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DEPARTMENT OF COMMERCE

International Trade Administration

19 CFR Part 351

Proposed Modification to Regulation Concerning the Use of Market Economy Input Prices in Nonmarket Economy Proceedings

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Proposed Rule; Request for Comments

SUMMARY: The Department of Commerce (“Department”) proposes to modify its regulation which states that the Department normally will use the price that a nonmarket economy (“NME”) producer pays to a market economy supplier when a factor of production is purchased from a market economy supplier and paid for in market economy currency, in the calculation of normal value (“NV”) in antidumping proceedings involving NME countries. The rule, if adopted, would establish (1) a requirement that the input at issue be produced in one or more market economy countries, and (2) a revised threshold requiring that “substantially all” of an input be purchased from one or more market economy suppliers before the Department would use the purchase price paid to value the entire factor of production. Through this proposed modification, the Department is announcing its proposed definition of “substantially all” to be 85 percent of the total purchased volume of the particular input. The Department invites public comment on this proposed change.

DATES: To be assured of consideration, comments must be received no later than [INSERT DATE 30 days after publication in the Federal Register].

ADDRESSES: All comments must be submitted through the Federal eRulemaking Portal at <http://www.Regulations.gov>, Docket No. ITA-2012-0002, and the Department prefers this means

of submitting comments. However, if a commenter does not have access to the Internet, as an alternative, he or she may submit the original and two copies of each set of comments by mail or hand delivery/courier. All comments should be addressed to Paul Piquado, Assistant Secretary for Import Administration, Room 1870, Department of Commerce, 14th Street and Constitution Ave., NW, Washington, DC 20230. The comments should be identified by Regulation Identifier Number (RIN) 0625-AA89.

The Department will consider all comments received before the close of the comment period. The Department will not accept comments accompanied by a request that part or all of the material be treated confidentially because of its business proprietary nature or for any other reason. All comments responding to this notice will be a matter of public record and will be available for inspection at Import Administration's Central Records Unit (Room 7046 of the Herbert C. Hoover Building) and online at <http://www.Regulations.gov> and on the Department's Web site at <http://www.trade.gov/ia/>.

Any questions concerning file formatting, document conversion, access on the Internet, or other electronic filing issues should be addressed to Andrew Lee Beller, Import Administration Webmaster, at (202) 482-0866, *e-mail address: webmaster-support@ita.doc.gov*. FOR FURTHER INFORMATION CONTACT: Wendy Frankel at (202) 482-5849 or Scott McBride at (202) 482-6292.

#### SUPPLEMENTARY INFORMATION:

##### Background

In antidumping proceedings involving NME countries, the Department calculates NV by valuing the NME producer's factors of production, to the extent possible, using prices from a market economy that is at a comparable level of economic development and that is also a

significant producer of comparable merchandise. *See* section 773(c)(4) of the Tariff Act of 1930, as amended (“the Act”). The goal of this surrogate factor valuation is to use the “best available information” to determine NV. *See* section 773(c)(1) of the Act; *see also Dorbest Ltd, et al. v. United States*, 604 F.3d 1363 (Fed. Cir. 2010). Pursuant to 19 CFR 351.408(c)(1), as currently written, when an NME producer purchases inputs from market economy suppliers and pays for those purchases in a market economy currency, the Department normally uses the weighted-average price paid by the NME producer for these inputs to value the input in question, where possible. When a portion of the input is purchased from a market economy supplier and the remainder from a nonmarket economy supplier, the Department will normally use the price paid for the input sourced from market economy suppliers to value all of the input, provided that the volume of the market economy input as a share of total purchases from all sources is “meaningful.” *See Antidumping Duties; Countervailing Duties, Final Rule*, 62 FR 27296, 27366 (May 19, 1997); *Shakeproof Assembly Components Div. of Ill. Tool Works, Inc. v. United States*, 268 F. 3d 1376 (Fed. Cir. 2001).

In *Antidumping Methodologies: Market Economy Inputs, Expected Non-Market Economy Wages, Duty Drawback; and Request for Comments*, 71 FR 61716 (October 19, 2006), the Department instituted a rebuttable presumption that market economy input prices are the best available information for valuing all of an input when the total volume of the input purchased by the respondent from all market economy sources during the period of investigation or review exceeds 33 percent of the total volume of the input purchased from all sources during the period. Under this practice, unless case-specific facts provide adequate grounds to rebut the Department’s presumption, the Department uses the weighted-average market economy purchase price to value all of the input. Alternatively, when the volume of an NME firm’s purchases of a

particular input from market economy suppliers during the period of investigation/review does not exceed this 33 percent threshold, the Department weight-averages the (weighted-average) market economy purchase price and an appropriate surrogate value,<sup>1</sup> using as weights the relative quantities of the input imported and purchased from domestic sources.

In determining whether market economy purchases meet this 33 percent threshold, the Department compares the volume that the respondent purchased from market economy sources during the period of investigation or review with the respondent's total purchases during the period. When a firm has made market economy input purchases that may have been dumped (*e.g.*, the country covered by our proceeding has an antidumping measure on the input from the source country) or from a country that the Department has a "reason to believe or suspect" maintains general export subsidies, are not *bona fide*, or are otherwise not acceptable for use in a dumping calculation (*i.e.* if the purchases are from an affiliate and are not made at arm's length), the Department excludes them from the numerator of the ratio to ensure a fair determination of whether valid market economy purchases meet the 33 percent threshold.

The Department now proposes to revise 19 CFR 351.408(c)(1) to establish that where substantially all (*i.e.*, 85 percent or more) of an input is purchased from market economy suppliers (from one or more market economy countries) as a share of total purchases of that input from all sources during a particular period of investigation or review, the Department will normally use the weighted-average purchase price paid to the market economy supplier(s) to value all of the input. When the 85 percent threshold is not met, the Department will weight-average the market economy purchase price(s) and an appropriate surrogate value, using the

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<sup>1</sup> The Department will choose a surrogate value from a market economy country which is at a level of economic development comparable to that of the nonmarket economy country and is a significant producer of comparable merchandise.

respective quantities of the input sourced, from market economy and nonmarket economy suppliers. One reason for this proposed revision is a concern that, when market economy purchases of an input do not account for substantially all purchases of the input (imported and domestically supplied), a market economy input price is not the best available information, particularly since it would not be possible to determine objectively whether the price for the input would have been the same had the firm purchased solely from market economy suppliers. The Department has confidence in the market economy purchase price(s) only when the proportion of the total volume of the input that is sourced from market economies is substantially all (*i.e.*, for purposes of this provision, 85 percent or more) of the total purchases of that particular input.

The Department also proposes to add a requirement to 19 CFR 351.408(c)(1) that the market economy input at issue actually be produced in one or more market economy countries, and not just sold through market economy countries, to address concerns that the pricing of an NME-produced input by a market economy supplier (or reseller) can be distorted by NME cost or supply factors. For example, NME input prices that reflect non-profit objectives or low or suppressed capital, land, energy or other factors of production costs in the NME country can be reflected in, and therefore distort, the prices charged by market economy suppliers or resellers of that input. That is not to say that prices of market economy-produced inputs can never be distorted, but only that they are normally not reflective of systemic, economy-wide distortions, as are NME prices.

#### **Explanation of Proposed Modification to 19 CFR 351.408**

The second sentence of 19 CFR 351.408(c)(1) states that “{w}here a factor is purchased from a market economy supplier and paid for in a market economy currency, the Secretary

normally will use the price paid to the market economy supplier.” The Department proposes modifying the existing sentence and adding two parts to that sentence. First, the Department proposes adding “produced in one or more market economy countries” after “{w}here a factor is.” Second, the Department proposes changing the subsequent clauses to read “purchased from one or more market economy suppliers and paid for in market economy currency, the Secretary normally will use the price(s) paid to the market economy supplier(s).” Third, the Department proposes adding the following to the end of that sentence: “if substantially all of the total volume of the factor is purchased from one or more market economy suppliers. For purposes of this provision, the Secretary defines the term ‘substantially all’ to be 85 percent or more of the total volume of purchases of the factor used in the production of subject merchandise.” We view these additions as necessary to specify which inputs qualify and useful to clearly define the proposed threshold.

The current third sentence of 19 CFR 351.408(c)(1) states “In those instances where a portion of the factor is purchased from a market economy supplier and the remainder from a nonmarket economy supplier, the Secretary normally will value the factor using the price paid to the market economy supplier.” The Department proposes deleting “a portion of the factor” from the beginning of that sentence and replacing it with “less than substantially all of the total volume of the factor.” The Department also proposes adding “produced in one or more market economy countries and” before “purchased from a market economy supplier,” and changing the latter clause to read “purchased from one or more market economy suppliers.” In addition, the Department proposes deleting “and the remainder from a nonmarket economy supplier.” The Department also proposes deleting “value the factor using the price paid to the market economy supplier” at the end of that sentence. The Department is replacing these passages with “weight-

average the actual price(s) paid for the market economy portion and the surrogate value for the nonmarket economy portion by their respective quantities.” We view these changes as necessary to explain the methodology the Department will use when a respondent purchases less than substantially all of the input from market economy suppliers or only part of the input is produced in one or more market economy countries.

## **Classification**

### *Executive Order 12866*

This rule has been determined to be not significant for purposes of Executive Order 12866.

### *Initial Regulatory Flexibility Act (IRFA)*

Pursuant to Section 603 of the Regulatory Flexibility Act, the Department has prepared the following IRFA to analyze the potential impact that this proposed rule, if adopted, would have on small entities.

### *Description of the Reasons Why Action is Being Considered*

The policy reasons for issuing this proposed rule are discussed in the Background section of this document, and are not repeated here.

### *Statement of the Objectives of, and Legal Basis for, the Proposed Rule; Identification of all Relevant Federal Rules that may Duplicate, Overlap, or Conflict with the Proposed Rule*

This proposed rule is intended to revise 19 CFR 351.408(c)(1) to establish that in valuing factors of production in antidumping proceedings involving nonmarket economies, if substantially all of an input is purchased from market economy suppliers as a share of total purchases of that input from all sources during the investigation or review period, the Department will use the weighted-average purchase price paid to market economy suppliers to

value all of the input. Further, the proposed rule is also intended to add a requirement to 19 CFR 351.408(c)(1) that the market economy input at issue actually be produced in one or more market economy countries, and not just be sold through market economy countries.

The legal basis for this rule is 5 U.S.C. 301; 19 U.S.C. 1202 note; 19 U.S.C. 1303 note; and 19 U.S.C. 1671 *et seq.* No other Federal rules duplicate, overlap or conflict with this proposed rule.

#### *Number and Description of Small Entities Regulated by the Proposed Rule*

The proposed rule regulates entities that are: (1) producing merchandise in a nonmarket economy that is exported to the United States and is subject to an antidumping duty order; (2) being individually examined in an antidumping proceeding; and (3) claiming that market economy purchase prices should be used to value a factor of production in the calculation of the exporter's weighted average dumping margin and antidumping duty assessment rate. The resulting antidumping duty assessment rate determines the amount of antidumping duties to be paid by importers of record of the subject merchandise imported into the United States.

Entities that produce and export merchandise subject to U.S. antidumping duty orders are rarely U.S. companies. Some producers and exporters of subject merchandise do have U.S. affiliates, some of which may be considered small entities under the appropriate Small Business Administration (SBA) small business size standard. The Department is not able to estimate the number of exporters and producer domestic affiliates that may be considered small entities, but anticipates, based on its experience in these proceedings, that the number will not be substantial. Importers may be U.S. or foreign companies, and some of these entities may be considered small entities under the appropriate SBA small business size standard. There are no means by which the Department can readily determine whether or not a substantial number of small importers

will be impacted by this rule, as the effect of the Department's change in methodology will differ from proceeding to proceeding, on a case-by-case basis, and the importers depositing cash deposits and/or paying antidumping duties will also differ from proceeding to proceeding.

*Description of the Projected Reporting, Recordkeeping, and other Compliance Requirements of the Proposed Rule*

The proposed rule will require exporters or producers to establish on the administrative record that 85 percent or more of an input has been purchased from market economy suppliers from one or more market economy countries as a share of total purchases of that input from all sources (domestic and foreign) during a particular period of investigation or administrative review, if the exporter or producer wishes the Department to use the weighted-average purchase price paid to the market economy supplier(s) to value all of the input (from all sources).

Furthermore, the proposed rule will require that exporters or producers also establish on the administrative record that the market economy input at issue was produced in a market economy, rather than merely being sold through a market economy supplier. There will be no additional reporting or recordkeeping burdens on U.S. importers as a result of this rule.

*Description of any Significant Alternatives to the Proposed Rule that Accomplish the Stated Objectives of Applicable Statutes and that Minimize any Significant Economic Impact of the Proposed Rule on Small Entities*

As required by 5 U.S.C. § 603(c), the Department's analysis considered significant alternatives. The alternatives which the Department considered are: (1) the preferred alternative of modifying 19 CFR 351.408(c)(1) to (a) establish that if substantially all of an input is purchased from market economy suppliers as a share of total purchases of that input from all sources during the investigation or review period, the Department will use the weighted-average

purchase price paid to market economy suppliers to value all of the input and (b) require that the market economy input at issue actually be produced in one or more market economy countries, and not just be sold through market economy countries; (2) modify the regulation with respect to (1)(a), but not (1)(b); (3) modify the regulation with respect to (1)(b), but not (1)(a); or (4) maintain the *status quo* with respect to the valuation of inputs purchased from a market economy supplier and paid for in a market economy currency.

Factors of production for the subject merchandise will be assigned a value in the calculation of the weighted average dumping margin and antidumping duty assessment rate, whether the assigned value is a market economy purchase price, a surrogate value from a market economy country, or a combination of the two. Accordingly, the economic impact of providing information and argument to the Department in relation to the valuation of the factors of production for entities individually examined in the Department's antidumping proceedings is roughly equivalent under each of the above-noted alternatives.

In relation to the possible impact of the alternatives on the amount of antidumping duties to be paid by importers of record of the subject merchandise, the value of a factor of production is one of numerous elements in the calculation of a weighted average margin of dumping. Whether a particular factor value will have any impact on the resulting weighted average dumping margin is not certain. To the extent that a small U.S. importer will be economically impacted by this rule, it will only be through an increase or decrease in the cash deposits and duties posted by that importer as a result in the change of a weighted average dumping margin. In those circumstances where a change in the value of an input as a result of this regulatory modification does have an impact on the weighted average dumping margin, the impact to the

small U.S. importer will depend on whether the publicly sourced value is higher or lower than the market economy purchase price(s).

In this regard, the Department is required by 19 U.S.C. 1677b(c)(1)(b) to rely on the best information available for valuing the producer's factors of production. The proposed modification to the regulation addresses the Department's concerns that a market economy input price may not be the best available information when: 1) market economy purchases of an input are insufficient in proportion to NME purchases for the Department to objectively conclude that the purchase price for the input would have been the same had the firm purchased solely from market economy suppliers and 2) the reported pricing of an NME-produced input purchased from a market economy supplier (or reseller) can be distorted by NME cost or supply factors. Accordingly, the Department considers that the first, preferred alternative is the only alternative that fully addresses the Department's policy concerns explained in the Background section of this Notice.

*Paperwork Reduction Act*

This rule does not contain a collection of information for purposes of the Paperwork Reduction Act of 1980, as amended (44 U.S.C. 3501 *et seq.*)

**List of Subjects in 19 CFR Part 351:** Administrative practice and procedure, Antidumping, Business and industry, Cheese, Confidential business information, Countervailing duties, Freedom of information, Investigations, Reporting and recordkeeping requirements.

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Paul Piquado  
Assistant Secretary  
for Import Administration

June 15, 2012\_\_\_\_  
Date

For the reasons stated, 19 CFR part 351 is proposed to be amended as follows:

**PART 351 – ANTIDUMPING AND COUNTERVAILING DUTIES**

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.*; and 19 U.S.C. 3538.

2. In §351.408, revise paragraph (c)(1) to read as follows:

*Information used to value factors.* The Secretary normally will use publicly available information to value factors. However, where a factor is produced in one or more market economy countries, purchased from one or more market economy suppliers and paid for in market economy currency, the Secretary normally will use the price(s) paid to the market economy supplier(s) if substantially all of the total volume of the factor is purchased from the market economy supplier(s). For purposes of this provision, the Secretary defines the term “substantially all” to be 85 percent or more of the total purchase volume of the factor used in the production of subject merchandise. In those instances where less than substantially all of the total volume of the factor is produced in one or more market economy countries and purchased from one or more market economy suppliers, the Secretary normally will weight-average the actual price(s) paid for the market economy portion and the surrogate value for the nonmarket economy portion by their respective quantities.

