

Biden Administration Announces Duty-Free Tariff Treatment for Solar Products from Southeast Asia and Issues DPA Determinations

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On June 6, 2022, the White House declared a national emergency and took the unprecedented step of providing duty-free treatment of solar cells and modules from Southeast Asia for two years, delaying potential tariffs on certain Chinese-origin products shipped to the United States through third countries in order to, as alleged, circumvent existing trade remedy duties. At the same time, President Biden issued five separate determinations under Section 303 of the Defense Production Act of 1950, *as amended*, (DPA) offering potential financial awards to encourage domestic investments in the renewable energy sector.

Solar Cells and Modules from Southeast Asia

Proclamation 10414 provides the Secretary of Commerce with the authority to extend duty-free tariff treatment to solar cells and modules from certain Southeast Asian countries until June 6, 2024. Pursuant to 19 U.S.C. § 1318(a), the President may declare an emergency and authorize the Secretary of the Treasury to allow “the importation free of duty of food, clothing, and medical, surgical, and other supplies for use in emergency relief work.” Relying on this authority, the Biden Administration declared that the “availability of sufficient electricity generation capacity to meet expected customer demand” constituted an emergency. The Biden Administration cited the inability to import sufficient quantities of solar components from Cambodia, Malaysia, Thailand, and Vietnam as a contributor to this shortfall.

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Notably, this emergency authorization to provide an exemption from duties comes shortly after the Department of Commerce initiated a circumvention investigation into solar cells and modules from these same four countries. According to the circumvention petition, Chinese solar producers engaged in limited assembly operations in Southeast Asian countries to avoid paying antidumping (AD) and countervailing duties (CVD) on solar cells and modules produced in China. While the circumvention investigation will continue despite the Presidential emergency declaration, the duty-free treatment will delay the imposition of any AD/CVD duties assessed on solar cell and modules imported from Cambodia, Malaysia, Thailand, and Vietnam. While previous presidents have used emergency authority to remove regular customs duties on goods, this is believed to be the first time presidential authority has been used to remove potential AD/CVD duties.

It is well-documented that many of these solar products have come under increased scrutiny by the U.S. government for having been produced in China using forced labor. Section 307 of the Trade Act, as amended, and the Uyghur Forced Labor Prevention Act prohibit the U.S. importation of products manufactured, in whole or in part, from forced labor.

DPA Determinations

Concurrently, President Biden issued several declarations under Section 303(a) of the DPA aimed to augment domestic production of the following five critical technology items:

1. Solar panel parts like photovoltaic modules and module components;
2. Building insulation;
3. Heat pumps, which heat and cool buildings super efficiently;
4. Equipment for making and using clean electricity-generated fuels, including electrolyzers, fuel cells, and related platinum group metals; and
5. Critical power grid infrastructure like transformers.

The DPA Title III awards, as these are commonly called, allow the President to provide the necessary financial incentives to develop, expand, or modernize the production of materials critical to national security. Where an “action is necessary to avert an industrial resource or critical technology item shortfall that would severely impair national defense capabilities,” the President may waive more stringent statutory requirements.

These determinations authorize the Department of Energy to provide financial awards to companies involved in the production of the five referenced product categories. These awards, however, are based on appropriations by Congress that have not yet occurred, and the timing is uncertain. Additionally, the process of obtaining awards is, at times, lengthy, so it is unclear whether the timeline for the Biden Administration to obtain the funding authorizations from Congress, solicit award applications and select recipients, and oversee the completion of production facilities by the award recipients will extend longer than the two-year national emergency window of the Executive Order.

Wiley continues to monitor these and all supply chain and solar industry developments and will provide updates as they develop. Wiley's comprehensive Supply Chain and Transactional Support practices complement its robust International Trade and National Security practices with significant expertise in trade remedy proceedings, government funding processes, and many other industry competitiveness strategies. Please contact the attorneys listed on this alert if you have any questions about these or related areas.