



Press Release

COMMERCE STRENGTHENS RULES TO FIGHT UNFAIR TRADE PRACTICES

For Immediate Release

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Contact: Office of Public Affairs

Phone: 202-482-3809

WASHINGTON - Today, the U.S. Department of Commerce announced modifications to its antidumping duty (AD) and countervailing duty (CVD) regulations, which will improve enforcement activities designed to defend U.S. companies from unfair and illegal trade practices.

“The Commerce Department is committed to safeguarding American workers, farmers, and other businesses from foreign actions that undermine free and fair trade,” said U.S. Secretary of Commerce Gina M. Raimondo. “These regulations represent the most comprehensive updates to trade enforcement in more than two decades. I thank U.S. industries and interagency partners who contributed through their review and input to this important rulemaking.”

The new regulations apply to various aspects of AD/CVD proceedings, including:

- Standalone rules governing circumvention inquiries and determinations;
- Rules for Commerce to assist U.S. Customs and Border Protection in combating duty evasion;
- Rules to prevent abuse of new shipper reviews;
- Rules updating the procedures and standards for scope inquiries and rulings; and
- Revised timeline for submitting comments pertaining to industry support.

These final regulations take into consideration comments from the public on the draft regulations, which were published on August 13, 2020. Certain parts of the rule will be effective within 30 days of the September 20, 2021 publication date (October 20, 2021) while other parts will be effective within 45 days (November 4, 2021), as detailed in the rule. For more information on the new regulations, please refer to the [Federal Register notice](#) and the [updated AD/CVD FAQ section](#) on trade.gov.

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On September 20, 2021, the U.S. Department of Commerce (Commerce) announced modifications to its antidumping duty (AD) and countervailing duty (CVD) regulations, which will improve enforcement activities designed to defend U.S. companies from unfair and illegal trade practices. A summary of the modified regulations is below and the full text can be found in the [September 2021 Federal Register notice](#) and in the [August 2020 Federal Register Notice](#).

Initiation Comment Period for Industry Support

Context:

The antidumping and countervailing duty provisions of the trade laws provide Commerce with 20 calendar days in which to determine whether the elements necessary for initiation of antidumping or countervailing duty investigations have been satisfied, including a determination of industry support for the petition. Commerce may extend the time for an additional 20 calendar days, for a maximum of 40 calendar days, solely to determine industry support for a petition.

Past Practice:

Comments on industry support for a petition could be filed up to and including the scheduled date of the determination of whether to initiate the requested investigations.

Change:

Comments on industry support for a petition may now be filed no later than 5 business days before the scheduled date of the decision on initiation; and

rebuttal comments or information to rebut, clarify, or correct such information on industry support may now be filed no later than 2 calendar days from the scheduled date for filing the original comments.

These changes apply to proceedings in which petitions for investigations are filed on or after October 20, 2021.

Who Does This Affect:

The revised commenting period affects potential interested parties and members of the domestic industry.

‘New Shipper’ Reviews

Context:

The statute provides a procedure by which “new shippers” can obtain their own individual dumping margin or countervailable subsidy rate on an expedited basis. A new shipper is an exporter or producer that did not export to the United States, and is not affiliated with an exporter or producer that did export to the United States, during the period of investigation.

Past Practice:

Commerce’s regulations allowed new shippers to obtain a new shipper review without submitting information pertaining to whether the sales at issue constitute bona fide sales. In addition, the requester was not required to submit any certification with respect to its unaffiliated purchaser’s information and participation.

Change:

Commerce is making conforming amendments to the new shipper regulation to require cash deposit of duties, instead of allowing the issuance of bonds,

during the new shipper review, consistent with a change to the statute. The regulation also clarifies the circumstances under which it will grant a new shipper review and establishes that additional information and certifications will be required to obtain a new shipper review. In addition, Commerce is establishing factors to consider in determining whether the sales at issue constitute bona fide sales for purposes of the antidumping and countervailing duty laws. Lastly, the regulation establishes that Commerce may rescind the new shipper review if 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.

These changes apply to new shipper reviews in which the request for review is filed on or after October 20, 2021.

Who Does This Affect:

Foreign producers or exporters interested in requesting a new shipper review of an established antidumping or countervailing duty order.

Scope

Context:

When Commerce publishes antidumping and countervailing duty orders it provides a general description of the merchandise covered by the order (i.e., the “scope” of the order). Questions sometimes arise as to whether a particular product is covered by the scope of the order.

Past Practice:

Commerce’s current regulations allow for parties to seek scope rulings from Commerce by submitting a scope ruling request. Commerce issues its scope rulings based on the information contained in the scope ruling request (i.e.,

an “informal scope inquiry”), or, if further inquiry is warranted, it initiates a formal scope inquiry and then issues a scope ruling. Commerce may also self-initiate a formal scope inquiry. Since the scope regulations were issued in 1997, Commerce has established methodologies to determine a product’s country of origin, crafted remedies on a case-by-case basis to clarify whether a product is covered by the scope of an order, and frequently had to issue multiple supplemental questionnaires to get the information necessary to make a scope ruling determination. Commerce’s regulations also establish various procedures and standards for conducting a scope inquiry and issuing a scope ruling, as well as ordering the suspension of liquidation of entries of products subject to a scope inquiry. Lastly, although circumvention inquiries are considered an entirely different area of trade law, Commerce’s conduct of circumvention inquiries fell under the scope regulations.

Change:

Commerce adopted numerous procedural and substantive changes to its new scope regulations. The procedural changes include:

- Eliminating “informal inquiry” proceedings;
- Adopting a standardized scope ruling application (which explicitly lists the types of information needed, thereby reducing the need for multiple supplemental questionnaires);
- Streamlining initiation, notice, service, and other procedures; and adopting new regulatory deadlines. Of note, parties filing a scope application must now serve a copy of it on the newly established Annual Inquiry Service List for the relevant order or suspended investigation. Commerce will allow interested parties to submit an entry of appearance to be added to the Annual Inquiry Service List for those cases where they qualify as an interested party, and then update the lists on an annual basis.

In addition, 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 separate the conduct of circumvention inquiries into a different set of regulations. Further, Commerce has amended and restructured its regulations governing the substantive standards and analysis Commerce employs in issuing a scope ruling, including:

- Codifying its country of origin/substantial transformation analysis to determine the origin of a product that is the subject of a scope inquiry;
- Formally adopting its "mixed-media" analysis dealing with mixed component products;
- Codifying its practice of issuing either company-specific or country-wide scope rulings;
- Strengthening its suspension of liquidation regulations to deter abuse of scope procedures by ensuring that antidumping and countervailing duties apply to products determined to be within the scope of the orders, regardless of when a scope ruling is requested, as appropriate.

These changes apply to scope inquiries for which a scope ruling application is filed, as well as any scope inquiry self-initiated by Commerce, on or after November 4, 2021.

Who Does This Affect:

Interested parties, such as foreign and domestic producers, importers, and exporters, interested in seeking a scope ruling or participating in a scope inquiry to determine whether a particular product is covered by the scope of an antidumping or countervailing duty order.

Circumvention

Context:

The antidumping and countervailing duty statute identifies four types of merchandise originating from a country with an existing antidumping and countervailing duty order that, in certain instances, may be found circumventing the order(s): (1) merchandise that is completed or assembled in the United States after importation; (2) merchandise completed or assembled in a third country before exportation to the United States; (3) merchandise that has undergone minor alterations; and (4) merchandise that was later-developed after the order was established. If Commerce reaches an affirmative final determination, such merchandise will be covered by the scope of the order(s).

Past Practice:

Commerce's conduct of circumvention inquiries was generally governed by Commerce's scope regulations and its interpretation of the statute on a case-by-case basis.

Change:

Commerce has now established new standalone regulations governing the conduct of circumvention inquiries and the issuance of circumvention determinations. These regulations incorporate much of the practice that Commerce has implemented over decades of administering and applying the circumvention law. Of note, these regulations provide that Commerce may conduct a circumvention inquiry at the request of an interested party or self-initiate a circumvention inquiry. These regulations also detail the required content of a circumvention request, and clarify notice, service, and other procedures. For instance, parties filing a circumvention request must also serve a copy of it on the newly established Annual Inquiry Service List for the relevant order, as described above in the "Scope" section. In addition, 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. The regulations also allow for Commerce to address a scope matter or covered merchandise referral within

a circumvention inquiry, defer a circumvention inquiry to first consider a scope matter, or align its deadlines with other segments of the proceeding.

On substance, these regulations codify much of Commerce's existing practice in reaching circumvention determinations that was simply not present in the previous scope regulations. For example, the regulations codify the legislative history criteria used in minor alterations inquiries and Commerce's long-standing "commercial availability" test applied in later-developed merchandise inquiries. In addition, the regulations codify Commerce's ability to apply circumvention determinations on a country-wide basis to both products which are similar and to products which 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.

These changes apply to circumvention inquiries for which a circumvention request is filed, as well as any circumvention inquiry self-initiated by Commerce, on or after November 4, 2021.

Who Does This Affect:

Interested parties such as importers, exporters, and domestic producers, interested in seeking a circumvention determination or participating in an inquiry to determine whether a particular product is circumventing the scope of an antidumping or countervailing duty order.

Covered Merchandise Referrals

Context:

In 2016, the Trade Facilitation and Trade Enforcement Act of 2015 (TFTEA) (Pub. L. No. 114-125, 130 Stat. 122) was signed into law, which contains title IV – Prevention of Evasion of Antidumping and Countervailing Duty Orders

(short title “Enforce and Protect Act of 2015” or “EAPA”). Section 421 of the EAPA (codified as section 517 of the Act) establishes a formal process for CBP to conduct investigations of potential duty evasion of antidumping and countervailing duty orders. Pursuant to section 517 of the Act, CBP may make a referral to Commerce to determine whether the product at issue is covered by the scope of the order(s) (i.e., a covered merchandise referral/inquiry).

Past Practice:

There is no current regulation governing Commerce’s receipt of a covered merchandise referral from CBP; Commerce’s practice has developed on a case-by-case basis.

Change:

Commerce has established new regulations governing its receipt of covered merchandise referrals from CBP and providing a new type of inquiry – a covered merchandise inquiry. Of note, these regulations provide that, after receiving a sufficient covered merchandise referral from CBP, Commerce has 20 days to determine whether to initiate a covered merchandise inquiry or to address the referral in an ongoing segment of the proceeding. In addition, 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. Commerce may also align its deadlines with other segments of the proceeding. These regulations also adopt specific notice, service, and other procedures.

On substance, these regulations allow for Commerce to use the standards and analysis from its scope and circumvention regulations in determining whether a product is covered by the scope of the order. In other words, these regulations allow Commerce to conduct a scope or circumvention analysis within the expedited timelines of a covered merchandise inquiry to ensure a determination is promptly transmitted to CBP consistent with the statute. These regulations also allow Commerce flexibility to ensure that entries

subject to an EAPA investigation remain properly subject to suspension of liquidation during the conduct of Commerce's covered merchandise inquiry.

These changes apply to covered merchandise inquiries for which a sufficient covered merchandise referral is received on or after November 4, 2021.

Who Does This Affect:

Parties to a CBP EAPA investigation, as well as any interested party seeking to participate in a covered merchandise inquiry.

Certifications

Context:

In various situations, including circumvention inquiries, Commerce may require certifications by importers, exporters, and other interested parties as to whether merchandise is subject to an AD/CVD order.

Past Practice:

There is no current regulation governing Commerce's certification practice.

Change:

Commerce has established new regulations codifying and enhancing 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. The regulations set forth procedures for complying with certification requirements and consequences for a party's failure to satisfy certification requirements.

These changes are applicable on or after October 20, 2021.

Who Does This Affect:

Interested parties such as foreign and domestic producers, importers, and exporters.

Importer Reimbursement Certification

Context:

Under 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.

Past Practice:

Commerce's existing regulation sets forth requirements for the importer reimbursement certification.

Change:

Commerce revised the regulation to no longer require a specific format for the certification and to allow for either electronic or paper filing in accordance with CBP's procedures. The revisions also clarify that certifications are required prior to liquidation but allow for CBP to accept certifications in accordance with its protest procedures.

These changes are applicable on or after October 20, 2021.

Who Does This Affect:

Importers of goods subject to antidumping and countervailing duty orders.

Other Procedural Amendments

Context:

To implement the substantive changes to the scope, circumvention, and covered merchandise referral regulations, Commerce has adopted amendments to two of its procedural regulations.

Past Practice:

Commerce's existing regulations set forth requirements for entries of appearance and procedures for access to business proprietary information under an administrative protective order (APO). The regulations include a requirement that a legal representative of an importer applying for APO access in a scope segment provide documentary evidence of importation or that the importer has taken steps to import the merchandise subject to the inquiry.

Change:

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.

Who Does This Affect:

Interested parties filing a scope ruling application or a circumvention request, parties to a CBP EAPA investigation, and importers.



Former Commerce official: New AD/CVD rules fix loopholes, inefficiencies

September 21, 2021 at 10:13 AM

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The Commerce Department on Monday published the first overhaul of antidumping and countervailing duty regulations in more than 20 years, aiming to close loopholes and address inefficiencies following a years-long effort that was essentially completed by the end of the Trump administration, according to a former Commerce official who led the push to craft the new regulations.

The [282-page rule](#) is fundamentally unchanged from a version signed in January by Jeffrey Kessler before he left his post as assistant secretary of Commerce for enforcement and compliance. Kessler, a partner at WilmerHale, shepherded the regulatory update -- which he called one of his top priorities while in office -- almost to publication. He told *Inside U.S. Trade* on Friday the update will help address problems in trade enforcement practice the department has seen arise over the past two decades and "imposes structure" on "increasingly important areas of Commerce's practice."

After Kessler approved the final rule, it was put on hold because of an "across-the-board" regulatory freeze and review imposed by the Biden administration, he said. The rule was sent to the Federal Register before Kessler left office, but he didn't know if it ultimately would "see the light of day" and was "totally surprised" last week when he saw the rule was scheduled to be published.

Commerce Secretary Gina Raimondo called the rulemaking "the most comprehensive updates to trade enforcement in more than two decades."

"The Commerce Department is committed to safeguarding American workers, farmers, and other businesses from foreign actions that undermine free and fair trade," she said in a Monday statement. "I thank U.S. industries and interagency partners who contributed through their review and input to this important rulemaking."

Kessler highlighted updates to circumvention and scope cases, which he said have become a "much bigger part" of Commerce's workload since the 1990s. The new regulations are designed to impose "structure and clarity around the process" for those cases, he said.

A new "standalone circumvention rule," for example, explicitly empowers Commerce to self-initiate circumvention inquiries, offering a stronger legal basis for the department to do so, he said. In addition, he said, time limits on circumvention inquiries introduced in the new rules should help limit the number of cases that "drag on indefinitely."

The rules also were crafted to address problems such as "gamesmanship and delay" relating to the scope of AD/CVD orders, he said.

For example, the regulations previously were set up so that duties would not attach to "unsuspended entries" before the date of a scope inquiry's initiation, Kessler said. Importers, he contended, could game this system by delaying requests for scope rulings from Commerce.

To close this loophole, the new regulations provide for "retroactive suspension" of entries that pre-date the scope inquiry initiation, according to the Federal Register notice.

Another significant change, Kessler said, are updated rules for "new shipper reviews." Commerce conducts reviews of companies that begin shipping covered goods to the U.S. after the completion of AD/CVD investigations. According to Kessler, companies could manipulate this process by engineering costly initial sales to obtain improperly low dumping margins.

This could create a potential “whack-a-mole dynamic,” he said, “where new, anonymous or fly-by-night companies sprout up in foreign countries” to obtain new shipper status.

To address this concern, the new regulations stipulate that individual AD/CVD rates for new shippers “must be based on *bona fide* sales” in the U.S. and codify “the factors that Commerce has historically used to determine whether a sale is *bona fide*,” according to the Federal Register notice.

The rules require “that a new shipper establish the circumstances surrounding the sales, including the price, any expenses arising from such sales, whether the subject merchandise was resold at a profit, and whether such sales were made on an arms-length basis,” according to the Federal Register. They also require documentation about a producer’s business activities, including “offers to sell merchandise in the United States, identification of the complete circumstances surrounding sales to the United States, any home market, or third country sales, identification of the producer or exporter’s relationship to the first unrelated United States purchaser, and with respect to non-producing exporters, an explanation of the non-producing exporter’s relationship with its supplier,” the notice states.

Another important change, according to Kessler, is that the rules impose deadlines for parties to challenge AD/CVD petitions for lacking industry support, so that Commerce has time to review those challenges before issuing decisions. Under the older regulations, parties could comment “up until the day of Commerce’s decision,” the notice states.

That system created a “scramble” for Commerce officials handling the pre-petition process, especially when, as in 2020, the department faced a dozen or more petitions at the same time, Kessler said.

The update also includes rules for handling covered merchandise inquiries referred by U.S. Customs and Border Protection under the Enforce and Protect Act of 2015. EAPA, which was implemented in 2016, established a process for CBP to investigate industry allegations that importers are evading AD/CV duties.

While the slew of changes represents a comprehensive overhaul, Kessler allowed that legislative reform of AD/CVD rules to better counter evasion might still be warranted.

Ohio Sens. Rob Portman (R) and Sherrod Brown (D) earlier this year introduced a proposal that, among other things, would establish a process for the U.S. International Trade Commission and Commerce to handle “[successive and concurrent investigations](#)” so that domestic industry can more easily seek relief when producers try to evade enforcement actions by shifting production to other countries, according to a statement from the senators.

“I don’t think that this set of regulations eliminates the need for that provision,” Kessler said.

The new rules will help Commerce operate more efficiently, he concluded. That the update was published in “essentially the same form” as Kessler had left it in January, he said, shows “both that the staff supports it and that ... this is not a partisan issue.”

“This is really something that is needed for the efficient ... and sound administration of the trade remedy laws,” he said. -- *Margaret Spiegelman* (m Spiegelman@iwnews.com)

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