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What Commerce's Anti-Dumping Rules Mean For Importers

By **William Isasi and Cynthia Galvez** (February 11, 2022, 6:17 PM EST)

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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]

This article on the regulatory amendments highlights key aspects of the rulemaking with respect to covered merchandise inquiries, the agency's general authority to require certifications and reimbursement certifications for importers.

Most significant among these changes are the Commerce Department's first regulations for covered merchandise inquiries that became effective for inquiries initiated on or after Nov. 4, 2021. They are part of a high-stakes evasion investigation pursuant to the Enforce and Protect Act, or EAPA.

Among other things, these new rules potentially (1) accelerate the timelines for scope and circumvention determinations made within covered merchandise inquiries, (2) provide the Commerce Department with authority to apply adverse facts available in such inquiries, and (3) provide that the Commerce Department will normally apply covered merchandise determinations retroactively to all unliquidated entries, even those that entered prior to initiation of the inquiry.

Some key changes resulting from the regulatory amendments are discussed below.

Covered Merchandise Inquiries

Among the most significant changes in the Commerce Department's recent amendment to its regulations was the creation of Title 19 of the Code of Federal Regulations, Section 351.227.

This section establishes procedures for a covered merchandise inquiry, a new type of action — or segment — under anti-dumping and countervailing duty orders.

Through these inquiries the Commerce Department determines, in response to a referral from U.S. Customs and Border Protection during an EAPA investigation, whether merchandise is covered by an order. Although the Commerce Department has been responding to such referrals from CBP for a few years, the amendments codified for the first time an official procedure for issuing determinations in response to such referrals.

While it is helpful that the regulatory amendments have created a clear procedure that the agency will follow in issuing covered merchandise determinations, some aspects of this procedure, discussed below, could raise fairness concerns and may be subject to legal challenge.

In 2016, EAPA established, for the first time, authority for CBP to conduct a civil investigation into potential duty evasion of anti-dumping and countervailing duty orders.

Where CBP is unable to determine whether a product is covered merchandise, it is required by EAPA to suspend the investigation, and refer the matter to the Commerce Department to make a covered merchandise determination.

Within 20 days of receiving a referral from CBP, the regulations provide that the Commerce Department will publish in the Federal Register notice of how it intends to address the referral (i.e., in a covered merchandise inquiry or in an ongoing segment such as ongoing scope or circumvention inquiry) at which point interested parties — even if they are not also parties to the EAPA investigation — are permitted to comment on the referral.

Such public notice is welcome because it will increase the likelihood that interested parties will participate in any covered merchandise inquiry. Practitioners with clients who are U.S. importers, domestic and foreign producers, and other interested parties in anti-dumping and countervailing duty proceedings should regularly monitor the Federal Register for notices discussing any referral from CBP pertaining to merchandise of interest to their clients.

The procedure for covered merchandise inquiries is similar to other segments under anti-dumping and countervailing duty proceedings, for example, the Commerce Department may issue questionnaires or publish in the Federal Register a preliminary determination on which parties may comment and a final determination.

The regulatory amendments confirm that in a covered merchandise inquiry the Commerce Department will base its determination on the analyses it uses in scope and circumvention inquiries, which are the analyses that the agency traditionally has used to determine whether merchandise is covered by an order.

One of the most important differences between scope/circumvention inquiries and covered merchandise inquiries, however, is that the agency will issue determinations on a faster timeline for the latter.

The regulations provide that the Commerce Department will issue a final covered merchandise determination within 120 days from the date of publication of the initiation notice, which can be increased up to an additional 150 days.[2]

Thus, a fully extended covered merchandise inquiry would span only 270 days,[3] which is significantly shorter than the 300-day and 365-day deadlines that apply to fully extended scope and circumvention inquiries, respectively.

The agency explained that this shortened timeline was necessary to comply with the legal requirement that the Commerce Department issue covered merchandise determinations promptly and in recognition

that CBP will have to stay its EAPA investigation until the Commerce Department issues its determination.

While the agency's goal to complete such determinations quickly so as to minimize the delay in CBP's EAPA investigation is laudable, it is unclear why determining whether a product is covered by an order should take less time in a covered merchandise inquiry than in a scope or circumvention inquiry, particularly as the regulations provide that the agency will make determinations in covered merchandise inquiries using scope and circumvention analyses.

The accelerated timeline also raises questions and concerns for U.S. importers given that covered merchandise determinations arise in the context of potential duty evasion, which could have much more serious consequences for U.S. importers than a scope or circumvention determination outside of an EAPA investigation.

Were the Commerce Department to find an importer's merchandise subject to an order in a covered merchandise inquiry, CBP could in turn reach an affirmative evasion determination and decide to refer the matter for criminal investigation, as it is authorized to do pursuant to EAPA.[4] Such criminal proceedings do not normally result from scope or circumvention inquiries.

Because EAPA explicitly provides that a covered merchandise determination can lead to a potential criminal investigation, the Commerce Department should arguably prescribe longer deadlines to issue a covered merchandise determination rather than issue these determinations on a shortened timeline.

The potential for a criminal investigation also highlights another important issue raised by the amendments with respect to a new regulatory provision, which is that the regulations permit the Commerce Department to apply adverse facts available, or AFA, to parties it deems uncooperative in a covered merchandise inquiry.[5]

It is unclear whether AFA should be used where a potential criminal investigation could result from that AFA determination. For example, the Commerce Department often seeks information from foreign producers in determining whether merchandise is covered by an order.

If a foreign producer fails to cooperate and the Commerce Department then determines based on AFA that merchandise is covered by an order, it could raise serious fairness questions if CBP then uses that determination to recommend a criminal investigation of a U.S. importer.

For these reasons, the potential use of AFA in covered merchandise inquiries should represent a significant concern for parties, particularly U.S. importers, in responding to the Commerce Department's requests for information in such inquiries.

Also significant is the retroactive effect the Commerce Department will normally apply to covered merchandise determinations.

Specifically, if the Commerce Department finds that merchandise is covered by an order, the regulations provide that it will normally apply that determination to all unliquidated entries of the merchandise including those entries that predate the initiation of the covered merchandise inquiry.

This means that tariffs may be applied to merchandise that entered the United States months or even years prior to the Commerce Department initiating a covered merchandise inquiry.

While retroactive application of covered merchandise determinations is likely supported by U.S. producers that have long pushed for the Commerce Department to do more to deter evasion of anti-dumping and countervailing duty orders, determining that merchandise is subject to an order retroactively raises fairness concerns that the Commerce Department itself has recognized,[6] particularly in the context of scope language ambiguous enough to require sophisticated inquiry by two separate agencies — CBP and the Commerce Department.

Such a retroactive application has also been struck down by the courts in the context of scope and circumvention determinations under the prior regulations.[7] Thus, this aspect of the regulation providing for retroactive effect may be subject to legal challenge.[8]

A final issue to note is that the Commerce Department intends to approach the new regulations for covered merchandise inquiries with flexibility given the relative novelty of the CBP referrals on which these inquiries are based.

As a result, the agency has explained that one of its goals is to "maintain flexibility in both its opportunities to request information and the issues that it considers in its analysis, before reaching a covered merchandise determination."[9]

Thus, practitioners involved in covered merchandise inquiries should appreciate that it may be difficult to anticipate the information that the agency will seek or issues that it will analyze in these inquiries and should be prepared to seek clarification as needed.

For this same reason, trade practitioners should also assess and substantiate their needs for extensions of time to provide, or analyze responses in these purposefully accelerated proceedings.

At the same time, the flexibility in these new inquiries may create an opportunity for parties to propose to the Commerce Department novel approaches that best suit the particular circumstances presented in the inquiry.

General Authority to Impose Certifications

The Commerce Department also created a new regulation at Title 19 of the Code of Federal Regulations, Section 351.228, which for the first time establishes general regulatory authority to require certifications — broadly, and not limited to any particular circumstances — from importers and other interested parties in anti-dumping and countervailing duty proceedings, and the consequences in these proceedings if a party fails to comply.

Previously there was no such regulatory authority.

For example, in the circumvention context, the Commerce Department routinely has required importers or exporters to submit certifications that products shipped through and declared products of a third country were not instead products subject to an anti-dumping or countervailing duty order, or certifications that products declared as nonsubject would not be further manufactured into subject products; however, no authority for these certifications existed explicitly in the regulations.

With the addition of Section 351.228, the department has established a general regulatory authority for the certifications it has required in practice and also certification requirements it intends to apply to yet

unknown anti-dumping and countervailing duty proceedings, determined on a case-by-case basis.[10]

An issue raised by this very general approach is that it is so general that it does not itself create an actionable obligation that interested parties can plan for and implement into their procedures.[11] Instead, practitioners must evaluate carefully certification requirements imposed by the Commerce Department on a case-by-case basis.

Importantly, the regulations specify the consequences that the Commerce Department could impose if an importer or other interested party fails to provide a required certification or provides a false certification.[12] In either instance, the Commerce Department may now apply tariffs to the merchandise associated with that party.[13]

While application of tariffs may be reasonable when a party fails to comply with a certification requirement, given the very general nature of these regulations, it is difficult to ascertain whether such a consequence would be permissible under the anti-dumping and countervailing duty laws generally.[14] Instead, such an application of tariffs will need to be evaluated on a case-by-case basis to determine if it permissible.

The Commerce Department's promulgation of this general authority to impose certifications suggests that the Commerce Department will continue to use certification requirements in anti-dumping and countervailing duty proceedings and may intend to use them with more frequency.

Practitioners, particularly those representing U.S. importers and foreign exporters/producers, should be on the lookout for any certification requirements that might apply to their clients and ensure that their clients are aware of the consequences if they fail to comply with these requirements including the application of tariffs to their merchandise.

Further, to the extent that a foreign producer or other party in a commercial transaction poses a risk of noncompliance with a certification requirement, importers should consider making changes to their commercial arrangements to maximize compliance.

Importer Reimbursement Certifications

Finally, the Commerce Department revised aspects of its existing regulation on importer reimbursement certifications.

Prior to these changes, the regulation required specific language for reimbursement certifications, and provided no exception to the rule that certifications must be filed prior to the final assessment of tariffs, despite such an exception existing in practice. In its revisions, the Commerce Department eliminated the requirement for specific language and codified the exception that existed in practice.

If foreign exporters or producers pay anti-dumping or countervailing duty tariffs on behalf of U.S. importers or reimburse these importers for such tariffs, the Commerce Department must increase the anti-dumping tariff imposed under long-standing regulations.

Thus, for many years, the agency has required importers of merchandise subject to anti-dumping tariffs to certify that an exporter/producer has not paid for, or reimbursed the tariffs owed. If such an importer fails to provide a reimbursement certification prior to the final assessment of tariffs, CBP presumes reimbursement and doubles the tariffs owed.[15]

Title 19 of the Code of Federal Regulations, Section 351.402, establishes the rules for these reimbursement certifications.

In its recent amendments, the Commerce Department made a number of changes to this provision, among which included removing the requirement for specific language in these certifications, requiring instead that the certifications "contain the information necessary to link the certification to the relevant entry or entry line number(s)."[16]

In addition, the Commerce Department clarified that, as an exception to the requirement that certifications must be filed with CBP before the final assessment of tariffs, they may also be filed after this time during a CBP protest proceeding.

The Commerce Department's elimination of specific language for reimbursement certifications from its regulations creates some uncertainty for U.S. importers regarding how to comply with the reimbursement certification requirement, especially for importers with large shipment volumes and complex documentation procedures.

For U.S. domestic producers, the regulation's indication that certifications should contain information to link to relevant entries or entry line numbers may add assurance that the certifications cover the right merchandise,[17] but the lack of specific language may still raise concerns for these producers regarding the subjectivity it introduces.

Practitioners should ensure that their importing clients file certifications that comply with the new regulatory requirements, particularly the requirement to include necessary information in the certification to link the certification to the relevant entries or entry line numbers.

With respect to the exception now codified that reimbursement certifications may be provided during protest proceedings if not filed before final assessment of duties, it is worth noting that as the Commerce Department explained, the exception has been included in CBP instructions "for almost a decade."[18]

Codification of this exception is welcome because it clarifies for U.S. importers that an additional process exists after the assessment of final duties to avoid an increase in tariffs pursuant to the reimbursement regulation.

Conclusion

In sum, the Commerce Department's regulatory updates included significant changes affecting products subject to covered merchandise inquiries pursuant to EAPA and the certifications that importers and other interested parties are required to submit to the Commerce Department and CBP for their entries.

Some practices for trade practitioners to consider adopting in response to these amendments include:

- Give serious and careful consideration to requests for information made by the Commerce Department in the context of a covered merchandise referral because of the significant consequences that may arise for parties deemed uncooperative and the potential referral by CBP for a criminal investigation if the Commerce Department determines that the merchandise is covered by an order.

- Upon receiving notice from the Commerce Department of a certification requirement in an anti-dumping or countervailing duty proceeding, consider carefully how all the relevant parties may comply with the requirement because failure of one party in the selling chain (e.g., a foreign producer) to comply could result in the imposition of tariffs that another party in the chain would have to pay (i.e., the U.S. importer).

- Review reimbursement certifications to ensure that these contain the "information necessary to link the certification to the relevant entry or entry line number(s),"[19] as required in the updated regulations rather than the precise language contained in the previous regulation.

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[1] Regulations to Improve Administration and Enforcement of Antidumping and Countervailing Duty Laws, 86 Fed. Reg. 52,300 (Dep't of Commerce Sept. 20, 2021) ("Final Rule").

[2] 19 C.F.R. § 351.227(c)(1) – (2).

[3] The deadlines for a covered merchandise inquiry can be aligned with another segment under the order. 19 C.F.R. § 351.227(c)(3). Depending on when such an alignment occurs, the Commerce Department could have significantly longer than 270 days to issue a determination.

[4] 19 U.S.C. § 1517(d)(1)(E)(iv).

[5] AFA is a tool employed by the Commerce Department, typically in antidumping and countervailing duty investigations and administrative reviews, through which the agency relies on information adverse to a non-cooperating party. Clear examples of such non-cooperation include "deliberate concealment or inaccurate reporting," and more generally are circumstances where it was "reasonable for Commerce to expect that more forthcoming responses should have been made." Nippon Steel Corp. v. United States, 337 F.3d 1373, 1382–83 (Fed. Cir. 2003).

[6] Antidumping Duties; Countervailing Duties, 62 Fed. Reg. 27,296, 27,328 (Dep't of Commerce May 19, 1997).

[7] See, e.g., United Steel and Fasteners, Inc. v. United States, 947 F.3d 794, 801–03 (Fed. Cir. 2020); AMS Assocs. Inc. v. United States, 737 F.3d 1338, 1343–44 (Fed. Cir. 2013).

[8] William Isasi & Rishi Gupta, Scope, Circumvention, New Shippers: Key Rule Changes, Law360 (Jan. 26, 2022), https://www.law360.com/articles/1458682/scope-circumvention-new-shippers-key-rule-changes (discussing why retroactive application of scope and circumvention determinations may lead to a legal challenge).

[9] Proposed Rule, 85 Fed. Reg. at 49,489.

[10] Final Rule, 86 Fed. Reg. at 52,363.

[11] In the preamble to the Final Rule, the Commerce Department responded to comments that the certification requirements imposed "significant costs on regulated entities," "particularly small companies or those not represented by counsel." The Commerce Department disagreed with this sentiment, but it's unclear that the content of this new regulation would not be burdensome to a small company or entity not represented by counsel, as the regulation essentially establishes specific and significant consequences for non-compliance with certification requirements that remain yet unknown.

[12] 19 C.F.R. § 351.228(b). Previously, the Commerce Department discussed potential prosecution pursuant to 18 U.S.C. § 1001 for false certifications rather than any direct consequence in an antidumping or countervailing duty proceeding. See Certification of Factual Information To Import Administration During Antidumping and Countervailing Duty Proceedings, 78 Fed. Reg. 42,678 (Dep't Commerce July 17, 2013).

[13] 19 C.F.R. § 351.228(b).

[14] In the preamble to the Final Rule, the Commerce Department relies on its authority to prevent evasion and circumvention of orders as its authority to promulgate this rule. See Final Rule, 86 Fed. Reg. at 52,364. Whether this authority adequately covers the Commerce Department's ability to impose tariffs for inadequate certifications remains to be seen and will depend on how the agency exercises its discretion in enforcing these consequences on a case-by-case basis.

[15] See, e.g., Guidance for Reimbursement Certificates, EO13891-OT-159, U.S. Customs and Border Protection (Nov. 30, 2018), https://www.cbp.gov/document/guidance/guidance-reimbursement-certificates.

[16] 19 C.F.R. § 351.402(f)(2)(i).

[17] Although additional guidance from CBP may be forthcoming, it appears likely, based on past CBP guidance, that such "information necessary to link" does not require a listing of entries or entry line numbers but instead information such as the time period that the certificate applies to. See Guidance for Reimbursement Certificates, U.S. Customs and Border Protection (Nov. 18, 2018), https://www.cbp.gov/sites/default/files/assets/documents/2018-Nov/trade-guidance-reimbursement-certificates.pdf.

[18] Final Rule, 86 Fed. Reg. at 52,366.

[19] 19 C.F.R. § 351.402(f)(2)(i).