

NOTICE 701 OF 2010**DRAFT AMENDED TARIFF INVESTIGATIONS REGULATIONS**

The draft Amended Tariff Investigations Regulations is hereby published for public comment. An explanatory document on draft amendments to the Tariff Investigations Regulations is included in the publication. Comments should be submitted in writing to:

Niki Kruger or Alexander Amrein
International Trade Administration Commission
Private Bag X753
PRETORIA
0001

Tel No: (012) 394 3707 / 394 3711

Fax No: (012) 394 4707 / 394 4711

Email: nkruger@itac.org.za / aamrein@itac.org.za

Written comments must be received no later than 16 August 2010.

REPUBLIC OF SOUTH AFRICA

THE INTERNATIONAL TRADE ADMINISTRATION COMMISSION OF SOUTH AFRICA

DRAFT AMENDED TARIFF INVESTIGATIONS REGULATIONS

TABLE OF CONTENTS

Part A - Definitions

1. Definitions

Part B - General Provisions

2. Scope of regulations
3. Confidentiality
4. Representation
5. Oral presentations
6. Submission of applications
7. Computation of periods of time
8. Public File
9. Additional information
10. Assessment Criteria

Part C - Procedures

Sub-Part I - General

11. Verifications
12. Verification report
13. Investigating officials

Sub-Part II - Pre-Initiation Procedure

14. Applications
15. Acknowledgement of receipt
16. Deficient applications

Sub-Part III - Preliminary Investigation Phase

17. Preliminary Commission evaluation of an application
18. Initiation
19. Publication notice

Sub-Part IV - Final Investigation Phase

20. Comments on publication notice
21. Deficiencies in comments received
22. Final Commission evaluation

Part D - Final Provisions

23. Submission of same or similar applications
24. Delegation
25. Application of Regulations

REGULATIONS

Part A – Definitions

1. Definitions

“applicant” means a party submitting an application as provided for in section 6 for purposes of initiating an investigation under section 19.

“Commission” means the International Trade Administration Commission of South Africa established in terms of section 7 of the *Main Act*.

“correspondence” means any written communication by a party submitted by hand delivery, mail, facsimile or electronically to the Commission for purposes of an investigation under section 19.

“customs duty” means ordinary customs duties as contained in Part 1 of Schedule No. 1 of the Customs and Excise Act, 1964 (Act No. 91 of 1964).

“deadline” shall be interpreted as the final date for submissions, responses, comments and requests and the like to the Commission as envisaged by the different sections of these Regulations, and shall be deemed to be at 15h00 South African standard time on such date, unless expressly indicated otherwise.

“good cause” for an extension of the submission of information does not include merely citing insufficient time to complete such submission.

“interested parties” means parties that have a direct interest in an investigation and may include the applicant, producers in SACU, exporters, importers, trade or business associations whose members are SACU producers, exporters or importers and labour unions whose members are employees of SACU producers. This does not preclude the Commission from accepting other parties as interested parties at the behest of the Commission.

“Main Act” refers to the International Trade Administration Act, 2002 (Act No. 71 of 2002);

“Minister” means the member of the Cabinet, which body is referred to in section 91 of the Constitution, responsible for trade and industry;

“SACU” means the Southern African Customs Union established by Article 3 of the SACU Agreement.

“SACU Agreement” means the Agreement establishing SACU, as referred to in the *Main Act*.

“Tariff Board” means the SACU Tariff Board established by Article 7 of the SACU Agreement.

Part B – General Provisions

2. Scope of regulations

These regulations apply solely to applications and investigations with regard to the reduction or increase in the rate of a customs duty and the creation or removal of rebate or drawback provisions with regard to a customs duty.

3. Confidentiality

3.1 Parties providing confidential information in any correspondence shall at the same time submit non-confidential summaries thereof. These summaries shall –

- (a) indicate each instance where confidential information has been omitted;
- (b) indicate, in each instance where confidential information has been omitted, the reasons for confidentiality; and
- (c) be in sufficient detail to permit other interested parties a reasonable understanding of the substance of the information submitted in confidence.

3.2 Where information does not permit non-confidential summarisation as contemplated in subsection 1, a sworn statement must be provided explaining why the information cannot be summarised.

3.3 The following list indicates “information that is by nature confidential” as per section 33(1)(a) of the *Main Act*, read with section 36 of the *Promotion of Access to Information Act, 2000* (Act No. 2 of 2000):

- (a) management accounts;
- (b) financial accounts of a private company;
- (c) actual and individual sales prices;
- (d) actual costs, including cost of production and importation cost;

(e) actual sales volumes;(f) information, the release of which could have serious consequences for the person that provided such information; and

(g) information that would be of significant competitive advantage to a competitor;

provided that the party submitting such information indicates it to be confidential.

3.4 All correspondence not clearly indicated to be confidential shall be treated as non-confidential.

3.5 The Commission may disregard any information indicated to be confidential that is not accompanied by:

(a) a proper non-confidential version, provided the Commission is of the opinion that such failure materially affects the ability of interested parties to defend their interests; or

(b) a sworn statement contemplated in subsection 2;

and the deficiency has not been addressed in accordance with section 17 or 22.

3.6 The Commission may disregard any information indicated to be confidential that is not accepted as confidential by the Commission under section 34(1) of the *Main Act*.

4. Representation

4.1 Should an interested party wish to be represented by an outside party in an investigation, the interested party must provide the Commission with a letter of appointment of its representative, detailing the identity of the representative and the scope and duration of the representation, signed by –

(a) its chief executive officer or other person having similar executive authority where there is no chief executive officer position; or

(b) a duly appointed and authorised representative of the interested party.

- 4.2 Where a letter of appointment is signed by a representative as provided for in subsection 1(b), written proof of the appointment and authorisation of the representative must also be provided.
- 4.3 Should any interested party wish to terminate a representation indicated in subsection 1, such party must provide the Commission with a letter to this effect. The letter must comply with, as applicable, the requirements set forth in subsections 1 and 2.
- 4.4 Once an interested party has appointed a representative, all communication between the Commission and that interested party will take place through the appointed representative.
- 4.5 Notwithstanding subsection 4 above, the Commission may contact an interested party directly if it deems this necessary and it may copy interested parties on the communication sent to the duly appointed representative of the interested party.

5. Oral presentations

- 5.1 Interested parties may in writing request an oral presentation during the investigation, provided the parties indicate reasons for not relying on written submissions only and substantially similar information has not already been submitted to the Commission in the investigation. The Commission may also refuse an oral presentation if, amongst others, granting such presentation would unduly delay the finalisation of an investigation.
- 5.2 All information presented during an oral presentation shall be reduced to writing by interested parties and a non-confidential version will be placed on the public file.
- 5.3 Interested parties requesting an oral presentation shall provide the Commission, in writing, at the time of the request with:
 - (a) A detailed agenda for the oral presentation; and
 - (b) A detailed version, including a non-confidential version, of the information to be presented at the oral presentation.
- 5.4 The Commission may limit or add to the agenda contemplated in subsection 4 and may structure the proceedings as it deems

appropriate. The interested party will be informed of the approved agenda.

- 5.5 The Commission may limit the duration of the oral presentation. Any such limitation will be communicated to the party requesting the presentation at the same time that the Commission indicates the date for such presentation.

6. Submission of applications

- 6.1 Applications must be submitted in writing and in the manner and form determined by the Commission.
- 6.2 Applications referred to in subsection 1 must be submitted by mail or by hand delivery. If submission is made by mail, the application must be addressed to the Senior Managers: Tariff Investigations, International Trade Administration Commission of South Africa, Private Bag X753, Pretoria 0001. If submission is made by hand delivery, the application must be delivered to the Senior Managers: Tariff Investigations at the following address: DTI Campus (Uuzaji Building, first floor reception), 77 Meintjies Street, Sunnyside, Pretoria.
- 6.3 If an applicant submits an application by facsimile or electronically, it must also provide the Commission with a hard copy of the application in the manner provided for in subsection 2 within 14 days after the transmission of the facsimile or electronic version of the application.

7. Computation of periods of time

- 7.1 Computation of any period of time provided for in these regulations commences with the first day following the act or event initiating such period of time. The last day of the period of time is included in the computation unless such day is a Saturday, Sunday or public holiday, or such other day when the Commission is closed for business, in which case the deadline is the next business day.
- 7.2 Where a deadline is indicated by these regulations or the Commission, the submission must reach the Commission by the deadline indicated.

7.3 A party shall be deemed to have received a written communication from the Commission –

- (a) in the case of transmission by facsimile or electronically, on the day the written communication is transmitted by the Commission;
- (b) in the case of same-day, overnight or registered mail, on the day such written communication is delivered to a party; or
- (c) in the case of regular mail, 5 working days after the written communication is placed in the post by the Commission.

8. Public file

- 8.1 A public file will be kept in all investigations and all non-confidential documents will be kept in this file.
- 8.2 All interested parties can access the public file of an investigation by making an appointment with the investigating official identified in the publication notice of an investigation.

9. Additional information

- 9.1 The Commission may request information from a person or an interested party or gather information of its own accord at any stage of an investigation.
- 9.2 The Commission may request a person, including an interested party, to make an oral presentation to the Commission at any stage of an investigation.

10. Assessment Criteria

- 10.1 The Commission's evaluation of applications and its determinations in investigations are based on a case-by-case approach and are informed by the industrial policy and economic objectives of government; and informed by the World Trade Organization bound rate applicable to the product that is the subject of the investigation.
- 10.2 In evaluating applications and making determinations in investigations, the Commission may consider, as applicable, the following factors as these relate to the product that is the subject of the investigation -

- (a) the domestic industry's actual or potential production capacity, including, where relevant, substitute products;
- (b) price differentials between the domestic product and the equivalent imported product;
- (c) the market share of the domestic product and the equivalent imported product;
- (d) import and export data for the domestic product and the equivalent imported product;
- (e) demand and supply conditions in the market related to the domestic product and the equivalent imported product;
- (f) the financial state of the domestic industry, including profitability and return on investments;
- (g) price and cost structures of the domestic product;
- (h) investment and employment of domestic manufacturers;
- (i) primary and intermediate input costs of domestic manufacturers;
- (j) productivity of domestic manufacturers;
- (k) the rate of effective protection of the domestic product; and
- (l) sector-related cost/benefit impact analyses.

This list of factors is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.

Part C – Procedures

Sub-Part I – General

11. Verifications

- 11.1 The Commission may satisfy itself as to the accuracy of the information supplied to it by any interested party by conducting verifications at such time and place as it may deem necessary, including verifications at the premises of such interested party.
- 11.2 In the event that the interested party who provided the information to be verified refuses to attend a verification or receive a verification visit by the Commission provided for in subsection 1, refuses the Commission access to relevant information or acts so as to

significantly impede the verification process, the Commission may terminate the verification proceedings and disregard any or all the information submitted by that party. The Commission may nevertheless consider information received from such an interested party that was properly submitted and verified.

- 11.3 The Commission shall inform the interested party concerned of the dates of the intended verification visit and shall conduct the verification on those dates unless such party objects to the verification.
- 11.4 In the event that an interested party to be verified is from another Member State in SACU, the Government of the specific Member State and the SACU Secretariat will also be informed of the proposed date of the verification visit.

12 Verification reports

- 12.1 Following a verification, the Commission shall make a verification report, indicating the information verified, available to the party that was verified. The Commission may, subject to the requirement to protect confidential information, make the verification report available to other interested parties.
- 12.2 The purpose of a verification report, related to an examination of information submitted by an interested party, is to ensure that the Commission and the party verified agree on what was verified during the Commission's verification. The failure to reference in the verification report information that was verified shall not preclude the Commission from using such information in its findings.
- 12.3 The Commission will place a copy of the non-confidential verification report on the public file.
- 12.4 The interested party verified will receive 7 days to comment on the verification report. The Commission may grant a single extension upon good cause shown.

13 Investigating officials

Applications received by the Commission are allocated to investigating officials. Applicants and other parties must address all communications related to the application for the attention of the responsible investigating official.

Sub-Part II – Pre-Initiation Procedure**14 Applications**

Applicants must provide the Commission with all information requested in the relevant application form available on the Commission's official website. In the case of a confidential application being submitted by an applicant, a non-confidential application conforming to the requirements of section 3 must be submitted with the confidential application.

15 Acknowledgement of receipt

- 15.1 Upon receipt of an application, the Commission will provide applicants with written acknowledgement of receipt by mail or facsimile.
- 15.2 The letter of acknowledgement will contain the investigating official's name and contact details to whose attention all communications must be addressed as provided for in section 13.

16 Deficient applications

- 16.1 In the case of a deficient application, the Commission shall inform an applicant in writing, by mail, facsimile or electronically that the application is deficient.
- 16.2 If the Commission determines the application to be deficient, the application will not be processed. An application may be regarded as deficient if one or more of the following is applicable:
 - (a) The application is not in the manner and form determined by the Commission;
 - (b) All information requested in the application in terms of section 14 is not submitted;

- (c) The application contains conflicting information; or
 - (d) The application contains incorrect information.
- 16.3 An applicant who submitted a deficient application must provide the Commission with a corrected application within the time period indicated in the Commission's deficiency letter provided for in subsection 1.
- 16.4 If an applicant fails to provide the Commission with a corrected application within the time period provided for in the Commission's deficiency letter, the Commission may reject the application. The Commission shall inform the applicant in writing if the application is rejected.

Sub-Part III – Preliminary Investigation Phase

17 Preliminary Commission evaluation of an application

- 17.1 The Commission shall evaluate whether to accept or reject an application.
- 17.2 If the Commission accepts an application, it shall publish a notice of the application in the *Government Gazette*.
- 17.3 If the Commission rejects an application, the applicant shall be informed in writing of the decision and the reasons therefore.

18 Initiation

- 18.1 An investigation shall be initiated only if the Commission accepts an application, as provided for in section 17.2 or if the Commission self-initiates an investigation.
- 18.1 In instances of self-initiation by the Commission, there will not be an application.
- 18.2 The Commission may self-initiate an investigation for a number of reasons, including, but not limited to, the following:
- 18.2.1 to review the tariff structure related to a product or a range of products; or
 - 18.2.2 upon request by a government entity.

19 Publication notice

- 19.1 An investigation is initiated by means of a Publication Notice in the *Government Gazette*.
- 19.1 Where the Commission initiates an investigation based on an application, the Publication Notice shall contain at least the following information:
- (a) the name of the applicant;
 - (b) the nature of the application;
 - (c) a summary of the stated reasons for the application;
 - (d) the name and contact details of the investigating official; and
 - (e) the reference number of the application.
- 19.2 The Commission shall inform the SACU Secretariat of its decision to initiate an investigation. The Commission may also directly inform industry associations and role players within the affected industry of the initiation decision.
- 19.3 Subsequent to the publication referred to in subsection 2, interested parties may request non-confidential version of the application referred to in section 14. The non-confidential application will also be available on the public file referred to in section 8.

Sub-Part IV – Final Investigation Phase**20 Comments on publication notice**

- 20.1 The period in which all interested parties may comment in writing on the publication notice will be set out in the publication notice.
- 20.2 Comments must be in writing and may be submitted by hand, mail, facsimile or electronically.
- 20.3 If the comments referred to in subsection 2 are confidential, a non-confidential version of the comments, conforming to the requirements of section 3, must be submitted with the confidential comments.
- 20.4 The Commission may grant one extension of the comment period provided for in subsection 1 on good cause shown. This extension will not be longer than a maximum of 14 days except under exceptional circumstances as approved by the Commission.

20.5 Any extension granted in terms of subsection 4 will apply only to the party to which such extension was granted, and will not apply to other parties.

20.6 Any request for an extension must be submitted in writing 2 days prior to the deadline provided for in subsection 1, and must contain a full motivation for the request.

21 Deficiencies in comments received

21.1 Comments submitted in terms of section 20 that contain confidential information will be deemed deficient if not accompanied by –

(a) a proper non-confidential version; or, where applicable

(b) a sworn statement as contemplated in section 3.2.

22.2 The Commission will provide an interested party with a letter indicating any deficiency in terms of subsection 1. The Commission's deficiency letter will set out the time period in which to address any deficiencies.

22.3 The Commission may disregard comments that are deficient after the deadline contemplated in subsection 2 for purpose of its final findings.

22. Final Commission evaluation

22.1 The Commission will evaluate the information obtained during the investigation initiated in terms of section 18 and shall forward a recommendation, which includes a ministerial minute or a report setting forth the results of its evaluation, to the Minister, unless the provisions of section 64(2) of the *Main Act* are in operation, in which case such recommendation shall be forwarded to the Tariff Board.

22.2 Applicants shall be informed in writing of the

22.2.1 final approval of their applications and the reasons therefore after the Commission's recommendation has been approved by the Minister and implemented by the South African Revenue Services through the publication of a notice in the Government Gazette; or

22.2.2 final rejection of their applications and the reasons therefore after the Commission's recommendation has been approved by the Minister.

Part D – Final Provisions

23 Submission of same or similar applications

- 23.1** The Commission will not accept, except under exceptional circumstances as approved by the Commission, an application referred to in section 14 for evaluation under section 17 that deals with a substantially similar matter to that of an application submitted to the Commission earlier in time until the expiry of 12 months after the date on which the application submitted earlier in time was rejected pursuant to section 17 or the Minister accepted or rejected the recommendation forwarded pursuant to section 22.
- 23.2** Subsection 1 is not applicable to investigations self-initiated by the Commission under section 18.1.

24 Delegation

Other than decision-making powers concerning the evaluation whether to accept or reject an application as provided for in section 17, decision-making powers concerning the self-initiation of investigation as provided for in section 18.1 and the Commission's final evaluation as provided for in section 22, the Commission may delegate and the Commission staff may perform any of the functions in respect of customs duty investigations provided for in these regulations.

25 Application of Regulations

These regulations shall apply to all investigations provided for in section 2 initiated after the promulgation of the Regulations.

**Explanatory Document
Draft Amended Tariff Investigations Regulations**

I. Introduction and Disclaimer

The International Trade Administration Commission of South Africa (“the Commission”) has drafted Amended Tariff Investigations Regulations (“the *Amended Regulations*”) that are being published in the *Government Gazette*. To assist parties wishing to comment on the *Amended Regulations*, the Commission has drafted this document, which explains the purpose of the revision and identifies the more significant amendments that are being proposed.

The amendments are informed by ITAC’s practice and are designed to create a more comprehensive and coherent set of regulations. To achieve this objective, the *Amended Regulations* contain new provisions addressing issues such as assessment criteria, verification reports, the public file and deficient submissions. Additionally, the *Amended Regulations* track the application, investigation and decision-making process more carefully.

This document does not discuss all of the amendments that have been incorporated into the *Amended Regulations*. Many of the amendments deal with relatively minor issues, such as the inconsistent use of terms, which are not addressed. Rather, the focus of this document is on significant substantive or procedural amendments.

Finally, this document cannot be cited to establish Commission practice or interpret, in any manner, the final version of the *Amended Regulations*. The document does not undertake to provide a comprehensive or authoritative interpretation of the amendments it identifies, which amendments are often highly technical. Instead, the document identifies certain amendments, seeking to focus comments on certain aspects of these amendments.

II. Identification of Amendments

To assist parties in their review, amendments are identified in the order they appear in the *Amended Regulations*. The headings provided below identify the Part and section of the *Amended Regulations* in which the amendments can be found. Because the numbering of various sections has changed as a result of the amendments, the section numbers below identify the numbering in the Amended Regulations.

1. Part A – Definitions

The term “interested party” has been revised to include labour unions whose members are employees of SACU producers. Although labour unions were never excluded from being an interested party, the amendment makes explicit that they are a potential interested party.

2. Part B – General Provisions

- a. Section 2 – Scope of regulations: In the current regulations, this section states that the regulations apply to investigations. The amendment to this section clarifies that the regulations also apply to applications.
- b. Section 3 – Confidentiality: Where confidential information is submitted, a party must normally provide non-confidential summaries of such information (see subsection 3.1). In this regard, subsection 3.2 was amended to clarify that where information does not allow for non-confidential summarisation, a sworn statement must be provided as opposed to the submission of reasons. This change is in line with the requirements of the Commission's enabling statute, the International Trade Administration Act, 2002 (Act No. 71 of 2002).
- c. Section 4 - Representation: The various amendments to this section seek to ensure that an applicant's executive management is aware that an application has been submitted on its behalf by a third party. The amendments detail the requirements that must be met for the appointment (or termination) of such representation.
- d. Section 5 - Oral presentations: Section 5.2, which sets a deadline for requesting oral representations, has been deleted. Section 5.4 has been reorganised to impart greater clarity as to what must be submitted to the Commission at the time a request is made for an oral presentation. New section 5.5 has been added to make explicit that the Commission to vary the agenda for oral representations.
- e. Section 7 – Computation of periods of time: New section 7.2 has been added to provide explicitly that submissions must reach – and not merely be dispatched to – the Commission by the deadline indicated.
- f. Section 8 – Public File: The provisions of this new section identify the public file, its purpose, and how parties can access it.
- g. Section 9 – Additional information: This new section replaces current section 10, explaining in greater details the Commission's ability to gather information on its own and to request information from an interested or other third party by means of written submissions or oral presentations.
- h. Section 10 – Assessment criteria: This new section arguably represents the most significant amendment to the current regulations. By setting forth various criteria that may inform the Commission's evaluation of applications and its determinations, the section provides guidance regarding Commission decision-making. As noted at the end of subsection 2, the factors listed are not exhaustive and the importance of any factor may vary from case to case.
- i. Section 11 – Verifications: This section (current section 8) has been amended to simplify its structure and to clarify certain aspects of verification proceedings. Subsection 4 clarifies how the Commission will handle verification of an interested party that is from another SACU Member State.
- j. Section 12 – Verification reports: This new section provides interested parties with information about such reports, specifying to which party reports will be sent, the purpose of report and the deadline for submitting comments on reports.
- k. Section 14 – Applications: The revised section (current section 11) provides additional information on applications, including where to obtain applications forms and the submission of confidential and non-confidential versions of an application.

- l. Section 16 - Deficient applications: Clarifications regarding the Commission's deficiency letter have been added to subsections 3 and 4 of this section (current section 12).
- m. Section 18 - Initiation: Together with amendments in section 17 (Preliminary Commission evaluation of an application) and 19 (Publication notice), the purpose of this new section is to clarify and more carefully track the steps leading to the initiation of an investigation.
- n. Section 19 - Publication notice: In light of sections 17 and 18, amended subsection 1 of this section specifies that an investigation is initiated by means of a publication notice in the *Government Gazette*. New subsection 3 provides guidance on interested and other parties requesting non-confidential versions of an application.
- o. Section 20 - Comments on publication notice: The amendments in this section (current section 17) clarify issues surrounding confidential information and the period for the submission of comments.
- p. Section 21 - Deficiencies in comments received: This new section was inserted to address deficiencies in comments responding to a publication notice and the Commission's handling of such deficiencies.
- q. Section 22 - Final Commission evaluation: Several technical amendments have been made to this section (current section 18) regarding what the Commission evaluates and what documents, as part of its recommendation, are forwarded to the Minister.
- r. Section 23 - Re-submission of applications: The amendments to this section (current section 19) detail the circumstances under which the Commission will allow parties to submit an application that deals with an identical or substantially similar previous request.
- s. Section 24 - Delegation: The amendments to this section (current section 20) detail the decision-making powers of the Commission that cannot be delegated to the Commission staff.