1700 N. Moore Street, Suite 2250, Arlington, VA 22209
Phone: 703-841-2300 Fax: 703-841-1184
Email: info@retail-leaders.org www.retail-leaders.org

June 23, 2008

The Honorable David Spooner
Assistant Secretary for Import Administration
U.S. Department of Commerce
Central Records Unit, Room 1870
14th Street & Constitution Ave., NW
Washington, D.C. 20230

Dear Mr. Assistant Secretary:

In response to the Commerce Department's federal register notice, the Retail Industry Leaders Association (RILA) provides these comments on Commerce's proposed methodology for identifying and analyzing targeted dumping. *Proposed Methodology for Identifying and Analyzing Targeted Dumping in Antidumping Investigations; Request for Comment*, 73 Fed. Reg. 26371 (May 9, 2008).

RILA represents the largest and fastest growing companies in the retail industry, which together provide millions of jobs, operate more than 100,000 stores, manufacturing facilities and distribution centers domestically and abroad and generate more than $1.5 trillion in annual sales. RILA promotes consumer choice and economic freedom through public policy and industry operational excellence.

RILA members purchase hundreds of millions of dollars in merchandise from producers in the United States and around the world. Uncertainty and disruption in the supply chain can cost the industry millions of dollars. Thus, while RILA's members understand and appreciate the role of unfair trade laws in U.S. trade policy, they have a

substantial interest in ensuring that the law is interpreted properly and is administered in a rational, fair and balanced manner that is consistent with the United State's international obligations. It is in pursuit of that goal that we offer these comments for the Department's consideration.

COMMENTS

The targeted dumping provision is an exception that authorizes Commerce in a specific, narrow set of circumstances to deviate from the preferred average-to-average method for calculating the existence of dumping.[1] In establishing a method for identifying and analyzing targeted dumping Commerce must ensure that the exception cannot be used to swallow the rule.[2] To do so, it must develop a methodology that provides a consistent, objective and reliable means of determining whether the statutory criteria for invoking the targeted dumping exception are met.

The statute authorizes Commerce to use the targeted dumping exception only if (1) "there is a *pattern of* export *prices* (or constructed export prices) for comparable merchandise *that differ significantly* among purchasers, regions or periods of time", and (2) *Commerce explains why it cannot take such differences into account using the preferred method.* 19 U.S.C. § 1677f-1(d)(1)(B) (emphasis added). Despite this

---

[1] There are two primary calculation methodologies: (1) the comparison of weighted-average normal values to weighted-average export prices, and (2) the comparison of the normal value for individual transactions with prices for comparable individual export transactions. 19 U.S.C. §1677f-1(d)(1)(A). The Statement of Administrative Action explains, however, that the Department will normally use the average-to-average comparison method, whereas transaction-to-transaction would be appropriate where there are only a few sales in each market of very similar or custom-made merchandise. *See* Statement of Administrative Action Accompanying the Uruguay Round Agreements Act ("URAA"), H.R. Doc. No. 103-316 at 8442. This preference for the average-to-average methodology is reflected in the Commerce Department's regulations. 19 C.F.R. § 351.414(c).

[2] Although the targeted dumping provision has been in the statute since enactment of the URAA, allegations have been rare. Following recent decisions of the Appellate Body of the World Trade Organization ("WTO"), which have interpreted the WTO Antidumping Agreement as prohibiting the U.S. practice of "zeroing" negative dumping margins, there has been a significant increase in targeted dumping allegations. There is particular concern that the targeted dumping provision will simply be used to circumvent the Appellate Body's decisions.

provision, however, the statute "instructs Commerce to be more concerned about amplification of dumping margins through the use of transaction-specific prices than about masking them with averaging." *Borden, Inc. v. United States*, 4 F. Supp. 2d 1221, 1226 (Ct. Int'l Trade 1998). Each of the criteria in the statute play an important role in insuring that the targeted dumping provision is used only to the extent necessary and appropriate to achieve its intended purpose.

When promulgating the regulations on targeted dumping, Commerce stated, "targeting means that, within the industry under consideration, the price differences suggest a meaningful pattern." Thus, Commerce has recognized that it cannot simply assume that observed price differences constitute targeting. A "meaningful" pattern is one that indicates that the exporter has singled out (*i.e.*, targeted) a particular customer, region or time period with significantly different (*i.e.*, abnormally low) prices. By basing its targeted dumping methodology solely on comparisons of identical merchandise Commerce has properly recognized that price differences based on normal commercial factors do not constitute targeted dumping. To identify a targeting pattern, however, Commerce must also take into account other price differences that are the result of normal commercial factors within the industry, such as volume, seasonality, terms of sale and channels of distribution. Such differences do not constitute targeting. They are, in fact, explicitly contemplated by, and provided for, within the normal calculation methodology. *See, e.g.*, 19 U.S.C. § 1677b(a)(6); 19 C.F.R. §§ 351.409-412. Failure to take these additional factors into account could reduce the targeted dumping methodology to little more than a mechanism to artificially increase the impact of specific transactions on the overall margin calculation.

It is also imperative that Commerce recognize and apply the second statutory criteria as a distinct analysis that must be undertaken independent of the identification of targeting. In other words, the existence of targeting cannot in and of itself be used to justify use of the average-to-transaction methodology. As a threshold matter, a targeted dumping analysis is not warranted unless Commerce has determined that the allegedly targeted transactions are, in fact, dumped. If there is no dumping with respect to the alleged target, there is nothing to mask and therefore no reason to employ a special method. Further, as required by the statute, Commerce must have a rational basis for concluding that the targeted dumping cannot be addressed using the average-to-average methodology, *e.g.*, through the creation of special averaging groups for the targeted transactions. The statute and regulations provide Commerce with ample authority to take into account regions, time periods and "such other factors as the Secretary considers relevant" in establishing averaging groups. 19 C.F.R. §351.414(d)(2). There is absolutely nothing in the statute or regulations that precludes Commerce from utilizing averaging groups to address targeted dumping. Moreover, the fact that an average-to-average comparison and an average-to-transaction comparison may yield different results is an insufficient basis to assert that the former methodology does not adequately address the targeted dumping.

Finally, if targeted dumping is properly established and the use of the average-to-transaction comparison methodology is warranted, that methodology will enable Commerce to measure the amount of dumping that actually occurred with respect to the targeted customer, region or time period. By comparing each of the targeted transactions to a monthly weighted-average normal value, Commerce will certainly have eliminated

any potential "masking" of dumping that may have occurred by using standard POI-wide average values that would include non-targeted transactions. The fact that circumstances warrant the use of a special methodology to determine the level of dumping within the targeted group of transactions, however, does not justify Commerce zeroing negative margins when calculating the overall weighted-average dumping margin for the particular exporter. The issue of calculating the proper level of dumping within the targeted group is separate and apart from Commerce's obligation under the WTO rules to offset negative and positive dumping margins when calculating an overall dumping margin.

With these general principles in mind, we provide below additional comments on some of the specific issues raised in Commerce's notice.

The Methodology. We support Commerce's effort to base the targeted dumping analysis on standard statistical methods rather than the arbitrary thresholds proposed by some parties. In simple layman's terms, we understand Commerce's two-part test for identifying targeted-dumping as: (1) 33 percent (by value) of the exporter's sales must be more than one standard deviation below the weighted-average price for all of the exporter's sales; and (2) more than 5 percent of the exporter's sales to the alleged target must represent a price gap ("targeted price gap")[3] that is greater than the average price gap for the non-targeted group ("non-targeted price gap"). If our understanding is correct, then Commerce could find targeted dumping even if (1) the vast majority (two-thirds) of the sales to the alleged target were close to (or above) the weighted average price for sales to all customers, and (2) 95 percent of the sales to the alleged target did not

[3] The targeted price gap is measured by comparing the sales-weighted average price to the target to the next higher sales-weighted average price to a non-target.

represent an above-average price gap.[4] On its face, it is difficult to see how such a scenario could reasonably be characterized as "targeting." If there were, in fact, targeting one would expect to see the abnormal patterns reflected in at least a majority (if not a substantial majority) of the sales to the alleged target.

Definitions of "region" and "time period". These terms should be defined in a way that promotes consistency and predictability within the analytical framework. As noted above, Commerce has stated that "targeting" is defined as a meaningful pattern "within the industry under consideration". In defining these terms, therefore, it is important to build into the analytical framework consideration of any factors unique to the industry under investigation that might explain pricing patterns within a particular region or time period that are unrelated to targeting.

Standards for Allegations. A targeted dumping allegation may be made up to 30 days prior to the preliminary determination[5] at which point petitioners have access to full questionnaire responses from the exporters with transaction-specific information. Given all of the exporter-specific information at petitioner's disposal, as well as petitioner's knowledge of the U.S. market and the relevant industry, the standard for alleging targeted dumping should be high. Petitioner should be able to present clear and convincing evidence of targeted dumping, taking account other factors within the relevant industry that may account for various pricing patterns, and provide an explanation for why dumping within the targeted group cannot be adequately measured using an average-to-average methodology.

---

[4] It is not entirely clear whether the price gap test is applied to all sales to a targeted customer for which the standard deviation test has been satisfied, or whether it is applied only to the subset of sales of the target that meet that test. In either event, however, a 5 percent threshold for sales meeting the above-average gap test is too low.

[5] *See* 19 C.F.R. §351.301(d)(5).

Application of the Alternate Methodology. The targeted dumping provision is a narrow exception and should be construed and applied by Commerce accordingly. The Department's regulations state that Commerce normally will limit application of the average-to-transaction methodology to the sales that constitute targeting dumping. 19 C.F.R. §351.414(f)(2). In promulgating the regulation, Commerce specifically rejected the suggestion that the average-to-transaction methodology should be applied to all sales by a firm found to have engaged in targeted dumping, stating that to do so would be "unreasonable and unduly punitive". *See* Notice of Proposed Rulemaking and Request for Public Comments, 61 Fed. Reg. 7308, 7350 (Feb. 27, 1996). We agree. The alternate methodology is intended to address targeted dumping and should be used solely for that purpose.

We appreciate the opportunity to present these comments. If you have any questions concerning these comments, please contact the undersigned at (703) 841-2300 or katherine.lugar@rila.org.

Respectfully submitted,

RETAIL INDUSTRY LEADERS ASSOCIATION

By________________________

Katherine Lugar

SVP, Government Affairs