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DEPARTMENT OF COMMERCE

International Trade Administration

19 CFR Part 351

[Docket No. 210813-0162]

RIN 0625-AB10

Regulations to Improve Administration and Enforcement of Antidumping and Countervailing Duty Laws

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

ACTION: Final rule.

SUMMARY: Pursuant to its authority under Title VII of the Tariff Act of 1930, as amended (the Act), the Department of Commerce (Commerce) is modifying its regulations to improve administration and enforcement of the antidumping duty (AD) and countervailing duty (CVD) laws. Specifically, Commerce is modifying its regulation concerning the time for submission of comments pertaining to industry support in AD and CVD proceedings; modifying its regulation regarding new shipper reviews; modifying its regulation concerning scope matters in AD and CVD proceedings; promulgating a new regulation concerning circumvention of AD and CVD orders; promulgating a new regulation concerning covered merchandise referrals received from U.S. Customs and Border Protection (CBP); promulgating a new regulation pertaining to Commerce requests for certifications from interested parties to establish whether merchandise is subject to an AD or CVD order; and is modifying its regulation regarding importer reimbursement certifications filed with CBP. Finally, Commerce is modifying its regulations regarding service lists, entries of appearance, and importer filing requirements for access to business proprietary information in AD and CVD proceedings.

DATES: *Effective date*: The amendments to §§ 351.203, 351.214, 351.228, and 351.402(f)(2) in instructions 3, 4, 8, and 10, respectively, are effective [INSERT DATE 30 DAYS FROM PUBLICATION IN THE ***FEDERAL REGISTER***]. The amendments to §§ 351.103(d), 351.225, 351.226, 351.227, and 351.305(d) in instructions 2, 5, 6, 7, and 9, respectively, are effective [INSERT DATE 45 DAYS FROM PUBLICATION IN THE ***FEDERAL REGISTER***].

For information concerning applicability dates, see SUPPLEMENTARY INFORMATION.

FOR FURTHER INFORMATION CONTACT: Scott McBride at (202) 482-6292; David Mason at (202) 482-5051; or Jessica Link at (202) 482-1411.

SUPPLEMENTARY INFORMATION:

Applicability dates:

- Amendments to § 351.203 apply to segments of the proceeding for which a petition is filed on or after [INSERT DATE 30 DAYS FROM PUBLICATION IN THE ***FEDERAL REGISTER***].
- Amendments to § 351.214 apply to new shipper reviews for which a new shipper review request is filed on or after [INSERT DATE 30 DAYS FROM PUBLICATION IN THE ***FEDERAL REGISTER***].
- Amendments to § 351.225 and corresponding amendments to §§ 351.103(d) and 351.305(d) apply to scope inquiries for which a scope ruling application is filed, as well as any scope inquiry self-initiated by Commerce, on or after [INSERT DATE 45 DAYS FROM PUBLICATION IN THE ***FEDERAL REGISTER***]. For information on specific applicability dates for amendments to § 351.225(l), please see section 12 in the preamble under "Scope – § 351.225."

- Added § 351.226 and corresponding amendments to § 351.103(d) and § 351.305(d) apply to circumvention inquiries for which a circumvention request is filed, as well as any circumvention inquiry self-initiated by Commerce, on or after [INSERT DATE 45 DAYS FROM PUBLICATION IN THE **FEDERAL REGISTER**]. For information on specific applicability dates for § 351.226(l), please see section 12 in the preamble under "Circumvention – § 351.226."
- New § 351.227 and corresponding amendments to § 351.103(d) and § 351.305(d) apply to covered merchandise inquiries for which a covered merchandise referral determined to be sufficient is received on or after [INSERT DATE 45 DAYS FROM PUBLICATION IN THE ***FEDERAL REGISTER***]. For information on specific applicability dates for § 351.227(l), please see section 8 in the preamble under "Covered Merchandise Referrals -- § 351.227."
- Added § 351.228 is applicable on or after [INSERT DATE 30 DAYS FROM PUBLICATION IN THE ***FEDERAL REGISTER***].
- Amendments to § 351.402(f)(2) are applicable on or after [INSERT DATE 30 DAYS FROM PUBLICATION IN THE *FEDERAL REGISTER*].

General Background

On August 13, 2020, Commerce published proposed amendments to its existing regulations, 19 CFR part 351, to strengthen and improve the administration and enforcement of the AD/CVD laws.[1] Relevant to this final rule are the AD/CVD statutory and regulatory provisions in general, as well as those pertaining to industry support, new shipper reviews, scope inquiries, circumvention inquiries, covered merchandise inquiries, certifications, and certain procedures, which we briefly summarize below.

[1] *Regulations to Improve Administration and Enforcement of Antidumping and Countervailing Duty Laws*, 85 FR 49472 (August 13, 2020) (*Proposed Rule*).

Title VII of the Act vests Commerce with authority to administer the AD/CVD laws.[2] In general, the AD/CVD laws are intended to provide relief to domestic industries, including businesses, workers, farmers, and ranchers from the injurious effects of unfairly traded imports through the imposition of AD/CVDs.[3]

Title VII allows for a domestic interested party to file a petition seeking an AD or CVD order, and corresponding duties, on certain imports. If the petition meets all the elements necessary for initiation, Commerce will initiate and conduct an AD or CVD investigation. Similarly, the U.S. International Trade Commission (ITC) will conduct a separate investigation concerning material injury or threat of material injury to the domestic industry. 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 ITC. 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.[4]

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[2] *See generally* Title VII of the Act (19 U.S.C. 1671 *et. seq.*); *see also* titles I, II, and IV of the Uruguay Round Agreements Act (URAA), Pub. L. No. 103-465, 108 Stat. 4809 (1994) (implementing into law the World Trade Organization (WTO) agreements, the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the Anti-Dumping (AD) Agreement) and the Agreement on Subsidies and Countervailing Measures ((SCM) Agreement)); and Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103-316, vol. 1 (1994) (SAA).

[3] *See Guangdong Wireking Housewares & Hardware Co. v. United States*, 745 F.3d 1194, 1203 (Fed. Cir. 2014) (*Guangdong Wireking*) ("The congressional intent behind the enactment of countervailing duty and antidumping law generally was to create a civil regulatory scheme that remedies the harm unfair trade practices cause.");

[4] A countervailable subsidy is further defined under section 771(5)(B) of the Act 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.

After issuance of an AD/CVD order, Commerce directs CBP to "suspend liquidation"[5] and collect cash deposits, or estimated amounts of duties, on appropriate entries subject to the scope of the order corresponding to the margins of dumping established under an AD order and the CVD rates established under a CVD order.[6] On a yearly basis, interested parties may request that Commerce conduct an administrative review to determine the appropriate dumping margin or CVD rate for entries subject to the order during the previous review year.[7] Pursuant to its administrative review procedures, Commerce instructs CBP to "lift the suspension of liquidation" and assess AD/CVDs at the appropriate amount.[8]

With respect to industry support, once an AD petition under section 732(b) of the Act or a CVD petition under section 702(b) is filed, the statute provides Commerce with 20 days in which to determine whether the elements necessary for initiation of an investigation have been satisfied, including the requirement to demonstrate industry support. In exceptional circumstances, Commerce may extend the 20-day period to a maximum of 40 days solely for purposes of determining industry support. In the *Proposed Rule*, Commerce proposed to modify § 351.203 to provide for the establishment of a deadline by which parties may file comments on industry support. As discussed below, we are adopting the modifications from the *Proposed Rule*.

Regarding new shipper reviews, section 751(a)(2)(B) of the Act and § 351.214 provide a procedure by which exporters or producers who did not export the product during the original AD or CVD investigation can obtain their own individual dumping margin or countervailing duty rate on an accelerated basis (referred to as a "new shipper review").[9] Commerce explained

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[5] "Liquidation" is the point at which CBP ascertains and assesses the final rate and amount of duty on an entry. *See generally* 19 U.S.C. 1500.
[6] *See generally* section 706 of the Act; section 736 of the Act; *see also* 19 CFR 351.211.
[7] *See* section 751(a)(1) of the Act; *see also* 19 CFR 351.212-213.
[8] 19 CFR 351.212-213.
[9] Section 751(a)(2)(B) of the Act was enacted in the URAA in 1994. *See* SAA at 816 ("Article 9.5 [of the AD Agreement] establishes special procedures for imposing antidumping duties on exporters or producers who did not export the product to the importing country during the original period of investigation (so-called 'new shippers')."). Section 351.214 was subsequently adopted pursuant to a rulemaking in 1997. *See Antidumping Duties;*

in the *Proposed Rule* that in 2016 the Trade Facilitation and Trade Enforcement Act of 2015 (TFTEA) was signed into law, which contains title IV – Prevention of Evasion of Antidumping and Countervailing Duty Orders (short title "Enforce and Protect Act of 2015" or "EAPA").[10] Section 433 (entitled "Addressing Circumvention by New Shippers") added two key provisions to the new shipper procedures under section 751(a)(2)(B) of the Act.[11] First, section 433 removed the ability for importers to post AD/CVD-specific bonds or security in lieu of AD/CVD cash deposits by striking this provision from section 751(a)(2)(B) of the Act.[12] Second, section 433 added a provision that the individual dumping margin or countervailing duty rate determined for a new shipper must be based on *bona fide* sales in the United States and codified the factors that Commerce has historically used to determine whether a sale is *bona fide*.[13] Accordingly, in the *Proposed Rule*, Commerce proposed conforming amendments to § 351.214, which are adopted in this final rule. The modifications to § 351.214 clarify the circumstances under which Commerce will grant a new shipper review and establish specific factors to be considered in determining whether the sales at issue constitute *bona fide* sales for purposes of the AD and CVD laws.

With respect to scope inquiries, upon issuance of an AD or CVD order, the Act requires Commerce to provide a description of the class or kind of merchandise subject to the order at issue (*i.e.*, subject merchandise).[14] That description is known as the scope of the AD/CVD order. Because the statute "does not require Commerce to define the class or kind of foreign merchandise in any particular manner[,] Commerce has the authority to fill that gap and define

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Countervailing Duties, Proposed Rule, 61 FR 7308, 7317-18 (Feb. 27, 1996) (*1996 Proposed Rule*) (discussing the proposed new shipper review regulation); *Antidumping Duties; Countervailing Duties, Final Rule*, 62 FR 27296, 27318-19 (May 19, 1997) (*1997 Final Rule*) (discussing the finalized new shipper review regulation).

[10] Trade Facilitation and Trade Enforcement Act of 2015, Pub. L. No. 114-125, 130 Stat. 122 (2016) (TFTEA).

[11] *See* Pub. L. No. 114-125, section 433, 130 Stat. at 171. *See also* H.R. Rep. No. 114-114, at 89 (2015) ("The Committee is concerned that the ability of new exporters and producers to obtain their own individual weighted average dumping margins or individual countervailing duty rates from the Department of Commerce on an expedited basis (known as 'new shipper reviews') has been abused to avoid antidumping and countervailing duties.")

[12] *See* Pub. L. No. 114-125, section 433, 130 Stat. at 171. *See also* H.R. Rep. No. 114-114, at 89; H.R. Rep. No. 114-376, at 192 (2015) (Conf. Rep.)

[13] *See* Pub. L. No. 114-125, section 433, 130 Stat. at 171. *See also* Conf. Rep., H.R. Rep No. 114-376 at 192-193.

[14] *See* section 706(a)(2) of the Act; section 736(a)(2) of the Act; section 771(25) of the Act.

the scope of an order consistent with the countervailing duty and antidumping duty laws."[15] Further, "under the statutory scheme, Commerce owes deference to the intent of the proposed scope of an antidumping investigation as expressed in an antidumping petition."[16]

Under the statutory framework, as recognized by the U.S. Court of International Trade (CIT) and U.S. Court of Appeals for the Federal Circuit (Federal Circuit), Commerce is the agency charged with establishing and interpreting the scope of AD/CVD orders,[17] and CBP is the agency charged with applying and enforcing the AD/CVD orders.[18] As part of its statutory responsibility "to fix the amount of duty owed on imported goods[,]" CBP "is both empowered and obligated to determine in the first instance whether goods are subject to existing [AD/CVD orders]."[19] Pursuant to 19 U.S.C. 1514(b) (section 514 of the Act), this "determination is then 'final and conclusive' unless an interested party seeks a scope ruling from Commerce (which ruling would then be reviewable pursuant to [19 U.S.C. 1516a])."[20]

Commerce retains discretion to define the scope of the order to ensure that all imports causing injury have been addressed, and, additionally, may take into account potential circumvention and duty evasion concerns in crafting the scope language.[21] Because the scope of an AD/CVD order is written in general terms, questions may arise as to whether a certain product is covered by the scope of an order. Beyond a general recognition that Commerce may

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[15] *Canadian Solar, Inc. v. United States*, 918 F.3d 909, 917 (Fed. Cir. 2019) (internal citations and punctuation omitted) (*Canadian Solar*).
[16] *Ad Hoc Shrimp Trade Action Committee v. United States*, 637 F. Supp. 2d 1166, 1174 (CIT 2009).
[17] *See Xerox Corp. v. United States*, 289 F.3d 792, 795 (Fed. Cir. 2002) ("Commerce should in the first instance decide whether an antidumping order covers particular products, because the order's meaning and scope are issues particularly within the expertise of that agency.") (internal citations and punctuation omitted).
[18] *See Sunpreme Inc. v. United States*, 946 F.3d 1300, 1303 (Fed. Cir. 2020) (*Sunpreme*) (holding that "it is within Customs's authority to preliminarily suspend liquidation of goods based on an ambiguous [AD or CVD] order, such that the suspension may be continued following a scope inquiry by Commerce."); and *Fujitsu Ten Corp. v. United States*, 957 F. Supp. 245, 248 (CIT 1997) (*Fujitsu*) ("The statute recognizes Customs makes the initial determination that an existing antidumping order applies to a specific entry of merchandise. The statute states that such a decision is 'final and conclusive' unless it is appealed by petition to Commerce." (citations omitted)).
[19] *Id.,* 946 F.3d at 1317 (citing 19 U.S.C. 1500(c)).
[20] *See TR International Trading Co. v. United States*, 433 F. Supp. 3d 1329, 1341 (CIT 2020) (citing *Sunpreme*, 946 F.3d at 1318) (*TR International*) (appeal pending) (referencing section 516 of the Act); *see also Fujitsu*, 957 F. Supp. at 248.
[21] *See Canadian Solar*, 918 F.3d at 921-22 ("It is unnecessary for Commerce to engage in a game of whack-a-mole when it may reasonably define the class or kind of merchandise in a single set of orders, and within the context of a single set of investigations, to include all imports causing injury.").

issue "class or kind of merchandise" determinations,[22] the statute is otherwise silent regarding the procedures and standards that Commerce may apply in issuing a scope ruling. Therefore, Commerce's regulation, § 351.225, describes the applicable procedures and standards concerning "scope rulings" that Commerce will issue upon application of an interested party, or by initiating a "scope inquiry." In the *Proposed Rule*, Commerce proposed numerous revisions to § 351.225, many of which are further revised or adopted in this final rule.

Concerning circumvention inquiries (considered another type of "class or kind determination" under the jurisdictional provisions of the statute), section 781 of the Act identifies four types of products that may be found circumventing an AD/CVD order, and, therefore, may be included within the scope of the order. The legislative history accompanying the Omnibus Trade and Competitiveness Act of 1988 provides that "[a]n order on an article presumptively includes articles altered in minor respects in form or appearance[,]" and that the purpose of the circumvention statute "is to authorize the Commerce Department to apply AD and [CVD] orders in such a way as to prevent circumvention and diversion of U.S. law."[23] Further, the legislative history indicates that Congress was concerned with the existence of "loopholes," *i.e.*, foreign companies evading orders by making slight changes in their method of production, because such scenarios "seriously undermine the effectiveness of the remedies provided by the antidumping and countervailing duty proceedings, and frustrated the purposes for which these laws were enacted."[24] Congress also recognized that "aggressive implementation of [the circumvention statute] by the Commerce Department can foreclose these practices."[25] With the implementation of the URAA, the SAA expressed similar concerns about scenarios limiting the effectiveness of the AD duty law (*i.e.*, completion or assembly in a country other than the subject

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[22] *See* section 516A(a)(2)(B)(vi) of the Act (referencing, in the judicial review provision of the statute, "[a] determination by the administering authority as to whether a particular type of merchandise is within the class or kind of merchandise described in an existing finding or dumping our antidumping or countervailing duty order.")
[23] Omnibus Trade Act of 1987, Report of the Senate Finance Committee, S. Rep. No. 100-71, at 101 (1987).
[24] *Id.*
[25] *Id.*

country).[26] Accordingly, Commerce "has been vested with authority to administer the antidumping laws in accordance with the legislative intent" and, thus, "has a certain amount of discretion [to act] . . . with the purpose in mind of preventing the intentional evasion or circumvention of the antidumping duty law."[27] In the *Proposed Rule*, Commerce proposed to adopt a new regulation, § 351.226, to address circumvention inquiries and determinations. After making some revisions from the *Proposed Rule*, Commerce is adopting § 351.226 in this final rule.

Pertaining to covered merchandise inquiries, title IV of the TFTEA (referred to as EAPA), section 421, added section 517 to the Act,[28] which establishes a formal process for CBP to conduct civil administrative investigations of potential duty evasion of AD and CVD orders on the basis of an allegation by an interested party or upon referral by another Federal agency (referred to herein as an "EAPA investigation"). Pursuant to section 517(b)(4)(A) of the Act, if CBP is conducting an EAPA investigation based on an allegation from an interested party, and is unable to determine whether the merchandise at issue is "covered merchandise" within the meaning of section 517(a)(3) of the Act, it shall refer the matter to Commerce to make a covered merchandise determination (referred to herein as a "covered merchandise referral").[29] Although Congress did not require that Commerce promulgate regulations with respect to section 517 of the Act, in the *Proposed Rule*, Commerce proposed to adopt § 351.227, a new regulation to address procedures and standards specific to Commerce's consideration of covered merchandise referrals. In particular, this new regulation would govern Commerce's receipt of a covered merchandise referral, Commerce's initiation and conduct of a covered merchandise inquiry, and

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[26] *See* SAA at 892-95.
[27] *Tung Mung Development Co., Ltd. v. United States*, 219 F. Supp. 2d 1333, 1343 (CIT 2002) (*Tung Mung*) (quoting *Mitsubishi Elec. Corp. v. United States*, 700 F. Supp. 538, 555 (CIT 1988) (*Mitsubishi I*), *aff'd* 898 F.2d 1577, 1583 (Fed. Cir. 1990) (*Mitsubishi II*)).
[28] *See* Pub. L. No. 114-125, § 421, 130 Stat. at 161-69.
[29] *See* H.R. Rep. No. 114-376, at 190 ("If the Commissioner is unable to determine whether the merchandise at issue is covered merchandise, the Commissioner shall refer the matter to the Department of Commerce to determine whether the merchandise is covered merchandise. The Department of Commerce is to make this determination pursuant to its applicable statutory and regulatory authority, and the determination shall be subject to judicial review under 19 U.S.C. 1516a(a)(2). The Conferees intend that such determinations include whether the merchandise at issue is subject merchandise under 19 U.S.C. 1677j." (referencing sections 516 and 781 of the Act)).

Commerce's covered merchandise determination, pursuant to section 517(b)(4) of the Act. With some revisions, Commerce is adopting § 351.227 in this final rule.

Regarding certifications, in the *Proposed Rule*, Commerce proposed to adopt § 351.228, a regulation to codify and enhance Commerce's existing authority and practice to require certifications by importers and other interested parties as to whether merchandise is subject to an AD/CVD order. With minor revisions, Commerce is adopting § 351.228 in this final rule.

Another form of certifications relates to importer reimbursement certifications as provided for under § 351.402(f)(2). In the *Proposed Rule*, Commerce proposed to amend § 351.402(f)(2) regarding importer certifications for the payment or reimbursement of AD/CVDs on entries subject to AD orders to account for updated procedures. With minor revisions, Commerce is adopting the amendments to § 351.402(f)(2) in this final rule.

To implement the substantive changes in the final rule, Commerce is also adopting proposed changes to two procedural regulations. First, in conducting its administrative proceedings, the statute directs Commerce to make certain information generally available on a public record.[30] Pursuant to § 351.103(d)(1), with some exceptions, parties that wish to be served with public information on a segment of a proceeding must file an entry of appearance on that record to be placed on the relevant segment-specific public service list.[31] In the *Proposed Rule*, Commerce proposed to amend § 351.103(d)(1) to reflect that certain interested parties need not file an entry of appearance to be placed on the segment-specific service list for the relevant segment. With a minor revision, these changes are adopted in this final rule. Additionally, § 351.103(d) contains a cross-reference to the service list procedures for scope ruling applications, which are further described in § 351.225(n). This language has been updated to include

[30] *See generally* section 777(a) of the Act. *See also* 19 CFR 351.104 (describing the official record of AD/CVD proceedings).
[31] Section 351.303(b)(2) contains procedures regarding the filing of documents through Commerce's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS).

reference to service list procedures for requests for circumvention inquiries, which are further described in § 351.226(n).

Second, because of the nature of Commerce's proceedings, which frequently require Commerce to rely on non-public information such as business proprietary information (BPI) in issuing its determinations, the statute also requires Commerce to make BPI available to interested parties who have been authorized to receive such information under an administrative protective order (APO).[32] Section 351.305(d) provides specific filing requirements for importers to access BPI in Commerce's proceedings, including certain requirements for importers in scope inquiries. In the *Proposed Rule*, Commerce proposed to amend § 351.305(d) to add reference to importers in circumvention inquiries and to exempt importers identified by CBP in a covered merchandise referral from these specific filing requirements. These changes are adopted in this final rule.

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

In the *Proposed Rule* published on August 13, 2020, Commerce invited the public to submit comments.[33] Commerce received 37 submissions providing comments and 17 rebuttal submissions from interested parties, including domestic producers, exporters, importers, surety companies, and foreign governments. We have determined to make certain modifications to the *Proposed Rule* in response to issues and concerns raised in those comments and rebuttal comments. We considered the merits of each submission and on many of the issues and

[32] Pursuant to section 777(c)(1)(A) of the Act, Commerce must make BPI submitted to it during the course of an AD/CVD proceeding available to interested parties who have been authorized to receive such information under an APO. Additionally, section 777(d) of the Act requires that parties submitting BPI to Commerce which is covered by an APO must serve such information on "all interested parties who are parties to the proceeding" that are subject to the APO. "Interested party" is defined under section 771(9) of the Act and 19 CFR 351.102(b)(29); "party to the proceeding" is defined under 19 CFR 351.102(b)(36).

[33] On September 10, 2020, in response to concerns raised by interested parties, Commerce determined that it would benefit "the public and the agency" if parties had "the opportunity to submit rebuttal comments in response to comments filed by other parties on the proposed rule." *Regulations to Improve Administration and Enforcement of Antidumping and Countervailing Duty Laws; Extension of Comment Period to Allow Submissions of Rebuttal Comments and Requirement of Electronic Submission of Comments and Rebuttal Comments*, 85 FR 55801 (Sept. 10, 2020). Accordingly, Commerce granted "an extension of time solely for the purpose of allowing the public to file such rebuttal comments." *Id.*

concerns raised, we analyzed the legal and policy arguments in light of both our past practice, as well as our desire to strengthen the administration and enforcement of our AD/CVD laws.

As we explained in the *Proposed Rule*,[34] the purpose of these modifications and additions to our regulations is to strengthen the administration and enforcement of AD/CVD laws, make such administration and enforcement more efficient, and to create new enforcement tools for Commerce to address circumvention and evasion of trade remedies. These modifications allow Commerce to better fulfill the Congressional intent behind the AD/CVD laws – namely, to remedy the injurious effects of unfairly traded imports. In addition, these regulations promote the Administration's objective to strongly enforce and efficiently administer the AD/CVD laws rigorously.

The preamble to the *Proposed Rule* provides extensive background, analysis, and explanation which are relevant to these regulations. With some modifications, as noted, this final rule codifies those proposed on August 13, 2020. Accordingly, to the extent that parties and the public wish to have a more detailed and comprehensive interpretation of these regulations, we advise not only considering the preamble to these final regulations, but also the analysis and explanations in the preamble to the *Proposed Rule.*

In drafting this final rule, Commerce carefully considered each of the comments received. The following sections generally contain a brief discussion of each regulatory provision, a summary of the comments we received (if any) and Commerce's responses to those comments. In addition, these sections contain an explanation of any changes Commerce has made to the *Proposed Rule,* either in response to comments or that it deemed necessary for conforming, clarifying, or providing additional public benefit. The final section discusses other comments received not related to the regulations covered in this final rule.

Comment Period on Industry Support Prior to Initiation Determination –§ 351.203(g)

[34] *Proposed Rule*, 85 FR 49472 at 49472-73.

Section 351.203(g) establishes a deadline for comments on industry support no later than five business days before the scheduled date of initiation, and rebuttal comments no later than two calendar days thereafter. We received several comments and rebuttal comments both in support and in opposition to the *Proposed Rule*. In addition, some commenters proposed that the final rule should impose additional requirements for parties filing comments in opposition to the petitioning party's claims of industry support.

After considering the comments and rebuttal comments, we have not adopted the suggested modifications to the *Proposed Rule* and, therefore, have left unchanged proposed § 351.203(g). We believe the *Proposed Rule* to establish a deadline for industry support comments and rebuttal comments is reasonable because it provides sufficient time for parties to submit comments and rebuttal comments, while balancing the need for Commerce to have sufficient time to consider and analyze the comments and information on the record within the normal timeframe established by Congress. We also believe the deadlines, as set forth in the *Proposed Rule*, recognize the importance of giving parties adequate time to prepare meaningful comments. Last, we recognize that establishing regulatory deadlines is a reasonable exercise of Commerce's authority to implement the statutory provisions the agency is responsible for administering.

1. Time Limits for Comments

Several commenters understand Commerce's desire to have adequate time to consider comments on industry support, and several commenters support and agree with Commerce's proposal to set a new deadline. Other commenters contend that Commerce's justification about needing time to review industry support comments does not outweigh the importance of giving parties time to prepare meaningful comments because the issue cannot be revisited after initiation.

In particular, one commenter asserts that adding a limitation on the timeline for filing comments on industry support is contrary to the Act because the Act does not permit Commerce to limit the period for comments on industry support and the statute is unambiguous in allowing

comments any time before Commerce initiates the investigation. The commenter further argues that even if the Act were silent on this issue, Commerce's interpretation is arbitrary and capricious and not based on a permissible construction of the statute. Another commenter disagrees, arguing that the commenter's statutory analysis is flawed. The rebutting commenter contends the Act does not set forth an explicit timeline for submitting comments on industry support and further that the Act allows Commerce to promulgate regulations such as this one. Moreover, the rebutting commenter states, this proposed regulation is neither arbitrary nor capricious because Commerce's proposal provides sufficient time for interested parties to challenge the industry support claim provided in the petition for relief.

Response:

Contrary to the commenter's argument that the statute prohibits Commerce from limiting the time for comments on industry support, there is nothing in the statute that precludes Commerce from adopting a rule that provides parties with specific deadlines for submission of comments or rebuttal comments on the issue of industry support. The sole commenter advancing the statutory argument did not cite to any express language in the statute for support. To the contrary, sections 702(c)(4)(E) and 732(c)(4)(E) of the Act provide that, before the administering authority makes a determination with respect to initiating an investigation, any person who would qualify as an interested party may submit comments or information on the issue of industry support. The Act does not set forth an explicit timeline for submitting comments, provided it is before Commerce makes its determination. Thus, based upon its authority to promulgate regulations, Commerce may establish a reasonable timeframe for when industry support comments are to be submitted. Nothing in the Act restricts Commerce from doing so. Indeed, the Act allows for, and Commerce has set, deadlines for most other types of submissions in its AD and CVD proceedings.

2. Sufficiency of Time for Comment

Several commenters claim that shortening the time to file comments on industry support would prejudice interested parties because respondents do not have advanced notice of new petitions and, therefore, a limited time to prepare comments. Commenters also allege that there is a delay in obtaining access to the petitions because the respondents must obtain APO approval to access BPI in the petition, although other commenters contradict this claim, arguing that interested parties have notice of the petitioner's industry support claims on the first day the petition is filed.

Other commenters raise concerns about the rebuttal comment deadline, arguing that this is an insufficient amount of time. These commenters suggest expanding the rebuttal deadline from two days to five days and recommend that Commerce revise the rule to restrict the deadline for industry support comments further, to ten days before the date of initiation, rather than five business days, as Commerce proposed. Another commenter wonders how Commerce would take rebuttal claims into account if due only two days before the scheduled date of the initiation decision. Alternatively, some commenters propose that Commerce should work with Congress to amend the Act and expand the timeframe for initiation decisions from 20 days to 40 days.

Response:

We have not accepted these proposed changes. With respect to the arguments of insufficient time for parties to provide information and comment, we disagree. The *Proposed Rule* provides parties with, at a minimum, more than a week, and in many cases a longer period, for preparation of comments. This amount of time should be sufficient. As a general rule, we believe the deadlines proposed for the submission of comments and rebuttal comments on the sole issue of industry support provide a sufficient and reasonable amount of time for interested parties to address industry support issues.

With respect to the point made by certain commenters regarding insufficient notice, we disagree. Subsections 702(b)(4) and 732(b)(4) of the Act state that, upon receipt of a petition, the administering authority is required to notify the government of any exporting country named

in the petition by delivering a public version of the petition to an appropriate representative of such country. Thus, the government of the exporting country receives notice of the petition on or about the day of receipt by Commerce. The commenters seem to imply there should be advance notice of a petition filing. This is incorrect, and in any case, it is not possible to provide advance notice before a petition is filed. Nonetheless, we are mindful that in establishing due dates for submissions, Commerce must balance the interests of parties to submit information and comment with Commerce's ability to consider fully such information and comments and to make a decision on initiation supported by evidence on the record.

With respect to the claim that there may be delays in obtaining access to the petitions because the parties must first obtain APO approval to access the BPI contained in such petitions, we do not believe this will be an issue. First, based on Commerce's years of experience with petitions and the arguments parties have advanced against industry support in the past, we find that, in general, the types of claims made against the petitioner's establishment of industry support tend to focus on the scope of subject merchandise as defined in petitions, the domestic like product, the methodology the petitioner uses to calculate industry support, and whether U.S. producers within the industry are left out of the industry support calculation. Our experience has been that these types of arguments in opposition to the petitioner's industry support claims generally can be advanced based on the public information provided in the petitions. Therefore, obtaining access to BPI is generally not needed for submission of comments and information on the issue of industry support.

Second, in the instance in which APO access is needed in order for parties to comment on the industry support claim contained in a petition, we do not believe obtaining such access will be an impediment to a timely submission of comments. We note that while obtaining APO access has the potential to delay access to BPI, the APO/Dockets Unit of Enforcement & Compliance issues an APO and routinely expedites the approval process once an APO

application is filed. We, therefore, believe obtaining APO access to BPI will not be an impediment to parties seeking to comment on industry support.

With respect to the comment as to how Commerce would take rebuttal claims into account if due only two days before the scheduled date of the initiation decision, we note that, under the current rule, Commerce must take into account comments that are filed up to and including the day of the scheduled decision. Thus, we believe the commenter's point highlights the issue with the current situation and recognizes that a procedural improvement is necessary, and one that is aimed at providing Commerce with sufficient time to make an informed initiation decision in accordance with the statute's 20-day period. Providing two days for Commerce to consider any rebuttal comments is a significant improvement over the current process which allows comments and rebuttal comments to be submitted up to the close of business on the scheduled date of the decision.

3. Additional Requirements

Two commenters suggest that Commerce include a regulatory provision that requires parties objecting to industry support to: (1) if they are domestic producers, provide their affiliation status and whether they are related to a foreign producer; and (2) identify the sources of industry data and indicate why the data is more accurate than the data in the petition. Other commenters disagree with the suggested additions to the proposed regulation and argue that, pursuant to the Act, the petitioner bears the burden of establishing industry support, and not for opposing parties to establish a lack of industry support.

Response:

We have not adopted the proposed additions. The suggestion to impose new requirements on parties that object to a petition would establish a substantive change beyond the scope of the procedural rule Commerce has proposed. In addition, in our view, the suggested requirement is unnecessary. The petitioners are responsible for establishing industry support of the petition. To the extent industry support is not established in accordance with the Act, or is

unclear from the evidence on the record, Commerce has authority to address these situations as they arise, such as through polling the industry or otherwise determining whether there is sufficient industry support to initiate an AD or CVD investigation.

4. Pre-initiation CVD Consultations

One commenter expressed concern that shortening the time period for industry support comments may prevent parties from requesting pre-initiation consultations pursuant to the SCM Agreement.

Response:

With respect to CVD consultations, we do not see how the new procedural deadlines for comments "may prevent parties from requesting pre-initiation consultations" under the SCM Agreement, nor did the commenter explain the basis for its concern on this point. To clarify, Commerce does not wait for the government of the exporting country to make a request for consultations. Instead, in every instance in which a CVD petition is filed, consistent with subsection 702(b)(4)(A)(ii) of the Act, Commerce invites the government of the exporting country to engage in consultations, if it wishes.

New Shipper Reviews – § 351.214

After considering the comments and rebuttal comments, Commerce is removing §§ 351.214(b)(2)(iv)(A), 351.214(k)(3), and 351.214(k)(4). Commerce is also modifying § 351.214(b)(2)(iv)(A) and (B) of the *Proposed Rule* to clarify that the exporter or producer requesting the new shipper review will provide certifications pertaining to necessary information related to the unaffiliated customer in the United States and the unaffiliated customer's willingness to participate in the new shipper review, and provide information relevant to the new shipper review, if requested by Commerce or an explanation by the producer/exporter of why such certification from the unaffiliated customer cannot be provided. With the elimination of §§ 351.214(k)(3) and (k)(4), §§ 351.214(k)(5) and (k)(6) are now designated as §§ 351.214(k)(3) and (k)(4), respectively; and §§ 351.214(k)(5) and (k)(6) are eliminated.

In addition, Commerce is modifying § 351.214(b)(2)(v)(B) by adding the terms "shipment" and "any" to this provision, for consistency with the language utilized in § 351.214(b)(v)(C) and to clarify that a new shipper is required to provide documentation establishing the volume of any subsequent shipments where subsequent shipments have occurred. Commerce is also modifying § 351.214(b)(v)(C) by removing the "and" at the end of the clause and placing it at the end of § 351.214(b)(v)(D)(*4*) to grammatically conform with the additions of § 351.214(b)(v)(D) and (E) to the regulation. Next, Commerce is modifying § 351.214(b)(2)(v)(E)(4) by replacing the term "unrelated" with the term "unaffiliated" to conform more closely to the terms of sections 772(a) and (b) of the Act.

Last, we note that in § 351.214(k) of the *Proposed Rule*, Commerce inadvertently cited to section 752(a)(2)(B)(iv) of the Act. Commerce, however, intended to cite to section 751(a)(2)(B)(iv) of the Act in this provision of the *Proposed Rule*. Accordingly, Commerce is correcting this error in its final rule.

1. The Requirements for Requesting a New Shipper Review (§ 351.214(b))

(a) Certification requirements for unaffiliated purchasers

To obtain a new shipper review, § 351.214(b) of the *Proposed Rule* sets forth documentation requirements for an exporter or producer requesting a new shipper review. In particular, § 351.214(b)(2)(iv)(A) and (B) of the *Proposed Rule* establish the requirements that the producer or exporter requesting the review provide certifications from the unaffiliated customer in the United States certifying that (1) it did not purchase the subject merchandise from the producer or exporter during the period of investigation; and (2) it will provide necessary information requested by Commerce regarding its purchase of subject merchandise.

Several commenters oppose Commerce's additional requirements. One commenter asserts that these requirements are contrary to the intent of the statute and Commerce's authority to conduct new shipper reviews. Both this commenter and several others argue these

requirements deprive a requestor the option of filing a new shipper review where an unaffiliated customer chooses not to certify.

Two commenters argue that requiring unaffiliated customer certifications is burdensome and may discourage meritorious new shipper claims. One commenter points out that the concern raised here is similar to the concern Commerce articulated when it previously considered and rejected a proposal to require unaffiliated customer certifications in the *1997 Final Rule*.[35] The commenter further argues that the requirement in § 351.214(b)(2)(iv)(B) risks use of adverse facts available if the customer is not forthcoming, particularly with a requestor's limited control over an unaffiliated customer. Similarly, another commenter argues that applying an adverse inference based on an unaffiliated party's failure to cooperate is "potentially unfair" to a respondent, while another commenter asserts this requirement is too burdensome on a requestor. Another commenter argues there are legitimate circumstances where a new shipper has no sales to unaffiliated customers in the United States, such as when a multinational company sells a component to its U.S. subsidiary for purposes of later selling a downstream product.

By contrast, two commenters support the new standards and documentation requirements for requesting new shipper reviews in the *Proposed Rule*. One commenter asserts that other commenters have vastly overstated the burden of providing customer certifications to demonstrate *bona fide* sales because (1) no customer has commented that it could not comply with Commerce's requirements; (2) providing customer certifications is a limited burden given that often only a small number of sales and customers are involved; and (3) the certifications are limited to information pertaining to the customer's purchase of the subject merchandise. The commenter, therefore, concludes that Commerce's proposed certification requirements are not unduly burdensome.

Response:

[35] *1997 Final Rule*, 62 FR 27296 at 27319 (discussing the finalized new shipper review regulation).

We have made changes to the *Proposed Rule* with respect to the unaffiliated customer certifications. In particular, we have removed the certification requirements contained in § 351.214(b)(2)(iv)(A) and (B) of the *Proposed Rule* and have replaced the certification requirements with additional exporter or producer certifications, as explained further below.

As an initial matter, we disagree with the commenters that assert the certification requirements in § 351.214(b)(2)(iv)(A) and (B) are contrary to the intent of the statute and Commerce's authority to conduct new shipper reviews. Section 751(a)(2)(B)(i) of the Act provides that if Commerce receives a request from an exporter or producer of subject merchandise establishing that the requestor (1) did not export subject merchandise during the period of investigation, and (2) is not affiliated with any exporter or producer who exported the subject merchandise during the period of investigation, Commerce shall conduct a new shipper review to establish an individual weighted average dumping margin or countervailing duty rate. These certification requirements are consistent with the requirements a new shipper review requestor must satisfy in order for Commerce to conduct a new shipper review, as identified in this section of the Act.

However, in the interest of eliminating unnecessary requirements, the final rule modifies § 351.214(b)(2) of the *Proposed Rule* by removing the requirement in § 351.214(b)(2)(iv)(A) that requires the producer or exporter requesting the review to submit certifications from the unaffiliated customer in the United States that it did not purchase the subject merchandise from the producer or exporter during the period of investigation. Upon further consideration, we find this certification to be unnecessary given the certification requirement from the requestor in § 351.214(b)(2)(i) and (ii) that it did not sell the subject merchandise to the United States during the period of the investigation.

In response to comments concerning the burden of obtaining the unaffiliated customer's certification, we have replaced both § 351.214(b)(2)(iv)(A) and (B). The final rule replaces § 351.214(b)(2)(iv)(A) of the *Proposed Rule* with the requirement that the exporter/producer

certify that it will provide during the course of the new shipper review, and to the fullest extent possible, necessary information related to the unaffiliated customer in the United States.

Additionally, the final rule modifies § 351.214(b)(2)(iv)(B) of the *Proposed Rule* to clarify that the exporter/producer will provide a certification by the unaffiliated customer of its willingness to participate in the new shipper review and provide information relevant to the new shipper review, if such information is requested by the Secretary. To the extent the unaffiliated customer cannot provide its certification, the exporter/producer is required to provide, in the alternative, an explanation of why the unaffiliated customer cannot provide its certification.

Section 351.214(b) of the *Proposed Rule* provides further guidance, consistent with section 751(a)(2)(B)(i) of the Act, on the requirements necessary for Commerce to conduct a new shipper review. We consider the new certification requirement in § 351.214(b)(2)(iv)(B) of the *Proposed Rule* to be a necessary supplement to a new shipper review request that comports with the requirements in section 751(a)(2)(B)(i) of the Act which requires a new shipper to establish that it did not export subject merchandise during the period of investigation and that such exporter or producer is not affiliated with any exporter or producer who exported the subject merchandise to the United States during the period of investigation. In particular, this requirement addresses concerns that Congress expressly identified involving abuse of the new shipper review procedures where a new shipper "enter[s] into a scheme to structure a few sales to show little or no dumping or subsidization when those sales are reviewed…resulting in a low or zero antidumping or countervailing duty rate for that producer or exporter."[36]

In response to commenters' concerns that the requirements in § 351.214(b)(2)(iv)(A) and (B) are overly burdensome, we clarify that the aim of these provisions is to ensure that Commerce can obtain the necessary information for Commerce to determine whether the sales at issue are *bona fide*, consistent with the intent of Congress pursuant to section 751(a)(2)(B)(iv) of the Act. In balancing the aim of these provisions consistent with the intent of Congress with the

[36] H.R. Rep. No. 114-114 at 89; *see also Proposed Rule*, 85 FR 49472 at 49473.

burdens imposed, we have crafted these amended certifications in as least burdensome a manner as possible, while ensuring that Commerce obtains all of the necessary information to conduct the *bona fide* sale analysis intended by Congress. As explained in the *Proposed Rule*, at the time Commerce rejected the proposal to require such certifications in 1997, Commerce had limited experience dealing with new shipper reviews.[37] In light of the more than 20 years of agency experience involving new shipper reviews, and in particular given concerns over abuse of procedures expressed by Congress, as discussed in the *Proposed Rule*, we believe these additions to the requirements are necessary to ensure that Commerce is able to conduct a proper new shipper review consistent with the intent of Congress.

Further, one commenter expressed concern that there may be legitimate circumstances in which an exporter or producer does not sell subject merchandise to an unaffiliated customer and, therefore, cannot obtain a certification from such a customer.

The aim of a new shipper review, however, is to establish an individual margin of dumping or countervailing duty rate for each qualified new shipper. To establish an individual margin, for example, Commerce needs to obtain sales data pertaining to the sale from the foreign exporter or producer to the first unaffiliated customer in the United States in order to calculate the new shipper's margin of dumping. Contrary to the commenter's contention, the sale to the first unaffiliated customer is a necessary element for Commerce to provide a new shipper with its own antidumping duty or countervailing duty rate.

(b) Documentation requirements related to the issue of whether sales are *bona fide*

Sections 351.214(b)(2)(v)(A) through (E) of the *Proposed Rule* sets forth specific documentation a requestor must provide to Commerce in its request for a new shipper review. In particular, § 351.214(b)(2)(v)(D) requires that a new shipper establish the circumstances surrounding the sales, including the price, any expenses arising from such sales, whether the subject merchandise was resold at a profit, and whether such sales were made on an arms-length

[37] *Proposed Rule*, *id.* at 49474.

basis. Section 351.214(b)(2)(v)(E) provides that a new shipper submit documentation regarding the business activities of the producer or exporter. These include the producer's or exporter's offers to sell merchandise in the United States, identification of the complete circumstances surrounding sales to the United States, any home market, or third country sales, identification of the producer or exporter's relationship to the first unrelated United States purchaser, and with respect to non-producing exporters, an explanation of the non-producing exporter's relationship with its supplier.

Two commenters support the new documentation requirements in § 351.214(b)(2)(v)(D) through (E) for a new shipper to obtain a review. One commenter argues that Commerce should not require the documentation in § 351.214(b)(2)(v)(D) through (E) at the time of the new shipper *request*, but rather Commerce should ask for more information from the producers or exporters requesting a new shipper review before determining whether to initiate. Similarly, one commenter argues that requiring this additional documentation to establish a *bona fide* sale is inconsistent with Article 9.5 of the AD Agreement[38] because these are additional preconditions to conducting a new shipper review that expand beyond what was provided for in that agreement. Another commenter opposes the *Proposed Rule*'s new documentation requirements for new shipper review requests which, the commenter argues, are likely to unfairly discourage legitimate requests because "new shipper reviews are often the only alternative for producers and exporters who would otherwise face high all other rates, separate rates, or country-wide rates."

Response:

We have left unchanged § 351.214(b)(2)(v)(D) through (E). Commerce explained in the *1996 Proposed Rule* that it was requiring certain certifications from the requestor "demonstrating that the party is a *bona fide* new shipper."[39] Consistent with this earlier discussion, and in light of the concerns related to circumvention and abuse of new shipper review procedures expressed

[38] The Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (AD Agreement).
[39] *See 1996 Proposed Rule*, 61 FR 7308 at 7317-18.

by Congress in enacting section 751(a)(2)(B)(iv) of the Act, the *Proposed Rule* limits initiations of new shipper reviews to where there is a reasonable likelihood of *bona fide* sales for Commerce to review. Further, as clarified in section 1(e) below, normally, when a requestor of a new shipper review submits all of the documentation necessary for Commerce to perform a *bona fide* sales analysis, as outlined in the *Proposed Rule* § 351.214(b)(2)(i) through (v), and (vi) for countervailing duty new shipper reviews, the requestor has demonstrated a reasonable likelihood that there are *bona fide* sales for Commerce to base its initiation of a new shipper review. These requirements, as contained in § 351.214(b)(2)(v)(D) through (E), are consistent with Commerce's statutory obligation to provide new shipper reviews to those exporters and producers with *bona fide* sales of subject merchandise to the United States.[40] The documentation requirements in § 351.214(b)(2)(v)(A) through (E) assist Commerce in determining whether a party qualifies as a new shipper and whether a new shipper review should, therefore, be conducted, consistent with Commerce's statutory obligation to calculate a dumping margin or countervailing duty rate based solely on *bona fide* United States sales.[41] Accordingly, we find it reasonable for the agency to require that a requestor for a new shipper review provide the required *bona fide* sales documentation necessary for Commerce to perform the *bona fide* sales analysis in the review.

For these reasons, we also disagree that this regulatory modification is inconsistent with the United States' international obligations under the AD and SCM Agreements.[42] While Articles 9.5 and 19.3 of the AD and SCM Agreements, respectively, identify broad qualifications for conducting a new shipper review, the requirements identified in § 351.214(b)(2)(v)(D) through (E) are consistent with U.S. law, which is consistent with our obligations under the AD and SCM Agreements.

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[40] *See* section 751(a)(2)(B) of the Act.
[41] *See* section 751(a)(2)(B)(iv) of the Act.
[42] Agreement on Subsidies and Countervailing Measures (SCM Agreement).

Further, historically, new shipper reviews have involved very few sales. In such cases, Commerce must fully understand the circumstances surrounding these limited number of transactions as these provide the basis for a new shipper's future selling of subject merchandise into the United States and the level of dumping or subsidization, if any.

(c) Documentation requiring volume of the sale and subsequent sales

Paragraphs (B) and (C) of § 351.214(b)(2)(v) of the *Proposed Rule* require that a new shipper provide in its new shipper review request information regarding the volume of its shipment(s), including whether such shipments were made in commercial quantities, and the date of sales to an unaffiliated customer in the United States.

One commenter argues that requiring documentation establishing that sales are of "commercial quantities" in § 351.214(b)(2)(v)(B) is inconsistent with Article 9.5 and 19.3 of the AD Agreement and the SCM Agreement, respectively, which only require that a new shipper not have exported subject merchandise during the period of investigation and is not related to any of the investigated exporters and/or producers. Further, another commenter argues that the criteria requiring "the date of any subsequent sales" when requesting a new shipper review is "unrealistic in a commercial context" because the commercial reality renders few importers with the financial position to import multiple shipments of products that are subject to high antidumping duty margins.

Response:

With respect to the issue of requiring documentation pertaining to whether the sales were made in commercial quantities under § 351.214(b)(2)(v)(B), we disagree with the commenter's objection. Section 751(a)(2)(B)(iv)(II) of the Act requires Commerce to consider, depending on the circumstances surrounding such sales, whether the sales were made in commercial quantities. Section 351.214(b)(v)(B) of the *Proposed Rule* is intended to implement this provision of the statute.

Regarding the commenters' concerns that Commerce is requiring requestors to establish that "subsequent shipments" and "subsequent sales" occurred under § 351.214(b)(2)(v)(B) and (C) of the *Proposed Rule* in order to obtain a new shipper review, these concerns are misplaced. The *Proposed Rule* does not establish such requirements. Rather, Commerce simply requires that a producer or exporter requesting a new shipper review provide documentation of any subsequent sales or shipments and the dates of such sales to the extent such sales or shipments were made. Thus, there is no requirement to make subsequent sales or shipments in order to obtain a new shipper review. In addition, we note the requirement to provide such information was not added to the Proposed Rule, but rather exists in the current regulations. Under this same requirement, Commerce previously initiated new shipper reviews where subsequent shipments or sales did not occur.[43] However, as identified above, for consistency with the language utilized in § 351.214(b)(v)(C) and for further clarity, Commerce is modifying § 351.214(b)(v)(B) for consistency with the language utilized in § 351.214(b)(v)(C) and to clarify that a new shipper is required to provide documentation establishing the volume of any subsequent shipments where subsequent shipments have occurred.

(d) Proposal for documentation requiring proof of multiple sales in the new shipper request

Paragraph (b) of § 351.214 outlines the requirements for requesting a new shipper review. Several commenters propose that Commerce amend § 351.214(b) of the *Proposed Rule* to require that requestors demonstrate they have made multiple *bona fide* sales, as opposed to a singular "sale" in their request for purposes of initiating a new shipper review. These commenters argue that by using the plural term "sales," as opposed to the singular term "sale" in section 751(a)(2)(B)(iv), Congress expressed its clear intent to require multiple *bona fide* sales as a pre-requisite to obtain a new shipper review. In their view, such single-sale reviews should be

[43] *See, e.g.*, *Polyethylene Terephthalate Film, Sheet and Strip from India: Initiation of Antidumping Duty and Countervailing Duty New Shipper Reviews*, 75 FR 10758 (March 9, 2010); *see also Hardwood Plywood Products From the People's Republic of China: Initiation of Antidumping New Shipper Review; 2019*, 84 FR 44862 (Aug. 27, 2019).

prohibited because Commerce lacks the statutory authority to conduct a new shipper review based on a singular sale. To support their interpretation of the statute, the commenters point out that only the plural term "sales" is consistent with the legislative history and language of the TFTEA, and section 751(a)(2)(B)(iv) of the Act. In their view, Commerce should therefore clarify in the final rule that proof of multiple *bona fide* sales is required to obtain a new shipper review.

Response:

We disagree and have not accepted the suggested interpretation of the statute or its legislative history, and, therefore, have left § 351.214(b) unchanged with respect to this issue. The *Proposed Rule* pertaining to new shipper reviews does not require proof of more than one sale for a requestor to obtain a new shipper review. Declining to create a regulatory bar to the new shipper review process for singular sales is consistent with the proper construction of the TFTEA[44] and section 751(a)(2)(B)(iv) of the Act, as amended, in accordance with federal law.

Interpretative canons guide statutory construction because the language used by Congress in the making of laws is often ambiguous with respect to meaning. Title 1 of the United States Code codified the interpretative canons that govern the construction of federal statutory law.[45] Section 1 of Title 1 specifies that, "[i]n determining the meaning of any Act of Congress, [. . .] words importing the plural include the singular[.]" *Id.* The text, context, and structure of TFTEA and section 751(a)(2)(B)(iv) do not compel a departure from this interpretative canon.[46]

Therefore, although Congress used the word "sales" in section 433 of EAPA in the TFTEA, and as a result, the plural "sales" appears in section 751(a)(2)(B)(iv) of the Act, the use of the plural form of the word "sale" does not support the conclusion that the statute should be

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[44] *See* Pub. L. No. 114-125, section 433, 130 Stat. at 171 (enacting modifications to the Act, including section 751(a)(2)(B)(iv), "Determinations Based on *Bona fide* Sales," in the context of new shipper reviews to address circumvention).

[45] 1 U.S.C. 1.

[46] *See Life Techs. Corp. v. Promega Corp.*, 137 S. Ct. 734, 742. 580 US ___ (2017) (asserting that the Court's departure from 1 U.S.C. 1 that "words importing the plural include the singular" resulted from the statute's text, context and structure).

construed to mean multiple sales are required for a new shipper review. Pursuant to 1 U.S.C. 1, the plural "sales" includes the singular "sale." Congress has not indicated to Commerce that it intended to exclude single sales with its use of plural "sales" and, therefore, Commerce believes that a single sale could be subject to review. Moreover, a single sale could, for example, include substantial quantities such as thousands or even hundreds of thousands of units, and thus does not, by itself, provide a basis to bar new shipper reviews of such sales or create a *per se* rule that such sales are not *bona fide* sales for purposes of the AD and CVD laws.

Consistent with federal law governing the construction of federal statutes, Commerce's proposed new shipper review regulation does not impose a regulatory bar to review of singular sales. While Commerce will not act contrary to federal law in construing the meaning of a statute, the agency believes that other practical considerations support the position that a regulatory bar to new shipper reviews for singular sales is unnecessary. First, the number of sales continues to be a factor which Commerce considers in its *bona fide* sales analysis conducted in a new shipper review. At the same time, as noted, Commerce looks to the volume and quantity of the sales as a factor to consider in the context of determining whether the sales or sale is *bona fide* for purposes of the AD and CVD laws.

Historically, new shipper reviews have often involved the review of few or singular sales because the new shipper review provides a path for a new entrant to the U.S. market to receive its own rate based on its individual activity on an expedited basis. Commerce's *Proposed Rule*, as adopted in this final rule, does not intend to limit a new shipper's eligibility for review based on whether the applicant can demonstrate one (as opposed to more than one) sale, provided the sale at issue is *bona fide* for purposes of the AD and CVD laws.

(e) The appropriate standard for initiating new shipper reviews

One commenter requests that Commerce clarify whether the "reasonable indication" standard (*i.e.*, the same standard applied by the ITC in its preliminary material injury determinations) is intended to be the legal threshold which respondents must satisfy in order to

obtain a new shipper review. This commenter requests that if Commerce intends to use this legal standard, then Commerce should include language that reflects that standard in the final rule.

Response:

We have left unchanged § 351.214(b) with respect to this issue. The *Proposed Rule* did not apply the ITC's "reasonable indication" standard for material injury determinations to the required showing for the initiation of a new shipper review. Commerce intends to initiate new shipper reviews, as stated in the *Proposed Rule*, where there is a "*reasonable likelihood* that there ultimately will be a *bona fide* sale for Commerce to review."[47] Additionally, Commerce intends to initiate new shipper reviews, as stated in the *Proposed Rule*, unchanged in this final rule, where "there is a *reasonable likelihood* that the unaffiliated customer will participate in the review."[48] Therefore, the standard articulated by Commerce in the *Proposed Rule* is the "reasonable likelihood" standard which imposes a burden on the new shipper review requestor to demonstrate that there is a reasonable likelihood that the request for review involves *bona fide* sales. As outlined in the *Proposed Rule* §§ 351.214(b)(2)(i) through (v), and (vi) for countervailing duty new shipper reviews, unchanged in this final rule, when a requestor of a new shipper review submits all of the documentation necessary for Commerce to perform a *bona fide* sales analysis, the requestor has demonstrated a reasonable likelihood that there are *bona fide* sales for Commerce to base its initiation of a new shipper review.

2. Enumerated Factors for Commerce's Bona Fide Sales Analysis (§ 351.214(k))

(a) Sections 351.214(k)(2), (k)(3), and (k)(4)

The elements outlined in § 351.214(k)(2) through (4) identify additional factors that Commerce shall consider in determining whether a new shipper requestor's sales are *bona fide*, consistent with section 751(a)(2)(B)(iv)(VII) of the Act. These sections provide that Commerce shall consider whether an exporter, producer, or customer has lines of business unrelated to the

[47] *See Proposed Rule*, 85 FR 49472 at 49474 (emphasis added).
[48] *Id.* (emphasis added).

subject merchandise; whether there is an established history of duty evasion or circumvention with respect to new shipper reviews under the relevant order; and whether there is an established history of evasion or circumvention with respect to new shippers under any order in the same or similar industry.

One commenter opposes § 351.214(k)(2) of the *Proposed Rule*, arguing that whether the producer, exporter, or customer has lines of business unrelated to the subject merchandise is not relevant for a *bona fide* sales analysis. Oppositely, another commenter supports Commerce's proposed § 351.214(k)(2), a factor to analyze a new shipper's line of businesses that are not subject merchandise, because new shipper reviews have been in the past misused to engineer low dumping margins. This commenter argues that looking to whether the subject merchandise is sold in the new shipper's existing line of business can provide insight into whether the sale was made in the normal course of business. Another commenter similarly opposes Commerce's requirement that the "full operations" of a producer or exporter requesting a new shipper review be examined as part of the *bona fide* sales analysis. This commenter argues that Commerce should limit its review to the actual sales transactions and relationship between the requestor and importer.

Additionally, two commenters oppose factors related to the history of duty evasion which Commerce will consider as part of the *bona fide* sales analysis listed in § 351.214(k)(3) and (4) of the *Proposed Rule*.[49] These commenters argue that whether there is an established history of duty evasion with respect to new shipper reviews or circumvention under the relevant antidumping or countervailing duty order or any antidumping or countervailing duty order in the same or similar industry is not relevant for a *bona fide* sales analysis. One of these commenters asserts that unless Commerce finds collusion at play, any wrongdoing that may have occurred in the past is not pertinent to the review because there is no nexus between the current shipper and any past wrongdoing. Contrary to this opposition, one commenter supports the *Proposed Rule*

[49] *Id.* at 49495.

which considers the history of duty evasion of an antidumping duty order because it would prevent further harm to the domestic industry, particularly in cases where Commerce has not applied a circumvention ruling on a country-wide basis.

Response:

We have modified the mandatory factors to be considered for purposes of the final rule. First, § 351.214(k)(2) is retained in the final rule. Commerce's consideration of the lines of business in which the producer, exporter, or customer is engaged can be telling as to the *bona fide* nature of the sales involved in a new shipper review. For example, Commerce's consideration of the lines of business unrelated to the subject merchandise may indicate that sales of subject merchandise are entirely unrelated to the company's primary business, that it has little or limited knowledge and expertise in the subject merchandise, and, thus, may be indicative of whether the sale or sales are considered *bona fide*, in conjunction with other relevant factors. Section 351.214(k)(2) of the *Proposed Rule*, unchanged in this final rule, will assist Commerce in developing a consistent practice of evaluating typical behavior of new shippers and more clearly identifying unmeritorious claims of *bona fide* sales based on schemes to engineer low dumping margins involving companies not engaged in the relevant business for purposes of the AD and CVD laws.

While we have retained § 351.214(k)(2), the factors pertaining to the history of duty evasion found in paragraphs (k)(3) and (4) are removed from the final rule solely on the ground that these factors need not be considered in every case. However, where the evidence compels consideration, Commerce continues to be authorized to consider the issue of duty evasion under an order and industry-wide basis. While the evidence may not be specific to the particular new shipper, and, thus, cannot by itself be considered sufficient to determine whether the sales at issue are *bona fide*, such evidence may be indicative of a pattern of behavior under an order or in an industry that is generally reflective of activity of a contrived nature and, thus, may contribute to a finding of sales being non-*bona fide* for purposes of the AD and CVD laws (*e.g.*, where

actors within an industry tend to engage in similar conduct and are generally faced with similar facts and circumstances, such as low barriers to entry, a high degree of changes in ownership, or where an industry is typified by a high degree of turnover of companies). In such cases, an established history of duty evasion or circumvention may be relevant and, therefore, may be considered by Commerce in making its determination. Because the enumerated factors are not exhaustive, these types of factors, where relevant, should be considered in determining whether the sales at issue are *bona fide* for purposes of the AD and CVD laws.

(b) Section 351.214(k)(6)

Section 351.214(k)(6) provides that Commerce shall consider "any other factor" it determines relevant with respect to the future selling behavior of a new shipper, including indicia that the sale was not commercially viable. Several commenters support the *Proposed Rule* as reflecting the 2016 statutory changes in the TFTEA which require an exporter or producer to demonstrate that its sale(s) is *bona fide* pursuant to the *bona fide* sales factors in section 751(a)(2)(B)(iv) of the Act. One commenter opposes § 351.214(k)(6) of the *Proposed Rule*, asserting that this section of the regulation provides "vague and unlimited authority" to reject new shipper requests. Accordingly, this commenter argues that Commerce should remove § 351.214(k)(6) from its final rule to "ensure Commerce doesn't exceed its statutorily granted authority" or, in the alternative, define the circumstances in the regulations as to the factors it may consider in determining whether or not to reject a request for a new shipper review.

Response:

We have left unchanged § 351.214(k)(6). Contrary to the commenter's assertion that paragraph (k)(6) provides Commerce unlawful and unlimited authority in analyzing a request for a new shipper review, section 751(a)(2)(B)(iv) of the Act provides that Commerce may consider "any other factor" it determines relevant with respect to the future selling behavior of the producer or exporter. This may include any other indicia that indicate whether the sale was or was not commercially viable, and, thus, *bona fide* for purposes of the AD and CVD laws.

Accordingly, this section of the *Proposed Rule* conforms to the intent of Congress for purposes of examining whether the sales at issue are *bona fide* for purposes of the AD and CVD laws.

Regarding the commenter's request that Commerce define the circumstances in the regulations as to the factors it may consider in determining whether it will initiate on a request for a new shipper review, Commerce has three clarifications. First, regarding the request to clarify what Commerce will consider in determining whether to initiate a new shipper review, Commerce clarifies that normally Commerce will initiate a new shipper review where a requestor submits the required documentation necessary for Commerce to perform a *bona fide* sales analysis, as outlined in § 351.214(b)(2)(i) through (v), and (vi) in the countervailing duty context. By providing such documentation, the requestor is able to demonstrate a reasonable likelihood that the sales subject to the review are *bona fide* sales for purposes of initiation and that the unaffiliated customer will participate in the review.

Second, Commerce notes that the factors enumerated in § 351.214(k)(1) and (2) provide further clarity as to the other factors Commerce will look to, pursuant to section 751(a)(2)(B)(iv)(VII) of the Act.

Third, Commerce clarifies that, regarding the factors it may consider beyond those enumerated in the final rule, such additional factor or factors to be considered may vary based on the facts and circumstances in a given case. Congress provided Commerce with the authority to consider "any other factor the administering authority determines to be relevant as to whether such sales are, or are not, likely to be typical of those the exporter or producer will make after completion of the review," affording Commerce the flexibility to evaluate additional factors based on the facts and circumstances of a given case.[50] Thus, consistent with its statutory authority, Commerce will continue to consider factors that it determines, based on the facts and circumstances in a given case, are relevant with respect to the future selling behavior of the producer or exporter, including any other indicia that the sales were not commercially viable.

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[50] *See* section 751(a)(2)(B)(iv)(VII) of the Act.

(c) Whether Commerce should require documentation of genuine negotiations and/or order inquiries from an unrelated purchaser

Several commenters propose that Commerce add an additional factor to the *bona fide* sales requirements of § 351.214(k) that would require producers or exporters requesting a new shipper review to provide documentation of "genuine negotiations or order inquiries," such as emails or internal sales approval documentation from the unaffiliated purchaser, to further ensure that new shippers have not coordinated with purchasers to "engineer" lower margins.

Response:

We have not changed § 351.214(k) with respect to the proposed change. The *Proposed Rule* requires documentation establishing the circumstances surrounding such sale(s), including the producer or exporter's offers to sell merchandise in the United States under § 351.214(b)(v)(E)(*1*). This includes the offers made to the unaffiliated purchaser in the United States, along with information on price, expenses, and whether such merchandise was resold at a profit under § 351.214(b)(v)(D). We believe the requirements established for a new shipper review request are sufficient for purposes of the request. In addition, Commerce is not precluded from requesting additional documentation, as needed, during the course of the review, including documents typically examined during verification. For these reasons, Commerce's final rule captures the additional documentation we believe necessary to prevent meritless new shipper review claims.

(d) Discussion of a single or low number of sales in the *bona fide* analysis

One commenter argues that Commerce should explain in the preamble to the final rule that "a single or low number of sales, particularly a single sale, will rarely be found to be *bona fide*, unless the shipper can establish that a low number of sales is typical for the merchandise in question in the U.S. market for the period covered by a new shipper review." Further, this commenter asserts that should Commerce find that a "multiple sales" requirement cannot be implemented in every case, Commerce should modify § 351.214(k)(5) to read: "the quantity and number of sales; and . . . ."

Response:

We have not adopted the commenter's proposal that a single or low number of sales will rarely be found to be *bona fide* or the commenter's proposed modification to § 351.214(k)(5) concerning the quantity and number of sales. Commerce makes its *bona fide* sales determinations on a case-by-case basis. Any statement, therefore, concerning the frequency of affirmative or negative *bona fide* sales determination would be inappropriate. However, Commerce clarifies that the language in § 351.214(k)(5) identifying "the quantity of sales" as a factor Commerce will consider in accordance with section 751(a)(2)(B)(iv)(VII) of the Act, means the same as "number of sales." Therefore, the suggested change is unnecessary.

(3) Rescission of Initiated New Shipper Reviews

(a) Rescission if information to establish multiple sales is missing from the record

Section 351.214(f) of the *Proposed Rule* describes the circumstances under which Commerce may rescind a new shipper review. One commenter argues that Commerce should amend § 351.214(f) to state that Commerce shall rescind a new shipper review if it finds that information to establish *bona fide* sales, plural, are missing from the new shipper review request to alleviate administrative burdens.

Response:

As an initial matter, the commenter's position that rescission based on lack of *bona fide* "sales" - plural, is addressed at length in comment 1(d). To reiterate, there is no statutory or regulatory bar to the new shipper review process based on the existence of only one, as opposed to more than one, *bona fide* sale. Therefore, Commerce declines to adopt the commenter's proposal that § 351.214(f) be amended to reflect a requirement that multiple sales are required for a new shipper review to proceed in regular course.

As Commerce explained in the *Proposed Rule*, the purpose of the conforming amendments to § 351.214 pertaining to new shipper reviews is to implement the modifications to

section 751(a)(2)(B) of the Act enacted by Congress in 2016.[51] Therefore, we do not amend the *Proposed Rule*'s rescission provision to require Commerce to rescind a review where proof of multiple sales is absent from the record.

(b) Rescission as a bar to future new shipper review requests

One commenter requests that Commerce include in its final rule a new paragraph (f)(5) that states: "[i]f the Secretary rescinds a new shipper review pursuant to § 351.214(f)(3), then the party that requested the rescinded new shipper review may not subsequently request a further new shipper review, but must instead request an administrative review as provided in § 351.213(b)" to prevent a party from filing a new shipper review request if it failed to establish its sales are *bona fide*.

Response:

We are not adopting this commenter's suggestion to add a new paragraph (f)(5) to § 351.214. To clarify, if Commerce rescinds a review of specific sales pursuant to § 351.214(f)(3), we will not revisit that determination with respect to those particular sales as there is finality with respect to Commerce's determinations. However, a new shipper will not be barred from requesting a new shipper review, consistent with § 351.214(c), for later, unreviewed, sales made within one year of the date referred to in § 351.214(b)(2)(v)(A).

(4) Procedure for Parties to Challenge a Decision Not to Initiate a New Shipper Review at the Administrative Level

One commenter argues that the *Proposed Rule* is not clear regarding what a respondent is required to provide to Commerce in order to obtain a new shipper review, and that the *Proposed Rule* grants "unfettered discretion" to Commerce on whether to initiate a new shipper review. This commenter argues that because the *Proposed Rule* indicates Commerce will determine whether the information provided in a new shipper request will reasonably indicate a *bona fide* sale occurred in order to initiate a new shipper review, Commerce will open itself up to litigation

[51] *See* Pub. L. No. 114-125, section 433, 130 Stat. at 171.

over any determination not to initiate. Therefore, this commenter asserts that Commerce should amend its proposed regulation and provide for a preliminary determination by Commerce on whether to initiate a new shipper review, providing opportunities for parties to comment and submit additional factual information, before making a final decision on initiation. Relatedly, this commenter requests that Commerce establish "specific objective thresholds" that a requestor needs to satisfy in order to obtain a new shipper review.

Several commenters oppose the former commenter's proposal to establish a preliminary determination, briefing, and comment process regarding Commerce's decision whether to initiate a new shipper review because, these commenters assert, doing so would needlessly use additional Commerce resources and provide an avenue for arbitrary appeals of Commerce's preliminary determinations to the CIT.

Response:

We have left unchanged § 351.214 with respect to this issue. Contrary to the commenter's concern that the *Proposed Rule* grants "unfettered discretion" to Commerce as to whether to initiate a new shipper review, Commerce's determinations whether to initiate a new shipper review are limited by the requirements identified in the final rule, including whether the documentation submitted in a new shipper review request indicates a reasonable likelihood of *bona fide* sales for Commerce to review. Additionally, as clarified in this preamble, if a new shipper review requestor provides Commerce with the documentation identified in the proposed § 351.214(b)(2)(i) through (v), and (vi) in the countervailing duty context, then the requestor will normally be able to demonstrate a reasonable likelihood that there ultimately will be a *bona fide* sale for Commerce to review and base its determination. Thus, in such cases, Commerce will initiate a new shipper review.

Further, the *Proposed Rule* provides additional clarity as to the specific requirements of a producer and/or exporter when requesting a new shipper review. Such clarity, as provided in § 351.214(b)(iv) and (v), offers producers and exporters "specific objective threshold"

requirements that a new shipper review requestor needs to provide Commerce in order to seek a new shipper review. In addition, the procedure we have adopted provides that Commerce will not initiate a new shipper review where the information submitted with the request pursuant to the documentation requirements outlined in § 351.214(b) is insufficient. In the event that Commerce determines that the requirements for a request for a new shipper review have not been satisfied, in denying the request, Commerce will provide a written explanation of the reasons for the denial. In this way, the requestor has an understanding of the deficiencies of the request and the basis for Commerce's decision. We see no reason to add further procedural steps. These decisions are analogous to the requirement that Commerce not initiate an AD or CVD investigation where the petition fails to provide support for the necessary elements for initiation. In those cases, Commerce determines not to initiate the investigation. Here, where a request for a new shipper review fails to meet the requirements outlined in § 351.214(b), Commerce expects to deny the requestor a new shipper review.

(5) Whether the Proposed Rule Permits Commerce up to 6 Months to Initiate a New Shipper Review

Promulgated in 1997 with the new shipper review regulations, § 351.214(d)(1) outlines the specific times when Commerce will initiate a new shipper review under a relevant order: in the calendar month immediately following the anniversary month or in the calendar month immediately following the semiannual anniversary month, depending on when a new shipper request is received.[52]

One commenter requests that Commerce confirm whether the *Proposed Rule* will continue to permit up to six months for Commerce to initiate a new shipper review and whether the goods would be subject to the residual duty during this period.

Response:

[52] *1997 Final Rule*, 62 FR 27296 at 27395.

The *Proposed Rule* makes no change to the current regulation pertaining to the time limits for the initiation of a new shipper review (with the exception of a minor grammatical edit in paragraph (d)(2)). As required by the current and proposed § 351.214(d)(1), Commerce will initiate a new shipper review in the calendar month immediately following the anniversary month or the semiannual anniversary month if the request for the review is made during the six-month period ending with the end of the anniversary month or the semiannual anniversary month (whichever is applicable).[53] The regulation thus requires Commerce to initiate a new shipper review pertaining to an order during two months in a calendar year: (1) in the month after the order's anniversary month; and (2) in the month after the order's semiannual anniversary month. Given that the two months in which Commerce may initiate a new shipper review are separated by six months, the rule does permit six months for Commerce to initiate a new shipper review. However, the time permitted depends on when the new shipper requests a review. For example, the rule provides for a much shorter time period for the initiation of a new shipper review based on the proximity to the anniversary and semiannual anniversary of the relevant order.

With respect to the comment to confirm whether the merchandise would be subject to a duty, in accordance with § 351.214(e) of the *Proposed Rule*, Commerce will direct the suspension or continued suspension of liquidation for any unliquidated entries of subject merchandise from the relevant exporter or producer at the applicable cash deposit rate upon its initiation of the new shipper review.

(6) Whether the New Documentation Requirements Identified in § 351.214(b) of the Proposed Rule Applies to Expedited Reviews

One commenter requests that Commerce clarify that expedited reviews in CVD proceedings for non-investigated exporters do not impose the new documentation requirements listed in the *Proposed Rule* pertaining to the initiation of a new shipper review. This commenter

[53] *See Proposed Rule*, 85 FR 49472 at 49494.

asserts that there is no reason to apply such requirements to expedited reviews based on the current language of § 351.214(l)(3).

Response:

The *Proposed Rule* addressed new shipper review requests, and was not intended to, and does not, impose new documentation requirements for requesting expedited reviews. Apart from the request, however, in the context of an expedited review, as with administrative reviews, a respondent may be subject to a *bona fide* sales analysis, where the facts or circumstances warrant examination.

Scope – § 351.225

Section 351.225 covers procedures in which Commerce addresses scope-related matters following the issuance of an AD or CVD order, most frequently through a scope inquiry and scope ruling. We received many comments and rebuttal comments on the proposed provisions under this regulation. Below, we briefly discuss each provision, address any comments received, and, where appropriate, explain any changes to the *Proposed Rule* in response to comments. In addition, we explain additional modifications to the *Proposed Rule* where we have determined that such amendments brought § 351.225 into greater conformity with circumvention and covered merchandise regulations §§ 351.226 and 351.227, or otherwise provided greater clarity to these regulations.

1. Section 351.225(a) – Introduction

Section 351.225(a) is the general provision set forth in the beginning of the scope regulations, in which Commerce has explained that it will conduct a scope ruling at the request of an interested party or on Commerce's initiative. One of the proposed modifications is the addition of Commerce's understanding that a scope ruling that a product is covered by the scope of an order is a determination that the product in question has always been covered by the scope of that order. Commerce also explained in the preamble to the *Proposed Rule* that it was removing the term "clarify" from the existing regulations because scope inquiries are "intended

to cover a wide variety of scope questions, and are not intended to be restrictive to only those scenarios in which certain language in the scope requires 'clarification.'"[54]

Commerce received multiple comments on this provision. Several commenters express complete support for the provision as written, emphasizing that concerns about evasion and duty collection should be one of the primary drivers Commerce considers in designing and implementing its revised scope regulations. Those commenters also stress that the Federal Circuit has issued multiple holdings which support Commerce's interpretation of its scope rulings that a determination in a scope ruling that a product is covered by the scope of an order means that a product has always been covered by the scope of an order.[55]

Other commenters challenge that understanding of scope coverage. They argue that such an interpretation of a scope ruling would have an unfair effect on importers and sureties, with one commenter citing to a 1999 scope ruling in which Commerce modified a scope after a scope ruling, as an example in which importers were unfairly forced to pay duties when they did not believe their entries were subject merchandise, and could not have been expected to know their merchandise was covered by an order.[56]

In rebuttal comments, some challenge Commerce's removal of the word "clarify" and argue that scope rulings should only apply retroactively when the scope is "clear" and not "ambiguous," while others disagree that importers would be penalized by the proposed modifications to the regulations. It was pointed out that in the *1997 Final Rule*, Commerce

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[54] *Id.*, at 49476-77.

[55] *See, e.g.*, *Bell Supply Co. v. United States*, 888 F.3d 1222, 1229 (Fed. Cir. 2018) (*Bell Supply*) (stating that extending the reach of a scope determination backwards is consistent with the Federal Circuit's finding that a determination of origin of imported merchandise for the purposes of a scope ruling necessarily precedes a circumvention inquiry); *AMS Associates, Inc. v. United States*, 737 F.3d 1338, 1343-1344 (Fed. Cir. 2013) (*AMS*); *Sunpreme*, 946 F.3d at 1316-1322; *United Steel and Fasteners, Inc. v. United States*, 947 F.3d 794, 801-803 (Fed. Cir. 2020) (*Fasteners*).

[56] *See Notice of Scope Rulings and Anticircumvention Inquiries*, 65 FR 41957, 41958 (July 7, 2000) ("pasta in packages weighing (or labeled as weighing) up to and including five pounds, four ounces is within scope; May 24, 1999."); *see also Certain Pasta From Italy: Final Results of Antidumping Duty Administrative Review*, 65 FR 77852, 77853 (Dec. 13, 2000) ("On October 26, 1998, the Department self-initiated a scope inquiry to determine whether a package weighing over five pounds as a result of allowable industry tolerances is within the scope of the antidumping and countervailing duty orders. On May 24, 1999 we issued a final scope ruling finding that, effective October 26, 1998, pasta in packages weighing or labeled up to (and including) five pounds four ounces is within the scope of the antidumping and countervailing duty orders.").

expressed concerns that "[i]t would be extremely unfair to importers and exporters to subject entries not already suspended to suspension of liquidation and possible duty assessment with no prior notice and based on nothing more than a domestic interested party's allegation,"[57] but that such concerns never came to fruition, and, in fact, the primary users of scope proceedings have been importers and foreign exporters. Those commenters went on to argue in their rebuttal comments that any arguments based on the innocence of importers is misplaced, as concerned importers have appropriate tools available to them through scope rulings to determine whether a product may be covered by the order.

Response:

When Commerce initiates a scope inquiry, the purpose of that inquiry is to determine whether a product is covered by the language of the scope of an AD/CVD order. The scope of an order (*i.e.*, the description of the class or kind of merchandise subject to the order) is established during the investigation and published in the *Federal Register* notice of the final determination and order.[58] As explained further below in the discussion of § 351.225(l), the publication of the scope of an order in the *Federal Register* generally provides notice to producers, exporters, and importers that their products may be covered by the scope of the order. The fact that an importer did not declare merchandise as subject to an AD and/or CVD order for a period of time before Commerce issued a scope ruling, for whatever reason, does not mean the product was not covered by the scope up until the scope ruling was issued. If a product is found to be covered by the language of the scope, then the product has always been covered by that language. As some commenters note, the Federal Circuit has stated through a variety of cases that the current regulations do not adequately acknowledge this fact.[59] Accordingly, we are adopting proposed paragraph (a), with some minor modifications to more clearly emphasize this point.

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[57] *1997 Final Rule*, 62 FR 27296 at 27328.
[58] *See* section 706(a)(2) of the Act; section 736(a)(2) of the Act; section 771(25) of the Act.
[59] *AMS,* 737 F.3d at 1343-1344; *Sunpreme*, 946 F.3d at 1316-1322; *Fasteners*, 947 F.3d at 801-803.

Further, as discussed above, the statute is silent regarding the procedures and standards that Commerce may apply in issuing a scope ruling. In the absence of any such statutory guidance, Commerce's position is that a factual determination that a product is covered by the scope of the order amounts to a determination that the product has always been covered by the scope of the order. With respect to issues concerning the application of such a determination to certain entries of products and notice to exporters and importers, those issues are addressed below in response to comments under § 351.225(l). As discussed below, the purpose of these modifications is not to penalize companies acting in good faith, but to ensure that scope rulings are properly applied to products that are covered by the scope of an order.

Additionally, as we also explained in the preamble to the *Proposed Rule*, Commerce's scope rulings frequently do more than merely clarify the language of a scope, and we do not believe the degree of ambiguity or clarity of the coverage of a particular product in the language of a scope should support or detract from the fact that a product which is determined to be covered by an order has always been covered by an order, and a product which Commerce determines is not covered by the scope of an order was not covered by the scope of that order before the scope ruling was issued.

Furthermore, we agree with the commenters who explain that any concerned importer who believes a scope is unclear or is uncertain whether its entries may be covered by an AD/CVD order has the appropriate tools available to it, through these regulations, to request a scope ruling.

With respect to the 1999 scope ruling raised by one of the commenters which modified the text of a scope, the Federal Circuit in several subsequent holdings explained that Commerce does not have the authority to outright change the scope of an order through reinterpretation in a scope ruling.[60] There are other means, such as changed circumstances reviews under section

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[60] *See Notice of Scope Rulings and Anticircumvention Inquiries*, 65 FR 41957, 41958 (July 7, 2000) ("pasta in packages weighing (or labeled as weighing) up to and including five pounds, four ounces is within scope; May 24,

751(b) of the Act, through which the scope may be modified, but with respect to scope rulings, Commerce will not modify the text of a scope in the context of a scope inquiry.[61] In addition, Commerce may conduct a circumvention inquiry under section 781 of the Act to determine whether certain types of products are covered by the scope of the order.

Finally, to bring this provision into conformity with language used in other provisions under § 351.225, as well as language which was already contained in proposed § 351.225(a), we have replaced references to a product being "within" the scope of an order to a description of the product at issue being "covered by the scope of an order." This change is made only to use consistent terminology, and not to modify the meaning of the provision.

2. Section 351.225(b) – Self-initiation of scope inquiry

Section 351.225(b) addresses Commerce's authority to self-initiate a scope ruling. In the *Proposed Rule*, Commerce indicated that if it self-initiated a scope inquiry, it would notify all parties on the annual inquiry service list. The only comments that Commerce received on this provision pertained to notice of the agencies' decision to initiate. Specifically, commenters worry that producers, exporters, importers, sureties, and foreign governments who were not on the annual inquiry service list might not get sufficient notice under that procedure should Commerce self-initiate a scope ruling. They, therefore, suggest that Commerce publish its self-initiation in the *Federal Register*.

Response:

In response to those comments, we have revised our notice requirements for self-initiation. The regulation now provides that if Commerce self-initiates a scope inquiry, it will

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1999."); *Certain Pasta From Italy: Final Results of Antidumping Duty Administrative Review*, 65 FR 77852, 77853 (Dec. 13, 2000); *Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1095 (Fed. Cir. 2002) (*Duferco*) ("Commerce cannot 'interpret' an antidumping order so as to change the scope of that order, nor can Commerce interpret an order in a manner contrary to its terms.") (*citing Eckstrom Indus., Inc. v. United States,* 254 F.3d 1068, 1072 (Fed. Cir. 2001)).

[61] This is distinguished from a scope clarification, found in the new provision section 225(q). A scope clarification does not change the scope of an order but does clarify the scope – frequently through a footnote to the scope of the order.

publish a notice of initiation in the *Federal Register*, as suggested by certain commenters. We believe this will satisfy all notice concerns raised by the commenters pertaining to this provision.

3. Section 351.225(c) – Scope ruling application

Section 351.225(c) sets forth the requirements for an interested party[62] to submit a standardized scope ruling application. This is a significant change from Commerce's current procedures, which do not require a detailed standardized application. Commerce explained in the preamble to the *Proposed Rule* that it was now requiring an application, with specific information required in that application, as a result of various concerns, including the fact that "scope ruling requests do not always include the requisite sufficient description and supporting information necessary for Commerce to complete an analysis."[63]

Several commenters indicate their strong support for the standardized application procedure, and both they, and other commenters, provide suggestions to modify the application requirements. One commenter argues that Commerce should provide further guidance on what the phrase "to the extent reasonably available" means, while others complain that requests for "narrative history of the production of the product" and the "volume of annual production of the product for the most recently completed fiscal year" would be too burdensome for certain parties. Others complain that the application would seem to require more data from producers, exporters, and importers of certain merchandise than a requesting domestic industry, and one claims that Commerce seemed to request unnecessary or "superfluous" data, such as "past models of products."

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[62] The term "interested party" is defined in section 771(9) of the Act, and pertains, for example, to "foreign manufacturers," "producers," "exporters," or "United States importers" "of subject merchandise." However, the nature of a scope ruling is to determine whether the merchandise produced, imported by, or exported by a party is subject to an AD or CVD order. Thus, in many cases, the question of whether a party is an "interested party" depends in part on whether the merchandise at issue is subject merchandise. Accordingly, for purposes of these scope regulations, the term "interested party" includes a party that would meet the definition of "interested party" under section 771(9) of the Act, if the merchandise at issue in the scope inquiry is in fact in-scope. This clarification of the term "interested party" for purposes of this regulation is in no way intended to weaken the requirement that the product is, or has been, in actual production as of the filing of the scope ruling application, as required by paragraph (c)(1).

[63] *Proposed Rule,* 85 FR 49472 at 49477.

Certain commenters also suggest that the application require further detailed quantity and value data, including a disclosure of how much scope inquiry merchandise was imported or shipped to the United States without the payment of duties. Further, they argue that Commerce should request the identity of an importer's U.S. customer or customers if the product was already imported into the United States. They argue that the provision of the quantity and value information, as well as the customer lists, would provide further enforcement tools to Commerce in administering and implementing its scope rulings.

In addition, another commenter argues that Commerce should require that a scope applicant indicate in the application if any of its imports are currently subject to suspension of liquidation and cash deposits.

Another commenter suggests that Commerce insert this clause at the end of § 351.225(c)(2)(i)(C): " . . . and copies of any Customs rulings relevant to the tariff classification," because it claims that such additional information would permit Commerce and other interested parties to verify the scope requestor's classification as accurate. The same commenter also voices concerns about Commerce's proposed requirement of a "concise public description of the product," in § 351.225(c)(2)(ii), without any details about what would be included in that description, claiming that the lack of clarity in that respect could lead to confusion, manipulation by the party filling out the application, and litigation concerns.

Furthermore, another party expresses its concerns that once a certain number of years have passed since an investigation or earlier administrative review segments, and certain proprietary versions of the requested information once available to the requestor are no longer available to interested parties under the terms of an APO, Commerce should consider adopting a procedural mechanism to allow parties access to such data, or at least provide a procedure by which Commerce itself could place the proprietary versions of documents on the record of the scope inquiry.

In rebuttal comments, one commenter disagrees that Commerce should request additional quantity and value information, or customer lists, noting that such information requests would be unduly burdensome to respond to and completely unnecessary to Commerce's determination if a product is subject to an AD or CVD order.

Response:

We have considered all of the comments received on this provision and have determined to make certain modifications to the proposed § 351.225(c); some in response to the comments raised and others to clarify the information which Commerce needs from a requestor to initiate a scope inquiry.

First, as explained in more detail in the discussion of § 351.225(j) below, Commerce continues to recognize that, in addressing country of origin issues in the context of Commerce proceedings, Commerce is not bound by the country of origin determinations of other agencies, such as CBP.[64] That said, such determinations may be informative to our analysis, and are identified as relevant secondary interpretive sources under § 351.225(k)(1), discussed below. Therefore, we agree with the commenter that proposes requesting copies of any Customs rulings relevant to a given tariff classification. Such rulings would be beneficial to our analysis, and we have included that request in our regulation.

Second, we also agree with the same commenter that there should be some clarification as to the requirements of the concise public summary, and have modified the regulation to reflect that the physical characteristics of the product, the countries where the product is produced and from which it is exported, the declared country of origin (if imported and known to the requestor), and the product's tariff classification should all be included in that concise public summary of the product's description. Because Commerce sometimes conducts scope inquiries

[64] While the "Department may consider the decisions of Customs, it is not obligated to follow, nor is it bound by, the classification determinations of Customs...." *Wirth Ltd. v. United States*, 5 F. Supp. 2d 968, 973 (CIT 1998) (*Wirth*) ("Commerce, not Customs, has authority to clarify the scope of AD/CVD orders and findings.")

on merchandise that is already in commercial production but has not yet been exported to the United States, we recognize that there may be cases in which there is no declared country of origin to report under § 351.225(c)(2)(i)(B).

Third, we realize that the proposed regulations neglected to note that we need parties to identify the countries of production, export, and declared origin, both in the detailed description of the product, as well as the concise public summary of the product's description, for our scope inquiry analysis. Accordingly, we have added those requirements to the list of necessary information requested in the application.

Fourth, we are no longer requiring the names and addresses of the producers, exporters, and importers in the public summary, but we still need such information in the detailed description of the product in the application, so we have modified the language to reflect that change.

Fifth, we recognize that the term "physical characteristics" is a term used in Commerce's current regulations, and includes not only chemical and technical characteristics, but dimensional characteristics, as well (such as the height, length, circumference, and width of a product). We have, therefore, revised the regulations to once again use the term "physical characteristics" and noted that the term "physical characteristics" includes all of those additional descriptive terms. It is our understanding that the term "technical characteristics," which is not defined, covers a wide array of characteristics, such as the mass or weight of the product, the volume of the product, the buoyancy, conductivity, and aerodynamic properties of product, and even various mechanical characteristics and properties of the product, such as elasticity, tensile strength, elongation, ductility, brittleness, malleability, plasticity, and hardness of the product. Furthermore, we wish to be clear that by using the term "including" in this description, we are expressly indicating that we do not believe these descriptors are exhaustive. Frequently, the physical characteristics relevant to a scope ruling are almost entirely dependent on the language used in the scope of an order to describe the particular product, as well as the additional descriptions provided in the

petition or during the underlying investigation. Accordingly, our use of this term is meant to be broadly interpreted and adaptable to the facts of a given scope and inquiry.

Sixth, and finally, we have clarified in § 351.225(c)(2)(vi) that, for imported merchandise that an importer has declared to be subject to an order, or for merchandise which has been determined by CBP to be subject to an order, we need the applicant to provide an explanation for either situation in the application. The language provided in proposed § 351.225(c)(2)(v) was unclear in that regard, appearing to only request information if CBP had determined the entry was covered by the scope of the applicable order and not if the importer had declared it to be subject to an order upon importation.

On the other hand, we do not believe that quantity and value data, or customer lists, should be provided to Commerce in every scope application, as requested by certain domestic producers. Although we agree that such information might be of value to Commerce's analysis in certain situations, we do not believe that in most scope rulings such information would inform our determination as to whether a product at issue is covered by the scope of an order. Instead, in those cases in which Commerce determines that quantity and value data, or customer lists, might be of value to Commerce's analysis, Commerce retains the authority to request that information of the applicant or other interested parties to the scope inquiry. Accordingly, we will not include this additional data request in the scope application.

In addition, although we do request that an applicant making a request for a scope inquiry on a product already imported into the United States as of the date of the scope ruling application indicate whether an entry of the product has been declared by an importer, or determined by CBP, as subject to an order, under § 351.225(c)(2)(vi), we do not believe it is necessary to also request that the applicant inform us if imports of the merchandise at issue are currently subject to suspension and cash deposits. We agree with the commenter that such information might be relevant at some point in our inquiry, for example, for purposes of our CBP instructions under §

351.225(l).[65] However, for purposes of evaluating a scope application to determine if a product is covered, or not covered, by the scope of an AD/CVD order, it is only whether the product has been previously declared by an importer, or determined by CBP, as subject to an order which is relevant to our analysis under § 351.225(k). Notably, if a producer, exporter, or petitioner is the party filing the scope inquiry application, unlike the importer, they may not even know if the product at issue is currently subject to suspension and cash deposits.

In response to the concerns expressed by some of the commenters that they would be unable to obtain all of the information listed, that is the reason we have included the words "to the extent reasonably available to the applicant" in this paragraph. Whether or not information is reasonably available to an applicant will be a determination made on a case-by-case basis. We understand that interested parties requesting a scope ruling may not have access to all the information that is listed, and despite the criticisms of some of the commenters, it is a fact that domestic industries will likely have less information about a particular exporter and its production experience, for example, than the producer, exporter, and possibly importer of that product. Accordingly, Commerce will allow applicants to explain the reasons they do not have certain information when filling out the scope application. Further, Commerce retains the authority to either issue supplemental questions about those explanations if necessary, or reject a scope ruling application entirely, if Commerce determines that it cannot conduct a scope inquiry in the absence of the missing information at issue.

Accordingly, the information identified in the *Proposed Rule* for the scope application has remained largely the same in this final rule, as we believe those data requests, including information as to the history of earlier versions of the product if this is not the first model of the product under § 351.225(c)(2)(C)(iv), are important to our scope analysis. Again, if a party is

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[65] As discussed further below, Commerce is modifying § 351.225(l) to provide that Commerce normally will apply a scope ruling that a product is covered by the scope of an order to unliquidated entries not yet suspended which entered prior to the date of initiation of the scope inquiry, with certain exceptions. One of those exceptions would allow for a party to timely request that Commerce consider whether to direct CBP to suspend liquidation and collect cash deposits at an alternative date. Such request must be based on a specific argument supported by evidence establishing the appropriateness of that alternative date, as explained further below.

unable to provide certain information, and can provide a reasoned explanation as to why those data are unavailable, Commerce will consider such claims in determining whether to accept or reject an application or issue supplemental questionnaires.

Finally, with respect to the request that Commerce create a procedure to place proprietary information on the record of a scope inquiry from proceedings which are a few years old, or make such data generally available to a scope applicant, we have determined not to implement such a procedure in these regulations. To the extent that information is relevant for a scope application, we believe public data will likely usually suffice. We do not believe that Commerce should establish a whole new regulatory exception to the APO procedures for what we foresee as a rare occurrence in which an interested party seeks access to proprietary data no longer available for use in a scope application.

4. Section 351.225(d) - Initiation of a scope inquiry and other actions based on a scope ruling application

Section 351.225(d) of the modified regulations provides for the process by which a scope inquiry may be initiated based on a scope application. Certain commenters indicate that they support Commerce's determination to deem a scope inquiry automatically initiated if no further action is taken within 30 days, while another commenter requests that Commerce publish notice of its scope applications and initiations in the *Federal Register* to provide notice to interested parties who may not be on the annual inquiry service list. In addition, another commenter argues that Commerce should provide surety companies with notice of scope initiations so that they can participate in scope inquiry proceedings that are relevant to their interests.

In related comments, several commenters argue that Commerce should allow interested parties an opportunity to submit comments and factual information prior to initiation of a scope inquiry.

Response:

As explained above, Commerce has modified its self-initiation procedures under § 351.225(b) to publish notice of the self-initiation in the *Federal Register*. However, given

deadlines and complications in scope inquiry procedures initiated pursuant to a scope application, consistent with our current procedures, we will not publish notices of initiations of scope inquiries in the *Federal Register* under § 351.225(d). Instead, we will, as requested by a commenter, under § 351.225(d)(2), publish on a monthly basis a notice in the *Federal Register* that lists scope applications from the past couple of months filed with Commerce. It is our expectation that usually that list will reflect most, if not all, of the scope applications filed over the past month, but we also recognize that given certain timing constraints, issues frequently arise which make that goal impractical – such as when an application has been filed after the monthly notice has been sent to the *Federal Register* for publication. In that situation, it would be understood that the scope application would be included in the following month's *Federal Register* notice.

We have added this requirement to ensure adequate notification is provided via the *Federal Register* to interested parties not on the annual inquiry service list. By listing the applications received by Commerce requesting a scope inquiry, it is our expectation that the descriptions of the applications will give all interested parties an opportunity to consider if the scope inquiry request is relevant to them and their interests, and allow them the opportunity to file a notice of appearance with Commerce on the record of that scope inquiry. To the extent that surety companies wish to have notice of Commerce's scope inquiries, although they are not interested parties under section 771(9) of the Act (as discussed further below regarding § 351.225(l), comment 12(f)), this monthly published list will also provide them with that notice.

It is our expectation that the *Federal Register* list will include, where appropriate, for each scope application the following data: (1) identification of the AD and/or CVD orders at issue; (2) a concise public summary of the product's description, including the physical characteristics (including chemical, dimensional and technical characteristics) of the product; (3) the country(ies) where the product is produced and the country from where the product is exported; (4) the full name of the applicant; and (5) the date that the scope application was filed

with Commerce. We anticipate that Commerce may include additional information in the monthly *Federal Register* list at its discretion and may leave off the list references to applications which have been rejected and not properly resubmitted.

In addition, Commerce has revised § 351.225(d) to explain that deemed initiation will only occur if Commerce has neither rejected the scope application nor initiated the scope inquiry at an earlier date, and that after 30 days the scope application will be deemed accepted and the scope inquiry will be deemed initiated.

In response to complaints that Commerce should permit parties a greater amount of time in which they can submit comments on the scope application before initiation, we have declined to modify our regulations in that manner. Interested parties on the annual inquiry service list, as provided under § 351.225(n), will be electronically notified soon after an application is filed with Commerce, and the applicant will otherwise serve the application on those interested parties in accordance with § 351.225(c) and (n). Those parties will, therefore, have an opportunity to file arguments with Commerce before initiation.[66] Nonetheless, even if they do not file comments on the application before it is deemed accepted and the scope inquiry is initiated, they will also have an opportunity afterward to comment on the application and provide responsive facts and arguments on the record, in accordance with § 351.225(f). This is true for interested parties who received notice of the filing of the scope application in the *Federal Register* as well, as described in this provision.

We recognize that under Commerce's current practice, interested parties frequently submit comments prior to the initiation of a scope inquiry in order to provide Commerce with additional factual information that rebuts or clarifies a scope ruling request. However, we believe that, under the new scope inquiry procedures, the need for such an opportunity to submit comments/additional factual information pre-initiation will be largely alleviated with

[66] Given the short turn-around of scope initiations, at its discretion, Commerce may, but is not required to, consider such arguments before a scope inquiry is initiated.

Commerce's proposed standardized scope ruling application because use of the scope ruling application should result in more fulsome and complete information being filed at the outset.

We continue to believe that requiring a more fulsome standardized scope application (rather than what is required in the current regulation), and having a scope application deemed accepted and a scope inquiry commenced after 30 days, is reasonable and will speed up Commerce's scope ruling procedures. If we were to extend that time longer, as requested by several commenters, that goal would be less likely to be achieved. Therefore, we have made no modification to the timetable spelled out in § 351.225(d) from that set forth in the *Proposed Rule*.

Finally, we have also added a provision to § 351.225(d) that if Commerce determines upon review of a scope ruling application that the scope issue should be addressed in another, ongoing segment of the proceeding, such as a circumvention inquiry, then Commerce will notify the applicant, within 30 days after the scope ruling application has been filed, that the agency will not initiate the scope inquiry, but address the scope issue in that other segment.

5. Section 351.225(e) - Deadlines for scope rulings

Section 351.225(e) provides that Commerce shall issue a final scope ruling within 120 days after the date on which the scope inquiry was initiated, although it may be extended up to an additional 180 days for good cause (for a fully-extended total of 300 days). This was a change from the 45-day deadline in the current regulations, which Commerce explained in the preamble to the *Proposed Rule* has been a "difficult and frequently unworkable deadline."[67] Commerce explained that the shorter deadline led to "unnecessary delay and questions on the part of outside parties," and if Commerce had to solicit and "receive new factual information and comments from numerous parties," it left "little time to consider the evidence and arguments and reach a well-reasoned decision within the time allotted."[68] Therefore, Commerce frequently had

[67] *Proposed Rule*, 85 FR 49472 at 49478.
[68] *Id.*

to extend deadlines in a large number of its scope inquiries. Accordingly, Commerce revised these regulations to provide for a more realistic and manageable timetable.

We received many comments and rebuttal comments on this provision. One commenter argues that the current 45-day deadline is already too long for certain simple and non-controversial scope rulings. If Commerce has the authority to extend the 45-day deadline for good cause, the elimination of the importers' ability to obtain a scope ruling within 45 days is unnecessary because the agency can already achieve a short delay when necessary under its current regulations. The same commenter also opposes removing the distinction between an informal and formal scope ruling under the current regulations, arguing that, in fact, such a change would slow down the scope ruling process rather than speed it up and the 120-day deadline would become the automatic default in every case. That commenter, therefore, argues Commerce should make no changes to its scope inquiry procedures in the modified regulations.

Other commenters argue that Commerce should not just have a deadline for final scope rulings, but should also have a deadline for preliminary scope rulings, *i.e.*, when Commerce determines to issue a preliminary scope ruling. They express concern that there could be a period of time between the initiation and the preliminary scope ruling where potential subject merchandise is being liquidated without regard to duties, given that entries are deemed liquidated by operation of law after one year. The commenters suggest that Commerce should establish a deadline for preliminary scope rulings of no later than 150 days after initiation. They argue that this would be consistent with Commerce's proposed circumvention regulations, which identify a 150-day deadline for preliminary circumvention determinations.

Furthermore, one commenter argues that Commerce should inquire into whether an importer has entries of the merchandise at issue subject to suspension of liquidation or cash deposit requirements under the AD or CVD order at issue, and if that entity's imports are not currently being suspended or subject to cash deposits, the regulations should mandate that

Commerce issue a preliminary scope ruling no later than 120 days after initiation of the scope inquiry, to ensure relief to the injured domestic industry.

In addition, two other commenters express concern over the fully extended deadline of 300 days. They argue that such a deadline is excessive, inconsistent with other provisions in the proposed regulations, and that providing Commerce with six more months to consider a scope ruling request would increase burdens on U.S. companies in terms of legal and business uncertainty.

In their rebuttal submissions, certain commenters agree with the request for a 150-day deadline for preliminary scope rulings, and strongly disagree with the argument that Commerce should retain its 45-day deadline. They point out that the proposed regulations do not preclude Commerce from issuing its scope ruling before the 120-day deadline, only that the 120-day deadline is a maximum deadline. Indeed, certain domestic industry commenters state that they believe that the 120-day deadline will result in more predictable, and possibly shorter, deadlines than under the current system, where they claim there have been too many extensions, and that each day Commerce does not initiate or issue a scope ruling is another day where injury to the domestic industry occurs.

Further, in their rebuttal submissions, certain commenters challenge the idea that the length of a scope inquiry is unfair to importers, arguing that if an importer conducts proper due diligence, it will have the appropriate tools to analyze whether its product may or may not be covered by an order, and if it does not, it should request a scope ruling sooner rather than later. Due diligence, they argue, is a best practice and should not be seen as an unreasonable burden or unfairness to importers.

Response:

After considering the submitted comments regarding scope segment deadlines, we have determined not to modify the deadlines set forth in the proposed § 351.225(e). For all of the reasons we explained in the preamble to the *Proposed Rule*, the current system is unwieldy and

forces Commerce to issue multiple extensions. We also disagree that the current system of an informal and formal scope ruling dichotomy is a preferable way to conduct our scope rulings. As we also explained in the Preamble to the *Proposed Rule*, the distinction between those two procedures sometimes causes confusion and adds unnecessary delay to our proceedings; accordingly, we believe the burden resulting from the current system outweighs the benefit of a simpler, single scope inquiry procedure.[69]

Furthermore, we believe the use of a standardized scope application and a 120-day deadline is reasonable, and if a case is complicated and good cause exists to warrant an extension, allowing Commerce to extend its scope inquiry proceedings up to an additional 180 days is also reasonable. As one of the commenters argues, this does not mean that Commerce will always take 120 days to issue scope rulings, especially when a scope ruling is fairly simple, straightforward, and/or uncontested. In those cases, it is not unreasonable to expect that Commerce might issue a scope ruling in a shorter time frame. Similarly, it does not mean that every time Commerce extends the proceeding, it will automatically extend the full 180 days.

Moreover, we do not agree with the commenter who argues that Commerce should be mandated by the regulations to: (1) request that every applicant that imports the product subject to the scope inquiry inform us whether liquidation of its entries of the particular product are currently being suspended and if it is paying cash deposits on those entries; and (2) if the requestor responds that the imports at issue are not being suspended or that the importer is not paying cash deposits on those entries, Commerce must issue a preliminary scope ruling within 120 days after initiation of the scope inquiry. We do not believe such a requirement is appropriate. We agree with the commenter that such information might be relevant at some point in our inquiry, for example, for purposes of our CBP instructions under § 351.225(l), but, for the reasons explained above in the discussion of § 351.225(c), such information normally is not relevant for our scope analysis under § 351.225(k).

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[69] *Id.* at 49478.

In addition, we do not agree with the parallels drawn to preliminary circumvention determinations. Preliminary circumvention determinations are issued in every circumvention inquiry, but Commerce does not issue a preliminary scope ruling in all scope inquiries. When Commerce determines that a preliminary scope ruling is warranted, we do not believe it should be restricted by a specific deadline in the regulations. Instead, we believe that Commerce should have the flexibility to determine when to issue a preliminary scope ruling and request comments from participating interested parties. Thus, it would be unreasonable to require Commerce to issue a preliminary scope ruling when the facts on the record are simple and clear enough for Commerce to issue a final scope ruling before or on 120 days after initiation of the scope inquiry. Therefore, we have not modified § 351.225(e) to mandate the issuance of preliminary scope rulings within 120 days, or even 150 days as suggested by some, after initiation of the scope inquiry.

We also disagree with the commenter expressing concerns regarding the prolonged uncertainty for U.S. importers as to the ultimate status of products subject to a scope inquiry under the 300-day deadline, when coupled with the potential for retroactive suspension of liquidation. As other commenters have argued, all importers of merchandise to the United States are required to conduct their business affairs with due diligence and should be informed as to the potential trade remedies that may be applied to imported merchandise when they decide to import that merchandise. If a party is concerned that its products might be covered by an AD or CVD order, it is the party's responsibility to request a scope ruling at the earliest possible time. We do not believe the potential 120-day or fully-extended 300-day deadlines set forth in § 351.225(e) are unnecessarily lengthy or burdensome on importers, and we do not believe that the firm deadlines in the regulations will result in uncertainty or unpredictability, as some commenters asserted. In fact, we find the opposite to be true. Commerce will now be required by regulation to issue scope rulings no later than 300 days after initiation – a requirement not found in the current regulations.

Finally, we have revised the heading of this section to "Deadlines for scope rulings" from "Time limits," to better reflect the provisions covered by this section of the regulation, and we have moved the provision allowing for alignment of scope rulings with other segments of a proceeding from proposed § 351.225(i)(2) to this section to clarify that all of the deadlines described in this section may be adjusted if the scope inquiry is aligned with another segment.

6. Section 351.225(f)- Scope inquiry procedures

Section 351.225(f) provides the deadlines for rebuttal comments and factual information and other procedural matters. We received multiple comments specifically on the various deadlines contained within the proposed procedures. All of those comments requested more time, claiming that the deadlines as proposed were too short for interested parties and Commerce to effectively analyze questionnaire responses and other submissions prior to the deadline for responses and rebuttal submissions.

Furthermore, one commenter argues that Commerce should not indicate in § 351.225(f)(3) that it may limit issuance of questionnaires to a reasonable number of respondents, because such a limitation would also have the effect of limiting verification of those respondents to whom questionnaires had been issued. That commenter argues that it would be inappropriate to decline gathering information via questionnaire from all potential respondents.

Finally, certain commenters express their support for § 351.225(f)(6), which acknowledges that Commerce maintains the ability to rescind a scope inquiry if it determines it is appropriate to do so. One of those commenters points to the *Proposed Rule* where Commerce explained that it might "rescind a scope inquiry, for example, if an interested party has failed to provide information necessary for Commerce to issue a scope ruling,"[70] in "instances in which a scope matter may be addressed in another segment of a proceeding" or in "instances in which a new scope inquiry or scope ruling is unnecessary because of a related or prior scope ruling."[71]

[70] *Id*. at 49479.
[71] *See id.*

That commenter requests that Commerce codify those examples in the regulation. Further, that same commenter notes that Commerce stated in a footnote in the preamble to the *Proposed Rule* that it "maintains the discretion to apply facts available pursuant to section 776 of the Act, as appropriate, rather than rescind a scope inquiry," and argues that Commerce should, therefore, codify its authority to apply facts available with an adverse inference when an interested party has failed to supply requested necessary information.

Response:

Upon consideration of the various comments about Commerce's proposed deadlines, as well as consideration of our own practice in other circumstances, we have determined to modify our proposed deadlines under § 351.225(f) to allow interested parties additional time to provide responses and new factual information as follows:

- Under § 351.225(f)(1), parties will have 30 days, rather than 20 days, to submit comments and factual information after Commerce self-initiates a scope inquiry;
- Under § 351.225(f)(1), parties will have 14 days, rather than 10 days, to submit comments and factual information to rebut, clarify, or correct factual information submitted by the other interested parties;
- Under § 351.225(f)(2), parties will have 30 days, rather than 20 days, to submit comments and factual information after Commerce initiates a scope inquiry pursuant to a scope application;
- Under § 351.225(f)(2), the applicant will have 14 days, rather than 10 days, to submit comments and factual information to rebut, clarify, or correct factual information in response to the interested parties' submissions;
- Under § 351.225(f)(3), interested parties will have 14 days, rather than 10 days, to submit comments and factual information to rebut, clarify, or correct factual information contained in a questionnaire response;

- Under § 351.225(f)(3), the original submitter will have seven days, rather than five days, to submit comments and factual information to rebut, clarify, or correct factual information submitted in the interested party's rebuttal, clarification, or correction;
- Under § 351.225(f)(4), interested parties will have 14 days, rather than 10 days, after the preliminary scope ruling to submit comments; and
- Under § 351.225(f)(4), interested parties will have seven days, rather than five days, to submit rebuttal comments thereafter.

With respect to the commenter's argument that we should codify our ability to apply facts available, pursuant to section 776(a) of the Act, and an adverse inference, pursuant to section 776(b) of the Act, we have declined to do so because Commerce already has the authority to apply adverse facts available when an interested party fails to provide necessary information in all of its proceedings, including scope inquiries.

Furthermore, we have also declined to list the scenarios under which Commerce would rescind a scope inquiry in § 351.225(f)(6) because such a determination to rescind a scope inquiry is made on a case-by-case basis, and, although the examples provided in the preamble of the *Proposed Rule* were illustrative, they were by no means exhaustive. Accordingly, we do not believe it would be beneficial in this case to codify a non-exhaustive list of examples in the final regulations in which we would rescind a scope inquiry. We acknowledge that we have provided some common examples in the circumvention inquiry (§ 351.226) and covered merchandise inquiry (§ 351.227) regulations in which we may rescind those inquiries, but again, even those examples are not exhaustive.

With respect to Commerce's authority to rescind a scope inquiry, we have made some additional changes to conform this section with parallel or similar language in the circumvention inquiry (§ 351.226) and covered merchandise inquiry (§ 351.227) regulations. Specifically, we have edited § 351.225(f)(6) to clarify that rescission of scope rulings can be in whole or in part. This is consistent with Commerce's current practice. For example, Commerce may conduct a

scope inquiry in which a single importer has filed six scope applications covering six different products from the same producer and exporter. Commerce may determine in that situation to conduct a single segment of the proceeding covering all six products, but then later in the combined scope inquiry segment determine to rescind the inquiry with respect to three or four of the products. In another example, Commerce may determine to consider and analyze in one segment of the proceeding scope inquiries covering products with the same physical characteristics produced and exported by different entities and imported by different importers. As with the segment covering multiple products, Commerce may rescind in whole or in part a segment covering different combinations of producers, exporters, and/or importers. The language of § 351.225(f)(6) is meant to cover various scenarios, including examples such as these.

In response to the commenter's argument that Commerce should not be permitted to limit issuance of questionnaires to a reasonable number of respondents under § 351.225(f)(3), we disagree. In the context of a scope inquiry, such situations most frequently arise when a domestic producer requests a scope ruling covering certain products produced and exported by multiple entities. If Commerce had unlimited resources, we agree that the best-case scenario would have Commerce never limiting the number of questionnaires it issues and respondents that it considers. However, in reality, Commerce conducts its administrative proceedings with limited resources and under specific time constraints. Accordingly, and in consideration of Commerce's authority to limit respondents under section 777A(c)(2) of the Act for investigations, we continue to believe that it is appropriate to retain the language in our regulations that clarifies that we may limit the issuance of questionnaires to a reasonable number of respondents if the record of the scope inquiry warrants such a limitation.

Finally, for greater clarity, we have made some minor edits to § 351.225(f)(7) to explain that Commerce can both alter or extend time limits if it determines it is appropriate to do so on a case-by-case basis.

7. Section 351.225(g) – Preliminary scope ruling

Section 351.225(g) would authorize Commerce to issue a preliminary scope ruling as to whether there is a reasonable basis to believe or suspect that the product is covered by the scope of the order. Additionally, § 351.225(g) would continue to allow Commerce to use its discretion in issuing a preliminary scope ruling at the same time Commerce initiates a scope inquiry. Pursuant to § 351.225(n)(4), Commerce will notify interested parties on the segment-specific service list of the issuance of the preliminary scope ruling.

One commenter argues that notification of a preliminary scope ruling only to the parties participating in the scope inquiry is insufficient and might be inconsistent with U.S. obligations under the AD and SCM Agreements. The commenter, therefore, argues that Commerce should publish its preliminary scope ruling in the *Federal Register*, rather than just notify the parties on the segment-specific service list.

In their rebuttal comments, several commenters disagree with this argument, arguing that Commerce's implementation and use of an annual inquiry service list and segment-specific service list is fully consistent with U.S. international obligations, and that Commerce is not required to publish preliminary scope rulings in the *Federal Register*.

Response:

As explained above, Commerce is modifying its regulations under § 351.225(b) and (d), such that we will publish in the *Federal Register* notices of self-initiation and monthly lists describing scope applications which have recently been filed with Commerce. We believe both types of those *Federal Register* notices, which we anticipate will identify the product, AD or CVD order, and country of production and export (the latter where the product has already been imported), will provide adequate notification to the public. Following such publication, however, it will be incumbent upon interested parties to take the necessary steps to participate in Commerce's proceedings in accordance with § 351.225(n)(4) by filing an entry of appearance to stay apprised of the status of a scope inquiry. The final rule is in compliance with U.S.

international obligations under the AD and SCM Agreements, and we do not believe there is any additional requirement that Commerce publish preliminary scope rulings in the *Federal Register.* Accordingly, we have declined to make the commenter's suggested modification to our regulations.

8. Section 351.225(h) – Final scope ruling

Under proposed § 351.225(h), Commerce would convey final scope rulings to interested parties who are parties to the scope inquiry proceeding in accordance with the requirements of section 516A(a)(2)(A)(ii) of the Act. Such interested parties would be required to have legal standing to appeal the final scope ruling. Additionally, under proposed § 351.225(n), all parties on the segment-specific service lists would be notified of the final scope ruling through Commerce's electronic ACCESS system.

One commenter observes that currently scope mailings are "conveyed" by first class mail, and advocates that Commerce revise that requirement in its regulations to have "conveyance" be made solely through ACCESS.

Response:

With respect to the commenter's request, we agree that conveying our scope rulings to interested parties who are parties to the scope inquiry proceeding through first class mail or common carriers, such as Federal Express, is largely superfluous and unnecessary in light of the notification they receive through ACCESS. However, section 516A(a)(2)(A)(ii) of the Act states that judicial review of "class or kind" determinations, such as scope rulings, are based off the "date of mailing" of the determination.[72] The CIT has explicitly held that it "refuses to extend the definition of 'mailing' to include email messages," faxes, or other such electronic conveyances for purposes of this provision.[73] For that reason, we believe that Commerce is required to continue to convey its final scope rulings through first class mail or common carriers

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[72] *Id*. at 49479.

[73] *Medline Industries, Inc. v. United States,* 911 F. Supp. 2d 1358, 1361 (CIT 2013); *see also Bond St., Ltd. v. United States,* 521 F. Supp. 2d 1377, 1381 (CIT 2007).

at this time. Should Congress eventually modify this statutory provision and allow for conveyance of scope rulings through electronic means, our use of the term "conveyance" in the modified regulation will allow us to convey scope rulings through electronic means, without further revision of the regulation.

Additionally, we note that Commerce's current regulations under part 356 of Title 19 (current §§ 356.6 and 356.7) contain specific notification requirements for "scope determinations" made by Commerce applicable to producers and exporters from a free trade agreement (FTA) country to the governments of those FTA countries. We have, therefore, added a clause to § 351.225(h) in the final regulations which acknowledges that scope rulings applicable to FTA countries are governed, where relevant, by those provisions.

9. Section 351.225(i) – Other segments of the proceeding

Section 351.225(i) recognizes that Commerce may make a scope determination in the context of another segment of the proceeding, such as an administrative review under section 751(a) of the Act, and acknowledges the flexibility Commerce has to modify deadlines and other actions to ensure that its scope analysis is complete in those other segments.

One commenter indicates its support for this provision, and stresses the importance of Commerce's ability to request further information concerning a product subject to a scope inquiry in other segments of the proceeding, set forth in proposed § 351.225(i)(3).
Another commenter requests that Commerce clarify how it will notify entities when it opts to address scope issues within the context of a segment of the proceeding that is not a scope inquiry, and suggests that Commerce do so by notifying entities on the annual inquiry service list under § 351.225(n)(3).

Response:

Section 351.225(i)(1), which has been slightly modified, applies to at least two scenarios in which Commerce might address a scope issue in another segment of the proceeding. First, if a scope issue is raised for the first time in the context of another segment and we determine that it

would be illogical to self-initiate a new scope inquiry under § 351.225(b), Commerce may address the scope issue in that other segment without following the procedures of a scope inquiry under § 351.225. This could happen, for instance, in a circumvention inquiry under § 351.226, a covered merchandise inquiry under § 351.227, or in an administrative review under § 351.213. The parties to that segment of the proceeding would be notified of the pending scope issue through a variety of means. For example, the issue would likely be raised by the parties, and they would have the opportunity to provide new factual information or comment, as appropriate, or Commerce may request additional information of the parties. In addition, parties not already participating in that segment of the proceeding would be notified of the scope issue in Commerce's preliminary results (in the case of an administrative review under § 351.213) or preliminary determination (in the case of a circumvention inquiry under § 351.226 or a covered merchandise inquiry under § 351.227), which would be published in the *Federal Register*. At that time, interested parties not yet participating in that segment of the proceeding could file a notice of appearance and submit case briefs.[74]

Second, where a scope inquiry has already been initiated and is ongoing, but Commerce determines that it would be best addressed in another segment which is also ongoing or just beginning, Commerce would rescind the scope inquiry under § 351.225(f)(6) and conduct its scope analysis solely in that other segment and notify interested parties.

Additionally, § 351.225(i)(2) (proposed § 351.225(i)(3)) provides that during the pendency of a scope inquiry or upon issuance of a final scope ruling, Commerce may take any further action, as appropriate, with respect to another segment of the proceeding. As referenced by a commenter, this means that Commerce has the ability to request further information concerning a product subject to a scope inquiry in other segments of the proceeding, such as an administrative review under § 351.213.

[74] In addition, if those interested parties wished to submit new factual information, they would follow the procedures in § 351.301 to request permission to do so.

Furthermore, at any point during an ongoing segment of a proceeding, Commerce retains the ability to self-initiate a separate scope inquiry in accordance with § 351.225(b), rather than address the scope issue in the context of the other segment of the proceeding.

Finally, as already noted above, to provide clarity with regard to scope ruling deadlines, we have moved what was proposed § 351.225(i)(2) to § 351.225(e)(3), and as a result of that modification, prior § 351.225(i)(3) is now § 351.225(i)(2).

10. Section 351.225(j) – Country of origin determinations

Section 351.225(j) addresses Commerce's country of origin analysis, and in particular provides the factors Commerce considers when applying its "substantial transformation" test. Each scope contains a description of the physical class or kind of merchandise covered by that order, while Commerce's country of origin analysis determines at what point in the production and processing of the product the country of origin of the class or kind of merchandise is established. The country of origin determined through this analysis applies to all merchandise in the production and processing chain of the product meeting the physical descriptions of the scope originating in that country, regardless of the point in the production and processing chain of the product at which the country of origin is established. We received several comments on this provision.

One commenter points out that Commerce indicates that it "may" consider relevant factors on a case-by-case basis in the regulation, rather than stating that it "will" consider the listed factors in every case. That commenter stresses that Commerce should state clearly that not all of the numbered factors are necessarily required to be considered in every case.

A second commenter suggests that Commerce should take into consideration the activities of tollers in the production chain when it conducts a substantial transformation analysis. That commenter argues that Commerce does not consider tollers to be "manufacturers" or "producers" if they do not acquire ownership and control the relevant sale of subject merchandise, but nothing prevents exporters or importers from declaring foreign processors to be

tollers, thereby evading Commerce's country of origin analysis. That commenter argues that to prevent such manipulation of Commerce's country of origin analysis, Commerce should codify a consideration of whether or not a toller is a toller or foreign processor as part of its substantial transformation test.

Other commenters express concerns that Commerce does not explain in its regulations the scenarios in which it will use an alternative to the substantial transformation test, and appears to give Commerce wide discretion in applying the factors in the regulation when determining the country of origin of a product. They request that for both the substantial transformation and the alternative options, Commerce codify further guidance in the regulations.

The proposed regulation states that Commerce is not "bound" by the country of origin "determinations of any other agency." One commenter argues that Commerce should be required to justify its determination when it departs from the country of origin determinations of CBP or other agencies.

That same commenter also argues that Commerce should not conduct a country of origin analysis in a scope ruling, but instead should conduct that analysis in its third country processing circumvention analysis, under § 351.226(i). That comment appears to reflect a misunderstanding of the relationship between Commerce's country of origin analysis pursuant to investigations, administrative reviews and scope rulings, and the separate analysis conducted pursuant to third country processing circumvention inquiries. Accordingly, we address this argument below, with respect to comments on § 351.226(i).

In rebuttal submissions, some commenters respond that Commerce's country of origin analysis is fundamental to determining if a particular product is covered by the scope of an order, that the *Proposed Rule* simply codifies Commerce's longstanding use of the substantial transformation test, and that the *Proposed Rule* recognizes that on a case-by-case basis Commerce should retain the flexibility to address other case-specific factors or the need for an entirely different test when the facts on the record warrant such an analysis. They argue that

because country of origin determinations can be complex, especially when complicated global supply chain sourcing issues arise, the language as proposed in § 351.225(j) should not be changed, as that language provides Commerce with the tools to adequately determine the country of origin based on relevant characteristics of the particular product at issue.

In addition, in their rebuttal submissions, certain parties challenge the idea that Commerce must justify its determinations when those determinations come to a different conclusion as to the country of origin from CBP. The commenters argue that, just as the proposed language states, Commerce is not bound by the determinations of other agencies when conducting a country of origin analysis, since Commerce's analysis is ultimately made independently of CBP and is based upon the information on the record of the proceeding.

Finally, in their rebuttal submissions, some commenters express their agreement that Commerce should add consideration of the facts surrounding reported toll processors as a factor to the substantial transformation test, stressing that foreign producers have increasingly used toll processors to escape affiliation issues and avoid duties, such as contracting with tollers that are former employees or tollers that are located within their own facilities.

Response:

We have made changes from the language published in the *Proposed Rule*. First, we have adopted minor renumbering changes. Second, we have revised the terminology of § 351.225(j)(1)(ii) to cover "physical characteristics (including chemical, dimensional and technical characteristics)" to bring that language into conformity with other provisions of the regulations. Third, we have turned the listed five factors into six factors, separating the intended end-use of the downstream product from the physical characteristics factor. We believe this better reflects the distinct factors which Commerce considers when applying its substantial transformation analysis.

With respect to the comments we received on this provision, we agree with those commenters who explain that the factors listed in the proposed regulation are not exhaustive.

We understand the arguments that it would bring more certainty to certain parties if we set forth definitive factors that we would apply in every case, but as some commenters explain, every product is different and every supply chain and production process is different, as well. Accordingly, the listed factors are not exhaustive, because Commerce must retain the flexibility to adjust its country of origin analysis when the facts on the record warrant such an adjustment. The listed factors represent the factors we normally apply in most cases, but as we explained in the preamble to the *Proposed Rule*, there have been "different iterations" of Commerce's substantial transformation analysis and Commerce has "considered other factors in applying its substantial transformation analysis when necessary."[75]

Furthermore, as Commerce also explained in the preamble to the *Proposed Rule*, this provision states that Commerce "may" conduct its substantial transformation analysis, but is not required to apply that analysis if it determines "for some reason" that "the substantial transformation test is not appropriate for purposes of determining the country of origin of a particular product."[76] In those circumstances, as the Federal Circuit has affirmed, Commerce continues to have the authority to apply a different, reasonable test to determine the country of origin of a particular product.[77]

With respect to the argument that Commerce must justify its country of origin determinations when they differ from that of CBP's country of origin analysis, conducted pursuant to 19 CFR 134.1(b), it is well established that different Federal agencies apply different country of origin tests, depending on the context and purpose of the test. Commerce's country of

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[75] *Proposed Rule*, 85 FR 49472 at 49480.
[76] *Id.*
[77] *See Canadian Solar*, 918 F.3d at 918-20. At issue in *Canadian Solar* was a situation in which Commerce applied its substantial transformation test in one investigation, and as a result, exporters evaded the payment of duties by shifting the country of production of solar cells to a third country. Thus, in the context of the second investigation claiming solar panels continued to cause the petitioners injury, Commerce determined the use of its substantial transformation test again would be ill-advised, as it would not provide a meaningful remedy to the injured petitioners. Accordingly, Commerce applied a second test, which the Federal Circuit affirmed as in accordance with law, focusing on the country where solar panels were completed, thereby granting the injured petitioners relief from dumped and subsidized Chinese solar panels. *Id.*, 918 F.3d at 915-20.

origin analysis in the context of AD and CVD proceedings differs from that of CBP in its own proceedings.

As the CIT explained in *Venus Wire Industries*,[78] Commerce has applied its own country of origin analysis for over 40 years. It is an analysis which has been litigated and upheld by the Federal Circuit.[79] That Commerce has a different county of origin analysis from CBP is not surprising, given that Commerce's analysis has a different purpose from that of CBP and is applied specifically to determine the relevant point in a production and processing chain where the country of origin of the products described in AD/CVD orders is established.[80] If there is tension between the two analyses, for purposes of Commerce's proceedings, Commerce's analysis applies. As the Federal Circuit held in *Mitsubishi (1994)*,[81] CBP's role in liquidating AD duties is "ministerial" and CBP "cannot modify Commerce's determinations, their underlying facts, or their enforcement." Accordingly, we disagree with the commenter which argued that if Commerce determines the country of origin of a product for purposes of an AD or CVD order in a scope ruling, and that determination is different from the country of origin established by CBP for its purposes, Commerce must take an additional step to justify the distinction. Such an additional analysis in making a country of origin determination is generally unnecessary and unwarranted.

In addition, it would be illogical for Commerce to remove its country of origin analysis from these scope regulations. As other commenters have noted, Commerce frequently conducts a country of origin test as a part of its scope rulings, and there is no reason to change this practice. As we have explained, the commenter who argued for this change cites to Commerce's

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[78] *Venus Wire Industries Pvt. Ltd. v. United States*, 471 F. Supp. 3d 1289, 1299 (CIT 2020) (*Venus Wire Industries*).
[79] *See, e.g.*, *Bell Supply*, 888 F.3d at 1227.
[80] To be clear, physically described products in the scope produced or processed in the country of origin, whether produced or processed before or after the point at which the country of origin is established, are subject to the scope of an AD/CVD order.
[81] *Mitsubishi Electronics America, Inc.*, 44 F.3d 973, 977 (Fed. Cir. 1994) (*Mitsubishi (1994)*). *See also Wirth*, 5 F. Supp. at 973 ("Commerce, not Customs, has authority to clarify the scope of AD/CVD orders and findings. Although the Department may consider the decisions of Customs, it is not obligated to follow, nor is it bound by, the classification determinations of Customs …").

third country processing circumvention proceedings in relation to § 351.226(i) and we have, therefore, addressed its arguments in this regard with our response to other comments on that provision below.

Finally, we understand the arguments from the various commenters that in certain cases Commerce may need to consider toll processors, the role of tollers in the production and supply chain, and the affiliations and relationships of those tollers with other processers, in considering the country of origin of a particular product. However, we do not believe it is necessary to codify such a requirement in this final rule. Based on experience, most prior scope rulings/substantial transformation analyses have not involved tollers or toll processors. In addition, Commerce's primary focus in a country of origin analysis is the location of the production and/or processing of the product in an effort to determine the specific point in the production chain where the product's origin is established, regardless of whether the production and/or processing are conducted by a toller, and regardless of whether the toller is affiliated with the producer or processor. We do not wish to overwhelm our country of origin analysis in most cases with processor and toller affiliation analyses if such an analysis is not helpful to determining the country of origin of a particular product. Furthermore, nothing in the final regulation prevents Commerce from conducting such an analysis if warranted.

11. Section 351.225(k) – Scope rulings

Section 351.225(k) provides the analysis Commerce utilizes in the conduct of a scope inquiry to determine whether a product at issue is covered by the scope of an order. We received many comments and rebuttal comments on this provision, which we address herein. Furthermore, we have determined to make certain edits to the proposed regulation to provide greater clarity to this provision.

The comments which Commerce received on § 351.225(k) focused on topics relevant to individual paragraphs (k)(1) through (3).

(a) Section 351.225(k)(1)

In the proposed revision of § 351.225(k), Commerce significantly revised § 351.225(k) introductory text and (k)(1). Commerce added a chapeau to the beginning of the provision which articulated that Commerce will first and foremost consider the language contained in the scope of an AD or CVD order in determining whether or not a product is covered by that AD or CVD order. Commerce explained that it was adding this language to § 351.225(k) to reflect an additional analysis that Commerce had applied in multiple cases, and was then affirmed by the Federal Circuit, which is that "'a predicate for the interpretive process is language in the order that is subject to interpretation.' The scope of the order can be clarified but it cannot be changed by the interpretive process" and that scope "orders are interpreted under [§ 351.225(k)] with the aid of the antidumping petition, investigation, and preliminary order."[82]

In the preamble to the *Proposed Rule*, Commerce explained that other traditional interpretive tools, such as industry usage of a particular word or phrase, dictionaries or other record evidence, could be used to interpret a scope as well, but, "in the event of a conflict between these interpretive tools or other record evidence and the sources identified in paragraph (k)(1), Commerce would adopt the interpretation supported by the (k)(1) sources."[83]

Notably, there appear to be differing views in the Federal Circuit as to whether the sources under the current § 351.225(k)(1) are used to interpret the "plain meaning" of the text of the scope,[84] or whether the plain meaning analysis comes first, and only once a determination on the plain meaning is determined, then the current § 351.225(k)(1) sources are considered.[85] Those differing views appear to be reflected, as well, in the comments that we received on this

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[82] *See Tak Fat Trade Co. v. United States*, 396 F.3d 1378, 1382-1383 (Fed. Cir. 2005) (citing *Duferco*, 296 F.3d at 1097).
[83] *Proposed Rule,* 85 FR 49472 at 49481.
[84] *See Fedmet Res. Corp. v. United States*, 755 F.3d 912, 918 (Fed. Cir. 2014) (*Fedmet*). Under the Federal Circuit's holding in *Fedmet*, because the plain language is "paramount," in "reviewing the plain language of a duty order," "Commerce must consider the descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of the Secretary (including prior determinations) and the Commission." *See id.*
[85] *See OMG, Inc. v. United States*, 972 F.3d 1358, 1363-66 (Fed. Cir. 2020) (*OMG*).

paragraph. Accordingly, we have modified this provision to provide greater clarity on this point in this final rule.

Several commenters in their comments and rebuttal comments indicate their support for Commerce's inclusion in the proposed § 351.225(k) that the language of the scope is paramount in its scope analysis. They also agree with Commerce that, in most straightforward cases, the agency is not required to consider the four listed (k)(1) interpretive sources if such an analysis would waste agency time and resources.

One commenter argues that Commerce should apply the four sources listed under paragraph (k)(1) in every case, no matter the straightforward nature of the language in the scope, because such an application would bring predictability to Commerce's scope rulings. That commenter objects to Commerce's removal of the language "will take into account" from the current paragraph (k)(1). Several commenters in their rebuttal comments disagree with this argument, saying consideration of those sources in simple cases would be a waste of time and resources for everyone.

With respect to the arguments about secondary interpretive sources, such as Customs rulings and industry usage, one commenter points out that subsequent to Commerce's issuance of the proposed regulations, the Federal Circuit issued its holding in *OMG*, which interpreted the current regulation in the reverse – finding that under the current regulatory hierarchy, dictionaries and other traditional interpretive tools should be considered in interpreting the scope of an order before the sources in the current paragraph (k)(1).[86] The commenter stresses that such an interpretation ignores the intentions of those who have initially drafted the scope language and the petition – the injured domestic producers, as well as the understandings of Commerce, the ITC, and the domestic producers expressed throughout the underlying investigation. Accordingly, it advocates that, rather than just mention the hierarchy of interpretive sources in the preamble, Commerce should codify that hierarchy in the regulation

[86] *See OMG*, 972 F.3d at 1363-66.

itself. The commenter argues that the "primacy of the (k)(1) factors over other interpretive tools should be clearly articulated in the revised" § 351.225(k)(1) "to avoid any confusion among parties as to the importance of other interpretive tools in defining a scope and to provide clarity for courts of review of Commerce's intended policy in scope inquiries." The commenter states that if Commerce does not codify such a hierarchy, a court might ignore the fact that terms defined in a dictionary or other interpretive tools might not align with the interpretation of those terms as used in the industry at issue.

In their rebuttal submissions, several other commenters voice their agreement that Commerce should codify its hierarchy of interpretive tools in the regulation, so that in the future, scopes will not be "voided by dictionary definitions and trade usage, contrary to the plain language of the scope and (k)(1) sources." They argue that such an interpretation would be consistent with the Federal Circuit's rejection of the primacy of "external interpretive tools" such as a dictionary over the (k)(1) sources in *Meridian Products*, where the Federal Circuit held that the lower court improperly narrowed the scope of the antidumping order by relying on its own findings as to the "common and commercial meaning" of the term "fastener" using the dictionary.[87]

Finally, another commenter in its rebuttal comments challenges the majority of commenters who recommend codifying the hierarchy of interpretive sources in the regulation, arguing that the "dictionary definitions and industry usage" should be given more weight, not less, than the (k)(1) interpretive sources, as they "ensure" an "objective assessment of the manner in which the trade community understands the product subject to the Order." They note that sometimes the proposed scope language in a petition is not the same as the ultimate language memorialized in an AD or CVD order, and that if that language is given greater weight by Commerce in a scope inquiry than the actual language of the scope, as interpreted by a dictionary, such an analysis would allow domestic producers to create an "alternate reality,"

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[87] *See Meridian Prods., LLC v. United States*, 890 F.3d 1272, 1280-1281 (Fed. Cir. 2018) (*Meridian Products*).

arguing interpretations of the scope language which were not adopted by Commerce in the scope of the order.

Response:

We agree with the commenters that Commerce should have the discretion to not consider the current § 351.225(k)(1) sources in cases in which it determines that the language of the scope is clear and dispositive. However, we also agree with the commenters who argue that in most scope inquiries the language of the scope is written in more general or broad terms, and, therefore, in the majority of scope inquiries, it is likely that the current (k)(1) sources would be considered by Commerce in determining if a product is covered by the scope of an order in a scope ruling. It is Commerce's understanding that the sources listed in current § 351.225(k)(1) were always intended to be interpretive tools to understand the plain meaning of the scope, recognizing that terms that may have been plain at the time they were drafted and adopted upon the issuance of the order could be interpreted differently at some later point.

With respect to the need for codifying the hierarchy of interpretive sources, we agree with the commenters who warn that absent such codification, a court might rely on a secondary source, such as a dictionary definition, to interpret a word or phrase in a manner which is inconsistent with the meaning used by the injured domestic industry in drafting the proposed scope and petition, and the collective interpretation of Commerce, the industry, and the ITC of that term expressed in the underlying investigation. We agree with the commenters that if we do not incorporate the hierarchy into our regulations, the use by courts of "external interpretive tools," rather than the current (k)(1) sources, in analyzing Commerce's scope rulings could potentially weaken or even undermine the effectiveness of Commerce's orders. The purpose of an AD or CVD order is to provide a remedy to offset the harm caused by unfairly traded merchandise. Therefore, the intentions and interpretations of Commerce, the ITC, and the injured domestic parties themselves at the time of the underlying investigation should be given primary consideration in defining and interpreting the scope of the order.

On the other hand, we agree with the commenter that argues that a proposed scope or petition may differ from the language ultimately adopted by Commerce in the final scope of an order, and, under a situation such as that one, Commerce may determine that it must not only consider the current (k)(1) sources, but additional, secondary sources as well.

In light of all of these comments, we have, therefore, made several modifications to the proposed § 351.225(k)(1) provision. First, we have moved the proposed chapeau language, which states that the language of the scope is dispositive, to paragraph (k)(1). This is because it is our belief that the traditional (k)(1) sources were never intended by Commerce to be separate from the initial analysis of the scope language, but were instead intended to be interpretive tools that could be considered by Commerce, at its discretion and under consideration of the arguments on the administrative record, to determine the meaning of the scope of the order.

Second, we have modified the numbering of the paragraph and incorporated the hierarchy of the interpretive sources into the regulation itself. Specifically, using language from the current regulations, paragraph (k)(1) now states that, if Commerce determines that the language of the scope is not itself dispositive (*i.e.*, it is not dispositive using no interpretive tools whatsoever), Commerce may take into account the identified primary interpretive sources, which are the traditional (k)(1) sources, in determining if the language is dispositive and the scope covers the product at issue. Those sources (in paragraph (k)(1)(i)) are then followed by a paragraph (paragraph (k)(1)(ii)) which states that Commerce may consider secondary interpretive sources such as other Commerce or ITC determinations not included in the primary interpretive sources, Customs rulings or determinations, industry usage, dictionaries, and any other relevant record evidence. This language provides clarity in that it distinguishes primary interpretive sources from secondary interpretive sources, and affirmatively acknowledges that Commerce may consider secondary sources in its scope inquiries under certain scenarios. The revised language uses the terms "may" and "discretion" to be clear that Commerce is not required to consider any of these sources in this manner if it believes the record does not warrant

such a hierarchical consideration. We recognize that Commerce has always had the authority under the AD and CVD laws to consider secondary sources in interpreting the scope of AD and CVD orders, but we believe in light of our experience over the last 20 years that it is better to include reference to those sources in the regulations to avoid the possibility of confusion going forward and to describe the hierarchy of interpretive sources clearly.

Third, we have also codified language in this final rule which addresses a conflict between the primary and secondary interpretive sources, providing that the primary interpretive sources will normally govern in determining whether a product is covered by the scope of the order at issue. We have used the word "normally" in this provision because, as one commenter points out, there may be limited scenarios in which, under a certain set of facts, Commerce might elect to give greater weight to certain secondary sources. For example, a commenter has provided a hypothetical in which the proposed scope and petition contain language different from that of the ultimate order, and the other current (k)(1) sources provide no further guidance. Under those hypothetical facts, Commerce might determine it acceptable to give more weight to a secondary source, presuming that the secondary source is informative.

Finally, in making these modifications, Commerce also determined that it would be beneficial to provide some clarity on the descriptions of the (k)(1) sources. For paragraphs (k)(1)(i)(A), (B), and (D), we have added language to clarify that the petition language, investigation language, and ITC determinations considered under (k)(1) all pertain to the order at issue. While this may seem obvious, we have concluded that it is appropriate to add that language to distinguish those sources from paragraph (k)(1)(i)(C), which includes determinations not always applicable to the order at issue. Specifically, we have modified paragraph (k)(1)(i)(C) to clarify that both previous or concurrent Commerce scope determinations may be considered by Commerce as part of its analysis, including prior scope rulings, memoranda, or clarifications which pertain to both the order at issue, as well as other orders with the same or similar language as that of the order at issue. This change reflects Commerce's practice and

interpretation of that provision over the years, and shows that unlike the other three primary sources, this primary source includes scope determinations, such as scope rulings and scope clarifications, from other proceedings addressing similar language used in the scopes of different orders that sometimes cover the same or similar physical merchandise from other countries. We have found it valuable over the years to consider such determinations as part of our scope inquiry analysis.

(b) Section 351.225(k)(2)

Section 351.225(k)(2) describes the factors Commerce considers if it finds that the sources listed under § 351.225(k)(1) are still not dispositive as to whether or not the particular product is covered by the scope of an order. In the preamble to the *Proposed Rule*, Commerce explained that under § 351.225(k)(2), it was "Commerce's intent that the first factor – the characteristics of the product, including the technical, physical, or chemical characteristics of the product – may be given greater weight than the other factors. Nonetheless, Commerce should consider each of the factors in making its determination under paragraph (k)(2)."[88] One of the commenters objects to this "change" and argues that Commerce should consider all of the factors equally, and that "placing more importance on one factor skews" Commerce's scope analysis.

Response:

We have made some changes to the language of § 351.225(k)(2) to clarify that Commerce will conduct its analysis under this paragraph only if the (k)(1) factors are not dispositive. Further, we have also modified the paragraph (k)(2)(i) factor to bring the term "physical characteristics" into conformity with the way it is used in other parts of the regulation (*i.e.*, physical characteristics (including chemical, dimensional, and technical characteristics)). In addition, we have adopted minor numbering changes.

In addition, we have revised § 351.225(k)(2)(i)(B) to clarify that Commerce considers the expectations of the ultimate users, instead of the expectations of the ultimate purchasers. This is

[88] *Proposed Rule*, 85 FR 49472 at 49481.

because we have found in our practice that there are sometimes cases in which it is not the expectations of purchasers, but the expectations of the ultimate users of a product which inform whether or not a product was intended to be included in the scope of an order. There are several reasons an entity might purchase a product, including (for example) as an investment or as a gift, but in neither of those scenarios would the purchaser's activities necessarily inform whether or not the product is subject to an order. On the other hand, as § 351.225(k)(2)(i)(C) (the ultimate use of the product) informs us, it is the expectations of the ultimate user which better informs us as to whether or not a product was intended to be included in the scope of an order. We also note that § 351.225(k)(2)(i)(B) and (C) are distinguishable because, as a factual matter, the expectations of a user do not always align with the actual, ultimate use of the product.

In response to the comment on our prioritization of the first (k)(2) factor, we disagree that such an interpretation is inconsistent with our current practice. Indeed, when there is a conflict between the five factors listed under (k)(2), it has been Commerce's consistent practice to give greater weight to our analysis of the physical characteristics of the particular product. This is because the scopes of orders are generally written to cover products with certain physical characteristics, and it is an established principle in our scope practice that the objective characteristics of merchandise, including the physical descriptions of merchandise, should be given greater weight in case of a conflict between the factors under consideration. This is distinguishable from other factors, such as the expectations of the ultimate users under (k)(2)(i)(B) or the manner in which a product is advertised, and displayed under (k)(2)(i)(E), which might incorporate elements such as "intended end use" or "design" into Commerce's analysis, but also by their nature lend themselves to a more subjective outcome. Nonetheless, although this is Commerce's general practice, we also recognize that there could be scenarios in which Commerce considers and determines that the physical characteristic factor should not be given greater weight in its analysis. Thus, it is our policy to "normally," but not always, give

greater weight to the physical characteristics factor as part of our (k)(2) analysis if there is a conflict between the five listed factors.

Because this comment suggests that Commerce's practice in this area may not be well-known or understood, we have, therefore, added to paragraph (k)(2)(ii) a sentence which clarifies that in the event of a conflict between the five listed factors under paragraph (k)(2)(i), paragraph (k)(2)(i)(A) will normally be allotted greater weight than the other factors.

(c) Section 351.225(k)(3)

Commerce proposed a codification of its analysis of component parts of larger products, colloquially referred to as its "mixed-media analysis" (*i.e.*, subject merchandise assembled or packaged with non-subject merchandise), in a new § 351.225(k)(3) in the *Proposed Rule*.

One commenter argues that Commerce's mixed-media test "lacks sufficient clarity" to allow importers "to discern reliably whether particular merchandise will be found to be within the scope of an order through the operation of this provision." The commenter, therefore, argues that Commerce should provide more definitive factors in § 351.225(k)(3), which Commerce will consider in determining if a mixed media analysis should be applied, and that Commerce should remove the term "as appropriate" in this paragraph to provide more certainty for exporters and importers.

Another commenter asks Commerce to explain how a party should establish the value of the components at issue under § 351.225(k)(3)(ii), arguing that importers may only have the price of the good as a whole available to them, so that they would be unable to report the value of the component to CBP for purposes of suspending and/or collecting AD or CVDs.

In a rebuttal, a third commenter states that it disagrees that Commerce should list definitive factors under this provision, arguing that it is important that Commerce retain flexibility in applying the mixed-media factors because all products are different, and, therefore, its test should be able to adapt to the products under consideration.

Response:

We agree with one commenter that paragraph (k)(3) as proposed required a certain amount of revision to more clearly reflect Commerce's mixed-media analysis. Accordingly, we have taken the three sentences as proposed, and reformatted the paragraph to reflect the sequential steps of the analysis. We have also revised some of the language used to describe the analysis. First, under paragraph (k)(3)(i), Commerce analyzes the component of the merchandise as a whole under paragraph (k)(1) and, if necessary, under (k)(2). If, after review under those provisions, Commerce determines that the component, taken alone, would not be covered by the scope of the order, then the inquiry ends. However, if the component, taken alone, would be covered by the scope of the order, under those provisions, then, under paragraph (k)(3)(ii), Commerce will analyze the scope under (k)(1) to determine whether the component product's inclusion in the merchandise as a whole would result in the component product being excluded from the order. Finally, if Commerce determines the analysis under (k)(3)(ii) does not resolve whether the component product's inclusion in the merchandise as a whole results in its exclusion from the scope of the order, then, under paragraph (k)(3)(iii), Commerce will consider additional relevant factors on a product-specific basis, including those explicitly listed.

In addition, we also agree with the commenter that the first factor listed in Commerce's mixed-media analysis, as proposed, should also be clarified. The term "practicability" in factor (i) is a general and undefined term. Accordingly, we have modified that factor to explain that Commerce will consider the relative difficulty and expense of separating components as part of its analysis of whether or not separation is practicable – which Commerce has historically considered as part of this analysis.

Next, in response to concerns about how Commerce values an in-scope component, we must emphasize that a determination of how to measure the value of such a component is a case-specific analysis. Some merchandise as a whole might be extremely valuable when the component is included, even if the component, individually, is commercially inexpensive. Other merchandise as a whole does not undergo much of a change in value without the in-scope

component, while the in-scope component might actually be quite valuable. Because such an analysis is case-specific, we will not include additional guidance in the regulation on this factor. We understand that the commenter's primary concern is the knowledge of unaffiliated importers with respect to this factor. We cannot speak to the chain of knowledge between an importer and the producer of the imported merchandise, except to note, as we have explained above, that there is an expectation that importers should be able to obtain relevant information pertaining to the importation of the product at issue and should have familiarity with the U.S. AD/CVD laws which apply, or potentially apply, to that merchandise. With or without that information or knowledge, the importers understand that they take on certain risks when importing the product at issue. These regulations are intended to direct and guide parties on Commerce's mixed-media analysis, so that they may make informed decisions regarding whether to import merchandise potentially subject to an AD and/or CVD order. This final rule serves as notice to parties of Commerce's intent to apply this analysis, as warranted, when examining such mixed-media products.

Finally, we disagree with the commenter that argues that we should remove the language "as appropriate" from this provision. While we believe that, under most scenarios, the three enumerated factors listed in paragraph (k)(3)(iii) should be sufficient, we also believe that it is possible that, in some cases, additional factors might be relevant to our analysis. We agree with the commenter who states that it is important that Commerce retain flexibility in applying the mixed-media analysis. We, therefore, determine that it is best to leave the opportunity for consideration of additional factors "as appropriate" in the regulation.

12. Section 351.225(l) – Suspension of liquidation

As discussed in the *Proposed Rule*, in the context of a formal scope inquiry, current paragraph (l) allows for Commerce to direct CBP to begin the suspension of liquidation of unliquidated entries not yet suspended which entered on or after the date of initiation of the scope inquiry, and collect applicable cash deposits, at the time of a preliminary or final scope

ruling, whichever is applicable, determining that the product is covered by the scope of an order. The current regulation does not address unliquidated entries not yet suspended which pre-date the date of initiation of the formal scope inquiry.[89] Furthermore, the Act does not provide direction to Commerce regarding the suspension of liquidation of entries subject to a scope inquiry.

Under paragraph (l) in the *Proposed Rule*, among other changes, Commerce proposed to eliminate the distinction between formal and informal scope inquiries so that all scope inquiries would be conducted by a formal initiation. In addition, Commerce proposed that, at the time of a preliminary or final scope ruling determining that the product is covered by scope of an order, Commerce would direct CBP to begin suspension of liquidation for any unliquidated entries not yet suspended and collect applicable cash deposits.[90] After consideration of comments on the *Proposed Rule*, Commerce is adopting certain changes to paragraph (l) in this final rule. In addition, Commerce is making a number of revisions to paragraph (l) on its own initiative. For clarity, we describe all revisions made to paragraph (l) in these introductory paragraphs before summarizing and addressing comments below. Also discussed herein are the specific applicability dates for paragraph (l) as referenced in the Applicability Dates section of this preamble.

Paragraph (l)(1), which describes Commerce's actions at the time of initiation of a scope inquiry, is slightly revised from the *Proposed Rule* as discussed below. Additionally, as discussed further below, Commerce is altering paragraphs (l)(2) and (3), which describe Commerce's actions at the time of a preliminary or final scope ruling determining that the product is covered by the scope of an order. Paragraph (l)(4), which describes Commerce's actions in the event of a negative final scope ruling, remains unchanged from the *Proposed Rule*.

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[89] *Id*. at 49481-84.
[90] *Id.*

Lastly, Commerce is adding a new provision, paragraph (l)(5), to include specific reference to CBP's authority.

Minor revisions have been made to paragraphs (l)(1), (l)(2)(i), and (l)(3)(i) from the *Proposed Rule*. Specifically, paragraph (l)(2)(i) provides that, at the time of a preliminary scope ruling determining that the product is covered by the scope of an order, Commerce will direct CBP to continue the suspension of liquidation of previously suspended entries, but removes express reference to entries previously suspended *as directed by* paragraph (l)(1). Under paragraph (l)(1), Commerce does not direct CBP to suspend liquidation at the time of initiation of the scope inquiry; rather, under paragraph (l)(1), Commerce directs CBP *to continue* the suspension of liquidation of entries subject to the scope inquiry that were already subject to the suspension of liquidation and to collect the applicable cash deposits.[91] As an initial matter, CBP has independent authority to suspend liquidation.[92] Therefore, prior to a scope inquiry, entries may be previously suspended for a number of reasons, for example, because the importer declared the merchandise as subject to the order (*e.g.*, Type 03 or Type 07), or CBP directed the importer to refile an entry that was previously declared as not subject to the order (*e.g.*, Type 01) to an entry type indicating it is covered by an AD and/or CVD order.[93] Thus, to avoid any unintended confusion regarding the underlying basis for suspension of liquidation of previously suspended entries, the reference to paragraph (l)(1) is removed from paragraph (l)(2)(i).

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[91] The phrase "until appropriate liquidation instructions are issued" from the *Proposed Rule* is removed in paragraph (l)(1) (which refers to continued suspension of liquidation) as such language is unnecessary and redundant. The relevant language is retained in paragraph (l)(3) as discussed below.

[92] As part of its statutory responsibility "to fix the amount of duty owed on imported goods[,]" CBP "is both empowered and obligated to determine in the first instance whether goods are subject to existing [AD/CVD orders]." Pursuant to 19 U.S.C. 1514(b) (section 514 of the Act), this "determination is then 'final and conclusive' unless an interested party seeks a scope ruling from Commerce (which ruling would then be reviewable pursuant to [19 U.S.C. 1516a])." *See TR International*, 433 F. Supp. at 1341 (citing *Sunpreme*, 946 F.3d at 1318) (referencing section 516 of the Act). The Federal Circuit has confirmed that CBP has authority to order suspension of liquidation pursuant to its authority if it determines that an AD/CVD order applies to the imported goods. *See Sunpreme*, 946 F.3d at 1317-18.

[93] For further information, see discussion of new paragraph (l)(5) below. For a list of entry types, including those identifying the entries as subject to AD or CVD duties, see, "CBP Form 7501: Summary," available at *https://www.cbp.gov/trade/programs-administration/entry-summary/cbp-form-7501* (last visited June 9, 2021).

Similar edits have been made to paragraph (l)(3)(i) by removing a reference to entries previously suspended "as directed under" paragraphs (l)(1) and/or (l)(2). Under paragraph (l)(2)(ii) (as further discussed below), if Commerce issues a preliminary scope ruling determining that the product is covered by the scope of an order, Commerce will direct CBP to begin the suspension of liquidation of certain entries. Therefore, at the time of a final scope ruling, entries may be previously suspended for the reasons described above, or because of Commerce's instruction to CBP to begin the suspension of liquidation of certain entries at the time of the preliminary scope ruling. To avoid confusion regarding the underlying basis for suspension of liquidation of previously suspended entries, the reference to paragraphs (l)(1) and/or (l)(2) is removed from paragraph (l)(3)(i).

Revised paragraph (l)(3)(i) eliminates potentially confusing language regarding entries subject to suspension of liquidation as a result of another segment of a proceeding, and revised paragraphs (l)(3)(i) and (ii) eliminate references to liquidation instructions issued pursuant to §§ 351.212 and 351.213. There may be a number of reasons why entries may already be subject to suspension of liquidation in any given scope inquiry in which Commerce issues a final scope ruling determining that the product is covered by the scope of an order, and Commerce cannot immediately instruct CBP to lift suspension of liquidation and assess final duties. This includes, for example, an ongoing administrative review, or a pending circumvention inquiry or covered merchandise inquiry. Therefore, we find that a simple reference to continued suspension until appropriate liquidation instructions are issued in paragraph (l)(3) will account for various scenarios. In addition, the language in new paragraph (l)(5) will provide added clarification regarding CBP's authority in relation to the framework established by Commerce under paragraph (l). Commerce intends to provide more details, as needed, in its individual instructions to CBP for a given case.

On the other hand, we note that we have retained similar language in paragraph (l)(4) to provide that when Commerce issues a final scope ruling determining that the product is not

covered by the scope of an order, entries subject to suspension of liquidation as a result of another segment of a proceeding will remain suspended until the other segment of the proceeding has concluded. This is because, as discussed in other parts of §§ 351.225, 351.226, and 351.227, it is possible that there could be a pending circumvention or covered merchandise inquiry on the same product at the time Commerce issues its final scope ruling. Therefore, to avoid confusion in this particular scenario, this language is retained in paragraph (l)(4).

Paragraphs (l)(2)(ii) and (l)(3)(ii) clarify and maintain the *status quo* of the current regulation to provide that, at the time of a preliminary or final scope ruling determining that the product is covered by the scope of an order, Commerce will direct CBP to begin the suspension of liquidation of any unliquidated entries not yet suspended, which entered on or after the date of initiation of the scope inquiry, and collect applicable cash deposits. Paragraphs (l)(2)(ii) and (l)(3)(ii) also retain language from the current regulation regarding entries entered, or withdrawn from warehouse, for consumption, to maintain consistency with this long-standing language and to avoid confusion.

New paragraphs (l)(2)(iii)(A) and (l)(3)(iii)(A) provide that, at the time of a preliminary or final scope ruling determining that the product is covered by the scope of an order, Commerce normally will direct CBP to begin the suspension of liquidation of unliquidated entries not yet suspended, which entered before the date of initiation of the scope inquiry, and collect applicable cash deposits. This includes any unliquidated entries back to the first date of suspension under the order that remain unliquidated at the time of the preliminary or final scope ruling. However, new paragraphs (l)(2)(iii)(B) and (l)(3)(iii)(B) provide an exception that, if Commerce determines it is appropriate to do so, Commerce may direct CBP to begin suspension of liquidation and application of cash deposits to merchandise entering at an alternative date. Under this framework, Commerce may consider upon timely request of an interested party or at its discretion whether such suspension of liquidation and application of cash deposits, also referred to as retroactive suspension, should not be applied to certain entries which pre-date the

date of initiation. In response to a timely request from an interested party, Commerce will only consider directing CBP to begin suspension of liquidation and application of cash deposits to merchandise entering at an alternative date based on a specific argument by the interested party supported by evidence establishing the appropriateness of that alternative date. These provisions are further explained below in response to comments. New paragraphs (l)(2)(iii) and (l)(3)(iii) also retain language from the current regulation regarding entries entered, or withdrawn from warehouse, for consumption, to maintain consistency with this long-standing language and to avoid confusion.

Lastly, new paragraph (l)(5) provides language to clarify CBP's authority to take related action. Specifically, this language clarifies that the revised framework established by Commerce in § 351.225 do not affect CBP's authority to take any additional action with respect to the suspension of liquidation or related measures. As discussed above, CBP has independent authority to suspend liquidation of entries that CBP determines are within the scope of an AD or CVD order, and such determinations are "final and conclusive" unless appealed to Commerce through a request for a scope ruling.[94] Additionally, there may be entries of products subject to a scope inquiry that CBP has liquidated but for which liquidation is not yet final (*e.g.*, entries under protest pursuant to 19 U.S.C. 1514) or for which CBP has extended liquidation (*e.g.*, pursuant to 19 U.S.C. 1504(b)). Consistent with current practice and in accordance with CBP's statutory and regulatory authorities, Commerce expects that CBP may stay its action on these entries during the course of the scope inquiry.[95] This language also clarifies that any instructions

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[94] *See Sunpreme*, 946 F.3d at 1317-18 (citing 19 U.S.C. 1500(c) and 1514(b); sections 500(c) and 514(b) of the Act); *TR International*, 433 F. Supp. 3d at 1341; and *Fujitsu*, 957 F. Supp. at 248. Section 517 of the Act (concerning CBP's civil administrative investigations of duty evasion of AD/CVD orders) also authorizes CBP to suspend liquidation of entries for which it has reasonable suspicion, or, in the case of final determination, substantial evidence, that covered merchandise is entered into the United States through evasion under section 517(e) and (d) of the Act.

[95] This is consistent with the Federal Circuit's decision in *Thyssenkrupp Steel North America, Inc. v. United States*, 886 F.3d 1215 (Fed. Cir. 2018). In *Thyssenkrupp*, the Federal Circuit recognized that instructions revoking an antidumping duty order superseded previously issued liquidation instructions, as of the effective date of the revocation, and applied to entries under protest that entered the United States after the effective date of the revocation. *Id.* at 1223-27. The Federal Circuit explained that this "serves the purpose of the protest mechanism—to allow agency consideration of issues after an initial liquidation determination—and respects the longstanding

issued by Commerce directing CBP to "lift suspension of liquidation" and assess duties at the applicable AD/CVD rate would not limit CBP's ability to: 1) suspend liquidation/assess duties/take any other measures pursuant to CBP's EAPA investigation authority under section 517 of the Act specifically; or 2) suspend liquidation/assess duties/take any other action within CBP's or HSI's authority with respect to AD/CVD entries.[96]

There is one clarification to this revised regulatory framework as referenced above in the DATES section regarding the effective date and in the Applicability Dates section of this preamble. As stated above, amendments to § 351.225 apply to scope inquiries for which a scope ruling application is filed, as well as any scope inquiry self-initiated by Commerce, on or after the effective date for the amendments to § 351.225 identified in the DATES section. However, Commerce will not apply paragraphs (l)(2)(iii) and (l)(3)(iii) in a way that would direct CBP to begin the suspension of liquidation of unliquidated entries not yet suspended, entered, or withdrawn from warehouse, for consumption prior to this effective date. For example, should Commerce initiate a scope inquiry and issue a preliminary or final scope ruling that the product is covered by the scope of an order:

- Commerce will instruct CBP to begin the suspension of liquidation and application of cash deposits for any unliquidated entries not yet suspended, entered, or withdrawn from warehouse, for consumption, on or after the date of initiation of the scope inquiry pursuant to paragraphs (l)(2)(ii) and (l)(3)(ii); and
- Commerce normally will instruct CBP to begin the suspension of liquidation and application of cash deposits for any unliquidated entries not yet suspended, entered, or withdrawn from warehouse, for consumption, prior to the date of initiation of the scope

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principle … that newly governing law, if retroactive to particular events, is to be applied to those events in ordinary, timely initiated direct-review proceedings." *Id.* at 1224. A similar point was recognized in *TR International*, 433 F. Supp. 3d at 1344-46, currently on appeal, concerning CBP's potential application of a Commerce scope ruling to entries under protest.

[96] Homeland Security Investigations (HSI) has the authority to investigate criminal violations related to illegal evasion of payment of required duties, including payment of AD/CVDs. *See, e.g.*, 18 U.S.C. 542.

inquiry, but not for such entries prior to the effective date identified in the DATES section, pursuant to paragraphs (l)(2)(iii) and (l)(3)(iii).

In other words, the furthest retroactive suspension directed by Commerce that could apply under this framework is to unliquidated entries not yet suspended, entered, or withdrawn from warehouse, for consumption, on or after the effective date identified in the DATES section. This is consistent with the language of paragraphs (l)(2)(iii)(B) and (l)(3)(iii)(B) that allows for Commerce to alter the date for which the suspension of liquidation should begin under this provision at its discretion. Thus, when applying paragraphs (l)(2)(iii) and (l)(3)(iii) in a given scope inquiry, Commerce will include the appropriate clarifying language regarding the effective date identified in the DATES section in the preliminary and final scope rulings and corresponding instructions to CBP. That being said, as expressly stated in paragraph (l)(5), this framework does not affect CBP's authority to take any additional action with respect to the suspension of liquidation or related measures. Nor will this framework apply to scope ruling applications filed or scope inquiries self-initiated by Commerce before the effective date identified in the DATES section.

This application will be limited in practice; as detailed in the *Proposed Rule*, CBP normally will liquidate entries declared as non-subject to AD/CVDs within one year of entry. Therefore, we expect that only within the first year after the effective date identified in the DATES section will there be entries that remain unliquidated and not yet suspended, entered, or withdrawn from warehouse, for consumption, prior to the effective date.

To be clear, entries that are already suspended as of the effective date identified in the DATES section, will be subject to the continued suspension of liquidation under paragraph (l)(1), which provides that, at the time of initiation of a scope inquiry, Commerce will instruct CBP to continue the suspension of previously suspended entries and apply the applicable cash deposit rate. Similarly, entries that are already suspended as of the effective date identified in the DATES section will be subject to the continued suspension of liquidation under paragraphs

(l)(2)(i) and (l)(3)(i), which provide that, at the time of a preliminary or final scope ruling determining that the product is covered by the scope of an order, Commerce will instruct CBP to continue the suspension of previously suspended entries and apply the applicable cash deposit rate. These entries will retain their *status quo* from before the effective date to after the effective date. Specifically, current paragraph (l)(1), as well as current paragraphs (l)(2) and (3), require continued suspension of previously suspended entries both at the time of initiation of a scope inquiry and in the event of a preliminary or final scope ruling determining that the product is covered by the scope of an order.

As noted above, Commerce received numerous comments on paragraph (l). Summaries of those comments, and responses to those comments, are provided below.

(a) Retroactive suspension of liquidation

As described above, among other changes, Commerce proposed to eliminate the distinction between formal and informal scope inquiries in the *Proposed Rule*, so that all scope inquiries would be conducted by a formal initiation. In addition, Commerce proposed that, at the time of a preliminary or final scope ruling determining that the product is covered by the scope of an order, Commerce would direct CBP to begin suspension of liquidation for any unliquidated entries not yet suspended retroactive to the first date of suspension under the relevant order, and collect applicable cash deposits. Therefore, the key distinction between the current regulation and what was proposed is that the current regulation imposes a "cut-off" of the initiation date of the scope inquiry – the proposed regulation would have removed this limitation so that any unliquidated entries found within the scope of the order would be subject to duties, not just those that entered on or after the initiation date.

Several commenters support the proposal to apply affirmative scope rulings to all unliquidated entries dating back to the first date of suspension under the order. Certain of these commenters agree that by eliminating the distinction between formal and informal scope inquiries, Commerce makes clear that an affirmative scope ruling means that the product has

always been subject to the order. One commenter argues that the proposal will address serious duty evasion issues and will foster uniformity in the enforcement of AD/CVD laws no matter what type of scope inquiry is conducted. This commenter also agrees with Commerce's statement in the *Proposed Rule* that, at the time Commerce issues an affirmative preliminary or final scope ruling, it is unlikely that there will be any unliquidated entries more than one year old other than those already suspended.

Another commenter argues that the proposed changes are necessary because, while scope rulings do not expand the scope of an order, the Federal Circuit has foreclosed Commerce from applying scope rulings to all unliquidated entries in instances where Commerce issues a scope ruling based on the application under the current regulations.[97] According to this commenter, the proposal results in the common-sense proposition that AD/CVDs should be collected on all in-scope merchandise regardless of when a scope inquiry was initiated.

Roughly the same number (12) of commenters to those above, oppose the *Proposed Rule* regarding retroactive suspension in scope inquiries. These commenters raise the issue of fairness; in particular, they argue that there is a significant duty liability risk to importers that are genuinely unaware their products may be within the scope of an order.

In addition to fairness concerns, certain of these commenters raise concerns regarding notice and due process and argue that assessing duties retroactively when the language of an order is unclear is a violation of due process and creates uncertainty for importers. Certain of these commenters argue that product scope language should be as precise and clear as possible from the beginning and that clarification of ambiguous scope language should be applicable at the time of initiation of the scope inquiry because, otherwise, retroactive duty liability presents an incalculable risk and significant uncertainty to parties. Certain commenters also argue that scope rulings should be published in the *Federal Register* so that all interested parties affected have the same level of information and can defend their interests, or available on Commerce's

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[97] *See Fasteners*, 947 F. 3d at 800-03.

website. Another of these commenters argues that, as held by the Federal Circuit, a scope ruling does not confirm the scope of an order, but clarifies an unclear scope.[98] This commenter argues that parties should not be penalized for relying on scope language that does not clearly cover merchandise, and also expresses support for providing notice of initiation of a scope inquiry via the *Federal Register*. Another commenter argues that the *Proposed Rule* would encourage ambiguity in scope language and prevent importers from making appropriate business plans.

A few commenters also argue that Commerce alleges, without citing any specific past examples of such activity by importers, that the existing approach in the current regulations encourages gamesmanship, delay, and duty evasion based on a view that importers fail to do their due diligence, are aware of the potential liability, and would not seek a scope ruling so as to avoid payment of AD/CVDs. These commenters claim that the proposal would result in negligent importers not seeking a scope ruling at all if doing so would imply that all unliquidated entries could be subject to AD/CVDs.

Another commenter argues that Commerce's premise in the *Proposed Rule* that the AD/CVD order constitutes notice that unspecified products may be in-scope is flawed because scope language may not be clear, and allowing for retroactive suspension would only serve to correct the petitioner's own errors or neglect when finalizing scope language in the investigation.

Finally, two commenters oppose the proposal to apply affirmative scope rulings to all unliquidated entries dating back to the first date of suspension under the order because it would deprive parties of the ability to request an administrative review of entries later found to be subject to an AD/CVD order. One of these commenters notes that, in certain scenarios, importers would have no ability to request an administrative review to lower their liability for entries later determined to be subject to an order. The other commenter proposes that a review would need to be conducted outside of the normal administrative review process, as often the time for requesting such reviews will have elapsed by the time Commerce issues a final scope

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[98] *Id.*, 947 F.3d at 803.

ruling. According to this commenter, absent such a process, the proposal would likely be violative of the Excessive Fines clause of the 8th Amendment.

Response:

As discussed above, after consideration of these comments, Commerce is adopting a number of key changes to paragraph (l).

First, Commerce is adopting changes to paragraphs (l)(2) and (3) to clarify and maintain the *status quo* of the current regulation with respect to unliquidated entries not yet suspended which entered on or after the date of initiation of the scope inquiry. Specifically, paragraphs (l)(2)(ii) and (l)(3)(ii) provide that, at the time of a preliminary or final scope ruling determining that the product is covered by the scope of an order, Commerce will direct CBP to begin the suspension of liquidation of any unliquidated entries not yet suspended, which entered on or after the date of initiation of the scope inquiry, and collect applicable cash deposits.

Second, Commerce is adopting changes to paragraphs (l)(2) and (3) with respect to unliquidated entries not yet suspended which entered before the date of initiation of the scope inquiry. Specifically, paragraphs (l)(2)(iii)(A) and (l)(3)(iii)(A) provide that, at the time of a preliminary or final scope ruling determining that the product is covered by the scope of an order, Commerce normally will direct CBP to begin the suspension of liquidation of unliquidated entries not yet suspended, which entered before the date of initiation of the scope inquiry, and collect applicable cash deposits. This includes any unliquidated entries back to the first date of suspension under the order that remain unliquidated at the time of the preliminary or final scope ruling.[99] However, new paragraphs (l)(2)(iii)(B) and (l)(3)(iii)(B) provide an exception that, if Commerce determines it is appropriate to do so, Commerce may direct CBP to begin suspension

[99] As stated above in the discussion of new paragraph (l)(5), consistent with current practice and in accordance with CBP's statutory and regulatory authorities, CBP may stay its action on entries of products that CBP has liquidated but for which liquidation is not yet final pending the outcome of a scope inquiry. Additionally, any instructions issued by Commerce directing CBP to "lift suspension of liquidation" and assess duties at the applicable AD/CVD rate would not limit CBP's ability to (1) suspend liquidation/assess duties/take any other measures pursuant to CBP's EAPA investigation authority under section 517 of the Act specifically, or (2) suspend liquidation/assess duties/take any other action within CBP's or HSI's authority with respect to AD/CVD entries.

of liquidation and application of cash deposits to merchandise entering at an alternative date. Under this framework, Commerce may consider upon a timely request of an interested party or at its discretion whether such suspension of liquidation and application of cash deposits, also referred to as retroactive suspension, should not be applied to certain entries which pre-date the date of initiation. In response to a timely request from an interested party, Commerce will employ a heightened standard and will only consider directing CBP to begin suspension of liquidation and application of cash deposits to merchandise entering at an alternative date based on a specific argument by the interested party supported by evidence establishing the appropriateness of that alternative date. This would require, for instance, specific identification of the interested parties and entries at issue and the circumstances surrounding the declaration of the entries as non-AD/CVD type entries. Broad, non-specific arguments concerning general unfairness or lack of notice that are not concrete or particular to the interested party or entries at issue would not be sufficient. In addition, Commerce may consult with CBP as necessary under this provision.

As Commerce stated in the *Proposed Rule*, and as set forth in paragraph (a) of § 351.225, a scope ruling that a product is within the scope of the order is a determination that the product has always been within the scope of the order. Therefore, one of Commerce's objectives in crafting suspension of liquidation rules for scope inquiries is to ensure that AD/CVDs are applied to all unliquidated entries of products found within the scope of the order, including entries that may pre-date the date of initiation of the scope inquiry.

As a general matter, producers, exporters, and importers are already notified that their products may be covered by the scope of an order through the publication in the *Federal Register* of Commerce's determinations and/or order, which provides a description of the subject merchandise and any associated Harmonized Tariff Schedule of the United States (HTSUS)

categories.[100] As discussed in further detail below under the discussion of § 351.226(l), importers are generally expected to perform their due diligence and exercise reasonable care, which would include understanding the imported product and reviewing prior *Federal Register* notices relevant to the product. Furthermore, an importer of a product under an HTSUS category that is associated with an AD/CVD order would be faced with a particular responsibility to ensure whether the product is subject to an AD/CVD order. Additionally, exporters, producers, and importers are able to ask Commerce at any time for a scope ruling on any product that is in actual production (regardless of whether it has yet been sold or exported to the United States). To the extent that a party is unclear as to whether a product falls within the scope of the order, the onus is on that party to request a scope ruling, and to seek such a scope ruling in an expeditious manner.[101]

This is particularly the case where a party has been alerted by CBP that the entries may be subject to an AD/CVD order, and advised to seek a scope ruling from Commerce.[102] Moreover, as explained above, "Commerce, not Customs, has authority to clarify the scope of AD/CVD orders[.]"[103] Accordingly, producers, exporters, and importers of products found to be within the scope of an order generally cannot claim ignorance or reliance on another agency's determinations or actions to avoid the application of Commerce's scope ruling to their merchandise. Thus, establishing a rule that normally applies retroactive suspension in scope inquiries will encourage parties to maintain a reasonable awareness of whether the product they are producing, exporting, or importing is subject to an AD/CVD order.

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[100] The Federal Circuit has recognized that *Federal Register* notices are treated as legally effective notices in a wide range of circumstances. *See Suntec Indus. Co. v. United States*, 857 F.3d 1363, 1370 (Fed. Cir. 2017) (*Suntec*). In certain cases, the courts have determined that a party that did not receive actual notice nonetheless received constructive notice of an event through the publication of a *Federal Register* notice. *Id.* In *Suntec*, the Federal Circuit found that publication of a notice of initiation of an administrative review in the *Federal Register* constituted notice to Suntec as a matter of law, despite the fact that the domestic industry failed to serve Suntec directly with its request that Commerce conduct an administrative review of Suntec. *Id.*

[101] *See Proposed Rule*, 85 FR 49472 at 49481.

[102] In such a scenario, CBP may agree not to convert the entry to an AD/CVD type entry at that time, and instead to extend liquidation for the entry while the party seeks a scope ruling from Commerce.

[103] *See Wirth*, 5 F. Supp. 2d at 973.

Further, as discussed in the *Proposed Rule*, and as supported by numerous commenters, in crafting its rules regarding suspension of liquidation in scope inquiries, Commerce is particularly concerned with gamesmanship, delay, and duty evasion if foreign producers and exporters, as well as U.S. importers, believe that all entries not already suspended prior to the date on which Commerce initiates a scope inquiry are essentially excused from AD/CVDs, even if Commerce finds through the scope inquiry that the product has always been within the scope of the order. Under such a system, importers would have an incentive to import as much merchandise as possible prior to requesting a scope ruling to avoid potential AD/CVD liability. If Commerce found the product at issue is not covered by the order, the importer could continue to import it without concern of AD/CVDs. On the other hand, if Commerce determines that the product is, in fact, covered by the order, the importer will have avoided AD/CVD liability for the imports imported before requesting the scope ruling. They would essentially avoid the application of the scope ruling through timing and gamesmanship. We find that such manipulation of AD/CVD liability undermines the effectiveness and remedial purpose of the AD/CVD laws.[104]

That said, Commerce also agrees, in part, with some commenters that there may be some limited instances in which it may be appropriate for Commerce to exercise its authority to direct CBP to begin the suspension of liquidation and collection of cash deposits to entries as of an alternative starting point. For example, there may be situations in which Commerce issues a scope ruling that a product is covered by the scope of an order, and the affected importers have no opportunity, for no reason other than the timing of the scope ruling, to request an administrative review to potentially lower their liability for entries that pre-date the date of initiation of the scope inquiry. In such a situation, Commerce may consider specific arguments of the parties that retroactive application of the scope ruling to certain entries might be inappropriate. However, as explained above, such a showing would require, for instance,

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[104] *Proposed Rule*, 85 FR 49472 at 49481-84.

specific identification of the interested parties and entries at issue and the circumstances surrounding the declaration of the entries as non-AD/CVD type entries. Broad, non-specific arguments concerning general unfairness or lack of notice that are not concrete or particular to the interested party or entries at issue would not be sufficient.

This exercise of Commerce's discretion (in the absence of express statutory language, as noted above) is reasonable and balanced in that it takes into account the enforcement objectives and concerns about scenarios limiting the effectiveness of an order discussed in the *Proposed Rule*, as well as comments raised in response to the *Proposed Rule* that suggest that Commerce should leave open the opportunity for a party to try to demonstrate why an exception might be appropriate in light of particular facts. In addition, in certain instances, it would not be an unreasonable exercise of Commerce's discretion to direct CBP to liquidate entries that have been converted from non-AD/CVD type entries to AD/CVD type entries at the applicable cash deposit rate, even where the party may have missed an opportunity to seek individual review of its entries. For example, if parties engaging in gamesmanship and delay tactics later discovered that they missed an opportunity to seek an administrative review to lower their potential duty liability, through a scheme to import massive volumes of merchandise, and then request a scope ruling, Commerce believes that such a missed opportunity would be the fault and responsibility of the party attempting to avoid AD/CVDs in the first instance.

On the other hand, we agree with commenters that, for example, we should leave open the possibility for limited exceptions where the facts and circumstances warrant – *e.g.*, a party seeks a scope ruling as early as possible, but the time to seek an administrative review on certain pre-initiation entries has passed. In such instances, Commerce may direct CBP to suspend liquidation and collect cash deposits only for those unliquidated entries not already subject to suspension and made prior to the initiation of the scope inquiry for which an administrative review can still be requested. In light of these changes, we disagree that a revised process for requesting an administrative review of such entries is necessary.

Therefore, with respect to comments that the *Proposed Rule* would encourage ambiguity in scope language, prevent importers from making appropriate business plans, and increase uncertainty, we believe that the framework adopted in this final rule described above adequately addresses such concerns. In practice, in individual scope proceedings, Commerce will have to balance its interest in ensuring the effectiveness of all AD/CVD orders with any case-specific issues that might warrant altering the date for which suspension of liquidation should begin for unliquidated entries not yet suspended. Exactly how to strike this balance should emerge over time, through Commerce's practice and consideration of case-specific issues.

With respect to comments that the publication of an AD/CVD order may not be sufficient notice to parties of a pending scope inquiry and the potential for retroactive suspension of entries not previously suspended, Commerce is adopting new procedures to publish a monthly notice in the *Federal Register* listing scope applications received over the past month in § 351.225(d)(2) (see discussion above). Such monthly notice will give all interested parties an opportunity to consider if the scope inquiry request is relevant to them and their interests and allow them the opportunity to participate.

Another commenter also points out that scope rulings are not published and are difficult to find and proposes that Commerce should put public versions of scope rulings on its website. As discussed below under § 351.225(o), Commerce publishes notice of its final scope rulings on a quarterly basis in the *Federal Register*. In addition, all final scope rulings since 2012 are available on ACCESS, and Commerce continuously updates its website with past scope rulings, currently available at *https://www.trade.gov/us-antidumping-and-countervailing-duties*.

Further, we disagree with certain comments that Commerce has not provided adequate support for its concern that the existing approach in the current regulations encourages gamesmanship, delay, and duty evasion. As highlighted not only by Commerce in its discussion

in the *Proposed Rule*,[105] but also by commenters in favor of the *Proposed Rule* and numerous Federal court decisions,[106] the agency, as the administrator of the AD/CVD laws, has a well-founded and significant concern that Commerce determinations may not be adequately enforced due to gamesmanship, delay, and duty evasion. If Commerce is able to modify its regulations to diminish the possibility of evasion of the payment of duties, while maintaining procedures that assure that its determinations are based on record evidence, then it is appropriate for Commerce to make such changes in this final rule.

We also disagree with comments that the proposal would result in negligent importers not seeking a scope ruling at all if doing so would imply that all unliquidated entries would be subject to AD/CVDs. We believe that the framework we have set forth will, in fact, deter parties from engaging in such gamesmanship, and will encourage parties to maintain a reasonable awareness whether the product they are producing, exporting, or importing is subject to an AD/CVD order.

(b) Suspension of liquidation and cash deposits at initiation

Several commenters generally agree with Commerce's proposal under § 351.225(l)(1) to instruct CBP upon initiation of a scope inquiry to continue to suspend liquidation of products that are already subject to suspension. Several of these commenters argue that Commerce should instruct CBP to begin suspending liquidation of entries not already suspended by CBP at an earlier stage in a scope inquiry. Specifically, these commenters request that Commerce instruct CBP upon initiation of a scope inquiry to suspend liquidation of entries which are not already subject to suspension of liquidation. Several of these commenters propose that cash deposits for such entries be collected at the rate of zero, which they argue means there would be no economic harm to importers, while one commenter proposes that the cash deposit should be at the

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[105] *See Id.* at 49483; 49473 (discussing under the revisions to the new shipper review regulation, § 351.214, the Enforce and Protect Act of 2015 which highlighted duty evasion concerns).

[106] *See Sunpreme*, 946 F.3d at 1317 and 1321. In *Fasteners*, 947 F.3d 794, the Federal Circuit did not disagree with Commerce's concerns of potential "gamesmanship and delay" if importers did not report their merchandise to CBP as subject merchandise. *See Fasteners*, 947 F.3d at 803 (finding that "we do not find that such gamesmanship occurred in this case.").

applicable rate under the order if the product at issue were found to be covered by the order. These commenters argue that suspending liquidation at the time a scope inquiry is initiated will preserve entries for duty assessment if the product at issue is ultimately found to be within the scope of an order. According to these commenters, waiting for an affirmative preliminary scope ruling to suspend liquidation means that entries made more than one year prior to a preliminary scope ruling would have already liquidated, which would significantly undermine the purpose of the proposed changes to Commerce's regulations in this rulemaking. These commenters argue that suspending liquidation and collecting cash deposits upon initiation of a scope inquiry helps counter the situation where an importer could escape liability by importing as much as possible prior to requesting a scope ruling. These commenters consider that, under Commerce's proposal, an importer could escape duty liability by filing a scope ruling application at a time when an affirmative preliminary or final scope ruling would be issued more than one year after the date the importer's merchandise enters the United States.

These commenters further argue that Commerce's concerns in the *1997 Final Rule* with beginning the suspension of liquidation of entries at the time of initiation of a scope inquiry based on nothing more than a mere allegation by domestic industries are resolved by the proposed regulations because the proposed regulations now require additional information when filing a scope ruling application. These commenters argue that, as a practical matter, the overwhelming majority of scope ruling requests are filed by U.S. importers and foreign producers, so any purported inconvenience to these parties from domestic industries filing scope ruling requests apply only to a small portion of the importing community.

One commenter opposes the requirement under proposed § 351.225(l)(1) to post cash deposits from the date Commerce initiates a scope inquiry for any unliquidated entries at the time of initiation, arguing that this is an overly burdensome revision to the regulations and prematurely assumes a product is within the scope of an order before any analysis is conducted. This commenter argues that many times parties request scope rulings because it is not necessarily

clear that a product is within the scope of an order. This commenter argues that requiring the posting of cash deposits from initiation of a scope inquiry is inconsistent with Commerce's practice with requiring cash deposits in similar situations, such as when Commerce initiates an investigation.

In rebuttal, several commenters expressed support for the argument that, upon initiation of a scope inquiry, Commerce should instruct CBP to suspend liquidation and require cash deposits for all unliquidated entries, whether the entries are already subject to suspension of liquidation and cash deposit requirements or not. These commenters argue that this would preserve the largest amount of entries for duty assessment and would help prevent foreign producers and exporters, and U.S. importers, from importing as much merchandise as possible before a scope ruling application is filed.

In rebuttal, several commenters oppose the proposal to begin suspending liquidation and requiring cash deposits on all unliquidated entries at the time a scope inquiry is initiated. One commenter argues that this would be contrary to all notions of fairness, which Commerce recognized when rejecting similar proposals in the *1997 Final Rule* and by not itself proposing this change in the proposed regulations. One commenter adds that this would promote the filing of frivolous scope requests, harass U.S. importers, and waste Commerce's resources.
One commenter argues in rebuttal that, regardless of the cash deposit requirement and the applicable cash deposit rate, there is a significant financial impact on importers if liquidation is suspended upon initiation of a scope inquiry because entries would remain open until Commerce issues liquidation instructions to CBP and an importer's bond cannot be terminated while entries remain open. This commenter argues that suspension of liquidation also has a significant financial impact on an importer's unrelated activity because the collateral that sureties typically require for a bond, which may be up to the face value of the bond, is not released until at least six months after all entries have liquidated.

Response:

We have left unchanged § 351.225(l)(1), which states that, upon initiation of a scope inquiry, Commerce will direct CBP to continue the suspension of liquidation of previously suspended entries and to apply the applicable cash deposit rate. In addition, we have considered the proposal by some commenters that Commerce should instruct CBP upon initiation of a scope inquiry to begin the suspension of liquidation of unliquidated entries not previously suspended and to require cash deposits on such entries (either at zero or at the rate in effect at the time of entry). We have also considered the arguments in opposition to this proposal. As noted above, the statute does not provide direction to Commerce on the suspension of liquidation of entries subject to a scope inquiry. Therefore, after consideration of the parties' arguments and based on current practical and administrability concerns, we have decided to continue to order suspension of liquidation and collection of cash deposits for such entries only after Commerce's first (preliminary or final) scope ruling that a product is covered by the scope of an order. As a result, we have not accepted the proposal that Commerce instruct CBP to begin suspension of liquidation upon initiation.

One reason we do not find it appropriate to instruct CBP to begin the suspension of liquidation for unliquidated entries not previously suspended upon initiation of a scope inquiry is a consequence of the revisions to § 351.225(d)(2). Under those revisions, scope ruling applications that are not rejected will be deemed accepted 31 days after filing and the scope inquiry will be deemed initiated. In these situations, scope inquiries may be deemed initiated without Commerce fully analyzing the application (including the description of the product for which a scope ruling is requested) prior to initiation. Once initiated, paragraph (l)(1) provides that Commerce will direct CBP to continue the suspension of liquidation of previously suspended entries and to apply the applicable cash deposit rate. From a practical perspective, under this new framework, Commerce is seeking to maintain the *status quo* with respect to this group of previously suspended entries. Therefore, we find it acceptable for Commerce to

incorporate the description of the product in the application "as is" in its instructions to CBP, even if Commerce has not had a great deal of time to fully analyze the product description.

However, we find that ordering suspension for the first time on merchandise which was not previously suspended, based only on the description in the scope ruling application, raises practical and administrability concerns. Specifically, before initiation, Commerce may not have adequate time to analyze the description to ensure that when such a description is provided in CBP instructions, CBP is able to administer and enforce those instructions without difficulty. Commerce does not have the same concerns for entries already suspended, because, as noted above, for those entries Commerce is simply seeking to maintain the *status quo* for those entries. On the other hand, after initiation, Commerce would have the time to receive feedback from interested parties and seek clarification from the scope ruling applicant as appropriate, before settling on the precise description of the product to include in its instructions to CBP.

We therefore disagree with commenters who argue that Commerce's revised requirements for scope ruling applications under revised § 351.225(c) would always provide Commerce with sufficient information for purposes of ordering suspension of liquidation and collection of cash deposits upon initiating an inquiry for all entries. Although Commerce may have more information from a scope ruling application under revised § 351.225(c) than under current practice, at the point of initiation, in most cases, it is unlikely that Commerce would have had sufficient time to analyze the description for the purpose of ordering CBP to begin suspension of liquidation for certain entries as detailed above. Notably, there may be instances in which Commerce finds that the record and product descriptions are sufficient and clear enough to warrant combining an initiation with a concurrent affirmative preliminary scope ruling. However, in the cases in which Commerce just initiates a scope inquiry, Commerce will not have reached any sort of determination on the merits that the product at issue is covered by, or excluded from, the scope of the order.

Further, we are also concerned with the significant administrative burden that would result if we were to instruct CBP to begin suspension of liquidation and collection of cash deposits of all entries at initiation, regardless if they are determined later to be merchandise covered or not covered by an AD or CVD order. For example, under one possible scenario, such suspension could result in a multi-step process of Commerce: (1) directing CBP to convert all non-AD/CVD type entries meeting the description of the product at issue in the scope ruling application to AD/CVD type entries and directing CBP to suspend liquidation without any cash deposits at the time of initiation; (2) directing CBP subsequently, upon the event of an affirmative preliminary scope ruling, to collect cash deposits at the rate to be determined applicable retroactively; and (3) directing CBP, in the event of a negative final scope ruling, to lift suspension and liquidate entries without regard to AD/CVDs. This is just one sequence of scope inquiry proceedings and determinations, among several, that reflects the additional administrative burden that suspension of liquidation of all entries of the product described in a scope ruling application at initiation would require of Commerce and CBP.

We are cognizant of the concerns expressed by some commenters that certain entries that entered prior to a preliminary scope ruling may liquidate without being assessed AD/CVDs, and that certain parties may time the filing of a scope ruling application in an attempt to avoid the payment of AD/CVDs. We have also considered the suggestion of some commenters to begin the suspension of liquidation of not yet liquidated entries at the time of initiation, with a cash deposit rate of zero, which they argue means there would be no economic harm to importers. However, Commerce believes that this balance between enforcement concerns and practical and administrability considerations described above weighs in favor of maintaining its current practice of not imposing either suspension of liquidation and/or cash deposit requirements until after evaluating a scope ruling application and making either a preliminary or final affirmative scope ruling, whichever occurs first.

That said, although we are not adopting the suggestions that we suspend liquidation of all entries described in scope applications at initiation, we note that we have made numerous other changes throughout these regulations, such as the remedy provisions found in § 351.225(m) and the certification process addressed in § 351.228, in addition to the changes discussed above for paragraph (l), that we believe significantly strengthen the administration and enforcement of AD/CVD laws, and, overall, these changes minimize the opportunities for gamesmanship and evasion of AD/CVD orders while also mitigating the harm to importers that may be acting in good faith.

With respect to the comment that Commerce should not require cash deposits upon initiation of a scope inquiry, it is unclear whether this commenter believes that under revised § 351.225(l)(1) Commerce would be directing CBP to begin suspension of liquidation and require cash deposits of all unliquidated entries (including entries not previously suspended), or whether the commenter disagrees that Commerce should inform CBP that it has initiated a scope inquiry and direct CBP to continue any suspension of liquidation and collection of cash deposits already in place. As discussed above, prior to a scope inquiry, entries may be previously suspended for a number of reasons, including for example, because the importer declared the merchandise as subject to the order, or CBP directed the importer to refile an entry that was previously declared as not subject to the order to an entry type indicating it is covered by an AD and/or CVD order. Thus, at the time Commerce initiates a scope inquiry, entries of products subject to the scope inquiry may already be suspended. We clarify that under revised § 351.225(l)(1), when Commerce initiates a scope inquiry, it does not intend to direct CBP to suspend liquidation and collect cash deposits in the first instance. Rather, Commerce will inform CBP that it has initiated a scope inquiry and direct CBP to continue the suspension of liquidation of all unliquidated entries of products subject to the scope inquiry that have already been suspended. In other words, under revised § 351.225(l)(1), Commerce would direct CBP to continue suspending any entries that are already suspended and to continue collecting cash deposits at the applicable rate

for such entries. This is consistent with current § 351.225(l)(1) in the sense that both the current and revised regulation require suspension of liquidation to continue at the applicable cash deposit rate for previously suspended entries after initiation of a scope inquiry. Although it has not been Commerce's practice under the existing regulations to direct CBP upon initiation of a scope inquiry to continue the suspension of liquidation for entries already subject to suspension and collection of cash deposits, current § 351.225(l)(1) provides that any such suspension will continue when Commerce initiates a scope inquiry. This revised framework is guided by the curative purpose and remedial intent of the AD/CVD law, as well as to provide for the protection of revenue.[107] Consistent with that policy, Commerce has revised § 351.225(l)(1) to require the issuance of instructions to ensure that entries previously suspended by CBP continue to be suspended during the pendency of the scope inquiry.

(c) Action pursuant to a negative preliminary scope ruling

Certain commenters oppose eliminating the requirement for Commerce to notify CBP of a preliminary scope ruling determining that the product at issue is not covered by the scope of the relevant order along with instructions to terminate the suspension of liquidation for any entries previously suspended by CBP and to refund cash deposits of estimated duties. One of these commenters argues that eliminating this requirement effectively requires companies to float the extra duties under an AD/CVD order pending a final scope ruling and receiving a reimbursement without interest several months later. Other commenters argue that the proposal would be unfair to importers, especially when CBP suspends liquidation and requires cash deposits for products that are facially out of scope, because importers would be forced to wait a full year or more than 500 days based on the amount of time that it has historically taken before liquidation occurs and cash deposits are refunded. These same commenters argue that, in the

[107] *See Guangdong Wireking*, 745 F.3d at 1203 (noting that the statutory scheme has a "curative purpose" and a "remedial intent"); and *Sunpreme*, 946 F.3d at 1321-22 (noting "the policy declared in the Tariff Act, which instructs the government to 'provide, to the maximum extent practicable, for the protection of revenue.'") (citing 19 U.S.C. 1484(a)(2)(C)).

context of investigations, provisional measures are not imposed following a negative preliminary determination.

In rebuttal, several commenters responded with arguments supporting the proposal to eliminate the requirement to notify CBP of a preliminary negative scope ruling. Many of these commenters argue that duty collection is a guiding principle for this rulemaking and notifying CBP at the time of a final scope ruling ensures that any duties collected are preserved in the event Commerce reverses its position after a preliminary negative scope ruling. These same commenters believe that this particular aspect of the suspension of liquidation rules will encourage importers to seek scope rulings earlier in the proceeding or risk having entries suspended by CBP. Another group of commenters agreed that the proposal ensures the appropriate application of AD/CVD orders in the event of a final scope ruling determining that the product in question is covered by the scope of an order and ensures that affirmative rulings are applied to all entries of subject merchandise. These commenters believe the proposal is consistent with the overall objective of addressing serious enforcement concerns and the very real risk of duty evasion.

Response:

We have left unchanged proposed § 351.225(l)(2) with respect to this issue. Under the existing regulations, if Commerce issues a preliminary scope ruling determining that the product at issue is not covered by the scope of an order, Commerce is required to notify CBP and direct CBP to terminate the suspension of liquidation for any entries previously suspended by CBP with refunds of any cash deposits paid as estimated duties. The *Proposed Rule* proposed eliminating this requirement so that Commerce would no longer issue instructions upon issuance of a preliminary scope ruling determining that the product is not covered by the scope of an order. Instead, through the elimination of this requirement, any entries previously suspended would remain suspended pending completion of the scope inquiry and a final ruling on the matter. We believe that adoption of the proposal is necessary to preserve the *status quo* for the

duration of the scope inquiry and ensure the appropriate application of AD/CVDs to subject merchandise in the event of a final scope ruling determining that the product is covered by the scope of an order. As we have explained, regardless of the preliminary scope ruling, if Commerce concludes in the final scope ruling that the product at issue is covered by the scope of an order, that is a determination that the product at issue was always covered by the scope of an order. Keeping the *status quo,* therefore, helps protect the integrity of such a determination and promotes the effectiveness and remedial purpose of the AD/CVD laws.

Further, we do not agree with the comments that not directing CBP to terminate suspension of liquidation pursuant to a preliminary determination that the product at issue is not covered by the scope of an order would be unfair to importers, because that may mean importers would be forced to wait a full year or longer based on how it has historically taken before liquidation and refunding of cash deposits to occur. The revised regulations implement other changes that we anticipate will streamline and expedite the scope inquiry process and will, to a certain extent, address that timing issue. Therefore, Commerce has revised § 351.225(l)(2) to no longer require notifying CBP of negative preliminary scope rulings with instructions to terminate the suspension of liquidation for any entries previously suspended by CBP and refund any cash deposits paid as estimated duties.

With respect to the argument that provisional measures are not imposed following a negative preliminary determination in an investigation, Commerce will not direct CBP to suspend liquidation of entries not already suspended by CBP following a preliminary negative scope ruling. However, any suspension of liquidation (for example, suspension of liquidation ordered by CBP pursuant to its own authority) will be left undisturbed to preserve the *status quo* until the conclusion of the scope inquiry. Additionally, in response to one commenter, we clarify that Commerce instructs CBP to pay interest on overpayments of cash deposits paid as estimated duties following a final scope ruling determining that the product at issue is not covered by the

scope of an order, in accordance with section 778 of the Act and § 351.212(e) of Commerce's regulations.

(d) Clarifying the product at issue

One commenter opposes the proposal to suspend liquidation of unliquidated entries of the "product at issue" without any limitation as to when the entries occurred. The commenter states that the proposed regulations are vague because the language does not limit any new suspension of liquidation instructions to only apply to unliquidated entries made on or after the underlying case order's earliest suspension of liquidation. The commenter further asserts that language must be added to paragraph (l)(2) and (3) that restricts the imposition of suspension of liquidation and cash deposit requirements to the entries of the applicable manufacturer or exporter. The commenter claims that the United States is not entitled to AD/CVDs on entries that are not covered by or subject to the order.

Response:

We have left paragraphs (l)(2) and (3) unchanged from how they were proposed with respect to this issue. First, we agree with the commenter that Commerce does not have the authority to direct CBP to impose AD/CVDs on entries that are not subject to an order by virtue of pre-dating the first date of suspension associated with that order. Accordingly, any retroactive suspension of liquidation and collection of cash deposits would not be imposed on entries that predate the first date of suspension in the relevant AD and/or CVD proceeding. Second, the reference to the "product at issue" in paragraphs (l)(2) and (3) refers to the product that is the subject of the inquiry and that, for purposes of paragraph (l), the appropriate scope of products impacted, either on a country-wide or company-specific basis, are discussed under revised § 351.225(m), discussed below. Third, we do not disagree that AD/CVDs and cash deposits may not be applied on entries not covered by or subject to the order; however, the commenter's assertion that Commerce must limit the imposition of suspension of liquidation and cash deposit requirements to the entries of the applicable manufacturer or exporter is incorrect. If Commerce

determines that a product is subject to the order following an affirmative scope ruling, then it has the authority to impose AD/CVDs on entries of that product. Additionally, as Commerce explains below in response to comments made on § 351.225(m), Commerce may apply a scope ruling to a group of products on a country-wide basis, regardless of the producer, exporter, or importer, or apply its scope ruling on a producer-specific, exporter-specific, or importer-specific basis, or a combination of any of those remedies. Therefore, we do not find further clarification necessary for purposes of describing the product at issue under paragraphs (l)(2) and (3).

(e) Interest on refunds of cash deposits

One commenter requests that Commerce modify paragraph (l)(4) to ensure that, in the event Commerce issues a final scope ruling that the product is not covered by the scope of an order, Commerce will instruct CBP to include interest on cash deposits that are refunded to importers. The commenter states that this modification would be consistent with § 351.212(e) of Commerce's regulations, which deals with interest on overpayments and underpayments of estimated duties. The commenter alternatively requests that Commerce reference § 351.212(e) in paragraph (l)(4). We received no rebuttal comments in response.

Response:

We have left paragraph (l)(4) unchanged with respect to this issue. Section 778 of the Act requires that CBP pay interest on overpayments or assess interest on underpayments of cash deposits paid as estimated duties on merchandise entered, or withdrawn from warehouse, for consumption, on and after the date of publication of the order. The implementing regulation, § 351.212(e), provides that Commerce will instruct CBP to calculate interest for each entry on or after the publication of the order from the date that a cash deposit is required to be deposited through the date of liquidation. In accordance with section 778 of the Act and § 351.212(e), following a final scope ruling determining that the product at issue is not covered by the scope of an order, Commerce instructs CBP to pay interest on overpayments of estimated duties. Given

this well-established framework, we are not modifying paragraph (l)(4) regarding the payment of interest on cash deposits paid as estimated duties.

(f) Notification to sureties

One commenter requests that sureties be notified, either by Commerce or CBP, at the time CBP is instructed to begin the suspension or continue the suspension of liquidation of entries for AD/CVD purposes in the context of a scope inquiry. This commenter argues that the duties demanded from sureties may be in amounts which exceed the bond and without any prior notice to the surety to allow for participation in administrative proceedings and communication with the bond principal, *i.e.*, the importer, to address or satisfy AD/CVD requirements. Citing to a previous CIT decision,[108] this commenter argues that sureties have standing in AD/CVD proceedings, given that sureties stand in the shoes of the importer and are jointly and severally liable for the duties that an importer is liable to pay. Therefore, this commenter argues that this rulemaking presents Commerce with an opportunity to recognize a surety as an "interested party" in AD/CVD proceedings. The commenter also states that providing sureties with information on AD/CVD entries in a timely manner will enhance the role and ability of sureties to address shortfalls in the collection of AD/CVDs.

No commenter opposes notifying sureties of any instruction to CBP to suspend or continue to suspend liquidation of entries for AD/CVD purposes in the context of scope inquiries. However, in rebuttal, several commenters oppose the inclusion of a surety in the regulatory definition of "interested party." These commenters argue that it would be inconsistent with the statute to grant sureties interested party status through regulation, because a surety is not listed in the statutory definition of "interested party." These commenters argue further that the surety-importer relationship does not involve the extent to which dumping or subsidization is occurring or the actual importation of unfairly traded imports.

Response:

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[108] *See Lincoln Gen. v. United States*, 341 F. Supp. 2d 1265 (CIT 2004).

We have not modified paragraph (l) to include a requirement to notify the involved surety or sureties that Commerce has instructed CBP to suspend, or to continue to suspend, liquidation of entries for AD/CVD purposes. However, we recognize and appreciate the unique role of sureties in the payment and collection of AD/CVDs, and that sureties need timely access to information to assess the risk that they assume when underwriting bonds for imports of merchandise subject to AD/CVD orders. As such, in response to these comments, Commerce intends to consult with CBP and explore whether and how sureties may be notified of entries that are subject to suspension of liquidation for AD/CVD purposes in connection with a scope inquiry being conducted by Commerce. In the interim, we note that, under revised § 351.225(d)(2), Commerce will publish in the *Federal Register* a notice of a self-initiated scope inquiry and a monthly notice that lists recently-filed scope applications to provide notice to those that are not on the annual inquiry service list, as discussed above. Separately, we decline to modify the regulatory definition of "interested party" under § 351.102(b)(29) to include a surety because such a change would be beyond the scope of this rulemaking. Furthermore, section 771(9) of the Act provides the list of entities that qualify as an "interested party" in AD/CVD proceedings, and sureties are not expressly included in that list. Commerce's regulations include a definition of the term "interested party," but this definition does not differ from the statutory definition and was promulgated solely for purposes of addressing an issue that Commerce previously experienced in identifying and verifying the interested party status of an applicant that seeks access to BPI under an APO. As explained in the 2008 final rule that promulgated the regulatory definition of "interested party," Form ITA-367 (Application for Administrative Protective Order in Antidumping or Countervailing Duty Proceeding) requires applicants who are not a petitioner or respondent to identify the section of Commerce's regulations that defines the applicant's

interested party status and this was not possible under the regulations as they existed at the time because the regulations did not provide a definition of the term "interested party."[109]

13. Section 351.225(m) – Applicability of scope rulings; companion orders

Section 351.225(m) addresses the universe of products at issue to which Commerce may apply its scope rulings. In the proposed § 351.225(m)(1), Commerce included a sentence which stated that if it had previously issued a scope ruling for an order with respect to a particular product, it might apply that scope ruling to all products with the identical physical description from the same country of origin as the particular product at issue, regardless of producer, exporter, or importer, without initiating or conducting a new scope inquiry under this section. One commenter requests that Commerce delete much or all of that sentence. The commenter's request stems from the requirement of proposed § 351.225(c)(2)(ii) for scope requestors to submit a concise public description of the product. The commenter argues that through this description, the applicant might unintentionally characterize the product in such a way publicly that interested parties might not realize they have an interest in the proceeding and should comment on the scope inquiry. The result, the commenter argues, would be that Commerce either might automatically apply its scope ruling to either too many or too few products, under this provision, without giving other parties an adequate opportunity to participate.

More generally, several parties raise due process concerns about determinations being made under this provision without the opportunity for meaningful input.

Finally, in accordance with paragraph (m)(2), which applies only to companion AD and CVD orders covering the same merchandise from the same country, one commenter requests that Commerce add a provision which applies its scope rulings not only to companion orders, but also to orders with identical scope language across multiple countries and multiple proceedings.

Response:

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[109] *See Antidumping and Countervailing Duty Proceedings: Documents Submission Procedures; APO Procedures*, 73 FR 3634, 3635-36 (January 22, 2008).

Upon consideration of the comments and further reflection, we have determined to remove the last two sentences of proposed paragraph (m)(1). Commerce agrees with the concerns expressed that if Commerce does not initiate or conduct a new scope inquiry based upon the filing of a scope application, but instead automatically issues a scope ruling that is applicable to all producers, exporter, or importers of that merchandise, such a procedure would not provide potential interested parties with adequate procedures to protect their interests.

Nonetheless, we believe a remedy still exists that largely addresses previously issued scope rulings covering "identical physical" products from the "same country of origin," as described in those sentences. Specifically, as Commerce explained in the preamble to the *Proposed Rule*, Commerce may issue a scope clarification, post-order, that addresses scope inquiry requests by multiple parties made "over and over covering the same or similar scope language."[110] For this reason, we have determined to codify Commerce's authority to issue scope clarifications in a new paragraph, § 351.225(q), which we describe in greater detail below.

With respect to the request of a commenter that Commerce add a provision to its regulations that automatically applies its scope rulings across AD and CVD orders from different countries, we have determined not to include such a provision in our regulations. Unlike companion orders from the same country, as described in § 351.225(m)(2), parallel orders from different countries have different records, different interested parties, and sometimes different procedural histories. Accordingly, such a provision would not be administrable or fair to those interested parties subject to different orders from different countries who never had the opportunity to comment on the original scope ruling.

We note, however, that this does not mean that Commerce is unable to take action based upon a scope ruling applicable to an order covering one country with the same or similar scope language on the record of another order. Section 351.225(b) permits Commerce to self-initiate a scope inquiry on the record of another proceeding where the products are similar or identical to

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[110] *Proposed Rule*, 85 FR 49472 at 49480, n. 51.

that of a particular product subject to a scope ruling. Furthermore, interested parties to both proceedings can do the same by filing a scope application, in accordance with paragraph (c), and attaching the scope ruling at issue. In accordance with paragraph (k)(1), if the product at issue in the first scope ruling was physically identical to the product for which a new scope ruling is requested, the results of that first scope ruling would certainly carry a great deal of weight for Commerce in reaching a determination.

Finally, we have determined to significantly revise and simplify the first sentence of paragraph (m)(1) to clarify that Commerce may apply a scope ruling on a country-wide basis to all products from the same country with the same relevant[111] physical characteristics (including chemical, dimensional, and technical characteristics), as the product at issue, no matter the identity of the producers, exporters, or importers, or apply its scope ruling on a producer-specific, exporter-specific, or importer-specific basis. Furthermore, the new language provides that Commerce may determine to apply its scope ruling to a combination of producers, exporters, and importers, depending on the remedy which Commerce determines is appropriate given the facts of a particular case. We believe this modified language provides a much clearer description of the options which Commerce has available to it in applying the results of a scope ruling.

Likewise, we have changed the term "merchandise at issue" to "product at issue" in paragraph (m)(2) to use the terminology as that used in paragraph (m)(1) and other provisions of these regulations.

14. Section 351.225(n) – Service of scope ruling application; annual inquiry service list; entry of appearance

Section 351.225(n) covers Commerce's creation of a public annual inquiry service list and segment-specific service lists (both public and APO). As we have explained above,

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[111] Commerce has added the word "relevant" to this description because it is possible that two products may not be completely physically identical, but share the physical characteristics which Commerce considered in making its scope ruling. For example, the products might have different coloring or come in different designs or different sizes, but none of those factors were relevant to Commerce's determination in the scope ruling that the particular product was covered by the scope of an order. In that case, even if the similar products do not share exactly the same physical characteristics, Commerce could still apply its scope ruling to entries of those products.

Commerce has determined to modify its notice requirements to publish self-initiations of scope inquiries and a monthly list of scope applications filed with Commerce in the *Federal Register* notice, as described in § 351.225(b) and (d). Furthermore, after publication of the final rule, Commerce intends to provide additional instruction to interested parties on the procedures for the annual inquiry service list, as appropriate. We received many comments on this provision.

(a) Supportive comments

We received many comments in support of the *Proposed Rule*. Commenters expressed their belief that Commerce's current use of a comprehensive service list to notify parties has been an "onerous task." Further, they argue that the new requirement that parties must affirmatively request participation on the annual inquiry service list may encourage importers to be more alert to AD/CVD issues and file scope applications when they are uncertain if the product they are importing is covered by the scope of an order, given that importers will be affirmatively receiving notifications of new scope inquiries throughout the year. Finally, they voice their approval that Commerce automatically place petitioners on the annual inquiry service list under this provision, because, in every case, the petitioners have an interest in the order which does not abate until the order is revoked.

Response:

We appreciate the support of the commenters in this regard and agree with each of the points they raised. We do not disagree that the use of the comprehensive service list has, indeed, been an onerous task. Further, we believe that this new system of annual service lists and segment-specific service lists will make interested parties more alert to potential scope issues and proceedings. In addition, we agree that petitioners are uniquely situated in that they filed the petition requesting trade remedies, and, therefore, have a unique continuing interest in AD and CVD orders for the life of the orders.

That being said, upon consideration of the comments we received on this provision, we have concluded that foreign governments are also uniquely situated in that their interest in the

products covered by the scope of AD and CVD orders does not diminish as foreign producers and exporters come and go during the life of an order. Accordingly, we have, therefore, modified § 351.225(n) to reflect that after an initial request and placement on the annual inquiry service list, both petitioners and foreign governments will automatically be placed on the annual inquiry service list in the years that follow.

As noted above, Commerce intends to provide additional instruction to interested parties on the procedures for the annual inquiry service list, as appropriate, with special instructions for petitioners and foreign governments. Specifically, once the petitioners and foreign governments have submitted their initial requests to be added to the first annual inquiry service list for a given proceeding, it is reasonable to automatically add them in each subsequent year to the list when the annual service list for the proceeding is updated. To be clear, the first time a petitioner or foreign government wishes to be included on an annual inquiry service list, it will be incumbent upon the petitioner or foreign government to request Commerce to include them on the list. However, after that first time, inclusion for them will be automatic. Additionally, after initial inclusion on the annual inquiry service list, it is also incumbent upon the petitioner or foreign government to notify Commerce of any changes to its information.

(b) Comments suggesting changes

We also received several comments with suggested changes or criticisms of Commerce's proposed § 351.225(n).

First, one commenter suggests that Commerce require scope applicants to file notice of their applications on foreign governments of countries from which the product at issue is exported.

Second, some commenters request that all initiations, preliminary scope rulings, and final scope rulings be published in the *Federal Register*.

Third, certain surety companies request that Commerce provide them with "interested party" status, so that they may receive notification of all scope inquiry requests and scope rulings.

Finally, one commenter points out that Commerce currently automatically places foreign governments on the segment of a proceeding that commences under a CVD order, but under proposed paragraph (m)(2), all scope inquiries applicable to companion orders will be conducted on the record of the AD order. That commenter, therefore, requests that Commerce modify paragraph (n) to automatically place foreign governments on the segment of the AD proceeding in which the scope inquiry is conducted for both companion orders.

Response:

First, as noted above, we have determined that once a foreign government requests to be included on the annual inquiry service list for a particular AD or CVD order, it will automatically be placed on subsequent annual inquiry service lists. Once that occurs, because scope inquiry applicants will be required to file notice of their applications on all interested parties on the annual inquiry service list, the foreign government of the country of the order at issue in the inquiry will be sent copies of scope inquiry applications. For those foreign governments which elect not to request placement on the annual inquiry service list in the first instance, we believe the monthly list of scope applications in the *Federal Register* pursuant to paragraph (d) nonetheless provides sufficient notice in that regard.

Second, we will not require that all initiations, preliminary scope rulings, and final scope rulings be published in the *Federal Register* in these regulations, as there is no requirement in the statute that Commerce take such additional actions, and we believe our procedures outlined herein provide appropriate opportunities for notice to interested parties.

Third, we have not provided sureties "interested party" status because, as discussed above regarding § 351.225(l), section 771(9) of the Act lists the parties who are "interested parties" under the AD and CVD laws, and surety companies are not included on that list. Nonetheless, as

we explained earlier, we believe publication in the *Federal Register* of Commerce's scope self-initiations and the monthly list of scope applications will provide the public, including sureties, with notice that a scope inquiry may be commencing or underway, allowing those companies an opportunity to determine if they wish to follow and participate in the scope inquiry.

Finally, we disagree with the commenter that requested that Commerce modify paragraph 225(n) to automatically place foreign governments on the segment-specific service list of the AD proceeding in which the scope inquiry is conducted for both companion orders. Because we have determined to automatically place foreign governments on the annual inquiry service list following their initial request for inclusion, there is no additional need to automatically place foreign governments automatically on segment-specific service lists. As we've explained, foreign governments on the annual inquiry service list will get notification of all scope inquiry requests. Like petitioners and all other interested parties, if the foreign government wishes to participate in a particular scope inquiry segment of the proceeding, that foreign government will have an opportunity to timely request placement on the segment-specific service list.

In addition, in addressing comments on paragraph (n)(4), we realized that we had not included the self-initiation of scope inquiries in the description of determinations that lead to the establishment of a segment-specific service list. Such an exclusion was an oversight. Accordingly, we have added language to that effect in this final rule.

15. Section 351.225(o) – Publication of list of final scope rulings

In the *Proposed Rule*, Commerce amended current § 351.225(o) to indicate that, in addition to the quarterly list of final scope rulings published in the *Federal Register*, Commerce may also include complete public versions of its scope rulings on its website should Commerce determine such placement is warranted. Numerous commenters encourage Commerce to create a single public repository on its website for all scope rulings to ensure that all parties have notice of all public scope rulings.

Response:

We agree with those commenters and Commerce has endeavored to create such a repository in an effort to assist interested parties to efficiently obtain scope ruling information. However, implementation and maintenance of such a repository requires resources and a significant amount of time. Commerce continues to update its website with copies of scope rulings that pre-date 2012, the year in which Commerce's electronic record system, ACCESS, went live.[112] Additionally, Commerce updates the website regularly with the scopes of new orders and the ACCESS bar codes for newly issued scope rulings that can be obtained through ACCESS. Accordingly, because we agree that the pursuit of such a resource is worthwhile, we will continue to maintain the language from the *Proposed Rule* in paragraph (o) in that regard and work to continue to maintain this online repository in the future.

16. Section 351.225(p) – Suspended investigations; suspension agreements

No comments were filed with respect to this paragraph. We have modified the provision, however, to clarify that the procedures of this regulation may be applied in determining whether a product at issue is covered by the scope of a suspended investigation or agreement.

17. Section 351.225(q) – Scope clarifications

As noted above, we removed certain language from proposed paragraph (m)(1), which addressed determinations made based on "previously issued" scope rulings "without initiating or conducting a new scope inquiry," because of due process concerns raised by certain commenters. We believe that some of the scenarios which we wished to address in proposed paragraph (m)(1), however, can be addressed through a different proceeding without those same due process concerns – scope clarifications. We discussed scope clarifications in the preamble to the *Proposed Rule*,[113] and have concluded that in light of the removal of the aforementioned language from paragraph (m)(1), it would be beneficial to codify scope clarifications in the final regulations. For example, there are scenarios in which Commerce issues a scope ruling on a

[112] Currently available at: *https://www.trade.gov/us-antidumping-and-countervailing-duties*.
[113] *Proposed Rule*, 85 FR 49472 at 49480-81, n. 51.

product covered by the scope of an order, and then later it is called upon again to conduct a scope ruling on a product nearly identical to that product, and then a third time a scope request is filed with the agency to address a product which is the same or very similar to the prior two products. As we explained in the preamble to the *Proposed Rule*, historically Commerce has been able to address this situation using scope clarifications instead of scope rulings. Accordingly, we are adding to the final regulations paragraph (q) to codify the use of scope clarifications in certain scenarios.

Unlike scope rulings, which require a fulsome analysis under these regulations, scope clarifications either provide an interpretation of specific language in the scope of an order or address a particular scope matter which was already brought to Commerce's attention on a prior occasion. Scope clarifications may be issued either in underlying investigations or after an order has been issued. With respect to post-order clarifications, specifically, Commerce explained in the preamble to the *Proposed Rule* that "after an AD/CVD order has been in place for a period of time and Commerce has found that multiple parties have requested scope rulings over and over covering the same or similar scope language," Commerce has, at times, issued "a scope clarification addressing that particular scope language" and then memorialized "that clarification in the form of an interpretive footnote to the scope of the order."[114]

Post-order scope clarifications need not be issued in the context of a scope ruling, but can be conducted and applied in the course of different segments of a proceeding. Because Commerce conducts scope clarifications in a segment of the proceeding, parties to that segment have an opportunity to comment on the clarification, unlike the procedures set forth in the proposed (and now removed) language of paragraph (m)(1) of this section. Thus, the due process concerns we had with the removed paragraph (m)(1) language do not exist for scope clarifications. Subsequent to the issuance of a scope clarification, the resulting interpretive footnote will normally accompany the text of the scope itself when it is published in

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[114] *See id.*

Commerce's administrative determinations, such as preliminary and final results of subsequent segments, and instructions to CBP.

Given the importance of post-order scope clarifications, and the fact that we have removed certain remedies available under proposed paragraph (m)(1), we have concluded that it is reasonable to add a new regulatory provision, § 351.225(q), which codifies Commerce's ability to issue such scope clarifications. Specifically, the new provision provides that Commerce may issue a scope clarification in any segment of a proceeding providing an interpretation of specific language in the scope of an order or addressing whether a product is covered or excluded by the scope of an order at issue based on previous scope determinations covering the same or similar products. Further, it explains that the scope clarification may take the form of an interpretive footnote to the scope when the scope is published or issued in instructions to CBP. We believe codifying post-order scope clarifications in Commerce's scope regulations will add clarity to Commerce's scope procedures under the factual scenarios set forth in the regulation.[115]

Circumvention – § 351.226

Section 351.226 covers procedures in which Commerce addresses potential circumvention of AD/CVD orders. Section 781 of the Act provides the four scenarios under which Commerce may inquire into alleged circumvention and, if it finds circumvention, may determine that a particular product should be considered subject to an order, even if that product would not otherwise be covered by the scope of an AD or CVD order under § 351.225. We received many comments and rebuttal submissions on the proposed provisions under this regulation. Below, we briefly discuss each provision, address any comments received, and, where appropriate, explain any changes to the *Proposed Rule* in response to comments. In

[115] Section 351.225(q) addresses scope clarifications issued by Commerce following the publication of an AD or CVD order. As Commerce explained in the *Proposed Rule*, we continue to also have the authority to issue scope clarifications during an investigation. *See Proposed Rule*, 85 FR 49472 at 49480, at n. 51. Unlike post-order scope clarifications, investigation scope clarifications will usually not take the form of an interpretive footnote, but instead can be issued solely as a response to a comment on the record or as part of Commerce's determination of the language of the scope of the order itself.

addition, we explain additional modifications to the *Proposed Rule* where we have determined that such amendments brought § 351.226 into greater conformity with scope and covered merchandise regulations §§ 351.225 and 351.227, or otherwise provided greater clarity to these regulations.

1. Section 351.226(a) – Introduction

Section 351.226(a) summarizes the general principles of a circumvention inquiry under section 781 of the Act. Numerous commenters have expressed their support for these regulations and have requested that Commerce clarify that even if it determines that a particular product is determined to not be covered by the scope of an order under § 351.225 of these regulations, Commerce may still conduct a circumvention inquiry of the product. Further, those commenters request that Commerce explain that if it concludes that the particular product has circumvented an order, it may, despite the negative scope ruling, find that the product should be treated as subject to the order.

An additional commenter also expressed its support for Commerce's division of the scope and circumvention regulations, citing to Federal Circuit holdings in which the Court has recognized the differences between the two types of proceedings.[116]

Other commenters are critical of Commerce's proposed circumvention regulations in general, arguing that the proposed regulations treat parties who operate in good faith in the same manner as those who operate in bad faith, that the regulations would do nothing to address bad conduct of certain exporters, and that the regulations place too great of an obligation on importers.

In rebuttal to those claims, other commenters disagree with the portrayal of U.S. importers as unknowing and unsuspecting with regard to circumvention or potential circumvention, especially when the importer is a subsidiary of a foreign producer. They argue

[116] *See Deacero S.A. de C.V. v. United States*, 817 F.3d 1332, 1337-39 (Fed. Cir. 2016) (*Deacero*); *Nippon Steel Corp. v. United States*, 219 F.3d 1348, 1350 (Fed. Cir. 2000); *see also Bell Supply*, 888 F.3d at 1230.

that U.S. importers are in the best position to prevent circumvention because they can communicate with the foreign producer and, with proper due diligence, can request information directly from the foreign producer or exporter prior to importing particular products to determine whether the product could be circumventing an AD/CVD order. These commenters suggest that the nature of circumvention typically requires an affirmative act by a foreign producer to change the location of production/assembly, alter the merchandise in minor respects, or develop a new product to circumvent the order, and a U.S. importer is usually well-situated to notice such changes and the risks that come with such changes.

Response:

We disagree that the new circumvention regulation places an excessive burden on importers and treats good faith importers the same as bad faith importers.

As discussed above, although section 781 of the Act describes certain applicable procedures and standards for circumvention determinations, the Act does not provide direction to Commerce regarding the suspension of liquidation for entries subject to a circumvention inquiry. In the absence of any such statutory guidance, Commerce is modifying § 351.226(l) to provide that affirmative circumvention determinations will normally apply to products entered on or after the date of initiation of the circumvention inquiry, with certain exceptions. With respect to issues concerning notice to exporters and importers, those issues are addressed below in response to comments under § 351.225(l)). As discussed below, the purpose of the proposed modifications is not to penalize companies acting in good faith, but to ensure that circumvention determinations are properly applied to merchandise found to be circumventing an order. Also, as explained further below under § 351.226(l), when an importer decides to import merchandise from a foreign country, it takes on the risk and the responsibility that the merchandise it imports might be subject to an AD and/or CVD order. If an importer is transparent and works with its exporters and producers to abide by the trade remedy laws, we do not believe these regulations will be excessively burdensome.

Furthermore, we disagree that these regulations will have no effect on foreign exporters' behavior. An exporter which is found to be circumventing an order will be faced with customers having to pay additional cash deposits and duties on those exports when they are imported. As a result, an exporter may find that demand for its products declines in the United States as the cost to import its merchandise increases, which might, in turn, lead to the exporter altering its behavior with regard to circumvention.

Finally, we agree that just because Commerce determines that a particular product is not covered by the scope of an order, pursuant to § 351.225 of these regulations, such a determination does not preclude Commerce from also finding that the product should still be covered by the order if the product is found to be circumventing the order. Indeed, a product can only be determined to be circumventing an AD or CVD order under section 781 of the Act if the product does not fall within the description of the subject merchandise in the scope of the order in the first place. Sometimes, as part of its circumvention analysis, Commerce must first determine if the product at issue is covered by the description of subject merchandise in the scope of an order, and it is only after it determines that the product at issue does not match the description of merchandise covered by the scope that Commerce can then continue with its circumvention analysis and reach a determination. If Commerce ultimately finds that the merchandise is circumventing the order, such merchandise will be determined to be covered by the scope of the order for AD/CVD purposes despite not falling within the physical description of the subject merchandise of the scope of the order.

2. Section 351.226(b) – Self-initiation of circumvention

Section 351.226(b) describes Commerce's authority to self-initiate a circumvention inquiry. One commenter requests that Commerce make it clear that when it determines under § 351.225 of these regulations that a particular product is not covered by the scope of an order, the agency may self-initiate a circumvention inquiry of that product when information derived from the scope inquiry suggests that the product may be circumventing an AD or CVD order.

Response:

We agree that a determination that a product is not covered by the scope of an order does not preclude Commerce from conducting a circumvention inquiry. We further agree that Commerce may self-initiate a circumvention inquiry whenever it determines from available information that an inquiry is warranted into the question of whether the elements necessary for a circumvention determination under section 781 of the Act exist. This includes a situation where Commerce has reviewed information through the course of a scope inquiry that indicates that although the product is not covered by the scope of the order, circumvention of the order may, nonetheless, be taking place. In fact, the Federal Circuit explained this very scenario in *Bell Supply*, in which the court held that "if Commerce applies the substantial transformation test and concludes that the imported article has a country of origin different from the country identified in an AD or CVD order" (and is, therefore, not covered by the scope of the order) "then Commerce can include such merchandise within the scope of an AD and CVD order only if it finds circumvention under [section 781(b) of the Act]."[117] We have accounted for various related scenarios in both §§ 351.225 and 351.226, which allow Commerce, for example, to issue a negative scope ruling on a product while a circumvention inquiry is pending (*see* § 351.225(l)(4)), or to address scope issues in the context of a circumvention inquiry (*see* § 351.225(i)(1)).

We note, however, that although Commerce may conduct a circumvention inquiry following the completion of a scope inquiry, such an analysis is not required by statute or Commerce's practice. Furthermore, in certain situations, self-initiating a circumvention inquiry at the conclusion of a scope inquiry may not be warranted, because, for example, Commerce does not have information concerning the elements necessary for a circumvention determination under section 781 of the Act. For these reasons, we are not codifying a process for automatic self-initiation of a circumvention inquiry following a negative scope determination. A

[117] *Bell Supply*, 888 F.3d at 1230.

determination to self-initiate a circumvention ruling is fact-based and, therefore, should be decided by Commerce on a case-by-case basis.

3. Section 351.226(c) – Circumvention inquiry request

Section 351.226(c) sets forth the requirements for an interested party[118] to request a circumvention inquiry. In many respects, they parallel much of the information required of a party filing a scope ruling application, pursuant to § 351.225(c). Where we have modified the parallel language in § 351.225(c), we have, therefore, incorporated the same modifications into § 351.226(c). Accordingly, we have made the following modifications for the same reasons we made to those modifications in the scope regulations: (1) we focused on the physical characteristics of the product, which include the chemical, dimensional, or technical characteristics of the particular product in § 351.226(c)(2)(i)(A); (2) we added the requirement that a requester identify the country or countries where the product is produced, the country from where the product is exported, and the declared country of origin in § 351.226(c)(2)(i)(B); (3) we added the requirement that Customs rulings relevant to the product's tariff classifications be included in § 351.226(c)(2)(i)(C); (4) we identified the information that a requester must include in its concise public summary of the product's description in § 351.226(c)(2)(ii); (5) we removed the name and addresses of producers, exporters, and importers of the product from the public summary, and included that data request, instead, in the overall circumvention inquiry request in § 351.226(c)(2)(iii); and (6) we removed the language that stated that the concise public description was not intended to restrict the inclusion of BPI, as that provision was not proposed for the scope regulations, and is unnecessary now that Commerce has listed the factors required for the public summary.

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[118] As noted above with respect to the discussion of § 351.225(c), the term "interested party" is defined in section 771(9) of the Act, and pertains, for example, to "foreign manufacturers," "producers," "exporters," or "United States importers" "of subject merchandise." However, the nature of a circumvention proceeding is to determine whether the merchandise produced, imported by, or exported by a party is circumventing an AD or CVD order. Thus, in many cases, the question of whether a party is an "interested party" depends in part on whether the merchandise at issue is subject merchandise. Accordingly, for purposes of these circumvention regulations, the term "interested party" includes a party that would meet the definition of "interested party" under section 771(9) of the Act, if the merchandise at issue in the circumvention inquiry is in fact circumventing.

Several commenters express concern with the provisions that require "clear and legible photographs, schematic drawings, specifications, standards, marketing materials, and any other exemplars providing a visual depiction of the product" and "a description of parts, materials, and the production process employed in the production of the product," because they argue that domestic producers will frequently not have access to such information. They worry that such requirements would discourage petitioners from requesting circumvention inquiries due to lack of access to that data, and additional commenters filed rebuttal comments arguing that Commerce should eliminate those provisions on the exact same basis.

Other commenters, in rebuttal to those claims, disagree with that request, stating that removing the proposed requirements would lower the bar too much. Those commenters claim that circumvention requests are a new "petition light" weapon for domestic industries, allowing them to avoid an expensive investigation process while basing their requests on vague, baseless, specious, and unsubstantiated allegations of circumvention. Instead, these commenters argue that Commerce should require even more robust information from parties filing a circumvention request under § 351.226(c) than that put forward in the *Proposed Rule*.

Another commenter requests that parties requesting a circumvention inquiry be required to serve the request upon all producers, exporters, and importers of the product, arguing that such service is necessary to provide adequate notice.

Finally, one commenter suggests Commerce include a question under § 351.226(c) that asks the requester whether, based on information available to the requestor at the time of the request, the circumvention inquiry, if initiated, should be conducted on a country-wide basis.

Response:

We recognize that some of the information requested of a party requesting a circumvention inquiry might not be reasonably available, which is why we have included the restricting phrase "to the extent reasonably available" in § 351.226(c)(2). We believe, however, that where the information, such as clear and legible photographs, schematic drawings, and the

description of the parts and production process employed in producing the particular product, is available, that information should be provided and is important to Commerce's analysis. We, therefore, reject the request to remove this information request from our list of necessary information under § 351.226(c)(2). However, if a party can explain why certain information is not reasonably available to it, we will take that explanation into consideration in determining whether or not to reject a circumvention inquiry request, or initiate on the data submitted on the record.

With respect to the argument that Commerce should require requestors to serve their circumvention inquiry request on all known producers, exporters, and importers of the product at issue, we disagree that such actions are necessary. As provided for under § 351.226(c) and (n), the requestor is required to serve parties on the annual inquiry service list. Therefore, parties wishing to be served with such requests must follow Commerce's procedures as detailed in §§ 351.225(n) and 351.226(n) to be added to the list. Additionally, if Commerce determines to initiate a circumvention inquiry, it will publish that initiation in the *Federal Register* and the public will be made aware of the circumvention inquiry. Such notification will then allow parties to file a notice of appearance and participate in the circumvention inquiry, if they wish to do so, in accordance with § 351.226(n).

Finally, a finding that a circumvention determination should be addressed through a company-specific or country-wide application, or some combination thereof, pursuant to the remedies outlined in § 351.225(m), is a determination that Commerce will make based on the case-specific facts. In general, though, Commerce will consider the description of the product and any named companies in the circumvention request in issuing the initiation notice in the *Federal Register*. Absent evidence on the record of the inquiry that would lead the agency to apply its determination differently, this notice will indicate the scope of Commerce's inquiry, which will normally be tied to the remedy ultimately determined, if any, under § 351.226(m). Therefore, although we will not require that a requestor provide a suggested remedy under §

351.225(m), we expect that requestors likely will include a suggested remedy in their arguments in support of their request.

4. Section 351.226(d) – Initiation of circumvention inquiry and other actions based on a request

Section 351.226(d) provides the deadline by which Commerce must reject or accept a request for a circumvention inquiry. One commenter argues that the 20-day deadline set forth in the *Proposed Rule* was too short a period of time to allow parties to correct any deficiencies in their submissions.

Several other commenters argue in both comments and rebuttal comments that Commerce should automatically initiate a circumvention inquiry after the deadline for accepting the circumvention inquiry request, similar to the automatic initiation of a scope inquiry described in § 351.225(d), or at least set a hard deadline in which Commerce must initiate following the receipt of a circumvention inquiry request to make certain that Commerce addresses circumvention in a timely fashion. Those commenters express frustration with Commerce's procedures under the current regulations in which Commerce has extended its decision to initiate a circumvention inquiry at times by over one hundred days.

Other commenters disagree that Commerce should automatically initiate circumvention inquiries because there will inevitably be cases in which a request to conduct a circumvention inquiry does not contain adequate information to warrant such initiation. Those commenters argue that automatic initiation based on circumvention inquiries which are meritless would force importers, exporters, and producers to participate in unnecessary proceedings, force them to unnecessarily pay cash deposits on their entries, and would undermine the necessity of the information required under § 351.226(c). Those same commenters state that they approve of Commerce's proposed § 351.226(d)(1), which describes Commerce's authority to reject an incomplete or otherwise unacceptable circumvention inquiry request.

Finally, one commenter argues that Commerce should publish notification of the receipt of all circumvention inquiry requests in the *Federal Register*.

Response:

With respect to the argument that 20 days is too short a period of time in which Commerce must decide to accept or reject a circumvention inquiry request, we find that it would be reasonable to increase the deadline from 20 days to 30 days. As set forth in the text in the regulation, that deadline may be extended by Commerce by 15 days, making the maximum period 45 days in which Commerce must decide to accept or reject a circumvention inquiry. The unextended 30-day period also brings this provision more in alignment with the 30-day deadline for accepting or rejecting a scope application found in § 351.225(d).

We believe that this new deadline will better enable Commerce to determine whether the circumvention request properly alleges that the elements necessary for a circumvention determination under section 781 of the Act exist and is accompanied by information reasonably available to the requestor supporting these allegations. Within this timeframe, Commerce may also send questionnaires to the requestor and gather additional information, if necessary. As provided for under § 351.226(d), Commerce may ultimately determine to reject the request and provide the requestor with the reasons for the rejection so that the requestor may cure the request and refile at a later date. In addition, Commerce may determine that the request is best addressed either by conducting a scope inquiry in the first instance or in another segment of the proceeding.

To the extent certain commenters argue that Commerce should automatically accept requests for circumvention inquiries without seeking additional information that would otherwise be necessary, or that Commerce must initiate a circumvention inquiry by a hard deadline, even if it does not have the necessary information by that deadline to satisfy initiation standards, we disagree. In determining to accept a request and initiate a circumvention inquiry, it is vital that Commerce conclude that the request satisfies the standard for initiation of an inquiry and is supported by reasonably available information. If Commerce were to initiate a circumvention inquiry without having made such a determination, we agree with the commenters who argue that such an exercise would result in a waste of time and resources for both Commerce and the

interested parties. It is imperative that Commerce have all the information which it needs to initiate a circumvention inquiry before it initiates. We recognize that this differs in some respects from the initiation procedures set forth in § 351.225, but the information necessary to initiate a scope inquiry is different from that needed to initiate a circumvention inquiry.

Further, we disagree that Commerce should publish notification of the receipt of circumvention inquiry requests in the *Federal Register*. Section 351.226(n) requires that those requesting a circumvention inquiry must serve a copy of the circumvention inquiry request on all persons on the annual inquiry service list. Furthermore, when Commerce determines to initiate a circumvention inquiry, § 351.226(d)(3) requires that Commerce publish notice of initiation in the *Federal Register*. We believe that the initial service on persons on the annual inquiry service list, combined with the publication of initiation in the *Federal Register*, will provide more than enough notice to all interested parties that a circumvention inquiry has commenced.

We have also made some additional revisions to paragraph (d) from that proposed in the *Proposed Rule*. Specifically, we have concluded that there may be situations in which, after a request for a circumvention inquiry has been filed, Commerce determines that the circumvention issue should be addressed in an ongoing segment of the proceeding, such as a covered merchandise inquiry under § 351.227. In that case, Commerce will inform the requestor of its intent to not initiate the circumvention inquiry, but instead to address the issue in that other segment.

5. Section 351.226(e) – Deadlines for circumvention determinations

Section 351.226(e) sets deadlines of 150 days from the date of publication of the initiation notice for a preliminary circumvention determination and 300 days, to the maximum extent practicable, for the final circumvention determination. However, if Commerce determines that a circumvention inquiry is extraordinarily complicated, it may extend the 300-day deadline, but by no more than 65 days (for a fully-extended total of 365 days). Commerce received praise from commenters on these new regulatory deadlines, with commenters stating that such time

limits will provide all interested parties with a better and more predictable understanding of the duration of a circumvention inquiry.

We have, however, made some changes to this section. We have revised the heading of this section to "Deadlines for circumvention determinations" from "Time limits," to better reflect the provisions covered by this section of the regulation, and we have moved the provision allowing for alignment of scope rulings with other segments of a proceeding from proposed paragraph (f)(7) to this section to clarify that all of the deadlines described in this section may be inapplicable or extended if the circumvention determination is aligned with another segment.

6. Section 351.226(f) – Circumvention inquiry procedures

Section 351.226(f) sets forth Commerce's procedure for circumvention inquiries. Commerce received a number of comments for scope and circumvention that argued that the deadlines set forth in both sets of regulations were too short.

In addition, one commenter expressed its concerns with the language in § 351.226(f)(3) which states that Commerce may limit issuance of questionnaires to a reasonable number of respondents. The commenter states that Commerce does not set forth any standards as to how it would select respondents for this exercise and expresses concern for the due process rights of those respondents not selected.

Response:

Upon consideration of the various comments about Commerce's proposed deadlines, as well as consideration of our own practice in other circumstances, including scope rulings under § 351.225(f), we have determined to modify our proposed deadlines under § 351.226(f) accordingly, to allow interested parties additional time to provide responses and new factual information as follows:

- Under § 351.226(f)(1) parties will have 30 days, rather than 20 days, to submit comments and factual information after Commerce self-initiates a circumvention inquiry;

- Under § 351.226(f)(1) parties will have 14 days, rather than 10 days, to submit comments and factual information to rebut, clarify, or correct factual information submitted by the other parties;
- Under § 351.226(f)(2) parties will have 30 days, rather than 20 days, to submit comments and factual information in response to the request after Commerce initiates a circumvention inquiry;
- Under § 351.226(f)(2), the requestor will have 14 days, rather than 10 days, to submit comments and factual information to rebut, clarify, or correct factual information submitted by the interested parties;
- Under § 351.226(f)(3), interested parties will have 14 days, rather than 10 days, to submit comments and factual information to rebut, clarify, or correct factual information contained in a questionnaire response;
- Under § 351.226(f)(3), the original submitter will have 7 days, rather than 5 days, to submit comments and factual information to rebut, clarify, or correct factual information submitted in the interested party's rebuttal, clarification or correction;
- Under § 351.226(f)(4), interested parties will have 14 days, rather than 10 days, after the preliminary circumvention determination to submit comments; and
- Under § 351.226(f)(4), interested parties will have 7 days, rather than 5 days, to submit rebuttal comments thereafter.

With respect to the argument about Commerce's ability to limit questionnaires, we do not disagree with the commenter that it would be preferable if Commerce could issue questionnaires to all potential respondents in all circumvention inquiries. However, in reality, Commerce normally conducts its administrative proceedings with limited resources and under specific time constraints. Accordingly, in consideration of Commerce's authority to limit respondents under section 777A(c)(2) of the Act, we continue to believe that it is appropriate to retain the language in our regulations that explains that we may limit the issuance of questionnaires to a reasonable

number of respondents, if the record of the circumvention inquiry warrants such a limitation. In accordance with that provision, it is Commerce's normal practice to select the "exporters and producers accounting for the largest volume of the" particular product subject to the circumvention inquiry "from the exporting country that can be reasonably examined."[119]

In addition, we have made some modifications to § 351.226(f)(6) and (7), however, to provide clarity to this provision which are not directly responsive to comments. First, we explain that if Commerce determines it appropriate to do so, Commerce may rescind a circumvention inquiry, in whole or in part, and we explain that the list provided in the proposed regulations is not exhaustive, but merely contains examples of situations in which rescission might be warranted.

Second, we have removed a reference to Commerce's ability to "forgo" a circumvention inquiry, as that scenario is now set forth in paragraph (d) of this section.

Furthermore, we have added a fourth example in which a covered merchandise inquiry under § 351.227 has been initiated, and Commerce concludes that an inquiry into whether the elements necessary for a circumvention determination exist can be addressed in that segment of the proceeding instead.

In addition, we have noted that if we rescind a circumvention inquiry, we will notify interested parties. We also have clarified that Commerce can both alter and extend time limits under this section, if it determines it appropriate to do so.

Finally, we have moved proposed § 351.226(m)(2), which addresses actions Commerce may take during the pendency of a circumvention inquiry or upon issuance of a final circumvention determination, to § 351.226(f)(9). Not only does this change better conform with the structure of the scope and covered merchandise referral regulations, but it also logically fits more appropriately under the section labeled "Circumvention inquiry procedures."

7. Section 351.226 (g) – Circumvention determinations

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[119] *See* section 777A(c)(2)(B) of the Act.

We received no comments on this provision.

8. Section 351.226(h) – Products completed or assembled in the United States

Section 351.226(h) addresses the situation in which an entity circumvents an order through further processing or assembly of its merchandise in the United States. Commerce's regulation provides that in determining the value of parts or components, or the value of processing, of the particular product under inquiry, Commerce may determine the value of the part or component on the basis of the cost of producing the part or component under section 773(e) of the Act – or, in the case of a nonmarket economy, through the use of surrogate values and the nonmarket economy methodology, as set forth in section 773(c) of the Act. One commenter expressed its support for this clarification, stating that it agreed with Commerce's revised regulation, and stating that Commerce's use of a constructed value or nonmarket economy methodology to value those parts or components in its circumvention analysis, as proposed, will improve the accuracy of its further processing or assembly circumvention methodology and analysis. We agree and have made no revisions to § 351.226(h).

9. Section 351.226(i) - Products completed or assembled in foreign countries

Section 351.226(i) addresses the situation in which an entity circumvents an order through further processing or assembly in a third country under section 781(b) of the Act. One commenter argues that Commerce should remove the country of origin provision, at § 351.225(j), from the scope regulations and conduct its substantial transformation analysis in a circumvention inquiry under this provision, or, in the alternative, provide greater explanation as to the similarities and differences between the two provisions. We have addressed some of these arguments above in response to comments specific to § 351.225(j).

However, with respect to the commenter's confusion over the situations in which Commerce will apply the substantial transformation factors set out in § 351.225(j) and the situations in which Commerce will apply its third country processing and assembly analysis using the factors set out in § 351.226(i), we respond below. The commenter argues that the

factors which Commerce considers in both provisions are similar, but not exactly the same, and those differences may lead to confusion and impair predictability. The commenter, therefore, argues that Commerce should explain with greater specificity which factors apply in each situation.

Response:

Commerce's substantial transformation analysis under § 351.225(j) and the test for determining whether a product was completed or assembled in other foreign countries under § 351.226(i) (and section 781(b) of the Act) are two distinct analyses used for different purposes, and there is no basis for Commerce to modify either the scope regulations or the circumvention regulations in response to this comment. Commerce has explained this distinction before in certain circumvention determinations, noting that its substantial transformation test is used in scope rulings and other proceedings to determine a particular product's country-of-origin, while the factors it considers to determine whether merchandise is being completed or assembled into a product in a third country are specific to a circumvention analysis under section 781 of the Act to determine if the product is circumventing an AD or CVD order.[120] Because these analyses are distinct and serve different purposes, Commerce's application of a substantial transformation analysis does not preclude Commerce from also applying an analysis based on statutory criteria established in section 781(b) of the Act.[121]

In determining whether merchandise is subject to an AD and/or CVD order, Commerce considers whether the merchandise is: (1) the type of merchandise described in the order; and (2)

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[120] *See Certain Cold-Rolled Steel Flat Products From the Republic of Korea: Affirmative Final Determinations of Circumvention of the Antidumping Duty and Countervailing Duty Orders*, 84 FR 70934 (Dec. 26, 2019) and accompanying Issues and Decision Memorandum (IDM) at Comment 9; *Certain Corrosion-Resistant Steel Products from the People's Republic of China: Affirmative Final Determination of Circumvention of the Antidumping Duty and Countervailing Duty Orders*, 83 FR 23895 (May 23, 2018), and accompanying IDM at Comment 1 and 2; *Certain Cold-Rolled Steel Flat Products from the People's Republic of China: Affirmative Final Determination of Circumvention of the Antidumping Duty and Countervailing Duty Orders*, 83 FR 23891 (May 23, 2018), and accompanying IDM at Comment 1 and 2.

[121] *See Bell Supply*, 888 F.3d at 1230 ("Although substantial transformation and circumvention inquiries are similar, they are not identical.").

from the particular country the order covers.[122] Thus, Commerce's determination on whether merchandise meets these parameters involves two separate inquiries, *i.e*., whether the product is of the type described in the order, and whether the country of origin of the product is that of the subject country.[123] In determining the country of origin of a product, Commerce's usual practice has been to conduct a substantial transformation analysis.[124] The substantial transformation analysis asks, essentially, "whether, as a result of the manufacturing or processing, the product loses its identity and is transformed into a new product having a new name, character, and use"[125] and whether "[t]hrough that transformation, the new article becomes a product of the country in which it was processed or manufactured."[126] Commerce may examine a number of factors when conducting its substantial transformation analysis, and the weight of any one factor can vary from case to case and depends on the particular circumstances unique to the products at issue.[127]

Section 781(b) of the Act provides that Commerce may include merchandise completed or assembled in foreign countries within the scope of an order if the "merchandise imported into the United States is of the same class or kind as any merchandise produced in a foreign country that is the subject of" an AD or CVD order, and such merchandise "is completed or assembled … from merchandise which … is produced in the foreign country with respect to which such order [] applies…." To include such merchandise within the scope of an AD or CVD

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[122] *See Bell Supply Co., LLC v. United States*, 179 F. Supp. 3d 1082, 1091 (CIT 2016); *see also Sunpower Corp. v. United States*, 179 F. Supp 3d 1286, 1298 (CIT 2016) (*Sunpower*).
[123] *See Sunpower*, 179 F. Supp. 3d at 1298; *see also Final Determination of Sales at Less Than Fair Value: 3.5" Microdisks and Coated Media Thereof from Japan*, 54 FR 6433, 6435 (February 10, 1989).
[124] *See, e.g.*, *Notice of Final Determination of Sales at Less Than Fair Value: Glycine from India*, 73 FR 16640 (March 28, 2008), and accompanying IDM at Comment 5; *see also Stainless Steel Plate in Coils from Belgium: Final Results of Antidumping Duty Administrative Review*, 69 FR 74495 (December 14, 2004) (*Plate Belgium Final*), and accompanying IDM at Comment 4; *see also Canadian Solar*, 918 F.3d at 918-20 (affirming Commerce's discretion to use other tests beyond the substantial transformation test when reasonable).
[125] *See Bell Supply,* 888 F.3d at 1230 (quotations and citations omitted).
[126] *See Ugine and Alz Belgium N.V. v. United States*, 571 F. Supp. 2d 1333, 1337 n.5 (CIT 2007) (quoting *Notice of Final Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Carbon Steel Flat Products from Argentina*, 58 FR 37065 (July 9, 1993) (*Steel Argentina Final*)).
[127] *See Laminated Woven Sacks from the People's Republic of China: Final Results of First Antidumping Duty Administrative Review*, 76 FR 14906 (March 18, 2011) (*Sacks China Final*), and accompanying IDM at Comment 1b.

order, Commerce must determine and assess whether: the process of assembly or completion in the foreign country is minor or insignificant; the value of the merchandise produced in the country subject to the AD or CVD order is a significant portion of the merchandise exported to the United States; and, the action is appropriate to prevent evasion of such order or finding.[128] As part of this analysis, Commerce also considers additional factors such as: patterns of trade, including sourcing patterns; whether the manufacturer or exporter of the parts or components in the country of the order is affiliated with the person who assembles or completes the merchandise sold in the United States. and, whether imports of the parts or components produced in such foreign country into the country in which they are assembled or completed have increased after the initiation of the investigation which resulted in the issuance of such order or finding.[129] As such, the purpose of this circumvention inquiry under section 781(b) of the Act is to determine whether merchandise from the country subject to the AD and/or CVD orders that is processed, *i.e.*, completed or assembled into a finished product, in a third country into a merchandise of the type subject to the AD and/or CVD order should be considered within the scope of the AD and/or CVD order at issue.

Although an AD or CVD order would not normally cover merchandise that has a country of origin other than the country subject to the order, the Act expressly provides an exception to the general rule in the cases of circumvention because, in general, with regard to third country or U.S. further processing, "[c]ircumvention can only occur if the articles are from a country not covered by the relevant AD or CVD orders."[130]

An interpretation of section 781(b) of the Act that requires the imported merchandise have the same country of origin as the merchandise subject to the AD/CVD order at issue would severely undermine section 781(b) of the Act because the merchandise would already be subject to the order and there would be no need to engage in a circumvention analysis. Accordingly,

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[128] *See* sections 781(b)(C)-(E) of the Act.
[129] *See* section 781(b)(3) of the Act
[130] *See Bell Supply*, 888 F.3d at 1229.

Commerce interprets the requirement in section 781(b) of the Act that the merchandise imported into the United States be of "the same class or kind" as the merchandise that is subject to the AD and/or CVD order to mean that the imported merchandise must be the same type of product as the subject merchandise. In other words, the imported merchandise meets the physical description of the subject merchandise and is only distinct because of its different country-of-origin designation.

With regard to the circumvention statute established by Congress, the language provided in the SAA supports Commerce's decision to not apply the substantial transformation test in third-country circumvention proceedings. The Federal Circuit has affirmed that "[t]the legislative history indicates that [section 781 of the Act] can capture merchandise that is substantially transformed in third countries, which further implies that [section 781 of the Act] and the substantial transformation analysis are not coextensive."[131] When Congress passed the Omnibus and Trade Competitiveness Act in 1988, it explained that section 781 of the Act "addresses situations where 'parts and components … are sent from the country subject to the order to the third country for assembly and completion."[132] Congress also stated that "[t]he third country assembly situation will *typically* involve the same class or kind of merchandise, where Commerce has found that the *de facto* country of origin of merchandise completed or assembled in a third country is the country subject to the antidumping or countervailing duty order."[133] Thus, Congress contemplated that where Commerce had made an affirmative circumvention determination, the imported merchandise found to be circumventing would be within the AD or CVD order at issue and would be treated as having the same country of origin as the country subject to the order. Subsequently, when implementing the URAA in 1994, Congress further recognized in the SAA the problem arising from foreign exporters attempting to "circumvent an

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[131] *See id.* at 1231.
[132] S. Rep. No. 100-71, at 101.
[133] *See* H.R. Rep. No. 100-576, at 603 (1988) (Conference Report accompanying the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (1988)) (emphasis added).

[] order by purchasing as many parts as possible from a third country" and assembling them in a different country, such as the United States.[134] Similarly, the SAA demonstrates that Congress was aware of Commerce's substantial transformation analysis and the potential interplay of such an analysis with a circumvention finding under section 781 of the Act. Further, as Congress noted in the SAA, "*outside of a situation involving circumvention* of an antidumping duty order, a substantial transformation of a good in an intermediate country would render the resulting merchandise a product of the intermediate country rather than the original country of production."[135] In sum, it is evident from the above that Congress anticipated that circumvention could result in a situation where, despite the merchandise undergoing some change that resulted in a new country of origin pursuant to a substantial transformation analysis, the merchandise could still be considered to be within the AD or CVD order at issue, if, pursuant to section 781(b) of the Act, Commerce determined the existence of circumvention. As such, Congress has already contemplated that substantial transformation did not preclude a finding of circumvention under the Act.

Moreover, the Federal Circuit has stated that "[i]n order to effectively combat circumvention of antidumping duty orders, Commerce may determine that certain types of articles are within the scope of a duty order, *even when the articles do not fall within the order's literal scope*."[136] The Act "identifies four articles that may fall within the scope of a duty order without unlawfully expanding the order's reach,"[137] including *inter alia* merchandise completed or assembled in foreign countries using merchandise produced in the country with respect to which the AD or CVD order applies.[138] Similarly, the Federal Circuit has explained that "if Commerce applies the substantial transformation test and concludes that the imported article has

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[134] *See* SAA at 893.
[135] *Id.* at 844 (emphasis added).
[136] *See Deacero*, 817 F.3d at 1338 (emphasis added).
[137] *Id.*
[138] *See* section 781(b) of the Act. The other three articles are: (1) merchandise completed or assembled in other foreign countries with respect to which the AD or CVD order applies; (2) merchandise altered in form or appearance in minor respects … whether or not included in the same tariff classification; and (3) later-developed merchandise. See section 781(a), (c)-(d) of the Act.

a country of origin different from the country identified in an AD or CVD order, then Commerce can include such merchandise within the scope of an AD and CVD order only if it finds circumvention under [section 781(b) of the Act]."[139]

In short, the two analyses have distinct purposes. The substantial transformation test is focused on whether the input product loses its identity and is transformed into a new product having a new name, character, and use, and thus a new country of origin. On the other hand, section 781(b) of the Act focuses on the extent of processing applied to subject merchandise in a third country and whether such processing is minor or insignificant in comparison to the entire production process of the finished subject merchandise. Under section 781(b) of the Act, we also examine whether the processing in a third country has resulted in "evasion" of the order, and, therefore, whether "action is appropriate" to prevent further evasion in the future. Thus, there is nothing contradictory in finding an input to be substantially transformed into a finished product, in terms of its physical characteristics and uses, while also finding the process of effecting that transformation to be minor *vis-à-vis* the manufacturing process of producing a finished product. Further, as the Federal Circuit has explained, "even if a product assumed a new identity, the process of 'assembly or completion' may still be minor or insignificant, and undertaken for the purpose of evading an AD or CVD order."[140] The SAA illustrates this possibility in its discussion of the circumvention provisions of the Act through its references to "parts" and finished products.[141] It is evident from this discussion that the "parts" and the finished goods assembled are two different products. Nevertheless, the process of assembling such parts into a final product may be minor.[142] Furthermore, section 781(b) of the Act requires that we examine other factors, *e.g.*, patterns of trade including sourcing patterns, and whether

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[139] *See Bell Supply*, 888 F.3d at 1230.
[140] *See id.*
[141] *See* SAA at 893.
[142] *Id.* ("Another serious problem is that the existing statute does not deal adequately with the so-called third country parts problem. In the case of certain products, particularly electronic products that rely on many off the shelf components, it is relatively easy for a foreign exporter to circumvent an antidumping duty order by establishing a screwdriver operation in the United States that purchases as many parts as possible from a third country.").

imports into the third country have increased after initiation of the relevant AD or CVD investigation. These additional factors further emphasize the different purposes of the substantial transformation test and the analysis conducted under section 781(b) of the Act and § 351.226(i).

For these reasons, Commerce has neither removed the country of origin section from 351.225(j) nor modified the requirement as set forth in the newly created 351.226(i).

10. Section 351.226(j) - Minor alterations of merchandise

Section 351.226(j) addresses the situation in which a particular product has been altered in form or appearance in minor respects before being exported to the United States. In the proposed modifications to the current regulation, Commerce included certain criteria described in the legislative history of the provision to determine whether alterations are properly considered "minor."[143] One commenter states that it was pleased Commerce had included those factors in its revised regulation, as those factors are important to Commerce's minor alterations analysis.

Response:

Commerce appreciates the comment and agrees that the inclusion of the factors from the legislative history in the regulation will provide greater clarity to Commerce's analysis of a minor alteration allegation in a circumvention inquiry.

Upon further consideration of this provision, we have made one minor edit, clarifying that physical characteristics include chemical, dimensional, and technical characteristics, to bring that term into conformity with other provisions of the regulation. Otherwise, we have made no further changes from the provision as it appeared in the *Proposed Rule*.

11. Section 351.226(k) – Later-developed merchandise

There were no comments on this provision.

12. Section 351.226(l) – Suspension of liquidation

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[143] *See Proposed Rule*, 85 FR 49472 at 49487 (referencing S. Rep. No. 100-71, at 100).

As discussed in the *Proposed Rule*, in the context of a circumvention inquiry, current § 351.225(l) allows for Commerce to direct CBP to begin the suspension of liquidation of unliquidated entries not yet suspended which entered on or after the date of initiation of the inquiry, and collect applicable cash deposits, at the time of a preliminary or final affirmative determination, whichever is applicable. The current regulation does not address unliquidated entries not yet suspended which pre-date the date of initiation of a circumvention inquiry.[144] Furthermore, the Act does not provide direction to Commerce regarding the suspension of liquidation for entries subject to a circumvention inquiry.

Under § 351.226(l) in the *Proposed Rule*, Commerce proposed that, at the time of a preliminary or final affirmative circumvention determination, Commerce would direct CBP to begin suspension of liquidation for any unliquidated entries not yet suspended and collect applicable cash deposits.[145] After consideration of comments on the *Proposed Rule* and corresponding changes to similar language in § 351.225(l), Commerce is adopting certain changes to § 351.226(l) in this final rule both in response to comments and on its own initiative. For clarity, we describe all revisions made to § 351.226(l) in these introductory paragraphs before summarizing and addressing comments below. Also discussed herein are the specific applicability dates for § 351.226(l) as referenced in the Applicability Dates section of this preamble.

Paragraph (l)(1), which describes Commerce's actions at the time of initiation of a circumvention inquiry, is slightly revised from the *Proposed Rule* and mirrors changes in § 351.225(l)(1), which are described above in that section. Additionally, because § 351.226(l)(2) and (3) concerning Commerce's actions at the time of a preliminary or final circumvention determination largely mirror similar provisions in §§ 351.225, with a few exceptions described below, we are adopting the same changes to paragraphs (l)(2) and (3) that are being made to §

[144] *Id.* at 49487-88.
[145] *Id.*

351.225(l)(2) and (3). Paragraph (l)(4), which we touch on briefly below, describes Commerce's actions in the event of a negative final circumvention determination, remains unchanged from the *Proposed Rule*. Lastly, Commerce is adding a new provision, paragraph (l)(5), to include specific reference to CBP's authority.

Minor revisions have been made to paragraphs (l)(1), (l)(2)(i), and (l)(3)(i) from the *Proposed Rule*. Specifically, as explained above in the discussion of similar language in § 351.226(l), paragraph (l)(2)(i) provides that, at the time of an affirmative preliminary circumvention determination, Commerce will direct CBP to continue the suspension of liquidation of previously suspended entries, but removes express reference to entries previously suspended "as directed under" paragraph (l)(1). Under paragraph (l)(1), Commerce does not direct CBP to suspend liquidation at the time of initiation of the circumvention inquiry; rather, under paragraph (l)(1), Commerce directs CBP *to continue* the suspension of liquidation of entries subject to the inquiry (if any) that were already subject to the suspension of liquidation and to collect the applicable cash deposits.[146] As noted above in the discussion of § 351.225(l), CBP has independent authority to suspend liquidation, and, therefore, prior to a circumvention inquiry, it is possible that entries may be previously suspended for a number of reasons. Therefore, to avoid any unintended confusion regarding the underlying basis for suspension of liquidation of previously suspended entries, the reference to paragraph (l)(1) is removed from paragraph (l)(2)(i).

Similar edits have been made to paragraph (l)(3)(i) by removing a reference to entries previously suspended "as directed under" (l)(1) and/or (l)(2). Under paragraph (l)(2)(ii) (as further discussed below), if Commerce issues a preliminary affirmative circumvention determination, Commerce will direct CBP to begin the suspension of liquidation of certain entries. Therefore, at the time of a final circumvention determination, entries may be previously

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[146] The phrase "until appropriate liquidation instructions are issued" from the *Proposed Rule* is removed in paragraph (l)(1) (which refers to continued suspension of liquidation) as such language is unnecessary and redundant. The relevant language is retained in paragraph (l)(3) as discussed below.

suspended as described above, or because of Commerce's instruction to CBP to begin the suspension of liquidation of certain entries at the time of the preliminary affirmative circumvention determination. To avoid confusion regarding the underlying basis for suspension of liquidation of previously suspended entries, the reference to paragraph (l)(1) and/or (l)(2) is removed from paragraph (l)(3)(i).

Revised paragraph (l)(3)(i) also eliminates potentially confusing language regarding entries subject to suspension of liquidation as a result of another segment of a proceeding, and revised paragraphs (l)(3)(i) and (ii) eliminate reference to liquidation instructions issued pursuant to §§ 351.212 and 351.213. There may be a number of reasons why entries remain subject to suspension of liquidation in any given circumvention inquiry in which Commerce issues an affirmative final circumvention determination, and Commerce cannot immediately instruct CBP to lift suspension of liquidation and assess final duties. This includes, for example, an ongoing administrative review. Therefore, we find that a simple reference to the continued suspension until appropriate liquidation instructions are issued in paragraph (l)(3) will account for various scenarios. In addition, the language in new paragraph (l)(5) will provide added clarification regarding CBP's authority in relation to the framework established by Commerce under paragraph (l). Commerce intends to provide more details, as needed, in its individual instructions to CBP for a given case.

On the other hand, we note that we have retained language in paragraph (l)(4) to provide that when Commerce issues a final negative circumvention determination, entries subject to suspension of liquidation as a result of another segment of a proceeding, if any, will remain suspended until that other segment of the proceeding has concluded. Although perhaps less common in the circumvention context, it is possible that there could be a scenario in which it would not be appropriate to immediately direct CBP to liquidate entries without regard to duties. Therefore, to avoid confusion in this particular scenario, this language is retained in paragraph (l)(4).

Paragraphs (l)(2)(ii) and (l)(3)(ii) clarify and maintain the *status quo* of the current regulation to provide that, at the time of a preliminary or final affirmative circumvention determination, Commerce will direct CBP to begin the suspension of liquidation of any unliquidated entries not yet suspended, which entered on or after the date of initiation of the inquiry, and collect applicable cash deposits. Paragraphs (l)(2)(ii) and (l)(3)(ii) also retain language from the current regulation regarding entries entered, or withdrawn from warehouse, for consumption, to maintain consistency with this long-standing language and to avoid confusion. Additionally, this language also clarifies that the relevant date is the date of publication of the notice of initiation in the *Federal Register*.

New paragraphs (l)(2)(iii)(A) and (l)(3)(iii)(A) provide that, at the time of a preliminary or final affirmative circumvention determination, if Commerce determines that it is appropriate to do so, Commerce may direct CBP to begin the suspension of liquidation of certain unliquidated entries not previously suspended, which entered before the date of publication of notice of initiation of the inquiry, and collect applicable cash deposits. Under this framework, Commerce may consider upon timely request of an interested party or at its own discretion whether such suspension of liquidation and application of cash deposits, also referred to as retroactive suspension, should be applied to certain entries which pre-date the date of initiation, *i.e.*, to a specific alternative retroactive suspension date. In response to a timely request from an interested party, Commerce will only consider an alternative date based on a specific argument supported by evidence establishing the appropriateness of that alternative date. These provisions are further explained below in response to comments. Additionally, new paragraphs (l)(2)(iii)(B) and (l)(3)(iii)(B) provide an exception that, if Commerce has determined to address a covered merchandise referral under § 351.227 in a circumvention inquiry, the rules of § 351.227(l)(2)(iii) and (l)(3)(iii) will apply. This provision is explained below under the discussion of § 351.227(l). New paragraphs (l)(2)(iii) and (l)(3)(iii) also retain language from the current regulation regarding entries entered, or withdrawn from warehouse, for consumption, to maintain

consistency with this long-standing language and avoid confusion. Additionally, this language also clarifies that the relevant date is the date of publication of the notice of initiation in the *Federal Register*.

Lastly, new paragraph (l)(5) provides language to clarify CBP's authority to take related action. Specifically, this language clarifies that the revised framework established by Commerce in § 351.226 do not affect CBP's authority to take any additional action with respect to the suspension of liquidation or related measures. This is identical language to the language for § 351.225(l), which is explained above and not repeated here.

There is one clarification to this revised regulatory framework, as noted in the DATES section and in the Applicability Dates section of this preamble, and as discussed in detail above regarding § 351.225(l)(2)(iii) and (l)(3)(iii) for scope inquiries, regarding the effective date and applicability dates. As stated above, amendments to § 351.225 apply to scope inquiries for which a scope ruling application is filed, as well as any scope inquiry self-initiated by Commerce, on or after the effective date for the amendments to § 351.225 identified in the DATES section. Likewise, amendments to § 351.226 apply to circumvention inquiries for which a circumvention request is filed, as well as any circumvention inquiry self-initiated by Commerce, or after the effective date for the amendments to § 351.226 identified in the DATES section. However, for § 351.226(l), like for § 351.225(l), Commerce will not apply paragraphs (l)(2)(iii) and (l)(3)(iii) in a way that would direct CBP to begin the suspension of liquidation of unliquidated entries not yet suspended, entered, or withdrawn from warehouse, for consumption, prior to this effective date. These issues are fully described above for § 351.225(l) and are not repeated here. In addition, we clarify that as expressly stated in paragraph (l)(5), this revised framework does not affect CBP's authority to take any additional action with respect to the suspension of liquidation or related measures. Nor will this framework apply to circumvention requests filed or circumvention inquiries self-initiated by Commerce before the effective date identified in the DATES section.

As noted above, Commerce received numerous comments on paragraph (l). Summaries of those comments, and responses to those comments, are provided below.

(a) Retroactive suspension of liquidation

As described above, in the *Proposed Rule*, among other changes, Commerce proposed that, at the time of a preliminary or final affirmative circumvention determination, Commerce would direct CBP to begin suspension of liquidation for any unliquidated entries not yet suspended and collect applicable cash deposits. Therefore, the key distinction between the current regulation and what was proposed is that the current regulation imposes a "cut-off" of the initiation date of the inquiry. The proposed regulation would have removed this limitation so that the affirmative circumvention determination would apply to any unliquidated entries of the product at issue, not just those that entered after the initiation date.

Thirteen commenters support the proposal to apply affirmative circumvention determinations to all unliquidated entries dating back to the first date of suspension under the order. A few of these commenters generally support the adoption of proposed new § 351.226, with no comments specific to paragraph (l). Another group of these commenters discuss their first-hand experiences in dealing with circumvention and explain that such practices undermine the import relief granted to the domestic industry. In their view, companies engaging in circumvention contravene the remedial purpose of the AD/CVD law, and Commerce's experience over the past 20 years has made it evident that strong enforcement of the trade remedy laws is necessary to level the playing field, prevent circumvention, and eliminate opportunities to elude the payment of AD/CVDs.

Several of these commenters disagree that imports that circumvent an AD/CVD order can enter without the payment of duties unless and until a domestic interested party alerts Commerce that circumvention is occurring. These commenters argue that importers should be exercising due diligence (as part of the concept of shared responsibility and the statutory duty to exercise reasonable care when entering merchandise) and it is incumbent upon them to take proactive

measures to reduce any duty risk exposure. One of these commenters notes that the Federal Circuit has also recognized the risk of duty evasion and the declared policy in the Act to protect AD/CVD revenue to the maximum extent practicable, which is consistent with the curative purpose and remedial intent of the statute.[147]

Eleven commenters oppose the proposal to apply affirmative circumvention determinations to all unliquidated entries dating back to the first date of suspension under the order. These commenters argue that by applying suspension of liquidation to the earliest date of suspension, the *Proposed Rule* unfairly expands the scope of an order prior to making a circumvention determination. In particular, they argue that there is a significant duty liability risk to importers that are genuinely unaware their products may be covered by the scope of an order. They state that, as Commerce acknowledges, these products do not fall within the literal scope language; thus, it is impossible for importers to predict what products may be circumventing an order when they are not covered by the literal scope language. Certain of these commenters also argue that attaching duty liability when the language of the orders does not cover the product is a violation of due process and the fair notice doctrine. They note that a circumvention request is the first time an importer has notice of a potential circumvention inquiry; retroactively applying orders to unliquidated entries does not constitute fair notice to importers.

Additional commenters oppose the *Proposed Rule* and raise notice and due process issues. In particular, they argue that the proposal requires notification to those on the annual inquiry service list, but does not clearly establish how producers and importers will be informed if circumvention is taking place via third countries. One of these commenters proposes that circumvention inquiries be published in the *Federal Register* so that all interested parties affected have the same level of information and can defend their interests. Another commenter also expressed support for providing notice via the *Federal Register*, either at the time of the

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[147] *See Guangdong Wireking*, 745 F.3d at 1203; and *Sunpreme*, 946 F.3d at 1321-22.

circumvention allegation or the time of the initiation. This commenter also notes that the *Proposed Rule* implicates due process issues, stating that importers should not be held responsible for duties on entries that pre-date any notice of the extension of the order to cover the merchandise.

Another group of commenters argues that Commerce has expressly recognized in the *1997 Final Rule* that notice and fairness are key factors in a circumvention case. These commenters argue that the issue regarding the apparent unfairness associated with retroactively imposing duties on merchandise prior to initiation of an inquiry was expressly addressed in *Fasteners*, where the Federal Circuit held that Commerce exceeded its regulatory authority.[148] The commenters also argue that the court's reasoning was based on the *1997 Final Rule* and Commerce has failed to provide an adequate explanation as to why it is no longer extremely unfair to respondents to subject entries to duty assessment with no prior notice based on nothing more than a domestic party's allegation. Further, these commenters argue that the Federal Circuit's decision in *Sunpreme* cannot justify retroactive assessment because that case concerned CBP's suspension authority, not Commerce's authority to reach all unliquidated entries prior to the initiation of a circumvention inquiry.[149] Finally, they state that the proposal is even more blatantly unfair in the circumvention context with third country completion, where there has been no AD/CVD investigation, no injury finding, no suspension, and no notice of findings in the *Federal Register*. They also state that it is unreasonable to assume importers can make a prediction concerning merchandise produced in a separate country.

Response:

As discussed above, after consideration of these comments, Commerce is adopting a revised framework under paragraph (l) with respect to entries that pre-date the date of initiation of a circumvention inquiry. First, under paragraph (l)(1), Commerce is clarifying that, at the

[148] *See Fasteners*, 947 F.3d at 803.
[149] *See Sunpreme*, 946 F.3d at 1316-18.

time of initiation of a circumvention inquiry, Commerce will direct CBP to *continue* the suspension of liquidation of entries subject to the inquiry (if any) that were already subject to the suspension of liquidation and to collect the applicable cash deposits. Second, Commerce is clarifying its treatment of unliquidated entries not yet suspended which entered before the date of initiation of the inquiry. Specifically, paragraphs (l)(2)(iii)(A) and (l)(3)(iii)(A) provide that, at the time of a preliminary or final affirmative circumvention determination, if Commerce determines that it is appropriate to do so, Commerce may direct CBP to begin the suspension of liquidation of certain unliquidated entries not previously suspended, which entered before the date of publication of notice of initiation of the inquiry, and collect the applicable cash deposits. This includes any unliquidated entries back to the first date of suspension under the order that remain unliquidated at the time of the preliminary or final circumvention determination.[150] Under this framework, Commerce may consider upon timely request of an interested party or at its own discretion whether such suspension of liquidation and application of cash deposits, also referred to as retroactive suspension, should be applied to certain entries which pre-date the date of initiation, *i.e.*, to a specific alternative retroactive suspension date. In response to a timely request from an interested party, Commerce will only consider an alternative date based on a specific argument supported by evidence establishing the appropriateness of that alternative date. In addition, as explained further below, because this is a determination separate from a determination as to whether the elements for circumvention exist, the evidence required to support retroactive suspension must go beyond the evidence required to establish circumvention of the order under the relevant criteria. Further, Commerce may consult with CBP as necessary

[150] As stated above in the discussion of new paragraph (l)(5), consistent with current practice and in accordance with CBP's statutory and regulatory authorities, CBP may stay its action on entries of products that CBP has liquidated but for which liquidation is not yet final pending the outcome of a circumvention inquiry. Additionally, any instructions issued by Commerce directing CBP to "lift suspension of liquidation" and assess duties at the applicable AD/CVD rate would not limit CBP's ability to (1) suspend liquidation/assess duties/take any other measures pursuant to CBP's EAPA investigation authority under section 517 of the Act specifically, or (2) suspend liquidation/assess duties/take any other action within CBP's or HSI's authority with respect to AD/CVD entries.

under this provision to determine if suspension of liquidation should fall on the date of initiation or to entries preceding that date.

In establishing this framework, which differs from the scope framework applied under § 351.225(l), we recognize that neither section 781 of the Act nor any other provision of the Act contains specific guidance regarding when merchandise found to be circumventing an AD and/or CVD order should be subject to suspension of liquidation and cash deposit requirements. When Congress passed the Omnibus and Trade Competitiveness Act of 1988, it explained that the purpose of the circumvention statute "is to authorize the Commerce Department to apply antidumping and countervailing duty orders in such a way as to prevent circumvention and diversion of U.S. law."[151] Congress also recognized that "aggressive implementation of [the circumvention statute] by the Commerce Department can foreclose these practices."[152]

In light of this language, we are cognizant of the purpose of the AD/CVD law generally and the circumvention provisions, in particular, to prevent parties from undermining the effectiveness of these trade remedies through circumvention measures. Congress, and the courts, have long recognized that Commerce has the vested authority to administer the trade remedy laws in accordance with their intent, and has the discretion to take appropriate enforcement measures to ensure the effectiveness of its AD/CVD orders by preventing duty evasion and circumvention.[153] Weighing in favor of retroactive suspension are Commerce's objectives to promote the effectiveness and remedial purpose of AD/CVD orders; to provide the requisite relief to domestic industries suffering from attempts by others to undermine that relief; to deter parties from engaging in the circumvention practices in the first instance; and to encourage parties to maintain a reasonable awareness whether the product they are producing, exporting, or

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[151] *See* S. Rep. No. 100-71, at 101.
[152] *Id.*
[153] *See generally* section 781 of the Act; SAA at 892-95; *Tung Mung*, 219 F. Supp. 2d at 1343 ("Commerce has a duty to avoid the evasion of antidumping duties. [Commerce] 'has been vested with authority to administer the antidumping laws in accordance with the legislative intent. To this end, [Commerce] has a certain amount of discretion [to act] ... with the purpose in mind of preventing the intentional evasion or circumvention of the antidumping duty law.'") (quoting *Mitsubishi I,* 700 F. Supp. at 555; *see also Torrington Co. v. United States*, 745 F. Supp. 718, 721 (CIT 1990), *aff'd* 938 F.2d 1276 (Fed. Cir. 1991).

importing is subject to an AD/CVD order, and also to scrutinize the parties with which they do business (for example, to determine whether a supplier is a respondent in a U.S. AD/CVD proceeding, which could indicate possible circumvention activity depending on the circumstances). Therefore, based on these objectives, we agree, to an extent, with commenters in favor of the *Proposed Rule*.

On the other hand, we also agree to some degree with arguments raised by the commenters opposed to the *Proposed Rule* that retroactive application of circumvention determinations may not be appropriate in all instances. Depending on the circumstances of a given case, prior to the notice of initiation of the circumvention inquiry, certain exporters, producers, and/or importers of products alleged to be circumventing may not be aware that Commerce could apply AD/CVDs to such products – which "do not fall within the order's literal scope"[154] – through an affirmative circumvention determination.

In light of the concerns raised by those opposed to the *Proposed Rule*, and the need to effectively administer and enforce the circumvention laws under section 781 of the Act, we have therefore modified paragraphs (l)(2)(iii)(A) and (l)(3)(iii)(A) as described above. In determining whether to suspend liquidation of entries preceding initiation, Commerce will consider its objectives described above (*e.g.*, to promote the effectiveness and remedial purpose of AD/CVD orders; to provide the requisite relief to domestic industries; to deter parties from engaging in circumvention; and to encourage parties to maintain a reasonable awareness of their business activities) in light of the circumstances set forth on the administrative record. This framework recognizes that although merchandise may not fall within the literal terms of the order, this does not mean, depending on the circumstances, that parties are completely unaware of an existing order or previous circumvention determinations relevant to their product, or even unaware that

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[154] *See Deacero*, 817 F.3d at 1337-38 ("In order to effectively combat circumvention of antidumping duty orders, Commerce may determine that certain types of articles are within the scope of a duty order, even when the articles do not fall within the order's literal scope. The Tariff Act identifies four articles that may fall within the scope of a duty order without unlawfully expanding the order's reach[.]" (internal citations omitted)).

their products are or may be circumventing the order. Thus, in certain instances, we disagree that it would be unfair to all parties or that all parties would have "no notice" or lack due process in every case before potential duty liability attaches to entries that pre-date the date of initiation of the inquiry pursuant to an affirmative circumvention determination. In fact, we believe that there are scenarios in which parties will certainly have notice before potential duty liability attaches to entries that pre-date the date of initiation. Therefore, the appropriateness of applying duty liability to pre-initiation entries pursuant to an affirmative circumvention determination must be determined by Commerce on a case-by-case basis.

For example, Commerce has published hundreds of AD/CVD orders on numerous types of products covering multiple countries and issued numerous circumvention determinations. The Federal Circuit has recognized that *Federal Register* documents are treated as legally effective notices in a wide range of circumstances.[155] In certain cases, the courts have determined that a party that did not receive actual notice nonetheless received constructive notice of an event through the publication of a *Federal Register* document.[156] These published documents and accompanying memoranda would put parties on notice that circumvention occurred in previous instances under the same order by the same or different companies, or that the same pattern of circumvention occurred in previous instances involving the same product for a different country. This type of evidence could serve as the evidence needed to consider retroactive suspension appropriate under paragraphs (l)(2)(iii) and (l)(3)(iii), because, as noted above, such evidence would go beyond the evidence required to establish circumvention of the order under the relevant criteria.

Allowing for retroactive suspension in such instances would encourage parties to maintain a reasonable awareness of whether the product they are producing, exporting, or importing is subject to an AD/CVD order, and also to scrutinize the parties with whom they do

[155] *Suntec*, 857 F.3d at 1370.
[156] *Id*.

business (as stated above). As a general matter, importers are expected to perform their due diligence and exercise reasonable care in conducting their business. Certain importers are also required to provide or maintain relevant information for their product; and, depending on the type of product, more detailed information may be mandated based on requirements established by CBP, Commerce, or other Federal agencies.[157] In light of these existing obligations and requirements, a reasonable importer may be expected to know, at a minimum, the identity of certain parties in the transaction chain, understand the imported product, including where it was made, how it was made, and the components of the product (and, in some instances, the source of those components). Furthermore, an importer of a product under an HTSUS category that is associated with an AD/CVD order would be faced with a particular responsibility to ensure whether the product is subject to an AD/CVD order. And, as described above, an importer would generally be charged with reviewing prior *Federal Register* notices relevant to its product and to the producers and exporters of its products.

Moreover, in determining whether to apply retroactive suspension, certain evidence, apart from the evidence required to establish circumvention of the order under the relevant criteria, may be considered in light of Commerce's objective to deter parties from engaging in the circumvention practices in the first instance.[158] Just as there is no right to import,[159] there is no

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[157] For example, importers of steel products are required to obtain a steel import license through Commerce's Steel Import Monitoring and Analysis (SIMA) online license system. *See* 19 CFR part 360. In their license application, importers are required to report, among other requirements, the country of origin of the product, along with the country where the steel used in the mill product is melted and poured (which may differ from the claimed country of origin). Steel importers must also furnish steel mill test certificates that provide detailed information regarding the imported steel product. *See Steel Import Monitoring Analysis System*, 85 FR 56162 (Sept. 11, 2020).

[158] We note that the AD/CVD statute on the whole, as well as the circumvention provisions in particular, do not contain intent elements. *See, e.g.*, *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003) (explaining that, in the context of an adverse facts available determination under section 776(b) of the Act, [w]hile intentional conduct, such as deliberate concealment or inaccurate reporting, surely evinces a failure to cooperate, the statute does not contain an intent element."). However, evidence demonstrating intentional conduct may support retroactive suspension because such evidence could indicate that there was no lack of notice about the order or the fact that the particular product might be circumventing the order before the date of initiation, thereby undermining arguments regarding fairness, notice, and due process in a given case.

[159] *See GPX International Tire Corporation v. United States*, 893 F. Supp. 2d 1296, 1313 (CIT 2013) ("[T]he court notes that customs duties are to an extent unique from other government assessments in that there is no right to import, and where unfair trade remedies apply, those with goods that may be imported rarely can predict with accuracy what the duty will be.") (citing *Norwegian Nitrogen Prods. Co. v. United States*, 288 U.S. 294, 318 (1933) (recognizing that as with tax rates '[n]o one has a legal right to the maintenance of an existing rate or duty.')).

right to circumvent the order with impunity until or unless a party gets caught in the circumvention scheme. In practice, in individual circumvention inquiries, Commerce will have to balance its various objectives in ensuring the effectiveness of all AD/CVD orders, along with case-specific considerations. For example, Commerce must consider its objective to deter parties from engaging in the circumvention practices in the first instance in light of the facts surrounding an importer's classification of an entry as not subject to AD/CVDs. Exactly how to strike this balance should emerge over time, through Commerce's practice and consideration of case-specific issues.

Lastly, to the extent parties argue that it is unfair to apply AD/CVDs retroactively to merchandise which may not fall within the literal terms of the order without adequate notice, this final rule provides additional notice to parties that AD/CVDs may be applied retroactively because of a subsequent affirmative circumvention determination, depending on the circumstances described above.

In response to arguments regarding notice of circumvention inquiries, we note that, as provided under § 351.226(b) or (d), Commerce publishes notice of initiation of a circumvention inquiry in the *Federal Register*. In addition, Commerce publishes notice of its preliminary and final circumvention determinations as well, as provided under § 351.226(g)(1) and (2).

In light of the above, Commerce may consider whether retroactive suspension should be applied to entries prior to the date of initiation, based upon available information on the record, at the time of the first affirmative (preliminary or final) circumvention determination. In exercising its discretion under this provision, Commerce will consider whether there is information on the record supporting retroactive suspension, which goes beyond the evidence required to establish circumvention of the order under the relevant criteria.

(b) Suspension of liquidation and cash deposits at initiation

Several commenters generally agree with Commerce's proposal under § 351.226(l)(1) to instruct CBP upon initiation of a circumvention inquiry to continue to suspend liquidation of

products that are already subject to suspension. Some commenters oppose Commerce's proposal under § 351.226(l)(1) to require cash deposits at the time of initiation of a circumvention inquiry, arguing that it is contrary to statute, unreasonable, and unfair. These commenters argue that, under current practice, cash deposits are not required until Commerce makes a preliminary determination of circumvention.

As with proposed § 351.225(l)(1), in the context of circumvention, several commenters argue Commerce should instruct CBP to begin suspending liquidation of entries not already suspended by CBP at an earlier stage in a circumvention inquiry. Specifically, these commenters request that Commerce instruct CBP upon initiation of a circumvention inquiry to suspend liquidation of entries which are not already subject to suspension of liquidation, and to require cash deposits. Likewise, we received similar comments and rebuttal comments to those described above regarding § 351.225(l)(1), both supporting and opposing this proposal, which we incorporate herein.

In the context of circumvention, several commenters further argue that unless CBP suspends liquidation under its own authority, in most cases products subject to a circumvention inquiry will not have liquidation suspended when Commerce initiates a circumvention inquiry, and thus, certain circumventing products will liquidate without duty liability. These commenters argue that waiting until a preliminary determination of circumvention to begin suspension of liquidation undermines the relief to the domestic industries, and that suspending liquidation and requiring cash deposits upon initiation of a circumvention inquiry is consistent with Congress's intent to aggressively implement the circumvention statute. These commenters argue that Commerce's concerns in the *1997 Final Rule* do not apply in circumvention because the proposed regulations clearly outline the factors necessary to allege a *prima facie* case of circumvention. These commenters further argue that circumvention typically requires an affirmative act by foreign producers, so it is unlikely foreign producers will be unaware that their actions potentially circumvent an order. Additionally, these commenters argue there is no

economic harm when entries are suspended at initiation and cash deposits are set to zero, but that doing so preserves potentially circumventing entries for duty assessment.

As noted above, in rebuttal, certain commenters oppose the proposal that Commerce direct CBP, upon initiation of a circumvention inquiry, to suspend liquidation of unliquidated entries not previously suspended and to require cash deposits. In addition to rebuttal comments described under § 351.225(l)(1), one commenter points out that petitioning parties have inconsistently argued that Commerce should lower the threshold for initiating a circumvention inquiry while also arguing that these same criteria establish a *prima facie* case of circumvention and support their proposal that suspension of liquidation for entries not already suspended should begin upon initiation of a circumvention inquiry.

Response:

We have left unchanged § 351.226(l)(1), which states that, upon initiation of a circumvention inquiry, Commerce will direct CBP to continue the suspension of liquidation (if any) of previously suspended entries and to apply the applicable cash deposit rate. In addition, we have considered the proposal by some commenters that Commerce should instruct CBP upon initiation of a circumvention inquiry to begin the suspension of liquidation of unliquidated entries not previously suspended and to require cash deposits on such entries (either at zero or at the rate in effect at the time of entry). We have also considered the arguments in opposition to this proposal. As noted above, the statute does not provide direction to Commerce on the suspension of liquidation of entries subject to a circumvention inquiry. Therefore, after consideration of the parties' arguments and based on current practical and administrability concerns, we have decided to continue to order suspension of liquidation and collection of cash deposits for such entries only after Commerce's first (preliminary or final) affirmative circumvention determination. As a result, and for many of the same reasons described in detail above under the discussion of § 351.225(l), we have not accepted the proposal.

In particular, during the 45-day period in which Commerce has to decide whether to initiate an inquiry based on a circumvention request, Commerce must consider whether the request alleges the elements necessary for a circumvention determination under section 781 of the Act and is accompanied by information reasonably available to the interested party supporting these allegations. During this time, Commerce may receive comments from other interested parties, and may issue questionnaires to the requestor to seek clarification or additional information. Although Commerce may seek clarification of the description of the product at issue, it would likely be difficult for Commerce to fully analyze the description of the product at issue, such that it would be appropriate to direct CBP to *begin* suspension of liquidation for entries not previously suspended. We recognize that once initiated, paragraph (l)(1) provides that Commerce will direct CBP to *continue* the suspension of liquidation of previously suspended entries and to apply the applicable cash deposit rate. However, for the reasons discussed above under § 351.225(l), we find it acceptable for Commerce to incorporate the description of the product in the circumvention request "as is" in such instructions to CBP, even if Commerce has not had a great deal of time to fully analyze the description, because Commerce is seeking to maintain the status quo with respect to this group of previously suspended entries.

On the other hand, we find that ordering suspension for the first time on merchandise which was not previously suspended, based only on the description of the product at issue in the circumvention request, raises practical and administrability concerns. Specifically, before initiation, Commerce may not have adequate time to analyze the description of the product at issue to ensure that when such a description is provided in CBP instructions, CBP is able to administer and enforce those instructions without difficulty. Notably, there may be instances in which Commerce finds that the record and product descriptions are sufficient and clear enough to warrant combining initiation with a concurrent affirmative preliminary circumvention determination. However, in the cases in which Commerce just initiates a scope inquiry,

Commerce will not have reached any sort of determination on the merits that the product at issue is circumventing the order.

Further, we are also concerned with the significant administrative burden that would result if we were to instruct CBP to begin suspension of liquidation and collection of cash deposits of all entries at initiation, regardless if they are determined later to be circumventing an AD/CVD order. For example, under one possible scenario, such suspension could result in a multi-step process of Commerce: 1) directing CBP to convert all non-AD/CVD type entries meeting the description of the product at issue to AD/CVD type entries and directing CBP to suspend liquidation without any cash deposits at the time of initiation; 2) directing CBP subsequently, upon the event of an affirmative preliminary determination, to collect cash deposits at the rate to be determined applicable retroactively; and 3) directing CBP, in the event of a negative final determination, to lift suspension and liquidate entries without regard to AD/CVDs. This is just one sequence of circumvention inquiry proceedings and determinations, among several, that reflects the additional administrative burden that suspension of liquidation of all entries of the product described in a circumvention request at initiation would require of Commerce and CBP.

We are cognizant of the concerns expressed by some commenters that certain entries that entered prior to an affirmative preliminary determination may liquidate without being assessed AD/CVDs, and that parties later found to be circumventing the order may benefit from this arrangement. We have also considered the suggestion of some commenters to begin the suspension of liquidation of not yet liquidated entries at the time of initiation, with a cash deposit rate of zero, which they argue means there would be no economic harm to importers. However, Commerce believes that this balance between enforcement concerns and practical and administrability considerations described above weighs in favor of maintaining its current practice of not imposing either suspension of liquidation and/or cash deposit requirements until

making either an affirmative preliminary or final affirmative determination, whichever occurs first.

That said, although we are not adopting the suggestions that we suspend liquidation of all entries described in circumvention requests at initiation, we note that we have made numerous other changes throughout these regulations, such as the remedy provisions found in § 351.226(m) and the certification process addressed in § 351.228, in addition to the changes discussed above for paragraph (l), that we believe significantly strengthen the administration and enforcement of AD/CVD laws, and, overall, these changes minimize the opportunities for gamesmanship and evasion of AD/CVD orders while also mitigating the harm to importers that may be acting in good faith.

With respect to the comment that Commerce should not require cash deposits upon initiation of a circumvention inquiry, it is unclear whether these commenters believe that under § 351.226(l)(1), Commerce would be directing CBP to begin suspension of liquidation and require cash deposits of all unliquidated entries (including entries not previously suspended by CBP), or whether the commenter disagrees that Commerce should inform CBP that it has initiated a circumvention inquiry and direct CBP to continue any suspension of liquidation and collection of cash deposits already in place. As noted in response to a similar comment regarding § 351.225(l), CBP has independent authority to suspend liquidation. Thus, at the time Commerce initiates a circumvention inquiry, although perhaps less common in the circumvention context, CBP may have already suspended liquidation for entries of products subject to the circumvention inquiry. We clarify that, under § 351.226(l)(1), when Commerce initiates a circumvention inquiry, it does not intend to direct CBP to suspend liquidation and collect cash deposits in the first instance. Rather, Commerce will inform CBP that it has initiated a circumvention inquiry and direct CBP to *continue* the suspension of liquidation of any unliquidated entries of products subject to the circumvention inquiry that have already been suspended by CBP. This is consistent with current § 351.225(l)(1), the existing regulation governing suspension of

liquidation in circumvention inquiries, in the sense that both the current and revised regulation require suspension of liquidation to continue at the applicable cash deposit rate for previously suspended entries after initiation of a circumvention inquiry. Although it has not been Commerce's practice under the existing regulations to direct CBP upon initiation of a circumvention inquiry to continue any suspension of liquidation already subject to suspension and collect cash deposits, current § 351.225(l)(1) provides that any such suspension by CBP will continue when Commerce initiates a circumvention inquiry. Consistent with the noted policy objectives of the AD/CVD law (including the protection of revenue),[160] Commerce has revised § 351.226(l)(1) to require the issuance of instructions to ensure that entries previously suspended by CBP continue to be suspended during the pendency of the circumvention inquiry.

(c) Action pursuant to a negative preliminary circumvention determination

Certain commenters oppose the proposal not to include a requirement for Commerce to notify CBP of a negative preliminary circumvention determination that the product at issue is not circumventing the relevant order along with instructions to terminate the suspension of liquidation for any entries previously suspended by CBP and to refund cash deposits of estimated duties. These commenters argue that the proposal is contrary to the statute and would be manifestly unfair to importers because entries for which liquidation has already been suspended by CBP may have been in error or based on a misunderstanding of the scope. According to these commenters, to continue to collect cash deposits following a negative preliminary circumvention determination is unlawful, especially where the product is entering from a country different from the country to which an order applies and for which no injury determination has been made. These commenters also argue that, in the context of investigations, provisional measures are not imposed following a negative preliminary determination.

In rebuttal, several commenters responded with arguments supporting the proposal not to include a requirement for Commerce to notify CBP of a negative preliminary circumvention

[160] *See Guangdong Wireking*, 745 F.3d at 1203; and *Sunpreme*, 946 F.3d at 1321-22.

determination. Many of these commenters argue that duty collection is a guiding principle for this rulemaking and notifying CBP at the time of a final circumvention determination ensures that any duties collected are preserved in the event Commerce reverses its position after a negative preliminary circumvention determination. These same commenters believe that this particular aspect of the suspension of liquidation rules applicable to circumvention inquiries will encourage importers to seek scope rulings earlier in the proceeding or risk having entries suspended by CBP. Another group of commenters agreed that the proposal ensures the appropriate application of AD/CVD orders in the event of an affirmative final circumvention determination. These commenters believe the proposal is consistent with the overall objective of addressing serious enforcement concerns and the very real risk of duty evasion.

Response:

We have left unchanged proposed § 351.226(l)(2) with respect to this issue. Under the existing regulations, if Commerce issues a preliminary circumvention determination that the product at issue is not circumventing the order, Commerce is required to notify CBP and direct CBP to terminate the suspension of liquidation for any entries previously suspended by CBP with refunds of any cash deposits paid as estimated duties. In the *Proposed Rule*, Commerce proposed not to include this requirement so that Commerce would no longer issue instructions to CBP at the time of a negative preliminary circumvention determination. Instead, by not including this requirement, any entries previously suspended by CBP pursuant to its own authority would remain suspended pending completion of the circumvention inquiry and a final determination on the matter. We believe that adoption of the proposal is necessary to preserve the *status quo* for the duration of the circumvention inquiry and ensure the appropriate application of AD/CVDs in the event of an affirmative final circumvention determination. Consistent with the aforementioned underlying policy objectives of the Act, including the protection of the revenue,[161] Commerce has decided that it is not appropriate to require notifying

[161] *Id.*

CBP of negative preliminary circumvention determinations with instructions to terminate the suspension of liquidation for any entries previously suspended by CBP and to refund any cash deposits paid as estimated duties.

With respect to the argument that provisional measures are not imposed following a negative preliminary determination in an investigation, Commerce will not direct CBP to suspend liquidation of entries not already suspended by CBP following a negative preliminary circumvention determination. However, any suspension of liquidation ordered by CBP pursuant to its own authority will be left undisturbed to preserve the *status quo* until the conclusion of the circumvention inquiry. We disagree with the commenters that argue the proposal is contrary to the statute. As discussed above, Congress enacted section 781 of the Act to combat certain forms of circumvention of AD/CVD orders; however, neither section 781 of the Act nor any other provision of the Act contains specific guidance regarding suspension of liquidation and cash deposit requirements in the context of circumvention inquiries. The rules adopted herein are a reasonable exercise of Commerce's discretion in light of the statutory aims to prevent circumvention and evasion. Moreover, Commerce's final circumvention determination and any subsequent instructions to CBP will clarify the appropriate status of such entries.

Consistent with Congress's intent when enacting the circumvention statute, the proposal not to require Commerce to notify CBP of a negative preliminary circumvention determination will help prevent companies from eluding the payment of duties if Commerce ultimately concludes in a final determination that the merchandise is circumventing an order.

(d) Clarifying the product at issue

One commenter opposes the proposal to suspend liquidation of unliquidated entries of the "product at issue" without any limitation as to when the entries occurred. The commenter states that the proposed regulations are vague because the language does not limit any new suspension of liquidation instructions to only apply to unliquidated entries made on or after the underlying case order's earliest suspension of liquidation. The commenter asserts that language must be

added to §§ 351.226(l)(2) and (3) that restricts the imposition of suspension of liquidation and cash deposit requirements to the entries of the applicable manufacturer or exporter. The commenter claims that the United States is not entitled to AD/CVDs on entries that are not covered by or subject to the order.

Response:

We have left paragraphs (l)(2) and (3) unchanged from how they were proposed with respect to this issue. First, we agree with the commenter that Commerce does have the authority to direct CBP to impose AD/CVDs on entries that are not subject to an order by virtue of pre-dating the first date of suspension associated with that order. Accordingly, such retroactive suspension of liquidation and collection of cash deposits would not be imposed on entries that predate the first date of suspension in the relevant AD and/or CVD proceeding. Second, the reference to the "product at issue" in paragraphs (l)(2) and (3) refers to the product that is the subject of the inquiry, and that for purposes of (l), the appropriate scope of products impacted, either on a country-wide or company-specific basis, are discussed under revised § 351.226(m), discussed below. Third, we do not disagree that AD/CVDs or cash deposits may not be applied on entries not covered by or subject to the order; however, the commenter's assertion that Commerce must limit the imposition of suspension of liquidation and cash deposit requirements to the entries of the applicable manufacturer or exporter is incorrect. If Commerce determines that a product is subject to the order following an affirmative circumvention determination, then it has the authority to impose antidumping and/or countervailing duties to entries of that product. Additionally, as Commerce explains below in response to comments made on § 351.226(m), Commerce has the ability to apply a remedy which is producer-specific, exporter-specific, importer-specific, or a combination of any of those remedies Commerce also has the ability to apply its circumvention determination on a country-wide basis to all products from the same country as the particular product at issue and with the same relevant physical characteristics, and even to apply its circumvention determination to physically similar products as well (*i.e.*, not

physically identical in all relevant characteristics). Therefore, Commerce need not limit its ability to suspend liquidation for imports of merchandise found to be circumventing an AD/CVD order under § 351.226(l)(2) and (3).

(e) Notification to sureties

One commenter requests that sureties be notified, either by Commerce or CBP, at the time CBP is instructed to begin the suspension or continue the suspension of liquidation of entries for AD/CVD purposes in the context of a circumvention inquiry. This commenter argues that the duties demanded from sureties may be in amounts which exceed the bond and without any prior notice to the surety to allow for participation in administrative proceedings and communication with the bond principal, *i.e.*, the importer, to address or satisfy AD/CVD requirements. This commenter believes providing notice of any suspension of liquidation ordered in the context of circumvention inquiries will help sureties manage risk.

Response:

For the reasons discussed above regarding § 351.225(l), comment 12(f), in the context of scope, we have not modified paragraph (l) in § 351.226 to include a requirement to notify the involved surety or sureties that Commerce has instructed CBP to suspend or to continue to suspend liquidation of entries for AD/CVD purposes. However, we note that, under § 351.226(b) and (d)(3), sureties will be notified of Commerce's self-initiation of a circumvention inquiry or initiation of a circumvention inquiry based on a request through publication in the *Federal Register*.

13. Section 351.226(m) – Applicability of circumvention determinations; companion orders

Section 351.226(m) is the provision through which Commerce applies circumvention determinations. Commerce received several comments on this proposal, with some commenters expressing satisfaction that Commerce indicated under the proposed § 351.226(m)(1) that it would consider, based on the available record evidence, whether the circumvention determination should be applied on a country-wide basis, while others expressed concern with

that language. For those commenters advocating a country-wide application, they emphasize that a such an analysis avoids repeated requests for circumvention inquiries on the same product against exporters from the same country, thereby conserving Commerce resources and ensuring the effectiveness of trade remedies. They further suggest that Commerce take the additional step in the final regulations of making a country-wide application the default remedy for most circumvention determinations, with an exception only in rare cases for the application of a company-specific remedy.

Other commenters express concerns over the use of the country-wide remedy, asking Commerce to clarify the bases or criteria it would use to determine when the use of a country-wide remedy versus when a company-specific remedy is appropriate. Some commenters even oppose it outright, arguing that the country-wide remedy is too harsh when the majority of producers in a foreign country have not sought to circumvent the United States' AD and CVD orders. Those commenters argue that a company-specific remedy is more balanced, targeting only those participating in bad behavior.

Still other commenters suggest that Commerce limit a country-wide circumvention remedy to cases of repeated action and not apply the country-wide remedy to circumvention determinations in the first instance. They emphasize that the facts surrounding most circumvention allegations and findings are often exporter-specific, and only in rare cases do they involve repeated activity.

In addition, some commenters suggest that if Commerce does make a country-wide remedy the default remedy, that it also create a mechanism by which exporters may request exemption from that remedy. In rebuttal, other commenters agree with this suggestion and emphasize that because many exporters of the same merchandise have not engaged in any circumventing activities, the creation of an exemption mechanism would be a practical alternative when Commerce cannot individually analyze all companies willing to participate in circumvention proceedings or make a circumvention determination on a company-specific basis.

Several other commenters argue that Commerce should, in fact, expand the remedies available to it in § 351.226(m) to include not only country-wide remedies, company-specific remedies, and the use of certifications, as described in greater detail in § 351.228 of these regulations, but also a remedy which takes into consideration the possibility of future circumvention and is applied to imports of products similar to, but not the same as, the particular product subject to the circumvention inquiry. Specifically, those commenters cite to the remedy Commerce applied in *Wire Rod from Mexico*.[162] In that case, Commerce determined that to prevent the repeated circumvention by a company of the AD order, it found that all wire rod under 4.75 mm in diameter, including wire rod with a diameter less than 4.4. mm, produced and/or exported by that company, to be merchandise altered in minor respects and within the class or kind of merchandise subject to the order. The commenters argue that because discovering circumvention normally requires significant resources and time, Commerce should not have to wait for a company to circumvent an order in the same general manner again, as that could result in the repetitive undermining of U.S. trade remedy laws. They argue that Commerce should be able to foreclose predictable, potential circumvention schemes by applying a country-wide remedy that applies not only to identical products, but similar products, as well. Furthermore, they rebut the claims that Commerce should have any "default" remedy under § 351.225(m), because the appropriateness of a remedy should be one that is determined on a case-by-case basis.

Another commenter rebuts the arguments from some commenters that country-wide remedies should be applied only to parties who have repeatedly been found to circumvent an order. It notes that producer-specific circumvention findings are often ineffective because parties merely rearrange and shift operations to continue circumventing after Commerce has

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[162] *Carbon and Certain Alloy Steel Wire Rod from Mexico: Final Affirmative Determination of Circumvention of the Antidumping Duty Order*, 84 FR 9089 (Mar. 13, 2019), and accompanying Issues and Decision Memorandum (*Wire Rod from Mexico*); *see also Carbon and Certain Alloy Steel Wire Rod from Mexico: Preliminary Affirmative Determination of Circumvention of the Antidumping Duty Order*, 83 FR 53030 (Oct. 19, 2018), and accompanying Preliminary Decision Memorandum (*Wire Rod from Mexico Preliminary Memorandum*).

issued a circumvention finding. It highlights the importance of country-wide remedies to ensure relief from circumvention, when record evidence supports such an application.

Finally, one commenter expresses its support for Commerce's ability in § 351.226(m)(2) to request information concerning the product that is the subject of the circumvention inquiry for purposes of an administrative review under § 351.213.

Response:

Upon consideration of the various arguments on this provision, we have determined to revise § 351.226(m)(1). We agree with the commenters that Commerce has multiple potential remedies available to it upon an affirmative finding of circumvention, each of those listed in the final rule which may be combined with certain others listed if the facts warrant such an application. There may be other options for remedies, as well, so it is important to emphasize that this list is not exhaustive. Further, although the rule applies to products "from the same country," this language is not meant to delineate only the country of export. It could mean the country of export, but it could also mean the country of production or country of further processing, depending on the product at issue and the facts in a given case. It is not uncommon for products produced or further processed in one country to be transshipped and exported to the United States through another country. In that scenario, regardless of the reported country of export to the United States, if a product at issue was found to be circumventing an AD and/or CVD order, that merchandise could be considered "from" the country of production or further processing, and remedies under this provision could apply to those imported products.

Commerce has the ability to apply a remedy which is producer-specific, exporter-specific, importer-specific, or a combination of any of those remedies, such as applying a circumvention determination to merchandise produced and exported by a particular company, or merchandise produced by one company, exported by a second, and imported by a third. We have, therefore, included all of these options in the regulation.

Furthermore, Commerce has the ability to apply its circumvention determination on a country-wide basis to all products from the same country as the product at issue and with the same relevant physical characteristics. When Commerce uses the term "relevant" here, it means that if Commerce's circumvention determination focused on particular physical characteristics, such as the height and width of the particular product, then those are the physical characteristics which are the "same" and "relevant" for purposes of a country-wide application, regardless of producer, exporter, or importer.[163]

We agree with commenters who argue that Commerce has an additional practice, as reflected in *Wire Rod from Mexico*, where it may determine that based on record evidence and to prevent future evasion concerns, the appropriate remedy should include products which are similar to the circumventing merchandise. We have incorporated that option into the regulation as § 351.226(m)(1)(iii), and also provided that Commerce may apply that option on a country-wide basis.

Commerce frequently uses certifications in conjunction with other remedies in response to affirmative circumvention determinations. Thus, we have added reference to that remedy as well in § 351.226(m)(1). Further, we have used the conjunction "and" between these remedies, rather than "or," because Commerce also has the authority to apply a remedy which is a combination of two or more of these remedies, such as, for example, the use of certifications under § 351.228 and the country-wide remedy under § 351.226(m)(1)(i).

Additionally, Commerce has determined not to make any of these options a "default" option. We agree with the commenters who argue that Commerce should maintain flexibility in applying remedies to address its circumvention determinations on a case-by-case basis. For example, there may be cases in which Commerce finds that the circumvention of an order by a particular product was unique to a particular exporter, producer, or importer, and that it is

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[163] In other words, two products with the same height or width might be considered the "same," despite different colors or weights, if those additional physical characteristics are not relevant to Commerce's circumvention determination.

unlikely that other producers or exporters would or could engage in the same or similar forms of circumvention in the future. In that situation, Commerce might determine that the most appropriate remedy to apply in that case is a company-specific application. On the other hand, Commerce might conclude that the observed circumvention could be replicated by other producers, exporters, or importers of the same product, and, therefore, determine that the application of a country-wide remedy is appropriate.

The remedy which Commerce may apply with potentially the greatest impact, however, is that of the remedy used in *Wire Rod from Mexico*. In that case, Commerce had initially determined in an earlier circumvention determination that a producer and exporter had circumvented the *Wire Rod from Mexico* order through its production and export of wire rod with actual diameters between 4.75 mm and 5.00 mm.[164] Commerce, therefore, expanded the scope of the order through its circumvention determination to cover those products. Subsequently, the same company produced and exported wire rod with a 4.4 mm diameter, which Commerce found was a minor alteration to circumvent, yet again, the *Wire Rod from Mexico* order. In determining the appropriate remedy, Commerce considered the fact that the producer/exporter had now been determined twice to have circumvented the *Wire Rod from Mexico* order, engaging in efforts to evade the payment of AD duties. Further, there was evidence on the record that at least one other producer made wire rod with a diameter less than 4.4 mm. Commerce concluded that the record reflected that a remedy was necessary to ensure that the exporter/producer at issue in that case would not engage in further circumvention of the *Wire Rod from Mexico* order in the future. Thus, Commerce concluded that the "history of the proceeding" indicated that "limiting" the "affirmative circumvention finding in this inquiry to wire rod with a diameter greater than or equal to 4.4 mm and less than 4.75 mm could allow for

[164] *See Carbon and Certain Alloy Steel Wire Rod from Mexico: Affirmative Final Determination of Circumvention of the Antidumping Duty Order,* 77 FR 59892 (Oct. 1, 2012), and accompanying Issues and Decision Memorandum.

further circumvention of the *Order*" if the exporter/producer were permitted "to again make another marginal change to the diameter of its wire rod."[165]

In reaching that decision, Commerce explained the legal basis for its determination that it should apply this particular remedy under these specific facts. Citing to the legislative history accompanying the Omnibus and Trade Competitiveness Act in 1988, Commerce explained that Congress was concerned about preventing "circumvention and diversion" of United States trade laws, and the undermining of the effectiveness of trade remedies through "'loopholes,' *i.e.*, foreign companies evading orders by making slight changes in their method of production, because such scenarios "seriously undermine the effectiveness of the remedies provided by the antidumping and countervailing duty proceedings. …"[166] Accordingly, Commerce explained that as the agency "vested with authority to administer the antidumping laws in accordance with the legislative intent" and, it "has a certain amount of discretion [to act] ... with the purpose in mind of preventing the intentional evasion or circumvention of the antidumping duty law."[167]

Furthermore, Commerce explained that in "enacting the circumvention provisions, Congress did not intend to allow foreign companies to avoid antidumping duties by advantageously modifying their manufacturing process to produce merchandise altered in minor respects in form or appearance from that which is covered by the order. In similar circumstances, Commerce has found it appropriate to implement measures necessary to prevent future circumvention."[168] Commerce, therefore, concluded that the "circumstances of this proceeding require Commerce to exercise its discretionary authority under the antidumping duty

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[165] *See Wire Rod from Mexico Preliminary Memorandum* (emphasis in original).
[166] *Id.* (citing S. Rep. No. 100-71, at 101 and H.R. Rep. No. 100-576, at 600). Commerce also noted that in the SAA, Congress recognized that "aggressive implementation of [the circumvention statute] by the Commerce Department can foreclose these practices." *See id.* (citing the *SAA* at 892-95).
[167] *See id.* (citing *Tung Mung*, 219 F. Supp. 2d at 1343 (quoting *Mitsubishi I*, 700 F. Supp. at 555), *aff'd* in *Mitsubishi II*, 898 F.2d at 1583).
[168] *See id.* (citing to *Affirmative Final Determination of Circumvention of the Antidumping Duty Order on Certain Cut-to-Length Carbon Steel Plate from the People's Republic of China*, 76 Fed. Reg. 50996, 50997 (August 17, 2011), which was an affirmative circumvention that was applied to all producers in the subject country where circumvention occurred repeatedly by multiple parties producing and importing different specifications of cut-to-length plate that used boron).

law in a manner that is tailored to prevent future evasion or circumvention of the *Order* by" the producer/exporter at issue.[169]

In drafting the remedies listed in paragraph (m), we have determined that there may be situations in which Commerce applies its circumvention determinations to similar products not only on an exporter/producer basis, as it did in *Wire Rod from Mexico*, but also on country-wide basis. For example, if Commerce determines that more than one producer or exporter has consistently altered merchandise related to a single case, such a conclusion might lead Commerce to apply a "similar product" remedy to the country as a whole, regardless of producers, exporters, or importers. Likewise, Commerce might decide to apply a certification requirement under § 351.228 alongside a country-wide determination that covers the same products or a country-wide determination that covers similar products. As we have indicated, the most important factor is that Commerce has the flexibility to apply a remedy in accordance with a circumvention determination on a case-by-case basis which it finds to be appropriate given the facts on the record and its policies and practices.

In light of these changes to our regulations, we have not adopted the suggestion by multiple parties to create a new procedure by which to review additional exporters or producers to determine if parties that have not engaged in any circumventing activities should be exempt from country-wide determinations. Still, we recognize that, in some circumstances, Commerce uses the certification program, as described in § 351.228 of these regulations, to allow parties who have not engaged in the practices which Commerce determined were circumventing an order to certify that they did not participate in such conduct. Additionally, as discussed below under § 351.228, parties can seek a changed circumstances review or raise issues regarding ongoing certification requirements in the context of an administrative review, as appropriate.

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[169] *Id. (citing also to Appleton Papers, Inc. v. United States*, 929 F. Supp. 2d 1329, 1337 (CIT 2013) ("Commerce has a certain amount of discretion to act in order to 'prevent [] the intentional evasion or circumvention' of the Act. To that end, Commerce may impose measures ... where it believes they will be effective in preventing future circumvention of its orders.") (internal citations omitted)).

Finally, we have changed the term "merchandise at issue" to "product at issue" in paragraph (m)(2) to use the same terminology as that used in § 351.226(m)(1) and other provisions of these regulations.

14. Section 351.226(n) – Service of circumvention inquiry request; annual inquiry service list; entry of appearance

Section 351.226(n) provides the service procedures for the circumvention regulation. We received two comments on this provision.

First, one commenter requests that Commerce provide sureties "interested party" status and allow them to receive notice under this provision.

Second, another commenter points out that currently, Commerce automatically places foreign governments on the segment of a proceeding that commences under a CVD order, but under proposed § 351.226(m), all circumvention determinations applicable to companion orders will be conducted on the record of the AD order. That commenter, therefore, requests that Commerce modify § 351.226(n) to automatically place foreign governments on the segment of the AD proceeding in which the circumvention inquiry is conducted for both companion orders.

Response:

In response to the surety issue, as discussed in response to this same commenter under § 351.225(l) and (n) and other provisions, we have not provided sureties with "interested party" status because, among other reasons, section 771(9) of the Act lists the parties who are "interested parties" under the AD and CVD laws, and surety companies are not included on that list.

On the other hand, as we explained above, we have modified § 351.225(n) to automatically include foreign governments on the annual inquiry service list for AD or CVD proceedings after the foreign governments' first request to be on that list; meaning that if they are on that list they will receive copies of all circumvention inquiry requests. In light of the fact that foreign governments will get notification of all such requests, we disagree that they should also automatically be placed on the service list of particular segments of AD or CVD proceedings.

Like petitioners and all other interested parties, if they decide to participate in the circumvention inquiry segment of the proceeding, foreign governments will have an opportunity to timely request placement on a segment-specific service list.

In addition, in addressing comments on proposed § 351.226(n)(2), we realized that we had not included the self-initiation of circumvention inquiries in the description of determinations which lead to the establishment of a segment-specific service list in the *Proposed Rule*. Such an exclusion was an oversight. Accordingly, we have added language to that provision to that effect in these final regulations.

15. Section 351.226(o) – Suspended investigations; suspension agreements

Commerce received no comments on this provision. We have made minor modifications to this paragraph, however, to bring it into conformity with the similar provisions of §§ 351.225(p) and 351.227(o).

Covered Merchandise Referrals – § 351.227

Section 351.227 addresses procedures when Commerce receives a covered merchandise referral from CBP under section 517 of the Act. As explained in the *Proposed Rule*,[170] Commerce and CBP each have their own independent authorities under the AD/CVD statutory framework to address the circumvention and evasion of AD/CVD orders. Section 517 of the Act establishes a formal process for CBP to investigate potential duty evasion of AD/CVD orders. During an EAPA investigation, if CBP is unable to determine whether the merchandise at issue is "covered merchandise" within the meaning of section 517(a)(3) of the Act, pursuant to section 517(b)(4)(A) of the Act, CBP shall refer the matter to Commerce to make a covered merchandise determination (covered merchandise referral). In the *Proposed Rule*, Commerce proposed adopting new § 351.227 to address procedures and standards specific to covered merchandise referrals that Commerce receives from CBP in connection with an EAPA investigation.[171] To

[170] *See Proposed Rule*, 85 FR 49472 at 49489.
[171] *Id.* at 49489-91.

summarize, in proposing this new regulation, Commerce took into account considerations relating to flexibility in requesting the information that Commerce needs in making a covered merchandise determination, the timeliness of Commerce's covered merchandise determination in response to a CBP referral, and the need to afford parties opportunities to submit evidence and argument for Commerce's consideration and allow Commerce sufficient time to consider such evidence and argument for purposes of reaching a well-reasoned determination.[172]

The *Proposed Rule* also explained that there is a potential significant overlap between the inquiry that Commerce undertakes in response to a covered merchandise referral through a covered merchandise inquiry, a scope inquiry conducted under § 351.225, and a circumvention inquiry conducted under § 351.226. Congress has directed Commerce to make covered merchandise determinations pursuant to its existing authority under the Act,[173] and, thus, Commerce has utilized its authority and procedures for issuing scope and circumvention determinations to determine whether a product is "covered merchandise." Accordingly, many provisions in § 351.227 were crafted to mirror the corresponding provisions in §§ 351.225 and 351.226, which have been further revised in this final rule.

We received numerous comments and rebuttal submissions on the proposed adoption of § 351.227, some in favor and some in opposition. Below, we briefly discuss each provision, address any comments received, and, where appropriate, explain any changes to the *Proposed Rule* in response to comments. In addition, we explain additional modifications to the *Proposed Rule* where we have determined that such amendments brought § 351.227 into greater conformity with scope and circumvention regulations §§ 351.225 and 351.226, or otherwise provided greater clarity to these regulations.

1. Section 351.227(a) – Introduction

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[172] *Id.* at 49489-90.

[173] *See* section 517(b)(4)(A)(i) of the Act (providing that, upon referral from CBP, Commerce shall "…determine whether the merchandise is covered merchandise pursuant to the authority of [Commerce] under subtitle IV [of the Act.]").

Paragraph (a) is an introductory provision to § 351.227, which briefly describes the framework of CBP's EAPA investigations and covered merchandise referrals under section 517 of the Act and the procedures for Commerce's covered merchandise inquiries and determinations. We received no comments on § 351.227(a) and no changes are being made to this provision in this final rule.

2. Section 351.227(b) – Actions with respect to covered merchandise referral

Under § 351.227(b) of the *Proposed Rule*, Commerce proposed taking one of the following three actions within 15 days after receiving a covered merchandise referral that Commerce determines to be sufficient:[174] (1) initiate a covered merchandise inquiry; (2) self-initiate a circumvention inquiry in accordance with § 351.226(b); or (3) address the referral in an ongoing segment of a proceeding (*e.g.*, a scope inquiry under § 351.225 or a circumvention inquiry under § 351.226). After consideration of comments on the *Proposed Rule*, Commerce is adopting certain changes to § 351.227(b) in this final rule.

First, upon further consideration, we find it reasonable to increase the time period during which Commerce must decide what action to take upon receipt of a sufficient covered merchandise referral from 15 days to 20 days. In the *Proposed Rule*, we explained that, although the EAPA does not prescribe timing requirements for Commerce, we took timeliness into account in drafting the proposed deadlines and procedures in § 351.227.[175] While timeliness continues to be a significant consideration in drafting this final rule, increasing the proposed 15-day deadline to 20 days will give Commerce the time it needs at this initial stage while also ensuring that Commerce takes swift action after receiving a sufficient covered merchandise referral. This 20-day deadline remains shorter than the deadlines at similar stages in scope

[174] As explained in the *Proposed Rule*, in determining whether a covered merchandise referral is sufficient, Commerce may consider, among other things, whether the referral has provided the name and contact information of the parties to CBP's EAPA investigation, including the name and contact information of any known representative acting on behalf of such parties; an adequate description of the alleged covered merchandise; identification of the applicable AD and/or CVD orders; and any necessary information reasonably available to CBP regarding whether the merchandise at issue is covered merchandise. *See Proposed Rule*, 85 FR 49472 at 49490.

[175] *See Proposed Rule*, 85 FR 49472 at 49489.

inquiries under § 351.225(d) (30 days with an inquiry deemed initiated on day 31) and circumvention inquiries under § 351.226(d) (30 days with the possibility of a 15-day extension).

Second, we are removing one of the three actions in § 351.227 that Commerce proposed to take upon receiving a sufficient covered merchandise referral – paragraph (b)(2) that had provided that Commerce may self-initiate a circumvention inquiry in accordance with § 351.226(b). To be clear, Commerce retains the authority and discretion to self-initiate a circumvention inquiry pursuant to § 351.226(b) if it determines from available information that an inquiry is warranted. However, we are adopting an approach which will allow Commerce to immediately initiate a covered merchandise inquiry within 20 days of receipt of a sufficient referral and conduct a circumvention analysis in reaching a covered merchandise determination. Specifically, under § 351.227(b)(1), when read in conjunction with paragraph (f), Commerce may initiate a covered merchandise inquiry and rely on either the scope analysis described under § 351.225(j) or (k), or the circumvention criteria under section 781 of the Act (as reflected in paragraphs (h), (i), (j), and (k) of § 351.226), in issuing a covered merchandise determination. Importantly, initiation of a covered merchandise inquiry simply allows Commerce to begin its inquiry into the appropriate analysis to use for its covered merchandise determination. In other words, Commerce does not need to have identified, at this early stage of the proceeding, before the benefit of evidence and argument presented by interested parties, whether to conduct a scope or circumvention analysis. Rather, Commerce will consider the appropriate analysis on a case-by-case basis.

This framework, coupled with the expedited deadlines for completion of a covered merchandise inquiry under § 351.227(c) (a maximum deadline of 270 days, rather than a maximum deadline of 365 days under § 351.226(e) for completion of a circumvention inquiry), means that Commerce can still apply the same analysis and reach the same determination it would if it self-initiated a circumvention inquiry, but on an expedited basis. An additional consideration informing this approach is that, although a covered merchandise referral may be

found sufficient for purposes of initiating a covered merchandise inquiry, a referral likely will not have all the information needed regarding the elements necessary for a circumvention determination under section 781 of the Act, as required for self-initiation of a circumvention inquiry under § 351.226(b).[176] Thus, under this preferred approach described in § 351.227(b)(1), Commerce can initiate its covered merchandise inquiry, collect information and arguments from interested parties regarding either a scope analysis or the elements necessary for a circumvention determination (or both), and issue a determination on an expedited basis. For these reasons, we have removed reference to § 351.226(b) in § 351.227(b).

The one alternative to § 351.227(b)(1) is provided in § 351.227(b)(2) (paragraph (b)(3) in the *Proposed Rule*). Under this alternative, Commerce envisions that a scope or circumvention inquiry may already be underway at the time Commerce receives a sufficient covered merchandise referral. In this scenario, Commerce may elect to address the referral in an ongoing segment of the proceeding, rather than starting at the beginning of a new inquiry. Under such a scenario, as provided under § 351.227(e)(3), Commerce would transmit a copy of the final action in that segment to CBP in accordance with section 517(b)(4)(B) of the Act.

These changes simplify the procedures for covered merchandise referrals and still provide for the flexibility that Commerce endeavored to create in the *Proposed Rule*. The remaining changes to § 351.227(b) consist of minor revisions to the text of the two remaining subparagraphs and conforming changes required after removal of proposed § 351.227(b)(2).

(a) Authority to self-initiate a circumvention inquiry and to integrate covered merchandise referrals into other segments

One commenter asserts that Commerce is not authorized to use scope or circumvention tools to address covered merchandise referrals. This commenter opposes the covered merchandise regulations on the basis that CBP's EAPA investigations are largely conducted in

[176] This is because, for example, the information CBP provides with its referral may pertain only to a single company, may rely heavily on BPI, or may not provide the kind of detail Commerce might need to self-initiate a circumvention inquiry.

secret and these investigations do not conform to Commerce's unfair trade practice or the AD Agreement. This commenter appears to argue that Commerce should not pursue any additional fact-finding inquiries in addition to CBP's own inquiry, claiming that the legislative history of section 517 of the Act has made it clear that either Commerce or CBP was intended to conduct investigations of evasion, but not both. This commenter argues that Commerce's own factual inquiry is a waste of resources and a burden on the parties in an EAPA investigation. This commenter further argues that EAPA-covered merchandise referrals should not be intertwined with a circumvention inquiry or any other ongoing segment of a proceeding. In the alternative, this commenter argues that Commerce should not be permitted to self-initiate a circumvention inquiry unless it can meet the requirements set forth under proposed § 351.226(c)(2). This commenter also argues that Commerce should refrain from conducting a circumvention inquiry within the framework of an EAPA investigation because of the harsh consequences of EAPA investigations. The commenter claims that the proposed regulatory provision requiring that Commerce merely believe that an inquiry is "warranted" to initiate invites an abuse of Commerce's self-given authority to self-initiate a circumvention inquiry. The commenter asserts that if Commerce cannot resolve the scope issue that is the basis of CBP's covered merchandise referral within a reasonable time, then CBP's EAPA investigation should be concluded with no finding of evasion. After such a conclusion, Commerce could then conduct its circumvention inquiry within the framework of its own statutory authority. This commenter also made general comments about the differences between CBP's and Commerce's authority and claimed that Commerce does not have the authority to intertwine EAPA-covered merchandise referrals and AD/CVD proceedings.

A few commenters assert that the *Proposed Rule* does not explain why a referral from CBP should be treated differently, nor does the *Proposed Rule* justify Commerce's authority to do so. Another commenter argued that Commerce needs to distinguish between its different proceedings, including scope, circumvention, and covered merchandise inquiries, in order to

ensure predictability and legal certainty for stakeholders. This commenter requested clarification on the implication that, in its response to CBP on covered merchandise referrals, Commerce may rely on varying analyses regarding country of origin, scope rulings, or circumvention.

Several commenters rebut the assertion that Commerce cannot self-initiate a circumvention inquiry or integrate covered merchandise referrals into other segments of the proceeding. They argue that Congress authorized CBP to make a covered merchandise referral to Commerce so that Commerce may determine whether the products are covered by the scope of an order. They note that nothing precludes Commerce from relying on information from an EAPA investigation to initiate an inquiry under its own authority. They state that U.S. government agencies must take a coordinated approach to enforce trade laws and protect domestic industries. They also state that arguments that EAPA investigations and Commerce's proceedings should never be intertwined are irrelevant, legally flawed, and should be dismissed.

Response:

We disagree with the commenters that argue Commerce should not conduct a covered merchandise inquiry in response to a covered merchandise referral from CBP. As explained in the *Proposed Rule*,[177] pursuant to section 421 of the TFTEA/EAPA, section 517 was added to the Act and establishes a formal process for CBP to conduct an EAPA investigation. If CBP is unable to determine whether the merchandise at issue is covered merchandise within the meaning of section 517(a)(3) of the Act, then section 517(b)(4) of the Act requires CBP to make a covered merchandise referral to Commerce. Pursuant to section 517(b)(4)(A)(i) of the Act, Commerce determines whether merchandise is covered by the scope of an order "pursuant to the authority of the administering authority under title VII." Title VII of the Act provides the basis for Commerce's authority to administer the AD/CVD laws, including making class or kind determinations.[178] Thus, Congress expressly provided that, in answering a covered merchandise

[177] *See Proposed Rule*, 85 FR 49472 at 49489.
[178] *Id.* at 49475, 49484; *see also* section 701(a) of the Act; section 706(a)(2) of the Act; section 731(a) of the Act; section 736(a)(2) of the Act; and section 771(25) of the Act.

referral, Commerce should use its existing authority to determine whether the merchandise at issue is covered by the scope of the order. In doing so, Congress did not limit Commerce in the procedures that it may use to determine whether the merchandise at issue is covered by the scope of an order.

The commenter's arguments regarding the legislative history and whether Commerce should be pursuing any fact-finding inquiry in relation to a covered merchandise referral from CBP are contrary to Congress's intent as expressed in the language of section 517 of the Act. When CBP submits its referral to Commerce, Commerce is charged with determining if the merchandise at issue is subject to the scope of an order. If Commerce could not request information from parties, and conduct its own fact-finding inquiry, then it would be unable to perform its function under the statute to answer CBP's referral. Commerce's existing authority allows it to conduct its own fact-finding inquiry to make a class or kind determination and, as explained in the *Proposed Rule*, § 351.227 allows for flexibility in relying on the standards for scope issues under § 351.225 or circumvention issues under § 351.226, as appropriate, in issuing a covered merchandise determination. While Commerce has only received a limited number of these referrals to date, analyzing a covered merchandise referral under these criteria is consistent with how Commerce has answered covered merchandise referrals.[179] For further clarity, as provided in adopted § 351.227(b)(2), Commerce may also address a covered merchandise referral in the context of an ongoing segment of the proceeding. Furthermore, as discussed below under § 351.227(d)(5)(ii), Commerce may also rescind a covered merchandise inquiry and address a covered merchandise referral in another segment of the proceeding, as appropriate.

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[179] Commerce has addressed covered merchandise referrals using both scope and circumvention analyses. *See, e.g., Wooden Bedroom Furniture From the People's Republic of China: Notice of Covered Merchandise Referral,* 83 FR 9272 (March 5, 2018) (*Wooden Bedroom Furniture*); *Hydrofluorocarbon Blends From the People's Republic of China: Notice of Covered Merchandise Referral,* 83 FR 9277 (March 5, 2018) (*HFC Blends*); and *Diamond Sawblades and Parts Thereof From the People's Republic of China: Notice of Covered Merchandise Referral,* 83 FR 9280 (March 5, 2018) (*Diamond Sawblades*).

Nor do we agree with commenters' argument that Commerce does not have the authority to self-initiate a circumvention inquiry in the context of a covered merchandise referral. As explained above, Congress authorized Commerce to determine whether the merchandise at issue is covered by the scope of an order, and Congress did not limit Commerce's discretion in determining the appropriate procedures to make a covered merchandise determination. In any event, as explained above, Commerce has removed the express reference to self-initiation of a circumvention inquiry under § 351.227(b) for purposes of streamlining its procedures because a circumvention analysis can be performed, on an expedited basis, in a covered merchandise inquiry as provided for under § 351.227(b) and (f). Nor do we find persuasive the argument that Commerce must refrain from conducting a circumvention inquiry within the framework of an EAPA investigation because of the "harsh consequences" of an EAPA investigation. Notably, while Commerce's and CBP's duties and responsibilities under the AD/CVD statutory framework are often related, Commerce and CBP are U.S. government agencies that operate independently and pursuant to distinct statutory mandates and authorities. CBP's EAPA investigation and Commerce's segment answering a covered merchandise referral are two separate proceedings and each proceeding addresses different issues. CBP's EAPA investigation addresses evasion concerns as outlined under section 517 of the Act. This is distinct from, but aided by, Commerce's covered merchandise inquiry (or another segment of the proceeding used to address a covered merchandise referral), which determines whether merchandise is subject to the scope of an order.

Additionally, the adoption of § 351.227 is intended to fit into the current statutory scheme and the revised regulatory framework adopted in this final rule, under which Commerce may already request participation of interested parties and issue a substantive determination whether certain merchandise is covered by the scope of an AD/CVD order.

We also disagree with a commenter's argument that if Commerce cannot resolve the scope issue that is the basis of CBP's referral within a reasonable time, then CBP's EAPA

investigation should be concluded with no finding of evasion, and that Commerce can then examine whether the merchandise is circumventing an order. First, as Commerce noted in the *Proposed Rule*, Congress did not prescribe timing requirements for Commerce to reach its covered merchandise determination. As contemplated in the *Proposed Rule*, there may be a need for Commerce to seek further information to establish a more detailed description of the merchandise at issue, or engage in a complex analysis, before determining whether the merchandise is covered merchandise. Commerce is mindful that section 517(b)(4)(B) of the Act instructs Commerce to promptly transmit its determination to CBP, and that CBP's deadlines to complete its EAPA investigation will be stayed pending completion of Commerce's covered merchandise determination. At the same time, as explained further below in response to comments on proposed paragraph (c), Commerce requires sufficient time to request necessary information, allow parties an opportunity to comment and submit factual information, analyze the issues and record evidence, and to issue a covered merchandise determination. The deadlines established in paragraph (c) ensure that Commerce will issue a covered merchandise determination within a reasonable timeframe and are more expedient than the deadlines established for scope and circumvention inquiries.

Second, this commenter's argument conflates the two different proceedings. Under section 517(b)(4)(A)(i) of the Act, Commerce is tasked with determining whether the merchandise at issue is covered by the scope of the order, not determining whether covered merchandise has entered the United States through evasion.

Finally, as noted above, Commerce is not precluded from conducting a covered merchandise referral in a circumvention inquiry as a means to address CBP's covered merchandise referral. The commenter's argument to the contrary suffers from the misconception that unliquidated entries of products that circumvent an AD/CVD order and enter without the payment of duties are beyond the reach of trade remedies unless and until a domestic interested party alerts Commerce that circumvention is occurring and Commerce actually initiates a

circumvention inquiry. Congress enacted section 781 of the Act to combat certain forms of circumvention of AD and CVD orders; however, neither section 781 of the Act nor any other provision of the Act contains specific guidance regarding when merchandise found to be circumventing an AD and/or CVD order should be subject to the order. As discussed in great detail above in our analysis under § 351.226(l), merchandise not covered by the literal terms of an order may, under certain factual scenarios, be subject to the imposition of AD/CVDs prior to the date a circumvention inquiry is initiated. Moreover, Commerce's regulations do not address CBP's independent authority to suspend liquidation for purposes of its EAPA investigation under section 517 of the Act.

(b) Participation of interested parties and opportunity to comment prior to initiation

We received a few comments on proposed § 351.227(b) requesting clarification on the participation of interested parties in the segment of the proceeding used to address a covered merchandise referral, as well as whether parties will have an opportunity to comment on a covered merchandise referral prior to Commerce initiating a covered merchandise inquiry. One commenter noted that in the *Proposed Rule*, Commerce stated it will decide whether to initiate an inquiry in response to a covered merchandise referral from CBP within 15 days. This commenter requested that Commerce modify proposed § 351.227(b) to notify interested parties on the annual inquiry service list of the referral from CBP within 7 days of receipt of the referral. This commenter also requested that Commerce provide parties an opportunity to comment on the referral prior to initiating a covered merchandise inquiry.

Another commenter rebutted the request to provide notice to petitioners and other interested parties on the annual inquiry service list when Commerce receives a covered merchandise referral from CBP. This commenter requested that we not allow these parties an opportunity to comment on the covered merchandise referral prior to initiating a covered merchandise referral.

Response:

Commerce is not adopting the recommendation to notify interested parties on the annual inquiry service list when Commerce receives a covered merchandise referral from CBP. Nor is Commerce adopting the recommendation to allow parties to comment on the covered merchandise referral prior to initiating a covered merchandise inquiry. As explained above, Congress authorized CBP to investigate evasion of AD/CVD orders. If CBP cannot determine whether the merchandise at issue is covered merchandise, then it is required to refer the inquiry to Commerce and Commerce is required to make a covered merchandise determination. Given this statutory directive, Commerce will not notify parties or allow parties the opportunity to comment on the covered merchandise referral prior to taking action in response to a referral. Instead, Commerce will publish notice of its intent to address the covered merchandise referral pursuant to § 351.227(b) in the *Federal Register*, allow parties the opportunity to enter an appearance on the segment-specific service list, submit an APO application, and review and comment on the referral in accordance with its outlined procedures.

Additionally, Commerce disagrees with one commenter's claim that it cannot allow any party that is not an interested party in CBP's EAPA investigation to participate in a covered merchandise inquiry. As explained above, pursuant to section 517(b)(4)(A)(i) of the Act, Commerce determines whether merchandise is covered by the scope of an order "pursuant to the authority of the administering authority under title VII." Title VII of the Act provides the basis for Commerce's authority to administer the AD/CVD laws, including making class or kind determinations.[180] Thus, Congress expressly provided that Commerce should use its existing authority in responding to a covered merchandise referral from CBP. By statute, Commerce provides interested parties the opportunity to comment and participate in AD/CVD proceedings.[181] Commerce has provided additional explanation below under proposed §

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[180] *See Proposed Rule*, 85 FR 49472 at 49475, 49484; *see also* section 701(a) of the Act; section 706(a)(2) of the Act; section 731(a) of the Act; section 736(a)(2) of the Act; and section 771(25) of the Act.

[181] *See* section 782(g) of the Act ("Information that is submitted on a timely basis to the administering authority…during the course of a proceeding under this title shall be subject to comment by other parties to the proceeding within such reasonable time as the administering authority…shall provide."); *see also Mid Continent*

351.227(n) in response to this comment regarding interested party participation in Commerce's segment of the proceeding addressing a covered merchandise referral.

3. Section 351.227(c) – Deadlines for covered merchandise determinations

Section 351.227(c) of the *Proposed Rule* provided the deadline for Commerce to conduct covered merchandise inquiries and also set forth that Commerce could only extend the deadline if it determines that the inquiry is extraordinarily complicated. After consideration of the comments on the *Proposed Rule*, detailed below, and in light of changes to §§ 351.225 and 351.226, Commerce is adopting certain changes to § 351.227(c) in this final rule. For clarity, we first describe the revisions to § 351.227(c) in these introductory paragraphs, before discussing comments and responses to comments below.

To conform with similar provisions in §§ 351.225 and 351.226, we have revised the heading of proposed § 351.227(c) from "Time limits" to "Deadlines for covered merchandise determinations," which better reflects the nature of this. Similarly, as with §§ 351.225 and 351.226, we have moved and made minor revisions to the provision allowing for alignment of the deadlines for a covered merchandise determination with the deadlines in another segment of a proceeding from proposed § 351.227(d)(6) to § 351.227(c)(3). Placing the alignment provision within § 351.227(c) clarifies that the deadline for a covered merchandise determination will no longer apply if the deadline for the covered merchandise inquiry is aligned with the deadlines of another segment of the proceeding.

While we are adopting § 351.227(c)(1) and the initial 120-day deadline for a covered merchandise determination as proposed in the *Proposed Rule*, as further explained below, we are changing § 351.227(c)(2) in this final rule to increase the number of days that Commerce may extend the deadlines for issuing a final covered merchandise determination from an additional 60 days to up to an additional 150 days (for a fully-extended total of 270 days). Additionally, we

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Nail Corp. v. United States, 712 F. Supp. 2d 1370, 1375 (CIT 2010) ("Congress has provided a fair process for commenting within the statutory language of [section 782(g) of the Act].").

are changing the standard for an extension under § 351.227(c)(2) from "extraordinarily complicated" to "good cause," and have provided examples of situations in which good cause exists to warrant an extension. One example of good cause specific to covered merchandise inquiries that we have added in § 351.227(c)(2)(iii) refers to a situation where Commerce has determined to address a scope or circumvention issue from another segment of the proceeding (such as a scope or circumvention inquiry) involving the same or similar products in the covered merchandise inquiry. These changes provide Commerce with flexibility as it continues to gain experience in this new area of the law, establish procedures that remain more expedient than those provided for scope inquiries under § 351.225 and circumvention inquiries under § 351.226, and ensure that Commerce will have sufficient time to consider all evidence and arguments submitted and reach a well-reasoned determination that may be subject to judicial review.

As noted above, Commerce received numerous comments on § 351.227(c). Summaries of those comments, and responses to those comments, are provided below.

(a) Clarification of applicable deadlines

We received several comments asking for clarification of the applicable deadlines when Commerce receives a covered merchandise referral, or otherwise proposing alternative deadlines. Several commenters generally request that Commerce complete covered merchandise inquiries on an expedited basis. One group of commenters proposes that Commerce complete a covered merchandise inquiry within 45 days of the initiation notice publication date, with an extension possibility of an additional 45 days if the covered merchandise inquiry is extraordinarily complicated. This group of commenters argues that an expedited timeframe is appropriate and fair because parties have already participated in the EAPA investigation for up to 360 days. Two other commenters propose that the expedited timeframes in proposed § 351.227(c) should apply to circumvention inquiries self-initiated under proposed § 351.227(b)(2). One commenter requests clarification of what time limits apply when Commerce addresses a covered merchandise referral in an ongoing segment under proposed § 351.227(b)(3). Another

commenter proposes that Commerce revise proposed § 351.227(b)(3) to state that Commerce will address a covered merchandise referral in an ongoing segment only if Commerce determines it can do so "without undue delay."

Response:

We have not adopted the proposed modifications to further expedite the deadlines in Commerce's covered merchandise inquiries. As explained further below, we have made changes to § 351.227(c) to maintain flexibility and to provide Commerce additional time to complete a covered merchandise inquiry. Specifically, although we are adopting the initial 120-day period under § 351.227(c)(1), we are increasing the number of days that Commerce may extend the deadlines for issuing a final covered merchandise determination under paragraph (c)(2) from an additional 60 days to up to an additional 150 days (for a fully-extended total of 270 days). Additionally, we are changing the standard for an extension from "extraordinarily complicated" to "good cause," and have provided examples of situations in which good cause exists to warrant an extension. We believe an "extraordinarily complicated" standard would unduly restrict Commerce's ability to extend the deadline and, although the same standard is provided under new § 351.226(e)(2), that heightened standard applies only to an extension that goes beyond the 300-day deadline referenced in the statute for a final circumvention determination.[182] We believe that applying the same standard in covered merchandise inquiries at the 120-day mark is unworkable and fails to recognize that covered merchandise referrals will often present complex scope and circumvention issues.

As we stated in the *Proposed Rule*, in proposing § 351.227, Commerce has taken into account considerations relating to flexibility in Commerce's ability to request information necessary for its analysis in reaching a covered merchandise determination, timeliness, and scheduling that allows Commerce sufficient time to analyze the issues and the record evidence

[182] *See* section 781(f) of the Act.

and issue a determination that may be subject to judicial review.[183] Although the EAPA does not prescribe timing requirements for Commerce to reach its covered merchandise determinations, Commerce is mindful that section 517(b)(4)(B) of the Act instructs Commerce to promptly transmit its determination to CBP, and that CBP's deadlines to complete its EAPA investigation will be stayed pending completion of Commerce's covered merchandise determination. Upon further consideration, Commerce believes additional time may be necessary to allow Commerce sufficient time to request necessary information, allow parties an opportunity to comment and submit factual information, analyze the issues and record evidence, and to issue a covered merchandise determination. As explained below in our discussion of § 351.227(d), we have increased the time periods for parties to comment and submit factual information. While these increases provide interested parties with additional time to comment and submit factual information to Commerce, they further shorten the time Commerce has to consider and analyze such information, and to subsequently issue a timely and well-reasoned covered merchandise determination that may be subject to judicial review.

Additionally, Commerce is cognizant that covered merchandise inquiries are a new type of segment, and, to date, the limited number of covered merchandise referrals Commerce has received have presented novel or complex issues. Thus, Commerce believes it is important to maintain flexibility to ensure sufficient time for Commerce to complete a covered merchandise determination. Nonetheless, Commerce continues to be mindful of timeliness considerations and notes that even with the additional extension days, the deadline to complete a fully extended covered merchandise inquiry under § 351.227(b)(1) is shorter than the deadlines to complete a fully extended scope or circumvention inquiry under §§ 351.225 and 351.226. Moreover, it is not necessarily the case that Commerce will always extend the deadline for a covered merchandise inquiry, especially when the inquiry is fairly simple, straightforward, and/or uncontested. In such cases, Commerce might issue a covered merchandise determination within

[183] *See Proposed Rule*, 85 FR 49472 at 49489-90.

the initial 120-day period provided under § 351.227(c)(1). Nor is it necessarily the case that Commerce will extend the deadline of a covered merchandise inquiry the full 150 days allowed under § 351.227(c)(2) if Commerce is able to issue a covered merchandise determination within a shorter timeframe.

In response to the comment that the expedited time frames in § 351.227(c) should apply to circumvention inquiries self-initiated under proposed § 351.227(b)(2), as discussed above, we have removed this proposed subparagraph. However, to be clear, Commerce maintains its authority to self-initiate a circumvention inquiry under § 351.226(b) if it determines from available information that an inquiry is warranted. If Commerce self-initiates a circumvention inquiry, § 351.226 would govern and the deadlines under § 351.226(e) would apply.

In response to the comment asking for clarification of what deadlines apply when Commerce addresses a covered merchandise referral in an ongoing segment of the proceeding, we clarify that, in that situation, the deadlines in the ongoing segment would continue to apply. By contrast, if Commerce initiates a covered merchandise inquiry under § 351.227(b)(1), the expedited deadlines of § 351.227(c) apply.

In response to the comment that Commerce should only address a covered merchandise referral in an ongoing segment if it determines it can do so "without undue delay," we disagree that it is necessary to revise the regulation to include this language. As noted above, however, Commerce is mindful of timeliness considerations and will continue to take these considerations into account when it receives a covered merchandise referral from CBP.

(b) Deadline for issuance of preliminary covered merchandise determinations

One commenter argues that Commerce should also have a deadline for preliminary covered merchandise determinations when not issued concurrently with the initiation of a covered merchandise inquiry. According to this commenter, this would allow for greater certainty and clarity because interested parties would know when to expect a preliminary covered merchandise determination.

Response:

We have not adopted changes establishing a deadline for preliminary covered merchandise determinations. As with scope inquiries, Commerce is not required to issue a preliminary covered merchandise determination in every case. When Commerce determines that a preliminary covered merchandise determination is warranted, we do not believe Commerce should be restricted by a specific deadline in the regulations. Instead, we believe that Commerce should have the flexibility to determine whether to issue a preliminary covered merchandise determination. Furthermore, it would be unreasonable to require Commerce to issue a preliminary covered merchandise determination when the facts on the record are simple enough for Commerce to issue a final covered merchandise determination on or before 120 days after the date of notice of initiation of a covered merchandise inquiry is published in the *Federal Register*. Therefore, we have not modified the deadlines in § 351.227(c) to mandate the issuance of a preliminary covered merchandise determination.

4. Section 351.227(d) – Covered merchandise inquiry procedures

Section 351.227(d) of the *Proposed Rule* provides the procedures for covered merchandise inquiries, including the deadlines for comments and the submission of factual information, in the event such an inquiry is initiated pursuant to paragraph (b)(1). Much of this provision tracks the procedures provided for scope inquiries under § 351.225(f) and circumvention inquiries under § 351.226(f). As discussed above, we have considered the comments submitted regarding these procedures and have determined to modify the proposed deadlines to allow interested parties additional time to submit comments and factual information from 20 to 30 days under § 351.227(d)(1), from 10 to 14 days under § 351.227(d)(1) through (3), and from five to seven days under § 351.227(d)(2) and (3). This follows the same modifications to the deadlines for comments and factual information in scope and circumvention inquiries under §§ 351.225 and 351.226. We have also made a minor revision to the text of § 351.227(d)(3) to add language that was inadvertently omitted in the *Proposed Rule*. Within

proposed § 351.227(d)(4), one commenter identified an incorrect reference to "paragraphs (e)(1) through (3)," which we are correcting to make reference to "paragraphs (d)(1) through (3)" as intended in the *Proposed Rule*.

Additionally, in line with the changes to similar provisions in §§ 351.225 and 351.226, we have made changes to § 351.227(d)(5) to provide clarity and to establish more streamlined procedures in covered merchandise inquiries. Specifically, we have limited this provision to provide that Commerce may rescind a covered merchandise inquiry in a variety of situations and removed language indicating that Commerce may "forgo" such an inquiry. As established under § 351.227(b)(2), Commerce may determine not to initiate a covered merchandise inquiry if it determines to address the issue in another segment of the proceeding. With respect to rescission, § 351.227(d)(5) provides that, if Commerce determines it appropriate to do so, Commerce may rescind, in whole or in part, a covered merchandise inquiry. We have also included an express requirement for Commerce to notify interested parties when a covered merchandise inquiry has been rescinded.

Proposed § 351.227(d)(5) further provided a non-exhaustive list of three situations in which Commerce may rescind a covered merchandise inquiry. In this final rule, we have adopted the first situation listed in § 351.227(d)(5)(i) (*i.e.*, rescission when CBP withdraws its covered merchandise referral). We have removed proposed § 351.227(d)(5)(ii) and (iii), which, upon reflection, may have led to some confusion about the interplay between covered merchandise inquiries and other segments of a proceeding. Therefore, we are adopting a new § 351.227(d)(5)(ii) to describe a situation where, after initiation of a covered merchandise inquiry, Commerce may rescind the inquiry if it determines that it can address the covered merchandise referral in an ongoing scope or circumvention inquiry. Under such a scenario, as provided under § 351.227(e)(3), Commerce would transmit a copy of the final action in that segment to CBP in accordance with section 517(b)(4)(B) of the Act. These changes also reflect that we do not consider it appropriate to rely on a prior scope or circumvention determination to serve as the

basis for a covered merchandise determination without conducting an inquiry (whether a covered merchandise inquiry or an ongoing scope or circumvention inquiry) and affording interested parties an opportunity to participate.

Lastly, we have made modifications to proposed § 351.227(d)(6) to conform to the changes being made to similar provisions in §§ 351.225 and 351.226 discussed above. In addition to minor revisions to the text of proposed § 351.227(d)(6), we have moved and made minor revisions to the provision allowing for alignment of the deadlines for a covered merchandise determination with the deadlines in another segment of a proceeding from proposed § 351.227(d)(6) to § 351.227(c)(3), as explained above. We have also moved the provision explaining that Commerce may request information concerning the product that is the subject of a covered merchandise inquiry with respect to another segment of the proceeding, such as an administrative review, from proposed § 351.227(m)(2) to § 351.227(d)(7). The changes we have made are reflected in the regulatory text adopted in this final rule.

Several commenters propose that Commerce allow interested parties an opportunity to comment and provide factual information prior to any decision to rescind a covered merchandise inquiry under proposed § 351.227(d)(5). These commenters indicate that there may be instances where Commerce decides to address its covered merchandise determination in a separate segment of the proceeding, but an interested party believes that the separate segment does not cover the product that is the subject of the referral. These commenters suggest that Commerce provide a period for interested parties to comment and provide factual information on a decision that a determination in another segment negates the need to conduct a covered merchandise inquiry, and further claim that this would serve as a procedural safeguard before rescission.

One commenter submitted rebuttal comments generally arguing that EAPA covered merchandise referrals and Commerce's AD/CVD proceedings should be kept separate, and that Commerce should not allow parties that are not a party to CBP's EAPA investigation to participate in covered merchandise inquires whatsoever.

Response:

Commerce is not adopting the proposal to allow interested parties an opportunity to comment and provide factual information prior to a decision to rescind a covered merchandise inquiry under § 351.227(d)(5). As stated in the *Proposed Rule*, Commerce recognizes the potential significant overlap between a covered merchandise inquiry, scope inquiry, circumvention inquiry, and any other segments of a proceeding that may address scope issues.[184] There may be situations in which it may not be apparent that Commerce can address a covered merchandise referral in another segment of a proceeding until after Commerce initiates a covered merchandise inquiry under § 351.227(b)(1). Additionally, there may be situations in which CBP withdraws its request for a covered merchandise inquiry. In such situations, Commerce maintains its flexibility to rescind the covered merchandise inquiry. Although Commerce appreciates the concern that interested parties may not agree with a decision to rescind a covered merchandise inquiry, Commerce disagrees that it should provide a period for comment and submission of factual information in these instances. Commerce notes that it already provides interested parties multiple opportunities to comment and provide factual information under § 351.227(d), including after initiation of a covered merchandise inquiry. To the extent interested parties believe that Commerce should proceed with a covered merchandise inquiry after initiation, parties may provide comments to that effect at that time.

We disagree with the comment that Commerce should not allow parties that are not a party to CBP's EAPA investigation to participate in covered merchandise inquiries whatsoever. As also explained in response to similar comments submitted regarding proposed § 351.227(b) and (n), section 517 of the Act provides that Commerce should use its existing authority to determine whether the merchandise at issue is covered merchandise in responding to a covered merchandise referral from CBP.[185] By statute, Commerce provides interested parties the

[184] *Id*. at 49490.
[185] *See* section 517(b)(4)(A)(i) of the Act

opportunity to comment and participate in AD/CVD proceedings.[186] Commerce believes that this authority equally applies when it makes covered merchandise determinations, which may apply more broadly to merchandise that is produced, exported, or imported by interested parties that are not a party to CBP's EAPA investigation itself. Thus, Commerce disagrees that it should not allow parties that are not a party to CBP's EAPA investigation to participate in Commerce's covered merchandise inquiries.

5. Section 351.227(e) – Covered merchandise determinations

Section 351.227(e) addresses covered merchandise determinations issued by Commerce either in connection with a covered merchandise inquiry or another segment of the proceeding under which Commerce addresses a covered merchandise referral. Apart from a minor revision to the text in § 351.227(e)(3), no changes are being made to this provision in this final rule.

One commenter notes that in proposed § 351.227(e)(2) and (3), Commerce specifies that a final determination as to whether merchandise is covered by the scope of an order shall be "promptly" transmitted to Commerce. This commenter requests that the term "promptly" be expressly defined to mean no later than seven days after publication of a final determination in the *Federal Register*. This commenter notes that defining "promptly" will provide additional clarity and consistency, and support transparency.

Response:

We are not adopting the proposal to define "promptly" in § 351.227(e)(2) and (3) to mean no later than seven days after publication of a final determination. As Commerce stated in the *Proposed Rule*, the term "promptly" is not defined in section 517(b)(4)(B) of the Act.[187] However, consistent with the use of the same term in revised §§ 351.225 and 351.226, it is Commerce's expectation that prompt conveyance and transmittal of a copy of the final covered merchandise determination to CBP normally would occur no more than five business days from

[186] *See* section 782(g) of the Act.
[187] *See Proposed Rule*, 85 FR 49472 at 49490.

the publication of the determination in the *Federal Register*. We further clarify that to the extent Commerce's covered merchandise determination is addressed through an ongoing scope inquiry, which would not generally result in a final scope ruling that is published in the *Federal Register*,[188] we expect that prompt conveyance and transmittal of the covered merchandise determination would normally occur no more than five business days from the date of issuance of the final scope ruling.

6. Section 351.227(f) – Basis for covered merchandise determination

Section 351.227(f) in the *Proposed Rule* provided that Commerce may rely on the standards under § 351.227(j) and (k) of § 351.225, or the provisions of section 781 of the Act (paragraphs (h), (i), (j), or (k) of § 351.226), in reaching a covered merchandise determination. We have made minor revisions to clarify that Commerce may utilize the analyses described in any of the aforementioned provisions when conducting a covered merchandise inquiry.

(a) Circumvention analysis to address covered merchandise referrals

One commenter argues that Commerce should refrain from conducting a circumvention inquiry within the framework of an EAPA investigation because of the harsh consequences parties may face in EAPA investigations. The commenter asserts that if Commerce cannot resolve the scope issue that is the basis of CBP's covered merchandise referral within a reasonable time, then CBP's EAPA investigation should be concluded with no finding of evasion. After such a conclusion, Commerce could then conduct its circumvention inquiry within the framework of its own statutory authority.

Response:

We disagree with this commenter. We have already addressed this commenter's arguments on proposed § 351.227(b) in relation to Commerce's authority to address a covered

[188] Although final scope rulings are not published in the *Federal Register*, under § 351.225(o)), on a quarterly basis, Commerce publishes in the *Federal Register* a list of final scope rulings issued within the previous three months. Under § 351.225(o), Commerce may also include complete public versions of scope rulings on its website should it determine such placement is warranted.

merchandise referral in another segment of the proceeding (*i.e.*, an ongoing circumvention inquiry), and incorporate our response herein. However, we are also addressing this commenter's arguments in our analysis of § 351.227(f) to the extent the commenter objects to Commerce's ability to use the circumvention criteria under section 781 of the Act (paragraphs (h), (i), (j), or (k) under § 351.226) when conducting a covered merchandise inquiry. Consistent with our analysis of comments under § 351.227(b) above, we believe that we have the authority to conduct an analysis for circumvention under section 781 of the Act and § 351.226, as appropriate, in the context of a covered merchandise inquiry. Congress expressly provided that Commerce should use its existing authority in responding to a covered merchandise referral from CBP. This includes the authority to bring circumventing merchandise within the scope of an AD/CVD order. Finally, as noted above, Commerce is not limited from examining a covered merchandise referral in the context of a circumvention proceeding, as appropriate.

(b) Application of facts available and facts available with an adverse inference in covered merchandise inquiries

One commenter requests that, as Commerce stated with regard to § 351.225 in the *Proposed Rule*, Commerce should clarify that it may apply facts available or facts available with an adverse inference, pursuant to section 776 of the Act, where a party fails to provide information requested in a covered merchandise inquiry, or in a circumvention inquiry or other segment of the proceeding that Commerce uses to address a covered merchandise referral. This commenter states that this change is necessary to align § 351.227 with § 351.225, and to avoid adverse decisions based on the view that the two provisions are not parallel and must mean different things.

Response:

We agree and clarify herein that, just as with a scope ruling under § 351.225 and a circumvention determination under § 351.226, Commerce has the authority to apply facts available, including facts available with an adverse inference, pursuant to section 776 of the Act, to covered merchandise inquiries under § 351.227.

7. Sections 351.227(g)-(k)

As explained in the *Proposed Rule*, proposed §§ 351.227(g) through (k) in § 351.227 have been reserved to maintain consistency with §§ 351.225 and 351.226.

8. Section 351.227(l) – Suspension of liquidation

Section 351.227(l) provides the rules for the suspension of liquidation and the requirement of cash deposits for entries of the product at issue in covered merchandise inquiries. The Act does not provide direction to Commerce regarding the suspension of liquidation for entries subject to a covered merchandise inquiry. Under § 351.227(l) in the *Proposed Rule*, Commerce proposed that, at the time of an affirmative preliminary or final covered merchandise determination, Commerce would direct CBP to begin the suspension of liquidation for any unliquidated entries not yet suspended and collect applicable cash deposits. Commerce received numerous comments on § 351.227(l) for §§ 351.225 and 351.226 but received only one comment on proposed § 351.227(l) concerning notice to sureties, which has already been addressed elsewhere in this final rule (see discussion regarding § 351.225(l)). After consideration of corresponding changes to similar language in §§ 351.225(l) and 351.226(l), Commerce is adopting certain changes to § 351.227(l) in this final rule, which are briefly described below. Also discussed herein are the specific applicability dates for § 351.227(l) as referenced in the Applicability Dates section of this preamble.

Section 351.227(l)(1), which describes Commerce's actions at the time of initiation of a covered merchandise inquiry, is slightly revised from the *Proposed Rule* to mirror changes in §§ 351.225(l)(1) and 351.226(l)(1), which are described above. Additionally, because § 351.227(l)(2) and (3) concerning Commerce's actions in the event of an affirmative preliminary or final covered merchandise determination largely mirror similar provisions in §§ 351.225 and 351.226, with a few exceptions described below, we are adopting the same changes to paragraphs (l)(2) and (l)(3) in § 351.227 that are being made to the paragraphs (l)(2) and (l)(3) in §§ 351.225 and 351.226. Section 351.227(l)(4), which we touch on briefly below, describes

Commerce's actions in the event of a negative final covered merchandise determination, remains unchanged from the *Proposed Rule*. Lastly, Commerce is adding a new provision, paragraph (l)(5), to include specific reference to CBP's authority, described below.

New § 351.227(l)(2)(iii) and (l)(3)(iii) provide that, at the time of an affirmative preliminary or final covered merchandise determination, Commerce normally will direct CBP to begin the suspension of liquidation of certain unliquidated entries not previously suspended, which entered before the date of publication of the notice of initiation of the inquiry, and apply the applicable cash deposit rate. Under this framework, Commerce maintains the flexibility in covered merchandise inquiries to apply, depending on the nature of the product at issue in the covered merchandise referral, rules for the suspension of liquidation and cash deposits in a manner appropriate to the situation. This includes establishing a specific alternative retroactive suspension date. If Commerce considers an alternative date for not yet suspended entries pre-dating the date of initiation, Commerce may consult with CBP.

These rules differ in significant ways from the scope and circumvention suspension of liquidation rules under §§ 351.225 and 351.226, which reflects the unique nature of a covered merchandise inquiry. Specifically, in contrast to scope and circumvention inquiries, covered merchandise inquiries are a new type of proceeding and stem from a referral from CBP concerning potential evasion. Therefore, we find it appropriate to exercise our discretion on a case-by-case basis and may consult with CBP on whether to adopt an alternative date in light of the facts of a given case, including the circumstances which led to the referral. This will allow our practice to develop on a case-by-case basis, rather than adopt more detailed procedures in this final rule.

With respect to § 351.227(l)(4), we have retained language to provide that when Commerce issues a final negative covered merchandise determination, entries subject to suspension of liquidation as a result of another segment of a proceeding, if any, will remain suspended until the other segment of the proceeding has concluded. Although perhaps less

common in this context, it is possible that there could be a scenario in which it would not be appropriate to immediately direct CBP to liquidate entries without regard to duties. Therefore, to avoid confusion in this particular scenario, this language is retained in § 351.227(l)(4).

Lastly, new § 351.227(l)(5) provides language to clarify CBP's authority to take related action. Specifically, this language clarifies that the rules established by Commerce in § 351.227 do not affect CBP's authority to take any additional action with respect to the suspension of liquidation or related measures. This is identical language to the language for §§ 351.225(l) and 351.226(l), which is explained above and not repeated here.

Finally, there is one clarification to this revised framework, as noted in the DATES section and the Applicability Dates section of this preamble, and as discussed in great detail above regarding § 351.225(l)(2)(iii) and (l)(3)(iii) for scope inquiries and § 351.226(l)(2)(iii) and (l)(3)(iii) for circumvention inquiries, regarding the effective date and applicability dates. For the reasons explained above, Commerce will not apply paragraphs (l)(2)(iii) and (l)(3)(iii) of § 351.227 in a way that would direct CBP to begin the suspension of liquidation of unliquidated entries not yet suspended, entered, or withdrawn from warehouse, for consumption, prior to the effective date identified in the DATES section. However, as discussed above, the framework established in § 351.227 does not affect CBP's authority to take any additional action with respect to the suspension of liquidation or related measures.

9. Section 351.227(m) – Applicability of covered merchandise determination; companion orders

Section 351.227(m) addresses the effect and application of covered merchandise determinations. We received no comments on proposed § 351.227(m). However, because certain changes are being made to §§ 351.225 and 351.226, as discussed above, we have made conforming changes to paragraph (m) in § 351.227, as reflected in the regulatory text adopted in this final rule.

10. Section 351.227(n) – Service list

Section 351.227(n) provides the service procedures for covered merchandise inquiries. Given the unique nature of a covered merchandise referral, which originates from another agency, and is placed on the record of the relevant segment by Commerce once deemed sufficient, there is no need to adopt similar language from §§ 351.225(n) and 351.226(n) concerning the annual inquiry service list. Rather, as provided under § 351.227(b), once Commerce determines the referral is sufficient, Commerce will publish notice of its intent to address the covered merchandise referral in either a covered merchandise inquiry or another segment of a proceeding in the *Federal Register*, allow parties the opportunity to enter an appearance on the segment-specific service list, submit an APO application, and review and comment on the referral in accordance with its outlined procedures.

Several commenters generally support interested party participation in Commerce's segment of the proceeding used to address a covered merchandise referral, while a few commenters argue that Commerce should not allow a party that is not a party in CBP's EAPA investigation to participate in Commerce's segment of the proceeding, raising the same arguments raised regarding other provisions under § 351.227.

Response:

For the reasons discussed above, we disagree that Commerce should not allow a party that is not a party in CBP's EAPA investigation to participate in a segment of the proceeding used to address a covered merchandise referral. Consistent with the statute and Commerce's practice, parties that may have an interest in a determination of whether a product is covered by the scope of an order will have the opportunity to participate in that segment of the proceeding to address a covered merchandise referral.

11. Section 351.227(o) – Suspended investigations; suspension agreements

Section 351.227(o) allows the covered merchandise referral procedures set forth in § 351.227 to apply to suspended investigations and suspension agreements. We received no comments on proposed § 351.227(o). However, we have made minor revisions to reflect that

Commerce may, in general, use the procedures under § 351.227 in determining whether the product at issue is covered merchandise with respect to a suspended investigation or a suspension agreement.

Certifications – § 351.228

Section 351.228, a new provision proposed in the *Proposed Rule*, sets out procedures for complying with certification requirements that Commerce may impose on interested parties in the context of AD and CVD proceedings.[189] It also sets out consequences for a party's failure to satisfy certification requirements. We received comments from various parties regarding § 351.228. After consideration of comments, we are adopting § 351.228 as proposed in the *Proposed Rule* with clarifying edits. Specifically, we are modifying § 351.228 to reflect updated paragraph numbering and to mirror similar language regarding the suspension of liquidation, application of cash deposits, and assessment of AD/CVDs in other parts of Commerce's regulations.

1. General Comments

Several commenters generally support adopting § 351.228, because it codifies Commerce's existing practice to require certifications, for various reasons, in certain proceedings. Particularly, these commenters referred to certifications in Commerce's circumvention determinations, such as where Commerce has required parties to certify that the importer did not import, and the exporter did not ship, merchandise from a third country to the United States that originates from the country that is subject to the AD and/or CVD order. One party also explained that such certification requirements will allow Commerce to target merchandise circumventing an order with "greater precision" and finely tune scope language to correspond with a scope's intent. Another commenter expressed approval of Commerce's imposition of cash deposits if certifications are not provided or are false or fraudulent. Other commenters generally oppose § 351.228. Several commenters contend that additional

[189] *See Proposed Rule*, 85 FR 49472 at 49491.

certifications, such as those proposed in § 351.228, have little benefit towards Commerce's AD/CVD goals, are unnecessary, and are burdensome.

Response:

Commerce agrees with the comments supporting § 351.228. As discussed in the *Proposed Rule*, § 351.228 is a codification of existing practice, although it may also be applicable in contexts where it has not yet been applied, as well. For this reason, because § 351.228 merely codifies existing practice, we disagree with comments in opposition.

Section 351.228 itself does not impose any additional requirements on parties. Instead, this provision adopts existing practice and enhances that practice to clarify the consequences for failure to provide certifications to all parties subject to any current or future certifications. To the extent that parties are faced with any additional burdens pursuant to such certifications, such potential burdens are directly related to the proceeding itself in which Commerce adopted the certification and relevant requirements. Furthermore, as detailed below, Commerce considers the benefit that certifications afford the agency as well as CBP, including the flexibility to create certification processes in various proceedings for various reasons, to outweigh the burden on the parties. Specifically, certifications strengthen Commerce's enforcement of the AD/CVD laws, including taking steps to prevent evasion and circumvention of AD and CVD orders by producers, exporters, and importers.

In a given case, Commerce considers the burden on parties to complete the certification requirements while also taking into consideration the information that Commerce and CBP need in their respective roles in administering and enforcing AD/CVD orders. Furthermore, each certification is narrowly tailored to the particular situation – for example, allowing Commerce to target merchandise circumventing an order with "greater precision" and finely tune scope language to correspond with a scope's intent.

Additionally, the certifications and related requirements currently in effect and codified pursuant to § 351.228 serve a different purpose from CBP's existing requirements for importers

regarding the "reasonable care" standard. As explained below, certifications are an additional tool for Commerce and CBP to evaluate whether entries should be filed as either not subject to an AD and/or CVD order (*e.g.*, Type 01) or subject to an AD/CVD order (*e.g.*, Type 03), beyond current requirements. In instances in which certifications are required, parties would not be able to file an entry as not subject to an AD and/or CVD order without having the information or knowledge required of the certification, in light of Commerce's determination at issue. Although this information and knowledge may be inherent in a party's entry summary paperwork, the benefit of the certification is to ensure the party exercises reasonable care when determining the proper entry type.

2. Administrability and Vagueness

One commenter believes that § 351.228 is vague and not administrable. Specifically, the commenter requests that Commerce provide a list of proceedings in which certifications will be required and propose language that parties must use to certify their merchandise. Other commenters contend that Commerce requires flexibility in identifying proceedings where certification is appropriate. These commenters identify that Commerce has used certifications in circumvention inquiries, scope inquiries, and changed circumstances reviews, and Commerce should not limit its certification practice to specific proceedings because doing so would undermine its ability to address evasion. One commenter also contends that § 351.228 is unclear regarding to whom interested parties must transmit electronic certifications or how a party may demonstrate that it has complied.

Response:

Commerce is not providing an exhaustive list of every proceeding in which it intends to impose a certification requirement consistent with § 351.228. Rather, Commerce intends to evaluate proceedings on a case-by-case basis and determine whether a certification requirement under § 351.228 is necessary due to the specific circumstances of an individual proceeding. As explained above, Commerce has implemented a certification requirement as a result of

circumvention determinations,[190] but it has also instituted certification requirements to carry out the terms of certain suspension agreements and for various AD and CVD orders.[191]

Further, because Commerce intends to evaluate the circumstances of each case individually and determine whether a certification requirement is appropriate, it has provided several methods by which a party may be required to satisfy a certification requirement under § 351.228. For example, under § 351.228(a)(1), Commerce may require an interested party to maintain a completed certification, and, under § 351.228(a)(2), provide a certification electronically at the time of entry or entry summary. Additionally, under § 351.228(a)(3), where Commerce requires a party to maintain a completed certification, it may require the party to provide the certification, to whatever agency inquires, upon request. Section 351.228 also states that Commerce may require a party to otherwise demonstrate compliance with a certification requirement. Because Commerce is implementing certification requirements under § 351.228 on a case-by-case basis, it intends to issue specific instructions, if necessary, in the context of each proceeding where it implements certification requirements. Finally, Commerce is not providing certification language generally applicable in all relevant cases, but as it has done in the past, if necessary, Commerce intends to issue the relevant certification language in the context of specific proceedings.[192]

3. Relationship to CBP Measures

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[190] *See, e.g.*, *Carbon Steel Butt-Weld Pipe Fittings from the People's Republic of China: Final Affirmative Determination of Circumvention of the Antidumping Duty Order*, 84 FR 29164 (June 21, 2019) (*Butt-Weld Pipe from China Final*) (where Commerce instituted a certification requirement for parties to certify that their merchandise was not circumventing an existing order); and *Steel Concrete Reinforcing Bar from Mexico: Final Affirmative Determination of Circumvention of the Antidumping Duty Order*, 85 FR 34705, 34706 (June 8, 2020) (where Commerce required certifications from importers to exclude a category of merchandise produced for an identified construction project and produced according to an engineer's structural design consistent with an industry standard).

[191] *See, e.g.*, *Sugar from Mexico: Suspension of Countervailing Duty Investigation*, 79 FR 78044 (December 29, 2014) (where Commerce required importers, exporters, and producers to certify certain requirements with respect to entries of subject merchandise subject to the agreement.

[192] *See, e.g.*, *Butt-Weld Pipe from China Final*; *Carbon Steel Butt-Weld Pipe Fittings from the People's Republic of China: Preliminary Affirmative Determination of Circumvention of the Antidumping Duty Order*, 83 FR 35205 (July 25, 2018). In both, its preliminary and final Federal Register notices in some circumvention cases, Commerce has provided certification language as an appendix.

Several commenters claim that, because CBP already has measures in place requiring parties to properly classify entries and mechanisms to address missing or fraudulent certifications, § 351.228 is redundant or infringes CBP's existing authority. One commenter affirms that CBP already requires importers to exercise reasonable care in filing entries as Type 01 (*e.g.*, not subject to an AD/CVD order), or Type 03 (*e.g.*, subject to an AD/CVD order), and § 351.228 is, therefore, redundant. Several commenters take issue with the language in § 351.228 pertaining to missing certifications, or false or fraudulent certifications, asserting that there are already procedures in place for CBP to address missing and fraudulent certifications.[193] Additionally, some commenters claim that § 351.228 infringes on CBP's authority to enforce collection of import documents and address fraud.[194] The same parties also raised the possibility that, where both CBP and Commerce investigate certifications, under § 351.228, both agencies could reach opposing or contradictory conclusions.

Response:

We disagree. Although CBP may already require parties to exercise reasonable care in filing their entries as not subject to an AD and/or CVD order (*e.g.*, Type 01) or subject to an AD and/or CVD order (*e.g.*, Type 03), the certifications and related requirements currently in effect and adopted pursuant to § 351.228 serve a different purpose, and, furthermore, are intended to complement, not supplant, CBP's existing authority. We note that Commerce frequently imposes certifications in instances in which CBP may not be able to ascertain certain identifying details relevant to the product's classification as either subject to or not subject to an AD and/or CVD proceeding through physical inspection or the relevant sales documentation accompanying the entry summary, and, thus, could not confirm through these means alone whether a particular

[193] According to the commenter, importers that improperly declare goods face penalties under 19 U.S.C. 1592, 31 U.S.C. 3729, and they are also subject to EAPA, under 19 U.S.C. 1517.

[194] The commenter cites to 19 U.S.C. 1509 and 19 CFR 151.11, regarding CBP's authority to collect missing certifications, and 19 CFR 101.9(b), regarding CBP's procedure for parties to file post summary correction. Commenters also cite to 19 U.S.C. 1592, which prohibits importation, or attempted importation by false documents or material omission, and 19 CFR 171, Appendix B, which provide CBP with a mechanism to determine whether fraud has occurred.

entry has been properly designated as, for example, Type 01.[195] In such instances, both CBP and Commerce would rely on the certifications as an additional tool to ascertain whether the entry correctly was filed as an entry type not subject to an AD and/or CVD proceeding.

Additionally, as stated in the *Proposed Rule*, Commerce recognizes that CBP has its own independent authority to address import documentation related to negligence, gross negligence, or fraud.[196] However, enforcement of the AD/CVD laws, including taking steps to prevent evasion and circumvention of AD and CVD orders by producers, exporters, and importers, is well within Commerce's authority and is of paramount importance to Commerce. The addition of a certification requirement, where necessary based on a given case, strengthens the administration and enforcement of the AD and CVD orders by reducing the possibility that entries may be inaccurately filed by importers. Given the complex supply chains that may be involved with certain types of subject merchandise (which may involve input producers, intermediate processors, producers, exporters, trading companies, importers, *etc*.), certifications provide additional assurance that the producer, exporter, and/or importer sought adequate information regarding the relevant product in order to accurately certify a particular entry as not subject to an order.

Furthermore, as stated in the *Proposed Rule*, § 351.228 is not intended to supplant CBP's authority, nor is a formal finding by CBP required for Commerce to determine, within its own authority, that the certification is deficient and unreliable. Whether a certification contains "material" or "fraudulent" information is a determination that would be made by Commerce pursuant to its own authority and consideration of the normal meaning of those terms (although

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[195] For example, in the circumvention inquiry on certain corrosion-resistant steel products (CORE) from Vietnam, Commerce explained that CBP could not identify whether an entry of a CORE product from Vietnam contained substrate from China based on physical inspection. In addition, Commerce explained that "sales documentation provided along with the entry package may not be helpful, as the source of the substrate may not be apparent from invoices, bills of lading, etc., especially for steel that has passed through multiple hands (producer, exporter, trading company) obscuring the source of the substrate." *See Certain Corrosion-Resistant Steel Products from the People's Republic of China: Affirmative Final Determination of Anti-Circumvention Inquiries on the Antidumping Duty and Countervailing Duty Orders*, 83 FR 23895 (May 23, 2018) and accompanying IDM at 27-28.

[196] Additionally, HSI has the authority to investigate criminal violations related to illegal evasion of payment of required duties, including payment of AD/CVDs. *See, e.g.*, 18 U.S.C. 542.

determinations by other agencies may be informative). As noted, CBP has its own individual authority and would continue to exercise that authority as appropriate, as well.

In sum, certifications are imposed on a case-specific basis in numerous contexts; such certifications do not infringe on CBP's authority and operate in a manner that is consistent with the broader framework pertaining to CBP's requirements for importers.

4. Certification in Entry Summaries

Several commenters suggested that certifications could be a recordkeeping requirement, submitted with a party's entry summary, or some other means to implement the certification scheme. Parties requested that Commerce require certifications as part of the entry summary processes, as opposed to a recordkeeping requirement. These parties argued that certification at entry would be relevant where certification is tied to end-use.

Response:

Commerce disagrees with the commenters that Commerce should restrict its discretion in this manner. Generally, Commerce's current certifications impose a recordkeeping requirement. The regulation as drafted provides Commerce the flexibility, on a case-by-case basis, to determine whether a recordkeeping requirement, filing upon entry summary, or some other means is an appropriate mechanism to enforce the certification scheme.

5. Other Comments:

Numerous commenters recommended various additional changes to § 351.228. First, one commenter noted that certification requirements should not be unduly burdensome on importers/foreign producers and should not limit legitimate market access. Second, other commenters proposed that Commerce review certifications as a "meaningful and regular part" of annual reviews and/or implement an appeal process to allow for revisions to the certification scheme. Third, one commenter also proposes that Commerce articulate a notice requirement in the form of specific instructions to CBP, which would be available to all parties handling the entry to ensure that they are aware of the certification requirement. Fourth, one commenter

requests that notice should be provided to an importer's surety when the importer has not properly certified its entries and CBP has begun suspending and collecting cash deposits on the entries. This commenter argues that this will help the surety manage its risk and protect the revenue and integrity of the AD/CVD process. Fifth, one commenter also points to Commerce's existing requirement to provide an annual non-reimbursement statement for goods covered by AD/CVD orders and states that Commerce has not explained the benefit of requiring additional certifications or an estimate for the cost of the additional paperwork burden. Sixth, one commenter requested that Commerce require parties to affirmatively state a product's country of origin, or if applicable country/countries of processing in its certification.

Response:

First, in Commerce's view, the regulations as drafted are necessary and do not limit legitimate market access.

Second, Commerce already provides parties with a mechanism whereby it may reconsider a determination underlying a certification requirement as part of a changed circumstances or administrative review.[197] This process also allows Commerce flexibility to meaningfully review certifications and does not preclude Commerce from reviewing an existing certification in the context of an administrative review. However, Commerce intends to continue evaluating how it may incorporate a review of certifications in additional proceedings if it determines that such action is necessary and feasible.

Third, generally, where relevant, Commerce has provided notice in its preliminary and final determinations, as well as providing certification language in its customs instructions.[198]

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[197] *See, e.g.*, *Butt-Weld Pipe from China Final; see also Glycine from the People's Republic of China: Final Partial Affirmative Determination of Circumvention of the Antidumping Duty Order*, 77 FR 73426 (December 10, 2012).

[198] *See, e.g.*, *Certain Cold-Rolled Steel Flats Products from the People's Republic of China: Affirmative Preliminary Determination of Anti-Circumvention Inquiries on the Antidumping Duty and Countervailing Duty Orders*, 82 FR 58178 (December 11, 2017); *see also Certain Cold-Rolled Steel Flat Products from the People's Republic of China: Affirmative Final Determination of Circumvention of the Antidumping Duty and Countervailing Duty Orders*, 83 FR 23891 (May 23, 2018).

Commerce, therefore, intends to determine whether notice is relevant on a case-by-case basis and does not find it necessary to add a notice requirement to the existing language of § 351.228.

Fourth, as discussed above regarding § 351.225(l), (comment 12(f)), in the context of scope, we recognize and appreciate the unique role of sureties in the payment and collection of AD/CVDs, and that sureties need timely access to information to assess the risk that they assume when underwriting bonds for imports of merchandise subject to AD/CVD orders. As such, in response to these comments, Commerce intends to consult with CBP and explore whether and how sureties may be notified with respect to any certification requirement.

Fifth, we disagree with the commenter regarding the existing reimbursement certification for importers and additional burden to parties. The certification proposed in § 351.228 serves a different purpose from Commerce's importer reimbursement certification requirement. Whereas importer reimbursement certifications, described in § 351.402(f)(2), certify whether an importer was reimbursed AD or CVD duties by an exporter/producer, certifications under § 351.228 generally serve specialized purposes and are unrelated to reimbursement. For instance, Commerce has, upon making an affirmative determination of circumvention on a country-wide basis, permitted importers and exporters to certify that the importer did not import, and the exporter did not ship, merchandise from a third country to the United States that originates from the country that is subject to the AD and/or CVD order.[199] Additionally, with respect to any additional arguments regarding the potential cost and burden on parties, see the Classifications section in this final rule for further discussion.

Sixth, and finally, Commerce will consider the commenter's suggestion to require parties to affirmatively state a product's country of origin in its certification on a case-by-case basis. We do not believe such language needs to be adopted in the regulation itself at this time.

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[199] *See, e.g.*, *Butt-Weld Pipe from China Final*; and *Certain Cold-Rolled Steel Flat Products from the People's Republic of China: Affirmative Final Determination of Circumvention of the Antidumping Duty and Countervailing Duty Orders*, 83 FR 23891 (May 23, 2018).

Importer Reimbursement Certification – § 351.402(f)(2)

Section 351.402(f)(2) provides the requirement that importers certify with CBP prior to liquidation whether the importer has or has not entered into an agreement for the payment or reimbursement of AD/CVDs by the exporter or producer. In the *Proposed Rule*, Commerce proposed to modify this provision to better conform with CBP's procedures in collecting electronic, rather than paper, certifications and to clarify that, although the certification is required prior to liquidation, CBP could also accept the reimbursement certification in accordance with its protest procedures.[200] We received several comments both in support of, and in opposition to, the *Proposed Rule*, and no rebuttal comments.

After review of proposed § 351.402(f)(2) and the comments submitted pertaining to that section, we are modifying § 351.402(f)(2) in certain respects. Specifically, § 351.402(f)(2)(i), which does not require specific certification language, and, instead, allows for importers to certify to the substance of the certification prior to liquidation, now provides that the certification must contain the information necessary to link the certification to the relevant entry or entry line number(s). We are also adopting clarifying edits to reflect that § 351.402(f)(2)(iii) is an exception to § 351.402(f)(2)(i) in allowing for certifications to be filed during CBP's protest proceedings. In addition, we are modifying § 351.402(f)(2)(iii) to indicate that CBP may accept the certification in accordance with its protest procedures under 19 U.S.C. 1514, unless otherwise directed. We have left unchanged proposed § 351.402(f)(2)(ii), which allows the certification to be filed either electronically or in paper form in accordance with CBP's requirements, as applicable. We are also adopting minor clarifying edits to § 351.402(f)(2)(iii), which describes the entries subject to the certification requirement.

1. Streamlining Certification Requirements

A few commenters generally support the proposal to streamline the importer reimbursement certification process and make it more efficient and user-friendly. Several

[200] *See Proposed Rule*, 85 FR at 49472 at 49491-92.

commenters object to the removal of express certification language. Some of these commenters argue that Commerce should reconsider and retain the current, specific language to prevent foreign producers and exporters from responding to the certification in a self-serving and non-specific manner. These commenters argue that any relaxation of these requirements appears to be inconsistent with Commerce's goals to improve enforcement of the AD/CVD laws, as well as prevent evasion of current trade remedies.

Response:

We disagree with comments objecting to the streamlining of the certification language and procedures. However, in reviewing comments, Commerce is modifying § 351.402(f)(2)(i) to provide some additional specificity and clarify that the certification must contain the information necessary to link the certification to the relevant entry or entry line number(s). As discussed in the *Proposed Rule*, under CBP's current requirements, parties may certify to the substance of the current regulatory certification language through a variety of electronic means. Commerce is aligning its regulation with these requirements, which allow for better tracking, tracing, and matching of entries, by entry or entry line number, to the certification (either a blanket or individual certification). This also allows for easier retrieval of certification information directly from CBP's Automated Commercial Environment (ACE) system. Therefore, we find that this is a significant improvement upon the previous requirement for paper certifications and remains consistent with our goal of stronger enforcement while also improving administrability.

2. Acceptance of Certifications During Protest Proceedings

Several commenters object to proposed § 351.402(f)(2)(iii), which allows for missing certifications to be filed during CBP's protest proceedings under 19 U.S.C. 1514. These commenters argue that the proposal to allow a belated certificate runs contrary to the strong enforcement of trade remedy laws and is inconsistent with proposed § 351.402(f)(i)'s requirement that the importer must certify prior to liquidation. These commenters further argue

that the *Proposed Rule* acknowledges this conflict but offers no rationale, and that to the extent administrability concerns exist, those are best addressed by CBP's regulations.

Certain commenters also argue that in past cases Commerce has asserted its authority not only to assess double AD duties, but to also establish cash deposit rates reflecting the reimbursement of duties prior to assessment during the administrative review process. They also argue that the proposed revisions state that the requirement to file a certificate prior to liquidation remains obligatory; but allows CBP, at its discretion, to accept certificates in accordance with its protest procedures. According to these commenters, this would seem to allow importers to raise arguments with a separate agency that the adjustment should not be applied because the importer has provided the certificate during the protest proceeding, and this might otherwise undermine an established agency practice in addressing circumstances where Commerce has already determined that reimbursement has taken place and imposed double cash deposits accordingly.

Commenters also argue that Commerce should make clear that, under § 351.402(f)(3), if the certification has not been filed by the time of the administrative review, Commerce may presume that the failure to have filed the certification by that date is due to the payment or reimbursement of duties by the exporter or producer. These commenters argue that the proposed regulation allows for parties to file the certification during the protest phase, after the review process has ended and liquidation has occurred, and, therefore, Commerce cannot properly complete the review without the certification.

Response:

In light of these comments, Commerce is modifying § 351.402(f)(2)(i) and (iii) in certain respects to clarify and better explain that acceptance of a certification during the protest phase is an exception to the general rule that certifications are due prior to liquidation. However, contrary to certain comments, we do not see this as setting up a potential abuse of the process, because: (1) Commerce has included this relevant language in CBP instructions for almost a decade, and we are merely codifying that language in the regulation; (2) we have not seen

evidence of any abuse of this exception; and (3) nor have we heard any complaints from petitioners or CBP that there has been any abuse of this exception. Indeed, commenters were only able to point to three examples over the past 25 years where there has been a reimbursement scheme uncovered during the administrative review process, and those examples do not point to the unreasonableness of our policy choice in the *Proposed Rule*. Moreover, not all liquidations result in protests, and not all protests deal with importer reimbursement issues, so this issue has limited practical applicability.

Further, many of the comments at issue were focused more on a request to alter the deadline so that parties must submit their certification prior to the start of the administrative review (even earlier than the current deadline of prior to liquidation). In practice, most, if not all, companies filing certifications will do so upon entry summary – well before the start of the review. Additionally, during the course of the review, Commerce asks respondents directly if they have reimbursed or entered into any agreement to reimburse the importer – it is this information that we rely upon in conducting our AD calculations. If we discover there has been such reimbursement or agreement, we take that into account either by: (1) making a deduction to export price or constructed export price pursuant to § 351.402(f)(1)(i): or (2) when appropriate, applying facts available with an adverse inference pursuant to section 776(a)-(b) of the Act if the party has, for example, failed verification or otherwise failed to cooperate in this respect. The resulting assessment rate and cash deposit rate will then reflect the appropriate adjustment. If need be, in a given case, Commerce can explain in its CBP instructions that CBP should not accept certifications from a given importer during any protest proceeding based on any decisions made with respect to this issue in the administrative review. Therefore, in light of the above, Commerce is modifying § 351.402(f)(2)(iii) to indicate that CBP may accept the certification in accordance with its protest procedures under 19 U.S.C. 1514, unless otherwise directed.

3. Additional Notification:

One commenter requests that Commerce and CBP provide additional notification to sureties through the Automated Surety Interface (ASI) with respect to any certification which will allow the sureties to more effectively secure and underwrite the duty obligations under AD and CVD laws.

Response:

For the reasons discussed above regarding § 351.225(l), (comment 12(f)), in the context of scope, and numerous other provisions, we recognize and appreciate the unique role of sureties in the payment and collection of AD/CVD cash deposits and duties, and that sureties need timely access to information to assess the risk that they assume when underwriting bonds for imports of merchandise subject to AD/CVD orders. As such, in response to these comments, Commerce intends to consult with CBP and explore whether and how sureties may be notified with respect to any importer reimbursement certification.

Procedural Amendments –§§ 351.103(d) introductory text and (d)(1) and 351.305(d)

1. Sections 351.103(d) introductory text and (d)(1) – Central Records Unit and Administrative Protective Order and Dockets Unit

To implement the substantive changes pertaining to scope inquiries (§ 351.225), circumvention inquiries (§ 351.226), and covered merchandise inquiries (§ 351.227), Commerce proposed to modify § 351.103(d)(1) to reflect that an interested party filing a scope ruling application or a circumvention request, as well as any publicly identified parties in a covered merchandise referral from CBP, under section 517 of the Act, need not file an entry of appearance. We received many positive comments in support of this provision. However, one commenter argued that Commerce should revisit § 351.103(d)(1) and remove the allowance of the entry of appearance to be filed as a cover letter to an application for APO access, to bring it into conformity with requirements for notices of appearances in other circumstances.

Response:

We note that the allowance for a cover letter/entry of appearance for APO filings already existed in the regulations before Commerce proposed amending them, so the comment is, in fact,

not on revisions Commerce has made, but on its existing regulations. That being said, the ability for parties to file their entry of appearance in their APO cover letter is intended to save time and resources and is not mandatory for filers. We see no reason to make this change, and, in fact, if we were to remove this option for APO filers, we find that it would only further burden the parties and Commerce's APO system with unnecessary additional paperwork.

In addition, Commerce is making two minor clarification and correction revisions to § 351.103(d) introductory text and (d)(1) unrelated to the comments raised. First, in paragraph (d) introductory text, Commerce is adding reference to the annual inquiry service list which must be used for requests for circumvention inquiries under § 351.226(n), to mirror the existing reference to the annual inquiry service list for scope ruling applications under § 351.225(n). Second, in paragraph (d)(1), Commerce is amending a typographical error following the phrase "in a covered merchandise referral to" with a citation to § 351.227, rather than the incorrect reference to § 351.226 as appeared in the *Proposed Rule*.

2. Section 351.305(d) – Access to business proprietary information

Section 351.305(d) provides for additional importer filing requirements with Commerce, differing from the filing requirements of exporters, producers, or domestic producers, to obtain access to BPI through an APO application. In the *Proposed Rule*, Commerce proposed to amend § 351.305(d) to add reference to importers in circumvention inquiries and to exempt importers identified by CBP in a covered merchandise referral from these specific filing requirements. Commerce received only support from commenters on changes made to this provision and has not made any changes from the *Proposed Rule*.

Other Comments

In addition to the comments discussed above, Commerce also received some comments that did not relate to a particular provision in the *Proposed Rule*. Instead, they relate to §§ 351.213, 351.302, and 351.303, or pertain to our general rulemaking process or matters outside

of the regulatory framework. For the following reasons, we are not making the requested changes to our regulations.

1. Amend Regulation on Administrative Reviews to Include the Enumerated Factor for Bona Fide Sales

One commenter argues that § 351.214(b)(2)(v)(D) through (E) and (f)(3) should be reproduced in § 351.213 so that the *bona fide* sales analysis proposed for new shipper reviews would also apply to annual administrative reviews of AD/CVD orders, especially when such reviews involve few or singular sales or entries. The commenter requests that the final rule should reproduce in § 351.213 governing administrative reviews the specific proposed § 351.214(b)(2)(v)(D) through (E) and (f)(3), which outline a number of documents a new shipper is required to include with a review request, and to mirror the factors listed in section 751(a)(2)(B)(iv)(I)-(VI) of the Act that pertain to new shipper reviews. In effect, the commenter proposes that a request for an annual administrative review include documentation concerning business activities and establishing the circumstances surrounding sales including prices, expenses, whether sales were resold for profit in the United States, and whether such sales were made at arm's-length prices. Additionally, the commenter argues that an annual administrative review could be rescinded if the information necessary to conduct a *bona fide* sales analysis is not on the administrative record. The commenter's rationale is that administrative reviews are more common and numerous than new shipper reviews. Applied to annual administrative reviews which involve few or singular sales or entries, the commenter claims that the *bona fide* sales analysis requirements would discourage meritless claims and conserve Commerce's resources in conducting reviews.

Another commenter responded, stating that Commerce should reject the commenter's suggestion that Commerce perform a *bona fides* analysis on the sales of exporters participating in administrative reviews. This commenter argues that Commerce should not erect artificial barriers to respondents' efforts and that such barriers would only work to create an unfair advantage for petitioners and could never create a level playing field, as the AD/CVD laws are

intended. Additionally, several commenters proposed in rebuttal comments that Commerce analyze new shipper reviews within the administrative review process under § 352.213.

Response:

We have left unchanged § 351.213 governing administrative reviews.

As explained in the *Proposed Rule*, Commerce is amending § 351.214 pertaining to new shipper reviews to conform with changes to section 751(a)(2)(B) of the Act made by Congress with the enactment of section 433 of EAPA to address circumvention by new shippers in the context of new shipper reviews. While Commerce remains cognizant of the potential for misuse of administrative review processes in AD and CVD proceedings, amendments to § 351.213, which governs administrative review of orders and suspension agreements, is beyond the scope of the *Proposed Rule* and section 433 of EAPA. The *Proposed Rule* did not propose changes to this regulatory provision. Accordingly, any consideration or implementation of such proposals would require a notice and comment proceeding, which did not occur in this rulemaking with respect to § 351.213. Therefore, we find that these proposals are beyond the scope of the *Proposed Rule* and section 433 of EAPA.

Importantly, we agree that the *bona fide* sales analysis constitutes an important check on the misuse of administrative review processes to circumvent duty orders or obtain a contrived dumping margin. Commerce has a well-established practice of conducting a *bona fide* sales analysis in administrative reviews, where warranted.[201] The CIT has stated that Commerce's practice clearly demonstrates that Commerce is "highly likely to examine objective, verifiable factors" to confirm that a sale is not being made to circumvent or evade an antidumping duty order.[202] Therefore, while the documents necessary to perform a *bona fide* sales analysis are not required in a request for an annual administrative review, Commerce retains its well-established

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[201] *See, e.g.*, *Silicon Metal From the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2017-2018*, 84 FR 69361 (Dec. 18, 2019); *see also, e.g.*, *Certain Pasta From Turkey: Final Results and Rescission of Antidumping Duty Administrative Review; 2015-2016*, 83 FR 6516 (Feb. 14, 2018).
[202] *See Hebei New Donghua Amino Acid Co., Ltd. v. United States*, 374 F. Supp. 2d 1333, 1339-40 (CIT 2005).

practice of conducting a *bona fide* sales analysis in such administrative reviews, where warranted, to address efforts to evade or dilute the effectiveness of its AD/CVD orders through the use of non-*bona fide* sales. Lastly, we have not adopted the commenters' rebuttal proposal that Commerce analyze new shipper reviews within the administrative review process under § 351.213. This commenters' proposal is also beyond the scope of this final rule, as such an amendment would require a notice and comment proceeding pertaining to § 351.213 governing administrative reviews. Moreover, such an amendment would be contrary to section 751(a)(2)(B) of the Act which provides new shippers a review process apart from the administrative review process to obtain an AD margin or CVD rate based on *bona fide* sales.

2. Section 351.302(c) and (d) – Requests for extension

Several commenters suggest that Commerce modify § 351.302 to limit the number of days of extensions of time to complete questionnaire responses, for both initial and supplemental questionnaire responses, to a total of 30 calendar days. These commenters argue that by shortening the number of days available for extensions, Commerce will have more time to consider arguments and will have greater certainty concerning when filings will be made, alleviating stress over overlapping submissions across multiple cases. Several other commenters also argue that respondents have repeatedly requested extensions for questionnaire responses as a method of delaying the proceeding and limiting the time available for Commerce to conduct its investigation or review, and that Commerce should address this issue by limiting the extension of time for questionnaire responses to 30 days.

Other commenters challenge the above arguments, stating that Commerce already has complete control of the number and length of extensions it grants, and further argue that Commerce allows for such extensions because it is fully aware of the fact that first-time foreign respondents do not maintain their books and records in anticipation of the initiation of an AD or CVD investigation against their subject exports. These commenters also argue that the proposal of limiting extension requests should be rejected because the comments proposing this limit are

not responsive to any provision in the *Proposed Rule*, establishing such a limit would be in violation of the requirements set forth in the Administrative Procedures Act, and establishing such a limitation in the regulation would deny Commerce the flexibility required to work with respondents to ensure accuracy and fairness in its decisions. They point out that each proceeding before Commerce and each company under review is unique, and, thus, the information that Commerce may seek in a particular proceeding can vary wildly, pointing to different administrative cases as examples of how great a variance there can be in the amount of information sought by Commerce in a given proceeding.

In addition, they argue that making such a change would contravene the United States' international obligations to provide parties with ample opportunity to present all evidence that they consider relevant in respect of the investigation under Article 6.1 of the AD Agreement and Article 12.1 of the SCM Agreement.

Finally, one commenter argues that adopting such a short, arbitrary limit on time would create significant risk of due process violations by denying parties the time required to gather and present information necessary to defend their interests.

Response:

Commerce has not adopted this proposal and will not be modifying § 351.302 at this time. The *Proposed Rule* did not cover or address this regulatory provision, and such an argument is outside the scope of the modifications and additions to regulations that we have proposed and upon which we have invited commentary. Any consideration or implementation of such a requirement would require a notice and comment, which did not occur in this rulemaking with respect to § 351.302.

Additionally, as mentioned by some of the other commenters, Commerce is already in full control of the number and length of extensions it grants, and there has been no evidence of the extension process being manipulated to prevent Commerce from having enough time to properly conduct its investigations or reviews. Given Commerce's current discretion to

determine whether to grant an extension request, placing a maximum limit on the number of days that can be granted would only serve to limit Commerce's discretion in how it handles such requests, and further restrict Commerce's ability to ensure the accuracy and fairness of its decisions.

3. Section 351.303(g) – Certification of Documents

One commenter argues that Commerce's regulations in § 351.303(g), which require a company representative to certify as to the accuracy of information that does not belong to the company and that the company did not develop, has created an unnecessary burden on petitioners and petitioners' counsel. They suggest changes to § 351.303(g) restricting the certification requirement to requiring a certification from the company or government representative only when the factual information was provided by the company or government representative in question or by a company or government that is not represented by legal counsel.

Response:

Commerce has not adopted this proposal and is not modifying § 351.303(g) at this time. The *Proposed Rule* did not cover or address this regulatory provision, and such an argument is outside the scope of the modifications and additions to regulations that we have proposed and upon which we have invited commentary. Any consideration or implementation of such a requirement would require notice and comment, which did not occur in this rulemaking with respect to § 351.303.

4. Comments on Overall Drafting Approach

In general, many commenters commended Commerce on the updates and additions to its regulations, claiming that such changes were a long time coming and warranted. In particular, several commenters expressed general support and appreciation for Commerce's commitment and efforts to effectively administer the AD/CVD laws, and state that the proposed regulations

are intended to close several loopholes that currently weaken the efficacy of the U.S. trade laws with reasonable, fair, and equitable modifications that strengthen its current regulations.

However, Commerce received criticism as well. One commenter, although complimentary of the *Proposed Rule*, argued that sureties should be treated as interested parties and was critical that the revised and new regulations do not provide for notifications to sureties of filings and determinations.

A few commenters expressed concern about the 30-day deadline for initial comments on the *Proposed Rule* and requested a rebuttal period, as well. In response, Commerce provided a 14-day-period for parties to file rebuttal comments, but did not provide extensions for the initial party comments. The commenters argued that 30 days for parties to file comments did not allow an adequate period of time for outside parties to consider the effects of the regulatory changes on importers. One commenter argued that because the regulatory changes were submitted during a national pandemic, when most offices are operating remotely, it made it difficult to review, absorb, and discuss the potential impact of these regulations with their clients in a 30-day time span. Furthermore, they pointed out that when Commerce revised its (comprehensive) regulations in 1996 and 1997, it allowed parties more time to provide comments.

Some commenters generally opposed the changes to the regulations, arguing that they place too much responsibility and cost on the shoulders of importers and not enough responsibility on the shoulders of exporters and producers. They argue that Commerce should revise its *Proposed Rule* to focus primarily on foreign exporters with related importers, the parties that would be aware of schemes to circumvent and evade the AD and CVD laws, and not on unrelated importers with little to no knowledge of such schemes.

Finally, one commenter argues that the benefits of the proposed regulations in stopping companies from intentionally circumventing or evading AD or CVD orders would be outweighed by the negative impact the *Proposed Rule* would have on conscientious importers, particularly smaller companies, through the assignment and collection of retroactive AD/CVDs.

The commenter points out that many sureties will not guarantee a bond associated with a product that has been subject to a circumvention inquiry or covered by the scope of an AD or CVD order, which creates a burden for small companies who simply cannot afford the additional costs resulting from a circumvention determination.

Commerce's Response:

First, Commerce disagrees with the argument made by commenters that 30 days is insufficient for parties to consider and respond to the changes made in the proposed regulations. Under 5 U.S.C. 553, which lays out the procedural requirements for revising federal regulations, 30 days is the standard that must be met by any agency when proposing changes to their regulations. Over the past 20 years of administering and enforcing the current iteration of the regulations, Commerce has discovered some inefficiencies and burdens that applied equally to our procedures for all interested parties – domestic producers, U.S. importers, and foreign exporters, alike. Over the years, we have heard complaints about those inefficiencies and burdens, but could do nothing about them without modifying our regulations. Furthermore, we have built a practice in some regards, like Commerce's substantial transformation test, which should be codified in the regulations, but are not. In addition, we have discovered that our regulations do not adequately address some matters, such as the problem of circumvention of our orders. In short, none of these problems or concerns should be new to those who practice AD and CVD law before Commerce.

Furthermore, comparing these regulations, which address new shipper reviews, scope rulings, circumvention determinations, and a few other matters, with the *1997 Final Rule* which revised nearly all of Commerce's regulations covering most of Commerce's AD and procedural practice is an unreasonable comparison. These are important regulations, but they are still limited in the areas to which they apply. Thus, we do not find the time limits Commerce provided to outside parties for comments on those regulations to be comparable to the time limits parties

needed to comment on these regulations. We continue to believe that a 30-day period for parties to prepare and file initial comments on the *Proposed Rule* was sufficient.

That being said, Commerce recognized in response to early comments which it received from outside parties that the agency had not initially provided parties with an opportunity to file rebuttal comments, and that both Commerce and the public as a whole could benefit if parties had time to file rebuttal comments. Accordingly, Commerce granted 14 days after the close of the initial comment period for parties to file rebuttal comments, and the agency received many rebuttal comments, which we found to be helpful to our analysis. Thus, we extended the period in which parties could provide meaningful insight and commentary, and as noted, many took the agency up on its offer to prepare and file rebuttal comments. We consider that additional time for commentary further evidence that we met the statutory requirements of 5 U.S.C. 553.

Second, the changes and additions found in these final regulations are consistent with the requirements of the Act and are narrowly tailored to address Commerce's concerns. Commerce recognizes the issues expressed by several commenters regarding the potential effect the regulatory changes may have on various interested parties. As explained herein, in response to many of those comments, we have made modifications from the *Proposed Rule* to these final regulations.[203] That being said, we disagree with the commenters who argued that we should retain the current regulations unchanged, and forgo these updates and changes. These changes are necessary and will improve both the administration and enforcement of the various areas of AD and CVD law which they cover.

Finally, we disagree that these improvements to our regulations will create an outsized burden for small importers, and in fact, we believe we have appropriately balanced the interests of all affected parties with the U.S. Government's statutory mandate and Commerce's policy to prevent circumvention and evasion of the application of AD and CVD orders.

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[203] For example, in response to the comment that Commerce should revise its *Proposed Rule* to focus primarily on foreign exporters with related importers in addressing circumvention and evasion, as discussed above under § 351.226(l), Commerce is modifying this provision to take into account such potential concerns.

5. Additional Unrelated Comments

Several commenters made comments unrelated to the regulations and their purpose, and as such these comments will not be summarized or addressed herein.

Classifications

Executive Order 12866

OMB has determined that this final rule is significant for purposes of Executive Order 12866.

Paperwork Reduction Act

This proposed rule contains no collection of information subject to the Paperwork Reduction Act, 44 U.S.C. Chapter 35.

Executive Order 13132

This proposed rule does not contain policies with federalism implications as that term is defined in section 1(a) of Executive Order 13132, dated August 4, 1999 (64 FR 43255 (August 10, 1999)).

Regulatory Flexibility Act

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration at the proposed rule stage that this rule, if adopted, would not have a significant economic impact on a substantial number of small entities as that term is defined in the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq*. For that reason, no Initial Regulatory Flexibility Analysis was required. A summary of the need for, objectives of, and legal basis for this rule is provided in the preamble in this final rule and the preamble to the *Proposed Rule* and is not repeated here. The factual basis for the certification is found in the *Proposed Rule* and is repeated below.

Commerce did receive comments on the certification. For the reasons discussed below, Commerce states that the certification stands because the final rule will not have a significant economic impact on a substantial number of small entities.

The entities upon which this rulemaking could have an impact include foreign governments, foreign exporters and producers, some of whom are affiliated with U.S. companies, and U.S. importers. Commerce currently does not have information on the number of entities that would be considered small under the Small Business Administration's size standards for small businesses in the relevant industries. However, some of these entities may be considered small entities under the appropriate industry size standards. Although this rule may indirectly impact small entities that are parties to individual AD and CVD proceedings, it will not have a significant economic impact on any such entities; the rule applies to administrative enforcement actions, and only clarifies and establishes streamlined procedures. It does not impose any significant costs on regulated entities. Therefore, the rule would not have a significant economic impact on a substantial number of small business entities.

Commerce received two comments in response to its determination not to prepare an Initial Regulatory Flexibility Analysis. One commenter argues that the rule will incur new additional costs to affected U.S. importers in terms of the paperwork burden for additional certifications under § 351.228, costs associated with the rebuilding of supply chains to address country-wide circumvention determinations under § 351.226, and the retroactive application of scope rulings under § 351.225. This commenter further argues that, contrary to Commerce's certification statement in the *Proposed Rule*, these are not enforcement actions but rather are new requirements or changed procedures that would directly impact U.S. importers. For these reasons, the commenter argues that Commerce should prepare a regulatory impact analysis inclusive of these costs to ensure that the rule does not impose significant costs on small entities.

In response to this comment, a second commenter agrees that Commerce should be required to prepare a regulatory flexibility analysis. This commenter points to comments from several other parties in arguing that a substantial number of small business will be directly adversely affected, not indirectly impacted as stated in Commerce's certification statement in the *Proposed Rule*. This commenter argues that, with respect to the proposed comment period for

industry support comments in response to a petition under § 351.203(g), small and medium enterprises would have difficulty meeting such deadlines because these entities do not have the compliance or government relations expertise to monitor Commerce's electronic docket on ACCESS. Additionally, this commenter reiterates arguments from the first commenter regarding the retroactive effect of scope ruling and circumvention determinations under proposed §§ 351.225 and 351.226 and the impact on a substantial number of small entities.

Response:

As stated in the certification statement in the *Proposed Rule*, the proposed regulations, as further revised and adopted in this final rule, will not have a significant economic impact on a substantial number of small entities.

Regarding the number of small entities that may be indirectly impacted, as stated in the *Proposed Rule*, the entities upon which this rulemaking could have an impact include foreign governments, foreign exporters and producers, some of whom are affiliated with U.S. companies, and U.S. importers. Commerce currently does not have information on the number of entities that would be considered small under the Small Business Administration's size standards for small businesses in the relevant industries. However, some of these entities may be considered small entities under the appropriate industry size standards. Additionally, based on Commerce's experience in AD and CVD proceedings, Commerce estimates that the number of small entities impacted by these revised regulations will not be substantial.

Regarding the potential for a significant economic impact, although these revised regulations may indirectly impact small entities that are parties to individual AD and CVD proceedings, those impacts will not have a significant economic impact on any such entities.

Moreover, as a general matter, Commerce's proceedings, including each of the types of proceedings discussed in this rule (AD and CVD investigations, new shipper reviews, administrative reviews, scope inquiries, circumvention inquiries, and covered merchandise inquiries), afford fair notice and due process to all parties, including small businesses.

Commerce will ensure that any small business that is potentially prejudiced by proceedings conducted in accordance with these regulations will receive appropriate legal notice, as well as a full and fair opportunity to present relevant information and arguments to Commerce, before a determination is made that may have some impact on such entity. We also note that, under the governing statute and in practice, Commerce will consider any difficulties experienced by interested parties, particularly small companies or those not represented by counsel, in supplying any information requested, and provide any assistance to such parties that is practicable.[204]

As summarized above, two commenters raised arguments regarding the impact on small entities arising from the certification requirements under § 351.228, country-wide circumvention determinations and retroactive application under § 351.226, the retroactive application of scope rulings under § 351.225, and the comment deadline for industry support under § 351.203(g).

First, as explained above in response to a similar comment pertaining to § 351.228, the regulation itself does not impose any burden; a determination of whether to implement a certification requirement is made on the record of an individual case – the regulation merely codifies existing practice. Further, any burden related to Commerce's determination, in a given case, to impose a certification requirement on importers is narrowly tailored to the facts of its determination and is otherwise a minimal burden. Moreover, any such burden resulting from a certification requirement is outweighed by its benefits. For example, companies that export or import under a certification scheme will potentially have less duty liability than other similarly situated importers or exporters.

Second, with respect to any rebuilding of supply chains to address country-wide circumvention determinations, Commerce's role by statute, and the purpose of the AD/CVD law, is not to manage the business operations of domestic importers, but to enforce the trade remedy laws and ensure that those laws will not be circumvented. In accordance with this framework, producers, exporters, and importers must determine how best to comply with an AD/CVD order

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[204] *See* section 782(c) of the Act.

pursuant to any number of business decisions, in light of the order and in response to a scope ruling, circumvention determination, or covered merchandise determination.

Third, as explained above, Commerce has revised its suspension of liquidation provisions under §§ 351.225(l) and 351.226(l) for scope and circumvention inquiries in light of comments from several parties. Commerce will now consider additional information under certain scenarios in scope inquiries to determine if the application of retroactive suspension is appropriate. Furthermore, Commerce will only apply its circumvention determinations to entries that precede the date of initiation of the circumvention inquiry when it determines the facts on the record warrant such an application. Additionally, these revisions to Commerce's regulations will not impact any imports of entries that pre-date the effective date of the final rule, as explained in the DATES section and the Applicability Dates section of the preamble of this final rule, and in more detail under §§ 351.225(l) and 351.226(l). Through these revisions to the *Proposed Rule*, Commerce has reduced any impact on U.S. importers, which may include small entities, and further reduced the number of small entities that may be impacted. Therefore, the final rule will not have a direct, significant economic impact on a substantial number of small entities.

Fourth, and finally, with respect to the argument that the comment period for industry support would significantly impact a substantial number of small entities, we disagree. Under § 351.203(g), Commerce is establishing a deadline for comments on the issue of domestic industry support of an AD or CVD petition no later than five business days before the scheduled date of initiation, and rebuttal comments no later than two calendar days thereafter. Currently, there is no established comment period, meaning parties can comment up until the day of Commerce's decision. As stated in the certification statement, this is a clarification of Commerce's procedures and does not impose any direct cost, let alone a significant cost, on small entities. Further, the parties that normally comment on industry support include domestic producers of like products that may be considered small entities under the appropriate SBA small business

size standard. Although Commerce is unable to estimate the number of producers that may be considered small entities, Commerce does not anticipate that the number affected by the proposed rule will be substantial. Typically, domestic producers that bring a petition or participate actively in an AD or CVD proceeding account for a large amount of the domestic production within an industry, so it is unlikely that many of these domestic producers will be small entities. Therefore, the proposed regulation, as adopted in this final rule, will not have a significant economic impact on a substantial number of small entities.

In sum, Commerce does not dispute that these new and revised regulations will have an impact on U.S. importers. However, the current regulations and Commerce's AD and CVD proceedings already have an impact on those entities. Thus, the question for purposes of a regulatory impact analysis is whether these revisions and additions are such that the changes will have an economic impact which is significant on a substantial number of small entities. They will not.

For these reasons, we continue to find that neither an Initial Regulatory Flexibility Analysis nor a Final Regulatory Flexibility Analysis is required and none has been prepared. Therefore, Commerce certified that the final rule will not have a significant impact on a substantial number of small business entities.

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.

Dated: August 16, 2021

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Christian Marsh
Acting Assistant Secretary
for Enforcement and Compliance

For the reasons stated in the preamble, the Department of Commerce amends 19 CFR part 351 as follows:

PART 351—ANTIDUMPING AND COUNTERVAILING DUTIES

1. The authority citation for 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 § 351.103, effective [INSERT DATE 45 DAYS FROM PUBLICATION IN THE ***FEDERAL REGISTER***], revise paragraphs (d) introductory text and (d)(1) to read as follows:

§ 351.103 Central Records Unit and Administrative Protective Order and Dockets Unit.

* * * * *

(d) The APO/Dockets Unit will maintain and make available a public service list for each segment of a proceeding. The service list for an application for a scope ruling is described in § 351.225(n). The service list for a request for a circumvention inquiry is described in § 351.226(n).

(1) With the exception of a petitioner filing a petition in an investigation pursuant to § 351.202, an interested party filing a scope ruling application pursuant to § 351.225(c), an interested party filing a request for a circumvention inquiry pursuant to § 351.226(c), and those relevant parties identified by the Customs Service in a covered merchandise referral pursuant to § 351.227, all persons wishing to participate in a segment of a proceeding must file an entry of appearance. The entry of appearance must identify the name of the interested party, how that party qualifies as an interested party under § 351.102(b)(29) and section 771(9) of the Act, and the name of the firm, if any, representing the interested party in that particular segment of the proceeding. All persons who file an entry of appearance and qualify as an interested party will be included in the public service list for the segment of the proceeding in which the entry of appearance is submitted. The entry of appearance may be filed as a cover letter to an application for APO access. If the representative of the interested party is not requesting access to business

proprietary information under APO, the entry of appearance must be filed separately from any other document filed with the Department. If the interested party is a coalition or association as defined in subparagraph (A), (E), (F) or (G) of section 771(9) of the Act, the entry of appearance must identify all of the members of the coalition or association.

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3. In § 351.203, effective [INSERT DATE 30 DAYS FROM PUBLICATION IN THE ***FEDERAL REGISTER***], add paragraph (g) to read as follows:

§ 351.203 Determination of sufficiency of petition.

* * * * *

(g) *Time limits for filing interested party comments on industry support.* For purposes of sections 702(c)(4)(E) and 732(c)(4)(E) of the Act, the Secretary will consider comments or information on the issue of industry support submitted no later than 5 business days before the date referenced in paragraph (b)(1) of this section by any interested party under section 771(9) of the Act. The Secretary will consider rebuttal comments or information to rebut, clarify, or correct such information on industry support submitted by any interested party no later than two calendar days from the time limit for filing comments.

4. Effective [INSERT DATE 30 DAYS FROM PUBLICATION IN THE ***FEDERAL REGISTER***], revise § 351.214 to read as follows:

§ 351.214 New shipper reviews under section 751(a)(2)(B) of the Act.

(a) *Introduction*. Section 751(a)(2)(B) of the Act provides a procedure by which so-called "new shippers" can obtain their own individual dumping margin or countervailable subsidy rate on an expedited basis. In general, a new shipper is an exporter or producer that did not export, and is not affiliated with an exporter or producer that did export, to the United States during the period of investigation. Furthermore, section 751(a)(2)(B)(iv) requires that the Secretary make a determination of whether the sales under review are bona fide. This section contains rules regarding requests for new shipper reviews and procedures for conducting such

reviews, as well as requirements for determining whether sales are bona fide under section 751(a)(2)(B)(iv) of the Act. In addition, this section contains rules regarding requests for expedited reviews by non-investigated exporters in certain countervailing duty proceedings and procedures for conducting such reviews.

(b) *Request for new shipper review*—(1) *Requirement of sale or export*. Subject to the requirements of section 751(a)(2)(B) of the Act and this section, an exporter or producer may request a new shipper review if it has exported, or sold for export, subject merchandise to the United States and can demonstrate the existence of a bona fide sale.

(2) *Contents of request*. A request for a new shipper review must contain the following:

(i) If the person requesting the review is both the exporter and producer of the merchandise, a certification that the person requesting the review did not export subject merchandise to the United States (or, in the case of a regional industry, did not export the subject merchandise for sale in the region concerned) during the period of investigation;

(ii) If the person requesting the review is the exporter, but not the producer, of the subject merchandise:

(A) The certification described in paragraph (b)(2)(i) of this section; and

(B) A certification from the person that produced or supplied the subject merchandise to the person requesting the review that that producer or supplier did not export the subject merchandise to the United States (or, in the case of a regional industry, did not export the subject merchandise for sale in the region concerned) during the period of investigation;

(iii)(A) A certification that, since the investigation was initiated, such exporter or producer has never been affiliated with any exporter or producer who exported the subject merchandise to the United States (or in the case of a regional industry, who exported the subject merchandise for sale in the region concerned) during the period of investigation, including those not individually examined during the investigation; and

(B) In an antidumping proceeding involving imports from a nonmarket economy country, a certification that the export activities of such exporter or producer are not controlled by the central government;

(iv) Certain information regarding the unaffiliated customer:

(A) A certification from the exporter or producer that it will provide, to the fullest extent possible, necessary information related to the unaffiliated customer in the United States during the new shipper review; and

(B) A certification by the unaffiliated customer of its willingness to participate in the new shipper review and provide information relevant to the new shipper review, if such information is requested by the Secretary, or an explanation by the producer/exporter of why such certification from the unaffiliated customer cannot be provided.

(v) Documentation establishing:

(A) The date on which subject merchandise of the exporter or producer making the request was first entered, or withdrawn from warehouse, for consumption, or, if the exporter or producer cannot establish the date of first entry, the date on which the exporter or producer first shipped the subject merchandise for export to the United States;

(B) The volume of that shipment and any subsequent shipments, including whether such shipments were made in commercial quantities;

(C) The date of the first sale, and any subsequent sales, to an unaffiliated customer in the United States;

(D) The circumstances surrounding such sale(s), including but not limited to:

(*1*) The price of such sales;

(*2*) Any expenses arising from such sales;

(*3*) Whether the subject merchandise involved in such sales was resold in the United States at a profit;

(*4*) Whether such sales were made on an arms-length basis; and

(E) Additional documentation regarding the business activities of the producer or exporter, including but not limited to:

(*1*) The producer or exporter's offers to sell merchandise in the United States;

(*2*) An identification of the complete circumstance surrounding the producer or exporter's sales to the United States, as well as any home market or third country sales;

(*3*) In the case of a non-producing exporter, an explanation of the exporter's relationship with its producer/supplier; and

(*4*) An identification of the producer's or exporter's relationship to the first unaffiliated U.S. purchaser;

(vi) In the case of a review of a countervailing duty order, a certification that the exporter or producer has informed the government of the exporting country that the government will be required to provide a full response to the Department's questionnaire.

(c) *Deadline for requesting review*. An exporter or producer may request a new shipper review within one year of the date referred to in paragraph (b)(2)(v)(A) of this section.

(d) *Initiation of new shipper review*—(1) *In general*. If the requirements for a request for new shipper review under paragraph (b) of this section are satisfied, the Secretary will initiate a new shipper review under this section in the calendar month immediately following the anniversary month or the semiannual anniversary month if the request for the review is made during the 6–month period ending with the end of the anniversary month or the semiannual anniversary month (whichever is applicable).

(2) *Semiannual anniversary month*. The semiannual anniversary month is the calendar month that is 6 months after the anniversary month.

(3) *Example*. An order is published in January. The anniversary month would be January, and the semiannual anniversary month would be July. If the Secretary received a request for a new shipper review at any time during the period February–July, the Secretary would initiate a new shipper review in August. If the Secretary received a request for a new

shipper review at any time during the period August–January, the Secretary would initiate a new shipper review in February.

(4) *Exception*. If the Secretary determines that the requirements for a request for new shipper review under paragraph (b) of this section have not been satisfied, the Secretary will reject the request and provide a written explanation of the reasons for the rejection.

(e) *Suspension of liquidation*. When the Secretary initiates a new shipper review under this section, the Secretary will direct the Customs Service to suspend or continue to suspend liquidation of any unliquidated entries of the subject merchandise from the relevant exporter or producer at the applicable cash deposit rate.

(f) *Rescission of new shipper review*—(1) *Withdrawal of request for review*. The Secretary may rescind a new shipper review under this section, in whole or in part, if a producer or exporter that requested a review withdraws its request not later than 60 days after the date of publication of notice of initiation of the requested review.

(2) *Absence of entry and sale to an unaffiliated customer*. The Secretary may rescind a new shipper review, in whole or in part, if the Secretary concludes that:

(i) As of the end of the normal period of review referred to in paragraph (g) of this section, there has not been an entry and sale to an unaffiliated customer in the United States of subject merchandise; and

(ii) An 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 set forth in paragraph (i) of this section;

(3) *Absence of bona fide sale to an unaffiliated customer*. The Secretary may rescind a new shipper review, in whole or in part, if the Secretary concludes that:

(i) Information that the Secretary considers necessary to conduct a bona fide sale analysis is not on the record; or

(ii) The producer or exporter seeking a new shipper review has failed to demonstrate to the satisfaction of the Secretary the existence of a bona fide sale to an unaffiliated customer.

(4) *Notice of rescission*. If the Secretary rescinds a new shipper review (in whole or in part), the Secretary will publish in the FEDERAL REGISTER notice of "Rescission of Antidumping (Countervailing Duty) New Shipper Review" or, if appropriate, "Partial Rescission of Antidumping (Countervailing Duty) New Shipper Review."

(g) *Period of review*—(1) *Antidumping proceeding*—(i) *In general*. Except as provided in paragraph (g)(1)(ii) of this section, in an antidumping proceeding, a new shipper review under this section normally will cover, as appropriate, entries, exports, or sales during the following time periods:

(A) If the new shipper review was initiated in the month immediately following the anniversary month, the twelve-month period immediately preceding the anniversary month; or

(B) If the new shipper review was initiated in the month immediately following the semiannual anniversary month, the period of review will be the six-month period immediately preceding the semiannual anniversary month.

(ii) *Exceptions*. (A) If the Secretary initiates a new shipper review under this section in the month immediately following the first anniversary month, the review normally will cover, as appropriate, entries, exports, or sales during the period from the date of suspension of liquidation under this part to the end of the month immediately preceding the first anniversary month.

(B) If the Secretary initiates a new shipper review under this section in the month immediately following the first semiannual anniversary month, the review normally will cover, as appropriate, entries, exports, or sales during the period from the date of suspension of liquidation under this part to the end of the month immediately preceding the first semiannual anniversary month.

(2) *Countervailing duty proceeding*. In a countervailing duty proceeding, the period of review for a new shipper review under this section will be the same period as that specified in § 351.213(e)(2) for an administrative review.

(h) *Procedures*. The Secretary will conduct a new shipper review under this section in accordance with § 351.221.

(i) *Time limits*—(1) *In general*. Unless the time limit is waived under paragraph (j)(3) of this section, the Secretary will issue preliminary results of review (see § 351.221(b)(4)) within 180 days after the date on which the new shipper review was initiated, and final results of review (see § 351.221(b)(5)) within 90 days after the date on which the preliminary results were issued.

(2) *Exception*. If the Secretary concludes that a new shipper review is extraordinarily complicated, the Secretary may extend the 180-day period to 300 days, and may extend the 90-day period to 150 days.

(j) *Multiple reviews*. Notwithstanding any other provision of this subpart, if a review (or a request for a review) under § 351.213 (administrative review), § 351.214 (new shipper review), § 351.215 (expedited antidumping review), or § 351.216 (changed circumstances review) covers merchandise of an exporter or producer subject to a review (or to a request for a review) under this section, the Secretary may, after consulting with the exporter or producer:

(1) Rescind, in whole or in part, a review in progress under this subpart;

(2) Decline to initiate, in whole or in part, a review under this subpart; or

(3) Where the requesting producer or exporter agrees in writing to waive the time limits of paragraph (i) of this section, conduct concurrent reviews, in which case all other provisions of this section will continue to apply with respect to the exporter or producer.

(k) *Determinations based on bona fide sales*. In determining whether the U.S. sales of an exporter or producer made during the period covered by the review are bona fide, the Secretary shall consider the factors identified at section 751(a)(2)(B)(iv) of the Act. In accordance with section 751(a)(2)(B)(iv)(VII) of the Act, the Secretary shall consider the following factors:

(1) Whether the producer, exporter, or customer was established for purposes of the sale(s) in question after the imposition of the relevant antidumping or countervailing duty order;

(2) Whether the producer, exporter, or customer has lines of business unrelated to the subject merchandise;

(3) The quantity of sales; and

(4) Any other factor that the Secretary determines to be relevant with respect to the future selling behavior of the producer or exporter, including any other indicia that the sale was not commercially viable.

(l) *Expedited reviews in countervailing duty proceedings for noninvestigated exporters*—(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 § 351.204(d)) may request a review under this paragraph (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:

(i) The requester exported the subject merchandise to the United States during the period of investigation;

(ii) The requester is not affiliated with an exporter or producer that the Secretary individually examined in the investigation; and

(iii) The requester has informed the government of the exporting country that the government will be required to provide a full response to the Department's questionnaire.

(2) *Initiation of review*—(i) *In general*. The Secretary will initiate a review in the month following the month in which a request for review is due under paragraph (l)(1) of this section.

(ii) *Example*. The Secretary publishes a countervailing duty order on January 15. An exporter would have to submit a request for a review by February 14. The Secretary would initiate a review in March.

(3) *Conduct of review*. The Secretary will conduct a review under this paragraph (l) in accordance with the provisions of this section applicable to new shipper reviews, subject to the following exceptions:

(i) The period of review will be the period of investigation used by the Secretary in the investigation that resulted in the publication of the countervailing duty order (*see* § 351.204(b)(2));

(ii) The final results of a review under this paragraph (l) will not be the basis for the assessment of countervailing duties; and

(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 § 351.204(e)(1)), provided that the Secretary has verified the information on which the exclusion is based.

(m) *Exception from assessment in regional industry cases*. For procedures relating to a request for the exception from the assessment of antidumping or countervailing duties in a regional industry case, see § 351.212(f).

5. Effective [INSERT DATE 45 DAYS FROM PUBLICATION IN THE ***FEDERAL REGISTER***], revise § 351.225 to read as follows:

§ 351.225 Scope rulings.

(a) *Introduction.* Questions sometimes arise as to whether a particular product is covered by the scope of an antidumping or countervailing duty order. Such questions may arise for a variety of reasons given that the description of the merchandise subject to the scope is written in general terms. The Secretary will initiate and conduct a scope inquiry and issue a scope ruling to determine whether or not a product is covered by the scope of an order at the request of an

interested party or on the Secretary's initiative. A scope ruling that a product is covered by the scope of an order is a determination that the product has always been covered by the scope of that order. This section contains rules and procedures regarding scope rulings, including scope ruling applications, scope inquiries, and standards used in determining whether a product is covered by the scope of an order. Unless otherwise specified, the procedures as described in subpart C of this part (§§ 351.301 through 351.308 and §§ 351.312 through 351.313) apply to this section.

(b) *Self-initiation of a scope inquiry*. If the Secretary determines from available information that an inquiry is warranted to determine whether a product is covered by the scope of an order, the Secretary may initiate a scope inquiry and publish a notice of initiation in the FEDERAL REGISTER.

(c) *Scope ruling application*—(1) *Contents*. An interested party may submit a scope ruling application requesting that the Secretary conduct a scope inquiry to determine whether a product, which is or has been in actual production by the time of the filing of the application, is covered by the scope of an order. The Secretary will make available a scope ruling application, which the applicant must complete and serve in accordance with the requirements of paragraph (n) of this section.

(2) *Requested information*. To the extent reasonably available to the applicant, the scope ruling application must include the following requested information and relevant supporting documentation.

(i) A detailed description of the product and its uses, as necessary:

(A) The physical characteristics (including chemical, dimensional, and technical characteristics) of the product;

(B) The country(ies) where the product is produced, the country from where the product is exported, and if imported, the declared country of origin;

(C) The product's tariff classification under the Harmonized Tariff Schedule of the United States and copies of any Customs rulings relevant to the tariff classification;

(D) The uses of the product;

(E) Clear and legible photographs, schematic drawings, specifications, standards, marketing materials, and any other exemplars providing a visual depiction of the product; and

(F) A description of parts, materials, and the production process employed in the production of the product;

(ii) A concise public summary of the product's description under paragraphs (c)(2)(i)(A) through (C) of this section.

(iii) The name and address of the producer, exporter, and importer of the product.

(iv) A narrative history of the production of the product at issue, including a history of earlier versions of the product if this is not the first model of the product.

(v) The volume of annual production of the product for the most recently completed fiscal year.

(vi) If the product has been imported into the United States as of the date of the filing of the scope ruling application:

(A) An explanation as to whether an entry of the product has been declared by an importer, or determined by the Customs Service, as subject to an order, and

(B) Relevant documentation, including dated copies of the Customs Service entry summary forms (or electronic entry processing system documentation) identifying the product upon importation and other related commercial documents, including invoices and contracts, which reflect the details surrounding the sale and purchase of that imported product.

(vii) A statement as to whether the product undergoes any additional processing in the United States after importation, or in a third country before importation, and a statement as to the relevance of this processing to the scope of the order.

(viii) The applicant's statement as to whether the product is covered by the scope of the order, including:

(A) An explanation with specific reference to paragraph (j) and (k) of this section, as appropriate;

(B) Citations to any applicable legal authority; and

(C) Whether there are companion orders as described in paragraph (m)(2) of this section.

(ix) Factual information supporting the applicant's position, including full copies of prior scope determinations and relevant excerpts of other documents identified in paragraph (k)(1) of this section.

(d) *Initiation of a scope inquiry and other actions based on a scope ruling application*—(1) *Initiation of a scope inquiry based on a scope ruling application*. Except as provided under paragraph (d)(2) of this section, within 30 days after the filing of a scope ruling application, the Secretary will determine whether to accept or reject the scope ruling application.

(i) If the Secretary determines that a scope ruling application is incomplete or otherwise unacceptable, the Secretary may reject the scope ruling application and will provide a written explanation of the reasons for the rejection. If the scope ruling application is rejected, the applicant may resubmit the full application at any time, with all identified deficiencies corrected.

(ii) If the Secretary does not reject the scope ruling application or initiate the scope inquiry within 31 days after the filing of the application, the application will be deemed accepted and the scope inquiry will be deemed initiated.

(2) *Addressing the scope issue in another segment of the proceeding*. Within 30 days after the filing of a scope ruling application, if the Secretary determines upon review of the application that the scope issue before the Secretary should be addressed in an ongoing segment of the proceeding, such as a circumvention inquiry under § 351.226 or a covered merchandise inquiry under § 351.227, rather than initiating a scope inquiry, the Secretary will notify the applicant of its intent to address the scope issue in such other segment.

(3) *Notice of scope applications.* On a monthly basis, the Secretary will publish a notice in the FEDERAL REGISTER listing scope applications filed with the Secretary.

(e) *Deadlines for scope rulings*—(1) *In general*. The Secretary shall issue a final scope ruling within 120 days after the date on which the scope inquiry was initiated under paragraph (b) or (d) of this section.

(2) *Extension*. The Secretary may extend the deadline in paragraph (e)(1) of this section by no more than 180 days if the Secretary determines that good cause exists to warrant an extension. Situations in which good cause has been demonstrated may include:

(i) If the Secretary has issued questionnaires to the applicant or other interested parties; received responses to those questionnaires; and determined that an extension is warranted to request further information or consider and address the parties' responses on the record adequately; or

(ii) The Secretary has issued a preliminary scope ruling (*see* paragraph (g) of this section).

(3) *Alignment with other segments*. If the Secretary determines it is appropriate to do so, the Secretary may align the deadlines under this paragraph with the deadlines of another segment of the proceeding.

(f) *Scope inquiry procedures*. (1) Within 30 days of the Secretary's self-initiation of a scope inquiry under paragraph (b) of this section, interested parties are permitted one opportunity to submit comments and factual information addressing the self-initiation. Within 14 days of the filing of such comments, any interested party is permitted one opportunity to submit comments and factual information to rebut, clarify, or correct factual information submitted by the other interested parties.

(2) Within 30 days of the initiation of a scope inquiry under paragraph (d)(2) of this section, an interested party other than the applicant is permitted one opportunity to submit comments and factual information to rebut, clarify, or correct factual information contained in

the scope ruling application. Within 14 days of the filing of such rebuttal, clarification, or correction, the applicant is permitted one opportunity to submit comments and factual information to rebut, clarify, or correct factual information submitted in the interested party's rebuttal, clarification or correction.

(3) Following initiation of a scope inquiry under paragraph (b) or (d) of this section, the Secretary may issue questionnaires and verify submissions received, where appropriate. The Secretary may limit issuance of questionnaires to a reasonable number of respondents. Questionnaire responses are due on the date specified by the Secretary. Within 14 days after a questionnaire response has been filed with the Secretary, an interested party other than the original submitter is permitted one opportunity to submit comments and factual information to rebut, clarify, or correct factual information contained in the questionnaire response. Within seven days of the filing of such rebuttal, clarification, or correction, the original submitter is permitted one opportunity to submit comments and factual information to rebut, clarify, or correct factual information submitted in the interested party's rebuttal, clarification or correction.

(4) If the Secretary issues a preliminary scope ruling under paragraph (g) of this section, which is not issued concurrently with the initiation of the scope inquiry, the Secretary will establish a schedule for the filing of scope comments and rebuttal comments. Unless otherwise specified, any interested party may submit scope comments within 14 days after the issuance of the preliminary scope ruling, and any interested party may submit rebuttal comments within 7 days thereafter. Unless otherwise specified, no new factual information will be accepted in the scope or rebuttal comments.

(5) If the Secretary issues a preliminary scope ruling concurrently with the initiation of a scope inquiry under paragraph (g) of this section, paragraphs (f)(1) through (4) of this section will not apply. In such a situation, the Secretary will establish appropriate procedures on a case-specific basis.

(6) If the Secretary determines it is appropriate to do so, the Secretary may rescind, in whole or in part, a scope inquiry under this section and will notify interested parties.

(7) If the Secretary determines it is appropriate to do so, the Secretary may alter or extend any time limits under this paragraph or establish a separate schedule for the filing of comments and/or factual information during the scope inquiry.

(g) *Preliminary scope ruling*. The Secretary may issue a preliminary scope ruling, based upon the available information at the time, as to whether there is a reasonable basis to believe or suspect that the product subject to a scope inquiry is covered by the scope of the order. In determining whether to issue a preliminary scope ruling, the Secretary may consider the complexity of the issues and arguments raised in the scope inquiry. The Secretary may issue a preliminary scope ruling concurrently with the initiation of a scope inquiry under paragraph (b) or (d) of this section.

(h) *Final scope ruling*. The Secretary will issue a final scope ruling as to whether the product that is the subject of the scope inquiry is covered by the scope of the order, including an explanation of the factual and legal conclusions on which the final scope ruling is based. The Secretary will promptly convey a copy of the final scope ruling in the manner prescribed by section 516A(a)(2)(A)(ii) of the Act to all parties to the proceeding (*see* § 351.102(b)(36)), subject to the notice requirements for Governments of an FTA country under §356.6 and §356.7.

(i) *Other segments of the proceeding*. (1) Notwithstanding any other provision of this section, the Secretary may, but is not required to, address scope issues in another segment of the proceeding, such as an administrative review under § 351.213, a circumvention inquiry under § 351.226, or a covered merchandise inquiry under § 351.227 without conducting or completing a scope inquiry under this section. For example, the Secretary may rescind a scope inquiry under paragraph (f)(6) of this section and determine whether the product at issue is covered by the scope of the order in another segment of the proceeding (including another scope inquiry).

(2) During the pendency of a scope inquiry or upon issuance of a final scope ruling under paragraph (h) of this section, the Secretary may take any further action, as appropriate, with respect to another segment of the proceeding. For example, if the Secretary considers it appropriate, the Secretary may request information concerning the product that is the subject of the scope inquiry for purpose of an administrative review under § 351.213.

(j) *Country of origin determinations*. In considering whether a product is covered by the scope of the order at issue, the Secretary may need to determine the country of origin of the product. To make such a determination, the Secretary may use any reasonable method and is not bound by the determinations of any other agency, including tariff classification and country of origin marking rulings issued by the Customs Service.

(1) In determining the country of origin, the Secretary may conduct a substantial transformation analysis that considers relevant factors that arise on a case-by-case basis, including:

(i) Whether the processed downstream product is a different class or kind of merchandise than the upstream product;

(ii) The physical characteristics (including chemical, dimensional, and technical characteristics) of the product;

(iii) The intended end-use of the downstream product;

(iv) The cost of production/value added of further processing in the third country or countries;

(v) The nature and sophistication of processing in the third country or countries; and

(vi) The level of investment in the third country or countries.

(2) In conducting a country of origin determination, the Secretary also may consider where the essential component of the product is produced or where the essential characteristics of the product are imparted.

(k) *Scope rulings*. (1) In determining whether a product is covered by the scope of the order at issue, the Secretary will consider the language of the scope and may make its determination on this basis alone if the language of the scope, including the descriptions of merchandise expressly excluded from the scope, is dispositive.

(i) The following primary interpretive sources may be taken into account under paragraph (k)(1) introductory text of this section, at the discretion of the Secretary:

(A) The descriptions of the merchandise contained in the petition pertaining to the order at issue;

(B) The descriptions of the merchandise contained in the initial investigation pertaining to the order at issue;

(C) Previous or concurrent determinations of the Secretary, including prior scope rulings, memoranda, or clarifications pertaining to both the order at issue, as well as other orders with same or similar language as that of the order at issue; and

(D) Determinations of the Commission pertaining to the order at issue, including reports issued pursuant to the Commission's initial investigation.

(ii) The Secretary may also consider secondary interpretive sources under paragraph (k)(1) introductory text of this section, such as any other determinations of the Secretary or the Commission not identified above, Customs rulings or determinations, industry usage, dictionaries, and any other relevant record evidence. However, in the event of a conflict between these secondary interpretive sources and the primary interpretive sources under paragraph (k)(1)(i) of this section, the primary interpretive sources will normally govern in determining whether a product is covered by the scope of the order at issue.

(2)(i) If the Secretary determines that the sources under paragraph (k)(1) of this section are not dispositive, the Secretary will then further consider the following factors:

(A) The physical characteristics (including chemical, dimensional, and technical characteristics) of the product;

(B) The expectations of the ultimate users;

(C) The ultimate use of the product;

(D) The channels of trade in which the product is sold; and

(E) The manner in which the product is advertised and displayed.

(ii) In the event of a conflict between the factors under paragraph (k)(2)(i) of this section, paragraph (k)(2)(i)(A) will normally be allotted greater weight than the other factors.

(3) If merchandise contains or consists of two or more components and the product at issue in the scope inquiry is a component of that merchandise as a whole, the Secretary may adopt the following analysis:

(i) The Secretary will analyze the scope language under paragraph (k)(1) of this section, and, if necessary, the factors under paragraph (k)(2) of this section, to determine if the component product, standing alone, would be covered by an order;

(ii) If the Secretary determines that the component product would otherwise be covered by the scope of an order as a result of the analysis under (k)(3)(i) of this section, the Secretary will consider the scope language under paragraph (k)(1) of this section to determine whether the component product's inclusion in the merchandise as a whole results in its exclusion from the scope of the order; and

(iii) If the Secretary determines the analysis under (k)(3)(ii) of this section does not resolve whether the component product's inclusion in the merchandise as a whole results in its exclusion from the scope of the order, then the Secretary will consider, as appropriate, the following relevant factors that may arise on a product-specific basis:

(A) The practicability of separating the in-scope component for repackaging or resale, considering the relative difficulty and expense of separating the components;

(B) The measurable value of the in-scope component as compared to the measurable value of the merchandise as a whole; and

(C) The ultimate use or function of the in-scope component relative to the ultimate use or function of the merchandise as a whole.

(l) *Suspension of liquidation*. (1) When the Secretary initiates a scope inquiry under paragraph (b) or (d) of this section, the Secretary will notify the Customs Service of the initiation and direct the Customs Service to continue the suspension of liquidation of entries of products subject to the scope inquiry that were already subject to the suspension of liquidation, and to apply the cash deposit rate that would be applicable if the product were determined to be covered by the scope of the order.

(2) If the Secretary issues a preliminary scope ruling under paragraph (g) of this section that the product at issue is covered by the scope of the order, the Secretary will take the following actions:

(i) The Secretary will direct the Customs Service to continue the suspension of liquidation of previously suspended entries and apply the applicable cash deposit rate;

(ii) The Secretary will direct the Customs Service to begin the suspension of liquidation and require a cash deposit of estimated duties, at the applicable rate, for each unliquidated entry of the product not yet suspended, entered, or withdrawn from warehouse, for consumption on or after the date of initiation of the scope inquiry; and

(iii)(A) *In general*. Subject to paragraph (l)(2)(iii)(B) of this section, the Secretary normally will direct the Customs Service to begin the suspension of liquidation and require a cash deposit of estimated duties, at the applicable rate, for each unliquidated entry of the product not yet suspended, entered, or withdrawn from warehouse, for consumption prior to the date of initiation of the scope inquiry.

(B) *Exception*. If the Secretary determines it is appropriate to do so, the Secretary may, at the timely request of an interested party or at the Secretary's discretion, direct the Customs Service to begin the suspension of liquidation and apply the applicable cash deposit rate under paragraph (l)(2)(iii)(A) of this section at an alternative date. In response to a timely request from

an interested party, the Secretary will only consider an alternative date based on a specific argument supported by evidence establishing the appropriateness of that alternative date.

(3) If the Secretary issues a final scope ruling under paragraph (h) of this section that the product at issue is covered by the scope of the order, the Secretary will take the following actions:

(i) The Secretary will direct the Customs Service to continue the suspension of liquidation of previously suspended entries and apply the applicable cash deposit rate until appropriate liquidation instructions are issued;

(ii) The Secretary will direct the Customs Service to begin the suspension of liquidation and require a cash deposit of estimated duties, at the applicable rate, for each unliquidated entry of the product not yet suspended, entered, or withdrawn from warehouse, for consumption on or after the date of initiation of the scope inquiry until appropriate liquidation instructions are issued; and

(iii)(A) *In general*. Subject to paragraph (l)(3)(iii)(B) of this section, the Secretary normally will direct the Customs Service to begin the suspension of liquidation and require a cash deposit of estimated duties, at the applicable rate, for each unliquidated entry of the product not yet suspended, entered, or withdrawn from warehouse, for consumption prior to the date of initiation of the scope inquiry until appropriate liquidation instructions are issued.

(B) *Exception*. If the Secretary determines it is appropriate to do so, the Secretary may, at the timely request of an interested party or at the Secretary's discretion, direct the Customs Service to begin the suspension of liquidation and apply the applicable cash deposit rate under paragraph (l)(3)(iii)(A) of this section at an alternative date until appropriate liquidation instructions are issued. In response to a timely request from an interested party, the Secretary will only consider an alternative date based on a specific argument supported by evidence establishing the appropriateness of that alternative date.

(4) If the Secretary issues a final scope ruling under paragraph (h) of this section that the product is not covered by the scope of the order, and entries of the product at issue are not otherwise subject to suspension of liquidation as a result of another segment of the proceeding, such as a circumvention inquiry under § 351.226 or a covered merchandise inquiry under § 351.227, the Secretary will order the Customs Service to terminate the suspension of liquidation and refund any cash deposits for such entries.

(5) Nothing in this section affects the Customs Service's authority to take any additional action with respect to the suspension of liquidation or related measures.

(m) *Applicability of scope rulings; companion orders*—(1) *Applicability of scope rulings.* In conducting a scope inquiry under this section, the Secretary shall consider, based on the available record evidence, whether the scope ruling should be applied:

(i) On a producer-specific, exporter-specific, importer-specific basis, or some combination thereof; or

(ii) To all products from the same country with the same relevant physical characteristics, (including chemical, dimensional and technical characteristics) as the product at issue, on a country-wide basis, regardless of the producer, exporter or importer of those products.

(2) *Companion antidumping and countervailing duty orders.* If there are companion antidumping and countervailing duty orders covering the same merchandise from the same country of origin, the requesting interested party under paragraph (c) of this section must file the scope ruling application pertaining to both orders only on the record of the antidumping duty proceeding. Should the Secretary determine to initiate a scope inquiry under paragraph (b) or (d) of this section, the Secretary will initiate and conduct a single inquiry with respect to the product at issue for both orders only on the record of the antidumping proceeding. Once the Secretary issues a final scope ruling on the record of the antidumping duty proceeding, the Secretary will include a copy of that scope ruling on the record of the countervailing duty proceeding.

(n) *Service of scope ruling application; annual inquiry service list; entry of appearance*. (1) The requirements of § 351.303(f) apply to this section, except that an interested party that submits a scope ruling application under paragraph (c) of this section must serve a copy of the application on all persons on the annual inquiry service list for that order, as well as the companion order, if any, as described in paragraph (m)(2) of this section. If a scope ruling application is rejected and resubmitted pursuant to paragraph (d)(1) of this section, service of the resubmitted application is not required under this paragraph, unless otherwise specified.

(2) For purposes of this section, the "annual inquiry service list" will include the petitioner(s) and those parties that file a request for inclusion on the annual inquiry service list for a proceeding, in accordance with the Secretary's established procedures.

(3) A new "annual inquiry service list" will be established on a yearly basis. Parties filing a request for inclusion on that list must file a request during the anniversary month of the publication of the antidumping or countervailing duty order. Only the petitioner and the government of the foreign country at issue in an antidumping or countervailing duty order will be automatically placed on the new annual inquiry service list once the previous year's list has been replaced.

(4) Once a scope inquiry has been self-initiated or a scope ruling application is accepted by the Secretary, a segment-specific service list will be established and the requirements of § 351.303(f) will apply. Parties other than the scope ruling applicant under paragraph (c) of this section that wish to participate in the scope inquiry must file an entry of appearance in accordance with § 351.103(d)(1).

(o) *Publication of list of final scope rulings.* On a quarterly basis, the Secretary will publish in the FEDERAL REGISTER a list of final scope rulings issued within the previous three months. This list will include the case name, and a brief description of the ruling. The Secretary also may include complete public versions of its scope rulings on its website, should the Secretary determine such placement is warranted.

(p) *Suspended investigations; suspension agreements*. The Secretary may apply the procedures set forth in this section in determining whether a product at issue is covered by the scope of a suspended investigation or a suspension agreement (*see* § 351.208).

(q) *Scope clarifications.* The Secretary may issue a scope clarification in any segment of a proceeding providing an interpretation of specific language in the scope of an order or addressing whether a product is covered or excluded by the scope of an order at issue based on previous scope determinations covering the same or similar products. Such a scope clarification may take the form of an interpretive footnote to the scope when the scope is published or issued in instructions to the Customs Service.

6. Effective [INSERT DATE 45 DAYS FROM PUBLICATION IN THE ***FEDERAL REGISTER***], add § 351.226 to subpart B to read as follows:

§ 351.226 Circumvention inquiries.

(a) *Introduction*. Section 781 of the Act addresses the circumvention of antidumping and countervailing duty orders. This provision recognizes that circumvention seriously undermines the effectiveness of the remedies provided by the antidumping and countervailing duty proceedings and frustrates the purposes for which these laws were enacted. Section 781 of the Act allows the Secretary to apply antidumping and countervailing duty orders in such a way as to prevent circumvention by including within the scope of the order four distinct categories of merchandise. The Secretary will initiate and conduct a circumvention inquiry at the request of an interested party or on the Secretary's initiative, and issue a circumvention determination as provided for under section 781 of the Act and the rules and procedures in this section. Unless otherwise specified, the procedures as described in subpart C of this part (§§ 351.301 through 351.308 and 351.312 through 351.313) apply to this section.

(b) *Self-initiation of circumvention inquiry*. If the Secretary determines from available information that an inquiry is warranted into the question of whether the elements necessary for a

circumvention determination under section 781 of the Act exist, the Secretary may initiate a circumvention inquiry and publish a notice of initiation in the FEDERAL REGISTER.

(c) *Circumvention inquiry request*—(1) *In general*. An interested party may submit a request for a circumvention inquiry that alleges that the elements necessary for a circumvention determination under section 781 of the Act exist and that is accompanied by information reasonably available to the interested party supporting these allegations. The circumvention inquiry request must be served in accordance with the requirements of paragraph (n) of this section.

(2) *Contents of request.* To the extent reasonably available to the requestor, a circumvention inquiry request must include the following requested information under paragraph (c)(1) of this section and relevant supporting documentation:

(i) A detailed description of the merchandise allegedly circumventing the antidumping or countervailing duty order, including:

(A) The physical characteristics (including chemical, dimensional or technical characteristics) of the product;

(B) The country(ies) where the product is produced, the country from where it is exported, and the declared country of origin;

(C) The product's tariff classification under the Harmonized Tariff Schedule of the United States and copies of any Customs rulings relevant to the tariff classification;

(D) The uses of the product;

(E) Clear and legible photographs, schematic drawings, specifications, standards, marketing materials, and any other exemplars providing a visual depiction of the product; and

(F) A description of parts, materials, and the production process employed in the production of the product.

(ii) A concise public summary of the product's description under paragraphs (c)(2)(i)(A) through (C) of this section.

(iii) The name and address of the producer, exporter, and importer of the product. If the full universe of parties allegedly circumventing the order(s) is unknown, then examples are sufficient.

(iv) A statement of the requestor's position as to the nature of the alleged circumvention under section 781 of the Act, such as a description of the procedures, channels of trade, and foreign countries involved (including a description of the processes occurring in each country), as appropriate.

(v) A statement of the requestor's position as to whether the circumvention inquiry, if initiated, should be conducted on a country-wide basis.

(vi) Factual information supporting this position, including import and export data relevant to the merchandise allegedly circumventing the antidumping or countervailing duty order.

(d) *Initiation of a circumvention inquiry and other actions based on a request*—(1) *Initiation of a circumvention inquir*y. Except as provided under paragraph (d)(2) of this section, within 30 days after the filing of a request for a circumvention inquiry, the Secretary will determine whether to accept or reject the request. If it is not practicable to determine whether to accept or reject a request within 30 days, the Secretary may extend that deadline by an additional 15 days.

(i) If the Secretary determines that the request is incomplete or otherwise unacceptable, the Secretary may reject the request, and will provide a written explanation of the reasons for the rejection. If the request is rejected, the requestor may resubmit the full request at any time, with all identified deficiencies corrected.

(ii) If the Secretary determines that a request for a circumvention inquiry satisfies the requirements of paragraph (c) of this section, the Secretary will accept the request and initiate a circumvention inquiry. The Secretary will publish a notice of initiation in the *Federal Register*.

(2) *Other actions based on a request for a circumvention inquiry*. Where applicable, the Secretary may take one of the following actions within the applicable timeline under paragraph (d)(1) of this section:

(i) If the Secretary determines upon review of a request for a circumvention inquiry that a scope ruling is warranted before the Secretary can conduct a circumvention analysis, the Secretary may either initiate the circumvention inquiry under paragraph (d)(1)(ii) of this section and address the scope issue in the circumvention inquiry (*see* § 351.225(i)(1)), or defer initiation of the circumvention inquiry pending the completion of any ongoing or new segment of the proceeding addressing the scope issue. When initiation is deferred pending another segment of the proceeding, if the result of that other segment is that the product at issue is not covered by the scope of the antidumping and/or countervailing duty order(s) at issue, the Secretary may immediately initiate the circumvention inquiry upon the issuance of the final decision in that other segment; or

(ii) If the Secretary determines upon review of the request for a circumvention inquiry that the circumvention issue should be addressed in an ongoing segment of the proceeding, such as a covered merchandise inquiry under §351.227, rather than initiating a circumvention inquiry, the Secretary will notify the requestor of its intent to address the circumvention issue in such other segment.

(e) *Deadlines for circumvention determinations*—(1) *Preliminary determination*. The Secretary will issue a preliminary determination under paragraph (g)(1) of this section no later than 150 days from the date of publication of the notice of initiation of a circumvention inquiry under paragraph (b) or (d) of this section.

(2) *Final determination*. In accordance with section 781(f) of the Act, the Secretary shall, to the maximum extent practicable, issue a final determination under paragraph (g)(2) of this section no later than 300 days from the date of publication of the notice of initiation of a circumvention inquiry under paragraph (b) or (d) of this section. If the Secretary concludes that

the inquiry is extraordinarily complicated and additional time is necessary to issue a final circumvention determination, then the Secretary may extend the 300-day deadline by no more than 65 days.

(3) *Alignment with other segments*. If the Secretary determines it is appropriate to do so, the Secretary may align the deadlines under this paragraph with the deadlines of another segment of the proceeding.

(f) *Circumvention inquiry procedures*. (1) Within 30 days of the publication of the notice of the Secretary's self-initiation of a circumvention inquiry under paragraph (b) of this section, interested parties are permitted one opportunity to submit comments and factual information addressing the self-initiation. Within 14 days of the filing of such comments, any interested party is permitted one opportunity to submit comments and factual information to rebut, clarify, or correct factual information submitted by the other interested parties.

(2) Within 30 days of the publication of the notice of initiation of a circumvention inquiry under paragraph (d) of this section, an interested party other than the requestor is permitted one opportunity to submit comments and factual information to rebut, clarify, or correct factual information contained in the request. Within 14 days of the filing of such rebuttal, clarification, or correction, the requestor is permitted one opportunity to submit comments and factual information to rebut, clarify, or correct factual information contained in the interested party's rebuttal, clarification or correction.

(3) Following initiation of a circumvention inquiry under paragraph (b) or (d) of this section, the Secretary may issue questionnaires and verify submissions received, where appropriate. The Secretary may limit issuance of questionnaires to a reasonable number of respondents. Questionnaire responses are due on the date specified by the Secretary. Within 14 days after a questionnaire response has been filed with the Secretary, an interested party other than the original submitter is permitted one opportunity to submit comments and factual information to rebut, clarify, or correct factual information contained in the questionnaire

response. Within 7 days of the filing of such rebuttal, clarification, or correction, the original submitter is permitted one opportunity to submit comments and factual information to rebut, clarify, or correct factual information contained in the interested party's rebuttal, clarification or correction.

(4) If the Secretary issues a preliminary circumvention determination under paragraph (g)(1) of this section, which is not issued concurrently with the initiation of the circumvention inquiry, the Secretary will establish a schedule for the filing of comments and rebuttal comments. Unless otherwise specified, any interested party may submit comments within 14 days after the issuance of the preliminary circumvention determination, and any interested party may submit rebuttal comments within 7 days thereafter. Unless otherwise specified, no new factual information will be accepted in the comments or rebuttal comments.

(5) If the Secretary issues a preliminary circumvention determination concurrently with the initiation of the circumvention inquiry under paragraph (g)(1) of this section, paragraphs (f)(1) through (4) will not apply. In such a situation, the Secretary will establish appropriate procedures on a case-specific basis.

(6) If the Secretary determines it is appropriate to do so, the Secretary may rescind, in whole or in part, a circumvention inquiry, under this section and will notify interested parties. Situations in which the Secretary may rescind a circumvention inquiry include:

(i) The requestor timely withdraws its request for a circumvention inquiry under paragraph (c) of this section;

(ii) The Secretary issues a final determination in another segment of a proceeding, and has determined that the merchandise at issue in the circumvention inquiry is covered by the scope of the antidumping or countervailing duty order;

(iii) The Secretary has initiated a circumvention inquiry under paragraph (b) or (d) of this section to examine circumvention under two or more provisions under paragraph (h), (i), (j), or (k) of this section, and determines that it is not necessary to issue a final circumvention

determination with respect to one of those paragraphs. For example, if the Secretary initiates a circumvention inquiry to examine whether merchandise is altered in minor respects under paragraph (j) of this section or later-developed merchandise under paragraph (k) of this section, the Secretary may rescind the inquiry in part to address only one of those provisions; or

(iv) The Secretary has initiated a covered merchandise inquiry under § 351.227 and determined that it can address the necessary elements for a circumvention determination under section 781 of the Act in that proceeding.

(7) If the Secretary determines it is appropriate to do so, the Secretary may alter or extend any time limits under this paragraph or establish a separate schedule for the filing of comments and/or factual information during the circumvention inquiry.

(8)(i) The Secretary will notify the Commission in writing of the proposed inclusion of products in an order prior to issuing a final determination under paragraph (g)(2) of this section based on a determination under:

(A) Section 781(a) of the Act (paragraph (h) of this section) with respect to merchandise completed or assembled in the United States (other than minor completion or assembly);

(B) Section 781(b) of the Act (paragraph (i) of this section) with respect to merchandise completed or assembled in other foreign countries; or

(C) Section 781(d) of the Act (paragraph (k) of this section) with respect to later-developed products that incorporate a significant technological advance or significant alteration of an earlier product.

(ii) If the Secretary notifies the Commission under paragraph (f)(8)(i) of this section, upon the written request of the Commission, the Secretary will consult with the Commission regarding the proposed inclusion, and any such consultation will be completed within 15 days after the date of such request. If, after consultation, the Commission believes that a significant injury issue is presented by the proposed inclusion of a product within an order, the Commission

may provide written advice to the Secretary as to whether the inclusion would be inconsistent with the affirmative injury determination of the Commission on which the order is based.

(9) During the pendency of a circumvention inquiry or upon issuance of a final circumvention determination under paragraph (g)(2) of this section, the Secretary may take any further action, as appropriate, with respect to another segment of the proceeding. For example, if the Secretary considers it appropriate, the Secretary may request information concerning the product that is the subject of the circumvention inquiry for purposes of an administrative review under § 351.213.

(g) *Circumvention determinations*—(1) *Preliminary determination*. The Secretary will issue a preliminary determination, based upon the available information at the time, as to whether there is a reasonable basis to believe or suspect that the elements necessary for a circumvention determination under section 781 of the Act exist. The preliminary determination will be published in the *Federal Register*. The Secretary may publish notice of a preliminary determination concurrently with the notice of initiation of a circumvention inquiry under paragraph (b) or (d) of this section.

(2) *Final determination*. The Secretary will issue a final determination as to whether the elements necessary for a circumvention determination under section 781 of the Act exist, in which case the merchandise at issue will be included within the scope of the order. As part of its determination, the Secretary will include an explanation of the factual and legal conclusions on which the final determination is based. The final determination will be published in the Federal Register. Promptly after publication, the Secretary will convey a copy of the final determination in the manner prescribed by section 516A(a)(2)(A)(ii) of the Act to all parties to the proceeding (see § 351.102(b)(36)).

(h) *Products completed or assembled in the United States*. Under section 781(a) of the Act, the Secretary may include within the scope of an antidumping or countervailing duty order imported parts or components referred to in section 781(a)(1)(B) of the Act that are used in the

completion or assembly of the merchandise in the United States at any time such order is in effect. In determining the value of parts or components (including such purchases from another person) under section 781(a)(1)(D) of the Act, or of processing performed (including by another person) under section 781(a)(2)(E) of the Act, the Secretary may determine the value of the part or component on the basis of the cost of producing the part or component under section 773(e) of the Act – or, in the case of nonmarket economies, on the basis of section 773(c) of the Act.

(i) *Products completed or assembled in other foreign countries*. Under section 781(b) of the Act, the Secretary may include within the scope of an antidumping or countervailing duty order, at any time such order is in effect, imported merchandise completed or assembled in a foreign country other than the country to which the order applies. In determining the value of parts or components (including such purchases from another person) under section 781(b)(1)(D) of the Act, or of processing performed (including by another person) under section 781(b)(2)(E) of the Act, the Secretary may determine the value of the part or component on the basis of the cost of producing the part or component under section 773(e) of the Act – or, in the case of nonmarket economies, on the basis of section 773(c) of the Act.

(j) *Minor alterations of merchandise*. Under section 781(c) of the Act, the Secretary may include within the scope of an antidumping or countervailing duty order articles altered in form or appearance in minor respects. The Secretary may consider such criteria including, but not limited to, the overall physical characteristics of the merchandise, (including chemical, dimensional, and technical characteristics), the expectations of the ultimate users, the use of the merchandise, the channels of marketing and the cost of any modification relative to the total value of the imported products. The Secretary also may consider the circumstances under which the products enter the United States, including but not limited to the timing of the entries and the quantity of merchandise entered during the circumvention review period.

(k) *Later-developed merchandise*. In determining whether later-developed merchandise is within the scope of an antidumping or countervailing duty order, the Secretary will apply

section 781(d) of the Act. In determining whether merchandise is "later-developed" the Secretary will examine whether the merchandise at issue was commercially available at the time of the initiation of the underlying antidumping or countervailing duty investigation.

(l) *Suspension of liquidation*. (1) When the Secretary publishes a notice of initiation of a circumvention inquiry under paragraph (b) or (d) of this section, the Secretary will notify the Customs Service of the initiation and direct the Customs Service to continue the suspension of liquidation of entries of products subject to the circumvention inquiry that were already subject to the suspension of liquidation, and to apply the cash deposit rate that would be applicable if the product were determined to be covered by the scope of the order.

(2) If the Secretary issues an affirmative preliminary determination under paragraph (g)(1) of this section that the product at issue is covered by the scope of the order, the Secretary will take the following actions:

(i) The Secretary will direct the Customs Service to continue the suspension of liquidation of previously suspended entries and apply the applicable cash deposit rate;

(ii) The Secretary will direct the Customs Service to begin the suspension of liquidation and require a cash deposit of estimated duties, at the applicable rate, for each unliquidated entry of the product not yet suspended, entered, or withdrawn from warehouse, for consumption on or after the date of publication of the notice of initiation of the inquiry; and

(iii)(A) *In general*. Subject to paragraph (l)(2)(iii)(B) of this section, if the Secretary determines that it is appropriate to do so, the Secretary may direct the Customs Service to begin the suspension of liquidation and require a cash deposit of estimated duties, at the applicable rate, for each unliquidated entry of the product not yet suspended, entered, or withdrawn from warehouse, for consumption prior to the date of publication of the notice of initiation of the inquiry. The Secretary may take action under this provision at the timely request of an interested party or at the Secretary's discretion. In response to a timely request from an interested party,

the Secretary will only consider an alternative date based on a specific argument supported by evidence establishing the appropriateness of that alternative date.

(B) *Exception*. If the Secretary has determined to address a covered merchandise referral (*see* § 351.227) in a circumvention inquiry under § 351.226, the rules of § 351.227(l)(2)(iii) will apply.

(3) If the Secretary issues an affirmative final determination under paragraph (g)(2) of this section that the product at issue is covered by the scope of the order, the following rules will apply:

(i) The Secretary will direct the Customs Service to continue the suspension of liquidation of previously suspended entries and apply the applicable cash deposit rate until appropriate liquidation instructions are issued;

(ii) The Secretary will direct the Customs Service to begin the suspension of liquidation and require a cash deposit of estimated duties, at the applicable rate, for each unliquidated entry of the product not yet suspended, entered, or withdrawn from warehouse, for consumption on or after the date of publication of the notice of initiation of the inquiry until appropriate liquidation instructions are issued; and

(iii)(A) *In general*. Subject to paragraph (l)(3)(iii)(B) of this section, if the Secretary determines that it is appropriate to do so, the Secretary may direct the Customs Service to begin the suspension of liquidation and require a cash deposit of estimated duties, at the applicable rate, for each unliquidated entry of the product not yet suspended, entered, or withdrawn from warehouse, for consumption prior to the date of publication of the notice of initiation of the inquiry until appropriate liquidation instructions are issued. The Secretary may take action under this provision at the timely request of an interested party or at the Secretary's discretion. In response to a timely request from an interested party, the Secretary will only consider an alternative date based on a specific argument supported by evidence establishing the appropriateness of that alternative date.

(B) *Exception*. If the Secretary has determined to address a covered merchandise referral (see § 351.227) in a circumvention inquiry under § 351.226, the rules of § 351.227(l)(3)(iii) will apply.

(4) If the Secretary issues a negative final determination under paragraph (g)(2) of this section, and entries of the product are not otherwise subject to suspension of liquidation as a result of another segment of the proceeding, such as a covered merchandise inquiry under § 351.227, the Secretary will order the Customs Service to terminate the suspension of liquidation and refund any cash deposits for such entries.

(5) Nothing in this section affects the Customs Service's authority to take any additional action with respect to the suspension of liquidation or related measures.

(m) *Applicability of circumvention determination; companion orders*—(1) *Applicability of circumvention determination*. In conducting a circumvention inquiry under this section, the Secretary shall consider, based on the available record evidence, the appropriate remedy to address circumvention and to prevent evasion of the order. Such remedies may include:

(i) The application of the determination on a producer-specific, exporter-specific, importer-specific basis, or some combination thereof;

(ii) The application of the determination on a country-wide basis to all products from the same country as the product at issue with the same relevant physical characteristics, (including chemical, dimensional and technical characteristics), regardless of producer, exporter, or importer of those products;

(iii) The application of the determination on a country-wide basis to all products from the same country as the product at issue with similar relevant physical characteristics, (including chemical, dimensional and technical characteristics), regardless of producer, exporter, or importer of those products; and

(iv) The implementation of a certification requirement under 19 CFR 351.228.

(2) *Companion antidumping and countervailing duty orders*. If there are companion antidumping and countervailing duty orders covering the same merchandise from the same country of origin, the requesting interested party under paragraph (c) of this section must file the request pertaining to both orders only on the record of the antidumping duty proceeding. Should the Secretary determine to initiate a circumvention inquiry under paragraph (b) or (d) of this section, the Secretary will initiate and conduct a single inquiry with respect to the product at issue for both orders only on the record of the antidumping proceeding. Once the Secretary issues a final circumvention determination on the record of the antidumping duty proceeding, the Secretary will include a copy of that determination on the record of the countervailing duty proceeding.

(n) *Service of circumvention inquiry request; annual inquiry service list; entry of appearance.* (1) The requirements of § 351.303(f) apply to this section, except that an interested party that submits a circumvention inquiry request under paragraph (c) of this section must serve a copy of that inquiry request on all persons on the annual inquiry service list for that order, as well as the companion order, if any, as described in paragraph (m)(2) of this section. The procedures and description pertaining to the "annual inquiry service list" are set forth in § 351.225(n)(1) through (3).

(2) Once a circumvention inquiry is self-initiated or a circumvention inquiry request is accepted by the Secretary, a segment-specific service list will be established and the requirements of § 351.303(f) will apply. Parties other than the interested party requesting a circumvention inquiry that wish to participate in the circumvention inquiry must file an entry of appearance in accordance with § 351.103(d)(1).

(o) *Suspended investigations; suspension agreements.* The Secretary may, in accordance with section 781 of the Act, apply the procedures set forth in this section in determining whether the product at issue circumvented a suspended investigation or a suspension agreement (*see* § 351.208).

7. Effective [INSERT DATE 45 DAYS FROM PUBLICATION IN THE ***FEDERAL REGISTER***], add § 351.227 to subpart B to read as follows:

§ 351.227 Covered merchandise referrals.

(a) *Introduction*. The Trade Facilitation and Trade Enforcement Act of 2015 contains Title IV-Prevention of Evasion of Antidumping and Countervailing Duty Orders (short title "Enforce and Protect Act of 2015" or "EAPA") (Pub. L. No. 114-125, sections 401, 421, 130 Stat. 122, 155, 161 (2016)). The Enforce and Protect Act of 2015 added section 517 to the Act, which established a new framework by which the Customs Service can conduct civil administrative investigations of potential duty evasion of an antidumping and/or countervailing duty order (referred to herein as an "EAPA investigation"). Section 517(b)(4)(A)(i) of the Act provides a procedure whereby if, during the course of an EAPA investigation, the Customs Service is unable to determine whether the merchandise at issue is covered merchandise within the meaning of section 517(a)(3) of the Act, it shall refer the matter to the Secretary to make such a determination (referred to herein as a "covered merchandise referral"). Section 517(b)(4)(B) of the Act directs the Secretary to determine whether the merchandise is covered merchandise and promptly transmit the determination to the Customs Service. The Secretary will consider a covered merchandise referral and issue a covered merchandise determination in accordance with the rules and procedures in this section. Unless otherwise specified, the procedures as described in subpart C of this part (§§ 351.301 through 351.308 and 351.312 through 351.313) apply to this section.

(b) *Actions with respect to covered merchandise referral*. Within 20 days after receiving a covered merchandise referral from the Customs Service pursuant to section 517(b)(4)(A)(i) of the Act that the Secretary determines to be sufficient, the Secretary will take the following action.

(1) Initiate a covered merchandise inquiry and publish a notice of initiation in the Federal Register; or

(2) If the Secretary determines upon review of the covered merchandise referral that the issue can be addressed in an ongoing segment of the proceeding, such as a scope inquiry under § 351.225 or a circumvention inquiry under § 351.226, rather than initiating the covered merchandise inquiry, the Secretary will publish a notice of its intent to address the covered merchandise referral in such other segment in the *Federal Register*.

(c) *Deadlines for covered merchandise determinations*—(1) *In general*. When the Secretary initiates a covered merchandise inquiry under paragraph (b)(1) of this section, the Secretary shall issue a final covered merchandise determination within 120 days from the date of publication of the notice of initiation.

(2) *Extension*. The Secretary may extend the deadline in paragraph (c)(1) of this section by no more than 150 days if the Secretary determines that good cause exists to warrant an extension. Situations in which good cause has been demonstrated may include:

(i) If the Secretary has issued questionnaires to interested parties; received responses to those questionnaires; and determined that an extension is warranted to request further information or consider and address the parties' responses on the record adequately;

(ii) The Secretary has issued a preliminary covered merchandise determination (*see* paragraph (e)(1) of this section); or

(iii) The Secretary has determined to address a scope or circumvention issue from another segment of the proceeding involving the same or similar products in the covered merchandise inquiry, pursuant to § 351.225(d)(2) or (i) or § 351.226(f)(6)(iv).

(3) *Alignment with other segments.* If the Secretary determines it is appropriate to do so, the Secretary may align the deadlines under this paragraph with the deadlines of another segment of the proceeding.

(d) *Covered merchandise inquiry procedures*. (1) Within 30 days of the date of publication of the notice of an initiation of a covered merchandise inquiry under paragraph (b)(1) of this section, interested parties are permitted one opportunity to submit comment and factual

information addressing the initiation. Within 14 days of the filing of such comments, any interested party is permitted one opportunity to submit comment and factual information to rebut, clarify, or correct factual information submitted by the other interested parties.

(2) Following initiation of a covered merchandise inquiry under paragraph (b)(1) of this section, the Secretary may issue questionnaires and verify submissions received, where appropriate. The Secretary may limit issuance of questionnaires to a reasonable number of respondents. Questionnaire responses are due on the date specified by the Secretary. Within 14 days after a questionnaire response has been filed with the Secretary, an interested party other than the original submitter is permitted one opportunity to submit comment and factual information to rebut, clarify, or correct factual information contained in the questionnaire response. Within 7 days of the filing of such rebuttal, clarification, or correction, the original submitter is permitted one opportunity to submit comment and factual information to rebut, clarify, or correct factual information submitted in the interested party's rebuttal, clarification or correction.

(3) If the Secretary issues a preliminary covered merchandise determination under paragraph (e)(1) of this section, which is not issued concurrently with the initiation of a covered merchandise inquiry, the Secretary will establish a schedule for the filing of comments and rebuttal comments. Unless otherwise specified, any interested party may submit comments within 14 days after the issuance of the preliminary covered merchandise determination, and any interested party may submit rebuttal comments within 7 days thereafter. Unless otherwise specified, no new factual information will be accepted in the comments or rebuttal comments.

(4) If the Secretary issues a preliminary covered merchandise determination concurrently with the initiation of the covered merchandise inquiry under paragraph (e)(1) of this section, paragraphs (d)(1) through (3) will not apply. In such a situation, the Secretary will establish appropriate procedures on a case-specific basis.

(5) If the Secretary determines it appropriate to do so, the Secretary may rescind, in whole or in part, a covered merchandise inquiry under this section and will notify interested parties. Situations in which the Secretary may rescind a covered merchandise inquiry include:

(i) The Customs Service withdraws its request for a covered merchandise inquiry under paragraph (b) of this section; or

(ii) The Secretary has initiated a scope inquiry under § 351.225 or a circumvention inquiry under § 351.226 and determines that it can address the covered merchandise referral in such other segment of the proceeding.

(6) If the Secretary determines it is appropriate to do so, the Secretary may alter or extend any time limits under this paragraph or establish a separate schedule for the filing of comments and/or factual information during the covered merchandise inquiry.

(7) During the pendency of a covered merchandise inquiry or upon issuance of a final covered merchandise determination under paragraph (e)(2) of this section, the Secretary may take any further action, as appropriate, with respect to another segment of the proceeding. For example, if the Secretary considers it appropriate, the Secretary may request information concerning the product that is the subject of the covered merchandise inquiry for purpose of an administrative review under § 351.213.

(e) *Covered merchandise determinations*—(1) *Preliminary determination*. The Secretary may issue a preliminary determination, based upon the available information at the time, as to whether there is a reasonable basis to believe or suspect that the product that is the subject of the covered merchandise inquiry is covered by the scope of the order. In determining whether to issue a preliminary determination, the Secretary may consider the complexity of the issues and arguments raised in the context of the covered merchandise inquiry. The preliminary determination will be published in the Federal Register. The Secretary may publish notice of a preliminary determination concurrently with the notice of initiation of a covered merchandise inquiry under paragraph (b)(1) of this section.

(2) *Final determination*. The Secretary will issue a final determination as to whether the product that is the subject of the covered merchandise inquiry is covered by the scope of the order. As part of its determination, the Secretary will include an explanation of the factual and legal conclusions on which the final determination is based. The final determination will be published in the Federal Register. Promptly after publication, the Secretary will:

(i) Convey a copy of the final determination in the manner prescribed by section 516A(a)(2)(A)(ii) of the Act to all parties to the proceeding (see § 351.102(b)(36)); and

(ii) Transmit a copy of the final covered merchandise determination to the Customs Service in accordance with section 517(b)(4)(B) of the Act.

(3) *Covered merchandise determinations in other segments of the proceeding*. If the Secretary addresses the covered merchandise referral in another segment of the proceeding as provided for under paragraph (b)(2) or (d)(5)(ii) of this section, the Secretary will promptly transmit a copy of the final action in that segment to the Customs Service in accordance with section 517(b)(4)(B) of the Act.

(f) *Basis for covered merchandise determination*. In determining whether a product is covered by the scope of the order under this section, the Secretary may utilize the analysis described in paragraphs (j) and (k) of § 351.225 or any provision under section 781 of the Act (paragraph (h), (i), (j), or (k) of § 351.226).

(g)-(k) [Reserved]

(l) *Suspension of liquidation.* (1) When the Secretary publishes a notice of initiation of a covered merchandise inquiry under paragraph (b)(1) of this section, the Secretary will notify the Customs Service of the initiation and direct the Customs Service to continue the suspension of liquidation of entries of products subject to the covered merchandise inquiry that were already subject to the suspension of liquidation, and to apply the cash deposit rate that would be applicable if the product were determined to be covered by the scope of the order.

(2) If the Secretary issues an affirmative preliminary covered merchandise determination under paragraph (e)(1) of this section that the product at issue is covered by the scope of the order, the Secretary will take the following actions:

(i) The Secretary will direct the Customs Service to continue the suspension of liquidation of previously suspended entries and apply the applicable cash deposit rate;

(ii) The Secretary will direct the Customs Service to begin the suspension of liquidation and require a cash deposit of estimated duties, at the applicable rate, for each unliquidated entry of the product not yet suspended, entered, or withdrawn from warehouse, for consumption on or after the date of publication of the notice of initiation of the covered merchandise inquiry; and

(iii) The Secretary normally will direct the Customs Service to begin the suspension of liquidation and require a cash deposit of estimated duties, at the applicable rate, for each unliquidated entry of the product not yet suspended, entered, or withdrawn from warehouse, for consumption prior to the date of publication of the notice of initiation of the covered merchandise inquiry.

(3) If the Secretary issues an affirmative final covered merchandise determination under paragraph (e)(2) of this section that the product at issue is covered by the scope of the order, the Secretary will take the following actions:

(i) The Secretary will direct the Customs Service to continue the suspension of liquidation of previously suspended entries and apply the applicable cash deposit rate until appropriate liquidation instructions are issued;

(ii) The Secretary will direct the Customs Service to begin the suspension of liquidation and require a cash deposit of estimated duties, at the applicable rate, for each unliquidated entry of the product not yet suspended, entered, or withdrawn from warehouse, for consumption on or after the date of publication of the notice of initiation of the covered merchandise inquiry until appropriate liquidation instructions are issued; and

(iii) The Secretary normally will direct the Customs Service to begin the suspension of liquidation and require a cash deposit of estimated duties, at the applicable rate, for each unliquidated entry of the product not yet suspended, entered, or withdrawn from warehouse, for consumption prior to the date of publication of the notice of initiation of the covered merchandise inquiry until appropriate liquidation instructions are issued.

(4) If the Secretary issues a negative final covered merchandise determination under paragraph (e)(2) of this section that the product at issue is not covered by the scope of the order, and entries of the product at issue are not otherwise subject to suspension of liquidation as a result of another segment of a proceeding, such as a circumvention inquiry under § 351.226, the Secretary will direct the Customs Service to terminate the suspension of liquidation and refund any cash deposits for such entries.

(5) Nothing in this section affects the Customs Service's authority to take any additional action with respect to the suspension of liquidation or related measures.

(m) *Applicability of covered merchandise determination; companion orders*—(1) *Applicability of covered merchandise determination*. In conducting a covered merchandise inquiry under this section, the Secretary shall consider, based on the available record evidence, whether the covered merchandise determination should be applied:

(i) On a producer-specific, exporter-specific, importer-specific basis, or some combination thereof; or

(ii) To all products from the same country with the same relevant physical characteristics, (including chemical, dimensional and technical characteristics) as the product at issue, on a country-wide basis, regardless of the producer, exporter or importer of those products.

(2) *Companion antidumping and countervailing duty orders*. If there are companion antidumping and countervailing duty orders covering the same merchandise from the same country of origin, and should the Secretary determine to initiate a covered merchandise inquiry under paragraph (b)(1) of this section, the Secretary will initiate and conduct a single inquiry

with respect to the product at issue only on the record of the antidumping duty proceeding. Once the Secretary issues a final covered merchandise determination on the record of the antidumping duty proceeding, the Secretary will include a copy of that determination on the record of the countervailing duty proceeding and notify the Customs Service in accordance with paragraph (l) of this section.

(n) *Service list.* Once the Secretary initiates a covered merchandise inquiry under paragraph (b)(1) of this section, a segment-specific service list will be established and the requirements of § 351.303(f) will apply. Parties other than those relevant parties identified by the Customs Service in the covered merchandise referral that wish to participate in the covered merchandise inquiry must file an entry of appearance in accordance with § 351.103(d)(1).

(o) *Suspended investigations; suspension agreements.* The Secretary may apply the procedures set forth in this section in determining whether the product at issue is covered merchandise with respect to a suspended investigation or a suspension agreement (*see* § 351.208).

8. Effective [INSERT DATE 30 DAYS FROM PUBLICATION IN THE ***FEDERAL REGISTER***], add § 351.228 to subpart B to read as follows:

§ 351.228 Certification by importer or other interested party.

(a) *Certification requirements*. (1) The Secretary may determine in the context of an antidumping or countervailing duty proceeding that an importer or other interested party shall:

(i) Maintain a certification for entries of merchandise into the customs territory of the United States;

(ii) Provide a certification by electronic means at the time of entry or entry summary; or

(iii) Otherwise demonstrate compliance with a certification requirement as determined by the Secretary, in consultation with the Customs Service.

(2) Where the certification is required to be maintained by the importer or other interested party under paragraph (a)(1) of this section, the Secretary and/or the Customs Service may

require the importer or other interested party to provide such a certification to the requesting agency upon request.

(b) *Consequences for no provision of a certificate; provision of a false certificate*. (1) The Secretary may instruct the Customs Service to suspend liquidation of entries of the importer or entries associated with the other interested party and require a cash deposit of estimated duties at the applicable rate if:

(i) The importer or other interested party has not provided to the Secretary or the Customs Service, as appropriate, the certification described under paragraph (a) of this section either as required or upon request for such entries; or

(ii) The importer or other interested party provided a certification in accordance with paragraph (a) of this section for such entries, but the certification contained materially false, fictitious or fraudulent statements or representations, or contained material omissions.

(2) Under paragraph (b)(1)(i) or (ii) of this section, the Secretary may also instruct the Customs Service to assess antidumping or countervailing duties, as the case may be, at the applicable rate.

9. In § 351.305, effective [INSERT DATE 45 DAYS FROM PUBLICATION IN THE ***FEDERAL REGISTER***], revise paragraph (d) to read as follows:

§ 351.305 Access to business proprietary information.

* * * * *

(d) *Additional filing requirements for importers*. If an applicant represents a party claiming to be an interested party by virtue of being an importer, then the applicant shall submit, along with the Form ITA-367, documentary evidence demonstrating that during the applicable period of investigation or period of review the interested party imported subject merchandise. For a scope segment of a proceeding pursuant to § 351.225 or a circumvention segment of a proceeding pursuant to § 351.226, the applicant must present documentary evidence that the interested party imported subject merchandise, or that it has taken steps towards importing the

merchandise subject to the scope or circumvention inquiry. For a covered merchandise referral segment of a proceeding pursuant to § 351.227, an applicant representing an interested party that has been identified by the Customs Service as the importer in a covered merchandise referral is exempt from the requirements of providing documentary evidence to demonstrate that it is an importer for purposes of that segment of a proceeding.

10. In § 351.402, effective [INSERT DATE 30 DAYS FROM PUBLICATION IN THE ***FEDERAL REGISTER***], revise paragraph (f)(2) to read as follows:

§ 351.402 Calculation of export price and constructed export price; reimbursement of antidumping and countervailing duties.

* * * * *

(f) * * *

(2) *Reimbursement certification*. (i) The importer must certify with the Customs Service prior to liquidation (except as provided for in paragraph (f)(2)(iii) of this section) whether the importer has or has not been reimbursed or entered into any agreement or understanding for the payment or for the refunding to the importer by the manufacturer, producer, seller, or exporter for all or any part of the antidumping and countervailing duties, as appropriate. Such certifications should identify the commodity and country and contain the information necessary to link the certification to the relevant entry or entry line number(s).

(ii) The reimbursement certification may be filed either electronically or in paper in accordance with the Customs Service's requirements, as applicable.

(iii) If an importer does not provide its reimbursement certification prior to liquidation, the Customs Service may accept the reimbursement certification in accordance with its protest procedures under 19 U.S.C. 1514, unless otherwise directed.

(iv) Reimbursement certifications are required for entries of the relevant commodity that have been imported on or after the date of publication of the antidumping notice in the FEDERAL REGISTER that first suspended liquidation in that proceeding.

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