# Proposed Regulations May Significantly Expand Commerce's Enforcement Ability of Trade Remedy Laws

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## Key Points

- On May 9, 2023, Commerce issued proposed regulations that would expand the agency's authority to enforce trade remedy laws in several substantive and procedural respects.
- Interested parties have until July 10, 2023 to submit comments.

The U.S. Department of Commerce ("Commerce") published "**Regulations Improving and Strengthening the Enforcement of Trade Remedies Through the Administration of the Antidumping and Countervailing Duty Laws**" in the *Federal Register* on May 9, 2023 ("Proposed Regulations"). The proposed new rules cover a variety of substantive and procedural issues related to Commerce's administration of antidumping (AD) and countervailing duties (CVD) proceedings under Title VII of the Tariff Act of 1930, as amended (the "Act"). Comments are due no later than **July 10, 2023**. We provide below a summary of the most significant changes included in the Proposed Regulations that, if adopted, would greatly expand Commerce's authority to enforce AD and CVD laws and regulations.

## Foreign Government Inaction that Benefits Foreign Producers

The Proposed Regulations would give Commerce new tools to address foreign governments' inaction that benefit foreign producers in the context of both AD and CVD proceedings. For example, the Proposed Regulations would codify Commerce's practice of treating non-collection or deferred payments of fees, fines, or penalties as countervailable subsidies.

In addition, when selecting benchmark data to determine the existence and amount of subsidies, Commerce would be able to consider evidence of a foreign government's weak enforcement of laws governing human rights, labor rights, environmental protections and intellectual property. Because government inaction on these issues could distort prices, Commerce may treat pricing data from the respective country as improper benchmark sources.

Similarly, in AD proceedings involving non-market economy (NME) countries, if there is sufficient evidence of government inaction as described above, Commerce may conclude that the values in that country are distorted and therefore reject data from the respective country as surrogate values for certain inputs to calculate normal value. Indeed, Commerce has started taking this approach in recent AD proceedings involving China, a practice that would be formalized under the Proposed Regulations. In a recent AD proceeding regarding Certain Activated Carbon from China, for instance, Commerce declined to use the Malaysian manufacturing labor costs as a surrogate value due to the allegedly widespread use of forced labor throughout the Malaysian electrical and electronics sector.

## Transnational Subsidies

Commerce would eliminate the current regulatory provision governing transnational subsidies (19 C.F.R. § 351.527), which limits the agency's ability to countervail subsidies provided by a foreign government "other than the country in which the recipient firm is located." In the Proposed Regulations, Commerce noted that "instances in which a government provides a subsidy that benefits foreign production are far more prevalent." The new rules, therefore, would enable Commerce to target transnational subsidy programs such as China's Belt and Road Initiative in CVD proceedings.

In this regard, the Proposed Regulations echo a bill introduced to Congress two years ago (S. 1187, "the Eliminating Global Market Distortions to Protect American Jobs Act"), which, among other objectives, would amend the statutory definition of "countervailable subsidy" to explicitly cover cross-border subsidies, or subsidies provided by governments outside of the country of export. In issuing the Proposed Regulations, Commerce appears to take the position that it is already authorized under the current statute to regulate such subsidies. Commerce's interpretation may be challenged in U.S. courts and before the World Trade Organization.

## Particular Market Situation

Commerce also proposed new rules governing the determination of a particular market situation (PMS) that distorts the prices or costs in an exporting country. In general, PMS methodologies empower Commerce to deviate from its normal AD calculations and tend to inflate AD rates. Please refer to our previous **alert** for additional background information.

These new rules in the Proposed Regulations appear to follow recent court decisions relating to Commerce's PMS analysis. In *Nexteel v. United States*, 28 F.4th 1226 (Fed. Cir. 2022), the Federal Circuit criticized Commerce's PMS findings for lack of substantial evidence. Following the courts' guidance, the Proposed Regulations would standardize the information requirements for PMS findings. Additionally, Commerce provided illustrative PMS scenarios that may meet the threshold, such as overcapacity of a significant input used to produce the subject merchandise, or significant control of the input production by state-owned enterprises or other public entities.

## Procedural Changes and Other Modifications

The Proposed Regulations would change several procedural rules governing the timelines and the record development in various AD and CVD proceedings, including scope and circumvention inquiries. We highlight below several proposed procedural changes that could, to some extent, shape the course of the proceedings:

- *Merchandise Eligible for Scope Inquiries*: Commerce will allow parties to submit scope inquiries of merchandise not yet imported, which provides exporters and importers more certainty about their AD and CVD exposure before they expend the time and resources to ship and import a product to the United States. However, the product must be "commercially produced and sold", and cannot be samples, prototypes or mere models.
- *Pre-Initiation of Scope and Circumvention Inquiries*: Commerce proposed changes to the pre-initiation stage of scope and circumvention inquiries. Parties other than the requestor would have 10 days to submit comments on the adequacy of the application or request. In circumvention proceedings, parties would also be able to submit new factual information with their comments, and the requestor would have five days to respond.
- *Initiation Procedures*: Under the current regulations, Commerce has 30 days to decide whether to initiate a scope or circumvention inquiry upon receiving an application or request. Under the new rules, in situations in which Commerce needs clarification of certain aspects of the application or request, Commerce's 30-day deadline to initiate would run from the date it receives timely responses to its follow-up questions.

- *Extension of Time Limits in Circumvention Proceedings*: The Proposed Regulations would allow Commerce to further extend certain time limits in a circumvention inquiry. Specifically, Commerce would be able to extend the initiation deadline to 60 days after the submission of the request, and to extend the preliminary determination deadline to 240 days after the initiation notice. Commerce otherwise retained its discretion to extend any non-statutory deadlines for "good cause" under its pre-existing regulations. Note that "good cause" is undefined in the regulations and therefore broadly interpreted in practice.
- *Factual Submissions*: The Proposed Regulations would clarify that references, citations and hyperlinks to documents within a submission do not incorporate the underlying information onto the official record. As a result, parties must submit printouts of websites, academic literature, and other reference information in order for them to be considered part of the record.
- *Notice of Subsequent Authority*: While an AD or CVD proceeding is ongoing, a federal court or Commerce may issue a decision directly applicable to an issue in the ongoing proceeding, and an interested party might submit a Notice of Subsequent Authority. The Proposed Regulations would require parties to file such notices at least 30 days before the deadline for the final determination.

Interested parties have until **July 10, 2023** to submit comments.

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