

## DEPARTMENT OF COMMERCE

## International Trade Administration

## 19 CFR Part 351

[Docket No. 101130598-0598-01]

RIN 0625-AA87

**Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings**

**AGENCY:** Import Administration, International Trade Administration, Department of Commerce.

**ACTION:** Proposed Rule; Proposed Modification; Request for Comments.

**SUMMARY:** The Department of Commerce (“the Department”) is requesting comments regarding the calculation of the weighted average dumping margin and antidumping duty assessment rate in certain antidumping duty proceedings. Currently, in a review of an antidumping duty order conducted under 19 CFR 351.213 (administrative review), 351.214 (new shipper review), and 351.215 (expedited antidumping review) (collectively “reviews”), the Department usually makes comparisons between transaction-specific export prices and average normal values and does not offset any dumping that is found with the results of comparisons for which the transaction-specific export price exceeds the average normal value. In addition, in the most recent original antidumping duty investigation in which the Department calculated the weighted average margins of dumping using transaction-to-transaction comparisons, the Department did not grant offsets for non-dumped comparisons. Several World Trade Organization (“WTO”) dispute settlement reports have found that the United States application of these methodologies was inconsistent with our WTO obligations. In response to these reports, the Department proposes modification of its methodologies, including changes to certain provisions of the Department’s regulations.

**DATES:** To be assured of consideration, comments must be received no later than January 27, 2011.

**ADDRESSES:** All comments must be submitted through the Federal eRulemaking Portal at <http://www.regulations.gov>, Docket No. ITA-2010-0011, unless the commenter does not have access to the internet. Commenters that do not have access to the internet may submit the original and two copies of each set of comments by mail or hand delivery/courier to Ronald

K. Lorentzen, Deputy Assistant Secretary for Import Administration, Room 1870, Department of Commerce, 14th Street and Constitution Ave., NW., Washington, DC 20230. The comments should also be identified by Regulation Identifier Number (RIN) 0625-AA87.

The Department will consider all comments received before the close of the comment period. The Department will not accept comments accompanied by a request that part or all of the material be treated confidentially because of its business proprietary nature or for any other reason. All comments responding to this notice will be a matter of public record and will be available for inspection at Import Administration’s Central Records Unit (Room 7046 of the Herbert C. Hoover Building) and on the Department’s Web site at <http://www.trade.gov/ia/>.

Any questions concerning file formatting, document conversion, access on the Internet, or other electronic filing issues should be addressed to Andrew Lee Beller, Import Administration Webmaster, at (202) 482-0866, e-mail address: [webmaster-support@ita.doc.gov](mailto:webmaster-support@ita.doc.gov).

**FOR FURTHER INFORMATION CONTACT:** Quentin M. Baird, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482-0834.

**SUPPLEMENTARY INFORMATION:****Background**

In antidumping proceedings, the Department determines margins of dumping by comparing normal value with the export price<sup>1</sup> of comparable merchandise. Pursuant to 19 CFR 414(c)(2), in a review, the Department normally will compare normal value and export price using the average-to-transaction method, which involves a comparison of the weighted average normal value to export price of individual transactions for comparable merchandise. When determining the weighted average margin of dumping in a review, the Department aggregates the results of these comparisons and has not allowed the results of the comparisons for which export price exceeds normal value to offset the results of comparisons for which export price is less than normal value.<sup>2</sup> When

<sup>1</sup> The Department may also use constructed export prices, if appropriate. Because the use of export prices or constructed export prices is not relevant to the substance of this notice, the Department refers only to export prices hereafter.

<sup>2</sup> Section 771(35)(A) of the Act defines the dumping margin as the amount by which normal value “exceeds” export price (or constructed export price). Section 771(35)(B) defines the weighted average dumping margin as the percentage

determining importer-specific assessment rates in a review, the Department similarly aggregates the results of importer-specific comparisons and has not allowed the results of the comparisons for which export price exceeds normal value to offset the result of comparisons for which export price is less than normal value.

Pursuant to section 777A(d)(1)(A) of the Tariff Act of 1930 (“the Act”), in an investigation, the Department may determine whether the subject merchandise is being sold at less than fair value by comparing normal values of individual transactions to the export prices of individual transactions for comparable merchandise (the transaction-to-transaction comparison method).<sup>3</sup> The Department’s regulations state that Department will use the transaction-to-transaction method only in unusual situations, such as when there are very few sales of subject merchandise and the merchandise sold in each market is identical or very similar or is custom-made. 19 CFR 351.414(c)(1). The Department has rarely applied the transaction-to-transaction comparison method in investigations. In the most recent investigation in which the Department calculated the weighted average margins of dumping using transaction-to-transaction comparisons, the Department did not grant offsets for non-dumped comparisons.<sup>4</sup>

The above methodologies have been challenged as being inconsistent with the World Trade Organization (“WTO”) General Agreement on Tariffs and Trade 1994 (“GATT 1994”) and the Agreement on Implementation of Article VI of the GATT 1994 (“Antidumping Agreement”). In several disputes,<sup>5</sup> the

determined by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export or constructed export price of that exporter or producer.

<sup>3</sup> The Department’s regulations also state that the Department normally will compare weighted average normal values to weighted average export prices for comparable merchandise (the average-to-average comparison method) in an investigation. 19 CFR 351.414(c)(1). In response to prior WTO dispute settlement reports, the Department modified its methodology for calculating the weighted average margin of dumping in an original investigation to no longer use average-to-average comparisons without providing offsets for non-dumped comparisons. *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification*, 71 FR 77,722 (December 27, 2006).

<sup>4</sup> See *Notice of Determination Under Section 129 of the Uruguay Round Agreements Act; Antidumping Measures Concerning Certain Softwood Lumber Products From Canada*, 70 FR 22,636 (May 2, 2005).

<sup>5</sup> *United States-Laws, Regulations and Methodology for Calculating Dumping Margins (“Zeroing”)* (“US-Zeroing (EC)”), WT/DS294/R, WT/

WTO Dispute Settlement Body has adopted dispute settlement panel reports, as modified by the WTO Appellate Body, which found denial of offsets for non-dumped comparisons in reviews to be inconsistent with the United States' WTO obligations. The WTO Appellate Body also found denial of offsets for non-dumped comparisons in original investigations using transaction-to-transaction comparisons to be inconsistent with the United States' WTO obligations. In addition, certain of the Department's determinations made pursuant to section 751(c) of the Act (five-year reviews) were found to be inconsistent with the United States' WTO obligations insofar as those determinations relied on weighted average margins of dumping calculated using the methodologies found to be inconsistent with the United States' WTO obligations.

**Proposal for Calculating the Weighted Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings and Request for Comment**

Pursuant to section 123(g)(1) of the Uruguay Round Agreements Act ("the URAA"), "[i]n any case in which a dispute settlement panel or the Appellate Body finds in its report that a regulation or practice of a department or agency of the United States is inconsistent with any of the Uruguay Round Agreements," certain requirements must be met before "that regulation or practice" may be "amended, rescinded, or otherwise modified \* \* \*." Section 123(g)(1)(C) of the URAA requires that the Department provide opportunity for public comment by publishing "the proposed modifications and the explanation of the modification" in the *Federal Register*.

Pursuant to section 123(g)(1) of the URAA, by this notice the Department is proposing modifications to its practice in response to the following WTO dispute settlement findings. The WTO Appellate Body in *US-Zeroing (EC)*, *US-Zeroing (Japan)*, *US-Stainless Steel (Mexico)*, *US-Continued Zeroing (EC)* found denial of offsets for non-dumped comparisons in antidumping duty

administrative reviews to be inconsistent with Article 9.3 of the Antidumping Agreement and Article VI:2 of the GATT 1994, either "as such," or "as applied" in certain administrative reviews, or both.<sup>6</sup> In *US-Zeroing (Japan)*, the WTO Appellate Body also found denial of offsets for non-dumped comparisons in antidumping duty original investigations using transaction-to-transaction comparisons was inconsistent with Articles 2.4 and 2.4.2 of the Antidumping Agreement.<sup>7</sup> In addition, in *US-Zeroing (Japan)*, the WTO Appellate Body found denial of offsets for non-dumped comparisons in antidumping duty new shipper reviews was inconsistent with Articles 2.4 and 9.5 of the Antidumping Agreement.<sup>8</sup> Finally, in *US-Zeroing (EC)*, *US-Zeroing (Japan)*, and *US-Continued Zeroing (EC)*, the WTO Appellate Body found reliance on weighted average margins of dumping calculated without granting offsets for non-dumped comparisons as the basis for determinations made in certain five-year (sunset) reviews was inconsistent with Article 11.3 of the Antidumping Agreement.<sup>9</sup>

In response to prior findings of inconsistency with respect to the Department's calculation of weighted average margins of dumping in original investigations, the Department previously modified its methodology such that it now provides offsets for non-dumped comparisons when using average-to-average comparisons in original investigations.<sup>10</sup> In response to the findings of inconsistency identified above, the Department now proposes to modify its methodology for calculating weighted average margins of dumping and assessment rates to provide offsets for non-dumped comparisons while using monthly average-to-average comparisons in reviews in a manner that parallels the WTO-consistent methodology the Department currently applies in original investigations. In particular, except where the Department determines that application of a

different comparison method is more appropriate, in reviews, the Department proposes to compare monthly weighted average export prices with monthly weighted average normal values and to grant an offset for such comparisons that show export price exceeds normal value in the calculation of the weighted average margin of dumping and assessment rate. Where the weighted average margin of dumping is zero or *de minimis*, no antidumping duties will be assessed. In addition, to the extent that any prior original antidumping duty investigations using transaction-to-transaction comparisons could be considered as establishing a practice of the Department with respect to the granting or denial of offsets for non-dumped comparisons when calculating the weighted average margin of dumping,<sup>11</sup> the Department proposes to withdraw any such practice. With respect to the findings of inconsistency in certain of the Department's five-year (sunset) reviews, the Department notes that the underlying issue is the methodology for calculating weighted average dumping margins in investigations and reviews, which is addressed by the modifications the Department has made with respect to investigations and is proposing herein to make with respect to reviews. Moreover, the Department recognizes that while section 752(c) of the Act provides that the Department shall consider the weighted average dumping margins determined in the investigation and subsequent reviews, among other factors, the Act does not require the Department to rely on the weighted average dumping margins, or any particular weighted average dumping margin, as the basis for its determinations in five-year (sunset) reviews where such reliance would render the determination inconsistent with the United States' international obligations.

The modified methodology for reviews requires the Department to revise certain provisions of the Department's regulations. In particular, 19 CFR 351.414(a) and (c) indicate a preference for making "average-to-transaction" comparisons in administrative reviews. This proposed rule would revise these provisions to permit application of average-to-average comparisons in reviews in a manner that parallels the comparison methods used in original investigations. In addition, § 351.414(d)(3) and (e) of the Department's regulations set forth the time periods over which weighted

DS294/AB/R, adopted May 9, 2006; *United States Measures Related to Zeroing and Sunset Reviews* ("US-Zeroing (Japan)"), WT/DS322/R, WT/DS322/AB/R, adopted Jan. 23, 2007; *United States-Final Anti-Dumping Measures on Stainless Steel from Mexico* ("US-Stainless Steel (Mexico)"), WT/DS344/R, WT/DS344/AB/R, adopted May 20, 2008; *United States-Continued Existence and Application of Zeroing Methodology* ("US-Continued Zeroing (EC)"), WT/DS350/R, WT/DS350/AB/R, adopted Feb. 19, 2009.

<sup>6</sup> *US-Zeroing (EC)*, WT/DS294/R, WT/DS294/AB/R, para. 263 (a)(i); *US-Zeroing (Japan)*, WT/DS322/R, WT/DS322/AB/R, para. 190 (c) & 190(e); *US-Stainless Steel (Mexico)*, WT/DS344/R, WT/DS344/AB/R, paras. 165 (a) & 165 (b); *US-Continued Zeroing (EC)*, WT/DS350/R, para. 8.1(e), WT/DS350/AB/R, paras. 395 (a)(v), 395 (d) & 395 (e)(ii).

<sup>7</sup> *US-Zeroing (Japan)*, WT/DS322/AB/R, para. 190(b).

<sup>8</sup> *Id.*, para. 190(d).

<sup>9</sup> *US-Zeroing (EC)*, WT/DS294/AB/RW, para. 469(h)(iv) & (vi); *US-Zeroing (Japan)*, WT/DS322/AB/R, para. 190(f); *US-Continued Zeroing (EC)*, WT/DS350/R, para. 8.1(f), WT/DS350/AB/R, para. 395(f).

<sup>10</sup> *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification*, 71 FR 77,722 (December 27, 2006).

<sup>11</sup> *US-Zeroing (Japan)*, WT/DS322/AB/R, paras. 88, 138.

averages are calculated. Section 351.414(d)(3) provides that when applying the “average-to-average” method, the weighted averages will normally be calculated over the entire period of investigation or review, unless another averaging period is deemed appropriate. Section 351.414(e) provides that when applying the preferred “average-to transaction” method in a review, the Department will calculate weighted average normal values on a monthly basis. The Department proposes to modify § 351.414(d)(3) to permit weighted averages to normally be calculated on a monthly basis in reviews, regardless of the comparison method used. Conforming changes to § 351.414(e) will ensure § 351.414(d)(3) and (e) do not contain redundant language. Proposed language for the modified provisions is set forth at the end of this notice.

#### Submission of Comments

As specified above, to be assured of consideration, comments must be received no later than January 27, 2011.

The Department will consider all comments received before the close of the comment period. The Department will not accept comments accompanied by a request that part or all of the material be treated confidentially because of its business proprietary nature or for any other reason. All comments responding to this notice will be a matter of public record and will be available for inspection at Import Administration’s Central Records Unit (Room 7046 of the Herbert C. Hoover Building) and on the Department’s Web site at <http://www.trade.gov/ia/>.

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#### Timetable

After considering all comments received, the Department intends to publish in the **Federal Register** a Final Rule and Final Modification regarding the calculation of the weighted average dumping margin and assessment rate in certain antidumping duty proceedings. See section 123(g)(1)(F) of the URAA (19 U.S.C. 3533(g)(1)(F)). Any changes in methodology will be applicable in any determinations made pursuant to section 129 of the URAA (19 U.S.C. 3538) in connection with the above-referenced WTO disputes, and in all reviews pending before the Department for which a preliminary results is issued

more than 60 business days after the date of publication of the Department’s Final Rule and Final Modification.

#### Classification

##### *Executive Order 12866*

The proposed rule has been determined to be not significant for purposes of Executive Order 12866.

##### *Regulatory Flexibility Act*

The Chief Counsel for Regulation has certified to the Chief Counsel for Advocacy of the Small Business Administration (“SBA”) under the provisions of the Regulatory Flexibility Act, 5 U.S.C. 605(b), that the proposed rule would not have a significant economic impact on a substantial number of small business entities. An explanation of the provisions that would be implemented by this rule is provided in the preamble and is not repeated here. The entities that could be impacted by this rulemaking include U.S. importers of merchandise subject to antidumping duty orders. Currently, the Department is not able to estimate the number of small entities that will be impacted by this proposed rule, but the Department anticipates that some of the entities affected by the proposed rule may be considered small entities under the SBA small business standard. However, the Department has determined that the proposed rule will not adversely impact small business entities. The proposed rule, by granting offsets in the calculation of the dumping margin and assessment rate, will not increase antidumping duty liability. Thus no Initial Regulatory Flexibility Act statement is required, nor has one been prepared.

##### *Paperwork Reduction Act*

The proposed rule does not contain a collection of information for purposes of the Paperwork Reduction Act of 1980, as amended (44 U.S.C. 3501 *et seq.*).

#### List of Subjects in 19 CFR Part 351

Administrative practice and procedure, Antidumping, Business and industry, Cheese, Confidential business information, Countervailing duties, Freedom of information, Investigations, Reporting and recordkeeping requirements.

Dated: November 30, 2010.

**Ronald K. Lorentzen,**

*Deputy Assistant Secretary for Import Administration.*

For the reasons stated, ITA proposes to amend 19 CFR part 351 as follows:

#### PART 351—ANTIDUMPING AND COUNTERVAILING DUTIES

1. The authority citation for part 351 continues to read as follows:

**Authority:** 5 U.S.C. 301; 19 U.S.C. 1202 note; 19 U.S.C. 1303 note; 19 U.S.C. 1671 *et seq.*; and 19 U.S.C. 3538.

2. Section 351.414 is revised to read as follows:

##### **§ 351.414 Comparison of normal value with export price (constructed export price).**

(a) *Introduction.* This section explains when and how the Secretary will average prices in making comparisons of export price or constructed export price with normal value. (See section 777A(d) of the Act.)

(b) *Description of methods of comparison—(1) Average-to-average method.* The “average-to-average” method involves a comparison of the weighted average of the normal values with the weighted average of the export prices (and constructed export prices) for comparable merchandise.

(2) *Transaction-to-transaction method.* The “transaction-to-transaction” method involves a comparison of the normal values of individual transactions with the export prices (or constructed export prices) of individual transactions for comparable merchandise.

(3) *Average-to-transaction method.* The “average-to-transaction” method involves a comparison of the weighted average of the normal values to the export prices (or constructed export prices) of individual transactions for comparable merchandise.

(c) *Choice of Method.* (1) In an investigation or review, the Secretary will use the average-to-average method unless the Secretary determines another method is appropriate in a particular case.

(2) The Secretary will use the transaction-to-transaction method only in unusual situations, such as when there are very few sales of subject merchandise and the merchandise sold in each market is identical or very similar or is custom-made.

(d) *Application of the average-to-average method—(1) In general.* In applying the average-to-average method, the Secretary will identify those sales of the subject merchandise to the United States that are comparable, and will include such sales in an “averaging group.” The Secretary will calculate a weighted average of the export prices and the constructed export prices of the sales included in the averaging group, and will compare this weighted average to the weighted average of the normal values of such sales.

(2) *Identification of the averaging group.* An averaging group will consist of subject merchandise that is identical or virtually identical in all physical characteristics and that is sold to the United States at the same level of trade. In identifying sales to be included in an averaging group, the Secretary also will take into account, where appropriate, the region of the United States in which the merchandise is sold, and such other factors as the Secretary considers relevant.

(3) *Time period over which weighted average is calculated.* When applying the average-to-average method in an investigation, the Secretary normally will calculate weighted averages for the entire period of investigation. However, when normal values, export prices, or constructed export prices differ significantly over the course of the period of investigation, the Secretary may calculate weighted averages for such shorter period as the Secretary deems appropriate. When applying the average-to-average method in a review, the Secretary normally will calculate weighted averages on a monthly basis and compare the weighted-average monthly export price or constructed export price to the weighted-average normal value for the contemporaneous month.

(e) *Application of the average-to-transaction method*—In applying the average-to-transaction method in a review, when normal value is based on the weighted average of sales of the foreign like product, the Secretary will limit the averaging of such prices to sales incurred during the contemporaneous month.

(f) *Contemporaneous Month.* Normally, the Secretary will select as the contemporaneous month the first of the following months which applies: (1) The month during which the particular U.S. sales under consideration were made;

(2) If there are no sales of the foreign like product during this month, the most recent of the three months prior to the month of the U.S. sales in which there was a sale of the foreign like product.

(3) If there are no sales of the foreign like product during any of these months, the earlier of the two months following the month of the U.S. sales in which there was a sale of the foreign like product.

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BILLING CODE 3510-DS-P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

#### 21 CFR Parts 170, 184, 186, and 570

[Docket No. FDA-1997-N-0020; Formerly Docket No. 1997N-0103]

#### Substances Generally Recognized as Safe; Reopening of the Comment Period

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Proposed rule; reopening of the comment period.

**SUMMARY:** The Food and Drug Administration (FDA) is reopening the comment period for the proposed rule published in the *Federal Register* of April 17, 1997 (the 1997 proposed rule). The 1997 proposed rule would replace the voluntary petition process to affirm the generally recognized as safe (GRAS) status of a substance intended for use in food for humans or animals with a voluntary notification procedure. FDA is reopening the comment period to update comments. The proposed rule would also clarify the criteria for exempting the use of a substance as GRAS.

**DATES:** The comment period for the proposed rule published April 17, 1997 (62 FR 18938), is reopened. Submit either electronic or written comments on the proposed rule by March 28, 2011. Submit comments on information collection issues under the Paperwork Reduction Act of 1995 by February 28, 2011, (see the "Paperwork Reduction Act of 1995" section of this document).

**ADDRESSES:** You may submit comments, including comments regarding the proposed collection of information, identified by Docket No. FDA-1997-N-0020, by any of the following methods:

#### Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

#### Written Submissions

Submit written submissions in the following ways:

- *FAX:* 301-827-6870.
- *Mail/Hand delivery/Courier (for paper, disk, or CD-ROM submissions):* Division of Dockets Management (HFA-305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

*Instructions:* All submissions received must include the Agency name and

Docket No. FDA-1997-N-0020, for this rulemaking. All comments received may be posted without change to <http://www.regulations.gov>, including any personal information provided. For additional information on submitting comments, see the "Comments" heading of the **SUPPLEMENTARY INFORMATION** section of this document.

*Docket:* For access to the docket to read background documents or comments received, go to <http://www.regulations.gov> and insert the docket number, found in brackets in the heading of this document, into the "Search" box and follow the prompts and/or go to the Division of Dockets Management, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

#### FOR FURTHER INFORMATION CONTACT:

*With regard to substances that would be used in human food:* Paulette M. Gaynor, Center for Food Safety and Applied Nutrition (HFS-255), Food and Drug Administration, 5100 Paint Branch Pkwy., College Park, MD 20740, 301-436-1192.

*With regard to substances that would be used in food for animals:* Geoffrey K. Wong, Center for Veterinary Medicine (HFV-224), Food and Drug Administration, 7519 Standish Pl., Rockville, MD 20855, 240-453-6879.

*With regard to the information collection:* Denver Presley Jr., Office of Information Management, Food and Drug Administration, 1350 Piccard Dr., PI50-400B, Rockville, MD 20850, 301-796-3793.

#### SUPPLEMENTARY INFORMATION:

##### I. Background

In the 1997 proposed rule, FDA proposed to replace the voluntary GRAS affirmation petition process in §§ 170.35(c) and 570.35(c) (21 CFR 170.35(c) and 570.35(c)) with a voluntary notification procedure whereby any person may notify us of a determination that a particular use of a substance in human food (proposed § 170.36) or in food for animals (proposed § 570.36) is GRAS.<sup>1</sup> We also proposed to clarify the criteria in §§ 170.30 (21 CFR 170.30) and 570.30 (21 CFR 570.30) whereby the use of a substance is not subject to the premarket approval requirements of the FD&C Act because it is GRAS. To simplify the discussion in this document, in general,

<sup>1</sup> As an error, the authority citation we listed for the proposed amendments to part 570 (21 CFR part 570) did not include an existing authority citation, i.e., section 408 of the Federal Food, Drug, and Cosmetic Act (the FD&C Act) (21 U.S.C. 346a). Nothing in the 1997 proposed rule would alter the citation to section 408. Therefore, the authority citation for part 570 will continue to include section 408.