

Commerce Proposes Wide-Ranging Regulations for Antidumping and Countervailing Duty Proceedings, With Reduced Court Deference Lurking in the Rulemaking Process

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The U.S. Department of Commerce (“Commerce”) earlier this month proposed a set of wide-ranging revisions and additions to its regulations (i.e., the “Proposed Rule”) for antidumping and countervailing duty (“AD/CVD”) proceedings. The Proposed Rule would alter procedural and substantive aspects of Commerce’s AD/CVD regulations. Interested parties can provide comments on the Proposed Rule via the electronic docket, available on [Regulations.gov](https://www.regulations.gov), until September 10, 2024 (U.S. Eastern Standard Time).

Although many of the regulatory changes simply reflect current Commerce practices in AD/CVD proceedings, their codification in Commerce regulations would ensure they remain Commerce’s practice until modified through notice and comment rulemaking or an adverse court decision. Commerce goes to great length in tying various aspects of the Proposed Rule to prior AD/CVD cases, and judicial review of those proceedings, as a way to show they merely are a refinement of Commerce’s existing regulations to reflect current practice. Some of the changes described below, however, include key additions or alterations to Commerce’s regulations, including some that were not previously announced by Commerce.

The initial part of this eUpdate highlights some key changes to AD/CVD cases generally, followed by two sections describing some specific changes to market economy and then non-market economy (“NME”) AD/CVD cases. NME cases most frequently involve goods from China and Vietnam. As this is merely a Proposed Rule, it is subject to further change and revision. However, we expect such changes will be marginal given that much of the rule simply reflects current Commerce practice. Finally, the eUpdate concludes with a brief summary of judicial review of Commerce’s AD/CVD proceedings, and how that will imminently change because of the U.S. Supreme Court’s recent decision in *Loper Bright Enterprises v. Raimondo* and *Relentless v. Department of Commerce* (collectively, “*Loper Bright*”).^[1]

Key Changes to All AD/CVD Cases.

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The following are key changes that apply to market economy and NME cases alike.

1. **Use of Adverse Facts Available.** Commerce applies adverse facts available (“AFA”) when information is missing from an administrative record, or if an interested party failed to respond to questionnaires to the best of its ability. Commerce may apply total AFA to calculate an AD/CVD rate, or partial AFA, which limits the adverse inference to a particular issue. In the Proposed Rule, Commerce will codify its practice of application of AFA. In AD cases, Commerce will use any previously calculated dumping margin in the same AD proceeding. In CVD cases, Commerce may use the same or similar program in a CVD proceeding involving the same country (e.g., Commerce frequently uses as AFA subsidy rates in China cases calculated in a prior China proceeding).
2. **Revisions to Certain Specified Subsidies.** Commerce proposes to update its regulations relating to certain types of subsidies in CVD cases, such as those for disaster relief, employment assistance, and loans. The Proposed Rule would codify certain Commerce practices relating to the treatment of benefits under those types programs.
3. **Cross Ownership and Attribution of Subsidies.** Commerce proposes significant changes to its regulations relating to attributing subsidies to entities that are cross-owned with the producer of subject merchandise. In particular, Commerce proposes to provide a ten-factor test to consider when an input is linked to subject merchandise. Commerce calls this analysis “highly fact-intensive of all of the information on the record.” In addition to expanding the amount of material that interested parties will submit to Commerce on this issue, the regulatory change also shifts the analysis from whether the input is from a cross-owned “supplier” to one that is a “producer.” Prior to the Proposed Rule, Commerce’s cross-ownership analysis was set forth in numerous cases.
4. **Cross-Owned Utility and Service Providers.** In a significant change, Commerce proposes regulations allowing investigation of potential subsidies to any supplier of electricity, natural gas, or similar utilities that is cross-owned by the respondent. In particular, Commerce proposes that subsidies to the utility producer are countervailable if 25% or more of the utility from the supplier goes to the cross-owned producer, or if 25% or more of the supplier’s utility producer goes to the producer. These rules are in addition to Commerce’s regularly used authority to countervail subsidies for utilities provided to a producer at less than market rates. Commerce also proposes to investigate service providers, such as those that may provide research and development, tolling, or engineering services, if those services are critical inputs to the manufacture of the subject merchandise. The Proposed Rule expands the scope of cross-owned affiliate activities and programs that now routinely will be investigated in AD/CVD proceedings.
5. **High-Inflation CVD Investigations.** Commerce proposes a new regulation that would allow indexing of countervailable benefits for countries experiencing high inflation. Noting that Commerce’s current practice has been “inconsistent,” Commerce proposes to take into account the inflation-adjusted benefits received in high-inflation economies using data from the International Monetary Fund or government-published indices of the rate of inflation. The indexing would alter the benefits received and the sales denominators to the end of the period of investigation or review. Although Commerce has used modified methods of calculating values in AD investigations in Turkey and Argentina, it has not consistently done so for high-inflation CVD cases in those countries.
6. **Change of Subsidies.** Commerce’s current regulation allows it to lower the CVD cash deposits if a subsidy was revoked or changed after the period of investigation or review, but before the relevant determination. In its Proposed Rule, Commerce calls

this current regulation “fundamentally unfair” since it only allows the lowering of CVD rates, but provides no comparable way to increase the CVD rate for U.S. petitioners in the cases. Commerce accordingly proposes to revoke the regulatory provisions allowing it to adjust the CVD deposit rate.

Key Changes to Market Economy Cases.

We summarize key changes proposed to Commerce’s conduct of market economy cases. Commerce considers any country a market economy, unless it is an NME (see below for list of NMEs).

1. **Constructed Value Profit Calculations.** In AD proceedings, Commerce compares a measure of the exporter’s normal value prices against U.S. prices to determine if the U.S. prices are below normal value, and thus dumped. However, in some cases, there is no basis for normal value because the exporter has insufficient or distorted sales in the home and third-country markets. In those situations, Commerce constructs values based on costs, plus an amount for profit and selling expenses. Commerce’s Proposed Rule would codify its existing practice of selecting a basis for normal value profit, which includes a multi-factored comparison of surrogate values. The constructed value profit measure often has a significant impact on the size of AD margins.
2. **Selection of Respondents.** Commerce proposes to codify its practice of using data from U.S. Customs and Border Protection (“CBP”) to select mandatory respondents based on the largest volume of exports to the United States (usually one or two under current practice). Commerce also proposes to codify its ability to issue and rely on quantity and value questionnaires to determine exporters representing the largest foreign shippers of subject merchandise to the United States for purposes of selecting mandatory respondents in AD cases. Commerce’s mandatory selection process typically involves excluding many foreign exporters from being selected as respondents, which prevents their own sales data from being used as the basis for their AD margin.
3. **Calculation of All Others Rate.** Commerce typically only calculates AD margins for one or two mandatory respondents, and then assigns an average of the two for all other foreign companies that were not selected as mandatory respondents in the case. Commerce proposes to codify this practice, including the circumstances under which it will disregard a mandatory respondent rate for purposes of calculating the rate that applies to all other companies.

Key Changes to Non-Market Economy Cases.

We provide summaries of key changes proposed to Commerce’s conduct of non-market economy (“NME”) cases. Commerce currently considers the following countries to be NMEs: Armenia,^[2] Azerbaijan, Belarus, China, Georgia, the Kyrgyz Republic, Moldova, Russia,^[3] Tajikistan, Turkmenistan, Uzbekistan, and Vietnam.^[4]

1. **Separate Rate Applications (“SRAs”).** Commerce proposes to codify and modify its current practice of reviewing SRAs. An SRA is required in an NME AD case for an exporting company to demonstrate its independence from the NME government, and thus to receive a “separate” rate that is usually lower than the NME-wide AD rate (which usually is higher, and based on AFA). Commerce presumes that an exporter is affiliated by law or in fact with the NME government unless the exporter submits an SRA proving otherwise. In a change under the Proposed Rule, SRAs would now be

due within 14 days of the publication of the initiation of the AD investigation or AD administrative review, which is less than half of the current 30-day deadline for submission of the SRA. This tight timeframe will be difficult for NME exporters to meet given they often are unprepared for an AD case on the subject merchandise. In addition, Commerce's Proposed Rule would presume an exporter is ineligible for a separate rate if the NME government: (1) is a majority owner of the exporter; or (2) is a 50% or minority owner but (i) exercises significant, disproportionate influence over key decisions; (ii) can veto key decisions; (iii) has officials, employees, or representatives in key positions of authority; or (iv) holds power under applicable law, corporate documents, or other requirements to appoint its officials, employees, or representatives to key positions of authority. If the SRA applicant satisfies that initial hurdle by showing that none of the control factors exist, the applicant also must show that there are no additional indicia of *de jure* or *de facto* NME government control. In the Proposed Rule, Commerce expands the multi-factor tests that it had developed over the past three decades under these two additional criteria to consider additional evidence that an NME government exerts control over an exporter. Commerce justifies the codification and modification of this practice by reference to cases involving China, which Commerce says has demonstrated the need for an expanded multi-factor test to ensure SRAs demonstrate independence from the NME government. Consistent with longstanding practice, Commerce proposes an exemption for NME exporters that are wholly owned by non-NME parent companies, but this exemption only applies if the parent company is both incorporated in and headquartered in non-NME countries. These modified SRA criteria could make it more challenging for NME exporters to obtain separate rates.

2. **Combination Cash Deposit Rates.** The Proposed Rule would codify Commerce's practice of applying AD/CVD cash deposit rates for specified producer and exporter combinations in NME cases. This aspect of the Proposed Rule would mean that exporters must ensure their SRA specify with particularity all producers of subject merchandise, in addition to the exporter-applicant submitting the SRA.
3. **Selection of Mandatory Respondents.** In NME cases, Commerce's practice is to select mandatory respondents based on issuance of quantity and value questionnaire responses, and by selecting the largest exporter or exporters of subject merchandise to the United States. Commerce's Proposed Rule leaves this practice largely intact.
4. **Separate Rates Versus NME-Entity Rates.** Commerce has long distinguished between the NME-wide rate, which is usually an adverse (and very high) rate, and the rate that applies to SRA submitters that demonstrate their independence from the NME government. The Proposed Rule would codify this practice, ensuring Commerce can continue to assign high rates to companies that fail to submit SRAs, or demonstrate independence from the NME government. In addition, the SRA rates are codified under the Proposed Rule as averages of the mandatory respondent rates, except that zero or adverse rates are disregarded in calculating the average (often meaning that only one mandatory respondent rate becomes the applicable rate for SRA companies).
5. **Selection of Surrogate Value Country.** In NME cases, Commerce calculates normal value based on the exporter or producer's factors of production, which are assigned values from a surrogate country at a similar level of economic development. The Proposed Rule would codify Commerce practice of using either *per capita* Gross National Income or *per capita* Gross Domestic Product to assess a potential surrogate country's comparability with the country under investigation. Commerce also proposed to codify its multifactor approach to determining the best surrogate country by looking at overall size, the composition of exports, the availability and accessibility of potential surrogate data sources, and other record information.

Judicial Review of Commerce AD/CVD Rulemaking and Proceedings.

Commerce's rulemaking comes in the wake of the U.S. Supreme Court's landmark ruling in *Loper Bright*. The U.S. Court of International Trade ("CIT") and U.S. Court of Appeals for the Federal Circuit ("CAFC") regularly review Commerce's AD/CVD proceedings as a result of complaints by interested parties. Prior to the Supreme Court's decisions in *Loper Bright*, the CAFC had held that courts should defer in many instances to Commerce's interpretation of its governing statute and regulations under *Chevron U.S.A. Inc. v. Natural Resources Defense Council* ("*Chevron*").

Loper Bright, however, overturned *Chevron*, which means that the CIT and CAFC's review of Commerce's interpretations of law now may involve no deference, making Commerce's regulations and administrative rulings more susceptible to challenge through judicial review. The Supreme Court held that reviewing courts should invalidate agency statutory interpretations unless the court agrees that interpretation represents the "best" interpretation, with the court using its standard tools of statutory interpretation.

Whether the CIT and CAFC, in practice, will view *Loper Bright* as requiring the courts to regularly strike down Commerce's AD/CVD regulations and administrative determinations remains to be seen. Before *Loper Bright*, the CIT and CAFC often deferred to Commerce's interpretations of law, regularly remanding determinations, but rarely finding that Commerce unlawfully misconstrued its statutory authority under *Chevron*. Under *Loper Bright*, the CIT and CAFC may begin to invalidate Commerce's statutory interpretations, potentially including its regulations, with greater frequency because of the Supreme Court's holding that they should review for the "best" legal interpretation. This standard for judicial review could affect pending AD/CVD cases before the CIT and CAFC, and may encourage even more challenges to Commerce's AD/CVD decisions. This situation could create significant uncertainty whether recent determinations in Commerce AD/CVD proceedings (or even promulgated regulations such as the Proposed Rule) could become subject to judicial review. The liquidation (final duty assessment) of import entries subject to AD/CVD proceedings already are years-long under the retroactive imposition of liquidation rates through yearly administrative reviews and judicial challenges of those reviews. This additional uncertainty could lead to even more protracted delays.

[1] The Supreme Court's decision in *Loper Bright* is available on [SupremeCourt.gov](https://www.supremecourt.gov).

[2] The Government of Armenia asked Commerce to reconsider the country's status as an NME country for antidumping purposes in 2023. That request remains under review.

[3] In November 2022, Commerce reversed its post-Soviet recognition of Russia's market-economy status and reverted to its NME methodology for Russia. A [press release from the International Trade Administration](#) is available.

[4] The Government of Vietnam asked Commerce to reconsider the country's status as an NME country for antidumping purposes in 2023. That request remains under review.