

ALERT

Commerce Proposes Updating Trade Remedy Regulations to Enhance Administration of Antidumping and Countervailing Duty Laws

July 19, 2024

On July 12, 2024, the U.S. Department of Commerce (Commerce) issued a proposed rule designed “to enhance the administration of the antidumping duty (AD) and countervailing duty (CVD) laws.” Commerce is accepting comments on the proposed rule through September 10, 2024. Commerce’s revision of its regulations seeks to codify several distinct procedures and practices under various sections of the Act.

Cash Deposit Rates: Commerce’s proposed rule updates and expands on Commerce’s establishment and application of cash deposit rates. This is the rate that importers must deposit with Customs when covered merchandise enters the United States. This rate is initially set at the preliminary determination of an investigation and then adjusted at the final determination. The proposed rule describes situations in which Commerce applies cash deposit rates in a producer/exporter combination and the process by which a producer/exporter combination may be excluded from provisional measures and an order as the result of a *de minimis* case deposit rate in an investigation. The proposed rule would also set hierarchies for cash deposit rates in AD (market economy and nonmarket economy) and CVD proceedings.

Nonmarket Economy Separate Rates: The proposed rule codifies, for the first time, Commerce’s methodology for determining if an entity exporting merchandise should receive an AD rate separate from that of the nonmarket economy entity. This is important because quite often companies are either owned or controlled by the governments of nonmarket economies. Commerce’s practice recognizes the

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economic effects of such structures and the coordination among such companies that could be used to conceal or shift subsidies among them. Commerce's practice is that an exporter must show that it is entitled to a rate separate from that of the country-wide nonmarket economy entity.

Attribution of Subsidies: The proposed rule changes the way Commerce will calculate the benefit of subsidies provided to certain affiliated companies. This is important because respondents with complex corporate structures may conceal or dilute the effect of subsidies by channeling subsidies through affiliated companies. The proposed rule contains provisions that seek to remedy some of the more common issues that arise in this regard and to streamline the procedures that Commerce uses to address them.

Specifically, the proposed rule provides that transferred subsidies will be solely attributed to the products produced by the recipient of the transferred subsidy, including those subsidies transferred by holding or parent companies. It also revises regulations to cover the attribution of subsidies to cross-owned corporations providing electricity, natural gas or other utility products. Importantly, the rule provides that Commerce would not tie or attribute subsidies on a plant- or factory-specific basis. If Commerce were to allow such tying, it could remove certain subsidies from the calculation of the subsidy rate.

The proposed regulations would make other notable changes and clarifications. For example, the new regulations would:

- Clarify that Commerce may share business proprietary information with U.S. Customs and Border Protection (CBP) officials in cases involving negligence, gross negligence, or fraud investigations. This will allow Commerce to provide CBP with evidence of evasion.
- Provide that Commerce need not consider the "commercial reality" of an interested party in applying adverse facts available. Respondents often argue that rates determined by Commerce's application of adverse facts available do not reflect "commercial reality."
- Modify Commerce's selection of economically comparable countries regarding its nonmarket economy methodology to include additional factors other than GDP or GNI. These factors include the size and composition of export activity and the availability, accessibility, and quality of data from those countries. This should improve country selection, which currently often defaults to countries on a generic list based only on GDP or GNI.
- Provide that subsidy would normally be "tied" to a product or market when the authority providing the subsidy was made aware of, or had knowledge of, the intended use of the subsidy and so acknowledges the intended use prior to or concurrent with the approval or bestowal of the subsidy. This would prevent arguments where there was no such acknowledgement. Respondents often argue that subsidies are "tied" to non-subject merchandise because of how the respondents assert the subsidy is actually used.
- Allow Commerce to limit the number of cross-owned companies examined under 351.525(b)(9) if the factors on the record and available resources warrant such a limitation.

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Commerce is accepting comments on the proposed rules through September 10, 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 or comments about these issues.