

ALERT

Commerce Department Issues Important New Proposed Regulations to Strengthen Trade Law Enforcement

May 10, 2023

On May 9, 2023, the U.S. Department of Commerce (Commerce) issued new proposed regulations aimed at improving and strengthening the enforcement of trade remedy laws. Several of the proposed regulations represent significant policy changes and important improvements to current antidumping (AD) and countervailing duty (CVD) laws.

Interested parties have until July 10, 2023, to provide comments on the new proposed regulations. Given the scope of the changes, it is likely many companies and industries will want to provide comments.

Among the most significant aspects of the new proposed rules are the following:

- **Transnational subsidies.** Commerce is proposing to eliminate its longtime transnational subsidies regulation, which held that a subsidy did not exist if the program or project was funded by a government outside of the country where the recipient was located. This would potentially allow Commerce for the first time to countervail programs such as China's Belt and Road Initiative, which provides massive subsidies outside of China for infrastructure, transportation, mining of raw materials and critical minerals, and relocation of manufacturing industries abroad. In its explanation of the change, Commerce concedes that its previous interpretation of the law "was overly restrictive," and that governments providing subsidies that benefit foreign production are "far more prevalent" today.

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- **Foreign government inaction that benefits foreign producers.** Commerce's proposed regulations also attempt to address for the first time a problem that companies and industries have complained about for decades, which is weak, ineffective, or non-enforced laws governing human rights, labor rights, environmental protections, and intellectual property. In vivid language, Commerce noted that "foreign government environmental laws, policies, and standards might be weak, ineffective, or nonexistent, allowing producers to dump toxic water into the local water supply, or spew corrosive smog into nearby neighborhoods, which may enable producers to produce merchandise at costs lower than would be possible if the environmental laws were in place and effectively enforced."

Commerce proposes changes to both its countervailing duty and antidumping regulations to address such distortions. For example, for its subsidies analysis, Commerce could reject benchmark prices from certain countries where the parties can demonstrate that there is a likely impact on prices of an input as a result of weak, ineffective or nonexistent laws. And for antidumping purposes, Commerce would be able to reject surrogate values used in non-market economy investigations for the same reasons.

- **Particular market situation.** Commerce is also proposing a new regulation to govern situations where it finds that a "particular market situation" distorts prices or costs in a specific country. Commerce has found such distortions in a number of recent antidumping determinations, but the reviewing courts have sharply limited Commerce's ability to find particular market situations. Commerce discussed the Federal Circuit's 2022 holding in the NEXTEEL case, and then proposed changes to address the court's holding. Among other things, the proposed Commerce regulation:
 1. explains the information needed to allege a particular market situation,
 2. gives examples of particular market situations that prevent a proper price comparison in home or third country markets,
 3. gives examples of particular market situations that may not accurately reflect the cost of production in a country, and
 4. lists information that Commerce may consider in determining the existence of a "market situation," or if it is "particular."
- **Scope and circumvention procedures.** Commerce also proposes additional rules governing scope and circumvention proceedings, which have become increasingly important in recent years (for example, in several large circumvention proceedings affecting products such as steel, solar products, cabinets, and hardwood plywood). The proposed rule provides guidance for allowing pre-initiation submissions in response to scope and circumvention requests. In addition, the rule allows Commerce to extend the time for initiation and preliminary determinations in scope and circumvention proceedings.

In all, the proposed rule from Commerce covers 22 different topics related to AD/CVD rules and procedures.

The proposed rule provides an important opportunity for companies and industries to comment and offer insights on these new AD/CVD proposals. Wiley's International Trade practice is ready to assist companies and industries with this process.