US Multilateral Trade Policy Developments

Japan External Trade Organization

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US Trade Actions

Section 232

US Department of Commerce Initiates Section 232 Investigation Into Imports of Neodymium Magnets

On September 24, 2021, the US Department of Commerce (DOC) announced that it had initiated an investigation pursuant to Section 232 of the Trade Expansion Act of 1962 (Section 232) to determine whether neodymium-iron-boron (NdFeB) permanent magnets "are being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security." This is the first Section 232 investigation initiated under the Biden administration.

Regarding the national security implications of such imports, DOC stated that "[c]ritical national security systems rely on NdFeB permanent magnets, including fighter aircraft and missile guidance systems." NdFeB permanent magnets are also used in electric vehicles, wind turbines, computer hard drives, audio equipment, and MRI devices. DOC's findings in the Section 232 investigation, if affirmative, would provide the President with unilateral authority to impose considerable tariffs or other restrictions on imports of the subject merchandise into the United States. By law, the Secretary of Commerce has 270 days from initiation (until June 18, 2022) to present DOC's findings and recommendations to the President.

DOC has not yet issued its Federal Register notice announcing the process and schedule for interested parties to participate in the investigation; however, the press release announcing the investigation states that interested parties are invited to submit written comments, data, analyses, or other information to DOC by November 12, 2021.

The investigation was foreshadowed by the Biden administration's June 2021 report on supply chain security, which recommended that DOC evaluate whether to initiate a Section 232 investigation on imports of NdFeB permanent magnets. The supply chain report stated that "the U.S. is heavily dependent on imports for this critical product. We recommend that the Department of Commerce evaluate whether to initiate an investigation into neodymium permanent magnets under [Section 232]."

Secretary of Commerce Gina M. Raimondo stated upon initiating the new investigation that "[t]he Department of Commerce is committed to securing our supply chains to protect our national security, economic security, and technological leadership. Consistent with President Biden's directive to strengthen our supply chains and encourage investments to shore up our domestic production, the Department initiated a Section 232 investigation on imports of NdFeB permanent magnets to determine whether U.S. reliance on imports for this critical product is a threat to our national security."

This report summarizes the legal framework for Section 232 and the prospects for the new Section 232 investigation of NdFeB permanent magnets.

Legal Framework for Section 232

Section 232 provides the Secretary of Commerce with the authority to conduct investigations to determine the effects of imports of any article on the national security of the United States. The statute authorizes the Secretary to conduct an investigation if requested by the head of any department or agency, upon application of an interested party, or upon his own motion. The Bureau of Industry and Security (BIS), within DOC, conducts the Section 232 investigation. BIS determines whether an article "is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security[.]" BIS must address three central issues in a Section 232 investigation: (1) what constitutes "national security" (for purposes of evaluating the nexus, if any, between the products in questions and US national security); (2) what "effects of imports" should be considered; and (3) when those imports "threaten to impair" the national security.

BIS must conclude its investigation no later than 270 days after initiation. If BIS finds in the affirmative, the President must, within 90 days: (1) determine whether he concurs with the finding; and, if he concurs (2) "determine the nature and duration of the action that must be taken to adjust imports of the article and its derivatives so that such imports will not threaten to impair the national security." The President must implement any such action within 15 days after making the determination.

Next Steps and Outlook for the Section 232 Investigation of NdFeB Permanent Magnets

In addition to soliciting written comments, DOC may also hold a public hearing on the investigation, but it is not required to do so, and it declined to hold public hearings in the recent Section 232 investigations of uranium and titanium sponge. If a public hearing is held, a separate Federal Register notice will be published providing the date and information about the hearing. In addition, DOC may issue questionnaires to interested parties, but it is not required to do so. DOC issued questionnaires to certain interested parties in its recent Section 232 investigation of automotive goods (and reportedly did so in the uranium investigation), but declined to do so in the steel and aluminum investigations in 2017.

DOC's initial statement on the investigation of NdFeB permanent magnets does not provide detailed information on the scope of the investigation (*i.e.*, the specific Harmonized Tariff Schedule of the United States (HTSUS) subheadings associated with the subject products). The forthcoming Federal Register notice announcing the investigation might clarify its scope, but recent agency practice indicates that this information might not be provided until much later in the investigation. However, recent trade remedy investigations of "Raw Flexible Magnets," including those containing NdFeB, have covered imports under HTSUS subheading 8505.19.10 and 8505.19.20.

The outcome of the new Section 232 investigation of NdFeB permanent magnets is difficult to anticipate. Though the previous administration declined to impose import restrictions in the majority of the Section 232 investigations it initiated (including those involving automotive goods, uranium, and titanium sponge), it did impose significant tariffs and quotas based on its Section 232 investigations of steel and aluminum imports. Moreover, while the Biden administration has not yet undertaken a Section 232 investigation, its July 2021 supply chain report highlighted specific concerns related to the structure of the supply chain, in particular its concentration in China (stating that NdFeB permanent magnets are "an example of a strategic and critical materials supply chain where one country [in this case, China] is able to maintain vertical capabilities throughout the supply chain").

The initiation of a Section 232 investigation is an important development for producers, exporters, importers, and consumers of NdFeB permanent magnets. Interested parties in the United States and abroad may therefore wish to assess (1) the risks arising from this investigation on their supply chains and trade flows; (2) factual and legal arguments protecting their commercial interests; and (3) potential near-term mitigation strategies.

More broadly, the Biden administration's decision to initiate a Section 232 investigation marks the continuation of a trend that began under the Trump administration, whereby national security considerations are increasingly influencing US trade policy. Whereas prior administrations rarely used Section 232, the Trump administration self-initiated several Section 232 cases (including on steel, aluminum, automotive goods, and transformer materials), and its willingness to use the law prompted a series of petitions from domestic industries seeking import protection under the law, which had previously been uncommon. The Biden administration's willingness to initiate a Section 232 investigation indicates that this controversial tool may remain a feature of US trade policy in the coming years, particularly given US policymakers' current concerns about supply chain security and resilience.

DOC's statement can be viewed **here**.

Trade Remedies

US Department of Commerce Issues Final Rule to "Improve Administration and Enforcement" of Antidumping and Countervailing Duty Laws

On September 20, 2021, the US Department of Commerce (DOC) published a Final Rule that significantly modifies existing regulations and creates new ones governing antidumping (AD) and countervailing duty (CVD) procedures, with the aim of "improv[ing] administration and enforcement" of the AD and CVD laws. The Final Rule concerns original AD and CVD investigations, new shipper reviews, scope inquiries, circumvention inquiries, and inquiries relating to US Customs and Border Protection ("CBP") investigations of alleged duty "evasion," and may have important implications for parties directly or indirectly involved in such proceedings. The Final Rule is based largely on DOC's Proposed Rule of August 13, 2020, but makes several changes to the Proposed Rule based on public comments and, in some instances, DOC's own initiative. Among other changes, the Final Rule:

- Modifies DOC's regulation concerning scope matters in AD and CVD proceedings, to reflect DOC's view that an affirmative scope determination "is a determination that the product has always been covered by the scope of [the] order" (this change makes affirmative determinations, at DOC's discretion, affect entries made before the inquiry's initiation regardless of whether an order's scope was previously ambiguous, and thus eliminates the distinction between formal and informal scope proceedings);
- Establishes a new regulation concerning circumvention of AD and CVD orders, which largely mirrors the new final regulation on scope matters;
- Establishes a new regulation concerning "covered merchandise referrals" received from CBP pursuant to the Enforce and Protect Act (EAPA), which largely mirrors the new scope and circumvention procedures;
- Modifies DOC's regulation concerning the submission of comments on industry support in AD and CVD proceedings, to "provide[] sufficient time for parties to submit comments and rebuttal comments, while balancing the need for Commerce to have sufficient time to consider and analyze the comments and information on the record";
- Modifies DOC's regulation regarding new shipper reviews to require that any requesting exporter or producer provide certain certifications designed to address concerns about "abuse" of such reviews; and
- Establishes a new regulation pertaining to requests for certifications from interested parties to establish whether merchandise is subject to an AD or CVD order.

This alert provides an overview of key provisions of the Final Rule. The Final Rule's provisions concerning industry support, new shipper reviews, and certifications will take effect on October 20, 2021. The Final Rule's provisions concerning scope, circumvention, and EAPA covered merchandise inquiries will apply to inquiries for which a party files a request (or that DOC self-initiates, in the case of scope and circumvention inquiries) on or after November 4, 2021. As discussed in more detail below, the preamble to the Final Rule explains how DOC will apply provisions concerning the retroactive application of affirmative scope, circumvention, and covered merchandise inquiries in light of the November 4 effective date.

Scope Inquiries and Rulings—Section 351.225

The Final Rule substantially revises 19 C.F.R. § 351.225, which previously governed scope inquiries and circumvention inquiries, although courts had interpreted the old regulation's requirements differently for each species of inquiry. The Final Rule removes circumvention inquiries from the purview of § 351.225 and establishes a new regulation dedicated solely to such inquiries (new § 351.226, discussed below). Additionally, the Final Rule eliminates § 351.225's previous distinction between an informal, scope ruling procedure (*i.e.*, a ruling based upon the application) and a formal scope inquiry. According to the preamble to its Proposed Rule, DOC intended these structural changes to "clarify and improve Commerce's procedures and standards related to scope matters." The most significant changes to § 351.225 are summarized below.

Retroactivity of scope rulings

Under revised 19 C.F.R. § 351.225(a), "a scope ruling that a product is covered by the scope of an order is a determination that the product has always been covered by the scope of that order." Accordingly, the Final Rule's changes to § 351.225(l), which sets forth suspension of liquidation rules for scope inquiries, are intended to "ensure that AD/CVDs are applied to all unliquidated entries of products found within the scope of the order, *including entries that may pre-date the date of initiation* of the scope inquiry" (emphasis added). In DOC's view, "producers, exporters, and importers are already notified that their products may be covered by the scope of an order through the publication in the *Federal Register* of Commerce's determinations," and these parties "generally cannot claim ignorance or reliance on another agency's determinations or actions to avoid the application of Commerce's scope ruling to their merchandise."

As discussed in more detail below, the Final Rule "normally" will require DOC to apply affirmative preliminary and final scope rulings to all unliquidated entries dating back to the earliest suspension date under the order, normally the preliminary determination in the underlying investigation. However, DOC has decided that, in "some limited instances," and only "based on a specific argument" in which an interested party provides "evidence establishing the appropriateness," DOC may instruct CBP to begin the suspension of liquidation "as of an alternative starting point[.]" The Final Rule therefore gives DOC discretion to limit the retroactive application of scope rulings, but only in certain circumstances.

Elimination of distinction between informal scope ruling and formal scope inquiry procedures

Like DOC's Proposed Rule, the Final Rule amends 19 C.F.R. § 351.225(a) to "eliminate[] the distinction between a simpler, or informal, scope ruling procedure (i.e., a ruling based upon the application) and a formal scope inquiry," based on further information submitted by interested parties. DOC thereby seeks not to distinguish "between scope language which is 'unambiguous' and therefore does not require 'clarification' under the section 351.225 procedures, and scope language which is 'ambiguous' and does require such 'clarification.'" Related changes throughout § 351.225 (*e.g.*, to subsections (c), (d), and (e)) similarly remove the previous distinction between an informal scope ruling procedure and a formal scope inquiry procedure, which in DOC's view "sometimes causes confusion and adds unnecessary delay to our proceedings[.]" A change via new 19 C.F.R. § 351.225(e) therefore eliminates a previous 45-day deadline for informal rulings and requires DOC instead to issue a final scope ruling within 120 days (as for formal inquiries under old 19 C.F.R. § 351.225(f)(5)), or after an additional 180 days for "good cause," up to 300 days.

Suspension of liquidation under the "single scope inquiry procedure"

To reflect the declaration in 19 C.F.R. § 351.225(a) that an affirmative scope ruling "is a determination that the product has always been covered by the scope of [the] order," the Final Rule makes the following revisions to 19 C.F.R. § 351.225(l) (which governs the suspension of liquidation and requirement of cash deposits for entries affected by DOC's scope rulings):

- New paragraphs (l)(2)(iii)(A) and (l)(3)(iii)(A) provide that, at the time of a preliminary or final scope ruling that the product is covered by the scope of an order, DOC "normally will" direct CBP to begin the suspension of liquidation of unliquidated entries that entered *before* the date of initiation of the scope inquiry, and to collect applicable cash deposits. This includes any unliquidated entries back to the first date of suspension under the order that remain unliquidated at the time of the preliminary or final scope ruling. However, new paragraphs (l)(2)(iii)(B) and (l)(3)(iii)(B) provide exceptions whereby, if DOC "determines it is appropriate to do so," DOC may direct CBP to begin the suspension of liquidation and application of cash deposits to merchandise entering "at an alternative date." DOC may limit the retroactive application of scope rulings in this manner "[i]n response to a timely request from an interested party" or at its own discretion. Where an interested party requests an alternative date, DOC "will only consider an alternative date based on a specific argument supported by evidence establishing the appropriateness of that alternative date."

The regulation does not specify the types of arguments or evidence that could justify an alternative date for the suspension of liquidation to begin. DOC's preamble to the Final Rule explains in general terms that justifying an alternative date will require "specific identification of the interested parties and entries at issue and the circumstances surrounding the declaration of the entries as non-AD/CVD type entries." By contrast, "[b]road, non-specific arguments concerning general unfairness or lack of notice" would not suffice. The Final Rule also provides one example of a circumstance in which an alternative date might be justified, *i.e.*, "situations in which Commerce issues a scope ruling that a product is covered by the scope of an order, and the affected importers have no opportunity, for no reason other than the timing of the scope ruling, to request an administrative review to potentially lower their liability for entries that pre-date the date of initiation of the scope inquiry."

According to the preamble to the Final Rule, DOC "will not apply paragraphs (l)(2)(iii) and (l)(3)(iii) in a way that would direct CBP to begin the suspension of liquidation of unliquidated entries not yet suspended, entered, or withdrawn from warehouse, for consumption prior to [the stated effective date of November 4, 2021.]" In other words, "the furthest retroactive suspension directed by [DOC] that could apply under this framework is to unliquidated entries not yet suspended, entered, or withdrawn from warehouse, for consumption, on or after [November 4, 2021]."

- Unlike previous 19 C.F.R. § 351.225(l)(2), which required DOC after a *negative* preliminary determination to have CBP *terminate* any suspensions of liquidation already in place before the scope inquiry began and to return any cash deposits from already-suspended entries, revised 19 C.F.R. § 351.225(l)(2) contains no such requirement. As a result, "any entries previously suspended would remain suspended pending completion of the scope inquiry and a final ruling on the matter."
- New 19 C.F.R. § 351.225(l)(4) similarly provides that if DOC issues a *negative* final scope determination, it will instruct CBP to terminate the suspension of liquidation and to refund cash deposits only if potentially affected entries are "not otherwise subject to suspension of liquidation as a result of another segment of a proceeding, such as a circumvention inquiry under § 351.226 or a covered merchandise inquiry under § 351.227[.]" In other words, the new Final Rule prevents DOC from lifting a scope-inquiry-related suspension of liquidation if CBP suspended liquidation of the same entry on its own authority pursuant to an EAPA investigation or if DOC instructed CBP to suspend liquidation of that entry pursuant to a simultaneous, still pending circumvention inquiry.

<u>Substantive basis for scope rulings</u>

Revisions to 19 C.F.R. § 351.225(k) (which describes the substantive basis for DOC's scope rulings) codifies a possibly hierarchical analysis that proceeds as follows:

- Pursuant to 19 C.F.R. § 351.225(k)(1), DOC always starts with the scope language itself (*i.e.*, read using no interpretive tools whatsoever);
- If that reading is not dispositive, DOC has discretion to use—as tools in interpreting an order's scope language—as many as four other sources (descriptions of the merchandise contained in the petition, descriptions of the merchandise contained in the initial investigation, previous or concurrent DOC determinations pertaining to both the order at issue and other orders with same or similar language, or International Trade Commission (ITC) determinations);
- If the above does not resolve the issue, DOC may examine any other DOC determinations, CBP rulings, industry usage, dictionaries, and any other relevant record evidence)—to determine, primarily, the intentions and interpretations of DOC, the ITC, and the injured domestic parties themselves at the time of the underlying investigation.
- Setting forth the so-called *Diversified Products* factors that DOC considers if it finds that the sources listed under 19 C.F.R. § 351.225(k)(l) are still not dispositive, revised 19 C.F.R. § 351.225(k)(2) importantly and for the first time codifies DOC's discretionary authority "normally" to prioritize the first factor—the product's technical, physical, or chemical "characteristics"—over other factors, which DOC says pertain more to the

product's context, and, regarding the latter, clarifies that DOC considers the expectations of the ultimate users, instead of the expectations of the ultimate purchasers.

Additionally, new § 351.225(k)(3) codifies DOC's analysis for "mixed media" products (*i.e.,* subject merchandise assembled or packaged with non-subject merchandise). Under this provision, if merchandise contains two or more components and the product at issue in the scope inquiry is a component of that merchandise, DOC will first analyze the scope language and other specified criteria to determine "if the component product, standing alone, would be covered by an order." If this determination is affirmative, DOC will consider the scope language to determine "whether the component product's inclusion in the merchandise as a whole results in its exclusion from the scope of the order[.]" If that analysis "does not resolve" whether the component's inclusion in the merchandise as a whole results in its exclusion from the order, DOC "will consider, as appropriate," certain "relevant factors" that may arise on a product-specific basis to make its determination. Such "relevant factors" include "[t]he practicability of separating the in-scope component for repackaging or resale, considering the relative difficulty and expense of separating the components;" "[t]he measurable value of the in-scope component" compared to the merchandise as a whole, and "[t]he ultimate use or function of the in-scope component" relative to the merchandise as a whole.

"Codification" of DOC's substantial transformation test

New 19 C.F.R. § 351.225(j) codifies the "substantial transformation" test that DOC uses to determine the country of origin of a product or products, which differs from CBP's "substantial transformation" test, and which applies such "factors" as (i) "[w]hether the processed downstream product is a different class or kind of merchandise than the upstream product"; (ii) "[t]he physical characteristics (including chemical, dimensional, and technical characteristics) of the product"; (iii) "[t]he intended end-use of the downstream product"; (iv) "[t]he cost of production/value added of further processing in the third country or countries"; (v) "[t]he nature and sophistication of processing in the third country or countries"; and (vi) "[t]he level of investment in the third country or countries." New 19 C.F.R. § 351.225(j) also retains DOC's authority to apply "any reasonable method" (including a method *other than* the substantial transformation test) to determine country of origin.[1]

Permissible contexts for addressing scope questions

The Final Rule also specifies when, other than after requests for scope inquiries, DOC may and may not answer scope questions, as follows:

- New 19 C.F.R. § 351.225(b) reflects DOC's existing view that the agency "may," outside the context of an administrative review or circumvention inquiry, self-initiate a scope inquiry, if it believes such initiation is warranted.
- New 19 C.F.R. § 351.225(i)(1) would expressly let DOC "address scope issues in another segment of the proceeding, such as an administrative review under § 351.213, a circumvention inquiry under § 351.226, or a covered merchandise inquiry under § 351.227 without conducting or completing a scope inquiry under [§ 351.227.]"
- New 19 C.F.R. § 351.225(c)(1) requires that scope ruling applications pertain to a product that "*is or has been in actual production* by the time of the filing of the application" (regardless of whether it has yet been sold or exported to the United States), thus apparently precluding certain kinds of advance scope ruling requests by foreign producers (emphasis added).
- New 19 C.F.R. § 351.225(q) "codif[ies] Commerce's authority to issue scope clarifications" in any segment of a proceeding, providing "an interpretation of specific language in the scope of an order or addressing whether a product is covered or excluded by the scope of an order at issue based on previous scope determinations covering the same or similar products[.]"

[1] In the Preamble to the Final Rule, DOC cites *Canadian Solar, Inc. v. United States*, 918 F.3d at 918-20 (Fed. Cir. 2019) to support its view that "Commerce continues to have the authority to apply a different, reasonable test to determine the country of origin of a particular product."

Discretion regarding application of scope rulings

New 19 C.F.R. § 351.225(m) provides that DOC "may apply a scope ruling to a group of products on a country-wide basis, regardless of the producer, exporter, or importer, or apply its scope ruling on a producer-specific, exporter-specific, or importer-specific basis, or a combination of any of those remedies."

Circumvention Inquiries—Section 351.226

The Final Rule removes circumvention matters from the purview of 19 C.F.R. § 351.225, which previously covered both circumvention and scope inquiries, and establishes a new regulation at 19 C.F.R. § 351.226 to address circumvention matters. DOC explained in its Proposed Rule that it views this change as necessary because there is "unique [statutory] authority for these different inquiries" and because DOC in practice "conduct[s] the two proceedings differently[.]" In other words, scope and circumvention inquiries differ both substantively and procedurally. The most significant changes to DOC's current regulations governing circumvention inquiries are summarized below.

Suspension of liquidation in circumvention inquiries

The Final Rule creates new 19 C.F.R. § 351.226(l), which includes the following rules concerning suspension of liquidation in circumvention inquiries:

- Like the revised regulation on scope inquiries, new 19 C.F.R. § 351.226(l) gives DOC discretion to apply its liquidation instructions in a circumvention inquiry to all unliquidated entries dating back to the earliest suspension date under the order, normally the preliminary determination in the underlying investigation, as opposed to the date of initiation of the circumvention inquiry. This provision dramatically changes DOC's prior rule. Per new § 351.226(l)(2)(iii)(A) and § 351.226(l)(3)(iii)(A), DOC "may," upon issuing an affirmative preliminary or final determination of circumvention, direct CBP to begin suspending liquidation and requiring cash deposits for unliquidated entries that occurred before the date of initiation of the circumvention inquiry, if DOC "determines that it is appropriate to do so[.]" DOC may exercise this authority "at the timely request of an interested party" or at its own discretion. If an interested party requests an alternative date for the suspension of liquidation to begin, DOC "will only consider an alternative date based on a specific argument supported by evidence establishing the appropriateness of that alternative date." According to the preamble to the Final Rule, DOC will not apply the above provisions "in a way that would direct CBP to begin the suspension of liquidation of unliquidated entries not yet suspended, entered, or withdrawn from warehouse, for consumption, prior to [the stated effective date of November 4, 2021]."
- In addition, new 19 C.F.R. § 351.226(l) does not require DOC to notify CBP of a negative preliminary circumvention determination, meaning that suspension of liquidation for already suspended entries (if any) will remain in effect pending DOC's issuance of a final circumvention determination.
- Where DOC has determined to address an EAPA covered merchandise referral in a circumvention inquiry, the EAPA covered merchandise referral requirements set forth in 19 C.F.R. § 351.227 (described below) will govern the retroactive suspension of liquidation for entries predating the initiation of the inquiry.

Changes to substantive criteria for circumvention determinations

The Final Rule changes some of DOC's substantive criteria for circumvention determinations, as follows:

- New 19 C.F.R. §§ 351.226(h) and (i)—which otherwise mirror previous 19 C.F.R. §§ 351.225(g) and (h), regarding products completed or assembled in the United States or other foreign countries—remove the following:
    - The statements, taken from the Statement of Administrative Action ("SAA") for the Uruguay Round Agreements Act (URAA), that "no one single factor" for determining whether processing is "minor or insignificant" under 19 U.S.C. §§ 1677j(a)(2) and 1677j(b)(2) "will be controlling"; and

- References to "the major input rule," which permits DOC to base the value of parts or components purchased from an affiliated person under 19 U.S.C. §§ 1677j(a)(1)(D) and 1677j(b)(1)(D), or of processing performed by an affiliated person under 19 U.S.C. §§ 1677j(a)(2)(E) and 1677j(b)(2)(E), on the cost of producing the part or component under 19 U.S.C. § 1677b(f)(3). This deletion occurs apparently so that DOC may also base determinations of the value of parts or components on the cost of producing the part or component under 19 U.S.C. §§ 1677b(e) (constructed value) and 1677b(c) (factors of production under the nonmarket economy methodology).

- New 19 C.F.R. §§ 351.226(j) and 351.226(k)—which otherwise incorporate previous 19 C.F.R. §§ 351.225(i) and 351.225(j), pertaining to minor alteration of merchandise under 19 U.S.C. § 677j(c) and later-developed merchandise under 19 U.S.C. § 1677j(d), respectively—*add* the following:

  - What factors DOC must consider in determining whether alterations are "minor" (*e.g.*, the overall physical characteristics of the merchandise (including "chemical, dimensional, and technical characteristics,") the expectations of the ultimate users, the use of the merchandise, the timing of the entries, and the quantity of merchandise entered during the circumvention review period); and

  - With respect to later-developed merchandise, whether the merchandise at issue was commercially available at the time of the initiation of the AD or CVD investigation.

Initiation of circumvention inquiries

Consistent with the Proposed Rule, new 19 C.F.R. §§ 351.226(b) and 351.226(c) authorize DOC to initiate a circumvention inquiry either on its own initiative or based on a request from an "interested party." In pertinent part, 19 U.S.C. § 1677(9)(A) defines "interested party" as including a "foreign manufacturer, producer, or exporter" only if it is "*of such {covered} merchandise*" (emphasis added). DOC noted in the preamble to its Proposed Rule that "whether a party is an 'interested party' is tied to the question of whether the merchandise at issue is determined to be subject merchandise, or not." Accordingly, DOC stated that "for purposes of these circumvention regulations, the term 'interested party' includes a party that *potentially* meets the definition of 'interested party' under section {19 U.S.C. § 1677(9)}, depending upon the outcome of the circumvention inquiry."

Moreover, pursuant to new 19 C.F.R. §§ 351.226(c)(1) and 351.226(c)(2), respectively, a request for a circumvention inquiry must "*allege the elements* necessary for a circumvention determination" (accompanied by reasonably available information "*supporting* these allegations") and describe the goods "*allegedly circumventing* the antidumping or countervailing duty order" (emphases added). Therefore, the proposed regulation might let a *foreign producer* request an inquiry, but not let the foreign producer's request support a *negative* final determination.

Discretion to defer, forego, or rescind circumvention inquiries

New 19 C.F.R. § 351.226(d) addresses circumstances where DOC considers that a scope ruling is warranted before it can conduct a circumvention analysis. In such circumstances, DOC may (1) initiate the circumvention inquiry and address the scope issue in the circumvention inquiry; or (2) defer initiation of a circumvention inquiry pending the completion of any ongoing or new segment of the proceeding addressing the scope issue. Additionally, revised 19 C.F.R. § 351.225(i)(1) permits DOC to address scope issues in a circumvention inquiry.

New 19 C.F.R. § 351.226(f)(6) would let DOC "rescind, in whole or in part, a circumvention inquiry," in situations where DOC (1) has issued a final determination in another segment of the proceeding that the scope of the AD or CVD order covers the merchandise at issue; or (2) has initiated an EAPA covered merchandise inquiry under new § 351.227 and determined that DOC can address the necessary elements for a circumvention determination in that proceeding.

Discretion regarding application of circumvention decisions

New 19 C.F.R. § 351.226(m)(1) interprets 19 U.S.C. § 1677j as granting DOC discretion to apply a circumvention decision on either a "producer-specific, exporter-specific, importer-specific basis, or some combination thereof," as

well as on a "country-wide basis" to all products with "the same" or "similar" relevant physical characteristics.

EAPA "Covered Merchandise Referrals"—Section 351.227

The Final Rule establishes a new regulation (19 C.F.R. § 351.227) to address procedures and standards specific to DOC's consideration of "covered merchandise referrals" that it receives from CBP pursuant to EAPA. EAPA governs the formal process by which CBP conducts civil administrative investigations of potential evasion of AD and CVD orders on the basis of allegations by interested parties or upon referral by another Federal agency.[2] If CBP is conducting an EAPA investigation based on an allegation from an interested party, and cannot determine whether the existing AD or CVD order already covers the merchandise at issue, the law requires CBP to refer the matter to DOC "to determine whether the merchandise is covered merchandise." DOC's proposed rule would govern DOC's receipt of such "covered merchandise referrals," its initiation and conduct of a "covered merchandise inquiry," and its covered merchandise determination. The most important elements of the new regulation are summarized below.

Receipt of covered merchandise referrals

New 19 C.F.R. § 351.227(b) requires that, within 20 days after receiving a sufficient covered merchandise referral from CBP, DOC must:

- Initiate a covered merchandise inquiry and publish a notice of initiation in the Federal Register; or
- If DOC determines that the issue can be addressed in an ongoing segment of the proceeding, such as a scope or circumvention inquiry, DOC will publish a notice of its intent to address the covered merchandise referral in such other segment in the *Federal Register*, rather than initiating the covered merchandise inquiry.

Case deadlines

The Final Rule sets the following deadlines for covered merchandise inquiries:

- Interested parties will have 30 days after the notice of initiation to submit comments, and 14 days thereafter to submit rebuttal comments, per new 19 C.F.R. § 351.227(d)(1);
- Interested parties will have 14 days to comment on any questionnaire responses (if DOC exercises its discretion to issue questionnaires), and 7 days thereafter to submit rebuttal comments per new 19 C.F.R. § 351.227(d)(2);
- The proposed regulation sets no requirement or deadline for DOC to issue a preliminary determination. However, interested parties will have 14 days to comment on any preliminary determination, and 7 days thereafter to submit rebuttal comments, per new 19 C.F.R. § 351.227(d)(3)—so long as DOC does not otherwise specify and DOC does not issue the preliminary determination concurrently with the initiation of the covered merchandise inquiry.
- DOC must make its final determination within 120 days, with a possible extension by no more than 150 days (making the total time 270 days), if DOC determines that "good cause" exists to warrant an extension) per new 19 C.F.R. § 351.227(c).

Basis for covered merchandise determinations

New 19 C.F.R. § 351.227(f) permits DOC to base its response to CBP's EAPA covered merchandise referral on either:

- "the analysis described in paragraphs (j) and (k) of [19 C.F.R.] § 351.225," which set forth the bases for DOC's country of origin determinations and scope rulings, respectively; or

[2] EAPA was enacted in Title IV of the Trade Facilitation and Trade Enforcement Act of 2015 (P.L. 114-125).

- "Any provision under [19 U.S.C. § 1677j]" regarding the four forms of circumvention, described in new 19 C.F.R. § 351.227(h)-(k).

This new rule is significant, because pending litigation in the US Court of International Trade is still in the process of determining whether a DOC circumvention determination made after an importer already entered the merchandise can support an EAPA allegation that the importer, in declaring the imported merchandise to be outside the scope of an order, entered the merchandise by means of a material false statement or a material omission, to "evade" paying AD or CVD.

Suspension of liquidation

New 19 C.F.R. § 351.227(l), which concerns the suspension of liquidation, requires DOC to take the following actions when initiating a covered merchandise inquiry and issuing preliminary and final covered merchandise determinations:

- Upon initiation, DOC will direct CBP to continue suspending liquidation of entries of products subject to the covered merchandise inquiry that were already subject to the suspension of liquidation, and to apply the cash deposit rate that would be applicable if the product were determined to be covered by the scope of the order.
- Upon issuing an affirmative preliminary or final covered merchandise determination:
    - DOC will direct CBP to continue the suspension of liquidation and apply cash deposits for previously suspended entries;
    - DOC will direct CBP to begin the suspension of liquidation and require cash deposits for unliquidated entries that occurred after the initiation of the inquiry; and
    - DOC "normally will" direct CBP to begin the suspension of liquidation and require cash deposits for unliquidated entries that occurred prior to the date of initiation of the inquiry. However, unlike the corresponding provisions of 19 C.F.R. §§ 351.225(l) and 351.226(l), which govern suspension of liquidation in scope and circumvention inquiries, respectively, 19 C.F.R. § 351.227(l) does not specify the circumstances in which DOC might choose an alternative date for the retroactive suspension of liquidation in covered merchandise inquiries, nor does it contemplate requests from interested parties on this topic. According to the preamble to the Final Rule, DOC intends its use of the term "normally" to give DOC "the flexibility in covered merchandise inquiries to apply, depending on the nature of the product at issue in the covered merchandise referral, rules for the suspension of liquidation and cash deposits in a manner appropriate to the situation," which includes "establishing a specific alternative retroactive suspension date."

As the preamble to its Final Rule also states, DOC will not apply the above provisions "in a way that would direct CBP to begin the suspension of liquidation of unliquidated entries not yet suspended, entered, or withdrawn from warehouse, for consumption, prior to the effective date [of November 4, 2021]."

- If DOC issues a negative final covered merchandise determination, CBP will terminate the suspension of liquidation and refund cash deposits, provided that the entries are not otherwise subject to suspension of liquidation as a result of another segment of a proceeding, such as a circumvention inquiry under 19 C.F.R. § 351.226.

Discretion regarding application of covered merchandise determinations

New 19 C.F.R. § 351.227(m) gives DOC discretion to apply a covered merchandise determination "[t]o all products from the same country with the same relevant physical characteristics, (including chemical, dimensional and technical characteristics) as the product at issue, on a country-wide basis, regardless of the producer, exporter or importer of those products."

New Shipper Reviews—Section 351.214

Under current law, foreign exporters or producers who did not export a product covered by an AD or CVD order to the US during the original AD or CVD investigation can obtain their own individual dumping margin or countervailing duty rate on an accelerated basis (referred to as a "new shipper review").[3] DOC's regulation implementing this statutory requirement, set forth at 19 C.F.R. § 351.214, provides the rules regarding requests for new shipper reviews and procedures for conducting such reviews.

The Final Rule amends 19 C.F.R. § 351.214 to reflect certain statutory changes enacted in 2016 as part of the EAPA, which DOC interprets as (1) removing the ability for importers to post AD/CVD-specific bonds or security in lieu of AD/CVD cash deposits; (2) newly requiring that the individual dumping margin or countervailing duty rate determined for a new shipper be based on *bona fide* sales in the United States; and (3) codifying the factors that DOC has historically used to determine whether a sale is *bona fide*. As a result of these statutory changes, the Final Rule makes the following amendments to 19 C.F.R. § 351.214:

- Revisions to 19 C.F.R. § 351.214(b) require that, in requesting a new shipper review, an exporter or producer must not only satisfy the export or sale requirement but must also demonstrate the existence of a *bona fide* sale. To demonstrate the existence of a *bona fide* sale, the exporter or producer must provide certain information regarding the unaffiliated customer, namely: (1) a certification from the exporter or producer that it will provide, to the fullest extent possible, "necessary information related to the unaffiliated customer in the United States during the new shipper review;" and (2) a certification by the unaffiliated customer of its willingness to participate in the new shipper review and provide relevant information if requested by DOC, or an explanation as to why the unaffiliated customer cannot do so. In addition, the revised 19 C.F.R. § 351.214(b) would require additional documentation, including information pertaining to whether shipments were made in commercial quantities, the date of any subsequent sales, and circumstances surrounding the sale, such as price, expenses, resale for profit, and the arm's-length basis of the sale. Revisions to 19 C.F.R. § 351.214(d) and new 19 C.F.R. § 351.214(f)(3) specify that DOC will reject a request for a new shipper review where the above requirements are not satisfied, and that DOC may rescind a new shipper review if (1) DOC considers that the information necessary to conduct a *bona fide* sale analysis is not on the record; or (2) the producer or exporter has failed to demonstrate the existence of a *bona fide* sale to an unaffiliated customer.
- Revisions to 19 C.F.R. § 351.214(e) eliminate language that previously required DOC to allow, at the option of the importer, the posting of an AD/CVD-specific bond or security in lieu of an AD/CVD cash deposit. Under the revised 19 C.F.R. § 351.214(e), DOC would direct CBP to suspend or continue to suspend liquidation of any relevant unliquidated entry of subject merchandise at the applicable cash deposit rate.
- New 19 C.F.R. § 351.214(k) specifies the factors DOC will consider in making a *bona fide* sale determination, including whether the parties in the transaction were established for purposes of the sale(s) in question after the imposition of the order, whether the parties have other lines of business unrelated to the subject merchandise, the quantity of sales, and "any other factor" that DOC determines to be relevant with respect to "the future selling behavior of the producer or exporter, including any other indicia that the sale was not commercially viable."

According to DOC, the new requirements address concerns expressed by Congress regarding the "abuse" of new shipper reviews, and conform DOC's regulations to the statutory changes set forth in the EAPA.

The Final Rule's amendments to 19 C.F.R. § 351.214 apply to new shipper reviews for which a new shipper review request is filed on or after October 20, 2021.

[3] 19 U.S.C. § 1675(a)(2)(B).

Certifications—Section 351.228

The Final Rule establishes a new regulation (19 C.F.R. § 351.228) that "sets out procedures for complying with certification requirements that Commerce may impose on interested parties in the context of AD and CVD proceedings," and "sets out consequences for a party's failure to satisfy certification requirements." Under new 19 C.F.R. § 351.228(a), DOC has the authority to determine in the context of an AD or CVD proceeding that an importer or other interested party "shall":

- Maintain a certification for entries of merchandise into the customs territory of the United States;
- Provide a certification by electronic means at the time of entry or entry summary; or
- Otherwise demonstrate compliance with a certification requirement as determined by DOC, in consultation with CBP.

If an importer or other interested party does not provide the required certification, or provides a certification that contains "materially false, fictitious or fraudulent statements or representations," or "material omissions," DOC "may," pursuant to new 19 C.F.R. § 351.228(b), instruct CBP to: (1) suspend liquidation of that party's entries and require the importer to post a cash deposit at the applicable AD or CVD rate; and (2) instruct the CBP to assess antidumping or countervailing duties, as the case may be, at the applicable rate.

Added 19 C.F.R. § 351.228 applies on or after October 20, 2021.

Comment Period on Industry Support Prior to Initiation Determination—Section 351.203

The AD and CVD laws give DOC 20 days after the filing of an AD or CVD petition to determine whether facts have satisfied the elements necessary for initiation of an investigation, including the requirement to demonstrate industry support.[4] In "exceptional circumstances," the law permits DOC to extend the 20-day period to a maximum of 40 days solely for purposes of determining industry support. Previously, interested persons could comment on industry support up to and including the scheduled date of DOC's initiation determination. The Final Rule modifies the applicable regulation at 19 C.F.R. § 351.203 to provide for the establishment of a deadline for comments no later than five business days before the scheduled date of initiation; and rebuttal comments no later than two days thereafter. According to DOC, this change "is reasonable because it provides sufficient time for parties to submit comments and rebuttal comments, while balancing the need for Commerce to have sufficient time to consider and analyze the comments and information on the record within the normal timeframe established by Congress."

The Final Rule's amendments to 19 C.F.R. § 351.203 apply to segments of the proceeding for which a petition is filed on or after October 20, 2021.

Outlook

The Trump administration touted DOC's Proposed Rule as evidence of its commitment to "defending the interests of American workers and the vigorous enforcement of our trade remedy laws," and the Biden administration's Final Rule has adopted the core elements of the Proposed Rule with relatively minor modifications. As shown above, the Final Rule reaches far and wide, procedurally and substantively. Of all the changes to current regulations, the provisions allowing affirmative scope, circumvention, and covered merchandise determinations to affect entries made before DOC initiated such inquiries are likely to have the most dramatic impact.

The Final Rule can be viewed **here**.

[4] 19 U.S.C. §§ 1673a and 1671a, respectively.

US Department of Commerce Issues Affirmative Final Determinations in Antidumping Duty Investigations of Thermal Paper from Germany, Japan, South Korea, and Spain

On September 27, 2021, the US Department of Commerce (DOC) announced its affirmative final determinations in the antidumping duty (AD) investigations of thermal paper from Germany, Japan, South Korea, and Spain. In its investigations, DOC determined that imports of the subject merchandise were sold in the United States at the following dumping margins:

Country	Dumping Margin
Germany	2.90%
Japan	135.06 to 140.25%
South Korea	6.19%
Spain	37.07 to 41.45%

The scope of these investigations covers thermal paper in the form of "jumbo rolls" and certain "converted rolls." The scope covers jumbo rolls and converted rolls of thermal paper with or without a base coat (typically made of clay, latex, and/or plastic pigments, and/or like materials) on one or both sides; with thermal active coating(s) (typically made of sensitizer, dye, and co-reactant, and/or like materials) on one or both sides; with or without a top coat (typically made of pigments, polyvinyl alcohol, and/or like materials), and without an adhesive backing. Jumbo rolls are defined as rolls with an actual width of 4.5 inches or more, an actual weight of 65 pounds or more, and an actual diameter of 20 inches or more (jumbo rolls). The merchandise subject to these investigations may be classified in the Harmonized Tariff Schedule of the United States (HTSUS) under subheadings 4811.90.8030 and 4811.90.9030.

The US International Trade Commission (ITC) is scheduled to issue its final determinations in these investigations by November 8, 2021. If the ITC makes affirmative final determinations that a US industry is materially injured by reason of imports of the subject merchandise, DOC will issue antidumping orders.