

# ClientAlert

## International Trade

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### ITA Publishes Final Rule Concerning Targeted Dumping in AD Proceedings

On April 22, 2014, the International Trade Administration (ITA) of the Department of Commerce (DOC) published in the Federal Register a final rule (79 FR 22371) in an attempt to clarify the status of previously withdrawn targeted dumping regulations. The DOC's practice regarding targeted dumping has been in flux since December 2008, when the DOC withdrew regulations that previously had governed targeted dumping in AD investigations as expressed in its interim final rule (73 FR 74930) on December 10, 2008. The final rule determined that the DOC would continue to not apply the withdrawn targeted dumping regulations in AD investigations.

Targeted dumping occurs when there is a pattern of export prices that differ significantly among purchasers, regions or periods of time, and such differences cannot be taken into account using the DOC's normal dumping margin calculation methodologies. Normally, the DOC will calculate margins by one of two methods (1) "average-to-average method"—comparing the weighted average of normal values to the weighted average of export prices for comparable merchandise or (2) "transaction-to-transaction method"—comparing the normal value of individual transactions to the export prices of individual transactions for comparable merchandise. If the DOC finds targeted dumping, it instead calculates margins using an "average-to-transaction method" that compares the weighted average of the normal values to the export prices of individual transactions of comparable merchandise.

The final rule is DOC's latest attempt to clarify and defend its targeted dumping practice after the Court of International Trade's (CIT) June 2013 decision in *Gold East (Jiangsu) Paper Co. v. United States*, 918 F. Supp. 2d 1317, in which the CIT ordered the DOC to reconsider its final determination in that case because the CIT found that the DOC had failed to demonstrate that the withdrawn targeted dumping regulations were properly withdrawn in 2008. The DOC's previous regulations on targeted dumping provided that when it found targeted dumping, the application of the average-to-transaction method could be applied only to the sales that constituted targeted dumping ("limiting rule"). The DOC, however, had argued that the targeted dumping regulations had been properly withdrawn in December 2008 and, thus, was no longer required to limit the average-to-transaction method only to the targeted sales, but could apply this method to all sales, including the non-targeted sales. The CIT found that the prior targeted dumping regulations should still be applied in that proceeding because there was a procedural defect in the rulemaking process in which the DOC did not provide the requisite notice and opportunity to comment on the proposed withdrawal of the targeted dumping regulations. Although the DOC is appealing the CIT's



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decision regarding the applicability of the withdrawn targeted dumping regulations, the DOC determined that this rulemaking was necessary to clarify through proper notice and comment procedures whether the withdrawn targeted dumping regulations should be reinstated or to continue to treat them as having been withdrawn.

The final rule, published on April 22, 2014, noted the DOC had in February 2012 published notice of a rule ("2012 Final Modification") that modified its methodology for calculating dumping margins in certain AD review proceedings and did not include specifically the "limiting rule" in the changes to the applicable regulations.<sup>1</sup> The DOC noted that the withdrawn targeted dumping regulations and the revised regulations that resulted from the 2012 Final Modification, together with the new final rule, established that the method by which the Department determines whether it is appropriate to use the average-to-average method may continue to evolve as the DOC further develops in this area. Although commenters argued that the DOC was now making targeted dumping determinations on an ad hoc, undefined basis that lacks parameters, principles, transparency and predictability, the DOC found that the withdrawal of the targeted dumping regulations and case-by-case adjudication would allow it to exercise the discretion intended by the statute and thereby develop a practice that will allow interested parties to pursue all statutory avenues of relief in this area.

As a result of the DOC's latest rulemaking, it has taken yet another step to try to distance itself from its prior regulations and practice regarding targeted dumping. By confirming that the previous targeted dumping regulations had been withdrawn and were no longer in effect, the DOC, therefore, has clarified that it will determine on a case-by-case basis whether to apply an alternative comparison method instead of either of the normal average-to-average or transaction-to-transaction methods. Since 2008, the DOC's targeted dumping practice has been subject to substantial litigation that is likely to continue and even increase, given that it has emphasized that it will not issue any bright line rules for when and how it will apply targeted dumping, but rather will continue to evaluate the particular facts of each case and determine whether the alternative comparison methods should be applied.

This final rule takes effect on May 22, 2014 and will apply to all less-than-fair-value investigations initiated thereafter.

Click [here](#) for 79 FR 22371 and [here](#) for 73 FR 74930.

Please let us know if you have any questions.

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<sup>1</sup> Please see Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin and Assessment Rate in Certain Antidumping Proceedings; Final Modification, 77 FR 8101, dated February 14, 2012, available [here](#).

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