

Commerce Issues New Trade Remedy Regulations for Antidumping and Countervailing Duty Laws

On September 20, 2021, the Department of Commerce (Commerce) published in the *Federal Register* [amended regulations](#) to improve its administration and enforcement of the antidumping (AD) and countervailing duty (CVD) laws. The AD/CVD laws are intended to provide relief to domestic industries, including businesses, workers, farmers, and ranchers, from the injurious effects of unfairly traded imports through the imposition of AD/CVDs. The final rule significantly modifies the agency's regulations concerning industry support, new shipper reviews, scope inquiries, circumvention inquiries, covered merchandise inquiries, certifications, and certain procedures. Aimed at closing loopholes and addressing inefficiencies, these revisions are Commerce's first overhaul of the AD/CVD regulations in more than 20 years.

For the following regulatory provisions, Commerce's amendments are effective October 20, 2021:

(1) Deadlines for submission of comments pertaining to industry support in AD and CVD proceedings (19 C.F.R. § 351.203(g)). Through this amendment, Commerce for the first time sets forth deadlines for comments on industry support no later than five business days before the scheduled date of initiation and for rebuttal comments no later than two calendar days from the time limit for filing comments.

(2) New shipper reviews (19 C.F.R. § 351.214). The statute provides a procedure by which "new shippers" can obtain their own individual dumping

margin or countervailable subsidy rate on an expedited basis. Commerce's new regulation clarifies the circumstances when Commerce will grant a new shipper review and establishes the specific factors to be considered in determining whether the sales at issue constitute bona fide sales under the AD and CVD laws.

The final rule (19 C.F.R. § 351.214(b)(2)(v)(D), (E)) establishes new documentation requirements for an exporter or producer requesting a new shipper review, in which a new shipper must establish the circumstances surrounding the sales, such as (a) the price, (b) any expenses arising from such sales, (c) whether the subject merchandise was resold at a profit, (d) whether such sales were made on an arms-length basis, and (e) additional documentation regarding the producer's or exporter's business activities, including, but limited to, (i) the producer's or exporter's offer to sell merchandise in the United States, (ii) the identification of the complete circumstances surrounding sales to the United States, any home market, or third country sales, (iii) the identification of the producer's or exporter's relationship to the first unrelated U.S. purchaser, and (iv) for non-producing exporters, an explanation of the non-producing exporter's relationship with its supplier. The new regulation establishes that Commerce may rescind the new shipper review if the necessary information

pertaining to the bona fide sale issue is not on the record, or if the exporter or producer failed to demonstrate the existence of a bona fide sale to an unaffiliated customer.

In the final rule, Commerce revised its proposed rule and introduced requirements for (a) additional certifications from the exporter and/or producer requesting a new shipper review and (b) either a certification from its unaffiliated customer that it is willing to participate in the review or relevant information why such a certification cannot be provided.

(3) Certifications (19 C.F.R. § 351.228). Section 351.228, a new provision to the regulations, codifies Commerce's existing practice to require certifications in certain proceedings, sets out procedures for complying with these certification requirements, and provides "consequences" for not complying with these certification requirements.

(4) Importer reimbursement certifications filed with U.S. Customs and Border Protection (CBP) (19 C.F.R. § 351.402(f)). Section 351.402(f) requires an importer to certify with CBP before liquidation of its entry whether the importer has or has not entered into an agreement for the payment or reimbursement of AD/CVDs by the exporter or producer.

For the following regulatory provisions, Commerce's amendments are effective November 4, 2021:

(1) Scope matters in AD and CVD proceedings (19 C.F.R. § 351.225). The scope regulations have been significantly revised. An interested party must submit a detailed and standardized scope ruling application, which is currently not required for a scope ruling request. Commerce clarified that a scope ruling determining that a product is covered by the scope of an order is a determination that the product has always been covered by the scope of the order. Commerce will now have 30 days to

accept or reject a scope ruling application. Applications that are not rejected are deemed accepted, and a scope inquiry will be initiated. Scope inquiries must be completed within 120 days or, if extended, within 300 days. The new regulations also provide Commerce with the flexibility to address scope matters in other segments of the proceeding (including circumvention inquiries, covered merchandise inquiries, and administrative reviews) or to align scope deadlines with other segments of the proceeding. Commerce's new regulations also moved the conduct of circumvention inquiries into a different set of regulations.

(2) Circumvention of AD and CVD orders (19 C.F.R. § 351.226). Previously, Commerce's conduct of circumvention inquiries was generally governed by its scope regulations and interpretation of the statute on a case-by-case basis. Now, the agency has established new stand-alone procedures to address the potential circumvention of AD/CVD orders. In the preamble, Commerce explains that it may self-initiate a circumvention inquiry whenever warranted, including when it reviews information during a scope inquiry and determines that circumvention of the order may be occurring, even if the product is not covered by the scope of the order. The new rule also sets forth requirements for (a) an interested party to request a circumvention inquiry, (b) the initiation of a circumvention inquiry, (c) circumvention determination deadlines, and (d) the procedures for such a proceeding. These regulations establish specific deadlines for ensuring the timely completion of circumvention inquiries, requiring that Commerce determine within 30 days, or, if extended, within 45 days, whether to accept and initiate a circumvention request. Commerce must issue its final determination within 300 days, or, if extended, within 365 days.

These regulations codify much of Commerce's existing practices in reaching circumvention

determinations that were not present in the previous scope regulations. These regulations codify Commerce's ability to apply circumvention determinations on a country-wide basis to products that are similar and to products that are the same as those subject to inquiry, and to impose a certification requirement. Commerce has also overhauled its regulations to adopt a case-specific analysis of whether it is appropriate to extend the suspension of liquidation to certain entries that pre-date the initiation of the circumvention inquiry.

(3) Covered merchandise referrals received from CBP (19 C.F.R. § 351.227). There is no current regulation governing Commerce's receipt of a covered merchandise referral from CBP. Effective from November 4, 2021, within 20 days upon receipt of a covered merchandise referral from CBP, Commerce will now either (a) initiate a covered merchandise inquiry and publish a notice of initiation in the *Federal Register* or (b) publish a notice of its intent to address the covered merchandise referral in an ongoing segment of the proceeding (such as a scope inquiry or a circumvention inquiry) in the *Federal Register*. These regulations establish specific deadlines for ensuring the timely completion of covered merchandise inquiries, requiring that Commerce reach a final determination within 120 days, or, if extended, within 150 days. The covered merchandise referral inquiry uses a framework that allows Commerce to apply the same analysis and reach the same determination as it would in a self-initiated circumvention inquiry, but on an expedited basis.

(4) Certain procedures regarding service lists, entries of appearance, and importer filing requirements for access to business proprietary information in AD and CVD proceedings (19 C.F.R. §§ 351.103(d), 351.305). Commerce revised its regulations to provide that an interested party filing a scope ruling application or a circumvention

request, as well as any publicly identified parties in a covered merchandise referral from CBP, need not file an entry of appearance to be placed on the segment-specific service list for that inquiry. Commerce also revised its regulations to provide that a legal representative applying for APO access who represents an importer in a circumvention inquiry must also submit documentary evidence of importation, similar to that required in a scope inquiry. However, the revisions provide that legal representatives of importers identified in a CBP covered merchandise referral are exempt from such a requirement.

FOR MORE INFORMATION

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