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International Trade Administration
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Investigation
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MEMORANDUM TO: Ronald K. Lorentzen
Acting Assistant Secretary
for Enforcement and Compliance

THROUGH: Gary Taverman
Associate Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

FROM: Erin Begnal
Director, Office III
Antidumping and Countervailing Duty Operations

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SUBJECT: Countervailing Duty Investigation of Softwood Lumber Products from Canada: Company Exclusions

Summary

For the reasons detailed below, we have determined that the Department of Commerce ("Department") lacks the authority to conduct the company exclusion process.

Background

On March 29, 2017, a letter presenting a proposal for company exclusions was filed on behalf of the Government of Canada ("GOC"), Canadian provincial and territorial governments, as well as the Canadian industry associations.[1]

[1] *See* letter from the Government of Canada, "Proposal for Company Exclusions," dated March 29, 2017; *see* letter from the Government of New Brunswick, "Softwood Lumber from Canada: Proposals for Product- or Company-Based Exclusions from the CVD Investigation," dated March 31, 2017; *see* letter from Government of British Columbia, "Certain Softwood Lumber Products from Canada: Comments in Support of Clarifying and Exclusionary Language Proposed by Canada Regarding the Scope of these Investigations," dated April 3, 2017.

Analysis

In the absence of an express statutory directive, the Department has promulgated regulations governing company exclusions in countervailing duty ("CVD") investigations. The Department's regulations expressly require that we consider exclusion requests in CVD investigations conducted on an aggregate basis, but are silent with respect to a requirement to conduct a similar analysis in company-specific investigations.[2] In this context, the Department may fill the gap in its regulation, provided that its interpretation is reasonable.[3]

In exercising this gap-filling authority, the Department has reviewed and analyzed the history of 19 CFR 351.204(e), and concludes that the Department does not have the authority to consider exclusion requests in investigations conducted on a company-specific basis. Specifically, under a prior iteration of the regulation (19 CFR 355.14 (1996)), all exclusion requests from CVD orders were governed by a single regulation that did not differentiate between company-specific and aggregate investigations.[4] But in the 1996 post-Uruguay Round Agreements Act proposed rulemaking, the Department announced what it intended to be a "significant change from prior practice as reflected in . . . {section} 355.14."[5] The regulation reflecting this "significant change" expressly authorizes consideration of exclusion requests only in aggregate investigations.[6] The preamble to the final rulemaking indicates that the omission of a similar provision for company-specific investigations was intentional, based on the Department's assessment that, except in aggregate CVD investigations, the original purpose of 19 CFR 355.14 had become "superfluous" in light of intervening statutory changes involving voluntary respondents under section 782(a) of the Tariff Act of 1930, as amended (the Act).[7]

The Department disagrees that, with this *Preamble* language, "the Department clearly contemplated that respondents would have an opportunity to establish they were entitled to be excluded from an order, either through filing a voluntary response or through the exclusion process."[8] To the contrary, the foregoing indicates that the Department contemplated (and rejected) an exclusion process in company-specific investigations based on the availability of a separate statutory mechanism through which companies could pursue individual examination and exclusion.[9] Furthermore, in CVD investigations, companies have an additional regulatory mechanism through which they can be excluded from an order in an expedited review after

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[2] *See* 19 CFR 351.204(e) (2016).
[3] *See Roberto v. Dep't of Navy*, 440 F.3d 1341, 1350 (Fed. Cir. 2006) (applying *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) principles to regulatory interpretation).
[4] *See Countervailing Duties; Final Rule*, 53 FR 52306, 52348 (December 27, 1988).
[5] *See Antidumping Duties; Countervailing Duties; Proposed Rulemaking*, 61 FR 7308, 7315 (February 27, 1996).
[6] *See* 19 CFR 351.204(e)(4) (2016).
[7] *See Antidumping; Countervailing Duties; Final Rule*, 62 FR 27296, 27311 (May 19, 1997) (*Preamble*). The GOC asserts that what the Department found to be "superfluous" were "the more detailed requirements of" section 355.14 concerning the form and content of company-specific certifications and supporting foreign government certifications. *See* March 29, 2017, Proposal at 2 n.4. We disagree that this is the most reasonable reading of the *Preamble*. The Department found that the underlying *purpose* of section 355.14 had become superfluous outside of non-aggregate investigations.
[8] *See* March 29, 2017 Proposal at 2 n. 4.
[9] *See* section 782(a) of the Act. Only one company in this investigation followed the statutory procedures for consideration as a voluntary respondent (J.D. Irving Limited).

publication of a CVD order.[10] In this context, there is no need to provide for an additional exclusion process, and indeed the relevant regulatory history indicates that the Department intended not to do so.

The Department likewise disagrees that 19 CFR 351.204(e)(1) (2016) provides a regulatory basis for the Department to conduct a company exclusion process in this investigation.[11] Section 351.204(e)(1) of the Department's regulations provides that the Department will exclude from an affirmative final determination "any exporter or producer for which the {Department} determines an individual weighted-average dumping margin or individual net countervailable subsidy rate of zero or *de minimis*." That provision speaks only to the the proper treatment of companies that have been individually examined and receive zero or *de minimis* rates; it does not speak to whether the Department has the authority to consider company exclusion requests in a non-aggregate investigation (and as set forth above, the relevant regulatory history does not support this interpretation).

Recommendation

Based on the above, we recommend the Department not consider company-specific exclusions during the ongoing CVD investigation of certain softwood lumber products from Canada.

☒ Agree ☐ Disagree

4/19/2017

X Ronald K. Lorentzen

Signed by: RONALD LORENTZEN

Ronald K. Lorentzen
Acting Assistant Secretary
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[10] *See* 19 CFR 355.214(k)(3)(iv) (2016).
[11] *See* March 29, 2017 Proposal at 2.