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Scope, Circumvention, New Shippers: Key Rule Changes

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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 focuses on the new rule's effect in three areas: scope inquiries, circumvention inquiries and new shipper reviews.

As discussed below, many of the regulatory amendments, which went into effect in October and November 2021, are sensible updates to the Commerce Department's regulations, designed to conform the regulations to statutory changes and to reflect agency practice.

Certain changes may be challenged in court because they erect hurdles for parties involved in scope and circumvention inquiries and new shipper reviews, and permit the Commerce Department to apply scope and circumvention determinations in a retroactive manner.

Through scope and circumvention inquiries and new shipper reviews, the Commerce Department addresses different issues that may arise under anti-dumping and countervailing duty orders. For example, because the "scope" in such orders is usually written broadly, questions often arise about whether a specific product is covered by the scope and thereby subject to anti-dumping and countervailing duty tariffs.

Through a scope inquiry, the Commerce Department determines whether a product is within the scope of a particular order.

Through a circumvention inquiry, the Commerce Department determines whether a product that is outside the scope of an order can nevertheless be subject to tariffs because it is circumventing the order in one of the four manners prescribed by law — e.g., the product is altered in some minor way to remove it from the scope of the order.[2]

New shipper reviews provide a process through which an exporter or producer that did not export subject merchandise during the period of an anti-dumping and countervailing duty investigation, and is not affiliated with such a party, may seek an individual tariff rate on an expedited basis.

The recent amendments to the Commerce Department's regulations created separate circumvention

regulations for the first time, and updated existing regulations for scope inquiries and new shipper reviews.

Noteworthy procedural and substantive changes resulting from these amendments are discussed below. The discussion below is not intended to be exhaustive of all the amendments to the scope, circumvention and new shipper regulations, and practitioners should consult the Commerce Department's final rule for additional amendments.

Procedural Changes to Scope and Circumvention Inquiries

One of the more important and welcome procedural changes to scope inquires is that the Commerce Department has agreed to keep the public better apprised of these inquiries through the Federal Register. These rulings are important to the U.S. importing community because importers are expected to keep track of them in order to determine whether their products are subject to anti-dumping and countervailing duty tariffs.

In the past, only certain parties associated with the relevant order were made aware that applications for scope inquiries had been filed with the Commerce Department, and the agency's publication of information regarding scope-inquiry determinations in the Federal Register was inconsistent.

Under the new regulations, the Commerce Department is publishing in the Federal Register (1) a list of scope applications received on a monthly basis; (2) any determination to self-initiate a scope inquiry; and (3) a list of all final scope rulings on a quarterly basis.

Parties requesting scope rulings were often frustrated. The Commerce Department's deadlines for scope inquiries were merely hortatory and the agency sometimes took a long time to issue such rulings. Thus, another important and welcome procedural change is that the agency has adopted seemingly mandatory deadlines for scope inquiries.

Following receipt of an application, the Commerce Department now has 30 days to either initiate a scope inquiry or notify the applicant of its intent to address the scope issue in another segment of the proceeding, such as an administrative review, circumvention inquiry or covered merchandise inquiry.[3] If the agency fails to act, a scope inquiry is deemed initiated after the 31st day.

The Commerce Department is now also required to issue a final scope ruling within 120 days — extendable to 300 days — of initiation; however, the agency may align its scope deadlines with the deadlines of another segment of the proceeding.[4]

In practice, this may be an important caveat because in some cases, depending on when such an alignment occurs — e.g., where a scope inquiry is aligned long after its initiation with a fully-extended administrative review that is recently initiated — the aligned scope-inquiry deadline could far exceed the 300-day maximum.

In time, we should learn whether the Commerce Department will avoid such alignments or whether they will be commonplace thereby eliminating the predictability provided by a 300-day maximum deadline.

For both scope and circumvention inquiries, the revised regulations also establish new deadlines for the submission of factual information and comments. Following initiation based on a request for a scope or

circumvention inquiry, interested parties besides the requester will have 30 days to file factual information and comment on the agency's decision, followed by a 14-day rebuttal period.[5]

In scope and circumvention inquiries, the Commerce Department may require parties to file questionnaire responses, in which case the amendments provide deadlines for parties to file rebuttal and surrebuttal factual information and comments.

Where the Commerce Department issues a preliminary scope or circumvention determination, the amendments provide deadlines for parties to file affirmative and rebuttal comments.

This process should be welcomed by and familiar to practitioners because it matches the process for submission of rebuttal and surrebuttal information and comments in investigations and administrative reviews.

During the rulemaking process, some commentators expressed concern that they would need additional time to analyze questionnaire responses and submit information or comments in rebuttal. In response, the Commerce Department helpfully adopted longer deadlines for such submissions than the agency initially proposed.

Substantive Changes to Scope and Circumvention Inquiries

Perhaps the most significant substantive changes to scope and circumvention inquires resulting from the amendments is the Commerce Department's decision to strengthen its enforcement efforts by applying the resulting determinations with a stronger retroactive effect.

Under the prior rules, the Commerce Department did not typically apply scope or circumvention determinations to entries occurring prior to the initiation of the inquiry.[6] Now, the agency will normally apply scope determinations to all unliquidated entries, regardless of entry date.

For example, if the agency issues a scope determination finding a particular product within the scope of an order, that determination will normally apply to all unliquidated entries, even goods that entered the U.S. long before initiation of the scope inquiry.

Similarly, for circumvention determinations, the revised regulations provide that the Commerce Department will apply such determinations also to all unliquidated entries — even those occurring prior to the initiation date — where it deems it appropriate to do so.

Although Commerce did not spell out in the regulation what appropriate circumstances would be for such a retroactive application, the preamble indicates that it might be appropriate where a party is circumventing an order in a manner similar to that which the agency has previously recognized as circumvention.[7]

This preambulatory language suggests that the Commerce Department believes that it may be appropriate to apply tariffs retroactively in circumvention inquiries where parties arguably had notice that their behavior could constitute circumvention because similar behavior was already found to constitute circumvention.

The Commerce Department's new approach of retroactively applying scope and circumvention

determinations to entries occurring prior to the date of initiation of the inquiry may be subject to legal challenge.

In 2020, the U.S. Court of Appeals for the Federal Circuit concluded in United Steel and Fasteners Inc. v. U.S. that the Commerce Department may not retroactively apply a scope ruling to unliquidated entries made prior to the initiation of a scope inquiry.[8]

While that decision was based on a plain reading of the prior regulation, there are important notice concerns implicated whenever the Commerce Department applies tariffs retroactively.

Indeed, the Commerce Department, itself, noted in the preamble to the prior regulation that it would be extremely unfair to subject goods to tariffs without prior notice.[9]

Moreover, in the context of circumvention inquiries, the Commerce Department's retroactive application of tariffs raises additional concerns because circumvention determinations pull goods under an order which, prior to that determination, were firmly outside the scope of the order.

In the end, the courts may need to decide whether the agency is properly exercising its enforcement authority or has crossed the line and created an unfair process, particularly for U.S. importers.

Another important substantive change promulgated in the scope and circumvention regulations is that the Commerce Department has clarified that these inquiries can result in determinations that are either company-specific or countrywide.[10]

With respect to scope inquiries, this codified existing practice because scope determinations normally apply to all products from the subject country with the same physical characteristics, regardless of the producer or exporter.

Circumvention inquiries, in contrast, were normally company-specific. Indeed, some information the Commerce Department analyzes in circumvention inquires is company-specific in nature.[11] It remains to be seen how often the agency will apply circumvention determinations on a countrywide basis under the new regulation.

Many aspects of the amendments will not result in significant changes to scope and circumvention inquiries, but are noteworthy because they codify important agency practice or judicial precedent.

For example, with respect to scope inquiries, the Commerce Department (1) codified its substantial transformation test for determining the country of origin; (2) clarified that the inquiry will begin with the plain language of the order in response to Federal Circuit precedent; and (2) codified the agency's mixed-media test.

Likewise, with respect to circumvention inquiries, the Commerce Department has (1) codified the factors it considers for a minor-alterations analysis; (2) codified its commercial-availability test for later-developed merchandise; and (3) clarified that, for products completed or assembled in the U.S. or other foreign countries, the cost of producing parts or components may be calculated under one of two established approaches.

This codification of agency practice and judicial precedent is welcome because it provides practitioners with greater clarity and predictability regarding how the agency will conduct these inquiries.

New Shipper Reviews

The Commerce Department amended its new shipper regulations largely to clarify the requirements for requesting companies. Perhaps the most important of these amendments implement statutory changes enacted in the Trade Facilitation and Trade Enforcement Act,[12] particularly the requirement that an anti-dumping and countervailing duty tariff rate determined for a new shipper may be based only on a bona fide sale.

The amendments codify the circumstances of sale that the Commerce Department is statutorily required to examine when determining if the sale is bona fide, including price, commercial quantities, timing, expenses, resale at a profit and arms-length nature of the sale.

The statute also provides that the Commerce Department may examine any other factor it determines may be relevant to whether the sale is likely to be typical of the new shipper's sales after the completion of the review.

The regulatory amendments provide that these factors include whether the parties to the sales transaction were established after imposition of the anti-dumping and countervailing duty order, whether the parties have lines of business unrelated to the subject merchandise and the quantity of sales.[13]

Requiring that a new shipper review be based only on a bona fide sale makes sense. Parties could abuse the new shipper process, particularly for an anti-dumping order, if they were able to receive their own rate based on a sale that was constructed only for purposes of qualifying as a new shipper and not indicative of their future selling behavior.

However, in making a bona fide sale determination, it is important for the agency to appreciate the context in which new shippers often arise. These shippers are often subject to very high anti-dumping and countervailing duty tariffs applicable to nonreviewed companies. It is therefore not surprising that a new shipper would be able to make only relatively few or unique sales.

Perhaps in recognition of this context, at least in part, the Commerce Department did not accept proposals that would have required multiple sales to meet the bona fide standard, or establish a rule that a single or low number of sales would rarely be considered bona fide.[14]

In time, we will learn how strenuously the agency is interpreting the new bona fide regulatory requirement, and whether it effectively bars bad actors from the U.S. market or significantly impedes legitimate new entrants.

New shipper reviews are based on sales to unaffiliated customers in the U.S., and another noteworthy amendment to the new shipper regulations relates to information from such customers. The Commerce Department has created for the first time a regulatory requirement that a new shipper certify that it will provide, to the greatest extent possible, necessary information pertaining to its unaffiliated customer.

The Commerce Department also requires a new shipper to file, as part of its request for a new shipper review, a certification by its unaffiliated customer expressing the customer's willingness to participate in the new shipper review or, if such a certification cannot be provided, an explanation from the new shipper why that is the case.

Because information from unaffiliated customers may be needed to determine whether the sale is bona fide, determining whether such customers will cooperate with requests for information before initiating a new shipper review could be helpful.

The Commerce Department may be able to avoid initiation of reviews which it would not be able to complete because such customers are unwilling to provide the agency with necessary information.

It is unclear however, whether information from unaffiliated parties is always necessary for a new shipper review, particularly in the context of countervailing duty orders where the focus is on level of subsidization rather than a sales price to an unaffiliated customer in the U.S.

Moreover, because the parties are unaffiliated, the new shipper may have no way to compel its customer to comply with requests for information from the Commerce Department. Indeed, in the preamble to the prior regulation, the Commerce Department recognized that requiring these types of certifications from new shippers could discourage meritorious claims.[15]

In time, we will learn whether the agency will interpret these certification requirements reasonably, in a manner with which new shippers can comply, or in overly burdensome way that discourages legitimate new shippers from requesting reviews.

Conclusion

While these regulatory amendments are a welcome update to the Commerce Department's rules, particularly as they provide greater clarity regarding how to request scope and circumvention inquiries and new shipper reviews, certain aspects of the amendments — particularly with respect to the retroactive application of some of the agency's determinations — raise legal issues that may face judicial challenge.

Here are some practices to consider adopting in response to these amendments.

- Practitioners should monitor the Federal Register for scope applications, notice of which the Commerce Department will now publish on a monthly basis, to determine whether their client's merchandise may become the subject of a scope inquiry.

- When requesting a scope inquiry to determine whether a client's products are subject to an order, a practitioner should carefully consider the timing of such a request because, for example, waiting can now subject a client to retroactive tariff liability extending to entries occurring prior to the initiation of the inquiry if the client's merchandise is determined to be within the scope of an order.

- Practitioners considering whether to request a new shipper review should analyze whether the sale or sales satisfy the recently codified bona fide sale factors, in order to determine whether the Commerce Department is likely to find that the sale can be the basis for a new shipper review.

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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).

[2] The law provides that circumvention can occur under any of the following four scenarios: (1) products completed or assembled in the U.S., (2) products completed or assembled in other foreign countries, (3) minor alterations of merchandise, and (4) later-developed merchandise. 19 U.S.C. §§ 1677j(a)-(d).

[3] 19 C.F.R. § 351.225(d)(1)-(2).

[4] Id. § 351.225(e)(3).

[5] Id. §§351.225(f)(1)-(2), 351.226(f)(1)-(2). In the event of self-initiation, the requester may also file initial factual information and comment.

[6] While the prior regulations allowed Commerce to apply scope or circumvention determinations to entries occurring prior to initiation where such entries were already suspended, it was uncommon for these circumstances to occur in practice. Moreover, the Federal Circuit has repeatedly found that application of such determinations to entries occurring prior to initiation was impermissible. See, e.g., United Steel and Fasteners Inc. v. U.S., 947 F.3d 794, 801-03 (Fed. Cir. 2020); AMS Assocs. Inc. v. U.S., 737 F.3d 1338, 1343-44 (Fed. Cir. 2013).

[7] 19 C.F.R. §351.226(l)(2)(iii)(A), (l)(3)(iii)(A).

[8] See United Steel and Fasteners, 947 F.3d at 801-03 (concluding that the prior version of 19 C.F.R. § 351.225(l)(3) "does not allow suspension of liquidation before a scope inquiry").

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

[10] 19 C.F.R. §§351.225(m), 351.226(m).

[11] See, e.g., 19 U.S.C. §1677j(a)(3)(B).

[12] Public Law No. 114-125, 130 Stat. 122 (2016).

[13] 19 U.S.C. §1675(a)(2)(B)(iv); 19 C.F.R. §351.214(k). Under the statute and regulation, the Commerce Department may also consider any other factor it deems relevant.

[14] Final Rule, 86 Fed. Reg. at 52,308-10.

[15] 1997 Preamble, 62 Fed. Reg. at 27,319.