

## AD/CVD Evasion

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In 2016, Congress passed the Trade Facilitation and Trade Enforcement Act, also known as TFTEA. One of the provisions within the Act gave U.S. Customs and Border Protection (CBP) additional authority and resources to investigate claims of evasion of payment of antidumping and countervailing duties (AD/CVD). At the end of March, 2017, the president issued [executive order 13785](#) "Establishing Enhanced Collection and Enforcement of Antidumping and Countervailing Duties and Violations of Trade and Customs Laws."

CBP has long had authority to enforce violations of AD/CVD orders but has had little authority to investigate broader claims of evasion. Under TFTEA CBP developed an [entirely new chapter within its regulations](#) to investigate AD/CVD evasion claims. Briefly summarized, any interested party may now make a claim against an importer for evading AD/CVD orders. The definition of an interested party is broad and could include other suppliers, labor unions, employees and competitors among others. CBP has fifteen days to determine if the claim has any merit and if it will proceed with an investigation. This is a powerful regulation that places an importer at risk of an evasion investigation and possibly defending itself in court.

The EO requires CBP to *"develop a plan that would require covered importers that, based on a risk assessment conducted by CBP, pose a risk to the revenue of the United States, to provide security for antidumping and countervailing duty liability through bonds and other legal measures, and also would identify other appropriate enforcement measures."* This plan is to be developed no later than the end of June, 2017. It is unclear at this time what is meant by "other appropriate enforcement measures."

Until now, AD/CVD has been one of the more obscure areas of international trade. The TFTEA and the executive order bring AD/CVD compliance and enforcement to the forefront.

### AD/CVD Overview

The AD/CVD process allows the federal government to impose punitive duties when, after an investigation, it discovers that an unfair trade practice has injured a U.S. industry. When the International Trade Administration (ITA) determines that a specific country's industry used non-market pricing and the U.S. International Trade Commission (USITC) determines that this practice resulted in harm to the corresponding U.S. industry, they issue an antidumping order directing CBP to collect antidumping duties for goods of that type imported from the offending country. When the ITA demonstrates that a foreign government unfairly subsidized exports of specific goods and the USITC determines that this subsidy resulted in injury to the corresponding U.S. industry, they issue a countervailing order directing CBP to collect countervailing duties on those goods from that country. It is common that there are dual findings of non-market pricing combined with unfair subsidies. In such cases the USITC issues two orders.

AD/CVD orders can be sizeable. To the unsuspecting importer they can be crippling. For example, the combined AD/CVD orders against certain aluminum extrusions from China can exceed 400%.

### **The AD/CVD Challenge**

It can be challenging for importers to determine if their goods fall within the scope of one of the many AD/CVD orders. Each case defines a scope of goods covered by the order. The scope specifies commodities by description. Harmonized Tariff Schedule (HTS) numbers are also provided within the order for guidance. The listing of an HTS code does not mean that all goods falling to that number are subject to an AD/CVD order. That your good falls to an HTS code not listed in the order does not mean that it is excluded from the order. It can be difficult, however, for importers to interpret an AD/CVD order as scope descriptions may include technical specifications describing attributes that the typical importer and their suppliers do not know or cannot readily ascertain. Likewise, the Customs understanding of country of origin may differ from the country of origin for goods as defined within the scope of an AD/CVD case. It is critical, therefore, that importers read the scope of an order carefully and, if they do not understand it, to seek professional assistance in interpreting the scope.

The law provides for a scope ruling process. Unlike the relatively simple HTS classification ruling process under CBP, obtaining an AD/CVD scope ruling from Commerce is lengthy and cumbersome. Instead of submitting a formal ruling request, Importers could seek informal advice from specialists within the CBP Center of Excellence and Expertise. Advice from a CEE, however, is not binding.

### **AD/CVD Evasion**

The word evasion implies that an importer has intentionally tried to circumvent the order to avoid the punitive duties. This does not have to be the case. Evasion comes in various forms both intentional and otherwise.

**Simple negligence:** Importers that unintentionally fail to pay AD/CV duties are still considered to have evaded the law and are liable for paying the duties as well as any additional penalties. Negligence occurs when an importer fails to provide reasonable oversight of its import program. AD/CVD evasion could be due to inaccurate classification, poor product description or lack of awareness of the orders. In more complex supply chains it can be challenging to identify an item imbedded within a retail set that is within scope of an AD/CVD order.

**False Reporting** The most blatant of the AD/CVD evasion techniques is an importer's intentional misdescription of goods or misreporting of country of origin at time of entry. Lying of this nature is a fraudulent import practice even when AD/CVD is not a concern.

**Transshipment** It is important to understand that AD/CVD goods remain in scope regardless of the origin of the shipment. It is not uncommon for AD/CVD goods to be distributed from a third country after minor processing or repackaging. The incidental value-added processing in the third country does not exempt the goods from the scope of the AD/CVD order.

A cottage industry has emerged that collaborates with importers to ship AD/CVD goods through origins that are not subject to the order. This is done with full knowledge and intent to deceive. This unscrupulous practice extends to relabeling goods with a different country of origin. Some of these service providers will attempt to dupe the U.S. importer into believing that such practices are legal.

**Deceptive Transformation** An emerging practice transforms the AD/CVD good into another product subject to a different classification and description and, on its surface, removing it from the scope of the AD/CVD order. Upon arrival in the U.S. the good is transformed back into its original form. This has happened with Chinese aluminum extrusions that were transformed into packing containers. Upon arrival in the U.S. the containers were disassembled and converted back into aluminum extrusions that were clearly within scope of the AD/CVD orders.

The government is also exploring the practice of blending AD/CVD goods with other materials resulting in a good that falls outside of the order. This has happened with certain metals and chemicals. The practice is clearly deceptive and conflicts with the intent of the original AD/CVD order. From a legal perspective, however, it is unclear if the scope of the order can be interpreted broadly in advance to include such practices. Under the current AD/CVD process, the government would likely need to expand the scope of the order first before proceeding with enforcement. Nevertheless, the practice represents a type of evasion.

**Vendor Concealment** One of the more difficult issues for importers to detect is when a vendor is concealing the source or the specification of a good from the importer. Perpetrators of this scheme can be quite clever, falsifying inspection certificates, manufacturing records and transportation documents in an effort to evade AD/CV duties. Regardless of intent, the importer will still be liable for AD/CV duties.

#### **AD/CVD Risks and Warning Signs**

Importers should be alert to warning signs and risks that their shipments might be within scope of an AD/CVD order. Consider the following:

- Your goods are the same or similar to those subject to AD/CVD orders from other countries.
- You are importing from a country such as China that is included within a wide range of AD/CVD orders.
- The price is too good to be true and below market for your industry.
- The seller is insistent that you take delivery in the United States instead of at origin.
- A factory suddenly has production capacity in another country. For example, a Chinese company claims to have a new factory in Thailand, Singapore or Taiwan.
- The vendor is evasive when you ask to visit the factory.
- Upon visiting the factory you notice any of the following
  - The factory does not have the employees, the space or the type or equipment necessary to produce the goods you buy from them.
  - You notice finished goods on the inbound receiving dock indicating the factory has outsourced some of its production.
  - Employees appear to lack the technical know-how to producer your goods.

#### **Don't Be an AD/CVD Victim**

Importers need to be on their guard when it comes to AD/CVD management and might consider some of the following actions to avoid evading AD/CV duty payments.

- Stay current with the orders that apply to your goods. A list of AD/CVD resources follows this article.
- Screen your new products against existing AD/CVD orders and review your product database when new orders are introduced or older orders are changed.

- Develop contract language that holds suppliers accountable for AD/CVD compliance. (Caution, being reimbursed for antidumping duties may be a violation in its own right.)
- Require suppliers be transparent about their supply chains and provide detailed and verifiable product specifications necessary to evaluate AD/CVD scope.
- Visit factories to validate production capacity and capabilities.
- Initiate surprise quality control visits at factories to validate origin production.
- Use third-party quality control firms to identify product specifications.
- Rely on third party experts (consultants, brokers, attorneys) to evaluate the scope of AD/CVD orders.
- Submit your product for an AD/CVD scope ruling.

A proactive approach will prevent an importer from falling prey to importing goods subject to AD/CVD orders and prepare it should an AD/CVD claim of evasion arise.

#### **AD/CVD Resources:**

U.S. International Trade Commission

- [General information](#)
- [List of current AD/CVD orders](#)

International Trade Administration

- [General information](#)
- [Summary of Orders by Country](#)

Customs & Border Protection

- [General information](#)
- [AD/CVD search engine](#)
- [19 CFR §165 – Investigation of Claims of Evasion of Antidumping and Countervailing Duties](#)