

Commerce Publishes Long-Awaited Changes to AD/CVD Regulations

October 1, 2021

On September 20, 2021, the U.S. Department of Commerce (“Commerce”) published a final rule codifying numerous changes – both substantive and procedural in nature – to certain portions of the body of regulations governing antidumping and countervailing duty proceedings. [Regulations To Improve Administration and Enforcement of Antidumping and Countervailing Duty Laws](#), 86 Fed. Reg. 52,300 (Dep’t Commerce Sept. 20, 2021) (“*Final Rule*”). The rule revisions constitute the first major overhaul of the AD/CVD regulations in over 20 years and were several years in the making. That Commerce’s work on and ultimate implementation of these revisions spanned multiple presidential administrations is a testament to the apolitical nature of the effort and its importance to the good governance of U.S. trade laws.

Commerce first published a proposed rule in August 2020, inviting public comment and allowing 30 days for initial comments and 14 days for rebuttal submissions. [Regulations To Improve Administration and Enforcement of Antidumping and Countervailing Duty Laws](#), 85 Fed. Reg. 49,472 (Dep’t Commerce Aug. 13, 2020) (“*Proposed Rule*”). In response to the *Proposed Rule*, Commerce received 37 sets of comments and 17 rebuttal submissions from interested parties, including domestic producers, exporters, importers, surety companies, and foreign governments. Given the scope and significance of the *Proposed Rule* most submissions were submitted on behalf of formal trade associations or informal groups of companies, or law firms, including Kelley Drye, representing the general interests of their client base and providing input based on extensive practitioner experience.

The modifications proposed and ultimately adopted by Commerce were largely expected and codified agency practice as it has developed over many years, in a number of increasingly important areas. As Commerce explains:

Over the past 20 years of administering and enforcing the current iteration of the regulations, Commerce has discovered some inefficiencies and burdens that applied equally to our procedures for all interested parties—domestic producers, U.S. importers, and foreign exporters, alike. Over the years, we have heard complaints about those inefficiencies and burdens, but could do nothing about them without modifying our regulations. Furthermore, we have built a practice in some regards, like Commerce’s substantial transformation test, which should be codified in the regulations, but are not. In addition, we have discovered that our regulations do not adequately address some matters, such as the problem of circumvention of our orders. In short, none of these problems or concerns should be new to those who practice AD and CVD law before Commerce.

Final Rule at 52,369.

The changes made were not intended to only codify existing practice or merely correct identified inefficiencies, but, importantly, were also designed to improve the enforcement mechanisms inherent in Commerce’s procedure, to address “gamesmanship and delay” in current processes, and

to strengthen the administration of the AD/CVD laws for the intended purpose of protecting domestic industries from unfairly traded imports:

The purpose of the regulatory changes proposed in this rulemaking is to strengthen the administration and enforcement of AD/CVD laws, make such administration and enforcement more efficient, and create new enforcement tools for Commerce to address circumvention and evasion of trade remedies. If adopted, these changes would equip Commerce to better fulfill the Congressional intent behind the AD/CVD laws—namely, to protect U.S. companies, workers, farmers, and ranchers from the injurious effects of unfairly traded imports. In addition, if adopted, these changes would promote the Administration’s objective to enforce the AD/CVD laws rigorously, and to aggressively pursue parties that seek to skirt them. Moreover, the proposed regulations facilitate a stronger and more efficient administration of the AD and CVD laws in the context of Commerce’s proceedings. *Proposed Rule* at 49,472.

The *Final Rule* strongly reinforced this objective. *Final Rule* at 52,303.

As a general matter, some of the rules changes give Commerce more flexibility to deal with emerging challenges as new shippers and related review proceedings, scope, circumvention, and coordination with Customs and Border Protection (CBP). At the same time, many revisions give more detailed requirements to initiate certain proceedings and clearer time frames for Commerce to deal with new allegations and new information, which can be viewed as an attempt by the agency to shift some administrative burden to parties.

To the extent new and stricter requirements may encumber petitioners or respondents under different circumstances, greater clarity with respect to both procedure and substance engenders procedural certainty and efficiency for all parties. Moreover, rules that support administrative efficacy tend to work in the domestic industry’s favor. Indeed, when Secretary of Commerce Gina Raimondo announced the issuance of the *Final Rule*, she specifically thanked “U.S. industries and interagency partners who contributed through their review and input to this important rulemaking,” reiterating that Commerce “is committed to safeguarding American workers, farmers, and other businesses from foreign actions that undermine free and fair trade.”

There are eight key aspects of *Final Rule*:

1. Initiation Comment Period for Industry Support (19 C.F.R. § 351.203(g)). The *Final Rule* imposes specific deadlines for interested parties to comment on industry support for a petition, and to respond to such comments, within the 20-day period for Commerce to determine whether to initiate on an AD or CVD petition. *Effective October 20, 2021*.
2. New Shipper Reviews (19 C.F.R. § 351.214). The *Final Rule* codifies Commerce’s long-standing practice of evaluating whether the sale(s) at issue in a new shipper review is a *bona fide* sale. The rule revisions also set forth information and certification requirements for Commerce to conduct a new shipper review, establish that new shippers must post cash deposits of duties, instead of bonds, during the new shipper review, and make other procedural changes and clarifications. *Effective October 20, 2021*.
3. Scope (19 C.F.R. § 351.225). Through the *Final Rule*, Commerce has made a number of substantive and procedural modifications to the regulations governing scope inquiries. These changes include: establishing a standardized scope inquiry application form with detailed informational requirements necessary for initiation of a scope inquiry; eliminating the prior distinction between “informal” and “formal” scope inquiries; revising procedural elements such as service requirements and deadlines; and clarifying the hierarchy of sources and Commerce’s

step-wise analysis Commerce utilizes in interpreting scope. The *Final Rule* also amends suspension of liquidation procedure, such that at the first scope ruling – preliminary or final – Commerce normally will direct CBP to begin the suspension of liquidation of *any* unliquidated entries not yet suspended and collect applicable cash deposits, including those entries pre-dating initiation of the scope inquiry. *Effective November 4, 2021.*

4. Circumvention (19 C.F.R. § 351.226). The *Final Rule* creates new regulations governing circumvention inquiries. Previously, Commerce relied on the scope inquiry provisions in analyzing and determining whether certain merchandise, although not covered by scope, could be found to be circumventing an existing trade order. The new circumvention inquiry provisions largely mirror the amendments made to the scope inquiry rules, with some exceptions, including different requirements for initiation and deadlines. A notable distinction between the scope and circumvention provisions is that upon a preliminary or final circumvention determination, Commerce will direct suspension of liquidation only for entries on or after the date of initiation of the circumvention inquiry. Commerce will adopt a case-by-case approach in determining whether “retroactive suspension” is appropriate. *Effective November 4, 2021.*
5. Covered Merchandise Referrals (19 C.F.R. § 351.227). If, during the course of CBP’s investigation of potential AD/CVD order evasion, pursuant to the Enforce and Protect Act of 2015, CBP is unable to determine whether the merchandise at issue is “covered merchandise” within the meaning of the statute, CBP shall refer the matter to Commerce to make a covered merchandise determination (covered merchandise referral). The *Final Rule* establishes entirely new provisions, non-existing in the current regulatory framework, to address the formal process for CBP to refer a scope coverage determination to Commerce. The new rules establish expedited deadlines for completion of the covered merchandise inquiry and allows Commerce to rely on the scope or circumvention analysis standards in making a determination. *Effective November 4, 2021.*
6. Certifications (19 C.F.R. § 351.228). The *Final Rule* codifies and enhances Commerce’s existing authority and practice to require certifications by importers, exporters, and other interested parties as to whether merchandise is subject to an AD/CVD order in the context of a circumvention inquiry and in other circumstances. *Effective October 20, 2021.*
7. Importer Reimbursement Certification (19 C.F.R. § 351.402(f)(2)). Under the current regulation, importers must certify whether they have or have not entered into an agreement for the payment or reimbursement of antidumping and countervailing duties by the exporter or producer. The *Final Rule* revises the regulation with respect to the format and procedure for filing such a certification. *Effective October 20, 2021.*
8. Other Procedural Amendments 19 C.F.R. § 351.103(d) Introductory Text and (d)(1). In conjunction with other revisions imposed by the *Final Rule*, Commerce amends two of its procedural regulations related to entries of appearance and the information required for importers to be granted access to business proprietary information under administrative protective order in circumvention inquiries. *Effective November 4, 2021.*