LEGAL UPDATES

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Commerce New Regulations Governing AD/CVD Proceedings

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Husch highlights

Commerce's new regulations impact the conduct of new shipper reviews, scope ruling requests, anticircumvention proceedings and increases the burden on importers with respect to certifications to be provided.

The biggest concern for exporters and importers is the increased enforcement tools that have been incorporated into the regulations and how that will impact the level of detail required as documentary support if a client is part of any of these proceedings.

Without proper strategic planning it increases the risks of doing business with a company that is subject to or could be potentially subject to antidumping or countervailing duties, particularly from China.

On September 20, 2021, the Department of Commerce published a new set of antidumping (AD) and countervailing duty (CVD) regulations governing a multitude of administrative proceedings including: changes to new shipper reviews, scope ruling requests, anticircumvention inquiries, covered merchandise referrals from Customs under the Enforce and Protect Act (EAPA), and modifications to certification requirements. These changes to Commerce's regulations are the most comprehensive overhaul since 1997, when Commerce issued regulations instituting statutory and procedural changes that arose from the World Trade Organization agreements and accompanying revisions to the statute in 1994.

The modifications to the regulations will have the most substantive impact on importers as they relate to new shipper reviews, scope rulings, anticircumvention proceedings, covered merchandise referrals and

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certifications. This summary highlights and explains these impacts and how importers can navigate the changes.

New shipper reviews: 19 C.F.R. § 351.214

Commerce's modifications to the new shipper review proceedings go into effect on **October 20, 2021**, for all new shipper reviews starting after this date. The final rule at 19 C.F.R. §351.214(b)(2)(v)(D) and (E) sets forth specific requirements for the documentation to be provided by an exporter or producer requesting a new shipper review. These include a description of the circumstances of the sale such as:

price

any expenses arising from the sales

whether the subject merchandise was resold at a profit

whether such sales were made at an arm's length basis, and

additional documentation regarding the producer or exporter's business activities such as:
the producer's or exporter's offer to sell the merchandise to the United States;
the identification of the complete circumstances surrounding sales to the United States, any home market or third-country sales;
the identification of the producer or exporter's relationship to the first unrelated U.S. producer; and
for nonproducing exporters, an explanation of the nonproducing exporter's relationship with the supplier.

While the above may seem to be "new" requirements, in effect they are not and merely codify in the regulations Commerce's long-standing practice in new shipper reviews where it has examined whether the transactions constitute bona fide sales under the AD and CVD laws.

Finally, the regulations also establish that Commerce may rescind the new shipper review if any of the above information pertaining to the bona fide sale factors is not placed on the record of the review, or if the exporter or producer failed to demonstrate the existence of a bona fide sale to an unaffiliated customer.

By codifying the bona fide factors, Commerce is establishing its authority and ability to be more exacting in its requirements for new shipper reviews. Producers and exporters must be mindful of the level of detail and ensure that they plan in advance of the initial sale that establishes its status as a "new shipper" and document each of the factors in the sale.

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Commerce also modified its final rule from the proposed rule with respect to the certification requirements such that the requesting producer and/or exporter will have to provide specific certifications related to whether its unaffiliated customers purchased the subject merchandise during the original period of investigation. In addition, the new shipper regulations now require the requesting company to provide to the "fullest extent possible, necessary information related to the unaffiliated customer in the United States."

Scope ruling requests: 19 C.F.R. § 351.225

The modifications to the procedures for scope rulings go into effect on **November 4, 2021**, for all scope rulings filed on or after that date. The scope rulings regulations at 19 C.F.R. § 351.225 have undergone a significant and substantive overhaul that has potentially the most exacting impact on the importing community. While this summary attempts to capture the highlights related to the changes, importers who are contemplating filing scope ruling requests should ensure that they are planning and consulting with counsel or other advisors to ensure that all the requirements that are now being implemented are met.

The first modification is that Commerce is now requiring that scope rulings be submitted following a detailed and standardized scope ruling application. Second, Commerce is providing itself the authority to self-initiate scope inquiries and will announce these initiations in the *Federal Register* as public notification. Third, Commerce specifically clarified that a scope ruling determining that a product is covered by the scope of an order is a determination that the product has *always* been covered by the scope of the order. Fourth, Commerce now will have 30 days to accept or reject a scope ruling application and after 30 days that application is deemed accepted. Fifth, the regulations now establish specific deadlines for Commerce to complete the scope ruling within 120 days or, if they extend, within 300 days. Finally, the new regulations provide Commerce the flexibility to opine on and address scope matters in other segments of the proceeding – including circumvention inquiries, covered merchandise inquiries, and ongoing administrative reviews, and, importantly, Commerce now has the authority to align scope deadlines with other segments.

Effectively, these changes taken together provide Commerce with an extraordinary amount of flexibility on how to address scope rulings which means that the development of new aspects to the Department's practice along with increased appellate challenges to scope rulings under the new regulations which will have a long-term impact on Commerce's determinations. Commerce in its new regulations lists out the requirements for evaluating and determining the key factors for scope rulings conducted under 19 C.F.R. § 351.225(k)(1) and (k)(2) that will require companies to ensure that it documents and supports any requests for scope rulings consistent with Commerce's prior practice for that specific proceeding. The best way to do that going forward is to review the original petition, the administrative record of the proceeding at Commerce, the International Trade Commission's injury

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investigation and product discussion. The new regulations make clear that reliance on generally available product descriptions and definitions will not be given the same merit as case-specific product descriptions and history.

The two most impactful changes include: (1) the requirement of a standardized application that will enable requestors to submit more precise and detailed requests, and (2) the retroactive collection of duties. The new regulations codify Commerce's existing practice and ability to retroactively collect duties if and when it determines that imports are in fact within the scope of an existing AD or CVD order. The retroactive collection of duties is a clear articulation of Commerce's practice when it finds that merchandise is within the scope of an order. Commerce has codified its ability to: (a) order the suspension of liquidation of entries on or after the date of initiation of a scope inquiry; (b) when a preliminary scope ruling is issued, Commerce will instruct U.S. Customs and Border Protection to continue suspension of entries that were already suspended and will direct Customs to suspend entries if they were not already suspended; (c) Commerce now will begin the suspension of entries of *unliquidated* entries that are not yet suspended which entered *before* the date of the initiation of the scope inquiry; and (d) Commerce may consider an *alternate date* for suspension of liquidation at the request of an interested party.

What do all these changes effectively mean for a party that is requesting or could be impacted by a scope ruling? In the normal course of business, Customs generally liquidates entries approximately 300 days after the date of entry. So, for example, if Commerce initiates a scope proceeding on January 1st, and issues a preliminary affirmative scope ruling on May 1st, then generally entries which came in approximately after June 1st of the previous year would remain unliquidated and therefore Commerce under the new scope regulations could theoretically go back approximately 11 months prior to the preliminary finding and require suspension of those entries until a final scope ruling is issued. How this differs from the old regulations is that Commerce had the authority to go back and retroactively capture entries **but** only from the date of the *final scope ruling*.

One other modification in the scope regulations relates to country of origin determinations under 19 C.F.R. § 351.225(j). The new regulations articulate exactly what information Commerce examines to make its determinations. Country of origin/substantial transformation decisions by Commerce focus on "what point in the production and processing of the product the country of origin of the class or kind of merchandise is established." Therefore, Commerce has now listed the physical characteristics and separated that from the intended end-use of the downstream product. Commerce has also indicated that the substantial transformation analysis is to be invoked at the discretion of Commerce and provides it with the flexibility to chose other analysis if it determines that the substantial transformation test is not appropriate for purposes of determining country of origin.

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All in all, the revisions to the scope proceedings procedural and substantive requirements are quite dense and only time will tell how Commerce intends to now implement this in a manner that actually makes it feasible to request and obtain scope rulings. The revisions to the regulations however provide a significant amount of discretion to Commerce to not only render its findings but also how it intends to capture and corral merchandise into the tentacles of existing AD and CVD orders on a post-facto basis.

Anticircumvention proceedings: 19 C.F.R. § 351.226

The modifications to the procedures for anticircumvention proceedings go into effect on **November 4, 2021**, for all circumvention proceedings commenced on or after that date. The new regulations have an entirely new section related to anticircumvention proceedings. Previously the circumvention regulations were part of the scope ruling regulations which led to a lot of confusion and now these are stand-alone regulations. Commerce, as explained in the preamble to the new regulations, has now provided for the self-initiation of anticircumvention proceedings when it is reviewing information during a scope inquiry even if the product is not covered by the scope of the order. The new rules set for the requirements for: (a) an interested party to request an anticircumvention inquiry; (b) the initiation process; (c) deadlines for circumvention inquiries; and (d) the procedures for the conduct of the proceeding.

The new regulations also provide for specific deadlines for the conduct of the circumvention inquiry and timely completion of the inquiries. Commerce must now decide within 30 days, or if extended 45 days, to accept and initiate the circumvention inquiry, and it **must** issue a final determination within 300 days, or if extended 365 days of the initiation.

The regulations codify Commerce's existing procedural process for the conduct of anticircumvention inquiries. Furthermore, the regulations also codify Commerce's ability to apply circumvention determinations on a country-wide basis to products that are similar or the same as those subject to the inquiry and to also require a certification requirement. The most important procedural modification in the new regulations is that it now clearly articulates Commerce's ability to order the suspension of liquidation of any unliquidated entries both already suspended and not yet suspended if it makes an affirmative preliminary determination. In addition, Commerce as provided itself the ability to institute a more draconian approach and suspend entries on a case-specific basis if it determines that it is appropriate to examine entries that pre-date the initiation of the circumvention inquiry.

While the vast majority of the changes are merely a codification of existing practice, it remains to be seen how Commerce will address the issue of suspension of entries on a case-by-case basis. Collectively, the changes relating to when Commerce can suspend entries and require cash deposits create significant uncertainty for the importing community should the product imported suddenly be

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caught up in a circumvention inquiry. If importers learn of the initiation of a circumvention inquiry on a product that they are handling, the immediate action should be to take stock of a year's worth of entries to determine the risk of duty exposure and not delay that analysis, otherwise the importer risks having to pay duties on prior entries. It seems highly likely that Commerce will consistently attempt to suspend liquidation prior to the date of initiation which will be an issue that will likely be adjudicated in several cases. We also suspect that there will be a significant increase in the number of circumvention inquiries once the regulations go into effect given the modifications authorizing Commerce to self-initiate these proceedings.

Covered merchandise referrals: 19 C.F.R. § 351.227

This is a brand new provision in the regulations to address the receipt of covered merchandise referrals from Customs under EAPA. This provision goes into effect on **November 4, 2021**. Going forward, Commerce, within 20 days of receiving a covered merchandise referral from Customs, will now either: (a) initiate a covered merchandise inquiry and publish a notice of initiation in the *Federal Register*, or (b) publish its notice of intent to address the referral in the context of an ongoing proceeding such as a scope or circumvention inquiry. The regulations also establish specific deadlines for completion and require that Commerce reach a final determination within 120 days, or if extended, 150 days. Basically, the covered merchandise referral is to be conducted in a similar manner as a self-initiated circumvention inquiry but on a truncated schedule.

Certifications: 19 C.F.R. § 351.228

This is a new section of the regulations which codifies Commerce's existing practice related to certifications that are required in certain proceedings and spells out the requirements to comply with certifications and impose consequences for failure to maintain accurate certifications. The certification requirements go into effect for all entries on **October 20, 2021**.

Certifications will be required by importers or other interested parties for the following circumstances:

certification of entries into the United States;

provide certifications at the time of entry electronically; and

otherwise demonstrate compliance with the certification requirements as determined by Commerce.

If a certification is required to be maintained by the importer or interested party, then Commerce or Customs may require providing the certification as proof.

The consequences for the failure to provide or maintain accurate certifications are a bit draconian in nature and provide Commerce with some significant teeth in terms of its enforcement power.

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Examples of certain “consequences” include requiring Customs to suspend liquidation and require a cash deposit of estimated duties if:

an importer or interested party has not provided a certification; and/or

the importer or other interested party provides a certification that is materially false, fictitious, fraudulent or contains material misrepresentations.

What this means to you

The modifications to the regulations will have the most substantive impact on importers as they relate to new shipper reviews, scope rulings, anticircumvention proceedings, covered merchandise referrals and certifications. Careful planning and strategic advising will be required to mitigate risks to HB clients.

HB anticipates a higher level of scrutiny and stricter enforcement of existing AD and CVD orders as well as a significant increase in the number of scope and circumvention inquiries once the regulations go into effect given the modifications authorizing Commerce to self-initiate these proceedings.

Clients should plan, document, strategize and institute stricter vetting procedures for their suppliers and products purchased, institute compliance procedures if your product is subject to AD/CVD duties, and finally don’t go it alone. It’s more difficult to fix a problem in the new regulatory environment than to address the issue before it becomes a problem.

Contact us

If you have questions about how these regulations might impact your business, contact Nithya Nagarajan, Jeffrey Neeley or your Husch Blackwell attorney.

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