

Commerce Department Issues Final Regulations to Enhance and Strengthen Trade Law Enforcement

March 27, 2024

On March 25, 2024, the U.S. Department of Commerce (Commerce) issued a final rule designed to “improve, strengthen and enhance” its antidumping (AD) and countervailing duty (CVD) regulations. The final rule largely adopts Commerce’s proposed rule of May 9, 2023, with only minor revisions. Commerce’s new regulations introduce several significant policy changes that will expand Commerce’s toolkit and narrow existing loopholes in trade enforcement.

Revitalizing Particular Market Situation Allegations: Commerce’s new rule introduces a regulation specific to particular market situation allegations. In AD proceedings, parties may allege that a set of circumstances distort costs or prices in a specific country. Commerce’s new regulation seeks to address recent federal court holdings that have significantly limited Commerce’s ability to find a particular market situation. Among other changes, Commerce’s final rule:

- Explains the information needed to support a particular market situation;
- Clarifies that a particular market situation distorting costs may contribute to a particular market situation that distorts prices;
- Lists examples of particular market situations that prevent proper price comparisons (*g.*, export taxes, export restrictions, government control of pricing) or distort the costs of production (*e.g.*, overcapacity/oversupply, subsidies, duty exemptions);
- Identifies certain types of foreign government inaction as a potential basis for a particular market situation;

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Practice Areas

- Removes the word “distinct” from the *Proposed Rule* to clarify that a particular market situation does not need to be unique to a country or company.

Antidumping and Countervailing Duties/
Trade Remedy Cases
International Trade

Transnational Subsidies: The final rule eliminates Commerce’s prohibition on countervailing transnational subsidies (also known as cross-border subsidies), where a government provides a benefit to a recipient outside of its borders. For the first time, Commerce can potentially 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 industries and state-owned enterprises abroad. Commerce recognized that its previous interpretation of the law “was overly restrictive,” acknowledging that transnational subsidies are more widely used today than previously.

Correcting for Distortive Foreign Government Inaction: U.S. producers have long recognized that weak, ineffective, or nonexistent laws governing human rights, labor rights, environmental protections, and intellectual property allow foreign competitors to benefit from these externalities. Commerce’s regulations recognize that lax, ineffective, or nonexistent government regulations allow foreign producers to produce merchandise at lower costs than if effective laws were in place. While the final rule stops short of allowing Commerce to countervail foreign government inaction, Commerce may disregard benchmark or surrogate data where parties demonstrate the likely impact of government inaction.

Other notable changes and clarifications include:

- Confirming that the benefit of a government equity infusion must be compared against an outside investor when calculating a CVD rate.
- Clarifying procedures for scope and circumvention proceedings, which have increased substantially in recent years.
- Codifying Commerce’s practice to only conduct scope rulings where merchandise has already been imported or has been “historically commercially produced and sold.”
- Codifying current agency practice regarding the “hierarchy” for selecting an adverse facts available subsidy rate, which is

relevant when a respondent fails to cooperate with Commerce's proceedings. Commerce must now choose an "above de minimis" (0.5%) rate as adverse facts available, rather than an "above zero" rate.

- Codifying current agency practice regarding the calculation of the benefit imparted by certain types of subsidy programs.

Commerce's new regulations go into effect April 24, 2024. These measures provide numerous new opportunities for companies and industries facing pressures from unfairly traded merchandise. Wiley's International Trade practice has deep experience with AD/CVD laws, regulations, and policies and is ready to assist companies and industries with questions about these issues.