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Committee on Anti-Dumping Practices
Committee on Subsidies and Countervailing Measures

Original: English

NOTIFICATION OF LAWS AND REGULATIONS UNDER ARTICLES 18.5 AND 32.6 OF THE AGREEMENTS

UNITED STATES

Supplement

The following communication, dated and received on 16 December 2024, is being circulated at the request of the delegation of the United States.

Pursuant to Article 32.6 of the Agreement on Subsidies and Countervailing Measures and Article 18.5 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, the United States hereby notifies:

Regulations Enhancing the Administration of the Antidumping and Countervailing Duty Trade Remedy Laws, 89 Fed. Reg. 101,694 (Dec. 16, 2024).

Pursuant to Title VII of the Tariff Act of 1930, as amended (the Act), the U.S. Department of Commerce (Commerce) is amending its trade remedy regulations to enhance the administration of the antidumping duty (AD) and countervailing duty (CVD) laws. Specifically, Commerce is codifying existing procedures and methodologies and creating or revising regulatory provisions relating to several matters including the collection of cash deposits, indicators used in surrogate country selection, application of antidumping rates in nonmarket economy proceedings, calculation of an all-others' rate, selection of examined respondents, and attribution of subsidies received by cross-owned input producers and utility providers to producers of subject merchandise.

The regulations are effective January 15, 2025.

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Part II

Department of Commerce

International Trade Administration

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19 CFR Part 351

Regulations Enhancing the Administration of the Antidumping and Countervailing Duty Trade Remedy Laws; Final Rule

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DEPARTMENT OF COMMERCE

International Trade Administration

19 CFR Part 351

[Docket No. 241206-0317]
RIN 0625-AB25

Regulations Enhancing the Administration of the Antidumping and Countervailing Duty Trade Remedy Laws

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

ACTION: Final rule.

SUMMARY: Pursuant to Title VII of the Tariff Act of 1930, as amended (the Act), the U.S. Department of Commerce (Commerce) is amending its trade remedy regulations to enhance the administration of the antidumping duty (AD) and countervailing duty (CVD) laws. Specifically, Commerce is codifying existing procedures and methodologies and creating or revising regulatory provisions relating to several matters including the collection of cash deposits, indicators used in surrogate country selection, application of antidumping rates in nonmarket economy proceedings, calculation of an all-others' rate, selection of examined respondents, and attribution of subsidies received by cross-owned input producers and utility providers to producers of subject merchandise.

DATES: These amendments are effective January 15, 2025.

FOR FURTHER INFORMATION CONTACT: Scott D. McBride, Associate Deputy Chief Counsel for Trade Enforcement and Compliance, at (202) 482-6292, Jesus Saenz, Senior Attorney, at (202) 482-1823, Ashlande Gelin, Attorney, at (202) 306-7302, or John Van Dyke, Import Policy Analyst, at john.vandyke@trade.gov.

SUPPLEMENTARY INFORMATION:

General Background

On July 12, 2024, Commerce proposed amendments to its existing regulations, 19 CFR part 351, to enhance the administration of the AD and CVD trade remedy laws, in "Regulations Enhancing the Administration of the Antidumping and Countervailing Duty Trade Remedy Laws," published at 89 FR 57286 (July 12, 2024) (Proposed Rule). This final rule concerns the AD/CVD statutory and regulatory provisions in general, as well as those provisions pertaining to filing requirements; the application of cash deposits; the determination of separate rates for nonmarket economy entities; the calculation of rates for unexamined exporters and producers, including the all others rate; the selection of voluntary respondents; the assessment of AD and CVD rates on a per-unit basis; the submission of surrogate value, benchmark, and rebuttal information; the selection of facts otherwise available; the sharing with U.S. Customs and Border Protection (USCBP) of proprietary data for use in negligence and gross negligence investigations, in addition to investigations involving fraud; the collapsing of affiliated producers and non-producers, the application of the special rule for multinational corporations, the calculation of amounts for selling expenses and for profit for constructed value: and a series of CVD-specific provisions, which Commerce summarizes below.

Title VII of the Act vests Commerce with authority to administer the AD/CVD trade remedy laws. Section 731 of the Act directs Commerce to impose an AD order on merchandise entering the United States when it determines that a producer or exporter is selling a class or kind of foreign merchandise into the United States at less than fair value (i.e., dumping), and material injury or threat of material injury to that industry in the United States is found by the U.S. International Trade Commission (ITC).

In addition, section 701 of the Act directs Commerce to impose a CVD order when it determines that a government of a country or any public entity within the territory of a country is providing, directly or indirectly, a countervailable subsidy with respect to the manufacture, production, or export of a class or kind of merchandise that is imported into the United States, and material injury or threat of material injury to that industry in the United States is found by the ITC.

Section 771(5)(B) of the Act defines a countervailable subsidy as existing when "a government or any public entity within the territory of a country provides a financial contribution; provides any form of income or price support; or makes a payment to a funding mechanism to provide a financial contribution, or entrusts or directs a private entity to make a financial contribution, if providing the contribution would normally be vested in the government and the practice does not differ in substance from practices normally followed by governments; and a benefit is thereby conferred." To be countervailable, a subsidy must be "specific" within the meaning of section 771(5A) of the Act.

The Act provides numerous disciplines which Commerce must follow in conducting AD and CVD proceedings. For example, sections 703(d)(1)(B), 705(d), 733(d)(1)(B), 735(c), and 751 of the Act direct Commerce to order USCBP to collect cash deposits as security pursuant to affirmative determinations in its proceedings until Commerce orders the assessment of AD or CVD duties. Likewise, sections 705(c)(1)(B), 705(c)(5), 735(c)(1)(B)(i), and 735(c)(5) of the Act set forth the means by which Commerce determines the AD margin or countervailable subsidy rate to be applied to imported subject merchandise exported or produced by entities not selected in an investigation for individual examination. In addition, sections 777A(c)(2) and 777A(e)(2)(A) of the Act allow Commerce to limit the number of exporters or producers to be individually examined, while section 782(a) allows Commerce to select voluntary respondents.

In accordance with these and other statutory provisions, this final rule codifies and enhances the procedures and practices applied by Commerce in administering and enforcing the AD and CVD laws.

As Commerce explained throughout the preamble to the Proposed Rule, the purpose of these amendments is to help enhance and facilitate the administration of the AD and CVD regulations found at part 351.\1\ The codification of Commerce practice in this final rule, as well as updates to certain regulatory provisions to reflect modifications made by Congress to the Act in 2015, will provide greater clarity and transparency to Commerce's procedures and calculations. In addition, Commerce has revised its methodology in nonmarket economy investigations and reviews to more effectively address situations in which a state-owned entity has less than majority state ownership but the state continues to control an entity through veto power or "golden shares." It has furthermore updated the means by

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which it selects economically comparable countries for purposes of determining normal value in nonmarket economy proceedings. Furthermore, Commerce has updated many of its CVD regulations

to provide both clarity and transparency to Commerce's CVD methodology and to codify long-standing CVD policies. Finally, for the first time, Commerce has promulgated CVD regulations to address the government purchase of goods for more than adequate remuneration (MTAR) and the provision of rebates or exemptions of indirect taxes and import charges to exporters that purchase capital goods and equipment.

\1\ This final rule codifies several distinct procedures and practices under various sections of the Act. As such, Commerce generally intends the rule's provisions to be severable and to operate independently from each other. Commerce's intent that the rule's provisions be severable is demonstrated by the number of distinct regulatory provisions addressed in this rulemaking and the structure of the preamble in addressing them independently and supporting each, respectively, with Commerce's statutory interpretation, agency practice, and court precedent. Accordingly, Commerce intends each portion of this rule to be severable from each other but has included all the proposed provisions in one rulemaking for purposes of enhancing Commerce's trade remedy regulations.

Explanation of Modifications From the Proposed Rule to the Final Rule and Responses to Comments

In the Proposed Rule, Commerce invited the public to submit comments.\2\ Commerce received 27 submissions from interested parties providing comments, including domestic producers, exporters, importers, foreign governments, and foreign entities. The majority of commenters supported Commerce's proposed regulations and indicated that the new and revised regulations would increase transparency and enhance and improve the administration and enforcement of the AD and CVD laws. Some of the comments provided suggestions to further improve the regulations at issue, and Commerce considered the merits of each submission and analyzed the legal and policy arguments considering both past practice and Commerce's mandate to enhance and improve the administration of our AD and CVD laws. Pursuant to that analysis, Commerce has made certain modifications to the Proposed Rule in response to those submissions.

\2\ See Proposed Rule, 89 FR at 57286.

The preamble to the Proposed Rule provided background, analysis, and explanations which are relevant to these regulations. With some modifications, as noted, this final rule would codify regulations proposed on July 12, 2024. Accordingly, to the extent that parties wish to have a greater understanding of these regulations, Commerce encourages not only consideration of the preamble of these final regulations but also a review of the analysis and explanation in the preamble to the Proposed Rule.

In drafting this final rule, Commerce carefully considered each of the comments received and the following sections address the comments received. Each section contains a brief discussion of the regulatory provision(s), a summary of the comments Commerce received, and Commerce's response to those comments, including an explanation when Commerce modified its proposed regulations in response to those comments.

1. Commerce Has Made Small Modifications to Proposed Sec.351.104(a)(7), Which Addresses the Citation of Certain New Factual Information on the Record

On March 25, 2024, Commerce issued a final rule which provided clarity and procedures for interested parties submitting documentation to the agency, explaining which documents from other segments and proceedings may be cited without placing such documents on the record and which documents must be placed on the record to be considered by Commerce in its analysis and determinations (RISE Final Rule).\3\ Those modifications added Sec. 351.104(a)(7), which states that interested parties citing public versions of documents issued by Commerce in other segments or proceedings before the implementation of Commerce's Antidumping Duty and Countervailing Duty Centralized Electronic Service System (ACCESS) (or that otherwise have no assigned ACCESS barcode number) must submit copies of those documents on the record.

\3\ See Regulations Improving and Strengthening the Enforcement of Trade Remedies Through the Administration of the Antidumping and Countervailing Duty Laws, Final Rule, 89 FR 20766, 20768-20773 (March 25, 2024) (RISE Final Rule).

In the Proposed Rule, Commerce stated that it was reconsidering the scope of public documents to which Sec. 351.104(a)(7) applies and proposed that public preliminary and final issues and decision memoranda issued in investigations and administrative reviews pursuant to Sec. Sec. 351.205, 351.210, and 351.213 with no assigned ACCESS barcode number need not be subject to the requirements of that provision.\4\ Commerce explained that citations to these memoranda, like all such citations relied upon by interested parties in submissions to Commerce, would still be required to be cited in full (albeit without an ACCESS barcode number).\5\ Commerce also stated that, as set forth in Sec. 351.104(a)(6), if Commerce determined that a citation was not provided in full, Commerce could decline to consider and analyze the cited decision memoranda in its preliminary and final determinations.\6\

\4\ Id.
\5\ Id.
\6\ Id.

Commerce received five comments in response to the Proposed Rule. No commenter opposed allowing interested parties to cite preliminary and final issues and decision memoranda from other investigations and administrative reviews without ACCESS barcode numbers without also submitting those documents on the record of a segment of the proceeding. Accordingly, this final rule continues to allow parties to cite public documents that meet that description without submitting them on the record.

Two commenters suggested that Commerce modify the proposed regulation language to clarify that the exception being proposed under Sec. 351.104(a)(7) applies to all investigation and administrative review preliminary and final issues and decision memoranda without an associated ACCESS barcode number and not just those which were issued "before the implementation of ACCESS." Those commenters noted an inconsistency between the first and second sentences of the paragraph as proposed in that regard.

One commenter suggested that all investigation and administrative review preliminary and final determinations from other segments or proceedings are not "new factual information," and therefore, the Secretary should state in the regulation that such memoranda are not subject to the timing and filing restrictions of the factual information regulation, Sec. 351.301. The commenter stated that just because an ACCESS barcode number is missing does not mean that it should be treated as new factual information under Sec. 351.301.

Other commenters took issue, fundamentally, with both Sec. 351.104(a)(6) and (7), stating that Commerce should expand the list of documents that need not be submitted on the record, or need not include an ACCESS barcode number, to be cited without submitting them on the record. They stated that Commerce's allowance of an exception for just preliminary and final decision memoranda in investigations and administrative reviews and not similar decision memoranda in other segments of a proceeding is arbitrary and that there is no reason for Commerce to treat investigation and administrative review documents differently. Furthermore, they stated that by requiring that certain public Commerce documents, but not others, be submitted onto administrative records, Commerce would be prejudicing interested parties by preventing them from citing relevant Commerce practice and policies, especially once the time for the submission of new factual information on the administrative record has passed. Therefore, they advocated that

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Commerce should either allow all public documents originating with Commerce from other segments or other proceedings to be cited without submitting them on the record, or that Commerce at minimum expand the list of documents which may be cited without submitting them on the record in Sec. 351.104(a)(6).

Finally, two commenters stated that if Commerce continues to require that public Commerce documents listed in Sec. 351.104(a)(6) or public Commerce documents without associated ACCESS

barcode numbers be submitted on the record, Commerce should take into consideration that interested parties frequently wish to cite certain Commerce public documents from other segments or proceedings in response to Commerce's preliminary determinations, which are issued after the time for the submission of new factual information has passed. They stated that if the time for new factual information closes before Commerce issues its preliminary determination, there is no means by which those interested parties can adequately defend their interests by arguing in a brief or rebuttal brief that Commerce acted inconsistently in the preliminary determination from past cases. They stated that under that scenario, parties may not have been aware that a particular Commerce decision memorandum from another segment or proceeding was relevant until after the preliminary determination was issued. Those commenters, therefore, suggested that Commerce allow parties to submit documents listed in Sec. 351.104(a)(6) or those without associated ACCESS barcode numbers as attachments in an appendix to case briefs and rebuttal briefs.

Response

Commerce has made two revisions to Sec. 351.104(a)(7), as proposed. First, for purposes of Sec. 351.104(a), when Commerce is describing documents issued by all agency employees, Commerce uses the general term "the Department" to describe the overall originator of those documents. This is true for Sec. 351.104(a)(3) through (6) and should equally be used in Sec. 351.104(a)(7). The term "Commerce" appeared in the proposed regulation language, but should say "the Department," and Commerce has corrected for that error.

The second revision is in response to those commenters who pointed out that Commerce's first and second sentences in the provision were inconsistent. Section 351.104(a)(7) applies to all documents originating with Commerce with no associated ACCESS barcode numbers and not just those issued before the implementation of ACCESS. Accordingly, Commerce has revised the second sentence to make that sentence consistent with the first sentence, as requested by those commenters.

In response to the statements that Commerce's various decision memoranda are not factual information and should not be subject to the requirements of Sec. 351.301, Commerce addressed this claim in the RISE Final Rule,\7\ explaining that collapsing determinations under Sec. 351.401(f), for example, and calculation memoranda, are highly dependent on the case-specific facts that Commerce analyzes.\8\ Commerce explained that although it agreed that "each collapsing and calculation memoranda is a legal analysis and decision by the agency, each of these memoranda also reflect conclusions based on the facts unique to the segment of the proceeding in which they were issued."\9\ Accordingly, each such document "contains factual information being introduced on the record of the ongoing segment or proceeding for the first time." \10\ Thus, Commerce disagrees with the statement that Commerce should state that the filing requirements of Sec. 351.301 do not apply to Commerce-authored public decision memoranda from other segments or proceedings because such information is not allegedly new factual information on the record. In fact, such memoranda are unquestionably new factual information in the context of a separate segment or proceeding, and Commerce has not adopted that proposed change.

\7\ See RISE Final Rule, 89 FR at 20772.
\8\ Id.
\9\ Id.
\10\ Id.

As Commerce also explained in the RISE Final Rule, "the conduct of an administrative proceeding is a time-intensive, resource-intensive, and fact-intensive endeavor." \11\ Commerce implemented the ACCESS barcode requirement to make it easier, in part, for Commerce to retrieve the documents and consider them in reaching conclusions for preliminary and final determinations.\12\ Therefore, allowing parties to cite documents in their submissions without those ACCESS barcode numbers present defeats the purpose of the requirement.

\11\ Id.
\12\ Id., 89 FR at 20771.

However, Commerce also recognizes that interested parties have cited preliminary and final issues and decision memoranda in investigations and administrative reviews without including ACCESS barcode numbers for many years, and those four types of documents are by far the public Commerce decision documents most frequently cited by interested parties in their case briefs and rebuttal briefs. In addition, those documents are relatively less difficult for Commerce to find in legal resource services than many other types of documents listed in Sec. 351.104(a)(6). Accordingly, Commerce has determined that despite the additional burden on the agency case teams to retrieve the cited documents, it is both fair and reasonable to allow interested parties to cite those four types of public documents from other segments or proceedings in submissions before the agency; especially those submissions issued when no ACCESS barcode was associated with those documents. Commerce has made no such determination with respect to other documents listed under Sec. 351.104(a)(6) and therefore has not codified such a filing exception for those additional Commerce-authored documents.

With respect to the suggestion that Commerce should permit parties to submit documents listed in Sec. 351.104(a)(6) for the first time on the record as appendices to case briefs and rebuttal briefs, for the reasons described below, Commerce does not agree that such a change to the agency's procedures and regulations is warranted or that failing to allow the submission of such documents late in a proceeding after the time for new factual information has passed unduly prejudices interested parties. These types of documents, such as collapsing memoranda and calculation memoranda, typically contain extensive case-specific business proprietary information. In the public versions of such memoranda, the business proprietary information can be redacted such that the detailed basis of Commerce's decision resulting from the underlying business proprietary data may not even be publicly discernable. Furthermore, to the extent that Commerce's analysis is discernable in the public version of the memorandum, that same public analysis should be reflected in a second location-Commerce's preliminary and final issues and decision memoranda. Commerce normally includes a public summary of its collapsing and calculation methodologies, for example, in its preliminary decision memoranda accompanying preliminary determinations or preliminary results published in the Federal Register. In

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those memoranda, Commerce publicly describes its collapsing determinations and other major calculation issues raised by interested parties in their case and rebuttal briefs in all final decision memoranda accompanying final determinations or final results. It is in these public issues and decision memoranda that Commerce's methodologies can be clearly discerned in a public manner, without relying on case-specific business proprietary information attached to briefs or rebuttal briefs for the first time on the record, long after the time for submitting new factual information on the record has expired.

Under Sec. 351.104(a)(6) and (7) as modified in this final rule, because interested parties can cite these public issues and decision memoranda from other segments or proceedings, including such memoranda without an associated ACCESS barcode number, to support their arguments in their case and rebuttal briefs, Commerce disagrees that the regulations, as amended, unduly prejudice interested parties as claimed by certain commenters. Instead, Commerce finds that Sec. 351.104(a) reflects a reasonable balance that allows parties to defend their interests, while also allowing Commerce officials the ability to analyze and consider information on the record without forcing the officials to also assume the additional burden of (1) independently researching the records of other past segments and proceedings, (2) analyzing as part of that exercise the unique facts that were present in those segments or proceedings that resulted in the application of a particular methodology, analysis or calculation, and then (3) placing additional information derived from those segments or proceedings. on the record of the case before the agency. These regulations allow interested parties to cite many different documents and sources, including over 20 types of Commerce's public decision documents, without placing those documents on the record, but also make clear that interested parties have a responsibility to make certain that the public versions of the factual information which support their arguments from other segments or proceedings and not listed in the relevant provisions of the regulation must be timely submitted on the record to be considered by Commerce in making its determinations. Accordingly, Commerce has determined to make no further modifications to Sec. 351.104(a)(7), other than the changes explained above.

2. Commerce Has Modified Proposed Sec. 351.107 and Proposed Sec. 351.212(b)(1), Which Cover Cash Deposits and Assessment of Duties, To Remove the Examples of Units Upon Which Cash Deposits and Assessment Rates May Be Applied

Commerce significantly revised and updated its cash deposit regulation in proposed Sec. 351.107 to more accurately and holistically reflect Commerce's establishment and application of cash deposit rates.\13\ Specifically, the revised regulation: (1) explains that while Commerce normally calculates cash deposit rates on an ad valorem basis, Commerce may calculate cash deposit rates on a per-unit basis; (2) describes situations in which Commerce applies cash deposit rates in a producer/exporter combination and the process by which a producer/exporter combination may be excluded from provisional measures and an AD or CVD order as a result of a calculated de minimis cash deposit rate following an investigation; (3) sets forth an AD cash deposit hierarchy for imports from market economies, an AD cash deposit hierarchy for imports from nonmarket economies, and a CVD cash deposit hierarchy; and (4) describes the effective date for cash deposit rates following the correction of ministerial errors in investigations and administrative reviews.

\13\ See Proposed Rule, 89 FR at 57290-93.

In addition, Commerce also revised its assessment regulation covering AD determinations, Sec. 351.212(b)(1), by dividing it into two sections-one providing for the assessment of entries on an ad valorem basis and another providing that if the information normally used to calculate an ad valorem assessment rate is not available or the use of an ad valorem rate is otherwise not appropriate, Commerce may instruct USCBP to assess duties on a per-unit basis.\14\

\14\ Id., 89 FR at 57301.

Commerce received several comments supporting the proposed changes to Sec. 351.107. One commenter supported the proposed rule as a welcome clarification to Commerce's cash deposit procedures and recognition of its authority to establish and tailor cash deposit rates to properly effectuate the AD/CVD law. That commenter specifically identified Commerce's proposed regulation as effectively codifying its authority to use combination producer/exporter cash deposit rates to address circumstances such as middleman dumping.

Another commenter specifically expressed support for proposed Sec. 351.107(c)(1), which would codify an exception to Commerce's normal ad valorem practice where the calculation of cash deposits on a per-unit basis might be appropriate if the information normally used to calculate an ad valorem cash deposit rate is not available or the use of an ad valorem cash deposit rate is otherwise not appropriate. The commenter further noted that Commerce's practice of using such alternate methodologies to calculate cash deposit rates results in more accurate duty calculations and codifying that practice would provide clear notice of this practice to interested parties.

A third commenter expressed support for the proposed regulation and suggested additional modifications to Sec. 351.107(c)(1) and Sec. 351.107 generally. Regarding Sec. 351.107(c)(1), the commenter proposed that, given the often technical nature of the products subject to review, as well as scope and data issues related to the underlying calculations and entries, Commerce should clarify that draft instructions be accompanied by an explanation of (1) the basis for Commerce's conclusion that the relevant information to calculate an ad valorem rate is "not available" or the reason an ad valorem rate "is otherwise not appropriate" and (2) a detailed description as to how the per-unit basis is to be calculated, particularly in view of an AD/CVD order's scope. The commenter noted that such an explanation would allow parties to comment on any errors and Commerce to make any appropriate modifications before final instructions are issued.

Regarding the Sec. 351.107 cash deposit regulation generally, the commenter proposed that Commerce explicitly require draft Customs instructions concerning cash deposit and assessment rates be placed on the record for comment at or near the time of the publication of the preliminary results to allow parties an opportunity to comment on the proposed calculations and rates as part of their administrative case briefs or, where Commerce is unable to issue draft instructions sufficiently in advance of the deadline for case briefs, Commerce establish an alternative process for submitting such comments. The commenter emphasized that Commerce should require that draft instructions be placed on the record for comment sufficiently in advance of the final results so parties may

comment on those instructions and Commerce may address or respond to such comments as part of the final issues and decision memorandum or notice of final results.

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One commenter expressed that while the proposed rule generally codifies Commerce's existing practice, Commerce should clarify its intent behind certain provisions. Regarding the proposed Sec. 351.107(c)(4), which would provide that USCBP may, upon receiving instructions from Commerce, apply a cash deposit requirement that reflects the record information and effectuates the administration and purpose of a certification, the commenter noted that it appeared Commerce intended to codify only its current practice of instructing USCBP to collect cash deposits based on the implementation of a certification requirement pursuant to a circumvention determination and expressed that Commerce should confirm the scope of this provision.

That commenter also requested clarification regarding proposed Sec. 351.107(d) and (e), which identify the hierarchies Commerce utilizes to determine the appropriate cash deposit rate for entries subject to AD/CVD investigations and orders. The commenter pointed out that the regulation states that Commerce may instruct USCBP to use an alternative methodology in applying cash deposit rates if Commerce determines that a cash deposit rate other than that resulting from the CVD cash deposit hierarchy should be applied based on the unique facts in the underlying proceeding. The commenter suggested that, if Commerce adopts the regulation as proposed, it should provide further information and examples of the types of unique circumstances that would warrant a different approach and the alternative approaches that could be used. The commenter further suggested that Commerce confirm that in such a circumstance, interested parties would be provided an opportunity to comment on any such instructions.

Commerce received only one comment on the proposed modifications to Sec. 351.212(b)(1). The same commenter that proposed that Commerce should clarify that draft cash deposit instructions be accompanied by an explanation of: (1) the basis for Commerce's conclusion that the relevant information to calculate an ad valorem rate is "not available" or why an ad valorem rate "is otherwise not appropriate"; and (2) a detailed description as to how the per-unit basis is to be calculated, particularly in view of an AD/CVD order's scope, made the same request for assessment instructions. The commenter noted that just as such an explanation would allow parties to comment on any errors in Commerce's cash deposit instructions, so too could parties comment on any errors in Commerce's draft assessment instructions and allow Commerce to make any appropriate modifications before the final assessment instructions are issued.

Response

As noted above, all of the commenters on the revised Sec. 351.107 approved of the significant modifications which Commerce made to the provision. Commerce agrees with the commenters that the new version of the regulation will provide substantially more guidance to the public on Commerce's application of cash deposit rates in the normal course of its proceedings.

With respect to additional suggestions, one commenter suggested that Commerce place draft cash deposit instructions to USCBP on the record at or near the time of the publication of the preliminary results on the record to allow interested parties an opportunity to comment on those draft instructions. Commerce has determined not to place this additional requirement in the regulation. However, Commerce agrees that it is Commerce's normal practice to share draft Customs instructions with interested parties and provide an opportunity to comment on them in most cases. In accordance with that practice, when appropriate, Commerce places draft Customs instructions on the record prior to issuance of the final results of a given segment of a proceeding with sufficient time for the parties to have an opportunity to comment on those instructions. However, there is no statutory obligation for Commerce to place draft Customs instructions on the record immediately after a preliminary agency decision has been issued, and sometimes, based on the facts on the record, it is either unnecessary for Commerce to issue draft instructions, or Commerce may be unable to issue draft instructions for a month's time or more after the agency's preliminary decision has been issued. Accordingly, Commerce has determined not to codify the commenter's suggestion into the regulation.

Nonetheless, Commerce acknowledges the importance of interested parties having the ability in most cases to consider draft Customs instructions and to identify any potential inaccuracies in a submission to Commerce before the final agency decision has been issued. Thus, Commerce recommends and encourages that if interested parties in a proceeding find that draft Customs instructions have not been placed on the record for a significant period of time after Commerce has issued its preliminary decision, those interested parties should request in writing that the agency

place draft Customs instructions on the record while there is still sufficient time for parties to comment on them when they submit their case and rebuttal briefs on the record to Commerce in accordance with Sec. 351.309(c) and (d).

Relatedly, with respect to the commenter's suggestion that Commerce provide an explanation and calculation when Commerce applies a cash deposit rate on a per-unit basis under proposed Sec. 351.107(c)(1), as well as that same commenter's suggestion that Commerce provide the same explanation and calculation when Commerce determines an assessment rate on a per-unit basis under proposed Sec. 351.212(b)(1)(ii), it is Commerce's practice to provide interested parties with an opportunity to comment on the calculation of cash deposit and assessment rates in disclosure packages uploaded to the record, and Commerce normally explains its cash deposit requirements in its Federal Register notices. However, the Act does not require that Commerce issue such a detailed disclosure in every case, and in fact there may be situations in which the issuance of such a disclosure is simply not necessary. Accordingly, Commerce has determined that it will not modify Sec. 351.107(c)(1) or Sec. 351.212(b)(1)(ii) to codify the issuance of disclosure packages regarding per-unit cash deposits in every case.

Commerce has, however, determined to modify those provisions as set forth in the Proposed Rule to remove the examples of units "to which a cash deposit rate may be applied" and "on which duties may be assessed." \15\ Commerce proposed those examples to provide greater clarity to the issue, but has determined that those examples may have instead been the source of some confusion. Accordingly, Commerce will continue to determine the appropriate units on which to apply cash deposits or assessment rates on a case-by-case basis and will forgo listing examples in the regulation.

\15\ Id., 89 FR at 57323 and 57328.

In response to the comment that Commerce provide further information and examples of the types of unique circumstances that would warrant a different approach and the alternative approaches that could be used under the AD and CVD cash deposit hierarchies set forth in Sec. 351.107(d) and (e), in the regulation, Commerce must emphasize that these exceptions to the cash deposit hierarchies will be highly dependent on the unique circumstances and facts of a

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particular segment of a proceeding. Thus, it would be inappropriate for Commerce to provide examples in the regulation. However, if such a situation arises and Commerce is considering application of an alternative to the cash deposit hierarchy in a segment of the proceeding, consistent with its practice, Commerce anticipates that it would inform the interested parties of that possibility and provide interested parties with an opportunity to provide commentary on such an alternative approach.

Finally, Commerce does not agree with the comment that Commerce intended for proposed Sec. 351.107(c)(4) to apply only to certifications issued pursuant to circumvention determinations under section 781 of the Act. Certifications issued under Sec. 351.228 may be applied pursuant to circumvention determinations, of course, but Commerce may also instruct USCBP to use certifications, for example, in enforcing certain scope rulings, under Sec. 351.225, and there are other situations in which Commerce may instruct USCBP to collect cash deposits in accordance with an importer or interested party certification. Accordingly, the language of proposed Sec. 351.107(c)(4) is appropriately broad enough to cover all situations in which Commerce instructs USCBP to collect cash deposits in accordance with a certification issued under Sec. 351.228 to effectively administer and enforce the AD and CVD laws.

3. Commerce Has Revised Proposed Sec. 351.108, the Separate Rate Regulation, To Clarify Various Provisions and To Address Third Country Exporters of Subject Merchandise From Nonmarket Economies

In the Proposed Rule, Commerce proposed to codify its longstanding practice of granting a separate rate to exporters of merchandise from nonmarket economies in new Sec. 351.108.\16\ Commerce explained that its practice was in accordance with section 771(18)(A) of the Act, which defines a nonmarket economy country as a foreign country which Commerce determines "does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise." \17\ Accordingly, as Commerce explained

in the Proposed Rule, for over three decades, in antidumping proceedings involving nonmarket economy countries, Commerce has repeatedly determined that legally distinct entities are in a sufficiently close relationship to the government to be considered part of a single entity (i.e., the government controlled entity). In this regard, current Sec. 351.107(d) explicitly provides that in an "antidumping proceeding involving imports from a nonmarket economy country, 'rates' may consist of a single dumping margin applicable to all exporters and producers."

\16\ Id., 89 FR at 57293.
\17\ Id.

Commerce explained in the Proposed Rule that it applies a separate rate test in antidumping proceedings involving a nonmarket economy. Under this test, Commerce considers whether an entity can demonstrate that the foreign nonmarket economy government does not have either legal (de jure) control or control in fact (de facto) over the entity's export activities.\18\ Commerce explained that over the past decade, Commerce has modified its practice to conclude that when a government holds a majority ownership share, either directly or indirectly, in a respondent exporting entity located in a nonmarket economy, the majority holding in and of itself demonstrates that the government exercises, or has the potential to exercise, control over the entity's operations generally.\19\ Commerce further explained that it was also proposing to strengthen its separate rate practice to address additional real-world factors through which a foreign government can control or influence production decisions, pricing and sales decisions, and export behavior.\20\ Commerce's practice in this regard has been affirmed in multiple cases by the U.S. Court of Appeals for the Federal Circuit (Federal Circuit).\21\

\18\ Id., 89 FR at 57293.
\19\ Id.
\20\ Id.
\21\ See., e.g., Sigma Corp. v. United States, 117 F. 3d 1401, 1405 (Fed. Cir. 1997) (Sigma v. United States); Transcom, Inc. v. United States, 182 F. 3d 876, 882 (Fed. Cir. 1999) (Transcom v. United States); Michaels Stores, Inc. v. United States, 776 F.3d 1388, 1390 (Fed. Cir. 2014) (Michaels v. United States); and Changzhou Wujin Fine Chem. Factory Co. v. United States, 701 F.3d 1367, 1370 (Fed. Cir. 2012) (Changzhou v. United States).

Commerce received several comments on proposed Sec. 351.108. Numerous commenters indicated their approval for Commerce's separate rate practice and its codification of that practice in its regulations, including its modification of that practice to deny the application of a separate rate when a nonmarket economy government has less than a majority ownership in a company but other indicia exist in conjunction with that (minority) ownership to indicate that the government controls or can control relevant decisions of the company.

Certain commenters identified concerns involving certain aspects of the proposed separate rate regulation. In particular, several commenters expressed concerns that the regulation did not address situations in which a company owned in whole or in part by the nonmarket economy government but located in a market economy other than the United States, exports merchandise from the non-market economy to the United States. One commenter stated that if the final regulations did not address situations in which a company incorporated in a market economy country exports merchandise from a nonmarket economy to the United States, the lack of such guidance could have a negative impact on U.S. import businesses seeking to comply with U.S. trade laws. That commenter stated that by remaining silent on those scenarios, Commerce's proposed regulations discourage the filing of separate rate applications in the first place by third-country exporters of merchandise from nonmarket economies. That commenter also suggested that Commerce should additionally consider addressing Commerce's practice when merchandise is substantially transformed in a third country before exportation to the United States, as well as other situations which might arise in a complex supply chain in the third country with regard to merchandise from the nonmarket economy.

Another commenter recommended that Commerce clarify that the separate rate test applies to all exporters, whether the exporter is located in the nonmarket economy or a market economy other than the United States, because the focus of the statute is on the merchandise produced or exported from the nonmarket economy and not the geographic location of the exporter. That commenter

stated that regardless of whether exporters are located in Hong Kong, Toronto, or Shanghai, if the merchandise is exported from a nonmarket economy to the United States, there is no reason to treat any of those exporters differently with regard to the application of the separate rate test, especially if the nonmarket economy government has any ownership interest in those exporters. That commenter stated that under Commerce's proposed regulation there is a significant risk that entities affiliated with the nonmarket economy government exporting merchandise from the nonmarket economy and sold to the United States could be treated differently solely because of whether the entities are physically located within or outside of the nonmarket economy.

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Another commenter acknowledged that governments of certain nonmarket economies, including the People's Republic of China (China), have recently established corporate footholds and export platforms in third country market economies, resulting in a significant increase in circumvention and evasion inquiries conducted by Commerce and USCBP. The commenter stated that Commerce's proposed regulation "contains a significant loophole" in not addressing exporters of nonmarket economy merchandise that are located in third countries and stated that Commerce "should not voluntarily limit its ability to remedy control over a firm's export activities exercised by the government of a nonmarket economy solely based on geography." Citing a separate rates policy bulletin issued by Commerce in 2005, the commenter explained that if a company physically located in a market economy country is owned or otherwise controlled by the nonmarket economy government, then that government could still be in a position to control the export activities of the company, which it asserted is the precise "situation that the separate rate test is intended to address." \22\

\22\ Citing Policy Bulletin 05.1, Separate-Rates Practice and Application of Combination Rates in Antidumping Investigations Involving Non-Market Economy Countries (April 5, 2005), available on Commerce's ACCESS website at https://access.trade.gov/Resources/policy/bull04-1.html.

In addition, a few commenters expressed concerns with Commerce's separate rate exception codified in proposed Sec. 351.108(c) for entities wholly owned by market economy entities and incorporated and headquartered in a market economy. One commenter stated that Commerce failed to take into consideration in the proposed regulation that a nonmarket economy government might exercise control through various ownership interests or other means. That commenter advocated removing the exception from the proposed regulations altogether.

Similarly, another commenter identified concerns with the same language in proposed Sec. 351.108(c), suggesting that Commerce should include an "ultimate ownership" analysis in the regulation looking beyond "one level of corporate control" to upstream shareholders and corporate owners to determine if the nonmarket economy government, including through the use of state-owned enterprises, might be situated in such a way as to evade Commerce's separate rate analysis.

A third commenter suggested that Commerce add language to the provision that would allow Commerce to deny the application of the exception if there was evidence on the record suggesting that the company is otherwise controlled by the nonmarket economy government.

A fourth commenter expressed concerns that the exception might allow for "indirect" ownership of an exporter of nonmarket economy merchandise, which "could be exploited by government-controlled" nonmarket economy entities "attempting to obscure their status by routing ownership through one or more foreign holding companies with some operations in a market economy country." Therefore, that commenter recommended that Commerce add the terms "directly and indirectly" before the descriptor "wholly owned" in Sec. 351.108(c).

Two commenters stated that they disagreed with Commerce's proposed requirement in Sec. 351.108(d)(1), (2), and (3) that separate rate applications and certifications be filed no later than 14 days following publication in the Federal Register of a notice of initiation, stating that Commerce's current practice of 30 days was preferrable. In the Proposed Rule, Commerce explained that "the thirty-day deadline delays Commerce from selecting respondents in its nonmarket economy proceedings because Commerce cannot select respondents for individual examination in its nonmarket economy proceedings until it first determines the pool of exporters who have satisfied the separate rate analysis." \23\ One commenter stated that it disagreed with Commerce's conclusion, stating that the thirty-day requirement does not affect the selection of mandatory respondents because it claimed that Commerce's practice is to choose the largest exporters based

on quantity and value questionnaires and that if a company is selected as a mandatory respondent, Commerce can gather the information it needs for a separate rate analysis from the mandatory respondent's section A questionnaire response. In addition, that commenter stated that gathering necessary information to complete a separate rate application, in particular, is a difficult task, because many exporters may have never participated in an antidumping proceeding before, many companies have intermediate shareholders who may be initially unwilling to report their ownership, and the proposed regulations suggest that new information might be requested of exporters in the future which might take even more time to collect, report, and support with documentation.

\23\ See Proposed Rule, 89 FR at 57296.

A second commenter that disagreed with the fourteen-day deadline focused on the hardship which that truncated deadline would have on United States small businesses and, in particular, importers. The commenter explained that many United States importers are caught by surprise in antidumping investigations and have less-sophisticated operations than larger importers, and it may take a lengthy amount of time after a petition in an investigation has been filed to identify smaller importers as interested parties. In addition, the commenter explained that once those smaller importers realize that they are interested parties, it can take some time for them to retain legal counsel, fully understand the impact of antidumping and countervailing duties on their business, identify relevant products covered by an investigation being imported, and identify their upstream producers and exporters that are ultimately responsible for completing the separate rate application. Even after they identify those producers and exporters, the commenter explained that communicating with those parties and inducing them to file a timely separate rate application also takes time. That commenter stated that this "significant change" would be "likely to disproportionately and negatively impact small U.S. businesses." Therefore, considering the financial impact of such a change on U.S. importers and numerous steps which U.S. importers would have to take under the proposed fourteen-day deadline, that commenter stated that Commerce should retain the thirty-day deadline.

One commenter indicated its support for the fourteen-day deadline, stating that it should not create any hardship for companies wishing to submit a separate rate application or certification. That commenter stated that the applications and certifications are available on Commerce's website, and all importers, producers, and exporters should be aware after the petition is filed in investigations, (before initiation of the investigation), or after a review request is filed in reviews, that they are subject to an antidumping proceeding. That commenter agreed with Commerce that the new deadline would help prevent delays in nonmarket economy investigations or reviews because it allows Commerce to select respondents for individual examination earlier in the proceeding.

In addition, Commerce received several suggestions from commenters for smaller modifications to proposed

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Sec. 351.108 to improve the regulations. One commenter recommended that Commerce make the following modifications: Remove the term "the lack of" in the header language for proposed Sec. 351.108(b)(3) because the criteria listed in that section actually indicate de facto control; remove the word "no" in proposed Sec. 351.108(b)(3)(vi) because, again, that provision speaks to evidence of de facto control or influence; remove the word "must" in Sec. 351.108(b)(3)(i) and add the term "or must maintain" because the described situation covers both existing and required maintenance of certain government representatives in positions of control; include the term "or managers" following the term "officers" throughout the regulation because both officers and managers can influence corporate decisions; and when addressing situations in which representative of the governments may, in fact, be placed in positions of leadership or power in a company, Commerce should include the term "or their family members," because Commerce has a long-standing practice of recognizing that family members and family groupings may share a common business interest and authority.\24\

\24\ That commenter cited Jinko Solar Co. v. United States, 279 F. Supp. 3d 1253, 1260 (CIT 2017), and Echjay Forgings Priv. Ltd. v. United States, 475 F. Supp.3d 1350, 1366 (CIT 2020), for cases affirming Commerce's determinations that family members can share a common interest with a business.

Another commenter suggested that Commerce revise the regulation to better clarify that the agency, and not the separate rate applicants or certifiers, must be satisfied that the applications or certifiers have shown that the degree of government control or influence is not significant and to emphasize that the applicants or certifiers have the sole responsibility to provide proof of lack of government control or influence. That commenter also suggested that Commerce include "government-appointed or controlled labor unions" in the regulation as types of governing authorities through which the nonmarket economy government may exert control or influence, because Commerce has indicated in the past that such unions are under the "control and direction of the All-China Federation of Trade Unions (ACFTU)," which is affiliated with the Chinese government and an organ of the Communist Party of China.\25\

\25\ That commenter cited a memorandum drafted by Commerce, "Memorandum on China's Status as a Non-Market Economy," dated October. 26, 2017, available at https://enforcement.trade.gov/download/prc-nme-status/prc-nme-review-final-103017.pdf.

Finally, one commenter expressed concerns with proposed Sec. 351.108(e), which states that entities that submit separate rate applications or certifications and are subsequently selected to be an examined respondent in an investigation or review must fully respond to Commerce's questionnaires to be eligible for separate rate status. That commenter stated that Commerce should not adopt the proposed provision and not "automatically deem companies that failed to respond to all questionnaires as part" of the nonmarket economy entity. The commenter stated that a failure to respond to all questionnaires would justify the application of adverse facts available, pursuant to section 776(a) and (b) of the Act, but would not necessarily justify the refusal of a grant of separate rate eligibility. That commenter stated that treating individually examined respondents differently from non-selected exporters in this manner would create an "arbitrary distinction" and would result in Commerce not considering "the rate assigned" to an examined respondent in "calculating the separate rate" if the examined respondent was "deemed to be part" of the nonmarket economy entity. The commenter stated that such a practice would create a "significant incentive for manipulation by exporters and permit separate rate companies to potentially benefit from lower rates, notwithstanding the selected respondent's deemed representativeness of the non-individually examined companies." The commenter explained that under this situation, parties with no intent to fully participate or that anticipate substantial dumping margins would be incentivized to submit a separate rate application or certification and, once selected as an examined respondent, could withdraw from participation as a means of manipulating the rate applied to the non-selected separate rate companies.

Response

Commerce has made certain modifications to proposed Sec. 351.108 in light of the comments it received on the proposed regulation. With respect to the concerns expressed by multiple commenters as to third country exporters, Commerce respectfully disagrees with the commenters who stated that there is no difference for purposes of Commerce's separate rate practice between exporters of subject merchandise owned, in whole or in part, by a nonmarket economy government located in the nonmarket economy and those exporters located in a third country.

When an entity is physically located in a nonmarket economy, there are multiple means by which the nonmarket economy government may, directly or indirectly, influence and control the entity. In the Act, Congress instructed Commerce to take into account at least six factors in determining if a country is a nonmarket economy: (i) the extent to which the currency of the foreign country is convertible into the currency of other countries; (ii) the extent to which wage rates in the foreign country are determined by free bargaining between labor and management; (iii) the extent to which joint ventures or other investments by firms of other foreign countries are permitted in the foreign country; (iv) the extent of government ownership or control of the means of production; (v) the extent of government control over the allocation of resources and over the price and output decisions; and (vi) such other factors as the administering authority considers appropriate.\26\ Some of those factors are specific to the nonmarket economy government's ownership and control of the producers and exporters of the subject merchandise, but other factors reflect the nature of the nonmarket economy itself.\27\ As Commerce has explained, its practice is focused on

"the government's use of a variety of legal and administrative levers to exert influence and control (both direct and indirect) over the assembly of economic factors across the economy." \28\

\26\ See section 771(18)(B) of the Act.

\27\ In 1997, the Federal Circuit in Sigma v. United States recognized that the Act "recognizes a close correlation between a nonmarket economy and government control of prices, output decisions, and the allocation of resources." Sigma v. United States, 117 F.3d at 1405-1406.

\28\ See Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments; 2012-2013, 80 FR 40998 (July 14, 2015), and accompanying Issues and Decision Memorandum at Comment 42.

As noted above, Commerce has recognized in multiple cases the ability of the nonmarket economy government to influence or control production decisions, commercial decisions, or export activities within the nonmarket economy, even when such influence or control is applied through multiple entities and organizational relationships, and the Federal Circuit has affirmed such findings.\29\ The nonmarket economy government might control one producer directly, through a government agency or a state-owned

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enterprise, while indirectly influencing another producer through privately-owned companies over which the nonmarket economy has ownership interests or governing authority.

\29\ See., e.g., Sigma v. United States 117 F.3d at 1405; Transcom v. United States, 182 F. 3d 876, 882; Michaels Stores v. United States, 776 F.3d 1388, 1390; and Changzhou v. United States, 701 F.3d 1367, 1370.

However, when an exporting entity is physically located outside of the nonmarket economy at issue, some of those conclusions may not equally apply. In other words, the nonmarket economy government's "legal and administrative levers" in the nonmarket economy that impact certain activities may differ from that government's "legal and administrative levers" in a third country where that government is not the legal authority. At the same time, Commerce recognizes that a nonmarket economy government can, depending on the specific circumstances, continue to exert substantial influence over the export activities of state-owned firms incorporated in third countries. For example, direct ownership of an exporter by a nonmarket economy government or state-owned enterprise could imply control over the selection of management of the exporter under the governing corporate agreements or inform the extent to which that exporter retains the proceeds of its export sales or repatriates them to the nonmarket economy parent.

Accordingly, whether the exporting entity is located in a market economy or a different nonmarket economy is a factor that can be relevant to the analysis of whether a third country exporter is owned or potentially controlled by the nonmarket economy government.

The focus of the separate rate test is "if a respondent can demonstrate the absence of both de jure and de facto government control over its export activities." \30\ The ultimate question under the separate rate test is whether the nonmarket economy government has influence or control over important decisions of the entity, like the "selection of management," which would be "key" in "determining whether a company has sufficient independence in its export activities to merit a separate rate." \31\

\30\ See Polyester Textured Yarn from the People's Republic of China, Preliminary Affirmative Determination of Sales at Less Than Fair Value, Postponement of Final Determination and Extension of Provisional Measures, 84 FR 31297 (July 1, 2019), and accompanying Preliminary Decision Memorandum at "Separate Rates."

\31\ Id.

In the case of an entity located in a third country that exports merchandise subject to an investigation or AD/CVD order and originating from the nonmarket economy, the subject merchandise might be exported directly to the United States from the nonmarket economy. Alternatively, the subject merchandise might be exported to a third country, either the one where the entity is located or another third country, where it is held in a warehouse, stored in inventory or otherwise retained for a period of time, before it is eventually exported to the United States at a later date. A third option might be that the subject merchandise undergoes some minor processing in a third country, like the painting or marking of a product, without changing the country of origin of the merchandise. In all of these potential situations, unless record evidence demonstrates that the company is wholly owned by a foreign entity and is incorporated and headquartered in a market economy, in accordance with Sec. 351.108(c), Commerce requires a separate rate application or certification from that entity.\32\ This is because it is Commerce's experience that entities in third countries that export merchandise from the nonmarket economy to the United States commonly are owned, in part or in whole, by the nonmarket economy government through the government's agencies or state-owned enterprises.\33\ Additionally, based on experience, there is a strong possibility that through that ownership relationship the nonmarket economy government might control or influence the entity's export activities and decisions with respect to the merchandise being exported from the nonmarket economy. Such control might arise, for example, through the appointment of officers, managers, and the board of directors, but could also manifest through veto power or the use of "golden shares" and outsized voting rights within the company. Every company is unique, so a state-owned enterprise or other government-controlled entity might equally be able to direct or influence export-related decisions of a third country company based on the unique nature of its ownership share.

\32\ See Commerce's Separate Rate Application at 3, available at https://access.trade.gov/Resources/nme/sep-rate-files/app-20190221/prc-sr-app-022119.pdf.

\33\ See, e.g., Chinese Firms are expanding in South-Asia, The Economist, dated April 24, 2024, available at https://economist.com/asia/2024/04/25/chinese-firms-are-expanding-in-south-east-asia.

On the other hand, because the nonmarket economy government may not have the same legal and administrative levers in the third country which it has in the subject country, the exercise of ownership and control of the entity in the third country by the nonmarket economy government may differ. Accordingly, after consideration of the comments, Commerce has modified paragraph (a) of Sec. 351.108 to add a paragraph (a)(3) which states that if a nonmarket economy government has direct ownership or control, in whole or in part, of an entity located in a third country market and that entity exports subject merchandise from the nonmarket economy to the United States, Commerce may determine on the basis of record information that such an entity is part of the government-controlled entity and assign that entity the nonmarket economy entity rate.

Furthermore, Commerce has modified Sec. 351.108(b) and divided it into two provisions. Pursuant to paragraph (b)(1), Commerce will apply an updated separate rate test and analysis to entities located in nonmarket economies, as set forth in the Proposed Rule, and pursuant to paragraph (b)(2), Commerce may analyze an entity directly owned or controlled by a nonmarket economy government and located in a third country and determine based on record information if that third country exporter should be treated as part of the nonmarket economy entity and receive the nonmarket economy entity rate or if it should be granted a separate antidumping duty rate. This language is consistent with Commerce's historical analysis and treatment of entities located in nonmarket economies and allows for Commerce to consider the legal and administrative levers present in third countries that might allow for the control of an entity that exports subject merchandise to the United States and is owned, in part or in whole, by the nonmarket economy government.\34\

\34\ See, De Facto Criteria for Establishing a Separate Rate in Antidumping Proceedings Involving Nonmarket Economy Countries, 78 FR 40430, 40432 (July 5, 2013) ("We agree that there is a legitimate concern that NME producers under government control selling through affiliated third-country resellers may, in fact, control that reseller and, in such cases, the reseller's exporting activities would also be under government control") and ("In circumstances when the record indicates there may be government control through the NME producer, we may require both the

NME producer and the ME exporter to provide" separate rate de jure and de facto information).

In response to the comments on proposed Sec. 351.108(c), Commerce has clarified the language of the provision to explain that, in accordance with our current practice, if an entity claims that it is wholly owned by a foreign entity and headquartered and incorporated in a market economy, it must complete and submit relevant, designated sections of the separate rate application or

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certification explaining as much and provide accompanying information on the record that supports such a claim.\35\ Furthermore, Commerce has modified the language of Sec. 351.108(d) to explain that all exporters of subject merchandise to the United States, even those claiming the "wholly owned" exception applies, must submit a separate rate application or certification, with the only difference being those claiming that the "wholly owned" exception need only complete a section of the application or certification explicitly designated for that purpose by Commerce.

\35\ See Commerce's Separate Rate Application at 3, available at https://access.trade.gov/Resources/nme/nme-separate.html.

On the other hand, Commerce will not modify the regulations to require further analysis or investigation under the "wholly owned" exception into possible "ultimate owners" of the foreign owners themselves in every proceeding in which the issue arises, as suggested by certain commenters. The facts of each antidumping proceeding are unique, and the application of any such requirement to Commerce in every case in which this arises, whether the foreign-owned entity is located in the nonmarket economy or in a third country, would be unreasonable and fail to take into consideration the time, record constraints and overall difficulty which Commerce could be faced with in pursuing such lines of inquiry in a proceeding involving multiple parties or complicated facts. Commerce has an extensive history of applying the foreign-owned exception in its separate rate practice,\36\ and Commerce will continue to apply that exception and consider the evidence on the record in determining on a case-by-case basis whether the exception should apply to a given exporter. Furthermore, for the same reason, Commerce will not expand its normal analysis to mandate inquiry in the regulation into "indirect" means of ownership or control of foreign-owned entities by a nonmarket economy government through potential holding companies or shareholder deception in every case, as suggested by some commenters.

\36\ Commerce has allowed an exception for wholly-foreign-owned exporters from the application of the separate rate analysis for three decades. See Notice of Final Determination of Sales at Less Than Fair Value: Bicycles From the People's Republic of China, 61 FR 19026 (April 30, 1996) (explaining that "Four of the responding exporters in this investigation are located outside the PRC… Further, there is no PRC ownership of any of these companies. Therefore, we determine that no separate rates analysis is required for these exporters because they are beyond the jurisdiction of the PRC government"); Certain Steel Threaded Rod from the People's Republic of China: Preliminary Results and Partial Rescission of the Antidumping Duty Administrative Review; 2014-2015, 81 FR 29843 (May 13, 2016), and accompanying Issues and Decision Memorandum at 5, citing Final Results of Antidumping Administrative Review: Petroleum Wax Candles from the People's Republic of China, 72 FR 52355 (September 13, 2011) (stating "In its Section A response, the RMB/IFI Group, reported that it is wholly-owned by individuals or companies located in a market economy ("ME") country. Therefore, because it is wholly foreign-owned, and we have no evidence indicating that it is under the control of the PRC government, a separate rate analysis is not necessary to determine whether this company is independent from government control. Accordingly, we preliminarily grant a separate rate to the RMB/IFI Group"); and Wooden Bedroom Furniture From the People's Republic of China: Amended Final Results Pursuant to a Final Court Decision, 75 FR 72788 (November 26, 2010) (stating "Wanvog provided evidence that during the POR it was a wholly foreign-owned company. Therefore, consistent with the Department's practice, further analysis is not necessary to determine whether Wanvog's export activities are independent from government control, and we have preliminarily granted a separate rate to Wanvog").

With regard to the comments on proposed deadlines for the filing of separate rate applications and certifications under Sec. 351.108(d)(1) and (2), Commerce has reconsidered its proposed deadline of 14 days from publication of initiation in antidumping investigations in agreement with the commenters who noted that many importers or exporters who find themselves subject to an investigation might be unfamiliar with the antidumping laws and procedures and may need more than fourteen days after initiation to communicate with the appropriate lawyers, company representatives or government officials and gather information to submit necessary documentation with Commerce. Although one commenter is correct that Commerce normally determines the potential pool of respondents using Quantity and Value questionnaires in nonmarket economy procedures, Commerce disagrees that the receipt of those questionnaires, followed by the receipt of separate rate applications, does not delay the selection of respondents. As Commerce explained in the Proposed Rule, the longer Commerce must wait for questionnaires, applications, and certifications, the longer it takes for Commerce to select respondents and issue full questionnaires to respondents selected for examination.\37\ Investigations, administrative reviews and new shipper reviews are all conducted under statutory deadlines, and the Act does not provide for extensions of those deadlines due to response times of Quantity and Value questionnaires and separate rate applications and certifications.

\37\ See Proposed Rule, 89 FR at 57296.

Commerce, therefore, continues to find that 30 days from initiation of an investigation is still too lengthy of a period in which to wait for separate rate applications in an investigation, but also agrees with some of the commenters that in an investigation 14 days may be too short of a time for importers and exporters to communicate and gather the necessary data. Accordingly, Commerce has modified Sec. 351.108(d)(1) to allow for a separate rate application to be filed an additional seven days from that proposed in the Proposed Rule. Specifically, in antidumping investigations, interested parties will be allowed to file separate rate applications no later than 21 days following publication of initiation of the investigation in the Federal Register. This means that from the time a petition is filed in an investigation, interested parties will have notice that an investigation might be conducted and start gathering necessary information, and from the time the investigation notice is published in the Federal Register, they will have 21 days to answer the questions in Commerce's separate rate application, located on Commerce's website, and file the application electronically with the agency. Commerce has determined that this modification to the proposed regulation appropriately takes into consideration the concerns raised by some of the commenters, while also helping Commerce to prevent delays of its procedures by a few days when conducting an AD investigation.

However, with respect to administrative reviews and new shipper reviews, Commerce does not agree that the same issues exist as were raised by the commenters with respect to investigations. After an investigation is completed, an AD order is issued and published in the Federal Register.\38\ Administrative reviews and new shipper reviews are conducted pursuant to an existing AD order. U.S. importers and foreign exporters alike are on notice that when merchandise subject to an AD order is imported into the United States, cash deposits will be collected on that merchandise, and duties will be assessed on that merchandise at some point.\39\ Importers and exporters have an obligation to be aware of potential duties on the merchandise which they are importing or exporting, and ignorance of the existence of the AD order or of their fiduciary duties to pay the applicable trade remedies is not a

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reasonable excuse. On the other hand, the fourteen-day deadline will allow Commerce the opportunity to avoid certain existing delays in its proceedings to the benefit of the participants who must answer questionnaires and to Commerce officials in analyzing and considering those parties' questionnaire responses and information. Accordingly, Commerce has not modified the fourteen-day deadline from the publication of initiation of an administrative review or new shipper review set forth in Sec. 351.108(d)(2).

\38\ See section 736(a) of the Act.

\39\ Id.

Commerce agrees with other suggestions and has adopted them as follows: (1) Commerce has removed the term "the lack of" in the header language for proposed Sec. 351.108(b)(1)(iii) because the criteria listed in that section actually indicate de facto control; (2) Commerce has removed the word "no" in proposed Sec. 351.108(b)(1)(iii) because, again, that provision speaks to evidence of de facto control or influence and the inclusion of the word "no" spoke to the opposite meaning; (3) Commerce has revised Sec. 351.108(b)(1)(iii)(A) to read "maintains or must maintain" because the described situation covers both existing and required maintenance of certain government representatives in positions of control; (4) Commerce has included the term "or managers" following the term "officers" throughout the regulation because both officers and managers can influence corporate decisions; (5) Commerce has included the term "or their family members" when addressing situations in which representatives of the governments may, in fact, be placed in positions of leadership or power in a company, in accordance with Commerce's practice of recognizing that family members and family groupings may share a common business interest and authority; and (6) Commerce has included "government-appointed or controlled labor unions" in the regulation as types of government authorities through which a nonmarket economy may exert control or influence. In addition to those modifications, Commerce has emphasized in Sec. 351.108(a)(2), that its analysis is based on record information, clarified language throughout the regulation when it was referring to a "government" that the government at issue is the "nonmarket economy government," and removed the term "or control" from Sec. 351.108(b)(1)(i)(B)(2) because that language is superfluous, as that particular provision pertains to the veto power of the nonmarket economy government giving it control over the decisions of the entity. Furthermore, Commerce has also modified "production and commercial" decisions throughout the regulation to be "production, commercial and export" decisions because export decisions are always under consideration in Commerce's separate rate analysis.

In addition, in response to a commenter's suggestion that Commerce revise the regulation to clarify that Commerce, not the separate rate applicants or certifiers, must be satisfied that the applications or certifiers have shown that the degree of government control or influence is not significant and that applicants or certifiers must provide proof of lack of government control or influence, Commerce has modified the text of Sec. 351.108(b) to indicate that Commerce must determine "that the exporter has demonstrated that it operates certain activities sufficiently independent from nonmarket economy government control." Commerce has also provided further language in Sec. 351.108(d) to explain that if no separate rate application or certification is timely submitted by an exporter of merchandise subject to an investigation or AD/CVD order, Commerce may apply the nonmarket economy rate to that exporter's merchandise. Also, Commerce modified the title language to the overall regulation to emphasize that Commerce's separate rate analysis applies to entities, whether in the nonmarket economy or in a third country, that export merchandise from the nonmarket economy to the United States.

In response to the comment on proposed Sec. 351.108(e) that entities that submit separate rate applications or certifications and are subsequently selected to be an examined respondent in an investigation or review by Commerce must fully respond to Commerce's questionnaires in order to be eligible for separate rate status, Commerce has expanded that proposed paragraph to not only require full responses to questionnaires but also full participation in the proceeding, as explained below.

With respect to Commerce's questionnaires, the full "section A" questionnaire asks more detailed questions specifically about corporate structure than the separate rate application or certification. It asks for an organizational chart on affiliation and has more comprehensive questions about manufacturing facilities, locations, legal structure, third parties, narrative history, capital verification reports, and other information in addition to ownership and affiliation. Further, the "section C" questionnaire requests information that supports claims that a respondent retained the proceeds of their export sales and made independent decisions regarding the disposition of profits or financing of losses. In addition to requesting more data about the company's corporate structure in the initial questionnaire, Commerce frequently will issue supplemental questionnaires to learn even more details about the affiliations and structure of the respondent being examined. Much of the "section A" questionnaire is akin to a more detailed request for information to supplement the separate rate application or certification and allows Commerce to confirm or clarify claims made in a separate rate certification or application.

In addition, full participation in the proceeding overall is necessary to allow Commerce to be able to verify any information relevant to determining separate rate eligibility, and it is not unusual for Commerce to discover at verification that information believed to be complete on the record before conducting verification was, in fact, incomplete after consideration of an entity's complete books and record. Accordingly, if a respondent selected for individual examination fails to fully respond to

Commerce's questionnaires or, where applicable, fails to allow Commerce to verify information submitted in response to Commerce's questionnaires, absent extenuating circumstances, Commerce shall determine that it also has failed to demonstrate its eligibility for a separate rate.

The commenter on Sec. 351.108(e) did not seem to take issue with the provision itself, but instead indicated concerns with what Commerce does after it has made a determination that the exporter is part of the nonmarket economy entity. The commenter expressed concerns that non-selected entities and examined respondents would collude in such a way that if an examined respondent realized that review of its entries could lead to a high dumping margin, which would in turn be used to help calculate the rate applied to the non-selected exporters, the examined respondent might choose not to answer questionnaires, thereby pulling it into the nonmarket economy entity and pulling it out of the non-selected exporters calculation, under Commerce's current practice for determining that non-selected exporter rate.

Although Commerce appreciates the concerns expressed by the commenter on this issue, Commerce disagrees that treating an examined respondent differently for purposes of its separate

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rate analysis from those exporters who only submit separate rate applications and certifications is "arbitrary." The distinction is in no way arbitrary because examined respondents must provide a much greater amount of information to Commerce to analyze and determine an antidumping margin covering their merchandise. In addition, without full participation by the examined respondent, including a response to questionnaires, Commerce is unable to confirm, clarify, or verify claims made in a separate rate certification or application. Furthermore, although Commerce has codified its methodology for determining a rate to be applied to non-selected exporters in an antidumping proceeding covering a nonmarket economy in general at Sec. 351.109(g), neither that provision nor Sec. 351.108(e) addresses the use, or nonuse, of the nonmarket economy entity rate in determining a rate to be applied to the non-selected exporters in an antidumping investigation or administrative review. The commenters' concerns seem to speak to that element of Commerce's calculation of a rate to apply to non-selected exporters, but because Commerce is not codifying that practice in this provision, Commerce has determined that this concern should be addressed on a case-specific basis. Accordingly, other than requiring full participation in the proceeding, Commerce has made no further modifications to Sec. 351.108(e).

Finally, Commerce is not addressing in the new regulation or in the preamble to the final rule situations in which an entity located in a third country substantially transforms subject merchandise into a different product in the third country, completes or assembles the subject merchandise into a different product in the third country, or alters the subject merchandise in form or appearance in minor respects in the third country, as suggested by one of the commenters. All of those scenarios are already addressed in scope and circumvention proceedings by sections 781(b) and (c) of the Act and Sec. Sec. 351.225(j) and 351.226(i) and (j) of Commerce's regulations.

4. Commerce Has Made a Small Modification to Proposed Sec. 351.109(c)(2)(v), Which Applies to the Selection of Additional Respondents

Proposed new Sec. 351.109 addresses Commerce's procedures for selecting respondents, calculating the all-others rate in investigations, calculating a rate for unexamined respondents in various proceedings, and the selection of voluntary respondents.\40\

\40\ See Proposed Rule, 89 FR at 57296.

Commerce received several generally supportive comments on the proposed new Sec. 351.109. With respect to the selection of additional respondents, one commenter stated that the language "soon after filing questionnaire response" and "early in the segment of a proceeding" in proposed Sec. 351.109(c)(2)(v) \41\ is open-ended and would likely lead to debate over what counts as "soon" or "early." That commenter recommended that Commerce instead define the cutoff for adding new respondents by stating Commerce would select a respondent only after determining that there is sufficient time left before deadlines in the proceedings to complete all of its procedures without additional administrative burden. That commenter suggested that by adding language that addressed timing and other such considerations, Commerce would set realistic parameters for parties to understand when Commerce may select additional respondents.

\41\ Id., 89 FR at 57296-57300.

That commenter stated that this revised language would also establish a standard that is consistent with Commerce's approach elsewhere in its regulations. For example, Sec. 351.311(b) provides that Commerce "will examine the practice, subsidy, or subsidy program {discovered in the course of an investigation or review} if the Secretary concludes that sufficient time remains before the scheduled date for the final determination or final results of review." Similarly, Sec. 351.214(f)(2) states that Commerce may rescind a new shipper review where "{a}n expansion of the normal period of review to include an entry and sale to an unaffiliated customer in the United States of subject merchandise would be likely to prevent the completion of the review within the time limits."

The second commenter stated that it generally concurred with Commerce's proposed rule but recommended that the regulation define the parameters on the timing for the selection of additional respondents under Sec. 351.109(c)(2)(v). For example, the proposed language does not define how soon after the filing of questionnaire responses a respondent could withdraw from participation and Commerce would consider reviewing another exporter or producer for examination, how early in the segment Commerce could determine that a selected exporter or producer is no longer participating in the investigation or administrative review and that there is sufficient time to pick another respondent, or when in the segment Commerce could determine that the exporter's or producer's sales of merchandise subject to an investigation or AD/CVD order are not bona fide but that there remains time to examine another respondent. Without a clear definition of what "early in the segment" means, the commenter explained the uncertainty could result in the selection of additional respondents and the filing of new questionnaire responses very late in a proceeding, thereby providing insufficient time for domestic producers to provide meaningful comment or for Commerce to issue supplemental questionnaires prior to a preliminary determination or preliminary results. Therefore, the second commenter recommended that Commerce add language to state that Commerce will select additional respondents only if it is within 90 days of initiation, consistent with the 90-day deadline for parties to withdraw requests for administrative reviews under Sec. 351.213(d).

Two other commenters suggested that Commerce codify that a "reasonable number of respondents" in an investigation or administrative review where individual examination of all known exporters or producers is not practicable must be more than one respondent, consistent with recent holdings of the Court of International Trade (CIT) and Federal Circuit.\42\

\42\ See YC Rubber Co. (North America) LLC v. United States, No. 2021-1489, 2022 WL 3711377 at 3 (Fed. Cir. 2022); see also Schaeffler Italia S.R.L. v. United States, 781 F. Supp. 2d 1358, 1363 (CIT 2011).

Those two commenters also recommended that Commerce modify its practice to enable more frequent use of sampling as a respondent selection methodology. They stated that in many cases, selection of the two largest producers or exporters results in selection of the same respondents in proceeding after proceeding and allows those respondents to tailor their operations or reporting in a manner that avoids antidumping or countervailing duties without being representative of the foreign industry.

The commenters also expressed concern with Commerce's rejection of the use of sampling in most cases. In a 2013 notice, the agency stated that it would not rely on sampling unless it "has the resources to examine individually at least three companies for the segment." \43\ One commenter stated

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that Commerce rarely selects more than two respondents, particularly in administrative reviews, and claims that Commerce has not conducted a single proceeding since the issuance of the 2013 policy announcement in which it used sampling to select respondents. One commenter also stated that a system in which most foreign exporters will be excluded from individual examination and thus able to "free ride" off the largest respondents' margins creates a significant barrier to leveling the playing field in the U.S. market.

\43\ See Antidumping Proceedings, 78 FR 65963, 65965 (November 4, 2013) (announcement of change in Commerce practice for respondent selection in AD proceedings and conditional review of the nonmarket economy entity in AD proceedings).

Another concern raised by one commenter was Commerce's normal reliance on USCBP data to select respondents. That commenter stated that while USCBP data is generally an appropriate starting point for respondent selection, these data can also be highly problematic for the purpose of respondent selection. For example, it is possible for quantities to be reported in different units that are not easily converted into a uniform unit of measurement. That commenter also suggested that USCBP data may also contain errors or appear to be incomplete, which can be evident on the face of the data or revealed only in light of information submitted by interested parties. Therefore, one commenter recommended that Commerce clarify in its regulations that, when such problems with USCBP data are evident or revealed by information placed on the record, Commerce will rely on additional information for the purpose of respondent selection. That commenter suggested that Commerce consider requiring all exporters requesting an administrative review to provide with their request the quantity and value of their shipments of subject merchandise during the period of review in order to have a second set of reliable data on the record from which to select respondents.

Lastly, one commenter expressed concerns regarding Commerce's proposed regulation for calculating the all-others and non-selected rates. That commenter referenced several past cases where Commerce used either quantity or value in calculating the dumping margin assigned to exporters and producers who were not individually reviewed and stated that Commerce's calculations had been inconsistent. That commenter stated that Commerce should clarify in the regulations the circumstances in which it will rely on a weighted average of publicly ranged U.S. sales values or the circumstances in which Commerce would rely on a weighted average of sales quantities for calculating the all-others rate and the non-selected respondents' rate.

Response

Commerce agrees with the commenter that suggested Commerce should focus on the time remaining and actions which need to be taken in a segment of a proceeding before selecting a new respondent. Accordingly, in the last sentence of Sec. 351.109(c)(2)(v) Commerce has added language to say that the Secretary may select the next respondent based on the next largest volume or value "if the Secretary determines that such a selection will not inhibit or impede the timely completion of that segment of the proceeding."

On the other hand, Commerce does not agree with a commenter's suggestion that Commerce should codify a hard deadline before which it can select additional respondents. There is nothing in the Act which would suggest such a restriction, and imposing such a deadline in the regulation may curtail Commerce's ability to select respondents when issues arise during a proceeding. As mentioned in the Proposed Rule, considerable time and resources are necessary for issuing questionnaires and analyzing data for purposes of respondent selection.\44\ If Commerce were to codify a deadline as suggested and then a respondent decided not to participate or to withdraw its request for administrative review, or Commerce determined that the U.S. sales reported by a selected respondent were not bona fide sales of subject merchandise after that deadline, yet Commerce also determined that there remained sufficient enough time for Commerce to select another respondent, then such a deadline would be a hindrance to the agency. Commerce should be able to select another respondent for examination in any of those scenarios. Accordingly, Commerce does not believe the codification of a hard deadline is advisable.

\44\ See Proposed Rule, 89 FR at 57297.

Section 777A(c)(1) and (e)(1) of the Act direct Commerce to determine an individual weighted-average dumping margin or countervailable subsidy rate for each known exporter and producer of the subject merchandise. If Commerce codified a hard deadline and for whatever reason one or more respondents dropped out after that deadline, Commerce might find itself with no ability to select additional exporters or producers, despite the statutory preference to review more exporters and producers and the fact that Commerce has determined that it has the time and resources to examine another exporter or producer. Such a restriction is illogical and would only

provide Commerce with fewer opportunities to exercise its statutory authority to examine a reasonable number of respondents.\45\ Accordingly, Commerce has not adopted that recommendation in the final rule.

\45\ See Viet I-Mei Frozen Foods Co. v. United States, 83 F. Supp. 3d 1345, 1362 (CIT 2015), aff'd, 839 F.3d 1099 (Fed. Cir. 2016) ("{T}o the prevention of abuse where Commerce expends resources to initiate an individual examination – and the respondent seeks to withdraw its participation when it changes its mind about the benefit of such examination and prefers the 'all others' rate instead – is a reasonable basis on which Commerce may decline to abort its examination.").

As mentioned in the Proposed Rule, the primary focus of respondent selection is whether Commerce can effectively examine a reasonable number of producers and exporters, as Congress intended, to calculate an accurate dumping margin or countervailable subsidy rate.\46\ Certain commenters requested that Commerce codify that when limiting individual examination to the largest producers/exporters, Commerce will select more than one respondent in every case. However, Commerce saw no need to codify any such requirement in its Proposed Rule and continues to see no benefit in codifying such a requirement into the regulation. Accordingly, Commerce has not placed such a restriction in the regulation.

\46\ See Proposed Rule, 89 FR at 57297.

With respect to the comments on sampling, section 777A(c) of the Act states that if it is "not practicable to make individual weighted average dumping margin determinations" because of "the large number of exporters or producers involved" in an investigation or review, Commerce may "determine the weighted average dumping margins for a reasonable number of exporters or producers by limiting its examination to (A) a sample of exporters, producers or types of products that is statistically valid based on the information available" to Commerce at the time of selection or (B) the exporters and producers accounting for the "largest volume of the subject merchandise from the exporting country that can be reasonably examined." The Statement of Administrative Action (SAA) states that "the authority to select samples rests exclusively with Commerce, but, to the greatest extent possible, Commerce will consult with

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exporters and producers regarding the method to be used." \47\

\47\ See Statement of Administrative Action Accompanying the Uruguay Rounds Agreement Act, H. Doc. 316, Vol. 1, 103d Cong. (1994) (SAA) at 872.

In its 2013 Change in Practice Notice, Commerce explained that it will normally rely on sampling for respondent selection purposes in AD administrative reviews when (1) there is a request by an interested party for the use of sampling to select respondents, (2) Commerce has the resources to examine individually at least three companies for the segment, (3) the "largest" three companies (or more if Commerce intends to select more than three respondents) by import volume of the subject merchandise under review account for normally no more than 50 percent of total volume, and (4) information obtained by or provided to Commerce provides a reasonable basis to believe or suspect that the average export prices and/or dumping margins for the largest exporters differ from such information that would be associated with the remaining exporters.\48\ In the rare cases where Commerce relies on sampling to select respondents, it is typically when there are multiple, and often numerous, prior reviews to draw upon for evidence of margin differentials attributable to size.

\48\ See Antidumping Proceedings: Announcement of Change in Department Practice for Respondent Selection in Antidumping Duty Proceedings and Conditional Review of the Nonmarket

Economy Entity in NME Antidumping Duty Proceedings, 78 FR 65963, 65964 (November 4, 2013) (2013 Change in Practice Notice).

An important part of any methodology using sampling to select respondents is that the sampling must be "statistically valid" under section 777A(c)(A) of the Act. The commenters who expressed concerns with Commerce's respondent selection sampling methodology did not explain why that methodology is not statistically valid, or, in the alternative, provide an alternative methodology that would meet this statutory requirement.\49\ Therefore, Commerce will continue to rely on the criterion specified in the 2013 Change in Practice Notice and consider sampling when Commerce can select a minimum of three respondents to examine individually in light of resource constraints. Despite statements by the commenters to the contrary, Commerce has in fact completed a statistically valid sampling request since the issuance of the 2013 Change in Practice Notice,\50\ and statistically valid sampling for purposes of respondent selection remains a viable option for parties to request and consider.

\49\ See SAA at 873 ("Commerce will employ a sampling methodology designed to give representative results based on the facts known at the time the sampling method is designed").

\50\ See, e.g., Commerce's Memorandum, "Antidumping Duty Administrative Review of Steel Nails from the People's Republic of China: Sampling Pool for Selection of Respondents and Selection Methodology," dated April 1, 2019 ("In light of the particularly large number of exporters that are under review in this segment, as well as the history of margins in the prior segments of this proceeding, discussed above, we find that using a sampling methodology in this review addresses this enforcement concern").

In the Proposed Rule, Commerce stated that it would normally base respondent selection on information derived from USCBP.\51\ While one commenter expressed concerns regarding Commerce's preference for USCBP data, suggesting that USCBP data are susceptible to errors, no database is perfect. Although the Act does not limit Commerce to relying only on USCBP data in its reviews, Commerce weighs USCBP data more heavily because they contain the actual entry documentation for the shipments, including the CBP 7501 entry summary form (or its electronic equivalent), invoice, and bill of lading.\52\ USCBP data are based on information required by, and provided to, the U.S. government authority responsible for permitting goods to enter into the United States.\53\ Moreover, significant penalties can be imposed on parties that report entry information inaccurately.\54\ Furthermore, Commerce prefers USCBP data because they are "a primary source, as opposed to a secondary source, which may be prone to errors in the data collection and aggregation process." \55\ Given the aforementioned reasons, Commerce's treatment of USCBP data will remain unchanged when selecting that as a data source to determine the largest exporters or producers of subject merchandise.

\51\ See Proposed Rule, 89 FR at 57297.

\52\ See, e.g., Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Final Results of Antidumping Duty Administrative Review; Final Determination of No Shipments; 2020-2021, 87 FR 55996 (September 13, 2022) (Fish Fillets from Vietnam), and accompanying Issues and Decision Memorandum ("Although the petitioners assert that ship manifest data it placed on the record 'raises questions' regarding the CBP data, it is well-established that mere speculation does not constitute substantial evidence, which is the standard for Commerce to make a finding.").

\53\ See, e.g., Certain Frozen Warmwater Shrimp from India: Final Results and Partial Rescission of Antidumping Duty Administrative Review, 74 FR 33409 (July 13, 2009), and accompanying Issues and Decision Memorandum, at Comment 2.

\54\ See Fish Fillets from Vietnam Issues and Decision Memorandum at Comment: Commerce Should Ensure that All Subject Merchandise Is Subject to the Appropriate Duties.

\55\ See, e.g., Certain Cut-to-Length Carbon Steel Plate from the People's Republic of China: Preliminary Results of Antidumping Administrative Review and Preliminary Determination of No Shipments, 77 FR 47593 (August 9, 2012).

In addition, Commerce will not include in the regulation a requirement that respondents that request an administrative review file a quantity and value questionnaire response when making a

review request, as suggested by a domestic industry commenter. Such further information submissions from foreign exporters would be unnecessary and create an additional burden on Commerce to consider and analyze such submissions, regardless of whether such additional information on the record actually adds value to the case at hand.

Commerce agrees that for some imported products, problems arise in relying on certain USCBP volume data because different importers will report their entries in quantities that are denominated in different units of measure (UOMs). For example, in the 2023 CVD administrative review of softwood lumber from Canada, Commerce acknowledged that certain importers reported their imports based on cubic meters, others on square meters, others on kilograms, and still others based on number of pieces.\56\ Commerce also explained that "in addition to missing volumes, the various UOMs are problematic because, for example, measurements of weight (e.g., kilograms) cannot be converted to measurements of volume (e.g., cubic meters) without making certain assumptions, and 'number of pieces' simply cannot be converted to a measurement of volume." \57\ On the other hand, the USCBP data in that review did contain "value amounts for all entries of subject merchandise in the same unit of currency." \58\ Therefore, as it had in prior review periods, Commerce determined to rely "on the value data as a proxy for quantity and selecting respondents accounting for the largest value." \59\ Commerce explained that using value as a proxy for quantity when there are issues with reported UOMs for entry quantities "is transparent and consistent with Commerce's approach in other proceedings as well as the prior administrative reviews of this order." \60\ For this reason, Sec. 351.109(c)(2)(ii) specifically provides that if Commerce determines that "volume data are

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unreliable or inconsistent, depending on the product at issue," Commerce "may instead select the largest exporter of subject merchandise based on the value of the imported products instead of the volume of the imported products." The value data, however, will still normally originate from the USCBP. Thus, on this basis as well, Commerce sees no reason to second-guess its normal preference of using data derived from USCBP if possible.

\56\ See Memorandum, "Administrative Review of the Countervailing Duty Order on Certain Softwood Lumber Products from Canada; 2023: Respondent Selection," dated April 19, 2024 (ACCESS Barcode: 4546196-01).

\57\ Id.

\58\ Id.

\59\ Id.

\60\ Id.

Lastly, one commenter claimed that Commerce has been inconsistent on whether it relies on a weighted-average using publicly ranged U.S. sales values or on a weighted-average using U.S. sales quantities in calculating all-others and non-selected rates. That commenter requested that Commerce set a clear test in the regulation as to the circumstances in which Commerce will base its calculations on sales values and when it will base its calculations on sales quantities.

Upon consideration of this comment, Commerce has determined not to adopt this proposed addition to its regulations but clarifies here that the agency's practice is to calculate the all-others and non-selected rates using a weighted-average based on publicly ranged U.S. sales values. To the extent that Commerce chooses to use, instead, a weighted average using U.S. sales quantities in determining the all-others rate or a rate to apply to respondents who are not individually examined, such an application is an exception to Commerce's practice and would be case-specific and based on the unique facts to the record before the agency. If Commerce determines to calculate the all-others rate or rate for respondents who are not individually examined based on U.S. quantities instead of U.S. sales-values, Commerce will provide an explanation in its determination.

5. Commerce Has Made No Modifications to the Proposed Change to Sec. 351.214, Which Covers Expedited CVD Reviews

In the Proposed Rule, Commerce proposed modifying the heading of Sec. 351.214, which currently reads "New shipper reviews under section 751(a)(2)(B) of the Act," by adding the phrase "and expedited reviews in countervailing duty proceedings." \61\ Commerce proposed such a change because section 751(a)(2)(B) of the Act provides Commerce the authority to determine dumping

margins and CVD rates for exporters and producers that did not export subject merchandise to the United States during the period of investigation, referred to as "new shipper reviews." However, paragraph (l) of Sec. 351.214 does not relate to new shipper reviews but instead provides procedures for conducting expedited reviews of exporters not selected for individual examination in CVD investigations. Instead, the Federal Circuit in Comm. Overseeing Action for Lumber Int'l Trade Investigations v. United States, 66 F.4th 968, 977 (Fed. Cir. 2023) (COALITION v. U.S.) held that the "individualized-determination provisions" of section 777A(e) of the Act, along with the "regulatory-implementation authority" of section 103(a) of the URAA,\62\ explicitly provide Commerce with the authority to promulgate Sec. 351.214(l).\63\ Therefore, Commerce proposed modifying the heading to Sec. 351.214 to make it consistent with the holding in COALITION v. U.S.

\61\ See Proposed Rule, 89 FR at 57302.
\62\ See Uruguay Round Agreements Act, Public Law 103-465, 108 Stat. 4809 (1994) (URAA).
\63\ See COALITION v. U.S., 66 F.4th at 977.

One party commented on this change, stating that the Federal Circuit in COALITION v. U.S. held that expedited CVD administrative reviews are not prescribed by the Act. Accordingly, that commenter stated that Commerce should remove Sec. 351.214(l) entirely from the regulation to conserve agency resources, instead of modifying the heading to Sec. 351.214 as proposed.

Response

Commerce proposed to only revise the heading to Sec. 351.214 and not to remove an entire provision pursuant to which Commerce has conducted expedited CVD administrative reviews. As the Federal Circuit held in COALITION v. U.S., that provision was added consistent with language in the WTO Agreement on Subsidies and Countervailing Measures (the SCM Agreement),\64\ and Commerce does not believe it would be reasonable to remove that language in this final rule. Accordingly, Commerce will not modify the regulation as suggested by the commenter and will modify the heading of Sec. 351.214 as set forth in the Proposed Rule.

\64\ See Agreement on Subsidies and Countervailing Measures (SCM Agreement); 19 U.S.C. 3511 (Approval and entry into force of Uruguay Round Agreements") (December 9, 1994).

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6. Commerce Has Made Certain Small Modifications to Proposed Sec. 351.301(b)(2), Covering the Submission of Rebuttal Information

Commerce proposed a modification to one of its reporting regulations, Sec. 351.301(b)(2), to require greater detail from interested parties filing factual information to rebut, clarify, or correct factual information on the record.\65\ The existing regulatory language does not require the submitter of such information to explain what information on the record the alleged rebuttal/clarification/correction information actually rebuts, clarifies, or corrects, and the lack of such an explanation has created a burden on both Commerce and interested parties to understand why the information being provided under this paragraph is being submitted and how it is particularly responsive to the information already on the record.\66\ Accordingly, Commerce proposed adding a sentence to the regulation that stated that the submitter "must also provide a narrative summary explaining how the factual information provided under this paragraph rebuts, clarifies, or corrects the factual information already on the record."\67\

\65\ See Proposed Rule, 89 FR at 57302.
\66\ Id.
\67\ Id.

Two commenters expressed concerns with this proposed modification to the regulation, stating that the proposed additional requirement would hinder the submission of relevant information and delay proceedings because frequently parties that initially submit factual information in response to Commerce's questionnaires do not provide the detailed explanation required by the proposed

language. They stated that the difference between what is required of those submitting initial factual information on the record and what would be required of those submitting rebuttal factual information would be inherently unfair. Furthermore, the commenters stated that to require submitters rebutting that information to prepare a detailed narrative before the record is complete would require parties to also prematurely disclose arguments in an ongoing segment of the proceeding, basically emboldening parties to "litigate their arguments" early in a segment of the proceeding in the guise of objections to the scope of rebuttal factual information. They stated that those submitting factual information on the record for the first time often may not provide a specific explanation for how the submitted factual information supports their questionnaire responses. Thus, those filing rebuttal information are often forced to submit information that they think might be responsive, but they may not learn until the time for filing new factual information has passed the specific capacity for which the initial facts on the record were actually submitted in the first place.

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The commenters also stated that such a requirement would push those submitting rebuttal information to request extensions from Commerce to prepare a detailed narrative. The commenters stated that placing such a requirement in the regulation would create a burden for Commerce with no real benefit, and, as such, they requested that Commerce reject the proposed modification to its regulations, or at minimum, have the required explanation only address how the information is "relevant" to the factual information already on the record.

Response

Commerce retains the view that the failure to identify the information being rebutted creates a burden on Commerce or other interested parties. Under the current regulatory language parties may submit information with no explanation as to what it rebuts, clarifies or corrects, thereby permitting the submission of information that does not meet those requirements despite the restrictions of the regulation. Having information on the record without an explanation of how it ties to the initial facts on record complicates Commerce's ability to analyze and enforce the limitations of submitting factual information under Sec. 351.301. Accordingly, Commerce will continue to include language addressing this concern in the regulation.

With respect to the perceived unfairness of the reporting requirements of those submitting information in the first instance on the record in response to questionnaires, Commerce emphasizes two points. First, normally, when a respondent submits information on the record in response to a specific Commerce question, the reason that the information was submitted on the record in the first place is evident. That may not be the case, however, with rebuttal information submitted on the record with no explanation. Therefore, by their nature these two types of factual information submissions are different, and Commerce requires specific explanation from those submitting rebuttal information to identify the information already on the record that is being rebutted (or clarified or corrected).

Second, if an interested party reviewing the record does not believe that factual information submitted on the record in the first instance by another interested party supports or is relevant to the question asked by Commerce, the interested party has the ability to bring that concern to Commerce's attention in a timely fashion. Commerce may reject new factual information submitted on the record in the first instance if Commerce determines that it is not relevant to the questions or information request made of the respondent. In short, the record should be clear as to the reasons new factual information is being submitted, either through a response to an agency questionnaire, or in a rebuttal, clarification, or correction explanation. Commerce has determined, therefore, that the regulation should reflect that understanding of new factual information and the administrative record.

Commerce has made certain small changes, however, to the language set forth in the Proposed Rule. The opening paragraph of Sec. 351.301(b) requires those submitting factual information in the first instance to provide a "written explanation identifying the subsection of 351.102(b)(21) under which the information is being submitted." Commerce has revised the new language in Sec. 351.301(b)(2) to state that the submitter of rebuttal, clarifying or correction factual information must "provide a written explanation describing how the factual information" rebuts, clarifies, or corrects the factual information already on the record. This language provides greater symmetry in the parties' obligations in the regulation while emphasizing the type of information Commerce is seeking from those submitting rebuttal factual information-not a long narrative submission, but rather a concise and complete explanation describing specifically what factual information on the record the new factual information rebuts, clarifies or corrects.

7. Commerce Has Made No Changes to the New Deadlines in Proposed Sec. 351.301(c)(3), Covering the Submission of Benchmark and Surrogate Value Data, But Has Added Language Permitting Commerce To Issue a Schedule With New Deadlines in Unique Circumstances

Commerce proposed a revision to Sec. 351.301(c)(3) to update deadlines for filing certain information on the record.\68\ Current Sec. 351.301(c)(3)(i) and (ii) establish a thirty-day time limit before the scheduled dates of preliminary determinations and results of review for interested parties to submit factual information to value factors of production under Sec. 351.408(c) or to measure the adequacy of remuneration under Sec. 351.511(a)(2) in AD and CVD investigations, administrative reviews, new shipper reviews, and changed circumstances reviews.

\68\ See Proposed Rule, 89 FR at 57302-57303.

The Proposed Rule explained that those submissions sometimes contain hundreds, if not thousands, of pages of information that Commerce must analyze in a short amount of time prior to issuing a preliminary determination or preliminary results.\69\ Because the volume of information often contained in these submissions can be so large, it makes it difficult for Commerce to meet its statutory deadlines to determine the appropriate surrogate values or benchmarks in the preliminary determination or preliminary results.\70\ Commerce also explained that since the 30-day deadlines were codified, Commerce has experienced a large increase in AD and CVD proceedings and orders which it must administer.\71\ Accordingly, to effectively administer and enforce the AD and CVD laws, Commerce proposed modifying these time limits to allow Commerce additional time to more fully analyze these voluminous submissions for purposes of its preliminary decisions.\72\ Specifically, Commerce proposed revising Sec. 351.301(c)(3)(i) to create both a paragraph (c)(3)(i)(A) and (B) covering investigations. Under the proposal, the time limit for parties to submit factual information to value factors of production under Sec. 351.408(c) in AD investigations under Sec. 351.301(c)(3)(i)(A) would be no later than 60 days before the scheduled date of the preliminary determination, and the time limit for parties to submit factual information to measure the adequacy of remuneration under Sec. 351.511(a)(2) in CVD investigations would be no later than 45 days before the scheduled date of the preliminary determination in proposed Sec. 351.301(c)(3)(i)(B).\73\

\69\ Id.
\70\ Id.
\71\ Id.
\72\ Id.
\73\ Id.

Furthermore, for administrative reviews, new shipper reviews, and changed circumstances reviews, proposed Sec. 351.301(c)(3)(ii) would require parties to submit factual information to value factors of production under Sec. 351.408(c) or to measure the adequacy of remuneration under Sec. 351.511(a)(2) no later than 60 days before the scheduled date of the preliminary results of review.\74\

\74\ Id.

Commerce received several comments on the proposed change in deadlines. One party supported the change, stating that the modifications would enhance Commerce's ability to enforce trade laws in a timely and efficient manner and

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would provide interested parties with a more complete preliminary determination, as the agency would have more time to consider and analyze its benchmark and surrogate value determinations for purposes of the preliminary agency decision. That commenter agreed with Commerce that the agency does not currently have sufficient time to review the benchmark and surrogate value data

provided in either submissions or rebuttal submissions, and therefore, Commerce frequently cannot address those submissions in part or in whole in the preliminary determination or results, to the disservice of the interested parties. That commenter stated that it disagrees with the claim that the revisions will unduly affect the ability of interested parties to gather and submit necessary factual information on the record and emphasized that if Commerce's preliminary determinations contain more analysis and information as a result of this change in the deadlines, it will provide interested parties with an opportunity to submit fulsome, better comments in anticipation of a final determination or results of review.

The other commenters indicated that they were opposed to the change in deadlines for submitting benchmark and surrogate value data, and instead advocated for Commerce to retain its current thirty-day deadlines. There were essentially four concerns or suggestions which they expressed pursuant to the proposed change. First, if Commerce needs an additional 15 days for CVD investigations and an additional 30 days for surrogate values and CVD administrative reviews, that is 15 days and 30 days, respectively, which interested parties will no longer have to gather benchmarks and surrogate value information and then submit it to Commerce. Domestic industries stated that Commerce's proposal was biased against them because respondents are already familiar with their factors of production in an AD case and would be able to consider possible surrogate values even before they have filed their questionnaire responses and supplemental questionnaire responses, creating a disadvantage for domestic industries with a shorter period of time to gather information in AD proceedings. Likewise, domestic industries said they were also disadvantaged in CVD cases because respondents would have time to consider benchmarks while answering Commerce's questionnaires. With respect to both types of proceedings, domestic industries expressed concerns that respondents would have an incentive to request extensions and thereby run out the clock, making it impossible for domestic industries to find and submit appropriate benchmarks and surrogate values based on the questionnaire responses.

On the other hand, a foreign government stated that respondents are at a disadvantage in CVD investigations with a shorter period of time to gather potential benchmark data because domestic industries that file a petition have already had an opportunity to consider benchmarks for a less than adequate remuneration (LTAR) allegation, and in both CVD investigations and reviews, petitioners have time before they make new subsidy allegations to gather potential benchmark information. Further, another commenter stated that the shortened deadlines would be unfair for respondents that spend extensive amounts of time answering questions and gathering data. That commenter stated that that providing such a short period in which to file benchmark and surrogate value data would add unreasonably to respondents' burden and impact the quality of their responses.

In both AD and CVD cases, the commenters stated that the ultimate submissions would be of lesser quality and accuracy because the time period in which to gather sufficient data would be too short, thereby impeding Commerce's ability to issue supplemental questionnaires and the domestic industry's ability to identify deficiencies in the respondents' questionnaire responses. They also expressed concerns that it would be more difficult to analyze foreign government responses to Commerce's questionnaires and determine if a tier-one or tier-two benchmark under Sec. 351.511 would be appropriate, and if supplemental questionnaires were issued to respondents with respect to their reported factors of production in an AD case, there may be little to no time for domestic parties to consider potential surrogate values so late in the proceeding within the proposed deadlines.

Some commenters noted that Commerce sometimes sets an earlier deadline for surrogate value submissions and then allows further submissions subsequently within the 30-day deadline. This proposed change, they stated, would make that entire process more difficult, therefore reducing the potential surrogate value information on the administrative record. The commenters, therefore, stated that the proposed shorter deadlines would result in less complete administrative records, less accurate preliminary determinations and results of administrative reviews, and more extension requests from parties to submit necessary information, with no clear benefit to Commerce.

The second expressed concern involved the postponement or extension of preliminary determinations or results of administrative reviews. The commenters stated that 60 days and 45 days before a preliminary determination or results of administrative review is issued, petitioners may not have yet requested postponement or, in administrative reviews, Commerce may not have yet decided to extend the preliminary results. If the preliminary determination or results were extended, so too would be the benchmark and surrogate value submission deadlines. They stated that the result might be that interested parties work quickly to find proposed benchmarks or surrogate values, submit them on time, and then discover that the preliminary determination or results or review have been extended. Had the interested parties known that an extension was forthcoming, the commenters stated that parties could have used the additional time to find potentially better quality and more accurate information. They noted that with respect to the

extension of preliminary results of reviews in administrative reviews, Commerce normally issues an extension 30 days before the preliminary results are set to be issued, which would result in the described situation if that practice was retained. They stated that adding this amount of uncertainty to Commerce's procedures is unnecessary and should be avoided. Accordingly, the commenters requested that if Commerce retains the proposed changes, it should modify the dates upon which extensions to preliminary determinations or results would be granted so that parties would be aware if the benchmark and surrogate value deadlines had been extended as well.

The third comment on this proposed change to deadlines was a suggestion for Commerce to instead tie deadlines for submitting surrogate value information or market benchmarks to other points in the proceedings, including supplemental responses, which would allow the record regarding factors of production specifications and subsidy programs to be fully developed by the deadline. The commenter providing this suggestion stated that it would both achieve the stated goal of giving Commerce more time to analyze submissions and would avoid creating delays or a lack of adequate surrogate

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value or benchmark information on the record.

The final group of suggestions Commerce received on this issue was that if Commerce insisted on maintaining the changes in deadlines, it should make certain other changes to its regulations and practice, such as allowing for rebuttal benchmark and surrogate value submissions to be submitted on the record after those regulatory deadlines have passed if subsidy program information or factors of production end up being placed on the record on or after those deadlines. In addition, the same commenter suggested that Commerce also consider limiting extension deadlines for questionnaire responses so that late filings do not chip away at the opportunity for the domestic industry to file adequate responsive benchmark or surrogate value submissions.

Response

Although Commerce recognizes the concerns expressed by the commenters, it continues to find that setting the deadline to submit surrogate value comments and information 60 days prior to the scheduled due date of the preliminary determination and preliminary results in AD nonmarket economy proceedings is reasonable, as is setting the deadline for the submission of benchmark comments and information 45 days before the scheduled date of the preliminary determination in a CVD investigation, and 60 days prior to the scheduled preliminary results in a CVD administrative review.

Commerce's determinations are based on the facts on the administrative record and they are frequently challenged before the CIT, Federal Circuit, and various World Trade Organization (WTO) and United States-Mexico-Canada Agreement (USMCA) dispute panels. Accordingly, Commerce must have sufficient time to consider and analyze the facts on the record when it issues preliminary or final determinations or results, to be certain that its decisions are accurate and based on the substantial evidence on the record. In short, Commerce needs the additional 15 and 30 days which it has proposed adding to Sec. 351.301(c)(3).

While interested parties will have less time to gather and submit benchmark data and surrogate value information, both the domestic industry and respondents to the agency's proceedings produce the domestic like product/subject merchandise and therefore have an acute understanding of the inputs that are required to produce subject merchandise in a nonmarket economy AD or similar proceeding.

With respect to surrogate value submissions specifically, Commerce disagrees that the 60-day deadline will result in parties having to submit surrogate values and comments prior to the submission of a section D questionnaire response, specific to nonmarket economy cases, containing workable factors of production information. In the vast majority of cases, parties have sufficient time to prepare and submit surrogate value comments and information well after a section D questionnaire response is submitted to the respondent. However, if there is a timing concern, parties should request in writing that the agency extend the deadline for the submission of surrogate value comments and information.

With respect to the deadlines for benchmarks in CVD investigations, most of the alleged subsidy programs at issue in a CVD investigation are known on the date the petition is filed, and Commerce indicates the alleged subsidy programs that it has determined to investigate in the initiation checklist, issued concurrently with the date Commerce signs the initiation notice. Further, in Commerce's experience a domestic industry's allegation that a product has been sold for LTAR includes information regarding an appropriate benchmark.

Additionally, in CVD investigations where a LTAR subsidy is alleged, Commerce's initial questionnaire solicits information as to whether market conditions in the subject country permit the use of certain benchmarks. Thus, parties should be on notice at the early stages of the investigation that they may need to submit comments and information regarding certain benchmark information.

Likewise, with respect to administrative reviews, Commerce finds that requiring parties to submit benchmark and surrogate value information 60 days prior to the scheduled due date of the preliminary results is reasonable given that the timeline for CVD and AD reviews is substantially longer than the timeline for CVD and AD investigations. Under section 751(a)(3)(A) of the Act, Commerce has 245 days to issue its un-extended CVD and AD preliminary results of review and 365 days to issue fully extended CVD and AD preliminary results of review. These schedules provide ample time for Commerce to solicit, and respondents to provide, information on benchmarks and surrogate values, thereby permitting parties to meaningfully comment on such information by the revised 60-day deadline.

Notwithstanding the above, Commerce agrees that it will have to make adjustments to its practice as a result of these changes in some instances, as raised by one of the commenters. For example, as some of the commenters noted, there may be instances in AD nonmarket economy proceedings in which the initial section D questionnaire response has not been submitted by the 60-day deadline. In such situations, Commerce will adjust the comment schedule to allow for parties to have sufficient time to submit surrogate value comments and information. Likewise, in certain CVD investigations, it is possible that a respondent or foreign government may submit its initial response regarding a LTAR subsidy allegation on a date that occurs on or after the proposed 45-day deadline. In such instances, again, Commerce may need to adjust the comment schedule to allow for parties to have sufficient time to submit benchmark information for that alleged LTAR program.

Furthermore, with respect to new subsidy allegations, under Sec. 351.301(c)(2)(iv)(A), domestic industries must make new subsidy allegations in CVD investigations no later than 40 days before the scheduled date of the preliminary determination. This results in a second potential situation in which Commerce's proposal to require benchmark information to be submitted no later than 45 days prior to the scheduled date of the preliminary determination will not be feasible. Accordingly, if the new deadlines for benchmark submissions found in Sec. 351.301(c)(3) have already passed or are imminent, Commerce will determine that they do not apply in that case to new subsidy LTAR allegations filed near or on the due date specified under Sec. 351.301(c)(2)(iv)(A). In addition, if the domestic industry files new subsidy allegations at an earlier stage of an initiated CVD investigation, it may occur that Commerce's initiation, issuance of the new subsidy allegation questionnaire, and receipt of the respondents' responses to the new subsidy allegation questionnaire are not completed in time for interested parties to submit benchmark information by the forty-five-day deadline. In both of those instances, Commerce agrees that it would likely need to establish a separate schedule for the interested parties to provide them with sufficient time to submit benchmark information.

Accordingly, in the final rule, Commerce has added Sec. 351.301(c)(3)(i)(C) which states that if

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Commerce determines that interested parties will not have sufficient time to submit factual information in investigations under the deadlines set forth in paragraph (c)(3)(i)(A) or (B) because of circumstances unique to the segment of the proceeding, Commerce may issue a schedule with alternative deadlines for parties to submit factual information on the record.

With respect to administrative reviews, Commerce acknowledges that there may be cases in which it will also have to issue a separate schedule for interested parties to have sufficient time to submit new factual information in this regard. For example, in AD nonmarket economy administrative reviews, if the initial section D questionnaire response is submitted on or after the revised sixty-day deadline, Commerce may need to issue a separate schedule for the interested parties to submit surrogate value comments and information. Likewise, in CVD administrative reviews, Commerce may also need to issue a separate schedule for parties to submit benchmark comments and information when the domestic industry alleges a LTAR subsidy and Commerce has yet to issue an initiation decision memorandum or questionnaire responses concerning such an allegation were not submitted until a date on or after the revised sixty-day deadline.

Accordingly, Commerce has also divided Sec. 351.301(c)(3)(ii) into two paragraphs, with Sec. 351.301(c)(3)(ii)(A) reflecting the previously proposed language and Sec. 351.301(c)(3)(ii)(B) to add new language similar to that of Sec. 351.301(c)(3)(i)(C), stating that if Commerce determines that interested parties will not have sufficient time to submit factual information in administrative reviews, new shipper reviews, and changed circumstances reviews under the deadlines set forth in paragraph (c)(3)(i)(A) because of circumstances unique to the segment of the

proceeding, Commerce may issue a schedule with alternative deadlines for parties to submit factual information on the record.

Commerce disagrees, however, with the concern that these new deadlines will disadvantage interested parties because it is Commerce's practice to grant postponement or extensions of preliminary determinations or results of administrative review 30 days before the preliminary determination or results, which would fall after benchmarks and surrogate values are due. The scenario that commenters describe already occurs under the current 30-day comment deadline, and thus, Commerce does not find this argument to be a valid basis to refrain from the 45- and 60-day benchmark and surrogate value deadlines in CVD and AD nonmarket economy investigations. However, Commerce acknowledges that the scenario described by parties has the potential to occur more frequently in the context of CVD and AD nonmarket economy administrative reviews. Therefore, in CVD and AD nonmarket economy administrative reviews in which the 60-day deadline to submit benchmark and surrogate values information is approaching, and Commerce has yet to extend the due date of the preliminary results, parties may file a request for Commerce to extend the deadline to file benchmark and surrogate value information.

Commerce also disagrees that basing the deadline for parties to submit benchmark comments and information in CVD investigations on the receipt of the last questionnaire response pertaining to the LTAR subsidy and surrogate value comments, and information in AD nonmarket economy investigations on the last section D questionnaire response would be preferable to deadlines for submissions being tied to the issuance of preliminary determination or results. Commerce finds that such an approach would be impractical, as it would require Commerce and parties to track different benchmark and surrogate value comment deadlines across cases. Such an approach also assumes that Commerce would be able to easily determine the point in CVD and AD nonmarket economy investigations when the "last" such questionnaire responses were submitted, as an insightful deficiency submission from a party could lead to Commerce determining that that yet another supplemental questionnaire is needed.

Such an approach could also lead to outcomes where different respondents have a different number of days between the date when benchmark and surrogate value comments are submitted and the preliminary determination due date, which means that interested parties would not have the same number of days across cases to prepare comments for consideration in the preliminary determination or results that parties often submit, and which often address benchmark and surrogate value issues.

Furthermore, Commerce disagrees with the suggestion that if it proceeds with the revised benchmark and surrogate value deadlines, then it should allow rebuttal benchmark and surrogate value submissions to be submitted on the record after those regulatory deadlines have passed if factors of production or subsidy program information is submitted on the record on or after those deadlines. As noted above, based on the agency's experience with AD nonmarket economy investigations and reviews, Commerce believes that in most cases it will be able to solicit section D questionnaire information from respondents such that parties will have sufficient time with the initial section D questionnaire response, first section D supplemental questionnaire supplemental response, and any additional supplemental section D questionnaire response to submit surrogate value information by the revised deadlines. Further, as discussed above, because the nature of the good alleged to have been provided for LTAR and the potential need for tier-one, tier-two, and tier-three benchmarks is known at the outset of CVD investigations and reviews, Commerce expects interested parties will normally be able to submit their LTAR benchmark information by the revised deadlines.

However, as explained above, should a respondent submit a supplemental questionnaire response containing new factual information regarding factors of production information or LTAR benchmarks on or after the revised deadlines, then pursuant to Sec. 351.301(c)(1)(v) Commerce will normally allow other interested parties a sufficient amount of time to submit rebuttal, clarifying, or corrected factual information on the record pertaining to the benchmark and the factors of production information contained in those supplemental submissions.

Finally, the same commenter also suggested that Commerce consider limiting extension deadlines for questionnaire responses in the regulation so that late filings do not reduce the opportunity for the domestic industry to file adequate responsive benchmark or surrogate value submissions. It is Commerce's practice to respond to respondents' extension requests with consideration of the deadlines that Commerce and parties face in CVD investigations and reviews and AD nonmarket economy investigations and reviews, and the agency will continue to do so under the current regulations. Therefore, Commerce has elected not to adopt additional language in the regulation to limit extension deadlines for questionnaire responses as suggested.

Accordingly, for the reasons described above, Commerce determines that requiring benchmark and surrogate value comments and information to be submitted 45 days and 60 days prior to the scheduled due date of preliminary determinations and administrative

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review results to be a practical and necessary modification to the regulation to allow Commerce to accurately and sufficiently consider the information and make its determination on these issues.

8. Commerce Has Made No Modifications to Proposed Sec. 351.306(a)(3), Which Covers the Sharing of Data With U.S. Customs and Border Protection

As amended in 2015, section 777(b)(1)(A)(ii) of the Act states that Commerce may disclose proprietary information "to an officer or employee of the United States Customs Service who is directly involved in conducting an investigation regarding negligence, gross negligence or fraud under this title." Current Sec. 351.306(a)(3) states that Commerce may disclose business proprietary information to "an employee of U.S. Customs and Border Protection" involved in conducting "a fraud investigation." However, the Act now includes "negligence" and "gross negligence" investigations. Thus, Commerce proposed amending Sec. 351.306(a)(3) to expand the covered investigations to negligence and gross negligence investigations as well as fraud investigations.\75\

\75\ See Proposed Rule, 89 FR at 57303.

One commenter suggested that Commerce add further language to the regulation and include the phrase "or any other action specifically contemplated in section 777(b)(1)(A)(ii) of the Act" to, in the words of the commenter, "eliminate the need for similar updates in the future should the Act be further amended." However, if the Act is modified in the future, Commerce will be able to revise its regulations at that time in accordance with any new statutory language and obligations.

9. Commerce Has Made Small Revisions to Proposed Sec. 351.308(i), Which Covers the Application of Facts Available in AD and CVD Proceedings

In the Proposed Rule Commerce updated Sec. 351.308(g) to reflect its practice of applying either partial facts available or total facts available and added Sec. 351.308(h) and (i) to reflect changes to section 776 of the Act by Congress in 2015.\76\ Two parties commented on this regulation, with one expressing its full support as written, and the other, although indicating its support for the changes, providing suggested edits to revise one possible inconsistency and to prevent redundancy. Specifically, proposed Sec. 351.308(i)(2) states that Commerce "may" use the highest CVD rate available if it determines that such an application is warranted, whereas Sec. 351.308(j) states that Commerce "will normally select the highest program rate available using a hierarchical analysis." Second, the commenter recommended various revisions to Sec. 351.308(i)(2) to avoid certain perceived redundancies.

\76\ See Trade Preferences Extension Act (TPEA) of 2015, Public Law 114-27, 129 Stat. 362, 384 (2015), section 502, codified at 19 U.S.C.1677(e) and Proposed Rule, 89 FR at 57303-04.

Response

After consideration of the comments on this provision, Commerce agreed that certain small changes to Sec. 351.308(i)(2) were warranted. First, Commerce has replaced the phrase "The Secretary may use the highest countervailing duty rate available" with "The Secretary will normally apply the highest calculated above-de minimis countervailing duty rate available" to be in accordance with the language of the CVD adverse facts available hierarchy, found at Sec. 351.308(j). In addition, Commerce has moved the phrase "in accordance with the hierarchy set forth in paragraph (j) of this section" from the second sentence in the paragraph to the first sentence of the paragraph, because the entire paragraph relates to Commerce's CVD adverse facts available hierarchy, and not just the second sentence.

10. Commerce Has Modified Proposed Sec. 351.401(f) To Reflect That It Is Concerned About the Significant Potential for Manipulation of Prices, Production, or Export Decisions, and That It Will Not Normally Collapse Certain Affiliated Input Suppliers and Home Market Resellers of the Domestic Like Product

When affiliated producers share ownership or management or have intertwined operations, there is a significant potential for the manipulation of the prices or production of the subject merchandise. Commerce has a longstanding and court-affirmed practice of "collapsing" certain affiliated entities and treating them as a single entity for purposes of its AD calculations.\77\ As currently written, Sec. 351.401(f)(1) codifies Commerce's practice of collapsing affiliated producers who "have production facilities for similar or identical products that would not require substantial retooling of either facility in order to restructure manufacturing priorities" where "there is a significant potential for the manipulation of price or production." Section 351.401(f)(2) identifies the factors Commerce may consider in determining whether there is significant potential for the manipulation of price or production.

\77\ See Notice of Final Determination of Sales at Less Than Fair Value: Certain Frozen and Canned Warmwater Shrimp from Brazil, 69 FR 76910 (December 23, 2004) (Shrimp from Brazil), and accompanying Issues and Decision Memorandum at Comment 5; see also Rebar Trade Action Coalition v. United States, 398 F. Supp. 3d 1359, 1366-1371 (CIT 2019) (Rebar Trade Action Coalition); Queen's Flowers de Colombia v. United States, 981 F. Supp. 617, 622 (CIT 1997) (Queen's Flowers); and Viraj Group. v. United States, 476 F.3d 1349, 1355-58 (Fed. Cir. 2007).

By collapsing affiliated producers and calculating a single weighted-average dumping margin for the combined entity, the current regulation discourages producers subject to antidumping duties from shifting their production or sales to affiliated producers to evade those duties.\78\

\78\ See Rebar Trade Action Coalition, 475 F. Supp. at 1368.

However, as Commerce explained in the Proposed Rule, affiliated non-producers such as exporters and processors can also manipulate and influence prices and production through their mutual relationships.\79\ Accordingly, to prevent manipulation of prices and production, and the evasion of duties, Commerce has in several AD proceedings collapsed non-producers with both producers and non-producers, and the CIT has affirmed Commerce's authority to do so.\80\ Although the Act does not expressly address collapsing, the CIT has held that Commerce's collapsing practice, as applied to both affiliated producers and non-producers, effectuates the basic purpose of the Act: to calculate accurate dumping margins and to prevent the evasion of duties.\81\

\79\ See Proposed Rule, 89 FR at 57305 (citing, as an example, Shrimp from Brazil Issues and Decision Memorandum at Comment 5).

\80\ See NACCO Materials Handling Group, Inc. v. United States, 971 F. Supp. 586, 591-92 (CIT 1997) (NAACO Materials); Queen's Flowers, 981 F. Supp. at 617-622; and Echjay Forgings, 475 F. Supp. 3d. at 1360 (CIT 2020) (citing Hontex Enterprises Inc. d/b/a Louisiana Packing Company v. United States of America, 248 F. Supp. 2d. 1323 (CIT 2003) (Hontex)).

\81\ See Queen's Flowers, 981 F. Supp. at 622.

Commerce, therefore, proposed revising Sec. 351.401(f) to explicitly address the ability of the agency to collapse producers and non-producers when it determines that there is significant potential for the manipulation of prices or production between two or more affiliated parties.\82\

\82\ See Proposed Rule, 89 FR at 57305 (citing United States Steel Corp. v. United States, 179 F. Supp. 3d 1114, 1135 (CIT 2016)).

Commerce received three comments on proposed Sec. 351.401(f). Two commenters agreed with the decision to modify Sec. 351.401(f) to address Commerce's ability to collapse

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producers and non-producers but suggested certain additional modifications to Commerce's proposed rule. Another commenter expressed concerns that Commerce's decision to modify Sec. 351.401(f) may undermine Commerce's ability to apply its transactions disregarded rule or major input rule, pursuant to sections 773(f)(2) and (3) of the Act.

The first commenter suggested a change to Sec. 351.401(f)(3) to expand Commerce's ability to consider the extent of necessary retooling in its analysis of affiliated parties' production facilities that are used for similar or identical products. The commenter proposed that Commerce clarify that its analysis will go beyond evaluating "manufacturing priorities" to also consider the possibility of a shift in production among affiliated facilities or any other commercial activities related to production. As an example, it referred to an administrative review where Commerce found that the respondent had the potential to rearrange selling and producing roles between affiliated producers and non-producers.\83\

\83\ See, e.g., Shrimp from Brazil Issues and Decision Memorandum at Comment 5.

A second commenter agreed that the proposed modification reflected Commerce's current practice and authorities but expressed concerns that the expansion of Commerce's practice of collapsing entities to include non-producers could unintentionally result in less accurate dumping margins. Specifically, under section 773(f)(2) and (3) of the Act, Commerce may disregard direct or indirect transactions between affiliated parties that do not fairly represent the market costs and the full costs of production in such transactions. These are commonly called the "transactions disregarded" and "major input" rules. They are frequently applied in consideration of transactions between affiliated input suppliers and producers of subject merchandise. The current regulation addresses only affiliated entities that both might produce the subject merchandise, while the proposed revision to the regulation would allow for the collapsing of affiliated input suppliers and producers of subject merchandise. Accordingly, the commenter expressed concerns that Commerce might elect to collapse such affiliated entities rather than apply the transactions disregarded or major input rules, thereby allowing the respondent to manipulate Commerce's calculations, with the result being a less accurate dumping margin.\84\ The commenter stated that such an application of the collapsing regulation would expand the number of non-market prices and below-cost affiliated-entity transactions that Commerce would not disregard, with resulting calculations that include more transactions between affiliated entities at values not reflective of the market prices producers would pay for the same transaction with a non-affiliated entity. It cautioned that this proposal could create a situation wherein the exception could swallow the rule, contrary to sections 773(f)(2) and (3) of the Act, and therefore suggested that Commerce not codify its current collapsing practice with respect to non-producers and producers.

\84\ See AK Steel Corp. v. United States, 226 F.3d 1361, 1375-76 (Fed. Cir. 2000) ("once Commerce has decided to treat the companies as one 'person' for purposes of the anti-dumping analysis, it is not statutorily required to apply the provisions").

A third commenter praised the proposed modification to Sec. 351.401(f) and stated that the new language would permit Commerce to address the evasion and manipulation of duties by affiliated parties. That commenter, however, also expressed concerns that the proposed language could result in the manipulation of Commerce's calculation of dumping margins for the same reason as the second commenter. That commenter stressed that the purpose of Sec. 351.401(f) is to prevent the manipulation of dumping margins, and thus Commerce should add language in the regulation to the effect that if record evidence suggested collapsing would result in the manipulation of Commerce's calculations, Commerce could decline to collapse the affiliated entities. Furthermore, the commenter recommended that Commerce include a non-exhaustive list of entity relationships that might result in a collapsing decision.

Response

After consideration of the comments on the regulation, Commerce is adding a new paragraph to Sec. 351.401(f) to address exceptions to Commerce's collapsing practice and making certain other minor edits. Specifically, Commerce is amending proposed Sec. 351.401 to add a paragraph (f)(4), titled "Exceptions." Commerce has a practice of not collapsing affiliated input suppliers with other affiliated parties if the input suppliers do not produce similar or identical products to the subject merchandise or export subject merchandise to the United States.\85\ Likewise, Commerce also has a practice of not collapsing affiliated sellers of the foreign like product in the home market with other affiliated parties, if those sellers (including resellers) of the foreign like product in the home market do not produce similar or identical products to the subject merchandise or export subject merchandise to the United States.\86\ Commerce has therefore codified both exceptions to its collapsing practice in the regulation as Sec. 351.401(f)(4)(i) and (ii). To be clear, although Commerce will normally not collapse such entities, Commerce might still apply the transactions disregarded rule or the major input rule, in accordance with sections 773(f)(2) and (3) of the Act, if such an application is warranted.

\85\ See, e.g., Light-Walled Rectangular Pipe and Tube from Turkey: Notice of Final Determination of Sales at Less Than Fair Value, 69 FR 53675 (September 2, 2004), and accompanying Issues and Decision Memorandum at Comment 5; Certain Fabricated Structural Steel from Canada: Final Determination of Sales at Less Than Fair Value, 85 FR 5373 (January 30, 2020), and accompanying Issues and Decision Memorandum at Comment 6: and Notice of Final Determination of Sales at Less Than Fair Value: Live Swine from Canada, 70 FR 12181 (March 11, 2005), and accompanying Issues and Decision Memorandum at Comment 41.

\86\ See Steel Concrete Reinforcing Bar from Mexico: Final Results of Antidumping Duty Administrative Review; 2021-2022, 89 FR 40467 (May 10, 2024), and accompanying Issues and Decision Memorandum at Comment 5.

In addition, pursuant to the concerns of possible evasion or manipulation, Commerce has decided to include a third "catch-all" provision at Sec. 351.401(f)(4)(iii), which states that if Commerce determines that treating certain affiliated entities as a single entity would otherwise be inappropriate based on record information, Commerce may decide not to collapse those affiliated entities. Collapsing determinations are case-specific, and frequently Commerce makes its determinations based on proprietary information that reflects complex and unique relationships between affiliated entities. Commerce agrees with the commenters that the overarching purpose of Sec. 351.401(f) is to prevent manipulation of prices, production, or export decisions among affiliated entities. Further, the factors listed in Sec. 351.401(f)(2) are non-exhaustive and Commerce may consider additional factors as evidence that there is significant potential for manipulation, or even determine that not all of the factors listed are identified to find evidence of significant potential for manipulation.\87\ In examining the factors that pertain to significant potential for manipulation, Commerce considers both actual manipulation in

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the past and the possibility of future manipulation.\88\ As Commerce stated in the preamble to the regulation when it was issued in 1997, the standard in looking at potential manipulation is focused "on what may transpire in the future;" thus Commerce may consider the record in total, covering past, present and future potential manipulation of prices, production or other commercial activities.\89\ Given the wide array of possible affiliations between producers, exporters, and other entities in various channels of trade, the concerns expressed by the commenters, and Commerce's intention to prevent potential manipulation, whether it be through collapsing or, in some cases, not collapsing affiliated entities, the regulation now includes a collapsing-exception provision that covers any situation in which the collapsing of entities would be "otherwise inappropriate based on record information."

\87\ See Antidumping Duties: Countervailing Duties; Final Rule, 62 FR 27296, 27346 (May 19, 1997).

\88\ Id. at 27345-45.
\89\ Id.

In addition to that change, Commerce is correcting a typographical error that resulted in publishing Sec. 351.401(f)(2)(iii) as a second Sec. 351.401(f)(2)(ii).\90\

\90\ See Proposed Rule, 89 FR 57329.

Finally, Commerce proposed to modify the phrase "potential manipulation of price or production" in Sec. 351.401(f)(1) and (2) to encompass "potential manipulation of prices, production or other commercial activities." The reason for this change was to address the collapsing of non-producing affiliated exporters that, given the nature of their affiliations, might not lead to the manipulation of prices or production but might lead to the manipulation of various export decisions.\91\ Upon further reflection, Commerce has determined that the term "other commercial activities" is too broad a term to describe that scenario and might lead to confusion. Accordingly, Commerce is modifying Sec. 351.401(f)(1) and (2) to apply to the "potential manipulation of prices, production, or export decisions." Commerce has determined that such language more accurately reflects the concerns that led to the proposed revision.

\91\ See, e.g., Hontex, 248 F. Supp. 2d 1323, 1345-1350.

With respect to the suggestion that Commerce clarify that it can make a determination based on more than just a restructuring of "manufacturing priorities," including a focus on the shifting of production among facilities of affiliated entities or a restructuring of commercial activities among affiliated parties related to production, Commerce disagrees that such a change is necessary. The term "restructure manufacturing priorities" has been in the regulation since it was initially proposed in 1996.\92\ In the decades that followed, as the commenter explained, Commerce has found the term "restructure manufacturing priorities" to cover various factual scenarios, including the shifting of production between affiliated producers and the restructuring of commercial activities among affiliated parties related to production. "Manufacturing priorities" is not a defined term, and may cover both production and non-production actions, if those potential actions might lead to the manipulation of prices, production, or other commercial activities among affiliated entities. Accordingly, Commerce has not adopted this proposed modification to Sec. 351.401(f).

\92\ See Antidumping Duties; Countervailing Duties; Proposed Rule, 61 FR 7308, 7381 (February 27, 1996).

In addition, Commerce will not include a non-exhaustive list of entity relationships that might result in a collapsing decision as suggested by one of the commenters. As explained above, there are many ways by which entities might be affiliated, and likewise there are many unique entity relationships that can lead to the potential manipulation of prices, production or export decisions. Collapsing decisions are best left analyzed on a case-by-case basis and frequently can be far more complex than can be summarized in a simple list of examples. Accordingly, Commerce has determined that a non-exhaustive list of examples in the regulation would likely lead to greater confusion than provide clarity, and it has therefore not included such a list in the final rule.

11. Commerce Has Made Small Adjustments to Proposed Sec. 351.404(g)(2), Which Applies to the Determination of Normal Value and Certain Multinational Corporations

Section 773(d) of the Act provides a special rule for certain multinational corporations when Commerce is determining the appropriate normal value to use in its antidumping calculations. The Act states that if, in the course of an investigation, Commerce determines that three criteria exist, Commerce "shall determine the normal value of the subject merchandise by reference to the normal value at which the foreign like product is sold in substantial quantities outside the exporting country."

Those three criteria are: (1) subject merchandise exported to the United States is being produced in facilities which are owned or controlled, directly or indirectly, by a person, firm, or corporation which also owns or controls, directly or indirectly, other facilities for the production of the foreign like product which are located in another country or countries; (2) the foreign like product is not sold (or offered for sale) for consumption in the exporting country or is sold in the exporting country for insufficient amounts to allow for a proper comparison with the United States, and, therefore, Commerce should look to third country sales to determine normal value (or a sales-based particular market situation exists); and (3) the normal value of the foreign like product produced in one or more of the facilities outside the exporting country is higher than the normal value of the foreign like product produced in the facilities located in the exporting country.\93\

\93\ See section 773(d) of the Act; see also section 773(a)(1)(C) of the Act.

Section 773(d) of the Act requires that Commerce make adjustments for the differences in the costs of production between the exporting country and the third country where the merchandise is also produced. It states that for "purposes of this subsection, in determining the normal value of the foreign like product produced in a country outside the exporting country," Commerce shall determine its price "at the time of exportation from the exporting country" and make any adjustments "required by subsection (a) for the cost of all containers and coverings and all other costs, charges and expenses incident to placing the merchandise in condition packed ready for shipment to the United States by reference to such costs in the exporting country." \94\

\94\ See section 773(d) of the Act.

Although Commerce has applied the special rule for certain multinational corporations ("MNC provision") in determining normal value for many years, none of Commerce's regulations address the MNC provision. Commerce proposed the addition of Sec. 351.404(g) to address the filing requirements for those alleging the applicability of the MNC provision and to clarify that the MNC provision is only applicable when the non-exporting country is a market economy and not a nonmarket economy.\95\

\95\ See Proposed Rule, 89 FR at 57305-06.

Specifically, Commerce proposed codifying its practice directing parties alleging that the MNC provision should

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apply to submit their allegations in accordance with the filing requirements set forth in Sec. 351.301(c)(2)(i). Moreover, Commerce explained that the provision does not apply when the non-exporting country at issue is a nonmarket economy country because, in accordance with Sec. 351.408, when the non-exporting country is a nonmarket economy, Commerce will apply the factors of production methodology described in section 773(c) of the Act.\96\

\96\ Id.

Two parties submitted comments regarding the proposed addition of Sec. 351.404(g). The first commenter requested not that Commerce modify Sec. 351.404(g), but rather modify Sec. 351.301(c)(2)(i), which provides that in general, market viability allegations, and through Sec. 351.404(g)(1), allegations that the MNC provision applies, should be due "10 days after the respondent interested party files the response to the relevant section of the questionnaire, unless the Secretary alters this time limit." The commenter maintained that requiring parties to review questionnaire responses, research independent factual information, and prepare allegations within 10 days creates a significant burden. Accordingly, that commenter requested that Commerce

increase the dates for market viability and MNC provision allegations from 10 days to 30 days in Sec. 351.301(c)(2)(i).

The second commenter requested that Commerce revisit its practice of not applying the MNC provision to AD proceedings in which the non-exporting country would be a nonmarket economy. The commenter acknowledged that the Federal Circuit in Ad Hoc Shrimp Trade Action Committee v. United States, 596 F. 3d 1365, 1370 (Fed. Cir. 2010) (Ad Hoc) affirmed Commerce's interpretation of the Act to apply to market economies only as permissible, but the commenter noted that the dissent in that case disagreed that Commerce's interpretation was consistent with the Act, reasoning that if the Congress had intended for the provision to not apply to nonmarket economy non-exporters, Congress would have clearly stated as such in the Act.\97\ The commenter stated that Commerce's practice, as reflected in proposed Sec. 351.404(g)(2), unduly and unnecessarily limits Commerce's ability to apply the MNC provision when the non-exporter is located in a nonmarket economy to the disservice of domestic industries seeking trade remedy relief from the dumping of merchandise produced and exported by a multinational corporation. Accordingly, the commenter requested that Commerce revise Sec. 351.404(g)(2) to apply the MNC provision equally to multinational corporations and their affiliates located in market and nonmarket economies.

\97\ See Ad Hoc, 596 F.3d at 1373 (J. Prost dissenting). The commenter pointed out that in 1996, Commerce had a different interpretation of the Act, stating in Melamine Institutional Dinnerware Products from the People's Republic of China, 61 FR 43337, 43340 (August 22, 1996), Commerce determined that the Act was silent and therefore to both market economy and nonmarket economy cases.

Response

With respect to the first commenter's request, Commerce has determined not to modify the ten-day deadline set forth in Sec. 351.301(c)(2)(i). Investigations and administrative reviews are extremely fact intensive and restricted by statutory deadlines. Adding 20 days to that deadline would take away from the time Commerce needs to analyze and consider the allegation. Notably, Sec. 351.301(c)(2)(i) states that Commerce may "alter this time limit." Accordingly, if a party wishing to allege that the MNC provision should be applied in a case believes that it needs more time to submit an allegation, before the 10 days have passed that party may request an extension from Commerce to do so. In requesting an extension, the party should provide Commerce with the reason it needs additional time to file an allegation and specify the actions it will take in the extended time to ensure that its MNC provision allegation is complete when it is submitted to the agency.

In response to the second commenter, the MNC provision includes citations to section 773(a) of the Act, which covers a determination of normal value based on third country sales and makes no reference to section 773(c) of the Act, which applies to nonmarket economies.\98\ Further, the provision explicitly includes adjustments for costs of production, but the statutory nonmarket economy analysis, which incorporates surrogate values and factors of production, does not involve costs of production. For that reason, Commerce has concluded that the MNC provision, by its very terms, cannot apply if the non-exporting country is a nonmarket economy. As the commenter notes, the Federal Circuit affirmed that determination in Ad Hoc.\99\

\98\ See section 773(c) of the Act ("Nonmarket Economy Countries").

\99\ See Ad Hoc, 596 F. 3d at 1370.

Specifically, the Federal Circuit reasoned that the MNC provision was "silent regarding nonmarket economies," but the Act "instructs Commerce to determine the normal value of the subject merchandise by reference to the normal value at which the foreign like product is 'sold in substantial quantities' and its 'price at the time of exportation from the exporting country,' " and that "sold" and "price" are terms "not used to describe calculating the normal value in a nonmarket economy." \100\ The majority also referred approvingly to Commerce's reasoning that because the case before the Court involved a market economy (Thailand), to use a nonmarket economy as the alternative producer would be the same as "treating a market economy country as a nonmarket economy and would, therefore, circumvent" the Act which only provides for a nonmarket economy analysis when the country at issue is a nonmarket economy.\101\

\100\ Id.

\101\ Id. at 1371. The Federal Circuit also affirmed Commerce's interpretation of the legislative history of the provision that "Congress was concerned with the practice of discriminatory pricing where a home market was not viable and yet a respondent's low-priced exports to the United States market were supported by higher priced sales of its affiliates in a third country market." (citing Senate Committee on Finance Report on Trade Reform Act of 1974, S. Rep. No. 93-1298, at 175 (November 16, 1974)). The Court agreed with Commerce that "Congress was addressing the problem of discriminatory pricing practices of multinational corporations, but pricing practices are generally irrelevant in nonmarket economies."

As Commerce has stated before in analyzing the MNC provision, it is of no consequence whether some of a respondent's affiliated parties are located in nonmarket economy countries and some are located in market economy countries, or whether all of a respondent's affiliated parties are located in a nonmarket economy country.\102\ The Act, as interpreted in relevant case law, requires that the MNC provision be applied in cases where prices and costs are disregarded in favor of the factors of production methodology. If Congress had intended for the MNC provision to apply equally to nonmarket economy and market economy countries, it could have included language in the MNC provision that applied to nonmarket economies, but it did not do so.\103\ Accordingly, Commerce will not modify its interpretation of the MNC provision in proposed Sec. 351.404(g)(2) or change its practice in this regard.

\102\ See Utility Scale Wind Towers from Malaysia: Final Results of Antidumping Duty Administrative Review; 2021-2022, 89 FR 56735 (July 10, 2024), as amended 89 FR 65848, at accompanying Issues and Decision Memoranda at Comment 8.

\103\ Id.

Commerce has, however, made certain small changes to the language to provide further clarity that if the

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Secretary determines that the non-exporting country is a nonmarket economy and that normal value would be determined using a factors of production methodology if the MNC provision was applied, Commerce will not apply the MNC provision in that situation.

12. Commerce Has Revised Certain Language in Proposed Sec. 351.405(b)(3), Which Covers the Calculation of Constructed Value Profit

As set forth in proposed Sec. 351.405(a), pursuant to section 773(e) and (f) of the Act, in certain circumstances Commerce may determine normal value by constructing a value based on the cost of manufacturing; selling, general and administrative expenses; and profit. In constructing such a value, the Act provides that Commerce use the "actual amounts incurred and realized by the specific exporter or producer being examined in the investigation or review for selling, general, and administrative expenses, and for profits, in connection with the production and sale of a foreign like product, in the ordinary course of trade, for consumption in the foreign country." \104\ However, there are times when the "actual data are not available with respect" to those production and sale amounts, and in those circumstances, section 773(e)(2)(B) of the Act establishes three alternative methods for calculating amounts for selling, general, and administrative expenses, and profit, in connection with the production and sale of a foreign like product, in those instances.\105\ The Act provides Commerce with the discretion to select from any of the three alternative methods, depending on the information available on the record.\106\

\104\ See section 773(e)(2)(A) of the Act.

\105\ See SAA at 840 ("At the outset, it should be emphasized, consistent with the Antidumping Agreement, new section 773(e)(2)(B) does not establish a hierarchy or preference

among these alternative methods. Further, no one approach is necessarily appropriate for use in all cases").

\106\ See Certain Steel Nails from the Republic of Korea: Final Determination of Sales at Less Than Fair Value, 80 FR 28955 (May 20, 2015) (Certain Steel Nails from Korea), and accompanying Issues and Decision Memorandum at Comment 4.

One of those three options, described in section 773(e)(2)(B)(iii) of the Act, allows Commerce to use amounts incurred and realized for selling, general, and administrative expenses and for profit based on "any other reasonable method" with one exception. The Act provides that "the amount allowed for profit may not exceed the amount normally realized by exporters or producers" other than the individually examined exporter or producer "in connection with the sale, for consumption in the foreign country, of merchandise that is in the same general category of productions as the subject merchandise." This limitation on profit used in constructed value is frequently called the "profit cap."

The SAA states that in applying "any other reasonable method" under the Act, "Commerce will develop this alternative through practice," \107\ and as Commerce explained in the Proposed Rule, it has done just that for many years.\108\ It has been Commerce's practice to consider four criteria in selecting sources for selling, general, and administrative expenses, as well as for profits, under "any other reasonable method." In the Proposed Rule, Commerce determined to codify that criteria in proposed Sec. 351.405(b)(3).\109\ Accordingly, under the proposed regulation, Commerce will "normally consider": (A) the similarity of the potential surrogate companies' business operations and products to the examined producer's or exporter's business operations and products; (B) the extent to which the financial data of the surrogate company reflects sales in the home market and does not reflect sales to the United States; (C) the contemporaneity of the surrogate company's data to the period of investigation or review; and (D) the extent of similarity between the customer base of the surrogate company and the customer base of the examined producer or exporter in selecting such sources.

\107\ See SAA at 841.

\108\ See Proposed Rule, 89 FR at 57306.

\109\ Id., 89 FR at 57306-07.

Upon review of the Proposed Rule, however, Commerce has concluded that its preamble language may have confused two different aspects of its analysis under the Act. In the Proposed Rule, Commerce described these criteria as relating not only to the sources for "any other reasonable method" for selecting selling, general, and administrative expenses, as well as profit, but also pertaining to "the amount normally realized by exporters or producers" other than the individually examined exporter or producer "in connection with the sale, for consumption in the foreign country, of merchandise that is in the same general category of productions as the subject merchandise." \110\ In other words, Commerce correctly referred to the use of these criteria in determining what sources to use when relying on "any reasonable method," but incorrectly also referred to the use of this criteria in selecting a "profit cap." \111\ That mischaracterization also was reflected in proposed Sec. 351.405(b)(3). Commerce is therefore modifying the regulation to remove that "profit cap" language and to clarify that the four criteria pertain to the selection of sources for determining amounts for selling expenses and for profit under section 773(e)(2)(B)(iii) of the Act.

\110\ See Proposed Rule, 89 FR at 57288 and 57306.

\111\ See SAA at 841 (addressing the "any other reasonable method" statutory option, as well as the profit cap: "The Administration also recognizes that where, due to the absence of data, Commerce cannot determine amounts for profit under alternatives (1) and (2) or a "profit cap" under alternative (3), it might have to apply alternative (3) on the basis of 'facts available.' This ensures that Commerce can use the alternative (3) when it cannot calculate the profit normally realized by other companies on sales of the same general category of products").

Two commenters expressed their support for the new regulation, finding it to be timely and useful in achieving Commerce's stated goal of enhancing the administration of the AD and CVD laws. One

of those commenters provided a suggestion that Commerce state that the list of criteria is not exhaustive in the regulation, or in the alternative add a fifth criteria that states that Commerce might also consider other factors and information as appropriate in selecting sources for selling, general and administrative expenses and profit as "any other reasonable method" under the Act.

Response

Other than the modifications Commerce has made to proposed Sec. 351.405(b)(3) described above, Commerce has made no further changes to the provision. The language states that Commerce will "normally consider the following criteria," and thus, by its terms the regulation is already clear that the list is not exhaustive. Likewise, because the list of criteria is not exhaustive, it is unnecessary to add a fifth "catch-all" criterion to the regulatory list. Normally, as the regulation states, and consistent with Commerce's long-standing practice, Commerce will consider the four listed criteria in selecting a profit amount for its constructed value calculations, but if Commerce determines that there is some additional information on the record that might be relevant to its analysis, the regulation does not prevent or prohibit Commerce from considering that information as well in its analysis.

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13. Commerce Has Revised Proposed Sec. 351.408(b) To Describe the Methodology for Selecting Surrogate Countries and the Use of Gross Domestic Product To Determine Economic Comparability

In the Proposed Rule, Commerce indicated that it was modifying Sec. 351.408(b) to reflect that Commerce may consider either per capita gross national income (GNI) or per capita gross domestic product (GDP) in selecting potential surrogate countries for purposes of antidumping investigations and administrative reviews of nonmarket economies.\112\ Currently, Sec. 351.408(b) states that in determining whether a country is at a level of economic development comparable to the nonmarket economy under sections 773(c)(2)(B) and 773(c)(4)(A) of the Act, Commerce will "place primary emphasis on per capita GDP as the measure of economic comparability." However, Commerce's general practice has been to use per capita GNI instead of per capita GDP as the measure of economic comparability.\113\ Commerce's use of GNI has been recognized and affirmed as reasonable by the U.S. Court of International Trade as a measure to determine economic comparability in multiple holdings.\114\ Per capita GNI measures the total income earned by the residents of a country, whether from domestic or foreign sources, divided by the average population of that country.\115\ Per capita GDP, on the other hand, measures the total value of goods and services produced within a country per person in a given year.\116\ The Proposed Rule explained either per capita GNI or per capita GDP can be reasonably used to determine comparable economies, depending on the facts before the agency.\117\ Proposed Sec. 351.408(b) also provided that Commerce could consider additional factors in selecting comparable economies and explained that consideration of these factors would assist it in avoiding distortive economic comparisons.\118\

\112\ See Proposed Rule, 89 FR at 57330.

\113\ See Antidumping Methodologies in Proceedings Involving Nonmarket Economy Countries: Surrogate Country Selection and Separate Rates; Request for Comment, 72 FR 13246, 13246 n.2 (March 21, 2007).

\114\ See, e.g., Clearon Corp v. United States, 38 CIT 1122, 1137-1140 (July 24, 2014); see also Tri Union Frozen Prods. v. United States, 163 F. Supp. 3d. 1255, 1268, n. 8 (CIT 2016); and Tianjin Wanhua Co. v. United States, 253 F. Supp. 3d. 1318, 1322 (CIT 2017).

\115\ See World Bank. (2024). GNI per capita (current US$), available at https://data.worldbank.org/indicator/NY.GNP.PCAP.CD (see "details" section in chart); comparable definition is in IMF, "IMF Glossary", available at https://www.imf.org/en/About/Glossary.

\116\ See World Bank. (2024). GDP per capita (current US$), available at https://data.worldbank.org/indicator/NY.GDP.PCAP.CD (see "details" section in chart); comparable definition is in IMF, "IMF Glossary", available at https://www.imf.org/en/About/Glossary.

\117\ See Proposed Rule, 89 FR at 57330.

\118\ Id.

Commerce received several comments on the proposed modifications to Sec. 351.408(b). Numerous commenters indicated their appreciation of Commerce's codification of its established

practice and its goal of considering additional factors to determine which countries may be deemed economically comparable to a non-market economy. However, commenters also expressed concern that including the option of using both GNI and GDP and identifying the additional factors adds uncertainty to the selection of surrogate countries. Most commenters were not opposed to the use of GDP only or GNI only but were very concerned about the potential confusion and inconsistencies if Commerce were able to pick one or the other on a case-by-case basis. Other commenters expressed opposition to the consideration of additional factors in Commerce's analysis entirely for similar reasons.

One commenter questioned the relationship between GNI and GDP and the additional factors. The commenter pointed out that the Proposed Rule stated that it "will place primary emphasis" on GNI or GDP, as compared to the additional factors it "may also consider" pursuant to new Sec. 351.408(b)(1) through (4),\119\ and questioned if Commerce was therefore mandated to analyze all of these factors in every case, or only GNI and GDP in all cases and the other factors in some cases. Moreover, that commenter stated that implementing the additional factors as a mandatory, case-specific, multi-factor economic analysis when the current methodology is often sufficient would unnecessarily increase costs in terms of time, human resources, and legal fees for both Commerce and domestic interested parties. Therefore, that commenter recommended that Commerce clarify that it may decline to consider the proposed additional factors absent record evidence that relying on GDP or GNI would result in understated dumping margins for the subject non-market economy entity or entities.

\119\ Id (emphasis in the comment, not in the Proposed Rule).

A second commenter also expressed that it was unclear when and why, in any given proceeding, Commerce would place primary emphasis on GNI over GDP and vice versa. That commenter recommended that Commerce provide clarification regarding how it will take GNI and GDP information into consideration. In addition, while that commenter agreed that Commerce should have the flexibility to consider information other than GNI and GDP in determining economic comparability, it also stated that the proposed Sec. 351.408(b)(3) related to the quality of the available data should be considered a separate and distinct determination from whether a country is economically comparable. Similarly, that commenter stated that by limiting the number of countries considered to be economically comparable based on factors unrelated to economic comparability, Commerce risked unnecessarily limiting potential surrogate countries and making it more difficult to identify the best available information for valuing a respondent's factors of production. Accordingly, that commenter recommended that Commerce confirm that the potential quality and accessibility of data are not relevant in determining whether a country can be considered economically comparable to the nonmarket economy country at issue.

The third commenter acknowledged that the proposed changes commendably address the fact that the use of GNI alone may not result in a principled or predictable calculation of normal value or antidumping margins. However, that commenter also stated that the proposed changes do not address the fact that Commerce's practice continues to elevate economic comparability over merchandise comparability, adding greater uncertainty to the selection of surrogate countries and contrary to the intent of the statute. That commenter stated that because Commerce's practice is to first create a list of six surrogates deemed to be equal in terms of economic comparability,\120\ Commerce will select a country producing comparable merchandise that is "the same" in terms of economic development over a country that produces identical merchandise but is slightly less comparable in economic terms. Because the statute requires that a surrogate be both economically comparable and a significant producer of comparable merchandise, the third commenter stated that both criteria call for a comparison that will yield relative levels of comparability. Accordingly,

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that commenter recommended that Commerce modify the current approach to balance economic comparability and merchandise comparability to make surrogate country determinations more predictable and consistent. Particularly in the case of products that are only produced in a few countries, that commenter suggested that Commerce place more weight on merchandise comparability to allow for the selection of a country that is likely to provide market-based factor values for the subject merchandise, even though its overall economy over time may have improved or declined relative to a nonmarket economy country. To assess merchandise comparability, the third commenter cited the Shanghai Foreign Trade litigation where Commerce identified various

factors that allow parties to analyze, rank, and anticipate which merchandise will be considered comparable for purposes of section 773(c)(4)(ii) of the Act.\121\ The Court in Shanghai Foreign Trade recognized that Commerce's established practice in selecting surrogate financial statements was to apply a three-part test that examines "physical characteristics, end uses, and production processes" \122\ of the products produced by a company in a surrogate country to see if they were comparable.

\120\ See Enforcement and Compliance's Policy Bulletin No. 04.1, regarding, "Non-Market Economy Surrogate Country Selection Process" (March 1, 2004), available on Commerce's ACCESS website at https://access.trade.gov/Resources/policy/bull04-1.html.

\121\ See, e.g., Shanghai Foreign Trade Enterprises Co., Ltd. v. United States, 318 F. Supp. 2d 1339, 1348 (CIT 2004) (Shanghai Foreign Trade).

\122\ Id. (citing Certain Cased Pencils from the People's Republic of China; Final Results and Partial Rescission of Antidumping Administrative Review, 67 FR 48612 (July 25, 2002), and accompanying Issues and Decision Memorandum at Comment 5).

In addition, the third commenter also recommended that Commerce not arbitrarily foreclose the use of the country producing identical or more comparable merchandise simply because it is not one of the countries deemed by Commerce to be "the same" as the subject nonmarket economy country in terms of economic comparability in its annual list of comparable economies. That commenter recommended that both economic comparability and merchandise comparability factors should be weighed such that a country outside the current six-country GNI list might still be selected as the surrogate country based on significant production of identical merchandise (or merchandise that is more comparable to the subject merchandise than any products produced in any of the six listed countries).

Lastly, a fourth commenter stated that it generally supported Commerce's proposed changes. However, that commenter was concerned that placing primary emphasis on "either per capita gross domestic product (GDP) or per capita gross national income (GNI) . . ." \123\ provides an equivocation that incorporates an additional and unnecessary element of uncertainty in an already complicated process of surrogate country selection. That commenter stated that given Commerce's long-standing and successful utilization of GNI alone, it recommended that Commerce codify the use of GNI in place of the current reference to GDP. With respect to the additional factors, the fourth commenter stated that it supported Commerce's proposal to incorporate into Sec. 351.408(b) the qualitative analysis of the availability of potential surrogate values, but only in part.

\123\ See Proposed Rule, 89 FR at 57330.

For the first proposed factor (i.e., economic activity), the fourth commenter stated that the reference in the Proposed Rule, to "development phase and role in the global economy," \124\ was too ambiguous and could be ripe for abuse even if not incorporated into the text of the regulation. The commenter stated that the phrase runs counter to Commerce's longstanding practice that its selection of surrogate values, such as surrogate companies for financial ratios, does not require Commerce to use surrogates that exactly replicate the experience of respondents. As for the second proposed factor (i.e., examination of trade patterns), the fourth commenter stated that the proposed revision inadvertently suggested that the import and export analysis may include commodities other than identical or comparable merchandise. That commenter therefore recommended that Commerce modify the regulation to consider the composition and quantity of "exports of identical or comparable merchandise" from those countries.

\124\ Id., 89 FR at 57307, 57330.

The commenter supported the third proposed factor (i.e., availability, accessibility, and quality of data), noting that Commerce includes similar elements in its deliberation.\125\

\125\ See, e.g., Certain Activated Carbon From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review, and Preliminary Determination of No Shipments; 2019-2020, 86 FR 33,988 (June 28, 2021), and accompanying Issues and Decision Memorandum (June 21, 2021) at 16-17.

Finally, for the fourth proposed factor (i.e., additional economic factors for consideration), the fourth commenter stated that the introduction of indicators in the preamble such as purchasing power parity to account for differences in spending power between countries could largely negate the standard analysis of economic comparability using either GNI or GDP. The fourth commenter also noted that another example provided in the preamble-"regional indicators that would allow Commerce, when reasonable, to select a surrogate country or countries that are in the same geographic region as the nonmarket economy country"-is so broad and subjective that it might nullify all other considerations, such as GNI or net exports of merchandise under consideration. Accordingly, the fourth commenter stated that it did not support this last factor, and it urged Commerce to not include such language in Sec. 351.408(b).

Response

Upon consideration of the comments on Commerce's proposed revisions to Sec. 351.401(b), it has become clear from the questions and concerns raised that a regulatory provision that only focuses on the "Economic Comparability" aspect of Commerce's analysis is not sufficient. Accordingly, Commerce has revised the provision, codified each of the three steps in selecting surrogate countries, and revised the header of the provision to read "Selecting Surrogate Countries."

The first step, now codified in Sec. 351.408(b)(1), explains that Commerce is directed by sections 773(c)(2)(B) and 773(c)(4)(A) of the Act to select surrogate countries which are at a level of economic development comparable to that of the nonmarket economy at issue. Furthermore, unlike in the Proposed Rule, final Sec. 351.408(b)(1)(i) provides that in measuring economic comparability, Commerce will place primary emphasis solely on GDP. Commerce acknowledges the concerns expressed by several commenters that if Commerce had the option of using either GNI or GDP in determining economic comparability, it could potentially lead to perceived inconsistencies and otherwise lead to confusion associated with the use of either measurement of economic comparability. After taking into consideration those comments, Commerce has determined that the agency and the public is best served by a single, consistent and predictable measurement to determine countries economically comparable to a nonmarket economy in all cases.

As Commerce acknowledged in the Proposed Rule,\126\ for several years it has used GNI levels to measure economic comparability, a practice that

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has been upheld by the CIT in multiple cases as being in accordance with law.\127\ However, as explained below, for purposes of comparing different economies for purposes of an AD analysis, the use of GDP levels is a more appropriate alternative. Accordingly, final Sec. 351.408(b) will continue to provide that Commerce will use GDP to determine countries economically comparable to each nonmarket economy at issue in cases before it, starting with the next list of comparable economies issued by Commerce following the publication of this final rule.

\126\ Id.

\127\ Id. at n.128.

Commerce recognizes that there are similarities between GNI and GDP, and both are acceptable options for measuring economic comparability. Both indicators are close to one another numerically and represent important means of measuring a country's overall economic activity. Some authoritative institutions, such as the World Bank, regularly publish both indicators and have found that GNI provides a useful indicator that is "closely correlated with other, nonmonetary measures of the quality of life, such as life expectancy at birth, mortality rates of children, and enrollment rates in school." \128\ Moreover, the World Bank often relies on per capita GNI levels more heavily than per capita GDP levels as a means of measuring countries' income, as it includes earnings a country's

citizens receive either within its borders or from its foreign assets.\129\ Other authoritative institutions, such as the Organization for Economic Cooperation and Development (OECD), also publish both indicators on a regular basis, and have found that many analysts prefer the theoretical construct of GNI over GDP, given its ability to isolate income earned by all of its citizens regardless of geographic boundaries.\130\ For reasons such as this, Commerce has relied upon GNI in making economic comparisons for several years.

\128\ Why Use GNI Per Capita To Classify Economies Into Income Groupings?, World Bank, available at https://datahelpdesk.worldbank.org/knowledgebase/articles/378831; Neil Fantom and Umar Serajuddin, The World Bank's Classification of Countries by Income, World Bank, available at https://documents1.worldbank.org.

\129\ Why Use GNI Per Capita To Classify Economies Into Income Groupings?, World Bank, available at https://datahelpdesk.worldbank.org/knowledgebase/articles/378831.

\130\ See National Income Per Capita, OECD Factbook: Economic, Environmental and Social Statistics (May 6, 2014) (OECD Factbook 2014), available at https://oecd-ilibrary.org/economics/oecd-factbook-2014/national-income-per-capita_factbook-2014-21-en.

However, while there are benefits to using GNI when investigating relative levels of wealth across countries, Commerce has determined that the use of GDP would be more appropriate for this specific function. Primary among those reasons is that GDP measures the total value of goods and services produced within a country's borders during a specific period, while GNI measures the total income earned by citizens and residents, including money received from sources outside the country. According to the World Bank, the technical definition of GDP is "the sum of gross value added by all resident producers in the economy plus any product taxes and minus any subsidies not included in the value of the products," and represents the income citizens earn on wealth they hold in the domestic economy and in other countries less the payments made to foreign owners of wealth located in the domestic economy.\131\ Using GDP, rather than GNI, avoids the challenges associated with measuring international salaries of citizens outside of the country of measurement associated with the GNI calculations. Accordingly, GDP is often considered among economic institutions and authorities to be the more practical of the two indicators.\132\

\131\ World Bank, "GDP Per Capita" in Metadata Glossary of World Bank's Databanks, available at https://databank.worldbank.org/metadataglossary/world-development-indicators/series/NY.GDP.PCAP.KN. See also Paul Krugman & Maurice Obstfeld, International Economics: Theory and Practice (7th ed. 2005), at 281.

\132\ See OECD Factbook 2014 at 58.

Furthermore, because of the complexities associated with estimating GNI, GDP is widely used by economic institutions which compare economies. Although each measure of economic aggregation has its shortcomings, the OECD characterizes GDP as "a core indicator of economic performance and is commonly used as a broad measure of average living standards or economic well-being," while the Federal Reserve Bank of St. Louis classifies it as "one of the most common measures." \133\ Furthermore, the International Monetary Fund (IMF), states that GDP "has become widely used as a reference point for the health of national and global economies" and that it is often cited in news sources and in reports by governments, central banks, and the business community.\134\ In fact, as the primary measure of production in the international guidelines for economic accounting (System of National Accounts), the United States moved to the use of GDP to compare countries in the 1990s.\135\ The Bureau of Economic Analysis, which is the U.S. government agency responsible for reporting aggregated economic output for the country, explained that this move was based in large part by a desire to allow "reliability in comparisons of economic activity across countries." \136\

\133\ See "GDP Per Capita," OECD National Accounts at a Glance 2014 (2014), available at https://www.oecd-ilibrary.org/docserver/na_glance-2014-6-en.pdf, and Grittayaphong, Peter, Beyond GDP: Three Other Ways to Measure Economic Health, Federal Reserve Bank of St. Louis (April 19, 2023), available at https://www.stlouisfed.org/open-vault/2023/apr/three-other-ways-to-measure-economic-health-beyond-gdp.

\134\ See Tim Callen and Sarwat Jahan, Gross Domestic Product: An Economy's All, International Monetary Fund: IMF's Finance & Development -Back to the Basics, available at https://www.imf.org/en/Publications/fandd/issues/Series/Back-to-Basics/gross-domestic-product-GDP.

\135\ See Gross Domestic Product as a Measure of U.S. Production, Bureau of Economic Analysis: Survey of Current Business, available at https://apps.bea.gov/scb/pdf/national/nipa/1991/0891od.pdf; Kelly Ramey, The Changeover from GNP to GDP-A Milestone in BEA History, Bureau of Economic Analysis, Volume 101, available at https://apps-fd.bea.gov/scb/issues/2021/03-march/pdf/0321-reprint-gnp.pdf.

\136\ Id.

Finally, while GNI may be a more accurate indicator of national wealth, it is less aligned with Commerce's objective of finding countries at comparable levels of economic development for the purposes of identifying appropriate surrogate for factors of production. GDP focuses squarely on a country's production. Reliance on GDP will also ensure that country comparisons will not be skewed by disproportionally high or low incomes of country citizens that lie outside the geographic boundaries of the comparison countries.

To the extent that commenters raised concerns about the use of GDP, it was because Commerce has relied upon GNI to measure economic comparability for many years and its methodology had become transparent and predictable. Commerce continues to believe that its use of GNI has, historically, been lawful, reliable and transparent, and until Commerce issues its next list of comparable economies, Commerce will continue to rely on its current list of comparable economies determined based on GNI (which can be accessed at https://access.trade.gov/Resources/surrogate.aspx) after this final rule is issued. When Commerce next issues its list of comparable economies, it will be based on GDP data from the World Bank, consistent with both the current and revised regulations. For comparability purposes, and for consistency with how Commerce used GNI, the World Bank's GDP indicator will be US$ denominated nominal GDP levels.

In addition to the switch from relying on GNI data to GDP data, under final Sec. 351.408(b)(1)(ii) Commerce may also

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consider additional factors in determining whether countries are at a comparable level of economic development to the reference non-market economy. In the proposed regulation, Commerce set forth factors such as the "overall size and composition of economic activity in those countries" and "the composition and quantity of exports from those countries." \137\ Certain commenters questioned how those general terms would relate to Commerce's comparable economy analysis. After consideration of those concerns Commerce has removed the factors from the regulation, instead clarifying here in greater detail than the Proposed Rule that in certain cases Commerce might consider additional factors that would be relevant to economic comparability, such as if the size or structure of certain market economies under consideration are significantly different from that of the nonmarket economy at issue. For example, a small island country might share a GDP level with a nonmarket economy in a particular year, but Commerce might determine that the uniqueness of the market economy's situation is such that it would be inappropriate to consider that small island country comparable to the nonmarket economy at issue for purposes of deriving surrogate values to use in Commerce's antidumping calculations. Likewise, Commerce might consider that an economy with a similar GDP in a certain year to the nonmarket economy is primarily agrarian or service-oriented, while the nonmarket economy might be structured as a primarily industrial economy. Commerce might therefore consider that notwithstanding a similar GDP, other countries may serve as better comparators given Commerce's interest in finding surrogates for price and costs in production.

\137\ See Proposed Rule, 89 FR at 57307.

Commerce recognizes that there might be other factors, unique to a given situation, that may also warrant further consideration in determining if country should be used as a surrogate. To be clear, if Commerce determined to omit certain countries from its surrogate country list based on factors other than GDP, Commerce would identify those factors and explain its basis and reasoning

for excluding that country from the surrogate country list when it issues that list on the Commerce website.\138\

\138\ See Sec. 351.408(b)(1)(ii) (codifying that Commerce will provide its reasoning as described).

Finally, under the economically comparable analysis, Commerce has codified its current practice and added Sec. 351.408(b)(1)(iii), which states that on an annual basis, Commerce will determine market economies economically comparable to individual nonmarket economies and list those market economies on its website.

In addition to its economically comparable analysis, Commerce has also codified the second step of its surrogate country analysis at Sec. 351.408(b)(2). Sections 773(c)(2)(A) and 773(c)(4)(B) of the Act direct Commerce to consider countries that are significant producers of merchandise comparable to the subject merchandise. Accordingly, after issuing a list of certain countries that are economically comparable under Sec. 351.408(b)(1), Commerce will next select significant producers of comparable merchandise under Sec. 351.408(b)(2) from among economically comparable countries.

Lastly, the third step, under Sec. 351.408(b)(3), provides that if there is more than one economically comparable country that produces comparable merchandise in a given case that might be considered a potential surrogate country, Commerce will consider the totality of the information on the record in selecting a surrogate country. Such criteria include the availability, accessibility, and quality of data from those countries and the similarity of production processes and products manufactured in the potential surrogate countries in comparison to the subject merchandise.

Commerce introduced the element of data quality in the Proposed Rule,\139\ but did so with respect to the first step of its surrogate country analysis pertaining to economic comparability. As explained above, the inclusion of that element with respect to economic comparability raised concerns among commenters. Commerce agrees that in practice, although it may find that data availability, accessibility, and quality can at times be a concern, data quality normally does not become a significant issue until Commerce must select a surrogate country from among a list of economically comparable countries with significant producers of comparable merchandise. Even if Commerce has determined that a country is economically comparable to the nonmarket economy country, if the data quality on the record is unusable, insufficient data can create serious problems for the agency's normal value calculations. For example, incomplete data from a potential surrogate country may result in distorted surrogate values, which in turn can adversely affect Commerce's calculation of AD margins. Therefore, the data quality with respect to potential surrogate countries plays a pivotal role in ensuring the accuracy and transparency of the surrogate country selection process. Accordingly, Commerce has included the availability, accessibility, and quality of data element in the third step of Commerce's surrogate country selection analysis.

\139\ Id., 89 FR at 57307.

Commenters raised concerns regarding the proposed Sec. 351.408(b)'s reliance on general economic comparability rather than focusing on the export composition of countries that produce merchandise identical or comparable to the subject merchandise. In response, Commerce included all three steps of its surrogate country analysis in the updated regulation, because while export composition is not part of the first step of Commerce's surrogate country analysis (which was the only part analyzed in the current regulation and addressed in the Proposed Rule), it is analyzed in the second and third parts of its analysis in selecting a surrogate country.

Another concern raised by certain commenters was Commerce's proposed inclusion of "additional factors which are appropriate to consider in light of unique facts or circumstances" with respect to its economic comparability analysis.\140\ Commerce has not included that language in the final regulation but has retained the "additional considerations in determining economic comparability" at Sec. 351.408(b)(1)(ii) and provided examples for when it might consider additional unique factors in its comparability analysis in this preamble. Commerce appreciates the need for predictability and consistency in its analysis but also recognizes that each country, whether a market economy or nonmarket economy, is unique, and if a factor arises in a given case that Commerce determines is significant and relevant enough to consider as part of its economic comparability analysis, Commerce must have the ability to do so to comply with its statutory responsibilities.

\140\ See Proposed Rule, 89 FR at 57330 (at proposed Sec. 351.408(b)(4)).

In addition, certain parties commented more specifically on the importance of the comparability of merchandise from a potential surrogate country. One commenter suggested that Commerce should at times place greater importance on the comparability of merchandise over the comparability of economies in selecting a surrogate country. In accordance with that suggestion, the commenter recommended that both economic

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comparability and merchandise comparability factors should be weighed such that a country outside the current six-country GNI list might still be selected as the surrogate country based on significant production of identical merchandise (or merchandise that is more comparable to the subject merchandise than any products produced in any of the six listed countries).

Commerce has not adopted that commenter's suggestion in revising Sec. 351.408(b). The Act states that Commerce "shall utilize, to the extent possible, the prices or costs of factors of production in one or more market economy countries that are-(A) at a level of economic development comparable to that of the nonmarket economy country, and (B) significant producers of comparable merchandise." \141\ While economic comparability and comparable merchandise production are both important considerations in Commerce's surrogate country analysis, it is Commerce's longstanding practice to prioritize economic comparability, with the similarity of merchandise produced in those potential surrogate countries serving as a secondary aspect of Commerce's analysis. The Federal Circuit has stated that when a statute does not mandate a procedure or methodology for applying a statutory test, "Commerce may perform its duties in the way it believes most suitable" \142\ and has affirmed Commerce's selection of surrogate countries in several cases on the basis of this methodology.\143\ Indeed, consistent with this practice, Commerce's modified surrogate country memo affirms the prioritization of "economic comparability" in the surrogate selection process, while also acknowledging the relevance of selecting a "significant producer of comparable merchandise." \144\ Likewise, consistent with that practice, the revised regulation also prioritizes economic comparability, as reflected in the first, second and third steps of Commerce's surrogate selection analysis in Sec. 351.408(b)(1), (2) and (3) of the final rule.

\141\ See sections 773(c)(4)(A) and 773(c)(4)(B) of the Act.

\142\ See JBF RAK LLC v. United States, 790 F.3d 1358, 1364 (Fed. Cir. 2015).

\143\ See, e.g., Jiaxing Brother Fastener Co. v. United States, 822 F.3d 1289, 1300 (Fed. Cir. 2016) (affirming Commerce's selection of Thailand over the Philippines as the surrogate country).

\144\ See Memorandum, "List of Surrogate Countries for Antidumping Investigations and Reviews from the People's Republic of China ("China"), dated August 27, 2024, available at https://access.trade.gov/Resources/surrogate/China_Surrogate_Country-List_Memo.pdf. The memorandum specifies that when multiple countries meet the criteria of economic comparability, the availability and quality of publicly available data should guide the selection process. Commerce's surrogate country memo also indicates that if no countries on the list produce comparable merchandise, Commerce may consider countries outside the list in selecting a surrogate country.

Nonetheless, Commerce agrees with that commenter that the similarity of merchandise produced by countries that are both economically comparable and significant producers of subject merchandise can be an important consideration in the agency's surrogate country analysis, depending on the facts on the administrative record. Accordingly, in analyzing the comparability of merchandise from potential surrogate countries with subject merchandise, Commerce has codified in Sec. 351.408(b)(3) that besides the availability, accessibility and quality of data, Commerce will also consider the similarity of production processes and products manufactured in the potential surrogate countries to the subject merchandise. Consistent with Commerce's normal practice, Commerce may consider if the merchandise is identical or similar to the subject merchandise and may consider other factors besides the physical characteristics of the products if the administrative record contains such detailed information.\145\

\145\ As one commenter pointed out, in Shanghai Foreign Trade the CIT recognized that Commerce's practice in selecting surrogate financial statements, for example, is to compare not only the physical characteristics of the potential surrogate product with the subject merchandise, but the end use and similarity of production process between the products as well. See Shanghai Foreign Trade, 318 F. Supp. 2d at 1348. Such considerations might also be relevant in selecting a surrogate country, but only if the information on the record is of sufficiently quality and completeness to support such an analysis.

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14. Commerce Will Remove the Integral Linkage Specificity Provision, as Well as the Agricultural and Small- and Medium-Sized Businesses Exceptions to the Specificity Rule (Currently Found at Sec. 351.502(d), (e), and (f))

It is axiom that Commerce will only countervail a subsidy program that provides benefits that are specific as that term is contemplated under U.S. CVD law; that is, not broadly available and widely used but narrowly focused and used by discrete segments of an economy.\146\

\146\ See, e.g., sections 771(5)(A) and 771(5A)(D) of the Act and SAA at 929-930.

In the Proposed Rule, Commerce proposed removing the integral linkage specificity provision, as well as the agricultural and small- and medium-sized business exceptions to the specificity rule, currently found at Sec. 351.502(d), (e), and (f).\147\ Commerce received comments on these proposed changes. After considering those comments, Commerce is removing these provisions consistent with the Proposed Rule.

\147\ See Proposed Rule, 89 FR at 57308-10.

Integral Linkage Provision

Consistent with the proposed changes to the regulation, the agency will delete the integral linkage provision found at current Sec. 351.502(d) pursuant to which Commerce, at its discretion, may expand its analysis of whether a particular investigated subsidy program is specific under section 771(5A)(D) of the Act by expanding its specificity analysis to programs other than that particular investigated subsidy program if the investigated subsidy program is "integrally linked" to other subsidy programs under investigation. The concept of integral linkage contained in Sec. 351.502(d) was a discretionary practice at the time of its codification. There is not, and has never been, a statutory requirement to expand the analysis of specificity under section 771(5A)(D) of the Act beyond the particular investigated subsidy program. Since 1998, when Commerce added the integral linkage provision to the regulations, respondents have rarely invoked this provision, and Commerce has rarely found two or more subsidy programs to be integrally linked.\148\ For these reasons, Commerce has determined to remove the integral linkage provision found at current Sec. 351.502(d).

\148\ See, e.g., Countervailing Duties; Final Rule, 63 FR 65348, 65357 (November 25, 1998) (1998 CVD Regulations); see also the Preamble to Countervailing Duties: Notice of Proposed Rulemaking and Request for Public Comments, 54 FR 23366, 23368 (May 31, 1989) (1989 Proposed Regulations). The 1989 Proposed Regulations were never finalized.

Two parties commented in opposition to the removal of the integral linkage provision. While they acknowledged Commerce's observation that there is no express statutory requirement to expand the analysis of specificity under section 771(5A)(D) of the Act, the commenters stated that the elimination of the regulation diminishes clarity and certainty by removing analytical standards deemed useful in resolving whether a measure satisfies the statute's specificity requirements. Commerce finds these arguments unpersuasive.

While the commenters state that the elimination of this regulation diminishes clarity with respect to Commerce's analytical standards, these parties have cited no cases or instances since this regulation was promulgated

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in which the integral linkage provision provided useful guidance or clarity to Commerce's analysis of a subsidy program's specificity. Because the integral linkage provision is not required by the Act and has not provided any useful assistance or clarity to the agency's specificity analysis conducted under section 771(5A)(D) of the Act, Commerce has removed the provision from the regulation.

The Agricultural Exception

Consistent with the proposed changes to the regulation, in this final rule Commerce has removed the agricultural exception found at current Sec. 351.502(e). Current Sec. 351.502(e) provides that Commerce will not regard a domestic subsidy as being specific under section 771(5A)(D) of the Act solely because the subsidy is limited to the agricultural sector. When paragraph (e) was issued, Commerce explained that this exception for generally available agricultural subsidies was consistent with prior practice and that Commerce would find an agricultural subsidy to be countervailable only if it were specific within the agricultural sector, e.g., a subsidy limited to livestock or livestock received disproportionately large amounts of the subsidy.\149\

\149\ See 1998 CVD Regulations, 63 FR at 65357-58.

This regulation was based on Commerce's decisions in several cases during the 1980s, including Asparagus from Mexico,\150\ Fresh Cut Roses from Israel,\151\ and Certain Fresh Cut Flowers from Mexico.\152\ In Asparagus from Mexico, Commerce determined that the provision of water to agricultural producers was not countervailable, explaining: "{p}referential rates are not provided to the producers of any one agricultural product" and "{w}e do not consider the provision of water at a uniform rate to all agricultural producers in this region to be a benefit, which would constitute a bounty or grant, because Commerce considers the agricultural sector to constitute more than a single group of industries within the meaning of the Act." \153\ Commerce cited this finding in support of its determination that benefits from government-funded agricultural extension services were not countervailable in Fresh Cut Roses from Israel.\154\ This practice of considering the agricultural sector to constitute more than a specific industry or group of industries was reaffirmed again in Certain Fresh Cut Flowers from Mexico.\155\

\150\ See Final Negative Countervailing Duty Determination: Fresh Asparagus from Mexico, 48 FR 21618, 21621 (May 13, 1983) (Asparagus from Mexico).

\151\ See Fresh Cut Roses from Israel: Final Results of Administrative Review of Countervailing Duty Order, 48 FR 36635, 36636 (August 12, 1983) (Fresh Cut Roses from Israel).

\152\ See Certain Fresh Cut Flowers from Mexico, 49 FR 15007, 15008 (April 16, 1984) (Certain Fresh Cut Flowers from Mexico).

\153\ See Asparagus from Mexico, 48 FR at 21621.

\154\ See Fresh Cut Roses from Israel, 48 FR at 36636.

\155\ See Certain Fresh Cut Flowers from Mexico, 49 FR at 15008.

Commerce's conclusion in this regard on the application of the CVD law was upheld by the CIT in Roses Inc. v. United States, where the Court held that "Commerce's determination that a group composed of all of agriculture, that is, whatever is not services or manufacturing, is not within the meaning of the statutory words 'industry or group of industries' is a reasonable interpretation of the statute." \156\

\156\ See Roses Inc. v. United States, 774 F Supp. 1376, 1383-84 (CIT 1991).

Commerce first attempted to codify a specificity exception for the agricultural sector in the 1989 Proposed Regulations, which were never finalized.\157\ When Commerce attempted to codify this agricultural exception the agency was administering the CVD law with limited guidance from the Act with respect to the analysis of specificity. The CVD law did not have an explanation or a definition of a "specificity test" which is now incorporated under the current statute. In addition, the Trade Agreements Act of 1979 that governed Commerce's administration of the CVD law at that time did not set forth any criteria with respect to the analysis of specificity. Section 771(5)(B) of the Trade Agreements Act of 1979 only referenced domestic subsidies "provided or required by government to a specific enterprise or industry, or group of enterprises or industries." Indeed, the criteria to be used in any specificity analysis undertaken by Commerce was not in the Act but only in the 1989 Proposed Regulations.

\157\ See 1989 Proposed Regulations at Sec. 355.43(b)(7).

The agricultural exception that was codified in Sec. 351.502(e) in the 1998 CVD Regulations was based upon the 1989 Proposed Regulations. With respect to the codification in 1998 of the agricultural exception in Sec. 351.502(e), one commenter suggested that Commerce should abandon the special specificity rule for agricultural subsidies citing section 771(5B)(F) of the Act and Article 13(a) of the WTO Agreement on Agriculture referencing the so-called "green box" category of non-countervailable agricultural subsidies. In response to that comment, Commerce stated that "[g]iven the absence of any indication that Congress intended the 'green box' rules to change the Department's practice or overturn Roses, Commerce is retaining the special specificity rule for agricultural subsidies." \158\

\158\ 1998 CVD Regulations, 63 FR at 65358.

Commerce has now reconsidered its exception for agricultural subsidies. A blanket specificity exception provided to agricultural subsidy programs denotes a conclusion by Commerce unrelated to any case-related (or case-specific) facts regarding the availability and use of a subsidy by any enterprise or industry or group thereof and that every country that is subject to a CVD investigation has an identical agricultural sector within its economy. The SAA states that Commerce can only make a specificity determination on a case-by-case basis.\159\ Accordingly, it is more consistent with the SAA to eliminate the blanket specificity exception for the group of enterprises or industries in agriculture.

\159\ See SAA at 930.

The elimination of the agriculture exception to specificity should not be construed as a change in policy by Commerce, nor does it imply a renewed emphasis on pursuing any particular agricultural subsidies or agricultural subsidies in general. Rather, Commerce's analysis of whether an agricultural subsidy is specific will be conducted on a case-by-case basis, consistent with the SAA, based on an examination of the specificity criteria enacted under section 771(5A)(D) of the Act within the framework of the specificity test set forth in the SAA. Commerce is legally bound by these criteria. In practice, the agricultural exception has not been a deciding factor in Commerce's analysis of agricultural subsidies because, as commenters have noted, Commerce has countervailed agricultural subsidies consistent with the specificity standards set forth within section 771(5A)(D) of the Act.\160\

\160\ See, e.g., Sugar from Mexico: Final Affirmative Countervailing Duty Determination, 80 FR 57337 (September 23, 2015), and accompanying Issues and Decision Memorandum; Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Final Affirmative Countervailing Duty Determination, 78 FR 50387 (August 19, 2013), and accompanying Issues and Decision Memorandum; Final Affirmative Countervailing Duty Determinations: Certain Durim Wheat and Hard Red Spring Wheat from Canada, 68 FR 52747 (September 5, 2003), and accompanying Issues and

Decision Memorandum; and Ripe Olives from Spain: Final Affirmative Countervailing Duty Determination, 83 FR 28186 (June 18, 2018), and accompanying Issues and Decision Memorandum.

Comments on the removal of the agricultural exception from the

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regulation were evenly split between those parties that supported the removal of the specificity exception and those that opposed.

The commenters that supported the removal of the agricultural exception stated that there is no basis under current law to maintain a regulatory exception that conflicts with both the statutory language of section 771(5A)(D) of the Act and the SAA. Other commenters that supported the removal of the exception also noted the changing economic landscape of the agricultural sector since the agricultural exception was implemented by Commerce in the 1980s.

Those commenters that opposed the removal of the agricultural exception stated the following general points: (1) Commerce did not clearly indicate how the Act requires or permits the agency to delete the exception from the agency's regulation; (2) the removal of the exception would be inconsistent with the statute and Congress' affirmation of Commerce's agricultural exception practice; (3) domestic agricultural policies and broad-based agricultural subsidies are generally considered a normal function of government and, therefore, should not be susceptible to countervailing actions; (4) the agricultural exception has not prevented Commerce from conducting CVD investigations on agricultural products; (5) the agricultural sector is highly diverse and is composed of more than a single group of enterprises or industries within the meaning of section 771(5A)(D) of the Act; and (6) removing the exception would send the wrong signal to U.S. trading partners.

Response

Before addressing these comments, Commerce must first address another point made by various commenters regarding the reference Commerce made to the economic criteria and the economic importance of the agricultural sector in the Proposed Rule. In the Proposed Rule, Commerce referenced various economic factors of the agricultural sector during the early 1980s when the agency created its agricultural exception and then explained how those economic factors may have changed in the ensuing four decades.\161\ These factors were cited in the Proposed Rule to explain, in part, how Commerce analyzed the specificity of investigated agricultural subsidies in the early 1980s when there was, as explained above, no statutory criteria with respect to analyzing whether a subsidy was limited to a specific enterprise or industry or group of enterprises or industries.\162\ Commerce also referenced these factors in an attempt to make the point that a blanket and static specificity exception provided to any one group of enterprises or industries could become de facto obsolete over a long period of time.\163\ Commerce did not intend to suggest that any analysis of specificity should or could be based solely on this type of economic data as that type of restricted analysis would be inconsistent with the SAA. The SAA is explicit on this point as it states that there is no precise mathematical formula for determining when the number of enterprises or industries eligible for a subsidy is sufficiently small as to be considered specific.\164\ A proposal to establish such quantitative criteria was made during the Uruguay Round but was quickly rejected by the United States and many other participants.\165\

\161\ See Proposed Rule, 89 FR at 57308-57309.
\162\ Id.
\163\ Id.
\164\ See SAA at 929-30.
\165\ Id. at 930.

The comments received by Commerce make clear that the discussion of various economic criteria in the Proposed Rule was confusing to the public and could be subject to various interpretations, some of which could be inconsistent with the agency's intent and with the SAA. Therefore, Commerce has not included that language in the preamble to this final rule.

As to the remaining submissions, concerns that Commerce's removal of the agricultural exception is in violation of or inconsistent with the Act are without legal foundation. Congress incorporated the

SAA and the specificity test established within the SAA into U.S. law; in addition, section 771(5A)(D) of the Act contains the criteria that Commerce must apply in its analysis to determine whether a subsidy program is specific. Nothing in the Act or the SAA prohibits Commerce from considering whether agriculture provides a basis for specificity. Removing the regulation that provided a blanket specificity exception for the agricultural sector recognizes the case-by-case nature of a specificity analysis consistent with the Act.

The commenters' statement that Congress has affirmed Commerce's agricultural specificity exception is incorrect. To support this claim, the parties cited the preamble to the 1998 CVD Regulation where Commerce stated that "[g]iven the absence of any indication that Congress intended the 'green box' rules to change the Department's practice or overturn Roses, Commerce is retaining the special specificity rule for agricultural subsidies." \166\ However, it is clear from the context of the cited language in the preamble that it was solely related to an argument that Commerce should abandon the agricultural exception because of the creation of a category of "green box" agricultural subsidies under section 771(5B)(F) of the Act. Thus, the statement in the preamble referenced by these parties is unpersuasive as the issue of "green box" subsidies is unrelated to the removal of this exception. Commerce also notes that the treatment of "green box" agricultural subsidies under section 771(5B)(F) of the Act has long-since lapsed and is no longer applicable under the CVD law. Thus, the prior statutory exception to countervailing certain subsidies to the agricultural sector is no longer in effect.

\166\ See 1998 CVD Regulations, 63 FR at 65358.

Commenters opposing the removal of the agricultural exception also state that broad-based agricultural subsidies are a normal function of government and, therefore, should not be susceptible to countervailing actions. Commerce finds this argument unavailing as Commerce has the authority under the Act to countervail support that meets the statutory requirements for a countervailable subsidy, and these Commenters have not pointed to any statutory provision that prohibits Commerce from considering whether subsidies to the agricultural sector are countervailable. Congress has not exempted agricultural subsidies from the CVD law. In fact, to the contrary, a specific provision at section 771B of the Act addresses subsidies provided to processed agricultural products.

To support the claim that Commerce should not remove the agricultural exception, commenters stated that the exception has not prevented Commerce from investigating and countervailing agricultural subsidies. Yet the fact that the agency has countervailed agricultural subsidies under the existing regulations highlights the irrelevance of this exception and the lack of a need for it in the first place.

The commenters opposing the removal of the agricultural exception also stated that the agricultural sector is highly diverse and is composed of more than a single group of enterprises or industries within the meaning of section 771(5A)(D) of the Act. Commerce does not disagree that the agricultural sector is generally highly diverse and may be composed of more than a single group of enterprises or industries. At the same

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time, section 771(5A)(D) of the Act requires that Commerce determine whether a subsidy, including an agricultural subsidy, is limited to a group of enterprises or industries on a case-by-case basis,\167\ and therefore Commerce has removed the agricultural exception consistent with the Proposed Rule.

\167\ See SAA at 930.

In sum, the statements made by these commenters do not support the need to have a blanket and static specificity exception, especially because Commerce will continue to consider the issue of specificity based on the language in the SAA and section 771(5A)(D) of the Act.

Finally, one commenter opposing the removal of the agricultural exception stated that its removal would disavow agriculture's unique situation and would send the wrong signal to U.S. trading partners. Commerce disagrees. As stated above, the elimination of the agriculture exception to specificity should not be construed as a change in policy by Commerce; indeed, Commerce has

previously found certain subsidies to enterprises or industries in the agricultural sector to be countervailable.

One commenter did not directly oppose the removal of the exception but emphasized that Commerce's analysis of specificity should be consistent with the specificity criteria that are set forth in Article 2 of the WTO Agreement on Subsidies and Countervailing Measures (the SCM Agreement).\168\ Commerce agrees with this commenter, as the specificity criteria set forth within Article 2 of the SCM Agreement are incorporated within section 771(5A)(D) of the Act.

\168\ See Agreement on Subsidies and Countervailing Measures (SCM Agreement); 19 U.S.C. 3511 (Approval and entry into force of Uruguay Round Agreements") (December 9, 1994).

Small- and Medium-Sized Business Exception

Commerce proposed deleting the small- and medium-sized business exception to the specificity rule currently found at Sec. 351.502(f).\169\ That regulation states that Commerce "will not regard a subsidy as being specific under section 771(5A)(D) of the Act solely because the subsidy is limited to small firms or small- or medium-sized firms (SMEs)." The specificity test discussed in the SAA states that Commerce will find not specific only those subsidy programs "which truly are broadly available and widely used throughout an economy." Therefore, Commerce has determined in this final rule to eliminate the specificity exception provided to SMEs under Sec. 351.502(f), consistent with the SAA.

\169\ See Proposed Rule, 89 FR at 57308-310.

A blanket specificity exception provided to SME subsidy programs suggests a conclusion by Commerce that every country that is subject to a CVD investigation has an identical or similar economy with respect to the role played by SMEs. The SAA and the language of section 771(5A)(D) of the Act require that Commerce analyze specificity based upon the "jurisdiction of the authority providing the subsidy" and makes clear that specificity can be found when a subsidy is limited to any "group" of enterprises or industries. Accordingly, Commerce has determined that it is appropriate to delete the SME exception that was under Sec. 351.502(f), as the specificity of SME subsidy programs should be determined on a case-by-case basis, pursuant to the language of the SAA and section 771(5A)(D) of the Act.

Commerce's deletion of the SME exception, like the deletion of the agriculture exception, should not be construed as a change in the agency's policy or practice. In fact, the SME exception has also not been a deciding factor when raised, as Commerce has countervailed SME programs meeting the specificity standards set forth within section 771(5A)(D) of the Act.\170\ These two blanket specificity exceptions have been removed from our regulations, consistent with both the SAA and section 771(5A)(D) of the Act.

\170\ See, e.g., Aluminum Extrusions from the People's Republic of China: Final Affirmative Countervailing Duty Determination, 76 FR 18521 (April 4, 2011), and accompanying Issues and Decision Memorandum discussing the Fund for SME Bank-Enterprise Cooperation Projects; and Large Diameter Welded Pipe from the Republic of Korea: Preliminary Results of Countervailing Duty Administrative Review; 2018-2019, 86 FR 42779 (August 5, 2021), and accompanying Issues and Decision Memorandum discussing Smart Factory Construction and Advancement Project program.

A subsidy allegation that alleges specificity solely because a program is limited to SMEs, in general, would not normally be sufficient to support an allegation of de jure specificity. With a specificity allegation made under section 771(5A)(D)(iii) of the Act, the agency would also normally expect that the interested party explain why there would be a reason to believe or suspect than an SME program would be de facto specific based upon information reasonably available to it.

Four commenters submitted comments in support of the removal of the SME exception and two commenters opposed the deletion of the SME exception. The parties that opposed the removal of the SME exception stated that there is no conflict between the SME exception and the SAA. They submit that both the SCM Agreement and U.S. law provide that a subsidy program is not de jure

specific if it sets forth objective criteria that are "economic in nature and horizontal in application, such as the number of employees or the size of the enterprise." \171\

\171\ The commenters' description of the CVD law is not a completely accurate statement of U.S. law. Section 771(5A)(D)(ii) of the Act is a corollary clause to de jure specificity. Under clause (ii), a subsidy would not be deemed to be de jure specific merely because it was bestowed pursuant to certain eligibility criteria. However, the eligibility criteria or conditions must be objective, clearly documented, capable of verification, and strictly followed. In addition, eligibility for the subsidy must be automatic where the criteria are satisfied. Finally, clause (ii) defines the term "objective criteria or conditions" as criteria or conditions that are neutral and that do not favor one enterprise or industry over another. The quoted language referenced by these parties is taken from page 930 of the SAA and is taken out of context from the full definition of "objective criteria or conditions." The SAA states that "the objective criteria or conditions must be neutral, must not favor certain enterprises or industries over others, and must be economic in nature and horizontal in application, such as the number of employees or the size the enterprise." Therefore, the SAA sets forth three different legal requirements for "objective criteria or conditions" and these are (1) must be neutral, (2) must not favor certain enterprises or industries over others, and (3) must be economic in nature and horizontal in application, such as the number of employees or the size of the enterprise.

The parties submit that the SAA states that there are "many instances in which U.S. law or administrative practice will remain unchanged under the Uruguay Round Agreements" and that the de jure specificity prong of the statute "is consistent with existing Commerce practice." The parties also submit that finding programs for SMEs not specific is consistent with the original purpose of the specificity test that is set forth in the SAA.

Response

While the first two statements are indeed accurate reflections of the language within the SAA and that a finding that an SME program is not specific, based on the facts on the record, may be consistent with the SAA's specificity test; however, these statements do not directly address the current regulatory provision for a blanket and static specificity exemption for SME programs. Commerce also notes that with respect to the cited SAA statement that the de jure specificity prong of the statute "is consistent with existing Commerce practice," the SME exception cited to section 771(5A)(D) of the Act which covers both de jure as well as de facto specificity. Ultimately, Commerce is of the view that a decision of whether a subsidy is limited to an enterprise or industry or group of enterprises or industries within the

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meaning of section 771(5A)(D) of the Act must be made on a case-by-case basis based upon record evidence.

Accordingly, after careful consideration of the comments received on this issue, Commerce has removed the SME exception from the regulations for the reasons set forth above.

15. Commerce Will Revise and Move the Disaster Relief Exception to the Specificity Rule and Create an Employment Assistance Program Exception to the Specificity Rule, in Sec. 351.502(d) and (e), as Proposed, With Slight Modifications

As stated above, for Commerce to find benefits provided by a particular program to be countervailable, the program must provide benefits that are specific as that term is contemplated under U.S. CVD law; that is, not broadly available and widely used but narrowly focused and used by discrete segments of an economy. In the Proposed Rule, Commerce proposed updating the disaster relief exception to the specificity rule and moving it from Sec. 351.502(g) to Sec. 351.502(d).\172\ Commerce is now codifying that proposed move and updating the regulation in this final rule. The current disaster relief regulation states that Commerce will not regard disaster relief as being specific under section 771(5A)(D) of the Act if such relief constitutes general assistance available to anyone in the area affected by the disaster. With the onset of the global COVID-19 pandemic, Commerce encountered certain government programs that provided COVID-19 relief to individuals and enterprises affected by the pandemic. Where the assistance was generally

available to any individual or enterprise in the area affected by the pandemic, Commerce found the assistance to be not specific.

\172\ See Proposed Rule, 89 FR at 57310.

It was unclear under the current disaster relief specificity exception whether the definition of "disaster relief" included relief provided during a pandemic. Commerce's practice of finding pandemic relief (if available to any individual or enterprise in the affected area) to not be countervailable because the relief was determined to be not specific under section 771(5A)(D) of the Act has been uncontroversial. However, Commerce has modified the regulatory language to specify that Commerce will not regard disaster relief, including pandemic relief, as being specific under section 771(5A)(D) of the Act if such relief constitutes general assistance available to any individual or enterprise in the area affected by the disaster. This exception to specificity provided to disaster relief, including pandemic relief, would not apply when this relief is limited on an industry or enterprise basis because the relief would not be available to all individuals or enterprises in the area affected by the disaster.

Similar to the exception provided for disaster relief assistance, Commerce proposed a new employment assistance program exception to the specificity rule at Sec. 351.502(e) in the Proposed Rule.\173\ As with the disaster relief assistance provision, Commerce is now codifying that proposed regulation in this final rule. Under Commerce's current practice, the agency does not generally find employment assistance programs that are created to promote the employment of certain classes or categories of workers or individuals to be specific.\174\ Under this new rule at Sec. 351.502(e), Commerce will regard employment assistance programs as being not specific under section 771(5A)(D) of the Act if such assistance is provided solely with respect to employment of general categories of workers, such as those based on age, gender, disability, veteran, and unemployment status, and is available to any individual with one or more of these characteristics without any industry restrictions.

\173\ Id.

\174\ See, e.g., Certain Steel Nails from Korea the Republic of Korea: Final Negative Countervailing Duty Determination, 80 FR 289966 (May 20, 2015), and accompanying Issues and Decision Memorandum at 13.

In examining the specificity of these types of employment assistance programs, similar to unemployment programs, programs that focus on the general employment of certain classes of individuals without industry- and enterprise-based restrictions would not be specific within the meaning of section 771(5A)(D) of the Act.

However, job creation or retention programs that provide incentives to certain enterprises or industries, such as those implemented to attract new firms or industries or to provide incentives for firms to expand, would not fall within this exception. Similarly, any employment program related to the hiring of employees with specific job skills such as high-tech or engineering skills would also not fall within this exception. Rather, the specificity of such programs will continue to be determined on a case-by-case basis pursuant to the language of the SAA and section 771(5A)(D) of the Act.

Two commenters submitted comments with respect to disaster relief and general employment exceptions. One party commented that Commerce failed to explain why it is appropriate to codify the agency's practice of not finding programs that are created to promote the employment of certain classes or categories of individuals to be specific. That commenter stated that while disaster relief-the other sole remaining exception-can be seen as a unique situation, it is unclear why employment assistance merits a regulatory exception. However, this party stated that if Commerce wanted to codify this practice it should ensure that the regulatory language is consistent with the explanation of the regulation provided by the agency in the preamble to the proposed rule. Therefore, this party recommended two changes to the text of this regulation that are highlighted: (1) assistance is provided solely with respect to general categories of workers; and (2) the assistance is available to everyone hired within those categories without any industry or enterprise restrictions. Commerce finds these suggestions improve the regulation and has made these changes in these Final Rules.

Another commenter stated that with respect to both the disaster relief and general employment exceptions, Commerce should clarify whether these types of programs may be de facto specific or regionally specific if the facts of the case would normally support such a finding.

With the removal of the exceptions for agricultural and small- and medium-sized businesses, Commerce has only codified two specificity exceptions for disaster relief and the general employment of categories of workers. The purpose and focus of the CVD law and specificity as set forth within the statute is based upon whether, on a de jure or de facto basis, a government has created a subsidy program that may distort the market allocation of resources by limiting that subsidy program, and the benefits from that subsidy program, to an enterprise or industry or a group of enterprises or industries.\175\ The remaining exceptions for disaster relief and general employment of categories of workers are unrelated to the enterprise or industry

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specificity criteria set forth within section 771(5A)(D) of the Act. The disaster relief exception is based on the occurrence of natural disasters that are outside the control of a government, and the exception for general categories of workers is focused on individual qualities or characteristics that are unrelated to specific enterprises or industries.

\175\ See, e.g., Notice of Proposed Rulemaking and Request for Public Comments, 54 FR 23366, 23367 (May 31, 1989); see Final Affirmative Countervailing Duty Determination: Certain Steel Products from Austria, 58 FR 37261 at General Issues Appendix (July 9, 1993); Final Negative Countervailing Duty Determination; Carbon Steel Wire Rod from Czechoslovakia, 49 FR 19370 (May 7, 1984); Final Negative Countervailing Duty Determination; Carbon Stel Wire Rod from Poland. 49 FR 19274 (May 7, 1984), affirmed by the Federal Circuit in Georgetown Steel Corp v. United States, 801 F.2d 1308 (Fed. Cir. 1986).

The proposal by the commenter that general disaster relief programs may be found to be regionally specific would invalidate disaster relief programs because most natural disasters such as earthquakes, hurricanes, tornadoes, wildfires, and flooding normally do not impact, at any one time, an entire country but only specific regions within a country. Therefore, under Commerce's practice and this regulation, disaster relief programs will not be found to be regionally specific if the relief constitutes general assistance available to anyone in the area affected by the disaster. Similarly, Commerce does not find employment assistance programs provided to the general category of workers listed in the employment assistant regulation to be specific to industries or enterprises based on the conditions set forth in that regulation. However, employment programs related to the hiring of employees with specific job skills, and job creation or retention programs that provide incentives to certain enterprises or industries, such as those implemented to attract new firms or industries or to provide incentives for firms to expand, may be either de jure or de facto specific within the meaning of the Act based upon the facts of the case. While general employment assistance programs for general categories of rural or urban unemployed individuals would not normally be found to be regionally specific, a government worker assistance program that is implemented and legally restricted to only designated regions within the authority's jurisdiction would normally be found to be regionally specific within the meaning of section 771(5A)(D)(iv).

16. Commerce Has Made Some Small Changes to Proposed Sec. 351.503(b)(3), the Benefit Regulation

In the Proposed Rule, Commerce proposed to add a new paragraph to the benefit regulation at Sec. 351.503(b)(3) to provide rules for the general treatment of contingent liabilities and assets that are not otherwise addressed in the regulations.\176\ Under current Sec. 351.505(d), in the case of an interest-free loan for which the repayment obligation is contingent upon the company taking some future action or achieving some goal in fulfillment of the terms of the loan, Commerce normally treats the outstanding balance of the loan as an interest-free short-term loan.

\176\ See Proposed Rule, 89 FR at 57310.

However, other types of contingencies exist which are not explicitly referenced in that loan regulation. Commerce has encountered hybrid programs which have elements of two or more types of financial contributions, and, thus, two or more types of benefits. For example, in India, a program provides for import duty waivers contingent upon future export performance of the recipient.\177\ With respect to Korea, Commerce has investigated a research and development (R&D) grant program in which participating companies are required to repay 40 percent of the R&D grant if the R&D project is deemed by the government to be successful.\178\ In these cases, Commerce treated the outstanding contingent liability of the import duty exemptions in India and the R&D grant in Korea as contingent liability interest-free loans within the meaning of Sec. 351.505(d). In addition, under Sec. 351.510, which covers direct and indirect taxes and import charges, the benefit from the deferral of indirect taxes and import charges when the final waiver of such taxes and charges is contingent on fulfillment of other criteria such as realizing an amount of export earnings is also calculated using the methodology described under Sec. 351.505(d).

\177\ See, e.g., Certain Hot-Rolled Carbon Steel Flat Products from India: Final Results of Countervailing Duty Administrative Review, 73 FR 40295 (July 14, 2008), and accompanying Issues and Decision Memorandum at Comment 42 (discussing the Export Promotion Capital Goods Scheme (EPCGS)).

\178\ See, e.g., Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea: Final Results of Countervailing Duty Administrative Review, 76 FR 3613 (January 20, 2011), and accompanying IDM at 2-3 (discussing the Act on Special Measures for the Promotion of Specialized Enterprises for Parts and Materials).

While the treatment of these contingent import duty exemptions and R&D grants under Sec. 351.505(d) has never been a source of controversy, for purposes of clarity and flexibility the agency proposed and in this final rule codifies a separate paragraph under the benefit regulation to specifically provide for the treatment of contingent liabilities and assets that are not otherwise addressed in the regulations in this final rule. As Commerce encounters ever more complicated government programs, the goal is to have a regulation that provides for the specific treatment of contingent liabilities to ensure that there is no question that any government program that incorporates a contingent element falls within the purview of the CVD law and Commerce's regulations.

Commerce has also incorporated the element of contingent assets into this regulatory addition to ensure that a contingent asset that is provided by a government and that has not been measured under the other rules within our CVD regulations can be addressed within this benefit section of the CVD regulations. Therefore, for either the provision of a contingent liability or asset, under this change to the regulation the agency will treat the balance or value of the contingent liability or asset as an interest-free provision of funds and would calculate the benefit using, where appropriate, either a short-term or long-term commercial interest rate.

Every comment Commerce received on this regulation was in support of the change. However, one of the commenters proposed a small change to the regulation. This commenter stated that the proposed regulation specifies that Commerce will treat the balance or value of the contingent liability or asset as an interest-free provision of funds and will calculate the benefit using a short-term commercial interest rate. The commenter noted that this approach may not be appropriate for all contingent liabilities and assets; for example, if the period between the provision and the closing of the contingency is greater than one year, the use of a short-term interest rate would not be appropriate. This commenter suggested that Commerce replace the proposed language with "will calculate the benefit using a short-term commercial interest rate or a long-term commercial interest rate based on the time period between the provision and the closing of the contingency." Since the agency agrees that the regulation should reflect that, where appropriate, Commerce will use either a short-term or long-term interest rate to determine the benefit from a contingent liability or asset, Commerce has made that modification to Sec. 351.503(b)(3).

17. Commerce Has Made Some Small Changes to Proposed Sec. 351.505(c)(2) and 505(e)(2), the Loan Regulation

Section 351.505 applies to the procedures and policies pertaining to loans under the CVD law. In the Proposed Rule, Commerce proposed to make modifications to Sec. 351.505(b), (c), and (e) and add new Sec. 351.505(a)(6)(iii).\179\ After consideration of the comments on these changes, Commerce is implementing

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those modifications with some small changes.

\179\ See Proposed Rule, 89 FR at 57311-312.

Section 351.505(a)(6)(ii) pertains to loans provided by government-owned banks. Commerce proposed to add a paragraph (a)(6)(iii) to address the initiation standard for specificity allegations for loans provided by government-owned policy banks, which are special purpose banks established by governments. Under the new language in paragraph (a)(6)(iii), an interested party would meet the initiation threshold for specificity under paragraph (a)(6)(ii)(A) of Commerce's current CVD regulations with respect to section 771(5A)(D) of the Act if the party could sufficiently allege that loan distribution information is not reasonably available and that the bank provides loans pursuant to government policies or directives.

Commerce has found that information on the distribution of loans and data on the enterprises and industries that receive loans from government-owned policy banks is usually not published and, therefore, not reasonably available to U.S. petitioning industries. Thus, these interested parties are hindered in their ability to make a specificity allegation under section 771(5A)(D)(iii) of the Act due to lack of transparency of these government-owned entities. It has been our experience that government-owned policy banks are normally established by laws and regulations which discuss the purposes of the policy banks; these laws and regulations are usually publicly available and, thus, would be available to U.S. petitioning industries.

The provision of, and access to, capital is a critical component to the growth and development of firms and industries. The control of the distribution or allocation of capital by the government has been shown to lead to a misallocation and distortion of resources within an economy.\180\ Fundamentally, a subsidy is a distortion of the market process for allocating an economy's resources and this principal is an underlying foundation of Commerce's entire CVD methodology.\181\

\180\ See, e.g., Shleifer, A., State versus Private Ownership, National Bureau of Economic Research Working Paper 6665 at 19 (1998), available at https://www.nber.org/papers/w6665; Iannotta, G., Nocera, G., et al., The Impact of Government Ownership on Bank Risk, J. Fin. Intermediation (2013), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2233564; Gonzalez-Garcia, J. and Grigoli, F., State-Owned Banks and Fiscal Discipline, IMF Working Paper (2013), available at https://www.imf.org/en/Publications/WP/Issues/2016/12/31/State-Owned-Banks-and-Fiscal-Discipline-40982; Sapienza, P., The Effects of Government Ownership on Bank Lending, J. of Fin. Economics (2004); La Porta, R., Lopez- De-Silanes, F., et al., Government Ownership of Banks, J. Finance (2002); Levy Yeyati, E., Micco, A, et al., Should the Government Be in The Banking Business? The Role of State-Owned and Development Banks, Inter-American Development Bank Working Paper, available at https://publications.iadb.org/en/publication/should-government-be-banking-business-role-state-owned-and-development-banks; Ijaz Khwaja, A., and Mian, A., Do Lenders Favor Politically Connected Firms? Rent Provision in an Emerging Financial Market, Q. J. Economics (2005), ; Serdar Dinc, I., Politicians and Banks: Political Influences on Government-owned Banks in Emerging Markets, J. Fin. Economics (2005), ; Carvalho, D., The Real Effects of Government-Owned Banks: Evidence from an Emerging Market, J. Finance (2012); and Claessens, S., Feijen, E., et al., Political Connections and Preferential Access to Finance: The Role of Campaign Contributions, J. Fin. Economics (2008).

\181\ See 1989 Proposed Regulations, 54 FR 23366, 23367 (May 31, 1989).

Therefore, based on the lack of publicly available data with respect to the distribution of loans for most of the state-owned policy banks that have been the subject of subsidy allegations in the past, Commerce's addition of Sec. 351.505(a)(6)(iii) addresses the initiation standard for an allegation of specificity for state-owned policy banks. Where loan distribution information for the state-owned policy bank is not reasonably available, under the new language in Sec. 351.505(a)(6)(iii) an interested party would normally meet the initiation threshold for specificity under the Act if the party sufficiently alleges that the bank provides loans pursuant to government policies or directives.

Commerce is also modifying Sec. 351.505(b) and (c) to establish a uniform standard with respect to the treatment of long-term loans. Commerce currently calculates the benefit for long-term loans

using different methodologies depending on whether the long-term loan has a fixed interest rate, a variable interest rate, or a different repayment schedule. These modifications would now ensure consistency in the benefit calculation of long-term loans by focusing on the key aspect that the benefit in any given year is the difference between the amount of interest the firm paid on the investigated loan and the amount of interest that the firm would have paid on a comparable commercial loan. In addition, the use of a comparable commercial loan as defined under Sec. 351.505(a) already appropriately adjusts for any differences in the government-provided loan based on whether the loan is fixed rate, variable rate, or with a term based on a different payment schedule.

Therefore, consistent with the Proposed Rule Commerce has modified and deleted parts of current Sec. 351.505(c), specifically both Sec. 351.505(c)(3) and (4). Current sections 351.505(c)(3) and (4) separately address long-term loans with different repayment schedules and long-term loans with variable interest rates. Commerce is deleting those provisions and adding a provision that indicates that, instead, Commerce will calculate the benefit conferred by any type of long-term loan in the same manner by taking the difference between what the recipient of the government loan would have paid on a comparable commercial loan and the actual amount the recipient paid on the government-provided loan during the period of investigation (POI)/period of review (POR) and allocating that benefit amount to the relevant sales during the POI/POR. Therefore, all long-term loans will be addressed solely under Sec. 351.505(c)(2).

One commenter suggested a change to the proposed Sec. 351.505(c)(2) language, stating that the subsidy benefit conferred from a long-term loan would be based on "the difference between the interest paid by the firm in that year on the government-provided loan and the interest the firm would have paid on the comparison loan." \182\ This commenter recommended that to ensure clarity, Commerce replace the term "comparison loan" with "comparable commercial loan," the term used to describe the loan benchmark in Sec. 351.505(a). Commerce agrees and has made this change in the final version of Sec. 351.505(c)(2).

\182\ See Proposed Rule, 89 FR at 57331.

In addition, consistent with the Proposed Rule Commerce has deleted sentences in current Sec. 351.505(c)(1) and (2) that state that in no event may the present value of the calculated benefit in the year of receipt of the loan exceed the principal of the loan. Commerce is also deleting the same sentence with respect to the provision of contingent liability interest-free loans at Sec. 351.505(e)(1). Section 771(5)(E) of the Act does not provide a cap on the benefit a loan may confer, so Commerce is therefore removing that regulatory restriction. The deleted language of the regulation was a holdover from the 1980s when Commerce would calculate a benefit from a loan by calculating a grant equivalent for the loan and then allocate that amount over the Average Useful Life (AUL) of a firm's renewable physical assets, a methodology that has long since been abandoned by Commerce.

One commenter objected to the deletion of the language that in no event may the present value of the calculated benefit in the year of loan receipt exceed

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the principle of the loan. That commenter stated that there should be a limit on the amount of the benefit based on reasonable presumptions of what a loan market would actually bear and stated that the Act directs Commerce to determine a loan benefit based on "a comparable commercial loan that the recipient could actually obtain on the market." That commenter stated that a benchmark such as the one used when a company is determined to be uncreditworthy is susceptible to overestimation.

As noted above, the "benefit cap" language that Commerce is deleting from the current regulation was based upon a loan methodology that Commerce ceased using over 30 years ago. When Commerce became the administering authority of the CVD (and AD) law in 1980, to determine the subsidy benefit conferred by a government loan, Commerce, after calculating the interest payment differential for the entire term of the government loan, would then calculate the present value of the stream of benefits to the year in which the loan was made. In other words, Commerce determined the subsidy value of the government loan as if the benefits had been bestowed as a lump-sum grant in the year in which the loan was given. This grant equivalent was then allocated evenly over the life of the loan to yield annual subsidy amounts. When the loan was provided for the purchase of capital equipment, this grant equivalent was allocated over the average useful life of the capital

equivalent.\183\ Because Commerce was in essence treating the loan benefit as a grant, it employed this grant benefit cap. This grant equivalent loan methodology was abandoned by Commerce over 30 years ago and thus, the grant "benefit cap" language is obsolete and has been stricken from our loan regulations.

\183\ See, Appendix 2 to the Final Affirmative Countervailing Duty Determinations on Certain Steel Products from Belgium; 47 FR 39304; 39316 (September 7, 1982).

More importantly, as the commenter pointed out, section 771(5)(E)(ii) of the Act states that in the case of a loan, a subsidy benefit is conferred if there is a difference between the amount the recipient of the loan pays on the government loan and the amount it would have paid on a comparable commercial loan that it could actually obtain on the market. Commerce's Sec. 351.505 loan regulation implements this statutory requirement, and the Act does not provide any benefit cap on the loan subsidy calculated under section 771(5)(E)(ii) of the Act.

Finally, while not germane to the broader statutory issue and to the modifications that have been made to Sec. 351.505, Commerce disagrees with the commenter's statement that an uncreditworthy benchmark is susceptible to overestimation. The fact that an uncreditworthy benchmark under Sec. 351.505(a)(3)(iii) will yield a loan benefit greater than a benchmark from "a comparable commercial loan that the recipient could actually obtain on the market" does not mean that the subsidy loan benefit is overestimated. The higher calculated subsidy benefit results from the government providing a loan to a firm that could not receive lending from a commercial bank because the firm is uncreditworthy. Commerce's uncreditworthy benchmark merely accounts for the fact that an uncreditworthy firm cannot obtain a commercial loan.

In addition, Commerce proposed to modify current Sec. 351.505(e), which addresses the treatment of a contingent liability interest-free loan.\184\ Under current Sec. 351.505(e)(2), Commerce treats a contingent liability interest-free loan as a grant if at any point in time the agency determines that the event upon which repayment depends is not a viable contingency. However, the current regulation does not address the situation where the recipient firm has either taken the required action or achieved the contingent goal and the government has waived repayment of the contingent loan. Therefore, Commerce is modifying this regulation to state that it will also treat the contingent loan as a grant when the loan recipient has met the contingent action or goal and the government has not taken any action to collect repayment.

\184\ See Proposed Rule, 89 FR at 57311.

Commerce received no comments objecting to the revision in Sec. 351.505(e)(2) under which Commerce will treat a contingent loan as a grant if "the government has not taken action to collect repayment." However, one party recommended a minor change to the text to state that "the government has not taken meaningful action to collect repayment." Commerce agrees with this recommended edit and has made this change to Sec. 351.505(e)(2) in this final rule.

18. Commerce Has Modified Certain Language in Proposed Sec. 351.509(b)(1), the Direct Taxes Regulation

Commerce proposed modifying Sec. Sec. 351.509 and 351.510, the regulations covering direct taxes and indirect taxes and import charges (other than export programs).\185\ Commerce is codifying those proposed changes in this final rule. The modification to both provisions clarifies Commerce's treatment of the exemption of taxes and import charges in zones designated as being outside the customs territory of the country, and in response to comments Commerce has made a change to Sec. 351.509(b)(1) as proposed.

\185\ Id., 89 FR at 57312.

In the 2012 CVD investigation of Steel Pipe from Vietnam, Commerce determined that the exemption of import charges on capital assets into an export processing zone was not countervailable.\186\ Commerce stated that the Government of Vietnam designated the respondent

company as an export processing enterprise, and based upon that designation the company's facilities are a "non-tariff zone" and thus the operations of the company were outside the customs territory of the country.\187\ Therefore, Commerce concluded that because the company was outside the customs territory of Vietnam, the exemption of import duties on capital goods did not provide a financial contribution in the form of revenue forgone.\188\ However, upon further consideration of our decision in Steel Pipe from Vietnam, Commerce has concluded that its treatment of firms or zones that are designated as being "outside the customs territory" of a country in that case to be at odds with our long established practice, our regulations, and the purpose of the CVD statute.

\186\ See Circular Welded Carbon-Quality Steel Pipe from the Socialist Republic of Vietnam: Final Negative Countervailing Duty Determination, 77 FR 64471 (October 22, 2012), and accompanying Issues and Decision Memorandum at Comment 3.

\187\ Id.

\188\ Id.

Under Sec. 351.102(a)(25), "government-provided" is a shorthand expression for any act or practice being analyzed as a possible countervailable subsidy. Critical to Commerce's analysis of whether a government act or practice constitutes a countervailable subsidy is a determination of what the situation of the firm would be in the absence of the government program. For example, Sec. 351.509(a), which addresses direct taxes, states that a benefit exists to the extent that the tax paid by the firm is less than the tax the firm would have paid in the absence of the program; under Sec. 351.510(a) regarding indirect taxes and import charges, a benefit exists to the extent that the taxes or an import charge paid by a firm as a result of the program are less than the taxes or import charges the firm would have paid in the absence of the program.

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Similarly, under the benefit regulation at Sec. 351.503(b), Commerce will consider a benefit to be conferred by government programs when a firm pays less for its inputs (e.g., money, a good or service) than it otherwise would pay or receives more revenue than it otherwise would earn in the absence of the government program.

The government designation of either a firm or a zone as being outside the customs territory constitutes a government act or program is consistent with the definition of "government-provided" under Sec. 351.102(a)(25). By establishing areas in which it will not collect taxes or import charges on capital goods, the government has taken an explicit action to provide both a financial contribution and a benefit to a firm that is operating within the designated area. Absent the government action, the firm otherwise would have paid either direct taxes or import charges to the government. These government actions provide incentives to exporters, and, as the Supreme Court explained in Zenith, a purpose of the countervailing duty law and the imposition of countervailing duties is "to offset the unfair competitive advantage that foreign producers would otherwise enjoy from export subsidies paid by their governments." \189\

\189\ See Zenith Radio Corp. v. United States, 437 U.S. 443, 455-56 (1978).

Thus, to ensure the appropriate application of the CVD statute, Commerce is amending both Sec. Sec. 351.509(a)(1) and 351.510(a)(1) to close a potential loophole through which foreign governments might provide a countervailable subsidy including a prohibited export subsidy. Commerce has included the additional language within Sec. 351.509(a)(1): "a benefit exists to the extent that the tax paid by a firm as a result of the program is less than the tax the firm would have paid in the absence of the program, including as a result of being located in an area designated by the government as being outside the customs territory of the country" (emphasis added). For Sec. 351.510(a), the amended language reads: "a benefit exists to the extent that the taxes or import charges paid by a firm as a result of the program are less than the taxes the firm would have paid in the absence of the program, including as a result of being located in an area designated by the government as being outside the customs territory of the country" (emphasis added). This new language is also included in Commerce's new Sec. 351.521(a)(1), discussed further below, that addresses indirect taxes and import charges on capital goods and equipment (export programs).

Commerce has not added this language to Sec. Sec. 351.518 and 351.519, which address the exemption, remission, or deferral upon export of prior-stage cumulative indirect taxes and the remission or drawback of import charges upon export for inputs consumed in the production of an exported product. The treatment of inputs consumed in the production of an exported product codified under these sections of our regulations addresses long-established rules of global trade adopted by the United States that were first established under the General Agreement on Tariffs and Trade (GATT) and later incorporated into the SCM Agreement. For the same reason, Commerce has not incorporated this language into Sec. 351.517, which addresses the exemption or remission upon export of indirect taxes.

Commerce received only supportive comments for these changes. Commerce has also made a clarifying change to Sec. 351.509. The agency is removing the word "normally" from Sec. 351.509(b)(1) to codify Commerce's long-standing practice of always using the date that a firm filed its tax return to determine the receipt of an income tax benefit and stating that "[f]or all exemptions or remissions related to income taxes, this date will be the date on which the firm filed its tax return."

19. Commerce Has Moved the Proposed Language in the Provision of Goods or Services Regulation From Sec. 351.511(a)(2)(i) to 351.511(a)(2)(iii) and Made a Small Revision to Proposed 351.511(a)(2)(iii)(C)

Section 351.511 regulates how Commerce examines and determines if goods or services are being sold for less than adequate remuneration (LTAR) in accordance with section 771(5)(E)(iv) of the Act. Section 351.511(a)(2) defines "adequate remuneration" and describes the use of a market-determined benchmark price resulting from actual transactions in the country subject to the CVD proceeding for purposes of evaluating the adequacy of remuneration. Pursuant to the language of the current provision, under certain circumstances, an in-country, market-determined price could also include "actual sales from competitively run government auctions."

In the Proposed Rule, Commerce proposed a modification to the regulation which would list the circumstances under which such auction prices may serve as a usable tier-one benchmark.\190\ Upon consideration of the comments on this issue, Commerce has determined to codify that modification in this final rule, although it has moved the provision from tier 1 to tier 3. Under the new language in the regulations, Sec. 351.511(a)(2)(iii), Commerce states that for a government run auction to be "competitively run," the government auction must use "competitive bid procedures that are open without restriction on the use of the good or service;" it must be "open without restrictions to all bidders, including foreign enterprises, and protect the confidentiality of the bidders;" it must account "for the substantial majority of the actual government provision of the good or service in the jurisdiction in question;" and the winner of the government auction must be "based solely on price."

\190\ See Proposed Rule, 89 FR at 57313-57315.

While the preamble to the 1998 CVD Regulations provides some guidance on when Commerce would use actual sales from a government-run auction to evaluate adequate remuneration,\191\ the codification of a more defined set of auction criteria in Sec. 351.511(a)(2)(iii) ensures consistency and clarity in the application of this regulation and better informs the public of the criteria that will be used by Commerce in evaluating whether prices from a government-run auction can be used for purposes of evaluating the adequacy of remuneration.

\191\ See 1998 CVD Regulations, 63 FR at 65377.

Commerce received various comments on this regulation with some parties supporting and others opposing the auction criteria within the proposed Sec. 351.511(a)(2)(i). The commenters that opposed the criteria stated that (1) a May 2024 decision by a North American Free Trade Agreement (NAFTA) Binational Panel in Softwood Lumber from Canada stated that Commerce should use Quebec government auction prices; (2) the criteria are not based on statistical and economic data; (3) the auction criteria are different than the criteria listed in the Proposed Policies Regarding the Conduct of Changed Circumstances Reviews of the Countervailing Duty on Softwood Lumber from Canada, 68 FR 37456, 37457 (June 24, 2003) (Proposed Policies); (4) the criterion that the auction

be open to all bidders including foreign enterprises ignores a number of sound policy reasons why eligibility criteria might exist for an auction; and (5) it is common practice for prices for a minority of the transactions within a larger market to be used in determining

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prices in that larger market, such as wholesale dealers auctions for used cars that are used as a basis for determining other prices for used cars and prices for aluminum sold on the London Metal Exchange which are used as a barometer for prices of aluminum in the world market.

Some commenters opposing the auction criteria stated that instead of these auction criteria, Commerce should evaluate auction-based benchmarks on a case-by-case basis and give due regard for expert opinions submitted by interested parties. In addition, one commenter stated that Commerce should modify this regulation to state that the agency may use actual sales from competitively run government auctions if the government auction conforms to market-economy principles and the agency determines that such an auction is fair and emulates the characteristics of a private auction without adding distortions. That commenter further suggested that Commerce should not elaborate in the regulation or in the preamble to the final rule on how a government run auction would constitute a fair tier 1 benchmark because it may be very difficult for the agency to obtain all information associated with a particular auction.

Commerce has carefully considered all the concerns raised by the commenters on this matter, as well as the proposed alternatives to the regulation. Commerce disagrees that those concerns merit a rejection of the proposed regulation language and does not agree with the suggested alternatives. Indeed, the suggested alternative language is inconsistent with the changes to the analysis of the provision of a good or service by the government provided in the Act by the URAA.

Before the enactment of the URAA, under the Trade Agreements Act of 1979, the government provision of a good or service would constitute a countervailable subsidy if the government provided that good or service "at preferential rates." \192\ Under the analysis of whether the government provision of a good or service was provided at a preferential rate, Commerce would compare the price charged by the government for that good or service to the companies that were subject to a CVD investigation to the price that the government received from other users of that good or service.\193\ The parameter of Commerce's analysis was not based upon market prices (i.e., transaction prices of that good or service between private parties) but was, instead, based upon the prices that the government charged and received for that good or service from different parties within its jurisdiction. Therefore, the analysis focused on government actions and behavior, not on the market actions between private, commercial parties. Commerce's analysis for the provision of a good or service, including the benchmark used to determine the countervailable benefit, was based upon the government prices for that good or service.

\192\ See section 771(5)(B)(ii) of the Trade Agreements Act of 1979.

\193\ See, e.g., Sec. 355.44(f)(1) of the 1989 Proposed Rules, 54 FR 23366 and 23381.

The URAA, enacted in December 1994, changed the standard for determining whether the provision of a government good or service provided a countervailable benefit from one based on preferentiality and the difference in prices charged by the government to different parties for that good or service, to a standard based upon private, commercial market prices. Thus, the URAA rejected the preferentiality standard using government prices as a benchmark in determining whether there is a countervailable benefit conferred by the government provision of a good or service.\194\

\194\ See, e.g., SAA at 927.

When Commerce issued its regulations in 1998 for the provision of a good of service under Sec. 351.511, the agency stated that in the 1997 proposed regulations it held this provision as "reserved" because Commerce had limited experience with the new benefit standard under section 771(5)(E)(iv).\195\ Nevertheless, Commerce included criteria in the final 1998 CVD Regulations, because while commenters recognized Commerce's lack of experience with the new statutory standard for a government provision of a good or service made it difficult to

promulgate a regulation, these commenters requested guidance as to how Commerce intended to identify and measure adequate remuneration.\196\

\195\ See, Preamble to 1998 CVD Regulations, 63 FR at 65377.

\196\ Id.

Even with this admitted lack of experience in 1998, when Commerce issued its CVD regulation on the provision of a good or service, the agency created rules that have generally served it well in addressing the provision of a good or service by the government.\197\ However, it is clear now, after many years of experience administering this area of law, that when Commerce included the discretion to rely on prices from competitively run government auctions, the agency lacked sufficient experience to adequately address the issue in its regulations. While Commerce provided some guidance in the Preamble to the 1998 CVD Regulations, the agency did not provide any useful regulatory criteria for the use of government auction prices within Sec. 351.511. Accordingly, Commerce is modifying the regulation now to correct for that problem.

\197\ Id.

In addition, in 1998, Commerce, based on this lack of experience in administering the new statutory provision for a government provision of a good or service, did not fully consider and address the use of government auction prices in the regulation within the change of the statutory context that rejected the use of government prices as a benchmark to determine whether the government provision of a good or service confers a countervailable subsidy. All the benchmark prices that Commerce may use under Sec. 351.511(a)(2)(i) and (ii), other than government auction prices, are prices that are derived from transactions between private, commercial parties. The use of a government auction price as a benchmark to determine whether the government price of a good or service confers a countervailable benefit uses one government price to measure the subsidy benefit of another government price. The use of this type of government price as a benchmark is a type of benchmark that would have been used under the preferentiality methodology that was rejected by Congress in the URAA. Essentially, the reference to the use of a government auction price is based on the old preferentiality standard because it is based on measuring a government provision of a good or service by using another government provision of a good or service as a benchmark.

Commerce's practice in administering this area of law, however, makes clear that Commerce has maintained a concern regarding the use of government prices, including the use of government auction prices, for many years, because since the 1998 CVD Regulations were issued, Commerce has never relied upon a government auction price to measure the adequacy of remuneration of the government provision of a good or service. Commerce has used all the other benchmarks set forth within Sec. 351.511(a)(2)(i), (ii), and (iii), but not government auctions.

This normal rejection of the use of government auction prices is based, in part, on the statutory standard enacted under the URAA that moved from the

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use of government prices to the use of prices derived from transactions between private parties.\198\ Furthermore, the Preamble of the 1998 CVD Regulations states that Commerce will not use prices within a market that is distorted, because the government provider constitutes either a majority or substantial portion of the market. The rejection of the use of auction prices is based on that reasoning as well. Accordingly, based on both the language of the Act and the language within the Preamble of the 1998 CVD Regulations, in determining to modify this regulation, Commerce considered whether it would be more appropriate to just remove the provision within the regulation that allows the agency to use government auction prices or instead provide a set of more defined criteria as to when government auction prices may be used to determine the adequacy of remuneration. In consideration of the comments and administrative concerns, Commerce determined that it is best to maintain this discretionary option, but to codify criteria for the use of government auction prices.

\198\ See, e.g., SAA at 927.

While the use of a government price for the good or service, such as a government auction price, would be appropriate under the old "preferentiality" standard for the provision of a good or service, Commerce recognizes that the preamble to Sec. 351.511(a)(2)(iii) provides for the use of possible government price discrimination.\199\ While Commerce expressed concerns that the possible use of government prices may continue the use of the preferentiality standard, the agency stated that there may be situations where there may be no better alternative than the use of a government price. However, Commerce stated that it would only rely on a government price as a benchmark if the government good or service is provided to more than a specific enterprise or industry or group thereof.\200\ The use of a government price (i.e., price discrimination) under Sec. 351.511(a)(2)(iii) is a "last resort" when there are no other available benchmark options under Sec. 351.511(a)(2)(i), (ii), and (iii). Similarly to government auction prices, Commerce has never used government price discrimination as a benchmark to measure the adequacy of remuneration since the enactment of the URAA.

\199\ See 1998 CVD Regulations, 63 FR at 65378.

\200\ Id.

Because a government auction price is akin to the use of a preferentiality benchmark and government price discrimination is referenced as a type of assessment that Commerce may make under a Sec. 351.511(a)(2)(iii) market principles benchmark analysis, Commerce has determined that it is more appropriate to consider the use of government auction prices within Sec. 351.511(a)(2)(iii) instead of Sec. 351.511(a)(2)(i). In addition, the Preamble to the 1998 CVD Regulations states that Commerce will assess whether a government price was set in accordance with market principles through an analysis of such factors as the government's price setting-philosophy, costs (including rates of return sufficient to ensure future operations), or possible price discrimination.\201\ Because Commerce is moving the use of government auction prices into a Sec. 351.511(a)(2)(iii) market principles analysis, the agency is also codifying the types of assessment that were addressed in the Preamble to the 1998 CVD Regulations. Since 1998, Commerce has found that an assessment of costs (including rates of return) and whether the government's price setting philosophy (methodology) is consistent with market principles has been effective in our analysis of the government provision of goods and services like electricity, natural gas, water, and the provision or leasing of natural resources such as land, mining rights and stumpage.

\201\ Id.

While Commerce has maintained its discretion to use government prices from a government-run auction, Commerce will normally only use government auction prices when the agency determines that there is no other benchmark available under Sec. 351.511(a)(2)(i) and (ii). Before Commerce would even consider the use of government auction prices in that situation, the government-run auction must meet all the criteria established under Sec. 351.511(a)(2)(iii).

While Commerce has explained above the reason the claims made by the commenters opposing the regulation are unpersuasive and inconsistent with the analysis of the provision of good by the government required by the Act and the 1998 CVD Regulations, Commerce will also further address each of the arguments raised by the commenters.

First, a NAFTA Binational Panel in Softwood Lumber from Canada regarding the use of Quebec government auction prices is not binding on Commerce's development, creation or modification of Commerce's CVD regulations.\202\

\202\ See SAA at 926.

Second, the argument that the regulatory criteria are not based on statistical and economic data is equally without merit. The criteria established within this regulation are derived from the legal standards enacted by Congress under the URAA that changed the analysis of a government good or service based on government price discrimination (i.e., government prices) to a standard based upon transaction prices between private parties.\203\ The two studies that were commissioned by the parties to defend their arguments in a CVD case and which were referenced in the parties' comments to our Proposed Rules have no bearing on the statutory provision addressing the government provision of a good or service enacted by Congress in the URAA.

\203\ Id. at 927.

While Commerce is not questioning the academic credentials of the two individuals commissioned to produce the submitted studies, there are various schools of economic thought within this discipline. Nonetheless, even if there are different schools of economic thought on the matter, a general accepted principle of economics is that price is a function of demand and supply. Thus, changes to either the demand or the supply of a good would normally have an impact on the price of the good. In the instances where an interested party has argued that Commerce use a government auction price as a benchmark, both the supply of the good as well as administrative controls relating to the demand of the good have all been in the hands of a government authority. Thus, even ignoring the change in the statutory criteria that moved away from using a government price as a benchmark, as explained above from pre-URAA to post-URAA, there is a clear element of distortion within jurisdictions in which the government has an overwhelming presence in the market. Moreover, through its administrative and policy preferences, the government can impact and change both the demand and supply of goods.

Certain commenters also pointed out that the criteria in this regulation for a competitive run government auction are different than the criteria listed in the Proposed Policies. Commerce ultimately found those Proposed Policies to be not constructive and thus never adopted and implemented them.\204\ Instead,

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Commerce is codifying its existing criteria now, within Sec. 351.511(a)(2)(iii).

\204\ See, e.g., Certain Softwood Lumber Products from Canada: Final Affirmative Countervailing Duty Determination, and Final Negative Determination of Critical Circumstances, 82 FR 51814 (November 8, 2017), and accompanying Issues and Decision Memorandum at 104 ("The Policy Bulletin was a preliminary document, through which comments were solicited from the public pertaining to proposed policies for Canadian provinces to move to market-based systems of timber sales. Those proposed policies, however, were never adopted by the Department. The Department's analysis of a provincial stumpage system is not bound by proposed ideas that were never finalized, and which neither incorporated nor addressed the solicited comments").

Some commenters also suggested that the requirement that the auction be open to all bidders, including foreign enterprises, ignores a number of sound policy reasons why eligibility criteria might exist for an auction. Regardless of the government's policy reasons for placing restrictions on who may participate in the government run auction or on restricting how the good may be used, these governmental restrictive policies and administrative practices implement government-created restrictions on the demand for the good. One of the parties claimed that the bidding restrictions that it places on its administrative auctions have no impact on demand of the government provided good. However, that statement raises the question as to why this authority maintains these bidding restrictions, if as the commenter stated, these restrictions have no impact on demand and price. Again, this argument is unpersuasive. However, Commerce does agree that legitimate bidding requirements that consist of deposit requirements that are applied equally to all bidders or the exclusion of government employees from participating in a government-run auction would not necessarily invalidate a government-run auction that otherwise met all the criteria set forth in the regulation.

Some commenters stated that it is common practice that prices for a minority of the transactions within a larger market serve as market-referenced prices, citing to instances where wholesale auto

dealer auction prices for used cars can serve as the basis for determining the sales price for other used cars and that prices for aluminum sold on the London Metal Exchange are used as a barometer for prices of aluminum in the world market. Although that might be true, for purposes of Commerce's regulations and practice, Commerce does not find those situations to support a change to the proposed regulation modifications. Both the Act and Commerce's regulation state that a benchmark should be based on transaction prices between private parties. The London Metal Exchange is a private company and auto dealers are also private parties. Thus, auction prices on the London Metal Exchange and auctions conducted by auto dealers are auctions conducted by private parties. Therefore, regardless of the percentage of the market accounted for by these auctions, these referenced auction prices are transaction prices between private parties and not government transactions from a government run auction.

One commenter stated that Commerce should not elaborate on how a government run auction would constitute a fair tier 1 benchmark because it may be very difficult for the agency to obtain all information associated with a particular auction. However, that commenter misinterpreted the language originally proposed within Sec. 351.511(a)(2)(i). In order for an interested party to argue that prices from a government run auction should be used as a benchmark to measure whether a government provision of a good or service is for adequate remuneration in a CVD investigation or administrative review, that interested party must, at a minimum, provide documented evidence to demonstrate that the government run auction meets each of the criterion originally proposed under Sec. 351.511(a)(2)(i). It is not Commerce's responsibility to demonstrate that these criteria are not met before discarding the use of a proposed benchmark based on government auction prices. Accordingly, Commerce does not find this statement supports a change to Commerce's proposed modification of the regulation.

For the reasons explained above, Commerce is not adopting the commenters' proposal to evaluate government auction-based benchmarks on a case-by-case basis and to give due regard for what these parties reference as "expert opinions" submitted by interested parties. However, Commerce will evaluate whether an interested party's proposed use of government auction prices as a benchmark meets the criteria under Sec. 351.511(a)(2)(iii) based on the evidence on the case record.

Commerce has also addressed above the use of third-party opinions submitted by interested parties. Commerce is very cautious about the relevance it places on the use of third-party opinions or reports that are commissioned by interested parties in a case. As noted above, equally qualified economists may examine an identical issue and derive different conclusions. Commerce is also concerned that undue reliance on third-party reports and opinions commissioned in our CVD cases would reward the interested party that has the larger budget, which would raise a fairness issue in the administration of our cases.

In addition, with respect to an issue like the use of prices from a government auction, much of the data required for a complete statistical or economic analysis by third parties may not be publicly available, and access to that data will also be in the control of the government, an interested party in a CVD case. Therefore, as an interested party, a foreign government is in the position to control access to that data and may decide to only grant access to a third party that will work in the interest of the government and deny access to a third party that is working on behalf of other interested parties in a CVD case. In the alternative, an interested party foreign government may only release data to the public that advances its cause or position in a CVD case while withholding data from the public that would result in an outcome that would contradict or undermine the arguments and positions it is espousing in its comments made before Commerce in a CVD proceeding.

In addition, one commenter suggested that Commerce should modify this regulation to state that sales from competitively run government auctions will only be used if the government auction conforms to market-economy principles. Commerce has not adopted this suggestion because a general statement with respect to the government auction being consistent with "market-economy principles" provides less clarity and guidance as to the standard to be applied by the agency in its analysis of whether to consider using a government run auction as a benchmark. While current Sec. 351.511(a)(2)(iii) states that where there were no in-country or world market benchmarks available, Commerce will assess whether the government price is consistent with market principles, the preamble to the 1998 CVD Regulations provided a discussion to the methodologies that the agency would use to assess market principles. Based on the experience that Commerce has gained since 1998 in our analysis of the provision of a good or service under section 771(5)(E)(iv) of the Act, Commerce has determined that it is more appropriate to provide greater detail in the regulation and provide the criteria that Commerce will use in assessing a government run auction within the regulation itself.

Finally, one commenter stated that Commerce should modify criterion (C) within Sec. 351.511(a)(2)(iii). That commenter stated that in some cases the provision of the good or service is not done by a national government

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authority but by a subnational authority; thus, the use of the term "country" may be interpreted to mean that when the provision of the good or service is made by a subnational level government that the comparison addressed in (C) will be made based on country-wide data basis. To clarify this point as concerns competitively run government auctions, Commerce has changed the term "country" in the proposed regulation to "jurisdiction" in this final rule.

20. Commerce Has Added a New Provision to Proposed Sec. 351.512, the Provision Covering the Purchase of Goods To Address the Exclusion of Certain Prices From Consideration as a Benchmark in Determining the Potential Benefit of a Subsidy

When Commerce issued its current CVD regulations in 1998, it designated Sec. 351.512 as reserved.\205\ Commerce explained that it did not have sufficient experience with respect to the government purchase of a good for MTAR at the time; thus, it concluded that it was not appropriate then to set forth a standard with respect to its treatment of these types of financial contributions.\206\ More than 25 years later, the issue of a subsidy in the form of the government purchase for MTAR has come before Commerce in only a limited number of cases. Nonetheless, in these cases, Commerce has developed certain methodologies with respect to this type of financial contribution, especially where the government is both a provider and a purchaser of the good at issue. In addition, Commerce has observed differences between the treatment of an MTAR and an LTAR relating to the basis for the applicable price comparison. Accordingly, in the Proposed Rule, Commerce proposed a regulation providing guidance specifically on subsidies covering the purchase of a good for MTAR.\207\ Upon consideration of the comments on this proposed regulation, Commerce has both codified the provision in this final rule and added certain language with respect to prices that might be excluded as potential benchmarks from Commerce's analysis in determining the benefit of a MTAR subsidy.

\205\ See, 1998 CVD Regulations at 65412.
\206\ Id., 63 FR at 65379.
\207\ See Proposed Rule, 89 FR at 57313-57314

First, Sec. 351.512(a)(1) addresses the benefit conferred from the government purchase of a good, which is derived from the standard in section 771(5)(E)(iv) of the Act. Under this provision, where a government or a public body purchases goods, a benefit exists to the extent that such goods were purchased for MTAR.

Next, Sec. 351.512(a)(2) defines "adequate remuneration" within the context of an analysis of a government's purchase of a good. This standard for adequate remuneration for the purchase of a good is not as detailed as the definition for the provision of a good or service by a government under Sec. 351.511(a)(2) because Commerce has had a much longer history and more experience in addressing LTAR claims. While Commerce offers parties a general standard in this final rule, it anticipates that its MTAR practice will continue to evolve with additional cases.

Under Sec. 351.512(a)(2)(i), Commerce will measure the adequacy of remuneration by comparing the price paid to the firm for the good by the government to a market-determined price for that good based on actual transactions between private parties in the country in question or, if such transactions are not available, then to a world market price or prices for that good. In applying this standard, consistent with the Act, Commerce's preference will be to use actual transactions between private parties within the country in question.

Actual transactions in the country in question must be market-based and, therefore, would ordinarily consist of the sale of the investigated goods between private parties. In-country market-determined prices would also include import prices. Similar to the treatment of actual transactions in Sec. 351.511, Commerce does not intend to adjust in-country prices to account for government distortion of the market. While Commerce recognizes that government involvement in a market may have some impact on the prices of the good, such distortion will normally be minimal unless the government constitutes a substantial portion of the market.

Where sufficient evidence indicates that the government's involvement in the market has significantly distorted actual transaction prices or that market-determined in-country prices are otherwise not available, Sec. 351.512(a)(2)(i) states that Commerce will consider the use of world market prices as the comparison price for measuring the adequacy of remuneration. If there is useable information on the record for more than one world market price, Commerce will average the world market prices that are on the record absent record evidence that one or more of those world market prices are otherwise distorted.

This regulation differs from Commerce's treatment of world market prices under the LTAR regulation, Sec. 351.511(a)(2)(ii), pursuant to which Commerce uses world market prices in analyzing the provision of goods or services for LTAR only when it is reasonable to conclude that the good in question is commercially available to the firm. Commerce has not adopted that standard for the government purchase of a good because section 771(5)(E) of the Act requires Commerce to assess benefit based upon the "benefit to the recipient." The benefit analysis for the government purchase of a good is unrelated to whether the recipient of the benefit could purchase the good that it sold to the government.

Under Sec. 351.512(a)(2)(ii), if there are no market-determined domestic prices or world market prices available, then Commerce could measure the adequacy of remuneration by examining any premium provided to domestic suppliers of the goods based on the government's procurement regulations and policies, those that are established in any bidding documents,\208\ or any other methodology. This assessment could include comparing the costs of production of the producer obtaining the benefit, including a reasonable profit margin to the price that is paid by the government for the purchased goods.

\208\ In Aluminum Extrusions from the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination, 75 FR 54302 (September 7, 2010), Commerce found that the Procurement Law provided an incentive to domestic producers in that the government will purchase a good from a domestic producer as long as the price does not exceed the lowest offered price for that good from foreign producers by more than 20 percent. In the Final Determination Commerce found the program not used.

Commerce recognizes that for certain products, such as enriched uranium, the primary purchasers in both the domestic and the world market are normally governments, government-owned entities, or government-controlled entities, or the purchase of such goods is highly controlled and regulated by the government.\209\ In such markets Commerce will closely examine the bidding and purchase conditions in assessing whether the purchase price paid by the government is consistent with market principles, which may include an analysis of the costs of producing or processing that good.

\209\ See Uranium Enrichment, World Nuclear Association (2022), available at https://world-nuclear.org/information-library/nuclear-fuel-cycle/conversion-enrichment-and-fabrication/uranium-enrichment.aspx.

Commerce received no objections to the benchmark methodology established within Sec. 351.512(a)(1) and (a)(2)(i) and (ii) of the MTAR regulation. However, Commerce did receive comments requesting that Commerce (1) further

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illuminate the "other methodologies" it may use to assess whether the price paid by the government is consistent with market principles; (2) provide a non-exhaustive, illustrative list of examples of countervailable MTAR programs; (3) provide additional guidance on the type of information needed to support an MTAR allegation; (4) consider a provision for local content requirements (LCRs) and provide illustrative examples in the final regulations; (5) add language to Sec. 351.512(a)(2)(ii) to capture instances of distortion not specifically contemplated in the Proposed Rule that disrupt the proposed benchmark hierarchy by adding the term "or the Secretary deems such prices to be distorted," and (6) clarify situations in which a price will not be considered a market-determined price, such as when a price may be impacted due to government involvement or other distortive activity in the market.

With respect to the comment requesting Commerce to elaborate on the other methodologies it may use to determine whether a government price is consistent with market principles, as Commerce explained in the Proposed Rule, one methodology could be the comparison of the producer's costs of production, including a reasonable profit margin, to the price that is paid by the government for the purchased good.\210\ Commerce does not believe it is necessary at this stage to explain additional methodologies for making this assessment. This analysis will be conducted on a case-by-case basis, and, as Commerce has explained, to date there have not been a large number of MTAR cases to cite as examples in this regard. Likewise, Commerce has determined that it would not be helpful to codify a complete list of examples of a countervailable MTAR in this regulation because both the Act and this regulation set forth the criteria that will be used to analyze whether a government purchase of a good would confer a countervailable benefit.

\210\ See Proposed Rule, 89 FR at 57313, 57314.

Nonetheless, because there have been so few cases involving MTAR allegations before Commerce, Commerce has concluded that it might be of assistance to highlight three cases for general guidance in understanding MTAR determinations which Commerce has made to date. First, in Aluminum Extrusions, Commerce determined that a government purchase of a good provided a countervailable benefit because the investigated country's procurement law provided a price incentive of up to 20 percent for domestic manufactures over the prices offered by foreign manufacturers.\211\ Second, in Low Enriched Uranium from France, Commerce found a countervailable benefit based on the difference in the price the government paid for the purchase of LEU (low enriched uranium) from the respondent to import prices of LEU.\212\ Finally, in SC Paper from Canada, Commerce used private land transactions to determine whether a government's purchase of land was for MTAR.\213\

\211\ See Aluminum Extrusions from the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination, 75 FR 54302 (September 7, 2010) (Aluminum Extrusions).

\212\ See Notice of Final Affirmative Countervailing Duty Determination: Low Enriched Uranium from France; 66 FR 65901 (December 21, 2001), and accompanying Issues and Decision Memorandum at Purchase at Prices that Constitute "More Than Adequate Remuneration".

\213\ See Supercalendered Paper from Canada: Final Affirmative Countervailing Duty Determination; 80 FR 63535 (October 20, 2015), and accompanying Issues and Decision Memorandum at GNS Purchase of Land for More than Adequate Remuneration (MTAR).

With respect to local content requirements (LCRs), Commerce has declined to address LCRs in this regulation because subsidies that include LCRs can take the form of not only MTARs but also subsidies provided in the form of loans, grants, and tax incentives. Therefore, if LCRs were solely addressed under the MTAR regulation, it would suggest that Commerce could not address LCRs provided within the context of loans, grants or tax incentives. For an example of an LCR raised in an MTAR allegation, see the Wind Towers from Canada investigation.\214\

\214\ See Utility Scale Wind Towers from Canada: Final Affirmative Countervailing Duty Determinations and Final Negative Determination of Critical Circumstances, 85 FR 40245 (July 6, 2020), and accompanying Issues and Decision Memorandum at Comment 4 and Comment 5.

With respect to the suggestion that Commerce add language to Sec. 351.512(a)(2)(ii) to capture instances of distortion not specifically contemplated in the Proposed Rule, the commenter raising this issue suggested that Commerce include language that it will measure the adequacy of remuneration by analyzing any premium in the request for bid or government procurement regulations provided to domestic suppliers of the good if Commerce determines that there are no market-determined domestic or world market prices available, "or the Secretary deems such prices to be distorted."

Commerce has not modified Sec. 351.512(a)(2)(ii) to add the additional suggested step to Commerce's benchmark hierarchy. Commerce does not believe that it has ever determined in the

context of an MTAR examination that when there were no non-distorted market-determined domestic or world market prices available, outstanding potential benchmarks on the record were otherwise distorted, and the commenter did not provide any citation to Commerce's making such a determination in past cases. Furthermore, Commerce sees no benefit in adding such a requirement to its normal analysis at this point. Indeed, adding such language would likely complicate Commerce's analysis in every case in which it determines that the potential benchmark domestic and world market prices are distorted by certain actions. One of the reasons Commerce is issuing these regulations is to make its process and procedures more transparent and less complicated to apply and enforce. Commerce has therefore not adopted that suggestion in the final rule.

Finally, Commerce has agreed to clarify some situations in which it might reject a benchmark price for an MTAR allegation. In determining if a government has purchased a good for MTAR, Sec. 351.512(a)(2) states that Commerce will normally seek to measure the adequacy of remuneration by comparing the price paid to the firm for the good by the government with a market-determined price based on actual transactions, including imports, between private parties in the country in question. However, it also states that if market-determined prices for the good based on actual transactions in the country in question are unavailable, Commerce may measure the adequacy of remuneration using a world market price or prices for the good. As Commerce explained in the preamble to the Proposed Rule, "If there is useable information on the record for more than one world market price, Commerce would average the world market prices that are on the record absent record evidence that one or more of those world market prices are otherwise distorted." \215\

\215\ See Proposed Rule, 89 FR at 57313.

In response to the Proposed Rule, certain commenters suggested that Commerce should expressly identify factors that would result in finding that a potential benchmark price derived from private market prices in the country or world market prices is distorted. One commenter went further and suggested that Commerce should indicate that even when a potential benchmark price is not distorted directly by government interference but instead through private market actions,

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that price might also be unsuitable for consideration as a benchmark price for a MTAR analysis. Specifically, the commenter explained that there might be evidence of a limited number of private sellers of the goods or service in question in a particular country, such as in a monopoly or oligopoly; as a result, the prices derived from that country might be considered artificially too high or too low as a result of being set in a captive market. Further, the commenter suggested that if two or more competitors might establish price setting arrangements, or a foreign government has found that companies are guilty of collusion or other non-competitive behavior, such actions could result in setting prices for particular goods or services on nonmarket terms.

Upon consideration of the comments, Commerce has determined to revise proposed Sec. 351.512(a)(2) to indicate that certain prices may be excluded from consideration as potential benchmark prices for purposes of an MTAR analysis under this provision. Commerce has numbered this new paragraph Sec. 351.512(a)(2)(iii) and moved the paragraph covering use of ex-factory or ex-works prices to Sec. 351.512(a)(2)(iv). This new paragraph, titled "Exclusion of certain prices," states that in measuring the adequacy of remuneration, Commerce may exclude certain prices from its analysis if it determines that interested parties have demonstrated, with sufficient information, that prices from a country are likely impacted because of particular actions, including government laws or policies. Commerce is aware that many governments have mandatory domestic-content requirements, price controls, production mandates, or other policies that can impact potential benchmark prices. If interested parties place information on the record which Commerce determines shows that prices have likely been impacted by such actions, then Commerce may look to other potential benchmarks on the record in measuring the adequacy of remuneration.

In response to the suggestion that Commerce should consider potential price distortions from monopolies, oligopolies, price setting arrangements between private companies, collusion, and other anticompetitive actions, we note that, as a general matter, the countervailing duty law is focused on the actions of government entities and not on private-party behavior. Accordingly, Commerce has determined not to codify such a consideration, although Commerce may consider on a case-by-case basis whether parties have sufficiently demonstrated that such anticompetitive actions among private firms would likely impact benchmark prices for the purposes of an MTAR analysis. Commerce will not codify an analysis that it might later discover limits its authority or flexibility to

consider whether certain potential benchmark prices are based on market principles or are otherwise impacted by anticompetitive behavior. Anticompetitive market conditions, including weak, ineffective or nonexistent enforcement of competition laws, could conceivably impact the appropriateness of a potential benchmark price, but in some countries a decision by a government or competition authority that certain private entities are engaged in anticompetitive conduct could be based on political or other considerations and not concerns about price distortion.

Accordingly, Commerce has not codified in the regulation a requirement that Commerce conduct an analysis of anticompetitive private actions that might impact potential benchmark prices. At the same time, the regulation does not prohibit parties from submitting information in that regard and arguing that a particular potential benchmark price has been impacted by such anticompetitive conduct. While not dispositive, if interested parties provide sufficient information on the record demonstrating that a foreign government, multilateral organization or other governing authority has concluded that prices in a particular country are distorted as a result of the above-suggested anticompetitive behavior and actions, Commerce may consider such evidence in the context of the totality of the information placed on the record, (including, for example, any evidence that such prices were, in fact, impacted by the alleged anticompetitive behavior), in determining if the potential benchmark or benchmarks are useable for purposes of its MTAR analysis.

With respect to Sec. 351.512(a)(2)(iv), in measuring adequate remuneration under paragraph (a)(2)(i) or (ii) of this section, Commerce will use an ex-factory or ex-works comparison price and the price paid to the firm for the good by the government in order to measure the benefit conferred to the recipient within the meaning of section 771(5)(E) of the Act. Therefore, if necessary, Commerce will adjust the comparison price and the price paid to the firm by the government to remove all delivery charges, import duties, and taxes to derive an ex-factory or ex-works price. This is another important difference from Commerce's LTAR methodology, which uses delivered prices pursuant to Sec. 351.511(a)(2)(iv). Under section 771(5)(E) of the Act, Commerce is required to determine the benefit of a subsidy based on the benefit conferred to the recipient. In an LTAR analysis under Sec. 351.511, Commerce determines the price that the recipient would have paid for the good or service from a private party and that good must be available to the recipient. Therefore, for the good to be available to the recipient, the recipient must incur delivery charges and any taxes or import changes to take possession of the good.

However, in an MTAR analysis under section 771(5)(E) of the Act, Commerce's sole focus is the benefit that is provided to the recipient from the government purchase of the good. Any delivery charges or taxes are expenses that are ultimately incurred by the government as the purchaser of the goods and are not relevant to the revenue and benefit received by the MTAR subsidy recipient. Thus, the subsidy benefit conferred to the recipient in a MTAR analysis is solely the additional revenue (funds) received from the government, beyond what the market would have provided, for the purchase of that good. This is an important distinction between LTAR and MTAR benefit analyses under Sec. Sec. 351.511 and 351.512.

Delivery charges could be considered the provision of a service; however, purchases of services by the government are not financial contributions under section 771(5)(D) of the Act. Thus, with respect to an MTAR analysis, delivery charges are also not countervailable subsidies under the CVD law. Including delivery charges within an MTAR analysis would potentially place Commerce in the position of finding countervailable the government purchase of services. Accordingly, for this reason as well, it is important that Commerce adjust the comparison price and the price paid to the firm by the government to remove all delivery charges in its MTAR analysis under Sec. 351.512.

One commenter expressed concern about the use of ex-factory or ex-works prices in the regulation. That commenter stated that it was worried that foreign governments could manipulate the price paid for the purchase of the good by shifting some of the payment for the good into the payment of freight to a respondent. Therefore, that commenter suggested that Commerce include a provision stating that Commerce would evaluate delivery charges on government purchases to determine whether delivery charges are consistent with prevailing market conditions and that the agency would accordingly adjust the government and benchmark prices.

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Commerce has not adopted this suggestion because the suggested language appears to be inconsistent with the express language of the Act. Sections 771(5)(D)(iv) and (E)(iv) of the Act provide explicitly that a government purchase for MTAR only relates to the government purchase of a good and not the government purchase of a service. Nonetheless, if Commerce, while investigating the government purchase of a good for MTAR, finds evidence on the record that a government may be engaging in possible price manipulation by switching funds from the payment of the good to other

payments to a respondent, Commerce will conduct further analysis of the price the government paid for the good.

In the Proposed Rule, Commerce also proposed including in the regulation its treatment of how it calculates a benefit when the government is both a provider and purchaser of the good, such as with electricity in Sec. 351.512(a)(3).\216\ In that situation, Commerce would normally measure the benefit to the recipient firm by comparing the price at which the government provided the good to the price at which the government purchased the same good from the firm. Commerce has determined to codify that provision in the final rule. While Commerce has not had a large number of cases in which it determined the existence of subsidies in the form of the government purchasing a good for MTAR, it has had numerous cases where the government is both the provider and purchaser of a good, e.g., the government both provided and purchased electricity from a respondent, in our investigations and administrative reviews.\217\

\216\ Id., 89 FR at 57314.

\217\ See, e.g., Countervailing Duty Investigation of Certain Hot-Rolled Steel Flat Products from the Republic of Korea: Final Affirmative Determination, 81 FR 53439 (August 4, 2016), and accompanying Issues and Decision Memorandum at 35-36; Certain Softwood Lumber Products from Canada: Final Affirmative Countervailing Duty Determination, and Final Negative Determination of Critical Circumstances, 82 FR 51814 (November 8, 2017), and accompanying Issues and Decision Memorandum at 159-74; and Certain Uncoated Groundwood Paper from Canada: Final Affirmative Countervailing Duty Determination, 83 FR 39414 (August 9, 2018), and accompanying Issues and Decision Memorandum at 149-83.

Section 771(5)(E) of the Act states that a benefit will normally be treated as conferred when there is a "benefit to the recipient." In other words, section 771(5)(E) of the Act provides the standard for determining the existence and amount of a benefit conferred through the provision of a subsidy and reflects the "benefit-to-the-recipient" standard which "long has been a fundamental basis for identifying and measuring subsidies under U.S. CVD practice." \218\ Therefore, in situations where the government is acting on both sides of the transactions-both selling a good to, and purchasing that good from, a respondent-under Sec. 351.512(a)(3), Commerce will measure the benefit to the respondent by determining the difference between the price at which the government is selling the good to the company and the price at which the government is purchasing that good from the company. In other words, under the "benefit-to-the-recipient" standard set forth within section 771(5)(E) of the Act, if a government provided a good to a company for three dollars and then purchased the identical good from the company for ten dollars, logic dictates that the benefit provided to the company by the government would be seven dollars.

\218\ See SAA at 927.

Commenters both supported and opposed this regulatory provision. The commenters that opposed Sec. 351.512(a)(3) expressed concerns that this regulation (1) is inconsistent with the "prevailing market conditions" standard under section 771(5)(E)(iv) of the Act; (2) is not based on the "benefit-to-recipient" standard established under section 771(5)(E) of the Act; (3) is inconsistent with a 2024 Softwood Lumber Binational Panel decision and the WTO Appellate Body Report-Canada-Feed-In Tariff Program; \219\ and (4) compares a wholesale price (government purchase of electricity) to a retail price (government provision of electricity). After careful consideration of those comments, Commerce finalizes Sec. 351.512(a)(3) with no changes.

\219\ Article 1904 Binational Panel Decision, Certain Softwood Lumber Products from Canada: Final Affirmative Countervailing Duty Determination, USA-CAN-2017-1904-02 (May 6, 2024); Appellate Body Report, Canada-Feed-In-Tariff Program, WT/DS426/AB/R, adopted May 24, 2013.

There is, however, no support for the claim that the regulation is inconsistent with prevailing market conditions. The commenters that make that claim, focus specifically on the purchase of electricity. In the referenced cases, authorities are purchasing electricity from firms that are producing electricity from renewable resources such as biomass, and thus, given the increased

production costs of producing electricity from renewable sources, the government needs to pay more for that electricity. However, the prevailing market condition in those cases is that there is no private, commercial market for this type of generated electricity because such a private market does not exist because of the market domination of cheaper electricity generated using cheaper methods of generation of electricity. The lack of a comparable private market is further confirmed by the fact that those firms that are generating electricity from renewable sources such as biomass are not choosing to displace their purchases of electricity with their own generated electricity but are selling this electricity to the government for a higher price than the price that they pay to purchase electricity. Electricity is a generic product in that it is an identical product regardless of how it is generated. Thus, this type of environment can only exist due to the presence of government subsidies or government mandates.

What Commerce understands these commenters to be suggesting is that a government can create its own artificial "market" environment based upon a government's ability to create laws and regulations and its ability to provide subsidies, and these types of actions and government subsidies can escape the remedies provided under the CVD law because this type of unnatural environment would not be created by private, commercial parties that are driven by market principles.\220\ Commerce disagrees that such a conclusion of that situation is a correct understanding of the CVD law. Nothing in the Act or regulations anticipate that governments can avoid the disciplines of the CVD law through such artificial markets. Accordingly, the methodology established within Sec. 351.512(a)(3) exists, in part, because the situations in which the type of "actual market-determined prices" exist addressed in

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Sec. 351.512(a)(2) are not present in the artificial environment created by foreign governments.

\220\ For example, similar to these parties' statements with respect to electricity, there may be a situation in which within a government's jurisdiction a steel mill is producing a steel product using an inefficient and more costly production process compared to its competitors. Because the product this mill produces is identical to the product produced by its competitors, the company cannot sell the product at a price that would cover its production costs. The government, however, may want to keep this company producing steel products because it is the largest employer in the area. Therefore, the government might enact a law and regulation whereby the government will purchase a share of the company's production at a high price so that the company can remain in operation producing this product. Under an argument similar to the statements made by the commenters on this issue, the government might claim that there is not a subsidy because it has created an artificial "market" for a product that is inefficiently and costly produced, and that product otherwise would not have been produced because there is no private market party that would purchase this product at a price that would allow the producer to cover its costs of production. Under that scenario, the government might allege that that there is no subsidy because these are the "prevailing market conditions" for that type of inefficiently produced product. Again, that is not a correct assessment of the CVD laws and trade remedies.

Commerce also disagrees that a benefit in such an artificial environment would be treated as "conferred" where there is a benefit to the recipient as set forth within section 771(5)(E) of the Act. The benefit to the recipient standard is whether a firm (i.e., recipient) pays less for its inputs (e.g., money, a good, or service) than it otherwise would pay in the absence of the government program, or receives more revenues than it otherwise would earn.\221\ The methodology established within Sec. 351.512(a)(3) is based on the revenue that a firm receives from the government purchase of a good that it otherwise would not have received absent the government action and program. As Commerce explained in the Proposed Rule,\222\ if a government provided a good to a company for three dollars while also purchasing that identical good from the company for ten dollars, both logic and the benefit-to-recipient standard dictates that the benefit provided to the company by the government is seven dollars.

\221\ See Sec. 351.503(b) and the Preamble to the 1998 CVD Regulations, 63 FR at 65339.

\222\ See Proposed Rule, 89 FR at 57314.

Furthermore, Commerce rejects the argument that the administering authority is required to create, modify, and codify rules based upon a decision from a NAFTA Panel or the WTO Appellate Body. A chapter 19 NAFTA Panel decision is not precedential and not binding on any case but the one before it,\223\ while WTO Panel and Appellate Body decisions are not binding on U.S. law, other than through the procedures set forth in sections 123 and 129 of the Uruguay Round Agreements Act.\224\

\223\ See SAA at 926.

\224\ See section 123 of the Uruguay Round Agreements Act ("Dispute settlement panels and procedures") (19 U.S.C. 3533) and section 129 of the Uruguay Round Agreements Act ("Administrative action following WTO panel reports") (19 U.S.C. 3538). See also Corus Staal BV v. Department of Commerce, 395 F.3d 1343 (Fed. Cir. 2005).

Certain commenters stated that the proposed methodology is faulty because it compares a wholesale price (price paid by government) to a retail price (price charged by the government). They posit that the price of electricity in the retail market will provide no useful information as to whether the purchase of electricity generated in the wholesale market has been made for MTAR. Further they argue that this methodology is not expressly conditioned on the consideration of "product similarity, quantities sold, imported or auctioned; and other factors affecting comparability," as it would be under the criteria set forth in the LTAR regulation, Sec. 351.511(a)(2)(i), for measuring adequacy of remuneration.

Asserting that the price that electricity is sold for in the retail market will provide no useful information in determining whether the purchase of electricity generated in the wholesale market has been made for MTAR is illogical. As part of their claims, the commenters state that the price paid to the recipient by the government for generated electricity is a "wholesale price," while the price the recipient pays to the government for generated electricity is a "retail price." In a functioning commercial market, a wholesale price is normally lower than a retail price. Thus, if the government purchase of the good is a "wholesale price," while the price the government charges the recipient is a "retail price," as claimed by these commenters, then the price paid by the government should logically be lower than the price the government charges the recipient for electricity. Therefore, if the "wholesale price" for electricity that is paid to the recipient by the government is higher than the "retail price" charged to the recipient for electricity, this fact would provide useful information to Commerce that the government purchase is for MTAR.

Furthermore, these parties' reliance on the language within the LTAR regulation at Sec. 351.511(a)(2)(i) is misplaced. With respect to the language within that regulation regarding product "similarity" and "comparability," the characteristics and properties of electricity do not change based upon how that electricity is generated. Moreover, Commerce has addressed above these "similarity" and "comparability" comments with respect to the issue of "wholesale" prices and "retail" prices. In addition, to the extent that the cited LTAR regulation relates to "prevailing market conditions" for electricity, Commerce has already addressed that concern above.

In addition, two more commenters suggested further modifications to the regulation. One commenter stated that the methodology set forth in Sec. 351.512(a)(3) is too rigid and fails to account for adjustments that may be necessary to ensure a fair and accurate price comparison. That commenter stated that the provision should be revised to allow for the removal of selling, distribution, and other operational expenses incurred between the government's purchase and resale of the goods in question from any government sales price used as benchmark.

The other commenter stated that Commerce's methodology under this provision rests upon the assumption that the government sells goods at market-based prices and claimed that the fact that the price paid by the government is higher than the price it sells the good may, in fact, reflect the provision of a good for LTAR. Therefore, that commenter stated that Commerce should clarify that the exception provided under Sec. 351.512(a)(3) will not apply in situations where the same input is investigated for both LTAR and MTAR purposes.

After consideration of these suggested modifications, Commerce has determined that these proposed modifications to Sec. 351.512(a)(3) are not warranted.

Adjustments to benchmark prices for selling, distribution and operational expenses are adjustments that can be valid in an antidumping analysis, but are irrelevant for CVD purposes, and the commenter has not explained how such an adjustment would be consistent with Commerce's CVD practice or the CVD law in general. Furthermore, Commerce disagrees that the modifications to the regulation suggested by the second commenter are appropriate because the government provision of a good for LTAR and the government purchase of a good for MTAR are two different

types of financial contributions under section 771(5A)(D) of the Act, and Commerce analyzes benefits separately for each type of financial contribution. If there is a benefit from the government provision of a good for LTAR, the benefit from that financial contribution will be quantified using the methodology set forth within Commerce's LTAR regulation at Sec. 351.511; and if there is a benefit from a government purchase of a good then Commerce will quantify the benefit from that separate financial contribution using the methodology set forth within our MTAR regulation at Sec. 351.512. In addition, adjusting the benchmarks as suggested by this party would be inconsistent with section 771(5A)(E) of the Act that requires the benefit from a government financial contribution be determined based upon the benefit to the recipient. Furthermore, the suggested adjustment would also be inconsistent with Commerce's general definition of a "benefit" that is set forth under Sec. 351.503 of the CVD regulations.

Finally, Sec. 351.512(b) addresses the timing of the receipt of the benefit from the government purchase of goods. Under Sec. 351.512(b), Commerce will normally consider a benefit as having been received on the date on which the

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firm receives payment from the government for the good. Under Sec. 351.512(c), Commerce will normally allocate (expense) the benefit to the year in which the benefit is considered to have been received under paragraph (b) of this section. However, if the purchase is for, or tied to, capital assets such as land, buildings, or capital equipment, the benefit will be allocated over time as provided in Sec. 351.524(d)(2).

21. Commerce Made No Revisions to Proposed Sec. 351.521, the Regulation Addressing Indirect Taxes and Import Charges on Capital Goods and Equipment (Export Programs)

Import substitution subsidies are defined as subsidies that are "contingent upon the use of domestic goods over imported goods, alone or as 1 of 2 or more conditions," in section 771(5A)(C) of the Act. When Commerce published its current CVD regulations in 1998, Commerce held in reserve Sec. 351.521 for import substitution subsidies.\225\ However, in the years in which that term has been defined in the Act, Commerce has had no issues with addressing and quantifying import substitution subsidies without an applicable regulation. Accordingly, Commerce is deleting that reserved regulation as unnecessary in this final rule.

\225\ See 1998 CVD Regulations, 63 FR at 65414.

Instead, Commerce proposed new Sec. 351.521, which would address Indirect Taxes and Import Charges on Capital Goods and Equipment (Export Programs).\226\ Commerce has found that programs that provide for an exemption from or reduction of indirect taxes and import charges on capital goods and equipment to be countervailable export subsidies and has had to address such subsidies under existing regulations on the treatment of direct taxes (Sec. 351.509); treatment of indirect taxes and import charges (other than export programs) (Sec. 351.510); and remission or drawback of import charges upon export (Sec. 351.519).\227\ However, none of these current regulations directly addresses programs that provide an exemption from indirect taxes and import charges for exporters that purchase capital goods or equipment.

\226\ See Proposed Rule, 89 FR at 57314-57315.

\227\ See, e.g., Certain Frozen Warmwater Shrimp from Thailand: Final Negative Countervailing Duty Determination, 78 FR 50379 (August 19, 2013), and accompanying Issues and Decision Memorandum at 9.

A program that provides an exemption from indirect taxes and/or import duties for exporters that purchase capital equipment would not be addressed under the regulation for direct taxes (Sec. 351.509); nor would that program be addressed under Sec. 351.510, which is only applicable to domestic subsidies. In addition, Sec. 351.519 addresses duty drawback on inputs of raw materials that are consumed in the production of an exported product and thus would not be applicable to the exemption of indirect taxes and import charges provided on purchases of capital goods and equipment. Therefore, Commerce proposed this new regulation to explicitly address the exemption

of indirect taxes and import charges on capital goods and equipment that are export-specific in the Proposed Rule.\228\ In consideration of the comments on this regulation, Commerce has determined that no further modification is necessary to it, so Commerce is codifying that regulation as proposed in this final rule.

\228\ See Proposed Rule, 89 FR at 57314-57315.

New Sec. 351.521(a)(1) and (2) addresses the exemption or remission of indirect taxes and import charges and the deferral of indirect taxes and import charges. In the case of export subsidies which provide full or partial exemptions from or remissions of an indirect tax or an import charge on the purchase or import of capital goods and equipment, Sec. 351.521(a)(1) provides that a benefit exists to the extent that the indirect taxes or import charges paid by a firm are less than they would have been but for the existence of the program (including firms located in customs territories designated as outside of the customs territory of the country). For the deferral of indirect taxes or import charges, the regulation provides that a benefit exists to the extent that appropriate interest charges are not collected. Under Sec. 351.521(a)(2), a deferral of indirect taxes or import charges will normally be treated as a government-provided loan in the amount of the taxes or charges deferred, consistent with the methodology set forth in Sec. 351.505; Commerce will use a short-term interest rate as the benchmark for deferrals that are a year in length or shorter; and for deferrals of more than one year, Commerce will use a long-term interest rate as the benchmark.

Under Sec. 351.521(b), the timing of receipt of benefits for the recipient for the exemption from or remission of indirect taxes or import charges will be when the recipient firm would otherwise be required to pay the indirect tax or import charge, the date on which the deferred tax becomes due for deferral of taxes for one year or shorter, or the anniversary date of a deferral lasting for more than one year.

Finally, Sec. 351.521(c) states that Commerce will allocate the benefit of a full or partial exemption, remission, or deferral of payment of import taxes or import charges to the year in which the benefit was considered received under Sec. 351.521(b).

Commenters on this provision were all supportive of the new regulation, but one stated that Commerce should clarify in this regulation that export programs regarding indirect taxes and import charges on capital goods and equipment would normally be considered non-recurring subsidies, and the benefit from these subsidies would be allocated over time instead of expensed in the year of receipt.

Commerce understands the concerns of the commenter but finds no reason to make this type of clarification within this regulation because the regulation addressing the allocation of benefit to a particular time period, Sec. 351.524, already explicitly states that Commerce will consider a subsidy to be non-recurring if the subsidy was provided for, or tied to, capital assets of a company.\229\

\229\ See Sec. 351.524(c)(2)(iii).

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22. Commerce Is Removing the Regulation Regarding Green Light and Green Box Subsidies, Sec. 351.522

In the Proposed Rule, Commerce proposed deleting the Green Light and Green Box subsidies provision found at current Sec. 351.522 because the provisions are no longer relevant under U.S. law.\230\ Commerce received no objections from the commenters to this change, and therefore is removing the regulation in this final rule. Under section 771(5B)(G)(i) of the Act, the Green Light provisions under subparagraphs (B), (C), (D) and (E) lapsed 66 months after the WTO Agreement entered into force, circa 2000 and 2001, as these provisions were not extended pursuant to section 282(c) of the URAA. Under section 771(5B)(G)(ii) of the Act, the provision for Green Box subsidies no longer applied at the end of the nine-year period beginning on January 1, 1995. Because the statutory authority to consider Green Light and Green Box subsidies ended over 20 years ago, Commerce has eliminated these obsolete provisions.

\230\ See Proposed Rule, 89 FR at 57315.

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23. Commerce Is Making Some Small Revisions to Proposed Sec. 351.525, the Regulation Covering the Calculation of Ad Valorem Subsidy Rates and Attribution of Subsidies to a Product

Under section 701(a) of the Act, Commerce is required to investigate and quantify countervailable subsidies that are provided either directly or indirectly with respect to the manufacture, production, or export of merchandise subject to a CVD investigation or administrative review. The calculation and attribution rules that are set forth under Sec. 351.525 are the primary tools used to quantify the subsidies that are being provided either directly or indirectly to the manufacture, production, and exportation of subject merchandise.

When Commerce developed the current attribution rules for cross-owned companies 25 years ago, it had limited experience with the attribution of subsidies between affiliated companies. The practice of requiring information from cross-owned companies involved in the supply of an input product, a holding or parent company, or the production of subject merchandise evolved slowly for Commerce, and this practice led to the development of some of the attribution rules that are currently codified under Sec. 351.525. It was essentially not until 1993 when Commerce had investigations on steel products from various countries \231\ that the agency began to attribute to a respondent the subsidies that were provided to companies that were related to the respondent through cross-ownership.\232\ In those investigations, Commerce required "complete responses for all related companies that conducted either of the following types of financial transactions: (a) Any transfer of funds (e.g., grants, financial assets) or physical assets to the respondent, the benefits of which were still employed by the producer of the subject merchandise during the POI; or (b) Any assumption of debt or other financial obligation of the respondent (e.g., loan payments, dividend payments, wage compensation) that the respondent would have had to pay during the POI." \233\ Therefore, collecting subsidy information from parent companies and affiliated input suppliers was a relatively recent practice in 1998 when Commerce first attempted to develop and codify a set of attribution rules.

\231\ See Final Affirmative Countervailing Duty Determination: Certain Steel Products from Austria, 58 FR 37217, 37218 (July 9, 1993).

\232\ Under Sec. 351.525(b)(6)(vi), cross-ownership exists between two or more corporations where one corporation can use or direct the individual assets of the other corporation(s) in essentially the same ways it can use its own assets.

\233\ See Final Affirmative Countervailing Duty Determination: Certain Steel Products from Austria, 58 FR 37217, 37218 (July 9, 1993).

In the ensuing years, Commerce has developed a detailed practice with respect to the treatment of cross-owned companies and the attribution to respondents of subsidies received by cross-owned companies. Based on this experience, Commerce proposed revising its attribution rules that are currently codified under Sec. 351.525(b)(6) in the Proposed Rule.\234\ After consideration of the comments on this issue, Commerce is codifying the revisions as proposed, with some small modifications, in this final rule.

\234\ See Proposed Rule, 89 FR at 57315-57320.

As an initial matter, cross-ownership is defined under current Sec. 351.525(b)(6)(vi), and Commerce has not modified that paragraph in this final rule, except for moving it to Sec. 351.525(b)(6)(vii) in light of changes to other provisions.\235\

\235\ Commerce notes that the standard set forth in the regulation is that cross-ownership will normally be met when there is a majority voting ownership interest between two corporations or through common ownership of two (or more) corporations. While the regulatory standard of control will normally be met by a majority ownership, cross-ownership is defined based on whether one company exercises control of another company to a degree where one corporation can use or direct the assets of another corporation in essentially the same ways it can use its own assets. Cross-ownership may also be based on a large minority voting interest, a "golden share," and other

corporate relationships such as common interlocking board members and corporate officers that administer the daily operations of a corporation. In addition, Commerce's experience since the promulgation of the cross-ownership standard in 1998 has shown that other factors, such as certain familial relationships, may, in particular circumstances, warrant a finding of cross-ownership, with or without a majority voting ownership interest. See Coated Free Sheet Paper from Indonesia: Final Affirmative Countervailing Duty Determination, 72 FR 60642 (October 25, 2007). Commerce has also found the absence of cross-ownership even when one corporation held the majority ownership interest in another corporation because that corporation, even with majority voting rights was precluded by a creditors' agreement from exercising control over certain critical corporate decisions within the second corporation. A finding of cross-ownership is an entity-specific determination.

Next, Sec. 351.525(b)(6)(iii) addresses holding or parent companies. Commerce has deleted the section that states that if a holding company merely serves as a conduit for the transfer of the subsidy from a government to a subsidiary, Commerce will attribute the subsidy solely to the products sold by the subsidiary. This language became redundant in light of revisions to the attribution section on the transfer of subsidies between corporations with cross-ownership, as described below. Notably, no commenter objected to this modification of the holding company or parent company attribution rule.

The Cross-Owned Input Producer Attribution Rule

With respect to the cross-ownership attribution rule for input suppliers, Sec. 351.525(b)(6)(iv), Commerce made several changes to provide greater clarity with respect to the analysis of when an input is "primarily dedicated" to the production of a downstream product. In addition, Commerce has found that the examples provided in the preamble of the 1998 CVD Regulations (semolina to pasta; trees to lumber; and plastic for automobiles) \236\ have not provided much guidance with respect to many of the input products that Commerce has encountered in its CVD cases. Moreover, the analysis of whether an input is primarily dedicated has been an issue in recent CIT holdings.\237\ Therefore, Commerce has codified several factors that it will consider in its analysis of whether an input is primarily dedicated.

\236\ See 1998 CVD Regulations, 63 FR at 65401 (providing examples of when it may be appropriate to attribute the subsidies received by an input supplier to the production of cross-owned corporations producing the downstream product-situations where the purpose of the subsidy provided to the input producers is to benefit both the input and downstream product.).

\237\ See, e.g., Kaptan Demir Celik Endustrisi Ve A.S. v. United States, Court No. 21-00565, Slip-Op 23-62 (CIT April 26, 2023) (Kaptan v. United States) at 13-16; Nucor Corporation v. United States, Court No. 21-00182, Slip Op. 22-116 (CIT October 5, 2022) (Nucor Corp. v. United States) at 23-24; and Gujarat Fluorochemicals Ltd. v. United States, 617 F. Supp. 3d 1328, 1330 (CIT 2023) (Gujarat v. United States).

In Sec. 351.525(b)(6)(iv)(A), Commerce added language to explicitly state that the attribution rule applies only to cross-owned corporations that produce the input, as opposed to cross-owned companies that procure the input from non-cross-owned companies and then provide that input to the respondent. To provide further clarity, Commerce has changed the title of this attribution regulation from "input supplier" to "input producer." The definition of an "input" under this attribution regulation covers the creation or generation of by-products resulting from the production operations of the cross-owned input producer. With these changes to the regulation, Commerce is not intending to change its current practice that a primarily dedicated input does not have to be used directly in the production of subject merchandise but may be used as an input at earlier stages of production.

One commenter opposed the modification of "input supplier" to

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"input producer" in the regulation. That commenter stated that the modifications to this cross-owned attribution rule for input producers could create a loophole to avoid the attribution of subsidies whereby a cross-owned input supplier can first provide the input to a cross-owned supplier that then will provide the input to the cross-owned respondent/producer. While this type of cross-owned transaction is covered by the input producer rule, Commerce has made a small modification to proposed Sec. 351.525(b)(6)(iv)(A) to clarify that transactions involving a cross-owned input producer that provides the input to a cross-owned supplier that then provides the input to the

cross-owned producer fall within the cross-owned input producer regulation. The final language in Sec. 351.525(b)(6)(iv)(A) now states: "If there is cross-ownership between an input producer that supplies, either directly or indirectly, a downstream producer and the production of the input product is primarily dedicated . . . ."

On the other hand, a commenter that supported the revisions to Sec. 351.525(b)(6)(iv)(A) recommended that Commerce consider including subsidies to upstream input suppliers even if those suppliers are not cross-owned with the subject merchandise producer. This commenter stated that in the stainless-steel industry, for example, many producers in foreign countries are receiving subsidized nickel for stainless steel production which distorts the market and provides those foreign producers with an unfair competitive advantage.

While Commerce agrees with the commenter that the described stainless-steel industry situation described is concerning, that type of subsidization is more properly addressed under other provisions of the regulations and the Act, such as the upstream subsidies provision at Sec. 351.523 and sections 701(e) and 771A of the Act; where the supplier is a state-owned enterprise, under sections 771(5)(D)(iii) and (E)(iv) of the Act that address the government provision of a good or service; or under the "entrusts or directs a private party" provision at 771(5)(B)(iii) of the Act.

The Primarily Dedicated Input Provision

Section 351.525(b)(6)(iv)(B) sets forth several criteria or factors that Commerce will review when determining whether an input is primarily dedicated to the production of downstream products. First, Commerce will determine whether the input could be used in the production of a downstream product, including the production of subject merchandise. Then, under the additional criteria, in no particular hierarchy, Commerce may consider (1) whether the input is a link in the overall production chain; (2) whether the input provider's business activities are focused on providing the input to the downstream producer; (3) whether the input is a common input used in the production of a wide variety of products and industries; (4) whether the downstream producers in the overall production chain are the primary users of the inputs produced by the input producer; (5) whether the inputs produced by the input producer are primarily reserved for use by the downstream producer until the downstream producer's needs are met; (6) whether the input producer is dependent on the downstream producers for the purchases of the input product; (7) whether the downstream producers are dependent on the input producer for their supply of the input; (8) the coordination, nature, and extent of business activities between the input producer and the downstream producers whether directly between the input producer and the downstream producers or indirectly through other cross-owned corporations; and (9) other factors deemed relevant by Commerce based upon the case-specific facts. The analysis of the facts on the record of whether an input is primarily dedicated is always guided by the statutory mandate of addressing and including countervailable subsidies provided either directly or indirectly to the manufacture or production of subject merchandise as required under section 701(a) of the Act.

Whether an input product is primarily dedicated is a highly fact-intensive analysis of all the information on the record; such information is usually business proprietary and thus cannot be discussed in Commerce's public determinations. The fact that the data, and Commerce's analysis, usually rely on business proprietary information makes it a complicated process with respect to distinguishing specific determinations of "primarily dedicated" from one another. For some complicated input issues, just a few small differences in the facts on the record may be the deciding factor that render an input primarily dedicated or not. However, Commerce has concluded that the criteria set forth within Sec. 351.525(b)(6)(iv)(B) will provide additional clarity to the public and the courts with respect to Commerce's analysis of whether an input product is primarily dedicated to a downstream product.

Commerce received comments both in support and in opposition of the criteria within Sec. 351.525(b)(6)(iv)(B). Commenters that opposed the list of primarily dedicated criteria stated that the list of factors was "too long," and they took issue with it not being hierarchical and including a "catch-all" provision, which they stated made the other factors irrelevant. One of the commenters stated that the list has factors that are redundant and place too much emphasis on the relationship between the input producer and the producer of subject merchandise instead of the nature of the input. Another commenter suggested that Commerce condense these factors into one factor such as "the share of the input producer's sale of the input that are supplied to the downstream producer." Finally, another commenter stated that Commerce should continue to analyze the primarily dedicated issue on a case-by-case basis.

After consideration of the comments on this regulatory provision, Commerce disagrees that the list of factors within Sec. 351.525(b)(6)(iv)(B) is too long. The list of factors set forth in that regulation is based upon criteria that Commerce provided to the court in recent litigation of the issue

of primarily dedicated inputs.\238\ In addition, Commerce has not put these factors in hierarchical order because whether inputs are primarily dedicated can, in many instances, be a complicated issue in which evidence on the record will indicate that certain of the factors may be more relevant than others, which may change based on case-specific facts. Moreover, given the wide array of inputs and corporate and business relationships between cross-owned companies, a strict hierarchy of criteria or factors could prevent Commerce from adequately addressing subsidies conferred directly or indirectly on the production or manufacture of subject merchandise as required under section 701(a) of the Act. Because of the complicated nature of the primarily dedicated issue, Commerce has also included within Sec. 351.525(b)(6)(iv)(B) the ability to review other factors deemed relevant based upon case-specific facts.

\238\ See, e.g., Kaptan v. United States, Slip-Op 23-62 at 13-16; Nucor Corp. v. United States, Slip Op. 22-116 at 23-24; and Gujarat v. United States, 617 F. Supp. 3d at 1330.

Commerce disagrees that the list of factors in the regulation places too great an emphasis on the relationship between the cross-owned input producer and the producer of subject merchandise. The attribution rule for

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input products was developed because Commerce was concerned that a government would both directly provide subsidies to the downstream producer and provide production assistance to that downstream producer by subsidizing cross-owned companies that produce inputs required by that downstream producer. Therefore, while the nature of the input is important in the agency's primarily dedicated analysis, it is also important to analyze the nature of the relationship between the cross-owned input producer and the cross-owned downstream producer because it is that relationship that dictates the provision of that input.

Commerce has also determined that condensing the factors within Sec. 351.525(b)(6)(iv)(B) into the single factor of "the share of the input producer's sales of the input that are supplied to the downstream producer" is too limited and could obfuscate the purpose of the input producer attribution regulation. For example, one might observe that an input producer provides a critical input to the production of the downstream product and that the cross-owned input provider is the sole supplier of that input to the cross-owned downstream producer. However, the sales of that input to the downstream producer might account for only a small share of the input producers' total sales of the input. Under the lone factor consideration proposed by this commenter, Commerce would find this critical input not to be primarily dedicated, while under a more comprehensive consideration of multiple factors, Commerce might find the reverse. Therefore, consideration of the proposed one lone factor would not be sufficiently informative, either with respect to the purpose of the input producer regulation or to the issues of whether an input product is primarily dedicated.

Likewise, Commerce, will continue to consider the factors set forth in Sec. 351.525(b)(6)(iv)(B) and will not go back to deciding whether an input is primarily dedicated to the production of the downstream product on a case-by-case basis, without consideration of those factors, as suggested by one commenter. A major impetus behind the agency's codification of the factors for analyzing primarily dedicated inputs within Sec. 351.525(b)(6)(iv)(B) is recent court decisions that have taken umbrage with Commerce's case-by-case approach for our analysis of whether an input is primarily dedicated. To go back to a case-by-case approach would fail to address some of the criticism raised by the courts with respect to Commerce's primarily dedicated analysis.

In addition, under the strict CVD deadlines in the Act, Commerce has limited time in which to make its initial decisions as to whether an input is primarily dedicated. Indeed, Commerce must make these complicated decisions in an investigation or administrative review within days of receipt of the information on cross-owned companies because the agency must provide foreign respondents with explicit instructions as to which cross-owned input producers will be required to provide full questionnaire responses. Delays in making these cross-owned input producer decisions adversely impact Commerce' ability to remain in compliance with the statutory deadlines established by Congress. Therefore, having criteria in the regulation provides clarity to the interested parties regarding Commerce's preliminarily dedicated analysis and assists the agency in its decision-making process, which will help to ensure that all statutory deadlines are met in a more efficient manner.

Thus, Commerce continues to believe that the codification of these criteria or factors in Sec. 351.525(b)(6)(iv)(B) is appropriate and ensures consistency in the agency's analysis of whether an input is primarily dedicated. In addition, Commerce has determined that the codification

of these criteria or factors provides clarity to both the interested parties and the courts with respect to the issue and analysis of whether an input is primarily dedicated.

In addition, one commenter expressed its concerns about the revised language in Sec. 351.525(b)(6)(iv)(B), stating that Commerce expanded the input provider rule by providing a more extensive definition of "primarily dedicated" to include within the definition inputs that merely "could be used in the production of a downstream product including subject merchandise, regardless of whether the input is actually used for the production of subject merchandise." This commenter stated that this modification, in effect, addresses upstream subsidies without complying with the statutory provisions for upstream subsidies set forth within the Act. The party suggested that Commerce should incorporate a more definitive limiting principle based not on whether the input product "could" be used to produce a downstream product including the subject merchandise but that the input product must actually be used to produce the downstream product.

Commerce finds that this description of the regulation misconstrues the original, non-modified language within Sec. 351.525(b)(6)(iv). The original language of the regulation only referenced "cross-ownership between an input supplier and a downstream producer, and the production of the input product is primarily dedicated to production of the downstream product." The original language in the regulation did not require that the input product be related to the production of downstream products that include subject merchandise, only that the input has to be used to produce downstream products. While Commerce has effectively administered the regulation to ensure that the subject merchandise was included as one of the downstream products, the original language could be interpreted otherwise. Therefore, to remove the ambiguity in the original regulation, Commerce has modified it to state that the input is one that could be used in the production of subject merchandise. Thus, the new language has been inserted into the regulation to restrict the application of this attribution rule, not to expand the scope of this attribution regulation. In the Proposed Rules, we used the phrase "could be used in the production of a downstream product including subject merchandise, regardless of whether the input is actually used for the production of subject merchandise." For clarity in the final rule we have shortened the language to simply state "could be used in the production of a downstream product including subject merchandise."

Commerce notes that it has continued to include the term "could be used" rather than the commenter's suggested term "actually used," because in Commerce's examination of a "primarily dedicated" input, Commerce will examine whether the input is one that is normally used to produce subject merchandise. If the input is not an input that is normally used to produce subject merchandise, then the input would not be "primarily dedicated." Commerce has retained the phrase "could be used" specifically instead of "actually used" because of the agency's long-standing practice that it does not trace the use of a subsidy. It has also retained that phrase, more importantly, because of concerns of potential manipulation to avoid countervailing duties.

For example, one can imagine a situation in which a respondent purchased an input from both a cross-owned producer and from a non-crossed-owned company, and yet claims in its reporting to Commerce that it only "actually uses" the inputs purchased from the non-cross-owned company to produce subject merchandise that is exported to the United States. It might be true, but it also might not be true,

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and in either case it might be difficult, if not impossible, to verify. Using the term "could be used," rather than "actually used" therefore addresses that potential for manipulation.

In addition, the modifications made to the input producer regulation do not relate to the provision of upstream subsidies. As the preamble of the 1998 CVD Regulations states, input products provided by a cross-owned producer that are not primarily dedicated to the downstream products would not fall within the cross-owned attribution rule but would be addressed under the upstream subsidies provision of the statute.\239\ The modifications to this regulation do not change that policy.

\239\ See 1998 CVD Regulations, 63 FR at 65401.

Finally, one commenter suggested that Commerce should add clarifying language to the regulation to define the production of an input as including the generation or creation of an input as a by-product. The agency does not see a need to include this type of clarification within the regulatory language, as the regulatory language is expansive enough to include by-products and this preamble sufficiently and explicitly explains that the production of an input would also include inputs that are by-products of the cross-owned company's production process.

Cross-Owned Providers of Utility Products

Since the publication of the original attribution rules in 1998, Commerce has increasingly faced more complex cross-ownership issues and corporate structures. Moreover, the transactions between these cross-owned corporate entities and their provision of "inputs" as defined and addressed within the CVD regulations have multiplied with increased complexities. Therefore, with over 25 years of experience in addressing transactions between cross-owned companies since the publication of the 1998 attribution rules, Commerce has concluded that it is appropriate now to codify an additional attribution rule to cover the provision of certain inputs that are more than just input products used in the manufacture or production of downstream products; specifically cross-owned providers of electricity, natural gas or similar utility goods. Commerce proposed this addition to the regulation in the Proposed Rule,\240\ and, after consideration of comments on this provision, Commerce is now codifying it as part of the final rule.

\240\ See Proposed Rule, 89 FR at 57317.

Under Sec. 351.525(b)(6)(v), titled "Providers of utility products," if there is cross-ownership between a company providing electricity, natural gas or other similar utility product and a producer of subject merchandise, Commerce will attribute subsidies received by that provider to the combined sales of that provider and the sales of products sold by the producer of subject merchandise if at least one of the following two conditions is met: a substantial percentage, normally defined as 25 percent or more, of the production of the electricity, natural gas, or other similar utility product by the cross-owned utility provider is provided to the producer of subject merchandise; or the producer of subject merchandise purchases 25 percent or more of its electricity, natural gas, or other similar utility product from the cross-owned provider. Commerce has concluded that the criteria for determining whether an input product is primarily dedicated to the production of downstream products is not particularly useful for utility products such as electricity and natural gas. Among other considerations, electricity and natural gas are not physical inputs into the production of downstream products but have emerged as goods or services that can effectively subsidize the production or manufacture of certain products. Therefore, a consistent standard of analysis for the attribution of utility products provided by a cross-owned corporation will assist the agency in effectuating the requirements of section 701(a) of the Act.

This regulation focuses on the provision of utility products between cross-owned companies to provide both clarity to the public and consistency of treatment among Commerce's cases. With the codification of this standard, Commerce recognizes that in most economies, providers of goods such as electricity and natural gas are government-regulated public utilities, and manufacturers require utility goods and services to conduct their operations. In Commerce's view, a utility company providing 25 percent of its output to one company indicates a significant level of dependency and dedication to one customer, and a company that purchases 25 percent of its energy needs from one supplier has also become engaged in a significant supplier relationship. Therefore, Commerce has established a 25 percent threshold for attributing subsidies received by the cross-owned utility company and the producer of subject merchandise.

However, if the cross-owned utility company is an authority and there is an allegation that the government is providing the electricity or natural gas for LTAR or that the private cross-owned utility company is entrusted or directed to provide electricity or natural gas for LTAR, Commerce will normally analyze these types of allegations under Sec. 351.511, its regulation on the provision of a good or service.

In response to the Proposed Rule, Commenters both supported and opposed the attribution of subsidies provided to cross-owned providers of utility products in the regulation.

One of the commenters opposing the provision stated that Commerce should not implement this rule and should instead apply the primarily dedicated standard used for inputs used in the production of a downstream product.

Commerce disagrees with the application of the primarily dedicated standard to utility products and services because that standard is neither relevant nor informative to the agency's analysis of a cross-owned utility provider. The criteria used for an input producer address a physical input that is incorporated into a downstream product. Normally, utility goods such as electricity, while necessary for the manufacturing or production process of a manufactured good, are not physical inputs into that merchandise. Therefore, the factors set forth within Sec. 351.525(b)(6)(v) for a primarily

dedicated analysis are not instructive for the analysis as to whether subsidies provided to a cross-owned utility provider should be attributed to producers of the subject merchandise.

Other commenters opposing the provision stated that the 25 percent threshold will limit Commerce's flexibility, and they suggested that Commerce should address cross-owned utility providers instead on a case-by-case basis.

Commerce disagrees with this suggestion. The purpose of this new attribution regulation for cross-owned utility providers is to provide both clarity to the public with respect to the agency's treatment of cross-owned utility providers and to provide more consistency in Commerce's treatment of cross-owned utility providers. Going back to analyzing cross-owned utility providers on a case-by-case basis would undermine both of those policy and administrative goals. In addition, the 25 percent threshold for a utility good provides useful regulatory guidance that will assist Commerce in determining which cross-owned companies need to provide full questionnaire responses, a decision that needs to be made in mere days given the strict CVD deadlines in the Act. Moreover, the new attribution rule for cross-owned utility providers will effectively and efficiently implement the statutory mandate under section 701(a) of the Act that Commerce

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investigate the subsidies that are conferred, directly or indirectly, on the production and manufacture of subject merchandise.

In response to concerns which some commenters expressed, Commerce recognizes that it is possible that after a CVD order has been put in place a respondent may attempt to avoid the application of this regulation by attempting to reduce the amount of electricity provided or purchased to a level below the 25 percent threshold. Accordingly, to prevent this type of potential avoidance of the application of this attribution regulation, in reviewing record documents in its proceedings, Commerce will be sensitive to these potential types of provision and consumption changes after the issuance of a CVD order, and it also recommends that other interested parties in its proceedings be sensitive to those potential concerns as well.

One of the commenters supporting the regulation suggested that Commerce codify the language in the preamble that if the cross-owned utility provider is an authority and there is an allegation that the utility good or service is provided for LTAR or there is an allegation of entrustment or direction, Commerce will analyze the provision of the utility good or service under Sec. 351.511, the regulation on the provision of a good or service.

Commerce sees no need to make this an additional regulatory provision under our attribution regulations as this standard is already explicitly addressed under Commerce's LTAR regulation at Sec. 351.511, the government provision of a good or service.

Finally, one of the commenters supporting the regulation for providers of utility products recommended that Commerce create a separate regulatory provision for cross-owned freight service providers using the same 25 percent threshold used for cross-owned providers of utility products.

Commerce has not adopted this recommendation. Since the implementation of the 1998 CVD Regulations that included the attribution rules for cross-owned companies, while Commerce has investigated hundreds of different subsidies related to the production or manufacture of merchandise that is covered in a CVD investigation, the agency has rarely, if ever, had allegations related to the subsidization of freight services other than those covered under the statutory provision of a government good or service. Therefore, Commerce does not see a need to promulgate an attribution rule to cover the provision of freight services from cross-owned companies. However, Commerce does recognize that if a cross-owned freight service provider transferred a subsidy to the cross-owned producer/respondent, the transfer of that subsidy could fall under Sec. 351.525(b)(6)(vi), the attribution rule for the transfer of a subsidy between companies with cross-ownership.

Other Service Providers

While the proposed, and now final, regulation addressed only the attribution of subsidies for cross-owned utility product providers, in the Proposed Rule Commerce acknowledged that it retains the authority to include subsidies received by certain cross-owned companies that are not utility product providers when it concludes the specific facts on the record warrant such inclusion.\241\

\241\ See Proposed Rule, 89 FR at 57317-57318.

For example, Commerce has at times had to determine whether to include subsidies received by cross-owned companies that provide land, employees, and manufacturing facilities, including plants and equipment, to the producer of subject merchandise. In that situation, if the record reflects that in order to manufacture or produce merchandise that is subject to an investigation or administrative review the cross-owned company requires a manufacturing facility and equipment, land upon which to place its manufacturing facilities, and/or employees, Commerce may find that government subsidies provided to those cross-owned companies are providing, directly or indirectly, subsidies to the manufacture and production of subject merchandise as set forth within section 701(a) of the Act. In that case, Commerce might determine it appropriate to attribute the subsidies received by that provider to the combined sales of that provider and the sales of products sold by the producer of subject merchandise.

Likewise, there may be situations in which Commerce determines that it is appropriate to include subsidies received by certain cross-owned service providers in its calculations. The preamble to the 1998 CVD Regulations refers to the situation in which a government provides a subsidy to a non-producing subsidiary such as a financial subsidiary and notes that consistent with Commerce's treatment of holding companies, the agency would attribute a subsidy to a non-producing subsidiary to the consolidated sales of the corporate group.\242\ Commerce normally does not include cross-owned general service providers in the attribution of subsidies.\243\ Where cross-owned service providers provide critical inputs into the manufacture and production of subject merchandise,\244\ Commerce may include cross-owned service providers in the attribution of subsidies. In all cases, whether to include subsidies provided by cross-owned service providers in the attribution of subsidies is a case-specific determination.

\242\ See 1998 CVD Regulations, 63 FR at 65402.

\243\ See, e.g., Bottom Mount Combination Refrigerator-Freezers from the Republic of Korea: Final Affirmative Countervailing Duty Determination, 77 FR 17410 (March 26, 2012), and accompanying Issues and Decision Memorandum at Comment 22.

\244\ For the purposes here, Commerce is using the term "input" as defined in Sec. 351.503(b) and the 1998 CVD Regulations, 63 FR at 65359, where the term "input" is defined as money, a good, or a service.

For example, if there is cross-ownership with a company providing R&D, tolling, or engineering services directly related to the production or assembly of subject merchandise, Commerce may determine that it is appropriate to attribute subsidies received by the service provider to the combined sales of that provider and the producer of subject merchandise. In the case of a cross-owned company performing R&D for the respondent company, Commerce might determine to include the subsidies provided by the government to that cross-owned R&D service provider. Similarly, if the respondent company has a cross-owned toller that assembles or manufactures the subject merchandise which is subsequently sold or exported by the respondent, Commerce might include subsidies provided by the government to that cross-owned toller.\245\ With respect to engineering services, while Commerce will not include subsidies to companies that provide only general engineering services to a respondent, the agency might include subsidies to those service providers if the services are directly related to the manufacture, production or export of subject merchandise. For example, in Fabricated Structural Steel from Canada, Commerce included cross-owned companies that provided engineering drafting services because these services were critical to the production and manufacture of subject merchandise.\246\ While the revisions to Sec. 351.525(b)(6) do not include subsidies to cross-owned providers of services or

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subsidies to cross-owned providers of land, employees, and manufacturing facilities, the agency may attribute such subsidies in its CVD calculations where supported by the record.

\245\ See Certain Fabricated Structural Steel from Canada: Preliminary Negative Countervailing Duty Determination and Alignment of Final Determination with Final Antidumping Duty Determination, 84 FR 33232 (July 12, 2019), and accompanying preliminary decision memorandum at section VI. Subsidies Valuation.

\246\ Id.

Transfer of a Subsidy

Under the language for the transfer of subsidies (formerly Sec. 351.525(b)(6)(v), now Sec. 351.525(b)(6)(vi)), if a cross-owned corporation receives a subsidy and transfers it to a producer of subject merchandise, Commerce will attribute the subsidy only to products produced by the recipient of the transferred subsidy. Moreover, when the cross-owned corporation that transferred the subsidy could fall under two or more of the attribution rules under Sec. 351.525(b)(6), the transferred subsidy will be attributed solely to the recipient of the transferred subsidy as set forth under Sec. 351.525(b)(6)(vi). With these revisions to the transfer attribution rule, as proposed in the Proposed Rule \247\ and codified in this final rule, Commerce clarifies that when a cross-owned corporation transfers a subsidy, that subsidy will be attributed only to the recipient of the subsidy.

\247\ See Proposed Rule, 89 FR at 57318.

In addition, the agency amended the title of Sec. 351.525 in the Proposed Rule from "Transfer of subsidy between corporations with cross-ownership producing different products" to "Transfer of subsidy between corporations with cross-ownership" to indicate that the transfer of a subsidy can be from any cross-owned corporation, not just from a cross-owned corporation that is a manufacturer.

General Questionnaire Reporting Requirements

In the preamble to the Proposed Rules, Commerce set forth our normal practice for general questionnaire reporting requirements for cross-owned corporations. We are making no changes to the reporting requirements. We are providing these instructive guidelines to provide clarity to the public and to ensure consistency across our cases. For cross-owned corporations covered by Sec. 351.525(b)(6)(iv), Commerce will normally only request information or a questionnaire response for input producers that provide the input to the producer of subject merchandise during the POI or POR. Similarly, for cross-owned corporations that covered by Sec. 351.525(b)(6)(v), Commerce will normally only request information or a questionnaire response for cross-owned utility companies that provided electricity, natural gas or other utility products to the producer of subject merchandise during the POI or POR. In addition, for corporations producing subject merchandise under Sec. 351.525(b)(6)(ii) that were cross owned during the POI and POR, they must provide information and a questionnaire response covering the AUL of a firm's renewable physical assets even if one or more did not export subject merchandise to the United States during the POI or POR. Due to the ease of switching export shipments of subject merchandise between cross-owned corporations producing the subject merchandise and the potential for evasion of a CVD order, Commerce will analyze subsidies conferred to all cross-owned corporations producing subject merchandise and will calculate one CVD rate for these cross-owned entities. Commerce will also attribute subsidies provided during the AUL to all holding or parent companies that are cross owned with the producer of subject merchandise during the POI or POR. Finally, information on the transfer of non-recurring subsidies from a cross-owned company during the AUL must be reported, even if the company that transferred the subsidy to the producer of subject merchandise is no longer cross-owned during the POI or POR or has ceased operations.

Non-Attribution of Subsidies to Plants or Factories and General Standing for Finding Subsidies Tied

In the Proposed Rule, Commerce proposed two additions to the attribution rules under Sec. 351.525(b) to codify two longstanding Commerce practices with respect to the attribution of subsidies to plants and factories and the tying of a subsidy.\248\ Commerce is now finalizing those changes as proposed. Under Sec. 351.525(b)(8), Commerce will not tie or attribute a subsidy on a plant- or factory- specific basis. Under Sec. 351.525(b)(9), a subsidy will normally be determined to be tied to a product or market when the authority providing the subsidy (1) was made aware of, or otherwise had knowledge of, the intended use of the subsidy and (2) acknowledged that intended use of the subsidy prior to, or current with, the bestowal of the subsidy. Commerce is also modifying Sec. 351.525(b)(1) to reflect references to the above additions of paragraphs (8) and (9) to the regulation.

\248\ Id., 89 FR at 57318-57319.

In the preamble to the 1998 CVD Regulations, Commerce rejected comments proposing a regulation to allow the agency to tie or attribute subsidies on a plant- or factory-specific basis.\249\ Commerce's practice from at least the publication of the 1998 CVD Regulations, over 25 years ago, has been consistent-subsidies will not be attributed or tied on a plant- or factory-specific basis. Commerce is now codifying that practice in its regulations.

\249\ See 1998 CVD Regulations, 63 FR at 65404.

Commerce's approach to tying goes back to 1982. In Certain Steel Products from Belgium, Commerce stated that it determines that a grant is "tied when the intended use is known to the subsidy giver and so acknowledged prior to or concurrent with the bestowal of the subsidy." \250\ When Commerce examines whether a subsidy is tied to a product or market, it has consistently used this test that will now be codified in Sec. 351.525(b)(9).

\250\ See Final Affirmative Countervailing Duty Determinations; Certain Steel Products from Belgium, 47 FR 39304, 39316-17 (September 7, 1982).

Under this regulatory provision, Commerce will continue to carefully examine all claims that a subsidy is tied to a product or market, based on the case-specific facts on the record. To support a claim that a subsidy is tied, the documents on the record must demonstrate, in accordance with Sec. 351.525(b)(9), that the authority providing the subsidy explicitly acknowledged the intended purpose of the subsidy prior to, or concurrent with, the bestowal of the subsidy. Because the authority and the respondent company have access to all the program-specific documentation related to the bestowal of a subsidy, the authority and the respondent company will be required to submit these documents to support any claim that a subsidy is tied. In general, these documents include all application documents submitted by the respondent company to the authority providing the subsidy and all the subsidy approval documents from that authority. A mere claim that a subsidy is tied to a product or market, absent the submission of supporting documents, will not be sufficient.

Because interested parties other than the respondent government and company may not have access to documents related to the application and approval of the subsidy, such interested parties may make arguments that a subsidy is tied to a product or market based on information that is reasonably available to them. The tying of R&D subsidies raises a number of difficult and challenging issues due to the complex and highly technical nature of certain R&D projects. Therefore, in general, the documents submitted to support a tying claim for R&D subsidies

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must clearly set forth the products that are the focus of the R&D project.

Finally, as Commerce noted in the preamble to the 1998 CVD Regulations, if subsidies that are allegedly tied to a particular product are in fact provided to the overall operations of a company, Commerce will continue to attribute the subsidy to all products produced by the company.\251\

\251\ See 1998 CVD Regulations, 63 FR at 65400.

The tying standard finalized in these regulations was initially developed in 1982 based on the conclusions of the Steel Issues Group, an interagency group whose deliberations were based on governing legislation and related administrative proceedings.\252\ In the 1982 Subsidies Appendix \253\ Commerce explained that a subsidy is "tied" when the intended use is known to the subsidy giver and so acknowledged prior to or concurrent with the bestowal of the subsidy. Commerce has applied this standard ever since and is codifying it in these final regulations.\254\ In reaching this conclusion, the Steel Issues Group considered multiple sources to determine that the

definition or identification of the intended purpose of a subsidy should be the primary consideration in determining if a subsidy is tied and how that subsidy should be allocated.\255\

\252\ Richard Herring & Brien Stonebreaker, Evolution of Countervailing Duties (CVD) Regulations and Methodology in the United States, 30 Int'l Trade L. & Reg. 1 (2024) (CVD Evolution).

\253\ The 1982 Subsidies Appendix was published as Appendix 2- Methodology attached to the Final Affirmative Countervailing Duty Determinations; Certain Steel Products from Belgium, 47 FR 39304, 39317 (September 7, 1982).

\254\ See CVD Evolution at 5-9. The 1998 CVD Regulations, 63 FR at 65402-03, subsequently provided further discussion of the fungibility of money and the attribution and tying of subsidies.

\255\ CVD Evolution at 5 and 9. As explained in CVD Evolution, the Steel Issues Group considered several sources in determining the correct approach to the tying of subsidies, including then section 771(5) of the Act defining a subsidy as being provided "directly or indirectly" on the manufacture, production and exportation of merchandise imported into the United States and the legislative history to the Trade Agreements Act of 1979 (Public Law 96-39, 93 Stat. 144, 96th Congress (July 26, 1979)), including the Senate Report (Senate Report of the Committee on Finance, Trade Agreements Act of 1979, S. Rep. No. 96-249 (July 17, 1979), at 85-86) and the House Report (House of Representatives Report of the Committee on Ways and Means, Trade Agreements Act of 1979, H.R. Rep. No. 96-317 (July 3, 1979) at 74-75). It also considered Viscose Rayon Stable Fiber from Sweden, in which Commerce determined that government grants were provided specifically to develop the production of modal fiber, and, therefore, the benefits were allocated to the production of modal fiber and not to all products produced by the respondent as the fungibility of money would have supported. See Viscose Rayon Stable Fiber from Sweden; Final Results of Administrative Review of Countervailing Duty Order, 46 FR 60486 (December 10, 1981) (Viscose Rayon Stable Fiber from Sweden)).

With respect to the codification of these regulations, one commenter expressed concerns as to the attribution regulation regarding subsidies to plants and factories and suggested that Commerce tie subsidies to plants and factories when an authority provides a subsidy to a specific plant or factory that does not produce subject merchandise.

In 1998, Commerce expressed concern that if subsidies were to be tied to a particular plant or factory, interested parties could use that methodology in an attempt to escape the payment of appropriate countervailing duties by selling the production of a subsidized plant or factory domestically, while exporting from an unsubsidized factory.\256\ This commenter did not address this long-standing concern regarding manipulation of payment of countervailing duties through the use of tying subsidies to a firm's individual plants or factories. In addition, Commerce has had a consistent long-standing practice codified in 1998 that it will only tie subsidies on a product- or market-specific basis.\257\ Notably, the commenter did not claim that Commerce should tie a subsidy to a specific plant or factory when that plant or factory produces only subject merchandise, nor did the commenter provide statutory or regulatory support for its request that Commerce change its long-standing position on this issue. Accordingly, Commerce has made no modifications to its regulation in this regard and will not expand the concept of typing subsidies on a plant- or factory-specific basis.

\256\ See 1998 CVD Regulations, 63 FR at 65404.

\257\ See current Sec. 351.525(b)(4) and (5).

Another commenter suggested that Commerce should add a second tying standard in the regulation that would apply to the government provision of a good or service. Under this proposed second tying standard, the government provision of a good or service would be tied to a particular market or product if the authority providing the subsidy could have reasonably been expected to know the intended use of the subsidy. This party stated that it was proposing this special tying standard for the provision of a good or service because it was concerned that government authorities could exploit a loophole, wherein they would choose not to specify their knowledge of the use of the subsidy in order to avoid tying in a CVD proceeding.

Commerce has not adopted this proposal for the following reasons. First, since Commerce developed its tying standard in 1982, the agency has only found subsidies to be tied based upon actual documentation that a subsidy is tied to a particular product or market. The documentation

normally relied upon by Commerce were applications and approval documents for the conferred subsidy. Actual documentation for tying was required because Commerce wanted documented evidence that a subsidy is tied to help alleviate concerns that a respondent party was attempting to avoid the application of countervailing duties by making unsupported and ad hoc claims that a subsidy was tied to non-subject merchandise. In addition, Commerce required documented evidence because the agency did not want to be in a position of having to guess the intent of the authority providing the subsidy.

Second, Commerce believes that creating a second standard for tying that does not require actual documentation creates a much larger loophole in our practice than the loophole the party is suggesting that Commerce close.

Finally, the commenter provided no legal justification for creating two different and potentially conflicting standards for tying a subsidy to a particular product or market, especially where one standard is solely based upon the type of financial contribution.

Limiting the Number of Examined Cross-Owned Companies

In addition to the other changes Commerce made to Sec. 351.525(b), Commerce also proposed to add text that would stipulate that when record information and resource availability supported limiting the number of cross-owned corporations examined, Commerce could do so before conducting a subsidy attribution analysis under any subsidy attribution provisions.\258\ Specifically, proposed Sec. 351.525(b)(1) stated that the Secretary "may determine to limit the number of cross-owned corporations examined under this section based on record information and resource availability."

\258\ See Proposed Rule, 89 FR 57318-57319.

Commerce explained in the preamble to the Proposed Rule that it has determined in past cases that a limitation of examination was warranted when a respondent had a large number of cross-owned input suppliers and examination of each of those input suppliers would have been unduly burdensome based on the record information and available resources.\259\

\259\ Id., 89 FR at 57319.

Commerce received several comments on this addition to the regulation from domestic industries and law firms asserting that Commerce's limitation of

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examination cross-owned companies was unnecessary, overly broad, and would likely result in inaccurate overall ad valorem subsidy rates because Commerce could not account for all countervailable benefits received by cross-owned companies if it limited the companies examined. Two commenters expressed concerns that respondents could avoid countervailable duties by separately incorporating dozens of affiliates and cross-owned entities assuming Commerce will excuse many of them on resource constraint grounds. Another commenter stated that such a limitation would be tantamount to allowing certain subsidies to go unremedied. That commenter asserted that Commerce could now consider transnational subsidy allegations after changes made to its regulations in March 2024, so it is even more important for Commerce to ensure that subsidies granted to all possible cross-owned entities are reflected in Commerce's CVD calculations. Yet another commenter claimed that the proposed change was not necessary because there are already restrictions on what entities Commerce considers to be cross-owned companies, and section 777A(c)(2) of the Act allows Commerce to limit the number of respondents it reviews in the first place.

In addition, several of the domestic industries commenting on this issue claimed that limiting the number of cross-owned entities examined would be inconsistent with the Act. One commenter noted that sections 701 and 775 of the Act instruct Commerce to countervail specific subsidies provided "directly or indirectly" to subject merchandise, including subsidies discovered during a proceeding, and not examining all of the cross-owned input suppliers would violate these provisions. Another commenter stated that section 777A(c)(2) of the Act may allow Commerce to limit respondents selected but does not further limit the cross-owned affiliates of a producer who may have subsidies which can be attributed to the producer.

Three commenters argued that if Commerce kept the limitation language they would prefer to be deleted in the regulation, the agency should also codify criteria on how it would select cross-owned companies for examination. They pointed to Commerce's current respondent selection methodology, which is now being codified at Sec. 351.109(c), as an example, and stated that Commerce should add additional clarification about the factors that Commerce will consider when determining which cross-owned corporations to examine. In that regard, one commenter requested that Commerce permit parties to submit public information regarding subsidies to each cross-owned company in question to ensure large subsidies provided to certain cross-owned entities are not left unexamined and take into consideration how significant an input is to the production of the subject merchandise when selecting cross-owned input suppliers or utility suppliers to examine.

Finally, one commenter suggested that if Commerce continues to retain this limitation language in the regulation, it should adopt a rebuttable presumption that unexamined cross-owned entities receive subsidies at a rate attributable to subject merchandise that is an average of the rates calculated with respect to examined cross-owned entities.

Response

After consideration of the comments on this issue, Commerce has determined to make no change to the proposed regulation. Some commenters downplayed Commerce's resource constraints, but in some cases Commerce lacks the resources to review every cross-owned entity in a given segment or proceeding. In fact, Commerce is sometimes faced with dozens of cross-owned entities to examine in CVD proceedings, but the public may be unaware of that fact if the names and number of cross-owned input suppliers, for example, are proprietary. For this reason, Commerce presumes that those commenters downplaying Commerce's resource constraints were unaware of such factual scenarios.

Commerce is tasked by Congress to be the administrator of the CVD law. Commerce disagrees with certain commenters that because the Act expressly allows Commerce to select respondents when the number of potential respondents is too large to examine, the Act does not also permit Commerce to limit examination of certain transactions or entities when resource constraints and the record supported such a limitation. Indeed, it is common for Commerce to limit the number of transactions \260\ or affiliated parties reviewed in a case when the facts on the record warrant such limitation.\261\ This should not be surprising to anyone who practices before Commerce-it is the normal authority given to a Federal agency in charge of administering an administrative proceeding.

\260\ See, e.g., 4th Tier Cigarettes from the Republic of Korea: Preliminary Affirmative Determination of Sales at Less Than Fair Value and Preliminary Negative Determination of Critical Circumstances, 85 FR 44281 (July 22, 2020), and accompanying issues and decision memorandum at 1 (explaining that "Commerce limited home market sales reporting requirements to two sales channels").

\261\ See, e.g., Countervailing Duty Investigation of Certain Cold-Rolled Steel Flat Products from the Russian Federation: Preliminary Affirmative Countervailing Duty Determination, Preliminary Negative Critical Circumstances Determination, and Alignment of Final Determination with Final Antidumping Determination, 80 FR 79564 (December 22, 2015), and accompanying preliminary decision memorandum at 2 (stating that "given the large number of NLMK's cross-owned affiliated input suppliers of scrap, it was not practicable to examine each of them. As such we determined to limit our examination to NLMK's two largest suppliers of scrap during the period of investigation").

Furthermore, the Act reflects that Commerce anticipated that Commerce could limit the number of cross-owned companies examined. By recognizing in section 777A(c)(2) of the Act that it may not be "practicable" for Commerce to examine every potential respondent "because of the large number of exporters or producers involved in an investigation or review," Congress clearly appreciated that Commerce has limited resources and therefore some restrictions must be necessary at times when the burden is too large for the task at hand. In certain, but not all, cases, this becomes an issue when Commerce is faced with a large number of cross-owned entities.

When Commerce examines cross-owned entities, such as cross-owned input suppliers, it must essentially conduct an additional, complete, investigation of the cross-owned entity or entities, including issuing questionnaires and supplemental questionnaires to examine the subsidies received by the cross-owned entities for purposes of attributing the subsidies received by the cross-owned entities to the respondent company. When Commerce has fully developed the record in this regard, it must then analyze the information and consider which of the attribution methodologies is

appropriate for effectuating the purpose of identifying the subsidies to the production and exportation of the subject merchandise. Moreover, the inclusion of cross-owned entities in Commerce's analysis expands Commerce's verification obligations, increasing the resources that Commerce must devote to fulfilling its statutory obligations regarding verification.

Commerce acknowledges that a general statement in the regulation that Commerce may limit the number of cross-owned corporations based on record information and resource availability does not provide guidance

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on how Commerce will select those entities. Commerce agrees that it should take into consideration how significant an input is to the production of the subject merchandise when identifying cross-owned input suppliers or other cross-owned entities that meet the criteria for attribution of subsidies (i.e., parent companies, producers of subject merchandise) and also agrees that as a normal practice, similar to its respondent selection methodology, Commerce should try to identify the biggest and most relevant cross-owned entities as part of that process. However, every case is factually different, as is every product, and in some cases the cross-owned input suppliers that provide the most important input might not also be the largest cross-owned input suppliers. Accordingly, Commerce disagrees that at this time Commerce should codify the process by which it will identify cross-owned entities in every case or provide a list of criteria that would either be too general to be useful or omit material criteria. Instead, the agency will explain its methodology on the record of each unique case in which it determines that the information before it and resource limitations will prevent Commerce from examining every cross-owned entity.

In response to the comment that Commerce should allow domestic industries in every case the opportunity to place public information on the administrative record regarding the subsidization of each cross-owned company in question to ensure that large subsidies are not left unexamined, that suggestion presumes that all of the cross-owned companies are publicly identified and that there is a reasonable number of cross-owned companies to allow for such an analysis. If, for example, there are 30 or 40 cross-owned companies, one can expect that the domestic industry would request that Commerce allow them an extensive amount of time to gather subsidy information. Commerce's investigations and reviews are restricted by statutory deadlines that cannot be met if Commerce sets forth procedures in the regulations that would lead to lengthy extensions. Accordingly, Commerce has determined not to codify a requirement in the regulation that allows interested parties to submit publicly available subsidy information on the cross-owned entities in every case. Instead, Commerce will determine whether to allow such a procedure on a case-by-case basis, and when it does, will likely need to convey to the interested parties that they only have a limited amount of time in which to submit such information.

Finally, Commerce has determined not to adopt a rebuttable presumption suggested by one commenter that unexamined cross-owned entities receive subsidies at a rate attributable to subject merchandise that is an average of the rates calculated with respect to examined cross-owned entities. Although Commerce has limited the number of cross-owned entities that it has reviewed in past cases, it has not done so with frequency, and thus lacks enough experience in limiting review of such entities to serve as the basis for such a presumption.

Trading Companies

Commerce is finalizing Sec. 351.525(c), which pertains to trading companies, as proposed.\262\ When Commerce first codified its trading company practice in 1998, trading companies were not selected as respondents in Commerce's investigations or administrative reviews. However, when Commerce started using CBP import data to identify the largest producers/exporters of subject merchandise for purposes of selecting respondents, Commerce discovered that in many cases, the largest exporters were trading companies. Commerce used the 1998 trading company regulation to cumulate the subsidies provided to the trading company with those provided to the producers from which the trading company has sourced the subject merchandise that it exported to the United States but did not set forth a detailed methodology.\263\ To provide consistency and clarity with respect to its cumulation methodology when a trading company is selected as a respondent, Commerce is now adding this methodology to the trading company regulation as proposed.

\262\ See Proposed Rule, 89 FR at 57319.

\263\ Commerce's practice of cumulating subsidies provided to trading companies with the subsidies provided to the producer of subject merchandise began in 1984 with the Final Affirmative Countervailing Duty Determination; Oil Country Tubular Goods from Korea, 49 FR 46776, 46777 (November 28, 1984). When Commerce codified this practice in Commerce's current CVD regulations

in 1998, Commerce did not set forth a detailed methodology but stated that the subsidy benefits provided to trading companies would be cumulated with the subsidy benefits provided to the producer of the subject merchandise. See 1998 CVD Regulations, 63 FR at 65404. The preamble to the trading company regulation did not provide guidance as to how these subsidy benefits were to be cumulated. Id. While this approach provided Commerce with some flexibility as to how the subsidy benefits provided to trading companies were to be cumulated with the subsidy benefits conferred to the producer of subject merchandise, this lack of clarity in the language of the regulation also led to inconsistencies in the application of the methodology.

In Sec. 351.525(c)(i) through (iii), Commerce has included language stating that when the producer of subject merchandise exports through a trading company, Commerce will pro-rate the subsidy rate calculated for the trading company by using the ratio of the producer's total exports of subject merchandise to the United States sold through the trading company to the producer's total exports of subject merchandise to the United States and add the resultant rate to the producer's calculated subsidy rate. If the producer exports subject merchandise to the United States through more than one trading company, this calculation would be performed for each trading company and added, or cumulated, to the producer's calculated subsidy rate. This modification to the regulation provides consistency in the application of the trading company regulation and provides clarity to the public with respect to this practice.\264\

\264\ See, e.g., Certain Cold-Rolled Steel Flat Products from the Republic of Korea: Final Results of Countervailing Duty Administrative Review, 2019, 87 FR 20821 (April 8, 2022), and accompanying Issues and Decision Memorandum at Comment 6.

Commerce received a comment requesting that we modify the proposed language for this provision. The commenter suggested that in situations where the trading company is cross-owned with the producer of the subject merchandise, the Secretary should use a trading company ratio of one to cumulate the subsidies provided to the trading company instead of pro-rating the subsidy rate calculated for the trading company by using the ratio of the producer's total exports of subject merchandise to the United States sold through the trading company divided by the producer's total exports of subject merchandise to the United States. The commenter stated that the use of a trading company ratio of one would be consistent with Commerce's obligation pursuant to section 701(a) of the Act to establish an ad valorem rate equal to the countervailable subsidies conferred on the subject merchandise.

Commerce has not adopted this suggestion because the use of a trading company ratio of one would, in fact, be inconsistent with Commerce's obligation pursuant to section 701(a) of the Act to establish an ad valorem rate equal to the countervailable subsidies conferred on the manufacture, production, and export of subject merchandise because the full amount of the calculated subsidies conferred upon the trading company would be cumulated or added onto the subsidy

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rate calculated for the producer/respondent.

For example, assume that a producer/respondent exports all its subject merchandise to the United States through four cross-owned trading companies, one-fourth (25 percent) of its exports go through each of the four cross-owned trading companies, and each of the four trading companies has a calculated subsidy rate of two percent. Therefore, because each cross-owned trading company has a calculated subsidy rate of two percent, every export of subject merchandise to the United States by the producer/exporter through any of these trading companies would be subsidized by two percent at the trading company level.

Under the methodology that Commerce is codifying under this regulation, the agency in determining the trading company subsidy rate that will be cumulated (added onto) the producer's rate will be determined by pro-rating the subsidy rate calculated for the trading company by using the ratio of the producer's total exports of subject merchandise to the United States sold through the trading company divided by the producer's total exports of subject merchandise to the United States. Thus, in the example above, because 25 percent of the producer's exports of subject merchandise to the United States is exported through each of the four cross-owned trading companies, Commerce will calculate 0.25 of the two percent subsidy rate calculated for each of the four trading companies (2.00 x 0.25 = 0.50). It will then take this pro-rated subsidy amount of

0.50 calculate for each of the four trading companies and add each of the amounts onto the producer's CVD rate. Adding the calculated 0.50 subsidy rate four times to account for each of the trading companies will derive a total of two percent that will be cumulated (added) onto the producer's calculated subsidy rate to reflect the additional subsidies conferred on the exports of subject merchandise to the United States at the trading company level. This calculation methodology that Commerce is codifying in this regulation accurately calculates the level of trading company subsidies.

Under the proposal to use a ratio of one for this calculation, the full amount of the calculated subsidy rate for each of the four cross-owned trading companies would be cumulated and added onto the subsidy rate even though each of the four cross-owned trading company only exported 25 percent of the producer's total exports of subject merchandise to the United States. Instead of the correct ratio used by Commerce under this regulation, which is 0.25 percent, the proposal by this commenter to use a ratio of one assumes that each of the four trading companies exported 100 percent of the producer's exports of subject merchandise to the United States. This ratio would result in the full two percent subsidy rate calculated for each of the four trading companies to be separately added onto the producer's subsidy rate. Thus, the calculation proposed by this commenter would be: two multiplied by one, plus two multiplied by one, plus two multiplied by one, plus two multiplied by one, equals eight, (2 x 1 + 2 x 1 + 2 x 1 + 2 x 1 = 8). Therefore, under this party's proposed methodology, Commerce would add an additional subsidy rate of eight percent onto the producer/respondent's subsidy rate instead of the accurate two percent because each of the four cross-owned trading companies had an individual subsidy rate that was calculated at two percent. In other words, although the CVD rate determined for each entity was two percent, in the end under the proposed calculation, Commerce would have to cumulate those rates four times because there were four trading companies and would thus apply an additional eight percent subsidy rate onto the calculated producer's subsidy instead of the accurately calculated two percent rate. Such a calculation is inconsistent with the directive of section 701(a) of the Act to establish an ad valorem rate equal to the countervailable subsidies conferred on the subject merchandise. Accordingly, Commerce has not adopted this proposal in the final rule.

That commenter also claims that pro-rated ratios for attribution under this regulation are contrary to the well-established concept of control of corporate decisions between cross-owned companies, as the trading company (exporter) and producer should be considered the same corporate entity. However, the comment appears to be based on a misinterpretation of the attribution rules set forth in Sec. 351.525. The paragraph of that regulation addressing corporations with cross-ownership, Sec. 351.525(b)(6), specifies specific criteria for the types of cross-owned companies that would fall within this cross-ownership subsection of our attribution regulation; and the attribution regulations are clear that not all cross-owned companies, even cross-owned input producers, would fall within Sec. 351.525(b)(6).\265\

\265\ See, e.g., 1998 CVD Regulations, at 63 FR 65401.

More importantly, Commerce's trading company regulation and methodology is not part of the cross-owned attribution rules found at Sec. 351.525(b)(6) because the attribution of subsidies conferred upon trading companies is not based upon cross-ownership; instead, it is based upon the requirements set forth within section 701(a) of the Act that Commerce must determine the amount of countervailable subsidies conferred upon the manufacture, the production, and the exportation of subject merchandise. Therefore, Commerce's trading company regulation is derived from the statutory requirement to determine the amount of countervailable subsidies on the exportation of subject merchandise and was not derived from the concept of cross-ownership. Indeed, Commerce first implemented its trading company methodology in 1984,\266\ a full decade before contemplating the attribution of subsidies from affiliated or cross-owned companies.

\266\ See Final Affirmative Countervailing Duty Determination: Oil Country Tubular Goods from Korea, 49 FR 46776 (November 28, 1984).

Ad Valorem Subsidy Rate in Countries With High Inflation

With respect to Sec. 351.525(d), Commerce has observed instances where the country whose imports were the subject of investigation or review was experiencing high inflation during either the

POI or POR or had experienced levels of high inflation during the AUL period of the firm's renewable physical assets when the government had provided large non-recurring subsidies such as equity infusions to the respondent company. In those cases, Commerce addressed the high inflation rate to prevent distortions in the calculated ad valorem subsidy rate. However, the agency's treatment of high inflation has been inconsistent. For example, in cases on CTL Plate from Mexico in 2000, 2001, and 2004,\267\ Turkish Pasta \268\ in 2001, Steel Wire

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Rod from Turkey \269\ in 2002, Cold-Rolled Steel from Brazil \270\ in 2002, and CTL Plate from Mexico Reviews \271\ in 2004, Commerce made adjustments to its subsidy calculations to account for periods of high inflation but did not do so in Honey from Argentina \272\ in 2004 and Biodiesel from Argentina \273\ in 2017.\274\ Therefore, to clarify its practice and to improve consistency as to when the agency will adjust its subsidy calculations for high inflation, Commerce proposed new paragraph Sec. 351.525(d) in the Proposed Rule to provide that Commerce would normally adjust its subsidy calculations for when inflation is higher than 25 percent per annum during the relevant period.\275\ Commerce received only comments in support of this provision, so is now codifying it in this final rule. Commerce has used a variety of methodologies to account for high inflation and Sec. 351.525(d) will allow for any of them to be used in the appropriate context. Consistent with Steel Wire Rod from Turkey, Commerce is defining "high inflation" as an annual inflation rate above 25 percent.

\267\ See Certain Cut-to-Length Carbon Steel Plate from Mexico: Final Results of Administrative Review, 65 FR 13368 (March 13, 2000) (CTL Plate from Mexico 2000), and accompanying Issues and Decision Memorandum at 3-4; see also Certain Cut-to-Length Carbon Steel Plate from Mexico: Final Results of Administrative Review, 66 FR 14549 (March 13, 2001) (CTL Plate from Mexico 2001), and accompanying Issues and Decision Memorandum at 5-6; and Certain Cut-to-Length Carbon Steel Plate from Mexico: Final Results of Administrative Review, 69 FR 1972 (January 13, 2004) (CTL Plate from Mexico 2004) (CTL Plate from Mexico 2004), and accompanying Issues and Decision Memorandum at 4.

\268\ See Certain Pasta from Turkey: Final Results of Countervailing Duty Administrative Review, 66 FR 64398 (December 13, 2001), and accompanying Issues and Decision Memorandum at 3.

\269\ See Final Negative Countervailing Duty Determination: Carbon and Certain Alloy Steel Wire Rod from Turkey, 67 FR 55815 (August 30, 2002), and accompanying Issues and Decision Memorandum at 3 (Steel Wire Rod from Turkey).

\270\ See Final Affirmative Countervailing Duty Determination: Certain Cold-Rolled Carbon Steel Flat Products from Brazil, 67 FR 621128 (October 3, 2002), and accompanying Issues and Decision Memorandum (Cold-Rolled Carbon Steel Flat Products from Brazil) at 7.

\271\ See CTL Plate from Mexico 2000 Issues and Decision Memorandum at 3-4; see also CTL Plate from Mexico 2001 Issues and Decision Memorandum at 5-6; and CTL Plate from Mexico 2004 Issues and Decision Memorandum at 4.

\272\ See Honey from Argentina: Final Results of Countervailing Duty Administrative Review, 69 FR 29518 (May 24, 2004) (Honey from Argentina), and accompanying Issues and Decision Memorandum (making no adjustments to account for high inflation).

\273\ See Biodiesel from the Republic of Argentina: Final Affirmative Countervailing Duty Determination, 82 FR 53477 (November 16, 2017) (Biodiesel from Argentina), and accompanying Issues and Decision Memorandum (making no adjustments to account for high inflation).

\274\ Neither Honey from Argentina nor Biodiesel from Argentina reference high inflation in Argentina, although the companion antidumping cases completed at the same time made adjustments to account for high inflation. See Honey from Argentina: Final Results of Antidumping Duty Administrative Review, 69 FR 30283 (May 27, 2004), and accompanying Issues and Decision Memorandum at Comment 4; see also Biodiesel from Argentina: Final Determination of Sales at Less Than Fair Value and Final Affirmative Determination of Critical Circumstances, in Part, 83 FR 8837 (March 1, 2018), and accompanying Issues and Decision Memorandum at Comment 6.

\275\ See Proposed Rule, 89 FR at 57319-57320.

In Steel Wire Rod from Turkey, the annual inflation rate in Turkey exceeded 25 percent during the POI. Therefore, to prevent any distortions in its calculated subsidy rate due to the high level of inflation, Commerce adopted a methodology to adjust for inflation during the POI. Adjusting the subsidy benefits and the sales figures for inflation neutralizes any potential distortion in Commerce's

subsidy calculations caused by high inflation and the timing of the receipt of the subsidy. To calculate the ad valorem subsidy rates for each program Commerce indexed the benefits received in each month and the sales made in each month to the last year of the POI/POR to calculate inflation-adjusted values for benefits and the relevant sales denominators. In these high inflation calculation adjustments, Commerce used the changes in the Wholesale Price Index for Turkey as reported in the IMF's International Financial Statistics. In other cases where a country was experiencing high inflation, the agency used government-published indexes that are used by companies to adjust their accounting records on a monthly basis in its analysis.\276\

\276\ See, e.g., Final Affirmative Countervailing Determination; Steel Wheels from Brazil, 54 FR 15523, 15526 (April 18, 1989).

Commerce has also investigated non-recurring subsidies, normally the provision of equity, where the provision of the subsidy occurred during a period within the AUL in which the country experienced high inflation. The issue before Commerce in those cases was how to account for the periods of high inflation to accurately calculate the benefit. In Cold-Rolled Steel from Brazil, Commerce found that from 1984 through 1994, Brazil experienced persistent high inflation.\277\ There were no long-term fixed-rate commercial loans made in domestic currencies during those years with interest rates that could be used as discount rates. Commerce determined that the most reasonable way to account for the high inflation in the Brazilian economy through 1994, given the lack of an appropriate Brazilian currency discount rate, was to convert values of the equity infusions provided in Brazilian currency into U.S. dollars.\278\ If the date of receipt of the equity infusion was provided, Commerce applied the exchange rate applicable on the day the subsidies were received or, if that date was unavailable, the average exchange rate in the month the subsidies were received.\279\ Then Commerce applied as the discount rate a contemporaneous long-term dollar lending rate in Brazil.\280\ Therefore, for Commerce's discount rate, it used data for U.S. dollar loans in Brazil for long-term, non-guaranteed loans from private lenders, as published in the World Bank Debt Tables: External Finance for Developing Countries.\281\

\277\ See, e.g., Cold-Rolled Carbon Steel Flat Products from Brazil at 7.
\278\ Id.
\279\ Id.
\280\ Id.
\281\ Id.

In three reviews of CTL Plate from Mexico, Commerce determined, based on information from the Government of Mexico (GOM), that Mexico experienced significant inflation from 1983 through 1988 and significant, intermittent inflation during the period 1991 through 1997.\282\ In accordance with past practice, because Commerce found significant inflation in Mexico and because the respondent AHMSA adjusted for inflation in its financial statements, Commerce made adjustments, where necessary, in each of those reviews to account for inflation in the benefit calculations.\283\ Because Mexico experienced significant inflation during only a portion of the 15-year allocation period, had Commerce either indexed for the entire period or converted the non-recurring benefits into U.S. dollars at the time of receipt (i.e., dollarization) for use in Commerce's calculations, such actions would have inflated the benefit from these infusions by adjusting for inflationary as well as non-inflationary periods. Thus, in the CTL Plate from Mexico \284\ reviews, Commerce used a loan-based methodology instead to reflect the effects of intermittent high inflation.

\282\ See CTL Plate from Mexico 2000 Issues and Decision Memorandum at 3-4; see also CTL Plate from Mexico 2001 Issues and Decision Memorandum at 5-6; and CTL Plate from Mexico 2004 Issues and Decision Memorandum at 4.

\283\ See CTL Plate from Mexico 2000 Issues and Decision Memorandum at 3-4; see also CTL Plate from Mexico 2001 Issues and Decision Memorandum at 5-6; and CTL Plate from Mexico 2004 Issues and Decision Memorandum at 4.

\284\ See CTL Plate from Mexico 2000 Issues and Decision Memorandum at 3-4; see also CTL Plate from Mexico 2001 Issues and Decision Memorandum at 5-6; and CTL Plate from Mexico 2004 Issues and Decision Memorandum at 4.

The methodology Commerce used in the CTL Plate from Mexico reviews assumed that, in lieu of a government equity infusion/grant, a company would have had to take out a 15-year loan that was rolled over each year at the prevailing nominal interest rate. The benefit in each year of the 15-year period equaled the principal plus interest payments associated with the loan at the nominal interest rate prevailing in that year. Because Commerce assumed that an equity infusion/grant given was equivalent to a

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15-year loan at the current rate in the first year, a 14-year loan at current rates in the second year and so on, the benefit after the 15-year period would be zero, just as with Commerce's grant amortization methodology. Because nominal interest rates were used, the effects of inflation were already incorporated into the benefit. The use of this methodology had been upheld by the Federal Circuit in British Steel III.\285\ Commerce used the loan-based methodology in the CTL Plate from Mexico reviews, described above, for all non-recurring, peso-denominated grants received since 1987.

\285\ British Steel plc v. United States, 127 F.3d 1471 (Fed. Cir. 1997) (British Steel III).

It is Commerce's intent that Sec. 351.525(d) will provide enhanced consistency in the treatment of economies experiencing high inflation. To implement this methodology for countries experiencing high inflation during the POI or POR, Commerce normally will follow the methodology used in Steel Wire Rod from Turkey. For cases where the high inflation occurred during the AUL period at the time of a provision of equity or other nonrecurring subsidies, Commerce may rely on the methodology employed in CTL Plate from Mexico or Cold-Rolled Steel from Brazil.

24. Commerce has Made Certain Revisions to Proposed Sec. 351.526, the Regulation Covering Subsidy Extinguishment From Changes in Ownership

Under current Sec. 351.526, Commerce may consider a program-wide change to lower the cash deposit rate from the subsidy rate that was calculated for the firm during the POI or POR in establishing an estimated countervailing duty cash deposit rate if certain conditions are met. While program-wide changes that result in the adjustment of the cash deposit rate are extremely rare, Commerce has eliminated the program-wide change regulation because it treats differently the interests of the interested parties by providing an avenue only for respondent-interested parties to lower the cash deposit rate but no comparable avenue for the U.S. industry, a situation that Commerce has concluded is fundamentally unfair and at odds with the neutral application of the countervailing duty law. Moreover, nothing in the Act requires the practice of recognizing a program-wide change for this purpose. Indeed, section 705(c)(1)(B)(ii) of the Act indicates that the cash deposit rate shall be based on the estimated countervailable subsidy rate and makes no reference to exceptions for changes of any sort to such subsidy programs.

The only comments Commerce received on this change supported the elimination of the program-wide change regulation. Furthermore, in deleting the program-wide changes regulation, Commerce is not seeking to change its practice with respect to determining when an investigated program is terminated. Commerce will maintain its long-standing practice to find a program to be terminated only if the termination is effectuated by an official act, such as the enactment of a statute, regulation, or decree, or the termination date of the program is explicitly set forth in the statute, regulation, or decree that established the program.\286\

\286\ See Drawn Stainless Steel Sinks from the People's Republic of China: Final Results of the Expedited First Sunset Review of the Countervailing Duty Order, 83 FR 35212 (July 25, 2018), and accompanying Issues and Decision Memorandum at "Likelihood of Continuation or Recurrence of a Countervailable Subsidy" ("[I]n order to determine whether a program has been terminated, we will consider the legal method by which the government eliminated the program and whether the

government is likely to reinstate the program. Commerce normally expects a program to be terminated by means of the same legal mechanism used to institute it. Where a subsidy is not bestowed pursuant to a statute, regulation or decree, Commerce may find no likelihood of continued or recurring subsidization if the subsidy in question was a one-time, company-specific occurrence that was not part of a broader government program.").

Moreover, Commerce will continue its practice of investigating terminated programs that potentially provided a benefit during the POI or POR. For example, if Commerce was reviewing a company during a POR with a calendar year of 2023, but during the underlying CVD investigation Commerce found that a program providing grants for the purchase of capital equipment was terminated in 2016, Commerce might still include this terminated program in the 2023 administrative review if the AUL, and therefore the benefit stream of the grant, lasted to or beyond the review period. Depending on the AUL, under this practice Commerce would continue to include that program in all future administrative reviews until the non-recurring benefit was fully allocated.

In the place of the removed Sec. 351.526, Commerce proposed adding a new regulation that would address subsidy extinguishment from changes in ownership.\287\ After considering comments on this regulation, Commerce has determined to finalize it with some revisions. Section 771(5)(f) of the Act provides that a change in ownership of all or part of a foreign enterprise or the productive assets of a foreign enterprise does not, by itself, require a determination that a past countervailable subsidy received by the enterprise no longer continues to be countervailable, even if the change in ownership is accomplished through an arm's length transaction. The SAA explains that "the term 'arm's-length transaction' means a transaction negotiated between unrelated parties, each acting in its own interest, or between related parties such that the terms of the transaction are those that would exist if the transaction had been negotiated between unrelated parties." \288\ In addition, the SAA states that "[s]ection 771(5)(F) is being added to clarify that the sale of a firm at arm's length does not automatically, and in all cases, extinguish any prior subsidies conferred" because the "issue of the privatization of a state-owned firm can be extremely complex and multifaceted." \289\

\287\ See Proposed Rule, 89 FR at 5732-57322.

\288\ See SAA at 258.

\289\ Id. ("While it is the Administration's intent that Commerce retain the discretion to determine whether, and to what extent, the privatization of a government-owned firm eliminates any previously conferred countervailable subsidies, Commerce must exercise this discretion carefully through its consideration of the facts of each case and its determination of the appropriate methodology to be applied.").

Consistent with the Act and SAA, and against a broader background of domestic litigation and WTO dispute settlement findings, in 2003 Commerce published a modification to its change-in-ownership methodology (CIO Modification Notice) for sales by a government to private buyers (i.e., privatizations).\290\ In a subsequent CVD proceeding in 2004 involving pasta from Italy, Commerce extended that methodology to address sales by a private seller to a private buyer (private-to-private sales).\291\ The agency has implemented the methodology set forth in Pasta From Italy in numerous CVD proceedings since.

\290\ See Notice of Final Modification of Agency Practice Under Section 123 of the Uruguay Round Agreements Act, 68 FR 37125 (June 23, 2003) (CIO Modification Notice).

\291\ See Certain Pasta from Italy: Final Results of the Seventh Countervailing Duty Administrative Review, 69 FR 70657 (December 7, 2004) (Pasta from Italy), and accompanying Issues and Decision Memorandum at 2-5.

Commerce is now codifying that methodology in Sec. 351.526(a), which establishes the presumption that non-recurring subsidies continue to benefit a recipient in full over an allocation period determined consistent with Commerce's regulations,\292\ notwithstanding an intervening change in ownership. However, under Sec. 351.526(b), the recipient is able to rebut the presumption of the existence

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of the subsidy by demonstrating with sufficient evidence that a change in ownership occurred in which the seller sold all (or substantially all) of its company assets, retained no control of the company and its assets, and, in the case of government-to-private sales, that the sale was either at an arm's length transaction for fair market value, or, in the case of a private-to-private sale, was an arm's-length transaction and no one demonstrated that the sale was not for fair market value.

\292\ See Sec. 351.524.

Section 351.526(b)(2) and (3) set forth the factors Commerce considers in determining whether the transactions at issue were conducted at arm's-length and for fair market value. In determining if the transactions were for fair market value, proposed Sec. 351.526(b)(3)(ii) sets forth a non-exhaustive list of considerations including (1) whether the seller performed or obtained an objective analysis in determining the appropriate sales price and implemented recommendations pursuant to an objective analysis for maximizing its return on the sale; (2) whether the seller imposed restrictions on foreign purchasers or purchasers from other industries, overly burdensome or unreasonable bidder qualification requirements, or any other restrictions that artificially suppressed the demand for or the purchase price of the company; (3) whether the seller accepted the highest bid reflecting the full amount that the company or its assets were actually worth under the prevailing market conditions and whether the final purchase price was paid through monetary or close equivalent compensation; and (4) whether there were price discounts or other inducements in exchange for promises of additional future investment that private, commercial sellers would not normally seek and, if so, whether such committed investment requirements were a barrier to entry or in any way distorted the value that bidders were willing to pay.

Section 351.526(b)(4) states that Commerce will not find the presumption of continued benefits during the POR to be rebutted if an interested party has demonstrated that, at the time of the change in ownership, the broader market conditions necessary for the transaction price to accurately reflect the subsidy benefit were not present or were severely distorted by government action or inaction such that the transaction price was meaningfully different from what it would have been absent the distortive government action or inaction. Section 351.526(b)(i) and (ii) provide that Commerce may consider certain fundamental conditions and legal and fiscal incentives provided by the government in reaching this determination.

Finally, Sec. 351.526(c) addresses the situation in which an interested party has rebutted the presumption of continued benefits during the POR. In that case, the full amount of pre-transaction subsidy benefits, including the benefits of any concurrent subsidy meeting certain criteria, would be found to be extinguished and therefore not countervailable. Under Sec. 351.526(c)(2), concurrent subsidies would be defined as "subsidies given to facilitate, encourage, or that are otherwise bestowed concurrent with a change in ownership." The same provision provides three criteria that Commerce normally will consider in determining if the value of a concurrent subsidy has been fully reflected in the fair market value prices of an arm's-length change in ownership and is therefore fully extinguished.

Commerce received multiple comments on this regulation, including those that agreed with codifying Commerce's existing practice in this area in full, as proposed. One commenter noted that establishing a rebuttable presumption that non-recurring subsidies continue to provide a benefit over the allocation period notwithstanding changes in ownership through government-to-private or private-to-private sales is an effective way to address the issue, since respondents are in the best position to provide the information needed to show whether or not recipients continue to benefit from a subsidy after a change in ownership.

Another commenter suggested that Commerce should clarify certain procedural requirements for parties seeking to challenge Commerce's baseline presumption. Noting concerns regarding respondents' questionnaire responses, the commenter suggested that Commerce should clarify that the agency will not consider extinguishment arguments in the absence of timely disclosure in the initial questionnaire of a relevant change in ownership and an intent to challenge the baseline presumption, followed by complete responses to the change-in-ownership appendix from both the respondent and the foreign government. The commenter stated that this denial of consideration of extinguishment arguments should apply in that situation whether or not Commerce has found any non-recurring subsidies in previous segments of the proceeding.

This commenter also suggested that to address situations in which the foreign government undertakes a program of debt forgiveness in order to make otherwise non-viable assets viable and

thereby enable the acquisition and continued operation of production capacity that would otherwise have been forced to exit the market, Commerce should add a fourth enumerated incentive, as Sec. 351.526(b)(4)(ii)(D), for "the forgiveness or modification of debts or other liabilities by government-owned or directed financial institutions."

A third commenter stated that Commerce should modify Sec. 351.526(c)(1) to clarify that finding that a program has been extinguished does not affect whether a program is countervailable prior to the change in ownership and therefore the program should still be countervailed and attributed to sales made prior to the change in ownership.

For concurrent subsidies, another commenter stated that Commerce should modify the identified criteria regarding extinguishment to address subsidies bestowed prior to initiation of the bidding process instead of prior to a sale because basing a determination for concurrent subsidies on whether the subsidy was bestowed prior to sale would allow parties to manipulate the analysis based on when the sale occurred.

A fifth commenter stated that the rebuttal presumption, articulated in Sec. 351.526(a)(1) that Commerce will presume that non-recurring subsidies continue to benefit a recipient in full over an allocation period . . . notwithstanding an intervening change in ownership-is not required by Act and should be more specifically restricted by distinguishing between transactions involving a government-to-private sale or a private-to-private sale. That commenter stated that private-to-private sales do not require the same scrutiny, since those transactions are more than likely to be at arm's length. Thus, when a party has demonstrated that it has satisfied Sec. 351.526(b)(1), by showing that (i) the seller retains no control of the company or assets, and (ii) the sale was at arm's length, the commenter stated that Commerce's inquiry should end. According to the commenter, this approach is consistent with Sec. 351.526(b)(1)(ii), which states that the burden should be on the petitioning party with sufficient evidence that the sale was not for fair market value. The commenter stated that this approach should be reflected in Commerce's "Change-in-ownership

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appendix" and any other practice that addresses change in ownership.

Finally, a sixth commenter expressed concerns that the non- exhaustive factors Commerce may consider in analyzing market distortion's effect on the presumption of continued benefits articulated in Sec. 351.526(b)(4), are overly broad and ill-defined. That commenter suggested that Commerce should promulgate a more detailed standard to define the level of "severely distorted" and what constitutes a "properly functioning market." Further, that commenter expressed concerns about any arbitrary interpretation of distortion from country to country based on each country's regulatory environment.

Response

As an initial matter, some of the comments Commerce received on this regulation were similar to the comments Commerce received when promulgating its CIO Modification Notice, and therefore Commerce refers the public to that notice, as well, for an in-depth discussion of this methodology.\293\

\293\ See CIO Modification Notice, 68 FR at 37125.

With respect to the specific comments on the regulation as proposed, Commerce agrees in part with the comment that the agency should clarify that it will not consider extinguishment arguments in the absence of timely disclosure in the initial questionnaire of a relevant change in ownership and an intent to challenge the baseline presumption followed by complete responses to the change-in-ownership appendix from both the respondent and the foreign government and should apply this denial of consideration of extinguishment arguments whether or not Commerce has found any non-recurring subsidies in previous segments of the proceeding. Specifically, Commerce agrees with the general principle that it is important that other interested parties in a case have adequate time to evaluate the information and claims in such a rebuttal to defend their interests, including demonstrating under Sec. 351.526(b)(5) that certain market distortions exist. Accordingly, Commerce has added a provision to Sec. 351.526(b)(4) that makes clear that the agency will normally require that such rebuttals be included in a respondent's initial questionnaire response.

Commerce emphasizes, however, that there may be instances where such a requirement is not appropriate, in recognition of the fact that the provision of complete information regarding complex changes in ownership, including a full response to the change-in-ownership appendix that forms part of Commerce's current standard questionnaire, can be a very resource-intensive exercise. Consider the hypothetical example of an investigation where none of the subsidy programs under investigation at the time of the initial questionnaire responses were non-recurring subsidies provided prior to a change in ownership and, therefore, a change in ownership during the AUL would normally be irrelevant to Commerce's analysis of subsidy benefits during the POI. If Commerce were to subsequently initiate on and include new subsidy allegations involving non-recurring subsidies in that investigation after the deadline for the respondent's initial questionnaire response, it would normally be appropriate to allow the respondent additional time to provide its rebuttal in light of the new potential relevance of a change in ownership. Similar situations may arise involving administrative reviews. Under those and similar circumstances, Commerce would consider what alternative deadlines for such a rebuttal are appropriate with a view to ensuring that all interested parties have an opportunity to present relevant evidence and fully defend their interests. Finally, to accommodate the addition of this new deadline to the regulations at Sec. 351.526(b)(4), we have moved the market distortions that appeared at Sec. 351.526(b)(4) in the proposed regulations to a new paragraph at Sec. 351.526(b)(5).

Commerce disagrees that adding Sec. 351.526(b)(4)(ii) to explicitly address situations in which the government undertakes a program of debt forgiveness in order to make otherwise non-viable assets viable and thereby enables the acquisition and continued operation of production capacity that would otherwise have been forced to exit the market is necessary. First, the regulation already makes clear that the factors noted in Sec. 351.526(b)(4)(i) and (ii) are not exhaustive, and, as such, parties are free to include other considerations in their arguments that they can demonstrate are relevant under this provision. Second, the relevance of the types of debt forgiveness to which this commenter refers may be more appropriately considered as a concurrent subsidy under Sec. 351.526(c)(2) depending on the particular facts and circumstances of the change in ownership.\6\ Finally, for over 20 years Commerce has applied the basic methodology set forth in the Proposed Rule, and that experience has not suggested that commenter's expressed concerns are a significant or recurring problem. Accordingly, Commerce has determined that such a change to the regulation is neither necessary nor appropriate.

With respect to the comment that Commerce should modify proposed Sec. 351.526(c)(1) to clarify that a finding that a program has been extinguished does not affect whether a program is countervailable prior to the change in ownership, Commerce has concluded that the regulation is sufficiently clear in this regard. However, for the sake of additional certainty, Commerce notes here that, if a subsidy program was countervailable prior to the change in ownership, that benefit (i.e., the benefit generated prior to the change in ownership) would still be countervailed and attributable to sales made prior to the change in ownership under the language of Sec. 351.526(c)(1).

One commenter raised a concern that basing a determination on whether a concurrent subsidy was bestowed "prior to sale" would allow parties to manipulate this analysis based on its consideration of when the sale occurred and that this could also permit the provision of a subsidy after the completion of the bidding process but before the finalized sale has occurred. Commerce disagrees and concludes that the language of Sec. 351.526(c)(2) is sufficiently flexible and robust to address the scenarios of concern that this commenter raises. In particular, the provisions in Sec. 351.526(c)(2)(i) and (iii) ensure that all concurrent subsidies are reflected in the transaction price. Moreover, Commerce's experience does not suggest that the commenter's concern here is a significant or recurring problem.

Moreover, Commerce disagrees with the commenter that stated that private-to-private sales should not require the same scrutiny as government-to-private sales, since the former transactions are more than likely to be at arm's length. According to this commenter, when a party has demonstrated that it has satisfied Sec. 351.526(b)(1) by showing that (i) the seller retains no control of the company or assets, and (ii) the sale was at arm's length, Commerce's inquiry should end, or at least that the burden should be on the petitioning party to provide sufficient evidence that the sale was not for fair market value. In practice, according to this commenter, this should mean that the respondent company or government should not be required to provide information which speaks to whether a private-to-private transaction was at fair market value.

Commerce does not agree with the commenter's conclusions in this regard.

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As Commerce explained in response to similar comments in the CIO Modification Notice,\294\ in the normal course of an investigation or review, Commerce will usually issue a questionnaire that solicits basic information about a change in ownership, as well as the broader market conditions in which that transaction took place. In instances where a party (normally the respondent company) wishes to rebut the baseline presumption that non-recurring subsidies continue to benefit a recipient in full over an allocation period in light of an intervening change in ownership, that party will need to provide a response to Commerce's change in ownership questionnaire. Accordingly, as much of the necessary information to analyze such a fact-intensive transaction (regardless of whether it is government-to-private or a private-to-private) is in the possession of the respondent company and/or government, that company or government will necessarily bear the burden of providing the necessary information, as is the case with most factual questions that Commerce must consider in the course of a countervailing duty proceeding.

\294\ Id., 68 FR at 37129.

Commerce's methodology does make an importance distinction between government-to-private sales and private-to-private sales, however, in that for the latter type of transaction, where a party has demonstrated the seller sold its ownership of all or substantially all of a company or its assets, retaining no control of the company or its assets, and the sale was an arm's-length transaction, the onus is on the petitioner to demonstrate based on the information provided by the respondent and government, in addition to information the petitioner might otherwise place on the record, that the transaction was not for fair market value.

Commerce also disagrees that the standards articulated in Sec. 351.526(b)(4), which includes the non-exhaustive factors Commerce may consider in analyzing market distortion's effect on the presumption of continued benefits, are overly broad and ill-defined and require a more detailed standard to define the level of "severely distorted" and what constitutes a "properly functioning market." Commerce responded to similar concerns 20 years ago in the CIO Modification Notice, stating that "[w]ith regard to the comment that the facts we have listed as potentially relevant are too broad, we disagree," because Commerce believed that it was "important to leave room for flexibility in this analysis and not to circumscribe artificially or prematurely the nature of the factors that could be found to distort a market." \295\ Commerce explained that "such distortions can be specific to the unique circumstances of particular countries or markets, and it is especially difficult for the Department to foresee at this time all of the factors that may be relevant to this analysis, particularly without obtaining more experience in this area." \296\ Therefore, Commerce stated that it intended "that this analysis will be conducted on a case-by-case basis, and that we will be able to refine such analysis over time building on our accumulated experience." \297\

\295\ Id. at 37135.
\296\ Id.
\297\ Id.

Commerce acknowledged in the CIO Modification Notice that there are no perfect markets, and therefore Commerce must, on a case-by-case basis, focus only on distortions that might make a meaningful impact. Commerce explained that it recognized "that perfect markets seldom exist outside of economics textbooks," and that it did not "intend to 'fail' a privatization merely because the broader environment in which it took place did not perfectly conform to some market paradigm." \298\ Instead, it explained that it would "be balanced and realistic" in its analysis, "focusing on those severe distortions that would have a meaningful impact on the transaction in question." \299\

\298\ Id.
\299\ Id.

Based on the 20 years of experience which Commerce has had in applying the factors set forth in the CIO Modification Notice, including the factors that can inform a market distortions analysis, Commerce finds that the analysis and stated expectations it set forth then remain sound and still

applicable today. While the number of proceedings in which parties have attempted to make a market distortions claim during the intervening period have been relatively few, they have shown that the level of detail and particularity characterizing Commerce's list of broader market distortion factors continue to strike the appropriate balance between being too narrow (such that the factors are largely in applicable to the circumstances in a given country across the more than 20 countries for which Commerce currently maintains a CVD order) and too broad (such that parties are confused about the type of evidence that might be relevant in a given case). Accordingly, Commerce has concluded no further narrowing or broadening of the criteria in the regulation is necessary or appropriate at this time.

25. The Elimination of Sec. 351.502(e) is Not Economically Significant or Major

One commenter to Commerce's Proposed Rule stated that while the proposed regulations were deemed significant for the purposes of E.O. 12866, the elimination of Sec. 351.502(e) should also be considered economically significant because it is likely to result in "an annual effect on the economy of $200 million or more (adjusted every 3 years by the Administrator of [the Office of Information and Regulatory Affairs (OIRA)] for changes in gross domestic product)," the standard established in Executive Orders 12866 and 14094.\300\

\300\ See E.O. 12866, "Regulatory Planning and Review," 58 FR 51735 (1993); and E.O. 14094, "Modernizing Regulatory Review," 88 FR 21879 (2023).

In addition, that commenter also expressed a concern that Commerce did not address whether it regards the elimination of Sec. 351.502(e) as major for purposes of the Congressional Review Act (CRA),\301\ and asserted that it would be major because many farms and businesses could be impacted in substantial and predictable ways.

\301\ See Congressional Review Act, 5 U.S.C. 801 (1996).

Response

Commerce does not determine whether rules are significant under E.O. 12866 or major for purposes of the CRA. Such decisions are made by the Office of Management and Budget's (OMB) OIRA.

OIRA determined that the Proposed Rule was significant but did not determine that it was either economically significant or major. Because OIRA determined that the Proposed Rule was significant, it went through interagency review pursuant to E.O. 12866, but because it was not determined to be economically significant no regulatory impact analysis was required and OMB's Circular A-4 was not implicated.

To date, no party has provided any information to Commerce that would call into question these determinations. In particular, Commerce has been provided with no data that suggests that the elimination of Sec. 351.502(e) would cause any significant economic impact to American farmers and small business. This comports with OIRA's determinations in two of our recent regulatory packages which also addressed the calculation and application of AD and CVD duties to producers, exporters, and importers; the

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same entities impacted by the Proposed Rule. In the Scope and Circumvention Regulations \302\ and more recently in the RISE Regulations,\303\ OIRA determined that both regulatory packages were significant but did not determine that they were economically significant or major.

\302\ Regulations To Improve Administration and Enforcement of Antidumping and Countervailing Duty Laws, 85 FR 49472, 49492-49493 (2020) (Scope and Circumvention Regulations).

\303\ See RISE Final Rule, 89 at 29870-71.

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25. Commerce Was Not Required to do an Analysis of Indirect Costs Under the RFA With Respect to the Elimination of Sec. 351.502(e)

A commenter expressed concerns that Commerce did not engage in a more thorough Regulatory Flexibility Act (RFA) analysis, particularly involving indirect costs to small business entities, in its removal of Sec. 351.502(e).\304\ The commenter asserted that Commerce must quantify and consider indirect impacts on American small businesses and that the removal of the provision was not procedural in nature and would not lead to "streamlined procedures," as asserted by Commerce, because certain procedures involving agricultural subsidies might now become more complex as a result of the proposed change.

\304\ See Regulatory Flexibility Act, 5 U.S.C 601 (1980).

Response

The RFA does not require an analysis of indirect costs. Commerce has certified to the Small Business Administration that the proposed regulations will not have a significant economic impact on a substantial number of small entities. As discussed above, the removal of the agricultural exception does not present a policy change with respect to the analysis of specificity for foreign government subsidy programs that are provided to the foreign agricultural sector. Commerce's treatment and the standard for both de jure and de facto specificity for foreign government subsidy programs within the agricultural sector remain identical before and after the removal of this provision. Thus, the specificity analysis of agricultural-related subsidy allegations will continue to be assessed within the statutory standard enacted under section 771(5)(D) of the Act and the change is procedural in nature. Even if the change were not technically procedural, in practice Commerce's analysis of agricultural subsidies has not changed since the regulation was issued, and therefore removing the provision would have no impact on any entity, large or small.

Summary of Changes From the Proposed to Final Rule

Commerce has made the following changes to the proposed regulatory text:

Commerce revised Sec. 351.104(a)(7) with two changes. First, Commerce replaced "Commerce" with "the Department." Second, in response to comments regarding consistency within the regulation, Commerce is modifying the language to reflect that preliminary and final issues and decision memoranda issued in investigations and administrative reviews before the implementation of ACCESS may be cited in full in submissions before Commerce without placing the memoranda on the record.

Commerce removed references to examples of units to which a cash deposit rate or assessment rate may be applied under Sec. Sec. 351.107(c)(1) and 351.212(b)(ii).

Commerce made several revisions to proposed 351.108. First, Commerce revised the title of Sec. 351.108 to clarify that the section applies to entities exporting merchandise from nonmarket economies in antidumping proceedings. Second, Commerce made substantive changes to Sec. 351.108(a) by adding paragraphs (a)(1), (2), and (3). The regulation at Sec. 351.108(a)(1) defines the nonmarket economy entity, paragraph (a)(2) defines the nonmarket economy entity rate, and paragraph (a)(3) details that if Commerce determines that an entity in a third country is owned or controlled by the non-market economy government and that entity exports subject merchandise from the nonmarket economy (directly or indirectly) to the United States, Commerce may determine to assign that entity the nonmarket economy entity rate. Third, Commerce added Sec. 351.108(b)(2) to detail Commerce's analysis when it determines that a nonmarket economy government controls an entity located in a third country that exports subject merchandise from the nonmarket economy to the United States. Fourth, Commerce clarified under Sec. 351.108(c) that it will rely on information provided in a separate rate application or certification when determining whether an entity is wholly owned by foreign entities incorporated and headquartered in a market economy. Fifth, Commerce added language to Sec. 351.108(d) to clarify that if no separate rate or certification is submitted timely, Commerce may apply the nonmarket economy entity rate to an entity's merchandise subject to the AD order. Commerce also made several smaller revisions to the language of proposed Sec. 351.108 to further clarify the terminology of the regulations. Lastly, as a result of these revisions, Commerce renumbered the paragraphs of Sec. 351.108(b)(1).

Commerce added language to proposed Sec. 351.109(c)(v) to further clarify that it may select an additional respondent for examination if such a selection will not inhibit or impede the timely completion of that segment of the proceeding.

Commerce modified proposed Sec. 351.301(b)(2) to further clarify that the submitter must provide a written explanation describing how the provided factual information rebuts, clarifies, or corrects the factual information on the record.

Commerce also added language to proposed Sec. 351.301(c)(3) to clarify that in investigations, administrative reviews, new shipper reviews and changed circumstances reviews, Commerce may issue a schedule with alternative deadlines if it determines that parties do not have sufficient time to submit factual information on the record.

Commerce made smaller revisions to Sec. 351.308(i)(2) to clarify that the Secretary will normally apply the highest calculated above de-minimis countervailing duty rate if it finds that the application of an adverse inference is warranted.

Commerce added paragraph (f)(4) to proposed Sec. 351.401. The regulation at Sec. 351.401(f)(4) provides exceptions to Commerce's treatment of affiliated parties as a single entity in AD proceedings. Commerce will normally not treat the parties as a single entity if the affiliated parties in question do not produce merchandise similar or identical to subject merchandise and are input suppliers, sellers of the foreign like product in the home market, or affiliated entities for which Commerce determines that treating those parties as a single entity would be otherwise inappropriate based on record information.

Commerce modified proposed Sec. 351.404(g)(2) to clarify that the paragraph is applicable when the special rule for certain multinational corporations is applied.

Commerce modified proposed Sec. 351.405(b)(3) to clarify that Commerce considers the criteria under paragraphs (b)(3)(i) through (iv) when selecting sources for selling, general and administrative expenses as well profit in calculating construct value.

Commerce revised proposed Sec. 351.408(b). First, Commerce created a new paragraph (b)(1)(i) to clarify that it

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will measure economic comparability to determine whether countries are at a level of economic development comparable to the nonmarket economy at issue by placing a primary emphasis on per capita GDP. Second, Commerce added paragraph (b)(1)(ii) to provide that, where such additional analysis is needed, Commerce will consider additional factors in determining whether countries are at a level of economic development comparable to the nonmarket economy at issue. Commerce will provide its reasonings for relying on additional factors, where such analysis is needed. Third, Commerce also created a new paragraph (b)(1)(iii) to notify parties that an annual listing of comparable economies will be available on Commerce's website. Fourth, Commerce further clarified at Sec. 351.408(b)(2) that it will consider whether countries are a significant producer of merchandise comparable to subject merchandise consistent with the statutory directive under sections 773(c)(2)(A) and 773(c)(4)(B) of the Act. Lastly, Commerce included new language under Sec. 351.408(b)(3) to explain that Commerce will consider the totality of the information on the record in selecting a surrogate country if more than one economically comparable country produces comparable merchandise. That new paragraph provides that the additional criteria for consideration includes the availability, accessibility, and quality of data from those countries and the similarity of products manufactured in the potential surrogate countries in comparison to the subject merchandise.

Commerce revised proposed Sec. 351.511(a)(2). Commerce removed references to competitively run government auctions from Sec. 351.511(a)(2)(i) and placed those references instead in Sec. 351.511(a)(2)(iii), as well as the proposed criteria for determining if auction prices are consistent with market principles.

Commerce added a new Sec. 351.512(a)(2)(iii) that provides that Commerce may exclude certain prices from a particular country if Commerce finds that certain actions, including government laws or policies, likely impact such prices, and moved proposed Sec. 351.512(a)(2)(iii) to a new Sec. 351.512(a)(2)(iv).

Commerce also modified proposed Sec. 351.525(b)(iv)(A) and (B). With respect to Sec. 351.525(b)(iv)(A), Commerce added language to its attribution analysis to clarify that an input producer can supply, either directly or indirectly, a downstream producer. Under Sec. 351.525(b)(iv)(B), Commerce deleted certain language under its primarily dedicated analysis. Specifically, Commerce deleted the phrase "regardless of whether the input is actually used for the production of subject merchandise."

Commerce also added language to proposed Sec. 351.526(b)(4) to provide a deadline to rebut the presumption of subsidy continuation notwithstanding a change in ownership. The regulation provides that information to rebut the presumption of subsidy continuation must be timely filed as part of the respondent's or government's initial questionnaire response.

Lastly, Commerce also made minor modifications to Sec. Sec. 351.502(e), 351.503(b)(3), 351.505(c)(2) and (e)(2), 351.509(b)(1), and 351.511(a)(2)(iii)(C).

Classifications

Executive Order 12866

The Office of Management and Budget has determined that this final rule is significant for purposes of Executive Order 12866.

Executive Order 13132

This final rule does not contain policies with federalism implications as that term is defined in section 1(a) of Executive Order 13132 of August 4, 1999, 64 FR 43255 (August 10, 1999)).

Paperwork Reduction Act

This final rule does not contain a collection of information subject to the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35.

Regulatory Flexibility Act

The Chief Counsel for Regulation has certified to the Chief Counsel for Advocacy of the Small Business Administration under the provisions of the Regulatory Flexibility Act, 5 U.S.C. 605(b), that the rule would not have a significant economic impact on a substantial number of small business entities. A summary of the need for, objectives of, and legal basis for this rule is provided in the preamble of both the proposed rule and this final rule and is not repeated here. Comments received regarding this certification did not provide information that undermines the certification. Thus, a Final Regulatory Flexibility Analysis is not required and has not been prepared.

Congressional Review Act

Pursuant to 5 U.S.C. 804(2), the Administrator of the Office of Information and Regulatory Affairs at the Office of Management and Budget has determined that this rule is not major.

List of Subjects in 19 CFR Part 351

Administrative practice and procedure, Antidumping, Business and industry, Confidential business information, Countervailing duties, Freedom of information, Investigations, Reporting and recordkeeping requirements.

Dated: December 9, 2024.
Ryan Majerus, Deputy Assistant Secretary for Policy and Negotiations, performing the non-exclusive functions and duties of the Assistant Secretary for Enforcement and Compliance.

For the reasons stated in the preamble, the U.S. Department of Commerce amends 19 CFR part 351 as follows:

PART 351-ANTIDUMPING AND COUNTERVAILING DUTIES

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1. The authority citation for 19 CFR part 351 continues to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 1202 note; 19 U.S.C. 1303 note; 19 U.S.C. 1671 et seq.

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2. Revise the heading to subpart A to read as follows:

Subpart A-Scope, Definitions, the Record of Proceedings, Cash Deposits, Nonmarket Economy Antidumping Rates, All-Others Rate, and Respondent Selection

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3. In Sec. 351.104, revise paragraphs (a)(2)(iii) and (a)(7) to read as follows:

Sec. 351.104 Record of proceedings.

(a) * * *
(2) * * *
(iii) In no case will the official record include any document that the Secretary rejects as untimely filed or any unsolicited questionnaire response unless the response is a voluntary response accepted under Sec. 351.109(h) (see Sec. 351.302(d)).
* * * * *
(7) Special rules for public versions of documents originating with the Department with no associated ACCESS barcode numbers. Public versions of documents originating with the Department in other segments or proceedings under paragraph (a)(6)(iii) through (xii) of this section but not associated with an ACCESS barcode number, including documents issued before the implementation of ACCESS, must be submitted on the record in their entirety to be considered by the Secretary in its analysis and determinations and are subject to the timing and filing restrictions of Sec. 351.301. Preliminary and final issues

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and decision memoranda issued by the Secretary in investigations and administrative reviews and not associated with an ACCESS barcode number, including those issued before the implementation of ACCESS, pursuant to Sec. Sec. 351.205, 210 and 213 may be cited in full without placing the memoranda on the record.
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4. Revise Sec. 351.107 to read as follows:

Sec. 351.107 Cash deposit rates; producer/exporter combination rates

(a) Introduction. Sections 703(d)(1)(B), 705(d), 733(d)(1)(B), and 735(c) of the Act direct the Secretary to order the posting of cash deposits, as determined in preliminary and final determinations of antidumping and countervailing duty investigations, and additional provisions of the Act, including section 751, direct the Secretary to establish a cash deposit rate in accordance with various reviews. This section covers the establishment of cash deposit rates and the instructions which the Secretary issues to U.S. Customs and Border Protection to collect those cash deposits.
(b) In general. The Secretary will instruct U.S. Customs and Border Protection to suspend liquidation of merchandise subject to an antidumping duty or countervailing duty proceeding and apply cash deposit rates determined in that proceeding to all imported merchandise for which a cash deposit rate was determined by the Secretary in proportion to the estimated value of the merchandise as reported to U.S. Customs and Border Protection on an ad valorem basis.
(c) Exceptions-(1) Application of cash deposit rates on a per-unit basis. If the Secretary determines that the information normally used to calculate an ad valorem cash deposit rate is not available or the use of an ad valorem cash deposit rate is otherwise not appropriate, the Secretary may instruct U.S. Customs and Border Protection to apply the cash deposit rate on a per-unit basis.
(2) Application of cash deposit rates to producer/exporter combinations. The Secretary may instruct U.S. Customs and Border Protection to apply a determined cash deposit rate only to imported merchandise both produced by an identified producer and exported by an identified exporter if the Secretary determines that such an application is appropriate. Such an application is called a producer/exporter combination.

(i) Example. Exporter A exports to the United States subject merchandise produced by Producers W, X, and Y. In such a situation, the Secretary may establish a cash deposit rate applied to Exporter A that is limited to merchandise produced by Producers W, X, and Y. If Exporter A begins to export subject merchandise produced by Producer Z, that cash deposit rate would not apply to subject merchandise produced by Producer Z.

(ii) In general. The Secretary will instruct U.S. Customs and Border Protection to apply a cash deposit rate to a producer/exporter combination or combinations when the cash deposit rate is determined as follows:

(A) Pursuant to a new shipper review, in accordance with section 751(a)(2)(B) of the Act and Sec. 351.214;

(B) Pursuant to an antidumping investigation of merchandise from a nonmarket economy country, in accordance with sections 733 and 735 of the Act and Sec. Sec. 351.205 and 210, for merchandise exported by an examined exporter;

(C) Pursuant to scope, circumvention, and covered merchandise segments of the proceeding, in accordance with Sec. Sec. 351.225(m), 351.226(m) and 351.227(m), when the Secretary makes a segment-specific determination on the basis of a producer/exporter combination; and

(D) Pursuant to additional segments of a proceeding in which the Secretary determines that the application of a cash deposit rate to a producer/exporter combination is warranted based on facts on the record.

(3) Exclusion from an antidumping or countervailing duty order-(i) Preliminary determinations. In general, in accordance with sections 703(b) and 733(b) of the Act, if the Secretary makes an affirmative preliminary antidumping or countervailing duty determination and the Secretary preliminarily determines an individual weighted-average dumping margin or individual net countervailable subsidy rate of zero or de minimis for an investigated exporter or producer, the exporter or producer will not be excluded from the preliminary determination or the investigation. However, the Secretary will not instruct U.S. Customs and Border Protection to suspend liquidation of entries or collect cash deposits on the merchandise produced and exported from the producer/exporter combinations examined in the investigation and identified in the Federal Register, as the investigated combinations will not be subject to provisional measures under sections 703(d) or 733(d) of the Act.

(ii) Final determinations. In general, in accordance with sections 705(a), 735(a), 706(a), and 736(a) of the Act, if the Secretary makes an affirmative final determination, issues an antidumping or countervailing duty order and determines an individual weighted-average dumping margin or individual net countervailable subsidy rate of zero or de minimis for an investigated producer or exporter, the Secretary will exclude from the antidumping or countervailing duty order only merchandise produced and exported in the producer/exporter combinations examined in the investigation and identified in the Federal Register. An exclusion applicable to a producer/exporter combination shall not apply to resellers. Excluded producer/exporter combinations may include transactions in which the exporter is both the producer and exporter, transactions in which the producer's merchandise has been exported to the United States through multiple exporters individually examined in the investigation, and transactions in which the exporter has sourced from multiple producers identified in the investigation.

(iii) Example. If during the period of investigation, Exporter A exports to the United States subject merchandise produced by Producer X, based on an examination of Exporter A the Secretary may determine that the dumping margins with respect to the examined merchandise are de minimis. In that case, the Secretary would normally exclude only subject merchandise produced by Producer X and exported by Exporter A. If Exporter A began to export subject merchandise produced by Producer Y, that merchandise would be subject to the antidumping duty order.

(4) Certification requirements. If the Secretary determines that parties must maintain or provide a certification in accordance with Sec. 351.228, the Secretary may instruct U.S. Customs and Border Protection to apply a cash deposit requirement that is based on the facts of the case and effectuates the administration and purpose of the certification.

(d) The antidumping duty order cash deposit hierarchies-(1) In general. If the Secretary has not previously established a combination cash deposit rate under paragraph (c)(2) of this section for the producer and exporter in question, the following will apply:

(i) A market economy country proceeding. In a proceeding covering merchandise produced in a market economy country:

(A) If the Secretary has established a current cash deposit rate for the exporter of the subject merchandise, the Secretary will instruct U.S. Customs and Border Protection to apply the cash deposit rate established for the exporter to entries of the subject merchandise;

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(B) If the Secretary has not established a current cash deposit rate for the exporter, but the Secretary has established a current cash deposit rate for the producer of the subject merchandise, the Secretary will instruct U.S. Customs and Border Protection to apply the cash deposit rate established for the producer of the subject merchandise to entries of the subject merchandise; and

(C) If the Secretary has not established a current cash deposit rate for either the producer or the exporter of the subject merchandise, the Secretary will instruct U.S. Customs and Border Protection to apply the all-others rate determined in the investigation to entries of the subject merchandise, pursuant to section 735(c) of the Act and Sec. 351.109(f).

(ii) A nonmarket economy country proceeding. In a proceeding covering merchandise originating from a nonmarket economy country:

(A) If the Secretary has established a current separate cash deposit rate for the exporter of the subject merchandise, the Secretary will instruct U.S. Customs and Border Protection to apply the cash deposit rate for the exporter to entries of the subject merchandise;

(B) If the Secretary has not established a current separate cash deposit rate for an exporter of the subject merchandise, the Secretary will instruct U.S. Customs and Border Protection to apply the cash deposit rate determined by the Secretary for the nonmarket economy entity to entries of the subject merchandise, pursuant to Sec. 351.108(b); and

(C) If the entries of subject merchandise were resold to the United States through a third-country reseller, the Secretary will normally instruct U.S. Customs and Border Protection to apply the current separate cash deposit rate applicable to the nonmarket economy country exporter (or the applicable producer/exporter combination, if warranted) that supplied the subject merchandise to the reseller to those entries of the subject merchandise.

(2) Exception. If the Secretary determines that an application of cash deposit rates other than that described in paragraph (d)(1) of this section to particular producers or exporters is warranted, the Secretary may instruct U.S. Customs and Border Protection to use an alternative methodology in applying those cash deposit rates to entries of subject merchandise.

(e) The countervailing duty order cash deposit hierarchy-(1) In general. If the Secretary has not previously established a combination cash deposit rate under paragraph (c)(2) of this section for the producer and exporter in question and the exporter and producer have differing cash deposit rates, the following will apply:

(i) If the Secretary has established current cash deposit rates for both the producer and the exporter of the subject merchandise, the Secretary will instruct U.S. Customs and Border Protection to apply the higher of the two rates to the entries of subject merchandise;

(ii) If the Secretary has established a current cash deposit rate for the producer but not the exporter of the subject merchandise, the Secretary will instruct U.S. Customs and Border Protection to apply the producer's cash deposit rate to entries of subject merchandise;

(iii) If the Secretary has established a current cash deposit rate for the exporter but not the producer of the subject merchandise, the Secretary will instruct U.S. Customs and Border Protection to apply the exporter's cash deposit rate to entries of subject merchandise; and

(iv) If the Secretary has not established current cash deposit rates for either the producer or the exporter of the subject merchandise, the Secretary will instruct U.S. Customs and Border Protection to apply the all-others rate determined in the investigation pursuant to section 705(c)(5) of the Act and Sec. 351.109(f) to the entries of subject merchandise.

(2) Exception. If the Secretary determines that an application of cash deposit rates other than that described in paragraph (e)(1) of this section to particular producers or exporters is warranted, the Secretary may instruct U.S. Customs and Border Protection to use an alternative methodology in applying those cash deposit rates to the entries of subject merchandise.

(f) Effective dates for amended preliminary and final determinations and results of review upon correction of a ministerial error. If the Secretary amends an agency determination in accordance with sections 703, 705(e), 733 and 735(e) of the Act and Sec. 351.224 (e) through (g):

(1) If the Secretary amends a preliminary or final determination in an investigation for a ministerial error and the amendment increases the dumping margin or countervailing duty rate, the new cash deposit rate will be effective to entries made on or after the date of publication of the amended determination;

(2) If the Secretary amends a preliminary or final determination in an investigation for a ministerial error and the amendment decreases the dumping margin or countervailing duty rate, the new cash deposit rate will be retroactive to the date of publication of the original preliminary or final determination, as applicable;

(3) If the Secretary amends the final results of an administrative review pursuant to a ministerial error, the effective date of the amended cash deposit rate will be retroactive to entries following the date of publication of the original final results of administrative review regardless of whether the antidumping duty margin or countervailing duty rate increases or decreases; and

(4) If the Secretary amends the final results of an investigation or administrative review pursuant to litigation involving alleged or disputed ministerial errors, the effective date of the amended cash deposit rate may differ from the effective dates resulting from the application of paragraphs (f)(1) through (3) of this section and normally will be identified in a Federal Register notice.

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5. Add Sec. 351.108 to subpart A to read as follows:

Sec. 351.108 Rates for entities exporting merchandise from nonmarket economies in antidumping proceedings

(a) Introduction-(1) The nonmarket economy entity. When the Secretary determines that a country is a nonmarket economy country in an antidumping proceeding pursuant to section 771(18) of the Act, the Secretary may determine that all entities located in that nonmarket economy country are subject to government control and thus part of a single, government-controlled entity, called the nonmarket economy entity.

(2) The nonmarket economy entity rate. All merchandise from the nonmarket economy exported to the United States and subject to an antidumping proceeding by entities in the nonmarket economy determined by the Secretary on the basis of record information to be part of the government-controlled entity may be assigned the antidumping cash deposit or assessment rate applied to the government-controlled entity. That rate is called the nonmarket economy entity rate.

(3) Entities in third countries owned or controlled by the nonmarket economy government. If a nonmarket economy government has direct ownership or control, in whole or in part, of an entity located in a third country and that entity exports subject merchandise to the United States, the Secretary may determine on the basis of record information that such an entity is part of the government-controlled entity and assign that entity the nonmarket economy entity rate.

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(b) Separate rates. An entity exporting merchandise to the United States from a nonmarket economy may receive its own rate, separate from the nonmarket economy entity rate, if the Secretary determines that the exporter has demonstrated that it operates certain activities sufficiently independent from nonmarket economy government control to justify the application of a separate rate. In determining whether an entity operates certain activities sufficiently independent from government control to receive a separate rate, the Secretary will normally consider the following:

(1) Nonmarket economy government ownership and control in the nonmarket economy-(i) Government control through ownership. When a nonmarket economy government, at a national, provincial, or other level, holds an ownership share of an entity located in the nonmarket economy, either directly or indirectly, the level of ownership and other factors may indicate that the government exercises or has the potential to exercise control over an entity's general operations. No separate rate will be applied when the nonmarket economy government either directly or indirectly holds:

(A) A majority ownership share (over fifty percent ownership) of an entity; or

(B) An ownership interest in the entity of fifty percent or less and any one of the following criteria applies:

(1) The government's ownership share provides it with a disproportionately larger degree of influence or control over the entity's production, commercial, and export decisions than the ownership share would normally entail, and the Secretary determines that the degree of influence or control is significant;

(2) The government has the authority to veto the entity's production, commercial and export decisions;

(3) Officials, employees, government-appointed or government-controlled labor union members, representatives of the government, or their family members have been appointed as officers or managers of the entity, members of the board of directors, or other governing authorities in the entity that have the ability to make or influence production, commercial and export decisions for the entity; or

(4) The entity is obligated by law or its foundational documents, such as articles of incorporation, or other de facto requirements to maintain one or more officials, employees, government-appointed or government-controlled labor union members, or representatives of the government as officers or

managers, members of the board of directors, or other governing authorities in the entity that have the ability to make or influence production, commercial and export decisions for the entity.

(ii) Absence of de jure government control. If an entity demonstrates that neither Sec. 351.108(b)(1)(i)(A) nor (B) applies to the entity, the entity must then demonstrate that the government has no control in law (de jure) of the entity's export activities. The following criteria may indicate the lack of government de jure control of the entity's export activities:

(A) The absence of a legal requirement that one or more officials, employees, government-appointed or government-controlled labor union members, or representatives of the government serve as officers or managers of the entity, members of the board of directors, or other governing authorities in the entity that make or influence export activity decisions;

(B) The absence of restrictive stipulations by the government associated with an entity's business and export licenses;

(C) Legislative enactments decentralizing government control of entities; and

(D) Other formal measures by the government decentralizing control of companies.

(iii) Absence of de facto government control. If the entity demonstrates that Sec. 351.108(b)(1)(i)(A) and (B) and (b)(1)(ii) do not apply to the entity, the entity must then demonstrate that the government has no control in fact (de facto) of the entity's export activities. The following criteria may indicate de facto government control of the entity's export activities:

(A) Whether the entity maintains or must maintain one or more officials, employees, representatives of the government, or their family members as officers or managers, members of the board of directors, or other governing authorities in the entity which have the ability to make or influence export activity decisions;

(B) Whether export prices are set by or are subject to the approval of a government agency;

(C) Whether the entity has authority to negotiate and sign contracts and other agreements without government involvement;

(D) Whether the entity has autonomy from the government in making decisions regarding the selection of its management;

(E) Whether the entity retains the proceeds of its export sales and makes independent decisions regarding disposition of profits or financing of losses; and

(F) Whether there is any additional evidence on the record suggesting that the government has direct or indirect influence over the entity's export activities.

(2) Nonmarket economy government ownership or control of an entity located in a third country. If the Secretary determines that a nonmarket economy government owns or controls, in whole or in part, an entity located in a third country, the Secretary may determine on the basis of record information that the entity should be assigned the nonmarket economy entity rate or that the entity should be granted a separate rate.

(c) Entities wholly owned by foreign entities incorporated and headquartered in a market economy. In general, if the Secretary determines based on information submitted in a separate rate application or certification that an entity exporting merchandise subject to a nonmarket economy country antidumping proceeding is wholly owned by a foreign entity and both incorporated and headquartered in a market economy country or countries, then the Secretary will consider the entity independent from control of the nonmarket economy government and an analysis under paragraph (b) of this section will not be necessary.

(d) Separate rate applications and certifications. In order to demonstrate separate rate eligibility, an entity subject to a nonmarket economy country antidumping proceeding will be required to timely submit a separate rate application, as made available by the Secretary, or a separate rate certification, as applicable. If no separate rate application or certification is timely submitted, the Secretary may apply the nonmarket economy entity rate to merchandise exported to the United States and subject to the nonmarket economy country antidumping proceeding. In filing a separate rate application or certification, the following applies:

(1) In an antidumping investigation, the entity will normally file a separate rate application on the record of the investigation no later than twenty-one days following publication of the notice of initiation in the Federal Register;

(2) In a new shipper review or an administrative review in which the entity has not been previously assigned a separate rate, the entity will normally file a separate rate application on the record no later than fourteen days following publication of the notice of initiation in the Federal Register. In both new shipper reviews and administrative reviews, documentary evidence of an entry of subject

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merchandise for which liquidation was suspended during the period of review must accompany the separate rate application.

(3) In an administrative review, if the entity has been previously assigned a separate rate in the proceeding, no later than fourteen days following publication of the notice of initiation in the Federal Register, the entity will instead file a certification on the record in which the entity certifies that it had entries of subject merchandise for which liquidation was suspended during the period of review and that it otherwise continues to meet the criteria for obtaining a separate rate. If the Secretary determined in a previous segment of the proceeding that certain exporters and producers should be treated as a single entity for purposes of the antidumping proceeding, then a certification filed under this paragraph must identify and certify that that the certification applies to all of the companies comprising that single entity.

(e) Examined respondents and questionnaire responses. Entities that submit separate rate applications or certifications and are subsequently selected to be an examined respondent in an investigation or review by the Secretary must fully respond to the Secretary's questionnaires and participate in the antidumping proceeding in order to be eligible for separate rate status.

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6. Add Sec. 351.109 to subpart A to read as follows:

Sec. 351.109 Selection of examined respondents; single-country subsidy rate; calculating an all-others rate; calculating rates for unexamined respondents; voluntary respondents.

(a) Introduction. Sections 777A(c)(2) and 777A(e)(2)(A) of the Act provide that when the Secretary determines in an antidumping or countervailing duty investigation or administrative review that it is not practicable to determine individual dumping margins or countervailable subsidy rates for all potential respondents, the Secretary may determine individual dumping margins or countervailable subsidy rates for a reasonable number of exporters or producers using certain criteria set out in the Act. This section sets forth those criteria, describes the methodology the Secretary generally applies to select examined producers and exporters, and provides the means by which the Secretary determines the "all-others rate" set forth in sections 705(c)(5) and 735(c)(5) of the Act, separate rates in nonmarket economy antidumping proceedings, and review-specific margins or rates in administrative reviews. This section also addresses the treatment of voluntary respondents in accordance with section 782(a) of the Act.

(b) Examining each known exporter or producer when practicable. In an investigation or administrative review, the Secretary will determine, where practicable, an individual weighted-average dumping margin or individual countervailable subsidy rate for each known exporter or producer of the subject merchandise.

(c) Limiting exporters or producers examined-(1) In general. If the Secretary determines in an investigation or administrative review that it is not practicable to determine individual dumping margins or countervailable subsidy rates because of the large number of exporters or producers involved in the investigation or review, the Secretary may determine individual margins or rates for a reasonable number of exporters or producers, In accordance with sections 777A(c)(2) and 777A(e)(2)(A) of the Act, the Secretary will normally limit the examination to either a sample of exporters or producers that the Secretary determines is statistically valid based on record information or exporters and producers accounting for the largest volume of the subject merchandise from the exporting country that the Secretary determines can be reasonably examined.

(2) Limiting examination to the largest exporters or producers. In general, if the Secretary determines to limit the number of exporters or producers for individual examination, otherwise known as respondents, based on the largest volume of the subject merchandise from the exporting country that the Secretary determines can be reasonably examined, the Secretary will apply the following methodology:

(i) Selecting the data source to determine the largest exporters or producers of subject merchandise. The Secretary will normally select respondents based on data for entries of subject merchandise made during the relevant time period derived from U.S. Customs and Border Protection. If the Secretary determines that the use of the U.S. Customs and Border Protection data source is not appropriate based on record information, the Secretary may use another reasonable means of selecting potential respondents in an investigation or review including, but not limited to, the use of quantity and value questionnaire responses derived from a list of possible exporters of subject merchandise.

(ii) Selecting the largest exporters or producers of subject merchandise based on volume or value. The Secretary will normally select the largest exporters or producers based on the volume of

imports of subject merchandise. However, the Secretary may determine at times that volume data are unreliable or inconsistent, depending on the product at issue. In those situations, the Secretary may instead select the largest exporters of subject merchandise based on the value of the imported products instead of the volume of the imported products.

(iii) Determining whether the number of exporters or producers is too large to make individual examination of each known exporter or producer of subject merchandise practicable. The Secretary will determine on a case-specific basis whether the number of exporters or producers is too large to make individual examination of each known exporter or producer of subject merchandise practicable based on the potential exporters or producers identified in a petition, the exporters or producers identified in the data source considered in paragraph (c)(1) of this provision, or the exporters or producers for which an administrative review is requested. In determining whether the number of exporters or producers is too large to make individual examination of each known exporter or producer of subject merchandise practicable, the Secretary will normally consider:

(A) The amount of resources and detailed analysis which will be necessary to examine each potential respondent's information;

(B) The current and future workload of the office administering the antidumping or countervailing duty proceeding; and

(C) The Secretary's overall current resource availability.

(iv) Determining the number of exporters or producers that can be reasonably examined. In determining the number of exporters or producers (respondents) that can be reasonably examined on a case-specific basis, the Secretary will normally:

(A) Consider the total and relative volumes (or values) of entries of subject merchandise during the relevant period for each potential respondent derived from the data source considered in paragraph (c)(2) of this section;

(B) Rank the potential respondents by the total volume (or values) of entries into the United States during the relevant period; and

(C) Determine the number of exporters or producers the Secretary can reasonably examine, considering resource availability and statutory requirements, and select the exporters or producers with the largest volume (or

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values) of entries consistent with that number.

(v) Selecting additional respondents for examination. Once the Secretary has determined the number of exporters or producers that can be reasonably examined and has selected the potential respondents for examination, the Secretary will issue questionnaires to those selected exporters or producers. If a potential respondent does not respond to the questionnaires or elects to withdraw from participation in the segment of the proceeding soon after filing questionnaire responses, or the Secretary otherwise determines early in the segment of the proceeding that a selected exporter or producer is no longer participating in the investigation or administrative review or that the exporter's or producer's sales of subject merchandise are not bona fide, the Secretary may select the exporter or producer with the next largest volume or value of entries to replace the respondents initially selected by the Secretary for examination if the Secretary determines that such a selection will not inhibit or impede the timely completion of that segment of the proceeding.

(d) Waiver for certain selected respondents. The Secretary may waive individual examination of an exporter or producer selected to be an examined respondent if both the selected respondent and the petitioner file waiver requests for that selected respondent no later than five days after the Secretary has selected respondents. If the Secretary provides such a waiver and previously selected the waived respondent in accordance with paragraph (c)(2) of this section, the Secretary may select the respondent with the next largest volume or value of entries for examination to replace the initially selected respondent.

(e) Single country-wide subsidy rate. In accordance with 777A(e)(2)(B) of the Act, in limiting exporters or producers examined in countervailing duty proceedings, including countervailing duty investigations under sections 703(d)(1)(A)(ii) and 705(c)(5)(B) of the Act, the Secretary may determine, in the alternative, a single country-wide subsidy rate to be applied to all exporters and producers.

(f) Calculating the all-others rate. In accordance with sections 705(c)(1)(B), 705(c)(5), 735(c)(1)(B)(i), and 735(c)(5) of the Act, if the Secretary makes an affirmative antidumping or countervailing duty determination, the Secretary will determine an estimated all-others rate as follows:

(1) In general. (i) For an antidumping proceeding involving a market economy country, the all-others rate will normally equal the weighted average of the estimated weighted-average dumping

margins established for the individually investigated exporters or producers, excluding any zero and de minimis margins and any margins determined entirely under section 776 of the Act.

(ii) For a countervailing duty proceeding, the all-others rate will normally equal the weighted average of the countervailable subsidy rates established for the individually investigated exporters and producers, excluding any zero and de minimis countervailable subsidy rates and any rates determined entirely under section 776 of the Act.

(2) Exceptions to the general rules for calculating the all-others rate. The Secretary may determine not to apply the general rules provided in paragraph (f)(1) of this section:

(i) If the Secretary determines that only one individually investigated exporter or producer has a calculated weighted-average dumping margin or countervailable subsidy rate that is not zero, de minimis, or determined entirely under section 776 of the Act, the Secretary may apply that weighted-average dumping margin or countervailable subsidy rate as the all-others rate.

(ii) If the Secretary determines that weight-averaging calculated dumping margins or countervailable subsidy rates established for individually investigated exporters or producers could result in the inadvertent release of proprietary information among the individually investigated exporters or producers, the Secretary may apply the following analysis:

(A) First, the Secretary will calculate the weighted-average dumping margin or countervailable subsidy rate for the individually investigated exporters or producers using their reported data, including business proprietary data;

(B) Second, the Secretary will calculate both a simple average of the individually investigated exporters' or producers' dumping margins or countervailable subsidy rates and a weighted- average dumping margin or countervailable subsidy rate using the individually investigated exporters' or producers' publicly-ranged data; and

(C) Third, the Secretary will compare the two averages calculated in paragraph (f)(2)(ii)(B) of this section with the weighted-average margin or rate determined in paragraph (f)(2)(ii)(A) of this section. The Secretary will apply, as the all-others rate, the average calculated in paragraph (f)(2)(ii)(B) of this section which is numerically the closest to the margin or rate calculated in paragraph (f)(2)(ii)(A) of this section.

(iii) If the estimated weighted average dumping margins or countervailable subsidy rates established for all individually investigated exporters and producers are zero, de minimis, or determined entirely under section 776 of the Act, the Secretary may use any reasonable method to establish an all-others rate for exporters and producers not individually examined, including averaging the estimated weighted average dumping margins or countervailable subsidy rates determined for the individually investigated exporters and producers.

(3) A nonmarket economy country entity rate is not an all-others rate. The all-others rate determined in a market economy antidumping investigation or countervailing duty investigation may not be increased in subsequent segments of a proceeding. The rate determined for a nonmarket economy country entity determined in an investigation is not an all-others rate and may be modified in subsequent segments of a proceeding if selected for examination.

(g) Calculating a rate for unexamined exporters and producers. In determining a separate rate in an investigation or administrative review covering a nonmarket economy country pursuant to Sec. 351.108(b), a margin for unexamined exporters and producers in an administrative review covering a market economy country, or a countervailable subsidy rate for unexamined exporters and producers in a countervailing duty administrative review, the Secretary will normally apply the methodology set forth in paragraphs (f)(1) and (2) of this section. If the Secretary determines that weight-averaging calculated dumping margins or countervailable subsidy rates established for individually investigated exporters or producers could result in the inadvertent release of proprietary information among the individually examined exporters or producers, then the Secretary may establish a separate rate, review-specific margin, or countervailable subsidy rate using a reasonable method other than the weight-averaging of dumping margins or countervailable rates, such as the use of a simple average of the calculated dumping margins or countervailable subsidy rates.

(h) Voluntary respondents-(1) In general. If the Secretary limits the number of exporters or producers to be individually examined under sections 777A(c)(2) or 777A(e)(2)(A) of the Act, the Secretary may choose to examine voluntary respondents (exporters or producers, other than those initially

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selected for individual examination) in accordance with section 782(a) of the Act.

(2) Acceptance of voluntary respondents. The Secretary will determine, as soon as practicable, whether to examine a voluntary respondent individually. A voluntary respondent accepted for individual examination under paragraph (h)(1) of this section will be subject to the same filing and

timing requirements as an exporter or producer initially selected by the Secretary for individual examination under sections 777A(c)(2) or 777A(e)(2)(A) of the Act, and, where applicable, the use of the facts available under section 776 of the Act and Sec. 351.308.

(3) Requests for voluntary treatment. (i) An interested party seeking treatment as a voluntary respondent must so indicate by including as a title on the first page of the first submission, "Request for Voluntary Respondent Treatment."

(ii) If multiple exporters or producers seek voluntary respondent treatment and the Secretary determines to examine a voluntary respondent individually, the Secretary will select voluntary respondents in the chronological order in which complete requests were filed correctly on the record.

(4) Timing of voluntary respondent submissions. The deadlines for voluntary respondent submissions will generally be the same as the deadlines for submissions by individually investigated respondents. If there are two or more individually investigated respondents with different deadlines for a submission, such as when one respondent has received an extension and the other has not, voluntary respondents will normally be required to file their submissions with the Secretary by the earliest deadline of the individually investigated respondents.

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7. In Sec. 351.204:
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a. Revise the section heading and paragraphs (a), (c), and (d); and
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b. Remove paragraph (e).

The revisions read as follows:

Sec. 351.204 Period of investigation; requests for exclusions from countervailing duty orders based on investigations conducted on an aggregate basis.

(a) Introduction. Because the Act does not specify the precise period of time that the Secretary should examine in an antidumping or countervailing duty investigation, this section sets forth rules regarding the period of investigation ("POI"). In addition, this section covers exclusion requests in countervailing duty investigations conducted on an aggregate basis.

* * * * *

(c) Limiting exporters or producers examined and voluntary respondents. Once the Secretary has initiated the antidumping or countervailing duty investigation, the Secretary may determine that it is not practicable to examine each known exporter or producer. In accordance with Sec. 351.109(c), the Secretary may select a limited number of exporters or producers to examine. Furthermore, in accordance with section 782(a) of the Act and Sec. 351.109(h), the Secretary may determine to examine voluntary respondents.

(d) Requests for exclusions from countervailing duty orders based on investigations conducted on an aggregate basis. When the Secretary conducts a countervailing duty investigation on an aggregate basis under section 777A(e)(2)(B) of the Act, the Secretary will consider and investigate requests for exclusion to the extent practicable. An exporter or producer that desires exclusion from an order must submit:

(1) A certification by the exporter or producer that it received zero or de minimis net countervailable subsidies during the period of investigation;

(2) If the exporter or producer received a countervailable subsidy, calculations demonstrating that the amount of net countervailable subsidies received was de minimis during the period of investigation;

(3) If the exporter is not the producer of subject merchandise, certifications from the suppliers and producers of the subject merchandise that those persons received zero or de minimis net countervailable subsidies during the period of investigation; and

(4) A certification from the government of the affected country that the government did not provide the exporter (or the exporter's supplier) or producer with more than de minimis net countervailable subsidies during the period of investigation.

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8. In Sec. 351.212 revise paragraph (b)(1) to read as follows:

Sec. 351.212 Assessment of antidumping and countervailing duties; provisional measures deposit cap; interest on certain overpayments and underpayments.

* * * * *

(b) * * *

(1) Antidumping Duties-(i) In general. If the Secretary has conducted a review of an antidumping duty order under Sec. 351.213 (administrative review), Sec. 351.214 (new shipper review), or Sec. 351.215 (expedited antidumping review), the Secretary normally will calculate an assessment rate for each importer of subject merchandise covered by the review by dividing the dumping margin found on the subject merchandise examined by the estimated entered value of such merchandise for normal customs duty purposes on an ad valorem basis. If the resulting assessment rate is not zero or de minimis, the Secretary will then instruct U.S. Customs and Border Protection to assess antidumping duties by applying the assessment rate to the entered value of the merchandise.

(ii) Assessment on a per-unit basis. If the Secretary determines that the information normally used to calculate an ad valorem assessment rate is not available or the use of an ad valorem rate is otherwise not appropriate, the Secretary may instruct U.S. Customs and Border Protection to assess duties on a per-unit basis.

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9. In Sec. 351.213, revise paragraph (f) to read as follows:

Sec. 351.213 Administrative review of orders and suspension agreements under section 751(a)(1) of the Act.

* * * * *

(f) Limiting exporters or producers examined and voluntary respondents. Once the Secretary has initiated an antidumping or countervailing duty administrative review, the Secretary may determine that it is not practicable to examine each known exporter or producer. In accordance with Sec. 351.109(c), the Secretary may select a limited number of exporters or producers to examine. Furthermore, in accordance with section 782(a) of the Act and Sec. 351.109(h), the Secretary may determine to examine voluntary respondents.

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10. In Sec. 351.214, revise the section heading and paragraphs (l)(1) introductory text and (l)(3)(iii) to read as follows:

Sec. 351.214 New shipper reviews under section 751(a)(2)(B) of the Act; expedited reviews in countervailing duty proceedings.

* * * * *

(l) * * *

(1) Request for review. If, in a countervailing duty investigation, the Secretary limited the number of exporters or producers to be individually examined under section 777A(e)(2)(A) of the Act, an exporter that the Secretary did not select for individual examination or that the Secretary did not accept as a voluntary respondent (see Sec. 351.109(h)) may request a review under this paragraph

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(l). An exporter must submit a request for review within 30 days of the date of publication in the Federal Register of the countervailing duty order. A request must be accompanied by a certification that:

* * * * *

(3) * * *

(iii) The Secretary may exclude from the countervailing duty order in question any exporter for which the Secretary determines an individual net countervailable subsidy rate of zero or de minimis (see Sec. 351.107(c)(3)(ii)), provided that the Secretary has verified the information on which the exclusion is based.

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11. In Sec. 351.301, revise paragraphs (b)(2), (c)(1), and (c)(3)(i) and (ii) to read as follows:

Sec. 351.301 Time limits for submission of factual information.

* * * * *

(b) * * *

(2) If the factual information is being submitted to rebut, clarify, or correct factual information on the record, the submitter must provide a written explanation identifying the information which is already on the record that the factual information seeks to rebut, clarify or correct, including the name of the interested party that submitted the information and the date on which the information was submitted. The submitter must also provide a written explanation describing how the factual information provided under this paragraph rebuts, clarifies, or corrects the factual information already on the record.

(c) * * *

(1) Factual information submitted in response to questionnaires. During a proceeding, the Secretary may issue to any person questionnaires, which includes both initial and supplemental questionnaires. The Secretary will not consider or retain in the official record of the proceeding unsolicited questionnaire responses, except as provided under Sec. 351.109(h)(2), or untimely filed questionnaire responses. The Secretary will reject any untimely filed or unsolicited questionnaire response and provide, to the extent practicable, written notice stating the reasons for rejection (see Sec. 351.302(d)).

* * * * *

(3) * * *

(i) Antidumping and countervailing duty investigations. (A) All submissions of factual information to value factors of production under Sec. 351.408(c) in an antidumping investigation are due no later than 60 days before the schedule date of the preliminary determination.

(B) All submissions of factual information to measure the adequacy of remuneration under Sec. 351.511(a)(2) in a countervailing duty investigation are due no later than 45 days before the scheduled date of the preliminary determination.

(C) If the Secretary determines that interested parties will not have sufficient time to submit factual information under the deadlines set forth in paragraph (c)(3)(i)(A) or (B) because of circumstances unique to a given segment of a proceeding, the Secretary may issue a schedule with alternative deadlines for parties to submit factual information on the record.

(ii) Administrative reviews, new shipper reviews, and changed circumstances reviews. (A) All submissions of factual information to value factors under Sec. 351.408(c) or to measure the adequacy of remuneration under Sec. 351.511(a)(2) in administrative reviews, new shipper reviews and changed circumstances reviews are due no later than 60 days before the scheduled date of the preliminary results of review.

(B) If the Secretary determines that interested parties will not have sufficient time to submit factual information under the deadlines set forth in paragraph (c)(3)(ii)(A) of this section because of circumstances unique to a given segment of a proceeding, the Secretary may issue a schedule with alternative deadlines for parties to submit factual information on the record.

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12. In Sec. 351.302, revise paragraph (d)(1)(ii) to read as follows:

Sec. 351.302 Extension of time limits; return of untimely filed or unsolicited material.

* * * * *

(d) * * *

(1) * * *

(ii) Unsolicited questionnaire responses, except as provided for voluntary respondents under Sec. 351.109(h)(2).

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13. In Sec. 351.306, revise paragraph (a)(3) to read as follows:

Sec. 351.306 Use of business proprietary information.

(a) * * *

(3) An employee of U.S. Customs and Border Protection directly involved in conducting an investigation regarding negligence, gross negligence, or fraud relating to an antidumping or countervailing duty proceeding;

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14. In Sec. 351.308, add paragraphs (g) through (i) to read as follows:

Sec. 351.308 Determinations on the basis of the facts available.

* * * * *

(g) Partial or total facts available. In accordance with section 776(a) of the Act, if the Secretary determines to apply facts available, regardless of the use of an adverse inference under section 776(b) of the Act, the Secretary may apply facts available to only a portion of its antidumping or countervailing duty analysis and calculations, referred to as partial facts available, or to all of its analysis and calculations, referred to as total facts available, as appropriate on a case-specific basis.

(h) Segment-specific dumping and countervailable subsidy rates. If the Secretary has determined dumping margins or countervailable subsidy rates in separate segments of the same proceeding in which the Secretary is applying facts available, in accordance with section 776(c)(2) of the Act the Secretary may apply those margins or rates as facts available without being required to conduct a corroboration analysis.

(i) Selection of adverse facts available. If the Secretary determines to apply adverse facts available, in accordance with sections 776(d)(1), (2), and (3) of the Act, the following applies:

(1) In an antidumping proceeding, the Secretary may use a dumping margin from any segment of the proceeding as adverse facts, including the highest dumping margin available. The Secretary may use the highest dumping margin available if the Secretary determines that such an application is warranted after evaluating the situation that resulted in an adverse inference;

(2) In a countervailing duty segment of the proceeding, in accordance with the hierarchy set forth in paragraph (j) of this section, the Secretary may use a countervailing subsidy rate applied to the same or similar program in a countervailing duty proceeding involving the same country or, if there is no same or similar program, use a countervailing subsidy rate from a proceeding that the Secretary determines is reasonable to use. The Secretary will normally apply the highest calculated above-de minimis countervailing duty rate available if the Secretary determines that such an application is warranted after evaluating the situation that resulted in an adverse inference; and

(3) In applying adverse facts available, the Secretary will not be required to:

(i) Estimate what a countervailable subsidy or dumping margin would have

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been if an interested party that was found to have failed to cooperate under section 776(b)(1) of the Act had cooperated; or

(ii) Demonstrate that the countervailable subsidy rate or dumping margin used by the Secretary as adverse facts available reflects an alleged "commercial reality" of the interested party.

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15. In Sec. 351.309, revise paragraphs (c)(2) and (d)(2) to read as follows:

Sec. 351.309 Written argument.

* * * * *

(c) * * *

(2) The case brief must present all arguments that continue in the submitter's view to be relevant to the Secretary's final determination or final results, including any arguments presented before the

date of publication of the preliminary determination or preliminary results. As part of the case brief, parties are requested to provide the following:

(i) A table of contents listing each issue;

(ii) A table of authorities, including statutes, regulations, administrative cases, dispute panel decisions and court holdings cited; and

(iii) A public executive summary for each argument raised in the brief. Executive summaries should be no more than 450 words in length, not counting supporting citations.

(d) * * *

(2) The rebuttal brief may respond only to arguments raised in case briefs, should identify the arguments raised in case briefs, and should identify the arguments to which it is responding. As part of the rebuttal brief, parties are requested to provide the following:

(i) A table of contents listing each issue;

(ii) A table of authorities, including statutes, regulations, administrative cases, dispute panel decisions and court holdings cited; and

(iii) A public executive summary for each argument raised in the rebuttal brief. Executive summaries should be no more than 450 words in length, not counting supporting citations.

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16. In Sec. 351.401, revise paragraph (f) to read as follows:

Sec. 351.401 In general.

* * * * *

(f) Treatment of affiliated parties in antidumping proceedings-(1) In general. In an antidumping proceeding under this part, the Secretary will normally treat two or more affiliated parties as a single entity if the Secretary concludes that there is a significant potential for manipulation of prices, production, or other export decisions.

(2) Significant potential for manipulation. In identifying a significant potential for the manipulation of price, production or other export decisions, the factors the Secretary may consider for all affiliated parties include:

(i) The level of common ownership;

(ii) The extent to which managerial employees or board members of one firm sit on the board of directors of an affiliated firm; and

(iii) Whether operations are intertwined, such as through the sharing of sales and export information; involvement in production, pricing, and other commercial decisions; the sharing of facilities or employees; or significant transactions between the affiliated parties.

(3) Additional considerations for affiliated parties with access to production facilities in determining the significant potential for manipulation. In determining whether there is a significant potential for manipulation, if the Secretary determines that affiliated parties have, or will have, access to production facilities for similar or identical products, the Secretary shall consider if any of those facilities would require substantial retooling in order to restructure manufacturing priorities.

(4) Exceptions. If the following affiliated parties do not produce similar or identical products to the subject merchandise or export subject merchandise to the United States, the Secretary will normally not treat those parties as part of a single entity for purposes of the Secretary's calculations under this provision:

(i) Input suppliers;

(ii) Sellers of the foreign like product in the home market; and

(iii) Affiliated entities for which the Secretary determines that treating those parties as a single entity would be otherwise inappropriate based on record information.

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17. In Sec. 351.404, add paragraph (g) to read as follows:

Sec. 351.404 Selection of the market to be used as the basis for normal value.

* * * * *

(g) Special rule for certain multinational corporations. In the course of an antidumping investigation, if the Secretary determines that the factors listed in section 773(d) of the Act are

present, the Secretary will apply the special rule for certain multinational corporations and determine the normal value of the subject merchandise by reference to the normal value at which the foreign like product is sold in substantial quantities from one or more facilities outside the exporting country. In making a determination under this provision, the following will apply:

(1) Interested parties alleging that the Secretary should apply the special rule for certain multinational corporations must submit the allegation in accordance with the filing requirements set forth in Sec. 351.301(c)(2)(i).

(2) If the Secretary determines that the non-exporting country at issue is a nonmarket economy country and, in accordance with Sec. 351.408, normal value would be determined using a factors of production methodology if the special rule for certain multinational corporations was applied, the Secretary will not apply the special rule for certain multinational corporations.

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18. In Sec. 351.405, revise paragraph (a) and add paragraph (b)(3) to read as follows:

Sec. 351.405 Calculation of normal value based on constructed value.

(a) Introduction. In certain circumstances, the Secretary may determine normal value by constructing a value based on the cost of manufacturing, selling, general and administrative expenses and profit. The Secretary may use constructed value as the basis for normal value when: neither the home market nor a third country market is viable; sales below the cost of production are disregarded; sales outside the ordinary course of trade or sales for which the prices are otherwise unrepresentative are disregarded; sales used to establish a fictitious market are disregarded; no contemporaneous sales of comparable merchandise are available; or in other circumstances where the Secretary determines that home market or third country prices are inappropriate. (See section 773(e) and (f) of the Act.) This section clarifies the meaning of certain terms and sets forth certain information which the Secretary will normally consider in determining a constructed value.

(b) * * *

(3) Under section 773(e)(2)(B)(iii) of the Act, the Secretary will normally consider the following criteria in selecting sources for selling, general and administrative expenses, as well as profit, in calculating constructed value:

(i) The similarity of the potential surrogate companies' business operations and products to the examined producer's or exporter's business operations and products;

(ii) The extent to which the financial data of the surrogate company reflects

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sales in the home market and does not reflect sales to the United States;

(iii) The contemporaneity of the surrogate company's data to the period of investigation or review; and

(iv) The extent of similarity between the customer base of the surrogate company and the customer base of the examined producer or exporter.

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19. In Sec. 351.408, revise paragraph (b) to read as follows:

Sec. 351.408 Calculation of normal value of merchandise from nonmarket economy countries.

* * * * *

(b) Selecting surrogate countries-(1) Determining comparable economies. The Secretary is directed by sections 773(c)(2)(B) and 773(c)(4)(A) of the Act to select surrogate countries which are at a level of economic development comparable to that of the nonmarket economy country at issue.

(i) Measuring economic comparability. In determining whether market economy countries are at a level of economic development comparable to the nonmarket economy at issue, the Secretary will place primary emphasis on per capita gross domestic product (GDP).

(ii) Additional considerations in determining economic comparability. When the Secretary determines that such an analysis is warranted, the Secretary may consider additional factors in determining whether certain market economy countries are at a level of economic development

comparable to the nonmarket economy at issue. If the Secretary considers additional factors in its analysis, the Secretary will identify those factors and provide the reason it considered those factors along with the list of comparable market economies issued under paragraph (b)(1)(iii) of this section.

(iii) Annual listing of comparable economies. On an annual basis, the Secretary will determine market economies comparable to individual nonmarket economies and list those market economies on the Secretary's website.

(2) Determining significant producers of comparable merchandise. In selecting a surrogate country from those countries which the Secretary determines are economically comparable, the Secretary will consider, in accordance with section 773(c)(2)(A) and (c)(4)(B) of the Act, those countries that are significant producers of merchandise comparable to the subject merchandise.

(3) Selecting between surrogate countries which are economically comparable and significant producers of comparable merchandise. If more than one economically comparable country produces comparable merchandise, the Secretary will consider the totality of the information on the record in selecting a surrogate country. Among the criteria the Secretary may consider in selecting a surrogate country are the availability, accessibility, and quality of data from those countries and the similarity of products manufactured in the potential surrogate countries in comparison to the subject merchandise.

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20. In Sec. 351.502:
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a. Revise paragraphs (d) and (e); and
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b. Remove paragraphs (f) and (g).

The revisions read as follows:

Sec. 351.502 Specificity of domestic subsidies.

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(d) Disaster relief. The Secretary will not regard disaster relief including pandemic relief as being specific under section 771(5A)(D) of the Act if such relief constitutes general assistance available to anyone in the area affected by the disaster.

(e) Employment assistance. The Secretary will not regard employment assistance programs as being specific under section 771(5A)(D) if such assistance is provided solely with respect to employment of general categories of workers such as those based on age, gender, disability, long-term unemployment, veteran, rural or urban status and is available to everyone hired within those categories without any industry or enterprise restrictions.

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21. In Sec. 351.503, add paragraph (b)(3) to read as follows:

Sec. 351.503 Benefit.

* * * * *

(b) * * *

(3) Contingent liabilities and assets. For the provision of a contingent liability or asset not otherwise addressed under a specific rule identified under paragraph (a) of this section, the Secretary will treat the balance or value of the contingent liability or assets as an interest-free provision of funds and will calculate the benefit using, where appropriate, either a short-term or long-term commercial interest rate.

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22. In Sec. 351.505, add paragraph (a)(6)(iii) and revise paragraphs (b), (c), and (e) to read as follows:

Sec. 351.505 Loans.

(a) * * *

(6) * * *

(iii) Initiation standard for government-owned policy banks. An interested party will normally meet the initiation threshold for specificity under paragraph (a)(6)(ii)(A) of this section with respect to section 771(5A)(D) of the Act if the party can sufficiently allege that the government-owned policy bank provides loans pursuant to government policies or directives and loan distribution information for the bank is not reasonably available. A policy bank is a government-owned special purpose bank.

(b) Time of receipt of benefit. The Secretary normally will consider a benefit as having been received in the year in which the firm otherwise would have had to make a payment on the comparable commercial loan.

(c) Allocation of benefit to a particular time period-(1) Short-term loans. The Secretary will allocate (expense) the benefit from a short-term loan to the year(s) in which the firm is due to make interest payments on the loan.

(2) Long-term loans. The Secretary normally will calculate the subsidy amount to be assigned to a particular year by calculating the difference in interest payments for that year, i.e., the difference between the interest paid by the firm in that year on the government-provided loan and the interest the firm would have paid on the comparable commercial benchmark loan.

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(e) Contingent liability interest-free loans-(1) Treatment as loans. In the case of an interest-free loan for which the repayment obligation is contingent upon the company taking some future action or achieving some goal in fulfillment of the loan's requirements, the Secretary normally will treat any balance on the loan outstanding during a year as an interest-free, short-term loan in accordance with paragraphs (a), (b), and (c)(1) of this section. However, if the event upon which repayment of the loan depends will occur at a point in time more than one year after the receipt of the contingent liability loan, the Secretary will use a long-term interest rate as the benchmark in accordance with paragraphs (a), (b), and (c)(2) of this section.

(2) Treatment as grants. If at any point in time the Secretary determines that the event upon which repayment depends is not a viable contingency or the loan recipient has met the contingent action or goal and the government has not taken meaningful action to collect repayment, the Secretary will treat the outstanding balance of the loan as a grant received in the year in which this condition manifests itself.

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23. In Sec. 351.509, revise paragraph (a)(1) and (b)(1) to read as follows:

Sec. 351.509 Direct taxes.

(a) * * *

(1) Exemption or remission of taxes. In the case of a program that provides for a full or partial exemption or remission of a direct tax (for example, an income tax), or a reduction in the base used to calculate a direct tax, a benefit exists to the extent that the tax paid by a firm as a result of the program is less than the tax the firm would have paid in the absence of the program, including as a result of being located in an area designated by the government as being outside the customs territory of the country.

(b) * * *

(1) Exemption or remission of taxes. In the case of a full or partial exemption or remission of a direct tax, the Secretary normally will consider the benefit as having been received on the date on which the recipient firm would otherwise have had to pay the taxes associated with the exemption or remission. For all exemptions or remissions related to income taxes, this date will be the date on which the firm filed its tax return.

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24. In Sec. 351.510, revise paragraph (a)(1) to read as follows:

Sec. 351.510 Indirect taxes and import charges (other than export programs).

(a) * * *

(1) Exemption or remission of taxes. In the case of a program other than an export program that provides for the full or partial exemption or remission of an indirect tax or an import charge, a benefit exists to the extent that the taxes or import charges paid by a firm as a result of the program are less than the taxes the firm would have paid in the absence of the program, including as a result of being located in an area designated by the government as being outside the customs territory of the country.
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25. In Sec. 351.511, revise paragraphs (a)(2)(i) and (iii) to read as follows:

Sec. 351.511 Provision of goods or services.

(a) * * *
(2) * * *
(i) In general. The Secretary will normally seek to measure the adequacy of remuneration by comparing the government price to a market-determined price for the good or service resulting from actual transactions in the country in question. Such a price could include prices stemming from actual transactions between private parties or actual imports. In choosing such transactions or sales, the Secretary will consider product similarity; quantities sold or imported; and other factors affecting comparability.
* * * * *
(iii) World market price unavailable. If there is no world market price available to purchasers in the country in question, the Secretary will normally measure the adequacy of remuneration by assessing whether the government price is consistent with market principles. In making an assessment of whether a government price is consistent with market principles under this provision, the Secretary may assess such factors as costs (including rates of return sufficient to ensure future operations), the government's price setting methodology, possible price discrimination, or a government price derived from actual sales from competitively run government auctions if the government auction:
(A) Uses competitive bid procedures that are open without restriction on the use of the good or service;
(B) Is open without restriction to all bidders, including foreign enterprises, and protects the confidentiality of the bidders;
(C) Accounts for the substantial majority of the actual government provision of the good or service in the jurisdiction in question; and
(D) Determines the winner based solely on price.
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26. Revise Sec. 351.512 to read as follows:

Sec. 351.512 Purchase of goods.

(a) Benefit-(1) In general. In the case where goods are purchased by the government from a firm, in accordance with section 771(5)(E)(iv) of the Act a benefit exists to the extent that such goods are purchased for more than adequate remuneration.
(2) Adequate remuneration defined-(i) In general. The Secretary will normally seek to measure the adequacy of remuneration by comparing the price paid to the firm for the good by the government to a market-determined price for the good based on actual transactions, including imports, between private parties in the country in question, but if such prices are not available, then to a world market price or prices for the good.
(ii) Actual market-determined prices unavailable. If there are no market-determined domestic or world market prices available, the Secretary may measure the adequacy of remuneration by analyzing any premium in the request for bid or government procurement regulations provided to domestic suppliers of the good or use any other methodology to assess whether the price paid to the firm for the good by the government is consistent with market principles.
(iii) Exclusion of certain prices. In measuring the adequacy of remuneration under this section, the Secretary may exclude certain prices from a particular country from its analysis if the Secretary determines that interested parties have demonstrated, with sufficient information, that certain

actions, including government laws or policies, such as price or production mandates or controls, likely impact such prices.

(iv) Use of ex-factory or ex-works price. In measuring adequate remuneration under paragraph (a)(2)(i) or (ii) of this section, the Secretary will use an ex-factory or ex-works comparison price and price paid to the firm for the good by the government in order to measure the benefit conferred to the recipient within the meaning of section 771(5)(E) of the Act. The Secretary will, if necessary, adjust the comparison price and the price paid to the firm by the government to remove all delivery charges, import duties, and taxes to derive an ex-factory or ex-works price.

(3) Exception when the government is both a provider and purchaser of the good. When the government is both a provider and a purchaser of the good, such as electricity, the Secretary will normally measure the benefit to the recipient firm by comparing the price at which the government provided the good to the price at which the government purchased the same good from the firm.

(b) Time of receipt of benefit. In the case of the purchase of a good, the Secretary normally will consider a benefit as having been received as of the date on which the firm receives payment for the purchased good.

(c) Allocation of benefit to a particular time period. In the case of the purchase of a good, the Secretary will normally allocate (expense) the benefit to the year in which the benefit is considered to have been received under paragraph (b) of this section. However, if the Secretary considers this purchase to be for or tied to capital assets such as land, buildings, or capital equipment, the benefit will normally be allocated over time as defined in Sec. 351.524(d)(2).

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27. Revise Sec. 351.521 to read as follows:

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Sec. 351.521 Indirect taxes and import charges on capital goods and equipment (export programs).

(a) Benefit-(1) Exemption or remission of taxes and import charges. In the case of a program determined to be an export subsidy that provides for the full or partial exemption or remission of an indirect tax or an import charge on the purchase or import of capital goods and equipment, a benefit exists to the extent that the taxes or import charges paid by a firm as a result of the program are less than the taxes the firm would have paid in the absence of the program, including as a result of being located in an area designated by the government as being outside the customs territory of the country.

(2) Deferral of taxes and import charges. In the case that the program provides for a deferral of indirect taxes or import charges, a benefit exists to the extent that appropriate interest charges are not collected. Normally, a deferral of indirect taxes or import charges will be treated as a government-provided loan in the amount of the taxes deferred, according to the methodology described in Sec. 351.505. The Secretary will use a short-term interest rate as the benchmark for tax deferrals of one year or less. The Secretary will use a long-term interest rate as the benchmark for tax deferrals of more than one year.

(b) Time of receipt of benefit-(1) Exemption or remission of taxes and import charges. In the case of a full or partial exemption or remission of an indirect tax or import charge, the Secretary normally will consider the benefit as having been received at the time the recipient firm otherwise would be required to pay the indirect tax or import charge.

(2) Deferral of taxes and import charges. In the case of the deferral of an indirect tax or import charge of one year or less, the Secretary normally will consider the benefit as having been received on the date on which the deferred tax becomes due. In the case of a multi- year deferral, the Secretary normally will consider the benefit as having been received on the anniversary date(s) of the deferral.

(c) Allocation of benefit to a particular time period. The Secretary normally will allocate (expense) the benefit of a full or partial exemption, remission or deferral of taxes or import charges described in paragraph (a) of this section to the year in which the benefit is considered to have been received under paragraph (b) of this section.

Sec. 351.522 [Removed and Reserved]

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28. Remove and reserve Sec. 351.522.

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29. In Sec. 351.525:
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a. Revise paragraphs (b)(1) and (b)(6)(iii), (iv), (v), and (vi);
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b. Add paragraphs (b)(6)(vii) and (b)(8) and (9);
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c. Revise paragraph (c); and
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d. Add paragraph (d).
The revisions and additions read as follows:

Sec. 351.525 Calculation of ad valorem subsidy rate and attribution of subsidy to a product.

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(b) * * *

(1) In general. In attributing a subsidy to one or more products, the Secretary will apply the rules set forth in paragraphs (b)(2) through (9) of this section. The Secretary may determine to limit the number of cross-owned corporations examined under this section based on record information and resource availability.

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(6) * * *

(iii) Holding or parent companies. If the firm that received a subsidy is a holding company, including a parent company with its own business operations, the Secretary will attribute the subsidy to the consolidated sales of the holding company and its subsidiaries.

(iv) Input producer-(A) In general. If there is cross-ownership between an input producer that supplies, either directly or indirectly, a downstream producer and production of the input product is primarily dedicated to production of the downstream products, the Secretary will attribute subsidies received by the input producer to the combined sales of the input and downstream products produced by both corporations (excluding the sales between the two corporations).

(B) Primarily dedicated. In determining whether the input product is primarily dedicated to production of the downstream product, the Secretary will determine, as a threshold matter, whether the input could be used in the production of a downstream product including subject merchandise. The Secretary may also consider the following factors, which are not in hierarchical order: whether the input is a link in the overall production chain; whether the input provider's business activities are focused on providing the input to the downstream producer; whether the input is a common input used in the production of a wide variety of products and industries; whether the downstream producers in the overall production chain are the primary users of the inputs produced by the input producer; whether the inputs produced by the input producer are primarily reserved for use by the downstream producer until the downstream producer's needs are met; whether the input producer is dependent on the downstream producers for the purchases of the input product; whether the downstream producers are dependent on the input producer for their supply of the input; the coordination, nature and extent of business activities between the input producer and the downstream producers whether directly between the input producer and the downstream producers or indirectly through other cross-owned corporations; and any other factor deemed relevant by the Secretary based upon the case-specific facts.

(v) Providers of utility products. If there is cross-ownership between a corporation providing electricity, natural gas or other similar utility product and a producer of subject merchandise, the Secretary will attribute subsidies received by that provider to the combined sales of that provider and the sales of products sold by the producer of subject merchandise if at least one of the following two conditions are met:

(A) A substantial percentage, normally defined as 25 percent or more, of the production of the cross-owned utility provider is provided to the producer of subject merchandise, or

(B) The producer of subject merchandise purchases a substantial percentage, normally defined as 25 percent or more, of its electricity, natural gas, or other similar utility product from the cross-owned provider.

(vi) Transfer of subsidy between corporations with cross-ownership. If a cross-owned corporation received a subsidy and transferred the subsidy to a producer of subject merchandise, the Secretary will only attribute the subsidy to products produced by the recipient of the transferred subsidy. When the cross-owned corporation that transferred the subsidy could fall under two or more of the

paragraphs under paragraph (b)(6) of this section the transferred subsidy will be attributed solely under this paragraph.

(vii) Cross-ownership defined. Cross-ownership exists between two or more corporations when one corporation can use or direct the individual assets of the other corporation(s) in essentially the same ways it can use its own assets. Normally, this standard will be met when there is a majority voting ownership interest between two corporations or through common

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ownership of two (or more) corporations.

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(8) Attribution of subsidies to plants or factories. The Secretary will not tie or attribute a subsidy on a plant- or factory-specific basis.

(9) General standard for finding tying. A subsidy will normally be determined to be tied to a product or market when the authority providing the subsidy was made aware of, or otherwise had knowledge of, the intended use of the subsidy and acknowledged that intended use of the subsidy prior to, or concurrent with, the bestowal of the subsidy.

(c) Trading companies-(1) In general. Benefits from subsidies provided to a trading company that exports subject merchandise shall be cumulated with benefits from subsidies provided to the firm which is producing subject merchandise that is sold through the trading company, regardless of whether the trading company and the producing firm are affiliated.

(2) The individually examined respondent exports through trading company. To cumulate subsidies when the trading company is not individually examined as a respondent, the Secretary will pro-rate the subsidy rate calculated for the trading company by using the ratio of the producer's total exports of subject merchandise to the United States sold through the trading company divided by producer's total exports of subject merchandise to the United States and add the resultant rate onto the producer's calculated subsidy rate.

(3) The individually examined respondent is a trading company. To cumulate subsidies when the trading company is individually examined as a respondent, the Secretary will pro-rate the subsidy rate calculated for the producer(s) by the ratio of the producer's sales of subject merchandise to the United States purchased or sourced by the trading company to total sales to the United States of subject merchandise from all selected producers sourced by the respondent trading company and add the resultant rates to the trading company's calculated subsidy rate.

(d) Ad valorem subsidy rate in countries with high inflation. For countries experiencing an inflation rate greater than 25 percent per annum during the relevant period, the Secretary will normally adjust the benefit amount (numerator) and the sales data (denominator) to account for the rate of inflation during the relevant period of investigation or review in calculating the ad valorem subsidy rate.

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30. Revise Sec. 351.526 to read as follows:

Sec. 351.526 Subsidy extinguishment from changes in ownership.

(a) In general. The Secretary will normally presume that non-recurring subsidies continue to benefit a recipient in full over an allocation period determined consistent with Sec. Sec. 351.507(d), 351.508(c)(1), or 351.524, notwithstanding an intervening change in ownership.

(b) Rebutting the presumption of subsidy continuation notwithstanding a change in ownership. (1) An interested party may rebut the presumption in paragraph (a) of this section by demonstrating with sufficient evidence that, during the allocation period, a change in ownership occurred in which the seller sold its ownership of all or substantially all of a company or its assets, retaining no control of the company or its assets, and

(i) In the case of a government-to-private sale, that the sale was an arm's-length transaction for fair market value, or

(ii) In the case of a private-to-private sale, that the sale was an arm's-length transaction, unless a party demonstrates that the sale was not for fair market value.

(2) Arm's-length. In determining whether the evidence presented in paragraph (b)(1) of this section demonstrates that the transaction was conducted at arm's length, the Secretary will be guided by the SAA, which defines an arm's-length transaction as a transaction negotiated between unrelated parties, each acting in its own interest, or between related parties such that the terms of

the transaction are those that would exist if the transaction had been negotiated between unrelated parties.

(3) Fair Market Value. (i) In determining whether the evidence presented by parties pursuant to paragraph (b)(1) of this section demonstrates that the transaction was for fair market value, the Secretary will determine whether the seller, including in the case of a privatization through the government in its capacity as seller, acted in a manner consistent with the normal sales practices of private, commercial sellers in that country, taking into account evidence regarding whether the seller failed to maximize its return on what it sold.

(ii) In making the determination under paragraph (b)(3)(i) of this section, the Secretary may consider information regarding comparable benchmark prices as well as information regarding the process through which the sale was made. The following is a non-exhaustive list of specific considerations that the Secretary may find to be relevant in this regard:

(A) Objective analysis. Whether the seller performed or obtained an objective analysis in determining the appropriate sales price and, if so, whether it implemented the recommendations of such objective analysis for maximizing its return on the sale, including in regard to the sales price recommended in the analysis;

(B) Artificial barriers to entry. Whether the seller-imposed restrictions on foreign purchasers or purchasers from other industries, overly burdensome or unreasonable bidder qualification requirements, or any other restrictions that artificially suppressed the demand for, or the purchase price of, the company;

(C) Highest bid. Whether the seller accepted the highest bid, reflecting the full amount that the company or its assets (including the value of any subsidy benefits) were actually worth under the prevailing market conditions and whether the final purchase price was paid through monetary or close equivalent compensation; and

(D) Committed investment. Whether there were price discounts or other inducements in exchange for promises of additional future investment that private, commercial sellers would not normally seek (for example, retaining redundant workers or unwanted capacity) and, if so, whether such committed investment requirements were a barrier to entry or in any way distorted the value that bidders were willing to pay for what was being sold.

(4) Deadline to rebut the presumption under paragraph (b)(1) of this section. The Secretary will normally not consider information submitted by a respondent or government on the record to be sufficient to rebut the presumption of subsidy continuation under paragraph (b)(1) of this section unless that submitted information is timely filed as part of the respondent's or government's initial questionnaire response.

(5) Market distortion. Information presented under paragraphs (b)(2) and (3) of this section notwithstanding, the Secretary will not find the presumption in paragraph (a) of this section to be rebutted if an interested party has demonstrated that, at the time of the change in ownership, the broader market conditions necessary for the transaction price to accurately reflect the subsidy benefit were not present or were severely distorted by government action or inaction such that the transaction price was meaningfully

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different from what it would otherwise have been absent the distortive government action or inaction. In assessing such claims, the Secretary may consider, among other things, the following factors:

(i) Fundamental conditions. Whether the fundamental requirements for a properly functioning market are sufficiently present in the economy in general as well as in the particular industry or sector, including, for example, free interplay of supply and demand, broad-based and equal access to information, sufficient safeguards against collusive behavior, and effective operation of the rule of law; and

(ii) Legal and fiscal incentives. Whether the government has used the prerogatives of government in a special or targeted way that makes possible or otherwise significantly distorts the terms of a change in ownership in a way that a private seller could not. Examples of such incentives include, but are not limited to, the following:

(A) Special tax or duty rates that make the sale more attractive to potential purchasers;

(B) Regulatory exemptions particular to the privatization (or to privatizations generally) affecting worker retention or environmental remediation; or

(C) Subsidization or support of other companies to an extent that severely distorts the normal market signals regarding company and asset values in the industry in question.

(c) Subsidy benefit extinguishment-(1) In general. If the Secretary determines that any evidence presented by interested parties under paragraph (b) of this section rebuts the presumption under

paragraph (a) of this section, the full amount of pre-transaction subsidy benefits, including the benefit of any concurrent subsidy meeting the criteria in paragraph (c)(2) of this section, will be found to be extinguished and therefore not countervailable. Absent such a finding, the Secretary will not find that a change in ownership extinguishes subsidy benefits.

(2) Concurrent subsidies. For purposes of paragraph (c)(1) of this section, concurrent subsidies are those subsidies given to facilitate or encourage or that are otherwise bestowed concurrent with a change in ownership. The Secretary will normally consider the value of a concurrent subsidy to be fully reflected in the fair market value price of an arm's-length change in ownership and, therefore, to be fully extinguished in such a transaction under paragraph (c)(1) of this section, if the following criteria are met:

(i) The nature and value of the concurrent subsidies are fully transparent to all potential bidders and, therefore, reflected in the final bid values of the potential bidders,

(ii) The concurrent subsidies are bestowed prior to the sale, and

(iii) There is no evidence otherwise on the record demonstrating that the concurrent subsidies are not fully reflected in the transaction price.

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