



Southern Shrimp Alliance
P.O. Box 1577 Tarpon Springs, FL 34688
955 E. MLK Dr. Suite D Tarpon Springs, FL 34689
727-934-5090 Fax 727-934-5362

August 1, 2022

Submitted via Regulations.gov

Mr. Ryan Majerus
Deputy Assistant Secretary for Policy & Negotiations
U.S. Department of Commerce
1401 Constitution Ave., N.W.
Room 1870
Washington, D.C. 20230

Re: Docket No. ITA-2022-0006: Comments on Proposed Rule – Procedures Covering Suspension of Liquidation, Duties and Estimated Duties in Accord with Presidential Proclamation 10414

Dear Deputy Assistant Secretary Majerus:

The Southern Shrimp Alliance respectfully submits the following comments on the proposed rule published by the U.S. Department of Commerce (“Department”) on July 1, 2022 in the *Federal Register* (“*Proposed Regulations*”).¹ These comments are timely as they are filed on the August 1, 2022 deadline for submissions.²

On June 6, 2022, President Biden issued Proclamation 10414,³ arguing that threats to “the ability of the United States to provide sufficient electricity generation” caused by the “unavailability of solar cells and modules” could be linked to the Department’s ongoing circumvention inquiry into crystalline silicon photovoltaic (“CSPV”) cells and modules completed using parts and components

¹ *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).

² *Id.* at 39,426 (“Written comments must be received by August 1, 2022.”).

³ Proclamation No. 10414, 87 Fed. Reg. 35,067 (June 9, 2022).

from China.⁴ Invoking section 318(a) of the Tariff Act, the Proclamation directs the Department to permit “the importation, free of the collection of duties and estimated duties, . . . solar cells and modules” imported from Cambodia, Malaysia, Thailand, and Vietnam for a period of 24 months.⁵

On July 1, 2022, the Department published the *Proposed Regulations* “to provide relief . . . in accordance with {Proclamation 10414}.”⁶ After summarizing the Proclamation and the Department’s existing regulations governing the suspension of liquidation and collection of cash deposits in circumvention inquiries, the *Proposed Regulations* introduce new rules that would apply only to CSPV cells and modules completed in the four Southeast Asian countries covered by the Department’s circumvention inquiry. The Department explains that its “proposed actions would ensure that duties or estimated duties would not be collected on entries of {CSPV cells and modules completed in Cambodia, Malaysia, Thailand, or Vietnam}” that are entered before June 6, 2024 (i.e., two years after the signing date of Proclamation 10414).⁷

The membership of the Southern Shrimp Alliance does not produce CSPV cells and modules, nor do members of the organization import or purchase CSPV cells and modules as part of their routine business operations. Nevertheless, the Southern Shrimp Alliance is submitting comments in opposition to the *Proposed Regulations* because of our industry’s concerns regarding the weakening of U.S. trade laws and the substantial adverse impact the agency’s *Proposed Regulations* will have on small businesses that are comparable to the thousands of businesses that comprise the U.S. commercial warmwater shrimp industry.

Twenty years ago, thousands of small, family-owned businesses operating in the eight warmwater shrimp producing states of Alabama, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Texas organized to form the Southern Shrimp Alliance. These businesses came together for the express purpose of petitioning the federal government to counter unfairly-traded imports through the rigid structure of the trade remedy laws. The industry, as a whole, pursued a strategy premised on an understanding that, despite the lack of ability to make substantial political contributions or engage high-priced “connected” lobbyists, it was entitled to trade relief so long as the industry’s members could demonstrate, through a quasi-judicial administrative proceeding, that imported shrimp was being sold at less than fair value in the United States and that the domestic industry was materially injured by reason of these unfairly-traded imports.

After two years of work attempting to meet the requirements of law and heavily-contested litigation before the Department and the U.S. International Trade Commission (“ITC”), antidumping duty orders were issued in February 2005 on imports of shrimp from six countries (Brazil, China, Ecuador, India, Thailand, and Vietnam). However, the imposition of trade relief was only the

⁴ *Id.* See also *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People’s Republic of China: Initiation of Circumvention Inquiry on the Antidumping Duty and Countervailing Duty Orders*, 87 Fed. Reg. 19,071 (Dep’t Commerce Apr. 1, 2022).

⁵ Proclamation No. 10414, 87 Fed. Reg. at 35,068.

⁶ *Proposed Regulations*, 87 Fed. Reg. at 39,427.

⁷ *Id.* at 39,428.

opening chapter in this industry's pursuit of a level playing field. Every year, shrimp exporters and importers have the opportunity to seek a reduction in their antidumping duties and our industry must remain vigilant, defending the trade remedy in these administrative reviews. At the same time, other shrimp exporters and importers attempt to operate outside the law and evade the payment of antidumping duties, necessitating the adoption of a significant monitoring program in order to counter trade fraud. And every five years, the domestic industry must, once again, demonstrate to the Department that unfair trade practices would continue or recur in the absence of the antidumping duty orders and convince the ITC that material injury will continue or recur by reason of those unfairly-traded imports. Indeed, hundreds of members of our industry have committed to supply all information that may be requested by the ITC in the recently initiated third sunset reviews of the remaining antidumping duty orders.

Our industry has not shouldered these burdens happily, but has done so because the federal laws on the books guarantee our members a fair shot at trade relief provided that we can meet the objective criteria established by Congress through statute, as interpreted by the Department and reviewing federal courts. We further understood that even if the Department were to find that trade relief is warranted, these determinations are subject to an analysis of their consistency with the nation's obligations under the World Trade Organization ("WTO") agreements through the views expressed by unaccountable quasi-jurists in the WTO's dispute settlement apparatus.

Proclamation 10414 undermines this understanding of our country's trade laws. Instead, we are now presented with a fact pattern where extensive expenditure on lobbying campaigns and the use of political capital can result in a President preventing the regular operation of laws enacted by Congress to address the harm caused to U.S. industries by unfair trade. The Southern Shrimp Alliance appreciates that the issue before the Department is not the appropriateness of this entirely unprecedented action by the Administration but, rather, whether to adopt the *Proposed Regulations* as a means of implementing Proclamation 10414. Nevertheless, as the Department moves forward, it must carefully account for and seek to reasonably mitigate the violence done to the integrity of the trade laws by the President's decision to invoke emergency authority.

The U.S. shrimp industry continues to support thousands of small, family-run businesses and is a vital contributor to the economies in towns and cities throughout the American south because of the relief provided against unfairly-traded imports. Since its formation two decades ago, the Southern Shrimp Alliance has matured as an organization to now encompass all issues confronting the industry. This growth in responsibility is consistent with the central mission of the Southern Shrimp Alliance: ensuring that the shrimp industry remains both a foundation to the economy and pillar of the social structure of coastal communities throughout the Gulf and Southeast Atlantic regions. As a practical matter, this has meant that our organization has also worked to limit the adverse impacts of federal regulatory rulemaking on the commercial fishing industry, which is overwhelmingly composed of small, family-owned businesses. It is this experience that informs our comments in response to the *Proposed Regulations*.

The *Regulatory Flexibility Act* (“RFA”)⁸ “requires an agency promulgating a rule to consider the effect of the proposed regulation on small businesses and to design mechanisms to minimize any adverse consequences.”⁹ In particular, “under the RFA, an agency that publishes a notice of proposed rulemaking must prepare an IRFA describing the effect of the proposed rule on small businesses and discussing alternatives that might minimize adverse economic consequences.”¹⁰ “When promulgating a final rule, the agency not only must prepare a final regulatory flexibility analysis (FRFA) but also must make copies available to members of the public and publish directions for obtaining such copies.”¹¹ The “RFA does not require mechanical exactitude. However, the statute compels the Secretary to make a ‘reasonable, good-faith effort,’ prior to issuance of a final rule, to inform the public about potential adverse effects . . . and about less harmful alternatives.”¹² Accordingly, while the requirements of 5 U.S.C. § 604 are “purely procedural,” an agency’s rulemaking may be reviewed by federal courts to determine whether it has followed the required procedural steps, with one of them being the provision of “a description of the steps that the agency has taken to minimize the significant economic impact on small entities . . . , including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule”¹³

On July 1, 2022, the Department published the *Proposed Regulations* “to provide relief . . . in accordance with {Proclamation 10414}.”¹⁴ The *Proposed Regulations* include an IRFA conducted pursuant to the RFA.¹⁵ The IRFA accompanying the *Proposed Regulations* explains that the “proposed rule is intended to . . . encourage sufficient imports of solar cells and modules from {Cambodia, Malaysia, Thailand, and Vietnam} in order to respond to” threats to the availability of sufficient electricity generation capacity in the U.S. market.¹⁶ The IRFA further describes the *Proposed Regulations* as “directly affect[ing] importers of {CSPV cells and modules finished in Cambodia, Malaysia, Thailand, and Vietnam}.”¹⁷ According to the Department, the *Proposed Regulations* “remov[e] uncertainty concerning potential antidumping and countervailing duties or

⁸ See 5 U.S.C. § 601 *et seq.*

⁹ *Southern Offshore Fishing Ass’n v. Daley*, 995 F. Supp. 1411, 1433 (M.D. Fla. 1998).

¹⁰ *Associated Fisheries of Maine, Inc. v. Daley*, 127 F.3d 104, 111-112 (1st Cir. 1997) (citing 5 U.S.C. § 603).

¹¹ *Id.* at 112 (citing 5 U.S.C. § 604).

¹² *Southern Offshore Fishing Ass’n v. Daley*, 995 F. Supp. at 1,437 (citing *Associated Fisheries of Maine, Inc. v. Daley*, 127 F.3d 104, 114-115 (1st Cir. 1997)).

¹³ *Nat’l Ass’n for Fixed Annuities v. Perez*, 217 F. Supp. 3d 1, 56 (D.D.C. 2016) (quoting *United States Cellular Corp. v. F.C.C.*, 254 F.3d 78, 88 (D.C. Cir. 2002) and 5 U.S.C. § 604(a)(6)).

¹⁴ *Proposed Regulations*, 87 Fed. Reg. at 39,427.

¹⁵ *Id.* at 39,430-31. See also 5 U.S.C. § 603.

¹⁶ *Proposed Regulations*, 87 Fed. Reg. at 39,430.

¹⁷ *Id.*

duties that might otherwise be owed on merchandise subject to the circumvention inquiries.”¹⁸ The IRFA presents this exemption from duties as a benefit to importers and concludes that the agency “does not expect the proposed action to have a significant impact on a substantial number of small entities for purposes of the Regulatory Flexibility Act.”¹⁹ Based on the *Proposed Regulations*’ purported lack of impact, the Department asserts that “there are no regulatory alternatives for reducing burdens on small entities.”²⁰

The Department’s IRFA was deficient in several respects and failed to meet the legal obligations imposed by the *RFA*.²¹ As explained below, in discussing the anticipated regulatory impact, the *Proposed Regulations* completely ignore the impact the rule will have on the small businesses that populate the domestic CSPV cell and module industry. Moreover, the Department fails to consider regulatory alternatives that may reduce the burden on these small entities.

As noted above, under the *RFA*, agencies are required to consider the impact of a proposed rule on small entities and consider whether the agency can achieve its regulatory objective through less burdensome means.²² The *RFA* requires that the rulemaking agency include a regulatory flexibility analysis that “describe{s} the impact of the proposed rule on small entities” in the published notice of proposed rulemaking and allow for public comment.²³ The statute requires that each IRFA contain the following elements:

- (1) a description of the reasons why action by the agency is being considered;
- (2) a succinct statement of the objectives of, and legal basis for, the proposed rule;
- (3) a description of and, where feasible, an estimate of the number of small entities to which the proposed rule will apply;
- (4) a description of the projected reporting, recordkeeping and other compliance requirements of the proposed rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record;

¹⁸ *Id.* at 39,430-31.

¹⁹ *Id.* at 39,431.

²⁰ *Id.*

²¹ *See* 5 U.S.C. §§ 601-611.

²² *See generally* U.S. SMALL BUSINESS ADMINISTRATION, OFFICE OF ADVOCACY, A GUIDE FOR GOVERNMENT AGENCIES: HOW TO COMPLY WITH THE REGULATORY FLEXIBILITY ACT (Aug. 2017) (“RFA GUIDE FOR GOVERNMENT AGENCIES”), <https://cdn.advocacy.sba.gov/wp-content/uploads/2019/06/21110349/How-to-Comply-with-the-RFA.pdf>.

²³ 5 U.S.C. § 603(a).

- (5) an identification, to the extent practicable, of all relevant Federal rules which may duplicate, overlap or conflict with the proposed rule.²⁴

When conducting an IRFA, the U.S. Small Business Administration (“SBA”) instructs that agencies “must examine the costs and other economic implications for the industry sectors targeted by the {proposed} rule,” by analyzing relevant industry data.²⁵ When such data are unavailable, the agency should nonetheless “state why and request comments.”²⁶

The IRFA accompanying the *Proposed Regulations* fails to comply with the *RFA*. As an initial matter, the Department’s IRFA does not attempt to estimate the number of small entities to which the proposed rule will apply, let alone analyze such data.²⁷ Instead, the Department offers the conclusory statement that “{t}he number of importers that are classified as small entities is unknown.”²⁸ The Department does not explain why the agency has elected to not refer to data on employer firms by firm size and industry published by the U.S. Census Bureau in order to estimate the number of small entities that may be impacted by the Department’s proposed rule.²⁹ Moreover, the ITC was able to identify the number of U.S. producers, U.S. importers, and U.S. importers of CSPV cells and modules in its recent review of the safeguard measure on imports of certain CSPV products.³⁰ A review of the ITC’s report identifies fourteen (14) U.S. producers of CSPV products – a number of which would be small entities under the SBA’s definition.³¹ Accordingly, it is evident that the Department’s effort to estimate the number of small entities impacted by the *Proposed Regulations* falls short of the *RFA*’s requirement.

More egregiously, in describing the small entities to which the *Proposed Regulations* will apply, the Department omits any consideration of the impact of the proposed rule on domestic producers of CSPV products. Rather, the Department limits its description of the entities impacted by the *Proposed Regulations* to importers of CSPV products.³² This limited approach ignores the fact

²⁴ 5 U.S.C. § 603(b)(1)-(5).

²⁵ RFA GUIDE FOR GOVERNMENT AGENCIES at 32.

²⁶ *Id.*

²⁷ *See* 5 U.S.C. § 603(b)(3).

²⁸ *Proposed Regulations*, 87 Fed. Reg. at 39,430.

²⁹ U.S. SMALL BUSINESS ADMINISTRATION, OFFICE OF ADVOCACY, DATA ON SMALL BUSINESS, <https://advocacy.sba.gov/data-on-small-business/>.

³⁰ *Crystalline Silicon Photovoltaic Cells, Whether or Not Partially or Fully Assembled into Other Products*, Inv. No. TA-201-75, USTIC Pub. 5266 (Dec. 2021) (Extension).

³¹ *See id.* at I-37.

³² *See Proposed Regulations*, 87 Fed. Reg. at 39,430 (“In doing so, {the proposed rule} would directly affect imports of certain SA-Completed Cells and Modules exported from the identified Southeast Asian Countries.”); *id.* at 39,431 (“{T}he rule could also potentially provide a benefit by allowing importers, including small entities, to receive an exemption from the collection of antidumping and countervailing cash deposits and duties.”).

that many domestic manufacturers, including those producing solar cells and modules, qualify as small entities under the *RFA* that are clearly impacted by the proposed rules. The entire purpose of the *Proposed Regulations* is to prevent the domestic industry from obtaining relief until June 6, 2024 from unfairly-traded imports that these small businesses would otherwise be entitled to under the operation of law.

Agencies are advised to “pay special attention to small entities expected to face disproportionate impacts relative to other entities in the industry” when conducting analyses under the *RFA*.³³ The Department’s description in the IFRA of the entities that will be impacted by the *Proposed Regulations* fails to account for a segment of the regulated industry, many of whom will need to rapidly adjust their business activity due to the suspension of duty collection on imports that would otherwise be deemed to be unfairly-traded and, thus, subject to antidumping and countervailing duties. Whereas “{f}air pricing {would} incentivize domestic production of CSPV cells and modules because such cells and modules will be able to compete with fairly traded imports {,}”³⁴ duty-free importation of unfairly-traded CSPV cells and modules found to be circumventing relief imposed under the trade remedy laws will dramatically inhibit the ability of domestic producers to continue to operate in this market.

Furthermore, in assessing the impact of a proposed rule, agencies are counseled to consider “economic implications that derive from additional compliance costs such as economic viability (including closure), competitiveness, productivity, and employment.”³⁵ This analysis should identify cost burdens on the industry generally and on the individual small entities affected.³⁶ However, the Department failed to consider the detriments to the overall supply chain of solar products in its IRFA. For instance, a recent Department of Energy (“DOE”) SOLAR FUTURES STUDY emphasized the need for “{a} resilient supply chain” in support of developing U.S. solar manufacturing as a means to deter “over rely{nce} on any single supply avenue.”³⁷ By circumscribing the relief the domestic industry is entitled to under the trade remedy laws, the *Proposed Regulations* make it harder for the domestic solar manufacturing industry to compete and threaten the resilience of solar product supply chains.³⁸

³³ RFA GUIDE FOR GOVERNMENT AGENCIES at 36.

³⁴ Letter from Cassidy Levy Kent LLP to the Department, “Auxin Solar’s Request For An Anti-Circumvention Ruling Pursuant To Section 781(b) Of The Tariff Act Of 1930, As Amended,” A-570-979/C-570-980 (Feb. 8, 2022), at 86–87.

³⁵ RFA GUIDE FOR GOVERNMENT AGENCIES at 32.

³⁶ *Id.*

³⁷ OFFICE OF EFFICIENCY & RENEWABLE ENERGY, U.S. DEPARTMENT OF ENERGY, SOLAR FUTURES STUDY, at pp. x and 168 (Sept. 2021) (“SOLAR FUTURES STUDY”) <https://www.energy.gov/sites/default/files/2021-09/Solar%20Futures%20Study.pdf>.

³⁸ *Id.* at 168. “{A} resilient supply chain” that would allow for the U.S. to move towards a more “robust and reliable electric power system” cannot be “over {ly} reliant on any single supply avenue.” *Id.* at pp. x and 168.

Moreover, U.S. industry investment in domestic manufacturing is clearly contingent upon the ability to compete in the domestic market without incurring material injury from unfairly-traded imports.

A complete picture of the U.S. solar industry includes both importers and domestic producers. An analysis of the impact of the *Proposed Regulations* on domestic producers, however, is entirely absent from the IRFA.³⁹ As the intended beneficiary of the trade remedy laws, any impact analysis that does not account for the harm caused by an unmitigated flow of unfairly-traded imports on domestic producers is incomplete. Guidance from the SBA's Office of Advocacy warns that “it is crucial that the agency list all industry classes affected by the rule,”⁴⁰ as “classification requires the development of a profile for the affected industry or industries and categorization by various size classes within each affected industry.”⁴¹ In summary, the Department's IRFA must consider the potentially devastating impact that the *Proposed Regulations* could have on small entities within the domestic CSPV producing industry.

Finally, under the *RFA*, the Department must assess the impact of the clearest “regulatory alternative” for reducing burdens on small entities.⁴² The Department states that the agency “has determined that, although there is an emergency declared by the Proclamation, the existing regulations at 19 CFR part 358 (‘Supplies for Use in Emergency Relief Work’), which set out procedures for duty-free importation of certain merchandise to be used in emergency relief work, would not apply to the solar cells and modules that are subject of this proposed rule.”⁴³ Explaining this odd conclusion, the agency observes that “this is because none of the merchandise addressed by the Proclamation was subject to an existing antidumping or countervailing duty order as of the date the Proclamation was signed.”⁴⁴

But this legal interpretation is plainly inconsistent with the clear language of the regulations. Section 358.101 of the Department's regulations defines the scope of the regulations as encompassing “procedures for importation of supplies for use in emergency relief work free of antidumping and countervailing duties, as authorized under section 318(a) of the Act.”⁴⁵ The regulations further set out procedures through which the Department is to consider requests for the importation of goods without payment of antidumping and/or countervailing duties “where the President, acting under

³⁹ See *Proposed Regulations*, 87 Fed. Reg. at 39,430-31.

⁴⁰ RFA GUIDE FOR GOVERNMENT AGENCIES at 36.

⁴¹ *Id.*

⁴² *Proposed Regulations*, 87 Fed. Reg. at 39,431. The results of the Department's IRFA are intended to “allow interested parties to compare the impacts of regulatory alternatives on the differing sizes and types of entities affected by the rule.” RFA GUIDE FOR GOVERNMENT AGENCIES at 32.

⁴³ *Proposed Rule*, 87 Fed. Reg. at 39,429.

⁴⁴ *Id.* See also *Procedures for Importation of Supplies for Use in Emergency Relief Work*, 71 Fed. Reg. 63,230 (Dep't Commerce Oct. 30, 2006).

⁴⁵ 19 C.F.R. § 358.101.

section 318 of the Act, authorizes the Secretary to permit the importation of supplies for use in emergency relief work free of antidumping and countervailing duties”⁴⁶ There is nothing within the language of these regulations that renders their application contingent upon the goods being subject to antidumping and/or countervailing duties at the time of the President’s action. Further, in the event the Department reaches affirmative preliminary circumvention determinations, entries of CSPV cells and modules from the four counties would be subject to antidumping and/or countervailing duties. In that instance, under the Department’s interpretation, the existing regulation would be directly applicable.

Whatever the merits of the Department’s efforts to avoid the application of part 358 of the agency’s regulations, there can be no dispute that these previously promulgated regulations provide an option that the *RFA* requires be considered as an alternative to the *Proposed Regulations*. And, unlike the *Proposed Regulations*, the Department’s existing regulations balance the harm caused to the small businesses comprising the domestic CSPV cells and modules industry against the benefits gifted to U.S. importers. Pursuant to the *RFA*, agencies are required to “explain the reasons for their ultimate regulatory choice” upon completion of their analysis.⁴⁷ In this instance, it is impossible for the Department to have conducted a complete impact analysis without having considered whether the agency could achieve its regulatory objective through less burdensome means. As such, the Department must evaluate whether the use of part 358 of the agency’s regulations would be a less burdensome means for achieving the regulatory objective of implementing Proclamation 10414.

For all of these reasons, the Department has failed to meet its obligations under the *RFA*. By ignoring both the small businesses that comprise the domestic CSPV cells and modules industry and part 358 of the agency’s existing regulations, the Department has altogether failed to evaluate the impact of the *Proposed Regulations* on small businesses.

* * *

Thank you in advance for your consideration of these comments on the *Proposed Regulations*. The members of the Southern Shrimp Alliance, along with many small businesses across the country, depend on the government’s commitment to the strong enforcement of the U.S. trade remedy laws. The *Regulatory Flexibility Act* exists to ensure that the interests of businesses like those within our industry are, at an absolute minimum, considered in the Department’s rulemaking. Here, we believe that an evaluation of those interests demonstrates conclusively that part 358 of the agency’s regulations provides a far more preferable alternative to the *Proposed Regulations*.

Respectfully submitted,



John Williams, Executive Director

⁴⁶ 19 C.F.R. § 358.103(a).

⁴⁷ RFA GUIDE FOR GOVERNMENT AGENCIES at 7.