

ALERT

Commerce Department Publishes Final Rule Amending Regulations on Various AD/CVD Procedures

September 20, 2021

On Monday, September 20, 2021, the Department of Commerce (Commerce) published its Final Rule modifying regulations affecting certain antidumping (AD) and countervailing duty (CVD) proceedings. Commerce proposed these modifications “to strengthen and improve the administration and enforcement of the AD/CVD laws,” which are “intended to provide relief to domestic industries . . . from the injurious effects of unfairly traded imports.” The Final Rule makes certain changes to Commerce’s August 13, 2020 Proposed Rule.

Commerce has modified the proposed rule to incorporate the views of domestic industry, foreign governments, foreign producers/exporters, and other interested parties to arrive at a Final Rule with significant implications for parties participating in AD/CVD investigations, reviews, and other related proceedings. Some parts of the Final Rule will go into effect October 20, 2021 while others are effective November 4, 2021.

The most impactful modifications in Commerce’s Final Rule include:

Scope Rulings: Commerce made several changes to its scope inquiry procedures. Perhaps most importantly, Commerce is standardizing the application for a scope ruling request and eliminating the distinction between its formal scope inquiries and informal scope rulings. Under the new regulations, if Commerce does not act on a scope ruling request within 31 days, the application will be automatically initiated. In a change to existing practice, Commerce is also establishing hard deadlines for scope rulings. Under the Final Rule, Commerce must issue a final scope ruling within 120 days of initiation. However,

Authors

Alan H. Price
Partner
202.719.3375
aprice@wiley.law
Timothy C. Brightbill
Partner
202.719.3138
tbrightbill@wiley.law
Stephanie M. Bell
Partner
202.719.4384
sbell@wiley.law
John Allen Riggins
Associate
202.719.4493
jriggins@wiley.law

Practice Areas

Antidumping and Countervailing Duties/
Trade Remedy Cases
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Commerce may extend the deadline up to 180 days for a total of up to 300 days following initiation based on a showing of good cause.

Regarding the suspension of liquidation of imports subject to a scope ruling, the Final Rule made changes to both current practice and the proposed regulations. In a change from Commerce's initial proposal and consistent with existing practice, at the time of a preliminary or final affirmative scope ruling determination, Commerce will direct Customs and Border Protection (CBP) to suspend liquidation and collect cash deposits for any unliquidated entries that entered on or after Commerce initiated the scope inquiry. However, in a change from the existing regulations, Commerce will also normally now suspend liquidation on unliquidated entries imported prior to initiation back to the first date of suspension under the order unless it determines, either as an exercise of its discretion or upon the request of an interested party, that an alternative date is appropriate.

Additionally, Commerce is codifying agency practice with respect to the country of origin, scope language interpretation, and "mixed media" products (*i.e.*, products incorporating subject merchandise), making minor changes from its proposed regulations.

Circumvention: The Final Rule moves circumvention inquiries into a new regulatory section to better distinguish them from scope inquiries. Commerce also clarifies its discretion to self-initiate circumvention inquiries and apply any circumvention determination to all producers in a country based on the possibility of subsequent circumvention attempts. The Final Rule requires Commerce to decide whether to initiate a circumvention inquiry within 30 days, which can be extended to a maximum of 45 days. The Final Rule also establishes a deadline for preliminary determinations of 150 days after initiation and for final determinations of 300 days after initiation (although this can be extended an additional 65 days). In addition, Commerce made changes to its practices with respect to which imports are subject to circumvention rulings that largely mirror those made in the scope section discussed above. Specifically, CBP will suspend liquidation and collect cash deposits for any unliquidated entries that entered on or after Commerce initiated the scope inquiry; however, Commerce now has the discretion to unilaterally or at the request of an interested party direct suspension of liquidation of all unliquidated entries back to the first date of suspension under the underlying order.

New Shipper Reviews: Commerce's Final Rule implements several changes to new shipper review proceedings that clarify what information is required for requestors to receive a separate dumping margin. The most substantial change to Commerce's new shipper review is the inclusion of enumerated factors to determine *bona fide* sales. Companies that did not export during an investigation or are not related to any company that exported during an investigation may later apply for an individually calculated dumping margin in a new shipper review. However, the requesting company must demonstrate that any sale was *bona fide*, and not manufactured to obtain the lower rate. Commerce has traditionally looked to a variety of factors to determine whether a sale is *bona fide*, which it now partially incorporates into the Final Rule. In the Proposed Rule, Commerce enumerated six factors to determine whether a sale is *bona fide* including (1) whether the requestor was established for purpose of the sale after the AD/CVD orders were implemented, (2) whether the requestor has business lines unrelated to subject merchandise, (3) whether a company has an established history of duty evasion, (4) whether there is a history of duty evasion or circumvention in the same or similar

industry, (5) the quantity of the sale, and (6) any other factor deemed relevant to determine whether the sale was commercially viable. In the Final Rule, Commerce decided to retain an analysis of a requestor's other business lines, while striking factors relating to a company's history of evasion and an industry's history of evasion. Commerce contemplates that these factors may still be probative in some cases but would instead only consider them under the broad "all other factors" subsection, if necessary.

Commerce also made other minor changes affecting the new shipper review process and information requestors must provide. First, a request must provide documentation surrounding the circumstances of surrounding relevant sales, including (1) the price of the sales, (2) expenses arising from the sales, (3) whether subject merchandise involved in the sales was resold in the United States at a profit, and (4) whether sales were made on an arms-length basis. When requesting a review, the party must also provide additional documentation on offers to sell the merchandise, identification of the circumstances surrounding the sale, an explanation of a non-producing exporter's relationship to the producer/supplier, and a discussion of the relationship between the producer/exporter and its first unaffiliated U.S. purchaser. Second, Commerce clarifies that parties requesting a new shipper review must provide information on the volume of shipments, whether shipments were made in commercial quantities, and the date of sales to an unaffiliated customer. Finally, the Final Rule requires that requestors provide a certification that they will provide necessary information related to an unaffiliated customer, and either a certification from an unaffiliated customer of its willingness to participate in the review or an explanation from the producer/exporter of why such a certification cannot be provided.

Importer Certifications: The Final Rule codifies Commerce's increasing practice of requiring importers and other interested parties to certify whether the merchandise is subject to an AD/CVD order. Commerce added 19 C.F.R. § 351.228 to establish "procedures for complying with certification requirements that Commerce may impose on interested parties" and "consequences for a party's failure to satisfy certification requirements." Importer certifications are especially important, and increasingly used, to ensure parties are complying with circumvention determinations. The Final Rule gives Commerce the flexibility to require importers to require that a party maintain a completed certification and provide the certification at the time merchandise is entered. The new regulation also gives Commerce flexibility to adapt the precise terms of the certification on a case-by-case basis, rather than issuing blanket language for all certifications.

Industry Support Deadline: Commerce's Final Rule sets a firm deadline for comments on whether the domestic industry has the requisite percentage of industry support to bring an AD/CVD case. When a domestic industry files an AD and/or CVD petition, Commerce must determine whether to initiate the investigation within 20 days (or 40 days under certain circumstances). Previously, parties were able to file last-minute challenges to industry support, which could jeopardize the accuracy of Commerce's initiation decision. The Final Rule implements 19 C.F.R. § 351.203(g), requiring all parties to submit comments on industry support "no later than five business days" before initiation and rebuttal comments "no later than two calendar days thereafter." Commerce explained that this "procedural improvement is necessary" to ensure the agency has "sufficient time to make an informed initiation decision."

If you have any questions about these, or any other topics related to AD/CVD proceedings, please contact one of the attorneys listed on this alert.

Nicole Hager, a Law Clerk at Wiley Rein LLP, contributed to this alert.