Commerce Proposal Could Ease Trade Remedy Administration

By **Natan Tubman** (September 19, 2024)

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On July 12, the U.S. Department of Commerce's International Trade Administration issued a proposed rule and requested comments on regulations enhancing the administration of the antidumping and countervailing duty trade remedy laws.[1]

Commerce's proposed rule includes approximately 25 discrete changes that seek to ease the agency's administrative burden, codify its existing procedures and methodologies, and create or revise regulatory provisions relating to a variety of technical matters.

As the comment period closed on Sept. 10, it is important that parties that will be affected understand these possible regulatory changes.

Easing the Administrative Burden — Reduced and Streamlined Submissions

Certain parts of the proposed rule appear designed to facilitate Commerce's administration of antidumping and countervailing duty proceedings.

For example, revising Title 19 of the Code of Federal Regulations, Section 351.104(a)(7), aims to allow Commerce to cite administrative determinations without actually placing those same decisions on the administrative record of the proceeding in which Commerce is making a determination.

This change and several others are designed to reduce administrative burdens on Commerce's case teams by either creating a regulatory basis purporting to establish that the agency is not required to upload certain determinations, or, in other instances, by shifting the burden to the trade bar.

Such changes would include requiring executive summaries and a table of contents in case briefs;[2] specific references to material that is being rebutted, clarified or corrected;[3] and, where applicable, citations to ACCESS barcodes stamped on documents filed on Commerce's online docketing system.[4]

There are several key points here.

First, with this rule Commerce is saying that even if certain determinations are not yet published or otherwise available to the public, it may still rely on those decisions. This could allow a certain amount of streamlining across multicountry proceedings that have a staggered publication schedule.

Second, the rule could be leveraged in the future to avoid putting long decision memoranda onto the docket of a particular segment, but that remains to be seen.

Third, it is important to note that as many parties are represented by firms with limited institutional knowledge of Commerce's policies and procedures, and others attempting to participate pro se, these regulations streamline filings with easy-to-digest summaries and citations that make documents easy to locate, and elevate the expectation that parties involved in proceedings before the enforcement and compliance unit will have a higher level

of awareness and sophistication.

Codification of Existing Practice

Other proposed changes under the rule appear to be codification of Commerce's existing practice, or modest revision thereof. These regulatory updates include a range of issue areas.

For example, the update would codify and update Commerce's methodology for determining whether an entity exporting merchandise from a nonmarket economy, or NME, should receive an antidumping duty rate separate from that of the NME entity.

New Section 351.108 leans heavily on Commerce's existing practice for assessing whether an entity is de jure and de facto separate from the NME government for purposes of export determinations.

Adding a new Section 351.109 would address Commerce's methodologies for selecting respondents in investigations and administrative reviews, including the steps Commerce would take to determine the number of exporters or producers that it is practicable to investigate or review for calculating the all-others rate in investigations, and for calculating a rate for unexamined exporters and producers.

For trade practitioners, this category of updates is particularly interesting not because it includes novel concepts. Rather the codification of long-standing practices shows maturation in Commerce's ongoing dialogue with the U.S. Court of International Trade and the U.S. Court of Appeals for the Federal Circuit.

Relatedly, Commerce's timing in codifying these practices is significant.

Even before the U.S. Supreme Court overturned 40 years of Chevron deference with its June 28 decision in Loper Bright Enterprises v. Raimondo, Commerce was well-aware of this possible outcome.

So, it should come as little surprise that, as the Supreme Court abrogated deference for agencies' interpretation of statutory ambiguity, Commerce was considering how it would assert that courts should defer to it in a post-Loper Bright world.

Accordingly, Commerce's response appears to be promulgating regulations that either elevate the weight of the legal authority on which it makes its determinations or increase the odds of receiving judicial deference to the extent that it remains, such as Auer deference that would only apply in the context of ambiguous regulations.

Modification of Existing Regulations

The lion's share of changes in the proposed rule modify a wide range of technical issues.

These modifications include revising Section 351.107 to better describe how Commerce establishes and applies cash deposit rates, including explaining that some cash deposit rates are calculated on an ad valorem basis at importation, while others are calculated on a per-unit basis.

A similar corresponding change to Section 351.212(b) would clarify that entries may be assessed either on an ad valorem value or per-unit basis.

The proposal would also modify Section 351.306(a)(3) to clarify that Commerce may share business proprietary information with U.S. Customs and Border Protection officials involved in negligence, gross negligence or fraud investigations. This reflects that Commerce continues to work closely with CBP to administer trade remedies laws as well as to prevent evasion under the Enforce and Protect Act.

It also adds provisions to Section 351.308 to reflect that, pursuant to Section 776 of the act, Commerce may apply partial or total facts available, may use previously calculated dumping margins and countervailable subsidy rates in separate segments of the same proceeding without the need to corroborate those margins or rates, and may use the highest dumping margin available as adverse facts.

This is not new, but here again we see Commerce, which had not gotten around to updating the relevant regulatory provisions to reflect changes made to the statute in 2015, making these changes in a sort of minibus-style regulatory update.

In the context of its subsidy rules, Commerce has made various modifications to technical rules for assessing certain programs, such as contingent liabilities, policy loans, direct taxes, export subsidies and when a foreign government provides more than adequate remuneration for goods.

It also remains to be seen how Commerce will deploy other regulations such as the provision of more than adequate remuneration for goods.

Historically, Commerce has been reluctant to countervail that type of program, and it is not clear that the addition of this regulation is a watershed moment after which Commerce would be more eager to use this particular tool.

It is possible that this could end up being in the vein of regulations on countervailing currency manipulation or labor, which although on the books Commerce has been reluctant to actually use.

Commerce also revised regulations that cover groups of companies and situations where there is cross-ownership, and Commerce must determine whether to attribute the subsidies received by an investigated company's cross-owned affiliate to the investigated company itself.

This type of change reflects the reality that parties in Commerce proceedings often have complex organizational structures through which they are able to hide many types of support from foreign governments. Hopefully, these modifications will build some momentum for Commerce vigorously enforcing trade laws, maximizing relief to American companies that have been adversely affected by unfair trade.

Conclusion

With the steady movement toward an increasingly regulated trade framework, it is important for interested parties to remain vigilant for changes that can disrupt the trajectory of their industries and the continuity of business.

This proposed rule reflects that trend. It remains to be seen what Commerce will adopt as the final rule, but interested parties should view this as an important signal from Commerce on the direction of its trade enforcement.

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[1] Regulations Enhancing the Administration of the Antidumping and Countervailing Duty Trade Remedy Laws, 89 Fed. Reg. 57,286 (Dep't Commerce July 12, 2024).

[2] Proposed Rule at 57,304.

[3] Proposed Rule at 57,302.

[4] Proposed Rule at 57,305.