January 23, 2009

Ronald K. Lorentzen
Acting Assistant Secretary
for Import Administration
Department of Commerce
Washington, D.C. 20230

Re: **Interim final rule; Withdrawal of the Regulatory Provision Governing Targeted Dumping in Antidumping Duty Investigations, 73 Fed. Reg. 74930 (December 10, 2008); Comments of Consuming Industries Trade Action Coalition (CITAC)**

Dear Mr. Lorentzen:

This comment letter is submitted on behalf of the Consuming Industries Trade Action Coalition (CITAC) in response to the Department's Federal Register notice of December 10, 2008 (73 Fed. Reg. 74930). The Department extended the comment deadline to January 23 by subsequent Notice.[1] CITAC includes U.S. manufacturers, retailers and distributors employing millions of Americans that are concerned about global competitiveness of United States manufacturers, who require access to globally priced imported goods in the United States market to maintain competitiveness for U.S. industries.

Targeted dumping is an extremely important issue for consuming industries. If inappropriately handled, targeted dumping could serve as a method for imposing unnecessary and excessive antidumping duties that consuming industries must pay. Coupled with the unique retrospective system of duty collection in the United States, U.S. manufacturers could find themselves without adequate access to imported raw materials, placing them at a significant disadvantage compared to their global competitors. The Department should not penalize consuming industries by imposing excessive burdens.

In our comments of June 9, 2008, CITAC noted several problems with the method for handling "targeted dumping" investigations that the Department

[1] 74 FR 2059 (January 14, 2009).

had proposed the previous month.[2] Our concerns were threefold: (1) the threshold for determining whether a targeted dumping investigation should be instituted in a particular case was uncertain and vague; (2) that the targeted dumping analysis must be predictable and objective; and (3) that targeted dumping must not be used as a device to reinstitute "zeroing," which is unfair to consuming industries.

The notice of December 10 makes the situation worse for consuming industries by eliminating, without adequate justification, the regulation governing targeted dumping investigations. The Notice did not identify any case that required revocation of the rule or otherwise justify the extraordinary action of revoking these regulations[3] without prior notice or opportunity for comment.

The revocation of these regulations removes even the meager predictability that these rules were intended to provide. Consuming industries are now faced with procedures that are completely opaque and will cost them millions of dollars in reduced access and higher prices for needed raw materials and components that are, or may be, subject to antidumping duties.

CITAC reiterates our call to the Department to establish policies of general and prospective application to give consuming industries an enhanced role in (1) commenting on the allegations of targeted dumping made by petitioners in specific cases; and (2) participating in investigations of targeted dumping, due to the enhanced exposure of consuming industries in such cases.

While there is little experience with the application of targeted dumping in Commerce Department cases, this is an inadequate justification for putting all consuming industries in the position of having no idea whether goods are dumped, or what the appropriate level of duties might be. To be clear, the following conditions should, at a minimum, be adopted to be fair to all parties concerned, both domestic industry petitioners and downstream U.S. users and consumers of these goods:

- Specific provision for input from consuming industry parties likely to be affected by the imposition of antidumping duties;

- The opportunity for consuming industries (including domestic purchasers of goods from the domestic producers and exporters) to comment on the

[2] 73 Fed. Reg. 26371 (May 9, 2008).

[3] 19 CFR § 351.414(f) and (g) and 19 CFR § 351.301(d)(5).

existence of targeted dumping and the calculation of any margins of dumping based on targeted dumping; and

- Zeroing (disregarding sales comparisons for goods where normal value is exceeded by export price) will not be employed in targeted dumping investigations.

In targeted dumping cases, even more than in normal investigations, downstream customers possess the knowledge of regional markets, identities and attributes of customers, and relevant time periods to measure whether an unusual pattern of sales is present. This information is directly relevant to targeted dumping analysis. Moreover, foreign exporters are much less likely than domestic customers to have the detailed knowledge of these issues in the U.S. market.

Moreover, the correct calculation of the *amount* of targeted dumping, perhaps more than its existence, is of critical importance in reaching a fair result. This leads to three important principles that are indispensable to a fair system:

First, when dumping is measured on a comparison of average normal values to individual sales transactions, the Department must calculate average normal values on a basis consistent with the time period targeted dumping. For example, if a targeted dumping allegation is based on a time period of six months, average normal values should be calculated for a period not longer than six months. It would be illogical for the normal value calculation to be inconsistent with the time period involved.[4]

Second, the Department must not use targeted dumping as a pretext to bring back "zeroing" to investigations. We reiterate our point in previous comments that zeroing is inappropriate in targeted dumping investigations because it negates the core concept inherent in a targeted dumping allegation (a *pattern* of significant price differences). By ignoring actual price differences where some are at prices that negate a pattern of conduct, the Department would be violating the basis for investigating targeted dumping.[5]

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[4] It follows also that, if the targeted dumping time period is equal to or greater than the period of investigation, that targeted dumping cannot be based on a time period, but must be based on allegations of targeting by customer or geographic region.

[5] For example, if a respondent is accused of targeted dumping by selling at significantly lower prices to a specific customer than for other customers, the evidence that most sales to that customer were above normal value would tend to negate a finding of a "pattern" of

Third, downstream users of the product must be permitted to participate meaningfully in the process. We urge the Department to consider that in targeted dumping proceedings downstream representatives of consuming industries be given access to the full record, including business proprietary information under appropriate protective order.

We note that during 2008, in a series of antidumping investigations, the Department carefully considered the law, its experience in this area, and the views of many interested parties and settled on a methodology for identifying targeted dumping that has now been applied in several antidumping investigations. This *Steel Nails* test represents a fair and prudent approach to the issue and one which achieves the statutory objective to apply the average-to-transaction comparison methodology only on an exceptional basis and only where there is positive evidence of targeted dumping by customer(s), regions, or time periods.[6]

It is therefore incomprehensible that the Department concluded in its December 10 Notice that it lacks "any experience" in this area. The targeted dumping regulations did not limit the ability of the Department to construct the Steel Nails test and apply it in subsequent cases. There is nothing in the Department's practice or in the Notice of December 10 that states or implies that the *Steel Nails* test is no longer viable.

Finally, CITAC believes that the interim regulation is a "significant regulatory action" within the meaning of Executive Order 12866 (September 30, 1993), as amended. [7] CITAC asks for reconsideration of the Department's contrary finding in the December 10 Notice.

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pricing behavior. Zeroing cannot be justified in such a situation because the mathematical result would be meaningless and unconnected to the basis for the analysis.

[6] *See Certain Steel Nails from the People's Republic of China: Final Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances,* 73 Fed. Reg. 33977, 33979 (June 16, 2008); *Certain New Pneumatic Off-The-Road Tires from the People's Republic of China; Final Affirmative Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances,* 73 FR 40485, 40487 (July 15, 2008).

[7] E.O. 12866, § 3(f)(1) provides in relevant part:

> (f) "Significant regulatory action" means any regulatory action that is likely to result in a rule that may:

CITAC appreciates the opportunity to submit these comments for the Department's consideration. We look forward to working with the Department and other interested parties to achieve fair results for all participants in the process.

Sincerely,

Jon Wadsworth
Executive Director

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(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, [or] jobs. . . .