

# DOC SLIDES

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# Circumvention Inquiries: New Regulations

*Regulations to Improve Administration and Enforcement of Antidumping and Countervailing Duty Laws, 86 FR 52300 (September 20, 2021)*

- Before these regulations were issued, circumvention inquiries were covered by Commerce's scope regulations at 19 CFR 351.225, which did not provide a great deal of clarity on certain matters unique to the administration and enforcement of circumvention proceedings.
- The new regulations, found at **19 CFR 351.226**, are now targeted specifically to the administration and enforcement of circumvention proceedings. They codify much of Commerce's circumvention practice and procedures.
- The circumvention regulations became effective on **November 4, 2021**.



## Circumvention Inquiries: The Roadmap

During this presentation we will cover the following:

- 1) The four types of circumvention found in the statute and the elements Commerce must consider for each of those types of circumvention;
- 2) The deadlines and procedures set forth in the new circumvention regulation, 19 CFR 351.226;
- 3) The remedies which may apply following a circumvention determination;
- 4) The certifications under the new regulation 19 CFR 351.228 and how they are applied in the context of circumvention determinations;
- 5) The differences between a country-of-origin analysis under a scope inquiry proceeding and a third country completion or assembly circumvention determination; and
- 6) The means by which interested parties may participate in circumvention proceedings.



# Circumvention Inquiries: Section 781 of the Tariff Act of 1930

Under existing United States law, “Circumvention” entails four scenarios:

## 1) Merchandise Completed or Assembled in the United States

- Merchandise sold in the United States is of the same class or kind of merchandise as that subject to an antidumping or countervailing duty order;
- Merchandise is completed or assembled from parts from the foreign country to which the order applies;
- The process of assembly or completion in the United States is minor or insignificant; and
- The value of the parts or components at issue is a significant portion of the total value of the merchandise.

## 2) Merchandise Completed or Assembled in Other Foreign Countries

- Merchandise imported into the United States is of the same class or kind of merchandise as that subject to an antidumping or countervailing duty order;
- Merchandise is completed or assembled in a third country from parts or components from the foreign country to which the order applies;
- The process of assembly or completion in the third country from parts from the foreign country minor or insignificant;
- The value of the parts or components at issue is a significant portion of the total value of the merchandise;
- Commerce determines that action under this provision would prevent evasion of the order.



# Circumvention Inquiries: Section 781 of the Tariff Act of 1930

Under existing United States law, “Circumvention” entails four scenarios (continued):

## 3) Minor Alterations

- Merchandise subject to an order is altered in form or appearance in minor respects.

## 4) Later-Developed Merchandise

- Merchandise developed after the initiation of an investigation may be determined to be covered by an order. Commerce considers the following in determining if later-developed merchandise is covered by an order:
  - If the later-developed merchandise has the same general physical characteristics as the merchandise originally covered by the order;
  - The expectations of the ultimate purchasers of the later-developed merchandise are the same as for the earlier product;
  - The ultimate use of the later-developed product is the same as that of the earlier product;
  - The later-developed merchandise is sold through the same channels of trade as the earlier product;
  - The later-developed merchandise is advertised and displayed in a manner similar to the earlier product.

It is important to note that **transshipment** of merchandise through third countries or certain types of **evasion** of the antidumping and countervailing duty laws through means such as mislabeling, false invoices and fraudulent paperwork are not covered by our circumvention laws. Those issues are covered by other areas of United States law, most frequently addressed by Customs and Border Protection.



## Circumvention Inquiries: Initiation (19 CFR 351.226)

- Under section **351.226(b)**, Commerce may self-initiate a circumvention inquiry if it determines that information available to it warrants such an inquiry. When Commerce initiates an inquiry, it will publish a notice of initiation in the *Federal Register*.
- Section **351.226(c)** lists the type of information which Commerce requires of interested parties if they wish to request initiation of a circumvention inquiry.
  - Information required includes:
    - physical characteristics of the product;
    - the country or countries where the product is produced and/or exported;
    - the product's tariff classification and the uses of the product;
    - names and addresses of producers, exporters and importers of the product;
    - supporting factual information, such as schematic drawings, specifications, standards, photographs, and marketing materials; and
    - other information specific to the alleged circumvention and addressing the relevant factors listed in section 781 of the Act (such as a description of why assembly or completion in the United States or a third country is allegedly minor or insignificant).
- Section **351.226(c)** provides that all of these requirements are dependent on a “reasonably available” standard, because naturally certain parties (such as competitors or the domestic industry) will not have as much information available to them about a product as the producer or exporter will have available to them.



## Circumvention Inquiries: Deadlines (19 CFR 351.226)

- Section **351.226(d)** states that unless Commerce rejects a circumvention inquiry request within 30 days after it is filed, (unless extended by 15 days), Commerce will initiate a circumvention inquiry.
- Section **351.226(e)** provides for deadlines following initiation:
  - 150 days to issue a Preliminary Determination.
  - 300 days to issue a Final Determination.
  - If Commerce determines a case is “extraordinarily complicated,” it may extend the Final Determination by another 65 days.
  - If Commerce determines it is appropriate to do so, Commerce may align a circumvention inquiry with another ongoing segment (like an administrative review), at which time the (later) deadlines for that review would apply to the inquiry instead of the above deadlines.





# Circumvention Inquiries: Key Dates for Participation

- Section **351.226(f)** provides most of the significant filing deadlines for a circumvention inquiry:
  - Within 30 days after Commerce initiates a circumvention inquiry, interested parties are permitted one opportunity to submit comments and new factual information addressing the self-initiation or circumvention request.
  - Within 14 days after the filing of comments and new factual information, any interested party can file comments and new factual information to REBUT, CLARIFY or CORRECT factual information submitted by other interested parties.
  - Commerce may issue questionnaires and verify submissions received, where appropriate, after initiation. If Commerce issues questionnaires and receives responses, interested parties have 14 days after the responses are filed to submit comments and factual information to REBUT, CLARIFY or CORRECT factual information contained in those responses, and the original submitter is provided 7 days to then submit comments and factual information to REBUT, CLARIFY or CORRECT the interested parties' rebuttal, clarification or correction.
    - In the case of a circumvention inquiry covering a nonmarket economy, parties must also submit surrogate value suggestions. This usually happens after initial questionnaire responses have been filed. This submission is in addition to the questionnaire deadlines set forth in 351.226(f)(3).
  - After Commerce issues a Preliminary Circumvention Determination, parties have 14 days to submit comments, and any interested party may submit rebuttal comments within 7 days thereafter. It is important to note that unless Commerce says otherwise, "no new factual information will be accepted in the comments or rebuttal comments" at this stage.





# Circumvention Inquiry Timeline and Process: Key Dates for Participation

## Initiation of inquiry (publication of notice in the *Federal Register*)

Comments and factual information filed addressing the inquiry request from interested parties: *within 30 days.*

Response from the requestor (can include factual information): *within 14 days of the filing of the interested party's comments.*

**19 CFR 351.226(f)(2)**

## Respondent Selection

Commerce may issue quantity and value questionnaires to collect information from parties subject to the inquiries.

Commerce may select a reasonable number of respondents to examine in the inquiry.

**19 CFR 351.226(f)(3)**

## Questionnaires

Comments and factual information on the questionnaire response from interested parties: *within 14 days after a questionnaire response is filed.*

Response from the questionnaire submitter (can include factual information): *within 7 days of the filing of interested party comments.*

**19 CFR 351.226(f)(3)**

## Preliminary Determination

Unless otherwise specified: any interested party can submit comments *within 14 days after the issuance of a preliminary circumvention determination.*

Rebuttal comments are due *within 7 days thereafter.*

No new factual information will be accepted in comments or rebuttal comments.

**19 CFR 351.226(f)(4)**



# Circumvention Inquiries: Entries, Cash Deposits and Duties

- Section **351.226(l)** addresses the different scenarios under which a circumvention finding would apply to entries of merchandise subject to an inquiry.
  - Under Commerce's retrospective system, importers of merchandise subject to an AD/CVD order must pay cash deposits on their entries. Entries subject to an AD/CVD order generally are described as "Type 03" entries; entries not subject to an AD/CVD order generally are described as "Type 01" entries.
  - If Commerce finds that certain merchandise is circumventing an AD or CVD order, Commerce will direct Customs and Border Protection to treat certain "Type 01" entries of a specific product as "Type 03" entries, and Customs and Border Protection will start collecting cash deposits on those entries under the AD or CVD order at issue.



# Circumvention Inquiries: Entries, Cash Deposits and Duties

- Section **351.226(l)** – The rules for affirmative determinations are explained below:
  - 1) When Commerce initiates a circumvention inquiry, nothing will change at the border (entries that are subject to duties will continue to pay cash deposits and those which are NOT subject to duties will not pay cash deposits).
  - 2) When Commerce issues an affirmative preliminary (or final) determination, for imports that are not currently subject to duties at the border, Commerce will direct CBP to start collecting duties at the applicable cash deposit rate on or after the date of initiation.
  - 3) If an interested party requests and provides evidence that CBP should start collecting duties at an alternative, earlier date, Commerce may determine based on the facts on the record that the collection of duties should start for entries made at the earlier date.

*\*In the Preamble, Commerce explained that the evidence required to warrant application of duties to pre-initiation entries would have to go beyond the evidence required to establish circumvention of the order under the relevant criteria.*

*\*Commerce will not direct CBP to apply duties to imports not already paying cash deposits prior to November 4, 2021, the effective date of the regulation.*



## Circumvention Inquiries: Application of Remedies

- Section **351.226(m)** specifies that Commerce can apply circumvention determinations on different bases for the product under inquiry.
  - 1) It can be applied on an importer, exporter or producer specific basis, or any combination of those, or
  - 2) It can apply a circumvention determination on a country-wide basis (regardless of the parties) to all imports of the product at issue.
- Commerce determines its remedies on a case-by-case basis, applying the “appropriate remedy to address circumvention and to prevent evasion of the order.”



# Circumvention Inquiries: Application of Remedies

## What Rate Applies?

- 1) If Commerce finds that **circumvention is not occurring**, **no duties apply** to the merchandise at issue in the inquiry.
- 2) If Commerce **finds circumvention** of an AD/CVD order, but **applies that determination only on an importer-, exporter-, or producer-specific basis**, then importers of **all other entries of merchandise** subject to the inquiry **will pay no duties**.
- 3) If Commerce **finds circumvention** of an AD/CVD order and **applies that determination on a country-wide basis**, **duties will apply to all imported merchandise** subject to the inquiry **unless a certification by the company is allowed** pursuant to **19 CFR 351.228**.
- 4) If Commerce finds circumvention, entries of merchandise subject to the enquiry will subject to the applicable AD/CVD rates.





# Circumvention Inquiries: Certifications

## Certifications under 19 CFR 351.228

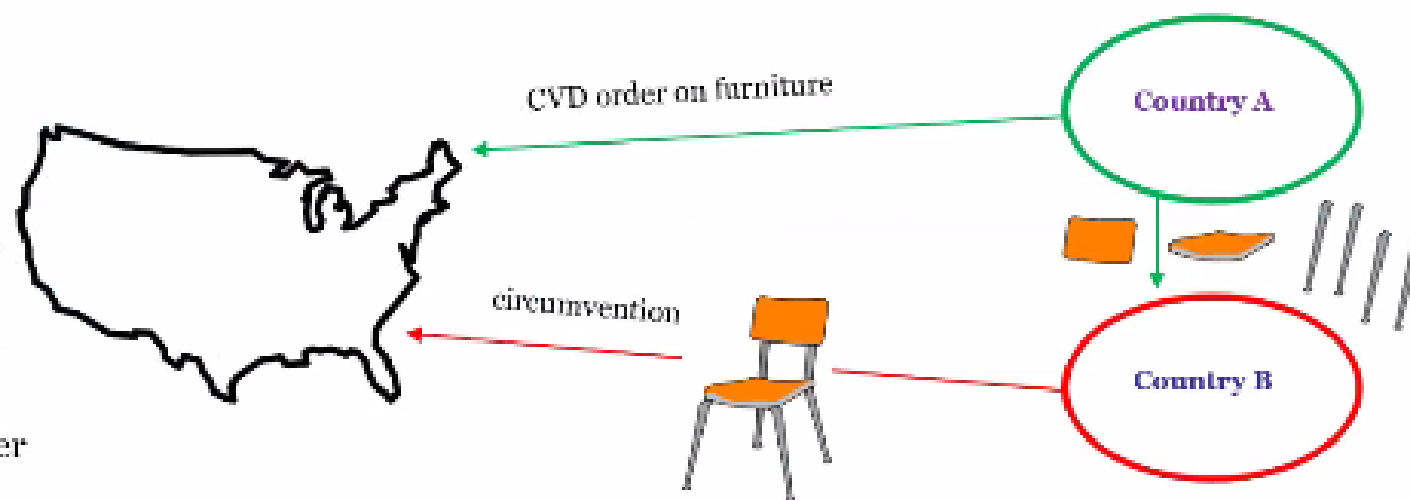
- In the circumvention context, Commerce has historically used certifications for importers and other interested parties to certify that they did not import/export merchandise to the United States subject to a circumvention inquiry.
- For example, if there is an AD/CVD order covering Italian merchandise, and the alleged circumvention involved merchandise completed in Kenya using specific Italian inputs, Commerce might make its circumvention finding on a country-wide basis. In that situation:
  1. Kenyan companies that do not use those Italian inputs might be able to certify to that fact and their product will not be subject to duties.
  2. If Kenyan companies using those particular Italian inputs cease sourcing those inputs from Italy in the future, they might also be able to use the certification process and their future entries will not be subject to duties.
- It is worth noting that depending on the facts of the case, certain companies may be precluded from participating in the certification process. For example, Commerce has historically prohibited companies who received questionnaires but elected to refrain from answering those questionnaires (and participating in the circumvention inquiry) from subsequently benefiting from a certification regime.



# Circumvention Inquiries: Applicable Remedies and Certifications

## Example – Country-wide Application (market economy)

Commerce conducts a circumvention inquiry involving assembly of furniture in **Country B** using inputs sourced from **Country A**, which is subject to a CVD order on furniture. Commerce finds that imports of furniture from **Country B** that were produced using specific inputs sourced from **Country A** are circumventing the CVD order on furniture from **Country A**. In this example, all of the inputs from **Country A** are sourced from a single company (the **Input Supplier**) with its own calculated CVD rate.



**Acme Corp.**, a company in **Country B** that assembles furniture from specific inputs sourced from **Country A**, is now subject to the **Input Supplier**'s calculated rate under the CVD order covering furniture from **Country A**.

Exports of Furniture by  
Acme Corp. from **Country B**,  
Assembled from Inputs  
from **Country A**

Now Subject to

The **Input  
Supplier**'s calculated  
CVD Rate on Furniture  
from **Country A** at the  
time the merchandise  
entered the United  
States

**Smith Corp.**, a company in **Country B**, can certify that it did not use the specific inputs from **Country A** when producing the furniture it exported to the United States. As a result, **Smith Corp.**'s exports are not subject to duties.

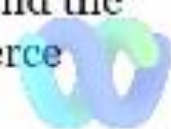
Exports of Furniture from  
**Country B** from **Smith  
Corp.**

Now Subject to

No Additional  
Duties

## Difference Between Country-of-Origin Scope Analysis (Substantial Transformation) and Circumvention

- **19 CFR 351.225 (j)** provides a test whereby Commerce determines the country-of-origin for purposes of determining if something is covered by the scope of an order. This test is only necessary when a product is manufactured in two or more countries. Essentially, Commerce looks at the sequence of production of the product at issue and determines where in that sequence the country-of-origin is established or imparted for purposes of determining if a product is covered by the scope of an AD/CVD order. The test Commerce most frequently used is called a "substantial transformation analysis."
- \* The factors Commerce considers are set forth in the regulation and include: Consideration of the physical characteristics of the product and the downstream product, the intended end-use of the downstream product, the value added by further processing in the third country, the nature and sophistication of processing in the third country, the level of investment in the third country, and in some cases, where the "essential component" of the product is produced or where the "essential characteristics" of the product are imparted.
- Section 781(b)(1)(D) of the Act and 19 CFR 351.226(i), (third country completion and assembly circumvention), however, address products which are NOT covered by the scope of an order (even after such a determination has been reached applying the substantial transformation analysis) but may be nonetheless circumventing the payment of AD or CVD duties through further completion or assembly in a third country. If Commerce finds that a product is circumventing the payment of AD or CVD duties, Congress has determined that Commerce may effectively expand the scope of the order to pull those products into the order. Remember that we covered those factors which Commerce considers in making such a determination above.



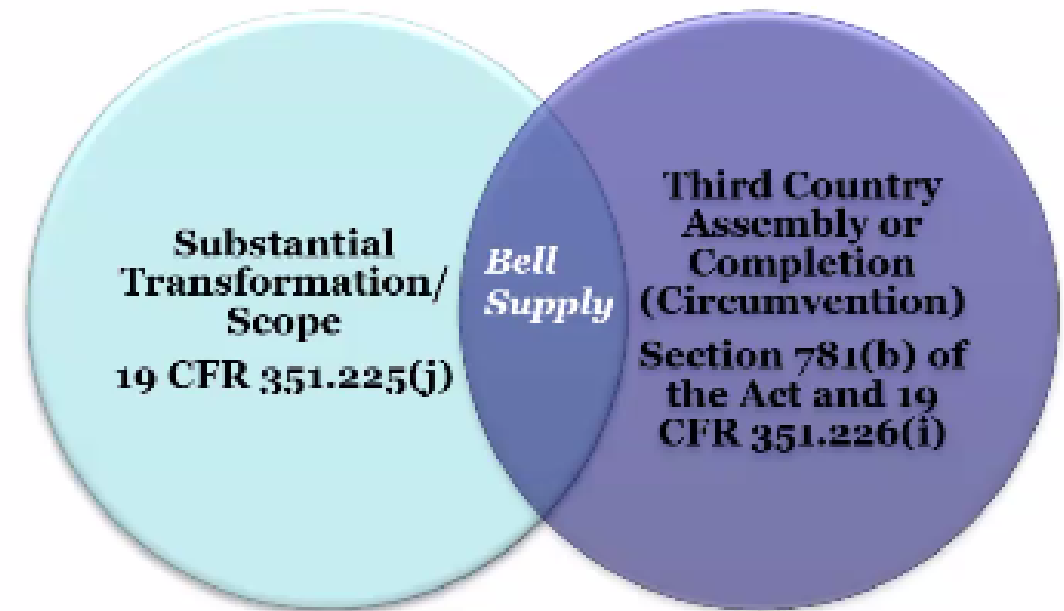
# Difference Between Country-of-Origin Scope Analysis (Substantial Transformation) and Circumvention

- As Commerce explained in the *Preamble* to the Final Rule, at 86 FR 52300, 52342 (September 20, 2021), and the Court of Appeals for the Federal Circuit explained in *Bell Supply Co., LLC v. United States*, 888 F. 3d 1222, 1230 (Fed. Cir. 2018), the Substantial Transformation scope analysis determines “whether, as a result of manufacturing or processing, the product loses its identity and is transformed into a new product having a new name, character, and use,” and “becomes a product of the country in which it was process or manufactured.”
- On the other hand, for a Circumvention analysis, Commerce will consider “additional factors such as: Patterns of trade, including sourcing patterns; whether the manufacturer or exporter of the parts or components in the country of the order is affiliated with the person who assembles or completes the merchandise sold in the United States, and whether imports of the parts or components produced in such foreign country into the country in which they are assembled or completed have increased after the initiation of the investigation which resulted in the issuance of such an order or finding.” *Preamble* at 52342. The “focus” is “on the extent of processing applied to the subject merchandise in a third country and whether such processing is minor or insignificant in comparison to the entire production process of the finished subject merchandise.”



# Difference Between Country-of-Origin Scope Analysis (Substantial Transformation) and Circumvention

- As the Federal Circuit explained, “even if a product assumed a new identity, the process of ‘assembly or completion’ may still be minor or insignificant, and undertaken for the purpose of evading the AD or CVD order.” *Bell Supply*, 88 F.3d at 1230 and *Preamble* at 52343.
- Thus, even if a widget largely made in Brazil was further assembled in Mexico and would otherwise be considered “substantially transformed” into a widget of Mexico under Commerce’s scope test, Commerce could still find that the assembly done in Mexico was minor and permitted the evasion of an order on widgets from Brazil. In light of such a circumvention finding, Commerce could determine the product should be covered by an order on Brazilian widgets.





# Circumvention Inquiries: How to Participate

- Any interested party can submit a request for a circumvention inquiry
- Interested parties can also submit information and arguments at key times during a circumvention inquiry
  - “Interested parties,” as defined, include foreign manufacturers, producers, and exporters; U.S. importers, manufacturers, producers, and wholesalers; certain unions; and certain trade associations. *Section 771(9) of the Tariff Act of 1930, as amended (the Act)*
  - All submissions are filed via E&C’s electronic filing system, ACCESS.
  - Information on ACCESS can be found here: [https://access.trade.gov/help/ACCESS\\_User\\_Guide.pdf](https://access.trade.gov/help/ACCESS_User_Guide.pdf)
- Any member of the public can register for an ACCESS account and view documents on the public record, including those pertaining to circumvention inquiries
- For further information, ITA’s website has a “Frequently Asked Questions” page and is a great resource for understanding the circumvention process. It is found at <https://www.trade.gov/antidumping-and-countervailing-duty-frequently-asked-questions>. Thank you.

