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## DOC Proposes New Regulations Considering Currency Undervaluation in CVD Proceedings

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**May 30, 2019** – On May 28, 2019, the U.S. Department of Commerce ("DOC") published a [notice in the Federal Register](#) requesting public comments on a new rule for countervailing duty ("CVD") proceedings, which is intended to facilitate the imposition of countervailing duties in certain circumstances on imports from certain countries that undervalue their currencies relative to the U.S. dollar. In the accompanying [press release](#), Commerce Secretary Wilbur Ross explained, "[t]his change puts foreign exporters on notice that the Department of Commerce can countervail currency subsidies that harm U.S. industries. . . . Foreign nations would no longer be able to use currency policies to the disadvantage of American workers and businesses. This proposed rulemaking is a step toward implementing President Trump's campaign promise to address unfair currency practices by our trading partners."

Depending on the analytical approach that is employed, the new rule could result in the collection of potentially over \$3 billion in additional countervailing duties. The notice asserts that roughly 32% of total imports currently subject to countervailing duties are from countries with undervalued currencies. The proposed rule would apply to proceedings involving any exporting country, but China, South Korea, and India are highlighted in the Commerce notice. In past cases, U.S. industries have alleged subsidies arising from currency undervaluation – for example, in utility scale wind towers from China and crystalline silicon photovoltaic cells and modules from China. The Commerce Department previously chose not to pursue the issue, finding instead that the allegations lacked adequate factual support. The notice recognizes that the issue of currency undervaluation is complex and unlike the programs the agency has historically investigated.

Under the Tariff Act of 1930, as amended (19 U.S.C. § 1671, *et seq.*), countervailing duties may be imposed if the Commerce Department determines that a foreign government is providing countervailable subsidies that benefit products imported into the United States. (In addition, in its own investigative proceedings, the U.S. International

Trade Commission must find material injury or threat of material injury to the domestic industry by reason of subject imports in order for the duties to be imposed.) For there to be a countervailable subsidy, there must be a financial contribution and a benefit to the recipient, and the subsidy must be specific as a matter of law or fact.

Acknowledging that there are a variety of possible currency-related fact patterns that could satisfy the statutory criteria for countervailability, the newly proposed rule identifies one particular fact pattern under which there would be a financial contribution associated with currency undervaluation that would “normally” provide a benefit to companies that trade internationally under a unified currency regime. In that fact pattern, exporting enterprises exchange U.S. dollars for domestic currency at a state bank and receive more domestic currency in exchange for each U.S. dollar converted than they would have in the absence of the currency undervaluation. In applying this rule, the Commerce Department would request the Secretary of the Treasury’s evaluation and conclusion as to (1) whether the currency of a country is undervalued as a result of government action on the exchange rate and (2) the extent of any such undervaluation.

Regarding the third statutory factor – specificity – the notice proposes to permit the Commerce Department to consider all companies that primarily buy or sell goods internationally as a specific group of enterprises to which the subsidy is being provided, *i.e.*, it could do so regardless of the variety of products traded by the enterprises. This broad definition of specificity is likely to make it easier for the Commerce Department to countervail government involvement in currency exchange.

Comments on the notice and proposed rule are due June 27, 2019. If you have questions about the proposed rule, please contact one of the experienced attorneys in Hughes Hubbard’s International Trade practice.

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