiday-themed apparel and similar utilitarian articles should not be classified as festive articles. ITC's current proposal would establish new provisions in HTSUS heading 9817 that would effectively reclassify utilitarian articles with holiday themes as festive articles. By restoring the classification and duty treatment that WCO's creation of chapter Note 1(v) required the United States to change, the United States could in large part nullify the President's 2007 proclamation and circumvent the United States' obligations under the Convention. For this reason, Fruit respectfully requests that ITC reconsider its proposal and withdraw its proposed modifications to the HTSUS.

#### **IV. Conclusion**

In 2004, WCO provided a clear statement about classification of holiday-themed garments: they shall be classified according to their constituent materials and not as festive articles. ITC recommended modifications to the HTSUS to implement the new chapter note created by WCO and to fulfill U.S. obligations under the Convention. The President proclaimed the effect of those modifications and, in contrast to the case-by-case, oft-litigated regime of years past, the classification of holiday-themed apparel was settled. ITC now proposes to reverse its proper modifications by reclassifying apparel as that cannot be classified as festive articles in HTSUS chapter 95 as festive articles in HTSUS chapter 98.

ITC's proposed revisions risk harm to the conditions of competition in the U.S. textile and apparel industry and could ask the President to proclaim changes that are not in the national economic interest of the United States. The uncertainty and risk of litigation increases these risks. Moreover, ITC's revisions effectively reverse the WCO-consistent modifications recommended by ITC and proclaimed by the President in 2007 and thereby may be contrary to

the United States' obligations under the Convention. Fruit is concerned about these risks and respectfully requests that ITC reconsider these revisions and with its proposal.

Fruit welcomes an open dialog with ITC on this matter and is happy to provide further information. Please contact Chris Champion at (256) 500-6851 in our Legal Department with any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Rick Medlin". The signature is fluid and cursive, with the first name "Rick" and last name "Medlin" clearly distinguishable.

Rick Medlin  
President and CEO



**APPENDIX F**

**SUBMISSION FROM  
THE HOSIERY ASSOCIATION**





Chairman: Jed Holland  
(336) 227-1431, ext. 260  
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President/CEO: Sally Kay  
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October 21, 2010

Office of the Secretary  
United States International Trade Commission  
500 E. Street, SW  
Washington, DC 20436

**U.S. International Trade Commission (ITC) Investigation No. 1205-9 Certain Festive Articles: Recommendations for Modifying the Harmonized Tariff Schedule**

I am writing to you on behalf of The Hosiery Association (THA), which represents an industry that employs over 35,000 workers across the United States (U.S.). We wish to comment on the above-referenced investigation relating to festive articles and recommendations for modifying the harmonized tariff schedule.

We believe that amendments in their proposed form would run counter to the national economic interest of the U.S. and should not be recommended to the President for the following reasons:

There is currently no reference to socks and hosiery in heading 9817.95 of the Harmonized Tariff Schedule (HTS). This proposed revision would be a fundamental change of policy that would impact the Western Hemisphere's textile and apparel industry, a critical and highly sensitive U.S. supply chain of goods, services, and jobs.

U.S. Free Trade Agreements (FTAs) and preference programs currently require festive apparel (including socks and hosiery) articles to be made of U.S. yarns, fabrics and in some cases finishing operations. Amending the HTS in such a manner provides importers with an immediate incentive to shift festive hosiery and socks production from the Western Hemisphere to Asia, India and other overseas manufacturers. We do not believe this is the intent of the proposal, and it inadvertently does not ensure a level playing field nor does it convey the spirit of equality.

With that said, we recommend that the following measures (including but not limited to) should be taken into consideration during the deliberation process:

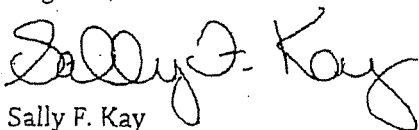
- Clearly define the term "festive" in festive occasions as broad interpretation may foster abuse of the intent of the law.
- Strike the term "or similar occasion," and identify those festive occasions that are eligible for this category.

The Hosiery Association  
ITC Investigation 1205-9 – Page 2  
October 21, 2010

- Require that symbol/motif be permanently affixed to the socks/hosiery item.
- Require that the festive adornment be the only symbol/motif appearing on the article, precluding the possibility of dual-purpose garments reflecting licensed characters (e.g., Sponge Bob with a candy cane).
- Require a size parameter for the festive adornments on socks and hosiery. For example, the symbol/motif should cover a significant portion, at least 30 percent, of the surface of an article.
- Require an import eligibility timeframe of 45 days from the date of the festive occasion as to preclude year-round abuse of the provision.
- Require annual quantitative limitations by importer.
- Require entries to be subject to Type 1 entries for consumption, and not eligible for withdrawal from bonded warehouses or Free Trade Zones (FTZs), where simple application of festive symbols/motifs would change tariff treatment.

We thank you in advance for your attention to these comments and appreciate hearing from you should you have any questions concerning our industry.

Regards,



Sally F. Kay  
President and CEO  
The Hosiery Association

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**APPENDIX G**

**SUBMISSION FROM  
McGUIRE WOODS, LLP,  
ON BEHALF OF  
THE UNITED STATES ASSOCIATION OF IMPORTERS  
OF TEXTILES AND APPAREL**

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October 21, 2010

Secretary  
United States International Trade Commission  
500 E Street, SW  
Washington, D.C. 20436

**Certain Festive Articles: Recommendations for Modifying  
the Harmonized Tariff Schedule of the  
United States – Investigation No. 1205-9**

Dear Ms. Abbott:

This submission is filed on behalf of the United States Association of Importers of Textiles and Apparel ("USA-ITA"). USA-ITA supports the recommended modifications.

Investigation No. 1205-9 was prompted by a letter from United States Customs and Border Protection ("CBP"). CBP requested that the Commission make recommendations to the President regarding the addition of a U.S. Note and the amendment of certain classification provisions in Subchapter XVII, Chapter 98 of the Harmonized Tariff Schedule of the United States ("HTS"). The amendments relate to certain utilitarian articles that incorporate a festive design, decoration, emblem or motif.

At present, utilitarian articles (including apparel and accessories) classified in Chapter 61 or 62 of the HTS as well as made-up textile articles classified in Chapter 63 are not eligible for classification as festive articles in Chapter 95. The proposed modifications would add a new U.S. Note 9 in Subchapter XVII, Chapter 98 indicating that a new subheading (9817.95.02) would apply only to specified utilitarian articles. Proposed subheading

9817.95.02 would provide a free rate of duty for those utilitarian articles which qualify as festive articles.

USA-ITA is a voluntary association of some 200 importers and retailers of textile products and wearing apparel, as well as related service industries such as international transportation concerns. Many USA-ITA members import wearing apparel that satisfies the requirements for classification as festive articles.

USA-ITA's comments are quite limited. USA-ITA requests that the Commission's recommendations include retroactive treatment for the modifications. The request letter from United States Customs and Border Protection ("CBP") dated July 1, 2010 concludes by indicating that the proposed amendments would ensure proper classification for all qualifying festive articles entered on or after February 3, 2007. USA-ITA requests that the Commission Report include recommend retroactive treatment.

The language of new subheading 9817.95.82 proposed by CBP describes the utilitarian articles eligible for duty-free treatment as those "closely associated with festive occasions, for example, Christmas, Easter, Halloween or Thanksgiving [ ]. The Commission proposes a minor change in the language. The Commission's recommendation would read: "utilitarian articles, each incorporating a symbol or motif closely associated with Christmas, Easter, Halloween or Thanksgiving or similar festive occasion [ ]." USA-ITA makes no comment on the change in language; in its opinion, both formulations are clear. However, USA-ITA suggests that it would be appropriate to include one or two examples of festive occasions that may not be as well known as the four listed. This would ensure that there is no confusion that the term "festive articles" is not limited in any meaningful way. Examples are Valentines Day and Columbus Day.

The Commission's announcement indicates that it will examine information concerning the rates of duty currently used by importers in liquidated and undisputed entries of specific festive articles that are the subject of this investigation. USA-ITA respectfully submits that, at least in the case of apparel, and made-up textile articles, an examination of this nature is unnecessary.

The letter from CBP requesting the investigation makes it perfectly clear that utilitarian apparel and made-up textile articles qualify for classification as festive articles. This is based on the numerous court decisions cited in CBP's letter. There is no dispute on this point. Nevertheless, importers have been required to enter these festive articles in Chapters 61, 62 and 63 by virtue of Note 1(v), Chapter 95, HTS. For that reason there will be no liquidated entries of apparel classified as festive articles. The proposed modification would correct the situation by providing Chapter 95 duty treatment. Given these factors, there is no purpose in examining the rates of duty currently utilized by importers of these articles.

USA-ITA appreciates the opportunity to comment and support the proposed modification.

Please contact the undersigned if you have any questions on this submission.

Respectfully,

McGUIREWOODS LLP



John B. Pellegrini



**APPENDIX H**

**SUBMISSION FROM  
GRUNFELD, DESIDERIO, LEBOWITZ,  
SILVERMAN & KLESTADT LLP,  
ON BEHALF OF BGE LTD.**



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October 22, 2010

**BY HAND**

United States International Trade Commission  
500 E Street SW  
Washington, DC 20436

Attention: The Honorable Marilyn Abbott, Secretary

Re: Comments Relating to ITC Investigation No. 1205-9 (Festive Articles)  
Our Reference: 10417 0050001

Dear Madam Secretary:

On behalf of BGE Ltd., we are filing this letter in response to the United States International Trade Commission ("ITC") Notice published in the Federal Register on September 20, 2010 soliciting public comment on certain proposed modifications to the Harmonized Tariff Schedule of the United States ("HTSUS"). Certain Festive Articles: Recommendations for Modifying the Harmonized Tariff Schedule of the United States - Investigation 1205-9, 75 Fed. Reg. 57,293 (September 20, 2010).

BGE generally supports the ITC's proposed recommendations with certain modifications as described below.

**I. BACKGROUND**

**A. Request by U.S. Customs and Border Protection (“CBP”)**

In a letter dated July 1, 2010, Myles B. Harmon, Director, CBP Commercial and Trade Facilitation Division, submitted a request, pursuant to Section 1205 of the Omnibus Trade and Competitiveness Act of 1988, that the ITC commence an investigation regarding Note 1 (v) to Chapter 95 of the Harmonized Tariff Schedule of the United States (“HTS”) and its effects on the tariff treatment of imported festive articles under HTS heading 9505. CBP further requested that the ITC recommend to the President the amendment of certain special classification provisions in Subchapter XVII of Chapter 98 of the HTSUS in order to ensure substantially rate neutral, duty-free treatment to certain utilitarian articles with festive designs and/or motifs in accordance with applicable binding legal precedent.

CBP specifically requested the following amendments:

**1. Replace subheading 9817.95.01 and the superior text thereto with the following new heading:**

9817.95.01 Utilitarian articles (including but not limited to Seder plates, blessing cups, menorahs or kinaras) of a kind used in the home in the performance of specific religious or cultural ritual celebrations for religious or cultural holidays, or religious festive occasions (provided for in subheading 3924.10, 3926.90, 6307.90, 6911.10, 6912.00, 7013.22, 7013.28, 7013.41, 7013.49, 9405.20, 9405.40 or 9405.50) ..... Free 25%

**2. Insert the following new U.S. Note 9 to subchapter XVII of Chapter 98:**

9. Heading 9817.95.02 applies only to tableware, kitchenware (except baking pans, cookie cutters, cookie stamps and presses) and toilet articles of chapter 39, 69 or 70; carpets and other textile

floor coverings of chapter 57; apparel and accessories of chapter 61 or 62; and made-up textile articles of chapter 63.

3. **Replace subheading 9817.95.05 with the following new heading:**

9817.95.02 Utilitarian articles, each incorporating a symbol and/or motif that is closely associated with a festive occasion (for example, Christmas, Easter, Halloween, or Thanksgiving), the foregoing articles used or displayed principally during that festive occasion and not typically at any other time, under the terms of U.S. note 9 to this subchapter..... Free 25%.

As observed by CBP, the proposed amendments, if properly implemented, will ensure that utilitarian or functional articles with festive designs and/or motifs entered on or after February 3, 2007, will be classified in accordance with Note 1 (v) to Chapter 95, while ensuring substantial rate neutrality for this merchandise in accordance with the decisions of the courts.

**B. Investigation by ITC**

In its notice, the ITC announced that, as a result of the CBP letter, it has instituted investigation No. 1205-9, *Certain Festive Articles: Recommendations for Modifying the Harmonized Tariff Schedule of the United States*, pursuant to section 1205 of the Omnibus Trade and Competitiveness Act of 1988 (19 U.S.C. 3005), for the purpose of making recommendations to the President regarding the addition of a U.S. note and the amendment or replacement of certain classification provisions in subchapter XVII of chapter 98 of the Harmonized Tariff Schedule of the United States (HTS) relating to certain utilitarian articles that incorporate a festive design, decoration, emblem, or motif.

The ITC indicated its proposed recommendation to adopt CBP's request (with the exception that it proposes to replace the phrase "a festive occasion (for example, Christmas, Easter, Halloween, or Thanksgiving)" with "Christmas, Easter, Halloween, Thanksgiving or similar festive occasion."

## II. COMMENTS

BGE largely supports the ITC's proposed recommendation but would like to offer the below comments intended to ensure that any tariff changes better reflect the letter and spirit of issues raised by the relevant judicial and administrative precedent.

### A. Definition of "Festive Occasion"

#### 1. Definition Must Include All Holidays

As currently proposed, the term festive occasion would embrace a narrowly drawn list of holidays and similar festive occasions. We maintain that the term should be defined more expansively to embrace other occasions held by the courts to be festive for tariff purposes. To our knowledge, the courts have not rejected any holiday as not being festive. Thus, for example, in addition to Christmas, Easter, Halloween and Thanksgiving, other holidays including the Fourth of July (Park B. Smith, Ltd. v. United States, 347 F.3d 922 (Fed. Cir. 2003)) and Valentine's Day (Midwest of Cannon Falls, Inc. v. U.S., 122 F.3d 1423 (Fed. Cir. 1997)) have also been recognized as being festive for tariff purposes.

Numerous other holidays have also been recognized by CBP on the administrative level as being festive for tariff purposes. These include, for example, St. Patrick's Day (NY R03881

of May 9, 2006); Hanukah (N097916 of March 19, 2010), the Sabbath (HQ 962128 of October 18, 1999) and Father's Day (NY H83205 of July 23, 2001).

Indeed, CBP has gone so far as to acknowledge that:

the United States is a constantly changing diverse, multicultural society. As such, there are holidays recognized today which were little known in this country fifty or even twenty years ago.

Limitation Of The Application Of The Decisions Of The Court Of International Trade And The Court Of Appeals For The Federal Circuit In Park B. Smith V. United States, Customs Bulletin (April 5, 2006, p. 26). In footnote 23, CBP went on to observe as follows:

Today, a segment of the American society celebrates Kwanzaa, a celebration of traditional African values begun in 1966. See <http://www.tike.com/celeb-kw.htm>. We have had postage stamps issued to commemorate Eid, an Islamic holiday that marks the end of Ramadan. See Wikipedia, the free encyclopedia at [http://en.wikipedia.org/wiki/Eid\\_ul-Fitr](http://en.wikipedia.org/wiki/Eid_ul-Fitr). These stamps were first issued on September 1, 2001. More recently, it was reported in various news sources that there is a movement to have the Lunar New Year, also known as Chinese New Year, declared a federal holiday.

In short, there are a multitude of holidays that are celebrated beyond Christmas, Easter, Halloween, and Thanksgiving and which are not be similar thereto. Any definition of festive occasions must be broadly drafted to embrace all such holidays.

## **2. Definition Must Include Other Celebratory Events**

Festive occasions are in no way limited to calendar-based or annual events, but have been recognized as embracing a whole host of celebratory occasions. Thus in Wilton Industries, Inc. v. United States, 493 F. Supp. 2d 1294 (Ct. Int'l Trade 2007), the CIT recognized that private celebratory events may qualify as festive occasions for tariff purposes. In particular, the Court noted that weddings, anniversaries and birthdays are "occasions comfortably within any

reasonable definition of a festive occasion.” *Id.* at 1317. The Court in Wilton also observed as follows (on p. 1331):

Similarly, sentiments such as Happy Birthday, Happy Anniversary, Congratulations, and Best Wishes are motifs closely associated with non-holiday festive occasions including birthdays, weddings, anniversaries, and baptisms or First Communion.

The Court further observed that none of the parties identified any country that limits classification as festive articles solely to merchandise associated with recognized holidays.

In short, there are a multitude of private celebratory events other than named holidays. Any definition of festive occasions must be broadly drafted to embrace all such occasions.

**B. Construction of “Closely Associated with a Festive Occasion”**

BGE requests that, by terminology or construction, the concept of “closely associated” be subject to reasonable parameters (*i.e.*, that a symbol or motif be required to *reasonably* be associated with a festive occasion). A review of CBP rulings reflects various holiday items being determined not to be closely associated with the depicted holiday. Thus, for example, in Ruling N100955 of May 4, 2010, CBP held that a red and white “Ceramic Christmas Chiming Tree” that was marketed as a Christmas item in the “Holiday Lane” section of a store, to be sold in the first few months prior to Christmas, was not a festive article (as it did not depict a decorated evergreen tree as would be traditionally associated with or used at Christmas).

Similarly, in HQ W967854 of July 19, 2007, CBP addressed the tariff classification of a Starbucks “Christmas Banner Garland” composed of artificial poinsettia leaves made of white paper. The paper leaves were attached to wire stems wrapped with white paper. The poinsettia beads were made of Styrofoam and coated with red colored lacquer. The leaves and beads were

bound together with white paper to simulate the poinsettia flower. Festive article tariff treatment was denied as CBP concluded that the garland was “not immediately recognizable as a Christmas decoration.”

In order to imbue the festive article concept with sufficient substance, reasonable parameters must be applied in determining whether a symbol or motif is “closely associated” with a festive occasion.

**C. Display During a Festive Occasion**

It is fair and appropriate to require a “festive article” to be used or displayed in connection with a festive occasion. However, we maintain that the formulation of this concept in the proposed recommendation is overly narrow (*i.e.*, used or displayed principally during that festive occasion and not typically at any other time).

In practice, this concept has been applied in a restrictive manner. For example, in Ruling N017638 of October 4, 2007, heart-shaped Valentine gel clings sold as a Valentine season item were deemed not to be festive articles as “decorations in the shapes of hearts, lips and kisses may be used at any time of the year as symbols of love and romance.” Similarly, in Ruling NY E85113 of September 14, 1999, CBP addressed the tariff treatment of the "Chanukah Musical Mug," consisting of a ceramic mug with an exterior depicting dancing draydels, musical notes and wording "Draydel, Draydel, Draydel." When the mug was lifted, it played the traditional Chanukah melody, "The Draydel Song." The Chanukah Musical Mug was deemed not to be a festive article as it was suitable for use in the home as a drinking cup all year long.

As such, BGE proposes that the “use” portion of proposed subheading 9817.95.02 focus on the reasonable principal use without further limitations.

**D. Proposal to Include Jewelry Articles (Classifiable within Chapter 71, HTS, or Elsewhere)**

Although not specifically addressed by the proposed recommendations in the ITC's notice, it is the view of BGE that jewelry articles (classifiable within Chapter 71, HTS, or elsewhere) should be included in the new U.S. Note 9 to subchapter XVII of Chapter 98 as it applies to the proposed new subheading 9817.95.02.

The issue of the treatment of jewelry items as festive articles has been squarely addressed by the U.S. Court of Appeals for the Federal Circuit in Russ Berrie & Co., Inc., v. United States, 381 F.3d 1334 (Fed. Cir. 2004). That case dealt with the tariff classification of lapel pins and earring sets containing Christmas themes and an earring set containing Halloween themes. The particular holiday motifs at issue were: a Santa Claus; a snowman decorated with holly, wearing a top hat and holding a snowball; a teddy bear dressed in red and white Santa outfit and holding a present; red, green, gold bells with/or without red or green bows; a ghost; a jack-o-lantern; a (Frankenstein) monster; and a witch.

In considering whether the jewelry items qualified as festive articles, the Court of Appeals went so far as to observe that:

The imported articles in this case fit comfortably within that standard. Snowmen decorated with holly, ghosts, and witches' and monsters' heads are symbols that are closely associated with the Christmas and Halloween holidays and are used principally on those occasions. Moreover, these items are listed in Russ Berrie's Christmas and Halloween catalogues and distributed and sold in connection with those holidays. The imported pins and earrings are prima facie classifiable under heading 9505.

Russ Berrie at 1336.



However, the Court recognized that the items were also *prima facie* classifiable as jewelry within Chapter 71, HTS. The Court observed the existence of two seemingly conflicting tariff notes. First, Note 3 to Chapter 71 excluded "articles covered by Note 2 to Chapter 95." Note 2 to Chapter 95 provided that such chapter "includes articles in which natural or cultured pearls, precious or semiprecious stones (natural, synthetic or reconstructed), precious metal or metal clad with precious metal constitute only minor constituents."

Overruling a determination by the U.S. Court of International Trade (Russ Berrie & Co. v. United States, 281 F. Supp. 2d 1351 (Ct. Int'l Trade 2003)) holding that the festive jewelry articles were classifiable within Chapter 95, the CAFC resolved the two competing tariff notes in favor of classification within Chapter 71. However, in so doing, the Court acknowledged that "these two notes may not be models of clarity . . ." Id. at 1336. When urged by the importer to reject what it concluded would be an anomalous result, the CAFC observed that: "Our function, however, is to apply the Customs classification standards as Congress has written them, not to change their meaning to correct seeming injustice."

In light of the confusion that has reigned on this issue, coupled with the existing judicial determinations that jewelry articles with holiday themes satisfy the judicial criteria as festive articles, BGE requests that the ITC clarify the area once and for all in favor of treating festive jewelry items as festive articles for the purposes of its recommendation. As such, BGE requests that proposed Note 9 be broadened to include jewelry articles classified in Chapter 71 (or elsewhere).

**E. Proposal to be Made Effective for all Entries Filed on or After February 3, 2007**

As reflected in the its July 1, 2010 letter, CBP requested that the ITC “recommend to the President the amendment of certain special classification provisions in Subchapter XVII of Chapter 98 of the HTSUS in order to ensure substantially rate neutral, duty-free treatment to certain utilitarian articles with festive designs and/or motifs in accordance with the recent judicial decision of Michael Simon Design, Inc. v. United States . . . .”

The basis of the CBP request was an attempt to reconcile Note 1(v) to Chapter 95, HTS, which (effective February 3, 2007) excluded certain utilitarian articles from Chapter 95 with the decision in Michael Simon Design, Inc. v. United States, 501 F. 3d 1303 (Fed. Cir. 2007) which concluded that certain such articles are indeed properly classifiable within Chapter 95, HTS. As stated by CBP on page 4 of its letter:

Because Note 1 (v) to Chapter 95 excludes certain utilitarian articles from classification as festive articles under heading 9505 (a duty-free provision), and because the Michael Simon decision grants certain utilitarian articles duty-free treatment as festive articles under heading 9505, CBP is requesting that the ITC commence a Section 1205 investigation with a view to recommending to the President the adoption of a new duty-free provision in Subchapter XVII of Chapter 98 of the HTS covering certain utilitarian or functional articles with festive designs and/or motifs.

In order to give effect to the CBP proposal (and the underlying intent to ensure that the rate neutrality that was compromised by Chapter 95 Note 1(v), is restored), we maintain that the ITC recommendation must be made retroactive to entries filed on or after February 3, 2007 (*i.e.*, the effective date of Note 1(v)), regardless of liquidation status. While this result can be accomplished in a number of different ways, we ask that the ITC consider a mechanism to allow for the filing of claims covering impacted entries filed on or after February 3, 2007 for a

specified period of time (*e.g.*, 180 days) after the effective date of any HTS amendment resulting from the ITC proposal.

**F. Alternative Formulation of Proposed 9817.95.02**

We have drafted below an alternative formulation of proposed subheading 9817.95.02 incorporating the comments made above. BGE requests that the ITC consider the below formulation in finalizing its recommendations in the captioned matter.

9817.95.02 Utilitarian articles, each incorporating a symbol and/or motif that, applying a standard of reasonableness, is closely associated with a festive occasion (for example, any holiday or celebratory event), the foregoing articles actually or reasonably expected to be used or displayed principally during that festive occasion, under the terms of U.S. note 9 to this subchapter

Note 1 – Holidays include without limitation those celebrated by any group whether for religious, national, cultural, familial or other reasons.

Note 2 – Celebratory events include festive occasions that are not holidays (*e.g.*, weddings, anniversaries, birthdays, graduations, etc.):

Note 3 – For purposes of U.S. Note 9 to this subchapter, Heading 9817.95.02 applies only to tableware, kitchenware (except baking pans, cookie cutters, cookie stamps and presses) and toilet articles of chapter 39, 69 or 70; carpets and other textile floor coverings of chapter 57; apparel and accessories of chapter 61 or 62; made-up textile articles of chapter 63; and jewelry articles of Chapter 70. [71]

Note 4 - Regardless of liquidation status, claims for refunds of duties on items entered on or after February 3, 2007 but before the effective date of this provision may be made within 180 days pursuant to a procedure to be announced by CBP


**III. CONCLUSION**

BGE appreciates the opportunity to comment in the above matter. It strongly supports the recommendation to restore duty-free treatment (through the adoption of Chapter 98 provisions) to the items that have been deprived of such treatment, since February 3, 2007, by virtue of the adoption of Note 1(v), Chapter 95, HTS. BGE offers the above discussed comments in connection with certain aspects of the recommendation in order to ensure its broad application bearing in mind the goals of ensuring substantially rate neutral, duty-free treatment to certain utilitarian articles with festive designs and/or motifs in accordance with applicable legal precedent.

Please do not hesitate to contact us with any questions.

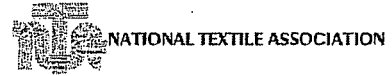
Sincerely,

GRUNFELD, DESIDERIO, LEBOWITZ,  
SILVERMAN & KLESTADT LLP

  
Arthur W. Bodek

**APPENDIX I**

**SUBMISSION FROM  
THE AMERICAN MANUFACTURING TRADE  
ACTION COALITION,  
THE NATIONAL COUNCIL OF TEXTILE  
ORGANIZATIONS, AND  
THE NATIONAL TEXTILE ASSOCIATION**



October 22, 2010

Marilyn R. Abbott, Secretary  
United States International Trade Commission  
500 E Street SW  
Washington, DC 20436

**RE: International Trade Commission Investigation No. 1205-9, Certain Festive Articles:  
Recommendations for Modifying the Harmonized Tariff Schedule of the United States.**

Dear Secretary Abbott:

The undersigned organizations - the National Council of Textile Organizations, the National Textile Association, and the American Manufacturing Trade Action Coalition - are submitting formal comments regarding the U.S. International Trade Commission Investigation No. 1205-9, Certain Festive Articles: Recommendations for Modifying the Harmonized Tariff Schedule of the United States. The Commission is conducting this investigation at the request of U.S. Customs and Border Patrol ("CBP").

We strongly oppose the Commission's proposed recommendations to modify the Harmonized Tariff Schedule of the United States ("HTSUS") by adding a U.S. note 9 and changing two U.S. tariff rate lines at the 8 digit level (9817.95.01 and 9817.95.02) covering certain festive articles. It is our contention that the Commission's proposed modifications circumvent the U.S. tariff schedule to the detriment of U.S. textile and apparel producers.

Background:

The definition and implementation of the festive articles rules have a direct effect on U.S. textile manufacturers. Our member companies, which include home furnishings manufacturers as well as fiber, yarn, and fabric manufacturers, and specialty dyeing and finishing companies, represent the supply chain for apparel and home textile items that will be included in the revised HTSUS codes.

Industry associations and individual companies have been engaged in the process of defining festive articles for many years, including the 2002 joint filing of an *amicus* brief to the U.S. Government appeal in the decision *Park B. Smith v. United States*. At issue in *Park B. Smith v. United States* was the question of whether certain utilitarian textile products are properly classified under HTSUS Heading 9505. On the face, most textile products are excluded from consideration of classification under HTSUS 9505 by Explanatory Note 1(v), which states:

"This chapter does not cover tableware, kitchenware, toilet articles, carpets and other textile floor coverings, apparel, bed linen, table linen, toilet linen, kitchen linen and similar articles having a utilitarian function (classified according to their constituent material)."

However, the Explanatory Notes have not been found by the courts to be legally binding, and, in *Park B. Smith*, the court ruled that certain textile products are properly classified under 9505. More recently, in *Michael Simon Design v. United States*, a court again ruled that certain textile products are properly classified under Heading 9505.

The domestic industry strongly disagrees with the court rulings allowing certain utilitarian textile and apparel articles closely associated with a festive occasion to be entered as festive articles under Heading 9505. We assert that textile articles with a festive design are still ordinary textile articles that should be subject to the applicable duties. To focus on the decorative design versus the use and nature of the item is illogical. We agree with the U.S. Government's argument in the *Park B. Smith* appeal that "the correct classification standard is whether the articles are the class or kind of merchandise that can be used only on a specific festive occasion, such as the Christmas tree ornaments of Chapter 95, and not whether the articles themselves are used only on a festive occasion." Apparel and home furnishing products such as shirts and rugs are certainly used on other occasions and therefore are not properly classified as festive articles.

#### Impact on the Domestic Industry:

The U.S. textile industry faces enormous pressures from low-cost imports which already enjoy enormous unfair advantages including state-sponsored subsidies; lax safety, environmental and regulatory controls; and low wages. When these products are allowed to enter the U.S. market duty free, it further erodes the competitiveness of domestic producers, and the entire supply chain is negatively impacted. As just one example, our membership includes a producer of holiday rugs. They feel certain that they will lose this business if the applicable U.S. duty is removed.

Furthermore, the elimination of the U.S. quota system in the Uruguay Round fell especially hard on the U.S. textile industry. In light of the scale of this concession, the U.S. government essentially promised that there would be no further erosion of U.S. tariffs at least until a new round of global trade talks was completed. Our domestic industry has invested in equipment and worker training to respond to this competitive world market. Allowing textile articles to enter duty free as festive articles violates the commitments our government made to maintain the Uruguay Round tariffs for our domestic manufacturers. It will undoubtedly undermine the domestic industry's competitiveness and result in the displacement of U.S. workers in an economic environment that cannot absorb additional job losses. In the last ten years, the U.S. textile and apparel industry has experienced a 62 percent decline in employment, equating to a loss of 672,000 jobs.

In addition, it is now common knowledge that further textile tariff reductions are being considered again in the Doha Round. It makes no sense to unilaterally reduce or eliminate a tariff now that we may use in the negotiations later in return for some concession from our trading partners.

It is also important to point out that textiles and apparel have a high rate of customs fraud, and there will be enormous financial incentive to mislabel non-holiday related apparel items as festive articles to skirt U.S. tariffs. It is unreasonable to expect that CBP will be able to prevent illegal misclassifications from entering U.S. commerce considering the high volume of trade in this product sector. CBP is stretched thin with current programs, and adding additional responsibilities in relation to festive articles could further erode enforcement of all textile agreements.

Recommendations for Mitigating Damage Should the Proposed Modifications Be Submitted:

In light of the court decisions over the years on festive articles, we understand that CBP finds itself confronted with the text of the HTSUS excluding textile products from classification under Heading 9505 and court decisions affirming that certain textile products are properly classified under Heading 9505. According to CBP guidance from 2009, consistent with those court rulings, in order to be classified under heading 9505, HTSUS, "(1) such articles must be 'closely associated' with a festive occasion and (2) such articles must be displayed and used by the consumer only during the festive occasion." This guidance does not allow the classification of apparel or textile made up goods in Heading 9505 due solely to color scheme or general artwork. The proposed changes to the HTSUS for classifications 9817.95.01 and 9817.95.02 appear to be an effort on the part of CBP to codify the current guidance cited above.

However, we are concerned that any modifications to Subheading 9817.95 not inadvertently result in classifying as "festive" any product currently not classified, per the court rulings, as "festive" under Heading 9505. The authority to set import duty rates resides with Congress, and while Congress has delegated to the President the authority to modify the HTSUS in cases as this to conform the HTSUS to court decisions, that delegation must be understood as limited in scope to the minimum necessary to effect the technical correction to implement the court rulings. CBP must take utmost care in modifying Subheading 9817.95 lest it exceed the Executive Branch's authority and violate the intention of Congress in creating the HTSUS. Further, we note, that the role of CBP is to collect all the import duties that Congress has enacted via the HTSUS; therefore CBP must be very circumspect when the Bureau proposes actions that could move articles from HTSUS classification subject to import duties into a classification with zero rate of duty.

To ensure that normal wearing apparel and made up articles continue to be classified in chapters 50-63 subject to import duties and are not improperly classified in HTSUS 9505, we recommend a few other points for consideration that should be included in additional CBP guidelines and explanatory notes.

- 1) The emblem or artwork should be permanently affixed. Tags, stickers, or other temporary items that are removed by the consumer before use and/or laundering are not valid indicators of whether a product is festive or utilitarian.
- 2) Any goods entered under HTSUS 9817.95 should be fully finished. Unfinished textile, apparel or made-up articles should not enjoy duty-free entry based on an intention to add a festive motif as there is no way Customs can verify that the further processing (screen printing, embroidering, etc.) is done.
- 3) We support the clarifying language from Customs in HTS 9817.95.02 that provides specific examples of holidays. We note that holidays (which the English language recognizes as proper nouns with initial capitalization) fall on specific days (e.g., Christmas on December 25, Thanksgiving on the fourth Thursday in November) and we urge a strict interpretation of this definition so that items with emblems for a wider season, such as winter or summer (not proper nouns in English and of no fixed start or end date), are not inappropriately identified with a particular holiday.

We note with approval that the revised HTSUS 9817.95 description is silent on any changes to the classification of costumes, presumably since this issue was determined in *Rubie's Costume Co. v. United States* in 2003. CBP guidance from August 18, 2009, clearly indicates that Customs is adhering to the court's decision. Further the proposal from CBP does not alter HTSUS Chapter 95 Note 1 (d), which



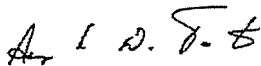
states that "This chapter does not cover: sports clothing or fancy dress, of textiles, of chapter 61 or 62." In *Rubie*, the court determined that:

- flimsy, non-durable textile costumes that are not recognized as ordinary articles of apparel are classified under 9505.90.6000, HTSUSA (flimsy); and
- textile costumes that exceed the flimsy, non-durable standards, or are recognized as ordinary articles of apparel are classified in Chapters 61 or 62, HTSUSA (well-made).

In conclusion, we are highly concerned with the increasing array of utilitarian textile products that are allowed to enter the U.S. duty free through the festive articles loophole. Should this trend continue, significant jobs losses are very likely to occur. As result, the U.S. Government should take all measures at its disposal to mitigate the damage to U.S. producers.

Thank you for providing us the opportunity to provide comments.


Sincerely,



Augustine D. Tantillo  
Executive Director  
American Manufacturing Trade  
Action Coalition (AMTAC)



Cass M. Johnson  
President  
National Council of Textile  
Organizations (NCTO)



David Trumbull  
Vice President, International Trade  
National Textile Association  
(NTA)

**APPENDIX J**

**SUBMISSION FROM  
DRINKER BIDDLE & REATH LLP.**

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WISCONSIN

October 22, 2010

**VIA HAND DELIVERY**

Secretary  
United States International Trade Commission  
500 E Street, SW  
Washington, DC 20436

**Re: Investigation No. 1205-9; Certain Festive Articles: Recommendations  
for Modifying the Harmonized Tariff Schedule of the United States**

Dear Secretary:

Pursuant to Section 1205(b)(1) of the *Omnibus Trade and Competitiveness Act of 1988* (the "1988 Act") (19 U.S.C. § 3005(b)(1)), we are providing the following comments on the proposed modification of the *Harmonized Tariff Schedule of the United States* ("HTSUS") with respect to the tariff classification of certain festive articles. As set forth in the International Trade Commission's ("ITC") notice of institution of investigation (75 *Fed. Reg.* 57293, September 20, 2010), the ITC proposes to adopt the following language for HTSUS subheading 9817.95.02:

Utilitarian articles, each incorporating a symbol and/or motif that is closely associated with Christmas, Easter, Halloween, Thanksgiving or similar festive occasion, the foregoing articles used or displayed principally during that festive occasion and not typically at any other time, under the terms of U.S. note 9 to this subchapter.

**1. The Language of Heading 9817.95.02 Should Include Reference to Private Festive Celebrations**

First, we respectfully assert that the use of the phrase "Christmas, Easter, Halloween, Thanksgiving or similar festive occasion" could be confusing and narrowly construed to limit the scope of festive occasions that should be covered by this subheading. More specifically, if the phrase "similar festive occasion" were limited to occasions similar to the listed exemplars, it is possible that the term "festive occasion" in this new tariff provision could be limited to major holidays. This limitation was specifically rejected by the Court of International Trade ("CIT") in the case of *Wilton Industries, Inc. v. United States*, 493 F.Supp.2d 1294 (Ct. Int'l Trade 2007).

In *Wilton Industries*, the CIT determined that “private festive celebrations” such as birthdays, weddings, anniversaries, and graduations are considered “festive occasions” within the meaning of HTSUS heading 9505. Specifically, the CIT found that “nothing in the definition of the word ‘festive’ suggests that the term is limited to civic and religious holidays, or that it excludes private celebrations such as birthdays, weddings, anniversaries and graduations.” Accordingly, utilitarian articles with designs, symbols, and/or motifs related to private celebrations such as birthdays, weddings, anniversaries and graduations should also be covered by the proposed HTSUS subheading 9817.95.02.

Next, we note that U.S. Customs and Border Protection’s (“CBP”) proposed use of the language “for example” followed by listed exemplars may be more flexible and broad for the purposes of identify the “festive occasions” covered by the proposed new tariff provision. We understand that the ITC changed CBP’s proposed language to “clarify the intended scope of the heading and conform to normal HTS language.” However, for the reason set forth above, we believe that the ITC’s modified language may have just the opposite effect. In fact, the language “for example” in a parenthetical followed by listed exemplars is used frequently and effectively throughout the language of the HTSUS, including in more than 80 tariff headings.

**2. The Language of Heading 9817.95.02 Should Correspond to the Language of the Explanatory Note for Heading 9505**

Further to the above, we believe that the use of the phrase “symbol and/or motif” could be similarly restrictive and may not fully encompass the scope of the decision in the *Michael Simon Design* case. See *Michael Simon Design v. United States*, 452 F.Supp.2d 1316 (Ct. Int’l Trade 2006), *aff’d* 501 F.3d 1303 (Fed. Cir. 2007), *reh’g denied* (Fed. Cir. April 2, 2008). For example, the Explanatory Note to heading 9505 reads “The heading also **excludes** articles that contain a festive ***design, decoration, emblem or motif*** and have a utilitarian function, e.g. tableware, kitchenware, toilet articles, carpets and other textile floor coverings, apparel, bed linen, table linen, toilet linen, kitchen linen.” Emphasis added. In order to correspond with the decision in the *Michael Simon Design* case and the language of the ENs, we suggest that these competing descriptions be harmonized. This could be done by including the terms “design,” “decoration,” and “emblem” as currently found in the ENs, but absent from the proposed subheading 9817.95.02 language.

In light of the foregoing comments, we propose that the language for HTSUS subheading 9817.95.02 be revised to read as follows:

Utilitarian articles, each incorporating a *design, decoration, emblem, symbol and/or motif* that is closely associated with *a festive occasion (for example, Christmas, Easter, Halloween, Thanksgiving or private festive*

*celebrations*), the foregoing articles used or displayed principally during that festive occasion and not typically at any other time, under the terms of U.S. note 9 to this subchapter.

The changes that we propose to the current language for HTSUS subheading 9817.95.02 drafted by CBP and the ITC are emphasized in bold, italic font.

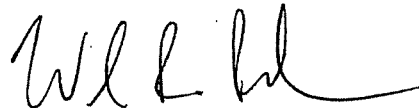
**3. Subheading 9817.95.02 Should Be Applied Retroactively to Provide Duty Refunds on Utilitarian Festive Articles Imported Since February 3, 2007**

Finally, we believe that any HTSUS change with respect to utilitarian festive articles ultimately adopted by the ITC be applied retroactively to all entries made since the change to the HTSUS on February 3, 2007. Accordingly, we respectfully request that the ITC establish a process for duty refunds on eligible goods imported since February 3, 2007 in order to implement this tariff change. We believe that this is an equitable result given that, but for the change to Chapter 95, Note 1(v) of the HTSUS that was effective on February 3, 2007, the present modification proposal would not be necessary. As a result of this change, many utilitarian festive articles that would otherwise have been eligible for duty free entry under HTSUS heading 9505, were imported under dutiable tariff provisions. Such a result is in clear contradiction to the principle of substantial rate neutrality found in the 1988 Act and can be remedied by a retroactive application of the proposed change to HTSUS subheading 9817.95.02.

We thank you for your consideration of our comments on the proposed modifications to the HTSUS. If you have any questions regarding our comments in this matter or require any additional information, please do not hesitate to contact the undersigned.

Respectfully submitted,

**Drinker Biddle & Reath LLP**



William R. Rucker



**APPENDIX K**

**SUBMISSION FROM  
GILDAN ACTIVEWEAR, INC.**



October 22, 2010

Marilyn R. Abbott  
Secretary to the Commission  
United States International Trade Commission  
500 E Street, SW  
Washington, DC 20436

**Re: Investigation No. 1205-9. Certain Festive Articles: Recommendations for Modifying the Harmonized Tariff Schedule of the United States.**

Dear Secretary Abbott,

These comments are submitted on behalf of Gildan Activewear Inc. ("Gildan") as part of the U.S. International Trade Commission's ("ITC") investigation No. 1205-9. Gildan opposes the proposed recommendation to the President for modifying the Harmonized Tariff Schedule of the United States ("HTS") for certain festive articles, as drafted by U.S. Customs & Border Protection ("CBP") and subsequently redrafted by the ITC.

The proposed recommendations for modifying the HTS are inconsistent with statutory requirements that govern modifications of the HTS through the 1205 process. Specifically, amending the HTS to allow textile and apparel articles in Chapters 61, 62, and 63 of the HTS, which are currently subject to the General tariff rates, to be reclassified under a duty-free tariff line of Chapter 98 raises two potential inconsistencies with statutory provisions of the 1205 process: first, the proposed modifications could "alter existing conditions of competitiveness for U.S. industry, labor, and trade"<sup>1</sup>; and second, the proposed modifications do not "ensure substantial rate neutrality."<sup>2</sup> *For broad?*

Further, the creation of another broad duty-free provision for apparel would further complicate the already difficult trade enforcement mission of the Administration. Compliance with complicated and diverse textile and apparel trade rules is difficult to monitor and enforce, but the mission is absolutely critical given the revenue impact of duties collected on these articles and the high rates of violations that occur. Permanently eliminating tens of millions of dollars

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<sup>1</sup> 19 U.S.C. 3005(d)(3)

<sup>2</sup> 19 U.S.C. 3005(d)(1)(C)



in duties would not only harm U.S. free trade agreements (“FTAs”) and trade preference programs, but also would eliminate a benefit the U.S. can offer in future trade negotiations.

Gildan recognizes that the Administration may believe it is compelled to recommend a modification to the HTS due to the outcomes of U.S. court rulings pertaining to classification of festive apparel articles. Following this investigation, should the ITC advance the proposed recommendation to the President, Gildan requests that the Administration strongly consider implementing such HTS amendments in a manner that could mitigate potential abuses of the reclassification. These comments offer concepts for regulations that could facilitate effective implementation and enforcement of the proposed HTS modifications.

Proposed Recommendations for Modifying the HTS could Alter Existing Conditions of Competitiveness for U.S. Industry, Labor, and Trade.

The proposed recommendations for modifying the HTS are inconsistent with the 1205 process requirement that “the modification must not alter existing conditions of competition for the affected United States industry, labor, or trade.”<sup>3</sup> Gildan is in a position to comment on this aspect as we are one piece of a delicate textile and apparel supply chain in the Western Hemisphere that could be harmed by the proposed amendment to the HTS. Specifically, the proposed U.S. Note 9 of Subchapter XVII of Chapter 98, and the related proposed HTS subheading of 9817.95.02, would combine to undermine the Western Hemisphere supply chain of festive apparel production.

Gildan is a vertically integrated manufacturer, marketer, and distributor of basic apparel, headquartered in Canada and with operations in the United States, Central America, the Dominican Republic, and Haiti. Gildan is a substantial consumer of U.S. cotton, and currently has a 64.6 percent U.S. market share in t-shirts and a 63.9 percent U.S. market share in all activewear apparel sold into the wholesale distributor channel.<sup>4</sup> Gildan does substantial business in festive apparel articles during U.S. holiday seasons, distributing to U.S. private label and retail channels. Gildan utilizes the duty-free apparel provisions of U.S. FTAs and trade preference programs, importing blank t-shirts and fleece made from U.S. yarns, which are then screen-printed in the United States for festive occasions.

Gildan’s apparel manufacturing operations are based on yarn-forward rules of origin in U.S. FTAs and trade preference programs. Under these rules, generally, from the yarn spinning process going forward, all operations of the apparel manufacturing (e.g., weaving, knitting, cutting, sewing, etc.) must take place in the United States or a trade partner country in order to be eligible for duty-free treatment into the United States.

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<sup>3</sup> 19 U.S.C. 3005(d)(3)

<sup>4</sup> Three months ended June 30, 2010 (based on unit sales (%)) shipments from wholesale distributors to U.S. screen printers - Gildan Activewear Quarter 3 Report 2010: [www.gildan.com/corporate/IR/overview.cfm](http://www.gildan.com/corporate/IR/overview.cfm).

The overwhelming majority of Gildan's apparel production, including production intended for festive apparel, is made from U.S. yarns, and therefore is eligible for duty-free treatment under U.S. FTAs and preference programs such as the U.S.-Central America-Dominican Republic Free Trade Agreement ("CAFTA-DR") and the Caribbean Basin Trade Preference Act ("CBTPA").

The Administration's proposed modification of the HTS would undermine the yarn-forward rule of origin, and would constitute a fundamental shift in U.S. trade policy that the Executive Branch and Legislative Branch have long nurtured. The yarn-forward rule is a staple of U.S. trade policy, and the policy has created and protected a regional apparel industry that sustains U.S. and regional manufacturing jobs and support services. For decades U.S. trade negotiators have insisted upon the yarn-forward rule of origin for textiles and apparel in U.S. free trade agreements and preference programs to protect jobs in the U.S. textile industry, and to develop regional markets for the export of U.S. yarns and fabrics.

The economic sensitivity of the U.S. textile industry, and the U.S. Executive and Legislative Branches' commitment to protecting the industry, is evident in nearly every U.S. trade program, from the yarn-forward rule in the Western Hemisphere agreements to the exclusion of textile and apparel articles from the Generalized System of Preferences ("GSP") program. Gildan's business relies on the U.S. textile industry remaining competitive.

However, the modification to the HTS, as proposed, would alter the existing conditions by providing apparel importers with a duty-free alternative to the apparel supply chain supporting the U.S. textile industry. This industry has been under extreme competitive pressures for many years as lower cost imports have taken an increasing share of the market. Contrary to the Western Hemisphere apparel supply chains that support the U.S. textile industry and regional jobs and services, East Asian or South Asian-sourced festive apparel articles, for example, contain no U.S. inputs and no other value-added from the region.

The duty-free provisions of U.S. FTAs and preference programs in the region keep Gildan and other companies on a somewhat competitive playing field with our overseas apparel rivals. Over the past few years we have had to face eroding trade protections such as the expiration of U.S. transitional quotas on Chinese apparel and the expiration of the Department of Commerce's apparel monitoring program in Vietnam. Further, overarching issues such as undervalued foreign apparel imports (as evidenced by the Administration's ongoing efforts in Operation Mirage)<sup>5</sup>, extremely low wage rates, lack of environment, labor and social compliance, and export subsidies give an added advantage to overseas apparel exporters. Notwithstanding the above, the current duty-savings through U.S. trade agreements and trade preference programs provide companies with a Western Hemisphere supply chain the opportunity to compete. Unfortunately, the proposed amendments to the HTS provide importers with an immediate incentive to shift festive apparel production from the Western Hemisphere to East Asian, South Asian, and other overseas manufacturers.

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<sup>5</sup> Operation Mirage is an ongoing joint CBP - Immigration & Customs Enforcement (ICE) initiative to determine whether certain textile products entering the United States are undervalued.

Accordingly, recommending an HTS amendment with such economic ramifications through executive proclamation is inconsistent with the requirement that the modification “not alter existing conditions of competition for the affected United States industry, labor, or trade.”

Proposed Recommendations for Modifying the HTS do not Ensure Substantial Rate-Neutrality.

The proposed amendments to the HTS are inconsistent with the 1205 process requirement that the modification must, among other criteria, “ensure substantial rate neutrality.”<sup>6</sup> On the surface, the proposed amendments would not change any national tariff rates in the HTS, so proponents can claim that in fact the modification ensures rate neutrality. However, the effect of the reclassification of textile and apparel articles in Chapters 61, 62 and 63, which are currently fully dutiable at the General tariff rates, into a duty-free tariff line in Chapter 98 achieves the same end result as a massive change in tariff rates.

Apparel articles in Chapters 61 and 62 are subject to some of the highest U.S. tariff rates in the HTS, as high as 32 percent for certain man-made fiber apparel articles. These high tariff rates were instituted to protect jobs in the competitive textile and apparel industry in the United States. The high tariff rates on apparel are the primary reason that the United States collects more revenue from duties on apparel imports than any other imported product, both in terms of total duties collected and on an ad valorem basis. The data below further demonstrate that the HTS Chapters for which the largest amounts of duties are collected are also those that would benefit from the proposed modification to the HTS.

**2009 U.S. Imports, Duties Collected, and Effective Duty Rates**  
 (Data in Millions of Dollars)

Chapter	Description	Imports	Duties	Rate
61	Knit Apparel	33,333	4,318	13.0%
62	Woven Apparel	30,891	3,769	12.2%
87	Vehicles	131,887	1,733	1.3%
64	Footwear	17,666	1,702	9.6%
85	Electrical Machinery	212,100	1,511	0.7%
42	Travel Goods	8,093	896	11.1%
84	Machinery	202,079	890	0.4%
39	Articles of Plastic	28,164	694	2.5%
63	Made-up Textile Items	9,385	643	6.9%

Source: U.S. International Trade Commission

We believe that the potential economic ramifications, including significant job and revenue losses, of using the 1205 process to reclassify certain apparel into duty-free HTS lines, should

6 19 U.S.C. 3005(d)(1)(C)

persuade the ITC to not recommend the proposed modifications to the President. Such a wide-reaching amendment to the HTS should be exclusively a decision of the U.S. Congress, which bears exclusive authority over U.S. revenue generation, and which bears a responsibility to its constituents for economic policies that directly affect their well being.

Proposed Recommendations for Modifying the HTS would Create Unnecessary Difficulties for U.S. Textile/Apparel Enforcement.

Apparel articles most likely to benefit from the proposed recommendation are basic apparel articles such as t-shirts, sport shirts, and sweatshirts. Gildan is concerned that the duty or FTA rule of origin obligations may be circumvented for these high-volume, price-sensitive articles.

Textile and apparel imports have some of the highest rates of enforcement violations. This is due in part to the lengthy list of duty-free apparel tariff lines in Chapters 98 and 99 of the HTS, and the limited ability of CBP to validate the compliance of all entries. Adding yet another duty-free apparel tariff line to the HTS would only expand the current enforcement problems.

Should Proposed Recommendations for Modifying the HTS be Sent to the President, they should also Include Regulations to Implement and Enforce the Amendments in Order to Mitigate Potential Economic Damage and Risk.

Gildan recognizes that the recent outcome of U.S. court cases is driving the proposed modification to the HTS. The Administration may feel compelled to modify the HTS even while understanding the negative economic ramifications and apparent contradiction with long-standing U.S. trade policies. That being said, should the U.S. ITC move forward and make a recommendation to the President, it should consider two options: first, modify the proposed description of subheading 9817.95.02; and second, include language that requires the Administration include implementing regulations that will help to mitigate potential damage and risk.

As indicated above, should the ITC recommend to the President the proposed modification to the HTS, the ITC should first consider a modification of the proposed description for heading 9817.95.02 in order to clarify the intended scope of the subheading. Gildan proposes that the phrase "or similar festive occasion" be struck from the description of the proposed heading, and replaced with a definitive list of specific festive occasions that would apply to this subheading. The description already contains the occasions of Christmas, Easter, Halloween, and Thanksgiving, and should include only the occasions specifically intended by the policy. Currently, the proposed subheading description is broad and therefore creates an open-ended loophole that risks abuse of the duty-free provision. For example, importers could claim duty-free eligibility for apparel used for charitable events, political events, birthdays, awareness activities, etc. These are key events that use t-shirts and other apparel manufactured by Gildan and imported duty-free under U.S. trade programs. It is likely the current open-ended language would invite countless customs rulings.

In addition, if the ITC recommends to the President the proposed modification to the HTS, the ITC and/or other agencies of the Administration should strongly consider incorporating regulations that can smoothly implement the amendments in the short term, and serve to effectively enforce the new policy in the long-term.

Below are concepts for regulations that would serve the trade interests of Gildan's festive apparel business in the United States, and the economic interest of the United States broadly:

1. Require that the symbol/motif be permanently affixed to the apparel article upon entry.

This requirement would help prevent potential abuse of the duty-free provision should an importer simply use stickers or other temporary means of affixing a symbol/motif to an apparel article. Further, it would help to prevent abuse by importers who would simply claim that apparel is destined to undergo finishing operations in the United States that will adorn the article with a festive symbol/motif.

2. Require entries to be subject to Type 1 entries for consumption, and not eligible for duty-free withdrawal from free trade zones.

Similar to the first proposed regulation, this would help prevent abuse of the duty-free provision by not allowing processing of apparel within free trade zones, where simple application of festive symbols/motifs would change tariff treatment.

3. Require that the festive adornment to be the only symbol/motif appearing on the article, precluding the possibility of dual-purpose garments.

This would help prevent potential abuse of the duty-free provision should an importer claim festive occasion duty preferences for apparel that is primarily apparel intended to market licensed characters. For example, a t-shirt that depicts characters from Dr. Seuss's *How the Grinch Stole Christmas* should not receive festive article Chapter 98 status.

4. Require a size parameter for the festive adornments on apparel.

The festive symbol/motif should cover a predominate portion, at least 30 percent, of the surface area of an article. Requiring a size parameter for the festive adornment would help prevent potential abuse of the provision if an importer added small festive symbols/motifs for the purpose of navigating around the tariff rates for apparel.

5. Require a uniform and transparent standard for determining whether an article is considered "festive apparel" upon import for purposes of subheading 9817.95.02.

An article should not be considered festive for purposes of 9817.95.02 if it replaces or substitutes for another apparel item. In other words, a t-shirt, sock or underwear article,

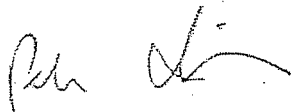
even if it has a festive motif, should be classified as apparel since it is intended to serve the purpose of a primary apparel article and not simply to celebrate the festive occasion. However, if the article supplements another apparel item, the supplementary item may be considered festive if it meets the appropriate requirements (*e.g.*, permanently affixed, coverage of sufficient surface area) and thus classifiable under 9817.95.02.

6. Require an import eligibility timeframe of 30-60 days from the date of the festive occasion. Such a regulation would hinder possibilities for year-round abuse of the provision.
7. Require annual quantitative limitations by importer.

The Administration should track entries arriving under this duty-free provision and enforce a quantitative limitation by importer.

Thank you for your careful consideration of these comments and suggestions.

Sincerely,



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Peter Iliopoulos  
Vice President, Taxation and Governmental Affairs  
Gildan Activewear Inc.



**APPENDIX L**

**SUBMISSION FROM  
THE SPECIALTY GRAPHIC IMAGING ASSOCIATION**





October 22, 2010

Secretary  
United States International Trade Commission  
500 E Street, S.W.  
Washington, D.C. 20436

Dear Madame Secretary,

On behalf of the membership of the Specialty Graphic Imaging Association (SGIA), the following comments are submitted regarding Investigation No. 1205-9, Certain Festive Articles: Recommendations for Modifying the Harmonized Tariff Schedule of the United States.

SGIA represents the interests of those facilities engaged in garment decoration that include the finishing operations such as screen printing and embroidery. Currently, there are approximately 10,000 firms operating in the United States and many of these firms are small businesses averaging 15 people per facility and annual sales revenue of \$500,000. SGIA opposes the recommended changes to the Harmonized Tariff Schedule that would provide apparel importers with a duty-free alternative for items, with no U.S. inputs, from Asian sources.

Indeed, the proposed modification would negatively "alter existing conditions of competitiveness" for the U.S. screen-printing industry. The effects of this recommendation are inconsistent with the statute governing the Commission's 1205 HTS modification process, particularly 19 U.S.C. 3005(d)(3), which requires that any modification not "alter the existing competitiveness for U.S. industry, labor and trade."

The garment decoration industry, as represented by SGIA, has felt the effects of the current recession. Globalization, increased regulation by the Consumer Product Safety Commission and changes in consumer buying habits has contributed to the overall decline in facilities operation in the United States. SGIA's *2010 Market Trends Survey* indicates that 96 percent of the garment decoration community produces products for local, regional or national markets. Of these markets, the top two customers are retail establishments and direct to consumer sales.

We feel that this recommendation clearly puts U.S. firms operating in this market place at a severe economic disadvantage. Adoption of this recommendation will cause importers to further shift production overseas, thus further eroding the U.S. manufacturing base resulting in further job losses in this sector.

We feel that the outcome of this recommendation outweighs the justification. SGIA considers the implementation of this recommendation to be short sighted by failing to consider the economic ramifications to the garment decoration industry sector. This action is not rate neutral. Any attempt to portray as such is misleading. Amending this class of duty-free items to include decorated apparel

brings this group of high-tariff, sensitive, articles into a duty free tariff line. This action runs counter to the President's overall strategy to increase the global competitiveness of the small business community.

Our objective in opposing this recommendation is to prevent the duty free festive article provision from being applied to textile and apparel products; however, this may require a change in U.S. law. If it is decided to move forward, we would recommend that a very narrow definition of festive articles be offered until the U.S. Congress can debate this matter.

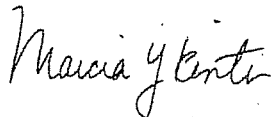
Recommendations to narrowly define this provision include:

- A clear and succinct definition of the term "festive" in festive occasions so as to limit the abuse of the intent of the law.
- Clearly identify those festive occasions eligible for this category.
- Require that symbols/motifs be of colors commonly associated with festive occasions. For example, red/green for a Christmas article or black/orange for a Halloween article.
- Require that the symbol/motif be permanently affixed to the apparel article.
- Require that the festive adornment be the only symbol/motif appearing on the article, thus precluding the use of dual purpose garments reflecting licensed characters.
- Implement and require a size parameter for festive adornments on apparel.
- Require an import eligibility time frame of 45 days from the date of the festive occasion.
- Require annual quantitative limitations by importer.

Thank you for the opportunity to provide comments on this important trade issue. SGIA believes that this recommendation, in its current format, will undermine the economic viability of an important small business sector operating within the United States.

If you have any questions regarding our comments, I can be reached directly at 703-359-1313 or by email at [marcik@sgia.org](mailto:marcik@sgia.org).

Sincerely,



Marcia Y. Kinter  
Vice President – Government & Business Information

**APPENDIX M**

**SUBMISSION FROM  
THE U.S. DEPARTMENT OF COMMERCE,  
ON BEHALF OF  
THE COMMITTEE FOR THE IMPLEMENTATION OF  
TEXTILE AGREEMENTS (CITA)**



**UNITED STATES DEPARTMENT OF COMMERCE**  
**International Trade Administration**  
Washington, D.C. 20230

November 4, 2010

Secretary  
United States International Trade Commission  
500 E Street, S.W.  
Washington, D.C. 20436

RE: Comment on Certain Festive Articles: Recommendations for Modifying Tariff Schedule of the United States; Investigation No. 1205-9 (Preliminary)

Dear Secretary:

This concerns the above-captioned investigation by the United States International Trade Commission (ITC) regarding Customs and Border Protection (CBP) recommendations for Modifying Tariff Schedule of the United States.

The Committee for the Implementation of Textile Agreements (CITA) supports CBP's recommendation to conduct an investigation under section 1205 for the purpose of making recommendations to the President regarding the addition of a U.S. note and the amendment or replacement of certain classification provisions in chapter 98 of the HTS relating to certain utilitarian articles that incorporate a festive design, decoration, emblem, or motif. CITA supports CBP's proposed language for a U.S. note and proposed changes in two U.S. tariff rate lines at the 8-digit level as it reflects (a) a Federal court decision on the classification of particular festive articles, and (b) the amendment of note 1 to chapter 95 of the international Harmonized System by the World Customs Organization (WCO).

However the CITA urges the ITC, in its report the President, to recommend that the CBP closely examine goods entering under these tariff classifications to assure that those products meet the description of a festive article in that they must be closely associated with a festive occasion and the article be used or worn principally during that festive occasion. If textile and apparel products enter that are not festive articles it could have a large negative impact on the U.S. textile and apparel industry.

Sincerely,

  
Janet E. Heinzen

Acting Deputy Assistant Secretary for  
Textiles and Apparel and Acting Chairman for the Committee for the Implementation of  
Textile Agreements (CITA)





**APPENDIX N**

**COPY OF SECTIONS 1205 AND 1206 OF THE  
OMNIBUS TRADE AND COMPETITIVENESS ACT OF  
1988 (19 U.S.C. 3005-3006)**



**Sections 1205 and 1206 of the Omnibus Trade and Competitiveness Act of 1988  
(19 U.S.C. 3005 and 3006)**

**§ 3005. Commission review of, and recommendations regarding, Harmonized Tariff Schedule**

**(a) In general**

The Commission shall keep the Harmonized Tariff Schedule under continuous review and periodically, at such time as amendments to the Convention<sup>1</sup> are recommended by the Customs Cooperation Council for adoption, and as other circumstances warrant, shall recommend to the President such modifications in the Harmonized Tariff Schedule as the Commission considers necessary or appropriate—

- (1) to conform the Harmonized Tariff Schedule with amendments made to the Convention;
- (2) to promote the uniform application of the Convention and particularly the Annex thereto;
- (3) to ensure that the Harmonized Tariff Schedule is kept up-to-date in light of changes in technology or in patterns of international trade;
- (4) to alleviate unnecessary administrative burdens; and
- (5) to make technical rectifications.

**(b) Agency and public views regarding recommendations**

In formulating recommendations under subsection (a) of this section, the Commission shall solicit, and give consideration to, the views of interested Federal agencies and the public. For purposes of obtaining public views, the Commission—

- (1) shall give notice of the proposed recommendations and afford reasonable opportunity for interested parties to present their views in writing; and
- (2) may provide for a public hearing.

**(c) Submission of recommendations**

The Commission shall submit recommendations under this section to the President in the form of a report that shall include a summary of the information on which the recommendations were based, together with a statement of the probable economic effect of each recommended change on any industry in the United States. The report also shall include a copy or summary, prepared by the Commission, of the views of all other interested parties.

**(d) Requirements regarding recommendations**

The Commission may not recommend any modification to the Harmonized Tariff Schedule unless the modification meets the following requirements:

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<sup>1</sup> "Convention" refers to the Harmonized System Convention; the "Annex" to the Convention is the Harmonized Commodity Description and Coding System (HS), which is incorporated in the structure of the Harmonized Tariff Schedule of the United States. Both the Convention and its Annex are maintained by the Customs Cooperation Council (widely known as the World Customs Organization) in Brussels, Belgium.



- (1) The modification must—
  - (A) be consistent with the Convention or any amendment thereto recommended for adoption;
  - (B) be consistent with sound nomenclature principles; and
  - (C) ensure substantial rate neutrality.
- (2) Any change to a rate of duty must be consequent to, or necessitated by, nomenclature modifications that are recommended under this section.
- (3) The modification must not alter existing conditions of competition for the affected United States industry, labor, or trade.

## **§ 3006. Presidential action on Commission recommendations**

### **(a) In general**

The President may proclaim modifications, based on the recommendations by the Commission under section 3005 of this title, to the Harmonized Tariff Schedule if the President determines that the modifications—

- (1) are in conformity with United States obligations under the Convention; and
- (2) do not run counter to the national economic interest of the United States.

### **(b) Lay-over period**

(1) The President may proclaim a modification under subsection (a) of this section only after the expiration of the 60-day period beginning on the date on which the President submits a report to the Committee on Ways and Means of the House of Representatives and the Committee on Finance of the Senate that sets forth the proposed modification and the reasons therefor.

- (2) The 60-day period referred to in paragraph (1) shall be computed by excluding—
  - (A) the days on which either House is not in session because of an adjournment of more than 3 days to a day certain or an adjournment of the Congress sine die; and
  - (B) any Saturday and Sunday, not excluded under subparagraph (A), when either House is not in session.

### **(c) Effective date of modifications**

Modifications proclaimed by the President under subsection (a) of this section may not take effect before the 30<sup>th</sup> day after the date on which the text of the proclamation is published in the Federal Register.

(Pub.L. 100-418, Title I, § 1205-1206, Aug. 23, 1988, 102 Stat. 1151; Pub.L. 109-432, Div. D, Title III, § 3012, Dec. 20, 2006, 120 Stat. 3177.)