

New Anti-Dumping Rules Both Clarify And Complicate

By **William Isasi and Jordan Bakst** (January 12, 2022, 5:19 PM EST)

The U.S. Department of Commerce recently promulgated a final rule implementing some of the largest changes to its anti-dumping and countervailing duty regulations in decades.[1]

Some changes codified existing agency practice and have been under discussion for many years at the Department of Commerce, while other changes addressed relatively new statutory provisions enacted as part of the Trade Facilitation and Trade Enforcement Act.[2]

The stated purpose of the regulatory changes is to strengthen the administration of the anti-dumping and countervailing duty law, make enforcement of the law more efficient and create new tools to address circumvention and evasion of AD/CVD orders.[3]

Portions of the rule became effective on Oct. 20, 2021, and other portions became effective on Nov. 4, 2021.

Among other things, these changes significantly alter the Commerce Department's procedural rules, of which practitioners should be mindful when appearing before the agency in anti-dumping and countervailing duty proceedings.

Specifically, the department has modified its rules relating to:

- Service lists and entries of appearance for scope and circumvention inquiries;
- Access to business proprietary information for representatives of importers; and
- The deadline for the submission of industry support comments prior to the initiation of investigations.

Each of these regulatory changes is discussed below.

Creation of Annual Inquiry Service Lists

One of the more noteworthy procedural changes introduced by the Commerce Department's new



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regulations involves reforms to its service lists for scope and circumvention inquiries.

Previously, scope requests had to be served on any party named on the scope service lists, maintained on the department's website, which were often quite long and outdated.

The Commerce Department now maintains an annual inquiry service list for every AD/CVD order. Copies of applications for scope rulings or requests for circumvention inquiries must be served by interested parties on every party listed on the annual inquiry service list for the relevant order or orders.[4]

Only parties appearing on the service list are served with the scope ruling application or request for a circumvention inquiry. To be served with documents in an active scope or circumvention inquiry, parties other than those requesting such action must enter an appearance in that inquiry.[5]

The Commerce Department provided parties from Sept. 27, 2021, until Oct. 27, 2021, to request inclusion on the initial annual inquiry service list for any AD/CVD order in which they qualify as an interested party.[6] For those who missed this deadline, additional opportunities for inclusion on the list will occur on an annual basis: Each year during the anniversary month of an AD/CVD order or suspended investigation, interested parties may request to be placed on the service list for that order or suspended investigation.[7]

Many interested parties must renew their request to be included on an annual inquiry service list on an annual basis, during the anniversary month of the relevant AD/CVD order or suspended investigation.[8] However, once a petitioner or foreign government requests inclusion on an inquiry service list, they will be exempted from this renewal requirement, as the department will automatically include these parties on the service list for the relevant AD/CVD order going forward.[9]

Creating a way for interested parties to ensure inclusion on a service list for scope and circumvention inquiry requests is a helpful change for AD/CVD practitioners. Previously, the Commerce Department created and updated scope service lists to include all the parties that had participated in an AD/CVD proceeding. Given the long life of many AD/CVD orders, these lists were often quite long and outdated.

However, the requirement that most responding parties, such as foreign producers and U.S. importers, must now renew their requests on an annual basis creates a new procedural hurdle for these parties to stay apprised of developments in the AD/CVD proceedings in which they participate. Such parties now need to incorporate into their standard operating procedures contacting the department each year during the anniversary month of any relevant AD/CVD order.

Appearance in Scope, Circumvention and Covered Merchandise Inquiries

The Commerce Department has also amended its rules relating to entries of appearance in scope, circumvention and covered merchandise inquiries. Parties requesting scope and circumvention inquiries do not need to file entries of appearance in those inquiries. Similarly, relevant parties identified by U.S. Customs and Border Protection in a covered merchandise referral do not need to file an entry of appearance.

Instead, the department will automatically add these parties to the service list for the specific inquiry.[10] Previously, only the petitioners in an investigation were exempted from this entry of appearance requirement. These procedural changes are helpful for AD/CVD practitioners because they eliminate a procedural step for many parties participating in such inquiries.

Access to Business Proprietary Information for Representatives of Importers

Additionally, the Commerce Department has revised its regulations for representatives seeking access to business proprietary information on behalf of an importer in a circumvention inquiry. Such representatives must now demonstrate that the party they represent is an importer, or has taken steps to import, the merchandise subject to the circumvention inquiry.[11] Prior to this change, only representatives of importers seeking access to business proprietary information in a scope inquiry were required to make such a showing.

Relatedly, the department has exempted business proprietary information applicants representing a party identified by CBP as an importer in a covered merchandise referral from the requirement of providing evidence demonstrating that the party is an importer.[12]

These procedural changes are sensible because they align the requirements for representatives of importers seeking access to business proprietary information in circumvention inquiries with the requirements in scope inquiries, and clarify that a representative of an importer identified by CBP in a covered merchandise referral should have access to the business-proprietary-information record without having to demonstrate that their client is an importer.

Revised Timeframe for the Submission of Industry Support Comments

Finally, the Commerce Department has revised the timeframe in which any comments on industry support must be submitted prior to the initiation of an AD/CVD investigation. In the past, comments on industry support were permitted to be filed up to and including the scheduled date of an initiation determination.

The department now requires that industry support comments be submitted no later than five business days before the scheduled date of initiation, and that rebuttal comments be submitted no later than two calendar days thereafter.[13]

This regulatory change is helpful because it clarifies for practitioners the date by which they can submit industry support comments or rebuttal comments to ensure that the Commerce Department will consider them prior to the initiation of an AD/CVD investigation.

However, the time period between the filing of a petition and initiation of an AD/CVD investigation is typically quite short — 20 days. Requiring affirmative comments to be filed no later than day 15 eliminates a significant amount of time during this 20-day time period prior to initiation.

Generally, parties that file industry support comments do so in opposition to an AD/CVD petition. It is not unusual for these parties to have no notice of a petition prior to its filing, and news of the filing may take days to reach them.

Thus, the Commerce Department is asking a lot of such parties by requiring that they prepare industry support comments, familiarize themselves with the agency's procedures and file such comments all within 15 days or less. The compressed filing window may result in parties regularly seeking extensions of these new regulatory deadlines.

Conclusion

Some of the Commerce Department's recent procedural changes are helpful because they clarify the process for parties participating in AD/CVD proceedings and eliminate certain procedural steps — as is the case with respect to the entries of appearance discussed above. However, other changes add procedural hurdles for

nonpetitioning parties, such as foreign producers or domestic parties that do not support AD/CVD action — e.g., the shortened deadline to file comments on industry support.

AD/CVD practitioners should evaluate the new procedural requirements early and incorporate them into their standard operating procedures. If a practitioner ultimately determines that they need to request an extension of one of the new deadlines, it is important that they submit such request prior to the established deadline, as the department will only grant an extension after a deadline has passed if an extraordinary circumstance exists.[14]

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[1] Regulations to Improve Administration and Enforcement of Antidumping and Countervailing Duty Laws, 86 Fed. Reg. 52,300 (Sep. 20, 2021).

[2] Public Law 114-125, 130 Stat. 122, 155 (2016).

[3] Regulations to Improve Administration and Enforcement of Antidumping and Countervailing Duty Laws, 85 Fed. Reg. 49,472 (Aug. 13, 2020).

[4] 19 C.F.R. §§ 351.225(n)(1)&(2); § 351.226(n)(1).

[5] 19 C.F.R. § 351.225(n)(4); § 351.226(n)(2).

[6] See Scope Ruling Application; Annual Inquiry Service List; and Informational Sessions, 86 Fed. Reg. 53,205, 53,206 (Sep. 27, 2021).

[7] See *id.*

[8] See 19 C.F.R. § 351.225(n)(3).

[9] See *id.*

[10] 19 C.F.R. § 351.103(d)(1).

[11] 19 C.F.R. § 351.305(d).

[12] See *id.*

[13] 19 C.F.R. § 351.203(g).

[14] 19 C.F.R. § 351.302(c).