Prepared Testimony of Marguerite Trossevin
On Behalf of the Retail Industry Leaders Association
Before the U.S. Senate Committee on Finance
Subcommittee on International Trade, Customs and Global Competitiveness
May 5, 2011

Chairman Wyden and Members of the Subcommittee:

I am pleased to appear before you today representing the Retail Industry Leaders Association (RILA), an association of the world's largest and most innovative retail companies. RILA members include more than 200 retailers, manufacturers and service suppliers, which together account from more than $1.5 trillion in annual sales, employing millions of Americans in more than 100,000 stores, manufacturing facilities and distribution centers across the United States and abroad. We appreciate the opportunity to provide the Subcommittee with RILA's perspective on your efforts to address the problem of customs fraud and unlawful evasion of antidumping and countervailing duties.

By way of introduction, I am Marguerite Trossevin, a member of the law firm Jochum Shore & Trossevin PC and international trade counsel to RILA. I have more than 25 years of experience in trade remedy law, including 13 years at the Department of Commerce where I served as Deputy Chief Counsel at Import Administration, the agency within the Department of Commerce charged with enforcing the U.S. antidumping and countervailing duty laws. I hope that the experience gained during years at the Department of Commerce and in the private sector will be useful to your deliberations.

The subject that the Subcommittee is discussing today is a very serious legal and economic issue. As global trade has expanded over the last few decades, American companies have become more competitive, raising our national income and standard of living. RILA members play a critical role in the manufacture and distribution of goods throughout the United States and globally, creating high paying jobs and providing American consumers access to a broad array of products at affordable prices.

RILA members depend on stable global supply chains and firmly support free and fair trade. We therefore have a strong interest in the issue before the Committee. RILA shares the Chairman's view, as I believe do most of American businesses, that fraud and evasion of U.S. law, including the trade remedy laws, is costly and harmful to the U.S. economy. In fact, RILA's members, who include the some of largest U.S. importers, devote millions of dollars and substantial time and personnel to ensure that they are in compliance with U.S. law and to preserve the integrity of their supply chains, using tools such as sophisticated technology, vendor certification and on-site compliance audits. RILA members don't want to compete with bad actors nor do business with them.

Unfortunately, it is inevitable that there will always be some who try to circumvent the law. The question then becomes, does more need to be done to address the problem and, if so, what. In approaching this issue, RILA respectfully suggests that the Chairman and Members of the Subcommittee keep the following principles in mind.

First, the overwhelming majority of importers play by the rules. Members of RILA and other importers participate in trusted importer programs, such as CTPAT and Importer Self Assessment, and work closely with Customs and other agencies on an ongoing basis to facilitate the prompt and orderly processing of goods at the border, while identifying transactions of concern from a commercial and security standpoint. It is important that efforts to fight evasion recognize and complement these efforts and not stifle, disrupt or overburden legitimate trade that is critical to the competitiveness of so many American companies.

Second, to promote the most effective enforcement of antidumping and countervailing duty orders, the current jurisdictional lines of authority between the Departments of Commerce and Homeland Security should be preserved. Import Administration at the Department of Commerce and U.S. Customs and Border Protection at the Department of Homeland Security have unique capabilities and expertise. The agencies also have long-established and well-defined responsibilities in

implementing and enforcing antidumping and countervailing duty orders, and they already can and do work cooperatively when there is fraudulent evasion of AD/CVD orders. Legislation that would blur the jurisdictional authorities of the agencies would be counterproductive.

Specifically, as U.S. courts have frequently stated, the Commerce Department is the "master" of the law with exclusive authority not only to determine AD/CVD rates, but also what products fall within the scope of an AD/CVD order. Thus, in any dispute over whether a product should or should not be subject to duties, Commerce has the final say. Having that authority rest with one agency promotes consistency, efficiency and orderly and effective administration of the law. In addition, Commerce's authority extends beyond merely determining whether a product falls within the literal language of the scope of an order. Commerce also has the authority to address situations in which an AD/CVD order is circumvented by exporters who make minor changes in the product, or ship the parts and components to another country for final assembly. Further, in such an inquiry, if an exporter presents Commerce with false or misleading information, Commerce will make a scope ruling adverse to the exporter. Commerce therefore has broad authority to ensure that the disciplines of an AD/CVD order are properly and effectively applied.

Meanwhile, CBP has the expertise and the powers necessary to address fraud and evasion, such as falsely declaring the country of origin of goods transshipped through a third country, or intentionally misclassifying, mislabeling or misidentifying imports subject to AD/CVD orders. Customs can and does already bring its broad enforcement authority to bear in such cases, using its investigative powers and ability to impose civil and criminal penalties. The bill introduced last year would have blurred these lines of authority, placing Commerce in the role of fraud investigator, a task for which it is not equipped and that would drain resources away from the agency's primary responsibilities and core competencies. The result would be unnecessary inefficiency and confusion that would undermine rather than enhance effective enforcement.

Third, in order resolve a problem it is necessary to clearly define it in the first instance. It is important to bear in mind that certain issues, such as the proper Customs classification for goods, or interpretation of the scope of an AD/CVD order can be complex issues on which reasonable minds can differ. Commerce and Customs already have procedures in place for resolving these issues and, as we understand it, those issues are not the concern being addressed. Rather, the problem being addressed is evasion of AD/CVD duties, which by definition entails a fraudulent scheme, such as transshipping goods and falsely declaring the country of origin. We therefore consider inappropriate provisions, such as those in the bill introduced last year, which would expose importers to substantial penalties *without regard to intent*, which is an essential element of fraud. Such legislation would sweep more broadly and overlap with the processes already in place to address legitimate questions as to the applicability of an AD/CVD order to specific imports. Importers that make a reasonable, good faith effort to properly declare the classification, country or origin and duty liability of their imports are not currently exposed to substantial penalties such as retroactive duty assessments, nor should they be.

Finally, in seeking to catch bad actors Congress should not create innocent victims or disrupt legitimate trade. If there are changes that could enhance Customs enforcement, it is critical to maintain clear and reasonable standards, and ensure procedural due process. Setting unrealistic deadlines or low evidentiary requirements, such as "reasonable basis to believe or suspect", are not consistent with the requirements of due process and ignore the seriousness of the potential consequences.

To compete successfully in today's global economy, American companies need access to competitive sources of supply, including imports. American companies – manufacturers as well as retailers – therefore increasingly rely on a global supply chains. Thus, in considering legislation to address customs fraud, special care should be given to enact legislation that is neither vague nor overly broad such that it impinges on lawful trade. The important economic aspects of imports should be taken into account to produce a balanced piece of legislation.

Moreover, as Congress explores ways to improve enforcement of our AD/CVD laws, we urge you to give careful consideration to the potential benefits of a prospective duty assessment system, as opposed to the retrospective system we now have. The Government Accountability Office and Treasury Department have both identified the retrospective nature of the current U.S. duty collection system as a significant factor in Customs' inability to collect hundreds of millions of dollars in AD/CVD duties each year. Moreover, unlike a prospective system, under the current system, U.S. companies who want to trade fairly cannot and do not know at the time they are making purchasing decisions what Commerce will say constitutes a fairly traded price. The system is therefore unpredictable and results in substantial, unexpected duty rate increases for legitimate U.S. businesses. Predictability and protection are not mutually exclusive – we believe Congress can and should develop a prospective duty assessment system that provides both an effective remedy against unfair trade and greater predictability in the global supply chains that are so critical to U.S. manufacturers, processors, distributors and retailers.

U.S. companies are willing to pay fairly traded prices – they simply need to know what they are so that they can make informed, sound business decisions. As a matter of policy, it makes no sense to tell U.S. companies that Commerce cannot determine what is a fairly traded transaction until years after the fact and penalize the companies for Commerce's not knowing by imposing large duty increases years after import.

Under a "prospective normal value" system, Commerce would determine what the non-dumped price (i.e., "normal value") is and CBP would apply those results prospectively on a transaction-by-transaction basis. Thus, if subject merchandise were imported at a price below the normal value (i.e., at a "dumped price"), CBP would, at the time of import, immediately collect final AD duties equal to the amount of the price difference (the dumping margin). Zero duties would be assessed on non-dumped imports. The same system would apply for calculating and assessing CVD duties.

Under such a system, therefore, injurious dumping or subsidization would be remedied immediately upon importation, and U.S. companies would know in advance what the actual fairly traded cost associated with each potential source is and could make informed decisions regarding competitive strategies and sourcing. That is good for competing U.S. producers as well as consuming industries and other importers. For example, the current system of assessing additional duties 3 years after the fact does nothing to help the competing U.S. producer that lost the sale because the additional duties on imports are not assessed in a manner timely enough to influence purchasing decisions. In contrast, prospective normal values would impact purchasing decisions, prior to import, promoting fair competition when it really matters.

In addition, according to a Treasury study, the collection rate for additional retroactive AD/CVD duties is less than 50%. It is inherently difficult to collect duties years after import. Importers faced with an unexpected liability may be unable to pay, or an exporter may game the system. For example, a foreign exporter with a low AD rate can reduce prices and increase exports and then disappear before the additional duties can be collected. This type of "hit and run" scheme is possible only in a retrospective system. Under a prospective system, CBP would immediately assess higher duties at the time of import if import prices declined; therefore collection rates for AD/CVD duties should be close to 100%, contributing to enhanced enforcement.

On behalf of RILA and its members, I thank you for the opportunity to appear before you today and would be happy to answer any questions you may have.