

# Commerce Issues Final Rule Implementing Pause on Possible Circumvention Duties on Solar Panels

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The US Department of Commerce (Commerce) has finalized its proposed regulations (Final Rule) implementing Presidential Proclamation 10414.<sup>[1]</sup> In Proclamation 10414, US President Joe Biden temporarily waived the application of any antidumping (AD) or countervailing (CVD) duties on entries of silicon photovoltaic cells and modules (CSPVs) that are completed in Cambodia, Malaysia, Thailand or Vietnam and using parts and components manufactured in the People's Republic of China (PRC) that are subject to the ongoing circumvention inquiry on CSPVs from the PRC (SA-Completed CSPVs).<sup>[2]</sup>

In general, the Final Rule retains the structure of the proposed regulations and pauses the possible imposition of AD or CVD circumvention duties or estimated duties on CSPVs that are subject to the current circumvention proceedings.<sup>[3]</sup> However, the Final Rule introduces an important qualification: That these SA-Completed CSPVs “must be utilized in the United States” by the “Utilization Expiration Date,” which is 180 days after the end of the presidential waiver of any AD/CVD duties.<sup>[4]</sup> This qualification may be difficult to implement and adds some degree of uncertainty as to the application of this temporary waiver on the duties. The Final Rule also authorizes potentially troubling certifications to accompany SA-Completed CSPVs in the event of an affirmative preliminary or final circumvention determination. The Final Rule does not take effect until November 15, 2022.

## IN DEPTH

### TERMINATION OF WAIVER

Commerce’s waiver of the imposition of any AD/CVD duties or cash deposits is in effect until the “Date of Termination.”<sup>[5]</sup> Consistent with Proclamation 10414, the “Date of Termination” means June 6, 2024, or the date the emergency described in Proclamation 10414 has been terminated—whichever occurs first.<sup>[6]</sup>

Thus, consistent with Proclamation 10414, the Final Rule provides that there is some possibility that the AD/CVD waiver of duties could cease prior to June 6, 2024. Section 362.103(b)(2) of the Final

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Rule addresses the steps Commerce will take in the event that the emergency is terminated prior to June 6, 2024, but following an affirmative preliminary or final determination of circumvention.<sup>[7]</sup> Notably, Commerce would be able to order the suspension of liquidation and the collection of cash deposits on merchandise that entered on an alternative later date following the Date of Termination. Commerce does not provide what that alternative date might be but simply states that it would be “an appropriate date that is on or after the Date of Termination.”<sup>[8]</sup>

This provision was added in response to requests to include a grace period in the event of an early termination.<sup>[9]</sup> While Commerce declined to add a grace period (declaring that such a request was “premature”), it did note that, in the one instance where similar presidential authority to waive duties had been exercised (duty-free importation of lumber in 1947), President Biden granted the industry six weeks to prepare for the end of duty-free importation.<sup>[10]</sup> Thus, should President Biden decide that the emergency has ceased prior to June 6, 2024, it appears likely that there would be at least some notice of such termination before the reimposition of cash deposit requirements.

## **DEADLINE FOR UTILIZATION OF SA-COMPLETED CSPVs**

The Final Rule introduces a new condition that, in order to qualify for this waiver, the SA-Completed CSPVs “must be utilized in the United States by the Utilization Expiration Date,” which is 180 days following the Date of Termination.<sup>[11]</sup> That is, assuming the waiver terminates on June 6, 2024, the SA-Completed CSPVs must be utilized by December 3, 2024. The Final Rule provides that “utilization and utilized” means the SA-Completed CSPVs will be used or installed in the United States.<sup>[12]</sup> The Final Rule further provides that “[m]erchandise which remains in inventory or a warehouse in the United States, is resold to another party, is subsequently exported, or is destroyed after importation is not considered utilized.”<sup>[13]</sup>

Commerce explained that it introduced the utilization condition in response to concerns about “stockpiling” CSPV imports. Specifically, Commerce stated: “It is not Commerce’s goal to have merchandise that enters before the Date of Termination be used in projects long into the future, as the emergency declared by the President exists at this very moment.”<sup>[14]</sup> This new condition only applies to CSPV entries after November 15, 2022 (the effective date of the Final Rule). Thus, entries prior to that date will not be subject to this condition.

It is not entirely clear how Commerce will implement this utilization condition. Presumably, Commerce will require some type of certification as to when or how a company expects to utilize the CSPVs. The fact that this provision does not go into effect until November 15, 2022, and will only be necessary should Commerce issue a preliminary affirmative circumvention determination (Commerce’s preliminary circumvention determinations are not currently due until November 28, 2022) may provide Commerce time to implement a certification requirement. However, any certification will be with respect to activities that happen after the CSPVs have been entered into the United States, which will be difficult to implement—that is, it is not clear how, or whether, Commerce or the US Customs and Border Protection (CBP) would try to verify that such utilization will or did occur by the Utilization Expiration Date.

## **CERTIFICATION REQUIREMENT**

The Final Rule also provides Commerce the authority to require certifications to accompany SA-Completed CSPVs. Specifically, 19 C.F.R. § 362.104 provides that “[n]othing in this section shall preclude the Secretary from requiring certifications . . . in the event of an affirmative preliminary or final determination in the Solar Circumvention inquiries.” While Commerce’s Final Rule explains that

it will continue to use the certification requirements in place as an enforcement tool to monitor imports of CSPVs that are “either Chinese or Taiwanese in origin and covered by the current AD/CVD duty orders,”<sup>[15]</sup> its Final Rule could be interpreted as allowing certifications for purposes other than monitoring existing orders. The Final Rule does not provide any clarification as to why such certifications might be required for other purposes or what the consequences are for failing to provide such certifications.

## SUMMARY OF POSSIBLE LIABILITY FOR AD/CVD DUTIES

Under the Final Rule, even if there have been affirmative circumvention determinations, no resulting AD/CVD estimated duties will be applied to SA-Completed CSPVs that have been entered into the United States or withdrawn from the warehouse for consumption before the Date of Termination and for use by the Utilization Date. Thus, assuming no change to the June 6, 2024, termination date outlined in Proclamation 10414, companies should be able to import SA-Completed CSPVs up to June 6, 2024, without the risk of paying AD/CVD duties, provided that they (1) are able to utilize those CSPVs in the United States by the December 3, 2024, utilization date and (2) are able to provide whatever certification of this utilization that Commerce and CBP may require.

There is some risk that President Biden could decide that the emergency that formed the basis for Proclamation 10414 has ended before this June 6, 2024, date and could therefore lift the waiver of any AD/CVD circumvention duties prior to this date. Should that be the case, as noted above, the Final Rule leaves open the possibility of some grace period after an announcement of the termination of the emergency before duty liability could begin; however, they do not provide for any specific grace period.

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## ENDNOTES

<sup>[1]</sup> *Procedures Covering Suspension of Liquidation, Duties and Estimated Duties in Accord with Presidential Proclamation 10414*, 87 Fed. Reg. 56,868 (Dep’t Commerce Sept. 16, 2022) (to be codified in 19 C.F.R. §§ 362.101, et seq.) (*Final Rule*); see generally *Proclamation 10414 of June 6, 2022: Declaration of Emergency and Authorization for Temporary Extensions of Time and Duty-Free Importation of Solar Cells and Modules from Southeast Asia*, 87 Fed. Reg. 35,067 (June 9, 2022) (*Proclamation 10414*).)

<sup>[2]</sup> See *Proclamation 10414*, 87 Fed. Reg. at 35,068.

<sup>[3]</sup> *Procedures Covering Suspension of Liquidation, Duties and Estimated Duties in Accord with Presidential Proclamation 10414*, 87 Fed. Reg. 39,426 (Dep’t Commerce July 1, 2022).

<sup>[4]</sup> *Final Rule*, 87 Fed. Reg. at 56,870.

<sup>[5]</sup> *Final Rule*, 87 Fed. Reg. at 56,870.

<sup>[6]</sup> *Final Rule*, 87 Fed. Reg. at 56,886 (to be codified at 19 C.F.R. § 362.102).

<sup>[7]</sup> *Final Rule*, 87 Fed. Reg. at 56,887.

<sup>[8]</sup> *Final Rule*, 87 Fed. Reg. at 56,887.

<sup>[9]</sup> *Final Rule*, 87 Fed. Reg. at 56,880.

[10] *Final Rule*, 87 Fed. Reg. at 56,880.

[11] *Final Rule*, 87 Fed. Reg. at 56,886 (to be codified in 19 C.F.R. § 362.102).

[12] *Final Rule*, 87 Fed. Reg. at 56,886 (to be codified in 19 C.F.R. § 362.102).

[13] *Final Rule*, 87 Fed. Reg. at 56,886 (to be codified at 19 C.F.R. § 362.102).

[14] *Final Rule*, 87 Fed. Reg. at 56,879.

[15] *Final Rule*, 87 Fed. Reg. at 56,869.

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