

International Trade

ADVISORY

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USTR REQUESTS PUBLIC COMMENTS ON SPS AND STANDARDS RELATED MEASURES THAT CREATE BARRIERS TO TRADE

Regulations governing standards, licensing, or certification requirements in foreign jurisdictions often create more serious market access barriers to U.S. products than traditional border measures like tariffs and quotas. The Obama Administration has invited companies to bring such barriers to its attention. If your company faces these types of non-tariff barriers, this provides an important opportunity to engage the Administration to help address these barriers.

On September 24, 2009, the Office of the United States Trade Representative (USTR) issued a Federal Register notice requesting public comments on sanitary and phytosanitary (SPS) and standards-related measures that may be inconsistent with international trade agreements or that otherwise create barriers to U.S. exports. USTR requested these comments in advance of two new annual reports that will, for the first time, draw particular attention to trade barriers in the form of SPS and standards-related measures. The deadline for comments is November 4, 2009.¹

STANDARDS-RELATED MEASURES

Standards-related measures in foreign markets impact a wide range of U.S. products and industries. These measures may take the form of technology mandates, mandatory process or design standards, labeling or registration requirements, or in-country testing or certification procedures. Examples of the types of standards-related measures for which comments may be appropriate include:

- Requirements that products implement specific technologies or standards, particularly where these requirements diverge from international standards or norms;
- Mandatory testing or certification requirements, particularly where these are redundant and/or require the use of in-country testing or certification entities;
- Exclusion of foreign technology owners from domestic standards-setting organizations;
- Requirements that technology owners who participate in standards-setting organizations agree to license their technologies at below-market rates; and
- Labeling or packaging requirements that are costly, burdensome, discriminatory, or lack a sound scientific or technical basis.

¹ The same notice also requests comments for the 2010 National Trade Estimate Report on Foreign Trade Barriers, but these comments are not due until November 18, 2009.

SPS MEASURES

Innovative companies, particularly those in the life sciences and biotech industries, may also face trade barriers in the form of SPS measures. Such measures are generally applied to protect the life or health of humans, animals, and plants from risks associated with additives, contaminants, pests, toxins, or diseases. These measures may take various forms, including specific product, processing, or inspection standards; quarantine regulations; sampling and testing requirements; and health-related labeling measures. Examples of the types of SPS measures for which comments may be appropriate include:

- Annual licensing requirements imposed on foreign but not domestic businesses;
- Regulations requiring quality assurance testing at the border on a lot-by-lot basis;
- Requirements that foreign suppliers provide testing equipment;
- Bans on the inclusion in drug products of any material from producers who have not been domestically certified;
- Bans on vaccines or other pharmaceuticals manufactured from genetically modified organisms; and
- Excessive fees or delays associated with mandatory testing or certification.

In addition to comments on specific SPS and standards-related measures, USTR has also invited comments that identify systemic issues affecting one or more sectors. Such issues might include trends or patterns in SPS or standards-related measures that create barriers to U.S. exports or actions that create or perpetuate such barriers.

Comments should also include an estimate of the potential increase in U.S. exports that would result from removing the trade barrier, as well as a description of the methodology the commenter used to produce the estimate. Commenters providing information on foreign trade barriers in more than one country should provide separate submissions for each country.

TRADE POLICY EXPERTISE

Covington & Burling is well positioned to assist companies facing such non-tariff barriers in drafting comments. Ambassador John Veroneau recently served as Deputy USTR, where he had broad supervisory responsibilities over U.S. trade policy. He previously served as USTR General Counsel, responsible for U.S. trade law and litigation activities. Marney Cheek served as USTR Associate General Counsel and advised the agency on a broad range of trade policy issues, including standards, biosafety, and environmental regulation. Several other Covington attorneys, including Lisa Peets, Laurie Self, and Marty Hansen, have advised leading innovative pharmaceutical and high-tech companies, and their trade associations, on standards-related trade barriers for over a decade.

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