



This document is scheduled to be published in the Federal Register on 12/31/2014 and available online at <http://federalregister.gov/a/2014-30664>, and on [FDsys.gov](http://FDsys.gov)

**BILLING CODE 3510-DS-P**

**DEPARTMENT OF COMMERCE**

**International Trade Administration**

**19 CFR Part 351**

**[Docket No. 140929814-4814-01]**

**RIN 0625-AB02**

**Modification of Regulations Regarding Price Adjustments in Antidumping Duty Proceedings**

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

ACTION: Proposed rule and request for comments.

SUMMARY: The Department of Commerce (“the Department”) proposes to modify two regulations pertaining to price adjustments in antidumping duty proceedings and is seeking comments from parties. These modifications, if adopted, are intended to clarify that the Department generally will not consider a price adjustment that reduces or eliminates a dumping margin unless the party claiming such price adjustment demonstrates, to the satisfaction of the Department, through documentation that the terms and conditions of the adjustment were established and known to the customer at the time of sale.

DATES: To be assured of consideration, written comments must be received no later than [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: All comments must be submitted through the Federal eRulemaking Portal at <http://www.regulations.gov>, Docket No. ITA-2014-0001, unless the commenter does not have access to the internet. Commenters that do not have access to the internet may submit the

original and one electronic copy of each set of comments by mail or hand delivery/courier. All comments should be addressed to Paul Piquado, Assistant Secretary for Enforcement & Compliance, Room 1870, Department of Commerce, 14th Street and Constitution Ave., NW, Washington, DC 20230. Comments submitted to the Department will be uploaded to the eRulemaking Portal at [www.Regulations.gov](http://www.Regulations.gov).

The Department will consider all comments received before the close of the comment period. All comments responding to this notice will be a matter of public record and will be available on the Federal eRulemaking Portal at [www.Regulations.gov](http://www.Regulations.gov). 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.

Any questions concerning file formatting, document conversion, access on the Internet, or other electronic filing issues should be addressed to Moustapha Sylla, Enforcement and Compliance Webmaster, at (202) 482-4685, e-mail address: [webmaster-support@ita.doc.gov](mailto:webmaster-support@ita.doc.gov). FOR FURTHER INFORMATION CONTACT: Jessica Link at (202) 482-1411 or Melissa Skinner at (202) 482-0461.

SUPPLEMENTARY INFORMATION:

### **Background**

In general terms, section 731 of the Tariff Act of 1930, as amended (the Act) provides that when a company is selling foreign merchandise into the United States at less than fair value, and material injury or threat of material injury is found by the International Trade Commission, the Department shall impose an antidumping duty. An antidumping duty analysis involves a comparison of the company's sales price in the United States (known as the export price or constructed export price) with the price or cost in the foreign market (known as the normal

value). *See* 19 CFR 351.401(a); *see also* section 772 of the Act (defining export price and constructed export price); section 773 of the Act (defining normal value). The prices used to establish export price, constructed export price, and normal value involve certain adjustments. *See, e.g.*, 19 CFR 351.401(b). In its May 19, 1997 final rulemaking, the Department promulgated regulatory provisions governing the use of price adjustments in the calculation of export price, constructed export price, and normal value in antidumping duty proceedings. *Antidumping Duties; Countervailing Duties; Final Rule*, 62 FR 27296 (May 19, 1997) (“*Final Rule*”). In particular, the Department promulgated the current regulation at 19 CFR 351.102(b)(38), which provides a definition of “price adjustment”. In providing this definition, the Department stated that “{t}his term is intended to describe a category of changes to a price, such as discounts, rebates and post-sale price adjustments, that affect the net outlay of funds by the purchaser.” *Id.*, 62 FR at 27300.

The Department also enacted 19 CFR 351.401(c), which explains how the Department will use a price net of price adjustments. In the *Final Rule*, the Department explained that 19 CFR 351.401(c) was intended to “restate{} the Department’s practice with respect to price adjustments, such as discounts and rebates.” *Final Rule*, 62 FR at 27344.

The Department also addressed the following comment on the proposed rulemaking, regarding whether “after the fact” price adjustments, that were not contemplated at the time of sale, would be accepted under 19 CFR 351.401(c):

One commenter suggested that, at least for purposes of normal value, the regulations should clarify that the only rebates Commerce will consider are ones that were contemplated at the time of sale. This commenter argued that foreign producers should not be allowed to eliminate dumping margins by providing “rebates” only after the existence of margins becomes apparent.

The Department has not adopted this suggestion at this time. We do not disagree with the proposition that exporters or producers will not be allowed to

eliminate dumping margins by providing price adjustments “after the fact.” However, as discussed above, the Department’s treatment of price adjustments in general has been the subject of considerable confusion. In resolving this confusion, we intend to proceed cautiously and incrementally. The regulatory revisions contained in these final rules constitute a first step at clarifying our treatment of price adjustments. We will consider adding other regulatory refinements at a later date.

Since enacting these regulations, the Department has consistently applied its practice of not granting price adjustments where the terms and conditions were not established and known to the customer at the time of sale (sometimes referred to as determining the “legitimacy” of a price adjustment) because of the potential for manipulation of the dumping margin through so-called “after-the-fact” adjustments. *See, e.g., Certain Oil Country Tubular Goods From Taiwan: Final Determination of Sales at Less Than Fair Value*, 79 FR 41979 (July 18, 2014) and accompanying Issues and Decision Memorandum, Cmt. 3; *Lightweight Thermal Paper From Germany: Notice of Final Results of the First Antidumping Duty Administrative Review*, 76 FR 22078 (April 20, 2011) (*Lightweight Thermal Paper from Germany*) and accompanying Issues and Decision Memorandum, Cmt. 3; *Canned Pineapple Fruit from Thailand: Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 71 FR 70948 (Dec. 7, 2006) and accompanying Issues and Decision Memorandum, Cmt. 1; *Ball Bearings and Parts Thereof from France, Germany, Italy, Japan, and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews*, 71 FR 40064 (July 14, 2006) and accompanying Issues and Decision Memorandum, Cmt. 19.

On March 25, 2014, the Court of International Trade issued *Papierfabrik August Koehler AG v. United States*, 971 F. Supp. 2d 1246 (Ct. Int’l Trade 2014) (*Koehler AG*), remanding the Department’s decision in *Lightweight Thermal Paper from Germany*, noted above. The Court ordered the Department to reconsider Papierfabrik August Koehler AG’s rebate program. The

Court disagreed with the Department's determination that the regulations permitted it to disregard certain price adjustments, the terms and conditions of which were not established or known to the customer at the time of sale, stating that "the regulations set forth a broad definition of price adjustment encompassing 'any change in the price charged for . . . the foreign like product' that 'are reflected in the purchaser's net outlay.'" 971 F. Supp. 2d at 1251-52 (quoting 19 CFR 351.102(b)(38)) (emphasis added by Court). In accordance with the Court's order, on remand, under protest, the Department granted an adjustment for the rebates at issue. *See* Final Results of Redetermination Pursuant to Court Remand, Lightweight Thermal Paper from Germany, Papierfabrik August Koehler AG v. United States, Court No.11-00147, Slip Op.14-31 (Ct. Int'l Trade March 25, 2014), dated June 20, 2014.

The Department continues to defend its regulatory interpretation of disallowing price adjustments the terms and conditions of which were not contemplated and known to the customer at the time of sale. However, the Department recognizes that the Court of International Trade in *Koehler AG* disagrees with its interpretation. Therefore, without prejudice to the United States Government's right to appeal *Koehler AG*, or to argue that the Department's current interpretation of its regulations is correct, the Department is issuing this proposed rule to modify the regulations at issue pursuant to Administrative Procedure Act (5 U.S.C. 553) notice and comment procedures; we invite comments from all interested parties.

### **Proposed Modification**

The Department proposes to modify 19 CFR 351.102(b)(38) and 19 CFR 351.401(c) as indicated below. These modifications, if adopted, are intended to clarify that the Department generally will not consider a price adjustment that reduces or eliminates a dumping margin unless the party claiming such price adjustment demonstrates, to the satisfaction of the

Department, through documentation that the terms and conditions of the adjustment were established and known to the customer at the time of sale. This rulemaking would be effective for proceedings initiated on or after 30 days following the date of publication of the final rule.

The Department invites parties to comment on this proposed rule and the proposed effective date. Further, any party may submit comments expressing its disagreement with the Department's proposal and may propose an alternative approach.

### **Classifications**

#### *Executive Order 12866*

It has been determined that this proposed rule is not significant for purposes of Executive Order 12866.

#### *Paperwork Reduction Act*

This proposed rule contains no new collection of information subject to the Paperwork Reduction Act, 44 U.S.C. Chapter 35.

#### *Executive Order 13132*

This proposed rule does not contain policies with federalism implications as that term is defined in section 1(a) of Executive Order 13132, dated August 4, 1999 (64 FR 43255 (August 10, 1999)).

#### *Regulatory Flexibility Act*

The Chief Counsel for Regulation has certified to the Chief Counsel for Advocacy of the Small Business Administration 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. A summary of the need for, objectives of and legal basis for this rule is provided in the preamble, and is not repeated here.

The entities upon which this rulemaking could have an impact include foreign exporters and producers, some of whom are affiliated with U.S. companies, and U.S. importers.

Enforcement & Compliance currently does not have information on the number of entities that would be considered small under the Small Business Administration's size standards for small businesses in the relevant industries. However, some of these entities may be considered small entities under the appropriate industry size standards. Although this proposed rule may indirectly impact small entities that are parties to individual antidumping duty proceedings, it will not have a significant economic impact on any entities.

The proposed action is merely a continuation of the Department's practice based on its interpretation of current Department regulations. If the proposed rule is implemented, no entities would be required to undertake additional compliance measures or expenditures. Rather, the regulations, both in their current form and in this proposed rulemaking, instruct the Department on what adjustments to make to export price or constructed export price and normal value under certain factual scenarios in the course of an antidumping duty proceeding. Because the proposed rule only impacts the way in which the Department makes certain calculations in antidumping duty proceedings, it does not directly impact any business entities. The proposed rule merely clarifies the regulations to better align with current Departmental practices. Therefore, the proposed rule would not have a significant economic impact on a substantial number of small business entities. For this reason, an Initial Regulatory Flexibility Analysis is not required and one has not been prepared.

#### **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: December 19, 2014.

---

**Paul Piquado,**  
*Assistant Secretary*  
*for Enforcement and Compliance.*

For the reasons stated, 19 CFR part 351 is proposed to be amended as follows:

**PART 351—ANTIDUMPING AND COUNTERVAILING DUTIES**

- 1. The authority citation for 19 CFR 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. In § 351.102, revise paragraph (b)(38) to read as follows:

**§ 351.102 Definitions.**

\* \* \* \* \*

(b) \* \* \*

(38) *Price adjustment.* “Price adjustment” means a change in the price charged for subject merchandise or the foreign like product, such as a discount or rebate, including, under certain circumstances, a change such as a discount or rebate that is made after the time of sale (*see* §351.401(c)), that is reflected in the purchaser’s net outlay.

\* \* \* \* \*

- 3. In § 351.401, revise paragraph (c) to read as follows:

**§ 351.401 In general.**

\* \* \* \* \*

(c) *Use of price net of price adjustments.* In calculating export price, constructed export price, and normal value (where normal value is based on price), the Secretary normally will use a price that is net of price adjustments, as defined in § 351.102(b), that are reasonably attributable to the subject merchandise or the foreign like product (whichever is applicable). The Secretary generally will not consider a price adjustment that reduces or eliminates a dumping margin unless the party claiming such price adjustment demonstrates, to the satisfaction of the Secretary, through documentation that the terms and conditions of the adjustment were established and known to the customer at the time of sale.

\* \* \* \* \*

[FR Doc. 2014-30664 Filed 12/30/2014 at 8:45 am; Publication Date: 12/31/2014]